# SUMMARIES OF PUBLISHED SUCCESSFUL INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS POST-WIGGINS V. SMITH

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**Capital Cases*

**UNITED STATES SUPREME COURT CASES**

***Sexton v.* Beaudreaux 138 S.Ct. 2555 (2018) (per curiam).** In murder and attempted robbery case, grant of habeas relief by Ninth Circuit Court of Appeals on claim of ineffective assistance of counsel is reversed. The petitioner had alleged that trial counsel was ineffective in failing to seek suppression of certain eyewitness identification testimony. The state habeas court had summarily denied the claim. Looking to the state court record, there was "at least one theory that could have led a fairminded jurist to conclude that the suppression motion would have failed." It would have been reasonable to conclude that the petitioner failed to prove that the identification was not reliable under the totality of the circumstances. In analyzing the claim, the Ninth Circuit erred by essentially inverting the *Richter* rule. Instead of asking whether there were arguments or theories that could have supported the state court's ruling the Ninth Circuit considered arguments against the state court's decision that had not even been raised in the state habeas petition. Further, the Ninth Circuit failed to apply appropriate deference to the state court decision. "The Ninth Circuit essentially evaluated the merits *de novo*, only tacking on a perfunctory statement at the end of its analysis asserting that the state court's decision was unreasonable." Yet this was an instance where deference to the state court should have been "near its apex" given that general rules were at issue as to both the propriety of the identification and the effectiveness of trial counsel.

******McCoy v. Louisiana***, 138 S. Ct. 1500 (2018).** Although this is a case under the Sixth Amendment, it is not about counsel's effectiveness, but rather about a defendant's "[a]utonomy to decide that the objective of the defense is to assert innocence," regardless of how reasonable an alternative strategy determined by counsel may be. 138 S. Ct. at 1508. Petitioner was arrested, tried, and convicted of the murders of his estranged wife's mother, stepfather, and son. Throughout the proceedings, he "insistently maintained" that he was out of state at the time of the killings and that corrupt police killed the victims during a botched drug deal. Nevertheless, at trial, his attorney concluded that the evidence against petitioner was overwhelming and, over petitioner's strong objections (he "opposed [counsel's] assertion of his guilt at every opportunity, before and during trial, both in conference with his lawyer and in open court," 138 S. Ct. at 1509), conceded during his opening statement at the guilt phase that petitioner had committed all three killings. His attorney believed that this concession was necessary in order to secure a sentence less than death at the penalty phase of the trial. At the penalty phase, counsel urged mercy on the basis of petitioner's mental and emotional issues, but the jury returned three death verdicts. (Before and during trial, petitioner sought to have counsel removed, but his requests were denied. The trial court also determined that petitioner was competent to stand trial.) Post-trial, new counsel representing petitioner moved for a new trial, arguing that the trial court violated petitioner's constitutional rights by allowing his counsel to concede guilt over petitioner's objection. The Louisiana Supreme Court affirmed the ruling of the trial court that counsel's concession was permissible because counsel reasonably believed that admitting guilt afforded petitioner the best opportunity to avoid a death sentence. SCOTUS held that, under the Sixth Amendment, a defendant may insist on maintaining innocence at the guilt phase of a capital trial (just as the defendant may insist on refusing to plead guilty or on representing herself, despite overwhelming evidence of guilt or lack of legal experience). "These are not strategic choices about how best to *achieve* a client's objectives; they are choices about what the client's objectives in fact *are*." 138 S. Ct. at 1508. Even if counsel reasonably concludes that concession of guilt is most likely to avoid the death penalty, the defendant may not share that objective, and that is the defendant's

decision to make. SCOTUS noted that the trial court had found petitioner competent to stand trial, even though counsel believed that petitioner was not competent. SCOTUS concluded that counsel had options short of conceding guilt: "If, after consultations with [counsel] concerning the management of the defense, McCoy disagreed with [counsel's] proposal to concede McCoy committed three murders, it was not open to [counsel] to override McCoy's objection. [Counsel] could not interfere with McCoy's telling the jury 'I was not the murderer,' although counsel could, if consistent with providing effective assistance, focus his own collaboration on urging that McCoy's mental state weighed against conviction." 138 S. Ct. at 1509. SCOTUS also noted that counsel did not concede guilt because he believed petitioner to be perjuring himself by declaring innocence; counsel thought petitioner believed what he was saying but counsel disbelieved it, and counsel's approach was not designed to avoid suborning perjury but rather to avoid a death sentence. SCOTUS did not apply *Strickland* here "[b]ecause a client's autonomy, not counsel's competence, is in issue." 138 S. Ct. at 1510-11. Petitioner's Sixth Amendment right was violated when the trial "court allowed counsel to usurp control of an issue within McCoy's sole prerogative," and the error was thus structural and no prejudice analysis was required. SCOTUS remanded for a new trial.

***Ayestas v. Davis*, 138 S.Ct. 1080 (2018).** Although this is a funding case under 18 U.S.C. § 3599(f), the ineffective assistance of counsel (IAC) discussions are significant, especially with regard to the procedural default argument and Sotomayor's concurrence. Petitioner, a Texas death row inmate in federal habeas corpus proceedings, moved for funding under 18 U.S.C. § 3599(f), which makes funds available if they are "reasonably necessary," and the motion was denied by the district court. The United States Supreme Court held that the district and Fifth Circuit Court of Appeals applied the wrong legal standard in denying the motion for funding. Petitioner was represented by four sets of lawyers, one at trial, one on direct appeal in state court, one on state habeas, and another in federal habeas. Although some claims of IAC were raised in the state habeas petition, others, including failure to investigate petitioner's mental illness and substance abuse, were not. (As Sotomayor's concurrence notes, although petitioner was not diagnosed with schizophrenia until he was in prison and while his state post-conviction application was pending, trial counsel had information that petitioner had a history of head trauma as well as substance abuse, but failed to follow up on this information, as did state post-conviction counsel.) Federal habeas counsel (fourth set of lawyers) raised these latter claims in federal court; the district court denied them as barred by procedural default because they had not been raised in state court. After SCOTUS remanded for reconsideration under *Martinez v. Ryan*, 566 U.S. 1 (2012) and *Trevino v. Thaler*, 569 U.S. 413 (2013), petitioner's counsel filed an ex parte motion in district court pursuant to 18 U.S.C. § 3599(f) for funding to investigate and develop evidence in support of his ineffective assistance of trial and state habeas counsel claims. The district court denied the motion for funding and the habeas corpus petition. With regard to funding, the district court held that, under Fifth Circuit precedent, habeas counsel was required to demonstrate "substantial need" for investigative services, and had not done so. (The district court also ruled that the IAC claim was procedurally barred, so funding was not available to develop it.) Both the district court and the reviewing Fifth Circuit Court of Appeals refused to issue a COA on the IAC claims. SCOTUS granted review to decide if the lower courts applied the correct legal standard in denying the funding request. It first determined that it had jurisdiction to review and rule upon this issue, because, contrary to Texas' argument, the district court's denial of petitioner's funding motion was a judicial rather than an administrative decision. SCOTUS then determined that the Fifth Circuit's standard that funds are only available under § 3599(f) if the petitioner can show a "substantial need" for services is

different from, and more burdensome than, the requirement set forth in §3599(f) that funds are available if the services are "reasonably necessary." Section 3599(f) uses the term "necessary" to mean something less than essential; it calls for "a determination by the district court, in the exercise of its discretion, as to whether a reasonable attorney would regard the services as sufficiently important." 138 S. Ct. at 1093. And after *Trevino*, "[i]n those cases in which funding stands a credible chance of enabling a habeas petitioner to overcome the obstacle of procedural default, it may be error for a district court to refuse funding." 138 S. Ct. at 1094. However, "[p]roper application of the 'reasonably necessary' standard thus requires courts to consider the potential merit of the claims that the applicant wants to pursue, the likelihood that the services will generate useful and admissible evidence, and the prospect that the applicant will be able to clear any procedural hurdles standing in the way." *Id*. SCOTUS remanded the case, leaving open the question for the Fifth Circuit to consider whether funding can be reasonably necessary where a habeas petitioner seeks to present a procedurally defaulted IAC of trial counsel claim depending on facts outside the state court record.

***Davila v. Davis*, 137 S.Ct. 2058 (2017).** The ineffective assistance of post-conviction counsel does not provide cause to excuse the procedural default of an ineffective assistance of appellate counsel claim.

***Jae Lee v. United States*, 137 S.Ct. 1958 (2017).** Petitioner, a lawful permanent resident who had spent 35 years in the United States after leaving South Korea with his parents when he was 13 and never returning to South Korea, established prejudice from his attorney's deficient performance in advising him to accept a guilty plea in a drug case after erroneously informing petitioner that he did not face mandatory deportation. That there was a likelihood of an increased sentence as well as deportation had petitioner gone to trial did not negate the showing of prejudice where the record established that deportation was the determinative issue in petitioner's acceptance of the plea; it would not be irrational for someone in petitioner's position to risk additional prison time in exchange for holding on to some chance of avoiding deportation.

***Weaver v. Massachusetts*, 137 S.Ct. 1899 (2017).** A petitioner raising a claim of ineffective assistance of trial counsel for failing to object to closure of the courtroom to the public during jury selection is required to prove prejudice. For purposes of this case, the Court accepts the petitioner's interpretation of *Strickland* prejudice as requiring a showing of either a reasonable probability of a different outcome in the petitioner's case, or, that the particular public-trial violation was so serious as to render petitioner's trial fundamentally unfair. The Court distinguishes a public-trial violation during jury selection from other errors that have been deemed structural "because they cause fundamental unfairness, either to the defendant in the specific case or by pervasive undermining of the systemic requirements of a fair and open judicial process." These errors include: (1) failure to give a reasonable-doubt instruction; (2) biased judge; and (3) exclusion of grand jurors based on race. Regarding claims involving allegations of race or gender discrimination in the selection of the petit jury, which have necessitated automatic reversal where preserved and raised on direct review, "this opinion does not address whether the result should be any different if the errors were raised instead in an ineffective-assistance claim on collateral review." Looking to prejudice here, the Court finds that petitioner failed to show either a reasonable probability of a more favorable result or that the trial was fundamentally unfair.

**Capital Cases*

***Buck v. Davis*, 137 S.Ct. 759 (2017).** In death penalty case out of Texas where petitioner sought to reopen federal habeas proceedings in light of *Martinez* and *Trevino*, the Fifth Circuit's denial of a COA is reversed. First, the Fifth Circuit exceeded the limited scope of the COA analysis by essentially conducting merits review in determining that Buck was not entitled to a COA. Second, regarding petitioner's procedurally defaulted ineffective assistance of trial counsel claim, petitioner established deficient performance by his trial attorney who introduced expert testimony at the sentencing phase that petitioner's race predisposed him to violence. Petitioner was prejudiced by counsel's action as there was a reasonable probability that at least one juror would have harbored a reasonable doubt about petitioner's future dangerousness had the expert testimony not been presented. (A finding of future dangerousness by the jury was required before a sentence of death could be imposed.) Third, the district court abused its discretion in denying petitioner's Rule 60(b) motion to reopen the proceedings as the circumstances of this case were extraordinary. The State's argument that *Teague* precluded petitioner from relying on *Martinez* and *Trevino* was waived.

***Woods v. Etherton*, 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 belonged to the defendant. 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.

***Maryland v. Kulbicki*, 136 S. Ct. 2 (2015) (Per Curiam).** Certiorari granted and state court finding of ineffective assistance of counsel reversed. The state court held that trial counsel were ineffective in murder case for failing to challenge the state's evidence based on comparative bullet lead analysis (CBLA). The defendant was accused of killing his mistress, while the two were "ensnarled" in a paternity and child support suit. He was convicted in 1995. An FBI Agent examined a bullet fragment found in the defendant's truck and a bullet from the victim and testified that the results were "the sort one would "expect" if "examining two pieces of the same bullet." Additionally, the FBI Agent examined a bullet recovered from a handgun in the defendant's home and testified that it "likely came from the same package." In 2006, in state post-conviction proceedings, after "CBLA had fallen out of favor" and long after the initial post-conviction application had been filed, Kulbicki first asserted that counsel was ineffective in failing to challenge the CBLA evidence. The post-conviction court rejected this claim. In the appeal to the Maryland Court of Appeals, Kulbicki abandoned his ineffective assistance of counsel claim, but the state court reversed on "that ground alone." The state court based its finding on counsels' failure to find a 1991 report coauthored by the FBI Agent that testified at trial, which "presaged the flaws in CBLA evidence" found by the Maryland court 15 years later. The state court "offered no support" for the finding that counsel was ineffective in failing "to predict the demise of CBLA," the validity of which was "widely accepted" at the time of trial. Even the 1991 report the state court relied on "did not question the validity of CBLA." Thus, the state court violated "the rule of contemporary assessment of counsel's conduct." *Id*. at ___ (quoting *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993)). This failure was especially clear in that "there is no reason to believe that a diligent search would even have discovered the supposedly crucial report." While the state appellate court, two decades after trial, found the report by "Internet research" on a Government Printing Office website, there is no support for a finding that counsel could have found this information prior to trial or used it if they had found it. "Given the uncontroversial nature of CBLA at the time of Kulbicki's trial, the effect of the judgment below is to demand that lawyers go 'looking for a needle in a haystack,' even when they have 'reason to doubt there is any needle there.'" *Id*. at ___ (quoting *Rompilla v. Beard*, 545 U.S. 374, 389 (2005)).

****Christeson v. Roper*, 135 S. Ct. 891 (2015) (Per Curiam)**. The Supreme Court granted review, vacated, and remanded due to the District Court in Missouri abusing its discretion in denying the petitioner's request for substitution of federally-appointed habeas counsel. Petitioner's first habeas petition was dismissed as untimely because appointed counsel filed 117 days past the one year statute of limitations, despite having been appointed nine months before the deadline. Counsel did not even meet with their client until the deadline had passed. Nearly seven years later, appointed counsel consulted with new counsel, who realized that the only option to reopen the final judgment was a Rule 60(b) motion arguing equitable tolling, which appointed counsel could not make because the argument for equitable tolling would have to be "premised on their own malfeasance in failing to file timely the habeas petition." New counsel filed a motion to substitute counsel, which was denied. New counsel appealed to the Eighth Circuit, which ultimately dismissed for lack of jurisdiction, reasoning that new counsel were not authorized to file the appeal on petitioner's behalf. While this appeal was pending, the Missouri Supreme Court set an execution date. New counsel

again filed a motion in the District Court for substitution of counsel. The court denied finding that "the interests of justice" would not be served by substitution. The Eighth Circuit summarily affirmed. Under 18 U.S.C. § 3599(e), a court may replace appointed counsel with "similarly qualified counsel . . . upon motion" of the petitioner. Under *Martel v. Clair*, 132 S. Ct. 1276 (2012), a motion for substitution should be granted when it is in the "interests of justice." Factors for consideration "include: the timeliness of the motion; the adequacy of the district court's inquiry into the defendant's complaint; and the asserted cause for that complaint, including the extent of the conflict or breakdown in communication between lawyer and client (and the client's responsibility, if any, for that conflict)." *Id*. at 1287. The District Court's primary error was in failing to acknowledge appointed counsel's conflict of interest despite the fact that tolling was available only for "serious instances of attorney misconduct." *Holland v. Florida*, 560 U.S. 631, 651-52 (2010). Appointed counsel clearly could not make this argument, which was a clear conflict of interest. "Counsel cannot reasonably be expected to make such an argument, which threatens their professional reputation and livelihood." 135 S. Ct. at 894. "Given the obvious conflict of interest here," the District Court abused its discretion in denying substitution of counsel.

***Jennings v. Stephens*, 135 S. Ct. 793 (2015)**. In federal habeas, petitioner asserted entitlement to sentencing relief on three grounds of ineffective assistance of counsel. Two of those grounds were under *Wiggins v. Smith*, 539 U.S. 510 (2003), and asserted ineffective assistance for failing to investigate and present evidence of a disadvantaged background, low intelligence, and organic brain damage. The third ground asserted under *Smith v. Spisak*, 558 U.S. 139 (2010) that counsel was ineffective in arguing in closing arguments that he could not "quarrel with" a death sentence. The District Court granted relief on the *Wiggins* claims but denied relief based on Spisak. The state appealed. In response, petitioner argued that the District Court was correct in granting relief based on *Wiggins* and that counsel was also ineffective under *Spisak*. The Fifth Circuit reversed under *Wiggins* and held that it lacked jurisdiction to address the *Spisak* claim because the petitioner had filed to file a timely notice of appeal and had failed to obtain a certificate of appealability. The Supreme Court held this was error. While it is unclear whether 28 U.S.C. § 2253(c) requires a certificate of appealability when a petitioner seeks to cross-appeal in a case already before a court of appeals, it is clear that § 2253(c) does not apply when the petitioner simply defends a judgment on alternative grounds. A certificate of appealability is not required in this circumstance. Thus, the Fifth Circuit erred in failing to consider the *Spisak* claim. Remanded.

***Hinton v. Alabama*, 134 S. Ct. 1081 (2014) (Per Curiam)**. Under "a straightforward application" of *Strickland*, defense counsel's failure in capital murder trial to request additional funding to replace an inadequate expert amounted to deficient performance. In February 1985, the first victim was killed during a restaurant robbery. In July 1985, the second victim was killed in a "very similar" restaurant robbery. Later the same month, a third man survived a similar robbery-shooting (which was not charged) and identified the defendant in a photo-array. The defendant was arrested and a .38 caliber pistol was seized from his home. State "firearms and toolmark" experts testified that bullets from all three crime scenes were fired by this weapon. No other evidence linked the defendant to the two murders. Recognizing the importance of his issue, counsel requested funding to hire his own expert. The trial court, believing that the statutory maximum that he could grant for each murder count was $500, authorized $1000 in funding but invited counsel to request more funding if that was insufficient. The statutory maximum relied on by the trial court had been

amended more than a year prior to the defendant's arrest. The statute at the time of the ruling actually authorized the court to approve "any expenses reasonably incurred." "Operating under the mistaken belief that he could pay no more than $1,000," trial counsel searched for a qualified expert but could locate only one person, Andrew Payne, willing to perform the services for only $1000. Counsel did not believe Payne had the necessary expertise, but hired him anyway. Payne testified that the barrel of the defendant's revolver had been corroded to the point that it was impossible to say whether a particular bullet had been fired from the gun. He also testified that the bullets from the three crime scenes did not match one another. "On cross-examination, the prosecutor badly discredited Payne." He had testified in only two cases in the preceding eight years and one of those cases involved a shotgun rather than a pistol. He also conceded that he had to obtain assistance from one of the state's experts to operate the microscope at the state laboratory and that he had vision in only one eye. In closing argument, the state also highlighted the fact that Payne's expertise was in military ordinance, not firearms and toolmark identification, and that he had graduated with a degree in civil engineering "more than half a century before the trial." In post-conviction, the defense presented three qualified experts, who all testified that they could not conclude that any of the six bullets had been fired from the defendant's revolver. The state presented no evidence in rebuttal. The state trial court denied relief finding no prejudice because Payne said the same thing as the post-conviction experts. The Alabama Court of Criminal Appeals affirmed for the same reason. The Alabama Supreme Court remanded for the trial court to determine whether Payne was "a qualified firearms and toolmarks expert." After the trial court found that Payne was qualified, the Alabama Supreme Court affirmed. The Supreme Court held that, under *Strickland*, "it was unreasonable for Hinton's lawyer to seek additional funds to hire an expert where that failure was based not on any strategic choice but on a mistaken belief that available funding was capped at $1,000."

> The trial attorney's failure to request additional funding in order to replace an expert he knew to be inadequate because he mistakenly believed that he had received all he could get under Alabama law constituted deficient performance. Under *Strickland*, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." 466 U.S., at 690–691. Hinton's attorney knew that he needed more funding to present an effective defense, yet he failed to make even the cursory investigation of the state statute providing for defense funding for indigent defendants that would have revealed to him that he could receive reimbursement not just for $1,000 but for "any expenses reasonably incurred." 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*.

The Court further clarified its holding:

> We wish to be clear that the inadequate assistance of counsel we find in this case does not consist of the hiring of an expert who, though qualified, was not qualified enough. The selection of an expert witness is a paradigmatic example of the type of "strategic choic[e]" that, when made "after thorough investigation of [the] law and facts," is "virtually unchallengeable." *Strickland*, 466 U.S., at 690. We do not today launch federal courts into examination of the relative qualifications of experts hired and experts that might have been hired. The only inadequate assistance of counsel here was the inexcusable mistake of law – the unreasonable failure to understand the resources that state law made available to him—that caused counsel to employ an expert that he himself deemed inadequate.

The Court remanded for a proper prejudice determination. The state court had held that, because Payne's testimony was the same as the post-conviction experts' testimony, there could be no prejudice. The Supreme Court rejected this analysis.

> It is true that Payne's testimony would have done Hinton a lot of good if the jury had believed it. But the jury did not believe Payne. And if there is a reasonable probability that Hinton's attorney would have hired an expert who would have instilled in the jury a reasonable doubt as to Hinton's guilt had the attorney known that the statutory funding limit had been lifted, then Hinton was prejudiced by his lawyer's deficient performance and is entitled to a new trial.

***Burt v. Titlow*, 134 S. Ct. 10 (2013) (*reversing* 680 F.3d 577 (6th Cir. 2012))**. Under *Pinholster*, "[w]hen a state prisoner asks a federal court to set aside a sentence due to ineffective assistance of counsel during plea bargaining, our cases require that the federal court use a 'doubly deferential' standard of review that gives both the state court and the defense attorney the benefit of the doubt." In this case, the Supreme Court reversed the grant of relief because the Sixth Circuit "failed to apply that doubly deferential standard by refusing to credit a state court's reasonable factual finding and by assuming that counsel was ineffective where the record was silent." Petitioner, along with her aunt, was charged with first-degree murder of the aunt's husband. Even though petitioner claimed innocence, trial counsel negotiated and advised petitioner to accept a plea agreement in which the defendant would plead guilty to manslaughter and receive a sentence of 7-15 years – which was higher than provided for in state sentencing guidelines – in exchange for her testimony against her aunt. After entering the plea "and only days away from offering self incriminating testimony in open court," petitioner retained new counsel and demanded a sentence of only three years in exchange for her testimony. When the state rejected this demand, petitioner moved to withdraw her plea and refused to testify against her aunt. The aunt was acquitted and the petitioner was convicted of second-degree murder at trial. "Although a defendant's proclamation of innocence does not relieve counsel of his normal responsibilities under *Strickland*, it may affect the advice counsel gives." The Sixth Circuit rejected the state court's conclusion that counsel's conduct was not deficient "because the 'record in this case contains no evidence that' he gave constitutionally adequate advice on whether to withdraw the guilty plea." (Quoting 680 F.3d at 590). The Supreme Court found this finding to be "troubling."

> We have said that counsel should be "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable

> professional judgment," *Strickland*, 466 U. S., at 690, and that the burden to "show that counsel's performance was deficient" rests squarely on the defendant, *id*., at 687. The Sixth Circuit turned that presumption of effectiveness on its head. It should go without saying that the absence of evidence cannot overcome the "strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance." *Id*., at 689.

***Trevino v. Thaler*, 569 U.S. 413 (2013)**. The holding of *Martinez v. Ryan* applies where state law says that ineffective assistance of counsel (IAC) claims "must be raised in an initial- review collateral proceeding." This holding also applies where state law does not require IAC to be raised first in collateral review, but "[t]he structure and design of the [state] system in actual operation, however, make it 'virtually impossible' for an ineffective assistance claim to be presented on direct review." Here, while Texas permits IAC claims before the trial court in a motion for new trial, this "vehicle is often inadequate because of time constraints and because the trial record has generally not been transcribed at this point." *Id*. at ___ (quoting *Ex parte Torres*, 943 S.W.2d 469, 475 (Tex. Crim. App. 1997) (en banc)).

> The present capital case illustrates why it does not. The trial court appointed new counsel for Trevino eight days after sentencing. Counsel thus had 22 days to decide whether, and on what grounds, to make a motion for a new trial. She then may have had an additional 45 days to provide support for the motion but without the help of a transcript (which did not become available until much later–seven months after the trial). It would have been difficult, perhaps impossible, within that time frame to investigate Trevino's background, determine whether trial counsel had adequately done so, and then develop evidence about additional mitigating background circumstances.

*Id*. at ___. In addition to the inadequacy of the direct review process, the "Texas courts in effect have directed defendants to raise claims of ineffective assistance of trial counsel on collateral, rather than on direct, review." *Id*.

> [W]here, as here, state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal, our holding in Martinez applies.

*Id*. at ___.

***Chaidez v. United States*, 568 U.S. 342 (2013)**. The decision in *Padilla v. Kentucky* does not apply retroactively to convictions that had already become final.

***Missouri v. Frye*, 566 U.S. 133 (2012)**. In this felony driving while revoked case, the Court held that counsel's conduct was deficient in failing to communicate a formal favorable plea offer from the state to the defendant. The defendant was charged with a felony that carried up to a four year sentence. Prior to trial, the state offered two plea bargains. On the first, the state agreed to

recommend a three year sentence, without a recommendation regarding probation but with a recommendation of 10 days in jail. On the second, the state offered to reduce the charge to a misdemeanor and to recommend a 90 day sentence. The state put an expiration date on both offers, which passed without defense counsel even advising the defendant of the offers. Subsequently, but before trial, the defendant was again arrested for driving with a revoked license. He ultimately plead guilty with no plea agreement. The state recommended a three-year sentence, made no recommendation on probation, and requested 10 days in jail. The Court noted the desirability of plea bargaining. "Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas." The Court also noted, "[t]hough the standard for counsel's performance is not determined solely by reference to codified standards of professional practice, these standards can be important." Here, the American Bar Association Standards for Criminal Justice require counsel to "promptly communicated and explain to the defendant all plea offers made by the prosecuting attorney," and "this standard has been adopted by numerous state and federal courts over the last 30 years." Likewise, "[t]he standard for prompt communication and consultation is also set out in state bar professional standards for attorneys."

> [A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused.

Counsel was deficient, here, because counsel "allowed the offer to expire without advising the defendant or allowing him to consider it."

> To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel. Defendants must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law. To establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time.

Here, the defendant could show that he would have accepted one of the offers had he known about the state's plea offers, as he later entered a guilty plea with no deal at all. While this might not be enough of a showing in a case where the state's case become stronger after the initial plea offer, it was enough of a showing here. Nonetheless, "there is strong reason to doubt the prosecution and the trial court would have permitted the plea bargain to become final." Specifically, because of the defendant's additional arrest following the plea offer, the prosecution and the trial court likely would not have adhered to the deal. Case remanded to allow the state court to resolve this issue in the first instance.

***Lafler v. Cooper*, 566 U.S. 156 (2012)**. In this assault with intent to commit murder case, counsel was found to be ineffective in advising respondent to reject the state's plea offer and proceed to trial. The

prosecution twice offered to dismiss two of the charges and to recommend a sentence of 51 to 85 months for the other two charges in exchange for a guilty plea. Respondent initially indicated a willingness to enter the deal, but later rejected the offer because counsel convinced him that the prosecution would be unable to establish his intent to commit murder on the basis that the victim had been shot below the waist. After a full and fair trial, respondent was convicted on all four counts and received a mandatory minimum sentence of 183 to 360 months. Respondent asserted ineffective assistance of trial counsel for advising him to reject the state's plea offer. Rather than applying *Strickland* as was inappropriate in this circumstance, the state court simply found that respondent's rejection of the plea offer was knowing and voluntary. "By failing to apply *Strickland* to assess the ineffective-assistance-of-counsel claim respondent raised, the state court's adjudication was contrary to clearly established federal law." The Supreme Court again rejected the argument that *Lockhart v. Fretwell* modified *Strickland*. The Court also reiterated the desirability of pleas as "criminal justice today is for the most part a system of pleas, not a system of trials. Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas." On deficient performance, the Supreme Court noted that "an erroneous strategic prediction about the outcome of a trial is not necessarily deficient performance," but the State conceded that counsel's conduct was deficient in this case. Thus, the only question before the Court was how to apply *Strickland*'s prejudice test where counsel's ineffectiveness resulted in rejection of a plea offer.

> In these circumstances a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed.

Respondent established a reasonable probability that he would have accepted the plea offer and the court would have accepted the guilty plea. In addition, prejudice was shown as respondent received a sentence 3 ½ times more severe than he likely would have received by pleading guilty. In fashioning a remedy, the Court noted that "a remedy must 'neutralize the taint' of a constitutional violation."

> The correct remedy in these circumstances . . . is to order the State to reoffer the plea agreement. Presuming respondent accepts the offer, the state trial court can then exercise its discretion in determining whether to vacate the convictions and resentence respondent pursuant to the plea agreement, to vacate only some of the convictions and resentence respondent accordingly, or to leave the convictions and sentence from trial undisturbed.

In short, "[t]oday's decision leaves open to the trial court how best to exercise that discretion in all the circumstances of the case."

***Martinez v. Ryan*, 566 U.S. 1 (2012)**. In this criminal sexual conduct with a minor case, the Court qualified the opinion in *Coleman v. Thompson*, by recognizing that a federal habeas court may

excuse a procedural default of an ineffective-assistance claim when the claim was not properly presented in state court due to an attorney's errors in an initial-review collateral proceeding, i.e., the first proceeding in which a claim of ineffective assistance at trial can be raised. State law prohibited arguing ineffectiveness of trial counsel during the direct appeal. In state post-conviction, the first opportunity to assert the issue, the issue was not presented. When it was raised in a successive state post-conviction petition, the state court dismissed due to a state court procedural bar that was an independent and adequate ground. Thus, the claim could only be heard in federal court by establishing cause to excuse the procedural default. Cause can be established in two circumstances.

> The first is where the state courts did not appoint counsel in the initial-review collateral proceeding for a claim of ineffective assistance at trial. The second is where appointed counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective under the standards of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To overcome the default, a prisoner must also demonstrate that the underlying ineffective-assistance- of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit.

In other words, the State can "elect between appointing [effective] counsel in initial-review collateral proceedings or not asserting a procedural default and raising a defense on the merits in federal habeas proceedings." At bottom, ineffectiveness of post-conviction counsel is not a "freestanding" claim for relief, but merely one that allows a federal court to find cause and prejudice for failing to adequately assert the issue in state court, which "allows a federal court to consider the merits of a claim that otherwise would have been procedurally defaulted."

***Martel v. Clair*, 565 U.S. 648 (2012)**. The Court held that the standard to be applied in evaluating a capital habeas petitioner's motion to replace appointed counsel under 18 U.S.C. §3599(d) is the "interests of justice" standard applied in non-capital cases under 18 U.S.C. §3006A. The initial habeas petition was filed by appointed habeas counsel in 1994. An evidentiary hearing was held in 2004 and post-hearing briefs were filed in February 2005. The District Court informed both parties that there would be no additional materials submitted. After that, in March 2005, the petitioner moved to replace appointed counsel because "they were seeking only to overturn his death sentence, rather than to prove his innocence." The District Court denied the motion and the Supreme Court applied the "interests of justice" standard, which "contemplates a peculiarly context-specific inquiry."

> Those factors . . . generally include: the timeliness of the motion; the adequacy of the district court's inquiry into the defendant's complaint; and the asserted cause for that complaint, including the extent of the conflict or breakdown in communication between lawyer and client (and the client's own responsibility, if any, for that conflict). Because a trial court's decision on substitution is so fact-specific, it deserves deference; a reviewing court may overturn it only for an abuse of discretion.

*Id*. at ___(citations omitted). Courts "cannot properly resolve substitution motions without probing why a defendant wants a new lawyer" in "an on-the-record inquiry," which will make possible meaningful appellate review of the trial court's exercise of discretion. Here, after the court's initial inquiry, the petitioner dropped his complaint. When the petitioner renewed the substitution motion, it was based on counsel's failure to challenge guilt-or-innocence phase issues when, in fact, counsel had raised many challenges to the conviction, including to the sufficiency of the State's evidence. Regardless, the timing of the motion alone in this case "precludes a holding that the District Court abused its discretion." "The case was all but over but the deciding; counsel, whether old or new, could do nothing more in the trial court proceedings. At that point and in that forum, Clair's conflict with his lawyers no longer mattered."

***Maples v. Thomas*, 565 U.S. 266 (2012)**. The Court addressed the question of whether the habeas petitioner could establish "cause" to excuse the procedural default of issues due to the petitioner's failure to timely appeal the state trial court's order denying post-conviction relief. The petitioner was an Alabama death-sentenced inmate. He was initially represented in state post-conviction by two New York attorneys, who were associated with same large law firm serving pro bono. An Alabama attorney, designated as local counsel, had moved for their admission pro hac vice, but made clear to the New York counsel that he "would undertake no substantive involvement in the case." The petition was filed in August 2001. In the summer of 2002, with the petition still pending, the New York attorneys left the firm and their new employment disabled them from continuing to represent the petitioner. They did not, however, inform the petitioner of their departure and did not seek the Alabama trial court's leave to withdraw or move for substitution of counsel. In May 2003, the court denied the petition. Notice was sent to the attorneys at the law firm, but it was returned, unopened, to the trial court clerk. Local counsel also received notice but did not even contact the New York firm to ensure their receipt of notice because they were copied on the same letter from the court. The 42 days allowed for filing a notice of appeal expired on July 7, 2003. Over a month later, the Assistant Attorney General assigned to the case sent a letter directly to the petitioner informing him of the missed deadline and that he had four weeks to file a federal habeas petition. He clearly understood that local counsel and the New York counsel were providing no representation as counsel were not copied on the letter. In the federal habeas proceedings, the court did not entertain the habeas claims because of the state procedural default, which could be overcome only by demonstrating "cause" for the default and actual prejudice as a result of the alleged violation of federal law. "Cause" exists where "something external to the petitioner, something that cannot fairly be attributed to him" impeded his efforts to comply with the state procedural rule. As held in *Coleman v. Thompson*, negligence on the part of counsel does not qualify as "cause" because the attorney is the prisoner's agent. "Thus, when a petitioner's postconviction attorney misses a filing deadline, the petitioner is bound by the oversight." Without disturbing this general rule, the Court held that "cause" existed to excuse the missed notice of appeal deadline in this case.

> Abandoned by counsel, Maples was left unrepresented at a critical time for his state postconviction petition, and he lacked a clue of any need to protect himself pro se. In these circumstances, no just system would lay the default at Maples' death-cell door.

Counsel's abandonment of the petitioner without notice severed the principal-agent relationship as counsel was no longer the petitioner's representative. The petitioner could not be faulted for failing to act on his own behalf because he lacked any reason to believe that counsel were not representing him. The Court also noted Alabama's "low eligibility requirements" for capital trial lawyers. Counsel need only be a member of the Alabama bar with five years' prior experience in the active practice of criminal law. No capital experience or even capital-case-specific professional education or training is required. Appointed counsel were also undercompensated. Until 1999, counsel were paid $40 per hour in court and $20 per hour out of court, with a cap of $1000 for out-of-court work. "[D]eath penalty litigation is plainly time intensive," as "[o]ne study of capital trials from 1990 to 1997 found that defense attorneys spent an average of 1,480 out-of-court hours preparing a defendant's case." Even now, Alabama capital counsel are paid only $70 per hour.

***Cullen v. Pinholster*, 563 U.S. 170 (2011)** (sentenced in May 1984).The Court reversed the Ninth Circuit's finding of ineffective assistance of counsel and held that federal habeas review under 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits. Prior to sentencing, trial counsel moved to exclude any aggravating evidence due to the state's failure to provide notice of the evidence to be introduced as required by state law. That motion was denied and trial counsel rejected the court's offer of a continuance. In sentencing, trial counsel presented only testimony from the petitioner's mother concerning the petitioner's troubled childhood and adolescent years. In state habeas, counsel asserted ineffectiveness in failing to adequately investigate and in failing to furnish the defense expert with adequate background materials. The petitioner presented evidence from a new expert, Dr, Woods, that the petitioner suffers from bipolar mood disorder and seizure disorders. The state court summarily rejected the claims on the merits. In federal court, the district court granted an evidentiary hearing and received additional evidence from two new medical experts. The district court and the Ninth Circuit granted habeas relief. The Supreme Court found error in the federal courts considering evidence that was not before the state court when the claim was unadjudicated on the merits. The Court also found error in the federal courts' finding of ineffective assistance of counsel. Review of the state court's decision is "doubly deferential." First, there is a "highly deferential" look at counsel's performance. Second, this must be done through the "deferential lens of § 2254(d)." Here, "[t]he state court record supports the idea that [petitioner's] counsel acted strategically to get the prosecution's aggravation witnesses excluded for lack of notice, and if that failed, to put on [petitioner's] mother." Counsel interviewed the mother and retained a psychiatrist. Counsel "confronted a challenging penalty phase with an unsympathetic client, which limited their feasible strategies." Specifically, the petitioner bragged in his trial testimony about "his criminal disposition" and "hundreds of robberies." The defense expert, who did not testify, had noted "psychopathic personality traits" and diagnosed antisocial personality disorder. "Given these impediments, it would have been a reasonable penalty-phase strategy to focus on evoking sympathy for [petitioner's] mother." "[I]t certainly can be reasonable for attorneys to conclude that creating sympathy for the defendant's family is a better idea because the defendant himself is simply unsympathetic." In finding that the state court had unreasonably applied *Strickland*, the Ninth Circuit "erred in attributing strict rules to this Court's recent case law" in *Williams v. Taylor*, 529 U.S. 362 (2000), *Wiggins v. Smith*, 539 U.S. 510 (2003), and *Rompilla v. Beard*, 545 U.S. 374 (2005). Here, just as the relevant standard in *Wiggins* was the standard of practice for capital cases in Maryland at the time of trial, the relevant standard of professional competence here was the standard "that prevailed in Los Angeles in 1984." Even if trial counsel performed deficiently,

there was no showing that the state court unreasonably concluded there was no prejudice in light of the extensive aggravating evidence and the unsympathetic defendant. The "new" evidence presented in state habeas "largely duplicated the mitigation evidence at trial." To the extent it did include "new factual allegations or evidence, much of it is of questionable mitigating value." If trial counsel had presented Dr. Woods' testimony, it would have opened the door to rebuttal by a state expert. Likewise, the "new evidence" concerning the petitioner's family–"substance abuse, mental illness, and criminal problems"–"is also by no means clearly mitigating, as the jury might have concluded that [petitioner] was simply beyond rehabilitation." The Ninth Circuit again erred in relying on *Williams* and *Rompilla* in finding prejudice. "[T]his Court did not apply AEDPA deference to the question of prejudice in those cases; each of them lack the important 'doubly deferential' standard of Strickland and AEDPA" and "therefore offer no guidance with respect to whether a state court has unreasonably determined that prejudice is lacking." Even if the federal court might have reached a different conclusion as an initial matter, the state court did not unreasonably apply Supreme Court precedent in finding no prejudice.

***Harrington v. Richter*, 562 U.S. 86 (2011)**. The Supreme Court reversed the Ninth Circuit's finding of ineffective assistance of counsel in murder and attempted murder case for failing to consult with blood evidence experts. The State's case was built on the testimony of the attempted murder victim and circumstantial evidence. While the state had not planned to present blood pattern evidence, the approach was altered following defense counsel's opening statement. The State presented expert testimony by both a blood spatter expert and a serologist to contradict the defense theory.

> The pivotal question is whether the state court's application of the Strickland standard was unreasonable. This is different from asking whether defense counsel's performance fell below *Strickland*'s standard.

*Id*. at ___. In this case, the state court's decision was "unaccompanied by any explanation." Under

> § 2254(d), a habeas court must determine what arguments or theories supported or, as here, could have supported, the state court's decision; and then it
> must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court.

*Id*. at ___. "[E]ven a strong case for relief does not mean the state court's conclusion was unreasonable." *Id*.

> As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.

*Id*. at ___. In assessing the effectiveness of representation, "[t]he question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it

deviated from best practices or most common custom." *Id*. at ___. "Counsel was entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies." *Id*. at ___. "Reliance on 'the harsh light of hindsight' to cast doubt on a trial that took place now more than 15 years ago is precisely what *Strickland* and AEDPA seek to prevent." *Id*. at ___. Counsel's failure to consult a blood expert was not unreasonable. Even if it was apparent that expert testimony would support the defense, competent counsel might elect not to use this evidence. "Counsel was entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies." Here, counsel had "reason to question the truth of his client's account, given his initial denial of involvement and then production of evidence. Thus, concentrating on the blood pool carried its own serious risks, such as exposing the petitioner's story as "an invention." "An attorney need not pursue an investigation that would be fruitless, much less one that might be harmful to the defense." "Even apart from this danger, there was the possibility that expert testimony could shift attention to esoteric matters of forensic science, distract the jury from whether [the petitioner] was telling the truth, or transform the case into a battle of the experts." *Id*. at ___.

> To support a defense argument that the prosecution has not proved its case it sometimes is better to try to cast pervasive suspicion of doubt than to strive to prove a certainty that exonerates. All that happened here is that counsel pursued a course that conformed to the first option.

*Id*. at ___. Counsel also was not ineffective in failing to anticipate that the state would offer expert testimony. "Just as there is no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities." *Id*. at ___. Here, the prosecution did not anticipate that it would present expert testimony until the eve of trial. Even if counsel had anticipated the state would call an expert, *Strickland* does not enact Newton's third law for the presentation of evidence, requiring for every prosecution expert an equal and opposite expert from the defense." *Id*.

> In many instances, cross-examination will be sufficient to expose defects in an expert's presentation. When defense counsel does not have a solid case, the best strategy can be to say that there is too much doubt about the State's theory for a jury to convict.

*Id*. at ___. Prejudice was not established.

> *Strickland* asks whether it is "reasonably likely" the result would have been different. This does not require a showing that counsel's actions "more likely than not altered the outcome," but the difference between *Strickland*'s prejudice standard and a more-probable-than-not standard is slight and matters "only in the rarest case." The likelihood of a different result must be substantial, not just conceivable.

*Id*. at ___ (citations omitted). "There was ample basis for the California Supreme Court to think any real possibility of [the petitioner's] being acquitted was eclipsed by the remaining evidence pointing to guilt." *Id*.

***Premo v. Moore*, 562 U.S. 115 (2011)**. The Supreme Court reversed the Ninth Circuit's finding of ineffective assistance of counsel for recommending a plea bargain in felony murder case without first seeking suppression of a confession assumed to have been properly obtained. Counsel asserted he did not move to suppress the confession in light of the petitioner's admissible confessions to two other witnesses. The state court decision was not an unreasonable application of either part of the *Strickland* rule. "With a potential capital charge lurking, [petitioner's] counsel made a reasonable choice to opt for a quick plea bargain." The Ninth Circuit erred in resting its holding on *Arizona v. Fulminante*, 499 U.S. 279 (1991) because *Fulminante* may not be incorporated into the *Strickland* performance inquiry. *Fulminante* involved the admission into evidence of an involuntary confession. It "says nothing about the *Strickland* standard of effectiveness." Thus, "a finding of constitutionally adequate performance under *Strickland* cannot be contrary to *Fulminante*."

> There are certain differences between inadequate assistance of counsel claims in cases where there was a full trial on the merits and those, like this one, where a plea was entered even before the prosecution decided upon all the charges.... Hindsight and second guesses are ... inappropriate, and often more so, where a plea has been entered without a full trial or, as in this case, eve before the prosecution decided on the charges. . . . There is a most substantial burden on the claimant to show ineffective assistance. The plea process brings to the criminal justice system a stability and a certainty that must not be undermined by the prospect of collateral challenges in cases not only where witnesses and evidence have disappeared, but also in cases where witnesses and evidence were not presented in the first place.

***Holland v. Florida*, 560 U.S. 631 (2010)**. The Court held "that the timeliness provision in the federal habeas corpus statute is subject to equitable tolling," *id*. at ___, "in appropriate cases," *id*. at ___. The Court had previously held that a petitioner would be entitled to equitable tolling only if he shows: "(1) that he had been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way" and prevented timely filing. *Id*. at _____(quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). Here, "'the extraordinary circumstances' at issue involve an attorney's failure to satisfy professional standards of care." *Id*. at ____. The Eleventh Circuit held in this case that even "grossly negligent" conduct by counsel could not warrant tolling, "absent 'bad faith, dishonesty, divided loyalty, mental impairment or so forth on the lawyer's part.'" *Id*. at ___. The Court rejected this standard as "too rigid." *Id*. at ___. The Court recognized that it had held in "the context of procedural default" and "whether federal courts may excuse a petitioner's failure to comply with a state court's procedural rules," id. at _____, that "without qualification, . . . a petitioner 'must bear the risk of attorney error,'" *id*. at ___(quoting *Coleman v. Thompson*, 501 U.S. 722, 752-53 (1991)). "Equitable tolling, by contrast, asks whether federal courts may excuse a petitioner's failure to comply with federal timing rules, an inquiry that does not implicate a state court's interpretation of state law." *Id*. at ___. "[A]t least sometimes, professional misconduct that fails to meet the Eleventh Circuit's standard could nonetheless amount

to egregious behavior and create an extraordinary circumstance that warrants equitable tolling." *Id*. at ___. While "a garden variety claim of excusable neglect, such as a simple 'miscalculation' that leads a lawyer to miss a filing deadline, does not warrant equitable tolling," *id*. at (quotations omitted), this case does "not involve, and we are not considering, a 'garden variety claim' of attorney negligence," *id*. at ____. Here, counsel was appointed in state post-conviction when only 37 days had elapsed under the 1-year AEDPA limitation period. Counsel waited 316 days to file the post-conviction motion in state court, leaving only 12 days on the AEDPA clock. During the next three years, while the case remained in state court, the defendant sent counsel correspondence specifically asking counsel to make sure the case would be timely filed in federal court and counsel assured him it would be. After the state trial court denied relief, another two years went by with the case pending in the Florida Supreme Court. During this period relations had broken down between Holland and counsel and counsel communicated with Holland only three times by letter. Holland wrote to the state court asking it to remove counsel. He also filed a complaint with the state bar association. Neither entity took action and counsel orally argued the case in state court. Shortly afterwards, Holland again wrote to counsel specifically emphasizing the importance of timely filing in federal court after the state court ruled. Five months later the state court denied relief. Three weeks later the state court issued its mandate "making its decision final. At that point, the AEDPA federal habeas clock again began to tick–with 12 days left on the 1-year meter." Counsel took no action. A month after the AEDPA time limit expired, while Holland was still unaware of the ruling, he again wrote to counsel specifically asking him to make sure the case was timely filed in federal court. Nine days after that, and five weeks after the state court had issued its mandate, Holland learned, while working in the prison library, that the state court had denied him relief. The very next day he mailed out his own pro se federal habeas petition. That same day he received a letter from counsel saying that he intended to file a petition for certiorari in the United States Supreme Court. Holland immediately wrote back advising counsel that the AEDPA time limitations were not tolled during such discretionary reviews. He was "right about the law." Counsel wrote back five days later informing Holland that "the limitations period applicable to Holland's federal habeas application had in fact expired in 2000–before [counsel] had begun to represent Holland." Counsel was "wrong about the law," as "the AEDPA clock . . . had 328 days left to go" when counsel was appointed. Holland immediately wrote back pointing this out. Counsel did not respond to this letter or file a federal habeas petition. Holland subsequently filed another complaint with the state bar, which asked counsel to respond. The day after his response was filed through his attorney, which was over three months after Holland's AEDPA statute of limitations had expired, counsel mailed a federal habeas petition to Holland for review. The District Court granted Holland's previously filed motion and appointed different federal habeas counsel for him. In short, "this case may well be an 'extraordinary' instance in which petitioner's attorney's conduct constituted far more than 'garden variety' or 'excusable neglect.'" *Id*. at ___. Counsel was unaware of the date on which the limitations period expired and failed to "do the research necessary," despite repeated communications from Holland. He also "failed to communicate with his client over a period of years, despite various pleas from Holland that [he] respond to his letters." As a result, Holland "lost what was likely his single opportunity for federal habeas review of the lawfulness of his imprisonment and of his death sentence." *Id*. at ___. The District Court had ruled against Holland, not on lack of extraordinary circumstances, "but rather on a lack of diligence." *Id*. at ___. "Reasonable diligence" is required for equitable tolling. Id. at ___. Holland exercised "reasonable diligence." He wrote his counsel numerous letters, contacted the state court and state

bar, and prepared his own federal habeas petition, "the very day that [he] discovered that his AEDPA clock had expired due to [counsel's] failings." *Id*. at ___. Remanded to the Eleventh Circuit for further proceedings because "no lower court has yet considered in detail the facts of this case to determine whether they indeed constitute extraordinary circumstances sufficient to warrant equitable relief." *Id*. at ___.

***Sears v. Upton*, 561 U.S. 945 (2010) (Per Curiam)**. The Court held that the state postconviction court failed to apply the proper prejudice inquiry in determining that counsel's facially inadequate mitigation investigation did not prejudice the petitioner. Because "some mitigation evidence" had been presented, "the state court determined it could not speculate as to what the effect of additional evidence would have been." "[I]t is plain from the face of the state court's opinion that it failed to apply the correct prejudice inquiry . . .for evaluating [petitioner's] Sixth Amendment claim." At trial, "counsel presented evidence describing his childhood as stable, loving, and essentially without incident" in an effort to "portray the adverse impact of [his] execution on his family and loved ones." This strategy backfired as the prosecutor "used the evidence of [petitioner's] purportedly stable and advantaged upbringing against him during the State's closing argument." Rather than being "privileged in every way," as the state argued, petitioner's parents had a physically abusive relationship and divorced when the petitioner was young. He suffered sexual abuse from a male cousin. He was demeaned by his mother referring to him and his brothers as "little mother fuckers." His father was also "verbally abusive," even berating him in front of his school principal during a parent-teacher conference. His father disciplined him "with age-inappropriate military-style drills." He "struggled in school, demonstrating substantial behavior problems from a very young age." He repeated the second grade and was referred at age nine to a local mental health center for evaluation. By the time he reached high school, he was described as "severely learning disabled" and "severely behaviorally handicapped." His older brother was "a convicted drug dealer and user, who introduced [petitioner] to a life of crime. "Environmental factors aside, and more significantly," the postconviction evidence revealed that petitioner "performs at or below the bottom first percentile in several measures of cognitive functioning and reasoning," likely due to "significant frontal lobe damage [the petitioner] suffered as a child, as well as drug and alcohol abuse in his teens." He had a "grandiose self-conception" and beliefs of "magical thinking," due to a "profound personality disorder." "[T]he fact that some of this evidence may have been 'hearsay' does not necessarily undermine its value–or it admissibility–for penalty phase purposes" because:

> We have . . . recognized that reliable hearsay evidence that is relevant to a capital defendant's mitigation defense should not be excluded by rote application of a state hearsay rule. *See Green v. Georgia*, 442 U.S. 95, 97, 99 S. Ct. 2150, 60 L.Ed.2d 738 (1979) (per curiam) ("Regardless of whether the proffered testimony comes within Georgia's hearsay rule, under the facts of this case its exclusion constituted a violation of the Due Process Clause. . . . The excluded testimony was highly relevant to a critical issue in the punishment phase of the trial); see also *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S. Ct. 1038, 35 L.Ed.2d 297 (1973) ("In these circumstances, where constitutional directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice").

In considering the state court's prejudice analysis, the Court noted that the state court "appears to have stated the proper prejudice standard," but then "did not correctly conceptualize how that standard applies to the circumstances of this case." Because some mitigation evidence had been presented, the state court concluded that it could not "be fairly compared with those where little or no mitigation evidence is presented and where a reasonable prediction of outcome can be made." Likewise, the state court found it "impossible to know what effect [a different mitigation theory] would have had on [the jury]." In short, in the state court's view, "counsel put forth a reasonable theory with some supporting evidence," which precluded finding "a reasonable likelihood that the outcome at trial would have been different if a different mitigation theory had been advanced." The state court committed two errors in its analysis. First, it "placed undue reliance on the assumed reasonableness of counsel's mitigation theory," when the reasonableness of counsel's theory was, "at the very least, called into question" by the state court's "determination that counsel had conducted a constitutionally deficient mitigation investigation."

> [T]hat a theory might be reasonable in the abstract, does not obviate the need to analyze whether counsel's failure to conduct an adequate mitigation investigation before arriving at this particular theory prejudiced [petitioner]. The "reasonableness" of counsel's theory was, at this stage in the inquiry, beside the point: [petitioner] might be prejudiced by his counsel's failures, whether his haphazard choice was reasonable or not.

The Court made this "plain" in *Williams v. Taylor*, 529 U.S. 362 (2000), where the Court "rejected any suggestion that a decision to focus on one potentially reasonable trial strategy–in that case, petitioner's voluntary confession–was 'justified by a tactical decision' when 'counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background.'" *Id*. at ___ (quoting, *Williams*, 529 U.S. at 396). "A 'tactical decision' is a precursor to concluding that counsel has developed a 'reasonable' mitigation theory in a particular case." Second, "and more fundamentally, the court failed to apply the proper prejudice inquiry." The Court has "never limited the prejudice inquiry under *Strickland* to cases in which there was only 'little or no mitigation evidence' presented." To the contrary, "the *Strickland* inquiry requires . . . probing and fact-specific analysis," rather than "the type of truncated prejudice inquiry undertaken by the state court in this case." A proper prejudice analysis must consider "the newly uncovered evidence" and the mitigation evidence introduced during sentencing.

***Berghuis v. Thompkins*, 560 U.S. 370 (2010)**. Under AEDPA, counsel was not ineffective in murder trial for failing to request a limiting instruction, informing the jury that it could consider an accomplice's acquittal in a prior trial only in assessing the accomplice's credibility and not as substantive evidence of the defendant's guilt. Here, without considering whether the state court used an incorrect legal standard or applying "AEDPA's deferential standard," prejudice could not be shown in light of significant evidence of guilt independent of the accomplice, including an eyewitness and a surveillance photo of the crime identifying the defendant, as well as, the defendant's friend's testimony that the defendant confessed to him.

**Capital Cases*

****Jefferson v. Upton*, 560 U.S. 284 (2010) (Per Curiam)**. The state court rejected Jefferson's claim of "constitutionally inadequate" assistance due to counsel's failure "to investigate a traumatic head injury that he suffered as a child" because of "a finding that the attorneys were advised by an expert that such investigation was unnecessary." The Eleventh Circuit erred in presuming this finding was correct, under pre-AEDPA law, without having fully considered the applicable exceptions to a presumption of correctness under 28 U.S.C. § 2254(d) and *Townsend v. Sain*, 372 U.S. 293 (1963). The court considered only whether the findings were "fairly supported by the record," even though Jefferson had consistently argued that "the state court's process was deficient" because: "those findings were drafted exclusively by the attorneys for the State pursuant to an ex parte request from the state-court judge, who made no such request of Jefferson, failed to notify Jefferson of the request made to opposing counsel, and adopted the State's proposed opinion verbatim even though it recounted evidence from a nonexistent witness." Remanded for further proceedings.

***Padilla v. Kentucky*, 559 U.S. 356 (2010)**. Padilla, a native of Honduras who had lived in the U.S. for 40 years legally and fought for the U.S. in the Vietnam War, pleaded guilty based on counsel's incorrect advice that deportation was unlikely. Starting with the premise that "the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel," the Court found deficient conduct in counsel's failure to advise Padilla that his conviction for drug distribution made him subject to automatic deportation. The Court declined to consider whether there is some "distinction between direct and collateral consequences" for *Strickland* purposes because of the "unique nature of deportation," which is "an integral part–indeed, sometimes the most important part–of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes." "The first prong [of *Strickland*]–constitutional deficiency–is necessarily linked to the practices and expectations of the legal community," described in *Strickland* as "prevailing professional norms." While ABA standards and the like "are 'only guides,' and not inexorable commands,' these standards may be valuable measures of the prevailing professional norms of effective representation, especially as these standards have been adapted to deal with the intersection of modern criminal prosecutions and immigration law." Here, the Court cited the ABA Standards for Criminal Justice, NLADA standards, and others in finding, with some qualification, that "[t]he weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation."

> When the law is not succinct and straightforward . . . , a criminal defense attorney need do no more than advise a noncitizen client that pending charges may carry a risk of adverse immigration consequences. But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear.

In addressing whether there is a distinction between giving bad advice and no advice, the Court found "no relevant difference 'between an act of commission and an act of omission' in this context." Case remanded for a determination of prejudice.

****Wood v. Allen*, 558 U.S. 290 (2010)** (crimes in 1993 and direct appeal in 1996). Under AEDPA, the Court upheld the Eleventh Circuit's finding that counsel was not ineffective in failing to pursue and present mitigating evidence of the defendant's borderline mental retardation as the failure was

a strategic decision rather than a negligent omission. The state court's factual findings in denying relief were reasonable. Counsel were aware of a favorable expert report about low IQ, but that report also contained the expert's conclusion that the defendant had a high level of adaptive functioning. In addition, the report contained details of the defendant's 19 prior arrests and his attempt to murder a prior ex-girlfriend when the capital murder involved the killing of an ex-girlfriend. All of the defendant's counsel read the report. Lead counsel told the counsel handling sentencing that nothing in the report merited further investigation. Sentencing counsel told the judge that counsel did not intend to introduce the expert report before the jury. Thus, the failure to present the report "was not mere oversight or neglect but was instead the result of a deliberate decision to focus on other defenses." While Wood's counsel asserted that counsel's strategic judgment was not reasonable due to the failure to make a reasonable investigation of Wood's mental deficiencies before deciding not to pursue or present such evidence, the Court declined to reach that question because the argument was not "fairly included" in the question presented: "Whether the state court reasonably determined that there was a strategic decision under § 2254(d)(2) is a different question from whether the strategic decision itself was a reasonable exercise of professional judgment under *Strickland* or whether the application of *Strickland* was reasonable under § 2254(d)(1)."

***Smith v. Spisak*, 558 U.S. 139 (2010)** (sentenced in 1983). Without deciding whether "deference" to the state court decision was required under AEDPA, the Court reversed the Sixth Circuit's finding of ineffective assistance due to an inadequate closing argument in the capital sentencing phase. Counsel described the crimes in detail, acknowledged that the defendant's "admiration for Hitler inspired his crimes," referred to the defendant as "sick," "twisted," and "demented," and said that he would never change. Counsel did argue, however, that the defendant should not be executed due to mental illness (schizotypal and borderline personality disorders characterized by bizarre and paranoid thinking), despite the "substantial" aggravating factors. The Court assumed that counsel's conduct was deficient, but found no prejudice, as the defendant admitted three murders and two other shootings by asserting a not guilty by reason of insanity plea. In addition, the defendant himself gave very damaging testimony admitting his "Aryan" admiration of Hitler and his crimes. He also testified that he would continue to commit similar crimes if he had the chance.

***Porter v. McCollum*, 558 U.S. 30 (2009) (Per Curiam)** (sentenced in 1988). Under AEDPA, counsel ineffective in capital sentencing for failing to adequately investigate and present mitigation evidence. The defendant, after proceeding pro se with stand-by counsel, plead guilty to shooting his former girlfriend. His stand-by counsel was appointed to represent him in sentencing and presented only his ex-wife's testimony and an excerpt from a deposition. "The sum total of the mitigating evidence was inconsistent testimony about [the defendant's] behavior when intoxicated and testimony that [he] had a good relationship with his son." *Id*. at 33. No mental health evidence was presented and the trial court found no mitigating circumstances. Because the state court did not decide whether counsel's conduct was deficient, the Court reviewed this element of the claim de novo. While "counsel had an 'obligation to conduct a thorough investigation of the defendant's background,'" *id*. at 39 (quoting *Williams v. Taylor*, 529 U.S. 362, 396 (2000)), counsel "did not satisfy those norms," id. Counsel was appointed a month before sentencing and had only one short meeting with the defendant about the sentencing phase. "He did not obtain any of [the defendant's] school, medical, or military service records or interview any members of [the defendant's] family." Where counsel in *Wiggins* failed to "expand[] their investigation," counsel here "did not even take the first step of interviewing witnesses or requesting records." Id. "[H]e ignored pertinent avenues

for investigation of which he should have been aware." *Id*. at 40. Even court-ordered competency evaluations revealed his limited education, his military service and combat record, and his father's "over-discipline." *Id*. While counsel asserted that the defendant was "fatalistic and uncooperative," the defendant had instructed him not to talk to his ex-wife or son, but otherwise "did not give him any other instructions limiting the witnesses he could interview." *Id*. In short, while the defendant "may have been fatalistic or uncooperative, . . . that does not obviate the need for defense counsel to conduct some sort of mitigation investigation." *Id*. There was also prejudice. In short, the judge and jury at sentencing "heard almost nothing that would humanize [the defendant] or allow them to accurately gauge his moral culpability. They learned about [his] turbulent relationship with [the victim], his crimes, and almost nothing else." *Id*. at 41. Evidence was available that the defendant had routinely witnessed his father beat his mother. He was also routinely beaten by his father, particularly when he tried to protect his mother. His father even shot at him once. He attended classes for slow learners and left school when he was 12 or 13. He joined the Army at 17 and fought in the Korean War. His company commander testified that he fought in two major battles within a 3 month period and was wounded in both. In one of the battles his unit suffered more than 50% casualties. He was individually decorated for his actions in both battles. When he returned to the U.S., he went AWOL and was sentenced to six months' confinement, but he was honorably discharged. *Id*. at 33-34. After his discharge, he suffered from posttraumatic stress disorder (PTSD), which the Court noted is "not uncommon among veterans returning from combat," as the Secretary of Veteran Affairs testified before Congress in 2009 "that approximately 23 percent of the Iraq and Afghanistan war veterans seeking treatment at a VA medical facility had been preliminarily diagnosed with PTSD." *Id*. at 35 n.4. He also developed a serious drinking problem. An expert in neuropsychology also found that he suffered from "brain damage that could manifest in impulsive, violent behavior." *Id*. at 36. The expert testified that two statutory mitigating circumstances were present: substantially impaired ability to conform conduct and extreme mental or emotional disturbance.

> Unlike the evidence presented during [the defendant's] penalty hearing, which left the jury knowing hardly anything about him other than the facts of his crimes, the new evidence described his abusive childhood, his heroic military service and the trauma he suffered because of it, his long-term substance abuse, and his impaired mental health and mental capacity.

*Id*. at 33. The aggravation evidence "[o]n the other side of the ledger" was not substantial. *Id*. at 41.

> Had the judge and jury been able to place [the defendant's] life history "on the mitigating side of the scale," and appropriately reduced the ballast on the aggravating side of the scale, there is clearly a reasonable probability that the advisory jury–and the sentencing judge–"would have struck a different balance," *Wiggins*, 539 U.S. at 537, and it is unreasonable to conclude otherwise.

*Id*. at 42. Thus, under AEDPA, the state court's finding of no prejudice was "an unreasonable application of our clearly established law." *Id*. at 44. The state court did not consider the expert testimony for purposes of nonstatutory mitigation and "unreasonably discounted the evidence of [the defendant's] childhood abuse and military service." *Id*. at 43. The evidence of childhood abuse

"may have particular salience" in a case like this where the defendant killed his former girlfriend. *Id*. The military service was important as "[o]ur Nation has a long tradition of according leniency to veterans in recognition of their service, especially for those who fought on the front lines." *Id*. The military service was also relevant mitigation because of "the intense stress and mental and emotional toll that combat took." *Id*. at 44.

***Wong v. Belmontes*, 558 U.S. 15 (2009) (Per Curiam) (*reversing Belmontes v. Ayers*, 529 F.3d 834 (9th Cir. 2008))** (sentenced in 1982). The Court reversed the Ninth Circuit's finding of ineffective assistance of counsel for failing to adequately investigate and present mitigation evidence. The Court did not resolve whether counsel's conduct was deficient because it found that prejudice was not established.

> That showing requires [the defendant] to establish "a reasonable probability that a competent attorney, aware of [the available mitigating evidence], would have introduced it at sentencing," and "that had the jury been confronted with this . . . mitigating evidence, there is a reasonable probability that it would have returned with a different sentence."

*Id*. at ___ (quoting *Wiggins v. Smith*, 539 U.S. 510, 535, 536 (2003)). The Court accepted the lower court's conclusion that a reasonably competent lawyer would have introduced more mitigation evidence, but found no likelihood of a different result.

> In evaluating that question, it is necessary to consider all the relevant evidence that the jury would have had before it if [counsel] had pursued the different path–not just the mitigation evidence [counsel] could have presented, but also the . . . [aggravation] evidence that almost certainly would have come in with it.

*Id*. In this case, counsel had put on nine lay witnesses for testimony spanning two days to testify about the defendant's terrible childhood, with an alcoholic and abusive father, living in a small house, and not doing well in school. His younger sister died when she was only 10 months old and his grandmother drowned. He had plead guilty to accessory after the fact of murder and had a religious conversion in custody where he adapted well. The evidence counsel did not present was "merely cumulative" or "would have triggered admission" of powerful aggravation evidence in rebuttal. *Id*. at ___. Specifically, there was extensive evidence that the defendant had committed the prior "execution style" murder to which he plead guilty as an accessory. *Id*. at ___. He had boasted to several people and admitted to his counselor while in custody that he had committed the murder. Counsel had structured the mitigation evidence to keep this evidence out. There was no prejudice from not using expert testimony because the mitigating evidence "was neither complex nor technical" and the jury could "use its common sense or own sense of mercy" to "understand the 'humanizing' evidence." *Id*. at ___. Moreover, presenting expert testimony would have opened the door to the evidence of the prior murder, which was the "elephant in the courtroom" kept out only by counsel's careful presentation of the mitigation. *Id*. at ___.

***Bobby v. Van Hook*, 558 U.S. 4 (2009) (Per Curiam) (*reversing Van Hook v. Anderson*, 560 F.3d 523 (6th Cir. 2009))** (sentenced in 1985). In this pre-AEDPA case, the Court reversed the

Sixth Circuit's finding of ineffective assistance of counsel for failing to adequately investigate and present mitigation evidence. The Court reiterated that the *Strickland* "standard is necessarily a general one." *Id*. at 7.

> Restatements of professional standards . . . can be useful as "guides" to what reasonableness entails, but only to the extent they describe the professional norms prevailing when the representation took place.

*Id*. In this case, the Sixth Circuit erred by "relying on ABA guidelines announced 18 years after Van Hook went to trial" in 1985. *Id*. In short, "[t]he ABA standards in effect in 1985 described defense counsel's duty to investigate both the merits and mitigating circumstances in general terms," *id*., rather than the "detailed prescriptions for legal representation of capital defendants" in the 2003 Guidelines, *id*. at 8. It was error to judge counsel's conduct based on the 2003 Guidelines and to treat the Guidelines "not merely as evidence of what reasonably diligent attorneys would do, but as inexorable commands with which all capital defense counsel 'must fully comply.'" *Id*. The Court noted that it was expressing "no views" on how post-2003 representation should be judged, *id*. at 8 n.1, but declared here:

> What we have said of state requirements is a fortiori true of standards set by private organizations: "While States are free to impose whatever specific rules they see fit to ensure that criminal defendants are well represented, we have held that the Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices." *Roe v. Flores-Ortega*, 528 U.S. 470, 479 (2000).

*Id*. at 9. The Court also held that, applying the appropriate standards, counsel was not ineffective. While the lower court held that counsel "began their mitigation investigation too late," counsel had three months from the time of indictment to trial and "contacted their lay witnesses early and often," including talking nine times with the defendant's mother. *Id*. at 9. They contacted one of their experts a month before trial and met with the other expert a week before the trial court verdict. They attempted to obtain VA medical records seven weeks before trial. *Id*. They also "looked into enlisting a mitigation specialist when the trial was still five weeks away." *Id*. at 10. The scope of counsel's investigation was also not unreasonable. Counsel presented evidence that the defendant's parents were "heavy drinkers" that encouraged his drug and alcohol use as a child and that he continued abusing drugs and alcohol into adulthood. *Id*. He grew up in a "combat zone" with his father holding his mother at gun and knife-point and engaging in "sexual violence." *Id*. His drug and alcohol abuse resulted in him being forced out of the military. He had attempted suicide five times in the month before the murder. *Id*. There was also expert testimony about his diminished capacity at the time of the offenses–a "homosexual panic"–from his borderline personality disorder and drugs and alcohol. *Id*. at 10. While counsel did not interview a stepsister, two uncles, two aunts, and a psychiatrist that had treated the defendant's mother, this conduct was not deficient. *Id*. at 10.

> [T]here comes a point at which evidence from more distant relatives can reasonably be expected to be only cumulative, and the search for it distractive from more important duties. The ABA Standards prevailing at the time called for . . . counsel to cover several broad categories of mitigating evidence, which they did. And given

> all the evidence they unearthed from those closest to [the defendant's] upbringing and the experts who reviewed his history, it was not unreasonable for his counsel not to identify and interview every other living family member or every therapist who once treated his parents.

*Id*. at 11 (citations omitted). In short, this was not a case like *Wiggins v. Smith*, 539 U.S. 510 (2003), where counsel "failed to act while potentially powerful mitigating evidence stared them in the face," or *Rompilla v. Beard*, 545 U.S. 374 (2005), where evidence "would have been apparent from documents any reasonable attorney would have obtained." *Bobby*, 558 U.S. at 11.

> It is instead a case, like *Strickland* itself, in which defense counsel's "decision not to seek more" mitigating evidence from the defendant's background "than was already in hand" fell "well within the range of professionally reasonable judgments."

*Id*. at 11-12 (quoting *Strickland v. Washington*, 466 U.S. 668, 699 (1984)). Finally, even if counsel's conduct was deficient, there was no prejudice as only two witnesses "even arguably would have added new, relevant information." *Id*. at 12. In addition, the lower court failed to consider the aggravation evidence "[o]n the other side of the scales," *id*. at 12, which included a history of luring homosexual men into secluded settings to rob them many times in the past, as he did in this case that resulted in murder. *Id*. at 13.

***Knowles v. Mirzayance*, 556 U.S. 111 (2009)**. Reversing the Ninth Circuit's holding, under AEDPA review, that the decision of the California Court of Appeal, that defendant was not deprived of effective assistance of counsel when his attorney recommended withdrawing his insanity defense, was not contrary to or an unreasonable application of clearly established federal law, and defense counsel was not ineffective. Defendant was charged with murder and plead not guilty and not guilty by reason of insanity. Under California law, this required a bifurcated trial, first on guilt or innocence (with the burden of proof on the state) and then on insanity (with the burden of proof on the defendant. Although the defendant confessed, the defense first sought conviction only on the lesser included offense of second-degree murder based on the defendant's inability to premeditate or deliberate. Counsel presented medical testimony in the guilt-or-innocence phase, but the jury rejected this evidence and convicted of first-degree murder. Counsel had intended to present the same medical testimony in the insanity phase, along with testimony of the defendant's parents, but the parents refused to testify. On the advice of counsel, who believed it was unlikely the defense would prevail, the defendant withdrew the insanity plea. Following confusion from the Ninth Circuit's remand, the Magistrate Judge and District Court granted relief and the Ninth Circuit affirmed even though it appeared that the District Court had "evaluated counsel's strategy under a 'nothing to lose' standard," meaning counsel had no true tactical reason for withdrawing the plea because there was "nothing to lose" in pursuing insanity. Even following the Supreme Court's remand for consideration in light of *Carey v. Musladin*, 549 U.S. 70 (2006), the Ninth Circuit granted "because defense counsel's failure to pursue the insanity defense constituted deficient performance as it 'secured ... [n]o actual tactical advantage.'" The Supreme Court reversed.

> The question "is not whether a federal court believes the state court's determination" under the *Strickland* standard "was incorrect but whether that determination was unreasonable-a substantially higher threshold." *Schriro* [*v.*

> *Landrigan*, 550 U.S. 465 (2007)]. And, because the *Strickland* standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard. *See Yarborough v. Alvarado*, 541 U.S. 652, 664, 124 S.Ct. 2140, 158
> L.Ed.2d 938 (2004) ("[E]valuating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations").

*Id*. at ___.

> We conclude that the state court's decision to deny Mirzayance's ineffective-assistance-of-counsel claim did not violate clearly established federal law. The Court of Appeals reached a contrary result based, in large measure, on its application of an improper standard of review-it blamed counsel for abandoning the NGI claim because there was nothing to lose by pursuing it. But this Court has held on numerous occasions that it is not "'an unreasonable application of clearly established Federal law'" for a state court to decline to apply a specific legal rule that has not been squarely established by this Court. This Court has never established anything akin to the Court of Appeals' "nothing to lose" standard for evaluating *Strickland* claims.

*Id*. at ___ (citations omitted). The Court also rejected the Court's "nothing to lose" reasoning: "Finding that counsel is deficient by abandoning a defense where there is nothing to gain from that abandonment is equivalent to finding that counsel is deficient by declining to pursue a strategy where there is nothing to lose from pursuit of that strategy." *Id*. at ___.

> Under the doubly deferential judicial review that applies to a *Strickland* claim evaluated under the § 2254(d)(1) standard, *see Yarborough v. Gentry*, 540 U.S. 1, 5-6 (2003) (per curiam), Mirzayance's ineffective-assistance claim fails. It was not unreasonable for the state court to conclude that his defense counsel's performance was not deficient when he counseled Mirzayance to abandon a claim that stood almost no chance of success.

*Id*. at ___. "Even if Mirzayance's ineffective-assistance-of-counsel claim were eligible for de novo review, it would still fail" under *Strickland*. Counsel's conduct was not deficient because his counsel merely recommended the withdrawal of what he reasonably believed was a claim doomed to fail." *Id*. Counsel reasoned that "t]he jury had already rejected medical testimony about Mirzayance's mental state in the guilt phase, during which the State carried its burden of proving guilt beyond a reasonable doubt" and, thus, the defense could not meet its burden in the insanity phase because "there was almost no chance that the same jury would have reached a different result when considering similar evidence." *Id*. at ___. Counsel also believed the experts could be impeached for other reasons.

> We are aware of no "prevailing professional norms" that prevent counsel from recommending that a plea be withdrawn when it is almost certain to lose. And in

> this case, counsel did not give up "the only defense available." Counsel put on a defense to first-degree murder during the guilt phase. Counsel also defended his client at the sentencing phase [where he received the lowest possible sentence for his first-degree murder conviction]. The law does not require counsel to raise every available nonfrivolous defense. Counsel also is not required to have a tactical reason-above and beyond a reasonable appraisal of a claim's dismal prospects for success-for recommending that a weak claim be dropped altogether.

*Id*. at ___ (citations omitted). While the Court of Appeals faulted counsel for not persuading the reluctant parents to testify, the Magistrate Judge and District Court had found more than reluctance. They found refusal.

> [C]ourts of appeals may not set aside a district court's factual findings unless those findings are clearly erroneous. Fed. Rule Civ. Proc. 52(a); *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573-574, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985). Here, the Court of Appeals failed even to mention the clearly-erroneous standard, let alone apply it, before effectively overturning the lower court's factual findings related to counsel's behavior.

*Id*. at ___. "Competence does not require an attorney to browbeat a reluctant witness into testifying, especially when the facts suggest that no amount of persuasion would have succeeded." *Id*. There was also no prejudice. "It was highly improbable that a jury, which had just rejected testimony about Mirzayance's mental condition when the State bore the burden of proof, would have reached a different result when Mirzayance presented similar evidence at the NGI phase."

***Wright v. Van Patten*, 552 U.S. 120 (2008) (Per Curiam)**. The Court vacated the Seventh Circuit's holding that the defendant had been denied the assistance of counsel under *Cronic* during his plea hearing for reckless homicide because his lawyer was not physically present "but was linked to the courtroom by speaker phone." Because the Court's precedents have not addressed this question, it could not be said that the state courts had unreasonably applied clearly established Federal law under AEDPA in applying *Strickland* rather than *Cronic* as the Seventh Circuit did.

****Schriro v. Landrigan*, 550 U.S. 465 (2007)**. The Court reversed the Ninth Circuit's grant of an evidentiary hearing on the question of whether counsel was ineffective for failing to adequately investigate and present mitigation despite the defendant's instruction to counsel not to offer any mitigating evidence. In sentencing, counsel attempted to present the testimony of the defendant's ex-wife and birth mother, but, at the defendant's request, both refused to testify. The defendant also informed the court that he did not want to present any mitigating evidence. Counsel proffered that the witnesses would have testified that the defendant's birth mother used drugs and alcohol (including while she was pregnant with the defendant), that the defendant had abused drugs and alcohol, and that he had been a good father. When counsel tried to proffer additional mitigating evidence, the defendant "would have none of it" and contradicted counsel. The defendant also informed the court that "if you want to give me the death penalty, just bring it right on. I'm ready for it." In reversing the Ninth Circuit, the Court held that, if the defendant "instructed his counsel not to offer any mitigating evidence" then "counsel's failure to investigate further could not have

been prejudicial under *Strickland*." *Id*. at ___. The Court also rejected the Ninth Circuit's finding that, "due to counsel's failure to investigate, [the defendant] could not have known about the mitigating evidence he now wants to explore." This finding was rejected because the proffered evidence "overlaps" with the evidence relied on in the habeas proceedings and because it was plain from the transcript "that Landrigan would have undermined the presentation of any mitigating evidence that his attorney might have uncovered." *Id*.

> In short, at the time of the Arizona postconviction court's decision, it was not objectively unreasonable for that court to conclude that a defendant who refused to allow the presentation of any mitigating evidence could not establish Strickland prejudice based on his counsel's failure to investigate further possible mitigating evidence.

*Id*. at ___. The Court also rejected the Ninth Circuit's finding that the decision not to present mitigation was informed and knowing. "We have never imposed an 'informed and knowing' requirement upon a defendant's decision not to introduce evidence. Even assuming, however, that an 'informed and knowing' requirement exists in this case, Landrigan cannot benefit from it. . . ." *Id*. (citation omitted). First, this issue was not raised in state court. Second, counsel informed the trial court that he had carefully explained the importance of mitigation to the defendant and it is "doubtful that Landrigan would have sat idly by" if this were not true. Finally, Landrigan's final statement to the court to "bring it right on" clearly indicates the defendant understood the consequences of not presenting mitigation. Finally, the Court rejected the Ninth Circuit's finding of a "colorable" showing of prejudice because most of the evidence available could have been presented through the defendant's birth mother and ex-wife and was proffered to the sentencing court anyway. Thus, "[t]he District Court could reasonably conclude that any additional evidence would have made no difference in the sentencing." *Id*. at ___. The "mitigation evidence was weak," the defendant had an "exceedingly violent past" ("before he was 30 years of age, Landrigan had murdered one man, repeatedly stabbed another one, escaped from prison, and within two months murdered still another man"), the defendant showed no remorse, and the defendant was "belligerent" and "flaunted his menacing behavior." In sum, "[o]n this record, assuring the court that genetics made him the way he is could not have been very helpful."

***Rompilla v. Beard*, 545 U.S. 374 (2005)**. Counsel ineffective in capital sentencing for failing "to make reasonable efforts to obtain and review material that counsel [knew] the prosecution [would] probably rely on as evidence of aggravation at the sentencing phase of the trial," *id*. at 377, which would have led to significant mitigation. Counsel interviewed the defendant, who provided minimal assistance in mitigation and "was actively obstructive by sending counsel off on false leads," *id*. at 381, and a few of the defendant's family members, and reviewed the reports of court-appointed examiners, who assessed only competence and capacity at the time of the offenses. Finding nothing "particularly helpful" in these sources, id., counsel did not conduct additional investigation for information "that might have cast light on [the defendant's] mental condition," *id*. at 382. Counsel also did not obtain the file of a prior conviction for rape and assault, even though counsel knew the state intended to rely on the aggravating circumstance of a significant history of felony convictions indicating the use or threat of violence and knew that the state specifically intended to read the testimony of the prior rape victim into evidence in sentencing. In mitigation, the defense presented

brief testimony from the defendant's family members, who "argued in effect for residual doubt, and beseeched the jury for mercy." *Id*. at 378. In addressing the ineffective assistance claim, the Court noted that, in a capital sentencing, "defense counsel's job is to counter the State's evidence of aggravated culpability with evidence in mitigation." *Id*. at 380-81. While "reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste," *id*. at 383, counsel's conduct in this case was "deficient in failing to examine the court file," *id*., on the prior conviction because counsel knew the state intended to rely on it and "the prior conviction file was a public document, readily available for the asking at the very courthouse where [the defendant] was to be tried," *id*. at 384. While counsel opposed admission of the evidence, this was insufficient because "[c]ounsel's obligation to rebut aggravating evidence extended beyond arguing it ought to be kept out." *Id*. at 386 n.5. Here, despite knowing of the state's intent to rely on the evidence, counsel did not look at any part of the file, until the day before the sentencing phase began and then looked only at the transcript of the victim's testimony. The obligation to review the remainder of the file

> was particularly pressing here owing to the similarity of the violent prior offense to the crime charged and [the defendant's] sentencing strategy stressing residual doubt. Without making efforts to learn the details and rebut the relevance of the earlier crime, a convincing argument for residual doubt was certainly beyond any hope.

*Id*. at 386. In reaching this conclusion, the Court emphasized "[t]he ease with which counsel could examine the entire file. . . . Suffice it to say that when the State has warehouses of records available in a particular case, review of counsel's performance will call for greater subtlety." *Id*. at 386 n.5. The Court also noted that "[t]he notion that defense counsel must obtain information that the State has and will use against the defendant is not simply a matter of common sense." *Id*. at 387. It is described "in terms no one could misunderstand" in the ABA Standards for Criminal Justice "in circulation," id., at the time of trial and the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases promulgated in 1989, "shortly after" this trial, and made "even more explicit" in the 2003 revisions. *Id*. at 387 n.7. "[I]n any case, [we] cannot think of any situation in which defense counsel should not make some effort to learn the information in the possession of the prosecution and law enforcement authorities." *Id*. at 387 n.6. The state court's application of *Strickland* was objectively unreasonable because the court reasoned that "defense counsel's efforts to find mitigating evidence by other means excused them from looking at the prior conviction file." *Id*. at 388. The Court rejected this reasoning because "[n]o reasonable lawyer would forgo examination of the file thinking he could do as well by asking the defendant or family relations whether they recalled anything helpful or damaging in the prior victim's testimony." *Id*. at 389. Counsel is not required to look

> for a needle in a haystack, when a lawyer truly has reason to doubt there is any needle there. But looking at a file the prosecution says it will use is a sure bet: whatever may be in that file is going to tell the defense counsel something about what the prosecution can produce.

*Id*. The Court cautioned, however, that, although counsel's conduct was unreasonable in the circumstances of this case, a different result might be obtained in other situations "where a defense lawyer is not charged with knowledge that the prosecutor intends to use a prior conviction in this way." *Id*. at 390. Because the state court never reached the question of prejudice, the Court examined this issue "de novo." *Id*. Prejudice was uncontested by the Commonwealth and the Court found prejudice. If counsel had looked in the file, counsel would have discovered "mitigation leads that no other source had opened up," *id*., including information that the defendant grew up in a "slum environment" and had numerous prior incarcerations for offenses "often of assaultive nature and commonly related to over-indulgence in alcoholic beverages," *id*. at 391. The file also contained information "pointing to schizophrenia and other disorders, and test scores showing a third grade level of cognition after nine years of schooling." *Id*. "The jury never heard even of this and neither did the mental health experts who examined [the defendant] before trial." *Id*. at 392. If the experts had reviewed these records, they (like "their post-conviction counterparts") would have "found plenty of 'red flags' pointing up to a need to test further." *Id*. This testing would have established that (1) the defendant "suffers from organic brain damage, an extreme mental disturbance significantly impairing several of his cognitive functions"; (2) the impairments probably resulted from "fetal alcohol syndrome" and, thus, existed since childhood.; and (3) the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the law was substantially impaired at the time of the offenses. *Id*. "These finds in turn would probably have prompted a look at school and juvenile records, all of them easy to get," which showed that (1) the defendant's mother was often missing from the home for a week or more at a time when the defendant was 16; (2) the defendant's mother was frequently drunk and "the children have always been poorly kept and on the filthy side which was also the condition of the home at all times"); and (3) the defendant's "IQ was in the mentally retarded range." *Id*. at 393. "This evidence adds up to a mitigation case that bears no relation to the few naked pleas for mercy actually put before the jury" and "'might well have influenced the jury's appraisal' of . . . culpability." *Id*. (quoting *Wiggins v. Smith*, 539 U.S. 510, 538 (2003) and *Williams v. Taylor*, 529 U.S. 362, 398 (2000)).

***Florida v. Nixon*, 543 U.S. 175 (2004)**. Trial counsel's "failure to obtain the defendant's express consent to a strategy of conceding guilt in a capital trial" is not automatically deficient performance and must be evaluated under the *Strickland* test rather than under the *Cronic* test. The Court recognized that some decisions concerning "basic trial rights" must be made by the defendant and require that "an attorney must both consult with the defendant and obtain consent to the recommended course of action." These basic trial rights include the determination of "whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." *Id*. (quoting *Jones v. Barnes*, 463 U.S. 745, 751 (1983)). For other matters, "[a]n attorney undoubtedly has a duty to consult with the client regarding 'important decisions,' including questions of overarching defense strategy," *id*. (citing *Strickland*, 466 U.S. at 688), but this "obligation . . . does not require counsel to obtain the defendant's consent to 'every tactical decision,'" *id*. (citing *Taylor v. Illinois*, 484 U.S.400, 417-418 (1988) (an attorney has authority to manage most aspects of the defense without obtaining his client's approval)). With respect to capital cases, the court recognized that

> the gravity of the potential sentence in a capital trial and the proceeding's two-phase structure vitally affect counsel's strategic calculus. Attorneys representing capital defendants face daunting challenges in developing trial strategies, not least

> because the defendant's guilt is often clear. Prosecutors are more likely to seek the death penalty, and to refuse to accept a plea to a life sentence, when the evidence is overwhelming and the crime heinous. In such cases, "avoiding execution [may be] the best and only realistic result possible." ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases § 10.9.1, Commentary (rev. ed.2003), reprinted in 31 Hofstra L.Rev. 913, 1040 (2003).

*Id*. In circumstances where guilt is clear, counsel must "strive at the guilt phase to avoid a counterproductive course," *id*., such as presenting logically inconsistent strategies in the trial and sentencing. *Id*. (citing, inter alia, Lyon, Defending the Death Penalty Case: What Makes Death Different?, 42 Mercer L.Rev. 695, 708 (1991) ("It is not good to put on a 'he didn't do it' defense and a 'he is sorry he did it' mitigation. This just does not work. The jury will give the death penalty to the client and, in essence, the attorney.")). Thus, "[c]ounsel . . . may reasonably decide to focus on the trial's penalty phase," *id*., and "counsel cannot be deemed ineffective for attempting to impress the jury with his candor and his unwillingness to engage in 'a useless charade.'"

> To summarize, in a capital case, counsel must consider in conjunction both the guilt and penalty phases in determining how best to proceed. When counsel informs the defendant of the strategy counsel believes to be in the defendant's best interest and the defendant is unresponsive, counsel's strategic choice is not impeded by any blanket rule demanding the defendant's explicit consent. Instead, if counsel's strategy, given the evidence bearing on the defendant's guilt, satisfies the *Strickland* standard, that is the end of the matter; no tenable claim of ineffective assistance would remain.

*Id.*

***Holland v. Jackson*, 542 U.S. 649 (2004) (Per Curiam)**. The Sixth Circuit Court of Appeals erred in finding that the state court decision denying relief on the basis of an ineffective assistance of counsel claim was an "unreasonable application" or "contrary to" *Strickland*. The petitioner in a murder case sought state post-conviction relief on the basis of counsel's failure to adequately investigate. The court denied relief. Afterwards, the petitioner filed a motion to reopen on the basis of "newly discovered evidence" and attaching an affidavit that would have contradicted the testimony of the state's primary witness. On appeal, the state court held that the affidavit was not properly before the court. Alternatively, the court stated it would deny relief on the merits. "[W]hether a state court's decision was unreasonable must be assessed in light of the record the court had before it." Here, the District Court and the Court of Appeals made no findings warranting the admission of new evidence buttressing a previously rejected claim. Instead, the Court of Appeals "simply ignored entirely the state court's independent ground for its decision, that [the] statement was not properly before it." Thus, the court erred in finding that the state court's decision was an unreasonable application of *Strickland*. The court also erred in finding that the state court's decision was "contrary to" *Strickland* (in three instances) due to imposition of a different burden of proof on prejudice than "reasonable probability." The important holding

here is that "the unadorned word 'probably' is permissible shorthand when the complete *Strickland* standard is elsewhere recited."

***Yarborough v. Gentry*, 540 U.S. 1 (2003) (Per Curiam)**. The Court reversed the Ninth Circuit's grant of relief because the state court determination that counsel was not ineffective was not objectively unreasonable under the AEDPA. The defendant had been convicted of assault with a deadly weapon for stabbing his girlfriend. On appeal, he argued that his trial counsel's closing argument deprived him of his right to effective assistance of counsel. The state court denied relief, as did the federal district court, but the Ninth Circuit reversed. The court held that the right to effective assistance extends to closing arguments. Nonetheless, counsel has wide latitude in deciding how best to represent a client, and deference to counsel's tactical decisions in his closing presentation is particularly important because of the broad range of legitimate defense strategy at that stage. Closing arguments should "sharpen and clarify the issues for resolution by the trier of fact," but which issues to sharpen and how best to clarify them are questions with many reasonable answers. Indeed, it might sometimes make sense to forgo closing arguments altogether. Judicial review of a defense attorney's summation is therefore highly deferential – and doubly deferential when it is conducted through the lens of federal habeas. The Court found that the Ninth Circuit erred in finding the state court decision to be objectively unreasonable. While the Ninth Circuit found and relied on the fact that counsel did not highlight a number of potential exculpatory pieces of evidence, the Court found "these other potential arguments do not establish that the state court's decision was unreasonable." Relying on a number of law review articles and treatises, the court found that "focusing on a small number of key points may be more persuasive than a shotgun approach." "In short, judicious selection of arguments for summation is a core exercise of defense counsel's discretion." "When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he did so for tactical reasons rather than through sheer neglect." That presumption has particular force where a petitioner bases his ineffective assistance claim solely on the trial record, creating a situation in which a court "may have no way of knowing whether a seemingly unusual or misguided action had a sound strategic motive." Here, "counsel plainly put to the jury the centerpiece of his case." The court also found that counsel's argument was not deficient in reminding the jury of evidence of the defendant's bad character but also stating that evidence was legally irrelevant. "This is precisely the sort of calculated risk that lies at the heart of an advocate's discretion. By candidly acknowledging his client's shortcomings, counsel might have built credibility with the jury and persuaded it to focus on the relevant issues in the case." The Court also found that counsel's conduct in making only a passive request that the jury reach some verdict was not unreasonable. "Given a patronizing and overconfident summation by a prosecutor, a low-key strategy that stresses the jury's autonomy is not unreasonable." The Court also rejected the Ninth Circuit's finding that counsel was ineffective for failing to argue explicitly that the government had failed to prove its case. The court held "[c]ounsel's entire presentation, however made just that point." Finally, the Court rejected the Ninth Circuit's finding of ineffectiveness because counsel admitted that he did not know the truth which implied that he did not even believe his client's testimony. The Court held, however, "there is nothing wrong with a rhetorical device that personalizes the doubt anyone but an eyewitness must necessarily have. Winning over an audience by empathy is a technique that dates back to Aristotle." In sum, the Court found that the Ninth Circuit's decision "gives too little deference to the state courts that have primary responsibility for supervising defense counsel in state criminal trials."

***Wiggins v. Smith*, 539 U.S. 510 (2003)**. Counsel ineffective in capital habeas case, decided under the AEDPA, for failing to adequately prepare and present mitigation. Counsel relied on arguments that the defendant was not directly responsible for the murder and did not present any social history or other mitigation, despite knowledge of at least some of the defendant's background information. The issue before the Court was "whether the investigation supporting counsel's decision not to introduce mitigating evidence of Wiggins' background was itself reasonable." *Id*. at 523 (emphasis in original). "In assessing counsel's investigation, we must conduct an objective review of their performance, measured for 'reasonableness under prevailing professional norms,' which includes a context-dependent consideration of the challenged conduct as seen 'from counsel's perspective at the time.'" *Id*. (quoting *Strickland*, 466 U.S. at 688). In this case, where counsel had only limited records available and did not investigate further, counsel's conduct "fell short of the professional standards that prevailed in Maryland in 1989," because no "social history report" was prepared even though counsel had funds available to retain a "forensic social worker." *Id*. at 524.

> Counsel's conduct similarly fell short of the standards for capital defense work articulated by the American Bar Association (ABA) – standards to which we have referred as "guides to determining what is reasonable." *Strickland*, *supra*, at 688; *Williams v. Taylor*, *supra*, at 396. The ABA Guidelines provide that investigations into mitigating evidence "should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.I(c), p. 93 (1989) (emphasis added).

*Id*. "Despite these well-defined norms, . . . , counsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources." *Id*. (citing the ABA standards again). The Court found that "[t]he scope of their investigation was also unreasonable in light of what counsel actually discovered" in the records available to them, "particularly given the apparent absence of any aggravating factors in petitioner's background." *Id*. at 525 (citation omitted).

> In assessing the reasonableness of an attorney's investigation, . . . , a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further.
>
> Even assuming [counsel] limited the scope of their investigation for strategic reasons, *Strickland* does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather, a reviewing court must consider the reasonableness of the investigation said to support the strategy.

*Id*. at 527. In this case, "counsel were not in a position to make a reasonable strategic choice . . . because the investigation supporting their choice was unreasonable." *Id*. at ___. "In assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigation

evidence." *Id*. at 536. "[W]e evaluate the totality of the evidence – 'both that adduced at trial, and the evidence adduced in the habeas proceeding[s].'" *Id*. (quoting *Williams v. Taylor*, 529 U.S. at 397-98). Prejudice was found here because counsel did not discover "powerful" evidence of "physical torment, sexual molestation, and repeated rape," as well as, alcoholic parents, foster homes, homelessness, and "diminished mental capacities." *Id*. at 535. "Had the jury been able to place petitioner's excruciating life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a difference balance." *Id*. at 537. While *Williams v. Taylor* had not been decided at the time of the state court decision, the Court held that it "made no new law" in *Williams v. Taylor* and had just applied *Strickland* to conclude that "counsel's failure to uncover and present voluminous mitigating evidence at sentencing could not be justified as a tactical decision . . . , because counsel had not 'fulfill[ed] their obligation to conduct a thorough investigation of the defendant's background." *Id*. at 522 (quoting *Williams*, 529 U.S. at 396). Like in *Williams*, the state court decision here was "objectively unreasonable," *id*. at 527, and an unreasonable application of *Strickland* (under the AEDPA standards) because the state court did not

> conduct an assessment of whether the decision to cease all investigation . . . actually demonstrated reasonable professional judgment. The state court merely assumed that the investigation was adequate. In light of what the . . . [available] records actually revealed, however, counsel chose to abandon their investigation at an unreasonable juncture, making a fully informed decision with respect to sentencing strategy impossible.

*Id*. at 527-28. The state court decision was also an unreasonable application of the facts to the law because the state court erroneously concluded that the [available] . . . records reflected sexual abuse, when the records did not mention it at all, "much less . . . the repeated molestations and rapes of petitioner. . . ." *Id*. at 528. The state court conclusion was proven to be incorrect by clear and convincing evidence as required by 28 U.S.C. 2254(e)(1). The facts are discussed in more detail below in the capital sentencing section

**Capital Case*

## I. TRIAL PHASE

### A. NUMEROUS DEFICIENCIES AND INADEQUATE DEFENSE

#### 1. U.S. Court of Appeals Cases

**2017: ****Browning v. Baker*****, 875 F.3d 444 (9th Cir. 2017).** Petitioner was convicted in Nevada state court of four crimes arising from a robbery of a jewelry store and the murder of its owner, and was sentenced by a jury to death. The attorney appointed to represent petitioner at trial had been practicing as a defense lawyer for less than a year, and petitioner may have been his first capital client. After the Nevada Supreme Court affirmed petitioner's conviction on appeal, petitioner filed a habeas petition in state court alleging, among other claims, that his trial counsel was ineffective for failing to perform an adequate investigation before trial. The state court held an evidentiary hearing, during which evidence was presented that the three identifications of petitioner were questionable for several reasons, including that they were cross-racial identifications (petitioner was black) and that there was an innocent explanation for petitioner's fingerprints at the store. Petitioner also presented the testimony of trial counsel that he wanted to call petitioner's girlfriend as a witness to testify that she and petitioner had been in the store prior to the date of the homicide and that there was a person of Cuban descent who may have better matched the description of the perpetrator provided by witnesses. Trial counsel testified that he could not find petitioner's girlfriend at the time of trial. He also testified about the investigation of the case, saying that he never went to the store while it was a crime scene, he conducted no interviews himself but instead had an investigator do so, he did not interview the informants prior to trial even though he knew they were long-time informants, and he did not inquire whether they were given benefits for their testimony against petitioner. He did not hire a fingerprint examiner or a shoe print examiner because he was a former prosecutor and trusted the state's forensic witnesses' examinations. Trial counsel did not have his investigator interview a witness he had been informed was selling jewelry from the store with one of the informants, and he did not follow up on a witness's initial statement that the man she had seen running from the store was white, not black. The trial investigator testified at the evidentiary hearing that he had no autonomy in the investigation and did only what trial counsel told him to do, he did not start work until 5 months after petitioner's arrest, even though he had been appointed much earlier, he did not get the file until 10 months after petitioner's arrest, and that only included police reports, he performed a total of 12 hours work on the case, and trial counsel denied his request for additional investigation funds. He requested funds to perform specific investigation that counsel denied, such as interviewing the informants and others who had information on the informants. The prosecutor also testified for the defense at the hearing that he had given one of the informants concrete benefits – a job, and leniency in sentencing in a criminal case. The defense also called the investigating officer, who got a description of the perpetrator from the victim before he died – describing his hair as shoulder length, loosely curled, and wet – completely different from petitioner's four-inch Afro with braids on top. Petitioner also testified that he saw a Cuban man enter one of the informants' car wearing a Hollywood hat and a tan jacket that had been identified by witnesses and found in the informants' apartment. The state court denied relief. Petitioner filed a habeas petition in federal district court, which also denied relief but granted a certificate of appealability on several claims, including limited IAC claims. The Ninth Circuit expanded the COA to include a claim that petitioner's trial counsel was

ineffective generally for failing to investigate, holding that the district court's limitation of the IAC COA was error: because, under *Strickland*, the court is required to consider counsel's conduct as a whole to determine whether it was constitutionally adequate, "the IAC portion of the COA should have been crafted at a higher level of generality." The Ninth Circuit Court of Appeal held that the Nevada Supreme Court unreasonably applied clearly established Supreme Court precedent in denying some of petitioner's claims, and reversed the district court's denial of habeas corpus relief and remanded. These included *Brady* claims as well as IAC claims [but only the IAC claims are discussed here]. Counsel's performance was deficient for (1) failing to interview the state investigator before calling him to testify at trial (Nevada court agreed); (2) failing to investigate the bloody shoeprints at the scene (state court's acceptance of counsel's statements that he could just argue the source of the prints was unknown was unreasonable – not okay to simply rely on fear of learning the truth, especially when there is no reason to believe the results will be inculpatory); (3) failing to interview the informants (state court finding that it was reasonable strategy for counsel not to interview them himself was only part of the analysis – did not consider whether it was deficient for counsel not to permit his investigator to interview them). Counsel's "failure to investigate what happened [on the date of the crime] 'so undermined the proper functioning of the adversarial process that [his] trial cannot be relief on as having produced a just result'" (quoting *Strickland*). Petitioner was prejudiced because the case against him was weak, and the evidence that the shoeprints could not have been made by paramedics or a responding officer (or petitioner), that the identifications against him were grossly suspect, and that the victim's description of the perpetrator differed greatly from petitioner's appearance would have made a significant impact. The state court's conclusions otherwise were objectively unreasonable. Court grants guilt phase habeas relief.

***United States v. Laureys*. 866 F.3d 432 (D.C. Cir. 2017).** Petitioner was convicted by a jury in federal court of attempted coercion and enticement of a minor and travel with intent to engage in illicit sexual conduct, based upon his online encounter with an undercover agent posing as a pimp for a nine-year-old girl. He was sentenced to twenty years in prison after a trial in which he testified in his own defense that he was merely engaging in fantasy when discussing a desired encounter with the girl with the undercover officer. Following an evidentiary hearing, the district court denied relief on petitioner's claim that his trial counsel was ineffective for having failed to obtain and present testimony of a mental health expert at petitioner's trial, despite having been aware that mental health testimony was needed. The district court concluded that counsel's failure to present the testimony of a mental health expert with whom he had corresponded prior to trial was not due to his lack of effort but rather due to mutual misunderstandings, and also that petitioner did not establish prejudice because he himself testified about his intent and there was no evidence he would not have testified if an expert did so instead. The D.C. Circuit Court of Appeals reversed the district court's denial of relief. The record indicated that trial counsel was seeking an "internet compulsivity diagnosis" that he had settled upon through his own online research, and led his selected expert to believe that he was only interested in establishing a diminished capacity defense that the expert did not support, rather than a fantasy defense that the expert could and would have provided, and to which petitioner ended up testifying at trial. "Trial counsel focused [the expert] on an *invalid* diminished capacity defense *to the exclusion of all other possible defenses*." Trial counsel's statements to the contrary during habeas proceedings were completely at odds with the trial record. "[T]rial counsel's grievously misguided effort to employ a mental health expert in his client's defense was so flawed as to be 'the sort of serious blunder that will singlehandedly support

a *Strickland* claim.'" (internal quote omitted). "Counsel admitted that he had never handled an insanity defense, and yet he appears to have considered himself qualified, as a layperson, to effectively diagnose his client as an 'internet sexual compulsive' and pursue confirmation of a diminished capacity diagnosis with potential experts." Counsel's deficient performance was prejudicial because petitioner's defense and own testimony would have been significantly bolstered by expert testimony regarding fantasy chat, "and more specifically, the existence of a subculture of men who meet first online and then offline for sex with one another spurred on by child sex fantasies, such that a 'reasonable probability' of a different outcome at trial exists." The mental health expert testimony also would have rebutted the "dubious, quasi-expert testimony" by the undercover officer.

**2016:** ***Hardy v. Chappell*, 849 F.3d 803 (9th Cir. 2016)**. In capital murder case, trial counsel was ineffective for failing to investigate and present proof that the prosecution's star witness was the real killer. The California Supreme Court's denial of relief on that issue was contrary to and involved an unreasonable application of clearly established federal law. The charges against petitioner arose out of his alleged involvement as the killer in a murder-for-hire plot that resulted in the stabbing deaths of a mother and her child. At trial the prosecution maintained that petitioner killed the victims himself, and supported that theory with testimony from one Calvin Boyd, who was acquainted with the others involved in the plot and claimed to have turned down a request to carry it out, and from Colette Mitchell, petitioner's former girlfriend. Petitioner's defense counsel made no opening statement and presented no evidence, and the jury found him guilty and sentenced him to death. Later, evidence presented in a state habeas proceeding told "a very different story than the one presented at trial," and resulted in factual findings that trial counsel had been deficient in failing to present proof that Boyd was the real killer, and that petitioner could not have been present at the time the killings took place. On review, the California Supreme Court accepted many of the lower court's factual determinations and agreed counsel's performance had been deficient, but denied guilt-or-innocence phase relief on the ground that "there was 'substantial evidence' to convict [petitioner] under an aid-and-abet or conspiracy theory." (The state court did grant relief to petitioner on his ineffective assistance claim related to the death sentence.) A federal district court later denied petitioner's *pro se* habeas petition. On appeal, because the finding of deficient performance was not contested, the focus of the analysis was on prejudice. Likening the California Supreme Court's approach in this case to the "contrary to" example contained in *Williams v. Taylor*, 529 U.S. 362 (2000), the Ninth Circuit found that the "substantial evidence" threshold used by the state court "was not the correct standard, and consequently, the relevant question regarding prejudice at the guilt phase was never properly addressed." *Id.* at 818-19. After observing that "[s]ubstantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,'" and that use of that standard "created a much higher bar for [petitioner] than the law required," the circuit court held that, "[t]o the extent that the California Supreme Court found the *Strickland* prejudice prong was not met because substantial evidence remained to convict [petitioner] under a different theory, it applied a standard contrary to clearly established federal law." *Id*. at 819 (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)). And because the state court used the wrong standard, no deference was owed to its decision on the prejudice prong of *Strickland*. Reviewing the prejudice question *de novo*, the Ninth Circuit found that petitioner "was clearly prejudiced in the guilt phase by [trial counsel's] performance." 849 F.3d at 820. The circuit court first rejected the California Supreme Court's alternative aider and abettor / conspiracy theory,

explaining that, in light of the prosecution's positions at trial, "no reasonable reading of the record" could support a finding that the jury convicted petitioner as an aider or abettor, *id.* at 821; that "although [petitioner] was found guilty by the jury of conspiracy to commit murder for insurance proceeds, his conviction rested on being the actual killer," *id.*; and that, "even if the aid-or-abet and conspiracy theories of guilt could supplant what the jury found at trial—that [petitioner] was the actual killer—it is reasonably likely the jury would have had a reasonable doubt under those theories based on the evidence that should have been presented at trial," *id.* at 822. After further explaining that Mitchell's testimony was suspect from the start and would have been further undermined by the evidence indicating that Boyd was the real killer, the circuit court summed up its prejudice analysis as follows:

This is not a case where counsel's deficient performance had no bearing on the outcome due to otherwise strong or overwhelming evidence of guilt. ... Instead, the verdict was only weakly supported by the evidence. No witness except Boyd placed [petitioner] at the scene of the crime, no witness reported seeing [petitioner] leaving the apartment complex the night of the crime, and no blood, fingerprint, footprint, hair, or other forensic evidence linked [petitioner] to the crime. No murder weapon was found and no evidence was presented that linked [petitioner] to any knife similar to the one used by the killers. Indeed, no physical evidence whatsoever linked [petitioner] to the crime. [Petitioner] was convicted of being the actual killer primarily on the strength of Boyd's now discredited testimony. It cannot be reasonably argued that strong or overwhelming evidence of guilt under any theory exists without Boyd's testimony. Thus, there is a substantial likelihood that the jury would not have convicted [petitioner] had [counsel] performed effectively.

849 F.3d at 824. Finally, the Ninth Circuit added that even assuming the California Supreme Court did correctly conceptualize and apply the *Strickland* prejudice standard, it applied it in an objectively unreasonable manner.

***Jones v. Calloway*, 842 F.3d 454 (7th Cir. 2016)**. The Seventh Circuit affirmed the district court's determinations that petitioner's showing of "actual innocence" was sufficient to overcome the procedural default of his ineffective assistance of trial counsel claim, and that he was entitled to relief on the merits. Petitioner was convicted of being the shooter in a homicide that took place on a Chicago street. Prior to his bench trial, however, his two co-defendants were tried for the same offense. In that earlier trial, the prosecution contended that one of those defendants – Stone – was the actual shooter; Stone himself agreed in both a post-homicide statement and in testimony at his own trial, maintaining that he alone had fired upon the decedent, and that he had done so in defense of his half-brother. Despite these admissions, petitioner's trial counsel failed to call Stone, who was by all accounts willing to testify, as a witness. Petitioner initially asserted counsel's ineffectiveness in this regard during his state post-conviction proceeding, but the trial-level state court dismissed the claim as procedurally defaulted because it was not supported with an affidavit from Stone as required by settled state law. The state appellate court agreed with that determination, but also "went on to apply *Strickland* based on the existing record," and held both that counsel's omission was a matter of "trial tactics" that were virtually "immune" to challenge, and that petitioner could not show prejudice. 842 F.3d at 459. A federal district court later granted relief after holding an evidentiary hearing at which Stone, trial counsel, and others testified. On

appeal by the state, the Seventh Circuit began by agreeing with the district court "that the new evidence of actual innocence warrants a merits review of Jones's *Strickland* claim." 842 F.3d at 462. The court explained:

In brief, the decisive evidentiary points are these: Stone turned himself in two days after the crime and immediately confessed to shooting [the decedent]. From the beginning he has consistently maintained that he alone shot ... and that he did not plan the crime with either [the co-defendant] or [petitioner]. [His] account matches the physical and forensic evidence; the accounts of the prosecution's eyewitnesses do not. His testimony is also corroborated at least in part by some of the eyewitnesses .... And Stone's testimony in the district court was entirely consistent with his testimony at his own trial. The eyewitness testimony, moreover, was all over the map. No two witnesses gave the same account of the shooting. ... In short, ... the new evidence, considered in light of the entire record, raises sufficient doubt about [petitioner's] guilt to undermine confidence in the verdict without the assurance that it was untainted by constitutional error.

842 F.3d at 462. The Seventh Circuit then concluded the state appellate court's remarks about the ineffectiveness claim were defective in multiple ways. First, with regard to deficient performance, the Seventh Circuit found that the state court's decision involved an unreasonable application of *Strickland* both because it inappropriately relied upon a "presumption" that counsel's omission was strategic in the absence of any record evidence to establish that proposition, and because it then "treated the *Strickland* presumption as essentially unrebuttable." 842 F.3d at 464; *see also id.* ("A court adjudicating a *Strickland* claim can't just label a decision 'strategic' and thereby immunize it from constitutional scrutiny. .... Because there was no post-conviction hearing in state court, [counsel's] actual reason for omitting Stone was then unknown."). With regard to prejudice, the Seventh Circuit found that the state court applied a standard that was "contrary to" *Strickland* when it required petitioner "to show that 'but for counsel's shortcomings, the outcome of the proceeding would have been different.'" *Id.* (quoting state court opinion). The Seventh Circuit then added that the "reasons" proffered by the state court in support of "its no-prejudice finding were so flawed as to fall outside the bounds of reasonable judicial disagreement." *Id.*; *see also id.* (explaining that state court's assumption that Stone would have refused to testify was "speculative" and would not have been dispositive even if correct, and that its reliance on eyewitnesses overlooked their internal inconsistencies and their conflicts with the physical evidence). Finally, proceeding under § 2254(a), the Seventh Circuit observed that its analysis "overlap[ped] so significantly [with its § 2254(d) inquiry] that [petitioner's] entitlement to relief flows easily from [the] § 2254(d) conclusion." 842 F.3d at 465.

***Liao v. Junious*, 817 F.3d 678 (9th Cir. 2016)**. Under AEDPA, counsel ineffective in attempted murder case for failing to secure medical evidence to support the defense expert's opinion that the defendant was sleepwalking at the time of the offense and did not have the requisite criminal intent when he struck the victim on the head with a hammer three times. The victim was the son of the defendant's girlfriend. He was awakened in the early morning hours after the defendant struck him with the hammer. He pushed the defendant to the ground and asked what he was doing. The defendant did not respond. The victim ran and awakened his mother, who told the defendant to call the police. After several requests, he did so. When his girlfriend asked why he did it, he said that

he had been dreaming someone was hitting him and he had fought back. The victim testified that the defendant had argued with the victim's mother before they went to sleep and he believed the defendant's anger at her was the reason for the attack, as the victim had known the defendant for five years in which the defendant never struck him and never showed any animosity towards him. In preparation for trial, counsel consulted with an expert in sleep disorders who advised that the defendant should undergo a medical examination and sleep studies. Counsel filed a motion requesting authorization for the procedures, which was initially denied by a court commissioner. Counsel renewed the motion with additional information and the commissioner took the matter under advisement. When counsel's associate later called to inquire about the status of the request, a court clerk erroneously told him that the motion had been denied when in fact it had been granted. "Instead of conducting any further inquiry into the status of his motion, counsel proceeded to trial without the benefit of the medical examination and study" his expert recommended. The state conceded that counsel's conduct was deficient in failing "to verify what the court clerk told his associate over the phone." Prejudice was established. While the defense expert in sleep disorders testified to his opinion that the defendant was sleepwalking at the time of the offense, he did not have the sleep studies or medical examination he had recommended. Thus, the prosecutor was able to discredit the expert's opinion on cross-examination and in rebuttal from a state expert. Then, "[h]aving set up her summation with the precision of a surgeon, the prosecutor belittled and mocked" the defense expert's testimony in final argument. If the additional testing had been done, two experts would have been available to testify that the defendant was a sleepwalker and that his behavior on the night of the assault was consistent with sleepwalking as it was not a "focused assault that leads to injuries that might have been expected had there been an intent to really seriously injure or kill" and "there was amnesia and confusion" afterwards. The state court's determination to the contrary was an unreasonable determination of the facts in light of the evidence presented and was a "demonstrably unreasonable" application of *Strickland*. Thus, the state court's review was entitled to no deference and the issue was considered de novo. "Counsel's error left Liao's defense weak and pregnable. It would not have been so with the evidence the jury did not hear because of counsel's mistake."

**2015:** ***Rivas v. Fischer*, 780 F.3d 529 (2nd Cir. 2015)**. Under AEDPA, counsel ineffective in second-degree murder case in failing to adequately investigation and present evidence challenging the testimony of the medical examiner concerning the time of death. The defendant was charged with killing his former girlfriend in her apartment. The victim had not been seen or heard from after about 8:15 p.m. on Friday until Sunday evening. Shortly after the murder, the medical examiner estimated the time of death as Saturday evening going into Sunday. While the defendant was questioned, he was not arrested as he had alibi evidence that accounted for his whereabouts on both Saturday and Sunday. The case remained a "cold case" for five years until a new District Attorney was sworn in. The defense alleged that he asked the medical examiner to review the case again with an eye toward expanding the time of death to include Friday evening, when the defendant had no alibi. The medical examiner was under criminal investigation by the D.A.'s office and other state agencies for a variety of misconduct, including improper disposal of waste and stealing and mishandling of body parts. The medical examiner resigned in 1993, in part to avoid prosecution. While some of these facts were reported in the local news, neither the defendant nor counsel was aware of this information as "both then lived downstate." Whether it was due to an eagerness to

please the prosecutor or simply an independent reevaluation of the evidence, the medical examiner revised his opinion to a finding that the murder occurred on Friday evening. Thus, in late 1992, nearly six years after the murder, the defendant was indicted. The only thing that had changed in the case facts during that six years was the medical examiner's estimation of the time of death. Nonetheless, counsel failed to investigate the reason for this change or to independently consult with a medical expert about the time of death. He never even considered doing so and, instead, chose to rely on the alibi evidence that accounted for the defendant's whereabouts all weekend except for three and a half hours on Friday evening between 9:00 p.m. and 12:30 a.m. when the state alleged the murder occurred. During cross-examination of the medical examiner, counsel confronted the witness with contemporaneous newspaper accounts of his earlier estimation that the murder occurred on Saturday evening, but the witness denied that he had ever "tied" himself to a Saturday night estimation. He explained on redirect that he had not had a chance, at the time of the earlier estimations, to review some of his slides, which showed "some decomposition to the brain," which pushed the time limits back to Friday evening. In closing, the defense argued, without any evidence, that the medical examiner "had to stretch science beyond the breaking point" to place the time of death on Friday evening, but counsel did not directly challenge the witness' credibility or suggest that he might be biased in favor of the District Attorney's office. Counsel's conduct was deficient in: (1) failing to consult an independent forensic pathologist, who would have confirmed that the revised findings were not scientifically reliable; (2) failing to investigate the medical examiner's qualifications and background, which would have revealed his prior misconduct and that he was under investigation when his opinion was revised; (3) failing to review the medical examiner's file, which would have revealed that there were no "brain slides" as alleged in the redirect testimony; and (4) failing to impeach the medical examiner with a search warrant application in which a police officer swore that the medical examiner had estimated the time of death as between Saturday afternoon and Sunday morning. Reliance simply on the alibi, which did not account for the precise time that the prosecution asserted was the time of the murder, "amounted to no defense at all." Thus, the state court's finding that counsel's conduct was based on reasonable trial strategy was an unreasonable application of Strickland. Prejudice was also established because, absent his counsel's unprofessional errors and omissions, a fact finder would have had a reasonable doubt respecting his guilt." Although the state court "did not make any express findings as to prejudice," the court held that it was "required to assume for the purpose of argument" that the court had adjudicated prejudice, as well. That "assumed" adjudication was also an unreasonable application of *Strickland*.

***Thomas v. Clements*, 789 F.3d 760 (7th Cir. 2015)**. Under AEDPA, counsel ineffective in murder case for failing to consult with a pathologist or other medical expert. The case involved the death of the defendant's ex-wife, with whom he still lived and with whom he still had sexual relations with. A neighbor downstairs heard noises for an hour that included the deceased screaming "Stop, stop. I love you. I love you." Subsequently, the defendant called the police saying the deceased was unconscious. She was unresponsive when police arrived. After several inconsistent statements, the defendant admitted causing the death but stated that it was unintentionally caused during sex and horseplay when he had his forearm across the deceased's throat. The state argued intentional murder, however, and supported this theory with the testimony of the medical examiner, who concluded that the death was caused by strangulation, which was intentional and would have taken at least four minutes of continuous pressure. While the state trial court had addressed the issue of

deficiency, the state appellate court did not. Because the Seventh Circuit looks only to the "last reasoned opinion" in state court, the court held that there was no "look through" to the trial court. Because the appellate court did not address this issue, no deference was required and the claim was reviewed de novo. Although the court acknowledged that the result might be different under deferential review, the court found counsel's conduct was deficient in failing to consult a medical expert, despite being aware of the opinion of the state expert and that there was no external bruising on the deceased's neck or evidence of any struggle. Counsel admitted that there was no strategy for this failure and that counsel simply did not consider consulting with an expert. In finding no prejudice, the state court addressed the issue in only two sentences in which the court held that the defendant failed to demonstrate that consultation with and presentation of a defense expert "would have led to a different result at trial." Because this is the "wrong standard" and the defendant was required only to show a "reasonable probability" of a different result, the state court's adjudication was an unreasonable application of *Strickland*. Thus, the Seventh Circuit also reviewed this prong de novo. Again, acknowledging that the result might be different under deferential review, the court found prejudice. The state's theories of motive for murder were weak. Additionally, the state's case "suffers from a very serious flaw in terms of timing." While the state and its medical expert relied on four minutes of intentional strangulation, the neighbor heard noise for an hour, there was no evidence of a struggle, and the state provided no explanation of "how a woman being choked to death can scream 'Stop, stop, I love you, I love you' loud enough to be heard one floor below her." Under these circumstances, testimony from a defense expert that there was no evidence of intentional strangulation and that the evidence was entirely consistent with the defendant's statements of accidental death during sex and horseplay showed a reasonable probability of a different result.

***Gebaree v. Steele*, 792 F.3d 991 (8th Cir. 2015)**. Counsel ineffective in child sodomy, molestation, and abuse case for failing to object to the inadmissible testimony of state experts vouching for the credibility of the alleged victim's and establishing the defendant's "propensity" for the crimes. There were four alleged victims, two of whom were the children of the defendant's live-in girlfriend, and two of whom were the defendant's children with the girlfriend. In 1996, three of the girls reported physical abuse. Thereafter, one of the three also alleged sexual abuse against herself and one of the others, who initially denied "bad touch[ing]" but then agreed. No physical evidence of sexual abuse was found, but there was substantial evidence of physical abuse found upon examination of the girls. Following conviction, a new trial was granted on the basis of trial counsel's failure to impeach the girls by introducing statements they had made recanting their allegations of sexual abuse. During retrial, both girls again alleged sexual abuse. The defendant testified and admitted physically disciplining the children, but denying it was abusive. He also denied the sexual abuse allegations. A state expert, Dr. Kelly, testified about the marks and evidence of physical abuse on the girls' bodies, as well as his opinion that these wounds had been intentionally inflicted. The District Court found counsel's conduct was deficient in failing to object when Dr. Kelly, who had never interviewed the two girls alleging sexual abuse or been present during their interviews, went further and testified that their disclosure of the details of sexual abuse were "consistent" and "credible." Likewise, counsel's conduct was deficient in failing to object to the testimony of Dr. Sisk, a psychologist, who testified that he interviewed the defendant and administered testing "designed to uncover abusive or neglectful attitudes." He concluded that the defendant held "parenting beliefs that contributed to abuse and neglect." Defense counsel elicited

further damning conclusions on cross-examination. No strategy explained counsel's failures. Counsel could not recall in post-conviction why she had not objected but speculated that she did not want to highlight Kelly's testimony by objecting and that she chose to "argu[e] away" Sisk's conclusions. Prejudice established as the state relied heavily on this inadmissible testimony by both doctors in closing arguments. The Eighth Circuit affirmed with respect to the sexual abuse convictions, but not the physical abuse convictions. In finding reasonable strategy based on counsel's testimony of what she "might have" been thinking, the state court's adjudication was an unreasonable application of *Strickland*. The only evidence of sexual abuse was the inconsistent testimony of the girls. In this context failure to object to the improper vouching and improper "propensity" evidence so as "not to draw attention" to the testimony was objectively unreasonable. With respect to Sisk she did draw attention to the testimony by eliciting greater detail in cross-examination. Likewise, the alleged strategy of explaining away the testimony was non-existent as counsel did not even mention this testimony in her closing argument. Because the state court relied on this unreasonable determination of the facts, the Eighth Circuit reviewed the issue de novo and found no reasonable strategy. Likewise, because the state court had not reached the issue of prejudice, this issue was reviewed de novo. Prejudice found as "[t]he doctors' inadmissible testimony strengthened an otherwise very weak case" of sex-abuse as there was no medical evidence and no independent eyewitness accounts and the testimony of the alleged victims was "conflicting and inconsistent." These convictions were reversed. As there was substantial credible evidence of physical abuse, however, there was no prejudice here and those convictions affirmed.

**2014:** ***Mosley v. Butler*, 762 F.3d 579 (7th Cir. 2014)**. Under AEDPA, counsel was ineffective in murder and arson case for failing to adequately investigate and present a defense. In its prior decision, in *Mosley v. Atchison*, 689 F.3d 838 (7th Cir. 2012), the Seventh Circuit agreed with the District Court that Mosley had met the requirements of 2254(d) by showing that the state court decision denying relief "rested on an unreasonable determination of facts and an analysis that was contrary to *Strickland*." *Id*. at 580. The Seventh Circuit remanded, however, for determination of whether Mosley was entitled to relief under 2254(a), which "depends on whether he 'is in custody in violation of the Constitution or laws or treaties of the United States." The defendant was convicted in a bench trial under an accountability theory for an apartment building fire in which an elderly resident died. The state's theory was that the defendant was a gang member, who ordered two younger gang members to set the fire in retaliation for the actions of Fernando, a resident in the building, who was a rival gang member. Her car window had been smashed out earlier because "she refused to pay 'taxes' to the Gangster Disciples for selling drugs out of her apartment." Fernando testified that the defendant had threatened her at least five times and immediately before the fire, she heard the defendant outside the building saying "burn this motherfucker down." Fernando's friend corroborated this testimony. The defense presented only the testimony of Coward. She testified that the defendant was in a schoolyard across the street three hours before the fire with her and a group of people and she never heard him order anyone to set a fire or burn the building. Counsel was ineffective in failing to investigate and present testimony from two other witnesses, Jones and Taylor. Jones testified that she had been in the schoolyard with the defendant and a group of others for about two and half hours before the fire started. When the fire broke out, the defendant and the others from the schoolyard ran to the burning building in order to help the victims. She saw the defendant run into the burning building to aid rescue efforts. Taylor, who was a friend of the

defendant. Taylor lived in the apartment right above Fernando. She would have testified that the defendant visited her earlier in the evening. Later, about 45 minutes before the fire she looked out her apartment window and saw the defendant and a group of other men and children (but no adult women) in the schoolyard. She never heard him say anything about burning down the building. After the fire started, she saw the defendant and others run over from the schoolyard, yelling that the building was on fire. The defendant rescued her infant son by catching him as Taylor dropped him from her window. Counsel testified that "he had not planned to call any witnesses at the trial because he was convinced hat his motion for judgment of acquittal would be granted." After the motion was denied, he spoke to Coward during a short recess and decided to call her to testify. He did not recall ever talking to Taylor but testified that he would not have called her to testify because her testimony that he had been in the building earlier contradicted his theory that the defendant was in the schoolyard all night and her testimony that no women were in the schoolyard contradicted Coward. During its initial review, the district court found counsel ineffective based on Jones and Taylor. During the remand for consideration under 2254(a), however, the court addressed only Taylor in finding that counsel was ineffective for failing to investigate and present her testimony. Counsel's conduct was deficient, not based on strategy, and prejudicial.

***Vega v. Ryan*, 757 F.3d 960 (9th Cir. 2014)**. Under AEDPA, counsel ineffective in sexual abuse case for failing to review prior counsel's file and, as a result, failing to call as a witness a Catholic priest to whom the alleged victim, the defendant's stepdaughter, had recanted her allegations of sexual abuse. The initial allegation was made in 1996 and the defendant was charged in federal court. The charges were dismissed after Counsel 1 learned that the alleged victim had recanted her allegations to her mother and a priest. Later, the defendant was charged in state court, but again the charges were dismissed after Counsel 2 learned of the recantations. State charges were brought again (eight counts) and Counsel 3 represented the defendant. After two mistrials, the defendant was convicted on five counts. After trial, counsel filed a motion for mistrial or to vacate judgment on the grounds that he had just learned that the alleged victim had recanted her allegations to the priest. The motion was denied. Counsel 3's conduct was deficient because counsel did not review the files of Counsel 1 and Counsel 2, which contained notes by both counsel that the alleged victim had recanted to the priest. The state court held that counsel's conduct was not deficient because the defendant knew of the recantation and did not inform counsel. This was an unreasonable application of clearly established Federal law under *Rompilla* where counsel were held to be ineffective for failing to obtain and review records–"all matters that *Rompilla* himself would have had some knowledge."

> *Rompilla* is dispositive here. . . . The Court made clear in *Rompilla* that counsel had a duty–independent of whatever knowledge his client may have–to make reasonable investigation including, at a minimum, reviewing "the court file" on *Rompilla*'s prior conviction. If *Rompilla*'s counsel had a duty to review the court file in a prior case, it is minimally incumbent on Vega's counsel to review the file of the previous attorneys who handled the charges in the same case.
>
> We think it apparent from *Rompilla* that the client's own knowledge of what is in his file is irrelevant to the discharge of his counsel's duty.

Here, counsel needed to look no further than previous counsel's files, which were "at his fingertips," to find the arguably exculpatory evidence. "[W]e can conceive of no circumstances where the decision not to read a client's file–a file prepared to answer the same charges–would be reasonable." Prejudice was also established because the priest was available and willing to testify because the recantation statement from the alleged victim was not obtained during confessional and, thus, was not privileged. The state could held that there had been no prejudice because this recantation would have been cumulative to the evidence admitted at trial that the alleged victim had recanted to her mother. The state court's holding was unreasonable. First, the recantation to the priest occurred at a different time as the recantation to the mother and the priest spoke to the alleged victim alone. Second, the family members in this case were pitted against each other and some testified (and the state argued) that the mother had pressured the alleged victim to recant in order to protect the defendant. Third, although there was no "priest-penitent privilege" here, state law "recognized the special relationship between priests and their parishioners." Thus, the priest's testimony "would have been of much greater weight" than the evidence of the recantation to the mother, such that it "could have tipped the scales" in the defendant's favor. In addition, the jury's verdict indicated prejudice, as well, in that the jury could not reach a unanimous verdict on three of the eight counts.

**2013:** ***McClellan v. Rapelje*, 703 F.3d 344 (6th Cir. 2013)**. Counsel's conduct in murder case was "grossly deficient" in failing to interview witnesses and appellate counsel's procedural default of the issue did not bar merits review. The case arose out of a "barroom conflict" between two groups that spilled outside when they were asked to leave. The prosecution's theory was that the shooting was premeditated as the defendant left the bar and retrieved a gun from his car prior to the shooting. Numerous witnesses were available to testify that the defendant had the gun with him to start with and never went to his car to retrieve it. Likewise, these witnesses would have testified that the alleged victim who was much larger than the defendant "rushed him with a chrome object in his hand that appeared to be a gun" before the defendant pulled out his gun and fired. Cause and prejudice was established to overcome the procedural default because both the defendant and his aunt informed appellate counsel in letters, provided to the court, of the basis for investigation.

***Cannedy v. Adams*, 706 F.3d 1148 (9th Cir. 2013), *amended*, 733 F.3d 794 (9th Cir. 2013)**. Under AEDPA, counsel ineffective in lewd acts upon stepdaughter case for failing to present witnesses who could have corroborated the defendant's testimony that the stepdaughter had motives to lie. Her friend could have testified that the stepdaughter communicated with the witness by America Online Instant Message that she lied because she wanted to move to her natural father's home rather than with her mother and the defendant. Prejudice established as there was no physical evidence and there were "significant inconsistencies in the government witnesses' testimony." In denying this claim, the state court unreasonably determined the facts in finding that counsel's conduct was not deficient, as the defendant had informed counsel about the message and the witness' willingness to testify and yet counsel failed to interview the witness.

**2012:** ***Elmore v. Ozmint*, 661 F.3d 783 (4th Cir. 2011)** (tried initially in 1982 and retried in 1984). Under AEDPA, counsel ineffective in capital murder trial for "blind acceptance of the State's forensic evidence" and failure to investigate or adequately challenge that evidence. The defendant spent nearly 30 years on death row. His death sentence was vacated by the state court in 2010 based on

a finding of mental retardation on an *Atkins* claim. The defendant, a black, mentally retarded, handyman, had done work for the elderly, wealthy white victim and others in her neighborhood. The state's evidence through the trials and for 17 years was that the victim was raped and murdered in her home on the evening of January 16, 1982, when the defendant had no alibi. Her body was discovered by a neighbor on January 18 and the neighbor immediately pointed at the defendant as a suspect. The defendant's thumbprint was found on the exterior frame of the back door of the home and he was arrested on January 20 and tried less than three months later. The neighbor, police, and state experts testified during trial. Essentially, based on circumstantial evidence, including a TV guide open to the evening of January 16, the state put the time of death on that evening, even though the state's pathologist who performed the autopsy days later, put the time of death anywhere between 11:00 a.m. on January 16 and to 11:00 p.m. on January 18. The state argued that the defendant entered the backdoor where the fingerprint was located, assaulted the victim, forced her into her bedroom and sexually assaulted and killed her on the bed before dumping her body in the bedroom closet, cleaned the scene of fingerprint and other evidence, and stole some money before leaving in his own car. During the 1984 trial, where the state's evidence was identical to that from the 1982 initial trial, the state's pathologist based on "history" received "estimated" the time of death to be the evening of January 16. A fingerprint analyst and four police officers testified the defendant's thumbprint was "recent" and "fresh," although the analyst conceded it could have been there for a month. An agent from the South Carolina Law Enforcement Division (SLED), who assisted in processing the scene, testified that he collected a number of hairs from the victim's bed, but took no photographs of the hairs and did not collect the bedding. Another SLED agent testified that there were 49 hairs, 4 consistent with the victim, but 45 were Negroid with rare "banding" and a "reddish cast," which was consistent with the defendant. Of the 45 Negroid hairs, the agent testified that four appeared to have fallen out normally, but 41 were forcibly removed by the 75-year-old victim during the sexual assault. Although the crime scene was "a particularly bloody one," the state's evidence was that there were small amounts of blood on the defendant's shoes, coat, and denim pants. There was no blood or evidence in the defendant's car or elsewhere. While the defendant's ex-girlfriend testified that he was wearing a white shirt that she threw away that evening, no one asked for details, which would have been that she saw no blood on the shirt and she threw it away simply because she did not want his clothes at her house. All of the identifiable blood in the house was Type A, which was consistent with the victim and 40-45% of the population. Small amounts of Type A and Type B blood were on the defendant's clothing. A jailhouse snitch, who later recanted in post-conviction proceedings, also testified during trial that the defendant had spontaneously confessed to him. The only defense evidence was the defendant's own testimony denying involvement in the murder and denying confessing to the jailhouse snitch. Defense counsel essentially conceded the time of death, made only perfunctory efforts in cross-examination, and actually "vouched for the investigators" in closing arguments by citing SLED as a "fine department" with "good personnel," who are "experts at everything they do." The jury convicted after only two hours of deliberations. Counsel's conduct was deficient as counsel conducted no independent analysis of the State's evidence and never even thought to suspect irregularities in the chain of custody. Indeed, just days prior to the 1982 trial, counsel requested to see only the evidence the state intended to introduce during the trial. Even with "a rare second chance to contest the State's case – along with near-perfect knowledge of what that case would be," the same counsel did nothing more to prepare for the 1984 retrial. While counsel cited sparse

state funding available, counsel made no effort to obtain funding and apparently never even considered challenging the state's case as counsel had complete faith in the police. Indeed, it appears that counsel's only preparations for trial was in the 10 day period prior to the 1982 trial and in the ten day period prior to the 1984 trial. If counsel had adequately investigated, a defense pathologist would have placed the most likely time of death, based solely on the autopsy evidence rather than a TV guide and the like, between 11:00 a.m. and 3:00 p.m. on January 17, a time frame when the defendant had an alibi. The pubic hair evidence on the bed could have been challenged by the lack of any photographs or seizure of the bedding, even though everything else in the house, including undisturbed rooms," were photographed. Likewise, there was a "conspicuous omission of any reference to the hairs" in the affidavit in support of an arrest warrant. In addition, the hairs were contained in a clear plastic baggy on which the agent wrote directly when all the other evidence in the case had distinctive SLED labels on which the agents wrote. The defense theory was that the hairs allegedly found on the bed were removed from the defendant by police following arrest. The defendant could not challenge whether the hairs were actually his in post-conviction because neither the slides nor any record of them could be located. The print evidence could have been challenged because the defendant's thumbprint on the backdoor frame was upside, which was consistent with him leaning on the door to wash windows rather than touching it on his way into the house or leaning on it as the state theorized. Likewise, while the state examiner had testified during trial that there were no other identifiable prints in the house, there was an identifiable print on the underside of a blood-smeared toilet seat in the bathroom connected to the victim's bedroom. This print did not match the defendant. No determination could be made in post-conviction whether it belonged to the victim, as her prints also could not be located. The testimony that the defendant's print was "fresh" or "recent" also could have been challenged as there is no way to determine the age of a latent print. In addition, the evidence concerning the blood on the defendant's clothing could have been challenged because there were irregularities in the chain of custody for those items. In addition, the small amounts of blood on the clothing was inconsistent with the likely amount of the blood the actual killer, who had carried the victim's body allegedly from the bed to the closet, would have had on him. To make matters worse, the state's autopsy report reflected "apparent pubic hair" on the victim's chest and abdomen during autopsy. The evidence log by the pathologist listed this same evidence as "fibers, hairs from chest & abdomen." When this evidence reached SLED, the report of analysis of this evidence, marked as "Item T," was that it contained only "blue fibers." This evidence was not mentioned during any of the trials and "could not be located" during post-conviction until the post-conviction appeal, which was then remanded for analysis of the long hidden "blue fibers" of "Item T." Visual analysis of the slides revealed four human hairs, three animal hairs, and a single blue fiber. The human hairs were Caucasian. Experts disagreed on visual inspection about whether it was consistent or inconsistent with the victim, although everyone agreed it was inconsistent with the defendant. Mitochondrial DNA testing revealed that one of the Caucasian pubic hairs found on the victim's abdomen was not consistent with the victim. The defense also presented behavioral profiling evidence in post-conviction that tended to exculpate the defendant and implicate the neighbor who allegedly found the body, but was never seriously considered as a suspect by anyone because he was a County Councilman known personally to officers and defense counsel. The state court's determination that counsel's conduct was not deficient was both an unreasonable application of, and contrary to, the controlling *Strickland* principles." For example, the court found that no investigation was necessary because counsel "reasonably trusted in not only the integrity, but

the infallibility, of the police," which the Fourth Circuit found to be a "notion abhorrent to *Strickland*, which was designed to protect the Sixth Amendment right to 'a reliable adversarial testing process.'"

> A healthy skepticism of authority, while generally advisable, is an absolute necessity for a lawyer representing a client charged with capital murder. After all, the custodians of authority in our democracy are ordinary people with imperfect skills and human motivations. The duty of the defense lawyer "is to make the adversarial testing process work in the particular case, *Strickland*, 466 U.S. at 690 – an obligation that cannot be shirked because of the lawyer's unquestioning confidence in the prosecution.

*Id.* at ___. Here, counsel's conduct was deficient as "the need for scrutiny of the forensic evidence was indisputable." While counsel attempted to challenge the evidence in cross-examination, they "twice squandered opportunities to investigate the forensic evidence (prior to the 1982 and 1984 trials)." The state court also unreasonably applied *Strickland* because it "repeatedly relied on later-developed facts – unknown to Elmore's trial lawyers when they decided against investigating the State's forensic evidence prior to the 1982 and 1984 trials – to retroactively justify that decision." This was "in plain contravention of *Strickland*'s contemporary assessment rule." The state court also unreasonably "deemed facts relevant to the prejudice issue to also be pertinent to the performance question." For example, the court held that counsel's conduct was not deficient in failing to investigate because the jury would have believed the state's evidence regardless of what the defense presented. On prejudice, the state court erroneously believed that the decision in *Lockhart* changed the prejudice-prong test. This was rejected as an unreasonable application of and contrary to *Strickland* in *Williams*. The PCR court also never considered "all of the trial and PCR evidence favoring Elmore's acquittal" in the prejudice analysis. To the contrary, the state court "embraced the theory that the only evidence that mattered was the evidence incriminating Elmore." Proper analysis leads to "only one reasonable conclusion:" a reasonable probability that Elmore "would have been acquitted" if counsel had performed competently. Counsel could have shown "gross violations of standard procedures for the handling of forensic evidence," as well as "the extraordinariness of finding so many incriminating hairs." There was "additional clear evidence that the SLED team was at least mistake-prone" and at worst "that the agents were outright dishonest."

***Foster v. Wolfenbarger*, 687 F.3d 702 (6th Cir. 2012)**. Under AEDPA, counsel ineffective in second-degree murder case for failing to investigate and present an alibi defense. The petitioner was at a woman's home having sexual relations. Afterwards her ex-boyfriend and father of her children showed up with friends. He assaulted the woman and then smashed the back window of the petitioner's vehicle as he was leaving. Police were called and the petitioner overheard the ex-boyfriend's address. Almost two hours later, the ex-boyfriend was shot as he arrived home by a man on foot. Petitioner was arrested and charged with first degree murder. His defense was based on mistaken identity. Prior to trial, a man sent a letter to counsel asserting that the petitioner was at his home at the time of the murder. Counsel spoke to the witness by phone for 15-20 minutes but chose not to call him as a witness because he thought he "would make a poor witness." Counsel's conduct was deficient. Even if the man was a "poor witness," counsel did nothing to investigate with respect

to the other two potential alibi witnesses at the home at the same time. Either of these witnesses or all three together could have supported the defense. Moreover, the alibi defense was consistent with the mistaken identification defense presented.

> Thus, this is not a situation where defense counsel is required to choose between two different avenues and pick the theory of the case that counsel believed was stronger. Instead, trial counsel chose not to investigate an avenue that potentially could have bolstered the defense that counsel was already pursuing.

Prejudice also established. The jury initially deadlocked before convicting on the lesser included offense of second degree murder. Moreover, the sole eyewitness against the petitioner described the shooter as 5'6, 180 pounds, and wearing a green jacket. The petitioner is 6'0', 240 pounds, and was wearing a blue jacket. "By any standard this is a weak identification." There was no other evidence, forensic or otherwise, linking the petitioner to the crime.

***Toliver v. Pollard*, 688 F.3d 853 (7th Cir. 2012)**. Under AEDPA, counsel ineffective in first degree intentional homicide case for failing to present defense testimony from the petitioner's wife and cousin to support the defense argument that the petitioner tried to stop his brother from shooting the victim. The brothers lived with a man who sold drugs out of the residence. When some of the drug money was missing, they suspected that the victim had stolen it. The petitioner and his brother, who were both armed, brought her to the residence to question her. Three state witnesses testified that the petitioner ordered his brother to shoot her. The petitioner testified that he was pushing his brother back and trying to calm him when he shot her, but the brother shot and killed her anyway. Prior to trial, the petitioner's wife contacted counsel and told him that one of the state's eyewitnesses had told her that the petitioner was trying to wrestle the gun from his brother after the shooting. Counsel did not call her and never interviewed the cousin despite being told of his potential testimony by the petitioner. The cousin would have testified that the he was present for a conversation between the two brothers one the brother admitted that he was to blame. While counsel was deceased and unavailable to testify, the pretrial state court record did reflect that the petitioner had requested new counsel because counsel would not follow-up on witness leads provided. The 7th Circuit had previously found prejudice prior to remanding the case for an evidentiary hearing and did not revisit that issue. Because the state court did not address the question of deficient conduct, the issue was reviewed de novo. Counsel's decision not to call these witnesses based simply on their family relationship to the defendant was not a "sound strategic choice." This testimony was crucial as the only defense witness was the petitioner.

***Thomas v. Chappell*, 678 F.3d 1086 (9th Cir. 2012)**. Under pre-AEDPA law, counsel ineffective in murder case for failing to adequately investigate and present a defense. The petitioner was convicted of murdering two "'Deadheads,' who followed the Grateful Dead band on tour," near a homeless encampment by the San Francisco Bay. There was no direct evidence of guilt, but "considerable circumstantial evidence," although "none of the evidence presented by the prosecution plainly contradicted Petitioner's generally consistent account of what had occurred on the night of the murders and during the following morning." *Id*. at 1091. The defense argued that the state had not met its burden of proof and also argued that someone other than Petitioner had committed the crime. The only evidence presented of this was from the grand jury testimony of a homeless woman,

who could not be located at the time of trial. Her testimony was characterized by the prosecution as "ridiculous, at best, perjurious at worst." *Id*. at 1093. Even according to the California Supreme Court, counsel's conduct was deficient in failing to investigate and present additional witnesses to corroborate the defense that another person committed the crimes. While the petitioner presented eleven corroborating witnesses, the state court found that competent investigation would have discovered only three of these witnesses. The District Court held that this was "not fairly supported by the record." *Id*. at 1098. Even considering just the three witnesses that the state court did, prejudice was found. The state's case was entirely circumstantial. The grand jury testimony of the one defense witness "was not particularly believable. Without any corroboration her story . . . appears to be fantasy." *Id.* at 1105. Even with that, the jury deliberated for almost five days, even though the argument and evidence only took six days to present. Moreover, "the jury struggled with precisely the theory that adequate representation would have bolstered." And, "[t]wo of the requested readbacks [of testimony during deliberations] related directly" to the theory that someone else committed the crime. *Id*. at 1103. The additional three witnesses corroborated her testimony.

**2011:** ***Breakiron v. Horn*, 642 F.3d 126 (3rd Cir. 2011)**. Under AEDPA, counsel was ineffective for several reasons murder committed during robbery case. The District Court vacated the murder conviction due to a *Brady* violation so only the robbery conviction was at issue. The petitioner never denied killing or theft but presented a voluntary intoxication/diminished capacity defense asserting he was guilty only of third-degree murder because he did not have the specific intent to kill. He also asserted guilt of only theft rather than robbery because he decided to steal after the murder was complete. Counsel's conduct was deficient in failing to request a jury instruction on the lesser- included offense of theft, which was supported by the evidence. This was the sole defense theory so no reasonable counsel would have failed to request the instruction. The state court's finding of no prejudice was both contrary to and an unreasonable application of *Strickland*. Counsel was also ineffective in failing to take corrective action during jury selection after a venire member testified in front of a panel of jurors that he knew the petitioner, who "used to do a lot of robbing." This juror was excused because he had a "fixed opinion" and could not be an impartial juror, but one of the venire members from the same panel served on petitioner's jury without ever being asked about other juror's statement. Counsel was ineffective in failing to move to strike the panel, seek a mistrial, or take other corrective action to ensure that no one exposed to the biased juror's testimony would serve on the jury. The state court's finding to the contrary was objectively unreasonable. While the state argued that the petitioner must show that the seated juror was actually biased, the Court held that *Strickland* requires an objective inquiry based on the prejudicial nature of the statement rather than a subjective view of the seated juror's opinions. In short, the proper inquiry was not whether the statement rendered the seated juror biased, but whether there is a reasonable probability that a juror exposed to that testimony would have voted to acquit.

***Couch v. Booker*, 632 F.3d 241 (6th Cir. 2011)**. Counsel ineffective in second-degree murder case for failing to investigate a "causation" defense. The murder "arises from an incident that occurred when a party went awry." In essence, the victim was drinking, smoking marijuana, and using cocaine at a party. A woman at the party called the defendant and two other men asking for assistance with "a situation." When the men arrived they discovered that the victim had raped a

woman. They pulled him outside and "punched him repeatedly." The defendant punched him 5-7 times and kicked him once. An ambulance was called, but the victim later died. The pathologist that conducted the autopsy found a chronic heart problem, possibly related to drugs, a .17 blood-alcohol level, noticeable levels of "cannabinoids" from marijuana, and significant levels of cocaine. There was blood in the lung tissue. The doctor concluded that the cause of death was asphyxia from inhaled blood that resulted from blunt-force injury to the face. Counsel's conduct was deficient in failing to pursue a causation defense after receiving this information. Counsel did not seek the records or interview the medics. Counsel claimed he did not get the report because he did not want to emphasize the victim's "fear and the effect of the attack." While this kind of fear might explain not offering the evidence during trial, "that is no reason not to read the report. How can one exercise reasonable professional judgment about whether to stop a causation-based investigation before reading the key report that might support it?" *Id*. at 246. Likewise, counsel's conduct was not excused by a defense medical expert agreeing with the cause of death found by the state's pathologist. The defense expert never saw the incident report or talked to the medics. "An attorney cannot hire an expert, give him whatever evidence he happens to have on hand (but not the evidence the client pointed to) and accept the report without further discussion." *Id*. at 247. "Hiring a medical expert to review an autopsy report does not amount to the outsourcing of all investigation into plausible causation theories, including a theory that may have nothing to do with the autopsy report." Prejudice found. Investigation revealed that the victim was conscious when medics arrived, he fought medics when they tried to put him in the ambulance, and his mouth and nose were not flooded with blood, even though the state repeated argued that he "drowned in his own blood." With this information, a defense expert could have testified that the cause of death was actually "cardio respiratory failure" due to cocaine toxicity from an "accidental" cocaine overdose. Prejudice especially with respect to the petitioner, as he was arguably the least culpable of assailants, such that there was no evidence of premeditation or anything else to suggest that he meant to kill the victim.

***Sussman v. Jenkins*, 636 F.3d 329 (7th Cir. 2011)**. Counsel ineffective in child pornography and sexual assault of minor case for failure to adequately present evidence of the minor's prior false accusation against his father during divorce proceedings. The petitioner was a former school mentor for the child, who also saw him frequently outside of school. Once the mentoring concluded, the child's mother, acting on the advice of friends, asked the child if he had been abused. The child told his mother that petitioner had sexually abused him and the authorities were called. Counsel was initially precluded from eliciting testimony about the prior false allegation because he had not timely raised the issue pretrial as required by the Wisconsin rape shield statute. After the child testified that he did not report the abuse because he thought it "was right," the trial court revisited the ruling and permitted counsel to inquire whether he had previously reported an unlawful touching. Counsel interpreted the court's ruling to allow only cross of the child on this point. Thus, counsel did not seek to present evidence from the child's father or counselor to establish the prior false accusations against the father or to establish that the child had denied to the counselor, as documented in his records, that petitioner had abused him. Because the state court addressed only prejudice, review of counsel's conduct was de novo under AEDPA. While there is a presumption of reasonable professional judgment "as a general proposition of law," that presumption "has little bearing" here. Counsel's failure to file the pretrial motion was an oversight. Counsel's failure to introduce the counselor's note was due simply to a misunderstanding of the

breadth of the trial court's ruling. With respect to prejudice, the state court's determination that the evidence would have been excluded even with a timely pretrial motion under the statute could not be reviewed as it was a matter of state law. The court could, however, consider the Confrontation Clause issue as the state court ruling precluded petitioner from confronting the witnesses against him. Here, with the evidence of the prior false accusations against his father, the jury could reasonably have concluded that the child was prone to use allegations of sexual abuse against father figures as a means either of gaining their attention or as a means of punishing them for abandoning him. This type of "evidence that exposes a motive to fabricate a specific kind of lie under a specific set of circumstances" directly implicated the petitioner's confrontation rights. In failing to even address this confrontation issue, the state court unreasonably applied the law as construed by the Supreme Court. Prejudice established even though the jury heard evidence of the prior allegations. "[T]here is an obvious difference between an accusation and a false accusation." Counsel did not establish that the prior allegation was false and did not explore the child's motives for the false allegations against his father or draw parallels to the current case. While the child's credibility was impeached generally, this evidence would have demonstrated that he "lies specifically about sexual abuse when he feels abandoned by father figures." The child's testimony was the only evidence of guilt. Even without the false-accusation testimony, the jury acquitted on some charges. Thus, "the jury harbored doubts as to some aspects of [the child's] testimony." Likewise, while a lay witness testified that the child had stated previously that his allegations against petitioner was false, failure to include the counselor's note and testimony was prejudicial. The lay witness was thoroughly discredited as biased. The counselor was an objective third party with no motive to lie. The jury would "have given far more credence" to the counselor's note. While this single note error might not require reversal due to required deference to "reasonable" state court determinations, the cumulative impact when combined with counsel's failure to present the false allegation evidence required reversal.

***United States v. Coutentos*, 651 F.3d 809 (8th Cir. 2011)**. Counsel ineffective in possession of child pornography case for failing to raise statute of limitations defense. The allegations were made by two 14-year-old girls, who alleged events eight years earlier. The government charged the defendant with possession "in or around 2001." A general statute provided a five-year statute-of-limitations period. A later statute enacted July 27, 2006, extended the statute-of-limitations period, but only if the original period had not run. Thus, July 27, 2001, was the cut-off date for determining whether the statutory time was extended in this case. Counsel's conduct was deficient in failing to challenge this issue because the government did not present any specific evidence that the alleged conduct occurred before July 27, 2001. According to the girls' testimony, the acts could have occurred any time between 2000 and 2002. Convictions vacated on these charges, although there remained valid convictions on other offenses.

**2010:** ***White v. Thaler*, 610 F.3d 890 (5th Cir. 2010)**. Under AEDPA, counsel was ineffective in murder case for eliciting evidence about the defendant's post-arrest silence and for failing to object to evidence the murder victim was pregnant at the time of her death. After a confrontation with a woman in a bar, the defendant ran over her and a second woman with his pickup while leaving the parking lot. The second woman, who was pregnant, died. The defendant never gave his exculpatory version of events–that he was fleeing from an angry mob–until his trial testimony. During direct,

counsel elicited this fact. During cross, the state questioned the defendant "extensively about his post-arrest silence." Because the state court did not adjudicate deficiency on the merits, the court reviewed this de novo. Counsel conceded he did not elicit this evidence as part of a strategy. Because the police did not advise the defendant of his Miranda rights at the time of arrest, there was no violation under federal constitutional law. Under the Texas Constitution, however, state cases held "that a defendant's post-arrest, pre-Miranda silence could not be used against him at trial." In short, "Texas law prohibits a prosecutor from impeaching a defendant with his post-arrest silence." By opening the door, defense counsel allowed the prosecutor to "verbally pound[]" the defendant and to "mock[]" his testimony that he feared for his life. The prosecutor used the silene as "prior inconsistent conduct" and argued the defendant was not "credible" on this basis. The state court's finding of no prejudice was "objectively unreasonable." Counsel's conduct was also deficient in failing to object or file a motion in limine to exclude evidence that the victim was pregnant. Again, because the state court did not adjudicate deficiency, this was reviewed de novo. Counsel's conduct was deficient as the evidence of pregnancy was "irrelevant" under state evidence rules as the only disputed issue at trial was whether the defendant "intended to hit the victims with his truck." Moreover, there was no evidence to show the defendant knew the victim was pregnant, as this only became apparent during the autopsy. Counsel conceded there was no strategy for failing to object to this evidence. Prejudice established, as the state referred to the death of the "unborn child" nine times in closing arguments. Prejudice was also clear as the murder conviction rested on the jury finding intent to kill the victim. By its verdict, however, the jury acquitted him of (finding no intent) attempted murder of the other woman, who was the person he had argued with. "Under these circumstances, the jury's verdict of intentional murder is not reliable." The state court's finding of no prejudice was "objectively unreasonable." While both of these issues were prejudicial, standing alone, the cumulative of "combined prejudicial effect . . . inexorably leads" to reversal.

***English v. Romanowski*, 602 F.3d 714 (6th Cir. 2010) (*affirming in part and reversing in part*, 589 F. Supp. 2d 893 (E.D. Mich. 2008))**. Under AEDPA, counsel ineffective in assault with intent to commit murder case for failing to adequately investigate prior to informing the jury in opening statements that the defendant's girlfriend would be called as a witness to corroborate the claim of self-defense. Because the state court had failed to address the issue, although raised in state court, review was de novo. Counsel's conduct was deficient, even though there were arguably valid strategic reasons for counsel's decision not to call the girlfriend as a witness. "This is not a case where counsel simply failed to pursue a potential witness. . . . Here, counsel was actually prepared to call" the witness and informed the jury of this intent before discovering the problems and concerns that caused counsel to change his mind. Simple pretrial interviews of witnesses would have revealed the problems, but counsel "failed to interview any of the witnesses outside of the courthouse or prior to trial." Reasonable trial strategy could not be developed on guesses of what witnesses would say. The unfulfilled promise to the jury to call the girlfriend as a witness was prejudicial because the unfulfilled promise (1) created a negative inference against the defendant generally; (2) caused a negative inference against the defendant's own testimony, which counsel promised would be corroborated by the girlfriend; and (3) prejudicial, inflammatory evidence of the girlfriend's witness tampering and alleged false evidence planting would not have been admitted if defense counsel had not identified her as a witness. In addition, the state's evidence was not overwhelming as there were "no unbiased witnesses" and no physical evidence.

**Capital Case*

**2009:** ***Wilson v. Mazzuca*, 570 F.3d 490 (2nd Cir. 2009)**. Under AEDPA, counsel ineffective in robbery case for numerous reasons and the state court finding to the contrary was an unreasonable application of clearly established federal law. In December 1992, the victim was robbed at gunpoint by two men. That day, he gave a general description of the man that assaulted him and demanded cash and then selected the defendant's photo from a book of "mug shots" maintained by police. The defendant was arrested almost two years later on unrelated extortion charges. The next day the robbery victim picked him out of a line-up and the defendant was charged with the robbery. Under New York law, the initial photo identification was inadmissible except for rebuttal purposes. During opening statements, defense counsel asserted mistaken identification and insufficient police investigation. The trial court warned defense counsel that if he proceeded along the line of the police investigation, the door would be opened for the photo identification. Following opening, the trial had to be continued because the victim did not appear. He was brought in under a Material Witness Order. Counsel's conduct was deficient in eliciting testimony from him on cross that he did not appear because he feared the defendant would retaliate against him for testifying. This was "objectively unreasonable" because there had been no mention of fear in appearing before. "To ask these questions on the theory that [the witness] might say that he was not afraid of [the defendant] was "reckless and objectively unreasonable." Counsel also opened the door on cross to the photo identification. Counsel initially "appeared to misunderstand the legal issue" but "[t]his mistaken belief was entirely unreasonable, especially in light of the court's warning following opening that "was more than sufficient to dispel any misunderstanding" on counsel's part. During the rebuttal, the state referred to the photos as "mug shots" without objection from the defense. The trial court suggested that the "mug shots" be redacted to exclude the booking plaque hanging around the defendant's neck. Counsel's conduct was deficient in objecting to the redaction. Counsel had "no strategic explanation" for the failure to object to the "mug shot" label or for objecting to redacting the photos. Next, counsel's conduct was deficient in introducing the unredacted arrest report on the extortion charges, despite the trial court expressing concerns and sua sponte raising the possibility of whether the defendant had been denied the effective assistance of counsel. Counsel's reasons, in showing the prior arrest was "baloney" and to be "honest" with the jury, were "incomprehensible." It also appeared that counsel "did not even realize that the report contained prejudicial information linking the defendant to "prior threatening and violent activity." Finally, counsel presented a character witness and inquired about the defendant being a role model for youth in a community organization. Although the trial court gave counsel an opportunity to strike his own question, counsel declined. This testimony opened the door for the state to inquire on cross about the witness' knowledge of the defendant's prior convictions for drugs, weapons, theft, and assault. "It was objectively unreasonable for defense counsel, particularly in the face of the trial court's warnings, not to have understood that eliciting reputation testimony would lead to the introduction of [the defendant's] criminal history." In short:

> The record indicates that defense counsel misinterpreted and misunderstood the law, failed to pay attention, acted recklessly, and did not appreciate the consequences of his decisions, even though in many cases he was explicitly warned of the risks by the trial court.

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Prejudice established. The state's whole case was built on the "single eyewitness identification made two years after the robbery by a reluctant eyewitness who testified only after being served with a material witness warrant." "On the other side of the ledger," due only to defense counsel's errors, the evidence undermined the "mistaken identification defense, corroborated the eyewitness identification, and implied [the defendant] had a propensity for criminality and violence. Indeed, the state's closing argument relied primarily on the "evidence that would not have been admissible but for [counsel's] decisions at trial." In addition, the trial court expressed concern about ineffective assistance during the trial or in "real-time, not merely post hoc."

***Richards v. Quarterman*, 566 F.3d 553 (5th Cir. 2009) (*affirming* 578 F. Supp. 2d 849 (N.D. Tex. 2008))**. Under AEDPA, counsel was ineffective in murder case (with death a day or so after assault) for a number of reasons. The case involved a number of homeless people living on the streets near a church tent known as the "slab church." Two eyewitnesses testified that they observed the victim and defendant in a minor altercation and returned later to see the victim standing over the defendant, who appeared to be asleep, with a stick and length of steel. The defendant got up, picked up a piece of asphalt, and hit the victim 9 or 10 times around the head and face. The defendant's brother later discovered the victim's body and testified that the defendant told him, consistent with the eyewitness testimony, that the victim had choked him into unconsciousness. When he awoke, he hit the victim in self-defense. First, counsel's conduct was deficient in failing to present evidence (and preventing the state from presenting evidence) of the victim's pre-death statements that significantly varied from the state's evidence and theory. In essence, the victim had gone to a nearby house at 3:00 a.m. and told a witness there he had been attacked by 3-5 men after he had fallen asleep and that another man [not the defendant] was the principal assailant that hit him in the head with a brick. Due to counsel's sustained hearsay objections, the victim's statements were excluded. The victim also told the police officer that responded to the house that he was attacked by 4 men around 3:00 a.m. and that he knew the men. Again, counsel's sustained hearsay objections excluded the victim's statements. Another homeless man testified that he was with the victim in the area around 6:00-7:00 a.m. when a man (not matching the defendant's description) walked by and the victim became agitated and said he was the attacker from the night before. Again, the victim's statements were excluded based on counsel's objections. Finally, counsel failed to present the defendant's testimony that his fight with the victim occurred around 10:00 or 10:30 p.m. Counsel's conduct was deficient and not based on any legitimate strategic reason. The state court's contrary findings were an unreasonable application of *Strickland*. Second, counsel's conduct was deficient in failing to request instruction on aggravated assault, a lesser-included offense. This was not the result of any reasoned trial strategy. Counsel initially stated she thought the request would have been frivolous. But, counsel's "testimony strongly suggests that she both failed to recognize" that it "was entirely possible for the jury to believe that [the defendant] did not act in self-defense but also believe that he did not kill [the victim]." Counsel "misunderstood the law governing lesser-included offenses." Thus, her additional explanation that she did not want to give the jury the option of convicting of a lesser offense was "a 'post-hoc rationalization' rather than a genuine account of her decision-making process." The state court's contrary finding was an unreasonable application of *Strickland*. Third, counsel's conduct was deficient in failing to put into evidence the defendant's VA medical records to establish the defendant's physical problems, which included a triple bypass surgery, left side weakness, frequent chest pains, and an inability to walk more than half a block without stopping. Counsel's "ethical" explanations for not presenting this evidence "were

developed after the fact" and "make no sense." "[T]here is nothing implausible about being strong enough to hit someone two to three times with a rock in self-defense but not strong enough to kill the person." The medical evidence also might have made the self-defense claim "more plausible." Counsel's conduct was deficient and not based on reasonable strategy. The state court's contrary findings were an unreasonable application of *Strickland* and the state court's factual findings on this were rebutted by clear and convincing evidence. Finally, counsel was ineffective in failing to interview important witnesses prior to trial. Again, the state court's contrary findings were an unreasonable application of *Strickland* and the state court's factual findings on this were rebutted by clear and convincing evidence. Prejudice established based on the "cumulative effect" of the errors. "But for the deficiencies in [counsel's] performance . . ., the jury would have heard compelling evidence that there was another, more serious assault on [the victim] after the one described by the prosecution's witnesses and [the defendant] himself, as well as of [the defendant's] documented frailties."

***Bigelow v. Haviland*, 576 F.3d 284, *rehearing denied*, 582 F.3d 670 (6th Cir. 2009) (*affirming* 476 F. Supp. 2d 760 (N.D. Ohio 2007))**. Counsel ineffective in kidnaping, assault, and arson case for failing to adequately prepare and present alibi evidence. The defendant was arrested based on his resemblance to a composite sketch of the attacker. He maintained that he was in a different city at the time of the attack. He presented one alibi witness to state that he was working with the defendant 150 miles away on the day of the crimes. Counsel's conduct was deficient in failing to identify other alibi witnesses. He called some witnesses, whose names the defendant had provided. They could verify that the defendant had been there sometime during the month, but could not pinpoint the relevant day. The defendant then attempted to locate additional witnesses, sending letters to some people. Four days before trial, one potential alibi witness contacted counsel and informed him he had met the defendant that day and identified the location where wedding preparations were being made. The witness believed only three people were there and the third person, the home owner, could not verify the defendant's presence. Nonetheless, counsel called only this witness and did not search for other corroborating witnesses. If counsel had taken additional steps, he would have discovered that "many others" were at the house the day. "An attorney's duty of investigation requires more than simply checking out the witnesses that the client himself identifies," especially where, as here, the defendant suffered from an "untreated mental illness." Prejudice established because two additional alibi witnesses would have bolstered the defense. Thus, there would have been, at minimum, "two reasonably confident alibi witnesses, with no connection to [the defendant] and no axe to grind, who had time to observe him under ordinary conditions, versus two prosecution witnesses who caught no more than a glimpse of the perpetrator's face." There was, however, a third alibi witness. "The three witnesses who corroborated his alibi were strangers to [the defendant], to the victim and to the crime and thus had no reason to perjure themselves one way or another. And all of this must be weighed against the flaws in the prosecution's case." The state court's conclusions unreasonably applied *Strickland*.

**2008:** ***Avery v. Prelesnik*, 548 F.3d 434 (6th Cir. 2008) (*affirming* 524 F. Supp. 2d 903 (W.D. Mich. 2007))**. Under AEDPA, counsel ineffective in second degree murder case for failing to investigate and interview alibi witnesses. The defendant gave counsel three names and the business address for alibi witnesses. Counsel's investigator went there and interviewed one of the individuals, who was not personally an alibi, but told the investigator that his brother, who the

defendant had named, and another person had been with the defendant. The investigator left his business card but neither the investigator nor counsel took any other action to investigate. Counsel's conduct was deficient because, at bare minimum, counsel should have sought the witness' phone number and made a reasonable attempt to contact them. Failure to do so was not excused by strategy. "[T]he limitations on [the] investigation rendered it impossible for [counsel] to have made a 'strategic choice' not to have [the alibi witnesses] testify because he had no idea what they would have said." Prejudice was reviewed de novo because the state court did not rule on this issue. Although the state post- conviction judge found at least one of the witnesses to be "totally incredible," the Sixth Circuit noted that the hearing was more than a year after the trial. In addition, "evaluation of the credibility of alibi witnesses is 'exactly the task to be performed by a rational jury,' not by a reviewing court." The court also noted that there was "otherwise flimsy evidence" supporting the conviction, which was basically one eyewitness, "peeking" out a window in the dark. This witness also had made inconsistent statements and identifications.

**2007:** ***Bell v. Miller*, 500 F.3d 149 (2nd Cir. 2007)**. Counsel ineffective in robbery and assault case for failing to consult with a medical expert regarding the reliability of the victim's identification of the defendant. The victim was robbed and shot in the thigh with a shotgun in the street. When police arrived he had lost half his blood. He described his assailant as a black male with a lemon-colored shirt in a fashion that implied he did not know the shooter. He then lapsed into a coma for eleven days. He identified the defendant by name when he recovered although he continued to take painkillers every four hours and suffered from memory lapses and dizziness for a month. Counsel's conduct was deficient because he asked no questions about the medications or memory loss. He also asked no questions of the ER doctor concerning the effect of blood loss on consciousness and memory or the effect of the medications. Counsel's conduct was deficient in failing to consult a "medical expert regarding the effects of trauma, blood loss and painkillers" on the victim's memory. No strategy explained this failure. Prejudice found because there was evidence of "retrograde amnesia," which was exacerbated by the medications he was likely given in the ER, and that he likely had not fully regained consciousness when he first identified the defendant. While state law prohibited testimony on the reliability of eyewitness identification from social scientists, it is likely the trial court would have permitted a "medical expert" to testify to these factors. [It should be noted that while the court repeatedly referred to a "medical expert," the defendant's post-conviction evidence of prejudice was from a "neuropsychologist."] There was no evidence linking the defendant to the crime other than the victim's identification and he had three alibi witnesses. Under AEDPA, the court's review was conducted de novo because the state court had applied a state rule that was not regularly applied to deny relief and was, therefore, not adequate to bar habeas review. The state court's alternative statement that "if the merits were reached, the result would be the same" was not an adjudication on the merits requiring application of § 2254(d).

***Fadiga v. Attorney General U.S.*, 488 F.3d 142 (3rd Cir. 2007)**. Counsel ineffective in immigration proceedings where the issue of ineffectiveness is cognizable under the Fifth Amendment as a violation of due process but the courts often and in this case essentially used the *Strickland* standard. Here, the alien was a native of Guinea, who entered the country in 1991 on a visa that expired after one month. Eleven years later, INS brought removal proceedings. The alien applied for withholding of removal and protection under the Convention Against Torture. During the hearing, the alien testified that he had left Guinea due to political issues in the country, which

rose to the level of his uncle being murdered due to political motivations, and his fear that he would be "arrested, tortured, or killed." Shortly after his departure, an arrest warrant had been issued for him charging "public disorder." The Immigration Judge (IJ) found dramatic inconsistencies in his testimony and the application filed and noted the lack of supporting witnesses and documents to corroborate the alien's testimony. Although the alien and his counsel essentially explained that the fault lay with counsel, the IJ ruled against the alien. The alien appealed to the Board of Immigration Appeals (BIA) and, represented by new counsel, asserted only the ineffectiveness of initial counsel, who provided an affidavit in support of the issue. The BIA denied relief and the case proceeded to the Third Circuit. Counsel admitted (and the court found) that counsel's conduct was deficient because a law student prepared the application and counsel assumed it was complete and accurate. Thus, counsel did not review the application with the alien or advise him to review it before signing it. He also did not discuss with the alien the need for additional witnesses and corroboration other than a simple generic letter about a month before the hearing, which is the only reason the alien was able to provide some documentation. In discussing a threshold procedural requirement applied by the BIA for ineffectiveness claims, the court held that the "Lozada requirements" do not require a bar or disciplinary complaint against counsel. Those requirements are aimed at serving, in essence, the interests of ensuring adequate counsel, deterring meritless claims of ineffectiveness, and prohibiting "collusion between counsel and the client" on these issues.

> All of these interests–save the last–are served without a complaint where, as here, prior counsel has fully and openly owned up to his error and provided a detailed affidavit attesting to the problems in the representation. As to the "collusion" rationale, it seems unlikely that a lawyer would go so far as to commit perjury (i.e., intentionally filing a false affidavit) in furtherance of such collusion. Therefore, we find that the requirement of a complaint was excused in this case where counsel acknowledged the ineffectiveness and made every effort to remedy the situation.

*Id*. at 156-57. Prejudice found because the IJ's doubts about the alien's credibility and the lack of corroborating evidence were caused by counsel's deficient conduct. "Thus, counsel's errors contributed directly to the evidentiary defects that led the IJ to deny relief." *Id*. at 163.

***Richey v. Bradshaw*, 498 F.3d 344 (6th Cir. 2007)**. On remand from the Supreme Court, the Sixth Circuit again held that counsel was ineffective in inadequately cross-examining the state's experts and failing to present competing scientific evidence on the cause of the fire that caused the deaths. *See Richey v. Mitchell*, 395 F.3d 660 (6th Cir. 2005). Counsel's conduct was deficient because the State presented two experts to present a detailed, specific theory of arson, which was "fundamental to the State's case." Counsel retained his own expert late in the case and just deferred to his conclusion agreeing with the State's experts without question. "[T]he mere hiring of an expert is meaningless if counsel does not consult with that expert to make an informed decision about whether a particular defense is viable." 498 F.3d at 362. Here, the defense expert did not perform his own independent testing and deferred to the state expert's who he believed to be better qualified.

> [I]t is inconceivable that a reasonably competent attorney would have failed to know what his expert was doing to test the State arson conclusion, would have failed to work with the expert to understand the basics of the science involved, at least for purposes of cross-examining the State's experts, and would have failed to inquire about why his expert agreed with the State. A lawyer cannot be deemed effective where he hires an expert consultant and then either willfully or negligently keeps himself in the dark about what that expert is doing, and what the basis for the expert's opinion is. . . . The point is not that [counsel] had a duty to shop around for another expert who would refute the conclusions of [the defense expert] and the State's experts. The point is that [counsel] had a duty to know enough to make a reasoned determination about whether he should abandon a possible defense based on his expert's opinion. . . . Having simply been served up with [the defense expert's] flat agreement with the State, and not having known either what [he] did to arrive at his conclusion or why he came out where he did, [counsel] was in no position to make this determination.

*Id*. Counsel's conduct was not explained by strategy to simply challenge the identity of the arsonist since other circumstantial evidence against Richey "made such a choice unreasonable." In addition, because there were gaps in the State's proof "investigating the scientific basis for the State's arson conclusion became all the more imperative." *Id*. Counsel could have presented testimony to severely undermine the State's case by attacking the State's analysis as "unsound and out of step with prevailing scientific standards," disputing the conclusion that gasoline or paint thinner traces were found; testifying that the burn patterns and speed were consistent with a naturally occurring fire; and testifying that the most likely cause of the fire was a cigarette smoldering in the cushions of the victim's couch. Prejudice established for trial and sentencing. "Although the circumstantial evidence alone might have led to a conviction, the question before us is not one of the sufficiency of the evidence, but of undermining our confidence in the reliability of the result." *Id*. at 364.

***Ramonez v. Berghuis*, 490 F.3d 482 (6th Cir. 2007)**. Under AEDPA, counsel ineffective in home invasion, assault, and aggravated stalking case for failing to interview and present the testimony of three witnesses. The defendant was charged with breaking into his ex-girlfriend's home (and she had two of his children living with her) and assaulting her. Even according to her preliminary hearing testimony, three witnesses saw a portion of the alleged events. Those three men were the defendant's son, stepson, and an acquaintance from work. Months prior to trial, the defendant insisted that counsel call these men as witnesses. Counsel did not interview them or even attempt to do so until just days before trial when he attempted to call one of them but was successful only in exchanging phone messages. At the close of the prosecution's case, the defendant insisted to the court that he wanted those witnesses called. The court declined to intervene in counsel's judgment. Thus, the defendant was left only with his own testimony, which counsel had also advised against. He denied breaking into the home, but admitted to pushing the woman when they got into an argument because she was high and his children were in the home. Counsel's conduct was deficient because of the "decision to limit (or more accurately, not to pursue at all until it was too late) any investigation regarding the three potential witnesses." The state court found that counsel had a reasonable strategy to focus just on undermining the alleged victim's credibility as to events inside the home, but that "strategy" was based on counsel's "belief that was grounded on a fatally flawed

foundation" that the witnesses, who were outside, could not support that strategy. If counsel had interviewed the witnesses, he would have learned that they did witness events inside the home and their testimony would have corroborated the defendant's testimony.

> That being so, the state court ignored the central teaching of *Strickland*, as reaffirmed by *Wiggins*, 539 U.S. at 522-23, that the investigation leading to the choice of a so-called trial strategy must itself have been reasonably conducted lest the "strategic" choice erected upon it rest on a rotten foundation.

In addition, counsel's explanation of "strategy" was contradicted by the record. Counsel was aware from the alleged victim's preliminary hearing testimony that the witnesses outside could have at least addressed whether the defendant kicked in the door and whether the alleged assault continued outside the home with one of the witnesses even assisting the defendant. "How could [counsel] rationally have concluded that . . . [none of the witnesses] could possibly have anything to add to [the defendant's] case? Of course the answer is he didn't–at least not entirely" since counsel did attempt to reach at least one of these witnesses shortly before trial and then conceded to the court during the trial that these witnesses could possibly contradict the alleged victim's testimony. With this recognition, it was "objectively unreasonable" for counsel "not to interview them (or at least make reasonable efforts to interview them) before coming to his ultimate choice of trial conduct."

> In sum, the point is this: Constitutionally effective counsel must develop trial strategy in the true sense-not what bears a false label of "strategy"–based on what investigation reveals witnesses will actually testify to, not based on what counsel guesses they might say in the absence of a full investigation.

Prejudice was also established because the jury sent out a note during deliberations saying it was deadlocked on the home invasion count and the trial was one of a credibility contest between the alleged victim and the defendant. The court noted that there were inconsistencies in the post-conviction testimony of the three witnesses and the state court found one of them to be not credible and found a second one to be "not a particularly helpful witness," which did not appear to be a credibility finding. The state court made no "finding" as to the third witness. Regardless, the Sixth Circuit held:

> a state court's blanket assessment of the credibility of a potential witness–at least when made in the context of evaluating whether there is a reasonable probability that the witness's testimony, if heard by the jury, would have changed the outcome of the trial–is not a fact determination within the bounds of Section 2254(e)(1). After all, what the state court has really done is to state its view that there is not a reasonable probability that the jury would believe the testimony and thus change its verdict.

The Sixth Circuit rejected this approach because "the question whether those witnesses were believable for purposes of evaluating [the alleged victim's] guilt is properly a jury question."

> In the end, weighing the prosecution's case against the proposed witness testimony is at the heart of the ultimate question of the *Strickland* prejudice prong,

> and thus it is a mixed question of law and fact not within the Section 2254(e)(1) presumption. Even though the jury could have discredited the potential witnesses here based on factors such as bias and inconsistencies in their respective stories, there certainly remained a reasonable probability that the jury would not have.

The court also declared that "[a]ll it would have taken is for 'one juror [to] have struck a different balance' between the competing stories (*Wiggins*, 529 U.S. at 537)." The court footnoted that

> *Wiggins* was a death penalty case in which a single juror's vote would have spared defendant's life. In [this] case, of course, even a single juror's holdout would have resulted in a hung jury rather than a conviction, while a jury's unanimous striking of "a different balance" would have produced an acquittal.

*Id*. at ___.

***Raygoza v. Hulick*, 474 F.3d 958 (7th Cir. 2007)**. Under AEDPA, trial counsel was ineffective in murder trial for failing to adequately investigate and present an alibi defense. The defendant, a gang member, was charged with murder and a second shooting of rival gang members in a Chicago Pizzeria. A confession was suppressed because of a Sixth Amendment violation as a result of extended interrogations despite the petitioner's representation by counsel. The petitioner waived jury trial. During the ensuing bench trial, the state's eyewitness testimony consisted of three rival gang members and a passerby who did not see the shooter's face and was only able to give a general description of the perpetrators' clothing as they fled from the scene. Another witness testified that Petitioner had been at a party near the scene shortly before the murder and trial counsel did not impeach her even though she had previously told police he was not present and never said that he was until two years after his arrest. Trial counsel conducted almost no cross-examination of the state witnesses and presented one alibi witness, the Petitioner's girlfriend, but argued the defendant was at home with his mother, girlfriend, and others. The state hammered in closing on the lack of additional alibi witnesses and the trial court found the petitioner guilty. Counsel's conduct was deficient in failing to prepare and present the alibi evidence. Although counsel met with the Petitioner's mother numerous times, he never inquired and never learned that the date of the alleged crime, the Petitioner's mother had a birthday party in her home which the defendant and nine others, including relatives and non-relatives, attended. The court also noted that "Mapquest (a popular internet site)" put the party an hour's drive away from the murder scene. Available alibi evidence included testimony from people at the party; testimony of an attorney, who was the mother's employer, and her husband, that they had called the home during the party and spoken to the Petitioner, who answered the phone; and phone records and train tickets corroborating the available testimony in parts. Although trial counsel asserted his trial strategy was to attack the identification witnesses, he never attempted to interview any of them or the state's other witnesses. In addition, "[i]n a first-degree murder trial, it is almost impossible to see why a lawyer would not at least have investigated the alibi witnesses more thoroughly." *Id*. at 964. The court noted that counsel may have been influenced by his own opinion of the petitioner's guilt, but held that this "would hardly distinguish him from legions of defense counsel who undoubtedly do the same every day, yet who conscientiously investigate their clients' cases before coming to a final decision about trial strategy."

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*Id*. Counsel also asserted that each of the alibi witnesses could be impeached due to some alleged bias. Even if this were true, counsel "does not seem to have considered what impact they would have cumulatively." *Id*. The court also found prejudice, "even taking into account both the AEDPA standard or review and the fact that the trial judge [who was also the post-conviction judge] subjectively believed that the array of additional alibi witnesses would not have swayed his judgment." *Id*. at 965. The state's case was "not particularly strong."

> Obviously, a trier of fact approaching the case with fresh eyes might choose to believe the eyewitnesses and to reject the alibi evidence, but this trier of fact never had the chance to do so.

*Id*. at 965.

**2006:** ****Rolan v. Vaughn*, 445 F.3d 671 (3rd Cir. 2006)**. Counsel ineffective in capital trial for failing to adequately investigate and present two witnesses who would have supported the claim of self-defense. The defendant told counsel about the witnesses and counsel notified the state that they were alibi witnesses (rather than self-defense), but never attempted to contact the two witnesses. The state did contact the witnesses. One (who died prior to post-conviction proceedings) refused to cooperate with the state and denied being an alibi witness and the other declined to be a witness against the defendant. During trial, the defendant informed the court that he had two witnesses but counsel refused to call the witnesses. Counsel's conduct was deficient because "[f]ailure to conduct any pretrial investigation is objectively unreasonable." Counsel's decision was not given "the normal deference to strategic choices because it was uninformed." Under AEDPA, the state court's ruling that the second witness would have refused to testify on behalf of the defense was an objectively unreasonable finding of fact that was not supported by the record. The witness had stated only that he would not testify for the prosecution. Prejudice found because the state's case was weak and this witness would have bolstered the affirmative defense and undermined the prosecution's claims of a premeditated murder during a robbery. This witness "also shows the relevance" of the other witness, who died after trial without ever having been interviewed.

***Stewart v. Wolfenbarger*, 468 F.3d 338 (6th Cir. 2006)**. Under AEDPA, counsel ineffective in murder case for several reasons. Counsel failed to provide alibi notice to the prosecution of the place of the alibi, as required by Michigan law, which resulted in the exclusion of alibi testimony. Counsel also failed to investigate a potential witness, who resided in a home where a prosecution witness alleged that the defendant made death threats against the victim. This witness would likely have testified that the defendant was not at his house on the date of the alleged threats. Prejudice found because the failure to give proper alibi notice resulted in the trial court's exclusion of two of the three alibi witnesses when the jury knew that others should be available and the one that testified was impeached with prior convictions, the prosecution emphasized the lack of other alibi witnesses during cross-examination of the one alibi witness who did testify, and the witness not called would have cast substantial doubt on the key prosecution witness's testimony that the defendant made death threats against the victim shortly before the murder.

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***Goodman v. Bertrand*, 467 F.3d 1022 (6th Cir. 2006)**. Counsel ineffective in armed robbery and a felon in possession of a firearm trial for numerous reasons. After police arrested two suspects in a getaway car, one of them brokered a deal by implicating the petitioner. One of the robbery victims initially chose someone else in a lineup and then chose the petitioner. The second robbery victim selected someone else in a lineup. Following an initial mistrial due to a hung jury, the second initial suspect agreed to testify against the petitioner in exchange for leniency and identifying another participant, who also testified against the petitioner. In the second trial, the eyewitness, who did not identify the defendant, did not testify for the state and did not testify for the defense because counsel failed to subpoena her because counsel erroneously believed that the State would call her as a witness. Because counsel could not demonstrate that she was unavailable, the trial court excluded portions of her prior testimony from the second trial. "There is little tactical wisdom in counsel resting on his hands and assuming the government would help make the defense case for him." Counsel also opened the door on direct examination of the defendant to cross-examination about two of the petitioner's prior armed robbery convictions. The nature of the prior felonies would otherwise have been excluded because counsel had stipulated to the petitioner's status as a convicted felon. Counsel also failed to request a limiting charge to the jury after two of the participant witnesses testified that they had been threatened due to their participation in the trial and the court admitted the testimony for the limited basis of reflecting on the witnesses' credibility by demonstrating that they had something to lose as well as to gain by their testimony. Finally, counsel failed to object to the prosecution's misleading statements in questioning that one participant witness had not been given any reason to testify and false statements in argument to bolster the credibility of another participant witness. The state court decision was "contrary to" clearly established federal law because the court conflated the heightened prejudice standard of *Lockhart v. Fretwell*, 506 U.S. 364 (1992) with the *Strickland* standard by citing to *Strickland* at times but repeatedly reasoning that the petitioner failed to show that his trial was "fundamentally unfair" or "unreliable." Even if it wasn't contrary to federal law, it was an unreasonable application of *Strickland* because the state court weighed each error individually when the "cumulative effect" of the errors required reversal. Rather than evaluating each error in isolation, . . . the pattern of counsel's deficiencies must be considered in their totality." *Id*. at 1030.

***Stanley v. Bartley*, 465 F.3d 810 (7th Cir. 2006)**. Counsel ineffective in murder case for failing to interview any witnesses or prospective witnesses. According to the state's case, three gang members were present at the time of the murder, including the state's primary witness, who was a cocaine addict and convicted felon. The petitioner's sister also testified, following a question directing her attention to a day and time shortly after the murder, that the petitioner told her he had killed someone. Other testimony was only secondary. Counsel read the statements prospective witnesses gave the police, but he did not interview anyone. He sought instead to only cross-examine the witnesses concerning any discrepancies. Counsel was aware of the statement of a prospective witness, who did not testify at trial, that a few hours before the murder, the state's primary witness and the murder victim had had a quarrel over cocaine that had involved pushing and shoving. Counsel cross-examined the state's principal witness about this argument, but he denied that the argument had been serious or had involved pushing or shoving. If counsel had interviewed the prospective witness, he would have been aware and could have cross-examined the witness and presented evidence that the murder victim had struck the witness

with a wine bottle, punched him, and had knocked him down. Afterwards, the witness told the murder victim that he would catch "his ass later on." Counsel also had failed to interview the petitioner's sister, who had told officers that she saw him with a gun a week before the murder when he had been drinking, which always led him to talk about beating someone or killing them. Counsel was aware of her statement but failed to cross-examine her at trial about the date of the confession or the date on which she had seen her brother with the gun. He also failed to object to the prosecutor's having led her by prefacing his question about the confession with the statement that he was directing her attention to the night of the murder. The state's primary witness also testified in post-conviction that he had been drinking the night of the murder (he had denied that at trial), that he hadn't seen the defendant shoot the victim, and that in fact he didn't know who had the gun. Prejudice found.

***Adams v. Bertrand*, 453 F.3d 428 (7th Cir. 2006)**. Counsel ineffective in sexual assault case in which counsel cross-examined the alleged victim about prior inconsistent statements but did not call an available defense witness, who would have testified that he heard the alleged victim invite the alleged assailants to her room before events unfolded and saw the alleged victim smoking a cigarette with the alleged assailants after the alleged assault. Counsel made an unreasonable decision not to investigate the potential defense witness because counsel was aware even before the trial that the witness "could have swung the case in his client's favor." While counsel made minimal efforts to locate the witness, he did not pursue the matter because he had decided to call no witnesses. In other words, counsel "committed to a predetermined strategy without a reasonable investigation that could have produced a pivotal witness." The state court's determination of a reasonable trial strategy in this regard was not a reasonable application of *Strickland*. Prejudice found because this was a close case contingent on the alleged victim's credibility and the available defense witness would have contradicted her in several significant respects.

**2005:** ***Gersten v. Senkowski*, 426 F.3d 588 (2nd Cir. 2005) (*affirming* 299 F. Supp. 2d 84 E.D.N.Y. 2004))**. Counsel was ineffective in sodomy and sexual abuse of daughter case for failing to consult with or call expert medical witness and psychological expert to rebut the testimony of the state's experts. The defendant was charged with sexually abusing his daughter when she was between the ages of 10 and 13. During the trial, however, the daughter testified that the sexual abuse began when she was five years old with anal intercourse beginning when she was 7 years old and the sexual abuse occurring almost every night. The state called a medical expert that testified that physical examination revealed that the victim had suffered penetrating trauma to her hymen and tearing of the anus. The state presented a psychologist to testify about child sexual abuse accommodation syndrome, which corroborated the victim's statements. The defense presented no witnesses. Analyzing the case under the AEDPA, the court found that defense counsel's conduct was deficient. "In sexual abuse case, because of the centrality of medical testimony, the failure to consult with or call a medical expert is often indicative of ineffective assistance of counsel." *Id*. at 607. Here, counsel "essentially conceded" that the physical evidence was significant without investigating when a defense medical expert could have testified that the physical evidence was not indicative of sexual abuse, which would have cast doubt on the alleged victim's credibility. A defense psychological expert also would have testified that the prosecution's evidence of "Child Sexual Abuse Accommodation Syndrome" lacked any scientific validity for the purpose for which the prosecution used it. Counsel had no valid strategy for this course because "counsel settled on a defense theory

and cut off further investigation of other theories without having first conducted any investigation whatsoever into the possibility of challenging the prosecution's medical or psychological evidence." *Id*. at 610. Prejudice found because the state's entire case, aside from the expert evidence that should have been challenged, rested on the credibility of the alleged victim. The state court holding was an unreasonable application of Strickland.

***Henry v. Poole*, 409 F.3d 48 (2nd Cir. 2005)**. Counsel ineffective in robbery case for presenting and emphasizing an alibi that was clearly given for the wrong day. The state's evidence was dependent on the eyewitness testimony of the victim, who was robbed at 12:10 a.m. on August 10. The alibi presented covered "the night" of August 10 and counsel continued to argue this as an alibi even after its flaw was clearly exposed by the state in cross-examination. Counsel's conduct was deficient because the date and time of the crime were undisputed and counsel had been provided with the witness' grand jury testimony, which revealed that her alibi was given for the wrong night. "The failure to recognize the difference between the beginning and the end of the day plainly falls below any acceptable level of professional competence." Prejudice was found because the jury would likely have viewed the alibi as contrived, which is commonly accepted as evidence of a defendant's consciousness of guilt. Thus, the state's case was bolstered. Under the AEDPA, the state court's denial of relief was an objectively unreasonable application of *Strickland*.

***Jacobs v. Horn*, 395 F.3d 92 (3rd Cir. 2005)**. Counsel was ineffective for failing to adequately investigate, prepare, and present mental health evidence in support of his diminished capacity defense during the trial. Counsel consulted with a psychiatrist, who reported orally that there was no evidence of a major mental illness. Even without expert testimony, counsel presented a heat of passion and diminished capacity defense asserting that the defendant was incapable of forming a specific intent to kill given his mental state at the time. The only evidence presented in support of this theory was the defendant's own testimony. Counsel's conduct was deficient because counsel failed to inform his expert that the state was seeking the death penalty and failed to provide the expert with any background information concerning the crimes or the defendant's history. "Counsel did not question any of [the defendant's] family members or friends regarding his childhood, background, or mental health history, or obtain any medical records demonstrating mental deficiencies." When counsel made the decision not to investigate further, counsel knew or should have known from his interactions with the defendant that "he should initiate some investigation 'of a psychological or psychiatric nature.'" He also knew that the defendant had no criminal history or history of violence and yet admitted to stabbing his girlfriend more than 200 times. "In light of all that was known or made available to counsel, . . . counsel did not exercise reasonable professional judgment in failing to investigate further. . . ." If counsel had adequately performed, the evidence would have established that the defendant has mild mental retardation, organic brain damage, and schizoid personality disorder. He was also a witness and victim of abuse and suffered from drug and alcohol addictions. The combination of these factors substantially diminished his capacity to formulate the specific intent to kill. The court also noted that this was not a case where counsel made a strategic decision not to investigate and present this evidence. "The question raised here is whether counsel was ineffective by failing to investigate and discover evidence to support the defense he pursued." The state court's decision was unreasonable because the court found that counsel made a reasonable decision not to investigate further after receiving the psychiatrist's report

while disregarding counsel's failure to provide the expert "with the necessary information to conduct a proper evaluation." This was an unreasonable application of *Strickland* because "*Strickland* mandates that counsel's decision 'must be directly assessed for reasonableness in all the circumstances.'" (quoting *Strickland v. Washington*, 466 U.S. 668, 691 (1984)).

***Draughon v. Dretke*, 427 F.3d 286 (5th Cir. 2005)**. Counsel ineffective for failing to retain a ballistics expert. The defendant was fleeing the scene of an armed robbery and shot and killed a pursuing bystander. He testified that he did not intend to harm anyone and had attempted to fire over the heads of his pursuers. The State's evidence from another pursuing witness was that the victim had been shot from only about 10 steps away and a ballistics expert testified that the bullet recovered from the body had not ricocheted before striking the victim. Counsel's conduct was deficient because counsel was aware that the State's argument of intent to kill and for death was based on the witnesses' testimony about the distance of the shot and the ballistics evidence. Prejudice found because a defense expert could have presented a strong case that the fatal bullet struck the pavement in front of the victim and was fired at a much greater distance than the witness' testimony reflected. The prejudice increased in sentencing because the only way to counter the state's argument was for the defendant to testify and in cross examination the prosecutor marched the defendant through the horrible details of a prior rape conviction, which the prosecutor had not elicited from the prior victim out of deference to her. Under the AEDPA, the court found that the state court had unreasonably applied *Strickland*.

***Miller v. Dretke*, 420 F.3d 356 (5th Cir. 2005)**. Counsel was ineffective in deadly conduct case for failing to prepare and present evidence of treating physicians' testimony regarding the defendant's medical and psychological problems during sentencing. The defendant had been convicted of shooting into the unoccupied home of her in-laws a year after her husband died of a drug overdose, which his family blamed the defendant for. During sentencing, she and her ex-husband testified about her previous hospital for several weeks due to head injuries suffered in a car accident, her amnesia, post-traumatic stress disorder, and severe depression, which required medication and continuous care. Her testimony that she could not recall shooting into the home or previously threatening her in-laws was ridiculed as self-serving by the prosecutor and she was sentenced to 8 years and a fine of $5,000 with no recommendation of a suspended sentence. Counsel's conduct was deficient because he was aware of the defendant's mental and emotional problems but did not investigated further and made no effort to call the defendant's doctors as witnesses. This conduct was not excused by strategy because counsel admitted that he did not prepare for sentencing because he believed the defendant would accept a plea bargain offer, be acquitted, or given probation. "While [counsel] may have made reasonable tactical decisions based on the information that he had at the time, our review must focus on whether the information he possessed would have led a reasonable attorney to investigate further." Prejudice was found because expert testimony was available that the defendant had post-traumatic stress disorder, organic brain syndrome with frontal lobe dysfunction, memory loss, including amnesia, severe anxiety, depression, and some paranoia all of which was relevant and admissible in sentencing and would have explained the defendant's erratic, paranoid, and hostile behavior and would have supported the defendant's testimony that she could not remember the shooting or the prior threats. The "state habeas court was objectively unreasonable in holding otherwise" on deficient conduct and prejudice.

***Smith v. Dretke*, 417 F.3d 438 (5th Cir. 2005)**. Counsel ineffective in murder case for failing to adequately prepare and present evidence of self-defense. Although petitioner identified four witnesses for counsel, counsel did not interview them or call them to testify to corroborate the petitioner's testimony concerning the victim's history of violence. Counsel did not do so because of his erroneous belief that the testimony of these witnesses was inadmissible and that only evidence known to the defendant was permitted. Counsel's conduct was deficient because he "failed to achieve a rudimentary understanding of the well-settled law of self-defense in Texas" and because "[f]ailing to introduce evidence because of a misapprehension of the law is a classic example of deficiency of counsel." *Id*. at 442. The "state court was objectively unreasonable" in finding otherwise. Prejudice was found because petitioner's only plausible defense was that he acted in self-defense and he testified to that effect, but his testimony was easily discounted and disparaged by the prosecutor in argument without corroboration. "[A]n objectively reasonable court could not conclude otherwise." *Id*. at 444.

***Tenny v. Dretke*, 416 F.3d 404 (5th Cir. 2005)**. Counsel was ineffective in murder case for failing to adequately prepare and present evidence of self-defense. Because the state did not address the District Court's finding of deficient conduct in its opening brief, the court held that the State had waived argument on this issue and assumed deficient conduct. Prejudice was found because the evidence counsel failed to prepare and present included evidence that the victim, the defendant's live-in girlfriend, had threatened to kill him in the days prior to her death and even on that day, she had stabbed him within the week before, she had threatened to burn the house down, she had violent tendencies and would have "insane rages," and she was strong enough to throw almost any grown man to the ground. In addition, a doctor, who examined the defendant in the hospital after the fight with the victim would have testified that the defendant had a black eye, his ear was cut, and he had a punctured lung from being stabbed and had "nearly lost his life." The defendant also could have provided additional testimony that he knew of the threats made against him and that the victim had stabbed her previous husband. Counsel did not call some of these witnesses because they worked at a monastery and had been involved in a sex-abuse scandal. This did not justify not presenting the evidence, however, because their testimony was corroborated by another witness not involved in any scandal and this testimony was significant. Under the AEDPA standards, the state court's decision was unreasonable.

***Towns v. Smith*, 395 F.3d 251 (6th Cir. 2005)**. Counsel was ineffective in first degree murder case for failing to investigate a witness who had admitted to police, among others, that he had been involved in the crimes of which the defendant was ultimately convicted and that the defendant had played no part in these crimes. The witness was arrested with the murder weapon and he admitted that he drove the get-away car. He informed police in two statements that the defendant's brothers were the perpetrators. For unknown reasons, the police focused on the defendant rather than one of the brothers. When placed in a line-up, the single eyewitness to the murder tentatively identified him but only on the basis of size, which was similar to his brother. The prosecution initially intended to call the driver as a witness but then changed his mind at the last minute. Defense counsel insisted that he have the opportunity to interview him so the driver was held overnight in the local jail for that purpose. Counsel never interviewed him but then informed the court that he would not be called as

a defense witness. Counsel's conduct was objectively unreasonable because "counsel could not have evaluated or weighed the risks and benefits of calling [the driver] as a defense witness without so much as asking [him] what he would say if called." *Id*. at 260. Prejudice was found because, if counsel had investigated, the driver would have testified that the defendant had nothing to do with the crimes. Prejudice was also apparent because of the notable weaknesses in the prosecution's case. These findings were made even though the driver refused to testify in post-conviction. He spoke to counsel and his investigator, who both testified, but refused to testify without immunity, which the government inexplicably refused despite having never charged the driver. At the time of trial though, the driver was not worried about incriminating himself because his attorney had secured a favorable immunity deal.

***White v. Roper*, 416 F.3d 728 (8th Cir. 2005)**. Counsel was ineffective in failing to investigate and present exculpatory testimony of two witnesses in the guilt-or innocence phase of trial. Because the state court did not address the merits of this claim, no deference was given under AEDPA. The defendant was charged, along with two other men, who did not receive a death sentence, in a drug-related murder. While there were witnesses that connected the defendant to the other men, no physical evidence connected the defendant to the crime scene. The defense was that the third man was not the defendant but a man named A.J. Constantine, who had a Jamaican accent. Two witnesses present at the time of the murder. One of them, who said that the defendant was not the killer, but who could not identify the third man, was called at trial. The other, who said that the defendant was not the killer and who also identified the killer as A.J., was never interviewed by counsel and did not testify. Another witness, who saw one of the co-defendants earlier in the evening looking for drugs and arranging to go to the victim's house, would have testified that it was A.J. with the co-defendant at the time. She was also never interviewed by counsel, who also did not attend the co-defendant's bench trial or obtain deposition transcripts from that trial until the eve of trial. Counsel's conduct was deficient because "counsel's investigation was too superficial." *Id*. at 732. "In other words, the presumption of sound trial strategy founders in this case on the rocks of ignorance, as in *Wiggins*." *Id*. (The district court had also found counsel ineffective in sentencing for failing to investigate and present mitigation, but the court did not address this issue because Missouri appealed only the guilt-or-innocence phase determination.)

***Daniels v. Woodford*, 428 F.3d 1181 (9th Cir. 2005)**. Analyzing this capital case under pre-AEDPA standards, the court held that the defendant was constructively denied counsel due to a conflict created by a series of events related to the appointment of counsel. The defendant had previously been convicted of a bank robbery in which he had been shot nine times by police officers rendering him a paraplegic. He negotiated a plea in exchange for being permitted to remain free for six months so he could seek medical treatment and rehabilitation. Despite the agreement, the court sentenced him to 13 years and immediately remanded him to custody. On appeal, Roth, a new attorney (who had previously represented the defendant on other matters) took over and the defendant was released on bond. While on bond, he was mistakenly arrested by an officer who believed there was a warrant for him. He sued the state alleging mistreatment in jail and lack of appropriate medical care. After his appeal was denied, he failed to surrender to custody. When two officers went to his home, he shot and killed both officers. Following his arrest, the court appointed a Public Defender, who moved to substitute Roth because the PD had a conflict due to the prior

representation on the robbery. The PD in that case that negotiated the plea and release left the PD's office to join the prosecutor's interest and the new PD assigned was unaware of the plea agreement so the judge was never informed of the deal for release. A federal habeas petition alleging IAC on the robbery was pending at the time of the murder case appointment. Nonetheless, the court refused to relieve the PD office and Roth remained in a pro bono capacity. Roth was ultimately appointed as co-counsel, but then the state moved to relieve him because he was be a witness for the state. Roth was relieved even though the defendant agreed to stipulate to the information the state sought to present through Roth and agreed to waive the conflict. After this, the PD assigned became ill and the case was reassigned to two new PD's. Ultimately, nine months into the case and only three months prior to trial, the court relieved the PD office on its motion due to the conflict. Appointed this time was a former prosecutor who had just started in private practice and had no capital case experience and a co-counsel with only a few years under his belt. From the beginning, the defendant's relationship with these lawyers "was strained." The defendant informed the court that he didn't trust his counsel and sent a letter to that effect before the trial started. The federal court held that, "[g]iven this history, it is understandable that the [defendant] would mistrust the judicial process and his counsel" and the trial court should have granted the defendant's motion to substitute counsel. In this instance, because of the "serious conflict" between the defendant and counsel, the court presumed prejudice and found error in the trial court's failure to inquire into the conflict even though the defendant informed the court three months prior to trial that he did not trust counsel and informed the court again prior to the beginning of the trial. The federal court also found that counsel was ineffective, particularly given counsel's "ineffective efforts to overcome the impasse" with his client. Counsel did not inform the court of the problems, attempt to adequately advise the defendant, or even call Roth for assistance even though the defendant trusted and confided in him. Counsel also failed to conduct a thorough investigation concerning mental health. "Even though [the defendant] refused to speak to his counsel, [counsel] still had an independent duty to investigate the facts of his case and possible mitigation evidence." Counsel retained a psychologist to do a preliminary screening of the defendant to determine whether additional evaluation was needed. He found suggestions of organic brain damage but counsel never sought further testing and did not even request funds until one week before sentencing (which was granted a month after sentencing). Counsel also did not follow up on a prior psychiatric evaluation of the defendant done after the defendant had been shot. Although the defendant had a good relationship with this expert, counsel retained a different psychiatrist, who the defendant refused to speak to. Thus, the defense was left only with the screening psychologist. In addition, counsel did not investigate or present evidence explaining the defendant's fear of returning to custody, must of which was available, regardless of the defendant's lack of cooperation, in police records and public records of the defendant's law suit against the county. "Instead of seeking further mental evaluations, [the defendant's] counsel relied on the expert witness testimony of [a] psychologist . . . , who was not qualified to testify in a capital case and whose testimony toyed with the idea that [the defendant] could be a sociopath. This alone constituted a significant error." *Id*. at 1204. Counsel's conduct was not the result of strategy "but of a communication breakdown with their client, the court's refusal to grant a continuance, a shortage of time, and repeated problems with securing state funding." *Id*. at 1206. Prejudice found during trial and sentencing. During trial, despite overwhelming evidence of guilt, the defense argued that the defendant was not the perpetrator. Counsel did not pursue the more viable mental health defense even though the defendant was diagnosed as schizophrenic by prison psychiatrists many

years before the murders. The psychiatrist retained by counsel was not provided with these records and was only able to do a cursory exam because of the defendant's lack of cooperation. If counsel had performed adequately, the evidence would have established that the defendant has post-traumatic stress disorder from his shooting, paranoid delusions, and organic brain damage. This evidence could have been used in a diminished capacity defense (which has been abolished now in California, but is still available for crimes committed prior to June 1982) or an imperfect self-defense argument, which would have defeated a first-degree murder finding. Prejudice also found in sentencing because the jury deliberated for two days, which suggests that additional mitigation may have influenced the jury. Instead, the only mitigation presented was from the screening psychologist "who was woefully unprepared and who suggested [the defendant] may be a sociopath. This alone is sufficient for a finding of prejudice." *Id*. at 1210. The defendant was also prejudiced in sentencing by the implausible trial phase defense that the defendant was not the shooter. "As a result, [the defendant] faced a jury that could only be profoundly annoyed by this ludicrous defense in the face of overwhelming evidence of culpability." *Id*.

**2004:** ***Soffar v. Dretke*, 368 F.3d 441, *amended*, 391 F.3d 703 (5th Cir. 2004)**. Counsel ineffective in capital trial for failing to interview living victim, who was the only eyewitness to the crimes, and failing to consult with a ballistics expert. The basic facts are that four people were shot in a bowling alley armed robbery and shooting and only one of these people lived. The surviving victim made a number of statements, including under hypnosis, describing the events and the lone assailant. After weeks with no suspect, the defendant, who had a history of confessing to crimes that he did not commit, was arrested on other charges and confessed in a number of statements. He initially said that he was the getaway driver for the assailant and ultimately said that his "accomplice" shot two of the victims and then the defendant shot the last two. Analyzing the case under pre-AEDPA amendments, the court found that counsel's conduct was deficient in failing to interview the surviving victim even though counsel was aware that there were significant discrepancies between his statements and the defendant's "confession" and the victim had been unable to identify the defendant or his "accomplice" in a pretrial lineup. Counsel was also ineffective for failing to retain a ballistics expert, who could have established that the crime scene was consistent with the surviving victim's statements and inconsistent with the defendant's "confession." Counsel's conduct was inexplicable because the sole defense theory at trial was that the defendant's "confession" was false and should not be believed. Although the state argued that there were potential pitfalls if counsel had called the surviving victim to testify, the court held that "an actual failure to investigate cannot be excused by a hypothetical decision not to use its unknown results." Prejudice was found because the state's case was "predominantly" based on the defendant's "confession," which would have been contradicted by the surviving victim and the ballistics evidence if counsel had adequately investigated.

***McFarland v. Yukins*. 356 F.3d 688 (6th Cir. 2004)**. Habeas relief granted in drug case due to the trial court's failure to adequately inquire into counsel's conflict, counsel's actual conflict of interest that adversely effected his performance, and trial counsel's ineffectiveness in failing to present an adequate defense. The petitioner and her daughter were charged as co-defendants where drugs were found during a search of the home they shared. Both the defendant and her daughter were represented by the same retained attorney. On the day of the scheduled bench

trial, counsel informed the court that the defendant and co-defendant had concerns about sharing the same attorney and that the evidence might well raise antagonistic defenses. The petitioner also informed the court that she believed she needed a separate attorney and that she had attempted to hire a different attorney but could not afford one. Rather than appoint a second attorney, the court severed the cases and ordered that they be tried in front of different judges. The trials proceeded at pretty much the same time. In the co-defendant's trial, the state presented evidence that the bedroom where most of the drugs were found belonged to the co-defendant. A caller to the crack hotline also made complaints about a woman with the co-defendant's name. A confidential informant also identified the co-defendant as the person discussing drugs. During the petitioner's trial, the state did not present any evidence that the co-defendant lived in the house or in the bedroom where most of the drugs were found and did not present any evidence that the crack hotline telephone complaints and the confidential informant had both identified the co-defendant. Defense counsel did not bring any of this information out in cross-examination or present any evidence on its own. In closing argument, the defense argued only that the drugs belonged to one of two men that were also initially suspected. One of the men was present at the time of the search, but did not have a key to the locked bedroom where most of the drugs were found. The other man was not present at the time of the search and was connected to the house only by some paperwork identifying him as the co-defendant's husband. Both the defendant and co-defendant were convicted. They were represented on appeal by a different attorney but still had the same attorney between them. Appellate counsel did not raise any issue concerning ineffective assistance of counsel or a conflict of interest. In state post-conviction, the petitioner asserted ineffectiveness of trial counsel and of appellate counsel for failing to argue that trial counsel was ineffective but the state court denied on procedural grounds that the petitioner did not show good cause for a failure to assert the issue on direct appeal as required in state court. The court first found that the petitioner was entitled to relief under Holloway v. Arkansas because the petitioner objected to the joint representation and the trial court did not resolve the issue. Independent of the trial court's failure to inquire, reversal was also required because counsel had an actual conflict of interest that adversely affected representation. Finally, the court also found that counsel was ineffective under the standard of *Strickland v. Washington* because counsel failed to present a strong argument in petitioner's case that the co-defendant actually possessed the drugs. Prejudice was found under *Strickland* because the trial judge in petitioner's case mentioned her misgivings about the sufficiency of the evidence connecting the petitioner to the drugs. If counsel had adequately presented the evidence pointing to the co-defendant, trial court may well have ruled differently in the case. The court found that, with respect to all three of these arguments, the petitioner would have won on direct appeal had appellate counsel adequately raised the issues. Appellate counsel was ineffective in failing to assert these issues, which were clearly stronger than the arguments made by counsel on direct appeal. The conflict issue was an obvious one, and the petitioner was entitled to automatic reversal under the rule in *Holloway*. Because appellate counsel also represented the co- defendant, however, appellate counsel also had a conflict of interest. The court found that appellate counsel's ineffectiveness was the cause for petitioner's failure to assert ineffectiveness of trial counsel on appeal. Thus, the petitioner had established cause and prejudice for failing to assert these issues on appeal. Because the state court never ruled on the actual conflict of interest and the ineffective assistance claim under *Strickland*, the court reviewed these claims de novo. The only state court decision on the *Holloway* claim was the trial court's decision. Under the AEDPA, the court found

that the trial court's actions contradicted the clearly established precedent of *Holloway v. Arkansas* because the state court confronted a set of facts that were materially indistinguishable from *Holloway* and yet arrived at a different result.

***Earls v. McCaughtry*, 379 F.3d 489 (7th Cir. 2004)**. Counsel ineffective in sexual assault on child case for failing to object to testimony from an expert that she believed the alleged victim and for failing to redact a videotape of the expert interviewing the child when the videotape also included statements that the expert believed the child. Prejudice found because the child's credibility was the key issue in the trial and there were no corroborating witnesses even though numerous other people were present at the time of the alleged acts and no physical evidence.

***Harris v. Cotton*, 365 F.3d 552 (7th Cir. 2004)**. Counsel ineffective in murder case for failing to obtain a toxicology report that showed that the victim was under the influence of cocaine and alcohol at the time of his death. Counsel's conduct was deficient because the sole defense at trial was self- defense and counsel was aware that the toxicology report existed but did not obtain it solely due to "oversight," even though he knew that the victim's behavior prior to the shooting was "absolutely critical" to the defense. Prejudice was found because counsel attempted to question the state's pathologist about the victim's alcohol abuse but was prohibited from doing so because there was no evidence supporting this line of questioning. Prejudice also found because "[f]rom the perspective of a defense attorney, an affirmative defense of self-defense against a drunk and cocaine-high victim stands a better chance than the same defense against a stone-cold-sober victim." *Id*. at 556. Analyzing the case under the AEDPA, the court held that the state court's decision was an unreasonable application of *Strickland* because the state court unreasonably applied the "reasonable probability" standard in finding no prejudice.

***Jie Lin v. Ashcroft*, 377 F.3d 1014 (9th Cir. 2004)**. Counsel was ineffective in INS hearing for failing to collect available testimony and documentary evidence or to otherwise prepare for the hearing, failing to appear at the hearing other than telephonically, and failing to present legal or factual framework for asylum claims in the hearing or on appeal. The alien was fourteen years old and did not speak English. Counsel never met with him and had little or no contact with him prior to the hearing. Counsel did not investigate or prepare the basics in terms of factual issues. Counsel failed to even appear at the hearing other than by telephone and offered only the alien's unprepared testimony and conclusory legal arguments. The alien exercised his statutory right to counsel at no expense to the government. Thus, the claim of ineffective assistance of counsel falls under the Fifth Amendment right to due process. Counsel's actions in this case were deficient under the "low bar" of the *Strickland* standard. *Id*. at 1027. Prejudice found because the alien did have several plausible claims for refugee status. While counsel presented some of the factual basis for these claims

> the presentation of a few bare facts, without documentation and without the factual context that gives them meaning or the analytical context that gives them their power, does not suffice to place the critical issues squarely before the tribunal that must consider them.

*Id*. at 1029.

**Capital Case*

**2003:** ***Anderson v. Johnson*, 338 F.3d 382 (5th Cir. 2003)**. Counsel was ineffective in burglary case for failing to interview and present the testimony of an eyewitness that would have testified in the defendant's favor. During the crime, the victim, her young daughter, and the victim's boyfriend observed the suspect. The victim was unable to identify the suspect until three years later when she heard the defendant talking and then recognized him. She and her daughter then identified him in photo line-ups. The first trial ended with a hung jury. During the second trial, defense counsel cross-examined these witnesses and pointed out that the victim's boyfriend was not called to testify, but did not interview the boyfriend or present him as a defense witness. In state post-conviction, the defendant argued that counsel was ineffective and specifically stated that the boyfriend would have testified that the defendant was not the suspect. During federal habeas proceedings, the defendant presented the same claim and also offered, for the first time, an affidavit from the victim's boyfriend. The District Court granted relief. The Fifth Circuit first held that the claim was properly exhausted in state court, despite the defendant's failure to present the affidavit there, because the defendant had plead all of the facts in detail. The submission of the affidavit in federal court only supplemented the record but did not change the facts or legal arguments that were made in state court. The court then held that counsel's conduct was deficient because counsel, who was disbarred after trial, conducted no investigation and instead relied only on the state's discovery, which did not reveal that the victim's boyfriend affirmatively stated that the defendant was not the perpetrator. Since there were only two adult eyewitnesses, a reasonable attorney would have made some effort to investigate. The court also found that counsel's failure to investigate was not a reasoned decision, but was "likely the result of either indolence or incompetence." *Id*. at 393. Counsel's failure also could not be excused based on a belief that the witness would not have been credible. "In a claim grounded in failure to interview, the 'quality' and potential persuasiveness of the eyewitness is largely immaterial." *Id*. Prejudice was found because the state's case was grounded only on the identification of the victim and her daughter made three years after the crime. There was no other evidence connecting the defendant to the crimes. The court also considered the fact that the first jury to hear the same evidence hung. Finally, the court found, applying the AEDPA standards, that the state court's ultimate legal conclusion was an objectively unreasonable application of *Strickland*.

***U.S. ex rel. Hampton v. Leibach*, 347 F.3d 219 (7th Cir. 2003)**. Counsel was ineffective in sexual assault and robbery case for failing to investigate and interview exculpatory eyewitnesses and for making promises in his opening statement to the jury that he did not keep. The crimes were committed by gang members and occurred at a rhythm and blues concert near the stage. The defendant was tried with two co-defendants but a separate jury for each. In his opening statement, counsel promised that the defendant would testify that he had witnessed the attacks but was not involved and promised that the evidence would show that the defendant was not a gang member. During trial, the three victims and a security guard identified the defendant, but the evidence was shaky. The defendant's counsel presented only one witness concerning an identification of the defendant near the scene. In closing, counsel attacked the weakness of the state's case and the eyewitness identifications. Counsel's conduct in failing to interview exculpatory eyewitnesses identified by the defendant and to independently investigate was deficient. Although the state court found that counsel had a reasonable strategy for this failure, this finding was not supported by any evidence. Moreover, even if counsel had such a strategy it was based on an inadequate investigation and was unreasonable. While counsel vigorously attacked the eyewitnesses, he presented no

exculpatory eyewitness evidence. The state court's "assertion that such testimony would have been 'redundant" is' plainly wrong; testimony by one eyewitness to a crime that the perpetrator was not the person named by another eyewitness is the antithesis of redundancy." The state court's finding that counsel also had a reasonable strategy to avoid "guilt by association" by establishing the defendant's presence at the scene with some suspected individuals was also unreasonable. Presence at the concert, knowing the perpetrators, and riding the same bus home was not incriminating since they and many of the witnesses lived in the same neighborhood as the defendant. Prejudice was found because of "the central role that eyewitness testimony played in this case, the vulnerabilities in the testimony of the State's eyewitnesses, and the shortcomings in human perception that so frequently render eyewitness testimony less reliable than other types of evidence." The co-defendant's acquittal highlighted the prejudice because he presented the type of evidence in question. The state court's finding of no prejudice was also an unreasonable application of *Strickland*. "[U]nder *Strickland*, [the defendant] need not convince the court that such testimony more likely than not would have resulted in his acquittal; he need only establish that this is a reasonable probability, a better than negligible likelihood." Counsel's conduct was also deficient in failing to fulfill his promises to the jury. While it may have been reasonable not to call the defendant to testify or to decide not to call witnesses to establish that the defendant was not a gang member, "the foundation for this claim is the broken promise as opposed to the decision not to pursue a particular line of testimony." "[L]ittle is more damaging than to fail to produce important evidence that had been promised in an opening." (quoting *Anderson v. Butler*, 858 F.2d 16, 17 (1st Cir.1988). While the state court found that counsel changed his mind due to a reasonable strategy this finding was unreasonable because "[t]he potential disadvantages of [the defendant's] testimony were ones that would have been obvious from the outset of the case." While the broken promises to the jury "was not so prejudicial that it would support relief in and of itself, the breach serves to underscore the more important failure to investigate exculpatory occurrence witnesses." The defendant's "unexplained failure to take the witness stand" may have given the jury the impression that the state's witnesses were correct in their testimony.

***Alcala v. Woodford*, 334 F.3d 862 (9th Cir. 2003)**. Counsel ineffective in capital case for failing to adequately present alibi evidence. The underlying crime involved the disappearance of a twelve-year old girl, whose body was found several weeks later 50 miles away. The evidence connecting the defendant was only circumstantial identifications that put him in the area where the victim disappeared taking pictures of people on the beach. The girl with the victim on the afternoon of her disappearance did not identify the defendant as the man that took their pictures and an adult that was present then could not identify the defendant in photo lineups but then positively identified him seven years later during trial. The only evidence directly connecting the defendant to the crime was a jailhouse informant and a discredited forest service worker, who was interviewed twelve times prior to trial and initially provided nothing but gradually progressed up to placing the defendant with the body. During the second trial, following reversal, this witness denied even testifying in the first trial. During trial, the defense presented a number of alibi witnesses to establish that the defendant had been at a theme park seeking freelance photography work at the time when the one eyewitness placed him taking pictures of the victim shortly before her disappearance. While the witnesses confirmed that he had been at the park, none of them was able to give an actual date or time for the alibi. In federal court, the defendant presented testimony from another park employee, who had

actual business records and her own personal calendar, who could testify that the defendant was at the park during the pertinent time and that it was, therefore, impossible for him to have committed the crime. The District Court granted relief and the state appealed. Applying the law prior to the AEDPA (because the federal habeas petition was filed in 1994), the court found counsel ineffective for failing to present the alibi witness and records that could establish the date and time of the alibi. Counsel's conduct was deficient because this was by far the strongest alibi evidence available, counsel had listed this witness and subpoenaed her as a trial witness prior to trial and could not remember why she was not called, and the witness had told a defense investigator that her personal calendar would support the alibi. The court rejected the state's argument that counsel made a strategic decision not to present the witness "because it would have us find a strategic basis . . . in the absence of any evidence" and because the court would not "assume facts not in the record in order to manufacture a reasonable strategic decision." *Id*. at ___. Moreover, even if counsel had a strategic reason not to call this witness, it would have been an unreasonable strategy. Here, "counsel made a sound strategic choice to present an alibi defense," but did not adequately present the evidence supporting the chosen defense theory. *Id*. at ___. Prejudice was found because the state's case "was far from compelling" and was entirely circumstantial. Counsel's failure at trial also harmed the credibility of the alibi evidence that was presented because trial counsel told the jurors that they would establish an alibi and then "utterly failed to do so, harming the credibility of [the] entire defense." *Id*. at ___.

### 2. U.S. District Court Cases

**2018:** ***Jones v. Ryan*, 327 F. Supp. 3d 1157 (D. Az. 2018)** (1995 trial)**.** Trial counsel was ineffective in failing to investigate and present evidence to counter the prosecution's theory of the case and post-conviction counsel's failure to raise the related claims provided cause under *Martinez* to excuse the procedural default of the trial IAC claims. Petitioner was convicted in Arizona state court of engaging in an act of sexual intercourse with a four-year old victim, causing physical injury to her by striking her abdominal area and causing a rupture to her small intestine under circumstances likely to produce death or serious bodily injury, causing physical injury to her by bruising her face and ear and causing a laceration to her head, causing her to be placed in a situation where her health was endangered under circumstances likely to produce death or serious physical injury, and felony murder. The penalty phase judge found the existence of two aggravating factors: the murder was especially cruel and the victim was under the age of 15, and found no mitigating factors sufficiently substantial to call for leniency. The judge sentenced petitioner to death. The trial IAC claims at issue were not raised in state post-conviction proceedings and were therefore considered procedurally defaulted. The district court had initially denied relief on the claims because of the defaults but the Ninth Circuit post-*Martinez* remanded for reconsideration of whether there was cause to excuse the procedurally default, stating that they were "substantial." Petitioner alleged that his trial counsel was ineffective for failing to adequately investigate the police work, medical evidence, and timeline between the victim's fatal injury and her death. The district court found that petitioner's inexperienced trial counsel was aware that the timing in which the victim sustained her injuries was a critical part of the state's case, because the state's theory was that the victim sustained her fatal injuries during a time when she was alone in a van with petitioner, and counsel also was aware that witnesses had described incidents in the few days before the victim's death during which she may have been injured by third parties, but counsel

made no effort to investigate the timing of the victim's injuries. Evidence obtained, developed, and presented during federal habeas proceedings demonstrated that many of the victim's injuries were older than the time period within which the state argued she had been harmed, that her fatal injuries certainly predated that period, and that many of the injuries observed at autopsy may have arisen during the dying process or after her death while she was being examined. Counsel had access to autopsy slides but did not provide them to the forensic pathologist he consulted. Counsel's performance was deficient. His failure to investigate was not a strategic decision; he admitted as much in habeas proceedings and stated he "possibly just assumed Petitioner was guilty based on the State's version of the case." Counsel not only did not consult with his own experts about the timeline, but he also failed to cross-examine the state's experts and witnesses about the injury timeline. 327 F. Supp. 3d at 1205. The district court further found that trial counsel had information that the victim may not have been assaulted and raped by petitioner in his van, and knew that the state was going to present an interpretation of the blood evidence at trial. Therefore it was reasonably necessary for him to investigate the implications of the blood evidence presented at trial. Counsel's failure to do this was objectively unreasonable under prevailing professional norms. In addition, trial counsel did not ask for funding for investigators and experts, even believing that additional funding would have been granted had it been requested. Trial counsel's deficient performance was prejudicial at the guilt phase; the new evidence presented in habeas proceedings would have presented an extremely different evidentiary picture from what the jury heard at trial, both with regard to when the victim sustained her injuries and with regard to who inflicted them. Much of the evidence presented at trial linking the victim's bruises to the day before she died, when she was alone with petitioner, was scientifically unsupported and untrue. "[T]he evidentiary hearing in this case has demonstrated that the police investigation was colored by a rush to judgment and lack of due diligence and thorough professional investigation; effective counsel would have brought this to the jury's attention, casting further doubt on the strength of the State's case." 327 F. Supp. 3d at 1208-09. The district court found that petitioner had established prejudice overall and cumulatively even though he could not prove deficient performance and/or prejudice as to some of his IAC subclaims. Post-conviction counsel's performance was also ineffective. Counsel lacked the experience to satisfy Arizona's requirements for appointment of capital post-conviction counsel. Counsel requested funding for investigators and experts through the wrong mechanisms, even though the court advised him of the proper mechanism. His "decision to forego a properly grounded request for an investigator or for experts to assist him with the investigation of the medical time of injury evidence and the bloodstain evidence was based on either ignorance of the requirements of the appropriate funding state or on counsel's mistaken assumption of the Arizona courts' unwillingness to fund experts, and was not a reasonable strategic decision." 327 F. Supp. 3d at 1216 (citing *Hinton v. Alabama*). Post-conviction counsel interviewed only one person, after he prepared the final post-conviction petition, and otherwise made no effort to identify or investigate any potential claim that relied on the establishment of facts outside the record. This was true even though counsel questioned whether trial counsel had fully investigated petitioner's case. Post-conviction deficient performance was prejudicial as the trial counsel guilt phase IAC claim was meritorious.

**2017: ****Noguera v. Davis***, 290 F. Supp. 3d 974 (C.D. Cal. 2017).** Petitioner was convicted by a California state jury of the first-degree capital murder of his girlfriend's mother (the girlfriend, a minor at the time of the homicide, was convicted of conspiracy to commit murder and first degree murder and sentenced to the California Youth Authority). The financial gain special circumstance was found

true. The jury sentenced petitioner to death. The state court affirmed on appeal and summarily denied habeas corpus relief. After exhausting the claim in state court, petitioner raised a claim in 2254 proceedings before the district court that his counsel was burdened by unconstitutional, undisclosed, and unwaived conflict of interest. Counsel had represented petitioner's mother in acrimonious divorce proceedings during which he became privy to turmoil in petitioner's household, including physical abuse and violence, which the mother said was negatively affecting the children. Petitioner's mother then retained counsel to represent petitioner in his capital trial proceedings. Counsel had an ongoing duty of loyalty to petitioner's mother, and did not present evidence of petitioner's home life at petitioner's trial as a result. In addition, petitioner's mother was paying counsel's legal fees to represent petitioner, she still felt as though he was first obligated to her, and was outspoken in her control over petitioner's defense. She advised counsel that he was not to use the information he learned about the family during the divorce proceedings in the defense cause, could not question her about her behavior contributing to petitioner's mental health problems, and could not present evidence of the violence and abuse in the household. Even though petitioner told his mother he thought he was crazy, she would not permit him to have mental health examinations, and she told both counsel and petitioner that they had to go with an innocence defense. Counsel also had never tried a capital case. Counsel did not explain the legal conflict to petitioner or obtain a waiver of the conflict; he spent the majority of his time on guilt phase issues, did no mental health or social history investigation; and was a potential witness at the penalty phase as to mitigating social history information. The federal district court held that the state court's denial of this claim was an unreasonable application of clearly established federal law or an unreasonable determination of the facts under 2254(d). The evidence presented to the state court (including declarations from counsel and from petitioner's mother) indicated that trial counsel was influenced in his basic decision-making by the interests of the person paying him, petitioner's mother. This was an actual conflict of interest – it clearly made out a prima facie case – that the state court was required to investigate further. As a result, because the state court denial was not entitled to AEDPA deference, the federal court proceeded to evaluate the conflict claim de novo. Clearly established federal law holds that an actual conflict of interest arises where an attorney represents more than one client with divergent interests. Here, counsel could not simultaneously act in the best interest of both clients. The conflict adversely affected counsel's performance as petitioner's capital defense attorney. Counsel did not attend a pretrial conference at which the case could have settled on a penalty less than death, and the only explanation for this failure was that petitioner's mother did not want him to plead guilty because then everyone would say he committed the homicide and that would make her look like a bad mother. Also, although there was overwhelming evidence of petitioner's participation in the murder, and counsel had personal knowledge of petitioner's family and his mental health problems, counsel failed to investigate and present evidence to undermine the prosecution's theory of the case as death-eligible, including that petitioner was devastated when the victim forced his girlfriend to abort their baby, that petitioner suffered from brain damage and mental illness, and that he was under the influence of substances when he committed the homicide. Instead, counsel presented "a doomed innocence defense accompanied by a coerced alibi witness." Petitioner also was adversely affected by counsel's failure to investigate and present a thorough mitigation case.

The district court granted petitioner guilt and penalty relief. The court granted relief on claims that trial counsel was ineffective because counsel (1) failed to investigate and present available mental state defenses; (2) failed to investigate any motive for the homicide other than the prosecution's; (3) failed to present evidence that the homicide was caused by reasons that could

not have resulted in a finding of murder with a special circumstance; (4) failed to investigate and rebut false prosecution assertions regarding the victim, petitioner's girlfriend, and the homicide; (5) failed to investigate and present mitigating evidence at the penalty phase; (6) failed to participate in the prosecutor's pretrial penalty evaluation process; (7) IAC of appellate counsel for failing to challenge counsel's failure to participate in the pre-charging conference; and (8) cumulative prejudice; because they were integrally related to the conflict claim. The court denied relief on several other conflict/ineffective assistance of counsel claims. (1) Claim that there was a conflict because trial counsel's paralegal became romantically interested in him, brought petitioner mind-altering drugs in jail, became personally involved with his family, when he rejected her, she vowed to damage his defense. Court found no prejudice even if the "shocking" allegations were true. There is insufficient evidence counsel knew the paralegal was bringing the client drugs and did not stop this. (2) Claim of ineffectiveness for failure to investigate and present evidence that petitioner was incompetent during crucial proceedings. (Petitioner fails to provide evidence that he was incompetent.) (3) Claim of IAC for failure to object to prosecutor's misconduct at penalty phase closing argument (there was no reversible misconduct). (4) Claim of IAC for failure to seek recusal of the trial judge based on partiality (state court not unreasonable to determine that none of the judge's remarks biased the jury). (5) Claim of IAC for failing to investigate and present evidence of psychiatric problems to impeach prosecution's witness (no prejudice shown). (6) Claim of IAC for failure to object on multiple grounds.

**2016:** ***Garner v. Lee*, 2016 WL 7223335 (E.D.N.Y. Dec. 13, 2016).** Trial counsel was ineffective at defendant's attempted murder trial for failing to obtain cell phone records detailing calls made to and from defendant's cell phone on the night of the shooting. Defendant was implicated in a shooting that took place during a drug transaction through testimony by his co-defendant. Defendant claimed he was at home alone when the crime was committed. Prior to trial, trial counsel noted that he had not received defendant's cell phone records from the State. The prosecution indicated that they did not intend to introduce the records, and counsel dropped his request to see them. Following defendant's testimony, however, the state moved to introduce his cell phone records to show that numerous calls were made from his cell phone to his home phone number during the period of time that defendant claimed he was at home alone. Defense counsel did not object. The prosecution then argued defendant was lying about his whereabouts, stating "[w]ell, who is he calling? Is he calling himself? Did he take out his Nextel and call himself? . . . Does that make sense? Does that ring true?" *Id.* at *4. Trial counsel was ineffective for failing to obtain the cell phone records to prepare for trial and refresh defendant's recollection before his testimony and for failing to use the records in cross-reference with 911 calls to establish that defendant was continually using his cell phone throughout the only period of time during which the victim could have been shot. Trial counsel did not make a reasonable strategic decision to not review the records in order to avoid any inference that defendant's testimony was tailored to conform with information contained within the phone records. No reasonable attorney would conclude that such an inference would be more damaging "than [defendant] being completely blind-sided by the prosecution's use of the cell phone records on cross-examination to thoroughly impeach him and decimate his alibi claim." *Id*. Moreover, the alleged reason did nothing to justify trial counsel's failure to review the records himself, nor did it justify trial counsel's failure to object to introduction of the records, which the State had previously claimed it did not intend to use. Trial counsel's failures were unreasonable. They resulted in prejudice to defendant because had counsel

reviewed the records prior to trial, he likely would have made different strategic decisions, such as not asserting an alibi defense or not having defendant testify, which clearly could have affected the outcome of the trial given that the State's case came down to a credibility contest between defendant and his co-defendant. Moreover, trial counsel could have affirmatively used the cell phone records to defendant's advantage by using them to show he was on the phone continuously during the 10-minute timeframe of the shooting, which contradicts the co-defendant's testimony that defendant did not make any calls around the time of the shooting. Thus, "there is a reasonable probability that the outcome of the trial would have been different had [defendant's] counsel obtained and reviewed the cell phone records before trial, conducted investigation based on those records, and formulated a trial strategy that both took into account and affirmatively used the records in [defendant's] defense." *Id*. at *13.

***Harrison v. Tegels*, 216 F.Supp.3d 956 (W.D. Wis. 2016).** Trial counsel was ineffective for failing to identify inconsistencies in the alleged victim's statements and for failing to object to evidence of defendant's prior bad acts in this repeated sexual assault case. Defendant was accused of sexually assaulting his then stepdaughter "D.M.K." The state relied entirely on a recorded interview that D.M.K. gave to the police and the trial testimony of her mother, Kimberly, who recounted what D.M.K. allegedly told her about the assaults. At trial, counsel's theory of the case was that Kimberly persuaded her daughter to fabricate the allegations. During opening statements, counsel promised the jury that he would reveal many inconsistencies in D.M.K's and Kimberly's allegations. However, counsel never did. Counsel failed to present evidence of numerous and significant inconsistent statements that both D.M.K. and Kimberly made about the alleged assaults. Trial counsel was deficient for promising, and then failing, to identify inconsistencies in D.M.K.'s statements. Since D.M.K's statements were the only evidence of the sexual assault, the "credibility of the witnesses was the key issue for the jury to consider in evaluating the state's case." *Id*. at 966. Counsel failed to present evidence of significant inconsistencies with respect to the assaults such as the type of conduct involved, the frequency of the assaults, their location, and what defendant allegedly said to D.M.K during the assaults. Some of the differences were fundamental and dramatic such as D.M.K's initial statement that she was assaulted hundreds of times, and then her revised statement that she was assaulted between one and five times. Counsel's failure to uphold his promise to show the inconsistencies in the witness's statements, constituted deficient performance. Counsel also failed to object to D.M.K's statement at trial that defendant often hid from the police around the time that the alleged assault occurred even though defendant was hiding for reasons unrelated to the case. The statement was so clearly irrelevant to trial that "there is no excuse for counsel's failure to object." *Id.* at 967. Counsel's errors were cumulatively prejudicial under *Crisp v. Duckworth*, 743 F.2d 580 (7th Cir. 1984) because "the case the jury heard was very different from the case that it should have heard" and defendant's trial "did not reliably test whether he did as he was accused." *Id*. at 974.

***Gorby v. Wetzel*, 210 F.Supp.3d 725 (W.D. Pa. 2016).** Trial counsel was ineffective during the guilt-innocence phase because counsel failed to conduct an investigation from which he could have presented evidence of defendant's diminished capacity to compliment his voluntary intoxication defense in this capital murder and robbery case. Defendant was convicted in 1986 of murdering Drayton Sphar in Pennsylvania. At trial, counsel argued that defendant did not commit the murder.

**Capital Case*

The judge gave the jury instructions as to murder and the defense of voluntary intoxication. Counsel did not present evidence to support the latter. Trial counsel was deficient for not raising the defense of diminished capacity because defendant's cognitive and mental impairments were so severe and noticeable that even rudimentary investigation would have revealed sufficient information to spur a deeper investigation into the diminished capacity defense. Counsel conducted a limited investigation of defendant's mental health and social history, which consisted of talking to defendant, his mother, and his step-father. Counsel did not cite a tactical or strategic reason for not investigating a diminished capacity defense. Counsel testified that he knew defendant performed poorly on standardized tests, received low scores on intelligence and achievement tests, did poorly in school and that defendant was hospitalized for head trauma. With this limited information, "it is difficult to comprehend why [counsel] did not obtain educational records, medical records, or consult a mental health professional during his investigation and preparation for trial, especially when counsel knew this was a capital case." *Id*. at 741. The extent of defendant's mental illness and drug/alcohol abuse was readily discerned by mental health professionals during PCRA proceedings. Furthermore, counsel was aware of the plethora of information that defendant was likely intoxicated during the crime, and thus could not form the specific intent to kill. Counsel did not present this evidence, despite asking the judge to instruct the jury on the voluntary intoxication defense. Counsel only argued that defendant did not commit the crime. As a result, counsel's representation was "blatantly deficient at least with respect to his failure to investigate a diminished capacity defense." *Id.* at 742. Counsel's deficient performance was prejudicial because the investigation and presentation of the diminished capacity defense would have negated the state's case for specific intent, and that there is a reasonable probability that a jury, after considering the evidence related to the diminished capacity defense, would have reached a different result.

***Culbreath v. Weedon,* 2016 WL 3385090 (D.S.C., June 20, 2016).** Trial counsel was ineffective for failing to provide defendant with proper notice of the charges, failure to properly investigate and prepare for trial, and for failing to move to suppress evidence in a case involving drug-related charges. Prior to trial, counsel admitted to the court that he was unprepared and requested a continuance. Counsel had not reviewed many of the documents turned over in discovery and admittedly did not have sufficient knowledge of the case to cross-examine witnesses. Additionally, he was only informed the day of trial that one of the prosecution's witnesses would be testifying. The trial judge rejected the request for a continuance and ordered the trial to begin. Counsel's deficient performance, which stemmed from his lack of preparation, prejudiced defendant's basic right to a fair trial. The trial attorney's strategy to obtain a continuance "was not a valid strategy" and his subsequent strategy to poke holes in the State's case "does not withstand scrutiny based on counsel's admission that he was not prepared to proceed to trial or cross-examine the state's witnesses." *Id.* at 8. The attorney's level of preparation "significantly undercut the reliability of the trial process such that the [defendant's] right to a fair trial was prejudiced." *Id.* Furthermore, trial counsel's cross-examination of a confidential informant also constituted deficient performance because counsel never obtained a copy of the informant's criminal record prior to trial. The deficiency was prejudicial because counsel's performance during cross-examination opened the door to highly prejudicial testimony from the informant. Counsel was also ineffective in failing to move to suppress crucial drug evidence allegedly received from a confidential

informant during an alleged controlled buy which did not fit the description at trial of the drugs documented in police reports, warrants, or indictments.

***Fenn v. United States*, 175 F. Supp. 3d 602 (E.D. Va. 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.

**2015:** ***United States v. Arny*, 137 F. Supp. 3d 981 (E.D. Ky. 2015)**. Counsel ineffective in case of physician charged with unlawfully dispensing controlled substances for lying to his client and failing to adequately investigate and present a defense. The physician was a retired military pathologist, who returned to work due to financial problems. He went to work at a pain clinic, even though he was not a specialist in pain management. A month after he started, he gave notice that he was leaving because the clinic expected him to see 30-35 patients a day and he did not believe he could adequately treat so many patients in so short a time. The clinic convinced him to stay by doubling his salary and agreeing to make changes to allow him to better serve the patients. For many of the patients, the physician simply continued to use the treatment plans of the prior clinic doctor (Saxman), who was a specialist in pain management. Ultimately, the doctor was charged, along with the clinic owners, for conspiring to distribute controlled substances. For conviction, the government had to prove that the physician was operating "outside the course of ordinary medical practice," which required a showing that the defendant "did not issue the drugs for a legitimate medical purpose and in the usual course of medical practice." The physician asked counsel to call Dr. Saxman and some of his patients in his defense. Counsel told his client that the prosecutor informed him that Dr. Saxman "either had a deal in place or soon will be indicted," which was not true. Counsel's conduct was deficient in lying to his client and in failing to interview Dr. Saxman, who was not indicted and was still practicing medicine. As the defendant was following many of her treatment plans, she could have provided a legitimate medical reason for the treatment plans she

created. Counsel's conduct was also deficient in failing to interview and present the testimony of some of the defendant's patients, who would have testified that the defendant prescribed pain medication for a legitimate medical purpose after regular examinations and adjustments in medications when necessary. Cumulative prejudice established.

***LeTemps v. Secretary, Florida Department of Corrections*, 114 F. Supp. 1216 (M.D. Fla. 2015)**. Counsel in sexual battery and kidnaping case was ineffective in failing to investigate and challenge the semen stain analysis of a state technician and failing to properly cross-examine the arresting officer regarding the direction LeTemps was walking when he was arrested. LeTemps was convicted in 1989. In 2011, he filed a second motion for state post- conviction alleging actual innocence. The motion was summarily denied and affirmed in state court. In 2013, he filed a motion for leave to file a second or successive petition for writ of habeas corpus in the Eleventh Circuit, which was granted. The federal habeas petition filed in May 2013 was untimely under the statute of limitations but permitted under the "miscarriage of justice" exception as LeTemps made a credible showing of actual innocence. The evidence at trial revealed that the victim, who was fluent only in Spanish, was accosted around 4:30 a.m. while she was awaiting a bus. She was force to undress and sexually assaulted at knife-point before managing to escape and run to the nearby home of Williams, who gave her the robe he was wearing and called the police around 5:00 a.m. Two hours after she gave her initial statement to police, she and her cousin, Maldonado, went to the area of the crime looking for her attacker. They encountered LeTemps, who was fluent only in Creole, and contacted police, leading to the arrest and conviction. Rathman, a forensic serologist, examined the robe given to the victim by Williams and found a semen stain. The stain contained blood type O, which matched the victim who was an O "secretor." LeTemps was a type B "secretor." She testified that she could not determine the blood-type of the semen donor because the amount of semen in the stain was insufficient. LeTemps, as well as his live-in girlfriend and a roommate, testified that he had been hope asleep at the time of the crime. He woke up around 6:30 a.m. and left to walk to work at 7:00 a.m. He was arrested as he was walking to work. Prior to filing his second state post-conviction application LeTemps' counsel discovered a deposition of Rathman taken by the state prior to trial. In it Rathman revealed that she concluded that the semen stain was insufficient to type, as opposed to simply not containing type B, based on a "P30 test." "P30 is a protein only found in seminal fluid." According to Rathman, a dilution of approximately 1-in-200 would assure sufficient semen to pick-up the blood type of the donor. She took this number from the Serological Research Institute ("SERI"), which originated the technique. She found the dilution rate in this case to be 1 in 322. Her bench notes revealed that she arrived at this conclusion based on the assumption to 5,000 units would be "a neat semen stain." In post-conviction, Harmor, the senior forensic serologist at SERI since 1979, provided an affidavit stating that Rathman's calculations were incorrect because 3,000 units was the number used by SERI for a "neat stain" during the 1980's. Using this figure, the dilution rate in this case was within the 1-in-200 minimum for accurate blood group detection. Thus, rather than being an insufficient sample of semen, the testing revealed that LeTemps was not the source of semen. Williams, a type A "secretor," was also excluded as the source and Williams testified that no one other then he and the victim had ever worn the robe. In short, the semen donor was either a type O "secretor" like the victim or was a non-secretor. Another aspect of Rathman's testing also excluded LeTemps as the semen donor. She performed a microscopic analysis of the semen stain and failed to detect spermatozoa, meaning the

donor likely had a low sperm count or was sterile. Because LeTemps had three small children at the time, he had spermatozoa in his seminal fluid. Finding this evidence sufficient to establish the exception to AEDPA's one-year limitations period, the Court proceeded to the merits of the claims. Counsel's conduct was deficient in failing to investigate the testing standard used by Rathman. Counsel's conduct was also deficient in failing to cross-examine the arresting officer concerning the direction LeTemps was walking at the time of his arrest. LeTemps' home was south of the crime-scene and his place of employment was north of the location. At trial, the officer testified that LeTemps was walking south away from the crime scene and towards his home. His report, however, indicated that LeTemps was walking north bound towards his work-place. Prejudice established.

**2014:** ***United States v. Matthews*, 999 F. Supp. 2d 352 (N.D.N.Y. 2014)**. Counsel ineffective in bank robbery and conspiracy case for failing to inquire into the history between his investigator and the defendant and failing to adequately investigate and present a defense. The robbery charge was based on a bank robbery in Syracuse. The conspiracy charge related to the Syracuse robbery, as well as two prior bank robberies in Whitesboro and Auburn. The defendant had previously pled guilty to the Whitesboro and Auburn robberies in state court. Thus, he was sentenced in this case to life under the "three-strikes" sentencing law. In 1982, the defendant had been arrested for attempted murder of a police officer, but was mistakenly released prior to trial. After three months of the most extensive manhunt in Syracuse history, Richard Haumann, a deputy police chief, arrested the defendant who was disguised in women's clothes and a wig by tackling him as he attempted to flee. Following a trial in which Haumann testified, the defendant was acquitted of the attempted murder charge. Haumann was the investigator assigned by the Federal Public Defender Office to work on the defendant's case. The government's case concerning the Syracuse bank robbery revealed that Valerie Sewall and a male accomplice, who could not be identified from surveillance footage, robbed the bank. Eyewitness' described the accomplice as approximately 5'7", which matched the defendant and Sewall's boyfriend. Sewall testified that the defendant had been her accomplice in all three of the robberies and that she cooperated with police in order to secure her release from custody and avoid prosecution on the Syracuse bank robbery. The defense conceded guilt on the Whitesboro and Auburn robberies, but denied involved in the Syracuse robbery. Counsel called a single alibi witness, who could not confirm the defendant's whereabouts at the time of the crime, but contradicted Sewall's testimony about the defendant's whereabouts after the Syracuse bank robbery. Counsel was aware that Haumann and the defendant had a prior interaction and that Haumann had previously arrested the defendant. His failure to inquire further was deficient and he failed to discover the clear conflict of interest between the investigator and the defendant. Whether due to the conflict or simple negligence, counsel's conduct was also deficient in failing to adequately investigate and present the available evidence. Counsel focused only on the time after the Syracuse robbery, even though there was no reasonable basis to limit the investigation in this fashion because counsel possessed police reports showing that two other witnesses accounted for the defendant's whereabouts before the robbery at a garage at approximately 11:30 - 11:45. It took 38 minutes to drive from the garage to the bank where the robber was on camera at 11:49. These witnesses were consistent with the defendant's statements to counsel and also contradicted Sewall's testimony of events leading up to the robbery and the defendant's whereabouts in other ways. Prejudice established on the Syracuse bank robbery charge, which was reversed. The conspiracy charge and

life sentence were affirmed though because they were not depended on the Syracuse robbery evidence.

***Moore v. Beard*, 42 F. Supp. 3d 624 (M.D. Pa. 2014), *aff'd*, 640 Fed.Appx. 159 (3rd Cir. 2016)**. Following the Third Circuit's finding that the state court's decision was contrary to and an unreasonable application of federal law under AEDPA, the case was remanded to the District Court for a hearing and de novo findings. The court held that counsel was ineffective in this first-degree murder case for failing to adequately impeach co- defendant Scott, who was a state witness, and failing to call co-defendant Jones as a defense witness in the second 1983 trial. The first trial ended in a mistrial when improper evidence from a suppression hearing was sent into the jury room during deliberations. The case involved a murder during a robbery at a veterinary office that was committed by two individuals. According to Scott, Jones planned the robbery and waited in the car, while Scott and petitioner entered the office and petitioner committed the murder. According to Jones, who was willing to testify for the defense but was not called, he met up with Scott and another man, Burgis, after the crime and Scott told him of the robbery and admitted that he was the shooter. Petitioner testified that he was at home in a different city at the time of the crimes and was not involved. Scott, who is now deceased, later signed an affidavit recanting his trial testimony and stating that he had been coerced by the prosecution to testify against petitioner. Jones was also deceased. Regardless of "whether his memory was clouded by the passage of time, age, or medical condition," lead trial counsel could remember virtually nothing about the case. Thus, the court relied on co-counsel's testimony and the record. During Scott's testimony, he admitted on direct that he was testifying pursuant to a plea agreement in which he agreed to testify and plead guilty to third degree murder for which he would be sentenced to five to ten years to be served concurrently with a federal sentence and that he would be confined in a federal institution. Lead counsel's failure to conduct any cross-examination on the topic of the plea agreement was deficient given that Scott's charge was reduced from first to third degree murder and the possible sentence was reduced from a possibility of the death penalty or 60 years down to 20 years. In addition, counsel did not delve into the fact that Scott was facing a number of federal robbery charges and that even prior to the retrial a motion to reduce his 20-year sentence, based on his testimony against petitioner, had been filed. Counsel's conduct was also deficient in failing to call Jones to testify, even though counsel had identified him as a material witness and he was present in the courthouse during the initial trial. Co-counsel could recall only that he had been present when lead counsel interviewed Jones and that the interview lasted no more than 5-10 minutes. Jones was not interviewed before this and was not re-interviewed prior to the retrial. Co-counsel did not recall hearing information that Jones exonerated petitioner or that the man with Scott was Burgis, but co-counsel conceded, however, that this was an inadequate interview. Moreover, it was clear from Jones' testimony in his own subsequent trial and in later affidavits in this case that he denied involvement, contradicted Scott, and gave statements consistent with another defense witness that Scott admitted the robbery and murder afterwards, but it was Burgis with him rather than petitioner. Thus, counsel's failure to present Jones' testimony was also deficient conduct. Prejudice was also found.

***Raether v. Dittman*, 40 F. Supp. 3d 1097 (E.D. Wis. 2014), *aff'd*, 608 Fed.Appx. 409 (7th Cir. 2015)**. Under AEDPA, counsel ineffective in sexual assault of child and bail jumping case for

failing to adequately cross-examine two state witnesses based on their prior statements to police and for inadequately preparing a defense witness and/or making an unreasonable decision to present that witness at all. The charges arose from an underage drinking party where the defendant, who was 18 years old at the time, was accused of raping D.N., who was then 14 years old. Five days after the party, D.N. told a school counselor that the defendant had raped her. A police officer then interviewed D.N., E. Bragg, E. Brown, and the defendant. In her statement to the officer, D.N. said that she was highly intoxicated and could remember only "bits and pieces" of the evening, but she recalled the defendant raping her and that Bragg had told her about some details of the evening. During trial two years later, D.N.'s testimony included numerous damaging details that were not included in her statement to the police but counsel did not impeach her based on these discrepancies. Bragg told the police that Brown found D.N. in the bedroom naked and yelled causing a number of people to go to the room where the defendant was also present. At trial, however, Bragg testified that she and others found the bedroom door locked and jimmied it open with a credit card, after which the defendant walked out. She also testified that D.N. told her about the rape the next day, which had not been mentioned to the police. Nonetheless, counsel did not impeach her based on this omission or the other discrepancies between her statement to the police and her trial testimony. Counsel's conduct was also deficient with respect to Brown, who told police that at some point in the evening she went in the bedroom and saw D.N. on the bed naked with the defendant standing next to the bed. Defense counsel called her to testify. She said that she never saw D.N. or the defendant in the bedroom or coming out of the bedroom. Counsel did not ask any questions to reconcile this testimony with her statement to police. On cross, she was impeached with her statement to police and admitted that she lied on direct because she wanted to help the defendant. After her testimony, out of the jury's presence, the trial court had her arrested for perjury. The state court held that counsel's conduct was deficient but found no prejudice. The state did not contest the state court's deficiency findings. Thus, the District Court addressed only the question of prejudice. The court found that the state court's adjudication was not a reasonable application of *Strickland* because the state court evaluated the errors only individually. Viewing the errors under the proper *Strickland* analysis, the District Court viewed the errors cumulatively – rather than "in isolation" – and found prejudice. With respect to D.N., the state court simply relied on the fact that the bottom line of her statement to the police and her trial testimony was that the defendant raped her. The District Court held, however, that the inconsistencies in her statement and testimony was significant and impeachment "could have been critical" to the jury in assessing her credibility, especially in light of the prosecutor's closing arguments asserting that her trial testimony was consistent with her statements to police. Similarly, failure to impeach Bragg was critical because her trial testimony that D.N. told her about the rape the next day bolstered D.N.'s testimony and credibility, which again the state argued in closing arguments. Impeaching Bragg could have been critically in persuading the jury that she was not credible and that D.N.'s testimony was not corroborated. With respect to Brown, the state court found no prejudice because it was the defendant's own credibility problems, with 13 criminal convictions at age 20, that "did him in." The state court's determination was unreasonable, in part, because it focused simply on counsel's failure to adequately prepare Brown to testify when the larger issue is that counsel should never have called her to testify because her testimony was damaging to the defense rather than helpful in any way. In short, counsel "handed the prosecution the argument that the defense was willing and in fact put before the jury a witness to perjure herself to save the defendant. It is hard to imagine how such an

error would not be prejudicial." *Id*. at ___ (citations omitted). The state court's focus here on weighing the defendant's credibility problems with Brown's in determining prejudice due to counsel's presentation of Brown's testimony "misses the mark" on the proper cumulative prejudice analysis of the prejudice from failing to adequately impeach the state's witnesses in conjunction with Brown not being "properly prepared by counsel (or not called at all)." Focus simply on the defendant's prior convictions, "in isolation, ignores the potential impact of the impeachment of the State's key witnesses," especially in light of there being no other evidence of the defendant's guilt. In other words, the jury could have found the defendant lacking in credibility but also found the State's witnesses lacking in credibility and "insufficiently convincing – the two are not mutually exclusive." Finally, the state court's finding of no prejudice was unreasonable because the state court relied on the defendant's impaired credibility, as addressed above, in combination "with other evidence that [the defendant] was in the bedroom with a nearly naked" D.N. This finding is not supported by the record. Brown testified only that she saw D.N. partly naked in the room, but she said nothing about seeing the defendant there and no other witness supported this finding at all other than D.N. and Bragg, both of whom should have and could have been impeached.

**2013:** ***Green v. Lee*, 964 F. Supp. 2d 237 (E.D.N.Y. 2013)**. Under AEDPA, counsel was ineffective in sodomy, attempted sodomy, and sexual abuse case for failing to investigate and present a defense. The defendant was charged with ten counts related to the alleged sexual molestation of his granddaughter, G.G., and four of her friends, including B.M., who was G.G.'s friend and the first of the complainants to accuse Green of sexual abuse. In the fall of 2006, allegedly after watching a particular episode of Law & Order: SVU, B.M. alleged that she and G.G. had been abused in 1998-1999, but G.G. denied that any abuse had taken place and denied knowing B.M. until 2000. Green also denied any abuse and denied knowing B.M. in 1998–1999. In support of B.M.'s testimony, the prosecution presented: (1) a photo of B.M. and G.G. together dressed in Halloween costumes allegedly taken in 1998; and (2) a device called a "Turbo Twister Speller" that Green allegedly gave to B.M. to help with her spelling in 1999. To rebut G.G.'s testimony that she did not know B.M. prior to 2000, the People presented testimony from G.G.'s mother, Cindy. Cindy was Green's daughter-in-law, and was in the process of divorcing Green's son. She offered a souvenir Polaroid photograph in a photo jacket marked "6/98" of G.G. and B.M. at Coney Island. Even though she was not present when the picture was taken, she testified based on her daughter's hair length that the picture was taken in 1998-1999. Trial counsel had contacted a private investigator, "but for unexplained reasons, trial counsel ceased contact with [him] prior to the trial." Post-trial this investigator ascertained–"[w]ith very little effort and easy access"–"that the film used in the Coney Island photograph was not manufactured until several years after the date the People represented the photograph was taken." Likewise, the sweatshirt worn by B.M. in the Halloween photograph displayed a logo of a company that did not enter commerce until three years after the date testified to at the trial. The "Turbo–Twister" toy spelling machine given to B.M. by Green did not enter commerce until August 2001, not the years 1998 to 1999, as the testimony at the trial stated. And, the relevant episode of Law & Order: SVU did not air until several months after the time that B.M. suggested at the trial that she viewed the program. "These dates were crucial in that the Defendant and G.G. both testified that the family did not even meet B.M. and her mother until the year 2000." Here, there was prejudice, particularly based on the Coney Island photograph, which "the trial prosecutor referred to . . . as the 'one piece of evidence that the defense can't get

around' and 'the one piece of evidence in the whole case that is not capable of lying.'" Nonetheless, the People argued in habeas that this photograph was only "collateral" and "cumulative" evidence.

> What the prosecution cannot be permitted to do is proffer evidence, passionately argue for its centrality to obtain a conviction, then abandon reliance on that evidence once the conviction is obtained and the evidence is shown to be false.

While New York state courts apply a prejudice standard that is "more generous toward defendants than the standard spelled out in *Strickland*, the federal court applied the *Strickland* standard. In this case, the state court "applied an overly demanding standard of prejudice," essentially rejecting Green's claim of ineffective assistance of counsel because Green could not prove to a certainty that he would have been acquitted "but for" the trial counsel's deficient performance. "This strict 'but for' standard is different from an 'unreasonable application' of *Strickland*'s more defendant-friendly 'reasonable probability' standard and is therefore constitutionally deficient." Green was prejudiced even on the counts that did not involve B.M. due to "spillover prejudice."

***Lopez v. Miller*, 915 F. Supp. 2d 373 (E.D.N.Y. 2013)**. Under AEDPA, counsel ineffective in murder case for failing to investigate and call alibi witnesses. The case was 23 years old and involved the shooting of a drug dealer in a crackhouse. The case was not barred by the statute of limitations due to the court's finding that the defendant had made a credible and compelling case of actual innocence. There was no murder weapon or forensic evidence connecting the defendant to the murder. The prosecution was based on the testimony of two witnesses, only one of whom identified the defendant. This witness was on a "two-day crack binge." She did not call the police or provide any information until a month later following her arrest for prostitution. She made a number of contradictory statements. There was conflicting evidence whether she had a plea deal with prosecution in exchange for her testimony. The other witness who had been face-to-face to the shooter and spoke to him, did not identify the defendant and described the shooter as black and 6'3". The defendant was 5'7" and the state conceded he "could not be described as black." Counsel did not call the alibi witnesses, who were the defendant's mother-in-law and sister-in-law. Counsel claimed to have interviewed both of these witnesses before deciding not to present them because they would not be believed because they were "closely related" to the defendant. On the trial record, however, counsel stated that he had interviewed a single alibi witness that he chose not to call. The state court made unreasonable determinations, without an evidentiary hearing, by finding that counsel had interviewed both alibi witnesses and made a reasonable decision not to present the testimony because their residences were close to the location of the shooting and did not render the shooting impossible. While the court assumed that counsel had interviewed the alibi witnesses, despite their declarations to the contrary, the court found counsel's conduct deficient in failing to call the witnesses to testify. The decision not to call the witnesses solely because they were "closely related" was unreasonable. Likewise, even though the alibi witnesses "were not perfect, the court cannot imagine any significant harm that was likely to result from calling them to testify – only benefit, and potentially tremendous benefit." In short, calling them "was clearly a better option than presenting no case at all." Likewise, counsel did not discover and present testimony of a man who was in the crackhouse at the time of the shooting who affirmatively declared that the defendant was not the shooter. Prejudice established in light of the prosecution's "weak" evidence.

