

**SUMMARIES OF PUBLISHED SUCCESSFUL
INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS
PRE-*WIGGINS V. SMITH*
(August 10, 2015)**

Teresa L. Norris

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

TABLE OF CONTENTS

UNITED STATES SUPREME COURT CASES.	<u>1</u>
I. TRIAL PHASE.	<u>12</u>
A. NUMEROUS DEFICIENCIES AND INADEQUATE DEFENSE.	<u>12</u>
1. U.S. Court of Appeals Cases.	<u>12</u>
2. U.S. District Court Cases.	<u>38</u>
3. Military Cases.	<u>43</u>
4. State Cases.	<u>44</u>
B. ONE DEFICIENCY:.	<u>100</u>
1. JURY SELECTION	<u>100</u>
a. U.S. Court of Appeals Cases.	<u>100</u>
b. State Cases.	<u>101</u>
2. INDICTMENT.	<u>104</u>
a. U.S. Court of Appeals Cases.	<u>104</u>
b. State Cases.	<u>104</u>
3. MOTIONS AND NOTICE.	<u>106</u>
a. U.S. Court of Appeals Cases.	<u>106</u>
b. U.S. District Court Cases.	<u>108</u>
c. Military Cases.	<u>108</u>
d. State Cases.	<u>108</u>
4. PROSECUTION EVIDENCE OR ARGUMENT.	<u>124</u>
a. U.S. Court of Appeals Cases.	<u>124</u>
b. U.S. District Court Cases.	<u>126</u>
c. State Cases.	<u>127</u>
5. IMPEACHING WITNESS.	<u>143</u>
a. U.S. Court of Appeals Cases.	<u>143</u>
b. U.S. District Court.	<u>146</u>
c. Military Cases.	<u>146</u>
d. State Cases.	<u>147</u>
6. ELICITING DAMAGING EVIDENCE AND MAKING DAMAGING ARGUMENT.	<u>151</u>
a. U.S. Court of Appeals Cases.	<u>151</u>
b. State Cases.	<u>151</u>
7. CONCEDED GUILT/CONTRADICTING CLIENT.	<u>155</u>
a. U.S. Court of Appeals Cases.	<u>155</u>
b. State Cases.	<u>155</u>
8. ARGUING INCONSISTENT THEORIES.	<u>159</u>
9. INSTRUCTIONS.	<u>160</u>
a. U.S. Court of Appeals Cases.	<u>160</u>
b. U.S. District Court Cases.	<u>161</u>
c. State Cases.	<u>161</u>
10. FAILURE TO CHALLENGE COMPETENCE.	<u>175</u>

	a.	U.S. Court of Appeals Cases.	<u>175</u>
	b.	State Cases.	<u>175</u>
11.		INFORMING THE JURY THAT THE DEFENDANT WOULD TESTIFY AND THEN NOT CALLING THE DEFENDANT.	<u>178</u>
	a.	U.S. Court of Appeals Cases.	<u>178</u>
	b.	State Cases.	<u>178</u>
12.		FAILURE TO PRESERVE THE RECORD FOR APPEAL.	<u>180</u>
	a.	U.S. Court of Appeals Cases.	<u>180</u>
	b.	State Cases.	<u>180</u>
13.		MISCELLANEOUS.	<u>182</u>
	a.	U.S. Court of Appeals Cases.	<u>182</u>
	b.	Military Cases.	<u>182</u>
	c.	State Cases.	<u>183</u>
II.		CAPITAL SENTENCING PHASE ERRORS.	<u>188</u>
A.		NUMEROUS DEFICIENCIES AND INADEQUATE MITIGATION.	<u>188</u>
	1.	U.S. Supreme Court Cases.	<u>188</u>
	2.	U.S. Court of Appeals Cases.	<u>189</u>
	3.	U.S. District Court Cases.	<u>218</u>
	4.	Military Cases.	<u>227</u>
	5.	State Cases.	<u>229</u>
B.		ONE DEFICIENCY.	<u>261</u>
	1.	STATE AGGRAVATION EVIDENCE OR ARGUMENT.	<u>261</u>
		a.	U.S. Court of Appeals Cases. <u>261</u>
		b.	State Cases. <u>261</u>
	2.	INSTRUCTIONS.	<u>263</u>
		a.	U.S. Court of Appeals Cases. <u>263</u>
		b.	State Cases. <u>263</u>
	3.	MISCELLANEOUS.	<u>265</u>
		a.	U.S. Court of Appeals Cases. <u>265</u>
		b.	State Cases. <u>266</u>
III.		NON-CAPITAL SENTENCING ERRORS.	<u>268</u>
A.		U.S. Court of Appeals Cases.	<u>268</u>
B.		U.S. District Court Cases.	<u>270</u>
C.		Military Cases.	<u>271</u>
D.		State Cases.	<u>272</u>
IV.		ADVISING CLIENT.	<u>281</u>
A.		GUILTY PLEA AFTER INADEQUATE INVESTIGATION OR RESEARCH.	<u>281</u>
	1.	U.S. Court of Appeals Cases.	<u>281</u>
	2.	State Cases.	<u>282</u>
B.		ERRONEOUS ADVICE ON SENTENCING OR COLLATERAL CONSEQUENCES THAT LEADS TO PLEA.	<u>285</u>
	1.	U.S. Court of Appeals Cases.	<u>285</u>

	2.	U.S. District Court Cases.....	<u>287</u>
	3.	State Cases.....	<u>288</u>
C.		FAILURE TO INFORM DEFENDANT OR STATE OF PLEA OFFER.....	<u>293</u>
	1.	U.S. District Court Cases.....	<u>293</u>
	2.	State Cases.....	<u>293</u>
D.		OTHER ERRONEOUS LEGAL ADVICE LEADING TO PLEA.....	<u>295</u>
	1.	U.S. Court of Appeals Cases.....	<u>295</u>
	2.	Military Cases.....	<u>296</u>
	3.	State Cases.....	<u>296</u>
E.		BAD ADVICE LEADING TO REJECTION OF PLEA OFFER.....	<u>301</u>
	1.	U.S. Court of Appeals Cases.....	<u>301</u>
	2.	U.S. District Court Cases.....	<u>302</u>
	3.	State Cases.....	<u>303</u>
F.		INADEQUATE ADVICE ON RIGHT TO TRIAL OR TO PLEAD.....	<u>307</u>
	1.	U.S. Court of Appeals Cases.....	<u>307</u>
	2.	State Cases.....	<u>307</u>
G.		INADEQUATE ADVICE ON RIGHT TO TESTIFY OR TO MAKE CLOSING ARGUMENT.....	<u>308</u>
	1.	U.S. Court of Appeals Cases.....	<u>308</u>
	2.	U.S. District Court Cases.....	<u>308</u>
	3.	Military Cases.....	<u>308</u>
	4.	State Cases.....	<u>309</u>
H.		INADEQUATE ADVICE ON RIGHT TO APPEAL.....	<u>311</u>
	1.	U.S. Court of Appeals Cases.....	<u>311</u>
	2.	State Cases.....	<u>311</u>
I.		INADEQUATE ADVICE ON CONSEQUENCE OF APPEAL.....	<u>312</u>
	1.	U.S. Court of Appeals Cases.....	<u>312</u>
V.		FAILURE TO COMPEL COMPLIANCE WITH PLEA AGREEMENT.....	<u>313</u>
	A.	U.S. Court of Appeals Cases.....	<u>313</u>
	B.	State Cases.....	<u>313</u>
VI.		PERFECTING APPEAL.....	<u>315</u>
	A.	U.S. Court of Appeals Cases.....	<u>315</u>
	B.	U.S. District Court Cases.....	<u>316</u>
	C.	State Cases.....	<u>317</u>
VII.		APPEAL.....	<u>320</u>
	A.	U.S. Court of Appeals Cases.....	<u>320</u>
	B.	U.S. District Court Cases.....	<u>325</u>
	C.	State Cases.....	<u>326</u>
VIII.		POST-CONVICTION.....	<u>336</u>
	A.	U.S. Court of Appeals Cases.....	<u>336</u>
	B.	State Cases.....	<u>336</u>
IX.		PROBATION REVOCATION.....	<u>338</u>
X.		JUVENILE HEARINGS.....	<u>339</u>

XI.	INVOLUNTARY COMMITMENT PROCEEDINGS.	<u>340</u>
XIII.	POST-TRIAL CLEMENCY (MILITARY).	<u>341</u>
XIV.	DENIAL OF RIGHT TO COUNSEL ISSUES.	<u>343</u>
	A. SLEEPING COUNSEL.	<u>343</u>
	B. ATTORNEY LICENSING ISSUES.	<u>344</u>
	1. U.S. Court of Appeals Cases.	<u>344</u>
	2. State Cases.	<u>345</u>
	C. ATTORNEY MEDICAL PROBLEMS.	<u>346</u>
	1. U.S. Court of Appeals Cases.	<u>346</u>
	2. State Cases.	<u>346</u>
	D. MISCELLANEOUS.	<u>348</u>
	1. U.S. Court of Appeals Cases.	<u>348</u>
	2. State Cases.	<u>349</u>
XV.	RELATED ISSUES.	<u>350</u>
	A. U.S. Court of Appeals Cases.	<u>350</u>
	B. State Cases.	<u>350</u>

***Capital Case**

UNITED STATES SUPREME COURT CASES

Massaro v. United States, 538 U.S. 500, 123 S. Ct. 1690 (2003). Court held that an ineffective assistance of counsel claim may be brought in a collateral proceeding under 28 U.S.C. § 2255, “whether or not the petitioner could have raised the claim on direct appeal.” The Court did not hold that ineffective assistance claims “must be reserved for collateral review” because counsel’s ineffectiveness may be so apparent from the record that appellate counsel or the court *sua sponte* will consider it advisable to address the issue on direct appeal.

****Woodford v. Visciotti***, 537 U.S. 19, 123 S. Ct. 357 (2002). Court held that the Ninth Circuit had improperly granted habeas relief. The Ninth Circuit had found that the California Supreme Court’s decision was “contrary to” and an “unreasonable application” of federal law under 28 U.S.C. § 2254(d)(1). With respect to the “contrary to” clause, the Ninth Circuit read the state Supreme Court decision as requiring the defendant to prove by a preponderance of the evidence that he had been prejudiced. The Court held that this was a mischaracterization of the state court opinion, which had expressed and applied the proper standard for evaluating prejudice. Although there were instances of the state court using the term “probable” instead of including the modifier “reasonably,” the court held:

“This readiness to attribute error is inconsistent with the presumption that state courts know and follow the law. It is also incompatible with § 2254(d)’s “highly deferential standard for evaluating state-court rulings.” *Lindh v. Murphy*, 521 U.S. 320, 333, n.7, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997), which demands that state court decisions be given the benefit of the doubt.”

Id. at 360. The Ninth Circuit also held that the state court had unreasonably applied established Supreme Court precedent, but the Ninth Circuit apparently substituted its own judgment for that of the state court. While the state court decision may have been incorrect there was no showing that it was objectively unreasonable.

The federal habeas scheme leaves primary responsibility with the state court’s for these judgments, and authorizes federal-court intervention only when a state-court decision is objectively unreasonable. It is not that here. Whether or not we would reach the same conclusion as the California Supreme Court, “we think at the very least that the state court’s contrary assessment was not “unreasonable.”

Id. at 361.

****Bell v. Cone***, 535 U.S. 685, 122 S. Ct. 1843 (2002). The defendant was charged with burglary and murder of an elderly couple in their home following a two-day “crime rampage” that included a jewelry store robbery; shooting three people, including a police officer, during his attempt to elude capture; and the attempted shooting of yet another person. 535 U.S. at 689-90. “[T]he prosecution

***Capital Case**

adduced overwhelming physical and testimonial evidence showing that [the defendant] perpetrated the crimes and that he killed the [victims] in a brutal and callous fashion.” *Id.* at 690. During the trial, in the course of presenting an insanity defense, counsel presented evidence of substance abuse that caused “chronic amphetamine psychosis, hallucinations, and ongoing paranoia,” and evidence of “posttraumatic stress disorders related to his military service in Vietnam.” *Id.* at 690. The defendant’s mother also testified that the defendant was changed by his military service, he had graduated with honors from college, his father and fiancé had died while he was in prison for robbery, and the defendant “had expressed remorse for the killings.” *Id.* Following conviction, in a sentencing hearing that lasted about three hours, counsel stated in his opening statement that the jury should consider the defendant’s mental state, his addiction that stemmed from his military service, and his remorse. Counsel also asked for mercy. In cross-examining the state’s witnesses, counsel established that the defendant had received the Bronze Star in Vietnam. Counsel also successfully objected to photos of the victims’ decomposing bodies. The defense presented no mitigation witnesses. Following a junior prosecutor’s “low-key” closing, *id.* at 691-92, “that did not dwell on any of the brutal aspects of the crime,” *id.* at 701, counsel waived closing argument, which prohibited “the lead prosecutor, who by all accounts was an extremely effective advocate, from arguing in rebuttal,” *id.* at 692. The United States Court of Appeals for the Sixth Circuit held that the state court erred in analyzing the case under *Strickland* rather than *Cronic*. The court also held that prejudice must be presumed under *Cronic* because counsel’s failure to ask for mercy after the prosecutor’s final argument “did not subject the State’s call for the death penalty to meaningful adversarial testing.” *Id.* at 693. The Supreme Court reversed because the presumption of prejudice under *Cronic* does not apply unless the attorney’s failure to contest the government’s case is “complete.” *Id.* at 697.

Here, respondent’s argument is not that his counsel failed to oppose the prosecution throughout the sentencing proceedings as a whole, but that his counsel failed to do so at specific points. For purposes of distinguishing between the rule of *Strickland* and that of *Cronic*, this difference is not of degree but of kind. The aspects of counsel’s performance challenged by respondent—the failure to adduce mitigating evidence and the waiver of closing argument—are plainly of the same ilk as other specific attorney errors we have held subject to *Strickland*’s performance and prejudice components.

Id. The Court, thus, held that the state court had not erred in applying *Strickland* rather than *Cronic*. The Court also observed that, in order to obtain relief in federal habeas, the inmate,

must do more than show that he would have satisfied *Strickland*’s test if his claim were being analyzed in the first instance, because under § 2254(d)(1), it is not enough to convince a federal habeas court that, in its independent judgment, the state-court decision applied *Strickland* incorrectly. Rather, he must show the . . . [state court] applied *Strickland* to the facts of his case in an objectively unreasonable manner. This, we conclude, he cannot do.

***Capital Case**

Id. at 698-99. The Court based its conclusion on the State's "near conclusive proof of guilt," "extensive evidence demonstrating the cruelty of the killings," and evidence that, "despite his high intelligence and relatively normal upbringing, had turned into a drug addict and had a history of robbery convictions." *Id.* at 699. In addition, the defense had already presented evidence during the trial that was mitigating—"evidence regarding the change his client underwent after service in Vietnam; his drug dependency, which apparently drove him to commit the robbery in the first place; and its effects." *Id.* The Court also noted that counsel had "tactical reasons," *id.* at 700, for failing to present additional evidence in sentencing and in waiving closing argument in sentencing. The state court's conclusions that these tactical decisions were reasonable was not objectively unreasonable, as required under the federal habeas standards. *Id.* at 702.

Glover v. United States, 531 U.S. 198, 121 S. Ct. 696 (2001). Assuming, but not deciding, that counsel was deficient in failing to object to increase of offense level under sentencing guidelines despite available argument that all the offenses (labor racketeering, money laundering, and tax evasion) should be grouped together because they all involved substantially the same harm, Petitioner proved prejudice. If the sentence increase was erroneous, the petitioner's 84 month sentence was increased by 6 - 21 months. The government conceded that Seventh Circuit finding that this was insufficient for prejudice was drawn from *Lockhart*, which was error because "*Lockhart* does not supplant the *Strickland* analysis." *Id.* at 700. "Authority does not suggest that a minimal amount of additional time in prison cannot constitute prejudice. Quite to the contrary, our jurisprudence suggests that any amount of actual jail time has Sixth Amendment significance." *Id.*

Edwards v. Carpenter, 529 U.S. 446 (2000) (reversing *Carpenter v. Mohr*, 163 F.3d 938 (6th Cir. 1998)). Ineffective assistance of counsel claim asserted as cause for procedural default of another claim may itself be procedurally defaulted. The defendant plead guilty under *Alford*, while maintaining his innocence, solely to avoid the death penalty. Under Ohio law, however, in aggravated murder cases, a three-judge panel must then conduct a culpability hearing to determine that the defendant is in fact guilty. In this case, the prosecutor recited the facts to the panel, but no evidence was presented. The Ohio Supreme Court held subsequently that a recitation of the facts is not evidence and this alone will not support the culpability finding. Trial counsel served as direct appeal counsel and raised only one weak issue. Subsequently, represented by different counsel, Carpenter filed an application to reopen the direct appeal because appellate counsel was ineffective for failing to raise the sufficiency of the evidence issue. [Under state law, this was the appropriate vehicle for raising the appellate IAC issue.] The Court of Appeals dismissed the application as untimely under state law. The Ohio Supreme Court affirmed. In habeas, Carpenter argued IAC for failing to challenge the sufficiency of the evidence and IAC for failing to raise the issue on appeal. The Sixth Circuit held that, while the ineffective assistance of appellate counsel issue was procedurally barred because the state relied on a procedural bar in that filing was out of time, the ineffective assistance of appellate counsel claim was exhausted and could, therefore, serve as cause for the state court procedural default of his sufficiency of the evidence claim. The Supreme Court reversed finding that the ineffective assistance of appellate counsel claim was also procedurally defaulted because it was dismissed as untimely under state law. Thus, this claim can excuse the

***Capital Case**

procedural default on the sufficiency of the evidence challenge only if petitioner can show cause and prejudice for failing to timely file the application to reopen the direct appeal.

****Williams v. Taylor***, 529 U.S. 362, 120 S. Ct. 1495 (2000). The decision in *Lockhart v. Fretwell* did not modify or supplant the rule of *Strickland*, which does not include a separate inquiry into fundamental fairness even after the defendant shows that his lawyer was ineffective and that his ineffectiveness probably affected the outcome of the proceeding. The *Strickland* holding is clearly established law irrespective of the fact that the test requires a case-by-case examination of the facts. The state court's decision denying relief was an "unreasonable application" of this clearly established law because the state court's decision "turned on its erroneous view that a 'mere' difference in outcome is not sufficient to establish constitutionally ineffective assistance of counsel." *Id.* at 1515. In addition, the state court's decision was an unreasonable application of *Strickland* because the state court failed to evaluate the totality of the available mitigation evidence adduced at trial and in the habeas proceedings and affirmed simply because it did not find that the unrepresented mitigation evidence would undermine the prosecution's death-eligibility case or the finding of future dangerousness. "Mitigating evidence unrelated to dangerousness may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case." *Id.* at 1516. The Court found ineffective assistance in sentencing and reversed. The facts are discussed below in the capital sentencing section.

Roe v. Flores-Ortega, 528 U.S. 470 (2000). Counsel's failure to file notice of appeal without defendant's consent must be reviewed under the *Strickland* analysis rather than a per se rule. While the better practice is to consult with defendant regarding the possibility of appeal in all cases, and the state's are free to impose this rule, the constitution does not require such a per se rule. "[C]ounsel has a constitutionally-imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal) or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." *Id.* at 1036. In proving prejudice, "a defendant must demonstrate a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed." *Id.* at 1038. This prejudice analysis does not require a showing that the appeal would have had merit.

Smith v. Robbins, 528 U.S. 259 (2000). The Court held that California's no-merit brief procedure, in which appellate counsel who has found no non-frivolous issues remains available to brief any issues appellate court might identify, does not violate the Sixth Amendment right to effective assistance of counsel on appeal. Court also held that the Ninth Circuit erred when it ruled that asserted Anders violation required new appeal, without testing claimed Sixth Amendment error under *Strickland v. Washington*. The proper review under *Strickland* requires an analysis of prejudice unless there is a complete denial of counsel on appeal, state interference with counsel's assistance, or counsel has an actual conflict of interest.

*Capital Case

**Kyles v. Whitley*, 514 U.S. 419 (1995).¹ The “touchstone” of the prejudice test in ineffective assistance of counsel claims is “a ‘reasonable probability’ of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict . . . , but whether . . . he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.” *Id.* at 434. Likewise, the prejudice test of *Strickland* “is not a sufficiency of evidence test.” *Id.* Furthermore, the resulting prejudice from counsels’ errors must be “considered collectively, not item-by-item.” *Id.* at 436.

**Lockhart v. Fretwell*, 506 U.S. 364 (1993). Court holds that the prejudice test of *Strickland* “focuses on the question whether counsel’s deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair,” *Id.* at 372, and is not limited to a contemporary assessment of the law. The aggravating factor used to sentence Fretwell die was duplicative of an element of the underlying felony used to convict him of felony murder. Trial counsel did not object to this duplication despite an Eighth Circuit opinion finding the duplication to be unconstitutional. The Arkansas Supreme Court refused to review the issue on direct appeal because of the lack of objection. In state habeas, the Arkansas Supreme Court denied the ineffective assistance claim because, at the time of trial, the Arkansas Courts had not adopted the Eighth Circuit’s position. In federal habeas, the District Court granted relief due to ineffective assistance of counsel for failure to make the appropriate objection. The Eighth Circuit affirmed on appeal, despite the fact that it had reversed the controlling case due to the Supreme Court’s intervening opinion in *Lowenfield v. Phelps*, 484 U.S. 231 (1988). The Supreme Court granted cert and reversed declaring that “[t]o set aside a conviction or sentence solely because the outcome would have been different but for counsel’s error may grant the defendant a windfall to which the law does not entitle him.” *Id.* at 369-70. While recognizing that *Strickland* required that counsel’s conduct be viewed under the law at that time (“contemporary assessment”), the Court declared that there was no such restriction on the prejudice requirement. *Id.* at 372. The Court rejected the argument that *Teague v. Lane*, 489 U.S. 288 (1989) prohibited this retroactivity by declaring that *Teague* was motivated to protect State interests in finality. A federal habeas petitioner has no interest in finality and thus could not benefit from *Teague* despite the fact that States can. *Id.* at 372-73. Justice O’Connor in her concurrence noted that this decision “will, in the vast majority of cases, have no effect on the prejudice inquiry”

¹In *Kyles*, the Court reviewed a petitioner’s claim that the state did not disclose evidence favorable to the defense in violation of the rule established in *Brady v. Maryland*, 373 U.S. 83 (1963), and refined in *United States v. Bagley*, 473 U.S. 667 (1985). In *Brady*, the Court held that the government must disclose evidence that is both favorable to the defense and “material.” 373 U.S. at 87. In *Bagley*, the Court held that the “materiality” test under *Brady* was the same as the prejudice test espoused in *Strickland* for determining ineffective assistance of counsel claims. *Bagley*, 473 U.S. at 682, (Blackmun, J., with O’Connor, J., concurring) and 473 U.S. at 685 (White, J., with Burger, C.J., and Rehnquist, J., concurring in part and concurring in the judgment). Thus, the Court’s discussion of the “materiality” test in *Kyles* is equally applicable to the analysis of prejudice in resolving claims of actual ineffectiveness of counsel under *Strickland*.

***Capital Case**

under *Strickland*. *Id.* at 373. In her view, this case determined only that “the court making the prejudice determination may not consider the effect of an objection it knows to be wholly meritless under current governing law, even if the objection might have been considered meritorious at the time of its omission.” *Id.* at 374.

****Coleman v. Thompson***, 501 U.S. 722 (1991). There is no constitutional right to an attorney in state post-conviction proceedings; “[c]onsequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings.” *Id.* at 752. Thus, the risk of attorney error in state post-conviction proceedings is borne by the defendant and counsel’s filing of the notice of appeal one day late in state post-conviction, which prompted the state court to dismiss the petition, procedurally defaulted the issues for federal habeas proceedings.