**Capital Case*

***Smith v. United States*, 980 F. Supp. 2d 854 (N.D. Ohio 2013)**. Counsel was ineffective in felon in possession of a firearm case for three reasons. The evidence established that the police were responding to an anonymous tip about men gambling when they observed the defendant and other men and other men sitting outside at a table with dice and cards present. As the police approached, the petitioner said he had to use the bathroom and started to enter a neighboring house. He was stopped on the front porch and officers found a gun near this spot. The defense alleged that the gun did not belong to the defendant and he was attempting to evade the police only because there was an outstanding warrant for his arrest. Counsel's conduct was deficient because counsel: (1) failed to obtain the police records and to move to suppress the gun; (2) failed "even to speak with the non-police witnesses to petitioner's arrest"; and (3) "advised petitioner that testifying would preclude him from obtaining the acceptance-of-responsibility adjustment" in sentencing. First, counsel's failure to move to suppress the gun was deficient and not based on reasonable strategy. Counsel "made unreasonable assumptions about the facts and law, thereby abandoning, without due consideration or information, the possibility of excluding the only evidence in the case that really mattered. Specifically, counsel assumed, "with no reasonable basis," that police were justified in detaining the petitioner.

> Had [counsel] sought out the police records . . . , he would have learned: 1) the complaint came in nearly one hour before police responded; 2) police responded to the wrong address; 3) the complaint mentioned thirteen males, as opposed to the four males the officers mention in their reports; and 4) the complainant failed to provide any physical description of the alleged gambling suspects.

"[T]he police records suggested, at the very least, that the officers lacked any basis to attempt to detain petitioner . . . , even if dice were in plain view." Second, counsel's conduct was deficient in failing to call the non-police witnesses who would have established that the porch was "cluttered with furniture and boxes" and "was an active neighborhood social hub accessible at all hours of the day and night," which made the defense theory that the gun was already on the porch more likely. "While counsel pressed this theory during his closing argument, he could point to no concrete evidence supporting it. Predictably, the prosecutor pounced on that omission in his rebuttal" argument. Finally, counsel's advice that petitioner should not testify "was unreasonable" because the defense based on denial of guilt "precluded petitioner from an acceptance-of-responsibility adjustment, regardless of whether he testified. Moreover, no reasonable attorney could conclude the adjustment was available in petitioner's case." Prejudice was established. Counsel's "errors essentially cut the legs out from under the defense before the trial even began and denied petitioner the opportunity to present a plausible, coherent account of the events occurring before his arrest. The errors were all the more significant, given the lack of compelling evidence against petitioner," which was "underscored by the jury's note [during deliberations] reporting its inability to reach a unanimous verdict" prior to being given an *Allen* charge.

**2012:** ***Williams v. Woodford*, 859 F. Supp. 2d 1154 (E.D. Cal. 2012)**. Counsel ineffective in murder case for failing to call the defendant or his alibi witnesses to testify after promising at least 13 times in

the opening statements that the testimony would be presented. The petitioner was a drug dealer. His house was burglarized and some of his drugs were stolen. The burglars left a pager behind. The next day a person the petitioner could have suspected (based on the pager) was killed. The state's case was based on this theory, the testimony of an informant that the petitioner confessed to him, and a belt and rope found on the victim. Even though counsel believed the petitioner should not testify due to evidence of other crimes and was giving this advice, counsel told the jury 10 times in the opening that the petitioner would testify. This conduct "was highly unprofessional" and prejudicial as it highlighted the petitioner's failure to testify and "undermined the presumption of innocence." Counsel's failure to present the testimony of the petitioner and two other alibi witnesses was a result of a failure to prepare for trial as counsel never talked to these witnesses. Counsel's failure to discuss the substance of the case with his own client "betrays a shocking degree of neglect on counsel's part." Counsel was also ineffective in failing to interview a primary witness, who had told the same alibi story to police multiple times in interviews, even when interviewed "in quite hostile fashion and without a lawyer." Prejudice was clear because this was a close case and even without the alibi evidence the jury deliberated for a day and a half before rendering a verdict. Under AEDPA, the state court made an unreasonable determination of the facts by making evidentiary findings without holding a hearing and allowing the petitioner an opportunity to develop his claims.

***Baldwin v. Adams*, 899 F. Supp. 2d 889 (N.D. Cal. 2012)**. Under AEDPA, counsel ineffective in murder case for multiple reasons. The victim was shot multiple times with a .40 caliber pistol and left between parked cars. There were no leads in the case until more than two months later when an informant was arrested while standing near a car containing illegal drugs. He offered information and released without being charged with a crime. The petitioner's home was searched then based on a "parole search" and he was arrested due to a small amount of pot found. Police then interviewed Gaines (based on the informant's information), who said he dropped the petitioner off near the crime scene. When he returned, Hicks told him the petitioner shot the victim. Several months later, the weapon was dropped by a fleeing suspect, who generally fit the petitioner's description, in a low income housing project. Hicks was killed prior to trial. Gaines refused to testify, but his taped statement was admitted as a prior inconsistent statement. Counsel conduct was deficient for: (1) failing to object to the prosecutor's arguments that the defendant should be convicted "in order to protect community values, preserve civil order, or deter future law-breaking"; (2) failing to request a limiting instruction to limit evidence that the initial informant had been threatened to preclude consideration of this evidence for the impermissible purpose of consciousness of guilt because there was no evidence that the petitioner was responsible for the threats; (3) failing to object to the double hearsay in Gaines prior statement that Hicks told him the defendant killed the victim and Hicks was in fear for his life if he cooperated with police; (4) failing to request a limiting instruction to preclude the inference that Hicks was killed because of his knowledge because there was no evidence that petitioner was responsible for his death; (5) failing to present evidence that Hicks told police that he knew the shooter and petitioner was not the shooter; (6) failing to object to the prosecutor's closing statements that the defendant was involved in intimidating witnesses; (7) failing to object to the prosecutor's closing statements that two defense witnesses testified falsely solely because of fear of the petitioner, which both witnesses had repeatedly denied in cross; (8) failure to redact irrelevant prejudicial pejorative statements in a taped phone call and failing to obtain a limiting instruction related to this evidence; (9) failing to object to the prosecution's misstatements

of law and assertion of personal knowledge and facts not in evidence in questioning defense witnesses and in closing arguments; (10) failing to object to the prosecution's improper vouching for witnesses in closing. Reversal was required due to prosecutorial misconduct and the "cumulative impact of the multiple errors" by defense counsel.

***Hash v. Johnson*, 845 F. Supp. 2d 711 (W.D. Va. 2012)**. Under AEDPA, counsel was ineffective in capital murder trial, which resulted in a life sentence, for failing to investigate the State's jailhouse snitch witness and failing to present an alternate theory of the crime at trial. The police initially had a suspect in the murder "but the case went cold." After a new Sheriff was elected and new officers were assigned to the case, the petitioner was arrested almost four years after the crime. The prosecution had no physical evidence linking the petitioner to the crime, but had three primary witnesses: (1) an alleged accomplice; (2) the petitioner's cousin, who claimed the petitioner confessed to her; and (3) "a known prison informant, to whom [the petitioner] allegedly confessed the crime." Counsel cross-examined the snitch about inconsistencies in his statement. Counsel also asked if the informant had assisted the government on prior occasions. The snitch said he had done so only once. If counsel had investigated, counsel could have impeached the snitch with evidence that he "was a prolific informant," as he had "provided information or testimony that implicated at least twenty people in at least three different federal prosecutions." Likewise, counsel cross-examined the snitch about whether he was testifying in state court in order to obtain a reduction in his federal sentence. The snitch said "somewhat, yes," but on redirect testified that the state court proceedings would have no effect on his federal sentence. The petitioner testified in his own defense. He admitted discussions of possibly robbing "an old lady" in the area with the testifying accomplice and another man but said he withdrew from the discussions and took no part in planning or committing the murder. The defense also presented 18 witnesses emphasizing the contradictory nature of the accomplice's and cousin's testimony and putting forward an alibi defense. In discovery in state habeas proceedings it was revealed that the snitch wrote to his federal judge and others in at least 25 letters concerning a sentence reduction. Five of those letters were written prior to his testimony in the petitioner's trial. Although he had been facing a potential life sentence, the snitch was initially sentenced to 180 months. Following his testimony in this case, his sentence was reduced to 60 months, which was basically time served. There had been "a deal" and the snitch's testimony to the contrary was false. He had been moved to the jail where the petitioner was confined specifically for the purpose of obtaining information against the petitioner. The state failed to disclose any of this information or that both the accomplice and the cousin had failed polygraph examinations regarding their statements against the petitioner. Overall, the picture in federal habeas proceedings was that: (1) the accomplice's and snitch's testimony was manufactured and contradicted the crime scene evidence; (2) the state failed to disclose communications between the police, the snitch, and the accomplice, who recanted in post-conviction proceedings and the recantation was credible; and (3) the police failed to seize and test a rifle found at the initial suspect's house that matched the caliber and type of weapon used in the murder. In addition, the initial suspect lived near the victim and a man matching his description was seen near the area where the victim's truck was found. Counsel's conduct was deficient in failing to adequately investigate and impeach the snitch. Counsel admitted that he did not obtain the snitch's "federal file," which contained five letters in the snitch's own handwriting contradicting his trial testimony. In finding no prejudice, the state court unreasonably applied Strickland. The letters would have proven that the snitch lied in his

testimony in that he clearly believed that he would get a sentence reduction in federal court in exchange for his testimony in this case. Likewise the state court's decision was unreasonable in concluding that counsel's conduct was not deficient in failing to investigate and present an alternate theory simply because counsel reviewed police reports and spoke to the initial investigator who said the case against the initial suspect "had gone cold and the investigation was at a dead end."

> [I]t is not a reasonable strategic choice for defense counsel to rely on the finding of a police investigation. Counsel has an obligation to make [his] own independent investigation.

Here, the snitch's and the alleged accomplice's testimony was the primary evidence placing the petitioner at the crime scene and establishing the state's theory that the crime was committed by three people. Counsel should have contested this with evidence from the crime scene and the initial investigator, who believed the murder was committed by a single perpetrator. Because the state court did not consider prejudice on this, under *Pinholster*, the federal court was permitted to and did consider the evidence presented in federal court on this issue. The evidence revealed that the "multi-perpetrator theory was inconsistent with the evidence at the crime scene." [The court also found state misconduct for presenting false testimony and withholding evidence under *Napue* and *Brady*.]

**2010:** ***Larsen v. Adams*, 718 F. Supp. 2d 1201 (C.D. Cal. 2010)**. Under AEDPA, counsel ineffective in possession of dagger case (which resulted in "three strikes" enhanced sentencing) for failing to adequately investigate and present exculpatory evidence. (The court excused the failure to comply with the federal statute of limitations based on "the 'actual innocence' gateway set forth in *Schlup v. Delo*, 513 U.S. 298 . . . (1995)"). The charge resulted from a 1:00 a.m. call to police of an assault with a deadly weapon in progress, with shot fired, in a bar parking lot. Two police officers approached in a single car with flashing lights and a siren, then with roof-mounted floodlights, side spotlights, and high beams. Ten to 20 people were in the parking lot. One officer testified he saw the defendant remove an object from underneath his clothing and throw it. The object turned out to be the dagger found underneath a car. There were numerous significant inconsistencies in this officer's testimony from his testimony in two preliminary hearings. The second officer testified generally about the call and arrest with the defendant giving a false name. The only other state witness was a detective, who ran fingerprints and discovered the defendant's true identity. Counsel's conduct was deficient in failing to investigate and failing to obtain crucial information about witnesses from the prosecutor, even though the defendant informed counsel he was innocent and counsel was aware that numerous other people were in the parking lot. Counsel had even informed the prosecution that the defense theory at trial would be that it was Hewitt's dagger. "A reasonable defense attorney would have attempted to interview as many percipient witnesses as possible." Counsel of at least three eyewitnesses, who were not interviewed. If counsel had pursued the investigation, it would have led to exculpatory evidence, including the parents of one of the known eyewitnesses. While not directly relevant, the court detailed counsel's "record of indifference to his professional responsibilities" and his disbarment after this trial, as evidence "bolster[ing]" the court's findings. If counsel had adequately investigated, a military retiree, who had also been a police officer for eight years, would have testified that he was in the parking lot when police arrived and observed another man (Hewitt) throw the dagger. This witness was initially handcuffed, but was released without being questioned after officers saw his police identification in his wallet. This

man's wife also would have testified generally consistently, including that she had seen Hewitt through an object under a car. Another man, who had been inside the bar would have testified that he had been threatened with "the" dagger inside the bar by another man. This witness knew the defendant, who was inside the bar at the time, but was not in possession of "the" dagger. This prompted the bartender to make the call to police. Aside from these witnesses, Hewitt himself submitted an affidavit in federal court admitting the dagger was his. Hewitt's girlfriend also gave an affidavit stating Hewitt had told her the night of the incident that the defendant had been arrested for possession of Hewitt's knife. She also said that Hewitt felt bad and sold his motorcycle to post bail for the defendant. Even if counsel's conduct pretrial was not deficient, he was informed of the existence of the former police witness and his wife after conviction, but prior to sentencing and still failed to investigate or move for a new trial.

***Barco v. Tilton*, 694 F. Supp. 2d 1122 (C.D. Cal. 2010)**. Counsel ineffective in murder and conspiracy case for failing to adequately investigate and present defense evidence. Although AEDPA applied, the court reviewed counsel's conduct de novo because the state courts had denied an evidentiary hearing and evidence was presented in federal court that further developed the claim. Prejudice was reviewed de novo because the state courts did not reach the issue. Petitioner's son had been assaulted with life-threatening injuries and was hospitalized for several months. While there were rumors that the victim's father committed the assault, the police were unable to assemble any evidence against him and the investigation was suspended. Four months after the assault on petitioner's son, there was a drive-by shooting at the victim's home, which resulted in death. The father of petitioner's grandson, who lived with petitioner, was arrested a short distance away with the murder weapon and other damning evidence on him. He had a cellphone call with someone at Petitioner's home (and a number of people lived there) shortly before the shooting. No additional arrests were made until after petitioner's daughter broke up with her boyfriend and had him arrested for breaking into her home. Only then, despite previously denying any knowledge, the boyfriend/accomplice went to police claiming a conspiracy led by petitioner. He was granted immunity in exchange for his trial testimony. Counsel was ineffective in: (1) failing to investigate and introduce the boyfriend/accomplice's numerous crimes of moral turpitude, readiness to violently retaliate, and motive to falsely implicate petitioner; (2) failing to introduce the testimony of petitioner's family and friends to rebut the boyfriend/accomplice's testimony that numerous conversations about retaliation took place in their presence and were led by petitioner; and (3) failing to present testimony of character witnesses, particularly a veteran of the prison system to attest to petitioner's character for non-violence. Petitioner was a teacher who taught inmates in the state prison and at the California Youth Authority. The character witness would have also rebutted the allegation of a connection between Petitioner and the Mexican Mafia. Counsel's conduct was deficient in failing to retain an investigator despite the family's willingness to fund necessary investigation. Counsel also did not interview family members about the alleged discussions because, contrary to the trial record, he recalled that all of these conversations allegedly took place privately. Finally, counsel alleged a strategy not to present character evidence, but this decision was made "without even interviewing any of the character witnesses himself, to assess their demeanor and how they would have held up on cross-examination." *Id*. at 1145. It was "objectively unreasonable for [counsel] to make the decision not to call the character witnesses without interviewing them." *Id*. at 1146. His decision "cannot be deemed a fully informed one." *Id*. Prejudice established because

the state's evidence was "weak" and the boyfriend/accomplice was "the critical witness" for the state. Without him, the state "would have been unable to proceed" against petitioner. Yet, the jury heard none of the evidence impeaching his credibility and rebutting his testimony and the jury did not hear credible evidence of petitioner's own character for non-violence.

***United States v. Hebshie*, 754 F. Supp. 2d 89 (D. Mass. 2010)**. Counsel ineffective in arson case for failing to move for *Daubert* hearing, challenge testimony of prosecution experts, and challenge canine evidence. The prosecution arose from a fire in a commercial building in which the defendant leased space for his convenience store. The government built its case on "less than overwhelming" evidence of defendant's motive to burn down the store and arson experts and canine evidence. Although there were numerous articles in legal journals and cases casting a "critical eye on the scientific reliability of arson evidence" by 2006, when this case was tried, counsel did not investigate. "Ordinarily competent counsel would have understood that men and women had been convicted, sentenced, perhaps even executed, on the basis of flawed arson evidence." Aside from this general "drumbeat of concern about arson prosecutions," counsel "had been specifically warned about deficiencies in this case by predecessor counsel and by the experts retained by them." During trial, the court also "pointedly inquired" three separate times whether counsel wanted to challenge the evidence or needed a continuance. Counsel's alleged "explanations" for his behavior post-trial "were, in a word, incoherent." The most significant problems with the evidence was: (1) the government experts lifted a single sample from the area they believed was the origin of the fire and took no control or comparison samples; and (2) "Billy the dog sniffed a so-called accelerant" in the same area to which she had been led. The government never even looked for accelerant elsewhere. The single sample of "accelerant" taken was a "light petroleum distillate," which covers "a category so broad that a host of entirely benign substances fit within it." In addition, it could be found in many items sold in the convenience store or generated by heat of the fire itself with other materials, such as carpet glue. While requesting a *Daubert* hearing may not have resulted in excluding evidence, "exclusion (or in the case of the dog, strict limitation) was more than a 'reasonable probability.' It was likely."

> It is not an understatement to say that Lynch, the dog handler, was permitted to testify to an almost mythical account of Billy's powers and her unique olfactory capabilities. He presented unsubstantiated claims about the dog's accuracy. He was allowed to go on at great length about his emotional relationship with the dog and his entirely subjective ability to interpret her face, what she thought, intended, and the "strength" of the alert she gave in this case. Finally, Lynch was permitted to testify that the dog did not alert to anything else on the premises, as if the dog had been allowed to range widely on the fire scene (she was not), and as if the dog's failure to alert had evidential value (it did not).

Even though "scientific literature cast doubt on the significance of the dog's failure to alert (false negatives) and even raised concerns about canine 'proficiency' testing," counsel did not challenge this evidence. "Billy, like the traditional Ouija board, was simply allowed to point to [the defendant] as an arsonist." Counsel also did not challenge the "cause-and-origin testimony," even though no photographs were taken, except in the area the government expert believed relevant, and the

"building was razed to the ground" making further investigation impossible. While no prejudice was found with respect to the cause-and-origin testimony which simply purported to identify where the fire began, the canine evidence and the lab results were essential to prove that the fire was "an arson, not an accident. Without it, there is simply no crime."

***Robinson v. United States*, 744 F. Supp. 2d 684 (E.D. Mich. 2010)**. Counsel ineffective in felon in possession of ammunition case for failing to fulfill his promise to the jury in opening that the petitioner would testify and in failing to adequately investigate and present a defense. Contrary to counsel's alleged strategy and reasons, there was no evidence of unforeseeable events following the opening that would cause counsel to change his strategy mid-trial and decide against the petitioner testifying. The court did not find prejudice "without more" on this issue, but found cumulative prejudice. The state's case was based solely on police officer testimony. The petitioner had provided counsel with names and numbers for prospective defense witnesses. Counsel did not interview them, although one of them credibly corroborated the petitioner's version of events.

***Usher v. Ercole*, 710 F. Supp. 2d 287 (E.D.N.Y. 2010)**. Under AEDPA, counsel ineffective in child sex abuse case for: (1) failing to consult a medical expert to rebut the state's expert witness; (2) introducing unredacted medical records that contained otherwise inadmissible evidence and bolstered the testimony and credibility of the alleged victim; and (3) elicited damaging "outcry" testimony from a prosecution witness opening the door for the state to elicit additional damaging testimony. The state's medical expert testified that the size of the hymenal opening and other findings during physical examination established that the alleged victim had been sexually abused. Counsel's conduct was deficient in failing to consult and present rebuttal expert evidence that there were deficiencies in this expert's methodology and opinions, including that a large hymenal opening is simply not evidence of abuse and is explicable by other factors. Counsel could not make a reasoned decision as to the best defense strategy due to "counsel's failure to educate himself about the implications and validity" of the conclusions of the state expert, which was the only direct evidence of abuse aside from the testimony of the alleged victim. Counsel's conduct in introducing the unredacted medical records was likewise deficient because the records reflect "a coherent and frankly harrowing narrative of chronic abuse, with a suggestion of continuing danger." There was no strategic reason for admitting these records, which were at odds with the defense assertion that there was no sexual abuse. Finally, counsel's conduct in eliciting the "outcry" evidence and opening the door to more was deficient, especially in light of the trial court's in limine ruling limiting "outcry" evidence to the four to six words uttered by the alleged victim in the initial outcry to her mother. Prejudice established in the failure to rebut the state's expert testimony given the "relatively weak" state's case. The only evidence was the alleged victim's testimony, the testimony of a witness about what the alleged victim told her, and the expert testimony, which could have been "undermined by contemporaneous medical literature and informed expert testimony." While the additional errors might not be sufficient on their own to establish prejudice, "together with counsel's failure to consult a medical expert" there was cumulative prejudice. The state court's determination to the contrary was an unreasonable application of *Strickland*.

**Capital Case*

***Young v. Washington*, 747 F. Supp. 2d 1213 (W.D. Wash. 2010)**. Counsel ineffective in murder case for failing to subpoena the petitioner's son, who was the undisputed triggerman and a previously acquitted co-defendant. The son went to trial first on a first-degree murder charge with a predicate felony of robbery. He testified and admitted that he was the shooter but that it was "a drug deal gone bad." As the predicate of drugs would support only second-degree murder, which was not charged, he was acquitted. The state proceeded against petitioner on the second-degree charge. While counsel hoped to call the son to testify, he did not subpoena him and the son refused to voluntarily appear. The state court unreasonably applied *Strickland* by finding that this "single lapse" rather than a "pattern of incompetence" did not constitute ineffectiveness. "In effect, the court of appeals treated counsel's general professionalism as a defense against allegations of specific deficiency, finding that the 'entire record' showed him to be a competent attorney." Because the state court did not reach prejudice, de novo review applied. Prejudice found as the son would have appeared if he had been subpoenaed. He would have been "legally obligated to appear to testify, and could have been held in contempt had he failed to appear. This is substantially different from offering testimony voluntarily." Likewise, the state's assertion that he would have refused to testify due to concerns about perjury charges was "speculative and unpersuasive."

**2009:** ***Madrigal v. Yates*, 662 F. Supp. 2d 1162 (C.D. Cal. 2009)**. Under AEDPA, counsel ineffective in attempted murder trial for a number of reasons. The shooting was related to retaliatory gang attacks and witnesses identified the defendant, who was married with three children, had been working steadily since 1994, had moved away from East L.A., and had only a misdemeanor prior conviction. No physical evidence linked the defendant to the crime. During counsel's opening statement, counsel told the jury that he would present an alibi defense and a third-party culpability defense and the defendant would testify. The defendant did not testify and the only alibi witness called could not absolutely verify that the defendant was at work at the time of the offenses. Counsel's conduct was deficient in failing to present an audiotape of the co-defendant's conversation with his girlfriend that appear to establish the co-defendant's involvement in the crime but exculpate the defendant. The tape was provided in discovery, but counsel could not recall whether he ever listened to it. Prejudice established because with "conflicting eyewitness statements, the prosecution's case was far from compelling." In addition, the fact that the jury deliberated for four days after a three-day trial "underscores the weakness of the case against [the defendant]." The state court's decision to the contrary was objectively unreasonable. Counsel's conduct was also deficient in failing to call the defendant to testify after promising to do so in opening statement. While counsel testified that the defendant refused to testify at the last minute because of threats from his co-defendant, the court found the defendant's testimony to be more credible than counsel's, as counsel was "hostile and uncooperative" during the evidentiary hearing and "suddenly had a clear recollection of this single event, when he could not recall anything else." There was no tactical reason for counsel's decision "to promise the jury that [the defendant] would testify and then renege on that promise." Prejudice established as the jury was deprived of the defendant's testimony describing the details of his alibi and the basis of his belief that another man was the actual shooter. In addition, even though the jury was instructed not to consider the defendant's failure to testify against him, "it is reasonable to conclude that the jury nevertheless did so here."

> The jury could have surmised that the reason for [the defendant's] failure to testify, after his trial attorney promised he would, was that [counsel] had realized, at some point during trial, that [the defendant] was not a credible witness or, even worse, that he would commit perjury if allowed to take the stand.

The state court's decision was an objectively unreasonable application of *Strickland*. Counsel's conduct was also deficient in failing to present alibi testimony from the defendant's work supervisor. The supervisor had given a notarized statement to prior counsel and in two interviews had "unequivocally" asserted that the defendant was at work a 50-minute drive away at the time of the crimes. Counsel had never interviewed him and did not subpoena him for trial, but informed the jury he would testify. Counsel did not call him, however, and offered no strategy reason. Prejudice established because the supervisor "was a disinterested third party and had no apparent motive to fabricate an alibi" and his testimony would have been "certain and unequivocal." In addition, "the jury was expecting to hear [him] testify." Counsel's conduct was also deficient in failing to call the defendant's brother as an alibi witness. The brother car pooled with the defendant to work everyday and had been asked by counsel to testify. Counsel did not call him to testify, however, even though he was present in court. Counsel's alleged reasons for the failure were that the witness was related to the defendant, a gang member, and recently released on parole. "However, that a witness 'might not . . . make the best appearance' at trial is not a reasonable basis for failing to call a witness." Prejudice established because he strongly corroborated the alibi and would have clearly undermined the prosecution's "relatively weak case."

> [N]ot only were the multiple deficiencies individually prejudicial, but they also were cumulatively prejudicial. [Counsel] did not just botch one witness or one argument or one issue–he repeatedly demonstrated the lack of diligence required for a vigorous defense.

***United States v. Montgomery*, 676 F. Supp. 2d 1218 (D. Kan. 2009)**. Counsel ineffective in possession of 100 or more marijuana plants with intent to distribute case for failing to let the defendant testify and in failing to move to dismiss based on the government's destruction of evidence. The government searched the defendant's home and took photographs and videotape but it is impossible to determine the number of plants from the photos and video. Nonetheless, the government destroyed all the marijuana plants, except for ten samples, two days after the search. During trial, agents testified that they counted 101 plants with roots, stems, and leaves. The defendant told counsel that he wanted to testify. Counsel's conduct was deficient in this regard because he told the defendant he would withdraw from the case if he did, so the defendant dropped the subject. While counsel denied this, the court found the defendant's testimony credible as defense counsel had "a very long history of attorney discipline which involves complaints of improper withdrawal, communications terminating representation and truthfulness in communicating with others." The defendant would have testified that he routinely counted his plants and on the day of the search he had 91 plants and ten cuttings that did not have roots or growth at the time. While there was no prejudice during trial due to the defendant's failure to testify, there was prejudice when the failure to testify was considered in light of counsel's failure to move to suppress or move to dismiss based on the destruction of evidence. Counsel asserted that he did not file a motion to

dismiss because he planned to argue that the government had failed to prove there were at least 100 plants. This explanation was "nonsensical" though because there was "no reason why he could not do both." Counsel also stated that he believed a motion to dismiss would be frivolous because he could not establish bad faith. "[H]is testimony and case file suggest that he did not know the legal standard for showing bad faith in the Tenth Circuit." In short, counsel "did not reasonably investigate the facts and law regarding the government's destruction of evidence." In analyzing the case law and factors to be considered, however, the court found evidence of bad faith, including the government's failure to even follow DEA policy for which the government could not offer an innocent explanation and instead attempted to argue that it had followed proper policy. Thus, the factors weighed in favor of dismissing the charge that the defendant possessed more than 100 plants.

***Couch v. Booker*, 650 F. Supp. 2d 683 (E.D. Mich. 2009)**. Counsel ineffective in murder case for failing to investigate and rebut the medical examiner's conclusions that the victim died as a result of drowning in his own blood from the beating. The victim had consumed extremely large amounts of cocaine at a party gone awry. He was subsequently found sexually assaulting a woman and then beaten by the defendant and other men. Counsel's conduct was deficient in failing to investigate, which would have revealed that the victim was still speaking and coherent when police and firefighters arrived. He was combative when emergency medical personnel tried to render care and had to be restrained by five people. He was subsequently intubated and there was not blood in the airway leading to his lungs. The death was caused by pulmonary edema, "which has been associated by researchers with fatal levels of cocaine, such as the amounts found by toxicologists in the decedent." In short, the death "fit the pattern of a typical, sudden cocaine death occurring during a struggle while the person is subjected to police restraint" and was "accidental." While counsel had retained a defense expert, counsel did not provide the expert with the reports of the first or second responders and never talked to the expert, leaving that to co-counsel. By failing to provide the expert with the information, "defense counsel precluded [the expert] from conducting a complete review of [the state pathologist's] findings as to the cause of death."

***Hicks v. Howton*, 675 F. Supp. 2d 1050 (D. Ore. 2009)**. Under AEDPA, trial and appellate counsel ineffective in sexual abuse case. Trial counsel was ineffective in failing to adequately investigate and to cross examine witnesses. The defendant had an IQ of 60 and was charged with touching his step-daughter "with his hand, over her pajamas." The state offered a plea deal of 20-22 months, which was rejected. Counsel's conduct was deficient. The court noted first that the defendant's cognitive impairments raised serious questions about his ability to understand the severity of the charges, the risks inherent in going to trial, and the consequences of not accepting the plea offer. Nonetheless, trial counsel simply told the defendant "to 'think about' the plea offer, without further discussion or assistance."

> Advising a client to "think about" a plea presumes the client is able to assess the situation he is in, weigh the pros and cons of going to trial–whether it be a bench trial or a jury trial–and, in this case, take into consideration . . . sentencing and the possibility of consecutive terms of imprisonment. Asking a client to think about a plea is only reasonable advice when the client has the cognitive ability to do the necessary thinking, or is provided support.

Likewise, trial counsel failed to adequately investigate and present a defense. Trial counsel met with the defendant only briefly prior to trial and his "file contained no evidence witnesses were investigated or interviewed." "A file devoid of notes pertaining to investigation in preparation for trial is clear evidence that no investigation occurred." During trial, "counsel did not subject the State's case to meaningful adversarial testing." Counsel did not raise or challenge ambiguities and discrepancies in the witnesses' accounts of the touching. Counsel's failure could not be justified or explained because the defense theory was that the state could not prove its case and witness credibility was central to the state's case. In addition, proof that the defendant's acts were done for the "purpose of sexual arousal or gratification" was a required element of the offense but the state made no attempt to prove this. Nonetheless, counsel failed to seize on this opportunity and to offer the plausible explanation that the defendant did not have the required criminal intent. Instead, counsel "performed little cross-examination" and "did nothing to test the State's case" or consider the motives of the defendant's wife. Likewise, counsel waited until after conviction to "investigate his client's cognitive impairments," even though he had been receiving social security disability benefits for seven years by the time of trial. Counsel was also obviously aware of the impairments since he mentioned this in opening statements and sought to have the defendant's mother testify about this. The state court's finding that trial counsel was not ineffective was an unreasonable application of *Strickland*.

***Sturgeon v. Quarterman*, 615 F. Supp. 2d 546 (S.D. Tex. 2009)**. Under AEDPA, counsel ineffective in aggravated robbery case for two reasons. The case involved the robbery at gunpoint of a victim, who required a Vietnamese interpreter during testimony, by two black men. The crime occurred at night and involved the victim being repeatedly struck in the face. The victim gave descriptions of the attackers shortly after the crimes. The description did not match the defendant. The same day, a police officer stopped a car driven by the defendant. There were three passengers in the car, including co-defendant #1, who was the brother of the owner of the car. Co-defendant #1 had the victim's credit card, driver's license, and other incriminating evidence in his possession. The registration for the victim's car was found in the trunk of the car the defendant was driving. The defendant, the co-defendant, and a witness were all arrested. The robbery victim subsequently identified the defendant as one of his attackers. During retrial (following an initial appellate reversal), defendant testified as a state's witness. He testified that Co-defendant #2 had removed all of the victim's items from the victim's car and given them to him. He could not say whether defendant was involved or not. Counsel attempted to present an expert on the questionable reliability of eyewitness identifications, but this evidence was excluded because the proffered expert was unfamiliar with the facts of the case and because the expert provided insufficient information about the scientific studies on which he purported to rely. Counsel also attempted to call Co-defendant #2 to testify. He had been initially indicted, but charges were dismissed shortly after defendant's first trial when he plead guilty to unrelated charges. Co-defendant #2 refused to testify following the prosecutor's assertion that the charges had been dismissed without prejudice to refile against Co-defendant #2 if he made any inculpatory remarks. Counsel was ineffective in failing to obtain co-defendant #2's testimony. First, counsel should have objected that the applicable five-year statute of limitations had run on the aggravated robbery charges and a witness may not invoke the Fifth Amendment privilege against self-incrimination once the statute of limitations for that offense has expired. Second, counsel should have objected that the charges were dismissed by the state

"with prejudice" pursuant to a plea agreement, which could have been established by co-defendant #2's prior defense counsel. Prejudice established because co-defendant #2 would have testified that he was a participant in the robbery and that the defendant was not. The state's case was "not particularly strong" because it rested only on the victim's identification of him and his later arrest in the company of a man, who possessed the victim's property. Counsel was also ineffective in failing to adequately prepare and present the expert witness on the issue of eyewitness identification. Counsel should have prepared the expert for cross-examination about the studies he relied on by advising him "to come prepared with this information." Likewise, counsel should have prepared the expert for cross on the facts of this case "by providing him with materials pertinent to the case, such as the police reports and the transcript of [the] first trial, which information was readily available." Prejudice established because the expert's "credentials are extensive" and the "problems of cross-racial identification are well known." The expert "would have provided important support for [the] defense of mistaken identity." The state court's conclusions to the contrary were an "objectively unreasonable application of the *Strickland* standard." Reversal was also required on due process violations related to the state's misconduct in threatening the co-defendant with prosecution if he testified and related to the pretrial identification, which was suggestive.

**2008:** ***United States v. Thompson*, 561 F. Supp. 2d 938 (N.D. Ill. 2008)**. Counsel ineffective in felon in possession of gun case. The defendant was stopped for DUI and the gun was found on the floorboard behind or partially under the driver's seat. The defense theory was that the defendant had no knowledge of the gun. Defense counsel was ineffective for failing to interview the defendant's wife about her knowledge of the gun since she drove the vehicle on a daily basis. She would have testified that another man rode in the backseat shortly before the arrest and that she had personal knowledge that he had a gun similar in appearance to the one involved here. Counsel also objected and asked the court to advise her of her 5th Amendment rights when the prosecution asked if the gun was hers. Counsel had no strategy. "Counsel was doing anything but acting strategically; rather, he was quite plainly making it up as he went along." Even assuming this was strategy, it was not supported by adequate investigation because, if counsel had adequately investigated he would have known that she would deny the gun was hers rather than invoking her rights following the trial court's warnings. Prejudice found because this testimony, along with her testimony at trial that the gun could not have been placed where it was from the driver's seat because of the particulars of the vehicle, likely would have resulted in acquittal. Counsel was also ineffective in failing to impeach one of the police officers, who testified that the defendant had been given traffic citations that were later dismissed by state court prosecutors. If counsel had investigated, he could have presented affirmative evidence that the defendant had not been given any traffic citations. While the court did not find prejudice with respect to the trial, the court did find prejudice with respect to the motion to suppress the gun, which the court had denied under the inevitable discovery doctrine, but now finds was error. New trial granted and the motion to suppress hearing reopened.

***Byrd v. Trombley*, 580 F. Supp. 2d 542 (E.D. Mich. 2008), *aff'd*, 352 Fed. Appx. 6 (6th Cir. 2009)**. Under AEDPA, counsel ineffective in criminal sexual conduct case for several reasons. First, counsel failed to object to the introduction of Petitioner's ten-year-old forgery conviction and the prosecution's use of the conviction as "bad man" evidence. Second, counsel failed to investigate and present an expert witness to counter the prosecution's witnesses. The failure to obtain a defense

expert was not excused by cross-examination of the state expert. "Thorough cross-examination . . . does not excuse the abject failure of counsel to procure or even consult with an expert." Prejudice established because "the case turned on the credibility of Petitioner, as weighed against the credibility of the victim."

***Guilmette v. Howe**s*, 577 F. Supp. 2d 904 (E.D. Mich. 2008), *aff'd on other grounds*, 624 F.3d 286 (6th Cir. 2010). Trial and appellate counsel ineffective in home invasion case. Trial counsel was ineffective for conceding the entry element of the crime and focusing only on a mistaken identity defense. The alleged victim testified that her door "came crashing open" and she ran. When she looked back, no one was there, but she looked out the window and saw a man running off her porch to a van. She identified petitioner in two photo arrays, but at a preliminary hearing she was unable to distinguish between him and his brother. At trial, she could say only that petitioner looked like the man at her home. The only other evidence was a photo of a footprint in the snow taken from her sidewalk by police. After police left, the alleged victim also took a photo of a footprint on the threshold of the front door to her home. At trial, the prosecutor relied solely on this photograph to establish that the suspect entered the home. Counsel's conduct was deficient in conceding entry without investigating as a footprint expert opined that the threshold footprint was significantly different from the footprint found outside that police believed belonged to the suspect. While counsel's decision to focus on mistaken identity was likely strategy, the strategy was deficient in light of the alleged victim's credibility problems. Indeed, counsel even cross-examined her about the questionable value of the threshold footprint photograph. Likewise, an argument that the prosecution failed to prove entry would not have been inconsistent with the alibi defense.

> The most successful criminal attorneys are often those who can create a reasonable doubt in the jurors' minds by throwing up one or two or more plausible alternatives to the defendant's guilt. Individual jurors need not be persuaded by the same plausible alternative to guilt to vote an acquittal.

*Id*. at 916 (quoting *Moore v. Johnson*, 194 F.3d 586, 611 (5th Cir. 1999). Prejudice found because evidence suggesting that the person who made the threshold footprint was someone other than the suspect could have convinced the jurors that the prosecutor did not prove the element of entry. Appellate counsel's conduct was deficient in failing to challenge trial counsel's ineffectiveness. Prejudice established because the claim and a review of the photographs could have changed the result of the appeal.

***Espinal v. Bennett*, 588 F. Supp. 2d 388 (E.D.N.Y. 2008), *aff'd*, 342 Fed. Appx. 711 (2nd Cir. Aug. 18, 2009)**. Under AEDPA, counsel ineffective in second degree murder case for a number of reasons. First, counsel failed to investigate and discover the witness whose interview was recounted in a police report with the witness' name redacted. Counsel's conduct was deficient because this witness corroborated the defendant's alibi, which counsel had investigated without success prior to receipt of this document. Counsel thus had already chosen not to present an alibi. " Nonetheless, an existing trial strategy, even if initially reasonable, cannot excuse counsel's failure to investigate new evidence that could potentially exonerate his client or create reasonable doubt in

the minds of the jury." Prejudice established because counsel's deficient conduct "eliminat[ed] his best opportunity to cast significant doubt on the prosecution's case at trial."

> Although petitioner's alibi was before the jury, through his videotaped testimony, it was entirely uncorroborated. It is reasonable to expect a jury to discount an uncorroborated and self-serving statement offered by a defendant, and to give greater weight to an alibi corroborated by a witness whose credibility is not initially suspect. Moreover, this corroborating evidence would not have been merely cumulative, . .
> . because it would have significantly strengthened the alibi claims already before the jury through petitioner's videotaped statements.

The state court's holding to the contrary was an unreasonable application of *Strickland* and was based on an unreasonable determination of the facts in light of the evidence presented. Second, counsel's conduct was deficient in failing to introduce the victim's statement, given to police before he died, that identified someone other than the defendant as the shooter. This statement was admissible under New York's "constitutional" exception to the hearsay rule and could have been used to rebut the prosecution's argument that the defendant was a shooter. While the court did not find prejudice based solely on this issue, the court considered "the cumulative effect of counsel's errors at trial." Third, counsel's conduct was deficient in failing to impeach a government witness with his prior inconsistent statements that did not mention that there were two shooters rather than one. Again, while not finding individual prejudice, the court held that "counsel's failure to investigate evidence that might have corroborated petitioner's alibi defense was error of constitutional importance."

***McGahee v. United States*, 570 F. Supp. 2d 723 (E.D. Pa. 2008)**. Counsel in drug and robbery case ineffective for failing to investigate and present three potential alibi witnesses made known to counsel by the defendant. "If the attorney can easily investigate, his decision not to do so raises greater concerns than if undertaking an investigation would clearly require the assembly of great resources." Counsel's conduct was not excused by strategy. "When an attorney knows the details of what a certain witness will testify to, and then chooses not to interview that proposed witness, the decision is due greater deference than when the attorney knows nothing about the potential testimony." Here, counsel "elected not to investigate the alibi even though he knew none of the details about the potential defense, and nothing suggested that his investigation 'would be in vain.'" Likewise, counsel's conduct was not excused due to insufficient contact information being provided to him. "To investigate means to seek out unknown facts. . . . [I]n this day and age, searching for a phone number is not difficult." In addition, counsel was provided with the name of the employer for two of the witnesses . "Surely, it does not take a trained investigator to find the phone number for a business or a . . . deputy sheriff. If [counsel] had made even cursory attempts to contact these witnesses, to find their phone numbers, and failed, it would be another question. But in this case, no such effort was made." Counsel also could not rely on the lack of funding for an investigator because "there is no evidence, . . . that he requested funds for an investigator to search for the alibi witnesses."

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> A final factor, and perhaps the most important, is the nature and quality of the strategy employed at trial. For example, where the defense counsel's strategy is to attack a weak prosecution case, and where the presentation of the un-investigated evidence could distract from that strategy, the attorney's decision not to investigate is owed deference. In contrast, where an attorney fails to investigate a lead that might provide help for the defense actually employed at trial, the decision deserves greater scrutiny.

*Id*. at ___ (citations omitted). Counsel here "sought to create reasonable doubt by attacking the prosecution's witnesses and calling into question the work done by the investigating officers" and two of four counts were dismissed. Nonetheless, counsel's "decision cannot be labeled a strategic choice between putting on an alibi defense, on one hand, versus merely seeking to create reasonable doubt, on the other" because counsel failed to investigate.

> Even if a particular trial strategy may be strong, a lawyer should still investigate other leads, especially those that do not conflict with that strategy. Various defenses need not be mutually exclusive; to determine that one strategy might work is not to exclude all other options.

Prejudice established because the Government's case at trial was not overwhelming and there were no eyewitnesses other than a witness attacked by defense counsel for delaying in coming forward with allegations against the defendant and receiving benefits in his own case for disclosing the defendant's name. "[A]dditional evidence, even of relatively minor importance, would have been more likely to tip the balance in [the defendant's] favor at trial than if the Government's case had been more extensive." Although the alibi witness' had their own credibility issues and contradicted each other to some extent, "the testimony was basically consistent." In order to convict, a jury would almost have to believe all three men, one of whom was a police officer, were lying. In addition, it would be their word against the impeached Government witness. "Judging credibility is the paradigmatic role of the jury."

**2007:** ***Hays v. Farwell*, 482 F. Supp. 2d 1180 (D. Nev. 2007)**. Under AEDPA review, trial/appellate counsel was ineffective for numerous reasons in case where the petitioner was convicted of four counts of sexual assault on a minor and four counts of lewdness with a minor for alleging sexually abusing his oldest daughter, who was then eight years old. While many of the petitioner's claims had not been presented in state court and there was no showing of cause and prejudice, "the default was forgiven based on his preliminary evidence demonstrating to this court that he is actually innocent of the charges against him." Most of the claims were reviewed de novo because they had not been raised in state court or had been procedurally barred in state court. The charges arose because the petitioner's wife, who "was an abusive and neglectful mother" of their five children, "wanted desperately to be released from the responsibility of her five young children and from her marriage." In order to achieve her goals, she "schooled and coached eight-year old Jennifer about adult sexual behavior and then threatened and coerced her into making accusations of sexual abuse against her father," who was not himself abusive to the children but "was unable, or unwilling to stop his wife's actions" in general. Before reaching the issues related to counsel, the court granted relief

on the bases of: (1) insufficient evidence to support the convictions; (2) improper denial of a new trial when the daughter, who was no longer in her mother's custody, immediately confessed after the trial that her testimony was false and had been coerced; (3) double jeopardy; and (4) prosecutorial misconduct. Counsel was also held to be ineffective during trial for: (1) failing to request an evidentiary hearing on the motion for new trial in order to present the daughter's testimony concerning the recantation; (2) failing to seek an independent medical expert to challenge the testimony of the examining nurse, which would have resulted in testimony (supported even by the state's expert in habeas) that the photographs taken of the girls genitalia revealed no evidence of abuse or anything abnormal; (3) conceding guilt in closing argument; (4) failing to challenge the veracity or expertise of the social worker and the examining nurse called as state's witnesses and "merely enhancing the State's evidence by reinforcement"; (5) failing to object to the prosecutor's improper argument denigrating the presumption of innocence; and (6) failing to argue on the defendant's behalf at sentencing.

***Schulz v. Marshall*, 528 F. Supp. 2d 77 (E.D.N.Y. 2007), *aff'd*, 345 Fed. Appx. 627 (2nd Cir. 2009)**. Under AEDPA, counsel ineffective in robbery case for failing to interview and adequately examine the only witness to identify the defendant pre-trial and in failing to present alibi evidence. If the eyewitness had been interviewed, counsel would have learned that when the police showed the witness a photo array the day after the robbery, the owner of the restaurant robbed, who was serving as an interpreter, pointed to the defendant's picture and told the witness that he was the person. He also told the witness that if she did not help put him in jail, he would be released and hurt her. The eyewitness also would have told counsel that the defendant was innocent and she was 90% certain of her identification of another man, who had some similar physical characteristics to the defendant and had been arrested for numerous robberies, including a robbery on the same night three hours earlier, at a location about 10-12 miles away. The defendant's roommate also would have given alibi testimony. In failing to find ineffective assistance the state court unreasonably applied the *Strickland* standard. During trial, the eyewitness did not identify the defendant, but the restaurant owner did. Nonetheless, counsel did not present the alibi witness. Counsel's conduct was deficient and not based on valid strategy. "The fact that only one of the two eyewitnesses had identified petitioner at the trial and [counsel] viewed the prosecution case as weak does not justify the failure to call an alibi witness with no known credibility issues." Likewise, counsel's concern that the jury would wonder why the defendant did not also testify to the alibi was insufficient in light of counsel's other major failure in not interviewing the eyewitness prior to her testimony and to show her the picture of the man the defense asserted was the guilty party. While counsel stated that he wanted to interview the witness, he testified the prosecutor prohibited this. This testimony was contradicted by the prosecutor, though. Even if counsel's testimony was accurate, "the decision to abandon such an interview attempt certainly cannot be considered strategic." Counsel's conduct was deficient in failing to pursue this because there was "nothing to lose" and "no 'downside' at all" in interviewing the witness. If counsel had conducted the interview, counsel could have introduced the evidence against the other man and impeached the restaurant owner who identified the defendant during trial. Prejudice established because "[t]his [was] a case of underwhelming evidence. . . . All of the evidence against [the defendant] was affected by his counsel's failures." *Id*. (quoting *Lindstadt v. Keane*, 239 F.3d 191, 205 (2nd Cir. 2001)).

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**2006:** ***Garcia v. Portuondo*, 459 F. Supp. 2d 267 (S.D.N.Y. 2006)**. Under AEDPA, counsel ineffective in second-degree murder case for failing to adequately investigate and present alibi evidence, including foreign public documents. The defendant consistently maintained his innocence and asserted that he was in jail in the Dominican Republic on the day of the murder, but the jury heard almost nothing of this alibi. Counsel gave notice of the alibi with supporting documents prior to trial, but realized admissibility might be an issue. The trial court expressed doubt as to admissibility but suggested that counsel brief the issue. Counsel failed to do so and never offered the documents into evidence. The state's case consisted of a single eyewitness. This witness, who was on Valium at the time of the crime and Thorazine during trial, identified the defendant as one of three assailants in a lineup five months after the murder after initially identifying someone else in the same lineup. This witness had made a number of inconsistent statements. The defense presented the victim's sister as its sole witness. She testified that the defendant and her brother were friends, she did not see the defendant getting into the car when she saw her brother on the ground, and that she had talked to the defendant on the phone shortly after the murder and he was in the Dominican Republic. The prosecution discredited this testimony because she had no personal knowledge of his whereabouts and had not dialed the phone. In habeas, the District Court denied the state's "motion to dismiss the petition as untimely, finding that the statute of limitations was tolled because Garcia's was one of the "exceedingly rare case[s] in which the petitioner makes out a credible claim of actual innocence." Counsel's performance was deficient because the defendant's family had provided him with numerous official documents from the Dominican Republic to establish the defendant's alibi, but he made no efforts to verify the authenticity of any of the documents in his possession and made no effort to obtain additional documentary evidence to support the alibi. Counsel was also aware of several alibi witnesses who were prepared to testify, but they were not called. While counsel believed that the witnesses were truthful, he did not interview them because they were relatives and friends of the defendant's wife and counsel believed they would not likely be credited by the jury. If counsel had investigated, he could have found additional documentary and testimonial evidence to support the alibi and could have established the admissibility of the foreign documents.

> [A] decision not to prepare an adequate defense because a defense lawyer thinks the prosecution's case is weak is not "strategic." It is motivated by the desire to avoid work, not to serve the best interests of the defendant. "No lawyer could make a 'strategic' decision not to interview witnesses thoroughly, because such preparation is necessary in order to know whether the testimony they could provide would help or hinder his client's case, and thus is prerequisite to making any strategic decisions at all." Thus, . . . "[t]here is no reasonable trial strategy that would have excluded at least conducting interviews of the alibi witnesses to determine whether they could provide exculpatory evidence."

*Id*. at ___ (citations omitted). Likewise,

> Deciding that investigation is costly is not, as *Strickland* requires, equivalent to a reasonable and informed decision that investigation is unnecessary. Indeed, as one court has held, "There are costs involved whenever defense counsel is obliged to undertake an investigation. These costs are often substantial....

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> [However, h]aving accepted the responsibility of representing a criminal defendant, counsel owes a duty to his client that will on occasion require him to make financial outlays that might be considered unfair for an ordinary businessman who, unlike a licensed attorney, has not voluntarily adopted an enhanced ethical obligation to society."

*Id*. at ___ (quoting *Thomas v. Kuhlman*, 255 F. Supp. 2d 99, 111 (E.D.N.Y.2003). If counsel believed his retainer was insufficient to make investigation "financially feasible, he could have petitioned the trial court for public assistance. And even if the court denied his request, [he] could have undertaken less costly investigative measures, such as interviewing the available witnesses and issuing subpoenas for locally available information." In short, counsel "could not have made a strategic decision not to present the alibi because he did not then know the details of such a defense or how credible it would have been." Prejudice found because "[t]here is . . . little doubt that the alibi evidence, had it been produced at trial, would have altered the landscape substantially. The decision of a jury that did not weigh this evidence is not reliable." Under AEDPA, the state court's decision was an unreasonable application of clearly established federal law because the state court rejected the claim on the basis that the defendant had not established his alibi when he was required "only to show that trial counsel's performance fell below professional standards of competence and that the outcome of the case probably would have been different but for this deficiency."

**2004:** ***Mitchell v. Ayers*, 309 F. Supp. 2d 1146 (N.D. Cal. 2004)**. Counsel was ineffective in burglary case for failing to interview and present testimony of witness that would have corroborated petitioner's defense that he entered the home only to escape from people who were threatening his life. During the break in, the family members understood petitioner to say at times "don't call the police" and "call the police." Other than the window through which he entered, nothing in the home was disturbed. When petitioner was arrested he was clearly impaired by drugs. Petitioner testified that he entered the home because he was being chased by a man to whom he owed money because, rather than selling drugs for the man as he was supposed to, he would sometimes use the drugs because he was addicted to crack cocaine and used heroin. A witness was available to corroborate petitioner's testimony that a man with a gun had confronted him outside the home after petitioner had been using crack, which made him "paranoid." Counsel knew about the potential witness and could have easily located him because he was in confinement and, on the day of trial, was in the court holding area along with petitioner. Counsel's conduct was deficient in failing to interview the witness, because whether Petitioner was actually threatened or only perceived that he was threatened in a drug- induced paranoid reaction, the witness would have supported Petitioner's otherwise uncorroborated testimony and was, therefore, "critical." Prejudice found because "[t]his was a close case in which the jury deliberated for an entire day after receiving only one and half days of evidence" and the prosecution evidence of intent "was relatively slim." Analyzing the case under the AEDPA, the court held that, due to the significant potential impact of the witness' testimony, the State court's decision was an objectively unreasonable application of federal law as set forth in Strickland.

***United States v. Ramsey*, 323 F. Supp.2d 27 (D.D.C. 2004)**. Under the AEDPA, counsel was ineffective in drug distribution case for a number of reasons, but primarily failing to move for mistrial after the court suppressed an inculpatory statement after it was already heard by the jury.

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Counsel failed to realize until he heard the testimony that the defendant was questioned after he invoked his rights. This error was considered in conjunction, inter alia, with counsel's ignorance of the law and failure to understand the implications of an entrapment defense with respect to allowing evidence of predisposition until advised of the implications by the court. This resulted in counsel abandoning the sole defense in the midst of trial without having the defendant testify. Counsel's conduct was deficient and the proffered strategy reasons for failing to seek a mistrial were "so nonsensical that the Court is left to conclude that [counsel] simply abandoned what he had decided at some point during the trial was an unwinnable case, and had been unwilling to invest the time and effort that would be required by a second trial." Prejudice found, regardless of the likely outcome of a new trial, because counsel's deficient conduct deprived the defendant of a mistrial and, thus, "the opportunity for a second trial he otherwise would have had, untainted by an opening statement to the jury of an entrapment defense he could not present." A mistrial would have afforded counsel an opportunity to advise the defendant "of the substantial advantages of . . . pleading guilty in view of the strength of the government's case" after counsel had heard all of the evidence and realized that an entrapment defense could not be mounted.

***Tucker v. Renico*, 317 F. Supp. 2d 766 (E.D. Mich. 2004)**. Counsel was ineffective in criminal sexual conduct and breaking and entering case for failing to introduce evidence tending to prove that the defendant and the victim has a long-term, common-law, spousal relationship. The alleged victim downplayed her relationship with the defendant as only "spiritual," explained her two children by him as a result of prior sexual assaults, and denied that he lived with her. Analyzing the case under the AEDPA, the court held that ineffective assistance of appellate counsel established "cause" for not asserting trial counsel's ineffectiveness on direct appeal. Appellate counsel asserted only that the evidence was insufficient to support the convictions. Trial counsel was ineffective because adequate investigation and presentation would have revealed that the defendant lived with the alleged victim up through the time of his arrest, that the alleged victim held herself out as the defendant's wife, and that the defendant had an on-going relationship with their children and the alleged victim's family. Prejudice was found because these facts tended to negate the non- consensual nature of their sexual relations.

***Casey v. Frank*, 346 F. Supp. 2d 1000 (E.D. Wis. 2004)**. Trial counsel was ineffective in sexual assault case for failing to obtain the case file from the defendant's previous attorney, which contained numerous witness statements undermining the credibility of the alleged victims and an alleged corroborating eyewitness. The defendant was initially charged in 1993 for sexually assaulting a girl in the neighborhood. He was represented by a public defender, who assigned an investigator to interview potential witnesses. The investigator took a number of statements that raised questions about the credibility of the alleged victim and the prosecutor ultimately dismissed the charge without prejudice. A year later, the defendant's step-daughter alleged that the defendant sexually assaulted her, but the prosecutor brought no charges. In 1997, the stepdaughter alleged that the defendant had assaulted her in 1992 and that she witnessed the defendant assaulting the neighbor girl in the same time period. The defendant was charged with both assaults and retained counsel. Counsel requested two specific documents from the defendant's prior counsel, but did not request the entire file, which contained numerous witness statements challenging the credibility of both alleged victims and an alleged corroborating eyewitness. He also failed to independently discover

the witnesses that previously gave exculpatory statements. While the state court held that trial counsel requested the previous attorney's entire file, this finding was an unreasonable determination of the facts under the AEDPA because the evidence showed only that counsel asked for two specific documents. Counsel's conduct was deficient because counsel failed "to obtain predecessor counsel's investigative reports" or to otherwise adequately investigate. While the state court found that counsel's failure was excused because counsel did not know the additional documents existed, this finding was unpersuasive.

> A failure to investigate is not excused because it is not known in advance what will be found. That is precisely the reason to investigate. A lawyer must request a file to discover what documents it contains.

Here, it was particularly important because prior counsel represented the defendant not long after the alleged incident when the "witnesses' memories would have been fresher." Although the state court did not specifically address the prejudice analysis under *Strickland* and it was "debatable whether AEDPA applies to the court's determination on this point," *id*., the court applied the AEDPA standard. The state court's determination was unreasonable because the court "turned a blind eye to the potential impact of the witnesses who gave statements" to prior counsel. Indeed, the state court

> failed even to mention most of the statements, much less analyze their potential significance. The critical issue in the case was credibility, and a number of the statements severely undercut the credibility of the state's principal witnesses.
> . . .

Moreover, many of the statements would have been admissible and none were cumulative. Thus, there was "more than a negligible chance that the statements counsel failed to obtain would have affected the outcome of the trial." *Id*.

### 3. Military Cases

***United States v. Garcia*, 59 M.J. 447 (C.A.A.F. 2004)**. Counsel ineffective in robbery, conspiracy, and stolen property case for two reasons. First, civilian defense counsel waived the Article 32 pre-trial investigation without the accused's knowledge. This was deficient because waiver of this hearing must be personal to the accused. It was prejudicial because this hearing serves as a discovery proceeding for the accused and "stands as a bulwark against baseless charges." Here, if the accused had seen the potential strength of the government's case, he might have sought a plea agreement limiting his sentence. Second, military counsel (who tried the case alone) was ineffective for failing to adequately advised the accused of his options mid-trial when the strength of the government's case was clear and the accused first confessed his full involvement in the crimes to counsel. Without explaining the options to the accused, such as exploring the possibility of a plea agreement or changing the plea to guilty, counsel advised the accused to testify admitting his full involvement in the crimes. Counsel's conduct was deficient and prejudicial. Much of what counsel elicited bolstered the government's case and opened the door to cross eliciting aggravating and damaging

details not previously established by the government. Counsel also did not elicit any expressions of remorse or contrition so the testimony "had no mitigating impact." Counsel's argument in sentencing also highlighted the accused's culpability and including a statement that the accused was only "three-and-a-half pounds of trigger pull away from" murder. Under the circumstances, there was no discernable trial strategy for counsel's actions. "The extreme harshness of the sentence returned by the members is strong evidence" of prejudice. The government requested a sentence of a $23,000 fine and 86 years, but the penal returned a sentence including a $60,000 fine and 125 years of confinement.

### 4. State Cases

**2018:** ***State v. Lopez*, 410 P.3d 1117 (Wash. 2018).** Reinstating the grant of a new trial based on trial counsel's failure to investigate the case as a result of his severe depression. Defendant was convicted by a jury of first degree child molestation, arising out of an allegation by a six-and-a-half year old child who was a passenger on the school bus that defendant drove, that defendant touched her butt and itched and tickled her vagina like he was trying to pinch her. After the verdict but before sentencing, defendant fired his trial lawyer and hired a new attorney, who filed a motion for new trial based on IAC of original counsel. The motion argued that original counsel's severe mental depression, coupled with nearly contemporaneous disbarment, constituted IAC per se, removing the requirement of proving deficient performance or prejudice. Motion counsel also alleged that counsel's failure to investigate and call witnesses that defendant had identified constituted deficient performance. The record indicated that trial counsel failed to appear at court one day without explanation, called in sick at the last minute on the morning of trial another day, and usually showed up late when he did show. He failed to submit briefing requested by the court. The trial judge was alarmed and asked defendant if he wanted a new attorney. Counsel's investigator testified that she had a meeting with counsel months before trial to create a checklist for preparing for the defense, but after this meeting, counsel "checked out." He canceled numerous meetings with her, "with a different excuse every time." He stopped communicating with the investigator altogether, so that she could not communicate important case information to him. The investigator did not document the important case information she obtained in a memo because counsel stopped paying her, and she had worked for two months without payment because counsel did not submit a request for additional funding even though he told the investigator he had. The records showed he did not submit the request for additional funding until the trial ended. The trial court concluded, based on this evidence and its own observations of counsel's performance, that it was clear that if counsel had not been handicapped by his depression, he would have been more effective, and would have done things such as investigating reputation evidence and calling reputation witnesses. It granted the motion for new trial. The Court of Appeals reversed, interpreting the trial court's finding of IAC to be based solely on counsel's failure to call reputation witnesses as to defendant's sexual morality and decency, and such evidence was not admissible under the law of that division. It also interpreted the trial court's finding that counsel's depression had severely handicapped his representation as a per se prejudice finding, and held that defendants have no right to counsel free from mental illness. On petition for review, the Supreme Court of Washington reversed the Court of Appeals' reversal of the granting of the motion for new trial, and reinstated the grant of that motion. Its review of the trial court's factual findings with regard to IAC was for substantial evidence, meaning evidence that is sufficient to persuade a rational,

fair-minded person of the truth of the finding. If such is found, the reviewing court would not substitute its own judgment for that of the trial court. The Supreme Court held: (1) there is no presumption of deficient performance when counsel is affected by mental illness, what matters is the effect of the disability on counsel's performance, and the trial court properly analyzed the issues under this focus; (2) the trial court properly found that counsel's performance was deficient and without strategic or tactical explanation after taking into consideration the trial investigator's declaration and testimony, counsel's audio-recorded interview and declaration, a letter by counsel's psychologist, and the court's own observations during trial, including counsel's failure to conduct preparation for trial that he had deemed necessary when he was well; (3) the evidence "supports the trial court's implicit legal conclusion that this adverse effect amounted to prejudice," 410 P.3d at 1128, because the case was not a slam-dunk for the state, and depended solely on the credibility of a six-and-a-half year old's contradictory report, the jury deliberated for over a day, and the trial court found that it was a close case that could have gone the other way.

***Edward M. v. Commissioner of Correction*, __A.3d.__, 186 Conn.App. 754 (Conn. App. Dec. 25, 2018).** In case where petitioner was convicted of sexual assault in the first degree and risk of injury to a child, based upon petitioner's alleged sexual abuse of his daughter, trial counsel was ineffective in failing to present evidence to corroborate his assertion that he was circumcised, which conflicted with testimony presented by the prosecution. Counsel in petitioner's first habeas proceeding was also ineffective in failing to challenge the omission by trial counsel. In this case, there was no physical evidence of sexual abuse and the state admitted during closing argument that the case was a contest of credibility between petitioner and his daughter. The second habeas court hearing petitioner's case found that petitioner's daughter had described his penis as having skin on it and wrinkles, and she and her mother both testified at trial that he was uncircumcised. Both petitioner and his girlfriend at the time testified that he was circumcised. Trial counsel did not offer available medical records, testimony from a neutral third party or medical witness, or photographs of the petitioner's penis. During deliberations, the jury sent a note asking why such evidence had not been presented. The second habeas court granted relief to petitioner, which the state appealed. Under Connecticut law, "[t]he use of a habeas petition to raise an ineffective assistance of habeas counsel claim, commonly referred to as a habeas on a habeas, was approved by our Supreme Court in *Lozada v. Warden*, 223 Conn. 834, 613 A.2d 818 (1992)." In that case, the Connecticut Supreme Court had determined that the statutory right to habeas counsel includes an implied requirement that habeas counsel be effective. The state argued that the habeas court improperly determined that evidence of whether petitioner was circumcised at the time of trial, years after the alleged abuse, was relevant and admissible at trial, disregarded trial counsel's tactical decision to present evidence of petitioner's circumcised penis only through testimony, and relied on trial counsel's admission that failing to present the medical evidence was a mistake. The Appellate Court of Connecticut affirmed the habeas court's grant of relief, finding that the photographs and medical evidence of petitioner's circumcised penis at the time of trial met the extremely low standard for relevance, even if they did not affirmatively prove that petitioner was circumcised at the time of the alleged abuse. Trial counsel's failure to present this evidence was not a tactical decision; he admitted that he did not consider taking a photograph or having some appropriate person view the petitioner's circumcised penis and testify. Trial counsel admitted that he was distracted from this issue by other evidence in the case and missed the importance of the medical records. Habeas counsel failed to raise this at petitioner's first habeas trial even though petitioner had included this claim in his pro se petition, and even though trial counsel urged habeas

counsel to raise this issue. The failure to present the evidence was prejudicial – given that the circumcision issue was the major point of dispute at the trial, there is a reasonable probability that further evidence of the petitioner's circumcision would have caused a different result. The fact that the jury asked this question, did not receive an answer, and then convicted petitioner is significant.

***Fahnley v. State,* 188 A.3d 871 (Me. 2018).** Affirming grant of relief in sexual abuse of a minor case where trial counsel failed to present evidence countering the prosecution's case. Petitioner was convicted by a jury of one count of sexual abuse of a minor and acquitted of another count of sexual abuse of a minor and of a charge of gross sexual assault. In a post-conviction review petition, he alleged IAC of trial counsel for counsel's (1) failure to present exculpatory evidence, including medical records and credit card records; (2) failure to present witnesses; and (3) failure to present evidence that he had told petitioner he was going to present, without discussing this with petitioner. The court granted the petition and vacated the conviction of sexual abuse of a minor. The court found that counsel had failed to interview witnesses who could have supported at least a partial alibi, and this constituted a failure to make a reasonable investigation; failed to present potentially exculpatory evidence, including evidence that the alleged victim's family was angry at petitioner because he had stopped financial support to their family, even after counsel told petitioner he was going to present it; and failed to consult with petitioner with regard to overarching defense strategy, abandoning the defense he discussed with petitioner and which petitioner wanted presented. The court also found that petitioner was prejudiced by this deficient performance because witnesses and evidence were available to support his defense that neither he nor the victim were where the victim alleged, and witnesses and evidence that provided a motive for the victim and his family to retaliate against petitioner was not offered. The state appealed the grant of relief. The Supreme Judicial Court of Maine applied a "deferential standard of review to the findings of [the] post-conviction court," noting that in order for the state to prevail, the court "would have to conclude that the record is devoid of any competent evidence to support the court's finding." 188 A.3d at 875. Although the state noted that there was evidence to support some of the tactical decisions of counsel, that was not the guiding standard. The judgment was affirmed.

***Robinson v. State,* 428 P.3d 225 (Kan. Ct. App. 2018).** In arson-murder case, trial counsel was ineffective for failing to investigate and present sufficient expert testimony to refute the claims of the state's expert. Petitioner was convicted in state court of reckless second-degree murder and aggravated arson after he had first been indicted in federal court but the federal case was dismissed. The government's fire expert testified that the fire was intentionally set on the stairs using an open flame and a flammable liquid. Petitioner told detectives that he could have been smoking crack cocaine in the hall and could have thrown lighted matches on the floor. In state habeas proceedings, petitioner alleged numerous deficiencies by trial counsel. Following a hearing, the habeas court ruled that petitioner's counsel were ineffective for failing to investigate and present sufficient expert testimony to refute the claims of the state's expert, that this failure was prejudicial, and that cumulative trial counsel errors required relief. The Court of Appeals of Kansas affirmed the habeas court's grant of relief, using the standard of review of determining whether the habeas court's findings were supported by substantial competent evidence, whether the findings supported the court's legal conclusions, and applying a de novo standard to the habeas court's conclusions of law. It determined that the habeas court's finding of cumulative errors was insignificant given the expert evidence deficiency. It noted that the district court held that trial counsel performed an

insufficient investigation into the use of an arson expert. Arson cases generally rely on expert opinions that a person intentionally started the fire, and therefore, it is incumbent upon defense counsel to counter the cause and origin evidence by exploring the possibility of using its own experts. Counsel here waited until two weeks before trial before consulting with someone who had no expertise in determining the cause and origin of fires, did not offer counsel an opinion about the cause and origins of this fire, and only provided counsel notes for use in cross-examination of the state's expert witness. At the habeas hearing, petitioner established that the state's expert's opinions were vulnerable to attack because they were not based on the actual physical evidence and only on a process of elimination of causes, which is not the product of the scientific method. The appellate court noted that there were vivid contrasts between the preparation of trial counsel and habeas counsel, and between the state trial expert and the habeas defense experts. The trial lawyer did not hire an investigator and did not hire an arson expert, but rather a person who did not point out any flaw in the state's evidence. He did not try to hire someone else because he doesn't "go around trying to find people that are just opinions for hire." The defense "expert" was asked to assist on the case as a consulting expert. He gave trial counsel a timeline and recommended cross-examination questions and had an hour-long conversation with someone on the defense team. He was not a member of arson or fire investigators organizations. The habeas lawyers presented testimony of the federal public defenders who had represented petitioner before his federal case was dismissed. They had consulted with an expert who had written a foundational text on arson investigation and participated in the group that put together the Guide for Fire and Explosion Investigations. Counsel "studied [that guide] and used it in the preparation of his defense." 428 P.3d at 230. They moved to have the guide recognized as a learned treatise so they could use it to help with cross-examination of the state's expert. They had an investigator interview as many witnesses from the scene as possible. They moved for a *Daubert* hearing on the method the state's expert used to attempt to detect flammable accelerants. They believed the state's expert's methods did not fit with the recommendations of the guide. They also felt that the state's expert's opinion that petitioner did not flick a lit match was based on his personal belief that petitioner was not truthful, and he was not permitted to discuss that because it was outside his area of expertise. A habeas defense expert was a fire investigator who had been a fire fighter for 15 years, obtained certification through an association of fire investigators, and was a member of those organizations. He reviewed the fire investigation report, the report of the dog handler who investigated the case, read testimony from the original trial, and viewed photos and reviewed witness statements. He testified that the state expert's methodology violated the scientific method. There were numerous reasons besides the use of an accelerant why the fire spread rapidly that applied here. The appellate court noted that on appeal, many of the challenges the state raised to the habeas court's findings and conclusion were based on misinterpretations of what the habeas court actually did and found. Counsel's performance was deficient because counsel contacted the "expert" less than two weeks before trial and did not talk to another expert when the first proved unhelpful, not because (as the state contended) counsel did not call his expert to testify nor because he did not ask for a continuance to find an expert. The deficiency was prejudicial because the state expert's opinion could have been impeached, leaving the state with no case that petitioner intentionally started the fire. There was no physical evidence of any chemical accelerants at the scene. The significance of the gas can found at the scene was speculative, and the speed of the fire could have been caused by the structure of the apartment house.

**Capital Case*

**2017:** ***Marr v. State of Idaho*, 408 P.3d 31 (Idaho 2017).** Petitioner was charged with felony attempted strangulation and domestic battery with a traumatic injury of his wife and he was convicted by a jury on the domestic battery charge. The district court granted his petition for post-conviction relief on grounds of ineffective assistance of counsel at trial and sentencing. The Court of Appeals reversed. The Supreme Court of Idaho reversed the Court of Appeals, and affirmed the district court order granting petitioner relief on IAC grounds, ruling that trial counsel's failure to investigate petitioner's wife's character for aggression and belligerence when intoxicated and to discover and present evidence about this was prejudicial under the federal *Strickland* standard. Under Idaho law, a defendant can offer evidence of the victim's pertinent character trait, including the victim's trait for violence, in order to show the victim was the aggressor or that the defendant's force used was necessary for self-protection. Counsel should have, but failed to, investigate and present the testimony of a law enforcement officer who would have said that petitioner's wife had a reputation of being belligerent, difficult, and physically resistant when intoxicated, which corroborated petitioner's contention that he was acting in self-defense when he exercised force against her to protect himself. Counsel admitted at the post-conviction hearing that she missed this evidence (thus she did not make a strategic or tactical decision to exclude it), and she testified that despite being aware of the wife's reputation for being a nasty drunk, counsel did not interview anyone about this. The error was prejudicial because the jury's acquittal of petitioner on the attempted strangulation charge, and the wife's inconsistent testimony, demonstrated that the jury had some doubts about the wife's credibility – it is possible the jury would have acquitted petitioner of both charges had it heard the testimony of the law enforcement officer.

***State v. Scott*, 397 P.3d 837 (Utah Ct. App. 2017).** In case where defendant was convicted of the murder of his wife, trial counsel was ineffective in failing to argue that a threat made by the victim to defendant prior to the killing was admissible non-hearsay. Defendant admitted to killing his wife but argued that he had acted under extreme emotional distress, which would mitigate the murder charge to manslaughter. During his testimony, defendant stated that in the time period leading up to the killing, his wife's gun had been removed from the gun safe. He then referenced a threat having been made. When trial counsel attempted to elicit from defendant who had threatened who, the prosecutor objected on the ground that trial counsel couldn't get the information in without eliciting hearsay. Trial counsel acquiesced without making a counter argument. When defendant made further reference to the threat the trial court interrupted and called for a sidebar. The trial court admonished trial counsel to stay away from that line of questioning because the responses would be hearsay. Again, trial counsel acquiesced without any argument. At the conclusion of evidence, the jury was instructed on extreme emotional distress. It was told that "`[e]motional' distress does not include ... distress that is substantially caused by the defendant's own conduct." During deliberations, the jury sent two notes to the trial court. The first asked "What is the legal definition of 'substantially caused?'" The next note informed the court, "We are at an absolute impasse, 6-2," and continued, "Two feel that 'substantially caused' needs to be 'the majority of the time.'" The trial court instructed the jury to continue deliberating. Defendant was convicted of murder. On appeal, the State conceded that a threat made by the victim to defendant would not have been hearsay because it was offered not for the truth but for showing its impact on defendant. Trial counsel's failure to correctly argue the rules of evidence was deficient performance as there was not strategic reason not to argue that the threat was admissible. Even though defendant testified that "there was a threat made" and seeing that his

wife's gun was missing from the safe made him think "the threat was serious," he was precluded from providing any other information regarding the threat, including the surrounding circumstances, the words used, and the effect it had on him. After being shut down by the trial court, trial counsel did not argue, or even imply, that the threat played a role in special mitigation. In contrast, the prosecutor's closing argument stated that the victim "was no threat" and had not "provoke[d] him." The prosecutor asked the jury "what reasonable basis does [defendant] have to make [the] claim that simply the absence of that gun from the safe creates extreme emotional distress[?]" On this record, "testimony of the specific threat and its effect on [defendant] would have given the jury more evidence on the very point that was in dispute."

> In sum, the jury notes demonstrate the jury was at an impasse over whether [defendant] had substantially caused the distress he felt. At least two jurors were so convinced that [defendant] acted under extreme emotional distress that the jury described its position as an "absolute impasse." Testimony about the threat would have directly reinforced the sentiments of these two jurors. That testimony also might have influenced the jurors who believed that "substantially caused" meant "the majority of the time." Consequently, had [defendant] been allowed to testify about the threat, there is a reasonable probability the jury would have continued to be deadlocked, ending the case in a mistrial. This probability is enough to undermine our confidence in the outcome of this trial.

***People v. Taylor*, 156 A.D. 3d 86 (N.Y. App. Div. 2017).** Defendant was convicted of second-degree assault and criminal possession of a weapon arising from a fight during which the victim suffered a "16-inch-wide laceration across his abdomen." The prosecution's key witness was a cab driver who testified that he saw the incident. This testimony was countered by defendant's testimony that the victim challenged him to a fight and then knocked him to the ground, and he opened his pocket knife to scare the victim but the victim lunged at him. After his convictions were affirmed on appeal, he filed a motion to vacate under state law, setting forth four allegations of IAC by his trial attorneys. Two of these allegations were based on facts demonstrable in the record, and two were based on non-record information. The trial court summarily denied the motion, determining that the claims were barred because they should have been raised on appeal. The Supreme Court, Appellate Division of New York determined that because IAC is a claim that has to be considered cumulatively (state case law provided that "the core . . . inquiry in reviewing ineffective assistance of counsel claims is whether counsel's performance viewed in totality amounts to 'meaningful representation"), presenting both record-based and non-record based IAC allegations in a motion to vacate is proper. The appellate court determined that defendant had established ineffective assistance of counsel under state law, finding that "defendant was deprived of a fair trial by less than meaningful representation," requiring the vacation of his convictions. (1) Counsel's performance was defective because he failed to challenge the cab driver, the prosecution's key witness, with statements he had made in his deposition to the police that were significantly at odds with his testimony. Counsel's failure to do this was all the more unreasonable given counsel's unsuccessful repeated attempts to introduce the cab driver's deposition into evidence, only after the cab driver's testimony was complete. (2) Counsel was ineffective for failing "to clearly articulate and support his request for a justification charge." He argued that a statute permitted an instruction on both the necessity defense and the ordinary force defense. The

court denied instructions on both defenses under that statute, and thus instructed only on the necessity defense. Counsel could have requested an ordinary force instruction under a different statute, and so obtained both instructions. The appellate court determined that, cumulatively, these errors "deprived defendant of meaningful representation" under New York law. [Note that there is no reference to federal IAC law in this opinion, not even *Strickland* – it is all state IAC law.]

***Barnes v. State*, 218 So.3d 500 (Fla. Ct. App. 5th Dist. 2017).** In a case where defendant was convicted of first-degree murder, trial counsel was ineffective in failing to argue that there was insufficient evidence of premeditation to support a first-degree murder conviction. The victim had previously been in a romantic relationship with defendant and continued, unsuccessfully, to help defendant overcome his drug addiction even after they broke up. The victim was shot in her office. Two neighbors placed defendant at the office prior to and immediately after the sound of four rapid gunshots. Although some drawers in the office appeared to have been rummaged through, others did not. There was no evidence that anything was taken from the office. At the close of the prosecution's case, defense counsel moved for an acquittal, arguing there was insufficient evidence that defendant had committed the murder or that he intended the victim's death. The motion was denied. In defendant's testimony, he denied being present at the office and denied involvement in the killing. Defense counsel renewed his motion for judgment of acquittal which was again denied. Defense counsel then stipulated to the jury receiving standard instructions on premeditated first-degree murder, second-degree murder, and manslaughter. The primary evidence supporting an inference of premeditation was the multiple gunshots. But the State presented little, if any, evidence that defendant committed the murder according to a preconceived plan or that he had exhibited, mentioned, or even possessed an intent to kill the victim at any time prior to the actual homicide. Nor was there any evidence that defendant had previously threatened the victim or that he was angry with the victim prior to arriving at her office on the date of the homicide. In fact, the prosecution's theory of the case, provided in closing argument, was that defendant had gone to the victim's office to retrieve the Electronic Balance and Transfer (EBT) card the victim kept for defendant to prevent him for using it for illicit drugs, and when the victim refused to give him the card, defendant got so angry that he shot her and then "freaked out." The State further suggested that defendant's actions were influenced by the fact that he had been using crack cocaine and was "all amped up." "In summary, the most reasonable inference arising from the State's evidence was that in a moment of rage and anger, fueled by the use of crack cocaine, [defendant] shot the victim four times in rapid succession immediately after she refused to give him his EBT card. Accordingly, we conclude that the State's evidence was insufficient to prove premeditation." There was no perceivable strategic basis for trial counsel's failure to challenge the sufficiency of the evidence as to premeditation. The remedy is vacation of the first-degree murder conviction and the entering of judgment for second-degree murder.

***Shaw v. State*, 798 S.E.2d 344 (Ga. Ct. App. 2017).** In aggravated battery and aggravated assault case involving a confrontation at a Waffle House where defendant claimed self-defense, trial counsel performed deficiently "in either seriously mishandl[ing] an attempt to assert a defense of delusional compulsion or ma[king] an unreasonable decision not to investigate the possibility of asserting that defense." (The aggravated battery conviction was reversed based on instructional error.) Defendant was a member of the United State Army. At the time of trial, defense counsel was aware that defendant likely had PTSD and other disorders that could have affected his

behavior at the time of the Waffle House incident and he placed defendant's treating psychiatrist on his witness list weeks before trial. Yet defense counsel had failed to speak with the psychiatrist. The day before trial, the prosecutor spoke with the psychiatrist who recounted defendant's symptoms. The prosecutor complained to the court that the psychiatrist's testimony would lead the jury to conclude that defendant was insane but defense counsel had failed to observe the procedures for raising a defense based on insanity or other mental illness. After the trial court sustained the prosecutor's objection to the mental health evidence, defense counsel claimed that he had decided not to pursue an insanity defense. Nevertheless, defense counsel unsuccessfully attempted to have the psychiatrist's testimony about defendant's mental state admitted. When that failed, defense counsel elicited testimony from defendant, his wife, and his sister about defendant's mental condition and the effect it had on him on the night of the assault. Defense counsel also unsuccessfully attempted to have the court charge the jury on delusional compulsion and argued to the jury that it should acquit defendant because he was "sick." Notably, the record suggested that defense counsel failed to understand the defense of delusional compulsion and failed to conduct any research into asserting such a defense. Even assuming that trial counsel made a strategic decision not to assert an insanity defense, such a decision was legally flawed as it was premised on defense counsel's own conclusion, come to without expert advice, that defendant was not insane. In sum, counsel is found to have performed deficiently because he "knew at the time of trial that [defendant] had been in combat, had psychological disorders, and was seeking treatment from a psychiatrist, yet he relied on his own opinion that [defendant] was not insane, a defense that counsel appears to have only partially understood, without performing additional investigation, in deciding not to pursue a delusional compulsion defense." Regarding prejudice, at the motion for a new trial, defendant had presented testimony from a licensed psychologist with significant experience in evaluating current and former members of the military. After examining defendant, the psychologist diagnosed defendant was having Tourette's syndrome, OCD and PTSD. (While in the military, defendant had also been diagnosed with Tourette's and OCD). The psychologist explained how the conditions could impact defendant's behavior in general, and then went on to opine on how they influenced his actions towards the victim. According to the psychologist, defendant's behavior amounted to a delusional compulsion under the circumstances." This testimony was sufficient to raise a reasonable probability that the jury would have accepted the delusional compulsion defense had it been raised at trial.

***Tran v. State*, 798 S.E.2d 71 (Ga. Ct. App. 2017).** In case where defendant was convicted of two counts of armed robbery, one count of aggravated sexual battery, and one count of possession of a firearm during the commission of a felony, convictions are reversed based on several instances of deficient performance. The crimes were committed by two men who entered a karaoke club wearing surgical masks and carrying guns. After the robberies and sexual battery, the men left the club. A witness then observed a silver Acura with tinted windows leaving the parking lot. Shortly thereafter, a silver Acura was pulled over by police. The passenger fled and was never located. Defendant was the driver of the vehicle. He told officers a gun was in the car. Also found in the car were items matching those taken from the club. At trial, defendant testified that he had been waiting outside the club for friends when a masked man pointed a gun at him and ordered him to get in the car and drive. The gunman placed objects he was carrying in the car. After the car was pulled over, the gunman took bills from the glove compartment that had defendant's name on them

and threatened defendant not to say anything about the incident. The gunman then fled. According to defendant, he had been robbed and threatened previously, which he had reported to police, leading him to purchase a gun. Although defendant raised multiple allegations of deficient performance by trial counsel, only a few are found to be meritorious: (1) failing to raise a hearsay objection to testimony about the absence of a record of defendant having been a crime victim in a certain county; (2) failing to object to statements by the prosecutor that improperly impeached defendant's testimony; and (3) opening the door to damaging testimony that contradicted defendant's testimony that he was unaware who the gunman was. In finding prejudice from counsel's deficiencies, the court weighed the fact that "the jury heard the prosecutor essentially testify that [defendant] would not need an attorney if he was an innocent bystander and then question [defendant] at length about why he never gave the police information that would have cleared him of these charges." Defendant's allegation that trial counsel had been ineffective in failing to object to those improper comments and questions had been rejected because defense counsel had opened the door to them.

***Johnson v. Premo*, 399 P.3d 431 (Or. 2017).** In capital case involving the death of a fifteen-year-old girl, trial counsel was ineffective in failing to investigate and present evidence supporting defendant's account that the victim died of a drug overdose rather than strangulation, as theorized by the prosecution, or drowning, as theorized by the defense at trial. The unrefuted evidence in the case was that defendant had sexual intercourse with the victim, the victim had been rendered unconscious by morphine ingestion, there were injuries to her body, including her neck, and defendant threw her off a bridge. The prosecution theory at trial was that defendant had drugged the victim, raped her, strangled her to death, and then threw the body off the bridge. The prosecution presented expert testimony supporting the strangulation theory. The defense theory was that the victim was alive when thrown off the bridge and that she then drowned. The defense presented an expert supporting the drowning theory. According to the defense, this meant defendant had to be acquitted because the actual killing occurred in a different county than the venue where the prosecution alleged the murder took place. Neither the prosecution nor the defense expert believed the morphine in the victim's system was sufficient to have caused her death. In post-conviction proceedings defendant adduced evidence that, early in the investigative process, he had told his defense team that, shortly before her death, the victim had willingly consumed alcohol, marijuana, morphine and other opioids with him. He also indicated that they had engaged in sexual intercourse. According to defendant's account, he fell asleep, awakened at one point to find the victim choking and vomiting, and helped her to the bathroom. He fell asleep again, and when he awoke later, he discovered that she was dead. He then wrapped her in a blanket, put her in his car, drove her to the coast, then threw her off the bridge. Although there was conflicting evidence about whether defendant had told trial counsel he was unsure that the victim was dead when he threw her off the bridge, the post-conviction court made an implicit finding that defendant had told trial counsel that the victim died in the county where he was charged. Thus trial counsel was aware that the venue defense presented was contrary to defendant's account of the crime. Defendant also presented testimony from a retired anesthesiologist and a forensic pathologist that supported the overdose defense. That counsel made a tactical decision to pursue the drowning defense in light of the defense expert's opinion, as well as that of the medical examiner, regarding the impact of the morphine did not insulate trial counsel from a finding of deficient performance.

In fact, "that decision was unreasonable because counsel had not undertaken an adequate investigation of the relevant facts that, in turn, would have required hiring a toxicologist to review the forensic evidence." "Notably, the forensic data available to defense counsel tended to confirm important aspects of [defendant's] version of what had occurred — that [the victim] may have had multiple intoxicating substances in her system at the time of her death, and that she had vomited due to morphine ingestion at some time before her death. In sum, all the evidence indicated that drugs had played a significant role in the events that surrounded [the victim's] death." There was no reason for trial counsel to have believed that further inquiry into toxicology would have been fruitless or harmful.

> The defense advanced in this case, at best marginally viable in the guilt phase, lacked any tactical value in the penalty phase. In that admittedly very difficult circumstance, and in light of all the information known to defense counsel . . ., we conclude that adequate trial counsel should have sought out additional information concerning the drugs in the victim's system at the time of her death, in order to try to develop a guilt-phase theory that [defendant's] killing of the victim was unintentional, or alternatively, a penalty-phase theory that, even if the killing was intentional, it was not the type of crime for which the death penalty should be imposed.

Given the weakness of the defense presented at trial, both as to the guilt and penalty phases of the trial, prejudice is found.

***Butt v. State*, 398 P.3d 1024 (Utah 2017).** Trial counsel was ineffective in case involving a charge of dealing materials harmful to a minor by failing to raise a First Amendment defense. At issue in this appeal was a drawing that defendant made and sent to his five-year-old daughter while in jail on an unrelated charge. The rudimentary drawing depicted defendant naked and included his nipples, penis, and testicles. He was holding his daughter up with her bottom next to his mouth. A speech bubble from his mouth read: "Oh your butt taste [sic] so good." And a second speech bubble from his daughter's mouth read: "Oouch! Daddy don't Bite so hard Giggle giggle." At trial, defendant explained that he had made an earlier drawing of himself naked because his daughter had asked for it after they had watched a documentary about cave dwellings, with cave drawings depicting naked people. (Defendant had been convicted for this drawing but in the lower court the State had stipulated to dismissal of that conviction.) As to the drawing at issue in this appeal, defendant testified that his daughter likes being tickled. So as part of her bedtime routine he holds his daughter's hands up in the air and nibbles all over her stomach, while she laughs. To escape the tickling, his daughter rolls over from her back to her stomach. At this point, defendant teases her, saying "roll back over or I'm going to bite your butt cheek," to which his daughter responds by rolling back over. The State acknowledged that trial counsel was deficient in not raising a First Amendment defense but argued that defendant suffered no prejudice because the defense lacked merit. The state supreme court disagreed, concluding that the First Amendment defense would have prevailed as the drawing "did not appeal to the prurient interest in sex of his five-year-old daughter." "This decision rests on our independent factual conclusion that the drawing at issue is so rudimentary that taken as a whole — including the context of [defendant's] unrebutted

testimony about his routine with his daughter — it does not depict a sexual act. And we likewise conclude that the drawing is not sexually suggestive."

***Khalil-Alsalaami*, 399 P.3d 264 (Kan. Ct. App. 2017).** In case involving two counts of aggravated criminal sodomy on an underage victim, trial counsel was ineffective in numerous ways. First, trial counsel was ineffective in failing to request an interpreter at trial and appellate counsel was ineffective for not raising that failure on appeal. Defendant, whose primary language was Arabic, was in the United States as a permanent resident after serving as an interpreter for the United States military forces in Iraq. He was accused of sexually assaulting the victim at a party. He initially admitted to committing some of the sexual acts at issue but claimed it was consensual and that he was unaware the victim was underage. At trial, he denied having any sexual contact with the victim and stated that he had given a contrary account to the police because the officer had repeatedly suggested that sex had occurred. Trial counsel's defense strategy was: (1) arguing that DNA matched to defendant that was found on the victim's shorts had been transferred from the bed where defendant had sex with another woman earlier; and (2) asserting that defendant was tricked by police into giving an incriminating statement. Although defendant's initial counsel had requested an interpreter for defendant and one was employed at the preliminary hearing, trial counsel decided that use of an interpreter would make it appear to the jury that defendant was trying to hide behind a non-existent language barrier, especially given defendant's own history as an interpreter. Thus, defense counsel advised defendant not to use an interpreter. Such advice was made without counsel: (1) testing defendant's ability to understand English; (2) investigating the complexity of the interpreting defendant was asked to do for the U.S. military; or (3) considering how the use of voir dire and/or instructions could ameliorate any possible prejudice from use of an interpreter. In addition, trial counsel failed to inform defendant of his statutory right to an interpreter and the waiver was not accomplished in front of the trial court. Trial counsel had been aware that defendant would not be able to understand at least portions of the trial, such as the DNA testimony and the prosecutor's closing argument. At trial, defendant spoke in broken English that was difficult to understand and he failed to comprehend the meaning of fairly simple words. According to professionals who tested defendant post-trial, defendant's understanding of English was extremely limited and he would be very easy to trick due to the language problem. Evidence was also presented in post-conviction proceedings showing that approximately 1 year before the charged crime, defendant took an interpreter with him to get a Kansas driver's license and had to use the picture test rather than the written test. In addition, the interpreter for defendant in the preliminary hearing rated defendant's English skills on a scale of 0 to 10 as .01. He further testified that defendant's English was woefully inadequate to go through a court proceeding without an interpreter. The U.S. Army Captain that supervised defendant in Iraq indicated that their communication in English was at an elementary level and analogized defendant's ability as a little better than his 5-year-old daughter, who was entering kindergarten. Although defendant lived in the United States for 14 months prior to his arrest, he lived in a household with other Arabic speakers. When he interpreted for the U.S. Army in Iraq, again he continued to live with Arabic speakers. It was further noted by the appellate court that not only was the criminal trial complex, the stakes were extremely high – defendant was facing a possible sentence of 25 years to life, and, as an asylum seeker, a conviction would likely result in deportation to Iraq where his life could be at risk. Although the post-conviction court found, inter alia, that substantial competent evidence

supported the finding that defendant adequately understood English to proceed to trial without an interpreter, the appellate court disagreed, explaining:

> Even if one assumes that [trial counsel] were in the best position to evaluate [defendant's] language abilities at the time of trial, their testimony does not support such a conclusion. They reached what they believed to be a reasonable trial strategy, without fully investigating [defendant's] ability to understand the testimony and legal arguments at his own trial. Not only did they not investigate, but they ignored clear indications that [defendant] could not effectively understand what was going on during the trial.

On this record, trial counsel performed deficiently in not requesting an interpreter at trial. And, given the egregious nature of the error here, prejudice is presumed. In addition, give the appellate court's conclusion that the evidence does not support a finding defendant was able to understand the proceedings in the absence of an interpreter, appellate counsel was deficient in not raising a claim on direct appeal that the trial court erred in failing to appoint an interpreter for defendant. Because there is a reasonable probability that the appellate court would have found that the district court abused its discretion when it failed to appoint an interpreter, prejudice is established. Trial counsel was also found to have performed deficiently in failing to seek suppression of defendant's confession and stipulating to the voluntariness of defendant's confession after trial counsel entered the case in the midst of a *Jackson v. Denno* hearing that the State had initiated.

> The police minimization technique in conjunction with [defendant's] inability to speak and understand English weigh in favor of finding his confession was involuntary. In addition, [the interrogating officer] testified that in Iraq the police use force to coerce confessions from individuals. It is not unreasonable to conclude that [defendant] may have been pressured to confess because of his fear that force might be used. Finally, [defendant's] lack of understanding of the words used in the oral explanation of his *Miranda* rights coupled with his inability to read what was placed in front of him would also weigh in his favor in the voluntariness calculus. It is clear that [defendant] appeared to be confessing to criminal acts. That is not the issue. The issue for the district court to decide would have been whether his confession was freely and voluntarily given with an understanding of his rights under *Miranda.* We do not believe that was a foregone conclusion.

Further, by stipulating to the voluntariness of the confession and allowing admission of the stipulation into evidence, trial counsel prejudiced his own defense strategy of arguing that defendant was tricked into making the confession. Trial counsel was also deficient in failing to object when the prosecutor misstated the DNA evidence during argument in a manner that torpedoed his assertion his argument about how defendant's DNA came to be on the victim's shorts. Further, appellate counsel was ineffective in failing to raise the issue of prosecutorial misconduct on direct appeal. Finally, the appellate court concluded that defendant was entitled to relief on a claim that the cumulative impact of trial counsel's errors deprived him of a fair trial.

> [Trial counsel] committed six errors during his representation of [defendant]: (1) he failed to request an interpreter for [defendant] at trial; (2) he failed to file a motion to suppress [defendant's] confession or mount a defense at the *Jackson v. Denno* hearing; (3) he stipulated to the voluntariness of [defendant's] confession; (4) he failed to object to improper questioning of [the examining nurse]; (5) he failed to object to questions meant to highlight [defendant's] negative character traits; and (6) he failed to object when the prosecutor misstated evidence during closing arguments. We find that the number of errors is substantial, and even if the State could successfully argue that the impact that any one of them had on the trial was insignificant, we cannot ignore the fact that the accumulation of these errors impacted [defendant's] ability to receive a fair trial.

***State v. Fields*, 84 N.E.3d 193 (Ohio Ct. App. 2017).** In case involving defendant's failure to pay city taxes, trial counsel was ineffective in raising the issue of whether defendant owed taxes at all in a motion to dismiss, rather than at trial, and in failing to raise matters relating to whether defendant willfully failed to pay the taxes. Defendant had been given $55,000 during an appearance on the The Ellen DeGeneres Show in order to assist defendant and her four children who were struggling to get by. The tax form defendant received concerning the money indicated it was "nonemployee compensation." Defendant listed the $55,000 as income on her tax returns but subsequently was unable to pay the assessed taxes. Defendant was charged by the city with knowingly failing or refusing to pay her taxes. Trial counsel moved to dismiss the charges on the ground that the money had been a gift or charity and was mistakenly listed as income. Therefore, no tax was due. The motion was denied by the trial court. Defendant pleaded no contest in order to preserve the right to appeal the denial of the motion to dismiss. She was found guilty. On appeal, the appellate court found that the motion to dismiss was properly denied as it raised a general issue for trial that was not a proper basis for a motion to dismiss. The appellate court went on:

> We are concerned by the procedural history of this case. Fields's motion to dismiss raised an issue that was more properly raised at trial, yet the parties and the trial court proceeded on the motion on its merits. This led to the entry of a no contest plea in an effort to preserve the right to appeal the denial of the motion to dismiss. Issues such as whether Fields actually owed income tax (the issue at the motion to dismiss) and whether her failure to pay was willful (which included whether she had an honest dispute about whether she owed taxes and/or had the ability to pay them) were not presented at trial, which would have been the proper forum for those issues.

Given the record, which included sympathetic statements by the trial court, the appellate court found a reasonable probability that the outcome of this case would have been different had defendant proceeded to trial.

**2016: ****Ibar v. State*, 190 So. 3d 1012 (Fla. 2016)**. Counsel ineffective in capital trial for failure to obtain and present expert testimony from a facial identification expert. There was no physical evidence against the defendant, who steadfastly maintained his innocence and presented an alibi defense. The

crux of the state's case was a grainy video of the murders taken by a video surveillance camera installed in the home of one of the three murder victims. The defendant was identified as one of the perpetrators from photographs distilled from the video. An initial joint trial with a co-defendant, in which the co-defendant presented testimony from a forensic anthropologist, resulted in a hung jury. Following separate trials and convictions, the co-defendant's case was reversed on appeal and he was acquitted. Each time the co-defendant had the expert testimony. The defendant in his separate trial was convicted without ever retaining a facial identification expert. Counsel conceded deficient conduct and the court agreed. Counsel's explanation was only that he had "a litany of personal and professional issues that were occurring at the time of trial," including pneumonia, depression, and other physical ailments, a domestic violence charge, concern over his drug-addicted lover who became pregnant with his child, and child custody disputes. Counsel was hospitalized following conviction, even before sentencing proceeded. Counsel had obtained a second-chair counsel and placed the burden of hiring experts on her. While she believed she had a 12 minute call with a facial identification expert, who was prepared to testify, counsel did not follow through and the expert denied in post-conviction that he had been contacted, although he would have been available for retainer if asked. Prejudice was established. The court considered the similarities with the co-defendant's case. Here, counsel had objected to testimony from police officers that a number of lay witnesses identified the defendant from the photos as substantive evidence. On appeal, the court agreed that there was error but found it to be harmless. "Our harmless error analysis would have undoubtedly been different in this case had the surveillance videotape and images been challenged by a facial identification expert at trial."

***State v. Joshua*, 201 So.3d 284 (La. Ct. App. 2016).** In a case of aggravated battery with a firearm, trial counsel performed deficiently in failing to locate and interview eyewitnesses to the shooting. The victim, Shine, had been speaking with a woman named Rita at the time of the shooting. He identified defendant as the assailant. During his interrogation, defendant admitted being present at the crime scene but denied being the shooter. Although he initially claimed not to have seen the shooter, he later stated that he had but refused to identify him. He provided the police with the names of three eyewitnesses: Rita Reliford, "Jeff" and "Duke." Defendant claimed that these eyewitnesses could verify that he wasn't the shooter. At defendant's trial, an officer testified that no witnesses could be located during a canvas of the crime scene and that Rita Reliford could not be found. Shine testified that he had been talking with Rita when defendant got into a verbal altercation with him and then defendant shot him. Defendant agreed in his testimony that Shine had been talking to Rita. According to defendant, however, he merely told Shine to leave and Shine was shot by "Lil Duke" over a drug debt. In post-conviction proceedings, "Rita" was deposed and she corroborated defendant's account and revealed that her cousin was around that night but she didn't know if he witnessed the shooting. Rita explained that all witnesses fled the scene following the shooting because of drug usage. She also stated that she was still living in the area at the time of defendant's trial and would have been willing to testify for defendant if she had been contacted. She was unaware that defendant had been arrested for the shooting prior to moving to New Jersey. Post-conviction counsel could not locate Rita for purposes of testifying at the post-conviction hearing and the post-conviction court granted the state's objection to admission of her deposition testimony. Rita's cousin did testify about the events of the night. Although he did not see who actually shot Shine, he knew it had not been defendant because defendant was

standing next to him when he heard the shot. As with Rita, the cousin stated he was unaware of defendant's arrest for a long time and would have testified that defendant was not the shooter had he been contacted. Although trial counsel had no recollection of the case or any files, evidence was presented that trial counsel never requested an investigator even though that would have been the standard protocol under the circumstances. Defendant testified that he provided trial counsel with the names of eyewitnesses, including Rita and her cousin and had assumed they would be contacted and testify on his behalf. When he learned there were no defense witnesses, he felt forced to testify. During his testimony, he was impeached with prior convictions. When the prosecutor falsely asserted during cross-examination that defendant had pled guilty to aggravated arson, defense counsel failed to move for a mistrial. Following the hearing, relief was denied by the post-conviction court. The appellate court first found error in the lower court's ruling denying admission of Rita's deposition testimony. Such testimony was relevant and post-conviction counsel demonstrated her unavailability at the time of the hearing. On appeal, the state conceded that it could not argue in good faith than defendant received the effective assistance of counsel regarding the investigation and presentation of a defense. The appellate court agreed that both deficient performance and prejudice had been established.

***Commonwealth v. Williams*, 141 A.3d 440 (Pa. 2016).** In triple murder case, appellate counsel was ineffective in failing to raise trial counsel's ineffectiveness in not cross-examining the prosecution's expert or calling a defense expert concerning inconsistencies between the key prosecution witness's testimony and the forensic evidence. At trial, the prosecution relied primarily on the testimony of White, a purported eyewitness to two of the murders and an accomplice in all three. White testified that the three victims had arranged to purchase weapons from Williams, the leader of a gang that sold weapons and drugs. Williams had planned to rob the men when they met to receive the guns. When the groups met, Williams and members of the gang, including White, held the victims at gunpoint and demanded their money. After the purchase money was turned over, Williams continued to demand additional money from the three victims. When one of the men admitted he had additional money at another location, he was taken by Williams and two other gang members to retrieve the money. Williams and the gang members returned without the victim. White testified that one of the two gang members who accompanied Williams informed White that Williams had shot the victim in the head. The remaining two victims were then loaded in the back of a stolen van. Williams and another gang member were in the back with the victims and continuing to demand more money. White was in the front passenger seat. White testified that he saw Williams shoot the smallest of the three victims in the face while the victim looked at Williams and the gun. A short time later, the van slowed and this victim was thrown out of the back of the van into the street. White then saw Williams put his gun in the face of the remaining victim. White turned to face front and heard two gunshots and the back of the van open. When he next looked back, the third victim was gone, presumably also thrown out of the van. When the victims were later found by authorities, none were in a street but instead on a sidewalk or in a driveway. And each had sustained gunshots wounds but none had other injuries to their bodies, such as bruises or abrasions. Defense counsel did not ask any of the prosecution's expert witnesses a single question. Counsel for one co-defendant did cross-examine two of these witnesses about the absence of non-gun-related injuries to the victims but the witnesses opined that the lack of additional injuries did not establish that the victims had not fallen. Defense counsel

argued to the jury that common sense showed that the location and conditions of the bodies were inconsistent with White's account of what occurred. In post-conviction proceedings, defense counsel conceded he had no strategic reason for failing to consult with or present testimony from a medical or forensic expert in order to highlight the problems with White's testimony. Post-conviction counsel presented testimony from an expert in the field of homicide investigation, crime scene analysis and blood spatter analysis. This expert, who was credited by the post-conviction court, opined that the medical and forensic evidence was inconsistent with White's testimony. In finding that this expert's testimony would have been helpful to defendant at trial, the state supreme court noted in particular the expert's opinion that "the blood flow evidence was [] wholly incompatible with White's testimony that the victims were shot and thrown from a moving van." Additionally, the expert testified that none of the victims sustained gunshot wounds consistent with White's testimony that the victim was looking at the shooter's gun when he was shot. As for prejudice, it was noted that although White was subject to significant impeachment, "the cross-examination of White left his story about the three murders at issue largely unscathed." If the jury believed the post-conviction expert's testimony, coupled with other evidence impeaching White's credibility, it is likely the jury would have acquitted defendant of the three murders. Finally, the record supported the post-conviction court's "factual findings and legal conclusion that appellate counsel had no reasonable basis for failing to raise the claim of trial counsel's ineffectiveness for not calling an expert to testify or cross-examining the Commonwealth's experts regarding the blood flow evidence and gunshot wound evidence." (Appellate counsel testified that he had no independent recollection of the appeal but that confining his claims to those appearing on the record, as occurred in defendant's appeal, was consistent with his practice at the relevant time.) Prejudice is established because there was a substantial likelihood that the outcome of defendant's appeal would have been different if the trial counsel ineffectiveness claim had been raised there.

***Landry v. State*, 380 P.3d 25 (Utah Ct. App. 2016).** In aggravated arson case, trial counsel rendered ineffective assistance by failing to object to the State's use of testimony about an accelerant-detection canine's alerts at the scene of the fire and on items of defendant's clothing and by failing to consult with an arson expert or call an expert witness to refute the State's arson experts. Further, appellate counsel was objectively deficient in failing to present the meritorious claim of trial counsel ineffectiveness on appeal. The fire at issue occurred in an apartment defendant was in the process of moving out of due to eviction. It broke out five to ten minutes after defendant and his girlfriend left, apparently intending to return. Some of defendant's belongings remained in the apartment and he was supposed to meet the apartment complex manager that evening for a walk-through inspection of the apartment. At trial, the State presented expert testimony supporting the arson theory. One aspect of such testimony involved alerts by an accelerant-detection canine. Trial counsel, who had never tried an arson case before, failed to object to this testimony even though existing case law made it highly unlikely that the State would have been able to overcome a proper objection. In preparation for trial, trial counsel spoke only with a fire marshal who was a witness for the State. Obviously, this expert would not have provided trial counsel with a basis to challenge the expert's own findings. The defense theory was that either the fire started accidently by a cigarette smoked by the girlfriend contacting alcohol spilled on the floor during a party the night before or that it was started by an unknown individual who a neighbor saw outside the apartment around the time the fire began. Both theories had

significant evidentiary problems. As shown by post-conviction expert testimony, had trial counsel consulted with or presented testimony from an independent arson expert, she would have had ammunition to challenge how the arson investigation had been conducted as well as the findings of the State's arson experts. The defense post-conviction expert had criticized numerous aspects of the investigation and concluded that the fire should have been classified as of "undetermined origin." Trial counsel's failure to properly educate herself constituted deficient performance. Prejudice is found because: (1) post-conviction expert testimony revealed substantial errors in the State's arson case; (2) under existing case law, trial counsel likely would have kept out the canine alert testimony; and (3) the jury struggled to reach a verdict in this case. (After the jury announced a deadlock, it was told that if it did not reach a verdict that day, it would have to return to deliberate on an extra unplanned day causing a hardship to at least one juror. The jury reached consensus after that admonition.) Because trial counsel's deficient performance prejudiced defendant, "appellate counsel's failure to raise a claim of ineffective assistance of trial counsel on appeal was likewise objectively deficient and prejudicial."

***McLaughlin v. State*, 789 S.E.2d 247 (Ga. Ct. App. 2016).** In aggravated assault and battery case, defense counsel performed deficiently in failing to withdraw a statutory speedy trial demand and seek a continuance in order to obtain expert evidence of battered person syndrome (BPS) in support of the justification defense. The victim in this case was defendant's boyfriend. Defendant had been convicted on two prior occasions for harming the victim. Trial counsel, who had represented defendant in the two earlier cases, sought to have the charges in this case dismissed based on a justification defense. After hearing the testimony at the motion to dismiss hearing, trial counsel realized that defendant likely suffered from BPS. Nevertheless, trial counsel neither withdrew the speedy trial demand nor sought a continuance to explore BPS. As a result, trial counsel was unable to present evidence explaining taped jailhouse phone conversations between defendant and the victim in which defendant took responsibility for injuring the victim and which were used to impeach defendant. Nor was the defendant able to present evidence explaining why defendant had failed to report the victim's abusive conduct to the police, why she accepted blame for the situation, or why she continued to express love for the victim. An explanation for her behavior could have countered the testimony by a detective who stated that police look to whether a person attempted to distance his or herself from an alleged abuser in determining the veracity of a domestic violation accusation. At the motion for new trial hearing, an expert was presented who found that defendant had been suffering from BPS at the time of the offense and who explained how defendant's behaviors were consistent with BPS. In finding trial counsel's conduct deficient, it was noted that his failure to seek a continuance in order to retain a BPS expert was not based on strategy but rather on his mistaken belief that it was too late to ask for more time. As for prejudice, defendant's sole defense of justification hinged largely on her own testimony. The prosecution was able to impeach that testimony by playing the jailhouse conversations in which defendant apologized to and expressed her love for the victim and accepted blame for the incident. As the expert testimony at the hearing on defendant's new trial motion demonstrated, evidence of BPS would have explained why defendant accepted blame and why defendant's statements were not inconsistent with her claim of justification. Moreover, evidence of BPS would have entitled defendant to a jury instruction that would have allowed the jury to consider whether, given the nature of her abusive relationship with the victim, defendant reasonably believed that his use of force against her was imminent and that she therefore needed to protect herself.

**Capital Case*

***Fisher v. State*, 788 S.E.2d 757 (Ga. 2016).** In malice murder case, trial counsel was ineffective in failing to secure the attendance of a witness who could have countered the testimony of the only witness whose testimony directly identified defendant as the shooter, and in agreeing to a jury instruction that the testimony of a single witness is generally sufficient to establish a fact, without requesting an instruction on the exception that if the witness is an accomplice, his testimony must be properly corroborated. The sole witness identifying defendant as the shooter, Lewis, claimed that he was not involved in the crimes even though he admitted that he drove defendant and the victim to the crime scene, was present during the shooting, and drove defendant away afterwards. According to Lewis, who admitted using drugs with the victim, the shooting occurred over a dispute about drug sale proceeds. (Two other witnesses described men arguing about drugs and money.) Defendant denied being at the crime scene. Prior to trial, defense counsel spoke with Clark, an acquaintance of both defendant and Lewis, who informed defense counsel that Lewis was his drug dealer and that he saw Lewis flashing a revolver while looking for the victim to collect on a debt two or three days before the shooting. (The murder weapon was never recovered but it was determined to have been a revolver.) Although Clark provided defense counsel with his contact information, he never heard back from him. Defense counsel intended to have Clark testify, and he included him on the witness list, and yet he failed to secure his attendance at trial, an omission conceded by the State to be deficient performance. As for the failure to seek an instruction on the accomplice exception to the single witness rule, defense counsel conceded it was an oversight and not a tactical decision. Given Lewis's admission to his involvement with defendant in the events before, during and after the crime, and initial lies he'd told to the police, there was sufficient evidence to support a finding that Lewis was an accomplice and not merely present for the crimes as he claimed on the witness stand. On this record, in light of the importance of Lewis's testimony, it would have been unreasonable not to have requested the accomplice instruction. Regarding prejudice, there was no forensic evidence linking defendant to the victim, the crime scene, or the murder weapon. Neither of the two women who heard men seeking drugs and/or money testified that defendant was there during the shooting. Although one offered a description of the shooter that matched defendant, it was general -- about 5′10″, medium complexion, with a low haircut and a New Orleans accent – which would match innumerable other men in Atlanta as well, except perhaps for the accent. Notably, however, Lewis admitted on cross-examination that although he is from Atlanta, he was known in the community as "N.O.," or New Orleans, because of his voice. "[H]ad Clark testified, the jury could have chosen not to believe what he said about Lewis. But that is exactly the point. Due to the deficient performance of [defendant's] trial counsel, the jurors who found him guilty did not have the opportunity to hear Clark testify or to consider the evidence they did hear with the instruction that if they found Lewis to be an accomplice to the shooting, they must treat him unlike the other witnesses and decide whether his identification of [defendant] was corroborated by other evidence. A jury that heard Clark and was properly instructed might reach the same verdict, but we cannot say that with confidence."

***People v. Goods*, 62 N.E.3d 1168 (Ill. Ct. App. 2016).** In murder case, defense counsel was ineffective in failing to assert self-defense and ask for a corresponding instruction or an instruction on second degree murder. The prosecution's theory was that defendant and the co-defendant planned in advance to kill the victim. Through defendant's statements and the argument of defense

counsel, there was some evidence of the elements of self-defense, i.e., defendant believed he was in imminent danger from both the victim and the co-defendant. Whether defendant's belief was reasonable was a determination to be made by the jury. Supporting a finding of deficient performance was the fact that defense counsel initially sought to invoke compulsion as an affirmative defense, a defense unavailable for a murder charge under state law. It was only after that defense was precluded by the trial court that defense counsel switched to a theory that defendant shot the victim after he had been killed by the co-defendant. But this theory failed to relieve defendant of liability given that the jury was given an accountability instruction making defendant liable for the co-defendant's actions. In addition, an argument in defense counsel's unsuccessful motion for new trial indicated defense counsel erroneously believed he was not allowed the defense of self-defense. On this record, defense counsel performed deficiently in failing to invoke self-defense and failing to seek appropriate instructions. Prejudice is shown in part by the co-defendant's conviction in a separate trial of second degree murder.

***Fatumabahirtu v. United States*, 148 A.3d 260 (D.C. Ct. App. 2016).** In case involving a conviction for the attempted possession of drug paraphernalia with intent to sell, trial counsel was found ineffective for failing to investigate a mistaken-identification defense. Defendant worked a few days a week as a clerk at a gas station convenience store. One day, an undercover officer came in and asked to buy an "ink pen." According to the officer, defendant was the clerk and she provided the officer with an ink pen and a copper scouring pad, items commonly used to make crack pipes. A search warrant was executed the following week while defendant was present at the store and glass pens and copper scouring pads were seized. This search formed the basis for the charges against defendant. In coram nobis proceedings, defense counsel conceded that he did not pursue a mistaken-identification defense but instead focused on attacking the government's evidence that defendant knew or had reason to know that the pen and scouring pad constituted drug paraphernalia. Even assuming defense counsel made a strategic decision to present a single defense rather than combining two possible defenses, he made that decision prior to conducting a reasonable investigation. At trial, defendant testified that she had never seen the undercover officer before, she did not recall ever selling a pen and scouring pad together, and that she never would have combined items to sell if a customer had asked for a single item. Defendant's account supported an investigation into mistaken identification which would have revealed that another clerk worked at the store every day and better fit the description given by the undercover officer of the clerk who sold him the pen and pad. This clerk also acknowledged in the coram nobis proceeding that she owned and sometimes wore to work the type of attire described by the undercover officer. Defendant, in contrast, denied having and wearing similar items. That defendant had not informed trial counsel that she was not the sales clerk on the day the undercover officer made the purchase leading to the search did not defeat her claim. Given that defendant was present when the search warrant was executed, and that she was especially new to the United States and not fluent in English, it was understandable that she failed to recognize the importance of her absence from the store on the date the undercover officer made the purchase. That defendant could not conclusively prove that the other clerk, and not herself, was working when the purchase occurred did not defeat a finding of prejudice. There was a reasonable probability that the outcome of the trial would have been different had counsel not performed deficiently.

**Capital Case*

***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*, 373 P.3d 26 (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, leaved 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.

***Johnson v. Premo*, 370 P.3d 553 (Or. App. Ct. 2016)**. Counsel ineffective in aggravated murder trial for failing to investigate and present expert testimony that the victim's death was due to a morphine overdose and not strangulation. The victim's body was found along a beach in Clatsop County. State experts testified that she had high levels of morphine in her blood but she died from strangulation. Substantial evidence, including DNA from semen in the victim's vagina, connected the defendant to the case. The State's theory was that the defendant, who had a history of drugging women and then sexually assaulting them, had done so in this case and killed her at his home in Washington County before taking her body and dumping it from a bridge. The defendant told counsel that the victim had died at his home in Washington County from a drug overdose. Counsel's conduct was deficient because, without investigating this possibility, defense counsel relied on a theory of "defense" that the victim died from drowning in Clatsop County because she was alive when the defendant threw her off the bridge. Counsel presented several experts to say that drowning was a possibility. In other words, the defense was only a "venue defense," which "was not a reasonable tactical decision deserving of deference" because counsel did not investigate the possibility of a drug overdose despite the defendant telling him that's what actually happened. Instead, counsel hoped for an acquittal despite admission that the defendant threw the live victim from a bridge killing her by drowning and despite language in the indictment that permitted venue in the defendant's home county of Washington if the jury could not determine the location of death. Prejudice was established. Two experts testified in post-conviction that the most likely cause of death was a morphine overdose. Even though the jury could still have determined that the defendant was responsible for the victim's death, the defense could have argued that the defendant was guilty of a lesser offense, such as manslaughter, criminally negligent homicide, or unintentional felony murder. Even if the jury still had convicted the defendant of aggravated murder, unless the jury found that it was "deliberate," the defendant would not have been eligible for the death penalty.

**2015:** ***Starling v. State*, 130 A.3d 316 (Del. 2015)**. Counsel ineffective in capital trial for: (1) failing to cross-examine an eyewitness about prior exculpatory statements to an investigator; and (2) failing to object to admission of the defendant's brother's statement to police, which was likely involuntary. The case involved the shooting of a man and 5-year-old boy in a barbershop. A month later, Gaines, the victim of an unrelated shooting, identified the defendant as his shooter and the barbershop shooter after Gaines had been arrested for violating probation and possession of drugs. Gaines also told the police that he and the defendant's brother were present after the shooting when the defendant expressed remorse for shooting the child. The defendant's 23-year-old brother was questioned extensively without any rights warnings and while being denied outside contact. He was threatened with being charged in the barbershop murders and obstruction of justice, which the police admitted, unless he told the police what they already knew, i.e., that the defendant expressed remorse for shooting the child. The defendant's brother finally acquiesced. An eyewitness from the barbershop, who chased the shooter when he ran from the barbershop, told an investigator after seeing photographs of the two suspects in the newspapers, one of which was the defendant, that neither man "had the same appearance as the shooter." Counsel's conduct was deficient. First, during trial, counsel intended to cross-examine the eyewitness with this statement

but forgot to do so. Afterwards, when he remembered he was unable to locate the witness to recall him to testify. This error was prejudicial. This witness "arguably had the best view of the shooter," other witnesses had given contradictory descriptions of the shooter, and there was no physical evidence linking the defendant to the crime scene. Second, counsel's conduct was deficient in failing to object to admission of the defendant's brother's statement through a police officer. Under state law, voluntary out-of-court prior statements of a witness who is present and subject to cross-examination is admissible. A threshold determination of voluntariness must be made by the court before admission. Here, because of counsel's failure to object no such determination was made despite "substantial evidence pointing to the involuntariness" of the statement. Trial counsel did not object because he believed the statement to be admissible. This conduct was unreasonable and prejudicial. These two errors in combination with a *Brady* violation due to the state's affirmative misinformation that the charges against Gaines remained pending – when, in fact, they had been dismissed prior to trial – required reversal due to the "cumulative effect of the[] mistakes."

***Commonwealth v. Hampton*, 36 N.E.3d 586 (Mass. App. Ct. 2015)**. Counsel ineffective in assault and battery upon correctional officer case for failing to investigate and adequately present defense. The theory of defense was that the officer used excessive force and was the initial aggressor. Nonetheless, counsel failed to interview another inmate who observed a portion of the altercation and would have testified consistent with the defense theory. Counsel simply relied on the information from the prosecution witnesses that no one other than officers witnessed the incident. Counsel's conduct was deficient and not based on sufficient strategy. Prejudice also established. Despite the trial court's finding that the other inmate was not credible, under the state law analysis required for prejudice, "the question of the witness's credibility should have been left to the jury."

***State v. Pierre*, 127 A.3d 1260 (N.J. 2015)**. Counsel ineffective in murder case for failing to adequately investigate and corroborate the alibi defense. The defendant was one of several suspects charged in a shooting in Elizabeth, New Jersey, at 3:19 a.m. on March 20, 2004. His defense was that he and one of his codefendants were on their way to visit the defendant's relatives in Florida at that time. During trial, a speeding ticket issued in his name as the driver of his car was admitted into evidence. The ticket had been issued 750 miles away in South Carolina less than four hours before the crime. The defendant's cell phone records showing a call to his girlfriend from South Carolina about three hours before the time of the crime. The state argued that the defendant's brother, who had a similar appearance and the defendant's driver's license and phone, was the driver and caller from South Carolina. While counsel's decision to present an alibi surrounding the speeding ticket was a sound strategic choice, counsel's conduct was deficient in failing to adequately investigate and present corroborating evidence "that could have reinforced that alibi." Counsel failed to interview and present the testimony of the brother and a sister who would have testified that the brother did not know how to drive, had no driver's license at the time, had never taken the defendant's car, and was in New Jersey at the time of the crime. Counsel also failed to offer into evidence the defendant's additional cell phone records showing a number of calls to his girlfriend from Florida in the week after the crime. Finally, counsel failed to interview relatives in Florida and failed to present the testimony of three of them that it was the defendant and not his brother who had visited in March 2004. Prejudice was established. The evidence implicating the defendant at trial was "sparse." The defendant was not identified by any witness in the days and weeks following the crime, although the other three men charged were identified by witnesses.

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The only witness to identify the defendant from a photo array did not do so until ten months after the crime. Prior to that time she had provided no description of the man whom she identified as the defendant. The only other witness placing the defendant in New Jersey on the night of the crime was an acquaintance of the defendant, who "was a frequent cocaine user at the time of the shooting as well as when she provided her statement to police."

***State v. Reeves*, 782 S.E.2d 747 (S.C. Ct. App. 2015)**. Counsel ineffective in criminal sexual conduct with a minor and lewd acts case for failing to call a medical expert to challenge the state's medical evidence. The alleged victim testified that the defendant had inappropriately touched her from age four (lewd acts) and "stuck his finger" in her vagina when she was 10-years-old (CSC). About three weeks later, she reported the abuse and was examined by an emergency room doctor, who testified that he observed a "healing scar" on the alleged victim's hymen that was consistent with penetration within 30 days earlier. A month later, the alleged victim was examined by an expert in pediatrics, who found no abnormalities. Retained counsel's conduct was deficient in failing to investigate and present the testimony of a gynecological expert, even though counsel was aware that the state would rely on evidence of physical trauma. While counsel recalled that "there was a question about money," counsel never sought funding, which may have been available, through the Office of Indigent Defense and never discussed hiring a medical expert with the defendant. This was not "a legitimate trial strategy" excusing counsel's behavior. Prejudice established because a defense expert could have testified, contrary to the state's argument that the injury could only have been caused by abuse, that an injury to the hymen could have been caused by means other than sexual abuse. Likewise, a defense expert could have testified that an injury would have to be substantial to be apparent three weeks later and there was no evidence of substantial injury here.

***Garrido v. State*, 162 So. 3d 1069 (Fla. Dist. Ct. App. 2015)**. Counsel ineffective in kidnaping and sexual battery case for failing to pursue an alibi defense once the prosecutor disclosed a new range of offense dates after the jury had been sworn. The initial date was November 3 at noon. The defense provided notice of an alibi with four witnesses supporting his defense that he was at work. After the jury was sworn, the prosecutor, over objection, amended the dates of the charge to be between November 5 and November 9 with the alleged time still being around noon on a weekday. Counsel declined a mistrial or continuance, did not investigate or even talk to the alibi witnesses, and presented no evidence. Counsel's conduct was deficient in failing to investigate and present an alibi as supervisors and co-workers provided testimony and documentation that the defendant was working on a job in Boca Raton, a more than two hour drive from the alleged crime location, from 8:00-5:00 each day, November 5-9. Counsel's explanation for the failure to present evidence was that he wanted to preserve the error in allowing the dates to be changed. Counsel did not understand that by refusing to accept a mistrial or continuance, "he ended up waiving the very error he would to preserve." Prejudice established.

***People v. Lofton*, 42 N.E.3d 885 (Ill. App. Ct. 2015)**. Counsel ineffective in murder case for failing to object to the use of prior inconsistent statements as substantive evidence and for failing to object to inadmissible hearsay. The case involved the shooting of Dowthard on Jefferson Street. Dowthard's sister, an eyewitness, testified that he was shot after laughing at the man who said, "Stick your hands up." She could not identify the shooter that night but described his clothing

including the "hoodie" on his head and bandana wrapped around his face, such that she could see only from the bottom of his eyes to the middle of his forehead. A year later, she was shown a photo line-up, and "identified" the defendant "from his body structure, his neck, and his eyes." Another woman, McLaurin, who was Jones' girlfriend and had identified the defendant from a photo array a year after the crime, denied recollection but admitted her signature was on the photo array. The state went through her grand jury testimony question by question. Jones, the defendant's cousin and McLaurin's boyfriend, testified that the defendant had told him on the night of the crime that he was planning to commit a robbery ("hitting some licks") and called a half-hour later saying he "had just shot somebody." A day or two later, Jones was at the home of his sister, Johnson, who was yelling at the defendant who was not responding. The state then went through Jones' grand jury testimony question by question about the substance of the conversation. Jones denied any recollection of his grand jury testimony and denied that the defendant ever confessed to him. Jones admitted, however, that he told the prosecutor and an investigator the day before trial that the defendant said he shot someone, but denied that he said the shooting occurred on Jefferson street. Tate, who had lived with the defendant and Johnson at the time of the crime, testified that the morning after the crime, Johnson and the defendant were talking but he did not "catch the conversation." The state then examined him based on a prior written statement, but he denied that he had ever said that he heard the defendant say "that he had shot the dude from the night before on Jefferson." Detective Mastroianni testified that he had interviewed Jones a year after the crime and Jones told him that the defendant called after the crime saying he shot someone on Jefferson after the victim laughed at him. The detective also testified that Jones told him the next day he heard the defendant tell Johnson about the robbery and shooting on Jefferson. The detective also testified and produced a written statement of his interview with Tate a year after the crime in which Tate had said that the morning after the crime, he heard the defendant say to Johnson and Jones that he had shot the guy on Jefferson while he was trying to rob him. The written statement was admitted into evidence. Another officer testified about the prior statements of McLaurin generally implicating the defendant and her identification of him from a photo array. Her statements were never reduced to a written statement. The grand jury testimony of McLaurin and Jones was then admitted into evidence by stipulation. In his grand jury testimony, Jones had admitted that the defendant told him he shot a guy on Jefferson Street in a struggle over money, but denied that it was because the guy laughed at him. Finally, the state attorney's investigator testified that two days before trial, Jones told him that the morning after the crime he heard the defendant talking to Johnson about the shooting and robbery. The investigator did not obtain a written statement and wrote a report only on the morning of his testimony. Counsel's conduct was deficient in failing to object to the use of Tate's and Jones' prior inconsistent statements as substantive evidence. The state used Tate's prior written statement as substantive evidence, in addition to having Detective Mastroianni to give "repetitious testimony" about the statement. The same is true of the portions of Jones' oral statements recounted by Mastroianni and Lindmark. These statements met no exception under state law allowing their use as substantive evidence. Counsel's conduct was also deficient in failing to object to a portion of McLaurin's grand jury testimony. While grand jury testimony is generally admissible, the portions where McLaurin relayed to her what the defendant allegedly said to him was inadmissible hearsay. While the state kept this out during testimony, it went to the jury when defense counsel stipulated to the grand jury testimony going to the jury in "written form." There was "no strategic reason for counsel's failures." Prejudice also established.

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"Other than hearsay statements involving defendant's alleged confessions to others, there is very little evidence to tie defendant to Dowthard's killing." The only admissible evidence of defendant's alleged confession was from Jones' grand jury testimony, which gave the motive as a struggle rather than the victim's laughter. By admission of the inadmissible evidence, the jury heard "at least half a dozen" other references to the alleged confession, which was not just "duplicative" but prejudicial.

***Commonwealth v. Alcide*, 33 N.E.3d 424 (Mass. 2015)**. Counsel ineffective in murder case for failing to adequately investigate and present significant evidence supporting the third-party culprit defense and failing to challenge two in-court identifications of the defendant that should have been excluded. The case involved a shooting following an argument between two groups outside of a pub. The murder weapon was not recovered and no forensic evidence identified the defendant as the shooter. The defense was that someone else outside the pub shot the victim. The state's case relied heavily on the testimony of the defendant's "friends" in his group, who all had close ties to each other. All four of these witnesses testified that the defendant made statements admitting to the shooting and one of them testified that he saw the defendant lift his hand beforehand hearing the gunshot and seeing the victim fall. Two independent eyewitnesses also identified the defendant as the shooter, but they were unable to do so for photo line-ups shortly after the crime and identified the defendant only after seeing his picture in the newspaper following his arrest in the case and/or being shown only a picture of the defendant by the prosecutor shortly before the trial. One of the victim's friends, however, did not identify the defendant as the shooter. He said the shooter ran to a light colored Honda Accord afterwards, which did not match the defendant's vehicle or the vehicle the rest of his group rode in. One of the victim's friends did identify the defendant from a photo lineup as the shooter, but she also said that the shooter dropped a cellphone while running away afterwards. It was undisputed that the cellphone was dropped by Dor, one of the defendant's "friends" and state witnesses that identified him as the shooter. While counsel argued that a third party, probably Dor, was the shooter, counsel presented no additional evidence in support of this theory. The state conceded that counsel's conduct was deficient and not based on strategy. Counsel did not review discovery, examine the state's physical evidence, conduct any independent investigation, or seek exclusion of any of the state's evidence. As a result, significant evidence supporting the third-party culprit defense was not presented at trial and two in-court identifications of the defendant that should have been excluded were admitted in evidence. Specifically, if counsel had adequately prepared, the evidence would have established that one of the victim's friends described the clothing worn by the shooter in a manner consistent with Dor's neighbor, Heidi's, description of the clothing Dor wore that day. This same witness described the shooter as having "short dread locks," which matched Dor and not the defendant, who had a short, "fuzzy head," haircut. Likewise, Dor's girlfriend said to Heidi shortly after the shooting that "her man" was the shooter. Heidi's testimony likely would have been admissible under state law even if Dor's girlfriend would not admit this statement in her own testimony. There was other evidence available that Dor "had both a motive and an intent to engage in violence toward the victim's group of friends" shortly prior to the shooting. This evidence was available through the statements of three friends and neighbors of Dor. At least some of this evidence would have been admissible at trial. Counsel's conduct was also deficient in failing to challenge the identifications of the defendant as the shooter by persons that first identified him from news articles related to the arrest. Under state law, these

identifications would have been excluded from evidence if they had been challenged by the defense. Prejudice was established.

***People v. Ackley*, 870 N.W.2d 858 (Mich. 2015)**. Counsel ineffective in murder of child case for failing to investigate and present expert testimony concerning the cause of death. The case involved the death of the three-year-old daughter of the defendant's live-in girlfriend, while the child was in his care. The defendant testified that she had been napping alone in her room before he found her lying on the floor next to the bed unresponsive and called emergency services. The state alleged that the defendant killed the child either by blunt force trauma or shaking her and presented expert testimony to that affect. Specifically, the state called five medical experts opining that death was caused "by nonaccidental shaking, blunt force trauma, or a combination of both." Counsel's conduct was deficient in failing to present contrary evidence to support the defense of an accidental fall, despite the availability of funding for expert assistance. Counsel had contacted one forensic pathologist, Dr. Hunter, who explained that the medical community was sharply divided on this issue almost in a religious manner and that he was not the expert the defense wanted because he was of the wrong religious camp. He did, however, refer counsel to Dr. Shuman, a well-known forensic pathologist, who had conducted substantial research in the area and had the right religious beliefs to support the intended defense. Counsel never contacted Dr. Shuman and never even researched the issue. Instead, he continued consulting Dr. Hunter, who continued to warn "you don't want me as your defense expert." If counsel had consulted Dr. Shuman or another expert, he would have been able to present expert testimony that the bruises on the child's body were consistent with the life-saving measures used that day and that her head injuries were likely caused by an accidental "mild impact" trauma rather than abuse. Counsel's conduct was deficient as there was no reasonably objective explanation for counsel's decision to confine his search for expert assistance to an expert who was "a self-proclaimed opponent of the very defense theory counsel was to employ at trial," who even referred counsel to a more suitable expert. Likewise, counsel did nothing to prepare himself otherwise. These "sparse efforts" did not satisfy *Strickland*'s "'duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary,' especially in light of the prominent controversy within the medical community" on this topic. *Id*. at ___ (citations omitted). Two things resulted: "a defense theory without objective, expert testimonial support, and a defense counsel insufficiently equipped to challenge the prosecution's experts because he possessed only Dr. Hunter's reluctant and admittedly ill-suited input as his guide." This was not a case of requiring counsel to "shop for experts," as counsel did no shopping at all and settled on the first one he encountered despite the importance of the issue and despite that expert's "specific recommendation to contact a different and more suitable expert." Hunter's additional statements that Shuman "would not buy into every story" and was "a man of science" were not reasons to avoid contacting Shuman, but instead were "consistent with scientific integrity." Prejudice was established. "While we cannot say that a battle of the experts would have ensured the defendant's acquittal, counsel's failure to prepare or show up for the battle sufficiently 'undermine[s our] confidence in the outcome' of this case to entitle the defendant to relief. *Id*. at ___ (quoting *Strickland*, 466 U.S. at 694).

***People v. Cassala*, 130 A.D.3d 1252, 15 N.Y.S.3d 479 (N.Y. App. Div. 2015)**. Counsel was ineffective under state law "meaningful representation" standard in attempted rape case for failing

to investigate and challenge the state's case, based on the alleged victim's bleeding disorder, and failing to object to the testimony of the defendant's former spouse concerning his sexual preference for anal intercourse. The charges involved three separate instances where the defendant allegedly forcibly anally assaulted a 15-year-old victim. While the sexual assault nurse examiner ("SANE") found no physical evidence of assault, she noted in her report that the alleged victim had been diagnosed with a bleeding disorder, "VWD." The SANE testified at trial that it was not unusual not to find physical evidence and that this was not inconsistent the alleged victim's testimony. Counsel's conduct was deficient in failing to investigate despite being aware of the disorder and being unaware of what "VWD" meant. Investigation and consultation with an expert would have revealed that this is Von Willebrand Disease, which would have made the presence of bruising or bleeding during forceful, non-consensual anal intercourse far more likely than in a person without VWD. This would have provided powerful cross-examination evidence for the SANE and the defense could have presented its own powerful expert testimony. These failing "were magnified by the fact that the People's only direct evidence of defendant's guilt was the victim's testimony, making counsel's efforts to undermine her credibility of paramount importance." Counsel's conduct was also deficient in failing to object to the defendant's ex-wife's testimony or to request a limiting instruction related to this evidence. There was a "legitimate question" about whether the prejudicial effect of her testimony substantially outweighed its probative value, especially considering her lack of sexual relations with the defendant for at least several years prior to the alleged assaults. Even if this evidence was admissible, the defendant was entitled to a limiting instruction under state law. Prejudice from this unlimited propensity evidence was clear as the jury asked during deliberations to have read back the evidence of the defendant's "past sex life." Counsel also failed to object to prosecution arguments asking jurors to put themselves in the "victim's shoes" and to advocate or "fight" for her in the deliberations. The "cumulative effect" of counsel's conduct deprived the defendant of "meaningful representation" and required reversal.

***People v. Graham*, 11 N.Y.S.3d 242 (N.Y. App. Div. 2015)**. Counsel ineffective under state law in second degree murder case for failing to investigate a mental defense to charge that the defendant stabbed his former girlfriend to death while she was driving a car, despite awareness of the defendant's psychiatric history, which included several hospitalizations, and despite being authorized by the trial court to obtain an independent psychiatric evaluation. Under state law, a defendant need only show that he was denied "meaningful representation." "[S]ome showing of prejudice" is required, "albeit not necessarily the 'but for' prejudice required under federal law." Here, that standard was met.

***Freiburger v. State*, 775 S.E.2d 391 (S.C. Ct. App. 2015)**. Counsel ineffective in murder case for failing to introduce a letter rebutting the state's ballistics evidence. The case involved a 1961 murder of a taxi driver. Three bullet fragments were recovered from the victim's head, which identified the murder weapon as a .32 caliber revolver. The defendant was arrested carrying a .32. Another potential suspect, Dreher, was also found to possess a .32. Ballistics testing at the time could not conclusively identify either weapon as the murder weapon and no charges were brought. In 2000, the Richland County Sheriff's Department reopened the case. Five ballistics examiners from the South Carolina Law Enforcement Division (SLED), headed by Parnell, reported inconclusive results in which neither weapon could be included or excluded as the murder weapon.

The Sheriff's Department hired a private ballistics expert, Cayton, who concluded that Freiburger's gun was the murder weapon. During trial, Parnell testified concerning the inconclusive findings of SLED, but qualified this by saying there was "a remarkable similarity" with Freiburger's revolver but not enough for him to say it was a match. The state also called Stokes, who had been a SLED ballistics examiner from 1954-1981. Stokes testified that Lt. Cate set up the SLED ballistics division and that Stokes had been his "first understudy." According to Stokes, he worked with Lt. Cate on the case and the two of them had excluded the Dreher gun. Finally, Cayton testified that Frieburger's weapon was the murder weapon. Counsel's conduct was deficient in failing to introduce into evidence a letter from 1961 in which the Chief of SLED stated that Lt. Cate's opinion was that the Dreher gun was the murder weapon. Counsel stated no strategic reason for the failure. Prejudice was established as the state's case "was purely circumstantial, and – other than ballistics – weak." The letter would have contradicted Cayton, upset the "apparent unanimity" of the State's experts, and contradicted Stokes about the results of the 1961 testing. In short, admission of this letter "would have deeply undermined the State's case."

***State v. Jones*, 352 P.3d 776 (Wash. 2015)**. Counsel was ineffective in second degree assault case for failing to interview several eyewitnesses clearly identified in the discovery provided by the state and failing to present this testimony. The case involved a street fight involving the defendant, the alleged victim, and three of the alleged victim's friends. The state's witnesses, including the alleged victim's friends involved in the fight, generally identified the defendant as the aggressor and testified that he held a knife. A sole defense witness, Forbes, who was a neutral bystander, testified that it was essentially mutual combat and the defendant drew the knife only to protect himself after the three other men joined the fight. Based on a detective's testimonial mention of a witness listed in discovery that counsel had failed to interview, counsel sought a mistrial believing inaccurately that this witness' identity had not been disclosed. The court granted a continuance instead and the witness was then called by the prosecution. This witness, Brown, testified that the alleged victim had been chasing the defendant prior to the altercation. She also never saw a knife and only heard reference to it after the alleged victim's three friends joined the fray. Counsel's conduct was deficient in failing to interview Brown and failing to interview Hamilton, another eyewitness disclosed by the state in the discovery papers. Hamilton would have testified that the alleged victim had tackled the defendant and started beating him before the alleged victim's friends joined in. He saw the defendant with a knife only after he had been tackled and all four men were assaulting him. Counsel's conduct was also deficient in failing to interview witness Ooveda, who had been listed in an incident report in discovery. The prosecutor interviewed her at the beginning of the trial and informed counsel she might have evidence favorable to the defense, but counsel still did not interview her. In finding no prejudice for failing to call Hamilton, the trial court relied on counsel's post-trial testimony that when he read the transcript of Hamilton's 911 call after trial, he did not believe that Hamilton's testimony would have been helpful. This was error. "Strategic decisions are made before, not after, taking the challenged action" and counsel's testimony, after the fact, about the helpfulness of the potential testimony was nothing more than "hindsight." Prejudice was established due to the failure to present Hamilton's testimony, which would have corroborated Brown's testimony and bolstered Forbes' credibility, while also diminishing the credibility of the state's witnesses. "The failure to interview Brown and Ooveda compounds the prejudice."

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***State v. Coleman*, 865 N.W.2d 190 (Wis. Ct. App. 2015)**. Counsel ineffective in sexual assault of 13-year-old child on two occasions case for multiple reasons. First, counsel informed the jury during voir dire and the opening statement that the defendant had been previously convicted of a crime and is "not an angel." This evidence was not admissible because the defendant did not testify. Second, counsel also informed the jury that it was counsel's decision to make and he had decided the defendant would testify. The defendant did not testify and counsel did not take responsibility for that in the closing. Because counsel conceded that the defendant never indicated an intent to testify, there could be no reasonable strategy to explain this conduct. Third, counsel failed to impeach the alleged victim with statements to three different people that the defendant had ejaculated during the second alleged assault when there was no male DNA on her clothing or bedding. Counsel's only explanation for failing to present this evidence was that counsel "didn't want to talk about any sticky, wet substance on a 13-year old girl." This explanation was not reasonable as these prior statements were relevant and material in light of the lack of DNA evidence. Finally, counsel failed to impeach the alleged victim with her father's prior statements contradicting her trial testimony about events on the day of the first alleged assault. While this last aspect "might be minor," standing alone, "is was not the only misstep." Prejudice established based on the "cumulative effect" of the errors. There was no physical evidence and no witnesses, such that the entire case depended on the credibility of the alleged victim. Counsel's errors bolstered her credibility by failing to impeach her and impugned the defendant's character by providing inadmissible information.

**2014:** ***Robinson v. State*, 141 So. 3d 656 (Fla. Dist. Ct. App. 2014)**. Counsel was ineffective in aggravated battery case for failing to timely subpoena the defendant's girlfriend to testify. This was a "he said, he said" case where the defendant and the alleged victim each claimed that the other was the aggressor. The only other witness to the confrontation was the defendant's girlfriend, who did testify in sentencing. Thus, the record was sufficient to find deficient conduct and prejudice on direct appeal.

***Humphrey v. Williams*, 761 S.E.2d 297 (Ga. 2014)**. Trial counsel was ineffective in child molestation and statutory rape case involving the defendant's stepdaughter and her friend for failing to adequately investigate and present evidence concerning an alleged similar transaction of sexual abuse against his daughter in Florida seven years before. While trial counsel argued that the similar transaction evidence should be excluded, he presented no witnesses and offered no evidence. During trial, the state presented the defendant's daughter, Jessica, as its final witness. She testified that the defendant had gotten into bed with her, put his hand under her shirt, and rubbed her behind over her underwear on one occasion when she was 11 years old. She reported the incident to social services and was placed in a foster home before eventually being sent to the defendant's mother and then returned to the defendant. The defense presented four witnesses to counter her testimony. The defendant's sisters testified that "the State" returned Jessica to the defendant's custody, but the State challenged this in cross-examination alleging that there was no legal process and the defendant's mother simply returned Jessica to him. The defendant's mother testified that Jessica made shifting allegations against the defendant "in the context of a custody battle with Jessica's mother." She testified that the "allegations were investigated and shown to be false." Counsel did not, however, introduce documents from the Florida proceedings which supported the testimony that Jessica's allegations had been found to be false by a Florida court and that the court had, in fact, ordered that

she be returned to the defendant's custody. At the close of the evidence, when the trial court asked the defendant if he was satisfied with counsel's performance, the defendant specifically stated that he wanted counsel to call additional witnesses and introduce the Florida records. The court offered to continue the case for a day, but counsel intervened and asked to speak to the defendant. After that, counsel reported (and the defendant agreed) that they did not want a continuance because counsel believed the information was "already in the case sufficiently." The prosecutor's closing argument started with the assertion that "[t]here is not the first bit of evidence that Jessica was not believed by a Florida court." Trial counsel also represented the defendant on direct appeal and again challenged the trial court's admission of the similar transaction evidence unsuccessfully. In state habeas proceedings on the ineffectiveness claims, the Florida court records were presented. These records had been obtained by the defendant's mother from the courthouse in the adjacent county one week after trial. She notified defense counsel but he "said they wouldn't have any bearing on the case." The records contradicted Jessica's testimony at trial. She had previously alleged only that the defendant had kissed her and told her "she would get anything she wanted if she would have sex with him for ten minutes." After ten months of bi-weekly counseling sessions, a social worker reported to the court reported "conflicting and confusing" allegations by Jessica and concluded with the social worker's "clinical opinion that . . . no actual abuse occurred." A school psychologist had also reported in a letter that Jessica "lies easily." A joint report from a social services attorney and a counselor also reported that Jessica lies. The Florida court returned custody to the defendant and terminated the involvement of social services. Counsel's conduct was deficient in failing to obtain these records and present them to the trial court to get the similar transaction evidence excluded. Counsel was aware of the Florida court proceedings but made no effort to obtain the records "although any competent lawyer knows that courts produce documents reflecting (and usually explaining) such decisions." The Florida court records "presented an obvious source of information and evidence for presentation at the similar transaction hearing to try to exclude [Jessica's] testimony altogether and for impeachment if Jessica was allowed to testify at trial." Moreover, the records were easily accessible from the neighboring county "as revealed by the fact that Williams–operating pro se and from a Georgia prison–was able to obtain them without difficulty." Prejudice was established. The failure to present the Florida records "enabled the prosecutor to insinuate falsely on cross-examination" that Jessica had been returned to the defendant's custody "without any kind of court order to that effect. The prosecutor also "claim[ed] falsely in closing argument that Jessica did not make shifting allegations" and that there was no evidence that she had not been believed by the Florida court. Aside from Jessica's testimony, the other evidence of guilt was "conflicting." The significance of Jessica's testimony in the trial was clear as she testified last for the state and the defense presented four witnesses just to contradict her testimony. "The importance of the similar transaction evidence was also demonstrated by the prosecutor's repeated references to it in his closing argument–references that the Florida court records show to be untrue in significant part."

***Douglas v. State*, 761 S.E.2d 180 (Ga. Ct. App. 2014)**. Trial counsel was ineffective in armed robbery, aggravated assault, possession of weapon, carjacking, and misdemeanor obstruction of an officer case for failing to obtain the criminal records of the three alleged victims and impeach them on that basis. The three alleged victims testified that they were in the park together when they were robbed by two armed men of over $1100 in cash, cell phones, and a car. The robbers attempted to leave in the car and were immediately in a car accident. They then split up and ran and the alleged

victims chased them joined a witness to the robbery. Ultimately the police were involved and when a police officer spotted the defendant the witness, who had lost sight of the robbers during the chase, identified him as one of the suspects. The defendant attempted to run from the officer but was ultimately subdued and arrested. He had approximately $300 on him, but no weapon or cell phone and none was found along the route of the chase. After the defendant was cuffed and sitting in the police car, the three victims identified him as one of the robbers. The defense theory was misidentification. Counsel's conduct was deficient in failing to obtain the criminal records of the alleged victims and use the information to impeach them. Counsel admitted the deficiency and the lack of a strategic reason for the failure. Prejudice was established as the identification of the defendant as the robber rested almost entirely on these witnesses. The alleged victims had all been convicted of drug-related offenses and two of them actually had major drug charges pending when they testified. This information would have allowed impeachment of three kinds: (1) impeachment with a prior felony conviction; (2) impeachment regarding the nature of the victims' relationships; and (3) impeachment or possible bias due to pending charges. All convictions vacated, except the misdemeanor obstruction conviction.

***People v. Dupree*, 16 N.E.3d 788 (Ill. App. Ct. 2014)**. Counsel ineffective in murder and attempted murder case for multiple errors related to a prior consistent statement of a state's witness. The shooting involved a drive-by shooting into a group of people standing outside a house. While not labeled as gangs, the two groups had had conflicts before. Police interrogated Latimer and Haywood, who both initially denied involvement, but then Latimer admitted that he was in the car and identified Dupree as the shooter. The next day, Haywood returned to the police station and told the police that he was driving the car and that Dupree was the shooter. During trial, Latimer admitted being in the car and hearing shots but he testified that he believed the shots were fired towards the car and not out of it. He denied any recollection of telling the police that Dupree was the shooter. Haywood, however, testified consistent with his second statement. Counsel cross-examined Haywood about his initial statement and asked whether his "enhanced memory" had "just come to his mind last week." In rebuttal, the state read questions and answers from his statement the following day, which was consistent with his trial testimony, and repeatedly asked Haywood if that statement was true. Counsel's conduct was deficient in opening the door to this prior consistent statement, which was inadmissible.

> A prior consistent statement may not be used on direct examination to enhance the credibility of a witness's testimony. "Moreover, when a witness is impeached by means of a prior inconsistent statement, if a consistent statement does not disprove or explain the making of the inconsistent statement, it is inadmissible." Specifically, a prior consistent statement is not admissible simply because a witness has been impeached with a prior inconsistent statement. However, where there is a charge or inference of recent fabrication, a prior consistent statement is admissible to show that the witness told the same story before the time of the alleged fabrication.

*Id*. at ___ (citations omitted). Here, counsel opened the door to the prior consistent statement by suggesting that the change in the witness' statements was of "recent vintage," which counsel

undoubtedly knew was not true. Then, counsel called a detective to testify about Haywood's prior inconsistent statement. On cross, the state elicited additional testimony about Haywood's prior consistent statement. When the detective was asked if Haywood had identified Dupree as the shooter, counsel objected that the testimony was beyond the scope of direct. After the jury was sent out, the court sustained the objection. When the jury returned, it was not informed of that or given an instruction to disregard the question. Counsel's conduct was deficient in failing to object to the cross on the basis that the substance of the prior consistent statement was already before the jury. In addition, counsel's conduct was deficient in failing to obtain an instruction to at least disregard the question on which the court sustained counsel's objection. During closing arguments, counsel's conduct was also deficient in failing to object to the state's repeated assertion of the prior consistent statement as substantive evidence. Finally, counsel's conduct was deficient in failing to request a limiting instruction to inform the jury that the prior consistent statement could not be considered as substantive evidence of guilt. Counsel's failures were not based on strategy. Prejudice established.

> The reason prior consistent statements are prohibited is because they are likely to unfairly enhance the witness's credibility with the trier of fact simply because the statement has been repeated. "The danger in prior consistent statements is that a jury is likely to attach disproportionate significance to them. People tend to believe that which is repeated most often, regardless of its intrinsic merit, and repetition lends credibility to testimony that it might not otherwise deserve."

*Id*. at ___ (citations omitted). Here, Haywood was a crucial witness, the prior consistent statement directly related to the question of guilt, and the state's evidence was far from compelling.

***Wilson v. State*, 340 P.3d 1213 (Kan. Ct. App. 2014)**. Counsel was ineffective in murder case for multiple reasons. The defendant was convicted based primarily on the testimony of Goodpasture, an alleged eyewitness. Counsel's conduct was deficient in: 1) failing to challenge the state's evidence on the date of the offense when five witnesses had seen the victim alive several days later; 2) failing to challenge Goodpasture's credibility based on inconsistent statements to police; 3) failing to present letters Goodpasture wrote that contradicted his statements to police; and 4) failure to present police recordings of the defendant and another person – made without the defendant's knowledge – which suggested that the defendant did not even know a person Goodpasture said was also present at the murder. Prejudice established based on counsel's "failure to damage the credibility of the State's only eyewitness." The other two errors relating to the date of the offense and the letters, "when taken together," were also prejudicial. In reaching this conclusion, it was not error for the court to consider attorney expert testimony.

> While it's true, as the State argues, that many judges have had experience trying criminal cases, many have not. Certainly, most judges have not had the level of experience of Kerns, who had defended 10 murder trials and handled more than 60 jury trials. His testimony helped to place the legal issues of this case into context and thus was admissible.

**Capital Case*

***People v. Douglas*, 852 N.W.2d 587 (Mich. 2014) (*affirming* 817 N.W.2d 640 (Mich. Ct. App. 2012))**. Counsel ineffective in criminal sexual conduct case involving his three-year-old daughter for failing to object to testimony from a forensic interviewer, a police detective, and a social services caseworker that vouched for the alleged victim's credibility and indicated there was no indication that she had been coached, as the defense alleged. Counsel's conduct was deficient and not based on strategy. Prejudice established as the prosecution's case "hinged wholly" on the alleged victim's credibility as there was no physical evidence and no independent witness. Reversal was also required due to the trial court's error in admitting inadmissible hearsay from the forensic interview through the testimony of the interviewer and the videotape of the interview.

***People v. Ugweches*, 983 N.Y.S.2d 244 (N.Y. App. Div. 2014)**. Counsel was ineffective in assault on police officer with vehicle case for three reasons, which caused cumulative prejudice in this second trial following a hung jury in the first trial. The primary problem was that counsel, who had not represented the defendant in the first trial, failed to object to hearsay testimony about alleged bystander statements supporting the complainant's version when the prosecution was primarily based on her testimony. Counsel's conduct was deficient and not based on any strategy, as counsel was not even aware that this hearsay had been excluded in the initial trial. Likewise, counsel failed to subpoena the police officer's medical records or to call the medical expert that had testified in the first trial to establish that the officer's records did not corroborate her testimony that she had sustained physical injury in the assault. Finally, counsel failed to impeach the officer with her prior inconsistent statement to an administrative board concerning whether she had been knocked down. Here, the officer denied making the prior inconsistent statement and that was the end of the matter, but in the first trial counsel had taken proper steps to prove the issue.

***Bagwell v. State*, 763 S.E.2d 630 (S.C. Ct. App. 2014)**. Counsel ineffective in burglary case for failing to seek DNA testing of blood found on glass from the crime scene. The case involved an alleged burglary of the alleged victim's apartment. The alleged victim testified that he returned home to find the defendant exiting through the back glass patio door, which was shattered. Afterwards he confronted the defendant outside and punched him, but the defendant's face was already bleeding before the punch. The alleged victim's roommate also testified that the defendant's face was bleeding prior to the fight. The defendant testified that he was asleep in his own apartment in the same complex when he awoke to find the alleged victim beating him and accusing the defendant's roommate of breaking into his apartment. The defendant called the police and then looked outside where he saw the alleged victim beating the defendant's roommate and holding a gun to his head and he went outside. He testified that his face was bleeding after the incident because of the alleged victim's attack. During closing arguments, the state asserted as the "linchpin" of its case that the defendant's face was cut because he ran through the glass door in the alleged victim's apartment and was cut. Counsel's conduct was deficient in failing to seek DNA testing of blood found on three pieces of glass from the patio door. The testing, conducted in post-conviction, revealed that the blood was not the defendant's blood. "'At a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case.' *Ard v. Catoe*, 642 S.E.2d 590, 597 (S.C. 2007) (internal quotation marks omitted) (emphasis omitted)." Here, trial counsel's only explanation for the failure was that she believed the State had planned to do DNA testing. This was unreasonable "because criminal defense attorneys have a duty 'to make an independent investigation of the facts and circumstances

of the case.' *Ard*, 642 S.E.2d at 597 (internal quotation marks omitted) (emphasis omitted). Her duty to test the blood from the glass was especially important here because the test results could have supported Bagwell's claim that he was asleep in his apartment at the time of burglary." Prejudice established. This evidence would have rebutted the state's theory that the defendant' eye was cut when he exited the defendant's apartment through the glass patio door and would have cast doubt on the alleged victim's and his roommate's testimony that the defendant was bleeding before the alleged victim punched him. Likewise, this evidence would have supported the defendant's testimony that he was bleeding when police arrived because the alleged victim assaulted him.

***Walker v. State*, 756 S.E.2d 144 (S.C. 2014)**. Counsel was ineffective in kidnaping and criminal sexual conduct case for failing to interview the defendant's former girlfriend and present her testimony as an alibi witness. The victim testified that her car would not start after she stopped for gas at a convenience store in the early evening of a Saturday. She accepted help from her assailant, who fixed the car and then followed her home to obtain payment because she did not have the money with her. The assailant kidnapped her and took her – blindfolded – to his home where he sexually assaulted her. The following morning he returned her – again blindfolded – to her home around 5:00 a.m. The victim identified the defendant as her assailant from store video surveillance footage. In a videotaped statement, the defendant admitted being at the store but denied the remainder claiming instead that he had gone to a friend's home after leaving the store and then returned to his girlfriend's home around 9:30-10:00 p.m. and that he spent the remainder of the night there. Counsel's conduct was deficient in failing to interview the girlfriend despite being aware of the statement and having notes that the girlfriend should be interviewed. Five years later when the girlfriend was interviewed, she testified that she had spent every weekend with the defendant before he inexplicably disappeared, which she had not known was due to his arrest in this case. Prejudice established as the post-conviction judge found her to be credible and that there was a reasonable probability that the jury would have believed her alibi testimony.

***Ex parte Overton*, 444 S.W.3d 632 (Tex. Crim. App. 2014)**. Counsel ineffective in capital murder case for failing to present medical expert testimony. The defendant was charged in the death of a four-year-old child that she and her husband were in the process of adopting. The child died in the hospital due to brain swelling caused by incredibly high sodium intoxication. The defendant testified that the child was "obsessed with eating" and would become upset whenever he was not permitted to eat whatever he wanted. She had reported his excessive and inappropriate eating behaviors to the adoption supervisor. On the day of his death, the defendant gave the child chili was Zatarain's seasoning added to it. When he wanted more and became upset, she gave him water with Zatarain's mixed in to drink in his sippy cup. Twenty minutes or so later he "stumbled to the floor, said he was cold, and threw up." He then started to shake. The defendant put him in beds with blankets and a heating pad, but was not overly concerned. Later she put him in a warm bath. He then started having breathing problems and sounded congested. His breathing got better when she used a nebulizer on him. When the abnormal breathing returned and the child was moaning and lethargic, the defendant and her husband took him to an urgent care center. On the way, the child stopped breathing and the defendant performed CPR. The urgent care center transferred the child to a hospital and that hospital transferred him on to a Children's Hospital where he died the next day. The state argued two theories of murder: (1) that the defendant forced the child to consume sodium;

and (2) that she failed to obtain medical care for him. A jury poll following conviction revealed that the jury found the defendant guilty based only on the defendant's failure to obtain medical care. Defense counsel hired a leading expert on hypernatremia, or sodium intoxication, and he gave a deposition during the middle of the criminal trial. He was questioned by the defendant's counsel in a separate child-custody case. Two of the trial counsel in this case either attended or watched a portion, but advised the lead counsel not to use the deposition because it obtained objectionable material and could not be adequately edited. Counsel also failed to present the expert's testimony because his testimony had been postponed twice and counsel did not want to ask "for a continuance to accommodate the doctor, who could not travel on the Sabbath." Counsel's conduct was deficient because the two hour deposition "contained much testimony that was favorable to the defense." The expert described "emotional deprivation syndrome, which is often associated with extreme eating habits." The victim exhibited many features of this syndrome. This expert also disputed the testimony of the state's expert about the amount of Zatarain's the victim would have had to consume in order for his sodium level to be that high. While the state sought to prove that the defendant had forced the child to consume high levels of sodium, this expert concluded that the Defendant did not poison the child and that the child likely consumed something himself which was the cause of his sodium intoxication. More importantly, this expert concluded that salt poisoning and acute hypernatremia is rapidly lethal, but it would take at least an hour for the child to exhibit symptoms that would cause a reasonable person to believe that he was deathly ill and should be taken to the hospital. Even then by the time it would take to get to the hospital and for testing to be done to determine that the problem was salt poisoning, and the lack of any "specific therapy" or treatment, whether "someone lives or dies, to a large degree, it's luck." In short, the mortality rate is very high. Thus, even if the defendant had called 911 immediately and an ambulance had taken the child directly to the hospital, "it would be exceedingly unlikely for him to live; and, if he did, in all probability or almost certainly there would be irreversible neurological injury." The two primary trial counsel conceded that they did not review the deposition and that they were ineffective for not using the deposition or calling this expert to testify. While the one counsel believed that it would have been difficult to edit around objectionable parts of the deposition containing the prosecution's improper comments, this does not describe "a strategic decision." Moreover, there was no strategic decision not to request a continuance to accommodate the experts travel restrictions. Prejudice was established especially in light of the jury's conviction based on the defendant's alleged failure to obtain adequate medical care.

***Ex parte Skelton*, 434 S.W.3d 709 (Tex. Ct. App. 2014)**. Counsel ineffective in forgery case for three reasons. The defendant was an attorney charged with forging the will of a deceased client. During trial, the defense conceded that the defendant had cut and pasted the signatures of the decedent and two witnesses onto a writing purporting to be a will and then photocopying the altered document and filing it with the court. The contested point at trial was whether the defendant acted "with the intent to harm or defraud" because the defense contended that the forged will filed accurately represented a will actually executed by the decedent. The signed copy the defendant had kept had been severely damaged in a flood of the office, such that parts of it were illegible. She had simply cut and pasted the signatures from the copy onto a new copy of the will kept on and printed out from the defendant's computer. Both witnesses listed on the forged will testified that they had, in fact, witnessed the decedent sign the will. Counsel's conduct was deficient. First,

counsel failed to object when the prosecution elicited testimony from a police investigator that the defendant invoked her right to silence to terminate the interview of her. Second, counsel actually emphasized this testimony during cross-examination. Third, counsel failed to object to the investigator's "expert" testimony about the legal definition of forgery and his opinion that the defendant was guilty. The investigator had no specific training, expertise, or knowledge and his testimony was not helpful to the jury as it amounted only to his opinion of the defendant's guilt. Prejudice established because the testimony about the defendant invoking her rights was inadmissible and damaging to the defendant's credibility before she even testified and her credibility was essential to her defense and counsel's overall strategy. Likewise, the prejudice was enhanced by the prosecution's closing argument, which invited the jury to draw an inference of guilt from the defendant "attempting to cover up her actions by hiring an attorney." Considering the "overall record, . . . counsel's deficient performance permeated Skelton's trial."

***State v. Thompson*, 318 P.3d 1221 (Utah Ct. App. 2014)**. Counsel ineffective in forcible sodomy case for failing to object to state's "expert" rebuttal witness and state's improper closing arguments. The defendant, a "long-haul truck driver" from Wisconsin was charged with forcible sodomy of a 16-year old girl. The alleged victim testified that the defendant and his friend spent the night at her house and that the defendant sexually assaulted her between 9:00-9:30 a.m. the following morning. The incident allegedly occurred six years before trial and was not reported until 18 months later. The alleged victim was the only witness called in the state's case-in-chief. The defendant and his friend testified that no assault had occurred and that they were on the road to Las Vegas well before 9:00 a.m. Defense counsel sought admission of the defendant's "commercial truck driver's logs" to corroborate this testimony. The state opposed admission on the ground of late disclosure. The court admitted the log's but allowed the state a lunch break to locate a rebuttal witness. The rebuttal witness was a "transportation specialist" with the Utah Highway Patrol. In his testimony, he relied on "a computer software program called PC*Miler, which uses trucking routes and speed limits to estimate travel times." He presented a report generated by this program and testified, on the basis of this report, that the defendant's testimony about the time necessary for a specific trip "could not be accurate" and that the defendant "cooked the books." Trial counsel's conduct was deficient in failing to inquire about the "expert's) qualifications or his involvement in the preparation of the report. Only a single question was asked by the state on this topic: "What does the program do?" The defense presented the post-conviction testimony of a senior vice president of the company that developed the software. His testimony revealed that the state expert relied on an out-dated version of the software and "default settings" rather than "using the actual speed limits." Even using the out-dated version used by the state expert, the only was he could approximate the numbers relied on by the state's expert was to use a 55-miles per hour speed limit rather than the actual speed limit of 75-miles per hour. Using the correct speed limit on the correct software or the out-dated version, the time required for the trip was consistent the time range logged by the defendant. Likewise, the state's expert conceded in his post-conviction testimony that he did not generate the report he relied on and was not present when it was generated. Thus, the report itself was entirely inadmissible hearsay of the "declarant" who actually wrote the report. The trial court also found that the state's "expert" did not have the qualifications necessary to testify as an expert using the software. Trial counsel was also deficient in failing to object the following improper arguments by the state: (1) the prosecutor personally vouched for the "expert's" credibility; (2) the prosecutor expressed his personal opinion that the defendant's friend was not credible; (3) the prosecutor expressed his

opinion that the defendant's body language during his testimony indicated that he was dishonest when there had been no evidence presented to support these arguments; and (4) the prosecutor impermissibly appealed to the jurors' passions and prejudices in arguing that "this is the kind of crime that occurs very often" and asking the jury to "send a message" with its verdict. The court could "conceive of no reasonable trial strategy" for not objecting to the argument about the defendant's body language or the other arguments when credibility of the defendant versus the alleged victim was the primary issue in the case. Prejudice was established based on the "cumulative harm." "[W]hile trial counsel's impromptu cross-examination of [the state's expert] was skillful, it was not a substitute for preventing [the expert] from testifying in the first instance." Likewise, the improper arguments mostly related to the credibility of witnesses, which was the primary issue in the case. The trial court's instructions that counsel's statements were not evidence did not cure the problem, especially because the instructions came before the improper arguments.

***State v. Fedoruk*, 339 P.3d 233 (Wash. Ct. App. 2014)**. Counsel in second-degree murder case was ineffective in failing to investigate a mental-health defense. Counsel's conduct was deficient in failing to investigate the possibility of a mental health defense. The defendant had a long history of serious mental illness, including a diagnosis of schizophrenia and two prior admissions to a psychiatric hospital. In a competence evaluation following a prior arrest, the defendant had been diagnosed with bipolar disorder with psychotic features. At trial on this prior offense, a court found the defendant not guilty by reason of insanity. In events surrounding the current charge, the defendant engaged in bizarre behaviors and statements. A pretrial competence examiner found major mental illness. Nonetheless, counsel waived an affirmative defense of diminished capacity until the day before jury selection, when counsel sought a continuance in order to pursue an insanity defense. Counsel stated that he had no basis for such a defense prior to speaking with the defendant through an interpreter. Given the defendant's extensive mental health history, counsel's failure to seek to retain a mental health expert until the day before jury selection was deficient conduct. Prejudice was also established.

***State v. Jenkins*, 848 N.W.2d 786 (Wis. 2014)**. Counsel ineffective in intentional homicide case for failing to present testimony of an eyewitness, who did not identify the defendant in a photo array, and would have testified that the defendant was definitely not the shooter and that she had seen him across the street minutes after the shooting. Trial counsel's strategy was to attack the credibility of the victim, who identified the defendant as the shooter, and to provide an alibi for the defendant. Trial counsel had the police report that identified the eyewitness and included information that she had failed to identify the defendant in a photo array. He could not recall interviewing her, but the eyewitness testified that she spoke with defense counsel on multiple occasions but was not asked to testify or subpoenaed for the trial. Counsel's conduct was deficient in failing to present this witness, who supported the defense strategy and would have impeached the state's witness. Her testimony also would have supported the defendant's version of events and his professed alibi of visiting someone in the area as she saw him across the street outside that friend's home shortly after the shooting. Prejudice was also established. Although her testimony was not necessarily consistent over time and her credibility could be challenged, "the prosecution's key eyewitness, had similar if not more substantial credibility problems."

***Cooper v. State*, 319 P.3d 914 (Wy. 2014)**. Counsel ineffective in aggravated assault with a deadly weapon case for failing to develop and present an expert witness to testify as to how close the

victim's vehicle was to the defendant before the defendant started shooting his gun at the vehicle. The defendant and his friends got into an argument with the victim and his friend over a carnival game at a fair. Law enforcement directed all to leave the fair but the two groups encountered each other again later the same day. Although there were some conflicts in the evidence, it was undisputed that the victim drove his car towards the defendant, the defendant then shot into the windshield twice, the car hit the defendant before the defendant shot a third time while he was on the hood of the car, after the victim stopped the car and the defendant fell to the ground the victim of the car and the defendant told him to get the car off him, which the victim refused, and then the defendant fired three more shots with one hitting the victim in the leg. Trial counsel, who was arguing self-defense, was aware that there were discrepancies in witness statements about how far the car was from the defendant when he fired initially, but counsel did not retain an expert. Rather, counsel consulted "trajectory charts" on the internet and made her own calculations that the car was no more than 8 feet away when the first shots were fired. She hoped to present the evidence concerning distance through cross of the state witnesses but this "did not pan out." The state did not, as counsel assumed, call the evidence technician that conducted the trajectory analysis for the state and the detective on the case simply responded that he did not have any training in trajectory analysis and could not answer any questions about distance. During closing, defense counsel pointed out that the state presented no evidence on the issue and drew an objection when she argued her own calculations, which were not supported by the evidence. Counsel's conduct was deficient. Prejudice established because an accident and crime scene reconstructionist could have testified, based on the defendant's height and trajectory, that the first bullet was fired only 42 inches from the windshield, meaning that the defendant's hand and the gun itself were already past the front bumper.

**2013:** ***State v. Denz*, 306 P.3d 98 (Ariz. Ct. App. 2013)**. Counsel ineffective in child abuse and aggravated assault case for failing to consult with an independent medical expert. The defendant was charged with causing injuries to his infant son. He claimed he had accidentally dropped the infant while changing his diaper and the infant landed face-first onto a carpeted floor. The state had three medical experts to testify that the infant's injuries were inconsistent with the defendant's explanations and that the infant's abdominal injuries could only have resulted from intentional blows to his stomach. Counsel interviewed the state's experts prior to trial, but decided as "strategy" not to retain an expert and to rely instead on cross-examine of the state's experts to support the defense theory. This conduct was deficient, especially in light of the fact that funding was available to retain an independent medical expert.

> Counsel had no medical training or expertise, had limited experience with medical professionals, and could not independently assess whether the state's witnesses were competent. He also stated "this was the sole child-abuse case that [he had] ever tried and he had not consulted with any other attorneys about the case.

Counsel simply could not make a informed decision to rely solely on cross-examination without consulting an expert. Counsel even acknowledged that there was "no downside" to consulting with an expert prior to trial. In short, "despite its strategic gloss, counsel's decision not to consult with an expert before settling on a defense strategy cannot qualify as a reasoned decision." Prejudice established as a forensic pathologist would have testified to the contrary.

***State v. Estrada*, 426 S.W.3d 405 (Ark. 2013)**. Counsel ineffective in rape and sexual abuse case for failing to impeach the alleged victim, failing to investigate and present alibi witnesses, and failing to object to the victim's testimony about an incident outside the range of the charges. With respect to the rape charge, the 15-year-old alleged victim testified that the defendant, her uncle by marriage, sexually abused her at age 4 and again in 2001 at age 7. In her recorded statements to police about the 2001 incident, she said more than once than her grandparents were asleep downstairs during the incident, despite the fact that her grandmother had died in 2000. With respect to the sex abuse charge, the 18-year-old alleged victim testified that the defendant had abused her in December 1999. Even though the defendant had been charged for abuse between June 1998 and June 1999, counsel failed to object. Counsel also failed to present testimony from the defendant's sisters that he was in Texas with them in December 1999.

***Dieudonne v. Commissioner of Correction*, 60 A.3d 385 (Conn. Ct. App. 2013)**. Counsel ineffective in interfering with an officer case for failing to investigate and present a defense. The police received an anonymous tip that the defendant was selling drugs on a street corner. According to the officers, the defendant placed a white item in his mouth and attempted to run when they approached. He was wrestled to the ground but no drugs were found. Counsel failed to discover an eyewitness who would have testified that the defendant did not assault the officers or resist arrest. Prejudice established as this would have supported a credible defense that the defendant lacked the specific intent to interfere with an officer and any injuries suffered by the officers were a result of the defendant attempting to regain his ability to breathe as he was being choked by officers. The case was a "close one," even without the defense witness because the jury did acquit the defendant of assaulting one of the officers.

****State v. Fitzpatrick*, 118 So. 3d 737 (Fla. 2013)**. Counsel ineffective in capital trial for failing to investigate and challenge the state's forensic evidence of sexual assault and the timing of sexual activity prior to the victim's discovery. On August 18, 1996, at approximately 3:00 a.m., the inebriated victim was found walking on the side of the road, nude and bloody, with her throat slit. At the scene, while in and out of consciousness, she told one of her rescuers and a paramedic, separately, that "Steve" was her attacker. At the hospital, while heavily medicated, when police officers asked directly if "Steve" was her attacker, she shook her head "no." She died thereafter. "Steve" was cleared by DNA, alibi, and other evidence. The DNA from semen in the victim's vagina was matched to the defendant. The state's evidence at trial showed that the defendant, a Pro Pizza delivery man on duty, picked the victim up at a convenience store and gave her a ride to a motel around 7:30-8:00 p.m. Witnesses at the hotel confirmed this and testified that the victim then left the motel with "Howard" around 9:00 p.m. The defendant left work at 11:45 p.m. Thereafter, a witness saw his pizza delivery truck at the motel again and then at Howard's house. Howard and a woman at his home said that the victim left Howard's home with the defendant around midnight. Contrary to these witnesses, the defendant's girlfriend testified that he was home by 12:30 to 1:00 a.m. While the defendant admitted picking the victim up and dropping her off at the motel earlier in the evening, he adamantly denied seeing her again prior to her death. After he was confronted with the DNA evidence during the investigation and during trial, he said that he had had consensual sexual intercourse with the victim on the morning of her death, i.e. between 9:30 and noon on August 17 more than 15 hours before the victim was found with her throat slit. During trial, the state

presented two "experts." The first was a registered nurse, who had conducted the "sexual assault victim examination" at the hospital. She testified that: (1) the victim had a penetrating wound on her breast, which was either a stab wound or a bitemark, and a cigarette burn on her leg; (2) based primarily on the amount of fluid present which would have been removed by continued activities, sexual activity occurred a maximum of an hour or two before the victim was found with her throat cut; (3) the victim's "undergarment which was around her waist" when she was found, had not been on after the sexual activity because there was no semen on the garment; and (4) based on coloring of the flesh, sperm in the anal swabs, etc., the sexual activity also included anal intercourse and was most likely forcible rather than consensual. The state also presented "expert" testimony from a lab analyst in the serology/DNA division of the Florida Department of Law Enforcement (FDLE). She testified that: (1) the DNA from the semen in the victim's vagina matched the defendant; (2) the sexual activity occurred no more than 15 hours prior to the victim being found based on her microscopic evaluation of sperm, which revealed "'many to some' heads with tails still intact"; and (3) she conducted both an acid phosphate test and microscopic sperm search of the undergarment and found no semen. Counsel's conduct was deficient in failing to conduct a reasonable investigation and present expert testimony on "sperm motility," whether there was sperm on the underwear, and whether the amount of fluid could be used to determine timing. As expert testimony in post-conviction, including forensic pathologist Daniel Spitz, revealed, the state's testing and testimony on "sperm motility" was flawed. The state's expert never actually mounted the sperm on "wet mount slides," which would be required to determine whether sperm was "motile" or not. The state's expert also was incorrect in assuming that all sperm with a tail was "motile." Likewise, the evidence showed "intact sperm, meaning a head with a tail, and sperm heads without tails, "which indicate[s] that there was a period of many hours between the deposition of that material and the collection of the evidence." Generally, the tails began to separate from the heads, 15-18 hours after intercourse. Thus, 15 hours was the minimum amount of time from the intercourse, not the maximum as the state's expert testified and the time from the intercourse to collection was most likely approximately 24 hours. Additionally, the state's reliance on the amount of fluid, i.e. "a lot," to estimate timing within an hour or two was flawed and not even "a scientific statement." The amount of fluid is not even indicative of sexual contact. Likewise, the amount of fluid would not necessarily be lessened by continued activities. Moreover, additional testing and expert testimony in the post-conviction proceeding established that there were over 100 sperm heads found in 9 of 11 areas of the underwear tested and the sperm matched the defendant. This expert testified that there likely was no testing of the underwear prior to trial or if there was it was done incorrectly because there had been no prior cuttings made from the underwear. Counsel's conduct was deficient because counsel never sought expert assistance prior to trial, even though counsel was aware of the state's evidence and theory that the sexual contact occurred only a short time prior to the murder. Counsel's preparation for this expert and forensic evidence was, at most, a brief, undocumented conversation with a medical examiner and research at a law library. While counsel did find one article from an organization in London allegedly supporting "an extended timeline for the sexual encounter," he was precluded from offering this into evidence during cross examination of the state's expert.

> While it is counsel's responsibility to educate themselves about the aspects of a case they do not understand, gaining personal knowledge of a subject does not end counsel's obligation to his or her client. Counsel must apply the knowledge

> gained in a way that provides his or her client with evidence and constitutionally adequate legal representation. Here, even if we were to assume that counsel spent hours independently researching the scientific aspects of [the] case, he did not utilize this scientific knowledge in a way that meaningfully benefitted [the defendant] during his trial.

"Counsel's unpreparedness" was especially clear from his post-conviction testimony in that he still "did not understand the difference between motile and intact sperm. This fact alone exemplifies the objective unreasonableness of his performance." With respect to the testing of the underwear, counsel did not retest it because he was "under the impression" that retesting would have produced the same result. This was not a valid "strategy" because retesting would have reveled: (1) no semen, as the state said; (2) the defendant's semen; or (3) another man's semen. Thus, retesting could not have harmed the defendant in light of the DNA evidence already matching the defendant to semen from the victim's vagina and his admission of consensual sex. Prejudice was clear as the state's case relied primarily on the two trial "experts" and the forensic evidence, which was clear from the prosecutor's closing arguments which also informed the jury that the credibility of the state's experts had not been challenged. Clearly, if trial counsel had performed adequately, the state's case, as well as the credibility of the state's experts, would have been severely undermined. Counsel was also ineffective in failing to challenge the qualifications and testimony of the nurse expert. As Dr. Spitz testified in post-conviction, forensic nurse examiners are generally not qualified or involved in "interpretation" of the evidence. They simply collect it. Here, the nurse expert's testimony that there was anal intercourse and that sexual activity was most likely forcible was incorrect and misleading in substantial respects. First, there was no evidence of a stab wound or bite mark on the victim's breast. It was a nonspecific bruise that could have been caused in many ways. Second, the mark in the victim's pubic area interpreted by the nurse as a "cigarette burn" was just as consistent with a number of other things, such as syphilis. Third, the nurse found anal intercourse based on coloring and a swab from "deep within" the anus finding the presence of sperm. This did not establish anal intercourse as the fluid could easily have drained from the vagina into the anal cavity. Likewise, the testimony that the swab came from "deep within" the anus was "completely without scientific basis" because once the swab touched the outside of the anus and moved inward, there is no way to tell whether sperm collected came from the outside or "deep within." Finally, the evidence did not suggest that sexual activity was forced and the nurse lacked the credentials and expertise to even formulate such an opinion. Counsel's conduct was deficient in completely failing to investigate the qualifications of the state's "expert" nurse. Counsel never even considered doing so and just assumed that she had been recognized as an expert in the past. The prejudice was clear.

> By incorrectly assuming that [the nurse] was qualified to interpret [the] injuries, he failed to prevent [her] from painting a picture in the minds of the jurors of a victim who was vaginally and anally raped, stabbed, burned, and bitten. After [her] bleak characterization of [the] injuries on direct examination, nothing counsel did during his cross-examination . . . erased this horrific picture from the minds of the jurors.

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As additional evidence of prejudice, the court pointed out the nurse expert's testimony was not only summarized in the direct appeal opinion denying relief, but also "directly relied upon as a basis for denying" three claims, which "exemplifies the materiality of that testimony and how ineffective assistance compromises not only the trial, but the entire judicial process."

***Darst v. State*, 746 S.E.2d 865 (Ga. Ct. App. 2013)**. Counsel ineffective in aggravated child molestation case for a number of reasons. The defendant was charged with molesting two young girls who he was caring for, along with his girlfriend, as foster parents during on-going custody proceedings. After approximately two and a half years of being in the defendant's care, in September 2004 when the girls were four and seven, the girls' grandparents in Pennsylvania were granted permanent custody but the children were not moved to Pennsylvania until several months later. In October 2004, the four-year-old reported to the defendant's girlfriend that she had been abused by the defendant and "Uncle Billy." The girlfriend did not report this to police but did report it to a therapist seeing the older girl. The therapist reported this to the Department of Family and Children Services, who ordered a psycho-sexual evaluation of the child but did not remove the children or inform police. A month later, the seven-year-old reported to the defendant's girlfriend that she also had been abused. After repeatedly trying to dissuade the girl, who did not recant "[d]espite the intense questioning," the girlfriend also reported this allegation to the therapist. The therapist notified the Department and the police were notified. Both girls essentially refused to talk to the initial police investigator and the female detective brought in after initial efforts failed. A month later, forensic interviews of both children were conducted and both girls again alleged that the defendant had molested them. These interviews were videotaped and admitted in evidence without objection. The defendant denied the allegations in trial testimony. The defense challenged the girls' statements as inconsistent and unbelievable and also suggested that, if the children had been molested, it was by their biological father or their "Uncle Billy." Counsel's conduct was deficient. First, counsel failed to obtain school, therapy, and Department records that "demonstrated that the children's documented behavior during the time" they were in the defendant's foster case "was inconsistent with their allegations" of sexual abuse. Two months after being placed in the defendant's care, the older child reported that she had been sexually abused by her biological father. The records and reports otherwise indicated that, while in the defendant's care, the children made "positive social, developmental, and educational progress" up until the time they were informed they would be moving to Pennsylvania with their grandparents. This information was "clearly favorable to [the] defense theory that, if the children had been molested, it was someone other than [the defendant]." Counsel had no valid strategy for failing to obtain these records because his only "reason" was the desire to argue to the jury that the state had failed to obtain these records. Second, counsel's conduct was deficient in failing to consult with an expert and present expert testimony that the children's behavior was inconsistent with having been molested by the defendant. Specially, lay witnesses, including a teacher, saw no problems with the girls' behavior until they were informed of the impending move to Pennsylvania. An expert could have testified, based on this information, that neither girl presented the typical behavioral patterns observed in children who have been sexually abused. Counsel admitted that it "had not occurred to him" to retain an expert. Thus, there was no strategy decision. Third, counsel's conduct was deficient in failing to consult an expert and present expert testimony on the subject of the reliability of forensic interviews. Here, in addition to other criticisms, expert testimony was available to challenge the reliability of the forensic interviews

in this case, which were not conducted until after the defendant's girlfriend, the therapist, the Department case manager, at least two police investigators, and a "psycho-sexual evaluator" had interviewed the girls. Thus, the girls had been "subjected to repeated, suggestive questioning about the allegations" before the forensic interviews. Again, counsel conceded that there had been no strategy in failing to obtain expert assistance. Finally, counsel was ineffective in failing to object to hearsay testimony from the Department case worker that the biological father and "Uncle Billy" had undergone "psycho-sexual evaluations" and "no red flags" were raised, while the defendant had been offered a "psycho-sexual evaluation" but never completed it. The caseworker had no personal knowledge of this information "and, if she was relying on a document in the Department records, that document was never admitted at trial." Counsel's conduct was deficient in failing to object to this inadmissible hearsay evidence, which "lacked any probative value and should not have been presented for the jury's consideration." This failure was especially prejudicial, however, because it "essentially eliminated [the biological father and Uncle Billy] as possible molestation suspects and, as a result, severely undermined one of [the] primary defense theories, a fact the State specifically emphasized in its closing argument."

***Shumway v. State*, 293 P.3d 772 (Kan. 2013)**. Counsel ineffective in murder case for failing to present testimony of alibi witnesses and other available witnesses that supported the defense theories and contradicted the state's case. The state's primary witness was the defendant's friend who said they had been planning to steal bicycles from the victim's yard, but instead the defendant killed the victim. He admitted that the police had provided him with details of the crime and showed him crime scene photographs and diagrams. In exchange for his testimony, the witness, who had prior convictions involving false statements and dishonesty, was not charged. The other witnesses for the State were the primary witness' wife and three jailhouse informants. The defense theory was that the victim had been killed by a drug dealer (Love) in a dispute over drugs and drug money. One of the victim's neighbors testified that the victim was nervous and that Love had been looking for him on the day of the murder. Counsel filed a notice of alibi but did not present the available alibi witnesses because he believed their credibility was questionable. Counsel's conduct was deficient because even if they "were bad witnesses, they were the only witnesses" that could establish innocence. Likewise, counsel failed to present testimony from the primary witness' niece, who would have contradicted the other state witnesses about events on the evening of the murder. In addition, counsel failed to present testimony from a disinterested witness, who would have testified that she was at the victim's home from about 10:00 p.m. to 2:00 a.m., when the state's primary witnesses placed the murder between 10:30 p.m. and midnight. The witness was an addict at the victim's home waiting for delivery of methamphetamine. Counsel also failed to present testimony from a woman who had sold drugs to the victim and Love. The victim still owed her $100. Love was upset on the day of the murder because he said he had given the victim the money, but he paid the $100. Thus, Love was very angry because he believed he had to pay twice for drugs he had never received from the victim. He even made a statement that the victim would be dead by the next die. Finally, counsel failed to call the victim's friend as a witness. He would have testified that the victim was afraid of Love and had armed himself on the day of his murder because of his fear. Prejudice was established as there was no physical evidence against the defendant, who also had no apparent motive.

**Capital Case*

****State v. Cheatham*, 292 P.3d 318 (Kan. 2013)**. Counsel ineffective in capital trial for introducing the defendant's prior conviction for voluntary manslaughter and repeatedly referring to the defendant as a "professional drug dealer" and "shooter of people." The State agreed prior to trial to stipulate that the defendant was a convicted felon for purposes of the criminal possession of a firearm charge in order to avoid having the jury become aware that the prior was voluntary manslaughter. Nonetheless, counsel informed the jury during jury selection that the defendant was a cocaine dealer, who had previously killed another cocaine dealer with a gun when the State's theory in this case was that the defendant had killed two women in retaliation for stealing drug money from him. During trial, despite his claim of innocence in this case, counsel had the defendant testify in detail about his prior conviction, which opened the door for the state to introduce exhibits, including photographs of the victim who had been shot four times. Counsel gave two contradictory explanations for his actions. First, he said he believed the State would be able to introduce the evidence because it was an aggravating factor in sentencing, which revealed that counsel "was confused or uninformed about the difference between the guilt and penalty phases of a capital murder trial." Likewise, the State had already agreed not to present this evidence during the trial. Second, he said his strategy was to "tell the truth," which the court found to be "nonsensical." Prejudice was clear, as even counsel said in his closing that asking the jury to ignore the defendant's background in trial deliberations required "superhuman fiction." Counsel also had a conflict of interest that adversely affected his representation due to a flat fee arrangement.

***State v. Rocha*, 836 N.W.2d 774 (Neb. 2013)**. Counsel was ineffective in first degree sexual assault of a child and four counts of child abuse case for failing to move to sever the sexual assault of a child charge from the child abuse charges or to even request an instruction limiting the jury's consideration of the evidence of one crime to that particular crime. The alleged victim of sexual assault was also the alleged victim of one count of child abuse. The other three counts of child abuse related to her three brothers. The charges were improperly joined together because (1) the charges were not of the same or similar character; (2) the sexual assault charge was not based on the same act or transaction as the child abuse charges; and (3) the sexual assault charge and the child abuse charges were not connected together or parts of a common scheme or plan. Counsel's conduct was deficient in failing to request severance, especially because the "evidence of sexual assault, by its nature, was highly volatile and had the potential to fan the jury's emotions. That risk was exacerbated by the fact that the court did not specifically instruct the jury on the importance of keeping the charges, and evidence related to those charges, separate during its deliberations." The court could "conceive of no reasonable explanation" or strategy in allowing the joint trial without even requesting a limiting instruction. Prejudice was established.

***State v. L.A.*, 76 A.3d 1276 (N.J. Super. App. Div. 2013)**. Counsel ineffective in aggravated sexual assault case involving the defendant's 15-year-old daughter, who lived with her mother while the defendant lived with his wife and son, for failing to call the defendant's wife and son as exculpatory witnesses. There were three alleged incidents, the first of which was in November 2000 at the defendant's home when no one else was present in the home. The final alleged incident was in February 2001. The daughter reported the alleged abuse in April 2001. The State's evidence included evidence that the daughter's grades suffered and her behavior deteriorated after November 2000. The defendant denied the allegations and testified that his wife and son were home during the

alleged incident in November 2000. During trial, defense counsel first interviewed the defendant's wife and attempted to call her to testify but was precluded from doing so because she was not disclosed as a potential witness until after jury selection. Counsel's conduct was deficient in failing to interview the wife and son in advance of trial and failing to call them as witnesses. Prejudice was established because the wife would have testified that the alleged victim had behavioral issues, problems in school, and questionable veracity long before November 2000. Both the wife and son also would have testified that they were home at the time of the alleged incident in November 2000 and that no abuse occurred. The prejudice was heightened because the prosecutor highlighted the defendant's testimony and argued that "[s]urely his son and wife would have corroborated [the] defendant's testimony, if [he] had been telling the truth." There was prejudice due to the absence of the exculpatory testimony, the failure to corroborate the defendant's testimony, and the failure to challenge the alleged victim's credibility in general.

***People v. Mehmood*, 977 N.Y.S.2d 78 (N.Y. App. Div. 2013)**. Counsel was ineffective in child sexual abuse case under state law standard for eliciting testimony from state's expert of child sexual abuse accommodation syndrome that "the truthfulness of a child's disclosure of sexual abuse could be analyzed by looking at whether the content is specific and not age-appropriate knowledge." Even though this testimony was inadmissible under state law, "defense counsel inexplicably asked the expert to elaborate, eliciting highly damaging testimony that a child's allegations of oral sexual conduct, sexual contact between males, or reciprocal contact would be "rather unique and idiosyncratic," and more believable than "just a global statement that I was touched." Thus, defense counsel intentionally elicited inadmissible and unduly prejudicial testimony. Defense counsel was also ineffective in failing to object to the prosecutor's improper closing arguments. The prosecutor's improper arguments were, as follows. (1) The prosecutor argued that the defense evidence that the alleged victims had a motive to fabricate the allegations was only "an elaborate attempt to distract [the jury] from the real issues in this case." (2) The prosecutor inaccurately characterized the defendant's request for a clarification of the state's question during cross-examination to assert that "the defendant's denials of the sexual abuse allegations in the indictment were implicit admissions that he had abused the complainants outside the periods of time designated for the charged crimes. (3) "[T]he prosecutor impugned the defendant's right to testify and improperly suggested that he lied on the stand, when she referred to him as "an opportunist" who "took the stand, and ... said what he thought he had to to save himself." (4) "[T]he prosecutor impermissibly vouched for the credibility of a witness based on his position as a law enforcement officer." Reversal was also required on the separate plain error issue of the cumulative effect of the prosecutor's improper arguments.

***People v. Canales*, 972 N.Y.S.2d 316 (N.Y. App. Div. 2013)**. Counsel ineffective in murder and possession of a weapon case for failing to object to a videotape presented by the prosecution, failing to give the defendant the opportunity to view the videotape prior to trial or to discuss it with him, and failing to attempt to reconcile the defendant's claim that the shooting was accidental with the videotape evidence showing the defendant chasing someone. The videotape was one of the state's primary pieces of evidence as it shows the defendant, wielding a handgun, chasing another person who enters the screen but falls and tumbles out of view. The prosecutor contended throughout the trial that the person being chased by the defendant was the victim and argued to the jury that the videotape provided evidence of the defendant's intent to kill him. The People also introduced the

defendant's confession to the police, in which he claimed that he borrowed the gun from a friend, but asked the friend to remove the clip so that it would not be loaded. He claimed that he only intended to use the gun to scare away a group of people who were threatening his friends, but that someone grabbed his arm and, as he spun around, the gun unexpectedly fired. During deliberations, in response to a jury note asking to see "the video footage of the victim and [the defendant]," the defendant personally addressed the court, stating, "That is not the victim" in the videotape. A colloquy ensued wherein the defendant appears to have declined an offer by the court to reopen his case and give testimony about the videotape. The jury subsequently returned a verdict of guilt on both counts. In post-trial proceedings, the parties stipulated that the person being chased by the defendant in the videotape was not, in fact, the victim. The trial court vacated the murder conviction but nevertheless upheld the defendant's conviction of criminal possession of a weapon. In declining to vacate the defendant's conviction of criminal possession of a weapon in the second degree, the trial court applied the *Strickland* prejudice standard rather than the more lenient state law standard that required reversal on both counts.

***Commonwealth v. Stewart*, 84 A.3d 701 (Pa. Super. Ct. 2013)**. Counsel ineffective in murder case for failing to meaningfully interview an alibi witness and present her testimony at trial, even though the state's case was built on only one eyewitness and the defendant informed counsel of the witness prior to trial and the defendant testified to the alibi. While trial counsel denied that the defendant told him of the witness and stated that the defendant admitted being present at the crime scene, the trial court found this testimony to be incredible, especially in light of counsel's presentation of the defendant's testimony about the alibi at trial and argument that his testimony was credible. Counsel also stated that he did not believe the alibi witness was credible. "[W]hile trial counsel offered an explanation for why he did not call the witness, he gave no credible answer as to why he conducted no investigation into this case and did not interview the alibi witness."

***Commonwealth v. Champney*, 65 A.3d 386 (Pa. 2013) (per curiam)**. Convictions and death sentence vacated due to affirmance (due to the court being evenly divided) of the post-conviction court's finding of ineffective assistance of counsel and state misconduct under *Brady*.

***Commonwealth v. Matias*, 63 A.3d 807 (Pa. Super. Ct. 2013)**. Counsel ineffective in sex abuse of minors case for failing to call an available eyewitness and failing to present photographic evidence. The defendant was charged with molesting his daughter's friend when the alleged victim was 8 and the daughter was 7. The alleged victim, who was 13 at the time of trial, alleged that one incident occurred in the defendant's basement when his daughter was present. She also alleged that a second incident occurred in the basement bathroom. Counsel's conduct was deficient in failing to interview the defendant's daughter after the alleged victim said for the first time during trial that she was present during an assault. Counsel's decision not to interview her because of her young age and status as the defendant's daughter was simply unreasonable and prejudicial. She would have testified that the defendant was present with the two girls in the basement only once and that he committed no assault on that date. Counsel's conduct was also deficient with respect to the second alleged incident because he failed to investigate properly by "view[ing] the crime scene." He was, therefore, unaware that there was no bathroom in the defendant's basement. The defendant and his wife later gave counsel photographs establishing this fact, but counsel "either

misplaced" them of simply "failed to recognize the relevance" of the photographs. The prejudice was clear especially in light of the fact, which was clear from a jury note sent during deliberations, that "the jury obviously had trouble with the inconsistencies and credibility in [the alleged victim's] testimony."

***Ex parte Villegas*, 415 S.W. 3d 885 (Tex. Crim. App. 2013)**. Counsel ineffective in capital murder trial for failing to discover and present evidence of possible alternative perpetrators and for failing to discover and present evidence that would have allowed the jury to give effect to the voluntary confession jury instruction submitted in the case.

***Frangias v. State*, 413 S.W.3d 212 (Tex. Ct. App. 2013)**. Counsel ineffective in sexual assault case for failing to take the steps necessary to procure and introduce the deposition testimony of a crucial defense witness. The alleged victim testified that the defendant sexually assaulted her when she stayed at his hotel. The defendant testified that he found the alleged victim drunk and on the ground outside of the hotel late in the evening. He and a part-time maintenance worker helped her upstairs to her room but left her there alone. The alleged victim, however, testified than the defendant entered the room and sexually assaulted her. More than three months prior to trial, the maintenance worker provided an affidavit supporting the defendant's statements. Counsel did not call him to testify in Houston, however, because the witness was undergoing chemotherapy in El Paso and his doctor would not permit him to travel. The witness was, however, available to testify via deposition. Counsel's conduct was deficient and prejudicial, especially in light of the weakness of the state's evidence.

***State v. Campos*, 309 P.3d 1160 (Utah Ct. App. 2013)**. Counsel ineffective in attempted murder with injury case for (1) failing to request a special mitigation jury instruction for extreme emotional distress; (2) failing to object to a verdict form that misplaced the burden of proof for imperfect self-defense; and (3) failing to object to the prosecutor's improper closing arguments appealing to the jury's sympathies and attacking defense counsel's character. The defendant was charged with shooting an unofficial neighborhood watch volunteer, who was on the lookout for "suspicious" vehicles in the neighborhood. The defendant's 16-year-old daughter and her friend were out walking when the neighborhood watch guy passed in his SUV and told them to be careful going home. Neither girl knew who he was or responded. After they returned to the defendant's house, they got in a car and drove to pick up another friend. As they were driving back towards the defendant's house late at night, the neighborhood watch guy saw the vehicle and mistook them for one of the "suspicious" vehicles he was watching for.

> The girls were "freaked out" and "a bit traumatized" when they realized that the same individual who had spoken to them earlier was now following them. One of the girls called [the defendant] to tell him they were being followed and to ask for help.

The defendant took a gun from his home and drove to meet the girls, who had managed to elude the neighborhood watch guy by turning out of the neighborhood onto a major road. After the defendant got the girls to his house, he and his daughter drove around to find the vehicle that had been

following the girls. Meanwhile, neighborhood watch guy, who had also armed himself was out still looking for the "suspicious" vehicle. When the two vehicles passed, the defendant blocked the road and got out with his weapon. According to the watch guy, the defendant was pointing his weapon, and demanding to know why the girls were followed. While the neighborhood watch guy attempted to defuse the situation and put down his weapon, the defendant's daughter was screaming hysterically from the defendant's vehicle and the defendant shot him. According to the defendant, on the other hand, he had the weapon in his back pocket and only pulled it out and fired when the watch guy got out pointing his weapon at the defendant and cocked it in response to the defendant asking why the girls were being followed. Under these circumstances, counsel was ineffective in failing to request a jury instruction on the affirmative defense of extreme emotional distress, which was supported by the evidence. In short, "a rational jury might conclude that Campos was under 'extremely unusual and overwhelming stress that would cause the average reasonable person under the same circumstances to experience a loss of self-control, and be overborne by intense feelings, such as passion [and] anger.'" This failure was not explained by counsel's "strategy" of arguing self-defense as the two defenses were not inconsistent. "Campos's trial counsel could have argued to the jury that if it believed Campos's version of events, it must acquit him, but if it believed the State's version of events, it must convict him only of attempted manslaughter, not attempted murder." Counsel was also ineffective in failing to object to the verdict form's description of imperfect self-defense, which is available under state law if the defendant "attempted to cause the death of another under a reasonable belief that the circumstances provided a legal justification or excuse for the conduct although the conduct was not legally justifiable or excusable under the existing circumstances." Once a defendant has produced some evidence of imperfect self-defense, the prosecution is required to disprove imperfect self-defense beyond a reasonable doubt. While the court properly instructed the jury, the verdict form directly contradicted that instruction and placed the burden on the defendant to prove imperfect self-defense beyond a reasonable doubt. Finally, counsel was ineffective in failing to object to the prosecutor's improper arguments.

> Here, the prosecutor's comments called attention to matters the jury should not have considered in reaching its verdict. We are most troubled by the prosecutor's reference to Campos's "stealing from [the neighborhood watch guy] his ability to run, his ability to bike, his ability to walk his daughter down the aisle." The statement was a direct appeal to the passions of the jury. It suggested to the jury that it should find Campos guilty out of vengeance or sympathy for the victim rather than based on what the facts and the law required.

The prosecutor also improperly compared the defense's theory of the case to a "red herring" and suggested that defense counsel was being deceitful. "A prosecutor diverts the jury from its duty to decide the case on the evidence when he is 'permitted to make unfounded and inflammatory attacks on the opposing advocate.'" *Id*. at ___ (citing *United States v. Young*, 470 U.S. 1, 9 (1985) ("'A personal attack by the prosecutor on defense counsel is improper.'" (quoting ABA Standards for Criminal Justice 4–7.8 (2d ed.1980))).

> The prosecutor's comments here crossed the line from permissible argument of the evidence to an impermissible attack on defense counsel's character. The

> prosecutor argued not only that the claim of self-defense was a distraction, but also that it was a technique or ploy to confuse and distract the jury. That is, the prosecutor argued that defense counsel intended to mislead the jury. Arguing that the evidence does not support the defense theory and that the theory is thus a distraction from the ultimate issue is fundamentally different from arguing that defense counsel is intentionally trying to distract and mislead the jury.

Prejudice found due to "the cumulative effect of trial counsel's errors."

**2012:** ***State v. Harrison*, 404 S.W.3d 830 (Ark. 2012)**. Counsel ineffective in capital murder trial for failing to adequately impeach the state witnesses and to present a defense. The defendant was charged with killing a co-worker at an automobile repair shop. Two eyewitnesses and a jailhouse snitch, who had a prior juvenile adjudication for capital murder, testified for the state. The post-conviction court found counsel ineffective for failing to adequately impeach the snitch and present a defense alleging that he was the actual perpetrator. The state appealed but conceded deficient conduct. Thus, the only question was one of prejudice. Deficiency was clear in failing to learn of the prior adjudication. While the case file in juvenile proceedings was sealed, "there is a published opinion of [the] direct appeal issued by the Arkansas Court of Appeals." Likewise, the defendant told counsel about the adjudication. Counsel's conduct was also deficient in failing to pursue a defense strategy that the snitch committed the crime. Counsel knew the snitch had been stealing cars and was fired by the defendant for stealing money from the auto repair shop. Thus, he had a "motive" for pointing at the defendant. Prejudice was also established. No physical or scientific evidence implicated the defendant. Both eyewitnesses had biases and gave inconsistent statements. One was the defendant's step-cousin, who was having an adulterous affair with the victim and was angry at the defendant "for his expressed disapproval" of her affair.

***Gaines v. Commissioner of Correction*, 51 A.3d 948 (Conn. 2012) (*affirming* 7 A.3d 395 (Conn. Ct. App. 2010))**. Counsel ineffective in murder and conspiracy case for failing to adequately investigate and present alibi testimony. Two people were killed in a parked car. They were shot with .22 and .45 bullets. Five months after the murders, the 16-year-old defendant was arrested. He informed counsel he was not involved in the murders but he could not remember his whereabouts on the night of the murders. He gave counsel names of two potential witnesses for him, but counsel never interviewed these witnesses. During trial, the defense theory was that the two primary state witnesses were the killers. One of them testified that the defendant had lived with him and admitted that he and another man had committed the murders with weapons the other man had borrowed from the witness. This witness' girlfriend testified that, after the defendant's arrest, he had confessed to her that he had committed the murders for payment. The defendant testified that he sold drugs to pay his rent, the state witness was his "lieutenant," and there had been problems between them. He testified that the "lieutenant's" girlfriend had attempted to get him to admit involvement in the shooting but he did not. Counsel's conduct was deficient in failing to investigate. If counsel had called the two people, whose names the defendant had provided, he would have discovered an alibi witness. This witness would have testified that the defendant was with her on the evening of the murders assisting her in moving. This witness also could have put counsel in touch with her mother, who also supported the defendant's alibi. The first alibi witness attended the defendant's trial and

testified that she told counsel of the defendant's alibi, but she was not called to testify. She said she had not provided the information prior to trial because no one asked her and she did not think anyone would listen to "a parolee." Counsel should have interviewed the people identified by the defendant as possible witnesses to determine if they "had any useful information," especially since one of the persons, who turned out to be an alibi witness, was the sister of the lieutenant/state witness, who defense counsel asserted was one of the killers. Prejudice established. The post-conviction court found both alibi witnesses to "be credible and compelling" and also found the defendant's testimony that he did not recall his whereabouts at the time of the murders to be credible, as he was not arrested until five months after the crimes. Even trial counsel conceded that he believed the alibi witness testimony "might have made a difference in the jury's verdict." The state's case "was not particularly strong, as there were no indifferent eyewitnesses and no forensic evidence tying the petitioner to the crimes."

***Young v. United States*, 56 A.3d 1184 (D.C. 2012)**. Counsel ineffective in drug distribution case for failing to investigate and present testimony of narcotics expert witness to challenge police accounts of alleged drug transactions. Police officers testified that they observed the defendant enter a restaurant with another man, overheard the man say he had "50 on me," and observed the defendant pass a small brown object to the man in exchange for currency. The defendant was arrested by other officers one minute after he left the restaurant. The other man tossed away a "piece of brown-paper" containing 10 ziplock bags containing .87 grams of 28% pure heroin. The defendant denied that he had been in the restaurant and had two alibi witnesses who claimed to have been talking with him outside the restaurant the whole time. There was no forensic evidence linking the defendant to the drugs. He was carrying $72 on him when searched but had no drugs or drug paraphernalia. If counsel had investigated, available expert testimony would have established that the street value of the drugs found was $200 and that a typical street-level transaction would involve 1-3 ziplock bags rather than 10. Counsel's conduct was deficient. He conceded that he was unfamiliar with the street value of the drugs and that it had not occurred to him to consult with an expert. While he testified that he rarely found narcotics experts to be helpful, he did not say that was the reason for not consulting an expert in this case. "In other words, this was an omission, not a strategic decision." Prejudice established as the narcotics expert, a former police officer himself, would have cast doubt on the police testimony. "[T]he likely impact on the jury cannot be underestimated."

***Hills v. State*, 78 So. 3d 648 (Fla. Dist. Ct. App. 2012)**. Counsel ineffective in child sex abuse case involving two victims for multiple reasons. First, counsel failed to move to sever the cases until after the jury was informed of both crimes. Severance was granted. "Although the trial court tried to salvage a bad situation, the damage was irreparable, as counsel continued to perform ineffectively." During the testimony, the remaining alleged victim of incidents occurring between November 1997 and November 1998 (when she was 11), but not reported until June 2007 when her sister reported abuse, testified that the sexual encounters occurred about 50 times. Counsel suggested it could have been as many as 200 times. She also testified that the abuse continued until she was 16-17 and defense counsel did not object to the allegation of incidents five years outside the time period actually charged. Counsel then waived objection to the state's failure to give notice and failed to object to the trial court's finding that the second alleged victim could testify, even though the charges related to her had been severed. Likewise, counsel did not object to the trial court's

refusal to permit the defense to introduce evidence during the hearing on admissibility of this testimony that the alleged victim had recanted and changed her story. "Because the trial court must determine that clear and convincing evidence supports the claim that the defendant did commit a collateral crime whose admission is sought, a defendant has the right to present evidence on the issue." Finally, counsel failed to object "when the judge left a position of neutrality in an attempt to salvage the trial mess created by [the] belated motion to sever." The could made suggestions to the state on how to introduce the second alleged victim's testimony anyway and obtained a waiver from defense counsel to the lack of the statutorily required notice.

***State v. Crapp*, 732 S.E.2d 806 (Ga. Ct. App. 2012)**. Counsel ineffective in armed robbery and kidnaping case for failing to introduce available evidence to corroborate the defendant's testimony. The victim was forced to drive her kidnapper to a house where he purchased drugs. While she could not identify her attacker, she was able to locate the house again. The occupant identified the defendant and testified against him. The defendant testified that the witness was motivated to lie because the defendant owed him drug money and the witness had him robbed and pistol-whipped by another man who sold drugs for the witness. The defendant had reported the incident and the man was arrested. Charges were dismissed after the defendant ended up in the same jail, was threatened, and then retracted his statement. During cross-examination and argument, the state mocked the testimony and said that there was no report or it would have been admitted. Counsel did not introduce the police report, indictment, or arrest warrant despite these circumstances. Prejudice established as this case was "a pure credibility contest" between the defendant and the witness.

***State v. Kamau*, 131 So.3d 871 (La. Ct. App. 2012)**. Counsel ineffective in drug case for failing to raise numerous valid objections to state's case. The defendant was charged in an amended indictment with possession with intent to distribute over 200 grams of cocaine. "[T]here is no such crime," under state law but counsel failed to move to quash the indictment. Subsequently, none of the responsive verdicts presented to the jury included a requirement of finding that the defendant possessed over 200 grams of cocaine. Nevertheless, the verdict forms allowed the jury to convict of possession of over 200 grams of cocaine, which the jury found. Afterwards, the court and counsel agreed that the "200 grams" element should not have been included and that the jury's verdict was for simple possession only. Nonetheless, the defendant was sentenced to 20 years, with 10 to be served without parole. This was not a proper sentence for simple possession, but counsel failed to object. The result of all of this "was an insolubly ambiguous verdict." Reversal required.

***People v. Trakhtenberg*, 826 N.W.2d 136 (Mich. 2012)**. Counsel ineffective in criminal sexual conduct case for failing to investigate and present an adequate defense. The defendant was charged with sexually abusing his eight-year-old daughter. Counsel's alleged strategy was to impeach the child with inconsistent statements about the number of times she was abused and to show that the defendant lacked the requisite intent of sexual gratification. Counsel waived preliminary examination, did not obtain discovery, did not interview any witnesses, failed to consult an expert to testify about the problems with how the child's statements and testimony were developed, and failed to adequately impeach the state's witnesses, particularly the defendant's ex-wife and the child. During trial, counsel presented no defense other than the defendant's testimony in which he denied abuse but admitted that he had touched the child's genitals six times to apply medication for yeast

infections at his ex-wife's insistence. If counsel had investigated, counsel would have discovered that the defendant's ex-wife (the alleged victim's mother) had made numerous negative comments about the defendant to her daughter and had repeatedly asked her leading and suggestive questions. In addition, before reporting the allegations to the police, she took her daughter to a treatment center for child abuse victims where she underwent a forensic interview by a caseworker who was unaware that the child had spoken to others about the abuse. Counsel was also unaware that the child had testified in a civil trial, consistent with the defendant's statements that he had touched her while applying medication. Finally, counsel failed to present the testimony of another child, who was the alleged victim's friend, but testified in the civil trial that the defendant had never behaved inappropriately towards his daughter.

***Hibbler v. State*, 115 So. 3d 832 (Miss. Ct. App. 2012)**. Counsel ineffective in statutory rape case for multiple reasons. The case involved a 13-year-old victim who had been diagnosed with reactive attachment disorder and borderline intellectual functioning. The defendant was 69 years old. A pediatrician and an OB-GYN determined that the victim's hymen was still intact but that she tested positive for chlamydia, a sexually transmitted disease. Two months later the defendant was voluntarily tested and did not have chlamydia. During trial, the court allowed the state to ask leading questions of the victim due to her "obvious . . . diminished intellectual functioning." Counsel relied entirely on the defendant's lack of chlamydia as a defense. Counsel's conduct was deficient in failing to interview the victim; the defendant's daughters who were present on the day of the alleged offenses in the defendant's home; the victim's father, teachers, and the unidentified person to whom the victim first reported the offense; or the state's experts, whose testimony caught counsel by surprise. Specifically, the state's experts reported that the victim reported that she had no sexual contact with anyone other than the defendant. The experts also testified that chlamydia could only be contracted with "actual penile penetration of the vagina." Finally, the experts testified that the defendant could have been cured of chlamydia in the two months before he was tested, even if he had not received treatment. Counsel's conduct was deficient in cross-examination of the victim. Counsel asked only three questions and did not elicit information about the 3-day-delay in reporting the incident. Counsel also did not elicit information that the victim had previously accused someone else of raping her because counsel believed, contrary to the state rules of evidence, that he was prohibited from introducing this information. Likewise, counsel did not cross examine the victim about her prior inconsistent statements that the defendant did not rape her. In short, counsel "completely failed the challenge the believability of [the victim's] testimony and, "[i]n effect, . . . conceded it." Counsel's conduct was also deficient in failing to effectively cross-examine the state's expert who testified the defendant could have been cured of chlamydia without treatment, which was contradicted by all the medical journals defense counsel reviewed. Likewise, counsel could have established that symptoms of chlamydia generally do not appear in women until one to three weeks after exposure. Thus, it is unlikely the victim's chlamydia found in a test only three days after the alleged incident could have been caused by the defendant. Prejudice established.

***Smith v. State*, 370 S.W.3d 883 (Mo. 2012)**. Counsel ineffective in robbery case for failing to call the co-defendant to testify as a defense witness. Two men committed the crime. Initially, only the co-defendant was arrested. He pled guilty in September 2007. Subsequently, a pretrial inmate, seeking and obtaining a plea agreement in his own case, told police that the defendant had admitted

his involvement. Counsel's conduct was deficient and prejudicial because the co-defendant would have testified, if called, that the defendant was not with him during the crime.

***Gregg v. State*, 279 P.3d 396 (Utah 2012)**. Trial and appellate counsel ineffective in rape case for failing to adequately present a defense. The defendant and the victim both testified that they met on an "online dating service." They first met in person around 2:20 a.m. when the alleged victim invited the defendant to her apartment. According to her, they engaged in consensual kissing until 3:20 a.m. when a friend of the victim called. Thereafter, they resumed consensual kissing and "progressed to foreplay." According to the victim, she said no but was raped. According to the defendant, it progressed to consensual sex, which was interrupted by the friend, who was waiting outside with his girlfriend, calling again at 4:07 a.m. Counsel's conduct was deficient in failing to investigate and present evidence of the alleged victim's continued activity on the dating site after the alleged rape and in failing to elicit information about the 47 minutes between the calls. In her testimony, she said that she only logged back into the site to pull information about the defendant for the police. In reality, only two days after the alleged rape she had contacted four other men in "cheerful, light-hearted emails" saying she was leaving site to avoid charges but inviting them to contact her privately. These emails would also have undermined her credibility regarding the severe anxiety and panic attacks she claimed to suffer following the alleged rape. Counsel failed to subpoena these records. Likewise, counsel's conduct was deficient in failing to present evidence of the actual time line of events. While the alleged victim claimed the calls were only minutes apart, the phone records and the police report revealed that, even according to her testimony, there was "nearly an hour of [consensual] sexual foreplay" before intercourse. While counsel did make a vague reference in closing to a 45-minute time period, counsel presented no evidence supporting this argument. Prejudice was also established as consent was the only issue. Appellate counsel was ineffective for failing to assert trial counsel's ineffectiveness on appeal.

**2011:** ***In re Hill*, 129 Cal. Rptr. 3d 856 (Cal. Ct. App. 2011)**. Counsel ineffective in lewd acts against minor case for failing to obtain forensic examination photos and failing to secure medical expert testimony to contradict state's expert. The defendant's stepdaughter alleged 100-200 sexual penetrations over a two year period when she was 12-14 years old. A forensic examination conducted one month after the last alleged event was "normal," according to the state's expert. She also had no herpes virus even though the defendant was positive for herpes during the entire time period. After these initial allegations, a friend of the stepdaughter also alleged molestation on one incident. Subsequently, the stepdaughter reported to police and a defense investigator that she lied because she was angry at the defendant for imposing strict rules at home. She told her friend (the other alleged victim) and a Child Protective Service worker that she lied in these recantations, however, because her mother was pressuring her and she was afraid of going into foster care. During trial, the stepdaughter denied that the defendant had raped her or touched her inappropriately. The defense presented the defendant's denial testimony and character witnesses to his truthfulness and the stepdaughters untruthful character and argued that the stepdaughter was lying. Counsel's conduct was deficient in failing to obtain colposcopic photos referred to in the examining physician's report and in failing to adequately consult with an expert. Counsel had attempted to consult with one expert, who had a conflict. Counsel recalled consulting with a second expert but this discussion was "superficial, at best," as counsel could not recall the basis of the expert's conclusion that the "no

findings" examination was not inconsistent with molestation, but could recall that the expert did not want to assist the defense. Likewise, the expert had not been provided with the colposcopic photos. Adequate consultation would have rendered expert testimony to contradict the state's expert's conclusion that a "normal exam" was not inconsistent with the allegations. The defense expert opined that if there had been 100-200 penetrations there would have been changes in the hymen, which would be apparent in the colposcopic photos. Likewise, while the state expert testified that there was only a 4-10 percent chance of a person with herpes infecting an uninfected partner, there was no evidence where these statistics came from. The defense expert concluded that there was a 50% chance of infection with each act of intercourse. As the court put it, statistically there was almost a 100% chance that if the stepdaughter's allegations were true, she would have become infected with the herpes virus. Prejudice was apparent as the jury even asked for a "readback" of the testimony of the state's physician during deliberations. While the expert testimony related only to the stepdaughter, the court also found "a 'spillover' effect" related to the allegations of the friend. In essence, if the jury rejected the more serious allegations of the stepdaughter, the jury's determination of the friend's credibility would also be substantially impacted.

***Larry v. State*, 61 So.3d 1205 (Fla. Dist. Ct. App. 2011)**. Counsel ineffective in delivery of cocaine within 1,000 feet of a "convenience business" for failing to assert the defense that the business involved was not a "convenience business." Testimony by the lead investigator for the state established that the gas station had "at least 10,000 feet of retail space." Under the relevant statutes, a business of "at least 10,000 square feet of retail floor space" is not a "convenience business." Counsel's conduct was deficient in failing to assert this obvious defense. Prejudice established as the trial court would have been obliged to reduce the charge to the lesser-included offense of delivery of cocaine.

***Word v. State*, 708 S.E.2d 623 (Ga. Ct. App. 2011)**. Counsel in armed robbery case ineffective in failing to object to a police officer's testimony that he believed the alleged victim. Alleged victim initially said he did not know robber, but then identified the defendant in statements and testimony as the robber. Defense counsel attacked the victim's credibility during trial, but failed to object to the officer's testimony bolstering the victim's credibility and did not probe this in cross. Prejudice established as the alleged victim's testimony was the only direct evidence against the defendant.

***People v. Vega*, 945 N.E.2d 1189 (Ill. App. Ct. 2011)**. Counsel ineffective in criminal damage to government property in excess of $500 for failing to timely discover that the actual damage was less than $500 making the defendant guilty only of a lesser-included offense. The defendant damaged a police vehicle. The total repair charges submitted was $502, but this included $33 of sales tax. Under state law, the police department was exempt from paying sales tax. Counsel did not discover this and raise the issue until after trial.

***Timms v. State*, 54 So.3d 310 (Miss. Ct. App. 2011)**. Counsel ineffective in possession of firearm by a felon case for failing to ensure accurate portrayal of the defendant's status as a convicted felon. The defendant had been convicted of felony possession of cocaine, but counsel mistakenly believed he had been convicted of possession of a stolen firearm. While he had been arrested on this charge,

he was never convicted but counsel failed to object when the State introduced documents showing that the defendant had been charged for this offense. This was compounded by counsel asking the defendant and other witnesses about this non-existence prior conviction. This was especially prejudicial due to the similarity of that charge with the current charge. Likewise, the State introduced documents about the cocaine conviction that showed that he was charged with possession enhanced by possession of a stolen firearm when his plea and conviction was without the firearm enhancement. Counsel should have sought a stipulation as to the defendant's status prior to trial.

***People v. Reid*, 918 N.Y.S.2d 863 (N.Y. 2011)**. Counsel ineffective in failing to adequately investigate in larceny and stolen property case. Defendant was charged as an accomplice is a subway pickpocketing heist of an undercover officer. Charges were dismissed against the alleged principal and trial counsel hoped he would testify for the defense. The Defendant informed counsel that he was elsewhere in the city (NYC) at the time of the crimes for meetings related to his job as an independent daycare provider. Even after counsel learned shortly before trial that the principal would not testify, counsel failed to investigate and present paperwork or testimony establishing the defendant's presence at a city office, and failed to review surveillance tapes and Metro card transactions to establish that the defendant had not been on the subway platform where the crime was committed. Because the state's case relied on a single eyewitness, counsel "had everything to gain and nothing to lose from undertaking an investigation that would likely have revealed a creditable source of reasonable doubt." Counsel's failure was the result of neglect, not strategy.

***People v. Bodden*, 918 N.Y.S.2d 141 (N.Y. App. Div. 2011)**. Counsel ineffective in criminal possession of weapon and reckless endangerment case due to the cumulative effect of counsel's conduct. Examples included distancing himself from the defendant in jury selection, failing to adequately cross-examine state witnesses, allowing the state to introduce evidence counsel had not even reviewed, stipulating that a lay fact witness was an expert, stipulating to testimony he had not reviewed, failing to adequately examine defense witnesses, interrupting court numerous times and being admonished before jury, making untimely requests for important jury instructions, and arguing only rhetoric in closing arguments when there were serious weaknesses in the state's case. The representation was so bad that the court noted on the record before sentencing that he was troubled by counsel's behavior and believed the defendant had a viable appellate claim of ineffective assistance of counsel.

***Galloway v. Nooth*, 268 P.3d 736 (Ore. Ct. App. 2011)**. Counsel ineffective in arson and attempted murder case for failing to adequately investigate the cause of the fire and present evidence that the fire was not as serious as portrayed by the prosecution. The defendant was pending pretrial on charges of assault and theft. After his second arrest, he was intoxicated and "made boisterous statements and threats" against the prosecutor. The attempted murder victim was the prosecutor on those cases. He awoke to a smoke detector alarm in his home in the early morning hours and discovered a fire in his basement garage. The fire was basically a burning pile of clothing on an area rug on the concrete floor in front of a washer and dryer. Responding police officers put the fire out before firefighters arrived. First, they tried a fire extinguisher and then used a garden hose. Firefighters initially believed that the fire was a result of spontaneous combustion caused by compression of bleach and laundry detergent and they began cleaning up the scene. Another fire,

which was ruled as an arson, was set in a nearby park the following night. The defendant was seen by police in the area of both fires. After this, an arson detective inspected the scene at the prosecutor's house. The remains of the clothing had been rolled up in the area rug and was outside the house. The detective found a burned book of matches in the roll, even though the prosecutor kept no matches in his home. Thus, arson was suspected. At trial, the detective testified that he believed an accelerant was used to start the fire, even though he did not smell one and the crime lab found nothing, "because clothing generally does not readily burn." He suspected that alcohol was accelerant. The lab would not test for alcohol unless specifically requested because the crime lab used alcohol to clean its equipment. He did not explain why alcohol testing was not requested in this case. Three jailhouse snitches testified that the defendant had made incriminating statements. Counsel argued reasonable doubt in closing, but did not actually present any evidence to support the argument. Counsel asserted that she did not investigate because the defendant confessed to her that he intended to kill the prosecutor. The post-conviction court noted that there was evidence challenging counsel's credibility, but made no finding on this point because "even assuming that petitioner did make that confession, it does not follow that an investigation would have been fruitless." If counsel had investigated, she could have presented the evidence that a co-defendant presented if his own trial. Specifically, a firefighter who responded to the house would have testified that the first thing he did when he arrived was to smell the burned pile of laundry. He did not smell anything, accelerant or otherwise. On a scale of one to ten with one being something simple like a toaster fire, he rated the seriousness of the fire as a two. An "accident reconstructionist," who had worked more than 100 fires, testified that no accelerant had been used. There was no petroleum-based accelerant, which was tested for by the crime lab. He also found no alcohol-based accelerant, which would be apparent after water was used to put out the fire and the arson detective did not report anything consistent with this. In addition, the firefighter would have been able to smell an accelerant if it had been used. This expert videotaped two fires that he set. He used piles of clothing roughly the size of that described in the fire report. He used an alcohol accelerant on one and no accelerant on the other. While the video was played from the jury, the expert commented that neither of the flames rose above 2-3 feet. Neither the fire nor the smoke, in his opinion, posed a threat of serious injury to the occupants of the house. Indeed, the fire would have gone out in its own without ever posing a threat. Prejudice was established because the state's case on intent to kill rested primarily on the threat posed by the fire.

***State v. Charles*, 263 P.3d 469 (Utah Ct. App. 2011)**. Counsel ineffective in murder case for multiple reasons. The defendant's girlfriend was killed by blunt force trauma and asphyxiation, but was found submerged in the bathtub in the home. The state's expert believed she died prior to 6:00 a.m. but conceded that it could have been as late as 8:00 a.m. The defendant said that he had left for work around 6:00 a.m. and the victim had to help him get his truck in reverse to get it out of the driveway, due to mechanical difficulties with the truck. While the police concluded there was no evidence of robbery, because a purse, cash, and a Rolex watch had not been taken, a safe was open and empty. The defendant was not charged with the murder until eleven years later. The state presented a mechanical expert to testify the defendant's truck had no mechanical difficulties at the time of the death, but his report was lost and he was relying on his memory of eleven years earlier. There were holes in his memory and the circumstances and reliability of his testing was also questionable. A jailhouse snitch and distant relative testified that the defendant confessed to him

while in pretrial confinement. The defendant testified to his version, including that drugs and money had been stored in the safe found by police to be open and empty. Counsel's conduct was deficient in failing to subpoena the defendant's cousin to testify that on the day of her death the victim had called him between 1:00 and 3:00 a.m. and there was a brown car parked in the driveway after the defendant left for work. In addition, on the day of the funeral, he had received an anonymous threatening phone call telling him not to mention the car. Counsel did not subpoena the cousin because he expected the state to call him as a witness. Counsel's conduct was also deficient in failing to present evidence to corroborate the defendant's story that his girlfriend was alive when he went to work from the defendant's next-door neighbor and the victim's grandmother. The grandmother had died prior to trial and counsel sought to introduce her statement through the police officer who had taken her statement, but had failed to give proper notice of intent to present the hearsay evidence under state rules. Likewise, while the neighbor testified during trial, counsel failed to present the neighbor's testimony, which had been given during a preliminary hearing, to establish that the defendant had been having mechanical problems with his truck in the weeks before the death and that the neighbor had helped him. Both the grandmother and the neighbor would have corroborated the story that he would not have been able to drive his truck to work without his girlfriend's assistance that morning. Prejudice was cumulative. The state's case "was not particularly strong" and the trial court had even expressed "misgivings about the verdict" in denying a motion for directed verdict.

**2010:** ***State v. Smith*, 85 So. 3d 1063 (Ala. Crim. App. 2010)** (sentenced in August 1995). Retained counsel was ineffective in failing to adequately investigate and present a defense during capital trial and sentencing. The victim, a friend of the defendant's, had been missing for approximately 10 days when his body was found. He had been shot in the back of the head with a .25 pistol. Based on information from a single state witness, police focused the investigation on the defendant. The witness testified that he and the defendant had discussed robbing the victim initially as a joke but later the defendant was serious about it and the witness said he wanted nothing to do with it. This same witness testified that he had seen the defendant with a .25 pistol. A different witness testified that he had purchased a .25 caliber pistol that the defendant had offered to buy. This gun was later missing and the witness confronted the defendant who denied taking the gun. A third man testified that he saw the defendant and the victim together on a Friday in September. The prosecutor argued, without objection, that this witness had seen the defendant with the victim on September 23, the date on which the victim disappeared. Finally, police testified that the defendant had been interrogated and then confessed after a second interrogation in a tape-recorded statement. The defendant testified that had an alibi and that he had not seen the victim on Friday, September 23, the last day he was seen alive. Because the circuit court had found ineffective assistance, the court applied the abuse-of-discretion standard. Counsel's conduct was deficient in failing to adequately investigate. While counsel testified that he had interviewed a "whole list of people" and "everybody we could talk to," the circuit court found this testimony to be incredible. First, none of the witnesses called to testify in post-conviction proceedings had been interviewed and only the defendant's mother, who had testified during trial, recalled meeting counsel. The mother never spoke to counsel prior to the morning the trial started and counsel spent no time with her preparing her for her testimony. Second, counsel described his efforts in "broadest generalities" but could provide neither names nor details of his alleged investigation. He produced no witness list nor any interview notes although he

claimed he would have made notes and those notes would be in his file. Finally, when counsel did remember speaking to a particular person, what he remembered was trial testimony–"not anything that occurred in his purported pretrial investigation." While counsel also claimed to have employed others to assist with the investigation, no evidence supported this other than a mere three hours of investigation within the week before trial by a man who had never before and never since performed any investigation in a criminal case. The failure to investigate adequately could not be blamed on the family's failure to pay all of counsel's retainer either. The defendant was indigent, but counsel never sought money from the court to pay for a professional investigator. While counsel believed "the Court would not have granted such assistance," this assertion was not supported by the evidence. If counsel had interviewed the witness, who allegedly saw the defendant with the victim on September 23 and inquired further, he would have testified that it was actually September 16 when he saw the two together. Thus, there would have been no evidence suggesting the defendant had been with the victim on the date of his disappearance. Likewise, counsel failed to adequately investigate whether the primary state witness, who police relied on in focusing on the defendant, was the actual killer, although counsel believed he was. Counsel did not interview the witness' ex-wife, who had made a statement to police consistent with her husband's statement. By the time of trial, she was divorced from the witness and would have testified if asked that she and the witness were having financial problems at the time of the murder. Her husband had proposed the idea of robbing the victim to the defendant, who dismissed the idea because the victim was a good friend, who would loan him money any time he needed it. She would have testified further than her husband had purchased a handgun several months before the murder, that he was gone the afternoon the witness disappeared and came home muddy and wet with torn clothing that he disposed of, that he was unusually interested in news accounts of the discovery of the body, and that he had threatened her, prior to police interviewing them, that he would kill her and her parents if she "ever went against him." She and her husband had been interviewed together and she merely substituted the defendant's name for her husband's in the statement and parroted her husband's statement. The court found this witness to be credible. The court also found deficient conduct for failing to present expert testimony relating to the police procedures used in interviewing this witness with her husband and in interrogating the defendant. The police did not preserve a recording or transcript of the initial interview, which "was highly unusual" and undermined the credibility of the subsequent taped confession. The circuit court also made extensive findings on counsel's failure to present testimony in the "area of false confessions." Counsel was also ineffective in failing to adequately present evidence in sentencing. Counsel presented only two witnesses. The circuit court's findings with respect to both the trial and sentencing phase ineffective assistance of counsel was supported by the record and upheld.

***Head v. State*, 35 So. 3d 1008 (Fla. Dist. Ct. App. 2010)**. Court found trial counsel ineffective in per curiam opinion without "detail[ing] counsel's deficiencies."

***Henderson v. Hames*, 397 S.E.2d 798 (Ga. 2010)**. Counsel ineffective in misuse of a firearm while hunting and felony murder case for two reasons. The defendant was charged with malice murder, two counts of felony murder, and the predicate felonies of misuse of a firearm while hunting and aggravated assault following the shooting death of his brother. The jury rejected the state's argument that the defendant intentionally shot his brother and acquitted on malice murder and aggravated

assault. First, counsel was ineffective for failing to challenge the defective indictments. Misuse of a firearm while hunting required both "consciously disregarding a substantial and unjustifiable risk" and "the disregard constitute[d] a gross deviation from the standard of care which a reasonable person would exercise." The indictment for misuse included only the latter. The indictment for felony murder simply incorporated the indictment for misuse. Thus, the indictments were defective under the plain language of the statute. Second, counsel was ineffective for failing to move for a directed verdict of acquittal at the conclusion of the state's case because the circumstances known to the defendant would not have led a reasonable person to believe that there was a risk from which bodily injury would probably result. The brothers were hunting on their own land and had agreed to hunt separate areas. The deceased, however, did not stay in his area and was not wearing his "hunter's orange." The defendant shot him believing he was a bobcat or wildcat, which had been reported by the neighbors to be in the area.

***People v. Baines*, 927 N.E.2d 158 (Ill. App. Ct. 2010)**. Counsel ineffective in attempted murder and armed robbery case for a number of reasons. The victim had been assaulted by three men one of whom he was able to identify and provide a phone number for. Weeks later, he notified police he had seen one of his attackers at a Home Depot and was "100 percent" sure of identity. This man had a videotaped alibi and was quickly cleared by police. Months later, after failing to identify the defendant in a photographic lineup, the victim identified the defendant in a lineup, even though his height did not match initial descriptions to police. Counsel was ineffective in: (1) failing to adequately learn the facts behind the victim's misidentification of the man at the Home Depot; (2) failing to establish with clarity during cross-examination of the victim that this man had been exonerated by police; (3) failing to adequately impeach the alleged victim for continuing to maintain in his testimony that the exonerated man was one of the attackers; and (4) failing to adequately prepare the defendant's testimony, which resulted in counsel eliciting damaging admissions and bolstering the state's case. In short, "[d]efense counsel manifested a lack of knowledge about fundamental facts of the case, and a lack of knowledge of basic principles of trial procedure." Counsel's closing argument pointing out the weakness of the victim's identification was insufficient to cure the prejudice. "That was too late. Closing arguments are not evidence, and the jury was free to disregard those comments."

***Sea v. State*, 49 So. 3d 614 (Miss. 2010)**. Counsel ineffective in child sex abuse case for introducing evidence of the defendant's two prior criminal convictions–both of which had occurred more than 20 years prior to trial–and for failing to object to the state's introduction into evidence videotapes of damaging forensic interviews of the four alleged victims, who were all less than 10 years old. Counsel's conduct was deficient in introducing the two prior convictions for sexual battery, one of which involved a child under the age of 13 rather than filing a motion to exclude the convictions or at least have the trial court rule on admissibility. The convictions were 25 and 22 years old, well in excess of the ten-year threshold, under state Rule 609 and thus could not be admitted unless the trial court found that the prejudice created by the convictions was substantially outweighed by their probative value. Prejudice found because there was no physical evidence of abuse and "while there were four accusers, their trial testimony came almost entirely from the mouth of the prosecutor, with the children responding 'yes, sir' or 'no, sir.'" In these circumstances, the prior convictions evidence "was incendiary." Counsel's conduct was also deficient in failing to object to the videotaped

forensic interviews, which were "comprised almost entirely of leading and suggestive questions" and "were rife with hearsay statements from both the victims and the interviewers."

***People v. Okongwu*, 897 N.Y.S.2d 330 (N.Y. App. Div. 2010)**. Counsel ineffective in child sex abuse case for three reasons, which were the basis of a federal court's grant of relief to a co-defendant tried in a joint trial. First, counsel failed to introduce evidence of a 1988 medical examination of one of the alleged victims, which was consistent with the 1992 examination on which the allegation of abuse was based. Second, counsel failed to obtain experts to refute and discredit the state's experts. Finally, counsel failed to cross-examine the state's expert concerning literature raising doubts about child sexual abuse syndrome.

***State v. A.N.J.*, 225 P.3d 956 (Wash. 2010)**. Counsel ineffective in juvenile case where defendant pleaded guilty to first degree child molestation. Counsel was contracted by the county to provide public defender services for a flat yearly fee, which provided that counsel had to pay experts and investigators from this fee. Under state rules, "it is now unethical for an attorney to sign a public defender contract" of this nature. This contract "created an incentive" for counsel not to investigate. Counsel met with his 12-year old client and his parents for no more than an hour before the plea hearing, did no independent investigation, consulted with no experts, and did not carefully review the plea agreement before advising the defendant and his parents to accept it believing incorrectly that the conviction could be removed from the defendant's record when he turned 18 or 21. Counsel's failure to investigate was not excused by counsel's belief that the defendant was going to confess or even that he was guilty. "[A]t the very least, counsel must reasonably evaluate the evidence against the accused and the likelihood of a conviction if the case proceeds to trial so that the defendant can make a meaningful decision as to whether or not to plead guilty." Counsel also erroneously advised the defendant and his parents about the consequences of the plea by advising them that the conviction could be removed from the defendant's record when he turned 18 or 21. While the court has discretion to relieve the requirement to register as a sex offender, the conviction never goes away. Based on counsel's ineffectiveness, the defendant was entitled to withdraw his guilty plea.

**2009:** ***Bryant v. Commissioner of Correction*, 964 A.2d 1186 (Conn. 2009)**. Counsel ineffective in manslaughter case for failing to present four independent witnesses whose testimony would have supported a third party culpability defense and substantially impeached the evidence presented against the petitioner. The testimony of these witnesses "would have worked in concert to create a credible scenario in which the cause of . . . death was a gunshot wound to the head perpetrated by a small group of unidentified Hispanic males driving a white Cadillac or Lincoln, not the actions of the petitioner." Counsel's conduct was deficient and not explained by strategy because the witness' statements were given contemporaneous to the events and "there was no evidence in the record to suggest that any of these witnesses' statements . . . were influenced by the statements made by the other witnesses." Prejudice established. "When reviewed in its totality, the testimony of these neutral witnesses, each of whom the habeas court found to be credible and highly persuasive, creates a plausible, well supported third party culpability defense." The state's evidence, on the other hand, was limited to the eyewitness testimony of two witnesses who were both "subject to substantial impeachment evidence." "[N]ot only was the testimony that linked the

petitioner to the attack of dubious credibility, it also was internally inconsistent with respect to significant facts."

***Gravitt v. State*, 687 S.E.2d 150 (Ga. Ct. App. 2009)**. Counsel ineffective in DUI case for failing to adequately investigate and present testimony of two readily available eyewitnesses, who were riding in the defendant's vehicle at the time of the alleged incident. There was a two car crash allegedly caused by unsafe driving by the defendant, whose vehicle was not involved in the crash. Counsel called no witnesses and argued only that the defendant's actions were not the proximate cause of the accident. Counsel's conduct was deficient in making only minimal attempts to locate the eyewitnesses and waiting until close to trial to subpoena them, even though counsel knew they would be hard to locate. Prejudice established because these witnesses denied that the defendant appeared to be under the influence or was driving recklessly and explained how the accident happened through no fault of the defendant. In rejecting this finding, the trial court erred in measuring the credibility of these witnesses' testimony, "not against the witnesses who testified at the hearing, but against the witnesses who testified at . . . trial." In short, "the trial court judged the credibility of the witnesses had they testified at trial, and that is 'solely a matter to be resolved by the jury.'" The trial court also failed to consider that the state capitalized on counsel's error by arguing that these witnesses were not called by the defense because they might testify against the defendant.

***People v. Wilson*, 911 N.E.2d 413 (Ill. Ct. App. 2009)**. Counsel ineffective in murder case for failing to make a closing argument and failing to object to the admission of evidence of an unrelated revolver found in close proximity to the defendant at the time of his arrest. The case involved a shooting in the projects that may have been due to ill-will between the occupants of several buildings or areas. The state's evidence was based entirely on inconsistent witness identification testimony from arguably biased witnesses. There was no confession and no physical evidence connecting the defendant to the shooting. At the close of the evidence, the court informed the jury that the state and defense would have the opportunity to make final arguments, but then was surprised when defense counsel chose not to argue, especially in light of the state's extensive argument. Counsel's conduct was deficient and not sound trial strategy in assuming the jury would find "the prosecutor's argument specious."

> It would be a rare case in which choosing not to make a closing argument in a jury trial would be sound trial strategy. Given the evidence here, this was not such a case.

Counsel's conduct was also deficient in failing to object to the evidence of the unrelated revolver and failing to point out its irrelevance in closing. Prejudice found.

***People v. Bryant*, 907 N.E.2d 862 (Ill. Ct. App. 2009)**. Counsel ineffective in murder case for failing to call any witnesses in support of the defense theory that the murder was committed by others. Counsel represented two defendants, husband and wife, who allegedly killed a cocaine dealer in their home. They were accused along with two other men, one of whom was not prosecuted in exchange for his testimony. The victim's blood and driver's license was discovered in the defendants' home and the victim's blood was on the shoe of the other man charged. The only direct evidence that the

defendants committed the murder came from the immunized witness, who had made numerous inconsistent statements. In opening statements, defense counsel said the defendants were in their bedroom asleep when the victim was killed by the other men. Counsel repeatedly said the defendants would testify to this. Counsel also told the jury it would hear evidence that the other two men met together prior to arrest to plan their story and that one of them had bragged to others that he had committed the murder. When counsel attempted to elicit this information about the other men in cross-examination of witnesses, however, the state's objections that it was beyond the scope of direct were sustained and the court instructed the jury to disregard. Each time, the court invited defense counsel to recall the witness in the defense case in chief and defense counsel repeatedly said before the jury that he intended to do so. After the state rested, however, the defense also rested without presenting any evidence. In closing argument, defense counsel repeated his arguments from the opening. There were numerous objections from the state that he was arguing facts not in evidence and repeated admonishments from the judge that arguments were not evidence and that statements not based on evidence should be disregarded. Counsel asserted in a post-trial motions hearing that he did not present any witnesses because he was able to elicit the information on cross-examination. He did not call the defendants to testify because he did not want to subject them to cross or open the way for rebuttal and he believed that he had been able to make all the points he wanted in cross-examination and argument. While counsel's conduct "was a matter of trial strategy as opposed to witness reluctance or unavailability," the strategy was not "sound." Counsel promised the jury it would hear evidence and then "failed to present any evidence whatsoever, and his stated reasons for failing to do so are not reasonable explanations." Counsel did not present any evidence to support the defense theory and the court repeatedly instructed the jury to disregard the improper cross and closing arguments. The court also rejected counsel's reasons for not calling the defendants, despite promising the jury he would, and giving their version in the opening and closing. In essence, "counsel concluded that rather than support the defense theory with evidence that the jury might reject, it was better to not support the theory at all." Counsel also clearly "erroneously believed that he did not need to support his arguments with evidence." Thus, "counsel's chosen strategy was unsound." He was essentially relying on the jury to forgive his promises to present evidence he did not present and to ignore the court's instructions, which is contrary to the "assumption of the law that jurors follow their instructions." Even if the jurors were inclined to believe the defense theory, "they had no choice but to ignore it because they were presented with no evidence to support it." Prejudice found because, "[i]n the absence of overwhelming evidence establishing a defendant's guilt, the failure to present promised evidence that someone other than the defendant is guilty of the offense in question is highly prejudicial." Here, the state's case "hinged on the testimony of an admitted addict and uncharged accomplice whose testimony defense counsel effectively impeached." "[T]he defendants were undoubtedly prejudiced by counsel's conduct."

***State v. Overstreet*, 200 P.3d 427 (Kan. 2009)**. Counsel ineffective in attempted murder case for failing to present the testimony of two eyewitnesses that corroborated the defendant's assertion that he was not driving the car during the shooting. Counsel was aware from police reports that two witnesses identified someone other than the defendant as the driver. Counsel relied on his belief that the state, who had listed them as potential witnesses, would call them and did not subpoena these witnesses or interview them. When counsel realized his error, counsel was able to subpoena one of them and spoke for him the first time on the day of his testimony, which was more than 8 months

after the crime and, by that time, the witness incorrectly believed he had identified the defendant. Counsel's conduct was deficient in failing to interview these eyewitnesses and subpoena them. Counsel's conduct was also unreasonable in "fail[ing] to adequately prepare the one man who eventually did testify." Prejudice established because the jury asked to rehear testimony and asked questions relating to identification during deliberations. "In light of the record, there is a real possibility that but for counsel's deficient performance in this case, the jury would have returned a different verdict."

***Fisher v. State*, 206 P.3d 607 (Okla. Crim. App. 2009)** (direct appeal in 1987). Counsel ineffective in capital retrial and sentencing for numerous reasons including: (1) failing to establish a trust relationship with the defendant, even going so far as to physically threaten the defendant at a pre-trial hearing, which resulted in the defendant's refusal to attend his trial, which counsel did not explain to the jury; (2) counsel's alcohol and cocaine abuse during the representation; (3) failing to examine the eighteen boxes of records delivered to counsel by prior counsel; (4) failing to conduct an independent investigation or to utilize an experienced investigator assigned to him; (5) failing to review the physical evidence prior to trial, which would have revealed that the fingerprint card containing the only physical evidence linking the defendant to the crimes had been lost and had not even been used during the first trial, and failing to challenge the fingerprint evidence; (6) failing to present available evidence that the primary state's witness was the actual killer and failing to impeach the witness with his prior inconsistent statements, criminal record, and flight after his arrest and release; and (7) failing to request instructions on a lesser included offense or the defense of voluntary intoxication. Prejudice established despite the defendant's flight from the state and two incriminating statements because "counsel failed to discover and utilize evidence that would have called into question the validity and import of [the] statements" and the flight. The court also affirmed the PCR court's finding (and the State's concession) of ineffective assistance in sentencing for failing to adequately investigate and present mitigation.

***Garcia v. State*, 308 S.W.3d 62 (Tex. Crim. App. 2009)**. Counsel ineffective in aggravated sexual assault case of mentally and physically disabled 53-year-old niece for a number of reasons. First, counsel elicited testimony from the defendant and his wife that opened the door to otherwise inadmissible extraneous offense or "bad acts" evidence of a prior alleged sexual assault, a shooting in the defendant's home, and two prior DUI arrests and then failed to request a limiting instruction on this evidence. Second, counsel failed to object to hearsay testimony from the alleged victim's aunt concerning the victim's statements about the sexual assault to her. The state asserted admissibility under the "outcry" statute. Counsel's conduct was deficient for failing to object because the "outcry" statute applied only to hearsay statements of a child 12 or younger and, thus, "plainly did not apply" in this case. Third, counsel failed to interview the alleged victim or other state witnesses' prior to trial and, thus, was not aware that the initial defense theory (that the alleged victim was a trouble-maker and had been banned from the homes of relatives) would not be supported by the evidence. Finally, counsel incorrectly advised the defendant that the trial judge could award him community supervision, which resulted in the defendant waiving jury sentencing. While the jury could have ordered community supervision, the trial judge was prohibited by state

law from ordering this sentencing alternative. Counsel's conduct "[i]n its totality" (or cumulatively) required reversal.

***Aldrich v. State*, 296 S.W.3d 225 (Tex. App. 2009)**. Counsel ineffective in intoxication manslaughter case where the defendant drove his truck into the wheel-chair bound victim in a crosswalk. Counsel's conduct was deficient for a number of different reasons. (1) Counsel failed to understand basic discovery procedures and believed he did not have to investigate because *Kyles v. Whitley*, 514 U.S. 419 (1995), "required the State to do all of the investigation in the case and to turn over . . . all reports, statements, and evidence discovered in its investigation." The trial court repeatedly informed counsel of his misinterpretation but he persisted in his beliefs. (2) He failed to adequately convey a 20-year plea offer to the defendant because of his "belief that it would be unethical and would constitute malpractice for him to even discuss the proposed plea bargain" with the defendant. (3) He failed to investigate until just weeks before trial, including refusing to independently test the defendant's blood sample or interview an officer, whom the defendant asserted he had told at the scene that he had been blinded by headlights from an oncoming car. (4) He failed to timely obtain and designate experts, despite his awareness of the need, which resulted in the trial court's exclusion of the expert evidence. The only reason asserted was the defendant's financial problems. "[A] reasonably competent attorney would have several options, including to withdraw from the case" and to have the defendant declared indigent and counsel appointed. Alternatively, counsel could remain "but request investigatory and expert witness fees from the trial court for a now-indigent client." In short, counsel's failure "was not a strategic decision, it was an economic decision." (5) Counsel presented "bizarre" defense theories not supported by the evidence, despite the state's repeated objections. Counsel alternated between "theories that the accident was a suicide, assisted suicide, or [the victim's] fault for failing to yield the right-of-way" in her wheelchair. (6) Counsel did not understand the rules of evidence and "had great difficulty questioning witnesses," "repeatedly made sidebar comments during his questioning," "repeatedly interjected his own testimony,"–despite repeated warnings from the trial court–and asked over 18 times to have the jury removed so he could question witnesses outside the jury's presence. (7) Counsel repeatedly made inaccurate statements and arguments. "The totality of defense counsel's errors pervaded and prejudiced the entire defense." This was clear because the prosecutor and the trial court repeatedly "felt compelled to assist defense counsel." Prejudice also established.

***Holmes v. State*, 277 S.W.3d 424 (Tex. App. 2009)**. Counsel ineffective in misdemeanor assault on wife case where the wife refused to testify for failing to investigate and discover evidence (including the 911 and patrol car tapes), failed to develop a trial strategy, failed to be prepared for trial, and failed to object to admission of the 911 and patrol car tapes, or seek a continuance. Prejudice established during pretrial negotiations, including an offer of 120-days in exchange for a plea after jury selection began, because the defendant was "unable to make an informed decision regarding plea offers." Prejudice also established during the trial itself.

**2008:** ***Vazquez v. Commissioner of Correction*, 944 A.2d 429 (Conn. App. Ct. 2008)**. Counsel ineffective in robbery case for failing to present alibi testimony establishing that the defendant was at home asleep with his girlfriend at the time of the robbery. Counsel's conduct was deficient because he failed to prepare and present this evidence only because he believed incorrectly that the alleged

victim/eyewitness would not show up for trial because she was an illegal alien. Prejudice established because the PCR court found the defendant and his girlfriend to be credible and there was no evidence of any credible impeachment evidence.

***Rayshad v. State*, 670 S.E.2d 849 (Ga. Ct. App. 2008)**. Counsel ineffective in armed robbery, assault, and kidnaping case for failing to object to inadmissible, prejudicial evidence. First, counsel failed to object when the state elicited on cross-examination of the defendant that he had entered a guilty plea to a charge of theft by receiving a stolen car. This was error because under state law the charge was dismissed without an adjudication under the First Offender Act and, where there is no adjudication of guilt, could not be used as impeachment evidence on general credibility grounds. Second, counsel erred in not objecting to, and even introducing, out-of-court statements of a co-defendant who did not testify in violation of the right to confrontation. The statements were made to police several days after the crimes were committed and "[p]lainly, . . . were not made during the course of any conspiracy with [the defendant] and therefore were not admissible as declarations of a conspirator." Finally, counsel erred by not objecting to, and even introducing in evidence out-of-court statements of a second co-defendant, who did not testify. Again, these statements "were not made during the pendency of any criminal project . . . thus were not admissible as declarations of a conspirator." Prejudice found in light of the case being a credibility contest and notes during deliberations revealing the "jurors' focus on impermissible hearsay."

***Coney v. State*, 659 S.E.2d 768 (Ga. Ct. App. 2008)**. Counsel ineffective in aggravated assault and cocaine possession case for several reasons. First, counsel failed to object to the trial court's failure to charge on "assault," which was a necessary element of the aggravated assault. Prejudice established because the charge allowed the jury to convict of aggravated assault even for criminal negligence when the defense was contending that he accidentally shot the police officer in the hand during a struggle. Second, counsel was ineffective for failing to move to suppress evidence that the defendant was under the influence of cocaine, which was obtained in an illegal seizure of blood and urine samples taken while the defendant was hospitalized after being shot by another police officer. Prejudice was established because without this evidence the evidence showed only that crack cocaine was found in the vehicle driven by the defendant, with two passengers in it at the time of the traffic stop, and the vehicle was owned by the defendant's father and driven by others, as well. Thus, without this evidence, there was no presumption that the cocaine was his and the burden remained with the state.

***Anfinson v. State*, 758 N.W.2d 496 (Iowa 2008)**. Counsel ineffective in murder case arising from the drowning death of the defendant's infant son for failing to investigate and present evidence of the defendant's postpartum depression in furtherance of claim that the infant's death was an accident. Counsel was aware from interviews of the defendant's sisters about the defendant's behavior (including self-mutilation by plucking leg and pubic hairs) of the probability of postpartum depression, but "categorically rejected any suggestion that this condition be explored in her defense," including in statements in the media made "without the benefit of a reasonable investigation of [the defendant's] mental health." Counsel believed that asserting postpartum depression was tantamount to admitting an intentional killing. Thus, counsel did not request or obtain copies of medical records from the defendant's post-arrest hospitalization and treatment for depression, suicidal ideation, and

panic attacks. He also failed to conduct an investigation which would have divulged the defendant's prior episodes of depression after she gave birth and consented to the adoption of her first child in 1980, and again following an abortion in 1985. Trial counsel was also dismissive of the opinion of the defendant's post-arrest/post-hospitalization counselor that the defendant had symptoms consistent with postpartum depression. Retained counsel also rejected the defendant's father's request for a mental evaluation at the Menninger Clinic, even though the father offered to pay for the evaluation and the father was paying counsel. Counsel told the family that it would be "fuel for the prosecution." Counsel's conduct was deficient because the evidence of postpartum depression would have supported the accidental death defense to explain three things: (1) why the defendant was distracted enough to leave the infant in the bath to use the telephone; (2) why the defendant acted irrationally in hiding the body in a lake after she discovered his death; and (3) why her affect was flat and emotionless later that day when being questioned by investigators. Instead of investigating and presenting the mental health evidence, counsel simply used the "defense of 'accidents happen'" without supporting evidence. Counsel "closed not only his ears, but also his eyes as he neglected to obtain medical records evidencing [the defendant's] mental state." Even if the court accepted "trial counsel's assessment that insanity and diminished responsibility defenses are rarely successful, the decision to ignore evidence of . . . compromised mental state was not a reasonable professional judgment excusing an investigation of the extent to which that mental state supported the defense theory of accidental death." The court found "a reasonable probability that if a reasonable investigation had been undertaken, evidence would have been developed and presented at trial tending to establish [the defendant's] conduct from the time of [the infant's] birth until his death was profoundly affected by postpartum depression" and that an expert could have connected the evidence of severe postpartum depression "with her bizarre behavior in furtherance of the accidental death defense." While the court was "mindful of the deference owed by postconviction courts to counsel's strategic choices," the could held that "[d]eference for such choices is not unlimited, however, and it will not be stretched to deny [the defendant] a new trial under the circumstances presented here."

***Coleman v. State*, 256 S.W.3d 151 (Mo. Ct. App. 2008)**. Counsel ineffective in burglary case for failing to present evidence of the defendant's pre-existing injury in defense. An eyewitness saw a white man kick the front door of her neighbor's house in and then saw a second man ("well-tanned" or possibly Mexican) "run" from a vehicle into the house. While these men were inside the house and the police were on their way, the vehicle left the scene. The defendant, a light-skinned black man, was arrested outside the victim's house claiming that he was simply visiting someone in the neighborhood and innocent. Counsel's conduct was deficient in failing to present testimony and medical records of the defendant's pre-existing injury that resulted in him having an air brace on his ankle. While counsel asserted that this evidence was not presented because she did not want the jury to infer that he did not run from police officers only because he could not run, this was unreasonable because a police officer had already testified that he could not run, which raised this inference. Prejudice was established because this medical evidence cast doubt on whether the defendant could have been the white kicker or the darker skinned runner.

***Wiley v. State*, 199 P.3d 877 (Okla. Crim. App. 2008)**. Counsel ineffective in robbery, burglary, and rape case for numerous reasons. "[R]etained counsel provided little representation, much less the minimal effective assistance required by the Sixth Amendment."

> Due to defense counsel's obvious unpreparededness, his failure to comply with discovery requirements, to have the DNA independently tested, to know the names of his witnesses, to interview all alibi witnesses, to know the proper sentencing range for one of the charged crimes, and his abrupt conclusion of voir dire, despite advice from the trial judge not to pursue that course of conduct, the prosecution's case was not subject to meaningful adversarial testing.

*Id*. at ___.

***Lounds v. State*, 670 S.E.2d 646 (S.C. 2008)**. Counsel, who was since suspended from the practice of law indefinitely for other reasons, was ineffective in armed robbery and kidnaping trial for failing to adequately investigate and present the defense and for making harmful arguments contradictory to the petitioner's testimony in closing. Counsel's conduct was deficient because counsel did not speak to petitioner until the morning the trial began and admitted on the record that he had just learned the name of possible defense witnesses, who were not called because they could not be located during the trial and because counsel "believed the witnesses would not add much to petitioner's defense." Even if this could be considered as a strategic reason, it was "not objectively reasonable given the defense theory of the case." In essence, the petitioner testified that he asked the alleged victim for money owed to him due to previous drug dealings and the victim went with him voluntarily to the victim's parent's house to get money. The victim denied knowing the petitioner, owing him money, or every buying or using drugs. The defense witnesses the petitioner sought during trial and who testified in PCR would have testified that the victim did know the petitioner through drug dealing, which "would have added significantly to the credibility of petitioner's case." Counsel's conduct was also deficient in closing argument for asserting that the petitioner had a friend with him for "extra muscle" when the defendant had denied robbery or kidnaping or any attempt to threaten the victim. Prejudice was found on each individual count because the jury necessarily rejected the victim's testimony in acquitting on the armed robbery.

***McKnight v. State*, 661 S.E.2d 354 (S.C. 2008)**. Counsel ineffective for numerous reasons in retrial of homicide by child abuse case involving a full-term stillborn baby with cocaine in its system. The initial autopsy listed three causes of death, one of which was cocaine consumption. The state's theory was that other causes were ruled out and the cocaine use alone caused the death. In an initial trial, the defense presented two experts. The first completely contradicted the state's theory, testified that the cocaine studies the state's experts relied on were outdated, and ruled out cocaine as a cause of death. The second ruled out other causes, but could not rule out cocaine, which the state argued effectively supported the state's theory. The first trial resulted in a mistrial due to jury misconduct after seven hours of deliberations. In the second trial, the same defense counsel did not call the first defense expert because he was unavailable and recalled only the second that supported the state's theory, which resulted in conviction after only 30 minutes of deliberations. Counsel was ineffective both in calling the defense expert that undermined the defense and in failing to call the same (by obtaining a continuance or videotaped testimony) or a different available (and local) expert that supported the defense theory. Counsel was also ineffective in failing to investigate and present the medical evidence that contradicted the state's experts' testimony on the link between

cocaine and stillbirth and failing to challenge the state's evidence. Counsel was also ineffective in failing to object to improper instructions that confused the measure of intent required for homicide by child abuse. The court initially charged the required "extreme indifference to human life" and then gave a general charge of criminal intent. While this was proper, in response to a jury question on intent, the court repeated only the general charge which confused the issue further and resulted in conviction only five minutes later. Finally, counsel was ineffective in failing to introduce the autopsy report into evidence simply because counsel "just forgot" when the report contradicted the state's theory of the case. Prejudice found individually on each of these issues.

***Proffit v. State*, 193 P.3d 228 (Wyo. 2008)**. Counsel ineffective in sexual assault case for numerous errors. Counsel failed to object to testimony that the appellant had refused to take a polygraph test, testimony presenting the two officers' opinions that the appellant was guilty, the testimony that the appellant was a victim of molestation as a child (possibly leading to the assumption that, as a result, he had become an offender), the cross-examination of the appellant concerning whether other witnesses were "lying," the court's response to a jury question allowing use of the prior murder conviction evidence as substantive evidence, "and perhaps the most egregious failure, the failure to object to the prosecutor "hearsaying in" the extremely damaging testimony from two prior murder cases. Concerning the latter:

> The astounding fact that a prosecutor would engage in a cross-examination and would make a closing argument of this nature is exceeded only by the more astounding fact that defense counsel did not object. In effect, the prosecutor "hearsayed in" the testimony from two murder trials, told the jury that the other juries had convicted the appellant of those crimes, and then told the jury that [the victim] was murdered because he was going to be the witness in the present trial. It is hard to conceive of a more unfairly prejudicial presentation.

Counsel's "apparent theory of the case makes no sense." He believed that the earlier convictions were unreliable because the appellant did not testify and that when he did testify, the jury would acquit. "What is wrong with that construct is that the appellant could have testified in this case without opening the door to all the damaging testimony from the earlier cases." In short:

> Garnering trust for one's client rarely begins by allowing the jury to hear the detailed testimony from two murder trials in which that client was convicted. Neither is the client's veracity enhanced by allowing law enforcement officers to testify that they believe he is guilty. This is not trial strategy that any reasonable attorney would follow. As Mark Twain observed in evaluating the writings of James Fenimore Cooper, "crass stupidities [should] not be played upon the reader as 'the craft of the woodsman, the delicate art of the forest[.]'" Mark Twain, Fenimore Cooper's Literary Offenses, The Portable Mark Twain 543 (Viking Press, 1968).

*Id*. at 242. Likewise, "[t]here are few rules of cross-examination that could be said to be set in stone, but it is hard to conceive of a situation where sound trial strategy would include asking a law enforcement officer why he believed your client was guilty." Counsel also failed to demand notice

of the State's intent to present evidence of uncharged misconduct and failed to challenge admissibility prior to trial, which resulted in evidence of: (1) a prior sexual assault on the victim in this case; (2) involvement in a homosexual child pornography ring; and (3) involvement in two murders. "[N]o reasonable attorney in this situation would forfeit the opportunity to prevent the jury from learning about the different instances of uncharged misconduct noted above. While the appellant may have been subject to an attack upon his credibility through introduction of evidence . . . of the fact of the two murder convictions, there was a solid legal basis for defense counsel to attempt to prevent the jury from hearing the details of those crimes, or from hearing about the other alleged misconduct." Reversal was also required due to the plain error in the state's improper elicitation of polygraph information and improper cross and argument concerning the "lying" witnesses and the prior conviction evidence.

**2007:** ***State v. Barrett*, 263 S.W.3d 542 (Ark. 2007)**. Counsel ineffective in capital murder case (resulting in a life sentence) for failing to adequately present a defense. Counsel's conduct was deficient for failing to develop any strategy at all; failing to voir dire on "the elements of the State's case, the burden of proof, the presumption of innocence, or the mental states required for various degrees of murder"; and failing to present any discernible defense. Prejudice found because there was no defense and no distinction in "the various mental states of murder to the jury," even though the defendant had no prior felonies, was sympathetic, and was believable in his accident theory.

***Cosio v. United States*, 927 A.2d 1106 (D.C. 2007)**. Counsel was ineffective in child sexual abuse and carnal knowledge case for failing to ask the defendant's coworkers about his interactions with the alleged victim, who was the defendant's younger half-sister. The alleged victim testified that she had been repeatedly sexually assaulted by the defendant over a seven year period starting when she was seven or eight, but she did not report the abuse until she was fifteen due to her fear of the defendant. The government's case rested primarily on the alleged victim's testimony, but also included evidence from a pediatrician that the condition of the child's hymen was "strongly indicative of sexual abuse." A defense expert testified in a similar fashion. Three of the defendant's coworkers also testified that he was a good worker and a law-abiding citizen. Counsel's conduct was deficient because counsel failed to interview the coworkers concerning their knowledge of the defendant's relationship with the alleged victim even though counsel received a memo from his investigator that should have led counsel to investigate further rather than choosing to focus only a theory that the child resented the defendant due to discipline within the home, jealousy, and other matters, enough to fabricate charges against him. Reasonable counsel would also have seen the need to investigate the allegations that the alleged victim was afraid of the defendant. Further investigation would have revealed five coworkers with substantial knowledge of the relationship, who would have testified that the alleged victim voluntarily sought out the defendant at work and in other places, was very affectionate with him, and showed no sign of fear of him. Likewise, even in interviewing the coworkers to determine who would testify concerning the defendant's character, counsel should have asked about any knowledge of the defendant's relationship with the alleged victim because of the need to anticipate wide-ranging cross-examination. Counsel's failure is also not explained by counsel's "resentment" theory because counsel settled on this "theory prematurely, without having thoroughly investigated the relationship." This "was not the kind of 'reasonable professional judgment[]' that could support the curtailment of further defense investigation."

**Capital Case*

Prejudice found because the coworkers would have undermined the alleged victim's testimony of fearing the defendant and the believability of the remainder of her testimony. Likewise, counsel would also have been able to confront the alleged victim in cross-examination with the contradiction between her words and her deeds.

***Gibbs v. State*, 652 S.E.2d 591 (Ga. Ct. App. 2007)**. Counsel ineffective in child sexual abuse case for failing to investigate and present evidence that the alleged victim had a history of making false allegations of sexual molestation. The defendant, who was the alleged victim's neighbor, identified three men that the alleged victim had made allegations against and then recanted them. Counsel did not investigate or present this evidence because of his stated belief that it was inadmissible under the rape shield statute. Counsel's conduct was deficient in that any research was only "cursory" because the Georgia Supreme Court had explicitly held in 1989 that this type of evidence was not precluded under the rape shield statute. Prejudice found because all three men and at least one other corroborating witness would have been available to testify.

***Starling v. State*, 646 S.E.2d 695 (Ga. Ct. App. 2007)**. Counsel ineffective in aggravated assault and possession of a firearm by a convicted felon for failing to stipulate to the defendant's felon status, eliciting the defendant's testimony on the details of his criminal history, and failing to obtain a jury instruction on the use of the evidence of the defendant's criminal history. Counsel's conduct was deficient because a stipulation would have avoided exposing the jury to information that the defendant had previously been convicted of receiving stolen property, of aggravated assault that involved a gun, and possession of a gun by a first offender. Although counsel requested a limiting instruction at the conclusion of the evidence and the trial court agreed, counsel failed to renew the request the next day when the charges were given but the trial court failed to include the limiting charge. Prejudice found because the defense case rested largely on the defendant's credibility, only a single eyewitness testified that he saw the shooting, and the state emphasized the defendant's criminal history in closing arguments.

***People v. Sims*, 869 N.E.2d 1115 (Ill. App. Ct. 2007)**. Counsel ineffective in felony murder case for failing to timely give notice of the affirmative defense of compulsion and to seek instruction on the defense. According to the state's evidence, the defendant had been part of an armed robbery of a restaurant. The state's primary witness was a co-defendant who had plead guilty in a cooperation agreement with the state. He testified that the defendant was 15 while the other four participants were adults. After the robbery was discussed but before they entered the car to go to the crime scene, the defendant indicated that he was scared and did not want to participate. A codefendant, who was holding a gun at the time, told him that "he was there when it started, he got to be there when it finished." The state's witness testified that everyone knew "what that meant." During the robbery, the defendant was outside at a pay phone as a lookout and never entered the building. During the robbery, an employee of the store was hit and several shots were fired. The employee who was hit and close by the shooting died 5 ½ hours after the robbery. The state's expert testified that the victim died from cardiac arrest caused by the stress of the robbery. A defense expert disputed this finding. Counsel's conduct was deficient in failing to give timely notice of a compulsion defense or to, at least, give notice when he learned of this aspect of the codefendant's testimony 1 ½ hours before he testified. Although the court expressed concern about trial by ambush, the court allowed the

codefendant's testimony in this regard, but informed counsel that the issue concerning arguments and instructions would be addressed later. During the instruction conference, counsel did not request a compulsion instruction even though there was sufficient evidence to require the instruction on the affirmative defense, which required only a showing that the defendant acted under the threat or menace of imminent infliction of death or great bodily harm. Prejudice found because "this case was close" in light of the issues concerning the cause of death, a co-defendant's prior acquittal on the murder because of that issue, the defendant's age in comparison to his adult codefendants, and his role in the crimes as only a "look out."

***Commonwealth v. Bussell*, 226 S.W.3d 96 (Ky. 2007)**. Counsel ineffective in capital trial for failing to adequately investigate and to obtain expert assistance to rebut the state's experts concerning tree bark from a tree near the victim's body and the damaged fender of the defendant's car, automobile paint on the tree, and hair and fiber samples from the car and the victim's home. Prejudice found.

***People v. Cyrus*, 848 N.Y.S.2d 67 (N.Y. App. Div. 2007)**. Counsel ineffective in first-degree robbery case for several reasons. The primary issue was whether the defendant was armed with a box cutter during the offense or was unarmed, which would have been only a misdemeanor petit larceny. Eyewitnesses testified about the box cutter and a box cutter was found on the defendant at the time of arrest just outside the crime scene. Counsel's conduct was deficient in failing to adequately investigate and in opening the door to testimony about a crime scene videotape, when the existence of "taped recordings" had been disclosed by the prosecution. After cross about the tape, officers testified that the original tape was subsequently destroyed but officers had reviewed it and it showed a metal object in the defendant's hand. Counsel's conduct was also deficient in failing to adequately litigate a motion to suppress the defendant's statement when the defendant had been in custody for 17 hours and had been questioned several times before being given his *Miranda* warnings; he had not slept; he was suffering from heroin withdrawal and told officers that; he was not arraigned for more than 30 hours after his arrest; and the defendant alleged that he had been induced to falsely confess to using a box cutter in order to obtain leniency. While counsel's actions related to suppression may not have been prejudicial alone, it required reversal "when considered along with his error regarding the videotape."

***People v. Tykhonov*, 838 N.Y.S.2d 436 (N.Y. Co. Ct. 2007)**. Counsel ineffective for numerous reasons in driving while intoxicated case. The defendant was convicted based on a car accident. No one saw the accident but an ice fisherman allegedly saw the defendant walking around the vehicle from 200 yards away shortly after hearing the crash and was brought to the scene where he identified the defendant, who was then given field sobriety tests which he failed. Counsel failed to file a motion to suppress the arrest and identification. Counsel also ""was not prepared in both the law and the facts and he was unable to employ basic principles of criminal law and procedure." Counsel's conduct was ineffective under the New York State law standard, which is "more favorable to the defendant" than the *Strickland* standard.

***Kincek v. Hall*, 175 P.3d 496 (Ore. Ct. App. 2007)**. Counsel ineffective in attempted murder case for failing to present expert testimony about the defendant's mental state at the time of the shooting. The defendant and his wife of 25 years separated and he suspected her of having an affair. When

he entered her bedroom to find her having phone sex with the other man, an argument ensued and he ultimately shot her in the ankle. Although he had told officers that he had intended to kill her and himself, he testified that he did not intend to kill her and had only accidentally shot her. Defense counsel sought prior to trial to introduce the testimony of a clinical psychologist, who concluded that the defendant was acutely depressed at the time of the shooting and had not intended to shoot his wife. The trial court held that the expert could not testify as to the ultimate issue of petitioner's intent, but would otherwise be permitted to testify. Counsel did not call the expert to testify. Counsel's conduct was deficient and prejudicial.

***Ard v. Catoe*, 642 S.E.2d 590 (S.C. 2007)**. Counsel ineffective in capital case for failing to adequately develop and present gunshot residue evidence. The defendant was charged with killing his pregnant girlfriend, which resulted in the viable fetus dying from a lack of oxygen. The defense theory and the defendant's testimony was that his girlfriend was holding a gun during an argument and that it fired when he grabbed it to take it away from her. The state examiner issued a report that there was no gunshot residue on the victim's hands but testified that several particles were "very interesting, but there was not any or enough material for us to be able to call gunshot residue." Citing to the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty cases, the court held that counsel's conduct was deficient in failing to interview the state examiner or to cross-examine him on this point. Counsel's conduct was also deficient because the expert they retained had been the state expert's supervisor at the time the test was done and he reviewed and approved the report. This expert was not an "independent expert" because casting down on the state examiner's findings would have implicitly cast doubt on his own oversight of the analysis. Counsel's actions "were unreasonable and clearly deficient, especially given the fact that this was a capital case with an arguable defense to the guilt phase." Prejudice found because interviewing or cross-examining the state expert and hiring an independent expert would have revealed that, although the tests were not conclusive for gun powder, the "interesting" particles contained the three required elements of gunshot residue and the particles were "consistent with gunshot residue and could have come from her handling a weapon." Prejudice was also established because the defense's critical theory relied on this evidence and the state capitalized in argument on the lack of gunshot residue evidence and even called the "defense expert" to testify that he agreed with that finding and that he had been hired by the defense. Finally, the court noted that "the jury apparently did not believe this to be an open-and-shut case of murder" because the jury sought additional instructions on involuntary manslaughter during deliberations.

***Dillon v. Weber*, 737 N.W.2d 420 (S.D. 2007)**. Counsel ineffective in rape and criminal pedophilia case for numerous errors. The defendant was charged with abusing his eight-year-old daughter and four of her friends on two occasions. Counsel failed to object on double jeopardy grounds to charges of rape and pedophilia based on the same acts. Counsel did not investigate a prior allegation of sexual abuse by two of the alleged victim's that the state declined to prosecute against another man. Counsel failed to prepare his expert witnesses (social worker and psychologist) even though the entire case hinged on the credibility of the alleged victim's. Counsel also failed to provide the trial court with a sufficient offer of proof concerning his expert witnesses and did not establish an adequate foundation for some of the testimony counsel sought to present. Counsel also made numerous errors during the trial including failing to impeach the testimony of the mother of two of

the alleged victims. She testified they were healthy and normal prior to the alleged sexual assault but their medical records revealed an extensive history including more that 50 emergency room visits. "Possibly the most disturbing trial error" was in the cross-examination of one of the alleged victims. The trial court explained on the record that counsel was taking 40 seconds to a minute between each question leaving complete silence in the courtroom. The court found this "unsettling" and could find "no reasonable explanation for this type of uncomfortable delay during the cross examination of one of the victims." Counsel also elicited from one alleged victim that denied penetration on direct that she had been penetrated. "Based on this cross-examination, it is difficult to determine who [counsel] was representing in this case." Counsel also elicited testimony from a state's witness vouching for the credibility and truthfulness of one of the alleged victims when the trial court had ruled this testimony inadmissible. Counsel, thus, "violated a pretrial order that expressly favored his own client." Counsel also declined to offer video tapes, audio tapes, and transcripts of interviews of the child witnesses/victims even though he repeatedly told the jury that he would. His purported reason was that he felt pressured to get the trial over quickly. "Why [counsel] would feel pressured to make trial decisions based on judicial economy is a mystery, as is his decision to actually give in to this impulse." Finally, counsel said in closing that in rape cases the burden is on the defendant to disprove it. Although he later correctly stated the burden, he was "sending mixed and confusing signals to the jury about how they were to weigh the evidence." "When viewed in the totality of the circumstances," the Court found counsel's performance deficient and prejudicial. Although the court disavowed reliance on speculation about trial counsel's mental health, the court noted in a footnote that counsel was diagnosed with bipolar disorder two years after trial and received several months of in-patient treatment. The court observed "that bi-polar disorder is not a sudden onset condition. Instead, it develops over time." The court, thus, found "reason to be concerned" about counsel's mental health at the time of trial. "Here, we cannot even be certain that [counsel] was competent in a general sense, let alone competent to provide legal representation in a serious criminal matter."

***State v. Hales***, 152 P.3d 321 (Utah 2007). Counsel ineffective in murder of a child victim case for failing to obtain a qualified expert to give an independent interpretation of CT scans of the child victim. The defendant was charged with the murder 14 years after the child was allegedly injured by being violently shaken as a five-month-old infant. The child lived until the age of 12 but was mostly in a persistent vegetative state. The defendant was not charged until two years later. The child had been in the defendant's care for only 20 to 30 minutes on the alleged date of the crime when he called 911. The state's case that the injury occurred while the child was in the defendant's care and that the cause of death was a violent shaking that caused immediate unconsciousness was almost entirely based on a state expert's interpretation of CT scans of the child's brain taken after admission to the hospital. Counsel did not seek to have a defense expert to review the CT scans until the morning of trial and then asked a defense-retained pathologist to conduct this review. The pathologist testified that shaking could injure a child's neck but not the brain and that the most likely cause of death was an alleged near miss car accident in which the child had hit its head several days before followed by a "lengthy 'lucid interval.'" The pathologist was not permitted to testify concerning the CT scan though because he admitted in voir dire that he was not qualified to interpret the scan and did not do so in his practice. Counsel's conduct was deficient in failing to adequately investigate. It was clear from the preliminary hearing that the interpretation of the CT scans was

critical to the State's case because there was no witness to the child's injuries. Counsel's conduct was not explained by strategy because counsel made the choice to rely only on the pathologist without having conducted the investigation with an expert review of the CT scans. It is also clear from the opinion (although not clearly relied on by the court on this point) that counsel did ask the pathologist to review the scans and sought to introduce his testimony on this point, but counsel had failed to ascertain beforehand his qualification to do so and had not sought review by a defense expert until the morning of trial. The court also noted that, while counsel may sometimes have a valid strategy to rely on cross-examination or other strategy such that a defense expert need not be retained in every instance, "the centrality of this medical evidence to the jury's determination of . . . guilt or innocence made an expert necessary in this case." *Id*. at 341. Prejudice was also established because review of the CT scans by a qualified pediatric neuroradiologist "would likely alter the defense's theory at trial as well as the entire evidentiary picture presented to the jury." *Id*. at 342. Here, a qualified expert could have countered the state expert's testimony with testimony that the initial CT scans showed changes in cell structures that would not be present until 6 to 12 hours after injury. This testimony alone would have been significant because the child was not in the defendant's care during that time frame. A defense expert also could have countered the state's expert conclusion that the injuries were a result of shaking because nothing in the scans suggested shaking as a cause as opposed to an impact injury or other possible causes. Likewise, a defense expert could have testified that the scans did not support any conclusion of immediate unconsciousness and were not inconsistent with a period of lucidity following the injury. In short, a defense expert could have countered most of the state's expert testimony because the "[t]he scan shows the point to which the injury had progressed–not how it got there."

***In re Hubert*, 158 P.3d 1282 (Wash. Ct. App. 2007)**. Counsel ineffective in attempted rape case for failing to discover and present the defense that the defendant reasonably believed that the victim was not mentally incapacitated. The defendant had met up with three women out drinking and dancing and had been invited back to the home of two of the women for drinks. He was also invited to spend the night on the couch. He later entered the room of one of the women, who testified that she awoke undressed with the defendant having sex with her. She ended the encounter and left the home for over an hour while he remained in her room. He left after her roommate insisted he leave. The defendant testified that he believed the alleged victim was awake and consenting the entire time. Counsel's conduct was deficient because it is a defense to second degree rape that the defendant reasonably believed the person was not mentally incapacitated. Counsel was also aware that both the defendant and the alleged victim confirmed that he stopped physical advances to the woman when she did insist and that he remained in her room for a substantial time even after she left. Counsel did not pursue this defense simply because he was not aware of the statutory defense. Counsel needed only to review the relevant statutes and pattern jury instructions to learn of the defense. "An attorney's failure to investigate the relevant statutes under which his client is charged cannot be characterized as a legitimate tactic." *Id*. at 1285. Prejudice found because the defendant was convicted of attempted rape, which required a finding of specific intent to have sexual intercourse with a victim incapable of consent. Here, the jury was unaware that a reasonable belief that the alleged victim had capacity to consent was a defense to this charge.

**Capital Case*

***State ex rel. Humphries v. McBride*, 647 S.E.2d 798 (W. Va. 2007)**. Counsel ineffective in murder case for numerous reasons. The defendant was convicted of accessory before the fact of murder and conspiracy to commit murder in the bombing death of his wife's ex-husband, which was originally determined to be an accidental death by a bomb the victim built, 22 years before trial. Counsel's conduct was so bad that the state even conceded ineffective assistance of counsel and other reversible errors. (1) Counsel had an actual conflict and should have withdrawn from the case or should have been removed by the court when the state moved to disqualify counsel prior to trial. At that time, counsel admitted that his father and law partner had represented the victim in divorce proceedings from the defendant's wife, which went "to the very heart of the alleged motive" for murder. He stated that he was not involved in that representation and that the defendant waived any potential conflict. The post-conviction evidence, however, established that counsel was likely the last attorney to see the victim before his death, he did work on the divorce case, and he could have been a necessary witness for the defense to refute some of the state's assertions. Because counsel had misrepresented his involvement in the divorce case prior to trial, the court also questioned whether the defendant's waiver was "truly an informed decision" following adequate disclosure. (2) Counsel failed to object to testimony that the defendant had consulted with counsel and declined to speak with investigators during the initial investigation of the death, which violated the defendant's Fifth Amendment rights. (3) Counsel failed to offer an FBI report into evidence or to cross-examine an FBI agent with his original report that revealed that all of the components of the bomb were also found in the alleged victim's home, which supported the defense theory that he constructed the bomb himself and accidentally detonated it. (4) Counsel failed to retain a bomb expert or an independent investigator even though the case was very complex. (5) Counsel failed to object to testimony that the defendant's co-defendants had already been convicted even though counsel had sought a change of venue because of the publicity generated by those trials. (6) Counsel failed to object to numerous instances of hearsay testimony even though the state and the trial court were even posing their own objections to counsel's questions eliciting hearsay because "even they feared that [the defendant] was being 'done in' by his defense counsel." Counsel's deficient conduct was not excused by his "strategy" to "put it all out on the table" because "no reasonable attorney would have pursued a like 'strategy.'" Prejudice found due to the "cumulative effect of these errors."

***Strandlien v. State*, 156 P.3d 986 (Wyo. 2007)**. Counsel ineffective in aggravated vehicular homicide case for failing to secure the services of an expert in accident reconstruction. Although the defendant's blood alcohol concentration shortly after arrest was .20, the defense theory was that the impairment was not the proximate cause of the accident. The defendant testified that he was passing the victim's car when, without a turn signal, the victim began turning left. Two state troopers disputed the defendant's theory and testified that the defendant had adequate notice to avoid the collision had he not been impaired. Counsel's conduct in failing to retain an expert was deficient because the exact nature of how the collision occurred was vital to the defense strategy and counsel had notice of the troopers' opinions months before trial. Prejudice established because an independent expert would have supported the defense theory and challenged the validity of the troopers' investigations and conclusions.

**2006:** ***Douglas v. State*, 937 So. 2d 825 (Fla. Dist. Ct. App. 2006)**. Without any detail or explanation of the case, the court held that counsel was ineffective for failing to investigate appellant's treating

physician due to counsel's speculation that the physician's opinions, which counsel was unaware of, would be successfully challenged on cross-examination.

***Goldstein v. State*, 640 S.E.2d 599 (Ga. Ct. App. 2006)**. Counsel ineffective in child molestation and aggravated sexual battery case for several reasons: (1) failing to cross-examine the alleged victim's mother about her many prior allegations of child molestation extending from childhood into adulthood; and (2) failing to present expert medical testimony to refute the state's experts' opinions. The mother's own family members had provided information concerning her numerous false allegations to defense counsel, but this evidence was not pursued. Likewise, experts were available to contradict the state's expert's medical testimony concerning the elasticity of a prepubescent hymen, which counsel had notice of but did not attempt to rebut. Prejudice found because the state's evidence was far from overwhelming. There was no physical trauma to the alleged victim, no eyewitnesses, and the first witness to report the "crime" had a history of making false accusations of molestation.

***Gibson v. State*, 634 S.E.2d 204 (Ga. Ct. App. 2006)**. Counsel was ineffective in homicide by vehicle case where the defense theory was that the defendant had a green light before entering the intersection where the accident occurred. Counsel was ineffective in failing to introduce into evidence county records indicating previous problems with the traffic signals at the intersection. The records included a document provided in discovery that showed that just four days prior to this collision there had been a report that the traffic signals were showing green in all four directions at the same time. Counsel was also ineffective in failing to discover additional documents showing similar malfunctions in the year before this accident, which were obtained by appellate counsel. Counsel did not present evidence of the malfunction 4 days before because their request to subpoena the appropriate witness was not made until just before the state rested and the court denied the request. Prejudice established.

***Terry v. Jenkins*, 627 S.E.2d 7 (Ga. 2006)**. Counsel ineffective in capital trial for failing to adequately investigate and present defense in case where the victims were abducted from a coin- operated laundry and later murdered. The state's evidence was largely based on immunized testimony and trial counsel attempted to show that other persons were the murderers. Local counsel had no experience in capital cases so lead counsel was appointed. The two appointed counsel miscommunicated on the role of each counsel. Lead counsel assumed local counsel was investigating. Local counsel believed his job was to provide "local flavor" and knowledge, but otherwise just to do as he was told. Lead counsel did not discover until trial that very little investigation had been done. Counsel's files revealed some information pointing to other suspects and the falsity of their alibis but counsel could not recall investigating further and this evidence was not presented. Counsel also failed to seek a continuance in order to investigate when the defendant told counsel only six days before trial that his family had been threatened if the defendant "spoke up." "Had defense counsel investigated its own primary defense," the evidence would have implicated persons other than the defendant. Counsel's conduct was deficient and prejudicial.

***Testerman v. State*, 907 A.2d 294 (Md. Ct. App. 2006)**. Counsel ineffective in eluding a uniformed officer and DWI case for failing to challenge the sufficiency of the evidence of eluding. The charge

was based on the defendant's changing seats with the passenger as the arresting officer was getting out of his patrol car. Counsel's conduct was deficient because these actions may have been an attempt to evade arrest, but was not an evasion of the police officer, which was required under the statute for this offense. Prejudice established.

***Commonwealth v. Garcia*, 845 N.E.2d 1196 (Mass. App. Ct. 2006)**. Counsel ineffective in indecent assault case for failing to adequately investigate and present a defense. The defendant, a former part- time teacher, was charged with sexual acts with three young children at a Learning Center. Counsel's conduct was deficient because counsel failed to interview any of the government witnesses and inexplicably failed to present evidence from one essential witness, who was a teacher and a babysitter for one of the children. Her statement provided by the state in discovery included information that the child initially denied allegations even though she encouraged him to speak up until his mother became involved, which supported a defense theory of parental influence and pressure. Prejudice found on all three charges because the case against the defendant with respect to the other two children had similar problems in that there was physical evidence or injury and credibility was the sole issue.

***Johns v. State*, 926 So. 2d 188 (Miss. 2006)**. Counsel ineffective in aggravated assault case for failing to adequately investigate and present alibi witnesses. The victim testified that he was shot during a 20-minute period by the defendant firing into his car from the defendant's car behind him. The defendant was quickly arrested at his home and no evidence was found connecting him to the crime. The defendant claimed to have been at home with his young daughter at the time of the shooting. The defendant retained counsel he met in a retail store, who had no office, met with his client only at McDonald's or the courthouse, and was indicted four months after this trial for the sale of marijuana in a correctional facility. The defendant and his parents, who retained counsel, all informed counsel of the names and addresses of three alibi witnesses. Counsel never interviewed them and never contacted his client again until the night before trial. The defendant did not realize until the morning of trial that he had no witnesses, but he turned down a plea offer for five to six years because counsel told him the State had no evidence and that he would be able to win. Counsel's conduct was deficient.

> The decision not to interview witnesses, particularly your own, cannot be considered an effective strategic choice. When counsel makes choices of which witnesses to use or not to use, those choices must be based on counsel's proper investigation. Counsel's minimum duty is to interview potential witnesses and make an independent investigation of the facts and circumstances of the case.

Prejudice found because the post-conviction testimony of the alibi witnesses was not rebutted by the prosecution and "could very well have changed the outcome of the trial."

***People v. Anderson*, 813 N.Y.S.2d 725 (N.Y. App. Div. 2006)**. Counsel ineffective in drug case for announcing that the defense would be that of agency and conceding the defendant's identity as person involved in drug transaction when the officer's out of court identification of the defendant

had been suppressed and counsel abandoned the issue of allowing the officer's in-court identification of the defendant.

***State v. Gondor*, 860 N.E.2d 77 (Ohio 2006)**. Counsel ineffective in separate murder trials for two defendants. One co-defendant plead guilty and the other two were tried separately and convicted with their former co-defendant as the prosecution's key witness in both cases. During both trials, the state also relied on blood evidence in the back of one co-defendant's truck and evidence that the two co-defendants attempted to create a false alibi. One counsel testified that the prosecutor's file was made available to him but he did not review each page because of his busy trial schedule. He relied just on things pointed out to him that were consistent with the state's theory. The other counsel also testified that the state's file was made available to him. If either counsel had adequately reviewed the state's files, they would have discovered a report from a serologist that the substance found in the back of the truck was not blood and was most likely perspiration. There was also evidence in the file to impeach some of the testimony concerning development of a false alibi by showing that this attempt was after the defendants became suspects rather than just hours after the murder as the state suggested. The state's file also contained a transcript of a prior inconsistent statement by the prosecution's key witness, which also reflected his statement that he would set the other co-defendants up if necessary to help himself. There was also evidence that the witness' mother had attempted to smuggle a knife into the jail for him and the charges were dropped against her as part of his plea agreement. Finally, there was evidence reflecting that others, who had never been charged or convicted, may have been involved in the murder. Both trial counsel denied seeing this information in the state's files, but would have used the information if they had known about it. In addition to the state's open file policy, the post-conviction evidence reflected that both trial counsel had been provided with copies of the relevant information. Trial counsel's conduct in both cases was found to be ineffective for failing to discover and use this evidence during the trials. Prejudice was found due to the "cumulative effect of trial counsels' errors."

***Smith v. State*, 144 P.3d 159 (Okla. Crim. App. 2006)**. Counsel ineffective in murder case for failing to prepare and present a Battered Woman's Syndrome defense. The defendant called a neighbor and asked him to come to her house where she admitted to shooting her husband and killing him because she said she couldn't take another beating from him. The weapon was located at the scene with a live round jammed in the chamber. She told police that her husband was physically abusive throughout their marriage and his abuse had gotten worse through the years. In the month before the shooting, he had kicked the dog and shot the defendant's cat. His abuse of her escalated. During an episode of physical and mental abuse, she picked up a gun that was lying on a table. With her husband still yelling at her, the defendant, who feared another beating, shot him and then attempted to kill herself but the gun jammed. While counsel presented nine witnesses at trial concerning the victim's abusiveness to the defendant, counsel did not present an expert on Battered Woman's Syndrome and instead relied on a generalized self-defense argument. Counsel's conduct was deficient in failing to file an application with the court for appointment of an expert when the defendant said that she could not afford to pay for the expert. Prejudice established even though the defendant had been convicted of the lesser offense of second degree murder because, if counsel had obtained an expert, the defendant may have been acquitted.

**Capital Case*

****Nance v. Ozmint*, 626 S.E.2d 878 (S.C. 2006)**. On remand from the U.S. Supreme Court for consideration under *Florida v. Nixon*, 543 U.S. 175 (2004), the court reinstated its opinion finding that trial counsel's failure to investigate, plan, and present a defense in this capital trial constituted "a classic example of a complete breakdown in the adversarial process" and prejudice was presumed for eight reasons. (1) Lead counsel was suffering from numerous health problems, including alcoholism, and was taking numerous medications that impaired his memory and caused other problems. Co-counsel had been practicing law for only 18 months. (2) Counsel sought to show that the defendant was mentally ill and wanted the jury to view him in his unmedicated state and successfully got the judge to order such, but then failed to inform the jail personnel of the court's order so the jury saw "a drug-influenced demeanor" during trial. (3) Counsel pronounced in opening statements that they were appointed and neither of them "wanted to be there." (4) Counsel presented a defense of guilty but mentally ill but failed to qualify their only expert and presented supporting testimony of the defendant's sister only after the expert testified denying him the opportunity to inform the jury of how the sister's testimony supported a finding of mental illness. (5) Counsel presented no evidence of adaptability to confinement in sentencing when they had presented the only bad incident of urine-throwing in confinement during the trial. Evidence was available to establish that the defendant had been selected as an institution's inmate of the year and nominated for the entire state's inmate of the year and testimony was available from a jail administrator and prison minister that the defendant was a "model inmate." (6) Counsel presented "no mitigating social history evidence," even though the evidence would have established physical abuse throughout the defendant's childhood, an alcoholic, abusive father; being "treated with alcohol as a child in lieu of over-the-counter medication"; and growing up "in a family of extreme poverty and physical deprivation." (7) "[D]efense counsel's seven-minute mitigation presentation failed to provide the jury with any insight concerning Petitioner's mental illness," even though he has a family history of schizophrenia, history of hearing voices, and suffered from neurological damage. (8) In closing arguments in sentencing, counsel "failed to plead for Petitioner's life and referred to him as a 'sick' man."

> [C]ounsel abandoned his role as defense counsel and in fact helped bolster the case against his client. . . . We again recognize that this type of "consistently inept form of lawyer conduct [is not] acceptable in this state, nor will we employ a prejudice analysis, for '[defense] counsel's ineffectiveness [is] so pervasive as to render a particularized prejudice inquiry unnecessary.'"

*Id*. (quoting *Nance v. Frederick*, 596 S.E.2d 62, 67 (S.C. 2004)).

****Wiley v. State*, 183 S.W.3d 317 (Tenn. 2006)**. Counsel ineffective in felony murder trial for failing to request an instruction on second degree murder and failing to preserve the issue for appeal and in failing to adequately investigate and assert self-defense. Prejudice was found because the defendant informed counsel that the victim "rushed" him. Although the defendant did not tell counsel that his nose had been bloodied, diligent counsel would have conducted additional investigation. Prejudice found because two bloody towels were evident in crime scene photos and at least one of them had the defendant's blood on it. The victim also had a prior conviction for

battery, which would have been admissible under state law even though the defendant was not aware of it to establish that the victim was the initial aggressor.

***Ex parte Amezquita*, 223 S.W.3d 363 (Tex. Crim. App. 2006)**. Counsel ineffective in aggravated assault case for failing to investigate evidence involving the alleged victim's cellular telephone, which was taken and used while she remained in a coma for 10 days after the offense. If counsel had adequately investigated, the evidence would have revealed that the defendant was never in possession of the victim's telephone or that, other than the victim's testimony, he was at her place of business on the day of the assault. There was, however, evidence that another business employee, who was a parolee with a history of violent crime and who had recently been confronted about his harassment of the victim, was at the business on the day of the assault and possessed the victim's telephone shortly after the attack. Prejudice found.

***Wright v. State*, 223 S.W.3d 36 (Tex. Crim. App. 2006)**. Counsel ineffective in indecency with daughter case for failing to investigate following receipt of notes of the victim's therapy sessions and failing to obtain the assistance of an expert. The defense theory was that the victim had been coached into making false allegations because of a child custody dispute. The victim initially said that the defendant masturbated in front of her. She then began therapy and the therapist's notes indicated that the victim's mother, who had child custody disputes with the defendant, was present for most of the sessions. The therapist initially noted that the child said she accidentally woke up and saw her father and it was her fault. Her statements kept evolving though. The therapist was noting a belief that the defendant had the child to participate in the masturbation months before the child said that he had done so. The prosecutor was also present at one of the "therapy" sessions. Although counsel had never been denied access to the state's file and knew of the therapist at least a month prior to trial, counsel did not obtain the file until just before trial. Counsel did not seek a continuance or obtain expert assistance. Counsel's conduct was not excused by strategy because counsel did not seek an expert only because he had been told that his expert would not be allowed to interview the child, he did not have time after receiving the notes, he had difficulty reading the notes, and he thought the therapist would be providing him with a report. Prejudice found because an expert could have testified that custody disputes generate a high proportion of false allegations of sexual abuse. In addition, this "therapy" was outside the standard protocol for working with child victims and conducive to false allegations. The expert also could have assisted counsel in preparing cross-examination of the state's witnesses.

***Walker v. State*, 195 S.W.3d 250 (Tex. Crim. App. 2006)**. Counsel ineffective in resisting arrest case for several reasons. First, counsel's conduct was deficient in failing to ask any questions in voir dire even after six members of the jury venire identified themselves as working or having close relatives who worked in law enforcement and made statements indicating potential prejudice or bias. Counsel used peremptories to remove two of these jurors but otherwise failed to conduct voir dire or challenge these biased jurors for cause. Counsel was also ineffective in failing to conduct an appropriate investigation and to object to inadmissible evidence of extraneous offenses and bad acts that were irrelevant to the trial for resisting arrest. This evidence included evidence of another person at the scene being arrested for possession of drugs, the defendant having previously disturbed the peace by firing an automatic weapon, and a 20-year-old misdemeanor conviction for assault on

an officer. Counsel failed to object to this evidence because he was not familiar with the appropriate admissibility standards and also failed to request a limiting instruction. Here, where the defendant's credibility was critical to the defense, counsel should have investigated, filed appropriate discovery, prepared the defendant for his testimony, filed motions in limine to prevent the inadmissible evidence from coming before the jury, and objected and requested a limiting instruction when the evidence did come before the jury. Counsel was also ineffective in sentencing for failing to adequately investigate and opening the door to cross-examination of the defendant about numerous arrests for concealed weapons, criminal mischief, assault, and reckless conduct. Counsel also failed to object to the court's failure to instruct the jury in sentencing that evidence of unadjudicated offenses could not be considered unless the offenses were proven beyond a reasonable doubt. The defendant was prejudiced even though unadjudicated offenses were admissible under state law because the state did not offer any of this evidence or raise the issue until counsel asked the defendant broadly in redirect if he had "any problems with law violations." Prejudice found because evidence of extraneous offenses is inherently prejudicial. The prejudice in sentencing was particularly clear because the state recommended probation only, but the jury sentenced the defendant to 180 days in jail and a $2000 fine in addition to probation.

**2005:** ***State v. Hamlet*, 913 So. 2d 493 (Ala. Crim. App. 2005)**. Counsel was ineffective in robbery case for numerous reasons. One counsel was appointed and did not do much in preparation. The other was retained only days before trial but acted as lead counsel without preparation (although he had moved for a continuance). The original counsel did not inform the new counsel of prior inconsistent statements by key state witnesses and sat silently while the new counsel pursued a defense theory that fell apart quickly and required a change in the middle of trial. And, neither counsel advised the defendant of the state's plea offer.

***Lee v. State*, 899 So. 2d 348 (Fla. Dist. Ct. App. 2005)**. Counsel ineffective in capital sexual battery of child under 12 case for failing to adequately investigate and present a defense. This was a "classic familial sexual abuse situation, with no eyewitnesses, no direct physical evidence of abuse, nor even similar fact evidence." The defendant's 10-year-old stepdaughter alleged abuse on three occasions. The allegations were not made until the defendant left her mother for another woman, her mother was incarcerated, and her step-sister (who had found a letter to the alleged victim's mother stating that the defendant "was doing it with her") urged her to tell her grandmother, with whom she was living although she did not know her well. The only alleged physical evidence was from the testimony of a pediatrician, who testified that the victim's hymen had been torn and formed a scar as it healed. The pediatrician concluded that the hymenal ring was abnormal and indicated repeated penetration. She acknowledged that it was possible that the abnormality was caused by excessive masturbation "but virtually excluded that possibility." The only defense presented (other than the defendant maintaining his innocence) was that the alleged victim's mother had previously caught her masturbating and had been told then that a man (other than the defendant) had showed her how. Counsel's conduct was deficient. Counsel had never tried a capital sexual battery case and did not consider retaining an expert even though counsel could not read the state expert's notes and did not know the meaning of some of the terms used in the notes. Counsel also did not retain an expert because counsel dismissed the pediatrician's opinion because she "was not an expert." Counsel even advised the defendant that "he had a good trial case because there was no physical evidence of

abuse." The defendant "had the right to an attorney who understood the ramifications of the pediatrician's testimony." Moreover, counsel's conduct was not excused by the defendant's request that the case not be continued for counsel to investigate because counsel had not done any investigation until two weeks before trial even though the defendant had informed counsel from the beginning that the alleged victim had previously alleged sexual abuse by someone else. Moreover, counsel's erroneous belief that there was no physical evidence of abuse, even though the pediatrician corroborated the alleged victim's testimony, "significantly contributed" to the defendant's decision. By finding that counsel's conduct was excused by the defendant's conduct, "[i]ronically, the circuit court thus held the defendant to a higher standard than his attorney for understanding the significance of the evidence against him."

> The trial court made no factual findings or legal conclusions about the fact that the attorney had information about previous allegations available to him almost six months before trial and did nothing about it until the eve of trial, despite knowing that his client had been unable to make bond, had been held in jail since his arrest, and was anxious for his case to be concluded. Thus, when [the defendant] insisted on going to trial, he did so without the benefit of all of the relevant information that a reasonably prompt and thorough investigation by an effective attorney would have revealed. The circuit court erred when it found that [the defendant's] decision to go forward with the trial negated the deficiencies in his counsel's preparation.

If counsel had adequately investigated, counsel could have presented expert testimony that (1) the change in the hymenal ring was not indicative of repeated penetration: (2) the alleged victim's hymen was considered "a normal variance"; and (3) it was inappropriate procedure for the pediatrician to take the child's history while the grandmother was present.

> At a minimum, he could have impeached the pediatrician, and the jury would not have been left with the unchallenged impression that the medical evidence corroborated the State's theory that something of a criminal nature happened to the victim. Had the defense attorney gone further and discovered whether the victim had made prior allegations of abuse, either founded or unfounded, that information could have provided valuable impeachment of the victim's testimony. . . . As it stood, defense counsel was left with the very difficult job of attempting to demonstrate that a sympathetic young child, crying on the stand, was lying.

***Martin v. Barrett*, 619 S.E.2d 656 (Ga. 2005)**. Counsel ineffective in aggravated child molestation and cruelty to children case where counsel failed to seek to obtain the records or to request the assistance of an expert despite counsel's knowledge that the defendant had been hospitalized for treatment of mental illness. Prejudice found because the defendant had Bipolar Disorder with psychotic episodes of auditory and visual hallucinations. The defendant "might have been found to be incompetent to stand trial, legally insane at the time of the crimes, or guilty but mentally ill."

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***People v. Moore*, 824 N.E.2d 1162 (Ill. App. Ct. 2005)**. Counsel ineffective in burglary of car case for two reasons. First, counsel failed to object to the prosecutor's improper closing argument urging the jury to convict the defendant in order to prevent their insurance rates from increasing. This was an inflammatory argument that "served no purpose other than to appeal to the jurors' fears, prejudice defendant, and inflame the passions of the jury." *Id*. at 1165. The argument was also based on "irrelevant speculation" and not on the evidence because there was no mention of auto insurance during the trial. *Id*. at 1166. Second, counsel elicited incriminating hearsay during cross-examination of two of the state's key witnesses. The witnesses testified that they had seen the defendant burglarize the car and take a camera bag. When the defendant was arrested, however, he did not have the camera bag and it was nowhere near him so the defense was arguing mistaken identity and a reasonable doubt. During cross-examination of these witnesses, however, counsel elicited hearsay information from "members of the crowd" that the defendant dropped the bag during a struggle and a man with the defendant grabbed the bag and took it with him. "The members of the crowd who allegedly provided this information were not named, never testified during trial, and were never cross-examined." *Id*. at 1170. Counsel's conduct was deficient because this evidence was inadmissible, the trial court informed counsel in the midst of the cross that it was inadmissible (but the court did not exclude it since the state did not object), and any alleged strategy was unreasonable because the hearsay elicited "served to further incriminate" the defendant. *Id*. at 1171. Prejudice found on each of these issues.

***Parish v. State*, 838 N.E.2d 495 (Ind. Ct. App. 2005)**. Counsel ineffective in attempted murder and robbery case for failing to adequately investigate and present a defense and failing to object to an improper Allen charge. The state's witnesses testified that they were in the victim's apartment watching a movie. After a knock on the door, intruders entered demanding drugs, money, and guns. After a struggle with the co-defendant the victim was shot in the stomach. The defendant allegedly threatened the witnesses with a gun if they moved. The co-defendant was tried separately. Counsel presented an alibi defense supported by seven witnesses, all family members, during trial. Counsel's conduct was deficient in failing to adequately investigate because he just "assumed" that the crime did occur in the fashion the state alleged. *Id*. at 501. In short, counsel "did not make a reasonable decision not to investigate the shooting, which would have uncovered evidence that perhaps the crime did not occur as the State's eyewitnesses testified at trial." *Id*. at 502. If counsel had investigated, he would have discovered two independent witnesses who would have testified that the victim was selling drugs in the parking lot of the building when he was shot. This was also supported by a witness that did not testify for the state during trial but his statement to officers and identification of the defendant was admitted into evidence. This witness testified in post-conviction that he had been coerced by police into identifying the defendant. The state's crime technician would have testified that no blood was found in the apartment, although there was blood in the car used to transport the victim to a nearby fire station. Likewise, DNA evidence from a hat allegedly belonging to the co-defendant revealed that it was not the co-defendant's hat. Prejudice found because, at the least, this evidence would have seriously undermined the credibility of the state's witnesses. "That is, if the eyewitnesses were not telling the truth about where the crime occurred, then that could cast doubt on their account of how the crime occurred and who was involved," strengthening the alibi defense. In addition, five additional alibi witnesses, one of whom was not a family member, were available but not presented by counsel. This was complicated by the trial

court's *Allen* charge, which had been modified from the state's standard charge, in an impermissible fashion and was included in pre-deliberation charges. During deliberations, the jury submitted several questions concerning the state's primary witnesses, which went unanswered. After 9 hours of deliberations, the jury returned with a verdict of guilt. If counsel had "independently investigated the shooting, presented that evidence, and then objected to the Allen charge, the result of the proceeding would be different." *Id*. at 503.

***Bolden v. State*, 171 S.W.3d 785 (Mo. Ct. App. 2005)**. Counsel was ineffective in assault and armed criminal action trial for failing to seek a mental health examination, waiving the issue of competence, and proceeding to trial despite the defendant's incompetence. Counsel and the court had received letters prior to trial that contained "random numbers and letters that made no sense" and one had feces smeared on it. During pretrial hearings, the defendant "acted erratically and strangely," including urinating in the courtroom and swinging at counsel. He also testified in a hearing about "a conspiracy regarding activist Louis Farrakhan." Counsel was also aware that the defendant was unable to understand the plea offer by the State but refused to allow counsel to talk with his family and would not respond to her questions. Instead, the defendant would tell counsel how to kill herself. Counsel requested a mental health examination and the defendant was found to be competent but the doctor warned that there could be deterioration over time. Counsel requested a second examination and the defendant refused to speak with the doctor, but based on a review of the records, the doctor concluded that the defendant should receive an inpatient evaluation. The initial examining doctor agreed that inpatient examination was appropriate. The defendant, however, "announced that he was competent and ready for trial." Counsel then let the case go forward without requesting further evaluation. During the trial, the defendant's bizarre behavior continued, including making sexual and threatening statements to witnesses in the presence of the jury. He made a number of bizarre statements in sentencing including that the country would end and that he had done away with emotions and feelings through "astro-rejection, metaphysics, telepathic powers, telekinetics, and psychokinesis." Counsel had no strategy. She simply waived the competency issue because the defendant wanted her to do so. Prejudice found because "there is a reasonable probability that the result would have been different if an inpatient evaluation had been requested" because the defendant would likely have been able to establish a defense of not guilty by reason of insanity.

***Dorsey v. State*, 156 S.W.3d 825 (Mo. Ct. App. 2005)**. Counsel ineffective in kidnaping, sodomy, and other offenses case for failing to present evidence of juror misconduct in the motion for new trial and for urging the jury to convict the defendant of forcible sodomy. The victim testified that she was lost and asked the defendant for directions and then was kidnaped and raped. The defendant testified that the alleged victim was looking for drugs and he had consensual sex with her in exchange for cocaine. During deliberations, one of the jurors went to the scene "to investigate the victim's story about getting lost." The juror got lost in the same area and told the other jurors about it. The defendant was convicted of forcible sodomy and other offenses that day, but acquitted of a number of other charges. Shortly after the verdict, the judge's law clerk and an assistant prosecutor learned of the juror's trip and the information to the other jurors and disclosed it. The officer conducting the pre-sentence investigation (PSI) also disclosed that the juror that had made the trip called the victim's family after the trial to say that he "totally believed" the victim's story. Counsel's conduct

was deficient because counsel filed a motion for new trial seven days late and included no evidence or argument other than the letter from the PSI officer. Counsel's conduct was not excused because counsel did not offer a strategic reason. Counsel's conduct was deficient because the jury misconduct was clear. Once that was established, prejudice was presumed and the state offered insufficient evidence to rebut the presumption. While three jurors testified that they were not influenced, nine jurors did not testify and the juror that engaged in misconduct "attempt[ed] to minimize the effect of his own misconduct." Prejudice was found because "the victim's credibility was clearly at issue." If she had not been lost, her credibility was undermined and the defendant's version was supported. Relief granted despite the trial court's purported ruling on the merits even though it had no jurisdiction due to the late filing of the motion.

> The test is not whether that particular trial judge would have granted relief. The test of merit is not whether the trial judge would have reversed his earlier ruling but rather whether, in the light of applicable law, the contention was a valid one.

In sum:

> Even though there was a verdict of acquittal on many of the charges, we cannot say that there was not a reasonable likelihood of even more acquittals, at least as to charges requiring belief in the use of a weapon. Because we know so little about the dynamics of the jury deliberations and the true effect of the juror misconduct in this case, we have very little basis to say that, had counsel secured a new trial, [the defendant] would have done no better in a second trial. Thus, we feel constrained to say that defense counsel's errors and overall performance were such that we cannot be confident in the trial having achieved a just result. Because we have a definite and firm impression that a mistake was made in ruling on the post-conviction motion, we reverse the motion court's decision.

The court considered counsel's concession of guilt "only in regard to our consideration of counsel's overall performance." While the jury could have found the defendant guilty of forcible sodomy based on his testimony, counsel is expected "to argue the evidence in a way favorable to the client." In addition, the court's instructions required a finding that the defendant "displayed a dangerous instrument" in order to convict and the defendant had not admitted this element here. Finally, where there was obvious concern about the victim's credibility, "it seems less than astute for counsel to concede" guilt on any offense when the defendant had denied guilt. While the court declined finding ineffectiveness based only on this issue, it concluded that the overall performance of counsel undermined confidence in the outcome of the case.

***Johnson v. State*, 172 S.W.3d 6 (Tex. App. 2005)**. Counsel ineffective in assault on public servant case where the defendant and her husband had fought, he called 911 asking for an ambulance but then called back saying the defendant did not want an ambulance, and police went to the home anyway. When no one answered the door they kicked the door in and refused to leave when asked to do so insisting on questioning the two individually. The defendant became agitated and fought with officers. Afterwards another officer arrived and was audiotaping events as he talked with the defendant, her minister talked to her, and she talked to an officer that was allegedly assaulted.

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Counsel's conduct was deficient because, although counsel filed a discovery motion seeking all statements of the defendant, counsel never obtained a ruling on the motion and, thus, was not provided with this tape. When he learned of the tape during the trial, he ignored the defendant's request to personally review the tape, did not seek a continuance or recess, and reviewed the tape just over a lunch recess without the benefit of a transcript. He did not object to admission of a redacted tape that excluded the only arguably exculpatory portion of the tape. Counsel's conduct was deficient because the defense was clearly entitled to receive this tape in discovery but "a discovery request alone, without an order or follow-up in some manner, is a hollow gesture." Moreover, counsel's attempt to redact the tape, without the benefit of a transcript, just over a lunch recess was "difficult and virtually meaningless." Counsel also did not correct and, in fact, agreed with the state's evidence that the redacted tape contained the entire dialogue between the defendant and officers when it did not and the portion excluded was the only arguably exculpatory portion. Prejudice was found because if the defendant had been provided with the tape prior to trial her trial strategy might have changed. She might have considered a plea or been better prepared to testify. Counsel might have considered filing a motion to suppress when counsel otherwise was not even aware that the defendant had not been read her rights prior to the taping. Here, the recording was the "lynchpin of a case that turned on" the defendant's credibility and she was prejudiced by counsel's actions.

***Hall v. State*, 161 S.W.3d 142 (Tex. App. 2005)**. Counsel was ineffective in drug trafficking case for numerous reasons. The defendant was a passenger in a car stopped for speeding. The officer asked for consent to search the vehicle and found cocaine in a cooler in the back of the car. The driver pled guilty and testified. State law required an accomplice testimony instruction under these circumstances and precluded conviction on the testimony of an accomplice unless there was other evidence tending to connect the defendant to the crime. Here, because the jury was not properly instructed, the jury was authorized to convict the defendant with no corroborating evidence and the non-accomplice testimony provided only a weak inference of guilt. Counsel's conduct was deficient because the failure to request a proper instruction "relieved the State from proving the portion of its case that would have been the most difficult to prove." Counsel's conduct was also deficient in failing to object the state's cross-examination of the defendant based on inadmissible, unadjudicated offenses that the state referred to as "gang-banging" offenses. Counsel's conduct was also deficient in failing to object to the state's comment on the defendant's post-arrest silence in the opening statement and closing argument. Counsel's conduct was not excused by strategy because the court could not "envision a reason" for counsel's failures in each respect. The court found prejudice with respect to each deficiency and found that "the combined effects" required reversal.

***Keats v. State*, 115 P.3d 1110 (Wyo. 2005)**. Counsel ineffective in first degree arson case for failing to investigate the possibility of a plea of not guilty by reason of mental illness (NGMI). After the defendant set a fire in his mobile home, his roommate put it out and called police because he was threatening to burn the home down with him in it. After police arrived he vacillated between suicidal, threatening, anger, laughter, and depression. He set several fires that officers and firemen were able to put out, but ultimately set a fire that spread and filled the home with smoke. He was finally subdued but the mobile home was damaged beyond repair. After his arrest, the defendant was involuntarily committed to a mental health unit and found to have a major depressive disorder and

reality distortion. He also had symptoms consistent with bipolar disorder. He was later transferred to another mental health facility where he was diagnosed with substance abuse and a bipolar disorder. Counsel was aware of these facts and had also been informed by the defendant's mother that he had a history of mental health problems and an inability to stabilize his moods. While counsel discussed the possibility of an NGMI plea with the defendant and his mother, his strategy was to argue that the defendant's specific intent was suicide and not to burn down the house. He believed that NGMI was incompatible with this argument. Prior to trial, the court granted the state's motion to exclude mental because counsel had not entered an NGMI plea. Counsel's conduct was deficient because his trial strategy was to make some sort of diminished capacity argument that the defendant was depressed and suicidal when state law did not recognize a diminished capacity defense. Counsel's belief that the NGMI argument was inconsistent with his theory of the case was also "puzzling" and "not a reasonable decision that made further investigation unnecessary." "[F]urther investigation was essential" under these facts. Nonetheless, counsel did not obtain the defendant's medical records, did not consult with a mental health expert, or obtain an opinion about the defendant's mental state at the time of the crimes. Prejudice was found because the only question during trial was the defendant's intent. Counsel's deficient conduct deprived him "of the only true defense available to him," which had a reasonable likelihood of success.

**2004:** ***People v. Callahan*, 21 Cal. Rptr. 3d 226 (Cal. Ct. App. 2004)**. Counsel was ineffective in first degree murder case for three reasons. Following the arrest of four people, who believed that the victim had "ratted" on them, the defendant sought the assistance of two men who were members of "The Skin Head Dogs (SHD), a male white supremacist group," to obtain money to bail one of the arrested persons out. The victim subsequently asked the defendant to assist her in obtaining money to bail out a different arrested person. The defendant met with the victim at the defendant's home. The victim ingested two pills from a prescription drug on the defendant's dresser. In a pretrial statement, the defendant said that the victim took the pills to alleviate withdrawal symptoms of other drugs, even though the defendant warned her that the pills were strong and she would probably pass out. Two witnesses at trial testified, however, that the defendant stated that she deliberately gave the victim the pills to cause her to pass out within a few hours. According to the defendant's pretrial statement, which was admitted in evidence, after the victim took the pills, she and the defendant picked up some stolen electronic equipment that they intended to sell for bail money. They then met up with the SHD men and went to a hotel. By the time they reached the hotel, the victim had passed out. While at the hotel room, the stolen equipment was sold and the SHD exited the room. When the victim woke up, the defendant allowed her to call her mother. While she was on the phone, the SHD men returned to the room. One of them became upset because he feared the victim would report them for stealing the electronic equipment. Although the defendant argued that the victim should be allowed to leave, the SHD men killed the victim by slashing her throat while the defendant was in another room. The defendant assisted in disposing of the body. The state's theory was based on felony murder. While a duress defense would not apply to murder, it would apply to the underlying felonies of robbery and kidnaping, which were necessary to support first degree murder and the punishment of life without parole. Because counsel was aware of this, competent counsel would have sought to refute the testimony of the witnesses who asserted that the defendant deliberately gave the victim pills to cause her to pass out. This would have allowed counsel to portray any robbery and kidnaping as beginning inside the motel

room, so that a duress jury instruction would be given, and counsel would have had a factual and legal basis to argue against application of the felony murder rule. Counsel's conduct was deficient in failing to adequately cross examine the witnesses concerning the defendant's alleged statements concerning the suspicious circumstances under which they came forward, which caused even the prosecutor's investigator to doubt their truthfulness. Counsel's conduct was also deficient in failing to call the defendant to testify since she would have testified that she never met these witnesses until after the victim's death. She would have also testified that she was afraid of being killed if she did not comply with the SHD man's orders. Counsel's conduct was also deficient in failing to present expert testimony in support of a duress defense in that the defendant's fear was reasonable under the circumstances because of the history of the SHD members in being controlling and threatening the defendant previously. The duress defense was also supported by evidence that the defendant suffered from drug addiction and dissociation at the time of the murder, which would have impaired her thinking. Prejudice was found because counsel's actions "effectively" left the defendant with "no defense to the charged crimes," which allowed her conviction on felony murder despite her "concededly peripheral involvement" in the victim's death.

***Woods v. Commissioner of Correction*, 857 A.2d 986 (Conn. App. Ct. 2004)**. Counsel ineffective in murder case for failing to obtain an expert evaluation and to request an extension of time for notifying the state of the intent to present expert testimony in support of a diminished capacity defense. Counsel knew that the defendant was "slow" and was informed by another attorney, after jury selection began, that the defendant may have organic brain damage. Counsel did not seek expert assistance or a continuance because she believed it was "too late" and "felt that the court would have denied such a request." Counsel's conduct was deficient because the court had the discretion to fashion a remedy and a denial of the request would have preserved the record for appeal. Prejudice found because, if counsel had performed adequately, the jury would have heard expert testimony supporting diminished capacity and a lack of intent to commit murder.

***Yarbrough v. State*, 871 So. 2d 1026 (Fla. Dist. Ct. App. 2004)**. Counsel ineffective in sexual battery case, where the defense asserted consensual intercourse, for failing to properly investigate and secure the testimony of a witness who would have testified that the alleged victim had told her on several occasions that she had a sexual desire for the defendant and hoped that he would leave his wife. Counsel knew about the witness 10 months prior to trial and that she was in jail at that time, but counsel did not attempt to interview her until one month prior to trial when she had moved out of state. Although the witness spoke to counsel by telephone, counsel did not attempt to depose her or subpoena her for trial. Counsel's conduct was deficient and the defendant was prejudiced.

***People v. Briones*, 816 N.E.2d 1120 (Ill. App. Ct. 2004)**. Counsel ineffective in damage to property case for failing to call the defendant to testify after promising the jury that the defendant would testify and failing to object to an erroneous witness identification instruction. Although counsel's conduct is presumed to be sound trial strategy, when counsel promised that the defendant would testify and then changed his mind, "it was counsel's responsibility to evidence in the record that she was not deficient, i.e., that the determination was a result of the defendant's fickleness or of counsel's sound trial strategy due to unexpected events." Counsel was also ineffective in accepting an erroneous instruction even though she initially submitted a proper instruction. The court also

cited five other areas of deficient conduct and, "in conjunction with" with the other errors, found cumulative prejudice.

***People v. McMillin*, 816 N.E.2d 10 (Ill. App. Ct. 2004)**. Counsel ineffective in driving under the influence case for: failing to object to inadmissible hearsay that contradicted the defendant's statement that another man was driving; failing to object to the prosecutor's improper argument about missing defense witnesses; failing to object to the prosecutor's argument expanding the evidence; failing to object to the prosecutor's argument of prior consistent statements (which were not in evidence) by an officer; introducing the defendant's prior convictions, including two prior DUI convictions; and failing to object to the prosecutor's cross-examination concerning a charge for which the defendant was never tried or convicted. Prejudice found based on the "cumulative effect" of counsel's errors.

***People v. Lemke*, 811 N.E.2d 708 (Ill. App. Ct. 2004)**. Counsel ineffective in first-degree murder bench trial for failing to present the possibility of a conviction for involuntary manslaughter. The defendant was charged with the shooting death of his step-son would both were intoxicated and arguing. The defendant asserted that the shooting was accidental and there was sufficient evidence to establish involuntary manslaughter rather than murder. The court found that counsel's deficient conduct could not adequately be explained by an "all-or-nothing" strategy here because the evidence presented by the defendant could not have supported a finding of not guilty. Prejudice found.

***Montgomery v. State*, 804 N.E.2d 1217 (Ind. Ct. App. 2004)**. Counsel ineffective in arson and fraud case for failing to subpoena two of the State's expert witnesses when the State did not call the experts to testify. Alternatively, counsel was ineffective in failing to request a continuance in order to obtain the testimony of these witnesses. The defendant was convicted of burning down his own home. His girlfriend said he told her he was going to kill her dog and burn down the house. A police investigator, with no formal fire pattern recognition training, concluded that two fires had been set in the house. No accelerants were found. Two insurance company investigators concluded that the fire had been set, one could not find evidence of a second fire, and the other could not rule out the extension cord as a source of the fire. The state subpoenaed these investigators but did not call them to testify. Defense counsel had not subpoenaed the witnesses and was unable to serve them in time to testify at trial. Counsel did not move to continue the trial though. Counsel read a portion of the second investigator's deposition. Although counsel had also deposed the other investigator, he did not read any portion of that deposition to the jury. Counsel's conduct was deficient in failing to subpoena these witnesses or, alternatively, in failing to move for a continuance in order to obtain their testimony. Prejudice was found because both of these experts contradicted the opinions of the State's fire expert and were consistent to some extent with the defense expert that the fire was caused by an electric cord and the "second" fire was a natural "drop down fire." Where there was only circumstantial evidence of guilt and a "battle of experts," corroborating expert testimony would have been particularly powerful. The introduction of one of the depositions was an inadequate substitute for live testimony when the only reason for the witness' unavailability was counsel's failure to serve a subpoena.

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***State v. Davis*, 85 P.3d 1164 (Kan. 2004)**. Counsel ineffective in kidnaping and attempted rape case for failing to seek a competence evaluation and failing to understand and adequately present a mental state defense. The defendant suffers from schizophrenia and had been committed to psychiatric hospitals 31 times since age 13. His last release was two months prior to the offenses. Following his arrest, he was found to be incompetent and treated in a hospital for six months before competence was restored. He was found competent in May and new counsel was appointed in August. Counsel did not seek a competence evaluation prior to the November bench trial. Counsel was ineffective in failing to seek a competence evaluation because the defendant's letters to him were at times incoherent and clearly revealed confusion about the defense. If counsel had investigated, he would also have discovered that the defendant was not taking his medications after his return to the county jail. He had also reported an increase in hallucinations in the months prior to trial. Counsel was also ineffective in presenting a defense. Kansas has abolished the insanity or diminished capacity defense, but allows a defense that the defendant "lacked the mental state required as an element of the offense charged." During trial, counsel argued insanity and presented an expert that was also not familiar with the state law requirements. Moreover, the expert testified, consistent with his pretrial report, that the defendant's ability to control his behavior was compromised, but he was capable of forming the intent required for the crimes. Thus, because counsel was unfamiliar with the standards and did not adequately prepare his own expert, counsel presented the expert's testimony that "destroy[ed] the very defense he was attempting to establish."

***State v. Peterson*, 857 A.2d 1132 (Md. Ct. App. 2004)**. Counsel was ineffective in murder case for failing to prepare and present evidence of battered spouse syndrome. The defendant was charged with killing her husband. A defense expert testified that the defendant was suffering from bipolar disorder with psychotic features, had been physically abused throughout the marriage, and thought she was in imminent danger of being killed. Although counsel had discussed presenting a defense based on battered spouse syndrome and the expert would have testified in support of this defense, counsel did not ask any questions on this topic. Counsel's conduct was deficient because evidence of battered spouse syndrome would have supported a defense of imperfect self-defense, which would have negated the element of malice and reduced the offense to manslaughter. If counsel had adequately developed and presented the evidence, the jury would have learned of more than 20 years of physical and emotional abuse of the defendant by the victim. In the months leading up to the shooting, there was an instance of physical abuse and escalating daily threats to rape and kill the defendant. Counsel was aware of much of this information and presented some of this evidence but argued insanity and imperfect self-defense without presenting the evidence of the syndrome because counsel "did not appreciate" that this evidence was a necessary predicate to the defense of imperfect self-defense. Thus, "[t]he decision not to introduce battered spouse syndrome evidence was not a product of trial strategy; it was a consequence of trial counsel's not being adequately familiar with the law." Prejudice found because, without the evidence of battered spouse syndrome, the trial court refused an instruction on the defense of imperfect self-defense. If the evidence had been presented and the instruction given, there is a reasonable probability that the outcome would have been different.

***People v. Grant*, 684 N.W.2d 686 (Mich. 2004)**. Counsel ineffective in criminal sexual conduct case for failing to adequately investigate and substantiate the defendant's primary defense. The defendant

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was charged with three counts of sexual abuse on his girlfriend's two nieces. The first alleged incident to the older girl resulted in physical injury but was reported at the time as a bicycle accident. A year later, another allegation involving both girls arose and the older girl asserted that her previous injury was due to assault rather than a bicycle accident. Counsel's conduct was deficient in failing to investigate to seek evidence concerning the accident because counsel was aware of the girl's initial report, the initial doctor's finding that the injury was more consistent with a bicycle accident that abuse, and the defendant's insistence of innocence. Although the defendant provided counsel with a number of potential witnesses, counsel did not adequately pursue the matter. Prejudice established because adequate investigation would have revealed that two cousins of the girls witnessed the bicycle accident and would have testified accordingly. If counsel had been able to establish that the physical injury had been due to the accident, it would have called the credibility of the alleged victims into question and the other allegations involved only a credibility contest between them and the defendant. Thus, the court found a reasonable probability of a different outcome.

**2003:** ***State v. Wakisaka*, 78 P.3d 317 (Haw. 2003)**. Counsel was ineffective in a second-degree murder case for failing to object to the prosecution's improper argument commenting on the defendant's failure to testify and in counsel's cross-examination of a police officer during which counsel intentionally solicited the officer's opinion of the defendant's guilt in evidence. Counsel knew that the officer's opinion was that the defendant murdered his wife and, despite the court's warning and the prosecution's objection to the line of questioning, counsel insisted on eliciting the officer's testimony and did not move to strike the officer's testimony even though the court informed counsel that it would in fact strike the testimony if counsel desired. Counsel's stated reason for the questioning was that he wanted to show that the officer was working in conjunction with the victim's daughters to collect evidence and, therefore, the officer was biased. The court found that while this line of questioning may well have been part of counsel's misguided strategy, his conduct was an error reflecting defense counsel's lack of skill or judgment. The court found prejudice because counsel's errors and omissions resulted in "the possible impairment of a potentially meritorious defense" that the victim had in fact committed suicide.

***Law v. State*, 797 N.E.2d 1157 (Ind. Ct. App. 2003)**. Counsel was ineffective in child molesting and sexual misconduct with a minor case for failing to present evidence of the victim's age at the time of the offenses. The victim testified that the defendant began sexually abusing her when she was ten years old and the defendant was charged with multiple counts. One of the elements of a number of the offenses that the defendant was charged with was that the victim was under twelve years old when the crimes occurred. There was a significant difference in sentencing range for a child under twelve and a child over twelve. While the defendant presented a theory that he was not guilty, the court found that defense counsel's failure to present evidence that the victim was over twelve years old at the time of the alleged offenses was deficient in light of the sentencing consequences. The court also found that counsel made no strategic decision to avoid the apparent contradiction in defense theories because counsel had intended to introduce evidence of the victim's age through the defendant's wife and had not obtained other evidence to establish the victim's age because he did not anticipate that the defendant's wife would refuse to give this testimony. While the court found no prejudice with respect to some of the counts, the court did find prejudice with respect to several counts of the conviction and reversed in part.

***State v. Thiel*, 665 N.W.2d 305 (Wis. 2003)**. Counsel was ineffective in sexual exploitation by a therapist case for numerous deficiencies. The alleged victim asserted that she had repeated sexual relations with her psychiatrist and had been to his house more than one hundred times. When she first went to police, she also took a vial of semen that she claimed was the defendant's, but DNA testing revealed that it was not his. She explained that she had hoped to force him to confess with this false evidence. An assistant prosecutor, who had also had a sexual relationship with the alleged victim, testified that she had informed him of the relationship long before she reported it to police. The defendant's ex-wife, who had also been a former patient, and another former patient provided "other acts" evidence in corroboration. The defendant testified and denied the allegations and asserted the defense theory that the alleged victim made the complaint against him because he refused to assist her in filing for government disability benefits. He claimed that she had been to his house only three times when she showed up unannounced, but he had not documented these visits in her chart. The state called the victim's new psychiatrist in rebuttal to say that any contact with patients should be documented, but this was his personal opinion and not a standard of care requirement. Counsel's conduct was deficient in failing to read police reports and medical notes that had been provided in discovery. Counsel's conduct was also deficient in failing to conduct an independent investigation when they already knew of the lie concerning the semen. Finally, counsel's conduct was deficient in failing to file a motion that would have allowed the defense to present relevant evidence of the alleged victim's prior personal and medical history. If counsel had read the discovery documents, counsel would have discovered and been able to use numerous items that would further impeach the alleged victim, including giving the wrong address for the defendant, and even items consistent with the defense theory that her motive was anger at the defendant for not helping the victim to seek disability benefits. They would also have discovered that the statement to the assistant prosecutor used as a prior consistent statement was made only shortly before her report to police, which would have rendered this statement likely inadmissible. If counsel had investigated they would have discovered that the alleged victim had no driver's license during the time she claimed to have driven to the defendant's house 100 times, she had difficulty finding the defendant's house when police asked her to show them, none of the defendant's neighbors recalled seeing her, and she had numerous phone calls with the assistant prosecutor at his home and his work, which was inconsistent with the way that relationship had been portrayed in court. If counsel had filed the motion, the state may not have called the rebuttal witness due to concern that the defense could use his notes to impeach the credibility of the alleged victim further. No strategy could explain the failure to read discovery or to independently investigate when counsel knew the alleged victim had already lied about the semen. Likewise, counsel's purported strategy for not filing the motion prior to trial was based on "an erroneous view of the law" and, therefore, could not be a reasonable strategy. While finding that the deficiencies found did not "individually prejudice[]" the defendant to such a degree as to warrant a new trial, the court concluded "that the cumulative effective" of the deficiencies warranted a new trial, *id*. at ___, in this case, which "was a classic instance of the 'he-said-she-said' dilemma," *id*. at ____. While counsel had performed well in most areas of representation, "the proper inquiry for assessing prejudice is not the totality of counsel's performance, but rather the effect of counsel's acts or omissions on the reliability of the trial's outcome." *Id*. at ___.

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### B. ONE DEFICIENCY

#### 1. JURY SELECTION

##### a. U.S. Court of Appeals Cases

**2006:** ***Virgil v. Dretke*, 446 F.3d 598 (5th Cir. 2006)**. Counsel ineffective in causing bodily injury to an elderly person case for failing to challenge for cause two jurors who expressly stated an inability to be fair and impartial. One had close relationships with law-enforcement officers and one was influenced by his mother's mugging. Counsel's failure to challenge these jurors for cause or to remove them with peremptory challenges was deficient and there was no "suggestion of a trial strategy" for counsel's inaction. Prejudice found because both jurors admitted bias. In addition to their own bias, the court could not "know the effect" of their bias on the remaining jurors. Under AEDPA, the state court's decision to the contrary was an unreasonable application of clearly established Federal law as determined by the Supreme Court.

**2004:** ***Miller v. Webb*, 385 F.3d 666 (6th Cir. 2004)**. Counsel ineffective in murder case for failing to adequately question or challenge actually biased juror. During voir dire, a juror stated that she knew the state's key witness, who was the only eyewitness and had also been shot. The juror knew her through the juror's ministry and Bible Study in the local jail. She stated she would be "partial" to the witness and had sympathy for her. While she stated that she "believed" she could be fair, she qualified this by stating, "I do have some feelings about her." Counsel did not follow-up with questions or challenge this juror. Counsel's conduct was deficient and was not justified by strategy because counsel believed the juror would know the witness was unworthy of belief and would know that she was a drug addict and understand that culture. The court held, contrary to the state court, that "the decision whether to seat a biased juror cannot be a discretionary or strategic decision" because it amounts to "a waiver of a defendant's basic Sixth Amendment right to trial by an impartial jury." Under the AEDPA, the state court's finding that counsel's conduct was not deficient was an unreasonable application of *Strickland*. Even if strategy could justify the decision, counsel's strategy was unreasonable here where the juror clearly did not indicate a disbelief in the witness' credibility or knowledge of her being a drug addict. To the contrary, the juror indicated that she was sympathetic to the witness. Prejudice presumed because the presence of a biased juror cannot be harmless.

***Quintero v. Bell*, 368 F.3d 892 (6th Cir. 2004)**. Counsel was ineffective for failing to object to the presence of seven jurors who had served on the juries that convicted his co-conspirators. Prejudice was presumed under *Cronic*. *Bell v. Cone* was distinguished "[b]ecause the alleged deficient performance in Cone affected only specified parts of Cone's trial." Here, "allowing seven jurors who had convicted petitioner's co-conspirators to sit in judgment of his case surely amounted to an abandonment of 'meaningful adversarial testing' throughout the proceeding." The Court reinstated its prior opinion, *Quintero v. Bell*, 256 F.3d 409 (6th Cir. 2001), which had been vacated and remanded for reconsideration in light of *Cone*.

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### b. U.S. District Court Cases

**2015:** ****Mitcham v. Davis*, 103 F. Supp. 3d 1091 (N.D. Cal. 2015)**. Under AEDPA, counsel ineffective in capital murder case for failing to object in 1984 trial to the state's peremptory strikes of all black jurors on the basis of *People v. Wheeler*, 583 P.2d 748 (Cal. 1978), which held the use of peremptory challenges to strike venirepersons on the basis of race to be a violation of the California Constitution and the Sixth Amendment right to an impartial jury. While this issue had been litigated in state court, the state court denied relief on procedural grounds, which were not sufficient to operate as a bar to federal review. Thus, the federal court's review was de novo. After exclusions for cause and by stipulation, there were 117 qualified prospective jurors, seventeen of whom were black. During selection of the jury, the prosecutor peremptorily struck all five black jurors called and all three black jurors called in alternate selection. As a result, the black defendant with white victims was tried by "eleven Caucasian jurors and one Hispanic-surnamed juror." Under *Wheeler*, like *Batson v. Kentucky*, 479 U.S. 314 (1986), which was decided later, if the defendant objects and establishes a prima facie case of unlawful discrimination, the burden then shifts to the state to show that the peremptory challenged were "not predicated on group bias alone." If the state fails, the remedy is a different venire and jury selection starts anew. If the error is found on appeal, it is deemed prejudicial per se and reversal is required. Counsel, who was later disbarred for misconduct dating back to 1968, was deficient in failing to object on the basis of Wheeler, which had been the law in California for six years at the time of trial. A number of appellate court decisions in those six years had reversed judgments on the basis of *Wheeler*. An "expert regarding the standard of practice applicable to criminal defense attorneys" testified that by 1984, it was "the regular practice of defense counsel in California . . . to object to improper prosecutorial jury challenges under *Wheeler*." Not only had the prosecutor struck all eight potential black jurors, he had previously disclosed to defense counsel an intent to strike an additional four black jurors if they were called. Additionally, the prosecutor struck two white jurors "who evidenced potential sympathy for" black people – one was a college professor who had written a book on African American folklore and one was married to a black man. The prosecution had also questioned black jurors about whether they thought the death penalty was enforced disproportionately against minorities without also asking white jurors this question. Likewise, the prosecutor asked black jurors if the criminal justice system treated them differently without also asking white jurors this question. Additionally, the prosecutor asked black jurors if the race of the defendants would affect their ability to be fair or vote for the death penalty without asking white jurors this question, with the lone exception being the college professor who had expressed concern about the "disproportionate" sentencing of poor people and black people. Counsel not only failed to object to the strikes, but he also failed to develop a record of the race of prospective jurors. There could be no tactical reason justifying these failures. Prejudice was also established. The voir dire of three black jurors revealed no evidence of bias and suggested that these jurors would have been favorable to the state. The state could not have claimed a race-neutral reason that they preferred life without parole or equivocated on the death penalty because the prosecutor did not strike four white jurors that fell in this category and were seated on the jury. A number of white alternate jurors also fell in this category. Moreover, the prosecutor's notes indicated that he was keeping track of the black jurors by writing "B" next to their names on the qualified jury list, while not tracking any other race. He also had a rating system on which he rated all but one of 17 qualified black jurors as unacceptable.

The other was not rated because he was never called to the jury box. The prosecutor also had notes for potential black juror Combs that listed her race and that: "She has some feelings about death penalty – but could impose it in a given case. I think she would be alright but she does have some reservations about death – Keep if necessary to avoid Wheeler – She would try to be fair." In the absence of any objections by defense counsel, the prosecutor also struck this juror, who was an 18-year veteran of the U.S. postal service. The strike of this juror alone requires reversal. The court also reviewed the strikes of two other potential black jurors, who should have been desirable for the state absent race considerations. Both had family members in law enforcement.

**2012:** ***Drain v. Woods*, 902 F. Supp. 2d 1006 (E.D. Mich. 2012), *aff'd*, 595 Fed.Appx. 558 (6th Cir. 2014)**. Under AEDPA, trial counsel was ineffective in murder case for failing to object to the prosecutor's discriminatory use of peremptory challenges and to the trial court's corrective procedures. Even though trial counsel failed to object, the trial court raised the *Batson* issue sua sponte after the prosecutor used seven of nine peremptory challenges to eliminate black jurors. After the prosecutor voluntarily offered her reasons for the strikes, the court found a *Batson* violation. Rather than recalling the discriminatorily removed jurors or dismissing the entire panel and starting over, the court simply continued with jury selection and required the prosecutor to seek permission before dismissing any additional black jurors. Trial counsel did not object to this procedure. On direct appeal, the state court found the issue had been waived due to failure to object. In post-conviction, the state court found that no *Batson* error occurred and thus the trial court's improper procedure for correction of the error was irrelevant. The state court's determination was unreasonable because it found that a prima facie showing of discriminatory intent had not been shown, even though this issue was moot since the prosecutor voluntarily offered explanations for the strikes. Even if the issue was not moot, a prima facie case had been established since the prosecutor used 78 percent of her strikes to exclude black jurors, who comprised only 28 percent of the venire. In short, the state court decision "was contrary to clearly established Supreme Court precedent and was unreasonable." With regard to the state court's conclusions based on the prosecutor's answers, the state court unreasonably concluded that the trial court's findings were not supported by the record. The state court also unreasonably concluded that exclusion of a minority juror based on the same response given by a white juror who was not excused did not violate *Batson*. In short, the state court's decision was based on an unreasonable determination of the facts and resulted in an unreasonable application of *Batson* and progeny. Because *Batson* errors are structural and not subject to harmless error, automatic reversal was required. Counsel's conduct in failing to object to the violations and the trial court's procedure was deficient and prejudicial. The proper procedure was to either discharge the entire panel or to disallow the discriminatory challenges.

### c. State Cases

**2017:** ***Wadlow v. State*, 518 S.W.3d 872 (Mo. Ct. App. 2017).** In statutory sodomy case where the victim was a five year old girl, trial counsel was ineffective in failing to move to strike a venireperson who indicated that she could not be impartial in this case. When the prosecutor asked the venire panel whether anyone felt they would not be able to be fair and impartial simply due to the nature of the charges of this case, the venireperson in question, Juror3, raised her hand. She explained,

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"I have a granddaughter that's four years old and I just truly don't think that I could do it, to be honest, to be fair about it" She was then asked, "[w]ould you be able to listen to the evidence and make a decision just based on that evidence?" She responded "no." During his portion of voir dire, defense counsel did not ask any questions directed to Juror 3. Defense counsel did ask the panel if anyone "would find it difficult to find in favor of an older person as opposed to a young child if the evidence so dictated" or "find it impossible to adhere to the law as the Judge reads it to you and meet the standard of beyond a reasonable doubt before you would return a verdict of guilty?" The record did not indicate that Juror 3 responded to either of these questions. Defense counsel did not challenge Juror 3 for cause or use a peremptory challenge to strike her from the jury. At the post-conviction hearing, defense counsel couldn't recall a strategic basis for failing to strike Juror 3 but he offered that there "certainly could be" reasons to consider Juror 3 "a good potential juror for the defense[,]" but no such reasons were identified. Trial counsel recalled that defendant was with him "during the entire voir dire process[,]" and trial counsel did not recall defendant "expressing an objection to [him] regarding [Juror 3.]" Defendant testified that he did ask defense counsel why he had not objected to Juror 3 but that defense counsel ignored him. The post-conviction court denied the claim of ineffective assistance of counsel on the ground that defendant admitted that he was aware that Juror 3 was on the jury despite her statements and that he was aware that no objection had been made. Defending that ruling, the State first argued that defendant had failed to prove that defense counsel lacked a strategic reason for keeping Juror 3 on the jury. Looking to case law, the appellate counsel observed that an attorney's inability to recall the reasons for deciding not to strike a juror does not support a finding that the attorney's decision was a matter of trial strategy where the attorney has reviewed his notes from jury selection and no strategic reason for keeping the juror is apparent from the record. Secondly, the State asserted that Juror 3 was rehabilitated when she remained silent to the questions asked of the panel by defense counsel. Regarding the first question, about any difficulty finding in favor of an older person over a child, the appellate court stated: "Even if we assumed, *arguendo,* that Juror 3's silence was an unequivocal assurance that she would not find it hard to find in favor of [defendant] because he was older than his child victim, such an assurance would fail to cure the form of Juror 3's expressed bias. Her bias did not rest on the age difference between [defendant] and the victim — it was based instead on her granddaughter's age-based similarity to the victim." Regarding defense counsel's second question, the appellate court stated:

> Juror 3's silence in response to trial counsel's question to the panel as to whether anyone would "find it impossible to adhere to the law as the Judge reads it to you and meet the standard of beyond a reasonable doubt before you would return a verdict of guilty" can rightly be interpreted as an unequivocal assurance that Juror 3 could follow the law, including its requirement that she find [defendant] guilty beyond a reasonable doubt. But that assurance was also insufficient to cure Juror 3's bias that she would have a significant difficulty in fairly deciding the *factual* disputes in the case, a different concern than a difficulty in applying the law to the evidence. Juror 3 informed the parties that she believed she would be unable to listen to the evidence and fairly and impartially evaluate it. As a result, Juror 3's silence in response to the questions identified by the State did nothing to either remove or attenuate the nature of the bias she had freely admitted.

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***State v. Courtney*, 415 P.3d 604 (Utah Ct. App. 2017).** In case where defendant was on trial for a drug-related charge, trial counsel was ineffective in failing to move for a mistrial during voir dire when a prospective juror made statements that could taint the jury pool against defendant. During jury selection, trial counsel asked the prospective jurors whether any of them knew himself or defendant. One prospective juror responded affirmatively and offered additional unsolicited information: "Due to my years in law enforcement, yes. I have had affiliations with him, especially during the time that I was serving as an agent for the Weber-Morgan Narcotics Strike Force." Questioning of the prospective jurors continued after that answer. A few minutes later, the trial court asked: "Would any of you have difficulty in affording the defendant his guarantee of being considered innocent until proven guilty beyond a reasonable doubt or, stated differently, would any of you believe that because the defendant has been charged in this case by the State that there must be some basis for his guilt?" The prospective juror at issue raised her hand, the only one on the panel to do so, but before she could speak, the trial court cut her off and asked both counsel to approach the bench for a discussion out of the potential jurors' hearing. At the bench conference, the prospective juror's first answer was brought up as having possibly tainted the jury pool. It was agreed that the prospective juror would be immediately excused on a pretext to avoid the potential of further tainting. It was not until the jury was selected and sworn that a mistrial motion was made by trial counsel. It was denied as untimely. Given this record, there was no conceivable tactical basis for trial counsel to have not asked for a mistrial during jury selection. Defendant was prejudiced by trial counsel's inaction because the prospective juror's comments suggested that defendant had repeatedly had some involvement in the types of crimes he was on trial for. This prejudice was not cured by the fact that a detective at trial mentioned that unnamed other agents were familiar with defendant. The prospective juror's statement, which was not subject to cross-examination, improperly corroborated the detective's testimony. Absent the prospective juror's remark, there was a reasonable likelihood that the result of defendant's trial would have been different.

**2009:** ***White v. State*, 290 S.W.3d 162 (Mo. Ct. App. 2009)**. Counsel was ineffective in drug and child endangerment case for failing to move to strike a juror who stated that he could not be fair, but ended up serving on the jury. The juror stated and then reiterated during voir dire, based simply on the nature of the charges: "I don't believe I could be fair for the defendant." Later the juror indicated that he did not want to serve as a juror. Nonetheless, counsel did not challenge the juror and he served for the trial. Counsel cited "an oversight and not trial strategy" for the conduct. "Where trial counsel fails to strike a biased venireperson who ultimately serves as a juror, a post-conviction defendant is entitled to a presumption of prejudice."

> Here, because there were no follow-up questions to [the jurors] addressing his assertion that he could not be fair, there was not even an opportunity to give an unequivocal assurance of impartiality. Accordingly, neither the State, defense counsel, nor the trial court rehabilitated [him], and he was not qualified to serve as a juror.

Prejudice presumed.

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**2008:** ***Titel v. State*, 981 So. 2d 656 (Fla. Ct. App. 2008)**. Counsel ineffective in sexual battery and kidnaping case for failing to challenge a clearly biased juror, who stated that there was an incident of incest in his family and that he believed in execution of rapists. Counsel's notes mistakenly attributed these comments to a different juror that counsel did strike. The biased juror, unlike other jurors who reported rapes in their families, was not questioned further about whether he could be fair and was seated even though the defense had one remaining peremptory challenge. Prejudice found because the juror was biased.

**2007:** ***James v. State*, 222 S.W.3d 302 (Mo. Ct. App. 2007)**. Counsel ineffective in second-degree murder and armed criminal action case for failing to challenge for cause a venireperson who indicated that she would draw a negative inference from a defendant's failure to testify in his own defense. If counsel had objected, the trial court would have been required to strike the juror. Counsel's conduct was not explained by any strategy. Prejudice presumed because the defendant was "tried in violation of his constitutional right to an impartial jury."

****State v. Loftin*, 922 A.2d 1210 (N.J. 2007)**. Trial and appellate counsel were ineffective in failing to adequately address the presence of a possibly racially biased juror, who had predetermined guilt before hearing all the evidence, in the jury panel during the trial although he ultimately served as an alternate and did not deliberate on findings and a separate jury was empaneled under state law for sentencing. The juror, who was white and worked at the post office, admitted making comments early in the trial to other postal workers that he was "going to buy a rope to hang" the defendant, a black man charged with killing a white man. He denied, however, that the comments were intended to be racist or that he had already formed an opinion of guilt. Trial counsel sought to remove the juror, which was denied, but failed to request that the remainder of the jury be questioned to determine whether this juror had made similar comments to other jurors. The trial court ultimately ordered that the juror would serve only as an alternate. Appellate counsel failed to assert error in the trial court's failure to remove the juror and to assert as plain error the court's failure to question the remaining jurors. Under state law, the court found "a decided racial undertone [in the juror's comments] that evokes an era of vigilante and mindless mob justice that reigned during a dark period in American history." *Id*. at 1219. Likewise, even without racial bias, the juror violated the court's instructions not to discuss the case with others and not to determine guilt prior to deliberations. The court held that prejudice would be presumed and that "even allowing a non-deliberating juror suspected of racial bias to sit on a panel will lead to a presumption that other members of the panel may have been tainted." *Id*. at 1222. Thus, the court presumed that the biased juror shared his views with fellow jurors and, thus, it did not matter that he did not deliberate. Although trial and appellate counsel's ineffectiveness was asserted under both the state and federal constitutions, the court addressed the merits under only the state constitution but still applying the *Strickland* standard. Deficient conduct found because the need for the removal of the predisposed juror and a voir dire of the remaining jurors should have been self-evident." Counsel's conduct was not excused by strategy. Appellate counsel was also ineffective because failure to assert these issues on appeal deprived the court of the opportunity to address the issue, which would have required reversal on direct appeal.

**Capital Case*

**2006:** ****Anderson v. State*, 196 S.W.3d 28 (Mo. 2006)**. Counsel ineffective in capital case for failing to move to strike, for cause, prospective juror who, during voir dire, indicated he would vote for death unless the defense could convince him otherwise. Counsel's failure was not a decision based on trial strategy and instead occurred because of a note-taking error. Moreover,

> No competent defense attorney would intentionally leave someone on the jury who indicated a strong preference for the death penalty and also stated that he would require the defense to convince him that death was not appropriate even though he was aware that the burden of proof remains with the state. Any strategy that would place someone with such a predisposition on the jury is wholly unreasonable.

Prejudice established because this was a structural error.

**2005:** ***State v. Lamere*, 112 P.3d 1005 (Mont. 2005)**. Counsel in aggravated assault case was ineffective in failing to question a prospective juror on whether she could remain impartial even though her daughter was a paralegal assisting the prosecutor (even in the courtroom during the trial) and someone else in her family was retired from the police force. The juror disclosed this information on her questionnaire but, due to oversight, counsel did not question her about it. When counsel learned of the problem during trial and moved to excuse the juror, the motion was denied. Counsel's conduct was deficient because the juror's relationship to her daughter obviously raised legitimate questions about her impartiality. Because errors in jury selection are "structural errors," prejudice was presumed.

**2004:** ***State v. Garza*, 143 S.W.3d 144 (Tex. App. 2004)**. Counsel ineffective in aggravated sexual assault case for failing to challenge a juror for cause or to use a peremptory strike even though the juror (who became foreman) admitted that he would be biased because a family member had been the victim of sexual assault and admitted that he would believe a police officer rather than the defendant simply because it was a police officer. Counsel admitted that he had no strategy and failed to challenge the juror only because he was distracted and simply made a mistake after learning shortly before that his wife had been diagnosed with cancer. Even though there might have been a hypothetical plausible strategy for not challenging the juror, the record here clearly established no strategy. Prejudice found because "one improper juror destroys the integrity of the verdict." Finally, the court rejected the state's argument that the court should consider the fact that the defendant was an experienced criminal defense counsel as a factor in the ineffective assistance claim.

**2003:** ***Fortson v. State*, 587 S.E.2d 39 (Ga. 2003)**. Counsel was ineffective in a murder case for using a peremptory strike on a juror that had already been excused for cause by the trial court but inexplicably remained on the strike list. Defense used his entire allotment of peremptory strikes. Because Georgia law requires automatic reversal when a defendant is required to use a peremptory strike on a juror that should have been excused for cause, the court found prejudice under *Strickland*.

**Capital Case*

## 2. INDICTMENT

### a. U.S. Court of Appeals Cases

**2005:** ***United States v. Jones*, 403 F.3d 604 (8th Cir. 2005)**. Counsel ineffective in possession of firearm case for failing to challenge indictment as multiplicious where the indictment included two counts of possessing the same firearm as two different dates. Counsel's conduct was deficient because "a reasonably competent lawyer would be expected to know" that this was one offense because the evidence established that the possession was continuous. Prejudice found even though the sentences given were concurrent because: (1) the additional conviction could increase future sentences or be used to impeach the defendant's credibility in future proceedings; and (2) the defendant had to pay an additional $100 statutory special assessment due to the second conviction.

**2004:** ***Young v. Dretke*, 356 F.3d 616 (5th Cir. 2004)**. Counsel was ineffective in murder case for failing to move to dismiss untimely indictment. Under a state statute effective at the time of the defendant's trial, dismissal was required and re-prosecution was barred. The statute has since been amended to remove the bar to further prosecution following dismissal. The state court found that counsel's conduct was deficient and that if counsel had moved for dismissal, petitioner could not have been tried or convicted. Nonetheless, the state court denied relief finding that under *Lockhart v. Fretwell*, there was no prejudice because the state court believed that prejudice was to be determined by reference to current law rather than the law at the time of the deficient performance. Because the state court failed to properly distinguish *Fretwell* and disregarded the interpretation of *Fretwell* in *Williams v. Taylor*, the state court's decision was both contrary to and an unreasonable application of Supreme Court precedent, under the AEDPA. The court distinguished *Fretwell* because, in *Fretwell*, the petitioner sought to rely on a judicial decision of a court of appeals, which was not a final statement of law established by the Supreme Court. In this case, however, the defendant sought to rely on a statute, which is a final statement of the law. Because *Strickland* was controlling rather than the limited exception of *Fretwell*, petitioner was entitled to relief.

### b. State Cases

**2015:** ***Romine v. State*, 162 So. 3d 1102 (Fla. 2015)**. Counsel in burglary case was ineffective in failing to object to trial on uncharged offense. The defendant was charged with first-degree burglary while armed, but was convicted after a jury trial of burglary with assault. At the conclusion of the state's case, counsel moved for a judgment of acquittal on burglary while armed because the state failed to present evidence of the existence of a dangerous weapon. The court granted the motion and the trial proceeded. At the conclusion of the defense case, the state requested an instruction on burglary with assault. Counsel argued that the state had failed to present evidence of fear of imminent danger but the victim had testified, without objection from the defense, that he was scared. The court allowed the instruction, which changed the offense level, and the jury convicted of burglary with assault. Counsel's conduct was deficient. While counsel objected to the instruction due to insufficient evidence, counsel failed to object that the jury was being instructed on an offense not charged in the information. Counsel also failed to object to the verdict form. Counsel had also failed to object to

the victim's testimony that he was in fear, which was irrelevant to the charge of burglary while armed. Prejudice was established as the defendant was convicted of a first-degree felony when his exposure should have been limited to a second-degree felony due to the judgment of acquittal.

***State v. Smith*, 115 A.3d 210 (Md. Ct. Spec. App. 2015)**. Counsel in felony murder case was ineffective in failing to object to the prosecution's entry of nolle prosequi prior to the jury's deliberations. The victim and the defendant had a disagreement over a dog, which the defendant's girlfriend had taken from the victim, who was engaged to the girlfriend's mother. The victim called the defendant's girlfriend and said that if the dog was not returned, she was not going to "live to see tomorrow." The defendant, his girlfriend, and the girlfriend's son went to the victim's home to try "to make peace," but it escalated and the victim was shot and killed. The defendant was charged with first-degree felony murder predicated on first-degree burglary with intent to commit assault and second-degree felony murder predicated on assault. During trial, the state proceeded on the theory of first-degree felony murder. The defense proceeded on the theory that there was no burglary and the defendant had gone to the home only to "mend fences." At the conclusion of the state's case, the state dismissed the second-degree felony murder charge without objection from the defense. Counsel's conduct in failing to object was deficient and prejudicial. "It would be fundamentally unfair to say that the assault was sufficiently connected to the burglary so as to make the crime first-degree felony murder, while at the same time, keeping the jury from having the option of convicting Smith of second-degree felony murder predicated on the very same assault." No rational strategy could explain counsel's actions and counsel could not recall his thought process or whether he had discussed the issue with the defendant.

**2013:** ***Lacey v. State*, 114 So. 3d 452 (Fla. Dist. Ct. App. 2013)**. Counsel ineffective in escape from detention case for failing to recognize that the defendant's escape was governed by statute governing escapes from children's detention facilities and not from the Department of Corrections. The defendant was housed in the Department of Juvenile Justice (DJJ) and escaped from a hospital, while still under DJJ supervision. Counsel's conduct was deficient and prejudicial as the maximum possible sentence was lower under the correct statute

**2012:** ***McDuffie v. State*, 135 So. 3d 317 (Fla. Dist. Ct. 2012)**. Counsel ineffective in drug case for failing to object to an amended information filed after expiration of the speedy trial rule time. The defendant was initially charged with sale of cocaine, a second-degree felony. After expiration of the 175 days under the state speedy trial rule, the defendant demanded trial. Just days before the trial, the state amended the charge to sale of cocaine within 1000 feet of a school, a first-degree felony. Counsel's conduct was deficient in failing to object. Prejudice established as the defendant was convicted on the greater offense.

**2009:** ***People v. Peyton*, 98 Cal. Rptr. 3d 243 (Cal. Ct. App. 2009)**. Counsel ineffective in child sexual assault case for failing to object to the filing of an amended information at the close of the prosecution's case, which added a fifth count, when no preliminary hearing had been held on that count or waived by the defendant.

**Capital Case*

## 3. MOTIONS AND NOTICE

### a. U.S. Court of Appeals Cases

**2018:** ***Hendrix v. Palmer*, 893 F.3d 906 (6th Cir. 2018).** Trial counsel was ineffective in failing to move to suppress a statement made by petitioner which was obtained in violation of *Miranda*. Petitioner was convicted in Michigan state court of felony murder, carjacking, and unlawfully driving away a motor vehicle, and was sentence to life in prison. Upon arrest, petitioner had spoken briefly with officers, and then refused to speak further until he had the opportunity to consult with an attorney, and signed an advice-of-rights form to this effect. Two days later, when he still had not met with an attorney, an officer gave him another advice-of-rights form and tried to interrogate him again. Petitioner did not sign the form but agreed to speak with the police. The officer testified at trial about statements made by petitioner during that interview. Petitioner raised claims in both state and federal courts under the Fifth and Sixth Amendments that the admission of these statements violated his *Miranda* rights and that his counsel's failure to challenge their admission violated his rights to effective assistance of counsel. In federal court, the state agreed that the admission of the statements was erroneous but argued that the error was harmless. The district court granted relief on these claims. With regard to the Fifth Amendment claim, the Sixth Circuit affirmed the district court's grant of relief, noting both that the State had conceded the statements were improperly admitted and that the "governing law is beyond dispute" under *Miranda* and *Edwards v. Arizona*, 451 U.S. 477 (1981), which holds that police are not permitted to re-interrogate an accused regarding any offense after the accused has invoked his rights until counsel is present. The admission of the statements had a substantial and injurious effect on petitioner's defense because the prosecutor referred to them at length during closing argument, emphasizing that petitioner offered no alibi even though he was told that the victim was seriously injured and that his silence was "defining" and indicated, "I did it." Petitioner's anxious question about whether he would be charged with murder and his statement that he did not want to say anymore because he didn't want to get into any more trouble were also damning. Other parts of his statements were "inculpatory because of their incoherence. They smack of nonsense." 893 F.3d at 921. Regarding the Sixth Amendment claim, the Sixth Circuit ruled that trial counsel's failure to challenge the admission of the statements was ineffective. Regarding deficient performance, "[t]he meritorious nature of a motion to suppress, under these circumstances, is clear from blackletter law." 893 F.3d at 922. Counsel had access to all the facts that should have led him to conclude the statements were inadmissible, and there was nothing favorable to petitioner in the statements; on the contrary, they were only harmful. Petitioner was prejudiced by the deficient performance for the same reason he was prejudiced by the admission of the statements. The Michigan Court of Appeals' decision to the contrary was unreasonable given the nature and effect of the constitutional violation. The Sixth Circuit also held that the prosecutor's comments on petitioner's post-*Miranda* silence violated petitioner's right to due process under *Doyle v. Ohio*, and reversed the district court's denial of relief on that ground.

**2016:** ***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.

***Grueninger v. Director, Virginia Department of Corrections*, 813 F.3d 517 (4th Cir. 2016)**. Under AEDPA, counsel ineffective in child sexual abuse case for failing to timely move to suppress the defendant's confession to a police investigator during a re-interview three days after the defendant invoked his right to counsel. The defendant was arrested for sexually abusing his fourteen-year-old daughter. During the initial interrogation, after being read his Miranda rights, he said, "I need an attorney." The interrogation stopped. Three days later, the investigator re-interviewed him without an attorney present, and this time, the defendant confessed. The state court denied relief holding that the defendant had not been "interrogated" under *Edwards v. Arizona*, 451 U.S. 477 (1981), as he only made voluntary statements after being served with additional warrants. This finding was objectively unreasonable under AEDPA as the officer did more than serve warrants. He questioned the defendant about the charges and those questions clearly constitute "interrogation" for *Edwards* purposes. As the state court did not address the question of prejudice, the court reviewed this issue de novo. Prejudice was established as the defendant's confession was "detailed and deeply disturbing." The independent evidence of guilt, on the other hand, "while substantial, was not so overwhelming" that the court could find no prejudice. While the defendant's daughter testified as to his guilt, "the defense was able to raise questions about the reliability of that testimony."

***United States v. Freeman*, 818 F.3d 175 (5th Cir. 2016)**. Counsel ineffective in conspiracy to possess cocaine and possession with intent to distribute cocaine case for failing to move to dismiss the possession count, added in the superseding indictment, as barred by the statute of limitations. Counsel's conduct was deficient. "Although counsel's affidavit stated that he considered the issue, the record is silent as to the extent of counsel's research. Even minimal research would have revealed . . . a compelling argument" that the possession charge in the superseding indictment was barred by the statute of limitations. Prejudice established as the defendant had to pay a $100 special assessment for the possession conviction and the defendant would not have that conviction otherwise.

**2015:** ***United States v. Mercedes-De La Crus*, 787 F.3d 61 (1st Cir. 2015)**. Counsel ineffective in drug case for failing to timely file a motion to suppress post-arrest statements when the arrest was made without probable cause. Federal agents were conducting surveillance of a remote stretch of coastline in Puerto Rico that was suspected to be an area of drug trafficking activity. It was a large wooded area with trails near a beach and there were five or six "well kept" houses nearby. In this area, there was an abandoned vehicle. When the defendant came out of the woods towards the vehicle, he was immediately arrested. Drugs were found 100 feet from the vehicle and a boat that apparently delivered the drugs was found abandoned in the sand, but the arresting agents did not know of these discoveries at the time of the arrest. The defendant's incriminating statements at the scene and upon his

arrival at the Homeland Security Office should have been suppressed. Counsel's conduct in failing to make this motion was deficient and prejudicial as the government's case "was based almost exclusively on these statements."

**2013:** ***United States v. Liu*, 731 F.3d 982 (9th Cir. 2013)**. Counsel was ineffective in criminal copyright infringement and trafficking in counterfeit labels case for failing to raise an obvious statute-of-limitations defense on one count, which was not brought in indictment until February 2010. The count alleged criminal conduct between 2001 and 2003. The applicable statute of limitations period was five years. Counsel's conduct was deficient and prejudicial.

**2012:** ***Harris v. Thompson*, 698 F.3d 609 (7th Cir. 2012)**. Counsel in murder case ineffective due to failure to adequately perform in hearing on the competency of the defendant's six-year-old son as a witness in a case that involved the killing of the defendant's four-year-old son. It was undisputed that the child died from asphyxiation by an elastic band that had come loose from a fitted bed sheet and that the six-year-old son was present. The son had maintained since his first interview that his brother wrapped the band around his own neck and that the defendant was not present. The jury never heard this testimony though due to the trial court's finding that the son was not competent to testify. Because the state court did not review the constitutional issue under the Sixth Amendment Compulsory Process Clause, this issue was reviewed de novo. Counsel's conduct was deficient in: (1) failing to interview the child witness and prepare him for his testimony; (2) failing to secure the presence of a witness who would have established that the child's testimony was consistent and credible; and (3) failing to correct the trial court's misapplication of the burden of proof when the trial court placed the burden on the defendant to establish competence when the burden, under state law, was on the state to establish that the child witness was not competent. Prejudice established as the state court's holding to the contrary was an unreasonable application of *Strickland*. In short, the state court relied on the "trial judge's own post hoc rationalization," during motion for new trial proceedings, that a more diligent performance would not have changed his mind. Under *Strickland*, the assessment of prejudice is an "objective inquiry" in which "courts must consider the effect the evidence would have on an unspecified objectively reasonable decision-maker – not its effect on one particular judge."

**2011:** ***Tice v. Johnson*, 647 F.3d 87 (4th Cir. 2011)**. Counsel in murder and rape case ineffective for failing to move to suppress the petitioner's confession. The petitioner was one of the "Norfolk Four." The initial suspect in the murder, who lived nearby, was Joseph Dick. After making numerous contradictory statements, Dick testified that he and six other men, including the petitioner and Omar Ballard, participated in the rape and murder. The petitioner also confessed saying that he and five other men (Ballard not included) committed the crimes. The petitioner's statement, however, contained three incontrovertible errors or omissions of fact: (1) while he claimed forced entry, there was no evidence of such; (2) while he said he ejaculated, the only DNA evidence at the scene belonged to Ballard; and (3) while he did not name Ballard as an accomplice, Ballard undeniably was involved. His was the only DNA, he was convicted of severely beating a woman raping a 14-year-old girl in the area within just weeks of this crime, and he plead guilty to the murder and rape and agreed to testify against his codefendants in order to avoid a capital murder charge. The investigatory process "was characterized by grim repetition." Initially, based on Dick's

statements, Williams was the target. He confessed to the murder stating that he acted alone. After the DNA did not match him, the police went back to Dick who implicated himself. He then implicated Wilson. Then Tice. And then Tice implicated himself and three others, who ultimately had their charges dismissed. No one implicated Ballard and he was not even a suspect until after he wrote a letter while in confinement incriminating himself. He then confessed and admitted that he was the sole actor in the rape and murder. Tice was initially questioned for about an hour before he agreed to and did undergo a polygraph examination. After that three hour examination, Tice's interrogation continued and the officer took written notes, which included: "He told me he decide[d] not to say any more . . . . I told him he would be given time to think about it." A different officer resumed the questioning 13 minutes later without giving fresh *Miranda* warnings. Tice then confessed and signed a confession. The state court held that Tice had unambiguously invoked his constitutional right to stop questioning, that his confession would have been suppressed had a motion been made, and that counsel had performed deficiently in failing to so move. The court found no prejudice, however, based on Dick's testimony. While the case was reviewed under AEDPA, the court first conducted its own independent review as "our perception of how reasonably another court applies the law in a particular case is best informed by conducting our own, independent application so that we may gauge how the two compare." Counsel's conduct was deficient as the detective's notes were in the court record for more than three years prior to the retrial and defense counsel had a copy of the notes in his file. "As with any record of an accused's statements made in police custody, and especially a statement volunteered without the benefit of a lawyer's advice, the notes should have been parsed to ascertain not only the havoc the accused might have wreaked upon his own defense, but also any boon he may have unwittingly bestowed." The duty to investigate does not apply "only to facts yet unknown, as opposed to those already in the litigation file." A reasonable investigation of counsel's own file would have revealed the officer's notes, which should "give pause to even the greenest of criminal defense lawyers." Counsel could not remember seeing these notes, let alone any strategy not to move to suppress the confession. "One might think that such an important and irrevocable decision concerning trial tactics would have left an indelible imprint upon the memory of the strategist." Given this, the Court rejected the State's "invitation to engage in after-the-fact rationalization of a litigation strategy that almost certainly was never contemplated" and concluded that counsel simply overlooked the notes. Due to counsel's "otherwise laudably effective and competent" representation, the court was reluctant to find deficient conduct based on this "singular instance" of deficient conduct but did so because "[t]he error was of sufficient magnitude" to be "constitutionally deficient within the meaning of *Strickland*." The court also found that the motion to suppress would have been granted if filed under *Michigan v. Mosley*, 423 U.S. 96 (1975). The invocation of the right to cease questioning was "clear and unequivocal" and a "reasonable police officer under the circumstances" would have ceased questioning. Prejudice also found. Dick's credibility was shaky at best. His story evolved from denying all involvement, to merely being present, to being an actor, back to mere presence, and then adding additional actors including Tice. A reasonable jury would have grave doubts about his veracity. The state court in finding no prejudice "misapprehended the *Strickland* standard" by essentially finding that because Tice still could have been convicted there was no prejudice. The prosecution even recognized the relative weights of the evidence by focusing its arguments on Tice's confession rather than on the persuasiveness of Dick's testimony. Moreover, the jury's questions during deliberations indicated that it was struggling to

accord the proper weight to the confession. While it "is generally tricky business to try to divine a jury's thought processes by considering only its questions and speculating as to the reasons therefor," the Court found it "safe to say" that the jury did not consider Dick's testimony to be conclusive evidence of guilt.

**2010:** ***Hodgson v. Warren*, 622 F.3d 591 (6th Cir. 2010)**. Counsel ineffective in attempted murder trial for failing to seek an adjournment when an eyewitness with exculpatory testimony failed to appear after being subpoenaed. The state had 4-5 eyewitnesses implying that petitioner was the shooter but none could say affirmatively that they saw a gun in his hands or saw him fire the shots. The physical evidence, shell casings found away from where petitioner was, was inconsistent with the testimony that petitioner was the shooter. The eyewitness who failed to appear would have testified that she was only a few feet from petitioner at the time of the shooting that she could see his hands, and she could state affirmatively that he did not have a gun. This witness also "had no obvious motive to lie." Reasonably competent counsel would "do as much as humanly possible" to ensure the jury heard this witness' testimony. Thus, counsel's conduct was deficient in failing to seek an adjournment to locate this witness. Under AEDPA, the state court's finding that counsel had a strategic reason for not calling her was unreasonable. Court had refused the prosecution's request to waive presentation of her testimony, which made clear that counsel "did not make a strategic choice to forgo her testimony." The state court's decision was also unreasonable in finding that her testimony would have been cumulative. Prejudice established as this witness if believed would have impeached the government's eyewitness and undercut the prosecution's case.

***Bellizia v. Florida Dept. of Corrections*, 614 F.3d 1326 (11th Cir. 2010)**. Counsel ineffective in heroin trafficking of more than 28 grams case for failing to move for a judgment of acquittal because the state tested and weighed only one of the 32 pellets removed from petitioner's stomach and simply assumed the remaining pellets were heroin of similar weights (9.1 grams each) to charge petitioner with 28 grams or more in order to apply a 25 year mandatory minimum sentence. Under clear state law, although circumstantial evidence can be used to establish "the identity of a controlled substance, it cannot be used to establish the weight of a controlled substance." Prejudice established because counsel's error meant that petitioner faced a mandatory minimum of 25 years rather than three years based on the weight of the one and only pellet that was actually weighed.

**2009:** ***Gentry v. Sevier*, 597 F.3d 838 (7th Cir. 2009)**. Under AEDPA, counsel ineffective in burglary and theft case for failing to move to suppress evidence seized from the defendant and his wheelbarrow. Police were investigating a "suspicious person" report when they encountered the defendant pushing a wheelbarrow with a rain coat partially covering it. Although officers did not have a reasonable suspicion to warrant a Terry stop, they conducted one and patted the defendant down. During the pat-down, a garage door opener was found. By locating the garage the opener worked with and by searching the wheelbarrow officers obtained additional evidence against the defendant. Counsel's conduct was deficient because the Fourth Amendment issues "should have been apparent" to counsel. Moreover, the defendant even filed his own pro se motion to suppress the evidence, but counsel still did not assert the issue. Prejudice established because a motion to suppress was meritorious. The state court unreasonably applied federal law by concluding the evidence was

admissible despite the improper Terry stop based on the inevitable discovery doctrine. Because there were no intervening circumstances, all of the evidence obtained during the encounter was inadmissible as fruit of the poisonous tree.

**2007:** ***United States v. Weathers*, 493 F.3d 229 (D.C. Cir. 2007)**. Counsel ineffective for failing to challenge multiplicious counts in case arising out of the defendant's attempts to arrange for the murder of several witnesses and a prosecutor on pending rape charges. Two of the counts related to the prosecutor. Under the U.S. Code, the defendant was convicted of threatening a federal official. Under D.C. law, he was convicted of threatening to injure a person. Counsel's conduct was deficient and not explained by strategy. Prejudice found because there was a reasonable possibility that a challenge would have been granted. The conviction under D.C. law was vacated and the case remanded for resentencing.

**2004:** ***Clinkscale v. Carter*, 375 F.3d 430 (6th Cir. 2004)**. Counsel ineffective in murder and robbery case (that was a capital case but jury gave life) for failing to timely file notice of an alibi defense, which resulted in the trial court's exclusion of the evidence. The defendant had informed counsel immediately of his alibi and the defense investigator reported that there were at least three alibi witnesses. Nonetheless, counsel gave only "verbal notice" a few days before trial of a "possible alibi." Only after the jury was empaneled did counsel file a written notice of alibi identifying the witnesses. Counsel's conduct was deficient because "there is nothing reasonable about failing to file an alibi notice within the time prescribed by the applicable rules when such failure risks wholesale exclusion of the evidence." Prejudice found because the state's evidence was weak and the trial amounted to a credibility contest between the alleged victim/witness and the defendant. The exclusion of the alibi witnesses, who would have corroborated the defendant's testimony, was prejudicial in these circumstances. Although only one of the alibi witnesses provided an affidavit, there is no requirement that a defendant claiming ineffectiveness of counsel in these circumstances "produce an affidavit from the potential alibi witnesses documenting the substance of their anticipated testimony." Here, the investigator's notes and affidavit established the facts that the remaining witnesses could have testified to.

***Owens v. United States*, 387 F.3d 607 (7th Cir. 2004)**. Counsel was ineffective in drug case for failing to adequately move to suppress evidence seized pursuant to a search of the defendant's house. The evidence was seized pursuant to a warrant based on a barebones affidavit, signed by a detective, that stated that an informant had bought some crack from the defendant at the house three months earlier. There was no indication of the quantity of crack or the reliability of the informant. Counsel moved to suppress the evidence because the affidavit did not establish probable cause to believe that a search of the same premises three months later would reveal evidence. The court held that the affidavit was insufficient and the search could not be saved by *United States v. Leon*, 468 U.S. 897 (1984), because the officers that conducted the search could not have reasonably believed that the warrant was supported by probable cause. Although counsel moved to suppress the evidence, counsel's conduct was deficient because counsel argued that the house did not belong to the defendant, which allowed denial of the motion on the grounds that the defendant had no standing to contest the search. The evidence that the house was the defendant's was overwhelming and the

lawyer's argument otherwise, which "forfeit[ed] a compelling ground for excluding evidence essential to convict his client was therefore a blunder of the first magnitude." *Id*. at 608. Prejudice was found because if counsel had acknowledged that it was the defendant's house, the motion to suppress would have been granted and the defendant would have been acquitted. Alternatively, even if the court had denied the motion to suppress, counsel could have still argued that the house was not the defendant's under the rule of *Simmons v. United States*, 390 U.S. 377 (1968), which prohibits use of the defendant's suppression hearing testimony during the trial.

> The "prejudice" essential to a violation of the Sixth Amendment right to the effective assistance of counsel is not being convicted though one is innocent, although that is the worst kind; it is being convicted when one would have been acquitted, or at least would have had a good shot at acquittal, had one been competently represented.

*Id*. at 610. In reaching this conclusion, the court overruled its prior holding in *Holman v. Page*, 95 F.3d 481 (7th Cir. 1996) (failure to make a Fourth Amendment objection to the admission of evidence cannot amount to ineffective assistance of counsel if the evidence was reliable, so that its admission, even if improper, created no risk that an innocent person would be convicted).

***United States v. Hilliard*, 392 F.3d 981 (8th Cir. 2004)**. Counsel ineffective in illegal firearms case for failing to timely file a post-trial motion. Following the defendant's conviction on only one of five charges even though the evidence for all five overlapped, the court informed counsel of concerns about the validity of the jury verdict and reminded counsel to file post-trial motions. Although only allowed seven days to do so under the rules, counsel did not fil until 41 days after the verdict and the motion was dismissed as untimely. Counsel's conduct was deficient and was "a classic dereliction" of duty. Prejudice was found because the district court found that the motion would have been granted because "a miscarriage of justice was likely done here."

**2003:** ***Joshua v. Dewitt*, 341 F.3d 430 (6th Cir. 2003)**. Trial and appellate counsel were ineffective in drug case for failing to move to suppress evidence. The defendant was stopped by a highway patrolman for speeding. The highway patrolman did a license check on the defendant and learned that there was an entry in the station's "read and sign" book, which contained police intelligence information. The entry in the book reported that the defendant was a known drug courier who transported illegal narcotics between several cities. Based on this information, the defendant was detained for approximately forty-two minutes in order to allow time for a drug dog to come to the scene. When the dog arrived, it alerted, and a large quantity of cocaine was found. The defendant's girlfriend then told the police that the drugs belonged to the defendant. Prior to trial, counsel moved to suppress the evidence solely on the basis that the length of the traffic stop alone required suppression. The trial court denied the motion, and the defendant entered a no contest plea. The court found that counsel's conduct was deficient in failing to move for suppression under *United States v. Hensley*, 469 U.S. 221 (1985), which held that reliance on a flyer or bulletin can justify a brief detention but can do so only if the officer who issued the flyer or bulletin had articulable facts supporting reasonable suspicion that the person wanted had committed an offense. The court found a reasonable trial attorney would have raised the *Hensley* issue at trial. Prejudice was found because the state

failed to offer any evidence from the officer who provided the information from the "read and sign" book and because the state had never contended that there was a justifiable basis for the entry. The court likewise found appellate counsel ineffective for failing to raise the issue on appeal under the state plain error rule. Prejudice was found because *Hensley* bars the admissibility of the evidence seized at the scene of the defendant's arrest, including both the drugs and his girlfriend's statement. Without this evidence, there was a substantial probability that the defendant would not have been convicted. Analyzing the case under the AEDPA, the court found that the state court decision was contrary to clearly established Supreme Court precedent in *Hensley*.

### b. U.S. District Court Cases

**2018:** ***Pierotti v. Harris*, 2018 WL 4954094 (E.D. N.Y. Oct. 11, 2018).** In case involving multiple charges including two counts of murder where petitioner contended the victims were shot in self-defense, trial counsel was ineffective in failing to request and obtain reasonable accommodation for petitioner's hearing disability. Counsel was aware that petitioner had a hearing impairment and that petitioner normally wore two hearing aids but was wearing no hearing aids during the trial. On numerous occasions petitioner told counsel that he could not hear what was going on in the courtroom. Counsel's explaining and summarizing what had happened during the proceedings did not cure the problem. Prejudice is presumed here, because of the undisputed facts of the severity of petitioner's hearing disability; his inability to hear high frequencies (1/3 of the trial witnesses were women, whose voices have higher frequencies); the conditions in the courtroom, including the location of the witnesses in relation to the defense table, the position of the speakers (not facing directly at petitioner), the hard surfaces in the courtroom; and the presence of ambient noise. Petitioner was essentially rendered absent for much of his trial and without the present ability to consult with his lawyer with a reasonable degree of rational understanding (it is appropriate to presume prejudice when a defendant is denied the right to consult with counsel). These problems rendered his trial fundamentally unfair. That petitioner addressed his inability to hear to his counsel rather than to the trial court was "not surprising," and "when his trial counsel did not raise the issue, Petitioner's reluctance to address the court directly was understandable in view of the judge's somewhat brusque reaction to Petitioner's pro se audibility complaint during the pre-trial proceedings." Relief granted. (Note: This claim was reviewed *de novo* because it had not been adjudicated on the merits by the state court. Instead, it had been found procedurally defaulted by the state court but the Second Circuit in a prior decision had found that this case fell within the limited category of exceptional cases where the "exorbitant application of a generally sound rule renders the state ground inadequate to stop consideration of a federal question." *Pierotti v, Walsh,* 834 F.3d 171, 180 (2nd Cir. 2016).)

***Mendoza v. Holland*, 2018 WL 540095 (N.D. Cal. Jan. 22, 2018).** In case where petitioner was convicted in California state court of a total of 11 charges of committing a lewd or lascivious act against three minors under the age of 14, trial and appellate counsel were ineffective in failing to raise a claim that petitioner's *Miranda* rights had been violated. This ineffectiveness provided cause to overcome the procedural default of the *Miranda* claim in state court. Looking to *Visciotti v. Martel*, 862 F.3d 749, 768 (9th Cir. 2016), the district court independently determined whether there was IAC and did not defer to the state court's determination of this issue. Petitioner unambiguously

invoked his *Miranda* rights as soon as the detective started talking to him, saying "No way" did he want to discuss anything with the detective. Nevertheless, the interview continued for an hour thereafter. This was not an implied waiver of his *Miranda* rights; petitioner only answered later questions because the detectives had ignored his response and continued questioning him. The admission of his statements at trial was thus a constitutional violation. In its harmless error analysis, the court did not review petitioner's testimony at trial given that petitioner only testified because of the confession. The direct and graphic statements he gave to the police about two of the three victims had a substantial and injurious effect, because the independent evidence as to petitioner's guilt of those was less strong; with regard to the third victim, there was evidence obtained from a taped pretext call between petitioner and the victim that was damaging, and so his admissions to the police about that victim did not have a prejudicial effect under *Brecht*. Notably, the prosecution emphasized the confession in closing argument. Both trial and appellate counsel were deficient for failing to present this meritorious *Miranda* claim. There is a reasonable probability that had trial counsel raised it, the trial court would have suppressed the interview and an acquittal was possible, at least on the charges against two of the victims. There is also a reasonable probability that if appellate counsel raised it on appeal, petitioner would have prevailed then. Thus, cause and prejudice for the procedural default was established. Furthermore, the state superior court's denial of the IAC for failure to raise the *Miranda* claims involved an unreasonable application of *Strickland's* prejudice prong, because although the superior court articulated the correct standard (reasonable probability that the outcome of the proceedings would have been different), it then conflated that with a sufficiency of the evidence test. So AEDPA deference to the state court's decision did not apply.

**2014:** ***United States v. Wendfeldt*, 58 F. Supp. 3d 1124 (D. Nev. 2014)**. Counsel ineffective in plea to drug possession with intent to distribute case for failing to move to suppress the drug evidence due to an unlawful search. A highway patrol trooper stopped the defendant on the interstate because his tires touched the outside line of his lane several times. At the conclusion of the traffic stop, the trooper told the defendant that he was free to leave. As the defendant walked towards his car, however, the trooper asked for consent to search. When the defendant refused, the trooper took his canine from his patrol car and walked around the defendant's car. The dog alerted in the area of the passenger door. Thereafter, the trooper detained the defendant until a search warrant was obtained. Drugs and guns were found in the trunk of the car. The trooper lacked reasonable suspicion to justify the stop because the defendant's tires touched the line, but never crossed it. Even if the trooper acted in good faith, "this did not transform the unlawful traffic stop into a lawful one." The second seizure to use the canine was also unlawful. Counsel's failure to move to suppress was deficient and prejudicial.

**2011:** ***United States v. Serrano*, 798 F. Supp. 2d 634 (E.D. Pa. 2011)**. Counsel ineffective in possession with intent to distribute cocaine case for failing to move to suppress the defendant's confession on Miranda grounds. The defendant initially waved down an officer asserting that he had been kidnaped, robbed, and had his car stolen. After a car chase and shootout with the kidnapper, the car was recovered. In the car was a plastic bag containing a white powdery substance. The defendant was taken to the police department. After being left alone for hours in a locked room, he was questioned about the kidnaping and then his involvement in drug activity by different officers. He refused to answer any questions. After several more hours alone, a detective told the defendant that they were not interested in his involvement in drug activity and he could leave if he would just say

that he had done a couple of deals with his robbers before and this time they robbed him. The defendant took the detective at his word and signed a statement in line with the detective's outline. He was detained a few more hours and released without being arrested. In all, he had been held in the interrogation room for over 24 hours and he was never informed of his Miranda rights. Counsel negotiated a plea agreement and the defendant was sentenced to 151 months. Counsel stated that he believed a motion to suppress would be unsuccessful because the defendant was not "in custody" in that he was not charged at the time of the confession. Nonetheless, counsel admitted that he did not know the circumstances surrounding the confession and did not inquire about it. Counsel's conduct was deficient as counsel did not inquire about the circumstances. If he had "no reasonably competent attorney could conclude that [the defendant] was not entitled to a Miranda warning." Miranda applies when (1) a defendant is "in custody" and (2) he was subjected to "interrogation." Even though the defendant was not charged with a crime when his confession was made, that does not mean that his interrogation was non-custodial. Factors to be considered in determining whether the defendant was "in custody" include: (1) whether he told he was under arrest or free to leave; (2) the location and physical surroundings of the interrogation; (3) the length of the interrogation; (4) whether officers used coercive tactics, displayed weapons, physically restrained the defendant, etc.; and (5) whether the defendant voluntarily submitted to questioning. Here, the defendant was clearly in custody when he confessed. While it may be true that a motion to suppress may have scuttled ongoing plea negotiations, counsel decided between an agreement to 151 months in prison and moving to suppress the only evidence of guilt, which would have led to an acquittal. "[C]ounsel's decision was not only wrong, but it was uninformed." Prejudice established as there was no other evidence of guilt in the record. A motion to suppress "would have sounded a death knell for the prosecution's case."

**2009:** ***Oliva v. Hedgpeth*, 600 F. Supp. 2d 1067 (C.D. Cal. 2009)**. Under AEDPA, counsel ineffective in murder case for failing to move to suppress the pretrial identification of a six-year-old eyewitness. A transcript of the police interview revealed that she was shown a photo lineup without being told that the lineup might not include the shooter. She thus thought that she had to pick one of the photos. After picking one, she was asked leading questions to eliminate that person. After she picked the defendant's photo, she was praised and told that she did an "awesome" job in helping to get "that bad guy" before she had even looked at the other photos. Counsel's only reason for not challenging this evidence was that he did not believe the motion would be successful. This conduct was unreasonable because the identification procedure was clearly suggestive. The state court's decision to the contrary was objectively unreasonable in that its "conclusions unreasonably fly in the face of the undisputed evidence of record." Following a finding of suggestive procedures, the central question is "whether under the 'totality of the circumstances' the identification is reliable even though the confrontation procedure was suggestive." *Neil v. Biggers*, 409 U.S. 188, 199 (1972). Here, the witness had only a "fleeting" view of the shooter and "only a very limited opportunity" to view his face. Her prior description of him fit a number of other people at the scene. She gave inconsistent descriptions of his attire. At trial, she could not identify anyone in the courtroom and even affirmatively stated the shooter was not in the courtroom. Thus, her identification was not reliable and it is reasonably probable the trial court would have excluded the pretrial identification. Without this evidence, it was also reasonably probable that the result of the trial would have been different. The only other real evidence pointing to the defendant was another identification that was not strong

and indeed the witness "displayed a notable lack of certainty" in her identification. In addition, even with the child's pretrial identification in evidence, the jury deliberated for two and a half days and three times requested to rehear the testimony about the witness identifications.

***Robinson v. United States*, 638 F. Supp. 2d 764 (E.D. Mich. 2009)**. Counsel ineffective in drug conspiracy case for failing to file motion for new trial, even though the defendant filed a post-trial motion for judgment of acquittal, and failing to challenge the sufficiency of the evidence of the drug quantity attributable to the defendant. The defendant, who was from Indiana, was charged with his brother and others of growing a large crop of marijuana in between rows of corn on a rural farm. The government's only evidence connecting the defendant to the farm was in January of February, which, of course, was not in the growing season. The only other evidence connected the defendant to the operation was the testimony of the defendant's ex-sister-in-law, whose testimony was not credible in the court's view. Another woman had also testified that the sister-in-law bragged that she lied at trial to get even with the brothers. Despite a month long trial, the jury deliberated less than four hours before convicting all six defendants. During the trial, the defendant had moved a judgment of acquittal under Federal Rule of Criminal Procedure 29, which the Court took under advisement. After trial, counsel filed a brief in support of this motion but did not file a motion for new trial under Rule 33. Counsel's conduct was deficient because, under Rule 29, the court must consider the evidence in the light most favorable to the government. Under Rule 33, the court can consider the credibility of witnesses. Counsel's conduct was not strategy because he was unaware of Rule 33 or its standards. "A decision based on a misunderstanding of the law is not a strategic decision." Here, "counsel's failure to file the motion was not a strategic choice; it was based on ignorance of the law." Prejudice found because "the present case represents one [of] those extraordinary matters in which a motion for a new trial would have been appropriately considered and granted." Likewise, counsel's conduct was deficient in failing to challenge the sufficiency of the evidence of the drug quantity attributable to the defendant. "Again, it does not appear that it could have been a strategic decision to challenge guilt but not the amount for which the [defendant] was to be held accountable." Prejudice established because "the statutory mandatory minimum sentence in this case was tied directly to the amount of drugs charged." A successful challenged could have reduced the sentence exposure by half.

***Nelson v. Brown*, 673 F. Supp. 2d 85 (E.D.N.Y. 2009)**. Under AEDPA, counsel ineffective in robbery case for failing to request a remedy for the prosecution's discovery violation. There were several eyewitnesses to the crime that made contradictory statements about whether the assailant had facial hair or not. One of these eyewitnesses had made handwritten notes shortly after the crime but the state lost these notes and, therefore, did not provide them to the defense in discovery, even though state law required disclosure of "contemporaneous descriptions of a suspect" when identification is an issue. The state's case depended entirely on eyewitness testimony and the defendant was entitled to a remedy, such as an adverse inference instruction that the witness' original handwritten description was not consistent with her trial testimony, but counsel failed to seek a remedy. Prejudice established because the state's case was "remarkably weak" and this was the only alleged eyewitness that provided a consistent account of the robber's appearance from initial statements through to trial.

**Capital Case*

**2008:** ***Flowers v. United States*, 560 F. Supp. 2d 710 (N.D. Ind. 2008)**. Counsel ineffective in possession with intent to distribute drugs "within 1,000 feet" of a school, playground, or public housing. Trial and appellate counsel were ineffective for not challenging the government's failure to prove that the defendant's house was within 1,000 feet of a protected area. At trial, Officer Cameron testified that the residence was within 1,000 feet of "a public park in the South Bend Parks Department." There was no other evidence on the point even though the statute requires that the government prove beyond a reasonable doubt that the area is: 1) an outdoor facility, which is 2) intended for recreation, 3) open to the public, and 4) includes three or more separate apparatus intended for the recreation of children. Counsel's conduct was objectively unreasonable and prejudicial for failing to challenge the government's inadequate proof. The court set aside the conviction on this offense and entered a conviction on the lesser included offense (omitting the "within 1,000 feet" element) and ordered resentencing.

***Jones v. Wilder-Tomlinson*, 577 F. Supp. 2d 1064 (N.D. Iowa 2008)**. Under AEDPA, counsel in drug case ineffective in failing to timely file a motion to suppress evidence flowing from the defendant's arrest, which lacked probable cause. Counsel's conduct was deficient because the only evidence supporting the arrest was a small, gram scale, but there was no testimony regarding why the scale itself was any different from other food or mail scales and there was no other evidence, other than an officer's testimony that it was drug paraphernalia, to believe that the scale was being used to weigh drugs. Because the state court did not decide this issue on the merits, de novo review was conducted. Counsel's conduct was deficient because counsel "either forgot about the deadline or unreasonably assumed that the . . . Court would excuse the untimeliness of her motion." Prejudice established because "the evidence would have been suppressed had a timely motion to suppress been filed."

***Massillon v. Conway*, 574 F.Supp.2d 381 (S.D.N.Y. 2008)**. Counsel ineffective in trafficking case for failing to challenge, as the fruit of an illegal arrest, the out-of-court confirmatory identifications and in-court identifications of the defendant by two law enforcement officers. Counsel's conduct was deficient because the prosecution "would not have been able to meet its burden of proving admissibility by clear and convincing evidence." Prejudice established even if the trial court had excluded only the out-of-court confirmatory identifications because a year had passed with both officers engaged in more than 100 similar "buy-and-bust" operations in that time period. "With or without the in-court identifications, the evidence of petitioner's guilt, absent the out-of-court confirmatory identifications, is extremely thin."

***Showers v. Beard*, 586 F. Supp. 2d 310 (M.D. Pa. 2008)**. Under AEDPA, trial counsel was ineffective in murder trial for failing to present rebuttal expert testimony and appellate counsel was ineffective for failing to assert this issue on direct appeal. Petitioner was charged with the murder of her husband, who died from ingestion of liquid morphine Roxanol. The defense asserted that his death was a suicide. The state presented an expert who testified: (1) the taste of Roxanol could be disguised in food or drink, and (2) there was no evidence of forced swallowing. While counsel attempted to refute this is cross and in closing argument, the only evidence the defense presented was a lay witness to testify that the taste of Roxanol could not be masked. Counsel's conduct was deficient because counsel had retained a forensic psychiatrist prior to trial to review the victim's state of mind. The

psychiatrist interviewed pharmacists and nurses that administered the drug, along with the pharmacist that prescribed the medication used in this case, and learned that it is difficult to disguise the taste. He informed counsel that they needed to call an expert to testify about the drug, which he could not do because he was not a toxicologist, and gave the expert names of three possible experts. "[W]hile . . . this case does not involve the death penalty, the guidelines associated with defending a death penalty case are nevertheless instructive as to the role of defense counsel in preparing a defense in a criminal case potentially involving the use of a medical expert." Counsel failed to adequately investigate here. *Id*. (citing ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989)). Counsel knew the administration of the Roxanol was a crucial issue, but did not present a rebuttal defense expert. The cross-examination and counsel's arguments "did nothing to negate" the state evidence because the jury was instructed that counsel's arguments do not constitute evidence. The state court finding to the contrary "cannot be reasonably justified under Strickland" and the factual determination that counsel adequately performed "is plainly controverted by the evidence." Prejudice found because counsel could have presented the testimony of a forensic pathologist to establish: (1) the taste of the Roxanol could be disguised only in a large amount of a sweet-tasting or bitter substance; (2) the autopsy report showed no evidence of any such diluting or masking substance; and (3) the autopsy report did not indicate forced swallowing. Thus, the pathologist concluded the Roxanol was swallowed voluntarily. This testimony "would have been more convincing than testimony from a close family friend" and would have made the "innocence claim . . . considerably more compelling than a simple denial of guilt." The state court's finding of no prejudice "cannot be reasonably justified under *Strickland*." Appellate counsel's decision to pursue only eight issues on appeal, excluding this issue, was deficient and prejudicial.

**2007:** ***United States v. Baker*, 492 F.Supp.2d 1167 (D.Neb. 2007)**. Counsel ineffective in drug conspiracy and possession of a firearm by a felon case for failing to file a motion for new trial. Following the jury's verdict, the trial court granted a judgment of acquittal on the conspiracy charge and asking for briefing on whether the court should grant of a motion for new trial. Counsel responded only that no new trial could be granted because of double jeopardy. The government appealed and the Eighth Circuit reversed the judgment of acquittal on the conspiracy charge and remanded for sentencing. Counsel's conduct was deficient because Fed. R. Crim. P. Rule 29 provides that "if the court enters a judgment of acquittal after a guilty verdict, the court must also conditionally determine whether any motion for a new trial should be granted if the judgment of acquittal is later vacated or reversed." Here counsel did not move for a new trial, even after the court asked both parties to brief the new trial issue and instead advised the court that a new trial would be barred by double jeopardy. Prejudice established because the court would have granted "a motion for new trial or a conditional motion for new trial under Rule 29," especially since the court found that "the evidence at trial was so deficient that it warranted the granting of the motion for judgment of acquittal."

### c. State Cases

**2018:** ***Twigg v. State*, 254 So.3d 464 (Fla. App. Ct. 2018).** In case involving, inter alia, a charge of battery on an emergency medical care provider, trial counsel was ineffective in failing to move for a judgment of acquittal on that count. The alleged battery involved appellant spitting on a nurse when

he was involuntarily hospitalized in an inpatient psychiatric unit. Because the nurse was not a registered nurse, and was not working through the hospital's emergency department, the nurse did not qualify as an emergency care provider. If counsel had moved for a judgment of acquittal, appellant would have been entitled to a reduction of the charge from a felony to a misdemeanor battery.

***Woods v. State,* 242 So.3d 47 (Miss. 2018).** Trial counsel was ineffective in murder case for failing to file a post-trial motion on behalf of appellant. Appellant was convicted by a jury of second degree murder after being indicted on charges of first degree murder stemming from the shooting of his girlfriend's estranged husband, when the estranged husband showed up drunk at her house after having fired a shotgun into her house several weeks earlier and having been ordered to stay away from her and the home. The court sentenced appellant as a habitual offender to LWOP. On appeal, he argued, inter alia, that trial counsel was ineffective for failing to file any post-trial motion, thereby waiving his right to argue on appeal that the verdict was
against the overwhelming weight of the evidence. When considering such a motion, the trial court acts as a thirteenth juror. Under its own precedent, the state supreme court determined that no strategic reason existed for trial counsel not to file a motion for new trial and argue that the verdict was contrary to the overwhelming weight of the evidence. In determining prejudice, the court described the standard for reviewing a lower court's denial of a new trial based on the weight of the evidence: the verdict will only be disturbed when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice. The state supreme court found that standard met here. Appellant's jury was instructed on justifiable homicide and the Castle Doctrine (a state doctrine curtailing the duty to retreat and creating a presumption that the defendant reasonably feared imminent death, great bodily harm, or the commission of a felony upon him from a person who has unlawfully and forcibly entered the immediate premises of a dwelling). There was a great deal of evidence that the estranged husband was warned a number of times not to come to his wife's house, that he came anyway, heavily intoxicated, took his leg brace off to fight appellant, threw his wife down at the edge of her yard, and pulled a gun before appellant shot him in the leg (leading to his death). If the trial court had been presented with a motion for new trial, it would have evaluated the evidence and the applicability of the Castle Doctrine, and based on the evidence at trial, there is a reasonable probability that the trial court "would have found that the overwhelming weight of the evidence showed that [appellant] was in a place where he had a right to be; [the estranged husband] was the immediate provoker and aggressor; and [appellant] was not engaged in unlawful activity. As a result [he] had no duty to retreat." 242 So.3d at 61. Reversed and remanded for a new trial.

***State v. Gonzales-Bejarano,* 427 P.3d 251 (Utah Ct. App. 2018).** In case involving multiple charges, defense counsel was ineffective in failing to move for a directed verdict as to two of the charges. Appellant was convicted by a jury of possession of a stolen motor vehicle, possession of a controlled substance with intent to distribute, a count of forgery, two counts of unlawful possession of a financial transaction card, and unlawful possession of another's identification documents. The conviction stemmed from an incident during which appellant and his fiancée were stopped in a stolen car, appellant showed false identification documents to the officer, additional identification documents not belonging to appellant or his fiancée were found in the car, and later a package of nearly one pound of methamphetamine was also found in the car. The Court of Appeals of Utah

found that defense counsel was ineffective under *Strickland* for failing to move for a directed verdict as to the two charges of unlawful possession of a financial transaction card. Under the portion of the unlawful possession statute that the state requested the trial court instruct the jury on, the state was required to prove that appellant intended to use fraudulently the financial transaction cards belonging to another in his possession. Appellant argued that the state failed to present any evidence that he intended to use the card fraudulently, and that therefore his counsel should have moved for a directed verdict as to these two charges. Although the state argued on appeal that it only had to prove that appellant acquired the card without the consent of the card holder or that he received it with the intent to use it in violation of another statute – the Fraudulent Use Statute – the state did not seek to have the jury instructed on those portions of the statute. The appellate court could find no direct or circumstantial evidence that appellant intended to use the cards fraudulently. The appellate court vacated the two unlawful possession of a financial transaction card convictions and affirmed the rest.

***State v. Asadi-Ousley,* __N.E.3d___, 2018 WL 5734660 (Ohio Ct. App. 2018).** In case involving convictions of two counts of rape, felonious assault, and two counts of kidnapping, based on the sexual assault of a victim more than seven years prior to the trial, appellate counsel was ineffective in failing to argue that trial counsel was deficient in not moving to dismiss the charge of felonious assault based on the expiration of the six-year statute of limitations. After the convictions were affirmed on appeal, appellant had applied to the Court of Appeals to reopen the direct appeal in order to raise the argument that his appellate counsel had been ineffective. Although the state conceded the error, it argued that appellant's IAC claim should be rejected on the basis of waiver. The Court of Appeals granted the application and remanded for the trial court to reverse the felonious assault conviction. The court held that this is not a case where appellant pleaded guilty to the offense where the SOL had run (such a plea constitutes a waiver), or where appellant absconded and purposely avoided prosecution. The fact that appellant sought to avoid identification by coming upon the victim from behind did not constitute behavior tolling the SOL. Appellant was prejudiced as a result of his conviction of this crime even though his sentence was ordered to run concurrently with his sentences on the other charges; "a defendant is prejudiced by having more convictions than are authorized by law." 2018 WL 5734660 at *6 (internal quotation omitted). Appellant was denied the effective assistance of appellant counsel by counsel's failure to argue ineffective assistance of trial counsel on this issue. Had trial counsel moved to dismiss the felonious assault charge, the charge would have been dismissed; had appellate counsel raised this issue on appeal, there is a reasonable probability the outcome of the appeal would have been different as to the felonious assault conviction.

**2017:** ***Bryant v. State*, 800 S.E.2d 537 (Ga. 2017).** In a murder case, although defense counsel did make a motion to suppress evidence seized from defendant's home, counsel performed deficiently in failing to expressly challenge the search warrant for lack of particularity. The box on the warrant for listing the items to be seized contained only a detailed description of defendant's house and the vehicles on the property. Although the affiant detective's testimony by cell phone video to the magistrate at the time the affidavit was presented did provide additional particularity as to what items were expected to be seized, this was not incorporated by reference into the warrant itself. Nor was there any evidence that the video or a transcript of the testimony had been provided to defendant at his home. Regarding prejudice, testimony that defendant was the shooter of the victim came from three friends, D.T., D.B., and D.J., who were present with defendant at the time of the shooting. D.T.

had an unrelated pending armed robbery charge at the time of trial. A detective testified that during his interview with D.T., D.T. provided conflicting stories stating that he was not present at the time of the shooting, that he did not know who committed the shooting, and at another point claiming that friend D.B. was the shooter before naming defendant as the shooter. At trial, D.T. denied implicating D.B. The detective also testified that he recalled hearing that the group of friends were shooting the gun the day before the murder, and specifically that defendant's brother, who was present at the time of the shooting, had shot the gun. D.B. denied making any such statement to police and D.J. claimed not to have seen the gun prior to the shooting. Although the murder weapon itself was never found, officers recovered .40 caliber shell chasings and a .40 caliber bullet at the scene. The only physical evidence implicating defendant was an empty box of .40 caliber bullets seized during the search of his home. This empty box was highlighted during the prosecutor's argument to the jury. The court concludes: "Here, the credibility of the three eyewitnesses was substantially challenged and there was evidence presented that D.B. was the shooter. The only physical evidence connecting [defendant] to the crime was the empty ammunition box, and the State relied heavily on this piece of unconstitutionally obtained evidence in its argument and presentation of its case to the jury. Under these circumstances, we hold that [defendant] has shown a reasonable probability that the outcome of the trial would have been different had the empty ammunition box been excluded."

***People v. Peck*, 79 N.E.3d 232 (Ill. App. Ct. 2017).** In case involving multiple drug-related convictions, trial counsel was ineffective in failing to file a motion to suppress defendant's incriminating statements following his request for legal representation. It was undisputed that defendant was in custody and that he invoked his right to counsel after being read his *Miranda* rights. He later waived his rights and made admissions. Trial counsel explained in post-conviction proceedings that she did not file the suppression motion requested by defendant because in her viewing of the interrogation she concluded that defendant's rights were not violated because defendant reinitiated the conversation with the interrogating officer after having requested an attorney. This conclusion was erroneous given that defendant only reinitiated the interrogation after the police officer informed defendant that defendant's girlfriend was going to be arrested. Such a statement was reasonably likely to elicit an incriminating response, constituting an improper continuation of the interrogation. Thus counsel's failure to file the motion "was not the result of a tactical decision, but of a fundamental misjudgment." As for prejudice, "[t]he record demonstrate[d] that defendant's confession had an immense impact on the outcome of his case, and its admission negatively impacted defendant's ability to provide alternative theories and request jury instructions on lesser-included offenses. Additionally, defendant's confession was the State's strongest piece of evidence to establish his intent to deliver. As mentioned by the State in its closing argument, the jury did not have to speculate as to defendant's intent, as he said exactly what he intended to do with the drugs."

***Khalil-Alsalaami*, 399 P.3d 264 (Kan. Ct. App. 2017).** In case involving two counts of aggravated criminal sodomy on an underage victim, trial counsel was ineffective in failing to request an interpreter at trial and appellate counsel was ineffective for not raising that failure on appeal. Trial counsel was also ineffective in failing to seek suppression of defendant's confession and for failing to lodge several meritorious objections. Defendant, whose primary language was Arabic, was in the

United States as a permanent resident after serving as an interpreter for the United States military forces in Iraq. He was accused of sexually assaulting the victim at a party. He initially admitted to committing some of the sexual acts at issue but claimed it was consensual and that he was unaware the victim was underage. At trial, he denied having any sexual contact with the victim and stated that he had given a contrary account to the police because the officer had repeatedly suggested that sex had occurred. Trial counsel's defense strategy was: (1) arguing that DNA matched to defendant that was found on the victim's shorts had been transferred from the bed where defendant had sex with another woman earlier; and (2) asserting that defendant was tricked by police into giving an incriminating statement. Although defendant's initial counsel had requested an interpreter for defendant and one was employed at the preliminary hearing, trial counsel decided that use of an interpreter would make it appear to the jury that defendant was trying to hide behind a non-existent language barrier, especially given defendant's own history as an interpreter. Thus, defense counsel advised defendant not to use an interpreter. Such advice was made without counsel: (1) testing defendant's ability to understand English; (2) investigating the complexity of the interpreting defendant was asked to do for the U.S. military; or (3) considering how the use of voir dire and/or instructions could ameliorate any possible prejudice from use of an interpreter. In addition, trial counsel failed to inform defendant of his statutory right to an interpreter and the waiver was not accomplished in front of the trial court. Trial counsel had been aware that defendant would not be able to understand at least portions of the trial, such as the DNA testimony and the prosecutor's closing argument. At trial, defendant spoke in broken English that was difficult to understand and he failed to comprehend the meaning of fairly simple words. According to professionals who tested defendant post-trial, defendant's understanding of English was extremely limited and he would be very easy to trick due to the language problem. Evidence was also presented in post-conviction proceedings showing that approximately 1 year before the charged crime, defendant took an interpreter with him to get a Kansas driver's license and had to use the picture test rather than the written test. In addition, the interpreter for defendant in the preliminary hearing rated defendant's English skills on a scale of 0 to 10 as .01. He further testified that defendant's English was woefully inadequate to go through a court proceeding without an interpreter. The U.S. Army Captain that supervised defendant in Iraq indicated that their communication in English was at an elementary level and analogized defendant's ability as a little better than his 5-year-old daughter, who was entering kindergarten. Although defendant lived in the United States for 14 months prior to his arrest, he lived in a household with other Arabic speakers. When he interpreted for the U.S. Army in Iraq, again he continued to live with Arabic speakers. It was further noted by the appellate court that not only was the criminal trial complex, the stakes were extremely high – defendant was facing a possible sentence of 25 years to life, and, as an asylum seeker, a conviction would likely result in deportation to Iraq where his life could be at risk. Although the post-conviction court found, inter alia, that substantial competent evidence supported the finding that defendant adequately understood English to proceed to trial without an interpreter, the appellate court disagreed, explaining:

> Even if one assumes that [trial counsel] were in the best position to evaluate [defendant's] language abilities at the time of trial, their testimony does not support such a conclusion. They reached what they believed to be a reasonable trial strategy, without fully investigating [defendant's] ability to understand the testimony and legal arguments at his own trial. Not only did they not investigate, but they ignored clear

> indications that [defendant] could not effectively understand what was going on during the trial.

On this record, trial counsel performed deficiently in not requesting an interpreter at trial. And, given the egregious nature of the error here, prejudice is presumed. In addition, give the appellate court's conclusion that the evidence does not support a finding defendant was able to understand the proceedings in the absence of an interpreter, appellate counsel was deficient in not raising a claim on direct appeal that the trial court erred in failing to appoint an interpreter for defendant. Because there is a reasonable probability that the appellate court would have found that the district court abused its discretion when it failed to appoint an interpreter, prejudice is established. Trial counsel was also found to have performed deficiently in failing to seek suppression of defendant's confession and stipulating to the voluntariness of defendant's confession after trial counsel entered the case in the midst of a *Jackson v. Denno* hearing that the State had initiated.

> The police minimization technique in conjunction with [defendant's] inability to speak and understand English weigh in favor of finding his confession was involuntary. In addition, [the interrogating officer] testified that in Iraq the police use force to coerce confessions from individuals. It is not unreasonable to conclude that [defendant] may have been pressured to confess because of his fear that force might be used. Finally, [defendant's] lack of understanding of the words used in the oral explanation of his *Miranda* rights coupled with his inability to read what was placed in front of him would also weigh in his favor in the voluntariness calculus. It is clear that [defendant] appeared to be confessing to criminal acts. That is not the issue. The issue for the district court to decide would have been whether his confession was freely and voluntarily given with an understanding of his rights under *Miranda.* We do not believe that was a foregone conclusion.

Further, by stipulating to the voluntariness of the confession and allowing admission of the stipulation into evidence, trial counsel prejudiced his own defense strategy of arguing that defendant was tricked into making the confession. Trial counsel was also deficient in failing to object when the prosecutor misstated the DNA evidence during argument in a manner that torpedoed his assertion his argument about how defendant's DNA came to be on the victim's shorts. Further, appellate counsel was ineffective in failing to raise the issue of prosecutorial misconduct on direct appeal. Finally, the appellate court concluded that defendant was entitled to relief on a claim that the cumulative impact of trial counsel's errors deprived him of a fair trial.

> [Trial counsel] committed six errors during his representation of [defendant]: (1) he failed to request an interpreter for [defendant] at trial; (2) he failed to file a motion to suppress [defendant's] confession or mount a defense at the *Jackson v. Denno* hearing; (3) he stipulated to the voluntariness of [defendant's] confession; (4) he failed to object to improper questioning of [the examining nurse]; (5) he failed to object to questions meant to highlight [defendant's] negative character traits; and (6) he failed to object when the prosecutor misstated evidence during closing arguments. We find that the number of errors is substantial, and even if the State could successfully argue that the impact that any one of them had on the trial was

> insignificant, we cannot ignore the fact that the accumulation of these errors impacted [defendant's] ability to receive a fair trial.

***People v. Hardimon*, 77 N.E.3d 1184 (Ill. App. Ct. 2017).** In murder case, trial counsel was ineffective in failing to move to further redact a videotape recording of the police interview of defendant that was played for the jury. The original recording was more than four hours in length. The prosecution had redacted approximately three hours of the videotape, eliminating parts where defendant was not actively interviewed, where defendant was asked about prior *Miranda* warnings, and where the police referenced information they had received from defendant's companion on the night of the offense. Trial counsel failed to move for the redaction of irrelevant and prejudicial portions remaining in the redacted tape. Defendant during the interview acknowledged being present at the club where the shooting occurred but denied involvement in the shooting. Approximately 20 minutes of the redacted video contained defendant's relevant admissions about his location at the time of the shooting. The remainder of the video, however, consisted of prejudicial statements by the interrogating officers that "(1) described, in detail, a scenario where the defendant shot the victim because he was afraid; (2) attacked the defendant's character and credibility, which included the State's potential use of the words 'liar,' 'cold-blooded killer,' and 'execute,' at trial; (3) served to bolster the testimonies of the officers and other prosecution witnesses; (4) described the contents of the surveillance video, while inaccurately vouching for the clarity of the video; (5) claimed the case would be easily prosecuted; and (6) indicated the defendant hid in his girlfriend's basement when the police came to arrest him, which indicated knowledge of guilt." These comments "served only to impermissibly bolster the State's case and inflame the passions of the jury" while having no probative value. Prejudice from trial counsel's deficient performance is "supported by the totality of the evidence, which failed to directly connect the defendant to the crime. No witness identified the defendant as the shooter, the defendant never admitted to committing the charged offenses, and the physical evidence did not directly connect the defendant to the offense."

***State v. Taylor*, ___ So.3d ___, 2017 WL 1282124 (La. Ct. App. April 6, 2017).** In rape case, trial counsel was ineffective in failing to argue that the retroactive application of a statute to revive defendant's already prescribed forcible rape charge violated the Ex Post Facto Clauses of the state and federal constitutions. The crime occurred in 1994. At that time, there was a six-year statute of limitations for rape. In 2003, Louisiana enacted a statute extending the time limitation for cases where the identity of the offender was established after the expiration of the six-year time limitation through the use of a DNA profile. The statute was expressly retroactive. It wasn't until 2008 that defendant's DNA was matched with DNA taken from the victim. The trial occurred in 2011. In 2015, the Louisiana Supreme Court ruled that application of the 2003 statute to cases which had prescribed before its enactment violated ex post facto principles. Even though defendant's trial preceded that state supreme court ruling, trial counsel was nevertheless ineffective in failing to raise the meritorious ex post facto challenge in light of *Stogner v. California*, 539 U.S. 607 (2003), and then-existing state law that subscribed to the rule that the state may extend the time limits for instituting prosecution and apply them against a particular defendant, but only if the prior limitation period has not expired and abated the criminal consequences of that individual's conduct.

**Capital Case*

***Wurdemann v. State*, 390 P.3d 439 (Idaho 2017)**. In case involving numerous felony convictions related to an attack on the victim, trial counsel was ineffective in failing to properly challenge eyewitness identifications. The video lineup shown to the victim was unduly suggestive in that defendant was the only one of the six participants who met the victim's description of her attacker. An expert in eyewitness identification testified at the post-conviction hearing that this was among the worst lineups he had ever seen. Under the *Manson-Biggers* balancing test, it was found "due to the fact that it was dark and [the victim] was under the influence of marijuana when the attack occurred, combined with the fact that it had been close to two years between the attack and her identification of [defendant] and the fact that [the victim] had identified various other individuals as her attacker during that two-year interval, we cannot say that the reliability of the identification of [defendant] is sufficient to overcome the blatant suggestiveness of the lineup." Had trial counsel challenged the identification, the motion to suppress should have been granted. Trial counsel's failure to move to suppress the suggestive identification constituted deficient performance because it was based on inadequate preparation and ignorance of the law rather than strategy. The lower court's finding of prejudice is summarily affirmed as the State did not argue it was erroneous.

**2016:** ***Monroe v. State*, 191 So. 3d 395 (Fla. 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.

***People v. Booth*, 209 Cal.Rptr.3d 1 (Cal. Ct. App. 2016).** In a case involving an apparently gang related deadly shooting in 1992 that was not prosecuted until 2011, defense counsel was ineffective in failing to move to dismiss the case based on precharging delay where an eyewitness who had exonerated defendant in 1992 could not be located in 2011. Although defendant wanted the trial to start sooner rather than later because of a fear that the co-defendants might turn state's evidence in hopes of receiving a deal, this did not justify forgoing a motion to dismiss as the concern was merely theoretical and it was clear that a motion to dismiss would not have delayed the trial in any material sense. Further, the record did not support respondent's argument that trial counsel did not believe delay was worthwhile because the missing witness had credibility issues. Rather, the record established that reasonably competent counsel would have filed a motion to dismiss based on the precharging delay. As to prejudice, the appellate court declined to defer to the lower court's finding that the missing eyewitness lacked credibility. Because the lower court's determination was based on information in the record that the appellate court had equal access to, the appellate court was in an identical position to evaluate credibility. In addition, the lower court's credibility determination was premised in part on an important factual error concerning the missing eyewitness's identification of one of the participants in the shooting incident. The appellate court's own review of the record led it to conclude that the credibility issues were not that significant and that there were other

circumstances supporting the truthfulness of the eyewitness's account of the shooting. Thus, "despite all of the possible impeachment [the eyewitness] might have been subjected to had he been available to testify, he still had the potential to be a blockbuster witness for the defense. While it is impossible to know for sure how the jury would have perceived [the eyewitness's] testimony, it is reasonable to conclude [defendant] was substantially and materially prejudiced by [the eyewitness's] absence at his trial." Turning to the timing of the charges against defendant, the alleged lack of investigative resources in 1992 provided a strong justification for the delay. In 2009 there was an influx of grant money to fund cold case homicide investigations that led to the charges in this case. And there was no evidence of police negligence or wrongdoing in the original investigation. Although the delay was justified, the weakness of the case against defendant was considered in determining whether there was a probability of an unfair trial because of the delay. Looking to the record, the court found: "Balancing the prejudice from [the eyewitness's] absence against the state's justification for the precharging delay, and considering the weakness of the prosecution's case against [defendant], we conclude it is at least reasonably probable the trial court would have found the delay violated [defendant's] right to a fair trial" had defense counsel filed the motion to dismiss. As to the proper remedy, it is determined that the case can be retried but with the jury hearing the otherwise hearsay statements from the missing eyewitness.

***People v. Rogers*, 200 Cal. Rptr. 3d 355 (Cal. Ct. App. 2016)**. Counsel ineffective in case with multiple charges arising out of two hours of false imprisonment and assaults by the defendant on his girlfriend for failing to object to the addition of charges and enhancements after the defendant waived preliminary hearing. The defendant was initially charged with two counts and two enhancements. The defendant waived a preliminary hearing. Four days before trial, a different prosecutor that the one that agreed to the waiver of the preliminary hearing, without objection, added two additional counts and an enhancement. The state conceded, based on established California law that counsel's conduct was deficient in failing to object to the addition of the three additional counts because an information cannot be amended after the defendant has waived his right to a preliminary hearing. The court also found that counsel's conduct was deficient in failing to object to the addition of an enhancement after the defendant waived his right to a preliminary hearing. "While there is apparently no published case prohibiting an amendment to add a conduct enhancement to an information after a preliminary hearing has been waived," based on previously decided cases, "the writing was clearly on the wall. At the very least, under prevailing professional norms, counsel should have objected to preserve the issue." Prejudice established. The remedy was to strike the counts and the enhancement added after the waiver of the preliminary hearing. Remanded for new sentencing.

***People v. Davydov*, 144 A.D.3d 1170 (N.Y. App. Div. 2016).** In case where defendant was convicted of aggravated assault in the second degree, the conviction is vacated based on trial counsel's ineffectiveness in failing to seek severance from a co-defendant, defendant's uncle, once it became clear they were pursuing antagonistic defenses and also for failing to request a missing witness charge for an eyewitness who was not called to testify. The theory set forth by the uncle's attorney was that defendant had called his uncle to the crime scene to mediate a dispute between defendant and the victim. The uncle's attorney theorized that the dispute involved defendant's desire to have the victim participate in a fraudulent scheme. According to the uncle's attorney, when the uncle arrived at the scene he observed defendant in an altercation and intervened. The defendant's theory, in contrast,

was essentially that the victim was incredible in his account of events, that defendant was actually a friend of the victim and was merely at the scene, and that defendant did not act in concert with the co-defendants in assaulting the victim. Given that the two defenses were irreconcilably in conflict, defense counsel performed deficiently in failing to request a severance. Defense counsel also performed deficiently in failing to request a missing witness charge instructing the jury that an unfavorable inference could be drawn from the failure of the prosecution to call a friend and business associate of the victim as a witness. This friend was nearby when the assault occurred and had previously stated that the victim threw the first punch during the initial confrontation. No legitimate strategic reason could be found to support defense counsel's failure to request the charge.

***State v. Batchford*, 79 N.E.3d 97 (Ohio Ct. App. 2016).** In drug possession/possession of criminal tools case, trial counsel was ineffective in failing to move to suppress statements made by defendant. In light of testimony by the first officer encountering defendant that defendant had invoked his right to counsel during law enforcement's investigation, there were grounds to seek to suppress statements made by defendant later to another officer. Defendant was prejudiced as a result of trial counsel's error, as there was a reasonable probability that had counsel sought suppression of defendant's statements the result of the trial would have been different. The state heavily relied on defendant's statements in proving that he "knowingly possessed" the marijuana. And notably the jury appeared to rely on defendant's statements in finding defendant guilty, as the jury specifically requested it be permitted to rehear the audio recording of defendant's interview during its deliberations.

***Kennebrew v. State*, 792 S.E.2d 695 (Ga. 2016).** In robbery-murder case, trial counsel performed deficiently in failing to seek suppression of evidence found in backpacks seized by officers following defendant's arrest. Defendant had been arrested pursuant to a warrant in his girlfriend's college dorm room. The police seized the backpacks after defendant had been handcuffed and removed from the room. It was not until six days later that the backpacks were opened and shot gun shells and bullets of the type taken from the victim's home were discovered, along with a knife that might have been involved in the killing. These items were severely damaging to defendant's trial defense that he went with the co-defendants to the victim's home for the purpose of selling the victim a PlayStation and then fled the scene after co-defendant Hall unexpectantly went crazy and viciously beat and stabbed the victim to death. The prosecutor emphasized the items in arguing that defendant was not merely present in the victim's home but was an active participant in the robbery-murder. At the hearing on defendant's motion for new trial, defense counsel explained that he had not moved to suppress the backpack evidence because he believed it had been lawfully taken during a search incident to arrest. This exception to the search warrant requirement, however, was clearly inapplicable to the facts of this case. Defense counsel's misunderstanding of the law constituted deficient performance. Also deficient was defendant counsel's failure to object when the prosecutor commented on defendant's pre-arrest silence/failure to come forward after the killing, a clear violation of the state law *Mallory* rule. Although defense counsel guessed at the post-trial hearing that he had decided to forgo an objection in order to avoid bringing more attention to the issue, this did not justify the omission: "The State's discussion of [defendant's] failure to come forward to the police was not . . . just a passing or equivocal remark that the jury might have overlooked. It was a specific, extended argument aimed directly at demonstrating [defendant's] guilt. Given [defendant's] defense theory, the importance of the State's silence-equals-guilt argument to its case against him, and the

obviousness of the *Mallory* violation, [defense counsel's] failure to object was patently unreasonable and thus deficient performance under *Strickland*." Because the case against defendant was not overwhelming and he had a plausible explanation for his presence at the crime scene, prejudice is found given the prosecution's reliance on the backpack-related evidence, his improper argument, and notes from the jury seeking to compare the bullets found in the backpack with those found in the possession of co-defendant Hall.

***People v. Tayborn*, 49 N.E.3d 983 (Ill. App. Ct. 2016)**. Counsel ineffective in drug case for failing to file a motion to suppress the defendant's custodial statements made in response to police questioning without having received *Miranda* warnings. The defendant was a passenger in a car stopped because it did not have a registration plate. After the driver was removed from the car and arrested, the defendant was removed from the car while the car was searched incident to the arrest. Police officer testimony was contradictory about whether the defendant was handcuffed then. A search of the car revealed cocaine in the driver's purse. An officer asked the defendant about the cocaine and the defendant admitted that he obtained it in Chicago and was taking it to Iowa. Counsel's conduct was deficient as the trial court found that the defendant was in custody at the time the cocaine was discovered. Even if he had not been then, he certainly would have been when the cocaine was discovered. Prejudice also established because a motion to suppress would have been successful. Without the defendant's statement, there is a reasonable probability that the outcome of the trial would have been different.

***State v. Craft*, 397 P.3d 889 (Utah Ct. App. 2017).** In aggravated robbery and aggravated burglary case, trial counsel was ineffective in failing to move for a mistrial following a statement by a detective that co-defendants had placed defendant at the scene of the crime. Defendant and two other men were charged with a robbery-burglary. Defendant's trial was severed from his co-defendants so that incriminating admissions by them could not be used against defendant. The key evidence against defendant was an identification of him made by one of the two victims. The reliability of the identification was challenged by the defense. The detective who had prepared a photo lineup for the victim to view was asked by the State how he had selected the photos to include with defendant's photo. The following exchange occurred:

> Q. Okay. And the defense counsel mentioned hair, goatee and white skin as the characteristics discussed with [the witness] during his description before the lineup, correct?
>
> A. Yes.
>
> Q. Aside from those, are there any other factors other than just the similarity to the defendant that guided you in selecting the lineup photographs?
>
> A. *As far as the other two defendants saying he was there.*
>
> Q. No. Let me — the — when you were picking the photographs out —
>
> A. Oh.

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Defense counsel did not object. Given the significance of the statement to the defense, the appellate court concludes it was likely that a mistrial would have been granted had defense counsel asked for one. There was no conceivable strategic basis for counsel's failure to make the request. Defendant established prejudice given that the witness's description of his assailant was not very detailed, the witness did not have a direct view of his assailant's face, the room was dim, he had recently been assaulted, and he had blood in his eyes. In addition, the defense eyewitness identification expert highlighted the various limitations of eyewitness testimony under the circumstances and also described deficiencies in the photo lineup that could have influenced the jury's view of the reliability of the eyewitness identification. The other evidence in the case was a jail phone call made by defendant to a friend. Although it undercut defendant's defense, it did not unequivocally place defendant at the scene of the crime or include any explicit admissions. His statement that he expected to "do a nickel" could simply have indicated that he feared a conviction for the crime with which he was being charged. His statement that he told his "homeboys" to "leave all the electronics" suggests that he was aware of their intention to commit a crime but does not establish that he was at the house when the crime was committed. Notably, defendant was not found in possession of any stolen property, and neither his DNA nor his fingerprints were found on any of the stolen items. The vehicle where evidence was found belonged to one of the other co-defendants, and there was no evidence connecting defendant to that vehicle.

***State v. Ortiz*, 383 P.3d 586 (Wash. Ct. App. 2016).** In case involving, inter alia, charges of manufacturing controlled substances, trial counsel was ineffective in failing to challenge a "knock and announce" search that resulted in the discovery of 41 marijuana plants and other evidence of a growing operation. Officers obtained a warrant to search the home of defendant's mother where defendant resided. The officers executed the search warrant at approximately 6:47 a.m. in the morning. An officer knocked on the door three times, announced "police search warrant," waited one to two seconds, and repeated that process twice more. Hearing nothing, the officers breached the door and entered. Once inside, they encountered persons appearing to have just woken up and a juvenile who was still asleep. On the facts of this case, the officers did not wait a reasonable time before forcing entry into the house. It was foreseeable that the occupants of the house would be sleeping and giving them only six to nine seconds to respond violated the knock and announce rule. Trial counsel could not have a tactical reason for not challenging the search on that basis. Prejudice is established because the prosecution would have had insufficient evidence to bring the charges without the fruits of the illegal search.

***State v. Bell*, 380 P.3d 11 (Utah Ct. App. 2016).** In case where defendant was charged with two counts of aggravated robbery, trial counsel was ineffective in failing to move for a merger of the two counts. Defendant had entered the unlocked car of one of the victims. He was unable to start the car when the owner of the car and her two friends confronted defendant. Defendant then pulled out a knife. Observing the car owner's purse on the floorboard, defendant grabbed it and attempted to flee the scene. Defendant was charged with aggravated robbery as to the car and separately as to the purse. But because the robbery was completed when defendant attempted to take the car and its contents from the victim's immediate presence, the two counts should have merged. On this record, there was no conceivable tactical basis for trial counsel not to have moved for merger.

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***People v. Kindell*, 23 N.Y.S.3d 65 (N.Y. App. Div. 2016)**. Counsel ineffective in burglary case for failing to move to reopen the suppression hearing after a trial witness contradicted the suppression hearing testimony of the officer's relied on by the court in denying the suppression motion. Specifically, the court refused to suppress a tool bag and the burglar's tools it contained based on the testimony of two officers that the bag was open at the defendant's feet and the tools were in plain view when they arrived. During trial, however, the building superintendent who chased the defendant, detained him, and flagged down the police, testified that the bag was in the defendant's hand and closed when the police arrived. Counsel's conduct was deficient and prejudicial.

**2015:** ***Ayotte v. State*, 129 A.3d 285 (Me. 2015)**. Counsel ineffective in possession of stolen goods case for failing to move to dismiss the indictment on double jeopardy grounds. The defendant plead guilty in Cumberland County to theft by unauthorized taking or transfer as a result of the theft of items from an apartment in Cumberland County on November 29, 2012. A month later, he was indicted in York County for theft by receiving stolen property "for allegedly receiving, retaining, or disposing of some of the same stolen property – silverware – to pawnshops" in York County. Counsel in York County considered the possibility of double jeopardy but concluded that there was no double jeopardy violation. Counsel thus negotiated a plea agreement for a suspended jail sentence and consecutive probation to the Cumberland County sentence. Counsel's conduct was deficient as double jeopardy, under the test of *Blockburger v. United States*, 284 U.S. 299 (1932), clearly barred the York County prosecution. The Cumberland County theft was a continuing theft, given that the defendant continually exercised authorized control over the stolen silverware until he pawned it in York County. While counsel researched the issue, his conducted was not insulated as "strategy" where he reached "an erroneous conclusion about the state of the law and Ayotte's rights." Prejudice established.

***People v. Harris*, 43 N.E.3d 750 (N.Y. 2015)**. Counsel ineffective in burglary in the second degree and petit larceny case for failing to move for dismissal of the larceny charge, which was brought after the passage of the applicable statute of limitations had expired. The defendant entered a home while the alleged victim was asleep. She awoke after the defendant ejaculated on her and he ran taking with him a pair of her earrings. Seven years later, based on the defendant's DNA in the semen, he was charged with burglary and petit larceny. The state argued burglary because of the intent to steal in the home. Defense counsel argued that there was no burglary because the intent was only to masturbate over the victim, which was not at the time a crime under state law. Counsel's conduct in failing to object to the larceny charge, which had a two-year statute of limitations, was deficient and "there could have been no strategic purpose" for failing to object, particularly in light of counsel's arguments in defense of the burglary charge. Prejudice established, such that the larceny charge was dismissed.

***Haney v. United States*, 120 A.3d 608 (D.C. Ct. App. 2015)**. Counsel ineffective in assault with intent to kill case for failing to move to suppress a videotaped recording of the defendant's statement to police. The trial court found deficient conduct but no prejudice. The recording included a detective making accusations, which the defendant denied "often with profanity." After about one and a half hours, the defendant indicated that he did not want to answer any more questions, but the interrogation continued. During this portion, the defendant made statements that were admitted at trial. In these statements, the defendant referred to the shooting victim as "a bi**h," said that she

was afraid of him, and said that he believed that she had "snitched" on his friend. The appellate court agreed that counsel's conduct was deficient but reviewed only the question of prejudice. The trial court's finding of no prejudice relied on the court's own view of the credibility of witnesses and the weight of the evidence based on an initial mistrial, where the jury could not reach a unanimous verdict, and the retrial. In determining whether there is prejudice under Strickland, however, the focus is on whether there is a reasonable probability of a different result with "reasonable jurors, acting as factfinders." Under this analysis, prejudice was clear. The prosecutor opened her closing argument and closed her rebuttal argument emphasizing the defendant's statement and his alleged motive for the shooting. Although the defendant was acquitted on the obstruction charge that related to the victim's implication of the defendant's friend in a homicide, the appellate court refused to speculate, as the trial court did, that the defendant's statements played no role in the conviction for assault with intent to kill when the victim had significant credibility issues and she was the only witness that identified the defendant as the shooter.

***State v. Halverson*, 857 N.W.2d 632 (Iowa 2015)**. Counsel ineffective in possession of marijuana at a residential facility case for failing to move to dismiss due to the absence of evidence that the residential facility was under management of the Department of Corrections, as was required for the conviction.

***State v. Millett*, 356 P.3d 700 (Utah Ct. App. 2015)**. Counsel ineffective in forcible sodomy and attempted rape case for failing to move to suppress the defendant's statements to police on the grounds that the *Miranda* warnings were inadequate. The defendant who was 18 was charged with crimes against a 14 year old girl. The two had engaged in consensual sexual encounters involving touching each other's genitalia. On one occasion she performed oral sex on him and they attempted vaginal sex before she said it hurt and he stopped. After her mother called the police and he was arrested, he was interviewed. Prior to the interview, he was advised of his right to silence and that anything he said could and would be used against him in a court of law, but he was not advised that he had the right to an attorney and, if he could not afford one, an attorney would be appointed for him. Counsel moved to suppress the resulting statement on the basis of the rules of evidence but did not challenge the constitutionality of admission of the statement. Counsel's conduct was deficient as this was clearly a custodial interrogation conducted after inadequate *Miranda* warnings. While the state argued that counsel had a strategy to use the statement to argue consent rather than having the defendant testify, the record did not support this because counsel did move to exclude the statement, just on the wrong basis. Counsel's subsequent arguments of consent based on the statement were simply a "reaction" to the admission rather than "a deliberate trial strategy." Prejudice established. In order to convict, the state was required to prove that the defendant had enticed or coerced the victim to submit or participate. The state's theory was that the defendant coerced her by threatening to end the relationship if she did not perform oral sex and have sex with him. While the alleged victim had made statements of this nature prior to trial, she did not testify on direct that she was coerced. Instead, she said they were never really "together" and that it was her decision. During cross and redirect examination, she made conflicting statements. "In light of the equivocal state of the girl's testimony," admission of the defendant's statements and the detective's testimony about the statements was prejudicial as the detective's testimony was the "only unequivocal" evidence that the defendant

threatened to end the relationship with the girl in order to entice or coerce her to engage in oral and vaginal sex. If the statements had not been admitted, the detective's testimony also would have been inadmissible.

***State v. Maynard*, 351 P.3d 159 (Wash. 2015)**. Counsel ineffective in criminal mischief case for failing to notice juvenile defendant's impending 18th birthday and request that the juvenile court extend its jurisdiction, which was permitted under state law. As a result, the juvenile court lost jurisdiction after the state had extended a plea offer that the defendant intended to accept and the defendant was required to be tried as an adult. Counsel's conduct was deficient and prejudicial. The defendant was returned to juvenile court and the state ordered to reinstate the plea offer.

**2014:** ***Conley v. State*, 433 S.W.3d 234 (Ark. 2014)**. Counsel was ineffective in delivery of crack cocaine, possession of marijuana, and possession of paraphernalia case for failing to move for directed verdict on the marijuana and paraphernalia charges. The defendant sold crack to an undercover police officer, but was not arrested until several months later. On the day of the arrest, the police also executed a search warrant at the defendant's home, which he shared with someone else, and found a bag of marijuana and a digital scale in the laundry room on top of a cabinet out of view behind a decorative item. The defendant was not at home during the search. Counsel's conduct was deficient in failing to move for a directed verdict and prejudice was established as there was insufficient evidence to support the convictions for possessing the marijuana and the paraphernalia.

***Spargo v. State*, 132 So.3d 354 (Fla. Dist. Ct. App. 2014)**. Counsel ineffective for failing, prior to sentencing, to adopt and present the defendant's pro se motions to withdraw his guilty plea to second-degree murder, which had never been formally accepted by the trial court. "Because there was no formal acceptance, and sentence had not yet been pronounced, appellant had a right [under a state criminal rule] to withdraw his plea without any justification for doing so." Prejudice established.

***State v. Ross*, 845 N.W.2d 692 (Iowa 2014)**. Counsel ineffective in voluntary manslaughter and intimidation with a dangerous weapon with intent case for failing to move for a judgment of acquittal after the verdict on the intimidation charges where the defendant was convicted of five counts when he was guilty of only two under state law. The defendant had an ongoing argument with Milton, who passed the defendant's home with six other people. After additional argument, the defendant, while standing in the street, fired down the street into the crowd. By most accounts, there were two separate groups of shots separated by as much as 30 seconds. When the initial shots were fired, the group dispersed with Milton going to one side of the street and his uncle going to the other. After the initial rode of shooting had stopped, Milton's uncle attempted to cross the street prompting the defendant to fire again. The uncle was killed. The defendant was charged with seven counts and counsel moved to dismiss six counts prior to trial on the basis that there were not seven "separate independent acts" involved in the shooting. The motion was denied. Counsel also moved for a directed verdict on the basis of insufficient evidence at the end of the state's case, but did not make a specific objection on seven counts versus one. This motion was renewed at the end of the case. The jury convicted on five counts. Counsel's conduct was deficient in failing to move for a judgment of acquittal and prejudice established because the defendant was guilty of only two counts of

intimidation rather than five as the record supported only two "separate and distinct acts" based on the two separate groupings of shots.

***People v. Hall*, 991 N.Y.S.2d 114 (N.Y. App. Div. 2014)**. Counsel in robbery, drug, and resisting arrest case ineffective for failing to move to sever the robbery charge from the unrelated charges. The alleged robbery occurred over two months prior to the defendant's arrest at his mother's home where drugs were found and the resisting arrest charge arose. Counsel's conduct was deficient and prejudicial as "the jury could have inferred that the robbery at issue as committed for a drug-related purpose," which was improper.

***People v. Jian Long Shi*, 987 N.Y.S.2d 791 (N.Y. App. Div. 2014)**. Counsel was ineffective in endangering welfare of child case for failing to move *in limine* and failing to object to the prosecutor's improper cross-examination of the defendant about his illegal entry into the country. counsel's conduct was deficient and prejudicial where the case turned on the credibility of the defendant and the 11-year-old alleged victim.

***Burcham v. Franke*, 335 P.3d 298 (Or. Ct. App. 2014)**. Counsel ineffective in rape, sodomy, sexual abuse, and furnishing alcohol to a minor case for failing to challenge the state's interpretation of the mental incapacitation statute. The 16-year-old victim attended the birthday party of her friend's father, where she met the defendant, who was the friend's 48-year-old uncle. After the party, the defendant invited his niece and the victim to his house where he served them alcohol. The victim became intoxicated and was slurring her words and having trouble walking before she decided to go to bed. The defendant took her into a bedroom, laid her on the bed, and removed her pants and underwear. She attempted to stand but was too "severely intoxicated" to do so. The defendant performed oral sex on her and then attempted penile penetration of her vagina but she felt a sharp pain that "jolted her out of her 'extremely drunken state'" and she jumped up and ran out of the room screaming for her friend. The friend drove her back to the friend's house and the next day the friend's father took the girls to the police station to report the offenses. For three counts of the charges, the state was required to prove that the victim was "incapable of consent by reason of mental incapacitation." At the relevant time, "mentally incapacitated" required that the person was under the influence of an intoxicating substance "administered to the person without the consent of the person." Three other counts required a showing that the victim was "physically helpless" and the jury acquitted on those counts. The state's theory at trial on the "mental incapacitation" counts was that the victim was "legally unable to consent to drink alcohol" due to her age. Counsel was deficient in failing to challenge this theory or the jury instructions. As the post-conviction court held, the state's interpretation of the statute was "pure 'silliness.'" The statute clearly meant "factual consent" and said nothing about "legal consent." Moreover, challenging the state's interpretation could have been done simply in a motion for directed verdict or for a judgment of acquittal, which would have presented no risk before the jury. Prejudice also established as these three counts would have been dismissed or, at least, preserved for appeal where this Court would have reversed. The remaining convictions of two counts of sexual abuse in the second degree and furnishing alcohol to a minor were affirmed.

**Capital Case*

***Ex parte Cockrell*, 424 S.W.3d 543 (Tex. Crim. App. 2014)**. Counsel ineffective in aggravated sexual assault case for failing to seek an interpreter and other accommodations due to the defendant's deafness. The defendant used hearing aids, but basically could interpret what was said only by reading lips. Nonetheless, counsel did not seek an interpreter, even though he had to "yell" even when the defendant was testifying. Even that, the defendant had to ask clarification questions a number of times. Counsel's conduct was deficient in that the defendant was "deaf" and automatically entitled to an interpreter under the relevant state statutes. Prejudice established because the defendant could not understand a substantial portion of the trial proceedings and, therefore, could not adequately participate in his defense. The case against the defendant primarily consisted of the testimony of the alleged victim, who was the defendant's 12-year-old daughter, who had made admittedly false allegations of abuse before.

***State v. Hamilton*, 320 P.3d 142 (Wash. Ct. App. 2014)**. Counsel was ineffective in possession of methamphetamine case for failing to move to suppress the methamphetamine on the grounds that it was obtained through an unlawful search of the defendant's purse. The defendant had left her husband and their home for approximately 10 days. During her absence, the husband obtained a protective order against her. When she returned to the home, she left her purse on the kitchen counter and the husband observed drug paraphernalia in plain view in the purse and called the police. Officers arrived and told the husband they could not search the house but that he could bring items outside to show them. The husband brought out the purse and opened it so that the officers could see the drug paraphernalia. The officers then searched the purse and discovered a glass pipe that tested positive for methamphetamine. Counsel filed a motion to suppress but argued only that the search of the house was unlawful because the husband was acting as a police agent. Counsel's failure to move to suppress on the basis of the warrantless search of the purse was deficient and not based on any strategy. Prejudice established as the trial court likely would have suppressed the methamphetamine if the proper basis had been argued.

**2013:** ***Lamb v. State*, 124 So. 3d 953 (Fla. Ct. App. 2013)**. Counsel ineffective in armed robbery and false imprisonment case for failing to file a motion for new trial, based on the weight of the evidence. The charges arose from the armed robbery of the defendant's nephew and his girlfriend, who was also kidnaped in a car-jacking after the robbery. During trial, the nephew denied that the defendant was one of the masked perpetrators. The girlfriend, on the other hand, testified that one of the perpetrators was called "Chicken," which was the defendant's nickname. She also testified that the men never removed their masks, "but in a seeming contradiction," she also testified that she got a glimpse of their faces.According to police witnesses, the day following the crimes, she identified the defendant, who she knew, in a photo lineup. During trial, the girlfriend admitted picking the defendant in the photo lineup, but "she testified that she was not sure" who the perpetrators were and she could not identify the defendant as one of them. The defense moved for judgment of acquittal. During arguments, the parties agreed "that the entire case turned on" the girlfriend's identification of Lamb." The trial judge characterized it as "one of the weakest in my experience of trying these kinds of cases," but denied the motion, concluding "that there was identification sufficient to go to the jury." Following conviction, trial counsel filed a renewed motion for judgment of acquittal based on the sufficiency of the evidence. Counsel's conduct was deficient in failing to file a motion for new trial based on the weight of the evidence instead. Counsel testified that he did not file the motion as a

matter of strategy because (1) he did not think the judge would reconsider his trial rulings; and (2) success on the motion for acquittal "would end the case, whereas a motion for new trial would merely garner a new trial." This was "not reasonable trial strategy" because "trial counsel's testimony at the evidentiary hearing reflected his misunderstanding of the two motions."

> On the one hand, a motion for judgment of acquittal tests the sufficiency of the evidence; a trial court must determine "whether the evidence presented is legally adequate to permit a verdict." On the other hand, a motion for new trial tests the weight of the evidence; a trial court must weigh the evidence and determine credibility just as a juror is required to do. Trial counsel asserted that he forewent moving for a new trial because he did not think the judge would change his mind about rulings made during the trial. But his renewed motion for judgment of acquittal asked the judge to do precisely that in regard to the judge's previous ruling that the State's evidence was sufficient. A motion for new trial would have presented an entirely different question for the judge – based on the weight of the evidence, not its sufficiency.

Prejudice established. "Although the trial judge ultimately concluded that the [highly equivocal identification] testimony was legally sufficient, he struggled with that question, and he characterized the testimony as the weakest identification evidence he had ever seen."

***Laurito v. State*, 120 So. 3d 203 (Fla. Ct. App. 2013)**. Counsel was ineffective in aggravated battery and aggravated assault case for failing to file a motion to suppress the defendant's statements to police, which were made after the defendant unequivocally invoked his right to counsel after being given the Miranda warnings. While the State had no difficulty establishing that the crimes were committed when shots were fired from a vehicle in which Laurito was one of three passengers, prejudice was established because the State relied mainly on Laurito's admissions to prove that he was the shooter. Counsel's conduct was deficient because the defendant's immediate response after being read his rights was to ask: "Can I make a phone call so I can get a lawyer?" Counsel moved to suppress the statements as involuntary due to the coercive nature of the interrogation under the totality of the circumstances, but failed to assert invocation of the right to counsel. Counsel's conduct was deficient because "counsel missed or misunderstood the legal significance of [the] request to call a lawyer." Prejudice was established as the "confession would have been suppressed by the trial court if the issue had been raised or, absent a correct ruling at that point, could have been raised as an issue on appeal."

***People v. Miller*, 993 N.E.2d 988 (Ill. Ct. App. 2013)**. Counsel ineffective in possession of a stolen motor vehicle case for failing to move to suppress the defendant's admission made during custodial interrogation when no Miranda warnings had been given. An officer was attempting to stop the defendant for a traffic violation. After a high speed chase, the defendant crashed and then attempted to flee on foot. After he was detained at gun-point, the officer asked if he was fleeing because the car was stolen and the defendant said yes. Counsel's conduct was deficient as this was clearly custodial interrogation without the benefit of Miranda warnings. Prejudice also clear as the

remainder of the trial evidence were "not inconsistent with the defendant's explanation that defendant's employee purchased the vehicle for defendant from [the alleged victim's] husband."

***Pace v. State*, 981 N.E.2d 1253 (Ind. Ct. App. 2013)**. Counsel ineffective in drug and firearm case for failing to move to bifurcate the trial. The firearm charge was possession by a serious violent felon based on the defendant's prior conviction for felony dealing in cocaine. State law established more than a year before trial allowed for bifurcation so that the jury could first determine whether the defendant was guilty on the drug charge, so that the jury would not be aware at the time of the prior drug conviction. Counsel's conduct was deficient and prejudicial.

***State v. Brooks*, 305 P.3d 634 (Kan. 2013)**. Counsel ineffective in rape and aggravated criminal sodomy case for failing to seek a continuance to obtain evidence to rebut the alleged victim's testimony that the defendant had a unique identifying scar on his penis. Brooks immediately advised his counsel that he had no such scar and that he wanted to testify in rebuttal. Defense counsel advised Brooks against taking the stand and recommended finding another way to establish that Brooks did not have a scar on his penis, but defense counsel failed to follow through on obtaining any such impeachment testimony. Nonetheless, the jury found Brooks guilty of two counts but acquitted him of five counts. On appeal, Brooks submitted medical records from a prison physician who had examined Brooks' penis and detected no visible scars. The Court of Appeals found that counsel's conduct was deficient but found no prejudice. The only issue before the Supreme Court was whether prejudice was established. In finding no prejudice, the lower court questioned the weight that should have been given to the victim's testimony that she observed a scar on Brooks' penis when she allegedly saw it at least 4 years and perhaps 10 years prior to trial. The court found that her "credibility would likely have survived" any impeachment. The Supreme Court found error in the finding that the jury still would have found the alleged victim to be credible.

> In doing so, the panel glossed over the credibility issues arising from S.C.'s prior untruthful statements about her sexual activities with others and declared that "her overall credibility was anchored in her expressed anxiety in 'outing' her stepdad." Interestingly, the panel's credibility calculus did not include any reference to the jury's acquittal of Brooks on five of the seven counts upon which S.C. testified nor any rumination upon what inference might be drawn therefrom about the jury's view of S.C.'s credibility.
>
> Given the panel's stated reasons for finding no prejudice, we discern that it ran afoul of the oft-stated rule that an appellate court will not determine the credibility of witnesses or weigh conflicting evidence.

*Id*. at 640 (citation omitted). Prejudice was especially clear in light of the State's reliance on the alleged victim's testimony and the lack of rebuttal in closing argument: "You heard [S.C.] which is unrefuted describe Mr. Brooks' genitalia. How it was uncircumcised and how it had a small scar. Unrefuted. How would she know that?"

> Thus, not only was Brooks denied the opportunity to attack S.C.'s credibility with her allegedly false testimony, but the failure to cross-examine S.C. permitted the State

> to bolster the credibility of its complaining witness as being unrefuted. Then, having established the scar testimony as being true because it was unrefuted, the State used the substance of the statement to suggest that the abuse must have occurred because that was the only way that S.C. would have seen the scar on Brooks' penis. That use of the scar testimony would suggest that the prosecutor considered it to be a weightier part of the State's case than did the panel.

*Id*. at 640-41.

***State v. Tellegen*, 314 P.3d 902 (Mont. 2013)**. Trial counsel was ineffective in theft and accountability to burglary case for failing to object to the theft conviction, which was a lesser included offense of the burglary.

***People v. Oliveras*, 993 N.E.2d 1241 (N.Y. 2013) (*affirming* 936 N.Y.S.2d 12 (N.Y. App. Div. 2011))**. Counsel ineffective in murder case for failing to adequately and timely move to suppress the defendant's statements and to present psychiatric evidence challenging admission of the statements. While counsel did file a timely pretrial motion, it was denied with the trial court noting that counsel failed to produce the defendant's psychiatric records. Months later, trial counsel filed an untimely motion to present psychiatric evidence, which was denied. Counsel's conduct was deficient. The defendant confessed after being interrogated for over six and a half hours. The detectives were aware beforehand from the defendant's mother that he had been hospitalized for mental illness as a child. A pretrial psychiatric examination, conducted on motion of defense counsel, revealed that the defendant has a learning disability and "certain mental health issues," including auditory hallucinations. When counsel moved to suppress the confessions, he did not supply these records to the court. Counsel did not have a valid strategy: "It simply cannot be said that a total failure to investigate the facts of a case, or review pertinent records, constitutes a trial strategy resulting in meaningful representation." Prejudice was also clear as "no other evidence directly connected defendant with the murder. The 911 caller's description of the perpetrator did not match defendant's ethnicity or attire."

**2012:** ***People v. Wright*, 971 N.E.2d 549 (Ill. Ct. App. 2012)**. Counsel in aggravated criminal sexual assault case ineffective for failing, in the course of a motion to exclude DNA evidence, to inform the trial court of the results of a search of the Illinois database based on 9-loci. The prosecution was based almost entirely on "a cold-case DNA match" eight years after the crime. DNA was recovered from the victim's underwear and rectal swabs. The underwear was tested using the "standard" 13 loci evaluation. There was not match, but the defendant could not be excluded. The rectal swabs were examined using only 9 loci and the examiner reported "a match" to defendant. Defense counsel moved to exclude the DNA evidence done with only 9 loci. As an alternative, citing an Arizona study, the defense asked that the court order the State to determine how many 9 loci "matches there are in [the State's] convicted database." After the motions were denied, the defense proceeded with a consent defense. The court held that the trial court erred in failing to order a DNA database search and in barring the defense from cross-examining the State's expert about the Arizona study. Likewise, the court found that counsel was ineffective in litigating the DNA suppression motion. "[C]ounsel was asking the trial court to order a database search, that had already been done, and that had been done

at the request of the same counsel." Not only had the search been done, but "the state's own director of that database had stated [in a deposition in the earlier case] that it was 'misleading' to call a nine-loci comparison 'a match.'" The database search "had revealed that close to 2000 individuals had matched at 9 loci." If the court had known this, there is a reasonable probability the court would have granted the defense's motion to exclude the 9-loci analysis."

***Pryor v. State*, 973 N.E.2d 629 (Ind. Ct. App. 2012)**. Counsel ineffective in resisting law enforcement case for failing to timely file demand for jury trial. Under state law, the demand was required to be filed at least ten days prior to the trial date, but the motion was filed only six days prior to the scheduled trial date and was denied due to untimeliness. Prejudice established.

***State v. Madsen*, 813 N.W.2d 714 (Iowa 2012)**. Counsel ineffective in sexual abuse case for failing to move to suppress the defendant's statements, which were made only after impermissible leniency promises to him. The defendant was charged with molesting neighborhood boys. During his interrogation, police implied that he would be released and no information would be provided to the news or his employer if came "clean on everything." Counsel's conduct was deficient and prejudicial because under the state's "common law evidentiary test," the confession was inadmissible because it was obtained while the defendant was "influenced by any threat or promise." Here, the defendant was threatened with an adverse newspaper story and promised a quick wrap up and release if he confessed.

***Ennenga v. State*, 812 N.W.2d 696 (Iowa 2012)**. Counsel ineffective in eluding officer and drug possession case for failing to move to dismiss the state's untimely trial information. A state rule required dismissal "if an indictment or trial information is not 'found' within forty-five days of the defendant's arrest, unless the State can show good cause for its failure." Here, the trial court timely signed a trial information, but the information was not filed with the clerk of court until 56 days after arrest. Counsel's conduct was deficient in failing to object. No showing of prejudice was required under the state rule. Thus, the charges would have been dismissed if counsel had moved to dismiss.

***People v. Delgado*, 956 N.Y.S.2d 579 (N.Y. App. Div. 2012)**. Counsel ineffective in burglary trial for failing to request a pretrial hearing to limit the scope of the prosecution's cross of the defendant concerning his prior conduct. While evidence was properly admitted concerning the defendant's prior burglary convictions, which were relevant to motive, counsel failed to object to cross of the defendant concerning the underlying facts of the prior burglaries, which were similar to the charged crime.

***State v. Canty*, 736 S.E.2d 532 (N.C. Ct. App. 2012)**. Counsel ineffective in firearms case for failing to move to suppress the evidence obtained during a traffic stop. The defendant was a passenger in the vehicle but had standing to challenge the stop, which was initiated on the basis of the driver allegedly crossing the fog line, nervousness and failure to make eye contact when the officers drove up, and slowed speed. Counsel's conduct was deficient as these factors fall short of reasonable suspicion. The police video showed that the fog line was not crossed and, thus, there was no traffic violation before the officer initiated the stop. Counsel knew this. The officer's testimony was

questionable in that it was "hard to believe" that the officer can determine nervousness while driving beside the car. Likewise, the "slowed speed" did not amount to anything as the vehicle only slowed from 65 mph to 59 mph, which is hardly significant. Even if the officer's testimony was accepted as true, "[n]ervousness, slowing down, and not making eye contact is nothing unusual when passing law enforcement stationed on the side of the highway." Prejudice established as the weapons recovered in the search following the illegal stop was the only evidence against the defendant.

**2011:** ***Gordon v. State*, 126 So.3d 292 (Fla. Ct. App. 2011)**. Counsel ineffective in aggravated battery case for failing to move for a judgment of acquittal as the evidence was insufficient as a matter of law to establish the element of great bodily harm. The defendant struck the victim "one time with a belt, which caused bruises that healed without any medical treatment, and left neither scarring nor any other lasting effects."

***State v. Brubaker*, 805 N.W.2d 164 (Iowa 2011)**. Counsel ineffective in unlawful possession of a prescription drug case for failing to specify, as a ground for directed verdict, the insufficiency of evidence to support the charge. Syringes, a pipe, and an unlabeled prescription pill bottle with 51 yellow pills were found in the defendant's car. A criminalist testified, after simply by comparing the pills with a picture, that the pills were "consistent in appearance" with Clonazepam, a controlled substance for which a prescription is required. "Just because a pill looks like Clonazepam does not mean it is Clonazepam." Indeed, the court found that the pills were similar in size, shape, and consistency to aspirin and a number of other over-the-counter drugs. Likewise, the fact that the pills were in an unlabeled prescription bottle and found with syringes and a pipe was insufficient to establish illegal drug use as the State presented no evidence that Clonazepam could be smoked or injected into the body. While counsel made a broad motion for directed verdict, counsel's conduct was deficient in failing to move for a directed verdict on these specific grounds. Prejudice was clear as the trial court would have sustained a specific motion.

***State v. Brown*, 253 P.3d 859 (Mont. 2011)**. Counsel ineffective in DUI and other misdemeanor case for failing to move for dismissal due to untimely scheduling of trial following initial mistrial. Under state law, the state was allowed six months after a mistrial on misdemeanor charges to bring case to retrial. While counsel did not object initially when the case was scheduled outside that window, there was no waiver as the defendant had no duty to bring himself to trial. Counsel's conduct was deficient, however, in failing to move to dismiss the charges after the six month period. There was "extreme prejudice"–"a conviction instead of a dismissal."

***State v. Barlow*, 17 A.3d 843 (N.J. Sup. Ct. App. Div. 2011)**. Counsel ineffective for failing to assist the defendant in his motion to withdraw a guilty plea to robbery and, thereby, depriving him of counsel at a crucial stage of the proceedings. A week after the plea hearing the defendant wrote to counsel seeking to withdraw plea. Counsel took no action, but the judge, who also received a letter from the defendant held a hearing. During the hearing, counsel did not pursue the motion for the defendant and, in fact, made statements damaging to his motion and apparently provided his letter to her to the court (which also included damaging statements). The court's decisions were undoubtedly colored by these facts. New motion hearing with new counsel and new judge ordered.

***Smith v. State*, 357 S.W.3d 322 (Tenn. 2011)** (sentenced in 1995). Counsel ineffective in capital murder case for failing to adequately investigate and present evidence supporting his motion to recuse the sentencing judge due to bias. The defendant was initially arrested in 1984 and convicted and sentenced to death in 1985. He was convicted again and sentenced to death in a 1989 retrial. Following vacation of his death sentence, he was again sentenced to death in a 1995 retrial on sentence. The judge on the initial two trials had retired so a new judge was assigned for the third go-round. He sua sponte changed venue and denied a defense motion to recuse himself on the grounds that he had been the prosecuting attorney on a prior conviction of robbery and DUI. Counsel appealed both issues and obtained reversal of the change of venue order but lost on the denial of recusal issue. Counsel's conduct was deficient in ailing to adequately investigate and present the facts in support of the recusal motion. If counsel had performed adequately the record would have shown that, in 1985 and 1985 while the capital charges were initially pending, the judge was a prosecutor in a different county on the robbery and DUI charges that were pending at the same time. The judge/prosecutor was communicating and cooperating with the capital prosecutor through correspondence and phone calls. Following the robbery and DUI convictions, the judge/prosecutor provided the capital prosecutor with certified copies of the convictions, which were introduced in the capital sentencing proceedings to support the sole aggravating factor. In sentencing on the robbery and DUI case, the judge/prosecutor sought unsuccessfully to elicit testimony of the capital murder conviction. He also sought a sentence consecutive to the murder sentences (one life and one death) because Tennessee had not actually carried out a death sentence. In 1989, which the defendant was pending new trial on the capital murder case, he was charged with introducing contraband into the county jail. The judge/prosecutor presided over this contraband case "less than one year after he had been actively defending" the robbery/DUI convictions. He sentenced the defendant as a "persistent offender based in part on the convictions [he] had obtained as a prosecutor." Then came the capital resentencing in 1995 with the judge/prosecutor assigned. The sole aggravating factor was that the defendant had been convicted of one or more felonies involving the use or threat of violence. One of the convictions used to establish this aggravator was prosecuted by the judge. After the state's case, the judge held that the defendant could waive presentation of mitigation and final argument, and "approved the death penalty as thirteenth juror." "The State does not take issue with th[e] holding" that counsel's conduct was deficient. The issue is one of prejudice. The court found that "the roles of prosecutor Brown and Judge Brown were too closely connected," such that "a person of ordinary prudence would have a reasonable basis for questioning Judge Brown's impartiality." Under these circumstances, no evidence of actual bias was required.

> The justice meted out in this case did not "satisfy the appearance of justice." The potential injury to the judicial process due to the appearance of impropriety and unfair lack of impartiality by a judge imposing a death sentence is too great to allow the sentence of death to stand.

*Id*. at 345 (quoting *Offutt v. United States*, 348 U.S. 11, 13 (1954)).

**Capital Case*

***Ken v. State*, 267 P.3d 567 (Wyo. 2011)**. Counsel ineffective in attempted murder case for failing to timely file a motion for new trial. Prejudice established as the trial court would have granted the motion.

**2010:** ***Suluki v. State*, 691 S.E.2d 622 (Ga. Ct. App. 2010)**. Counsel ineffective in felon in possession of weapon case for failing to move to suppress the gun. The police went to a hotel with arrest warrants to arrest two murder suspects and the defendant was in the company of one of them. When he arrived at his room, officers surprised him from within, took him down to the floor, cuffed him, and questioned him about a murder before the gun was located in the back of his waistband. Counsel was ineffective for failing to move to suppress the evidence.

***Lewis v. State*, 929 N.E.2d 261 (Ind. Ct. App. 2010)**. Counsel ineffective for failing to timely file request for jury trial in misdemeanor battery case. At the defendant's initial hearing, he informed the court that he wanted a jury trial. The trial court's "Case Summary" clearly indicated that fact. Counsel was appointed, thereafter, but counsel should have known from the court paperwork of the defendant's desires and should have timely filed the motion instead of waiting until the day of the scheduled trial. Because the motion had not been filed 10 days prior to trial, as required under the rules, the motion was denied. Because counsel's error deprived the defendant of his constitutional right to "trial by jury," prejudice was presumed.

**2009:** ***Thrasher v. State*, 684 S.E.2d 318 (Ga. Ct. App. 2009)**. Counsel ineffective in driving under the influence of methamphetamine case for failing to move to suppress the chemical test of the defendant's blood sample because the defendant was not read his implied consent rights at the time of his arrest at the scene of the accident as required by state law.

***Frazier v. State*, 680 S.E.2d 553 (Ga. Ct. App. 2009)**. Counsel ineffective in aggravated assault case for waiving any objection to the admission of the defendant's videotaped statement taken in violation of *Miranda*. The defendant was charged with shooting at his business partner, with whom he had a pending lawsuit, from outside the business. After his arrest, while in custody, the defendant repeatedly stated that he did not want to talk and asked for a lawyer. The police ignored him though and got him to sign a *Miranda* waiver and interrogated him. Counsel specifically waived a pretrial hearing on admissibility and did not object when the state played the videotaped statement in its case-in-chief. On the videotape, the defendant appeared intoxicated and repeatedly used profanity. He initially denied being at the scene but then admitted that he "probably" shot at the building. He repeatedly denied shooting at the victim and said he would be dead if he had. He repeatedly asked if he was dead. The defendant testified during the trial. He admitted firing his gun but testified that he only fired into the air as a warning to possible intruders because he heard "a crash." Shell casings from his gun were found at the scene. Bullets recovered from the building were similar to his gun, but could not be specifically linked to his gun. Counsel testified that he did not object to admission of the videotaped statement because he knew the defendant planned to testify and counsel assumed the entire statement would be admissible for impeachment purposes. Counsel's conduct was deficient because the statement "was simply not admissible during the prosecution's case-in-chief." Prejudice found because "the jury's verdict likely turned on the credibility of the witnesses," including the defendant.

**Capital Case*

"Given the inflammatory nature of [the videotaped] statement, we cannot conclude that its admission did not affect his credibility; certainly, admission of the statement undermines our confidence in the verdict."

***State v. Veney*, 977 A.2d 570 (N.J. Super. Ct. App. Div. 2009)**. Counsel ineffective in possession of weapon case for failing to move for dismissal of charge prior to plea because the state had previously tried the defendant on another charge arising from the same core set of facts and was, thus, barred from prosecuting this charge, pursuant to the state mandatory joinder rule.

***State v. Sutherby*, 204 P.3d 916 (Wash. 2009)**. Counsel ineffective in failing to move to sever charges for possession of child pornography from charges for child rape and molestation. Counsel's conduct was deficient and not based on legitimate strategic or tactical reasons. "There is no indication of any possible advantage to the defendant in having a joint trial on all charges, given the State's announced intent to use the pornography counts to show [the defendant's] predisposition to molest children. Even the trial judge appeared to expect a severance motion because he asked at a pretrial hearing if severance was a possibility." Prejudice established because "the trial judge likely would have granted a severance under the relevant considerations, with the result that the outcome at a separate trial on child rape and molestation charges would likely have been different." While the state's evidence was strong on the pornography charges, it was weaker on the rape and molestation charges. Thus, the state consistently argued that the presence of child pornography on the defendant's computers proved he sexually abused his granddaughter and there was no limiting instruction directing the jury that the evidence of one crime could not be used to decide guilt for a separate crime. If the charges had been severed, it is "highly likely" that the pornography evidence would have been excluded in a separate trial for rape and molestation.

**2008:** ***Sparkman v. State*, 281 S.W.3d 277 (Ark. 2008)**. Counsel ineffective in rape of child case for failing to move to suppress the defendant's custodial statement taken after the appointment of counsel and, thus, in violation of the Sixth Amendment right to counsel. Counsel's conduct was deficient in that counsel moved to suppress the statement for other reasons but not on this one which was valid and would have been granted. Prejudice was clear because the only other evidence was a taped interview of the child. On direct appeal, the defendant's confrontation issue was rejected because the tape was merely cumulative of the defendant's confession and, therefore, harmless.

***People v. Givens*, 892 N.E.2d 1098 (Ill. App. Ct. 2008)**. Counsel in drug case ineffective in withdrawing motion to quash arrest and suppress evidence motion because the police officers' warrantless entry into the bedroom occupied by the defendant as an overnight guest of the apartment holder who consented to search of the apartment was not justified by any of the factors supporting a finding of exigency and the defendant had a reasonable expectation of privacy in the bedroom. Prejudice found because "the 21 bags of drugs would not have been admitted in evidence."

**2007:** ***McNabb v. State*, 967 So. 2d 1086 (Fla. Dist. Ct. App. 2007)**. Counsel ineffective in case involving two separate but similar drug offenses for failing to secure a severance of the charges.

**Capital Case*

***Spioch v. State*, 954 So. 2d 47 (Fla. Dist. Ct. App. 2007)**. Counsel ineffective in case of four counts of sexual activity with a minor in a custodial relationship, one count of attempt, and 23 counts of lewd and lascivious assault on a minor for failing to adequately move for a judgment of acquittal on 13 counts of lewd and lascivious assault. While counsel did move for acquittal, counsel's conduct was deficient because "his motion was simply a bare-bones motion" that "did not sufficiently set forth the grounds upon which relief was requested." Prejudice established because an adequate motion would have led to seven counts being dismissed for lack of evidence to support the conviction, one count being dismissed because the charging document did not allege sufficient elements to define a crime, and five counts being dismissed on double jeopardy grounds because these acts occurred when the sexual activity counts occurred. Acquittal entered on these 13 grounds and remanded for resentencing.

***Maymon v. State*, 870 N.E.2d 523, *amended on rehearing*, 875 N.E.2d 375 (Ind. Ct. App. 2007)**. Counsel ineffective in burglary case for failing to move for severance of charges. The defendant was charged with four burglaries with four separate victims over a period of three months. Two of the burglaries involved thefts while two did not. Counsel's conduct was deficient because, under state law, the burglaries were not connected together in a single scheme or plan and the defendant was entitled to severance. Prejudice found because the evidence of the two burglaries where thefts occurred would not be admissible at separate trials for the two burglaries where thefts did not occur. Those convictions remanded for new trial on rehearing.

***Alexandre v. State*, 927 A.2d 1155 (Me. 2007)**. Counsel ineffective in manslaughter and kidnaping case for failing to move to dismiss the kidnaping charge based on the statute of limitations. The limitations period was five years, but was extended for six years due to the defendant's absence from the state. Nonetheless, the indictment was not returned until more than 12 years after the date of the alleged offense. Counsel's conduct was deficient and was not explained by counsel's "reason" for not filing the motion, which was that he thought the defendant would be acquitted on that charge. Prejudice found even though the defendant's manslaughter conviction and length of sentence were not affected.

> [T]he simple reality that one or two or more simultaneous criminal convictions may result in a longer sentence of incarceration for a defendant's future convictions, create liability under recidivist statutes, impose a stigma, be used for impeachment, or "act as an impediment to clemency, pardon, more lenient conditions of imprisonment, and professional licensing. This is certainly true for a conviction for a crime as serious and socially abhorrent as kidnapping.

*Id*. at 1168.

***Gant v. State*, 211 S.W.3d 655 (Mo. Ct. App. 2007)**. Counsel ineffective in second-degree trafficking case by eliciting–during cross-examination of the state's witness during the suppression hearing–the evidence that established probable cause for arrest. Drugs and a weapon had been found in a hotel room registered to another person and officers had that man's photo ID. Officers waited nearby and arrested the defendant, who looked nothing like the man in the ID, as he approached the room with a key in his hand. This was all that the state's evidence in the suppression hearing

established, which alone was insufficient to establish probable cause. On cross-examination, however, defense counsel elicited the testimony that established probable cause for the arrest. Specifically, a motel employee connected a man fitting the defendant's description to the room and recognized his car and police informants described a man fitting the defendant's description as being connected with drug activity in the area. "Trial counsel's elicitation of evidence that supported the State's case constitutes conduct falling below that of a reasonably competent and diligent attorney." *Id*. at 660. Prejudice found because the defendant was not charged with the drugs or weapon in the room but was instead charged with possession of drugs found in his pocket in a search incident to arrest. This evidence likely would have been suppressed if counsel had performed adequately. New trial granted.

***Yecovenko v. State*, 173 P.3d 684 (Mont. 2007)**. Trial and appellate counsel ineffective in sexual abuse and sexual assault case for failing to adequately assert a motion for severance. The sexual assault charges alleged offenses involving the daughters of the defendant's former girlfriend. The sexual abuse charges were based on ten unrelated child pornography pictures. Trial counsel moved to sever but did not provide any specific detail to allege prejudice even after the state noted the deficiency and the court denied on this basis. While appellate counsel asserted error in the denial of the motion, counsel did not assert the ineffectiveness of trial counsel as a basis. Thus, the appellate court also denied on a procedural basis. Trial and appellate counsel's conduct was deficient. Specifically, with respect to appellate counsel: "Presenting new arguments on appeal without justification for doing so, in light of the volume of cases holding that such arguments will not be entertained, falls short of reasonable professional assistance." Prejudice was found with respect to the sexual assault conviction because the unrelated pictures "were, quite simply, horrific," such that the trial court had cleared the courtroom and allowed each image to be displayed to the jury for only five seconds.

***State v. Miner*, 733 N.W.2d 891 (Neb. 2007)**. Counsel ineffective in theft by unlawful taking case for failing to assert a double jeopardy bar to prosecution. The defendant was tried and convicted in Holt County for the theft of 62 steers from a Livestock Market in Holt County. Some of these steers (26 to be precise) were sold through a livestock market in Nance County where the defendant had been tried and convicted of theft by receiving stolen property prior to the case in Holt County coming to trial. Counsel's conduct was deficient because "counsel was charged with knowledge of the legal principles with respect to consolidation of theft offenses in Nebraska," which precluding two theft charges based on "'one scheme or course of conduct from one person' on the same day." Counsel's conduct was not explained by strategy. Prejudice found because the double defense was meritorious.

****State v. Brown*, 873 N.E.2d 858 (Ohio 2007)**. Counsel ineffective in capital trial for failing to request a formal ruling on whether the defendant and the state's primary witness were actually married. Counsel's conduct was deficient because there was a spousal privilege under state law and evidence from a marriage license and witnesses that the defendant was married to the witness. Although the witness denied it at trial, she had made contradictory pretrial statements. If counsel had requested a pretrial ruling and the court found that there was a marriage, state law required the court to instruct the witness on the spousal competency and make a finding on the record that she

voluntarily chose to testify. Prejudice found because state law holds that failure to do so is reversible plain error. In addition, this was the only eyewitness testimony and the defendant was eligible for the death penalty only because he was convicted of aggravated murder based on a finding of prior calculation and design. Even if the only difference was in the "final sentence, in this case, that difference is monumental–it is the difference between life and death." *Id*. at 870. The court also found a Brady violation and considered cumulative prejudice from both because "it might be possible to conclude that [the defendant] was not prejudiced" on the individual claims. Reversal required.

***West v. Director of Dept. of Corrections*, 639 S.E.2d 190 (Va. 2007)**. Counsel ineffective in aggravated involuntary manslaughter, involuntary manslaughter, and DUI case for failing to assert a double jeopardy objection to convictions both for statutory offense of aggravated involuntary manslaughter and common law offence of involuntary manslaughter. While counsel objected to sentencing on both offenses he did not state that his argument rested on constitutional or double jeopardy grounds. Counsel's conduct was deficient because the common law offense does not require proof of a fact different from those required for conviction of the statutory offense. Even though the trial court gave concurrent sentences, prejudice was found because the defendant was convicted of two felonies and given two punishments. The common law conviction and sentence were set aside.

**2006:** ***People v. Boyd*, 845 N.E.2d 921 (Ill. App. Ct. 2006)**. Counsel ineffective in multiple charge case for failing to invoke the defendant's statutory speedy-trial rights with respect to home invasion charges. The defendant was entitled to trial within 120 days from the date he was taken into custody unless his own acts occasioned delay. Here, although all of the charges arose from a single incident, the state filed charges against the defendant on three different dates. While the defendant had agreed to a continuance on initial charges, the home invasion charges were filed after the defendant agreed to continue the initial charges. The speedy-trial clock expired on the home invasion charges prior to trial, but counsel failed to request the discharge.

***Morris v. State*, 639 S.E.2d 53 (S.C. 2006)**. Counsel ineffective in assault and battery with intent to kill trial for failing to request a continuance, which resulted in the defendant being tried in absentia. The defendant showed up on the scheduled trial date, signed a sentencing sheet in anticipation of entering a guilty plea to the lesser-included charge of assault and battery of a high and aggravated nature, and then left the courthouse. He could not be located when his case was called so he was tried in absentia. Counsel's conduct was deficient because she objected to trial in absentia, but failed to move for a continuance in order to enter the guilty plea agreed to with the State. Prejudice found because the refusal of a continuance would have amounted to an abuse of discretion where ABHAN, the crime the defendant agreed to plead guilty too, is a common law misdemeanor punishable by up to ten years in prison, while ABIK, for which he was tried and convicted, is a violent crime felony punishable by up to twenty years in prison.

***Compton v. State*, 202 S.W.3d 416 (Tex. App. 2006)**. Counsel ineffective in aggravated perjury case for failing to move to dismiss the indictment even though the indictment was filed 75 days after the

expiration of the two year statute of limitations period. Counsel's conduct was deficient because he assumed the three year period for all other felonies applied and "[a] modest amount of research . . . would have disclosed an uncontradicted line of recent cases holding that aggravated perjury has a two year limitation period." "Without a firm command of the law governing the case, a lawyer cannot render effective assistance to the defendant." Prejudice found because "undeniable" since the motion to dismiss had merit.

***State v. Perez-Avila*, 131 P.3d 864 (Utah Ct. App. 2006)**. Counsel ineffective in DUI and felony automobile homicide case for failing to move to consolidate the charges because under state law the DUI was a lesser included offense of the felony automobile homicide.

***State v. Horton*, 146 P.3d 1227 (Wash. Ct. App. 2006)**. Counsel ineffective in possession with intent to manufacture and possession of drugs case for failing to move to suppress evidence from a pat-down search. The officer stopped a vehicle for traffic violations and observed materials in the back seat, which led to a valid search warrant for the car. Prior to obtaining the warrant, the officer performed a pat-down search of the defendant, who was a passenger in the car, and found a cigarette pack with a small baggie of methamphetamine inside. Counsel's conduct was deficient because counsel moved to suppress the evidence due to a pretextual stop but failed to move to suppress on the basis that the pat-down was an illegal search. A valid pat-down search is limited to objects that might be used as weapons, which would not include the cigarette pack or its contents or items subsequently found in the defendants pockets, which included a pill bottle containing ephedrine and a digital scale. Prejudice found.

***State v. Meckelson*, 135 P.3d 991 (Wash. Ct. App. 2006)**. Counsel ineffective in drug case for failing to move to suppress evidence on the basis that the officer's traffic stop was pretextual. While the officer stopped the defendant after the defendant made a right turn without signaling, the officer had begun following the defendant's car for the legally insufficient reason that the defendant had given the officer a "deer-in-the-headlight" look. Counsel's conduct was deficient because it is not enough for the state to show that there was a traffic violation, but rather the question is whether the traffic violation was the real reason for the stop. Prejudice found because there was a reasonable probability the motion to suppress would have been granted.

**2005:** ***Thompson v. Commissioner of Correction*, 880 A.2d 965 (Conn. App. Ct. 2005)**. Counsel ineffective for failing to file a motion to dismiss a count of failure to appear because of the delay between the issuance and the execution of the warrant such that the statute of limitations had expired. The defendant was charged with various sexual assault charges in addition to two charges of failure to appear for earlier scheduled court dates. Prejudice found because there is a reasonable probability that the charge would have been dismissed by the trial court because the defendant lived in state the whole time and had been arrested 15 times since the warrant for failure to appear had issued and each time provided his correct address and driver's license number.

***People v. Hernandez*, 840 N.E.2d 1254 (Ill. App. Ct. 2005)**. Counsel ineffective in murder case for failing to move to suppress the defendants videotaped statement to an assistant prosecutor, which

clearly revealed that the defendant had invoked his right to silence in a clear and unequivocal fashion. Nonetheless, the prosecutor continued the interrogation. Counsel moved to suppress the statement on other grounds, but not this ground and this failure was not explained by strategy. Prejudice found because the statement would have been excluded and the state's case was largely based just on this statement because there was no eyewitness testimony or physical evidence.

***State v. Becker*, 110 P.3d 1 (Mont. 2005)**. Counsel ineffective in drug possession and drug manufacture case for failing to move to dismiss the possession charge as a violation of double jeopardy under the state constitution and statutes. Because the state could not prove manufacture of drugs without first proving possession, state law prohibited conviction on both because the possession was a lesser included offense of the manufacturing charge. Possession charge dismissed and case remanded for resentencing.

***People v. Turner*, 840 N.E.2d 123 (N.Y. 2005)**. Trial and appellate counsel ineffective in manslaughter case for failing to assert a statute of limitations defense. The defendant was arrested 16 years after the crime and charged with second degree murder, which has no statute of limitations. During trial, the prosecutor requested an instruction on the lesser included offense of manslaughter. Counsel objected only on the basis of not offering the jury a compromise. The jury convicted only on manslaughter, which had a five year limitations period. Although the statute allows some tolling, the maximum period for tolling is an additional five years. Trial and appellate counsel's conduct was deficient because there was case law from 1914 supporting the argument, which was old but still valid. In addition, while there was some contrary precedent and the law may not have been definitively settled at the time of trial, "[a] reasonable defense lawyer at the time of defendant's trial might have doubted that the statute of limitations argument was a clear winner–but no reasonable defense lawyer could have found it so weak as to be not worth raising." Trial counsel should have asserted the issue. Appellate counsel should have asserted the ineffectiveness of trial counsel on this point.

***Commonwealth v. McClellan*, 887 A.2d 291 (Pa. Super. Ct. 2005)**. Counsel ineffective in third degree murder and conspiracy case for failing to provide, in a timely manner, the identity and opinion of the defense expert, which resulted in the exclusion of the expert's testimony. The defendant's child died only about 15 minutes after the defendant returned from a convenience store where she was caught on the surveillance tape. When she returned home, she and her boyfriend were alone with baby for a few minutes before a friend entered and found the defendant with the child saying something was wrong with him. Paramedics were called, but the child died from extensive, recently inflicted injuries. Appellant and her boyfriend were charged. From the beginning, counsel discussed the need to secure an expert witness is forensic pathology to understand the scientific principles involved and present testimony concerning the timing of the injuries. Counsel initially retained a different expert and fought the court's orders for disclosure before ultimately disclosing this expert's report and allowing a deposition. Even prior to his deposition, counsel had retained a second expert, however, but counsel never disclosed this information until shortly before the conclusion of the trial. The trial court excluded this expert's testimony because of the untimely disclosure. Counsel expressed no strategy for the untimely disclosure. Counsel simply did not expect that the court would exclude the testimony. Counsel's conduct was deficient because

"counsel were or should have been aware the trial court required disclosure of their experts' opinions and reports, based in particular on their previous experience" with their first expert. "[C]ounsel's actions exhibited either a lack of knowledge of the Rules of Criminal Procedure, constituting incomplete investigation into the law, or a deliberate attempt to frustrate the Commonwealth's right to learn of the witness, constituting a violation of both the Rules of Professional Conduct and the ABA Standards." Prejudice found because this expert would have testified that, in his opinion, the child's injuries were inflicted during the time period when the defendant was clearly away from home.

**2004:** ***United States v. Little*, 851 A.2d 1280 (D.C. 2004)**. Counsel ineffective in murder case for failing to timely move to suppress the defendant's unwarned custodial statement. Counsel's conduct was deficient and prejudicial because the defendant was in custody at the time of his written confession, but he had not been given the Miranda warnings. Thus, the statement should have been suppressed. Although counsel asserted a weak strategic reason and that there was no merit to the motion, counsel had made a motion, during the trial, to suppress the statement, which was denied as untimely. If counsel had adequately investigated, counsel would have also been aware that the issue had merit. There was also a reasonable probability of a different outcome at trial if the statement had been suppressed.

***Bruton v. State*, 875 So. 2d 1255 (Fla. Dist. Ct. App. 2004)**. Counsel ineffective in exploitation of an elderly person and third degree grand theft case for failing to move to dismiss the grand theft charge as a lesser included offense. The basic facts were that the defendant wore a nurse's uniform in a hospital, pretending to be a care giver, and stole the victim's diamond ring. Because the two crimes involved one act of taking the same property, convictions on both counts violated double jeopardy. Even though the precedent for this ruling had not been decided at the time of trial, "this is an issue that trial counsel should have recognized."

***Collier v. State*, 598 S.E.2d 373 (Ga. Ct. App. 2004), *aff'd on other grounds*, 612 S.E.2d 281 (Ga. 2005)**. Counsel ineffective in homicide by vehicle case for failing to move to suppress blood and urine samples taken from the defendant. The defendant ran a red light and collided with another car, killing two people. The defendant refused to consent to blood and urine tests, but police threatened to obtain a search warrant and to forcibly use a catheter to obtain the samples if he did not consent. In the face of the threat, the defendant consented. Counsel's conduct was deficient because the consequences of refusing under state law did not include the possibility of a search warrant and forcible testing. The police, thus, misled the defendant and his consent was coerced and invalid. Prejudice found because the admission of the blood and urine results showing methamphetamine and amphetamine unquestionably harmed the defense.

***Vann v. State*, 596 S.E.2d 722 (Ga. Ct. App. 2004)**. Counsel ineffective in robbery and assault case for failing to move to sever the charge of possession of a firearm by a convicted felon. The evidence against the defendant for robbery and assault was based on shaky eyewitness testimony and a codefendant's statement. Because of the weapons charge, the defendant's prior conviction for receiving stolen property was admitted in evidence. Counsel did not move for severance because counsel wanted the jury to know about the prior conviction rather that wondering whether the defendant had prior convictions. Counsel's conduct was deficient because "counsel misunderstood

the law concerning admission of bad character evidence." When the State introduced the prior conviction, the defendant's character was undoubtedly placed in evidence, even though the prior conviction was unrelated to the charges for which he was being tried. Prejudice found because even though the prior conviction was admitted only through certified documents referred to only once in the state's closing argument, trial counsel did not request a charge that the jury limit its consideration of the prior conviction to the charges of possession of a firearm by a convicted felon. Thus, the jurors were free to consider this evidence with respect to character and credibility when the evidence against the defendant was otherwise "far from overwhelming."

***People v. Miller*, 806 N.E.2d 759 (Ill. App. Ct. 2004)**. Counsel ineffective in drug possession with intent to deliver plea case for failing to challenge third-party consent to search the defendant's zipped duffle bag where the drugs were found. Counsel moved to suppress the evidence, which was located in a home shared with the third-party in a locked storage cabinet containing some of the third-party's property but for which only the defendant had keys. The third-party consented to police opening the cabinet with a crowbar and drugs were found inside. The motion was denied, without any evidence that the drugs were actually in a zipped duffle bag, which the third-party informed police belonged to the defendant, but the police searched it anyway and found the drugs. Following the denial of the suppression motion, the defendant plead guilty. Counsel's conduct was deficient in failing to present evidence of the zipped duffle bag. Counsel did not do so only because counsel's "mistake of law" in believing it was immaterial since the police had consent to open the storage cabinet. Prejudice found because, but for counsel's errors, the defendant would not have pleaded guilty and would have insisted on going to trial.

***Firestone v. State*, 83 P.3d 279 (Nev. 2004)**. Trial and appellate counsel ineffective in leaving the scene of an accident case for failing to challenge multiple convictions arising from one accident involving three victims. State statutes were clear that, "Since there was only accident, and one 'leaving,' the statute allows only one charge of leaving the scene of an accident, regardless of the number of people involved." Counsel's conduct was deficient and prejudicial in failing to raise this meritorious issue. Two of the three convictions were vacated and the case was remanded for further proceedings.

***State v. Reichenbach*, 101 P.3d 80 (Wash. 2004)**. Trial counsel was ineffective in possession of methamphetamine case for failing to move to suppress the methamphetamine that was involuntarily abandoned in the course of an illegal seizure of the defendant. An informant notified the police on several occasions that the defendant was forcing him to drive to Canada so that the defendant could purchase drugs. On the last of these occasions, the police obtained a search warrant for the informant's car and the defendant's person. After the warrant was obtained, however, the informant notified the police that the defendant had been unable to purchase drugs and that he was not sure whether he would be able to do so. The police then staged an accident to stop the informant's car. With weapons drawn and pointed at the defendant, officers ordered the defendant to raise his hands. Before doing so, the defendant dropped a bag of methamphetamine on the floor next to the passenger seat. The defendant was removed from the car and the drugs were discovered during the search of the car. Counsel's conduct was deficient in failing to move to suppress the drugs because the search

warrant was invalid because the information supplied by the informant after the warrant was obtained negated probable cause. Failure to object could not be explained by any legitimate tactic. Moreover, although the informant consented to search of the car, the informant could not consent to seizure of the defendant's person. The defendant was "seized" at gunpoint, however, and his abandonment of the bag of drugs was in response to the unlawful seizure and, thus, involuntary. The seizure of the bag of drugs thus violated the state constitution. Prejudice was found because the conviction was dependent on admission of the bag of drugs.

**2003:** ***State v. Johnson*, 837 A. 2d 1131 (N.J. Super. Ct. App. Div. 2003), *aff'd on other grounds*, 940 A.2d 1185 (N.J. 2008)**. Counsel ineffective in weapons case for failing to move to suppress a handgun seized from the defendant. The police obtained a warrant to arrest the defendant's half-brother on domestic violence charges. When the police arrived at the defendant's stepfather's home, they asked for permission to enter after advising him they had multiple arrest warrants and they were concerned about the presence of a handgun. The stepfather allowed the police to enter the home to arrest his son. Following the arrest, the police frisked the son and then took him outside to the squad car. The officers went back into the home to begin searching for the gun. The defendant was on the phone in the kitchen and stated that he was just visiting. The police officer frisked him and then asked him to leave until the police finished with their search. The defendant agreed to leave but said he needed to gather his things. He took a DVD box and another small box from a closet and proceeded to leave. The police officer stopped him and questioned him about the contents of the box. After receiving conflicting answers, the officer searched the box and found a loaded handgun inside. Counsel did not move to suppress the handgun because he believed the motion would have lacked merit because the owner of the home had consented to police entry. Counsel's conduct was deficient because it was based on a fundamental misunderstanding of the law. The homeowner's consent may well not have been knowingly and voluntarily given in that the homeowner was confronted with multiple warrants for his son's arrest and may not have been advised of his right to refuse consent. Moreover, the homeowner's permission appeared to be limited to entry for purposes of affecting his son's arrest on the second floor. The police officers far exceeded the scope of this invitation because, by their own admission, they re-entered the premises once the son had been safely secured in the squad car in order to search the home. The search was also outside the scope of the limited area included in a search incident to arrest. A search warrant was, therefore, required. Prejudice found due to the critical significance of the handgun to the prosecution's case. The court ordered that a suppression hearing be conducted. If the court granted suppression, the convictions would be set aside. If the court denied suppression, the judgment of conviction will stand.

**Capital Case*

## 4. PROSECUTION EVIDENCE OR ARGUMENT

### a. U.S. Court of Appeals Cases

**2018:** ***Baer v. Neal*, 879 F.3d 769 (7th Cir.), *cert. denied*, 139 S.Ct. 595 (2018).** In capital case from Indiana, trial counsel was ineffective for failing to object to improper and confusing penalty phase jury instructions as well as improper prosecutorial statements and the deficient performance was prejudicial as to the death sentence. Petitioner was convicted of two murders, robbery, theft, and attempted rape arising from a murder of a woman and her four-year-old daughter in their home. Petitioner had admitted that he had committed the crimes and sought to plead guilty but mentally ill, but the trial court rejected the plea, finding insufficient evidence of mental illness. At the penalty phase, the defense presented the testimony of Dr. Mark Cunningham, who described petitioner's social history, including prenatal and perinatal difficulties such as his mother's alcohol use and cancer while pregnant, petitioner's childhood in and out of foster care, the murder of his sister, his ADHD, head injuries, and substance abuse. Regarding the penalty phase instructions, trial counsel failed to object to modification of a jury instruction that eliminated intoxication as a basis for finding that the defendant lacked the capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law. Counsel also failed to object to the improper definition of intoxication as requiring involuntariness of the intoxication. Because counsel essentially failed to object to the removal of a mitigating factor from the jurors' consideration, the Seventh Circuit found his performance deficient under *Lockett v. Ohio*, 438 U.S. 586 (1978). The state court's analysis of the jury instructions in isolation rather than in the context of the overall charge was unreasonable because a juror could have understood the complete penalty phase instructions as foreclosing evidence of voluntary intoxication from consideration for all purposes in sentencing. The timing under which the instructions were given was also important; although the instructions were a correct statement of the law with regard to the mens rea of the crime, and the aggravating factors, they were not correct statements of the law with regard to the mitigating factors. But the instructions were given at the penalty phase, and not in conjunction with the aggravating factor instructions, but rather at the end of the charges as a whole. The jurors also were given the general mitigation instruction that there were no limits on what they could consider mitigating much earlier and at a different time from the voluntary intoxication instruction, and language that merely contradicts and does not explain a constitutionally infirm instruction does not suffice to absolve the infirmity under *Francis v. Franklin*, 471 U.S. 307, 322 (1985). "It is unreasonable to assume jurors could catch the nuance that voluntary intoxication can be considered for mitigation, but not as evidence of criminal intent, without any clear instruction." 879 F.3d at 779. Trial counsel's failure to object was deficient, and the state court unreasonably found otherwise. The error was prejudicial because evidence of petitioner's mental health and drug use was the cornerstone both of the defense at guilt phase and also the defense's sole strategy for avoiding a death sentence, and the instruction blocked consideration of this crucial mitigating evidence. It was unreasonable of the state court to conclude otherwise. Regarding statements by the prosecutor, the prosecutor repeatedly made improper and prejudicial comments, and trial counsel and the trial court failed to address them, introducing doubt into the reliability of the results of the penalty phase trial. First, the prosecutor improperly conflated the standards of guilty but mentally ill and the legal defense of insanity. The insanity defense, which requires a finding that defendant has a severely abnormal mental condition that renders him unable to appreciate the

wrongfulness of his conduct at the time of the offense" is a defense to intent and to guilt, while the guilty but mentally ill issue requires a finding that defendant suffers from an illness that "disturbs thinking, feeling, or behavior, and impairs ability to function" and has effect at the penalty phase but not at the guilt phase because it does not have an effect on his conviction. The prosecutor conflated these terms throughout the trial, starting during voir dire. The state court found that counsel's failure to object was "likely" strategic because counsel testified that he knew the prosecutor was capable of overstating his case and he was planning to correctly state the law to the jury. The Seventh Circuit found this analysis unreasonable, because "hoping the jury would decide that the prosecutor was not credible" is not strategic, especially where the difference between insanity and GBMI was never clarified. Second, the prosecutor repeatedly told the jurors (again beginning during voir dire) that the victims' family members wanted the jury to impose the death penalty. Trial counsel objected only one time to the violations of *Payne v. Tennessee*, 501 U.S. 808 (1991). The state court acknowledged that the prosecutor's statements were problematic, but erroneously found that the prosecutor told the jury he misspoke – this did not occur. Furthermore, the trial court repeatedly stated that the court was not listening, and "missed numerous opportunities to stop or clarify the prosecutor's statements and his absence was noticeable throughout trial." 879 F.3d at 786. Third, the prosecutor stated personal opinions and introduced facts not in evidence directing the jurors toward a death penalty verdict. For example, he said that it was possible that Indiana was going to change the law so LWOP would no longer be an option – there was no basis for this speculation. He also compared petitioner's crime to that of others he had personally seen and experienced. Petitioner's counsel did not object. And just because defense counsel argued that petitioner's crime wasn't the worst of the worst did not permit the prosecutor to argue what he did. "[J]ust because defense counsel cracked open the door to these subjects, it did not permit the prosecutor to drive a truck through it. The seditious and specific comments about the prosecutor's own mother, the community's layoffs, and 9/11 were all not hard blows, but beyond the pale foul ones." 879 F.3d at 787. It was unreasonable for trial counsel not to object. The state court's finding that the prosecutor's improper comments did not cumulatively affect the outcome of the trial was unreasonable – the state court failed to aggregate prejudice even though it claimed to do so. "[I]t is nearly impossible that the comments did not impact the juror's [sic] decision to recommend the death penalty." 879 F.3d at 788. "[The prosecutor's] misstatements were prolific and harmful to [petitioner's] case, yet [petitioner's] trial counsel failed to object at every opportunity. [The prosecutor's] comments began in voir dire, where his comments conditioned jurors to believe that [petitioner] was a liar, that mental illness was a 'copout' and 'defense,' that [petitioner] should not receive a GBMI conviction because he appreciated the wrongfulness of his actions (improperly using the insanity defense standard), life without parole was at a high risk of providing release, and the [victims'] family wanted a death sentence. All these comments were made before the jury heard any evidence in [petitioner's] case. Then at the close of penalty phase, [the prosecutor] again injected inflammatory comments and facts not in evidence, including remarks about [the prosecutor's] mother's prostitution, people being laid off to afford the state's pursuit of the death penalty, and [petitioner's] crime being worse than any of the prior 125 murders [the prosecutor] had heard of in his career in law enforcement. . . . Can we be certain that [petitioner] would not have been sentenced to death if given a fair trial and effective counsel? No. But it is 'reasonably likely' that without the prosecutor's injection of impermissible statements and incorrect law the jurors would not have recommended death." 879 F.3d at 788-89.

**Capital Case*

**2015:** ***Zapata v. Vasquez*, 788 F.3d 1106 (9th Cir. 2015)**. Under AEDPA, counsel ineffective in murder case for failing to object to improper prosecutorial arguments in rebuttal. The victim, a first-generation Mexican immigrant, was killed in a gang-infested area of Los Angeles, apparently because he was wearing a basketball jersey with the number 8, for Lakers star Kobe Bryant. The area was controlled by the Outside Posse (OSP), which was part of the Nortenos street gang, whose rival was the Surenos gang known as "Eighth Street." Thus, according to the state's gang expert, the victim was a "marked man" by wearing the number 8. The Nortenos tend to be established U.S. residents who speak English rather than Spanish. The Surenos, on the other hand, tend to be first-generation Mexican immigrants who speak limited English. As a member of the OSP, the defendant had participated previously in attacks on Eighth Street gang members and Mexican Nationals. The state's case was built mostly on circumstantial evidence and clearly biased witnesses. The only eyewitness to the shooting testified that the shooter was angry and yelling, but could not provide any substance of what was said. Nonetheless, in rebuttal closing arguments – after describing "scrap" and "wetback" in opening statements as derogatory terms like the "N word" for Mexican nationals – the prosecutor asserted several times, including at the end of the rebuttal, that the defendant was yelling, "Fuckin' scrap. You fuckin' wetback" at the time of the shooting. Counsel's conduct in failing to object to these arguments and ask for a curative instruction was deficient and prejudicial. While the state court agreed that the arguments constituted serious prosecutorial misconduct, the state court determination that counsel's conduct might have been based on a reasonable strategy and that there was no prejudice were unreasonable determinations.

**2013:** ***Griffin v. Harrington*, 727 F.3d 940 (9th Cir. 2013)**. Under AEDPA, counsel was ineffective in murder case for failing to object in a timely fashion to the unsworn testimony of a recanting jailhouse snitch. The victim was killed during a confrontation in Los Angeles involving rival street gangs during which at least forty bullets were fired from four different firearms. Nine months later, a jailhouse snitch informed police in a recorded statement that Griffin was the shooter. Griffin was arrested and charged based on this information. No other witness claimed to be able to identify Griffin as the shooter. By the time of Griffin's trial, however, the snitch had decided to change his story. Defense counsel was aware of that fact and that, under state law, the likely consequence of the snitch's repudiation of his prior statement would be that the prior recorded statement would be admitted "for the truth of the matter," i.e. as substantive evidence of guilt. When the snitch was called, he simply answered "no" after the clerk read him the oath and asked him to "swear to tell the truth." Without objection, the trial court then instructed the snitch to testify and allowed the prosecutor to treat him as a hostile witness. "On direct examination by the prosecutor, [the snitch] answered every question, but denied all knowledge of petitioner and the shooting, and also denied having ever identified petitioner to the police." The next day, the prosecutor sought to admit the prior recorded statement through a detective. Defense counsel objected for the first time that the snitch had not given "sworn testimony" and his in-court statements "could not technically be considered evidence." Counsel clearly knew at the time of the in-court statements that the snitch was not giving "sworn testimony" and counsel chose not to object at that time.

> What [counsel] did not know and what he did not comprehend under settled state law, however, was that by failing timely to object to that testimony in combination

> with conducting cross-examination, he was waiving any objection he might have had to [the] testimony. The dire consequences of his ignorance on this point was first, that [the] prior inconsistent inculpatory statement then became admissible . . . ; and second, that [the defendant] would be barred on appeal from raising any issue related to [the] [un]sworn testimony. . . .
>
> Thus, by waiting to object until after [the snitch] had been excused as a witness, and until the next day, [counsel] unwittingly sealed his client's fate, both at the trial and on appeal.

The Ninth Circuit rejected– as "objectively unreasonable"–the state court's conclusion that counsel's "decision not to object in a timely fashion was acceptably tactical" and not deficient conduct.

> It is one thing to devise a litigation tactic that fails. That is a common occurrence in the courtroom. It is wholly another matter to devise a tactic without realizing not only that it cannot work, but that it will result in permanently depriving your client of the one opportunity he has to render inadmissable the prosecution's only direct evidence linking him to the murder with which he is charged. With all respect, the state court's strained reasoning runs afoul of the Supreme Court's warning that courts should "not indulge [in] post hoc rationalization for counsel's decisionmaking that contradicts the available evidence of counsel's actions."

*Id*. at ___ (quoting *Harrington v. Richter*, 131 S. Ct. 770, 790 (2011) (internal quotation marks omitted)). In short, the state court's ruling was "beyond any possibility for fairminded disagreement." *Id*. (quoting *Richter*, 131 S. Ct. at 787). Likewise, the state court's "factual determinations" umderlying its conclusions that counsel engaged in reasonable tactics and conduct "were plainly unsupported by the record and thus demonstrably and clearly erroneous." Counsel's conduct was also clearly prejudicial: "To add injury to injury, the damaging effect of trial counsel's waiver at trial has now carried over into his client's federal habeas proceedings, blocking him from raising substantial federal constitutional issues" related to the violation of his right to confront the witness at trial.

**2007:** ***Girts v. Yanai*, 501 F.3d 743 (6th Cir. 2007)**. Counsel ineffective in aggravated murder case for failing to object to the prosecutor commenting on the petitioner's silence three separate times during closing arguments. Prejudice found because trial counsel's "failure to object exacerbated the prejudicial effect of the prosecutor's statements." The court found "a strong likelihood that at least one juror would have changed his mind if the improper and prejudicial statements would not have been made, especially because the prosecutor presented weak and limited evidence at trial." The IAC also served as cause and prejudice to excuse the procedural default of the prosecutorial misconduct issue, which had been reviewed by the state court only under a plain error analysis. Case reversed on the misconduct issue also.

**2005:** ***Hodge v. Hurley*, 426 F.3d 368 (6th Cir. 2005)**. Counsel ineffective in child rape case for failing to object to the prosecutor's "egregiously improper closing argument, the prosecutor commented on

the credibility of witnesses, misrepresented the facts of the case, made derogatory remarks about the defendant, and generally tried to convince the jury to convict on the basis of bad character." The prosecutor's arguments, among other things, incorrectly informed the jury that they would have to disbelieve all of the victim's family members to acquit, which was not true since two family members testified to seeing blood in the child's underwear and abnormal behavior. The jury could have believed this without convicting the defendant. The prosecutor also implied that disagreement between state and defense experts "(who could very well have legitimate professional disagreements) meant that one of those witnesses must be perjuring him or herself." *Id*. at 383. With respect to character, the prosecutor argued that the defendant, who was underage, regularly drank alcohol illegally and wanted to live off his family and not work, which was irrelevant and not based on any evidence before the court. The prosecutor also urged the jury to "put [itself] in the place of someone that might run into [the defendant] at night," which is "a version of the impermissible 'golden rule argument.'" *Id*. at 384. Under AEDPA, the state court's decision was an unreasonable application of Supreme Court precedent. Prejudice found because the result of the trial depended primarily on the jury's credibility determination between the defendant and the 3 year old child's mother, who claimed to have seen the rape. In addition, the trial court's "generic jury instructions . . . were insufficient to dispel any prejudice from these statements." *Id*. at 388 n.27.

***Martin v. Grosshans*, 424 F.3d. 588 (7th Cir. 2005)**. Counsel ineffective in sexual assault case for failing to object to improper testimony and argument. The defendant was an ordained Episcopal priest charged with molesting a boy prior to 1988. The boy first raised the allegation in 1993 and the defendant learned about the allegation in 1994. During the state's evidence, without objection from counsel, the state presented the testimony of a former prosecutor who had worked with the defendant in 1993 to develop a policy for dealing with allegation of sexual misconduct in the parish. She testified that his focus was greatly on protecting the accused clergymen and not the accusers. Counsel also did not object to testimony from a police officer, who met with the defendant in the presence of his counsel, that the defendant refused to answer questions about the allegations. Finally, counsel did not object or move for a mistrial based on the prosecutor's argument that the jury should not be swayed by the defense's strong character witnesses because even Jeffrey Dahmer had character witnesses. Counsel's conduct was deficient because: (1) the former prosecutor's testimony was irrelevant and prejudicial because the defendant was not even aware of allegations against him when these conversations occurred in a completely different jurisdiction years after the crimes alleged here and the defendant's beliefs did not necessarily imply a guilty conscience; (2) the officer's testimony was an improper comment on the defendant's right to counsel; and (3) the prosecutor's argument was inflammatory and improper, especially since this trial occurred in 1995 in Wisconsin when Dahmer's case was fresh in people's minds. Under AEDPA, the state court's decision was contrary to Strickland because it placed the burden on the defendant to prove that, but for counsel's errors, "the result of the proceeding would have different. Prejudice was, therefore, considered de novo. "[E]ven if these errors, in isolation, were not sufficiently prejudicial, their cumulative effect prejudiced . . . [the] defense" where "the prosecution's evidence was not overwhelming."

### b. U.S. District Court Cases

**Capital Case*

**2017:** ***Bryant v. Thomas*, 274 F.Supp.3d 166 (S.D.N.Y. 2017).** Trial counsel was ineffective for failing to request serological testing of defendant's blood at trial for murder and sexual assault in 1976. Three witnesses said they saw defendant in the area on the day of the crime, but there was conflicting evidence about whether anyone saw him carrying a knife. All witnesses agreed defendant was wearing white pants and a light colored sweatshirt. The victim was found early the next morning in a stairwell where she had been raped and stabbed repeatedly. The crime scene contained a large amount of blood. Police went to defendant's apartment where he was found sleeping in his underwear and asked him to get dressed in the same clothes he had worn the evening before. Defendant put on white pants, a light colored sweatshirt and sneakers. He was interrogated over the course of a day and repeatedly denied any involvement in or knowledge of the crime. Later that evening, Detective William Brent arrived at defendant's interrogation room. Brent later testified that defendant voluntarily confessed to the crime, but defendant alleged he was physically coerced after Brent grabbed him, threw him to the floor and kicked him. Defendant's confession contained several inaccurate facts and details and no blood was found on his clothing. At trial, an expert for the State testified that the victim had type O blood and he did not conduct any tests to determine whether she was a secretor or a non-secretor. A sample taken from the victim's underwear reacted for type O blood from a non-secretor, but the expert was unable to determine whether the typing was from the blood or semen collected on the underwear. In 2010, defendant's new counsel requested blood testing, which determined that defendant has type B blood and is a secretor. At an evidentiary hearing, defendant's expert testified that the presence of a sperm head suggested there was enough semen present in the crime scene sample to type the blood type of the semen donor and that there was a high probability that the victim was a secretor, so the serological evidence excluded defendant. The State's expert disagreed and concluded the new serological evidence was inconclusive and had no weight. Trial counsel was ineffective for failing to consult a serology expert and to test defendant's blood type and secretor status. Trial counsel initially testified that he could not recall anything about defendant's trial. However, after reviewing portions of the record, trial counsel clearly stated that there was no strategic reason for him not to order serology tests and he never considered retaining a serologist. It was not surprising that counsel had no independent recollection of defendant's trial dating back several decades. That does not detract from the clarity of his post-reflection answers given under oath that he had no strategic reason for his failures and his admission that the use of serological evidence was simply not on his "radar" at the time of trial. Trial counsel's failures were objectively unreasonable. He knew that the sample from the victim's underwear had tested positive for type O blood and that the prosecution was going to call a serological expert to testify. A reasonable attorney in these circumstances would have, at a minimum, investigated further. The fact that defendant's blood type is type B would have severely undermined the prosecution's case. For similar reasons, counsel's failure was prejudicial. Even if this evidence did not conclusively exculpate defendant, it would still have been significant. It would have forced the prosecution to make a much less straightforward argument, such as the possibility that there was not enough semen present to accurately test for type B blood. The blood type evidence would have cast doubt on defendant's confession, which he testified was coerced. As such, it would have strongly supported the conclusion that the prosecution had not met its burden in proving guilt. Defendant has established a reasonable probability that absent the errors of his counsel, the outcome of his trial would have been different.

**Capital Case*

***Jordon v. Hepp*, 260 F.Supp.3d 1046 (E.D. Wisc. 2017).** Trial counsel was ineffective for failing to object to the prosecution's improper vouching of a witness's credibility. Defendant was convicted of reckless homicide, first-degree endangerment and being a felon in possession of a firearm. A key issue at trial was defendant's confession and his claim that law enforcement officers had misled him into signing the confession. During closing argument, the prosecutor argued that the detective who took defendant's confession was more credible because she had more to lose, asserting: "Somebody's lying. Who is it? She [the detective] is going to put her whole career and her future on the line for this case? She does this every day. She's investigating homicide cases every day for years. Who has the most to lose based on your verdict in this case? Her or him?" *Id.* at *2. The Seventh Circuit concluded that defendant's trial counsel performed deficiently in failing to object to a textbook case of improper vouching and defendant suffered prejudice, but remanded for an evidentiary hearing to determine whether trial counsel had a strategic reason for his failure to object. Trial counsel testified that he had no independent recollection of the prosecutor's statements or any decision he may have made about whether to object to those comments. Trial counsel then added that he did recall thinking he did not want to draw the jury's attention to this issue because it was late in the day. Trial counsel also testified that he did not believe the prosecutor's comments rose to the level of vouching at all. Based on this testimony, the district court concluded that trial counsel did not remember the substance of the prosecutor's comments, did not believe the prosecutor's comments constituted vouching, and did not have a strategic reason for failing to object.

**2014:** ***Green v. Georgia*, 51 F. Supp. 3d 1304 (N.D. Ga. 2014)**. Under AEDPA, counsel was ineffective in conviction for failure to register as a sex offender for failing to challenge the prior conviction that was the sole basis for the state's argument that the defendant was required to register as a sex offender. The prior was a 1999 conviction for private consensual sodomy between two men who had each reached the age of consent (a 16 year old and a 20 year old). At the time of the conviction for failure to register as a sex offender in 2009, it was clear that the prior conviction was invalid under both state and federal law because "private consensual sodomy cannot be criminalized."

> Just as it is unthinkable that a conviction of miscegenation entered before *Loving v. Virginia*, 388 U.S. 1 (1967), was decided could be used after that decision to establish an element of a crime, so is it unthinkable that a conviction based on constitutionally protected private consensual sexual conduct entered before *Powell* [*v. State*, 510 S.E.2d 18 (Ga. 1998)] or *Lawrence* [*v. Texas*, 539 U.S. 558 (2003)] was decided could be so used. Counsel who fails to object to the use of an extant sodomy conviction that on its face raises serious concerns as to its constitutional validity has failed to provide effective assistance.

The state court's holding to the contrary was an unreasonable application of federal law.

**2011:** ****Rogers v. McDaniel*, 801 F. Supp. 2d 1049 (D. Nev. 2011), *aff'd on other grounds*, 793 F.3d. 1036 (9th Cir. 2015)**. Counsel ineffective in failing to challenge prior conviction supporting aggravating circumstance in capital sentencing. The jury found two aggravating circumstances:

(1) prior violent felony conviction; and (2) torture, depravity of mind or mutilation of the victim. The state offered evidence through a probation officer of two prior felony convictions in Ohio. On one of those, the defendant pled guilty but failed to appear for sentencing. Under Nevada law at the time, this meant there was no conviction, but counsel failed to recognize that and instead conceded that there was a conviction. Counsel's conduct was deficient in "failing to conduct even the most basic research" regarding the purported prior convictions. Prejudice also established as there were no other constitutionally valid aggravating circumstances and there was significant mitigation of mental illness and extreme mental and emotional disturbance at the time of the offenses. The state court ruling to the contrary was an unreasonable application of Strickland. With respect to the other aggravating circumstance found by the jury, the court found that the instruction was unconstitutionally vague under *Godfrey v. Georgia*, 446 U.S. 420 (1980). With respect to cumulative error, the state court found with respect to both aggravators that the underlying evidence was admissible in sentencing regardless of whether it supported a valid statutory aggravating circumstance. As a nonstatutory circumstance, "[h]owever, such evidence does not factor into the weighing of aggravating and mitigating circumstances [under state law]; only the valid aggravating circumstances are part of that weighing."

**2009:** ***Daly v. Burt*, 613 F. Supp. 2d 916 (E.D. Mich. 2009)**. Under AEDPA, the District Court found a Confrontation Clause violation due to admission of nontestifying codefendants' statement and that the state court ruling was an unreasonable application of *Crawford v. Washington*, 541 U.S. 36 (2004). The District Court also specifically adopted the Magistrate Judge's Report and Recommendation as "the opinion of this Court." The R&R included an alternative finding of ineffective assistance of counsel, in the event the Confrontation Clause issue was found to be procedurally defaulted, for failing to object to the admission of these statements or to move for severance. The defendant was charged with attempted armed robbery and conspiracy to commit armed robbery. Following a tip to the police of a pending robbery at a McDonalds, the defendant was arrested outside the McDonalds with a ski mask and a hammer. One codefendant was with him and another was nearby waiting in a getaway car. Both codefendants confessed in writing that they intended to rob that manager as he was taking a bank deposit to the bank and that the hammer was to be used as a weapon. The defendant made only an oral statement. While a police officer testified that his statement was consistent with the codefendants, the defendant testified that he had intended to break and enter the McDonalds and steal from the safe rather than committing an armed robbery and that this is what he told police. Prior to their joint trial, counsel for one co-defendant moved for a severance or, alternatively, to exclude the statements of the others. The District Court denied the motion. The District Court's finding of admissibility was erroneous under *Crawford*, which was decided while the case was pending on appeal. Under *Crawford*, testimonial statements of nontestifying witnesses, including those made while in police custody, are inadmissible. Under pre-*Crawford* law in *Ohio v. Roberts*, 448 U.S. 56 (1980), the statements were also inadmissible because they did not bear "adequate indicia of reliability." Specifically, the codefendants were shifting or stretching the blame while in police custody, which "weighed heavily against finding that there was an adequate indicia of reliability" even though the codefendants also admitted their own guilt. Counsel's conduct was deficient and not based on sound strategy.

> [A] knowledge of the applicable law is essential to providing effective assistance, and considering the extensive Supreme Court case law discussed above, no

> competent attorney could have failed to recognize the confrontation clause violations that occurred because of the introduction of the out-of court statements of the non-testifying codefendants at the joint trial.

Prejudice established because "the out-of-court statements . . . were extremely persuasive proof" of the attempted armed robbery and the conspiracy, which carries a potential life sentence.

**2008:** ***Neri v. Hornbeak*, 550 F. Supp. 2d 1143 (C.D. Cal. 2008)**. Under AEDPA, counsel ineffective in murder of her 16-month-old daughter for failing to object to the prosecutor's cross-examination of the defendant in violation of the trial court's previous ruling. In support of a pretrial motion, counsel had presented an unsigned "declaration" of the defendant. Prior to trial, the state requested a signed version. The hearings revealed that counsel had drafted the declaration on the basis of his notes of a discussion with the defendant, who was just learning English, and had shown it to her, but had not had it translated for her. She testified that there were inaccuracies in the declaration and it was corrected through her testimony and changes made to the declaration, which she then signed. The court ruled that she could be impeached if she testified by using her signed declaration or testimony, but not the unsigned declaration. Nonetheless, the prosecutor cross-examined her extensively about inconsistencies from the unsigned declaration without objection from defense counsel. Counsel's conduct was deficient. Prejudice was established because the defendant's credibility was a central issue. The major inconsistencies came from the unsigned declaration. Although there were some inconsistencies from her prior testimony and signed declaration, these inconsistencies were relatively minor in comparison and would not have been as harmful to her credibility. Prejudice was also clear because the jury deliberated for four days and nearly deadlocked even without this improper cross- examination.