****Murray v. Giarratano***, 492 U.S. 1 (1989). The Constitution does not require States to provide counsel in capital post-conviction proceedings.

****Burger v. Kemp***, 483 U.S. 776 (1987). Counsel was not ineffective in failing to offer mitigating evidence in capital sentencing. The evidence that could have been presented disclosed “an exceptionally unhappy and unstable childhood,” *id.* at 789, that included one incident of arrest as a juvenile that resulted in probation. Counsel was aware of some of the family history but “made the reasonable decision that his client’s interest would not be served by presenting this type of evidence.” *Id.* at 791. As the record stood, there was no evidence that petitioner had any prior criminal record. Presentation of the family history could have been counterproductive by revealing the juvenile probation, involvement in drugs at an early age, and “violent tendencies that are at odds with the defense’s strategy of portraying petitioner’s actions on the night of the murder as the result of [the codefendant’s] strong influence upon his will.” *Id.* at 793. While counsel “could well have made a more thorough investigation than he did,” *id.* at 794, “counsel’s decision not to mount an all-out investigation into petitioner’s background in search of mitigating circumstances was supported by reasonable professional judgment,” *id.*

Pennsylvania v. Finley, 481 U.S. 551 (1987). The Constitution does not require States to provide counsel in non-capital post-conviction proceedings.

****Smith v. Murray***, 477 U.S. 527 (1986). Court declined in federal habeas to review issue that had been preserved by counsel at trial but deliberately abandoned during the direct appeal to the Virginia Supreme Court because counsel did not believe that state law “support[ed] our position at that particular time.” *Id.* at 531. The court stated, “This process of ‘winnowing out weaker arguments on appeal and focusing on’ those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy.” *Id.* at 536 (quoting *Jones v. Barnes*, 463 U.S. 745, 751-52 (1983)).

Murray v. Carrier, 477 U.S. 478 (1986). Court in federal habeas case held that ineffective assistance of counsel is cause for procedural default, but the exhaustion doctrine generally requires

***Capital Case**

that such claim be presented to state courts as independent claim before it may be used to establish cause for procedural default. Attorney error short of ineffective assistance of counsel does not, however, constitute cause for procedural default even when that default is on appeal rather than at trial. In discussing safeguards from a miscarriage of justice, the court observed that “the right to effective assistance of counsel . . . may in a particular case be violated by even an isolated error of counsel if that error is sufficiently egregious and prejudicial.” *Id.* at 496.

Kimmelman v. Morrison, 477 U.S. 365 (1986). The restrictions on federal habeas review of Fourth Amendment claims do not apply to Sixth Amendment claims of ineffective assistance of counsel even though the principal allegation of inadequate representation relates to counsel’s failure to file a timely motion to suppress evidence allegedly obtained in violation of the Fourth Amendment. In order to succeed on the merits of the claim, however, the defendant must establish that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice. The Court relied, in part, on the reasoning that “[a] layman will ordinarily be unable to recognize counsel’s errors and to evaluate counsel’s professional performance; consequently a criminal defendant will rarely know that he has not been represented competently until after trial or appeal, usually when he consults another lawyer about his case.” *Id.* at 378 (citation omitted). Likewise, the Court reasoned that “[t]he constitutional rights of criminal defendants are granted to the innocent and the guilty alike. Consequently, we decline to hold either that the guarantee of effective assistance of counsel belongs solely to the innocent or that it attaches only to matters affecting the determination of actual guilt.” *Id.* at 380. Counsel in this case failed to file the motion to suppress because he was unaware of the search or the evidence. The Court held that counsel’s failure to conduct any discovery because of a belief the state was obliged to provide inculpatory information was unreasonable and “betray a startling ignorance of the law—or a weak attempt to shift blame for inadequate preparation.” *Id.* at 385. In other words, counsel failed to investigate or make a reasonable decision not to investigate through discovery. “Such a complete lack of pretrial preparation puts at risk both the defendant’s right to an ‘ample opportunity to meet the case of the prosecution,’ and the reliability of the adversarial testing process.” *Id.* (citations omitted). In addition, the state’s argument that counsel’s failure to investigate was reasonable because of the relative importance or unimportance of the evidence involved is “flawed.” *Id.* “At the time Morrison’s lawyer decided not to request any discovery, he did not—and, because he did not ask, could not—know what the State’s case would be. While the relative importance of [the evidence] . . . is pertinent to the determination whether [the defendant] was prejudiced by his attorney’s incompetence, it sheds no light on the reasonableness of counsel’s decision not to request any discovery.”

****Darden v. Wainwright***, 477 U.S. 168 (1986). Petitioner was not denied the effective assistance of counsel due to counsel’s failure to prepare and present evidence in capital sentencing. Counsel had prepared for sentencing, including obtaining a psychiatric report intended for use in sentencing. Counsel chose not to present any evidence, however, and “reasonably could have chosen to rely on a simple plea for mercy from petitioner himself.” *Id.* at 186. Any evidence that petitioner was non-

***Capital Case**

violent would have opened the door to evidence of petitioner's numerous prior convictions that had not previously been admitted and a psychiatric report that petitioner was a "sociopathic type personality." *Id.* Any evidence that petitioner was a "family man" would have been met with petitioner's admission during trial that, although still married, he had been spending the weekend with a girlfriend.

Hill v. Lockhart, 474 U.S. 52 (1985). *Strickland* standard applies to guilty plea challenges based on ineffective assistance of counsel. In order to satisfy the *Strickland* "prejudice" standard, the defendant must show that there was a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.

Evitts v. Lucey, 469 U.S. 387 (1985). "To prosecute the appeal, a criminal appellate must face an adversary proceeding that – like a trial – is governed by intricate rules that to a layperson would be hopelessly forbidding." *Id.* at 396. Thus, counsel is necessary, but "a party whose counsel is unable to provide effective representation is in no better position than one who has no counsel at all. A first appeal as of right therefore is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of counsel." *Id.* Retained counsel, who filed a timely notice of appeal but failed to perfect the appeal, provided ineffective assistance of counsel.

****Strickland v. Washington***, 466 U.S. 668 (1984). In order to establish ineffective assistance of counsel, the defendant must show that counsel's performance was deficient, i.e. "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. The defendant must also show that the deficient performance prejudiced the defense, i.e., "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* With respect to counsel's conduct, counsel has a duty to conduct an "independent examination of the facts, circumstances, pleadings and laws involved." *Id.* at 680. "[T]he defendant must show that counsel's representation fell below an objective standard of reasonableness," which must be judged under "prevailing professional norms." *Id.* at 688. "Prevailing norms of practice as reflected in American Bar Association standards and the like, e.g., ABA Standards for Criminal Justice 4–1.1 to 4–8.6 (2d ed. 1980) ('The Defense Function'), are guides to determining what is reasonable, but they are only guides." *Id.* at 688. "Judicial scrutiny of counsel's performance must be highly deferential," and must be evaluated "from counsel's perspective at the time." *Id.* at 689. "Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* (citation omitted). With respect to the duty to investigate, the Court held that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 691. "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." *Id.* Thus, "inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation

***Capital Case**

decisions.” *Id.* With respect to prejudice, “a defendant need not show that counsel’s deficient conduct more likely than not altered the outcome in the case.” *Id.* at 693. “The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.” *Id.* at 694. Thus, the appropriate test is that for materiality of exculpatory evidence not disclosed to the defense by the prosecution. “The defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* In determining prejudice, the court should presume “that the judge or jury acted according to law.” *Id.* “When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt. When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.” *Id.* at 695. “In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury,” *Id.*, because “a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support,” *Id.* at 696. In applying these standards, “[t]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process.” *Id.* at 696. No different or special standards apply in federal habeas. A state court’s findings of fact made in the course of deciding an ineffectiveness claim are subject to the deference requirement in federal habeas, but a state court conclusion that counsel rendered effective assistance of counsel is not a finding of fact binding on the federal court. “[B]oth the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact.” *Id.* at 698. Counsel in *Strickland* provided effective assistance even though defendant plead guilty and counsel did not prepare and present character or psychiatric evidence or request a presentence report. Counsel’s strategy was based on his knowledge of the judge, who favored acceptance of responsibility, and counsel wanted to rely on the plea colloquy and prohibit cross-examination of the defendant and other defense witnesses. Counsel did not want a presentence report because it would have reflected numerous priors.

United States v. Cronin, 466 U.S. 648 (1984). The court held that:

The right to the effective assistance of counsel is . . . the right of the accused to require the prosecution’s case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted – even if defense counsel may have made demonstrable errors – the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated. As Judge Wyzanski has written: “While a criminal trial is not a game in which the participants

***Capital Case**

are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators.” *United States ex rel. Williams v. Twomey*, 510 F.2d 634, 640 (CA7), *cert. denied sub nom. Sielaff v. Williams*, 423 U.S. 876, 96 S.Ct. 148, 46 L.Ed.2d 109 (1975).

Id. at 657-58 (footnotes omitted). In *Cronic*, the defendant was indicted on mail fraud charges involving a “check kiting” scheme in which over nine million dollars in checks were transferred between banks in Florida and Oklahoma during a four month period. Shortly before the scheduled trial date, the defendant’s retained counsel withdrew. The court appointed a young real estate lawyer, who had never before had a jury trial, to represent the defendant but allowed him only 25 days to prepare for trial. The Court of Appeals reversed the conviction without determining whether “there had been an actual breakdown of the adversarial process during the trial of this case. Instead it concluded that the circumstances surrounding the representation of respondent *mandated an inference that counsel was unable to discharge his duties.*” *Cronic*, 466 U.S. at 657-58. The Supreme Court held that this was error, however, because counsel is presumed to be competent except in limited circumstances, which warrant a presumption of prejudice. *Id.* at 658. These circumstances include the complete denial of counsel at a critical stage of trial. *Id.* at 659. “Similarly, if counsel entirely fails to subject the prosecution’s case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable.” *Id.* (citing *Davis v. Alaska*, 415 U.S. 308, 318 (1974) (no showing of prejudice required where the petitioner had been “denied the right of effective cross-examination” of state witnesses). There may also be circumstances present where “the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial.” *Id.* at 660 (citing *Powell v. Alabama*, 287 U.S. 45 (1932) (where counsel was appointed the day of trial in a highly publicized capital trial for six defendants surrounded by “hostile sentiment” and armed guards). In these limited circumstances, the Court held that “the surrounding circumstances made it so unlikely that any lawyer could provide effective assistance that ineffectiveness was properly presumed without inquiry into actual performance at trial.” *Id.* at 661. Because the Court of Appeals in this case did not find that *Cronic* was denied counsel during a critical stage or “find, based on the actual conduct of the trial, that there was a breakdown in the adversarial process that would justify a presumption” of prejudice, *id.* at 662, reversal was required. The fact that counsel was given only 25 days to prepare for trial, that counsel was young and inexperienced in criminal matters, etc., were “relevant to an evaluation of a lawyer’s effectiveness . . . , but neither separately nor in combination . . . provide[d] a basis for concluding that competent counsel was not able to provide” effective assistance of counsel. *Id.* at 663. With respect to the inexperience of counsel, the Court noted, “Every experienced criminal defense attorney once tried his first criminal case. . . . The character of a particular lawyer’s experience may shed light in an evaluation of his actual performance, but it does not justify a presumption of ineffectiveness in the absence of such an evaluation.” *Id.* at 665. The Court also noted:

***Capital Case**

[T]he appropriate inquiry focuses on the adversarial process, not on the accused's relationship with his lawyer as such. If counsel is a reasonably effective advocate, he meets constitutional standards irrespective of his client's evaluation of his performance. . . .

Id. at 657 n.21. The Court thus “attach[ed] no weight” to Cronin’s “expression of satisfaction with counsel’s performance at the time of his trial. . . .” *Id.*

Jones v. Barnes, 463 U.S. 745, 751-52 (1983). Appellate counsel does not have a constitutional duty to raise every nonfrivolous issue requested by defendant.

Cuyler v. Sullivan, 446 U.S. 335 (1980). The Sixth Amendment right to the effective assistance of counsel applies equally to retained and appointed counsel.

***Capital Case**

I. TRIAL PHASE

A. NUMEROUS DEFICIENCIES AND INADEQUATE DEFENSE

1. U.S. Court of Appeals Cases

2003: *Matthews v. Abramajtys*, 319 F.3d 780 (6th Cir. 2003) (affirming 92 F. Supp. 2d 615 (E.D. Mich. 2000)). Counsel ineffective in felony murder case for numerous reasons. The state's evidence showed that three men were seen fleeing the scene of a robbery and murder and that circumstantial evidence, including a ring from one of the victims, pointed to the petitioner. Counsel's conduct was deficient because counsel failed to present the defendant's alibi witnesses of which he was aware and failed to present evidence of which he was aware that a group of children that had observed the fleeing men gave descriptions inconsistent with the defendant who was 6'4" tall. Some of the children had also been shown a photo line-up with the petitioner included and affirmatively stated that none of the men in the line-up were seen fleeing from the murder scene. Instead of presenting this evidence, counsel simply made a "rambling closing argument in favor of reasonable doubt." *Id.* at 786. Prejudice found where the state's evidence was not overwhelming and the trial court had informed counsel in ruling on the motion for directed verdict that he believed the evidence was sufficient to convict the defendant. Nonetheless, even though it was a bench trial, counsel did not present the available evidence in defense.

**Cargle v. Mullin*, 317 F.3d 1196 (10th Cir. 2003). Counsel ineffective in capital trial and sentencing for numerous reasons. The petitioner was convicted in connection with the shooting of two people in a drug transaction. The petitioner and two friends had purchased marijuana and gone to a party. They were dissatisfied with the quality of the marijuana and returned to get their money. The drug sellers complied and the transaction was not confrontational. The petitioner and one of his friends (both nineteen) were prepared to leave when their older friend (twenty-four) suddenly inexplicably opened fire and killed the man. One of the participants then killed the woman that was present. In a statement to police, petitioner denied that he was the shooter. During trial, however, the remaining immunized accomplice testified that petitioner had shot the woman. A jailhouse snitch also testified that petitioner admitted shooting the woman. There was no other evidence on this issue, except the defense called one brief witness who testified that, contrary to his trial testimony, the immunized accomplice had told the witness that the original shooter had killed both the man and the woman. During sentencing, counsel presented only one witness in mitigation. The defendant's pastor provided "brief, unprepared, personally remote, and fairly generic testimony." *Id.* at 1210. Analyzing the case under the AEDPA (but for the most part finding for a variety of reasons that no deference was required under 2254(d)), the court found that counsel's conduct was deficient. Counsel had been retained by the petitioner's family. Unbeknownst to them he was embroiled in bankruptcy and ethical and criminal charges for which he was ultimately convicted and disbarred. "The strain of these overlapping pressures on counsel" was evident because he spent less than one hour with petitioner prior to trial. *Id.* at 1209-10. He also talked with the petitioner's parents only generally and made no effort to explain the process to them or to gather information

***Capital Case**

from them. “Counsel thus essentially foreclosed any helpful disclosures from those most likely to know, first-hand, the pertinent facts.” *Id.* at 1210. As a result, none of these witnesses testified. Counsel obtained the one trial witness because the witness contacted him and offered assistance. He obtained the one sentencing witness as “an after-thought.” *Id.* He waived opening. After the state’s case in aggravation was completed, “counsel turned to the courtroom crowd and secured his only witness when the pastor at petitioner’s church offered to take the stand.” *Id.* Counsel then actively deterred petitioner’s parents from testifying and arguably lied to the trial court, outside petitioner’s presence, to state that petitioner did not desire to testify. Counsel’s conduct was deficient during the trial for failing to adequately challenge the state’s case, which relied almost exclusively on an immunized accomplice and a jailhouse snitch. If counsel had conducted “[e]ven a rudimentary investigation,” counsel would have discovered five witnesses that would have testified that the accomplice had made prior statements claiming to have killed one or both of the victims himself and that he had indicated he would not testify if petitioner’s parents would pay him. Counsel could also have discovered and presented evidence that the jailhouse informant had told his wife that petitioner had actually told him that he did not kill anyone. “There is no plausible reason other than counsel’s self-inflicted ignorance” for not presenting this evidence. *Id.* at 1214. Counsel also failed to impeach the immunized accomplice with evidence that, aside from immunity in exchange for testifying here, the accomplice was also promised that he would not have a deferred sentence of up to 20 years for a prior assault brought up. Counsel even conceded by failing to respond to the state’s motion that the deferred sentence would not be brought up in examination. Counsel also failed to impeach a police officer that attempted to bolster the snitch’s testimony. The officer testified that he had no knowledge of the facts before the snitch approached him. If counsel had adequately cross-examined the officer, however, the jury would have heard that the officer was the chief investigator and swore out an arrest warrant the same day the snitch approached him based on the snitch but also on a witness that had provided significant details weeks before. While the officer “himself did not play an important role in the state’s case. . . , this impeachment would have shown the jury that even the police testimony in this case may not be believed. . . .” *Id.* at 1216. Counsel was also ineffective during the trial for suggesting that his client had lied to the police about the significance of a hand injury several months prior to the shooting. While counsel could choose not to press this as a defense, counsel violated his duty of loyalty in calling his client a liar in a case that was all about credibility. Prejudice was found in the trial due to the cumulative effect of these errors. Counsel also failed to object to instances of prosecutorial misconduct. Specifically counsel failed to object to the state’s argument that they only prosecuted guilty people, and that the police and prosecutor had corroborated the accomplice’s immunized testimony with evidence unknown to the jury (implied in argument and in the immunity agreement admitted in evidence). While the court did not find reversal was required due to improper arguments by the state, these errors were considered in the cumulative prejudice analysis because

any effort by the State to deflect responsibility for prosecutorial misconduct or to discount the resultant prejudice by blaming defense counsel for not objecting to/curing the errors would *support* petitioner’s case for relief in connection with his associated allegations of ineffective assistance.

***Capital Case**

Id. at 1217. The court held that a cumulative error analysis considering the ineffectiveness and state misconduct claims was appropriate and that the analysis was “unconstrained by the deference limitations in § 2254(d) because the [state court] did not conduct the appropriate cumulative error review.” *Id.* at 1220. Finding that “these errors had an inherent synergistic effect which pertained to the two absolutely critical witnesses for the State,” the court found cumulative prejudice. *Id.* at 1221. The court also applied the “commonsense notion that sentencing proceedings may be affected by errors in the preceding guilt phase.” *Id.* at 1208. Thus, the court applied cumulative error in sentencing that considered trial errors “so long as the prejudicial effect of the latter influenced the jury’s determination of sentence.” *Id.* With respect to sentencing, if counsel had adequately investigated and presented the evidence, the jury would have heard that petitioner was born prematurely when his mother was only fifteen. He had physical and learning problems and moved frequently as a child. His abusive father used drugs and was rarely around. On the positive side, his mother loved him and would have asked the jury to spare his life. Petitioner also would have expressed remorse for the murders (although maintaining that he did not personally shoot the victims) and would have asked the jury for mercy for his family’s sake. The court found that “counsel’s gross mishandling of the penalty-phase defense left his client’s fate to jurors who could only wonder why neither the man nor any member of his family would step up to explain, in personal human terms, why his life should be spared notwithstanding the reprehensible conduct of which he had been found guilty.” *Id.* at 1211. Prejudice was found. The court also found state misconduct due to the prosecutor’s argument that suggested that the jurors were part of “the team” with the police and prosecutors instead of impartial arbiters. This error was considered in the cumulative prejudice analysis.

2002: *Catalan v. Cockrell*, 315 F.3d 491 (5th Cir. 2002). Counsel ineffective in an aggravated assault case for several reasons. The defendant and his brother were jointly charged and represented by the same counsel until the day of trial when the trial court concerned about a conflict of interest appointed independent counsel for the defendant. New counsel did not request the ten day preparation period allowed for appointed counsel under Texas law. Instead, he consulted with the defendant and conflicted counsel for less than an hour and proceeded to trial. Because he had conducted no investigation and was unaware of the facts of the case, he failed to impeach the alleged victim on cross examination with a prior inconsistent statement that the defendant was a mere bystander during the assault. During the trial, counsel also relied completely on the conflicted counsel. Counsel’s performance was both deficient and prejudicial. In the analysis under the AEDPA, the court noted that the Texas court did not refer to *Strickland* at all in denying relief. The court assumed though that the Texas court decision was based on *Strickland* because the parties had relied on *Strickland* in their briefs. The court found that the Texas court application of *Strickland* was objectively unreasonable.

***Brown v. Sterns*, 304 F.3d 677 (7th Cir. 2002).** Counsel ineffective in armed robbery case for failing to investigate and present evidence of the petitioner’s history of mental illness. The petitioner had been diagnosed and treated for two years while in prior confinement for chronic schizophrenia. After his release from confinement he applied for social security disability benefits and was again

***Capital Case**

diagnosed as suffering from chronic schizophrenia. Prior to trial, counsel learned from petitioner's previous attorney that petitioner had been treated while incarcerated with psychotropic medication. Counsel sought a continuance, sought a court appointed evaluation, and subpoenaed the prior medical records. Counsel did not however, follow up on the subpoena and did not provide the available records to the court appointed examiners. Counsel also failed to advise the court appointed doctors of the history of mental illness. While the petitioner did inform the court appointed doctors of his history of mental illness, the doctors did not investigate and dismissed the petitioner's claims as malingering and found that he was competent to proceed. Prior to trial, substitute counsel took over representation but was not informed of the history of mental illness by the prior attorney. Petitioner testified in his bench trial that he attacked the victim with a knife because he believed the victim was following him. Following an outburst by the petitioner during the trial, the substitute attorney moved for a psychiatric examination prior to sentencing but the motion was never ruled on. During sentencing, the trial court found the petitioner was fully responsible for his actions and sentenced him to the maximum sentence of 30 years. The state court in reviewing the issue relied on the affidavits of the two attorneys that they had no information that required investigation into the petitioner's mental state. The state court also found that there was no prejudice because there was no evidence that the court appointed doctors would have reached a different conclusion if the prior medical record had been made available. The state court also found no prejudice in failing to raise an insanity defense or in failing to argue the history of mental illness in sentencing. The Seventh Circuit held that the state's courts findings were unreasonable in light of the facts presented in the case. The trial attorneys affidavits were not credible and contradicted statements made prior to trial in requesting the court appointed evaluation and issuing the subpoena for medical records, which indicated a strategic decision to investigate the psychiatric condition. Counsel failed to complete the investigation. Prejudice found in failing to provide the records to the court appointed examiners because "past available psychiatric records [are] an essential part of an evaluation of the defendant's competence to stand trial." The court ruled that the court appointed examiner conducted only a single interview and did not have the proper records or information from any family members. "We are convinced that the glaring absence of even a minimal investigation into Brown's medical history clearly affected the validity and thus the utility of the finding of the psychiatric institute doctors." The court was convinced that the lack of information concerning the medical history rendered the opinions of the court appointed doctors "useless and unreliable." Prejudice was found in the failure to request and to present the evidence of mental illness, which precluded the defendant from receiving a proper competence hearing, raising an insanity defense, or arguing for a more lenient sentence in light of his mental illness.

White v. Godinez, 301 F.3d 796 (7th Cir. 2002). Under pre-AEDPA analysis, counsel was ineffective in murder case for failing to adequately consult with petitioner and failing to call his alleged accomplice were to testify. Petitioner and his accomplice a charged with murder and conspiracy for allegedly hiring two men to kill the victims. The state's primary witness, one of the actual killers, testified that the victims were competitors to a prostitution business run by petitioner and his girlfriend accomplice. The defense theory at trial was that petitioner's brother actually hired the killers. This was consistent with the original statement to police by a state witness. The court

***Capital Case**

found that counsel's conduct was deficient because counsel met with the defendant once for ten minutes only to discuss fees and then the night before trial met with the defendant for only twenty minutes. Counsel never discussed trial strategy or possible defense witnesses and did not call either the accomplice or the petitioner to testify. The accomplice would have testified that she and the petitioner were at home on the night of the murder and that the actual killers took guns and a rental car from their home without their knowledge. Counsel's conduct was deficient because counsel failed to make the reasonable decision not to explore the possibility of calling the witnesses to testify or to explore the alternative defense that would have been supported by the testimony. Prejudice found because the inadequate preparation and investigation led to the decision to mount an implausible defense that the petitioner's brother contracted the killers and counsel knew from discovery material that the brother had an alibi and that another state's witness would corroborate testimony that it was the petitioner and not his brother who met with killers on the night of the murder.