**2006:** ***Wynters v. Poole*, 464 F. Supp. 2d 167 (W.D.N.Y. 2006)**. Under AEDPA review for pro se petitioner, counsel ineffective in first degree rape case for failing to object to the prosecutor's cross-examination of the investigator who interrogated the petitioner. The investigator testified that he requested that the petitioner take a polygraph after he denied guilt and the petitioner terminated the interview and requested counsel. The alleged victim had made numerous inconsistent statements and did not report the rape for more than a year. Appellate counsel asserted that the prosecutor committed misconduct and that trial counsel had been ineffective in failing to object. The District Court construed the pro se pleadings to assert trial counsel's ineffectiveness as "cause" and "prejudice" to overcome the procedural default of the state misconduct issue and found that counsel was ineffective. Counsel's conduct was deficient in failing to object to the prosecutor's misconduct, which "effectively decimated" the petitioner's credibility in a case where his credibility and the alleged victim's credibility was the only real issue. The prosecutor's conduct rendered the trial "fundamentally unfair." The state court's holding to the contrary (on the merits, despite finding a procedural default) was an unreasonable application of clearly established Supreme Court precedent. *Id*. at ___ (citing *Darden v. Wainwright*, 477 U.S. 168, 181-82 (1986)). In addressing this issue, the state court "approved of the way defense counsel handled the situation" and, therefore, summarily dismissed the ineffective assistance claim as "without merit." Because this was an adjudication on the merits, the District Court applied the AEDPA standards to this claim also. Counsel's conduct was deficient and prejudicial because the prosecutor deliberately implicated the petitioner's Fifth

Amendment right to remain silent, his Sixth Amendment right to counsel, and conveyed to the jury that it could infer guilt due to the petitioner's failure to submit to the polygraph. Although counsel attempted to mitigate the damage, "there is no evidence that he made an intelligent, tactical decision not to object." Instead, trial counsel "only reinforced the negative evidence elicited on direct examination" by having it repeated rather than objecting and moving for a mistrial or a curative instruction. "While the instance in which a single error will rise to the level of Sixth Amendment ineffectiveness is clearly the exception and not the rule, this case is one of those exceptions." *Id*. at ___ (quoting *Chatom v. White*, 858 F.2d 1479, 1486 (11th Cir. 1988)). The state court's summary denial was an unreasonable application of *Strickland*.

**2005:** ***Wade v. White*, 368 F. Supp. 2d 695 (E.D. Mich. 2005)**. Counsel ineffective in manslaughter case for failing to object to evidence regarding the shooting of a key prosecution witness and the state's closing argument concerning this evidence. The victim was killed when he was hit by a stolen car being pursued by police. The witness was a passenger in the car, who, at the scene of the accident, initially identified his friend as the driver, but changed his statement the next day to identify the defendant as the driver. He was later shot numerous times and testified about this, but he did not know of any connection between the shooter and the defendant and no evidence connecting the defendant to the shooting was presented. Nonetheless, the prosecutor focused on this incident in sentencing and strongly implied that there was some connection between the defendant and the shooting. Although this issue had been raised in state court, the state court failed to address this issue so the court's review, under the AEDPA, was de novo. Counsel's conduct was deficient because the evidence of the shooting of the witness was clearly inadmissible and the prosecutor's argument was improper. There could be no reasonable strategy not to object to this testimony and argument. The court found that the state court's finding that the testimony was properly admitted was irrelevant because it was wrong in that no evidence established any connection between the defendant and the shooting of the witness. Prejudice was found because the witness was the key witness identifying the defendant as the driver.

### c. State Cases

**2018:** ***Parmer v. State,* 545 S.W.3d 724 (Tex. Ct. App. 2018).** In attempted capital murder case, trial counsel was ineffective in failing to object to the inclusion during the guilt/innocence phase, of appellant's medical records, which contained evidence of several extraneous offenses and prior bad acts. The incident from which the charge stemmed was one in which appellant shot a police officer in the face when that officer and a number of others reported to appellant's girlfriend's distress call at night that appellant was acting strangely and shooting a gun. When the officers cut the power to appellant's property, appellant ran inside and grabbed a shotgun. The officer who was shot had shined a flashlight into a window of the house. To prove its case, the state had to establish that appellant knew the person he shot was a police officer, and the state presented evidence that the officers announced themselves and appellant would have been able to hear them. Appellant presented only argument that he did not intentionally or knowingly attempt to cause the officer's death and only intended to get people off his property when he shot the weapon. With regard to deficient performance, the medical records, while containing helpful information about appellant's serious mental illness that supported his girlfriend's report that he was acting strangely, they also

contained numerous, detailed references to appellant's extraneous offenses, prior bad acts, and unpopular attitudes, and these were admitted without objection. These included such acts as taking a rifle to work and frightening people, being uncooperative with police, having a substance abuse problem and being narcissistic, destroying several bedrooms and a bathroom, and having a gambling debt. They also included statements he made about being prejudiced and a member of the KKK. The danger of including all this information was that appellant might have been convicted on an implied charge of having a propensity to commit crimes generally. These prior bad acts and attitudes were inadmissible because they were irrelevant to the issue of whether appellant intentionally or knowingly attempted to cause the death of a person he knew to be a peace officer. Because this evidence was inadmissible, no reasonable trial strategy could have supported counsel's choice not to object to its admission. With regard to prejudice, the court found "probability sufficient to undermine confidence in the outcome where the effect of the error permeated the entire case and went to the heart of counsel's only defense issue." The only defense strategy was to challenge the intent requirement. Counsel presented no evidence and made no opening statement, and only argued in closing that there was no intent to kill the officer and just an attempt to get the officers off his property. The state called attention to the extraneous offenses in the medical records during closing argument, without any objection by defense counsel. During deliberations, the jury asked to see appellant's medical records. "[T]he totality of counsel's representation raises concern," and the court noted this was relevant for the purposes of determining prejudice. If the jury had only the admissible portions of appellant's mental health history, those portions, along with the evidence that appellant was acting strangely on the day of the incident, wasn't making any sense whatsoever, and that appellant said he wanted people to get off his property, could have negated the mens rea element of the crime. Reversed and remanded for a new trial.

***Robinson v. State,* 428 P.3d 225 (Kan. Ct. App. 2018).** In arson-murder case, trial counsel was ineffective for failing to investigate and present sufficient expert testimony to refute the claims of the state's expert. Petitioner was convicted in state court of reckless second-degree murder and aggravated arson after he had first been indicted in federal court but the federal case was dismissed. The government's fire expert testified that the fire was intentionally set on the stairs using an open flame and a flammable liquid. Petitioner told detectives that he could have been smoking crack cocaine in the hall and could have thrown lighted matches on the floor. In state habeas proceedings, petitioner alleged numerous deficiencies by trial counsel. Following a hearing, the habeas court ruled that petitioner's counsel were ineffective for failing to investigate and present sufficient expert testimony to refute the claims of the state's expert, that this failure was prejudicial, and that cumulative trial counsel errors required relief. The Court of Appeals of Kansas affirmed the habeas court's grant of relief, using the standard of review of determining whether the habeas court's findings were supported by substantial competent evidence, whether the findings supported the court's legal conclusions, and applying a de novo standard to the habeas court's conclusions of law. It determined that the habeas court's finding of cumulative errors was insignificant given the expert evidence deficiency. It noted that the district court held that trial counsel performed an insufficient investigation into the use of an arson expert. Arson cases generally rely on expert opinions that a person intentionally started the fire, and therefore, it is incumbent upon defense counsel to counter the cause and origin evidence by exploring the possibility of using its own experts. Counsel here waited until two weeks before trial before consulting with someone who had no expertise in determining the cause and origin of fires, did not offer counsel an opinion about

the cause and origins of this fire, and only provided counsel notes for use in cross-examination of the state's expert witness. At the habeas hearing, petitioner established that the state's expert's opinions were vulnerable to attack because they were not based on the actual physical evidence and only on a process of elimination of causes, which is not the product of the scientific method. The appellate court noted that there were vivid contrasts between the preparation of trial counsel and habeas counsel, and between the state trial expert and the habeas defense experts. The trial lawyer did not hire an investigator and did not hire an arson expert, but rather a person who did not point out any flaw in the state's evidence. He did not try to hire someone else because he doesn't "go around trying to find people that are just opinions for hire." The defense "expert" was asked to assist on the case as a consulting expert. He gave trial counsel a timeline and recommended cross-examination questions and had an hour-long conversation with someone on the defense team. He was not a member of arson or fire investigators organizations. The habeas lawyers presented testimony of the federal public defenders who had represented petitioner before his federal case was dismissed. They had consulted with an expert who had written a foundational text on arson investigation and participated in the group that put together the Guide for Fire and Explosion Investigations. Counsel "studied [that guide] and used it in the preparation of his defense." 428 P.3d at 230. They moved to have the guide recognized as a learned treatise so they could use it to help with cross-examination of the state's expert. They had an investigator interview as many witnesses from the scene as possible. They moved for a *Daubert* hearing on the method the state's expert used to attempt to detect flammable accelerants. They believed the state's expert's methods did not fit with the recommendations of the guide. They also felt that the state's expert's opinion that petitioner did not flick a lit match was based on his personal belief that petitioner was not truthful, and he was not permitted to discuss that because it was outside his area of expertise. A habeas defense expert was a fire investigator who had been a fire fighter for 15 years, obtained certification through an association of fire investigators, and was a member of those organizations. He reviewed the fire investigation report, the report of the dog handler who investigated the case, read testimony from the original trial, and viewed photos and reviewed witness statements. He testified that the state expert's methodology violated the scientific method. There were numerous reasons besides the use of an accelerant why the fire spread rapidly that applied here. The appellate court noted that on appeal, many of the challenges the state raised to the habeas court's findings and conclusion were based on misinterpretations of what the habeas court actually did and found. Counsel's performance was deficient because counsel contacted the "expert" less than two weeks before trial and did not talk to another expert when the first proved unhelpful, not because (as the state contended) counsel did not call his expert to testify nor because he did not ask for a continuance to find an expert. The deficiency was prejudicial because the state expert's opinion could have been impeached, leaving the state with no case that petitioner intentionally started the fire. There was no physical evidence of any chemical accelerants at the scene. The significance of the gas can found at the scene was speculative, and the speed of the fire could have been caused by the structure of the apartment house.

**2017:** ***Tran v. State*, 798 S.E.2d 71 (Ga. Ct. App. 2017).** In case where defendant was convicted of two counts of armed robbery, one count of aggravated sexual battery, and one count of possession of a firearm during the commission of a felony, convictions are reversed based on several instances of deficient performance. The crimes were committed by two men who entered a karaoke club wearing surgical masks and carrying guns. After the robberies and sexual battery, the men left the

club. A witness then observed a silver Acura with tinted windows leaving the parking lot. Shortly thereafter, a silver Acura was pulled over by police. The passenger fled and was never located. Defendant was the driver of the vehicle. He told officers a gun was in the car. Also found in the car were items matching those taken from the club. At trial, defendant testified that he had been waiting outside the club for friends when a masked man pointed a gun at him and ordered him to get in the car and drive. The gunman placed objects he was carrying in the car. After the car was pulled over, the gunman took bills from the glove compartment that had defendant's name on them and threatened defendant not to say anything about the incident. The gunman then fled. According to defendant, he had been robbed and threatened previously, which he had reported to police, leading him to purchase a gun. Although defendant raised multiple allegations of deficient performance by trial counsel, only a few are found to be meritorious: (1) failing to raise a hearsay objection to testimony about the absence of a record of defendant having been a crime victim in a certain county; (2) failing to object to statements by the prosecutor that improperly impeached defendant's testimony; and (3) opening the door to damaging testimony that contradicted defendant's testimony that he was unaware who the gunman was. In finding prejudice from counsel's deficiencies, the court weighed the fact that "the jury heard the prosecutor essentially testify that [defendant] would not need an attorney if he was an innocent bystander and then question [defendant] at length about why he never gave the police information that would have cleared him of these charges." Defendant's allegation that trial counsel had been ineffective in failing to object to those improper comments and questions had been rejected because defense counsel had opened the door to them.

***Entwisle v. State*, 796 S.E.2d 743 (Ga. Ct. App. 2017).** In case where defendant was convicted of numerous charges, including computer invasion of privacy, counsel was found ineffective as to the computer charge for failing to object to hearsay testimony by the victim about someone using her stolen computer to access her financial information. Because the hearsay testimony was the only evidence to offered to prove the elements of the offense, prejudice is found.

***Khalil-Alsalaami*, 399 P.3d 264 (Kan. Ct. App. 2017).** In case involving two counts of aggravated criminal sodomy on an underage victim, trial counsel was ineffective in numerous ways. First, trial counsel was ineffective in failing to request an interpreter at trial and appellate counsel was ineffective for not raising that failure on appeal. Defendant, whose primary language was Arabic, was in the United States as a permanent resident after serving as an interpreter for the United States military forces in Iraq. He was accused of sexually assaulting the victim at a party. He initially admitted to committing some of the sexual acts at issue but claimed it was consensual and that he was unaware the victim was underage. At trial, he denied having any sexual contact with the victim and stated that he had given a contrary account to the police because the officer had repeatedly suggested that sex had occurred. Trial counsel's defense strategy was: (1) arguing that DNA matched to defendant that was found on the victim's shorts had been transferred from the bed where defendant had sex with another woman earlier; and (2) asserting that defendant was tricked by police into giving an incriminating statement. Although defendant's initial counsel had requested an interpreter for defendant and one was employed at the preliminary hearing, trial counsel decided that use of an interpreter would make it appear to the jury that defendant was trying to hide behind a non-existent language barrier, especially given defendant's own history as an interpreter. Thus, defense counsel advised defendant not to use an interpreter. Such advice was

made without counsel: (1) testing defendant's ability to understand English; (2) investigating the complexity of the interpreting defendant was asked to do for the U.S. military; or (3) considering how the use of voir dire and/or instructions could ameliorate any possible prejudice from use of an interpreter. In addition, trial counsel failed to inform defendant of his statutory right to an interpreter and the waiver was not accomplished in front of the trial court. Trial counsel had been aware that defendant would not be able to understand at least portions of the trial, such as the DNA testimony and the prosecutor's closing argument. At trial, defendant spoke in broken English that was difficult to understand and he failed to comprehend the meaning of fairly simple words. According to professionals who tested defendant post-trial, defendant's understanding of English was extremely limited and he would be very easy to trick due to the language problem. Evidence was also presented in post-conviction proceedings showing that approximately 1 year before the charged crime, defendant took an interpreter with him to get a Kansas driver's license and had to use the picture test rather than the written test. In addition, the interpreter for defendant in the preliminary hearing rated defendant's English skills on a scale of 0 to 10 as .01. He further testified that defendant's English was woefully inadequate to go through a court proceeding without an interpreter. The U.S. Army Captain that supervised defendant in Iraq indicated that their communication in English was at an elementary level and analogized defendant's ability as a little better than his 5-year-old daughter, who was entering kindergarten. Although defendant lived in the United States for 14 months prior to his arrest, he lived in a household with other Arabic speakers. When he interpreted for the U.S. Army in Iraq, again he continued to live with Arabic speakers. It was further noted by the appellate court that not only was the criminal trial complex, the stakes were extremely high – defendant was facing a possible sentence of 25 years to life, and, as an asylum seeker, a conviction would likely result in deportation to Iraq where his life could be at risk. Although the post-conviction court found, inter alia, that substantial competent evidence supported the finding that defendant adequately understood English to proceed to trial without an interpreter, the appellate court disagreed, explaining:

> Even if one assumes that [trial counsel] were in the best position to evaluate [defendant's] language abilities at the time of trial, their testimony does not support such a conclusion. They reached what they believed to be a reasonable trial strategy, without fully investigating [defendant's] ability to understand the testimony and legal arguments at his own trial. Not only did they not investigate, but they ignored clear indications that [defendant] could not effectively understand what was going on during the trial.

On this record, trial counsel performed deficiently in not requesting an interpreter at trial. And, given the egregious nature of the error here, prejudice is presumed. In addition, give the appellate court's conclusion that the evidence does not support a finding defendant was able to understand the proceedings in the absence of an interpreter, appellate counsel was deficient in not raising a claim on direct appeal that the trial court erred in failing to appoint an interpreter for defendant. Because there is a reasonable probability that the appellate court would have found that the district court abused its discretion when it failed to appoint an interpreter, prejudice is established. Trial counsel was also found to have performed deficiently in failing to seek suppression of defendant's confession and stipulating to the voluntariness of defendant's confession after trial counsel entered the case in the midst of a *Jackson v. Denno* hearing that the State had initiated.

> The police minimization technique in conjunction with [defendant's] inability to speak and understand English weigh in favor of finding his confession was involuntary. In addition, [the interrogating officer] testified that in Iraq the police use force to coerce confessions from individuals. It is not unreasonable to conclude that [defendant] may have been pressured to confess because of his fear that force might be used. Finally, [defendant's] lack of understanding of the words used in the oral explanation of his *Miranda* rights coupled with his inability to read what was placed in front of him would also weigh in his favor in the voluntariness calculus. It is clear that [defendant] appeared to be confessing to criminal acts. That is not the issue. The issue for the district court to decide would have been whether his confession was freely and voluntarily given with an understanding of his rights under *Miranda.* We do not believe that was a foregone conclusion.

Further, by stipulating to the voluntariness of the confession and allowing admission of the stipulation into evidence, trial counsel prejudiced his own defense strategy of arguing that defendant was tricked into making the confession. Trial counsel was also deficient in failing to object when the prosecutor misstated the DNA evidence during argument in a manner that torpedoed his assertion his argument about how defendant's DNA came to be on the victim's shorts. Further, appellate counsel was ineffective in failing to raise the issue of prosecutorial misconduct on direct appeal. Finally, the appellate court concluded that defendant was entitled to relief on a claim that the cumulative impact of trial counsel's errors deprived him of a fair trial.

> [Trial counsel] committed six errors during his representation of [defendant]: (1) he failed to request an interpreter for [defendant] at trial; (2) he failed to file a motion to suppress [defendant's] confession or mount a defense at the *Jackson v. Denno* hearing; (3) he stipulated to the voluntariness of [defendant's] confession; (4) he failed to object to improper questioning of [the examining nurse]; (5) he failed to object to questions meant to highlight [defendant's] negative character traits; and (6) he failed to object when the prosecutor misstated evidence during closing arguments. We find that the number of errors is substantial, and even if the State could successfully argue that the impact that any one of them had on the trial was insignificant, we cannot ignore the fact that the accumulation of these errors impacted [defendant's] ability to receive a fair trial.

***Humphrey v. State*, 73 N.E.3d 677 (Ind. 2017).** In murder case, trial counsel was ineffective in failing to object to use of a witness's prior unsworn statement as substantive evidence and failing to request appropriate instructions on how the statement could be considered by the jury. The murder occurred during an attempted drug deal. According to a friend of the murder victim, he and the victim had been driving around in the friend's truck searching for drugs. When they spotted three men who appeared to be dealers, they pulled up near them. One of the men approached the truck and the victim asked him to get in to discuss a drug purchase. As the friend drove, words were spoken between the victim and the dealer who then drew a gun. The victim grabbed the gun and it went off. The dealer jumped out of the moving car and ran away. The victim had been struck in the abdomen and ultimately died from the wound. The victim's friend could only give a vague description of the dealer. A man named Smith testified that he had been

with defendant and a man named Brooks on the night of the murder. He observed a truck stop and defendant going to greet it, indicating to Smith that defendant thought the occupants wanted to buy drugs. Although Smith heard the door of the truck open and close, he didn't see defendant get in the truck and he heard no gunshot. He did hear the truck peel out and then defendant returned, telling Smith that the "dude" tried to "gank him" or "git him." Smith had seen defendant with a gun before but not on that night. Brooks, the third man allegedly present that night, gave police an unsworn statement about the events when Brooks was in jail on an unrelated charge. Brooks identified defendant in a photo lineup and stated that defendant went out to a truck, Brooks heard a "noise," and defendant returned stating that he had shot one of the men. At trial, however, Brooks denied being with defendant and Smith on the night of the shooting and claimed that his statement had been fabricated due to police pressure. The statement was admitted to impeach his in-court repudiation. As for trial counsel's failure to object to admission of the unsworn statement on hearsay grounds and to request a limiting instruction, the State argued that defense counsel could reasonably have decided not to further highlight the statement. But this supposed strategic justification for the omission was belied by the record which showed trial counsel's repeated references to the unsworn statement throughout the remainder of the trial, including defense counsel reading out loud the portion of the statement where Brooks identified defendant as the shooter. Trial counsel even expressly asked the jurors during closing argument to consider the out-of-court statement in determining defendant's guilt or innocence. The State's other argument – that trial counsel had a secondary strategy of wanting the Brooks statement admitted in order to sow reasonable doubt – was similarly unpersuasive. First, trial counsel had unsuccessfully objected to admission of the statement on other grounds (lack of foundation). Second, this argument contradicted the primary argument that trial counsel allowed the statement's admission in order to avoid further focus on it. "It defies credulity to say on the one hand that defense counsel strategically elected not to mount a hearsay objection or request a limiting instruction to refrain from drawing attention to Brooks' unsworn statement, but insist on the other hand that counsel wanted to 'use it to show the inconsistencies in the State's key witnesses.'" On this record, the deference normally accorded to trial counsel's acts or omissions was inappropriate and counsel's failure to lodge a hearsay objection to admission of the statement constituted deficient performance. Counsel also performed deficiently in failing to request an admonition or limiting instruction precluding the unsworn statement from being used as substantive evidence rather than only as impeachment evidence. Also deficient was defense counsel's failure to object to a jury instruction that expressly told the jury that it could consider the out-of-court statement in determining defendant's guilt. (The pattern instruction given to the jury had been rendered an incorrect statement of the law by a recent state supreme court ruling.) As to prejudice, the court observed: "[E]vidence improperly considered by the jury for want of a limiting instruction is no less prejudicial than evidence presented which should have never been introduced in the first instance. Both permit the jury to improperly determine guilt based information that should not be considered. Even if Brooks' unsworn statement was properly admitted for impeachment purposes, counsel failed to limit the use of that statement to his client's detriment." On the record before it, the court concluded there was a reasonable probability of a more favorable verdict had counsel not acted deficiently.

**Capital Case*

***Alne v. Nooth*, 406 P.3d 109 (Or. Ct. App. 2017).** In case involving charges of multiple sexual offenses, trial counsel was ineffective in failing to object to testimony by a prosecution witness commenting on the credibility of the complainant. The complainant, a five-year-old girl at the time of the alleged offense, told her father that defendant had committed several sexual acts on her. The girl was interviewed by a licensed social worker with extensive experience with child abuse evaluations. At trial, the social worker was asked about the girl's statements about sexual abuse and whether a non-abused child at her age would have been able to manufacture the descriptions she provided. The social worker responded, in part: "From my training and experience, I thought again that she provided information that was from a child's point of view, and it just seemed like a genuine statement." Defendant's counsel did not object to this testimony. Other evidence at trial included that the complainant had been brought in to be examined for sexual abuse on three prior occasions unrelated to defendant. There was also testimony that the complainant may have, at some time prior to her allegations of abuse by defendant, witnessed her parents engaging in sexual activity and may have seen pornographic videos playing on two occasions. Additionally, the defense brought an expert to testify about the memories of young children and how they may be affected and influenced by what they have seen. In affirming the grant of relief, the appellate court agreed with the lower court that the social worker's testimony about the complainant's statement seeming "genuine" was clearly impermissible vouching for the complainant. Trial counsel failed to exercise reasonable professional skill and judgment by not lodging an objection. Regarding prejudice, there was no physical evidence of sexual abuse and the credibility of the complainant was critical. The social worker's testimony that the complainant's statements were genuine could have tended to affect the outcome of the trial. Defendant was therefore prejudiced by trial counsel's failure to object to the vouching testimony.

***Briggs v. State*, 806 S.E.2d 713 (S.C. 2017).** In case involving charges of sexual crimes against a child, trial counsel was ineffective in failing to object when the forensic interviewer gave opinion testimony that she believed the alleged victim's accusations to be true and then eliciting further bolstering testimony on cross-examination. On direct examination the forensic interviewer's testimony that her "role" was to determine whether the child knows the difference between the truth and a lie and that her "purpose" was "finding out if something happened" or "to figure out what has occurred" clearly conveyed to the jury that she believed the victim. Trial counsel conceded he had no strategic reason for not objecting to this vouching testimony and his failure to object constituted deficient performance. During cross-examination, trial counsel asked the forensic interviewer an open-ended question that included "how can you as an expert determine if she's telling the truth . . .." Such a question "was sure to solicit an answer that directly bolstered the victim's credibility" and the answer provided met expectations "and placed squarely before the jury her opinion that the victim was telling the truth." This questioning constituted deficient performance. Given the importance of the victim's credibility and the absence of physical evidence, prejudice is found irrespective of some incriminating remarks by defendant. The most damaging testimony against defendant, which came from two jailhouse informants, was dismissed as unreliable.

**2016:** ***Eubanks v. Commissioner of Correction*, 140 A.3d 402 (Conn. Ct. App. 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.

***Kennebrew v. State*, 792 S.E.2d 695 (Ga. 2016).** In robbery-murder case, trial counsel performed deficiently in failing to seek suppression of evidence found in backpacks seized by officers following defendant's arrest, as well as failing to object to improper comments by the prosecutor. Defendant had been arrested pursuant to a warrant in his girlfriend's college dorm room. The police seized the backpacks after defendant had been handcuffed and removed from the room. It was not until six days later that the backpacks were opened and shot gun shells and bullets of the type taken from the victim's home were discovered, along with a knife that might have been involved in the killing. These items were severely damaging to defendant's trial defense that he went with the co-defendants to the victim's home for the purpose of selling the victim a PlayStation and then fled the scene after co-defendant Hall unexpectantly went crazy and viciously beat and stabbed the victim to death. The prosecutor emphasized the items in arguing that defendant was not merely present in the victim's home but was an active participant in the robbery-murder. At the hearing on defendant's motion for new trial, defense counsel explained that he had not moved to suppress the backpack evidence because he believed it had been lawfully taken during a search incident to arrest. This exception to the search warrant requirement, however, was clearly inapplicable to the facts of this case. Defense counsel's misunderstanding of the law constituted deficient performance. Also deficient was defendant counsel's failure to object when the prosecutor commented on defendant's pre-arrest silence/failure to come forward after the killing, a clear violation of the state law *Mallory* rule. Although defense counsel guessed at the post-trial hearing that he had decided to forgo an objection in order to avoid bringing more attention to the

issue, this did not justify the omission: "The State's discussion of [defendant's] failure to come forward to the police was not . . . just a passing or equivocal remark that the jury might have overlooked. It was a specific, extended argument aimed directly at demonstrating [defendant's] guilt. Given [defendant's] defense theory, the importance of the State's silence-equals-guilt argument to its case against him, and the obviousness of the *Mallory* violation, [defense counsel's] failure to object was patently unreasonable and thus deficient performance under *Strickland*." Because the case against defendant was not overwhelming and he had a plausible explanation for his presence at the crime scene, prejudice is found given the prosecution's reliance on the backpack-related evidence, his improper argument, and notes from the jury seeking to compare the bullets found in the backpack with those found in the possession of co-defendant Hall.

***Christian v. State*, 502 S.W.3d 702 (Mo. Ct. App. 2016).** In forgery case, trial counsel was ineffective in failing to object when the prosecutor introduced evidence that defendant had invoked his Fifth Amendment right to remain silent in a deposition he gave in a related civil suit. The prosecution's theory of the case was that defendant had forged the victim's signature on a deed transferring the victim's property to defendant and another party. During the prosecution's case-in-chief, the victim was asked whether he had gotten the property back. The victim responded that he had, through a civil bench trial. Also during the case-in-chief, the prosecutor read portions of defendant's deposition in the civil suit which referenced the pending criminal case. These excerpts included defendant's assertion of his Fifth Amendment rights on numerous occasions. Trial counsel did not object during the reading of the deposition but moved for a mistrial the following day. He commented that he had been surprised when the prosecution read the invocations but thought it better to approach the issue outside the presence of the jury. The prosecutor pointed out, however, that trial counsel had a copy of the deposition, which he had attended, and the prosecutor had omitted reading one part of the deposition at trial counsel's request. The prosecutor stated he would not further reference the invocations. The mistrial motion was denied but no admonitions were given to the jury about what it had heard about defendant invoking his Fifth Amendment rights. At the post-conviction hearing, trial counsel testified that his lack of contemporaneous objection was due to his shock and surprise by the prosecutor's use of the deposition. The post-conviction court denied relief. In reversing the post-conviction court's ruling the appellate court rejected the State's argument that no deficient performance was possible because there was no case establishing that use of an invocation of the Fifth Amendment in a related civil case was impermissible. The appellate court, applying the basic principles of Fifth Amendment jurisprudence, concluded that reasonably competent counsel would have objected to the prosecutor's use of the invocations. The fact that defendant ultimately chose to testify did not render the constitutional violation harmless.

***Taylor v. State*, 788 S.E.2d 97 (Ga. Ct. App. 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*, 892 N.W.2d 15 (Mich. Ct. App. 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*, 379 P.3d 702 (Or. Ct. App. 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.

**Capital Case*

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*, 785 S.E.2d 471 (S.C. 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.

***People v. Lucious*, 63 N.E.3d 211 (Ill. Ct. App. 2016).** In case where defendant was convicted at a bench trial of aggravated robbery, trial counsel was ineffective in failing to object to evidence of a statement by the co-defendant which was used by the trial court to find an element of the crime in defendant's case. Defendant and the co-defendant accosted a woman in an alley and took two backpacks from her. They both confessed to the robbery. The victim testified that defendant put a gun to her head, leading to a charge of armed robbery, as well as aggravated robbery. In his confession, defendant denied having a gun but stated he had a cell phone. In the co-defendant's confession, he stated that he told the victim, "Don't make him [i.e., defendant] shoot you." The co-defendant also stated he didn't know why he said that given that defendant only had a cell phone. When defendant and the co-defendant were arrested shortly after the robbery, neither had a gun or a cell phone with them. After the prosecution presented its case, the court granted defendant's motion for a directed verdict on the armed robbery charge. Neither defendant testified. Trial counsel argued that the evidence did not establish an aggravated robbery as that required that the defendant indicate to the victim, either verbally or through his actions, that he was armed with a firearm or other deadly weapon. Based on the statement of the co-defendant, which the court found accountable to defendant, the court concluded the defendants were attempting to make the victim believe they had a gun and convicted both defendants of aggravated robbery. Trial

counsel's failure to object to the use of the co-defendant's statement against defendant was deficient performance as it violated defendant's confrontation rights. As to prejudice, it was reasonable to infer, as the State did in summation, that defendant had pressed a cell phone to the victim's head making her believe it was a gun. Nevertheless, the direct evidence of a threat to shoot having been made was far stronger proof of the element of the crime, establishing prejudice from trial counsel's failure to object.

***Landry v. State*, 380 P.3d 25 (Utah Ct. App. 2016).** In aggravated arson case, trial counsel rendered ineffective assistance by failing to object to the State's use of testimony about an accelerant-detection canine's alerts at the scene of the fire and on items of defendant's clothing and by failing to consult with an arson expert or call an expert witness to refute the State's arson experts. Further, appellate counsel was objectively deficient in failing to present the meritorious claim of trial counsel ineffectiveness on appeal. The fire at issue occurred in an apartment defendant was in the process of moving out of due to eviction. It broke out five to ten minutes after defendant and his girlfriend left, apparently intending to return. Some of defendant's belongings remained in the apartment and he was supposed to meet the apartment complex manager that evening for a walk-through inspection of the apartment. At trial, the State presented expert testimony supporting the arson theory. One aspect of such testimony involved alerts by an accelerant-detection canine. Trial counsel, who had never tried an arson case before, failed to object to this testimony even though existing case law made it highly unlikely that the State would have been able to overcome a proper objection. In preparation for trial, trial counsel spoke only with a fire marshal who was a witness for the State. Obviously, this expert would not have provided trial counsel with a basis to challenge the expert's own findings. The defense theory was that either the fire started accidently by a cigarette smoked by the girlfriend contacting alcohol spilled on the floor during a party the night before or that it was started by an unknown individual who a neighbor saw outside the apartment around the time the fire began. Both theories had significant evidentiary problems. As shown by post-conviction expert testimony, had trial counsel consulted with or presented testimony from an independent arson expert, she would have had ammunition to challenge how the arson investigation had been conducted as well as the findings of the State's arson experts. The defense post-conviction expert had criticized numerous aspects of the investigation and concluded that the fire should have been classified as of "undetermined origin." Trial counsel's failure to properly educate herself constituted deficient performance. Prejudice is found because: (1) post-conviction expert testimony revealed substantial errors in the State's arson case; (2) under existing case law, trial counsel likely would have kept out the canine alert testimony; and (3) the jury struggled to reach a verdict in this case. (After the jury announced a deadlock, it was told that if it did not reach a verdict that day, it would have to return to deliberate on an extra unplanned day causing a hardship to at least one juror. The jury reached consensus after that admonition.) Because trial counsel's deficient performance prejudiced defendant, "appellate counsel's failure to raise a claim of ineffective assistance of trial counsel on appeal was likewise objectively deficient and prejudicial."

****Commonwealth v. Williams*, 141 A.3d 440 (Pa. 2016).** In triple murder case, appellate counsel was ineffective in failing to raise trial counsel's ineffectiveness in not cross-examining the prosecution's expert or calling a defense expert concerning inconsistencies between the key

prosecution witness's testimony and the forensic evidence. At trial, the prosecution relied primarily on the testimony of White, a purported eyewitness to two of the murders and an accomplice in all three. White testified that the three victims had arranged to purchase weapons from Williams, the leader of a gang that sold weapons and drugs. Williams had planned to rob the men when they met to receive the guns. When the groups met, Williams and members of the gang, including White, held the victims at gunpoint and demanded their money. After the purchase money was turned over, Williams continued to demand additional money from the three victims. When one of the men admitted he had additional money at another location, he was taken by Williams and two other gang members to retrieve the money. Williams and the gang members returned without the victim. White testified that one of the two gang members who accompanied Williams informed White that Williams had shot the victim in the head. The remaining two victims were then loaded in the back of a stolen van. Williams and another gang member were in the back with the victims and continuing to demand more money. White was in the front passenger seat. White testified that he saw Williams shoot the smallest of the three victims in the face while the victim looked at Williams and the gun. A short time later, the van slowed and this victim was thrown out of the back of the van into the street. White then saw Williams put his gun in the face of the remaining victim. White turned to face front and heard two gunshots and the back of the van open. When he next looked back, the third victim was gone, presumably also thrown out of the van. When the victims were later found by authorities, none were in a street but instead on a sidewalk or in a driveway. And each had sustained gunshots wounds but none had other injuries to their bodies, such as bruises or abrasions. Defense counsel did not ask any of the prosecution's expert witnesses a single question. Counsel for one co-defendant did cross-examine two of these witnesses about the absence of non-gun-related injuries to the victims but the witnesses opined that the lack of additional injuries did not establish that the victims had not fallen. Defense counsel argued to the jury that common sense showed that the location and conditions of the bodies were inconsistent with White's account of what occurred. In post-conviction proceedings, defense counsel conceded he had no strategic reason for failing to consult with or present testimony from a medical or forensic expert in order to highlight the problems with White's testimony. Post-conviction counsel presented testimony from an expert in the field of homicide investigation, crime scene analysis and blood spatter analysis. This expert, who was credited by the post-conviction court, opined that the medical and forensic evidence was inconsistent with White's testimony. In finding that this expert's testimony would have been helpful to defendant at trial, the state supreme court noted in particular the expert's opinion that "the blood flow evidence was [] wholly incompatible with White's testimony that the victims were shot and thrown from a moving van." Additionally, the expert testified that none of the victims sustained gunshot wounds consistent with White's testimony that the victim was looking at the shooter's gun when he was shot. As for prejudice, it was noted that although White was subject to significant impeachment, "the cross-examination of White left his story about the three murders at issue largely unscathed." If the jury believed the post-conviction expert's testimony, coupled with other evidence impeaching White's credibility, it is likely the jury would have acquitted defendant of the three murders. Finally, the record supported the post-conviction court's "factual findings and legal conclusion that appellate counsel had no reasonable basis for failing to raise the claim of trial counsel's ineffectiveness for not calling an expert to testify or cross-examining the Commonwealth's experts regarding the blood flow evidence and gunshot wound evidence." (Appellate counsel testified that he had no independent recollection of the appeal but that confining his claims to those appearing on the record, as occurred in defendant's appeal, was consistent with his practice at the relevant time.)

**Capital Case*

Prejudice is established because there was a substantial likelihood that the outcome of defendant's appeal would have been different if the trial counsel ineffectiveness claim had been raised there.

**2015:** ***State v. Johnson*, 57 N.E.3d 76 (Ohio Ct. App. 2015)**. Counsel ineffective in failing to object to the prosecutor's closing argument asking the jury to consider hearsay statements admitted for a limited purpose as substantive evidence of guilt. The defendant was convicted of assault for firing shots into a car occupied by his girlfriend and two other women. One of those women (Starks) did not testify but the state was permitted to introduce her statements during the investigation through a police officer over the defendant's objection. Prior to the testimony, the court instructed the jury that the testimony could be considered only for the limited purpose of describing the ongoing investigation. The officer testified that Starks said the defendant and his girlfriend were arguing and after the girlfriend got in the car and they were living, the defendant fired shots into the car. The cautionary instruction was not repeated in the final instructions. Following the defense closing asserting that no one testified that the defendant had a gun, the state argued in closing that Starks identified the defendant as the shooter. Counsel's conduct was deficient in failing to object to this argument because use of Starks' hearsay statements as probative evidence of guilt violated the defendant's right to confrontation. Prejudice established because without evidence identifying the defendant as the shooter, the state's case was weak and based entirely on inference as no gun was recovered and the shell casings in the parking lot near where the defendant was standing did not match the bullets removed from the car. The prejudice was enhanced because the improper arguments came in the state's rebuttal when the defense had no opportunity to respond. "As the last argument heard by the jury prior to deliberations, there is a substantial likelihood that its impact was prejudicial."

***Oatney v. Premo*, 369P.3d 387 (Or. Ct. App. 2015). Counsel ineffective in capital murder trial for failing to move to suppress the testimony and out-of-court statements of the codefendant which were used in violation of a use and derivative use immunity agreement between the state and the defendant. The victim disappeared after leaving home to meet with the defendant. The defendant was questioned but denied seeing her for three weeks. A week or so later the victim's badly decomposed body was found. The defendant retained counsel and informed counsel he was innocent but knew who had committed the crime. Counsel arranged a recorded interview of the defendant by the prosecutor and detectives. At the beginning of the interview, throughout the interview, and at the end of the interview, the prosecutor "promised petitioner that 'anything you say during the course of this interview' and 'any information that we derive from what you tell us' 'cannot ever be used against you.'" The defendant then made a statement that, while he was away from his apartment, his associate, Johnston, kidnaped the victim, sexually assaulted, and murdered her in the defendant's apartment. When the defendant returned, he helped clean up and dispose of the body because he feared being charged. Johnston was in custody on unrelated charges and had been interviewed several times about the murder, but he denied any knowledge. After the defendant's taped statement was played for Johnston, he became angry and then implicated the defendant. Over the next two days, he made additional statements ultimately admitting that both he and the defendant had sexually assaulted the victim and murdered her. Johnston and the defendant were jointly charged. In pretrial proceedings, counsel argued that the defendant's statements and Johnston's statements were inadmissible against the defendant due to the immunity agreement. Johnston subsequently entered into a plea agreement in which he agreed to

plead guilty and testify against the defendant in exchange for a life sentence. Trial counsel continued to argue that the defendant's statements were inadmissible under the agreement but inexplicably did not move to suppress Johnston's statements and testimony. The prosecutor conceded that the defendant's statements were inadmissible. During trial, Johnston testified consistent with his statements. The defendant also testified consistent with his statement. The only physical evidence of significance was the victim's blood in the defendant's apartment. Counsel's conduct was deficient in failing to move to suppress Johnston's testimony and prior statements. While counsel testified that he believed these statements were admissible, this "subjective belief, apparently belatedly arrived at," was unreasonable in light of the plain language of the agreement and counsel's earlier challenges to the statements. Likewise, while the state argued that the agreement was premised on the defendant's statements being true, this was inconsistent with the plain language of the agreement and was never argued before by the prosecutor who made the agreement and conceded that the agreement precluded use of the defendant's prior statements. While the state also argued that Johnston's statements were not derivative because they were from an independent source and would have inevitably been discovered, those arguments were also rejected. The record was clear that Johnston had consistently denied knowledge of the crimes and confessed only after the defendant's recorded statement was played for him. Prejudice was "readily" found, as the state made no argument otherwise and Johnston's statements and testimony were the only direct evidence against the defendant.

***Floyd v. State*, 159 So. 3d 987 (Fla. Dist. Ct. App. 2015)**. Counsel ineffective in shooting case for failing to object to the prosecutor's comments on the defendant's exercise of his post-arrest right to remain silent. These comments were made while cross-examining the defendant, who was arguing self-defense. Counsel's explanation of "not wanting to annoy the jury or give the appearance of attempting to hide something from the jury" was unreasonable because could did make other objections during the state's cross of the defendant.

***State v. Sims*, 769 S.E.2d 62 (Ga. 2015)**. Counsel ineffective in felony murder case for failing to object to the prosecutor's opening statement comments concerning the defendant's silence prior to arrest. Counsel's failure to object "was an oversight unrelated to any strategy." Prejudice established. The sole defense was justification, but these comments tainted the trial from the beginning leaving the impression of guilt from the defendant's failure to contact the police of his own accord following the shooting.

***People v. Coleman*, 25 N.E.3d 82 (Ill. Ct. App. 2015)**. Counsel ineffective in unlawful delivery of a controlled substance case for stipulating to the existence of over 900 grams of cocaine, even though the police field tested only 1 bag, containing only 63 or 64 grams, prior to commingling this evidence with powder contained in 14 other bags before sending it to the lab. Counsel's conduct was deficient and prejudicial with respect to quantity. Remanded for resentencing on the lesser included offense of possession of "15 grams or more but less than 100 grams."

***Taylor v. State*, 167 So. 3d 1143 (Miss. 2015)**. Counsel ineffective in receiving stolen property case for failing to object to the introduction of the defendant's past felony convictions. The police were investigating a stolen "skid steer" used by the owner of a tree service when they discovered photos of an identical "skid steer" on the defendant's phone while he was under arrest for an

unrelated crime. The tree service owner, who had previously identified someone else as the person he bought the equipment from, then identified the defendant as the culprit. Prior to trial, counsel moved to exclude evidence of the defendant's past criminal record, but the ruling was delayed until trial. Just prior to the defendant's testimony, counsel withdrew the motion as the defendant had decided to testify and would admit that he was a convicted felon. During his direct testimony, he admitted that he had previously been convicted on a drug charge. On cross, the state elicited testimony of seven or eight prior felony convictions of house burglary, vehicle theft, grand larceny, and other offenses. Defense counsel made no objection. Counsel's conduct was deficient, lacking in strategy, and prejudicial, as the evidence admitted was, under the state evidentiary rules, "clearly more prejudicial than probative in a case that largely turned on the respective credibility of Taylor and the State's main witness." The defendant's admission of his felon status should have been the only evidence admitted concerning the defendant's prior criminal history.

***State v. Pruett*, 31 N.E.3d 197 (Ohio Ct. App. 2015)**. Counsel ineffective in theft case for failing to object to police officers' statements, which bolstered victims' testimony. The case arose from alleged fraudulent fuel purchases made on the account of a painting company, who had an account at a gas station. The defendant was an employee of the gas station allegedly creating false fuel purchases and pocketing the cash. The owners of the businesses compared paperwork and concluded that the defendant was the guilty party. This information was taken to the police who brought charges. During trial, a detective was asked, without objection, whether he had any reason to doubt that the defendant signed the tickets. Another officer testified, without objection, that he verified the information provided. The defendant was never asked to provide a handwriting exemplar to determine whether he wrote the disputed tickets and neither officer conducted any investigation beyond speaking with the alleged victims and the defendant. Counsel's conduct was deficient in failing to object to the officers' testimony "attesting to the veracity of witnesses." Prejudice established, as there was no actual accounting of the business records, which were not admitted in evidence, and no independent investigation by the police.

***State v. Vandyke*, 863 N.W.2d 626 (Wis. Ct. App. 2015)**. Counsel ineffective in reckless homicide by delivery of controlled substance case for failing to objection to the introduction of a lab report containing the victim's blood and urine tests results, which was testimonial for confrontation clause purposes. The only evidence that the victim died of a heroin overdose came from this report, when neither the author of the report nor anyone else from the lab was produced as a witness. While counsel allegedly wanted this report in evidence in order to argue that a different drug killed the victim, this was unreasonable. If the objection were successful, such argument would be unnecessary because the state could not prove its case. If the argument were unsuccessful, counsel's argument could still have been made. Prejudice established.

**2014:** ***People v. Centeno*, 338 P.3d 938 (Cal. 2014)**. Counsel was ineffective in lewd acts case for failing to object to the prosecutor's arguments using a hypothetical to explain the burden of proof and other statements that diluted the state's burden of proof. Specifically, the prosecutor used a diagram showing the boundaries of California and urged the jury to convict based on a "reasonable" view of the evidence, which risked misleading the jury.

> The use of an iconic image like the shape of California or the Statue of Liberty, unrelated to the facts of the case, is a flawed way to demonstrate the process of proving guilt beyond a reasonable doubt. These types of images necessarily draw on the jurors' own knowledge rather than evidence presented at trial. They are immediately recognizable and irrefutable. Additionally, such demonstrations trivialize the deliberative process, essentially turning it into a game that encourages the jurors to guess or jump to a conclusion.

*Id*. at 947. Counsel's conduct was deficient in failing to object. Prejudice established as "this was a very close case" dependent almost entirely on the 10-year-old alleged victim's testimony, the credibility of which was repeatedly called into question.

***Hutchins v. State*, 756 S.E.2d 347 (Ga. Ct. App. 2014)**. Counsel ineffective in manufacture of methamphetamine and allowing child to remain present where methamphetamine was being manufactured case for failing to object to uncharged misconduct and bad character evidence. The defendant and her 3-year-old daughter lived with the defendant's mother and stepfather for 6 months. During this time, police received a tip from a confidential informant that methamphetamine was being manufactured and sold from the property. Police made two "controlled buys" from the defendant's stepfather at the home. A search of the home revealed methamphetamine ingredients, supplies, and a "recipe" but all in common areas of the home or in the parents' bedroom. Thus, the court of appeals held that there was insufficient evidence to support the manufacturing charge because the only evidence linking the defendant to any of the relevant evidence "was her awareness of and proximity to" it. The evidence was sufficient to support the charge of allowing her child to be present around the manufacture, though it was all circumstantial. Defense counsel's conduct was deficient, however, in failing to object to testimony from the lead police detective that the defendant had been involved in a suspected illegal "pill ring," in which participants obtained doctor's prescriptions for oxycodone and Oxycontin and then sold the pills on the street. The defendant allegedly transported participants to the doctor appointments. The investigator also testified without objection that he believed the defendant was lying when she denied knowledge of drug manufacture and sale from her home and claimed awareness only that her mother had manufactured methamphetamine in the past. During cross-examination of the defendant, the prosecutor questioned her extensively about the details and her involvement in the pill ring based on information from a confidential informant and from the police. While counsel did object to the cross-examination, the court overruled the objection because the evidence about the alleged "pill ring" had already been admitted. "[T]rial counsel offered no strategic basis for admitting the evidence; rather she testified that she did not think the evidence was harmful." Prejudice was established as the prosecutor relied on this evidence to establish the defendant's propensity for drug crimes and her intimate knowledge of the drug trade, which severely undermined her credibility on key issues in the trial.

***State v. Collins*, 91 A.3d 1208 (N.H. 2014)**. Counsel ineffective under the state constitution in aggravated sexual assault case involving the defendant's 14-year-old daughter for failing to object to improper expert testimony from the daughter's therapist that her behaviors "fit perfectly" with those of sexual abuse victims and that her disclosure, which "came out of the blue . . . added to its credibility." Counsel's conduct was deficient as this testimony was clearly improper. Prejudice

established as the case turned primarily on the daughter's credibility, which was improperly bolstered by the expert based on his "forty-two years of experience."

***People v. Shi*, ___ N.Y.S.2d ___, 2014 WL 1344412 (N.Y. App. Div. Mar. 21, 2014)**. Counsel was ineffective in endangering welfare of child case for failing to move in limine and failing to object to the prosecutor's improper cross-examination of the defendant about his illegal entry into the country. Counsel's conduct was deficient and prejudicial where the case turned on the credibility of the defendant and the 11-year-old alleged victim.

***Ex parte Bryant*, 448 S.W.3d 29 (Tex. Crim. App. 2014)**. Counsel ineffective in murder case for failing to object to evidence that several state witnesses had been given polygraph tests prior to changing their statements from favorable to the defendant to harmful to him. On the night of the murder, the victim's children told police they saw three men at the time of the shooting: Kenneth, Mitchell, and Tom, but were initially unable to identify Tom. A year later, Kenneth and Mitchell were indicted. Kenneth was killed in a car accident and the charges were dismissed against Mitchell. Nineteen years after the crime, when a new Sheriff took office, the case was reopened. A jailhouse snitch implicated Mitchell, who initially denied involvement. After being told that he failed a polygraph, however, he admitted involvement as a get-away driver and implicated Bryant as the shooter. One of the victim's children also changed his statement to implicate Bryant. Finally, Bryant's live-in girlfriend, Janie, was questioned. After she was told that she failed a polygraph, she also signed a written statement implicating Bryant. Counsel's conduct was deficient in failing to object to repeated references to Janie's and Mitchell's polygraph tests and the results, which the state used to argue that they were untruthful until confronted with these results. Thereafter, according to the state, they were truthful in implicating Bryant. Prejudice established.

***State v. Doutre*, 335 P.3d 366 (Utah 2014)**. Counsel ineffective in attempted kidnaping case for failing to object to the testimony of a detective, who was testifying as an expert witness. The state's case was based on the testimony of three young girls, who testified that they were out sledding. One girl separated from the group to walk towards a nearby house where her mother was visiting a friend. She testified that she was approached by a man who grabbed her hand and told her that her mother was by his truck. The other girls began yelling and the man fled. Based on their descriptions of the truck and the man's clothing, police arrested the defendant who lived in a nearby apartment. The state's case "hinged on whether the jury believed the girls' account – that Defendant ran down the hill, attempted to kidnap the girl, and then ran away in a different direction – or Defendant's explanation – that he saw a girl fall in the mud, walked a few feet over to help her, and then left." During trial, the detective in question was appointed by the court to guide the jury during a jury view of the scene. Afterwards he testified about his investigation in general but also gave expert testimony about footprints in the snow. He claimed to have found footprints in the melting snow five days after the attempted kidnaping that he testified were from an adult who was running down the hill, which was consistent with the girls' story. The state emphasized this testimony in closing arguments. Counsel's conduct was deficient in failing to object to this testimony for four different reasons: (1) the detective had served as the escort and narrator during the jury view; (2) the state failed to give prior notice of this expert testimony; and (3) the detective was not qualified to give expert testimony and his methods were unreliable. With respect to the jury view, the detective

"explained the location of events that supported the State's theory of the case, even though he had served as the court-appointed guide who was supposed to impartially point out landmarks for the benefit of the jurors during the jury view. All of this had the probable effect of bolstering his credibility." With respect to notice, the defendant was entitled to 30 days' notice, but the state gave only three business days' notice before trial. With respect to the "expert" testimony, the detective testified that he was a 4-year veteran of the search and rescue team with training in tracking people, which was "questionable qualification" from the start, but it was immediately apparent that his testimony was not "(1) reliable, (2) based on sufficient facts or data, or (3) reliably applied to the facts of the case." He did not even examine the unsecured scene until several days later when others could have walked through the area and, at minimum, the snow had melted a great deal. Prejudice established.

**2013:** ***Williams v. State*, 983 N.E.2d 661 (Ind. Ct. App. 2013)**. Counsel ineffective in burglary and firearms case for failing to object to a "breathtaking" "deluge" of prior criminal acts used by the State to argue the defendant's propensity to commit the crimes. The state's case was based on the burglary victim's testimony that he saw the defendant in his house with a gun. He could not identify the defendant's face, but identified him by his jacket and boots. An accomplice, testifying with immunity, identified the defendant as the burglar, but did not mention a gun. No gun was found at the time of arrest either. The defendant testified that he went to the home as a confidential informant to purchase drugs and guns for the police. On cross, the state elicited testimony and admitted evidence that the defendant had been charged and convicted of possession of cocaine and a firearm and placed on home detention. While on home detention, his was found to be in possession of drugs and guns and had tested positive for marijuana use. A detective confirmed his role as a confidential informant but denied that he was acting as such in this case. The detective also testified that the defendant admitted to him that he had committed previous unspecified burglaries, robberies, and gun-trafficking offenses. Counsel's conduct was deficient and prejudicial as the state's witnesses had credibility problems.

***Commonwealth v. Robertson*, ___ S.W.3d __, 2013 WL1688357 (Ky. Ct. App. Apr. 19, 2013)**. Counsel ineffective in sodomy and sexual assault case for complete failure to provide representation during juvenile transfer hearing and for failing to object to the prosecution's improper argument on the defendant's failure to testify during trial. The defendant was charged with sexually molesting two young boys that he babysat when he was 16-17 years old. He was charged in August 1995 when he was six weeks shy of his eighteenth birthday. At the juvenile transfer hearing, counsel provided essentially no representation resulting in a presumption of prejudice under *Cronic*. Nonetheless, given the defendant's age at the time of this opinion state law provided no remedy. Juvenile court jurisdiction ends at age 21. The defendant is now in his thirties. "To send [him] back before a juvenile court would be to ask the juvenile court to operate under the fiction that he could still benefit from a trial as a juvenile." The defendant was entitled to a new trial, however, due to counsel's ineffectiveness during trial. The defendant did not testify. During the prosecution's closing argument, the prosecutor informed the jury that sex abuse cases generally come down to a child's word against an adult's, but that this case was "as good as it gets. Additionally, he argued "this defendant cannot give you any reason why these children would make this up" and that the

testimony of the two children was "un-refuted" when the defendant was the only person that could refute the testimony. Counsel's failure to object to these three comments was deficient conduct.

> [E]ach constituted at least an indirect reference to [the defendant's] failure to testify. Even if each, if taken in isolation, might be permitted (which we do not concede), the cumulative effect of all three was prejudicial to [the defendant] and violated his Fifth Amendment right. The Commonwealth's comments were not general, they were specific; and they were not benign, they were prejudicial. They thrice reminded the jury that [the defendant] himself had offered no testimony in response to the allegations against him. This constitutes prosecutorial misconduct and impermissible evidence, both of which, if objected to, would likely have been cause for a mistrial or, at the very least, excluded from the jury's consideration.

Prejudice was especially clear in light of the "weak nature of the prosecution's case."

***Coleman v. State*, 75 A.3d 916 (Md. 2013)**. Counsel ineffective in murder case for failing to object to a detective's testimony about approximately 30 instances where the petitioner remained silent in the face of police questioning/accusation while the petitioner was in custody and after he had been issued Miranda warnings. Counsel's conduct was deficient because counsel "was not properly informed of the law, whether by neglect or ignorance." Prejudice was established by the numerous instances. *Id*. at ___ (citing *Williams v. Zahradnick*, 632 F.2d 353, 363 n. 13 (4th Cir.1980) ("One reference is less damaging than four; a lengthy colloquy is more prejudicial than a brief one")). Prejudice was enhanced by the detective's "editorializing" commentary which made "it appear as though Coleman might have been searching for an answer that would not hurt him." *Id*. at ___ (citing *Alston v. Garrison*, 720 F.2d 812, 816 (4th Cir.1983) (noting that evidence of a defendant's post-Miranda silence "plants in the mind of the jury the dark suspicion that the defendant had something to hide, and that any alibi which is subsequently proffered is pure fabrication"). Prejudice was not diminished by the fact that the defendant ultimately answered all of the detective's questions at some point over the course of the very lengthy interrogation because "it is the silence itself, and any inferences drawn from it, that is harmful to Coleman, and these harmful inferences are what the principles underlying Miranda strive to protect." Also factoring into prejudice was that the State's primary evidence of guilt came from "co-defendants that testified as a result of plea agreements with the State" and Coleman's theory of the case was accessory-after-the-fact, which made Coleman's version of the events and his credibility an essential factor for his defense. "[W]e would be naive if we failed to recognize that most laymen view an assertion of the Fifth Amendment privilege as a badge of guilt." *Id*. at ___ (quoting *Walker v. United States*, 404 F.2d 900, 903 (5th Cir.1968)).

***Vail v. State*, 738 S.E.2d 503 (S.C. Ct. App. 2013)**. Counsel ineffective in criminal sexual conduct with a minor case for failing to object to hearsay testimony about the alleged sexual relationship between the 13-year-old girl and her teacher and coach at her church school. Counsel's conduct was deficient in failing to object to testimony from the alleged victim's sister, father, and friend about her statements to them about the relationship and testimony from the school principal that there had been rumors of the defendant engaging in inappropriate behavior without another student. While counsel's strategy was to show that the alleged victim was "obsessed" with the

defendant, the detailed accounts of the alleged relationship went well beyond this and the rumor about the other student certainly had no "place amidst his articulated strategies." "The only purpose these testimonies served was to corroborate and bolster Victim's story and to evoke an emotional response from the jury, which was improper." Prejudice established as there were no eyewitnesses and no physical evidence as the alleged victim's hymen was fully intact despite six to nine alleged instances of sexual intercourse.

***State v. Larrabee*, 321 P.3d 1136 (Utah 2013)**. Trial counsel ineffective in aggravated sexual abuse of a child and dealing in material harmful to a minor case for failing to object to the state's improper closing argument. The defendant was charged with abusing his step-granddaughter. He and his wife were court-ordered guardians. Following his divorce, he wad given court-ordered visitation, during which the abuse was alleged to have occurred. During trial, the state sought to introduce evidence that the defendant had sexually molested the alleged victim's mother, who was his stepdaughter, but the trial court ruled her testimony inadmissible due to unreliability and instructed the witness and counsel not to refer to these allegations in front of the jury or a mistrial would be granted. Nonetheless, during closing arguments, the prosecutor did refer to the allegations that the defendant had sexually abused the alleged victim's mother. Counsel's conduct was deficient in failing to object and move for a mistrial or, at the very least, to request a curative instruction. This was not based on any alleged strategy to avoid highlighting the issue by objection. "Allegations of past sexual abuse of a child do not pass by unnoticed, particularly within the context of a criminal trial for that very crime. They shout their presence." Moreover, "the prosecutor's violation of the judge's order was so brazen and the accusation so obviously inflammatory that it had already been brightly highlighted by its very nature." Prejudice also established as the prosecutor's comments "went to the heart of what the jury was being asked to decide: whether Defendant's testimony was credible."

**2012:** ***State v. Moore*, 733 S.E.2d 418 (Ga. Ct. App. 2012)**. Counsel ineffective in rape case for failing to object to improper state evidence and argument concerning the defendant's pre-arrest silence. The state elicited evidence and argument that police called the defendant when he became a suspect asking to interview him. He declined at that time saying he was going out of state to see his son. Counsel's conduct was deficient as state law precluded reliance on pre-arrest silence even where the defendant had not received *Miranda* warnings and testified in his own defense. Prejudice established as the only real issue at trial was whether the sex was consensual, and the evidence of guilt was not overwhelming.

***People v. Moore*, 964 N.E.2d 1276 (Ill. App. Ct. 2012)**. Counsel ineffective in murder case for failing to object to the admission of other crimes evidence on interrogation videos. The defendant was interrogated on video over a period of two days with the actual questioning lasting 8-9 hours. Most of the defendant's statements were denials of the various allegations against him. During direct examination of a detective, several excerpts from the videos were shown to the jury. Afterwards, the court ruled that the jury would be allowed to watch the entire video and that it would be made available to them. The video contained detailed discussions of the defendant's prior crimes and past wrongs. Specifically, the defendant was questioned about a prior incident of domestic violence to which he plead guilty. In the video, the police indicated that they interviewed the woman involved, and she claimed that the defendant punched her and broke her jaw after finding her with another

man. The defendant responded that he learned that she had been hurt when she was granted an order of protection against him. Likewise, on the video, a detective refers to the defendant's "history of robberies," as well as his "prior history as a drug dealer and membership in the Vice Lords street gang." Counsel's conduct in failing to object to this information being provided to the jury was deficient. Prejudice established, because the trial court "would have excluded the irrelevant, unfairly prejudicial other crimes evidence." While the state argued that it was unlikely the jury watched the video, as deliberations lasted less than 6 hours, the Court rejected this. Most of the video showed the defendant in the room alone and the jury likely would have watched only the interrogation portions. Even if the jury did not watch all of the interrogation portions, "most of the unfairly prejudicial material appear[ed] in the first hours of the video."

***People v. Watson*, 965 N.E.2d 474 (Ill. App. Ct. 2012)**. Counsel ineffective in residential burglary case for failing to challenge partial-profile DNA comparisons. Hairs were recovered from the window that was the point of entry. The state's expert testified that his "laboratory types 13 loci on the DNA to create a profile." The hair sample allowed him to obtain information only on 7 of the 13 loci. Based on this, he was unable to exclude the defendant. He also testified that only 1 in 103 million (about 1/3 of the population of the U.S.) white men would meet this 7 loci profile. Defense counsel asked only three questions of the expert in cross, but argued in closing that the DNA was not a "perfect match" since there were only 7 of 13 loci. The state, on the other hand, argued in closing that the DNA was "a match" and that only 3 people in the U.S. would have that profile. Counsel's conduct was deficient in failing to challenge the DNA evidence. She failed to challenge the meaning or significance of the partial-profile comparison, even though "one legal scholar" has explained that matching on less than 13 loci will exclude a suspect. Likewise, counsel did not highlight that the state's expert said only that the defendant could not be excluded, not that he was a match. This error was compounded by counsel's failure to challenge the statistical significance of the partial match. Counsel's conduct was deficient as studies have been conducted in at least three states that suggest the statistical testimony here was overblown. Likewise, many "[l]egal scholars and scientists" dispute the legal significance testimony. In short, "it is clear that counsel's challenge to this evidence was virtually nonexistent, and quite possibly counsel simply did not understand the evidence." Prejudice established as this was "the only evidence linking defendant to the crime."

***Herrington v. State*, 102 So. 3d 1241 (Miss. Ct. App. 2012)**. Counsel ineffective in aggravated assault and possession of weapon by a felon case for allowing the defendant's prior convictions to be admitted as evidence. Even though the defendant stipulated that he was a convicted felon, two prior sentencing orders were admitted into evidence, which revealed three prior drug convictions. Counsel's conduct was deficient in failing to object to this evidence, which supported the state's motive theory, contradicted the defendant's testimony, and allowed the jury to infer the defendant "was lying" in his testimony. Prejudice established.

***People v. McArthur*, 956 N.Y.S.2d 71 (N.Y. App. Div. 2012)**. Counsel ineffective in murder case for failing to object to the prosecutor's comments about the defendant's post-arrest silence and demeanor as evidence of consciousness of guilt. Likewise, counsel elicited testimony concerning an unrelated shooting shortly before this crime and just two blocks away, even after the trial court

warned that this would open the door to the prosecutor presenting evidence that the defendant had pled guilty in connection with that shooting. Counsel failed to even request a limiting instruction related to this evidence. Prejudice established due to "[t]he cumulative effect" of the errors.

***People v. Fisher*, 967 N.E.2d 676 (N.Y. 2012)**. Counsel ineffective in sex offense case for failing to object to improper argument encouraging "inferences of guilt based on facts not in evidence." The prosecutor argued, without a basis in evidence, that the alleged victims had said the same thing over and over to police, social workers, doctors, and the grand jury. Likewise, the prosecutor essentially testified in arguing that the alleged victims' contemporaneous misbehavior at school was proof of the crimes. Finally, the prosecutor made a "less than frank minimization" argument concerning a benefit to a jailhouse snitch, who was confined on a parole violation and testified that the defendant confessed to him. The defense cross-examined the snitch about the prosecutor's agreement to write a letter to the parole board on his behalf. The prosecutor argued in closing that she was not the parole board and did not "control" the snitch's fate. While this was technically true, this argument was also "materially misleading; the prosecutor was plainly in a position, if not to control, at least to influence the outcome of [the snitch's] parole violation hearing." Finally, the prosecutor admonished the jury that their acceptance of the truth of the testimony of the child witnesses was essential to the administration of justice. "[D]efense counsel's failure to object to any, let alone all, of the prosecutor's egregiously improper departures during summation, particularly in the highly charged, potentially outcome determinative context in which they occurred, deprived defendant of the right to effective assistance of counsel." No possible strategy could explain this.

**2011:** ***People v. Fillyaw*, 948 N.E.2d 1116 (Ill. App. Ct. 2011)**. Counsel ineffective in murder case for failing to object to admission, as substantive evidence, of a written statement by a state witness that was given to a detective pretrial and included alleged inculpatory statements by the defendant to the witness. The witness testified during trial but maintained that the entire prior statement was false. Counsel's conduct was deficient.

> The constitutional guarantee of effective assistance of counsel requires a criminal defense attorney to use the applicable rules of evidence to shield his client from a trial based upon unreliable evidence.

Counsel's conduct was also prejudicial.

***State v. Washington*, 72 So. 3d 422 (La. Ct. App. 2011)**. Counsel ineffective in possession of cocaine with intent to distribute case for failing to move for mistrial or to request a jury admonishment after the trial court sustained counsel's objection to the prosecution's improper closing argument on the defendant's post-Miranda silence. Counsel had elicited testimony of the defendant's silence in cross-examination of a police officer and the state had properly explored this in redirect. The prosecution's argument crossed the line, however, "by asking the jurors to speculate what they would have done if wrongly accused of possessing drugs. With these remarks, the prosecutor was openly using the defendant's silence as substantive evidence of the defendant's guilt." While counsel objected and the court sustained the objection, counsel did not request mistrial or admonishment. Prejudice established as the state's case against the defendant was circumstantial.

While the cocaine was in his home, it was in plain view on top of a television where four young men were playing video games when officers searched the home and found the drugs. In addition, while drugs were found in a bedroom, there was no proof that the bedroom belonged to the defendant, who was not the sole resident of the house. At minimum, an admonishment from the court would have lessened the impact of the improper argument on the jury.

***State v. Gieser*, 248 P.3d 300 (Mont. 2011)**. Counsel ineffective in driving under the influence case for failing to object to admission of horizontal gaze nystagmus (HGN) evidence that was not supported by expert testimony and breath tests done on "un-certified apparatus." State law allowed HGN evidence only with a showing that the test was properly administered by the officer and supported by expert testimony. State law also required that breath test instruments be regularly inspected and calibrated. Prejudice established as the HGN and breath test evidence had "an appearance of precision and scientific reliability" and the breath test numbers from the machine could be used to infer intoxication under state law.

***State v. Thompson*, 20 A.3d 242 (N.H. 2011)**. Counsel ineffective in aggravated sexual assault on child case for failing repeatedly to object to hearsay testimony of the child's babysitter, the child's mother, and a police officer about the child's out-of-court statements, even though counsel was aware the child had recanted her statements prior to trial and told the jury this in opening. This hearsay was the only substantive evidence of guilt as the child denied in her trial testimony, even with leading questions and coaxing by the prosecutor, that the defendant had touched her. Counsel did object at times, but counsel's "erratic and inconsistent decisions . . . clearly fall below the constitutional bar." Counsel's behavior was "completely irrational" and could "only be attributed to a lack of understanding of the rules of evidence or extreme carelessness." Prejudice established as counsel allowed a legally insufficient case to go to the jury. The court relied exclusively on the hearsay in denying the motion for directed verdict. "The inaction was so fundamental and flawed that the State was able to prove the case only because of defense counsel's failure."

**2010:** ***Purvis v. State*, 43 So. 3d 734 (Fla. Dist. Ct. App. 2010)**. Counsel was ineffective for failing to object to the commingling of the contents of packages of suspected cocaine in trafficking of more than 400 grams case. Officers seized 27 small packets of white powder, a bag of white powder, and a bag of rock-like substance. The two bags were separately tested for cocaine and weighed 10.78 grams. The small packets were commingled 4-7 bags at a time in five different measures without testing the contents of each bag before commingling. The total weight of the substance from these bags was over 600 grams. The failure to test each bag was notable because officers had also found a large bag of benzocaine, which is not a controlled substance. In any event, the evidence was insufficient to establish that there were 400 grams of cocaine, as each individual packet contained approximately 14-28 grams and the court could be sure only that 5 of the packets contained cocaine.

***Higgins v. State*, 698 S.E.2d 335 (Ga. Ct. App. 2010)**. Counsel was ineffective in rape and sodomy case for failing to object to the state's admission of an "unredacted juvenile disposition order . . . that the state used to prove a similar transaction." Counsel had raised the need for redaction of the sentence and obtained the state's agreement to redact prior to trial. Nonetheless, the order was not

redacted and included information about the "need for protection" of the community, "sex offender treatment," and the like, for the defendant. Counsel's conduct was deficient and there was no strategic reason not to object. Prejudice established as "this case was not overwhelming because evidence was introduced that the encounter may have been consensual."

***People v. Sanchez*, 935 N.E.2d 1099 (Ill. App. Ct. 2010)**. Counsel ineffective in bench trial of drug case for failing to object to admission of the defendant's prior drug conviction that was more than 10 years old to impeach him. Although the defendant's release from parole was only 9 years prior to trial, state law calculates the period from the date of the prior conviction "or of the release of the witness from confinement, whichever is the later date." The defendant's release from confinement was more than 10 years prior to trial. There was no valid strategic reason for the failure to object. Either counsel failed to investigate the details of the prior conviction or was aware of those details and misapprehended the law. Under either scenario, counsel was ineffective. Prejudice established as this was a credibility contest between the defendant and police officers and the trial court twice expressly relied on the prior conviction in weighing the defendant's credibility.

***Smith v. State*, 689 S.E.2d 629 (S.C. 2010)**. Counsel ineffective in criminal sexual conduct with minor case for failing to object to improper hearsay from a "forensic interviewer" corroborating the alleged victim and asserting her statements were "believable" and that she had no reason "not to be truthful." Counsel's conduct was deficient, as corroborative witness testimony, under SCRE Rule 801(d)(1) is limited to time and place of the alleged assault. The testimony here far exceeded that and there was no valid strategy by counsel to allow this. Prejudice established as the case "hinged" on the alleged victim's credibility, there was otherwise an absence of overwhelming evidence of guilt, and the state relied heavily on this improper testimony in closing arguments.

***State v. King*, 248 P.3d 984 (Utah Ct. App. 2010)**. Counsel ineffective in attempted forcible sexual abuse case for failing to object to the prosecutor's improper statements in closing argument urging the jury to consider matters not in evidence. The defendant was accused of inappropriately touching his daughter's friend during a "tickle fight" with both girls during a sleep over at his home. The alleged victim testified the touching lasted for "two to three minutes." The daughter testified she saw no inappropriate touching during the "tickle fight." After making the allegations, an acquaintance of the alleged victim who testified for the defense, overheard her say, "I am so glad that nobody found out that I lied." During closing arguments, the prosecutor suggested, without evidentiary basis, that the reason for this statement was that she was only expressing concern that people would think she was a liar. Likewise, without evidentiary basis, the prosecutor argued the incident lasted just "a few seconds" during which the defendant's daughter had been looking away or distracted. While counsel can argue inferences, the prosecutor "went much further in 'spinning' the evidence to suit his purposes" and encouraged the jury to consider matters not in evidence. Likewise, the defense counsel, rather than objecting, basically agreed that "the encounter 'was probably fairly quick,' arguably conceding that the sexual touching actually occurred." Cumulative prejudice established, in combination with the "plain error" in the prosecution's misconduct, as the evidence of guilt was "scant" and relied almost exclusively on the alleged victim.

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***State v. Banks*, 790 N.W.2d 526 (Wis. Ct. App. 2010)**. Counsel ineffective in felon in possession of firearm and resisting or obstructing an officer case for failing to object to testimony and argument implying guilt based on the defendant's refusal to consent to DNA testing prior to the state obtaining a search warrant. The defendant and two other men were in a van that the police attempted to stop due to an expired license plate. All three men jumped and ran. A gun was found in the area. The driver of the van testified that the defendant had been in the backseat and the driver was not aware of there being a gun in the van. The front seat passenger of the van testified that the defendant had the gun in the van but threw it in the lap of the passenger during the attempted stop. The passenger then dropped the gun as he attempted to run. Both the driver and front seat passenger had at least five prior criminal convictions. Counsel's conduct was deficient in failing to object to testify by two officers and subsequent argument in closing that the defendant had twice refused to consent to DNA testing and that he did so "because his DNA might have been on that gun, and because he was the one that tossed the gun from the back of the van to the front into [the State witness'] lap."

> [I]t is a violation of the defendant's right to due process for a prosecutor to comment on a defendant's failure to consent to a warrantless search. It has long been a tenet of federal jurisprudence that a defendant's invocation of a constitutional right cannot be used to imply guilt.

*Id*. at 533-34 (citations omitted). Prejudiced established because the court could not "say with any confidence that the jury's verdict was untainted by the inadmissible evidence. . . . Consequently, there is a reasonable probability that, but for counsel's deficient performance, the result at trial would have been different." *Id*. at 535.

**2009:** ***State v. Shanklin*, 925 N.E.2d 161 (Ohio Ct. App. 2009)**. Counsel ineffective in grand theft case for failing to object to numerous instances of inadmissible hearsay by detectives. In essence, the defendant borrowed money from the alleged victim using a purchase order as collateral. Charges were brought when the defendant's "payment" checks were bounced for insufficient funds. During trial, without objection, detectives testified, based on information received only through third parties who did not testify at trial, that the purchase order was invalid and fictitious. This testimony was not only inadmissible hearsay, but, in one instance, left the jury with the impression that one third party admitted the purchase order was phony, when the transcript of the officer's phone interview with that third party revealed that the third party said the purchase order was okay. Counsel's conduct was deficient and prejudicial as the state's whole case was based on the argument that the purchase order was "a sham."

***Holman v. State*, 674 S.E.2d 171 (S.C. 2009)**. Trial counsel ineffective in case involving multiple charges arising from a shooting incident due to counsel's failure to object to admission of handgun found in defendant's apartment that had no relevance to the offenses for which the defendant was charged. "[T]he failure to object to this clearly inadmissible evidence was ineffective assistance of counsel" not explained by a valid trial strategy. Prejudice established.

**2008:** ***Antunes-Salgado v. State***, 987 So. 2d 222 (Fla. Dist. Ct. App. 2008). Counsel ineffective in cocaine trafficking and conspiracy case for stipulating to the admissibility of the postarrest and post-*Miranda* statements of co-defendants through the police officer who took their statements. Each of the

statements "minimized the respective declarant's involvement in the offenses and shifted the bulk of the involvement to [the defendant]." The statements were not admissible as being in furtherance of the conspiracy, statements against interest to the extent the statements inculpated the defendant, nonhearsay "verbal acts" (showing the effect of a statement on the defendant), or under any hearsay exception. The statements were inadmissible under *Crawford v. Washington*, 541 U.S. 36 (2004), which specifically holds that statements made during police interrogations are testimonial and therefore inadmissible. Prejudice found because, without these statements, the state could not establish the "agreement" element of the conspiracy charge, which was established solely through the inadmissible hearsay statements. Prejudice also found on trafficking charge when the evidence was disputed at trial. No strategy could excuse the ineffectiveness because "counsel conceded the admissibility of inadmissible statements that ultimately convicted his client without having researched the admissibility issue. Generally, important legal concessions are made after, not before, the applicable law is researched."

***Cobb v. State*, 658 S.E.2d 750 (Ga. 2008)**. Counsel ineffective in murder case for failing to object to improper hearsay testimony from a state firearms examiner. The examiner testified that bullets and casings found at the crime scene were from a .45 caliber pistol. A holster had been found in a search of the defendant's apartment. The expert testified that she called the manufacturer, gave the model number, and was told the holster was a Colt .45 pistol. Counsel's conduct was deficient because counsel failed to object to this testimony until the state attempted to elicit the testimony a second time. Prejudice was established because the testimony bolstered the only eyewitness, who was a crack addict with inconsistencies in her testimony, and the state's evidence was not overwhelming as evidenced by two prior hung juries.

***State v. Reynolds*, 746 N.W.2d 837 (Iowa 2008)**. Counsel was ineffective in counterfeit money orders case for failing to object to hearsay testimony. An employee of the bank that cashed the money orders testified, without objection, that she received emails from the Federal Reserve indicating the money orders were counterfeit. While counsel objected successfully to admission of those emails, counsel failed to object to this testimony, which was inadmissible as offered under the Business Records exception.

***Crawford v. State*, 256 S.W.3d 150 (Mo. Ct. App. 2008)**. Counsel ineffective in murder case for failing to consistently object to the state's repeated cross-examination of the defendant about the veracity of other witnesses.

***Wood v. State*, 260 S.W.3d 146 (Tex. Crim. App. 2008)**. Counsel ineffective in DWI trial for failing to object to admission of evidence of a prior DWI conviction. Prejudice found because the evidence of guilt was not overwhelming.

**2007:** ***Sims v. State*, 967 So. 2d 148 (Fla. 2007)**. Counsel ineffective in capital trial for failing to object to evidence of a "canine-alert" to drugs in a car that had been driven by the defendant at the time of the murder. The defendant had been stopped by an officer on suspicion of driving a stolen vehicle, which the defendant had borrowed but had failed to return. During the stop, the defendant shot and killed the officer. The defendant abandoned the car, which was subsequently searched. Although there was a "canine-alert" for drugs, no drugs were found in the car and there was no evidence the defendant had ever used drugs or been involved in the sale of them. Counsel's conduct was deficient

in failing to object to this "canine-alert" evidence or an officer's testimony that "the dog would alert to the scent of narcotics after the drugs had been removed." Counsel objected only when the defendant's parole officer was called to testify that parole would have been revoked if the defendant had been found in possession of drugs. The court overruled this objection. Counsel's conduct was also deficient in failing to move to strike the "canine-alert" evidence that laid the foundation for this testimony. All of this evidence supported the state's theory that the officer was killed because the defendant possessed drugs and was attempting to avoid a return to prison for violation of parole. Counsel admitted that there was no strategic reason for the failure to object and that he knew before trial that the state intended to offer this evidence, which was irrelevant since the defendant did not own the vehicle and no drugs were actually found in the car. Prejudice found because this evidence was essential to the state's motive theory and the state repeatedly relied on it in closing arguments.

***People v. Davis*, 879 N.E.2d 996 (Ill. App. Ct. 2007)**. Counsel ineffective in murder case for failing to adequately challenge and rebut "lip print" identification testimony alleging that the defendant's lip prints were on duct tape found at the crime scene. Counsel's conduct was deficient because this was the only physical evidence against the defendant and counsel knew it should be challenged. Counsel informed the defendant's family, who did not have additional funds to retain an expert, but did not attempt to retain an expert from his retainer fees or attempt to establish the defendant's indigence and get a court-appointed expert. The court found other bases, including court's extremely ill health prior to and during trial and failing to challenge the inconsistent eyewitness testimony, and found that "the cumulative effect of his errors was prejudicial."

***People v. Hoerer*, 872 N.E.2d 572 (Ill. App. Ct. 2007)**. Counsel ineffective in drug and involuntary manslaughter case for stipulating to the admission of the defendant's testimony from a co-defendant's trial admitting that he entered into plea negotiations with the state. Counsel's conduct was deficient because a state rule of evidence prohibited this testimony. Prejudice established because, under state law, admission of this evidence is "considered so devastating and prejudicial to a defendant that it constitutes reversible error absent a contemporaneous objection from trial counsel and even in the fact of overwhelming evidence of guilt." *Id*. at 578.

***State v. Butcher*, 866 N.E.2d 13 (Ohio Ct. App. 2007)**. Counsel ineffective in rape and kidnaping case for failing to adequately object to hearsay testimony. The defendant was charged with raping two sisters in the same room at the same time. One sister was five and the other was six. Almost two months after the alleged incident the sister's reported the alleged abuse and the identity of the abuser, the boyfriend of the aunt of one of the girls, to their grandmother, who relayed the information to the mother. During trial, counsel objected to the grandmother's testimony concerning statements the girls had made to her but the trial court improperly admitted this testimony. During the mother's testimony, which included double hearsay of what the girls said to the grandmother, who told her, counsel failed to object, however. Counsel also failed to timely object to improper hearsay testimony of the state's medical expert. The mother had taken the girls to a private doctor initially for treatment. On the advice of Child Services, the mother then took the children for examination at the "Child Advocacy Center" where they were physically examined and interviewed in depth by the doctor. The Detective on the case did not interview the children and deferred to the doctor's interview. Prior to trial, counsel had filed a motion in limine to exclude the doctor's

testimony about statements of the children because these were not made for the purpose of medical treatment. The court conditionally granted this motion unless a hearsay exception was established. When the doctor's testimony and report, which also included the hearsay statements, was offered, however, counsel failed to object. Counsel's conduct was deficient in failing to object to the mother's double-hearsay testimony, which was based on the grandmother's statements that counsel had objected to, and in failing to object to the Doctor's testimony and report because "[t]he granting of a motion in limine alone will not preserve error for review." It was also clear here that the doctor was "a 'manufactured witness'" that "assume[d] the role of a police investigator" and testified to hearsay statements "under the guise that they were given for the purpose of medical diagnosis or treatment." For example, the doctor testified that the identity of the perpetrator was important medically due to concerns about sexually transmitted diseases, but clearly was not concerned about that since the girls were not tested for STD. Considering both the court's error and the IAC, the court found the denial of a fair trial because four different adults (grandmother, mother, doctor, and detective) testified and the doctor's report also concluded that the defendant was the perpetrator based on inadmissible hearsay. Although the girls also testified,

> The prejudice arises when numerous adults repeat the girls' stories in court. If a statement is repeated often enough, it is more believable. Additionally, the repetition has the effect of the adults' vouching for the veracity of the statements.

Prejudice was also clear because portions of the girls' testimony were suspect because inconsistent with each other and one girl could not even identify the defendant in the courtroom and the medical evidence was equivocal because it was "consistent with" but not "diagnostic of" abuse.

***Fuller v. State*, 224 S.W.3d 823 (Tex. App. 2007)**. Counsel ineffective in sexual assault of a child and indecency with a child case for failing to object to improper testimony from four witnesses "bolstering" the 15-year-old alleged victim's truthfulness and credibility. The child's teacher testified in the state's case-in-chief that she was a credible and truthful person. This testimony was improper because the relevant rule of evidence allowed testimony concerning the victim's character for truthfulness only after her character had been attacked. The defense cross-examination of her does not "open the door" to character for truthfulness evidence. Likewise, "a defense theory of fabrication (as opposed to recent fabrication) which generally denies the charges against a defendant is not the equivalent of an attack on the victim's general character for truthfulness so as to warrant the admission of character testimony." The alleged victim's mother, an expert in child sexual assault investigations, and a forensic interviewer also testified that they believed the alleged victim's allegations against the defendant. This testimony was improper and inadmissible. Counsel's conduct was deficient in failing to object to this evidence because "counsel's conduct in allowing the State unfettered and unchecked bolstering of the victim was so outrageous that no competent attorney would have engaged in it." The failure to object was not explained by strategy or tactics. "Where counsel's strategy is premised on an incorrect understanding of the law, we need not defer to that as a reasonable strategy." Prejudice found because the alleged victim's credibility was the only real issue at trial and the repeated objectionable testimony was also "emphasized . . . to the jury during [the state's] closing argument."

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***State v. Hendrickson*, 158 P.3d 1257 (Wash. Ct. App. 2007), *aff'd on other grounds*, 198 P.3d 1029 (Wash. 2009)**. Counsel ineffective in second-degree identity theft case for failing to object to hearsay testimony from a Social Security Administration special agent that the owner of the social security card stated that his card had been lost and that no one had permission to use it. These statements were not admissible as business or government records and were "testimonial" and barred under *Crawford v. Washington*, 541 U.S. 36 (2004). Counsel's conduct was deficient and not explained by strategy. Prejudice found because this was the only evidence that the defendant did not have a valid reason to possess this card. Thus, absent counsel's error, there is a reasonable probability that the defendant would have been acquitted on this charge.

**2006:** ***McIntosh v. State*, 941 So. 2d 1 (Fla. Ct. App. 2006)**. Counsel ineffective in attempted murder case for failing to object to the improper use of demonstrative evidence and improper prosecutorial questioning and argument. The defense theory was that the defendant stabbed the victim in the neck with a pocketknife in self-defense. The stab wound was less than 3/4 inch across but left the victim partially paralyzed. Counsel was ineffective in failing to object when, during cross examination of the defendant, the prosecutor pulled out his own knife to demonstrate his theory that the defendant could not have pulled out his knife during the struggle and had come prepared to fight. Although the defendant had used an ordinary pocketknife, the prosecutor pulled out a knife that was 8 to 10 inches long, which was 3 times larger than what the defendant had used. Counsel did not object even though this knife was not in evidence and the prosecutor had given no notice of his intent to use it. Counsel also failed to address this issue when the jury returned from deliberations and asked, "What happened to the knife? And what are its dimensions?" Counsel did not request an instruction to clarify that the knife used by the prosecutor was not in evidence and was not intended to replicate the knife the defendant used, which was also not in evidence. Instead, counsel said nothing when the court instructed that "you've heard all of the evidence you're going to hear and seen all of the evidence you're going to see." Prejudice established because the evidence of self-defense was fairly strong and the jury's question revealed that the jury was influenced by the prosecutor's improper actions. Counsel also failed to object to the prosecutor's "completely improper" question to the defendant about whether he believed one of the defense witnesses, whose testimony was mostly helpful to the defendant, but included some bad information, which the defendant denied. This error was compounded when the prosecutor repeatedly restated in his closing arguments that the defendant called his own witness a liar, again without objection. While this error alone may not have been sufficiently prejudicial to require reversal, when "added to" the other error there was cumulative prejudice.

***State v. Milne*, 921 So. 2d 792 (Fla. Ct. App. 2006)**. Counsel ineffective in sexual battery and false imprisonment case for failing to request a mistrial due to the prosecutor's unsupported allegations during closing arguments. The defendant had told police at the time of arrest, consistent with his trial testimony, that he had consensual sex with the victim. The state had successfully excluded evidence of the prior consistent statements from evidence with a motion in limine. During arguments, however, the prosecutor implied that the defendant had tailored his trial testimony after hearing all the other witnesses testify.

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***Rose v. State*, 846 N.E.2d 363 (Ind. Ct. App. 2006)**. Counsel ineffective in child molestation case for failing to object to the treating physician's opinion that the victim's allegations were truthful. Prejudice found in light of the inconclusive physical evidence in the case.

***Bowman v. State*, 710 N.W.2d 200 (Iowa 2006)**. Counsel ineffective in kidnaping and assault case for failing to object to the prosecutor's repeated cross-examination questions asking the defendant if the state's witnesses fabricated their testimony. These questions were prohibited under clear state law. The defendant was prejudiced because the case depended on witness credibility to such a great extent that counsel presented two expert witnesses to testify concerning the impaired credibility of the state's intoxicated witnesses.

***State v. Roberson*, 924 So. 2d 1201 (La. Ct. App. 2006)**. Counsel ineffective in robbery case for failing to object to admission in evidence of the defendant's letter to the prosecution and cross-examination concerning the defendant's pretrial offer to plead guilty to a lesser included offense. Counsel's conduct was deficient because counsel was unaware of the state law making this information clearly inadmissible. Prejudice found.

**2004:** ***Joncamlae v. State*, 598 S.E.2d 923 (Ga. Ct. App. 2004)**. Counsel ineffective in aggravated assault case for failing to object to tainted in-court identifications of the defendant by the two victims. Defense counsel learned only during the testimony of the victims that they had been shown a photo line-up, including the defendant's picture, the day before trial. Counsel conceded that her conduct was deficient because she was "in shock" at that point and failed to object or move for mistrial. Prejudice found because the witnesses "were not absolutely certain of their in-court identifications, and did not have excellent views of the defendants at the time of the attacks." One witness even admitted outright his reliance on the photograph of the defendant he had seen in the prosecutor's office.

***Collier v. State*, 596 S.E.2d 795 (Ga. Ct. App. 2004)**. Counsel ineffective in aggravated assault case for failing to object to the prosecutor's improper comments during closing argument. The defendant was charged in connection with several unrelated bar fights that he initiated. During the trial, evidence was admitted concerning two similar incidents, one of which resulted in a guilty plea to terroristic threats. The defendant claimed self-defense or defense of others with respect to all four incidents. During the closing argument, the prosecutor, without objection, commented that he had taken part in a negotiated plea with respect to defendant's prior conviction for terroristic threats and was now asking for the jury's "forgiveness" for making the deal, which involved no confinement time, and that the jury should ensure confinement to protect the community from future danger. The prosecutor's arguments were impermissible use of similar transaction evidence and argument on future dangerousness, which was irrelevant to guilt or innocence. Counsel did not object solely because of his policy not to object in closing argument absent "blatant" error because objection just draws attention to the argument. The court rejected this as a "reasonable trial tactic" because of numerous state cases rejecting these same arguments as improper. Prejudice found, "not because the jury would have reached a different verdict, but because the case would never have been submitted to it for deliberation if defense counsel had moved for a mistrial."

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***People v. Jura*, 817 N.E.2d 968 (Ill. Ct. App. 2004)**. Counsel ineffective in use of weapon by felon case for failing to object to the admission of hearsay portions of a radio call and to the prosecution's use of that evidence. Three police officers testified and included hearsay statements identifying the suspect in initial radio calls about the incident. They further testified that the defendant matched these initial descriptions and the state relied on this testimony in closing argument, without objection, even though the court had sustained an objection to the testimony about the match. Prejudice found because the trial amounted to a credibility contest between the three officers and the defendant but the improper hearsay was repeatedly used by the state in argument and evidence as substantive evidence from a "concerned citizen" that made the radio call but never testified at trial.

***People v. Young*, 807 N.E.2d 1125 (Ill. Ct. App. 2004)**. Counsel ineffective in first degree murder case involving a shooting at a backyard barbecue where the defense was self-defense because counsel failed to object to the prosecutor's improper questions to the defendant and argument. The prosecutor improperly questioned the defendant concerning the veracity of other witnesses, confused the jury about the state's burden of proof, cross-examined the defendant about his post-arrest silence and prior bad acts, improperly vouched for witnesses and injected his own opinions in the proceedings. Counsel was also ineffective for admitting during cross-examine that he lacked the expertise to adequately cross-examine the state's pathologist, but failing to ask for a continuance that would likely have been granted. The cross of the expert actually bolstered the testimony of the expert. Counsel was also ineffective in failing to order gunshot residue tests of the victim's clothing, which the state had declined to order. The court declined to address whether each instance of deficient conduct would require reversal on its own because "[t]he process was tainted by the prosecution such that the arguable failures of the defense acting in concert therewith denied this defendant a fair trial.

***Peterson v. State*, 149 S.W.3d 583 (Mo. Ct. App. 2004)**. Counsel was ineffective in second degree murder case for failing to object to the prosecutor's improper rebuttal closing argument that suggested that the state had more than one eyewitness implicating the defendant, although only one eyewitness testified. Counsel's conduct was deficient because the prosecutor's argument was not supported by the evidence. Prejudice was found because "a prosecutor's assertions of personal knowledge . . . are apt to carry much weight against the accused when they should carry none. . . ." The improper arguments were "especially troublesome" in this case because there was no physical evidence implicating the defendant and the only eyewitness was a convicted felon with credibility problems.

***Roberts v. State*, 602 S.E.2d 768 (S.C. 2004)**. Counsel was ineffective in murder case for failing to adequately impeach a jailhouse snitch, who testified that he was 10 feet away in the cell next to the defendant in pretrial confinement and the defendant confessed to him. While counsel discussed with the defendant that the conversation was impossible due to the layout of the cells, counsel did not question the snitch about this or present any evidence on the issue. Counsel's conduct was deficient because, if counsel had adequately prepared and presented the evidence, the evidence would have established that the snitches' cell was 35-100 feet from the defendant and the cell block was extremely noisy. Any conversation between the snitch and the defendant would have been heard by numerous guards and inmates because the defendant would have had to yell to be

heard over the noise. Although a "close case," prejudice found because the snitch was a key witness and the state's remaining evidence consisted almost entirely of testimony of a codefendant who had made four contradictory statements, including implicating a clearly innocent man in three of those statements. The jury had also asked "who was on trial" during deliberations.

***Vaughn v. State*, 607 S.E.2d 72 (S.C. 2004)**. Counsel was ineffective in drug case for failing to object to the prosecutor's closing argument stating what uncalled witnesses would have testified to. The state presented only the testimony of the arresting officer to support a finding that the defendant possessed drugs. In response to defense counsel's argument that there had been another officer in the car at the scene who did not testify, the prosecutor argued that the other officer would have testified consistently if called to testify. Although the prosecutor was entitled to "some response" to the defense argument, the prosecutor's argument was unfair. Prejudice was found because the state's evidence was limited to the arresting officer. Moreover, during deliberations, the jury asked to see the "testimony" of the officer who was not called to testify.

***Sessums v. State*, 129 S.W.3d 242 (Tex. Crim. App. 2004)**. Counsel ineffective in indecency with a child case for failing to object to inadmissible expert testimony that improperly commented on the alleged victim's truthfulness. The evidence at trial showed that the alleged victim's mother found the five-year-old boy performing oral sex on her husband's stepfather. Child Protective Services (CPS) investigated. During interviews of the victim, he stated that he was also sexually abused by the Defendant, who was his paternal grandfather. At trial, the State's evidence consisted of testimony of four expert witnesses and the testimony of the victim's step-grandfather, who said the victim had told him his bottom was sore because the Defendant had been "playing with it." Each of the experts testified about the alleged victim's statements to them and were then asked to explain and then to comment directly on the factors they used in determining if this child was telling the truth. This testimony was inadmissible. Counsel's conduct was deficient "in failing to object to [this] clearly and unquestionably objectionable testimony of the most outrageous and destructive type. There is no conceivable strategy or tactic that would justify allowing this testimony in front of a jury." Prejudice found because the entire trial hinged on statements of the alleged victim, who did not even testify, and the state specifically argued in closing that the child must be truthful because he had convinced these four experts.

**2003:** ***Orr v. State*, 584 S.E.2d 720 (Ga. Ct. App. 2003)**. Counsel ineffective in statutory rape case for failing to object to police officer's testimony that impermissibly bolstered the credibility of the alleged victim where credibility was a major issue on the element of penetration.

***State v. Graves*, 668 N.W.2d 860 (Iowa 2003)**. Counsel was ineffective in manufacturing and possession of marijuana case for failing to object to the prosecutor asking the defendant whether a police officer was lying, failing to object to the prosecutor's argument in which he accused the defendant of calling the officer a liar, and failing to object in the prosecutor's rebuttal argument when he repeatedly characterized the defendant as lying. In addition, the prosecutor improperly called the defense argument a "smokescreen," improperly asserted that the police officer had no motivation to lie because he would keep his job regardless of the outcome of the case, argued that he personally did not leave cash at other people's homes, and inaccurately declared that if the jury believed the

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police officer it would have to find the defendant guilty. The court found that all of these arguments were improper and that counsel could not reasonably have concluded that failing to object was sound trial strategy. Prejudice was found because the police officer's and the defendant's credibility were the primary issue in the case, and the state's case was relatively weak and circumstantial outside of the credibility issue

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## 5. IMPEACHING WITNESS

### a. U.S. Court of Appeals Cases

**2013:** ***Grant v. Lockett*, 709 F.3d 224 (3rd Cir. 2013)**. Under AEDPA, counsel ineffective in murder case for failing to investigate and impeach the state's key witness–the only one who identified the defendant as the shooter–with prior drug convictions and the fact that he was on parole at the time of his testimony. The state court did not address the issue of whether counsel's conduct was deficient, but even if it had "such a determination would be an unreasonable application of *Strickland*." With respect to prejudice, the state court rejected the claims because the defendant had not presented evidence that the key witness had a special deal or was treated favorably by the prosecution in exchange for his testimony. There is simply "no requirement" that the defendant make this showing "before the witness's subjective motivation for bias becomes relevant. Thus, the state court made unreasonably applied *Strickland* and *Davis v. Alaska*, 415 U.S. 308 (1974). Under *Davis*, evidence that the defendant was on parole was relevant to show that the witness "might have been subject to undue pressure from the police and made his identifications under fear of possible probation revocation." *Id*. at ___(quoting *Davis*, 415 U.S. at 311). Prejudice was clear as the state's entire case rested on this witness, who was contradicted by the physical evidence and at least two other eyewitnesses who said the defendant was not the shooter. The state's closing argument even made clear that the state would not have even been able to charge the defendant without this witness.

***Peoples v. Lafler*, 734 F.3d 503 (6th Cir. 2013)**. Under AEDPA, counsel was ineffective in murder case for failing to impeach the only two witnesses tying the defendant to the murder with their known false testimony. The victim, "a drug dealer," was shot and killed outside of his Detroit home. Three months later, the defendant was arrested with Cornelius Harris and another man in a stolen Jaguar, after a high-speed car chase ended in a crash. After the crash, police found a nine millimeter Sig Sauer pistol – the murder weapon – on the driver's side floorboard of the Jaguar. During the murder trial, Harris and the other man "testified to two key facts: 1) that Peoples was the driver of the stolen Jaguar and had thus been sitting closest to the murder weapon, which Peoples owned; and 2) that Peoples told them about how he killed" the victim. The prosecution knew that, at least a portion of this testimony was false. Specifically, according to a police report written by an officer who witnessed the crash, the driver of the Jaguar was Harris. Moreover, Harris was the only one of the three who was charged and convicted for the crimes of fleeing in the third degree, which requires "being the driver," and unlawfully driving away in a motor vehicle. Counsel's conduct was deficient in failing to use these facts during trial. "Failure to impeach the credibility of key witnesses with known false testimony is an egregious error in a criminal case."

> Although the entire defense theory was that the two witnesses conspired to point the finger at Peoples, trial counsel did not use the only hard evidence at his disposal to prove that the two witnesses not only lied, but told the same lie. And he failed to do so despite the fact that Peoples himself found the evidence and told him how to use it.

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The state court's decision rejecting this claim was an objectively unreasonable application of *Strickland*. Before trial, Peoples mailed defense counsel a copy of the police report, indictment, and criminal docket sheet showing that Harris was the driver of the Jaguar. Nonetheless, counsel made no attempt to impeach Harris or the other witness with this information. Counsel also failed to present testimony from (1) the officer who wrote the police report naming Harris as the driver of the Jaguar; and (2) another officer who observed the car crash and could testify that Harris was the driver of the Jaguar. While counsel claimed a strategy to "try to limit testimony regarding the car chase," this was not "a protected strategic decision when there is no conceivable way that this decision could help the defense." Moreover, detailed evidence concerning the chase, the arrests, and the "various convictions arising out of the incident" had already been presented. Prejudice established because the state's case "hinged on the credibility of Harris" and the other man. Impeachment with evidence that Harris was driving the car

> would have done more than undermine the theory that Peoples sat closest to the gun. It would have shown that Harris and Powell told at least one lie – the same lie. All counsel had to do was ask one more question on cross-examination to completely undermine the credibility of these witnesses. . . . Moreover, impeachment would not have been a new and novel theory at trial. Trial counsel's entire defense strategy was to cast doubt on the credibility of Harris and Powell by suggesting that they cooked up their stories while sharing a jail cell. Impeachment on the issue of who drove the Jaguar would have been entirely consistent with and a significant boost to this theory.

Moreover, the defense could have "provided solid evidence that Harris and Powell had coordinated their stories, because both of them gave the same false testimony. We can think of no better way to attack the credibility of these witnesses than by proving that they testified to the same lie." Prejudice was clear in light of the events at trial, the weaknesses of the government's case, and the fact that the jury announced that it was deadlocked and only returned a guilty verdict after being given an Allen charge. "[B]y announcing that they were deadlocked two hours before reaching a verdict, the jury signaled that it was not persuaded that Harris and Powell were credible." "If counsel had done as Peoples asked and impeached the testimony that Peoples was the driver of the Jaguar, "there is a reasonable probability that at least one juror would have struck a different balance.'" (quoting *Wiggins*, 539 U.S. at 523–28).

**2008:** ***Brown v. Smith*, 551 F.3d 424 (6th Cir. 2008)**. Counsel ineffective in sexual molestation of teenage daughter case for failing to investigate and obtain daughter's counseling records. Counsel's conduct was deficient because the state's case depended almost entirely on the daughter's credibility and counsel knew that the counselor, who saw the daughter both before and after the alleged assault, did not believe her. Counsel's alleged belief that the counselor would not have been a credible witness did not excuse the conduct.

> [O]ur quarrel is not with trial counsels' decision to forego calling [the counselor] as a witness per se, but rather with the lack of any reasonable, timely investigation into what she might have offered the defense. Without ever seeking in camera

> review of the counseling records, . . . counsel could not reasonably have determined what value, if any, those records might have been to his defense, and could not properly have weighed the potential benefit of calling [the counselor] to the stand (whatever her perceived credibility) against the potential risk. Moreover, even if [the counselor] were never called as a witness, defense counsel could still have used the counseling records to impeach the daughter on cross-examination. But by the time defense counsel met directly with [the counselor] (for two to three minutes on the third day of trial), the daughter had already testified, and the opportunity to impeach her testimony directly had passed.

Prejudice established because the records also revealed inconsistencies in the daughter's statements to the counselor and her trial testimony. The court reviewed the issue de novo rather than under AEDPA's standards because the state court did not adjudicate this claim on the merits because the state court did not have the daughter's records before it through no fault of the defendant who had requested hearings and discovery and been denied until federal court.

**2006:** ***Higgins v. Renico*, 470 F.3d 624 (6th Cir. 2006) (*affirming Higgins v. Renico*, 362 F. Supp. 2d 904 (E.D. Mich. 2005))**. Under AEDPA, counsel was ineffective in murder case for failing to cross- examine the key prosecution witness because of lack of preparation. The defendant and the state's witness were the only people present when the victim was shot. The defendant made a statement, which was admitted in evidence that the state's witness shot the victim. The witness, who said that the defendant was the shooter, did not show up for his scheduled testimony during trial and his preliminary hearing testimony was read into the record. Two days later, the witness showed up and testified. Counsel informed the court that he had been provided with the witness' two prior statements several days before but had not reviewed the statements or prepared for cross-examination. The court recessed for 30 minutes, but counsel informed the court that he still was not prepared. The court would not delay longer and counsel asked no questions on cross-examination. The state court made a conclusory finding that there was no prejudice but did not address the issue of deficient conduct so this issue was reviewed de novo. Counsel's conduct in failing to adequately prepare for cross-examination was deficient and not justified by strategy. Prejudice was found because the witness at issue was the only witness that directly implicated the defendant as the shooter. There was no cross even though the witness (1) had a strong interest in the jury's finding since he was the only other person present at the time of the shooting; (2) had made two prior statements with inconsistencies; and (3) had gunshot residue on his hands after the shooting. In addition, the failure to challenge the testimony left the impression that the defense accepted the testimony. Likewise, the witness testified that he had not shown up earlier in the trial because he had been threatened by "people" and the failure to cross-examine left the impression that the threats came from the defendant when there was no evidence to support that inference. Finally, the preliminary cross-examination testimony was inadequate because counsel had been conducting only non-confrontational discovery at that time. In its AEDPA analysis, citing *Strickland*, the court held that the state court's finding of no prejudice was an unreasonable application of Supreme Court precedent.

**Capital Case*

***Reynoso v. Giurbino*, 462 F.3d 1099 (9th Cir. 2006)**. Counsel ineffective in murder case for failing to cross-examine state witnesses about their motivation for testifying. The crime went unsolved for two years and then a jail house snitch, after seeing advertisements about a $25,000 reward on television, contacted police saying the defendant had confessed to him shortly after the crime. After another year, with the reward still being advertised on television and in newspapers, the police reinterviewed a witness interviewed the night of the murder and another witness, who allegedly saw the defendant near the scene the night of the murder, contacted the police. Although there was no physical evidence, both of these witnesses also identified the defendant. During trial, counsel cross-examined the snitch about his motivation in seeking the reward ($10,000 of which he ultimately collected). Although counsel cross-examined the other two witnesses on other matters concerning credibility, counsel did not cross-examine them about the reward motivation. Counsel's conduct was deficient in failing to investigate or to question the witnesses on this matter because counsel knew about the reward. Prejudice was found because, if counsel had asked, she would have learned that both witnesses were aware of the reward and had asked police about it. Thus, they "may have had a motive to lie." (Both witnesses did ultimately collect $7,500 each). Prejudice was also clear because the prosecutor emphasized in closing that these witnesses had no bias and "that neither had any reason or motive to lie." Under AEDPA, the state court's decision was an unreasonable application of federal law. *Id*. at ___ (citing *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000)).

### b. U.S. District Court Cases

**2017:** ***United States v. Cross*, 249 F.Supp.3d 339 (D.D.C. 2017).** Trial counsel was ineffective for failing to use a chart suggesting the quantity of heroin attributable to defendant was under one kilogram in this prosecution for conspiracy to distribute over one kilogram of heroin. The government offered testimony from defendant's supplier, Mouloukou Toure, who told the jury that he sold defendant 1.2 to 1.3 kilograms for further distribution. Trial counsel performed deficiently by failing to use a chart created by law enforcement detailing the quantities of heroin that the FBI recovered from the alleged co-conspirators. It was undisputed that Toure imported 4,800 grams of heroin from a Toronto-based supplier and that this was Toure's first and only heroin supplier. The FBI recovered 623.4 grams of heroin in controlled buys from Toure, seized 944.3 grams from Toure's stash house and located 1,984.4 grams in a third co-conspirator' stash house that Toure testified he provided for distribution. When those amounts are added to the amounts Toure testified he distributed to a fourth co-conspirator, that leaves only approximately 400 grams for defendant – significantly less than the 1.2 or 1.3 kilograms to which Toure testified. Trial counsel's strategy was to show that defendant had a simple buyer/supplier relationship with Toure, but was not involved in a wider, international conspiracy to distribute large amounts of heroin. Counsel had no recollection of why she failed to use the drug quantity chart, but acknowledged that it would have supported her theory of the case and undermined an element of the charged offense. Counsel's performance was deficient, and there is no sound trial strategy that would have justified not using the chart, which trial counsel acknowledged she received prior to trial. Defendant suffered prejudice because the chart would have discredited Toure, the prosecution's key witness who provided the only evidence as to the one-kilogram drug amount, which was an essential element of defendant's conviction. Thus, there is a reasonable probability that the jury's

verdict as to the essential drug amount element would have been different if the chart had been put into play.

**2016:** ***Hyman v. Brown*, 197 F.Supp.3d 413 (E.D.N.Y. July 13, 2016).** Counsel was ineffective, in this case that depended on eye-witness testimony, for not calling an investigator who had determined through line-of-sight analysis that it was impossible for the witness to have seen what she claimed to have seen. Defendant was convicted of second-degree murder, weapons possession, and reckless endangerment. The charges arose out of a multiple participant shooting in front of an apartment building that resulted in the death of a bystander. Defendant admitted that he was in the driver's seat of one of the cars parked in front of the apartment building, but denied involvement in the crime. The prosecution argued that he was the shooter. The only direct evidence against defendant came from a prosecution witness, Shaquana Ellis, who testified that she saw, from her third-floor window, defendant with a gun, firing off gunshots. Trial counsel had hired an investigator who conducted a sight line study revealing that it was physically impossible for Ellis to have seen what she claimed from the third floor window. However, counsel declined to call the investigator because of a fee dispute. This was not a valid strategic decision. The court noted, "[t]he far reaches of human imagination cannot identify a legitimate strategy that would involve turning a blind eye to material with such potential to undermine [the] testimony, and none has been suggested." *Id.* at 464-65. Prejudice established because of the critical role of Ellis's testimony. Had trial counsel successfully impeached Ellis, there is more than a reasonable probability that the result of the proceeding would have been different.

**2010:** ***Schoenauer v. United States*, 759 F.Supp.2d 1090 (S.D. Iowa 2010)**. Counsel ineffective in drug conspiracy case for failing to investigate and present impeachment evidence. The government presented expert testimony from an ATF auditor to establish the petitioner's wealth exceeded his income during the relevant time period. While he earned $262,000, according to the government, he had available 2.9 million. While the defendant had requested that counsel obtain discovery and investigate to rebut this testimony, counsel believed this was a "'side issue' and that this was a drug case, not a tax case." Thus, counsel did not move to exclude this testimony or investigate even though the defendant had been investigated by the IRS, who had seized all of his financial records. The defendant, who was an accountant, informed counsel the IRS found no unexplained income. At trial, there was no "direct evidence" of the defendant participating in the conspiracy. Thus, his conviction was primarily because of this "unexplained income" testimony. If counsel had investigated, a special agent with the IRS, would have testified that he had investigated a five year period at the prosecution's request looking for criminal violations and found none. He also would have testified explicitly that he found no evidence of unreported or unexplainable funds. The court noted in a footnote that the defense had not asserted a *Brady* claim due to the government's failure to disclose this information. Nonetheless, the court was "troubled" by the government's actions and, on rehearing, dismissed the indictment citing the impracticalities of retrial due to the passage of time and the "significant expense" to the defendant in defending himself the first time.

**2004:** ***Harris v. Senkowski*, 298 F. Supp. 2d 320 (E.D.N.Y. 2004)**. Counsel was ineffective in second degree robbery case for failing to challenge the testimony of the robbery victim with her prior inconsistent description of the robber. Only thirty minutes after the robbery, the victim described

her assailant as a black male standing 5'4" tall and weighing 130 pounds. The next evening, the victim, who was Asian, rode around the neighborhood with police officers and identified the defendant, who was then arrested. The defendant was 6' tall and 220 pounds. Prior to trial, counsel moved to suppress the identification as being unduly suggestive, but counsel never addressed the victim's prior description and the motion was denied. During the trial, the victim and the police officer that drove her around were the only state's witness. Counsel did not cross-examine the victim concerning her prior description of the defendant even though his sole argument in defense was mistaken identification. The defendant never squarely claimed that trial counsel was ineffective on this basis in state court and, therefore, the state courts never ruled on the issue. The government explicitly waived any procedural or exhaustion issues though. Analyzing the case under pre-AEDPA standards, the court found that counsel's conduct was deficient and that "[a] more compelling example of ineffective representation is difficult to fathom." While counsel alleged strategic reasons for his failure, the court found that each reason was "ludicrous." Even if counsel chose not to cross-examine the victim for an alleged strategy, counsel still could have offered the complaint report into evidence as a business record or called the police officer that took the complaint as a witness. Prejudice found because the government's case rose or fell on the strength of the victim's testimony, but the jury never heard about her prior, strikingly inconsistent identification in the case.

**c. State Cases**

**2016:** ***Ex Parte Saenz*, 491 S.W.3d 819 (Tex. Crim. App. 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.

***Hannon v. State*, 491 S.W.3d 234 (Mo. Ct. App. 2016)**. Counsel ineffective in sodomy of a child case for failing to obtain the child's school records which would have contradicted the child's testimony. The child testified that he was molested by the defendant the day before his mother overdosed on drugs and his grandmother took custody of him. The day was named in the indictment and the state's arguments as October 3, 2005. The child testified that he was out of school sick that day and it was during that time that he was molested. Counsel's conduct was deficient in failing to obtain the child's school records, which reflected that he was in school on the day in question. While counsel testified that he had been informed by the school that the child was out sick all that week, the trial court rejected this testimony finding that counsel lacked credibility. Prejudice was established.

***Rutland v. State*, 785 S.E.3d 350 (S.C. 2016)**. Counsel ineffective in murder case for failing to cross-examine the state's "key" witness with prior inconsistent statements to the police and to newspaper reporters. The defendant was involved with the deceased's estranged wife. On the day of the shooting, the defendant and his girlfriend were at a pet grooming business to inquire about purchasing the business. The deceased came in and was shot and killed by the defendant. The only other person present besides the defendant's girlfriend was an employee of the business, Kestner. Kestner initially told law enforcement that the deceased was armed when he entered the business and pulled a gun before he was shot and killed. She made a similar statement to a newspaper reporter. At trial, however, she testified that the deceased had nothing in his hands when he entered the business, except a pack of cigarettes. She said she never saw him with a gun, but after the shooting there was a second gun lying on the floor. Counsel's conduct was deficient in failing to question her about the prior inconsistent statements to law enforcement and the newspaper reporter. Counsel conceded knowledge of these prior statements and an "oversight" in failing to cross-examine on this basis. While the post-conviction court found that counsel's conduct was deficient, the court found no prejudice because the defendant failed to produce extrinsic evidence of the prior inconsistent statements in the post-conviction hearing. This finding was not supported by the evidence in the record as the defendant produced the prior statement to law enforcement, as well as affidavits from individuals attesting to having heard the witness say that the deceased was armed at the time of the shooting. Prejudice established because, if trial counsel had adequately cross-examined the witness, the evidence would have demonstrated that "all three witnesses to the incident attested at some juncture the victim was armed at the time of the shooting." Additionally, the prosecutor relied on the witness' testimony in closing arguments, which "highlights trial counsel's deficient performance." Likewise, the jury sent out several relevant questions during deliberations indicating that "the jury was focusing on whether the victim was armed" and that the jury was having difficulty reaching a unanimous verdict.

**2012:** ***State v. Hollin*, 970 N.E.2d 147 (Ind. 2012)**. Counsel ineffective in conspiracy to commit burglary case for failing to present evidence to impeach the alleged accomplice's testimony. The defendant and the accomplice were arrested after a report of suspicious activity. Both made tape recorded

statements. The accomplice claimed that they had entered the home to use the telephone but then stole money from the bedroom while inside. He did not implicate the defendant in a plan to burglarize the home and said the defendant learned of the theft only after they left the home. The accomplice entered a plea agreement to felony theft with the burglary charge being dismissed and the felony charge being reduced to misdemeanor if he completed probation. The accomplice also pled guilty to a theft charge that was already pending at the time of this arrest and was given a suspended sentence. While in pretrial confinement, after being arrested for an additional felony and having petitions filed to revoke his suspended sentences, the accomplice claimed for the first time that he and the defendant had agreed in advance to break into homes and commit burglaries. Counsel's conduct was deficient in failing to adequately impeach the accomplice. The jury was aware that the accomplice had pled guilty and was in jail for the same incident as charged in this case, but the jury was not aware that the accomplice had faced a possible 23 year sentence, but ultimately pled in a manner that involved only a misdemeanor theft conviction and no jail time if he succeeded on probation. Thus, the jury had no idea that the only person to actually take money in these crimes got this result while the defendant still faced felony charges and up to 23 years confinement. A *Brady* violation was also found as the state failed to disclose much of this information prior to trial.

**2011:** ***People v. Armstrong*, 806 N.W.2d 676 (Mich. 2011)**. Counsel ineffective in criminal sexual conduct case for failing to introduce phone records to undermine the complainant's credibility. The complainant testified that she met with the defendant three times and was raped on the last two occasions. She testified unequivocally that she did not communicate with the defendant following the third meeting. Defense counsel confronted her with the defendant's cell phone records that revealed incoming calls from her adoptive mother's phone and she admitted making one or two calls to the defendant just days after the second alleged rape. When counsel confronted her with additional records allegedly revealing hundreds of incoming calls from her cell phone, the complainant unequivocally denied that she had called the defendant. Counsel's conduct was deficient in failing to introduce the phone records. Counsel attempted to do so, but the state's objection to lack of foundation was sustained. Counsel made no further effort to introduce the records. The court instructed the jury to disregard evidence not introduced. Counsel's conduct was not excused by any strategy, as counsel had simply failed to subpoena the custodian of the records due to a mistaken belief that the business records exception to the hearsay did not require a custodian to testify. Prejudice established, despite significant evidence from the complainant's grandmother, mother, and stepfather that she had falsely accused her stepfather of rape in the past and was a compulsive liar. The omitted records would have provided strong proof that "the complainant lied to this jury" about "the alleged rapes in this case." Aside from showing that she lied about contacting the defendant after the alleged rapes, these records case serious doubt on the substance of her allegations because if she was brutally raped as she testified "then one must question why she reached out to defendant through text messages and phone calls" afterwards. Likewise, even though the jury heard the testimony about the cell phone records, the court instructed the jury to disregard the evidence. In addition, the complainant only acknowledged making a fraction of the numerous calls and the state argued that the defendant or defense counsel might have fabricated the records.

**Capital Case*

**2008:** ***Millam v. State*, 745 N.W.2d 719 (Iowa 2008)**. Counsel ineffective in sexual abuse case for failing to present evidence of the alleged victim's prior, false accusation of sexual abuse. The alleged victim was the daughter of the defendant's girlfriend and she had previously alleged sexual abuse by her mother's previous boyfriend but then recanted the accusation. Counsel made no attempt to present this evidence even though there was no physical evidence and no witnesses other than the alleged victim. Counsel believed the evidence was inadmissible under the rape-shield law which excluded evidence of "past sexual behavior" of the victim. The Iowa court had held, prior to the enactment of the rape-shield law, that prior false allegations were not inadmissible under general relevance considerations but had not addressed the issue under the statute at the time of the defendant's trial. The court subsequently held that prior false allegations are not "sexual behavior" prohibited by the statute and this evidence is admissible if the defendant making a showing that the alleged victim made the statements and the statements were false, based on a preponderance of the evidence. Counsel's conduct was deficient because "the test to determine whether counsel is required to raise an issue" is based on "a normally competent attorney." "This test does not require an attorney to be clairvoyant, but rather to research the relevant legal issues and determine whether, given the circumstances of the particular case, the issue is 'worth raising.'" Here counsel conducted no research. If he had researched, he would have found "that many jurisdictions had concluded that prior false claims of sexual abuse were not protected by their rape-shield laws." In addition, the plain wording of the statute was clear because "it refers to sexual behavior, and quite simply, claims of sexual abuse are not sexual behavior." Prejudice was clear in that this evidence "could have greatly impugned" the alleged victim's credibility. This was especially so since "her own mother doubted her claims . . . due to her prior false claims."

***Miller v. State*, 665 S.E.2d 596 (S.C. 2008)**. Counsel ineffective in armed robbery case for failing to cross-examine the defendant's girlfriend, a state witness, regarding the similarities of three armed robberies she and the defendant's nephew were charged with. Specifically, the girlfriend's car was used in each robbery, a similar handgun was used, and the victim's description of the assailant more closely matched the nephew than the defendant. Prejudice established because the defense argued mistaken identity and third-party guilt, which was the primary defense. In addition, the girlfriend's credibility was "questionable at best" because she had initially implicated the defendant in an armed robbery, in which she and the nephew were charged, before she learned he could not have committed the crime because he was in jail at the time.

**2006:** ***J.J. v. State*, 858 N.E.2d 244 (Ind. Ct. App. 2006)**. Counsel ineffective in burglary and theft case for failing to inform the jury that the defendant's alleged accomplice had been granted use immunity. Prejudice found because the witness' testimony was of great consequence to the jury's consideration of the case and the prosecutor commented that the witness had "cooked himself" by his testimony that he had participated in the crime with the defendant, implying that the witness was credible because he would suffer for his own admission when the prosecutor knew he would not.

**2005:** ***Thompson v. Commonwealth*, 177 S.W.3d 782 (Ky. 2005)**. Counsel ineffective in reckless homicide and persistent felony offender case for failing to challenge the accident reconstruction testimony of the investigating officer. The case involved the death of an eight- year- old child that

ran into the street chasing a puppy and was hit by the defendant's motorcycle. Testing revealed alcohol in the defendant's blood, along with traces of marijuana, pain reliever, and anti-depressant medication. The investigating officer used an English study based on the running speed of eight-year- olds, distance, and the defendant's estimated speed and concluded that the defendant should have been able to stop with 26 feet to spare. Even without a defense expert, counsel should have realized that the officer made a mathematical error and his own formula would have revealed that the defendant could not have stopped his motorcycle until 40 feet after the point of impact. Counsel did not retain his own expert because the defendant consistently told him that he never saw the child before the impact. Thus, counsel believed the possible braking distance was irrelevant. Counsel's conduct was deficient because his only defense was that the accident was unavoidable and counsel knew that the prosecution would rely on the officer's testimony that it was avoidable with normal reaction times. It was unreasonable to fail to attempt to challenge this testimony because "jurors are undoubtedly greatly influenced by the testimony of someone deemed an 'expert.' This is especially

> true if the only countervailing testimony comes from the defendant, the sole person with a strong motive to lie (if the truth would deem him guilty of the crime charged)." In addition, the expert's testimony was so clearly erroneous in this case that "a non-mathematical expert discovered it on simple review of the calculations." Prejudice found because if counsel had performed adequately, the expert would have had to admit that the defendant "could not have stopped" in time.

**2004:** ***Black v. State*, 151 S.W.3d 49 (Mo. 2004)**. Counsel ineffective in capital trial for failing to impeach three state witnesses with prior inconsistent statements that supported the defense theory that the killing was committed in self-defense rather than as the result of deliberation. The case involved a black victim and a white defendant in a road fight that "grew out of [the defendant's] race-based reaction to the victim's behavior toward [the defendant's girlfriend]." Counsel failed to cross-examination one eyewitness with his prior statement, omitted at trial, that he saw the victim get out of his vehicle and hit the defendant with a beer bottle. Another eyewitness was not crossed on his prior statement that the two men both got out and exchanged blows, which was at odds with his trial testimony. Finally, another eyewitness was not crossed with evidence the victim was yelling and exited his vehicle without injury, even though she testified at trial that the victim remained in his vehicle. Counsel also failed to cross-examine a state witness concerning inconsistent statements about how alcohol the victim had prior to the altercation. Prejudice established because "counsel's failures went to the key issue of deliberation" as evidenced by the jury's request for additional instructions defining "cool reflection" in the first-degree murder verdict form. Reversal required even though each of the state witnesses did not testify in post-conviction. "[A] movant is not required to reenact how a hypothetical trial would have proceeded had particular evidence been utilized, but to show that counsel knew of the evidence and was ineffective in failing to use it, to movant's prejudice."

**Capital Case*

## 6. ELICITING DAMAGING EVIDENCE AND MAKING DAMAGING ARGUMENT

### a. U.S. District Court Cases

**2017:** ***Emerson-Bey v. Attorney General of Maryland*, 2017 WL 3279461 (D. Md., July 31, 2017).** Trial counsel was ineffective for eliciting damaging and inadmissible information at trial which also resulted in a violation of defendant's Sixth Amendment right to cross-examine witnesses against him. Defendant was charged with murder in connection with the shooting death of his estranged wife. The state's case was entirely circumstantial; defendant had motive and opportunity, there was no sign of forced entry at the victim's home, and defendant's palm print was found in the home. However, defendant had been inside the home for non-incriminating reasons and he and the victim sometimes exchanged friendly calls and texts. Following the murder, Phyllis Mason (also known as Leteara Thompson) was arrested on unrelated charges. During an interview with police, Mason said she was getting high in an alley with her friend, Tiffany Jenkins, on the night of the murder. Mason identified defendant in a photo array as the man she saw fleeing the home after the shooting. Tiffany Jenkins was also interviewed by police and stated that she was in the alley during the day (not at midnight when the shooting occurred) but claimed she also heard shots and saw a man fleeing a home. However, Jenkins was unable to identify defendant. Prior to trial, Mason died and Jenkins could not be located. There was no dispute that Mason's identification was inadmissible and the prosecutor agreed not to introduce it. And yet, during cross-examination of a police detective, trial counsel asked whether police had canvassed the neighborhood and whether any witnesses had indicated defendant was near the victim's home at the time of the crime. The detective responded "yes" and then counsel asked the detective to name the witness. The detective answered, "Veronica Jenkins, James, Tiffany Jenkins. She had several different names." In a misguided attempt to correct this blunder, trial counsel then asked a series of confusing follow up questions that incorrectly suggested that two different witnesses had identified defendant as the man they saw fleeing the house immediately after the shooting. After a lunch break, trial counsel continued questioning the detective to establish that Phyllis Mason was one of the names involved and that she gave a statement after she was arrested and under the influence of drugs and alcohol. Trial counsel did not move for a mistrial or move to strike any of the detective's testimony. Trial counsel performed deficiently in eliciting the damaging information and then compounded the error due to his failure to appreciate other avenues for attempting to cure his mistake, *i.e.*, by objecting, moving to strike, or moving for a mistrial or new trial. The evidence of defendant's guilt was neither abundant nor overwhelming, but was instead entirely circumstantial. If the identification evidence had not been erroneously introduced by trial counsel, there is a reasonable probability that the jury would have had a reasonable doubt as to defendant's guilt and the outcome of his trial would have been different. Moreover, trial counsel's inept handling of the detective's cross-examination also violated defendant's right to confrontation because Mason's identification was testimonial and defendant had no opportunity to cross-examine her. This error was not harmless because the identification was the only direct evidence of defendant's involvement in the crime and the only evidence that placed him at the crime scene at the time of the crime. The identification testimony was not cumulative, nor was it

corroborated by any other evidence. No cross-examination was permitted as the witness did not testify, and the overall strength of the prosecution's case was weak.

**2009:** ***Ramos v. Lawler*, 615 F. Supp. 2d 347 (M.D. Pa. 2009)**. Under AEDPA, counsel ineffective in conspiracy to commit murder case for eliciting testimony from the victim that the co-defendant had pled guilty to conspiracy to commit murder. Counsel's conduct was deficient because this evidence in no way negated the defendant's culpability and was damaging. "[T]he prosecutor relied extensively, almost exclusively, on the [evidence of the co-defendant's guilty plea] during his closing argument." Prejudice established even though the trial court instructed that the substance of the guilty plea could not be used as evidence of guilt.

> [T]here is a presumption that a jury will obey a jury instruction. However, this is only a presumption and can be rebutted by record evidence and the circumstances of the case.

Here, there was prejudice because there was very little, if any, evidence of a conspiracy to commit murder, although there was of conspiracy to assault and assault. The jury's guilty verdict on the conspiracy to commit murder charge "indicates that it necessarily and improperly considered [the] guilty plea as substantive evidence" of the defendant's guilt. The state court's decision was an unreasonable application of clearly established law.

### b. State Cases

**2013:** ***People v. Barnes*, 965 N.Y.S.2d 488 (N.Y. App. Div. 2013)**. Counsel ineffective in drug case for failing to investigate prior to trial, which resulted in counsel advancing an unsupported theory of defense during trial. The defendant was arrested in a "buy and bust" operation where he was arrested just moments after a sell drugs in a Ziploc bag to an undercover officer by other officers. At the time of his arrest, he had five Ziploc bags containing drugs, but did not possess the pre-recorded buy money used by the undercover officer to pay for the drugs. Counsel's prior argument during trial was that the purple Ziploc bag of drugs sold to the officer did not match the Ziploc bags found on the defendant. During closing arguments, counsel sought permission to open the heat-sealed evidence bags to display the evidence to the jury, but the court denied the motion. "Counsel then urged the jurors to examine the evidence themselves." During deliberations, the jury asked to do exactly that and the court unsealed the evidence, which revealed that "all the bags did match." Counsel's conduct was deficient for failing to examine this evidence pretrial. Prejudice was also clear as the defense counsel committed "self-sabotage" and "undermined his own credibility" and his error went to "the heart" of the defense. The error also undermined the defendant's credibility as he testified based on the understanding from counsel that the bags did not match. Even with this blunder, the jury requested to rehear some of the evidence, requested additional instructions, and announced deadlock resulting in an Allen charge before finally reaching a verdict.

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**2011:** ***State v. Fowers*, 265 P.3d 832 (Utah Ct. App. 2011)**. Counsel ineffective in criminal solicitation case involving two teenage boys for eliciting testimony about the defendant's 25-year-old conviction for sodomy on a child after the trial court had ruled the evidence would be excluded. Counsel apparently believed that the defendant could be cross-examined about the prior if he testified and had advised the defendant not to testify. The defendant did testify and counsel elicited information about the prior in direct. The defendant admitted contact with the boys but denied solicitation. Prejudice was established. Without the evidence of the prior, the jury might have been more inclined to believe the defendant rather than the boys, who were both residents of a juvenile detention facility and attended the same alternative high school. Thus, "unlike multiple victims who are strangers to one another, the boys here had an opportunity to collaborate on their version of events." Moreover, the jury acquitted with respect to one of the alleged victims in this "classic credibility contest." The prior "may have influenced [the jury] to convict [the defendant] on at least one of the charges.

**2007:** ***People v. Bailey*, 872 N.E.2d 420 (Ill. Ct. App. 2007)**. Counsel ineffective in bench trial for possession of crack with intent to distribute for eliciting damaging evidence in cross-examination. A police officer testified that he observed an "unknown person" yelling "Rocks" to passing cars. When cars stopped, he would direct them to an alley where the defendant would exchange money for drugs. The officer witnessed four such transactions in about 35 minutes before arresting the defendant who had cash and drugs on him. Counsel's conduct was deficient because during cross counsel elicited further information that the officer witnessed the defendant provide money to the "unknown person" several times and included that information in his case report, which counsel either had not read or did not think about. Counsel's lack of knowledge of the report, failure to move to strike the officer's initial non-responsive answer, and "digging the hole deeper" with further questioning was not explicable by any valid trial strategy. Prejudice found because this was "key" evidence in the case and the trial court clearly relied on it and said so.

***Robertson v. State*, 214 S.W.3d 665 (Tex. App. 2007)**. Counsel ineffective in aggravated assault case for eliciting testimony from the defendant that he was incarcerated on two convictions and that he was in possession of a knife at the time of the previous arrests. Prejudice found because this testimony opened the door for the state to elicit testimony on cross-examination that the defendant had two prior drug convictions with "deadly weapon findings on both charges." The state used this evidence in argument to undermine the defendant's credibility in arguing self-defense.

**2006:** ***Glancy v. State*, 941 So. 2d 1201 (Fla. Ct. App. 2006)**. Counsel ineffective in burglary with a sexual battery case for eliciting damaging character evidence against the defendant. Specifically, counsel's conduct was deficient for eliciting testimony from the alleged victim that she did not like the defendant because he gave her minor children pot, booze, and cigarettes and because she believed that he had been breaking into her house for two years, stealing her underwear, and leaving "dirty magazines" behind. Counsel also elicited testimony from her son that the alleged victim did not like the defendant because he had been "in and out of prison." Prejudice found.

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***Bowers v. State*, 929 So. 2d 1199 (Fla. Ct. App. 2006)**. Counsel ineffective in burglary and grand theft case for questioning the defendant concerning his prior criminal convictions and eliciting numerous details that the State would not have been entitled to elicit since the state's examination would have been limited to the number of felony convictions or convictions for misdemeanors involving dishonesty or false statement. Prejudice found because there was no physical evidence and the trial hinged on credibility issues. By eliciting information concerning prior convictions for burglary and grand theft, trial counsel impugned his client's credibility in front of the jury. While counsel's strategy to be completely candid with the jury so that the defendant's testimony would be more believable, "counsel's execution of the strategy defeated the intent" because the information was presented in such a manner, due to counsel's failure to properly prepare with the defendant, that it appeared the defendant was trying to withhold some information. Thus, the court held "that counsel's strategy to bolster his client's credibility with candor was 'patently unreasonable.'"

**2005:** ***Whitaker v. State*, 622 S.E.2d 916 (Ga. Ct. App. 2005)**. Counsel ineffective in burglary case for introducing an unredacted copy of previous convictions for two of the state's key witnesses that also showed that the defendant had been charged with the same crimes (possession of tools for the commission of a crime, criminal trespass, and burglary). Counsel's conduct was deficient and not explained simply by counsel's strategy to impeach the witnesses. Counsel "did not offer any explanation for failing to redact the exhibits, which she knew implicated her client in other crimes." Prejudice found because the state's case rested primarily on the testimony of these two alleged accomplices. The evidence showing that the defendant had been previously charged along with these witnesses was especially damaging because it "may have caused the jury to give additional credence to the testimony of the state's star witnesses."

***People v. Orta*, 836 N.E.2d 811 (Ill. Ct. App. 2005)**. Counsel ineffective in bench trial for possession of drugs with intent to deliver drugs case for eliciting testimony from police officers that enabled the State to prove an essential element of the charge. Counsel's conduct was deficient because counsel elicited information that a prior "control transaction" in which the defendant sold drugs to an informant, over the state's objection. Counsel also elicited testimony that there were a lot of male clothes in the apartment (when the defendant's argument was that he had no control or possession) and the drugs were found in a shaving bag, along with money, a scale, and the defendant's mail, which the state later attempted to move into evidence. Counsel's conduct was deficient. "A person charged with a crime has the right to expect his lawyer's questions to prosecution witnesses will not help the State prove its accusations." Prejudice found primarily because counsel elicited testimony about the prior "control transaction" with the state objecting and the trial court trying to discourage counsel from presenting this evidence. Counsel's reason for offering this evidence was because he was attacking the officer's credibility. The court rejected this as a valid strategy. This evidence was prejudicial because the court relied on it in finding an intent to deliver. The evidence about the clothes was also prejudicial because the court relied on it in finding constructive possession. Without all of the evidence elicited by the defense counsel the state's case for possession was solely that the defendant had keys to the apartment where the drugs were found.

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**2004:** ****State v. Davis*, 872 So. 2d 250 (Fla. 2004)**. Counsel ineffective in capital case for his statements during voir dire expressing racial animus and admitting his own racial prejudice where the Defendant, an African-American male who was 22 at the time, was accused of stabbing to death a 73-year-old white woman, but there was no apparent racial motivation for the crime. During voir dire counsel stated, "Sometimes I just don't like black people. Sometimes black people make me mad just because they're black." In closing in sentencing, counsel reminded the jurors that none had expressed the same feelings and that they promised not to consider race. Counsel's strategy in making the comments was to get the jurors to "drop the mask" and acknowledge hidden feelings about race. The court found that "an explicit expression of racial prejudice can[not] be considered a legitimate tactical approach. Whether or not counsel is in fact a racist, his expressions of prejudice against African-Americans cannot be tolerated." Prejudice was found because "the expressions of racial animus voiced by trial counsel" would have "unnecessarily tended either to alienate jurors who did not share his animus against African Americans . . .or to legitimize racial prejudice without accomplishing counsel's stated objective of bringing latent bias out into the open." Counsel's expressions of racial bias also may have affected his performance in both the guilt and penalty phases of trial. In the guilt phase, trial counsel rested without presenting a case, rather than present two African-American witnesses whose testimony would have implicated others in the murder because another white witness would contradict their testimony and counsel found the white witness to be more credible. The trial court also found counsel to be ineffective in sentencing for failing to obtain records and witnesses and never visiting the Defendant's family or neighborhood.

****People v. Morris*, 807 N.E.2d 377, *overruled on other grounds*, 813 N.E.2d 93 (Ill. 2004)**. Counsel ineffective in capital case for discussing in great detail an unrelated murder committed by the defendant in opening, even though the trial court had previously agreed to exclude all evidence of the unrelated murder from trial. Defendant was charged, along with several codefendants, with the robbery and murder in Chicago of someone believed to be a drug dealer. Several days before, the defendant had killed a man in a drug-deal gone bad scenario. In opening counsel conceded the defendant's participation in the charged crimes and discussed the unrelated murder in great detail. The defendant subsequently testified with respect to his involvement in both murders and the state offered evidence on both. In closing argument, the State repeatedly reminded the jury of the unrelated murder. Counsel conceded guilt in opening because her strategy was to minimize the defendant's culpability and essentially plead for jury nullification. While this was a proper strategy, in light of the significant evidence against the defendant, the problem in this case is that counsel also conceded guilt to an unrelated murder that had been excluded from the state's case prior to trial. Counsel did so because she misunderstood the court's pretrial ruling to allow the state to use this evidence in rebuttal. Likewise, the defendant's acquiescence was immaterial because it was undoubtedly based on the same misunderstanding. Thus, counsel's actions "were not the product of an informed, strategic choice. Rather, these actions were the product of a mistaken belief that the trial court had ruled evidence of the [unrelated] murder admissible at trial when, in fact, the trial court had ruled just the opposite." Prejudice was found because of the "severe repercussions at trial." First, counsel's jury nullification strategy was dependent on the jury sympathizing with the defendant to some extent. This strategy was completely destroyed by evidence of the defendant's guilt of the unrelated murder committed just 36 hours before the charged offense. Thus, counsel's actions "eviscerated the minimal trial strategy

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that was available to her." "Counsel's deficiencies in this case are distinguishable from typical trial error 'not [in] degree but [in] kind.' *Bell v. Cone*, 535 U.S. 685, ----, 122 S.Ct. 1843, 1851, 152 L.Ed.2d 914, 928 (2002). For in all practical effect, as a result of defense counsel's actions, defendant stood before the jury throughout the trial with no defensive strategy whatsoever."

***State v. Barr*, 814 N.E.2d 79 (Ohio Ct. App. 2004)**. Counsel was ineffective in fleeing and eluding case for opening the door in cross-examination of a police officer to admission of the defendant's statements that had previously been suppressed as involuntary. Prejudice found because without the statements there was no evidence the defendant knew he was being followed by police.

**2003:** ***Emilio v. State*, 588 S.E.2d 797 (Ga. Ct. App. 2003)**. Counsel was ineffective in drug trafficking case for admitting evidence of bad character. The defendant and his girlfriend had been arrested following a traffic stop for drugs found in the car. The girlfriend, who had been driving, pled guilty to a lesser offense and testified at the defendant's trial. During cross-examination of her, counsel offered into evidence a letter the girlfriend had written the defendant, which revealed that the girlfriend had asked the defendant to commit a crime, but also included a statement that the defendant was wanted in five different states. Counsel was ineffective for failing to redact the damaging portions of the letter or to even inform the jury that the defendant was not actually wanted in five states. Counsel's conduct was prejudicial because the bad character evidence created a reasonable probability that the outcome would have been different since the evidence of the defendant's guilt was not overwhelming.

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## 7. CONCEDING GUILT/CONTRADICTING CLIENT

**2018:** ***People v. Miramontes*, __ N.E.3d __, 2018 WL 4698596 (Ill. Ct. App. 2018).** In drug possession case, trial counsel was ineffective in stipulating to the weight of the drugs found in appellant's possession. Appellant was convicted at a bench trial of possession of between 400 and 900 grams of methamphetamine and sentenced to nine years in prison. On appeal, he argued that his conviction should be reduced to the lowest class of possessory offenses for methamphetamine because the state failed to prove that he possessed that specified amount of meth, and that his defense counsel was ineffective for stipulating to the weight of methamphetamine. Officers had commingled the substances they recovered – the substances had been in three bags and officers put them all in a single bag. The examining chemist weighed and tested the substance in the bag and measured it at 415 grams of a substance containing methamphetamine. Appellant argued that "the nonhomogenous substance recovered by police, which was originally in three separate bags, was commingled into one bag prior to testing, making it 'impossible to know whether each of the bags contained methamphetamine, or whether the officers mixed what was mostly a legal substance with a small amount of methamphetamine to create 415 grams of a "substance containing methamphetamine."'" The Appellate Court found that while it was clear that defense counsel's strategy was to challenge whether appellant knowingly possessed the methamphetamine, that strategy did not require counsel to stipulate to the weight of the substance – the knowledge element is entirely separate from the weight element. Counsel could have challenged both elements. Counsel rendered deficient performance by failing to require the state to prove an important element of its case; there was no reasonable trial strategy that supported the stipulation. The deficient performance was prejudicial; exactly how much of the 415 grams of nonhomogenous substance contained methamphetamine is unknown; if counsel had not stipulated, and the chemist had testified that he or she did not know how much was methamphetamine, it is reasonably likely that there would have been a different outcome. No evidentiary hearing is necessary to determine this. The proper remedy is not to reduce the sentence, but to grant appellant a new trial.

**2011:** ***Benitez-Saldana v. State*, 67 So.3d 320 (Fla. Ct. App. 2011)**. Counsel ineffective in robbery and burglary with assault or battery for conceding that the defendant was guilty on both charges. Counsel informed the court prior to trial that he would concede theft, consistent with the defendant's statement to police. During cross-examination and argument, however, counsel conceded facts sufficient to establish both charges. Thus, while counsel argued the defendant was not guilty of the charged crimes, he made factual assertions that amounted to admissions to the charges. These admissions "were unintentional and not a matter of trial strategy." Even assuming counsel was attempting to convince the jury to misapply the law, this was not a reasonable strategy when the jury could have acquitted if it believed the defendant's statement. Prejudice found as "this case boiled down to a credibility contest" and the state's case was not overwhelming.

**2010:** ***State v. Maready*, 695 S.E.2d 771 (N.C. Ct. App. 2010)**. Counsel was per se ineffective in murder case for conceding guilt of involuntary manslaughter in closing arguments. Because North Carolina courts require the defendant's explicit consent prior to any concession of guilt, even after *Florida v. Nixon*, 543 U.S. 175 (2004), reversal was required. The record did not reflect that "Defendant was asked if he consented to these admissions, or that Defendant had given informed and voluntary consent to these admissions of his guilt."

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**2009:** ****Cooke v. State*, 977 A.2d 803 (Del. Supr. Ct. 2009)**. Prejudice was presumed, on direct appeal, due to ineffective assistance of counsel and the trial court's failure to intervene when defense counsel pursued a guilty but mentally ill verdict over the objection of the defendant and while the defendant was arguing and testifying that he was innocent and not mentally ill. The trial court was informed of the conflict more than a year prior to trial. The defendant repeatedly objected to counsel's theory. The state moved in limine to preclude defense counsel from presenting the defense over the defendant's objections. Nonetheless, the trial court did not inquire and made no real effort to resolve the conflict. From defense counsel's opening statement focusing entirely on pursuit of a GBMI verdict, the stage was set for chaos. Throughout the state's case, there were repeated outbursts by the defendant in the jury's presence and in the jury's absence, all related to his objections to the GBMI defense. The defendant was removed from the courtroom at times. During some of those times, he was not even allowed to watch the proceedings. During other times, he was in a holding cell watching the proceedings by television. Some of the removals from the courtroom were requested by defense counsel. During the defense case, counsel presented evidence that the defendant confessed to a mental health expert, although the defendant in his own testimony denied making the statement. Defense counsel did not question the defendant during his testimony. He was instead allowed to testify on direct without anyone questioning him. In his testimony, he informed the jury that he disagreed with defense counsel, that he was innocent, and that he was not mentally ill. The defendant was excluded from the courtroom during the state's rebuttal, summations, and the charge, but watched by television. Defense counsel argued that the defendant's denials of mental illness was proof of it and argued that the defendant was guilty despite his testimony that he was innocent. After conviction, defense counsel continued to assert the defendant's guilt in sentencing, but argued that his mental illness was mitigating. The court held that the trial court violated the defendant's Sixth Amendment rights by permitting defense counsel's arguments and by failing to inquire into the issue and to resolve it. "[C]ounsel cannot undermine the defendant's right to make . . . personal and fundamental decisions by ignoring the defendant's choice and arguing affirmatively against the defendant's chosen objective." Here, counsel's actions infringed the defendant's right to plead not guilty and negated the defendant's right to testify in his own defense. Counsel refused to call him, although they believed his claims of innocence were due to mental illness rather than perjury. They also presented evidence of his confession to a mental health expert without obtaining the defendant's waiver of the psychotherapist-patient privilege. Counsel also deprived the defendant of his right to an impartial jury because counsel stated from the opening that he was guilty but mentally ill. The jury's impartiality was also likely affected by the defendant's frequent outbursts and his absences from the courtroom when these were caused by defense counsel's actions. The effect on the jury is also "apparent" from counsel's argument directly contradicting the defendant's testimony and asserting his guilt despite his not guilty plea and claims of innocence. The impartiality of the jury was also compromised in sentencing because counsel conceded the presence of the aggravating factors that made the defendant death eligible. This situation was not comparable to that in *Florida v. Nixon*, 543 U.S. 175 (2004) because the defendant here did not acquiesce silently to counsel's actions. Here, the defendant adamantly objected repeatedly to counsel's actions prior to and during trial. Thus, this was not a situation where the standard from *Strickland v. Washington*, 466 U.S. 668 (1984) was applicable. This was a case to be reviewed under *United States v. Cronic*, 466 U.S. 648 (1984). There was a breakdown in the adversarial system in this case in two ways.

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First, counsel did not "assist" the defendant in obtaining his objective of a not guilty verdict. Second:

> [C]ounsel not only failed to subject the prosecution's case to meaningful adversarial testing, but also undermined the due process requirement that the State prove [the defendant's] guilt–and his eligibility for the death penalty–beyond a reasonable doubt. . . . [O]n the issue of his guilt and his eligibility for a death sentence–the elements of capital murder–[the] defense attorneys' alignment with the prosecutors was complete.

Counsel's conduct "was inherently prejudicial and does not require a separate showing of prejudice." Reversal was also required due to the trial court's failure to inquire into the propriety of the representation. In essence, the trial court failed to protect the defendant's right to a fair trial "by failing to intervene and provide a remedy for this error, notwithstanding [the defendant's] explicit requests." "In this instance, the trial judge's obligation to ensure that the defendant receives a fair trial required the trial judge to instruct counsel not to pursue a verdict of guilty but mentally ill against [the defendant's] wishes."

**2004:** ***In re Welfare of B.R.C.*, 675 N.W.2d 348 (Minn. Ct. App. 2004)**. Counsel ineffective in juvenile damaging property case where counsel conceded the juvenile's guilt of shooting at a pickup truck and the record failed to show that the juvenile consented in this strategy. The court declined to assume acquiescence. "Given a juvenile's lack of maturity, we believe that a juvenile defendant's consent should be express and placed on the record before a concession of guilt can be made." Counsel's concession was inconsistent with the juvenile's prior statements to police and the statements of his accomplices. Counsel's references to admissions in the juvenile's withdrawn guilty plea were improper, because evidence regarding a withdrawn guilty plea may not be admitted in a criminal trial under state law. Counsel apparently made the concession in an attempt to convince the court to find the juvenile guilty of a misdemeanor and avoid a felony conviction. "While it may be a reasonable trial strategy to concede an adult defendant's guilt to a lesser-included offense in the hope of persuading the fact finder to acquit him or her of the greater charge, juvenile dispositions are not necessarily tied to a misdemeanor/felony distinction. Thus, the strategy of appellant's attorney was not reasonable in this juvenile proceeding." Counsel also incorrectly assumed that by conceding guilt to a misdemeanor, the juvenile could not be held accountable for the entire amount of restitution.

******State v. Matthews*, 591 S.E.2d 535 (N.C. 2004)**. Prejudice presumed in capital trial where defense counsel conceded the defendant's guilt to second degree murder without the defendant's consent, which must be established by "more than implicit consent based on an overall trial strategy and the defendant's intelligence."

***People v. Washington*, 785 N.Y.S.2d 885 (N.Y. Co. Ct. 2004)**. Counsel ineffective in robbery case for conceding guilt to a lesser included offense where the defendant did not consent and objected during the trial to counsel's strategy. While counsel's strategy was sound, "an attorney cannot concede guilt at trial . . . without consent of the accused" because this is the equivalent of a guilty

plea which "must be entered voluntarily by the defendant." While the court acknowledged that most courts reviewing this issue require a showing of prejudice under *Strickland* and that such an analysis might result in affirmance, the court held that New York courts have declined to follow *Strickland* because "the state constitution has been interpreted to set a higher standard of effectiveness for criminal attorneys than the federal constitution." Here, counsel's concession not only denied the effective assistance of counsel but also denied the defendant a fair trial because the state was not required to prove identification.

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## 8. INSTRUCTIONS

### a. U.S. Court of Appeals Cases

**2018: *_Baer v. Neal_, 879 F.3d 769 (7th Cir.), _cert. denied_, 139 S.Ct. 595 (2018).** In capital case from Indiana, trial counsel was ineffective for failing to object to improper and confusing penalty phase jury instructions as well as improper prosecutorial statements and the deficient performance was prejudicial as to the death sentence. Petitioner was convicted of two murders, robbery, theft, and attempted rape arising from a murder of a woman and her four-year-old daughter in their home. Petitioner had admitted that he had committed the crimes and sought to plead guilty but mentally ill, but the trial court rejected the plea, finding insufficient evidence of mental illness. At the penalty phase, the defense presented the testimony of Dr. Mark Cunningham, who described petitioner's social history, including prenatal and perinatal difficulties such as his mother's alcohol use and cancer while pregnant, petitioner's childhood in and out of foster care, the murder of his sister, his ADHD, head injuries, and substance abuse. Regarding the penalty phase instructions, trial counsel failed to object to modification of a jury instruction that eliminated intoxication as a basis for finding that the defendant lacked the capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law. Counsel also failed to object to the improper definition of intoxication as requiring involuntariness of the intoxication. Because counsel essentially failed to object to the removal of a mitigating factor from the jurors' consideration, the Seventh Circuit found his performance deficient under *Lockett v. Ohio*, 438 U.S. 586 (1978). The state court's analysis of the jury instructions in isolation rather than in the context of the overall charge was unreasonable because a juror could have understood the complete penalty phase instructions as foreclosing evidence of voluntary intoxication from consideration for all purposes in sentencing. The timing under which the instructions were given was also important; although the instructions were a correct statement of the law with regard to the mens rea of the crime, and the aggravating factors, they were not correct statements of the law with regard to the mitigating factors. But the instructions were given at the penalty phase, and not in conjunction with the aggravating factor instructions, but rather at the end of the charges as a whole. The jurors also were given the general mitigation instruction that there were no limits on what they could consider mitigating much earlier and at a different time from the voluntary intoxication instruction, and language that merely contradicts and does not explain a constitutionally infirm instruction does not suffice to absolve the infirmity under *Francis v. Franklin*, 471 U.S. 307, 322 (1985). "It is unreasonable to assume jurors could catch the nuance that voluntary intoxication can be considered for mitigation, but not as evidence of criminal intent, without any clear instruction." 879 F.3d at 779. Trial counsel's failure to object was deficient, and the state court unreasonably found otherwise. The error was prejudicial because evidence of petitioner's mental health and drug use was the cornerstone both of the defense at guilt phase and also the defense's sole strategy for avoiding a death sentence, and the instruction blocked consideration of this crucial mitigating evidence. It was unreasonable of the state court to conclude otherwise. Regarding statements by the prosecutor, the prosecutor repeatedly made improper and prejudicial comments, and trial counsel and the trial court failed to address them, introducing doubt into the reliability of the results of the penalty phase trial. First, the prosecutor improperly conflated the standards of guilty but mentally ill and the legal defense of insanity. The insanity defense, which requires a finding that defendant has a severely abnormal mental condition that renders him unable

to appreciate the wrongfulness of his conduct at the time of the offense" is a defense to intent and to guilt, while the guilty but mentally ill issue requires a finding that defendant suffers from an illness that "disturbs thinking, feeling, or behavior, and impairs ability to function" and has effect at the penalty phase but not at the guilt phase because it does not have an effect on his conviction. The prosecutor conflated these terms throughout the trial, starting during voir dire. The state court found that counsel's failure to object was "likely" strategic because counsel testified that he knew the prosecutor was capable of overstating his case and he was planning to correctly state the law to the jury. The Seventh Circuit found this analysis unreasonable, because "hoping the jury would decide that the prosecutor was not credible" is not strategic, especially where the difference between insanity and GBMI was never clarified. Second, the prosecutor repeatedly told the jurors (again beginning during voir dire) that the victims' family members wanted the jury to impose the death penalty. Trial counsel objected only one time to the violations of *Payne v. Tennessee*, 501 U.S. 808 (1991). The state court acknowledged that the prosecutor's statements were problematic, but erroneously found that the prosecutor told the jury he misspoke – this did not occur. Furthermore, the trial court repeatedly stated that the court was not listening, and "missed numerous opportunities to stop or clarify the prosecutor's statements and his absence was noticeable throughout trial." 879 F.3d at 786. Third, the prosecutor stated personal opinions and introduced facts not in evidence directing the jurors toward a death penalty verdict. For example, he said that it was possible that Indiana was going to change the law so LWOP would no longer be an option – there was no basis for this speculation. He also compared petitioner's crime to that of others he had personally seen and experienced. Petitioner's counsel did not object. And just because defense counsel argued that petitioner's crime wasn't the worst of the worst did not permit the prosecutor to argue what he did. "[J]ust because defense counsel cracked open the door to these subjects, it did not permit the prosecutor to drive a truck through it. The seditious and specific comments about the prosecutor's own mother, the community's layoffs, and 9/11 were all not hard blows, but beyond the pale foul ones." 879 F.3d at 787. It was unreasonable for trial counsel not to object. The state court's finding that the prosecutor's improper comments did not cumulatively affect the outcome of the trial was unreasonable – the state court failed to aggregate prejudice even though it claimed to do so. "[I]t is nearly impossible that the comments did not impact the juror's [sic] decision to recommend the death penalty." 879 F.3d at 788. "[The prosecutor's] misstatements were prolific and harmful to [petitioner's] case, yet [petitioner's] trial counsel failed to object at every opportunity. [The prosecutor's] comments began in voir dire, where his comments conditioned jurors to believe that [petitioner] was a liar, that mental illness was a 'copout' and 'defense,' that [petitioner] should not receive a GBMI conviction because he appreciated the wrongfulness of his actions (improperly using the insanity defense standard), life without parole was at a high risk of providing release, and the [victims'] family wanted a death sentence. All these comments were made before the jury heard any evidence in [petitioner's] case. Then at the close of penalty phase, [the prosecutor] again injected inflammatory comments and facts not in evidence, including remarks about [the prosecutor's] mother's prostitution, people being laid off to afford the state's pursuit of the death penalty, and [petitioner's] crime being worse than any of the prior 125 murders [the prosecutor] had heard of in his career in law enforcement. . . . Can we be certain that [petitioner] would not have been sentenced to death if given a fair trial and effective counsel? No. But it is 'reasonably likely' that without the prosecutor's injection of impermissible statements and incorrect law the jurors would not have recommended death." 879 F.3d at 788-89.

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**2017:** ***Bey v. Superintendent, Greene SCI*, 856 F.3d 230 (3rd Cir. 2017), *cert. denied sub nom. Gilmore v. Bey*, 138 S.Ct. 740 (2018).** The Third Circuit granted relief in this Pennsylvania non-capital murder case, finding that trial counsel was ineffective for failing to object to an erroneous jury instruction on eyewitness testimony, and that state post-conviction counsel's inadequate failure to assert that claim in state court constituted "cause" to overcome the resulting procedural default. Petitioner was charged with the shootings of two people, one fatal and one non-fatal. The "key witness" at his trial was a police officer, whose "certain and unequivocal" eyewitness identification of petitioner was the prosecution's strongest evidence. 856 F.3d at 233. The claim addressed by the Third Circuit arose when the trial court agreed to give a "*Kloiber* charge" concerning eyewitness testimony, then – without objection from trial counsel – gave a version of the charge that was "critically inconsistent with" state law. *Id.* at 234. "A proper charge under *Kloiber*," the Third Circuit explained, "informs the jury that it has the ultimate discretion of deciding whether to credit positive eyewitness testimony. Instead, the trial court's instruction essentially required the jury to accept positive eyewitness testimony as true by directing that 'testimony as to the identification may not be received with caution.'" 856 F.3d at 238 (emphasis by the court); *see also id.* at 239-40 ("The charge removed the discretion that the jury could otherwise have exercised that may have raised a reasonable doubt in the mind of one or more jurors about the identity of the shooter."). When petitioner later sought state post-conviction relief, his post-conviction counsel alleged that trial counsel had been ineffective for failing to object to three other aspects of the charge, but not the "may not" language targeted in the federal habeas petition that followed. On appeal from the denial of federal habeas relief, the Third Circuit accepted and agreed with petitioner's concession that the "specific ineffective assistance claim" he advanced was procedurally defaulted notwithstanding the state court's adjudication of three other claims based on the same defective jury charge. The court then examined the merits of the ineffective assistance of trial counsel claim to determine whether it was "substantial," such that post-conviction counsel's failure to raise it constituted "cause" under *Martinez v. Ryan*, and if so, whether it required a grant of habeas relief. Both inquiries were resolved in petitioner's favor. After explaining that "the faulty *Kloiber* instruction deprived [petitioner] of his due process right to have the prosecution prove every element beyond a reasonable doubt," 856 F.3d at 241, the Third Circuit held that trial counsel performed deficiently in failing to object: "Clearly, this instruction could be reasonably understood as requiring the jury to accept an eyewitness's identification of [petitioner] as the shooter. Indeed, that was what the jurors were told. We can think of no strategic reason for defense counsel not to object to a charge that raises such due process concerns." *Id.* With regard to prejudice, the court rejected the state's contention that the prosecution had presented an "overwhelming case," explaining that, "[a]t [petitioner's] first trial, nearly identical evidence resulted in a hung jury," and that two jury questions at petitioner's second trial (which yielded the judgment at issue here) indicated that the officer's eyewitness "testimony may well have been a source of concern." *Id.* at 243. Because the erroneous charge left the jury with "no room ... to conclude that [the officer], though certain, was wrong," the court added, "the prosecution was unconstitutionally relieved of its burden of proving [petitioner] was the shooter beyond a reasonable doubt," and petitioner was prejudiced by trial counsel's failure to object. *Id.* Finally, returning to the question of "cause" under *Martinez*, the Third Circuit concluded that petitioner had made the requisite showing. *See* 856 F.3d at 244.

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**2015:** ***Crace v. Herzog*, 798 F.3d 840 (9th Cir. 2015)**. Under AEDPA, counsel ineffective in felony attempted second-degree assault case for failing to request an instruction on the misdemeanor lesser-included offense of unlawful display of a weapon. The defendant, who had consumed a great deal of drugs and alcohol, was hallucinating and believed that someone was out to kill him. He was running down the street with a sword at night and screaming for help. When he spotted an officer, he ran towards him seeking protection. When the officer pulled his weapon and ordered him to stop, the defendant dropped the sword but continued running towards the officer because he was afraid. He stopped seven feet from the officer and got down on the ground. The Washington Court of Appeals found deficient conduct and prejudice, but the Washington Supreme Court reversed, without deciding whether counsel's conduct was deficient, because the court found no prejudice. In doing so, the state court assumed the jury would have reached the same verdict even if it had been instructed on the lesser-included-offense because the evidence was sufficient to support the verdict reached. By doing so, the state court "in essence converted *Strickland*'s prejudice inquiry into a sufficiency-of-the-evidence question." "This approach to *Strickland* is not merely wrong, but 'objectively unreasonable' under AEDPA." This issue was thus entitled to de novo review. The defendant was entitled to the lesser-included offense instruction because there was evidence to support an inference that the defendant displayed the sword without any intent to create reasonable fear or apprehension of bodily injury, which is the specific intent required for assault and attempted assault. The defense presented lay and expert testimony in support of a diminished capacity defense. Prejudice was clear, because with proper instruction, "a jury could rationally choose to convict Crace only of unlawful display of a weapon." Because the Washington Supreme Court did not address whether counsel's conduct was deficient, that question was also reviewed de novo. Where counsel admitted that he did not consider the issue, the "failure to request the instruction was neither strategic nor deliberate." Failure to consider the issue was deficient performance. Even if counsel had considered the issue and then failed to request the instruction, counsel's actions would still be "manifestly unreasonable."

***Lee v. Clarke*, 781 F.3d 114 (4th Cir. 2015)**. Under AEDPA, counsel ineffective in second degree murder case for failing to request a manslaughter and heat of passion instruction. The state court decision to the contrary was an unreasonable application of clearly established federal law set forth in *Strickland*. The victim died of multiple stab wounds to the chest. The state's evidence included a history of disputes between the defendant and the alleged victim. A state witness testified that the decedent approached the defendant "ready to fight" and struck the defendant multiple times. As they were fighting the witness heard the decedent yell that the defendant had stabbed him. The decedent then ran up the road holding his chest with the defendant following attacking from behind until two of the decedent's friends intervened. The defendant said "I'm gonna kill him" before running away. Following the state case, counsel moved to strike the first degree murder charge due to lack of premeditation and to proceed only on second degree murder or manslaughter. The court denied both motions. The defendant testified, along with his friend who was present. The defendant testified that the decedent attacked him and had him on the ground before he pulled out his pocket knife and stabbed the decedent. The friend did not see the stabbing but first saw the two men getting up off the ground and the decedent running away saying he had been stabbed. The defendant then got up and left. Counsel's conduct was deficient in failing to object to the court's charge, which included second degree murder and manslaughter but did not include the "full model instruction" from the "Virginia Model Jury Instructions" on heat of passion. Counsel did, however, in closing arguments

attempt to distinguish between malice and heat of passion. The jury sent out three notes during deliberations asking for clarification on premeditation and indicating a hung jury. The court repeated the initial instructions and gave an Allen charge without objection by defense counsel. Counsel's conduct was deficient in failing to request the appropriate instructions. The state did not contest this and the state court did not address this aspect in its analysis. The court analyzed it, nonetheless, and found counsel's conduct deficient. With respect to prejudice, "the undisputed testimony that [the decedent struck the defendant] first demonstrates that the state habeas court's *Strickland* analysis fails to perceive the prejudice created by the lack of a definitional heat of passion instruction." The defendant was given an instruction on manslaughter, but not an instruction defining heat of passion. While the state argued no prejudice based on defense counsel's argument, "it is well established that 'arguments of counsel generally carry less weight with a jury than . . . instructions from the court.'" *Id*. at 125 (quoting *Boyde v. California*, 494 U.S. 370, 384 (1990)).

> A court issued jury instruction carries the command and force of law in a way that a statement by counsel cannot, and thus prejudice that arises from a flawed or omitted jury instruction is not cured by mere argument.

Additionally, counsel's argument did not actually include the language of the model instruction or attempt to define heat of passion. Prejudice established.

**2010:** ***United States v. Luck*, 611 F.3d 183 (4th Cir. 2010)**. Counsel ineffective in drug case for failing to request an "informant instruction," when the government's evidence consisted only of the investigating officer and two paid informants. One of the informants approached police offering assistance because "she wanted to reduce her exposure for a robbery charge she was facing." The other approached police to benefit the first informant, who was the mother of his child, and to "earn money." While a buy in which the first informant was wired was conducted, the image and sound quality was too poor to record events. The officer also did not do a thorough search of the informant prior to the "buy." A search warrant of the defendant's house revealed scales and baggies commonly used to package narcotics, but no drugs. Without deciding "whether and when an informant instruction is required," the court held that "on these facts . . . counsel erred in failing to request an informant instruction." "This case presents the classic case of a professional informant paid for his services," with "little corroborating evidence." "[A] reasonable lawyer would have been concerned that the uncorroborated testimony of paid informants could have been 'manufactured . .. out of whole cloth' for the benefit of the informant alone. Because "counsel's defense strategy seem[ed] to be focused on discrediting the government's witnesses," there was no indication counsel's failure to request the instruction was strategy. Prejudice established, even though the court gave "general instructions" on witness credibility. "[T]he informant instruction is sui generis; it alerts jurors to the potentially unique problems that inhere where an individual is paid to inculpate a defendant."

**2005:** ***Cox v. Donnelly*, 432 F.3d 388 (2nd Cir. 2005)**. Counsel ineffective in second degree murder case for failing to object to an erroneous jury instruction that impermissibly shifted to the defendant the burden of proving that he did not intend "the ordinary consequences of his voluntary acts." The

failure was due te counsel's "ignorance of the law on point." Under AEDPA, the state court holding was an unreasonable application of *Strickland*.

**2004:** ***Reagan v. Norris*, 365 F.3d 616 (8th Cir. 2004)**. Counsel ineffective in first-degree murder case for failing to object to the trial court's instructions that failed to include an essential element of the crime – that the defendant "knowingly" caused the death. Counsel conceded that the failure to object was not strategic. Analyzing the case under the AEDPA, the court found that counsel's conduct was deficient and prejudicial because the jury could have believed every aspect of the defense case (that the death was accidental) and still convicted of first-degree murder under the erroneous instructions.

**b. U.S. District Court Case**

**2015:** ***Ruiz v. United States*, 146 F. Supp. 3d 726 (D. Md. 2015)**. Counsel ineffective in drugs and possession of a machine gun case for failing to request an instruction that conviction of the machine gun count required proof that the defendant knew the weapon was a machine gun. The defendant was "a first-time non-violent offender," who participated in a drug trafficking ring led by another. Because of the machine gun charge, the defendant, "a minor participant in the drug conspiracy, was sentenced to 480 months, which was greater than the combined total sentence for all of his co-conspirators and the "undisputed ringleader." Counsel's conduct was deficient in failing to request a mens rea instruction because "bedrock principles of Anglo-American jurisprudence" and the Supreme Court's interpretation of a similar automatic weapon offense required proof that the defendant knew the features of the weapon. Prejudice established. There was no direct evidence that the defendant knew the weapon was a machine gun, and the circumstantial evidence was minimal, at best, as forensic evidence showed the weapon had never been fired and the co-conspirators referred to the weapon as a "rifle" of "semi-automatic," while a machine gun is "automatic." There simply was no evidence that the defendant knew the weapon was a machine gun. If this issue had been raised, a reasonable jury would have found the defendant not guilty or the court would have granted a motion to dismiss. Conviction vacated and sentence reduced to 120 months.

**2005:** ***Baker v. Horn*, 383 F. Supp. 2d 720 (E.D. Pa. 2005)**. Counsel was ineffective in capital trial for failing to object to the trial court's instructions that permitted the jury to convict the petitioner of first degree murder under an accomplice liability theory without finding that the petitioner himself possessed the specific intent to kill, which was a required element under Pennsylvania law. Counsel's conduct was deficient because the state law was clearly established at the time of trial. Prejudice was found even though the jury could have convicted the petitioner either as a principal or as an accomplice because the verdict sheet did not reveal which theory the jury used and the evidence was contradictory concerning the identity of the shooter. Although AEDPA applied, the state court had not addressed the merits of this claim and the court reviewed the issues de novo.

**c. State Cases**

**2018:** ***Calhoun v. State of Kansas,* 426 P.3d 519 (Kan. Ct. App. 2018).** In case involving charges of multiple offenses allegedly committed by movant and three others, trial counsel was ineffective in

failing to object to the instruction that the jury could convict movant of the aiding and abetting specific intent crimes if it found that the specific intent crimes were a reasonably foreseeable consequence of the intended crime of aggravated robbery. Appellate counsel was also ineffective in failing to raise the trial IAC claim on direct appeal. Movant was convicted by a jury of aggravated kidnapping, aggravated criminal sodomy, attempted voluntary manslaughter, aggravated burglary, criminal threat, two counts of aggravated robbery, and two counts of aggravated battery. The charges arose from an incident in which movant and three others broke into a family's home, demanded money, pointed a gun at and threatened to kill a baby who was present, kicked, stomped on, and shot the father, and raped, sodomized, beat the mother and forced her to perform oral sex. Movant testified that he was at the house, that he and the others planned to rob the father who had sold him marijuana in the past, and that he participated in the robbery. He denied that he had committed any of the violent crimes against the mother, father, and baby. A minor who participated in the crimes testified that movant actively participated in the sexual assaults of the mother and punched the father in the head. After movant's convictions were affirmed on direct appeal, he filed a motion raising numerous claims, including ineffective assistance by trial and appellate counsel. The motion was denied and he appealed. The appellate court pointed out that Kansas state law (*State v. Overstreet*, 200 P.3d 427 (2009)) requires that in order to be convicted of a specific intent crime under an aiding and abetting theory, the defendant must have the same specific intent as the principal. Thus, when a defendant is charged with specific intent crimes under an aiding and abetting theory, the jury must be given the "same mental culpability" instruction, rather than the "foreseeability" instruction, which is only applicable to aiding and abetting general intent crimes. Here, trial counsel failed to object to the instruction that the jury could convict movant of the aiding and abetting specific intent crimes (aggravated kidnapping, attempted voluntary manslaughter, and criminal threat) if it found that the specific intent crimes were a reasonably foreseeable consequence of the intended crime (aggravated robbery). Appellate counsel also failed to raise the trial IAC claim on direct appeal. Both trial and appellate counsel's performance was deficient in this way, and both were prejudicial, given that "the prosecutor's entire rebuttal during closing arguments hinged on telling the jury that they could convict [movant] of all of the crimes charged because they were reasonably foreseeable consequences of the intended robbery," 426 P.3d at 531, that the jury asked questions about the reasonable foreseeability portion of the aiding and abetting instructions, and that the jury acquitted movant of rape and three counts of aggravated criminal sodomy (indicating that it did not believe he aided and abetted all of the crimes). [NOTE: Jurors had provided statements indicating that half the jurors believed he was guilty of all, and half the jurors believed he was guilty of none, one of the jurors had a planned vacation, and they decided to convict of some and acquit of some. The appellate court ruled that it was precluded from considering these statements, but it appears nevertheless that they may have had some effect on the court.] There was a real possibility that the jury would not have found movant guilty of aggravated kidnapping, attempted voluntary manslaughter, and criminal threat if it had been properly instructed. Under Kansas law, if a movant makes more than conclusory contentions and an evidentiary basis supports movant's claims, the movant is entitled to an evidentiary hearing. In addition, when ineffective assistance of counsel and prejudice is readily apparent from the motion, files, and records of the movant's case, the appellate court has exercised its de novo review and reversed the defendant's conviction and remanded for a new trial without first remanding for an evidentiary hearing. Here, the court decided that this was such a case. The court thus reversed his aggravated kidnapping, attempted voluntary manslaughter, and criminal threat charges and remanded for a new trial.

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***State v. Classen,* 422 P.3d 489 (Wash. Ct. App. 2018).** Trial counsel was ineffective in failing to request an inferior degree offense instruction as to one of the many crimes appellant was charged with. The offenses were based on an event during which a woman, who was driving with her infant son, offered to give appellant a ride, and once he was in the car he refused to get out, beat the woman, sexually assaulted her, and directed her where to drive. He was arrested after the woman and her son escaped from the car, he struck one bystander who was attempting to assist the woman, and other bystanders caught and subdued him. In the information, appellant was charged with second degree assault as to the bystander. He argued on appeal that trial counsel was ineffective as to that charge for failing to request an inferior degree offense instruction for the lesser crime of fourth degree assault. Here, appellant was entitled to such an instruction as it was an inferior degree of the charged offense, and there was evidence that appellant committed only the inferior degree offense. The evidence was that appellant slapped the bystander and then immediately ran away. Viewing this evidence in the light most favorable to appellant, the jury could have found that appellant was not intending to kidnap the bystander or the first victim at the time he slapped her, and intended instead only to harm her. It was clear from the closing argument that trial counsel's failure to request an inferior degree instruction was not a reasonable strategy, because the only statement counsel made about the assault on the bystander was that appellant was "guilty of assault. . . What kind of assault is it? That's the question." Counsel obviously was not pursuing an all or nothing approach to this charge (i.e., that appellant was innocent of the charge), so there was no legitimate reason to fail to request the instruction. Appellant was prejudiced by this failure, because in order to convict him of second degree assault, the jury had to find that appellant committed the assault with the intent to commit a felony – here, the evidence that appellant intended to kidnap either the first or second victim at the time he slapped the second victim was very weak. The Court of Appeals of Washington remanded for a new trial on the assault charge.

***Shortall v. State,* 183 A.3d 820 (Md. App. 2018).** Trial counsel was ineffective in failing to object to instructions that incorrectly increased the number of counts that petitioner could be convicted of. Petitioner was convicted of five misdemeanor counts of failing to comply with a state regulation for disposing of sewage in a manner which may cause pollution of the ground surface and five misdemeanor counts of failure to comply with a state regulation for disposing of sewage without an approved permit. The charges and convictions arose when environmental health department personnel noted that human waste and toilet paper had been discharged outside from a pipe leading from petitioner's building. Petitioner sought relief claiming ineffective assistance of counsel because counsel failed to object to the trial court's instruction on a continuing violation theory. Petitioner pointed out that the instruction given stated that "every day on which a violation is still present constitutes a separate offense until the date the violation is corrected," whereas the statute stated the "[e]ach day on which a violation occurs is a separate violation under this subsection." Petitioner argued that "is still present" is materially different from "occurs," and that "occurs" under the statute required the state to prove affirmative occurrence on each date, but here the state only proved that waste remained on the site for the five dates, not that more waste was disposed of on each date. Petitioner contended that he incurred criminal charges during the time he was awaiting direction about how to remedy the infractions, so the continuing violation doctrine is inapplicable to these charges. Although there was no Maryland case law addressing whether the continuing violation doctrine applied to the environmental crimes charged here, the appellate court found that trial counsel performed deficiently in failing to object to the instruction. It agreed with petitioner's argument that

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"[t]he mere presence of the same evidence of a prior crime simply cannot, as a matter of law, constitute separate chargeable criminal offenses for each day the State and/or County decided to visit the property," and that the plain language of the regulations did not support ten separate convictions for the two regulatory violations established. There was no conceivable benefit to petitioner to be gained by not objecting to the non-pattern jury instruction that did not closely track the wording of either the regulations or the statute they implemented. The regulations also imposed no duty to remediate. The instruction was an incorrect statement of law. This was prejudicial because petitioner should have been convicted of only a single violation of each regulation, not five violations of each; the fact that the counts were merged for sentencing does not change that – petitioner still has ten convictions on his criminal record, and that was prejudicial to him.

**2017:** ***White v. Delaware*, 173 A.3d 78 (Del. 2017).** Petitioner was convicted of first degree reckless endangering and his conviction was affirmed on appeal. He then filed a petition for post-conviction relief, alleging that his counsel was ineffective for failing to request an instruction on the lesser included offense of second degree reckless endangering. The post-conviction court denied relief. The Supreme Court of Delaware reversed the denial of relief, finding that counsel's performance was deficient because counsel did not understand the elements of either first or second degree reckless endangering. First degree required proof of a substantial risk of death, while second degree required proof of a substantial risk of injury, but counsel thought that first degree required proof either of risk of death or risk of serious physical injury (and did not read the statute). Asking for the instruction would have been consistent with trial counsel's strategy – to show that petitioner fired a gun but did not create a substantial risk of death. The evidence in this case, that petitioner was not pointing his gun at anyone in particular but instead behind himself, that there were few people on the street, that the shots went far away from the two people who were there and did not penetrate any residence, could have supported second degree reckless endangering.

***Kruse v. State*, 222 So.3d 13 (Fla. Ct. App. 4th Dist. 2017).** In a case involving a charge of felony battery on an elderly person with prior conviction, resulting in a conviction of the lesser included offense of felony battery with prior conviction, trial counsel was ineffective for failing to request a self-defense jury instruction. Regarding deficient performance, it was noted that defense counsel elicited testimony from defendant asserting that the victim was the aggressor who first made physical contact and "tried to push" defendant out of the yard. Defense counsel also elicited from a third-party witness that the victim was the first to make physical contact. In addition, defense counsel made arguments during closing that could have reasonably comported with a theory of self-defense. Yet defense counsel inexplicably failed to request an instruction on self-defense. That defense counsel may have reasonably assumed the jury would be skeptical of the defense given that defendant was some twenty years younger than the feeble victim who was punched in the face and had his jaw broken, that didn't explain the failure to request an instruction that coincided with the testimony and argument. As to prejudice, it was observed, inter alia, that the jury expressly asked the court during deliberations whether there was an affirmative defense available in this case, indicating the jury would have seriously considered the possibility that defendant acted in self-defense if that option were available under the instructions.

***Hardman v. State*, 217 So.3d 107 (Fla. Ct. App. 4th Dist. 2017).** In a case where defendant was convicted of two counts of grand theft, trial counsel was ineffective in failing to request a jury

instruction on good faith. The two transactions at issue involved the exchange of money for promissory notes. Defendant considered the monies loans; the victims (Krenzel and the Diehls) considered the monies an investment. Defendant initially made interest payments to both parties and ultimately attempted to deed property to the Diehls but they deeded it back. When defendant used the monies for personal expenses and failed to repay them, charges were filed. Defendant's recorded statement, which was admitted at trial, indicated that he borrowed $20,000 from Krenzel, promised a percentage back but failed to follow through, an outcome he had not intended. Defendant admitted owing about 1.3 million dollars in bad investments. He was trying to come up with the money. At trial, defense counsel emphasized the theory that the monies were loans and that defendant had attempted to repay them but had invested poorly. In moving for a judgment of acquittal, defense counsel argued that the prosecution had failed to prove defendant's intent to permanently deprive the victims of the money. The motion was granted on security fraud charges but not on those of grand theft. Because the evidence in the record supported a good faith defense, defense counsel performed deficiently in failing to request specific instructions on that defense. And given the absence of an instruction on the law applicable to defendant's only defense, there was prejudice.

***Burns v. State*, 803 S.E.2d 79 (Ga. Ct. App. 2017).** In a case where defendant was convicted, inter alia, of aggravated assault, trial counsel was ineffective in failing to request an instruction regarding the requirement that accomplice testimony be corroborated. Defendant and the co-defendant had been attempting to sell the victim a stolen car. Following a dispute between the parties, one of the defendants shot the victim. There was conflicting testimony by the victim and eyewitnesses regarding who the shooter was. The co-defendant testified that defendant had been the shooter. The jury was charged: "[t]he testimony of a single witness, if believed, is sufficient to establish a fact. Generally there is no legal requirement of corroboration of a witness provided that you find ... the evidence to be sufficient." Defense counsel raised no objection to the instruction nor requested that an accomplice-corroboration instruction be given. Defendant and the co-defendant were acquitted of numerous charges but both were conviction of theft by receiving stolen property. Defendant alone was convicted of aggravated assault. It was conceded on appeal that defense counsel performed deficiently in failing to request the accomplice instruction. In assessing prejudice, it was first noted that the co-defendant's acquittal of the aggravated assault charge established that defendant had not been convicted on the basis of having been a party to the assault. Second, it was observed that the fact that some evidence corroborated the co-defendant's account did not foreclose a finding of prejudice. "[T]he question is not whether there was sufficient corroboration of the accomplice testimony to allow the jury to rely on that testimony when determining the defendant's guilt. Rather . . . the question is whether, under the circumstances of this case, the absence of an instruction on the necessity for corroboration of accomplice testimony undermines confidence in the outcome of trial." Prejudice is found because: (1) the co-defendant's identification of defendant as the sole shooter was contradicted by testimony of an eyewitness who affirmatively identified the co-defendant as the shooter; (2) eyewitness description of the clothing worn by the shooter matched clothing the co-defendant was wearing at the time of the crime; (3) an eyewitness testified that the shooter had been seated in the front passenger seat of the car and the co-defendant had admitted that he had been in the front passenger seat, and (4) although the victim stated that both defendants shot him, his testimony indicated that defendant never left the car, implying it was the co-defendant who pursued the victim and delivered the shot that injured him. On this record, the outcome of the trial was likely affected by the absence of an accomplice-corroboration instruction.

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***Humphrey v. State*, 73 N.E.3d 677 (Ind. 2017).** In murder case, trial counsel was ineffective in failing to object to use of a witness's prior unsworn statement as substantive evidence and failing to request appropriate instructions on how the statement could be considered by the jury. The murder occurred during an attempted drug deal. According to a friend of the murder victim, he and the victim had been driving around in the friend's truck searching for drugs. When they spotted three men who appeared to be dealers, they pulled up near them. One of the men approached the truck and the victim asked him to get in to discuss a drug purchase. As the friend drove, words were spoken between the victim and the dealer who then drew a gun. The victim grabbed the gun and it went off. The dealer jumped out of the moving car and ran away. The victim had been struck in the abdomen and ultimately died from the wound. The victim's friend could only give a vague description of the dealer. A man named Smith testified that he had been with defendant and a man named Brooks on the night of the murder. He observed a truck stop and defendant going to greet it, indicating to Smith that defendant thought the occupants wanted to buy drugs. Although Smith heard the door of the truck open and close, he didn't see defendant get in the truck and he heard no gunshot. He did hear the truck peel out and then defendant returned, telling Smith that the "dude" tried to "gank him" or "git him." Smith had seen defendant with a gun before but not on that night. Brooks, the third man allegedly present that night, gave police an unsworn statement about the events when Brooks was in jail on an unrelated charge. Brooks identified defendant in a photo lineup and stated that defendant went out to a truck, Brooks heard a "noise," and defendant returned stating that he had shot one of the men. At trial, however, Brooks denied being with defendant and Smith on the night of the shooting and claimed that his statement had been fabricated due to police pressure. The statement was admitted to impeach his in-court repudiation. As for trial counsel's failure to object to admission of the unsworn statement on hearsay grounds and to request a limiting instruction, the State argued that defense counsel could reasonably have decided not to further highlight the statement. But this supposed strategic justification for the omission was belied by the record which showed trial counsel's repeated references to the unsworn statement throughout the remainder of the trial, including defense counsel reading out loud the portion of the statement where Brooks identified defendant as the shooter. Trial counsel even expressly asked the jurors during closing argument to consider the out-of-court statement in determining defendant's guilt or innocence. The State's other argument – that trial counsel had a secondary strategy of wanting the Brooks statement admitted in order to sow reasonable doubt – was similarly unpersuasive. First, trial counsel had unsuccessfully objected to admission of the statement on other grounds (lack of foundation). Second, this argument contradicted the primary argument that trial counsel allowed the statement's admission in order to avoid further focus on it. "It defies credulity to say on the one hand that defense counsel strategically elected not to mount a hearsay objection or request a limiting instruction to refrain from drawing attention to Brooks' unsworn statement, but insist on the other hand that counsel wanted to 'use it to show the inconsistencies in the State's key witnesses.'" On this record, the deference normally accorded to trial counsel's acts or omissions was inappropriate and counsel's failure to lodge a hearsay objection to admission of the statement constituted deficient performance. Counsel also performed deficiently in failing to request an admonition or limiting instruction precluding the unsworn statement from being used as substantive evidence rather than only as impeachment evidence. Also deficient was defense counsel's failure to object to a jury instruction that expressly told the jury that it could consider the out-of-court statement in determining defendant's guilt. (The pattern instruction given to the jury had been rendered an incorrect statement of the law by a recent state supreme court ruling.) As to prejudice, the court observed: "[E]vidence improperly considered

by the jury for want of a limiting instruction is no less prejudicial than evidence presented which should have never been introduced in the first instance. Both permit the jury to improperly determine guilt based information that should not be considered. Even if Brooks' unsworn statement was properly admitted for impeachment purposes, counsel failed to limit the use of that statement to his client's detriment." On the record before it, the court concluded there was a reasonable probability of a more favorable verdict had counsel not acted deficiently.

***State v. Virgil*, 895 N.W.2d 873 (Iowa 2017).** In domestic assault abuse case, third offense, trial counsel was ineffective in failing to request a jury instruction defining "household member." The marshaling instruction required the State to prove the assault occurred "between family or household members who resided together at the time of the incident or persons who have been family or household members residing together within the past year but not residing together at the time of the incident." If that element was not proven, the instructions permitted the jury to convict defendant of simple assault. The central issue at trial was whether defendant and the victim had been cohabitating. The first trial resulted in a hung jury. At the retrial, the jury asked during deliberations to define "Reside + Domestic." Without objection by defense counsel, the jury was told to refer to the ordinary meaning of the words. Defendant was convicted of the charge. There was no argument made that defense counsel had a strategic basis for failing to request the uniform instruction either before or after the jury submitted its questions. At issue was whether defendant was prejudiced by counsel's omission. Evidence at trial showed that during defendant's eight-month relationship with the victim, he spent three or four nights a week at her rented home. He was not on the lease or the utilities and did not pay any rent or household expenses. When he stayed over, he and the victim shared meals. Defendant kept a cell phone and a garbage bag with some clothes at the victim's home but no other possessions. The rest of his belongings were at his uncle or cousin's home, where he stayed three or four nights a week. He did not have a key to the victim's home but could come and go as he pleased. He was not allowed to have guests. He did not receive mail or phone calls at the victim's home, but she believed he gave his family her address as his own.. On most days, he provided child care to the victim's children. Although the victim claimed she and defendant were not living together, she acknowledged saying that to avoid jeopardizing her section 8 housing subsidy, which prohibits nonfamily cohabitants. Defendant and the victim had begun their relationship in late 2013. The first assault occurred in May 2014, after which the victim told defendant he was no longer welcome in her home and the relationship ended in June. Defendant assaulted the victim again in August 2014. The assault at issue here occurred in October 2014, with defendant first accosting the victim on the street and telling her he had nowhere to go. When the victim reached her doorway, defendant pushed her inside and assaulted her. On this record, the jury could have found either way on the cohabitation issue, thereby establishing prejudice from defense counsel's failure to request a uniform instruction that defined "household members" and "cohabitating." (The instruction defined "family or household members" as persons cohabiting with each other, and then explained: "'Cohabiting' does not require a sexual relationship, but does require more than dwelling or living together in the same place. To determine if the defendant and (victim) were cohabiting at the time of the alleged offense, you may consider whether they had sexual relations while sharing the same living quarters; they shared income or expenses; they jointly used or owned property together; they held themselves out as husband and wife; the continuity and length of their relationship, and any other facts shown by the evidence bearing on their relationship with each other.")

**Capital Case*

***State v. Brown*, 96 N.E.3d 1128 (Ohio Ct. App. 2017).** In felonious assault case, trial counsel was ineffective in failing to request an instruction on self-defense. At trial, the victim and defendant's girlfriend testified that defendant attacked the victim after finding the victim in defendant's girlfriend's home. Defendant, in contrast, testified that he had no intention of getting into a physical altercation with the victim. It was only after the victim tackled him, nearly causing defendant to fall down a steep flight of stairs, that defendant fought back. Trial counsel requested an instruction on the lesser offense of aggravated assault but it was denied. Trial counsel then unsuccessfully argued to the jury that the prosecution had failed to establish each element of felonious assault. Because defendant was at the least a visiting guest at the time of the incident, he had no duty to retreat prior to using force in self-defense. In order to warrant a jury instruction on self-defense, D only needed to submit evidence demonstrating that he was not at fault in creating the situation giving rise to the altercation with the victim, and that he had an honest belief that he was in imminent danger of bodily harm, i.e., that he acted out of fear of bodily harm. Defendant's testimony made the requisite showing for the self-defense instruction. Because of that, trial counsel's failure to request the instruction fell below an objective standard of reasonable representation. Prejudice is established despite the State's claim that defendant's self-serving testimony would not have been credited in light of the testimony of his girlfriend and the victim. Notably, there was significant credibility issues with both the testimony of the victim and the girlfriend. "Given the testimony and the various credibility issues, we find that that there is a reasonable probability that the jury might have accepted Brown's version of events and concluded that Brown acted in self-defense when he fought with [the victim]. In other words, there is a reasonable probability that, but for counsel's failure to request the self-defense instruction, the out-come of trial would have been different, thus prejudicing Brown."

***Commonwaelth v. Domek*, 167 A.3d 761 (Pa. Super. Ct. 2017).** In case involving a conviction for aggravated assault against a corrections officer ("CO"), trial counsel was ineffective in failing to object to an erroneous jury charge which permitted the jury to return a guilty verdict upon a finding that defendant acted recklessly. Under state law, aggravated assault required that the defendant acted intentionally or knowingly in causing the bodily injury. Regarding prejudice, it was noted that defendant had also been charged with assault by a prison on the same CO. That crime required the jury to find that "it was the intended conscious goal or purpose to cause serious bodily injury." Defendant was acquitted of that count. This demonstrated that the aggravated assault conviction might well have been premised on a finding of recklessness. Upon review of the record, the court could not conclude that the evidence tending to show that defendant intentionally or knowingly injured the CO was so overwhelming as to overcome the prejudice caused by the erroneous jury instruction. The testimony offered by the Commonwealth tended to show that defendant merely fell backwards onto the CO while he was being restrained by two other officers.

***State v. Ray*, 397 P.3d 817 (Utah Ct. App. 2017), *petition for writ of certiorari granted*, 406 P.3d 250 (Utah 2017).** In case where defendant was convicted of forcible sexual abuse, trial counsel was ineffective in failing to request a jury instruction explicating the legal meaning of a key phrase within the elements instruction for the crime. The phrase at issue came after specified sexual contact and was "otherwise takes indecent liberties with another . . .." Utah courts had recognized that the "phrase is so vague as to be unconstitutional when it is not accompanied with further instruction as to its precise legal definition, which is considerably narrower than what it might be taken to mean in common parlance." Trial counsel could not have had a reasonable strategic justification for not either

asking that the jury be provided with a definition of the phrase or asking that the phrase be eliminated from the instruction. Regarding prejudice, it was noted that the jury acquitted defendant as to a count of object rape and was unable to reach a verdict as to two forcible sodomy counts. That meant that the jury credited the victim's trial testimony that defendant never digitally penetrated her vagina, and also meant that one or more jurors did not believe the victim's testimony that defendant performed oral sex on her and she on him.

> Although the sexual abuse conviction could mean that the jury believed [the victim's] testimony that [defendant] put his hand down her pants, touching the outside of her vagina, and up her bra, touching her breast, it is just as likely, especially given [the victim's] credibility issues, that the jury rejected this testimony, too, but concluded that a twentyeight-year-old married man passionately kissing a fifteen-year-old while both were naked is "socially or morally reprehensible or... [otherwise] totally inappropriate" — conclusions with which one cannot reasonably argue — and thus constituted the taking of "indecent liberties."

The victim's credibility issues only increased the possibility that the jury convicted defendant based on moral condemnation and social disapprobation rather than the narrow terms of the law.

***In re Sharrow*, 175 A.3d 1236 (Vt. 2017).** In case where defendant was convicted of attempted second-degree murder, defendant was prejudiced by trial counsel's deficient performance in failing to object to jury instructions that did not require that the State prove the absence of passion or provocation in order to convict for attempted second-degree murder and did not include attempted voluntary manslaughter as a lesser offense. Defendant and the complainant in this case had been involved in a volatile relationship with allegations of abusive behavior by defendant leading to police involvement on a number of occasions. On the night at issue, complainant stated that defendant came to her apartment to visit. At some point he became angry and assaulted her. When neighbors heard her screams and came to her aid, complainant left with them to call the police and defendant left the premises. Later that night, defendant reentered the apartment through a window and threatened to kill complainant for calling the police earlier. He punched her and began to strangle her. He retrieved one or more knives from the kitchen and continued the assault. The neighbors again heard screams and called the police. Defendant was arrested at the apartment. Complainant had multiple knife wounds to her head, neck, arm, and back, most of which were superficial but at least one of which was potentially life threatening. Defendant told a starkly different version of events. He testified that complainant drank often and was frequently abusive while drunk. On prior occasions she had sprayed him with mace, and a couple of weeks before the incident at issue complainant hit defendant over the head with a cutting board. Defendant admitted entering through the window on the night in question but claimed he did not intend to kill complainant. According to defendant, he found complainant shaking, upset, and holding a knife with the blade up. Because of the earlier cutting board incident, and because he "didn't want to get stuck with the knife," he grabbed hold of complainant's wrist. The two struggled violently as he tried to get her to drop the knife. Defendant claimed that the knife remained in complainant's hand throughout the struggle, and that he did not realize she had been cut by the knife during the struggle. He eventually succeeded in getting complainant to drop the knife. As he was leaving, defendant grabbed a butterfly knife that was on the kitchen counter so complainant couldn't use it on him. He testified that he never touched her with

that knife. Police arrested defendant on the porch as he left complainant's apartment. He had the butterfly knife hidden in his sleeve and a small cut between the fingers of his right hand. The State argued that defendant had stabbed complainant in a premeditated and deliberate attempt to kill complainant. Trial counsel argued self-defense. The trial court instructed the jury on attempted first-degree murder, attempted second-degree murder, and aggravated assault, as well as self-defense. The trial court concluded that the evidence did not support instructions on attempted voluntary manslaughter and on the burden on the State to prove beyond a reasonable doubt that defendant had not acted out of passion or provocation in order to convict on attempted second-degree murder. Trial counsel did not object to the instructions. The post-conviction court found that there had been sufficient evidence to justify the omitted instructions and trial counsel's failure to object was deficient performance. That finding was not challenged on appeal. At issue was the lower court's finding of prejudice. The jury clearly disbelieved defendant's story of self-defense and concluded that he intentionally attempted to kill complainant by stabbing her. The omitted jury instructions would not have affected the jury's conclusion on these points. Nevertheless, three reasons supported the lower court's finding. "First, the error in this case removed from the jury's consideration an essential element of the second-degree murder charge. Second, the existence of that element was supported by substantial evidence. Third, the State's burden of proof on this element was high. The fact that, to acquit of attempted second-degree murder and convict [defendant] of voluntary manslaughter, the jury would have had to credit portions of [defendant's] testimony while rejecting most of it does not undermine our conclusion." "[J]uries routinely accept and reject portions of testimony in determining what actually happened. This is sufficient to undermine confidence in the outcome of the trial."

**2016:** ***Dumas v. State*, 786 S.E.2d 508 (Ga. Ct. App. 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.

***Mellerio v. Nooth*, 379 P.3d 560 (Or. Ct. App. 2016).** Trial counsel was ineffective as to two counts of coercion for failing to request a jury concurrence instruction. Defendant was charged with kidnapping, assaulting, menacing and coercing two woman. The coercion at issue here involved threats to each of the women to abstain from certain conduct - reporting defendant's conduct to a couple they met in the course of the offenses, and calling the authorities following the offenses. One count went to one victim, the second to the other victim. Because the counts implicated "multiple factual scenarios," jurors could return a verdict of guilt on either count without actually having agreed on the same predicate occurrence of coercion. Trial counsel's failure to request a jury concurrence instruction with respect to the two counts constituted a failure to exercise reasonable professional skill and judgment. (Trial counsel explained that such an instruction had not been requested because counsel did not believe, mistakenly as it turns out, that there had been multiple factual scenarios

present for the counts at issue.) Prejudice is found because, on the record presented, some jurors could have found persuasive the victim's testimony about coercion as to revealing defendant's conduct to the couple while disbelieving alleged coercion as to police nondisclosure. Other jurors could have found the obverse.

***Cusumano v. State*, 494 S.W.3d 652 (Mo. Ct. App. 2016).** In rape and sodomy case, defense counsel was ineffective in submitting lesser included offense instructions that waived the statute of limitations bar to defendant's ultimate convictions in this case, solely to support an untenable and largely unintelligible defense theory unsupported by Missouri law. Defendant was charged with three class A felonies. Defense counsel sought to have the charges dismissed on statute of limitations grounds despite the fact that Missouri law unambiguously provided that class A felonies were not subject to a statute of limitations. When that failed, defense counsel offered jury instructions on lesser included, unclassified felonies of forcible rape and sodomy. The instructions were given and the jury convicted defendant of the lesser included offenses. Defense counsel then renewed his prior motion to dismiss the class A felonies, arguing that the court had been retroactively deprived of its jurisdiction over prosecution of defendant on the class A felony charges because his convictions of the lesser included offenses were time-barred and, most critically, demonstrated that there was no evidence of the aggravating facts required to prove the class A felony versions of the crimes. Not only was this convoluted argument unsupported by the law, by submitting the instructions on the lesser included offenses, counsel waived defendant's statute of limitations objections to the time-barred offenses of which defendant was ultimately convicted. That defendant had not been convicted of the class A felonies did not establish that there was insufficient evidence to have charged him with those crimes. Thus the trial court had not lacked jurisdiction. Defense counsel's explanation for his strategy was premised on his mistaken belief that the class A felonies were subject to a statute of limitations and that his actions would somehow have preserved that non-existent affirmative defense. The motions court clearly erred in finding that defense counsel submitted the lesser included offenses instructions in order to give the jury an opportunity to render compromise verdicts which carried lesser sentences. Defense counsel had expressly stated that the lower sentence would not really matter and it was clear that his decision was based on his erroneous understanding of the law. As to prejudice, it was "a certainty that but for counsel's unreasonable submission of those instructions, the result in this case would have been different (i.e., [defendant] would not have been convicted of standard forcible rape and forcible sodomy)."

***Hoeber v. State*, 488 S.W.3d 648 (Mo. 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. Hoeber 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."

**Capital Case*

***Marty v. State*, 210 So.3d 121 (Fla. Ct. App. 2nd Dist. 2016).** In a case where defendant was convicted of aggravated assault with a deadly weapon, trial counsel "was ineffective for neglecting to request a jury instruction on the justifiable use of nondeadly force, the only self-defense instruction supportable by the undisputed facts presented at trial. Instead, [trial] counsel requested a self-defense instruction on the justifiable use of deadly force, which is applicable in a narrower set of circumstances as compared to nondeadly force." There was no apparent strategic reason to make the burden of proving self-defense more difficult, "especially because self-defense was essential to [defendant's] theory of defense at trial." The incident leading to the charge and conviction concerned an altercation between defendant and one of his neighbors. Although the accounts of what exactly occurred differed, there was no question that defendant did not fire his gun at the victim. And even if defendant had, as the victim contended, pointed his gun at her, this was, as a matter of law, the use of nondeadly force. Defense counsel's deficient performance was prejudicial because it was reasonably probable that the jury believed that defendant was entitled to use some form of self-defense against the neighbor, but not to the extent of deadly force.

***Gibson v. State*, 786 S.E.2d 121 (S.C. 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*, 308 S.E.2d 781 (S.C. 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.

***People v. Goods*, 62 N.E.3d 1168 (Ill. Ct. App. 2016).** In murder case, defense counsel was ineffective in failing to assert self-defense and ask for a corresponding instruction or an instruction on second degree murder. The prosecution's theory was that defendant and the co-defendant planned in advance to kill the victim. Through defendant's statements and the argument of defense counsel, there was some evidence of the elements of self-defense, i.e., defendant believed he was in imminent danger from both the victim and the co-defendant. Whether defendant's belief was reasonable was

a determination to be made by the jury. Supporting a finding of deficient performance was the fact that defense counsel initially sought to invoke compulsion as an affirmative defense, a defense unavailable for a murder charge under state law. It was only after that defense was precluded by the trial court that defense counsel switched to a theory that defendant shot the victim after he had been killed by the co-defendant. But this theory failed to relieve defendant of liability given that the jury was given an accountability instruction making defendant liable for the co-defendant's actions. In addition, an argument in defense counsel's unsuccessful motion for new trial indicated defense counsel erroneously believed he was not allowed the defense of self-defense. On this record, defense counsel performed deficiently in failing to invoke self-defense and failing to seek appropriate instructions. Prejudice is shown in part by the co-defendant's conviction in a separate trial of second degree murder.

***People v. Zambrano*, 64 N.E.3d 639 (Ill. Ct. App. 2016).** In murder case, defense counsel was ineffective in failing to submit an accomplice witness instruction. The victim was the boyfriend of co-defendant Sanchez's ex-girlfriend. The ex-girlfriend testified that someone buzzed her apartment late one night and the victim got up to answer the door. She heard the victim and Sanchez speaking before a gunshot. When she entered the living room, the victim was lifeless on the floor. Outdoor surveillance footage showed defendant, Sanchez, witness Lopez and a fourth person arriving in a car at the building next door to where the murder occurred. Sanchez was seen exiting the car and walking towards the building. Defendant also exited the car and removed something from under the hood. Then he, followed shortly by Lopez, walked toward the building. Not long after, Lopez ran back and reentered the car, followed by defendant who placed something under the hood before getting back in the car. Sanchez was seen running to the car seconds later. He entered it and the car departed from the scene. When Lopez was called by the prosecution at defendant's trial, his attorney informed the court that Lopez would invoke his Fifth Amendment rights. Lopez's attorney and defendant's attorney argued that Lopez had incriminated himself at Sanchez's earlier trial. The trial court rejected the prosecutor's argument that Lopez's mere presence at the crime scene was not enough to support criminal charges, leading the prosecutor to confer use immunity on Lopez. In his testimony, Lopez stated that defendant had a gun and that defendant and co-defendant Sanchez walked up to the third floor where the victim was shot while Lopez waited on a landing in the stairwell. Five minutes later he heard a bang. Defense counsel impeached Lopez with inconsistencies in the police statement and his attempt to portray defendant and Sanchez as the bad guys and himself as completely innocent. He was also examined on bias based on pending criminal charges and favorable dispositions he had received on other charges following his testimony in Sanchez's trial. Lopez maintained that he had no deal with the State. Defense counsel argued to the jury that the only evidence indicating defendant participated in the murder was Lopez's testimony which was not credible. But defense counsel failed to seek an instruction on accomplice witnesses. This was deficient performance as the "evidence at trial and the reasonable inferences that can be drawn from the evidence establish probable cause that Lopez acted as an accomplice." The videos showed Lopez exiting the car with defendant and Sanchez, with defendant retrieving something from under the hood of the car. Lopez admitted entering the apartment building with them. The video shows that he returned to the car at the same time as defendant and with the same sense of urgency. "At no time did Lopez separate himself from the criminal activity, and by his own admission, he participated in it. The grant of use immunity to

Lopez is further support of his role as an accomplice. There would be no need to immunize Lopez if he was not implicated in the shooting and involved in some fashion as an accomplice." There was no viable strategy for counsel's failure to submit the accomplice-witness instruction. "Counsel's failure to submit an instruction on accomplice testimony prejudiced [defendant] by depriving the jury of critical information it needed to evaluate Lopez's testimony."

***Fisher v. State*, 788 S.E.2d 757 (Ga. 2016).** In malice murder case, trial counsel was ineffective in failing to secure the attendance of a witness who could have countered the testimony of the only witness whose testimony directly identified defendant as the shooter, and in agreeing to a jury instruction that the testimony of a single witness is generally sufficient to establish a fact, without requesting an instruction on the exception that if the witness is an accomplice, his testimony must be properly corroborated. The sole witness identifying defendant as the shooter, Lewis, claimed that he was not involved in the crimes even though he admitted that he drove defendant and the victim to the crime scene, was present during the shooting, and drove defendant away afterwards. According to Lewis, who admitted using drugs with the victim, the shooting occurred over a dispute about drug sale proceeds. (Two other witnesses described men arguing about drugs and money.) Defendant denied being at the crime scene. Prior to trial, defense counsel spoke with Clark, an acquaintance of both defendant and Lewis, who informed defense counsel that Lewis was his drug dealer and that he saw Lewis flashing a revolver while looking for the victim to collect on a debt two or three days before the shooting. (The murder weapon was never recovered but it was determined to have been a revolver.) Although Clark provided defense counsel with his contact information, he never heard back from him. Defense counsel intended to have Clark testify, and he included him on the witness list, and yet he failed to secure his attendance at trial, an omission conceded by the State to be deficient performance. As for the failure to seek an instruction on the accomplice exception to the single witness rule, defense counsel conceded it was an oversight and not a tactical decision. Given Lewis's admission to his involvement with defendant in the events before, during and after the crime, and initial lies he'd told to the police, there was sufficient evidence to support a finding that Lewis was an accomplice and not merely present for the crimes as he claimed on the witness stand. On this record, in light of the importance of Lewis's testimony, it would have been unreasonable not to have requested the accomplice instruction. Regarding prejudice, there was no forensic evidence linking defendant to the victim, the crime scene, or the murder weapon. Neither of the two women who heard men seeking drugs and/or money testified that defendant was there during the shooting. Although one offered a description of the shooter that matched defendant, it was general -- about 5′10″, medium complexion, with a low haircut and a New Orleans accent – which would match innumerable other men in Atlanta as well, except perhaps for the accent. Notably, however, Lewis admitted on cross-examination that although he is from Atlanta, he was known in the community as "N.O.," or New Orleans, because of his voice. "[H]ad Clark testified, the jury could have chosen not to believe what he said about Lewis. But that is exactly the point. Due to the deficient performance of [defendant's] trial counsel, the jurors who found him guilty did not have the opportunity to hear Clark testify or to consider the evidence they did hear with the instruction that if they found Lewis to be an accomplice to the shooting, they must treat him unlike the other witnesses and decide whether his identification of [defendant] was corroborated by other evidence. A jury that heard Clark and was properly instructed might reach the same verdict, but we cannot say that with confidence."

**Capital Case*

***People v. Davydov*, 144 A.D.3d 1170 (N.Y. App. Div. 2016).** In case where defendant was convicted of aggravated assault in the second degree, the conviction is vacated based on trial counsel's ineffectiveness in failing to seek severance from a co-defendant, defendant's uncle, once it became clear they were pursuing antagonistic defenses and also for failing to request a missing witness charge for an eyewitness who was not called to testify. The theory set forth by the uncle's attorney was that defendant had called his uncle to the crime scene to mediate a dispute between defendant and the victim. The uncle's attorney theorized that the dispute involved defendant's desire to have the victim participate in a fraudulent scheme. According to the uncle's attorney, when the uncle arrived at the scene he observed defendant in an altercation and intervened. The defendant's theory, in contrast, was essentially that the victim was incredible in his account of events, that defendant was actually a friend of the victim and was merely at the scene, and that defendant did not act in concert with the co-defendants in assaulting the victim. Given that the two defenses were irreconcilably in conflict, defense counsel performed deficiently in failing to request a severance. Defense counsel also performed deficiently in failing to request a missing witness charge instructing the jury that an unfavorable inference could be drawn from the failure of the prosecution to call a friend and business associate of the victim as a witness. This friend was nearby when the assault occurred and had previously stated that the victim threw the first punch during the initial confrontation. No legitimate strategic reason could be found to support defense counsel's failure to request the charge.

**2015:** ***State v. Revish*, 185 So.3d 8 (La. Ct. App. 2015)**. Counsel ineffective in second degree murder case for failing to object to the trial court's instruction that self- defense was not available as a defense if the jury determined that the homicide occurred as a result of drug activity. The defendant, who had drugs for sale, was riding around with two other men doing some drug dealing. He shot both when the car was stopped because he believed that he was about to killed. State law at the time provided that a homicide is justifiable when committed in self- defense by one who reasonably believes that he is in imminent danger of losing his life or receiving great bodily harm and that the killing is necessary to save himself from that danger. La. R.S. 14:20(A)(1). In an unrelated portion of the self-defense statute, a homicide is justifiable in a motor vehicle when the person reasonably believes that the use of deadly force is necessary to prevent entry of an intruder or to compel the intruder to leave, except when the person committing the homicide is engaged, at the time of the homicide, in drug activity. La. R.S. 14:20(A)(4). The trial court erred in its instruction because the plain language of the statute made the drug activity exception applicable only to paragraph 4 of the statute and not paragraph 1, which was the provision applicable to the defendant. Counsel's conduct was deficient in failing to object to the instruction. Prejudice established because, "[e]ven if the jury had fully believed defendant's version of the facts, . . . the erroneous jury instruction would have categorically denied defendant from availing himself of a claim of self-defense."

***State v. Liti*, 355 P.3d 1078 (Utah Ct. App. 2015)**. Counsel ineffective in manslaughter case for failing to object to the trial court's inadequate instruction on the elements of manslaughter. Under state law, "[a] defendant, who 'recklessly causes the death of another' is guilty of manslaughter." Recklessness requires both that the defendant is "aware of but consciously disregards a substantial and unjustifiable risk" and that "[t]he risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all

the circumstances." The trial court failed to include the "gross deviation" instruction. Counsel's conduct in failing to object was deficient and prejudicial.

***Workman v. State*, 771 S.E.2d 636 (S.C. 2015)**. Counsel in assault and battery case was ineffective in failing to object to unconstitutionally coercive *Allen* charge, which instructed the minority to reconsider their opinions without instructing the majority jurors to consider the positions of the minority jurors. Counsel's conduct was deficient and prejudicial.

***State v. Barela*, 349 P.3d 676 (Utah 2015)**. Counsel ineffective in rape case for failing to object to an erroneous mens rea requirement in the court's instructions on the elements of the offense. In essence, the court's instruction implied that the defendant was guilty if the state established that he "intentionally or knowingly" had intercourse with the alleged victim, when, in fact, the state also had to prove that the defendant "intentionally or knowingly" had such intercourse "without . . . consent." Prejudice was established in this case because even in the alleged victim's account, "she never explicitly (in words) or openly (in physical resistance) rebuffed [the defendant's] advances. Instead [she] testified that she 'froze' – neither actively participating in sex nor speaking any words."

**2014:** ***People v. Hussain*, 179 Cal. Rptr. 3d 679 (Cal. Ct. App. 2014)**. Counsel ineffective in grand theft of automobile arising from an improper lien sale for failing to request a jury instruction on a claim of right defense. The Defendant, who was born in the Fiji Islands, moved to the United States in 2000. He owned a car report shop in 2006. Under state law, a lien sale is permitted based on a possessory lien for services and permits a licensed repair facility to sell a car to recoup repair costs and other expenses. The defendant, who only went to school through the sixth grade and learned to speak English but could not read or write English, consulted with the former office manager for a towing company, who advised him about how to do a possessory lien. She completed the paperwork for him, including the required notices, one of which was returned by the post office because she accidentally transposed numbers in an address and zip code. Without consulting with her further, the defendant submitted the paperwork to the DMV where the clerk did not notice the error and instead transferred title to the defendant, who sold the vehicle in question. "A claim-of-right defense provides that a defendant's good faith belief, even if mistakenly held, that he has a right or claim to property he takes from another negates the felonious intent necessary for conviction of theft or robbery." Counsel relied on claim of right in his closing arguments but failed to request an instruction on that defense. Counsel's conduct was deficient and could not be based on strategy. Prejudice was also established because the jury clearly did not reject the defendant's testimony in its entirety. Specifically, in addition to the grand theft charge, the defendant was charged with running a chop shop, theft by false pretenses, and perjury. The jury acquitted him of these other charges based on his testimony.

***Morgan v. State*, 146 So. 3d 508 (Fla. Dist. Ct. App. 2014)**. Counsel was ineffective in sexual battery of child case for failing to object to erroneous verdict form and instructions. The defendant had been convicted of battering his daughter, who was under the age of 12. There were three counts covering different time periods, which all alleged battery by penetration. Although contact of the defendant's mouth with the victim's vagina also violates the statute, this was not included in the Information. The trial court's instructions, however, specifically allowed conviction for contact of the defendant's mouth with the victim's vagina and the verdict form specifically asked for findings on

whether there was penetration or whether there was contact of the defendant's mouth with the victim's vagina. The jury did not find penetration and convicted on each count solely on the basis of contact of the defendant's mouth with the victim's vagina. Counsel's conduct was deficient because counsel did not object to the verdict form or the instructions and affirmatively agreed with both. Prejudice established because the defendant was "convicted of uncharged offenses."

***People v. Falco*, 17 N.E.3d 671 (Ill. App. Ct. 2014)**. Counsel in possession of firearm with defaced identification marks case ineffective for failing to request a jury instruction on mental state. Specifically, counsel failed to request an instruction that possession of the weapon had to be knowing and intentional where the defendant denied knowledge that the weapon was in the trunk of his car, which was stopped with another person driving. The defendant, whose driver's license was suspended, was a passenger. The defendant testified that the driver had asked to borrow his car. The defendant agreed but informed the driver the car was having steering issues. The driver told the defendant his cousin could fix the car. They were returning from a visit to the cousin's house when they were stopped and the weapon was found. Counsel's conduct was deficient and prejudicial because knowledge "was clearly an issue critical" to the defense.

***State v. Chafee*, 332 P.3d 240 (Mont. 2014)**. Counsel ineffective in accountability for arson and theft case for failing to request a "mere presence" instruction. The victims found their car burning and observed a vehicle drive away. An hour later, the vehicle, driven by the defendant, was stopped. She testified that the passenger in her vehicle told her to pull over near the victims' vehicle. He then busted a window in the vehicle and stole items from it before setting the vehicle on fire and telling her to drive away. Defense counsel also argued in closing that she was "merely present" and did not participate in the crimes. Counsel was deficient, however, in failing to request an instruction on "mere presence," which would have informed the jury that "mere presence" and knowledge of the crime, without participation, were insufficient for conviction. "The prosecutor was able to capitalize on this omission" in closing arguments by arguing that mere presence was sufficient for conviction. "Under these circumstances, there was no plausible justification for the failure of defense counsel to offer the 'mere presence' jury instruction." Prejudice established.

***People v. Collins*, 990 N.Y.S.2d 565 (N.Y. App. Div. 2014)**. Under New York standard for ineffective assistance, counsel was ineffective in robbery in the first degree, grand larceny, and possession of stolen property case where the defendant only pretended to have a gun during the robbery for failing to request an instruction on the affirmative defense that the object that appeared to be a firearm was not a loaded weapon from which a shot, capable of producing death or other serious physical injury, could be discharged. While normally the remedy would be a new trial, Collins sought only that his robbery conviction be reduced to second degree. The People conceded that counsel's conduct was deficient and that this remedy was appropriate.

***State v. Lewis*, 337 P.3d 1053 (Utah 2014)**. Counsel ineffective in sexual abuse of child case for failing to object to flawed jury instructions. The defendant was charged with two counts based on alleged abuse of two sisters, ages 13 and 11, during the same night. The 13-year-old testified that the defendant touched her breast and vagina over her clothing. The 11-year-old testified that she awoke to find the defendant trying to remove her pants. The defendant completely denied the

allegations of the 11-year-old and denied the allegations of the 13-year-old, but admitted that he told her she was pretty, prompted her to lift her shirt, and poked her stomach teasingly with his finger. The defendant was acquitted of the charge related to the 11-year-old but convicted on the charge related to the 13-year-old. The applicable statute allowed for conviction if the defendant "touches the anus, buttocks, or genitalia of any child, the breast of a female child, or otherwise takes indecent liberties with a child." While counsel objected to other inapplicable or vague parts of the proposed instructions, counsel failed to object to "indecent liberties" language or failing to object that "indecent liberties" be defined. Counsel's conduct was deficient as the "indecent liberties" provision was not alleged in this case. Moreover, "indecent liberties" had been interpreted by the Utah Supreme Court to mean activities of the "same magnitude or gravity as that specifically described in the statute." Here, without this definition, the jurors could reasonably assume that the "catch-all [indecent liberties] phrase covered actions that are less serious than the specifically prohibited conduct – including actions that are merely socially or morally reprehensible or that strike us, subjectively, as being indecent in the sense of being totally inappropriate." Here, while the defendant's actions, admitted in his own testimony, might be "indecent" in this lay person's view, they were not "indecent" under the appropriate interpretation of the statute. Counsel's conduct was deficient and prejudicial because the jurors could have completely disregarded the testimony of the 13-year-old while finding the defendant's testimony to be credible and yet convicted him erroneously of taking an "indecent liberty."

**2013:** ***Holloway v. Commissioner of Correction*, 77 A.3d 777 (Conn. Ct. App. 2013)**. Counsel was ineffective in possession of narcotics with intent to sell within 1500 feet of a public housing project case for failing to object to the trial court's failure to adequately instruct the jury that it could not find the defendant guilty under state law unless the state proved beyond a reasonable doubt, as an essential element of that offense, that he possessed narcotics with the intent to sell them at a specific location, which location happened to be within 1500 feet of a public housing project. In this case, however, the sole focus of the trial judge's charge to the jury with respect to the location where the prohibited activity must have occurred was on the element of possession. The court omitted all reference to or explanation of the intended-location-of-sale element of the offense. Counsel's conduct was deficient and prejudicial because the evidence was by no means clear and uncontested, much less overwhelming, that the defendant was engaged or about to engage in a drug sale at the time of his arrest within 1500 feet of a public housing project. He was not caught in the act of selling drugs and was not found in possession of other implements of the drug sales trade. Indeed, it was suggested by police officers who testified that, if a drug transaction was in progress at the time of arrest, it was more likely one where the defendant was the buyer rather than the seller.

***Washington v. State*, 113 So. 3d 1028 (Fla. Dist. Ct. App. 2013)**. Counsel ineffective in murder case (reduced to manslaughter by jury's verdict) for failing to request an addition to the justifiable homicide instruction of include aggravated assault and aggravated battery as felonies that the defendant would have been justified to resist. The defendant shot the victim five times in front of a crowd of patrons at a restaurant. His sole defense was that he was acting in self- defense. The jury was instructed only that the defendant could act in self-defense in response to death or grievous bodily harm. The failure to request the additional instruction, consistent with state law, was deficient and

prejudicial "because it is far more likely that the victim was attempting to scare or shoot at [the defendant] rather than to rob or kill him in front of a crowd."

***Byrd v. State*, 752 S.E.2d 84 (Ga. Ct. App. 2013)**. Trial counsel ineffective in armed robbery case for failing to object to instruction that a firearm is a deadly weapon as a matter of law, which removed from the jury's province an element of the offense, i.e., that the defendant used a deadly weapon.

***People v. Kidd*, 997 N.E.2d 634 (Ill. App. Ct. 2013)**. Counsel was ineffective for failing to proffer the entire pattern jury instruction regarding delivery in drug-induced homicide case where the defendant's girlfriend died after inhaling cocaine with the defendant. The Defendant told police that he and the victim had used cocaine the day before her death. When he awoke the next morning, he found her dead. While she had frequently used cocaine in the past, over the last year, she normally did not use cocaine but she asked him to get her some because she was upset that her cat died. The autopsy revealed that she had also consumed Xanax and morphine and she died from hypoxia (deficiency of oxygen reaching body tissues) caused by "cocaine and opiate intoxication." A defense expert on pharmacy and pharmacology testified that the cocaine did not contribute to the cause of death, but that the level of morphine in her blood was a "highly toxic level" that was "lethal." "The effect of the [therapeutic level of the] Xanax enhance[d] the toxicity of the morphine." She had consumed the morphine sometime after the defendant had gone to bed. The State never alleged that the defendant delivered either Xanax or morphine to the victim. During trial, there was a jury question, however, of who actually "possessed" the cocaine and whether the defendant had made a "delivery" of cocaine to the victim or whether the defendant and the victim bought the cocaine together. If so, there was no delivery. Counsel's conduct was deficient and prejudicial in failing to request complete and proper instructions on delivery.

***Roberson v. State*, 982 N.E.2d 452 (Ind. Ct. App. 2013)**. Counsel ineffective in murder case for failing to object to erroneous jury instructions on sudden heat and voluntary manslaughter. Under state law, in order to establish voluntary manslaughter, the state was required to prove all the elements of murder and disprove sudden heat when there is any appreciable evidence of such. Thus, the trial court's instruction on manslaughter placing the burden on the state to prove sudden heat was "erroneous as a matter of law." Likewise, the murder instruction failing to require the state to disprove sudden heat suffered a fatal flaw. Finally, the trial court erroneously instructed the jury that it could only consider manslaughter instead of murder if it first found the defendant not guilty of murder because the jury was required to simultaneously determine whether the defendant was guilty of murder or voluntary manslaughter. Prejudice established as the evidence of sudden heat in the case "was not inconsiderable."

***McTiller v. State*, 113 So. 3d 1284 (Miss. Ct. App. 2013)**. Counsel was ineffective in aggravated assault case for failing to object to jury instruction or offer additional instruction on accident. The trial court's instruction on accident lacked all the elements required by state law in that the instruction did not mention "accident, misfortune, the heat of passion, or any sudden and sufficient provocation."

***State v. Barnes*, 994 N.E.2d 925 (Ohio Ct. App. 2013)**. Counsel ineffective in resisting arrest and vandalism case for failing to request an instruction on necessity, which was presented as a defense to vandalism. On a warm, sunny evening in September 2011 at approximately 6:30 p.m., a police officer in Portage County responded to a domestic disturbance call was attempting to question the alleged victim. The defendant, "appearing both agitated and inebriated," kept interrupting and would not calm down. The officer attempted to handcuff him but he resisted. When he was forced to the ground, his "face was planted in dog excrement" and he continued resisting until the offer pepper sprayed the side of his face. The defendant "was placed into the cruiser with the excrement and pepper spray still on his face." After driving to the police station and parking in the garage, with the garage door closed, the car windows up except for a slight crack, and the car engine off, the officer left the defendant in the car while he went inside to write his report. The initial officers apparently went off duty at 7:00 p.m. and a new officer took over. The new officer observed the defendant in the car in the garage yelling, but left to take a nearby call. After about 45 minutes of sitting in the hot car, handcuffed and with pepper stray and dog excrement still on his face, the defendant broke out the cruiser window with his foot because he was hyperventilating and afraid he would asphyxiate. While trial counsel presented this evidence "arguing that [the defendant] had no choice but to kick out the window in order to breathe," counsel did not actually assert the defense of necessity or request the appropriate jury instruction. Clearly, there was no strategy for this failure as counsel "attempted to raise the defense." Counsel's conduct was deficient and prejudicial. "Without the instruction on the defense of necessity, there is nothing in the jury instructions as given that could have permitted the jury to find [the defendant] not guilty" on the vandalism charge/ Vandalism charge reversed and remanded for new trial.

***Villa v. State*, ___ S.W.3d ___, 2013 WL 5926211 (Tex. Crim. App. Nov. 6, 2013)**. Trial counsel was ineffective in indecency with a child and aggravated sexual assault case for failing to request a jury instruction on the medical-care defense to the aggravated sexual assault, even though the issue was raised and discussed throughout the trial. The defendant was alleged to have penetrated the vagina with his finger. Penetration was defined as contact that "could reasonably be regarded by ordinary English speakers as more intrusive than contact with [the victim's] outer vaginal lips." Additionally, penetration could include the "pushing aside and reaching beneath a natural fold of skin into an area of the body not usually exposed to view, even in nakedness." Here, the real dispute at trial was the "degree of penetration committed" by the defendant, who admitted to touching the child–with others present in the room–"for the sole purpose of applying diaper-rash medication" but confessed that his finger may have penetrated the vagina. Counsel's conduct was deficient and there was "no imaginable strategic motivation for trial counsel's failure to request a medical-care defensive instruction." Prejudice was clear as the jury acquitted on the indecency charge indicating that the jury found no intent by defendant to arouse or gratify his sexual desires.

***State v, Ekstrom*, 316 P.3d 435 (Utah Ct. App. 2013)**. Trial counsel was ineffective in aggravated assault case for failing to object to the trial court's failure to instruct on the statutory definition of "serious bodily injury," which is "the type of injury a dangerous weapon must be capable of inflicting," when the state's case was based on the theory that the defendant had used a dangerous

weapon or force likely to produce serious bodily injury. While a witness testified that the defendant struck the victim, the witness was uncertain about the object used but believed it was a pipe and no pipe or other weapon was ever found and there was no evidence that even if it was a pipe that it was made of metal.

**2012:** ***Brooks v. State*, 40 A.3d 346 (Del. Supr. Ct. 2012)**. Counsel in conspiracy on drug and weapon case and other charges was ineffective in failing to request an instruction on accomplice testimony. While there was independent corroborating evidence on the other charges, the conspiracy conviction "included an element entirely reliant upon accomplice testimony." There could be no reasonable strategy for this, as "the defense gains nothing by failing to request a cautionary instruction, aside perhaps from a later chance at a claim for ineffective assistance of counsel."

***Capiro v. State*, 97 So. 3d 298 (Fla. Dist. Ct. App. 2012)**. Counsel ineffective in grand theft case for failing to request an instruction of the good faith defense. The case involved a loan from the victims to the defendant who was starting a commercial mortgage lending company. The defendant used the loan to pay personal expenses. The defendant testified at trial that he believed the loan was a personal loan to him without any restriction on use. Under state law, "a good faith belief in one's right to possession of property is a defense to the charge of theft." Counsel referred to this defense in his opening and closing arguments but was ineffective in failing to request a jury instruction on the defense.

***In re Wilson*, 279 P.3d 990 (Wash. Ct. App. 2012)**. Counsel ineffective in felony murder case for requesting a defective pattern instruction on accomplice liability. The instruction requested was that "[a] person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of a crime," he does certain acts. The reference to "a crime" rather than "the crime" is erroneous because in order to be an accomplice, "a person must have knowledge that he or she was promoting or facilitating the crime charged." Counsel's conduct was deficient despite this being a pattern instruction. Prejudice established, especially in light of the prosecutor's misstatement of law in closing that the defendant was guilty of the crimes committed by the principal because he had in mind "a crime," even if it was not the same crime the principal had in mind.

***People v. Gallagher*, 980 N.E.2d 140 (Ill. App. Ct. 2012)**. Counsel ineffective in residential burglary case for failing to request a jury instruction on the lesser included offense of criminal trespass to a residence. The defendant walked into the victim's hotel room in the middle of the night. While the defendant claimed he thought the room was empty and he was looking for a bathroom, the alleged victim claimed that the defendant stole $40. The victim did not claim that money was stolen at the time of the arrest and this information was not included in the police reports. Counsel's conduct was deficient and prejudicial as the defendant admitted entry into the room, but the jury initially deadlocked on the burglary charge.

**2011:** ***State v. Soboroff*, 798 N.W.2d 1 (Iowa 2011)**. Counsel ineffective in threat to contaminate a water supply case for failing to request instructions that defined "true threat." The defendant was convicted based on internet postings of a slide show referring to putting 500 pounds of Thorazine in

the city water tower with pictures of the tower. Conviction required a showing of "true threat," i.e., a threat that a reasonable person of ordinary intelligence would have understood as such. While there was some evidence that the threats were real, there was also evidence from which the jury could have concluded the statements were not real threats. For example, the state's own expert testified it would be nearly impossible to obtain 500 pounds of Thorazine, the defendant did not disseminate the threats other than on his own website, and, although double-edged, the defendant was known generally as an unstable person. If the jury had been adequately advised on the "reasonable person" standard, there is a reasonable probability the outcome of the trial would have been different.

***Blunt v. State*, 55 So.3d 207 (Miss. Ct. App. 2011)**. Counsel ineffective in murder case for requesting an erroneous self-defense instruction that had been condemned by the Mississippi Supreme Court ten years prior to trial. Prejudice established as the misstatement of law on the instruction essentially left the defendant with no instruction on his theory of defense.

***Bailey v. State*, 709 S.E.2d 671 (S.C. 2011)**. Counsel ineffective in homicide by child abuse case for failing to object to supplemental jury instructions that allowed the jury to convict the defendant based on an act that was not alleged in the indictment. The indictment alleged "infliction of physical injuries" by the defendant. During deliberations, the jury sent out notes asking whether the defendant had to have "caused" the death as a result of "neglect and abuse." During the discussion with court, the foreperson informed the court that the jury could see "neglect" but no evidence that the defendant had struck the child. The judge gave supplemental instructions allowing the jury to convict for "abuse or neglect" that was a proximate cause of the harm. Nine minutes later the jury returned a guilty verdict. "[T]he trial judge's instructions improperly 'enlarged' the indictment. The indictment alleged a specific "act" by the defendant, while the charge allowed conviction for an "omission" or neglect. This was a material variance or a constructive amendment to the indictment.

***State v. Thomas*, 796 N.W.2d 706 (S.D. 2011)**. Counsel ineffective in reckless burning case for failing to request appropriate instructions on accomplice testimony. At trial, the only direct evidence of guilt was from two accomplices who had made prior inconsistent statements and had entered into plea agreements requiring their testimony. At the very least, counsel was ineffective in failing to request an instruction allowed under state law that accomplice testimony should be examined "with great care and caution." Likewise, counsel was ineffective in failing to request instructions that state law required corroboration of accomplice testimony and one accomplice could corroborate the other and that the remaining circumstantial evidence merely showing the circumstances and commission of the offense was not sufficient corroboration. Prejudice established.

***State v. Sellers*, 248 P.3d 70 (Utah Ct. App. 2011)**. Counsel ineffective in child sexual abuse case for failing to object to erroneous voluntary intoxication instructions. The crime charged required two intent elements for conviction: a general intent to touch and a specific intent to cause pain or to arouse or gratify sexual desires. Voluntary intoxication was raised as an affirmative defense to the specific intent element. While the court gave a voluntary intoxication instruction, the instructions failed to inform the jury that the State had the burden of disproving the defense beyond a reasonable

doubt. Counsel's conduct was deficient and there could not be any reasonable trial strategy for the deficiency. Prejudice found.

**2010:** ***Smith v. State*, 991 A.2d 1169 (Del. 2010)**. Counsel ineffective in murder case for failing to request a specific instruction on the credibility of accomplice testimony. The state's case rested almost entirely on the testimony of an accomplice, who had actually fired the bullet that killed the victim, and another eyewitness and their testimony was conflicting, internally inconsistent, and arguably inconsistent with prior statements. Under state law, the defendant was entitled, upon request, to a specific accomplice testimony instruction. Counsel's conduct was deficient in failing to request the instruction. Prejudice established even though a general credibility of witnesses instruction was given.

***Sloss v. State*, 45 So. 3d 66 (Fla. Dist. Ct. App. 2010)**. Trial counsel ineffective in aggravated battery case for failing to object to the inclusion of a forcible felony jury instruction, which informed the jury that the use of force likely to cause death or great bodily harm is not justifiable if the defendant was committing an aggravated battery. This instruction is appropriate only if the defendant "is charged with an independent forcible felony in addition to the offense for which he claims self-defense. When an instruction is read in the absence of a charge of an independent forcible felony, it essentially negates the defendant's theory of self-defense." Prejudice found as the evidence of guilt was "hardly overwhelming" and essentially amounted to a "swearing contest" between the defendant on one side and the alleged victim and his nephew on the other side.

***People v. Wheeler*, 929 N.E.2d 99 (Ill. App. Ct. 2010)**. Counsel ineffective in murder trial for failing to request an accomplice-witness instruction. The state's key witness was a friend of the victim, a convicted felon, and an admitted accomplice testifying in exchange for a deal. No physical evidence linked the defendant to the crimes. Prejudice established, because the only other witness connecting the defendant to the crimes with a jailhouse snitch, who had been promised help with parole in exchange for his testimony.

***Taylor v. State*, 922 N.E.2d 710 (Ind. Ct. App. 2010)**. Counsel ineffective in felony-murder case for failing to object to the trial court's instructions that did not include the elements of the underlying felony (robbery). While the lower court had found the error harmless based on the trial evidence, "[h]armless-error analysis has no place where, as here, an essential instruction on the underlying offense is missing entirely."

***Hatcher v. Commonwealth*, 310 S.W.3d 691 (Ky. Ct. App. 2010)**. Counsel ineffective in murder case for failing to object to the trial court's failure to provide a separate self-protection instruction, failure to define self-protection, failure to provide an imperfect self-defense instruction, failure to define extreme emotional disturbance, and failure to instruct on the lesser-included offense of second degree manslaughter. The court noted, "[i]n all fairness to defense counsel," that counsel "had already been in court for nearly 13 hours by the time the court asked him to state his objections to the instructions."

**Capital Case*

***State v. Johnston*, 237 P.3d 70 (Mont. 2010)**. Counsel was ineffective in obstructing a peace officer case for failing to object to charge that eliminated the crucial "knowing" element. Officers were responding to reports of gunshots during winter weather conditions. After stopping their vehicle, due to bad road conditions, they observed the defendant walking towards them. He informed them his car was stuck in the snow and other individuals and cars were further up the "snowy mountain road" having problems. The officers spent 30-40 minutes "attempting to assess the matter," before taking the defendant and the two others in his car to the police station. Based on the defendant's a search and rescue team was sent out looking for another man, who was not located. Due to the defendant's "various statements to police," he was charged with misdemeanor obstructing a peace officer. The offense requires that the person "knowingly obstructs, impairs, or hinders . . . the performance of a governmental function." Under state law, the court must also instruct on the meaning of "knowingly," which, depending on context, is awareness "of the person's own conduct" or awareness "that it is highly probable that the result will be caused by the person's conduct." Here, the court instructed only on awareness of his "own conduct" and the state argued repeatedly that the defendant was guilty because he was aware of his own conduct, as he admitted in his testimony that he made false statements to the officers. Counsel's conduct was deficient as "knowing" in this context required awareness that "it is highly probable that his conduct will obstruct, impair or hinder the officers' performance of their governmental function." To hold otherwise would only an obstruction conviction by "merely proving that a person gave a dishonest answer in response to an officer's question," and "the statute clearly requires more." There was no plausible justification for failing to object to the court's inadequate instructions. Counsel "had nothing to lose" and "failed to use the law to strike at the heart of the State's case." *Id*. at ___ (quoting *State v. Kougl*, 97 P.3d 1095, ___ (Mont. 2004)).

**2009:** ***Spicer v. State*, 22 So. 3d 706 (Fla. Dist. Ct. App. 2009)**. Counsel ineffective in aggravated battery case for imposing the burden of proving self-defense on the defendant through argument and requested instructions. Under state law, once a defendant has made a prima facie showing of self-defense, the burden is on the state to prove that the defendant did not act in self-defense. Counsel "was obviously unaware of the law on this point" and repeatedly argued in closing that the defendant had the burden of proof. Counsel also requested an outdated jury instruction, which had been replaced by an amended instruction nine months prior to trial, on this same point. "[C]ounsel's burden-shifting error caused a breakdown in the adversary process."

***State v. Smith*, 223 P.3d 1262 (Wash. Ct. App. 2009)**. Counsel ineffective in first-degree animal cruelty case for failing to request a jury instruction on lesser-included offense. Where there was evidence that the llama may have died from a parasite rather than starvation, the evidence supported a rational inference that the defendant committed only a second degree offense by failing to seek appropriate medical attention for the animal. Counsel's "all or nothing strategy was not a legitimate trial tactic."

***State v. Kyllo*, 215 P.3d 177 (Wash. 2009)**. Counsel ineffective in assault case for proposing an erroneous "act on appearances" self-defense instruction that lowered the state's burden of proof. While the law required only that the defendant reasonably apprehend that he is about to be injured,

the jury was instructed that he must reasonably apprehend that he was in actual danger of great bodily harm. "Failing to research or apply relevant law was deficient performance." Prejudice also established as the instruction and counsel's argument in closing misstated the law.

***State v. Powell*, 206 P.3d 703 (Wash. Ct. App. 2009)**. Counsel ineffective in second degree rape case, based on sexual intercourse with another person who was incapable of consent by reason of being physically helpless or mentally incapacitated, for failing to request instruction on the statutory affirmative defense of "reasonable belief" that the person had capacity to consent. Counsel's conduct was deficient and not based on a reasonable trial tactic because even the alleged victim's version of events was that she had blacked out from drug and alcohol use, woke up with the defendant (who she did not know previously), having sex with her, and then willingly participated in it because she was afraid. There was no indication that she told the defendant she was afraid or not a willing participant. In addition, independent state witnesses, who mostly agreed she appeared intoxicated, did not believe she appeared too drunk or otherwise incapacitated to make decisions. Prejudice established because, without the instruction, the jury had no way of acquitting the defendant even if it accepted his testimony and the defense argument that he reasonably believed the alleged victim was not mentally incapacitated or physically helpless. In short, "[t]he absence of this instruction essentially nullified [the] defense." *Id*. at 711.

**2008:** ***Michel v. State*, 989 So. 2d 679 (Fla. Dist. Ct. App. 2008)**. Counsel ineffective in simple battery case for failing to request an instruction on justifiable use of non-deadly force, which negated the defendant's self-defense argument.

***Stoute v. State*, 987 So. 2d 748 (Fla. Dist. Ct. App. 2008)**. Counsel ineffective in attempted murder case for failing to object to forcible felony instruction, which was not applicable and deprived him of his theory of self- defense. This instruction is only appropriate when the accused is charged with at least two criminal acts, the act for which the accused is claiming self- defense and a separate forcible felony. Here, the defendant was charged with one crime, the shooting, and no other forcible felony. The state supreme court reached this conclusion in an opinion issued after this trial, but "[i]t does not follow . . . [that] it constituted a change in the law." The decision was based on a statute and the court had not previously construed the statute in a contrary manner. Thus, counsel's conduct was deficient and prejudicial.

***People v. Gonzalez*, 895 N.E.2d 982 (Ill. App. Ct. 2008)**. Counsel ineffective in sexual abuse case for failing to object when the jury was not adequately instructed on the state's burden to disprove the affirmative defense, a reasonable belief that the victim was 17 years of age or older. The relationship began when the victim was 14 and the defendant 23, but there was conflicting evidence on whether she ever told the defendant her age. The charges arose when the 16-year-old victim became pregnant with the defendant's child. The trial court held that the evidence was sufficient to support the affirmative defense and agreed to give the necessary instruction. In the instructions, however, the court did not define "reasonable belief" and did not instruct on the State's burden to disprove the affirmative defense. Counsel's conduct was deficient. "Where defense counsel argues a theory of the

case, such as an affirmative defense, but then fails to ensure that the jury is properly instructed on that theory, that failure cannot be called trial strategy." Prejudice found.

***Tisdale v. State*, 662 S.E.2d 410 (S.C. 2008)**. Counsel ineffective in murder case for failing to request charges on involuntary manslaughter and accident. Counsel's conduct was deficient because the defendant's testimony supported the involuntary manslaughter charge by providing evidence of a struggle over a weapon and supported an accident charge because of an accidental discharge of a gun with the defendant lawfully armed for self-defense.

***Lowry v. State*, 657 S.E.2d 760 (S.C. 2008)**. Counsel ineffective in murder case for failing to object to a burden-shifting instruction on malice. The court initially gave proper instructions but because of the state's concern that the court had failed to instruct on felony murder, the court gave a supplemental instruction. While the initial charge contained permissive language allowing the inference of malice from participation in a felony, the supplemental charge created a presumption of malice from participation in a felony and shifted the burden of proof to the defendant. This charge was improper, was not alleviated by the early proper charge, and was especially problematic as "the last thing the jurors heard before beginning deliberations." Counsel's conduct was deficient in failing to object. Prejudice also established because the error was not "harmless" beyond a reasonable doubt. There was "little direct probative evidence of malice" in the defendant's statements and other evidence was questionable or minimal, such that "the only undisputed relevant facts . . . are that Petitioner was near the scene of the crime at the time it occurred, but was neither the gunman, nor in the getaway car."

**2007:** ***Nickens v. State*, 981 So. 2d 1165 (Ala. Crim. App. 2007)**. Counsel ineffective in theft of property case for failing to request an instruction defining the term "deprive" and failing to object when the trial court failed to give this instruction when the defense theory was that the defendant used the vehicle to escape from police but did not intend to permanently deprive the owner of the property, did not damage it, and merely abandoned it not far from the scene of the theft.

***Berdecia v. State*, 971 So. 2d 846 (Fla. Dist. Ct. App. 2007)**. Counsel ineffective in manslaughter and battery case for requesting an erroneous charge on manslaughter. The defendant was on trial with a codefendant. They had fought with two other men and the co-defendant shot and killed one of them. Both were charged with second degree murder. The co-defendant was convicted, but the defendant was convicted of the lesser included offense of manslaughter. Counsel's conduct was deficient because counsel requested a charge that repeatedly informed the jury that the defendant could be convicted based on his acts and intentions "and/or" his co-defendant's acts and intentions. State law held that "and/or" instructions can result in fundamental error. Prejudice was established because the jury could have convicted the defendant based solely on the acts and intentions of the co-defendant even if the jurors though the defendant was innocent with regard to the death.

***Aversano v. State*, 966 So. 2d 493 (Fla. Dist. Ct. App. 2007)**. Counsel ineffective in grant theft case for failing to seek instruction on good faith defense or advice of counsel defense. Following several major impacts in the area, the defendant allowed a third-party to temporarily store restaurant equipment in her garage. There was no agreement on length of time. Subsequently, she notified the

third-party to remove the equipment. She contacted an attorney and followed his advice to send a registered letter and then hire a process server notifying the third-party that she would dispose of the equipment if not picked up by a stated deadline. The deadline passed and she sold the equipment to an auctioneer. Counsel's conduct was deficient because counsel called the prior attorney to testify but failed to request an instruction of either the good faith or the advice of counsel defense, both of which were available under state law. "[I]is patently unreasonable to fail to request an instruction that provides a legal defense to undisputed facts." Prejudice established because omission of these instructions "essentially deprived her of a defense."

***Stiers v. State*, 229 S.W.3d 257 (Mo. Ct. App. 2007)**. Counsel ineffective in forcible restraint case for failing to request a self-defense instruction. The defendant was charged with two counts of forcible sodomy, two counts of armed criminal action, and felonious restraint following an altercation with his girlfriend. He was acquitted on all charges other than felonious restraint. Their testimony and evidence of her injuries was basically the entire case. The defendant's testimony alleged that the altercation began when she attempted to steal property from him and he defended with non-deadly force, which was permitted under state law. The altercation that elevated when she grabbed a knife and he then defended himself with deadly force. Under state law, he was entitled to a self-defense finding if he reasonably believed that deadly force was necessary to protect himself from serious physical injury. Counsel was ineffective in failing to request the self-defense instruction. Prejudice found because, without the self-defense instruction, the jury was obligated to convict if the defendant forcibly restrained the alleged victim and, in so doing, exposed her to risk of serious physical injury, regardless of the reason.

***State v. Eyre*, 179 P.3d 792 (Utah 2007)**. Counsel ineffective in tax evasion case for failing to object to instructions that did not require the jury to find the existence of a tax deficiency, which was a necessary element of the crime. Counsel's conduct was deficient and prejudicial because the defense argued that the defendant did not file his taxes because he did not believe he owed any taxes, but counsel failed to object to the court's failure to give the necessary charge.

**2006:** ***Mathis v. State*, 941 So. 2d 1 (Fla. Dist. Ct. App. 2006)**. Counsel ineffective in aggravated battery on a fellow inmate case for failing to request a jury instruction on the justifiable use of non-deadly force where the defense argued that the victim was the aggressor and the defendant was acting only in self-defense.

***Tillman v. Massey*, 637 S.E.2d 720 (Ga. 2006)**. Counsel ineffective in malice murder case for failing to object to an erroneous instruction on the presumption of innocence in the court's final charge. The court instructed the jury that the presumption protects only the innocent, which implies that the jury's assessment of guilt is separate and distinct from the prosecution's burden to prove guilt beyond a reasonable doubt, thereby eviscerating the presumption of innocence. Prejudice found even though a correct charge on the presumption of innocence was given in preliminary instructions.

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***People v. Pollards*, 854 N.E.2d 705 (Ill. Ct. App. 2006)**. Counsel ineffective in stolen motor vehicle case for failing to request jury instructions on definitions of stolen property and theft. Prejudice found because the defendant's intent was an issue in the case.

***Vaughn v. State*, 202 S.W.3d 106 (Tenn. 2006)**. Counsel ineffective in murder and other offenses case for failing to object to the court's erroneous jury instruction regarding the defendant's release eligibility dates. The trial court informed the jury that, if convicted of murder, the defendant would not be eligible for parole for 25 years, but a new statute had been passed so that the defendant actually would not have been eligible for parole for 51 years. Counsel's conduct was deficient at trial because he was unaware of the new provision. After trial counsel learned of the new provision but still did not assert the issue. While there were two conflicting provisions in the statutes, such that it may not have been clear at the time whether it was 25 or 51 years, "this conflict in the provisions, far from excusing counsel from raising the issue, should have brought to their attention the very need to raise the issue." Even after the Attorney General issued an opinion clarifying that it was 51 years, counsel still did not raise the issue as plain error in the direct appeal which was still pending. Trial and appellate counsel's conduct was deficient. Prejudice established because "prejudice occurs when a defendant receives a sentence greater than the range of punishment contemplated by the jury." If the jury had been properly instructed, it was reasonably likely the jury would have convicted the defendants of a lesser offense.

***State v. Pittman*, 166 P.3d 730 (Wash. Ct. App. 2006)**. Counsel ineffective in attempted residential burglary case for failing to request a lesser included offense instruction on first degree attempted criminal trespass, which was supported by the evidence.

**2005:** ***State v. Dabney*, 908 So. 2d 60 (La. Ct. App. 2005)**. Counsel was ineffective in armed robbery case for failing to object to a modified Allen charge to a deadlocked jury. The jury announced a guilty verdict but polling revealed an 8 to 4 vote when at least 10 votes were needed for a conviction. When the jury asked what happened if they could not agree, the court gave a modified Allen charge, without objection. Counsel's conduct was deficient because Louisiana law prohibited an Allen charge and approved only of following ABA Standards in this situation. Prejudice was found because the charge given was confusing, coerced jurors to reach a verdict, and coerced jurors in the minority to conform their views to the majority. Two jurors changed their votes within 35 minutes, which suggested that they "surrendered their beliefs in order to achieve a verdict."

**2004:** ***Benham v. State*, 591S.E.2d 824 (Ga. 2004)**. Counsel was ineffective in aggravated assault case for failing to request an instruction on the use of force in defense of a habitation. The defendant and the alleged victim had a history of animosity because the victim's husband had fathered children with both women. The victim confronted the defendant while the defendant was sitting in her car with her three young children talking to friends. Following a heated conversation, the victim admittedly threw the first blow. The women fought with the victim standing outside the car reaching in and the defendant inside her car. The defendant had attempted to drive away but her path was blocked by onlookers in the street. Ultimately, the defendant grabbed a box cutter from the car console and slashed the victim. Counsel argued self-defense but did not request an instruction on defense of

habitation. Under state law, deadly force is permitted to prevent or terminate the unlawful entry into or attack upon a habitation, including a motor vehicle, if the entry is made or attempted in a violent and tumultuous manner and there is a reasonable belief that the entry is made for the purpose of assault or personal violence therein. The uncontradicted evidence at trial clearly would have authorized such a charge because the victim threw the first punch and eyewitnesses testified that it took two attempts for on lookers to restrain the victim from continuing the attack. Counsel stated that her strategy was to present self-defense as the best defense because she wanted the jury to believe that the defendant was in fear for her safety and the safety of her children and not just that she was protecting her vehicle. The court held this was not a reasonable strategy because counsel failed to appreciate that the defense of habitation may have justified the use of deadly force. "In failing to adequately research and understand the defenses available to [the] client, defense counsel rendered assistance that fell below the minimum standard set forth in *Strickland*." Prejudice found because it was reasonably probable that the jury would have accepted the substantial evidence that the victim unlawfully entered the defendant's car in a violent and tumultuous manner for the purpose of offering personal violence to the occupants.

***State v. Kougl*, 97 P.3d 1095 (Mont. 2004)**. Counsel ineffective in operation of unlawful methamphetamine lab case for failing to request jury instructions on accomplice testimony. Although the prosecutor and counsel both informed the jury that accomplice testimony should be viewed with suspicion, counsel did not request instructions that accomplice testimony should be viewed with distrust and that it must be corroborated. In direct appeal, counsel's conduct was found to be deficient because there was no plausible reason not to request the instructions. Prejudice found because the state's case was built almost entirely on accomplice testimony with little corroboration. In addition, although counsel informed the jury to view accomplice testimony with suspicion, "hearing this from counsel, . . . is not the same as hearing it from the court."

**2003:** ***Patterson v. State*, 110 S.W.3d 896 (Mo. Ct. App. 2003)**. Counsel was ineffective in second-degree robbery case for failing to present the trial court with a properly worded instruction for the lesser included offense of felony stealing. Under state law, second degree robbery required the forcible stealing of property, whereas the lesser included offense of stealing did not include the element of force. Counsel argued the lack of force and requested an instruction on the lesser included offense of stealing but proposed a stealing instruction that improperly included the "forcibly stole" language, which materially misstated the elements of stealing. Counsel did not have a reasonable trial strategy for proposing the incorrect instruction and counsel even argued that the jury could find that there was no use or threat of use of physical force. "Counsel clearly made a strategic decision to have the jury instructed on the lesser-included offense of stealing but then failed to execute that strategy when he submitted instructions to the court that did not properly track the language" of the lesser-included offense. *Id*. at 903. The court found prejudice because the lesser included offense instruction was warranted by the evidence, where the witnesses never saw a weapon and a juror could reasonably find that the defendant did not actually use physical force or threaten immediate physical harm to anyone during the theft. Where doubt exists over whether a lesser included offense should be instructed, the court should give the instruction. Even assuming that the state's argument was correct that the defendant must also prove a reasonable possibility that he would not have been convicted of the

greater offense had the lesser-included instruction been given, the court found prejudice where "the evidence of either an explicit or an implicit threat of physical force in the stealing was not overwhelming."

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## 9. FAILURE TO CHALLENGE COMPETENCE

### a. U.S. Court of Appeals Cases

**2013:** ***Newman v. Harrington*, 726 F.3d 921 (7th Cir. 2013) (*affirming United States ex rel. Newman v. Rednour*, 917 F. Supp. 2d 765 (N.D. Ill. 2012))**. Under AEDPA, counsel was ineffective in murder case for failing to investigate the mentally retarded defendant's competence and failing to seek a competence hearing. The defendant's mother provided counsel with a "two-inch-thick stack" of records reflecting that the 16-year-old defendant went to a "special school," was found disabled by the Social Security Administration due to mental retardation, and had an IQ of 62. The state court did not determine whether counsel's conduct was deficient but rejected this claim due to a finding of no prejudice. The state conceded that the district court properly evaluated whether counsel's conduct was deficient de novo and that counsel's conduct was deficient. With respect to prejudice, the state court unreasonably applied Strickland by deeming an expert report of incompetence as "irrelevant" because it came after trial and because a state expert believed Newman was malingering.

> It would be unreasonable to think that Newman began faking symptoms of mental retardation before he was 11-years-old, leading to the creation of documentation 2- inches thick reflecting his mental deficits just to "use his manufactured retardation to confuse the justice system."

In short, the expert opinion ignored by the state court "was well-supported and relevant. It was consistent with the numerous reports from psychological and educational experts over many years (about a decade) leading up to trial and after." The state court's decision was also based on an unreasonable determination of the facts in light of the state-court record. Specifically, the state court unreasonably determined that Newman was nothing "other than academically challenged and a slow learner." "This factual determination is quite troubling," as it ignored the expert report and "most of the other evidence in the record." "Indeed, the state court ignored the clear and convincing weight of the evidence, resulting in a decision based on an unreasonable determination of the facts." The state court also unreasonably determined that Newman "at all times ... responded appropriately to questioning by the trial court."

> First, the evidence establishes that "yes, sir" and "no, sir" were the extent of Newman's responses to the trial court's questioning. He never gave more than a two-word answer and his simplistic answers do not suffice to show that he understood the questions regarding his defense rights. And Newman's responses to the trial court's questioning were not at all times appropriate. During one colloquy the trial judge asked Newman if he understood his constitutional rights to testify and not to testify, and asked "knowing all of this . . . what is your wish?" Newman responded, "No, sir." This nonresponsive answer lends support to the conclusion that Newman was unable to understand the proceedings against him and assist in his defense.

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In sum, the state court's denial of Newman's petition was based on an unreasonable determination of the facts in light of the evidence presented. "[T]here is a reasonable probability that Newman would have been found unfit had a hearing been held."

**2009:** ***Hummel v. Rosemeyer*, 564 F.3d 290 (3rd Cir. 2009)**. Under AEDPA, counsel ineffective in murder case for stipulating the defendant was competent to stand trial and failing to challenge competence. The defendant was charged with shooting and killing his wife because of her affair with another man. Shortly after shooting her, the defendant shot himself in the head and, thereafter, was "missing a portion of his brain." *Id*. at 291. Counsel was appointed and was informed by the defendant's parents, who were his legal guardians, that he was not competent. The parents requested evaluation by a psychiatrist and even gave counsel a list of possible experts. Rather than a psychiatrist, the defendant was examined by a psychologist retained by the prosecutor and a psychologist retained by the defense. The state's expert reported the defendant had an I.Q. of 65, which placed him in the mentally retarded range of intelligence. Due to the head trauma, he had only limited cognitive skills and deficits in short-term memory. This expert was unable to state to a reasonable degree of certainty that the defendant was competent but noted that at best understood things only in a concrete, simplified fashion and it would be necessary during trial to continually make sure he was understanding the proceedings. The defense psychologist reached similar conclusions in finding the defendant "marginally competent" but recommending frequent breaks in the trial for counsel to explain things to the defendant. Without seeking any additional evaluation or even meeting with the defendant himself, counsel stipulated that the defendant was competent. Counsel met with the defendant only briefly prior to the preliminary hearing and never saw him again until the day jury selection began. Counsel never talked to the defendant about his version of events but asserted a provocation defense. He convinced the defendant and his father that the defendant should not testify. Counsel had concerns about the defendant's ability to focus during the trial and even had to request a recess when the defendant was sleeping at the defense table. During the state's closing argument, the defendant woke up and shouted "[t]ell them about the blowjobs." The defendant's father took him out of the courtroom so he was not present for the rest of closing arguments. He was also absent during the jury instructions because counsel could not wake him. Following trial, counsel moved for a new trial based on concerns about competence but did not present any medical evidence. Counsel's conduct was deficient in stipulating to competence based on the psychologist's reports.

> We must ask whether either of these reports presented such an unqualified affirmation of [the defendant's] competency to stand trial so as to lead a reasonable attorney under these circumstances to stipulate that [the defendant] was competent. The answer is self-evident. Neither does. The reports from the psychologists were hardly ringing endorsements of [the defendant's] competency. There is little reason to believe that testimony from a psychiatrist would not have been enough to tip the scales, and it was unreasonable for [the defendant's] counsel not to pursue this further.

*Id*. at 301. "[A] reasonable attorney would not have stipulated to his client's competency without insisting on more information and further proceedings." Under the state statutes, counsel could have

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sought a court-order evaluation of competence, which would have been "conducted by at least one psychiatrist." Prejudice found. The state court's decision was rejected as an unreasonable

application of *Strickland* and as contrary to clearly established United States Supreme Court law in that rather than the appropriate standard of "reasonable probability" the state court used "the more stringent requirement of "show" in finding no prejudice.

**2005:** ****Burt v. Uchtman*, 422 F.3d 557 (7th Cir. 2005)**. Counsel ineffective in capital murder case (where the death sentence was later commuted by Governor Ryan) for failing to request a competence evaluation when the defendant plead guilty without any concessions and against the advice of counsel near the end of the state's case-in-chief. Counsel's conduct was deficient because counsel was aware that the defendant had been consistently medicated with anti-depressants and psychotropic drugs while in pretrial confinement. The only competence examination was conducted eight months prior to trial by an expert who did not even review the defendant's prison mental health records. A defense psychologist examined the defendant in connection to a motion to suppress statements and found a borderline IQ, neurological impairments, and severe depression. During jury selection, the defense requested a continuance, which was denied, because the defendant was having difficulty sleeping and expressing his inability to assist counsel. Counsel's conduct was deficient because counsel were aware of the defendant's medications, his frequent mood swings and that the defendant did not appear to comprehend legal advice. The state court had not addressed this prong of the *Strickland* test. The court found prejudice because there was "a reasonable probability that [the defendant] would have been found incompetent at the time he pleaded guilty if his attorneys had requested a competency hearing" because the only competence evaluation was 8 months prior to trial, failed to consider the effects of heavy medications, and could not have accounted for the repeated changes in prescriptions in the time after that evaluation until trial. Under AEDPA, the state court "unreasonably applied *Strickland* to the facts" because it "ignored a wealth of evidence." [The court also held that the trial court should have sua sponte ordered a competence evaluation.]

### b. State Cases

**2017:** ***Ramirez v. State*, 795 S.E.2d 891 (S.C. 2017).** In case involving numerous felony charges against a sixteen-year-old severely mentally retarded defendant, plea counsel was ineffective for failing to request an independent competency evaluation prior to the guilty plea. Defendant was initially found competent after a short forensic interview with an employee of the Department of Mental Health who also considered a limited number of documents primarily related to the charged crimes and defendant's juvenile criminal history. Plea counsel then requested that a psychological examination of defendant be conducted because plea counsel was concerned that defendant did not fully understand the gravity of the offenses or the charges he faced. (Defendant had informed the first examiner that he believed he was only facing a few years in the Department of Juvenile Justice. In fact, he was being tried as an adult and faced a sentence of fifteen years to life without parole in the Department of Corrections.) The second examiner met with defendant numerous times for extended periods. He also based his conclusions on a number of psychological tests, defendant's medical records, and collateral interviews conducted with defendant's family to obtain historical information defendant may not have been able to accurately convey due to his

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intellectual limitations. The expert diagnosed defendant with an adjustment disorder with mixed disturbance of emotions and conduct, severe mental retardation, and a Global Assessment of Functioning (GAF) score of thirty-five out of one hundred. The expert did not, however, opine as

to defendant's competency to stand trial. Defendant ultimately pleaded guilty but mentally ill and the reports of the two experts were submitted on the issue of whether defendant was mentally ill at the time of the offenses. The plea was accepted and defendant was sentenced to concurrent twenty-year terms for all charges, except the lewd act on a minor for which the circuit judge imposed a consecutive fifteen year sentence suspended upon five years' probation for mental health counseling. In post-conviction proceedings, plea counsel conceded he should have moved to have defendant's competency reevaluated after comparing the two reports. Given the second report, and plea counsel's own interactions with defendant, the failure to seek a reevaluation constituted deficient performance. Prejudice is found based on plea counsel's testimony and the second report. These "clearly established a reasonable, if not strong, likelihood that [defendant] was incompetent to plead guilty."