Luna v. Cambra, 306 F.3d 954, *amended*, 311 F.3d 928 (9th Cir. 2002). Counsel ineffective in attempted murder and robbery case for failing to interview and subpoena two alibi witnesses and one exonerating witness. The victim was attacked in a park and stabbed numerous times. While he was in the intensive care unit of the hospital he was shown a photo lineup and he identified the defendant and co-defendant. At trial the victim identified the defendant as the man who stabbed him. The victim admitted, however, that he had consumed five beers in the hours preceding the attack and was not wearing his prescription eyeglasses and the lighting was poor in the park. There was no physical evidence linking the defendant to the crimes. The defendant testified that he was home sleeping at the time of the crime. Counsel's conduct was deficient because the defendant had informed counsel of the availability of his mother and sister to testify as alibi witnesses and had also informed counsel that another witness could exonerate him. Prejudice found because the defendant's mother and sister could have testified that the defendant went to sleep at home the night before and woke up at home the next morning and if he had gotten up in the middle of the night (the crime was at 3:00 a.m.) they would have heard him because the sister slept in the room with the defendant and the mother slept in the front room of the one bedroom house. There was a reasonable probability that if the jurors had heard this testimony they would have entertained a reasonable doubt concerning guilt. The defendant was also prejudiced because if counsel had contacted the exonerating witness counsel could have obtained a statement much like the witness' declaration in federal habeas that stated that the defendant was innocent and did not participate in the crime which had in fact been committed by witness and another. Prejudice was also clear because the prosecution case was relatively weak. Under AEDPA, the court found that the state court's denial was objectively unreasonable in light of the Supreme Court decision in *Strickland*.

Rios v. Rocha, 299 F.3d 796 (9th Cir. 2002). Counsel ineffective in second degree murder case for failing to adequately investigate and present a defense of misidentification. The shooting occurred outside a pizza and deli and there were between fifty and two hundred people at that location (many of whom were outside when the shots were fired). The people present included members of both the "Crips" and the "Bloods," rival street gangs. Earlier in the evening the victim had punched the

***Capital Case**

defendant. Witnesses also observed the victim taunting members of his rival gang, waving a gun around, threatening some people, and physically attacking a number of others. The victim was ultimately shot five times and the state presented testimony of five eye witnesses. The co-defendant presented a misidentification defense and was acquitted. The defendant presented the affirmative defense of unconsciousness due to a concussion from his fight with the victim earlier. The state did not present any physical evidence linking the defendant to the crime and did not assert that the defendant was a member of a gang. Counsel's conduct was deficient because counsel decided prior to the preliminary hearing to rely on the unconsciousness defense. At the time he had done nothing but read the police reports and psychological report. He had also spoken to only one witness. Counsel "had insufficient facts on which to make any reasonable assumption on which to base any reasonable decision as to the appropriate defense or defenses to be offered." *Id.* at 806. Counsel's decision, prior to the preliminary hearing was "patently unreasonable." *Id.* at 807. The court rejected the state's argument that counsel's conduct was reasonable because counsel relied on investigative reports prepared by the investigator for the co-defendant. The court found that counsel did not have access to these documents at the time the decision not to present the misidentification defense was made. In addition, the court found that counsel could not reasonably rely solely on material gathered for the co-defendant any more than he could reasonably rely Solely on the police reports. The court also rejected the state's argument counsel that made a choice because of insufficient funds to investigate. The court held "reluctance to ask for public funds to hire his own investigator was not a proper reason for failing to pursue an initial investigation into potentially feasible defenses." *Id.* at 808. Prejudice found because the testimony of the states eyewitness was both inconsistent and severely impeached. There was also substantial evidence about other possible suspects, a number of whom had shot at the victim earlier and had a reason to want to hurt him. The fact that the jury acquitted the co-defendant also showed that the state did not have a strong case. The court found that the defense presented was not only based on a failure to investigate but also inadequate information which in all likelihood contributed to the defendant's conviction. The choice to present the unconsciousness defense was therefore an unreasonable choice. A defense of unconsciousness may well have communicated to the jury that even the defendant thought he might have shot the victim. If counsel had adequately investigated, five witnesses could have provided exculpatory testimony. All of these witness were close friends of the victim and one of them was a fellow gang member.

Avila v. Galaza, 297 F.3d 911 (9th Cir. 2002). Counsel ineffective in attempted murder case for failing to adequately investigate and present evidence that petitioners' brother was the shooter. Petitioner and his brother were both were associated with a gang attending a barbecue at a park. The shooting occurred in this area . The defendant was initially represented by counsel who also represented his brother in a separate case. The investigator was told by three people that it was the brother and not the petitioner that shot the victim. The brother also confessed to counsel and to the investigator and counsel withdrew due to conflict. Replacement counsel was appointed prior to trial. Counsel became convinced that the defendant's brother was the shooter and even told the prosecutor during plea negotiations that the brother was probably the shooter. Nonetheless, counsel conducted no investigation to substantiate his belief because he assumed that the petitioner and his mother did not

***Capital Case**

want him to implicate the brother at trial. Counsel also did not investigate because he believed that the brother would admit that he was the shooter during the trial. Counsel did not call the brother as a witness. Following trial, counsel filed a motion for new trial because he believed he had made a mistake in not going after the brother. The court rejected the state court findings because the court did not cite any law, much less controlling Supreme Court precedent, and did not apply either prong of *Strickland*. The decision was thus contrary to federal law. Counsel's conduct was deficient because he failed to investigate or include evidence that the brother was the shooter. Regardless of any sense of obligation to the client's family, counsel had no choice but to perform his duty to his client. Prejudice found because the prosecution's case rested on identification witnesses whose testimony was not rock solid. If counsel had adequately investigated, eleven witnesses could have testified that the petitioner was not in the area of the shooting. Finally, if counsel had adequately investigated, the brother might have come forward or at least made an inculpatory statement that could have been used against him at trial.

***Jennings v. Woodford**, 290 F.3d 1006 (9th Cir. 2002). Counsel was ineffective for failure to pursue mental health and drug abuse issues during trial and instead presenting a weak alibi defense. Counsel's conduct was deficient, even though counsel had available a preliminary two-hour examination by a psychiatrist, because counsel decided to present the weak alibi without sufficient investigation when counsel was aware that the defendant was a long-term methamphetamine addict who had used the night of the homicide; the defendant had attempted suicide; the defendant had been diagnosed as a schizophrenic and had been involuntarily committed for a psychiatric evaluation; and that counsel's paralegal, friends, and co-workers believed there was something "seriously wrong" with the defendant. Prejudice found because a reasonable investigation would have revealed a family history of paranoid schizophrenia and severe alcoholism; physical abuse; sexual abuse; and a pattern of self-mutilation. Investigation would also have revealed that – at least in part due to drug use – the defendant was experiencing psychotic symptoms including hallucinations, delusions, memory gaps, and dissociation; a diagnosis of schizoaffective disorder; and a finding of psychosis and dissociation at the time of the offenses, such that the defendant could not form the intent to kill or to premeditate or deliberate. If counsel had investigated counsel likely would have presented a mental health defense rather than the weak alibi. Prejudice found because the jury deliberated for two full days despite the overwhelming evidence of guilt, which indicates the jury would have been amenable to a verdict of second degree murder or manslaughter.

***Fisher v. Gibson**, 282 F.3d 1283 (10th Cir. 2002). Counsel ineffective in pre-AEDPA analysis of capital trial for numerous errors. District Court had found ineffective assistance in sentencing where counsel presented no opening, no evidence, and no argument and only uttered nine words during sentencing. The Court of Appeals did not address this issue, however, because of the finding of ineffectiveness during the trial. The defendant was arrested following the arrest for the same murder and then release of the state's key witness, who was a juvenile at the time, who pointed to the defendant. The witness alleged that he and the defendant met the victim, the defendant had sex with the victim, and then the defendant killed him. Counsel, who was a full-time state senator with limited time for investigation and trials, conducted no investigation and no preparation. He filed no

***Capital Case**

discovery motions and failed to even discover that the defendant had made potentially inculpatory statements at the time of his arrest. During the trial, he presented no opening, no witnesses other than the defendant, and made no closing argument. Counsel presented no defense theory and to the extent there was any it was an alibi advanced only through the defendant's testimony, which counsel undermined. "[H]is cross-examination served solely to allow prosecution witnesses to reiterate the state's evidence, and did not challenge the testimony or the witnesses' credibility in any way." He expressed sympathy for the state's key witness bolstering his testimony while at the same time actively undermining the defendant's credibility in his alibi testimony by eliciting evidence of prior drug use, berating his client, and essentially reenforcing the state's case. Counsel also "engaged in the dangerous and indefensible practice of conducting a fishing expedition with a police witness on cross-examination" and elicited damaging evidence from several police officers, such as bloodstains on the defendant's clothes and a bloody fingerprint on the victim's car, when the state had not presented this evidence and there was no indication that this evidence linked the defendant to the murder. Counsel had no strategy and was "conducting an admittedly uninformed and therefore highly reckless 'investigation' during trial." This "conduct cannot be called a strategic choice: an event produced by the happenstance of counsel's uninformed and reckless cross-examination cannot be called a 'choice' at all." Counsel also failed to challenge the testimony of the alleged eyewitness with the evidence that he was initially charged with this murder and was unable to impeach a police officer who denied that because counsel had failed to gather the readily available documentation. Counsel also failed to impeach the alleged eyewitness with evidence of prior inconsistent statements, questions of veracity even to those close to the eyewitness, and inconsistencies in his testimony with other evidence. Counsel also did not prepare and present evidence of the defendant's alibi, which was readily available and had been presented in the extradition hearing in New York. Counsel failed to present evidence that, while the defendant made some potentially inculpatory statements at the time of the arrest that he had assaulted a black man in Oklahoma around September 1982, there were also exculpatory aspects, including that the victim in this case was white and was murdered in December 1982. In addition, to these things, counsel was actively hostile to his client and implied his client's guilt, based in part on the client's admitted homosexual conduct at times and the homosexual nature of this offense. "An attorney's concession of animosity makes it appropriate to scrutinize counsel's performance with a somewhat more critical eye." (quotation omitted). In considering prejudice under "the totality of the evidence," the court recognized that each example of counsel's deficient conduct alone might not demonstrate prejudice. Together though, the defendant was prejudiced because the state's case included no physical evidence linking the defendant to the murder and the only evidence of bloodstains on the defendant's clothing and bloody fingerprints was presented by the defense. Outside of this evidence, which still did not link the defendant to the crime scene, but counsel failed to argue this to the jury, the trial amounted to a "swearing match" between the defendant and the state's key witness, "either of whom could have committed the murder."

2001: *Pavel v. Hollins*, 261 F.3d 210 (2d Cir. 2001). Counsel ineffective in a pre-AEDPA sexual abuse of children case because counsel did not prepare a defense, on the theory that the charges against the defendant would be dismissed at the close of the prosecution's case because there was little physical

***Capital Case**

evidence supporting the charges. The charges were brought by the defendant's wife in the midst of a marital, custody dispute and the same lawyer represented the defendant in both cases. The state's evidence consisted of the testimony of the two boys, the mother, a therapist, and a doctor. The two young sons alleged repeated anal sodomy but the physical evidence revealed only mild redness in the anal area of one of the boys, which the state doctor said was "consistent" with the allegations of anal sodomy. The defendant testified that he had not abused the children and that the son who had redness in the anal area had diarrhea the week before the defendant's arrest. The defendant was so adamant about his innocence that he had been paroled from prison, but a condition of parole required him to complete a sex offender program, which required him to admit guilt. He refused and returned to prison. In analyzing counsel's performance the court declared that "our focus in analyzing the performance prong . . . must be on the reasonableness of decisions when they were made, not on how reasonable those decisions seem in retrospect." Counsel failed to call three witnesses that would have supported the defense. The court recognized that the decision not to call witnesses is strategic in the sense of which witnesses to call and in that counsel made the choice for a reason, in this case, "to avoid preparing a defense that might ultimately prove unnecessary."

That goal, however, was mainly avoiding work--not, as it should have been, serving Pavel's interests by providing him with reasonably effective representation. Therefore, although Meltzer's decision was "strategic" in some senses of the word, it was not the sort of conscious, reasonably informed decision made by an attorney with an eye to benefitting his client that the federal courts have denominated "strategic" and have been especially reluctant to disturb.

One of the available but uncalled witnesses was with the defendant and the boys in an apartment in Florida during the week before the defendant's arrest. Her testimony contradicted that of the boys in significant respects and corroborated the defendant's testimony that one of the boys had diarrhea and would have testified that the defendant had no opportunity to abuse the children during the week when she was not present and that nothing seemed out of the ordinary with the boys' behavior or mood. The court, quoting *Griffin v. Warden*, 970 F.2d 1355, 1358 (4th Cir.1992), noted that "an attorney's failure to present available exculpatory evidence is ordinarily deficient, unless some cogent tactical or other consideration justified it." In this case, involving a "credibility contest," there was no reasonable strategy, because the defendant told counsel about this witness but counsel did not interview her or prepare her testimony. "[I]t should be perfectly obvious that it will almost always be useful for defense counsel to speak before trial with readily-available fact witnesses whose non-cumulative testimony would directly corroborate the defense's theory of important disputes." Counsel also failed to present the testimony of a psychiatrist appointed as a mediator and counselor in the custody proceedings. This doctor would have testified that the wife was having psychological functioning and memory problems and had accused the defendant of marital rape but then admitted that she never expressed any lack of consent. This testimony would have bolstered the defendant's testimony that his wife fabricated her trial testimony due to hostility to the defendant. Counsel had no strategy not to present this testimony as evidenced by counsel's attempt to elicit some of this information directly from the wife in cross-examination. Counsel also failed to call a medical doctor

***Capital Case**

who would have testified that the physical evidence was inconsistent with the testimony of the boys. If their testimony was true, there should have been some evidence of tearing and abrasions visible, according to the defense expert. There could be no strategy here because counsel had not based the decision not to call an expert on pretrial consultation with an expert.

Because of the importance of physical evidence in “credibility contest” sex abuse cases, in such cases physical evidence should be a focal point of defense counsel’s pre-trial investigation and analysis of the case against his client. And because of the “vagaries of abuse indicia,” such pre-trial investigation and analysis will generally require some consultation with an expert.

Here, the defense counsel had neither “the education or experience necessary to assess relevant physical evidence, and to make for himself a reasonable, informed determination as to whether an expert should be consulted or called to the stand” and there was a disparity between the findings with the two boys and their testimony of repeated abuse. In addition to these specific flaws, the court noted in analyzing prejudice, that if counsel “had so much as attempted to prepare a defense here, one of his initial steps would presumably have been to find ways to poke holes in the testimony of” the child therapist. This also would have been easily done with the testimony of a physician, who opined that the therapist’s “evaluation of the boys was conducted in a manner that was flatly inconsistent [in numerous enumerated ways] with the relevant, publicly available guidelines of the American Academy of Child and Adolescent Psychiatry.” Prejudice found, in light of the state’s “relatively weak” case, on the “cumulative weight of these flaws” so the court did not consider individual prejudice.

Lindstadt v. Keane, 239 F.3d 191 (2d Cir. 2001). Counsel ineffective in sexual abuse of daughter case where the state’s evidence consisted only of testimony from daughter and estranged wife, a child psychologist, and the doctor who examined the daughter. First, counsel’s conduct was deficient because counsel failed to notice and exploit a one-year discrepancy in the testimony concerning the first incident of abuse. Witnesses testified that it occurred in December 1986 when the alleged victim was in the first grade and the defendant lived in home. Those events could only have occurred in December 1985, however, because the defendant did not live in the home in 1986. Second, counsel failed to challenge the only alleged physical evidence of the abuse, which was based on unnamed studies not requested by the defense, which were unchallenged at trial, but controverted easily by other published studies. Third, counsel announced in opening that the defendant would only testify if the state had proved its case, thus, rendering the defendant’s testimony to be an implicit concession that the prosecution had met its burden. Finally, counsel proffered but was unsuccessful in admitting testimony of two officers that, before the daughter alleged abuse, her mother had attempted several times to have her husband jailed for alleged crimes. This testimony was essential to bolster the defense theory that the wife fabricated the charges, but counsel failed to adequately argue the relevance of the testimony and it was excluded. Prejudice found “in the aggregate.” *Id.* at 199. Court stated the last two errors “would not alone suffice. But when they are added to the first two, the cumulative weight of error” required reversal. *Id.* Case was reviewed

***Capital Case**

under AEDPA. Upon finding that petitioner met *Strickland* standard, court found that state court had unreasonably applied *Strickland* without any further discussion of 28 U.S.C. § 2254(d) standard. Court also reversed other charges not specifically affected because of the prejudicial spillover affect.

****Miller v. Anderson*, 255 F.3d 455 (7th Cir. 2001).**² Counsel ineffective in rape and murder capital case decided under the AEDPA for failing to adequately prepare and present a defense. One of the two co-defendants entered a deal to avoid death penalty and testified that the defendant was involved and planned the crimes. Although the co-defendant had contradictions in his testimony, the state corroborated the testimony with evidence from a state expert who said a pubic hair on the victim's thigh was "almost certainly" the defendant's. In addition, a hardware store clerk testified that she had received a check from a "Miller" the day before for shotgun shells and identified the defendant. The state expert testified that DNA evidence was inconclusive. Counsel was ineffective for failing to prepare and present testimony from a hair expert who testified that the hair was consistent with the victim but not the defendant. Counsel also failed to present evidence that the shells purchased were not consistent with the shells used in the crime and failed to subpoena the defendant's bank records, which would have revealed that the check was not written by the defendant. While counsel had reviewed the defendant's records and had his wife testify that he had not written the check and in support of the defendant's alibi, the wife's credibility was easily challenged as biased by the state. In addition, counsel failed to prepare and present DNA, tire-tread, and shoe-print evidence that was exculpatory. While cross-examination may be sufficient in some cases to challenge the state's case, "[i]n these circumstances, it was irresponsible of the lawyer not to consult experts." The biggest error made by defense counsel, however, was calling a psychologist to testify that the defendant was "incapable of the kind of violence that had been perpetrated against the victim" even though counsel knew of the defendant's prior convictions for kidnapping, rape, and sodomy, which was elicited by the state in cross examination. The lawyer offered and the state court found no reason for supposing this was intelligent tactic. Prejudice found even though "we think the chance of an acquittal would still have been significantly less than 50 percent; but it would not have been a negligible chance, and that is enough to require us to conclude that the lawyer's errors of representation were, in the aggregate, prejudicial."

2000: *United States v. Russell*, 221 F.3d 615 (4th Cir. 2000). Counsel ineffective in drug case where sole evidence was defendant's fingerprints on paper used to package heroin and access to the prison recreation area (along with 38 other inmates) where it was found. Defendant testified and did not deny the prints but explained that he ripped up paper into small pieces to use for prison art work and would discard left over pieces in a common area. If jury accepted this explanation as plausible, he would have been acquitted. Defendant's credibility was destroyed, however, when he was impeached with three prior felony convictions, two of which had been vacated prior to trial. Defendant had told his attorney prior to trial that convictions had been set aside but counsel relied

²The order to issue the writ was vacated following settlement by the parties. *Miller v. Anderson*, 268 F.3d 485 (7th Cir. 2001).

***Capital Case**

on government assertions, did not independently investigate, elicited testimony of the invalid convictions, and advised defendant to admit in cross that he had three prior convictions. Counsel's conduct deficient: "When representing a criminal client, the obligation to conduct an adequate investigation will often include verifying the status of the client's criminal record, and the failure to do so may support a finding of ineffective assistance of counsel." *Id.* at 621. Prejudice found because the defendant's credibility was major issue, jury sent out two questions during deliberations reflecting consideration of his credibility, and the government's evidence was of "marginal nature." Court also "recognize[d] that, as a practical matter, evidence of previous convictions often has a prejudicial impact beyond its proper purpose of impeachment." *Id.* at 622. "Under our system of justice, all criminal defendants--even those clearly guilty or otherwise reprehensible--are entitled to a fair trial and, under the Sixth Amendment, each is entitled to the effective assistance of counsel." *Id.* at 623.

***Combs v. Coyle**, 205 F.3d 269 (6th Cir. 2000). Counsel ineffective in capital murder trial for several reasons. Defendant was convicted of killing his girlfriend and her mother with an off-duty police officer as a witness. During the arrest, the defendant was shot by the officer. Another officer came to scene and took the shotgun from the defendant and 10-15 minutes later as he was put into the ambulance, this officer asked what happened. The defendant said, "talk to my lawyer," and otherwise never made a statement or testified. The sole defense theory at trial was that the defendant was too intoxicated to form the requisite intent to kill and to premeditate. During trial, counsel presented testimony about defendant's use of drugs and alcohol in the days leading up to and including the day of the crimes. Counsel also presented the testimony of a psychologist who agreed that the defendant was impaired but testified that defendant did have the requisite intent. While counsel made a strategic decision to present defense and to call psychologist, counsel's conduct was deficient for failing to consult with the expert and learn of this testimony prior to trial. Prejudice found because this testimony was devastating to the only defense theory. Counsel also ineffective for failing to object to the state's presentation of evidence and argument concerning the "talk to my lawyer" statement and the trial court's instruction that this evidence could be considered as relevant to intoxication and mental state at the time. Court notes that there is a split in the circuits on whether a defendant's pre-arrest silence or invocation of right to silence by requesting lawyer is admissible, but agrees with those circuits holding that the use pre-arrest silence as substantive evidence of guilt violates the Fifth Amendment privilege against self-incrimination. Court finds that even if the Fifth Amendment is inapplicable in pre-arrest situations the defendant was in custody here and should have been Mirandized prior to questioning. Court found that the failure to object to this testimony was deficient despite fact that law in circuit was not clear at the time of trial. "Although the contours of the privilege against self-incrimination may sometimes be unclear, that a defendant's silence cannot be used as substantive evidence against him at trial is a fundamental aspect of the privilege. Combs's counsel should have realized that the use of Combs's prearrest silence against him was at least constitutionally suspect and should have lodged an objection on that basis. Counsel's failure to have objected at any point is inexplicable, and we can perceive no possible strategic reason for such failure." *Id.* at 286 (footnotes omitted). Alternatively, court held that counsel's failure to object under state evidentiary rules requiring that evidence be relevant and more probative than prejudicial

***Capital Case**

was deficient. Court held that each of these errors alone were sufficiently prejudicial to require reversal, but noted as cumulative prejudice two additional errors by counsel. First, counsel failed to present evidence of wine cooler bottles, beer cans, and a cooler with several unopened beers in it from defendant's car as additional evidence of intoxication. Second, counsel failed to attempt to redact portions of the videotaped testimony of a witness who was with the defendant when he obtained the gun. The statement included statements that the defendant had stolen items from the witness's mother, which was inadmissible evidence of prior bad acts.