**2009:** ***Mast v. State*, 914 N.E.2d 851 (Ind. Ct. App. 2009)**. Counsel ineffective in failing to ensure that psychiatrists' reports were given to the court and a competence hearing conducted prior to the defendant's guilty plea to rape and sentence to 30 years. Initial counsel gave notice of a defense or mental disease or defect and the court appointed two doctors to examine competency and sanity issues. With substitute counsel, the defendant entered a guilty plea without obtaining the reports. The first doctor's report was received by the clerk's office on the day of the plea. It stated that he was unable to form an opinion about competency and that he requested repeated interviews and an in-patient evaluation. It was not clear whether the trial court had this report at the time of the plea. The second doctor's report, submitted four days after the plea, explicitly stated the doctor's "doubt[s]" that the defendant was competent. Counsel's conduct was deficient in advising the defendant to plead guilty without awaiting the results of the competency evaluations. Prejudice established as "there is a reasonable probability that the outcome of the case would have been different had the trial court been aware of the psychiatrists' reports."

**2008:** ***Coker v. State*, 978 So. 2d 809 (Fla. Dist. Ct. App. 2008)**. Counsel ineffective prior to plea for failing to obtain a competence hearing. Counsel's conduct was deficient because the trial court gave oral authorization for an evaluation, but counsel never presented a written order and failed to otherwise follow-up. Prejudice established because the defendant may well have been incompetent at the time of his plea. Remanded for a competence determination.

**2004:** ***People v. Shanklin*, 814 N.E.2d 139 (Ill. App. Ct. 2004)**. Counsel ineffective in attempted murder plea for failing to request a hearing on the defendant's competence or fitness or, alternatively, asking the trial court to question the defendant carefully as to the plea he entered and the consequences. Following the defendant's guilty plea, a presentence report disclosed that the defendant had been hospitalized three times for mental-health problems as a teenager. In addition, he was mildly mentally retarded and had significant problems retaining and receiving verbal information.

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> When confronted by a defendant, who may be mentally retarded, the trial court and both prosecution and defense may not simply rely on affirmative answers to rote questions to conclude the defendant understands the proceedings and the consequences of his plea.

*Id*. at ___.

> It is incumbent on the attorney representing a mentally retarded defendant to make that fact known to the trial court and for the trial court to proceed with care in accepting a plea.

*Id*. at ___. Counsel's conduct was deficient and prejudicial.

***Matthews v. State*, 596 S.E.2d 49 (S.C. 2004)**. Counsel ineffective in armed robbery, carjacking, and accessory after the fact to murder plea for failing to request a competence hearing prior to the defendant's plea. The defendant had learning disabilities and took special education classes in school. Just one year before the crimes, the defendant had been in a near fatal car accident that caused significant frontal lobe, neurological damage.

**Capital Case*

## 10. FAILURE TO PRESERVE THE RECORD FOR APPEAL

### a. U.S. Court of Appeals Cases

**2003:** ***Davis v. Secretary, Dept. of Corrections*, 341 F.3d 1310 (11th Cir. 2003)**. Counsel was ineffective in murder case in failing to adequately preserve a *Batson* claim for appellate review. While counsel did object, counsel failed to renew the motion before accepting the jury, which was required in order to preserve the issue for appeal. Because counsel's negligence affected only the appeal, the relevant focus in assessing prejudice was the appeal. Because the state court had already recognized that the *Batson* claim was meritorious, the court found that there was a reasonable probability that the state court would have granted reversal on appeal. This claim had been raised in state post-conviction, but the state court failed to resolve the merits of the claim. Thus, the court found that this case fell outside of § 2254(d)(1) requirement of deference to the state court decision.

### b. State Cases

**2008:** ***People v. Owens*, 894 N.E.2d 187 (Ill. App. Ct. 2008)**. Counsel ineffective in residential burglary case for failing to consult with the defendant concerning a motion to reconsider sentence. The defendant informed the court he wished to appeal his 18 year sentence and the court informed him he must file a motion to reconsider the sentence in order to preserve the appellate issue. Retained counsel withdrew without taking any action and the court entered a notice of appeal for the defendant. "[T]he attorney's failure to consult with the defendant during a critical stage of the proceedings" was deficient and the defendant's ability to preserve his sentencing arguments for appeal was prejudiced.

**2004:** ***Heckelsmiller v. State*, 687 N.W.2d 454 (N.D. 2004)**. Counsel ineffective in criminal trespass case for failing to preserve the record for appeal after two potential defense corroborating witnesses were excluded during the trial because counsel failed to ensure that they were sequestered as all other witnesses were. The defense was that the defendant had permission to be on the premises, but counsel considered this unsubstantiated and decided not to present the corroborating witnesses due to credibility concerns because they were family members. (Alleged victim was also a family member.) During the trial, counsel changed his mind and decided to present the testimony. Counsel's conduct was deficient because, when the court excluded the evidence, counsel did not make a proffer or preserve the record for appeal. Prejudice found because the excluded witnesses would have corroborated the only defense presented. Although the court was unaware of the substance of the witnesses' statements, the court held that "the significant point is that counsel's failure to make an offer of proof prevented a meaningful appeal on the issue."

**Capital Case*

## 11. MISCELLANEOUS

### a. U.S. Court of Appeals Cases

**2017: *McKernan v. Superintendent Smithfield SCI*, 849 F.3d 557 (3rd Cir. 2017)**. The Third Circuit granted relief in this Pennsylvania first degree murder case on petitioner's claim that because of the egregious advice given him by his counsel, he was deprived of the right to a fair trial before an impartial tribunal. On the second day of the bench trial, after the prosecution had rested but prior to the defense beginning its case-in-chief, the trial judge, Judge Lisa Richette, summoned counsel for the parties and members of the victim's family to her robing room to complain about and discuss disparaging comments about herself that she had found on a website created by the victim's family members. Judge Richette read some of the comments from the website which she characterized as "vicious and unfair."

> The website described an ongoing controversy between the judge and the actor Charlton Heston, who had criticized the judge as being soft on crime and referred to her as "Let `em Loose Lisa." The judge read a passage from the website stating "Lisa Richette is a bleeding heart judge that often sympathizes with murderers and other violent criminals and gives them light sentences," which the judge characterized as "a total lie." The judge then accused the [victim's family] of writing "dreadful, slanderous things about [her]" throughout the website.

(Footnotes omitted.) Despite her anger, Judge Richette sought approval from the victim's family of her actions in the trial. She described the case as "a horrible, horrible murder," and told the victim's family that she "just want[ed] to make sure that you folks are happy with me." Noting that the victim's family had "already been hurt enough," she told the assistant district attorney that she didn't "want them to have this case heard by a Judge in whom they have no faith." She also told the victim's family that they were very fortunate because there was a witness who came forward in this case unlike in many other murder cases. After being assured by the victim's family that they were "satisfied" with Judge Richette presiding over petitioner's trial, she concluded, "I don't want to open the Daily News tomorrow and read the usual B.S." Defense counsel remained mute during this meeting until the assistant district attorney asked him if he was concerned about the conference. Defense counsel responded that he needed to apprise his client of what had transpired and he left the robing room with the other parties still there with Judge Richette remarking that she'd just talk to the family generally in defense counsel's absence. In the continued discussion in the robing room, the victim's brother and Judge Richette entered into an agreement permitting the judge to "red line" anything she did not approve of from the site and to write her own thoughts about victimology, which would be posted in the judge's "defense." The judge told the victim's mother that she (the judge) would have acted similarly if the same events had happened to her son. She also told the victim's mother that the family was "very lucky" because the assistant district attorney assigned to the case was "one of the best D.A.s in the world." After the victim's family left the robing room, defense counsel returned and expressed his client's concern over the judge's mention of the prosecution's witness and worry that the judge would be harsh on petitioner to prove the victim's family wrong. The assistant district attorney shared those

concerns. Defense counsel said that he had advised petitioner to continue before Judge Richette and suggested the problem might be solved if petitioner was brought into the robing room as had the victim's family to talk with the judge. In the robing room, the judge assured petitioner that she would not be influenced by the conversation with the victim's family and that she would "try and pray to God that I be fair to you." Following further conversation with defense counsel, petitioner reluctantly accepted counsel's advice to proceed with trial, which later ended with the judge's rejection of his claim of self-defense and arguments for conviction on a theory less severe than first degree murder. On appeal from denial of relief by the district court, the Third Circuit had "no trouble holding that, in the unique circumstances of this case, counsel's performance in failing to move for recusal of Judge Richette fell far below the minimal standards of competence in the profession and the state court's failure to recognize this incompetence was an unreasonable application of the *Strickland* factors." Petitioner had reasonably recognized, as defense counsel had not, that a finding by the judge that petitioner was guilty of some offense involving a lower standard of culpability would play directly into the narrative the victim's family had published on their website, "the caricature of 'Let 'em Loose Lisa Strikes Again!'"

> While [defense] counsel's belief that Judge Richette was the best option for his client at the beginning of trial may have been a reasonable strategic decision, by the time Judge Richette held the robing room conference and revealed herself to be actively concerned with her image on the internet and the victim's family's perception of her, any competent attorney would have realized that the strategy had to be revised. ¶ Indeed, it appears that if [petitioner] had had no counsel at all, he would have made the decision to seek recusal. He expressed his concerns to his attorney, only to have his attorney inexplicably talk him out of those concerns .... If counsel is ineffective only where his conduct was so deficient as to render his client *de facto* without counsel, [petitioner's] counsel may have been worse: he convinced his client to proceed before a tribunal that objectively had the appearance of bias against him. He advised his client to proceed before a court that was structurally deficient, something no competent attorney would ever do. Under § 2254, where "[t]he question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard," the answer here is "No." Consequently, [petitioner] claim fulfills the first prong of *Strickland*.

(Footnotes omitted). The Third Circuit went on to find that "*Strickland*'s second prong ... is easily met." The court explained:

> In view of Judge Richette's sensitivity to criticism for being lenient, it would not appear likely that she would now accept [petitioner's] defense of a lesser degree of homicide. There is evidence in the record from which an impartial judge could have found a lesser degree of homicide. ... Thus, there is a reasonable probability that if [petitioner's] counsel had been effective and moved for recusal, the outcome of the trial would have been different.

**Capital Case*

**2012:** ***Cornell v. Kirkpatrick*, 665 F.3d 369 (2nd Cir. 2011)**. Counsel was ineffective due to the failure to object to improper venue on one of two counts of rape. There were two separate instances involving two different women. The first woman was raped in a car in a motel parking lot in Monroe County but she did not report it until the second woman, who was her friend, was raped in Ontario County and reported it. The State conceded the first rape was in Monroe County but indicted the petitioner on both charges in Ontario County. The State asserted it had jurisdiction under a state criminal rule that states: "[a]n offense committed in a private vehicle during a trip thereof extending through more than one county may be prosecuted in any county through which such vehicle passed in the course of such trip." Counsel moved to sever the charges but did not object to venue on the first rape. The District Court found counsel's conduct was deficient because there was clear state case law limiting the application of this criminal rule to instances where it is "impossible to determine in what county the offense occurred," but counsel did not research the law. The State did not appeal this issue. Prejudice found. If counsel had objected, the trial court would have been required to submit the issue of venue to the jury. The State twice conceded that the rape was in Monroe County and the victim's testimony was unequivocal on this point. Thus, there is a reasonable probability that this charge would have been dismissed. Under AEDPA, the state court's ruling was an unreasonable application of Federal law, as determined by the Supreme Court.

**2005:** ***United States v. Scott*, 394 F.3d 111 (2nd Cir. 2005)**. The indictment in illegal reentry case was dismissed because counsel was ineffective in the underlying deportation case for failing to apply for a waiver of deportation even though the immigration judge stated that he believed the defendant was eligible for a waiver and instructed counsel to file an application. Prejudice was found because the defendant could have made a strong showing that he was eligible for a waiver and his subsequent criminal charges were irrelevant because they would not have been considered at the time.

### b. District Court Cases

**2017:** ***Brooks v. Gilmore*, 2017 WL 3475475 (E.D. Pa. Aug. 11, 2017).** Petitioner was convicted by a jury in Pennsylvania state court of first degree murder and was sentenced to life without parole. The prosecution's key witness, and the "lynchpin of the case," was a sole eyewitness who identified two other individuals from a lineup before selecting petitioner, and named petitioner only because the cops kept bothering him. The witness was high on Xanax and alcohol at the time of the crime. At the time of trial, the witness was under court supervision and had two open cases. Charges of carjacking, robbery, and weapons offenses that were pending against him were dismissed for lack of prosecution just after he gave the police a statement implicating petitioner. Petitioner's conviction and sentence were affirmed on direct appeal and his state post-conviction petition was denied without a hearing. In federal habeas pursuant to 28 U.S.C. § 2254, petitioner alleged that he was deprived the right to effective assistance of counsel because his trial lawyer failed to object to a jury instruction improperly defining reasonable doubt. After providing the standard jury instruction on reasonable doubt, the court instructed the jury:

> It's helpful to think about reasonable doubt in this manner. Let's say, and I know that each one of you does have someone that you love very much, a spouse, a significant other, a child, a grandchild. Each one of you has someone in your life

> who's absolutely precious to you. If you were told by your precious one's physician that they had a life-threatening condition and that the only known protocol or the best protocol for that condition was an experimental surgery, you're very likely going to ask for a second opinion. You may even ask for a third opinion. You're probably going to research the condition, research the protocol. What's the surgery about? How does it work? You're going to do everything you can to get as much information as you can. You're going to call everybody you know in medicine: What do you know? What have you heard? Tell me where to go. But at some point the question will be called. If you go forward, it's not because you have moved beyond all doubt. There are no guarantees. If you go forward, it is because you have moved beyond all reasonable doubt.

The court held that this "emotionally charged metaphor" violated petitioner's due process rights because the jurors could interpret it to allow conviction based on any degree of proof below the reasonable doubt standard, under *Cage v. Louisiana*, 498 U.S. 39, 41 (1991). Because "any person of decency and morals would strive to put aside doubt when faced with a single life-saving option for a loved one," this instruction diminished the prosecution's burden of proof, creating strong motivation to put aside doubt. The initially accurate instruction on the standard of proof did not render the charge as a whole acceptable because the jury was instructed to consider the court's example as a proper exposition of the standard, and it was not. Counsel's failure to object was deficient because reasonable doubt is such a fundamental principle and the nature of the court's hypothetical was so instinctively problematic. Any reasonable attorney "would have focused sharp attention as soon as the judge deviated from the standard instruction." The deficiency was prejudicial because the error in defining reasonable doubt was structural under *Sullivan v. Louisiana*, 508 U.S. 275 (1993) (holding that without the reasonable doubt standard, a criminal trial cannot reliably serve its function). Prejudice was therefore presumed. But even if prejudice was not presumed, prejudice was established because there was not overwhelming evidence of guilt in this case. The state court's denial of the claim was both an unreasonable determination of fact (that the instruction was a mere example rather than a "lengthy and emotionally charged illustration antithetical to the concept purportedly being explained") and an unreasonable failure to recognize the due process principles in *Cage* and *Sullivan*.

### c. Military Cases

***United States v. Edmond*, 63 M.J. 343 (C.A.A.F. 2006)**. Counsel ineffective in conspiracy, larceny, and other offenses case for failing to secure the testimony of a subpoenaed defense witness. The alleged conspiracy and larceny concerned two cellular telephones. The subpoenaed witness had also been charged but had been discharged from the military in lieu of a court-martial. He would have testified that there was no conspiracy and that he and the accused, who had both worked in the supply room, believed that they were authorized to obtain the cell phones and that they had intended to return them to the unit but kept the phones after the unit said they no longer wanted the cell phones. When the witness arrived for court, the prosecutor warned him of the possibility of a perjury charge if he testified falsely. When the prosecutor told defense counsel that the witness did not want to testify, counsel did not speak to the witness before he was allowed to leave but instead entered

into a stipulation that the witness was invoking his Fifth Amendment rights. Counsel's conduct was deficient and prejudicial because the witness not only did not testify but the implication of the stipulation to the panel members was that the accused's coconspirator could not testify without incriminating himself. The case was remanded either for dismissal of the larceny and conspiracy charges and reassessment of the sentence or for a rehearing.

### d. State Cases

**2017: *Khalil-Alsalaami*, 399 P.3d 264 (Kan. Ct. App. 2017).** In case involving two counts of aggravated criminal sodomy on an underage victim, trial counsel was ineffective in numerous ways. First, trial counsel was ineffective in failing to request an interpreter at trial and appellate counsel was ineffective for not raising that failure on appeal. Defendant, whose primary language was Arabic, was in the United States as a permanent resident after serving as an interpreter for the United States military forces in Iraq. He was accused of sexually assaulting the victim at a party. He initially admitted to committing some of the sexual acts at issue but claimed it was consensual and that he was unaware the victim was underage. At trial, he denied having any sexual contact with the victim and stated that he had given a contrary account to the police because the officer had repeatedly suggested that sex had occurred. Trial counsel's defense strategy was: (1) arguing that DNA matched to defendant that was found on the victim's shorts had been transferred from the bed where defendant had sex with another woman earlier; and (2) asserting that defendant was tricked by police into giving an incriminating statement. Although defendant's initial counsel had requested an interpreter for defendant and one was employed at the preliminary hearing, trial counsel decided that use of an interpreter would make it appear to the jury that defendant was trying to hide behind a non-existent language barrier, especially given defendant's own history as an interpreter. Thus, defense counsel advised defendant not to use an interpreter. Such advice was made without counsel: (1) testing defendant's ability to understand English; (2) investigating the complexity of the interpreting defendant was asked to do for the U.S. military; or (3) considering how the use of voir dire and/or instructions could ameliorate any possible prejudice from use of an interpreter. In addition, trial counsel failed to inform defendant of his statutory right to an interpreter and the waiver was not accomplished in front of the trial court. Trial counsel had been aware that defendant would not be able to understand at least portions of the trial, such as the DNA testimony and the prosecutor's closing argument. At trial, defendant spoke in broken English that was difficult to understand and he failed to comprehend the meaning of fairly simple words. According to professionals who tested defendant post-trial, defendant's understanding of English was extremely limited and he would be very easy to trick due to the language problem. Evidence was also presented in post-conviction proceedings showing that approximately 1 year before the charged crime, defendant took an interpreter with him to get a Kansas driver's license and had to use the picture test rather than the written test. In addition, the interpreter for defendant in the preliminary hearing rated defendant's English skills on a scale of 0 to 10 as .01. He further testified that defendant's English was woefully inadequate to go through a court proceeding without an interpreter. The U.S. Army Captain that supervised defendant in Iraq indicated that their communication in English was at an elementary level and analogized defendant's ability as a little better than his 5-year-old daughter, who was entering kindergarten. Although defendant lived in the United States for 14 months prior to his arrest, he lived in a household with other Arabic

speakers. When he interpreted for the U.S. Army in Iraq, again he continued to live with Arabic speakers. It was further noted by the appellate court that not only was the criminal trial complex, the stakes were extremely high – defendant was facing a possible sentence of 25 years to life, and, as an asylum seeker, a conviction would likely result in deportation to Iraq where his life could be at risk. Although the post-conviction court found, inter alia, that substantial competent evidence supported the finding that defendant adequately understood English to proceed to trial without an interpreter, the appellate court disagreed, explaining:

> Even if one assumes that [trial counsel] were in the best position to evaluate [defendant's] language abilities at the time of trial, their testimony does not support such a conclusion. They reached what they believed to be a reasonable trial strategy, without fully investigating [defendant's] ability to understand the testimony and legal arguments at his own trial. Not only did they not investigate, but they ignored clear indications that [defendant] could not effectively understand what was going on during the trial.

On this record, trial counsel performed deficiently in not requesting an interpreter at trial. And, given the egregious nature of the error here, prejudice is presumed. In addition, give the appellate court's conclusion that the evidence does not support a finding defendant was able to understand the proceedings in the absence of an interpreter, appellate counsel was deficient in not raising a claim on direct appeal that the trial court erred in failing to appoint an interpreter for defendant. Because there is a reasonable probability that the appellate court would have found that the district court abused its discretion when it failed to appoint an interpreter, prejudice is established. Trial counsel was also found to have performed deficiently in failing to seek suppression of defendant's confession and stipulating to the voluntariness of defendant's confession after trial counsel entered the case in the midst of a *Jackson v. Denno* hearing that the State had initiated.

> The police minimization technique in conjunction with [defendant's] inability to speak and understand English weigh in favor of finding his confession was involuntary. In addition, [the interrogating officer] testified that in Iraq the police use force to coerce confessions from individuals. It is not unreasonable to conclude that [defendant] may have been pressured to confess because of his fear that force might be used. Finally, [defendant's] lack of understanding of the words used in the oral explanation of his *Miranda* rights coupled with his inability to read what was placed in front of him would also weigh in his favor in the voluntariness calculus. It is clear that [defendant] appeared to be confessing to criminal acts. That is not the issue. The issue for the district court to decide would have been whether his confession was freely and voluntarily given with an understanding of his rights under *Miranda.* We do not believe that was a foregone conclusion.

Further, by stipulating to the voluntariness of the confession and allowing admission of the stipulation into evidence, trial counsel prejudiced his own defense strategy of arguing that defendant was tricked into making the confession. Trial counsel was also deficient in failing to object when the prosecutor misstated the DNA evidence during argument in a manner that torpedoed his assertion his argument about how defendant's DNA came to be on the victim's

shorts. Further, appellate counsel was ineffective in failing to raise the issue of prosecutorial misconduct on direct appeal. Finally, the appellate court concluded that defendant was entitled to relief on a claim that the cumulative impact of trial counsel's errors deprived him of a fair trial.

> [Trial counsel] committed six errors during his representation of [defendant]: (1) he failed to request an interpreter for [defendant] at trial; (2) he failed to file a motion to suppress [defendant's] confession or mount a defense at the *Jackson v. Denno* hearing; (3) he stipulated to the voluntariness of [defendant's] confession; (4) he failed to object to improper questioning of [the examining nurse]; (5) he failed to object to questions meant to highlight [defendant's] negative character traits; and (6) he failed to object when the prosecutor misstated evidence during closing arguments. We find that the number of errors is substantial, and even if the State could successfully argue that the impact that any one of them had on the trial was insignificant, we cannot ignore the fact that the accumulation of these errors impacted [defendant's] ability to receive a fair trial.

***Commonwealth v. Brown*, 145 A.3d 196 (Pa. Super. Ct. 2016), *appeal granted* (Pa. Feb. 1, 2017).** Trial counsel was *per se* ineffective where he failed to have even one face-to-face meeting with defendant prior to his capital trial.

**2016: *State v. Garland*, 781 S.E.2d 787 (Ga. 2016)**. Counsel ineffective in motion for new trial of sexual battery involving a child case for withdrawing the motion without the defendant's consent and failing to challenge trial counsel's ineffectiveness for failing to adequately investigate and present mental health evidence challenging competence to stand trial and capacity at the time of the offenses. The defendant was convicted of initially touching a child's buttocks as he picked her up during a church conference. He was sentenced to one year imprisonment followed by four years of probation. Following sentencing, new counsel filed a motion for new trial asserting ineffective assistance of counsel. Prior to the motion hearing, the defendant had served his confinement and had been re-incarcerated on a probation violation. Without the defendant's knowledge, counsel entered an agreement with the state to re-instate probation in exchange for withdrawing the motion for new trial. Counsel's conduct was deficient in entering this agreement without the defendant's knowledge and for failing to pursue the issue of trial counsel's ineffectiveness, which was a meritorious claim. Uncontradicted expert testimony was available that the defendant had a cognitive disorder caused by multiple mini-strokes that impaired the defendant's ability to assist counsel and rendered the defendant unable to discern right from wrong or to conform his behavior to socially acceptable norms at the time of the crime.

**2015: *State v. Banks*, 56 N.E.3d 289 (Ohio Ct. App. 2015)**. Counsel ineffective in multi-count conviction case for failing to seek a bench trial on the repeat violent offender specifications. Counsel's conduct was deficient and not based on strategy. Prejudice established because the error allowed the jury to hear evidence of the defendant's prior conviction, even though the defendant had stipulated to the conviction and did not testify. The prejudice was compounded because the trial court erroneously informed the jury that it could consider the repeat violent offender specification as "other acts evidence."

**Capital Case*

***Ex parte Whited*, ___ So. 3d ___, 2015 WL 480837 (Ala. Feb. 6, 2015)**. Counsel ineffective in sodomy case for waiving closing argument. While counsel stated generally that this was a strategic decision, counsel did not recall any specifics of this waiver. There was no reasonable strategy and counsel's conduct was deficient. Prejudice was also established, as the state's case lacked any physical evidence connecting the defendant to the crime, there were inconsistencies in the alleged victim's testimony, the alleged victim and a codefendant had a sexually transmitted disease not carried by the defendant, and the defendant had "a relatively strong alibi." By failing to make a closing argument, "counsel lost the final opportunity to present these arguments to the jury."

***State v. Armstrong*, 863 N.W.2d 449 (Neb. 2015)**. Counsel in sexual assault on children case had an actual conflict of interest and was ineffective in stipulating that defense witnesses would be excluded. The case arose from allegations that the defendant, who was retired, sexually abused two twin girls that he babysat routinely after school and before school for his neighbors. The girls had been interviewed on video by a forensic interviewer prior to trial and the videos were released to the defense for trial preparation and for use by the defense expert. Defense counsel provided the videos to the defendant without any instruction not to share the videos with anyone and the defendant's wife and son-in-law intended defense witnesses also viewed the videos. During the trial's opening, the state asserted that the alleged victims' behavior had changed over time due to the alleged abuse and that they had become reluctant to spend time with the defendant. The defense countered in the defense opening that the defendant's wife, son-in-law, and granddaughter would testify that the girls were always happy to stay with the defendant. Following the state's case, the defendant's granddaughter testified followed by the defendant's son-in-law. During cross-examination of the son-in-law, it was discovered that he had watched the videos of the alleged victims' pretrial interviews. Based on a state law making it a misdemeanor to disclose videos of interviews of child sex abuse victims without court permission, the state challenged the son-in-law's testimony. The trial court stating that defense counsel may be guilty of a crime and that he had a right to remain silent heard argument only by the co-counsel. The state focusing on impact on the trial rather than on whether counsel was guilty of a crime stated that there were only two options: (1) a mistrial; or (2) to strike the son-in-law's testimony and precluded testimony by the defendant's wife, who was similarly "tainted." Without asking for a continuance or conducting any research to determine whether the statute had been violated or whether exclusion of the evidence was appropriate, even assuming a violation, counsel agreed to exclude the defense evidence believing this was a better alternative to a mistrial because the defense evidence would still be excluded and the state would have more time to prepare for the defense evidence. Counsel had an actual conflict of interest due to "the prospect of criminal or ethical violations [that] had a chilling effect on defense counsel's representation." "[C]ounsel's interest in avoiding criminal or ethical sanctions was in conflict with Armstrong's interest in presenting the strongest defense possible." Counsel acquiesced to appease the state and the trial court for counsel's benefit rather than as a matter of "trial strategy to benefit Armstrong's defense." Because the conflict adversely affected counsel's performance, prejudice was presumed. Even if no presumption was applied, the court found actual prejudice under *Strickland*. The excluded defense witnesses would have lent credibility to the defendant's testimony. This prejudice was compounded by "the negative inferences the jury could have drawn from the unexplained striking of the son-in-law's testimony and the unexplained absence of Armstrong's

wife." "[T]here is a natural negative inference any time a defendant's spouse fails to testify." This negative inference was "made even worse" here because the jury reasonably expected from the defense opening that the wife would testify.

**2014:** ***People v. Spencer*, 20 N.E.3d 785 (Ill. App. Ct. 2013)**. Counsel ineffective in bench trial of armed robbery with a firearm for failing to object to the trial court's conviction on the separate and distinct offense of armed robbery with a dangerous weapon other than a firearm. The trial court stated there was a reasonable doubt about whether a firearm was used as none was found and noted a sentencing enhancement if a firearm were used. It was error, however, to convict of armed robbery with a dangerous weapon other than a firearm because this offense was not a lesser-included-offense and the defendant had not been charged with this offense. Counsel's conduct in failing to object was deficient and prejudicial. Conviction reduced to the lesser-included-offense of robbery and remanded for sentencing.

**2013:** ***Huertas v. Commissioner of Correction*, 64 A.3d 766 (Conn. 2013)**. Counsel was ineffective in failing to request an increase on bond on two prior charges so that the petitioner could be credited with 17 days of presentence confinement credit on those charges. Counsel had "no strategic reason."

***People v. Johnson*, 991 N.E.2d 396 (Ill. App. Ct. 2013)**. Counsel ineffective in unlawful possession of weapon by a felon and misdemeanor domestic battery case for acquiescing to the joinder of the charges. Counsel's conduct was deficient and prejudicial. In the felon weapon case, the effect of joinder was that the jury was improperly allowed to consider other crimes evidence of domestic violence or threats. While these uncharged acts were admissible on the domestic battery case, they were not admissible on the felon weapon case. This error was exacerbated by improper jury instructions. Likewise, the jury was improperly permitted in the domestic battery case, to consider the defendant's felon status. "[C]ounsel's decision to go along with the joinder was based more on convenience than strategy." Reversal was also required due to "cumulative error" in light of the plain error in the trial court's instructions, which did not limit consideration of the defendant's felon status to the weapons charge.

**2012:** ***State v. Moore*, 289 P.3d 487 (Utah 2012) (*affirming* 223 P.3d 1137 (Utah Ct. App. 2009))**. Counsel ineffective in aggravated sexual abuse and dealing in material harmful to a minor case for failing to press issue of the discrepancy in the alleged victim's testimony about whether incident occurred when he was 13 or 14 years old. Aggravated sexual abuse, a first-degree felony, was applicable only if the victim was under 14 years old. Thus, if the victim was 14, the defendant could be convicted only of a lesser offense. The state conceded that counsel's conduct was deficient and prejudicial on that offense but argued that the pornography charge was unaffected, even though both offenses allegedly occurred on the same day, which was "illogical."

**2010:** ***Middleton v. State*, 41 So. 3d 357 (Fla. Dist. Ct. App. 2010)**. Counsel was ineffective in failing to adequately advise the defendant in capital murder prosecution. During trial, the state moved to strike a juror, who had failed to disclose (when asked) that he had a prior felony conviction. The court struck the juror and informed the defendant he could consent to proceeding with 11 jurors or replacing the struck juror with a previously-dismissed alternate juror. Counsel's

conduct was deficient in failing to advise the defendant of the third option–a motion for mistrial–in light of the defendant's absolute right under state law to have a jury of 12. Without this advice, the defendant consented to proceeding with 11 jurors and was convicted of second degree murder. On initial review, the court found counsel's conduct was deficient and remanded for a determination of whether the defendant would have moved for a mistrial if he had been adequately advised. On remand, the court found that he would have moved for a mistrial, but found no prejudice because the defendant could not demonstrate that the "outcome of a new trial would have been any different." This was erroneous because the defendant needed only to demonstrate a reasonable probability that he would have requested a mistrial and that a mistrial would have been granted.

**2009:** ***Bass v. State*, 674 S.E.2d 255 (Ga. 2009)**. Counsel ineffective in arson and robbery case for failing to object when the county sheriff assumed the duties of the bailiff after providing key testimony for the state. Counsel's conduct was deficient because "no competent attorney could reasonably have believed that [the Sheriff's] service as bailiff would not compromise appellant's constitutional right to a fair jury." Prejudice established where the Sheriff acted as bailiff for half of the trial or a two day period from the beginning of the defense case to the verdict. "[E]ven if it could be assumed that [the Sheriff] never did discuss the case directly with any members of the jury, it would be blinking reality not to recognize the extreme prejudice inherent in this continual association throughout [half of] the trial between the jurors and th[is] key witness[ ] for the prosecution." *Id*. at ___ (quoting *Turner v. Louisiana*, 379 U.S. 466, 473 (1965)). In addition, the state's case was circumstantial and hinged on credibility and a prior jury hung on 23 of 24 counts.

***People v. Centeno*, 916 N.E.2d 70 (Ill. App. Ct. 2009)**. Counsel was ineffective in stolen vehicle plea case for failing to surrender the defendant on his recognizance bond in Will County while he was in custody in Cook County on an unrelated offense. Prejudice established because, if counsel had performed adequately, the defendant would have been in simultaneous custody on both offenses and would have received credit for both offenses. Presentence credit given.

**2008:** ***McCombs v. State*, 3 So. 3d 950 (Ala. Crim. App. 2008)**. Counsel ineffective in murder case for advising the 18-year-old defendant to lie in his testimony and deny that he stabbed the victim, which resulted in the defendant giving up the right to assert self-defense. In light of *Nix v. Whiteside*, 475 U.S. 157, 171 (1986) ("under no circumstance may a lawyer either advocate or passively tolerate a client's giving false testimony"), "[t]here can be no question that the performance of . . . trial counsel falls outside prevailing professional norms and was unreasonable under any circumstance." Prejudice found because the evidence was undisputed that the defendant was told he was outnumbered and was going to get his "butt whooped," that he had been hit by three people, and that he was attempted to run when the victim was killed. Thus, "a defense that [he] acted out of a reasonable belief that an assault was imminent was a viable defense."

***Williams v. State*, 254 S.W.3d 70 (Mo. Ct. App. 2008)**. Counsel ineffective in murder case for failing to adequately establish the defendant's indigence in support of a motion for a psychiatric expert to evaluate the defendant's capacity at the time of the offense and to assist counsel. The defendant was indigent, but counsel was retained for him by his father. Counsel requested funds for a defense expert and presented evidence that the defendant had twice been involuntarily committed

and diagnosed with a schizophreniform type psychosis within several years of the crime. Counsel also presented testimony from the defendant to establish indigence that was inadequate under the state statute requiring an affidavit of indigence and specific information. Counsel's conduct was deficient for failing to present adequate testimony or evidence, which would have entitled the defendant to appointment of an independent expert. Prejudice was found because the court-appointed competence evaluation was insufficient. In addition, prejudice was found despite the defendant's failure to establish the expected testimony of an independent expert. "It would be useless to require such a movant, now proven to have been indigent, to produce at a post-conviction hearing the same expert testimony he could not afford at trial."

**2007:** ***State v. Grogan*, 163 P.3d 494 (N.M. 2007)**. Court affirmed trial court's grant of new trial on its own motion following conviction for great bodily harm by vehicle. The court found that counsel was ineffective. On appeal, the court held that it was appropriate to presume prejudice "when a trial court witnesses gross or obvious incompetence." Here, the defense counsel's failure to secure and review his own expert's opinion before permitting the expert to write the report. While the state examiners had found cocaine and methamphetamines in the defendant's blood it was not quantified. The defense expert did so and his written report was provided to the state, which called him to testify and admitted the report. This was the most harmful evidence against the defendant.

**2006:** ***In re R.K.S.***, 905 A.2d 201 (D.C. 2006). Juvenile adjudicated for unauthorized use of motor vehicle and receiving stolen property was completely denied counsel and prejudice was presumed under *Cronic* due to counsel's refusal to participate in the first day of trial after being denied a continuance. While counsel refused to participate, the juvenile's statement to police and an officer's testimony that the juvenile was a passenger in the car were admitted without objection or even cross-examination.

***Smith v. State*, 905 A.2d 315 (Md. 2006)**. Counsel ineffective in criminal contempt case. The witness, an inmate, was called to testify as a prosecution witness in another case. When the witness sought to invoke his Fifth Amendment right against self-incrimination, the court appointed counsel for him. Counsel informed the court, after discussions with the witness and the prosecutor, that he had advised the witness that he could find no legitimate basis for assertion of the Fifth Amendment privileges. The witness continued refusing to answer questions, although not on the asserted basis of the Fifth Amendment. The court found him in contempt and subsequently imposed a sentence of five months. Counsel's conduct was deficient because counsel, in violation of the attorney-client privilege, disclosed the nature of his advice to the witness and advised the trial judge as to his opinion regarding the application of the Fifth Amendment. In essence, counsel had a conflict due to his attempt to advise the witness and be a friend of the court. He could not do both here. Prejudice found because the trial court relied on counsel's statement in finding that the witness did not have a Fifth Amendment privilege.

**2005:** ***Jackson v. Washington*, 619 S.E.2d 92 (Va. 2005)**. Counsel was ineffective in burglary and grand larceny case for failing to object to the defendant being tried before a jury while wearing a jail-issued "jumpsuit" after the jail misplaced the defendant's civilian clothes and failed to replace them or allow him an adequate opportunity to obtain new clothing. There was no valid strategy where counsel did not object simply because he believed the defendant wanted to go to trial quickly

because counsel new that the defendant also objected to being tried in jail clothing and that his credibility would be a critical issue during the trial. Prejudice found because "[r]eason and common human experience dictate, at a minimum, that the accused's appearance in jail clothes is such a badge of guilt that it would render an accused's assertion of innocence less than fully credible to the jury."

**2004:** ***State v. Guerard*, 682 N.W.2d 12 (Wis. 2004)**. Counsel ineffective in armed robbery and burglary case for failing to adequately seek admission of the defendant's brother's statements against penal interest. The state relied on the victim and an eyewitness, who identified the defendant as the perpetrator. The defendant's brother confessed to his sister and a defense investigator though that he was the perpetrator. During trial, the brother invoked his right to silence. Counsel initially sought to admit the brother's confession to his sister, but did not pursue this or inform the court about the brother's additional confession to the defense investigator. Counsel's conduct was deficient because the brother's statements against penal interest were sufficiently corroborated (by their repetition to several people) to be admissible. Prejudice found because the defense sought to establish that the brother and not the defendant committed the crimes. If the jury had heard the brother's confessions, there was a reasonable probability of a different result.

**2003:** ***Commonwealth v. Brooks*, 839 A.2d 245 (Pa. 2003)**. Counsel was ineffective in capital trial for failing to meet with his client face-to-face prior to trial. Counsel's conduct was deficient in that counsel never once met with the defendant prior to the beginning of jury selection. Counsel spoke only briefly with the defendant by telephone.

> It should go without saying that no lawyer, no matter how talented and efficient, can possibly forge a meaningful relationship with his client and obtain adequate information to defend that client against first-degree murder charges in a single thirty minute telephone conversation.

The court found that face-to-face meetings were important, because

> Without such a meeting, there is little to no hope that the client will develop a fundamental base of communication with his attorney, such that the client will freely share important information and work comfortably with the lawyer in developing a defense plan. Moreover, only a face-to-face meeting allows an attorney to assess the client's demeanor, credibility, and the overall impression he might have on a jury. This is of particular importance in cases in which the client may take the stand in his defense or at the penalty phase in an attempt to establish the existence of particular mitigating circumstances.

The court held that there was no reasonable basis for the attorney's failure to meet with the defendant and that "failure to do so is 'simply an abdication' of the most basic expectations of defense counsel in a capital case." Prejudice found because, in this instance, the attorney's failure to meet with the client and develop a relationship resulted in the defendant proceeding pro se with counsel serving only as standby counsel.

*Capital Case

## II. CAPITAL SENTENCING PHASE ERRORS

### A. NUMEROUS DEFICIENCIES AND INADEQUATE MITIGATION

#### 1. U.S. Supreme Court Cases

**2009:** ***Porter v. McCollum*, 558 U.S. 30 (2009) (Per Curiam)** (sentenced in 1988). Under AEDPA, counsel ineffective in capital sentencing for failing to adequately investigate and present mitigation evidence. The defendant, after proceeding pro se with stand-by counsel, plead guilty to shooting his former girlfriend. His stand-by counsel was appointed to represent him in sentencing and presented only his ex-wife's testimony and an excerpt from a deposition. "The sum total of the mitigating evidence was inconsistent testimony about [the defendant's] behavior when intoxicated and testimony that [he] had a good relationship with his son." *Id*. at 33. No mental health evidence was presented and the trial court found no mitigating circumstances. Because the state court did not decide whether counsel's conduct was deficient, the Court reviewed this element of the claim de novo. While "counsel had an 'obligation to conduct a thorough investigation of the defendant's background,'" *id*. at 39 (quoting *Williams v. Taylor*, 529 U.S. 362, 396 (2000)), counsel "did not satisfy those norms," *id*. Counsel was appointed a month before sentencing and had only one short meeting with the defendant about the sentencing phase. "He did not obtain any of [the defendant's] school, medical, or military service records or interview any members of [the defendant's] family." Where counsel in *Wiggins* failed to "expand[] their investigation," counsel here "did not even take the first step of interviewing witnesses or requesting records." *Id*. "[H]e ignored pertinent avenues for investigation of which he should have been aware." *Id*. at 40. Even court-ordered competency evaluations revealed his limited education, his military service and combat record, and his father's "over-discipline." *Id*. While counsel asserted that the defendant was "fatalistic and uncooperative," the defendant had instructed him not to talk to his ex-wife or son, but otherwise "did not give him any other instructions limiting the witnesses he could interview." *Id*. In short, while the defendant "may have been fatalistic or uncooperative, . . . that does not obviate the need for defense counsel to conduct some sort of mitigation investigation." *Id*. There was also prejudice. In short, the judge and jury at sentencing "heard almost nothing that would humanize [the defendant] or allow them to accurately gauge his moral culpability. They learned about [his] turbulent relationship with [the victim], his crimes, and almost nothing else." *Id*. at 41. Evidence was available that the defendant had routinely witnessed his father beat his mother. He was also routinely beaten by his father, particularly when he tried to protect his mother. His father even shot at him once. He attended classes for slow learners and left school when he was 12 or 13. He joined the Army at 17 and fought in the Korean War. His company commander testified that he fought in two major battles within a 3 month period and was wounded in both. In one of the battles his unit suffered more than 50% casualties. He was individually decorated for his actions in both battles. When he returned to the U.S., he went AWOL and was sentenced to six months' confinement, but he was honorably discharged. *Id*. at 33-34. After his discharge, he suffered from posttraumatic stress disorder (PTSD), which the Court noted is "not uncommon among veterans returning from combat," as the Secretary of Veteran Affairs testified before Congress in 2009 "that approximately 23 percent of the Iraq and Afghanistan war veterans seeking treatment at a VA medical facility had been preliminarily

diagnosed with PTSD." *Id*. at 35 n.4. He also developed a serious drinking problem. An expert in neuropsychology also found that he suffered from "brain damage that could manifest in impulsive, violent behavior." *Id*. at 36. The expert testified that two statutory mitigating circumstances were present: substantially impaired ability to conform conduct and extreme mental or emotional disturbance.

> Unlike the evidence presented during [the defendant's] penalty hearing, which left the jury knowing hardly anything about him other than the facts of his crimes, the new evidence described his abusive childhood, his heroic military service and the trauma he suffered because of it, his long-term substance abuse, and his impaired mental health and mental capacity.

*Id*. at 33. The aggravation evidence "[o]n the other side of the ledger" was not substantial. *Id*. at 41.

> Had the judge and jury been able to place [the defendant's] life history "on the mitigating side of the scale," and appropriately reduced the ballast on the aggravating side of the scale, there is clearly a reasonable probability that the advisory jury–and the sentencing judge–"would have struck a different balance," *Wiggins*, 539 U.S. at 537, and it is unreasonable to conclude otherwise.

*Id*. at 42. Thus, under AEDPA, the state court's finding of no prejudice was "an unreasonable application of our clearly established law." *Id*. at 44. The state court did not consider the expert testimony for purposes of nonstatutory mitigation and "unreasonably discounted the evidence of [the defendant's] childhood abuse and military service." *Id*. at 43. The evidence of childhood abuse "may have particular salience" in a case like this where the defendant killed his former girlfriend. *Id*. The military service was important as "[o]ur Nation has a long tradition of according leniency to veterans in recognition of their service, especially for those who fought on the front lines." *Id*. The military service was also relevant mitigation because of "the intense stress and mental and emotional toll that combat took." *Id*. at 44.

**2005:** ***Rompilla v. Beard*, 545 U.S. 374 (2005)** (sentenced in November 1988). Counsel ineffective in capital sentencing for failing "to make reasonable efforts to obtain and review material that counsel [knew] the prosecution [would] probably rely on as evidence of aggravation at the sentencing phase of the trial," which would have led to significant mitigation. [For additional details, see the summary in the first section on U.S. Supreme Court cases.]

**2003:** ***Wiggins v. Smith*, 539 U.S. 510 (2003)** (sentenced in October 1989). Counsel ineffective in capital habeas case, decided under the AEDPA, for failing to adequately prepare and present mitigation. Prior to trial, counsel had arranged for a psychologist to test Wiggins and had obtained a presentencing report and his social services records. Prior to sentencing, counsel filed a motion to bifurcate sentencing so they could present evidence in the first phase that Wiggins was not directly responsible for the murder (a finding required by state law for death eligibility) and in the second phase could present mitigation. The court denied the motion. In opening statements, counsel argued

both issues and said that Wiggins had a difficult life and no prior convictions. Counsel did not present any life history evidence during mitigation though. Before closing arguments, counsel preserved the bifurcation issue and argued that, if bifurcation had been granted, counsel would have presented psychological reports and expert testimony demonstrating Wiggins' limited intellectual capacity, the absence of aggressive behavior, and his desire to function in the world. In post-conviction testimony, counsel claimed to have investigated "extensively," but counsel in making their proffer did not even mention sexual abuse. This failure is "explicable only if we assume that counsel had no knowledge of the abuse." *Id*. at 533. The Court found that this "may simply reflect a mistaken memory shaped by the passage of time. After all, the state post-conviction proceedings took place over four years after Wiggins' sentencing." *Id*. The Court described the issue in this case as "not whether counsel should have presented a mitigation case. Rather, we focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence of Wiggins' background *was itself reasonable*." *Id*. at 523 (emphasis in original). In this case, the Court held that "[c]ounsel's decision not to expand their investigation beyond the PSI and the DSS records fell short of the professional standards that prevailed in Maryland in 1989," because no "social history report" was prepared even though counsel had funds available to retain a "forensic social worker." *Id*. at 524. "Counsel's conduct similarly fell short of the standards for capital defense work articulated by the American Bar Association (ABA) – standards to which we have referred as 'guides to determining what is reasonable.'" *Id*. (quoting *Strickland*, *supra*, at 688; *Williams v. Taylor*, *supra*, at 396). Applying these standards, the Court found that, "[d]espite these well-defined norms, . . . , counsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources." *Id*. (citing the ABA standards again). The Court found that "[t]he scope of their investigation was also unreasonable in light of what counsel actually discovered" in the records available to them. *Id*. at 525.

> In assessing the reasonableness of an attorney's investigation, . . . , a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further. Even assuming [counsel] limited the scope of their investigation for strategic reasons, *Strickland* does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather, a reviewing court must consider the reasonableness of the investigation said to support the strategy.

*Id*. at 527. In this case, "counsel were not in a position to make a reasonable strategic choice . . . because the investigation supporting their choice was unreasonable." *Id*. at 536. Counsel's conduct was deficient because the trial record revealed that the "failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment." *Id*. at 526. The trial record reflected that "[f]ar from focusing exclusively on petitioner's direct responsibility, . . . , counsel put on a halfhearted mitigation case. . . ." *Id*. The "strategic decision" the courts had found to be reasonable was rejected because it "resembles more a post-hoc rationalization of counsel's conduct than an accurate description of their deliberations prior to sentencing." *Id*. at 527-28. Prejudice was found because counsel did not discover "powerful" evidence of severe abuse from "alcoholic, absentee" parents.

He also suffered "physical torment, sexual molestation, and repeated rape" in foster homes. He also spent time homeless and had "diminished mental capacities." *Id*. at 534-35. The Court found:

> Wiggins' sentencing jury heard only one significant mitigating factor – that Wiggins had no prior convictions. Had the jury been able to place petitioner's excruciating life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a difference balance.

*Id*. at 537. In the final analysis, the Court held:

> Given both the nature and the extent of the abuse petitioner suffered, we find there to be a reasonable probability that a competent attorney, aware of this history, would have introduced it at sentencing in an admissible form. While it may well have been strategically defensible upon a reasonably thorough investigation to focus on Wiggins' direct responsibility for the murder, the two sentencing strategies are not necessarily mutually exclusive. Moreover, given the strength of the available evidence, a reasonable attorney may well have chosen to prioritize the mitigation case over the direct responsibility challenge, particularly given that Wiggins' history contained little of the double edge we have found to justify limited investigations in other cases.

*Id*. at 535.

### 2. U.S. Court of Appeals Cases

**2018:** ***White v. Ryan*, 895 F.3d 641 (9th Cir. 2018)** (resentencing hearing in 1996). At resentencing in Arizona capital case, trial counsel was ineffective in failing to contest the pecuniary gain aggravating factor and failing to investigate and present mitigating evidence concerning petitioner's background and mental health issues. Petitioner was convicted of conspiracy to commit murder and the first-degree murder of the husband of a woman with whom he had been having an affair. There was also a finding of a pecuniary gain aggravating factor based on the state's theory that the victim's wife would share money from the life insurance policy with petitioner. Trial counsel unsuccessfully moved for a competency examination, believing that petitioner suffered from mental dysfunction, based on his strange behavior and the fact that petitioner repeatedly spoke about the case with inmates, prosecution witnesses, the prosecutor, and the victim's wife's lawyer, despite his counsel's advice not to. At the penalty phase, petitioner's counsel did not present mitigation evidence other than that petitioner had no prior felony record. Counsel also argued that the pecuniary gain aggravating factor did not apply because it was the victim's wife who wanted the insurance money, and petitioner only participated in the murder because of his love for or infatuation with her. Some additional mitigating evidence apparently was presented to the court (possibly through the probation report. Petitioner's conviction and sentence were affirmed on appeal, after appellate counsel moved to remand for appointment of mental health experts to determine whether petitioner was competent. The motion noted, inter alia, that petitioner said that the Arizona DOC was monitoring his thoughts through an electrical device attached to an electro-shock therapy machine and that the victim's wife

visited him outside his cell to taunt him. Petitioner also moved the court pro se for a medical evaluation related to his claim that the DOC had implanted a listening device in him. The Arizona Supreme Court denied both motions. The state court granted petitioner penalty phase relief in post-conviction proceedings, during which post-conviction counsel also noted that petitioner exhibited "troubling signs of mental health issues," including letters sent to counsel in which "he did not appear to be close to being lucid." 895 F.3d at 649. The prosecutor testified at the PCR hearing that he did not believe petitioner deserved the death penalty because it was the victim's wife who had done all of the planning, and petitioner would have gone his whole life without committing such an offense but for his relationship with her. The prosecutor also testified it was his office's policy to ask for the death penalty in every first-degree murder case with aggravating circumstances. Petitioner's trial counsel testified he didn't adequately investigate because the prosecutor told him he did not think this was a death penalty case and he didn't either. He recognized that petitioner had "some type of either emotional problem or health-related problem." 895 F.3d at 650. Post-conviction counsel then represented petitioner during the resentencing proceedings. Counsel presented testimony only of the prosecutor who did not believe the death penalty was appropriate, and petitioner who testified about being a model inmate and serving an important role in the lives of his children, even from prison. Counsel argued that the death sentence was grossly disparate from the sentence of the victim's wife for the same crimes – life sentences. Counsel failed to challenge the pecuniary gain aggravating factor, mistakenly believing it had been conclusively decided on appeal. Petitioner filed his own resentencing memoranda pro se, claiming that the DOC had placed implants in his brain to monitor his thoughts and cause him to hear voices, and were torturing him by causing his bones to age faster than that of a pregnant woman. Counsel did not investigate petitioner's background or petitioner's mental health. Counsel instead presented petitioner's statement to the probation officer that "he had a normal childhood. The state court resentenced petitioner to death, finding that petitioner had stated that the victim's wife had asked him to kill the victim, that petitioner had attempted to collect insurance proceeds immediately after the murder, and that no statutory mitigation factors were present. The court rejected the prosecutor's opinions as irrelevant and found the sentences between petitioner and the victim's wife were not disparate because petitioner was the triggerman and planned the killing. It considered, but appeared to reject, the non-statutory mitigating factors presented. The Arizona Supreme Court affirmed. New counsel was appointed to represent petitioner in a second round of state post-conviction proceedings. Multiple requests for funding for a neuropsychologist were denied. Counsel obtained medical and psychological records from the prison, and childhood school records, one of which showed an IQ of 74. An expert was appointed to conduct IQ testing to comply with *Atkins*. The expert reported verbal IQ of 95 and full scale IQ of 91. The post-conviction court approved funding for a mitigation specialist. The post-conviction petition included 13 areas that the mitigation specialist thought should have been presented at trial, including (1) petitioner's hyperthyroidism and Graves' disease, leading to many symptoms including anxiety, hyperactivity and excess energy; (2) psychological impairments, including a diagnosis of schizophrenia from the DOC, irrational thoughts and behaviors, grandiosity, auditory and visual hallucinations, paranoia; (3) borderline intellectual functioning; (4) the culpability of and duress imposed by the victim's wife; (5) family history of violence and criminality; (6) family history of alcoholism and substance abuse; (7) family instability; (8) neglectful parenting, resulting in multiple head injuries, lax supervision and discipline, and failure to send him to school; (9) transience; (10) head injuries likely resulting in brain damage; (11) hyperactivity; (12) inability to support himself and family and poverty; and (13) inability to maintain relationships over time, including lack of friendships, and multiple short

marriages. The state court held an evidentiary hearing, at which counsel who represented petitioner during the penalty retrial and the mitigation specialist testified. The court summarily denied relief, adopting the state's proposed findings of fact and conclusions of law, and determining that resentencing counsel was not ineffective because there was no reasonable probability the court would have found that the pecuniary gain factor was not proven and because counsel either had no reason to investigate the mitigating evidence or made a strategic decision not to do so. Petitioner then filed a federal habeas petition which was denied. The Ninth Circuit reversed the denial, finding that the state court's conclusions that resentencing counsel was not ineffective was an unreasonable application of *Strickland, Coleman v. Calderon*, 150 F.3d 1105 (9th Cir.), *rev'd on other grounds*, 525 U.S. 414 (1998), and *Wiggins*. Counsel's failure to challenge the pecuniary gain aggravator was not based on a strategic decision but instead on a misunderstanding of the law. Counsel's failure to investigate and president mitigating evidence included failure to order readily obtainable records. In addition, "[g]iven the substantial evidence from multiple sources that [petitioner] may have mental health issues and the possibility that such issues would have a mitigating effect on his sentence, it was unreasonable of [counsel] not to investigate further or request funding for an expert investigation." 895 F.3d at 668. The state court's conclusion that counsel was not required to request mental health records absent a suggestion that they would contain mitigating value is both wrong on its face and also an unreasonable factual premise, since there was plenty of evidence of petitioner's mental illness. With regard to prejudice, the state court's finding of no prejudice was contrary to *Strickland* because (1) the court determined that *it* would have imposed the death sentence even with the mitigation evidence brought out in the second post-conviction proceeding, but the determination is an objective one – what would an appellate court independently reweighing the evidence do – not a subjective one; and (2) because the court reviewed prejudice for each of the different types of mitigating evidence separately rather than considering the prejudice cumulatively. As a result, the Ninth Circuit assessed prejudice without AEDPA deference. The Ninth Circuit listed as mitigating evidence petitioner's four father figures; physical and emotional abuse he suffered as a child; poverty, transience, and difficulties forming relationships; his borderline intellectual functioning score; his schizophrenia, Graves' disease, and possible ADHD. It listed as aggravation only the one factor – that petitioner committed the murder for pecuniary gain. It then noted that evidence from multiple sources showed that petitioner was pressured by the victim's wife into perpetrating the crime on her behalf – he "struggled with the decision but eventually agreed because he was infatuated or in love with her. [She] was described as manipulative and a liar; [petitioner] as psychologically vulnerable and emotionally impaired. [She] was the one who, days before marrying a man while seeing [petitioner] on the side, contacted insurers to arrange a payoff from the murder of her soon-to-be husband." 895 F.3d at 672.

***Abdul-Salaam v. Sec'y Pennsylvania Dep't. of Corrections*, 895 F.3d 254 (3d Cir. 2018)** (1995 trial)**.** Trial counsel was ineffective at the sentencing phase of a capital trial involving convictions by a jury of first-degree murder, robbery, and conspiracy based on the attempted robbery of a store and the shooting and killing of a police officer who responded to the scene. The penalty phase lasted one day and the defense presented the testimony of three witnesses, petitioner's mother and two of his sisters. They described some abusive behavior by petitioner's father and one sister indicated food was sometimes lacking in the house hold. Petitioner's mother also mentioned petitioner's placement in a special school because of his "deficit disorder" and his being sent to a rehabilitation program as

a teenager following a juvenile adjudication. During state post-conviction proceedings, the state court held six days of hearings on petitioner's IAC claim. During the hearings, petitioner called 10 witnesses, 8 of whom had not been contacted by trial counsel. They testified that petitioner's father was physically abusive to petitioner's mother, petitioner, and his siblings, including beating them with aluminum bats, leather straps, sticks, and pipes. Petitioner's father hit him on the head, causing him to develop lumps. The witnesses also testified that frequently there was no food in the house and that petitioner was always very hungry. Petitioner's father used cocaine and marijuana, and gave the family's money to the Nation of Islam rather than using it for food, rent, or utilities, which were often turned off for failure to pay. Petitioner's father beat petitioner when he made mistakes reciting the rules of the Nation of Islam. Petitioner's mother took petitioner and his siblings to battered women's shelters several times. Petitioner's father testified and admitted to some, but not all, of these abuses. Lead trial counsel testified that his mitigation strategy had been to present evidence of petitioner's difficult upbringing. Although he had arranged for the appointment of a psychiatrist to evaluate petitioner, he did not follow through because he did not want her to explore events relating to the crime and was concerned about the dangerous side to presenting mental health evidence. He made no further investigation into petitioner's mental health, and did not try to obtain petitioner's school or juvenile records, but could not identify a strategic reason for failing to do so. Second trial counsel also testified that she had interviewed petitioner's mother, one of his sisters and one of his brothers shortly before trial. Petitioner also presented testimony from mental health professionals who, post-conviction, had reviewed and relied upon petitioner's school and juvenile records, which themselves contained records of mental health and educational assessments from the time petitioner was a young child. He attended schools for children with special needs from age 6 through 12, after being evaluated and given a diagnosis of "Unsocialized Aggressive Reaction of Childhood Secondary to Phobic Reactions" and being deemed to have problems so severe they could only be treated in a residential psychotherapeutic facility. His juvenile records indicated difficulty socializing, delinquency, and brief improvements and relapses. Both school and juvenile records indicated that he experienced physical abuse at home and that his home was unstable. The mental health professionals reviewing these records (including the psychiatrist trial counsel chose not to utilize) and evaluating petitioner opined that he had an impaired ability to appreciate the criminality of his conduct or conform his conduct to the requirements of law, that he had organic brain damage and schizotypal features, that he had severe impairments in logical reasoning and cognitive flexibility, and disparity between verbal and performance IQ. The state post-conviction court denied relief, concluding that trial counsel failed to investigate and present the mitigating evidence on the basis of a reasonable strategy, and did not present evidence of mental health because he reasonably believed that it would do more harm than good. The Pennsylvania Supreme Court affirmed. Both state courts reached only the deficient performance prong of *Strickland*, and finding no deficient performance, did not assess for prejudice. Petitioner then filed a habeas petition in federal court. The district court denied relief, finding that although the state court's determination that trial counsel's failure to present mitigation evidence and obtain the institutional records from petitioner's childhood was not deficient was unreasonable, petitioner had not demonstrated that he was prejudiced by counsel's deficient performance. The Third Circuit agreed with the district court that trial counsel's performance was deficient and that the state court's conclusion otherwise was an unreasonable application of clearly established federal law. Trial counsel's failure to pursue expert opinion about

petitioner's mental health, and instead to conclude prematurely that any testimony of an expert might result in warring experts or relitigation of guilt phase issues, was deficient because it was based upon an unreasonably limited investigation that cannot give rise to reasonable strategic choices. Trial counsel's failure to obtain background records had no strategic basis, as counsel admitted, and collection of these records was required under prevailing professional norms at the time. Trial counsel's limited investigation into petitioner's background through interviewing only a few family members rather than interviewing more and then deciding which would present the strongest mitigation case at trial was due to a lack of preparation and not to strategy, and it, too, was deficient. The Third Circuit disagreed with the district court's conclusion that this deficient performance was not prejudicial, an issue addressed *de novo* because it was not reached by the state courts. The Third Circuit did, however, defer to the Pennsylvania Supreme Court's fact-finding to the extent it found that fact-finding reasonable in light of the record. The Third Circuit thus deferred to the state court's factual finding that petitioner did not suffer from organic brain damage or other mental illness at the time of the crime that established the two statutory mental health mitigating factors petitioner pursued. It did consider the testimony by the mental health experts explaining petitioner's school records in the context of a child raised in an abusive home and how that context could explain the development of his issues with impulsive decision making, anxiety, aggression, and anti-social behaviors. The Court concluded that the unpresented family testimony was of a totally different quality than that presented at trial, was not cumulative of that evidence, and that it could have been buttressed by the school and juvenile records that also were not collected or presented at trial. "The evidence presented at the [state] hearings – consisting of extensive and detailed testimony about the poverty and abuse that dominated [petitioner's] upbringing, buttressed by the school records and mental health experts contextualizing those records – presented a far stronger mitigation case than the minimal mitigation testimony presented at trial, which presented the severe physical abuse as an uncommon, instead of dominant, feature of [petitioner's] childhood. If this additional evidence had been presented to the jury, it could have changed the picture of [petitioner's] childhood from one that was abusive and poor in a general sense, with one or two more severe instances occurring over his entire lifetime, to one that appears to have been dominated by severe and pervasive violence at the hands of his father and poverty that often rose to the level of serious deprivation." 895 F.3d at 272.

**2017:** ***Phillips v. White*, 851 F.3d 567 (6th Cir. 2017)** (sentenced in 2001). The Sixth Circuit granted sentencing relief in this Kentucky double murder case that was tried capitally but ended in consecutive sentences of life with parole eligibility after twenty-five years, concluding that defense counsel deficiently failed to prepare or present a defense at sentencing, and that prejudice could be both presumed under *United States v. Cronic*, 466 U.S. 648 (1984), and found under *Strickland v. Washington*, 466 U.S. 668 (1984). The case arose when petitioner, who was intoxicated, shot and killed his two neighbors over a small cash debt which had led to a simmering dispute that included acts of aggression by one of the decedents. While defense counsel made an effort at the guilt or innocence phase, he made clear to the trial judge that he knew nothing about death penalty litigation and was completely unprepared to proceed with a capital sentencing. When the trial proceeded to the penalty phase, counsel declined to propose jury instructions or to object to the prosecution's, declined to give an opening statement, presented no evidence, and gave a brief closing in which he complained about his failure at the first phase and announced he did not "intend to take anymore of

[the jury's] time in this part." Counsel also failed to object to or clarify the prosecutor's statements to the jury implying that the three most severe of the five sentencing options could be considered, while the other two – life with parole eligibility before twenty-five years, and twenty to fifty years – could not. After the judgment was affirmed on direct appeal, petitioner sought state post-conviction relief *pro se* but after six years without a state court disposition, petitioner – again *pro se* – proceeded to federal district court, where relief was denied. With exhaustion being excused, and no state court adjudication to review under § 2254(d), the Sixth Circuit had no difficulty finding counsel's performance deficient because he failed to investigate and present mitigating evidence and failed to clarify that the jury could sentence him to life imprisonment (with the possibility of parole before twenty-five years) or twenty-to-fifty years. With regard to prejudice, the court first determined that counsel's "performance amounted to nonperformance," thereby implicating *Cronic*. The Sixth Circuit added that counsel's failure to ensure the jury understood its lesser sentencing options or to present mitigating evidence also resulted in prejudice under *Strickland*. As for available mitigating evidence, petitioner had offered, inter alia: (1) positive character evidence from family and friends; (2) evidence that petitioner believed that the decedents posed a grave and imminent threat to his wife and stepdaughter; and (3) evidence that petitioner was intoxicated on the night of the shooting. Looking to this evidence, the court concluded that there is more than a reasonable probability that the available mitigation could have influenced the jury's assessment of petitioner's moral culpability and resulted in a different sentence.

**2015:** ***Saranchak v. Secretary, Pennsylvania Dept. of Corrections*, 802 F.3d 579 (3rd Cir. 2015)**(sentenced in September 1994). Under AEDPA, counsel was ineffective in failing to adequately investigate and present mitigation evidence in sentencing. The defendant entered an open plea of guilty to murdering his grandmother and uncle, which was followed by a nonjury degree-of-guilt hearing and then jury sentencing. The defendant challenged counsel's effectiveness in the degree- of-guilt hearing, inter alia, for (1) failing to move to suppress the defendant's confession to police following his arrest in which the defendant "acted as if the officers questioning him were drill sergeants," and (2) failing to investigate and introduce evidence of the defendant's mental health and family history to rebut a finding of intent. No expert testimony was presented during the degree-of-guilt hearing, but counsel presented lay witnesses, including the defendant's girlfriend, to establish that the defendant was intoxicated at the time of the crimes. The girlfriend also testified concerning the defendants' strange militaristic behavior when he was intoxicated. In sentencing, the mitigation testimony, including the state's cross of the girlfriend, consisted of only 40 pages. Her testimony was similar to that during the degree-of-guilt hearing and repeated that the defendant "thinks he's a sergeant" and gives orders when intoxicated. Trial counsel also presented the testimony of Dr. Kruszewski, a court-appointed psychiatrist, who examined the defendant only for purposes of competency and capacity at the time of the offenses and the statements to the police. The psychiatrist met the defendant only once and was not provided with any background information or records other than police records and the defendant's confession, but he was aware and testified that the defendant had a prior psychiatric hospitalization following a suicide attempt. On cross, Dr. Kruszewski conceded that the defendant had no major psychiatric diagnosis or any mental disability. The jury found no mitigating circumstances, which in light of the jury's finding of two statutory aggravating circumstances, made the death penalty a mandatory sentence. In post-conviction, after having reviewed the background records denied him prior to sentencing, Dr. Kruszewski's findings "changed

drastically." He testified to a "Jekyll and Hyde type syndrome" under the influence of alcohol, in which the defendant experienced delusions. He also found a history of depression with two prior suicide attempts and hospitalizations. He concluded that the defendant suffered from "a psychoactive . . . alcohol induced delusional disorder and alcohol induced depressive disorder when drinking" at the time of the crimes. The defendant also presented a psychologist in post-conviction, who testified concerning the defendant's "'highly dysfunctional' family history," including an alcoholic, abusive father and depressed mother, a developmental disorder and special education classes, self-medicating with drugs and alcohol at an early age, and a failed attempt to join the military followed by a "pronounced downward spiral" into a "fantasy world about being in the military." The psychologist found a history of "atypical pervasive developmental disorder" as a child, adult attention deficit disorder, depressive disorder, and a "personality disorder . . . with paranoid and anti-social features." The psychologist agreed with the "Jekyll and Hyde" type psychological problems under the influence of alcohol, which manifested as a "'full blown paranoid disorder" or 'a delusional disorder.'" He concluded that the defendant was experiencing an extreme mental or emotional disturbance at the time of the crimes. The state post-conviction court held that counsel's conduct was deficient in failing to adequately investigate and present the mitigation evidence. The Pennsylvania Supreme Court reversed finding that counsel ended his investigation at a reasonable point because the defendant, his mother, and his girlfriend failed to provide counsel with information concerning the defendant's background. This finding was rejected under AEDPA review because "the evidence before the Pennsylvania Supreme Court clearly and convincingly demonstrates that this premise was false." Trial counsel was aware of the defendant's odd militaristic behavior at times, which was reflected in the police reports, the defendant's confession, and the girlfriend's testimony. With this knowledge, trial counsel sought a court-appointed competence evaluation and focused his theory of defense on "the mental health issue." Counsel's conduct was deficient in failing to obtain a mental health evaluation despite his belief that this was the primary issue and despite the red flags in Dr. Kruszewski's report. The state court's finding to the contrary was an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. The state court's analysis was also an objectively unreasonable application of *Strickland*. Under *Strickland*, especially in light of *Wiggins* and *Rompilla* and a consideration of the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, "a defendant's failure personally to inform his counsel of possible avenues of investigation does not absolve his attorney from pursuing those avenues, particularly where counsel is aware of facts demonstrating that such an investigation may be fruitful." With respect to prejudice, the state post- conviction court found no prejudice. While the Pennsylvania Supreme Court did not reach this issue, the habeas court reviewed "through AEDPA's lens" due to the post-conviction court's adjudication. While the post-conviction court, at times, described the *Strickland* prejudice test correctly, it also, at times incorrectly described the prejudice test as outcome-determinative or a sufficiency-of-the-evidence test. "Thus, at the very least, the PCRA court's analysis constituted an unreasonable application of clearly established federal law." The state court's analysis was also unreasonable because of "[t]he PCRA court's failure to discuss the vast majority of the relevant evidence presented at the PCRA hearing." In short, "the PCRA court brushed aside Saranchak's childhood and mental health problems without analysis," even though "the portrait of Saranchak's troubled life that could have been presented to the jury and the one actually presented were stark." Prejudice was established. The state court's finding to the contrary was an unreasonable application of clearly established Supreme Court case law.

**Capital Case*

****Hardwick v. Secretary, Fla. Dept. of Corrections*, 803 F.3d 541 (11th Cir. 2015)** (sentenced in March 1986). Under pre-AEDPA law, counsel was ineffective in capital sentencing for failing to adequately investigate and present mitigation evidence. Rather than present any evidence in mitigation, counsel simply relied on his closing argument: (1) attempting to undermine the statutory aggravating circumstances; and (2) appealing for mercy based on the defendant's age (25 at the time of the crime) and the sanctity of human life. Trial counsel concluded his sentencing argument with an assertion that the defendant was innocent of murder. The jury recommended death by a seven-to- five vote and the trial court imposed a death sentence. On initial review, the Eleventh Circuit rejected the state court's findings of fact and conclusions of law and remanded to the District Court for an evidentiary hearing. During the hearing "three experienced capital defense attorneys testified as to the standard among defense attorneys in the mid-1980's for investigating and presenting mitigation evidence." Counsel's conduct was deficient. Counsel believed the defendant would be convicted and that the state would seek the death penalty. Counsel was aware of "a number of red flags," that "should have highlighted the need to conduct at least some life-history investigation and at least some mitigation investigation," such as information that the defendant had been physically and sexually abused, and had lived in foster homes and been in the care of social services for a great deal of his youth. Counsel also was aware of "potential sources of mitigating evidence" from notes a public defender had taken during a preliminary interview, which listed the names of family members, schools, and contact information for a prior mental health evaluation center where the defendant had been diagnosed with schizophrenia. Counsel even had the benefit of an evaluation by a court-appointed psychiatrist. Although this evaluation was focused solely on competence and sanity and counsel failed to provide the expert with any background information or records, the report still contained "many red flags" for potential mitigation. Prejudice also established. If counsel had adequately investigated and presented the mitigation, the evidence would have supported a statutory mitigating circumstance of impaired capacity at the time of the murder. Likewise, there was "ample evidence of 'the kind of troubled history [the Supreme Court] ha[s] declared relevant to assessing a defendant's moral culpability." *Id*. at ___ (quoting *Wiggins*, 539 U.S. at 535). The jury and the trial judge heard none of this evidence. All they had was a brief snapshot of the instant Hardwick's life hit rock bottom; absent was the decades-long slide of childhood neglect, abandonment, abuse, instability, mental and emotional problems, intoxication, and addiction that led to that moment. Without this evidence, the prosecutor was free to emphasize repeatedly in closing arguments that there was no mitigation. Even without this evidence, the jury came within a single vote of recommending life. Under these circumstances, there is at least a reasonable probability that the defendant would not have received a death sentence if counsel had performed adequately.

****Pruitt v. Neal*, 788 F.3d 248 (7th Cir. 2015)**. Sentencing relief was granted on two issues: (1) the defendant proved intellectual disability; and (2) counsel was ineffective in failing to adequately investigate and present mitigation evidence that the defendant also suffered from schizophrenia. While trial counsel asserted that counsel was intellectually disabled, the trial court rejected this claim finding no significantly subaverage intellectual functioning and finding no significant deficits in adaptive behavior. With respect to the ineffective assistance issue, trial counsel's theory was to: (1) establish intellectual disability; (2) establish that the defendant "was suffering mental illness at or

around the time of the crime"; and (3) establish that the defendant "had serious brain damage, brain injury, [or] brain dysfunction." Counsel presented one expert witness in sentencing, who testified about the defendant's intellectual disability and neuropsychological problems on the basis of one interview and his testing. This expert "had no experience in the assessment or treatment of individuals with psychotic disorders." Nonetheless, counsel also asked this expert to review the defendant's prison records and discuss his diagnoses. He testified that in 1996, while incarcerated for a different crime, doctors at the federal Bureau of Prisons had diagnosed "schizotypal personality disorder . . . an Axis II mental illness." With schizotypal, according to this expert, "psychotic episodes should be the exception rather than the rule." He further testified that two months after the defendant's arrest in this case, doctors at the Indiana Department of Corrections diagnosed "schizophrenia, chronic undifferentiated type compensated residual." According to the expert, this was similar to the schizotypal personality disorder diagnosis and antipsychotic medication was prescribed due to concern that the defendant "is capable of easily becoming schizophrenic at some time in the future." Based on his review, the expert concluded that the defendant's illness was "not severe enough to be called schizophrenic" so he agreed with the schizotypal personality disorder diagnosis. He then testified about the symptoms of this disorder. He opined that the defendant had been decompensating for six months prior to the crime, if not longer, but he conceded, in response to a juror's question about his firsthand knowledge of the defendant's thought processes, that they had only "talked a little bit about that" and the defendant "said to me basically what's already in the record." Counsel did not ask whether the defendant met the criteria for any statutory mitigating circumstances. Counsel's conduct was deficient in failing to investigate the evidence of mental illness and present accurate evidence on this in mitigation. Dr. Olvera, who had conducted intelligence testing prior to trial, observed possible signs of psychosis and learned that the defendant was taking antipsychotic medications. He recommended that counsel obtain an expert "in dealing with psychosis, such as schizophrenia" but counsel did not do so, despite his awareness that the defendant had been diagnosed in pretrial confinement with schizophrenia and that other examiners examining the defendant for intellectual disability had observed symptoms consistent with schizophrenia. In short, counsel acted unreasonably in ignoring these "red flags" and failing to investigate further. If counsel had done so, evidence such as that presented in post-conviction from two forensic psychiatrists and a clinical psychologist and neuropsychologist would have been available. These experts testified that the defendant suffers from paranoid schizophrenia, an Axis I mental illness, "which is characterized by delusions, hallucinations, and thought disorder." This evidence, in conjunction with the intellectual disability, supported two statutory mitigating circumstances at the time of the crime: (1) extreme mental or emotional distress; and (2) substantially impaired capacity to conform his conduct to the law. The state court denied relief on this claim finding that counsel made "a deliberate, strategic decision to concentrate on Pruitt's intellectual disability rather than his mental illness." This was an unreasonable application of *Strickland* in light of counsel's testimony that he sought to prove both intellectual disability and schizophrenia. Even assuming counsel did choose intellectual disability over schizophrenia, "that choice was made after less than thorough investigation, and as a result, the decision was not fully informed and was unreasonable." "[T]he evidence of mental illness was much weaker than the intellectual disability evidence only because counsel failed to investigate more fully Pruitt's mental health." Because the state court did not assess the prejudice prong, the Seventh Circuit's review was conducted "de novo."

Prejudice was established. This was not simply "a 'battle of the experts' over the severity of Pruitt's mental illness" or the correct "psychiatric terms and labels." The sentencing judge found no statutory mitigating circumstances, when at least two were established by the evidence of mental illness. Thus, there is a reasonable probability that this evidence might have affected the assessment of the defendant's "moral culpability" and the jury and the judge might have concluded that death was not warranted. It is clear from the jury's question to the defense expert that the jury wanted to know the defendant's "thought processes" at the time of the crime.

***Bemore v. Chappell*, 788 F.3d 1151 (9th Cir. 2015)** (tried and sentenced in 1989). Under AEDPA, counsel ineffective in capital sentencing for failing to adequately investigate and present mitigation evidence. Counsel's conduct was also deficient during the trial phase, but no prejudice found during trial. The trial deficiencies were considered, however, in a cumulative prejudice analysis for sentencing. In denying relief, the state court addressed the "good inmate" issue in depth, but summarily denied the other claims "without analysis or citation to authority." The federal court, therefore, applied "AEDPA deference" to the "good inmate" claim, but otherwise reviewed the issues de novo. The defendant was convicted of robbing and killing a clerk at a liquor store. During trial, the defendant testified asserting an alibi that he was committing a different robbery at the time of this offense. Counsel's investigation of this defense was limited to reviewing police reports of this separate robbery and the preliminary hearing testimony of eyewitnesses to that crime, who had identified the defendant as the perpetrator. Counsel's investigation and preparation of the defendant's testimony was deficient in: (1) failing to adequately prepare the defendant as a witness resulting in his inability to supply basic facts about the crime, forgetting his own direct testimony on cross, and providing details that were easily disproved, such as relying on landmarks that did not exist at the time of the crime; (2) failing to investigate the geographical layout, which would have revealed the problems with the landmark testimony and revealed that it was possible for the same perpetrator to have committed the separate robbery and the liquor store robbery based on the timing of the offenses and the distance between them; and (3) failing to interview the eyewitnesses to the separate offense, which would have revealed that one would completely recant and that the others were not certain in their identification of the defendant. Counsel's conduct was also deficient in failing to investigate a potentially viable alternative mental health defense, based on "[m]edical expert reports and statements by Bemore's family and friends, all known or readily available to" counsel at the time. If counsel had adequately investigated the mental health defense, counsel may well have "determined that a mental health defense, even if a longshot at the guilt phase, was the superior choice in view of the impending penalty phase," so as not to risk losing credibility in the sentencing phase from presentation of a weak denial defense during the trial. *Id*. at ___ (citing *Florida v. Nixon*, 543 U.S. 175, 191-92 (2004)). With respect to sentencing, counsel's conduct was deficient in failing to adequately investigate and present the mitigating evidence. Counsel had read an article from Dr. Kenneth Fineman about his "sun children" theory – "minority children from poor homes who, because of their talents become immersed in affluent white society, but then subsequently act out and, due to the psychological stress of having to live in two different worlds, begin using drugs." Counsel hoped to use this theory for the defendant, "an African-American and former star basketball player recruited to play at several colleges." In essence, counsel's mitigation strategy was to show the defendant "as a good guy with a drug problem." She retained Dr. Fineman to conduct psychological testing and was

"surprised" and "angry" when his 18 page report made no mention of "sun children." Thus, counsel did not use Dr. Fineman and instead proceeded anyway with her "good guy with a drug problem" theory. Counsel's conduct was deficient because Dr. Fineman had reported a number of psychological problems, including "'mild, diffuse organic brain impairment,' attention-deficit disorder; and poor impulse control." Based on his findings, he listed several "'diagnostic considerations,' including 'bi-polar affective disorder,' 'intermittent explosive disorder,' and 'anti-social personality disorder.'" He recommended further testing to reach a mental health diagnosis, which was not pursued. Instead, counsel called over 40 witnesses to testify about the defendant's good character. Prejudice was established, nonetheless, as "[m]any of these witnesses knew Bemore only slightly." Moreover, "a good character defense was unlikely to be persuasive to a jury that had just decided that Bemore had carried out a grizzly murder, including torturing the victim, and had lied on the stand to boot." Additionally, while some of these witnesses did mention the defendant's drug problems and tumultuous upbringing, this was "not enough" because "particularly persuasive evidence–especially evidence in the form of expert testimony–was omitted." Counsel's "good guy," including "good inmate" strategy, also opened the door to damaging rebuttal testimony about the defendant's "bad behavior in jail," including assaults and escape planning, which counsel had unreasonably failed to investigate and anticipate. Even if it were reasonable to present the "good guy" theory, this could have been presented in addition to mental health evidence. "A defense that Bemore was 'a good guy with a drug problem,' was fully consistent with a defense that he was a good guy who was plagued by a drug problem and mental illness." The court also considered the 25 year to life sentence imposed on the co-defendant in a separate trial by the same trial judge in the prejudice analysis. The co-defendant received this lesser sentence despite being convicted of a second robbery and murder in the same trial because his attorneys "presented evidence of impaired judgment due to drug use and organic brain damage." Finally, the findings of deficient conduct during the trial "support" the conclusion of prejudice in sentencing because "putting on a guilt phase defense both unlikely to succeed and likely adversely to affect the jury's view of Bemore for the penalty phase–must be viewed cumulatively in determining whether the *Strickland* prejudice standard was met with regard to the jury's decision to sentence Bemore to death."

***Doe v. Ayers*, 782 F.3d 425 (9th Cir. 2015)** (tried and sentenced in 1984). Under pre-AEDPA law, counsel ineffective in capital sentencing for failing to adequately investigate and present mitigating evidence in sentencing. Because the court "discuss[ed] disturbing evidence of sexual abuse suffered by the Petitioner" and was concerned about "the possibility that publication of this information might place him at risk in a prison environment" of further details, actual names and some details were omitted from the opinion. Counsel's conduct was deficient and prejudicial in failing to adequately investigate and present evidence that "relates to sexual abuse he suffered while previously incarcerated in a notorious prison in the South, as well as to mental illness, neglect and abuse he suffered during his childhood, and substance abuse."

> "[D]eath is different[.]" *Ring v. Arizona*, 536 U.S. 584, 587, 122 S. Ct. 2428, 153 L.E.2d 556 (2002). So too are the lengths to which defense counsel must go in investigating a capital case.

*Id*. at 435. Counsel had only one "perfunctory" interview with his client and did not follow-up on the information learned from the "limited investigation" that was discovered and "missed clear indications . . . that his client was repeatedly raped in prison." Counsel's failures "were not excused by the alleged failure of Doe (and his family) to be completely forthcoming." Counsel spoke at length only wife the defendant's mother and aunt, but when he went to the defendant's home state, he did not get out of the car. He spoke to the mother by phone, "but did not conduct any in-person interviews." He spoke to no one other than those called to testify. When the investigator "went to Doe's home state, he, at least, got out of his car," but failed to "ask obvious questions . . . . about [the defendant's] upbringing or behavioral signs of mental illness." He also met "only once with each interviewee" and then only in the mother's home. "Obviously, interviewees are less likely to be forthcoming about sensitive topics in the presence of family members and friends." While counsel did retain a psychologist with "the professional expertise necessary to discover and present the compelling mitigating testimony regarding Doe's mental health that went unheard at trial, . . . she was limited by the terms of her engagement," which asked her to consider only "mental state defenses" for the trial. "In addition to having a limited scope, the investigation that Dr. M.R. conducted was abbreviated." She was paid for less than 13 hours of time and provided only with police reports as background information. "This left [counsel] effectively without the assistance of any expert at all at the penalty phase," because "[h]iring an expert to evaluate possible guilt-phase mental-state defenses does not discharge defense counsel's duty to prepare for the penalty phase." The only witnesses called in sentencing "were family and friends attending the trial. Some of them were not told that they would be testifying until they arrived." The state argued that counsel's conduct was "an acceptable trial strategy," which was "both doubtful and disturbing" because "spur- of-the-moment mitigation presentations form no part of constitutionally adequate representation."

> Witness preparation is a critical function of counsel. . . . A lawyer needs to know the nature of the testimony he will elicit, and a witness needs to understand the proceeding in which he is participating. Our case law, and an elementary understanding of the function of a trial lawyer in our adversary system, make plain that although there is no requirement of rehearsal, not preparing penalty-phase witnesses at all is not a legitimate defense method in a capital trial.

*Id*. at 443. Despite the state argument, counsel conceded deficient conduct "because of a combination of inexperience and overconfidence" and "never attempted to justify his actions as based in strategy." Under these circumstances, which the court found to be "to his credit," the "presumption" of reasonable conduct fell. Counsel's conduct was also prejudicial in light of the "fairly minimal" aggravation evidence presented and the "brief . . . , haphazard, and thoroughly underwhelming" mitigation evidence presented. The most compelling mitigating evidence not presented was supported by multiple prison guards and inmates and consisted of the brutal and repeated rape of the defendant in prison when he was just 17-years-old and incarcerated for stealing two purses. "[T]his evidence alone would have stirred sufficient compassion or understanding in the jury to result in a life sentence." There was also "mental illness" as a result which was "obvious to those who knew him." He had symptoms of post-traumatic stress disorder, major depression, and self-medication, resulting in poly-substance dependence. This also was sufficient to establish prejudice

on its own. There was also evidence of childhood abuse and neglect that "would have been powerful" and substance abuse that, while note alone prejudicial, would "have helped to sway the jury when considered cumulatively, alongside the other mitigating evidence."

**2014:** ***DeBruce v. Commissioner, Alabama Dept. Of Corrections*, 758 F.3d 1263 (11th Cir. 2014)** (tried in February 1992). Under AEDPA, trial counsel was ineffective in failing to adequately investigate and present evidence in mitigation. Counsel's conduct was deficient and "was the result of inattention, not reasonable professional judgment." Counsel was retained only three to four weeks prior to trial and did not hire an investigator because he did not have the funds to pay for one and did not have time. Counsel interviewed only the defendant and his mother in preparation for sentencing and presented testimony only from the mother. She testified that DeBruce graduated from high school and attended college, "and that although he had an impoverished childhood, it was otherwise unremarkable." She made "passing mention to DeBruce's treatment for a mental disorder, although this statement was not accompanied by any explanation of the disorder or its effects." The state court held that counsel's conduct was not deficient in failing to investigate after a pre-trial report found the defendant competent.

> [T]he Alabama Court of Criminal Appeals concluded that [counsel] did not fail to conduct a reasonable investigation because [counsel] testified during the state collateral hearing that the information he received did not lead him to question DeBruce's competence to stand trial or to consider defending DeBruce based on a lack of mental capacity. However, DeBruce's fitness to be tried and decisions about whether to present a mental health defense during the guilt phase are separate issues from the decision whether to investigate and present mitigating evidence during sentencing. . . . [E]ven if we accept the state court's factual determination that [counsel] made a strategic decision not to investigate mitigation evidence based on the results of the pre-trial report governing DeBruce's competency to stand trial, that decision could not have been reasonable as it would have been based on a failure to understand the law. Because no lawyer could reasonably have made a strategic decision to forego the pursuit of mitigation evidence based on the results of the pre-trial report governing competency to stand trial, the Alabama Court of Criminal Appeals' conclusion to the contrary constitutes an unreasonable application of *Strickland*'s performance prong.

*Id*. at ____ (emphasis in original) (citations and footnotes omitted). Counsel's conduct "was all the more unreasonable" because the competence report, school records, and the "youthful offender investigation report" filed by a probation officer with the court contradicted the information supplied by the defendant's mother and counsel still did not investigate. "As a result, [counsel] permitted DeBruce's mother to present grossly inaccurate testimony during her son's sentencing hearing" that he had been "a successful student who had attended college." Prejudice established because the evidence through experts and the testimony of two of the defendant's sisters would have revealed that DeBruce was raised in an impoverished family of eleven child with an alcoholic father who was verbally abusive, experienced violence in his neighborhood, including being frequently attacked by

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gangs and witnessing stabbings and shootings, daily severe abuse at the hands of his older sister who would beat him and threaten him with a knife, as well as lock him in a closet and withhold meals, dropped out of school in the seventh grade at age 16, developed substance abuse problems during his teenage years, suffers from mental impairments, including brain damage and blackout episodes consistent with seizures), and low intellectual functional (IQ scores between 76 and 79), and has a painful intestinal disorder. The state court found no prejudice, in part, "because of its view of the mental health evidence as 'conflicting,'" but this finding "lacks support from the record." The defense experts did not present "conflicting" testimony and the state's expert, while disputing serious mental illness or defect, conceded that the defendant had low intellectual functioning.

> Moreover, in applying *Strickland* in cases where counsel has failed to introduce any of the available mitigating evidence of the defendant's mental impairment and history of abuse that should have been discovered by adequate investigation, the Supreme Court has repeatedly rejected arguments that the defendant is not prejudiced by the complete omission of this type of evidence.

*Id*. at ___. Thus, the state court "unreasonably applied *Strickland*" in finding no prejudice.

**2013: *_James v. Ryan_, 679 F.3d 780 (9th Cir. 2012) (sentenced in 1982) (_reaffirmed_ 733 F.3d 911 (9th Cir. 2013) following Supreme Court's GVR for consideration under _Johnson v. Williams_, 133 S.Ct. 1088 (2013))**. Under AEDPA, counsel ineffective in capital sentencing for failing to adequately investigate and present mitigation evidence. In a third state habeas petition, the state court held that the claim was procedurally barred. At the conclusion of the lengthy state court opinion rejecting 38 claims, the court included a paragraph holding that no hearing was warranted as no claim was "colorable." Because the state court "expressly stated" that it denied the claim "as procedurally barred," the Ninth Circuit rejected the State's argument that *Harrington v. Richter*, 131 S. Ct. 770 (2011), required a presumption that the state court's final paragraph was an alternative merits ruling. The court, thus, reviewed the claim de novo. Counsel's conduct was deficient because (1) counsel "failed to conduct even the most basic investigation of James's social history," despite "obvious indications that James had suffered emotional and psychological trauma during his childhood" in a pretrial competency report and a presentencing report. Counsel failed to interview James's adoptive parents, his biological family, or "others who knew him" and "failed to obtain readily available educational records." (2) Counsel failed to investigate James's mental health, despite awareness of several past suicide attempts and pretrial detention psychiatric care for "cyclothymia, a form of bipolar disorder," and medication with lithium. Counsel moved for the appointment of a forensic psychiatrist, which was denied, but then declined additional evaluation by pretrial competence examiners. (3) Counsel failed to investigate James's history of drug abuse, despite "clear cues that James had a history of polysubstance abuse and dependency" in the pretrial competence report. While counsel "argued James's diminished capacity because of LSD intoxication at the time of the offense as a mitigating circumstance," he "failed to appreciate that chronic drug abuse itself evinces, as well as exacerbates, serious mental illness." Prejudice established because substantial mitigation

> was available but counsel presented only "meager mitigation evidence" in sentencing. Counsel could have presented "a detailed picture of James's troubled childhood, his mental illness, and his downward spiral of depression and drug abuse in the year before [the] murder." James had "utterly unfit parents who exposed [him] to violence, drug abuse, poverty, and sexually predatory adults." He suffered physical and sexual abuse, was a dismal student, a high school dropout, and a habitual drug user.

**2012:** ****Winston v. Pearson*, 683 F.3d 489 (4th Cir. 2012) (*affirming Winston v. Kelly*, 784 F. Supp. 2d 623 (W.D. Va. 2011))** (arrested in 2002). Counsel ineffective in capital case for failing to develop and present evidence of mental retardation. In sentencing counsel presented records of the petitioner's psychological evaluations and testimony about his family history "as ordinary mitigating evidence to illuminate [the petitioner's] troubled childhood and subaverage intellectual functioning, but not to establish mental retardation." In state court, petitioner presented evidence that the petitioner's school records included a mentally retarded classification but was unable to present any evidence concerning the basis for this diagnosis. The petitioner also had available three IQ scores in state court but all exceeded 70, which was the maximum score Virginia accepts as evidence of mental retardation. The federal district court granted an evidentiary hearing on both mental retardation and ineffective assistance. Petitioner produced for the first time a 1997 IQ test reflecting a score of 66. Counsel revealed that they obtained the school records but failed to "read the complete records" before sending them to their court-appointed mental-health expert. Thus, counsel did not notice the "mental retardation" classification or interview any teachers or counselors at the school. If they had, several school officials would have testified about the petitioner's "severe limitations in cognitive functioning." Likewise, one of these officials had the 66 IQ score saved on a computer disk in her office at the time of trial. Without this information, the court-appointed expert, who also did not recall whether he considered the mentally retarded classification in the school records, concluded that the petitioner was not mentally retarded. Without this information, counsel chose not to present the mental health expert to testify because he also concluded that the petitioner exhibited antisocial behavior and had a capacity for future dangerousness. Initially, the district court declined to consider the evidence presented in federal court and declined relief. The Fourth Circuit remanded finding that it was appropriate to consider the evidence that had not been reviewed by the state court. The District Court granted relief and this appeal followed. The Court reaffirmed its prior holding after analyzing *Pinholster* and *Richter* based on the state court's refusal to order discovery or an evidentiary hearing. Counsel's conduct was deficient in failing to review the school records and interview school officials. In relying only on the court-appointed examiner to review the school records, "counsel abdicated their responsibility" to investigate. Prejudice was also established. Although petitioner cross-appealed on the question of whether he would be allowed only a mental retardation hearing of an entirely new sentencing hearing, the state conceded that "state law likely requires" a full resentencing proceeding.

***Stankewitz v. Wong*, 698 F.3d 1163 (9th Cir. 2012) (*affirming* 659 F. Supp. 2d 1103 (E.D. Cal. 2009))** (sentenced in 1984). Under pre-AEDPA law, counsel's conduct in capital resentencing was

deficient in failing "to conduct even the most basic investigation." *Id*. at 1166. Counsel did not hire an investigator or interview "teachers, foster parents, psychiatrists or anyone else who may have examined or spent time with [petitioner] during his upbringing." *Id*. Counsel did not interview anyone involved in the initial trial proceedings in 1978. Counsel did not obtain a mental health evaluation, even though he believed petitioner was incompetent. Counsel ineffective in capital case for failing to adequately investigate and present mitigating evidence. Although counsel presented six witnesses in mitigation, three provided no information specific to petitioner. The other three provided "only vague references" to petitioner's history. Counsel "also focused very little on the actual details of [petitioner's] life during his closing arguments." Id. Counsel's conduct was not based on strategy. In short, rather than "presenting a narrative that might have humanized [petitioner] to the jury," counsel chose "simply to ignore the state's presentation" of aggravation evidence. Prejudice found because there was substantial mitigation evidence available of: (1) a childhood of abuse/neglect; (2) a history of mental illness; and (3) substance abuse/lack of sleep prior to the murder. The jury, however, "had heard next to nothing about [petitioner's] traumatic childhood." *Id*. at 1174. Nonetheless, several jurors initially voted for life before finally reaching a unanimous verdict.

***Hooks v. Workman*, 689 F.3d 1148 (10th Cir. 2012)**. Counsel ineffective in capital sentencing for failing to adequately investigate and present mitigation, failing to mitigate aggravation evidence, and actually bolstering the aggravation case. Counsel's conduct was "woefully inadequate" in failing to investigate.

> Evidence of family and social history was sorely lacking; the mental-health evidence presented was inadequate and quite unsympathetic; and [counsel] not only failed to rebut the prosecution's case in aggravation but actually bolstered it by his own statements.

Counsel's statements and the statements of the defense expert "served to vilify [the petitioner] in the eyes of the jury." Counsel presented testimony from the petitioner's sister and mother, but neither testified for much more than one page of transcript. It "was perfunctory, to put it mildly." "Even the most minimal investigation would have uncovered a life story worth telling: a premature birth, an openly abusive father, frequent moves, educational handicaps, and personal family tragedies." Counsel also presented an expert. While the expert did say that petitioner had a "form of psychosis," he characterized the petitioner as "violent" and "crazy." Counsel "made little effort to connect [the expert's] diagnosis to the circumstance of the crime." This was deficient, because "[c]ounsel in capital cases must explain to the jury why a defendant may have acted as he did–must connect the dots between, on the one hand, a defendant's mental problems, life circumstances, and personal history and, on the other, his commission of the crime in question." To make matters worse, it was revealed on cross that the expert "knew almost nothing" about the case. He had not even read police reports or listened to the confession. In short, counsel "totally failed to prepare his witness." If counsel had adequately investigated the mental health evidence, the jury would have known that "the mental-health problems were enduring." In childhood, the petitioner struggled in school, was evaluated for mental retardation, and was placed in special education classes. While the Court

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rejected his mental retardation claim, "no one disputes that by the time of trial he had been clinically diagnosed with mild or borderline mental retardation." There were also "clear markers for organic brain damage due to a premature birth and head injuries from an 18-wheeler accident. This was powerful mitigation evidence because "the involuntary physical alteration of brain structures, with its attendant effects on behavior, tends to diminish moral culpability, altering the causal relationship between impulse and action." Counsel also failed to rebut evidence of a prior armed robbery conviction, which was one of the three aggravating circumstances. "Even a cursory investigation into the circumstances surrounding this crime would have revealed a much less sordid tale" than the one told by a police officer testifying for the state. The truth was that the petitioner took $35 from a cash drawer in a liquor store and returned home with that and a sack containing a handgun. He told his mother what he had done and she immediately took him to the police station. While this evidence "would not have entirely negated the violent-felony aggravator, it certainly would have softened its edge." Counsel also bolstered the prosecution's aggravation by effectively conceding the continuing threat aggravator in his opening statement. Prejudice was established.

**2011:** ****Blystone v. Horn*, 664 F.3d 397 (3rd Cir. 2011)** (sentenced in 1984). Counsel ineffective in capital sentencing for failing to adequately investigate and present mitigation evidence. Counsel's conduct was deficient because of an "extremely limited investigation." At most, counsel interviewed the petitioner, his parents, and one sister, whom counsel "unintentionally encountered in the hallway of the courthouse during trial." Counsel sought no background records. The Court did "not delve too deeply into" this question because the Commonwealth "all but concedes" that counsel's conduct was deficient.

> [T]h[e] duty to conduct a reasonable investigation of mitigating evidence exists independently of counsel's duty to present a mitigation case to the jury. In fact, the former is a necessary predicate to the latter: if counsel had failed to conduct a reasonable investigation to prepare for sentencing, then he cannot possibly be said to have made a reasonable decision as to what to present at sentencing.

*Id*. at 420. Counsel's investigation of mental health evidence was limited only to reliance on a pretrial competence evaluation. As the District Court held, "[i]t is beyond cavil that the scope of an evaluation for purposes of mitigation at a capital sentencing proceeding is far broader than that for competency at trial." *Id*. at 421. Nonetheless, the competency report contained "'red flags,' which a qualified expert would have found to require follow-up prior to sentencing. But counsel never even presented the competency evaluation to an expert." *Id*. Under AEDPA, the state court conclusion that counsel's conduct was not deficient was unreasonable. Counsel's explanation that the petitioner wanted "all or nothing" was also rejected. The fact that the petitioner turned down a deal for life "in no way compels the conclusion that he wanted to die if convicted." *Id*. at 422. Regardless:

> "The investigation for preparation of the sentencing phase should be conducted regardless of any initial assertion by the client that mitigation is not to be offered." Counsel cannot avoid the consequences of his inadequate preparation simply by

> virtue of the serendipitous occurrence that, on the day of sentencing, his client stuck with the decision not to go forward with a mitigation case.

*Id*. at 422 (quoting ABA Guidelines). Here, counsel did not do that investigation. Indeed, counsel "did not even perform an investigation sufficient to provide the foundation for a reasoned strategic choice." *Id*. at 423. Instead, the failure to investigate "was merely the consequence of lackluster performance." *Id*. The Court also rejected the state court finding that the petitioner waived his right to present mitigation. The Court distinguished *Schriro v. Landrigan*, 550 U.S. 465 (2007). Trial counsel never intended to present any testimony at sentencing other than petitioner and his parents. Prior to sentencing, counsel informed the court that petitioner wished to waive mitigation. The court's colloquy "focused almost entirely" on whether petitioner wanted to take the stand or have his parents testify. The only question about whether he wanted to present any other evidence was part of a compound question: "Do you wish to testify yourself or to have your parents testify or to offer any other evidence in this case?" *Id*. at 425. The petitioner "waived, at most, all lay witness testimony." *Id*. at 426. There was no indication that petitioner was even aware that "any other form" of mitigation could be presented. *Id*. Counsel still could have presented "expert mental health evidence and institutional records," *id*., including Navy records, prior prison records, and the report of the competence evaluation. Under AEDPA, the state court's conclusion of waiver was unreasonable. Prejudice was also found. Petitioner suffers "from serious untreated brain damage and psychiatric disorders, all of which were aggravated by a history of poly-substance abuse." *Id*. at 406. The psychiatric disorders diagnosed by petitioner's experts were bipolar disorder with major depressive episodes, and borderline personality disorder. The expert testimony and records evidence would have supported mitigating circumstances of substantially impaired capacity, extreme emotional distress, and adaptability to confinement. Thus, there is a reasonable probability that the mitigation evidence "would have convinced one juror to find the mitigating factors to outweigh the single aggravating factor," *id*. at 427, of murder in the perpetration of a felony.

***Sowell v. Anderson*, 663 F.3d 783 (6th Cir. 2011)** (sentenced in 1983). Under pre-AEDPA law, counsel ineffective in capital sentencing for failing to adequately investigate and present mitigation evidence. Counsel's mitigation strategy was to portray the petitioner "as a good person who lost his temper under the influence of drugs and alcohol." Counsel presented only two former probation officers, two work colleagues, petitioner's common-law wife, and an unsworn statement from the petitioner. The entire mitigation case totaled "only thirty-four pages of transcript" and included no mention of petitioner's "formative years." Counsel pursued this strategy despite having reports from court-appointed experts that "hinted at" petitioner's "difficult background" and without any investigation of petitioner's background or interviews of his family members. Because counsel failed to investigate, counsel "were not in a position to make a conscious, strategic decision about the type of mitigation case to present at sentencing." *Id*. at 790. In short:

> There is nothing wrong with a mitigation strategy that emphasizes a capital defendant's redeeming qualities. But. . . . [c]ounsel's failure to present evidence of [petitioner's] horrific childhood resulted from their ignorance of this evidence, not from an informed choice between mutually exclusive mitigation theories.

*Id*. In other words, "[a]n attorney does not make a strategic decision by choosing to ignore a body of evidence, the contents of which are unknown. This is not strategy." *Id*. at 791. Family interviews would have revealed that petitioner's "early life was abusive, impoverished, and totally chaotic." *Id*. His father was an abusive alcoholic, who was frequently absent but when present "the family lived in terror." *Id*. His mother was only 15 when she married. She "lacked basic parenting skills and vocally wished her children were dead or had never been born." *Id*. at 791-92. She often left the children "without supervision for days at a time." *Id*. at 792. The physical and psychological abuse continued into petitioner's adolescent years. His father also sexually molested petitioner's sister and threatened to kill her if she reported it. The family also lived in "extreme poverty." A younger brother died of starvation and the children often "had to beg for and steal food." *Id*. The children were also "bitten by rats, infected with worms, and lacked sufficient clothing and shoes." *Id*. Housing was also inadequate and petitioner was "living in a junkyard, on his own, in a tent" by the time he was 14. *Id*. Aside from family interviews, counsel also failed to pursue "obvious leads contained in the written reports of court-appointed experts." *Id*. These reports gave indications of the "troubled childhood." Even if counsel chose to emphasize the positive while ignoring the "horrific childhood," this "is not easily considered a reasonable mitigation strategy, particularly where the additional evidence would not have been inconsistent with–and might even have strengthened–the mitigation case counsel did present." *Id*. at 793-94. In other words, the evidence could have shown "that petitioner was capable of generosity and good acts in spite of the upbringing that he endured." *Id*. at 794. In addition, this was not "a case where counsel could have legitimately feared that digging deeper into [petitioner's] past would turn up evidence that was more damaging than favorable," because petitioner's entire criminal record and arrest history was already included in the evidence. Thus, "the panel already knew the worst." *Id*. Prejudice found. The reports of the court-appointed examiners spoke only "in generalities that lacked any details of the severe abuse and abject poverty" of petitioner's "formative years." *Id*. at 795.

> In contrast, [petitioner's] family members offered first-hand, eyewitness accounts of specific examples of extreme poverty and abuse. These specifics had far more evidentiary power than the abstractions and oblique references contained in the experts' written reports.
>
> What is more, the experts themselves never heard any of these details when they conducted their evaluations.

*Id*. At bottom:

> [Petitioner's] actions as an adult–good and bad–are merely a snapshot in time, unilluminated by the longitudinal perspective that his developmental history provides. . . . It is evidence of a lifetime of privation and abuse, beginning in early childhood and continuing throughout the formative years of [petitioner's] life.

*Id*. at 796.

**Capital Case*

****Foust v. Houk*, 655 F.3d 524 (6th Cir. 2011)** (sentencing in December 2001). Counsel ineffective in capital sentencing for failing to adequately investigate and present mitigation in hearing before three-judge panel. While the petitioner's parents and a psychologist testified, "their testimony pales in comparison to the horrific accounts detailed in records from Children's Services and in affidavits from [the petitioner's] siblings." Prior to trial, the court-appointed a psychologist to evaluate competence and sanity. Shortly before trial, without notice even to the psychologist, the defense sought funding to retain him as a "mitigation specialist." The psychologist informed counsel that normally a social worker is retained to prepare for capital sentencing. The psychologist recommended numerous times that counsel obtain records, including the Children's Services records, and interview witnesses, but counsel did only "minimal work" in preparation for sentencing and did not even meet with the psychologist or any of petitioner's family members, including the parents. Because the state court adjudicated the merits, "[w]e therefore afford double deference to both state-court decisions on both prongs of the Strickland test." Counsel's conduct was deficient in failing to obtain records and interview family members, even though the petitioner's "dire upbringing formed the crux of the mitigation strategy." The court could not "fathom why" counsel failed to obtain the Children's Services records for the 24-year-old petitioner, especially with the psychologist pushing them to do so. "There is no question that a reasonable attorney would believe records of [the petitioner's] childhood to be relevant to a defense about the conditions of [the petitioner's] childhood." Counsel also did not interview the petitioner's siblings or even his parents, who were called to testify. Counsel had only four pages of notes and suggested questions that the psychologist prepared for them the day before sentencing began. The state court's ruling–that counsel's failure to obtain the records and interview siblings was "a tactical decision"–was "nonsensical." This was not a case like Van Hook where counsel failed to "dig deeper." Here, counsel "failed to interview anyone or seek any" records. Counsel's conduct was also deficient in failing to interview the psychologist about his investigation and findings. "By neither interviewing [the psychologist] about his investigation nor conducting any independent investigation, [the] attorneys in effect delegated to [the psychologist], who is not an attorney, the strategic decisionmaking about how to present [the] mitigation defense." Counsel's conduct was also deficient in failing to hire a "trained mitigation specialist," even though they had "a clinical psychologist." This is "particularly troublesome" here when counsel knew of the petitioner's "difficult background" and the psychologist informed counsel that "that most death-penalty investigations include a mitigation specialist, which he was not." Even if the psychologist was qualified as a mitigation specialist, he did not fulfill that role here as he was unable to collect the Children's Services records and did not adequately interview family members. Prejudice also found. The state court's finding to the contrary was unreasonable because "[t]he testimony at the mitigation hearing 'only scratched the surface of [the petitioner's] horrific childhood.'" The unpresented evidence "paints an altogether different picture of [the petitioner's] childhood." The petitioner grew up in squalor and chaos that was documented repeatedly by Children's Services; and suffered maternal abuse, both emotional and physical, and neglect, which was also documented by Children's Services. In sentencing, the three-judge panel heard only minimal evidence of the conditions of the home and was "misled" into believing that only the petitioner's father had been abusive. The petitioner's childhood home was also filled with incest and sexual abuse of his sisters, none of which was presented in sentencing. The petitioner's "acclimation to sexual abuse of women is particularly relevant because rape was one of the aggravating circumstances that supported the death

penalty." There was also available evidence of "good acts" by the petitioner, but no "positive" evidence was presented in sentencing. The fact that the post-conviction judge that rejected relief was also the presiding judge of the three-judge sentencing panel made no difference as "Ohio law requires unanimity among a three-judge panel for a sentence of death. Thus, 'any one of the three judges alone could have prevented imposition of the death penalty.'" Moreover, the post-conviction judge's conclusion of no prejudice was not reasonable. While the aggravating circumstances were "overwhelming" and the "crime was heinous" and "gruesome," prejudice was still clear. "Powerful aggravating circumstances . . . do not preclude a finding of prejudice."

***Goodwin v. Johnson*, 632 F.3d 301 (6th Cir. 2011)** (sentenced in December 1994). Counsel ineffective in capital sentencing for failing to adequately investigate and present mitigation. Counsel presented no evidence in sentencing and instead argued residual doubt. Counsel's conduct was deficient as counsel had "little contact" with petitioner and his family and did not obtain "school, medical, and family history records." Counsel claimed he did not present mitigation to avoid opening the door to evidence of five armed robberies in the petitioner's criminal history. Counsel declined a court-ordered presentence report and psychiatric evaluation because of his belief that there was "nothing psychiatrically wrong" with the petitioner. Counsel in closing even discounted youth as a mitigating factor and told the jury that it would insult their intelligence to rely on mental health evidence. Following the jury's recommendation but prior to imposition of sentence, the defendant's aunt spoke in mitigation. If counsel had obtained juvenile court records, he would have been aware that there were only two adjudications for robbery and one for criminal trespass, rather than five armed robberies. The records also revealed a serious drug problem. School records included an evaluation at age 14 that revealed an IQ of 73. A psychologist that examined the defendant at age 15 in juvenile proceedings testified that she diagnosed conduct disorder but she also found the possibility of dysthmia or depression. Family interviews revealed neglect by a drug-using mother and physical and sexual abuse by others. All of this information would have suggested the need for a mental health evaluation. Prejudice also established. Under AEDPA, the state court's determination to the contrary was unreasonable.

***Cooper v. Secretary, Dept. of Corrections*, 646 F.3d 1328 (11th Cir. 2011)** (sentenced in January 1984). Counsel ineffective in capital sentencing for failing to adequately investigate and present mitigation evidence. The jury recommended death for three murders with votes of 9-3 and 7-5. The only mitigation witness to testify before the jury was the petitioner's mother. A psychologist testified before the judge but was not called before the jury for strategic reasons (i.e., the defendant admitted to him firing four shots while he had admitted to police firing only two shots). Counsel's conduct was ineffective in failing to adequately investigate and to interview others, particularly the petitioner's brother and sister, his school principal, and his ex-girlfriend. Because the state did not offer any argument challenging the District Court's finding that counsel's conduct was deficient, "the State has abandoned that claim." Regardless, the court found counsel's conduct was deficient "[u]nder the prevailing standards in 1984." Counsel did not adequately investigate and unreasonably decided to end the background investigation after talking to no one other than the petitioner, his mother, and one expert. While counsel sought to argue that the petitioner was impulsive and acting under the domination of another, could "did little to follow through with this strategy." While

counsel knew from the expert that the petitioner had been abused by his father, they did nothing to further develop this information once they decided not to call the expert. Under AEDPA, "fairminded jurists could not disagree about whether the state court's denial of this claim was inconsistent with earlier Supreme Court decisions." The state court's finding of no prejudice was an unreasonable determination of the facts. The petitioner's mother had testified that the petitioner's father abused her and the petitioner witnessed it. She gave no testimony about the father abusing the petitioner as the state court found. In addition, the mother's testimony "did not begin to describe the horrible abuse" described by the petitioner's brother and sister that was inflicted not just by their father but also by the older brother that testified in post-conviction proceedings. Thus, the state court's finding that the mother had presented a "substantial part" of the available mitigation was "a great exaggeration." Prejudice was, therefore, reviewed de novo without "AEDPA deference" and found. If counsel had adequately presented the evidence, two statutory mitigating circumstances that the trial judge had rejected would have been established: (1) age at the time of the crime; and (2) substantial domination by another. While the judge knew the petitioner was barely over 18, he did not hear the evidence that the defendant was "barely removed from being violently abused by his father and brother." Likewise, while the judge heard an expert's opinion that the petitioner was dominated by a co-defendant, the judge did not hear evidence from the lay witnesses, who described the petitioner's susceptibility to domination by older, dominant males during his childhood. In addition, the available evidence would have established multiple categories of nonstatutory mitigation including horrific abuse by his father and brother; drug and alcohol abuse by age 11; abandonment by his mother for long periods; learning deficits; an IQ of 75; and depression. The state emphasized "the dearth of evidence in mitigation" in closing arguments. Given that some jurors had voted for life even without this substantial mitigation, this evidence made it "possible" that "more jurors would have voted for life."

***Johnson v. Secretary, DOC*, 643 F.3d 907 (11th Cir. 2011)** (sentenced in 1980). Counsel ineffective in capital sentencing for failing to adequately investigate and present mitigation evidence. The jury recommended death by a 7 to 5 vote after hearing only brief testimony from family members and testimony from a psychologist who saw the defendant in a detoxication program he voluntarily entered less than five weeks before the crimes. She testified that his primary problem was "a character disorder" and that "alcoholism was secondary." While she testified that the defendant sincerely wanted to cure his problems, the program had been inadequate because "it was geared to people whose alcoholism is primary instead of secondary." Counsel's conduct was deficient. He conceded that he knew well before trial "that he had little or no chance of prevailing" on the question of guilt-or-innocence. Counsel had asked a jail psychologist to do "a personality profile," but did not interview family, "family physicians, or any school teachers," and did not obtain school records. The jail psychologist did only two personality tests, diagnosed "conduct or behavior disorder," and disclosed this information to the prosecutor and the judge, as well as defense counsel.

> The question under *Strickland* is not whether . . . trial counsel's overall performance at the sentence stage was exemplary or even average, but whether he conducted an adequate background investigation or reasonably decided to end the background investigation when he did. . . . And as the recent *Harrington* decision

> emphasized, because our deficiency inquiry is governed by AEDPA, the question is not just if counsel's investigative decisions were reasonable, but whether fairminded jurists could disagree about whether the state court's denial of the ineffective assistance of counsel claim was inconsistent with Supreme Court precedent or was based on an unreasonable determination of the facts. If fairminded jurists could reasonably disagree, then habeas relief is due to be denied.

*Id*. at 931-32 (citations omitted). Here, "[g]iven the overwhelming evidence of guilt, any reasonable attorney would have known, as [counsel] testified he actually did know, that the sentence stage was the only part of the trial in which [the defendant] had any reasonable chance of success." *Id*. at 932. Nonetheless, counsel "waited until the eleventh hour" to begin preparing for sentencing. Although counsel was aware that the defendant had a bad childhood, including an alcoholic and abusive father, counsel did not investigate or seek a continuance until after conviction on Friday with the sentencing to start on Monday. He did nothing other than speak to the defendant's father and he investigated no further when the father denied being an abusive alcoholic.

> No reasonable attorney who has every expectation that his client will be convicted and will be facing a death sentence would wait until the guilt stage ended before beginning to investigate the existence of non-statutory mitigating circumstances. No reasonable attorney, after being told by his client that he had an abusive upbringing, would fail to interview members of his client's family who were readily available and could corroborate or refute the allegations of abuse. No reasonable attorney told by his client that he had an alcoholic and abusive father would fail to pursue those non-statutory mitigating circumstances simply because the father denied it. . . .
>
> [I]t was unreasonable for him not to allocate even a few hours of time before the trial to investigating his client's claim of having been abused by an alcoholic father.
>
> This is not a case in which counsel relied on what his client told him, or failed to tell him, about his background. It is, instead, a case in which counsel failed to adequately investigate what his client did tell him.

*Id*. at 932-33 (citations omitted). In short, counsel's failure "was not influenced by": (1) a strong possibility of getting his client acquitted of the capital murder charge"; (2) "what his client said or failed to say," (3) "avoiding the possibility of opening the door to what could be harmful evidence"; or (4) "any difficulty in finding other family members or in getting them to talk." *Id*. at 934-35. The state court's determination was an unreasonable application of *Strickland*. "In *Harrington* terms, fairminded jurists could not disagree about whether the state court's denial of this claim was inconsistent with earlier Supreme Court decisions, including *Strickland* and *Williams v. Taylor*." *Id*. at 935. Prejudice was reviewed de novo as the state court had not decided the issue. "Prejudice established, as numerous family members would have testified. While the defendant's father had testified previously in sentencing, he had not been prepared and denied at that time that he was an abusive alcoholic. "The description, details, and depth of abuse . . . far exceeded what the jury was

told." *Id*. at 936. The jury never heard even that both parents were abusive alcoholics. While the jury heard that the defendant had been placed in an orphanage and with grandparents at times, they jury was not told that it was because the father abandoned him. While the jury was given the impression that the grandparents were caring and nurturing, they inflicted horrible physical and emotional abuse on the defendant, including rubbing his face in his own urine when he wet the bed. The jury did not hear that the defendant witnessed repeated suicide attempts by his mother. Likewise, although the jury heard that the defendant blamed himself for his mother's death and his brother's death in Vietnam, the jury "did not learn that his mother killed herself the same way his brother died–with a drug overdose. And the jury was not told that [the defendant] found his mother's body, with a photograph of his dead brother clutched in her hands." *Id*. at 937.

***Ferrell v. Hall*, 640 F.3d 1199 (11th Cir. 2011)** (sentenced in September 1988). Trial counsel ineffective in capital sentencing for failing to adequately investigate and present mitigation. Appellate counsel ineffective in failing to assert trial counsel's ineffectiveness. During sentencing, the defense presented five family witnesses, whose combined testimony and a break lasted only 26 minutes. These witnesses testified that they believed the petitioner was innocent and that he was a Christian, but they did ask for mercy. The available evidence through experts, records, and lay witnesses would have established that the petitioner suffers from organic brain damage, mental illness (probably bi-polar disorder), an epileptic or seizure disorder, and borderline mental retardation. He also had an impoverished and abused childhood, but always had a strong work ethic. His mother was schizophrenic and his family history included depression. While the Georgia Supreme Court's opinion on whether trial counsel was ineffective was viewed through the prism of AEDPA, the state court never reached the prejudice prong of the appellate counsel ineffectiveness claim and, therefore, AEDPA did not constrain federal court review. Nonetheless, the Court's "determination about prejudice would be exactly the same" whether AEDPA applied or de novo review. "Trial counsel conducted a profoundly incomplete investigation, and its judgment to so sharply limit its inquiry" was deficient conduct. The state court's conclusion to the contrary was an unreasonable application of Supreme Court law. The "mental health investigation was unjustifiably and unreasonably circumscribed." While counsel did obtain a mental health evaluation pretrial, the evaluation was limited to whether the petitioner was retarded and whether he suffered from any problems that would affect the waiver of *Miranda* rights. Likewise, the expert was not asked to look for evidence of brain damage, was provided with no material other than school records, was not asked to perform a clinical interview, and was not asked to even consider mitigation despite "the many red flags" raised about the petitioner's mental health such that counsel and the retained investigator "harbored serious questions" about petitioner's mental health. In addition, the petitioner had a seizure during the charge conference, but counsel did not seek a continuance or to have a mental health evaluation. Counsel also failed to even ask the family members who testified about the petitioner's mental health. Indeed, the investigator who had actually interviewed 40-50 witnesses, "only asked statutory character evidence questions . . . and only followed up with them if they said anything positive" about the petitioner. The questions were basically taken from the state statute governing character evidence and sought information on reputation in the community and opinion of the petitioner's truthfulness. While counsel claimed a "residual doubt" strategy, "[t]he long and the short of it is that defense counsel had nothing else to rely on because they looked for

nothing else." Thus, this "strategy" was "completely undermined" and did not "explain adequately why they unreasonably limited their mitigation investigation." Likewise, counsel's closing argument "undercut" any possible "residual doubt" strategy in that counsel said the petitioner's story of innocence was "absurd," "ludicrous," and the like. Counsel also "raised for the jury the question hovering over the entire trial, why [petitioner] did it–the very question that could have been answered by the powerful mitigating mental health evidence easily developed later."

> Even though counsel asked "why" . . . , counsel never conducted an investigation that would have begun to answer this question, and never offered the jury the slightest reason. . . .
>
> In short, the record . . . establishes that counsel at most pursued a half-hearted residual doubt defense, and then eviscerated that defense with his observations about the inadequacy of defendant's explanations. The real thrust of the defense at sentencing was not residual doubt, but rather, mercy.

Prejudice was also established and the state court "unreasonably determined" otherwise. First, "the 'new' mitigating evidence is consistent, unwavering, compelling, and wholly unrebutted." Second, the mental health evidence also "measurably weakens the aggravating circumstances found by the jury." The state argued that the crimes were "cold-blooded, execution-style, and planned out," such that they were "outrageously and wantonly vile." The mental health evidence would have served to reduce the volitional nature of the crimes, as well as the petitioner's ability to plan and act rationally. Third, the mental health evidence "would have easily and directly supported" the argument for mercy that "counsel offered at sentencing." It also would have answered the "repeated questions to the jury about why" the crimes were committed. Finally, the mitigation evidence presented at trial "was very sparse." Appellate counsel was also ineffective. During a motion for new trial, new counsel asserted ineffective assistance of counsel. She was provided funding to hire a mental health expert but not an investigator. While counsel asserted that trial counsel had not adequately investigated mental health, she hired a psychiatrist, but asked him to evaluate only competence and sanity. She provided him only with the trial expert's report and jail records. She did not even provide him with information known to her about the petitioner's seizure during trial, his mother's mental illness, or indications of the petitioner's mental illness. While the expert reported that the petitioner reported hearing voices, counsel did nothing with this information. The state court's determination that counsel's conduct was reasonable was an unreasonable application of *Strickland*. It was also unreasonable to conclude that the "other" mitigation investigation was not deficient. She presented three of the same family members who testified in sentencing, but did not elicit the kind of mitigating evidence that she claimed she sought to establish. She did not track down additional witnesses and did not "dig deeper with the witnesses she did have." She also "affirmatively presented harmful testimony." While the mother of petitioner's children testified that he tried to be a good father, she also provided harmful testimony. Specifically, in response to counsel's question, she could not answer whether she would have asked the jury to show mercy. Counsel also failed to even speak with the trial investigator and the limited nature of that investigation was not even referenced. Prejudice established for the same reasons as with trial counsel's ineffectiveness.

**Capital Case*

**2010:** ****Griffin v. Pierce*, 622 F.3d 831 (7th Cir. 2010)** (Sentenced in June 1985). Counsel ineffective in capital sentencing (death sentence later commuted to life imprisonment) for failing to adequately investigate and present mitigation in sentencing. Counsel presented only the defendant and one witness, who volunteered in the courtroom, to testify briefly in mitigation. Prejudice established because the evidence would have revealed petitioner's father's alcoholism and abusiveness, his mother's absence from the home, the impact of his mother's death, his diagnosis of schizophrenic reaction, and his drug addictions. The state court held there was no reasonable probability that the sentencing judge would have found that the mitigating evidence precluded the death penalty. The Seventh Circuit held:

> The question is not whether a particular judge would have imposed a different sentence, but rather whether there was a "reasonable probability" that the sentence would have been different. In assessing that probability we conduct an objective evaluation of the evidence.

*Id*. at 845. The state court had also considered the seriousness of the crime and petitioner's lengthy criminal history, "but it did not properly evaluate the totality of the mitigation evidence and reweigh it against the aggravation evidence as it must." The state court's decision was also unreasonable under AEDPA because it viewed the available mitigation evidence as "cumulative and not inherently mitigating," which was wrong on both fronts. While the presentence report contained some information about petitioner's history, it was incomplete and also inaccurate as it portrayed a normal childhood with good relationships with his parents when petitioner's "childhood was anything but normal." *Id*. at 845.

**2009:** ****Johnson v. Mitchell*, 585 F.3d 923 (6th Cir. 2009)** (retrial in 1986). Under AEDPA, counsel ineffective in capital sentencing for failing to adequately investigate and present mitigation. Counsel had represented the defendant in post-conviction arguing successfully that original counsel had failed to adequately investigate and present mitigation and then, in the retrial, counsel "himself committed the same grievous error." Counsel's sole preparation for sentencing was "reading the transcript of the . . . first trial" and speaking with the defendant. "Such inaction on the part of defense counsel in this case amounted to a complete abdication of the attorney's duty to investigate and present evidence in mitigation." He offered no mitigation evidence and relied only on the defendant's unsworn statement, which chastised the factfinders at length for failing to acquit him. "Thus, in effect, [counsel] merely replayed the disastrous initial trial a second time. Not surprisingly, the same result followed." When counsel did speak with the defendant, he asked only that the defendant provide him with the names of people who say anything "good" about him.

> Obviously, confining investigation in the defense of a capital case to only the "good" things that could be said about the client cannot be considered a reasonable investigation.

*Id*. at 942. At minimum, there were relatives willing to testify. "Without their testimony, the jury was left with no alternative but to believe that [the defendant's] own relatives were not supportive

enough of him to plead for his life." *Id*. These witnesses also could have provided "a more compassionate tint to the portrait," *id*. at 943, by providing humanizing testimony about the defendant's background and life. The state court's finding that counsel's conduct was not deficient was an unreasonable application of *Strickland*. Because the state court had not reached the question of prejudice, the Sixth Circuit reviewed this issue de novo.

> In order to establish prejudice, the new evidence that a habeas petitioner presents must differ in a substantial way–in strength and subject matter–from the evidence actually presented at sentencing.

*Id*. (quoting *Hill v. Mitchell*, 400 F.3d 308, 319 (6th Cir. 2005). Here, there was evidence that the defendant had been frequently beaten by his father. He was also exposed to violence in school and in his predominantly white neighborhood where the black defendant was forced to defend himself numerous times. The defendant also had diagnoses of cocaine abuse and mixed personality disorder.

***Libberton v. Ryan*, 583 F.3d 1147 (9th Cir. 2009)** (tried in June 1982). Under AEDPA, counsel ineffective in capital sentencing. Counsel's conduct was deficient because counsel "spent very little time preparing for sentencing." Although counsel had funds to hire an investigator, the investigator never interviewed anyone. Counsel did not interview the defendant's sister or ask the defendant's mother to testify, even though he did talk to her. Instead, counsel presented only two mitigating witnesses, "both of whom were only tenuously connected" to the defendant. Other than that, the sentencing court had a presentence report reflecting hearsay statements from the defendant's father that "his son is a liar and thief" and reflecting his opinion that his son "may have been the leader in planning the crime." Prejudice established as there was evidence available that the crimes were instigated by a co-defendant and the defendant was "merely a follower." Likewise, evidence was available to impeach a second testifying co-defendant who portrayed the defendant as an equal participant in the crimes. Finally, there was significant evidence that the defendant was seriously physically abused by his father and a step-father during his childhood. This evidence was not only mitigating but "could have seriously undercut his father's opinion" presented through the presentence report.

***Hamilton v. Ayers*, 583 F.3d 1100 (9th Cir. 2009)** (tried and sentenced in 1982). Under AEDPA, counsel ineffective in capital sentencing for failing to adequately investigate and present mitigation evidence. Counsel's conduct was deficient in his first capital case.

> [H]e never even thought about retaining a mitigation expert or a mental health expert. Moreover, he did not have the benefit of a more experienced attorney's advice, as he did not associate co-counsel.

The investigation consisted of five interviews conducted shortly before jury selection began. The interviews, including that of the defendant's sister, did not address the defendant's childhood at all, even though the sister "could have provided countless details about the physical and mental abuse [the defendant] suffered as a child." Counsel also failed to investigate further after his investigator learned from the defendant's uncle that the defendant's sister had been sexually abused by her father

while her mother acquiesced, and the family moved from place to place in the military. This was "classic mitigating evidence" that was not pursued. The other three interviews conducted revealed nothing as "each of them lasted only one to two minutes" and related only to events around the time of the crimes. A number of available witnesses were never contacted, including a sister who was a co-defendant, and available "documentary evidence" was never pursued, even though "[m]any of these documents were in fact in defense counsel's possession, but he never reviewed them." The unreviewed records, which were collected by the investigator just prior to sentencing, included information that the defendant's father's was sexually abusive, which resulted in the defendant being placed in foster care. Counsel was aware that the defendant had attempted suicide in prison and that he was taking antidepressants at the time of trial but did not investigate and discover other records that revealed that the defendant "had suffered from serious mental illnesses throughout most of his life."

> Defense counsel thus should have retained a mental health expert and provided the expert with the information needed to form an accurate profile of [the defendant's] mental health.

While counsel testified that the defendant was uncooperative, "[a] defendant's lack of cooperation does not eliminate counsel's duty to investigate." The court found *Schriro v. Landrigan*, 550 U.S. 465 (2007), "distinguishable" because "at most [the defendant] refused to assist in his defense; he did not impede the many other avenues of mitigating evidence available to counsel." Nonetheless, during sentencing, counsel "presented almost none of the mitigating evidence he had discovered." The entire penalty phase, including counsel's "anemic presentation," covered only 39 pages of transcript. Counsel waived his opening statement. He then presented only the defendant's mother to testify, but with "scant questioning" and lack of preparation, this testimony covers only 5 pages of transcript and "left the false impression that [the defendant's] childhood, while unhappy, was not unusual." Because the mother was involved in the abuse of the defendant and his siblings and testified as a prosecution witness during the trial, she "was one of the worst witnesses that defense counsel could have presented to the jury." Counsel also did not explain "the significance of the meager mitigating evidence during closing" and mentioned the mother's testimony only once. Counsel even "validated" the prosecution's characterization of the defendant's childhood "as 'unfortunate' but neither unusual nor extreme," even though "the environment in which [the defendant] grew up was extraordinarily abusive and atypical in almost every sense." Counsel's "strategy" to beg for mercy was unreasonable under these circumstances.

> Limiting the scope of a penalty phase presentation to evidence that the defendant is a good person who has done good deeds is, in and of itself, unreasonable where there is an extreme unlikelihood that any testimony about the defendant's character would be sufficient to humanize him.

Prejudice established. The evidence not presented would have revealed that the defendant's family moved 11 times in a 13 year period during the defendant's childhood. His father was an abusive alcoholic, who would kill the children's pets and terrorize them. He fought with his wife "wield[ing] butcher knives" in front of the children. He beat the defendant regularly, "but otherwise ignored

him." The parents were sexually inappropriate in front of the children and made them watch while the mother performed oral sex on the father. The father also sexually abused the defendant's sister for four years, while the mother acquiesced and even assisted at times by holding her daughter down or participating sexually. The defendant was aware of this activity and "tried to defend his sister, but his father beat him and threatened to kill him." When the sister reported the abuse to an uncle, the parents were arrested and the children were taken into protective custody. The father was convicted and "adjudged a mentally disordered sex offender." The defendant moved "from one foster home to another" after that. He was initially placed with an uncle until he observed the uncle also molesting his sister. From the time he was twelve years old, the defendant's records revealed "serious mental health problems," including schizophrenia and depression. He had attempted suicide and was still being treated for depression at the time of trial. Mental health problems and sexual abuse "were rampant in [the defendant's] immediate and extended family as well." In denying relief, the District Court "went astray by holding counsel to a lesser standard of performance than existed in 1982," even though compliance with the ABA Standards for Criminal Justice "was as crucial in 1982 as it is today."

> [W]e need not decide whether standard practice at the time of trial included retaining a "mitigation expert"–someone specially trained in investigating and presenting mitigating evidence at the penalty phase of a capital trial–because the deficient performance here did not result from counsel's failure to hire a specialized investigator. Rather, it resulted from counsel's failure to pursue obvious leads provided by the people he did interview, to review relevant documents that were in his possession, and to present to the jury the mitigating evidence of which he was aware.

**2008:** ***Bond v. Beard*, 539 F.3d 256 (3rd Cir. 2008)** (sentenced in Feb. 1993). Under AEDPA, counsel ineffective in failing to adequately investigate and present mitigation. Counsel presented "seven family members and friends at the penalty phase hearing" to testify generally about "good character and willingness to help others." The post-conviction testimony "painted a very different picture than that presented at the penalty hearing." In short, the defendant "endured an extremely troubled and deprived childhood." His mother drank, gambled extensively, and physically abused the defendant. The family lived in "poverty, disrupted by periods in which the family lacked food, utilities, or adequate clothing." The defendant "ate lead paint chips at certain points in his youth." There was "pervasive drug use in the home and . . . heavy gang presence in their neighborhood." School records reflected substantial absences from school, which his mother testified were "caused by his unstable family circumstances." Counsel did not discover this information because "counsel did not inquire into [the defendant's] background in any meaningful fashion." Counsel did not obtain school and hospital records and had only "brief and perfunctory discussions" with the family "between the guilt and penalty phases" of trial and "did not inquire into family dynamics or background." Counsel retained a mental health expert to evaluate capacity to understand Miranda warnings, but did not talk to the expert after receiving his report or inquire about the tests administered or anything the expert learned about the defendant's background. Counsel's conduct was deficient.

> We do not doubt that the prospect of representing a defendant at a capital penalty phase hearing can overwhelm even experienced lawyers. Nor does it surprise us that a first-degree murder verdict would disappoint defense attorneys who have worked hard during a trial. But that does not excuse trial counsel's failure to prepare for the penalty phase prior to the handing down of the conviction. These attorneys, particularly in the face of a record so full of testimony calling for a first-degree murder verdict, should not have waited until the eve of the penalty phase to begin their preparations.

*Id*. at ____. Because counsel did not obtain "readily available" school and medical records and did not "conduct a meaningful inquiry into [the defendant's] family life," they "failed to give their consulting expert sufficient information to evaluate [the defendant] accurately."

> Trial counsel did not investigate possible mitigating circumstances or ask experts to do so. Instead, counsel conducted an ad hoc and perfunctory preparation for the penalty phase the night before it began. Their "strategy" relied on an uninformed guess as to the best available way to present [the defendant] to the jury. We will not excuse this conduct on the ground that [the defendant] and his family members did not tell counsel that his background provided fertile territory for mitigation arguments. Neither [the defendant] nor his family had a duty to instruct counsel how to perform such a basic element of competent representation as the inquiry into a defendant's background. They did not, as the Commonwealth suggests, have to volunteer "red flags" about [the defendant's] mental health when trial counsel should have discovered that information through a basic inquiry into his background.

*Id*. at ____ (citing and quoting the American Bar Association's Guideline for Appointment and Performance of Counsel in Death Penalty Cases). Counsel, here, "neither began their investigation at an appropriate time nor attempted to discover reasonably available mitigation evidence. They thus failed to meet prevailing standards of timeliness and quality." Counsel compounded this error by deciding at the eleventh hour for co-counsel with no capital experience to take full responsibility for sentencing. "[N]o amount of good intentions makes up for his lack of experience and preparation." The state court "applied *Strickland* in an objectively unreasonable fashion in concluding that counsel performed adequately." The state court holding also rested "in part on the unreasonable factual determination that trial counsel began meaningful preparations for the penalty phase at a point prior to the eve of the penalty phase. The record includes no evidence to that end." The state court also "incorrectly" relied on strategy.

> It is difficult to call . . . counsel's decisions "strategic" when they failed to seek rudimentary background information about [the defendant]. Strategy is the result of planning informed by investigation, not guesswork.

*Id*. at ____. If counsel had performed adequately, the evidence would have established: (1) neglect, along with physical and psychological abuse, as a child; (2) severe cognitive impairments, likely from birth; (3) ingestion of lead paint chips, as well as fetal alcoholism, are consistent with a finding of

organic mental deficit; and (4) Post Traumatic Stress Disorder ("PTSD"), caused by the abuse he suffered as a child, being attacked by gang members, and/or the stillborn birth of one of his children. If counsel had performed adequately, the evidence would have supported two statutory mitigating circumstances ("under the influence of extreme mental or emotional disturbance" and substantially impaired capacity "to appreciate the criminality of his conduct or to conform his conduct to the requirements of law") and the catch-all mitigating circumstance. The state court's conclusion that the state's expert had thoroughly refuted the defense experts in post-conviction, "rendering any claim based on their testimony 'meritless,' . . . rests on an unreasonable factual determination." "[C]ounsel could have obtained testimony from family members that would have given the jury a very different impression than that left by the other penalty phase testimony. This testimony would not contradict earlier testimony, but rather provide details not uncovered by trial counsel at the penalty phase hearing." The state court found no prejudice.

> That court apparently equated the paltry testimony at the penalty phase hearing with the vastly expanded testimony provided by friends and family members at the PCRA hearing. The two sets of testimony brook no comparison. The first left the impression that [the defendant] came from a supportive (if poor) family but went on a crime spree after the type of disappointments many people face in life. The second showed that he had grown up in an extraordinarily dysfunctional environment rife with abuse and neglect. The penalty phase testimony may have suggested some difficulties during [his] youth, but this does not prevent relief. Strickland permits relief where, as here, trial counsel presented some mitigation evidence but could have introduced evidence that was upgraded dramatically in quality and quantity. The PCRA court's conclusion that [the defendant] had failed to show prejudice, however construed, either reflects an unreasonable determination of fact (in the comparison of the two sets of testimony) or an objectively unreasonable application of controlling law (in denying relief on the basis that [the defendant] already had presented some mitigating evidence).

*Id*. at ___.

> A reasonable lawyer who understood [the defendant's] life history would not have proceeded on the theory that he had led a productive life before going on a crime spree as a result of a series of disappointments. Such an attorney instead would have presented evidence to the jury of [the defendant's] abusive and neglectful family life, his low intelligence, and his psychiatric and psychological problems. There is a reasonable probability that this different course, even in the face of competing expert testimony introduced by the Commonwealth, would have resulted in the imposition of a life sentence.

*Id*. at ___.

**Capital Case*

***Gray v. Branker*, 529 F.3d 220 (4th Cir. 2008)** (sentenced in December 1993). Under AEDPA, counsel was ineffective in capital sentencing for failing to adequately prepare and present mental health evidence. The defendant, who was a dentist or "prosperous professional" (as noted by the dissenting judge) represented by retained counsel, was charged with killing his wife during ongoing, bitter divorce proceedings. Counsel's conduct was deficient because counsel was aware from the divorce proceedings, from the defendant's behavior in pretrial confinement, and from a five-week court-appointed evaluation of mental health issues, but only talked to the defendant once, pre-indictment and prior to the state's notice of intent to seek death, about the need to retain an independent mental health expert.

> Defense counsel should not have dispensed with a mental health investigation just because Gray did not want to hire an independent psychiatrist at the pre-indictment stage, well before the state announced its intention to seek the death penalty. See ABA Guideline 11.4.1.C ("The investigation for preparation of the sentencing phase should be conducted regardless of any initial assertion by the client that mitigation is not to be offered.").

Here, the court-appointed examiner had offered additional assistance at no charge. Additionally, counsel did not "seek court approval to hire an independent psychiatrist at state expense when [the defendant] became indigent shortly after his indictment" or even after the jury returned a guilty verdict and the defendant faced the certainty of a capital sentencing proceeding. Counsel's conduct was not excused by strategy. "There was simply no consideration of whether a defense based on psychiatric evidence might be a strategy worth exploring," before pursuing "a questionable alibi theory until days before trial" and then pursuing an accident theory. Counsel "simply missed or ignored-and failed to act on-the many signs that [the defendant] was mentally and emotionally unstable." The state court finding to the contrary was an unreasonable application of Strickland because the state court "failed to consider the reasonableness of counsel's actual performance under prevailing professional norms, which include the duty to make considered decisions about areas of potential investigation. The state court also erroneously found that the accident defense and the diminished mental responsibility defense were inconsistent, when "common sense dictates" to the contrary in this case. The state court also "overlooked" the mental health testimony that would have been available and unreasonably "relied heavily on [the defendant's] one-time refusal to hire an independent psychiatrist." "[A] reasonable lawyer would not rely on his client's self-assessment of his mental health, especially in a capital case. There was an independent duty to investigate." The state court held that the defendant was not indigent, but this finding was rebutted by clear and convincing evidence that he was in fact indigent at the time of trial, having placed all of his assets in an irrevocable trust for his children six months earlier." Finally, regardless of financial status, the court-appointed examiner had offered additional assistance without charge. *Schriro v. Landrigan* does not require a contrary conclusion, because '[n]othing in *Schriro* permits [the defendant's] statement to be used to relieve his counsel of their duty to investigate for mitigating mental health evidence." With respect to prejudice, the state court "required certainty that the jury would have reached a different result at sentencing," which is contrary to *Strickland*'s "reasonable probability" standard. The state court decision was also an unreasonable application of *Strickland* because the state court

relied on determinations that the court had instructed the jury on mental health mitigating evidence and the state had presented contrary lay evidence. The state court did so without mention, as *Williams* requires, of the mitigation evidence presented at trial and by improperly discounting the evidence that could have been presented in mitigation. Independent review established prejudice. The defendant had already presented mitigation evidence establishing the defendant was a loving and dedicated father and son, who contributed to the community as a Little League baseball coach. He had no prior offenses, cooperated with law enforcement, and behaved well in confinement. The defense presented no mental health evidence, even though "[e]vidence of mental disturbance . . . can be persuasive mitigating evidence for jurors considering the death penalty, and this evidence can determine the outcome." *Id*. at ___ (citing 2003 ABA Guidelines and capital jury study article). Here, "the two mental health mitigating factors–largely ignored by defense counsel–were [the defendant's] best hope of convincing the jury that he did not deserve the death penalty." If counsel had adequately investigated, the evidence would have revealed a diagnosis of paranoid personality disorder and adjustment disorder, with the possibility of "psychotic episodes" under severe stressors, such as faced by the defendant at the time of the offense. "The jury would have known that he suffered from a severe mental illness" when he killed his wife.

***Johnson v. Bagley*, 544 F.3d 592 (6th Cir. 2008)** (tried and sentenced in May 1998). Under AEDPA, counsel "committed legal malpractice–or, what is worse, legal representation that amounts to constitutionally ineffective assistance–" in failing to adequately investigate and present mitigation evidence. Citing the 2003 ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, the court observed that counsel had complied on a "surface level" in making the petitioner's grandmother as a positive caretaker the central theme of their sentencing strategy.

> In the abstract, this might well have been a legitimate strategic decision, one about which the Constitution would have nothing to say. But in [petitioner's] case, his counsel pursued this strategy after what can only be described as an anemic and leaderless investigation that suffered from at least three conspicuous flaws.

First, counsel never interviewed the petitioner's mother, even though counsel knew of her whereabouts. Counsel "chose" not to interview her because she had a bad background as a prostitute and drug addict and would make a bad witness.

> But [the mother's] "bad background" is precisely what should have prompted the defense team to interview her–both to see what that background entailed and to learn more fully how her prostitution and drug addiction affected [the petitioner's] childhood. That someone may make a bad witness is no explanation for not interviewing her first. And, that is particularly true with respect to this witness, who was [the petitioner's] mother, not a distant aunt or neighbor.

Second, counsel obtained a 12 inch thick stack of Department of Human Services (DHS) records shortly before sentencing and, without reading them, submitted them to the jury. Many of these pages

were not relevant to the petitioner. Some of the records indicated concerns about the grandmother's abusive history and placing the petitioner in her care.

> A review of the records, in short, not only would have tipped them off to a different mitigation strategy but also would have avoided the pitfall of submitting records to the jury, that directly contradicted their theory that [the grandmother] was a positive force for change in his life.

Third, "these investigative blunders occurred because no one who participated in [the] penalty-phase defense made any deliberate decisions about the scope of the investigation, let alone the 'reasonable' ones *Strickland* requires." Counsel gave the two "alleged mitigation specialists" an initial set of names for interviews but were otherwise "not involved in the investigation" and only began thinking about "a mitigation strategy" after the petitioner was convicted. The "lead" mitigation specialist was "in the midst of a debilitating bout of depression" that ultimately resulted in suspension from the practice of law. He, "it seems clear, was almost certainly not making any significant decisions, reasonable or otherwise, regarding the scope of . . . investigation." The other "alleged mitigation specialist," a graduate student with limited experience and working part-time interviewed only the witnesses on the list counsel initially gave him and gave only his notes to the defense expert. The state court's finding that counsel's conduct was not deficient was an unreasonable application of Strickland in finding that counsel had discovered the relevant evidence as shown by the sentencing evidence. "[T]he testimony only scratched the surface of [petitioner's] horrific childhood." While some information may have been included in the records submitted, "that does not mean defense counsel performed a reasonable investigation or for that matter reasonably used the evidence."

> [D]efense counsel was not familiar with the records; some of the records contradicted their mitigation strategy . . .; and it hardly constitutes a reasonable investigation and mitigation strategy simply to obtain . . . records from the State, then dump the whole file in front of the jury without organizing the files, reading them, eliminating irrelevant files or explaining to the jury how or why they are relevant.

The state court also unreasonably concluded that counsel performed adequately "without looking to the reasonableness of the investigation's scope." While counsel had presented testimony of five people about the petitioner's "troubled past" and presented an expert witness, "an unreasonably truncated mitigation investigation is not cured simply because some steps were taken prior to the penalty-phase hearing and because some evidence was placed before the jury."

> Buttressed by a reasonably adequate investigation, the defense team's ultimate presentation to the jury might have been justified as the product of strategic choice. But, that is not what happened. [Petitioner's] attorneys "were not in a position to make . . . reasonable strategic choice[s] . . . because the investigation supporting their choice[s] was unreasonable." *Wiggins*, 539 U.S. at 536; *Strickland*, 466 U.S. at 690-91.

Counsel's conduct was also not excused because their interviews did not yield information about the grandmother's abusive history or negative influence on the petitioner. "Uncooperative defendants and family members . . . do not shield a mitigation investigation (even under AEDPA's deferential standards) if the attorneys unreasonably failed to utilize other available sources that would have undermined or contradicted information received." Because the state court did not address prejudice, the court reviewed this issue de novo. Counsel's errors, "particularly their lack of investigation, had a serious impact on the mitigation theory presented to the jury." First, there was "a goldmine of mitigating evidence showing that [the grandmother] was anything but a saint." She had schizoid personality disorder, had no maternal instincts, was abusive to her daughter, and allowed her daughter to be raped by a friend. While petitioner "was an indirect victim" of the neglect and abuse of his mother, "he was a direct victim as well." The grandmother was emotionally and physically abusive to him. Thus, the jury was misled to believe that she was a positive influence. Second, counsel "could have presented a detailed and horrific picture" of petitioner's mother's role in his life. She was portrayed in sentencing as "a mostly absent mother, when the truth is that her early abuse and on-again-off-again presence in his life had an irreparable and devastating impact on [him]. The evidence would have shown: (1) she was a prostitute who sold herself to buy drugs; (2) she often fed him only sugar water; (3) when he cried, she would put him in a closet and give him beer and pain killers to make him stop crying; (4) she was physically abusive, even putting a cigarette out on his eye, and threatened to kill him; (5) she was involved in many abusive relationships and tried to set fire to petitioner's father at one time; (6) she taught petitioner to cut cocaine, cook it into crack and sell it; and (7) she killed one of her abusive boyfriends and bragged to petitioner about it.

> Yet, due to counsel's bungling or sheer laziness, the jury heard none of this. "I and the public know [w]hat all schoolchildren learn," it has been said, "[t]hose to whom evil is done [d]o evil in return." W.H. Auden, "September 1, 1939." While these words may not capture a satisfactory theory of morality, they assuredly suggest a plausible theory for sparing a life at a mitigation hearing, see ABA Guideline 10.11(F)(1)-(2), one that on this remarkable record could well have affected a juror's vote in the case.

Third, counsel's failure to investigate led to damaging testimony from the defense expert, who diagnosed antisocial personality disorder and testified that the petitioner was not remorseful. "This unhelpful testimony could have been prevented" with a complete background picture. The defense expert "then might have been able to say, as [the PCR expert] did . . . , that [petitioner's] 'chaotic, abusive, neglectful' family 'play[ed] a significant role in the development of [his] personality and his addiction to alcohol and drugs and later mental illness," such that his "psychological profile is 'almost identical' to that of his mother."

> Defense attorneys, we recognize, are not obligated to shop for "the 'best' experts" who will testify in the most advantageous way possible. But it is unreasonable, after an incomplete investigation, to put an expert on the stand who will "directly contradict[] the sole defense theory" and "render worthless" other helpful testimony."

*Id*. (citations omitted). This is especially so when the prosecution even points out in closing that the expert testimony is harmful to the defense. In sum, "this post-conviction evidence differs from that heard by the jury not only in degree but also in kind, and forms a mitigation story that 'bears no relation' to the story the jury heard." Even though some of this information was in the documents submitted to the jury, "this jury was given no basis for construing and digesting this information" because no mitigation witness ever referred to the 12-inch thick records and counsel simply told the jury to "leaf through" them, which "likely would have discouraged the jury from reading more closely" and the references to the grandmother's "deficiencies were few."

***Mason v. Mitchell*, 543 F.3d 766 (6th Cir. 2008)** (sentenced in June 1994). Under AEDPA (and citing the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989)), counsel was ineffective in failing to adequately investigate and present mitigation evidence. Counsel presented only brief testimony of adaptability to confinement, family member requests for mercy, and the defendant's unsworn denial of guilt. Counsel's decision to limit the defense presentation "to appeals for mercy and claims of residual doubt" was made after the conviction during a phone call with members of the Ohio Public Defender Office. "Therefore, the evaluation of [counsel's] performance must focus on what knowledge [counsel] then possessed regarding [the petitioner's] childhood and background and what investigation and interviews, if any, that [counsel] had performed prior to making that decision." Counsel met with the petitioner and his wife several times but did not really discuss mitigation. Counsel had been denied a mitigation investigator from the Public Defender Office and denied funding from the court. He was provided only with a brief psychiatric examination limited to "potential for rehabilitation and the likelihood of future dangerousness." He was provided voluminous records by the state concerning criminal history, involvement by Children's Services, drug treatment programs, and some educational records. From this, counsel was aware that: (1) petitioner was born into a drug-dependent family; (2) the family was involved in drug trafficking; (3) both parents had been incarcerated on trafficking charges; (4) petitioner had been exposed to a lot of violence; and (5) petitioner had prior injuries and scars he told police were due to beatings from his father. Counsel had only brief phone calls with a person at Children's Services and the petitioner's probation officer. Counsel's time records reflected only "very brief" contacts with some family members after that phone call. He never contacted some of petitioner's siblings. And, at most may have talked briefly with the petitioner's father and a brother, whose "statements appear to contradict the ample documentary evidence" already provided by the state in discovery. The failure to investigate further "is inexcusable given this apparent contrast between the facts contained in the documentary evidence and what he apparently learned" from the petitioner's father and brother.

> [Counsel's] efforts consisted of no more than reviewing documents provided by the state, arranging for a psychiatric evaluation limited to predicting [petitioner's] future dangerousness, talking to Mason himself, and very briefly talking to a small subset of [petitioner's] family members. Under the Supreme Court's governing case law regarding counsel's obligation to undertake a reasonable investigation to support

> strategic decisions about the presentation of mitigation evidence, we have no doubt that the performance of [petitioner's] counsel was deficient.

Prejudice established.

> [Petitioner] need only have persuaded one juror not to impose the death penalty, and [Petitioner's] jury initially reported a deadlock regarding his sentence. Even a slightly more compelling case for mitigation thus might have altered the outcome of the sentencing phase of [the petitioner's] trial.

If counsel had performed adequately, the evidence would have established: (1) petitioner's father ran a prostitution ring and a home-based drug business with 10 employees; (2) both of petitioner's parents were drug users and traffickers; (3) petitioner's mother shot his father; (4) petitioner's parents abused him and isolated him from anyone not associated with their drug dealing activities; (5) petitioner began using drugs at eight years old; (6) petitioner's father included him on drug trafficking trips when he was in junior high; and (7) petitioner has "a borderline personality disorder largely as a result of his dysfunctional home environment." This evidence would not necessarily have opened the door to damaging prosecution rebuttal evidence, which is permitted under state law only to rebut good character or rehabilitation potential evidence. The state court "unreasonably applied the *Strickland* standard" because the state court ignored the *Strickland* principle that "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id*. (quoting *Strickland*, 466 U.S. at 690-91). Here, the state court "simply asserted that . . . counsel had made a strategic decision regarding mitigation strategy, but that court failed to assess whether a thorough and reasonable investigation supported counsel's strategic decision." The state court's prejudice analysis was also "flawed and objectively unreasonable" because the court relied on the possibility of the state presenting rebuttal evidence to good character or rehabilitative potential evidence, which was "a mitigation strategy that [petitioner] was not advocating."

***Jells v. Mitchell*, 538 F.3d 478 (6th Cir. 2008)** (sentenced in October 1987). Under AEDPA, counsel ineffective in failing to adequately investigate and present mitigation evidence. In so holding, the court observed: "the deference owed to counsel's strategic judgments about mitigation is directly proportional to the adequacy of the investigations supporting such judgments." Counsel's conduct was deficient in failing to timely prepare for sentencing and in failing to utilize a mitigation specialist to gather information about the defendant's background, including his educational, medical, psychological, and social history. Counsel did not contact a mental health expert until two days after conviction and 16 days prior to the mitigation hearing. Counsel did not provide the expert with "personal history records–records that would have been collected had they uses a mitigation specialist–that were necessary for the evaluation." In addition, counsel interviewed only three family members, "neglecting to speak with many other family member who had lived with [the petitioner] and were available. When speaking with the family members they did contact, their inquiry was brief and they failed to ask sufficiently probing questions; as a result they failed to discover the abuse that [the petitioner] received from his mother's live-in boyfriend and his stepfather." Counsel also

failed to obtain a prior psychological report and accessible school records that revealed mental impairments. Counsel's conduct was also deficient "[i]n the context of [the petitioner's] case" in "failing to use a mitigation specialist." "While [petitioner's] counsel did not have a specific obligation to employ a mitigation specialist, they did have an obligation to fully investigate the possible mitigation evidence available." Under state law, "the range of potential mitigation evidence is quite broad." Thus, "defense counsel must conduct a reasonably thorough investigation into all possible mitigation evidence that would present a sympathetic picture of the defendant's family, social, and psychological background." Counsel conducted some investigation and made a "limited presentation of [petitioner's] unstable childhood and academic difficulties." Counsel's awareness of this limited information "should have alerted them that further investigation by a mitigation specialist might [have] proved fruitful." Counsel's failure to investigate prior to the conviction was objectively unreasonable under *Strickland* and the state court's finding to the contrary was an unreasonable application of *Strickland*. Prejudice established because "there is a reasonable probability that at least one of the [three state sentencing panel] judges may have reached a different conclusion regarding the imposition of the death penalty." Available but unpresented evidence "paints a significantly more detailed picture of [the petitioner's] troubled background." While trial counsel presented evidence of essentially a normal childhood, an IQ of 77, and no antisocial personality disorder or mental illness, petitioner had "a history of serious cognitive learning and socialization impairment" that amounted essentially to academic problems that resulted in behavioral problems with "several missed opportunities" to resolve the problems "through special education and remedial classes." These educational problems were compounded by his home. The defendant was one of seven children and his mother constantly moved in and out of relationships with abusive men making the petitioner "a witness to . . . violence and cruelty" inflicted on his mother. "In short, rather than being cumulative, this evidence provides a more nuanced understanding of [petitioner's] psychological background and presents a more sympathetic picture of [him]." The state court's finding of no prejudice was unreasonable.

***Sechrest v. Ignacio*, 549 F.3d 789 (9th Cir. 2008)** (sentenced in Sep. 1983). In pre-AEDPA case, counsel was ineffective in sentencing for three reasons. First, counsel permitted the prosecution to review and introduce into evidence the confidential report of a defense-retained expert counsel decided not to present as a witness. The report contained information about the defendant's "criminal history and his upbringing" revealed only to this doctor, who diagnosed a "polymorphous perversion." Counsel's conduct was deficient because the state would not have had access to this information otherwise and "defense counsel had absolutely no obligation to disclose [the] confidential report to the prosecution." Second, counsel erred in allowing the prosecution to call the defense expert as a witness.

> [C]ounsel should not have stipulated to the prosecutor calling [the same defense-retained expert] as a witness for the prosecution. Counsel's decision to so stipulate is indefensible. This decision put counsel in the difficult position of having to cross-examine the only mental health expert to testify during the penalty phase of . . . trial, even though counsel himself had chosen [the expert] and supplied him with information about [the defendant]. Furthermore, the jury was told that [the expert]

> was hired by the defense to examine [the defendant] and report on his mental health. Given that the defense's expert not only had nothing favorable to say about [the defendant], but thought that he was beyond all hope of rehabilitation, the jurors had even less incentive to impose a sentence that they were told [improperly] by the prosecutor and the court might lead to [the defendant's] eventual release.

*Id*. at ____. Counsel's alleged strategy for not objecting was the belief that the witness would provide helpful information on the defendant's troubled background, but this was not "a sound strategic decision" because [i]f counsel truly believed that [the] testimony would be helpful, the appropriate 'strategic decision' would have been to call [the expert] to testify on behalf of the defense." In addition, counsel did not pursue or argue any mitigating factors related to troubled background. "Given these considerations, counsel cannot hide behind a later, implausible assertion that his decision was 'tactical' given that his actions show that he had no intention of presenting any mitigating evidence based on . . . mental health." Finally, counsel inadequately prepared for the expert testimony. "Once counsel decided to allow the prosecution to call [the defense expert] as a witness, counsel had a duty to prepare for [the] testimony." Counsel did not speak to the expert after agreeing to let him testify for the state, which was evident in "counsel's lackluster performance at trial" eliciting on cross that the defendant could not be cured or treated. "In sum, some of the most damaging testimony presented during the penalty phase of trial was elicited by [the defendant's] own counsel, from a witness [defense] counsel had originally selected and could have prevented from testifying." Prejudice found because the expert's testimony "likely played an important role in the jury's verdict imposing the death penalty." Reversal was also required due to a due process violation in the prosecutor repeatedly making false, inflammatory statements indicating that the state board of pardon commissioners could release petitioner if the jury did not return a verdict imposing the death penalty.

***Correll v. Ryan*, 539 F.3d 938 (9th Cir. 2008)** (tried in 1984). Under pre-AEDPA law, counsel ineffective in capital sentencing for failing to adequately investigate and present evidence of the petitioner's mental health and failing to present mitigation evidence. Counsel's conduct was deficient in numerous respects. Counsel knew the petitioner "came from a dysfunctional family, sustained a serious head injury, was committed to various psychiatric facilities, and that he was addicted to drugs; yet defense counsel did not obtain the records nor did he interview witnesses concerning these matters." Counsel only met with the petitioner possibly once and with the petitioner's father, sister, and brother once and at the same time. He did not obtain school records, police reports on prior convictions, records from the California Youth Authority, medical records, or psychiatric records. "As anemic as the defense counsel's investigation was, his presentation of mitigating evidence at the penalty phase was worse." Counsel presented no evidence, which mandated the death penalty under Arizona law because the defendant had a qualifying prior conviction and no mitigation. Defense counsel's mitigation argument did not even attempt to rebut three of the five aggravating factors urged by the State. "The entirety of his oral argument at the penalty phase consists of approximately 7 pages of transcript." "Given his virtual concession of most of the aggravating factors argued by the State, and waiver of the presentation of mitigation evidence, the outcome was obvious: imposition of the death penalty." Prejudice found because, if

counsel had adequately investigated, the evidence would have established the petitioner endured an abusive childhood in which he was neglected by his mother, who spent most of her time at church. The children were physically punished if they did not understand religious doctrine. There was incest in the family. A brick wall collapsed on the petitioner's head when he was seven causing unconsciousness for some time, but no medical treatment was sought for several days. The petitioner began "self-medication" by experimenting with alcohol and drugs around age ten and was using marijuana, LSD, and amphetamines regularly by age twelve. The petitioner's parents responded by beating him and threatening to kick him out. After the petitioner was shot at age 14, his parents asked the state to terminate their parental rights and cut off all communication with him. He became a ward of the state and spent his teenage years "in various state institutions described as 'gladiator schools,' which were characterized as cruel and inhumane, even by those who worked there." Within months, he became addicted to heroin. He was committed to psychiatric institutions at least twice during his teen years and was described at age 16 as "severely psychologically impaired." He was treated with a tranquilizer/anti-psychotic drug while institutionalized, and attempted suicide on two occasions. By the time of the crimes, he was injecting a quarter gram to a gram of methamphetamine in one shot, and injecting three to four shots a day. He would go seven to ten days without sleep, followed by one to two days of continuous sleep. Expert testimony indicated that he was likely having impulse control problems and judgment impairment at the time of the crime, and may have been experiencing drug-induced paranoia. Counsel did not pursue "the classic mitigation evidence," because "he didn't think of the evidence as favorable evidence. However, it is precisely this type of evidence that the Supreme Court has termed as 'powerful.'" *Id*. (quoting *Wiggins*). While counsel also appeared to be afraid of the particular judge's reaction to the evidence, "this presumes that the judge would not follow the law–speculation that is never appropriate and that is not supported by the record here" and also ignores the fact that, under state law, the Arizona Supreme Court independently reviews the aggravating and mitigating factors and re-weighs them and conducts a proportionately review.

***Williams v. Allen*, 542 F.3d 1326 (11th Cir. 2008)** (sentenced in April 1990). Under AEDPA, counsel ineffective in capital sentencing for failing to adequately investigate and present mitigation. Counsel's conduct was deficient because counsel was aware of: (1) a report by a defense psychologist, who examined only competence and mental state at the time of the offenses, that the defendant had an IQ of 83 and exhibited signs of personality disorder and depression; (2) a presentencing report describing the petitioner's father as an abusive alcoholic and referring to previous psychological evaluations of the petitioner; and (3) petitioner's mother's statements. Counsel's "failure to broaden the scope of their investigation beyond these sources was unreasonable under prevailing professional norms" in the ABA Guidelines. "A reasonable investigation into the leads in this case should have included, at a minimum, interviewing other family who could corroborate the evidence of abuse and speak to the resulting impact on [the petitioner]. Counsel, however, failed to contact such witnesses."

> Counsel uncovered nothing in their limited inquiry . . . to suggest that "further investigation would have been fruitless." *Wiggins*, 539 U.S. at 525, 123 S. Ct. At

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> 2537. To the contrary, the many red flags . . . would have prompted a reasonable attorney to conduct additional investigation. Moreover, acquiring additional mitigating evidence would have been consistent with the penalty phase strategy that counsel ultimately adopted. Given that counsel's sentencing case focused on establishing . . . a troubled background, they had every incentive to develop the strongest mitigation case possible. Cf. id. at 526, 123 S. Ct. 2538. It is thus apparent that counsel's failure to expand their investigation "resulted from inattention, not reasoned strategic judgment." *Id*. at 526, 123 S. Ct. 2537.

The state court decision unreasonably applied *Strickland* by focusing "entirely on counsel's decision not to present additional mitigating evidence" without addressing "whether counsel's investigation into such evidence was adequate under prevailing professional norms." While other family members were available for interview, counsel relied only on the petitioner's mother, who was the sole mitigation witness, to provide "brief testimony" about the petitioner's childhood. "By choosing to rely entirely on her account, trial counsel obtained an incomplete and misleading understanding of [the petitioner's] life history." Prejudice established.

> The mitigation evidence that . . . trial counsel failed to discover paints a vastly different picture of [the petitioner's] background than that created by [his mother's] abbreviated testimony. . . . [T]he violence experienced by [the petitioner] as a child far exceeded–in both frequency and severity–the punishments described at sentencing. . . . Moreover, contrary to the impression created by [the petitioner's mother], this violence was not of a type remotely associated with ordinary parental discipline. . . . This evidence surely would have been relevant to an assessment of [the petitioner's] culpability, particularly in light of his age [nineteen] and lack of prior criminal history.

In addition, the trial court, in overriding the jury's nine to three recommendation for life, "expressly relied" upon the mother's testimony in "discounting the significance of the abuse described at sentencing." The available but unpresented mitigation evidence contradicted this finding. Prejudice was also clear because "this case is not highly aggravated." The state court's finding of no prejudice was an unreasonable application of *Strickland*" because of the "court's emphasis on the absence of a 'causal relationship' between [the] mitigating evidence and the statutory aggravator." The state court also "rested its prejudice determination on the fact that . . . mitigating evidence did not undermine or rebut the evidence supporting the aggravating circumstances" without considering the "possibility that the mitigating evidence, taken as a whole, might have altered the trial judge's appraisal of . . . moral culpability, notwithstanding that the evidence did not relate to his eligibility for the death penalty." The court rejected the trial court's "post-hoc statements" that additional evidence would not have impacted his decision because "the assessment should be based on an objective standard that presumes a reasonable decisionmaker."

**2007:** ****Morales v. Mitchell*, 507 F.3d 916 (6th Cir. 2007)** (tried in December 1985). Under AEDPA, counsel was ineffective in failing to adequately investigate and present mitigation. Counsel's

conduct was deficient because counsel failed to interview the petitioner's family, friends, and others who knew him; failed to obtain any background records; failed to retain a mitigation expert; and failed to adequately prepare the petitioner for his unsworn statement in sentencing. The state court's finding that counsel's conduct was not deficient was an unreasonable application of clearly established constitutional law. Because the state court did not address the issue of prejudice, the federal court's review of prejudice was de novo. Prejudice established because counsel presented no sworn testimony or evidence, made no opening statement, and made a closing statement that was a mere three pages long during the penalty phase. The jury was provided only with an unprepared unsworn statement by the petitioner. If counsel had adequately investigated, a number of family members and a former principal at the petitioner's school would have testified and documentary evidence was available to corroborate information about the alcohol abuse of the Petitioner's parents, his abuse by an older mentally retarded brother, his mentally disturbed sister's suicide when he was only nine, his mother's emotional problems, and the effect and role of alcohol, drugs, and Native American culture on him.

***Haliym v. Mitchell*, 492 F.3d 680 (6th Cir. 2007)** (tried in September 1987). Under AEDPA, counsel ineffective in capital sentencing for failing to adequately prepare and present mitigation. Counsel presented three witnesses in sentencing along with an unsworn statement from the defendant. A former employer testified that the defendant was a good employee. A psychiatrist, who spent only one and a half hours with the defendant and relied on pretrial court-appointed competence and sanity reports, testified that the defendant was diagnosed with an "adjustment disorder with depressed moods" and "malingering," but that the defendant does not have a mental disease or defect. Finally, the defendant's grandmother testified that the defendant lost both his parents and a brother over a two-month period. His father died of a heroin overdose and his brother was shot. Counsel's conduct was deficient in failing to conduct "even the most basic interviews" with the defendant's family members concerning the family background, even though counsel knew the defendant's father died of a heroin overdose. "It is not the usual case where a parent copes with an addiction as serious and controlling as a heroin addiction without repercussions, often serious repercussions, being felt by the remaining family members." Even basic interviews would have revealed a family history filled with the father's physical abuse, which is "an important mitigation factor." Counsel instead presented inconsistent evidence in the defendant's statement that his parents were wonderful and in a doctor's report that the defendant denied any physical abuse. Counsel also was aware that the defendant had attempted suicide by shooting himself in the left temple, "which should have strongly suggested the need to investigate whether Petitioner had a mental defect." Instead, counsel presented evidence that the defendant had no mental disease or defect when "the limited time that [the doctor] spent with Petitioner–a mere hour and a half–sharply hindered his ability to make any independent analysis of Petitioner's mental health." The court also noted that counsel's performance fell short of the 2003 ABA Guidelines. Counsel's failure to investigate "was unlikely the result of a strategic choice. Despite the availability of funding to procure experts chosen by Petitioner at the mitigation phase, . . . Petitioner's attorneys nevertheless relied upon the presentence report" of a court-appointed expert and the inadequate testimony of the expert witness presented.

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> Had Petitioner's counsel taken an active role in procuring an expert to investigate Petitioner and author a report for mitigation, evidence of Petitioner's social history and brain injury would likely have come before the trial court. We can fathom no strategic reason for Petitioner's counsel's failure in this regard.

Prejudice found because adequate investigation would have revealed significant mitigation, including the defendant's father's violence against the defendant and his family, the loss of both parents and a brother when the defendant was only a teenager, which affected the defendant profoundly. Shortly afterwards, he started using heroin, leading to a drug addiction. He also became severely depressed and shot himself causing a serious brain injury and functional brain impairment, which causes problems with impulsivity, judgment, and problem solving. There is a reasonable probability that this evidence would have led to a different result before the three-judge sentencing panel, which would likely have reached a different result with evidence of a mental disease or defect.

******Stevens v. McBride***, 489 F.3d 883 (7th Cir. 2007)** (crimes in July 1993 and affirmed on appeal in 1997). Under AEDPA, counsel ineffective in capital sentencing for failing to adequately prepare and present mental health expert and presenting the testimony of an "expert" counsel believed to be a "quack," which was very prejudicial. The defendant, described in the first sentence of the opinion as "an emotionally disturbed young man who had been abused and raped as a child," was sentenced to death for "the molestation and brutal murder" of a 10-year-old boy. He also had a prior molestation conviction for which he was on parole at the time. Prior to trial counsel retained "a defense mitigation specialist" and were aware of obvious mental health issues due to the defendant's physical, mental, and emotional abuse and his rape as a child. Medical records reflected that he had been held in a psychiatric facility following an attempted suicide and that he had been diagnosed with major depression and possible schizophrenia. The defendant also disclosed to the mitigation specialist that, at the time of the murder, he put himself in the victim's place because he had wished that the man who raped him had also killed him. Based on the mitigation specialist's recommendation, counsel retained a psychologist, who at the time was director of a child and adolescent psychiatric center. Counsel met with the doctor and asked him to evaluate the defendant but not to prepare a report. The doctor wrote a report anyway which included very prejudicial information such as no mental illness, molestation of 25-30 children, a prior murder (later recanted), lack of acceptance of responsibility, committing this murder for the purpose of avoiding a return to prison, a diagnosis of pedophilia, and future dangerousness. Counsel contacted the doctor, who said basically that he would make a good witness for them despite his report. Counsel also learned that the doctor believed that "mental illness" is a "myth" and used a "therapeutic technique described as putting 18-year-olds on his lap and sticking a bottle in their mouth." Counsel then had "well- founded doubts" about the doctor's "fitness as a defense expert" and believed he was a "quack." Counsel's conduct was deficient though because counsel did not seek a different mental health expert and provided the state with this doctor's report prior to trial (when counsel was only required to disclose reports from expert witnesses who would be called to testify). During trial, rather than pursuing a mental illness defense, counsel argued a voluntary manslaughter theory, but the court refused to even charge on manslaughter. In the penalty phase before the jury, counsel presented testimony from the defendant and some family members and then called the "quack" to testify. His testimony extensively covered the doctor's

beliefs and theories and some testimony about the defendant's "terrible childhood" and abuse. His testimony did not, however, provide any evaluation of the defendant's mental health at the time of the offenses. On cross, the state questioned the doctor extensively on his report, which he confirmed. The quack volunteered that the defendant had "antisocial qualities and sociopathic traits." In response to questions from the state, the doctor also confirmed that the defendant had admitted to him that he was sexually aroused by killing the child and had masturbated on the child's body. The doctor had not even disclosed this last information to defense counsel. After the jury recommended death, counsel called the doctor to testify yet again in sentencing before the judge. This time he added that the defendant posed "a great risk to society." The defendant challenged counsel's ineffectiveness for failing to present a mental health defense during trial and in mitigation. The state argued essentially that counsel was entitled to rely on their "expert" without seeking an additional expert because he was a qualified doctor. The court rejected this because "the general qualifications of an expert witness do not guarantee that the witness will provide proficient assistance in any given instance." The problem in this case arose due to the "methods" the doctor used, "his idiosyncratic view of mental disorders," and "the fact that [his] views favored the prosecution." Thus, "it would not have been reasonable for defense counsel to rely on" this doctor "based only on his credentials." While the court was "inclined to believe that their performance was ineffective" during the trial and that prejudice was established, the court, constrained by AEDPA review, did not find that the state court's contrary conclusion was an unreasonable application of *Strickland*. With respect to sentencing, however, counsel's conduct was both deficient and prejudicial because counsel presented lay testimony as essentially non-statutory mitigation but did not present evidence of the statutory mitigating circumstances of extreme emotional disturbance and impaired capacity to appreciate the wrongfulness of his conduct at the time of the murder, which were supported by two competent experts in post-conviction. These experts diagnosed a severe dissociative disorder and found that the defendant was dissociating during the murder and killing the child because he himself wanted to be killed by the man that had raped him as a child.

> The strategic reasons that might, at a stretch, have justified this decision [not to present a mental health defense] at the guilt phase, fall apart when we consider that at the sentencing phase [the defendant] had nothing left to lose. The lawyers' decision to forego presenting this kind of mitigation evidence was made without the kind of investigation into [his] mental health that Strickland calls for, after [his] lawyers had concluded that [the doctor] was a "quack." Indeed, it is uncontested that [his] lawyers knew nothing about the content of [the doctor's] planned testimony. The lawyers confessed at the post-conviction hearing that they were utterly in the dark about what [he] would say when he took the stand. . . . This is a complete failure of the duty to investigate with no professional justification. Where an expert witness's opinion is "crucial to the defense theory[,] defense counsel's failure to have questioned [the expert] ... prior to trial is inexcusable."

*Id*. (quoting *Combs v. Coyle*, 205 F.3d 269, 288 (6th Cir.2000)). The court also noted that counsel had the doctor's report and "we cannot imagine what they hoped to gain" by calling him to testify. In addition, if he had not been called as a witness, counsel was under no obligation to disclose his report

to the prosecution. Even though counsel may not have been ineffective for not presenting mental health testimony during the trial, they were during sentencing.

> [T]here is an important difference between the statutory mitigating factors . . . for capital sentencing purposes and the requirements for proving an insanity defense at the guilt phase. Furthermore, the burden on the defendant is not as heavy at sentencing as during the guilt phase. . . . As a legal matter, a mental illness mitigation defense to the imposition of a death sentence may be available even if an insanity defense to the murder charge is not.

If counsel had presented "mainstream expert psychological testimony" such as that presented in post-conviction, there is a reasonable probability of a different outcome. "Competent evidence" of "mental illness would have strengthened the general mitigation evidence presented by defense counsel . . . by focusing the jury on the concrete results of years of abuse on [the defendant's] psyche." There was also "little downside" in further evidence of the defendant's "predatory pedophilia" being presented when "evidence of the most damning sort was already before the jury." Prejudice was especially clear in calling the "quack" to testify and then to do it a second time because he not only provided the only evidence of "necrophilia after the murder, he also gave the prosecution a gift by expressing his belief in . . . future dangerousness–a subject that the prosecution itself is not permitted to argue as an aggravating circumstance under Indiana law." The trial court's sentencing order also was "a close reflection of [the doctor's] written report and testimony.

***Lambright v. Schriro*, 490 F.3d 1103 (9th Cir. 2007)** (tried in 1982). Under pre-AEDPA law, counsel ineffective in failing to adequately prepare and present mitigation. Counsel's conduct was deficient because counsel "failed to do even a minimal investigation of 'classic mitigation evidence,' notwithstanding the fact that he knew such evidence potentially existed." He spent less than five hours preparing for sentencing even though counsel was aware from the pre-sentence investigation report and the court-appointed examiner's report of the defendant's long history of mental health problems, his two prior suicide attempts, his prior hospitalization in a psychiatric facility, his traumatic combat experiences in Vietnam, his serious drug problems, and his diagnosis by a court-appointed examiner of antisocial personality disorder. It was not sufficient that counsel prepared a short memorandum for the sentencing court because counsel's duty "is not discharged merely by conducting a limited investigation of these issues or by providing the sentencing court with a cursory or 'abbreviated' presentation of potentially mitigating factors." Prejudice found because counsel presented a single witness to testify about adaptability to confinement and this evidence covered less than three pages of the transcript. The court rejected the "nexus requirement" applied by the District Court.

> If evidence relating to life circumstances with no causal relationship to the crime were to be eliminated, significant aspects of a defendant's disadvantaged background, emotional and mental problems, and adverse history, as well as his positive character traits, would not be considered, even though some of these factors, both positive and negative, might cause a sentencer to determine that a life sentence, rather than death

> at the hands of the state, is the appropriate punishment for the particular defendant. This is simply unacceptable in any capital sentencing proceeding, given that "treating each defendant in a capital case with that degree of respect due the uniqueness of the individual," and determining whether or not he is deserving of execution only after taking his unique life circumstances, disabilities, and traits into account, is constitutionally required. *Lockett v. Ohio*, 438 U.S. 586, 605, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978).

Prejudice established because counsel failed to even develop or argue the limited and unsubstantiated mitigating evidence that was before the court in the pre-sentence report and the state's expert report. These documents included information that the defendant's mother was "very strict" and hypochondriacal. In truth, she physically abused the defendant frequently and stayed in bed much of the time claiming to suffer from illnesses and was profoundly addicted to prescription drugs. She would even force the defendant to take Valium and sleeping pills when he acted up or had too much energy. The information before the court indicated that the defendant's family moved frequently but did not "convey" the impact on the defendant in terms of his ability to form relationships or that he never attended any school for more than a year. The information before the court indicated that the defendant was raised in a lower-middle class family, when he grew up in extreme poverty. The family moved frequently because of his father's struggle to maintain employment. The family often lived in homes with no running water or indoor plumbing and once had to live in a rat-infested house in which the walls and ceilings were lined with cardboard to block holes. The court had information about drug use but was not aware that drug and alcohol abuse were rampant in the defendant's family or that it was his mother who first exposed him to drug abuse by forcing him to take sedatives when he was a child or that he used large quantities of drugs throughout his life and would stay awake for weeks at a time on methamphetamine. The defendant also likely suffered from post-traumatic stress disorder from his combat experience and abusive background, but even the state's expert in post- conviction agreed that the defendant had a depressive disorder, which resulted in two suicide attempts, and had to be hospitalized at least once due to hallucinations. The state expert also agreed that the defendant has a personality disorder not otherwise specified with antisocial, borderline, and inadequate features, which "if properly developed and explained to the sentencer, would have had a mitigating effect under Arizona law." Even the diagnosis of antisocial personality disorder given by the court-appointed examiner at trial, "is a mitigating factor under Arizona law." Even though some mitigating evidence was before the court, prejudice was still clear.

> We do not underestimate the importance of the role of counsel in the adversarial process. The sentencing judge cannot be expected to comb the record looking for mitigating factors, particularly where the minimal evidence that exists is buried in reports that are on the whole strongly unfavorable to the defendant.

Prejudice was especially clear since there was only one aggravating factor and Arizona law at the time of sentencing "mandated the death penalty" when one aggravating factor was present and no mitigation evidence was presented.

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***Anderson v. Sirmons*, 476 F.3d 1131 (10th Cir. 2007)** (crimes in September 1996 and affirmed on appeal in 1999). Under AEDPA analysis, trial counsel ineffective in capital sentencing for failing to adequately investigate and present mitigating evidence. Although the issue was first raised in federal habeas, the court found, under unique facts not relevant here, that exhaustion was excused and the issue was not procedurally barred because the state had not established regular and consistent application of a procedural bar. Because of these rulings and the state court's failure to address the merits, the court applied de novo review and cited repeatedly to the 1989 and 2003 ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases. Counsel's conduct was deficient because counsel focused "almost exclusively on the guilt phase of his trial." Id. at 1143. While counsel had a mitigation investigator that investigator spent only 23 hours on the case, all of which was in the month prior to trial, did not interview the petitioner and "did not have access to life-history information, school records, or medical records." Counsel also did not have the petitioner evaluated by any mental health expert or other expert qualified to ascertain whether the petitioner "suffered from neurological or other deficits that would mitigate his moral culpability." *Id*. Although trial counsel did not provide an affidavit, the mitigation investigator's affidavit along with evidence that trial counsel's file contained no background records was sufficient to establish that the investigation of mitigation evidence was unreasonable. Prejudice established despite three "callous and brutal" murders, no residual doubt of guilt, three aggravating circumstances, and evidence the petitioner obtained drugs and a weapon and corresponded with his wife about "taking care" of witnesses while in pretrial confinement. Trial counsel had presented evidence only of petitioner's support of his family, that his mother was a "good woman," who loved him, and his daughter loved him and he could help her from prison. "Thus, rather than offering the jury a potential explanation for [the petitioner's] actions relating to the murders he participated in, trial counsel's case in mitigation was limited to a simple plea for mercy." *Id*. at 1144. This evidence "played into the prosecution's theory that the only explanation for the murders was that [the petitioner] was simply an 'evil' man." *Id*. at 1147. If counsel had adequately investigated the evidence would have established that the petitioner was raised in an environment of neglect and abuse; his mother and step-father were violent alcoholics, who battled before the children; his mother physically abused the children with anything at hand; his mother had numerous illicit affairs in the home that were known to the children; he suffered from brain damage and an IQ in the 70's, likely as a result of extensive drug and alcohol abuse begun as a child and numerous head injuries. "[T]his is just the kind of mitigation evidence trial counsel is obligated to investigate and develop as part of building an effective case in mitigation during the penalty phase of a trial." *Id*. at 1144.

**2006:** ****Outten v. Kearney*, 464 F.3d 401 (3rd Cir. 2006)** (sentenced in March 1993). Counsel ineffective in capital sentencing for failing to adequately investigate and present mitigation evidence. The state presented evidence of the defendant's post criminal history, which was all non-violent offenses. The defense presented six people (four family members, a friend, and an ex-girlfriend, who was the mother of the defendant's children) to testify about general background and good guy evidence in mitigation. Counsel's conduct was deficient because the "investigation was cursory" in that counsel only sent the defendant a letter asking for the names of "potential penalty phase witnesses" and had only limited discussions with the defendant and his mother. Counsel's conduct was not excused by

strategy to focus on the defendant being a loving, generous, and non-violent person, who did not commit the crime, and to avoid negative information.

> Simply stated, defense counsel's penalty-phase strategy was to argue to the jury-which had convicted Outten of murder unanimously and beyond a reasonable doubt-that he was a good guy and that his life should be spared because he was actually innocent.

The court found, however, that trial counsel did not "carry through this tack" because the trial court prohibited counsel from arguing actual innocence in sentencing. Trial counsel then changed tactics and stated explicitly that the defendant was guilty and had a "horrendous record." Counsel never mentioned the defendant's positive character traits. While counsel did mention the non-violent nature of the defendant's prior convictions, this was undermined by the state's cross of the mitigation witnesses about his assaults on various family members and his ex-girlfriend. Counsel's "effort fell well short of the national prevailing professional standards articulated by the American Bar Association" in the 1989 ABA Guidelines. Counsel's conduct was also unreasonable in light of "what they presumably discovered from the conversations" counsel had with the defendant and his mother. Prejudice found because, if counsel had adequately investigated, the evidence would have established that the defendant's alcoholic father was extremely physically and emotional abusive to his children all of whom ultimately suffered from alcoholism and/or drug addiction. The defendant's mother drank regularly while she was pregnant with him and was beaten by her husband. The defendant also had two serious head injuries that caused loss of consciousness as a child. He was placed in classes for the learning disabled at school. After the defendant ran away from home as a teenager to avoid his father's abuse, he was placed in foster care where he was sexually abused by his foster mother. He was ultimately placed in a facility for troubled children where counselors noted that he was depressed and hopeless. As an adult, the defendant suffered two major losses due to the death of his father from cancer (and the defendant cared for him the last 6 months of his life despite the history of abuse) and the death of his child who lived only 14 days because of the mother's drug use during pregnancy. The defendant also had a substantial history of alcohol and substance abuse beginning at age 10. Although counsel did present "some mitigating evidence" to the jury, "it does not follow that the jury was provided a comprehensive understanding" of the mitigation. "For example, while Outten's mother portrayed her husband as a 'very, very strict parent,' she did not relate to the jury the disturbing abuse. . . ." The jury also heard nothing of the sexual abuse, possible neurological damage, learning disabilities, or low IQ. Prejudice was also clear due to the jury's close vote in favor of death (7 to 5). Under AEDPA, the state court's holding was an unreasonable application of *Strickland* on both prongs. With respect to sentencing it was unreasonable, in part, because the court found no prejudice because the background information also "contained some harmful information."

***Williams v. Anderson*, 460 F.3d 789 (6th Cir. 2006)** (tried in July 1984). Under AEDPA, counsel ineffective in capital sentencing for failing to adequately prepare and present mitigation evidence. Following the defendant's conviction of hiring a person to commit the murder, counsel waived opening statement in sentencing and presented no evidence. The defendant made a brief statement and then counsel gave "a long, rambling closing, in which he arguably presented a case for residual

doubt." *Id*. at 794. The remainder of the closing argument included prejudicial statements by counsel. Appellate counsel asserted counsel's ineffectiveness on direct appeal, which was denied dud to the lack of any evidence outside the trial record. Post-conviction counsel asserted the issue with supporting evidence, but the post-conviction court was prohibited from granting relief under state law because the issue had been addressed on the merits during the direct appeal. The federal court determined that its review should be based on the direct appeal opinion. While the court would normally be prohibited from considering evidence not before the court at that time, the court found cause and prejudice for the default because appellate counsel was ineffective. Counsel's conduct was deficient because "[i]t is well-established in Ohio law that where an ineffective assistance of counsel claim cannot be supported solely on the trial court record, it should not be brought on direct appeal." *Id*. at 800. Moreover, "[i]neffective assistance of counsel claims based on trial counsel's failure to investigate and present mitigation evidence can never be proven based solely on evidence in the record because the record necessarily does not contain evidence of prejudice." *Id*. Prejudice was established because the underlying claim of ineffective assistance of trial counsel had merit when supported with evidence. Trial counsel's conduct was deficient in completely failing to investigate mitigation evidence. Counsel never even discussed the possibility of a court-ordered psychiatric evaluation and pre-sentence report with the defendant until two days prior to sentencing. He did not even discuss the issue with the defendant or with his family or friend. Counsel's conduct was not excused by strategy to focus only on residual doubt "because defense counsel never conducted an investigation into mitigation before deciding to pursue residual doubt." *Id*. at 804. The state court's determination that counsel's conduct was reasonable was "contrary to federal law as articulated in *Strickland*." *Id*. at 802. The state court did not address the question of prejudice so the federal court's review of this issue was de novo. Prejudice found because the available but unpresented evidence included evidence of an alcoholic, abusive mother; abandonment by his father at a young age; an uncle, who was his primary male role model, that was a career criminal; cocaine dependence and cocaine induced paranoid fears at the time of the murder; a diagnosis of Dyssocial Reaction, Mixed Personality Disorder with Anti-social and Narcissistic Features; and that the defendant had treated his wife's autistic son like his own. "In addition to presenting the jury with mitigating evidence, the testimony of Petitioner's family and friends would have humanized Petitioner." *Id*. at 805.

***Poindexter v. Mitchell*, 454 F.3d 564 (6th Cir. 2006)** (sentenced in June 1985). Under pre-AEDPA law, counsel ineffective in failing to adequately prepare and present mitigation. In sentencing, counsel presented the testimony of three family members and a friend. This testimony included the following information: (1) the petitioner was a good student, who was involved in gymnastics in school; (2) the petitioner was peaceful and quiet and kept to himself; and (3) the petitioner read the Bible a lot, worked, and got along with everyone. The petitioner also made an unsworn statement that began with describing his relationship with his former girlfriend, whose new boyfriend was the murder victim in this case and she had also been assaulted. He described an incident when he had slapped her for wearing an "obscene" miniskirt and said her mother had instigated everything because "she disliked dreadlocks." After that point, the petitioner refused to continue reading the prepared statement and a recess was taken. Counsel convinced him to continue reading "his" statement. He read the rest, which basically said he was a good guy and believed in God. At the

end, "he yelled, 'And the main thing, I didn't kill that man,' and slammed the microphone down." Counsel's conduct was deficient.

> [C]ounsel failed to conduct virtually any investigation, let alone sufficient investigation to make any strategic choices possible. They did not request medical, educational, or governmental records that would have given insight into [the petitioner's] background. They did not request funds to enlist a psychological or psychiatric expert to evaluate [the petitioner], despite the fact that he exhibited odd behavior. They did not consult with an investigator or mitigation specialist, who could have assisted in reconstructing [the petitioner's] social history. They failed to interview key family members and friends who could have described his upbringing. And they did not even begin to prepare for mitigation until [the petitioner] was convicted, which was only five days before the sentencing phase began. This was despite the fact that prevailing norms at the time of trial required counsel in a death penalty case to seek records, interview family members and friends, and obtain appropriate mental evaluations well in advance of trial.

*Id*. at ____. Counsel expressed no strategic reason. Prejudice found because, if counsel had adequately investigated, the evidence would have established the following: (1) the petitioner's father beat him, his mother, and his sister; (2) the petitioner's mother was a heavy drinker, who used marijuana almost daily; and (e) the petitioner's mother neglected her children, beat them, and once tried to kill the whole family by shutting them in the house and turning on a gas stove. An expert in forensic psychology described the family as "very dysfunctional" with "four generations of alcoholism and physical abuse and emotional abuse." In addition to his mother's problems, the petitioner was exposed to the alcohol abuse and domestic violence she endured in two of her three significant relationships. She was ultimately hospitalized and her children placed in foster homes. The petitioner functioned in the borderline range of intelligence and suffers from a paranoid personality disorder. These crimes were caused by "his paranoid personality disorder" and "a pathological jealous reaction accompanied by rage." Because of this evidence "any mitigation strategy to portray [the petitioner] as a peaceful person was unreasonable since that strategy was the product of an incomplete investigation." *Id*. at ___.

***Dickerson v. Bagley*, 453 F.3d 690 (6th Cir. 2006)** (tried in November 1985). Counsel was ineffective in capital sentencing for failing to adequately investigate and present mitigation. The court quoted extensively from the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases in describing counsel's duties. Here, counsel failed to discover significant mitigation that included that the petitioner's biological father denied that petitioner was his son; his mother referred to him as "the moron"; he was raised in an atmosphere of pimps, prostitutes, and drug dealers; several homosexual advances were made upon him; he had a full-scale I.Q. of 77, placing him in the lower seven percent of cognitive ability; and he had a borderline personality disorder. The state court held that counsel had a strategic reason for the failure to investigate, because one of the three-judge panel had suggested to him waiver of the jury, which counsel took to mean that the judges would not impose death. This finding was an unreasonable application of

Supreme Court case law because "[i]t is not reasonable to refuse to investigate when the investigator does not know the relevant facts the investigation will uncover."

> Had the investigation been conducted, reasonable lawyers surely would not have limited the mitigation proof in this case to simply an effort to show only that [the petitioner] was "provoked" by jealousy [in killing his former girl-friend's new lover] and could not control his impulses, and therefore suffered from "diminished capacity" at the time of the crime.

"Accordingly, the state court unreasonably applied clearly established Supreme Court precedent when it simply assumed that counsel's oversights were motivated by strategy, instead of requiring a complete and thorough mitigation investigation as mandated by *Strickland* and its progeny." Prejudice found because "[a]n argument based on reduced culpability similar to that given by the Supreme Court in *Atkins* might well have been persuasive in [this] case too."

***Frierson v. Woodford*, 463 F.3d 982 (9th Cir. 2006)** (crimes in 1978 and third trial in 1986). Under pre-AEDPA law, counsel ineffective in third capital sentencing for failing to adequately prepare and present mitigation and for failing to challenge a significant mitigation witness' invocation of his Fifth Amendment right against self-incrimination. Counsel's conduct was deficient because counsel failed to adequately investigate, even though "[t]he imperative to cast a wide net for all relevant mitigating evidence is heightened at a capital sentencing hearing." *Id*. at 989. "[T]he reasonableness of counsel's investigatory and preparatory work at the penalty phase should be examined in a different, more exacting, manner than other parts of the trial." *Id*. at 993. Here, counsel did not review the prior sentencing transcripts, which would have revealed a thorough drug history by an expert, along with a series of psychiatric evaluations while the defendant was in the custody of the California Youth Authority (CYA). These records revealed symptoms of organic brain dysfunction. Counsel also did not obtain readily available school, hospital, prison, and juvenile records. These records revealed significant head injuries as a child that required hospitalization, an IQ score of 71, and a documented learning disability. Although counsel knew of the head injuries, he "ignored the red flag of possible brain damage caused by multiple childhood head injuries by failing to consult a neurologist, and instead relied on the lay opinion of [the defendant's] parents" who saw no change in behavior following the injuries. *Id*. at 991. Counsel also claimed to have relied on the prior testimony of a forensic psychiatrist that there was no evidence of brain damage, but the "failure to consult with a neurologist–the only expert qualified to evaluate organic brain dysfunction caused by multiple childhood head trauma–[was] not ameliorated" on this basis, in part, because it was clear that counsel had not been aware of the prior testimony. Counsel's conduct was not excused by "strategy" because "strategy presupposes investigation." *Id*. at 992. Prejudice found because the omitted evidence, taken as a whole, might well have influenced the jury's appraisal of the defendant's moral culpability. Counsel's conduct was also deficient in adequately preparing and responding to the state's evidence that the defendant had a juvenile adjudication for murder for which he was committed to CYA. Counsel presented several witnesses who testified that the defendant was not the shooter, but these witnesses lacked much credibility. Counsel then sought to present the testimony of the juvenile co-defendant that counsel believed to be the shooter but basically encouraged this

witness to invoke his Fifth Amendment rights even though this witness had confessed to counsel and his investigator that he was, in fact, the shooter. Counsel's conduct was deficient because, much like counsel in *Rompilla*, counsel failed to review the prior juvenile records, which would have disclosed that this witness had been tried and acquitted on this charge and thus could not assert the Fifth Amendment privilege because double jeopardy barred trying him again for this murder. Prejudice was also established for this error because this prior homicide was "the central focus of the penalty hearing" and the prosecution's closing argument. Had the jury heard testimony that the co-defendant confessed to the murder rather than a simple invocation of his Fifth Amendment rights there is a reasonable probability that at least one juror would have struck a different balance in the outcome.

***Hovey v. Ayers*, 458 F.3d 892 (9th Cir. 2006)** (tried in 1982). Under pre-AEDPA law, counsel ineffective in capital sentencing for failing to adequately prepare and present mental health evidence during the trial, where a finding of premeditation was required before the petitioner was eligible for the death penalty, and sentencing. In exchange for the exclusion of other unrelated charges, the petitioner stipulated his guilt with the exception of the intent element. Early in the trial, the court convened a two-day hearing because of the court's concerns about primary counsel's competence. The court found him competent, but no one even informed the petitioner about this hearing. Following his conviction with a finding of premeditation, the defense presented eighteen witnesses, including twelve friends and three family members, who described him as a well-meaning and introspective young man from an unexceptional middle-class family. He attended college and had been living at home and working sporadically at the time of the murder. Witnesses described his behavior in the months leading up to his crimes as increasingly eccentric. The primary defense witness, a psychiatrist, testified (primarily just on his interviews with the petitioner) that the petitioner suffers from schizophrenia, which caused him to lose control and kill the victim. Counsel's conduct was deficient.

> A defense attorney in the sentencing phase of a capital trial has "a professional responsibility to investigate and bring to the attention of mental health experts who are examining his client[ ] facts that the experts do not request." Regardless of whether a defense expert requests specific information relevant to a defendant's background, it is defense counsel's "duty to seek out such evidence and bring it to the attention of the experts."

*Id*. at ____. While the petitioner's mental health was the "heart" of the mitigation case, this evidence came almost exclusively through the testimony of the psychiatrist. Counsel had not provided the psychiatrist with relevant background information, including records from the petitioner's hospitalization a year before these crimes due to what doctors initially believed was an acute "catatonic" schizophrenic episode. These records "would have strengthened" and "confirmed" the psychiatrist's diagnosis and "corroborated [his] testimony and bolstered the credibility of his response to the prosecution, whose primary strategy in attacking [the psychiatrist] was to suggest that [the petitioner] had never suffered from mental illness." *Id*. at ____. Without these records, the psychiatrist testified in cross-examination that he was not aware of the petitioner receiving any treatment or diagnosis prior to his arrest. The prosecution focused on the lack of support for the

doctor's testimony in closing arguments in sentencing. "The prosecutor's closing argument, in combination with [the psychiatrist's] ignorance of [petitioner's] experience [in his prior hospitalization], strongly suggested that the defense had concocted the mitigating mental illness evidence." *Id*. at ____. Prejudice found because "[t]his evidence, coming as it did from doctors who had no connection to the defense or incentive to invent a diagnosis and thus who were invulnerable to charges of fabrication, could very well have made the difference in a life as opposed to death verdict." *Id*. at ____. Moreover, even though the prior doctors ultimately concluded that the petitioner suffered from "drug-induced psychosis," this was based on his own statements that were not confirmed by blood tests. Regardless of the diagnosis, he "displayed symptoms consistent with" the defense expert's diagnosis and the initial diagnosis of the prior doctors of an "acute schizophrenic episode." "[A]ll potentially mitigating evidence is relevant at the sentencing phase of a death case, so ... mental problems may help even if they don't rise to a specific, technically-defined level." *Id*. at ___. Finally, during deliberations, the jury specifically asked that the defense expert's "testimony be re-read, suggesting that the jury placed importance on it." *Id*. at ___. Counsel also failed to provide the psychiatrist "with important information about the circumstances surrounding" a kidnaping that occurred after these crimes.

> This information would have prevented the prosecutor from portraying [the psychiatrist] as ill-prepared and foolish and thereby impugning his medical conclusions. Because [the psychiatrist] was not adequately prepared, the prosecution was able to demonstrate that [he] was completely ignorant of several important facts, including that [the petitioner] was regularly and successfully attending a training school at the time of [this] murder, that [the petitioner] altered his appearance after [this] murder and before the [separate] kidnapping, and that [the petitioner] released [the kidnaping victim] only after being discovered and pursued by two witnesses to his crime.

*Id*. at ___. The prosecution also focused on the doctor's ignorance of these facts in closing arguments. Prejudice found because "there is a reasonable probability that [the psychiatrist's] ignorance of basic background facts related to the [separate] kidnapping affected the jury's sentencing decision."

> The clear implication of the prosecution's argument was that [the psychiatrist] was uninformed about the subject of his diagnosis and that his conclusions stemmed from a general misunderstanding of the facts. Even if the background information did not change [his] diagnosis, he at least would have been able to testify more knowledgeably about the case and better weather the prosecution's attempts to discredit him. He would have been able to anticipate the prosecution's questions during cross-examination and explain how [the petitioner's] activities around the time of the offense could be consistent with a diagnosis of schizophrenia. Instead, [the psychiatrist] was caught by surprise, in an embarrassed and vulnerable situation. He was entirely discredited by his lack of critical information, information that lay in the hands of [petitioner's] counsel.

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*Id*. at ____. In a footnote, the court addressed additional prejudice due to counsel's failure to provide the psychiatrist with a probation report after he plead guilty to the separate kidnaping and with hospital records from post-arrest hospitalizations. While these documents reflected diagnoses of schizoid personality rather than schizophrenia, they also contained observations by medical professions, "including descriptions of his delusions and grandiose ideas that are consistent with [the psychiatrist's] observations and diagnosis." In short, whatever the precise diagnosis, medical professionals repeatedly had concluded that [the petitioner] was seriously mentally disturbed."

**2005: *_Marshall v. Cathel_, 428 F.3d 452 (3rd Cir. 2005) (_affirming_ 313 F. Supp. 2d 423 (D.N.J. 2004))** (tried in March 1986). Counsel ineffective in capital sentencing for failing to adequately investigate and present mitigation evidence, failing to seek a continuance to do so, failing to adequately consult with the defendant concerning his options and the procedure in the sentencing proceeding, and did not even make a plea for his client's life. Following conviction for hiring someone to murder his wife, the defendant proceeded immediately to sentencing after being checked at the hospital after fainting following his conviction. Counsel had not prepared at all for the penalty phase and had not investigated at all on this front or retained any experts. Nonetheless, counsel did not request a continuance to prepare. Instead, counsel "agreed" with the prosecutor that both sides would waive opening and would not present evidence in sentencing and would only do a short closing argument. The state also dismissed two of the three aggravating factors charged and stipulated a single mitigating factor–that the defendant did not have a prior criminal record. Analyzing the case under AEDPA, the court found that counsel's conduct was deficient because "the lack of preparation is striking and inexplicable," *id*. at 466, "in light of his knowledge from the inception that the case would be a capital one and that his client faced powerful State's evidence," *id*. at 472. While the defendant was a "difficult client to control" and the community, and perhaps his family, had turned against him, "neither circumstance excuses counsel's failure to conduct any investigation into possibly mitigating factors or prepare a case for life." *Id*. at 467. Counsel also failed to adequately consult with the defendant and did not even explain to him that he "had the right to allocute at the penalty phase." The defendant's failure to cooperate with the preparation of mitigation does nothing to relieve counsel "of his constitutional duty as an attorney."[1] "Widely accepted national guidelines, state specific standards, and [counsel's] own testimony regarding his previous capital experience–all of which aid in our evaluation of the reasonableness of [counsel's] preparation–make clear that

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[1] As the District Court put it:

> Even when clients strongly assert their innocence and refuse to discuss the possibility of being found guilty, an attorney must find a way to prepare for and investigate a mitigation case. . . . No matter how difficult, [counsel] had an obligation either to convince [the defendant] to cooperate with him in preparing a case for life, or to find a way to conduct an investigation without [the defendant's] assistance.

*Marshall v. Hendricks*, 313 F. Supp. 2d 423, 451 (D.N.J. 2004).

[counsel] understood but abdicated his responsibility as counsel to a client facing a possible death sentence." *Id*. at 467 (citing the ABA Standards for Criminal Justice).

> Regardless of counsel's trial strategy of denying guilt, "[w]ith the outright rejection of [the] defense, which is the only way the guilty verdict can be interpreted, [counsel] knew that the jury also had rejected the character evidence submitted in support of that defense. Indeed, it would only be fair to assume that they had found [the defendant] to be a liar and a despicable person for paying someone to have his wife killed. [Counsel's] clear duty at that point was to shift his focus away from absolving [the defendant] of involvement in his wife's murder–certainly, the evidence for the guilt phase had not worked for that purpose–to saving his life.

*Id*. at 469. Counsel's most glaring omission was failing to interview the defendant's sons even though he believed they would be hostile to the defendant. "[C]ounsel's 'beliefs' are not a substitute for informed strategy." *Id*. at 471. The court also viewed counsel's "agreement" with the state as an "abdication of his role." *Id*. at 472. Counsel "was not merely agreeing to hold back on the production of evidence–he had no evidence to introduce. . . . Far from a strategic, bargained-for exchange, the agreement appears to have been the only option." *Id*. While counsel argued that the defendant was a law abiding citizen with no significant history of prior criminal activity, these are "relatively insignificant aspects–essentially applicable to any and every first time offender of a brutal crime–that are anything but 'humanizing.'" *Id*. at 473. Counsel's presentation was only a "bland emotionless argument." Prejudice was found because the general character testimony presented during the trial was only general, "cursory" information. Counsel's conduct was not excused by strategy. "Rather, it is a situation where [counsel] inadequately prepared for the penalty phase and put in no mitigating evidence because he had none to present." Likewise, counsel only gave a "verbal shrug of the shoulders" in arguments and did not even make a plea for mercy. Prejudice was found because an adequate investigation would have revealed numerous family members and friends willing to ask for mercy and to testify about the harmful impact of execution on the defendant's family, particularly his son. The state court's finding of no prejudice was an unreasonable application of *Strickland*.

***Harries v. Bell*, 417 F.3d 631 (6th Cir. 2005)** (tried in 1981). Counsel was ineffective in capital sentencing for failing to prepare and present evidence in mitigation in case analyzed under pre-AEDPA standards. Despite the requirements of the ABA Guidelines to investigate "to discover all reasonably available mitigating evidence," *id*. 638 (quoting ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases § 11.4.1(c), p. 93 (1989), counsel limited their investigation to a few phone calls with family members, sending requests for information to some of the institutions in which the petitioner had been confined, and interviewing the defendant, his co-defendant, and two state witnesses. While the petitioner had requested that counsel not pursue mental illness as a defense and counsel believed that background evidence "would not persuade the jury," counsel's conduct was unreasonable because "defendant resistance to disclosure of information does not excuse counsel's duty to independently investigate." *Id*. at 639 (quoting *Coleman v. Mitchell*, 268 F.3d 417, 449-50 (6th Cir. 2001)). Counsel's conduct was also deficient

because counsel was aware of the defendant's poor mental health and troubled family background, which left "no 'room for debate'" that their truncated investigation was deficient. *Id*. at 639 (quoting *Rompilla v. Beard*, 545 U.S. 374, ____ (2005)). Prejudice was found because adequate investigation would have revealed a traumatic childhood, involving physical abuse by petitioner's mother, stepfather, and grandmother. He had been hit on the head with a frying pan and choked so severely, at age 11, that his eyes hemorrhaged. A year later, staff at a detention home noted multiple traumatic scars on his head. He was also exposed to his father and stepfather beating his mother and both his father and stepfather had ultimately been murdered themselves. Since age 11, he spent all of his life, except a combined total of 36 months, combined in institutions, many of which were violent or unsanitary. He had also had numerous heard injuries and had attempted suicide and suffered carbon monoxide poisoning at age 20. He had frontal lobe damage, even according to the state's experts, which "can result from head injuries and can interfere with a person's judgment and decrease a person's ability to control impulses." *Id*. at 640. He also suffered from a mental disorder although the exact diagnoses ranged from bipolar mood disorder, trauma-induced anxiety, anxiety disorder, post-traumatic stress disorder, and antisocial personality disorder. "This evidence adds up to a mitigation case that bears no relation to the few naked pleas for mercy actually put before the jury." *Id*. (quoting *Rompilla*, 125 S. Ct. at 2469). While the State argued that admission of this evidence would have opened the door to evidence of numerous prior criminal acts, Tennessee law prohibited this evidence. Even if it was admissible, however, prejudice was still found because the petitioner in *Williams v. Taylo*r, 529 U.S. 362, 396 (2000), "had a criminal history . . . at least as serious" as the petitioner's and the Court still found prejudice. *Id*. at 641. Tennessee law also supported a finding of prejudice because counsel's failure to present mitigation evidence left the jury with no choice but to impose the death penalty.

***Summerlin v. Schriro*, 427 F.3d 623 (9th Cir. 2005)** (sentencing in July 1982). Counsel ineffective in capital case for failing to prepare and present mitigation evidence. Analyzing the case under pre-AEDPA law, the court held that counsel "utterly failed" to investigate the defendant's family and social history or to develop a mental health defense. Counsel instead relied "on the limited information developed in [the defendant's] pre-trial competency examination, which was prepared for an entirely different purpose" than mitigation. *Id*. at 631. Counsel did so even though he was aware of the "preliminary mental health information" from the defendant's prior counsel. He even failed to interview the state's experts even though counsel knew the state intended to call these experts in sentencing. During the month between the trial and sentencing hearing, counsel did not meet with his client. In sentencing, counsel sought only to present testimony of consulting psychiatrist retained by the defendant's prior counsel. Before this witness was sworn, the defendant interrupted and apparently requested that the witness not be called so the defense presented no testimony.

> Even if [the defendant] had instructed counsel not to present a mitigation defense, that fact would have no effect on the deficient conduct prong of *Strickland* because counsel had already demonstrated ineffectiveness by failing to thoroughly investigate the existence of mitigating factors. Although the allocation of control between attorney and client typically dictate that 'the client decides the 'ends' of the lawsuit while the attorney controls the 'means,'" it does not relieve an attorney of the duty

> to investigate potential defenses, consult with the client, and provide advice as to the risks and potential consequences of any fundamental trial decision within the client's control.

*Id*. at 638 (citation omitted). The court stated that "[t]his is especially true in capital cases." *Id*. (citing the ABA Standards for Criminal Justice and ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases). Prejudice found even in the "context of judge-sentencing." If counsel had adequately investigated, the evidence would have shown a "tortured family history" in which the defendant's father deserted him and was later killed in a police shootout and the defendant's alcoholic mother beat him frequently and punished him by locking him in a room with ammonia fumes. He had electric shock treatments, at his mother's behest, to control his temper. He had a learning disability that left "him functionally mentally retarded." He had also been diagnosed as a paranoid schizophrenic and had been treated with anti-psychotic medications. He also had a temporal lobe seizure disorder and there were indications of organic brain syndrome and impaired impulse control. Instead of developing and presenting this evidence, counsel presented no evidence in sentencing and only asked the court to consider a report attached to the presentencing report. Counsel's argument covered only three pages of transcript. In addition to failing to present mitigation evidence, counsel also failed to present evidence mitigating one of the statutory aggravating circumstances (a prior violent felony conviction). The defendant's prior aggravated assault conviction was a result of the defendant showing a pocket knife to the driver of a car that veered off the road, jumped the curb, and struck the defendant's wife causing serious injuries that required hospitalization. The knife was pulled at the scene, but the driver was not physically injured. Counsel knew of this information because he had represented the defendant on this prior assault but still did not present this information. Finally, counsel also failed to object to the presentence report prepared by a probation officer that contained numerous sentencing recommendations from the probation officer, the victim's family and friends, police officers, and others. All of this material was hearsay and inadmissible and almost all was damaging to the defendant. Instead of objecting, counsel made it worse by requesting that the court review a report attached to it. Counsel's failure to present mitigation "all but assured the imposition of a death sentence" under state law that mandated death if there was a qualifying prior conviction and no mitigation. The court also found that this "was not by any means a clear-cut death penalty case" because the initial very experienced prosecutor did not believe he could get a death sentence and offered to allow the defendant to plead to second-degree murder for a 21 year sentence that would have allowed the defendant's release in14 years. (This offer was withdrawn when the initial prosecutor and defense counsel were replaced.)

**2004:** ****Smith v. Mullin*, 379 F.3d 919 (10th Cir. 2004)** (trial in October 1994). Counsel was ineffective in capital sentencing for failing to adequately prepare and present mitigation. Counsel's conduct during the trial was "troubling" but the court found no prejudice in light of the overwhelming evidence of guilt and disposed of these claims on that basis. In addressing the right to effective assistance in sentencing–"the most critical phase of a death penalty case," id. at ____–the court declared:

> [W]e are particularly vigilant in guarding this right when the defendant faces a sentence of death. Our heightened attention parallels the heightened demands on counsel in a capital case. See ABA Standards for Criminal Justice 4-1.2(c) (3d ed. 1993) ("Since the death penalty differs from other criminal penalties in its finality, defense counsel in a capital case should respond to this difference by making extraordinary efforts on behalf of the accused.").

*Id*. at ____ (other internal citations omitted). Here, counsel had no experience or training in capital cases and inadequate funding from the defendant's family. In addition, while counsel presented some mental health evidence during the trial, it was done in an "incoherent and haphazard" way. *Id*. at _____. Counsel did not present any additional mental health evidence during sentencing because counsel was unaware that he could do so. Counsel presented only on a few witnesses to testify that the defendant was kind and considerate but "made no attempt to explain how this kind and considerate person could commit such a horrendous crime, although mental health evidence providing such an explanation was at his fingertips." *Id*. at ____. The evidence in mitigation was "pitifully incomplete, and in some respects, bordered on the absurd." *Id*. at _____. Counsel's arguments concerning the trial mental health evidence in sentencing also "were at best belittling of the evidence and at worst damning" of the defendant. If counsel had performed adequately, the evidence would have established that the defendant was completely illiterate, mentally retarded or borderline mentally retarded, and had significant brain damage due to a near drowning and lack of oxygen to the brain when the defendant was quite young. The defendant had been taunted, tormented, and then beaten in school to the extent that the defendant's mother kept him home for an entire year. He also had an unstable home and had been abused by an aunt charged with his care.

> The Supreme Court has, time and again, cited "the standards for capital defense work articulated by the American Bar Association (ABA) . . . as 'guides to determining what is reasonable'" performance. Those standards repeatedly reference mental health evidence, describing it as "of vital importance to the jury's decision at the punishment phase." See ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 1.1, 4.1, 10.4, 10.7, 10.11. It was patently unreasonable for [counsel] to omit this evidence from his case for mitigation."

*Id*. at ___(other internal citations omitted). Prejudice found because the mitigating evidence omitted in this case "is exactly the sort of evidence that garners the most sympathy from jurors," according to "available empirical evidence as to juror attitudes." *Id*. at ____. This evidence could have provided the "explanation" of how a "kind-hearted person" could commit these crimes because the "organic brain damage caused these outbursts of violence." *Id*. at ___.

**2003:** ***Lewis v. Dretke*, 355 F.3d. 364 (5th Cir. 2003)** (sentencing in May 1987). Counsel was ineffective in capital sentencing for failing to adequately investigate and present evidence of the petitioner's abusive childhood. Applying pre-AEDPA law, the court gave no deference to the state court's resolution of the claims because the state court did not make any factual findings. Under *Wiggins*, "[a] limited investigation into mitigating evidence may be reasonable only if counsel has a basis for

believing that further investigation would be counterproductive or fruitless." *Id*. at 367. Here, counsel's performance was deficient. While the record was limited by counsel's hazy memories and the fact that neither counsel had their file from the trial conducted 14 years before, the petitioner's sisters testified credibly that counsel had never interviewed any of them. Nothing in counsel's testimony indicated a tactical decision for failure to do so. Although the district court found the sisters' testimony was not credible, the Fifth Circuit rejected this finding because the testimony of the sisters was remarkably consistent in that each testified that their father beat them all with extension cords, switches, sticks, or anything else within his reach and that he regularly made them undress and whipped them in their genital areas. The court also found that there was corroborating evidence in the records, which revealed that the defendant's father was a violent drug abuser who shot the defendant's mother, almost killing her; and that he beat the defendant's mother on numerous occasions in front of the children. Medical records also establish that the children made numerous trips to the hospital emergency room for treatment of injuries consistent with the described beatings. The defendant had been hospitalized for cuts on his penis and his sister had been hospitalized for severe burns on her back. The defendant's mother had been hospitalized for a gunshot wound. There was also evidence of numerous domestic disturbance calls to the home. Prejudice was found even though the defendant's grandmother testified that the defendant had been abused. "[H]er conclusional testimony contained none of the details provided by Lewis' siblings at the habeas hearing, which could have been truly beneficial. [Her] skeletal testimony concerning the abuse of her grandson was wholly inadequate to present to the jury a true picture of the tortured childhood experienced by Lewis." *Id*. at 368. "[H]ad this evidence [of Petitioner's abuse] been presented, it is quite likely that it would have affected the sentencing decision of at least one juror." *Id*. at 369. The district court found that the testimony would have been inadmissible or given little weight due to the elapsed time between the child abuse and the crimes and the fact that the defendant had intervening criminal convictions, but this finding was erroneous. Mitigating evidence was considered in both *Williams v. Taylor* and *Wiggins* despite the elapsed time in both cases and the defendant in *Williams* had many intervening criminal convictions. "The district court's conclusion regarding the temporal nexus requirement was therefore erroneous." *Id*.

***Hamblin v. Mitchell*, 354 F.3d 482 (6th Cir. 2003)** (sentenced in April 1983). Counsel was ineffective in capital sentencing for failing to adequately prepare and present mitigation. Counsel did not attempt to obtain any family history or any facts concerning the defendant's psychological background and mental illness and counsel did not seek any advice or expert consultation. Despite a large body of mitigating evidence, counsel did nothing to discover what was available or introduce it in evidence. Analyzing the case under pre-AEDPA standards, the court held:

> the *Wiggins* case now stands for the proposition that the ABA standards for counsel in death penalty cases provide the guiding rules and standards to be used in defining the "prevailing professional norms" in ineffective assistance cases. This principle adds clarity, detail, and content to the more generalized and indefinite 20-year-old language of *Strickland*.

*Id*. at 486. Even though Hamblin was tried before the 1989 ABA standards were published, the

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Court held:

> The standards merely represent the codification of long-standing, common-sense principles of representation understood by diligent, competent counsel in death penalty cases. The ABA standards are not aspirational in the sense that they represent norms newly discovered after Strickland. They are the same type of longstanding norms referred to in Strickland in 1984 as "prevailing professional norms" as "guided" by "American Bar Association standards and the like."

*Id*. at 487. The court also held:

> New ABA Guidelines adopted in 2003 simply explain in greater detail than the 1989 Guidelines the obligations of counsel to investigate mitigating evidence. The 2003 ABA Guidelines do not depart in principle or concept from *Strickland*, *Wiggins*, or our court's previous cases concerning counsel's obligation to investigate mitigation circumstances.

*Id*. While the court recognized that it was required to measure counsel's performance against the prevailing standards at the time of trial,

> We cite the 1989 and 2003 ABA guidelines simply because they are the clearest exposition of counsel's duties at the penalty phase of a capital case, duties that were recognized by this court as applicable to the 1982 trial of the defendant in *Glenn v. Tate*. . . .

*Id*. at 488. The district court held that counsel had a strategic reason for the failure to investigate and to rely instead on a residual doubt theory in sentencing (which has since been rejected by the Ohio Supreme Court as an improper mitigating factor). Counsel's conduct was deficient because counsel did not prepare in any way until after the guilty verdict. Counsel only interviewed the mother of Hamblin's daughter. Counsel did not gather any medical information, including psychological information, in part, because counsel believed that the only mental condition relevant was the defendant's competence to stand trial. In sentencing, the mother of the defendant's daughter testified only that the defendant had a good relationship with his child. She had nothing else positive to say and did not want to testify. The only other mitigation was a relatively short rambling, almost incoherent, unsworn statement by the defendant explaining his background. Counsel did nothing to prepare the defendant in giving this statement. The only explanation for the failure to prepare was that counsel believed the case would plead out and not go to trial. While the district court found a strategy because counsel would have uncovered harmful evidence and because the defendant expressed that he did not want to present evidence in mitigation; the Sixth Circuit rejected these findings

> because counsel does not know what an investigation will reveal is no reason not to conduct the investigation. Counsel was obligated to find out the facts not to guess or assume or suppose some facts may be adverse.

*Id*. at 492. Likewise, the court observed that

> ABA and judicial standards do not permit the court to excuse counsel's failure to investigate or prepare because the defendant so requested. . . . The Guidelines state that "the investigation regarding penalty should be conducted regardless of any statement by the client that evidence bearing upon penalty is not to be collected or presented," because
>
> > [c]ounsel cannot responsibly advise a client about the merits of different courses of action, the client cannot make informed decisions, and counsel cannot be sure of the clients competency to make such decisions, unless counsel has first conducted a thorough investigation. . . .

*Id*. (citing the 2003 ABA guidelines). Prejudice found because, if counsel had adequately investigated and presented mitigation, the evidence would have shown Hamblin's unstable and deprived childhood in which he grew up in extreme poverty and neglect surrounded by family violence and instability. He had a poor education and likely suffered from a mental disability or disorder. Hamblin's father was violent and beat his wife regularly. He ran a still and was arrested for public intoxication, manufacture of moonshine, and child neglect. Hamblin's mother often abandoned her children, leaving them to fend for themselves, and she at times resorted to prostitution. Hamblin tried to provide for himself and his younger sister by stealing food as a very young child. He started getting in trouble with the law as a teenager and left home at 13 the first time and left permanently at 16. He started showing signs of mental disorder when he was a teenager, probably resulting from his poor family situation and possibly from a severe blow to the head at age 8 inflicted by his father with a dog chain. His mother also had a severe infection while pregnant with him as a result of being stabbed by the defendant's father. In light of the "substantial evidence of a childhood in which abuse, neglect, violence and hunger were common," *id*. at 493, the court was convinced that had the available evidence been presented "at least one juror would have voted against the death penalty," *id*.

***Frazier v. Huffman*, 343 F.3d 780, *supplemented on denial of rehearing*, 348 F.3d 174 (6th Cir.2003)** (tried in August 1991). Counsel was ineffective in capital sentencing for failing to prepare and present mitigation evidence concerning a brain injury and a lack of impulse control that reasonably was a result of that injury. The defendant had been charged with killing his stepdaughter after she filed sexual assault charges against him in state court. During trial, the defense theory was one of innocence and the defense presented no evidence. In sentencing, the state had already proven the aggravating circumstances and state law required the jury to weigh aggravating and mitigating circumstances, but the defense presented no evidence, relying instead only on the defendant's brief statement to the jury in which he denied guilt, but asked for mercy. The court found that defense counsel was aware from a review of records about the brain injury and that there could be no reasonable trial strategy that would justify failing to investigate and present evidence of the brain impairment and instead rely exclusively on the hope that the jury would spare the defendant's life

due to doubt about guilt. The court also noted that residual doubt is not a mitigating factor under Ohio law. The defendant "had everything to gain and nothing to lose by introducing evidence of his brain injury in the penalty phase of the case. Yet they sat on their hands." In analyzing the case under the AEDPA, the court found that the state court's determination that counsel had performed in a competent manner was not simply erroneous but unreasonable. The court also found prejudice because evidence of the brain injury could easily have been used by counsel to argue a scenario where the defendant did not intend to kill the victim and did so only due to the impulsively and stress. The state court's conclusion that counsel was effective was found to be an unreasonable application of clearly established Supreme Court precedent.

### 3. U.S. District Court Cases

**2018:** ***Sasser v. Kelley*, 321 F. Supp. 3d 900 (W.D. Ark. 2018)** (1994 sentencing; 1995-1997 post-conviction proceedings)**.** Trial counsel in this Arkansas capital case was ineffective in failing to adequately develop and present mental health evidence and post-conviction counsel's failure to properly raise this claim provided cause under *Martinez* and *Trevino* to overcome the procedural default of the claim. Petitioner was convicted of capital murder and sentenced to death for a 1993 homicide of a clerk at a convenience store. In state post-conviction proceedings, counsel was performing work on petitioner's case when her employer, the Arkansas Capital Resource Center, ran out of government funding and was closed. Post-conviction counsel filed a motion to be appointed individually to represent petitioner, but that motion was not ruled on for a year, and when it was, counsel was permitted to bill up to $1000 to cover travel, service of subpoenas, witness fees, and attorney fees. Although she "did significant work on the case" given these restraints, she did not do "enough to qualify as reasonable"; she did not gather vital records, did not meet with family members individually, did not become aware that petitioner did not graduate high school or that he was deemed mentally unqualified to enlist in the military, did not hire a mitigation expert, and did not hire a mental health expert. Given the circumstances facing post-conviction counsel, not all of her deficiencies were the result of personal failings. Her deficiencies were not reasonable strategic choices, but rather were another facet of the systemic operation of Arkansas state proceedings to deny capital defendants 'meaningful review of a claim of ineffective assistance of trial counsel.'" 321 F. Supp. 3d at 917. The deficient performance was prejudicial, because the underlying claim of trial counsel ineffectiveness was meritorious. Trial counsel did not start investigating until 2 ½ weeks before the capital trial; counsel hired a family counselor who was not a qualified psychologist or psychiatrist, because she had done an evaluation for counsel before; counsel did not think that mental health experts were important or credible; he gave the family counselor no psychosocial history or referral questions; and as a result the family counselor was not qualified to perform the tests she gave, overestimated petitioner's intellectual functioning, and did not discover that he had organic brain damage. The evidence that could have been presented was that petitioner's father died when he was two years old and the family received only meager benefits and lived in poverty following his death; his mother was depressed during his childhood; petitioner had deficits in intellectual functioning from an early age and was socially promoted through school; as a result he failed to qualify for military service and attempted to cover up that failure; and petitioner suffered from moderate neurological impairment.

**Capital Case*

***Walker v. Davis*, 2018 WL 6591665 (N.D. Cal. 12/14/18)** (1980 trial and sentencing). Trial counsel was ineffective in failing to adequately investigate and present evidence concerning petitioner's troubled background. Trial counsel did not prepare for the penalty phase until after petitioner's convictions of murder during a robbery and several counts of attempted murder. This left him with a single day to develop mitigation. He had no investigator and had rejected a list of potential witnesses provided by petitioner's mother and brother. Trial counsel simply selected family members and friends who were in the courtroom to be mitigation witnesses without explaining to them the purpose of their testimony; instead he told them to plead for petitioner's life and cry if they could. The family and friends (5 total) told the jury that petitioner was 19 years old at the time of the offenses, he had no prior criminal record, he had done yard work for the church secretary in the past, he gave a friend rides to work, he provided financial and emotional support to his mother and sister, and he was loved by them and his girlfriend. Petitioner also testified, denying having committed the crimes he was convicted of, as well as having made certain threats that had been offered as aggravation evidence. Petitioner was sentenced to death. In state habeas proceedings, evidence about petitioner's background was developed through siblings, extended family, teachers and petitioner's father. Petitioner's family relocated frequently during his childhood with little or no notice or explanation. The poverty the family lived in was detailed. There were other family members living with them at times with up to 20 kids present with no supervision. When the children got into trouble they were beaten by one or both parents irrespective of who was actually to blame. Petitioner's father had "Line-up Sessions" where the children were forced to line up and watch as the father made each child bend down and grab his or her ankles and then he hit them multiple times with an extension cord, braided switch or a belt. Kids were placed in the back of the line for a second beating if they cried or let go of their toes. The father also had "Lay Down Sessions" where 4 or 5 kids laid down side-by-side on the floor to be whipped at the same time. Other adults were present during these beatings and they laughed at the children, taunted them and insulted them. The children became "objects to humiliate." Other instances of violence against petitioner were disclosed by the witnesses, including when he tried to protect his mother from his father, resulting in his father beating petitioner. Because petitioner was the oldest son, he was often in the line of fire. His siblings would ask him to do things that they knew would lead their father to beat petitioner, such as getting them food. Petitioner attempted to be the peacemaker in the family. The witnesses also recounted the death of one of petitioner's younger brothers from meningitis, and the impact this had on him, as well as the death of a beloved grandmother. After petitioner's father left the family, petitioner sought to be the protector of his mother and sisters even though petitioner was only twelve years old. Around that same time petitioner's older sister was murdered by her estranged husband. Petitioner "had seen his dying sister lying naked and bleeding with her killer still holding the knife over her body, and he could not shake the sight." He blamed himself for his sister's death and felt like he failed as the man of the family. Later, a new man moved into the household who attempted to sexually molest petitioner's sisters and maybe even the boys. He was a corrupting influence who taught the boys how to commit crimes and even joined them in doing so on some occasions. Petitioner tried to protect his sisters from the man. As he grew older, he also provided for his family members when he could, including shortly before the capital crimes. Teachers provided positive descriptions of petitioner but also attested to the failure of the schools petitioner attended to provide necessary assistance to black students like petitioner. Trial counsel's failure to adequately investigate petitioner's background was deficient, as was his failure to properly prepare the few witnesses he did call at the sentencing phase and his performance in examining them. As for prejudice, the state's

contention that the new mitigation was weak was rejected. And although petitioner could not show that the state supreme court could not reasonably have found that trial counsel lacked notice of brain damage and mental impairments discovered in the state habeas proceeding, there was at least some evidence that, had counsel conducted a reasonable investigation, he would have discovered that petitioner suffered from "long-standing" brain damage which affected petitioner's "cognitive functioning." Petitioner's proffered mental health evidence also showed that the systematic ritualized beatings by petitioner's father, "which at times constituted torture, affected every aspect of his development and life, including brain function, emotional responses, perception of the world around him, beliefs about himself, sense of personal integrity, and relationships with others." The state court's decision finding no prejudice was unreasonable.

**2017:** ***Wardrip v. Davis*, 2017 WL 8677939 (N.D. Tex. Nov. 29, 2017); *Report and Recommendation Adopted as Modified*, 2018 WL 1536279 (N.D. Tex. Mar. 29, 2018)** (trial and sentencing 1999)**.** Petitioner pleaded guilty in Texas state court to capital murder during a burglary and aggravated sexual assault. He was sentenced to death after a sentencing trial. His conviction and sentence were affirmed on direct appeal and he filed a habeas corpus petition in state court, which was denied. Petitioner filed a habeas petition in federal district court under 28 U.S.C. § 2254, and requested and was granted an evidentiary hearing. After evidence was presented at that evidentiary hearing, the court made findings and a recommendation to grant relief on petitioner's claim that he was deprived of his right to the effective assistance of counsel at the punishment phase due to counsel's failure to investigate and present evidence of petitioner's mitigating prison record and commendable behavior while previously in prison for murder, and those findings and recommendation were adopted and penalty phase relief was granted. The Fifth Circuit vacated and remanded that decision after the Supreme Court's opinion in *Cullen v. Pinholster*, 563 U.S. 170 (2011). On remand, the district court determined that the state court's denial of evidentiary development, finding that no material unresolved factual issues existed, deprived petitioner of any opportunity to compel evidence from trial counsel, specifically whether counsel made a strategic decision to not investigate or present evidence of his good prison record. Because petitioner had no means to compel evidence from trial counsel in state court, he had no meaningful opportunity to challenge *Strickland's* presumption that trial counsel acted reasonably. Instead, the state court resolved disputed factual issues by making findings accepting the state's version (including a declaration from trial counsel) as true and petitioner's version as false. Trial counsel's declaration was confusing and contradictory on the issue of prison behavior: it included information that showed that his strategy was to show that petitioner had a good prison record and also that he did not think the good things petitioner had done in prison were relevant to his argument. And nothing in counsel's declaration provided any information about what pretrial investigation he had conducted into petitioner's prison record, what witnesses could have testified about it, and what they would have said. And petitioner had no opportunity to examine counsel about this. In light of the lack of information about this, the state court's denial of the claim was based on an unreasonable determination of the facts that counsel acted strategically under 2254(d)(2). As a result of petitioner's overcoming of the barriers to review under 2254(d)(2), the court did not employ deferential review under AEDPA, but instead made its own determination, using the evidence received at the evidentiary hearing in federal court, which included that counsel testified that he did not recall making a strategic decision not to contact witnesses about petitioner's good conduct. This constituted deficient performance. The evidence of petitioner's good prison

conduct that was presented at the evidentiary hearing included that he attended classes in art, special education, horticulture, and construction; took and passed the GED exam; wrote articles for the monthly prison newsletter; participated in attempts to raise funds from the community to assist a man with emergency medical needs. This demonstrates the prejudice that petitioner suffered from not having this evidence presented at trial, particularly because the jury wrote a note to the court in which it appeared that it was deliberating petitioner's future dangerousness in prison. Court again recommended that sentencing phase relief be granted.

***Jefferson v. Sellers*, 250 F.Supp.3d 1340 (N.D. Ga. 2017)** (trial and sentencing 1986). In this capital, pre-AEDPA case, trial counsel was ineffective for failing to investigate and present evidence of brain damage where they knew defendant had been hit by a car and suffered a head injury at age two and where a psychologist, Dr. Gary Dudley, recommended in his written report that counsel obtain a neuropsychological evaluation. One of defendant's trial attorneys claimed that they made a strategic decision not to pursue neuropsychological testing because Dr. Dudley later told them by phone that it would be a waste of time and defendant was "just a criminal." Dr. Dudley denied making such a statement. The court credited Dr. Dudley's testimony over trial counsel's assertions for the following reasons: (1) trial counsel's time sheets do not reflect that he ever had a phone call with Dr. Dudley after he received Dr. Dudley's report recommending neuropsychological testing; this is consistent with Dr. Dudley's testimony that he did not recall having any conversations with counsel after he submitted his report; (2) trial counsel's claim of a follow-up telephone conversation with Dr. Dudley is inconsistent with his co-counsel's testimony; (3) trial counsel's own testimony on this issue has been internally inconsistent – at some points counsel claimed Dr. Dudley told them defendant was "just a criminal," at other points counsel said Dr. Dudley asserted that they shouldn't worry about it because defendant was a sociopath or a psychopath (however, no mental health professional has ever diagnosed defendant with psychopathy or anti-social personality disorder); and, (4) the court considered the witnesses' demeanor, tones of voice and levels of engagement during the hearing. The substantive evidence of brain damage included neuropsychological test results, a neurological evaluation, IQ test scores, academic test scores, and neuroimages – all of which established that defendant suffers from significant brain damage. Trial counsel performed deficiently because they knew that defendant was hit by a car at a young age and suffered a head injury, but failed to gather further information and abandoned a mental health investigation without requesting neuropsychological testing. Defendant was prejudiced because the jury did not hear that his head was run over by a car at age two and the impact his injuries subsequently had on his life. His brain damage would have provided the jury an explanation for his past behavior. The fact that Respondent recently obtained some rebuttal evidence while the case has been pending in federal court does not compel a conclusion that defendant suffered no prejudice. Defendant does not have to show that a jury would have preferred his experts over Respondent's to establish prejudice. Rather, a jury should have the opportunity to weigh and consider the evidence, including the opinions of both parties' experts. Evidence of brain damage would have also weakened the state's evidence in aggravation because if defendant's impulsive behavior is explained by brain damage it would reduce the volitional nature of the crime as well as his ability to plan and act rationally.

**Capital Case*

***Deck v. Steele*, 249 F.Supp.3d 991 (E.D. Mo. 2017)** (final sentencing 2008). Trial counsel was ineffective for failing to argue that defendant was denied a fundamentally fair penalty trial because of delay not attributable to him. Defendant was originally tried and sentenced to death in 1998. His first death sentence was overturned in state post-conviction; a second penalty-phase trial took place in 2003 and also resulted in a death sentence. The United States Supreme Court granted certiorari and reversed the sentence, finding defendant's visible shackling violated his constitutional right to due process. *Deck v. Missouri*, 544 U.S. 622 (2005). Upon remand, a third penalty phase proceeding was held in 2008 and the jury again recommended a death sentence. In *Betterman v. Montana*, 136 S. Ct. 1609 (2016), the United States Supreme Court held that a criminal defendant's speedy trial right does not apply once he has been convicted, but that he may have other recourse "'including, in appropriate circumstances, tailored relief under the Due Process Clause of the Fifth and Fourteenth Amendments.'" *Deck*, 2017 WL 1355437 at *58 (quoting *Betterman*, 136 S. Ct. at 1612)). The Supreme Court noted considerations relevant to such a claim may include the length of delay, the reason for delay, the defendant's diligence in requesting expeditious sentencing, and prejudice. In this case, these factors weighed in defendant's favor because: (1) "the ten-and-a-half-year delay between [defendant's] conviction and his final penalty-phase trial triggers the remainder of the due process analysis, especially given the negative implications such a delay could have on a capital defendant's constitutionally protected right to adequately provide the sentencing jury with mitigating evidence for its consideration in determining the appropriate sentence"; (2) the reasons underlying the delay weigh against the government because some of the delay was caused by defendant's previous trial counsel's ineffective assistance, which must be "imputed to the State" and additional delay was caused by the State's requests for trial continuances and the prosecuting attorney's disqualification for an undisclosed conflict of interest; (3) the diligence factor does not weigh heavily in favor of either defendant or the State; defendant did object to one of the State's requests for a continuance but also made one limited and reasonable continuance request of his own; and, (4) the prejudice factor weighs heavily in favor of defendant because his inability to present substantial mitigation evidence was directly attributable to the passage of many years' time. *Deck*, 2017 WL 1355437 at *58-60. Thus, the lengthy delay between defendant's original conviction in February 1998 and his final sentencing trial in September 2008 caused his mitigation evidence to be unavailable on account of its loss or destruction and because of "witness fatigue," thereby depriving him of his constitutional right to adequately present mitigating evidence to the jury and rendering his third sentencing trial fundamentally unfair. Trial counsel at the third sentencing proceeding were ineffective because they were aware that defendant could not present substantial mitigation evidence due to the passage of time, but failed to raise this claim. Prejudice was established because defendant was precluded from presenting substantial mitigation, which was not his fault, and there is a reasonable probability that he would not have been sentenced to death if his counsel had raised this constitutional challenge. Indeed, there is a reasonable probability that defendant would not have even undergone a third penalty-phase proceeding. Post-conviction counsel was also ineffective for failing to raise this claim. Although post-conviction counsel challenged trial counsel's failure to present certain mitigation evidence, they did not explore the "why" behind this failure. Instead, post-conviction counsel asserted that all the witnesses that should have been called by trial counsel were available and willing to testify. The state habeas court found that this assertion was simply not true and instead, many witnesses were hostile, uncooperative or could not be located. Had post-

conviction counsel adequately investigated why trial counsel did not call a number of witnesses, they would have discovered the basis for this meritorious claim. Thus, post-conviction counsel's performance was deficient and prejudice is established for the same reasons.

***Thomas v. Kelley*, 2017 WL 1239148 (W.D. Arkansas, March 31, 2017)** (sentencing in 2005). In this capital case, trial counsel was ineffective for failing to discover and present extensive mitigating evidence at sentencing, including: a dysfunctional childhood filled with alcohol abuse, drug abuse, physical abuse, sexual abuse, violence and poverty; voluminous social history records that trial counsel never obtained; extensive evidence of brain damage, possibly from exposure to alcohol in utero; and, evidence of mental illness, including depersonalization disorder, amnesia and dissociation. Trial counsel was experienced, but the team was dysfunctional. Few mitigation witness interviews were conducted and many were conducted ineffectively, just prior to trial, in groups and over the telephone. Trial counsel unsuccessfully sought a continuance detailing all the things they still needed to complete. As a result of counsel's lack of preparation, the mitigation case was entirely unconvincing and failed to tell defendant's whole life story. Prejudice was established because the un-presented mitigation evidence supports a reasonable probability of a life sentence when weighed against the aggravating circumstances presented at trial. Moreover, post-conviction counsel was ineffective as well because they: (1) performed very little, if any, review of trial counsel's file; (2) failed to request funding for an investigator or mitigation specialist; (3) did not consult with any experts or interview any mitigation witnesses; and, (4) failed to conduct any timely or meaningful interviews of trial counsel. "[U]nder prevailing standards post-conviction counsel has the same duties as trial counsel with respect to investigation and cannot rely on the previously compiled record but must conduct a thorough independent investigation." *Id*. at *25 (citing the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, and expert testimony from Sean O'Brien). Accordingly, defendant's ineffective-assistance-of-trial-counsel claim was not effectively raised during the state post-conviction proceedings and defendant was prejudiced because post-conviction counsel failed to raise a meritorious claim.

**2016: *McNish v. Westbrooks*, 149 F. Supp. 3d 847 (E.D. Tenn. 2016)** (trial and sentencing in 1984). Counsel ineffective in capital sentencing for failing to adequately investigate and present mitigating evidence. This issue was first raised on appeal of the denial of state post-conviction. The District Court held the issue was procedurally defaulted but the Sixth Circuit remanded following the decisions in *Martinez v. Ryan* and *Trevino v. Thaler*. On remand, the District Court held that post-conviction counsel's conduct was deficient in failing to assert trial counsel's ineffectiveness and the issue was "substantial." Therefore, the procedural default was excused. Trial counsel's conduct was deficient because trial counsel "failed to explore a wealth of evidence that was available" concerning the defendant's social, mental, and family history. While counsel had available records that indicated "a history of attempted suicides, depression, blackouts, and drug abuse," as well as indications of the defendant's traumatic childhood, counsel "chose not to investigate petitioner's family history any further because of their decision to pursue a reasonable doubt defense." This decision was not a valid strategic decision "because counsel did not fulfill their obligation to independently investigate this evidence in order to make an informed decision." Moreover, the decision to "limit their investigation" was not reasonable, "particularly considering that counsel had a general knowledge of

the difficulties of Petitioner's family history." Prejudice was established. "The sum of the testimony portrayed Petitioner as a good-hearted, tender, and compassionate person who was not violent and loved his family and friends," which was "undermined by the nature of the crime for which Petitioner had been convicted." If counsel had adequately investigated and presented the evidence, the jury would have heard evidence of the "degenerative environment Petitioner grew up in" with parents that ran a bootleg business in a dry county. The petitioner was physically and sexually abused by his parents, their customers, and his older siblings. He became addicted to prescription medications after back and head injuries. He attempted suicide and was admitted to a mental health center where he was diagnosed with "hysterical personality and drug dependence."

**2014:** ***Hall v. Beard*, 55 F. Supp. 3d 618 (E.D. Pa. 2014)** (sentenced in October 1994). Under AEDPA (with the court citing the ABA Guidelines numerous times), counsel was ineffective in capital sentencing for failing to adequately investigate, develop, and present mitigating evidence. During sentencing, counsel called only two witnesses, the defendant's mother and the mother of one of his two children, "who testified generally to [his] good character and willingness to help others." Trial counsel testified that he did not investigate further because "he was trying to 'speed this up as quickly as possible and give [the jury] the nuts and bolts and . . . [not] all the little flowers and trimmings." Counsel's conduct was deficient in failing to "reasonably investigate his life, medical, educational, and employment history, and performed no expert mental health evaluation." While the Commonwealth argued that the defendant and his family failed to inform counsel of the defendant's background, despite conversations with counsel, the court rejected this argument because a defendant "does not have 'a duty to instruct counsel how to perform such a basic element of competent representation as the inquiry into a defendant's background.'" *Id*. at ____(quoting *Bond v. Beard*, 539 F.3d 256, 288 (3rd Cir. 2008)). Because the state court decision that counsel was not ineffective based, primarily on this argument, the state court's decision was "contrary to United States Supreme Court precedent because it fails to address the question of whether trial counsel's investigation for potentially mitigating evidence is reasonable under prevailing professional norms." Because the state court did not address the prejudice prong, the court reviewed this issue de novo. Prejudice established as the records and testimony established that the defendant suffered an abusive and neglectful childhood, a history of seizures and several severe head traumas, but his school records established his ability to adjust to a structured environment during his years in a court-ordered placement in "disciplinary school." The evidence supported two statutory mitigating circumstances that had not been presented to the jury: (1) the defendant was under the influence of extreme mental and emotional disturbance and (2) his capacity to conform his conduct to the requirements of the law was substantially impaired. Additionally, the evidence would have given additional weight to "the catch-all factor" that the jury did consider.

**2013:** ***Bridges v. Beard*, 941 F. Supp. 2d 584 (E.D. Pa. 2013)** (tried in 1998). Under AEDPA, counsel was ineffective in capital sentencing for failing to adequately investigate, development, and present mitigating evidence. Counsel did not investigate the petitioner's "life history" and did not obtain a mental health evaluation, even though funding was approved for an expert to assist with the penalty phase. Counsel did not express a strategic reason for this and instead admitted that he simply did not see evidence of "psychological disturbance." Instead, counsel presented "thirteen witnesses,

nearly all of them family or acquaintances," to testify to the petitioner's good character. Even with this limited presentation, the jury deliberated for more than six hours and reported being deadlocked before reaching a death verdict. Counsel's conduct was deficient. The state court's finding to the contrary was an unreasonable application of federal law. The state court essentially found that counsel made valid strategic decisions based on his discussions with petitioner and that counsel simply had no further information that should have led to investigation.

> First, it is simply not the case that the lawyer's duty to investigate begins and ends with discussions with his client. Even a "fatalistic and uncooperative" client does not absolve a lawyer from independent investigation. . . . [I]t is not the duty of the defendant to provide information on mitigation to the lawyer; rather, it is the lawyer's duty to uncover it.

*Id*. at ___ (quoting *Porter v. McCollum*, 130 S. Ct. 447, 453 (2009)). Second:

> The state court is incorrect in suggesting that, under *Wiggins* [ *v. Smith*, 539 U.S. 510 (2003)] a lawyer is only obligated to investigate areas of mitigation of which he has knowledge already. The Supreme Court has specifically rebuked lawyers for "ignor[ing] pertinent avenues for investigation of which he should have been aware."

*Id*. at ___ (quoting *Porter*, 130 S. Ct. at 453 (emphasis added)).

> Moreover, even if the state court's characterization of the *Wiggins* rule were accurate, there was plenty of evidence of which [counsel] was already aware that should have triggered a wider investigation.

Counsel knew of petitioner's health problems and that petitioner had often been left in his grandmother's case. Prejudice was also established. The state courts one-sentence assessment was simply that petitioner "failed to prove the factors counsel was unaware of would have changed the outcome of the penalty phase proceeding." "This is the wrong standard," which is explicit in the examples given by the Court in *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). Thus, the state court's decision is "contrary to" clearly established federal law and is entitled to no deference. Prejudice was clear as "compelling mitigation" was available "that would have helped the jury to 'see the client as someone they do not want to kill.'" *Id*. at ___ (quoting American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases Commentary, Guideline 11.8.6 (1989). In short, the petitioner was raised in an unstable home by a single mother who was addicted to crack and he moved frequently between this chaotic life and the relative structure of his father's home. Petitioner had to move frequently as a child and attended three different schools in his first three school years. His mother's crack addiction was "debilitating." Medical records showed that she tested positive for cocaine while pregnant with petitioner's sibling. She gave up another sibling for adoption. She and the children were on food stamps and welfare through most of petitioner's childhood. She would often disappear for two to three weeks at a time leaving petitioner with his grandmother or aunt. Petitioner's father suspected that she was engaging in

prostitution to support her drug habit. Many of her boyfriends were violent and beat her in front of petitioner. She made frequent visits to hospitals with physical injuries that were most likely caused by abuse. Petitioner also "suffered debilitating illness and hospitalizations as a child." Specifically, while he was in the fifth grade, he was hospitalized for severe groin and leg pain. He was diagnosed with acute rheumatic fever and anemia. A year later, he was readmitted for rheumatic fever. Doctors recommended chronic care hospitalization, bed rest, and a wheelchair, but the family, who never visited while he was hospitalized, took petitioner home.

> Rheumatic fever is associated with untreated strep throat, and thus can be a sign of neglect. If left untreated, it can damage the heart valves–precisely what happened to [petitioner], who was forced at age 17 to undergo open-heart surgery. His mother never visited him in the hospital during his surgery or recovery.

"This evidence would not excuse [petitioner's] crimes, but it would have provided context for it."

> A proper life history . . . would have helped the jury see that [petitioner's] witnessing of the abuse of his mother could have spurred a strong sense of over-protectiveness of his girlfriend that could have explained his violent reaction to the robbery that preceded the murders. . . . This evidence could well have convinced the jury that [petitioner] was less culpable for his criminal behavior.

In finding prejudice, the court also considered the "relative weakness of the aggravation." Even without the available mitigation, the jury struggled through roughly six hours, additional requested instructions on mitigation and weighing aggravation and mitigation, and a deadlock, before reaching a death verdict. Additionally, "the jury rejected the prosecution's theory of the case–that it was related to drug trafficking–when it rejected the aggravating factor relating to the drug trade." Under these circumstances, "it is reasonably probable than an effective presentation of the available mitigating evidence would have convinced at least one juror to find that the mitigation outweighed the aggravation." Convictions and death sentence also vacated due to the prosecution's *Brady* violation.

**2012:** ***Johnson v. United States*, 860 F. Supp. 2d 663 (N.D. Iowa 2012)** (sentenced in June 2005). Counsel was ineffective in capital sentencing for failing to adequately investigate and challenge the government's aggravation evidence and arguments and failing to adequately investigate and present mitigation evidence. The defendant was convicted of five murders in furtherance of a continuing criminal enterprise. Even though she was tried as an "aider and abettor," she received four death sentences and one life sentence, while her boyfriend/the principal received only two death sentences in his separate trial. One of the persons killed was a drug dealer, who worked for the defendant's boyfriend. He was killed after the defendant's boyfriend was indicted on drug charges, due to fear that he might cooperate with law enforcement. His girlfriend, and her two children "simply had the misfortune to be at home" and they were also killed. The fifth victim was also a drug dealer for the defendant's boyfriend and was the defendant's "ex-boyfriend in what had been a stormy and physically abusive relationship." The defendant was sentenced to death for all but the first drug

dealer's murder while her boyfriend/the principal was sentenced to death only for the murder of the two children. First, counsel was ineffective in failing to challenge the prosecution's theory that the ex-boyfriend was killed due to the defendant's motive for "revenge for the beatings that he had inflicted upon her." Counsel did not present evidence that the defendant suffered from battered woman's syndrome, which made the "revenge" theory untenable. This evidence would have addressed the defendant's "mental state at the time of the offense." Prejudice was established with respect to the ex-boyfriend's murder. Counsel was also ineffective in failing to provide the defense psychiatric pharmacologist with data regarding the defendant's drug history. The expert testified about methamphetamine generally "from an informational perspective." He knew nothing at all and did not testify about the defendant. This expert could have testified that the defendant was a methamphetamine addict and about the effect of her chronic addiction on her at the time of the crime, even if she was not using at the time (which she claimed as she was pregnant at the time of the offenses). Even without this connection, four jurors found her methamphetamine addiction to be mitigating. While the trial expert did not testify in these proceedings, the court found that the assertions about what his testimony could have been was "not based on mere speculation."

> It is not speculation to find that . . . he would have been able to cast his testimony about the effects of methamphetamine use in terms of the effects of methamphetamine on Johnson in light of her drug use history, rather than simply in terms of the effects of methamphetamine on people who use some amounts of methamphetamine in certain ways.

Finally, counsel also failed to adequately investigate, prepare, and present mitigation evidence from experts and lay witnesses about the defendant's mental state at the time of the offenses. During the trial, counsel relied on a "mental state" defense in arguing that the defendant was present for the first four crimes but "did not have the requisite intent." Likewise, counsel argued that, while she lured her ex-boyfriend to a meeting where he was killed, she was not present and did not have the intent to kill him. Counsel's conduct was deficient in failing to pursue mental state at the time of the crimes in mitigation. Counsel retained an expert to explore her mental state at the time of the offenses but "pulled the plug" after his initial evaluation, which revealed "red flags" suggesting "brain impairments." Likewise, a second expert identified possible brain impairments and recommended further testing. "Thus, the hired experts' own advice called for further development of mental health evidence to support their opinions, suggesting that the limited bases for and scope of their opinions developed so far rendered those opinions inadequate."

> The lack of a reasonable investigation of mental health mitigation evidence here deprives the decision not to pursue a mitigation case based on mental state at the time of the offenses of any presumption of reasonableness.

Moreover, counsel's explanation that he decided to pull the plug "based on a bad experience that he had had with disclosure of mental health evidence in a capital case many years earlier" was inadequate "in the context of this case." As the Court stated:

**Capital Case*

> If [the] decision to reject such a mitigation defense was in some sense strategic, it was the worst strategic decision by any defense counsel that I have ever seen in my entire career: It effectively doomed [the] mitigation case from the start.

If counsel had adequately investigated, numerous experts could have testified about the defendant's impaired capacity at the time of the crimes based on a borderline personality disorder, and her brain dysfunction, including possibly temporal lobe disease, bipolar disorder, chronic methamphetamine abuse, dependent personality disorder, and post-traumatic stress disorder.

**2009:** ****Turner v. Wong*, 641 F. Supp. 2d 1010 (E.D. Cal. 2009)** (Sentencing in November 1984). In pre-AEDPA case, counsel ineffective in capital sentencing for failing adequately investigate and present mitigation evidence. Prior to sentencing, counsel informed the court that he was not prepared for the penalty phase. During sentencing, counsel presented brief, superficial testimony from the defendant's mother, half-sister, cousin, neighbor, and "job developer." Counsel argued "lingering doubt," despite the defendant's confession that he killed the victim after a homosexual advance and took his car and items from the home. Counsel also "referred to the Bible passage about not judging others" and summed up the defendant's life: "He's lived, the drug thing is wrong, the prior robbery is wrong, the prior receiving charge is wrong, this Defendant was wrong. Four item [sic] wrongness." Evidence that was available but not presented included: "early childhood abuse, his borderline intellectual capabilities, his drug abuse history, as well as [the victim's] predatory sexual practices." When the defendant was only five or six years old, his father would get drunk and abuse him by "thumping" him on the head, "whooping" him with a razor strap, and giving him karate punches in the stomach. The father also was verbally abusive berating the defendant as "stupid" and "dumb." The defendant's parents also fought frequently in front of the children, including physical fights that would leave the mother with knots on her head and black eyes. When the father moved out, he moved in with a woman and her four children just down the street. The defendant had an extensive history of drug and alcohol abuse that began in early adolescence. He used marijuana smoked cigarettes dipped in PCP ("sherms") pretty much daily. He frequently engaged in bizarre behavior, such as running down the street and attempting to fly. On the day of the crimes, he was using marijuana, PCP, methamphetamine ("speed"), and drinking alcohol. PCP was confirmed in blood samples taken two days after the crimes. Trial defense counsel did not have his file and could not remember a lot of details about the counsel but recalled that he chose not to rely on the PCP evidence because he believed it was inconsistent with the focus on the homosexual advances. He was also aware of information from family members that the defendant was violent on PCP. He recalled only one group contact with family members, but did not recall much of what was discussed. He did not recall learning about beatings, physical abuse, or the father's alcoholism. Counsel's conduct was deficient. The background investigation "was minimal and superficial." Counsel focused only on the defendant's mother and did not interview his sister's even though one was present during a group interview. Counsel also failed to interview the numerous family members and acquaintances interviewed by detectives or numerous people that had previously provided statements in support of a prior probation. "The problem with the investigation was not a lack of quantity of witnesses interviewed, but the quality of the interviews." At the very least, the defendant's mother, sisters, and others "were aware of serious family dysfunction in the [] household during [the defendant's]

childhood and early adolescence." These witnesses "were not asked the questions which would have elicited the information. Without the questions having been asked, there is no indication that the subject matter would have been obviously important to the family members, and thus volunteered." "Conducting an adequate investigation to inform strategic decisions is exactly what is required, and is exactly what wasn't accomplished." The "very limited penalty phase evidence and argument of Turner's good character, paternal abandonment, and occupational responsibility," during summation "was not a reasonable strategy for casting [the defendant] in a positive light. It was disjointed, confusing and lacking in real mitigation value." The requirements for competent counsel were not lower in the 1980's.

> The notion that the standard for death penalty cases was merely good character and good deeds also is refuted by the May 1983 article authored by Gary Goodpaster about how defense attorneys should try a capital case. The Goodpaster article is cited by the Supreme Court in *Strickland*, 466 U.S. at 689-90, itself decided May 14, 1984.

*Id*. at ___ (quoting Gary Goodpaster, "The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases," 58 N.Y.U.L.Rev. 299, 335-36 (1983)).

> Even earlier, in 1982, the Supreme Court held that evidence about a defendant's upbringing and turbulent family history is relevant to the individualized sentencing process in a death penalty trial. *See Eddings v. Oklahoma*, 455 U.S. 104, 115, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982).

Here, counsel "either didn't even think of developing background evidence, or, if he did, . . . he inexplicably chose not to pursue it. Neither course is reasonable, especially since there was no downside to the admission of evidence about [the defendant's] childhood victimization." "[A]t best," counsel gave "a distorted view of normalcy and non-violence in [the] family." Likewise, "there was no down side to presenting the jury with evidence of [the defendant's] depressed intelligence beyond the testimony of his paid defense expert." "There was no reasonable investigation or strategy supporting the decision to 'minimize the whole PCP episode.'"

> The PCP use may well have explained to the jury why the defense theory of the case was consistent with the [defendant's] actions in committing the crime (the excessive number of wounds) and immediately afterwards (stealing the television yet leaving the jewelry). Contrary to [counsel's] fears, [the defendant's] chronic drug use and the reasons therefor, were valid mitigating factors that could and should have been presented at the penalty phase.

Nonetheless, counsel continued his "indefensible adherence to [the] sexual advance resistance defense strategy when he could not or would not substantiate it. A reasonable attorney would have adjusted the trial strategy to theories that could be substantiated, like childhood abuse, borderline mental retardation, and PCP intoxication." Prejudice was also established. "[T]he background information presented at the penalty phase trial was general and superficial." In short, it was "a

sanitized version of [the defendant's] life with no explanation of his turbulent childhood, severe intellectual limitations, or dependence on PCP."

***McNeill v. Branker*, 601 F. Supp. 2d 694 (E.D.N.C. 2009)** (tried in April 1996). Under AEDPA, counsel ineffective in failing to adequately investigate and present mitigation evidence. During sentencing, the defense presented family members to testify about the defendant's positive traits and deeds, lack of criminal history, honorable military service, and how he was easily influenced by his brother, who was also a co-defendant. Although counsel had retained a mental health expert to examine the defendant, counsel did not present any evidence of the defendant's depression, troubled family background, or suicide attempt. Relying on the 1989 ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, the court found deficient conduct in the investigation because "counsel focused their attention on the guilt phase of trial and made only minimal effort to investigate potential mitigating evidence," which consisted only of asking the defendant and his parents "their impression on the subject." Counsel did not request funding for a "mitigation expert," even though "funds for mitigation experts were granted in capital cases during that time period." In addition, the defense psychiatric expert was given very little background information and was asked only to focus on the defendant's competence and criminal responsibility rather than sentencing issues. Counsel never contacted the defendant's sister, family members, former girlfriend, friends, and neighbors. The state court unreasonably "placed the responsibility on [the defendant] and his family for failing to inform counsel of petitioner's suicide attempt, depression, alcohol abuse, and troubled background."

> Rather than investigating the accuracy of the impression they received from [the defendant] and his parents in discussion or seeking other potential mitigating evidence, counsel did little more than work to confirm the opinion that petitioner had a good or "normal" childhood.

"The few people whom counsel did call at sentencing were not interviewed by counsel or the defense investigator to learn what type of evidence or information they could provide." Counsel also "failed to inform themselves of and develop information in their possession," including failure to review the defendant's "diary or autobiography, 84 pages long, with information about his life and upbringing," which was prepared at counsel's request. "It included references to . . . depression, regular abuse of alcohol, dysfunction in family relationships, and his suicide attempt." If counsel had adequately investigated the evidence would have established that: numerous family members suffered from depression and/or mental illness; the defendant's father sexually abused one of the defendant's sisters and, physically abuse, and ruled by threatening severe beatings; the defendant "exhibited symptoms of mental health problems as young as seven years-old when he began self-mutilating himself by pulling out all of his eyelashes and developed a nervous habit of clearing his throat"; and as a teenager he experienced serious depression, struggled with substance abuse, and eventually attempted suicide. Counsel's conduct was not excused by strategy, due to the failure to investigate. In addition, the available but unpresented evidence would not have conflicted with the evidence counsel presented in sentencing because the defendant's "helpful and reliable nature, military service, and positive character traits would have been more admirable in light of his personal struggle with mental health

issues and substance abuse." Prejudice established because "[t]here is a 'belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.'" *Id*. at ___ (quoting *Boyde v. California*, 494 U.S. 370, 382 (1990)).

**2008:** ***Ben-Sholom v. Ayers*, 566 F. Supp. 2d 1053 (E.D. Cal. 2008), *aff'd on other grounds*, 674 F.3d 1095 (9th Cir. 2012)** (sentenced in Feb. 1986). Under pre-AEDPA law, counsel ineffective in failing to adequately investigate and present mitigation. The 18-year-old defendant's confessions suggested that he wanted to be a "mercenary," planned to "fight communists in Burma," and the crimes were a "mission." Although counsel "consulted with five mental health experts during trial preparation [concerning a possible diminished capacity defense], he presented no expert testimony at penalty proceedings" and did not provide his mental health experts with records or social historyinformation. He presented only a few family members, associates, and the defendant to testify. Counsel's conduct was deficient.

> It is manifest that to counter the effect of the aggravating circumstances of the crime [counsel] was obligated to show something mitigating about [the defendant's] mental state during his homicidal actions. . . . What was missing was evidence explaining why [he] committed this awful crime and an effort on [counsel's] part to develop that evidence.

*Id*. at ___.

> In this case, however, it was not the quantity of sources consulted but the quality of the investigation and the assimilation of that information into a coherent mitigation case. Because [counsel] hung onto a "strategy" of not providing experts with pertinent background information and the belief that a clinical interview was unnecessary for psychological testing, the expert consultations he arranged were worse than worthless because not only were they based on insufficient information, but on fabricated information [the defendant] supplied. Digging deeper in this case meant that [counsel] needed to ascertain the true facts about [the defendant].

*Id*. at ____. Counsel's "opinion about mental defenses being a 'hard sell' and that the jury would have been disgusted" with such evidence was not borne out by other attorney testimony in the case, including a "*Strickland* expert." [The court also considered CLE publications prior to trial in determining the applicable standards.] Counsel's "conscious decision to provide no documents to most of his experts and only a few document[s] to" one was also unreasonable. The "idea that any psychologist could offer evidence of empirical test results without a clinical interview was totally wrong." "[N]ot giving his experts all relevant information, good and bad, totally defeated the purpose of a mental health examination." "Because [counsel] failed to verify [the defendant's] background information, he did not (and could not) provide what he didn't know to his experts." Counsel's actions (in not providing sufficient information to the one mental health expert he wanted to testify) were not justified by concerns that the four bad reports he had already received would be

disclosed. Rather than providing these negative reports, counsel could have supplied the expert with the "actual background" information through witness interviews.

> The problem with [counsel's] approach was that since he provided his experts with no substantiated background information, they could not be sure how much of what [the defendant] told them during clinical interviews was embellished, exaggerated, or true. The resulting opinions were uninformed, incomplete, and unfounded. . . . The lack of verifiable, true information about [the actual] background disabled the experts from giving the assistance for which they had been retained.

*Id*. Counsel's failure to present mental health evidence in sentencing was not justified by "clearly anti-social behavior in [the defendant's] past," which could be presented in rebuttal by the state's expert.

> [T]he cause for that behavior, including the merciless abuse inflicted by his father, the sense of abandonment by his mother, the depression over losing his life-long dream of being in the Army, and his lack of identity, were mitigating and could have been developed to explain why and how [the defendant] became involved in the unrealistic, military mission that tragically ended [the victim's] life. [Counsel's] failure to expose the [false] foundation for [the state expert's] potential testimony was constitutionally ineffective.

*Id*. at ____. The court "accept[ed]" the opinion of the "*Strickland* expert, knowledgeable about the standard of professional performance at the time" that "the entire trial presentation was confused and at cross purposes." Since counsel "viewed a penalty phase a certainty, the guilt phase opening statement should have raised penalty phase mitigation concepts."

> While [counsel] did explain the idea that [the defendant] and his companions perceived the entire crime as a military mission with the ultimate purpose of going to Burma, he didn't argue that the mission was fantasy, but instead told the jurors they would have to determine for themselves whether the military purpose of the crime was reality or fantasy.

Counsel then "negated" the military mission notion in trial closing. Counsel referenced some potential mitigation in the sentencing opening, "but failed to explain how those facts were mitigating and failed to mention these subjects again on summation." Counsel also failed to mention other significant aspects of mitigation, including the defendant's testimony "of his remorse and substantial domination (following the order to kill [the victim] 'explicitly')," in closing. Prejudice was established because the evidence would have shown: (1) abuse as a toddler "during the critically important time of toilet training"; (2) his father's "sadistic abuse" from the time he was seven years old; (3) 13 different schools; (4) a history of nightmares, depression, and preoccupation with suicide; (5) "extreme emotional and mental disturbances at the time of the crime, including PTSD, borderline personality disorder, identity fragmentation, and major depression; (5) hypertension for which he received a prescription of "Inderal, which can exacerbate depression"; and (6) humiliation and

demeaning "by his anti-Semitic father because he was Jewish." Yet, the defendant sought and "responded well to therapy, revealing his hurt and consistent efforts to escape an untenable home life (by running away) and seeking help from therapists." While counsel presented some of the background facts through lay witnesses in sentencing, "the depth and breadth of the evidence paled in comparison with the understanding the mental health experts added."

> [A]t least one member of . . . [the] penalty phase jury would have voted for life without the possibility of parole had [counsel] presented mental state evidence through the testimony of mental health experts. This conclusion is strengthened by the fact that the penalty verdict following the paltry mitigation evidence presented was not an instant victory for the prosecution. The deliberations began with a vote favoring life by eight to four and deliberations were protracted, lasting nearly 17 hours in contrast to the two and one half hours from beginning to end of the actual penalty phase case. The state of these deliberations suggest a close case.

*Id*. at ___ (citations omitted).

> [The defendant] was sentenced to death by a jury that had no understanding of the "indisputably sadistic treatment" inflicted upon him as a child. Nor was the jury aware of well-established psychological criteria for [his] mental state at the time of the crime.

*Id*. at ___ (citation omitted).

***Sowell v. Collins*, 557 F. Supp. 2d 843 (S.D. Ohio 2008), *aff'd* 663 F.3d 783 (6th Cir. 2011)** (sentenced in November 1983). Counsel, in pre-AEDPA case, ineffective in capital sentencing for failing to adequately investigate and present mitigation evidence. Counsel's mitigation strategy was to emphasize petitioner's good deeds during his adult life. Counsel presented lay witnesses (probation officers and acquaintances) on this, an unsworn statement by the petitioner, mental health reports of court-appointed examinations requested by counsel, and a presentencing (PSI) report. Citing the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989), the court found deficient conduct.

> [P]etitioner's case closely resembles that of *Wiggins*. [Petitioner's] trial counsel did not request or obtain a mitigation specialist or investigator, and instead relied on the investigations of others who were not trained to conduct the type of investigation required in a capital case. Counsel failed to investigate highly relevant mitigating evidence of petitioner's family background. Counsel relied on the information contained in the PSI and the brief mitigation reports prepared by [court- appointed examiners], and did not "dig deeper" and investigate several leads contained in those reports. Counsel did not call one family member to testify, and there is no evidence that counsel conducted even the most basic interviews with petitioner's siblings and other family members for the purpose of investigating petitioner's

> background. Like *Wiggins*, counsel abandoned their duty to investigate after "having acquired only rudimentary knowledge of his history from a narrow set of sources." 539 U.S. at 524, 123 S. Ct. 2527.

The court-appointed examiner reports "contained hints of petitioner's violent and deprived background," and "morsels of evidence," but "counsel did not investigate further."

> [C]ounsel's investigation into petitioner's background did not reflect reasonable professional judgment. Counsel's failure to interview members of petitioner's family was neither consistent with the professional standards that prevailed in 1983, nor reasonable in light of the evidence contained in the PSI and the psychological reports that would have led a reasonable attorney to investigate further. . . .
>
> This is not a case where counsel presented absolutely no evidence in mitigation. Counsel did present a case emphasizing the good in petitioner. The Court cannot conclude, however, that counsel's decision to emphasize the good rather than the bad was reasonable trial strategy, not because there was insufficient evidence to support that theory, but because there simply is no evidence that counsel were even aware of petitioner's troubled past because they did not sufficiently investigate petitioner's background. . . . In this case, counsel were not in a position to elect to pursue one strategy over another because they had not reasonably investigated petitioner's background. Pursuing the leads regarding petitioner's background was necessary to making an informed choice regarding available mitigation strategies. Furthermore, . . . a reasonable investigation would have revealed that the information concerning petitioner's background was not inconsistent with, and might actually have bolstered, counsel's mitigation theory.

Prejudice established because the available evidence "paint[s] a more complete picture of petitioner" and "is qualitatively different than the information that was presented during the mitigation hearing." The evidence was "powerful" and established: (1) severe deprivation, neglect, and physical and emotional abuse as a child; (2) extreme poverty, including malnourishment, a younger brother dying of starvation, inadequate clothing, and being bitten by rats; (3) beatings and head injuries as a child; and (4) living in a tent in a junkyard at age 14 to escape his father's home. This evidence "was significant, and qualitatively different" and "would have painted an entirely different portrait of petitioner." This evidence also "would have bolstered their mitigation case by demonstrating that petitioner was capable of generosity and good acts in spite of the upbringing that he endured."

> The testimony regarding his childhood could not have possibly made petitioner appear more culpable. Rather, the evidence, if discovered and presented, is of the type that might well have affected the [three-judge] panel's appraisal of his moral culpability. . . . The evidence would have helped illustrate the manner in which [petitioner's] violent background contributed to his conduct and violent reaction to the theft that he perceived.

> This is also not a case where counsel could have reasonably feared opening the door to negative information that the panel would not have otherwise learned about petitioner. The door was already opened by the information [presented in sentencing] . . . . Yet, the panel did not hear any evidence of how violence was so very prevalent during the formative years of petitioner's life-evidence which may have explained why petitioner grew into the kind of adult who found himself frequently reacting in a violent manner. Evidence of petitioner's background would have helped explain petitioner's significant repressed rage, and had the panel been able to place petitioner's "excruciating life history on the mitigating side of the scale," there is a reasonable probability that at least one member of the panel "would have struck a different balance." *Wiggins*, 539 U.S. at 537, 123 S. Ct. 2527.

***Richie v. Sirmons*, 563 F. Supp. 2d 1250 (N.D. Okla. 2008), *aff'd on other grounds sub nom. Richie v. Workman*, 599 F.3d 1131 (10th Cir. 2010)** (sentenced in October 1993). Under AEDPA, counsel ineffective in capital sentencing for failing to develop and present neuropsychological evidence. Counsel presented family member testimony of alcoholism in the family, verbal and physical abuse of petitioner, petitioner's prior hospitalization for stab wounds, and petitioner's drug problems and prior problems with the law.

> Consisting solely of testimony from family members, the thrust of Petitioner's mitigation defense focused on Petitioner's family history. Some of the family members touched briefly upon Petitioner's social and educational background. However, other than the mention of one hospitalization, there was no testimony regarding Petitioner's medical history, religious and cultural influences, or employment history. Notably, there was no testimony from a medical expert concerning Petitioner's mental state and mental abilities. . . . Omission of mental health evidence from Petitioner's case for mitigation was unreasonable, and resulted in prejudice to Petitioner.

Petitioner had a series of head injuries as a teenager and a long history of severe headaches.

> Nothing in the record indicates that trial counsel's failure to investigate and obtain a neurological expert was a strategic decision. Counsel simply did not take any action to determine whether such evidence was available.

While counsel did retain a psychologist prior to trial, his "evaluation was based on personality tests, rather than neuropsychological tests which are designed to detect brain damage." If counsel had performed adequately, the evidence would have included evidence of brain dysfunction, a history of significant alcohol and marijuana dependency, and limited intellectual capacity. Reversal was also required because petitioner was denied an instruction on second degree depraved mind murder, which was supported by the record.

**Capital Case*

**2005: *_King v. Bell_, 392 F. Supp. 2d 964 (M.D. Tenn. 2005)** (trial in November 1982). Counsel ineffective in capital sentencing for failing to adequately prepare and present mitigation and failing to object to the prosecutor's argument expressing his personal opinion. Counsel's conduct was deficient under Strickland and the ABA Standards for Criminal Justice. Counsel "focused their limited sentencing efforts on researching the statutory aggravating and mitigating factors and consulting with each other about the content of closing argument" after the guilty verdict. *Id*. at 975. Counsel did not interview family members or otherwise investigate. Counsel also failed to even discuss sentencing with the defendant or prepare him for his testimony. Even if counsel were not aware of any of the defendant's history before, counsel knew the basics about the defendant's background from his testimony during the trial. Nonetheless, counsel did not seek to delay sentencing to allow more time for investigation and preparation for sentencing. In short, "it appears trial counsel failed to conduct any investigation whatsoever." *Id*. at 986. Prejudice found based on the failure to present mitigation and the failure to object to the prosecutor's improper arguments expressing his personal opinion that the defendant deserved the death penalty without objection. If counsel had adequately investigated the evidence would have established that the defendant's biological parents separated when he was nine months old. His father moved to New York. His alcoholic mother gave him over to his aunt and uncle to raise. She died when he was 14 for cirrhosis of the liver. The defendant was raised in a good loving home with discipline even though they lived in "the projects." As a teenager, the defendant started getting into trouble running around with a biological brother raised in a different home nearby. After he was disciplined, he asked to move to New York with his father, which was allowed. His father did not maintain discipline and the defendant started skipping school and getting into trouble. Thus, the defendant "spent his formative years in New York with little supervision." *Id*. at 979. He became addicted to heroin before returning to Tennessee as a young adult. The turning point in his life though came when his aunt and uncle were murdered in 1975 by Black Moslems in retaliation for a mentally retarded, schizophrenic shooting one of their own. They were abducted and their bodies were later found shot in a burned out vehicle. Four other homes, including those of the defendant's brother and cousin who were raised in the same home with him, were firebombed. The murders "overwhelmed" him and he began seeing and hearing his "Mama" (the aunt) and using drugs to "an even greater extent than before." *Id*. at 980. He would often call out to her in his sleep and wake up sweating with nightmares. He had "anxiety attacks" and passed out a few times at work. He was also hospitalized for three gunshot wounds and a heroin overdose. His records showed "episodes of depression, heavy alcohol abuse, and IV drug abuse" and a referral for psychiatric treatment. Mental health experts could have testified that the defendant had Post Traumatic Stress Disorder and an organic brain syndrome, along with panic attacks associated with an anxiety disorder. The state court decision was an objectively unreasonable application of Strickland. The court withheld a final ruling, however, in order to conduct an evidentiary hearing to obtain counsel's testimony and "to resolve any factual disputes that may remain."

### 4. Military Cases

**2004: *_United States v. Kreutzer_, 59 M.J. 773 (Army Crim. App. 2004), _aff'd on other grounds_, 61 M.J. 293 (2005)** (sentenced in 1996). Counsel ineffective in capital sentencing for failure to adequately

investigate and present mitigation. The appellant was charged with 18 specifications of attempted premeditated murder and one premeditated murder arising from Appellant opening fire on his unit formation at Fort Bragg, North Carolina. After his apprehension, he asked to speak with a social worker that he identified as "his psychiatrist." The social worker was not available, but a substitutepsychiatrist was brought in. Appellant was given three military defense counsel, none with capital experience, beyond a two day training seminar. Prior to trial, Appellant privately paid for an evaluation by a civilian forensic psychiatrist, who advised defense counsel that an insanity defense was not viable and that their efforts should focus on mitigation. This doctor's services were not continued because Appellant could not afford to continue to pay for his services. A sanity board (similar to court-appointed examiners) evaluated Appellant and concluded that he was not suffering from any severe mental disease or defect at the time of the offenses. Counsel then requested funding for a mitigation specialist and for counsel to travel to investigate the case. Although funding for travel was authorized, counsel did very little travel for investigation. The mitigation investigator was denied. Instead, a team of psychiatrists at the Walter Reed Army Medical Center was assigned to evaluate Appellant as defense experts. Counsel interviewed two members of the Walter Reed team, who did not reduce their findings to writing. Their reports were made orally to defense counsel and "were not all favorable" to Appellant. Appellant entered pleas of guilty to the lesser included offenses of aggravated assault with a loaded firearm and murder by an inherently dangerous act, which left the government to prove only specific intent and premeditation. In the defense opening statement, counsel asserted that Appellant's state of mind at the time of the offenses was the focus of the defense case. During the defense case-in-chief, counsel presented lay testimony about the Appellant's breakdown in the Sinai two years before that required counseling. Counsel also presented testimony from the President of the Sanity Board, who testified that Appellant had embellished his statements to examiners but had been diagnosed with an adjustment disorder with mixed anxiety and depressed mood, dysthymia (a "lowgrade depression"), and a personality disorder not otherwise specified with a mixture of paranoid and narcissistic traits. This expert also testified that Appellant's actions were "a coolly calculated plan of revenge upon his unit," which supported the panel's findings of premeditation. In sentencing, the defense presented evidence that Appellant came from a normal family upbringing and had been an above average student in high school. Counsel also presented a "good soldier" packet of awards, certificates, transcripts, and counseling statements about Appellant. On appeal, the Army Court granted the request for a mitigation expert. A two-judge majority of the court found that the trial court erred in denying the defense request for a mitigation specialist and that the trial court's error required that the contested findings and sentence be reversed. [This was the issue addressed in a wonderful fashion by the United States Court of Appeals for the Armed Forces in *United States v. Kreutzer*, 61 M.J. 293 (2005).] The unanimous court agreed that counsel was ineffective in sentencing. Counsel's conduct was deficient because counsel failed to adequately investigate and present mitigation. Counsel did not discover and present evidence of Appellant's history that included a family history of alcoholism and depression and Appellant's depression since age 12 and multiple suicide attempts, since age 16. Counsel also did not discover and present the testimony of a social worker, who saw Appellant twice when Appellant broke down in the Sinai. He concluded that Appellant had problems with anger and interpersonal relationships, poor coping skills, and low self-esteem. Counsel also did not listen to the audiotapes of the interview or interview the psychiatrist that examined Appellant shortly after his arrest. The psychiatrist opined that she had

never seen anyone in such psychic distress and that Appellant's mood was severely distraught and that he was irrational and possibly delusional because of his beliefs that "God wanted him to commit murder and that he was doing [the] soldiers a favor by killing them." Counsel failed to interview the expert witnesses not due to a conscious, tactical decision, but due to incompetence because each counsel thought the other was responsible for interviewing the witnesses. Counsel also never interviewed the psychologist that examined Appellant for suicide risk in pre-trial confinement, even though this expert faxed his report to counsel. This expert found that Appellant was "profoundly depressed" and that "there were definite mental health issues in the case." Counsel also failed to request that their own examiners at Walter Reed consider mitigation and then failed to adequately interview their own investigation team at Walter Reed. If counsel had adequately investigated, they would have discovered that a third member of the Walter Reed team, a reserve officer, who was also a practicing civilian psychiatrist, signed a written report stating his opinion that Appellant was "chronically and seriously mentally ill," that "[t]he crimes which he committed are causally related to his mental illness," and "[t]he impulse to commit these crimes could not have been resisted by" Appellant. As a result of counsels' failure to adequately investigate and discover all this evidence, counsel presented the harmful testimony of the President of the Sanity Board. Prejudice was found because, "[a]s horrific as Appellant's crimes were, there was but a single death, and a substantial body of information to suggest Appellant's disordered mental status may have affected his volitional acts." One judge also found that counsel was ineffective in failing to interview or cross-examine the wife of the deceased, who provided victim impact testimony. Had she been interviewed and cross-examined, the panel would have learned that she was a religious woman, who had forgiven Appellant for killing her husband.

### 5. State Cases

**2018:** ***Reams v. State,* 560 S.W.3d 441 (Ark. 2018)** (1993 trial and sentencing). Affirming decision that trial counsel was ineffective at the penalty phase for failing to call the co-perpetrator to testify that he had been the actual shooter. Petitioner was convicted as an accomplice of capital murder based on the robbery and shooting death of a victim at an ATM, and sentenced to death. The co-perpetrator had pleaded guilty to capital murder and was sentenced to life without parole shortly before petitioner's trial. During post-conviction proceedings, counsel testified that he could not talk to the co-perpetrator because he was represented by counsel, that he did not have a good relationship with the co-perpetrator's counsel, and that he did not know when the co-perpetrator pleaded guilty. He did not investigate any of this or attempt to present the co-perpetrator's testimony to corroborate petitioner's defense that he was not the shooter. At the post-conviction hearing, the co-perpetrator admitted that he was the shooter. Although this did not have legal relevance during the guilt phase, it did at the penalty phase. This testimony left the post-conviction court "with doubts that the petitioner filed the fatal shot" and "those doubts . . . would have caused at least one reasonable juror to have doubt that the petitioner should be sentenced to death, despite his unquestionable complicity in the capital murder." 560 S.W.3d at 456 (quoting post-conviction court). The state Supreme Court rejected the state's argument that there were questions whether the co-perpetrator would have testified at the trial based on his hearing testimony; it determined that the co-perpetrator had already pleaded guilty and been sentenced to life without parole by the time of petitioner's trial, so it was likely he would have testified.. (Petitioner also raised a claim that trial counsel was ineffective for

failing to raise a fair cross-section challenge based on the systematic underrepresentation of African-American potential jurors under *Duren v. Missouri*, 439 U.S. 357 (1979). The post-conviction court had denied that claim. The Arkansas Supreme Court reversed, finding that trial counsel was deficient but remanding for a determination of whether there was a valid *Duren* claim. If there was, this established the necessary prejudice for a grant of relief.)

***Commonwealth v. Crispell*, 193 A.3d 919 (Pa. 2018)** (1990 trial and sentencing). Affirming grant of relief on claim that trial counsel was ineffective in failing to investigate and present mitigation. Petitioner was convicted, inter alia, of the robbery, kidnapping and murder of a woman who had been abducted in her own car from a mall parking lot. She was taken to a deserted area where she was stabbed to death. At the time of the murder, petitioner was eighteen years old. At trial, the key issue in dispute was whether petitioner or the co-defendant stabbed the victim. The case in mitigation at trial was limited to petitioner's own testimony reciting his age, expressing remorse, and continuing to deny having stabbed the victim. Trial counsel had entered into an agreement with the Commonwealth to forgo the presentation of evidence about petitioner's good character or his lack of criminal history in order to keep out evidence of petitioner's extensive history of violent juvenile delinquency. Trial counsel conducted few interviews in preparation for the sentencing phase and collected minimal records. Petitioner informed counsel that he did not want his teacher, father or brother called as witnesses. Three days after the capital crime, petitioner had been arrested in Arizona for attempted purse snatching. His public defender in that case was concerned with petitioner's mental condition and arranged psychological testing prior to petitioner's extradition to Pennsylvania. The testing indicated petitioner had impulse control problems, significant problems with depression, manic phases, posterior brain damage, and "a number of things with regard to his family . . .." Trial counsel failed to respond to the public defender's attempts to contact him concerning these findings. In state post-conviction proceedings, evidence was discovered and presented concerning physical, verbal and sexual abuse; mental health issues including PTSD; childhood poverty and hardship; substance abuse; and suicide attempts. Included in the voluminous records reviewed by a forensic psychiatrist was a medical record from when petitioner was sixteen years old. He had run away from home and reported that he was brutally raped by two men on a beach in Florida. The records also recounted at least one suicide attempt. Letters written pre-trial by petitioner to trial counsel and others reflected anxiety, suicidal thoughts, references to an alter ego, and multiple requests for psychiatric treatment and an evaluation. Background evidence discovered post-trial indicated petitioner's father began hitting petitioner around age 3, using sticks, belts, broomsticks, and metal objects, as well as punching petitioner in the face and then choking him. Military records showed that the military was going to find petitioner psychologically unfit for military duty. Petitioner suffered from emotional instability, persistent headaches and unpredictable losses of consciousness. Notably, the juvenile records that trial counsel had obtained indicated petitioner's dysfunctional family situation, providing a description of "child abuse, physical child abuse, by the father; growing up in a dysfunctional home environment; frequent moves; sexual assault; and behavioral problems; a wish to die; [and] problems with depression." Unpersuasive was trial counsel's post-trial contention that the prevailing norms at the time of petitioner's 1990 trial in Clearfield County did not include development of mental health issues for mitigation and that little was being done on showing how a family history impacted a defendant. "The Commonwealth's own experts . . . testified that a capital defendant's background and trauma were part of the mitigation assessment at the time. Professional norms for capital representation in 1990 did not exempt mental

health and family background from investigation." Decisions made by petitioner to limit the mitigation presentation did not preclude relief because those decisions were made prior to trial counsel conducting an adequate investigation. And while the agreement trial counsel made to limit good character evidence was reasonable, the agreement did not preclude the introduction of evidence about petitioner's sexual, physical, or emotional abuse, or his history of mental health problems. In the post-conviction proceedings, the Commonwealth presented a forensic psychiatrist and a forensic psychologist in rebuttal. Yet all experts agreed that the pre-trial testing presented red flags indicating the need for further investigation and evaluation. And all experts agreed about the psychological impacts of petitioner's upbringing and that understanding this upbringing was essential to understanding petitioner in 1990. Although the Commonwealth's forensic psychiatrist questioned the validity of petitioner's early report of juvenile rape, "it was not necessary to determine every detail about what did or did not occur, because the evidence of the sexual assault and the trauma it produced was available to trial counsel, was attested to by experts for both parties, and could have been presented to the jury." And as for disagreement about the PTSD diagnosis, this also did not need to be resolved as all experts testified about the psychologically damaging impact of petitioner's upbringing. Testimony collectively established a reasonable probability that one juror may have reached a different sentencing verdict based on the omitted evidence.

**2017: **Ellerbee v. State of Florida*, 232 So. 3d 909 (Fla. 2017)** (trial and sentencing presentation 2009). Petitioner was convicted of capital murder, cruelty to animals, burglary with an assault or battery while armed, grand theft of a firearm, and grand theft of a motor vehicle and sentenced to death by a recommendation of the jury by a vote of 11 to 1. After rejecting several claims of IAC related to the guilt phase, Supreme Court of Florida granted habeas corpus relief on claim of ineffective assistance of counsel at the penalty phase (as well as pursuant to *Hurst*). The court noted,

> Based on our conclusion that Ellerbee is entitled to a new penalty phase proceeding pursuant to *Hurst* and *Mosley*, we would normally decline to reach his penalty phase claims. Nevertheless, we feel compelled to address this issue [of IAC] because of the egregious nature of Ellerbee's upbringing, counsel's failure to discover it, and the prejudice Ellerbee suffered as a result. Due to the multiple failures of trial counsel to explore and present various aspects of Ellerbee's childhood, compounded with the presentation of conflicting evidence during the penalty phase, we cannot say the outcome of the penalty phase would have been the same had the jury heard this evidence.

While the postconviction court found deficient performance for the failure to develop mitigating evidence but not prejudice, the Supreme Court found prejudice, too. The Supreme Court also found deficient performance and prejudice for the failure to develop mental health mitigation. At trial, evidence was presented that Ellerbee's mother physically abused him and his siblings, poked them with a cattle prod, forced them to drink castor oil, beat them with hoses, switches, and cutting boards, did not feed them, and kept a padlock on the refrigerator. Although there was testimony that Ellerbee's father hit him with a belt, other testimony was presented that his father loved him, took him hunting, and never physically abused him. By contrast, at the evidentiary hearing on postconviction, there was testimony that Ellerbee's father whipped and beat Ellerbee with his belt, punched him in the chest to knock the air out of him, and punched him in the head. He brought

Ellerbee to the bad part of town while he looked for women and drugs and locked Ellerbee in the tool box of his truck. He dropped Ellerbee off with relatives, wearing dirty clothes, malnourished. His father was not involved in Ellerbee's schooling and withdrew him from a dropout prevention program. Ellerbee's father was always drunk, used drugs, and had women through his house. The trailer Ellerbee lived in was filthy, his clothes soiled with feces, and there were bugs and rotten furniture inside. The hunting trips were terrifying for Ellerbee because they occurred at night, involved a lot of drinking, and were dangerous because the hogs being hunted were massive and mean. Mental health evidence presented at trial was conflicting and unsubstantiated (including that Ellerbee had diagnoses of fetal alcohol syndrome although there was evidence that his mother did not drink during her pregnancy). In postconviction, the evidence presented explained how Ellerbee's abusive background (adverse childhood experiences, or ACEs) and extensive drug use damaged his brain and affected his cognitive development. Ellerbee was exposed to at least 9 of the 10 ACEs, leading to impaired development, emotional regulation, executive function, and decision making. He also experienced psychological maltreatment, including rejection, isolation, ignoring, terrorizing, and corrupting. Ellerbee was 21 at the time of the murder, at a time before his brain was fully developed in the areas of emotional regulation, executive function, and decision making. Ellerbee experienced chronic stressful events, with an increase in the release of cortisol that caused damage to his organ systems and brain. His severe drug and alcohol use, including chronic methamphetamine use, led to brain dysfunction, including frontal lobe deficits. Had the jury heard about the extensive abuse and how it affected his emotional and cognitive development, in addition to the other mitigation presented, there is a reasonable probability it would have arrived at a different sentencing conclusion.

**2016:** ***State v. Bright*, 200 So. 3d 710 (Fla. 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 victims 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.

***Salazar v. State*, 188 So. 3d 799 (Fla. 2016)** (trial and sentencing in 2006). Counsel ineffective in capital sentencing for failing to adequately investigate and present mitigating evidence. The state conceded that counsel's conduct was deficient, as counsel failed to conduct any investigation. Counsel also failed to follow-up on the recommendations of the one expert who conducted a preliminary evaluation of the defendant one week before trial. The expert noted the possibility of mental health impairments and possible organic brain damage that should be investigated. Instead, counsel presented only the testimony of the defendant's two sisters about the love and support the defendant provided to his family. Prejudice was established as there was significant available evidence of the defendant's low IQ, borderline intellectual functioning, and deficits in adaptive behavior. There was also significant mitigating evidence about the defendant's family history and traumatic childhood.

*Capital Case

**2015:** ***Commonwealth v. Solano*, 634 A.3d 218 (Pa. 2015)**. Counsel ineffective in capital sentencing for failing to adequately investigate and present mitigating evidence "of the cognitive and psychological impact of Solano's traumatic and abusive childhood." Counsel, who had only graduated from law school two years earlier and had no experience in homicide or capital cases, did not use available investigators in the public defender office and instead conducted her own mitigation investigation. Counsel met with the defendant only about five times and found him to be "guarded," but "she did nothing to foster a rapport with him in an effort to enable him to be more open with her." Counsel contacted only the defendant's mother and brother, despite having the names and locations of extended family members. Counsel did not interview the defendant's Children and Youth Services (CYS) caseworker. While she obtained a mental health evaluation, she did not discuss the evaluation with the examiner before deciding not to call him as a witness because of his anti-social personality diagnosis. In sentencing, counsel presented testimony only from the CYS caseworker, who had not been interviewed or provided a copy of the CYS records, the defendant's mother, and former foster parents. If counsel had adequately investigated, a number of the defendant's school teachers and aunts and uncles would have testified. The presentencing mental health expert, who had not been provided with information from these witnesses or the records of the defendant's parents, also would have provided substantial mitigating testimony. The CYS caseworker would have provided much stronger mitigating testimony, if he had been interviewed and provided the prior records. Neuropsychological testing would have established a cognitive disorder. Prejudice established. Even though the jury found the "catch-all mitigator," if counsel had adequately investigated and presented the evidence, "the jury may have given this mitigator more weight had counsel presented additional life-history mitigating evidence." The available but unpresented evidence "was not merely cumulative – it provided significant details concerning Solano's background that were not mentioned at the penalty phase."

***Chatman v. Walker*, 773 S.E.2d 192 (Ga. 2015)**. Counsel ineffective in capital sentencing for failing to adequately investigate and present mitigation. Counsel obtained funded for a mitigation specialist and hired William Scott, based on the recommendation of someone counsel had worked with on a prior capital case. According to counsel, Scott claimed to be a "Ph.D." with experience in capital cases, but his curriculum vitae did not support these claims. Counsel hired him without investigating further and delegated responsibility for developing mitigation to him. Scott, on the other hand, testified that he disclosed his limited experience to counsel and was relying to counsel to guide him and obtain records. Over a six month period prior to trial, Scott billed for 82 hours, less than 20 of which was devoted to interviews. Then three months before trial, counsel retained a psychiatric expert, who provided a report detailing five areas of potential mitigation, which were not pursued. Counsel asked Scott for a report and received only a half-page summary of his work and conclusions, along with four pages of sparse handwritten notes. Scott also provided a "script" for his proposed testimony. Although counsel were concerned about Scott's level of preparation, counsel was focused on obtaining an "acquittal" and believed it was too late to obtain a different mitigation specialist. During sentencing, counsel presented testimony only from the defendant's aunt, Scott, and the psychiatrist. Scott essentially testified that life was good for the defendant until his father died when the defendant was fifteen years old, which contradicted the testimony of the defense psychiatrist and "eventually devolved into opinions about Walker's characterological problems and the alignment of the planets." Counsel's conduct was deficient in hiring Scott "without any

investigation into his qualifications and then delegat[ing] to him responsibility for the mitigation investigation without sufficient supervision." Prejudice established. While the psychiatrist made some effort, "his account of Walker's life provided, at best, an overview and was cause for further investigation" into the extensive domestic violence in the defendant's childhood home between his parents, as well as the extreme physical abuse by his caretakers. In light of the "inaccurate, impersonal" sentencing presentation, the state was able to argue that the defendant's "childhood wasn't that bad" and his siblings were "doing quite well." If counsel had performed adequately, the jury would have had substantial evidence of the defendant's "exposure to pervasive violence in the forms of domestic violence, physical abuse, and abusive corporal punishment, which came from nearly every adult in [his] life who acted in a parental role." The witnesses that could have provided this testimony could also have "explained how and why Walker differed from his siblings."

**2014:** ***State v. Herring*, 28 N.E.3d 1217 (Ohio 2014)** (tried and sentenced in 1997). Counsel ineffective in failing to adequately investigate and present mitigation evidence, instead presenting only positive-mitigation evidence. The defendant and five other individuals robbed a bar and shot five people, three of whom died. The defendant was the "ringleader." If counsel had adequately investigated and conducted psychological testing, the evidence would have established that the defendant suffers from alcohol and substance abuse/dependence; depressive disorder; personality disorder with narcissistic and antisocial features; and learning disabilities. Other available evidence would have established the defendant's deeply troubled childhood, such that most of the adults around him were drug addicts, a complete lack of any positive role models, membership in gangs, as well as the possibility of organic brain impairment. While the mitigation specialist hired performed inadequately, it was counsel's responsibility to ensure an adequate investigation. While the state argued that counsel made a strategic decision to present only positive evidence, this argument was rejected because "counsel's decision to pursue a positive-mitigation theory was not justified because it was made before an adequate investigation had been conducted into Herring's background." Likewise, Herring's failure to be "forthcoming" about negative information about his family did not excuse counsel's failures. Prejudice established.

***Commonwealth v. Daniels*, 104 A.3d 267 (Pa. 2014)** (sentenced in November 1989). Counsel for defendant Pelzer, who was jointly tried with his co-defendant Daniels, was ineffective in capital sentencing for failing to adequately investigate and present mental health evidence in mitigation. Both were convicted of kidnaping for ransom and murder after holding the victim bound and gagged in the trunk of a car for more than 24 hours and then shooting him four times in the back of the neck to make sure he was dead. Pelzer's mitigation in sentencing consisted only of his own testimony and four pages of testimony from his aunt, with whom he lived as a teenager. Counsel's conduct was deficient in failing to adequately investigate and present additional mitigation from the aunt, who testified for 46 pages in post-conviction in a "more pointed" fashion. Additionally, another aunt and uncle were available to testify. This testimony would have established that Pelzer's mother was a compulsive gambler who permitted her home to be taken over by drug dealers. There were frequent changes of homes and schools and violently abusive men in the home. Pelzer was using drugs and alcohol by age 15. Counsel also failed to obtain school records despite his knowledge that the defendant was a "slow learner." The records indicated a learning disability, depression, feelings of inadequacy, and

anxiety and should have led to counsel to investigate mental health evidence. A pre- sentencing report prepared for the court indicated a mixed personality disorder. Defense experts in post-conviction testified that he met the standards for two mitigating circumstances: (1) the defendant was under the influence of extreme mental and emotional disturbance and (2) his capacity to conform his conduct to the requirements of the law was substantially impaired. Both of these were statutory mitigating circumstances that the jury had not been instructed to consider. Prejudice was established, despite the Commonwealth's presentation of contradictory expert testimony in post- conviction and the despite the presence of four aggravating circumstances, one of which was torture. Despite "the relative paucity of the mitigation presented by counsel at trial," the court found it significant that "the jurors were still receptive enough to find two mitigators, one unanimously." Specifically, the jury unanimously found the lack of a significant prior criminal history and a single juror found "the catchall mitigator."

> When analyzing *Strickland* prejudice in the context of the penalty phase of a capital trial, we must also keep in mind how tailored death penalty proceedings are toward life sentences, largely under the command of the U.S. Supreme Court, not only in the channeling of aggravators and the differing burdens of proof governing aggravators and mitigators, but also in the fact that a single juror can effectively negate the prospect of a death sentence.

Here, the evidence arguably would have supported two additional statutory mitigating factors and would have strengthened and added weight to "the catchall mitigator." "There is a reasonable probability that at least one juror would view both the mitigation case differently, and the overall penalty judgment differently, and would have decided against the imposition of the death penalty."

***Commonwealth v. Tharp*, 101 A.3d 736 (Pa. 2014)** (tried in November 2000). Counsel ineffective in capital sentencing for failing to adequately investigate and present mental health evidence in mitigation. The defendant was convicted of deliberately starving her seven-year-old daughter to death. The defendant had three other children and did not mistreat or neglect them. The victim in this case, however, the second born, was born prematurely and spent the first year of her life hospitalized. At age 7, she died from malnutrition due to starvation. She weighed less than 12 pounds and was only 31 inches tall. The defendant testified during the trial and denied guilt. She further testified about her background asserting that she had been the victim of physical and emotional abuse at the hands of her parents, step-parents, and previous boyfriends, including the fathers of her children. In sentencing, counsel presented no additional evidence, with the exception of a stipulation that the defendant had no prior criminal history. Counsel's conduct was deficient in failing to investigate and present evidence of the defendant's brain damage, mental health disorders, and low I.Q. Counsel conceded that they had interviewed two family members "for purposes of the guilt phase" but did not even inquire about mitigation. They interviewed no other family members and did not obtain any school, medical, or prison records. Additionally, despite a pretrial competence report indicating borderline intellectual functioning, schizoaffective disorder, adjustment disorder with anxiety, depressive personality disorder, and passive-aggressive personality disorder, counsel did not investigate further or call the competence examiner to testify in sentencing. Counsel also failed to obtain prior medical records indicating that the defendant was suffering from depression, even prior to

the birth of the deceased child, and pretrial confinement records indicating that the defendant was being treated for major depression. Counsel conceded that there was strategic reason for these failures. Post-conviction examiners diagnosed brain damage, cognitive disorder, post-traumatic stress disorder (based on her prior abuse as a child), major depressive disorder, borderline intellectual functioning, borderline independent personality disorders, polysubstance abuse, dissociative disorder, adjustment disorder, and encephalopathy (altered brain function). The pretrial competence examiner agreed with these experts that at the time of the crimes, (1) the defendant was under the influence of extreme mental and emotional disturbance and (2) her capacity to conform her conduct to the requirements of the law was substantially impaired. Both of these were statutory mitigating circumstances that the jury had not been instructed to consider. Prejudice established where the sole aggravating circumstance was the age of the victim.

***Weik v. State*, 761 S.E.2d 757 (S.C. 2014)** (tried in June 1999). Trial counsel were ineffective in capital sentencing for failing to develop and present social history mitigation evidence. The defendant killed his girlfriend following an argument over the couple's child. He confessed to the shooting and cooperated with law enforcement. "There was never any dispute regarding guilt." The aggravating factors asserted by the state were burglary and torture because the shooting occurred on the victim's property and there were multiple shots. The defense presented three mental health experts in sentencing who testified that Weik suffers from "paranoid schizophrenia, including auditory and visual hallucinations, suicidal ideations, and paranoid delusions." Weik's confession indicated that he was hearing voices just before the shooting and he quietly chanted Bible verses throughout his trial so the voices would not bother him. The only social history mitigation presented was through Weik's sister, who testified very briefly (three pages of transcript "out of a multi- thousand page record") about Weik's childhood. She described his childhood as "rough" and said that all the children suffered from "abuse." She made "cursory and nonspecific" references to her father's "military flashbacks" and described him as "paranoid, abusive." The state countered with two mental health experts who testified that Weik did not have schizophrenia and suffered only schizotypal personality disorder. The state's psychologist also testified that Weik essentially had a "normal" childhood. Counsel's conduct was deficit in failing to investigate and present the true nature of Weik's social history. Weik's family had initially retained counsel, but after the state served notice of intent to seek the death penalty, the retained counsel and the public defender were appointed in July 1998. Lead counsel was an experienced criminal defense lawyer but had never tried a capital case or even "attended any seminars or continuing legal education courses dedicated to capital defense." The public defender "is currently suspended from the practice of law" due to a number of ethical violations including competence, diligence, and misconduct involving dishonesty. In March 1999, "a mere eleven weeks prior to trial" an experienced mitigation investigator was hired. Counsel met with the investigator only once and did not provide the investigator with assistance in providing information or obtaining records despite the investigator's repeated requests. Nonetheless, the investigator provided counsel with a potential witness list for sentencing, including Weik's family members and their contact information, a list of records that should be obtained, and "detailed investigative interviews with Weik's family members that revealed pervasive mental health issues throughout the Weik family and that Weik endured severe emotional, psychological, and physical abuse during his childhood." After six to seven weeks, the investigator resigned because of

counsel's failure to assist her or respond to requests. A week later, a different mitigation investigator was hired and he requested a two month continuance. Instead, counsel sought a continuance of only two weeks so that some medical records could be obtained – records which the initial investigator had pushed counsel to obtain months earlier. Counsel told the trial judge only that the initial investigator had resigned due to "communication problems" without revealing the true reason for the departure or the investigator's detailed resignation letter. The continuance was denied. The new investigator interviewed the family members and provided reports to counsel but counsel never followed up on the information or reviewed it. Lead counsel testified that he focused on the trial phase and the public defender was responsible for the sentencing phase but during the trial she "was present, occupying space, but did not contribute anything useful or of substance during the entire case." The public defender testified that she had "limited" involvement and was just a "paper person" and "silent party" not involved in strategy or trial preparation at all. The court found this "especially troubling, for she simply washed her hands of the case, leaving the entire representation" to lead counsel. Counsel's conduct was clearly deficient due to "counsel's failure to review the investigators' reports they possessed in their own case files to become aware of the wealth of information that had been uncovered." This failure was not "the product of a strategic decision" so counsel's decision to present only the testimony of Weik's sister, Amy, "resulted from counsel's inattention, not reasoned strategic judgment."

> Indeed, counsel did not undertake a strategic decision to omit . . . [social history mitigation]; counsel simply did not read the investigators' reports and therefore did not know such evidence was available. Decisions made in ignorance of relevant, available information cannot be characterized as strategic.

The court declared:

> "The sentencing stage is the most critical phase of a death penalty case." *Romano v. Gibson*, 239 F.3d 1156, 1180 (10th Cir. 2001). . . . Important sentencing phase considerations include a defendant's "medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences. *Wiggins*, 539 U.S. at 524.

*Id*. at ____ (emphasis in original). Here, the post-conviction judge erred in finding that counsel's conduct was not deficient.

> Though counsel introduced psychological testimony regarding Petitioner's mental illness, counsel failed to present even a skeletal version of Petitioner's social history, even though there was abundant social history evidence available to them.

Here, the available evidence revealed that Weik had an "extremely dysfunctional, unstable, and abusive childhood." Weik's house was "filthy" and had no "running water for a period of several years." His father, Russell, "compulsively hoarded things (particularly military-related items such as guns, knives, swords, and other weapons and munitions) such that the inside and outside of the house

were piled high with junk and debris." Weik and his siblings were constantly teased by other children because they were "so poor." Weik was also teased because of his "large head" and for being "slow." He had a learning disability and attended special education classes. He ultimately was expelled from school after he fought another student who teased him for being "slow." Russell "experienced daily Vietnam flashbacks" and told his children that he had executed over two thousand people in Vietnam. He taught his children "how to kill people by 'crushing the windpipe' and 'snatching the heart.'" He also tormented his sons in order to "toughen them up" by making them do things like "stand at attention outside at all hours of the night in their underwear." Russell had served in the military from 1961 to 1965 when he was honorably discharged after being hospitalized for chronic schizophrenia. He had not, however, served in Vietnam or ever had any combat experience. Russell was also physically abusive and had beaten Weik with "rubber hoses, rose bush switches, a car antenna, a coax cable, and a machete." He would also punish the children by locking them in a "sweltering hot attic" for hours at a time. Russell was also verbally abusive and "consistently berated all of the children," but especially Weik who he called "'worthless' and 'stupid.'" He told Weik "he would never be good for anything." The children "always had to walk on eggshells" to avoid triggering "a fit of rage" from Russell. Their mother did not protect them from the abuse at all except on one occasion when she knocked Russell unconscious with a frying pan to stop him from choking his eight year old daughter during a "flashback" because he mistook her for "Charlie." Weik had "odd behaviors as a child, including that he 'would laugh at things that weren't really funny.'" He was also "slow learning to talk" but when he did learn she would speak "very quickly" and ramble from "thought to thought." He also had developmental delays in walking, being "potty trained," and "he didn't seem to grasp things as quickly as other children did." As a teenager, he was a loner and "experienced dramatic personality swings and became unpredictably irritable." Weik's father and paternal grandfather were hospitalized for "psychiatric illness." Weik's mother and all of his siblings "suffered from some form of mental health issue, such as depression, or alcohol or drug abuse problems." Prejudice was established. Weik's sister's testimony in sentencing "was general, vague, and offered no detail or insight into the degree of abuse Weik suffered as a child. Thus, the jury remained unaware of the severity and pervasiveness of the physical and psychological abuse Weik faced and the full extent of his father's mental illness." Additionally, the available but unpresented evidence "would have demonstrated Petitioner's genetic predisposition to schizophrenia and helped explain his auditory and visual hallucinations at the time of the shooting."

***Davidson v. State*, 453 S.W.3d 386 (Tenn. 2014)** (trial and sentencing in August 1997). Counsel was ineffective in capital sentencing for failing to adequately investigate and present evidence of the defendant's brain damage and cognitive disorders. Counsel possessed evidence that the defendant suffered from severe lifelong cognitive impairments and personality disorders and was predisposed to sexual violence. While counsel retained a neuropsychologist shortly before trial, counsel did not provide the expert with most of the evidence available. Likewise, counsel retained a mitigation specialist shortly before trial but did not seek a continuance as this expert advised. During sentencing, defense counsel presented only cursory social history evidence. Counsel's conduct was deficient and prejudicial. "Counsel held in their hands compelling evidence that Mr. Davidson has a broken brain and a tragic past," but failed to present this persuasive evidence. The court was not persuaded by the state's argument about a "two-edged sword" because the jury was already exposed to

aggravation evidence of "a long history of sexual violence against women. The evidence from Mr. Davidson's mental health records held little potential to demean him further in the jury's eyes. However, it had great potential to help explain the invisible mental machinations that made him behave this way."

**2013:** ***Shellito v. State*, 121 So. 3d 445 (Fla. 2013)**. Counsel ineffective in capital sentencing for failing to adequately investigate and present significant mental health evidence and social history evidence. Following the conviction, but in the month prior to sentencing, could requested a psychiatric evaluation and prior records, which indicated prior diagnoses of organic brain disorder and mental health issues. Counsel did not present expert testimony primarily because counsel's only conversation with an expert focused only the issue of insanity and not mitigation and counsel was concerned about opening the door to significant negative information. Thus, "there was no true follow-up" after receiving the prior records. "Yet counsel made a marginal attempt to present organic brain damage and other impairment as mitigation" through family member testimony. Counsel's conduct was deficient in failing to follow up on the mental health evidence and in failing to have the "mental health issues presented by an expert at trial to explain their significance and impact on his behavior at the time of the murder." Prejudice was established because the trial court found "no mental health mitigation, statutory or otherwise" when the prior records and additional expert evaluation, including a PET scan, revealed bipolar disorder and organic brain damage, which would have supported both statutory and nonstatutory mitigating factors. In evidence, while the lay witnesses had presented a picture in sentence that the defendant had been raised in a stable home, the post-conviction evidence revealed that he was raised in an abusive home. He was physically and sexually abused by his mother, and was neglected, such that there was no structure in the home and the defendant was left without food or supervision for days at a time, such that he would sometimes have to scavenge for food in neighbors' garbage cans.

**2012:** ***Simmons v. State*, 105 So. 3d 405 (Fla. 2012)** (sentenced December 2003). Counsel ineffective in capital sentencing for failing to adequately investigate or present mitigation evidence concerning the defendant's childhood and mental health. During the jury hearing, counsel presented testimony from once jailer and the defendant's sister. The jury unanimously recommended a death sentence. Before the judge, counsel also presented an expert who testified that the defendant had a moderateto severe learning disability and no significant history of violence. Counsel's conduct was deficient in failing to consult with a mental health expert or to otherwise investigate "mental mitigation." The expert presented before the judge had been retained by initial counsel and had not ordered a PET scan, despite knowledge that the defendant had "experienced a partial suffocation incident as a toddler that required medical intervention." If counsel had obtained the available records and a neuropsychological evaluation confirmed by a PET scan, the evidence would have established an IQ of 79, a history of special education and emotional handicap classes, a history of untreated attention deficit hyperactivity disorder (ADHD), brain damage that resulted in "impulsivity and behavioral problems," and borderline personality disorder. This evidence would have supported two statutory mitigating circumstances: (1) extreme mental or emotional disturbance; and (2) impaired capacity to appreciate the criminality of conduct. Counsel also failed to "have any significant conversations with" the defendant's family and did not even "consider hiring a mitigation specialist to do an

investigation." Adequate investigation also would have revealed that the defendant's father abused alcohol and marijuana and the defendant "modeled" this behavior beginning at age nine and continuing into adulthood. Counsel's conduct was not excused by any alleged strategy to present only good character mitigation. Counsel conducted no investigation and presented "almost nothing" on good character either. The defendant also was not "told what mitigation he was waiving – or the effect of such a waiver – in following this strategy." Prejudice established even though the state presented an expert to assert that, based on the PET scan, the defendant's brain was not abnormal. "Even without convincing proof of the brain abnormality, [the defendant] established the existence f substantial mental mitigation that was not presented to the jury or the judge."

***Robinson v. State*, 95 So. 3d 171 (Fla. 2012)**. Counsel ineffective in capital sentencing for failing to adequately investigate and present mitigation evidence that would have legally precluded the trial court from overriding the jury's life recommendation. Before the jury, counsel presented only the defendant's mother and a psychologist that had interviewed the defendant twice. The jury recommended life. In the hearing before the judge, counsel added only "character letters" even though counsel was aware that the Florida Supreme Court "had a history of affirming life overrides in the absence of substantial factual mitigation." The only mitigation the judge found, before overriding the jury vote and imposing death, was that the defendant "maintained close family ties and had been supportive of his mother." Counsel's conduct was deficient in failing to adequately investigate. Counsel did not obtain the court files of priors, obtain a mitigation expert, or provide sufficient information to the defense expert, even after the expert indicated that the defendant "was not an adequate historian." As a result, the sentencing testimony "pales in comparison to the postconviction testimony." The defendant's father was a violent, abusive drug abuser and dealer, who introduced the defendant to drugs at an early age. The defendant was also exposed to illegal activities by an older brother and attended an alternative school known for ongoing physical and sexual abuse (Okeechobee Boys' Home). The trial judge found that there was no prejudice because he was aware at the time of sentencing that the defendant "was a perpetual witness to violence, that he grew up impoverished and in a crime-ridden neighborhood, and that he spent his childhood in a chaotic environment." This finding was rejected, however, because, as one example: "testimony that [the defendant] grew up in a crime-ridden neighborhood does not reveal that he witnessed a murder at the age of five years old."

***Walker v. State*, 88 So. 3d 128 (Fla. 2012)** (offenses in 2003 and appeal in 2007). Counsel ineffective in capital sentencing for failing to adequately investigate and present mitigation evidence. In sentencing, counsel presented testimony from two mental health experts, who diagnosed bipolar disorder based primarily only on the defendant's self-reporting. The jury recommended death by a 7 to 5 vote. Before the judge, counsel presented only letters from the defendant's sister and a friend asking for mercy. Another friend testified that the defendant was addicted to drugs and that the drugs made him violent. The trial court in post-conviction proceedings found counsel ineffective. Counsel's investigation consisted only of five phone calls with the defendant's mother and sister and "unidentified 'local people." Counsel "never sought medical, educational, criminal, drug treatment, or social service records." Counsel also failed even to interview the defendant's cousin, despite the fact that the defendant had been using his name and identification at the time of the crimes. Counsel also

failed to attempt to speak to "any other immediate or extended family members" of "former neighbors, correctional officers, or teachers." If counsel had investigated, he could have presented extensive testimony from family and friends and two mental health experts with "specific" knowledge of the defendant's "drug addiction and lifelong emotional and educational problems." The defendant's parents often hosted chaotic parties that involved violence, drugs, and alcohol during which the children were neglected and allowed to sample drugs. The children often had to find their own meals. The defendant ended up addicted to drugs, including methamphetamine, which resulted in paranoia and violence. He was referred to therapy by a juvenile court at age 15. A psychopharmacologist testified about the drug abuse, which "typically results in drug-induced delirium, pronounced paranoia, and psychosis." This information "'gave considerable insight into [the defendant's] childhood and young adulthood,' serving to humanize him to the jury."

***Davis v. State*, 87 So. 3d 465 (Miss. 2012)**. Counsel ineffective in capital sentencing for failing to adequately investigate and present mitigation evidence. The defendant killed his friend, but immediately turned himself over to police, waived Miranda rights, and cooperated fully with the police. After learning that the State would seek death, counsel met with the defendant only twice, the second of which took place on the day before trial.

> Almost all of [counsel's] interviews of mitigation witnesses and preparation for the penalty phase of [the] trial took place the day before trial. [Counsel] made no attempt to obtain medical, school, or military records; he never interviewed any of the prison personnel where [the defendant] was incarcerated prior to trial; and he did not produce any evidence that described the alleged abuse [the defendant] had suffered as a child, at the hands of his father.

*Id*. at 467. In sentencing, counsel "made no opening statement. The total, combined testimony of mitigation witnesses consumed less than fifteen pages of transcript." The defendant's mother had met counsel only twice. The first time, she characterized as "a lot of nothing." The second time, which was the day before sentencing, counsel told her to "beg for [your] son's life." The defendant's sister also testified. She had met with counsel for only 10 minutes the day before sentencing. The defendant's landlord testified, at the defendant's suggestion, with "no preparation whatsoever." Finally, a highway patrolman testified about the defendant's criminal record. Counsel's conduct was deficient.

> [N]o trial strategy was involved here. It takes no deep legal analysis to conclude that an attorney who never seeks out or interviews important witnesses and who fails to request vital information was not engaging in trial strategy.
>
> [Counsel] had a duty to conduct a reasonable, independent investigation to seek out mitigation witnesses, facts, and evidence for the sentencing phase of [the] trial. Instead, he conducted no investigation, relying on witnesses whom [the defendant] suggested, and whom [counsel] failed to properly prepare.

*Id*. at 469 (footnote omitted) (emphasis in original). Likewise, counsel's explanation that he was not aware that the defendant was from the local community did not excuse counsel's failures. Except for his time in the military, the defendant "had lived in the local community his entire life." *Id*. at 470. Prejudice was also clear. Evidence was available from a lifelong friend of the defendant's family that he basically was a good guy, who helped everyone in the neighborhood, including a crippled, elderly woman. Evidence was also available from "the office deputy" of the Sheriff's Department that the defendant was a "trusty" in pretrial confinement. He ran errands within and even outside the jail. He was even allowed to drive patrol cars, unescorted, and in civilian clothes to a facility where he changed the oil in the cars. He never caused trouble and was "a very nice and polite fellow," who "had adjusted well to the prison environment." The defendant's sister, if prepared and asked, could have testified that the defendant's father was an abusive alcoholic. On one occasion, when the defendant was 12, he tried to save his mother who was being strangled by his father. He was unsuccessful and ran to a neighbor's house for help. When he returned home, his father threatened to kill him and forced him to sleep outside. The sister testified that this type of event happened "at least every weekend." Seven other witnesses--a church deacon, the husband of defendant's Sunday School teacher, three past employers, an ex-brother-in-law, and a long-time neighbor–would have testified if asked. All testified that the defendant (1) volunteered around the community and in church, (2) was not violent, and (3) had a "good work ethic."

***Commonwealth v. Keaton*, 45 A.3d 1050 (Pa. 2012)** (tried and sentenced in 1994). Counsel was ineffective in capital sentencing for failing to adequately prepare and present mitigation evidence. Counsel retained a mental health expert to evaluate the defendant but did not call him to testify or follow-up on the expert's request for records or recommendation of additional testing. Despite the expert's request, counsel did not obtain basic records, such as school, dependency, hospital, and pre-sentence reports that revealed substantial mitigation. During sentencing, counsel presented two younger sisters, an aunt, a family friend, and a minister to testify. In general, the testimony was that the defendant was helpful, respectful, and kind when he was not on drugs, but he was addicted drugs. The defendant also testified against the advice of counsel and admitted his drug addiction while claiming innocence. Counsel argued in closing that the jury should consider as mitigation: (1) age (31) because the defendant was young enough to have time to be rehabilitated if sentenced to life; (2) mental or emotional disturbance due to drug use; and (3) the defendant was worth saving. The jury found no mitigation. Counsel's conduct was deficient. Counsel did not prepare the sisters or inquire about the defendant's childhood. He spoke to them only outside the courtroom immediately prior to the sentencing hearing. They could have testified that the defendant was physically abused in childhood and witnessed his mother and siblings being beaten by the defendant's father and the mother's boyfriends. The family lived in extreme poverty. A psychologist, who treated the defendant in group therapy at age 13 because of his academic difficulties, confirmed the domestic violence in the home and that the defendant was ostracized by other children because of his extreme poverty. The psychologist retained by the defense conducted screening tests that revealed "a strong possibility of underlying organic or brain dysfunction." He reported these findings to counsel, recommended additional testing, and requested records. All he was provided, however, "was part of the police discovery materials." In post-conviction, he was provided with records from school, adolescent counseling, juvenile dependency, and drug treatment. These records, among other things,

showed a "'squalid' background of neglect and poverty, treatment for depression and suicidal ideation, drug dependence, auditory and visual hallucinations when he was on drugs, which suggested "brain involvement." A neuropsychologist, who evaluated the defendant in post-conviction, found borderline intelligence and neurocognitive deficits in executive functioning. The brain damage could have been caused by chronic poly-substance abuse, serial beatings to the head, or a gunshot wound to the head. Another expert confirmed the neurological problems and testified, based on examination and the records available, that the defendant had untreated attention deficit hyperactive disorder and bipolar disorder characterized by episodes of grandiosity and mania. This evidence would have supported at least three statutory mitigating factors. Thus, there was "a reasonable probability at least one juror may have struck a different balance, had such evidence been presented."

**2011:** ***Coleman v. State*, 64 So.3d 1210 (Fla. 2011)** (crime in 1988 and direct appeal in 1992). Counsel ineffective in capital sentencing for failing to adequately investigate and present available mitigation evidence that would have legally precluded the trial judge's override of the jury's life recommendation. The jury recommended life by a vote of six to six. Despite knowing the defendant grew up in Liberty City in horrendous conditions, counsel did not retain an investigator or seek a mental health evaluation because he claimed he believed the defendant's alibi defense. Counsel also stated that he did not believe mitigation would have made a difference to the court. Under state law, the focus is on "the reasonableness of the jury recommendation, not on the judge's determinations or personal inclinations." Likewise, state law provides that residual doubt is not an appropriate mitigating circumstance. Substantial mitigating evidence, including an impoverished, chaotic childhood, special education, substance abuse from a young age, sexual molestation, head injuries, and "mental health illness and deficiencies." Under state law, a trial court could not override a recommendation of life, unless "the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." Here, if the true mitigation evidence had been presented, the trial judge would have had to view it in the light most favorable to the defense and would have been precluded from overriding the jury. Thus, the defendant was prejudiced not just in the trial proceedings, but also in direct appeal. Remanded for imposition of a life sentence.

***Perkins v. Hall*, 708 S.E.2d 335 (Ga. 2011)** (sentenced in 1997). Counsel ineffective in capital sentencing for failing to investigate brain injuries and unduly limiting interviews of family and friends of the defendant. Counsel's conduct was deficient. "There is some tension, if not outright contradiction, between lead counsel's and co-counsel's accounts of who was responsible for preparing for the sentencing phase." Each claimed that the other was responsible, which helped "explain, at least in part," why the investigation was inadequate. Original counsel had discovered records of a head injury that left an "identifiable hole in his skull." The defendant insisted he did not want to pursue this mental health evidence and demanded her removal as counsel. Thereafter, the defendant refused to cooperate with a mental health evaluation. Counsel contacted only a few family members taking the word of the defendant's mother that others were "unavailable," even though numerous witnesses would have cooperated and testified. Citing the 1989 ABA Guidelines, the court found counsel's conduct deficient. Prejudice also established. While the mother testified

about the defendant's traumatic childhood in sentencing, the available evidence of "his abusive background is admittedly somewhat cumulative, but overall it is far more compelling." Even more powerful was the evidence of the defendant's "change in behavior and apparent mental distress following two head injuries." While the defendant "resisted investigation of this sort of evidence and refused expert mental health evaluations, he did not preclude his trial counsel from presenting a mitigation defense that included details about his personal history."

**2010:** ***State v. Gamble*, 63 So.3d 707 (Ala. Crim. App. 2010)** (sentenced in November 1997). Counsel was ineffective in capital sentencing for failing to adequately investigate and present mitigating evidence. Counsel spoke to the 18-year-old defendant one time and initially attempted contact with his family by simply sending them letters several months before trial. Later, eleven days before trial, he went to the defendant's neighborhood and simply stopped people at random to ask if they knew the defendant and what their opinion of him was. Counsel made no other efforts to investigate mitigate despite knowledge that the defendant had "cognitive limitation" and that his father had served in Vietnam and subsequently exhibited violence, erratic behavior, and alcoholism. Counsel initially filed a motion seeking funds for a mitigation investigator but abandoned this request. While counsel did speak to some family members right before trial in a group discussion lasting approximately 10 minutes, counsel did not call any of them to testify because he "had no idea what he wanted the family members to testify about." It was also clear based on counsel's closing argument in sentencing and his post-conviction testimony that counsel believed that the only mitigating evidence that was admissible in sentencing was evidence that fit within one of the statutory mitigating circumstances. The court considered the case in light of the 1989 ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases. The court held that could sought none of the information set forth in Guideline 11.4.1, except that counsel requested that the defendant, "who presented obvious cognitive deficits, compose a journal that would include his biography." On this evidence alone, counsel's conduct was deficient. Prejudice established because family members and friends would have testified that the defendant's father was an abusive, alcoholic. His mother was also an alcoholic, who had been in special education and was "slow." The defendant was raised in a small "run down shack" occupied by 14-20 people. His mother had taken him to Atlanta when he was just a child and had abandoned him. The defendant was in a special needs remedial program in school. Aside from these witnesses, available records documented that the defendant's mother was mentally retarded. His father's IQ was only 72 in school and later testing documented an organic mental disorder because of "heavy alcohol consumption" and possible schizophrenia. The defendant was hospitalized at 3 months when he was "dirty and emaciated." He was in the custody of the Department of Human Resources for seven months due to parental neglect, but then returned to his mother. Until he was seven he lived in his paternal grandmother's "run down shack" with 23 relatives in 4 rooms. When he was 7, his mother took him to Atlanta where he attended four schools in two years. After returning to Alabama at age 9, the defendant and his sister were passed from relative to relative for a year. He and his mother then lived with his mother's friend for 9 years. The friend sold drugs out of the house and frequently had the defendant to assist her. School records showed frequent absences, repeating the fourth grade three times, a social promotion in the fifth grade, and dropping out in the 7th grade at age 15. School records showed an 82 IQ, but the state's expert found a 77 IQ in pretrial testing. Prejudice established as the trial judge, who presided over the defendant's trial and

sentenced him to death following a 10-2 jury recommendation of the death verdict, found prejudice. This finding was entitled to "considerable weight," especially in light of the "plethora of evidence that could have been presented" rather than presenting no mitigation evidence at all.

***Ferrell v. State*, 29 So.3d 959 (Fla. 2010)**. The trial court's finding of ineffective assistance in capital sentencing for failing to adequately investigate and present mitigation was upheld. The defendant did not make a knowing and voluntary waiver of the right to present mitigation. "Each of the witnesses who testified for [the defendant] stated that they made repeated unsuccessful attempts to contact trial counsel and were never contacted by him. There is simply no indication that trial counsel performed any investigation into the penalty phase." Counsel also failed to retain or consult with a mental health expert concerning mitigation, although court-appointed examiners did examine competence and sanity issues. The trial court's finding of prejudice was also supported by the evidence. In addition to failing to present mitigation, counsel failed to object to improper sentencing arguments by the prosecutor. The prosecutor invited the jury to disregard the law, argued improperly the age mitigator could not apply to the defendant, argued improperly that the case deserved the death penalty, and improperly vouched for the credibility of several witnesses. Cumulative prejudice was clear in that the jury vote for death was only seven to five and the defendant was not the triggerman in the murder.

***Commonwealth v. Martin*, 5 A.3d 177 (Pa. 2010)** (crimes in 1993 and direct appeal in 1998). Counsel was ineffective in capital sentencing for failing to adequately investigate and present mitigation evidence, especially evidence of chronic post-traumatic stress disorder and depression as a result of sexual abuse he suffered as a child at the hands of his uncle. Counsel did not contact any of the defendant's prior doctors or obtain records from his prior substance abuse and mental health treatments, even though the defendant's mother gave them names and addresses, along with the dates of treatment. The day prior to sentencing, the mother, due to concern that counsel had not obtained the prior records, delivered some of the defendant's mental health records to counsel. Nonetheless, the only mitigation evidence presented was the mother's testimony that mentioned prior drug and mental health treatments following sexual abuse by his uncle, who was later convicted for the molestations. Counsel's conduct was deficient and not the result of reasonable strategy. While the state asserted that the defendant directed counsel not to investigate or not to present evidence regarding his mental health history, the record did not support such a finding. Likewise, counsel testified that he had a strategic decision to rely solely on the defendant's mother because, in his view, jurors in the county "view psychiatry as 'one step above witchcraft.'" The trial court rejected this, however, because counsel did not receive the defendant's mental health records until the day before the penalty hearing. He did not contact the defendant's prior documents. Thus, the court held that "the scope of his investigation was the result of lack of attention rather than reasoned strategic judgment." *Id*. at 202. In addition, the record did not support an alleged strategic decision not to present this evidence, due to concerns about "open[ing] the door" to evidence of another murder committed after this one. Counsel did not testify that he had such strategy and the defendant had not been convicted of the subsequent murder in Nevada at the time of this trial. Prejudice established. The mental health records and the testimony of two prior treating physicians, who were never contacted but would have been willing to testify in sentencing, documented Chronic PTSD and depression due to past

sexual abuse as early as age 15 and continuing until after the murder at issue, committed when the defendant was 21. This evidence was particularly significant in this case where the victim was a 74 year old homosexual man, who had offered the defendant money for sex, which resulted in his murder by the defendant. Two statutory mitigating circumstances were present, yet never presented to the jury: (1) extreme mental or emotional disturbance; and (2) substantially impaired capacity to appreciate criminality or to conform his conduct. The record supported the PCRA court's finding "that it was probable that at least one juror would have accepted at least one mitigating circumstance, and found that it outweighed the aggravating circumstances found." Aside from deference to the PCRA court's findings, the Court agreed with the assessment of prejudice.

***Commonwealth v. Smith*, 995 A.2d 1143 (Pa. 2010)** (sentenced in May 1995). Counsel ineffective in capital sentencing in failing to adequately develop and present mitigation. During trial, in a challenge to the degree of murder, the defense presented one expert to testify that the defendant was suffering a cocaine-induced psychotic disorder. The testimony of a second expert was excluded as cumulative. The state presented a rebuttal expert. The defense again sought to present its second expert, but this testimony was again precluded. In sentencing, the defense presented testimony from the defendant's mother and a case manager from a job training program the defendant had attended. A videotape of the second expert's testimony was also played. Lead counsel conceded that he "was primarily concerned with the guilt phase defense, and turned over preparation for the penalty phase to [co-counsel] one month before trial, but gave her no direction." Indeed, it was doubtful counsel "had any meaningful conversations concerning what mitigation evidence might be helpful." Lead counsel was aware of the defendant's abusive childhood, drug abuse, and past treatment for addiction but did not delve into the details, including during the defendant's mother's testimony. Counsel had not previously "mentioned or explained" to the mother "mitigation evidence." Counsel had had only a few brief calls with family members prior to trial and had obtained only the defendant's parole and military records. Counsel had an expert to examine the defendant for trial issues of diminished capacity, but did not ask the expert to evaluate him for sentencing mitigation purposes even after the expert and co-counsel suggested that he do so. In short, lead counsel "ignored the possibility that mental health mitigating evidence existed which would be helpful in the penalty phase; instead, he myopically focused only on the guilt phase defense of cocaine-induced psychosis, offering only generalized character evidence at the penalty phase." Counsel's conduct was deficient and not based on reasonable strategy.

> This is the type of case described by *Bobby* [*v. Van Hook*, 130 S. Ct. 13, 19 (2009)] as one where "potentially powerful mitigating evidence . . . would have been apparent from documents any reasonable attorney would have obtained."

Prejudice was established. If counsel had performed adequately, the testimony of family members and other lay witnesses would have established that the defendant had meningitis and head injuries as a baby. He suffered neglect and physical abuse from his father and also witnessed his father beating his mother and siblings. The defendant abused drugs and his personality would change when he was on drugs. After serving in the military, the defendant's attitude towards white people became almost paranoid. A neuropsychologist testified that the defendant's "poor school performance, impoverished and abusive childhood, and drug use suggested the possibility of cognitive impairments." In testing, the defendant had a full scale IQ of 76 and had moderate to severe

impairments on neuropsychological testing "designed to test for brain damage." These cognitive impairments would affect the defendant's "ability to reason, use judgment, and see the consequences of his actions; these abilities would become even more impaired by drug use, particularly cocaine." This expert's testimony would have supported several statutory mitigating factors. Another expert testified that the defendant's juvenile and hospital records included a number of "red flags" for potential mental disorders. The juvenile records, which were admitted in post-conviction "documented the dysfunctional environment in which he was raised, his psychological and mental impairments, and his cognitive deficits." The medical records, which were also admitted, revealed "treatment for drug and alcohol addiction." While the Commonwealth's expert testified and raised the issue of malingering, he conceded that the defendant had brain damage.

**2009:** ***Hurst v. State*, 18 So. 3d 975 (Fla. 2009)** (affirmed on direct appeal in 2002). Counsel ineffective in capital sentencing for failing to present expert mental health evidence in mitigation to establish the defendant's low IQ, borderline intellectual functioning, and possible organic brain damage caused by fetal alcohol syndrome. Counsel's conduct was deficient in failing to have the defendant examined by a mental health expert, even though prior counsel had filed a motion for an evaluation. Counsel also did not obtain school records that revealed a low IQ and the defendant had been in special education classes and dropped out of school after repeating the tenth grade. Counsel had sufficient information, however, to "place him on notice that further investigation of mental mitigation was necessary." Information from the family indicated he probably had borderline intelligence and was emotionally immature. Counsel also knew the defendant's mother drank heavily during her pregnancy, which could lead to fetal alcohol syndrome. Counsel also could have easily obtained the school records. Counsel's conduct was not excused by reasonable strategy as counsel simply believed that the defendant did not have a "mental problem," the defendant would be acquitted due to his claim of innocence, and that presentation of mental mitigation would have been inconsistent with evidence that the defendant was a good person.

> [B]ecause counsel never had [the defendant] examined and could not know what a mental health expert might discover, he could not make an informed tactical decision that the mental mitigation would be inconsistent with the defense or with other mitigation. Moreover, presentation of the mental mitigation discovered in this case. . . would not have been an admission that he committed the murder but would have been consistent with and supportive of the other mitigation that [the defendant] was slow, emotionally immature, and a follower.

In addition, even if counsel was concerned about inconsistency of the evidence before the jury, there was no explanation for not presenting the evidence before the judge. Prejudice established as both the prosecutor and the trial judge criticized the lack of any mental health expert testimony and the available evidence would have had an impact of the process of weighing the aggravation and mitigation in this case.

***Parker v. State*, 3 So. 3d 974 (Fla. 2009)** (trial in 1990). Counsel ineffective for failing to fully investigate and present mitigating evidence regarding defendant's chaotic and dysfunctional

childhood and mental health. If counsel had adequately investigated, the evidence would have shown: (1) defendant was abandoned by father as baby; (2) defendant's mother was frequently hospitalized with mental health issues; (3) defendant spent his childhood in a series of foster homes and attended 17 different schools; (4) defendant was physically and sexually abused; and (5) defendant had a long history of alcohol abuse and violent and "crazy" behavior. Counsel did not request any records and did not interview anyone other than the defendant, his mother, and his ex-wife. "The only investigator employed . . . was asked to investigate the victim's background and guilt phase issues."

> While trial counsel presented a 'bare bones' rendition of some of . . . [the defendant's background], it was not enough to establish mitigation even though there was a wealth of witnesses who were never interviewed and documents that were never sought that could have fleshed out and established the mitigating circumstances. . . . In addition to this failure to conduct an adequate investigation, . . . counsel presented the information about his childhood and background through the hearsay testimony of the public defender investigators and not from first-hand sources.

Counsel also gave the defense mental health expert, "quite sparse materials" and "no background records," such that the expert had to rely only on the defendant's self-report and a brief phone call with his mother. Counsel erroneously believed "it was the doctor's responsibility to seek out this information." If the expert had seen the records and been given background information, including the mother's mental health history and school records indicating significant behavorial and intellectual functioning problems, he would have supported additional nonstatutory mitigating factors and recommended additional evaluation and further testing that would have revealed "some type of neuropsychological impairment that affects his executive brain functions."

***Doss v. State*, 19 So. 3d 690 (Miss. 2009)**. On rehearing, counsel found ineffective in capital sentencing for failing to adequately investigate and present mitigation. Counsel had only a "cursory telephone interview" with the defendant's mother, who was the sole mitigation witness in sentencing. Counsel's conduct was deficient in failing to investigate despite awareness of prior head injuries and possession of some of the prior records, which were provided by the defendant's counsel in a separate case. Counsel also failed to interview possible witnesses and "failed to ask a single question" about possible abuse, the environment the defendant had grown up in, how he did in school, "or anything else that could have been mitigating." Prejudice established as there was significant evidence that the defendant's mother drank and was taking Valium during her pregnancy and was beaten and infected by gonorrhea by her husband during her pregnancy. The defendant had lead poisoning as a child and witnessed the man he thought was his father (but he was not) beating his mother and abusing drugs. The family also "lived in a very poor, bad, drug-infested neighborhood where gangs were prevalent in Chicago." The defendant began drinking and using drugs by age 11. He had a low IQ and was placed in special education classes.

***Rosemond v. Catoe*, 680 S.E.2d 5 (S.C. 2009)**. Counsel ineffective in capital sentencing for failing to present evidence of the defendant's mental illness. There was no need to "speculate about the

mitigation evidence known by trial counsel as the evidence was presented during pretrial competency hearings." Specifically, two defense experts testified that the defendant was "clearly paranoid" and suffered either from a delusional disorder or schizophrenia but a diagnosis could not be made because the defendant was evasive and guarded even with the experts. A court-appointed examiner was also willing to testify that the defendant might be in the early stages of schizophrenia. Trial counsel did not present this evidence in sentencing because he "mistakenly believed" that the trial court's finding of competence to stand trial "precluded him from presenting . . . mental health mitigation evidence in the sentencing phase." "Counsel's erroneous belief clearly constituted deficient representation." Prejudice was also established because counsel only presented a few family members and friends to portray the defendant as a good boy and a mental health expert gave "conclusory" testimony that the defendant "could adjust to prison." The expert conceded on cross, however, that he had not diagnosed a mental illness. In short, "the theme of the evidence was the absence of any mental health concerns." Even with only this evidence, the jury deliberated for more than 11 hours of two days and received an *Allen* charge before reaching its death verdict. "Given the jury's struggle during the sentencing phase and the want of any mental health mitigation evidence," prejudice found.

**2008:** ***State v. Pearce*, 994 So. 2d 1094 (Fla. 2008)** (arrest in 1999, direct appeal in 2004). Counsel ineffective for failing to adequately investigate mitigation in order to advise client prior to his waiver of presentation of mitigation and argument in sentencing. Counsel "did not conduct any preparation for the penalty phase of the trial." Counsel did not obtain any background records, never contacted any of defendant's family members, and never investigated mental health issues. If counsel had investigated, the following information would have been able: (1) defendant received "whoopings" with a belt or switch as a child; (2) he had "temper tantrums and mood swings" as a child; (3) there was a family history of bipolar disorder; (4) defendant fell down stairs as a baby and fell out of a truck, resulting in head injuries; (5) he was a drug user; (6) his ex-wife physically abused him; (7) he suffers from brain damage and (8) has bipolar disorder and "is predominantly manic and goes for long periods of time in manic states." Although the defendant "did not want any form of mitigation presented during the penalty phase. . . ., an attorney's obligation to investigate and prepare for the penalty portion of a capital case cannot be overstated because this is an integral part of a capital case."

> Although a defendant may waive mitigation, he should not do so blindly. Counsel must first investigate and advise the defendant so that the defendant reasonably understands what is being waived and reasonably understands the ramifications of a waiver. The defendant must be able to make an informed, intelligent decision.

*Id*. at 1102. The "waiver of the presentation of mitigating evidence was not knowingly, voluntarily, and intelligently made." Prejudice established "because there was substantial mitigating evidence which was available but undiscovered."

***Lowe v. State*, 2 So. 3d 21 (Fla. 2008)**. Counsel ineffective in sentencing for failing to investigate and present two witnesses, who would have testified that a state witness, who denied involvement at trial, had previously admitted participation in the robbery and to killing the victim. Counsel's conduct was deficient. The state's theory was that the defendant acted alone and specifically

excluding the state witness. Defense counsel believed the state witness was involved. Counsel's conduct was deficient because he failed to investigate even though one of the potential witnesses was mentioned in a police report and an officer's deposition as having information about the crime. This witness was aware of the other witness and could have provided that information. No prejudice during trial because his statements did not exclude the defendant and there was substantial evidence of the defendant's involvement in the crimes. Prejudice was found in sentencing even though there were "some inconsistencies . . . as to the specific details." In addition, these witnesses supported two mitigating factors raised by the defense but rejected by the trial judge: the disproportionate punishment mitigator and the relatively minor participation mitigator. Finally, while the evidence at trial proved the defendant was involved, including his confession also implicating the state witness, there was no evidence presented that conclusively showed that he was the actual killer.

***Williams v. State*, 987 So. 2d 1 (Fla. 2008)** (crimes in 1988 and direct appeal in 1993). Counsel ineffective in capital sentencing for failing to present a detailed report from a mental health expert in the override hearing before the trial court. The defendant was convicted of ordering the murders of three people and other charges stemming from the victims' alleged theft of drugs and money from the defendant in a drug trafficking ring. Counsel was aware that three co-defendants had already proceeded separately to trial. Each received a life verdict from the jury, but the same judge as defendant had overrode the verdict and imposed death. Counsel possessed an expert report that revealed that the defendant had: 1) an IQ of 75 and functioned mentally at the age level of a thirteen or fourteen-year-old; 2) abusive, alcoholic parents and an impoverished childhood; and 3) a lengthy drug abuse history. Counsel did not present this evidence before the jury or the trial court and instead presented only brief evidence that the defendant was a loving son and father. The jury recommended life by a vote of eleven to one, but the trial court overrode the verdict and imposed death. Counsel's conduct was deficient, especially since counsel was aware of the overrides for the co-defendants. Counsel's conduct was not based on strategy.

> It appears counsel's decision to withhold [the mental health expert's] evidence was based upon counsel's overconfidence that a life sentence would be imposed and his erroneous belief that it was not necessary since his research seemed to show that this Court generally did not approve of overrides. However, counsel clearly missed the mark in overlooking our extensive case law that consistently requires some reasonable evidentiary basis for a life sentence in order to bar an override. Under Florida law, a trial judge is prohibited from rejecting a jury's recommendation of life imprisonment if there is competent evidence of mitigation supporting a life recommendation at the time of sentencing.

The court also noted that counsel had "nothing to lose in presenting this evidence" to the court. Prejudice was clear even though the trial court held that it would have made no difference to his override ruling. The evidence would have "provided an objective and reasonable basis for the jury's recommendation and a sentence of life" and, thus, would "preclude a trial judge's override of the jury's decision."

**Capital Case*

****State v. Larzelere*, 979 So. 2d 195 (Fla. 2008)** (convicted in February 1992). Counsel was ineffective in capital sentencing for failing to adequately investigate and present mitigation evidence. Even though the defendant waived presentation of mitigation evidence, the jury recommended death only by a vote of seven to five. The defendant was convicted of planning and directly the murder of her husband for assets and insurance money. Counsel did not conduct any investigation concerning the defendant's background or interview her family members about mitigation. They even discounted reports from a prior investigator of her father's alcoholism, possible child abuse, and possible spousal abuse. They did not hire a mental health expert until after the jury's recommendation and then did not provide him with the investigator's report or other relevant information and did not even attend the state's deposition of the defense expert. Counsel even told the expert that "no family members were available to assist in his evaluation." The defendant's waiver was "not made knowingly and intelligently" because counsel "did not investigate possible mitigation sufficiently before [she] waived her right to present penalty-phase evidence." Counsel's conduct was deficient in failing to investigate, despite the investigative report, and in failing to obtain "an informed mental health evaluation . . . in advance of the penalty phase." Prejudice was established because the evidence would have revealed that the defendant was: 1) sexually abused as a child by her father and uncle; 2) physically abused as an adult; and 3) suffered from narcissistic and histrionic personality disorders. She also may have suffered from post-traumatic stress disorder and obsessive compulsive disorder. Although the state could have presented rebuttal evidence in sentencing, the prejudice was still clear, especially in light of the bare majority of jurors voting for death even in the absence of any mitigation evidence.

****Hall v. McPherson*, 663 S.E.2d 659 (Ga. 2008)** (sentenced in September 2000). Counsel ineffective in capital sentencing for failing to adequately investigate and present mitigation evidence and rebuttal to aggravation evidence. Initially, the court rejected the state's argument that the "habeas court erred as a matter of law by relying upon the American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases and the Southern Center for Human Rights Defense Manual in evaluating counsel's performance." Counsel's conduct was deficient. Counsel did not hire a mitigation investigator and instead arranged with the defendant's mother to bring anyone "she wished to bring with her" to his office one evening a week. Counsel did so despite having a court-appointed examiner's report that reflected that the mother was alcoholic and had physically and verbally abused the defendant and his brother and neglected them during their childhood. Counsel also did not interview the defendant's brother or a foster mother and did not obtain records from youth detention centers, group homes, or foster homes that the defendant informed him about. Counsel also did not adequately investigate and present evidence of the defendant's drug history and the "psychiatric mitigating evidence" related to that, despite the "thrust" of state's case at both phases being the defendant's drug addiction and intoxication when he left detoxification treatment against medical advice and killed his live-in girlfriend shortly afterwards. Trial counsel were on notice of this and had been provided with some records of prior detox treatments reflecting discharge prior to completion. Counsel failed, however, to obtain the complete records or to interview prior doctors, although eliciting testimony about these treatments from the defendant's mother and sister. While counsel proceeded on a theory of "residual doubt," counsel also "propounded a broad mitigation theory" that encompassed "lack of parental supervision, his early

introduction to drugs and alcohol, and the absence of a positive male role model in his life." "Trial counsel's [investigation and] presentation was not strategic, as the testimony presented in the habeas evidentiary hearing would have supported counsel's arguments at the sentencing phase of trial." Counsel argued about the defendant's rough life and use of drugs at an early age, but did not present any evidence of juvenile drug use. He also presented evidence of abandonment by the defendant's father but "the witnesses only hinted at the extent and scope of the neglect that [the defendant] suffered from his mother, and there was no testimony regarding his childhood history of abuse or his placement in foster homes and group homes as a youth." Prejudice found based primarily on the testimony of the defendant's foster mother and brother concerning the mother's extreme physical and verbal abuse and neglect, such that the defendant would sleep in abandoned cars and get food from dumpsters when she chased him from the home and he was on his own for days at a time. The older brother also testified that he introduced the defendant to marijuana, LSD, and other drugs when the defendant was 12. The jury did not hear this evidence and, in fact, heard evidence portraying the defendant as a child simply unsupervised because his mother was working two jobs, but doing "everything she possibly could to help her son, including trying to keep him away from drugs." The jury also did not hear testimony from a prior doctor that diagnosed a major depressive disorder and drug dependence following a suicide attempt. This doctor would have also testified about the defendant's genetic predisposition to substance dependence, such that he "never had a choice in the matter of whether to develop drug and alcohol addiction problems in his life." He also would have testified that the defendant did not complete detox on that occasion because his insurance would not cover it and no other funds were available. This doctor "would have willingly testified at . . . trial without charging a fee for his time." Information in the records also rebutted the state's claim that the defendant "chose his life of addiction" by establishing the defendant's struggles and intense desire for help.

***Taylor v. State*, 262 S.W.3d 231 (Mo. 2008)** (tried in January 2003). Counsel ineffective in capital sentencing for failing to adequately prepare and present mitigation evidence. The case involved a killing in prison. The defense presented substantial expert testimony concerning mental health history and issues in the trial in pursuing a not guilty by reason of mental disease or defect verdict, but otherwise presented only videotaped deposition testimony from the superintendent of the correctional facility, who testified that the defendant would present minimal risk to correctional officers and other inmates under his conditions of confinement. "Because of the unique nature of capital sentencing–both the stakes and the character of the evidence to be presented–capital defense counsel have a heightened duty to present mitigation evidence to the jury." Counsel's conduct was deficient. Where there is strong mitigation evidence available, "and the jury has recently convicted a defendant of first-degree murder while in a maximum security prison, it is not reasonable for defense counsel to only present mitigation evidence that the defendant is unlikely to commit crimes in prison." Here, four of five experts that testified in the trial were limited and the fifth focused on the affirmative defense. These experts could have been recalled in sentencing "for their own merit, as evidence of . . . [the] history of mental illness" without limitations "at a time when their instructions would have permitted them to give mitigating effect to their conclusions about . . . [the] history of mental illness-testimony that in itself provided no defense in the guilt phase." Likewise, while one of the experts testified about the defendant's "abusive upbringing and other difficulties in childhood," this

testimony was "provided primarily to support his conclusion at the guilt phase" on the affirmative defense. "Reasonable trial counsel would have recognized the need to put on additional mitigation evidence regarding the defendant's character and background at the penalty phase, particularly after the jury had rejected the expert's ultimate conclusion." Counsel also failed to introduce any of the records supporting the conclusions regarding the "abusive background, history of mental illness, and eventual diagnosis," which the jury asked for during the trial.

> Despite the jury's specific desire to see these available records, which were replete with statements showing [the defendant] had suffered from mental illness since long before the murder, counsel made no attempt to fill this evidentiary void by introducing them in the penalty phase.

Counsel did not present the records because of potentially harmful information.

> While not all of the evidence in the records was favorable . . . , such records seldom are. Where the only basis of defense is that one's client has long had a mental illness that reduces his responsibility, the failure to introduce records that present not only support for his history of mental health evaluations and treatment beginning at the extremely young age of 7, but also a treasure trove of mitigation regarding [his] abusive childhood, simply is not a reasonable trial strategy.

Counsel could also have presented record and family member testimony of the defendant's father's abuse of him and his mother, living in an abuse shelter, struggling in school, the early onset of mental illness hearing voices at 11 or 12, belief in "demons" so badly that "they attempted a church exorcism when he was in early adolescence," running away from home, command hallucinations, and suicide threats and behavior. Prejudice found. "A vivid description of [the defendant's] poverty-stricken childhood, particularly the physical abuse, and the assault . . . , may have influenced the jury's assessment of his moral culpability." *Id*. at 253 (quoting *Simmons v. Luebbers*, 299 F.3d 929, 939 (8th Cir.2002)). In addition the "contemporaneous records documenting . . . mental health problems, more than any testimony the defense offered at the guilt phase, could have persuaded the jury that the mental health evidence had value as mitigation of punishment, and that, perhaps, [the defendant] deserved a punishment other than death for his crime." "If competent counsel had presented and explained the significance of all the available mitigation evidence, there is a 'reasonable probability that the result of the sentencing proceeding would have been different.'" Reversal was also required due to *Brady* error because the state failed to disclose impeachment evidence related to jailhouse snitch, which was material in sentencing.

***Littlejohn v. State*, 181 P.3d 736 (Okla. Crim. App. 2008)** (crimes in 2002). Counsel found ineffective, as conceded by the state, in capital sentencing for failing to adequately investigate and present mitigation. The defendant was charged with three co-defendants for felony murder arising from a car-jacking. Throughout the trial and sentencing, the defendant admitted participation but denied only that he was the triggerman. Counsel did not conduct any investigation and presented only the unprepared testimony of the defendant and his mother to testify in sentencing. Prejudice

found because there was available evidence the defendant had: (1) a low IQ and attended special education classes; (2) suffered domestic abuse from his mother and step-father, who were drug dealers and users; (3) the defendant did not learn his step-father was not his father until he was a teenager; and (4) expressed remorse and suicidal ideation shortly after the crimes.

***Commonwealth v. Sattazahn*, 952 A.2d 640 (Pa. 2008)** (retrial in 1999). Counsel ineffective in retrial for failing to adequately investigate and present mitigation evidence. Counsel obtained school and prison records and spoke to the defendant' mother, a prison employee, and perhaps a school teacher and then offered "brief testimony" only from the defendant's mother and a former employer. Counsel's conduct was deficient because counsel failed to review the file of defendant's prior murder conviction, including the prison records, which "contained red flags concerning potential mental-health and/or cognitive impairment." Counsel also failed to investigate potential mental, cognitive, emotional and/or social difficulties despite awareness the defendant had failed several grades and was placed in special classes during early childhood development. Counsel's conduct was not justified by strategy. Prejudice found because "[t]he difference in the very nature and quality of the evidence adduced at trial versus that put forward at the post-conviction stage after a fuller investigation is substantial" and the additional evidence would have supported several statutory mitigating factors that "bore upon the degree of [the defendant's] culpability in terms of selecting between capital punishment and a life sentence." In addition to the actual evidence of difficulties in school, the available evidence included mental health experts to testify about the defendant's long history of learning disabilities, attention deficit hyperactivity disorder, chronic brain dysfunction, Aspergers syndrome, and pervasive developmental and schizotypal personality disorders.

***Commonwealth v. Williams*, 950 A.2d 294 (Pa. 2008)** (sentenced in June 1990). Counsel was ineffective in capital sentencing for failing to adequately investigate and present mental health mitigation evidence. Previous counsel had filed a notice of intent to assert an insanity defense, which referenced two prior psychiatric hospitalizations (one involuntary) in the seven months prior to these offenses. The defendant, who was a Vietnam veteran, had been diagnosed with adjustment disorder, depression and dysthmic disorder. Counsel's conduct was deficient in failing to obtain these records or a mental health evaluation and failure to investigate information about the defendant's bizarre behaviors, etc. Prejudice found because the jury heard only good character evidence in mitigation rather than evidence that the defendant's mental-health condition impacted on his conduct in a way that was relevant to the assessment of the degree of his moral culpability.

***Council v. State*, 670 S.E.2d 356 (S.C. 2008)** (sentenced in October 1996). Counsel ineffective in capital sentencing for failing to adequately investigate and present mitigation. Defense counsel asserted during trial and sentencing that the defendant was "merely present at the time" of the crimes, which were committed by another man. The only mitigation evidence presented was "extremely limited testimony" of the defendant's mother. Counsel's conduct was deficient, as follows:

> Initially, trial counsel was deficient in not beginning his investigation into [the defendant's] background once the State served its notice of intent to seek the death

> penalty, counsel discovered that [the defendant's] DNA was found at the scene of the crime, and counsel learned of Respondent's inculpatory statements to police indicating that he sexually assaulted the victim. Clearly counsel should have been aware that the defense accomplice theory was not that strong and that mitigation evidence was the only means of influencing the jury to recommend a life sentence.

Nonetheless, counsel sought only limited records prior to trial, did not request other records until the day jury selection began, did not have the defendant examined by a defense psychiatrist "until one month before trial," and provided the defense psychiatrist "with only limited records." "As in *Wiggins*, counsel's conduct fell below the standards set by the ABA." *Id*. at ____ (citing 1989 ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases). "Even the limited information obtained should have put counsel on notice that [the defendant's] background, with additional investigation, could potentially yield powerful mitigating evidence. "[N]ot only did counsel delay in investigating [the defendant's] background, he failed to conduct an adequate investigation." "Significantly," counsel "failed to provide his only expert witness . . . with sufficient records and only directed him to evaluate . . . competency to stand trial and criminal responsibility." The expert, "at the direction of counsel" also "only met with [the defendant] "on two occasions, the first being shortly before trial."

> Furthermore, even though the funding was available, trial counsel chose not to hire a social history investigator. Instead, he relied on his law partner and private investigator to collect potentially relevant information. However, neither of these individuals was qualified in terms of social work experience, to evaluate the information to assess [the defendant's] background.
>
> Finally, we believe it was unreasonable for trial counsel not to obtain . . . family records. First it is inexplicable that trial counsel deemed these records unimportant because they did not directly involve [the defendant].

*Id*. at ____ (citing 1989 Guidelines). Second, counsel's "brief interviews" with family and DJJ records "should have alerted him to the fact that the family was dysfunctional, [the defendant] had been raised in a violent home environment, and experienced learning disabilities. All of these factors constituted mitigating evidence and warranted further investigation." "Even if trial counsel's investigation could be deemed sufficient or adequate, we believe trial counsel also failed to present any significant mitigating evidence." Counsel's conduct was not excused by strategy because:

> [S]trategic choices made by counsel after an incomplete investigation are reasonable only to the extent that reasonable professional judgment supports the limitations on the investigation. Secondly, counsel was already aware the jury had rejected the defense theory that [the defendant] was not the actual perpetrator but was merely present. Thirdly, it would not have been inconsistent for trial counsel to present the accomplice theory during the guilt phase but mitigation evidence in the penalty phase. Finally, given the State had already presented damaging character evidence,

> we do not believe [the defendant's] character could have been damaged any further by the presentation of additional mitigating evidence. Trial counsel essentially would have had "nothing to lose" and "everything to gain" by presenting this evidence.

*Id*. at ____ (citations omitted). Prejudice found despite "overwhelming" evidence of guilt and the jury's finding of six aggravating factors because the jury did not hear "very strong mitigating evidence," including: (1) "medical evidence or other testimony describing mental health issues or that several of his immediate family members suffered from mental illness," such as "schizophrenia, bipolar disorder, depression, and borderline personality disorder"; (2) alcoholic father and parents' divorce on the basis of physical cruelty; (3) "bad neighborhoods" and extreme poverty; (4) a significant drop in I.Q. between the ages of seven and ten "which may have been the result of a head injury or the onset of mental illness; (5) "began getting into trouble at the age of ten years most likely as the result of his violent family environment and negative influence of his siblings"; (6) alcohol and drug use beginning at age sixteen; (7) attempted suicide in his twenties; (8) "a borderline I.Q. and frontal lobe brain dysfunction"; and (9) "the onset of . . . schizophrenia [which is undisputed now and has rendered the defendant incompetent since at least 2001] may have begun in early adolescence or childhood." The court concluded: "We cannot say beyond a reasonable doubt that the undiscovered mitigating evidence, taken as a whole, would not have influenced at least one juror to recommend a life sentence."

**2007:** ****In re Hardy*, 163 P.3d 853 (Cal. 2007)** (trial in 1983). Counsel was ineffective in capital sentencing for failing to adequately investigate and present evidence of a third party's culpability that would have undermined the state's theory that the defendant was the actual killer. The case involved a conspiracy headed by a man who sought to kill his wife and son for life insurance money and solicited the defendant and several others to assist him. Counsel's conduct was deficient and not explained by strategy because counsel sought to convince the jury that Calvin Boyd was involved rather than the defendant. This was counsel's primary strategy that he pursued in cross-examining the state's and codefendants' witnesses. Counsel's conduct was deficient because adequate investigation would have revealed that Boyd made incriminating statements to a number of people, strongly suggesting he had participated in the murders. He habitually carried a knife similar to the murder weapon and did around the time of the crimes. He had previously committed several assaults and threatened people with a knife. He had cuts on his hands after the murders and made up a false story to explain them. He made up a false alibi and pressured his wife and others to support that alibi. He had a motive to commit the murder because he was a habitual drug and alcohol user, who was unemployed at the time of the murders. He testified falsely during petitioner's preliminary hearing and trial. There was no prejudice during trial because the state argued primarily that the defendant was the actual killer but also argued conspiracy and aiding and abetting, which also allowed for the murder conviction. Prejudice established in sentencing though because, in addition, to the evidence of Boyd's guilt, this evidence would have undermined his credibility in testifying that the husband admitted to him that the defendant was one of the conspirators and that he saw the husband and the defendant together shortly before the crimes. Without this testimony, the evidence that the defendant was the actual killer was "weak and circumstantial." He was young and had only a minor criminal record. He had descended into despair and drug abuse following his brother's suicide.

Given these circumstances it would have made a difference if the jury heard substantial evidence that he "was likely not the actual killer, but merely participated in the conspiracy to kill for insurance proceeds." While the state argued that he personally stabbed the victims in a "brutal and horrific manner" solely for money, this evidence would have made a difference.

> "[I]f he did not kill anyone, if he merely conspired . . . , if he did not show up at the appointed hour, if he was lying passed out from drink and drugs that fateful night instead of stabbing a defenseless woman and child in the dark of night, the nature of his moral culpability is quite different. More to the point, the jury's weighing of the relevant aggravating and mitigating factors would have been entirely different.

*Id*. at 895.

***Ross v. State*, 954 So. 2d 968 (Miss. 2007)** (sentencing in October 1987). Counsel ineffective in capital sentencing for failing to adequately investigate and present mitigation evidence. "[C]ounsel may be deemed ineffective for relying almost exclusively on material furnished by the State during discovery and conducting no independent investigation." *Id*. at 1005. Likewise, "[i]t is not reasonable to refuse to investigate when the investigator does not know the relevant facts the investigation will uncover." *Id*. at 1006 (quoting *Dickerson v. Bagley*, 453 F.3d 690, 696-97 (6th Cir. 2006)). Counsel's conduct was deficient in failing to investigate even though a court-appointed evaluation disclosed a "a number of potential mitigating factors, including accounts of physical and sexual abuse, possible alcoholism, accounts of visual and auditory hallucinations, and the deaths of his ex-wife and four young children in a car accident in 1985 and the brutal murder of his sister in 1982." He was also taking anti-psychotic and anti-depressant medications at the time of the evaluation. Although counsel was aware of this information, they did not pursue mental health issues simply because the defendant informed counsel that "he wasn't 'crazy.'" *Id*. at 1006. The failure to investigate was unreasonable "given the serious mitigating issues evident." Id. Likewise, while lay witnesses, including the defendant, testified about some of this background information "defense counsel provided no expert evidence about how these events had affected [the defendant] psychologically." *Id*. Even more problematic, however, was counsel's failure to properly investigate the defendant's record as an inmate prior to making his adaptability to confinement a central argument in sentencing, which opened the door to rebuttal evidence that the defendant had been moved from the local jail to a more secure facility prior to trial because he possessed a hacksaw blade and planned an escape and that he had been disciplined for making alcoholic beverages during a prior confinement. "This failure falls below an objective standard of reasonableness and was undoubtedly highly prejudicial, as it tended to cast Ross as unrepentant, a habitual criminal, and a danger to society." *Id*. The court also found that the defendant was entitled to a new trial due to "cumulative error," which included counsel's failure to object to a tainted venire panel after a venireperson stated that she had testified against the defendant in federal court that she had been the victim of a crime when counsel was aware that she was the victim in the defendant's prior armed bank robbery. Counsel did not object to her statements, move to remove her after her initial statements, request a curative instruction, or query the remaining venire members about the possible prejudice from her statements.

*Capital Case

***Glass v. State*, 227 S.W.3d 463 (Mo. 2007)** (crimes in July 2001 and affirmed on appeal in 2004). Counsel ineffective in capital sentencing for failing to adequately prepare and present mitigation. Counsel presented the testimony of family members, friends, and former employers in sentencing, but did not investigate and present evidence from "school officials and prior professionals" who were "more 'disinterested' witnesses." Prejudice found because available witnesses included a doctor that admitted the defendant to the hospital for bacterial meningitis when the defendant was less than two years old. While an aunt testified about the meningitis, she could not explain "the long-term effects of meningitis" and the impact on the defendant's "impaired mental functioning." Former teachers were also available to testify concerning the defendant's impaired intellectual functioning. Former probation officers were available to testify that for about 18 months prior to the offenses the defendant had no probation violations and was cooperative. Counsel argued in closing that the crimes were "out of character" for the defendant and this testimony would have supported that argument. Counsel also failed to present the testimony of a neuropsychologist concerning the defendant's deficits even though "neuropsychologicial deficits have 'powerful, inherent mitigating value,'" especially in a case like this where the "jury heard from no experts." Counsel also failed to present the testimony of "a speech and language pathologist" concerning the defendant's impaired intellectual functioning, which is "valid mitigating evidence in the penalty phase of capital case, regardless of whether defendant has established a nexus between his mental capacity and crime." Finally, counsel failed to present the testimony of "a toxicologist and pharmacologist" concerning the influence of alcohol at the time of the offenses, which would have supported two statutory mitigating circumstances (substantially impaired capacity to appreciate the criminality of his conduct and conform to the requirements of law and extreme mental and emotional disturbance).

***Marquez-Burrola v. State*, 157 P.3d 749 (Okla Crim. App. 2007)** (tried in February 2003). Counsel ineffective in capital sentencing for failing to conduct a meaningful mitigation investigation. The defendant, a Mexican foreign national, was convicted of killing his wife of 17 years. Retained counsel had participated in one capital case but hired an associate counsel with no capital experience to prepare for sentencing. The first associate left one month before trial and a second associate who had only been an intern on one capital case was hired to prepare for sentencing. Well before trial counsel had been provided with sample funding motions for experts and other services to prepare mitigation by the Mexican Legal Assistance Program (MCLAP), counsel for Mexico. Counsel did obtain funding for a psychiatrist and an investigator but these people focused only on a "heat of passion" defense for the guilt-or-innocence stage of trial. Just days before trial, counsel for Mexico expressed concern to the trial court about the lack of preparation for sentencing because no investigation had been conducted other than speaking to a few family members one week prior to trial about testifying. The trial court told defense counsel it would be accommodating to additional request for funding but none was made. Counsel, who spoke no Spanish, also did not obtain the services of an interpreter to communication with the defendant, who spoke very little English when an interpreter had to be used even during his interrogation. Counsel used the brother of the victim and the defendant's 12-year-old nephew to interpret even during matters of legal significance. Counsel also did not attempt to overcome the "logistical challenges" involved because almost everyone who could offer insight into the defendant's past and his school, medical, and other records were in Mexico. Counsel's conduct

was deficient because "[d]efense counsel has a duty to take all necessary steps to ensure that available mitigating evidence is presented, *id*. at 765, including "seeking funds from the court and specifying why they were necessary." Counsel's conduct was also not explained by strategy because, even with testimony from all three defense counsel, "the actual strategy with regard to mitigation remains elusive." *Id*. The defendant was prejudiced because "mitigation evidence can, quite literally, make the difference between life and death in a capital case." *Id*. at 764. "One important purpose of mitigation evidence is to humanize the defendant in the eyes of the jury and, if possible, to explain what might have driven him to commit the crime." *Id*. at 766. Here, the mitigation consisted of less than fifteen pages of testimony from the defendant's father, mother, and sister that the defendant had been a good man and asking the jury to spare his life. If counsel had adequately investigated, a number of witnesses, some of whom made "substantial sacrifices" to come from Mexico to testify, would have "offered unique and moving vignettes about [the defendant's] good character." This evidence could have made the difference because there is a

> qualitative difference between having a family member generally ask the jury to spare the life of the defendant, and having third parties offer the jury more objective and specific examples of why the defendant's life should be spared. . . . Jurors may well understand that a defendant's mother will almost always extol the virtues of her son; but they may give different treatment, and perhaps greater weight, to the testimony of less biased witnesses which illuminates the man whose life is in their hands. . . . [T]he stories of Appellant growing up and doing good things in his rural Mexican community might well have resonated with citizens of a rural Oklahoma county.

*Id*. at 766-67 (emphasis in original). Preparation for sentencing was especially important because "[t]his case may fairly be called a 'second stage' case," where "[t]he only real question appeared to be what punishment was appropriate." *Id*. at 767. With adequate investigation, the defense could also have countered the state's argument that the defendant was "an abusive monster who was unreasonably jealous and controlling over his wife. *Id*. The evidence would have established that his "jealousy in the months leading up to the homicide might not have been unfounded, and that [his] marital problems may have had a marked effect on his mental health." *Id*. Prejudice was also established because the jury, at some point during deliberations, which evenly split on whether life or death should be imposed. This "strongly suggest[s] how outcome-determinative a real mitigation investigation might have been." *Id*. Finally, while there was argument in the case about whether a "mitigation specialist" is necessary in a capital case, the court held that "the real issue is whether defense counsel understands what kind of mitigation evidence can make a difference, what kind of mitigation evidence is available, and whether counsel makes reasonable efforts to obtain it." *Id*. at 768. The court also rejected the "suggestion that it was the responsibility of [the defendant] and his family to understand the nature of mitigation on their own, and to bring relevant evidence to defense counsel's doorstep." *Id*. Although the usual remedy would be to grant a new sentencing trial, the court modified the defendant's death sentence to life without parole because "[a]ll of the mitigating evidence, viewed together, clearly outweighed the evidence supporting the aggravating circumstances." *Id*.

**Capital Case*

**2006:** ****Blackwood v. State*, 946 So. 2d 960 (Fla. 2006)** (sentencing in early 1993). Counsel ineffective in capital sentencing for murder of former girlfriend for failing to adequately prepare and present mitigation. During sentencing before the jury, counsel presented eleven witnesses consisting of friends and family, as well as a detention officer who testified that the defendant demonstrated good behavior while incarcerated and had become an inmate trustee. Counsel's conduct was deficient because counsel never even met with the retained defense expert, who had previously found the defendant incompetent, or even attempted to schedule an evaluation of the defendant for sentencing purposes until two weeks prior to sentencing. That expert notified counsel that he could not testify concerning statutory mitigating circumstances, but counsel never asked about non-statutory mitigation. Rather than ask for a continuance or contact the court-appointed doctors, who had also examined competence, counsel did nothing and presented no mental health evidence. Prejudice found because even one of the court-appointed examiners would have testified that the defendant was depressed and emotionally disturbed at the time of the offense. She would also have testified that his verbal IQ was 70, placing him in the borderline mentally retarded range of intelligence. Her testing also indicated some neurological impairment and she would have recommended a neurological evaluation had counsel asked. She also would have testified that the defendant had no prior criminal history and was a good candidate for rehabilitation. Additional available testimony, if counsel had adequately prepared and presented the evidence reflected that the defendant suffered from major depression and avoidant personality traits with masochistic features and was experiencing extreme emotional disturbance at the time of the crime. While the court-appointed examiner testified before the trial court, the court was required to give great weight to the jury recommendation, which was 9 to 3 in favor of death.

****Commonwealth v. Gorby*, 909 A.2d 775 (Pa. 2006)** (crimes in December 1985 and affirmed on appeal in 1991). Trial counsel ineffective in capital sentencing for failing to adequately investigate and present mitigation evidence. Trial counsel's conduct was deficient because counsel knew the defendant behaved irrationally around the time of the offenses, had a history of drug abuse and a "rough childhood," and had been hospitalized previously for head injuries. Nonetheless, counsel did not investigate further than discussions with his client, his mother, and his step-father because he did not believe that any of this was potentially mitigating. In sentencing, counsel called only the step-father to testify that the defendant sometimes assisted him in work around the home. Prejudice found because if counsel had adequately investigated and presented the evidence the jury would have been aware that the defendant was raised in an impoverished, dysfunctional household. He endured substantial verbal and physical abuse and sexual molestation. He witnessed violent and life-threatening altercations between his mother and several husbands, in which he attempted to defend her. He would rock back and forth and bang his head against walls at times. He was also homeless during a substantial portion of his teenage years after his step-father kicked him out of the home. Mental health experts would have testified that the defendant suffered from "cognitive disorder (brain injury affecting thought process), major depression, post-traumatic stress syndrome, borderline personality disorder, and poly-substance abuse." Prejudice found.

**Capital Case*

****Commonwealth v. Sneed*, 899 A.2d 1067 (Pa. 2006)** (sentencing in March 1985). Counsel ineffective in failing to adequately prepare and present mitigation evidence. Counsel failed to conduct any investigation or to even interview family members, with the sole exception being one of the defendant's sisters, even though the defendant informed counsel that he had a "hard childhood," had abused drugs and alcohol, and had previously been incarcerated. Counsel presented no mitigation in sentencing. Counsel's conduct was deficient.

> "The onus is not upon a criminal defendant to identify what types of evidence may be relevant and require development and pursuit. Counsel's duty is to discover such evidence through his own efforts, including pointed questioning of his client." Therefore, although it is true that appellee never volunteered to counsel all of the alarming details of his childhood, it was not necessarily his responsibility to do so. Counsel is charged with the duty of asking probing questions of his client, and with the duty of discovering and developing mitigation evidence . . . .

*Id*. at ___ (quoting *Commonwealth v. Malloy*, 856 A.2d 767 (Pa. 2004)). Prejudice found because an adequate investigation would have revealed that the defendant grew up in extreme poverty with an alcoholic mother, who drank during pregnancy and while breast-feeding the defendant. He was often abandoned as a child while his mother was on drinking binges. He was exposed to his mother's prostitution and his alcoholic grandmother's making and selling of illegal liquor. He was physically abused by his mother and grandparents and malnourished such that he was often forced to steal in order to have any food.

****Ex parte Gonzales*, 204 S.W.3d 391 (Tex. Crim. App. 2006)** (sentencing in February 1997). Counsel ineffective in capital sentencing for failing to adequately prepare and present mitigation. Specifically, counsel failed to ask the defendant, his mother, or his sister whether the defendant had been abused as a child. Counsel's conduct was deficient because he spoke to the mother only once before trial and the sister once during the trial but did not ask about the issue of abuse. "[A]n objective standard of reasonable performance for defense counsel in a capital case would have required counsel to inquire whether the defendant had been abused as a child." *Id*. at 397. The only evidence counsel presented was general background testimony from the defendant's sister. Prejudice found because, if counsel had performed adequately, the evidence would have established the defendant's childhood abuse by his father, which included forced oral and anal sex. He was physically abusive if the defendant resisted and would threaten to kill him and his mother if he told anyone about the abuse. A psychiatrist could also have testified that the defendant suffers from Post-Traumatic Stress Disorder due to the repeated physical and sexual abuse he suffered. This expert would also have testified that, if treated, the defendant could perhaps become a productive, law abiding member of society.

**2005:** ****Orme v. State*, 896 So. 2d 725 (Fla. 2005)** (arrest in 1992 and direct appeal in 1996). Counsel ineffective in capital sentencing for failing to adequately investigate and present evidence of the defendant's mental state, including a diagnosis of bipolar disorder. Counsel were concerned the defendant was suicidal and sought treatment for him aware. He was diagnosed with bipolar disorder

and medicated, but the doctor that diagnosed him died prior to trial and the initial defense counsel withdrew from the case. New counsel saw the doctor's letter and diagnosis but did not present any evidence on this issue "because he had no other information to corroborate it. As he put it, he did not want his expert to stick his neck out and get his head cut off." Counsel's conduct was deficient because counsel failed to investigate with family and friends to establish that the defendant "had exhibited behavior in accord with a bipolar diagnosis." Counsel also failed to inform his trial experts of the diagnosis or to give them the prison medical records showing the medications he had been prescribed to treat the disorder. One of the trial defense experts saw the defendant once prior to trial and was informed by the defendant of the diagnosis and medications, but he had no corroboration. He diagnosed only "mixed personality disorder with chronic intermittent depression and addiction to cocaine." In post-conviction, he was provided the prison records, the prior doctor's letter with the diagnosis, and "affidavits prepared by . . . friends and family which provide anecdotal information about . . . past behavior indicative of someone with bipolar disorder." With this information, he diagnosed "probable bipolar in a depressed phase," which as a "major mental illness [linked] to his drug addiction because statistically bipolars are significantly more likely to abuse drugs." The other trial defense expert, also without the relevant information, was asked to testify about symptoms without a diagnosis and testified that the defendant was "a depressed cocaine addict," who was "anxious about his situation." If he had been asked a diagnosis, he would have diagnosed bipolar disorder. Prejudice established. In sentencing, evidence was presented of intoxication from cocaine, pills, and alcohol without any evidence of mental illness. The prosecution argued that the jury should not allow the defendant to "stand behind his crack pipe," which would have been undermined by "testimony linking his drug use to his bipolar disorder." This evidence " would explain to the jury that he was ill and that the mental illness made his addiction even greater." Prejudice was also clear because, even without this evidence, the jury voted to recommend death only in a vote of seven to five.

***Commonwealth v. Collins*, 888 A.2d 564 (Pa. 2005)** (sentencing in October 1991). Counsel ineffective in failing to adequately investigate and presentation mitigation evidence. Counsel presented evidence of the defendant's "good character" and also presented expert testimony demonstrating that the defendant had low intelligence, a history of drug and alcohol abuse, a lack of self esteem, and that he lacked a male role model in his life because his father left the family when the defendant was young. Counsel's conduct was deficient though because counsel did not obtain a "social history" and met only briefly with the defendant's family just prior to sentencing and told them to say "good things" about the defendant. Counsel failed to secure relevant school and mental health records, which would have demonstrated that the defendant was diagnosed with serious emotional problems from an early age and that such problems were compounded by a head injury he sustained in 1990. While the defendant had denied any head injuries, counsel had not asked anyone other than the defendant and could easily have obtained this information from family members. Prejudice found because if counsel had obtained these records and provided them to the defense psychologist at trial, he would have recommended neurological and neuropsychological testing. The evidence would have established that the defendant was abused by his father and other men as a child. He had cognitive defects and emotional problems, which supported two statutory mitigating circumstances: (1) the defendant was under the influence of extreme mental or emotional disturbance;

and (2) the defendant's capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired.

***Commonwealth v. Zook*, 887 A.2d 1218 (Pa. 2005)** (trial in January 1990). Counsel ineffective in capital resentencing trial for failing to adequately prepare and present mitigation evidence. Counsel believed that they had no significant evidence in mitigation even though counsel were aware that the defendant had suffered a head injury prior to the murders. Counsel also were provided with the defendant's prison records, which revealed the opinion of a consulting psychiatrist that the defendant had a change in behavior consistent with post-concussion syndrome and recommending a neuropsychiatric evaluation. Counsel failed to provide these records to their experts. One of these experts was aware of the head injury from hospital records and testified that it was his general practice to recommend additional evaluation by a neurologist. If counsel had adequately investigated, the evidence would have established that the defendant has organic brain damage, which would have exacerbated his underlying antisocial personality disorder. The defendant was unconscious for 45 minutes due to the head injury and developed seizures and post-traumatic amnesia as a result. In addition, the defendant had a "dramatic behavior change" with respect to violent tendencies which "was well-documented" in the prison records. This evidence would have supported two statutory mitigating circumstances: (1) extreme mental and emotional disturbance; and (2) substantially impaired capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law. "Had the jury heard this relevant evidence, there is a reasonable probability that at least one juror would have found an additional mitigating circumstance and struck a different balance in weighing the aggravating and mitigating circumstances."

**2004:** ***In re Lucas*, 94 P.3d 477 (Cal. 2004)** (crimes in October 1986 and affirmed on appeal in 1995). Counsel ineffective in capital sentencing for failing to adequately investigate and present mitigation. Counsel's conduct was deficient under the "norms prevailing in California" and the ABA standards because counsel waited until just before sentencing and then conducted only a few brief interviews of family members and did not follow up on the information they provided to conduct additional investigation and gather records. Counsel's stated reason for failing to follow up on the information concerning the defendant's childhood abuse and confinement and other information was that the information was too remote and trivial and would make the defendant look like a career criminal. Counsel "did not regard evidence of child abuse or alcoholism in the family as particularly mitigating–an apparently idiosyncratic view not commonly shared by contemporary capital defense attorneys." Counsel intended only to present testimony from the defendant and his wife, but the wife refused to testify and then the defendant also refused. Thus, no mitigation evidence was presented. Counsel's conduct was not excused by the defendant's refusal to testify or alleged failure to provide information about his background because "the accused would not necessarily understand the significance of the information that would be uncovered by such an investigation." There was also no evidence that counsel actually pressed the defendant for the information. Prejudice established because adequate investigation would have revealed severe emotional and physical abuse as a young child, institutionalization from age seven in a home staffed by abusive, violent adults, and then juvenile confinement in facilities known for crowding, neglect, and abuse. This evidence would

have provided some "explanation for petitioner's criminal propensities and some basis for the exercise of mercy."

***State v. Duncan*, 894 So. 2d 817 (Fla. 2004)** (crimes in 1990 and direct appeal in 1993). Counsel ineffective in capital sentencing for failing to adequately investigate and present mental health evidence in mitigation. Counsel's conduct was deficient because there was a pretrial expert available, who had concluded that the defendant "suffered from a mental illness, specifically a chronic, long-lasting psychotic disturbance, and that there was evidence of delusional paranoid thinking." The expert also found that psychological testing "suggested brain injury" and lay witnesses he interviewed "corroborated symptoms of a psychotic disturbance and significant drug abuse." Having found deficient conduct, "[i]t was then the State's obligation to demonstrate, either through the trial record or the testimony of . . . trial counsel, a reasonable, objective justification for counsel's failure to present the available evidence of mental health mitigation." Here, counsel offered no explanation and there was a "complete absence in the record . . . of any reason to support why the doctor was not called to testify). Prejudice established because there would have been substantial evidence to support two statutory mitigating circumstances considered by the trial court but rejected by the appellate court on appeal ((1) extreme mental or emotional disturbance; and (2) mental disturbance that interfered with knowledge of right and wrong).

***Hutchison v. State*, 150 S.W.3d 292 (Mo. 2004)** (crimes in late 1995 and affirmed on appeal in 1997). Counsel ineffective for failing to adequately prepare and present mitigation evidence. Counsel's conduct was deficient because "[t]hey spent nearly the entire time before trial preparing for the guilt phase and virtually no time preparing for the penalty phase." *Id*. at 297. They hired only one expert because the family lacked additional money and did not investigate the defendant's "life history or obtain any records documenting his troubled background and his mental and emotional deficits." In short, they "were overwhelmed, under-prepared and under-funded by the time they arrived at the penalty phase. . . . Counsel knew that they needed to prepare for the penalty phase, but they left no time to prepare adequately and to present such evidence" after they were denied a continuance which left them with only eight months to prepare for trial. *Id*. at 302. Counsel argued that the defendant was a "follower" influenced by his co-defendants but "failed to investigate and present testimony in support of this theory." *Id*. at 303.

> Readily available records that trial counsel admitted they did not attempt to obtain would have documented [the defendant's] troubled childhood, mental health problems, drug and alcohol addiction, history of sex abuse, attention deficit hyperactivity disorder, learning disabilities, memory problems and social and emotional problems.

*Id*. at 304. The one expert counsel retained provided information about the defendant's "severe psychiatric problems," that he had been hospitalized, that he had an IQ of 76 and trouble in school, and that the defendant had suffered emotional and sexual abuse. Prejudice found because counsel presented only brief testimony from the defendant's parents about his learning disability and placement in special education classes. The court rejected any requirement of "a nexus between his

mental capacity and the crime to admit such mitigating evidence." *Id*. at 305. The court also rejected piecemeal consideration of prejudice from "each family member's testimony," because "[t]he question is whether, when all the mitigation evidence is added together, is there a reasonable probability that the outcome would have been different?" *Id*. at 306. The testimony of the defense expert was not sufficient because of his "reliance solely on the background information" provided by the defendant, which left him "open to impeachment at trial." He also spent less than three hours with the defendant and "his report was very short" and "did not address the effect" the defendant's deficits had on him at the time of the crimes. *Id*. This was caused, in part, because trial counsel had instructed him to consider only where the defendant "was competent and whether he suffered from a mental disease or defect." *Id*. This expert did not address any statutory mitigating factors and "gave no interpretations and provided no testimony to assist the jurors in making an educated determination about [the defendant's] mental condition and whether it mitigated the offense." *Id*. at 306-07. The court noted that there was no allegation that counsel should have "shop[ped] for a more favorable expert," but alleged "only that the expert they hired should have conducted a more thorough investigation and evaluation." *Id*. at 307.

> Although [the defendant's] family could not afford these experts, failure to do any follow-up cannot, under these circumstances, satisfy Wiggins' mandate to discover all "reasonably available mitigating evidence." The evidence, readily obtained and presented by postconviction counsel established that with adequate mental health evaluations, the jury would have heard significant evidence for mitigation.

*Id*.

***State v. Chew*, 844 A.2d 487 (N.J. 2004)** (trial in June 1995). Counsel ineffective in capital sentencing for failing to adequately prepare and present mitigation. In preparation for sentencing, counsel retained a psychologist to assess any mitigating factors. The psychologist diagnosed: (1) personality disorder (NOS), mixed with dependent, histrionic, and antisocial features; (2) drug dependency; (3) depressive disorder; and (4) developmental reading disability. He believed there was support for the statutory mitigating factor that the "defendant was under the influence of extreme mental or emotional disturbance." After counsel learned that the defendant had an incestuous relationship with his sister though, counsel never discussed this information with the defense expert and did not present the expert testimony because she feared that this information had been disclosed to a state examiner, who had examined the defendant's sister, and that this harmful information would be revealed to the jury. In sentencing, counsel presented only the testimony of a social worker who described the defendant's family background of chaos, violence, sexual abuse, sexual promiscuity, beatings, excessive drinking, and lack of love and support. Counsels' conduct was deficient because the decision not to call the expert was not based on an adequate investigation because counsel failed to investigate to determine whether the court-appointed examiner was aware of the defendant's incestuous relationship with his sister. They never obtained his report or interviewed him. Counsel also failed to discuss this information with the defense expert, whose opinion would have been strengthened by the incestuous relationship because it demonstrated even greater problems than he had previously realized. Prejudice was found because presentation of the expert testimony in support

of the extreme mental or emotional disturbance mitigating factor would have substantially affected the jury's deliberations at the penalty phase. While the additional mitigating evidence had a potential downside, the defense expert's opinion would have been supported by the additional evidence of incest, along with undisclosed evidence of the defendant's abuse of animals and sexual abuse of a child.

***Commonwealth v. Moore*, 860 A.2d 88 (Pa. 2004)** (trial in 1983). Appellate counsel was ineffective in failing to assert trial counsel's ineffectiveness for failure to prepare and present mitigation evidence. Counsel presented no mitigation evidence. He asserted that the defendant declined to testify and he had no other mitigating evidence. Thus, counsel presented no opening and no evidence and only referred generically to possible mitigating circumstances in closing. The jury found two aggravating circumstances and no mitigating circumstances. On appeal, counsel alleged trial counsel's ineffectiveness but failed to specify what mitigating evidence had been available. Thus, the issue of trial counsel's ineffectiveness was denied on appeal. Appellate counsel was ineffective for failing to adequately present the available mitigating evidence, which included testimony from the defendant's mother, sister, and wife of the defendant's traumatic and abusive childhood, including witnessing his father slash his mother's throat. The mother and sister had not been subpoenaed and had not been advised of the need for their testimony in sentencing. Although the ex-wife did appear under subpoena to testify at trial concerning an alibi, she would have testified in sentencing if counsel had explained the nature of the proceeding to her. While these witnesses were "obviously more cooperative in 2000 than in 1983," *id*. at 99, and the defendant was an "uncooperative client," *id*. at 100, counsel's conduct was deficient because counsel was not "relieved of the duty to investigate potential mitigating evidence, particularly where counsel had no other penalty phase strategy," *id*. at 100. Counsel's conduct was not excused by any strategic reason. Prejudice was found because without any mitigating evidence, the defendant's only chance for a life sentence would have been if the jury did not find either of the aggravating circumstances, which was unlikely based on the evidence presented by the state. New sentencing granted.

***Commonwealth v. Malloy*, 856 A.2d 767 (Pa. 2004)** (sentencing in March 2000). Counsel was ineffective for failing to adequately prepare and present mitigation. Counsel's conduct was deficient because counsel met with the defendant only twice, did not apply for co-counsel or an investigator, and conducted no investigation. No evidence was presented in mitigation. Counsel's conduct was not excused by the defendant's failure to inform counsel of possible mitigation evidence and witnesses.

> The onus is not upon a criminal defendant to identify what types of evidence may be relevant and require development and pursuit. Counsel's duty is to discover such evidence through his own efforts, including pointed questioning of his client.

Counsel's conduct was also not excused by the defendant's statement in sentencing that he was satisfied with counsel.

> The fact that appellant was satisfied with counsel at the sentencing hearing colloquy in no way proves that trial counsel's investigation and performance satisfied Sixth

> Amendment standards. Appellant is not a lawyer, nor was he in a position to know whether his counsel had performed competently. The measure of effectiveness is not whether one's client appeared satisfied at the time. A client is entitled to trust in the fact that his attorney will know what investigation to undertake, what leads to pursue, and what evidence to look for.

Prejudice found because, if counsel had adequately performed, the evidence would have shown that the defendant was physically abused as a child, he lived with his grandmother after his drug-addicted mother abandoned him, and he was institutionalized by age 12 because his grandmother could not control him. Although this evidence is not overwhelming, it was a "close case" and the state presented only one aggravating circumstance. On the other hand, counsel completely failed to "personalize appellant for the jury."

***Von Dohlen v. State*, 602 S.E.2d 738** (S.C. 2004) (trial in May 1991). Counsel was ineffective in capital sentencing for failing to adequately prepare and present mitigation. Counsel presented evidence that the petitioner was a good husband, a good father, and a dependable employee. He grew up in a poor family and had suffered physical and emotional abuse as a child. He had no prior criminal record. His brother was murdered just two weeks before the crimes and petitioner became withdrawn and depressed and began abusing alcohol and Valium. The "violent murder was completely unexpected and out of character for a man who had never displayed violent tendencies." During sentencing, counsel presented testimony from a defense psychiatrist that petitioner suffered an "adjustment reaction with mixed features of emotions and conduct," and pathological intoxication of alcohol and Valium abuse. The psychiatrist testified, however, that petitioner "did not have a chronic mental illness" and the prosecutor capitalized on this in closing arguments. Counsel's conduct was deficient in failing to provide the defense expert with available medical records and testing relating both to the petitioner, as well as his father and brother. Prejudice found because, with the available records, the defense expert would have testified that the petitioner "suffered from severe, chronic depression, a major mental illness," 602 S.E.2d at 742, with "psychotic and suicidal tendencies." Counsel's conduct was also deficient in failing to object to the prosecutor's closing argument in sentencing inviting the jurors to put themselves in the "victim's shoes," which was improper under state law and impermissible under *Payne v. Tennessee*, 501 U.S. 808 (1991). Prejudice was not, however, established on this issue.

**2003:** ***State v. Williams*, 794 N.E.2d 27 (Ohio 2003), *modified on reconsideration*, 814 N.E.2d 818 (Ohio 2004)** (trial in March 1999). Counsel was ineffective in capital sentencing case for failing to object to improper prosecutorial argument and an improper instruction on mitigation. The court found that the trial court erred in denying counsel's motion to withdraw from representation after the defendant assaulted one of his attorneys in front of the jury following his conviction. After the assault, counsel had very little communication with the defendant because they were frightened of him and they were worried that their fear would be revealed to the jury.

> This is particularly damaging to a defendant during the penalty phase of a capital case when counsel must humanize the defendant for the jury, show his character in the best light available, and bring his good qualities to the fore.

*Id*. at 50. In closing arguments in sentencing the prosecutor argued that the jury should weigh non-statutory aggravating circumstances that included the final thoughts of the murder victim, the suffering of the victim's mother, and the death of the victim's unborn child. All of these arguments were improper under state law. At the conclusion of sentencing the trial court instructed the jury that mitigating factors are those that are "extenuating or reducing the degree of the defendant's blame or punishment." This instruction was improper because mitigation is not about blame or culpability, but rather about punishment. Despite the prosecutor's improper arguments and the improper instruction, counsel failed to object. The court found that there was no possibility, particularly in light of the prior physical assault of one counsel and the misgivings of both counsel about their ability to continue the representation of the defendant, that the failure to object was a conscious tactical decision. Prejudice was found because there was substantial mitigation in the case and the crime appeared to be a crime of passion. The defendant's family testified that he had a strong close knit family that loved him and was willing to stand beside him. Prejudice was also found because the jury deliberated for six and a half hours before announcing a deadlock and when they were required to continue deliberations they deliberated for an additional eight and half hours before reaching a unanimous decision for death

**Capital Case*

## B. ONE DEFICIENCY

### 1. STATE AGGRAVATION EVIDENCE OR ARGUMENT

#### a. U.S. District Court Cases

**2016:** ****Miller v. Beard*, 214 F.Supp.3d 304 (E.D. Pa. 2016).** (1997 trial). In this capital case, trial counsel was ineffective for failing to adequately investigate, prepare, and present testimony to rebut the commonwealth's allegation that the victim was raped. Following a bench trial, defendant was convicted of raping and murdering his wife, and was subsequently sentenced to death. At trial, the commonwealth relied on the testimony of Dr. Callery, who testified that due to the physical characteristics of the scene of the crime, the victim had been raped while defendant allegedly stabbed the victim with a knife. Dr. Callery's testimony provided the sole evidence to prove the victim had been raped, which was also the aggravating factor that led to the imposition of death. Trial counsel had the opportunity to cross-examine Dr. Callery at a pre-trial hearing, and again at trial. He noted several inconsistencies in his testimony and only challenged the doctor as to whether or not the possibility that the victim could not have been raped existed. Trial counsel did not consult any experts, provide a theory to undermine the doctor's crucial testimony, nor provide evidence or experts to contradict him. Trial counsel's performance was deficient. When asked why he did not consult any experts, counsel specifically noted that it was not because of a trial strategy, but rather because he thought nobody would believe Dr. Callery. First, given the scientific and technical nature of Dr. Callery's forensic testimony, and in light of the fact that this testimony formed the sole basis of the rape conviction and death sentence, consultation with an expert would "necessarily be part of a reasonable defense strategy." *Id*. at 337. Second, given that experts were available (two experts testified against Dr. Callery's findings during state post-conviction proceedings), and that the doctors' opinions were outside of a lawyer's expertise, not consulting with an expert to either prepare for cross examination or to present as a witness to rebut the allegation that a rape occurred during homicide was constitutionally deficient. Defendant was prejudiced by counsel's actions because Dr. Callery's testimony was the only evidence establishing the sole aggravating factor of rape, and the expert testimony during PCRA offered sound opinions, which undermined the basis of Dr. Callery's testimony. Had counsel performed competently and consulted with experts, he would have raised questions about Dr. Callery's theory, and there is a reasonable probability that the outcome regarding the rape charge would have been different.

**2015:** ****Roybal v. Davis*, 148 F. Supp. 3d 958 (S.D. Cal. 2015)**. Under AEDPA, habeas relief granted as to the death sentence due to counsel's failure to object to the prosecution's improper closing arguments in sentencing based on "biblical law," which diminished the jury's sense of responsibility for sentencing under *Caldwell v. Mississippi*, 472 U.S. 320 (1985). The state court held that the arguments were improper but found no prejudice because the bulk of the state's closing was focused primarily on the brutal circumstances of the crime" and the biblical references were brief and "amounted to little more than commonplaces, to emphasize his point that the jurors should . . . judge defendant primarily by his acts." The district court rejected this finding as objectively unreasonable because "[t]he circumstances of this case strongly suggest the prosecutor's remarks were anything but harmless." The prosecutor "clearly and improperly advocated that religious

authority supported a death verdict" and included "direct biblical quotations demanding a sentence of death." In finding that this argument could not have diminished the jury's responsibility, the state court's holding was objectively unreasonable because it focused only on the remainder of the prosecutor's closing argument rather than reviewing the prejudice in the context of the entire trial. Considering that context, the district court noted that the state's case on guilt was entirely circumstantial and the death verdict was "obviously close and difficult" because: (1) the jury heard substantial mitigation evidence "replete with physical and emotional abuse and neglect, substance abuse that started before age ten, and significant brain dysfunction and damage"; (2) the jury deliberated for portions of six court days, after hearing sentencing evidence for nine days, before reaching a verdict; (3) the jury requested to rehear the testimony of the defendant's "alcoholic and neglectful mother"; (4) the jury requested to rehear the testimony of two mental health experts who testified at length about the defendant's "brain dysfunction, long-standing substance abuse, personality disorders, and the possibility that he suffered from fetal alcohol effects from his mother's alcohol use when pregnant") and (5) the jury twice sent out notes "expressing their inability to reach a verdict." "By any measure, this was an extremely close penalty phase trial where the prosecution sought to impermissibly minimize the jury's sense of personal decision-making in violation of the Eighth Amendment." The trial court's general instructions that arguments of counsel were not evidence and that the jury must base the verdict on the evidence and the law were "insufficient to cure the misconduct or blunt the impact of this highly improper argument." Counsel's conduct in failing to object was deficient and not based on any strategy. If counsel had raised a timely objection to the prosecutor's initial biblical argument, "he could have at the very least curtailed the remainder of the argument and requested a curative instruction neutralizing the condemnable misconduct." Prejudice was clear.

**b. State Cases**

**2013:** ***Miller v. State*, 313 P.3d 934 (Okla. Crim. App. 2013)**. Counsel was ineffective in capital sentencing for failing to object to the prosecutor's improper and misleading arguments that a life sentence would be a "freebie" since the defendant was already serving a federal life sentence. Prejudice was determined in a cumulative error analysis due to multiple other issues.

**2010:** ***Vasquez v. State*, 698 S.E.2d 561 (S.C. 2010)** (sentenced in October 2003). Counsel was ineffective in capital sentencing for failing to object to the prosecution's arguments referring to the Muslim defendant as a "domestic terrorist" and referencing the events of 9/11/01 during this trial, which occurred on the second anniversary of 9/11. The defendant was charged with murdering several restaurant employees after he had been fired from the restaurant. He wore "traditional Muslim headgear" during the trial. Jurors were questioned in voir dire about prejudice against Muslims. The "domestic terrorist" arguments began in the first sentence of the state's opening statement in the trial. Both aggravation and mitigation witnesses, including an imam, testified in sentencing. Then in closing, the state continued the "domestic terrorist" argument and made the 9/11 references. Counsel's conduct was deficient in failing to object because there was no evidentiary support for characterizing the defendant's acts as "terrorism," as his acts did not constitute "'terrorism' by the legal sense of the word.'" The prosecutor was intentionally using inflammatory references that "improperly evoked religious prejudice and, thus, served only to inflame the passions

and prejudice of the jury." Prejudice was also established as the defendant's "Muslim faith was a key theme throughout the trial proceedings which coincided with the second anniversary of September 11th."

**2009:** ***Gill v. State*, 300 S.W.3d 225 (Mo. 2009)**. Counsel ineffective in capital sentencing for failing to discover child pornography, bestiality content, and sexually explicit instant message conversations on victim's computer that could have been used to limit or rebut the state's evidence of the victim's good character. The victim's computer was in the defendant's car at the time of his arrest and an investigator's report included a list of instant message accounts and a list of the users with whom the accounts exchanged messages. Defense counsel reviewed the report but did not notice anything unusual even though the users the victim was communicating with had user names such as "a_slutty18girl_w38c," "daddoesme15," and "sweet_tasting_slute." Counsel's conduct was deficient as these entries "should have alerted them to the presence of pornography on the computer." Counsel also failed to interview the investigator, who became aware a few days after preparation of the report that there was pornography and sexually explicit instant message conversations referencing sex with underage girls, including a sexually explicit discussion about the victim's daughter, on the computer. Prejudice established in light of the co-defendant's ability to have the state limit the victim impact testimony to avoid opening the door to this rebuttal evidence with "good character" evidence, which resulted in the co-defendant being sentence to life rather than death.

**2007:** ***Malone v. State*, 168 P.3d 185 (Okla. Crim. App. 2007)**. Counsel was ineffective in failing to object to improper victim impact testimony. Specifically, counsel failed to object when the state trooper victim's widow read from a prepared statement saying that her husband had been shown no mercy when he begged for his life and the defendant should be shown no mercy. She also cited the Bible as giving citizens duties and obligations to enforce the law. She also "beseech[ed]" and "beg[ged]" the jury to impose death. Counsel's conduct was deficient (and the trial court committed plain error) because "[t]his invocation of religious belief and obligation in the context of a capital sentencing recommendation is totally inappropriate." *Id*. at 210. Counsel also failed to object to the improper reading of cards the victim sent to other family members. Counsel's conduct was deficient (and the trial court committed plain error) in failing to object that the victim impact testimony was too long and overly emotional. The testimony covered 36 transcript pages, 28 of which was uninterrupted narrative.

> While this Court declines to adopt specific rules governing the length of such testimony, we note that we have previously held that such statements should not be "lengthy" and that they should contain only a "quick glimpse" of the life that has been extinguished. Victim impact statements were never intended to be–and should not be allowed to become–eulogies, which summarize the life history of the victim and describe all of his or her best qualities.

*Id*. at 210. Here the victim impact evidence was "'too much'–both too long and too emotional." The court also failed to give an instruction on how the jury was to evaluate and consider the victim impact evidence, within the context of its overall sentencing decision even though a uniform instruction is generally given. Prejudice established even though the defense conceded the three

aggravating factors as part of a reasonable strategy. The court emphasized, however, "that although a defendant's crime may make him eligible to receive the death penalty, a jury is never obligated to sentence a defendant to death, and that a single juror has the power to prevent a death sentence in a given case." *Id*. at 214-15. Here, the prejudice was enhanced by the prosecution's reliance on the improper victim impact testimony in the closing argument that asserted a sentence other than death would be "a travesty." *Id*. at 215. The court's "confidence in the jury's sentencing verdict" was also undermined by counsel's failure to prepare and present mitigation evidence from former co-workers, who could provide "powerful, varied, unbiased, and potentially result-altering mitigating evidence." The evidence would have established the defendant had been a good and caring person as a fireman and EMT, had saved a number of lives, and was a good father prior to his descent into drugs culminating in this methamphetamine-related murder. His descent was fueled, in part, by his ex-wife's very public affair with his supervisor in the fire department and then his mother's death. The court did not reverse on this basis, however. It noted that the defendant would be entitled to an evidentiary hearing on this claim, but the issue was mooted because of the victim impact ruling.

**2005:** ****State v. Fudge*, 206 S.W.3d 850 (Ark. 2005)**. In split decisions for varying reasons, the court affirmed the trial court's ruling finding counsel to be ineffective in capital sentencing for failing to object to evidence of a prior conviction the defendant did not have that was used to support an aggravating circumstance. The aggravating circumstance was that the defendant had been convicted of prior felonies "an element of which was the use of threat or violence to another person or the creation of a substantial risk of death or serious physical injury to another person." The state submitted three exhibits in support of this factor, which were read but not given to the jury. The exhibits included prior convictions of: (1) battery in the first degree; (2) two counts of terroristic threatening; and (3) an additional two counts of terroristic threatening. The issue involved only the battery in the first degree because the lower court found that the defendant had actually only been convicted of "robbery, a less violent offense." Three judges found no deficient conduct (based on the defendant's statements to counsel) and no prejudice (due to the other evidence supporting the aggravating circumstance). Two judges declined to review the issue of deficient conduct because the State had not raised the issue on appeal and affirmed on the prejudice prong on the basis that the lower court's ruling was not clearly erroneous. A third judge voted to affirm without a separate opinion stating the reason. Yet another judge voted to remand for additional fact-finding because the actual exhibit showed a conviction for battery in the first degree, but the state conceded in briefing that it was only a robbery conviction.

**2004:** ****Hall v. Catoe*, 601 S.E.2d 335 (S.C. 2004)**. Counsel was ineffective in capital sentencing for failing to object to the prosecutor's closing argument that asked the jury to compare the defendant's worth and the victims' worth in an emotionally inflammatory fashion unrelated to the circumstances of the crime and traditional victim impact evidence.

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### 2. INSTRUCTIONS

#### a. U.S. Court of Appeals Cases

**2006:** ****Lankford v. Arave*, 468 F.3d 578 (9th Cir. 2006)**. Under pre-AEDPA law, counsel ineffective in capital trial for requesting a jury instruction that eliminated Idaho's requirement that an accomplice's testimony must be corroborated by other evidence in order to convict a defendant. Petitioner and his brother were arrested based on fingerprints in the victim's van and other evidence. The petitioner's brother testified against him in exchange for a life sentence and the state's theory that petitioner was the actual killer depended heavily on his uncorroborated eyewitness testimony about the events. Counsel's conduct was deficient. He had conducted research at a law school library and took the instruction from a collection of federal instructions because there were no model instructions for Idaho at the time. While the instruction was correct under federal law, it was clearly incorrect under Idaho law, which expressly forbids" conviction on the basis of uncorroborated accomplice testimony. "It was a young lawyer's mistake, akin to failing to check the pocket part, but it was a mistake, plainly enough," id. at 585, based on "a misunderstanding of the law," *id*. at 584 (quoting *United States v. Span*, 75 F.3d 1383, 1390 (9th Cir.1996)).

#### b. U.S. District Court Cases

**2009:** ****Judge v. Beard*, 611 F. Supp. 2d 415 (E.D. Pa. 2009)** (sentenced in April 1987). Trial and appellate counsel ineffective for failing to assert Mills error based on the trial court's instructions that "erroneously led the jury to believe that it could not return a verdict at the penalty phase of the trial without agreeing unanimously both as to individual mitigating circumstances and the ultimate penalty." Counsel's conduct was deficient, even though the case was tried before the Supreme Court granted cert. or issued the opinion in *Mills v. Maryland*, 486 U.S. 367 (1988). The case was pending on direct appeal at the time of the decision. Although the Supreme Court determined in *Beard v. Banks*, 542 U.S. 406 (2004) that *Mills* announced a new rule that could not be retroactively applied to cases on collateral, Third Circuit cases prior to *Beard* concluded that *Mills* was simply an extension of *Lockett v. Ohio*, 438 U.S. 586 (1978) and *Eddings v. Oklahoma*, 455 U.S. 104 (1982). Thus, the court held that "reasonably competent defense counsel would or should have been aware of the ongoing developments in the state of capital law in April, 1987, and subsequent thereto." There was also no conceivable strategy for failing to object, "as the worst that could have happened would have been its denial."

#### c. State Cases

**2004:** ****Thomas v. State*, 83 P.3d 818 (Nev. 2004)**. Counsel ineffective in capital sentencing for failing to object to the trial court's erroneous instruction that informed the jury that the Board of Pardons could, under certain circumstances, modify a life without parole sentence. While the Nevada Supreme Court had approved this instruction in 1985, the state statute was amended in 1995. The amendments provide that the Pardons Board cannot commute a prison term of life without possibility

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of parole to a sentence allowing parole. Because the Defendant's crimes were committed in 1996, there was no circumstance or condition under which the Pardons Board could modify a life without parole sentence. Counsel's conduct was deficient in failing to object to the erroneous instruction to the jury. Prejudice found because the jury could have reasonably believed that a death sentence was necessary to prevent the possibility that the defendant could eventually receive parole if they returned a sentence of life without possibility of parole. Prejudice was exacerbated by the prosecutor's future dangerousness arguments. Trial and appellate counsel's conduct was also deficient in failing to object to the prosecutor's improper arguments in the closing argument of the penalty phase. First, the prosecutor asserted, "This is not a rehabilitation hearing. There is no program that we know of that rehabilitates killers." This argument was based on facts and inferences not supported by the record. Second, the prosecutor argued: "The defendant is deserving of the same sympathy and compassion and mercy that he extended" to the victims. This argument was improper because it "implored [the] jury to make a death penalty determination in the cruel and malevolent manner shown" by the defendant and was calculated to incite passion rather than a reasoned moral response to the evidence. While this argument has been approved by the Nevada Supreme Court when the argument is made in response to defense counsel raising the issue of mercy, defense counsel in this case did not invoke "mercy" or "sympathy" or "compassion" in closing argument. While trial and appellate counsel's conduct was deficient in failing to object to these arguments, the court declined to address prejudice since a new penalty hearing was already required.

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### 3. MISCELLANEOUS

#### a. U.S. Court of Appeals Cases

**2017:** ****Stephenson v. Neal*, 865 F.3d 956 (7th Cir. 2017)**. The Seventh Circuit granted penalty phase relief in this Indiana capital case on the ground that trial counsel was ineffective for failing to object when petitioner was required to wear a visible stun belt at trial. Having earlier determined that the Indiana Supreme Court's rejection of this claim was inconsistent with clearly established federal law, *see Stephenson v. Wilson*, 619 F.3d 664, 668 (7th Cir. 2010), the Seventh Circuit concentrated its analysis on the merits of counsel's failure to object to the stun belt:

> The box on Stephenson's belt was on his back under his shirt yet visible to the jurors as a bulge. ... [S]eeing the bulge and recognizing it as the action part of a stun belt the jurors may have thought it evidence that Stephenson was violent and unpredictable—evidence confirming the jury's decision to convict and encouraging it to sentence such a person, already found to be a murderer, to death. It's also possible that wearing the stun belt affected Stephenson's demeanor and appearance throughout the trial—made him nervous and fearful, which jurors might interpret incorrectly as signs of guilt. * * * The fault is certainly not Stephenson's; it's his lawyer's, for failing to object to his client's having to wear a stun belt, given the absence of any reason to think his client would go berserk in the courtroom. The possibility that the defendant's having to wear the stun belt—for no reason, given that he had no history of acting up in a courtroom—contaminated the penalty phase of the trial persuades us to reverse the district court's denial of [relief] ....

865 F.3d at 959.

**2008:** ****Duncan v. Ornoski*, 528 F.3d 1222 (9th Cir. 2008)** (sentenced in March 1986). Under pre-AEDPA standards, counsel ineffective in capital sentencing for failing to investigate and present evidence that the blood samples from the crime scene that did not belong to the victim, who was stabbed to death in a struggle, and also did not belong to the defendant, which supported an inference that the defendant had an accomplice and that the accomplice killed the victim. There was no prejudice during trial, but prejudice was established with respect to the special circumstance findings that required an intentional killing or an intent to kill. The state's serologist was given no blood to compare to samples other than the victim's and could state only what did not match the victim. The defense argued in closing that the state should have tested the defendant's blood, but the prosecutor responded that if inconsistent blood evidence had been present, the defense would have presented this evidence.

> Although it may not be necessary in every instance to consult with or present the testimony of an expert, when the prosecutor's expert witness testifies about pivotal evidence or directly contradicts the defense theory, defense counsel's failure to present expert testimony on that matter may constitute deficient performance.

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Here, the defense argued that the defendant was not the killer, but "did not advance any plausible alternative theory or present any specific evidence that he was not the murderer." Counsel had the serology report and understood the significance but opposed the state's motion for blood testing of the defendant and did not consult a serologist or have the defendant's blood tested.

> It is especially important for counsel to seek the advice of an expert when he has no knowledge or expertise about the field. . . . Additionally, the central role that the potentially exculpatory blood evidence could have played in [the] defense increased [the] duty to seek the assistance of an expert.

Counsel did not have a valid strategy not to incriminate the defendant further because the defendant admitted presence and his fingerprints and palmprints were present at the scene. In addition, state law allowed "confidential testing by defense experts," which the prosecutor even pointed out to the jury in closing in arguing the unfavorable inferences. Even if defense counsel was concerned about maintaining confidentiality, counsel could have obtained a small sample of the defendant's saliva in a vial or cloth and used that to determine his blood type without notifying the court or the State so there was "nothing to lose by testing [the defendant's] blood, but he stood to gain crucial evidence by doing so." Prejudice found

> especially considering that the blood evidence was the only physical evidence that had not been linked to [the defendant] at the time of the trial. The evidence that [counsel] failed to present would have been highly significant because it would have suggested that [the defendant] had an accomplice and that the accomplice was likely the actual killer. Under the State's own theory, the small money room likely would have accommodated only one killer. Given the blood found at the crime scene that did not belong to the victim or to [the defendant] and that was likely shed in the course of the attack, it appears probable that [the defendant] was not in the money room during the murder.

*Id*. at ___.

****Lawhorn v. Allen*, 519 F.3d 1272 (11th Cir. 2008)** (trial in April 1989). Counsel was ineffective in capital sentencing under AEDPA for waiving his closing argument in sentencing. Counsel's conduct was deficient and was not based on a reasonable strategy because counsel's decision was based on "a gross misunderstanding" of state law. While counsel believed that by waiving his closing, the state would be prohibited from making a closing, this was incorrect under state law and counsel had failed to adequately research the issue in preparation for trial. "Such preparation includes an understanding of the legal procedures and the legal significance of tactical decisions within these proceedings." The court reviewed *Bell v. Cone* but found this case factually distinguishable. The state court's decision was unreasonable because the court found that counsel had researched the issue and found a state case in support of his "strategy," which was not supported by the evidence. Prejudice was also found because counsel forfeited the opportunity to remind the jury of important mitigation evidence presented during the trial that indicated substantial domination of the

defendant by his aunt, who requested that he kill the victim because she was afraid of him. Here, the jury recommended death by a vote of 11-1. Under state law, at least a 10-2 vote was required for a verdict of death, so the defendant needed only to convince two more jurors.

**2005:** ***Canaan v. McBride*, 395 F.3d 376 (7th Cir. 2005)**. Counsel was ineffective in sentencing for failing to advise the defendant of his right to testify. The court was not constrained in this case by the AEDPA standards because the state courts failed to address this issue even though it was "squarely presented" in state court. Thus, the issue was not "adjudicated on the merits" for purposes of 28 U.S.C. § 2254(d), just as the Supreme Court's review was "not circumscribed by a state court conclusion with respect to prejudice [in *Wiggins*], as neither of the state courts below reached this prong of the Strickland analysis." (quoting *Wiggins v. Smith*, 123 S. Ct. 2527, 2537 (2003)). The court noted, however, that the result would be the same under the AEDPA. The court declined deference to the state court finding that counsel advised the defendant of his right to testify in sentencing because this finding was "flatly contradicted" by counsel's testimony. In determining whether counsel's conduct was deficient, the court "look[ed] first to the ABA Standards for Criminal Justice and the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases." The court noted that the 2003 ABA Guidelines for death penalty cases provide that "[c]ounsel should consider, and discuss with the client, the possible consequences of having the client testify . . . ." In failing to advise the defendant of his right to testify, "counsel also defaulted on their 'duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution." (quoting *Strickland v. Washington*, 466 U.S. 668, 688 (1984)). Although counsel's advice "might go either way, . . . [t]he point here is that the final choice must be the client's. . ." The defendant was prejudiced because no mitigating evidence was presented. State law requires that the jury weigh aggravating and mitigating circumstances. "With nothing to put on the mitigating side of the scale, the jury was almost certain to choose a death sentence." If counsel had performed adequately, the defendant's testimony would have revealed "a deeply troubled history" of the kind found to be relevant in *Wiggins*. *Id*. at 386. He suffered physical and emotional abuse and struggled with drugs and alcohol.

### b. U.S. District Court Cases

**2016:** ***McLaughlin v. Steele*, 173 F. Supp. 3d 855 (E.D. Mo. 2016)** (tried and sentenced in 2006). Under AEDPA, counsel ineffective in capital sentencing for failing to investigate, retain, and present the testimony of a qualified psychiatrist. Without independent investigation of the expert's credentials, counsel retained a psychiatrist based on the recommendation of his mitigation specialist, who had seen the psychiatrist speak at a capital defense seminar. After examining the defendant for at least seven hours, the psychiatrist opined, among other things, that the defendant was under the influence of extreme mental or emotional distress at the time of the murder and that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law were substantially impaired at the time of the murder. While the jury was out deliberating on guilt-or-innocence, the retained psychiatrist disclosed to defense counsel that he had engaged in professional misconduct during medical school that might subject him to serious impeachment. The next day in opening statements in the sentencing phase, defense counsel told the jury that it would hear from the

psychiatrist and summarized in detail his expected testimony, but then counsel decided not to call him to testify because of the likely impeachment. Prior to closing arguments in sentencing, counsel informed the trial court that he did so because after the opening he had done an internet search of the retained psychiatrist's name and quickly found information about the expert's prior misconduct. He then met with co-counsel and their bosses in the public defender office and decided not to call the expert because the potential for impeachment might seriously harm the defendant's case. Instead, in sentencing, counsel presented two mental health experts, who had evaluated the defendant at age 9; the testimony of a psychologist (Mark Cunningham, Ph.D.), who had reviewed the defendant's records and interviewed family members but who had not interviewed the defendant; and a mental health expert who treat the defendant months before the murder. Because this issue had not been raised until the appeal of the denial of state post-conviction relief, the issue was procedurally defaulted. Thus, the court first considered whether "cause" and "prejudice," based on post-conviction counsel's ineffectiveness, excused the default under *Martinez*. This standard was met because the court found the underlying claim of ineffective assistance of trial counsel to be "substantial." Likewise, the court found that post- conviction counsel's conduct was deficient in that counsel was aware of the issue simply from reading the trial transcripts, as trial counsel had expressed concern to the trial court that he may have been ineffective. In addition, post-conviction counsel intended to raise the issue, but unintentionally omitted the issue. Thus, there was no tactical decision for the omission. The prejudice analysis was intertwined with the sentencing prejudice discussed below. On the issue of trial counsel's ineffectiveness for failing to present the testimony of a psychiatrist, which had been raised, the state court held that counsel's decision not to present testimony from the retained psychiatrist was reasonable trial strategy. The state court also found no prejudice because the psychiatrist's testimony would have been largely cumulative to Dr. Cunningham's testimony. The District Court held that counsel's "ultimate decision" not to call the retained psychiatrist to testify was reasonable.

> But counsel's representation during trial is not the extent of his constitutional duty to his client. Counsel should never have been in the situation of deciding, at the last minute, between calling an expert with a serious truthfulness problem and calling no expert at all.
>
> It is, of course, common practice for capital defense attorneys to rely on mitigation specialists to propose potential experts, whom they may eventually call to testify in mitigation. But in making the decision whether to retain a potential expert, counsel must do something beyond reviewing what the expert says about himself on his resume.

*Id*. at ____ (citations omitted.) Here, counsel did nothing more than review the resume and, as such, "had not done the groundwork reasonably necessary to make a strategic decision" about whether to hire the expert. This is not a case about failing to engage in expert-shopping. It is instead, a case where counsel failed "to investigate the expert he did hire and to reasonably develop the strategy he had settled on." Counsel's conduct was deficient in failing to conduct "some investigation" of the expert prior to his retainer. He could have easily done an internet search, spoken to other lawyers

who had previously hired the expert, or even asked the expert about potential impeachment. "But he did none of these things." This was not strategy, as "[n]othing in the record suggests any strategic rationale, no matter how farfetched, for failing to conduct this investigation." Counsel's conduct was also established as "there was no built-in redundancy to counsel's penalty-phase strategy. . . . None of the other experts that were presented by the defense presented opinions based on current evaluations of the Petitioner or his mental state at the time of the crime." Moreover, the State "emphasized this gap repeatedly in its closing argument." Thus, the jury heard no testimony about two statutory mitigating factors that were present. The deficiency in counsel's conduct was heightened because, "even after" counsel became aware of the problem, "counsel went on to make an opening statement wherein he described [the psychiatrist's] anticipated testimony in detail, mentioning him by name six times." Even if there was not constitutional error before, the "decision to plow forward with an unedited opening statement would have magnified the error into one of constitutional proportion." Prejudice was also established. A competent, qualified psychiatrist could have opined that the defendant suffered from borderline personality disorder with narcissistic features and intermittent explosive disorder and that two statutory mitigating factors were present. This "would have comprised the only evidence from a mental-health expert bearing on Petitioner's psychological state at the time of the murder. The defense also would not have broken its promise to the jury about what it would hear as mitigation evidence." This likely would have made a difference in what the jury "obviously found . . . to be a close case," as the jury "rejected three statutory aggravators and ultimately deadlocked" sending the decision to the trial court, which imposed a death sentence.

**c. State Cases**

**2018:** ***Reams v. State,* 560 S.W.3d 441 (Ark. 2018)** (1993 trial and sentencing). Affirming decision that trial counsel was ineffective at the penalty phase for failing to call the co-perpetrator to testify that he had been the actual shooter. Petitioner was convicted as an accomplice of capital murder based on the robbery and shooting death of a victim at an ATM, and sentenced to death. The co-perpetrator had pleaded guilty to capital murder and was sentenced to life without parole shortly before petitioner's trial. During post-conviction proceedings, counsel testified that he could not talk to the co-perpetrator because he was represented by counsel, that he did not have a good relationship with the co-perpetrator's counsel, and that he did not know when the co-perpetrator pleaded guilty. He did not investigate any of this or attempt to present the co-perpetrator's testimony to corroborate petitioner's defense that he was not the shooter. At the post-conviction hearing, the co-perpetrator admitted that he was the shooter. Although this did not have legal relevance during the guilt phase, it did at the penalty phase. This testimony left the post-conviction court "with doubts that the petitioner filed the fatal shot" and "those doubts . . . would have caused at least one reasonable juror to have doubt that the petitioner should be sentenced to death, despite his unquestionable complicity in the capital murder." 560 S.W.3d at 456 (quoting post-conviction court). The state Supreme Court rejected the state's argument that there were questions whether the co-perpetrator would have testified at the trial based on his hearing testimony; it determined that the co-perpetrator had already pleaded guilty and been sentenced to life without parole by the time of petitioner's trial, so it was likely he would have testified.. (Petitioner also raised a claim that trial counsel was ineffective for failing to raise a fair cross-section challenge based on the systematic underrepresentation of African-American potential jurors under *Duren v. Missouri*, 439 U.S. 357 (1979). The post-conviction court

had denied that claim. The Arkansas Supreme Court reversed, finding that trial counsel was deficient but remanding for a determination of whether there was a valid *Duren* claim. If there was, this established the necessary prejudice for a grant of relief.)

**2008:** ***Green v. State*, 975 So. 2d 1090 (Fla. 2008)** (crimes in 1989 and direct appeal in 1994). Counsel ineffective in capital sentencing for failing to investigate a prior New York robbery case used by the state in support of a prior violent felony conviction aggravating factor. Counsel challenged admissibility unsuccessfully on the basis of remoteness and the failure to offer a certified copy of the judgment. Counsel's conduct was deficient because counsel failed to obtain the file from New York even though it was readily available. Counsel's conduct was not excused even though the defendant admitted to the robbery. Prejudice established because the file revealed that the defendant had pled guilty to a simple robbery when he was 18 rather than an "armed robbery" as the state's witnesses testified. The New York court then vacated the robbery conviction and entered a youthful offender finding and sentence. In short, under New York law, a youthful offender adjudication is not a "conviction" and, therefore, does not satisfy the prior violent felony conviction aggravator under Florida's death penalty statute. In addition to the prejudice of this aggravating factor, the defendant was prejudiced by the characterization of the prior as an "armed robbery" rather than a simple robbery because the capital murder was committed during the course of an armed robbery.

**2006:** ***Commonwealth v. May*, 898 A.2d 559 (Pa. 2006)**. Trial counsel ineffective in failing to assert as error the trial court's ruling in capital sentencing that the defendant's proffered mitigation evidence was irrelevant and inadmissible. Specifically, the defendant sought to present evidence, under the "catchall" mitigator, that his father physically and sexually abused him and forced him to watch the physical and sexual abuse of his sisters and mother. Prejudice was clear because, with an aggravating circumstance established and no mitigating circumstances, state law required the jury to impose a sentence of death.

**2005:** ***Salazar v. State*, 126 P.3d 625 (Okla. Crim. App. 2005)**. Counsel ineffective in jury trial determination of whether the defendant was mentally retarded due to counsel's failure to investigate with respect to the testing conducted by the state's expert. Although the defendant's IQ score fell in the mentally retarded range on his testing, the state's expert testified that, based on two tests, the defendant was malingering.

> [The state's expert] effectively discredited Petitioner's experts by claiming they used improper testing procedures, by using tests not "normed" for a person like Petitioner, and by not properly reporting the results. Had [he] not done the exact same things, there would be no problem.

Counsel did not cross-examine him, however, with respect to the malingering tests he conducted or other investigate to determine the nature of that testing. "One test counsel recognized as the TOMM test and the other he did not recognize but it did not occur to him to inquire into the origins of that test." Counsel did not cross-examine the state's expert concerning the malingering tests for strategy reasons but "it was a strategy based upon counsel's admitted failure to recognize the significance of and determine the origins of [the expert's] testing and raw data."

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> We cannot fathom, in a case which boiled down to a battle of experts, why Petitioner's counsel failed to research the tests [the state's expert] performed on Petitioner to confirm the origins of and the scientific validity of those tests before Petitioner's mental retardation hearing. The raw data was provided to counsel prior to the mental retardation jury trial. The evidence was discoverable with due diligence–that is clear from another attorney's discovery of the information in a separate and unrelated proceeding.

If counsel had adequately investigated, he would have discovered that one of the malingering tests given by the state's expert was a non-standardized test the expert "made up and . . . it was not administered pursuant to accepted scientific norms." "No reasonable trial strategy would have supported a decision not to utilize this important impeachment evidence." Prejudice found because counsel could have discredited the state's expert in the exact same way that he had discredited Petitioner's experts. Prejudice was also clear because "three juror surveys" revealed that the state's expert testimony was the most credible to the jury. Because the court was "bothered that this State's witness seemingly, intentionally, misled the trial court and the parties about the reliability of his own tests to strengthen the State of Oklahoma's case," the court modified the sentence to life without parole rather than remanding for a new hearing.

****Morrisette v. Warden of Sussex I State Prison*, 613 S.E.2d 551 (Va. 2005)**. Counsel ineffective in capital sentencing for failing to object to verdict form that did not provide "expressly for the imposition of a sentence of imprisonment for life and a fine of not more than $100,000 when the jury finds that one or both of the aggravating factors have been proven beyond a reasonable doubt." Counsel's conduct was deficient because the court ruled this language must be included in a case decided two months prior to this trial. Prejudice found because "a jury is likely to be confused when there is a conflict between the sentencing instructions and the verdict form" and the instructions included this language while the verdict form did not.

**2004:** ****In re Davis*, 101 P.3d 1 (Wash. 2004)**. Counsel was ineffective in sentencing for failing to object to the shackling of the defendant. Counsel objected to the shackling on the first day of jury selection but was overruled. A mistrial was subsequently granted due to the trial court's poor health and an order was entered that continued all prior rulings unless modified by the new judge. Counsel did not object to the shackling during the second trial, which resulted in the defendant's conviction and death sentence. "Assuming that the failure to object was deficient performance," *id*. at 30, there was prejudice during the trial even though one juror saw the leg restraints on two occasions because there was overwhelming evidence of guilt. Prejudice was found during sentencing, however, because "placing the [D]efendant in restraints indicates to the jury that the Defendant is viewed as a 'dangerous' and 'unmanageable' person, in the opinion of the court, who cannot be controlled, even in the presence of courtroom security." *Id*. at 32. Thus, even though no juror saw the shackles in sentencing, the court could not "be assured that any negative inference as to Petitioner's character was cured" from the juror's viewing of the shackles during trial. *Id*. In so finding, the court declined to

consider juror testimony of no impact because of "the remoteness in time of the reference hearing from the actual verdict." *Id*. at 24.

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## III. NON-CAPITAL SENTENCING ERRORS

### A. U.S. Court of Appeals Cases

**2018:** ***Richardson v. Superintendent Coal Township SCI*, 905 F.3d 750 (3d Cir. 2018).** In case involving numerous state court convictions, habeas relief granted on claim of ineffective assistance of post-sentencing counsel for failing to challenge the constitutionality of petitioner's waiver of counsel during sentencing. After petitioner had been convicted, he sought to fire his trial attorney during sentencing. The sentencing judge treated this as a waiver of the right to counsel without ensuring that the waiver was knowing and voluntary. Trial counsel, unsure whether or not he had been excused from representation, remained in the court during the second day of sentencing but did not say or do anything while petitioner represented himself. After sentencing, petitioner was appointed a new attorney who, pursuant to Pennsylvania law, could file post-sentencing motions and then an appeal. This new attorney filed a post-sentencing motion that failed to raise the waiver of counsel issue and thereafter filed an unsuccessful appeal. Petitioner then filed a pro se petition for post-conviction relief, raising a claim that the sentencing judge failed to inquire whether he knowingly and intentionally waived his right to counsel. Although post-conviction counsel was appointed, he abandoned that claim explaining to the court why he thought the claim was meritless. Petitioner filed a pro se habeas petition in federal court, raising a claim that his counsel was ineffective for abandoning him at the sentencing phase, that the court did not perform a sufficient inquiry as to the waiver of counsel, and that state appellate and post-conviction counsel were ineffective. The petition was denied and the Third Circuit denied a certificate of appealability. Petitioner then filed a Rule 60(b) motion which was denied and again the Third Circuit denied a COA. SCOTUS granted certiorari, vacated, and remanded in light of *Martinez*. The district court held an evidentiary hearing at which all three state lawyers testified. The district court again denied the 60(b) motion, declining to entertain petitioner's Sixth Amendment claim that the sentencing judge failed to conduct a colloquy because it did not consider it to be an IAC claim; finding no prejudice from the lack of counsel at sentencing; determining that *Martinez* does not apply to IAC of appellate counsel claims; and rejecting the IAC claim against state post-conviction counsel because there is no right to effective counsel on state habeas. The Third Circuit this time granted a COA to determine whether state post-conviction counsel's failure to raise post-sentencing counsel's effectiveness constituted cause for the procedural default of failing to raise the claim in state court. The Third Circuit held that (1) in Pennsylvania state court, the post-sentencing motions stage is a critical stage at which defendant is entitled to the effective assistance of counsel (and petitioner was denied that right); and (2) post-sentencing motions precede the notice of appeal, and they are thus part of the trial stage (the court held that the boundary between trial and appellate counsel falls at the effective date of the notice of appeal), so when a state post-conviction lawyer fails to raise a post-sentencing lawyer's ineffectiveness, the prisoner may raise that issue for the first time in the federal petition under *Martinez v. Ryan*. The Third Circuit concluded that petitioner established that the procedural default of the post-sentencing counsel IAC claim was caused by ineffectiveness of post-conviction counsel; that this ineffectiveness occurred in the first collateral proceeding in which the claim could be considered; and that the underlying claim of ineffectiveness of post-sentencing counsel was substantial. The sentencing judge conducted no colloquy whatsoever when petitioner terminated his trial attorney's representation. This issue

should have been raised in the post-sentencing motion, but counsel failed to do so, which was ineffective. If post-sentencing counsel had raised this issue, the proper remedy would have been to order a new sentencing hearing. Post-conviction counsel should have raised this issue, but instead he specifically told the court that it was meritless, which was also ineffective.

**2017:** ***United States v. Carthorne,* 878 F.3d 458 (4th Cir. 2017).** Fourth Circuit Court of Appeals reviewed the district court's dismissal of a motion for post-conviction relief under 28 U.S.C. § 2255 to determine whether the Fourth Circuit's decision on direct appeal, that a sentencing court did not plainly err in designating a defendant as a "career offender," required a conclusion on collateral review that trial counsel did not render ineffective assistance by failing to object to that designation. On appeal, the Court of Appeal had determined that although assault and battery on a police officer (ABPO) did not categorically qualify as a crime of violence under the force clause, because it did not include as an element physical force, the district court did not plainly err in applying the career offender enhancement under the United States Sentencing Guidelines (Guidelines) Section 4B1.1 because existing precedent did not require a conclusion that ABPO did not qualify as a crime of violence under the residual clause (there was a circuit split on that issue, and a district court does not commit plain error by following the reasoning of another circuit if neither SCOTUS nor this Circuit has addressed the issue directly). On this habeas review, the Fourth Circuit concluded that the standards for plain error and ineffective assistance of counsel are distinct and do not necessarily result in equivalent outcomes for the defendant. The plain error standard is statutory; the IAC standard is constitutional. While plain error review requires there to be settled precedent in order for the defendant to obtain relief, under the IAC standard, counsel may be required to raise material issues even in the absence of decisive precedent. The plain error standard thus reflects the view that the primary responsibility for protecting a defendant's interests at trial lies with his attorney rather than with the court. The Fourth Circuit therefore held that the defendant's trial counsel rendered ineffective assistance by failing to understand the required legal analysis, and by failing to make an obvious objection to the career offender designation. Counsel may be constitutionally required to object when there is relevant authority strongly suggesting that a sentencing enhancement is not proper. At the time of petitioner's sentencing, there was clear Supreme Court and Fourth Circuit precedent detailing the analytical framework for determining whether a crime qualifies as a predicate offense under the Sentencing Guidelines. Counsel's task under the categorical approach for purposes of Section 4B1.2(a) is to analyze whether the offense is necessarily a crime of violence, absent any consideration of the facts of the particular crime committed. Longstanding Virginia precedent clearly established that the ABPO could be accomplished with the slightest touching, and therefore did not categorically involve physical force or serious potential risk of physical injury, under the residual clause. Counsel should have known that the above-stated precedent raised serious questions whether ABPO qualified as a crime of violence under the Guidelines, but instead counsel only looked at the facts of petitioner's prior ABPO, during which he had been convicted of ABPO for spitting on an officer. There was no strategic reason for the failure to object; counsel did not do basic legal research (court cited *Hinton v. Alabama*, 571 U.S. 263 (2014)). With regard to the prejudice prong, if the district court had not found that ABPO was a crime of violence, the high end of petitioner's sentence would have been more than seven years shorter. If counsel had objected, there is a reasonable probability that the district court would not have applied the career offender enhancement. The Fourth Circuit vacated the petitioner's sentence, and remanded the case to the district court for resentencing.

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***Phillips v. White*, 851 F.3d 567 (6th Cir. 2017)** (sentenced in 2001). The Sixth Circuit granted sentencing relief in this Kentucky double murder case that was tried capitally but ended in consecutive sentences of life with parole eligibility after twenty-five years, concluding that defense counsel deficiently failed to prepare or present a defense at sentencing, and that prejudice could be both presumed under *United States v. Cronic*, 466 U.S. 648 (1984), and found under *Strickland v. Washington*, 466 U.S. 668 (1984). The case arose when petitioner, who was intoxicated, shot and killed his two neighbors over a small cash debt which had led to a simmering dispute that included acts of aggression by one of the decedents. While defense counsel made an effort at the guilt or innocence phase, he made clear to the trial judge that he knew nothing about death penalty litigation and was completely unprepared to proceed with a capital sentencing. When the trial proceeded to the penalty phase, counsel declined to propose jury instructions or to object to the prosecution's, declined to give an opening statement, presented no evidence, and gave a brief closing in which he complained about his failure at the first phase and announced he did not "intend to take anymore of [the jury's] time in this part." Counsel also failed to object to or clarify the prosecutor's statements to the jury implying that the three most severe of the five sentencing options could be considered, while the other two – life with parole eligibility before twenty-five years, and twenty to fifty years – could not. After the judgment was affirmed on direct appeal, petitioner sought state post-conviction relief *pro se* but after six years without a state court disposition, petitioner – again *pro se* – proceeded to federal district court, where relief was denied. With exhaustion being excused, and no state court adjudication to review under § 2254(d), the Sixth Circuit had no difficulty finding counsel's performance deficient because he failed to investigate and present mitigating evidence and failed to clarify that the jury could sentence him to life imprisonment (with the possibility of parole before twenty-five years) or twenty-to-fifty years. With regard to prejudice, the court first determined that counsel's "performance amounted to nonperformance," thereby implicating *Cronic*. The Sixth Circuit added that counsel's failure to ensure the jury understood its lesser sentencing options or to present mitigating evidence also resulted in prejudice under *Strickland*. As for available mitigating evidence, petitioner had offered, inter alia: (1) positive character evidence from family and friends; (2) evidence that petitioner believed that the decedents posed a grave and imminent threat to his wife and stepdaughter; and (3) evidence that petitioner was intoxicated on the night of the shooting. Looking to this evidence, the court concluded that there is more than a reasonable probability that the available mitigation could have influenced the jury's assessment of petitioner's moral culpability and resulted in a different sentence.

**2016: *United States v. Abney*, 812 F.3d 1079 (D.C. Cir. 2016)**. Counsel ineffective in crack cocaine case for failing to seek a continuance of the defendant's sentencing until after the Fair Sentencing Act (FSA), which lowered the mandatory minimum sentences for crack cocaine offenses, became effective. The act was passed by Congress five days before sentencing. Counsel's conduct was deficient in failing to seek a continuance as Presidential approval was virtually assured. In addition, it was "reasonably probable – if not more likely still – that courts would interpret the FSA's new mandatory minimums to apply to defendants sentenced after its effective date." "Any competent criminal defense attorney familiar with federal sentencing principles would have understood that" and the defense bar was universally seeking continuances in sentencing until after the FSA took

effect. In short, counsel's conduct was deficient. "The FSA's impending enactment was so important and widely publicized – and the reasonable likelihood of it retroactive effect so apparent – that objectively reasonable counsel would have known about it and the open retroactivity question, irrespective of what Abney's counsel subjectively knew." Prejudice was also established in that application of the FSA cut the mandatory minimum sentence from ten years to five years.

**2013:** ***Gonzalez v. United States*, 722 F.3d 118 (2nd Cir. 2013)**. Counsel ineffective in sentencing for failing to advocate on the defendant's behalf at all. The defendant pled guilty in narcotics and bribery case. In essence, the defendant and others were conspiring to use drugs and cash to bribe an allegedly corrupt Immigration and Naturalization (INS) official to provide certain aliens with "green cards" establishing Permanent Resident Alien status. While there were plea negotiations in which the defendant sought a sentencing reduction in exchange for cooperating with evidence against a codefendant, the final agreement simply dismissed some charges in exchange for the plea. The agreement said nothing about sentencing, although the prosecutor noted during the plea hearing that the guidelines range was 262 to 327 months. Following the plea hearing, for the 10 months until sentencing, counsel had no contact with the defendant. Counsel did not attend post-plea debriefing sessions with the government, did not attend the defendant's interview by the probation department, did not communicate with the defendant about the pre-sentence report (PSR), did not file a sentencing memorandum or respond to the government's sentencing memorandum, and did not even point out orally the feasible grounds for a departure from the Guidelines range. While the District Court, who had been the trial and sentencing judge, found deficient conduct, it found no prejudice in that the defendant was sentenced to 210 months, which was on the low end of the Guidelines range. The District Court erred, however, in simply finding "no adverse affect" due to counsel's deficient conduct. This is the wrong standard for prejudice under *Strickland* in that it is "a standard at least as demanding as more-likely-than-not." The District Court also erred in considering the sentence the defendant actually received in determining whether there was prejudice from counsel's complete failure to act as an advocate in sentencing. Indeed, counsel "did little more than simply attend" the sentencing hearing. The arguments for departure from the Guidelines advanced by 2255 counsel, some of which the District Court referred to as potentially "effective," was sufficient to establish prejudice.

**2012:** ***United States v. Rodriguez*, 676 F.3d 183 (C.A.D.C. 2012)**. Counsel ineffective in non-capital sentencing for distribution of 500 grams or more of cocaine for failing to assert the "safety valve provision," which permits the court to impose a sentence below the statutory minimum if certain conditions are met when the PSR recommended a guidelines range below the statutory mandatory minimum sentence. While counsel initially asserted this provision, counsel did not do so after the defendant belatedly met all five elements required for the safety-valve provision. Prejudice found because the provision is "mandatory" and the guidelines range would have been reduced from 78-97 months to 63-78 months. Even though the actual sentence was 72 months, there is a reasonable probability that he would have received a lower sentence if counsel had performed adequately.

**2010:** ***United States v. Tucker*, 603 F.3d 260 (4th Cir. 2010)**. Counsel ineffective in felon in possession of weapon sentencing for failing to object to the use of a prior misdemeanor conviction as a predicate violent felony conviction for purposes of designating him as an armed career criminal in sentencing.

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To be a felony, the crime must be punishable by imprisonment exceeding one year. Nonetheless, without objection, the prosecution relied on a common law assault and battery conviction in state magistrate court which had jurisdiction to impose punishment not to exceed 30 days in confinement. Counsel's conduct was deficient. It was also prejudicial. The government had relied on four prior convictions and had to prove three that "arose out of a separate and distinct criminal episode" to prove the enhancement. Two of the remaining three convictions were burglaries of storage units with an accomplice on the same night. Because the evidence was insufficient to establish these offenses occurred sequentially on separate occasions rather that simultaneously with the aid of the accomplice, these two burglaries had to be considered as one offense. Thus, without consideration of the improper misdemeanor conviction, the defendant could not be punished as an armed career criminal.

***Theus v. United States*, 611 F.3d 441 (8th Cir. 2010)**. Counsel ineffective in failing to object either in the trial court or on appeal to the district court's error in imposing a ten-year mandatory minimum sentence for a quantity of cocaine that required only a five-year minimum sentence. The defendant was charged with five co-defendants to conspiracy to distribute or possess with intent to distribute five kilograms or more of cocaine. The evidence at trial established, and the district court held post-trial, that the defendant was not a member of the conspiracy charged, but he was a member of a different conspiracy with two individuals not charged in the indictment. The presentence investigation report (PSR) attributed only 1.02 kilograms of cocaine to the defendant and explicitly concluded "there is not enough evidence to support that the defendant was involved with 5 kilograms of cocaine." The guidelines range for the defendant (at 1.02 kilograms) was 70-87 months, but the PSR inexplicably concluded that the 10 year mandatory minimum (at 5 kg) had to be applied rather than the 5 year mandatory minimum (at 1.02 kg). The district court rejected the government's argument that the guidelines range should be based on 5 kg, but still imposed the mandatory minimum sentence based on that amount, despite announcing that the court would like to impose a sentence in the 70 - 87 month range. Counsel's conduct was deficient and prejudicial under these circumstances.

***United States v. Washington*, 619 F.3d 1252 (10th Cir. 2010)**. Counsel ineffective in drug distribution case failing to understand the impact of "relevant conduct" under the sentencing guidelines and, as a result, failing to adequately advise the defendant of the consequences. The defendant was convicted of distributing 61.98 grams of cocaine base. Another four kilograms was attributed to him by a confidential government informant. During his interview by a probation officer for his presentence report, the defendant admitted an additional 2.5 kilograms attributable to him. Thus, a total of 6.5 kilograms was considered in sentencing. Counsel's conduct was deficient.

> The instant case is not one of misinformation by counsel; rather, the record reflects that [the defendant] was never in any way informed about the applicability or impact of relevant conduct because his counsel did not understand its significance in the sentencing scheme. As a panel of this court has pointed out, "failing to predict a sentence correctly is not the same as failing to understand the mechanics of the sentencing guidelines. . . ."

*Id*. at 1259. Here, "counsel failed to understand the basic structure and mechanics of the sentencing guidelines and was therefore incapable of helping the defendant to make reasonably informed decisions throughout the criminal process." *Id*. at 1260. Prejudice established. The defendant's admissions ultimately resulted in his loss of a downward adjustment in sentence under the 2007 Crack Cocaine Amendments. The two level reduction of these amendments could not be applied if the offense involved 4.5 kilograms or more. The defendant's admissions moved his drug quantity from 4 kilograms to 6.5. If the amendments could be applied, the defendant's sentencing range would be 324 - 405 months rather than being even above the statutory maximum sentence of 40 years.

**2009:** ***United States v. Polk*, 577 F.3d 515 (3rd Cir. 2009)**. Counsel ineffective in sentencing for possession of a weapon by prison inmate for failing to object to the court's characterization of the offense as a "crime of violence" in calculating the Guidelines range of 37-46 months. Without the enhancement, the range would have been 27-33 months.

**2007:** ***United States v. Otero*, 502 F.3d 331 (3rd Cir. 2007)**. Counsel ineffective for failing to object to improper sentencing enhancement for a prior crime of violence. The defendant's prior was a simple assault in Pennsylvania, which does not require the "the use of force." Counsel's conduct was deficient just based on the statutory language but there was also available case law that should have alerted counsel to the issue. "[C]ounsel does have a duty to make reasonable investigations of the law," including citing "favorable decisions from other courts of appeals." Prejudice established because, absent the enhancement, the guideline range would have been only 18 to 24 months but the defendant was sentenced to 60 months.

***Miller v. Martin*, 481 F.3d 468 (7th Cir. 2007)**. Counsel in securities violations and frauds case deprived the defendant of representation by standing silent during sentencing and prejudice was presumed. The petitioner was convicted following trial in absentia. He retained new counsel for sentencing. Due to counsel's belief that the convictions would be reversed due to the absentia trial, counsel advised him to remain silent because he was concerned the court would learn that the defendant had been noticed with the trial date. Counsel also remained silent other than to inform the court that they would not participate. The state court applied *Strickland* and found that while counsel's choice to stand mute was "unorthodox" it was a "purely strategic decision" that was not unreasonable and not prejudicial. The court held that the state court ruling was contrary to Supreme Court precedent because the issue should have been addressed under *Cronic*. Even assuming that *Strickland* was the appropriate standard, the court held that the state court findings were unreasonable under AEDPA. Counsel's "advocacy" at sentencing was "non-existent" by his own admission. While counsel explained a "strategy" for the petitioner to remain silent during sentencing, he "never explained his own silence." Even if he had been concerned that the court would question him about his client's knowledge, he could have declined to discuss this issue. Likewise, even if he were concerned that a presentation at sentencing could have somehow prejudiced the appeal, "which is not the reason he gave the sentencing court for his decision," he was wrong and had not conducted any research or consulted the court about his concerns. The state court decision of "strategy" was unreasonable. Prejudice was presumed under *Cronic*. Prejudice was found under *Strickland* in the alternative. Counsel's silence allowed the sentencing court to rely on

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errors in the petitioner's criminal record, the state's aggravating factors to go unchallenged, and offered no mitigation, even though the petitioner had already paid restitution to some victims. Counsel said nothing even though the court was clearly considering imposing maximum punishments and running some of the sentences consecutively.

**2003:** ***United States v. Conley*, 349 F.3d 837 (5th Cir. 2003)**. Trial and appellate counsel were ineffective in conspiracy and mail fraud case for failing to object to the defendant's sentence, which was greater than the maximum set for the crime for which he was convicted. The defendant was initially charged in a 15-count indictment with conspiracy, mail fraud, and money laundering. he was convicted of one count of conspiracy and four counts of mail fraud, but acquitted on the 10 counts of money laundering. The conspiracy indictment and verdict were ambiguous but "a sentence imposed for a conviction on a count charging violation of multiple statutes or provisions of statutes may not exceed the lowest of the potentially applicable maximums." Nonetheless, the judge sentenced the defendant for conspiracy with respect to the money laundering allegation to 121 months. The maximum sentence for conspiracy with respect to mail fraud though was only 60 months. Because the error "was obvious" and greatly increased the defendant's sentence, trial and appellate counsel were ineffective in failing to assert this meritorious issue.

***Alaniz v. United States*, 351 F.3d 365 (8th Cir. 2003)**. Trial and appellate counsel were ineffective for failing to object to the trial court's error in adding a second uncharged drug type to the charged drug type in order to trigger a higher quantity-based statutory penalty range. The defendant was convicted of conspiring to possess marijuana with intent to distribute and distributing marijuana. In determining the penalty range for the conspiracy count, however, the trial court applied the penalty range applicable to a person with a prior felony drug conviction involving 1000 kg or more of marijuana for which the sentence was 20 years to life. The court held that the defendant had a total of almost 1150 kg of marijuana by aggravating two different drug types. The judge added the approximately 800 kg of marijuana involved in the conspiracy with 12 ounces of methamphetamine the defendant sold during the conspiracy period, which the court converted to its equivalent of approximately 340 kg. If the court had not added the methamphetamine, the defendant's statutory penalty range would have been 2 years to life as opposed to 20 years to life. Under the sentencing guidelines, there was a difference of 210 to 262 months versus 240 to 262 months. While the Eighth Circuit had not previously addressed the aggravation issue, the court noted that every circuit that has addressed the issue has concluded that a second uncharged drug type cannot be added to the charged drug type in order to trigger a higher statutory penalty range. The court, therefore, found that counsel's conduct was deficient in failing to raise this issue in sentencing or on appeal. The court found prejudice because, under Glover, an error increasing a defendant's sentence by as little as six months can be prejudicial within the meaning of *Strickland*. If counsel had objected and the appropriate guideline range had been used, the district court would have been authorized to impose a sentence up to 30 months shorter than the one the defendant actually received. The court remanded to the district court to determine what sentence it would have imposed if it had used the appropriate guideline range and, if the sentence would have been less than the original sentence, the district court was instructed to re-sentence the defendant.

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### B. U.S. District Court Cases

**2018:** ***Roy v. United States*, 2018 WL 5915335 (S.D. N.Y. Nov. 13, 2018).** In case were petitioner's guilty plea to conspiracy to commit theft of government funds and theft of government funds subjected him, as a non-citizen, to mandatory removal, trial counsel was ineffective in failing to advise the court of the immigration consequences attached to its proposed sentence of six months' imprisonment and six months' home confinement as part of a term of supervised release and by failing to ask the court to remove one day from the petitioner's term of home confinement. Although counsel believed the offenses were theft offenses rather than fraud offenses, and it is not clear whether theft offenses are aggravated felonies only if they result in a sentence of a year or more, it was sufficiently clear that counsel should have brought this to the sentencing court's attention. "Effective counsel would have accounted for the possibility that the petitioner's offenses might be theft offenses, advised the Court that the petitioner could be mandatorily deportable if given a one-year sentence, and asked the Court for a one-day reduction in the petitioner's home confinement. Although petitioner might still be deportable under a reduced sentence, he would not be mandatorily deported, and he would have the opportunity to seek forms of discretionary relief from removal." That is sufficient prejudice to require relief.

***Clay v. United States*, 311 F. Supp. 3d 911 (N.D. Ill. 2018).** In federal drug case with a guilty plea and ultimate sentence of 168 months, sentencing counsel was ineffective in failing to object to the inclusion of petitioner's 2003 conviction under the state Aggravated Unlawful Use of a Weapon (AUUW) statute in his criminal history points, because the AUUW statute had been declared unconstitutional by *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012) and *People v. Aguilar*, 2 N.E. 3d 321, 328 (2013). Pursuant to *U.S. v. Jenkins*, 772 F.3d 1092 (7th Cir. 2014), the court should not have included that conviction in the calculation of petitioner's criminal history points and level. Appellate counsel was ineffective in failing to raise this issue on appeal.
The court acknowledged that no one – not sentencing counsel, not the Government, not the probation department, and not the district court – had caught this issue, but determined that such a legal error cannot be excused in sentencing counsel. It did not matter that petitioner had not been successful in convincing the Illinois state court to vacate his AUUW conviction, because the district court did not know the basis for the state court's refusal to do so, and *Jenkins* does not require the underlying conviction to be vacated in order for the conviction to be excluded from the calculation of the criminal history points. Appellate counsel's performance was deficient for failing to raise this issue because it "would have been the strongest – and the only – argument made by appellate counsel, who filed an *Anders* brief representing to the Seventh Circuit that Petitioner's appeal was frivolous." 311 F. Supp. 3d at 922. Petitioner was prejudiced by counsels' errors because there is a reasonable probability that petitioner received additional prison time as a result. There is no reason to think that the court (and the Government, who recommended a reduced sentence) would not have taken the same approach to petitioner's sentence had the Guidelines been calculated properly from the start. The court therefore reduced petitioner's sentence to 151 months.

***United States v. Arce-Flores*, 2018 WL 401524 (W.D. Wash. Jan. 12, 2018).** Following remand from the Ninth Circuit, trial counsel was found to be ineffective at sentencing for failing to inform the district court of the potential immigration consequences of the proposed sentence. The district

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court had previously found that trial counsel was ineffective during the plea-bargaining stage, because counsel had failed to advise petitioner that a sentence of 180 days or greater precluded her from demonstrating good moral character and avoiding deportation. Here, the district court determined that counsel was also ineffective during the sentencing phase, because counsel failed to inform the sentencing judge that a sentence one day shorter – 179 days – would allow petitioner to demonstrate good moral character and potentially avoid deportation. Counsel's failure to do so was prejudicial because the court sentenced her to 180 days; had counsel informed the sentencing court of the important consequences of a 180-day versus 179-day sentence, there is a reasonable probability that the court would have imposed the shorter sentence. The district court determined that its authority to supply a remedy included the authority to reduce the sentence itself rather than returning the parties to the plea-bargaining stage. It therefore vacated the six-month sentence and imposed a sentence of 179 days.

**2017:** ***Porter v. Muniz*, 2017 WL 3021022 (N.D. Ca. July 17, 2017).** Trial counsel at defendant's non-capital resentencing hearing was ineffective for advising defendant to accept a sentencing agreement after an inadequate investigation. In May of 2004, defendant was 18-years-old and attending college in San Diego. He visited Monterey County to attend the funeral of a friend and a series of gatherings in his friend's honor. The evidence shows he got progressively more intoxicated as the day wore on. Defendant became ill and started walking to his grandmother's house where he was staying. Travis Williams, whom defendant did not know previously, approached defendant and offered him a ride. Williams then drove past the house of DeShawn Lee, who was a suspect in the shooting death of defendant's friend, where a group of people was smoking on the porch. Williams told defendant to "get out and start talking shit." Defendant sat in the frame of the passenger's side window and did so. Shots were fired from the car into Lee's house. No one was injured. At trial, the jury heard conflicting evidence about whether the shots came from the driver's side or the passenger's side of the car. Gunshot residue samples were taken from both defendant and Williams and both results were negative, but their clothing was not tested. Defendant was convicted of attempted murder and sentenced to twenty-five years. On appeal, the state court partially reversed and returned the matter for a resentencing proceeding on sentencing enhancements related to whether the crime was connected to gang activity and whether defendant personally discharged a firearm. Public defender, James Eager was appointed to represent defendant on retrial for the sentencing enhancements. He requested GSR testing on defendant's and Williams's clothing but did not know the results when the prosecution offered a resentencing agreement that would subject defendant to nine additional years imprisonment and require him to waive his right to appeal. Eager advised defendant to accept the resentencing agreement, and defendant did so. Prior to the resentencing proceeding, however, Eager learned that the results of the GSR testing showed that no GSR was present on defendant's clothing but GSR was present on Williams's clothing. Defendant sought to withdraw his consent to the sentencing agreement, but the trial court denied this request and imposed the terms of the agreement. Counsel's performance was deficient because he failed to conduct a reasonable investigation prior to advising defendant to accept the plea agreement and prejudice was established because defendant declared under penalty of perjury that had he known of the GSR on Williams's clothing, he would not have agreed to be resentenced and would instead have gone to trial. Counsel's decision to recommend acceptance of the sentencing agreement was not reasonable merely because defendant could have faced up to eighty-five years had he gone to trial. Simply stating the fact that nine years is less

than eighty-five, without more, does not make counsel's choice a reasonable strategic decision. "If this were the case, defense attorneys would have no reason to ever conduct investigations in criminal cases. They could simply sit back and wait to receive plea offers from the government, which by their very nature promise defendants less time in prison than those same defendants would receive if convicted at trial." *Porter*, 2017 WL 3021022 at *6.

***United States v. Blount*, 2017 WL 1194230 (W.D. Louisiana, March 28, 2017).** Trial counsel was ineffective for failing to object to the court's incorrect sentencing guideline calculation. Defendant was convicted of wire fraud for defrauding more than fifty people as part of a Ponzi scheme he orchestrated. It was undisputed that the parties and the court incorrectly calculated defendant's sentencing guideline range as 188 to 235 months, whereas the correct calculation was a range of 151 to 188 months. At sentencing, the court imposed a sentence of 235 months and noted that it was the maximum sentence under the guidelines. Trial counsel did not object or attempt to appeal the improper sentence. The government agreed trial counsel's performance was deficient, but argued defendant was not prejudiced because the trial court was permitted to go outside the sentencing guidelines to impose a greater sentence. The court rejected this argument because the record was silent as to what the sentencing court might have done had it considered the correct guidelines range and did not show that defendant would have received the same sentence regardless of the error. Thus, defendant was prejudiced.

**2015:** ***Petrillo v. United States*, 147 F.Supp.3d 9 (D. Conn. 2015).** Counsel ineffective in sentencing of bank robbery plea case for failing to object to sentencing as a career offender, even though the plea agreement explicitly left this question open for argument. The government argued the defendant was a career offender because his two prior convictions qualified as "crimes of violence" under the statute. One of those convictions was a 1996 Connecticut conviction for attempted assault on a police officer. Under that statute, the Second Circuit had held that the actual causing of physical injury to an officer qualified as a crime of violence but no determination had been made concerning other crimes under the statute, which included throwing paint or dye or similar substances on an officer. Because it was unclear which subsection the defendant had been convicted of, counsel's failure to challenge the career offender designation was deficient conduct. Prejudice established because the career offender designation raised the sentencing range from 151-188 months to 188-235 months.

***Bowers v. McFadden*, 153 F. Supp. 3d 875 (D.S.C. 2015).** Under AEDPA, counsel ineffective in failing to challenge imposition of mandatory life sentence under "two strikes" statute. The defendant was convicted of common law assault with intent to ravish in 1976. In 2004, he was convicted of armed robbery. In sentencing, the state asserted that the "two strikes" statute was applicable. Under the statute, only a "most serious offense" qualifies as a strike. Qualifying offenses, not including common law assault with intent to ravish, are listed in the statute, but some other criminal sexual conduct offenses (CSC) are. The CSC rubric was established by statute in 1977 and includes varying degrees of offense. First and second degree CSC offenses do qualify as a "most serious offense" under the two strikes law. Other CSC offenses do not. Trial counsel's conduct was deficient because counsel failed to conduct any research which would have revealed that common law assault with intent to ravish included only two elements: (1) an assault by a male on a female, (2) with the intent to rape. No aggravated circumstance, such as force or coercion,

was required. *State v. Lindsay*, 583 S.E.2d 740 (2003), which was decided just a year before trial, was all the research counsel would have needed. Nonetheless, in sentencing trial counsel conceded that assault with intent to ravish was "the same basically" as CSC 1st or 2nd and the mandatory life sentence was imposed. Prejudice was clear. Post-conviction counsel failed to raise the issue of trial counsel's ineffectiveness until the appeal to the Court of Appeals from the denial of post-conviction. The state court recognized that assault with intent to ravish may not be a "most serious offense" for purposes of the "two strikes" statute but declined to reach the merits because of the procedural default. After reviewing the elements of the offenses, the federal court also rejected the state's argument that the underlying facts of the assault with intent to ravish qualified as a "most serious offense." The indictment did not contain sufficient information to reach this conclusion and the court held that it would be improper to rely on an affidavit from an arresting officer. South Carolina courts had never relied on this type of information and federal courts would not do so in the analogous circumstance of the Armed Career Criminal Act (ACCA) where only "conclusive judicial record[s]" could be considered. Finally, under *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), the federal court held that it could reach the merits of the trial ineffectiveness claim, despite the state court procedural default, because the claim "is a substantial one that state PCR counsel was ineffective in failing to raise the issue and such failure was obviously prejudicial."

***United States v. Jones*, 114 F. Supp. 3d 310 (D.S.C. 2015).** Counsel ineffective in sentencing following guilty plea to felon in possession of a firearm under the Armed Career Criminal Act ("ACCA") for failing to object that five of the defendant's prior convictions did not qualify as predicate offenses under ACCA. A Pre-Sentence Report ("PSR") found that four prior convictions of South Carolina burglary third degree, as well as convictions for assault on a correctional officer and taking of hostage by inmate, all qualified as "violent felonies" under ACCA. Thus, the PSR concluded that Jones faced a minimum term of 15 years to life under ACCA, which is applicable if the accused has three or more prior felonies "violent" felonies. Counsel's conduct was deficient in failing to object to the use of the third degree burglary convictions as "violent" felonies because the Supreme Court's holding in Shepard v. United States, 544 U.S. 13 (2005), and subsequent Fourth Circuit cases made clear prior to sentencing that these convictions did not qualify as predicate offenses under ACCA. Counsel's conduct was also deficient in failing to object to use of assault on a correctional officer as a predicate offense because the Supreme Court's holding in *Johnson v. United States*, 559 U.S. 133 (2010), and subsequent Fourth Circuit cases made clear prior to sentencing that this offense, which "requires no contact between the victim and the perpetrator," did not qualify as a violent offense under the "force clause" of ACCA. Prejudice established as the maximum sentence was only 10 year's imprisonment rather than the minimum 15 years to life under ACCA.

**2014:** ***Mann v. United States*, 66 F. Supp. 3d 728 (E.D. Va. 2014).** Counsel ineffective in sentencing for conspiracy to distribute oxycodone case for failing to object to the calculation of the drug quantity attributable to the defendant. The drug quantity was calculated, based solely on patient prescription records, at an offense level of 34 with a sentencing range of 151 to 188 months. Counsel's conduct was deficient in failing to move for a reduction based on the quantity of pills consumed for personal use pursuant to valid prescriptions. Prejudice established, as the offense level likely would have been reduced to 32 or a sentencing range of 121 to 151 months.

**Capital Case*

**2013:** ***Rogers v. United States*, 949 F. Supp. 2d 879 (N. D. Iowa 2013).** Counsel ineffective in sentencing for bank fraud via a check cashing scheme for withdrawing his objection to a two-level sentencing enhancement for use of an "access device" and failing to present mental health evidence in mitigation. Counsel initially objected to both a two-level enhancement and a three-level enhancement, but then argued that a two-level enhancement was proper. At the time of sentencing, the Eighth Circuit had not addressed whether or not this enhancement would apply to a bank fraud scheme that originated solely from the use of fraudulent paper checks, as the scheme in this case did, but the Fifth Circuit and Tenth Circuit had ruled that the term "access device" would not apply to a fraudulent check cashing scheme. Trial counsel asserted that he withdrew the objection because he was aware that three co-defendants had made the objection unsuccessfully and that he made a strategic decision to focus his arguments on more important issues. None of the co-defendants had made this argument in the District Court. One of the co-defendants raised this specific issue, for the first time, on appeal and the prosecution conceded error. The alleged strategy, made without knowledge of the favorable rulings in the other circuits, was not "a decision based on diligent preparation and investigation." Prejudice found. Counsel was also ineffective in failing to present evidence that the defendant had been diagnosed with intermittent explosive disorder in 2007, which causes him to engage in violent outbursts that are "disproportionate to the situation at hand." Prejudice was clear as the District Court varied upward from the guidelines sentence, by a significant amount, based solely on the defendant's history of violent behavior. Counsel alleged strategy not to present this evidence without even obtaining and reviewing the prior mental health records. Thus, "trial counsel did not have a sufficient record upon which to make this allegedly strategic decision."

***Carnesi v. United States*, 933 F. Supp. 2d 388 (E.D.N.Y. 2013).** Counsel ineffective in conspiracy to commit money laundering case for failing to challenge the restitution order due to procedural defects under the Mandatory Victims Restitution Act (MVRA). The defendant was a former attorney and president of business consulting firms. His sentence included restitution to the victims of his fraudulent schemes in the amount of $5,422,000. Counsel's conduct was deficient in failing to object to the court's failure to identify the victims and the actual amount of loss, which was required under the MVRA.

**2012:** ***Krecht v. United States*, 846 F. Supp. 2d 1268 (S.D. Fla. 2012).** Counsel ineffective in sentencing for failing to pursue safety valve relief. The defendant, a pharmacist with no prior criminal record, was sentenced to 210 months, which was at the bottom of guidelines range, for drug conspiracy that involved filling fake prescriptions. The defendant pled guilty pursuant to a plea agreement in which he agreed not to seek a downward departure from the guidelines range. In the PSI, the government calculated a total offense level of 37, which gave a guidelines range (considering the maximum statutory penalty) of 210-240 months. Trial counsel filed objections asserting that the defendant was entitled to a safety valve reduction, which would have reduced the total offense level by two points. The reduction was based on the defendant's first time offender status and cooperation with the government. Counsel withdrew the objection at sentencing. Counsel's conduct was deficient because application of the safety valve reduction is mandatory for narcotics crimes and "is an offense characteristic and not a downward departure." Prejudice found and court ordered resentencing at a total offense level of 35.

**Capital Case*

**2010:** ***Carter v. United States*, 731 F.Supp.2d 262 (D. Conn. 2010).** Counsel was ineffective in robbery and other offense case sentencing for failing to challenge enhancements under career offender sentencing guidelines and the Armed Career Criminal Act (ACCA). The defendant had five prior convictions in state court: (1) 1985 robbery; (2) 1988 risk of injury to minor; (3) 1992 sale of narcotics; (4) 1992 possession of narcotics; and (5) 1994 sale of narcotics. To apply the career offender sentencing guidelines, the government had to prove two prior felony convictions involving either a "crime of violence" or a "controlled substance offense." The 1985 robbery did not qualify as a "crime of violence" because the government did not count it in the PSR in the criminal history. The 1988 conviction did not qualify as the state statute included conduct outside the guideline range. Specifically, the defendant could be convicted in state court for "psychological harm" only, when the guideline required physical force or harm. The government had not attempted to prove that the defendant's specific facts met the standard. Of the defendant's three drug offenses, only one qualified as a "controlled substance offense" under the guideline because again the state statute was broader and included "any form of delivery which includes barter, exchange or gift" rather than just "selling" and the like. The government had included sufficient information in the PSR to establish that the 1994 conviction qualified, but had not attempted to prove the facts of the other two. To apply ACCA, the government was required to prove three felony convictions that were either a "violent felony" or a "serious drug offense." While the 1985 robbery qualified and the 1994 sale of narcotics qualified, the other three did not for basically the same reasons that they did not qualify under the career offender sentencing guidelines.

***Parks v. United States*, 687 F. Supp. 2d 564 (W.D.N.C. 2010).** Counsel ineffective in sentencing following guilty plea in drug case for failing to understand the importance of the fact that the indictment did not set forth a specific drug amount. Counsel objected to a drug quantity in sentencing but withdrew the objection without explanation. This conduct was deficient as "no matter what evidence the Government might have presented at the sentencing hearing, the fact would remain that such evidence had not been found by a jury beyond a reasonable doubt." There could be no reasonable strategy for withdrawing the objection because, in doing so, "counsel automatically increased Petitioner's sentence 120 months beyond that to which he was otherwise exposed." In short, the defendant was prejudiced because the court sentenced him to 360 months when the maximum statutory sentence based on the indictment was 20 years. Sentence vacated.

**2009:** ***Baxter v. United States*, 634 F. Supp. 2d 897 (N.D. Ill. 2009).** Counsel ineffective in sentencing of criminal tax case for failing to retain and consult with tax expert and stipulating to the tax loss compilation included in the presentence investigation report by the U.S. Probation Office. Counsel's conduct was deficient because counsel failed to independently examine the loss and simply accepted the government's position. While "[d]efense counsel in criminal tax cases need not always retain a tax expert to assist, . . . [t]he tax-loss question as it relates to [the defendant] was sufficiently complicated so as to require expert assistance." Reasonable counsel would have obtained expert assistance prior to entering a plea bargain in the case, especially in light of the fact that the defendant, a CPA, believed at the time she prepared the questioned tax documents for her clients that the tax returns were lawful. When she discovered they were not, she attempted to correct the error by cooperating with the IRS, which resulted in the clients paying all of the back taxes, etc., and not being criminally charged. The defendant was "duped . . . into believing it was legal." Prejudice

established. The government asserted that the defendant was responsible for more than 5 million tax-loss. The court rejected this, finding that the government had not proven that the defendant was accountable for that loss. The more than $500,000 tax-loss the defense stipulated to was included in the amount already rejected by the court but the court was not aware of that fact. Both government and defense experts in 2255 agreed the actual tax-loss related to the defendant's actions was only about $22,000. Sentence vacated.

***Robinson v. United States*, 638 F. Supp. 2d 764 (E.D. Mich. 2009).** Counsel ineffective in drug conspiracy case for failing to file motion for new trial, even though the defendant filed a post-trial motion for judgment of acquittal, and for failing to challenge the sufficiency of the evidence of the drug quantity attributable to the defendant. The defendant, who was from Indiana, was charged with his brother and others of growing a large crop of marijuana in between rows of corn on a rural farm. The government's only evidence connecting the defendant to the farm was in January of February, which, of course, was not in the growing season. The only other evidence connected the defendant to the operation was the testimony of the defendant's ex-sister-in-law, whose testimony was not credible in the court's view. Another woman had also testified that the sister-in-law bragged that she lied at trial to get even with the brothers. Despite a month long trial, the jury deliberated less than four hours before convicting all six defendants. During the trial, the defendant had moved a judgment of acquittal under Federal Rule of Criminal Procedure 29, which the Court took under advisement. After trial, counsel filed a brief in support of this motion but did not file a motion for new trial under Rule 33. Counsel's conduct was deficient because, under Rule 29, the court must consider the evidence in the light most favorable to the government. Under Rule 33, the court can consider the credibility of witnesses. Counsel's conduct was not strategy because he was unaware of Rule 33 or its standards. "A decision based on a misunderstanding of the law is not a strategic decision." Here, "counsel's failure to file the motion was not a strategic choice; it was based on ignorance of the law." Prejudice found because "the present case represents one [of] those extraordinary matters in which a motion for a new trial would have been appropriately considered and granted." Likewise, counsel's conduct was deficient in failing to challenge the sufficiency of the evidence of the drug quantity attributable to the defendant. "Again, it does not appear that it could have been a strategic decision to challenge guilt but not the amount for which the [defendant] was to be held accountable." Prejudice established because "the statutory mandatory minimum sentence in this case was tied directly to the amount of drugs charged." A successful challenged could have reduced the sentence exposure by half.

***United States v. Frost*, 612 F. Supp. 2d 903 (N.D. Ohio 2009).** Counsel ineffective following plea to drug distribution for failing to object to a career offender sentence enhancement. The government sought the enhancement based on two prior convictions, one of which was for a 1996 Attempted Drug Trafficking offense under Ohio state law. Defense counsel conceded that this offense met the requirement for consideration but argued for a downward departure because the career offender designation substantially overstated the defendant's criminal record. The Court found a guideline range of 168-210 months, but granted the downward departure to 135 months. Under the guideline, a prior controlled substance offense had to involve distribution or an intent to distribute to qualify as a predicate offense for career offender status. Under the statutory definition, the defendant's state conviction involved only simple possession. There were conflicting unpublished decisions in the

circuit at the time of defendant's trial as to whether the determination would be made only on the statutory language or whether the court would look through to the facts of the defendant's offense. There was a case pending in the Sixth Circuit addressing this issue. That case (*Montanez*), decided one month after sentencing, held that the determination would be made solely on the statutory definition. Counsel's conduct "was deficient in light of the conflicting Sixth Circuit caselaw and the pending *Montanez* litigation. . . . Simply put, caselaw in the Sixth Circuit at the time of . . . sentencing was conflicted and none was controlling" and there was one case squarely in the defendant's favor. Counsel's conduct was not excused by strategy because "there was nothing to lose, regardless how *Montanez* came out." Even if the defendant would not have succeeded in sentencing the record would have been preserved for appeal. Prejudice was thus established.

**2008:** ***Sasonov v. United States*, 575 F. Supp. 2d 626 (D.N.J. 2008).** Counsel in bribery of public official case ineffective for several reasons. First, counsel affirmatively misrepresented the immigration consequences of a guilty plea. Counsel's conduct was deficient because counsel informed the defendant that, as a resident alien with a green card, he would not be subject to deportation following his plea. Prejudice established because "it is likely that Petitioner would have taken his chances at trial because he faced only six to twelve months more than the sentence he received," due to his guilty plea. Second, counsel failed to conduct discovery and, thus, failed to argue petitioner's minor role in the crimes and failed to establish that the value of the benefit received from the bribe was less than $10,000, which would have prevented a four-point enhancement of the offense level. Prejudice established because the court might otherwise have reduced the sentence to less than one year or at least allowed the defendant "to negotiate a more favorable plea agreement with the Government."

***Potts v. United States*, 566 F. Supp. 2d 525 (N.D. Tex. 2008).** Counsel ineffective in child pornography case for failing to object to the district court's impermissible double counting of sentencing enhancements. Specifically, the court enhanced his offense level by two for possession of ten or more items of pornography under one section and by four for possession of more than three hundred images under another section. Guideline amendments effective in November 2004 should have alerted counsel to this problem. Prejudice established. "When the Court imposes a sentence at the bottom of an erroneously calculated sentencing range, that sentence demonstrates prejudice even when the imposed sentence also falls within the accurately calculated guideline range." Here, the court had imposed a sentencing "at the very bottom of the erroneously calculated range."

**2007:** ***Abraham v. United States*, 477 F. Supp. 2d 1232 (S.D. Fla. 2007).** Counsel ineffective in sentencing on conspiracy, kidnaping a postal employee, and other charges for failure to assert that a prior escape conviction was a non-qualifying offense under the affirmative defense provision of the federal three strikes law. Counsel argued that the escape was not a serious violent felony, under 28 U.S.C. § 3559(c), because it did not involve weapons or violence. The court found it was and that the court was, therefore, required to impose the mandatory life sentence. Counsel's conduct was deficient in failing to make the additional argument, under § 3599(c)(3)(A), of an affirmative defense, which allowed the defendant the opportunity to establish that the conviction was a non-qualifying conviction by showing by clear and convincing evidence that no weapons or guns were used or threatened to be used, and no injuries or death occurred in the commission of his escape. Counsel's conduct was deficient because counsel "failed to simply turn the page of the statute and continue the

analysis under § 3599." Prejudice found because the sentencing record made clear that the court believed it had no alternative other than to impose a mandatory life sentence. Likewise, although the court found the movant's trial testimony to be less than truthful, it had accepted as true the proffer on this issue, which was proven by clear and convincing evidence with the supporting state court record in this proceeding. Sentence vacated and resentencing ordered.

***Veal v. United States*, 486 F. Supp. 2d 564 (N.D. W. Va. 2007).** Counsel ineffective in sentencing following guilty plea to drug offenses for failing to review the presentence report prior to sentencing. He also did not prepare objections or even review the objections submitted by the defendant pro se.

**2006:** ***United States v. Gentry*, 429 F. Supp. 2d 806 (W.D. La. 2006).** Counsel ineffective following guilty plea to bank robbery for failing to file any objections to the loss calculation in the presentence report (PSR). The loss calculation included not only the robbery proceeds, but worker's compensation indemnity and medical expenses associated with a police officer's wounds incurred during pursuit of the defendant and co-defendants when he was shot by a co-defendant and certain home repairs that were necessary due to a co-defendant's actions in breaking into a home during the pursuit. Counsel's conduct was deficient because his notes indicated that he was aware of a potential issue, but he failed to object and could not articulate any strategy or rationale for the failure. Although there was no existing case authority supporting the objection at the time, the plain language of the guidelines excluded consideration of the worker's compensation payments and medical payments associated with the injuries to the police officer. Moreover, the fact that the sentencing court rejected the objections raised by co-defendants did not excuse the omission. "[R]easonably effective criminal defense counsel do not shy from confrontation and must zealously present their client's arguments." *Id*. at ___. Prejudice found because the defendant received a sentence that was 16 months over the guidelines maximum. If counsel had objected and appealed, as two co-defendants did, the Fifth Circuit would have held that the worker's compensation indemnity benefits and medical expenses associated with the officer's wounds were not properly included in the computation. New sentencing ordered.

**2005:** ***United States v. Holland*, 380 F. Supp. 2d 1264 (N.D. Ala. 2005).** Counsel ineffective in sentencing and on appeal in bank robbery case where the defendant and his co-defendant separately plead guilty and received an order of restitution payment under the Victim and Witness Protection Act (VWPA) as part of their sentence. The amount of restitution was not addressed by a jury and was based solely on hearsay in the probation officer's report. Counsel's conduct was deficient in failing to object because "[e]verybody in the courtroom knew that this court considered the federal restitution scheme constitutionally flawed" and the court ended up imposing "an ambiguous and impossible restitution obligation" on the defendant that was also inconsistent with the terms placed on the co-defendant, even though restitution was to be "paid jointly and severally." To make matters worse, the BOP informed the defendant on numerous occasions while he was in confinement that his restitution had been paid and then 9 years later informed him that he owed the full amount without even accounting for the $999 paid by the co-defendant. While the government challenged jurisdiction, the court held that the defendant "is not barred from access to this court to right a wrong that is partly the fault of this court." The court found that the disparity in treatment between the defendant and his co-defendant "is a travesty that calls for correction," especially since the VWPA "limited the

collectibility of restitution to 'five years from the date of the sentence.'" The court thus allowed equitable tolling in these 2255 proceedings. Although this case preceded *Booker*, *Ring*, *Apprendi*, and *Jones* (decided a month after this sentencing), the court found that counsel was ineffective in failing to test the constitutionality of the restitution award procedure since restitution was not charged in the indictment, not found by a jury, and the amount ordered to be paid was based on a standard other than proof by the Government beyond a reasonable doubt. Counsel "was required to recognize the potential constitutional claim" that came later in court rulings because "[t]he law has long recognized that defense counsel, both trial and appellate, is required to raise potential constitutional claims in view of developing law." Here, "this court was on record as doubting the constitutionality of the VWPA, and counsel in other cases had raised the issue in this court."

**2004:** ***Banyard v. Duncan*, 342 F. Supp. 2d 865 (C.D. Cal. 2004).** Trial counsel was ineffective in failing to investigate and object to the use of a prior assault conviction as a "serious felony" in sentencing the defendant to 25 years to life under the "Three Strikes Law" following a conviction for possession of a controlled substance. Appellate counsel was also ineffective for failing to assert trial counsel's ineffectiveness. Counsel's conduct was deficient because counsel advised the defendant to admit to two prior serious felony convictions even though the defendant's second strike was not a "serious felony," as required by state law. The second strike was for an assault conviction, "which arose from a domestic dispute and is the only arguably violent behavior in [the defendant's] record." The court found that the record on this offense revealed that, although the defendant was initially charged with a serious felony, he ultimately plead no contest only to assault, which was not a serious felony, and was sentenced to time served and probation. The court found that the state court erred in its judgment in finding that the defendant entered a no contest plea to a serious felony when the plea transcript revealed otherwise. Even if the alleged victim of the assault was believed, the "minor nature" of the defendant's "assault conviction show that it was outside the heartland of what would normally constitute assault." In addition, the "sentence of probation is not consistent with a desire to punish [the] crime as a serious felony." Without any real analysis, the court held, under the AEDPA, that the state court's decision was an unreasonable application of clearly established federal law."

***Garcia v. United States*, 301 F. Supp. 2d 1275 (D.N.M. 2004).** Counsel ineffective in sentencing for drug conspiracy for failing to object to the pre-sentence report, which improperly calculated points based on the erroneous finding that the instant offense occurred while the defendant was a probation for a DWI offense. The defendant was investigated by the DEA for a conspiracy to sell marijuana. Several co-defendants were arrested long before him with the last being on February 19, 1999. Following these arrests, but prior to his own arrest, the defendant was arrested and plead guilty to DWI. He was ordered to serve one-year of probation on March 8, 1999. He was indicted for these offenses in June 1999. He plead guilty pursuant to a plea agreement in which the state would recommend the lowest penalty available under the sentencing guidelines as long as the defendant participated in a "debriefing." Counsel at sentencing had not represented the defendant in the plea negotiations. During sentencing, although the petitioner asserted he was entitled to "the safety valve" downward departure, counsel asserted that he was ineligible without having a full understanding of the underlying facts. Because of the confusion, the court continued sentencing to allow counsel to investigate. Nonetheless, because the court had stated earlier that he would not give

the "safety valve," counsel convinced the defendant that he was ineligible and the case proceeded to sentencing the same day. Because the court's statement of ineligibility was based on counsel's inaccurate summation of the facts, the court rejected the government's argument that the court had already exercised its discretion to reject the "safety valve." The court found a guideline range of 168 to 210 months and sentenced the defendant to 168 months. Counsel's conduct was deficient in convincing the court and the defendant that the safety valve did not apply because there was no evidence and the government never argued that the defendant was involved in any distribution after February 1999. Indeed, the pre-sentence report attributed no drug activity to the defendant after July 1998. Thus, any activity alleged preceded the defendant's DWI arrest. Thus, the defendant was entitled to application of the "safety valve," so long as the defendant participated in the agreed upon debriefing, which counsel never scheduled because of the erroneous belief that the defendant was not eligible for the "safety valve." Counsel's failure to object to the pre-sentence report was deficient because it "was based entirely on his lack of understanding of the underlying facts." Prejudice was found because absent counsel's error, under the appropriate sentencing guidelines and the government's agreement to recommend the low end, the defendant would have been given a sentence 53 months shorter than the one he actually received. The court ordered the government to afford the defendant an opportunity to comply with the debriefing requirements prior to resentencing.

***Blount v. United States*, 330 F. Supp. 2d 493 (E.D. Pa. 2004).** Counsel was ineffective in sentencing on drug charges for failing to request a downward departure for time the defendant had already served in state and county custody on unrelated charges.

**2003:** ***Somerville v. Conway*, 281 F. Supp. 2d 515 (E.D.N.Y. 2003).** Counsel was ineffective in sentencing in a burglary and assault case where he failed to challenge the legality of the defendant's sentence as a second violent felony offender. The defendant's status as a second violent offender was predicated on a previous conviction in Maryland for robbery with a deadly weapon. Under New York law, however, the Maryland offense could not be used as a first offense if the Maryland offense was not equivalent to any New York felony. In state court, the prosecution conceded that if trial counsel had raised the issue that the Maryland prior offense should not have been used. Nonetheless, the state court affirmed the sentence stating that the defendant received meaningful assistance from his trial counsel. In federal court, the state no longer conceded that the crime for which the defendant was convicted in Maryland could not be used as a predicate for the second violent felony offender status. The court found that the prior conviction from Maryland could not be used under New York law because the defendant in Maryland could be convicted of armed robbery if he used force without an intent to take property and afterwards stole from the victim. While this would be felony robbery in Maryland, it would not in New York under the statute. The court found prejudice because if counsel had raised this issue, the defendant would not have been adjudicated a second violent felony offender and would have been eligible for, although not guaranteed, a sentence far below what he was given. Even if the trial court had sentenced the defendant to the exact same sentence without finding a second violent felony offender status, the defendant was nonetheless prejudiced by being adjudicated as a second violent offender because "[i]n the event he commits another felony at some point in the future, he will be exposed to a mandatory maximum prison term of life in prison." The court also found deficient conduct because "[e]ffective counsel must be

familiar with the sentencing law governing a defendant's case." Here, the New York law was manifested both in statute and in case law, and the Maryland law was clear from its case law.

> Given that the only legal question open at petitioner's sentencing was his status as a second violent felony offender and that resolution of the court's adjudication of that status might have significant effects on both petitioner's current sentence and on any sentence he might receive if he were to commit a subsequent felony, defense counsel was obliged to be familiar with this law.

The court also found that counsel's failure could not have been motivated by any strategic rationale. Analyzing the case under the AEDPA, the court found that the state court's decision was an unreasonable application of clearly established Supreme Court precedent as set forth in *Strickland*.

### C. Military Cases

**2006:** ***United States v. Dobrava*, 64 M.J. 503 (Army Ct. Crim. App. 2006).** Counsel was ineffective is false statement and larceny case for failing to call the accused to the stand for an unsworn statement in sentencing. The accused had been stationed in Afghanistan, near the Pakistan border, in an area where the threat level was high and several soldiers had been killed in the months prior to the accused's theft of money from a local national's house during a search of weapons. Counsel and the accused had agreed that an unsworn statement would be important but counsel did not call the accused. While the accused alleged that counsel simply forgot to call him, counsel asserted that he determined at the last moment that the statement would only dilute strong mitigation evidence and made a tactical decision not to call the accused. Regardless of the reason, counsel's conduct was deficient because the decision to make a statement or not was personal to the accused. Prejudice established because the accused's express statements of apology, contrition, and a desire to be rehabilitated might have persuaded the judge to give a lesser sentence.

**2005:** ***United States v. Davis*, 60 M.J. 469 (2005).** Counsel ineffective in rape and sexual abuse of step-daughter (over a period of seven years) case for basing the entire sentencing strategy on an erroneous conclusion that the accused officer would be allowed to retire from the military with benefits if not sentenced to a dismissal. Prior to these charges, the accused had been passed over twice for promotion and, in order to avoid involuntary separation, had applied for voluntary retirement under the discretionary Temporary Early Retirement Authority (TERA). He was approved for TERA, but these charges arose before his separation and the TERA retirement was terminated. The accused plead guilty to some charges and was found guilty on other contested charges. In sentencing, counsel argued for a longer period of confinement in order to avoid a punitive discharge so the accused could obtain retirement benefits for his family. The panel sentenced the accused to life but did not order dismissal. After sentencing, counsel finally learned that eligibility for TERA required that an adverse action be "resolved in favor of the member." The accused, thus, was not eligible for TERA and was separated with an "other than honorable" discharge. Counsel's conduct was deficient in failing to research the TERA eligibility or to even make a phone call, which would have revealed a policy that a felony conviction disqualified the accused from TERA retirement. There was no reasonable strategy because the sentencing strategy was "fundamentally flawed from its inception

because of a failure to research the critical law." *Id*. at 474-75. Prejudice was found because the accused would not have asked for increased confinement if he had been adequately advised. If defense counsel had not asked for the increased punishment, the panel likely would have accepted the government's recommendation of 40 years and a dismissal rather than sentencing the accused to life with no dismissal.

### D. State Cases

**2018:** ***State v. Walter,* 431 P.3d 22 (Mont. 2018).** In drug case, trial counsel was prejudicially ineffective in failing to advise the sentencing court on the relevant law. Appellant pleaded guilty to a charge of criminal possession of dangerous drugs, criminal possession of drug paraphernalia, and obstructing a peace officer. The state sought to have appellant sentenced as a persistent felony offender (PFO), which included minimum sentencing guidelines. Appellant's counsel argued that the PFO statutes were inapplicable because a more specific statute applied, and argued that appellant should get a deferred sentence as a first-time drug offender. The sentencing court noted that two controlling statutes were in conflict, and decided that it was required to follow the PFO statute, and sentenced appellant to five years imprisonment. Appellant argued on appeal that his trial counsel's failure to cite the Alternative Sentencing Authority statute (ASA) and *State v. Brendal*, 276 P.3d 886 (Mont. 2006), which is a "pivotal opinion interpreting the interrelationship between the ASA and PFO statutes," 431 P.3d at 25, fell below the objective standard of reasonableness required by *Strickland*. The Montana Supreme Court determined that under *Hinton v. Alabama*, trial counsel's ignorance on this point of law "typifies" unreasonable performance. Appellant was prejudiced by his counsel's deficient performance, because the record demonstrated that the trial court wanted to avoid sentencing him under the PFO statutes and sought to prioritize treatment over incarceration, and therefore there is a reasonable probability that had his counsel called the court's attention to authority permitting it to impose a reduced sentence, it would have. The Montana Supreme Court reversed the sentence and remanded for resentencing with "effective counsel."

**2018:** ***State v. Larsen,* 425 P.3d 694 (Mont. 2018).** It was clear from the face of the record on appeal that trial counsel was ineffective for incorrectly advising the trial court that appellant's sentence could not be deferred or suspended. Appellant was convicted by a jury of felony possession of methamphetamine and misdemeanor possession of marijuana and sentenced as a persistent felony offender to ten years in prison, with none suspended. At sentencing, appellant had spoken on his own behalf and asked the court for credit for time served and a suspended sentence with a recommendation to participate in treatment court, stating that his offenses were non-violent possession charges. Counsel, however, told the court that the "bare minimum" sentence was ten years without suspension or deferment, and the court repeatedly said this sentence was inappropriate, but agreed he "must give that as a sentence" because it was required by the persistent felony offender statute. Under *Strickland*, it was objectively unreasonable for counsel to tell the trial court that it had no authority to impose a sentence that departed from the PFO minimum requirements. In *State v. Brendal*, 213 P.3d 448 (Mont. 2009), the Supreme Court of Montana determined that if incarceration of the defendant is not appropriate for a person conviction of a dangerous drug felony, the court has alternative sentencing authority. Here, the state Supreme Court rejected the state's argument that the trial court in this case did not question whether

incarceration was appropriate but merely questioned the length of the prison term, calling it a "narrow construction of [the] exchange." It held that the trial court expressed frustration both orally and in writing about the sentence, and it was reasonably probable that had the court been appropriately advised, it would have suspended appellant's sentence. The Montana Supreme Court remanded for a new sentencing hearing.

**2016:** ***Castro v. State*, 417 S.C. 77 (S.C. 2016).** Trial counsel was ineffective in drug trafficking case for failing to object when the trial judge improperly considered defendant's decision to exercise his right to a jury trial as a factor in sentencing defendant. Prior to trial, defendant was offered a plea bargain that he declined. Immediately before the trial, the trial court reminded defendant that the plea offer was still on the table and remarked, inter alia, "I am inclined to sentence on a plea [to] seven years. *I would not be so inclined in the event of trial.*" Defendant continued to decline the plea offer. He was convicted and at sentencing the trial court stated:

> *You are different from these other defendants in that they have cooperated and they have acknowledged their responsibility for the crimes that they have committed.*
>
> [Defendant], this is, as I said, an extremely serious offense. *The State has had to take you to trial on a case where there was overwhelming evidence of your guilt.* The jury has found you guilty, and I sentence you to incarceration in the State Department of Corrections for a period of fifteen years.

Trial counsel did not object. Nor did trial counsel complain in the motion for resentencing of the trial court's consideration of defendant's election for a jury trial in sentencing defendant. In denying the motion, the trial court stated, "I certainly don't penalize anybody from going to trial. . . . But acceptance of responsibility is, I believe, a valid . . . consideration for [t]he Court" The state supreme court found "the statements made by the trial judge clearly reveal he improperly considered [defendant's] decision to exercise his right to a jury trial in sentencing [defendant]." That the trial court also stated valid reasons for the sentence did not establish that defendant suffered no prejudice from the trial court's improper consideration of defendant's rejection of the plea offer in favor of a trial. Because trial counsel had no strategic basis for failing to object, his performance was deficient. Remand for resentencing.

***Richardson v. Belleque*, 373 P.3d 1113 (Ore. Ct. App. 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.

**Capital Case*

**2015:** ***Davis v. Commissioner of Correction*, 126 A.3d 538 (Conn. 2015).** Counsel in manslaughter plea case ineffective in sentencing for agreeing with the prosecutor's recommendation of the maximum sentence allowed under the plea agreement even though the agreement contained a provision entitling defense counsel to advocate for a lesser sentence. The Court of Appeals denied relief by applying the prejudice test of *Strickland*. This was error, however, because there was a complete breakdown in the adversarial process, such that prejudice was presumed under *Cronic*. The defendant had been charged with murder. Believing that the defendant only had a few prior drug convictions, counsel negotiated the plea agreement to manslaughter with a range of 20-25 years punishment and each party free to argue within that range. Counsel learned from the presentence investigation report (PSI) recommending a 25-year sentence that the defendant had a much more extensive criminal record than he thought. Because counsel believed, based on this information, that 25 years was appropriate, counsel did not argue on the defendant's behalf in sentencing and, instead, affirmatively agreed with the prosecutor's recommendation of the maximum 25-year sentence. It was this affirmative agreement that distinguished this case from *Bell v. Cone*, 535 U.S. 685 (2002), and revealed the lack of any strategic decision. "The petitioner's sentence was already capped at twenty-five years pursuant to the plea agreement and, thus, assenting to that sentence did nothing to advance the petitioner's interests." Under *Cronic*, prejudice was presumed.

***Lampkin v. State*, 470 S.W.3d 876 (Tex. Ct. App. 2015).** Counsel ineffective in sentencing of driving while intoxicated case for failing to adequately investigate and present mental health mitigation evidence. Counsels' conduct was deficient because counsel had concerns about the defendant's mental health prior to trial, including concern about whether the defendant was competent to stand trial. While counsel's conduct was not deficient in failing to challenge trial competence, counsel was deficient in failing to discovery and present the same evidence as mitigating evidence in sentencing. Counsel did not retain an investigator or speak to family members or even inquire of any jail personnel about whether the defendant was receiving or had received mental health treatment, despite counsels' concerns. This conduct was not reasonable and was not based on strategy. Prejudice was established because the jury was precluded from considering the defendant's mental health history in mitigation where the defendant was facing up to 99 years' confinement for the non-violent offense of driving while intoxicated where no one was injured. The information that the defendant "had been homeless and impoverished, had diminished capacity, suffered from psychotic delusions and major depressive disorders, had attempted suicide, and had a long history of drug abuse" might well have influenced the jury, especially in "cast[ing] a better light" on the defendant's prior convictions.

***Director of the Dept. of Corrections v. Kozich*, 779 S.E.2d 555 (Va. 2015).** Counsel was ineffective in grand larceny and obtaining money by false pretenses case for failing to timely file a motion to reconsider the sentence, which had been invited by the sentencing judge. In sentencing, counsel submitted some evidence and argued that the defendant's crimes, including his extensive prior criminal record, were a direct result of his drug addictions and, therefore, he should be sentenced to a drug treatment program rather than prison. The judge sentenced the defendant to three consecutive two year terms but added that she would grant leave to file a motion to reconsider if counsel wanted to submit a specific recommendation for an appropriate treatment program. The

final sentencing order was issued two and a half weeks later with no mention of leave to file a motion for reconsideration. Counsel did not file the motion to reconsider until more than three months later when the defendant had already been moved to a state penitentiary, which, under state law, deprived the sentencing court of jurisdiction. While there is no right to the effective assistance of counsel to file a post-trial motion to reconsider the sentence after a final sentencing order has been issued, there was a right in this case during the time between the sentencing and issuance of the written order two and a half weeks later. While there may not be a "categorical" right, there was in this case because the motion to reconsider was "expressly invited" by the court during sentencing. Thus, the defendant "remained in a critical stage of his criminal prosecution even after the conclusion of the sentencing hearing." Counsel's conduct was deficient in failing to pursue the matter by filing a motion to reconsider and by simultaneously making efforts to ensure that the motion would be heard before entry of the final sentencing order. This could have been accomplished by delayed entry of the sentencing order or by including language in the sentencing order that leave to file a motion to reconsider had been granted and that the matter would be held in abeyance until further order of the court. Prejudice was also established even though it likely would not have been with a different post-conviction judge and just an objective record. Here, however, the post-conviction court was the sentencing court and the judge relied on her own recollections that she had intended to order drug treatment, if the motion to reconsider had been filed, and that she would have reduced the defendant's sentences and ordered his confinement in a drug treatment program, as she did in issuing the writ. While the court questioned "the propriety of a habeas court's reliance on subjective intentions of this kind for purposes of establishing prejudice," the court "accept[ed] the judge at her word" in this case because the state failed to object in post-conviction or to raise the issue on appeal.

***Hillman v. Johnson*, 774 S.E.2d 615 (Ga. 2015).** Counsel in armed robbery, felon in possession of a firearm, and other offenses case was ineffective in failing to challenge the trial court's imposition of the maximum punishment on the felon in possession charge under the mistaken belief that it was required under state law. While a state statute requires courts to sentence defendants with a prior felony conviction to the maximum time authorized for any subsequent conviction, this statute does not apply to the offense of felon in possession for which the statute authorized a range of one to five years imprisonment. While there was no error and no ineffective assistance of counsel in the trial court's mandatory imposition of the maximum punishments on the other offenses, counsel's conduct was deficient in failing to challenge trial court's belief that the maximum sentence was also required for the felon in possession charge. Prejudice was established given the trial court's denial of the state's request for consecutive sentences and the trial court's criticism of the mandatory sentences during the sentencing hearing. Thus, there was a reasonable probability that the trial court would have sentenced the defendant to less than the maximum five years on the felon in possession conviction.

***Lopez v. State*, 462 S.W.3d 180 (Tex. Ct. App. 2015).** Retained counsel was ineffective in aggravated robbery plea sentencing for failing to adequately investigate and present mitigation evidence. The defendant pled guilty without a recommendation of sentence and was sentenced to 30 years' confinement. Counsel's conduct was deficient. The state had offered a plea deal that included a 15-year sentence, which was the minimum available sentence. On the day of trial,

counsel moved to withdraw asserting an inability to communicate with the defendant and that his legal fees had not been paid. Counsel also sought a continuance indicating a need for additional time to prepare and that the defendant had retained new counsel. The record contains no rulings on these motions before the defendant pleaded guilty without a sentencing recommendation. The court ordered a presentence investigation and scheduled sentencing for two months later. Counsel sent the client a letter telling him to collect "good guy" letters to give to the person who interviewed him for the presentence investigation and to meet with counsel 15 minutes before sentencing, along with the people who "support you." Counsel also asked that he "get current" on his fee payments. The defendant gave the investigator one letter from his girlfriend proclaiming his innocence. On the day of sentencing, counsel did not appear and it was rescheduled. Again, counsel did not appear. Without counsel, the defendant asked to withdraw his plea, his bond was revoked, and he was taken into custody to await sentencing. When the next hearing was held with counsel finally in attendance, the plea was not changed and the defendant was sentenced. No mitigation evidence was presented and counsel gave a two sentence statement informing the court that the defendant wanted the minimum sentence and believed that he could be a good "role model." After sentencing, counsel withdrew and new counsel was appointed and filed a motion for new trial alleging ineffective assistance for failure to investigate and present evidence of the defendant's mental health issues. Counsel's conduct was deficient. Trial counsel admitted that he was unaware of this information as counsel conducted no investigation. Instead, as indicated by his letter, counsel tasked the defendant with preparing his own mitigation "without any assistance of counsel." Likewise, counsel received the pre-sentence report 10 days prior to sentencing. The report indicated the defendant "had a below-normal IQ and mental-health diagnoses," but still counsel did not investigate. Even if the defendant had rounded up witnesses, counsel could not have adequately interviewed and prepared these witnesses in 15 minutes just prior to sentencing. Prejudice was also established. New sentencing ordered.

**2014:** ***People v. Speight*, 174 Cal. Rptr. 3d 454 (Cal. Ct. App. 2014).** Counsel was ineffective in murder case sentencing for failing to raise an Eighth Amendment objection to the length of the defendant's 69 years to life sentence because the murder was committed when the defendant was 17-years-old. Under state law, the sentencing court was required to consider mitigating circumstances for juvenile offenders and would have been required to consider the lack of any prior criminal history and remorse if counsel had objected on the basis of cruel and unusual punishment.

***State v. Mills*, 137 So. 3d 8 (La. 2014).** Counsel ineffective in sentencing for possession of cocaine and possession of drug paraphernalia in that counsel encouraged the court to take into consideration improper factors, which likely enhanced the sentence. In essence, the defendant was facing a 10-year maximum sentence. The defendant desired to avoid the Orleans Parish Prison and be housed in a facility operated by the Department of Corrections. Based on counsel's argument to this effect, the trial court imposed the maximum punishment for the expressed purpose of effectuating the defendant's desires. Prejudice established because without this improper consideration, there is a reasonable probability that the defendant would have received a sentence that was significantly less harsh.

**Capital Case*

***Ex parte Howard*, 425 S.W.3d 323 (Tex. Crim. App. 2014).** Counsel was ineffective in sentencing for failing to obtain mental-health experts and present testimony in sentencing concerning the defendant's voluntary intoxication-induced psychosis during his attack of his adult son at the son's home. While the trial court initially found ineffectiveness related to the guilt-phase, the appellate court found no prejudice and remanded for a determination of whether there was prejudice in sentencing. The record supported the trial court's finding of prejudice in sentencing.

***In re Williams*, 101 A.3d 151 (Vt. 2014).** Counsel ineffective in sentencing following guilty plea to four counts of involuntary manslaughter for failure to provide more than just perfunctory assistance. The defendant, who was 19 years old, was initially charged with four counts of murder and arson after he intentionally set fire to paper in his waste basket in his bedroom. The fire spread and killed occupants of the apartment above, a woman and her three grandchildren. The parties entered a plea agreement amending the original charges to four counts of involuntary manslaughter with a maximum sentence of 50-60 years, but the agreement allowed the defense to argue for a sentence from 20-60 years. A pre-sentence investigation (PSI) report by a probation officer recommended a sentence of 40-60 years, which was imposed by the trial court after hearing a number of "bereaved" victims' family members express their desire for maximum punishment. The PSI had identified mitigation evidence, including petitioner's lack of a criminal record, no drug or alcohol abuse, graduation from high school as a foster child, remorse, efforts to get people out of the burning building, and descriptions by people who knew him as a good, hard-working person. Counsel's conduct was deficient and not based on strategy because counsel called no witnesses and did not even submit a sentencing memorandum in advance of the hearing "to present his arguments for the minimum sentence in a less hostile and emotionally-charged atmosphere. Instead, he offered a few remarks about petitioner's childhood, essentially repeating the information in the PSI." Attorney experts testified for both the defense and state. The defense attorney expert testified that counsel's conduct was a "gross deviation from the standard of care." Remanded for new sentencing before a different trial judge.

**2013:** ***In re Brown*, 160 Cal. Rptr. 3d 822 (Cal. Ct. App. 2013).** Counsel was ineffective in vandalism case for failing to investigate the legitimacy of a prior strike before advising the defendant in sentencing to admit to the prior strike based on a juvenile adjudication for robbery. The defendant's juvenile adjudication was actually for grand theft, which did not qualify as strike. As a result of the defendant's admission of the strike, however, the trial court doubled the defendant's prison term (four years rather than two). While the state conceded that the defendant's prior did not qualify as a strike and that the defendant was prejudiced by the error, the state, nonetheless, argued that counsel was not ineffective because his investigation was objectively reasonable under prevailing professional norms. This was rejected in light of *Lewis v. Lane*, 832 F.2d 1446, 1458 (7th Cir.1987) (defense counsel's conduct in stipulating in capital sentencing to four prior felony convictions based solely on information contained in an 'FBI rap sheet'" and the defendant's statements that it was accurate was "shockingly inferior"). Here, counsel allegedly relied on a packet of materials from the state, but neither counsel nor the state had identified the documents or produced them. "Defense counsel has a duty to investigate allegations made against his client, not merely assume their truth." It was not reasonable for counsel "to assume that his non-lawyer client had the specialized knowledge to understand the specific crime or section of the Penal

Code in his prior adjudication as a juvenile. Nor was it reasonable for trial counsel to assume his client could accurately recall exactly what offense or section of the Penal Code was sustained against him in a proceeding that occurred five years prior, when the defendant was only 16–years old." In addition, even if trial counsel had a reasonable basis for believing the defendant could accurately recall the specific offense underlying his prior adjudication, "counsel had a duty to ensure that the prosecution possessed evidence that would be sufficient to prove the prior strike allegation."

***Johnson v. State*, 120 So.3d 629 (Fla. Ct. App. 2013).** Counsel ineffective murder case for failing to object to the trial court's consideration of improper factors in sentencing in violation of due process. The trial court imposed the maximum sentence of life in prison with a minimum mandatory of twenty-five years based on the discharge of a firearm. He explained that he was doing so because the defendant, who denied guilt, had shown no remorse. "A sentencing judge may not consider a defendant's claims of innocence or refusal to admit guilt when imposing sentence." Counsel's conduct was deficient and prejudicial. "We are unable to envision any tactical reason that trial counsel would have had for standing mute when the trial judge imposed the harshest sentence available based on improper sentencing factors."

***State v. Phillips*, 130 So.3d 146 (La. Ct App. 2013).** Counsel in sentencing for armed robbery was ineffective in failing to object to the state's failure to meet its burden of proof at the habitual offender hearing. Specifically, the state relied on an out-of-state guilty plea but did not prove, as required under state law, that the defendant was represented by counsel during the plea.

***State v. Guillory*, 120 So. 3d 764 (La. Ct. App. 2013).** Counsel ineffective in possession of firearm by felon case for failing to move to quash the additional habitual offender bill under the fourth offender section. The defendant had three prior offenses but under state law the prior offense used as a basis for the convicted felon offense (possession with intent to distribute) could not also be used as a predicate for the fourth habitual offender status. The state conceded deficient conduct. Prejudice was also clear as the defendant was sentenced to mandatory life under the fourth offender section when he was only a third offender with a sentencing range of 13-40 years rather than a mandatory life sentence.

***Levering v. State*, 315 P.3d 392 (Okla. Crim. App. 2013).** Trial counsel ineffective in sentencing of kidnaping and second-degree rape by instrumentation case for failing to object to admission of prior transactional felony convictions for enhancement purposes. During trial, propensity evidence of sexual assault was admitted, which had resulted in three convictions. These prior convictions were committed on the same day against a single victim. During sentencing these three prior convictions, as well as four additional prior convictions were admitted to enhance the sentence. "In the absence of any instruction explaining the jury's consideration of propensity evidence in relation to transactional prior convictions, we find that counsel's deficient performance, combined with the improper admission of all six prior sexual assault convictions, prejudiced Appellant and warrants remand for resentencing." The jury should have been instructed that the sexual propensity evidence admitted during trial should be considered as a single conviction in sentencing and that the state was required to prove the prior convictions beyond a reasonable doubt.

**Capital Case*

***State v. Phuong*, 299 P.3d 37 (Wash. Ct. App. 2013).** Counsel ineffective in unlawful imprisonment and attempted rape case for failing to argue that these offenses covered the same criminal conduct for purposes of sentencing. The Cambodian defendant and his wife were involved in divorce proceedings when he grabbed her outside his home, drug her inside, and attempted to rape her. During the incident, their children ran to a neighbor's home for help. The defendant stopped only when the neighbor knocked on the door. Under state sentencing laws, these offenses should not have been considered separately because the defendant's "objective criminal purpose" for each offense was the same, i.e., his purpose for both offenses was rape.

**2012:** ***Radmer v. State*, 362 S.W.3d 52 (Mo. Ct. App. 2012).** Counsel ineffective in statutory sodomy sentencing for failing to present evidence of the defendant's impaired intellectual functioning. The defendant was initially charged with statutory rape in 2003. Counsel retained a psychologist to evaluate whether the defendant had the intellectual capacity to knowingly waive his Miranda rights before confessing. The expert diagnosed adjustment disorder with depressed mood and borderline intellectual functioning. The motion to suppress the statements on this basis was denied, but the charges were dismissed anyway because the alleged victim refused to testify. Four years later, when these charges arose, the same counsel again represented the defendant. In sentencing before the jury, the state presented evidence and argument that the defendant was a pedophile. In response, counsel presented two family members and an employer to testify, but presented no evidence about the defendant's "impaired intellectual functioning." Before the judge, prior to imposition of the 90 year sentences, counsel argued that the pre-sentence report might be inaccurate because is was based on the defendant's statements. He noted specifically that the defendant had a low IQ and may not have understood the questions asked of him. He also asked the judge to "remember" that the defendant has "mental deficits." If counsel had called the psychologist that examined the defendant previously, he would have testified that the defendant has an IQ of 75 and "his functioning age was ten years old." He also testified that "a person with borderline intellectual functioning who behaves sexually inappropriately is different than a pedophile" and would be amenable to treatment.

***Ex parte Rogers*, 369 S.W.3d 858 (Tex. Crim. App. 2012).** Counsel ineffective in jury sentencing for attempted aggravated sexual assault for failing to object to prior bad acts evidence from a former rape victim. The crime charged was essentially hiding in the women's room of an office building and assaulting a woman who came in by pinning her against the wall with a knife to her throat. She escaped and the defendant was arrested. He possessed at the time nylon rope, duct tape, handcuffs, and gloves. During sentencing, the jury heard evidence of a similar crime in a different office building bathroom 11 years before. The jury also heard, however, about an extraneous offense where a woman was raped in her apartment after a man broke through the glass of her window from a balcony. Her arms, legs, and eyes were duct taped and she was raped twice and cleaned afterwards with bleach or a similar cleaning substance. The defendant was matched to this crime because of his possession of duct tape when arrested in the current case. He was put in a lineup and identified by the prior rape victim. At the time of sentencing in this case, the defendant had been indicted for the prior rape, but those charges were dismissed after this trial because the actual rapist in the prior case was identified through "CODIS (the FBI's combined DNA index system)." That person pled guilty to the prior rape. Counsel's conduct was ineffective in failing to investigate and object to this prior rape evidence in sentencing. If counsel had investigated, counsel would have learned that the

defendant was wearing an electronic monitor from a deferred adjudication at the time of the prior rape. The monitoring records established that the defendant was at home five miles away at the time of the apartment rape. Prejudice established as this "emotional testimony" was "likely particularly inflammatory to the jury."

**2011:** ***People v. Roberts*, 125 Cal. Rptr. 3d 810 (Cal. Ct. App. 2011).** Counsel ineffective in assault on officer case for failing to object to statements from the underlying proceeding in the sentencing findings under the Three Strikes Law. The State enhanced punishment with a prior felony conviction for second degree assault from Washington. Counsel's conduct was deficient in failing to object to transcripts of unsworn statements following the defendant's Washington plea. Enhancement required showing that the defendant had personally inflicted "great bodily harm." When the record does not disclose the underlying facts, the court presumes the prior conviction was for the least offense punishable under the foreign law. The elements of the prior conviction in Washington were most similar to California crimes that did not qualify as a strike under the Three Strike Law. The documents showing conviction in Washington did not provide details of the underlying offense and alleged only infliction of "substantial bodily harm." Washington law distinguishes between "substantial bodily harm" and "great bodily harm." Even if they were the same, Washington law allows conviction for second degree assault without the defendant having personally inflicted the harm. The state thus had to rely on the specific underlying facts. Under state law, the court could consider "otherwise admissible evidence from the entire record of the conviction." Here, the defendant's statements, his counsel's statements, and the alleged victim's statements made after the court had accepted the *Alford* plea and were not "part of the record of conviction" and should not have been relied on to establish a strike. While counsel objected to this evidence as hearsay, he did not object of this basis even though state law had been established on this point almost three years prior to trial. As counsel did object, albeit on the wrong ground, there clearly was no tactical reason for failing to make this meritorious objection to the same evidence. Prejudice established as the evidence supporting the enhancement was clearly insufficient without this evidence.

***Velazquez v. State*, 70 So. 3d 741 (Fla. Ct. App. 2011).** Counsel ineffective in sentencing for violation of probation for failing to object when the trial court announced a sentence greater than that intended. Counsel's conduct was deficient because the trial court said several times on the record that the court intended to impose a six-year sentence with credit for three years time served. In announcing three consecutive five-year sentences with credit for three years on each, the court actually required the defendant to serve six years instead of the intended three, but counsel failed to recognize this fact and object. The prejudice was "patent."

***Fegley v. Commonwealth*, 337 S.W.3d 657 (Ky. Ct. App. 2011).** Counsel ineffective in sentencing on six counts of complicity to first-degree robbery for failing to object to erroneous testimony of a probation and parole officer that the maximum possible sentence was 120 years when it was actually "only 70 years." The state asked for a sentence "in the middle" of 60 years, which was returned by the jury.

***State v. Hess*, 23 A.3d 373 (N.J. 2011).** Counsel ineffective in sentencing for aggravated manslaughter in failing to present relevant Battered Women's Syndrome mitigation evidence and failing to object to lengthy, unduly prejudicial victim-impact video. The defendant shot and killed

her husband, a police officer, in his bed. "The only issue was, why." After going to work, the defendant called authorities. In her initial statement she described a history of domestic violence, psychological belittlement, and victimization leading up to the killing. She said that she had only intended to scare the victim by pointing a gun at his head, as he had done to her the evening before, but it went off accidentally. The day after her arrest, the defendant was admitted to a psychiatric hospital for four days due to suicidal ideations. A defense investigator interviewed nine friends and co-workers who corroborated the victim's physical abuse, threats, and attempts to dominate and control the defendant. Nonetheless, a year and a half later, counsel allowed the prosecutor and a detective to take a second statement from the defendant in counsel's absence. In this one, with prompting and leading by the prosecutor, the defendant "downplayed the level of abuse" and said that she had decided to kill the victim the night before. The defendant entered a negotiated plea agreement that included: (1) a 30-year sentence, subject to service of 25; (2) defendant's concession that aggravating factors outweighed the mitigating factors; and (3) defendant's agreement that neither she nor her attorney would seek a lesser term of imprisonment. After hearing a "tour-de-force presentation" by the state and no evidence or argument by the defense, the court imposed the agreed upon sentence. Counsel was ineffective in failing to present the substantial mitigation evidence the investigator had developed. Nothing in the plea agreement prohibited counsel from presenting the evidence or arguing that the defendant was "a physically and psychologically battered woman to explain her motivations." In addition to the Battered Women's Syndrome evidence, there were four other mitigating factors, including provocation by the victim, that the evidence would have supported. To the extent counsel believed he was "handcuffed by the restrictive plea agreement," the agreement itself was improper and the court had expressly prohibited "this type of gag provision" less than a year after this plea. This type of agreement deprives the court of necessary information in order to impose an appropriate sentence. Counsel was also ineffective in failing to object to the victim-impact video. "The music [religious and pop] and the photographs of the victim's childhood and of his tombstone, and the television segment about his funeral do not project anything meaningful about the victim's life as it related to his family and others at the time of his death." While the court would not have found prejudice only with respect to the video, the court discussed this in order to resolve the issue on remand. The restrictions on defense counsel in the plea agreement was stricken. The State was free to hold a new sentencing without the restrictions or to vacate the plea.

***State v. Rowe*, 965 N.E.2d 1047 (Ohio Ct. App. 2011).** Counsel ineffective in vehicular homicide case for failing to move the sentencing court to waive the imposition of court costs based upon the defendant's indigence.

***Branch v. State*, 335 S.W.3d 893 (Tex. Ct. App. 2011).** Counsel ineffective in sentencing for possession of cocaine with intent to deliver case for failing to object to the prosecutor's improper statements about the way in which parole law would affect the sentence during closing arguments. While the jury was instructed and the prosecutor could properly generally address parole law, the State here commented specifically on how the parole law and good-conduct time would affect this particular defendant. Instead of addressing when he would be eligible for parole, the State affirmatively argued in language of certainty that he would be released by a certain time. These comments were an inaccurate statement of the law, inappropriate, and prejudicial. Two trial counsel was ineffective for failing to object. The first testified that he recognized objectionable but

did not object because second counsel was handling sentencing. The second counsel stated objectionable and that he had simply missed the argument when it was made and had no trial strategy not to object. Even if there was an alleged strategy, "[t]here can be no reasonable trial strategy in failing to correct a misstatement of law that is detrimental to the client." Prejudice established as jury was misled into believing that a life sentence would result in the defendant serving only seven to twenty years.

**2010:** ***Gonzalez v. Commissioner of Correction*, 1 A.3d 705 (Conn. Ct. App. 2010).** Counsel ineffective in threat and violation of protective order case due to counsel's failure to take adequate steps to ensure that the defendant received sentencing credit for all time served in pretrial confinement. The defendant was initially arrested on a threat charge, but was released the same day on a $500 nonsurety bond. A month later he was arrested on a breach of peace and violation of protective order charge. Bond was set at $35,000 and he remained in confinement for several weeks until the court reduced his bond to a promise to appear. Six months later the defendant was arrested for the third time on violation of protective order and harassment charges. Bond was set at $65,000 and the defendant remained in confinement thereafter. After 73 days had passed since his third arrest, counsel moved successfully to increase the defendant's first two bonds so the defendant could get presentence confinement credit for those arrests. When the defendant entered guilty pleas on charges involved in the first two arrests and received some confinement time, counsel did not request presentence confinement credit for the 73 days counsel had waited in filing the motion to increase the bond. Counsel's conduct was deficient because, under state law, the defendant could get presentence confinement credit only if inability to obtain bail or the denial of bail was the reason the defendant remained in confinement. Thus, "a reasonably competent attorney not only would have known to ask for an increase in bond, but also would have asked for bond to be increased during the . . . third arraignment, not two and one-half months later." Prejudice established as the defendant was entitled to credit for the 73 days.

***Hernandez v. State*, 30 So. 3d 610 (Fla. Ct. App. 2010).** Counsel ineffective in aggravated battery case for failing to object to the trial court's reclassification of the conviction from a second-degree felony to a first-degree felony. The trial court's instructions and the jury verdict form failed to distinguish between aggravated battery causing great bodily harm and aggravated battery using a deadly weapon. Either would be a 2d degree felony, except the court can reclassify to a 1st degree felony when a firearm is used, except where the firearm is already an essential element of the crime. Here, the record was unclear and the court's reclassification resulted in an illegal sentence. Remanded for resentencing as 2d degree felony.