Washington v. Smith, 219 F.3d 620 (7th Cir. 2000) (*affirming* 48 F. Supp. 2d 1149 (E.D. Wis. 1999)). Counsel ineffective in armed robbery case where the defense was alibi and mistaken identity for failing to subpoena an alibi witness known to him for months prior to the trial until the middle of trial, failing to attempt to interview or subpoena two alibi witnesses he learned of just before the trial, and failing to call as a witness one of the people in the car with the defendant at the time of his arrest based on statements to the police that had been disclosed to counsel well before trial. On first, counsel's conduct was deficient because he knew the witness might be difficult to locate. On second, counsel's conduct was deficient because he was not excused from his duty to investigate by the fact that he only became aware of the witnesses just before trial. [District court said: "An attorney's obligation to investigate does not end when the voir dire begins." 48 F. Supp. 2d at ____.] On third, state did not dispute deficiency. The cumulative prejudice of these errors deprived the defendant of a fair trial. The state's case was not overwhelming and the defense had only one alibi witness, who was impeached with a criminal record. If counsel had performed competently, the defendant would have had four alibi witnesses and the uncalled witnesses could not have been impeached with a criminal record. The additional evidence was not cumulative because "cumulative evidence" is "offered to prove something already established beyond reasonable dispute." 48 F. Supp. 2d at _____. The alibi was disputed and the additional witnesses would have providing corroborating testimony, which "adds strength" to the case. In addition, the failure to call the other three alibi witnesses allowed the jury to draw an adverse inference because defense counsel had told the jury he would call one of them and the defendant had testified that he had been with these witnesses. Finally, the witness, who had made the statement to police, would have testified that the defendant had no connection to the bag containing guns found in the car in which he was arrested. These guns were the only direct evidence connecting the defendant to the crime. State court's determination that defendant was not prejudiced by counsel's deficient performance was contrary to Supreme Court precedent, given state court's application of *Lockhart* test looking to whether counsel's failure to investigate rendered result of trial unreliable or proceeding fundamentally unfair, rather than *Strickland* standard requiring showing of reasonable probability that, but for counsel's unprofessional errors, result of proceeding would have been different.

****Stouffer v. Reynolds***, 214 F.3d 1231 (10th Cir. 2000). Counsel ineffective in capital trial for numerous reasons. Counsel waived opening argument and failed to lay foundation for an exhibit and additional evidence impeaching key state witness. Counsel could not ask direct examination questions without leading and failed in cross to point out inconsistencies and only brought out greater detail and emphasis on incriminating evidence. Counsel's closing revealed no defense

***Capital Case**

theory. One counsel had been appointed only a week before trial but did not speak with the defendant or the state's experts and cross-examined four key state forensic experts based only on reading their reports during trial because counsel had failed to seek funding for defense experts to assist in attacking the state's theories. Counsel did not call a defense investigator to testify even though the investigator had viewed the crime scene and discovered numerous factual inconsistencies with the state's theory, such as 13 shots rather than 5. Counsel's only reason for this failure was they wanted the investigator to remain in the courtroom and feared sequestration if the investigator was called as a witness. Prejudice found because "it cannot be fairly said that the omissions and failures of trial counsel, while argumentatively explainable, do not raise a reasonable doubt in the guilty verdict."

1999: **Moore v. Johnson*, 194 F.3d 586 (5th Cir. 1999). Counsel ineffective in murder and armed robbery case in trial and sentencing phases but prejudiced only in sentencing. Counsel were ineffective in failing to conduct an adequate pretrial investigation prior to determining whether to present an alibi defense. The alibi presented was extremely weak and the defendant and his sister even contradicted each other on times and other pertinent facts. In addition, as a result of the alibi defense, the state was able to present extraneous evidence of two prior uncharged armed robberies within weeks of these crimes. The prior crimes had similar facts that were admissible to establish identity. Counsel was not prepared to cross-examine these witnesses, however, and did nothing to counter this strong evidence, which was relevant in sentencing to both special issues of deliberateness and future dangerousness. Counsel also failed to insist that the defendant's entire confession be considered by the jury. The state was allowed to present the portions establishing that the defendant was present at the crime scene with a shot gun pointed at the victim during the armed robbery and the portions describing events after the murder. The portion describing the actual events as an accidental shooting were excluded, however, with the defense counsels' consent. Counsel was also ineffective for eliciting very damaging evidence that connected the defendant to the crimes and defeated their own alibi defense from the very first state's witness even prior to the admission of the defendant's confession. Some of the damaging testimony elicited was never repeated by any other state's witness and no witness was more damaging. In other words, the state's best case was presented by the defense. Counsel then contradicted each other in the closing arguments. One argued the alibi, while the other essentially abandoned the alibi and challenged the defendant's confession as forged and argued that the state had not proven its case. Counsel also failed in sentencing to prepare and present mitigation evidence. Counsel knew of some of the defendant's background but did not investigate or present mitigation evidence. The evidence would have established that the defendant's father was an abusive alcoholic, who rarely provided financial support to the family. The father also routinely beat the defendant and his siblings, but the worst beatings were reserved for the defendant, who tried to intervene to assist his mother when she was beaten. The defendant's mother was an absent parent, who was forced to work two jobs to support the family. Ultimately, after a violent episode with his father, the defendant was kicked out of the home when he was 14. He had to sleep in the streets and was forced to steal food to survive. School records corroborated this history and reflected that the defendant had borderline intelligence, but functioned at an even lower level and never passed a single grade of school without a social promotion. He was forced to drop out when he began living

***Capital Case**

on the streets. He also may have suffered severe trauma to the head or brain. Counsel also failed to argue that the defendant's prison record defeated a showing of future dangerousness. The state offered the records of four prior convictions and argued dangerousness. The defense failed to point out, however, that all four sentences were pronounced the same day and, while the defendant had been sentenced to eight years, he served only two years due to good behavior. The court rejected the purported strategy reasons offered: that presentation of mitigation evidence or the alternative accidental shooting evidence argument was inconsistent with the alibi defense. Counsel did not conduct an adequate investigation such that the "strategy" chosen was entitled to deference. Moreover, the court observed that, while residual doubt arguments are valid in some instances, this was not a residual doubt case. The alibi evidence was extremely weak and the defense failed to present the alternative argument that the shooting was accidental when this argument was far more plausible and could have been made even in conjunction with the alibi defense in the trial phase. Moreover, counsel did not even attempt to argue the alibi in sentencing. One counsel argued that the shooting was accidental, even though counsel failed to present the portion of the defendant's confession that supported this argument, while the other counsel again argued that the state's case was weak. Court are "not required to condone unreasonable decisions parading under the umbrella of strategy, or to fabricate tactical decisions on behalf of counsel when it appears on the face of the record that counsel made no strategic decision at all." *Id.* at 604. With respect to prejudice, the court rejected the state's argument "that deficient performance occurring at the guilt phase of a capital trial may not be deemed to prejudice a capital defendant during the punishment phase of a capital trial." *Id.* at 619. "When, as here, the same jury considered guilt and punishment, the question is whether the cumulative errors of counsel rendered the jury's findings, either as to guilt or punishment, unreliable." *Id.* The court found that the errors in the trial phase were prejudicial because they all amounted essentially to failing to challenge the state's proof of deliberateness and future dangerousness. The court also found the errors in sentencing to be prejudicial. While the court was troubled by counsels' failure to investigate the defendant's background, the court was more troubled by counsels' failure to present the mitigating evidence that was already available to them, such as the accidental shooting language in the defendant's confession and the proof of good behavior in prison in the prison records offered by the state. Sentence reversed based on the cumulative prejudice of the errors in the trial phase and the sentencing phase.

****Lord v. Wood***, 184 F.3d 1083 (9th Cir. 1999). Counsel ineffective in capital trial for failing to present testimony of three witnesses who stated that they had seen the murder victim the day after the defendant allegedly murdered her. The state's case was built on circumstantial evidence and theory that victim was killed during unexplained 45 minute period one day, which was followed by strange behavior by the defendant. Two days after the girl disappeared, however, three boys said they had seen her the day before. Boys made similar statement to cops and twice to defense investigators in the four months after the murder. Court held conduct was deficient because counsel just said they thought the boys statements were inconsistent and would not be believed by jury causing jury to doubt defense counsel. The court rejected this reason as unreasonable because, while there were minor inconsistencies in the statements, all were consistent on the major point that they had seen the victim. All three boys knew her from school, but were not otherwise connected to her

***Capital Case**

or the defendant and had no motive to lie. Likewise, the court rejected counsels' reason because counsel had not bothered to personally interview the witnesses in order to make a credibility determination. Thus, counsels' reasons were entitled to less deference. Court found prejudice because the state's case was built on circumstantial evidence, the defendant's actions after arrest in trying to manufacture an alibi and favorable evidence, and jail house snitch testimony. Court found that, in light of the testimony that victim may have been alive the day after the defendant allegedly killed her, the manufacturing evidence information could have been explained away as the attempts of innocent man to come up with alibi evidence that was otherwise unavailable, which would have left only the questionable testimony of jail house snitches versus the testimony of the three boys with no motive to lie.

Hart v. Gomez, 174 F.3d 1067 (9th Cir. 1999). Counsel ineffective in child molestation case. His daughter testified that she had been molested during their visits to a camping resort during a one year period, but said that the defendant had never molested her when another adult accompanied them to the resort. The defendant's girlfriend testified that she had accompanied the defendant on every single trip the defendant made to the resort with his daughter during the relevant time period. Counsel was ineffective for failing to corroborate the girlfriend's testimony with independent records that she offered to counsel. For every single date the state could prove the defendant went to the resort, the girlfriend had credit card, hotel, and grocery store receipts, along with the dates marked on her calendar. Although the defendant had made statements to his ex-wife that he had molested his daughter in the past, those statements indicated that the abuse had been years before. Thus, the court found prejudice because if the jury had believed the girlfriend's testimony, which could have been corroborated with this evidence, a reasonable juror could not have found the defendant guilty of molestation during the relevant time period charged.

1998: Tejeda v. Dubois, 142 F.3d 18 (1st Cir. 1998). Counsel ineffective in drug possession case where the sole defense was that the police fabricated the evidence. Trial counsel and the court engaged in an ongoing battle which initially resulted in unfavorable rulings limiting the defense and culminated in counsel being held in contempt. Ultimately, counsel gave up trying to cross-examine the prosecution witnesses on the issue and thus failed to uncover significant inconsistencies in the state's case, including contradictions in the officers' testimony as to whether the drugs were seized from the defendant's car or apartment, whether a "drug ledger" was found in the apartment where cop testified it was but ledger was not mentioned in search warrant return or grand jury testimony, and officer's grand jury testimony and report placed location of arrest at three different street intersections (including one non-existent address). Likewise, because there was no evidence, the judge would not allow counsel to argue the theory based on the defendant's testimony. Court held that it did not matter whether battle was counsel's fault or judge's fault, either way the defendant was denied effective representation and there was no strategic reason. Defendant was prejudiced because he was deprived of his only defense.

Seidel v. Merkle, 146 F.3d 750 (9th Cir. 1998). Counsel ineffective in murder case for failing to prepare and present a mental health defense. Defendant killed another with a knife during a struggle

***Capital Case**

and told cops that he was “scared for his life” and that the victim “fell on the knife.” Counsel presented only a self-defense theory. Counsel failed to investigate mental health even though his notes showed that client informed him of medication from V.A. and that jail was arranging medication. If counsel had gotten jail records or done any investigation, he would have known that defendant’s reports were accurate. Likewise, if counsel had requested an evaluation, he would have learned that defendant had a history of mental illness (Post Traumatic Stress Disorder). This evidence should have been presented in conjunction with the self- defense evidence. Court held, “Counsel’s disregard for conspicuous pieces of evidence that pointed to a potentially fruitful trial strategy cannot be described as anything short of defective representation.” 146 F.3d at 756.

***Crandell v. Bunnell**, 144 F.3d 1213 (9th Cir. 1998), *overruled in part*, *Schell v. Witek*, 218 F.3d 1017 (9th Cir. 2000). Capital defendant was denied his right to counsel because he was forced to choose between incompetent counsel or no counsel at all. He appeared pro se pretrial and told the judge that appointed counsel was inadequate. The court did not inquire. If court had done so, the court would have discovered that counsel only visited the defendant 1-3 times in months and had no correspondence or phone calls, conducted no investigation on guilt or sentencing, conducted no discovery and just relied on state’s open file policy, and simply pressed the defendant for a plea without developing a working relationship with the client. While counsel’s decision that a plea bargain was the only alternative may have been sound, he was deficient in failing to enhance his bargaining position with investigation and failing “to meet and develop a working relationship with his client.” No showing of prejudice required. [This portion was overruled by *Schell*]. Trial court should have inquired and appointed new counsel.

Brown v. Meyers, 137 F.3d 1154 (9th Cir. 1998). Counsel ineffective in attempted murder case because counsel failed to investigate and present alibi evidence which would have corroborated the defendant’s testimony and prevented the prosecution from arguing lack of corroboration. Court found prejudice because, regardless of whether the jury would have believed the alibi or not, “there were sufficient inconsistencies in the prosecution evidence to make that result sufficiently probable to undermine confidence in the outcome of the trial.”

Holsomback v. White, 133 F.3d 1382 (11th Cir. 1998). Counsel ineffective in sodomy of child case for failing to subpoena the examining doctor’s report or to interview or call doctor as a witness. The report showed no evidence of physical abuse even though abuse was alleged over a five year period. Counsel chose simply to rely on prosecution’s lack of physical evidence and defendant’s word against victim’s word when the doctor could have testified that the victim’s claims of rectal abuse were medically impossible. Counsel’s decision unreasonable where counsel did not investigate and thus “could not have made an informed decision” concerning the benefits versus the risks of presenting testimony. Counsel only speculated that risks outweighed the benefits of presenting the doctor’s testimony, which was not true.

1997: *Groseclose v. Bell, 130 F.3d 1161 (6th Cir. 1997) (*affirming* 895 F. Supp. 935 (M.D. Tenn. 1995)). Trial counsel ineffective in capital case because he had no theory of defense, conducted no

***Capital Case**

cross-examination or adversarial testing of state case, allowed co- defendant's attorney to take the lead despite conflicts between defendant's, and failed to communicate with client prior to trial. **More details from District Court opinion:** Trial counsel, who had never tried a murder case and only tried a handful of criminal cases, was ineffective for failing to move for severance and failing to prepare and present evidence in guilt phase where defendant protested innocence and three codefendants implicated him. Counsel filed only five meaningless pretrial motions, did not interview witnesses, did not attempt to impeach or cross- examine critical state witnesses, did not investigate or present defense witnesses, advised defendant not to testify even though defendant had no criminal record, waived closing argument, and failed to object to defendant being placed on medications that made him "foggy." Counsel made independent objection only once in 2400 pages of transcript. In sentencing, counsel also failed to prepare and present mitigation evidence. Counsel waived opening argument and argued for only nine minutes in closing, called four witnesses who hurt the defense, had the defendant testify and protest innocence after he was found guilty, did not request that closing arguments be transcribed and prosecutor argued that defendant would be paroled if given life. Available mitigation included evidence that defendant had no criminal record, served honorably in the military for twelve years including service in Vietnam, was an ordained minister, and did volunteer work in the community. Numerous religious leaders, community volunteers, friends, and family would have testified concerning good character.

****Bloom v. Calderon*, 132 F.3d 1267 (9th Cir. 1997).** Trial counsel was ineffective in capital case involving the murders of defendant's father, step-mother, and 8 year old step-sister for failing to adequately prepare and present a mental health defense. Despite numerous continuances counsel did not retain a psychiatrist until days before trial and then had a law student who had no knowledge of the facts or defense counsel's theory to contact the expert. Expert requested records and a neuropsychological examination but got neither. The expert examined the client, with no idea of the theory of defense or history, and client who stated he killed father because he had been sexually molesting step-daughter and denied mental illness. Expert wrote a damaging report saying mother and daughter were killed so there would be no witnesses. If trial counsel had adequately investigated, the expert would have been aware of a history of severe childhood abuse, a family history involving generations of mental illness and domestic abuse, defendant's mother was epileptic and took Dilantin during pregnancy which is now known to cause neurological damage to fetus, the defendant was pronounced dead at age two after drowning, at age 11 the defendant was given a power steroid for a kidney condition which caused Cushing Syndrome which frequently leads to psychotic symptoms such as psychosis and agitation, and a history of black-outs. In addition, only five months prior to these offenses, the defendant had been arrested for robbery after police noticed strange behavior. A court-appointed psychiatrist recommended inpatient psychiatric care. The defendant's jail records reflected an attempted suicide, referrals for psychiatric observation and treatment, and a psychologist's notes of visual and auditory hallucinations while in pretrial confinement. Neuropsychological testing revealed substantial neurological damage. Nonetheless, counsel obtained none of this. Likewise, a social worker at the jail noted psychotic outbursts prior to trial and tried repeatedly to contact counsel to inform him, but counsel did not even return her calls. If the experts had all of this information, the testimony would have revealed that the defendant

***Capital Case**

suffers from black-outs or transient psychotic episodes. Court stated, “When the defense’s only expert requests relevant information which is readily available, counsel inexplicably does not even attempt to provide it, and counsel then presents the expert’s flawed testimony at trial, counsel’s performance is deficient.” *12

Johnson v. Baldwin, 114 F.3d 835 (9th Cir. 1997). Counsel ineffective in rape case where the only evidence of rape and identification of defendant came from the alleged victim who said that she had been raped numerous times by defendant and his brother and that both had ejaculated each time, but there was no physical evidence of rape found by examining physician, no lab evidence of semen or pubic hairs found in rape kit, and no evidence of semen on bed where rapes allegedly occurred. At trial, the defendant testified that he was not present at the scene. After conviction, he said prior to sentencing that he was present but did not rape the woman and that he had lied because his defense counsel told him to testify and lie. While court did not find that counsel told him to lie, court did find that counsel was ineffective for simply accepting the defendant’s statements at face value and failing to investigate. If counsel had investigated, he could have confronted defendant with either contradiction or lack of corroboration of his intended testimony and adequately advised the defendant that the better course was not to testify but simply to present a defense that he was present but there was no evidence of rape. The court stated that “ineffective assistance of counsel claims based on a duty to investigate must be considered in light of the strength of the government’s case.” (quoting *Eggleston v. United States*, 798 F.2d 374, 376 (9th Cir. 1986)).

***Williamson v. Ward**, 110 F.3d 1508 (10th Cir. 1997) (*affirming Williamson v. Reynolds*, 904 F. Supp. 1529 (E.D. Okla. 1995)). Counsel ineffective for a number of reasons including failing to prepare and present evidence of incompetence, insanity, inability to waive *Miranda* rights, and mental health mitigation where evidence showed a prior adjudication of incompetence, a long institutional history of mental problems including schizophrenia, defendant wasn’t taking prescribed medications for mental illness (including Thorazine) for a month prior to confessions, social worker noted that because of long history of substance abuse defendant may have organic damage and neuropsychological testing was needed. In addition, counsel failed to impeach two state witnesses who testified pursuant to deals and had prior history as snitches and failed to present evidence that another person turned himself in to police and confessed to this crime while defendant was in custody.

1996: Henry v. Scully, 78 F.3d 51 (2d Cir. 1996). Counsel ineffective in sale and possession of drugs case for: failing to object to admission of co-defendant’s confession and instruction that jury could consider it as evidence; failing to object to hearsay explaining why the defendant had no drugs on him when he was arrested; and failing to request a missing witness instruction with respect to a confidential informant who did not testify. Court does not address individually but finds that the aggregate of these errors constitutes ineffective assistance.

DeLuca v. Lord, 77 F.3d 578 (2d Cir. 1996) (*affirming* 858 F. Supp. 1330 (S.D.N.Y. 1994)). Trial counsel ineffective for failing to pursue an extreme emotional disturbance defense to murder charge

***Capital Case**

where defendant had been raped by the murder victim and defendant suffered from rape trauma syndrome. Trial counsel also failed to adequately explain to the defendant that she had the right to decide whether to testify or not and advised her not to testify.

Berryman v. Morton, 100 F.3d 1089 (3d Cir. 1996). Counsel ineffective in rape case for: (1) failing to cross-examine victim concerning prior inconsistent descriptions of assailants; (2) opening the door to police testimony that codefendant was being investigated for unrelated homicide and robbery which tended to implicate the defendant; and for failing to adequately investigate and present defense witnesses. Available witnesses included victim's friend who would have testified, contrary to victim, that victim was drinking just before rape. In addition, the mere presence of alleged accomplice, who was 5'5" tall, in courtroom would have impeached victim's testimony when she described him as being the same height as codefendant who was 6'4".

Hadley v. Goose, 97 F.3d 1131 (8th Cir. 1996). Counsel ineffective in rape and burglary case where the state offered evidence of an uncharged burglary at the same home four days after these offenses. Defense counsel failed: (1) to develop and present available alibi evidence on uncharged burglary and did not even ask defendant his whereabouts during testimony; (2) failed to impeach police officer who testified concerning uncharged burglary that there were footprints in snow outside victim's home consistent with footprints outside defendant's mother's home (hiking boots) nearby when another officer had written report saying no similar footprints found and would have testified that prints outside defendant's home were not similar to those outside victim's home (cowboy boots); and (3) defense counsel failed to develop and present testimony of half-brother who would have testified that the defendant did not own any pleated boots.

Freeman v. Class, 95 F.3d 639 (8th Cir. 1996) (*affirming* 911 F. Supp. 402 (D.S.D. 1995)). Counsel ineffective in auto theft prosecution for: offering report that contained accomplice's hearsay statement that defendant stole car; failing to request cautionary instruction on accomplice testimony where the only direct evidence against defendant was the testimony of accomplice; and failing to object or move for a mistrial when the prosecutor made repeated references in direct examination of witnesses to defendant's exercise of his right to remain silent.

Baylor v. Estelle, 94 F.3d 1321 (9th Cir. 1996). Counsel ineffective in rape case for failing to follow-up on criminalist's report which excluded defendant as source of semen. Counsel failed to subpoena the criminalist or follow-up in any other manner and defendant was prejudiced despite detailed confession which defendant alleged was coerced.

Sager v. Maas, 84 F.3d 1212 (9th Cir. 1996) (*affirming* 907 F. Supp. 1412, *aff'd on remand*, 907 F. Supp. 1422 (D. Or. 1995)). Trial counsel ineffective in armed robbery case for: introduction in guilt-or-innocence phase of entire victim impact statement as handwriting exemplar of victim; failure to object to introduction of 911 telephone call of victim, and even if call was admissible, her failure to listen to tape of call before played to jury and failure to attempt to exclude irrelevant, inflammatory references to defendant.

***Capital Case**

1995: *Genius v. Pepe*, 50 F.3d 60 (1st Cir. 1995). Counsel ineffective in murder case for failing to request a sanity evaluation the results of which would have been privileged after defendant was initially found incompetent to stand trial and court-appointed psychiatrist found diminished capacity.

Williams v. Washington, 59 F.3d 673 (7th Cir. 1995) (*affirming* 863 F. Supp. 697 (N.D. Ill. 1994)). Counsel ineffective in wife's case where counsel represented both husband and wife in joint trial for indecent liberties with adopted daughter. Only the alleged victim, the defendants, and a police officer testified at trial. Counsel did not present favorable character evidence including evidence of fitness as parents found by state agency prior to foster care and adoption. Counsel did not present evidence of alleged victim's character for untruthfulness despite teacher's notes in school records characterizing her as an "inveterate liar." Counsel did not call alleged victim's sister to testify to rebut victim's testimony that she told her sister about abuse. He did not produce medical records which indicated that abuse may not have occurred. He did not interview other occupants of home or building who did not hear outcry or see any evidence of a struggle. He did not request discovery or file pretrial motions. He did not object to admission of a letter victim allegedly wrote but never mailed and didn't even know of its existence despite fact that state had provided a copy and it was in his file. He did not attempt to suppress husband's alleged confession or attempt to limit it to the husband. He also did not attempt to sever the wife's trial.

****Harris ex rel. Ramseyer v. Wood***, 64 F.3d 1432 (9th Cir. 1995). District Court affirmed because trial counsel ineffective based on cumulative prejudice test. *See Harris ex rel. Ramseyer v. Blodgett*, 853 F. Supp. 1239 (W.D. Wash. 1994). Trial counsel ineffective in capital case for relying on defendant's admission of guilt rather than adequately investigating and presenting evidence. Specifics of inadequate representation include: failure to obtain independent ballistics or forensics expert when police believed the victim had only been shot once but defendant maintained that he was shot first by co-defendant who passed gun to defendant and told him to shoot; failure to investigate or have independent evaluation of defendant's mental status even though record was replete with evidence of mental dysfunction because counsel believed that defendant was faking mental illness; failure to provide state hospital experts with letters from defendant to counsel, police, and judges which contained delusional beliefs and bizarre statements; failing to adequately protect client's right to silence. Counsel advised defendant to make a statement and to testify at trial that companion shot victim and then handed gun to defendant who shot a second time. Counsel believed that the statement would eliminate an aggravating circumstance but entered into no specific agreement with the prosecutor to eliminate the aggravator and did not stop statement when lack of agreement became obvious and even had defendant to testify at trial with no protection or even preparation. Counsel also ineffective for: failing to present a defense or even challenge government's evidence including challenge government witness who testified as ballistics expert when there was no evidence of witnesses qualifications; arguing in guilt-phase closing that defendant lied 85% of the time, drank a lot, and was a thief and therefore jury should disregard most of his statements as unreliable and dishonest; and failing to request a jury instruction in sentencing to define manslaughter which was an admitted prior conviction even after prosecutor argued that defendant "had killed before." Moreover, counsel was ineffective for: failing to prepare and present available mitigation evidence

***Capital Case**

which would have shown a well-documented history of delusional thinking, paranoid, suicidal tendencies, substance abuse, and depression; failing to present evidence of successful work history prior to disability; and for allowing admission of prior conviction for manslaughter without admission of its subsequent dismissal or even an explanation of offense. [Yes, there's more!] Finally, counsel failed to advise defendant of conflict of interest because counsel represented defendant's step-father in the probate of defendant's mother's estate and defendant and step-father had adverse interests.

Territory of Guam v. Santos, 54 F.3d 786 (9th Cir. 1995) (*affirming* 856 F. Supp. 572 (D. Guam 1994)). Trial counsel ineffective in murder case for failing to follow-up on police department memo which implicated the key prosecution witness in the murder and failed to use the memo during the trial even though the implicated witness was the only witness who placed the defendant at the crime scene.

1994: *Bryant v. Scott*, 28 F.3d 1411 (5th Cir. 1994). Counsel ineffective for failure to interview alibi witnesses despite defendant's uncooperativeness in providing the names only three days before trial, failure to interview eyewitnesses prior to trial despite vigorous cross-examination, and failure to interview co-defendant who maintained that defendant was innocent.

Sanders v. Ratelle, 21 F.3d 1446 (9th Cir. 1994). Counsel ineffective in failing to prepare a present a defense. Defendant was charged with murder. Following initial hung jury, defendant's family retained counsel. Defendant's mother informed the new counsel that his brother had confessed to the crime and was prepared to testify. He attended court prepared to testify, but left on the instruction of counsel without testifying. Counsel offered three defenses: (1) an alibi; (2) that the shot came from inside the house rather than the street where witnesses placed defendant and his brother; and (3) relying on conflicting accounts of eyewitnesses who variously had identified the defendant and his brother, counsel claimed that the brother was the shooter. Defendant was convicted of second-degree murder. Despite the fact that the brother confessed from the beginning that he was the killer, counsel failed to interview the brother and even refused to speak with him when the brother presented himself at counsel's office. He did not seek to introduce the brother's out-of-court statements and told the brother to leave when he showed up to testify. Because counsel failed to investigate at all, calling his decision not to present this evidence as strategic "strips that term of all substance." *Id.* at 1456. Counsel completely failed to investigate the most important defense: that his brother was the shooter. He not only failed to call the brother to testify, he also (1) failed to attempt to obtain a statement from the brother; (2) failed to offer into evidence the brother's admission to his mother on the night of the murder that he was the shooter. Prejudice found because the alibi defense was weak. The shot from inside the house theory was even weaker. The mistaken identification defense had merit where there was contradictory eyewitness testimony. By failing to present direct evidence that the brother was the shooter, however, counsel deprived the defense of "its most powerful possible support." *Id.* at 1458.

***Capital Case**

It is beyond dispute, however, that [counsel's] behavior was unconscionable--above all, because he violated his elementary obligation to inquire into both the facts and the law before determining what was in his client's best interest. To refuse to listen to another person's confession to a crime one's client is accused of committing is unfathomable. Moreover, it is rarely a good strategic decision to advance a transparent lie as your client's primary defense, and certainly not when there is a far more plausible defense available. What makes Jefferson's behavior so inexplicable is that he was presented with an opportunity to obtain exculpatory evidence of critical import to his client, evidence that strongly suggested the most viable defense his client possessed – mistaken identity – and he refused to lift a finger to secure it, or even to ascertain its validity.

Id. at 1460. The court also considered that counsel was subsequently disbarred for similar indifference to the interests of his client. Counsel also had a conflict of interest because he was retained by the family and the court separately granted relief on this ground also. There is other evidence of Jefferson's indifference to Sheldon's interests, as well. Counsel also failed to secure a transcript of the first trial and, thus, did not highlight inconsistencies between the testimony of the five eyewitnesses at the first trial and at the second. He failed to hire a private investigator to interview witnesses and gather evidence from the scene; failed to hire a ballistics expert to validate the inside shot defense; and failed to familiarize himself with crime scene photos and other physical evidence. “In short, aside from showing up in court, [counsel] did little or nothing in his client's behalf.” *Id.* at 1460.

1992: *Griffin v. Warden*, 970 F.2d 1355 (4th Cir. 1992). Trial counsel ineffective for failure to contact robbery defendant's alibi witnesses despite counsel's belief that defendant would plead guilty. Investigation would have revealed alibi witnesses to counter the state's eyewitness evidence which was uncorroborated by any physical evidence.

****Martinez-Macias v. Collins*, 979 F.2d 1067 (5th Cir. 1992).** Trial counsel ineffective in guilt and sentencing phases. “The state paid defense counsel \$11.84 per hour. Unfortunately, the justice system got only what it paid for.” *Id.* at 1067. *See Martinez-Macias v. Collins*, 810 F. Supp. 782 (W.D. Tex. 1991) for facts. Trial counsel was ineffective for failing to call a disinterested alibi witness available at the time of trial because of a claimed risk of opening the door to an extraneous criminal incident where counsel never researched issue and if he had counsel would have learned that under Texas law the prior would not have been admissible. In addition, in light of witness' testimony that she had seen the defendant with blood on his shirt and washing blood off his hands, counsel was ineffective for failing to call either a defense investigator who had previously obtained a different story from the witness or the defendant's daughters, who were allegedly with the witness at the time in question. Finally, counsel was ineffective in sentencing for failing to prepare and present mitigation evidence which would have shown defendant's good character and his adaptability and good behavior in confinement which was easily demonstrated by admission of records from a California prison.

***Capital Case**

Sims v. Livesay, 970 F.2d 1575 (6th Cir. 1992). Trial counsel ineffective in murder case for failing to investigate and present evidence that, consistent with defendant's claim that the shooting was accidental and at close range, there was powder residue on the quilt with bullet holes that had been between the gun and the victim. State argued that defense was false due to the absence of tattooing around the bullet wound.

Workman v. Tate, 957 F.2d 1339 (6th Cir. 1992). Defense counsel ineffective (in trial for felonious assault on police officers) for failing to contact two witnesses defendant was with during events which led to his arrest because the testimony of the witnesses would have directly contradicted the testimony of police officers who arrested defendant.

1991: **Henderson v. Sargent*, 926 F.2d 706 (8th Cir. 1991). Trial counsel ineffective during guilt-innocence phase for failing to investigate and present evidence that the victim's husband committed the murder. Cause and prejudice established because post conviction counsel also found ineffective for not raising ineffective trial counsel claim in post conviction petition.

Grooms v. Solem, 923 F.2d 88 (8th Cir. 1991). Counsel ineffective for not investigating defendant's potential alibi and for not attempting to get alibi witnesses' testimony on record.

1990: *Harris v. Reed*, 894 F.2d 871 (7th Cir. 1990). Counsel was ineffective in defendant's murder trial when he failed to call or interview two eyewitnesses that would have testified they saw another man running from the scene of the crime.

****Chambers v. Armontrout***, 907 F.2d 825 (8th Cir. 1990) (en banc). Counsel rendered IAC in defendant's capital murder trial when he failed to interview and call the only witness that would have testified that the victim struck defendant before defendant shot victim, thus supporting defendant's claim of self defense, even though witness' testimony would have contained damaging information and even though defendant signed a statement agreeing with counsel's decision not to call witness.

1989: *United States v. Gray*, 878 F.2d 702 (3d Cir. 1989). Trial counsel ineffective for failing to conduct pretrial investigation to locate potential witnesses, to interview witnesses whose names had been supplied by the defendant when investigation would have yielded evidence that the defendant in prosecution for possession of firearm by convicted felon possessed gun in self-defense when it picked it up during a fight.

Tosh v. Lockhart, 879 F.2d 412 (8th Cir. 1989). Counsel ineffective for failing to use reasonable efforts to procure three alibi witnesses in defendant's aggravated robbery and theft of property trial. Court noted that any perceived reluctance by alibi witnesses was no excuse for not contacting them.

1988: *Anderson v. Butler*, 858 F.2d 16 (1st Cir. 1988). A defense counsel's decision in murder case not to call expert psychiatric witnesses as he said he would in his opening statement to the jury was not a reasonable change in strategy but was ineffective assistance of counsel. Non-production not only

***Capital Case**

left the jury with the inference that the psychiatrist & psychologist would not testify as counsel said they would, but also cast doubt on the testimony of lay witnesses who testified about the petitioner's mental state.

Quartarero v. Fogg, 849 F.2d 1467 (2d Cir. 1988) (affirming 679 F. Supp. 212 (E.D.N.Y.)). Trial counsel ineffective in murder case for failing to object to admission of evidence that the defendant's parents believed that another son's confession was true, the defendant's claim of innocence was false, and the defendant was a troublemaker and liar. Trial counsel also ineffective for failing to object to prosecutor's argument on this and playing of the tape recording as substantive evidence. In addition, trial counsel made a pathetic closing argument in which he did not inform the jury that there was little physical evidence linking the defendant to the murder and failed to point out that a witness who initially testified that the defendant admitted that he killed the victim subsequently recanted that testimony.

Montgomery v. Petersen, 846 F.2d 407 (7th Cir. 1988). Trial counsel ineffective for failing to investigate the only available disinterested alibi witness in burglary case, a store clerk, from whom petitioner allegedly purchased a bicycle on the day of the robbery. Uncalled witness could have impeached state's chief witness and, more importantly, could have provided petitioner with an unbiased alibi defense.

****Osborn v. Shillinger***, 861 F.2d 612 (10th Cir. 1988). Counsel was ineffective in capital case due to counsel's failure to adequately prepare and present evidence and due to counsel's obvious sympathies to the prosecution. Counsel believed he could talk the prosecutor out of seeking the death penalty. When that failed, counsel was left unprepared due to his failure to investigate. He advised defendant to plead guilty and in sentencing sought only to show that defendant's participation in the crimes was more limited than his codefendants, who were not sentenced to death. Counsel did not prepare and present mitigating evidence concerning defendant's family background and medical history. Counsel also failed to object to prejudicial *ex parte* information provided to the trial court that indicated defendant was the "ringleader," *id.* at 627, even though counsel knew or should have known that the information was provided to the court. Counsel was not prepared to present the argument chosen because counsel did not have the transcripts from codefendants' plea hearings or interview the codefendants (one of whom admitted that he was the ringleader). Counsel "so abandoned his 'overarching duty to advocate the defendant's cause,' *Strickland*, 466 U.S. at 688, 104 S.Ct. at 2064, that the state proceedings were almost totally non-adversarial." *Id.* at 628. Following the defendant's motion to withdraw his guilty plea, counsel also made statements to the press indicating that defendant had no evidence to support the claim and was playing a game to attract attention. "Publicly chastising a client is evidence of ineffectiveness." *Id.* During sentencing, counsel also made public statements that his client was not amenable to rehabilitation. Counsel did not challenge the *ex parte* information or the state's assertion that defendant was the ringleader because counsel believed this to be correct. "[T]hat conflicting evidence existed was apparently of no moment to him. Defense counsel must present conflicting evidence to the court, not judge the issue for himself." During sentencing, counsel also violated the duty of loyalty by stressing the

***Capital Case**

brutality of the crimes and compared his client to “sharks feeding in the ocean in a frenzy; something that’s just animal in all aspects.” *Id.* Following the trial, even though counsel still represented defendant on appeal, counsel, in an evaluation of the trial judge, informed the judge in a letter that his client deserved the death penalty.

A defense attorney who abandons his duty of loyalty to his client and effectively joins the state in an effort to attain a conviction or death sentence suffers from an obvious conflict of interest. . . . In fact, an attorney who is burdened by a conflict between his client's interests and his own sympathies to the prosecution's position is considerably worse than an attorney with loyalty to other defendants, because the interests of the state and the defendant are necessarily in opposition.

Id. at 629. Here, counsel “did not simply make poor strategic choices; he acted with reckless disregard for his client's best interests and, at times, apparently with the intention to weaken his client's case. Prejudice, whether necessary or not, is established under any applicable standard.”

United States v. Cronic, 839 F.2d 1401 (10th Cir. 1988). Trial counsel ineffective for failing to assert a defense of good faith and failing to investigate the bank’s acceptance of security for overdraft upon which the prosecution was based.

1987: *Profitt v. Waldron*, 831 F.2d 1245 (5th Cir. 1987). Counsel was ineffective due to failure to secure records from psychiatric hospital from which petitioner had escaped before crime and failure to present evidence of prior insanity adjudication but instead relied on reports from court appointed psychiatrist that defendant was competent to stand trial and sane.

Blackburn v. Foltz, 828 F.2d 1177 (6th Cir. 1987). Trial counsel ineffective in armed robbery prosecution for: misunderstanding law and advising defendant not to testify because he could be impeached by three prior convictions when those convictions could have been suppressed because two were uncounseled and more than 20 years old and the other had no bearing on veracity and would have probably been excluded as unduly prejudicial; failing to locate and question potential alibi witness; and failing to obtain transcript of previous trial in order to impeach key identification witness.

Sullivan v. Fairman, 819 F.2d 1382 (7th Cir. 1987). Trial counsel ineffective for failing to locate & call at murder trial several “occurrence” witnesses when defense counsel was aware, through police reports & discovery, that there were five witnesses with no apparent reason to help defendant who made statements to police that were exculpatory or inconsistent with prosecution witness’ statements, yet defense counsel’s attempts to locate them were perfunctory at best.

****Troedel v. Wainwright***, 828 F.2d 670 (11th Cir. 1987) (*affirming* 667 F. Supp. 1456 (S.D. Fla. 1986)). Trial counsel ineffective in capital case where defense theory was that co-defendant committed the murder: for not investigating and presenting evidence of the co-defendant’s

***Capital Case**

background which would have revealed a violent history and a motive for the killing; for failing to interview the state's expert witness who testified that defendant fired the weapon but whose opinion was not based on test results or other scientific evidence; and failure to obtain a statement made by a witness to police or find out name of witness and interview person even after police offered to disclose statement in which witness said that co-defendant had said the day before the murder that he was going to kill the victim.

Holsclaw v. Smith, 822 F.2d 1041 (11th Cir. 1987). Counsel ineffective for failing to raise question of sufficiency of evidence of theft at trial where the only evidence was the testimony of the victim, who had been drinking heavily, that she had passed out or been knocked out while talking to defendant and that her car was gone when she came to.

1986: United States v. Wolf, 787 F.2d 1094 (7th Cir. 1986). Trial counsel ineffective for failing to object to improper cross-examination of defendant which included improper innuendo and insinuations that defendant was guilty of uncharged crimes and was inflammatory. In addition, trial counsel failed to object to improper hearsay and speculation and made an inadequate attempt at impeachment by failing to lay a proper foundation for impeachment by prior inconsistent statement.

Walker v. Lockhart, 807 F.2d 136 (8th Cir. 1986). Defendant convicted of forgery & theft, was denied IAC through counsel's failure to obtain a continuance for the purpose of producing a witness who, as defendant informed counsel, would substantiate defendant's assertion that the victim, with whom defendant had a homosexual relationship, had given defendant permission to obtain victims money.

Code v. Montgomery, 799 F.2d 1481 (11th Cir. 1986). Counsel ineffective for failing to adequately investigate and present alibi defense where trial was a mere swearing match between alleged victims and an accomplice against the defendant.

1985: Nealy v. Cabana, 764 F.2d 1173 (5th Cir. 1985). Where trial boiled down to a swearing match between prosecution witness who admitted committing the crime & defendant who claimed innocence, counsel's failure to contact potential alibi witnesses & locate witnesses who could have corroborated petitioner's testimony was IAC.

2. U.S. District Court Cases

2003: *Steidl v. Walls, 267 F. Supp. 2d 919 (C.D. Ill. 2003). Counsel was ineffective in capital trial for a number of reasons. The murder victims were stabbed numerous times in their own home in July 1986. Following their deaths, a fire was deliberately set. The bodies were discovered by firemen. In September 1986, an admitted alcoholic gave the police a statement that he had been present at the victim's home, heard screams, and saw petitioner with blood on him afterwards. In February 1987, another witness, who was an admitted drug addict and alcoholic, gave the police a statement asserting that she had witnessed petitioner and another man commit the murders and she gave them

***Capital Case**

a knife that she claimed was the murder weapon. In addition to these witnesses, the state presented evidence that the knife provided by the witness was consistent with the wounds. The state also presented testimony from a jailhouse snitch, who admitted that he hoped to get consideration in his own sentencing in exchange for his testimony. The defense presented a corroborated alibi defense, testimony that contradicted the witness that came forward in September 1986, and written evidence that the second witness, who allegedly witnessed the murders and provided the murder weapon, was actually at work at the time of the murders. The witness testified, however, that she had someone to log her in, but she was not there. During closing arguments, the defense counsel argued that the witness had been at work and that the knife she provided could not be the murder weapon because the blade was only five inches long when some of the stab wounds were six inches deep. The court found that counsel's conduct was deficient for failing to adequately impeach the alleged eyewitness testimony with evidence of her presence at work. While the defense had presented the records, the defense had no evidence to contradict the argument that the person that filled out the records falsely indicated that the witness was there. That person was available and did testify in post-conviction that she would not have logged the witness into work unless she was actually there. Although the state court find a trial strategy for not calling this witness, trial counsel testified that he did not recall why this witness was not interviewed or called and the record shows that counsel probably "mistakenly and in haste subpoenaed the wrong supervisor." Prejudice was found because this witness' testimony could have led the jury to believe that the alleged eyewitness was clearing lying and that she had not been present at the time of the murders. Counsel's conduct was also deficient in failing to present expert testimony that the knife presented by the alleged eyewitness and the state as the murder weapon could not have been the murder weapon. Although it is possible for a five inch blade to make a six inch cut, contrary to defense counsel's argument, there were other aspects of the knife and the wounds that led a forensic pathologist to testify that this particular knife could not have been the murder weapon. Although counsel argued this, counsel's conduct was deficient in failing to obtain expert assistance or to even cross-examine the state's expert on this point. Instead, counsel chose to wait until argument to present this theory. The court found this strategy to be unreasonable and prejudicial though because expert testimony that this knife was incompatible with the murder weapon would have had a devastating impact on the alleged eyewitness' credibility. Counsel's conduct was also deficient for failing to prepare and present expert testimony concerning the crime scene. The alleged eyewitness' testimony included a broken lamp prior to the fire and the state argued that the presence of a broken lamp corroborated her testimony. Expert evidence from the arson investigator, who actually testified at trial on other points, and a second arson investigator established in post-conviction though that the lamp was intact at the time of the fire and was broken afterwards. Counsel's conduct was deficient because counsel did not even consider obtaining such experts or testimony, even though he was trying to discredit the witness. Petitioner was prejudiced because this evidence would have impacted the witness' credibility and the state's argument of corroboration. The court found that each of these errors was prejudicial because, aside from the alleged eyewitness that would have been discredited had counsel performed adequately, the state's evidence consisted only of an admitted drunk, who was contradicted by other witnesses already, and a jailhouse snitch. In addition, the court found that, "even if the individual instances of deficient performance were not, considered alone, sufficient, cumulative consideration required relief. The

***Capital Case**

court analyzed the state court findings thoroughly under the AEDPA. The state court found strategies with “no factual support in the record,” *id.* at ___, and relied on “a profoundly mistaken reading of the record,” *id.* at ___. The state court also applied the wrong legal standard by requiring petitioner to show that the result “would have been different,” rather than the proper “reasonable probability” standard. *Id.* at ___. The state court decision was also “not even minimally consistent with facts and circumstances of this case and was, therefore, unreasonable.” *Id.* at ___. In sum, the state court unreasonably determined the facts in light of the evidence presented and unreasonably applied *Strickland* to the facts.

Miller v. Senkowski, 268 F. Supp. 2d 296 (E.D.N.Y. 2003). Counsel ineffective in sodomy and rape of child case for numerous reasons. Petitioner was charged with crimes related to the daughter of his ex-girlfriend. A week prior to trial, his appointed counsel sought a continuance because counsel had to have medical treatments. The court replaced him with another counsel, who proceeded to trial without asking for any additional time. During jury selection, counsel sought and received authorization to retain a defense expert to advise him and potentially testify concerning obvious problematic areas in the state’s medical report finding evidence of vaginal trauma and penetration, but counsel never obtained his own expert. During his opening statement, counsel told the jury that the charges were trumped up by petitioner’s ex-girlfriend, who convinced both her daughters to allege sexual abuse because the petitioner would not marry her. He informed them that the victim’s sister had made allegations but these charges were dropped. During counsel’s cross-examination of the state’s witnesses, counsel did not pursue the conspiracy theory. During cross-examination of the state’s expert, counsel did not cross-examine him on “problematic” methodologies and unsupported conclusions. During closing argument, counsel argued only that petitioner was not living with his former girlfriend when the abuse was supposed to have occurred and argued the lack of forensic evidence to corroborate the abuse and the delay in reporting the abuse. Counsel’s conduct was deficient in failing to obtain defense experts even though the prosecution expert’s report was provided over a year prior to trial. Even after obtaining authorization for experts during jury selection, counsel still did not obtain expert assistance to advise him or to possibly testify. Counsel’s conduct was also deficient in informing the jury of the inadmissible information that the victim’s sister had also previously alleged sexual assault. Finally, counsel’s conduct was deficient in telling the jury that evidence of a conspiracy would be presented and then failing to present any evidence or to even explain to the jury why the theory was abandoned. In finding prejudice, the court applied a cumulative prejudice analysis. The court found prejudice because a defense expert likely would have neutralized the testimony of the state’s expert, which would have reduced the case to a credibility determination. Counsel’s error in informing the jury of the sister’s allegations bolstered the victim’s otherwise uncorroborated testimony. In a case that amounted to a credibility contest, counsel’s “errors take on a special importance.” *Id.* at ___. Although the court cited the appropriate AEDPA standards, the court did not discuss the application of these standards in its analysis of deficient conduct or prejudice.

2002: *United States v. Jasin*, 215 F. Supp. 2d 552 (E.D. Pa. 2002), *recon. denied*, 292 F. Supp. 2d 670 (E.D. Pa. 2003). Counsel was ineffective in arms embargo case for failing to adequately investigate

***Capital Case**

and present a defense at trial. The defendant was charged in a complex prosecution for violation of the United States arms embargo against South Africa during the 1980s. The defense theory at trial was that the defendant acted in good faith and that he had the honest belief that he was acting in compliance with the law. Counsel, who had never tried a criminal case, failed to investigate even though the defendant specifically asked counsel to interview several witnesses and several experts. The defendant was prejudiced because these expert witnesses would have in fact supported the defendant's good faith defense. The court found a reasonable probability that the defendant would have been acquitted.