***Patterson v. State*, 926 N.E.2d 90 (Ind. Ct. App. 2010).** Counsel in drug case was ineffective in failing to move to recuse the sentencing judge, who had previously signed the information and participated in the probable cause hearing ten years before as a prosecutor. The delay was caused by the defendant's failure to appear for sentencing following his guilty plea. Counsel's conduct was deficient and prejudicial, as the judge should have recused himself. Likewise, even though the 10 year sentence imposed was within the maximum of 10 years agreed to in the plea agreement, the denial of the right to an impartial judge only established prejudice.

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***Vaca v. State*, 314 S.W.3d 331 (Mo. 2010).** Counsel ineffective in robbery and assault sentencing for failing to consider whether to call a psychiatrist as a witness to present evidence of the defendant's low intelligence and mental health issues. By the time of counsel's appointment, the jail psychiatrist had already seen the defendant and prescribed medications for him because he suspected mental illness. Aware of this, counsel retained a psychologist to evaluate competence to stand trial and diminished capacity. The defendant had an IQ of 73, which was confirmed by his school records. Testing suggested the presence of schizophrenia and Social Security Administration records revealed that the defendant was on disability due in part to schizophrenia. Medical records revealed prior head traumas. Counsel knew from the beginning that the state's evidence was "substantial" and that the case "would probably be going to the sentencing phase." "Because defense counsel conceded that conviction was probable, he knew that strategy during the sentencing phase was vital to the representation of his client." Prior to the defense case, the state moved successfully to preclude any mental condition evidence due to counsel's failure to provide notice to the state. Counsel's theory during trial was complete innocence due to misidentification by key witnesses. He attempted to elicit testimony from the defendant's brother about his mental condition, however, but was prevented from doing so. Counsel never attempted to call his psychologist or present his report. During deliberations, the jury sent out four questions asking about the defendant's housing since arrest, psychological testing, and medications. These questions went unanswered. In sentencing, counsel again did not call the psychologist or submit his report. Counsel simply failed to consider whether to call the expert. "This omission, in front of this particular jury, undermines . . . confidence in the sentencing phase's outcome." In short, "the holding of this case is not that counsel was ineffective for not calling [the expert]. Rather, this case rests on the fact that the question of whether to call [the expert] was never considered."

***Boan v. State*, 695 S.E.2d 850 (S.C. 2010).** Counsel ineffective in criminal sexual conduct and lewd acts case for failing to move for clarification of the sentence when the trial court announced a twenty year sentence on the most serious charge but signed a sentencing order increasing the sentence to thirty years. Prejudice was clear as, ruling on this issue of first impression, the oral pronouncement controls.

***DeLeon v. State*, 322 S.W.3d 375 (Tex. Ct. App. 2010).** Trial counsel ineffective in sentencing of indecency with a child by sexual contact case for calling as an expert witness a probation officer who gave highly inflammatory testimony about risks posed by sex offenders on probation. Counsel was pleading for probation and presented the officer to testify about treatment for sex offenders on probation and the protections in place in the community. On cross-examination, however, he testified that a sex offender will always have the sex offender impulses and "[i]f you want to protect the public, then you put them in a situation where they can't have access to children." Counsel's conduct was deficient in calling this witness in the first place and in failing to object to this highly inflammatory testimony. Prejudice established, given the nature of this testimony, the emphasis placed upon it (with more than half of the sentencing transcript covered by this testimony), and that this witness was the only expert in sentencing.

***Ex parte Harrington*, 310 S.W.3d 452 (Tex. Crim. App. 2010).** Counsel ineffectiveness in felony driving while intoxicated (DWI) plea case, due to counsel's failure to investigate a prior DWI conviction used to enhance the defendant's misdemeanor DWI to a felony charge. The

indictment listed prior DWI convictions in 1986 and 2003 for purposed of enhancement. The defendant informed counsel that the 1986 conviction was not his. A man who had stolen his driver's license used it when he was arrested and was convicted using his name. Nonetheless, counsel failed to investigate and the defendant pled guilty. Subsequently, a police department fingerprint analysis confirmed that the defendant was not person attached to the 1986 conviction. There was a reasonable probability that the defendant would not have entered a plea to the felony charge if counsel had performed adequately.

***State v. Ott*, 247 P.3d 344 (Utah Ct. App. 2010).** Counsel ineffective in non-capital murder case for failing to object to inadmissible victim-impact evidence in jury sentencing where the defendant could be sentenced to life with or without the possibility of parole. Specifically, counsel failed to object to a six-minute videotape of pictures of the victim set to "moving music," and testimony of family members about the impact on them and their opinions of the defendant's character and the appropriate sentence. The opinions of the defendant's character (i.e. that he could not be rehabilitated) and opinions on the appropriate sentence were "at odds with United States Supreme Court precedent" in Payne and Booth. Thus, counsel's conduct was deficient. Prejudice also established.

**2009*:*** ***People v. Heinz*, 910 N.E.2d 610 (Ill. Ct. App. 2009).** Counsel ineffective in burglary and theft case for failing to object to restitution order in sentencing. The defendant was ordered to pay $7,000 in restitution following convictions from breaking into and stealing from a bowling alley. Counsel's conduct was deficient and not based on strategy because the State's restitution request "was cursory at best" and the supporting evidence was inconsistent, ambiguous, vague, or completely absent. Counsel's conduct was deficient in "remaining silent under these circumstances." Prejudice found because if counsel had objected, the trial court would have held a hearing to determine the actual amount of damages.

***Farris v. State*, 907 N.E.2d 985 (Ind. 2009).** Counsel ineffective for failing to challenge consecutive habitual offender sentence. Defendant was initially charged with robbery and while pending trial was charged with murder committed by someone he hired and who was attempting to kill his robbery co-defendant who was cooperating with the state. The defendant was convicted first of the robbery and his sentence was enhanced by 30 years as a habitual offender. Following his murder conviction, his sentence in that case was also enhanced by 30 years and ordered to run consecutive to sentence in robbery case. Counsel's conduct was deficient and prejudicial because state case law from at least seven years before the defendant's offenses or trial prohibited the state from seeking multiple enhancements by bringing successive prosecutions for charges that could have been consolidated for trial. These charges could have been consolidated because they were based on a "series of acts connected together" as required by statute.

***In re A.E.*, 922 N.E.2d 1017 (Ohio Ct. App. 2009).** Counsel ineffective in juvenile sex offender case for failing to advise the juvenile and the court of the proper classification procedures related to the statutory duty to register as a sex offender for the rest of the juvenile's life and failing to advocate on the defendant's behalf. The defendant was 15 and had no prior sex offense adjudications. Under state law, registrations requirements for a 14-15 year old with no prior sex offense adjudications was discretionary. Nonetheless, defense counsel sat silently in court when the court stated incorrectly

that registration for the juvenile would be mandatory. Even assuming that counsel and the court understood the discretionary nature of the determination, counsel made no argument that the court should decline registration requirements or that the court should consider the mandatory factors listed in the state statute.

***Gordon v. Hall*, 221 P.3d 763 (Ore. Ct. App. 2009).** Counsel ineffective in sentencing of first degree sexual abuse case where the defendant was given an enhanced sentence of life imprisonment without the possibility of parole (LWOP). Under state law, the presumptive sentence for a felony sex crime was LWOP if the defendant had been "sentenced" for two prior felony sex crimes. The state presented evidence of two prior sex "convictions" and counsel did not challenge this evidence, despite informing the court that the defendant did not believe he had a second conviction. Counsel's conduct was deficient in failing to investigate the defendant's prior criminal record and in failing to challenge the imposition of the enhanced sentence. First, the plain text of the statute required two prior "sentences" for the enhancement. Second, while counsel discussed prior "convictions" with the defendant, he did not discuss prior "sentences" with him and "failed to look beyond the face of the documents offered by the prosecutor to determine whether they had actually involved the imposition of sentences." Third, counsel failed to object to the enhanced sentence on the basis that the state had failed to prove two prior "sentences." The defendant was prejudiced because one of his prior convictions did not result in the imposition of a sentence because his sentence was suspended and he was placed on probation in California. At the completion of the probation, the court sentence aside the guilty plea, entered a not guilty plea, and dismissed the complaint. Thus, no prison sentence was ever imposed. Under the applicable law at the time in both California and Oregon, "probation was not a sentence." Thus, the defendant did not have two prior sentences for felony sex offenses and the presumptive LWOP sentence did not apply to him.

***Ex parte Lane*, 303 S.W.3d 702 (Tex. Crim. App. 2009).** Counsel ineffective in methamphetamine sentencing for failing to object to improper testimony during the trial and sentencing about "the methamphetamine problem." During trial, counsel's conduct was deficient in failing to object to an officer's testimony "that there is a methamphetamine epidemic in Texas." Counsel's conduct was also deficient in failing to object to the prosecutor's closing argument, which was not supported by evidence, asserting that the defendant was bringing methamphetamine into the county to poison the children and turn them into addicts and that children were in fact shooting up and smoking methamphetamine. The defendant suffered no prejudice during trial, but counsel's deficient conduct continued in sentencing. Counsel failed to object to testimony by a DEA agent about the societal problems caused by methamphetamine. Counsel also failed to request pre-trial notice of the State's experts, including the DEA agent, to properly object to his testimony about addiction and that 45,000 people could get high from the amount of methamphetamine possessed by the defendant, and to call an expert in rebuttal. The DEA agent was not qualified to testify about the addictive nature of the drug or about the number of people who could get high on the amount possessed by the defendant. Prejudice was established as the state asked for and obtained a life sentence, relying heavily on the objectionable testimony and argument in both phases of the trial.

***Ramirez v. State*, 301 S.W.3d 410 (Tex. App. 2009).** Counsel ineffective in intoxication manslaughter sentencing for failing to elect jury sentencing based on counsel's misunderstanding of the law. The state alleged use of a vehicle as a "deadly weapon," which, if found by the jury,

meant that only the jury (and not the judge) could assess a punishment of probation in sentencing. In order for the jury to be eligible to assess probation, defense counsel was required to file a sworn motion prior to voir dire that the defendant had not previously been convicted of a felony. Here, counsel filed the sworn statement, but failed to elect jury sentencing prior to voir dire, which meant under state law that the jury could assess punishment only if the prosecutor consented. Counsel did this because she believed the defendant could get probation if he had judge sentencing and she advised the defendant that he would have a better chance of getting probation before the judge. When counsel learned of her error, she met with the prosecutor in an attempt to resolve the problem. The state did consent to jury sentencing, but only on the condition the defendant waive his right to appeal on the basis that the jury had not been asked any questions relating to punishment in voir dire. Defense counsel believed she could not do this, but failed to even consult with the defendant about it. The prosecutor, who had offered a probationary sentence in pre-trial and post-guilty verdict negotiations, then agreed to a 10 year probationary sentence, but the trial court refused to accept this agreement and sentenced the defendant to 18 years' confinement. Counsel's conduct was admittedly deficient as it was "based on her misunderstanding of the law" and precluded a probationary sentence even though counsel argued that the defendant was "a good candidate for probation." Prejudice was also clear in that the jury may well have assessed probation as evidenced by the prosecutor's actions in the case in attempting to negotiate for a probationary sentence even after the guilty verdict. The prosecutor also testified in post-conviction that the victim's family agreed that probation was an appropriate punishment.

***State v. Bounhiza*, 294 S.W.3d 780 (Tex. App. 2009).** Trial court did not err in granting a motion for mistrial in sexual assault case based on ineffective assistance of counsel. Prior to trial, the defendant filed an application for probation. After conviction, however, the parties realized that the trial court was statutorily prohibited from considering probation as a sentence. The punishment range was 2-20 years. Counsel conceded his error and that he had incorrectly advised the defendant to choose the court rather than the jury for sentencing based on this error.

***State v. Adamy*, 213 P.3d 627 (Wash. Ct. App. 2009).** Counsel ineffective in child rape and assault case for failing to advise the court that it could consider a special sex offender sentencing alternative (SSOSA) under state law, despite a federal immigration hold. The defendant's parents were U.S. citizens and he always believed he was as well but learned shortly before the charges were filed that he had been born during a visit to Mexico and his mother had never filled out the required paperwork for citizenship. The defendant pled guilty and the state agreed he could seek a SSOSA if he was, in fact, a citizen and eligible. The court denied the SSOSA believing it could not grant a SSOSA because the defendant was subject to a deportation order. Under state law, however, the court could have sentenced under SSOSA regardless of the defendant's citizenship or immigration status. Counsel's conduct "was deficient for failing to recognize and cite the appropriate case law . . . to the sentencing court." Prejudice shown.

***In re Personal Restraint Petition of Crawford*, 209 P.3d 507 (Wash. Ct. App. 2009).** Counsel ineffective in sentencing following robbery and assault convictions for failing to challenge the use of an out-of-state conviction in designating the defendant as a persistent offender, which resulted in a sentence of life without parole. The prior conviction was for sex abuse in Kentucky. State law required the court to classify this according to the comparable offense in Washington law, based on

the elements of the offense (legal comparability) or based on the defendant's conduct as evidenced by the indictment or information (factual comparability). Here, the Washington statute included several elements that the Kentucky statute did not and, although the defendant's conduct almost certainly violated the Washington statute, the necessary information to establish the elements was not contained in the Kentucky documents. Thus, counsel's conduct was deficient and the defendant was prejudiced because the Kentucky offense was improperly counted as a strike under the persistent offender statute.

**2008:** ***Thompson v. State*, 990 So. 2d 482 (Fla. 2008).** Counsel ineffective in burglary, false imprisonment, and sexual battery case for failing to timely move to disqualify the presiding judge from sentencing. Prior to trial, counsel moved to withdrew stating the defendant had threatened to kill him, his family, and anyone associated with the case following conviction. The defendant denied the allegations and the motion was denied based on the court's finding that he would likely be sentenced to life and unable to carry out his threat if he was convicted. Counsel filed a motion to disqualify the court 14 days later, which was denied as untimely under state rules requiring that a motion for disqualification be made within 10 days after the discovery of the facts constituting the grounds for disqualification. Following conviction, the court sentenced the defendant to concurrent life sentences. Counsel's conduct was deficient and not based on strategy. Prejudice found because "the statements made by the judge . . . sufficiently evince judicial bias and predisposition so as to undermine confidence in the eventual sentence imposed."

***Robinson v. State*, 669 S.E.2d 588 (S.C. 2008).** Counsel ineffective following plea to drug trafficking offense for failing to challenge the use of a prior uncounseled magistrate court conviction to enhance the sentence, which resulted in a 20 year sentence. Prejudice found even though the sentence imposed was less than the maximum allowable punishment for a first trafficking offense. No sentencing ordered.

***Lair v. State*, 265 S.W.3d 580 (Tex. App. 2008).** Counsel ineffective in sentencing in possession of ecstasy case. Counsel presented only the defendant's sister-in-law to testify, despite the availability and willingness of over twenty witnesses, including the defendant's mother, relatives, and neighbors, who would have given good character type evidence. Counsel's conduct was deficient because he "did not even interview these witnesses, let alone present their testimony at the punishment hearing. This fact . . . necessarily defeats counsel's subsequent representation that the testimony of these additional witnesses would have been merely cumulative since, without conducting any sort of investigation into their testimony, he could not know whether the testimony was cumulative or not." Counsel's alleged concern about the state cross-examining these witnesses with the defendant's prior 50-year sentence also did not explain the failure because the jurors were already aware of the prior sentence. Prejudice found because the evidence the jury heard "was brief and lacking in the detail and information that the additional witnesses would have offered." In addition, the jury sentenced the defendant to 70 years when the State had requested only a 50 year sentence.

**2007:** ***Pettis v. State*, 212 S.W.3d 189 (Mo. Ct. App. 2007).** Counsel ineffective in sentencing following guilty plea to possession of a controlled substance within a correctional institution for affirmatively

misstating the parole consequences of a consecutive sentence to the court. The defendant was serving a life sentence and had been approved for parole prior to these charges. Following these charges, his parole was cancelled and a new parole hearing was scheduled. The defendant entered a plea in this case pursuant to an agreement wherein the state agreed to maximum of five years but left to the court the determination of whether the sentence should be concurrent or consecutive to the life sentence. During the sentencing, the court inquired about the impact on parole and clearly wanted to impose a sentence with some deterrent effect but also to show some leniency to the defendant. In response to the court's inquiries, counsel stated that his "release date is to going to be pushed backward" and urged the court not to impose a consecutive sentence. The court gave the defendant a sentence of four years consecutive. Counsel's conduct was deficient because counsel affirmatively misstated the real consequence, which was that a consecutive sentence of any length effectively converted the life sentence to one of life without parole. Prejudice was clear because the court had no inkling the defendant's parole eligibility would be extinguished by a consecutive sentence when the court clearly wanted to show some leniency in sentencing the defendant to four years rather than the five recommended by the state.

***State ex rel. Shelton v. Painter*, 655 S.E.2d 794 (W. Va. 2007)**. Counsel ineffective in sentencing of murder case for several reasons. The jury returned a verdict of murder without a recommendation of mercy, which resulted in a life sentence without parole eligibility. While the defendant testified and conceded his guilt, counsel's conduct violated the duty of loyalty by, among other things, expressing that he "did not know" whether the defendant "even deserved mercy"; distanced himself from the defendant with suggestions that it was his duty, or his job to ask for mercy; and reminding the jury that it had no obligation to recommend mercy. The court also noted that counsel overly emphasized the defendant's guilt in argument, failed to request bifurcation for sentencing, and failed to make even a minimal effort to obtain a life with mercy verdict. Prejudice found and remanded for a jury trial limited only to the question of whether mercy should or should not be granted

***State v. Thiefault*, 158 P.3d 580 (Wash. 2007).** Counsel ineffective in sentencing following indecent liberties and attempted rape convictions for failing to object to the sentencing court's comparability analysis regarding the defendant's prior Montana conviction for attempted robbery, which led to the sentencing court counting that offense as a strike under the Persistent Offender Accountability Act (allowing a life without parole sentence based on three prior convictions or "strikes) and sentencing the defendant to life without parole. Counsel's conduct was deficient because the Montana offense was broader than its Washington counterpart because the Montana statute required a lesser mens rea. There was also insufficient evidence in the record for the court to factually compare the offense to make a proper comparability determination. Prejudice found because counting the Montana offense as a strike allowed the court to sentence the defendant to life without parole.

**2006:** ***People v. Thimmes*, 41 Cal. Rptr. 3d 925 (Cal. Ct. App. 2006).** Counsel ineffective in sentencing for felony drug case for failing to advise the court that the defendant had been warned of the consequences of his prior conviction and the Three Strikes Law prior to the defendant's no contest plea in exchange for a sentence of 32 months. The strike offense admitted was a 1999 criminal threat for which the defendant was sentenced to probation. Counsel's conduct was deficient because the trial court assumed that the defendant had been advised that the 1999 conviction would count under the Three Strikes Law even though criminal threat was not included for purposes of that

provision until 2000. Prejudice found because the trial court was permitted to decline to apply the Three Strikes Law and had stated that the case was "a pitiful one," but applied the law based on the assumption that the defendant had previously been advised of the consequences.

***People v. Le*, 39 Cal. Rptr. 3d 146 (Cal. Ct. App. 2006).** Counsel ineffective in robbery and burglary case for failing to object based on double jeopardy to consideration of both offenses in calculating the restitution fine. Counsel's conduct was deficient and prejudicial because state law precluded multiple punishment for a single act or omission and the defendant's sole intent was to steal from a drugstore. Thus, the defendant should have been sentenced solely on the robbery conviction but the burglary conviction was included, which essentially doubled the restitution fine.

***Estrada v. State*, 149 P.3d 833 (Idaho 2006).** Counsel ineffective in plea to rape case for failing to advise the defendant of his right to refuse to cooperate with a court-ordered psychosexual evaluation for purposes of sentencing. After accepting the plea, the trial court ordered a psychosexual evaluation of the defendant, which counsel informed the defendant must be completed, even though the defendant initially refused to participate. Counsel's conduct was deficient in failing to advise the defendant that he still retained his right against self-incrimination following his plea and he was not required to participate in the psychosexual evaluation. Prejudice found because the sentencing judge's specific, repeated references to the psychosexual evaluation suggest that it played an important role in the sentencing and the evaluation report included a number of unfavorable and derogatory comments, including references to the defendant's potential for future violent actions.

**2005:** ***Matthews v. State*, 868 A.2d 895 (Md. Ct. App. 2005).** Counsel ineffective and prejudice presumed in probation violation case for failing to file a motion for modification of sentence when requested to do so by the defendant. Defendant entitled to filed a belated motion for modification of sentence.

***Shanklin v. State*, 190 S.W.3d 154 (Tex. Crim. App. 2005).** Counsel ineffective in punishment phase of non-capital murder case for failing to investigate or present evidence from at least 20 available witnesses and instead called only the defendant to testify that he was sorry. The prosecutor requested a sentence of 25 to 35 years but the jury imposed a sentence twice that length. The available witnesses would have testified that the defendant was an excellent father, helped his friends and relatives, and worked hard.

***Freeman v. State*, 167 S.W.3d 114 (Tex. App. 2005).** Counsel ineffective in sentencing on aggravated sexual assault charge for failing to adequately investigate and present evidence of the defendant's history of mental illness. While counsel was aware that the defendant had previously been hospitalized on a couple of occasions (and the defendant testified about this during trial), counsel presented only testimony from the defendant's mother in sentencing asking the jury to take his illness into account. If counsel had adequately investigated, the evidence would have shown that the defendant had another prior hospitalization following an attempted suicide and had been receiving regular outpatient treatment for more than a year prior to the crime. He had last been seen three weeks before the crime. Counsel's conduct was deficient under Wiggins because counsel failed to investigate and there was no strategy for this failure. Prejudice was found because counsel only

presented lay testimony from the defendant and his mother on this issue. Although "it is sheer speculation" that the jury would have given a lighter sentence if additional evidence had been presented, the court found a reasonable probability of a different outcome.

***Andrews v. State*, 159 S.W.3d 98 (Tex. Crim. App. 2005).** Counsel ineffective in sentencing for indecency and sexual assault of child case for failing to object to the prosecutor's argument that the defendant's sentences could not be made consecutive, which was a misstatement of law and contrary to the state's pretrial motion asking to make the sentences consecutive or cumulative. Counsel's conduct was deficient (and could not be explained by trial strategy) because "counsel has a duty to correct misstatements of law that are detrimental to his client." Prejudice was found because the argument left the jury with the false impression that the maximum the defendant would serve was 20 years when the maximum sentence was actually 80 years.

**2004:** ***Bargeron v. State*, 895 So. 2d 385 (Ala. Crim. App. 2004).** Counsel ineffective in theft case for failing to appear at the restitution hearing, which was "a component of the criminal-sentencing proceeding." Remanded for new restitution hearing.

***McCarty v. State*, 802 N.E.2d 959 (Ind. Ct. App. 2004).** Counsel was ineffective in failing to prepare and present mitigating evidence in sentencing following the defendant's plea to child molestation. Counsel's conduct was deficient because he met with the defendant only once, conducted no investigation, and did not retain an investigator or mental health expert. Prejudice was found because adequate investigation and presentation would have revealed that the defendant was mentally retarded, he had been molested himself as a child, there was a likelihood that he could be successfully rehabilitated, and his confession admitted acts beyond what the victims had reported. Because of the trial court's reluctance to find prejudice and grant relief, the court exercised its state constitutional authority to revise the defendant's sentence and reduced his sentence by 10 years to the presumptive term of 30 years.

***Storr v. State*, 126 S.W.3d 647 (Tex. Crim. App. 2004).** Counsel was ineffective in sentencing in aggravated kidnaping case for failing to obtain an instruction on voluntary release of kidnaping victim in a safe place. The defendant was charged with aggravated kidnaping, which is a felony in the first degree. Under state law, however, if the defendant raises the issue of voluntary release of the victim at the punishment stage and proves that by a preponderance of the evidence, the offense is a felony in the second degree. The first degree felony is punishable by imprisonment of 5 to 99 year. The second degree felony is punishable by a term of 2 to 20 years. Counsel's conduct was deficient in failing to request the instruction because the evidence conclusively established that the appellant voluntarily released the victim in a safe place. The victim was left in his car at a post office which is exactly the point were he had been abducted to start with. The court found that it was inconceivable that counsel had some trial strategy for not requesting an instruction on safe release given the significant difference in punishment. Prejudice found because the defendant was sentenced to 35 years which is 15 years more then the maximum imprisonment allowed for the second degree felony.

***State v. Saunders*, 86 P.3d 232 (Wash. Ct. App. 2004).** Trial counsel was ineffective in sentencing in murder, rape, and kidnaping case for failing to argue that rape and kidnaping constituted the "same

criminal conduct" for purposes of calculating offender score. "Same criminal conduct" refers to the situation where there are two or more crimes that (1) require the same criminal intent, (2) are committed at the same time and place, and (3) involve the same victim. Here, the primary motivation for sexually assaulting the victim by inserting a television antenna in her anus was to dominate her and to cause her pain and humiliation. Because this intent arguably was similar to the motivation for the kidnap, defense counsel was deficient for failing to make this argument. Prejudice was found because the case law provides strong support for this argument. New sentencing granted.

**2003:** ***Carswell v. State*, 589 S.E.2d 605 (Ga. Ct. App. 2003).** Counsel's performance was deficient in an aggravated assault case for failing to object to two prior convictions used by the state in aggravation of sentence because those guilty pleas may not have been entered into voluntarily. Because the court found that reversal was required on the substantive issue, the court found that the question of prejudice with respect to the ineffectiveness of counsel was moot.

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## IV. ADVISING CLIENT

### A. GUILTY PLEA AFTER INADEQUATE INVESTIGATION OR RESEARCH

#### 1. U.S. Court of Appeals Cases

**2018:** ***United States v. Shepherd*, 880 F.3d 734 (5th Cir. 2018).** In case involving a guilty plea to the federal crime of failing to register and update registration as a sex offender, trial counsel was ineffective for not adequately investigating whether one of petitioner's prior out-of-state sex offenses had required petitioner to register as a sex offender in Texas where he had relocated to. In 2002, petitioner pleaded guilty in Arizona state court to a charge of attempted public sexual indecency, and was required by the terms of the plea (but not by law) to register as a sex offender. In 2006, he was charged and pleaded guilty in Nevada state court to a charge of indecent exposure, and was required under Nevada law to register for life as a sex offender. In 2011, petitioner moved to Texas and did not register as a sex offender. In 2012, a U.S. Marshal criminal investigator was notified that petitioner was an unregistered sex offender. Petitioner was not listed on Texas's registry of sex offenders, and the marshal requested documents from Arizona and Nevada regarding petitioner. The Texas Department of Public Safety (DPS) reviewed them and informed the marshal that only the Arizona offense would require registration. Petitioner was then charged with knowingly failing to register and update his registration. He pleaded guilty in September 2012, upon advice of counsel, an assistant federal public defender. Petitioner was sentenced to 24 months in prison and 30 years supervised release. After he was released from prison, petitioner attempted to register as a sex offender in Texas, but he was told by DPS that he was not required to register based on his Arizona or Nevada convictions. Petitioner then filed a motion under 28 U.S.C. § 2255 to vacate his sentence, alleging that he never was under a duty to register in Texas and that his trial attorney was ineffective for failing to raise that claim. The DPS informed the court that before August 30, 2012 (which was prior to petitioner's guilty plea), DPS determined whether an out-of-state offense was substantially similar to a reportable Texas offense by looking at both the elements and the facts of that offense, but after August 30, 2012 (at the time petitioner pleaded guilty), following the decision in *Texas Department of Public Safety v. Anonymous Adult Texas Resident*, DPS was restricted to comparing the elements of the out-of-state offense with the elements of the Texas reportable offense. The magistrate judge determined that petitioner would not have had to report, but the district court rejected that recommendation and denied the 2255 motion, finding that the Arizona and Texas statutes were substantially similar. The Fifth Circuit determined that counsel's performance was deficient because counsel only compared the Arizona statute with the Texas statute before recommending that petitioner plead guilty; he did not review case law, he did not know which statutes of each state to compare, and he did not talk to anyone from DPS about their determination that petitioner was supposed to register. "[C]ounsel's lack of inquiry beyond comparing the two statutes is IAC." He made no independent investigation of the facts or law, which would have led him to *Anonymous Adult* and the correct standard. Petitioner was prejudiced by counsel's deficient performance; counsel admitted that had he read *Anonymous Adult* he would have filed a motion to dismiss and if that failed, he would have advised petitioner to go to trial. This is true even though *Anonymous Adult* was decided in the middle of counsel's representation of petitioner. The Fifth Circuit also determined that the district court's conclusion

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that the Arizona and Texas statutes are substantially similar is incorrect, because there is ambiguity as to whether petitioner pleaded guilty in Arizona to public sexual indecency with a minor or simply public sexual indecency – the plea document does not mention "minor." Petitioner's plea was involuntary. Relief granted.

**2013:** ***Heard v. Addison*, 728 F.3d 1170 (10th Cir. 2013).** Under AEDPA, counsel was ineffective in lewd molestation case for failing to recognize a likely defense before advising the defendant to plead guilty and in failing to advise the defendant of the possibility of filing an appeal following the plea. The defendant faced two counts under a statute that criminalized "[l]ook[ing] upon, touch[ing], maul[ing], or feel [ing] [a minor's] body or private parts." Each count carried a 20-year to life sentence. During the plea, the defendant admitted that he positioned himself in a Walmart store so that he could look at two children under the age of 16. He wanted to "look under [their] clothes at [their] bod[ies] and at [their] undergarments." Pursuant to the terms of the plea agreement, the defendant was sentenced to concurrent twenty-five-year prison terms. At the time of the plea, the Oklahoma Court of Criminal Appeals (OCCA) had decided only two cases–both of which were unpublished–that addressed the scope of the lewd molestation statute "as it applies to 'looking upon' the 'body or private parts' of a minor child," which was the critical portion in this case. *See Robinson v. State*, No. F–98–724 (Okla. Crim. App. July 29, 1999); *Terry v. State*, SR–2003–0276 (Okla. Crim. App. Mar. 30, 2004). In *Robinson*, the OCCA held that a lewd molestation conviction based on the "look[ing] upon" language would ordinarily require something on the order of nudity: "[w]hile the statute does not say 'naked body' or 'naked private parts,' we believe the pairing of the word 'body' with the term 'private parts' indicates the legislature intended something more than the act of staring between the legs of someone who is wearing both underwear and boxer shorts." Similarly, in *Terry*, the OCCA held that secretly filming clothed minors in public for sexual gratification did not violate the statute, "[e]ven though Appellee may have had lascivious intent." In short, *Terry* reinforced the rule, first articulated in *Robinson*, that when the Oklahoma legislature "pair[ed] the word 'body' with the term 'private parts,'" in the context of a "look[ing] at" charge, it "intended something more" than the statute's plain text suggests. Based on these cases, Heard asserted ineffective assistance because counsel "should have discovered" and advised him about these cases, which "would have provided Heard with a powerful defense." In denying relief in this case, however, "the OCCA for the first time disapproved *Robinson* and *Terry*'s reasoning" and held that, "under a proper reading of the statute, Heard's admitted conduct was clearly criminal." In this context, "the extra AEDPA deference that would ordinarily be given to the OCCA is not appropriate" because the state court's reasoning was contrary to *Strickland*, which prohibits the use of "hindsight" in evaluating ineffective-assistance claims. The court thus reviewed the claim de novo. The Tenth Circuit, citing amongst other sources the ABA Standards for Criminal Justice, held that counsel's conduct was deficient. "A criminal defense lawyer has a duty to conduct reasonable investigations into her client's case, which extends to the law as well as the facts." *Id*. at ___ (citing *Strickland*, 466 U.S. at 690–91. "Quite apart from the failure to discover the OCCA's unpublished decisions in Robinson and Terry, we hold that, on this record, minimally competent counsel would have recognized a likely defense based on the statute's text."

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> Minimally competent counsel would have realized that, without "something more," such as a requirement that the minor's "body or private parts" be unclothed, the statute's sweep would extend to dance recitals, community pools, shopping malls–the list goes on–with only an officer's personal judgment as to the lewdness of a glance as a limiting principle. A minimally competent lawyer would have identified that such unbridled police discretion in enforcing the law makes a statute constitutionally suspect.

Minimal research on this issue would have revealed the OCCA's unpublished opinions in *Robinson* and *Terry*. These opinions would not have been difficult to find as defense counsel was a member of the Tulsa Public Defender's office and, as such, had access to the Oklahoma Indigent Defense System (OIDS) website "which provides access to unpublished Oklahoma Court of Criminal Appeals decisions by case name, by date of decision, and by subject matter." "Indeed, the OIDS website is available to the public." Moreover, the OCCA "permits parties to cite unpublished decisions, provided that 'no published case would serve as well the purpose for which counsel cites it.'" In short, counsel's conduct was deficient and not "justifiable on any strategic basis." Prejudice was also established. "[W]e have no trouble concluding that a decision to go to trial in Heard's case would have been rational. And the evidence in the record strongly establishes a reasonable probability that Heard would have withdrawn his guilty plea if he had had timely notice from his lawyer of *Robinson* and *Terry*." The available cases provided a strong defense. Additionally, the defendant was 48 years old and facing two 20-year to life sentences. State law required service of 85% of the sentence before parole eligibility. "Given the uncertainties associated with the possibility of parole and life in prison," Heard was essentially already facing a life sentence. Moreover, it was uncontroverted that Heard "sought to undo his plea" immediately after learning of the *Robinson* decision. In short, Heard carried his burden to demonstrate "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill*, 474 U.S. at 59. Likewise, Heard established that counsel was ineffective in failing to advise Heard of his right to appeal but "since the relief we have already afforded Heard should allow him to vacate his guilty plea that effectively moots any state-court appeal challenging that guilty plea."

**2007:** ***United States v. Mooney*, 497 F.3d 397 (4th Cir. 2007).** Counsel ineffective in felon in possession of firearm case for advising the defendant to plead guilty based on the erroneous assumption that no justification defense existed. The defendant was in his home when his ex-wife, who had been drinking and had shot or shot at several former boyfriends, put a gun to his temple. He took the gun from her, called his boss at work (7 blocks away), and told him he was coming in to turn the gun over to police. His ex-wife threatened to have him arrested for possession of the gun so the defendant attempted twice to call 911 from the home to report it himself but the wife disconnected the calls. He left then and walked the seven blocks to work where the police, who had been called by his ex-wife showed up and arrested him. Counsel's conduct was deficient because the defendant insisted from the beginning that he had done the right thing and was not guilty. Counsel told him that justification was no defense though and advised him to plead guilty. When the defendant attempted to raise this question with the court at the plea hearing, defense counsel undermined him

and informed the court that justification was not a defense. This advice was clearly erroneous because every circuit to consider the issue, including the Fourth Circuit, had recognized justification as an affirmative defense to this charge.

> Counsel's erroneous legal advice resulted from a failure to conduct the necessary legal investigation. Counsel in criminal cases are charged with the responsibility of conducting "appropriate investigations, both factual and legal, to determine if matters of defense can be developed."

*Id*. at 404. Prejudice established because it was "incontrovertibly clear" that the defendant would not have plead guilty but for counsel's erroneous advice. He even attempted to withdraw his plea at sentencing asserting his innocence in doing the right thing. Had he proceeded to trial, the court would have been required to present the defense to the jury and the jury likely would have been persuaded of justification on these facts.

**2005:** ***Maples v. Stegall*, 427 F.3d 1020 (6th Cir. 2005).** Counsel ineffective in distributing cocaine case in which the defendant pled guilty following jury selection based on counsel's incorrect advice that he could retain his speedy trial claim for appeal. The defendant was prejudiced because he would not have pled guilty absent this incorrect advice. Although the case was reviewed under AEDPA, the court reviewed the merits de novo because the state court had not adjudicated the merits.

### 2. U.S. District Court Cases

**2014:** ***Roberts v. Howton*, 13 F. Supp. 2d 1077 (D. Ore. 2014).** Under AEDPA, counsel was ineffective in manslaughter case for advising the defendant to plead guilty without adequately investigating beforehand. While this issue had not been asserted in state post-conviction, the procedural default was excused under *Martinez*. The defendant was convicted of killing a woman, who was involved with the defendant's ex-lover. The state's theory was that she had been killed at the defendant's home and then her body was dumped in the park where it was found. The state's case was premised upon circumstantial evidence involving the volatile lesbian "love triangle," the defendant's history of domestic violence, incriminating threats made by the defendant prior to the murder, and cell phone tower evidence. Counsel knew that the state's case relied significantly on the cell tower evidence and had filed a motion for funding for an expert on this issue and filed a motion to suppress this evidence. While the defendant had been prepared to go to trial, she changed her plea less than a month prior to the scheduled trial based on defense counsel's advice. Counsel advised the plea because the prosecution informed defense counsel that the cell tower evidence would place the defendant in the vicinity of the park close to the time the pathologist believed the murder occurred. The prosecutor testified that he had a phone call with an employee of Verizon Wireless, who said that his "preliminary" review of "the call data 'code'" might show that the defendant was near the park. After that he met with the defense team and shared this information. The lead defense counsel offered an affidavit in state post-conviction asserting that he had investigated and his investigator reached the same conclusion. The defense investigator and co-counsel, however, disputed this

information. Co-counsel had contacted an expert to say that the cell tower evidence could be disputed but the expert was never retained. Counsel's conduct was deficient in relying on the state's representation of the evidence without adequately investigating. Counsel's conduct was "particularly troubling" in light of the fact that the state's representation was admittedly based on "preliminary" information about what "might" be established. Prejudice was also established as there was a reasonable probability that the defendant would not have pled guilty if counsel had adequately investigated. This was clear in that several defense experts, and even the state's expert in the habeas proceedings, agreed that the state could not have pinpointed the defendant's location based on the cell phone tower data evidence available.

**2010:** ***Cerda v. Hedgpeth*, 744 F.Supp.2d (C.D. Cal. 2010).** Counsel ineffective in drug possession plea for failing to adequately investigate and give proper advice prior to plea. The complaint alleged a prior violent felony conviction enhancement under the Three Strikes Law. The state's initial offer was for six years. Due to the 1993 conviction, counsel was uncertain whether the defendant would be eligible for a "Prop 36 disposition," which would allow for drug treatment, a noncustodial sentence, and eventual dismissal of the charge. The state agreed that if the defendant was eligible, which would mean that he did not either personally use a weapon or cause great bodily injury, he could have a "Prop 36 disposition." Counsel was aware there was a preliminary hearing transcript for the prior, but he was unsure whether this would be admissible to prove the strike. Counsel was also aware that the petitioner had been convicted of drug possession in 2003 and sentenced to 32 months, which suggested that the petitioner had admitted in 2003 that the 1993 conviction was a strike. With this information, counsel recommended an offer of four-years without a "Prop 36" recommendation. The state agreed to either of two plea options: (1) a Prop 36 referral, but 6 years if he was found ineligible; or (2) 4 years with no Prop 36 referral. The defendant chose the former. He clearly would not have done so if he had known he was not eligible for Prop 36. Counsel's conduct was deficient as his advice was legally and factually incorrect. While he was uncertain of Prop 36 eligibility, etc., he did nothing to research or investigate to determine the correct answer. Only after the guilty plea, did counsel obtain the documents related to the 2003 conviction, which contained an admission that the 1993 conviction was a strike. Under California law, this was equivalent to a guilty plea. Aside from that, under settled state law, the preliminary hearing transcript, which contained information that the 1993 prior did involve great bodily injury, was admissible in evidence. "Competent counsel would have been aware of this law or would have taken the time to learn the answer to his discrete, uncomplicated legal question." Likewise, the plea the petitioner entered at counsel's advice also admitted, per the complaint, that the 1993 conviction was a strike, precluding Prop 36 eligibility. Prejudice was clear as "common sense" dictates that any defendant offered a deal for four years or six years will take the four year deal. Under AEDPA, the state court's determination to the contrary was an unreasonable application of Supreme Court law.

***United States v. DeSimone*, 736 F.Supp.2d 477 (D. R.I. 2010).** Counsel in mail fraud and money laundering case ineffective during plea proceedings, such that the defendant had a fair and just reason to withdraw his guilty plea. Although the defendant maintained his innocence throughout, he pled guilty the morning trial was scheduled to begin based on counsel's advice that he would likely be convicted. The problems, however, were that counsel advised the defendant he could plead guilty even if he was not and that it "happens all the time." Likewise, during the state's recitation

of facts during the plea hearing, the defendant complained to counsel that the statements were "bullshit" but counsel told the defendant that he had to accept the recitation. While counsel did not explicitly tell the defendant to lie to the court in the plea colloquy, the defendant was justified in his understanding that lying was not only permissible, but even necessary, to get his plea accepted. This undermined the finding that the plea was "knowing, voluntary, and intelligent."

***Williams v. United States*, 684 F. Supp. 2d 807 (W.D. Tex. 2010).** Counsel ineffective in "conspiracy to attempt to possess with the intent to distribute" marijuana plea case for advising the defendant to plead guilty to a count in the indictment that failed to charge an offense. In short, under Fifth Circuit precedent and under the relevant statute, a defendant could be charged for "conspiracy" or "attempt," but not "conspiracy to attempt." Counsel's conduct was deficient and prejudicial and relief was not barred by guilty plea.

**2009:** ***United States v. Winsor*, 675 F. Supp. 2d 1069 (D. Ore. 2009).** Counsel ineffective in receipt of child pornography case for allowing the defendant to plead to one count of receipt when the defendant was charged with two counts of receipt and one count of possession of child pornography. Under Ninth Circuit precedent decided more than eight months prior to the plea, convictions for receipt and possession would violate double jeopardy. Thus, counsel should have advised the defendant to plead guilty to all three charges. Counsel could then have asked the court to dismiss the receipt charges, which had a five-year mandatory minimum sentence, rather than the possession charge

> Given the known general distaste for statutory mandatory minimum sentences of judges around the country, and the belief that sentences of these types of cases are too lengthy, a lawyer exercising reasonable professional skill and judgment would have counseled his client about this strategy.

Alternatively, counsel could have advised the defendant to stipulate the facts and proceed in a bench trial in order to preserve his right to appeal the denial of his motion to suppress evidence. Prejudice established as the court likely would have dismissed the receipt charge and sentenced the defendant to less than five years on the possession charge because the defendant was 62 years old and a professional engineer, the crimes were more than four years old, the defendant passed a polygraph confirming he had never had sexual contact with a child, and he had been attending therapy at the time of sentencing.

**2008:** ***McBroom v. Warren*, 542 F. Supp. 2d 730 (E.D. Mich. 2008).** Counsel ineffective under AEDPA in incorrectly advising the defendant of the law which resulted in a no contest plea in assault with intent to commit murder case. The state initially made a plea offer with a cap of a one year sentence, which defense counsel never advised the defendant of. The defendant indicated a willingness to accept the deal on the day of trial, but the state declared the offer was withdrawn. The defendant proceeded to trial and was convicted. Prior to sentencing, he obtained new counsel who negotiated withdrawal of the conviction, entry of a no contest plea, a sentence of 11-17 years, and a waiver of appellate issues relating to the initial representation and the trial. Counsel's conduct was deficient because counsel incorrectly advised the defendant that the state's initial offer could not be reinstated

despite the ineffectiveness of his initial counsel. Prejudice established because the defendant received a much higher sentence. In ruling on this issue, the state court incorrectly viewed it as a challenge to initial counsel's actions rather than a challenge to the plea counsel's actions.

### 3. State Cases

**2017:** ***State v. Riddle*, 88 N.E.3d 475 (Ohio Ct. App. 2017).** Trial counsel was ineffective in advising defendant to plead guilty to aggravated robbery given insufficient evidence of the "deadly weapon" element of the crime. Defendant had threatened the victim with a fake gun and did not use it as a bludgeon at the time of the offense. "[T]he facts recited by the State at the plea hearing do not support the 'deadly weapon' element required for aggravated robbery." Defendant's plea was rendered less than knowing, intelligent, and voluntary as a result of trial counsel's failure to recognize that the "deadly weapon" element of aggravated robbery was not satisfied, and in advising defendant to plead guilty despite this deficiency. As for prejudice, the record showed that the guilty plea had not been the result of an underlying agreement with the prosecution, thereby refuting any speculation that defendant knowingly pleaded guilty to a crime despite the lack of proof of an element in return for some benefit such as the dismissal of additional charges. Thus, there was a reasonable likelihood that defendant would not have entered his guilty plea to aggravated robbery had he understood from counsel that a fake gun (used in the manner that he used it) would not satisfy the deadly weapon element of aggravated robbery.

***Bowman v. State*, ___ S.W.3d ___, 2017 WL 1449232 (Tenn. Ct. Crim. App. April 24, 2017).** Trial counsel performed deficiently in advising defendant to plead guilty to employing a firearm during the commission of a dangerous felony when he had previously been convicted of a felony. Under state law, the prior conviction was required to have been for a dangerous felony and defendant's prior convictions were not considered dangerous felonies. Defendant was prejudiced because there was a reasonable probability the charge would have been dismissed had trial counsel challenged it or a jury would have acquitted defendant on that charge.

***Ex Parte Lewis*, 537 S.W.3d 917 (Tex. Crim. App. 2017).** Petitioner pleaded guilty to obtaining a controlled substance through the use of a fraudulent prescription form under state law. Petitioner's attorney did not advise him prior to the plea that the prosecution would be unable to prove the offense as alleged, because the state was required to prove that the prescription form itself was fraudulent, and not merely that it was forged. The Court of Criminal Appeals of Texas held, following an evidentiary hearing in the habeas court, that the plea was invalid due to the ineffective assistance of his counsel. Under *Strickland*, an attorney is required to be familiar with applicable law and to keep abreast of legal developments. The habeas court found petitioner credible when he said that when he entered his plea he was unaware that the state was required to prove he had used a fraudulent prescription form, and that the form the state alleged he used was not fraudulent. This conclusion is inconsistent with trial counsel's affidavit stating that although she was not aware of case law holding that the statute required proof of a fraudulent form, she independently warned petitioner that if he went to trial the state might recognize its mistake in the indictment and seek to correct with. Petitioner did not receive advice that fell within the wide range of reasonable professional assistance under *Strickland* because he was not told that well-settled caselaw precluded his conviction as to the charge as alleged. Under *Hill v. Lockhart*, 474

U.S. 52 (2015), in order to show prejudice, petitioner needed only to show that there was a reasonable probability that absent the deficient performance, he would not have pleaded guilty. This he did.

**2016:** ***People v. Armstrong*, 50 N.E.2d 745 (Ill. Ct. App. 2016).** Counsel ineffective in failure to register as a sex offender case for advising the defendant to plead guilty without adequately researching or investigating the issue first. The defendant's obligation to register was allegedly triggered by his 1997 conviction of unlawful restraint. As unlawful restraint was not inherently a sex offense, he was required to register as a sex offender only if the victim was under 18 years-of-age. Thus, counsel's conduct was deficient in failing to examine the record of the 1997 case. The record revealed that the complaint, nor testimony in the preliminary hearing, nor the facts as agreed upon in the defendant's plea agreement mentioned the victim's name. Likewise, neither the judge nor the written judgment mentioned the victim's age or a requirement that the defendant register as a sex offender. Thus, the defendant was not required to register as a sex offender based on the 1997 conviction. Prejudice established because the defendant would not have entered a guilty plea to failure to register as a sex offender if counsel had investigated and adequately advised him.

***State v. Schlemmer*, 58 N.E.3d 573 (Ohio Ct. App. 2016).** Counsel ineffective in plea to sex offense with sexually violent predator (SVP) specification case for advising the defendant to plead guilty to the SVP specification without adequately researching the issue. The defendant was charged with five counts of gross sexual imposition with the SVP specification and, on the advice of counsel pled guilty to one count with the SVP specification, which required a mandatory two years to life imprisonment sentence, and the state dismissed the other four counts. Counsel's conduct was deficient because gross sexual imposition did not constitute a "violent sex offense" that allowed for the SVP specification. Prejudice was clear as the maximum punishment for gross sexual imposition was 18 months. Thus, even if the defendant had pled guilty to all five counts and the sentences were made consecutive, the sentence would have been much less than the two years to life imprisonment mandatory sentence the SVP specification required. While the defendant asked the court to vacate just the SVP specification, the court held that since it was part of a plea deal the whole deal was vacated. Thus, a new trial was ordered.

***State v. Diaz-Bonilla*, 495 S.W.3d 45 (Tex. Ct. App. 2016).** Counsel ineffective in failing to adequately the defendant of possible defenses prior to the defendant's guilty plea to engaging in organized criminal activity. In order to be guilty of that offense, was required to show that the defendant be a member of a criminal street gang, who conspired to commit the offense, and performed an "overt act" in pursuit of the agreement. Here, the defendant was a member of the MS-13 street gang. He was present when the gang leader ordered that the victim be murdered. He rode in the backseat of the leader's car to the crime scene but only watched the murder without participating. He then rode away still in the backseat of the car until he was dropped off at home. Counsel was ineffective in failing to advise the defendant of this possible defense or the possibility of challenging the sufficiency of the evidence on appeal if convicted. The state conceded prejudice.

**2015:** ***Commonwealth v. Tigue*, 459 S.W.3d 372 (Ky. 2015).** Prejudice was presumed in murder case from counsel's complete failure to advocate for the defendant in his request to withdraw his guilty plea

in murder case. Just as it is the defendant's decision to enter a plea, counsel must abide by a defendant's decision to seek to withdraw a plea. Counsel also had an actual conflict of interest because the primary argument for withdrawing the guilty plea was that the defendant was forced to enter a plea due to counsel's refusal to prepare a defense for him. And, here, counsel did not just remain silent but responded to the court's questions in a way that "weighed against and undermined" the defendant's arguments. While the remedy for this error would be simply to remand for a determination on the motion to withdraw the plea with the defendant represented by adequate counsel, the court's review did not stop there as the defendant had also asserted ineffective assistance. Counsel was ineffective for failing to adequately investigate the possibility of an alternative perpetrator before advising the defendant to plead guilty in order to avoid a possible death sentence. The case involved the murder of a woman in her home with a shotgun, along with the theft of her purse, several drug prescriptions, a shotgun, and a canvas bag. The defendant was arrested based on a neighbor's testimony that his truck had been seen in the victim's driveway. The victim's drug prescriptions and canvas bag were found in his truck. While the defendant initially denied guilt, he later said that he had obtained the prescriptions and bag from his neighbor, Danny Smith, who offered him part of the drugs in order to get rid of the bag. After detectives left in search of Smith, the defendant asked to speak again and confessed to the crimes, along with taking detectives to the location of the hidden murder weapon, as well as other evidence. Thereafter, the defendant maintained his innocence. He told defense counsel he knew who the killer was, but would not name the killer. Later, he told defense counsel that he had entered the victim's home and committed theft only after Smith had killed her. He claimed to have withdrawn his statement that Smith was the killer due to fear that Smith would retaliate against his family. "Leaning heavily on the confession, Tigue's counsel was quite candid and unambiguous about the fact that their entire pretrial strategy had been geared solely toward brokering a plea deal with the Commonwealth to avoid the possibility of a death sentence." The defendant refused to consider entering a plea for ten months, but ultimately "capitulated to the pleas of family members and his defense team" and entered a plea in exchange for a life sentence with no parole eligibility for 25 years. Shortly afterwards, however, he sought to withdraw his plea. His defense counsel ignored his requests and filed no written motion on his behalf. Prior to sentencing, the defendant argued on his own behalf, but the trial court declined to address the arguments because no motion had been filed by defense counsel. Counsel's conduct was deficient in failing to investigate the possibility that Smith was the actual perpetrator. While the defendant never named Smith to his counsel, he had provided this information to the police which counsel could easily have discovered with even cursory investigation. If counsel had investigated, they would have discovered that another of the victim's neighbors heard the gunshot and saw Smith in the victim's driveway two hours before a different neighbor saw the defendant's truck at the victim's house. Counsel's conduct was also deficient in advising the plea prior to lab testing of clothing fibers found in the broken kitchen door of the victim's home where entry was forced. Police believed these fibers came from the defendant's shirt, but the actual testing revealed that his shirt was not the source of the fibers. Other evidence, such as hair evidence, proved to be inconclusive as to the defendant. One counsel conceded that no trial preparations had been conducted other than talking to the defendant and his mother. The other recalled investigating, including interviewing the neighbor who saw Smith, but her testimony was contradicted by answers she provided on "a form filled out in conjunction with the Kentucky DPA Capital Litigation Persuasion Institute's training workshop she attended in October 2003 in preparation for Tigue's

trial." Her answers indicated disdain for the client, even going so far as to state, "I hate my client." Also clear from her answers was "her steadfast refusal to acknowledge his claims of innocence or possible weaknesses in the Commonwealth's evidence that might in fact have supported such claims."

> The clear implication of [her] responses and non-responses is that she had no intention of making any significant investigation or preparation for the guilt phase of the trial.

She listed a motion to suppress the confession as the most important trial issue, but counsel filed a suppression motion only "as a token concession" to the defendant's insistence and then withdrew it without argument only two weeks later.

> We can think of few examples better encapsulating deficient pre-trial performance than determining that an issue is the most important one in a case, and then totally failing to pursue it.
>
> In sum, defense counsel was prepared only to concede guilt and pursue their sole goal of avoiding a death sentence. And although brokering a plea deal to avoid a possible death sentence is certainly a reasonable strategy for a capital defense lawyer, it is unreasonable to do so while disregarding counsel's duty to investigate and prepare for trial. . . . And Tigue's counsel's outright refusal to consider pursuing any strategic goal other than avoidance of a possible death sentence through pleading guilty ran afoul of their "duty to consult with the client regarding 'important decisions,' including questions of overarching defense strategy." *Florida v. Nixon*, 543 U.S. 175, 187, 125 S. Ct. 551, 160 L.E.2d 565 (2004). . . .

*Id*. at ___(citations omitted). Counsel's conduct was deficient in "dismiss[ing] out of hand his claim of innocence without making any effort to investigate the legitimacy of that claim." "We cannot allow the presumption of innocence enjoyed by all accused to be so unceremoniously tossed aside by the very individuals tasked with zealously defending that presumption." Prejudice established as the defendant would not have pled guilty if counsel had performed competently.

**2014:** ***Soucy v. State*, 22 N.E.3d 683 (Ind. Ct. App. 2014).** Counsel was ineffective in intimidation plea case for advising the defendant to plead guilty when the evidence was insufficient to establish the communication of threats such as to influence a witness's conduct or place her in fear of retaliation. In order to be guilty under the intimidation statute, "communication such as to influence conduct or place a person in fear of retaliation is required," although communication need not be direct to the intended victim. The state's case was based on telephone calls the defendant made to his mother. During these calls, in referring to a witness that had provided information to the police resulting in the defendant's arrest for probation violation, the defendant insisted that his mother contact the witness and relay threats. The defendant's mother refused, however, and the record was completely devoid of any evidence that the witness was aware of the threats. Counsel's conduct was deficient in advising a plea in these circumstances and prejudice was clear in that there was a reasonable probability that the defendant would have prevailed if he had proceeded to trial.

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**2013:** ***Privette v. State*, 108 So. 3d 1155 (Fla. Dist. Ct. App. 2013).** Counsel ineffective in simple robbery case for providing misadvice to the defendant, resulting in a guilty plea. In order to induce a guilty plea, the prosecution threatened to amend the charge to armed robbery if the defendant did not enter a guilty plea to simple robbery. Counsel's conduct was deficient in advising the defendant to enter the plea because "[s]uch an amendment would not have been justified under the facts of this case." Prejudice was established in that the defendant would not have pled guilty otherwise.

***Bodie v. State*, 143 So. 3d 420 (Fla. Dist. Ct. App. 2013).** Counsel ineffective in advising the defendant to plead "no contest" to an offense for which there was no factual basis established at the plea hearing. The defendant was arrested for trafficking methamphetamine, which required proof that he possessed at least 14 grams, but the State mistakenly tracked the language of a different statute in the charges, which required possession of only 10 grams of other substances, including phenethylamines. The judgment of the court indicated that the defendant had pleaded guilty to trafficking in phenethylamines. Counsel's conduct was deficient and prejudicial.

***Shorter v. State*, 113 So. 3d 940 (Fla. Dist. Ct. App. 2013).** Counsel ineffective in violation of conditional release case for affirmatively misadvising the defendant that the trial court had no jurisdiction to order that the sentence run concurrently with the defendant's prior sentence for sale of cocaine. Thus, the defendant was entitled to withdraw his "no contest" plea to the sale of cocaine charge.

**2012:** ***State v. Moser*, 822 N.W.2d 424 (Neb. Ct. App. 2012).** Counsel ineffective in drug manufacturing case for failing to advise the defendant of the possibility of suppressing evidence seized following a traffic stop which resulted in the defendant pleading guilty to the charge. The officer testified that he stopped the defendant's vehicle because of a damaged windshield, even though he had never stopped a vehicle on this basis before and he did not ticket the defendant for this offense. Following the traffic stop, the defendant was arrested for driving under suspension. An inventory of the vehicle revealed incriminating evidence. An officer recognized the defendant's name as someone who had been purchasing unusual amounts of pseudoephedrine. The defendant confessed to manufacturing methamphetamine. A search of his home revealed 374 grams of the drug and other incriminating evidence. Counsel's conduct was deficient in failing to adequately advise the defendant that having a damaged windshield is "not necessarily indicative of a traffic violation" under state law. Prejudice established as there is a reasonable probability the defendant would not have entered a guilty plea had he been advised of the possible defense hat probable cause was lacking for the traffic stop.

**2011:** ***People v. Edmonson*, 946 N.E.2d 997 (Ill. Ct. App. 2011).** Counsel ineffective in burglary and stolen vehicle for misinforming the defendant prior to his negotiated plea for a 20-year-sentence cap that he would be able to challenge his sentence on appeal. The defendant faced a sentencing range of 12 to 60 years. The state recommended a 20 year sentence and the court imposed a 15 year sentence. The defendant sought to appeal this sentence. While the court and prosecutor also did not recognize it, state law was clear that the defendant could not challenge a negotiated sentence as excessive on appeal. Prejudice found, as the defendant would not have pled guilty had he been adequately advised.

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***Harley v. State*, 952 N.E.2d 301 (Ind. Ct. App. 2011).** Counsel ineffective in non-support of child case for failing to inform the defendant and court prior to entry of guilty plea that the defendant's sole income was from SSI. SSI is a federal social welfare program and is specifically excluded from a parent's income for the purpose of computing child support under state law. Thus, the defendant had a defense that he was unable to pay child support.

***State v. Utter*, 803 N.W.2d 647 (Iowa 2011).** Counsel ineffective in supplying alcohol to person under the legal age for failing to move to dismiss the charge and permitting the defendant to plead guilty after the speedy indictment term expired. Under state law, the state had 45 days after arrest to indict the case, absent good cause shown for delay or waiver by the defendant. A citation in lieu of arrest is deemed an arrest for purposes of speedy indictment. The state did not indict the defendant until 18 days after the 45 day period expired and the charge should have been dismissed and the state made no claim of good cause. Counsel's conduct was deficient because "a competent practitioner must be aware of and vigilantly protect his or her client's speedy trial rights." Prejudice was clear as the defendant was entitled to dismissal of the charge with prejudice and a bar to reindictment.

**2010:** ***Garcia v. State*, 237 P.3d 716 (N.M. 2010).** Counsel ineffective for erroneously advising the 18-year-old defendant prior to his plea to intentional child abuse resulting in death that he could be convicted even if the child's death was "an accident." In essence, counsel advised the defendant that both negligent and intentional child abuse resulting in death were punishable by 30 years. While counsel's advice was correct based on the law prior to 2005, it was not correct at the time of trial, which was almost two years after the statutes had been amended. Under correct law, when intentional child abuse is charged, there is no lesser included offense. Thus, if the defendant acted only negligently, he must be acquitted. The defendant was charged here with only intentional child abuse. Nonetheless, counsel even informed the court at the time of the plea that the defendant had been advised that even negligent abuse and "an accident" was sufficient to establish guilt. Counsel's advice about sentencing was also incorrect as negligent abuse was punishable only up to 24 years, while intentional was punishable up to life with a mandatory minimum of 30. Counsel's conduct was deficient. Prejudice established as a conviction of intentional child abuse resulting in death "was by no means a foregone conclusion." Thus, there was a reasonable probability that the defendant would have proceeded to trial if he had been adequately advised. Alternatively, with adequate advice, the defendant may have sought a more favorable plea arrangement. Regardless, the defendant's plea was not knowing or voluntary.

***Kolle v. State*, 690 S.E.2d 73 (S.C. 2010).** Counsel ineffective in drug trafficking plea case for advising the defendant to plead guilty without sufficiently investigating and arguing the motion to suppress evidence seized from an apartment in which the defendant was an invited guest. Police officers testified that they received a call about loud music from the apartment. When an officer arrived, he heard music and observed fresh "forced entry marks" on the door, but no one responding to knocking. Believing there were exigent circumstances, officers entered and observed powder cocaine and materials used for processing and manufacturing cocaine in plain sight. The officers seized the powder cocaine and obtained a search warrant, which yielded a find of 63 grams of cocaine in the apartment. Counsel moved to suppress the evidence, but the motion was denied, due

to the court's finding of exigent circumstances followed by plain view. The defendant pled guilty the same day. Counsel's conduct was deficient during the motion hearing, because counsel had failed to obtain discovery and, therefore, failed to question the officers about time discrepancies, such as the warrant being issued and executed even before the initial "loud music complaint." Likewise, counsel failed to point out that the arrest and search warrant affidavits and incident reports referred to crack cocaine rather than powder and made no reference to "fresh damage" or "forced entry." If counsel had adequately performed, there is a reasonable probability that the court would have granted the suppression motion. Even if the trial court had ruled erroneously, counsel could have advised the defendant to proceed to trial and then challenge the denial of the suppression motion on direct appeal.

**2009:** ***Berry v. State*, 675 S.E.2d 425 (S.C. 2009).** Counsel ineffective in drug case in failing to inform the defendant who pled guilty to a drug charge of a potential challenge to the use of his prior conviction for possession of drug paraphernalia for sentencing enhancement purposes. Counsel's conduct was deficient because a conviction for possession of drug paraphernalia may not be used for enhancement purposes as it does not "relate to" drugs as statutorily mandated. Nonetheless, counsel did not challenge the State's reliance on the paraphernalia conviction for enhancement purposes or inform the defendant of the potential challenge. Indeed "counsel never gave any thought to the issue." While the validity of the legal challenge may have been "unclear" at the time of the plea, "uncertainty concerning a potential legal challenge may well provide a defendant a catalyst in plea negotiations with the State." Counsel's conduct was deficient because "[s]imply saying 'I never gave it a thought' falls short of the Sixth Amendment guarantee of effective assistance of counsel." Prejudice established because the defendant testified in PCR that he would have gone to trial if he had known that his paraphernalia conviction did not qualify as a prior offense for enhancement purposes.

***Ex parte Imoudu*, 284 S.W.3d 866 (Tex. Crim. App. 2009).** Counsel ineffective in plea to murder case for failing to investigate the possibility of an insanity defense prior to advising the defendant to plead guilty. Six months prior to the crimes, the defendant had been in jail for a month for misdemeanor theft. During that time, he was prescribed an antipsychotic medication. The murder consisted of the defendant stealing a car and driving into oncoming traffic (causing a death) in the ensuing chase. In confinement, his family and a social worker at the jail immediately noted mental health problems. Both attempted to contact court-appointed counsel without success and the family retained private counsel, based on the advice of the social worker. Both retained counsel observed that the defendant seemed "incoherent" and there was "something wrong" with him and asked for a competence evaluation. A month after the defendant was found competent by court-appointed examiners, he plead guilty. Despite counsel's knowledge of the defendant's problems, counsel did not review the jail records, including those following arrest in this case that reflected numerous referrals for mental health services and evaluation, a determination of "mental illness," antipsychotic medications, and housing in an area used to house the mentally ill inmates. Counsel also never spoke to any jail personnel, did not request an insanity evaluation, did not hire a psychiatrist to evaluate the defendant, and did not advise the defendant of the insanity defense. Counsel's conduct was deficient. Prejudice established because "there is a reasonable probability that if his attorneys

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had informed him of the possibility of pursuing an insanity defense, he would not have pled guilty and would have gone to trial."

**2008:** ***Stewart v. State*, 987 So. 2d 729 (Fla. Dist. Ct. App. 2008).** Counsel ineffective in failing to advise the defendant of a statute of limitations defense prior to entry of plea. The defendant had five charges relating to non-dwelling burglaries, felony theft, and auto thefts and pled guilty as charged in exchange for a five year sentence for burglary and probation on all other charges. The statute of limitations had already passed on all of the charges except the felony theft by the time of the plea regardless of the prior placement of detainers on the defendant, who was already serving a prison sentence when the charges arose.

***Knight v. State*, 983 So. 2d 348 (Miss. Ct. App. 2008).** Counsel ineffective in manslaughter and carrying concealed weapon case for allowing the defendant to plead guilty to carrying a concealed weapon, which resulted in a sentence to five years of confinement. The defendant had a pistol in a motor vehicle only, which is not illegal under Mississippi law.

**2006:** ***State v. Hunter*, 143 P.3d 168 (N.M. 2006).** Counsel ineffective in custodial interference case for failing to adequately advise the defendant prior to his no contest plea. Custody of the defendant's children had been granted to him in Missouri in 1992. He moved to New Mexico in 1994. His ex-wife, who had lived in Texas since prior to 1992, sought a change in custody in Missouri in 1997. Because the defendant objected to jurisdiction in Missouri and did not appear, the Missouri court granted custody to the ex-wife. She did not attempt enforcement through the New Mexico courts, but sought the help of the local police in taking physical custody. They declined. In 2001, she again sought the help of the local police and the defendant was charged with custodial interference. He plead no contest because counsel advised him incorrectly that he had no viable argument for a motion to dismiss due to the Missouri court's lack of jurisdiction and counsel's failure to discuss a conditional plea with the defendant that would have preserved that issue for appeal. This was deficient conduct because it was clear under Missouri law that the court lacked proper jurisdiction with neither of the parties or the children living outside that state for years. This would have been a viable basis for the motion to dismiss because the criminal custodial interference statute applies only to custody orders issued by a court of competent jurisdiction. The defendant was prejudiced because he would likely have refused the no contest plea and accepted a conditional plea if counsel had performed adequately.

**2005:** ***Julien v. State*, 917 So. 2d 213 (Fla. Dist. Ct. App. 2005).** Counsel ineffective in grand theft plea case for failing to inform the defendant of his option to apply for the pretrial intervention (PTI) program. The defendant was a first-time offender charged with shoplifting a pair of shoes. He pled guilty and was given probation, but then the government commenced removal proceedings to rescind his permanent residence status and remove him to Haiti. Counsel's conduct was deficient because the state rules of criminal procedure required counsel to advise the defendant of "any possible alternatives that may be open to the defendant" and the defendant was eligible for PTI, which would have resulted in dismissal of the charges if the program was successfully completed. Prejudice found because, if he had been adequately advised, the defendant would not have pled guilty but would have applied for the PTI program instead.

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***Petty v. Smith*, 612 S.E.2d 276 (Ga. 2005).** Counsel ineffective in felony murder and aggravated assault case for inadequate advice to the defendant that resulted in a guilty plea. The defendant was charged with (1) malice murder; (2) felony murder; and (3) aggravated assault. All three indictments were based on the defendant shooting the victim with a shotgun after a codefendant beat him. Counsel believed, however, that the assault charge was based on the codefendant beating the victim. Counsel believed that, if convicted, the defendant would be sentenced to life and 20 years consecutively. Based on counsel's advice, the defendant plead guilty to felony murder and aggravated assault and received life and a concurrent 20 year sentence. Counsel's conduct was deficient because the indictment clearly revealed that the alleged assault was shooting the victim. Thus, the aggravated assault count merged into the murder count and the accused could not be separately convicted of this offense. Counsel's conduct was deficient because "[a]ny reasonably competent attorney" would have realized this fact and that the defendant did not benefit from the plea agreement. The defendant was prejudiced because he would not have plead guilty and would not have received a harsher sentence than could legally be imposed on him if had been gone to trial and been convicted on all counts.

***Stevens v. State*, 617 S.E.2d 366 (S.C. 2005).** Counsel ineffective in plea to receiving stolen goods case where the defendant was charged and pled to eighteen counts. If counsel had adequately investigated and researched the issue, counsel could have challenged the number of indictments because, under the "plain meaning of the statute," the receipt of multiple items in a single transaction or event constitutes a single offence. Prejudice found because the defendant likely would not have pled guilty to 18 counts and may well have received a lighter sentence if the court had 4 or 5 counts before it rather than 18.

***Ex parte Briggs*, 187 S.W.3d 458 (Tex. Crim. App. 2005).** Counsel ineffective in felony injury to child case for failing to adequately investigate prior to the seventeen- year- old defendant's guilty plea. The defendant was charged in the death of her two- month old son, who had been very sick from the time of his birth. The defendant took his to doctors and hospitals five different times in two months. Ultimately on the day of his death, the defendant called 911 and attempted mouth-to-mouth when she found him blue and limp. The admitting diagnosis at the hospital was hypoxia (lack of oxygen to the brain). Emergency room personnel tried to intubate and placed the tube in the baby's esophagus instead of his trachea, which was not discovered for 30 minutes. By the time it was discovered, the baby was brain dead. He died seven days later. The original autopsy report concluded that the death was a homicide. After the defendant was charged, she retained counsel, but could only pay $10,400 of the $15,000 fee. He threatened to withdraw and stated that he could not retain experts without an additional $2500-$7500 for experts. He did not withdraw, did not obtain experts or adequately investigate, and advised the defendant to plead guilty. Counsel was aware of the child's medical history. His conduct was deficient in failing to consult with experts and "[t]his was not a 'strategic' decision, it was an economic one."

> Counsel is most assuredly not required to pay expert witness fees or the costs of investigation out of his own pocket, but a reasonably competent attorney–regardless of whether he is retained or appointed–must seek to advance his client's best defense in a reasonably competent manner.

Here, counsel had several options that could have been pursued: (1) subpoena the doctors that had previously treated the child and offer their records and opinions into evidence; (2) counsel could have withdrawn and requested appointment of counsel for the indigent defendant; or (3) remained as counsel, but requested investigatory and expert witness fees from the trial court due to the defendant's indigency. "If any reasonable attorney appointed to represent an indigent defendant would be expected to investigate and request expert assistance to determine a deceased infant's cause of death, a privately retained attorney should be held no lower standard." If counsel had adequately investigated, substantial testimony from a number of doctors would have revealed that there was no medical evidence of child abuse and that the child died from an undiagnosed birth defect, which led to a urinary infection, sepsis and severe pneumonia, which was made worse by the faulty intubation which led to brain death. Prejudice found because, absent counsel's deficient conduct, there is a reasonable probability that the defendant would not have pled guilty.

**2004:** ***Gerisch v. Meadows*, 604 S.E.2d 462 (Ga. 2004).** Counsel was ineffective in aggravated battery case for failing to recognize and adequately advise the defendant concerning a valid double jeopardy claim prior the defendant's guilty plea on the charge. The defendant was involved in a fight. He was initially charged in municipal court and plead guilty to disorderly conduct by fighting and public drunk. He was sentenced to probation. He was subsequently indicted for aggravated battery, arising from the same fight, and additional charges. The defendant accepted the prosecution's plea agreement to plead guilty in exchange for a sentence of 20 years (10 in prison and 10 on probation) for aggravated battery and concurrent sentences for the remaining offenses. On the day of the plea, the defendant, who was functionally illiterate, told counsel that he had been convicted in municipal court and asked why he was charged with the same offenses. Counsel discussed the issue with the prosecutor, who asserted that a double jeopardy claim would have no merit. Counsel also verified the city court convictions, but assumed there was no double jeopardy because the prior prosecution was under a municipal ordinance rather than state law. Counsel thus advised the defendant that a double jeopardy claim would be fruitless and would cause the state to withdraw the plea recommendation and to seek greater punishment. Counsel's conduct was deficient because counsel did not adequately research or evaluate the issue and instead relied on the advice of the prosecutor and her own misunderstanding of the law when the defendant did have a viable double jeopardy claim. Prejudice was found because, but for counsel's error, the defendant would not have pled guilty to the charge of aggravated battery.

***Heath v. State*, 601 S.E.2d 758 (Ga. Ct. App. 2004).** Counsel ineffective in injury by vehicle case for wholly failing to prepare or investigate prior to advising the defendant to plead guilty. The defendant had no memory of the collision, but he and his niece advised counsel that a co-worker may have been driving. Counsel did not investigate, conduct any research, or even consult with the defendant in person during the 13 months between arraignment and plea. Prejudice found because the defendant would not have plead guilty if counsel had performed adequately.

***Heyward v. Humphrey*, 592 S.E.2d 660 (Ga. 2004).** Counsel was ineffective in aggravated assault case for failing to adequately investigate prior to advising the defendant to plead guilty and failing to advise the defendant to withdraw from the plea agreement once it became apparent in the plea hearing that the state's case was unraveling. The defendant was charged with shooting a lounge owner. The state's case depended on the victim and four eyewitnesses. At the plea hearing, the

prosecutor disclosed that one of these witnesses had given a written statement asserting that the alleged victim drew his weapon on the defendant before the defendant fired. The state also disclosed that one of the witness' could not be located even though he had a probation violation charge pending. Another witness was reluctant to testify and failed to appear the last time the case had been scheduled. Another witness had recanted her initial version of events. Even the alleged victim was reluctant to testify. Despite this information, counsel did not advise the defendant to withdraw from the plea agreement. Counsel's conduct was deficient in failing to investigate and to pursue the defense of justification prior to the plea hearing. Even during the hearing, counsel did not attempt to subpoena the witness that had stated the victim pulled his weapon first. There could be no valid strategy for counsel's action because counsel's action "was based on a lack of vital information." Counsel's conduct was also deficient in failing to reassess the plea agreement and advise the client to withdraw from the agreement when it was apparent that the state would have grave difficulties if the defendant went to trial. Prejudice found because, if counsel had adequately investigated and adequately advised the defendant, the defendant would have insisted on going to trial.

***State v. Henderson*, 93 P.3d 1231 (Mont. 2004).** Counsel ineffective in drug case for failing to adequately consult with client, investigate, or conduct any research prior to advising defendant to plead guilty. Counsel "did nothing more than request a plea agreement and facilitate the conviction of his client without a trial." Prejudice found because there was at least a colorable argument and the defendant maintained his innocence in Alford plea. Had counsel performed adequately, the defendant would not have entered a guilty plea.

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## B. ERRONEOUS ADVICE (OR FAILURE TO ADVISE) ON SENTENCING OR COLLATERAL CONSEQUENCES THAT LEADS TO PLEA

### 1. U.S. Court of Appeals Cases

**2015:** ***United States v. Rodriguez-Vega*, 797 F.3d 781 (9th Cir. 2015).** Trial counsel ineffective in plea to misdemeanor attempted transportation of aliens case for failing to inform the defendant of the virtual certainty of her deportation following the plea. The defendant, who was born in Mexico, came to the United States with her family in 2001 when she was 12 years old. She became a lawful resident in 2002. She was charged in 2012 and initially rejected a plea agreement requiring her to stipulate to deportation following her criminal sentence. The revised plea agreement that she accepted included a general statement that "pleading guilty may have consequences with respect to her immigration status," including the possibility of "automatic removal." Counsel's conduct was deficient in failing to adequately advise the defendant. Counsel recognized and stated in sentencing that the misdemeanor plea would "probably" be considered an aggravated felony under immigration law and, therefore, there was "a high likelihood" of deportation. Nonetheless, counsel failed to investigate or research further, which would have revealed that deportation was a virtual certainty. The general provisions in the plea agreement and the trial court's general warnings during the plea hearing were "simply irrelevant to the question whether counsel's performance fell below an objective standard of reasonableness." Prejudice was also established. If counsel had adequately advised the defendant, she could have negotiated a plea agreement not requiring removal, as four similarly situated defendants in the same district (S.D. Cal.) had been allowed to do. Even without a plea agreement, it was clear that the defendant would not have entered a guilty plea if she had been adequately advised. This was clear from her rejection of the initial plea offer.

***United States v. Bui*, 795 F.3d 363 (3rd Cir. 2015).** Counsel ineffective in guilty plea to manufacturing or distributing drugs in proximity to a school or college due to counsel's erroneous advice on the statutory minimum. The defendant was charged with (1) conspiracy, (2) manufacturing more than 100 marijuana plants, (3) using the house he purchased near the school to manufacture and distribute; and (4) manufacturing and distributing in proximity to the school. The defendant pled guilty to counts one and four as part of a plea agreement in which the other charges were dismissed. Counsel's conduct was deficient because he advised the defendant that he would receive a reduced sentence if he pled guilty pursuant to the "safety valve" provision. Consistent with these statements, counsel filed a motion prior to sentencing seeking a sentence reduction. At sentencing, however, counsel withdrew the motion because he realized Third Circuit precedent made convictions for manufacturing or distributing in proximity to a school ineligible for a safety valve reduction. The defendant received the mandatory minimum sentence. Counsel's conduct was deficient. "Counsel's lack of familiarity with an eighteen-year-old precedent and his erroneous advice based on that lack of familiarity demonstrate counsel's performance fell below prevailing professional norms." The court's plea colloquy did not cure the err. Instead, the court's statements "reinforce[d]" counsel's incorrect advice by indicating the court had discretion to vary from the mandatory minimum without ever advising the defendant that he was ineligible for the safety valve reduction. Prejudice also established as the defendant would not have pled guilty if he had been accurately advised. Indeed, without a safety valve reduction, he "gained no benefit from his plea

agreement," as the dismissed charges were lesser-included offenses, "the elimination of which did not impact Bui's sentencing exposure."

**2012:** ***United States v. Akinsade*, 686 F.3d 248 (4th Cir. 2012).** Counsel ineffective in embezzlement by bank employee case for misadvising the defendant concerning immigration consequences of his guilty plea. The defendant was a Nigerian citizen who legally entered the U.S. in July 1988 at the age of 7. At age 19, he worked for the bank and embezzled funds. He self-reported his crimes and agreed to cooperate and provide evidence against others involved. Counsel's conduct was deficient. The defendant asked on at least two different occasions if there would be deportation consequences to a guilty plea. Both times counsel informed the defendant that he could only be deported if convicted of two felony convictions, which was incorrect as deportation was mandatory for the plea to fraud which caused a loss of over $10,000. Thus, one conviction in this case as a result of a guilty plea would not require deportation. The plea agreement made no mention of possible deportation. The plea court advised the defendant that he "could be deported" based on the conviction. The defendant received the minimum sentence possible under the guidelines. Nine years later, after his three years supervised release was completed, he obtained college and Masters degrees and a high level job, the government instituted deportation proceedings. He brought a petition for writ of error coram nobis, which the Fourth Circuit found, in the circumstances of this case, to be an appropriate vehicle. Prejudice also established as the defendant would not have pleaded guilty if accurately advised. In addition, he was ordered to pay only $8,000 in restitution as he had a valid dispute about one check which placed him over the $10,000 amount. Thus, a choice to go to trial rather than enter a plea would have been "rational."

***United States v. Juarez*, 672 F.3d 381 (5th Cir. 2012).** Counsel ineffective in failing to research and investigate the facts and law concerning a derivative citizenship defense prior to advising the defendant to plead guilty to lying about his United States citizenship and illegal re-entry after deportation following conviction for an aggravated felony. Citizenship is a defense to both of these offenses. It is "plausible," however, that the defendant derived citizenship when his mother became a naturalized citizen in 1999, when he was 16 years old. Counsel was aware of the mother's citizenship, but never heard of "the derivative citizenship defense." The defense is applicable to the defendant: (1) if one parent is naturalized and the other is deceased; (2) the naturalization occurred when the defendant was under 18; and (3) the defendant began "to reside permanently" in the U.S. while under 18. Here, the only question was the latter as the defendant remained in the U.S. until he was deported in 2002 and even married a U.S. citizen prior to turning 18. The Fifth Circuit had not interpreted the provision before and declined to do so here because "[b]ased on the legal authority available at the time" of the guilty plea, "a derivative citizenship defense was plausible." Counsel "had a duty to independently research the law and investigate the facts." If counsel had performed adequately, "there is a reasonable probability that [the defendant] would have been dissuaded from pleading guilty."

**2011:** ***United States v. Bonilla*, 637 F.3d 980 (9th Cir. 2011).** Counsel ineffective in felon in possession of firearm case for failing to advise the defendant of immigration consequences of a plea. The 33-year-old Mexican-born defendant had been a lawful permanent resident for over 30 years and his wife and children were U.S. citizens. The defendant's wife often spoke for him "due to his mental

health condition." Prior to the plea she asked counsel about immigration consequences of a plea. Counsel told her he would look into it but never did until after the plea hearing. When the defendant's wife asked again, counsel informed her of the immigration consequences, which was that deportation was "presumptively mandatory." Counsel stated that, at the time of the plea, she believed the defendant was a U.S. citizen. This was not just a case of "inadequate legal advice." Here, the defendant "received no advice about immigration consequences of his plea." "A criminal defendant who faces almost certain deportation is entitled to know more than that it is possible that a guilty plea could lead to removal; he is entitled to know that it is a virtual certainty." It was reasonable for the defendant here "to have inferred that he likely would not be deported if he pled" from the fact that counsel did not say differently after having been asked the question by the defendant's wife.

**2010:** ***Tovar Mendoza v. Hatch*, 620 F.3d 1261 (10th Cir. 2010).** Counsel ineffective in kidnapping, criminal sexual penetration and aggravated battery case for making blatant and significant misrepresentations regarding the sentence the petitioner would receive if he entered a no contest plea. Counsel had only a brief phone call with the petitioner and then met with him briefly prior to three scheduled plea hearings. Counsel informed petitioner that he had a special relationship with the judge and that the judge had agreed to sentence the petitioner to only three years. The defendant signed a plea agreement, which was in English, at counsel's instruction. Petitioner, a native Spanish speaker, could not read the agreement and it was not translated for him. Petitioner entered no contest pleas and faced up to 30 years confinements. He answered the court's questions during the plea colloquy with counsel instructing him how to answer each question. He was sentenced to 25 years. The court did not apply AEDPA standards because the federal court had held an evidentiary hearing while the state court had decided the issue without a hearing despite petitioner's diligence in attempting to develop the factual basis for his claims in state court. Thus, the court reviewed the claims de novo and held that the no contest pleas were involuntary and therefore constitutionally invalid.

***Bauder v. Dept.of Corrections, State of Florida*, 619 F.3d 1272 (11th Cir. 2010).** Counsel ineffective in aggravated stalking of minor plea for affirmatively misinforming petitioner that his no contest plea would not expose him to subsequent sexually violent predator civil commitment proceedings. Counsel's conduct was deficient because the law was clear. Even assuming it was unclear, counsel did not inform petitioner that there was a possible risk of civil commitment, or that the law was unclear, or that counsel simply did not know. Rather counsel affirmatively advised petitioner incorrectly that his plea would not subject him to civil commitment exposure. Prejudice established because the evidence of guilt was not overwhelming, petitioner maintained his innocence throughout, and petitioner would not have entered a no contest plea if he had been correctly advised on the potential for civil commitment.

**2005:** ***United States v. Kwan*, 407 F.3d 1005 (9th Cir. 2005).** Counsel in bank fraud case ineffective for affirmatively misleading the defendant as to the immigration consequences of his conviction. Counsel advised the defendant that deportation was not a "serious possibility." After the plea but prior to sentencing, statutory amendments, however, resulted in the guilty plea "almost certainly" resulting in deportation. "[W]here, as here, counsel has not merely failed to inform, but has

effectively misled, his client about the immigration consequences of a conviction, counsel's performance is objectively unreasonable under contemporary standards for attorney competence."

> That counsel may have misled [the defendant] out of ignorance is no excuse. It is a basic rule of professional conduct that a lawyer must maintain competence by keeping abreast of changes in the law and its practice. See, e.g.,ABA Model Rules of Professional Conduct, Rule 1.1[6]. Although counsel was a criminal defense attorney and not an immigration attorney, counsel made an affirmative representation . . . that he had knowledge and experience regarding the immigration consequences of criminal convictions; as a result, counsel had a professional responsibility to inform himself and his client of significant changes in the law that drastically affected the immigration consequences of his client's plea. *See generally* ABA Model Rules of Professional Conduct, Rule 1.1. . . . If counsel did not have the requisite competence in immigration law, or if counsel did not plan on maintaining the requisite competence, he should not have advised [the defendant] regarding the immigration consequences of his plea without referring [him] to an immigration lawyer or consulting himself with an immigration lawyer in the first place. See id.

"Counsel's representations regarding the deportation consequences of [the] plea may not have been erroneous at the time he made them, but he failed to correct those representations when they became grossly misleading, and when counsel still had the opportunity, and responsibility, to do so." Prejudice established because, if counsel had adequately advised the defendant and the court of the deportation consequences if sentenced to confinement for more than one year (rather than five as before), "there is a reasonable probability that the court would have imposed a sentence of less than one year." Alternatively, there is a reasonable probability the defendant would have moved to withdraw his guilty plea and then gone to trial or renegotiated his plea agreement to avoid deportation.

**2003:** ***Moore v. Bryant*, 348 F.3d 238 (7th Cir. 2003) (*affirming* 237 F. Supp. 2d 955 (C.D. Ill. 2002)).** Counsel was ineffective in murder case for giving erroneous advice on sentencing to the defendant prior to entry of his guilty plea. The defendant was fifteen years old and charged as an adult with first degree murder. Although the defendant maintained his innocence, counsel recommended that the defendant enter a plea in order to receive a recommendation of a 20- year sentence, which was the minimum allowed. Counsel informed the defendant that if he plead guilty he would only be required to serve fifty percent of the 20-year sentence, but that if he went to trial he would be given a higher sentence and would be subject to the new state statute that would require that the defendant serve at least 85 percent of his sentence. Although the defendant was very reluctant he followed counsel's advice. Counsel's advice was wrong because the new statute did not become effective until after the defendant's trial and did not apply retroactively. Counsel's conduct was deficient because "[a] reasonably competent counsel will attempt to learn all of the facts of the case, make an estimate of a likely sentence, and communicate the results of that analysis before allowing his client to plead guilty." Here, counsel recognized that his understanding of the statute might be incorrect, but he did not review the statute or case law to research the issue. Prejudice was found because the defendant, while maintaining innocence throughout, plead guilty solely because of counsel's advice that he would only have to serve 10 years as opposed to 22 to 27 years if he went

to trial and was found guilty. The state court's decision was rejected under AEDPA for two reasons. First, the state court's reliance on the adequacy of the plea judge's colloquy was irrelevant to the underlying question of counsel's effectiveness and, thus, was an unreasonable application of *Strickland*. Second, the state court's finding that the record did not show that the defendant relied on counsel's bad advice contradicted the testimony of the defendant and his counsel and, thus, was an unreasonable application of the facts to the law.

### 2. U.S. District Court Cases

**2018:** ***United States v. Hernandez*, 283 F. Supp. 3d 144 (S.D. N.Y. 2018).** Writ of coram nobis is granted to petitioner based on trial counsel's ineffectiveness in failing to advise petitioner that her guilty plea to a charge of conspiracy to distribute cocaine rendered her removable from the country. Petitioner was a legal permanent resident (LPR) when she was charged with conspiracy to commit narcotics trafficking. She retained counsel and informed him that she would not plead guilty to any charge if the plea would cause her to lose her LPR status. After being assured that the guilty plea would not have immigration consequences, petitioner accepted the offered plea deal. She was sentenced to time served and three years of supervised release. Almost three years later, the Department of Homeland Security issued a Notice to Appear and said petitioner was removable as a consequence of her conviction. Retained counsel's ineffectiveness demonstrated circumstances compelling the issuance of the writ to achieve justice. Counsel failed entirely to inform petitioner of the immigration consequences of her guilty plea, and she did not receive information about those consequences from any other source. There were two immigration statutes that set forth the basis for petitioner's removability; at least one of those statutes clearly and definitely established the removal consequences for her underlying plea. Although counsel was dead at the time of the filing of petitioner's motion for a writ of coram nobis, it was appropriate to accept petitioner's testimony about her counsel's failure to inform her of the immigration consequences because the Board of Immigration Appeals had already found her counsel ineffective in a similar legal context. (Petitioner's retained counsel had represented her in the removal proceeding. After being ordered deported, petitioner retained new counsel who successfully moved to reopen the removal proceedings based on the ineffective representation of the prior attorney. At the time of this decision, petitioner's asylum application remained pending.) Petitioner also demonstrated a reasonable probability that she would have rejected the plea had she known it would lead to mandatory deportation. She had maintained LPR status in the U.S. since 1992, residing in the U.S. for 11 years prior to taking the plea and for 26 years total. She had four children residing in the U.S. By pleading guilty she certainly was exposed to mandatory deportation; by going to trial, even if she was likely to be convicted, she only *almost* certainly was exposed to deportation. *Lee v. United States*, 137 S. Ct. 1958, 1968-69 (2017). Petitioner also showed sound reasons for failing to seek a writ of coram nobis earlier – her ineffective counsel continued to represent her and continued to fail to render effective counsel throughout the immigration proceedings. Petitioner continues to suffer legal consequences from her conviction, and therefore has met all the requirements of a petition for writ of error coram nobis.

**2017:** ***Mendoza v. Cate*, 2017 WL 5466767 (E.D. Cal. Nov. 14, 2017).** Petitioner pleaded guilty in California state court to rape of an intoxicated person (charges of unlawful intercourse with a minor and resisting arrest were dismissed pursuant to the plea). He filed a habeas petition pursuant to 28

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U.S.C. § 2254, alleging that his trial counsel was ineffective (1) in the negotiation and entry of his guilty plea based on counsel's misrepresentation that the conviction would not be a "strike" under CA Three Strikes Law, and (2) in failing to investigate and challenge the validity of the prosecutor's DNA evidence (because the court granted relief on the first claim, it did not reach the merits of this second claim). By the time of the scheduled evidentiary hearing, trial counsel was dead, and habeas counsel was unable to obtain his file. Petitioner alleged that he would not have accepted the prosecutor's plea offer if he had known that the offense to which he was pleading guilty was a strike, because he already had one strike, and the record at the plea hearing supported this allegation, including that the prosecutor was willing to allow him to plead to a non-strike offense. Petitioner alleged that he would have gone to trial instead, because the evidence against him was weak; he did not match the description of the perpetrator given by the eyewitness, and even had there been his DNA in the sample taken from the victim, that could have been explained by his non-criminal contact with both the victim and the perpetrator. A lawyer representing petitioner in another case spoke with trial counsel, who told her he had no specific recollection of petitioner's case, but that he couldn't imagine he would have told petitioner the conviction was not a strike. The state court rejected this claim, finding deficient performance but no prejudice, determining that petitioner's declaration alone that he would not have taken the plea had he known that the conviction would be a strike was insufficient to show prejudice; there needed to be independent corroboration of this, and there was none in the record. The federal district court agreed with the state court that counsel's performance was deficient. "Constitutionally effective counsel must competently assess a defendant's sentencing exposure and disclose the exposure to the defendant." The federal court found that the state court decision regarding prejudice was contrary to clearly established federal law under 2254(d)(1) as well as based on an unreasonable determination of the facts under 2254(d)(2), because the record included ample support for petitioner's declaration (throughout the proceedings petitioner repeatedly demonstrated that he was unwilling to plead guilty to a strike offense, he had been offered other plea deals prior to this one that he refused to accept, he had already suffered a strike and understood the consequences of suffering another, and it was "at least arguable that petitioner had a reasonable chance of prevailing at trial."), and because the court rejected petitioner's allegations as incredible without holding an evidentiary hearing. The proper question is not whether petitioner would have been more successful had he gone to trial than taken the plea; the proper question, as stated in *Lee v. United States*, 137 S. Ct. 1958, 1965 (June 23, 2017), is whether there is an adequate showing that the defendant, properly advised, would have opted to go to trial. Here, there was.

***Tzen v. United States*, 2017 WL 4233077 (S.D. Ill. Sept. 22, 2017).** Petitioner, a citizen of the U.K., pled guilty in federal court after being charged with conspiracy to commit mail and wire fraud, and she was sentenced to 12 months and one day, 3 years supervised release, and ordered to pay restitution. She filed a motion under 28 U.S.C. § 2255 alleging that her counsel was ineffective for (1) failing to investigate the law and facts before advising her to plead guilty, since she never joined the conspiracy; (2) failing to inform her that the guilty plea would result in mandatory deportation; (3) misadvising her regarding her sentencing exposure; and (4) failing to investigate and object to the loss amount that exceeded that attributable to petitioner. The court focused only on the second claim that her counsel failed to inform petitioner that the guilty plea would result in mandatory deportation. Under *Lee v. United States*, 137 S. Ct. 1958 (2017),

petitioner is entitled to relief on this claim. The focus of her decision-making in whether to accept a plea was whether she would be deported; she consulted another lawyer at the time of trial to advise her on this issue. Both her lawyers consulted together on this issue, and the lawyer sent the prosecutor an email stating that petitioner is not to be deported. Although petitioner was advised she "may" be deported, she was not informed that she "would" be deported. The advice she was given "was confusing, conflicting, and wrong." She did not make a rational decision to plead guilty as a result of the IAC, and relief is granted.

***Jenkins v. Plumley*, 2017 WL 1091791 (N.D. West Virginia, March 23, 2017).** Resentencing counsel was ineffective for failing to adequately advise defendant as to the consequences of resentencing. Defendant was convicted of breaking and entering and sexual assault. The State requested that he be designated as a recidivist based on his two prior felony convictions, permitting the imposition of a life sentence. The jury determined defendant was a recidivist under the statute, and the State requested that he be sentenced to three separate life sentences to run consecutively. Instead, the trial judge announced his belief that the recidivist statute required him to sentence defendant to a single life sentence. The State then sought to withdraw the recidivist request, noting that defendant would be eligible for parole after fifteen years under a single life sentence, but not until after twenty-one years if he were sentenced individually on each charge. The trial court granted the motion to withdraw and sentenced defendant to individual, consecutive sentences as to each charge for a total sentence of twenty-one to sixty-five years. Defendant filed a *pro se* motion to correct his sentence and counsel was appointed to represent him. Counsel failed to advise defendant that he would be resentenced to a longer sentence than he originally received if he pursued resentencing. Defendant was resentenced as a recidivist to twenty-six years to life. Resentencing counsel was ineffective for failing to adequately advise defendant of the consequences of pursuing resentencing. Respondent argued that defendant suffered no prejudice because his original sentence was illegal and had to be corrected. However, "[h]ad [defendant's] counsel advised him that his total sentence could increase if his motion to correct his sentence were granted, he could have explored advocating for other sentencing options regarding which sentence should be enhanced and whether his sentences should run concurrently or consecutively." *Jenkins*, 2017 WL 1091791 at *3. Thus, defendant was prejudiced because he could have received a different sentence had competent counsel been provided.

**2013:** ***Ross v. Wolfe***, 942 F. Supp. 2d 573 (D. Md. 2013). Under AEDPA, counsel was ineffective in assault case "when he lied to his client in order to persuade him to accept a plea bargain." The defendant was charged with assaulting five people, "apparently while he was high on PCP." Counsel did not think the case was triable and he urged a guilty plea. The defendant, however, wanted to proceed to trial with a voluntary intoxication defense. Ultimately, counsel had the defendant to sign two "memoranda of understanding" that essentially indicated that the defendant was accepting "a proposed plea agreement" to plead guilty to four charges. Although the maximum sentence was 100 years, the memoranda informed the defendant that the "typical disposition" was a guideline range of 45-100 years but that there was "a binding recommendation" from the prosecutor to require drug treatment but then the defendant would be "safe to resume life in the community" in less than ten years of confinement. The defendant entered *Alford* pleas and was sentenced to 70 years. Counsel's conduct was deficient in that counsel "affirmatively misled" the defendant as there was no agreement with the prosecution to make a sentence recommendation. This "error" was compounded by counsel's "misleading advice" as to his own expectations of the likely sentence. This case thus

involved not just "gross information" from defense counsel of the likely sentence which "were unrealistic and bordered on fantasy," but also "the additional element of intentional misrepresentation by defense counsel as to the prosecutor's expectations." Prejudice was established as "[t]he evidence is unrefuted that [the defendant] would not have pleaded guilty if he had thought he would wind up with the lengthy prison sentence he received following his plea. And a choice to go to trial would have been rational" as the defendant was 55 years old at the time of his plea and "honestly could expect to breathe his last breath either way while in prison." "In short, he had nothing to lose by going to trial." The state court's conclusion that counsel was not ineffective "rested upon 'thin air'" in that the court made "no factual findings as to whether the material misadvice . . . 'was within the range of competence demanded of attorneys in criminal cases.'"

> Bluntly, defense counsel may not lie to his client to persuade him to do what counsel "knows" is in the client's best interest. And fair-minded jurists could not disagree about that standard of professional conduct. Moreover, the record evidence commands a conclusion of ineffective assistance of counsel. Therefore, the state court's conclusion to the contrary is objectively unreasonable.

Because the state court never addressed the prejudice question, "no deference is owed to the state court on that point" and the issue was reviewed de novo.

**2009:** ***Alam v. United States*, 630 F. Supp. 2d 647 (W.D.N.C. 2009).** Counsel ineffective in illegal gambling case for failing to adequately advise the defendant on deportation consequences prior to entry of the plea and failing to seek to withdraw the plea after counsel learned his previous advice to the defendant was erroneous. The defendant, a Pakastani citizen with permanent legal resident status, was one of 41 defendants indicted in a public corruption case. From the beginning he informed counsel that he was concerned about the impact of a conviction on his immigration status. Counsel allegedly contacted several immigration attorneys and personally researched the issue prior to advising the defendant that he would not be deported following a plea. Based on this advice, the defendant pled guilty. Prior to sentencing, counsel received a letter from one of those immigration lawyers alerting him to the fact that the conviction would result in deportation. Nonetheless, counsel advised the defendant not to move to withdraw the plea because it might impact his usefulness to the government at the upcoming trial of the former County Sheriff. Counsel suggested that he would take up the deportation issue with the prosecutors, who had no desire for the defendant to be deported, after sentencing and the trial of the Sheriff in which the defendant testified. The question of deportation was not even addressed in court until the court made an inquiry in a hearing related to the government's subsequent motion to reduce the defendant's sentence. Original trial counsel had been replaced by that point and this 2255 was then filed. Regardless of whether counsel consulted with other attorneys, his "advice regarding the immigration consequences of petitioner's plea was undeniably grossly inaccurate, given that the governing statute . . . explicitly enumerates" petitioner's crime as one requiring removal. "[T]he plain language of the applicable immigration statutes compels the conclusion that Counsel grossly misinformed petitioner on this subject." Counsel also "grossly misinformed" the defendant that he could prevent deportation later by obtaining the government's cooperation when "the government has no such discretion" in cases of conviction of these crimes. Prejudice established because the defendant provided a credible affidavit stating that he would not have pled guilty if he had been adequately advised. The court also found

no reason to doubt this where the defendant had been a U.S. resident for 25 years, was married to a permanent legal resident, had children that were native-born U.S. citizens, had a successful business independent of the illegal gambling, and had few, if any, remaining ties to "Pakistan, a currently unstable country."

**2008:** ***United States v. Choi*, 581 F. Supp. 2d 1162 (N.D. Fla. 2008).** Counsel ineffective in relying on the advice of an employee of the Bureau of Immigration and Customs Enforcement that the defendant would probably not be deported if he pled guilty. Counsel's conduct was deficient because, "under the facts of this case, relying on a government agent's advice rather than performing one's own legal research fell short of an objective level of reasonableness. The governing statutes made clear on their face that this conviction would result in [the defendant's] mandatory deportation, subject only to narrow exceptions that [the defendant] plainly could not meet."

***Sasonov v. United States*, 575 F. Supp. 2d 626 (D.N.J. 2008).** Counsel in bribery of public official case ineffective for several reasons. First, counsel affirmatively misrepresented the immigration consequences of a guilty plea. Counsel's conduct was deficient because counsel informed the defendant that, as a resident alien with a green card, he would not be subject to deportation following his plea. Prejudice established because "it is likely that Petitioner would have taken his chances at trial because he faced only six to twelve months more than the sentence he received," due to his guilty plea. Second, counsel failed to conduct discovery and, thus, failed to argue petitioner's minor role in the crimes and failed to establish that the value of the benefit received from the bribe was less than $10,000, which would have prevented a four-point enhancement of the offense level. Prejudice established because the court might otherwise have reduced the sentence to less than one year or at least allowed the defendant "to negotiate a more favorable plea agreement with the Government."

**2007:** ***United States v. Marcos*-Quiroga, 478 F.Supp.2d 1114 (N.D. Iowa 2007).** Counsel ineffective in guilty plea to drug trafficking offense for erroneously advising the defendant he would not qualify for sentencing as a career offender. The court's ruling was entered based on a motion to withdraw the guilty plea and a pro se motion for appointment of new counsel prior to sentencing. Counsel's conduct was deficient because the defendant had prior convictions in Iowa for felony delivering cocaine and misdemeanor assault with intent to commit sexual abuse. "[T]here should have been no doubt . . . [that the] two prior convictions . . . would qualify him for career offender status. Thus, counsel certainly could have predicted with a fair degree of certainty that [he] would be sentenced as a career offender." Id. at 1135 (emphasis in original). Prejudice found because the defendant likely would not have plead guilty absent counsel's erroneous advice. Motion to withdraw guilty plea and for appointment of new counsel granted.

### 3. Military Cases

**2012:** ***United States v. Rose*, 71 M.J. 138 (C.A.A.F. 2012).** Counsel ineffective in indecent assault plea for failing to adequately advise the accused of sex offender registration consequences of the plea. The accused faced a number of charges. His first proposed pretrial agreement sent to the prosecution offered to plead guilty to all charges except the three specifications of indecent assault. He made clear to counsel that he was concerned about the possibility of having to register as a sex offender.

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Counsel did not believe it would be "a registerable offense" but never learned the answer. He conceded, however, that he would not have advised the accused to plead guilty to those charges if offender registration was required. Counsel's conduct was deficient as counsel violated the professional duty to "promptly comply with reasonable requests for information." Prejudice was clear as the accused would not have pled guilty to these charges if adequately advised.

### 4. State Cases

**2017:** ***People v. Olecski*, 57 Misc. 3d 698 (N.Y. Crim. Ct. 2017).** Defendant was charged with operating a motor vehicle while intoxicated and operating a vehicle while ability impaired, and she pled guilty to the second charge. She was sentenced to a one-year conditional discharge, with conditions that she pay a fine and surcharge, attend the impaired driver's program, and have a 90-day license suspension. Defendant's trial attorney told her she would be able to get a conditional license if she pleaded guilty, but this advice was incorrect; in fact, the law was that defendant was ineligible for a conditional license and her conviction also resulted in her license being automatically revoked for five additional years. The Criminal Court of the City of New York held that "Since counsel gave the defendant incorrect advice regarding the relicense consequences of her guilty plea, and defendant has convincingly established that she would not have pleaded guilty but for that advice, she is entitled to relief for ineffective assistance of counsel" under both the state and federal constitutions. [Court noted that the New York state IAC standard – whether the defendant was afforded meaningful representation, and if not, whether the ineffectiveness had an impact on the plea bargaining process – is less onerous than the federal standard.] Defendant provided an affidavit in which she said she was a dancer and her main concern was her ability to drive to work, and she pleaded guilty because she believed that this plea was the only way she could obtain a conditional license.

***State v. Tapia-Cortes*, 75 N.E.3d 878 (Ohio Ct. App. 2016).** In domestic violence case involving a Mexican citizen who was a legal resident in the United States, trial counsel was ineffective in failing to advise defendant that he would be eligible for deportation if he pleaded guilty. The statute that governed defendant's situation was clear and straightforward. Trial counsel could have easily determined that defendant's guilty plea would make him eligible for deportation by simply reading the text of the federal statute. Because the deportation consequences of defendant's guilty plea were truly clear, defense counsel was constitutionally obligated to advise defendant that as a result of his guilty plea, his deportation would be "presumptively mandatory." In finding a reasonable probability that defendant would not have pleaded guilty had he been properly advised, the following was considered by the court: (1) defendant expeditiously moved to withdraw his plea seven weeks after pleading guilty to domestic violence; (2) defendant averred that he would never had pleaded guilty had he known deportation was mandatory; (3) defendant was originally admitted in the United States in 2008 as a temporary nonagricultural worker; at the time of the plea, defendant was employed, was married to a U.S. citizen with whom he has children, and had been a legal resident in the United States since 2013; and (4) defendant received little benefit from the guilty plea. As for the trial court's general advisement to defendant that deportation was possible, this was insufficient to cure the prejudice from trial counsel's deficient performance.

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***People v. Sifuentes*, 410 P.3d 730 (Colo. Ct. App. 2017).** In a case where defendant pleaded guilty to a class four felony drug distribution charge in exchange for the dismissal of class three felony charges, plea counsel was ineffective in providing defendant with erroneous information about the immigration consequences of the plea. The defendant was a lawful permanent resident who came from Mexico at age two, close to forty years before the charges at issue. Defendant had significant ties to the United States and no familial or other ties with Mexico. Following his guilty plea, he was sentenced to Community Corrections (Comcor). Comcor rejected him, however, when Immigration and Customs Enforcement placed him on an immigration detainer after his conviction. Defendant was resentenced to forty-two months in prison followed by three years mandatory parole. The conviction, unbeknownst to defendant and his attorney, had triggered mandatory deportation along with mandatory detention throughout the ensuing deportation proceedings. When defendant sought to withdraw his guilty plea in post-conviction proceedings, it was found that plea counsel had performed deficiently by misadvising defendant that deportation was not mandatory if he pleaded guilty but instead that he might be allowed to remain in the country in light of his strong ties to the United States. The post-conviction court, however, concluded that defendant could not show prejudice because there were audio and video recordings of the offense. The court reasoned that it would not have been rational to reject the plea even had defendant known of the actual immigration consequences. Further, even if prejudice was found from the erroneous advice, the post-conviction court found that defendant still was not entitled to relief because he had signed an advisement indicating, among other things, that the guilty plea would result in deportation. The appellate court, in contrast, ruled that the signing of the advisement was irrelevant as to the claim of ineffective assistance of counsel as it did not show that defendant actually understood the consequences of the guilty plea. Regarding *Strickland* prejudice, in determining the likelihood that defendant would have rejected the plea had he been properly advised, the appellate court found that the lower court placed too much weight on the strength of the prosecution's case and the sentencing differential between the initial charges and that involved in the plea offer. Rather, "a court must consider all relevant factors — especially the defendant's ties to the United States and the resulting severity of deportation — before reaching a conclusion about prejudice." When considering the relevant factors, the appellate court observed that the record did not include the audio and video recordings of the drug sale thereby rendering a determination about the actual strength of the prosecution's case problematic. Nevertheless, the appellate court accepted in its analysis that the prosecution's case was formidable. It noted, however, that "the strength of the evidence against defendant is not as probative of rationality as it would be in a nonimmigration case." Further, the more favorable sentencing range under the plea was not necessarily that much better than defendant could have received if convicted of the original charges. In addition, defendant suffered from significant health problems. The likelihood of medical treatment in prison might be seen as preferable to earlier deportation where medical care was uncertain. Finally, defendant's strong ties to the United States and complete absence of ties to Mexico made removal from the United States the equivalent of banishment. On this record, rejection of the guilty plea had defendant been properly advised would be rational and defendant established prejudice from plea counsel's deficient performance.

***Blackwood v. State*, 217 So.3d 1146 (Fla. Ct. App. 2nd Dist. 2017).** Trial counsel was ineffective in failing to warn defendant, a Jamaican citizen legally in the United States, that he would be

eligible for automatic deportation as a result of pleading guilty to aggravated assault with a deadly weapon. Although the post-conviction court found that counsel had failed to advise defendant about automatic deportation and that defendant would not have entered the plea had he known of the consequences, the post-conviction court nevertheless denied relief on the ground that defendant had failed to prove that he was in fact subject to automatic deportation under the federal immigration statute. It was error to add this third requirement in a case like this, where defendant did not receive a warning about potential deportation from the court during the plea colloquy. "[I]t is irrelevant whether [defendant] is subject to automatic deportation under the federal immigration statutes; there was no record evidence that [defendant], a noncitizen, received any warning of potentially adverse immigration consequences before entering his plea. Defendant was entitled to relief under *Strickland*.

***Diaz v. State*, 896 N.W.2d 723 (Iowa 2017).** "[Defendant's] attorney failed in his duty to advise his client of the direct and severe immigration consequences of pleading guilty to the crime of aggravated misdemeanor forgery, leading [defendant] to plead guilty and subject himself to automatic and permanent removal." The case is remanded to permit withdrawal of the guilty plea. Defendant had been living in the United States since 2002. He had arrived from Mexico without examination of the Department of Homeland Security. Prior to this case, he had no criminal history and was the primary caretaker of his U.S. citizen daughter. In early 2013, an officer responded to a call of domestic disturbance. The mother of defendant's child reported that she felt threatened by defendant during an argument although the altercation did not involve physical violence. When defendant was placed in a squad car, he was asked for identification. He produced a Texas identification card that bore his name but was registered to someone else. Defendant was taken to the station for further questioning about the identification card even though he was not arrested for the domestic incident. Defendant claimed to have purchased the card in Texas and had been advised he could use it to open bank accounts and drive a motor vehicle. The interaction between the officer and defendant ultimately led to defendant's admission that he had not entered the country legally. ICE was contacted and removal proceedings begun. Defendant was charged with forgery as a class "D" felony under state law. Defendant initially received bail but ended up in custody after missing both an immigration hearing and a plea hearing in state court. Defense counsel informed defendant that he was probably going to be deported no matter what happened given his failure to appear at the immigration hearing. Defendant signed a written plea to aggravated misdemeanor forgery and received a two-year suspended sentence. Based on the conviction, he was removed to Mexico. Defendant subsequently returned to the United States in the custody of Homeland Security and moved for post-conviction relief, alleging that his defense attorney was ineffective in failing to inform him that the charge he pleaded guilty to foreclosed "cancellation of removal," a proceeding by which the Attorney General may adjust the status of a removable alien to that of a lawful permanent resident. Additionally, he argued his counsel should have advised him that his physical presence in the United States for more than ten years and his good moral character would have allowed him to seek this relief if he could establish his removal would result in "exceptional and extremely unusual hardship" to his daughter. Looking to the professional norms as expressed by the ABA and reference guides produced following the Supreme Court's *Padilla* decision, the Iowa Supreme Court held that "counsel has an obligation to inform his or her client of all the adverse immigration consequences that competent counsel

would uncover. We do not believe clients expect their counsel to only advise them that the chances of deportation are certain or possible." Here, even if removal was highly likely following defendant's failure to appear, defense counsel never mentioned the crime constituted an aggravated felony "and never attempted to explain the sweeping ramifications of that classification." Counsel's failure to do so constituted deficient performance. Defendant's asserted that he would not have pleaded guilty had he been properly informed of the consequences. Such as decision would have been rational given everything defendant had to lose by pleading guilty. Further, the evidence against defendant was not overwhelming on the forgery charge. Prejudice is established.

***People v. Abdallah*, 153 A.D.3d 1424 (N.Y. App. Div. 2017).** Granting the motion of defendant, a citizen from Barbados, to vacate his conviction for grand larceny in the second degree based on misrepresentations by defense counsel concerning the immigration consequences of defendant's guilty plea. Defense counsel incorrectly informed defendant that the guilty plea would preserve his eligibility to apply for cancellation of removal. Defense counsel had received the erroneous information from an immigration attorney he had consulted with. Defense counsel nevertheless performed deficiently given that the text of the relevant immigration statute made clear that a conviction of the charge would render defendant mandatorily deportable and ineligible for cancellation of removal. In finding prejudice, it was noted that defense counsel did not pursue a plea to criminal possession of stolen property in the second degree with the same sentence, which was charged in the indictment and would not have carried any immigration consequences to defendant. Notably, the prosecutor testified below that she was unconcerned about immigration consequences in negotiating a deal and had believed that the plea agreement defendant received permitted the possibility of cancellation of removal. Although the People asserted that the case against defendant was strong, defendant had a large incentive to remain in the country, including that he was 62 years old with health issues and had been in the country for 25 years. In addition, he had been married to a United States citizen for over 20 years, who suffered from multiple sclerosis, and had two children who are citizens of the United States. On this record, defendant established prejudice from the misadvice of his counsel.

***Schaeffer v. State*, ___ S.W.3d ___, 2017 WL 4477345 (Tenn. Ct. Crim. App. Oct. 6, 2017).** Trial counsel was ineffective in failing to adequately advise defendant regarding concurrent state and federal sentencing prior to defendant accepting a deal. Defendant was charged in state court with multiple crimes arising from defendant's car colliding with a church van head-on, killing two people and wounding many others. While the state charges were pending, defendant was indicted in federal court for a string of robberies. He entered into a plea agreement whereby he received a sentence of 100 years. He later entered into a negotiated plea agreement in state court where he received an effective sentence of 40 years to run concurrent with the federal sentence. As it turned out, however, while defendant was serving his state sentence the federal government was not crediting that time and the state court lacked authority to force the federal government to run the sentences concurrently. Thus, after the state sentence was complete, defendant could then have to begin his federal sentence. "If trial counsel had carried out his duty to investigate the terms of the plea agreement, he would have realized that a state court provision requiring federal and state sentences to run concurrently is not worth the paper on which it is written." His failure to do so constituted deficient performance. And because the record showed a reasonable probability that

defendant would not have accepted the plea had he been informed that the state and federal sentences might not run concurrently, defendant established prejudice. As for relief, the parties were encouraged to seek specific performance of the deal by requesting that the federal government accept defendant for his federal sentence. If that failed, new plea negotiations were urged. And if those failed, defendant would be entitled to withdraw the plea and face trial.

***Davis v. State*, ___ S.W.3d ___, 2016 WL 4737010 (Tenn. Ct. Crim. App. Sept. 9, 2016).** Trial counsel was ineffective in advising defendant during plea negotiations that he would serve a 15-year sentence at 85% when in fact the sentence in his case was not eligible for a 15% reduction thus requiring defendant to serve 100% of the sentence. On this record, defendant's guilty plea was not knowing and voluntary.

***Ex Parte Evans*, 537 S.W. 3d 109 (Tex. Crim. App. 2017).** Applicant was charged with causing serious bodily injury to a child under Texas state law. The state abandoned a deadly weapon allegation, and applicant pled guilty with a 50-year cap and was sentenced to 50 years in prison. He then claimed that his plea was involuntary because his attorney misadvised him about the effect of the deadly weapon finding on his parole eligibility. The court, applying the federal standard for ineffective assistance of counsel under *Strickland* and *Hill v. Lockhart*, 474 U.S. 52 (2015), determined that applicant was entitled to relief because *Hill v. Lockhart*, protecting a defendant's right to effective assistance of counsel in connection with a guilty plea, predated the finality of applicant's conviction. [There is no further discussion of the merits of the IAC claim.]

***State v. Hutton*, 806 S.E. 2d 777 (W.Va. 2017).** Petitioner, native to Jamaica, was indicted on charges of malicious assault and three counts of second degree sexual assault. He entered a *Kennedy* plea to the felony of unlawful assault in exchange for the dismissal of the charges in the indictment (under W. Va. state law, a defendant may plead guilty while asserting innocence if he believes it is in his interest to nevertheless plead guilty). He served his sentence in state prison and was then turned over to the federal government for deportation proceedings. He filed a writ for writ of error coram nobis, alleging that his trial counsel had failed to inform him that his guilty plea would result in his deportation. After being ordered by the Supreme Court of Appeals of West Virginia to conduct a hearing on the merits of the claim, the trial court conducted the hearing and denied relief. Reviewing the trial court's denial under an abuse of discretion standard, the underlying factual findings under a clearly erroneous standard, and questions of law de novo, the Supreme Court of Appeals of West Virginia reversed, finding IAC under *Padilla v. Kentucky*, 559 U.S. 256 (2010). The four requirements for coram nobis in West Virginia were established: (1) a more usual remedy was not available; (2) valid reasons existed for not attacking the conviction earlier – petitioner only learned that he might be deported when he was served with a deportation warrant after serving his state sentence; (3) there existed a substantial adverse consequence from the conviction (deportation); and (4) the error presented a denial of a fundamental constitutional right – the effective assistance of counsel (which in West Virginia is the federal *Strickland* test). Under *Padilla*, the Sixth Amendment requires counsel to warn an immigrant client of the deportation consequences of a guilty plea. Counsel here did not do this, and made no investigation into immigration consequences for his client, and so deficient performance is established. With regard to prejudice, *Padilla* does not require petitioner to show that he would have prevailed had he gone to trial; it merely requires that a reasonable person in the petitioner's shoes would have

chosen to go to trial had he been properly advised. *See U.S. v. Swaby*, 855 F.3d 233, 240 (4th Cir. 2017). Petitioner had evidence that he was not guilty of the charged crimes, and he entered a plea of guilty protesting that he was actually innocent. He was brought to the U.S. at the age of nine, had not returned to Jamaica since then, and his immediate family members all lived in the United States. *See Lee v. United States*, 137 S.Ct. 1958 (2017) (counsel's erroneous advice that defendant would not face deportation if he pleaded guilty was prejudicial because avoiding deportation was the determinative fact for defendant and the smallest chance of being acquitted to avoid deportation would have changed his mind about the plea).

**2016:** ***Ingram v. State*, 790 S.E.2d 641 (Ga. Ct. App. 2016).** In case involving gang, drug and firearm charges, defense counsel performed deficiently in misadvising defendant that he was subject to treatment as a recidivist, which would have meant a sentence of 75 years with no parole. The prosecutor had included a recidivist notice in the charges. This was premised on three prior felony "convictions." In one of the three cases, however, defendant had received first offender treatment, which meant that his guilty plea in that case did not result in a conviction for purposes of the recidivist provision. Unaware that he was not be subject to the recidivist law, defendant accepted the deal defense counsel negotiated whereby the prosecutor dropped some charges and the recidivism component. Defendant was sentenced to 35 years, 20 in confinement and the rest on probation. Prejudice from defense counsel's erroneous advice is found as both defense counsel and defendant maintained that avoiding the recidivism provision was the most important factor in the plea deal.

***State v. Antuna*, 144 A.3d 1255 (N.J. App. Div. 2016).** In case involving a Cuban native who did not speak or read English and who was subject to deportation following his guilty plea to a drug-related charge, trial counsel was ineffective in the drug case for failing to read the plea form to defendant or have him complete it himself. (The drug conviction occurred prior to the Supreme Court's decision in *Padilla v. Kentucky* so the rule of that case did not govern here.) Trial counsel filled out the plea form himself, leaving blank the question that asked: "Do you understand that if you are not a United States citizen or national, you may be deported by virtue of your plea of guilty? [YES] [NO] [N/A]." Trial counsel did not read the plea form to defendant and no mention of possible deportation occurred during the plea colloquy. Although trial counsel did not provide misinformation to defendant concerning the potential immigration consequences of the plea, trial counsel nevertheless performed deficiently in failing to have defendant review every question on the plea form. Knowledge about the possibility of deportation was necessary to a knowing, intelligent and voluntary guilty plea.

***State v. Gallegos-Delgado*, 392 P.3d 200 (N.M. Ct. App. 2016).** In case where undocumented immigrant's guilty plea ultimately led to deportation, trial counsel was ineffective in failing to inform defendant that he would be forever barred from reentry into the United States as a result of the plea. Defendant's attorney was required not just to inform defendant about the specific consequence of deportation but also of the other immigration ramifications of a guilty plea involving drug charges. That defendant would have rejected the plea had he been properly advised of the potential consequences was supported by the fact that defendant had attempted to engage an immigration attorney prior to the plea, showing that immigration consequences were important to him, and that he got married on the advice of an immigration attorney in order to avoid deportation.

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That the State's case against defendant was strong did not establish that he would have accepted the plea in light of the harsh consequences he faced from doing so. Defendant's connections to the United States and his post-conviction behavior also supported a finding that defendant would not have accepted the plea had he received adequate advice.

***State v. Gutierrez*, 380 P.3d 872 (N.M. Ct. App. 2016).** Affirming the grant of a motion to withdraw a guilty plea to a drug charge based on trial counsel's failure to adequately advise defendant on the immigration consequences associated with the plea. Supporting the lower court's order was defendant's statement during that plea colloquy that she understood that deportation was a "possibility." In fact, given the charge she was pleading guilty to, deportation was a "virtual certainty." Although trial counsel informed the plea judge that defendant understood there was a "high likelihood" of deportation, the plea judge did not inquire into the discrepancy between that statement and what defendant had stated. In addition, trial counsel filed an affidavit recounting that he could not recall a conversation with defendant where he explained to defendant with specificity that she would without a doubt be removed from the United States. On this record, the lower court could have reasonably concluded that defendant's lack of understanding was due to her counsel's failure to explain the consequences to her well or clearly enough. Statements at the sentencing hearing further supported a finding that defendant was not properly advised of the ramifications of the guilty plea. There, defense counsel represented that defendant's immigration attorney had informed him that a guilty plea should not impact defendant's then pending request for citizenship provided she was not imprisoned. The efforts on defendant's part to receive citizenship, based in part on the fact that her father and two of her children were United States citizens, helped establish a distinct possibility that defendant would not have pleaded guilty to the drug charge had she received accurate advice on the immigration consequences.

***Clarke v. Galdamez*, 789 S.E.2d 106 (Va. 2016).** In hit and run/DWI case, trial counsel was ineffective in providing erroneous advice to defendant concerning the immigration consequences of the plea agreement. Defendant, a native of El Salvador with Temporary Protected Status ("TPS"), was charged with felony hit and run and DWI. The felony hit and run charge carried a maximum sentence of ten years imprisonment. During plea discussions, defendant explained to his attorney that retaining his immigration status was his priority. (Defendant was the sole financial support for his young daughter, all of his extended family were in the United States, and, inter alia, he feared for his safety if he was returned to El Salvador.) The negotiated plea lowered the hit-and-run charge to a misdemeanor with a stipulated sentence of 180 days of incarceration with 170 days suspended on the hit and run conviction and 90 days, suspended, on the DWI conviction. Defendant accepted the plea agreement and did not appeal. Sometime later, the United States Department of Homeland Security notified defendant that his TPS would be revoked as a result of his criminal convictions. Under federal immigration regulations, a noncitizen forfeits his TPS after a conviction of either one or more felonies or two or more misdemeanors. Defendant filed for habeas relief alleging ineffective assistance of counsel based on erroneous advice and prevailed in the lower court. At issue in the appeal was whether the lower court erred in finding that defendant established prejudice. The Director contended that it would not have been rational for defendant to have turned down the deal as there was no defense to the felony hit and run charge. The lower court found, and the state supreme court agreed, that defendant's contention that he had not realized he had been in an accident until he arrived at his destination and saw damage to his vehicle,

if believed, could provide a defense under the relevant statute. Notably, defendant did return to the scene of the accident before the police arrived. The plausibility of defendant's account could be tested by a fact-finder, an opportunity defendant was denied. Defendant showed that had he been properly advised, he would have rejected the plea offer and such a decision would have been rational.

***Van Sellner v. State*, 416 S.E.2d 606 (S.C. 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.

**2015:** ***Commonwealth v. Steckley*, 128 A.3d 826 (Pa. 2015).** Counsel ineffective in possession of child pornography case for failing to inform the defendant of the possibility of a mandatory minimum sentence during plea negotiations. Prior to trial, the prosecutor provided the defense with sentencing guideline range worksheet showing a sentencing range of nine to sixteen months. Just prior to jury selection, the state offered a to recommend a sentence of three to six years in exchange for guilty pleas. After the defendant rejected this offer, the state offered a term of two to six years, which was also rejected. Prior to sentencing, due to the defendant's prior conviction, the state served notice, under the state sentencing scheme for repeat sex offenders, of its intent to seek imposition of a mandatory minimum sentence of twenty-five years' imprisonment. The court imposed the mandatory minimum sentence of 25 years. Counsel was unaware of the mandatory sentencing requirements under state law and, therefore, did not advise the defendant of this possibility during plea negotiations. Because of counsel's deficient conduct, and believing, based on the state's pretrial sentencing guidelines worksheets, that the sentencing range was nine to sixteen months, the defendant rejected the state's plea offers. Prejudice established. "A defendant's assertion of innocence does not necessarily belie his later claim that he would have accepted a guilty plea offer." While the initial prosecutor was also unaware of the mandatory sentencing statute, this did not negate prejudice because the prosecution did not discover its error until seven months after the defendant rejected the plea offer and proceeded to trial. Thus, the defendant would have been allowed to plead guilty under the state's pretrial offer if the deal had been accepted. There was also no reason to believe that the court would have rejected the offer. Resentencing under the terms of plea offer previously rejected by the defendant.

***People v. Valdez*, 37 N.E.3d 837 (Ill. App. Ct. 2015).** Counsel ineffective in plea to burglary predicated upon theft for failing to advise the non-citizen defendant from the Dominican Republic of the clear immigration consequences of his plea. While the court informed the defendant that the plea "may have" the consequence of deportation, this was inadequate to cure the error because deportation was mandatory. Counsel could have determined this by looking at the Immigration and Nationality Act and doing "minimal research beyond the text" of the statute. Prejudice established.

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***State v. Favela*, 343 P.3d 178 (N.M. 2015).** Counsel ineffective in aggravated battery and driving under the influence plea case for failing to explain to the defendant, a Mexican national lawful permanent resident of the U.S., that he would certainly be deported as a result of his plea and conviction.

**2014:** ***People v. Guzman-Ruiz*, 6 N.E.3d 806 (Ill. App. Ct. 2014).** Counsel was ineffective in plea to possession of 2000-5000 grams of cocaine for failing to advise the defendant of the deportation consequences of her plea. While counsel and the court informed her that there may be consequences this was inadequate where she was informed that deportation was "very unlikely" when, in fact, it was required. Prejudice established in that there was a reasonable probability that the defendant would not have plead guilty even though she had faced a potential 30 year sentence and was sentenced to only 180 days incarceration and 30 months of probation under the plea agreement.

***People v. Dodds***, 7 N.E.3d 83 (Ill. App. Ct. 2014). Counsel ineffective in possession of child pornography plea for erroneously advising the defendant with respect to the sex offender registration requirements of his conviction. The defendant entered a negotiated plea in exchange for a sentence of 18 months probation and registration as a sex offender for 10 years. Shortly after sentencing, his probation officer informed him that he was required to register for life and the defense filed a motion to clarify and was again informed that he would be required to register for only 10 years. At the end of the 10 years, he was again informed that registration was for life and brought this action. Under state law, the conviction qualified him as a "sexual predator," which meant mandatory registration for life. Counsel's conduct was deficient and prejudicial.

***State v. Tejeiro***, 345 P.3d 1074 (N.M. Ct. App. 2014). Counsel was ineffective is failing to advise the Cuban defendant of the deportation consequences of his guilty plea to drug trafficking. Counsel's conduct was deficient and prejudicial. The defendant had been a political prisoner in Cuba. He had lived in the U.S. with his family for over a decade. The evidence essentially established that the defendant was a "drug mule," possibly acting under duress. Even if this would not have served as an affirmative defense, it certainly was substantial mitigation. The defendant's motion to withdraw his plea because it was not knowing and voluntary should have been granted.

***State v. Kostyuchenko*, 8 N.E.3d 353 (Ohio Ct. App. 2014).** Counsel ineffective in operating a vehicle under the influence of alcohol or drugs for failing to inform the defendant of the deportation consequences of his guilty plea. Counsel testified that he had informed the defendant only that he "could get deported." The plea form and the court's advice also informed the defendant only that he "may" get deported when "federal immigration law plainly mandates deportation" for the defendant.

***Ex parte Leal*, 427 S.W.3d 455 (Tex. Ct. App. 2014).** Counsel ineffective in no contest plea to second charge of simple possession of marijuana for failing to advise the defendant of the mandatory deportation consequences of his plea. Counsel told the defendant only that his plea would result in "deportation proceedings," which "is not the equivalent of advising the defendant that his conviction will result in deportation."

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***State v. Chetty*, 338 P.3d 298 (Wash. Ct. App. 2014).** Counsel ineffective in plea to possession of cocaine with intent to deliver for failing to consult with the defendant about the adverse immigration consequences of conviction. An attorney, who was an "immigration law expert," testified.

***Ortega-Araiza v. State*, 331 P.3d 1189 (Wyo. 2014).** Counsel was ineffective in strangulation of household member case for failing to advise the defendant of the deportation consequences of his guilty plea. The defendant was a resident alien, living in the United States legally since 1980 who entered a guilty plea. Prior to sentencing, however, defense counsel learned for the first time of his alien status and the deportation consequences and moved to withdraw the guilty plea. Counsel's conduct was deficient. The trial court's "generic advisement" and the language in the plea agreement that a plea could make him deportable "could not compensate" for the deficiency. Prejudice established because "a reasonable person" in the defendant's shoes would have demanded trial knowing the deportation consequences of a plea. He had lived in this country for nearly 35 years; had two grown children, who were born here; and he buried his wife and a daughter in this country. Moreover, even though the defendant was already a "Level 2 offender" who was deportable based on three or more misdemeanor crimes, the plea to the felony in this case moved him to Level 1, which was the "highest priority for deportation."

**2013:** ***Scott v. State*, 986 N.E.2d 292 (Ind. Ct. App. 2013).** Counsel ineffective in fatal driving under the influence and resisting arrest case for failing to adequately advise the defendant of the correct maximum sentence he faced if convicted following trial, which resulted in an unintelligent guilty plea. The defendant was driving under the influence when he fled a police officer and lost control of the vehicle, killing another. Counsel informed the defendant that he faced a maximum 30 year sentence, which was the sentence imposed following his guilty pleas. Under state law, however, "the same harm cannot be used to elevate multiple convictions." Here, the victim's death was used to elevate both of the defendant's convictions. If the defendant had been convicted of both offenses at trial, state law required that the resisting law enforcement conviction would have been reduced to avoid punishing him twice for the death. Thus, the maximum sentence the defendant actually faced was 23 years. Sentence reduced to 23 years.

***Commonwealth v. Barndt*, 74 A.3d 185 (Pa. Super. Ct. 2013).** Counsel was ineffective in possession with intent to deliver drug case for providing inaccurate advice concerning maximum setback for street time accumulated against defendant's parole for prior offense, which led to a guilty plea. The defendant was charged, along with his son and his girlfriend. The weight of the drugs and the defendant's prior criminal record exposed him to the prospect of a mandatory minimum sentence of five years' incarceration. At the time of his arrest, the defendant had served approximately thirty months of parole related to a prison sentence for a separate drug charge. During plea negotiations with the Commonwealth, the defendant emphasized his competing concerns for his codefendants' exposure to substantial prison sentences, his own exposure to a mandatory minimum five-year sentence, and the effect of a guilty plea upon his parole status from the prior offense. Specifically, the defendant did not want to lose the approximately thirty months of "street time" that he had accumulated against his parole sentence (a penalty referred to as a "setback"). The prosecutor

informed defense counsel that she had been advised by the defendant's parole officer that the defendant would only lose "approximately 11 months of street time, not 30 months; however they could not give me a guarantee on the exact amount of street time he will lose." Defense counsel, however, informed the defendant that it was essentially a certainty that he would lose only 11 months of "street time." Relying on this information, the defendant agreed to a negotiated sentence of forty-eight to ninety-six months' incarceration for him, while his girlfriend and son were given probation and accelerated rehabilitative disposition, respectively. Following his plea, however, the Parole Board ordered him to serve approximately forty-one months in prison, which corresponded to the sum of his street time up to the point of his guilty plea to the PWID charge. Counsel's conduct was deficient and prejudicial. Remanded in order to permit the defendant to withdraw his guilty plea.

**2012:** ***Padilla v. Commonwealth*, 381 S.W.3d 322 (Ky. 2012).** Counsel ineffective for failing to adequately advise the defendant of the deportation consequences of a guilty plea. The state conceded deficient conduct, but argued that there was no prejudice. Prejudice was clear as the defendant, a Honduras native, had been a lawful permanent resident of the U.S. for over 40 years and had served honorably in the U.S. military during the Vietnam War. During that 40 year period, he had spent only two weeks in Honduras. While evidence of guilt was strong, it was "far from conclusive," such that acquittal at trial was a possibility.

***People v. Burgos*, 950 N.Y.S.2d 428 (N.Y. 2012).** Counsel ineffective in sale of controlled substance case for failing to adequately advise the defendant of the immigration consequences prior to entry of a guilty plea. The defendant was from the Dominican Republic and was seeking Licensed Permanent Residence (LPR) status at the time of his arrest based on his wife's LPR status. The defendant was charged with sale of one tinfoil of cocaine (taken from a hole in a wall) to an undercover officer. A few minutes later a backup team arrested the defendant and found two additional tinfoils of cocaine from the wall. A few minutes later the undercover buyer identified him, but no drugs or pre-recorded buy money was found in his possession. The defendant claimed mistaken identity and maintained innocence. He pled guilty, however, based on counsel's advice and belief that his sentence would not include incarceration. He would not have pled guilty if adequately advised and would have proceeded to trial. He had no priors and a "strong possibility" of acquittal on the sale charge and possibly the possession charge.

***Ex parte Moussazadeh*, 361 S.W.3d 684 (Tex. Crim. App. 2012).** Counsel ineffective for providing inaccurate advise on parole eligibility, which led the defendant to plead guilty to murder. The defendant, a juvenile who served as a "look-out" for three men, was charged with capital murder. He agreed to a plea offer to plead to the lesser offense of murder without a deadly weapon without a sentencing recommendation and to testify against a co-defendant. He was sentenced to 75 years. Prior to the plea, counsel advised the defendant that he would be eligible for parole basically after he served 25% of his sentence or 15 years. Unbeknownst to counsel, however, his advice was incorrect because the "parole law had changed dramatically" just 11 days before the murder in this case, which meant that the defendant would not be eligible for parole until he served 50% of his sentence or 30 years. Counsel's conduct was deficient because the parole statute was "succinct and clear." Prejudice established because the defendant would not have pled guilty if had known the time he would have to serve.

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**2011:** ***Frost v. State*, 76 So.3d 862 (Ala. Crim. App. 2011).** Counsel ineffective in sodomy and sexual abuse of child plea case for failing to advise the defendant that he would not be eligible for parole if he pled guilty. Counsel gave his standard advice that parole was "up to the Department of Corrections." The statutes were clear, however, that a defendant convicted of these crimes "shall not be eligible for parole." "The effect of a sentence is one of the most important matters about which a criminal defense lawyer should be cognizant." Here, counsel's advice was incorrect in implying that parole was a possibility at the discretion of the Department of Corrections. Prejudice established as the defendant would not have pled guilty knowing that the required sentence was life without the possibility of parole.

***Stith v. State***, 76 So.3d 286 (Ala. Crim. App. 2011). Counsel ineffective in sodomy plea for failing to inform the defendant that "good time" or "correctional incentive time" was not available for a Class A felony. The defendant turned down a plea agreement to a "20-year sentence, split to serve 5 years, day for day," and insisted on a plea to a 10-year "straight" sentence, which he believed would require service of less than 5 years due to "good time" eligibility. A simple reading of the statute, however, would have informed counsel that incentive time deductions were not available. Thus, counsel's statement that only the Department of Corrections could calculate or determine application of "good time" was "incorrect and amounted to a misrepresentation regarding the law."

> It is axiomatic that the reason why counsel is appointed is to advise a client about the law. The effect of a sentence is one of the most important matters about which a criminal-defense lawyer should be cognizant. . . . The fact that Stith, being ignorant of the law, instigated a renegotiation of his plea that effectively doubled the duration of his imprisonment is not a factor that prevents him from pleading or prevailing on a claim of ineffective assistance of counsel.

Counsel's conduct was deficient and prejudicial.

***Booth v. State*, 262 P.3d 255 (Id. 2011).** Counsel ineffective in non-capital murder case for inadequate advice leading to plea. Although the state was not seeking the death penalty, the prosecutor gave notice pretrial that he intended to request a special verdict form in sentencing to submit statutory aggravators found in the capital statute to the jury. The statute provided that if death was sought and the jury found statutory aggravators, but did not return a death sentence, the court was to impose a fixed life sentence. If the jury did not find aggravators when death was sought or if death was not sought, the court would impose an indeterminate life sentence with a minimum period of at least ten years to be served. The prosecutor interpreted this statute to mean that in a non-capital case if aggravators were found the court had to impose a fixed life sentence. Defense counsel agreed with this interpretation. Counsel thus convinced the defendant to plead guilty in exchange for the state not pursuing statutory aggravating circumstances and an indeterminate life sentence with thirty years fixed. Counsel's conduct was deficient as his advice regarding potential penalties was "contrary to the plain and unambiguous language of the statute." Statutory aggravating circumstances were relevant only if death was sought. Counsel's "blatantly erroneous reading" of the statute was not made "reasonable" simply because the prosecutor and the judge made the same mistake. Prejudice was clear.

***Denisyuk v. State*, 30 A.3d 914 (Md. 2011).** Counsel ineffective in second-degree assault case for failing to advise the defendant, a Latvian citizen, of the deportation consequences of a guilty plea. Prejudice also established. While the State argued that there was "overwhelming evidence" of guilt, such that the defendant's conviction was inevitable, this is not the standard. Reversal was required because there was a reasonable probability that the defendant would not have pled guilty if adequately advised.

***People v. Fonville*, 804 N.W.2d 878 (Mich. Ct. App. 2011).** Counsel ineffective in child enticement plea bargain, which included provision that the trial court would sentence the defendant at the low end of the sentencing guidelines or 51 months or allow the defendant to withdraw his plea. Defendant had been babysitting for his girlfriend and failed to timely return the children for a day as he had been out drinking and drugging. The children were not harmed in any way. Counsel's conduct was deficient because counsel had failed to advise the defendant that his plea would require him to register as a sex offender. As the statute was "succinct, clear, and explicit," as in *Padilla v. Kentucky*, 130 S. Ct. 4235 (2010), counsel had a duty to advise the defendant that registration would be a consequence of his guilty plea. "[G]iven the lack of any sexual component to [the defendant's] conduct, it was all the more imperative that his counsel advise him of the unique registration consequences of his plea."

***People v. De Jesus*, 935 N.Y.S.2d 464 (N.Y. 2011).** Counsel ineffective in drug sale case for failing to advise the defendant of the immigration consequences of a guilty plea. Counsel did not advise her of the immigration consequences which clearly were significant and "loomed quite large" for the defendant. She was born in the Dominican Republic but had been in the U.S. for most of the past six years. She worked selling perfume and as a waitress, which "allowed her to earn more than she would have earned in her native country." She was married to a U.S. citizen, and had obtained lawful permanent residence for herself and visas for her five children, who had initially remained in the Dominican Republic. Most of her immediate family was in the U.S. The only remaining ties she had in the Dominican Republic were an abusive ex-husband and a half-sister with whom she was not close. The state's case was "not impermeable" as it involved an observed street buy at night. While the defendant had drugs on her when she was later arrested and more were recovered from the patrol car she was placed in, she could have attacked the eyewitness' credibility and argued mistaken identity or she could have argued that she was the buyer and not the seller in the transaction. Regardless, counsel told her "that everything would be all right and that she did not have to worry" because he could obtain a plea deal that would not result in incarceration (five years' probation with intensive supervision). If counsel had adequately advised her, she would not have pleaded guilty. There was "a chance, however slight" that she would have been acquitted at trial. More importantly, given her circumstances, "it would have been rational for a person in defendant's position, made fully aware of the consequences of her guilty plea, to have chosen to reject the plea bargain and proceed to trial." This finding was buttressed by the fact that, right after her plea, she contacted her family attorney because she "remained unsettled about the plea, not relieved about it."

***Calvert v. State*, 342 S.W.3d 477 (Tenn. 2011).** Counsel ineffective in sex offense case for failing to advise the defendant about the mandatory lifetime community consequence of his pleas prior to

entry of the pleas. The defendant pled guilty to multiple counts and was sentenced concurrently so that he effectively received a 10 year sentence suspended to probation upon service of nine months. On the judgment forms, he was also sentenced, as required by law due to the nature of his offenses, to lifetime community supervision, including the payment of supervision fees and regular reporting to a parole officer who has the discretion to impose conditions of supervision. This part of the sentence was never discussed with him by counsel or the court, however. Counsel's conduct was deficient as the law was clear from "the plain language of the community supervision statute" that lifetime community supervision would be a consequence of the plea. Prejudice established as the defendant would not have pled guilty if he had been adequately advised.

***Elizondo-Vasquez v. State*, 361 S.W.3d 120 (Tex. Ct. App. 2011).** Counsel ineffective in possession of 50-2000 pounds of marijuana case for failing to inform the defendant, a citizen of Mexico legally residing in Texas that a guilty plea would result in deportation. Counsel advised the defendant that deportation was a possible consequence but did research the law or definitively answer the question. Counsel's conduct was deficient and prejudicial as the defendant would not have pled guilty but for the deficient advice.

***Salazar v. State*, 361 S.W.3d 99 (Tex. Ct. App. 2011).** Counsel ineffective in theft case for failing to correctly advise the defendant of the deportation consequences of a guilty plea. Counsel advised the defendant of the "possibility" of deportation. Likewise, the court's written admonishments included a warning that a guilty plea "might result" in deportation. Counsel's conduct was deficient in not accurately advising the defendant that deportation was a "certainty" following a guilty plea in this case. Prejudice established in that the defendant may well have chosen to stand trial if adequately advised. The defendant faced a possibility of two years' confinement and a fine. He was an 18-year-old high school student with no prior criminal record, which made him a good candidate for deferred adjudication or community supervision if convicted. Although he was a citizen of Mexico and had only been a legal resident for a short time, he had been raised in the U.S. by his mother. "It would be perfectly rational to take the chance of acquittal at the risk of a maximum of two years" in this case.

***State v. Martinez*, 253 P.3d 445 (Wash. Ct. App. 2011).** Counsel ineffective in plea case for failing to adequately warn the defendant of the deportation consequences of his plea to possession of a controlled substance with intent to deliver. Because the law "is clear" that this is a deportable offense, under Padilla and subsequent state rulings, counsel's conduct was deficient. Deficient conduct found even though the paperwork associated with the plea and the trial court informed the defendant that deportation may be a consequence of the plea. These warnings were not a substitute for the advice of counsel. Likewise, prejudice established even though "it may not seem rational that [the defendant] would refuse a very favorable plea offer," he claimed he would not have pled guilty if he had known deportation was a consequence and his counsel conceded that deportation was a "material factor" in the defendant's consideration. This was enough to establish prejudice.

***State v. Sandoval*, 249 P.3d 1015 (Wash. Ct. App. 2011).** Counsel ineffective in third degree rape case for giving erroneous advice regarding deportation consequences of a plea. The noncitizen permanent resident defendant expressly told counsel that he did not want to plead guilty if the plea

would result in deportation. Counsel told him that he would not "be immediately deported," that he would have time to retain an "immigration counsel to ameliorate any potential immigration consequences of the plea." During the plea hearing and signed plea statement, the defendant was warned that a guilty plea is "grounds for deportation." Predictably, before he was released from jail, Customs put a "hold" on him and deportation proceedings began. Counsel's conduct was deficient as "the law was straightforward enough for a constitutionally competent lawyer to conclude" that a guilty plea would subject the defendant to deportation. Therefore, "counsel was required to correctly advise, or seek consultation to correctly advise" the defendant of the deportation consequences. The court's and plea statement warnings did not resolve the matter as counsel's advice impermissibly left the defendant with the impression that deportation was a remote possibility. With respect to prejudice, it did not matter that the plea made the sentencing range 6-12 months, while without a plea the sentencing range would have been 78-102 months with life as a maximum. The defendant "had earned permanent residency and made this country his home." Although he would have risked a longer prison term by going to trial, the court held: "Given the severity of the deportation consequence, we think [the defendant] would have been rational to take his chances at trial."

**2010:** ***Greene v. Commissioner of Correction*, 2 A.3d 29 (Conn. Ct. App. 2010).** Counsel ineffective in theft of weapons case for advising the defendant to plead guilty but failing to ensure that the State would not be allowed to introduce the guilty pleas in evidence in the defendant's murder and conspiracy trial. While counsel's strategy was to preclude the jury in the murder case from learning of the earlier theft of weapons, counsel failed to take any action to prohibit the state's use of the guilty pleas. Prejudice established as the defendant would not have plead guilty to the weapons charges if he had been adequately advised.

***Johnson v. State*, 318 S.W.3d 313 (Mo. Ct. App. 2010).** Counsel ineffective in drug case for incorrectly advising the defendant that, as part of his negotiated plea agreement, that he could get sentence credit for time he spent on bond pretrial. Counsel's conduct was deficient because counsel made positive misrepresentations suggesting that bond time credit was available when it clearly was not under state law. The defendant was entitled to rely on counsel's advice, especially because the prosecutor and the trial court agreed with counsel and the trial court pronounced he would receive credit toward his sentence for the time he spent on bond. Prejudice was clear, as the decision to plead guilty rested on the mistaken belief that both the written agreement and the bond credit agreement would be honored.

***People v. Garcia*, 907 N.Y.S.2d 398 (N.Y. 2010).** Counsel was ineffective in misdemeanor drug plea case for failing to advise the defendant, a native of the Dominican Republic, of immigration consequences of his guilty plea. The defendant was charged with multiple drug counts, but pled guilty to a single misdemeanor charge in exchange for dismissal of the remaining charges. Prior to his plea, he asked counsel about immigration consequences, but counsel admitted his ignorance concerning immigration law, declined to research the issue, and informed the defendant that he should seek advice from an immigration specialist. The defendant paid "an immigration paralegal to assess his situation and was erroneously informed that a single misdemeanor conviction would have no adverse immigration consequences." Counsel's conduct was deficient. *Padilla v. Kentucky*,

130 S. Ct. 4235 (2010), did not create a new rule of law as *Padilla* merely applied *Strickland* precedents to a new set of facts. Here, the immigration consequences were readily ascertainable and "merely advising a client to seek outside immigration advice, without more, now fails to meet the affirmative duty set forth in *Padilla*, at least where the immigration implications of the plea were fairly straightforward, . . . and where the 'specialist's' advice was wrong." *Garcia*, 907 N.Y.S.2d at 405. Prejudice was established because the defendant likely would not have pled guilty if he had been accurately advised. He clearly was concerned enough to ask counsel and to follow counsel's advice to get further guidance from an immigration specialist. "That defendant went to a paralegal does not alter this Court's finding that defendant would not have pleaded guilty but for the deficiencies in the representation by his counsel." The more difficult issue was that during the plea hearing, the trial court had advised the defendant that, while he did not know for certain, conviction could lead to deportation and that he should "assume that he's deportable" if convicted. "[W]here, as here, defendant is found in fact to have been misled by bad advice from a so-called retained specialist and by a lack of advice from his defense attorney, the Court's general warning will not automatically cure counsel's failure nor erase the consequent prejudice." *Id*. at 407.

***State v. Powell*, 935 N.E.2d 85 (Ohio Ct. App. 2010).** Counsel was ineffective in providing inadequate and inaccurate advice concerning sex offender registration requirements that resulted in the defendant pleading guilty to voyeurism. The defendant was charged with obstructing official business, criminal trespass, and voyeurism, all of which were misdemeanors. The state initially offered to allow a plea to the obstruction and trespass charges in exchange for dismissing the voyeurism charges. This was rejected on the advice of counsel to litigate mental health issues and attempt to gain dismissal. After the court found the defendant competent, counsel advised him to accept the state's offer to plead guilty to voyeurism in exchange for dismissing the remaining charges. The possibility of required registration was never mentioned to the defendant until the middle of the plea hearing. The court allowed a brief recess for counsel to discuss the issue with the defendant. Counsel informed the defendant that he would have to register but that he would only have to be on the list for a year or so. Almost a year after sentencing and having completed his probation, the defendant sought relief. Counsel's conduct was deficient because, under applicable state law at the time, the defendant was exempt from registration (because he had no prior offenses and the victim was over age 18) unless the trial court may findings and entered an order removing the exemption. Further, counsel misadvised the defendant that the registration could be expunged within a brief time. Prejudice established and the plea vacated.

***Hart v. State*, 314 S.W.3d 37 (Tex. App. 2010).** Counsel ineffective in sexual assault of child plea for advising the defendant that he was eligible to receive community supervision if he pled guilty. The defendant was 19 and mentally retarded, as he had an IQ between 47-52 and a mental age of a six-year-old. "Even a person of genius status requires somewhat correct data in order to make an informed decision." Here, under state law the defendant was not eligible for community supervision due to the nature of the convictions. Prejudice established as the defendant would not have pled guilty absent the erroneous advice.

***State v. A.N.J.*, 225 P.3d 956 (Wash. 2010).** Counsel ineffective in juvenile case where defendant pleaded guilty to first degree child molestation. Counsel erroneously advised the defendant and his

parents about the consequences of the plea by advising them that the conviction could be removed from the defendant's record when he turned 18 or 21. While the court has discretion to relieve the requirement to register as a sex offender, the conviction never goes away. Based on counsel's ineffectiveness, the defendant was entitled to withdraw his guilty plea.

**2009:** ***State v. Nunez-Valdez*, 975 A.2d 418 (N.J. 2009).** Counsel ineffective in criminal sexual contact plea for providing false or misleading information as to the deportation consequences of the plea. Retained counsel advised the defendant to plead guilty in exchange for five years of probation or he would get a 10 year sentence. When the defendant asked about immigration consequences, counsel informed him "nothing like that" would ever happen. A different attorney appeared for the actual plea and conferred with the defendant through an interpreter. At best, he informed the defendant that deportation was a "possibility." The trial court found that deportation consequences were a central concern for the defendant, who had been in the U.S. for 18 years with his wife and children. The appellate court decided the case under the state constitution "because we recognize that a federal remedy may depend on whether deportation is a penal or collateral consequence." The trial court's finding that the defendant would not have pled guilty if properly advised was supported by sufficient credible evidence.

***Grindstaff v. State*, 297 S.W.3d 208 (Tenn. 2009).** Counsel ineffective in aggravated sexual battery plea case for advising the defendant incorrectly that he would be eligible for probation if he pled guilty. Under state law, the defendant could not be given probation and was subject to a sentence of not less than eight nor more than twelve years on each of the five counts. The court gave the defendant an effective sentence of thirty years confinement without parole eligibility. Counsel's conduct was deficient because the defendant was not eligible for probation under state law, even though counsel submitted evidence and argued for imposition of probation at sentencing. Counsel "obviously did not know" the law on this point and the prosecutor and court never corrected him. The court cited the ABA Standards for Criminal Justice as "guidelines" for gauging counsel's conduct. "Criminal defense attorneys must conduct adequate legal research in order to meet the required range of competence." Absent counsel's deficient advice, the defendant would not have plead guilty, which was evidenced by his rejection of prior plea offers by the state, which demanded a period of confinement.

**2008:** ***Polite v. State*, 990 So. 2d 1242 (Fla. Dist. Ct. App. 2008).** Counsel ineffective in robbery, carjacking, and violation of probation plea for incorrectly advising the defendant of the maximum sentence he could receive upon revocation of the community control/probation when the plea entailed a sentence of two years in prison followed by two years of community control with the possibility of conversion to probation. Counsel advised the defendant that the maximum would be six years upon revocation, which was incorrect.

**2007:** ***Sial v. State*, 862 N.E.2d 702 (Ind. Ct. App. 2007).** Counsel ineffective in theft case for failing to advise the defendant that his guilty plea carried possible deportation consequences. Counsel's conduct was deficient and he admitted–"with admirable candor"–"that he dropped the proverbial ball." *Id*. at 707. The fact that the probation officer preparing the presentence investigation report may have advised the defendant of the deportation causes a month after the plea was irrelevant to what the defendant knew at the time of the plea. Prejudice found because the defendant, a native of

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Pakistan, had been in the U.S. for 20 years and had a wife and 13-year-old daughter, who was presumably born here and a U.S. citizen. Thus, sufficient circumstances existed to establish a reasonable probability that the defendant would not have plead guilty if he had been adequately advised.

**2006:** ***State v. Patel*, 626 S.E.2d 121 (Ga. 2006).** Counsel was ineffective in sexual battery plea of nolo contendre for making affirmative misrepresentations to the defendant with respect to the effect of the plea on the defendant's future participation as a physician in federal health care programs, such as Medicare and Medicaid. The defendant entered a plea only after specifically asking counsel about this issue. Without conducting "the basic research" necessary, counsel incorrectly advised the defendant that there would not be any long-term consequence when, in fact, the defendant was prohibited from participation in these programs for 10 years. Although there is no constitutional requirement to advise defendants of collateral consequences of a plea, counsel here made an affirmative misrepresentation in response to the defendant's specific inquiries. Prejudice found because the defendant would not have entered a plea of nolo contendre if he had been properly advised.

**2005:** ***Davis v. Murrell*, 619 S.E.2d 662 (Ga. 2005).** Counsel was ineffective in armed robbery plea case. The defendant was charged with six armed robberies and other offenses and plead guilty to one armed robbery in exchange for dismissing the other charges and a sentence of 20 years that was made concurrent to a sentence he was serving in Florida. Counsel's conduct was deficient because counsel affirmatively misinformed the defendant that he would be eligible for parole and sentence review when neither was true. Prejudice found.

**2004:** ***Cobb v. State*, 895 So. 2d 1044 (Ala. Crim. App. 2004).** Counsel ineffective in driving under the influence case for failing to adequately investigate and advise the defendant prior to his entry of a guilty plea. The defendant plead guilty under the assumption that he would be accepted into drug court and would receive no prison time. Because of a prior conviction of which counsel was unaware, the defendant was ineligible for drug court. Counsel admitted in his post-trial motions and conceded that his conduct was deficient. Prejudice found because the defendant consistently maintained innocence and would not have plead guilty if he had been adequately advised.
***Hernandez v. Commissioner of Correction*, 846 A.2d 889 (Conn. Ct. App. 2004).** Counsel ineffective in murder nolo contendre plea case for erroneously advising the defendant concerning parole eligibility. During the first day of trial, the defendant withdrew his not guilty plea and entered a nolo plea in exchange for a 25 year sentence. He had been informed by counsel that he would be eligible for parole after serving half of the sentence, when the defendant was ineligible for parole under state law. Counsel's conduct was deficient and the defendant was prejudiced because he likely would not have entered the plea absent counsel's misadvice because the defendant had a plausible self-defense argument and the court had already excluded the testimony of the only state's witness that could testify about the defendant's motive to commit murder.

***Rollins v. State*, 591 S.E.2d 796 (Ga. 2004).** Counsel was ineffective in drug plea for giving the defendant erroneous advice concerning the collateral consequences of pleading guilty, which resulted in the defendant pleading guilty. The defendant was a native of Barbados and a resident alien when

she entered a first offender guilty plea to a drug charge based on trace amounts of cocaine discovered on a dollar bill in her purse. Although the defendant maintained her innocence and the state's evidence was very weak, she entered a plea on the advice of counsel. Prior to entry of the plea, the defendant asked counsel if there would be any negative repercussions from the plea that would affect the defendant's desire to go to law school and become a lawyer and her INS status. Without conducting any research, counsel advised the defendant that there would be no repercussions. Counsel's conduct was deficient because basic research would have revealed that the defendant was subject to deportation upon a drug conviction. Basic research also would have revealed that it is standard practice for any state bar to require the applicant to provide information concerning prior convictions. Prejudice was found because both the defendant and counsel testified unequivocally that the defendant would not have entered a plea had she known of the adverse impact on either her intension to become a lawyer or her immigration status.

***State v. Lamb*, 804 N.E.2d 1027 (Ohio Ct. App. 2004).** Counsel ineffective in sexual imposition plea for failing to object to the trial court's failure to inform the defendant, at the time of his guilty pleas, that he was subject to a mandatory five-year post-release control period, due to a prior felony sex offense and the determination that he was a sexually oriented offender. Prior to accepting a guilty plea, state law requires the trial court to inform the defendant of the maximum penalty involved. Post-release control is part of an offender's sentence. Thus, the trial court's failure to provide any explanation of the mandatory period of post-release control at the time of the plea was error. Without the proper instruction, the defendant here could not have fully understood the implications of the plea. Counsel's conduct was deficient and prejudicial in failing to object to the trial court's error.

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## C. FAILURE TO INFORM DEFENDANT OR STATE OF PLEA OFFER

### 1. U.S. Court of Appeals Cases

**2006: *Satterlee v. Wolfenbarger*, 453 F.3d 362 (6th Cir. 2006) (*affirming* 374 F. Supp. 2d 562 (E.D. Mich. 2005)).** Counsel ineffective in drug conspiracy case for failing to inform the defendant of the prosecution's plea offer on the day of trial to allow the defendant to plead guilty in exchange for a sentence of six to 20 years so the defendant proceeded to trial and received a sentence of 20 to 30 years. The defendant was facing up to life imprisonment on the indicted charges and from the beginning cooperated with police in order to obtain release on bond. Prior to counsel's retainer, the government had offered a deal to 12 to 20 years. The defendant rejected this offer but continued cooperating with the police. Ultimately, prior to trial, the prosecutor offered a deal of 7 to 20 years, but this was never conveyed to the defendant. On the day of trial, the prosecutor offered 6 to 20, but again this was not conveyed to the defendant. In finding counsel's conduct deficient the court found the defendant's testimony to be more credible than counsel's because it was supported by the defendant's mother and the prosecutor. The district court granted a conditional writ ordering reinstatement of the plea offer. When the state failed to reinstate the plea offer, the district court ordered immediate release and expungement of the record of conviction. The Sixth Circuit affirmed.

### 2. U.S. District Court Cases

**2016: *Green v. Attorney General, State of Florida*, 193 F. Supp. 3d 1274 (M.D. Fla. 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.

**2015:** ***United States v. Merlino*, 109 F. Supp. 3d 368 (D. Mass. 2015).** Counsel in Hobbs Act and firearms offenses case was ineffective in failing to advise the defendant of the government's plea offer. The defendant was convicted, along with three co-defendants following a month-long jury trial, of attempting to rob an armored car facility. On the weapons charges, the most serious involved the possession of a live hand grenade of which the others were convicted but the trial court entered a judgment of acquittal for the defendant on that count, which would have required a mandatory thirty year consecutive sentence. Prior to trial, the prosecutor had offered the defendant a plea bargain because he was less culpable than the other participants, the principal of which was his uncle. The government offered to dismiss the hand grenade count in exchange for a guilty plea on the other counts with no departure below the minimum guidelines range. Thus, the plea offer proposed a recommended sentence of 17 years versus 21 years, if acquitted on the hand grenade charge, or 40-50 years if convicted on all counts. Counsel's conduct was deficient and prejudicial. Sentence vacated and the government was ordered to extend the offer of 17 years previously made.

***United States v. Sain*, 79 F. Supp. 3d 696 (E.D. Mich. 2015).** Counsel was ineffective in drug case in failing to research Sain's sentencing exposure and failing to inform Sain of the government's plea offers, which resulted in Sain proceeding to trial and being sentenced to 168 months of imprisonment. Sain was indicted in June 2007, along with his brother and other codefendants on drug charges. Attorney Short represented Sain and his brother. Subsequently, in December 2007, Sain was indicted for possession with intent to distribute marijuana and other crimes. Short also represented Sain in this case. Counsel failed to advise Sain of the government's plea offers. The first plea offer would have reduced the sentencing range to 87 to 93 months. The second plea offer would have dismissed one count and reduced the sentencing range to 41 to 51 months. Counsel believed erroneously that Sain would be sentenced to no more than two to five years and completely failed to advise the defendant about the advisability of a plea or the government's plea offers. Prejudice was clear given "the substantial disparity between the Government's plea offers . . . and his ultimate sentence."

**2014:** ***Jacobs v. United States*, 10 F. Supp. 2d 272 (D. Conn. 2014).** Counsel was ineffective in conspiracy to possess with intent to distribute 1000 grams or more of heroin for failing to inform the defendant of the government's plea offer and proposed cooperation agreement before it expired. Counsel's conduct was deficient. Prejudice was also established because the agreement would have resulted in a sentencing range of 360 months to life when the defendant faced a mandatory life sentence if convicted at trial. The defendant had been convicted at trial and sentenced to life.

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***United States v. Miranda*, 50 F. Supp. 3d 85 (D. Puerto Rico 2014).** Counsel was ineffective in plea negotiations in drug and weapons conspiracy case arising from "a large-scale undercover investigation targeting corrupt law enforcement officers in Puerto Rico." The defendant was an officer in the Puerto Rico Department of Corrections, who was charged with eight co-defendants in a 30-count indictment. The defendant faced a potential life sentence on multiple charges and communicated to counsel from the beginning of the case his desire to enter a plea agreement. Following trial, he was sentenced to a total term of 811 months (over 67 years) when he could have entered into a plea agreement for 20 years. The record established that the government first extended a plea offer for 14 years, which counsel did not disclose to the defendant. The government then made an offer of 15 years on which counsel "stalled the negotiations" and "misled the Court and the prosecution" before finally informing the government that the defendant rejected the offer. [Notably, it is questionable whether the defendant was adequately advised before rejecting this deal but the Court passed over this question to the very clear question of the final offer.] Even on the day the trial began, the government offered a 20-year deal and the defendant was still expressing his desire to enter a deal. "All that was needed was the defense counsel's active participation in getting the deal finalized." The Court likely would have accepted this deal as another co-defendant was allowed to plead to 12 years. New trial granted and the government was ordered to reinstate the 20-year offer.

**2008: *Leatherman v. Palmer*, 583 F. Supp. 2d 849 (W.D. Mich. 2008), *aff'd*, 387 Fed. Appx. 533 (6th Cir. 2010).** Counsel ineffective in criminal sexual conduct case for failing to properly advise the defendant of the government's plea offer for probation and up to one year of confinement when the defendant faced a possible life sentence. Prejudice established.

**2004: *Shiwlochan v. Portuondo*, 345 F. Supp. 2d 242 (E.D.N.Y. 2004), *aff'd*, 150 Fed. Appx. 58 (2nd Cir.2005) .** Counsel was ineffective in failing to advise the defendant of the court's plea offer in second degree murder case. Although the prosecution never made a plea offer, the trial court offered to impose a sentence of 15 years to life–the minimum sentence for second degree murder–if the defendant plead guilty to the charge of second degree murder and the other offenses included in the indictment. [It is common practice in New York for trial courts to engage in plea offers independent of the prosecution.] Following conviction, the defendant was sentenced to 41 2/3 years to life, which was the maximum possible sentence. Counsel did not inform the defendant of the offer because counsel: (1) did not think the defendant would accept the offer since he maintained innocence; (2) believed that there was a viable defense of misidentification; and (3) did not believe that the defendant would receive a "severe sentence" if convicted. Counsel's conduct was deficient and the state court's finding to the contrary was, under the AEDPA standard, an unreasonable determination of the facts in light of the evidence presented. The state court's finding that counsel did convey the offer was contradicted by counsel's affidavit. Moreover, even though counsel knew the maximum sentence, he never informed the defendant of the actual maximum sentence or that he could be sentenced consecutively because counsel did not believe the defendant would receive a "severe sentence" if convicted. Instead, he left the defendant with the impression that the maximum sentence he faced was 25 years to life. The state court's finding that counsel's conduct was reasonable was an unreasonable application of *Strickland* under the AEDPA because

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> By underestimating petitioner's exposure, [counsel] breached his duty 'to advise his client fully on whether a particular plea to a charge appears desirable. . . . Merely advising petitioner as to possible sentences rather than advising him on his full sentencing exposure is insufficient.

Despite the defendant's assertion of innocence, the court found a reasonable probability that the defendant would have accepted the plea offer for 15 years had he known of the court's offer. The court thus ordered resentencing according to the plea offer.

### 3. State Cases

**2016:** ***Helmedach v. Com'r of Corrections*, 148 A.3d 1105 (Conn. Ct. App. 2016).** In robbery-murder case where defendant was convicted and sentenced to thirty-five years, defense counsel was ineffective in waiting until after defendant testified to convey the prosecution's offer of ten years. The defendant had initially given her assent to an offer to plead guilty to robbery with a sentencing range of fifteen to twenty years. The offer was withdrawn, however, after the prosecutor consulted with the victim's family. Defendant's boyfriend/co-defendant then went to trial separately and was convicted of all charges and sentenced to eighty-five years. A motion to compel specific performance of the initial offer to defendant was denied and the case proceeded to trial. During jury selection, the prosecution offered defendant a deal of twenty-two years, suspended after seventeen years of incarceration. The offer was rejected. A third offer of fourteen years to serve was also rejected. The second and third offers were rejected because the key witness against defendant tying her to the robbery had changed his story. The final offer of ten years to serve came the morning the defense case was to begin with defendant's testimony. Defendant's counsel asked the prosecutor if he could delay informing defendant of the offer until after her testimony, fearing defendant would become flustered if she was told prior to testifying. The prosecutor agreed. Defendant's counsel relayed what had occurred to his law partner who advised defendant's counsel to inform defendant of the offer immediately. Defendant's counsel decided not to heed the advice. Defendant then testified for two and one-half days, after which she was informed of the offer. She expressed a desire to accept the offer and indicated she wished to discuss it with her mother. When defense counsel approached the prosecutor and informed him that defendant was interested in the offer, the prosecutor responded that the offer was withdrawn. In subsequent habeas proceedings, relief was granted to defendant on her claim of ineffective assistance of counsel. On appeal, prejudice was not disputed. The sole issue was deficient performance. The court ruled: "Because defense counsel's actions prevented [defendant] from properly exercising her constitutional right to plead guilty and to make a fully informed decision as to whether to testify on her own behalf, we agree with [defendant] that [defense counsel's] decision may not properly be viewed as trial strategy at all, much less a *reasonable* trial strategy." But even if the delay in conveying the offer could properly be considered as strategy, it was not reasonable in this case. Defense counsel did not withhold the offer because he thought a more favorable offer could result or there was an enhanced chance of acquittal. Further, given the history of plea negotiations in the case, which included the withdrawal of the initial offer after defendant's acceptance, defense counsel acting unreasonably in waiting to inform defendant of the offer. That defense counsel had rejected his law partner's advice was additional evidence rebutting any presumption that defense counsel's delay was reasonable.

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**2015:** ***Woods v. State*, 48 N.E.3d 374 (Ind. Ct. App. 2015).** Counsel was ineffective in robbery case for failing to inform the defendant of a favorable plea offer prior to trial. The fifteen-year-old defendant was charged as an adult, along with a codefendant, of robbery resulting in serious bodily injury, a Class A felony. He already had pending charges: carjacking (Class B), auto theft (Class D), and drug possession charges (Class D). The state made a written plea offer. In exchange for the defendant's pleas of guilty to robbery (Class B), and the Class D auto theft and drug charges, the state would dismiss the carjacking charge. The sentence would be left to the Court's discretion. Counsel's conduct was deficient in failing to inform the defendant of this offer. The defendant subsequently rejected an offer to plead to Class A robbery and proceeded to a bench trial in which he admitted to Class B robbery. He was convicted of Class A robbery and sentenced to 45 years with 10 suspended. Prejudice was established. The maximum sentence under the proposed plea agreement was 20 years for the Class B robbery and an aggregate sentence of 26 years for all three offenses. The fact that the defendant would have accepted this offer was clear as he conceded guilt of the Class B offense in his bench trial. There was also no evidence of intervening circumstances like an arrest that would have led the state to retract the offer or the trial court to reject the plea agreement. The plea offer was reinstated. If the defendant rejected it, he was entitled to a new trial.

**2014:** ***Bell v. State*, 765 S.E.2d 4 (S.C. Ct. App. 2014).** Counsel ineffective in armed robbery case for failing to inform the defendant of a ten-year plea offer from the state. The defendant filed a grievance against his initial counsel and the file was passed to another public defender in the same office with a note that the solicitor offered a ten-year plea deal. New counsel never discussed this the defendant (or the solicitor apparently) and the case proceeded to trial. During sentencing, counsel informed the judge that the defendant had been offered a 10-year deal but the solicitor denied any offers. The judge sentenced the defendant to 20 years. In post-conviction, the defendant testified that the sentencing discussion was the first he had heard of a plea offer and that he would have taken the deal. The post-conviction judge found his testimony credible and granted relief. The court of appeals affirmed noting: "[W]e are mindful of our standard of review, and we find evidence to support the PCR court's decision." "Although self-serving, the [defendant's] statement is also evidence supporting the PCR court's finding of prejudice. Deferring credibility matters to the PCR court, we find evidence to support the finding." (Citations omitted).

**2011:** ***Johnson v. State*, 712 S.E.2d 811 (Ga. 2011).** Counsel ineffective in armed robbery and aggravated assault case for failing to adequately advise the defendant of the state's plea offer of 25 years. A series of public defenders did not advise the defendant for various reasons. Thus, the defendant was not advised of the offer or that he was facing a mandatory sentence of life without parole if convicted until two days before trial. The defendant proposed a counteroffer of 20 years to serve 10, which was conveyed to the state. When that offer was rejected, within minutes, the defendant agreed to accept the 25-year offer. This was rejected due to the standing policy of the prosecutor that plea offers were closed after the docket call when the defendant pled not guilty. While there was conflicting evidence of whether the defendant was ever advised of the 25-year offer prior to two days before trial, it was undisputed that no one attempted to negotiate a plea prior to the docket call. Likewise, counsel made no investigation and did not advise the defendant of the mandatory life sentence, prior to the docket call. Final counsel did not even meet with the defendant until after the docket call, even though he was aware of the prosecutor's docket call deadline for plea offers.

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Prejudice established as there is a reasonable probability the defendant would have accepted the state's offer if he had been adequately advised.

**2009:** ***Carmichael v. People*, 206 P.3d 800 (Colo. 2009).** Counsel ineffective in case involving numerous charges related to child sexual assault for inadequately advising the defendant about the state's plea offer. The defendant faced a sentence of 20 years to life. The state offered a plea bargain that included an indeterminate sentence of probation with a minimum of ten years. On counsel's advice, the defendant rejected this offer. He was ultimately sentenced to twenty years of probation. Counsel's conduct was deficient because counsel never informed the defendant he faced two indeterminate life sentences if convicted. He also did not inform the defendant that the minimum length of probationary supervision he would receive if convicted at trial would be twenty years, twice the minimum he would be facing if he accepted the plea offer. Instead, counsel incorrectly advised the defendant he would "end up with the same probationary sentence offered in the plea bargain" if convicted at trial. Counsel "fundamentally misunderstood the potential consequences of the charges" and was "unaware of the specialized sentencing requirements for sex offenders" under state law. Counsel mistakenly believed the defendant "would be subject to general felony sentencing guidelines. This mistake, combined with a failure to conduct adequate research," led counsel to incorrectly advise the defendant, who as a result "was unable to properly evaluate the attractiveness of" the state's offer and did not have "an opportunity to make a reasonably informed decision regarding the relative benefits of the offered plea bargain." Prejudice established because there is a reasonable probability that the defendant would have accepted the plea offer if he had been adequately advised. Indeed, the defendant, "though his counsel, was affirmatively pursuing a plea bargain despite his proclamations of innocence." "[A] defendant's protestations of innocence, standing alone, are insufficient to support a finding of no prejudice when weighed against objective evidence of prejudice."

> A large number of defendants will enter into the criminal justice system maintaining their innocence, only to later admit to the criminal acts they have committed. In addition, a defense attorney's accurate presentation of available outcomes may encourage a defendant to admit his actions and face the applicable consequences.

New trial granted without any order to reinstate the plea offer.

***Davie v. State*, 675 S.E.2d 416 (S.C. 2009).** Counsel ineffective in drug trafficking case for failing to inform the defendant of the state's initial written plea offer in which the State offered a fifteen-year sentence in exchange for a guilty plea. Counsel was unaware of the state's offer until after its expiration because counsel was relocating his office and changing his mailing address. Ultimately, the defendant entered a "straight up" plea to eight charges in return for the state dismissing three charges and the state recommended life without parole. The defendant was sentenced to 27 years. Even though counsel may not have been aware of the plea offer until after the expiration date, counsel's conduct was deficient in failing to object at the plea hearing to lack of notice of the first offer when it was mentioned by the state. "Had counsel done so, he might have been able to convince the solicitor to reinstate this plea offer or persuade the circuit court judge to impose a fifteen-year sentence." Prejudice established based on the difference in the sentence the defendant

received and that offered by the state initially and the fact that counsel and the defendant testified that he would have accepted the initial plea offer if it had been communicated to him. Remanded for resentencing not to exceed the original twenty-seven-year sentence.

**2006:** ***Jiminez v. State*, 144 P.3d 903 (Okla. Ct. App. 2006).** Counsel ineffective in second-degree burglary and other offenses case for failing to inform the defendant of a plea offer until the day set for trial. Prejudice found because the plea offer was not open when defense counsel did inform the defendant about it and the defendant probably would have accepted the offer and received a sentence of five years in prison rather than the 12-year sentence assessed by jury. Sentence modified to five years.

**2004:** ***Sanders v. Commissioner of Correction*, 851 A.2d 313 (Conn. Ct. App. 2004).** Counsel ineffective in robbery and conspiracy case for failing to meaningfully advise the defendant of a plea offer from the state. The defendant rejected an initial plea offer by the state and the state made a second offer. Although counsel informed the defendant of the offer, counsel did not inform the defendant of the statements of the witnesses against him or advise him of the likely outcome if the case proceeded to trial. Although *Strickland* presumes counsel's conduct to be reasonable,

> Nowhere is it said, though, that such a presumption is irrebutable. As with any refutable presumption, the petitioner may rebut the presumption on adequate proof of sufficient facts indicating a less than competent performance by counsel. In determining whether the presumption should apply, . . . other acts of ineffective assistance in the same matter may be considered in making that determination.

Prejudice found because the defendant would have accepted the second plea offer limiting his sentence if it had been meaningfully explained. Although the only evidence of this was the defendant's testimony, this was sufficient because the court assessed the defendant's demeanor and credibility.

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## D. BAD ADVICE LEADING TO REJECTION OF PLEA OFFER

### 1. U.S. Supreme Court Cases

**2012:** ***Lafler v. Cooper*, 566 U.S. 156 (2012).** In this assault with intent to commit murder case, counsel was found to be ineffective in advising respondent to reject the state's plea offer and proceed to trial. The prosecution twice offered to dismiss two of the charges and to recommend a sentence of 51 to 85 months for the other two charges in exchange for a guilty plea. Respondent initially indicated a willingness to enter the deal, but later rejected the offer because counsel convinced him that the prosecution would be unable to establish his intent to commit murder on the basis that the victim had been shot below the waist. After a full and fair trial, respondent was convicted on all four counts and received a mandatory minimum sentence of 183 to 360 months. Respondent asserted ineffective assistance of trial counsel for advising him to reject the state's plea offer. Rather than applying *Strickland* as was inappropriate in this circumstance, the state court simply found that respondent's rejection of the plea offer was knowing and voluntary. "By failing to apply *Strickland* to assess the ineffective-assistance-of-counsel claim respondent raised, the state court's adjudication was contrary to clearly established federal law." The Supreme Court again rejected the argument that *Lockhart v. Fretwell* modified *Strickland*. The Court also reiterated the desirability of pleas as "criminal justice today is for the most part a system of pleas, not a system of trials. Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas." On deficient performance, the Supreme Court noted that "an erroneous strategic prediction about the outcome of a trial is not necessarily deficient performance," but the State conceded that counsel's conduct was deficient in this case. Thus, the only question before the Court was how to apply *Strickland*'s prejudice test where counsel's ineffectiveness resulted in rejection of a plea offer.

> In these circumstances a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed.

Respondent established a reasonable probability that he would have accepted the plea offer and the court would have accepted the guilty plea. In addition, prejudice was shown as respondent received a sentence 3 ½ times more severe than he likely would have received by pleading guilty. In fashioning a remedy, the Court noted that "a remedy must 'neutralize the taint' of a constitutional violation."

> The correct remedy in these circumstances . . . is to order the State to reoffer the plea agreement. Presuming respondent accepts the offer, the state trial court can then exercise its discretion in determining whether to vacate the convictions and resentence respondent pursuant to the plea agreement, to vacate only some of the

> convictions and resentence respondent accordingly, or to leave the convictions and sentence from trial undisturbed.

In short, "[t]oday's decision leaves open to the trial court how best to exercise that discretion in all the circumstances of the case."

### 2. U.S. Court of Appeals Cases

**2016:** ***Sullivan v. Secretary, Florida Dept. of Corrections*, 837 F.3d 1195 (11th Cir. 2016)**. After upholding the district court's determination that inadequate assistance of post-conviction counsel constituted "cause" to overcome procedural default, the Eleventh Circuit affirmed the grant of relief on the uncontested merits of petitioner's claim that trial counsel was ineffective for advising him to reject a generous plea offer in favor of going to trial with a defense which – unbeknownst to trial counsel – had been legislatively abolished. The charges against petitioner arose out of his involvement in a high speed police chase while under the influence of (and in possession of) cocaine. Although he faced a thirty year sentence if convicted, the prosecution offered twelve years in exchange for a guilty plea. Trial counsel advised petitioner to reject the offer on the belief that he would likely be acquitted under a defense of voluntary intoxication, and petitioner followed that advice. Near the end of trial, however, petitioner and his counsel learned for the first time that voluntary intoxication had been legislatively eliminated as an available defense five years earlier. As a result, petitioner was left with no viable defense, found guilty, and sentenced to thirty years. At an evidentiary hearing on the resulting ineffectiveness claim (which had been rejected as untimely by the state courts), trial counsel testified that he had been ignorant of Florida's abolition of voluntary intoxication as a defense, that petitioner (whom he had represented before) always followed his advice, and that, had he been properly informed on the law, he would have advised petitioner to accept the plea offer. The trial prosecutor also testified, confirming that a plea offer had been made. The federal magistrate credited the testimony of trial counsel and petitioner, and recommended that relief be granted, and the district court adopted the recommendation and granted the writ. On appeal, the Eleventh Circuit noted that the only matter challenged by the state was the district court's determination that petitioner had shown "cause" to overcome default, resolved that issue against the state, and affirmed the grant of relief.

**2009:** ***Williams v. Jones*, 571 F.3d 1086 (10th Cir. 2009).** The state court failed to fashion a constitutionally permissible remedy following a finding of ineffective assistance in rejecting a plea offer in first-degree murder case. The Oklahoma prosecutor offered the defendant a 10-year sentence in exchange for a plea to second-degree murder. Believing the defendant was innocent, counsel threatened to withdraw if the defendant accepted the offer. Against his own desires and following counsel's advice, the defendant proceeded to trial, was convicted, and sentenced to life without parole. The Oklahoma Court of Criminal Appeals found ineffective assistance and, as a remedy, modified the defendant's sentence to life with parole eligibility, which was the minimum punishment allowed under state law for first-degree murder. The federal court declined to determine whether deference was due under AEDPA or whether review was de novo "because even under a deferential standard of review the remedy was objectively unreasonable." "[A]ny correction for a federal constitutional violation must be consistent with federal law," which requires "a remedy that comes

as close as possible to remedying the constitutional violation, and is not limited by state law." Remanded to District Court to determine remedy.

***Dasher v. Attorney General, Florida*, 574 F.3d 1310 (11th Cir. 2009).** Counsel ineffective in drug case for advising client to reject plea offer from judge and to plead guilty without any agreement on sentence. The prosecutor offered the defendant a two year sentence, which was rejected. Due to a huge backlog of cases and overflowing jails, the trial court, who rarely involved himself in plea negotiations, made his own offer of 13 months in a Florida State prison. The defendant, however, preferred a 12 month sentence that could be served in a county jail. Counsel advised the defendant that if he rejected the plea offer, pled straight up, and offered mitigation evidence, the trial court likely would not sentence the defendant to more than 13 months. The defendant pled guilty the same day and, considering a presentence report prepared by defense counsel that revealed numerous juvenile and adult priors, the court sentenced the defendant to 10 years. Counsel's conduct was deficient in that "the advice he gave . . . was a piece of foolishness," because, with the 13 month offer, the judge was already "giving away the store." Once the defendant rejected the judge's offer and pled straight up, the judge "had no reason to give him the thirteen month sentence he offered to induce a plea." In addition, although counsel suggested presenting mitigation to convince the judge, "it was obvious that he was not then aware of any."

> We do not suggest that there are no circumstances where it would be reasonable for a lawyer to advise his client to plead guilty without an agreement and throw himself at the mercy of the judge. But this was not such a case. Whether or not he had a lengthy prior criminal record, [the defendant] was clearly risking a sentence of substantially more than thirteen months, and there was certainly no reason to believe he would do better.

Because the defendant had served all but 5 months of his sentence, the sentence was modified to time served.

**2007:** ***Julian v. Bartley*, 495 F.3d 487 (7th Cir. 2007).** Counsel ineffective in plea negotiations for incorrectly advising the defendant on the maximum punishment he could receive if he did not accept the state's proposed plea offer, which led the defendant to reject the plea offer. The defendant was charged with two robberies and faced a maximum sentence of 60 years. The state offered a concurrent 23 year sentence for both. Just before entry of a plea, the court informed the defendant that his sentence would have to be served consecutive to his separate sentence imposed for parole violation. The defendant conferred with counsel, who informed him that under the recent decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), he could only be sentenced to 30 years because the indictments did not mention the prior conviction. The defendant then rejected the plea and proceeded to trial and got 40 years concurrent. Counsel's conduct was deficient and the state court's determination to the contrary was based on an unreasonable determination of the facts in light of the evidence presented in state court. The state court decision was also an unreasonable application of *Strickland*. Counsel's conduct was deficient because, in the context of advice concerning a plea agreement, "[a] reasonably competent attorney will attempt to learn all the facts of the case, make an estimate of the likely sentence, and communicate the result of that analysis before allowing the

client to plead guilty." *Id*. at 495. Here, counsel's advice was plainly wrong because "the holding of *Apprendi* is clear on first, second, or third glance that the fact of a prior conviction need not be submitted to a jury and proved beyond a reasonable doubt." *Id*. at 497. Thus, counsel's interpretation of *Apprendi* "simply cannot constitute an objectively reasonable analysis of the law." Prejudice established because the information counsel provided was "precisely the type of information that is likely to impact a plea decision." The defendant might risk seven extra years in prison for a chance at acquittal, but a reasonable defendant would not risk an extra 37 years for this gamble. In addition, the defendant rejected the plea immediately after counsel's erroneous advice. While the defendant argued that the remedy was to reinstate the state's initial plea offer, the court rejected this as inappropriate because "the State had no hand in denying [the defendant] his Sixth Amendment right to effective assistance of counsel, and [the defendant] never actually accepted the terms of the original plea offer." *Id*. at 500. New trial granted.

**2006: *United States v. Morris*, 470 F.3d 596 (6th Cir. 2006) (*affirming in part* 377 F. Supp. 2d 630 (E.D. Mich. 2005)).** Counsel was ineffective in felon in possession of a firearm case brought under Project Safe Neighborhoods, a joint program of the federal and state prosecutors in Michigan, for failing to adequately advise the defendant with respect to the state's plea offer. The defendant was initially charged in state court and offered a deal for one to four years on a marijuana charge and two additional years on the weapons charge. The state prosecutor required an immediate decision, however, and the defendant was informed that if he declined the deal, he would be transferred to federal court which could result in a more severe sentence. Counsel, who did not have complete discovery at that time, was able to speak only briefly with the defendant in the "bull pen" with others present and no ability for privileged communications prior to a hearing. State counsel was not familiar with the federal sentencing guidelines and relied on what the state prosecutor told her based on his information from the federal prosecutor. She, thus, informed the defendant that if transferred to federal court, he could receive a sentence of 62 to 68 months when he actually faced 101 to 111 months under the federal guidelines. The defendant rejected the deal and was transferred to federal court where he filed a motion to dismiss the federal indictment and to "remand" him to state court and to reinstate the plea. The District Court granted the motion on the basis of ineffective assistance of counsel. The Sixth Circuit found that it was proper to dismiss the indictment because the federal prosecutor was involved in the state court plea offer, which included dismissal of the federal charges as part of the agreement, but the federal court could not remand to state court and order reinstatement of the plea offer. The court held that the defendant was constructively denied counsel under United *States v. Cronic*, 466 U.S. 648 (1984), and prejudice was presumed.

> The fact that . . . counsel gave him some advice does not preclude a finding of constructive denial of counsel under this standard. Rather, the circumstances, such as the lack of time for adequate preparation and the lack of privacy for attorney-client consultation, would have precluded any lawyer from providing effective advice. This is demonstrated here in part by the fact that . . . counsel was precluded from taking basic preparatory steps such as looking at his prior record in conjunction with the federal sentencing guidelines so as to make an accurate prediction of his guideline range, and instead had to rely on the erroneous estimate provided by an Assistant United States Attorney. . . .

**Capital Case*

Alternatively, the court held that counsel provided ineffective assistance of counsel under *Strickland*. Counsel's conduct was deficient in failing to adequately inform the defendant of the likely consequences of rejecting the plea offer and being transferred to federal court. Prejudice found because the defendant would likely have accepted the plea offer and entered a plea of guilty if he had been adequately advised.

**2004:** ***United States v. Grammas*, 376 F.3d 433 (5th Cir. 2004).** Counsel ineffective in altering vehicle identification number case for failing to realize (and, therefore, failing to advise the defendant) that his prior convictions were crimes of violence that raised the base offense level for sentencing. Counsel's conduct was deficient because failure to properly advise the defendant of the maximum sentence that he could receive falls below an objective standard of reasonableness. The defendant was prejudiced because there is a reasonable probability that if he had known of the greater sentencing exposure, he would have plead guilty and availed himself of a guidelines reduction for acceptance of responsibility.

**2003:** ***Nunes v. Mueller*, 350 F. 3d 1045 (9th Cir. 2003).** Counsel was ineffective in second degree murder case for giving the defendant incorrect information and advice concerning the state's plea offer, which resulted in the defendant rejecting the offer. The defendant was initially charged with murder during the first two trials, the jury hung. After the third trial, the defendant was convicted of second degree murder but that conviction was reversed on appeal. Prior to the fourth trial, the state offered the defendant a sentence of eleven years in exchange for a guilty plea to voluntary manslaughter. Counsel met only briefly with the defendant and did not adequately explain the offer. The defendant believed the offer was for a 22 year sentence. The first time the defendant was able to talk to counsel again and clarify the offer was on the day of trial when the offer had expired. The defendant was convicted of second degree murder and received a 15 year to life sentence. Without holding an evidentiary hearing, the state court held that the defendant had not made out a prima facie case for prejudice and denied relief. Analyzing the case under the AEDPA, the Ninth Circuit found that the state court decision was an unreasonable application of the law to the facts and an unreasonable application of clearly established Supreme Court law. The court held that there was ample evidence in the record to establish a prima facie. The state court also unreasonably required the defendant to prove prejudice with absolute certainly when he needed only to demonstrate that there was a reasonable probability that he would have accepted the plea offer. Here, the defendant met that burden. To the extent the state court demanded more, it applied the Strickland test unreasonably. To the extent that the state court had made findings of fact, the court held that deference was not required because the state court did so without holding a hearing. Prejudice was clear here in that the defendant's strategy through all four trials was to argue that he was guilty only of voluntary manslaughter. Thus, the court found that it was reasonable to infer that he would have accepted an offer to plead guilty to voluntary manslaughter. To the extent that the state court made contrary inferences without a hearing, the court found that the state court decision was objectively unreasonable because there were equally valid inferences that could have been drawn in the defendant's favor. The court ordered the defendant released unless the state made an identical plea offer to the defendant.

**Capital Case*

### 3. U.S. District Court Cases

**2018:** ***United States v. Hamilton*, 326 F. Supp. 3d 354 (E.D. Kentucky, Mar. 7, 2018).** Trial counsel was ineffective in failing to adequately advise petitioner on the mechanics of a plea offer. Petitioner was indicted on one count of conspiring to defraud the government, four counts of wire fraud, and two counts of aggravated identity theft. He ultimately pleaded guilty to the conspiracy and one count of wire fraud and one of aggravated identify theft. He was sentenced to 82-months imprisonment. During plea negotiations, counsel failed to inform petitioner of the terms and mechanics of the offer from the government, including the import of the prosecutor's plea deadline, which caused petitioner to forego a plea deal including a third-point reduction in the sentencing guidelines for timely acceptance of responsibility (the plea offer lapsed). Counsel failed to convey the possibility of the irrevocable third-point loss and ineffectively advised petitioner that the prosecutorial deadline was not controlling. The government repeatedly advised counsel that petitioner would get the third point for acceptance of responsibility if he signed a plea agreement on or before a particular date, but otherwise the agreement would expire. Counsel acknowledged in an email to the government that "it would appear that denial of the third point is my responsibility." Petitioner established a reasonable probability that, if accurately advised, he would have accepted the plea offer before it lapsed. He ultimately accepted and was sentenced based on a plea offer that was different than the lapsed offer only by omitting the third point reduction.

***Contreras v. United States*, 2018 WL 1166311 (S.D. Texas, Mar. 6, 2018).** Trial counsel performed deficiently during plea negotiations by failing to learn the mandatory sentence on one of the charges. Petitioner was found guilty in federal district court by a jury on a number of counts, including two counts of knowingly using and carrying a firearm during and in relation to a drug-trafficking crime, in violation of 18 U.S.C. § 924(c). The Presentencing Report incorrectly stated that the second of these two counts carried a mandatory sentence of 5 years, when in fact it carried a mandatory sentence of 25 years. Post-trial, but presentencing, counsel continued to refer to the count as carrying a 5-year sentence. It was not until the probation officers issued an addendum to the PSR correcting the sentence that counsel became aware of the 25-year sentence. Thus, it is clear that counsel did not advise petitioner of the mandatory 25-year sentence during plea negotiations with the government. Although the district court reviewing petitioner's motion to vacate under 28 U.S.C. § 2255 observed that because even the government and the probation officer "were mistaken until the eleventh hour as to the correct sentence," and counsel's "conduct does not present the glaring examples of ineffective assistance of counsel that typically succeed on habeas review," 2018 WL 1166311 at *3, nevertheless, counsel's conduct did meet the ineffective assistance of counsel standard. The court, under *Lafler v. Cooper*, 566 U.S. 156, 171 (2012), ordered the government to reoffer petitioner the plea agreement it offered prior to trial. If petitioner accepts the offer, the court will decide whether to accept the plea and vacate petitioner's current convictions and sentence.

**2017:** ***Byrd v. United States*, 2017 WL 3605333 (N.D. Ala., August 22, 2017).** Trial counsel was ineffective during plea negotiations for failing to provide adequate and proper advice in multiple respects. Trial counsel undertook his representation of defendant in violation of his terms of employment with the Legal Aid Society. This was his first time representing anyone on criminal

charges in federal court. Counsel told defendant his chances at trial were 50-50 because that was what he told all of his clients about their chances at trial. This ignored the fact that the government had a strong case against defendant, including video evidence and testimony from two cooperating witnesses. Trial counsel also incorrectly told defendant he faced a possible sentence of ten years if convicted when, in fact, he faced a mandatory minimum of thirty-two years. Finally, the government offered a plea agreement that would have dropped one of the charges against him and removed a twenty-five-year mandatory minimum sentence. Trial counsel failed to convey this offer to defendant until the day of trial (even though counsel promised the court he would convey the offer immediately up to a week before trial) and then further failed to advise defendant that the agreement did not require his cooperation or testimony against a co-defendant at trial. Defendant rejected the plea offer because he did not want to be a "snitch." The government conceded trial counsel's conduct was deficient but argued defendant could not establish prejudice because he testified that he was satisfied with his attorney's performance and understood the plea offer at a pretrial colloquy. The court rejected this argument, finding that defendant simply responded "yes" to all of the court's questions on the advice of his trial counsel when, in fact, counsel had failed to provide adequate and proper advice. Had defendant been aware that his plea agreement did not require his cooperation *or* that he was facing a mandatory thirty-two-year sentence, he would have accepted the plea.

**2015:** ***United States v. Cobb*, 110 F. Supp. 3d 591 (E.D. Pa. 2015)**. Counsel ineffective in drug conspiracy and distribution case for advising the defendant inaccurately with respect to the possible maximum sentence, which resulted in the defendant rejecting a favorable plea offer. Prior to trial, counsel repeatedly recommended a guilty plea with continued cooperation with the government and a sentence range of 100 to 125 months if he pleaded guilty. Counsel, however, incorrectly believed that the defendant "was a career offender – a designation that would increase his Guidelines range from 130-162 months to 360 months to life." The defendant proceeded to trial and was sentenced (with an upward departure) to 24 years. Even if the court still would have applied the upward departure following a guilty plea, it is reasonably probable that the sentence would have been shorter than that given. While the defendant sought a new trial, the court found this would be an inappropriate "windfall" because the defendant had been convicted at a fair trial. The court noted its discretion in the matter and ordered additional briefing on the appropriate remedy.

**2011:** ***Young v. Zon*, 827 F. Supp. 2d 144 (W.D.N.Y. 2011)**. Counsel ineffective in attempted murder case in failing to render any advice concerning state's plea offer. The state made an offer of a maximum of seven years in exchange for a guilty plea when the defendant was facing a possible sentence of 25 years. While retained counsel sent his associate to inform the petitioner of the offer, counsel did not advise the defendant "about the pros and cons" or whether he should accept or reject the plea and gave his standard answer that "it was not his policy to recommend to his client whether a sentence [sic] offer should be accepted or rejected." The court found this "extremely troubling," as counsel's policy applied "especially when the potential sentence was 'significant'–a situation where the defendant is arguably in the most need of an attorney's professional recommendation." Counsel's conduct was deficient.

> [T]his is not a case where trial counsel's advice about the wisdom of accepting a plea could be placed on a continuum of reasonableness because, as trial counsel admitted,

> he gave no advice whatsoever. The failure to give any advice was entirely contrary to the minimum professional norms of practice.

There was also prejudice. There were eyewitnesses that positively identified the petitioner as the shooter, he had a motive, he was arrested shortly after the crime in a police chase, GSR results were "inconclusive" but did not exclude him as the shooter, and he had made statements to a jailhouse snitch. Under AEDPA, the state court unreasonably applied clearly established Supreme Court law.

**2010:** ***Harris v. United States*, 701 F. Supp. 2d 1084 (S.D. Iowa 2010)**. Counsel ineffective in cocaine distribution case for incorrectly advising the defendant, which resulted in the defendant rejecting the government's offer to plead guilty and accept responsibility for 100 grams of cocaine in exchange for a 10 year sentence. The defendant was charged with distributing on four occasions a total amount of 7.5 grams, but a superseding indictment included special findings that she was responsible for 500 grams to 1.5 kilograms. Due to counsel's misunderstanding of the role of "relevant conduct" under the sentence guidelines and his belief that the defendant could not be held responsible for more than 7.5 grams if she plead guilty, the defendant rejected the plea offer and entered an open guilty plea. Over her objection, the court accepted the PSI finding that she was responsible for 315 grams and sentenced her under the guidelines to 151 months, which was later reduced to 121 months. Counsel's conduct was deficient as counsel did not understand the application of Booker or the sentencing guidelines to the case.

> The court recognizes that counsel cannot be expected to predict the eventual sentence that a defendant will receive. Counsel should be expected, however, to advise a defendant on at least the fundamental provisions of the guidelines so that she can make an intelligent decision whether to accept or reject a plea.

*Id*. at 1094. Prejudice found as the defendant would have accepted the government's plea offer if she had been adequately advised. The remedy granted was reinstatement of the offer to plead to 100 grams of cocaine base for a 10 year sentence.

***United States v. Wilson*, 719 F. Supp. 2d 1260 (D. Ore. 2010)**. Counsel ineffective in drug case in failing to adequately advise the defendant in pretrial negotiations. At the time of arrest, the defendant had 116 ecstasy pills, scales, and drug packaging materials in his home. He confessed involvement in smuggling more that 100,000 ecstasy pills on the day of arrest. He cooperated with law enforcement for three weeks, including recording phone calls, and assisting agents in seizing additional drugs and locating his co-defendant in Amsterdam. The defendant believed the agents had offered him an immunity agreement. When he insisted on speaking to the prosecutor about a "deal" in exchange for his cooperation, the AUSA facilitated the appointment of counsel for him. The AUSA offered a pre-indictment plea bargain of six years with a one day time limit and no discovery. Despite counsel's awareness of the evidence seized in the defendant's possession, his confession, and his cooperation for weeks, counsel refused to advise the defendant on whether to accept the offer because counsel could not do so without obtaining discovery. Counsel made a counter "offer" of continued cooperation in exchange for full immunity, which the AUSA rejected immediately. Without evening informing the defendant that immunity had been

rejected, counsel informed the AUSA that the six year offer was rejected. Post-indictment, counsel did not pursue any plea negotiations other than continuing to push for full immunity. Due to counsel's grossly inadequate advice, the defendant went to trial believing that he faced between 30-80 months in prison when he actually faced a possible 20 year sentence. The Court rejected the government's argument that there was no right to the effective assistance of counsel pre-indictment. This was a "critical stage of the criminal process" that was "the functional equivalent of the initiation of formal adversarial proceedings." Moreover, when counsel was appointed at the request of the government, a finding that there was no right to effective assistance of that counsel "would make a mockery of the judicial appointment of counsel." Counsel's conduct was deficient. He failed to inform the defendant that he could be held liable for all the ecstasy imported or delivered during the conspiracy. He failed to inform the defendant he was facing a much longer possible sentence than 6 years and that acquittal was unlikely given the evidence against him. Counsel also provided inaccurate advice by informing the defendant the guideline range at that time was 41-51 months, which was based on an outdated version of the Sentencing Guidelines. These errors were compounded by counsel's failure to advise the defendant that full immunity in these circumstances was extremely unlikely. Even assuming the defendant was not entitled to effective assistance pre-indictment, counsel was ineffective post-indictment in failing to aggressively pursue a plea agreement comparable to the initial six year offer. He never accurately advised the defendant of his sentencing exposure. At the time of trial, the defendant believed he faced 30-80 months when he faced 20 years. Prejudice established. The Court found the defendant's testimony that he would have taken the six year deal if adequately advised to be credible and validated by the objective circumstances. Counsel's affidavit was rejected as incredible, where the affidavit contradicted counsel's notes and correspondence at the time. The remedy ordered was reinstatement of the government's initial six- year plea offer.

***Wolford v. United States*, 722 F. Supp. 2d 644 (E.D. Va. 2010)**. Counsel ineffective in drug case for failing to adequately advise the defendant during plea negotiations, which resulted in the defendant rejecting a very favorable plea agreement. The defendant was initially charged with several co-conspirators on one count of conspiracy to distribute drugs over a five year period out of the defendant's house, which was located within 1,000 feet of an elementary school. The majority of the controlled substances involved were pain medications the defendant and her boyfriend obtained through the use of physician-issued medical prescriptions. A search of the house revealed nearly 100 empty prescription bottles, totaling more than 8,000 pills, and other evidence. While there was substantial evidence of distribution, significant quantities of the substances were also used by the defendant and her boyfriend, as both were addicted to prescription pain killers. Counsel was appointed in February 2006. Several weeks later, while the defendant was in an inpatient drug treatment program, the government extended its first written plea offer, which would have allowed the defendant to plead to conspiracy at a base level of 28 to 30 and health care fraud. In exchange the government would agree not to charge her with distribution within a school zone and would not seek any additional adjustments or enhancements to the offense level. There is no evidence that counsel informed the defendant of this initial offer. Several months later, in May 2006, the defendant and counsel met with government agents for a "de-brief and proffer session" where the defendant signed an immunity agreement and agreed to show an undercover agent how she obtained the prescriptions from various doctor's offices. Several weeks later, counsel finally spoke with the

defendant about the government's plea offer. Only a few days after this, the defendant and counsel met with the government and covered the plea offer with the defendant in detail. The offer was the same, except the health care fraud charge was eliminated at counsel's request. The defendant was "not comfortable" with the offer. While she did not dispute that she had distributed some drugs, she contested the amount of drugs she would be held responsible for under the plea. She also did not accept the plea because she sought probation and no jail time if she entered a plea. A few days after this, the prosecution renewed the offer, which would expire in two weeks. While could discussed the offer with the defendant, he did not inform her of the expiration date. The offer expired and the government indicted on the initial charge, on two counts of distribution, and distribution within a school zone. The next day, the defendant and counsel again met with the prosecution to discuss a plea. She remained reluctant about the quantity of drugs, although she understood the government agent's explanation that if you distributed one pill out of a bottle the whole bottle was counted in the charge. The government suggested they meet again in two weeks, presumably to continue plea discussions, and the defendant agreed. Afterwards, counsel advised her, however, that the government would never agree to anything she wanted. Nonetheless, at the end of August 2006, the government extended the same offer without a deadline attached to it. Counsel informed the defendant of the offer and continued to discuss the offer, trial strategy, etc., with her but had no additional plea discussions with the government before a superceding indictment in October 2006 that added additional drugs to the conspiracy charge, which now was charged as within the school zone, and added six additional counts for distribution. Following this indictment, the government extended no additional offer and the case was set for trial. She was ultimately convicted of the conspiracy and two substantive counts of distribution. In sentencing, the court found her accountable for more than 21,000 kilograms of marijuana placing her base offense level at 36. With enhancements, she was sentenced at a base level of 42, with a guidelines range of 360 months to life. The court sentenced her, however, to concurrent 108 month sentences. Counsel's conduct was deficient because counsel advised the defendant throughout that there was a "household or family member" defense. In essence, she believed, based on counsel's bad advice and his "faith" in the defense that it was legal to distributed prescription drugs to family and household members if no money was exchanged. She also believed, based on counsel's bad advice, that she could not be held responsible for any drug quantity that she personally ingested. There was clear Fourth Circuit precedent contrary to counsel's advice. Counsel also never advised the defendant of his belief that she would be convicted of conspiracy. He also never advised her that conviction on the conspiracy charge would render her accountable for all "reasonably foreseeable" controlled substances that she and her co-conspirators distributed and possessed with intent to distribute during the course of the conspiracy. Counsel also never informed her that the trial judge would make this finding based on a preponderance of the evidence and could consider amounts even from substantive charges of which she was acquitted. In short, there were "no viable defenses" available to the defendant, but, based on counsel's bad advice, the defendant believed she did have viable defenses.

> This incorrect and incomplete advice, in turn, prevented [the defendant] from making a knowing and voluntary decision whether to accept the government's plea offer rather than proceed to trial. Of course, it is important to note that the Sixth Amendment does not require defense counsel to be 100% correct or perfect in advising his or her client in the course of a criminal prosecution, as such a standard

> would sometimes be impossible to meet. Indeed, defense counsel, on occasion, must make predictions in areas of unsettled law or perhaps make new arguments in areas of unsettled law, and in both of these instances, defense counsel will likely be unable to be 100% accurate. Yet where, as here, the legal advice at issue involves areas of settled law and no reasonable arguments could be made to alter these settled rules, defense counsel clearly has an affirmative duty to advise his or her client correctly in all material respects. And significantly, the incorrect and incomplete legal advice trial counsel provided [the defendant] in this instance was not only material, it was indeed central to [her] decision whether to accept the government's plea offer or instead proceed to trial.

Prejudice established because "there is ample objective evidence establishing a reasonable probability" the defendant would have accepted the plea offer if she had "received complete and accurate advice from trial counsel." The defendant never disputed that she distributed some quantity of drugs. "[T]he most compelling objective evidence in the prejudice analysis is the significant–indeed striking–disparity between the government's plea offer and [her] sentencing exposure were she to be convicted at trial." In essence, there was about 17 levels difference, which would have given her a guidelines range of 63-78 months rather than 360 months-life.

**2009:** ***United States v. Kimes*, 624 F.Supp.2d 565 (W.D. La. 2009)**. Counsel ineffective in methamphetamine and conspiracy case for failing to advise the defendant of the potential sentencing benefits of pleading guilty. Counsel failed to advise the defendant of how the Sentencing Guidelines might affect his sentence or that he could potentially receive a three-point reduction in sentence for acceptance of responsibility if he pled guilty. Although the government never made a specific plea offer, the prosecutor did state that a general offer of sentence reduction was made if the defendant pleaded guilty prior to one of his co-defendants. Regardless of whether the government officially made a plea offer to the defendant, counsel's conduct was objectively unreasonable. Because he was not adequately advised, the defendant was "under the impression" that he was going to be sentenced in the same fashion whether he pled guilty or proceeded to trial. Prejudice established because the court found the defendant's testimony that he would have pled guilty if he had been adequately advised to be "credible and substantially uncontradicted." Although the defendant had denied guilt in one letter to counsel prior to trial, this did not refute his credible testimony that he would have plead guilty. "An individual whose lawyer, through action or inaction alike, has left him with the impression that there is no benefit to a guilty plea would certainly be more inclined to rely on claims of actual innocence once resigned to the fact that trial was imminent." Prejudice found because the court routinely granted sentence reductions for acceptance of responsibility, even though not required to do so under the Guidelines. Thus, it was "reasonably likely" that the defendant would have received a lower sentence if he had been adequately advised and pled guilty. Sentence vacated and resentencing ordered as if the defendant had plead guilty.

***Carrion v. Smith*, 644 F. Supp. 2d 452 (S.D.N.Y. 2009), *aff'd*, 365 Fed. Appx. 278 (2nd Cir. 2010)**. Under AEDPA, counsel ineffective in drug and attempted murder case for inadequately advising the defendant, which resulted in rejection of the state's pre-trial plea offer. The defendant had numerous charges arising from a shootout with the police, in which he was shot twice, and

possession of five kilograms of cocaine. Conviction of just the least serious offence required a mandatory sentence of 15 years to life. Conviction on all carried the potential of 125 years to life. While the defendant was still hospitalized following his arrest, counsel informed him that the prosecution would agree to 10 years to life in exchange for pleas on all, which counsel thought was a "good officer." Counsel did not, however, inform the defendant of these sentencing ranges or discussion the strength of the state's case.

> When a plea offer is made and there is a reasonable probability that the defendant is uncertain about the sentencing exposure he faces, whether or not he accepts the plea, a lawyer unquestionably has a duty to inform his client of the sentencing exposure he faces if he accepts the plea offer and if he does not.

Counsel "knew that an acquittal on the drug charge was virtually impossible." As a matter of practice, counsel never made recommendations to his clients on whether to accept or reject plea offers. "Under these unique circumstances, where nothing could be gained by proceeding to trial, counsel should have made an explicit recommendation to take the plea offer, at the very least." Prejudice was clear in that the defendant had proceeded to trial and received a sentence of 125 years to life. There was sufficient objective evidence to support the conclusion that there is a reasonable probability that the defendant would have accepted the offer if properly advised. The state court decision to the contrary unreasonably applied *Strickland*. Court ordered reinstatement of plea offer.

**2006:** ***United States v. Hernandez*, 450 F.Supp.2d 950 (N.D. Iowa 2006)**. Counsel ineffective in conspiracy to distribute methamphetamine case for failing to adequately advise the defendant concerning the possible sentence, which resulted in the defendant declining to plead guilty and testifying during the trial rather than just relying on his pretrial statement, which had negative consequences under the Guidelines due to an obstruction of justice enhancement. While counsel believed that the defendant should plead guilty, even without a plea agreement, he never told the defendant that he believed he would be convicted and did not lean on him to plead guilty. He simply advised the defendant incorrectly that he would likely get a sentence of about 14 years rather than the 360 months to life range of the guidelines and the 360 months the defendant got. Prejudice established because the defendant would have entered a guilty plea, if counsel had performed adequately, and would have received a lesser sentence. At minimum, he would not have had the obstruction of justice enhancement because he would not have testified at trial, falsely or otherwise, and would have received a reduction for acceptance of responsibility. The court ordered resentencing based on a guilty plea with no plea agreement, with a range of 210 to 262 months of imprisonment.

**2005:** ***United States v. White*, 371 F. Supp. 2d 378 (W.D.N.Y. 2005)**. Counsel was ineffective in drugs and weapons case for failing to know of and to adequately advise the defendant of the consequences of a second conviction of possessing a firearm in furtherance of a drug crime, which resulted in the defendant rejecting a plea agreement. Counsel's conduct was deficient, because even conviction of more than one count of the statute, even if contained in a single indictment, required a 30-year mandatory consecutive sentence. If the defendant had been adequately advised, he most likely would have accepted the plea offer that would have required a plea to only one count of this offense and would have required a sentence of 147 to 168 months under the Sentencing Guidelines. Although

the defendant had been convicted at trial, but not yet sentenced, the court found that habeas review under 28 U.S.C. 2241(c) was appropriate. The court ordered that the rejected plea agreement would be enforced and set aside the convictions not in line with that agreement and scheduled sentencing for a later date.

### 4. State Cases

**2018:** ***State v. Drath*, 431 P.3d 1098 (Wash. Ct. App. 2018).** Trial counsel was ineffective during plea negotiations in failing to accurately inform appellant of the possible sentence she was facing. At trial, appellant was convicted by a jury of residential burglary, first degree burglary, first degree theft, theft of a firearm, first degree unlawful possession of a firearm, second degree unlawful possession of a firearm, first degree trafficking in stolen property, and bail jumping arising out of repeatedly breaking into a neighbors' home and stealing 75 firearms and a number of knives and swords, and then selling some of these. The court sentenced her to 128 months incarceration and ordered her sentences for first degree unlawful possession of a firearm and theft of a firearm to run consecutively. She moved for a new trial, alleging that she was drastically misinformed about possible sentencing ranges if she went to trial. She was provided a worksheet by her counsel that said that if she was found guilty of all charges, she would face between 87 and 116 months, and that did not show that the unlawful possession of the firearm and the theft of the firearm sentences would run consecutively. An evidentiary hearing was held with new counsel representing appellant. At the hearing, five attorneys who had represented appellant at various times while the case was pending testified about the numerous offers that had been received and appellant's rejection of them. The last attorney was the one who provided appellant with the 87 to 116 months range. At that time, the attorney had received an offer of 50 months that appellant rejected. Appellant testified that had she known her true sentencing range, she would have considered the 50-month plea offer, but was not sure she could answer whether she would have accepted it. After the hearing, the trial court found that appellant's last trial counsel rendered deficient performance by failing to take into account the consecutive nature of the sentences when advising appellant, but did not find prejudice because appellant was not able to say that she would have accepted the final 50-month plea offer if she had known the correct sentencing range, and denied the motion for new trial. The court of appeals reversed, finding that the lower court erred in determining appellant failed to establish prejudice. This was because defense counsel not only failed to convey crucial information to appellant, but actually misinformed her as to the sentencing range she faced if convicted at trial. Because of this information, appellant was denied the ability to make an informed decision about whether to accept the state's final 50-month offer. It is of no moment that appellant rejected four plea offers in the five years that her case was pending; she considered them and discussed them with her attorneys, and she said she would have considered the 50-month offer had she known her true sentencing range. "[I]t is reasonably probable that had [she] known she faced a maximum sentence that was 20 months longer than her attorney advised, the result of the proceeding would have differed." 431 P.3d at 1105. Any amount of additional jail time has Sixth Amendment significance under *Lafler*, 566 U.S. at 165. The court of appeals remanded and ordered the prosecution to reoffer the final 50-month plea offer which entailed appellant pleading guilty to counts other than what she was convicted of at trial, in order to put her back in the position she would have been in had counsel been effective.

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**2017:** ***Lindsey v. State*, 71 N.E.3d 428 (Ind. Ct. App. 2017).** Trial counsel was ineffective in advising defendant to scrap a plea agreement that had been worked out with the prosecution that had a thirty-two-year sentence. Defense counsel informed defendant that the longest sentence defendant could receive from an open guilty plea was thirty years. Defendant ultimately received a sentence of forty years. Defendant had been charged with one count of attempted criminal confinement and a second count of criminal confinement. The charges involved separate victims but occurred between half an hour to two hours apart as defendant attempted to force each of the two victims to drive him out of town. Defense counsel had concluded that the crimes were part of a single episode of criminal conduct, thereby limiting defendant's liability to thirty years. The trial court, however, prior to accepting the open guilty plea, informed defendant that the determination of whether defendant's conduct was part of a single episode of criminal conduct was fact-intensive and that defendant faced a maximum of forty years. Defendant nevertheless stuck with the open plea. The trial court rejected defense counsel's argument that the crimes were part of a single episode and then sentenced defendant to twenty-years for each offense, to be served consecutively. Although the trial court misapprehended the holding of the case defense counsel relied on, nevertheless it was not reasonable for trial counsel to have concluded that the case was analogous to the facts of defendant's case. Even if defense counsel had only told defendant that a single criminal act was the best prediction of what the trial court would find, rather than guaranteeing the result, it was nevertheless unreasonable. Regarding prejudice, the appellate court noted that defendant and the prosecutor had been moments away from submitting a mutually agreed upon plea deal when, at the last instant, defense counsel gave defendant erroneous advice that caused him to plead guilty without any set sentence. Further, the difference between the thirty-two year sentence offered and the forty-year sentence imposed was not so significant as to cast doubt upon the trial court's willingness to have accepted the plea agreement. "Under these facts, we have little doubt that, but for trial counsel's ineffectiveness, [defendant] would be serving a thirty-two-year sentence today. [Defendant] has met his burden of showing that he was prejudiced."

**2016:** ***State v. Estes*, 372 P.3d 163 (Wash. Ct. App. 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.

***Beavers v. State*, 495 S.W.3d 76 (Ark. 2016)**. In case where defendant was charged with rape, trial counsel was ineffective for providing erroneous information regarding defendant's parole eligibility under a plea offer, causing defendant to reject the plea and ultimately receive a less-favorable outcome after a jury trial. The minimum sentence for the rape charge that defendant faced at trial was 25 years, and 70 percent of the term of imprisonment would have to be served to be eligible for parole. On the day the case was originally set for trial, defendant's attorney informed the court that the State had offered to reduce the rape charge to second-degree sexual assault and recommend a sentence of 20 years. While reporting that the plea offer had been rejected, defense counsel's statements indicated his misapprehension about whether the plea offer fell above, rather than below, the seriousness line, which related to parole eligibility. "[D's] testimony that he would have accepted the more lenient plea offer had it been explained to him along with the imposition of a more severe sentence demonstrated that he suffered prejudice from the deficient performance."

**2015:** ***Rodriguez v. State*, 424 S.W.3d 153 (Tex. Crim. App. 2015) (*reversing in part* 424 S.W.3d 155 (Tex. Ct. App. 2014)).** The Court of Appeals held that counsel was ineffective for advising the defendant to reject a plea offer of ten years in sexual assault of child and indecency with child case where the defendant was sentenced to multiple life sentences following conviction. On motion for new trial, the trial court granted the motion due to counsel's admission of ineffectiveness in that this was his first criminal jury trial and that he provided inadequate advice due to his lack of experience and knowledge in criminal law. The trial court rejected the subsequent plea agreement instead advising the defendant that he had the option to withdraw his guilty plea and proceed to trial or to accept a sentence of years. The defendant filed a motion to recuse, which was granted. The new trial judge believed she was bound by the initial court's ruling and denied the defendant's request that the State be required to reinstate the offer of ten years. She accepted the subsequent negotiated plea of 25 years. While the initial trial court correctly found that the defendant refused the 10-year offer prior to trial, the Court of Appeals did not find the earlier refusal to accept a plea determinative in this case because he was relying upon trial counsel's improvident opinion that an acquittal would be easy to obtain at the time. "We cannot allow the same incompetent advice that rendered trial counsel's assistance ineffective to be used as a means of preventing appellant from demonstrating that counsel's ineffective assistance was prejudicial." Because the defendant accepted a plea agreement with a 25 year sentence when new counsel was obtained, the court concluded that there is a reasonable probability that he would have accepted the original ten-year plea-bargain offer if he had received competent advice prior to trial. On remand, the defendant was entitled to have the original plea offer re-instated. The Court of Criminal Appeals affirmed the finding of ineffective assistance of counsel but reversed the Court of Appeals' finding that the defendant was entitled to have the original plea agreement reinstated. In reaching this finding, the Court of Appeals assumed that the original trial judge recused herself on the basis of prejudice when there was no evidence in the record to support that assumption. The trial judge was within her discretion to reject the 10-year sentence and the 25-year sentence she imposed was still at the low range for the charged offenses. When the new judge was assigned, "the slate [was] wiped clean" meaning "the case started over from the beginning, and it was as if no plea negotiations had

ever occurred." The 25-year sentence imposed as a result of the proceedings before the second judge was reinstated.

**2013:** ***H.P.T. v. Commissioner of Correction*, 79 A.3d 54 (Conn. 2013) (*affirming, in part*, 14 A.3d 1047 (Conn. Ct. App. 2011)).** The Court of Appeals held that counsel was ineffective in pretrial negotiations which resulted in the defendant rejecting a plea offer in sexual assault on child case. In a pretrial conference, the prosecutor made an offer, including a recommendation of a 25 year sentence, suspended after 12 years. The trial court made its own offer, which the prosecutor acquiesced to by silence, of a 20 year sentence, suspended after 9 years. Counsel did not retain the services of an interpreter, even though the defendant's native language was Vietnamese, and did not advise the petitioner to accept the court's offer. After the defendant rejected the offer, initial counsel withdrew and the case proceeded to trial. Following conviction, the defendant was sentenced to 23 years, suspended after 13 years. The court of appeals affirmed the lower court's finding of ineffective assistance and remanded for sentencing only not to exceed the court's pretrial plea offer of 20 years, suspended after 9. The Supreme Court, however, held that the proper remedy under *Lafler v. Cooper*, 132 S. Ct. 1376 (2012), was to remand to the trial court "to consider whether it should vacate the convictions and accept the plea offer, leave the original convictions intact or otherwise modify the convictions and sentence."

**2012:** ***Ebron v. Commissioner of Correction*, 53 A.3d 983 (Conn. 2012).** Counsel ineffective in failing to advise the defendant to accept the state's plea offer which resulted in the defendant entering an open plea and receiving a higher sentence. The defendant was charged with a variety of offenses, including drugs, assault, and weapons, and faced total sentence exposure of over 41 years. During a hearing, the state formally offered a plea deal with a 10-year-sentence suspended after 6 years, which the hearing judge agreed was appropriate. Counsel recommended rejection of the offer and an open plea before a different judge. The defendant received an 11-year-sentence. Prejudice established. While the focus in determining whether the plea offer would have been accepted by the court is on "what a reasonable court would have done" rather than what the hearing judge would have done, this evidence is "probative" absent any evidence that this judge's practice deviated significantly from the normal practice.

**2010:** ***Kolle v. State*, 690 S.E.2d 73 (S.C. 2010).** Counsel ineffective in drug trafficking plea case for failing to adequately advise the defendant with respect to the state's initial plea offer of ten years suspended on service of five. The defendant was facing a sentence of 7-25 years, but counsel advised the defendant the offer was not a "good deal." Counsel also misinformed the defendant that the offer would still be open after the suppression hearing, when it was not. If the defendant had been aware that the state would withdraw the offer after the suppression hearing, he may have decided to accept it and receive a lower sentence.

**2009:** ***Lester v. State*, 15 So. 3d 728 (Fla. Ct. App. 2009).** Counsel was ineffective in robbery case for failing to adequately advise the defendant of the potential sentence, which led the defendant to reject a favorable pretrial plea offer. The defendant was initially charged with robbery by sudden snatching. The state offered a deal for 41.7 months, but this offered was rejected after counsel advised the defendant of the five year maximum punishment. Just before trial, the state amended

the charge to indictment by force. The deal was still rejected after counsel advised the defendant of the possible fifteen year sentence and recommended the defendant take the deal. Counsel did not, however, advise the defendant of the possibility that the state would seek habitual felony offender status, which happened prior to sentencing. The defendant was thus subject to a 30 year mandatory sentence. The remedy ordered was that the state could elect whether to retry the defendant of simply to withdraw the habitual offender notice, subjecting the defendant only to the fifteen year maximum.

***Holmes v. State*, 277 S.W.3d 424 (Tex. Crim. App. 2009).** Counsel ineffective in misdemeanor assault on wife case where the wife refused to testify for failing to investigate and discover evidence (including the 911 and patrol car tapes), failed to develop a trial strategy, failed to be prepared for trial, and failed to object to admission of the 911 and patrol car tapes, or seek a continuance. Prejudice established during pretrial negotiations, including an offer of 120-days in exchange for a plea after jury selection began, because the defendant was "unable to make an informed decision regarding plea offers." Prejudice also established during the trial itself.

**2008:** ***Revell v. State*, 989 So. 2d 751 (Fla. Ct. App. 2008).** Counsel ineffective in driving while license suspended or revoked case for failing to advise the defendant, who had two prior felony convictions, that he was eligible for habitual felony offender (HFO) enhanced sentencing prior to the State withdrawing its plea offer. The state offered nine months in the county jail in exchange for a plea; counsel advised the defendant he faced a maximum sentence of five years; and the defendant rejected the plea offer. The state then withdrew the offer and two weeks later filed a notice of intent to seek enhanced sentencing. The defendant was sentenced to ten years. Counsel's conduct was deficient because counsel conceded he was not aware of the possibility of an enhanced sentence until after the state's notice was filed. "Counsel's failure to accurately advise his client of the maximum sentence he faced when considering the offer of a plea negotiation amounts to ineffective assistance."

**2006:** ***Hall v. State*, 929 So. 2d 1148 (Fla. Ct. App. 2006).** Counsel ineffective in advising client prior to guilty pleas to various property crimes because counsel erroneously believed and advised the defendant that he would be sentenced to no more than seven years of confinement and that he was eligible for probation. Prejudice found because the defendant had been offered a plea agreement for 10 years in prison and five years of probation, but turned it down and then inexplicably pled guilty and got the mandatory 15 year prison sentence due to his prison releasee reoffender status.

**2004:** ***McKeeth v. State*, 103 P.3d 460 (Idaho 2004).** Trial counsel was ineffective in sexual exploitation by a medical care provider for failing to draft the conditional plea agreement in accordance with the terms that he and the defendant intended. The defendant, a licensed professional counselor, was charged with sexual contact with six patients. He offered a conditional plea agreement that was intended to reserve his right to appeal the denial of pre-trial motions and to withdraw all of his guilty pleas if he prevailed on appeal with respect to even one count. The defendant entered Alford pleas to all six counts. On appeal, three counts were dismissed but the court did not allow the defendant to withdraw his guilty pleas on the remaining three counts because the language of the plea agreement only allowed the defendant to withdraw his plea to those counts on which he prevailed on appeal. Counsel's conduct was deficient in failing to draft the conditional plea agreement according to the terms that he and the defendant intended to proffer. The defendant was prejudiced

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because but for counsel's error the defendant would have pleaded not guilty to all the offenses. The defendant's guilty pleas to the remaining three counts were vacated.

**Capital Case*

## E. ERRONEOUS ADVICE ON RIGHT TO SILENCE OR TO TESTIFY, LEADING TO DETRIMENTAL OUTCOME

### 1. U.S. Court of Appeals Cases

**2016:** ***Casiano-Jimenez v. United States***, 817 F.3d 816 (1st Cir. 2016). Counsel ineffective in drug case for failing to inform the defendant of his right to testify on his own behalf. The defendant was one of seven defendants tried for smuggling narcotics by ship into the country. Defense counsel conceded that the lawyers for all the defendants collectively decided that rather than have the defendants testify they should retain a single expert to present a "lack of knowledge" defense. The expert thus testified that – based on the hidden location of the contraband– it was possible that none of the crew members were aware that drugs were on board. Counsel's conduct was deficient because counsel did not inform the defendant, who was "an alien who had limited proficiency in English and no experience with the American criminal justice system," as well as no criminal history, of his right to testify or have any discussion that would "enable the defendant to make an informed decision about whether to take the stand." Prejudice was established as the government's case was entirely circumstantial and three of the codefendant's, who were "all ordinary seamen," were acquitted. If defendant had testified, he could have explained that he was new to the crew; had never been on the ship before; signed on as an ordinary seaman; was pressed into service as "first officer," as the government portrayed him, after he was on board; and had no knowledge of the drugs. This testimony would have been far more exculpatory than the expert's testimony and "could have been a game changer."

### 2. U.S. District Court Cases

**2012:** ***Credell v. Bodison***, 818 F. Supp. 2d 928 (D.S.C. 2011). Under AEDPA, counsel ineffective in murder case for inadequately advising the petitioner prior to advising him to testify, which resulted in him testifying and introducing evidence of prior bad acts. The petitioner was charged with "a violent, unexplained home invasion leading to the execution murder" of the victim. Because the public defender had a conflict, the Clerk of Court appointed private counsel, whose only criminal law experience as one plea in a DUI case. Counsel primarily practiced in bankruptcy and family law, but did not ask the court to appoint more experienced counsel to replace or assist her and did not seek assistance of other counsel at trial. Counsel's conduct was ineffective in advising the petitioner to testify because of her "profound ignorance of the law of evidence, particularly regarding the admissibility of such 'bad act' evidence as a prior history of drug dealing, previous misdemeanor convictions and prior arrests which did not lead to a felony conviction." Counsel believed "in [her] gut" that all of this information was admissible regardless of whether the petitioner testified. Because of this, she failed to advise the petitioner that this evidence would not be admissible if he chose not to testify. She did not inform him that if he did testify, the court would instruct the jury "not to hold this against him." She did not request an in camera hearing to obtain a ruling on what portions of the petitioner's history would be admissible if he testified. The prejudice was clear as the petitioner testified.

> Moreover, because of the mistaken belief that "bad act" evidence was generally admissible, trial counsel had the Petitioner disclose to the jury on direct examination that he was a drug dealer, had been involved in the drug trade with the victim, had been convicted of several misdemeanors (including possession of marijuana) and had numerous prior arrests.

This led to cross-examination, without objection, on these topics, that the drug trade was a "violent business," and that the petitioner had spent his "entire life in trouble." The state's evidence otherwise was based on an eyewitness whose "credibility and reliability" were in question. There was "no direct evidence of motive and little context for what ultimately resulted in an execution style murder." No evidence connected the petitioner to the crime scene, although his fingerprints were on the outside of a vehicle that had been observed near the crime scene. The "bad acts" evidence provided motive and context, even though the evidence was inadmissible under Rule 404(b) as the petitioner did not have a prior felony conviction. Likewise, the evidence was not proper impeachment material under Rule 609.

> [H]ad defense counsel possessed a rudimentary knowledge of the law of evidence and provided competent advice to her client, he most probably would not have taken the stand. . . .
>
> [E]ven if the Petitioner had taken the stand, a competent counsel providing professionally reasonable advice under no circumstances would have advised the Petitioner to volunteer his history of drug dealing, prior association in the drug trade with the victim, misdemeanor convictions and arrests. The voluntary introduction of this profoundly prejudicial evidence by defense counsel was the direct result of her ignorance of the most basic precepts of the law of evidence.

The state court's finding that counsel had "a professionally reasonable trial strategy" was based on an unreasonable application of the facts in light of the evidence presented. The state court did not address "the direct relationship of this purported strategy to trial counsel's seriously deficient knowledge and application of evidence law."

### 3. State Cases

**2012:** ***McGorman v. Commonwealth***, __S.W.3d ___, 2012 WL 5626893 (Ky. Ct. App. Nov. 16, 2012).

> Counsel ineffective in murder case for advising the 14-year-old mentally ill defendant charged as an adult to confess to police without first having him evaluated by a mental health expert and before speaking to the prosecutor about a possible plea agreement. While counsel claimed trial strategy, the court rejected this as unreasonable. Citing *Cronic*, 466 U.S. at 658 ("[T]he right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial"), the court held that "the trial was tainted" by the confession before it began. Thus, counsel's conduct "clearly affected [the defendant's] ability to receive a fair trial."

**Capital Case*

**2007:** ***Reeves v. State***, 974 So. 2d 314 (Ala. Crim. App. 2007). Counsel ineffective in burglary case for preventing the defendant from testifying on his own behalf after the defendant insisted that he wanted to do so. The defendant was charged with entering the home of his wife's ex-husband and had made a statement to police that he had gone to the home but he did not enter the home. Counsel's conduct was deficient because "[a] defendant has a fundamental right to testify on his own behalf, that right is personal to the defendant, and defense counsel may not waive that right." Counsel's conduct was not explained by strategy to avoid cross about the defendant's prior actions and stalking his wife because she had already testified to these events and the existence of a restraining order against the defendant. The denial of the right to testify was not "harmless," even though the defendant's testimony to police was admitted into evidence because he implied in the statement that he did not enter the home but did not specifically state that and because his testimony would have allowed the jury to "judge[] his credibility against the victim's," who was the only person to testify that he entered the home. Even without the defendant's testimony the jury had sought additional instruction on the elements of the charge and reached a verdict only after receiving an Allen charge.

***Visger v. State***, 953 So. 2d 741 (Fla. Dist. Ct. App. 2007). Counsel ineffective in burglary and battery case for advising the defendant not to testify. Counsel's conduct was deficient because the defense theory was that the defendant was invited into the home, but without the defendant's testimony there was no evidence to support that theory. Counsel's strategy to keep out information concerning the defendant's prior conviction of aggravated battery was not reasonable under these circumstances, particularly where there was already evidence that the state's two primary witnesses had drugs in their home and one of them was a convicted felon "thus reducing any effect of appellant's convictions on his credibility, as compared to that of the state's witnesses." *Id*. at 744. Strategic decisions must be informed decisions, where the alternatives have been considered and rejected. Where those decisions are uninformed, counsel's judgment may be deficient. That is the case here." Id. It was also not "strategy" that counsel believed that some of the defendant's version of events was "preposterous," but counsel failed to investigate.

> Furthermore, we find it unreasonable and deficient performance to believe that counsel could argue to the jury a theory that appellant was invited in without any evidence whatsoever to support it and all the evidence clearly contrary to that theory. Such an argument amounts to sheer speculation.

*Id*. at 745. Prejudice found in light of the inconsistencies in the state witnesses' testimony, the fact that some of their testimony "strains credulity," and the fact that much of the actions of the state witnesses, even according to their own testimony, "may appear more consistent with having been involved in an attack on the appellant [who was shot in the encounter] rather than the other way around." *Id*. at 746.

**2006:** ***People v. Whiting***, 849 N.E.2d 125 (Ill. App. Ct. 2006). Counsel ineffective in aggravated battery case for advising the defendant, who desired to testify, that she could not do so. The defendant was charged with assaulting an investigator of the Department of Children and Family Services who was in the defendant's home to investigate an incident between the defendant's son and local police

days before. While the defendant's husband and son testified, the defendant was prejudiced because she did not herself testify.

**Capital Case*

## F. ERRONEOUS ADVICE ON RIGHT TO JURY OR BENCH TRIAL

**2012:** ***Moore v. State***, 399 S.C. 641, 732 S.E.2d 871 (2012). Counsel ineffective in armed robbery case for waiving the defendant's right to a jury trial and opting for a bench trial. The trial court found that counsel had "detailed" and "at length" discussions with the defendant concerning the waiver, but the "[r]ecord is devoid of any evidence" supporting these findings. Counsel could not specifically recall discussing the issue with the defendant and there was no colloquy between the court and counsel or the defendant regarding the waiver.

**2011:** ***State v. Sampson***, 24 A.3d 1131 (R.I. 2011). Counsel ineffective in child abuse case for refusing to comply with the defendant's request to waive a jury and proceed to a bench trial. Under state law, the defendant had the right to waive the jury and proceed with a bench trial. Moreover, the Rhode Island Supreme Court had "explicitly stated that the decision whether or not to waive the jury is ultimately the decision of the defendant and not of counsel." Here, however, counsel mistakenly informed the court that it was his decision and the court accepted this. Faced with this, the defendant waived counsel and proceeded pro se to his bench trial. The court offered the defendant two choices: (1) trial by jury, against his wishes, represented by counsel; or (2) a pro se bench trial. The correct, third option of a bench trial, in accordance with his wishes, represented by counsel was never offered or considered by the court. Thus, the defendant's waiver of his right to counsel was not knowing, voluntary, or intelligent.

**Capital Case*

## G. INADEQUATE ADVICE ON RIGHT TO APPEAL

### 1. U.S. Court of Appeals Cases

**2013:** ***United States v. Cong Van Pham*, 722 F.3d 320 (5th Cir. 2013).** Counsel was ineffective following negotiated plea in drug case for failing to advise the defendant about his right to file a direct appeal.

> Pham is a refugee from Vietnam, speaks no English, and, until the events leading to this appeal, had no criminal record. When his wife was diagnosed with a brain tumor, Pham began cultivating marijuana to raise money for her medical treatment. The government found over seven hundred marijuana plants in Pham's "grow house" and charged him with one count of manufacturing a controlled substance. Because of the large number of his marijuana plants, Pham faced a mandatory minimum sentence of five years.

Pham pleaded guilty pursuant to a plea agreement that contained an appeal waiver but did not contain any agreement concerning the sentence. Despite counsel's warnings that Pham would likely receive the mandatory minimum sentence, Pham continued to hope for a sentence of probation so that he could care for his wife. When he was sentenced to five years, Pham was visibly upset and told counsel he "wanted to do something to get less time." "[A] lay defendant, particularly one who speaks no English," is not required to "incant the magic word 'appeal' to trigger counsel's duty" to advise the defendant of his right to appeal. Here, Pham's "statement to counsel, when viewed in context, was enough to trigger counsel's constitutional duty to consult with Pham about an appeal," but counsel did not "mention or discuss the possibility of a direct appeal, and no notice of appeal was filed." Counsel's performance was objectively unreasonable under *Flores–Ortega*. The government did not even argue the lack of prejudice so prejudice was easily established.

***Heard v. Addison*, 728 F.3d 1170 (10th Cir. 2013).** Under AEDPA, counsel was ineffective in lewd molestation case for failing to recognize a likely defense before advising the defendant to plead guilty and in failing to advise the defendant of the possibility of filing an appeal following the plea. The defendant faced two counts under a statute that criminalized "[l]ook[ing] upon, touch[ing], maul[ing], or feel [ing] [a minor's] body or private parts." Each count carried a 20-year to life sentence. During the plea, the defendant admitted that he positioned himself in a Walmart store so that he could look at two children under the age of 16. He wanted to "look under [their] clothes at [their] bod[ies] and at [their] undergarments." Pursuant to the terms of the plea agreement, the defendant was sentenced to concurrent twenty-five-year prison terms. At the time of the plea, the Oklahoma Court of Criminal Appeals (OCCA) had decided only two cases–both of which were unpublished–that addressed the scope of the lewd molestation statute "as it applies to 'looking upon' the 'body or private parts' of a minor child," which was the critical portion in this case. See *Robinson v. State*, No. F–98–724 (Okla. Crim. App. July 29, 1999); *Terry v. State*, SR–2003–0276 (Okla. Crim. App. Mar. 30, 2004). In *Robinson*, the OCCA held that a lewd molestation conviction based on the "look[ing] upon" language would ordinarily require something on the order of nudity: "[w]hile the statute does not say 'naked body' or 'naked private parts,' we believe the pairing of the word 'body' with the term 'private parts' indicates the legislature intended something more than the

act of staring between the legs of someone who is wearing both underwear and boxer shorts." Similarly, in *Terry*, the OCCA held that secretly filming clothed minors in public for sexual gratification did not violate the statute, "[e]ven though Appellee may have had lascivious intent." In short, *Terry* reinforced the rule, first articulated in *Robinson*, that when the Oklahoma legislature "pair[ed] the word 'body' with the term 'private parts,'" in the context of a "look[ing] at" charge, it "intended something more" than the statute's plain text suggests. Based on these cases, Heard asserted ineffective assistance because counsel "should have discovered" and advised him about these cases, which "would have provided Heard with a powerful defense." In denying relief in this case, however, "the OCCA for the first time disapproved *Robinson* and *Terry*'s reasoning" and held that, "under a proper reading of the statute, Heard's admitted conduct was clearly criminal." In this context, "the extra AEDPA deference that would ordinarily be given to the OCCA is not appropriate" because the state court's reasoning was contrary to *Strickland*, which prohibits the use of "hindsight" in evaluating ineffective-assistance claims. The court thus reviewed the claim de novo. The Tenth Circuit, citing amongst other sources the ABA Standards for Criminal Justice, held that counsel's conduct was deficient. "A criminal defense lawyer has a duty to conduct reasonable investigations into her client's case, which extends to the law as well as the facts." *Id*. at ___ (citing *Strickland*, 466 U.S. at 690–91. "Quite apart from the failure to discover the OCCA's unpublished decisions in *Robinson* and *Terry*, we hold that, on this record, minimally competent counsel would have recognized a likely defense based on the statute's text."

> Minimally competent counsel would have realized that, without "something more," such as a requirement that the minor's "body or private parts" be unclothed, the statute's sweep would extend to dance recitals, community pools, shopping malls–the list goes on–with only an officer's personal judgment as to the lewdness of a glance as a limiting principle. A minimally competent lawyer would have identified that such unbridled police discretion in enforcing the law makes a statute constitutionally suspect.

Minimal research on this issue would have revealed the OCCA's unpublished opinions in *Robinson* and *Terry*. These opinions would not have been difficult to find as defense counsel was a member of the Tulsa Public Defender's office and, as such, had access to the Oklahoma Indigent Defense System (OIDS) website "which provides access to unpublished Oklahoma Court of Criminal Appeals decisions by case name, by date of decision, and by subject matter." "Indeed, the OIDS website is available to the public." Moreover, the OCCA "permits parties to cite unpublished decisions, provided that 'no published case would serve as well the purpose for which counsel cites it.'" In short, counsel's conduct was deficient and not "justifiable on any strategic basis." Prejudice was also established. "[W]e have no trouble concluding that a decision to go to trial in Heard's case would have been rational. And the evidence in the record strongly establishes a reasonable probability that Heard would have withdrawn his guilty plea if he had had timely notice from his lawyer of *Robinson* and *Terry*." The available cases provided a strong defense. Additionally, the defendant was 48 years old and facing two 20-year to life sentences. State law required service of 85% of the sentence before parole eligibility. "Given the uncertainties associated with the possibility of parole and life in prison," Heard was essentially already facing a life sentence. Moreover, it was uncontroverted that Heard "sought to undo his plea" immediately after learning of the *Robinson*

decision. In short, Heard carried his burden to demonstrate "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill*, 474 U.S. at 59. Likewise, Heard established that counsel was ineffective in failing to advise Heard of his right to appeal but "since the relief we have already afforded Heard should allow him to vacate his guilty plea, that effectively moots any state-court appeal challenging that guilty plea."

**2009:** ***Bostick v. Stevenson*, 589 F.3d 160 (4th Cir. 2009).** Under AEDPA, counsel ineffective following murder trial in failing to consult with the defendant about filing an appeal. While the defendant had told counsel prior to trial that he would be satisfied with the jury's verdict, he told his daughter in open court prior to sentencing not to worry because he would "get an appeal." Counsel did not speak with the defendant about an appeal after that, but he told the defendant's then-wife, who inquired about an appeal, that there were no possible grounds for an appeal. Counsel's failure to consult with the defendant was deficient and "flew in the face of a duty to do so." *Id*. at 166.

> An attorney must consult with a client about filing an appeal either where a reasonable defendant would have wanted to appeal, typically because there were non-frivolous grounds to pursue, or because the particular defendant adequately demonstrated to counsel an interest in appealing. Though there is no per-se rule, a lawyer who fails to consult with a defendant about an appeal following a jury trial almost always acts unreasonably.

*Id*. at 166-67. "Here, trial counsel had a duty to consult with [the defendant] because he went to trial, there were non-frivolous grounds to pursue, and, most importantly, [the defendant] unequivocally demonstrated his interest in an appeal post-verdict." *Id*. at 167. He did so "in open court, which was sufficient, in and of itself, to implicate his attorney's duty to consult." *Id*.

**2007:** ***Thompson v. United States*, 504 F.3d 1203 (11th Cir. 2007).** Trial counsel ineffective following plea to conspiracy to possess cocaine with intent to distribute for failing to adequately advise the defendant of the right to appeal. The defendant and his two codefendants were sentenced the same day and the codefendants, who had filed motions for reduction based on "minor rule," were given lesser sentences than the defendant, whose counsel made only an oral motion, which was denied. Counsel's conduct was deficient because counsel did not adequately advise the defendant concerning the right to appeal following the trial court's advice to the defendant and the defendant's question to counsel about a possible appeal. Counsel told the defendant, in a five minute conversation, only that he could appeal but counsel did not think an appeal would be successful or worthwhile. Counsel had a duty to consult with the defendant because the defendant "demonstrated an interest in an appeal by asking his attorney about that right." Counsel's advice was deficient because the defendant was given no information from which he could have intelligently and knowingly either asserted or waived his right to appeal. Prejudice established because there is a reasonable probability the defendant would have appealed if he had been adequately advised.

**Capital Case*

### 2. U.S. District Court Cases

**2010:** ***United States v. Iberson*, 705 F. Supp. 2d 504 (W.D. Va. 2010).** Counsel ineffective in drug case for failing to adequately consult with the defendant during plea negotiations regarding the true advantages of appealing his sentence enhancement, which rendered the plea agreement waivers of appeal rights and collateral rights invalid. Prior to trial, the defendant unsuccessfully challenged a sentence enhancement based on prior felony drug convictions that increased the statutory mandatory minimum sentence from 10 to 20 years. The defendant wanted to appeal, but counsel believed the chances of the Fourth Circuit reversing the trial court were not great. "Advice regarding an appeal's chances for success is not the equivalent of discussing the advantages and disadvantages of appeal." Counsel advised the defendant his only other chance to reduce the length of the sentence was to offer substantial assistance to the government in hopes of achieving a motion for reduction below the statutory minimum. Based on counsel's advice, the defendant entered a plea agreement in which one charge was dismissed, the government recommended credit for acceptance of responsibility, and the defendant waived appeal and collateral attack rights. Counsel's conduct was deficient in failing to advise the defendant of the possibility of pleading guilty "straight up" without a plea agreement. This would not have exposed the defendant to a greater sentence, would have allowed the defendant to appeal the sentence enhancement, and left open the possibility of seeking a sentence reduction based on substantial assistance. Likewise, counsel did not "fully explore" the "minimal benefit" the defendant got from the plea agreement, which dismissed one count "but did not reduce his sentence exposure in the least." Likewise, "the reduction for acceptance of responsibility was swallowed up" by the sentence enhancement. Prejudice established as the defendant had expressed his dissatisfaction and desire to appeal the sentencing enhancement. There was a reasonable probability that if adequately advised the defendant would have entered a "straight up" plea to both counts and pursued an appeal. Judgment reentered and appeal allowed.

**2009:** ***Walton v. Hill*, 652 F. Supp. 2d 1148 (D. Ore. 2009).** Under AEDPA, counsel ineffective in murder case for failing to notify the defendant about the amended judgment following resentencing imposed without a hearing following remand. Counsel attempted to notify the defendant by letter, but the initial letter was "refused" by the prison mail room because counsel's secretary failed to put a return address on the envelope. After that counsel forgot to resend it. Thus, the defendant did not learn of the amended judgment until after the time to appeal had expired. The state court decision was contrary to established federal law under *Roe v. Flores-Ortega*, 528 U.S. 470, 486 (2000) because "[t]he question is not, as the PCR judge framed it, whether the appeal might have had merit, but instead, 'but for counsel's deficient conduct [the petitioner] would have appealed.'" Here, the defendant had taken a "pro-active role in his defense at all stages of this case, over the course of many years." Counsel had a constitutional duty to confer with him about an appeal, because he had "reasonably demonstrated to counsel that he was interested in appealing" and would have if counsel had performed adequately. "[R]egardless of the apparent lack of non-frivolous grounds for appeal," habeas relief was required to allow the defendant to prosecute an appeal.

***United States v. Purcell*, 667 F. Supp. 2d 498 (E.D. Pa. 2009).** Counsel ineffective in drug case for failing to adequately consult with the defendant about filing an appeal. Prior to sentencing, counsel spoke to the defendant and told the defendant he did not see any meritorious issues for

appeal. Nonetheless, the defendant said he wanted to file an appeal. Counsel's failure to follow through on this was deficient and prejudicial, despite the defendant's failure to identify any specific appealable issues. Direct appeal allowed.

### 3. State Cases

**2017:** ***Commonwealth v. Rivera*, 154 A.3d 370 (Pa. Super. Ct. 2017).** Trial counsel was ineffective in failing to *sua sponte* consult with defendant about whether he wanted to appeal following his guilty plea. At the time, although no state court had applied the recent Supreme Court decision in *Alleyne v. United States*, 133 S.Ct. 2151 (2013) to the mandatory minimum sentencing scheme involved in defendant's sentence, the case raised a non-frivolous issue for appeal that defendant was unaware of. While counsel was not at fault for failing to anticipate a change in the law, counsel failed to provide defendant with all the relevant information he needed to determine whether to file a direct appeal. Because counsel's ineffectiveness tainted defendant's direct appeal rights, the case is returned to the status *quo* after defendant was sentenced, and before counsel neglected to consult with him regarding his right to file post-sentence motions, and/or a direct appeal expired.

**2016:** ***State v. Perry*, 370 P.3d 754 (Kan. 2016).** Counsel's advice on the right to appeal sentence following a no-contest plea was inadequate. Following sentencing, the defendant asked counsel what his appeal options were, but counsel advised him there was nothing to appeal. The defendant untimely appealed based on a Kansas Supreme Court decision that came out the day of her sentencing, which if applicable would reduce her sentence. The Court of Appeals held that she was entitled to a belated appeal. The Court of Appeals also determined that her claim was meritorious and that she was entitled to a reduction in sentence. The Kansas Supreme Court considered only the issue of whether she was entitled to a belated appeal. The court held, as in Shelly (below), which was the case of her husband and co-defendant, counsel's conduct was deficient and prejudicial in failing to advise the defendant "of the current state of the law so that she could make an informed decision about whether to take an appeal."

***State v. Shelly*, 371 P.3d 820 (Kan. 2016).** Counsel's advice on the right to appeal sentence following a no-contest plea was inadequate. Following sentencing, the defendant asked counsel what his appeal options were, but counsel advised him there was nothing to appeal. Later, the defendant again asked the defendant about appeal based on a Kansas Supreme Court decision that came out the day of his sentencing, which if applicable would reduce his sentence. The defendant's pro se appeal was found to be untimely by the Court of Appeals. The Kansas Supreme Court held that counsel's conduct was deficient. Because a rational defendant in the defendant's place would want to appeal on the basis of the decision released by the Kansas Supreme Court on the day of sentencing, counsel had a duty to consult with the defendant about his right to appeal. "The minimal advice given – that there was nothing to appeal – unreasonably overlooked at least potentially meritorious grounds for appeal and did not allow Shelly to knowingly and intelligently waive his right to appeal." Prejudice established as the defendant had expressed interest in appealing several times. A belated appeal allowed and remanded to the Court of Appeals for consideration of the merits of the issue raised.

**Capital Case*

**2015:** ***Anderson v. State*, 183 So. 3d 1146 (Fla. Ct. App. 2015).** Counsel ineffective in DUI manslaughter case for incorrectly advising the incompetent defendant to enter a "conditional" plea of no contest in order to preserve the right to appeal the trial court's competency determination. The defendant suffered traumatic brain injury in the car wreck in 2000 that formed the basis of the DUI manslaughter. Over the next ten years, he was examined multiple times and found to be incompetent. He was committed to the state hospital for treatment for three months but still found to be incompetent with experts agreeing that he would likely remain incompetent. Nonetheless, the trial court found him competent based on a limited in-court appearance. In order to preserve the issue, trial counsel recommended the "conditional" plea. Counsel's conduct was deficient because this advice was "patently wrong." Under state law, a trial court's finding of competence is generally not reviewable until after a conviction at trial. Where the defendant enters a plea of guilty or no contest, the competence finding is not a dispositive order and can be reviewed only if the defendant first files a motion to withdraw his plea. When the issue was raised on direct appeal, relief was denied because there had been no motion to withdraw the plea. Afterwards, counsel filed a motion to withdraw the plea, which was denied. On appeal, the court denied relief because the motion to withdraw was untimely. Post-conviction relief was denied because the trial court held that counsel's failure to timely file the motion to withdraw was a strategic choice. "Assuming arguendo that the decision to enter a plea rather than proceed to trial was a strategic choice, there was nothing strategic about failing to file a timely motion to withdraw the plea in order to preserve the issue for appellate review."

> Strategy presupposes a course of action that, at least theoretically, would be of benefit to the client. The course of action taken by Anderson's counsel did nothing more than ensure he would not obtain the review Anderson desired; it was in all respects ineffective.

Prejudice established. Plea set aside.

**Capital Case*

## H. MISCELLANEOUS

**2014:** ***State v. Hatton*, 143 So. 3d 1006 (Fla. Ct. App. 2014).** Trial counsel was ineffective in failing to advise the defendant that he could receive a harsher punishment on retrial if he was successful in motion for new trial. In the first trial, the defendant was sentenced to 30 years for sexual activity by a person in familial authority and 15 years for lewd and lascivious exhibition with the sentences to run concurrently. A motion for new trial was granted. Following conviction, the defendant was sentenced by a different trial judge who imposed the same sentences but ordered that the sentences run consecutively. The post-conviction counsel, finding ineffectiveness in failing to advise the defendant that he could receive a harsher punishment on retrial, ordered a third trial. The appellate court, however, held that the appropriate relief was only reinstatement of the original judgment and concurrent sentences.

**Capital Case*

## V. FAILURE TO COMPEL COMPLIANCE WITH PLEA AGREEMENT

### A. U.S. District Court Cases

**2017:** ***Maslonka v. Hoffner*, 2017 WL 2666103 (E.D. Mich., June 21, 2017).** Trial counsel provided ineffective assistance by failing to appear at critical stages of defendant's plea negotiations. Defendant was charged with armed robbery. During pretrial negotiations, he agreed to provide substantial information and cooperate with the Drug Enforcement Administration in exchange for a favorable plea agreement. Defendant's counsel failed to request written documentation of the terms of the agreement and then further failed to attend multiple DEA interviews with defendant and preparations for his grand jury testimony, despite defendant's specific request that trial counsel be present. Following a final meeting between DEA agents and defendant to discuss his expected testimony (at which trial counsel was again not present) the agents told defendant they had everything they needed from him and his testimony would not be necessary. Two hours before defendant's own sentencing proceeding, the prosecution withdrew the plea agreement citing his "lack of cooperation." Trial counsel did not advocate for a more favorable sentence and failed to draw the court's attention to defendant's substantial cooperation. Defendant was given no credit for his assistance to the DEA and was sentenced to less favorable terms than the originally discussed agreement. Trial counsel's performance was deficient and defendant was prejudiced because the terms of the agreement were never placed in writing, allowing for the offer to be withdrawn on a mere allegation of non-cooperation. Counsel was also ineffective in failing to obtain information from the DEA regarding defendant's cooperation and in failing to apprise the sentencing court of these facts. Trial counsel did not advocate on defendant's behalf at the sentencing proceeding and did not even request a downward departure, but instead merely acquiesced to the prosecutor's assertion that the proposed agreement "did not work out." Defendant was prejudiced because he obtained a far less favorable sentence as a result of trial counsel's mistakes.

### B. State Cases

**2015:** ***State v. Lopez*, 872 N.W.2d 159 (Iowa 2015).** Counsel ineffective in plea to child endangerment causing bodily injury for failing to object to the prosecution's breach of the plea agreement. The defendant was charged with abusing the two-year-old son of his girlfriend after she discovered bruises, a bite mark, and a cigarette burn on her son. The parties entered an agreement in which the prosecution agreed that, in exchange for the guilty plea, the prosecution jointly recommended probation, fines, mental health evaluation and treatment, and no contact orders. A presentence investigation report (PSI) recommended a five-year suspended prison sentence. In sentencing, the child's father and the child's guardian ad litem gave victim-impact statements recommending harsh punishment. The prosecution offered into evidence pictures of the child's injuries and cross-examined defense witnesses with these photographs "in a manner suggesting a more onerous sentence was warranted" than the probation supported by the defense witnesses. In argument, however, the prosecutor correctly cited the terms of the plea agreement, never overtly advocated for a tougher sentence, and never referred to the PSI report recommendation. The trial court rejected the joint recommendation of probation and imposed an indeterminate prison term of up to five years.

**Capital Case*

Counsel's conduct was deficient in failing to object to the prosecution's breach of the plea agreement. While the prosecutor has no right or duty to prevent victim-impact statements, the prosecutor cannot solicit such statements in order to evade its obligations under the plea agreement. Here, however, the prosecutor did not solicit the victim-impact statements, did not examine the father or guardian, and made no argument concerning these statements. With respect to the photographs, however, the prosecutor did violate the plea agreement. The sentencing judge would not otherwise have had access to the photographs. Additionally, the defendant did not deny the injuries, thus, "[t]he introduction of the photos was unprovoked and unnecessary." And, of course, the prosecutor did not stop there but also used the photographs to cross-examine the defense witnesses. In short, "[t]he prosecutor's conduct was flatly inconsistent with the State's plea agreement to recommend probation." Counsel's conduct in failing to object was deficient. Prejudice is presumed when the state violates a plea agreement. Thus, the defendant was entitled to resentencing before a different judge and the state's compliance with the agreement.

***State v. Sidzyik*, 871 N.W.2d 803 (Neb. 2015).** Counsel ineffective in second degree sexual assault no contest plea case for failing to object to the state's breach of the plea agreement. The defendant was charged with first degree sexual assault. In the plea agreement, the state agreed to reduce the charge to second degree and to "stand silent" on sentencing. In sentencing, however, the prosecutor endorsed the recommendation of the presentence investigation report (PSI), which recommended "a substantial period of incarceration." Counsel did not object. Counsel testified that he did not think the state had violated the plea agreement, as it was common for the state to endorse the recommendations of the PSI. Counsel also stated that he did not object because he thought the only option was to withdraw the plea, which would have subjected the defendant to trial on the greater charge and the risk of greater punishment. "Counsel was mistaken on both counts." First, the state clearly violated the agreement. Second, state law provided two options to remedy the violation: (1) withdraw the plea; or (2) demand specific performance of the plea agreement before a different judge.

> We realize that even seasoned criminal attorneys . . . are not walking repositories of the entire body of the criminal law. But trial strategy based on a misunderstanding of the law is not reasonable.

Prejudice was established. The defendant did not have to show that he would have received a lesser punishment. "Instead, the focus is whether counsel's silence sacrificed Sidzyik's ability to protect the bargain he struck with the State, thereby making the proceedings unfair." Remanded with instructions to allow the defendant to withdraw the plea or to be sentenced before a different judge.

**2014:** ***Smith v. State*, 754 S.E.2d 900 (S.C. Ct. App. 2014).** Counsel ineffective in sentencing following negotiated plea to voluntary manslaughter for failing to object to the state's violation of the plea agreement in recommending the maximum sentence. The defendant was charged with murder. He agreed to plead to manslaughter and testify against his codefendant and the state agreed to remain silent as to sentencing.