2001: **Peterkin v. Horn*, 176 F. Supp. 2d 342 (E.D. Pa. 2001) (tried in September 1982), *amended on reconsideration*, 179 F. Supp. 2d 518 (E.D. Pa. 2002). Under AEDPA, trial counsel was ineffective for several reasons. Counsel's investigation consisted only of "reviewing the report of an investigator who interviewed Petitioner on one occasion and interviewed at least two of the witnesses whom Petitioner identified," which revealed potential alibi and character witnesses. Counsel's failure to follow-up on this information and provide notice of an alibi defense was deficient. The state court findings to the contrary was premised on unreasonable determinations of the facts and the evidence in this case and are contrary to the clearly established federal law established in *Strickland*. Counsel was also ineffective in failing to adequately investigate and present mitigation evidence. The state courts concluded that counsel's failure to present mitigation was justified because the prosecution had damaging evidence that Petitioner had been under investigation for welfare fraud, had served in two different branches of the armed forces under different names and had had simultaneous amorous relationships with various women. The state court decisions were again both an unreasonable application of clearly established Federal law and based upon an unreasonable determination of the facts in light of the evidence presented. Counsel had stipulated to the damaging facts cited. Thus, "the damaging evidence which trial counsel feared had already been admitted. Petitioner therefore likely had absolutely nothing to lose and everything to gain by presenting some character evidence in his defense at sentencing." Counsel did not investigate "background or family history" though other than to talk with the petitioner and to decide that he "didn't want to get involved heavily in his character." The available evidence would have established that the petitioner's parents were alcoholics who neglected and abused him and his seven brothers and sisters, that his mother drank heavily while she was pregnant with him, that his father eventually placed him and his youngest sister in foster care only to have the foster care authorities eventually separate Petitioner from his sister and place him in the home of another abusive couple. In addition, petitioner "exhibits some organic brain injury" and "suffers from post traumatic stress disorder as the result of his troubled childhood." Reversal was also required for four other reasons.

1999: *Berry v. Gramley*, 74 F. Supp. 2d 808 (N.D. Ill. 1999). Retained counsel ineffective in kidnapping and sexual assault case for failing to prepare and present a defense. Victim alleged that defendant, a probationary police officer, kidnapped her from street, drove her to his home, sexually assaulted her three times in garage, led her naked into his house, sexually assaulted her again with threatening use of pistol, made her give him phone number, drove her home, and gave her his pager number, which alleged victim said was disconnected. Defendant was ultimately arrested after a call to her was

***Capital Case**

traced to his home and a pistol was found, which he asserted he obtained from his father 11 days after the alleged assault. Defendant made statement to police asserting that sex was consensual. Defense counsel met with the defendant only twice prior to trial in the holding cells next to courtroom, but defendant was afraid to talk to him in the crowded room for fear that other inmates would learn that he was a police officer. Defendant could not call lawyer either because he only had pager number. If counsel had adequately prepared and presented a defense, one credible witness would have testified contrary to the alleged victim's assertion of being raped three times in garage and led naked into house that he saw defendant arrive home and come out of the garage after only a minute or so and that the victim was dressed and stood nearby appearing as if everything was normal. This witness had even called defense counsel and told him of available testimony. Another witness, corroborated by defendant's mother who answered phone, would have testified that he called and talked to defendant for 25 minutes during the time in which the alleged victim asserted she was in basement being sexually assaulted. Defendant's mother said he took call upstairs and left alleged victim in the basement where there was a door out. Defendant's father would have corroborated that he gave defendant the pistol found after the alleged assault. Proof was also available that defendant's pager, for which he gave alleged victim the number, contrary to state's testimony, was operational. In state court, counsel provided an affidavit asserting strategic reasons for conduct and defendant was denied an evidentiary hearing. Federal court found after evidentiary hearing that counsel was not credible and the state courts had erred in relying on his affidavit. Conduct was deficient because counsel made no strategic decisions due to complete failure to prepare. Prejudice found because defendant was denied material exculpatory and impeachment evidence. Court also considered in cumulative prejudice analysis that counsel made only a very brief opening that described no defense and failed to challenge two jurors who were either the victim of a rape or had a friend who was the victim of a rape and indicated potential bias. Case reversed as "contrary to" and "unreasonable application" of *Strickland* under AEDPA.

1993: *United States v. Muskovits*, 844 F. Supp. 202 (E.D. Pa. 1993). Trial counsel ineffective for failing to investigate the validity of the defendant's prior Mexican conviction before advising defendant (incorrectly) that it could be used for impeachment purposes if he testified and thus defendant did not testify.

1992: *Foster v. Lockhart*, 811 F. Supp. 1363 (E.D. Ark. 1992). Trial counsel ineffective in rape case for failing to pursue impotency defense where a urologist would have testified that the defendant is organically impotent and most likely could not have raped unwilling victim and ejaculated in three minutes.

United States v. Byfield, 795 F. Supp. 468 (D.D.C. 1992). Trial counsel ineffective in narcotics prosecution for making statements during opening that placed defendant with alleged drug courier at a time other than the date of the defendant's arrest and suggested that the shoe box carried by the courier (which later was found to contain drugs) had contained defendant's shoes thereby buttressing the government's constructive possession theory and allowing a guilty verdict.

***Capital Case**

1987: *Rode v. Lockhart*, 675 F. Supp. 491 (E.D. Ark. 1987). Counsel ineffective for pursuing an incredible defense on first degree murder where if defendant had testified to truth that he beat his wife in a fit of rage there was a reasonable probability that defendant would have been convicted of a lesser included offense.

Jemison v. Foltz, 672 F. Supp. 1002 (E.D. Mich. 1987). Trial counsel in narcotics case ineffective because counsel waived preliminary examination, filed no pretrial motion, made neither opening statement nor closing argument on defendant's behalf, failed to interview potentially effective alibi witness of whom defendant had advised him, waived jury trial, thereby allowing defendant to be tried before judge who was fully aware of defendant's long criminal record, and failed to conduct effective cross-examination of State's only witness.

1984: *Walker v. Mitchell*, 587 F. Supp. 1432 (E.D. Va. 1984). Trial counsel ineffective in murder case for failing to prepare and present an insanity defense where the evidence showed no immediate provocation for shooting of girlfriend, relative calm preceding shooting, no attempt at secrecy because shooting occurred in front of several eyewitnesses, defendant shot himself in the neck after shooting girlfriend, and defendant had previously been found not guilty by reason of insanity in another murder case and committed.

3. Military Cases

1997: *United States v. Wean*, 45 M.J. 461 (C.A.A.F. 1997). Trial counsel ineffective in child sexual abuse case for failing to object to testimony of government expert witnesses concerning "play therapy" and multiple hearsay problems and failed to counter with defense experts and lay witnesses who would have established that even if child abused circumstantial evidence did not point exclusively at defendant. Counsel was also ineffective in sentencing argument for telling sentencing panel that defendant was "suffering from an illness of the mind [which] compelled him to do these things" when defendant had maintained innocence throughout the proceedings and there was no basis in fact for the comments about mental illness.

1991: *United States v. Polk*, 32 M.J. 150 (C.M.A. 1991). Trial counsel ineffective in kidnapping and rape for refusing to interview four potential witnesses identified by accused. Two of these witnesses would have testified as to statements made by the victim that would have shown defendant was not involved in the crime and that the victim had a motive to lie and state that accused was involved. The other two witnesses would have testified that the alleged victim was notorious for being untruthful and "permissive." In addition, defense counsel refused to interview or explore the testimony of the co-defendant whose testimony would have revealed that he had an ongoing sexual relationship with the victim which involved rough and abusive but consensual sexual behavior. The sole reason for not exploring these matters was that defense counsel believed (without sufficient basis) that the co-defendant and the other witnesses would not be truthful.

***Capital Case**

1989: *United States v. Galinato*, 28 M.J. 1049 (N.M.C.M.R. 1989). Prejudice presumed where counsel as a protest to the judge's denial of a motion for continuance declined to participate in trial. Counsel did not conduct voir dire, make opening statement, cross-examine government witnesses, present defense, or make closing argument. In addition, during the sentencing hearing, the defendant made a statement (without the assistance of counsel) which included several incriminating statements including some that revealed additional uncharged misconduct.

1987: *United States v. Scott*, 24 M.J. 186 (C.M.A. 1987). Counsel in attempted murder, rape, forcible sodomy, and kidnapping case ineffective for failing to investigate and prepare accused's sole defense of alibi simply because counsel never expected the case to go to trial because he was so convinced of his client's innocence. In addition, counsel did not prepare accused's for his own testimony and failed to request a cautionary instruction on eyewitness identification which was the basis for the prosecution's case.

United States v. Mansfield, 24 M.J. 611 (A.F.C.M.R. 1987). Trial counsel ineffective in premeditated murder case for failing to prepare and present properly either an insanity defense or a diminished capacity defense where a defense expert was prepared to present testimony that accused was insane and lay witnesses could provide testimony of bizarre behavior. Counsel initially intended to present insanity defense but then abandoned the defense midway through the trial because the trial judge ordered the production of damaging inculpatory statements made by the accused to his expert witness.

4. State Cases

2003: *Terrero v. State*, 839 So. 2d 873 (Fla. Dist. Ct. App. 2003). Counsel was ineffective in armed robbery case for failing to call an exculpatory witness. Prior to trial counsel deposed an eyewitness, who had viewed a photographic line up that included a picture of the defendant. The eyewitness stated that the person that had committed the robbery was not in the photo line up. Counsel decided to call the eyewitness as a defense witness at trial and filed a speedy trial motion without ensuring the eyewitness' availability to testify. The eyewitness was not available when the case was called for trial, but counsel did not seek a continuance. The court rejected the finding that counsel made a strategic decision not to call the eyewitness because counsel decided to present the testimony and attempted to justify the actions only after counsel realized her mistake in filing a speedy trial demand. Prejudice was found because the sole evidence of guilt was the testimony of the robbery victim. The eyewitness, who was not called, was a disinterested witness who could have created a reasonable doubt about the identification of the defendant as the perpetrator.

Tenorio v. State, 583 S.E.2d 269 (Ga. Ct. App. 2003). Counsel ineffective in armed robbery case for failing to adequately investigate and present alibi defense that would have established that the defendant was more than a three hour drive from the crime scene only an hour after the crime. Counsel presented alibi evidence at trial from the defendant's supervisor at work and the defendant's step-daughter, but the state argued they were both biased because the supervisor was dating the step-

***Capital Case**

daughter. Time records from the store were also admitted but the store manager had altered them and could not personally say whether the defendant was at work or not. Following trial, two additional witnesses were located. One, an assistant manager, testified that the defendant called him that night saying he left work. The other witness said he saw the defendant at work. Neither of these witnesses had a bias and the defendant had even told counsel of the assistant manager. Counsel had retained an investigator and relied on him, but learned after trial that the investigator had not interviewed anyone and instead had given the defendant's wife a stack of blank subpoenas so she could subpoena anyone that could help. "The fact that [the investigator], rather than trial counsel, shirked his assigned duties does not matter. As trial counsel noted . . . , she was ultimately responsible for ensuring a thorough investigation." *Id.* at _____. Prejudice was found because the disinterested alibi witnesses may well have made the difference where there was no evidence against the defendant except for the alleged victim's eyewitness testimony.

Guzman v. State, 580 S.E.2d 654 (Ga. Ct. App. 2003). Counsel ineffective in burglary case for failing to present medical evidence demonstrating lack of criminal intent the defendant was charged with burglary after breaking down a neighbor's apartment door and entering their residence in the hopes of acquiring "pills." A police officer found the defendant in the apartment searching in the bathroom. He looked "spaced out" and had a "glassy" look in his eyes and told the officer that he was "looking for some pills." The officer testified that the defendant was sweating profusely and had a "grayish look on his face." The defendant had no prior criminal record. At trial, the defendant testified that he suffered from migraine headaches that were so severe at times that he would experience black outs. He testified that on the day of his arrest he had been suffering from a migraine and must have blacked out. He did not deny his guilt but simply testified that he could not recall. In support of this testimony, counsel sought to introduce 25 pages of medical records regarding the defendant's medical condition and treatment, but the state's objection to the lack of authentication and lack of foundation was sustained. If counsel had adequately sought expert assistance, he could have presented testimony from a neurologist that the defendant suffers from "confusional" migraines and that a person experiencing a confusional migraine would not know right from wrong when in a confusional state. The court found prejudice because medical testimony would have provided an explanation for the defendant's actions, which otherwise seemed bizarre in that the defendant had no prior criminal record, no prior problems with his neighbors, and no further problems with them after his arrest.

Wolfe v. State, 96 S.W.3d 90 (Mo. 2003). Counsel was ineffective in capital trial for failing to present physical evidence that would have contradicted the testimony of a key state's witness. The defendant was convicted of two murders, one of which involved a victim found on the front seat of his car, who had likely been shot from the backseat. Four days after the murders, the police received information from a witness that claimed to have witnessed the murders and she implicated the defendant. For her cooperation, she received full immunity. There was very little other evidence against the defendant, except for a jailhouse snitch with a history of serious mental illness. No physical evidence linked the defendant to the killing. During the trial, the theory of defense was that the witness was not credible and was framing the defendant. The counsel presented four

***Capital Case**

impeachment witnesses concerning the witness' reputation for truthfulness but presented no physical evidence contradicting her testimony. Prior to trial, counsel learned that police discovered human hair in the back seat of the victim's car and in the ammunition boxes found in the dumpster near the defendant's hotel. The prosecutor informed counsel that he was not sure whether samples of the witness' hair had been seized and that no testing had been conducted. Shortly before trial counsel learned that samples of the witness' hair had been taken, and counsel requested any reports concerning the sample. The prosecutor replied again that he was not sure if the witness' hair had been taken. Rather than pursuing the issue, counsel resorted during trial to arguing that the hairs found in the car and the dumpster were not the defendant's. If counsel had pursued the issue, counsel could have presented testimony that the hair found in the backseat and in the box of ammunition was similar to the witness' hair and could not have been the defendant's hair. Prejudice was found because the witness testified that the defendant was sitting in the backseat when he shot the victim and that she, the witness, had never been in the backseat. If counsel had presented this readily obtainable forensic evidence, it would have revealed that the witness was lying. The jury likely would have found the witness' testimony to lack credibility. Prejudice was found because the evidence of the defendant's guilt was not overwhelming and, if this testimony had been presented, the jury may well have rejected this witness's testimony.

Genetten v. State, 96 S.W.3d 143 (Mo. Ct. App. 2003). Counsel was ineffective in second degree murder case for failing to investigate and call available expert witness to testify in the defense. The defendant was charged with second degree murder after he took a fifteen month old baby to the hospital. He told the emergency room nurses that the baby had choked on a french fry and that he may have shaken her too hard in trying to expel it. Hospital personnel did not find any obstruction in the baby's airway and did not find any food particles in her stomach, but did notice burns on her body and the tops of her feet in different stages of healing. After several days the baby died. The pathologist that conducted the autopsy testified that she died from symptoms consistent with shaken baby syndrome. He also observed that the burns on her chest, back, and the tops of her feet were of three different ages and were inconsistent with accidental causes. The defendant testified in his own defense that the burns on the child had been caused several weeks before when she had accidentally fallen into the bathtub with her socks on and was burnt in hot water. Prior to trial counsel was provided with a death summary that had the stamped signature of the chief of the burn and trauma and critical care unit at the children's hospital, who was also the child's treating physician. Counsel listed this expert as a potential witness, but did not interview him and did not call him to testify. If counsel had interviewed this witness and presented his testimony, the expert would have testified that, in his opinion, the burns on the child's feet occurred at the same time and were very consistent with the type of accidental injury that the defendant claimed. He also would have testified that although the death summary bore his stamped signature, a resident prepared it, and he did not review it before his secretary stamped his name on it. He said he disagreed with the death summary because the burns themselves did not raise a red flag of child abuse as the death summary indicated. Counsel's conduct was deficient in failing to interview a key witness. Counsel also did not make a reasonable decision not to interview this expert witness when the defendant had been charged with both murder and with first degree assault for intentionally burning the child. The questioned expert

***Capital Case**

was clearly a key witness in that he was the child's treating physician. The defendant was prejudiced because without the expert's testimony, the jury heard only expert testimony that the child's burns were intentionally inflicted and the defendant's self-serving testimony that the burns occurred accidentally. If the jury had heard the expert testimony of the child's treating physician, the jury may have believed that the burns were accidental, which would have significantly undermined the state's theory of a pattern of abuse used to support the second-degree murder conviction.

Gardner v. State, 96 S.W.3d 120 (Mo. Ct. App. 2003). Counsel was ineffective in second degree murder trial for calling the victim's wife to testify to immaterial facts, which opened the door to cross examination that elicited prejudicial evidence. The defendant lived with the victim and his wife for some period of time in their home. The victim was sometimes abusive towards his wife and the couple had problems for some period of time. Ultimately, the defendant and the victim had a dispute, and the victim was shot three times. When the police arrived the victim's wife claimed that her husband had been threatening her earlier in the day. The victim's wife and the defendant claimed that the defendant shot the defendant in self-defense and in defense of the victim's wife. A large hunting knife was found at the victim's feet. During the investigation of the case, several people informed the investigating officers that the victim's wife had made statements indicating an intent to kill her husband. There were several witnesses to similar statements including the sister of the victim's wife. The defense counsel was aware of these statements. Prior to trial, the court sustained a motion to preclude introduction of the statements of the victim's wife about killing her husband. The state had subpoenaed, but did not call her to testify. Early in the defense case, the defense counsel called her to testify and questioned her only to establish that she had been subpoenaed by the prosecution. The state then cross examined the defendant's wife concerning her statements to others about killing her husband, and the defense did not object to these questions. The victim's wife denied making any of these statements. The defendant then testified in his own behalf that he shot the victim in the course of defending the victim's wife and himself. After the defense rested, the state called rebuttal witnesses concerning the statements of the victim's wife, and her statements were admitted as substantive evidence against the defendant. Trial counsel had called the victim's wife to testify believing that the state's cross examination of her would be limited to the subjects addressed in direct examination. A Missouri statute allows for cross examination without limit, and that has been the rule in Missouri since 1840 and has been codified since 1905. Counsel was unaware of this law and had failed to research the issue. Counsel's conduct was deficient in failing to adequately research the law prior to calling the victim's wife "with little to be gained." Counsel compounded this error by declining the court's offer for a mistrial after the surprise testimony of a rebuttal witness. One of the witnesses called by the state testified that the defendant had actually been present when the victim's wife had made a statement that they had intended to kill her husband. This fact had not been disclosed to the defense and was a surprise even to the prosecutor. The trial court agreed to grant a mistrial for this reason. After discussing the situation with the defendant, trial counsel declined the mistrial, but requested a recess for five days instead. Trial counsel declined the mistrial because this witness's statement might be admissible in a retrial as an adoptive admission. Trial counsel failed to consider, however, that the other witnesses who testified about the hearsay statements would not have been allowed to testify in a retrial. Because of trial counsel's mistake he

***Capital Case**

did not encourage the defendant to take a mistrial and instead sought a continuance to seek impeachment material, which he was unable to find. When the trial resumed, counsel failed to oppose the admissibility of the testimony of the remaining witnesses who testified that the victim's wife had made statements about planning to kill her husband. Counsel's conduct was deficient in failing to consider the risk of calling the victim's wife to testify and to warn his client accordingly. The defendant was prejudiced because of the information presented by the rebuttal witnesses and the prejudice was enhanced because the defense, rather than distancing the defendant from the victim's wife, had called her to the stand "as though she were allied with the defense." While the court would not necessarily reverse based on the failure to accept a mistrial, the court also found this to be an "ill-advised decision." The court found prejudice in counsel's error in calling the victim's wife to testify. This error "transformed a self-defense case, or at the worst a voluntary manslaughter case, into a conspiracy-to-commit-murder case." While the court did not reverse on other grounds, the court also mentioned other defects in counsel's overall performance, including failing to object to several instructional errors, failing to challenge a state's expert who had previously given testimony in a murder trial that was proven to be incorrect, and failing to make an adequate offer of proof concerning testimony that he desired to present. The court concluded:

We do not say that counsel's performance was miserable in all particulars or that counsel showed no flashes of skill in the defense of the matter. Counsel was an experienced defense attorney and showed an ability to think on his feet in the examination of witnesses. It was also clear, however, that counsel had not interviewed any of the key witnesses and had not prepared beyond reading the police reports. Even so, because the State's murder case was relatively weak, if it were not for the strategic blunders which began with the entirely unreasonable decision to call [the victim's wife] to the stand, there is a substantial probability that [the defendant] would have been acquitted of murder."

Id. at 133.

State v. Horton, 68 P.3d 1145 (Wash. Ct. App. 2003). Counsel ineffective in rape of child case for several reasons. The alleged victim, who was 13 years old, testified that she had not had sex with anyone other than the defendant. The state's expert found "penetrating trauma to the hymen." Defense counsel was aware that the alleged victim had previously told an investigator and one of her friends that she had sex with a boyfriend. Counsel did not cross-examine the alleged victim on this basis or ask the court to have her remain in attendance after testifying and she was released. In the defense case, counsel attempted to call the witnesses to testify about the prior inconsistent statements but was prohibited from doing so because called failed to comply with Rule 613(b), which is analogous to Federal Rule of Evidence 613(b). The rule prohibits extrinsic evidence of a prior inconsistent statement "unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon. . . ." Counsel's conduct was deficient and could not have been a strategy or tactic. Prejudice found because the prior inconsistent statements were admissible, if a proper foundation had been laid, and they would not

***Capital Case**

have been prohibited by the state Rape Shield statute because the state opened the door and the defense was entitled to rebut the inference that the alleged victim could only have “penetrating trauma” due to abuse. He was also entitled to impeach credibility. Counsel was also ineffective for failing to object to the prosecutor’s statement in closing argument that he personally believed the defendant was lying. This improper argument heightened the prejudice to the defendant.

Asch v. State, 62 P.3d 945 (Wyo. 2003). Counsel was ineffective in drug possession case for failing to adequately investigate and cross examine the arresting officer. The defendant was arrested as a passenger in a car driven by his co-defendant. During his trial, the arresting officer testified about the traffic stop and arrest and an expert identified the drug as methamphetamine. During the defense case the co-defendant testified that the drugs were hers. Counsel’s conduct was deficient because counsel did not obtain the transcript of the preliminary hearing in which the officer testified and did not use it to cross examine the officer despite inconsistencies and contradictions in the officer’s testimony. The court held, “[n]o reasonable attorney would have allowed this case to go to the jury without having investigated [the officer’s] testimony and without having raised questions about his observations.” Because the Wyoming court had previously held that prejudice is presumed when an attorney fails to interview an eye-witness and the court found this situation to be closely akin to the failure to interview an eyewitness” the court presumed prejudice.

2002: *Flores v. State*, 85 S.W.3d 896 (Ark. 2002). Counsel ineffective in first degree murder and assault case. The evidence revealed that defendant killed his wife and assaulted her lover after finding them engaged in sexual relations. Counsel’s conduct was deficient in (1) failing to object to the defendant’s appearance before the jury in clearly identifiable jail clothing; (2) failing to object to the defendant’s appearance before the jury in leg irons; and (3) numerous other errors. Prejudice found in relation to the jail clothing because “[w]hen someone is tried in prison garb, his or her right to a fair trial is placed in serious jeopardy.” Here, there is a reasonable probability that the jury would have convicted only of second degree murder if defendant had not appeared in jail clothing. Prejudice found in relation to the leg irons because restraints are “inherently prejudicial” and convey to the jury “that, in the judge’s mind at least, this defendant was an unusually dangerous man.” While the court “does not recognize cumulative prejudice,” the court declared, without individual analysis, that counsel was also ineffective for failing to seek discovery, failing to move to suppress the defendant’s statements and evidence seized from his residence, failing to move to suppress hearsay testimony that the victim had previously informed a women’s shelter worker that the defendant was abusive and had threatened to kill her, failing to make an opening statement, failing to make any objection during trial, failing to request a manslaughter instruction, failing to investigate and present any evidence (other than the defendant’s testimony) during trial or sentencing, and waiving closing argument in sentencing. The court found that both prongs of *Strickland* were met due to these errors.