**Capital Case*

**2011:** ***State v. Fannon*, 799 N.W.2d 515 (Iowa 2011).** Counsel ineffective in negotiated plea to sexual abuse for failing to adequately address the prosecutor's breach of the agreement during the plea hearing. The initial prosecutor agreed to make no sentencing recommendation during the sentencing hearing. A different prosecutor argued for up to ten year terms on both counts and asked for consecutive sentences before defense counsel interrupted for a bench trial. Following this, the prosecutor attempted to withdraw his statements in compliance with the plea agreement and the case proceeded to sentencing. Counsel's conduct was deficient in failing to move to withdraw the plea, failing to move for specific performance before a different judge, and failing to even consult with the defendant on these matters. While the court recognized the sentencing court's ability to disregard the improper argument, the court found it appropriate in light of the interests of justice to remand for sentencing before a different court with strict compliance by the state with the agreement.

**2008:** ***Baldridge v. Weber*, 746 N.W.2d 12 (S.D. 2008).** Counsel ineffective in sentencing following drug charge plea for failing to object to the state's failure to comply with the plea agreement. The agreement required, among other things, that the defendant cooperate in the investigation and reveal sources, contacts, and associates and that the state would inform the sentencing judge of the level of his cooperation. The defendant complied with other terms and provided information about people in the Aberdeen area. The prosecution indicated that they wanted information only on people in the Watertown area. The defendant was not from the area, but obtained information from his girlfriend about people in the Watertown area and supplied this as well. Without any allegation that his information was untruthful or his cooperation insufficient, the state failed to inform the sentencing court of the cooperation as required. This information was also not included in the presentencing report. Defense counsel did not object and the court sentenced the defendant to the maximum sentence. Counsel's conduct was deficient and not based on strategy. With respect to prejudice, the court held that "[i]t is immaterial that the sentencing judge may not have been influenced by the State fulfilling its end of the bargain." Prejudice was presumed because the defendant "had a substantial right to the fulfillment of the terms of his plea agreement" and the court viewed this as an instance whether there was an "[a]ctual or constructive denial of the assistance of counsel."

**2007:** ***Custodio v. State*, 644 S.E.2d 36 (S.C. 2007).** Counsel ineffective in burglary and grand larceny case for failing to have the defendant's plea agreement enforced based on detrimental reliance. Shortly after his arrest, the defendant met with police and two assistant prosecutors and was promised a 15 year cap if he would cooperate with officers. He did so in admitting to "a string of at least seventy-five burglaries" and assisting in the recovery of a half million dollars worth of property. Following his cooperation, the elected prosecutor chose not to honor the initial agreement and the defendant pled guilty and was sentenced to 45 years. Counsel's conduct was deficient in failing to pursue enforcement of the initial agreement, which the defendant told her about and the police and the assistant prosecutors confirmed it. The lower court's finding that there was no agreement was "without any evidence of probative value" because the defendant and his counsel testified and the state presented no contrary evidence. Thus, "[t]he only evidence presented was that an agreement in fact existed." Prejudice established because the defendant was entitled to enforcement of the deal. "[T]he State may withdraw a plea bargain offer before a defendant pleads guilty, provided the defendant has not detrimentally relied on the offer." Here, the defendant had detrimentally relied on the offer. Initial plea bargain enforced.

**Capital Case*

**2006:** ***Taylor v. State*, 919 So. 2d 669 (Fla. Dist. Ct. App. 2006).** Counsel ineffective in negotiated plea drug case for failing to ensure enforcement of the plea agreement. The agreement had a maximum of nine months confinement, but defense counsel and the prosecutor that negotiated the agreement were not present for sentencing. New defense counsel informed the court that it was a "straight up plea" and the prosecution sought confinement resulting in two concurrent five year prison sentences.

***Eskridge v. State*, 193 S.W.3d 849 (Mo. Ct. App. 2006).** Counsel ineffective in drug case for failing to inform the sentencing court that the negotiated plea agreement had been for concurrent time and failing to object to imposition of consecutive sentences.

**2005:** ***Barber v. State*, 901 So. 2d 364 (Fla. Dist. Ct. App. 2005).** Counsel in unlawful sex with child case was ineffective in failing to move to withdraw the defendant's guilty plea. The defendant had a deal to plead guilty in exchange for the state's recommendation of a sentence of 15 years, but the defendant failed to appear at sentencing. The state recommended a sentence of 30 years and the court sentenced the defendant to 22 years. Counsel did not move to withdraw the guilty plea even though the state violated the plea agreement, which did not include any agreement concerning the defendant's appearance for sentencing. Under state law, if the trial court declined to honor the terms of the agreement, the defendant was entitled to withdraw the plea. Counsel's conduct was deficient and prejudicial.

**Capital Case*

## VI. PERFECTING APPEAL

### A. U.S. Court of Appeals Cases

**2012:** ***Glover v. Birkett*, 679 F.3d 936 (6th Cir. 2012).** Counsel ineffective in assault case for failing to timely file notice of appeal. Prejudice presumed.

**2011:** ***Hardaway v. Robinson*, 655 F.3d 445 (6th Cir. 2011).** Appellate counsel ineffective in murder case for failing to file an appellate brief and depriving the petitioner of his direct appeal. While collateral proceedings and appeal was allowed, this was different than direct appeal and not an adequate substitute. Prejudice presumed under *Flores-Ortega*.

**2009:** ***Hodge v. United States*, 554 F.3d 372 (3rd Cir. 2009).** Counsel ineffective following murder plea for failing to file a timely appeal. Counsel filed numerous post-trial motions alleging that the government violated the plea-agreement, but his conduct was deficient because he "failed to file an appeal only because he mistakenly believed his motions practice had put off the pertinent deadline." Although the record was unclear about discussions between counsel and the defendant, the court could not "envision a scenario, aside from following a client's thoroughly informed and perfectly explicit direction, where it would be reasonable for an attorney not to appeal the life sentence of a client with a nonfrivolous argument as to why the sentence is unlawful." The prejudice "is manifest" in that there was a nonfrivolous argument that the government had breached its plea agreement and a codefendant with the same issue had timely appealed and won on this issue. Sentence vacated and ordered to be reentered so the defendant would have another opportunity to file a timely appeal.

**2007:** ***United States v. Poindexter*, 492 F.3d 263 (4th Cir. 2007).** Counsel ineffective following guilty plea to narcotics trafficking for disregarding the defendant's unequivocal instruction to file a notice of appeal, even though the defendant had executed an appeal waiver as part of his plea agreement and appealing could be "harmful to the client's interests" in the long run.

***Corral v. United States*, 498 F.3d 470 (7th Cir. 2007).** Counsel ineffective following drug plea for failing to perfect appeal. The defendant entered a conditional plea agreement reserving his right to appeal the adverse ruling on the motion to suppress seized evidence. Shortly before sentencing the defendant indicated that he did not desire to appeal and counsel indicated that he would no longer be representing the defendant. Afterwards, while still in time to file the notice of appeal, the defendant changed his mind and attempted to call counsel but counsel blocked prison calls. The defendant's family members also left messages for counsel, in addition to contacting the court and the public defender about getting an attorney appointed for the appeal. Counsel's conduct was deficient in not "remaining available" and taking "affirmative steps to prevent his client from reaching him" by not returning the calls from family members. Prejudice was clear because the defendant would otherwise have filed the appeal as his father-in-law/co-defendant did with success.

**Capital Case*

**2005:** ***Frazer v. South Carolina*, 430 F.3d 696 (4th Cir. 2005).** Counsel ineffective in plea to trafficking and weapon case where the court rejected the state's offer of concurrent five years sentences and gave consecutive sentences of five years each and a $100,000 fine. While counsel moved for reconsideration, counsel failed to consult with the defendant concerning his right to appeal. *Flores-Ortega* was not a new constitutional rule for *Teague* purposes because it only applied *Strickland*. Counsel's conduct was deficient because "[w]here, as here, the defendant has not specifically requested an appeal, counsel is under a professional obligation to 'consult' with the defendant regarding that fundamental decision, unless the circumstances demonstrate that consultation is unneccessary." Under AEDPA, the state court's holding was an unreasonable application of *Strickland*. "[W]hen there are non-frivolous issues to appeal or the defendant has manifested an interest in appealing, *Strickland* requires that counsel consult with the defendant in deciding whether to go forward . . . . even if the defendant has pled guilty." Here, the defendant had two non-frivolous issues: (1) the maximum possible fine was only $25,000; and (2) an allegation that the court's unexpectedly harsh sentence was impermissibly motivated. The written form the defendant signed notifying him of his right to appeal was insufficient to relieve counsel of the obligation to "consult" with the defendant because "[t]he duty to consult identified in *Strickland* is broader than the narrow obligation to inform a defendant of his right to appeal." Prejudice found because the defendant "need only demonstrate an interest in appealing." Here, the defendant's interest was unwavering and ongoing.

***United States v. Sandoval-Lopez*, 409 F.3d 1193 (9th Cir. 2005).** Counsel was ineffective for refusing to comply with the defendant's specific instructions to file a notice of appeal, even though the defendant had a "remarkably favorable" plea agreement in which his waived his right to appeal. Counsel's conduct was deficient, even though the court recognized that "[s]ometimes demanding that one's lawyer appeal is like demanding that one's doctor perform surgery, when the surgery is risky and has an extremely law likelihood of improving the patient's condition." Although the court only remanded for an evidentiary hearing to determine whether counsel did refuse, the court made it clear that the state could choose not to oppose the petition and to allow the appeal, which would free the state from the plea agreement, and "because getting the appeal dismissed would be less work than an evidentiary hearing."

**2004:** ***Lewis v. Johnson*, 359 F.3d 646 (3rd Cir. 2004).** Counsel ineffective in robbery plea case for failing to file a notice of appeal, even though the defendant filed a pro se motion challenging the validity of his pleas on multiple grounds, including ineffective assistance of counsel. As the court noted, Petitioner relied on *Flores-Ortega* for his assertion that counsel had a constitutional duty to consult and advise him of his appellate rights, even though *Flores-Ortega* was decided after Petitioner's appeal. Analyzing the case under the AEDPA, the court held that *Flores-Ortega* did not create a "new rule" under *Teague* because "*Flores-Ortega*'s application of the *Strickland* standard was dictated by precedent and merely clarified the law as it applied to the particular facts of that case." *Id*. at 655. Thus, the holding in *Flores-Ortega* was applicable to the claim of ineffectiveness. The state court had applied a state court opinion holding, as a matter of law, that counsel acts reasonably in all cases where a notice of appeal is not filed and the defendant is silent. Application of this state law was "contrary to" clearly established law in *Strickland* and *Flores-Ortega*. Because counsel never met with Petitioner or filed an appeal, even though Petitioner clearly indicated an interest in

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challenging his conviction, counsel's conduct was objectively unreasonable. No strategic reason could excuse this conduct because even if counsel "concluded that any appeal would be frivolous," he could not disregard Petitioner's desire to appeal. Prejudice found because Petitioner was denied his appeal. First appeal of right reinstated.

**2003:** ***United States v. Snitz*, 342 F.3d 1154 (10th Cir. 2003).** Appellate counsel's failure to perfect the appeal requested by his client in a drug case was presumptively prejudicial.

### B. U.S. District Court Cases

**2017:** ***Cagle v. United States*, 2017 WL 9249494 (E.D. Tex. Dec. 12, 2017).** Petitioner pleaded guilty in federal court to a charge of conspiracy to engage in monetary transactions in property derived from specified illegal activity, and waived his right to appeal. Petitioner filed a motion under 28 U.S.C. § 2255 alleging multiple claims of ineffective assistance of trial and appellate counsel, most importantly, according to the court, a claim that his lawyer failed to file and perfect an appeal after petitioner asked him to. The record showed that a notice of appeal was filed, but the appeal was dismissed for lack of prosecution due to counsel's failure to make financial arrangements with the court reporter. There was nothing in the record (or from counsel) that rebutted petitioner's allegation that he asked his counsel to file and prosecute the appeal. Under Fifth Circuit law, prejudice to petitioner is presumed, regardless of the merit of any potential claims on appeal, and regardless of petitioner's waiver of appeal in his plea agreement. Also under Fifth Circuit law, the remedy for the Sixth Amendment violation here is for the court to grant an out-of-time appeal. That is what the court did here.

**2016:** ***Kelly v. Director*, 2016 WL 4702476 (E.D. Va., Sept. 6, 2016).** Trial counsel was ineffective for failing to file a direct appeal as instructed by defendant. Defendant was convicted of robbery and use of a firearm in the commission of a robbery. Following the conviction, defendant requested that trial counsel file an appeal. Trial counsel failed to do so. Respondents conceded they were "not able to dispute the denial of appeal claim." *Id.* at *7.

***Franklin v. Koster*, 2016 WL 4561732 (E.D. Mo., Sept. 1, 2016).** Trial counsel was ineffective for failing to file a direct appeal as instructed by defendant. Defendant pled guilty to two counts of first-degree assault on a law enforcement officer. Following the sentencing hearing, defendant repeatedly, specifically, and clearly instructed trial counsel to appeal the sentence. Trial counsel failed to do so. Defendant was in possession of various letters and affidavits showing that trial counsel was aware of defendant's desire to appeal the sentence, but counsel nevertheless failed to do so.

**2015:** ***Bell v. United States*, 116 F. Supp. 3d 900 (N.D. Ill. 2015).** Counsel in crack distribution case abandoned his client and failed to perfect the appeal. Following trial and sentencing, counsel filed a notice of appeal. The Seventh Circuit affirmed the convictions, but ordered a limited remand for resentencing. Following resentencing, in which the court imposed the same sentence, counsel sent a letter to the defendant advising him of the order, that he had a right to appeal, and that counsel would not represent him, despite a retainer agreement that "expressly contemplated" that counsel would represent the defendant on appeal. The Seventh Circuit invited additional

submissions before affirming, expressly noting that it had received no submission from the defendant. The defendant had, however, submitted a pro se filing after the due date of which the court was apparently unaware. Counsel's conduct was deficient in "abandon[ing] the client altogether," which "denied Petitioner access to the appellate proceeding." Prejudice was presumed, as the petitioner clearly desired to appeal and filed his own pro se pleading just 20 days after the due date. New appeal allowed.

**2014:** ***Bowling v. United States*, 31 F. Supp. 3d 863 (N.D. Miss. 2014).** Counsel was ineffective in obstruction of justice and transportation of a minor in interstate commerce with intent to engage in sexual activity for failing to file notice of appeal. At the time, the defendant was facing multiple federal criminal charges, multiple state criminal charges, multiple state civil suits, as well as divorce proceedings. Counsel in this case, also represented the defendant in his divorce and state civil suits and was coordinating with counsel on state charges, as well as attending those proceedings. Following his plea in this case, while facing a guideline range of 135-168 months, the court departed upwards and sentenced the defendant to 300 months. Both counsel and the defendant were surprised and the defendant asked counsel to appeal before the exchange became heated such that the defendant even "lunged" at counsel before law enforcement restrained him. In separate state court proceedings sometime afterwards, the defendant again shouted and "lunged" at his federal counsel and told her that he did not want her to file "another paper on his behalf." The same day, federal counsel filed a motion to substitute counsel, which was denied well after the time for appeal had passed. Six days later counsel filed the untimely notice of appeal. The appeal was dismissed as untimely and this 2255 was filed. While there was some understandable confusion about when the defendant "fired" counsel and on what matters he "fired" her, it was indisputable "that he always wanted to appeal, counsel knew it, and she nonetheless failed to seek an appeal on his behalf." It was also undisputed that she was "court-appointed" in these proceedings. Thus, neither the defendant nor counsel "had the authority to determine to determine when counsel's representation ended. That decision rest[ed] entirely with the Court." While counsel did file a motion to substitute counsel, she did not include the true nature of the "strained" relationship including "the heated exchanges leading nearly to fisticuffs," or "the substantial breakdown of communication." Moreover, when the court did not rule prior to the time for the notice of appeal to be filed, counsel failed to file the notice in order to protect the defendant's rights. Thus, counsel was ineffective, although the court made very clear that "[t]his is not a case of incompetence or wilful neglect of a client's interests," but simply a case involving "a misunderstanding of the law – coupled with several miscommunications between attorney and client." In short, the court found that counsel "ably and zealously represented her clients" for 20 years before the court, but in these circumstances she was ineffective in failing to file the notice of appeal. Out-of-time appeal granted.

***United States v. Harrison*, 48 F. Supp. 3d 381 (N.D.N.Y. 2014).** Pro se defendant challenging his drug conspiracy convictions established that counsel was ineffective in failing to file a notice of appeal as the defendant requested. While the defendant and counsel gave conflicting affidavits about whether the defendant desired to appeal, the court found that the evidence established the defendant's desire to appeal even though he had been sentenced to the mandatory minimum of 120 months under his plea agreement. Although his views were erroneous, the defendant had

consistently maintained that the mandatory minimum was 60 months because a prior drug conviction was improperly used to enhance the sentence. These consistent arguments and the filing of this 2255 motion only six months after sentencing revealed that the defendant did desire to appeal. Amended judgment filed with order for counsel to file the notice of appeal and, as a sanction, counsel was required to pay the filing fee. Counsel relieved following the filing of the notice.

**2013:** ***Randle v. United States*, 954 F. Supp. 2d 339 (E.D. Pa. 2013).** Counsel ineffective in drug distribution case for failing to move the withdraw the guilty plea or file an appeal due to the court's sentence that breached the defendant's negotiated plea agreement. The plea agreement specified a sentence of 96 months imprisonment and a $100 special assessment. It made no mention of a fine or a required period of at least four years supervised release as required by statute. The court sentenced the defendant to 96 months imprisonment, five years of supervised release, a $1,000 fine, and a $100 special assessment. Within several days, the defendant wrote to counsel asking for an appeal because the sentence exceeded that in the plea agreement. The defendant's friend also called and spoke to counsel about an appeal. Counsel took no action. Thereafter, the defendant paid fees to two other lawyers to file an appeal and both of these took no action. After attempting to retain at least five other attorneys, the defendant, forced to proceed pro se signed up for law library privileges. After a wait of three weeks, he was given access but the library had no materials on 2255 petitions, as the defendant was confined in a state prison. Ultimately, he obtained the form from the District Court and filed his pro se petition four months after the AEDPA statute of limitations expired. The District Court held that equitable tolling was applicable and counsel's conduct was deficient and prejudicial. New appeal granted.

**2012:** ***St. George v. District Attorney of County of Philadelphia*, 884 F.Supp.2d 298 (E.D. Pa. 2012).** Counsel ineffective in kidnaping and robbery case for failing to fail a notice of appeal, even though counsel told the sentencing judge in court that he would. Counsel said that after that time, he spoke to the petitioner's "friend or girlfriend" and assumed from the conversation that new counsel would be retained. Counsel's conduct was deficient in relying on this "vague and inconclusive" information rather than making an effort to contact the petitioner directly and consult with him about his appellate rights. It was also clear that the petitioner desired to appeal as he rejected a plea offer and insisted on trial. Counsel's statements on the record also made it clear that counsel believed there were "meritorious issues for appeal." While petitioner sought the remedy of merely excusing the need to exhaust his claims in state court, the District Court ordered that he be allowed his state court appeal and that the state court address the merits of the claims.

**2010:** ***Brown v. United States*, 707 F. Supp. 2d 1009 (E.D. Mo. 2010).** Counsel ineffective in drug case for failing to file a notice of appeal. The defendant sent counsel a letter the day after sentencing requesting that he file a notice of appeal, but counsel never received it. The defendant also called counsel's office and spoke with his assistants, and counsel conceded this was possible. New appeal granted.

**2009:** ***Richardson v. United States*, 612 F. Supp. 2d 709 (N.D. W. Va. 2009).** Retained counsel per se ineffective in drug case for failing to file a notice of appeal. The defendant plead guilty, pursuant to a plea agreement that included a waiver of appeal. Following sentencing and while still timely, the defendant sent counsel a letter asking that he file an appeal of the sentence. Counsel

responded with a letter to the defendant stating that he was no longer the attorney as the defendant terminated his services after sentencing and that he would have to pay counsel if he wanted him to do the appeal, as the appeal was not included in the retainer agreement. Counsel's conduct was deficient because counsel is still obligated to protect the interests of the client upon termination. Here, counsel's proper course was to file the notice of appeal and then inform the defendant the attorney client relationship had been terminated. This would have "adequately protect[ed] petitioner's interests 'to the extent reasonably practicable' until such time as petitioner was able to retain other counsel or determine what other documents needed to be filed in conjunction with his appeal." In short, until it is clear to both counsel and the defendant that the relationship has terminated, "the prudent and professionally responsible action is to presume that the relationship is still intact."

**2008:** ***Rivera v. Goode*, 540 F. Supp. 2d 582 (E.D. Pa. 2008).** Appellate counsel ineffective under AEDPA for failing to perfect the direct appeal. Although a notice of appeal and appellate brief was filed, counsel failed to file a statement of issues for appeal in the trial court as required by state law, which resulted in appellate issues being procedurally barred.

**2007:** ***Espinal-Martinez v. United States*, 499 F. Supp. 2d 213 (N.D.N.Y. 2007).** Counsel was ineffective in failing to timely notify the defendant that the court had declined to resentence him after the appellate court remanded after the decision in *United States v. Booker*, 543 U.S. 220 (2005), allowing the court that option. By the time, the petitioner got notice, he was time-barred from direct appeal. Prejudice established because the petitioner would have filed an appeal, which was evidenced by his initial appeal of the sentence. Leave to file a direct appeal granted.

***Del Valle v. United States*, 497 F. Supp. 2d 346 (D.R.I. 2007).** Counsel was ineffective in failing to consult with the defendant about appealing. Prior to sentencing, the defendant informed counsel of his objection to enhancement based on a codefendant's possession of a gun and the possibility of appeal was discussed but no decision made since the court had not ruled yet. Following sentencing and the application of this enhancement the defendant and his wife attempted to contact counsel but counsel did not return their calls until after the time for filing a notice of appeal had passed. Prejudice established because the defendant would have filed an appeal. Judgment reentered in order to allow direct appeal.

**2004:** ***Linen v. United States*, 337 F. Supp. 2d 403 (N.D.N.Y. 2004).** Counsel ineffective in felon in possession of firearm plea case for failing to file a notice of appeal as requested by the defendant. Although the court found that the "appeal likely has no merit," prejudice was presumed and the sentence reimposed in order to allow an appeal.

***Waldron v. Jackson*, 348 F. Supp. 2d 877 (N.D. Ohio 2004).** Appellate counsel was ineffective in rape case for filing the notice of appeal four days late, which caused the defendant's appeal to be dismissed as untimely. Although more than one year passed before the filing of a habeas corpus petition, the court found that the petition was timely filed under 28 U.S.C. § 2244(d)(1)(B) because of "the impediment to filing an application created by State action." Appellate counsel was ineffective in failing to perfect a timely appeal in direct contravention of the petitioner's wishes

and this ineffective assistance is "imputed to the state, and constitutes an impediment to filing an application created by the state." This state action "reverberate[d] over time" and prevented a timely habeas petition because counsel's failure could only be cured by requesting a delayed appeal in order to exhaust the issues in state court, which necessarily delayed the filing of the federal habeas petition. Thus, the "habeas clock did not begin until the disposition of his motion for leave to file a delayed appeal." On the merits, the court held that because the failure to perfect the appeal was caused by appellate counsel's ineffectiveness, the state courts refusal to allow a delayed appeal amounted to a due process violation. Writ granted on condition of the state courts allowing a delayed appeal in forma pauperis and with court-appointed counsel.

***McIntyre v. Klem*, 347 F. Supp. 2d 206 (E.D. Pa. 2004).** Counsel was ineffective in failing to file a notice of appeal. Trial counsel was informed by the defendant's parents following the trial that a new lawyer would be retained to represent the defendant. Counsel withdrew without following a notice of appeal. Counsel's conduct was deficient because counsel knew or reasonably should have known that the defendant desired to appeal and only had a few weeks to file the notice of appeal. Nonetheless, counsel failed to consult with the defendant about his desires. While the Pennsylvania courts held that counsel could not be ineffective for failing to file an appeal unless the client had asked counsel to do so, this holding was contrary to the Supreme Court's holding in *Strickland* and did not consider whether counsel had an obligation to consult with consult as required by *Roe v. Flores-Ortega*, 528 U.S. 470 (2000). Thus, under the AEDPA, the state court ruling did not preclude habeas relief. The court held that counsel's conduct was deficient in failing to consult with the defendant because he knew that the defendant wanted to pursue an appeal and knew that the period to file an appeal might expire before the defendant's parents could retain new counsel. Counsel also knew that the defendant had contested guilt and been given a severe sentence and, therefore, had "every incentive to pursue an appeal." Under these circumstances, counsel should have consulted with the defendant and filed the notice of appeal and then moved to withdraw, which was permitted by state law. While the state court found that the defendant refused to speak to counsel, this finding did "not bar a finding of ineffective assistance of counsel" in light of the facts of *Roe* itself. Furthermore, the state court's finding was an unreasonable determination of the facts" because counsel testified that the defendant's parents informed him that the defendant refused to talk to him but counsel never attempted to contact the defendant directly. Prejudice was found because the evidence established that the defendant would have timely appealed but for counsel's failure to consult with him. The writ was granted conditioned upon the state allowing a new appeal.

***United States v. Edwards*, 297 F. Supp. 2d 813 (E.D. Pa. 2004).** Counsel was ineffective following guilty pleas to conspiracy and firearm offenses for failing to file a notice of appeal as his client specifically requested. Counsel's conduct was deficient because "[t]he decision to file an appeal is the petitioner's and counsel must complete this 'purely ministerial task' even if he disagrees with his client's decision." The court granted the petitioner leave to file a notice of appeal.

**2003:** ***Bishawi v. United States*, 292 F. Supp. 2d 1122 (S.D. Ill. 2003), *aff'd*, 109 Fed. Appx. 813 (7th Cir. 2004) .** Appellate counsel was ineffective in failing to file a consolidated appeal raising issues

from both a new trial motion and from the conviction and sentence. Petitioner was convicted of narcotics trafficking charges and filed an appeal. While the direct appeal was pending, counsel learned that the trial court may have had ex-parte communication with the jury during its deliberations. The Seventh Circuit issued a general remand to the district court and included in its order the directive that, a new notice of appeal had to be filed by any party dissatisfied with the district court's judgment. The district court initially granted a motion for new trial. The Seventh Circuit vacated the district court opinion because the district court failed to hold an evidentiary hearing to determine prejudice. Following an evidentiary hearing, the district court denied the motion for new trial. Petitioner appealed but appellate counsel raised only the issue concerning the denial of new trial. Petitioner filed a 2255 petition asserting numerous issues some of which had been raised on appeal. The government conceded and the court held that appellate counsel had been ineffective in failing to file a consolidated appeal as had been clearly directed by the seventh circuit. Counsel's failure was not a strategic decision because counsel incorrectly believed petitioner could later challenge his conviction and sentence on direct appeal if his appeal from the denial of the motion for new trial was denied. Prejudice was found because counsel's failure was the equivalent of the failure to file a notice of appeal under Flores-Ortega. Prejudice was presumed. The court vacated the judgment and reimposed the sentence in order to permit petitioner to file an appeal. In essence, the court found that appellate counsel's ineffectiveness established cause and prejudice for the petitioner's failure to raise the substantive issues on direct appeal.

### C. State Cases

**2016:** ***State v. Jones*, 139 A.3d 1234 (N.J. Super. Ct. App. Div. 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.

**2012:** ***Harvey v. State*, 285 P.3d 295 (Alaska Ct. App. 2012).** Counsel ineffective in sexual abuse case for failing to preserve the defendant's right to appeal after the defendant was sentenced to seven years following plea even though prosecutor had allegedly made oral promise to recommend a sentence of no more than six years. Counsel had been retained solely for the trial proceedings. While there were discrepancies between counsels asserting that he consulted with the defendant concerning a possible appeal but was not told to appeal and the defendant saying he explicitly told counsel he wanted to appeal, either way counsel was ineffective. Under *Flores-Ortega*, filing a notice of appeal is part of trial counsel's duties if counsel is aware of the defendant's desire to appeal and the client will not otherwise be able to obtain substitute counsel to appeal in a timely fashion.

***Gosch v. State*, 294 P.3d 197 (Idaho Ct. App. 2012).** Counsel ineffective in drug case for failing to file notice of appeal when client informed counsel after the jury verdict but before sentencing that he wanted to "appeal everything." It was irrelevant that the client did not schedule a follow-up meeting or respond to counsel's correspondence following sentencing. Absent an express withdrawal of the request by the client, counsel was obligated to file the appeal.

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***Ewing v. Denney*, 360 S.W.3d 325 (Mo. Ct. App. 2012).** Counsel ineffective in failing to timely perfect appeal in murder case. Counsel timely filed a notice of appeal, but did not pay the required filing fee until four months later. After the appellate court dismissed the appeal as untimely, counsel did not notify the defendant or seek leave to file out of time as could have been done under the court rules. The defendant had been attempting to contact counsel "to no avail," and did not learn of the dismissal until he wrote to the Missouri Supreme Court. Counsel for the court notified him by letter of the dismissal. By that time, he was out of time to file a motion for leave to file out of time and out of time to file a motion alleging ineffective assistance of counsel. The State conceded that the defendant was entitled to relief. Sentences vacated in order to allow for new sentencing and a new period in which to timely file appeal.

**2011:** ***Albright v. State*, 251 P.3d 52 (Kan. 2011).** Appointed post-conviction counsel ineffective in failing to timely file notice of appeal in murder case. As there was a statutory right to counsel, the court found there was "a right to receive effective assistance of counsel" and applied *Flores-Ortega*. Appeal allowed.

**2008:** ***Andrades v. Commissioner of Correction*, 948 A.2d 365 (Conn. Ct. App. 2008).** Counsel ineffective in murder case for failing to file application for sentence review by the "sentence review division," as allowed by state law, when counsel had told the defendant he would do so.

***People v. Ross*, 891 N.E.2d 865 (Ill. 2008).** Counsel ineffective for failing to file a timely notice of appeal in armed robbery case when the defendant had communicated his desire to appeal to counsel. Prejudice presumed and appeal allowed.

***State v. Patton*, 195 P.3d 753 (Kan. 2008).** Counsel ineffective following plea in drug case for failing to perfect direct appeal when the defendant clearly expressed a desire to appeal his sentence.

**2007:** ***King v. State*, 154 P.3d 545 (Kan. Ct. App. 2007).** Counsel ineffective following no contest plea to second-degree murder for failing to timely file the appellate brief which resulted in dismissal of the appeal of a sentence that was twice the guidelines range. Appeal reinstated.

**2006:** ***Woeppel v. City of Billings***, 146 P.3d 789 (Mont. 2006). Appellate counsel ineffective in assault case for failing to perfect the appeal by filing a brief. Prejudice found because the defendant clearly indicated an intent to appeal by filing a notice of appeal. Appeal reinstated.

**2005:** ***Louberti v. State*, 895 So. 2d 479 (Fla. Dist. Ct. App. 2005).** Trial counsel ineffective for failing to file defendant's post-trial motion with 10 days. Although the trial court had allowed counsel 30 days, the time for post-trial motions under state law could not be extended. Counsel's conduct was prejudicial because of a double jeopardy violation that required reversal. The defendant was convicted of organized scheme to defraud but acquitted on two counts of grand theft based on the same alleged conduct. Acquittal on the theft charges required reversal and dismissal of the fraud charge.

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**2003:** ***Wallace v. State*, 121 S.W.3d 652 (Tenn. 2003).** Counsel was ineffective in murder case for failing to file a timely motion for new trial which resulted in the waiver of all issues on direct appeal except for sufficiency of the evidence. Counsel had been retained for representation solely at trial. After conviction, counsel sent the defendant a letter instructing him on preparation of a motion for new trial and advising him of the legal issues to raise. Because counsel had not been given court approval to withdraw as attorney of record, the court refused to consider the defendant's timely filed pro se motion for new trial. Trial counsel later filed a motion for new trial and the defendant filed a second pro se motion for new trial, but these motions were denied as untimely. Counsel's conduct was deficient because counsel failed to file a timely motion for new trial or a motion to withdraw so the defendant could file his own pro se motion. While the retainer agreement purported to limit counsel's representation to trial work, "Taking necessary steps to preserve post-trial remedies, including filing of a motion for new trial are clearly responsibilities of counsel." *Id*. at 657. Prejudice found because counsel failure amounted to a denial of appeal, with the exception of sufficiency of the evidence claim. Prejudice presumed and a delayed appeal allowed.

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## VII. APPEAL

### A. U.S. Court of Appeals Cases

**2016:** ***Loher v. Thomas*, 825 F.3d 1103 (9th Cir. 2016)**. Affirming grant of habeas relief in attempted sexual assault case on claim of ineffective assistance by appellate counsel for failing to raise a challenge to the trial court's order requiring petitioner to testify before his other witnesses. Petitioner's trial began at 9:06 a.m. Although the prosecution had quite a number of witnesses on its witness list, only four were called before it rested at around 2:15 p.m. Following a fifteen minute recess, defense counsel asked for a continuance until the next court day to begin the defense. Defense counsel explained that he had anticipated the prosecution calling additional witnesses and so had not secured the presence of his defense witnesses for that day. The continuance motion was denied and the court ordered petitioner to take the stand if he wanted to testify, followed by any defense witnesses defense counsel was able to get to come in that day. The remaining witnesses could then testify on the next court day. Defense counsel objected, arguing that the decision whether petitioner should take the stand needed to be made after hearing the testimony of the defense witnesses. The objection was overruled, with the court expressing skepticism that defense counsel had not already determined whether petitioner should testify and criticizing defense counsel's failure to consult with the prosecution in advance in order to determine when the defense witnesses would likely be needed. Petitioner went on to testify and the prosecutor elicited damaging testimony on cross-examination. On appeal, no argument was included concerning the trial court's ruling requiring petitioner to testify before his witnesses. The issue was raised for the first time in post-conviction proceedings, along with a claim of ineffective assistance of appellate counsel. Petitioner relied on *Brooks v. Tennessee*, 406 U.S. 605 (1972), where the Supreme Court struck down a statute that required a defendant to testify before his or her witnesses. The claims were denied. The federal district court, in contrast, found both claims to be meritorious, along with an *Apprendi* claim not relevant here. The Ninth Circuit reversed the grant of relief on the *Brooks* claim finding that fairminded jurists could disagree whether *Brooks* controlled given the facts of this case. With regard to the appellate ineffectiveness claim, the circuit court explained that although it had already held that the *Brooks* claim could not succeed on the merits under § 2254(d), that conclusion did not foreclose relief under an "independent" *Strickland v. Washington* analysis. And "[b]ecause Hawaii has failed to argue this independent IAAC issue specifically and distinctly, it ... waived its challenge to the district court's grant of relief." 825 F.3d at 1121.

***Overstreet v. Warden*, 811 F.3d 1283 (11th Cir. 2016).** Under AEDPA, appellate counsel ineffective in armed robbery and kidnaping case for failing to challenge the sufficiency of the evidence on the kidnaping convictions under the Georgia Supreme Court's decision in *Garza v. State*, 670 S.E.2d 73 (Ga. 2008). The defendant was convicted of 35 counts arising from his role in the armed robberies of five fast-food restaurants. The four kidnaping convictions were based on the defendant leading the restaurant manager to the restaurant safe in a back room or office and then ordering the manager to open the safe. On two of the four occasions, the defendant led the restaurant manager back to the front of the restaurant, where the remaining employees were being held. At the time of conviction in 2007, this was sufficient to satisfy the asportation element of kidnaping. In 2008,

however, the Georgia Supreme Court decided *Garza*, which held that "movement of a victim that is 'part and parcel' of an independent crime, such as armed robbery, would generally not be considered asportation." *Id*. at 1285. In 2009, the Georgia Supreme Court held that the new rule of Garza was applicable to any kidnaping conviction that had not yet been adjudicated on direct appeal. Thereafter, appellate counsel filed the direct appeal brief challenging, among other things, the sufficiency of the evidence without any citation or argument under Garza. Thereafter, the defendant challenged the sufficiency of the evidence under Garza in pro se petitions but was denied relief in state habeas and in federal habeas. Appellate counsel's conduct was deficient in failing to assert the Garza issue. "[H]e either failed to recognize or elected not to raise this strong basis for reversal of four criminal convictions. Either way, counsel's performance is patently deficient." Counsel's conduct was not excused as a reasonable strategy because "[e]ven if meritorious, none of appellate counsel's arguments was as compelling as Garza, which almost certainly would have resulted in reversal of the kidnaping counts." *Id*. at 1287. Prejudice also established. "The state court's determination to the contrary was an unreasonable application of *Strickland*."

**2015:** ***Lynch v. Dolce*, 789 F.3d 303 (2nd Cir. 2015).** Under AEDPA, appellate counsel ineffective in first-degree robbery case for failing to assert the trial court's error in failing to instruct the jury, as requested by trial defense counsel, that in order to convict of first-degree robbery by using or threatening the immediate use of a dangerous instrument, it had to find that the defendant actually possessed a dangerous weapon at the time of the crime. The law in New York was clear on this for "a generation by the time of Lynch's trial" and trial counsel had cited to the controlling case in requesting the instruction. Prejudice was also established because while the defendant had threatened to shoot the victim, neither the victim nor two eyewitnesses saw a weapon, and during a struggle with the victim for her purse, the defendant held the purse with one hand and punched the victim with the other. From these facts, the jury could have inferred that the defendant did not actually possess a weapon during the crime. The state court's conclusion to the contrary was an unreasonable determination. While the defendant had other valid convictions for which he was sentenced to 10 years, he received an additional two years for this conviction. The remedy was to grant a new appeal on this issue, but the court also ordered the release of the defendant from confinement pending the new appeal as he had already served more than 10 years of confinement.

**2014:** ***Payne v. Stansberry*, 760 F.3d 10 (D.C. Cir. 2014).** Appellate counsel was ineffective in failing to seek plain error review of the trial court's instruction that the jury must find the defendant guilty even if the government failed to prove any element of a charged offense beyond a reasonable doubt. The government argued that there was a transcription error, but proffered no evidence. Likewise, even if the error was simply "a slip of the tongue," it was still an obvious error. Thus, counsel's conduct was deficient and counsel acknowledged that there was no strategic reason for the failure to assert this issue on appeal. Although the court could not be certain that the D.C. Court of Appeals would have found plain error, "the question before this court is limited to whether there is a reasonable probability that the outcome of his appeal would have been different." The appropriate relief was a belated appeal on this issue.

**2013:** ***Shaw v. Wilson*, 721 F.3d 908 (7th Cir. 2013).** Under AEDPA, appellate counsel ineffective in murder case for failing to assert on appeal that the state's amendment of the information to

elevate the charge was barred by state law. The defendant was charged, along with two other men, with aggravated battery. After the two other men agreed to plead guilty and to testify against the defendant, the state moved to amend the information to charge murder. Trial counsel objected correctly that this was prohibited by a 1982 state statute and an explicit holding by the Indiana Supreme Court three years before, which prohibited amendments of "substance" after 30 days before the omnibus date. Here, the omnibus date was July 31, 2000, and the state's amendment was not proposed until 17 months later. Four years after the defendant's trial, the Indiana Supreme Court reaffirmed its holding on this issue in another case. The state legislature thereafter amended the statute to allow substantive amendments at any time prior to trial if not prejudicial. Counsel's conduct was deficient in failing to raise this obvious claim that was clearly stronger than the sufficiency of the evidence claim asserted, which was "dead on arrival." The claim was obvious as it was carefully preserved by trial counsel. The fact that intervening appellate courts had rejected similar claims also did not excuse the deficient conduct. Prejudice was clear as the amendment increased the defendant's maximum sentence exposure from 20 years to 65 years. The state court's holding to the contrary was an unreasonable application of *Strickland* and *Smith v. Robbins*. Finally, this case was not impacted by *Lockhart v. Fretwell* because "[a] legislative repeal of a statute does not present the same situation as the one in which a court mistakenly recognizes a right for some period of time and then corrects itself (or is corrected by a reviewing court)." New direct appeal granted.

**2011:** ***Showers v. Beard*, 635 F.3d 625 (3rd Cir. 2011).** Appellate counsel ineffective in murder case for failing to assert ineffectiveness of trial counsel in failing to prepare and present rebuttal expert testimony regarding the properties of Roxanol or liquid morphine. The defendant was convicted of murdering her husband, who died from oral consumption of a lethal dose of the drug. The state's case was built on circumstantial evidence and testimony of a forensic pathologist that Roxanol is capable of being masked. The defense argued that the deceased committed suicide. Counsel consulted a psychiatrist prior to trial, who recommended that counsel secure an expert to address the impossibility of disguising Roxanol. This expert gave counsel, the names and contact information for three qualified experts but counsel did not pursue this. Instead, counsel presented a lay witness friend on this issue. Counsel failed to establish key facts that would have established that a large dose of Roxanol cannot be masked without a large amount of liquid or food, if at all, and that no such substance was found in the deceased's stomach. Counsel explained that he did not ask some questions on this of the state's expert "because he feared asking questions for which he did not know the answers." While "it may be risky for an attorney to ask questions for which he believes the answer may be harmful," this "is no excuse for failing to elicit significant evidence when the risk of an adverse response has been created by counsel's failure to conduct a thorough investigation or understand key, undisputed facts in the record." "Even the most minimally competent attorney here would have consulted at least one of the experts suggested to him" by the defense psychiatrist. While not dispositive, the court noted the 1989 Guidelines calls for retention of necessary expert witnesses. Prejudice established as rebuttal expert testimony would have injected significant doubt of guilt. Appellate counsel's conduct was deficient and prejudicial as he relied solely on the record, did not conduct an independent investigation, and failed to assert trial counsel's ineffectiveness. Under AEDPA, the state court's conclusion to the contrary was an unreasonable application of clearly established federal law.

**Capital Case*

**2010:** ***Ramchair v. Conway*, 601 F.3d 66 (2nd Cir. 2010) (*affirming* 671 F. Supp. 2d 371 (E.D.N.Y. 2009)).** Under AEDPA, appellate counsel ineffective in robbery case in failing to assert as error the trial court's denial of a motion for mistrial. During trial, the defense argued that the line-up conducted pretrial with the sole identification witness was suggestive, as the defendant was South Asian and the others in the line-up were Hispanics and an African-American. In response, although it had not done so during the suppression hearing or the first two trials, the state elicited evidence that defense counsel had been present at the line-up and failed to object, which cast the defense counsel as a witness against his client on the central issue in the case. Counsel requested permission to testify, but the court refused believing that counsel should have anticipated this prior to trial and sought to withdraw. Counsel then sought a mistrial, which the court denied without explanation. Appellate counsel asserted only that the trial court erred in refusing to allow counsel to testify. Counsel believed the mistrial claim was not separately preserved and was only another way of preserving the denial of the right to testify. Thus, she believed erroneously that relief could be granted only if the appellate court found that counsel should have been allowed to testify. The state court decision denying relief was an unreasonable application of Strickland. Rather than granting a new appeal, the court granted a new trial because it had already been almost 13 years since the defendant's trial.

***Goff v. Bagley*, 601 F.3d 445 (6th Cir. 2010).** Under AEDPA, appellate counsel ineffective in capital case ineffective for failing to assert the trial court's state law error in failing to afford the petitioner his right to allocution prior to sentencing. Although "there is no right to allocution under the federal constitution, there is a constitutional right to the effective assistance of appellate counsel," *id*. at 464 (internal quotations and citations omitted), "regardless of the fact that counsel's underlying failure is a matter of state law," *id*. Here, Ohio law provides the right of allocution prior to sentencing. State law also required reversal and resentencing if the trial court failed to address the defendant concerning this right. Thus, this was "an obviously winning claim" and counsel's failure to assert it on appeal was deficient and prejudicial. Although the defendant was advised of and waived his right to make an unsworn statement to the jury, this is "not equivalent" and is not a substitution for the right of allocution. The state court's denial of relief was an unreasonable application of federal law.

***Theus v. United States*, 611 F.3d 441 (8th Cir. 2010).** Counsel ineffective in failing to object either in the trial court or on appeal to the district court's error in imposing a ten-year mandatory minimum sentence for a quantity of cocaine that required only a five-year minimum sentence. The defendant was charged with five co-defendants to conspiracy to distribute or possess with intent to distribute five kilograms or more of cocaine. The evidence at trial established, and the district court held post-trial, that the defendant was not a member of the conspiracy charged, but he was a member of a different conspiracy with two individuals not charged in the indictment. The presentence investigation report (PSR) attributed only 1.02 kilograms of cocaine to the defendant and explicitly concluded "there is not enough evidence to support that the defendant was involved with 5 kilograms of cocaine." The guidelines range for the defendant (at 1.02 kilograms) was 70-87 months, but the PSR inexplicably concluded that the 10 year mandatory minimum (at 5 kg) had to be applied rather than the 5 year mandatory minimum (at 1.02 kg). The district court rejected the government's argument that the guidelines range should be based on 5 kg, but still imposed the mandatory minimum sentence based on that amount, despite announcing that the court would like to impose

a sentence in the 70 - 87 month range. Counsel's conduct was deficient and prejudicial under these circumstances.

***King v. United States*, 595 F.3d 844 (8th Cir. 2010).** Appellate counsel ineffective in drug plea case where the defendant was sentenced as a career offender. Under the defendant's plea agreement, he was to be sentenced using a base offense level of 32 and he was waiving his right to appeal. Based on the PSR, which concluded he was a career offender, the court actually used a base offense level of 34. The defendant appealed and filed a pro se brief asserting that, under the sentencing guidelines, he did not qualify as a career offender. Appellate counsel was ineffective in failing to rebut the state's argument that the appeal had to be dismissed due to the pretrial agreement. In short, because the defendant had not been sentenced in accord with the agreement, the provision that he waived appeal was not valid. If appellate counsel had adequately asserted this basis, the defendant's pro se brief would have been considered. The issue asserted had merit and required that the sentence be vacated.

**2008:** ***Suggs v. United States*, 513 F.3d 675 (7th Cir. 2008).** Appellate counsel was ineffective in failing to challenge the enhancement of the defendant's sentence based on possession of a dangerous weapon during a drug conspiracy. Counsel sent the defendant a letter outlining three issues he intended to assert on appeal, which included the enhancement issue, but then inexplicably raised only one of the other issues. Counsel's conduct was deficient in failing to assert the two-point enhancement issue. The witness testified only that he had seen the defendant with "weapons," but the district court concluded that the witness testified he had seen the defendant with a "gun." This was error because the testimony about weapons was not sufficient to establish a "dangerous" weapon as required for the enhancement. This error was "obvious" and had been objected to by trial counsel. The issue was also "significant" and "clearly stronger" than the indictment variance issue argued on appeal. Prejudice established because the enhancement put the guideline range from 292-365 months and the defendant was sentenced to 300 months. Without the enhancement the range was reduced to 235-293 months "[t]hat could very well net [the defendant] a much shorter sentence on the conspiracy count."

**2006:** ***Franklin v. Anderson*, 434 F.3d 412 (6th Cir. 2006).** Appellate counsel was ineffective in failing to assert as error the trial court's failure to excuse a biased juror. While this issue was defaulted, cause and prejudice was also established due to the ineffectiveness of counsel. The voir dire indicated that the juror "so completely misunderstood the presumption of innocence and burden of proof that she could not have made a fair assessment of the evidence of . . . guilt." "Even after she was corrected three times by the judge, she still insisted with her last statement that the defendant had to be proven innocent." Because the seating of a biased juror can never be harmless, "the State can make no argument that . . . trial counsel acted strategically" in not excusing this juror. "To permit this would be to allow trial counsel to waive the defendant's right to an impartial jury." Aside from this issue, "counsel did not meet the ABA standards in their dealings with him concerning his appeals," including failing to meet with the defendant or even have phone conversations.

**2005:** ***Cirilo-Munoz v. United States*, 404 F.3d 527 (1st Cir. 2005).** Appellate counsel ineffective for failing to assert sentencing error on charge of aiding and abetting the murder of an on-duty

policeman. The trial court found that the murder was motivated by the officer's status, which elevated the defendant's sentence range from 27-34 years to life. Trial counsel objected because there was no evidence the defendant knew the victim was a police officer. Appellate counsel was ineffective because the jury had made no determination on this issue and the trial court's finding was not supported by the evidence. The court rejected the government's argument of strategy because this issue would have "built upon" the issues raised challenging the conviction and because "[o]ne would need a potent reason for omitting the enhancement argument" when the difference in potential sentences was so great.

> Assuming that the omission of the argument was deliberate, the best one can say for counsel is this: that in some situations lawyers think–usually in error–that by omitting a good argument, they can thereby increase the chance of prevailing on a more doubtful argument directed to a more far-reaching result. However, in this instance, such a calculation would have been manifestly unreasonable. . . .

Prejudice found because reversal would have been required if the issue had been raised on direct appeal. Remanded for new sentencing.

***Ballard v. United States*, 400 F.3d 404 (6th Cir. 2005).** Appellate counsel ineffective in conspiracy to distribute drugs case for failing to challenge the defendant's sentence. The evidence established that the defendant had been a "mule" involved in transporting cocaine and marijuana. The jury returned only a general verdict of guilt, which did not specify what substances the defendant had transported. The court found that the evidence established only that she had transported cocaine and sentenced her accordingly. While her case was pending on appeal, the Sixth Circuit held in another case that a when a general verdict was returned in a conspiracy involving multiple drugs, the defendant should be sentenced only as if he had distributed only the drug carrying the lower penalty. After the Supreme Court's decision in *Apprendi*, the Circuit also held that failure to instruct the jury to determine both the type of drug and the drug quantity involved amounts to plain error. Counsel's conduct was deficient in not raising this issue. "[W]hile we do not require attorneys to foresee changes in the law, once a change–particularly an important and relevant change–does come about, we do expect counsel to be aware [of] it." *Id*. at 408. Counsel's conduct was also deficient because counsel was aware that one of the co-defendant's won on appeal on these same issues. "There is simply no rational basis for completely foregoing an argument that was not only potentially, but actually, successful." *Id*. at 409. The court found *Strickland* prejudice by applying a plain error standard to determine whether the trial court improperly determined the sentence.

***Sanders v. Cotton*, 398 F.3d 572 (7th Cir. 2005).** Appellate counsel ineffective in murder case for failing to challenge on appeal the trial court's failure to properly instruct the jury on the elements of murder, which required that the state prove the absence of sudden heat. The trial court's instructions on murder did not mention sudden heat. The instructions on voluntary manslaughter allowed conviction if the state proved the defendant was acting under sudden heat. Trial counsel proposed an instruction that would have properly required the State to prove the absence of sudden heat for murder. On appeal, trial counsel did not raise this issue, but counsel did not state a strategy. Instead, counsel could not remember why he did not raise the issue. In

addressing the substantive due process claim, the court held that the issue was not procedurally defaulted in state court and even if it was the default was overcome because appellate counsel's ineffectiveness established cause and prejudice for the default. Under the AEDPA, the court found that the state court's finding that the instructions were adequate was unreasonable because the jury instructions not only failed to properly state the burden of proof, but affirmatively misstated it when the manslaughter instructions included the element of proving the existence of sudden heat rather than proving the absence of it for murder. Counsel's conduct was deficient because counsel raised three issues concerning instructions on transferred intent, admission of prior bad acts, and abuse of discretion in ordering consecutive prison terms. The sentencing issue was clearly weaker because the trial court was given "wide discretion." The two other issues were also weaker because "neither argument relied on controlling Indiana precedent that would have warranted a new trial." This issue was "an obvious and stronger argument than the arguments" made by appellate counsel. With respect to prejudice, the court held that the state court's finding that trial counsel's proposed instruction was a misstatement of the law was also an unreasonable determination of the facts, thus requiring no deference. The state court also unreasonably applied the law because "Indiana law requires reversal and a new trial" under the facts of this case. If the issue had been raised, the state court "would have been bound by law" to grant a new trial.

**2004:** ***United States v. Reinhart*, 357 F.3d 521 (5th Cir. 2004).** Appellate counsel was ineffective in conspiracy to commit sexual exploitation of children case for failing to assert the trial court's sentencing error on appeal. The district court held the defendant accountable in sentencing for two minor males depicted in a pornographic videotape created by the defendant's co-conspirator prior to the formation of the conspiracy. Counsel objected during sentencing to the court's consideration of these two minors, but did not challenge the district court's action on appeal. The court held that consideration of these two minors was inappropriate under the sentencing guidelines, because the defendant played no part in the creation of the videotape, which was created well before the conspiracy began. Counsel was deficient for failing to assert this meritorious issue on appeal. Prejudice found because the appropriate sentencing guideline range would have resulted in a sentence shorter by five years than the sentence imposed on the defendant, which is sufficient to establish prejudice under Glover v. United States.

***Mapes v. Tate*, 388 F.3d 187 (6th Cir. 2004).** Appellate counsel was ineffective in capital case for failing to assert on appeal that the trial court erred in instructing the jury in sentencing that it was not permitted to consider mitigating evidence related to a prior murder conviction used in aggravation. Trial counsel objected to this instruction, but appellate counsel asserted only trial phase issues and one unrelated sentencing issue on appeal. In determining whether an attorney on direct appeal performed in a competent fashion, the court listed eleven factors to be considered. In applying the factors to this case, the court held that the issue not raised was "significant and obvious" because the jury was not allowed to consider mitigation in violation of the holding of *Eddings v. Oklahoma*, 455 U.S. 104 (1982), which had been decided a year before this trial. The omitted issue was also much stronger than any of the issues raised, which mostly challenged the trial phase despite evidence of overwhelming guilt and in some instances "were asserted in the face of established law to the contrary." The court also discussed other factors before concluding that "[n]o competent attorney, in the circumstances of this case, would have failed to raise this issue." The court also found a

reasonable probability that the defendant would have prevailed on appeal and conditioned the writ on the state courts allowing a new direct appeal.

**2003:** ***Caver v. Straub*, 349 F.3d 340 (6th Cir. 2003).** Appellate counsel was ineffective in assault with intent to commit armed robbery case for failing to assert trial counsel's ineffective assistance. On appeal, counsel asserted a claim of instructional error and insufficiency of the evidence. Following affirmance, the petitioner filed a pro-se application to the state Supreme Court asserting generally that appellate counsel was ineffective for failing to assert the claim of ineffective assistance of trial counsel. In state post-conviction, the petitioner asserted appellate ineffectiveness for failing to raise trial counsel ineffectiveness because trial counsel was not present during a jury question and re-instruction of the jury. The state court held that the petitioner had not demonstrated good cause to excuse the failure to present the issue in his direct appeal. The state court also found that appellate counsel was not ineffective. On appeal, the petitioner asserted appellate counsel ineffectiveness for failing to assert trial counsel's ineffectiveness for different specific reasons. The Sixth Circuit first held that the claim of appellate ineffectiveness was not procedurally defaulted due to failure to fairly present the claim in state court because the state did not raise the issue of default before the district court and instead argued only the merits. The petitioner also did not procedurally default his claim of ineffective assistance of trial counsel because, while it was not raised in his direct appeal, he did raise it in his pro se appeal to the state Supreme Court in a general fashion. Because it was a pro se application and less stringent standards apply the court found that the issue was fairly presented to the state court. Deficient conduct found because the issue of trial counsel's absence during the jury re-instruction was a much stronger issue than the two plain error issues asserted by appellate counsel. Prejudice was found because, if the issue had been raised on appeal, there is a reasonable probability that the result of the state appeal would have been different. In finding prejudice, the court noted that the Supreme Court has not expressly considered whether jury instruction is a critical stage that requires the presence of counsel. The Sixth Circuit held, however, that it is a critical stage. Therefore, trial counsel's absence required a presumption of prejudice. In analyzing the case under the AEDPA, the court found that the state court's decision was an unreasonable application of clearly established federal law in Strickland. In essence, the court characterized the finding of appellate counsel's ineffectiveness as both cause and prejudice for failure to assert trial counsel's ineffectiveness on appeal and as a free standing constitutional error.

***Joshua v. Dewitt*, 341 F.3d 430 (6th Cir. 2003).** Trial and appellate counsel were ineffective in drug case for failing to move to suppress evidence. The defendant was stopped by a highway patrolman for speeding. The highway patrolman did a license check on the defendant and learned that there was an entry in the station's "read and sign" book, which contained police intelligence information. The entry in the book reported that the defendant was a known drug courier who transported illegal narcotics between several cities. Based on this information, the defendant was detained for approximately forty-two minutes in order to allow time for a drug dog to come to the scene. When the dog arrived, it alerted, and a large quantity of cocaine was found. The defendant's girlfriend then told the police that the drugs belonged to the defendant. Prior to trial, counsel moved to suppress the evidence solely on the basis that the length of the traffic stop alone required suppression. The trial court denied the motion, and the defendant entered a no contest plea. The court found that counsel's conduct was deficient in failing to move for suppression under *United States v. Hensley*,

469 U.S. 221 (1985), which held that reliance on a flyer or bulletin can justify a brief detention but can do so only if the officer who issued the flyer or bulletin had articulable facts supporting reasonable suspicion that the person wanted had committed an offense. The court found a reasonable trial attorney would have raised the Hensley issue at trial. Prejudice was found because the state failed to offer any evidence from the officer who provided the information from the "read and sign" book and because the state had never contended that there was a justifiable basis for the entry. The court likewise found appellate counsel ineffective for failing to raise the issue on appeal under the state plain error rule. Prejudice was found because *Hensley* bars the admissibility of the evidence seized at the scene of the defendant's arrest, including both the drugs and his girlfriend's statement. Without this evidence, there was a substantial probability that the defendant would not have been convicted. Analyzing the case under the AEDPA, the court found that the state court decision was contrary to clearly established Supreme Court precedent in *Hensley*.

***United States v. Skurdal*, 341 F.3d 921 (9th Cir. 2003).** Appellate counsel was ineffective in drug case for failing to file a proper Anders brief in support of his motion to be relieved as counsel. In the § 2255 proceeding, the district court found that all issues raised were procedurally barred because the defendant had failed to raise them on direct appeal. The ineffectiveness of appellate counsel was found to excuse the procedural default and the district court was ordered to address the issues.

### B. U.S. District Court Cases

**2018:** ***Clay v. United States*, 311 F. Supp. 3d 911 (N.D. Ill. 2018).** In federal drug case with a guilty plea and ultimate sentence of 168 months, sentencing counsel was ineffective in failing to object to the inclusion of petitioner's 2003 conviction under the state Aggravated Unlawful Use of a Weapon (AUUW) statute in his criminal history points, because the AUUW statute had been declared unconstitutional by *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012) and *People v. Aguilar*, 2 N.E. 3d 321, 328 (2013). Pursuant to *U.S. v. Jenkins*, 772 F.3d 1092 (7th Cir. 2014), the court should not have included that conviction in the calculation of petitioner's criminal history points and level. Appellate counsel was ineffective in failing to raise this issue on appeal.
The court acknowledged that no one – not sentencing counsel, not the Government, not the probation department, and not the district court – had caught this issue, but determined that such a legal error cannot be excused in sentencing counsel. It did not matter that petitioner had not been successful in convincing the Illinois state court to vacate his AUUW conviction, because the district court did not know the basis for the state court's refusal to do so, and *Jenkins* does not require the underlying conviction to be vacated in order for the conviction to be excluded from the calculation of the criminal history points. Appellate counsel's performance was deficient for failing to raise this issue because it "would have been the strongest – and the only – argument made by appellate counsel, who filed an *Anders* brief representing to the Seventh Circuit that Petitioner's appeal was frivolous." 311 F. Supp. 3d at 922. Petitioner was prejudiced by counsels' errors because there is a reasonable probability that petitioner received additional prison time as a result. There is no reason to think that the court (and the Government, who recommended a reduced sentence) would not have taken the same approach to petitioner's sentence had the Guidelines been calculated properly from the start. The court therefore reduced petitioner's sentence to 151 months.

**Capital Case*

***Mendoza v. Holland*, 2018 WL 540095 (N.D. Cal. Jan. 22, 2018).** In case where petitioner was convicted in California state court of a total of 11 charges of committing a lewd or lascivious act against three minors under the age of 14, trial and appellate counsel were ineffective in failing to raise a claim that petitioner's *Miranda* rights had been violated. This ineffectiveness provided cause to overcome the procedural default of the *Miranda* claim in state court. Looking to *Visciotti v. Martel*, 862 F.3d 749, 768 (9th Cir. 2016), the district court independently determined whether there was IAC and did not defer to the state court's determination of this issue. Petitioner unambiguously invoked his *Miranda* rights as soon as the detective started talking to him, saying "No way" did he want to discuss anything with the detective. Nevertheless, the interview continued for an hour thereafter. This was not an implied waiver of his *Miranda* rights; petitioner only answered later questions because the detectives had ignored his response and continued questioning him. The admission of his statements at trial was thus a constitutional violation. In its harmless error analysis, the court did not review petitioner's testimony at trial given that petitioner only testified because of the confession. The direct and graphic statements he gave to the police about two of the three victims had a substantial and injurious effect, because the independent evidence as to petitioner's guilt of those was less strong; with regard to the third victim, there was evidence obtained from a taped pretext call between petitioner and the victim that was damaging, and so his admissions to the police about that victim did not have a prejudicial effect under *Brecht*. Notably, the prosecution emphasized the confession in closing argument. Both trial and appellate counsel were deficient for failing to present this meritorious *Miranda* claim. There is a reasonable probability that had trial counsel raised it, the trial court would have suppressed the interview and an acquittal was possible, at least on the charges against two of the victims. There is also a reasonable probability that if appellate counsel raised it on appeal, petitioner would have prevailed then. Thus, cause and prejudice for the procedural default was established. Furthermore, the state superior court's denial of the IAC for failure to raise the *Miranda* claims involved an unreasonable application of *Strickland's* prejudice prong, because although the superior court articulated the correct standard (reasonable probability that the outcome of the proceedings would have been different), it then conflated that with a sufficiency of the evidence test. So AEDPA deference to the state court's decision did not apply.

**2017:** ***Termitus v. Secretary, Dept. of Corr.*, 245 F.Supp.3d 1322 (M.D. Florida 2017).** Appellate counsel was ineffective for failing to argue that defendant's attempted robbery convictions violate the Double Jeopardy Clause. Defendant was indicted and convicted of murder, two counts of attempted robbery and related charges stemming from his armed robbery of a bank during which he ordered two employees to open the bank vault and then shot and killed one of the employees when they were unable to get it open. The Double Jeopardy Clause prohibits multiple punishments for the same offense. Florida law provides that separate convictions for different offenses involving multiple victims who are killed or injured during the same episode do not violate double jeopardy. However, to convict a defendant of two attempted robberies, there must also be two separate takings. According to the evidence presented at trial, defendant only committed one attempt to forcefully take money from the bank. Thus, his two convictions for attempted robbery violated double jeopardy and appellate counsel's failure to raise this claim on direct appeal resulted in prejudice "because the claim would have been successful on appeal." *Id*. at *4.

**Capital Case*

**2016:** ***Lee v. Haas*, 197 F.Supp.3d 960 (E.D. Mich. 2016).** Appellate counsel was ineffective for failing to raise defendant's self-representation claim under *Faretta v. California*, 422 U.S. 806 (1975). Defendant sent at least two letters to the trial judge prior to trial invoking his right to self-representation and attempting to present the issue in open court. In one letter, Defendant stated "not only do I want to represent myself, it is my right." *Id*. at 973. The trial judge actively avoided entertaining his invocation of the Sixth Amendment right, and allowed trial counsel to continue with the proceedings. Appellate counsel failed to raise this claim on appeal. Defendant sought permission to add to the claim to his brief, but the state court of appeals denied this request. Prejudice established because defendant's self-representation claim "almost certainly would have been found meritorious." *Id.* at 974. Defendant "repeatedly invoked his right to self-representation" and thus "no explanation appears to justify counsel's determination to forego a very strong *Faretta* claim." *Id.*

**2014:** ***Loher v. Thomas*, 23 F. Supp. 2d 1182 (D. Haw. 2014), *aff'd*, 825 F.3d 1103 (9th Cir. 2016).** Under AEDPA, appellate counsel ineffective in attempted sexual assault and kidnaping case for failing to assert trial court error in forcing the defendant to testify first in his defense case rather than granting a reasonable continuance request so that other defense witnesses could be called before the defendant made the decision whether to testify or not. This was a structural error and prejudice was presumed.

**2013:** ***United States v. Ocampo*, 919 F. Supp. 2d 898 (E.D. Mich. 2013).** Appellate counsel ineffective for failing to assert a double jeopardy violation due to the defendant's convictions, based on the same conduct, for felon in possession of firearm and possession of firearm by an unlawful user of controlled substances. Prejudice established, even though merging the offenses had no impact on the amount of time petitioner would spend in prison.

**2010:** ***United States v. Monnier*, 718 F. Supp. 2d 1040 (D. Neb. 2010).** Appellate counsel was ineffective in failing to challenge the defendant's sentence imposed prior to *Booker*. The defendant was convicted of conspiracy to distribute 500 grams or more of methamphetamine and distribution of less than 50 grams that resulted in death. The court found the guidelines range to be 360 months to life. The court invited argument on a downward-departure based on the victim's contributory conduct, but ultimately concluded there was no authority for a downward departure on that basis. The court sentenced the defendant to 360 months on each count to be served concurrently. Appellate counsel did not appeal the denial of the downward departure or otherwise address sentencing issues, even though the appellate court had invited supplemental briefing after the Supreme Court's decision in *Blakely v. Washington*, 542 U.S. 296 (2004), and cert. had been granted in *Booker* several weeks prior to oral argument in this case. Worse yet, in response to court questions, counsel reported that there was nothing in the trial record to indicate the court would have imposed a lower sentence if the Guidelines were advisory only. Counsel still did nothing even after *Booker* was decided, even though this case remained pending for another six months. Counsel's conduct was deficient as "[c]ounsel was aware, or should have been aware" of the trial court's reluctance to impose the "then-mandatory" sentence of 360 months, as "the record contained numerous indications that the court was predisposed to give a lower sentence if possible," including referring to the mandatory minimum sentence as "harsh" and "too long," stating the court had no other choice, urging counsel to pursue the downward departure issue on appeal, and urging the defendant to pursue his is 2255. Counsel

was also ineffective in failing to appeal the denial of the downward departure based on the victim's contributory conduct. Even before *Blakely* or *Booker*, this was appealable and the court urged him to appeal. Sentence reimposed at the statutory mandatory minimum of twenty years.

***Contreras v. United States*, 682 F. Supp. 2d 771 (S.D. Tex. 2010).** Appellate counsel ineffective in failing to file a *Booker* claim on appeal in drug trafficking case. The defendant was sentenced prior to *Booker* under the mandatory sentencing guidelines. His appeal was filed ten months after *Booker*, which allowed re-sentencing from cases decided prior to *Booker* but still on direct appeal. Nonetheless, counsel failed to assert this issue on appeal. Remanded for resentencing.

**2009:** ***Hicks v. Howton*, 675 F. Supp. 2d 1050 (D. Ore. 2009).** Under AEDPA, trial and appellate counsel ineffective in sexual abuse case. Appellate counsel was ineffective in failing to assert error in the trial court's overruling objection to the prosecutor's improper arguments in closing. The prosecutor repeatedly argued that if the jury believed the alleged victim's testimony, it had to convict. This argument was outrageous and misleading as a required element of the offense was that the touching had to be for the purpose of sexual gratification or arousal. Counsel erred in filing a "no merits" brief, as this issue was meritorious. In addition, by filing a "no merits" brief, "appellate counsel put a client with significantly impaired reading, writing and reasoning skills in the position of having to formulate and write legal claims and supporting arguments for his appeal, something he was incapable of. This in effect denied [the defendant] his right to appeal."

***Albrecht v. Beard*, 636 F. Supp. 2d 468 (E.D. Pa. 2009)** (Sentencing in August 1980). Under AEDPA, appellate counsel was ineffective in failing to assert *Mills* error. Because the state appellate court did not reach the merits of the question, review was de novo. Even though trial counsel did not assert this issue, "[i]n 1986, Pennsylvania courts applied a relaxed waiver doctrine in capital cases on direct appeal." Thus, appellate counsel could have asserted this issue and obtained merits review. Although *Mills v. Maryland*, 486 U.S. 367 (1988) was decided after the direct appeal, "*Mills* is not a substantial departure from the principle announced in the *Lockett* line of cases, and competent appellate counsel could have, and should have, recognized and litigated the mitigation unanimity issue based on established U.S. Supreme Court precedent." Likewise, "there was no conceivable strategic basis for failing to do so." Prejudice was also established.

> [T]here is a reasonable probability that competent appellate counsel would have persuaded the court that the *Lockett* line of cases rendered the sentencing-phase jury instructions unconstitutional. Even if the Supreme Court of Pennsylvania had denied the claim, the United States Supreme Court granted certiorari on an identical claim only months later. Accordingly, it is reasonable to presume Petitioner would have obtained relief on direct review on the mitigation unanimity issue had it been raised.

*Id*. at ___ (citations omitted).

***Judge v. Beard*, 611 F. Supp. 2d 415 (E.D. Pa. 2009)** (sentenced in April 1987). Trial and appellate counsel ineffective for failing to assert *Mills* error based on the trial court's instructions that "erroneously led the jury to believe that it could not return a verdict at the penalty phase of the trial

without agreeing unanimously both as to individual mitigating circumstances and the ultimate penalty." Counsel's conduct was deficient, even though the case was tried before the Supreme Court granted cert. or issued the opinion in *Mills v. Maryland*, 486 U.S. 367 (1988). The case was pending on direct appeal at the time of the decision. Although the Supreme Court determined in *Beard v. Banks*, 542 U.S. 406 (2004) that *Mills* announced a new rule that could not be retroactively applied to cases on collateral, Third Circuit cases prior to *Beard* concluded that *Mills* was simply an extension of *Lockett v. Ohio*, 438 U.S. 586 (1978) and *Eddings v. Oklahoma*, 455 U.S. 104 (1982). Thus, the court held that "reasonably competent defense counsel would or should have been aware of the ongoing developments in the state of capital law in April, 1987, and subsequent thereto." There was also no conceivable strategy for failing to object, "as the worst that could have happened would have been its denial."

**2008:** ***United States v. Stover*, 576 F. Supp. 2d 134 (D.D.C. 2008).** Appellate counsel ineffective in drug conspiracy case for failing to challenge the drug quantity calculation. Counsel's conduct was deficient because the court calculated the sentence based on an understanding that the heroin involved was diluted to 20% purity. The co-defendants challenged this because the heroin that was actually seized had purity levels between 27%-29%. Prejudice established.

***Flowers v. United States*, 560 F. Supp. 2d 710 (N.D. Ind. 2008).** Counsel ineffective in possession with intent to distribute drugs "within 1,000 feet" of a school, playground, or public housing. Trial and appellate counsel were ineffective for not challenging the government's failure to prove that the defendant's house was within 1,000 feet of a protected area. At trial, Officer Cameron testified that the residence was within 1,000 feet of "a public park in the South Bend Parks Department." There was no other evidence on the point even though the statute requires that the government prove beyond a reasonable doubt that the area is: 1) an outdoor facility, which is 2) intended for recreation, 3) open to the public, and 4) includes three or more separate apparatus intended for the recreation of children. Counsel's conduct was objectively unreasonable and prejudicial for failing to challenge the government's inadequate proof. The court set aside the conviction on this offense and entered a conviction on the lesser included offense (omitting the "within 1,000 feet" element) and ordered resentencing.

***Showers v. Beard*, 586 F. Supp. 2d 310 (M.D. Pa. 2008).** Under AEDPA, trial counsel was ineffective in murder trial for failing to present rebuttal expert testimony and appellate counsel was ineffective for failing to assert this issue on direct appeal. Petitioner was charged with the murder of her husband, who died from ingestion of liquid morphine Roxanol. The defense asserted that his death was a suicide. The state presented an expert who testified: (1) the taste of Roxanol could be disguised in food or drink, and (2) there was no evidence of forced swallowing. While counsel attempted to refute this is cross and in closing argument, the only evidence the defense presented was a lay witness to testify that the taste of Roxanol could not be masked. Counsel's conduct was deficient because counsel had retained a forensic psychiatrist prior to trial to review the victim's state of mind. The psychiatrist interviewed pharmacists and nurses that administered the drug, along with the pharmacist that prescribed the medication used in this case, and learned that it is difficult to disguise the taste. He informed counsel that they needed to call an expert to testify about the drug, which he could not do because he was not a toxicologist, and gave the expert names of three possible

experts. "[W]hile . . . this case does not involve the death penalty, the guidelines associated with defending a death penalty case are nevertheless instructive as to the role of defense counsel in preparing a defense in a criminal case potentially involving the use of a medical expert." Counsel failed to adequately investigate here. *Id*. (citing ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989)). Counsel knew the administration of the Roxanol was a crucial issue, but did not present a rebuttal defense expert. The cross-examination and counsel's arguments "did nothing to negate" the state evidence because the jury was instructed that counsel's arguments do not constitute evidence. The state court finding to the contrary "cannot be reasonably justified under *Strickland*" and the factual determination that counsel adequately performed "is plainly controverted by the evidence." Prejudice found because counsel could have presented the testimony of a forensic pathologist to establish: (1) the taste of the Roxanol could be disguised only in a large amount of a sweet-tasting or bitter substance; (2) the autopsy report showed no evidence of any such diluting or masking substance; and (3) the autopsy report did not indicate forced swallowing. Thus, the pathologist concluded the Roxanol was swallowed voluntarily. This testimony "would have been more convincing than testimony from a close family friend" and would have made the "innocence claim . . . considerably more compelling than a simple denial of guilt." The state court's finding of no prejudice "cannot be reasonably justified under *Strickland*." Appellate counsel's decision to pursue only eight issues on appeal, excluding this issue, was deficient and prejudicial.

**2007:** ***Richardson v. United States*, 477 F. Supp. 2d 392 (D. Mass. 2007).** Appellate counsel ineffective in perjury case for failing to file supplemental briefs on appeal concerning the sudden change in law caused by the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), in which the mandatory nature of the Sentencing Guidelines was found to be unconstitutional and the Guidelines were made advisory. Counsel's conduct was deficient because, under Circuit law, the issue had been preserved at trial due to *Apprendi* arguments. Counsel's conduct was also unreasonable given the "sea change" in the law caused by *Booker*, which could not be explained by a tactical decision. Prejudice found. Even though the 2255 judge was the trial judge, the court declined comment on whether he would give the same sentence after *Booker* and noted that it was his practice, because of a prior "professional rebuke" discussed in detail in the opinion, to reassign cases to a different court when remanded to him for resentencing. While he found it difficult to determine a reasonable probability of a different sentence "from publicly available materials" of a different District Court judge in Boston, he found, based on confidential data that he was "privy to," "a slightly less than even chance of obtaining a reduced sentence" from another judge and, therefore, vacated the sentence and ordered the case be reassigned to another judge.

***Hays v. Farwell*, 482 F. Supp. 2d 1180 (D. Nev. 2007).** Under AEDPA review, trial/appellate counsel was ineffective for numerous reasons in case where the petitioner was convicted of four counts of sexual assault on a minor and four counts of lewdness with a minor for alleging sexually abusing his oldest daughter, who was then eight years old. While many of the petitioner's claims had not been presented in state court and there was no showing of cause and prejudice, "the default was forgiven based on his preliminary evidence demonstrating to this court that he is actually innocent of the charges against him." Most of the claims were reviewed de novo because they had not been raised in state court or had been procedurally barred in state court. The charges arose

because the petitioner's wife, who "was an abusive and neglectful mother" of their five children, "wanted desperately to be released from the responsibility of her five young children and from her marriage." In order to achieve her goals, she "schooled and coached eight-year old Jennifer about adult sexual behavior and then threatened and coerced her into making accusations of sexual abuse against her father," who was not himself abusive to the children but "was unable, or unwilling to stop his wife's actions" in general. Before reaching the issues related to counsel, the court granted relief on the bases of: (1) insufficient evidence to support the convictions; (2) improper denial of a new trial when the daughter, who was no longer in her mother's custody, immediately confessed after the trial that her testimony was false and had been coerced; (3) double jeopardy; and (4) prosecutorial misconduct. Counsel was also held to be ineffective during trial for: (1) failing to request an evidentiary hearing on the motion for new trial in order to present the daughter's testimony concerning the recantation; (2) failing to seek an independent medical expert to challenge the testimony of the examining nurse, which would have resulted in testimony (supported even by the state's expert in habeas) that the photographs taken of the girls genitalia revealed no evidence of abuse or anything abnormal; (3) conceding guilt in closing argument; (4) failing to challenge the veracity or expertise of the social worker and the examining nurse called as state's witnesses and "merely enhancing the State's evidence by reinforcement"; (5) failing to object to the prosecutor's improper argument denigrating the presumption of innocence; and (6) failing to argue on the defendant's behalf at sentencing. The same counsel was also ineffective on direct appeal because counsel challenged only the sufficiency of the evidence and the denial of the motion for new trial. While the defendant personally filed a supplemental brief asserting additional errors, including the prosecutorial misconduct and double jeopardy, "[t]hose claims received little consideration by the state high court." Because those claims were also meritorious, as reflected in the district court's holdings, counsel was ineffective on appeal.

**2004:** ***Banyard v. Duncan*, 342 F. Supp. 2d 865 (C.D. Cal. 2004).** Trial counsel was ineffective in failing to investigate and object to the use of a prior assault conviction as a "serious felony" in sentencing the defendant to 25 years to life under the "Three Strikes Law" following a conviction for possession of a controlled substance. Appellate counsel was also ineffective for failing to assert trial counsel's ineffectiveness. Counsel's conduct was deficient because counsel advised the defendant to admit to two prior serious felony convictions even though the defendant's second strike was not a "serious felony," as required by state law. The second strike was for an assault conviction, "which arose from a domestic dispute and is the only arguably violent behavior in [the defendant's] record." The court found that the record on this offense revealed that, although the defendant was initially charged with a serious felony, he ultimately plead no contest only to assault, which was not a serious felony, and was sentenced to time served and probation. The court found that the state court erred in its judgment in finding that the defendant entered a no contest plea to a serious felony when the plea transcript revealed otherwise. Even if the alleged victim of the assault was believed, the "minor nature" of the defendant's "assault conviction show that it was outside the heartland of what would normally constitute assault." In addition, the "sentence of probation is not consistent with a desire to punish [the] crime as a serious felony." Without any real analysis, the court held, under the AEDPA, that the state court's decision was an unreasonable application of clearly established federal law."

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***Casey v. Frank*, 346 F. Supp. 2d 1000 (E.D. Wis. 2004).** Trial and appellate counsel were ineffective in sexual assault case for failing to obtain the case file from the defendant's previous attorney, which contained numerous witness statements undermining the credibility of the alleged victims and an alleged corroborating eyewitness. The defendant was initially charged in 1993 for sexually assaulting a girl in the neighborhood. He was represented by a public defender, who assigned an investigator to interview potential witnesses. The investigator took a number of statements that raised questions about the credibility of the alleged victim and the prosecutor ultimately dismissed the charge without prejudice. A year later, the defendant's step-daughter alleged that the defendant sexually assaulted her, but the prosecutor brought no charges. In 1997, the stepdaughter alleged that the defendant had assaulted her in 1992 and that she witnessed the defendant assaulting the neighbor girl in the same time period. The defendant was charged with both assaults and retained counsel. Counsel requested two specific documents from the defendant's prior counsel, but did not request the entire file, which contained numerous witness statements challenging the credibility of both alleged victims and an alleged corroborating eyewitness. He also failed to independently discover the witnesses that previously gave exculpatory statements. As discussed in the section on numerous deficiencies by trial counsel, the court found that trial counsel was ineffective. New appellate counsel was also ineffective in failing to obtain the file and to assert trial counsel's ineffectiveness in a post-conviction motion. Unconstrained by the AEDPA because the state court did not address the issue raised before it, the court held that counsel knew the prior attorney's file contained witness statements but chose to proceed without obtaining them. This conduct was unreasonable because "[a] lawyer may not make a strategic decision of such significance without conducting an investigation." While counsel faced a filing deadline, counsel did not request an extension to obtain the file, when such requests were routinely granted, or discuss the matter with the defendant. Although the state court did not specifically address the prejudice analysis under *Strickland* and it was "debatable whether AEDPA applies to the court's determination on this point," id., the court applied the AEDPA standard. The state court's determination was unreasonable because the court "turned a blind eye to the potential impact of the witnesses who gave statements" to prior counsel. Indeed, the state court

> failed even to mention most of the statements, much less analyze their potential significance. The critical issue in the case was credibility, and a number of the statements severely undercut the credibility of the state's principal witnesses. . . .

Moreover, many of the statements would have been admissible and none were cumulative. Thus, there was "more than a negligible chance that the statements counsel failed to obtain would have affected the outcome of the trial." *Id*.

### C. State Cases

**2018:** ***Lopez v. Junior,* 259 So.3d 202 (Fla. Ct. App. 2018).** Appellate counsel was ineffective is failing to seek discretionary review in the Florida Supreme Court so that petitioner could receive the benefit of a case then pending in the Florida Supreme Court if it resolved an issue present in petitioner's case in a favorable manner. Petitioner was convicted of attempted first-degree murder of one victim and kidnapping of and aggravated battery upon another. The jury found that with

regard to the attempted first-degree murder he used and discharged a firearm, and with regard to the kidnapping and aggravated battery, petitioner actually possessed a firearm. Petitioner was sentenced to 25 years on the attempted murder count with a 25-year mandatory minimum; 30 years on the kidnapping count, with a 10-year mandatory minimum, and 10 years on the aggravated battery count with a 10-year mandatory minimum. The trial court determined that under the then-controlling decision in *Morgan v. State*, 137 So.3d 1075 (Fla. 3d DCA 2014), each of the mandatory minimum sentences had to be served consecutively – aggregate mandatory minimum sentence of 45 years. Petitioner appealed, represented by counsel. Appellate counsel challenged the consecutive nature of the mandatory minimum sentences, acknowledging that *Morgan* was in conflict with another District's decision, and stating that the other decision represented a better analysis. Counsel also requested that if this court affirmed, it certify conflict with the other decision. The District Court of Appeal for the Third District affirmed the conviction and sentence, citing to *Morgan*. But before the District Court released its opinion in petitioner's case, the Florida Supreme Court had already entered a stay of proceedings in *Morgan* pending disposition of its review. Appellate counsel should have sought, but did not, discretionary review in the Florida Supreme Court in order to place petitioner in the pipeline so he would receive the benefit of a favorable resolution of *Morgan*. The Florida Supreme ultimately Court approved the other District's decision, and quashed the decision in *Morgan*, holding that consecutive mandatory minimum sentences are not required, but are permissible, under the 10/20/Life statute. Appellate counsel then filed a new timely but successive habeas corpus petition alleging his own ineffectiveness. The State conceded that petitioner was entitled to relief on the merits. Both deficient performance and prejudice are clear – had appellate counsel sought discretionary review, there is a reasonable probability that the Florida Supreme Court would have done what it did in *Morgan*, entered a stay and placed petitioner in the pipeline, giving him the opportunity to obtain the same outcome. The District Court of Appeal granted the petition, reversed the portion of the sentencing order directing that the mandatory minimum sentences be served consecutively, and remanded for a resentencing hearing.

***Marshall v. State*, 241 So.3d 969 (Fla. Ct. App. 2018).** Appellate counsel was ineffective in failing to challenge on appeal the trial court's oral pronouncement that two of the sentences imposed were to run consecutively. Petitioner was convicted of armed robbery based on the robbery of an acquaintance at gunpoint. The court sentenced him to 33 years in prison as a habitual violent offender. As part of that sentence, the court imposed a 15-year mandatory-minimum term. It also imposed a ten-year mandatory-minimum term for the possession of a firearm during the robbery. Over defense counsel's objection, the court orally imposed the two mandatory-minimum terms to run consecutively. Petitioner's conviction was affirmed on appeal. Under state law, the consecutive sentences were not permitted. Appellate counsel was ineffective for failing to move to correct the sentence, and if that failed, raising the issue on direct appeal. Although the written judgment imposed the two mandatory-minimum terms concurrently, petitioner was nevertheless prejudiced because under state law the oral pronouncement of sentence controls.

***Marshall v. State*, 240 So.3d 111 (Fla. Ct. App. 2018).** Appellate counsel was ineffective in failing to challenge a jury instruction where a recent case from another district had found the same instruction to be flawed. Petitioner was charged with second degree murder for strangling a victim to death in the presence of two bystanders and police who arrived at the scene with guns drawn. The trial court instructed the jury on the elements of second degree murder and, without objection,

to the lesser included offenses of manslaughter by act and manslaughter by culpable negligence. The jury convicted petitioner of second degree murder and the court sentenced him to 45 years in prison. Petitioner appealed, but his counsel did not challenge the validity of the manslaughter by act jury instruction, even though another District Court of Appeal decided during the pendency of the appeal that the standard manslaughter by act jury instruction erroneously suggested that intent to kill was an element of that crime (that case was *Montgomery I*). The District Court of Appeal affirmed petitioner's conviction. Following the affirmance, the Florida Supreme Court affirmed *Montgomery I* in *State v. Montgomery*, 39 So.3d 252, 260 (Fla. 2010) (*Montgomery II*). Petitioner alerted his appellate counsel of the decision, and appellate counsel acknowledged his failure to challenge the instruction was an oversight, and sent petitioner a motion for post-conviction relief alleging IAC of both trial counsel and appellate counsel for petitioner to file pro se. The trial court denied the motion on the ground that trial counsel could not have anticipated the holding in *Montgomery I*, and that the motion was an improper mechanism for raising ineffective assistance of appellate counsel. Petitioner later filed a post-conviction petition using the proper mechanism for raising a claim of IAC of appellate counsel. Petitioner alleged that appellate counsel's ineffectiveness in failing to raise the instructional issue prejudiced him by causing him to miss an opportunity to be placed in the *Montgomery* pipeline and thereafter to obtain relief under *Montgomery II*. While the petition was pending, petitioner filed a notice of supplemental authority and moved to stay the consideration of the petition pending resolution by the Florida Supreme Court of *Haygood v. State*, which was to consider whether a trial court committed fundamental error by giving the flawed manslaughter by act instruction where the manslaughter by negligence instruction was also given. The District Court of Appeal denied the stay motion and denied his petition. The Florida Supreme Court then decided in *Haygood v. State*, 109 So.3d 735, 736 (Fla. 2013), that it was fundamental error to give the improper manslaughter by act instruction even where the manslaughter by negligence instruction was also given, and where the defendant was convicted of a crime not more than one step removed from manslaughter (such as second degree murder) and the evidence supported a finding of manslaughter by act but not by negligence, the defendant is entitled to a new trial. Petitioner filed another pro se habeas petition, acknowledging that it was successive but arguing that it would be manifest injustice not to grant it. The District Court of Appeal agreed, and granted relief. The fact that petitioner choked the victim over a period of at least four minutes, resisting attempts by the victim, two bystanders, and the police to stop him, demonstrated that the evidence in the case did not reasonably support a finding that the victim's death occurred due to culpable negligence. Giving the jury the erroneous manslaughter by act instruction constituted fundamental error. Although at the time of the filing of the direct appeal in his case, no appellate court had held that the standard instruction for manslaughter by act was erroneous, such a case was decided while petitioner's case was pending on appeal. The District Court of Appeal compared petitioner's case to another case, *Nieves v. State*, in which the issue was raised on appeal at the time *Montgomery I* was pending, and in which Nieves eventually obtained relief – reversal and remanding for a new trial. The court here determined that if petitioner "had been placed in the *Montgomery* pipeline when this Court affirmed his conviction and sentence for second degree murder on direct appeal, we find it extremely likely, if not virtually certain, that [he] ultimately would have been granted the new trial that he now seeks in his instant petition." Therefore, the court found appellate counsel was ineffective for failing to file a supplemental brief citing to *Montgomery I*, and that petitioner was prejudiced by that failure.

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***Calhoun v. State of Kansas,* 426 P.3d 519 (Kan. Ct. App. 2018).** In case involving charges of multiple offenses allegedly committed by movant and three others, trial counsel was ineffective in failing to object to the instruction that the jury could convict movant of the aiding and abetting specific intent crimes if it found that the specific intent crimes were a reasonably foreseeable consequence of the intended crime of aggravated robbery. Appellate counsel was also ineffective in failing to raise the trial IAC claim on direct appeal. Movant was convicted by a jury of aggravated kidnapping, aggravated criminal sodomy, attempted voluntary manslaughter, aggravated burglary, criminal threat, two counts of aggravated robbery, and two counts of aggravated battery. The charges arose from an incident in which movant and three others broke into a family's home, demanded money, pointed a gun at and threatened to kill a baby who was present, kicked, stomped on, and shot the father, and raped, sodomized, beat the mother and forced her to perform oral sex. Movant testified that he was at the house, that he and the others planned to rob the father who had sold him marijuana in the past, and that he participated in the robbery. He denied that he had committed any of the violent crimes against the mother, father, and baby. A minor who participated in the crimes testified that movant actively participated in the sexual assaults of the mother and punched the father in the head. After movant's convictions were affirmed on direct appeal, he filed a motion raising numerous claims, including ineffective assistance by trial and appellate counsel. The motion was denied and he appealed. The appellate court pointed out that Kansas state law (*State v. Overstreet*, 200 P.3d 427 (2009)) requires that in order to be convicted of a specific intent crime under an aiding and abetting theory, the defendant must have the same specific intent as the principal. Thus, when a defendant is charged with specific intent crimes under an aiding and abetting theory, the jury must be given the "same mental culpability" instruction, rather than the "foreseeability" instruction, which is only applicable to aiding and abetting general intent crimes. Here, trial counsel failed to object to the instruction that the jury could convict movant of the aiding and abetting specific intent crimes (aggravated kidnapping, attempted voluntary manslaughter, and criminal threat) if it found that the specific intent crimes were a reasonably foreseeable consequence of the intended crime (aggravated robbery). Appellate counsel also failed to raise the trial IAC claim on direct appeal. Both trial and appellate counsel's performance was deficient in this way, and both were prejudicial, given that "the prosecutor's entire rebuttal during closing arguments hinged on telling the jury that they could convict [movant] of all of the crimes charged because they were reasonably foreseeable consequences of the intended robbery," 426 P.3d at 531, that the jury asked questions about the reasonable foreseeability portion of the aiding and abetting instructions, and that the jury acquitted movant of rape and three counts of aggravated criminal sodomy (indicating that it did not believe he aided and abetted all of the crimes). [NOTE: Jurors had provided statements indicating that half the jurors believed he was guilty of all, and half the jurors believed he was guilty of none, one of the jurors had a planned vacation, and they decided to convict of some and acquit of some. The appellate court ruled that it was precluded from considering these statements, but it appears nevertheless that they may have had some effect on the court.] There was a real possibility that the jury would not have found movant guilty of aggravated kidnapping, attempted voluntary manslaughter, and criminal threat if it had been properly instructed. Under Kansas law, if a movant makes more than conclusory contentions and an evidentiary basis supports movant's claims, the movant is entitled to an evidentiary hearing. In addition, when ineffective assistance of counsel and prejudice is readily apparent from the motion, files, and records of the movant's case, the appellate court has exercised its de novo review and reversed the defendant's conviction and remanded for a new trial without first remanding for an evidentiary hearing. Here, the court

decided that this was such a case. The court thus reversed his aggravated kidnapping, attempted voluntary manslaughter, and criminal threat charges and remanded for a new trial.

***Seals v. State,* 551 S.W.3d 653 (Mo. Ct. App. 2018).** Appellate counsel was ineffective in failing to argue for reversal of a conviction that was linked to a separate conviction that had been reversed. Movant was convicted by a jury of second-degree domestic assault, third-degree domestic assault, and attempted victim tampering under state law. On appeal, the Missouri Court of Appeals reversed the conviction on the first count and remanded for a new trial because the trial court plainly erred by failing to instruct the jury about self-defense on that count. The movant then filed an unsuccessful motion alleging, inter alia, IAC of appellate counsel. On appeal, the appellate court agreed with movant that appellate counsel rendered ineffective assistance by failing to request that the Court of Appeals reverse and remand his conviction for attempted victim tampering as well as his conviction for second-degree domestic assault. Movant argued that the attempted victim tampering charge was based on the assertion that movant had attempted to prevent the victim from assisting in the prosecution of the first charge, domestic assault in the second degree. Because the Court of Appeals reversed the first charge based on faulty jury instructions, and the conviction for victim tampering was contingent upon there being a victim of second-degree domestic assault, the conviction for victim tampering should also have been reversed and appellate counsel should have raised that issue. Appellate counsel conceded that he had no strategic reason for failing to raise that issue, and the claimed error was sufficiently serious that it created a reasonable probability that had it been raised, the outcome of the appeal would have been different. Movant's conviction and sentence for attempted victim tampering were vacated and remanded for a new trial.

***State v. Asadi-Ousley,* __N.E.3d___, 2018 WL 5734660 (Ohio Ct. App. 2018).** In case involving convictions of two counts of rape, felonious assault, and two counts of kidnapping, based on the sexual assault of a victim more than seven years prior to the trial, appellate counsel was ineffective in failing to argue that trial counsel was deficient in not moving to dismiss the charge of felonious assault based on the expiration of the six-year statute of limitations. After the convictions were affirmed on appeal, appellant had applied to the Court of Appeals to reopen the direct appeal in order to raise the argument that his appellate counsel had been ineffective. Although the state conceded the error, it argued that appellant's IAC claim should be rejected on the basis of waiver. The Court of Appeals granted the application and remanded for the trial court to reverse the felonious assault conviction. The court held that this is not a case where appellant pleaded guilty to the offense where the SOL had run (such a plea constitutes a waiver), or where appellant absconded and purposely avoided prosecution. The fact that appellant sought to avoid identification by coming upon the victim from behind did not constitute behavior tolling the SOL. Appellant was prejudiced as a result of his conviction of this crime even though his sentence was ordered to run concurrently with his sentences on the other charges; "a defendant is prejudiced by having more convictions than are authorized by law." 2018 WL 5734660 at *6 (internal quotation omitted). Appellant was denied the effective assistance of appellant counsel by counsel's failure to argue ineffective assistance of trial counsel on this issue. Had trial counsel moved to dismiss the felonious assault charge, the charge would have been dismissed; had appellate counsel raised this issue on appeal, there is a reasonable probability the outcome of the appeal would have been different as to the felonious assault conviction.

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***State v. Baskins,* 818 S.E.2d 381 (N.C. Ct. App. 2018).** In drug trafficking case, appellate counsel was ineffective in failing to argue all of the grounds on which the stop of petitioner's vehicle and the search thereof was unlawful. Although appellate counsel did raise the lawfulness of the search and seizure, appellate counsel did not challenge the trial court's finding that the arresting officers stopped and searched the vehicle because the vehicle had an inspection violation, even though the arresting officers had no information regarding the vehicle's inspection status at the time of the stop and search. The trial court had denied petitioner's motion to suppress on the basis of three independent grounds, so appellate counsel was tasked with reviewing the sufficiency – both legal and evidentiary – for each of those grounds. But appellate counsel had failed to do so, only mentioning the issue briefly in her reply brief after the state noted that she had not challenged it. This performance was deficient. The error was prejudicial because, had appellate counsel challenged the findings of fact, there is a reasonable probability that the appellate court would have concluded that the trial court's finding that the stop was initiated because of the inspection violation was not supported by competent evidence.

**2017:** ***Weitz v. State of Florida,* 229 So. 3d 872 (Fla. Ct. App. 2017).** The District Court of Appeal granted relief on claim raised in postconviction petition that appellate counsel was ineffective for failing to argue that petitioner's dual convictions for transmitting material harmful to minors and unlawfully using a two-way communication device under two separate state statutes violated double jeopardy. Under Florida law, a double jeopardy violation constitutes fundamental error that may be raised for the first time on appeal; so the failure to raise the violation when it exists may be ineffective assistance. At the time appellate counsel filed the initial brief in the direct appeal, the Florida courts applied the same-elements test under *Blockburger v. United States*, 284 U.S. 299 (1932), to hold that multiple convictions under the two-way communication device statute and three other statutes, all similar to the transmitting material harmful to minors statute, violated double jeopardy when the charges arose from the same episode, as they did here. The court noted that "[a]lthough [the cases interpreting the three other statutes] did not address a charge of transmitting harmful material to a minor . . . the question of whether the statutory elements of that offense are subsumed by the statutory elements of unlawful use of a two-way communications device is so close to the questions answered [in those other cases] that a reasonable appellate lawyer would have raised the argument in [petitioner's] direct appeal." This was particularly true because the trial lawyer stated on the record during petitioner's sentencing that the double jeopardy argument should be raised on appeal. The error was prejudicial because it "compromised the appellate process to such a degree as to undermine confidence in the correctness of the result" under Florida law. [Note that there is no reference to *Strickland* or the Sixth Amendment in this case.]

***Johnson v. State of Florida,* 226 So.3d 908 (Fla. Ct. App. 2017).** District Court of Appeal of Florida granted writ of habeas corpus and vacated petitioner's conviction and sentence for second-degree murder on the grounds of ineffective assistance of appellate counsel. The District Court of Appeal had reversed petitioner's codefendant's conviction on appeal on the basis that the trial court erred in denying the codefendant's motion to suppress evidence, because the denial resulted in manifest injustice. It was therefore ineffective assistance for defendant's appellate counsel not to have raised this issue on appeal. "Failing to grant [defendant] the same relief afforded to

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[codefendant], under virtually identical circumstances, would be an 'incongruous and manifestly unfair' result."

***Williams v. State*, 215 So.3d 642 (Fla. Ct. App. 5th Dist. 2017).** Where the trial court denied defendant's motion to withdraw his guilty plea and defendant's two motions for post-conviction relief in a single omnibus order, appellate counsel was ineffective on appeal from those denials for failing to argue that the motions for post-conviction relief had been premature given the absence of a final judgment due to the then-pending motion to withdraw the guilty plea. The remedy is remand with directions to vacate the portion of the prior order which denied the motions for post-conviction relief and entry of an order dismissing the motions without prejudice.

**2016:** ***Daugherty v. State*, 52 N.E.3d 885 (Ind. Ct. App. 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.

***Whitfield v. State*, 202 So.3d 456 (Fla. Ct. App. 5th Dist. 2016).** Defendant was denied the effective assistance of appellate counsel where appellate counsel failed to raise a double jeopardy challenge to defendant's convictions for domestic battery by strangulation and battery of a person sixty-five years or older. (Both crimes occurred during the infliction of multiple crimes by defendant on his grandmother.) The dual convictions violated double jeopardy because both domestic battery by strangulation and battery on a person sixty-five or older are aggravated forms, or higher degrees, of simple battery. The remedy was remand with directions to vacate the "lesser" offense based here on levels for scoresheet purposes.

***Branton v. State*, 187 So. 3d 382 (Fla. Ct. App. 2016).** Appellate counsel ineffective in robbery resentencing case for failing to assert the trial court's error in refusing to consider evidence of the defendant's rehabilitation and mitigation during the 10-year period from the time of the initial sentencing to the resentencing. While the trial court "applauded" the defendant for his exceptional behavior in confinement, including completion of vocational and drug programs, and his Christian "redemption," the court stated that it was precluded from considering evidence from the period after the initial sentence and reimposed the 40-year sentence initially given. Appellate counsel's conduct was deficient in failing to assert this error because Florida law is clear that in a new sentencing proceeding there is a "clean slate" and the court should proceed "de novo on all issues." Prejudice established as the trial court refused to consider the defendant's case in mitigation prior to imposing the sentence.

**Capital Case*

***Grant v. State*, 189 So. 3d 878 (Fla. Ct. App. 2016).** Appellate counsel ineffective in attempted armed robbery with a firearm for failing to assert as error on appeal the trial court's failure to instruct on the lesser-included offense of attempted armed robbery with a weapon. Counsel's conduct was deficient as this issue had been preserved at trial. Prejudice also established as automatic reversal would have been required on direct appeal for the failure to charge the lesser-included offense. New trial granted.

***Taylor v. Metoyer*, 788 S.E.2d 376 (Ga. 2016).** In case involving convictions for multiple armed robberies, appellate counsel, who represented defendant in a motion for new trial and in the ensuing appeal, was ineffective for: (1) raising untenable claims on appeal; (2) inadequately raising an IAC of trial counsel claim based on trial counsel's failure to investigate defendant's report to trial counsel that the testifying co-defendants had asserted during *Jackson-Denno* hearings that their police statements implicating themselves and defendant were untrue; and (3) failing to competently assert that trial counsel was unprepared for trial. Regarding the *Jackson-Denno* hearings claim, appellate counsel presented a single sentence argument on appeal and failed to support the claim with either the transcripts from the hearings or an explanation of what they would have shown. As to trial counsel's lack of preparation, appellate counsel focused solely on the amount of time spent with defendant pre-trial and made no showing of prejudice. A stronger claim of ineffectiveness had been available to appellate counsel. In addition to the failure to obtain the transcripts to use as impeachment, trial counsel also failed to cross-examine the testifying co-defendants on both the actual terms of their plea agreement and on the fact that the two men had misrepresented the nature of their agreements with the State. (Both plea agreements reflected that the State anticipated future cooperation at defendant's trial from both men and that, following that cooperation, the State would not oppose sentence remolding. At trial, however, both men repeatedly denied that they had received "a special deal" or "special treatment" in exchange for their testimony.) Given that the key evidence against defendant was the testimony of the co-defendants, prejudice was shown.

***Khalil-Alsalaami*, 399 P.3d 264 (Kan. Ct. App. 2017).** In case involving two counts of aggravated criminal sodomy on an underage victim, trial counsel was ineffective in numerous ways. First, trial counsel was ineffective in failing to request an interpreter at trial and appellate counsel was ineffective for not raising that failure on appeal. Defendant, whose primary language was Arabic, was in the United States as a permanent resident after serving as an interpreter for the United States military forces in Iraq. He was accused of sexually assaulting the victim at a party. He initially admitted to committing some of the sexual acts at issue but claimed it was consensual and that he was unaware the victim was underage. At trial, he denied having any sexual contact with the victim and stated that he had given a contrary account to the police because the officer had repeatedly suggested that sex had occurred. Trial counsel's defense strategy was: (1) arguing that DNA matched to defendant that was found on the victim's shorts had been transferred from the bed where defendant had sex with another woman earlier; and (2) asserting that defendant was tricked by police into giving an incriminating statement. Although defendant's initial counsel had requested an interpreter for defendant and one was employed at the preliminary hearing, trial counsel decided that use of an interpreter would make it appear to the jury that defendant was trying to hide behind a non-existent language barrier, especially given defendant's own history as an interpreter. Thus, defense counsel advised defendant not to use an interpreter. Such advice was

made without counsel: (1) testing defendant's ability to understand English; (2) investigating the complexity of the interpreting defendant was asked to do for the U.S. military; or (3) considering how the use of voir dire and/or instructions could ameliorate any possible prejudice from use of an interpreter. In addition, trial counsel failed to inform defendant of his statutory right to an interpreter and the waiver was not accomplished in front of the trial court. Trial counsel had been aware that defendant would not be able to understand at least portions of the trial, such as the DNA testimony and the prosecutor's closing argument. At trial, defendant spoke in broken English that was difficult to understand and he failed to comprehend the meaning of fairly simple words. According to professionals who tested defendant post-trial, defendant's understanding of English was extremely limited and he would be very easy to trick due to the language problem. Evidence was also presented in post-conviction proceedings showing that approximately 1 year before the charged crime, defendant took an interpreter with him to get a Kansas driver's license and had to use the picture test rather than the written test. In addition, the interpreter for defendant in the preliminary hearing rated defendant's English skills on a scale of 0 to 10 as .01. He further testified that defendant's English was woefully inadequate to go through a court proceeding without an interpreter. The U.S. Army Captain that supervised defendant in Iraq indicated that their communication in English was at an elementary level and analogized defendant's ability as a little better than his 5-year-old daughter, who was entering kindergarten. Although defendant lived in the United States for 14 months prior to his arrest, he lived in a household with other Arabic speakers. When he interpreted for the U.S. Army in Iraq, again he continued to live with Arabic speakers. It was further noted by the appellate court that not only was the criminal trial complex, the stakes were extremely high – defendant was facing a possible sentence of 25 years to life, and, as an asylum seeker, a conviction would likely result in deportation to Iraq where his life could be at risk. Although the post-conviction court found, inter alia, that substantial competent evidence supported the finding that defendant adequately understood English to proceed to trial without an interpreter, the appellate court disagreed, explaining:

> Even if one assumes that [trial counsel] were in the best position to evaluate [defendant's] language abilities at the time of trial, their testimony does not support such a conclusion. They reached what they believed to be a reasonable trial strategy, without fully investigating [defendant's] ability to understand the testimony and legal arguments at his own trial. Not only did they not investigate, but they ignored clear indications that [defendant] could not effectively understand what was going on during the trial.

On this record, trial counsel performed deficiently in not requesting an interpreter at trial. And, given the egregious nature of the error here, prejudice is presumed. In addition, give the appellate court's conclusion that the evidence does not support a finding defendant was able to understand the proceedings in the absence of an interpreter, appellate counsel was deficient in not raising a claim on direct appeal that the trial court erred in failing to appoint an interpreter for defendant. Because there is a reasonable probability that the appellate court would have found that the district court abused its discretion when it failed to appoint an interpreter, prejudice is established. Trial counsel was also found to have performed deficiently in failing to seek suppression of defendant's confession and stipulating to the voluntariness of defendant's confession after trial counsel entered the case in the midst of a *Jackson v. Denno* hearing that the State had initiated.

> The police minimization technique in conjunction with [defendant's] inability to speak and understand English weigh in favor of finding his confession was involuntary. In addition, [the interrogating officer] testified that in Iraq the police use force to coerce confessions from individuals. It is not unreasonable to conclude that [defendant] may have been pressured to confess because of his fear that force might be used. Finally, [defendant's] lack of understanding of the words used in the oral explanation of his *Miranda* rights coupled with his inability to read what was placed in front of him would also weigh in his favor in the voluntariness calculus. It is clear that [defendant] appeared to be confessing to criminal acts. That is not the issue. The issue for the district court to decide would have been whether his confession was freely and voluntarily given with an understanding of his rights under *Miranda.* We do not believe that was a foregone conclusion.

Further, by stipulating to the voluntariness of the confession and allowing admission of the stipulation into evidence, trial counsel prejudiced his own defense strategy of arguing that defendant was tricked into making the confession. Trial counsel was also deficient in failing to object when the prosecutor misstated the DNA evidence during argument in a manner that torpedoed his assertion his argument about how defendant's DNA came to be on the victim's shorts. Further, appellate counsel was ineffective in failing to raise the issue of prosecutorial misconduct on direct appeal. Finally, the appellate court concluded that defendant was entitled to relief on a claim that the cumulative impact of trial counsel's errors deprived him of a fair trial.

> [Trial counsel] committed six errors during his representation of [defendant]: (1) he failed to request an interpreter for [defendant] at trial; (2) he failed to file a motion to suppress [defendant's] confession or mount a defense at the *Jackson v. Denno* hearing; (3) he stipulated to the voluntariness of [defendant's] confession; (4) he failed to object to improper questioning of [the examining nurse]; (5) he failed to object to questions meant to highlight [defendant's] negative character traits; and (6) he failed to object when the prosecutor misstated evidence during closing arguments. We find that the number of errors is substantial, and even if the State could successfully argue that the impact that any one of them had on the trial was insignificant, we cannot ignore the fact that the accumulation of these errors impacted [defendant's] ability to receive a fair trial.

***Commonwealth v. Rosado*, 150 A.3d 425 (Pa. 2016).** Filing an appellate brief which abandons all preserved issues in favor of unpreserved ones is ineffective assistance by appellate counsel *per se*. "[E]rrors which *completely* foreclose appellate review amount to a constructive denial of counsel and thus ineffective assistance of counsel *per se,* whereas those which only *partially* foreclose such review are subject to the ordinary *Strickland*/*Pierce* framework." (Here, appellate counsel mistakenly believed issues could be preserved through an attachment to the filing specifying the issues raised. This resulted in the waiver of the only issue appellate counsel sought to argue on appeal.)

***Commonwealth v. Williams*, 141 A.3d 440 (Pa. 2016).** In triple murder case, appellate counsel was ineffective in failing to raise trial counsel's ineffectiveness in not cross-examining the

prosecution's expert or calling a defense expert concerning inconsistencies between the key prosecution witness's testimony and the forensic evidence. At trial, the prosecution relied primarily on the testimony of White, a purported eyewitness to two of the murders and an accomplice in all three. White testified that the three victims had arranged to purchase weapons from Williams, the leader of a gang that sold weapons and drugs. Williams had planned to rob the men when they met to receive the guns. When the groups met, Williams and members of the gang, including White, held the victims at gunpoint and demanded their money. After the purchase money was turned over, Williams continued to demand additional money from the three victims. When one of the men admitted he had additional money at another location, he was taken by Williams and two other gang members to retrieve the money. Williams and the gang members returned without the victim. White testified that one of the two gang members who accompanied Williams informed White that Williams had shot the victim in the head. The remaining two victims were then loaded in the back of a stolen van. Williams and another gang member were in the back with the victims and continuing to demand more money. White was in the front passenger seat. White testified that he saw Williams shoot the smallest of the three victims in the face while the victim looked at Williams and the gun. A short time later, the van slowed and this victim was thrown out of the back of the van into the street. White then saw Williams put his gun in the face of the remaining victim. White turned to face front and heard two gunshots and the back of the van open. When he next looked back, the third victim was gone, presumably also thrown out of the van. When the victims were later found by authorities, none were in a street but instead on a sidewalk or in a driveway. And each had sustained gunshots wounds but none had other injuries to their bodies, such as bruises or abrasions. Defense counsel did not ask any of the prosecution's expert witnesses a single question. Counsel for one co-defendant did cross-examine two of these witnesses about the absence of non-gun-related injuries to the victims but the witnesses opined that the lack of additional injuries did not establish that the victims had not fallen. Defense counsel argued to the jury that common sense showed that the location and conditions of the bodies were inconsistent with White's account of what occurred. In post-conviction proceedings, defense counsel conceded he had no strategic reason for failing to consult with or present testimony from a medical or forensic expert in order to highlight the problems with White's testimony. Post-conviction counsel presented testimony from an expert in the field of homicide investigation, crime scene analysis and blood spatter analysis. This expert, who was credited by the post-conviction court, opined that the medical and forensic evidence was inconsistent with White's testimony. In finding that this expert's testimony would have been helpful to defendant at trial, the state supreme court noted in particular the expert's opinion that "the blood flow evidence was [] wholly incompatible with White's testimony that the victims were shot and thrown from a moving van." Additionally, the expert testified that none of the victims sustained gunshot wounds consistent with White's testimony that the victim was looking at the shooter's gun when he was shot. As for prejudice, it was noted that although White was subject to significant impeachment, "the cross-examination of White left his story about the three murders at issue largely unscathed." If the jury believed the post-conviction expert's testimony, coupled with other evidence impeaching White's credibility, it is likely the jury would have acquitted defendant of the three murders. Finally, the record supported the post-conviction court's "factual findings and legal conclusion that appellate counsel had no reasonable basis for failing to raise the claim of trial counsel's ineffectiveness for not calling an expert to testify or cross-examining the Commonwealth's experts regarding the

blood flow evidence and gunshot wound evidence." (Appellate counsel testified that he had no independent recollection of the appeal but that confining his claims to those appearing on the record, as occurred in defendant's appeal, was consistent with his practice at the relevant time.) Prejudice is established because there was a substantial likelihood that the outcome of defendant's appeal would have been different if the trial counsel ineffectiveness claim had been raised there.

***State v. Johnson*, 60 N.E.3d 661 (Ohio Ct. App. 2016).** Appellate counsel ineffective in passing bad checks and theft case for failing to assert on appeal the trial court's error in failing to apply new sentencing laws that had been in effect for more than six months when the defendant was sentenced. Even though trial counsel had not raised the objection, appellate counsel's conduct was deficient because compliance with the sentencing law was mandated regardless of whether an objection had been raised. Prejudice was also established as the court's charge and verdict forms under the old law made 17 of the 18 counts of a more serious degree than they were under the new sentencing law. The higher degrees allowed for imposition of greater punishment. Remanded for new sentencing on the 17 counts impacted.

**2015:** ***Paul v. State*, 183 So. 3d 1154 (Fla. Ct. App. 2015).** Appellate counsel ineffective in 2009 murder case for failing to assert on appeal that the trial court fundamentally erred in giving the manslaughter by intentional act instruction disapproved of in *State v. Montgomery*, 39 So. 3d 252 (Fla 2010). Defendant's brother, who was his codefendant tried separately, raised this issue on appeal. While the District Court of Appeals denied relief, the brother appealed to the Florida Supreme Court, which accepted jurisdiction. Following its decision in *Haygood v. State*, 109 So. 3d 735 (Fla. 2013) holding that this instruction was reversible error in the circumstances of this case, the brother's case was remanded to the District Court of Appeals for reconsideration and the brother was granted a new trial. The defendant's counsel did not raise this issue on appeal. The issue was first raised in a petition for writ of habeas corpus before the District Court of Appeals, which was denied without opinion. A second habeas, denied without opinion, was filed before the District Court after the brother was granted a new trial. The issue of trial counsel's ineffectiveness for failing to object to the instruction was timely raised in post-conviction. Relief was denied because no prejudice could be established given the past two denials of relief. Exercising its power to reconsider and grant relief to avoid "manifest injustice," relief was granted.

**2014:** ***Molina v. State*, 150 So. 3d 1280 (Fla. Ct. App. 2014).** Appellate counsel was ineffective in second-degree murder case for failing to assert on appeal the trial court's erroneous jury instructions on the elements of manslaughter by act. A case directly on point, *State v. Montgomery*, 39 So. 3d 252 (Fla. 2010), was decided more than a year prior to the direct appeal. While a different district had reached a contrary conclusion, at minimum, the court would have at least certified a conflict. New trial granted.

***Gallien v. State*, 19 N.E.3d 303 (Ind. Ct. App. 2014).** Appellate counsel ineffective in case of two burglaries and two thefts separated by less than 15 minutes and 3 miles for failing to assert that this was a single episode in which the consecutive sentencing limitations imposed by state statute applied. Appellate counsel, who was also trial counsel, had raised this issue in sentencing but argued only sentence appropriateness during the appeal. The statute at issue limited the maximum consecutive sentences from a single episode to one class higher than the most serious felony

involved in the case. In this case, the statute limited the sentence to 10 years, but the defendant received two consecutive 8 year sentences on the burglary charges for a total of 16 years. Counsel's conduct was deficient in failing to assert this issue, which was much stronger than the one issue raised on appeal, which had "little likelihood of success." Prejudice was also established as the statutory sentencing limitation was applicable.

***Miller v. State*, 318 P.3d 155 (Kan. 2014).** Appellate counsel ineffective in murder case for failing to assert error in a written instruction: "If you have a reasonable doubt as to the truth of each of the claims required to be proved by the State, you must find the defendant not guilty." The word "each" was substituted for "any" and effectively told the jury that it could acquit the defendant "only if it had a reasonable doubt as to all of the elements the State was required to prove–rather than acquitting him if it had a reasonable doubt as to any single element." Counsel's conduct was deficient. While the state asserted "strategy," the evidence was "uncontroverted" that counsel "simply did not notice the error." This was structural error and prejudice was established.

***State v. O'Neil*, 99 A.3d 814 (N.J. 2014).** Appellate counsel ineffective in murder case where the defendant was convicted of manslaughter for failing to challenge the trial court's failure to charge self-defense related to manslaughter. Based on dicta in a 1999 case (*Moore*), the trial court instructed on self-defense for murder but not manslaughter. This case was tried in 2003. A panel of the Appellate Division held in 2007 (*Rodriguez*) that self-defense applies to manslaughter as well. The appeal of this case was still pending then but appellate counsel still failed to assert the issue. Likewise, counsel did not assert the issue even after the Supreme Court granted certification in *Rodriguez*. Counsel's conduct was deficient in failing to "bring to the court's attention controlling law that [would] vindicate her client's cause." In addition, the plain language of the self-defense statute indicates that self-defense applies to manslaughter. Case law prior to 1999 held that self-defense applied in manslaughter cases. Thus, the dicta in *Moore* was determined in *Rodriguez* in 2008 to be a "'mistaken assertion' limited to the peculiar facts in *Moore*." Even prior to this trial, "a widely read commentator" foreshadowed that the court would again hold that self-defense applied to manslaughter. Even without this backdrop, at minimum, counsel should have informed the appellate panel in this case of the *Rodriguez* decision from another panel, which was "controlling law unless overturned by this Court." Even if counsel did not know of the *Rodriguez* decision that was inexcusable. "If every person is presumed to know the law, no exception can be made for appellate counsel." There was no strategy because "appellate counsel could have no strategic reason for not raising a ruling that presumably would lead to a new trial for his client." Prejudice was clear because the jury, having been instructed on self-defense to murder, acquitted the defendant of murder.

***Wilds v. State*, 756 S.E.2d 387 (S.C. Ct. App. 2014).** Appellate counsel in murder and armed robbery case was ineffective in failing to assert error in the trial court's instruction on accomplice liability. The state presented evidence of the victim's DNA in blood on the defendant's shoe and testimony from two co-defendants who both testified that the defendant carried out the armed robbery and murder and their only participation was in hitting the victim after being ordered to do so by the defendant. During deliberations, the jury sent out a note asking, "[I]f we say [Wilds is] guilty of murder, are we saying he of the three [alone] actually pulled the trigger?" In response, and

over trial defense counsel's objection, the trial court instructed on accomplice liability, i.e., the hand of one is the hand of all. This instruction should not have been given because there was no evidence that another co-conspirator was the shooter. Appellate counsel's conduct was deficient. The only issue asserted on appeal "was unpreserved and the State presented no testimony indicating counsel made a tactical decision not to appeal this issue."

**2013:** ***Long v. United States*, 83 A.3d 369 (D.C. 2013).** Appellate counsel in murder case ineffective for failing to challenge the defendant's life without parole sentence due to error under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), which was decided while the direct appeal was pending. The sentence was based on the trial court's finding of an aggravating circumstance – that the murder was especially heinous, atrocious, and cruel – not found by the jury. "In a series of cases, beginning with *Keels v. United States*, 785 A.2d 672 (D.C. 2001), this court applied plain-error review to sentences of LWOP imposed prior to the issuance of *Apprendi*." The defendant advised counsel of these rulings and suggested an *Apprendi* challenge before filing his own pro se motion to correct his sentence on this basis. Under these circumstances, counsel's conduct was deficient for failing to assert the challenge. This conduct was not excused by strategy, as "[w]e . . . cannot conceive of any reasonable "professional judgment" which would lead an attorney to disregard an issue which, at the time of appeal, would likely have resulted in the vacating of appellant's LWOP sentence and the remand of the case for resentencing." Prejudice established because "reasonable minds could well have disagreed about whether this murder was 'especially heinous, atrocious, or cruel,' a standard that requires a conclusion that this murder was worse than most first-degree premeditated murders." This case involved "an [escalating] armed feud between two groups of young men that had been going on for several weeks" before the victim was shot. "Considering that the courts deal with a significant number of seemingly more inhumane crimes, we cannot conclude that a jury would have agreed with the conclusion the trial court reached on this factor, even if we cannot label the trial court's decision 'wrong.'"

***Martinez v. State*, 123 So. 3d 701 (Fla. Ct. App. 2013).** Appellate counsel ineffective in murder case for failing to challenge the sentence on the ground that the trial court relied on unsubstantiated allegations of drug possession in sentencing. While the state alleged that the murder was drug-related, "[t]he state introduced no evidence in the present case that drugs had anything to do with petitioner's crime." A law enforcement officer testified only that the defendant's "bag contained 'stuff,'" but the prosecutor argued in support of a maximum sentence that the witness testified the "stuff" was "two and a half pounds of marijuana." "[T]he sentencing judge plainly proceeded on the assumption that a drug transaction had been in progress when the charged offense took place." Trial counsel challenged the sentence in a timely fashion. Counsel's conduct was deficient and prejudicial.

***Hankins v. State*, 123 So. 3d 666 (Fla. Ct. App. 2013).** Appellate counsel was ineffective for failing to challenge on double jeopardy grounds defendant's convictions for armed burglary with assault or battery, aggravated battery with a firearm, and aggravated assault with a firearm. The evidence at trial showed that Hankins set a fire outside of his ex-girlfriend's house, injured the ex-girlfriend by firing shots through the front door of her house, entered the residence without permission by kicking in the front door, threatened the ex-girlfriend with a firearm while following

her through the house, and struck the ex-girlfriend on her forehead with the firearm. Prejudice established even though Hankins received a life sentence on a valid attempted first-degree murder charge so relief from the invalid convictions would not result in a reduction of the overall sentence. New appeal allowed.

***Lee v. State*, 115 So. 3d 1119 (Fla. Ct. App. 2013).** Appellate counsel ineffective in armed robbery case for failing to assert a meritorious preserved argument, which the codefendant won on in direct appeal. Specifically, the trial court erred in denying the defense peremptory strike a white potential juror when the defense had valid race-neutral reasons in that the juror and his wife had been victims of a burglary and had connections to law enforcement.

***Sullivan v. Kemp*, 749 S.E.2d 721 (Ga. 2013).** Appellate counsel in aggravated assault case ineffective for failing to assert error in trial court's instructions that permitted conviction for aggravated assault based upon criminal negligence. The defendant was convicted based on evidence that a one-year-old child in his care suffered serious brain injuries that were consistent with shaken baby syndrome. The defendant testified that the child fell off a couch and then he shook the child "try[ing] to get him to laugh." While aggravated assault requires a "criminal intent to injure," the trial court charged the jury that a crime involves "a joint operation of an act, or omission to act, and intention." The trial court went on to instruct that intent or criminal negligence is an essential element of any crime and that intent or criminal negligence may be shown in many ways, before also defining criminal negligence. Trial counsel objected. Appellate counsel's conduct was deficient, not based on strategy, and prejudicial because the jury could have been misled into believing it could convict for aggravated assault even if the evidence showed only criminal negligence rather than an intent to injure. The prejudice was exacerbated by the prosecutor's repetitive arguments in closing that "[t]his is a criminal negligence case," and conviction could be based on criminal negligence.

**2012:** ***Dill v. State*, 79 So. 3d 849 (Fla. Ct. App. 2012).** Appellate counsel ineffective in attempted murder case for failing to seek supplemental briefing based on new case that held that the standard instruction on attempted voluntary manslaughter "improperly imposed an additional element of intent to kill and was therefore fundamentally erroneous."

***Gregg v. State*, 279 P.3d 396 (Utah 2012).** Trial and appellate counsel ineffective in rape case for failing to adequately present a defense. The defendant and the victim both testified that they met on an "online dating service." They first met in person around 2:20 a.m. when the alleged victim invited the defendant to her apartment. According to her, they engaged in consensual kissing until 3:20 a.m. when a friend of the victim called. Thereafter, they resumed consensual kissing and "progressed to foreplay." According to the victim, she said no but was raped. According to the defendant, it progressed to consensual sex, which was interrupted by the friend, who was waiting outside with his girlfriend, calling again at 4:07 a.m. Counsel's conduct was deficient in failing to investigate and present evidence of the alleged victim's continued activity on the dating site after the alleged rape and in failing to elicit information about the 47 minutes between the calls. In her testimony, she said that she only logged back into the site to pull information about the defendant for the police. In reality, only two days after the alleged rape she had contacted four other men in "cheerful, light-hearted emails" saying she was leaving site to avoid charges but inviting them to

contact her privately. These emails would also have undermined her credibility regarding the severe anxiety and panic attacks she claimed to suffer following the alleged rape. Counsel failed to subpoena these records. Likewise, counsel's conduct was deficient in failing to present evidence of the actual time line of events. While the alleged victim claimed the calls were only minutes apart, the phone records and the police report revealed that, even according to her testimony, there was "nearly an hour of [consensual] sexual foreplay" before intercourse. While counsel did make a vague reference in closing to a 45-minute time period, counsel presented no evidence supporting this argument. Prejudice was also established as consent was the only issue. Appellate counsel was ineffective for failing to assert trial counsel's ineffectiveness on appeal.

***In re Morris*, 288 P.3d 1140 (Wash. 2012).** Appellate counsel in sexual molestation case ineffective in failing to assert violation of right to public trial under clear state law. Specifically, the trial court conducted part of individual juror voir dire in chambers. While in chambers and off the record 14 prospective jurors were questioned and 6 were excused for cause. Prejudice established as prejudice would have been presumed on direct review.

**2011:** ***Mauricio v. State*, 941 N.E.2d 497 (Ind. 2011).** Appellate counsel ineffective in murder case for failing to assert sentencing error in direct appeal. At the time of trial, there were two conflicting statutory amendments on the books: one providing a presumptive sentence of 50 years and the other a presumptive sentence of 40 years. The court applied the 50 year amendment here and sentenced the defendant to 50 years. Appellate counsel clearly should have raised this issue on appeal. As the court and the legislature later determined that the 40 year presumptive sentence was the appropriate one, case remanded for resentencing.

***Commonwealth v. Fink*, 24 A.3d 426 (Pa. Super. Ct. 2011).** Appellate counsel in murder case ineffective for failing to sufficiently brief the circumstances of the defendant's confession. Trial counsel filed a pre-trial motion seeking suppression. While this issue was raised on appeal, counsel failed to provide adequate citation to authority and analysis in briefing, which resulted in waiver and no merits review. Prejudice was presumed under *Cronic*.

**2010:** ***Whitmore v. State*, 27 So. 3d 168 (Fla. Ct. App. 2010).** Appellate counsel ineffective in aggravated battery case for failing to assert as error the trial court's consideration of the defendant's continued protestation of innocence against him in sentencing, which was error under state law.

***Brown v. Baskin*, 690 S.E.2d 822 (Ga. 2010).** Appellate counsel ineffective in armed robbery case for failing to assert trial counsel's ineffectiveness during direct appeal. At the time of trial, the alleged victim was facing criminal charges for possession of cocaine with intent to distribute and counsel sought to cross-examine him on that issue. The trial court ruled initially that the cross would not be permitted absent proof of conviction, but allowed counsel the opportunity to establish an entitlement to cross on the basis of a pending indictment. Trial counsel failed to pursue the issue further and appellate counsel failed to assert trial counsel's ineffectiveness. Prejudice established because the victim was a key witness and the jury had indicated a deadlock at one point prior to conviction.

**Capital Case*

***Rhoiney v. State*, 940 N.E.2d 841 (Ind. Ct. App. 2010).** Appellate counsel ineffective in murder and criminal confinement case for failing to assert error in court imposing consecutive sentences. The defendant was sentenced prior to 2005 statutory amendment changing presumptive sentences to advisory sentences. Under state law the court could impose the sentences consecutively only if the court found at least one aggravating circumstance and found that the aggravating circumstances outweighed mitigating circumstances. Here the court found the aggravating and mitigating factors to be in equipoise so state law required that the sentences run only concurrently. Appellate counsel should have recognized this error as significant and asserted the issue on appeal.

***State v. Aberegg*, 945 N.E.2d 1148 (Ohio Ct. App. 2010).** Appellate counsel ineffective in telecommunications harassment case for failing to challenge the defendant's overbroad and unreasonable conditions on probation. The defendant was convicted for harassing calls to the prosecutor's office. As part of the probation conditions, he could not be on any property owned or operated by the City of Wadsworth, which could include any street or sidewalk of the city, and could not call any city office. The only exception was the Probation Department. Appellate counsel's conduct deficient and prejudice established.

**2009:** ***Powers v. State*, 38 So. 3d 764 (Ala. Crim. App. 2009).** Appellate counsel in theft of property case was ineffective for failing to challenge the trial court's denial of the defendants' request to withdraw their waiver of the right to counsel. The defendants, husband and wife, initially waived counsel but then sought to withdraw the waiver. The trial court offered to appoint counsel for them but they declined while still saying they wanted to withdraw the waiver. The trial court took no other action and proceeded to trial with them representing themselves. Counsel's conduct was deficient in failing to challenge this issue because a state criminal rule allows a waiver of counsel to be withdrawn at any time and for any reason. The defendants were thus entitled to counsel from that point forward. Although they declined court-appointed counsel, the trial court never offered them the other options under state law of a continuance to obtain retained counsel or appointment of a standby counsel. "Unless a defendant has or waives assistance of counsel, the Sixth Amendment is a jurisdictional bar to a valid conviction and sentence." "Appellate counsel's failure to challenge a jurisdictional defect was deficient performance and per se prejudicial." The court also reversed on the substantive issue of deprivation of the right to representation at trial.

***Ex parte Miller*, 330 S.W.3d 610 (Tex. Crim. App. 2009).** Appellate counsel was ineffective in murder case for failing to assert, for purposes of habitual offender sentencing, that the evidence was insufficient to prove that the defendant's 1976 burglary conviction was for an offense committed after his 1972 possession of heroin conviction became final. Counsel's conduct was deficient because the state's proof was based only on the defendant's penitentiary packet, which did not contain the indictment or offense report for the 1976 judgment, "so it is impossible to tell from the face of the burglary judgment exactly when this second offense was committed." While there was evidence available to show that the burglary was committed in November 1975, this evidence was not presented in sentencing. Thus, if counsel had asserted this error, reversal of sentence was required.

**2008:** ***Wright v. State*, 881 N.E.2d 1018 (Ind. Ct. App. 2008).** Appellate counsel ineffective in attempted rape case for failing to assert the ineffectiveness of trial counsel or the fundamental error in the

sentence enhancement for being "a repeat sex offender." Under the plain language of the statute and prior state law interpreting similar language in other statutes, a rape conviction could be used to apply the "repeat" enhancement but an attempted rape conviction could not. Thus, appellate counsel was ineffective for failing to assert the ineffectiveness of trial counsel in eliciting an admission from the defendant that he was a repeat sex offender and failing to argue that the sentencing enhancement was fundamental error. Prejudice was clear since the enhancement had added eight years to the defendant's sentence.

**2007:** ***Mintun v. State*, 168 P.3d 40 (Idaho Ct. App. 2007).** Appellate counsel ineffective in sexual abuse of a minor case for failing to challenge one of the convictions, which required a solicitation "to participate in a sexual act." On this charge, the defendant had asked a 10 year old boy to watch him and to take pictures of him masturbating, which "although repugnant, is not prohibited by the statute in question."

***Harris v. State*, 861 N.E.2d 1182 (Ind. 2007).** Appellate counsel ineffective for failing to provide the appellate court with an adequate record to support a valid claim raised on appeal but unsupported by the record provided. Here, following the testimony of both victim's and his own testimony, the defendant changed his plea and entered pleas of guilty to two counts of sexual misconduct with minors. He was sentenced to twenty years on each count to be served consecutively for a total of 40 years. At the time of trial, state law limited the aggregate for crimes "arising out of an episode of criminal conduct." In this case, the limit was 30 years if found and appellate counsel asserted that the crimes were in a "single episode" of criminal conduct but did not include in the appellate record the trial testimony prior to the guilty plea. Based just on the record before it, the court rejected the argument. Counsel's conduct was deficient in failing to include the necessary record and was not based on any strategy. Counsel had simply not read the trial testimony because he believed it unnecessary given the guilty plea. This was deficient because the issue on appeal required a factual record and the necessary facts were in the portion counsel did not read or provide to the court. Prejudice found because the testimony of the two victims provided the necessary facts to support a "single episode" where the crimes occurred 5 minutes apart in the same bed and both victims were induced by the same need for a place to stay. The court revised the aggregate sentence to 30 years.

***Yecovenko v. State*, 173 P.3d 684 (Mont. 2007).** Trial and appellate counsel ineffective in sexual abuse and sexual assault case for failing to adequately assert a motion for severance. The sexual assault charges alleged offenses involving the daughters of the defendant's former girlfriend. The sexual abuse charges were based on ten unrelated child pornography pictures. Trial counsel moved to sever but did not provide any specific detail to allege prejudice even after the state noted the deficiency and the court denied on this basis. While appellate counsel asserted error in the denial of the motion, counsel did not assert the ineffectiveness of trial counsel as a basis. Thus, the appellate court also denied on a procedural basis. Trial and appellate counsel's conduct was deficient. Specifically, with respect to appellate counsel: "Presenting new arguments on appeal without justification for doing so, in light of the volume of cases holding that such arguments will not be entertained, falls short of reasonable professional assistance." Prejudice was found with respect to the sexual assault conviction because the unrelated pictures "were, quite simply, horrific,"

such that the trial court had cleared the courtroom and allowed each image to be displayed to the jury for only five seconds.

***State v. Loftin*, 922 A.2d 1210 (N.J. 2007).** Trial and appellate counsel were ineffective in failing to adequately address the presence of a possibly racially biased juror, who had predetermined guilt before hearing all the evidence, in the jury panel during the trial although he ultimately served as an alternate and did not deliberate on findings and a separate jury was empaneled under state law for sentencing. The juror, who was white and worked at the post office, admitted making comments early in the trial to other postal workers that he was "going to buy a rope to hang" the defendant, a black man charged with killing a white man. He denied, however, that the comments were intended to be racist or that he had already formed an opinion of guilt. Trial counsel sought to remove the juror, which was denied, but failed to request that the remainder of the jury be questioned to determine whether this juror had made similar comments to other jurors. The trial court ultimately ordered that the juror would serve only as an alternate. Appellate counsel failed to assert error in the trial court's failure to remove the juror and to assert as plain error the court's failure to question the remaining jurors. Under state law, the court found "a decided racial undertone [in the juror's comments] that evokes an era of vigilante and mindless mob justice that reigned during a dark period in American history." *Id*. at 1219. Likewise, even without racial bias, the juror violated the court's instructions not to discuss the case with others and not to determine guilt prior to deliberations. The court held that prejudice would be presumed and that "even allowing a non-deliberating juror suspected of racial bias to sit on a panel will lead to a presumption that other members of the panel may have been tainted." *Id*. at 1222. Thus, the court presumed that the biased juror shared his views with fellow jurors and, thus, it did not matter that he did not deliberate. Although trial and appellate counsel's ineffectiveness was asserted under both the state and federal constitutions, the court addressed the merits under only the state constitution but still applying the Strickland standard. Deficient conduct found because the need for the removal of the predisposed juror and a voir dire of the remaining jurors should have been self-evident." Counsel's conduct was not excused by strategy. Appellate counsel was also ineffective because failure to assert these issues on appeal deprived the court of the opportunity to address the issue, which would have required reversal on direct appeal.

***Commonwealth v. Williams*, 936 A.2d 12 (Pa. 2007)** (sentenced in August 1993). Appellate counsel ineffective in capital case for failing to challenge the defendant's conviction under the state Corrupt Organizations Act. Under the statute applicable at the time of the 1993 trial, the court had interpreted the statute to include only legitimate organizations and the defendant's "organization" was a wholly illegitimate enterprise. This issue was decided approximately a year before the direct appeal was filed. Although the legislature had shortly afterwards amended the statute and a lower court had held the amendment was retroactive, counsel's conduct was deficient and prejudicial for failing to assert this issue, because the Supreme Court had ultimately ruled that the amendment was not retroactive. Only the Corrupt Organizations Act conviction was reversed leaving intact the murder and criminal conspiracy convictions, which were remanded for consideration of other issues asserted.

**Capital Case*

**2006:** ***Burnside v. State*, 858 N.E.2d 232 (Ind. Ct. App. 2006).** Appellate counsel was ineffective in murder case for failing to assert as error the trial court's instructions on self-defense and the lesser-included offense of reckless homicide. Trial counsel requested jury instructions on both self-defense and reckless homicide and the trial court instructed the jury regarding both theories. The State objected to the instruction because it intermingled the self-defense and reckless homicide theories but trial counsel did not object. Appellate counsel's conduct was deficient because the instructions improperly required a finding of self-defense as a precondition to a reckless homicide verdict, which deprived the defendant of his right to have the jury consider his guilt on reckless homicide as a lesser-included offense. This issue was significant and obvious from the face of the record and was clearly stronger than the issues raised in the direct appeal. Prejudice found.

***Reed v. State*, 856 N.E.2d 1189 (Ind. 2006).** Appellate counsel ineffective in attempted murder case for failing to assert that the imposition of consecutive sentences for convictions arising out of a single "episode of criminal conduct," contravened the state sentencing statute. The defendant was convicted of two counts of attempted murder for firing a weapon at police officers during a car chase. Although the issue was a novel one under a new sentencing statute, a plain reading of the statute revealed that the issue was a clear winner and was a much stronger issue than those raised on appeal. Prejudice found, because based upon the state of the law at the time of the direct appeal, this claim would more than likely have resulted in reversal.

***Grinstead v. State*, 845 N.E.2d 1027 (Ind. 2006).** Appellate counsel ineffective in murder, theft, and conspiracy case for failing to make a double jeopardy objection under the state constitution. The state law had been interpreted to prohibit conviction and punishment for the crime of conspiracy where the overt act that constitutes an element of the conspiracy charge is the same act as another crime for which the defendant has been convicted and punished. Under this standard, the convictions for conspiracy to commit theft and theft in this case violated double jeopardy. The theft conviction was vacated.

***Taylor v. State*, 840 N.E.2d 324 (Ind. 2006).** Appellate counsel ineffective in murder case for failing to challenge the imposition of an enhanced sentence of 60 years. At the time of trial, the presumptive sentence for murder under state law was 40 years. Counsel's conduct was deficient and prejudicial because the trial court improperly considered a number of aggravating circumstances contrary to state law and contrary to the presentence report, which recommended the presumptive sentence.

****Commonwealth v. Gorby*, 909 A.2d 775 (Pa. 2006).** Trial counsel ineffective in capital sentencing for failing to adequately investigate and present mitigation evidence. Appellate counsel was also ineffective in failing to assert the issue of trial counsel's ineffectiveness during direct appeal. In sentencing, counsel called only the step-father to testify that the defendant sometimes assisted him in work around the home. Appellate counsel was also ineffective in failing to assert this issue on appeal because the "claim merited exploration based on the apparent weakness of trial counsel's penalty-phase presentation alone, as reflected on the face of the trial record." Prejudice found. (Facts discussed in the summary of trial counsel's ineffectiveness, *supra*).

**Capital Case*

***Ex parte Owens*, 206 S.W.3d 670 (Tex. Crim. App. 2006).** Appellate counsel was ineffective in aggravated sexual assault of a child case for failing to inform the defendant that he had a right to file a pro se petition to the Court of Criminal Appeals after counsel had filed an Anders brief in the court of appeals. Prejudice found because the petitioner had filed a pro se brief in the court of appeals. It was, therefore, likely that he would have filed the petition for discretionary review. Leave granted for an out-of-time petition.

**2005:** ***Shepard v. Crosby*, 916 So. 2d 861 (Fla. Ct. App. 2005).** Appellate counsel was ineffective in murder case and aggravated battery case for failing to assert on appeal the issue of the trial court's erroneous self-defense instruction, given over objection by trial counsel, which "was circular in nature and, thus, vitiated his defense." The trial court instructed the jury that the defendant's use of force against the victim was not justifiable if the jury found that the defendant was attempting to commit, committing or escaping after the commission of a murder or aggravated battery with a firearm. This instruction is not to be given "in cases where the defendant is charged with an offense as to which the defendant relies on self-defense." Prejudice found.

***Laymon v. State*, 122 P.3d 326 (Kan. 2005).** Appellate counsel ineffective in conspiracy to manufacture methamphetamine case where the defendant pled guilty and was sentenced based on "a drug severity level 1 felony." Two lines of argument were being pursued under state law at the time challenging sentences for this offense. One asserted that sentencing should occur under a misdemeanor provision and the other asserted that sentencing should occur under the drug severity 3 statutes. Appellate counsel raised only the first of these arguments, which was ultimately rejected by the state courts. The other argument, not raised by counsel, was ultimately accepted by the state courts. Counsel's conduct was deficient in failing to assert this issue "despite the icy reception that had been given both lines of argument by the Court of Appeals" because the Supreme Court "had not finally rejected either." *Id*. at 328. Counsel's conduct could not be explained by any plausible strategy or "avoidance of a 'shotgun' approach" because counsel's entire appellate brief was only five pages long. Moreover, counsel was in the same state office with the lawyer who initially asserted the ultimately successful argument. Thus, "we should charge his direct appeal counsel with knowledge that the *McAdam* issue was worthy of preservation and pursuit. Although *McAdam* was not yet the law of Kansas, the line of argument was in no worse position than the misdemeanor/felony line argument . . . counsel did pursue." *Id*. at 334.

***People v. Turner*, 840 N.E.2d 123 (N.Y. 2005).** Trial and appellate counsel ineffective in manslaughter case for failing to assert a statute of limitations defense. The defendant was arrested 16 years after the crime and charged with second degree murder, which has no statute of limitations. During trial, the prosecutor requested an instruction on the lesser included offense of manslaughter. Counsel objected only on the basis of not offering the jury a compromise. The jury convicted only on manslaughter, which had a five year limitations period. Although the statute allows some tolling, the maximum period for tolling is an additional five years. Trial and appellate counsel's conduct was deficient because there was case law from 1914 supporting the argument, which was old but still valid. In addition, while there was some contrary precedent and the law may not have been definitively settled at the time of trial, "[a] reasonable defense lawyer at the time of defendant's trial might have doubted that the statute of limitations argument was a clear winner–but no reasonable

defense lawyer could have found it so weak as to be not worth raising." Trial counsel should have asserted the issue. Appellate counsel should have asserted the ineffectiveness of trial counsel on this point.

**2004:** ***Davis v. State*, 886 So. 2d 332 (Fla. Ct. App. 2004).** Appellate counsel was ineffective in aggravated battery of elderly person over age 25 case for failing to assert as error the trial court's improper instruction on the use of force, which effectively negated the defense of self-defense. Although the defense of self-defense was prohibited only if the person claiming self-defense was engaged in the commission of another independent forcible felony, the trial court informed the jury, over trial counsel's objection, that a finding of the very act of aggravated battery the defendant sought to excuse on the basis of self-defense precluded a finding of justification. Appellate counsel's conduct was deficient because this instruction was circular and improper and the issue was preserved for appeal. Although no case had clearly held that this instruction was error under the circumstances at the time of the defendant's appeal, this holding was "clearly foreshadowed" by earlier case law and had been addressed previously in a "compelling dissent." "Where a preserved issue such as this appears in the appellate record, has facial merit, has some support in the case law, and is not foreclosed by controlling case law, it should be raised." The court, thus, granted a belated appeal on this issue.

***Bruce v. State*, 879 So.2d 686 (Fla. Ct. App. 2004).** Appellate counsel was ineffective for failing to assert as fundamental error the trial court's erroneous charge on burglary that failed to include the necessary of element of an intent to commit a crime within the structure or conveyance.

***Hickson v. State*, 873 So. 2d 474 (Fla. Ct. App. 2004).** Appellate counsel ineffective in aggravated battery of police officer case for failing to assert fundamental error with respect to the trial court's instruction on forcible felony, which essentially negated his only defense (self-defense). Belated appeal allowed.

***Smith v. Crosby*, 872 So. 2d 279 (Fla. Ct. App. 2004).** Appellate counsel ineffective in attempted murder, attempted burglary, and attempted robbery case for failing to challenge the attempted burglary conviction. Appellate counsel asserted only that the trial court erred in denying Petitioner's motion to suppress his statements. At the time of the appeal the Florida Supreme Court required reversal of the attempted burglary conviction because a conviction could not be sustained on a "remaining in" theory where the defendant initially entered the premises lawfully and then later formed a criminal intent to commit a crime therein. (Although the legislature subsequently nullified the Supreme Court's ruling, the legislation does not apply to the defendant in this case). Appellate counsel's conduct was deficient in failing to challenge the validity of the attempted burglary conviction because the evidence presented at trial showed that the defendant entered the premises with the victim's consent and remained there openly. Since any alleged intent to rob or assault was formed subsequent to his consensual entry, the defendant could not be convicted of burglary or attempted burglary. Although trial counsel did not preserve the issue, a fundamental error occurs when the evidence is insufficient to show that a crime was committed at all and the appellate court will review the legal sufficiency of the conviction on appeal. A belated appeal allowed only on this issue.

***Crawford v. Thompson*, 603 S.E.2d 259 (Ga. 2004).** Appellate counsel ineffective in armed robbery case for failing to assert that trial counsel was ineffective in failing to adequately assert a speedy trial motion. Counsel raised the speedy trial issue, but the appellate court found that it was procedurally defaulted because not addressed fully at trial under the applicable statute. Prejudice found because reversal would have been required if the issue had been asserted as an ineffectiveness of trial counsel claim.

***Carew v. State*, 817 N.E.2d 281 (Ind. Ct. App. 2004).** Appellate counsel was ineffective for failing to challenge the trial court's exclusion of expert's opinion testimony that tactics used by the police during the defendant's interrogation would increase the likelihood of a false confession from someone with the defendant's low IQ. Trial counsel preserved this issue by proffering expert testimony on this issue. While appellate counsel asserted five issues on appeal, including the involuntariness of the defendant's confession, counsel did not assert the issue of the trial court's exclusion of the expert testimony. Appellate counsel did not raise this issue because he did not believe the issue to be meritorious. Counsel's conduct was unreasonable because the issue was meritorious as subsequently found by the court in *Miller v. State*, 770 N.E.2d 763 (Ind. 2002). Although *Miller* had not been decided at the time of the defendant's direct appeal, the case the *Miller* court "relied on extensively" had been decided. Prejudice was found, even though the interview techniques and the defendant's IQ were already before the jury, because "an expert's opinion is helpful to the jury to tie up the relationship between the police interview techniques and individuals with diminished intellectual functioning, which is outside the common knowledge and experience of jurors." Prejudice was also apparent based on *Miller*. Although the two cases were not identical, they were similar enough to establish that the defendant–like the defendant in *Miller*–would have received a new trial if the issue had been raised on appeal. New trial granted.

***Haggard v. State*, 810 N.E.2d 751 (Ind. Ct. App. 2004).** Appellate counsel ineffective in multiple charge case starting with attempted suicide by use of cocaine, which precipitated violent resistance to officers upon their arrival. Counsel's conduct was deficient in failing to assert that the trial court erred in determining that the sentence for one of the five resulting charges (unlawful use of body armor) should be served consecutively. Because the time, place, and circumstances of the criminal acts were causally related and the evidence overlapped, state law prohibited consecutive sentences. Prejudice found even though the direct appeal opinion implied that the sentence was appropriate. The court held that it was "a gratuitous comment upon an issue not before the court. As such, it is not res judicata and does not control this decision."

****Browning v. State*, 91 P.3d 39 (Nev. 2004).** Appellate counsel was ineffective in failing to challenge the court's instruction on the "depravity of mind" aggravating circumstance, which did not include any reference to torture or mutilation. Although the Nevada court had rejected two challenges to instructions on "depravity" previously, counsel's conduct was deficient in failing to assert the issue in this case based upon *Godfrey v. Georgia*, 446 U.S. 420 (1980), because the other rejected state cases both included references to torture in the instruction and one of them also referenced mutilation. In both cases, there was also evidence of torture and mutilation, which was also lacking in this case. Prejudice found even though four other aggravating factors were present because the state's closing argument focused primarily on the "depravity of mind" aggravator.

***State v. Madan*, 840 A.2d 874 (N.J. Super. Ct. App. Div. 2004).** Appellate counsel was ineffective in murder case for failing to assert on appeal that the trial court abused its discretion in rejecting the defendant's plea agreement. The defendant was charged with murder and entered an agreement with the state to plead guilty to aggravated manslaughter in exchange for a state recommendation for a 20 year sentence with 7 years of parole ineligibility. A pre-sentence report recommended that the plea agreement be accepted. The defendant admitted stabbing the victim, but disputed some of the surrounding circumstances, which revealed that the victim may have well been the initial aggressor. At the hearing, the trial court discussed the issue with the victim's father and learned that the victim's family was opposed to the plea agreement. The court rejected the pre-trial agreement. Following trial, the defendant was convicted of murder and sentenced to life imprisonment with 30 years of parole ineligibility. The trial court abused its discretion in rejecting the plea because this case is a classic case for an aggravated manslaughter plea. The reasons listed by the trial court for rejecting the plea were inadequate and based upon incorrect statements concerning the potential length of sentences. The exercise of discretion to reject the plea was erroneous under these circumstances. Although the views of the victim's family may be taken into consideration, the victim's family's dissatisfaction with the plea cannot be controlling.

> A defendant my not be entitled to an offer of a plea bargain from the prosecutor, but when such an offer is made, accepted, and entered on the record, a defendant is entitled to a judicial assessment of that agreement grounded in a correct understanding of the law and the proper exercise of that discretion.

The court reinstated the defendant's plea agreement.

***Garrison v. State*, 103 P.3d 590 (Okla. Crim. App. 2004).** Appellate counsel was ineffective for failing to adequately preserve the issue that trial counsel was ineffective for failing to adequately prepare and present mitigation. The defendant was convicted, on largely circumstantial evidence, of the murder and subsequent dismemberment of a thirteen-year-old boy. On appeal, appellate counsel asserted the issue of ineffectiveness of counsel supported by affidavits and records and the court remanded for an evidentiary hearing. Because the trial court held the hearing only two weeks after the remand and the defendant's primary expert witness was unavailable to testify due to stage four cancer, appellate counsel presented no evidence at the evidentiary hearing and refused to even question trial counsel concerning the mitigation case. Thus, the court found, "[u]nder these unique and utterly bizarre circumstances," that appellate counsel "effectively waived" the issue of trial counsel's ineffectiveness. *Id*. at 619. Nonetheless, the court found that the defendant "was likely denied the effective assistance of trial counsel" with respect to sentencing and ordered a new sentencing trial. Trial counsel's conduct was deficient because the case in mitigation was limited to a single counseling psychologist who spent less than four hours with the defendant and had not reviewed the defendant's medical, psychiatric, or school records. The court did not condemn the expert, but noted that "[i]t appears he did what he was asked to do in the brief amount of time he was asked to do it." His testimony, which covered only nineteen pages of the transcript, provided "a quick overview" of the defendant's background, but he "did not go over any of these matters in any detail. He simply mentioned them casually in a sentence or two,

without amplification." *Id*. at 617. Because this expert spent an "extremely short amount of time" with the defendant and lacked "access to key records and people familiar with" the defendant, he "was vulnerable to attack by the State on cross-examination. The State was thus able to point out that most of the mitigation case was based upon a short interview, i.e., Appellant's own self-reporting." Overall, this "testimony did little to educate the jury about Petitioner's adolescent life or give jurors any mitigating reason to render a verdict less than death." *Id*. at 617. If counsel had adequately investigated, the evidence would have established that the defendant never knew his father; was abandoned by his mother, who tried to abort him; was raised by his verbally abusive grandmother; was abused by a schizophrenic and alcoholic uncle; was abused by his alcoholic, abusive mother after she moved back in to the extent of smothering him until he passed out; was sexually abused by his brother beginning at age 3-4,including "anal rapes," pulling his testicles and twisting his penis with pliers, binding him hand and foot, hanging him from a tree, and beating him to the point he required hospitalization. When he was thirteen, the defendant killed his four-year-old step-cousin and was committed to a hospital for 19 months. During this time, his brother was found dead from burning and a possible drug overdose. When the defendant was released on a pass from the hospital, he smothered a 3-year-old neighbor boy and severed the boy's penis post-mortem. In short, the defendant is "a thrice-convicted child- killer" and counsel's best hope after avoiding conviction "was to focus on the reasons why anyone would commit such inconceivable atrocities. And this would have necessarily required a close examination of Appellant's horrendous past." *Id*. at 619.

***Commonwealth v. Moore*, 860 A.2d 88 (Pa. 2004).** Appellate counsel was ineffective in failing to assert trial counsel's ineffectiveness for failure to prepare and present mitigation evidence. Counsel presented no mitigation evidence. He asserted that the defendant declined to testify and he had no other mitigating evidence. Thus, counsel presented no opening and no evidence and only referred generically to possible mitigating circumstances in closing. The jury found two aggravating circumstances and no mitigating circumstances. On appeal, counsel alleged trial counsel's ineffectiveness but failed to specify what mitigating evidence had been available. Thus, the issue of trial counsel's ineffectiveness was denied on appeal. Appellate counsel was ineffective for failing to adequately present the available mitigating evidence, which included testimony from the defendant's mother, sister, and wife of the defendant's traumatic and abusive childhood, including witnessing his father slash his mother's throat. The mother and sister had not been subpoenaed and had not been advised of the need for their testimony in sentencing. Although the ex-wife did not appear under subpoena to testify at trial concerning an alibi, she would have testified in sentencing if counsel had explained the nature of the proceeding to her. While these witnesses were "obviously more cooperative in 2000 than in 1983," *id*. at 99, and the defendant was an "uncooperative client," *id*. at 100, counsel's conduct was deficient because counsel was not "relieved of the duty to investigate potential mitigating evidence, particularly where counsel had no other penalty phase strategy," *id*. at 100. Counsel's conduct was not excused by any strategic reason. Prejudice was found because without any mitigating evidence, the defendant's only chance for a life sentence would have been if the jury did not find either of the aggravating circumstances, which was unlikely based on the evidence presented by the state. New sentencing granted.

*Capital Case

***In re Orange*, 100 P.3d 291 (Wash. 2004).** Appellate counsel was ineffective in failing to assert as error the trial court's closure of the courtroom during more than half of the voir dire, which violated the defendant's constitutional right to a public trial. Counsel's conduct was deficient because there was no compelling reason to close the proceedings. Even assuming that a compelling reason existed, the trial court did not narrowly tailor its order or consider alternatives to full closure. The trial court's actions thus violated the state constitution. In addition to denying the public's right to presence, the court denied the defendant's family the opportunity "to contribute their knowledge or insight to the jury selection" and denied the jury the opportunity "to see the interested individuals." What the jury saw instead was the "conspicuous" absence of the defendant's family. Because of the denial of the right to a public trial, prejudice would have been presumed had the issue been raised on appeal. Thus, prejudice was found and a new trial ordered.

***In re Personal Restraint Petition of Dalluge*, 100 P.3d 279 (Wash. 2004).** Appellate counsel was ineffective in rape case for failing to assert that the adult court had no jurisdiction to try and convict the defendant, who was seventeen years old at the time. The state initially charged the defendant with first degree rape, which automatically gave the adult court exclusive jurisdiction. The state later reduced the charges to second degree rape and a charge of third degree rape by complicity. Although these charges no longer resulted in automatic adult court jurisdiction and rested jurisdiction solely in the juvenile court unless the juvenile court declined jurisdiction "in the best interest of the juvenile or the public," the trial court did not remand to the juvenile court and the defendant was tried and convicted in adult court. Counsel's conduct was deficient and prejudicial in failing to raise this "meritorious issue." Because the defendant had since turned 18, the appropriate remedy was remand to the adult court for a hearing on whether declination by the juvenile court would have been appropriate. If so, the conviction would stand. If not, a new trial would be granted.

**2003:** ***Estevez v. Crosby*, 858 So. 2d 376 (Fla. Ct. App. 2003).** Appellate counsel was ineffective in aggravated battery case for failing to assert on appeal the issue of the trial court's erroneous self-defense instruction. The trial court instructed the jury that the defendant's use of force against the victim was not justifiable if the jury found that the defendant was attempting to commit, committing or escaping after the commission of an aggravated battery. This instruction is only to be given when the accused is charged with at least two offenses, the one for which the accused claimed self-defense as well a separate forcible felony. Although trial counsel did not object to this instruction, appellate counsel's conduct was deficient because counsel should have raised this issue as a fundamental error on direct appeal. Appellate counsel's failure to raise the issue in direct appeal prejudiced the defendant. As a result, the court reinstated the defendant direct appeal.

***Milliken v. Stewart*, 583 S.E.2d 30 (Ga. 2003).** Appellate counsel was ineffective in kidnaping case for failing to assert on appeal that the trial court had improperly intimated his opinion on the evidence and guilt of the accused. Because the trial court's actions were not harmless, the appropriate remedy was a new trial rather than a new appeal.

***Minor v. State*, 792 N.E.2d 59 (Ind. Ct. App. 2003).** Appellate counsel ineffective for failing to cite recent case establishing defendant's entitlement to 12-person jury (rather than 6) on felony count

**Capital Case*

of carrying a handgun without a license. While appellate counsel had already completed briefing, the controlling case was decided two months before the appeal was decided. Counsel's conduct was deficient in failing to read the Advance Sheets and bring the case to the court's attention. Prejudice established because reversal was required.

**Capital Case*

## VIII. POST-CONVICTION

### A. U.S. Court of Appeals Cases

**2018:** ***Richardson v. Superintendent Coal Township SCI*, 905 F.3d 750 (3d Cir. 2018).** In case involving numerous state court convictions, habeas relief granted on claim of ineffective assistance of post-sentencing counsel for failing to challenge the constitutionality of petitioner's waiver of counsel during sentencing. After petitioner had been convicted, he sought to fire his trial attorney during sentencing. The sentencing judge treated this as a waiver of the right to counsel without ensuring that the waiver was knowing and voluntary. Trial counsel, unsure whether or not he had been excused from representation, remained in the court during the second day of sentencing but did not say or do anything while petitioner represented himself. After sentencing, petitioner was appointed a new attorney who, pursuant to Pennsylvania law, could file post-sentencing motions and then an appeal. This new attorney filed a post-sentencing motion that failed to raise the waiver of counsel issue and thereafter filed an unsuccessful appeal. Petitioner then filed a pro se petition for post-conviction relief, raising a claim that the sentencing judge failed to inquire whether he knowingly and intentionally waived his right to counsel. Although post-conviction counsel was appointed, he abandoned that claim explaining to the court why he thought the claim was meritless. Petitioner filed a pro se habeas petition in federal court, raising a claim that his counsel was ineffective for abandoning him at the sentencing phase, that the court did not perform a sufficient inquiry as to the waiver of counsel, and that state appellate and post-conviction counsel were ineffective. The petition was denied and the Third Circuit denied a certificate of appealability. Petitioner then filed a Rule 60(b) motion which was denied and again the Third Circuit denied a COA. SCOTUS granted certiorari, vacated, and remanded in light of *Martinez*. The district court held an evidentiary hearing at which all three state lawyers testified. The district court again denied the 60(b) motion, declining to entertain petitioner's Sixth Amendment claim that the sentencing judge failed to conduct a colloquy because it did not consider it to be an IAC claim; finding no prejudice from the lack of counsel at sentencing; determining that *Martinez* does not apply to IAC of appellate counsel claims; and rejecting the IAC claim against state post-conviction counsel because there is no right to effective counsel on state habeas. The Third Circuit this time granted a COA to determine whether state post-conviction counsel's failure to raise post-sentencing counsel's effectiveness constituted cause for the procedural default of failing to raise the claim in state court. The Third Circuit held that (1) in Pennsylvania state court, the post-sentencing motions stage is a critical stage at which defendant is entitled to the effective assistance of counsel (and petitioner was denied that right); and (2) post-sentencing motions precede the notice of appeal, and they are thus part of the trial stage (the court held that the boundary between trial and appellate counsel falls at the effective date of the notice of appeal), so when a state post-conviction lawyer fails to raise a post-sentencing lawyer's ineffectiveness, the prisoner may raise that issue for the first time in the federal petition under *Martinez v. Ryan*. The Third Circuit concluded that petitioner established that the procedural default of the post-sentencing counsel IAC claim was caused by ineffectiveness of post-conviction counsel; that this ineffectiveness occurred in the first collateral proceeding in which the claim could be considered; and that the underlying claim of ineffectiveness of post-sentencing counsel was substantial. The sentencing judge conducted no colloquy whatsoever when petitioner terminated his trial attorney's representation. This issue

should have been raised in the post-sentencing motion, but counsel failed to do so, which was ineffective. If post-sentencing counsel had raised this issue, the proper remedy would have been to order a new sentencing hearing. Post-conviction counsel should have raised this issue, but instead he specifically told the court that it was meritless, which was also ineffective.

***Barnett v. Roper*, 904 F.3d 623 (8th Cir. 2018)** (1997 trial). Affirming grant of habeas relief on claim of ineffective assistance by trial counsel in failing, inter alia, to investigate and present information about petitioner's biological mother and her family, an issue not contested in the state's appeal. Also affirming the ruling that post-conviction counsel's ineffectiveness provided cause to overcome the procedural default of the trial ineffectiveness claim. Petitioner was convicted in Missouri state court of two counts of first degree murder, one count of first degree robbery, and two counts of armed criminal action based on the robbery and murder of his grandparents. A jury sentenced him to death. In state post-conviction proceedings, petitioner raised eight allegations of IAC, including that his penalty phase trial counsel failed to investigate and provide the jury with information about his biological mother, her family, and the environmental and genetic factors that affected his development. The Missouri courts denied the post-conviction motion on the basis that it was insufficiently pleaded. In federal habeas corpus proceedings, petitioner alleged that trial counsel was ineffective for failing to investigate and present information about petitioner's biological mother and her family. The district court and Eighth Circuit determined that the claim was procedurally barred for not having been adequately presented in state court. Thereafter, SCOTUS decided *Martinez v. Ryan*, but when petitioner moved for relief under Rule 60(b), the court denied it, ruling that *Martinez* was not retroactive and that the motion was actually a successive petition. Petitioner then filed a Rule 59(e) motion, and the district court ordered an evidentiary hearing on petitioner's claim of IAC at the penalty phase, concluding that the Rule 60(b) motion did not state a new claim for relief, but rather that the claim had never been addressed on the merits. Following the hearing, the district court concluded that petitioner established that his counsel was ineffective for failing to investigate and present mitigating evidence at the penalty phase. The state appealed. The Eighth Circuit affirmed the grant of relief. It noted that the district court properly found cause for the procedural default because state post-conviction counsel was ineffective by (1) insufficiently pleading the claim, (2) failing to follow specific state requirements for pleading in a post-conviction motion, and (3) choosing not to file a response when the state moved to dismiss. Notably, post-conviction counsel admitted to now taking care to follow the specific rules they violated in petitioner's case, including identifying witnesses with descriptions of their proposed testimony, showing that the witnesses are available to testify, and demonstrating that the witnesses would have been discovered at trial through proper investigation. The Eighth Circuit rejected the state's argument that the district court exceeded its jurisdiction in hearing evidence broader in scope than that limited to petitioner's biological background as initially pleaded, noting that the State had conceded to the expansion of the claim. The Eighth Circuit agreed that the Rule 60(b) motion was not a successive claim under 28 U.S.C. § 2244(b).

**2017:** ***Bey v. Superintendent,* Greene SCI, 856 F.3d 230 (3rd Cir. 2017), *cert. denied sub nom. Gilmore v. Bey*, 138 S.Ct. 740 (2018).** The Third Circuit granted relief in this Pennsylvania non-capital murder case, finding that trial counsel was ineffective for failing to object to an erroneous

jury instruction on eyewitness testimony, and that state post-conviction counsel's inadequate failure to assert that claim in state court constituted "cause" to overcome the resulting procedural default. Petitioner was charged with the shootings of two people, one fatal and one non-fatal. The "key witness" at his trial was a police officer, whose "certain and unequivocal" eyewitness identification of petitioner was the prosecution's strongest evidence. 856 F.3d at 233. The claim addressed by the Third Circuit arose when the trial court agreed to give a "*Kloiber* charge" concerning eyewitness testimony, then – without objection from trial counsel – gave a version of the charge that was "critically inconsistent with" state law. *Id.* at 234. "A proper charge under *Kloiber*," the Third Circuit explained, "informs the jury that it has the ultimate discretion of deciding whether to credit positive eyewitness testimony. Instead, the trial court's instruction essentially required the jury to accept positive eyewitness testimony as true by directing that 'testimony as to the identification may not be received with caution.'" 856 F.3d at 238 (emphasis by the court); *see also id.* at 239-40 ("The charge removed the discretion that the jury could otherwise have exercised that may have raised a reasonable doubt in the mind of one or more jurors about the identity of the shooter."). When petitioner later sought state post-conviction relief, his post-conviction counsel alleged that trial counsel had been ineffective for failing to object to three other aspects of the charge, but not the "may not" language targeted in the federal habeas petition that followed. On appeal from the denial of federal habeas relief, the Third Circuit accepted and agreed with petitioner's concession that the "specific ineffective assistance claim" he advanced was procedurally defaulted notwithstanding the state court's adjudication of three other claims based on the same defective jury charge. The court then examined the merits of the ineffective assistance of trial counsel claim to determine whether it was "substantial," such that post-conviction counsel's failure to raise it constituted "cause" under *Martinez v. Ryan*, and if so, whether it required a grant of habeas relief. Both inquiries were resolved in petitioner's favor. After explaining that "the faulty *Kloiber* instruction deprived [petitioner] of his due process right to have the prosecution prove every element beyond a reasonable doubt," 856 F.3d at 241, the Third Circuit held that trial counsel performed deficiently in failing to object: "Clearly, this instruction could be reasonably understood as requiring the jury to accept an eyewitness's identification of [petitioner] as the shooter. Indeed, that was what the jurors were told. We can think of no strategic reason for defense counsel not to object to a charge that raises such due process concerns." *Id.* With regard to prejudice, the court rejected the state's contention that the prosecution had presented an "overwhelming case," explaining that, "[a]t [petitioner's] first trial, nearly identical evidence resulted in a hung jury," and that two jury questions at petitioner's second trial (which yielded the judgment at issue here) indicated that the officer's eyewitness "testimony may well have been a source of concern." *Id.* at 243. Because the erroneous charge left the jury with "no room ... to conclude that [the officer], though certain, was wrong," the court added, "the prosecution was unconstitutionally relieved of its burden of proving [petitioner] was the shooter beyond a reasonable doubt," and petitioner was prejudiced by trial counsel's failure to object. *Id.* Finally, returning to the question of "cause" under *Martinez*, the Third Circuit concluded that petitioner had made the requisite showing. *See* 856 F.3d at 244.

**2016:** ***Sullivan v. Secretary, Florida Dept. of Corrections*, 837 F.3d 1195 (11th Cir. 2016)**. After upholding the district court's determination that inadequate assistance of post-conviction counsel constituted "cause" to overcome procedural default, the Eleventh Circuit affirmed the grant of

relief on the uncontested merits of petitioner's claim that trial counsel was ineffective for advising him to reject a generous plea offer in favor of going to trial with a defense which – unbeknownst to trial counsel – had been legislatively abolished. The charges against petitioner arose out of his involvement in a high speed police chase while under the influence of (and in possession of) cocaine. Although he faced a thirty year sentence if convicted, the prosecution offered twelve years in exchange for a guilty plea. Trial counsel advised petitioner to reject the offer on the belief that he would likely be acquitted under a defense of voluntary intoxication, and petitioner followed that advice. Near the end of trial, however, petitioner and his counsel learned for the first time that voluntary intoxication had been legislatively eliminated as an available defense five years earlier. As a result, petitioner was left with no viable defense, found guilty, and sentenced to thirty years. At an evidentiary hearing on the resulting ineffectiveness claim (which had been rejected as untimely by the state courts), trial counsel testified that he had been ignorant of Florida's abolition of voluntary intoxication as a defense, that petitioner (whom he had represented before) always followed his advice, and that, had he been properly informed on the law, he would have advised petitioner to accept the plea offer. The trial prosecutor also testified, confirming that a plea offer had been made. The federal magistrate credited the testimony of trial counsel and petitioner, and recommended that relief be granted, and the district court adopted the recommendation and granted the writ. On appeal, the Eleventh Circuit noted that the only matter challenged by the state was the district court's determination that petitioner had shown "cause" to overcome default, resolved that issue against the state, and affirmed the grant of relief.

### B. U.S. District Court Cases

**2018:** ***Jones v. Ryan*, 327 F. Supp. 3d 1157 (D. Az. 2018)** (1995 trial)**.** Trial counsel was ineffective in failing to investigate and present evidence to counter the prosecution's theory of the case and post-conviction counsel's failure to raise the related claims provided cause under *Martinez* to excuse the procedural default of the trial IAC claims. Petitioner was convicted in Arizona state court of engaging in an act of sexual intercourse with a four-year old victim, causing physical injury to her by striking her abdominal area and causing a rupture to her small intestine under circumstances likely to produce death or serious bodily injury, causing physical injury to her by bruising her face and ear and causing a laceration to her head, causing her to be placed in a situation where her health was endangered under circumstances likely to produce death or serious physical injury, and felony murder. The penalty phase judge found the existence of two aggravating factors: the murder was especially cruel and the victim was under the age of 15, and found no mitigating factors sufficiently substantial to call for leniency. The judge sentenced petitioner to death. The trial IAC claims at issue were not raised in state post-conviction proceedings and were therefore considered procedurally defaulted. The district court had initially denied relief on the claims because of the defaults but the Ninth Circuit post-*Martinez* remanded for reconsideration of whether there was cause to excuse the procedurally default, stating that they were "substantial." Petitioner alleged that his trial counsel was ineffective for failing to adequately investigate the police work, medical evidence, and timeline between the victim's fatal injury and her death. The district court found that petitioner's inexperienced trial counsel was aware that the timing in which the victim sustained her injuries was a critical part of the state's case, because the state's theory was that the victim sustained her fatal injuries during a time when she was alone in a van with

petitioner, and counsel also was aware that witnesses had described incidents in the few days before the victim's death during which she may have been injured by third parties, but counsel made no effort to investigate the timing of the victim's injuries. Evidence obtained, developed, and presented during federal habeas proceedings demonstrated that many of the victim's injuries were older than the time period within which the state argued she had been harmed, that her fatal injuries certainly predated that period, and that many of the injuries observed at autopsy may have arisen during the dying process or after her death while she was being examined. Counsel had access to autopsy slides but did not provide them to the forensic pathologist he consulted. Counsel's performance was deficient. His failure to investigate was not a strategic decision; he admitted as much in habeas proceedings and stated he "possibly just assumed Petitioner was guilty based on the State's version of the case." Counsel not only did not consult with his own experts about the timeline, but he also failed to cross-examine the state's experts and witnesses about the injury timeline. 327 F. Supp. 3d at 1205. The district court further found that trial counsel had information that the victim may not have been assaulted and raped by petitioner in his van, and knew that the state was going to present an interpretation of the blood evidence at trial. Therefore it was reasonably necessary for him to investigate the implications of the blood evidence presented at trial. Counsel's failure to do this was objectively unreasonable under prevailing professional norms. In addition, trial counsel did not ask for funding for investigators and experts, even believing that additional funding would have been granted had it been requested. Trial counsel's deficient performance was prejudicial at the guilt phase; the new evidence presented in habeas proceedings would have presented an extremely different evidentiary picture from what the jury heard at trial, both with regard to when the victim sustained her injuries and with regard to who inflicted them. Much of the evidence presented at trial linking the victim's bruises to the day before she died, when she was alone with petitioner, was scientifically unsupported and untrue. "[T]he evidentiary hearing in this case has demonstrated that the police investigation was colored by a rush to judgment and lack of due diligence and thorough professional investigation; effective counsel would have brought this to the jury's attention, casting further doubt on the strength of the State's case." 327 F. Supp. 3d at 1208-09. The district court found that petitioner had established prejudice overall and cumulatively even though he could not prove deficient performance and/or prejudice as to some of his IAC subclaims. Post-conviction counsel's performance was also ineffective. Counsel lacked the experience to satisfy Arizona's requirements for appointment of capital post-conviction counsel. Counsel requested funding for investigators and experts through the wrong mechanisms, even though the court advised him of the proper mechanism. His "decision to forego a properly grounded request for an investigator or for experts to assist him with the investigation of the medical time of injury evidence and the bloodstain evidence was based on either ignorance of the requirements of the appropriate funding state or on counsel's mistaken assumption of the Arizona courts' unwillingness to fund experts, and was not a reasonable strategic decision." 327 F. Supp. 3d at 1216 (citing *Hinton v. Alabama*). Post-conviction counsel interviewed only one person, after he prepared the final post-conviction petition, and otherwise made no effort to identify or investigate any potential claim that relied on the establishment of facts outside the record. This was true even though counsel questioned whether trial counsel had fully investigated petitioner's case. Post-conviction deficient performance was prejudicial as the trial counsel guilt phase IAC claim was meritorious.

***Sasser v. Kelley*, 321 F. Supp. 3d 900 (W.D. Ark. 2018)** (1994 sentencing; 1995-1997 post-conviction proceedings)**.** Trial counsel in this Arkansas capital case was ineffective in failing to

adequately develop and present mental health evidence and post-conviction counsel's failure to properly raise this claim provided cause under *Martinez* and *Trevino* to overcome the procedural default of the claim. Petitioner was convicted of capital murder and sentenced to death for a 1993 homicide of a clerk at a convenience store. In state post-conviction proceedings, counsel was performing work on petitioner's case when her employer, the Arkansas Capital Resource Center, ran out of government funding and was closed. Post-conviction counsel filed a motion to be appointed individually to represent petitioner, but that motion was not ruled on for a year, and when it was, counsel was permitted to bill up to $1000 to cover travel, service of subpoenas, witness fees, and attorney fees. Although she "did significant work on the case" given these restraints, she did not do "enough to qualify as reasonable"; she did not gather vital records, did not meet with family members individually, did not become aware that petitioner did not graduate high school or that he was deemed mentally unqualified to enlist in the military, did not hire a mitigation expert, and did not hire a mental health expert. Given the circumstances facing post-conviction counsel, not all of her deficiencies were the result of personal failings. Her deficiencies were not reasonable strategic choices, but rather were another facet of the systemic operation of Arkansas state proceedings to deny capital defendants 'meaningful review of a claim of ineffective assistance of trial counsel.'" 321 F. Supp. 3d at 917. The deficient performance was prejudicial, because the underlying claim of trial counsel ineffectiveness was meritorious. Trial counsel did not start investigating until 2 ½ weeks before the capital trial; counsel hired a family counselor who was not a qualified psychologist or psychiatrist, because she had done an evaluation for counsel before; counsel did not think that mental health experts were important or credible; he gave the family counselor no psychosocial history or referral questions; and as a result the family counselor was not qualified to perform the tests she gave, overestimated petitioner's intellectual functioning, and did not discover that he had organic brain damage. The evidence that could have been presented was that petitioner's father died when he was two years old and the family received only meager benefits and lived in poverty following his death; his mother was depressed during his childhood; petitioner had deficits in intellectual functioning from an early age and was socially promoted through school; as a result he failed to qualify for military service and attempted to cover up that failure; and petitioner suffered from moderate neurological impairment.

**2017: ****Deck v. Steele***, 249 F.Supp.3d 991 (E.D. Mo. 2017).** Trial counsel was ineffective for failing to argue that defendant was denied a fundamentally fair penalty trial because of delay not attributable to him and post-conviction counsel was ineffective in not raising the claim. Defendant was originally tried and sentenced to death in 1998. His first death sentence was overturned in state post-conviction; a second penalty-phase trial took place in 2003 and also resulted in a death sentence. The United States Supreme Court granted certiorari and reversed the sentence, finding defendant's visible shackling violated his constitutional right to due process. *Deck v. Missouri*, 544 U.S. 622 (2005). Upon remand, a third penalty phase proceeding was held in 2008 and the jury again recommended a death sentence. In *Betterman v. Montana*, 136 S. Ct. 1609 (2016), the United States Supreme Court held that a criminal defendant's speedy trial right does not apply once he has been convicted, but that he may have other recourse "'including, in appropriate circumstances, tailored relief under the Due Process Clause of the Fifth and Fourteenth Amendments.'" *Deck*, 2017 WL 1355437 at *58 (quoting *Betterman*, 136 S. Ct. at 1612)). The Supreme Court noted considerations relevant to such a claim may include the length of delay, the reason for delay, the defendant's diligence in requesting expeditious sentencing, and prejudice. In

this case, these factors weighed in defendant's favor because: (1) "the ten-and-a-half-year delay between [defendant's] conviction and his final penalty-phase trial triggers the remainder of the due process analysis, especially given the negative implications such a delay could have on a capital defendant's constitutionally protected right to adequately provide the sentencing jury with mitigating evidence for its consideration in determining the appropriate sentence"; (2) the reasons underlying the delay weigh against the government because some of the delay was caused by defendant's previous trial counsel's ineffective assistance, which must be "imputed to the State" and additional delay was caused by the State's requests for trial continuances and the prosecuting attorney's disqualification for an undisclosed conflict of interest; (3) the diligence factor does not weigh heavily in favor of either defendant or the State; defendant did object to one of the State's requests for a continuance but also made one limited and reasonable continuance request of his own; and, (4) the prejudice factor weighs heavily in favor of defendant because his inability to present substantial mitigation evidence was directly attributable to the passage of many years' time. *Deck*, 2017 WL 1355437 at *58-60. Thus, the lengthy delay between defendant's original conviction in February 1998 and his final sentencing trial in September 2008 caused his mitigation evidence to be unavailable on account of its loss or destruction and because of "witness fatigue," thereby depriving him of his constitutional right to adequately present mitigating evidence to the jury and rendering his third sentencing trial fundamentally unfair. Trial counsel at the third sentencing proceeding were ineffective because they were aware that defendant could not present substantial mitigation evidence due to the passage of time, but failed to raise this claim. Prejudice was established because defendant was precluded from presenting substantial mitigation, which was not his fault, and there is a reasonable probability that he would not have been sentenced to death if his counsel had raised this constitutional challenge. Indeed, there is a reasonable probability that defendant would not have even undergone a third penalty-phase proceeding. Post-conviction counsel was also ineffective for failing to raise this claim. Although post-conviction counsel challenged trial counsel's failure to present certain mitigation evidence, they did not explore the "why" behind this failure. Instead, post-conviction counsel asserted that all the witnesses that should have been called by trial counsel were available and willing to testify. The state habeas court found that this assertion was simply not true and instead, many witnesses were hostile, uncooperative or could not be located. Had post-conviction counsel adequately investigated why trial counsel did not call a number of witnesses, they would have discovered the basis for this meritorious claim. Thus, post-conviction counsel's performance was deficient and prejudice is established for the same reasons.

***Thomas v. Kelley*, 2017 WL 1239148 (W.D. Arkansas, March 31, 2017)** (sentencing in 2005). In this capital case, trial counsel was ineffective for failing to discover and present extensive mitigating evidence at sentencing, including: a dysfunctional childhood filled with alcohol abuse, drug abuse, physical abuse, sexual abuse, violence and poverty; voluminous social history records that trial counsel never obtained; extensive evidence of brain damage, possibly from exposure to alcohol in utero; and, evidence of mental illness, including depersonalization disorder, amnesia and dissociation. Trial counsel was experienced, but the team was dysfunctional. Few mitigation witness interviews were conducted and many were conducted ineffectively, just prior to trial, in groups and over the telephone. Trial counsel unsuccessfully sought a continuance detailing all the things they still needed to complete. As a result of counsel's lack of preparation, the mitigation

case was entirely unconvincing and failed to tell defendant's whole life story. Prejudice was established because the un-presented mitigation evidence supports a reasonable probability of a life sentence when weighed against the aggravating circumstances presented at trial. Moreover, post-conviction counsel was ineffective as well because they: (1) performed very little, if any, review of trial counsel's file; (2) failed to request funding for an investigator or mitigation specialist; (3) did not consult with any experts or interview any mitigation witnesses; and, (4) failed to conduct any timely or meaningful interviews of trial counsel. "[U]nder prevailing standards post-conviction counsel has the same duties as trial counsel with respect to investigation and cannot rely on the previously compiled record but must conduct a thorough independent investigation." *Id*. at *25 (citing the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, and expert testimony from Sean O'Brien). Accordingly, defendant's ineffective-assistance-of-trial-counsel claim was not effectively raised during the state post-conviction proceedings and defendant was prejudiced because post-conviction counsel failed to raise a meritorious claim.

**2016: *_McLaughlin v. Steele_, 173 F. Supp. 3d 855 (E.D. Mo. 2016)** (tried and sentenced in 2006). Under AEDPA, counsel ineffective in capital sentencing for failing to investigate, retain, and present the testimony of a qualified psychiatrist. Without independent investigation of the expert's credentials, counsel retained a psychiatrist based on the recommendation of his mitigation specialist, who had seen the psychiatrist speak at a capital defense seminar. After examining the defendant for at least seven hours, the psychiatrist opined, among other things, that the defendant was under the influence of extreme mental or emotional distress at the time of the murder and that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law were substantially impaired at the time of the murder. While the jury was out deliberating on guilt-or-innocence, the retained psychiatrist disclosed to defense counsel that he had engaged in professional misconduct during medical school that might subject him to serious impeachment. The next day in opening statements in the sentencing phase, defense counsel told the jury that it would hear from the psychiatrist and summarized in detail his expected testimony, but then counsel decided not to call him to testify because of the likely impeachment. Prior to closing arguments in sentencing, counsel informed the trial court that he did so because after the opening he had done an internet search of the retained psychiatrist's name and quickly found information about the expert's prior misconduct. He then met with co-counsel and their bosses in the public defender office and decided not to call the expert because the potential for impeachment might seriously harm the defendant's case. Instead, in sentencing, counsel presented two mental health experts, who had evaluated the defendant at age 9; the testimony of a psychologist (Mark Cunningham, Ph.D.), who had reviewed the defendant's records and interviewed family members but who had not interviewed the defendant; and a mental health expert who treat the defendant months before the murder. Because this issue had not been raised until the appeal of the denial of state post-conviction relief, the issue was procedurally defaulted. Thus, the court first considered whether "cause" and "prejudice," based on post-conviction counsel's ineffectiveness, excused the default under *Martinez*. This standard was met because the court found the underlying claim of ineffective assistance of trial counsel to be "substantial." Likewise, the court found that post-conviction counsel's conduct was deficient in that counsel was aware of the issue simply from reading the trial transcripts, as trial counsel had expressed concern to the trial court that he may have

been ineffective. In addition, post-conviction counsel intended to raise the issue, but unintentionally omitted the issue. Thus, there was no tactical decision for the omission. The prejudice analysis was intertwined with the sentencing prejudice discussed below. On the issue of trial counsel's ineffectiveness for failing to present the testimony of a psychiatrist, which had been raised, the state court held that counsel's decision not to present testimony from the retained psychiatrist was reasonable trial strategy. The state court also found no prejudice because the psychiatrist's testimony would have been largely cumulative to Dr. Cunningham's testimony. The District Court held that counsel's "ultimate decision" not to call the retained psychiatrist to testify was reasonable.

> But counsel's representation during trial is not the extent of his constitutional duty to his client. Counsel should never have been in the situation of deciding, at the last minute, between calling an expert with a serious truthfulness problem and calling no expert at all.
>
> It is, of course, common practice for capital defense attorneys to rely on mitigation specialists to propose potential experts, whom they may eventually call to testify in mitigation. But in making the decision whether to retain a potential expert, counsel must do something beyond reviewing what the expert says about himself on his resume.

*Id*. at ___ (citations omitted.) Here, counsel did nothing more than review the resume and, as such, "had not done the groundwork reasonably necessary to make a strategic decision" about whether to hire the expert. This is not a case about failing to engage in expert-shopping. It is instead, a case where counsel failed "to investigate the expert he did hire and to reasonably develop the strategy he had settled on." Counsel's conduct was deficient in failing to conduct "some investigation" of the expert prior to his retainer. He could have easily done an internet search, spoken to other lawyers who had previously hired the expert, or even asked the expert about potential impeachment. "But he did none of these things." This was not strategy, as "[n]othing in the record suggests any strategic rationale, no matter how farfetched, for failing to conduct this investigation." Counsel's conduct was also established as "there was no built-in redundancy to counsel's penalty-phase strategy. . . . None of the other experts that were presented by the defense presented opinions based on current evaluations of the Petitioner or his mental state at the time of the crime." Moreover, the State "emphasized this gap repeatedly in its closing argument." Thus, the jury heard no testimony about two statutory mitigating factors that were present. The deficiency in counsel's conduct was heightened because, "even after" counsel became aware of the problem, "counsel went on to make an opening statement wherein he described [the psychiatrist's] anticipated testimony in detail, mentioning him by name six times." Even if there was not constitutional error before, the "decision to plow forward with an unedited opening statement would have magnified the error into one of constitutional proportion." Prejudice was also established. A competent, qualified psychiatrist could have opined that the defendant suffered from borderline personality disorder with narcissistic features and intermittent explosive disorder and that two statutory mitigating factors were present. This "would have comprised the only evidence from a mental-health expert bearing on Petitioner's psychological state at the time of the murder. The defense also would not have broken its promise to the jury about what it would hear as mitigation evidence." This likely would have made a

difference in what the jury "obviously found . . . to be a close case," as the jury "rejected three statutory aggravators and ultimately deadlocked" sending the decision to the trial court, which imposed a death sentence.

***McNish v. Westbrooks*, 149 F. Supp. 3d 847 (E.D. Tenn. 2016)** (trial and sentencing in 1984). Counsel ineffective in capital sentencing for failing to adequately investigate and present mitigating evidence. This issue was first raised on appeal of the denial of state post-conviction. The District Court held the issue was procedurally defaulted but the Sixth Circuit remanded following the decisions in *Martinez v. Ryan* and *Trevino v. Thaler*. On remand, the District Court held that post-conviction counsel's conduct was deficient in failing to assert trial counsel's ineffectiveness and the issue was "substantial." Therefore, the procedural default was excused. Trial counsel's conduct was deficient because trial counsel "failed to explore a wealth of evidence that was available" concerning the defendant's social, mental, and family history. While counsel had available records that indicated "a history of attempted suicides, depression, blackouts, and drug abuse," as well as indications of the defendant's traumatic childhood, counsel "chose not to investigate petitioner's family history any further because of their decision to pursue a reasonable doubt defense." This decision was not a valid strategic decision "because counsel did not fulfill their obligation to independently investigate this evidence in order to make an informed decision." Moreover, the decision to "limit their investigation" was not reasonable, "particularly considering that counsel had a general knowledge of the difficulties of Petitioner's family history." Prejudice was established. "The sum of the testimony portrayed Petitioner as a good-hearted, tender, and compassionate person who was not violent and loved his family and friends," which was "undermined by the nature of the crime for which Petitioner had been convicted." If counsel had adequately investigated and presented the evidence, the jury would have heard evidence of the "degenerative environment Petitioner grew up in" with parents that ran a bootleg business in a dry county. The petitioner was physically and sexually abused by his parents, their customers, and his older siblings. He became addicted to prescription medications after back and head injuries. He attempted suicide and was admitted to a mental health center where he was diagnosed with "hysterical personality and drug dependence."

**2015:** ***Bowers v. McFadden*, 153 F. Supp. 3d 875 (D.S.C. 2015).** Under AEDPA, counsel ineffective in failing to challenge imposition of mandatory life sentence under "two strikes" statute. The defendant was convicted of common law assault with intent to ravish in 1976. In 2004, he was convicted of armed robbery. In sentencing, the state asserted that the "two strikes" statute was applicable. Under the statute, only a "most serious offense" qualifies as a strike. Qualifying offenses, not including common law assault with intent to ravish, are listed in the statute, but some other criminal sexual conduct offenses (CSC) are. The CSC rubric was established by statute in 1977 and includes varying degrees of offense. First and second degree CSC offenses do qualify as a "most serious offense" under the two strikes law. Other CSC offenses do not. Trial counsel's conduct was deficient because counsel failed to conduct any research which would have revealed that common law assault with intent to ravish included only two elements: (1) an assault by a male on a female, (2) with the intent to rape. No aggravated circumstance, such as force or coercion, was required. *State v. Lindsay*, 583 S.E.2d 740 (2003), which was decided just a year before trial, was all the research counsel would have needed. Nonetheless, in sentencing trial counsel conceded

that assault with intent to ravish was "the same basically" as CSC 1st or 2nd and the mandatory life sentence was imposed. Prejudice was clear. Post-conviction counsel failed to raise the issue of trial counsel's ineffectiveness until the appeal to the Court of Appeals from the denial of post-conviction. The state court recognized that assault with intent to ravish may not be a "most serious offense" for purposes of the "two strikes" statute but declined to reach the merits because of the procedural default. After reviewing the elements of the offenses, the federal court also rejected the state's argument that the underlying facts of the assault with intent to ravish qualified as a "most serious offense." The indictment did not contain sufficient information to reach this conclusion and the court held that it would be improper to rely on an affidavit from an arresting officer. South Carolina courts had never relied on this type of information and federal courts would not do so in the analogous circumstance of the Armed Career Criminal Act (ACCA) where only "conclusive judicial record[s]" could be considered. Finally, under *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), the federal court held that it could reach the merits of the trial ineffectiveness claim, despite the state court procedural default, because the claim "is a substantial one that state PCR counsel was ineffective in failing to raise the issue and such failure was obviously prejudicial."

**2014:** ***Roberts v. Howton*, 13 F. Supp. 2d 1077 (D. Ore. 2014).** Under AEDPA, counsel was ineffective in manslaughter case for advising the defendant to plead guilty without adequately investigating beforehand. While this issue had not been asserted in state post-conviction, the procedural default was excused under *Martinez*. The defendant was convicted of killing a woman, who was involved with the defendant's ex-lover. The state's theory was that she had been killed at the defendant's home and then her body was dumped in the park where it was found. The state's case was premised upon circumstantial evidence involving the volatile lesbian "love triangle," the defendant's history of domestic violence, incriminating threats made by the defendant prior to the murder, and cell phone tower evidence. Counsel knew that the state's case relied significantly on the cell tower evidence and had filed a motion for funding for an expert on this issue and filed a motion to suppress this evidence. While the defendant had been prepared to go to trial, she changed her plea less than a month prior to the scheduled trial based on defense counsel's advice. Counsel advised the plea because the prosecution informed defense counsel that the cell tower evidence would place the defendant in the vicinity of the park close to the time the pathologist believed the murder occurred. The prosecutor testified that he had a phone call with an employee of Verizon Wireless, who said that his "preliminary" review of "the call data 'code'" might show that the defendant was near the park. After that he met with the defense team and shared this information. The lead defense counsel offered an affidavit in state post-conviction asserting that he had investigated and his investigator reached the same conclusion. The defense investigator and co-counsel, however, disputed this information. Co-counsel had contacted an expert to say that the cell tower evidence could be disputed but the expert was never retained. Counsel's conduct was deficient in relying on the state's representation of the evidence without adequately investigating. Counsel's conduct was "particularly troubling" in light of the fact that the state's representation was admittedly based on "preliminary" information about what "might" be established. Prejudice was also established as there was a reasonable probability that the defendant would not have pled guilty if counsel had adequately investigated. This was clear in that several defense experts, and even the state's expert in the habeas proceedings, agreed that the state could not have pinpointed the defendant's location based on the cell phone tower data evidence available.

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### C. State Court Cases

**2018:** ***Allison v. State*, 914 N.W.3d 866 (Iowa 2018).** The Iowa Supreme Court, after a lengthy recitation of SCOTUS cases, cases of other states, and Iowa cases, determined that Iowa law permits a "variant of the equitable doctrine employed in *Martinez* [*v. Ryan*]" "[i]n order to avoid the difficult constitutional position that would result in denying a remedy where defense counsel allegedly provided ineffective assistance at trial and post-conviction counsel is ineffective in raising that claim," and held that where a post-conviction review petition alleging ineffective assistance of counsel was timely filed under state law and a successive PCR petition alleging post-conviction counsel was ineffective in presenting the ineffectiveness of trial counsel claim, the timing of the filing of the second PCR petition relates back to the timing of the filing of the original PCR petition. 914 N.W.3d at 891. The "application of the relation-back doctrine ensures that the right to effective assistance of counsel in PCR is not cut off by the running of the statute of limitations." *Id*.

***Edward M. v. Commissioner of Correction*, __A.3d.__, 186 Conn.App. 754 (Conn. App. Dec. 25, 2018).** In case where petitioner was convicted of sexual assault in the first degree and risk of injury to a child, based upon petitioner's alleged sexual abuse of his daughter, trial counsel was ineffective in failing to present evidence to corroborate his assertion that he was circumcised, which conflicted with testimony presented by the prosecution. Counsel in petitioner's first habeas proceeding was also ineffective in failing to challenge the omission by trial counsel. In this case, there was no physical evidence of sexual abuse and the state admitted during closing argument that the case was a contest of credibility between petitioner and his daughter. The second habeas court hearing petitioner's case found that petitioner's daughter had described his penis as having skin on it and wrinkles, and she and her mother both testified at trial that he was uncircumcised. Both petitioner and his girlfriend at the time testified that he was circumcised. Trial counsel did not offer available medical records, testimony from a neutral third party or medical witness, or photographs of the petitioner's penis. During deliberations, the jury sent a note asking why such evidence had not been presented. The second habeas court granted relief to petitioner, which the state appealed. Under Connecticut law, "[t]he use of a habeas petition to raise an ineffective assistance of habeas counsel claim, commonly referred to as a habeas on a habeas, was approved by our Supreme Court in *Lozada v. Warden*, 223 Conn. 834, 613 A.2d 818 (1992)." In that case, the Connecticut Supreme Court had determined that the statutory right to habeas counsel includes an implied requirement that habeas counsel be effective. The state argued that the habeas court improperly determined that evidence of whether petitioner was circumcised at the time of trial, years after the alleged abuse, was relevant and admissible at trial, disregarded trial counsel's tactical decision to present evidence of petitioner's circumcised penis only through testimony, and relied on trial counsel's admission that failing to present the medical evidence was a mistake. The Appellate Court of Connecticut affirmed the habeas court's grant of relief, finding that the photographs and medical evidence of petitioner's circumcised penis at the time of trial met the extremely low standard for relevance, even if they did not affirmatively prove that petitioner was circumcised at the time of the alleged abuse. Trial counsel's failure to present this evidence was not a tactical decision; he admitted that he did not consider taking a photograph or having some appropriate person view the petitioner's circumcised penis and testify. Trial counsel admitted that

he was distracted from this issue by other evidence in the case and missed the importance of the medical records. Habeas counsel failed to raise this at petitioner's first habeas trial even though petitioner had included this claim in his pro se petition, and even though trial counsel urged habeas counsel to raise this issue. The failure to present the evidence was prejudicial – given that the circumcision issue was the major point of dispute at the trial, there is a reasonable probability that further evidence of the petitioner's circumcision would have caused a different result. The fact that the jury asked this question, did not receive an answer, and then convicted petitioner is significant.

**2017:** ***Kaddah v. Com'r of Corrections*, 153 A.3d 1233 (Conn. 2017).** Because there is a statutory right to assigned counsel in a second habeas proceeding, and that necessarily includes the right to competent counsel, Connecticut common law "authorizes a third habeas petition as a proper vehicle to vindicate that right," i.e., a third habeas petition can properly allege a claim of ineffective assistance by second habeas counsel.

**2106:** ***People v. Groszek*, 54 N.E.3d 982 (Ill. App. Ct. 2016).** A defendant's right to the reasonable assistance of post-conviction counsel applies to both appointed counsel and privately retained counsel. Here, retained post-conviction counsel was ineffective in his raising of challenges to plea counsel's performance. Although deficiencies were alleged, prejudice was not. "The complete omission of the second prong of the *Strickland* analysis from the amended petition and the lack of oral argument in support of this prong was unreasonable. Without this necessary allegation and argument, the amended petition could never satisfy the 'substantial showing' of ineffective assistance required to advance the petition to an evidentiary hearing."

**2013:** ***Grayson v. State*, 118 So. 3d 118 (Miss. 2013).** "[B]ecause this Court has recognized that [post-conviction relief] proceedings are a critical stage of the death-penalty appeal process at the state level, today we make clear that PCR petitioners who are under a sentence of death do have a right to the effective assistance of PCR counsel" under state law.

***State v. Quixal*, 70 A.3d 749 (N.J. Sup. Ct. App. Div. 2013).** "[D]efendants have a State constitutional right to counsel when raising ineffective assistance of trial counsel for the first time, whether raised on direct appeal or by way of PCR."

**2012:** ***Allen v. LeMaster*, 267 P.3d 806 (N.M. 2011).** Under state criminal rules, it was improper for the post-conviction court to order the capital defendant to testify by deposition or to have his habeas petition dismissed as a sanction.

***Keough v. State*, 356 S.W.3d 366 (Tenn. 2011).** The court erred in capital post-conviction proceedings in denying the petitioner's motion to limit the cross-examination of petitioner, which resulted in the petitioner declining to testify in support of his claims of ineffective assistance of counsel. Under a state rule, petitioner was entitled to have the scope of cross-examination limited to supporting "the allegations of the petition" or the state's rebuttal of the allegations. Thus, petitioner's motion to preclude cross-examination "related to the factual allegations of the criminal charges for which he was convicted" should have been granted. Here, lead counsel was physically

unable to testify. Co-counsel could not "recall details of the representation." Thus, "Petitioner's testimony about the factual allegations supporting his claim of ineffective assistance of counsel was critical to his ability to prove his claim of ineffective assistance of counsel by clear and convincing proof." Remanded to allow petitioner to testify with cross limited to the relevant issues.

***Lapointe v. Commissioner of Correction*, 53 A.3d 257 (Conn. Ct. App. 2012).** Counsel ineffective in first post-conviction proceeding for failing to pursue *Brady* claim. The defendant, who suffered from Dandy-Walker's Syndrome, which made him "slow and unsteady of his feet"and left him incapable of lifting heavy objects, was convicted of murdering his wife's 88-year-old grandmother, who lived a 10-15 minute walk from his home. The defendant called 911 at 8:27 p.m. to report a fire at the victim's apartment. She had been stabbed, sexually assaulted, and strangled. She died of a combination of asphyxia by strangulation and smoke inhalation. The murder was unresolved for more than two years before the case was reassigned to Detective Ludlow, who had previously been a crime scene evidence officer. During the initial investigation, Ludlow had made notes after speaking with two state fire marshals that indicated the fire had been burning for a minimum of 30-40 minutes before firefighters arrived at the scene. The defendant's wife (who was divorced by the time of trial) had informed police that the only time the defendant was out of her sight the night of the murder was between 6:15-7:00 p.m. Trial counsel did not call her as a witness as he was unaware of the Ludlow note and the importance of this information to the defendant's alibi defense. Counsel also did not obtain an arson expert because he was unaware of the notes. Even if the fire could have been set in the 45 minute window unaccounted for by the ex-wife (as state experts testified), the facts of the crimes, including walking to and from the scene, left a reasonable probability that the result of the trial would have been different if the Ludlow notes had been disclosed to the defense. While the second habeas court found the state's expert to be more credible, "[i]f the Ludlow note had been disclosed to trial counsel, however, it would have been the responsibility of the jury and not the court to weigh the credibility of the arson experts."

**2011:** ***Lado v. State*, 804 N.W.2d 248 (Iowa 2011).** Post-conviction counsel constructively denied defendant the right to counsel. The defendant filed a pro se petition for postconviction relief. The court appointed counsel and ordered counsel to amend the application within 60 days if necessary or the case was subject to dismissal for failure to prosecute. Counsel filed a motion but did not respond to the state's answer and motion for summary judgment, did not amend the application, and did not move to extend the time file. Thus, the case was dismissed for failure to prosecute. The court held that the statutory right to counsel implied the right to "effective assistance." Counsel's failures amounted to a denial of counsel, which was a structural error rendering the proceeding "presumptively unreliable."

***Ex parte Medina*, 361 S.W.3d 633 (Tex. Crim. App. 2011).** New state habeas counsel appointed due to counsel's deliberate failure to submit an application for writ of habeas of corpus that contained sufficient specific facts as required by clear state statute and case law. Counsel simply submitted an application which stated factual and legal conclusions, which resulted in dismissal of the application. Counsel's conduct was deficient because he failed to file a cognizable writ application not because of incompetence but because of counsel's "misplaced desire to challenge the established law at the peril of his client." In short, "[b]y all appearances, counsel has thrown his

client under the bus." Counsel held in contempt and denied compensation. New counsel appointed with 180 days to file.

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***State v. Hicks*, 986 A.2d 690 (N.J. Super. Ct. App. Div. 2010).** Appointed post-conviction counsel failed to adequately prosecute the post-conviction petition. The petitioner submitted a pro se petition and brief asserting two issues and counsel was appointed. Counsel argued those two issues but demonstrated a "fundamental ignorance of the salient facts underpinning defendant's conviction." Counsel also did not file a brief in support of the petition or even personally and independently review the case to determine whether other grounds for relief were available. The relief was not based on Strickland or a constitutional standard but was based instead on state case law and court rules.

**2008:** ***Taylor v. State*, 882 N.E.2d 777 (Ind. Ct. App. 2008).** Post-conviction counsel's conduct was deficient and in violation of due process under state law in felony murder case. The defendant was jointly tried with two co-defendants. One co-defendant's conviction was reversed on direct appeal based on argument and finding of fundamental error by the trial court in failing to instruct on the elements of the underlying felony of robbery. The defendant asserted ineffective assistance of trial and appellate counsel in post-conviction proceedings for the failure to assert this same error. Post- conviction counsel presented no evidence or argument other than providing a copy of the co- defendant's direct appeal decision and asserting that it was binding on the trial court. Under state law, this was deficient, such that the defendant "was deprived of a procedurally fair hearing."

**2006:** ***Menzies v. Galetka*, 150 P.3d 480 (Utah 2006).** Post-conviction counsel ineffective in capital case for "willfully disregard[ing] nearly every aspect of Menzies' case. As a result, the court imposed discovery sanctions, granted summary judgment in favor of the State, and ultimately dismissed Menzies' petition for post-conviction relief." With new counsel, the death-sentenced inmate filed a Rule 60(b) motion alleging gross negligence and ineffective assistance. The Utah Supreme Court held that the district court erred in denying the Rule 60(b) motion and in compelling disclosure of work product. The defendant had initially been represented in post-conviction proceedings by pro bono counsel. After the state imposed rules for qualification and payment of counsel, the court sought qualified counsel for four months and all declined, but then Brass volunteered for appointment. He was appointed without the court ever conducting an inquiry to determine whether he was qualified under the state rule. Brass served as counsel for over five years and it would "be an understatement" to say he did little. His representation was "deplorable" in that he "willfully disregarded nearly every aspect of this case" and, in effect, "defaulted Menzies' entire post-conviction proceeding, resulting in the dismissal of Menzies' case." Counsel only met with the inmate a few times, avoided or refused his phone calls and did not respond to letters and cards. Counsel never conducted or hired anyone to conduct an investigation, notwithstanding repeated prior requests and the fact that the record indicates that extensive investigation on actual innocence and mitigation was needed. Prior counsel had obtained $2,000, but counsel did not even request these funds or consult with the prior pro bono team. Counsel also never challenged the inadequacy of the funding as prior counsel had and collected only his initial $5,000 appointment fee. Counsel also failed to meet numerous court deadlines and, ultimately, filed an amended petition that did little more than re-state the arguments that had been made in the first amended petition by pro bono counsel. Counsel failed to oppose the state's discovery requests, which resulted in orders for disclosure of trial counsel's file and the inmate's deposition. Counsel did not even appear for the

inmate's deposition and instead sent an unqualified counsel. Counsel was ultimately prohibited from presenting evidence in support of the claims because of his numerous violations of court orders and procedures. Likewise, counsel failed to respond to the state's motion for summary judgment, which was granted in its entirety with prejudice. For more than a year, counsel never even informed the defendant that the case had been dismissed. Counsel filed a notice of appeal, but never filed a docketing statement, which resulted in dismissal of the appeal. When the court allowed the appeal anyway, counsel never filed an appellate brief, despite being granted two extensions of time. Counsel did file a motion in the district court to set aside the summary judgment under Rule 60(b) stating only that the grounds would be set forth in a subsequent memo, which counsel never filed. More than a year after the event, counsel finally informed the defendant that summary judgment had been granted. Counsel still did not communicate with the defendant beyond this other than to inform the defendant that he would need new counsel without telling him why. Ultimately, another attorney from the state attended a capital litigation seminar and was asked to check on the status of Utah's death row. When she followed up on the case and learned of the events, she contacted the inmate and then filed an appearance as counsel and a memorandum in support of the Rule 60(b) motion focusing primarily on counsel's ineffectiveness. Ineffective counsel finally withdrew and admitted his inadequacies to a great extent. On appeal, the court held that the defendant has a statutory right to effective assistance of counsel, which the court analyzed under Strickland.

> While the ABA standards are not determinative of whether counsel's performance was ineffective and courts should examine counsel's conduct in light of all the contemporary circumstances, they do represent "well-defined norms" that provide guidance to courts. Because Utah's post-conviction rules do not currently contain any provisions regarding counsel's performance in post-conviction death penalty proceedings, and because it is traditionally the duty of the courts to supervise the performance of counsel, we rely on the ABA Death Penalty Guidelines to the extent they are relevant to our decision.

*Id*. at ___ (citations and footnotes omitted). The court analyzed the case under the Guidelines but found that counsel's "ineffective representation went far beyond a failure to comply with the ABA Death Penalty Guidelines" and that counsel's "willful disregard for Menzies' case cannot possibly be construed as sound strategy." Prejudice presumed due to counsel's complete failure to "provide meaningful adversarial testing" in the case. Relief was required on the Rule 60(b) because, while an attorney's negligent acts are ordinarily chargeable to the client, a client should not be held liable for the attorney's actions where those actions are grossly negligent and the defendant has alleged a meritorious defense. Here, the defendant had alleged multiple errors that, if proven, would require relief. Remanded to the district court to reinstate the post-conviction proceedings and to allow the defendant to investigate his claims.

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## IX. PROBATION REVOCATION

**2017:** ***Selby v. State*, 525 S.W.3d 842 (Tex. Ct. App. 2017).** In proceeding to revoke community supervision, trial counsel was ineffective in advising defendant to admit he violated the conditions of the community supervision without having conducted the necessary investigation in order to provide informed advice to defendant. Defendant had pleaded guilty to aggravated sexual assault of a child. The trial court deferred an adjudication of guilt and placed defendant on community supervision for a period of ten years. As a condition of his community supervision, defendant was ordered to submit to periodic polygraph evaluations. A motion to revoke his community supervision was filed alleging that defendant had violated the conditions of his community supervision by viewing or possessing sexually stimulating or sexually oriented materials and by having contact with a minor. On advice of counsel defendant pleaded "true" to both violations, and the trial court found that defendant had violated the conditions of his community supervision. After conducting a punishment hearing, the trial court sentenced defendant to a term of ninety-nine years in prison. Trial counsel at the revocation proceeding performed deficiently because he was unaware of potential challenges to use of the polygraph evidence where defendant had made the admissions leading to the motion to revoke community supervision. Had defendant's trial counsel challenged the admissibility of the polygraph evidence at the revocation hearing, there is a reasonable probability that the evidence would have been excluded and there would have been no basis for revoking community supervision.

**2008:** ***Gonzalez v. State*, 979 So. 2d 1257 (Fla. Ct. App. 2008).** Counsel ineffective in probation revocation case for filing the motion to reduce or modify the sentence in an untimely fashion. State law allowed a period of 60 days after imposition of the sentence and counsel's filing was timely from the written sentence but not the oral imposition, which was the appropriate trigger under state law. 60-day period re-opened.

**2006:** ***People v. Gayton*, 40 Cal. Rptr. 3d 40 (Cal. Ct. App. 2006).** Counsel ineffective in probation revocation proceeding for failing to review the defendant's probation file and to present it to impeach the probation officer's testimony that the defendant never reported and had otherwise failed to comply with the terms of probation. The probation file and the officer's own notes completely contradicted the probation officer's notes but counsel never bothered to review the file despite the defendant's statements to him, which were "from a different universe" than the probation officer's statements. The probation file would have corroborated the defendant's statements and revealed that the probation officer's testimony was, at best, "brutally incorrect." Counsel's conduct was deficient because, he interviewed the probation officer, but otherwise "assumed his client was lying and did not bother to take even the most basic steps to test that assumption." There was "no justification for counsel's failure to review the file." Prejudice was "inescapable" where probation was revoked and the defendant confined for seven years.

**2005:** ***Mikell v. State*, 903 So. 2d 1054 (Fla. Ct. App. 2005).** Counsel was ineffective in probation revocation proceedings for failing to inform the court that it had authority to continue probation. The defendant had entered a no contest plea to lewd acts and been sentenced to 10 years suspended and five years probation. After he committed several probation violations and was brought before the

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court counsel presented mitigation evidence and the defendant asked for mercy. The trial court indicated her belief that legally she could not extend mercy and sentenced the defendant to concurrent 10 year terms. Trial counsel's conduct was deficient because state law clearly allowed the court to continue probation. Prejudice was found because the record reflects that the trial court would have considered continuing the probation if she had known that she could do so. Remanded for resentencing by the same trial court without opposition from the state.

**2004:** ***Matton v. State*, 872 So. 2d 308 (Fla. Ct. App. 2004).** Counsel in sexual battery case was ineffective in probation revocation plea case for failing to advise the defendant that he was entitled to credit for his previously accrued "gain time" in prison and that, by entering plea agreement for 9 years credit, he was waiving his right to this gain time credit to which he was otherwise entitled. Counsel was also ineffective for failing to challenge the victim injury points included in the sentencing guidelines score sheet simply because they had been included in the initial sentencing and counsel believed she could not challenge them. Counsel's conduct was deficient because she could have made the challenge. Prejudice was found because the defendant was entitled to the gain time absent a knowing and intelligent waiver and the state could not include the victim injury points without proof of actual physical injury to the victim. Admission to probation violation withdrawn.

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## X. JUVENILE HEARINGS

**2013:** ***In re Danielle J.*, 1 N.E.3d 510 (Ill. 2013).** Counsel was ineffective in juvenile delinquency proceeding for misdemeanor battery for failing to timely make a request for a continuance under supervision, the successful conclusion of which would avoid an adjudication. Under a state statute, the juvenile could obtain continuance under supervision only if, prior to adjudication and with consent of the state attorney, the juvenile pled guilty. Prior to trial, the state offered to recommend a nine-month continuance under supervision in exchange for a guilty plea. The offer was rejected and the defendant proceeded to trial. Only after she was found guilty did defense counsel request a continuance under supervision. Counsel's conduct was deficient in failing to be aware of the state statute. Prejudice established. Remanded for a new adjudication.

***Commonwealth v. Robertson*, 431 S.W.3d 430 (Ky. Ct. App. 2013).** Counsel ineffective in sodomy and sexual assault case for complete failure to provide representation during juvenile transfer hearing and for failing to object to the prosecution's improper argument on the defendant's failure to testify during trial. The defendant was charged with sexually molesting two young boys that he babysat when he was 16-17 years old. He was charged in August 1995 when he was six weeks shy of his eighteenth birthday. At the juvenile transfer hearing, counsel provided essentially no representation resulting in a presumption of prejudice under Cronic.

> [C]ounsel called no witnesses and did not challenge the testimony of a witness called by the Commonwealth who testified incorrectly regarding programs which could assist with [the defendant's] rehabilitation as a juvenile. The law at the time of the hearing clearly refuted this testimony.

Nonetheless, given the defendant's age at the time of this opinion state law provided no remedy. Juvenile court jurisdiction ends at age 21. The defendant is now in his thirties. "To send [him] back before a juvenile court would be to ask the juvenile court to operate under the fiction that he could still benefit from a trial as a juvenile." The defendant was entitled to a new trial, however, due to counsel's ineffectiveness during trial for failing to object to the references to his failure to testify.

**2012:** ***State in Interest of D.L.*, 96 So. 3d 580 (La. Ct. App. 2012).** Counsel ineffective in juvenile adjudication for armed robbery case for failing to move to dismiss due to court's failure to hold hearing within 30 days of the appearance as required by state law. Mandatory dismissal was required absent good cause showing by the state before the 30 days elapsed. Counsel's conduct was deficient and prejudicial.

***State in Interest of S.L.*, 94 So. 3d 822 (La. Ct. App. 2012).** Counsel ineffective in juvenile adjudication for possession of firearm while in possession of marijuana case for failing to move to suppress the defendant's confession. After fleeing police on bicycles, the defendant and his co-defendant fled on foot. Neither the officers pursuing nor the officers who eventually cut off their flight from the front saw either boy drop anything. Along the path they ran, however, the police found a pistol and a bag containing 5.1 grams of marijuana. Although the 16-year-old defendant was

never advised of his *Miranda* rights or given an opportunity to speak to his mother, he made statements to an officer admitting that the gun and drugs were his. The officer admitted that the conversation was an "extended one-on-one conversation at the police station" while the defendant was cuffed. The officer even told the defendant at the time that he knew the statement was likely inadmissible and the officer attempted to correct the problem by asking the defendant's mother to execute an advice of rights form after the fact. Counsel's conduct was deficient and prejudicial in failing to move to suppress the statement.

**2009:** ***In re Edward S.*, 92 Cal. Rptr. 3d 725 (Cal. Ct. App. 2009).** Counsel was ineffective in juvenile jurisdictional hearing in sex offense case for: (1) failing to investigate potentially exculpatory evidence; (2) failing to seek an adequate continuance based on a mistake of law; and, (3) failing to move for a substitution of counsel knowing he was unable to devote the time and resources necessary to properly defend the case. Counsel was aware that the state's case was based almost entirely on the credibility of the ten-year-old alleged victim. The juvenile defendant provided counsel with information that the victim and her siblings had been molested by an uncle and perhaps her father and that the alleged victim and had mother had motives to fabricate the charges. Counsel was also given information about corroborating witnesses, but made no attempt to investigate. Counsel gave no strategic reason for the failure and explained only that he had an overwhelming caseload and a lack of resources and needed investigators and experts due to his supervisor's denial of funds and his fear of being fired if he pushed too hard on those requests. "[N]o reasonable defense attorney would have declined to investigate the information [the juvenile] provided simply because it contained hearsay and he was an ex-felon (especially one who had been released from custody six years earlier and was presently gainfully employed)." Counsel also sought a continuance of only seven days, although he knew this was inadequate, because he mistakenly believed the state statutes did not allow for a longer continuance. Moreover, even if the statute had imposed a seven-day limit, counsel still could have requested a longer continuance, which would have waived speedy trial rights. Alternatively, counsel should have moved to withdraw because "a conflict of interest is inevitably created when a public defender is compelled by his or her excessive caseload to choose between the rights of the various indigent defendants he or she is representing)." Prejudice established.

> Acknowledging that the prosecution's case boiled down to the question "why would a ten-year-old child make this up?", [counsel's] only response was "well, its not the defense's burden to-to provide an answer to that question. And I don't think that anyone would have an answer to that question." But [the juvenile] had provided [counsel] several potential answers.

The potential answers, however, were not investigated and corroborated with available evidence. The finding of prejudice was based primarily on: (1) the closeness of the case "because there was no eyewitness or physical evidence and the matter turned almost entirely on credibility"; (2) the evidence made available to counsel by the juvenile " was germane to the central issue of the victim's credibility"; and (3) counsel "failed to produce available evidence indicating that [the juvenile] d[id] not fit the typical personality or historical profile for juvenile sex offenders and lack[ed] the

psychological sophistication necessary to steadfastly maintain his innocence over a long period of time and in the face of a polygraph test."

**2008:** ***Houskeeper v. State*, 197 P.3d 636 (Utah 2008).** Counsel ineffective in attempted rape case for failing to adequately investigate and present evidence at defendant's juvenile retention hearing. The 17-year-old defendant was initially charged with aggravated sexual assault, which is included in offenses for which state statutes create a "strong presumption that cases involving inherently violent and aggressive offenses by juveniles sixteen years of age and older will be transferred to the district court." Due to stipulations, the only relevant issue once the state established "probable cause" of guilt was whether the defendant committed the offense in a "violent, aggressive, or premeditated manner." Aside from cross-examination of the state's medical experts, counsel presented only the defendant's testimony. The defendant pursued and preserved "the bindover through a variety of legal actions," but ultimately was tried as an adult. He was convicted of attempted rape, a lesser included offense of aggravated sexual assault, but acquitted of forcible sodomy. He was given a 3 year to life sentence, suspended to one year confinement and three years of probation, and required to register as a sex offender. Counsel's conduct was deficient and prejudice was found because, "[w]ithout defense witnesses, [the defendant was bound over to answer the charge of aggravated sexual assault, a crime that requires proof of aggression and/or violence," but "[w]ith defense witnesses [including two medical experts], [he] was convicted of attempted rape, a crime that does not require proof of any explicit element of aggression and/or violence." The defendant asserted only that the result of his attempted rape conviction "was a harsher penalty than he would have received for the same or even greater conviction in juvenile court." While he was given a fair trial, the court held that "the jury trial did not remedy the prejudice he suffered." Because the defendant had already served his jail sentence and paid his fine, the only remedy available was restoration of the ability to petition for expungement of his records, which he would have had if convicted in juvenile court but did not due to adult conviction.

**Capital Case*

## XI. INVOLUNTARY COMMITMENT PROCEEDINGS

**2014:** ***In re Jessica H.*, 17 N.E.3d 248 (Ill. Ct. App. 2014).** Counsel was ineffective in involuntary commitment proceeding for failing to object to an untimely second recommitment petition. Under state law, a recommitment petition was required to be filed prior to the expiration of the prior commitment order. In this case, the patient had been initially committed for 90 days and then recommitted for 90 days. The second recommitment petition was not filed until eight days after the prior commitment period had expired. Prejudice was established, even though the state could have filed a new initial commitment petition even if the untimely petition had been dismissed because an initial commitment would have lasted only 90 days rather than the 180 days ordered based on the untimely recommitment petition.

**2010:** ***In re Daryll C.*, 930 N.E.2d 248 (Ill. Ct. App. 2010).** Counsel ineffective in involuntary commitment to an inpatient mental health facility proceedings. Counsel failed to object to the state's failure to file a predisposition report, as required by state law. In essence, the state had not disproved the availability of alternative treatment settings and or why they were inappropriate.

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## XII. SEXUAL PREDATOR COMMITMENT PROCEEDINGS

**2013:** ***People v. Smith*, 152 Cal. Rptr. 3d 142 (Cal. Ct. App. 2013).** Counsel ineffective in sexually violent predator proceedings for agreeing to procedures that violated the statutes and deprived the individual of valuable rights. Under state law at the time, a committed individual could petition for conditional release or release. If the individual had a favorable report from his annual review by a psychologist, he was entitled to a jury trial at which the state had the burden of disproving the conclusion of the examiner beyond a reasonable doubt. If, on the other hand, the individual did not have a favorable report from his annual review, the proceeding was before a judge and the individual had the burden of proving entitlement to relief by a preponderance of the evidence. These proceedings were initiated following a 2009 annual review in which the psychologist recommended conditional release. By the time the case was called, the individual also had a 2010 annual review recommending unconditional release. Nonetheless, counsel agreed to proceedings before the judge alone with the burden on the individual. Counsel's conduct was deficient. Even if counsel had some strategy for preferring proceedings before the court rather than a jury, there could be no strategy for agreeing to shift the burden from the state to the committed individual.

**2012:** ***In re Ontiberos*, 287 P.3d 855 (Kan. 2012).** Counsel ineffective for multiple reasons in sexually violent predator (SVP) civil commitment proceedings before jury. Under state law, "when there is a right to counsel there is necessarily a correlative right to effective counsel." While the right was one under due process, the court applied the Strickland analysis. There were 3500 pages of discovery, which counsel stipulated should be marked all together as one exhibit. Most of the exhibit was irrelevant, but four aspects are relevant here: (1) police reports and witness statements from alleged priors that did not result in conviction; (2) a discharge summary from a sex offender treatment program showing a Static-99 test result concluding the defendant was a "low risk" to reoffend; (3) the results of a penile plethysmograph test (PPT) administered in the prior treatment program; and (4) documents completed by evaluators in the prior treatment program. Counsel stipulated that "the exhibit" could be provided to all mental health experts, could be used to cross-examine them, and would be included in the appellate record. "The exhibit" was not provided to the jury. The state court-appointed examiner found the defendant was an SVP. She gave the Static-99, which placed the defendant in the "high risk" category for recidivism. The defense expert said the defendant was not an SVP. Although he did not do testing, he testified that the most reliable tests for recidivism were the PPT and the Hare Psychopathy Checklist Revised. The state examiner had not given these tests. Counsel's conduct was deficient in numerous specifics, but "[t]wo themes pervade these errors. The first is counsel's failure to familiarize himself with the evidence [in 'the exhibit']. . . . The second them is a failure to recognize the evidentiary rules governing expert testimony and cross-examination." The specific deficiencies were: (1) failure to cross-examine the state's expert with the prior Static-99 result; (2) failure to alert the defense expert to the prior PPT result; (3) stipulating that the state expert could review and base her opinion on hearsay and other evidence that was inadmissible at trial, which was precluded by state law at the time; and (4) failing to object to the state's cross-examination of the defendant and the defense expert with documents purportedly from "the exhibit," which were never admitted into evidence. State law requires that counsel admit extrinsic evidence, either by document or testimony, if the witness denies the

impeaching fact. Here, generally, when the defendant or his expert said he did not recall or disputedthe state's rendition, the prosecutor supplied "the facts" from "the exhibit" in his questions, but never showed the witness the document and never admitted the documents.

> We find it disturbing that the State's method of cross-examination pervaded the trial without intervention by [defense counsel]. No evidence was admitted for the jury's review to determine the accuracy of the facts alleged to underlie the State's questions, and this was particularly egregious since some of the State's questions were not supported by the record.

In "the most poignant example of why attorneys must produce extrinsic evidence to avoid misquoting or mischaracterizing a document," the state cross-examined the defense expert about the defendant being disciplined in prison for possessing a homemade knife in 2003. The defendant had never been disciplined for possession of a knife. The report the State was relying on was from 1991 and listed "'less dangerous' contraband" only. Nonetheless, the State's questions, combined with the expert's answers made it appear that the defendant had been disciplined for a knife and had been dishonest with the expert by not disclosing the incident. Prejudice established "[g]iven the pervasive nature of counsel's errors." "While each individual error may not have required reversal, the accumulation of these errors undermines our confidence in the trial's outcome."

***People v. Willingham*, 956 N.Y.S.2d 165 (N.Y. App. Div. 2012).** Counsel ineffective in Sex Offender Registration Act proceedings for failing to contest the case at all. Counsel remained silent, except for two statements that showed complete ignorance of how to challenge the case.

**2009:** ***Smith v. State*, 203 P.3d 1221 (Idaho 2009).** Counsel ineffective in civil designation as violent sexual predator case for several reasons. First, counsel failed to timely challenge the denial of due process in the designation process due to "inadvertence or neglect." Prejudice found because the statutory scheme violated procedural due process principles by denying meaningful notice and an opportunity to be heard. Second, counsel failed to timely assert a challenge to the review board's failure to adopt and apply objective criteria for predator designation. Prejudice established where the trial court rejected this argument solely due to the untimeliness but otherwise stated "serious reservations concerning the constitutional validity" of the designation process. In addition, without objective standards, "due process rights could not be protected by the process of judicial review." Finally, counsel failed to timely assert due process claims regarding the district court's review, including the right to review the information considered by the district court from the board, which was not provided to the defense. Prejudice established because "the statutory denial of access to the information which the district court utilizes in making its decision deprives the offender of meaningful notice of that which he is attempting to challenge and consequently, it deprives the offender of any meaningful opportunity to be heard."

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## XIII. POST-TRIAL CLEMENCY (MILITARY) OR SENTENCE REVIEW (MONTANA)

**2014:** ***Avery v. Batista*, 336 P.3d 924 (Mont. 2014).** Counsel ineffective in proceeding before the Sentence Review Division for arguing for a more onerous sentence for the defendant in sexual intercourse without consent case. The defendant entered a plea agreement for a 30 year sentence, with 25 years suspended. The court rejected that agreement, but in response to defense counsel's question, indicated that it would accept a sentence of 30 years, with 10 years suspended. When the defendant plead guilty in light of this information, the court actually imposed a sentence of 30 years, with 20 years suspended. Nonetheless, in the Sentence Review Division, counsel urged the Division impose a sentence of 30 years, with just 10 years suspended and the Division increased the defendant's punishment, accordingly. Counsel's conduct was deficient in arguing "as a matter of equity" that the sentence imposed should be that initially approved by the trial court. There was no strategy. Prejudice was clear. "Not only did counsel fail to provide meaningful representation, but his statements actually undermined [the defendant's] interest."

**2010:** ***United States v. Fordyce*, 69 M.J. 501 (Army Crim. App. 2010).** Counsel's failure to advise the accused of his right to request waiver of mandatory forfeitures for the benefit of his wife and children, while not addressed as ineffective assistance of counsel, was found to be prejudicial post- trial error as there was "a colorable showing of prejudice."

***United States v. Lind*, 64 M.J. 611 (C.G. Ct. Crim. App. 2007).** Counsel ineffective in post-trial processing following guilty pleas and sentencing for wrongful use of ecstasy, wrongfully distributing ecstasy, conspiracy, and making a false official statement with intent to deceive. The accused was sentenced to reduction in grade, forfeitures of pay, confinement for four months, and a bad-conduct discharge. Counsel's conduct was deficient, because during post-trial clemency review, counsel did not contact the accused and did not submit matters on his behalf. Prejudice found because the accused's "intended clemency petition does present substantive reasons for clemency" in that he asserted it was a "one time" event and he had used the time between the incident and trial to re- certify for his positions in the Coast Guard. As relief for this and other errors, the court set aside all punishment except the bad conduct discharge.

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## XIV. DENIAL OF RIGHT TO COUNSEL ISSUES

### A. U.S. Court of Appeals Cases

**2017:** ***United States v. Pleitez*, 876 F.3d 150 (5th Cir. 2017).** Petitioner was represented by counsel and pleaded guilty in federal district court in Texas to conspiracy to engage in sex trafficking of children by force, fraud, or coercion. He agreed to pay restitution and waived his right to challenge the restitution order. At the sentencing hearing, petitioner objected to restitution requests by the victims that were made on the basis of "lost wages," arguing that the victims worked illegal jobs and were not legally present in the U.S. The court refrained from ruling on the restitution claims for lost wages, waiting to take the probation department's research into account. The probation department later reported that it was appropriate to award the victims restitution based on lost wages, and petitioner filed objections, as well as a notice of appeal. The court permitted trial counsel to withdraw, and following the withdrawal, the probation department filed another report that recalculated the amount of restitution owed for lost wages using a different method that increased the amount of restitution reportedly owed. The court adopted the probation department's final calculations in imposing its restitution order (while petitioner was unrepresented), and then appointed appellate counsel. The Fifth Circuit held that the increase of the restitution award during a gap in representation between trial and appellate counsel violated petitioner's Sixth Amendment right to counsel, because the district court's consideration and acceptance of the changed restitution amount constituted a critical stage in the proceedings. The final determination of a mandatory restitution award under 18 U.S.C. § 3664(d)(5) constitutes a critical stage during which a defendant is entitled to the assistance of counsel. No showing of prejudice is required and reversal is automatic under *United States v. Cronic*, 466 U.S. 648, 659 (1984).

**2005:** ***Pazden v. Maurer*, 424 F.3d 303 (3rd Cir. 2005).** The trial court violated the defendant's right to counsel by denying a continuance, which forced the defendant to proceed pro se in this fraud case related to the sale of condominiums. In December 1993, the defendant was appointed counsel from the Public Defender Office on charges contained in a 131-count indictment. In October 1995, a new PD was assigned. Trial was scheduled for February 1996. Counsel requested a three-month continuance due to her late appointment and the state's delay in discovery, which ultimately involved almost 5,000 pages of discovery. The court denied a continuance. The defendant, while not hostile at all to counsel and supportive of her request for a continuance, "believing that he was more familiar with the case than his attorney, given the witnesses and materials his attorney had not had an opportunity to explore, . . . informed the court that he believed he had no alternative but to represent himself." *Id*. at 308. He was permitted to proceed pro se with the PD as stand-by counsel. Under AEDPA, the state court's ruling that the "waiver of counsel was both 'contrary to' and 'an unreasonable application of . . . clearly established' Supreme Court pronouncements" in *Johnson v. Zerbst*, 304 U.S. 458 (1938) and *Faretta v. California*, 422 U.S. 806 (1975).

****Daniels v. Woodford*, 428 F.3d 1181 (9th Cir. 2005).** Analyzing this capital case under pre-AEDPA standards, the court held that the defendant was constructively denied counsel due to a conflict created by a series of events related to the appointment of counsel. The defendant had previously been convicted of a bank robbery in which he had been shot nine times by police officers rendering him a paraplegic. He negotiated a plea in exchange for being permitted to remain free for

six months so he could seek medical treatment and rehabilitation. Despite the agreement, the court sentenced him to 13 years and immediately remanded him to custody. On appeal, Roth, a new attorney (who had previously represented the defendant on other matters) took over and the defendant was released on bond. While on bond, he was mistakenly arrested by an officer who believed there was a warrant for him. He sued the state alleging mistreatment in jail and lack of appropriate medical care. After his appeal was denied, he failed to surrender to custody. When two officers went to his home, he shot and killed both officers. Following his arrest, the court appointed a Public Defender, who moved to substitute Roth because the PD had a conflict due to the prior representation on the robbery. The PD in that case that negotiated the plea and release left the PD's office to join the prosecutor's interest and the new PD assigned was unaware of the plea agreement so the judge was never informed of the deal for release. A federal habeas petition alleging IAC on the robbery was pending at the time of the murder case appointment. Nonetheless, the court refused to relieve the PD office and Roth remained in a pro bono capacity. Roth was ultimately appointed as co-counsel, but then the state moved to relieve him because he was be a witness for the state. Roth was relieved even though the defendant agreed to stipulate to the information the state sought to present through Roth and agreed to waive the conflict. After this, the PD assigned became ill and the case was reassigned to two new PD's. Ultimately, nine months into the case and only three months prior to trial, the court relieved the PD office on its motion due to the conflict. Appointed this time was a former prosecutor who had just started in private practice and had no capital case experience and a co-counsel with only a few years under his belt. From the beginning, the defendant's relationship with these lawyers "was strained." The defendant informed the court that he didn't trust his counsel and sent a letter to that effect before the trial started. The federal court held that, "[g]iven this history, it is understandable that the [defendant] would mistrust the judicial process and his counsel" and the trial court should have granted the defendant's motion to substitute counsel. In this instance, because of the "serious conflict" between the defendant and counsel, the court presumed prejudice and found error in the trial court's failure to inquire into the conflict even though the defendant informed the court three months prior to trial that he did not trust counsel and informed the court again prior to the beginning of the trial.

### B. State Cases

**2017:** ***Zapata v. Commonwealth*, 516 S.W.3d 799 (Ky. 2017).** Defendant was denied his right to counsel at the hearing on his motion to withdraw his guilty plea where one of the grounds for the motion was the alleged ineffectiveness of the attorney representing him. That defendant had earlier successfully sought to be appointed hybrid counsel under state law did not cure the conflict appointed counsel faced in representing defendant on the motion to withdraw the guilty plea. Although defendant's attorney did file a motion to withdraw the plea, she took no position on it and did not assist defendant at the hearing on the motion. In fact, she informed the trial court that in representing defendant, it would be better if she did not respond to his accusations, implying that her responses would be adverse to his position. On this record, an actual conflict existed. The case is remanded for further proceedings on the motion to withdraw the guilty plea.

**2014:** ***In the Interest of J.M.O.*, 459 S.W.3d 90 (Tex. Ct. App. 2014).** Defendant in parental rights termination case was deprived of effective assistance of counsel when his appointed counsel failed

to appear at trial and failed to make arrangements for the defendant, who was incarcerated, to appear at trial. The *Cronic* presumption of prejudice applied.

**2012:** ***Dennis v. Commissioner of Correction*, 39 A.3d 799 (Conn. Ct. App. 2012).** Denial of right to counsel on six of ten charges in consolidated guilty plea was a structural error requiring reversal. The defendant had three separate arrests over a six month period. Following the initial arrest on four charges, he retained counsel. Following the two subsequent arrests, the public defender declined representation until the court declared the defendant to be indigent. The retained counsel made it clear that he did not represent the defendant, except the initial charges. With the court taking no action on the question of counsel, the state offered to resolve all ten charges with a plea offer for a five year sentence. After the plea, the defendant moved to withdraw the plea because he had been denied his right to counsel on six charges, one of which had no factual basis such that the prosecutor agreed to file a motion to correct an illegal sentence. Even with one of the charges dismissed, the sentence remained the same. The denial of counsel was a structural error, such that prejudice was presumed.

**2011:** ***State v. Chavez*, 257 P.3d 1114 (Wash. Ct. App. 2011).** Counsel provided no representation during motion to withdraw guilty plea to violations of no-contact order. The defendant was initially charged with domestic violence and ordered to have no contact with his wife, but he contacted her four times from the jail. The state amended the charges to add violations of the "no-contact" order and witness tampering. Due to statements made by the defendant and his wife in recorded jail calls, defense counsel expressed concern that he had a potential conflict of interest on the witness tampering count as, according to statements in the calls, he was a "purported accomplice to the witness tampering claim." The court allowed counsel to withdraw and appointed new counsel on that charge only. With potentially-conflicted counsel, the defendant entered guilty pleas on the four no-contact order charges but, subsequently, moved to withdraw the pleas. The initial counsel was allowed to withdraw and the new counsel took over, but filed only an *Anders* brief in which counsel "clearly distanced" himself from his client and suggested "his client's position was frivolous." The court noted that an "*Anders* brief is an appellate procedure that is not appropriate for a trial court." Here, counsel's action amounted to a complete denial of counsel during a critical stage of the proceedings. Prejudice presumed.

**2010:** ***Commonwealth v. Grant*, 992 A.2d 152 (Pa. 2010).** Rape defendant denied effective assistance due to representation by attorney whose license to practice law had been put on inactive status due to attorney's failure to comply with the continuing legal education (CLE) requirements for lawyers. This failure was not a "technical licensing defect" because it reflected "directly on his lack of competence to practice law" as counsel had not attended CLE programs for almost five years and could not regain his license simply by completing the CLE classes.

**2008:** ***State v. Hemphill*, 186 P.3d 777 (Kan. 2008).** Counsel ineffective in drug case following no contest pleas when the defendant filed a pre-sentence motion to withdraw his pleas. Counsel abandoned his advocacy role during the hearing. "Appointed counsel for the defendant argued against his client's interest by explaining to the court why he did not believe the defendant's motions had merit," and the defendant had to argue his own motion. Prejudice established because the motion to withdraw

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raised questions about the voluntariness of the pleas and their factual basis sufficiently that the trial court did not summarily deny the motion and instead appointed counsel for the defendant. Counsel also failed to advise the defendant of his right to appeal the denial of his motion.

***Cannon v. State*, 252 S.W.3d 342 (Tex. Crim. App. 2008).** The defendant was constructively denied counsel in misdemeanor DWI case by counsel's refusal to participate in the trial following denial of a motion for continuance to obtain expert assistance and statements that he was not prepared for trial. Prejudice presumed under *Cronic*.

**2007:** ***Brown v. Commonwealth*, 226 S.W.3d 74 (Ky. 2007).** The defendant was denied his right to counsel in drug case when the court allowed counsel to leave the courtroom during the defendant's testimony, cross-examination, and closing argument. Counsel informed the court that he had an ethical conflict with the defendant and implied that the defendant intended to offer perjured testimony. Counsel acted properly and the court appropriately addressed the defendant and allowed the defendant to testify in narrative form, but the error occurred in allowing counsel to leave the courtroom rather than remaining present to make appropriate objections to the state's cross-examination during portions of the testimony counsel did not believe were perjured.

***State v. Blair*, 872 N.E.2d 986 (Ohio Ct. App. 2007).** Counsel ineffective in violation of a protection order case where counsel's motion for continuance due to lack of notice and lack of preparation was denied and then counsel refused to participate in the trial. A trial date was set at a hearing where the defendant was represented by a member of the public defender office. A different member of the same public defender office appeared for the defendant during trial. Prejudice was presumed. In addition, the court found that prejudice was apparent because the defendant was forced to have a bench trial due to counsel's untimely request for a jury trial and the defendant was denied his best defense because counsel had failed to file a timely notice of alibi. While the state argued that counsel and the defendant "acted in concert as a trial strategy to create error and thereby gain additional time," the trial court did not question the defendant and the court declined "to presume such outrageous and clearly unethical behavior by counsel."

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## XV. RELATED ISSUES

### A. U.S. Court of Appeals Cases

**2015:** ***Pidgeon v. Smith*, 785 F.3d 1165 (7th Cir. 2015).** The state appealed from the District Court's grant of habeas relief on a claim of ineffective assistance of counsel only on the basis that the District Court erred in finding that the petitioner's burden was satisfied when the petitioner had not called trial counsel as a witness, which would have been required in state court. The district court held that counsel was ineffective in advising the petitioner to enter into a negotiated no-contest plea to sexual assault based on counsel's erroneous belief that the petitioner would face a mandatory life without parole sentence, under the state's persistent repeater law, if convicted in this case and a pending case in another county. The negotiated plea required the petitioner to serve a 10-year sentence on this case, but also required the state to dismiss the charges pending in the other county. Under state law, a third "serious felony" conviction results in a mandatory life without parole sentence. Counsel's advice was based on the erroneous belief that the petitioner had already been convicted of one "serious felony," as defined by Wisconsin's "persistent repeater" law. The prior conviction was an aggravated battery, which did not qualify under the statute because it did not carry the possibility of a life sentence. There was also some doubt whether the charge dismissed, pursuant to the plea agreement, would have qualified as a "serious felony." The District Court ordered a hearing and granted relief finding that the state court unreasonably applied *Strickland* and *Hill v. Lockhart*, 474 U.S. 52 (1985). The state appealed only on the issue of whether counsel's testimony was required before the court could grant relief, which was a requirement under state law. The Seventh Circuit rejected this argument because "federal courts do not have to follow state procedural rules" in resolving federal constitutional issues and "[n]othing in *Strickland* or its progeny requires prisoners seeking to prove ineffective assistance to call the challenged counsel as a witness." Regardless, with the state conceding that counsel did, in fact, give the erroneous advice complained of, counsel's testimony would have been of little value. Either counsel failed to review the statute or reviewed the statute and misunderstood it, even though the "statute is relatively straightforward." There could be no "possible strategic explanation for counsel's mistake." On the question of prejudice, while the state argued that counsel might have testified that petitioner indicated that he would accept the plea offer even if he was not facing a life sentence, nothing prevented the state from calling counsel as a witness if it chose to do so. Thus, "[i]t makes little sense to penalize Pidgeon for her failure to do so."

**2014:** ***Gunner v. Welch*, 749 F.3d 511 (6th Cir. 2014).** Direct appeal counsel's ineffectiveness in failing to advise the defendant of the time limits for filing a post-conviction challenge to trial counsel's ineffectiveness in drug trafficking case established cause for the procedural default in failing to timely file the state post-conviction challenge to trial counsel's effectiveness.

***United States v. Lopez-Chavez*, 757 F.3d 1033 (9th Cir. 2014).** Counsel ineffective under due process in alien's removal proceeding by erroneously conceding his removability, failing to appeal the removal order to the Board of Immigration Appeals ("BIA"), and failing to petition the Seventh Circuit for review. The deficient conduct prejudiced the alien in a subsequent prosecution for attempted illegal reentry. The alien was the son of a Mexican seasonal agricultural worker who

entered the United States legally through the "Bracero Program" in 1984. In December 1990, the alien became a legal permanent resident. In February 2003, he was convicted in Missouri of possessing marijuana with intent to deliver. In June 2003, the alien was charged as being removable on the basis that he had been convicted of an aggravated felony for an offense relating to the illicit trafficking in a controlled substance as defined under the United States Code. Defense counsel conceded removability and did not appeal, although he had reserved the alien's right to appeal. The ineffectiveness claim was asserted after the alien was arrested in California for attempted reentry. Counsel's conduct was deficient because the Missouri statute covered conduct that could be a misdemeanor under the United States Code, as well as conduct that falls within the felony provisions. At the time of the alien's removal, there was a circuit split as to whether a conviction that is treated as a felony under state law but as a misdemeanor under felony law could be treated as an aggravated felony for purposes of removal. In the face of the conflicting circuit law, the BIA adopted a bifurcated rule. Where a circuit had spoken, it would use the rule of the circuit. Where a circuit had not spoken, it would apply the Fifth Circuit's rule that a state offense categorized as a felony would be treated as a felony for removal purposes, even if the conduct could only be punished as a misdemeanor under federal law. At the time of the alien's removal proceeding, the Seventh Circuit had not yet decided the question. Thus, although the BIA's default rule would have been followed, there was "a clear path to a contrary ruling by petitioning the Seventh Circuit for review." Counsel's conduct was deficient. "A competent immigration attorney would have been aware" of the BIA's bifurcated rule requiring application of circuit law where the circuit had spoken and "minimal research" would have revealed that the Seventh Circuit had not addressed the question. While counsel generally cannot be ineffective for failing to anticipate changes in the law, here "counsel's ineffectiveness did not depend on a later change in law" as the BIA had already made it clear that circuit precedent would be followed. Prejudice was also clear, as three years after the alien's removal proceeding, the Seventh Circuit addressed the issue for the first time and joined the three Circuits that held that conduct that would be treated as a misdemeanor under federal law could not be the basis for removal even if state law categorized the offense as a felony. Thus, if counsel had challenged removal, appealed it to the BIA, and then petitioned the Seventh Circuit for review, the removal ruling "almost certainly would have been reversed."

**2007:** ***Ege v. Yukins*, 485 F.3d 364 (6th Cir. 2007).** Under AEDPA, counsel's ineffectiveness in murder case for failing to object to bite mark evidence established cause and prejudice to overcome the procedural default for the free-standing claim. The defendant was charged with murdering another woman, allegedly because of jealousy because they were both romantically involved with the same man and the victim was pregnant with his child. No physical evidence linked the defendant to the crime and no arrests were made for nine years after the crime. The state then exhumed the body to review a mark on the victim's cheek listed in the autopsy report as livor mortis. Because of the condition of the body, the bite-mark expert was able only to examine photographs of the mark. From that the expert testified that the "bite-mark" matched the dentition of the defendant and no one else in the three and a half million people in the Detroit area would match up. Counsel did not object, but called a pathologist to testify that the mark was livor mortis and a dentist to testify that, even if it were a bite mark, it did not align with the defendant's dentition. The defendant asserted ineffectiveness on direct appeal, but this claim was denied. Almost sixteen months later

in 1999, a post-conviction application was filed asserting a free-standing due process claim, in part, because counsel had fortuitously obtained a copy of a letter from a state prosecutor from a news reporter. The letter noted that the expert's findings had been proven wrong with DNA evidence in one case and undermined by a second expert in another case and that the state would no longer rely on this expert as the "main evidence" in a case. This claim was denied under state law because counsel had failed to object. In federal habeas, the ineffectiveness and the due process claim were asserted. The ineffectiveness claim was found to be time-barred, but the court found that the "letter provided the factual predicate for" the due process claim and tolling applied. Therefore, the due process claim was not time-barred. The ineffectiveness of counsel in failing to object to the improper evidence established cause and prejudice to overcome the procedural default of the due process claim. Although bite-mark evidence had been used in other Michigan prosecutions, counsel's conduct was deficient in failing to object to the substance of the testimony here because the state expert was relying only on pictures of the alleged wound, which "appears to be novel." In addition, the need to object to the "unsubstantiated opinion evidence [based on statistical opinion] should have been obvious to defense counsel." In addition,

> where, as in the instant case, physical evidence is presented linking a defendant to the crime scene, and it is the only physical evidence showing such a link, then defense counsel must object to its admission if no proper foundation has been laid by the presenter. Anything else is objectively unreasonable. Furthermore, the fact that defense counsel chose to introduce counter-experts to [the state expert's testimony does not insulate counsel's performance. There is no reason counsel could not simultaneously have objected to [the expert's] testimony and attempted to rebut it with experts of his own.

Prejudice also found.

### B. U.S. District Court Cases

**2015: *United States v. Schneider*, 112 F. Supp. 3d 1197 (D. Kan. 2015).**

Reversal required in conspiracy, unlawful drug dispensing resulting in death, health care fraud resulting in death, and money laundering case due to the court's failure to properly instruct on the element of "death. . . results from." The case involved a doctor and his licensed practical nurse wife as codefendants. They had set up a "medical clinic" that allegedly provided pain management treatment and prescription of dangerous and addictive drugs but provided no actual treatment and just dispensed dangerous drugs while the doctor and his wife got rich. In short, it was a "pill mill." Over a period of six years, from 2002-2008, 68 of the mill's "patients" died of drug overdoses, while another 100 "patients" were hospitalized for overdoses. In 2255, the defendants sought application of the Supreme Court's decision in *Burrage v. United States*, 134 S. Ct. 881 (2014), which held that the in order to establish a resulting death from distribution of heroin the drug distributed must be "a but-for cause of the death," which is not the case when the alleged victim's death resulted from multiple drugs and the heroin could only be considered a "contributing cause." While trial counsel had requested "but-for" instructions that claim was procedurally defaulted in 2255 based on the Tenth Circuit's rule that failure to assert the claim on direct appeal resulted in procedural default in

2255. The default was excused, however, due to the ineffective assistance of appellate counsel. Counsel's conduct was deficient in failing to assert this claim on appeal because there was a circuit split on the issue and the Tenth Circuit had not yet addressed the issue. Prejudice also established because, regardless of the outcome the Tenth Circuit would have reached, the claim would have prevailed at the Supreme Court. The Court, thus, proceeded to the merits of the *Burrage* claim. On counts 2, 3, and 5 of illegal distribution resulting in death, reversal was required because: (1) the victim died of "mixed drug intoxication," including drugs not obtained from the "pill mill," or (2) the victim died of "mixed drug intoxication with a contributing factor of atherosclerotic cardiovascular disease" that was pre-existing; or (3) the government did not even attempt to argue "but-for" cause. On count 4, the error in failing to give the "but-for" instructions was harmless, however, because the evidence was overwhelming that the victim died of a fentanyl overdose and the fentanyl had been prescribed by the "pill mill." On counts 7-9 of health care fraud resulting in death, the government failed to establish how false billing can lead to death. Likewise, the Count 1 conspiracy to commit health care fraud sentence folded because the maximum sentence was based on the "resulting death" aspect of the substantive charge. Thus, rather than a maximum sentence of life, the maximum was 10 years. Thus, of the 9 counts, the sentence of count 1 was vacated, count 4 was affirmed, and all other counts were reversed for new trial.

**2003: *Gutierrez v. Ashcroft*, 289 F. Supp. 2d 555 (D.N.J. 2003), *aff'd on other grounds*, 125 Fed. Appx. 406 (3rd Cir. 2005).** The district court held that the limitations period for the alien to file a habeas petition challenging removal would be equitably tolled due to counsel's affirmative and knowing misrepresentation to the alien that he had filed a habeas petition. The alien, who came to the United States as a legal resident in 1971, pled guilty to five burglaries in 1995. While he was still in confinement, he was notified of the INS's intent to deport him. Upon his release on parole from prison, he got a job, got married, and otherwise indicated full rehabilitation. He was represented by counsel at all times in immigration proceedings, which went to hearing in 1998, and appeal in January 2000. The appeal was based on the denial of discretionary relief. The majority in his appeal held that the former discretionary relief provision was no longer applicable since the law had been changed. The alien surrendered for deportation in April 2000 and was removed in May 2000. During this time period, the alien directed his counsel to pursue all legal appeals with the only option available to him at that time being to file a petition for writ of habeas corpus. Counsel did not do so and affirmatively misrepresented to the alien, to his wife, and to his mother, who was paying counsel's legal fees, that counsel had filed the petition. Because no petition was pending, the alien was deported. When he subsequently filed a petition for writ of habeas corpus, it was dismissed because petitioner was not "in custody" at the time of the filing of the petition. In his Rule 59(e) motion to alter or amend the judgment, the petitioner submitted additional facts and evidence alleging entitlement to equitable relief. The court held that an alien has a statutory right to counsel, although not at government expense. An alien in deportation proceedings is also entitled to due process. The ineffective assistance of counsel can constitute a denial of due process. Here, the court found a due process violation because counsel deliberately and knowingly misrepresented to the petitioner that he had filed petitioner's habeas corpus petition. Prejudice was found because the only way the petitioner could avoid removal from the country was through the discretionary relief he sought. While this relief was not available at the time of his removal, the strong dissent in the alien's appeal and the fact that the issue was pending in numerous appellate courts made it clear to the immigration law bar that it was possible if not probable, that discretionary

relief would be held to be available for habeas petitioners with valid retroactivity claims. Here, the United States Supreme Court did hold, subsequent to the petitioner's deportation, the retroactive denial of the former discretionary relief provision the petitioner sought was unconstitutional. Thus, if petitioner's attorney had timely filed a habeas petition the change in law would have had a direct effect on petitioner's case and he would have had a right to a discretionary hearing. The court noted that over fifty percent of these discretionary claims are granted and that because petitioner had demonstrably been rehabilitated and maintained close family and work ties in the United States, he had a substantial likelihood of success. Under these circumstances, the court granted equitable relief in the form of deeming the petitioner's habeas petition to have been timely filed, granted the petition for habeas corpus, and ordered the government to conduct an INS discretionary relief hearing.

### C. State Cases

**2015:** ***In the Interest of S.S.*, 360 P.3d 16 (Utah Ct. App. 2015).** Counsel ineffective in termination of mother's parental rights proceeding. While the mother had complained about counsel's failure to assist her and sought a continuance to retain different counsel, the proceedings went forward without inquiry by the court. Counsel made no opening statement, failed to cross-examine the state's witnesses, failed to present evidence in mother's favor, and made no closing argument. Counsel's only affirmative acts, including questioning the mother's credibility about her allegations that counsel had not communicated with her, were harmful to the mother. "In other words, not only did Mother lack an advocate in the courtroom, but her own attorney appeared to take an adversarial position against her." Counsel's conduct was deficient and prejudicial.

**2013:** ***Grayson v. State*, 118 So. 3d 118 (Miss. 2013).** "[B]ecause this Court has recognized that [post-conviction relief] proceedings are a critical stage of the death-penalty appeal process at the state level, today we make clear that PCR petitioners who are under a sentence of death do have a right to the effective assistance of PCR counsel" under state law.

***State v. Quixal*, 70 A.3d 749 (N.J. Sup. Ct. App. Div. 2013).** "[D]efendants have a State constitutional right to counsel when raising ineffective assistance of trial counsel for the first time, whether raised on direct appeal or by way of PCR."

**2012:** ***Allen v. LeMaster*, 267 P.3d 806 (N.M. 2011).** Under state criminal rules, it was improper for the post-conviction court to order the capital defendant to testify by deposition or to have his habeas petition dismissed as a sanction.

***Keough v. State*, 356 S.W.3d 366 (Tenn. 2011).** The court erred in capital post-conviction proceedings in denying the petitioner's motion to limit the cross-examination of petitioner, which resulted in the petitioner declining to testify in support of his claims of ineffective assistance of counsel. Under a state rule, petitioner was entitled to have the scope of cross-examination limited to supporting "the allegations of the petition" or the state's rebuttal of the allegations. Thus, petitioner's motion to preclude cross-examination "related to the factual allegations of the criminal charges for which he was convicted" should have been granted. Here, lead counsel was physically unable to testify. Co-counsel could not "recall details of the representation." Thus, "Petitioner's

testimony about the factual allegations supporting his claim of ineffective assistance of counsel was critical to his ability to prove his claim of ineffective assistance of counsel by clear and convincing proof." Remanded to allow petitioner to testify with cross limited to the relevant issues.

**2008:** ***State v. Schoonmaker*, 176 P.3d 1105 (N.M. 2008).** The trial court deprived the defendant of effective assistance of counsel in child abuse case by denying the defendant's request for funds and denying retained counsel's motion to withdraw. Although the eighteen-year-old defendant was indigent, his family raised money to retain counsel. The family could not, however, afford to hire a defense expert or to pay the state's experts, who insisted on payment by the defense for pretrial interviews. The case essentially amounted to the question of whether the one-month-old child's death was due to violent shaking and shaken baby syndrome or was the result of a fall from a couch in combination with a premature birth and previously existing medical issues. Defense counsel requested funding for defense experts and to interview the state experts. The court denied this based on a previous state holding that indigent funding would be denied when the defendant chose to be represented by retained counsel. [The court noted that most states permit funding for indigent defendants even if counsel is retained.] Counsel then moved to withdraw so that the defendant would be represented by the public defender and entitled to indigent funding. The court also denied this motion. During trial, the state had four expert physicians on shaken baby syndrome, as well as the child's pediatrician and a pediatric ophthalmologist. The defense had no expert due to the court's rulings. Nonetheless, the state was permitted to comment in rebuttal closing on the lack of expert testimony supporting the defense theories. "A presumption of prejudice most certainly applies when counsel's potential ineffectiveness is expressly brought to the attention of the district court and is occasioned by the rulings of the court itself."

***Cannon v. State*, 252 S.W.3d 342 (Tex. Crim. App. 2008).** The defendant was constructively denied counsel in misdemeanor DWI case by counsel's refusal to participate in the trial following denial of a motion for continuance to obtain expert assistance and statements that he was not prepared for trial. Prejudice presumed under Cronic.

**2007:** ***State v. Hendershot*, 153 P.3d 619 (Mont. 2007).** The trial court abused its discretion in denying the defendant's request for appointment of new counsel in assault on wife case. Following his arrest, counsel was appointed to represent him on the assault charges and the probation revocation on a prior sentence. Counsel did not attend the probation revocation hearing, but sent his associate who did not question witnesses and agreed with the state's recommendation. The defendant immediately complained about the inadequate represent but the trial court simply forwarded his letter to counsel. Counsel scheduled a change of plea hearing without even discussing it with the defendant and failed to meet with the defendant outside of hearings despite his letters requesting a meeting. Counsel did not even attend the hearing on the motion for new counsel, but instead sent his associate again. While the associate disagreed with some of the defendant's allegations, he informed the trial court that the relationship had "broken down to such an irreparable state" that they could not provide adequate representation and the firm moved to be relieved. Under these circumstances, new counsel should have been appointed.

**Capital Case*

***In re Dependency of G.A.R.*, 150 P.3d 643 (Wash. Ct. App. 2007).** Mother in termination of parental rights case was denied the effective assistance of counsel. Counsel stipulated to the admission of relevant but highly damaging reports by nontestifying experts, which came in through lay witnesses who could not be cross-examined as to the substance of the reports.

**2005:** ***People v. Madera*, 112 P.3d 688 (Colo. 2005).** The trial court's order for in camera inspection of defense counsel's entire file was premature when the defendant had asserted ineffective assistance of counsel only with respect to the sentence expected from his guilty plea to attempted murder. Due to concerns about attorney-client and work-product privileges, "The decision of a trial court to conduct an in camera review of a defense counsel's case file has serious implications and should be undertaken only in the clearest of cases, when the information sought to be discovered is well defined and all other reasonable means of discovering the information have been excused."

***In re Welfare of J.M.*, 125 P.3d 245 (Wash. Ct. App. 2005).** Mother in termination of parental rights case was denied the effective assistance of counsel. Counsel stipulated to the admission of relevant but highly damaging reports by nontestifying experts, which came in through lay witnesses who could not be cross-examined as to the substance of the reports.

**2003:** ***State v. Meeks*, 666 N.W.2d 859 (Wis. 2003).** A former attorney's testimony during a competence hearing violated the attorney-client privilege. While the attorney did not testify concerning any actual statements by the defendant, "her opinions, perceptions, and impressions of her former clients mental state were necessarily premised upon her privileged and confidential relationship" with the client. *Id*. at ___. The court noted that courts have split on this issue and the majority have held that the attorney-client privilege only protects confidential communications and not the attorney's opinions, perceptions, and impressions of a former client's mental competency. The court adopted the minority position, however, and discusses other cases finding the attorney client-privilege applicable in these circumstances. *Id*. at ___ (citing *Gunther v. United States*, 230 F.2d 222 (D.C. Cir. 1956); *Bishop v. Superior Court*, *In and For Pima County*, 724 P.2d 23 (Ariz. 1986); *State v. Adams*, 283 S.E.2d 582 (S.C. 1981)).