Dames v. State, 807 So. 2d 756 (Fla. Dist. Ct. App. 2002). Counsel ineffective in first degree murder case for failing to present the defendant’s testimony on self-defense, which was the only available defense. In the first trial, the defendant testified and the jury hung. In the second trial,

***Capital Case**

counsel told the jury in opening that it would be self-defense but did not present the testimony and did not seek to reopen the evidence to present it even after the trial court refused to give the charge. The prejudice was emphasized in the state's closing argument.

Blouin v. State, 567 S.E.2d 39 (Ga. Ct. App. 2002). Counsel ineffective in sale of cocaine case for failing to offer the transcript of a co-defendant's exculpatory testimony in the defendant's prior probation revocation hearing. The state's case was based entirely on the testimony of a police officer who testified that during a sting operation the defendant was approached at a gas station and asked about a purchase of cocaine. According to the officer, the defendant spoke to the co-defendant and then got into the officer's car and directed the officer to go across the street where the co-defendant went behind a toolshed. According to the officer the defendant got out of the car and also went behind the shed. A few minutes later the co-defendant reappeared and sold crack cocaine to the officer. Both defendant and co-defendant were arrested. The defendant testified that he was present at the gas station but was not aware or involved in the sale of drugs. At the time of the defendants' arrest he was on probation on a different matter. At a probation revocation hearing, the co-defendant testified that he saw the cocaine and that it was he and not the defendant who got in the car with the officer and led the officer to the scene. He testified that the defendant was present at the gas station but had nothing to do with the drug sale. Prior to trial the co-defendant pleaded guilty to the sale of cocaine. The co-defendant was not called to testify at trial and counsel did not attempt to introduce the transcript of his prior testimony from the probation revocation hearing. Counsel testified that he had kept up with the co-defendant's location in order to subpoena him to testify, but learned shortly before trial that the co-defendant had absconded after his release from prison and counsel had no information about his whereabouts. Counsel was aware that the co-defendant had given the prior exculpatory statement but counsel did not consider introducing that testimony at trial. Counsel admitted that this was not part of trial strategy and that he could have gotten the transcript if he had considered it. Counsel's conduct was deficient because the defendant's sole defense was that he was not in the car or involved in the transaction. The co-defendant's testimony was easily available and would have corroborated this defense. "The attorney's failure was the equivalent of simply forgetting to call a key witness. We hold that this failure falls below the standard of care." *Id.* at 41-42. The court noted counsel did not decide not to use the evidence, which distinguishes this case from those involving a strategic decision. Prejudice found because there is a reasonable probability that the outcome of the trial had been different if the co-defendants' testimony would have been presented.

People v. Spann, 773 N.E.2d 59 (Ill. App. Ct. 2002). Counsel ineffective in possession with intent to deliver controlled substance case for failing to adequately prepare and present a defense. Counsel made no pretrial motions and no opening statement. He made no objections during the testimony of the single witness for the state, the arresting officer. His cross-examination of the officer was essentially a repeat of the witness' testimony on direct. Counsel presented no witnesses and no evidence and conceded the defendant's guilt of possession of controlled substance in closing. The state's evidence consisted of testimony from a police officer that he was conducting a residential safety check of a Chicago Housing Authority building when he saw the defendant receive money in exchange for an item that defendant retrieved from inside his mouth. The officer testified that he

***Capital Case**

approached the defendant and observed what appeared to be crack cocaine in a plastic bag in the defendant's mouth. He ordered the defendant to spit it out and the defendant complied. The defendant was then arrested and taken to the police station where he made statements that he lived in an apartment in the building and then signed a consent to search form and turned over the apartment key. Additional cocaine and substantial amounts of money were located in the apartment. Counsel was ineffective in failing to move to quash the arrest or evidence because the officer's testimony arguably lacked specific articulate facts which justified an investigative *Terry* stop and search. There was no testimony that the officer was concerned about his safety or the safety of others or that evidence would be destroyed when he ordered the defendant to spit out what was in his mouth. In addition, counsel did not test the credibility of the officer's testimony that he observed cocaine in the defendant's mouth, counsel through cross-examination and closing argument could have made a strong case that the circumstances surrounding the arrest were not as the officer described. Counsel's conduct was not appropriate trial strategy when the pretrial motion that counsel failed to present was the defendant's strongest defense. The court found a reasonable probability that a motion to quash the arrest and suppress evidence would have been successful. The court also found that counsel was ineffective in failing to present motions to suppress the key to the apartment, the consent to search the cocaine found in the apartment and defendant's statements about renting and using the apartment. Counsel could have made the challenges as fruit from an unlawful arrest. The court found a reasonable probability of success. The court also concluded that counsel was ineffective for failing to make a separate motion to suppress the statements as the result of the illegal arrest. The court noted that the record does not reflect that the defendant was advised of his *Miranda* rights at anytime before consenting to the search or producing the key or making incriminating statements. The court found a reasonable probability that such a motion would have been successful. The court also found that counsel was deficient for failing to move to dismiss two counts of the indictment based on the failure to satisfy the strict statutory pleading requirements and based on an argument that one count of the indictment was arguably fatally defective for enhancement of the crime. The court found a reasonable probability that a motion to dismiss this portion of the indictment would have been successful. Finally, the court noted that in the closing argument, defense counsel misstated the evidence and stated that his client when approached had spit cocaine from his mouth when in fact the defendant had been ordered to spit out the cocaine. Counsel also conceded the defendant's guilt regarding possession when the defendant had plead not guilty and did not testify. The court noted that admitting guilt is not per se ineffective, but the record in this case did not reflect that the defendant knowingly and intelligently consented to this approach. The court found that based on the "cumulative impact of the ineffective assistance of counsel," *Id.* at 75, the defendant was prejudiced.

People v. Dodson, 771 N.E.2d 586 (Ill. App. Ct. 2002). Counsel ineffective in armed robbery case for failing to provide any meaningful advocacy. Counsel, filed no pre-trial motions, advised the defendant to waive jury trial, stipulated to all the states evidence in a light most favorable to the state, made no opening statement, and in closing sought only to diminish the severity of the crime by arguing that the gun used was a pellet gun that was not loaded and that the robbery victim was not harmed. Counsel filed no post trial motions and no issue was preserved for appeal other than

***Capital Case**

ineffective assistance of counsel. Because this trial lacked any meaningful adversarial testing of the prosecution case, the court declined to apply *Strickland* and instead applied *Cronic*. The court, noted that even if counsel's actions could be characterize as a strategy to gain the trial judges favor resulting in lesser punishment, this strategy would be unreasonable because counsel still could have argued the mitigation following a conviction. The court noted that the argument of strategy ignored the fact that the defendant plead not guilty and nothing in the record demonstrated that he willingly and intelligently waived his right to trial, his right to confront witnesses, or the right to present witnesses. "Capitulation, on a song and a prayer that making it easy for the state somehow accrued to a client's benefit, is not strategy. It is merely a rationalization for failing to take on a hard case and perform in a manner in which criminal defense attorneys are expected to perform. Since there was absolutely no reason to give up without a contest, absent some concession from the state and return, counsel abdicated her role as an advocate."

Mullins v. State, 46 P.3d 1222 (Kan. Ct. App. 2002). Counsel ineffective in child sexual abuse case for failing to retain an expert in child interview techniques either for use as an expert witness or to assist in preparation of cross-examination of the state's witnesses. Prejudice found because the conviction rested primarily on the victim's testimony. The court also found that counsel's failure to review a study cited by a nurse (who testified that physical evidence of anal penetration was not present in the majority of cases where children were sodomized) was not prejudicial individually, but added to "the cumulative effect of the trial errors." *Id.* at 1227.

State v. Francis, 809 So. 2d 1132 (La. Ct. App. 2002). Counsel ineffective in aggravated burglary case for failing to investigate or to present defense witnesses that the defendant lived in the house that was allegedly burglarized. Counsel never met with the defendant outside of court proceedings and failing to even interview the two witnesses subpoenaed and in the courtroom due to the defendant's witness list filed pro se. Counsel's conduct was deficient and "strategy could not be imputed to tactics uninformed by adequate investigation." Prejudice found because the testimony that the defendant lived in the house could have raised a reasonable doubt about one of the required elements of the offense, unauthorized only.

State v. Johnson, 794 A.2d 654 (Md. Ct. App. 2002). Counsel ineffective in bench trial murder case for failing to pursue defenses of not criminally responsible and voluntary intoxication without discussing the matter with the defendant. Counsel withdrew the insanity plea without discussing it with the defendant even though state law is clear that a defendant, who is competent to stand trial, holds the power to decide whether to enter an insanity plea. Counsel also failed to pursue psychiatric evidence related to the defendant's psychotic symptoms due to PCP ingestion because he accepted a psychiatrist's legal misconception that the insanity defense was unavailable because the drug use was voluntary. Counsel should have researched and investigated the issue further. Prejudice found because an insanity plea would have allowed a court-appointed examination that would have at least provided more information. New trial on sanity ordered.

***Capital Case**

Bigner v. State, 822 So. 2d 342 (Miss. Ct. App. 2002). Counsel ineffective in statutory rape and sexual battery case for numerous failures. The victim testified that she had visited the defendant's home with friends. All were drinking and the others were snorting, cocaine and smoking marijuana. The victim testified that she left the home after the defendant's girlfriend accused her of flirting with the defendant. The victim testified that she rode with one friend and the defendant and another friend left in a separate vehicle and they all met up at a gas station. According to the victim, the two friends got together in one truck leaving no room for her so she rode with the defendant. According to the victim, they were all supposed to meet up later. The defendant and the alleged victim drove to the appointed meeting place but the others never showed. According to the victim, the defendant held a knife to her throat and ordered her to take off her clothes. According to the alleged victim, she was then sexually assaulted a number of times. Ultimately the defendant drove her back to the gas station and allowed her to make a phone call with him standing beside her. She called her sister-in-law and asked for someone to pick her up. The defendant then left. The sister-in-law sent her father to pick up the alleged victim. She told him that she had been raped. The father took the alleged victim to her home where she informed her sister and mother of the rape. They went to the police department and then the hospital, and a rape test kit was conducted. The state's evidence revealed that a knife was found on the driver's side floor board, but there were no traces of body fluids or cleaning products in the truck. When police officers arrived at the defendant's home, the defendant admitted seeing the victim earlier but denied that she had ever been in his vehicle. On cross-examination of an officer, counsel attempted to inquire concerning the results of the rape test kit, but the state's objection was sustained. Counsel informed the court that the state had subpoenaed a doctor and that counsel had relied on this subpoena and this witness' testimony to offer evidence that the rape test kit was negative. The state informed the court that the physician under subpoena was not the person who conducted the rape kit and that the person who conducted the rape kit and analyzed it had been released from subpoena a week prior to trial. Counsel was ineffective for numerous reasons. Counsel failed to make any pre-trial motions or any effort to suppress any of the evidence even though the record did not include any mention of a warrant or a consent to search. The record also did not reveal that the defendant had been advised of his *Miranda* rights prior to making statements. Counsel was also ineffective for failing to inquire in *voir dire* after a juror revealed that his niece and a close friend had both been victims of rape or sexual battery. Counsel did not conduct follow-up questioning or seek to strike this juror for cause. Counsel also did not object to armed trooper in full uniform being a member of the jury despite the trial court's hint that this could be a problem. Counsel was also ineffective for failing to object to repeated testimony concerning the use of marijuana and cocaine and supplying minors with alcohol, despite the trial court's hint that this could be a problem. To the extent that counsel's conduct could be characterized as tactics, the court noted that counsel's decision was based on misunderstanding of the law and that statutory rape is a crime that does not involve consent. Counsel was also ineffective for failing to conduct an independent investigation and to subpoena the party responsible for conducting the rape test kit, which showed no sign of sexual activity. Counsel simply relied on the state to call this witness and, after learning that the state did not intend to present this evidence, counsel rested without calling a single witness or offering one piece of evidence. Counsel was ineffective for failing to object to the state's closing argument that asked the jury to "send a

***Capital Case**

message” Finally, counsel was ineffective for submitting only one jury instruction that dealt with chaste character of the victim, a body of law that was abandoned by the state years before. The court noted that, while the trial court refused this instruction, offering the instruction illustrates the lack of preparation trial counsel made prior to trial.

People v. Brown, 752 N.Y.S.2d 347 (N.Y. App. Div. 2002). Counsel ineffective in sodomy and incest case for failing to: prepare for trial, effectively cross-examine the complaining witness, challenge the admissibility of hearsay testimony, and stating in closing that the witness’ testimony was believable. While no single error established prejudice, “the cumulative effect” required a new trial. *Id.* at 348. In reaching this conclusion, the court cited only state law.

* ***Patterson v. State***, 45 P.3d 925 (Okla. Crim. App. 2002). Counsel ineffective in murder case for failing to present the testimony of a school classmate of the 15-year-old victim to say that he had seen the victim several months after the alleged date of her murder. The police had provided the witness’ statement to the defense and he was listed as a defense witness but never contacted by counsel. While counsel presented other witnesses to testify in a similar fashion, prejudice found because this was the only available witness personally acquainted with the victim. The other witnesses testified about possible sightings based only on photographs disseminated in the media.

Ingle v. State, 348 S.C. 467, 560 S.E.2d 401 (2002). Counsel ineffective in criminal sexual conduct and lewd acts case for several reasons. Defendant was charged with assaulting the daughter of his live-in girlfriend. He testified that the semen on her shorts was a result of her sitting on the bed shortly after he and his girlfriend had sex. Defense counsel, without interviewing the girlfriend called her as a defense witness. She denied having sex with the defendant that morning. Counsel’s conduct in relying on the defendant’s belief that she would admit the intercourse and the state’s failure to call her in the case in chief was unreasonable. Defendant was prejudiced despite the state’s recall of the girlfriend in rebuttal because the prejudice of this testimony was heightened because “it came as part of what was supposed to be petitioner’s defense.” Counsel also elicited hearsay evidence of the alleged victim’s identification of the defendant from the state’s expert on child abuse and failed to object to hearsay of the child’s identification of the defendant to a police officer. This testimony was prejudicial because it was inadmissible corroboration and there was other evidence that called the victim’s credibility in question. Despite the cumulativeness of the identification testimony, it was prejudicial because it corroborated the victim’s testimony.

State ex rel. Myers v. Painter, 576 S.E.2d 277 (W. Va. 2002). Counsel was ineffective in sexual assault case for a number of reasons. First, psychological profiles of the victims had been prepared and placed under seal and the judge stated during the hearing that some of the information contained in the profiles was inconsistent with prior statements by the alleged victims. Nonetheless, trial counsel did not attempt to obtain copies of the psychological profiles. The court held that this could not be strategy because counsel could not make a strategic decision without first reviewing the evidence. Second, counsel attended a hearing concerning a continuance, a bench conference during the trial concerning a sitting juror’s recognition of an important state witness as a former neighbor,

***Capital Case**

and an in camera meeting several days before trial in which the trial court recused himself and assigned another circuit court judge. None of these hearings were transcribed and the defendant was not present at each of these critical stages. “Taken cumulatively, after a careful review of these and other acts and omissions identified by the appellant in the record,” the court found both deficient conduct and prejudice to “the appellant’s ability to obtain a fair trial.”

2001: *Light v. State*, 796 So.2d 610 (Fla. Dist. Ct. App. 2001). Counsel ineffective in assault on officer case for failing to locate eyewitnesses to corroborate the defendant’s testimony. The defendant admitted the charges of firing a weapon in public and resisting arrest but denied the claim that he had pointed his pistol at the officer, which was the basis of the assault charge. Prior to trial, counsel knew that there were numerous people within a few short blocks of the incident and knew from even another police officer that three people were close by. Nonetheless, counsel made no effort to find a witness to corroborate the defendant’s statements, even though the defendant had nine prior felonies and it was his word against the police officer that had fired his weapon otherwise. The officer either had to say the defendant pointed the pistol, when the circumstantial evidence did not support this, or else have to explain firing his weapon when the law did not allow deadly force for the initial misdemeanor of discharging the weapon. Prejudice found because a witness, whose closeness to the scene was corroborated by a police officer, testified that the defendant did not point his weapon at the officer. This witness’ testimony had already obtained an acquittal for a codefendant accused of shooting the officer following the defendant’s arrest.

***Acker v. State*, 787 So.2d 77 (Fla. Dist. Ct. App. 2001).** Counsel ineffective in murder case for failing to develop a coherent theory of defense, introducing damaging evidence, and delivering a harmful closing argument. Eyewitnesses saw three men, but only one was identified and connected to crime scene by fingerprint. A second man, in exchange for testimony against the first and identification of the third, identified defendant. He was allowed to plead to accessory after the fact and was the sole “eyewitness” against the defendant. No physical evidence connected defendant to crime. At the time of trial, defense counsel knew the murder weapon belonged to the witness’ brother, the murderers drove away in the brother’s car, that the brother worked in a slaughterhouse with the two convicted murders (case involved brutal stabbing), and that the brother had admitted to being with the two convicted murderers on the night of the offense. Nonetheless, counsel admitted that he had formulated no theory of defense when the trial began and conceded in opening, without arguing innocence or that evidence pointed to brother, that there was some evidence against the defendant. During the trial, the defense called two witnesses who eliminated the possibility that the brother was the third killer. Then, in closing, counsel essentially conceded that the defendant cut his hair after the crimes and made inconsistent statements because he was at the scene of the crime. Prejudice found “based on the cumulative errors that counsel committed.”

***People v. Anthony Roy W.*, 754 N.E.2d 866 (Ill. App. Ct. 2001).** Counsel ineffective in criminal sexual conduct with a child for failing to present evidence of the child’s previous consensual sexual relations with a juvenile one to two months before she alleged that the defendant assaulted and for failing to present evidence that the victim had pending delinquency charges and was in the custody

***Capital Case**

of the juvenile authorities at the time of trial. The alleged victim was the defendant's 12-year-old daughter. After she had gotten in trouble for pulling a knife on another child and the defendant had disciplined her, she alleged sexual assault. By the time of trial she was pending other charges and in custody. The defendant denied the assault and the experts testified that the position of the alleged victim's hymen was consistent with sexual assault. Nonetheless, counsel did not present the evidence of her prior sexual relations with the juvenile because he believed – erroneously – that it was not admissible under the Rape Shield Statute. The court found it to be admissible to explain the physical evidence found by the experts. Counsel did not present the evidence of the pending theft charges and juvenile custody because he also believed this to be inadmissible. The court found it admissible to prove bias and motive. Prejudice found in both instances because outside of the physical evidence, which was explicable with evidence of the juvenile's prior intercourse, the evidence was only the defendant's testimony and the that of the alleged victim.

***Prowell v. State**, 741 N.E.2d 704 (Ind. 2001). Counsel ineffective in capital murder case for failing to adequately investigate the defendant's mental illnesses prior to entry of a guilty plea without a sentencing agreement, which resulted in a death sentence. Investigation would have revealed that the defendant was a chronic schizophrenic, who was fearful and threatened by others. Prior incidents included having his stomach pumped because he was convinced that his grandmother, who he was close to, had poisoned his orange juice. Post-conviction experts found likelihood that defendant acted under paranoid delusions at the time of the shootings. Prosecutor rejected plea offer a week before scheduled trial and defendant plead guilty without a deal. Counsel conceded that he was scared to go to trial because he was unprepared, in part due to caseload that exceeded that allowed for capital counsel under state rules. He also relied on the judge's previously expressed reluctance to sentence a mentally ill person to death. Nonetheless, counsel, who believed from the start that defendant was mentally ill, never considered a plea of guilty but mentally ill and did not investigate the defendant's background and family history. During the plea, despite two hours of preparation, the defendant had difficulty stating a factual basis satisfactory to the court and the prosecutor. Defense counsel, however, assured the court that the defendant was competent and of sound mind at the time of the plea and at the time of the murders, which was fundamentally inconsistent with his attempt to argue in sentencing that the defendant was mentally ill. A week after the plea, counsel hired a mitigation investigator. He then sought a continuance prior to sentencing, but waited a full five weeks after obtaining continuance to retain a psychologist, who ultimately testified that the defendant suffered from paranoid personality disorder, "a relatively minor mental disorder in comparison to more severe forms of paranoia." *Id.* at 707. Court found that this was the "inevitable result of the scanty information supplied," *id.* at 714, to the expert only 18 days prior to sentencing, because testimony revealed that no expert could diagnose schizophrenia without information establishing symptoms for more than six months. Moreover, despite having prior experience with an expert in schizophrenia in a capital case, counsel hired an expert known to a new lawyer only through his work in Social Security disability benefits hearings. The trial court found no explanation for the murders and sentenced the defendant to death. Prejudice found because the evidence would possibly have supported an insanity or guilty but mentally ill conviction. While GBMI does not guarantee a life sentence, "as a practical matter, defendants found to be guilty but mentally ill of

***Capital Case**

death- penalty-eligible murders normally receive a term of years or life imprisonment.” *Id.* at 717. Indeed, court found that a GBMI plea even without a plea agreement would most likely have resulted in a life sentence. In reaching this conclusion, the court relied, in part, on the testimony of [a] lawyer experienced in capital representation.” *Id.* at 714. Court also rejected many of the trial court’s findings of fact, which had been written by the state’s lawyer, as clearly erroneous. “We recognize that the need to keep the docket moving is properly a high priority of our trial bench. For this reason, we do not prohibit the practice of adopting a party’s proposed findings. But when this occurs, there is an inevitable erosion of the confidence of an appellate court that the findings reflect the considered judgment of the trial court. This is particularly true when the issues in the case turn less on the credibility of witnesses than on the inferences to be drawn from the facts and the legal effect of essentially unchallenged testimony.” *Id.* at 709.

Latta v. State, 743 N.E.2d 1121 (Ind. 2001). Counsel ineffective in felony murder of baby case. Defendant and her husband, represented by the same lawyer, were jointly tried for setting fire to the house in which the baby died. While court addressed conflict issues due to joint representation, the court reversed based on *Strickland* analysis. Counsel’s conduct was deficient in failing to require redaction of husband’s pre-arrest interview. Husband was asked if his wife set the fire and counsel objected that his answer might tend to incriminate him. Although the question was never answered this portion of the statement was not redacted. Court finds a plain *Bruton* violation because the effect of this question and objection is the same as if the husband had made inculpatory statements that were admitted. Counsel was also ineffective for implying during his closing argument that the husband was possibly innocent but only covering for the defendant.

In re Parris W., 770 A.2d 202 (Md. 2001). Counsel ineffective in juvenile delinquency proceeding for failing to subpoena corroborative alibi witnesses for the right date. Juvenile allegedly assaulted a schoolmate at school. Case was initially scheduled for hearing on 1/20 but defense counsel was notified by letter several weeks beforehand that the hearing had been changed to 1/21. Defense counsel subpoenaed witnesses for 1/20 though. At hearing, the victim testified and identified defendant as the assailant. Defendant’s father testified as alibi witness that the defendant had been with him on delivery route all day. State challenged father’s testimony as biased and judge found delinquent. There were five witnesses subpoenaed for the wrong date. Those witnesses included two of the father’s co-workers, one person along the delivery route, and two family friends who would have corroborated the testimony that defendant was with his father for at least portions of the day in question. Prejudice found.

People v. Bass, 636 N.W.2d 781 (Mich. Ct. App. 2001). Counsel ineffective in drug distribution case for failing to investigate and present testimony of corroborating testimony from codefendants. Codefendant A was tried separately in a bench trial and testified that he did not know the defendant or Codefendant B, that he did not see anyone selling drugs, and that he did not sell any drugs. He was acquitted. Codefendant B testified during this trial that he did not know Codefendant A and that he met the defendant at a hotel to help him find a room. They split up and left when they learned the police were outside. He was arrested with heroin on him. Codefendant B later plead guilty.

***Capital Case**

Defendant testified at Scott's trial and his own trial, consistent with Codefendant B. While he had told counsel of both witnesses, she did not interview them or call them as witnesses, but had no recollection of why. Prejudice found.

Perkey v. State, 68 S.W.3d 547 (Mo. Ct. App. 2001). Counsel ineffective in involuntary manslaughter case for failing to interview and present the victim's family physician to testify. The victim died the day after a car accident with the defendant, who was intoxicated. The medical records disclosed to counsel revealed numerous health problems and the name of her physician. Counsel did not interview him simply because he believed the family doctor would have an emotional attachment and would not be helpful. This was not reasonable strategy though because counsel cannot determine whether a witness will be helpful without interviewing them. Prejudice found because the family physician would have testified that he had serious doubts that the accident caused the victim's death.

Cravens v. State, 50 S.W.3d 290 (Mo. Ct. App. 2001). Counsel ineffective in murder second case where the defendant said he entered the victim's home and saw her with a shotgun threatening suicide. They struggled over the gun and it accidentally discharged. Counsel ineffective for failing to prepare and present expert testimony challenging the state's expert, who testified that the shot was from 6-8 feet and was from the right side. The state's expert also testified that gun powder residue on the victim's hands could have been transferred from the defendant's hands rather than being from the actual shot. A defense pathologist in post-conviction testified that the shot was from a distance of less than a foot and was not from the right. A second defense expert in "forensic sciences" testified that the shot was from less than four inches and there was gun powder residue on the victim's hands due to closeness to the gun during the shooting, rather than being transferred from the defendant's hands. This expert also testified that the weapon was prone to accidental firing due to low "trigger pull" and absence of a trigger guard. Counsel made no independent investigation. Instead he just assumed that the state could not conclusively prove their theory. Thus, any possible strategy here was not reasonable due to the lack of investigation. Prejudice found even though the state expert was in a superior position due to actual examination of the body because the defense testimony should have been heard by the jury. The testimony could have resulted in "acquittal, hung jury, or conviction of the lesser offense" of involuntary manslaughter, which was charged. "We are not faced with the decision of innocence or guilt as that is not the function of post-conviction relief. *Strickland* . . . create[s] a strict standard, but the purpose is not to set an impossible standard."

State v. Kole, 750 N.E.2d 148 (Ohio 2001). Both trial and initial appellate counsel were ineffective in abduction, having a weapon under disability, and burglary (with firearm specification) case in which the defendant was a "bounty hunter" or "bail bonding agent," who entered the home of a fugitive's step-brother unannounced and without permission. Defense counsel argued a common law privilege based on an 1872 U.S. Supreme Court case allowing entry into the defendant's home but not the home of another. Counsel did not, however, raise a statutory defense to the abduction and burglary when a state statute allowed arrest "at any time or any place." Counsel's deficient conduct was the result of ineffective research rather than tactics. Prejudice found at least on the

***Capital Case**

abduction and burglary charges. With respect to the firearm charges, the court also found ineffectiveness for failing to raise a possible issue of firearm inoperability since that issue had never been considered by the courts before.

****Glossip v. State***, 29 P.3d 597 (Okla. Crim. App. 2001). Counsel ineffective in capital case for numerous reasons. The state's case was circumstantial except for testimony of a co-defendant with a life deal, who testified that the defendant convinced him to commit the murder. The defendant consistently maintained innocence but admitted involvement as an accessory after the fact. Counsel was ineffective for: (1) failing to cross-examine the co-defendant with a prior inconsistent taped interview that contained numerous material discrepancies and there was no possible reasonable strategic reason since the co-defendant was the state's star witness; (2) failing to adequately prepare by familiarizing himself with discovery obtained from the State and arguing an incomprehensible theory that others committed the murder based on a five minute call with a police officer without even researching to discover the officer's testimony was not admissible; (3) failing to object to improper double hearsay testimony from an officer that arguably provided the only independent corroboration of the co-defendant's testimony; (4) failing to request that the trial court answer the jury's question regarding culpability for not rendering aid and failing to renew the request for an accessory after the fact charge to which the defendant was entitled under the evidence; and (5) failing to object to improper victim impact evidence that went far beyond what was admissible.

In addition the court noted other examples of trial counsel's failure to prepare:

Trial counsel's lack of preparation is also apparent from his repeated statements prior to and during the trial referencing Appellant's ability to change his plea or Appellant's refusal to follow his advice to enter a blind plea to the murder charge. We also note other examples of unreadiness which are evident in the record: trial counsel's last minute requests for discovery which the State had already provided or had previously given counsel the opportunity to obtain; trial counsel's telling the jury "Howard Bender" was a fictitious person when his identity was known and obvious from discovery materials; trial counsel's failure to lay a proper foundation for the admission of evidence or testimony; trial counsel's objection to lack of notice withdrawn because trial counsel did have notice; trial counsel's failure to secure a witness whom counsel repeatedly referred to as a suspect in front of the jury; trial counsel's "calling" a witness (by yelling for him in the hallway during trial) to show the witness was not present; trial counsel's forgetting to demur to the evidence until prompted by the trial judge. Trial counsel also was not prepared for second stage. Although he prepared a list of mitigating factors for the jury's consideration, it was apparently one prepared in haste. Further, the only witness other than Appellant who testified during second stage was Appellant's mother, and counsel failed to ask her whether she wanted her son's life spared until prompted by the trial judge.

***Capital Case**

Id. at _____. In sum, “[t]he record as a whole suggests that trial counsel was not prepared for trial, had not formulated any reasonable defense theory, fully expected Appellant to enter a plea, and never expected to get to the second stage of the trial.” *Id.* at _____.

****Miller v. State***, 29 P.3d 1077 (Okla. Crim. App. 2001). Counsel ineffective in capital case for numerous reasons. First, counsel waived the opportunity to be present and to attempt to rehabilitate a juror when the judge talked to a juror in chambers during the sentencing phase after the juror became visibly upset and asked to be excused following testimony of the defendant’s brother about the defendant “being ‘scarred for life’ by abuse and about the stress” of the trial on the defendant’s family. Counsel also failed to adequately object to the victim impact witnesses’ extended testimony that the defendant should be sentenced to death, which had not been included in the state’s pretrial disclosure. While this testimony is normally admissible under state law, it should have been excluded in this case due to the lack of notice. In addition, the follow on testimony of *why* the victim impact witnesses believed the defendant should be sentenced to death was improper for the same reason. While state law allows only a straightforward statement of the sentence the victim impact witnesses believe should be imposed, the testimony in this case went well beyond that with “the witnesses’ amplified opinions about [the defendant’s] lack of remorse, his inability to be rehabilitated, and his being dangerous to those inside and outside of prison.” Nonetheless, while counsel had objected generically to the lack of notice, counsel did not object to this testimony as inadmissible for separate reasons. Counsel also failed to object to the court’s failure to properly instruct the jury, in accordance with state law, that a statutory aggravating circumstance must be found before the victim impact testimony could even be considered. Prejudice found due to ineffective assistance and plain error by the trial court found because “the victim impact witnesses essentially testified about ultimate issues in the case, i.e. whether Appellant was a continuing threat to society, whether or not Appellant could be rehabilitated, whether he had remorse, and whether his actions were justified. Such evidence is extremely dangerous, as it could easily lead to jurors substituting their own opinions with those of the victims, those who suffered the most from the crime.” The court was also “troubled by what can only be described as a serious breakdown in communication between Appellant and his attorneys. While this breakdown in communication may not technically fall under the rubric of ineffective assistance, it does to the extent the problems were not presented to the trial judge so that the possibility of appointing new counsel to represent Appellant could be explored.” Shortly before trial counsel had requested a mental health examination stating that the defendant did not trust them, although he would communicate with an investigator and another indigent defense counsel. Counsel also stated in the motion that they believed medication would help since the defendant had a history of depression and possible schizophrenia but was not currently on medications. These issues were never addressed by the court or pursued by counsel, except that counsel asked to have the investigator sit at counsel table during the trial to “assist” in communicating with the defendant. In post-conviction, counsel testified that the relations were strained and the defendant even reached the point of refusing to talk to counsel, in part, because they wanted him to enter an agreement for life but the defendant refused. Other reasons for the possible problems included the lack of medications and that one of the attorneys was on medical leave for three months just prior to trial. The defendant had also told another indigent

***Capital Case**

defense counsel that he would not cooperate with his counsel because one of them had made a racially derogatory comment. Counsel denied saying it to the defendant but admitted that he might have made the comment in private and again in the presence of co-counsel and the investigator. “Whether caused by one of these reasons or a combination of several, the breakdown in communication between Appellant and his attorneys may very well have affected numerous areas of the trial.” “The bottom line is the attorneys could not effectively communicate with their client, for whatever reason, and they should have sought to withdraw from representation and to notify the trial judge regarding their inabilities in this area.”

We see many capital cases where the relationship between the attorneys and the client has become strained. We do not rule here that such a strained relationship, standing alone, requires the removal of an attorney or the reversal of those cases. However, when a client completely refuses to talk to his attorneys and we have a record that poses a grave concern that this refusal was caused by the attorneys’ negative attitudes toward Appellant’s plea decisions or about the type of case this was, or one attorney’s derogatory comments, along with the other issues addressed in this opinion, we cannot in all good conscience say Appellant received a fair trial, a proceeding with a result that can be considered reliable.

State v. Honeycutt, 54 S.W.3d 762 (Tenn. 2001). Counsel ineffective in child abuse case for failing to investigate and develop an alternative theory of defense that focused on the mother of the infant victim. While defense counsel admitted in the opening that the baby had been shaken, he only denied that the defendant was the perpetrator. He failed, however, to present the available evidence that the mother had access to the child during the time frame in which injury to child occurred. The mother had also made numerous incriminating statements that she had slapped and shaken the infant before. Prejudice found because the evidence against the defendant was only circumstantial and the mother had equal access to the infant during the relevant time frame.

**In re Brett*, 16 P.3d 601 (Wash. 2001). Counsel ineffective in capital trial for numerous reasons. As court summarized, “when counsel knew or had reason to know of a mental defect or illness affecting their client in a possible death penalty case, counsel could and should have: (1) promptly sought the appointment of co-counsel; (2) presented a mitigation package to the prosecutor before a death penalty notice was filed; (3) promptly investigated relevant mental health issues; (4) sought a timely appointment of investigators; (5) sought a timely appointment of qualified mental health experts; and (6) adequately prepared for the penalty phase by having relevant mental health issues fully assessed and by retaining, if necessary, qualified mental health experts to testify accordingly. While the failure to perform one of these actions alone is insufficient to establish ineffective assistance of counsel, the failure to perform the combination of these actions establishes that defense counsel’s actions in Brett’s trial were not reasonable under the circumstances of the case.” *Id.* at 608. Despite counsel’s early notice that defendant suffered from diabetes and mental problems, counsel did not seek a mental health expert, a psychologist, until a month before trial. Because there were delays in appointment and obtaining temporary license the expert only had 19 days to prepare

***Capital Case**

and only received the necessary school, medical, and corrections records 2 days before trial. On the day he was scheduled to testify, the psychologist informed counsel that he was not qualified to diagnose and testify about fetal alcohol syndrome and the effect, which was defendant's central issue. "At the last minute, defense counsel presented a different witness. However, this witness was not qualified to testify concerning Brett's medical conditions and the mental effects, did not make an individualized diagnosis of Brett, and provided erroneous testimony concerning fetal alcohol effect." *Id.* at 606 n.1. Court found deficient conduct based on the uncontroverted testimony of three "legal experts": Miriam Schwartz (a federal public defender experienced in homicide cases), Joan Fisher (a supervising attorney for the capital habeas unit in Moscow, Idaho, and former prosecutor), and John Strait (an experienced criminal litigator, consultant, and professor of law at Seattle University). Prejudice found because, if counsel had performed adequately, the jury would have heard evidence of defendant's bipolar disorder, fetal alcohol effect or alcohol-related neurodevelopment disorder, and a severe medical and psychiatric consequences of poorly controlled diabetes. The fetal alcohol effect revealed a pattern of brain damage consistent with prenatal alcohol exposure and the brain damage had a "significant impact" on the defendant's mental abilities.

2000: *Cabrera v. State*, 766 So.2d 1131 (Fla. Dist. Ct. App. 2000). Counsel ineffective in drug trafficking case for failing to pursue entrapment defense. Counsel did not pursue entrapment defense because she did not think it was viable since defendant had a prior drug arrest and there was evidence of a connection between defendant and the confidential informant who allegedly entrapped him. Instead, counsel proceeded on a "bastardized entrapment theory" without calling it that and without requesting a jury instruction on this theory. Counsel's conduct was deficient where the defense was legally available and counsel conceded that it was the only defense available. In addition, although the defense used the "bastardized" theory, the jury was not instructed on it and the prosecutor highlighted that fact in closing. Although the state's evidence was strong, court found prejudice where counsel deprived defendant of the only available defense. Court also considered: "To some extent, a jury is a wild card and there is a tremendous lack of predictability as to what a jury in a given case will do." *Id.* at 1134.

***Honors v. State*, 752 So. 2d 1234 (Fla. Dist. Ct. App. 2000).** Counsel ineffective in burglary and theft case for failing to call an exculpatory witness known to counsel, although the opinion is not clear whether counsel failed to subpoena witness and she was not present or whether she was present and just not called. The state's case was only circumstantial evidence based on the defendant's possession of stolen property. This witness would have corroborated the defense that the defendant bought the items from two men. Defense counsel told the jury about the witness in opening statements but then failed to present her testimony.

****Head v. Taylor*, 538 S.E.2d 416 (Ga. 2000).** Counsel ineffective in murder case, where defendant had killed his wife with a knife, for failing to ensure proper medication for defendant, who had long history of mental illness, so defendant could assist in defense and in failing to obtain jail records to refute State's claim that defendant behaved normally in jail. Defendant had evidence of defendant's long history of mental illness, including hospitalization and medications, involving among other

***Capital Case**

things delusions that his wife, her family, and others were conspiring against him. Just prior to the murder, wife obtained a warrant to have defendant, who had no prior record except a bad check charge, removed from their apartment because she was afraid of him due to his mental illness. Defendant walked home from courthouse with children, left them outside, and went in and killed wife. He told police right afterwards that wife's family was going to kill him. Prior to trial, defendant continuously complained to counsel about conspiracies to make him commit suicide, crying, shaking, and nightmares and that he needed his medications, which had run out. Court appointed competence examiner in July 1989 said defendant suffered only from substance abuse problems and that his prior records had indications of malingering. As the trial approached, defendant became more bizarre. In 1990, all he would tell defense investigator was that the furniture in his apartment had been moved to confuse him. In July 1990, defense retained psychologist, but defendant cried and refused testing because he believed that his defense attorneys and the expert were conspiring with his in-laws. Psychologist reported that he did not believe the defendant was malingering and that he was schizophrenic. Psychologist also reported that the defendant's condition was deteriorating, such that he could not cooperate with defense counsel, and would continue to do so unless he was medicated. Counsel considered making a motion to have the defendant medicated but did not do so. During trial, the state presented testimony of psychologist and evidence that defendant behaved normally in jail, including playing basketball and chess with other inmates. The state also argued that if the defendant was truly psychotic, defense counsel would have gotten medications for him. Counsel were aware that State would make those arguments, because the defense expert had specifically warned them that this would likely be the state's theory, but counsel failed to challenge or rebut the state's evidence. Counsel's conduct was deficient in failing to have their client treated and medicated prior to trial. "In effect, trial counsel chose a strategy centered around their ability to convince the jury that their client was a paranoid schizophrenic and not a malingerer, but they proceeded to trial without taking the necessary action to prevent this strategy from being seriously impaired by Taylor's non-cooperation." Counsel's conduct was also deficient in failing to obtain the jail records, which would have reflected, contrary to the jail officers and doctor's testimony of normal behavior, that the defendant made repeated complaints of headaches, stomachaches, uncontrollable crying and shaking, suicidal ideation, difficulty sleeping, bad dreams, "abnormal feelings," and "emotional stress disorder." One of the doctors who testified that the defendant had no problems in confinement had noted that defendant was depressed and had prescribed anti-depressant drugs for him. In addition, although the doctor testified at trial that he could not recall whether he had prescribed psychotropic drugs, the jail records showed that he had actually increased defendant's dosage of Mellaril and prescribed Haldol, both psychotropic drugs, shortly after arrest. The defendant had also repeatedly requested mental health treatment and this same doctor had personally made several notations about contacting a mental health facility regarding the defendant. Nonetheless, the doctor did not mention these requests at trial and denied that he was ever asked to treat the defendant. The records also reflected that the defendant had a suicide attempt prior to trial and that this doctor had advised officers to keep a close check on him. Counsel's conduct was deficient in failing to get the records because their own expert had warned them that the state would present evidence of the defendant's behavior in confinement and because the defendant had told counsel of the problems he was experiencing in confinement. Prejudice found

***Capital Case**

because the key point of contention during trial and sentencing was whether defendant was a paranoid schizophrenic or a malingerer.

****People v. Sutherland***, 742 N.E.2d 306 (Ill. 2000). Counsel ineffective in capital case, involving kidnaping and criminal sexual assault because counsel failed to investigate and present evidence that defendant purchased kind of boots and tires that were linked to crime scene only after crime occurred. Body was found in open area with boot prints on back and tire prints in area. Pubic hairs were found in her rectal area and her neck had been cut. Death was fixed as July 1, 1987, by medical examiner. Tire tracks were narrowed to only two types sold in U.S. and boots were a brand sold by Kmart. Several months later, the defendant was arrested for shooting at park rangers in Montana. He had the Kmart brand boots in his possession and one of the suspect tires on his car. At the time of the murder, he had lived only a few miles from where the body was found. During trial, the state presented expert testimony concerning the tire prints and the boot prints consistent with those found in defendant's possession. Expert testimony also indicated that: (1) dog hairs found on victim's clothing were consistent with hairs from defendant's dog but inconsistent with hairs from victim's dogs; (2) fibers found on victim's clothing could have originated from the carpet or upholstery of defendant's vehicle; and (3) fibers found in defendant's vehicle could have originated from victim's clothing. A state expert also testified that two pubic hairs recovered from victim's rectal area could have originated from defendant, but did not originate from 24 other suspects in the case or from any member of Amy's family. The defendant's sister provided alibi testimony and a defense expert testified that fibers found in the defendant's car were inconsistent with fibers from the victim's clothes. On direct appeal, court held that the prosecution at trial improperly argued before the jury that the hair and fiber evidence conclusively established that the victim had been in the defendant's car, when the testimony was only that hair and fibers from the crime scene were "consistent with" those from defendant's car. No prejudice was found on direct appeal though due to the strength of the remainder of the state's evidence. Defendant's mother could have testified that the defendant purchased the boots and the tires after the date of the murder and had even offered the defense counsel the receipt for the purchase of the boots, which were returned to her and in her possession prior to trial. A friend of the defendant could have testified that he had changed tires on the defendant's car at least twice after the date of the murder and that defendant had to change tires frequently because he lived on a very rough road. The friend had told both the police and the defense counsel about this prior to trial, but the friend had also told police that the defendant was at his house on the night of the murder, which was inconsistent with the alibi the defendant presented. Defense counsel said he did not pursue the information provided by the defendant's mother and the defendant concerning the tires and boots and did not examine the boots because he did not think this evidence was significant to the state's case. Counsel's conduct was deficient in light of his strategy to discredit the state's circumstantial evidence. Prejudice found because boot and tire evidence was significant part of the State's circumstantial case, none of which was particularly strong in isolation. Prejudice also found in combination with direct appeal finding that the prosecutor improperly overstated the strength of fiber-comparison evidence in argument.

***Capital Case**

People v. York, 727 N.E.2d 674 (Ill. App. Ct. 2000). Counsel ineffective in aggravated criminal sexual conduct case for failing to introduce exculpatory DNA evidence or to stipulate to the results. Victim testified that defendant and two co-defendants raped her. Defendant testified that only the two co-defendants raped her. DNA testing revealed semen from two co-defendants but not the defendant. Defense counsel attempted to introduce those results through the defendant's testimony, but the state's objection to hearsay was sustained. Prosecutor said she would have stipulated to results if asked prior to trial. Nonetheless, prosecutor argued lack of DNA evidence in closing argument. Jury was aware of DNA testing but not results.

Commonwealth v. Alvarez, 740 N.E.2d 610 (Mass. 2000). Counsel ineffective in murder case for failing to review or to provide to defense experts medical records regarding a serious automobile accident in which the defendant sustained serious head injury. Prior to trial counsel retained an expert that noted history of psychotic disturbances and severe alcohol and substance abuse, which exacerbated the psychotic disorder. In the report, expert noted that defendant told him she had been in a serious automobile accident in 1985, following which she had been in a coma for six months and had a metal plate placed in her head. He also noted repeatedly, however, that she was a poor historian. Nonetheless, counsel failed to obtain the records from the 1985 hospitalization. The state, however, requested the records and received them the day before jury selection began. The records were approximately 12" thick, but the state gave its own expert and the defense only the discharge summary. Defense counsel gave the summary to its own expert only 30-40 minutes prior to the expert's testimony and the expert only had time to skim the report. During the expert's testimony, he opined, as he had in the initial report that the defendant suffered from a mixed personality disorder with organic, paranoid, and affective features. For the organic features, the expert relied only on the history of substance abuse and the defendant's self-reported testimony of being in a coma and having a metal plate in her head. The prosecutor on cross established that the expert was relying only on the defendant's self-reports for organic damage, noting that the discharge summary made no reference to a coma or metal plate, and, then, challenged the testimony because the evidence of psychosis relied on by the defense expert was also from self-reported statements. Defense counsel did not address this issue in closing argument, but the prosecutor made repeated reference to the defendants' alleged "lies" about her past. If counsel had obtained the records and provided them to the defense expert, however, the expert would have testified that the records supported a conclusion that she had been in a coma for weeks and had extensive and repeated surgeries involving her scalp, face, and ears. In short, the records provided ample support for the defense expert's conclusion about an "organic" component.

Where, as here, a defendant claiming lack of criminal responsibility has a significant medical history that appears to have contributed to the underlying mental disease or defect, competent counsel would certainly investigate the full extent of that contributing medical history. The possibility that a defendant's mental illness could be explained and confirmed by reference to some demonstrable physical illness or injury would be of such obvious value to the defense that one would expect counsel to explore it both promptly and thoroughly. The opportunity to present the jury with

***Capital Case**

a medical explanation for the defendant's mental illness, an explanation that could both corroborate the existence of the mental disease and portray the defendant's mental illness in a sympathetic light, should not have been squandered.

Id. at 616. Counsel was also ineffective specifically because counsel failed to provide his expert with evidence counsel was aware was "being reviewed by the opposing expert." While counsel can generally rely on information provided by their experts without further verification, counsel had a duty to further investigate given the defendant's prior reported medical condition following a serious accident. Her unreliability was enhanced by the simple fact that she was unconscious during a substantial period of time and defense expert reported that she was an unreliable historian. If counsel had "ignored his own expert's request for this information, the failure to obtain the records would be even more unreasonable." Prejudice is clearly established "[w]here, as here, the very matter as to which defense counsel has been ineffective becomes one of the linchpins of the prosecutor's closing." *Id.* at 618.

Blankenship v. State, 23 S.W.3d 848 (Mo. Ct. App. 2000). Counsel ineffective in involuntary manslaughter and assault case where counsel thought that he and prosecutor had agreed to a continuance but neglected to confirm continuance with judge and thus did not interview expert on accident reconstruction prior to trial. Then in opening statement, counsel told jury that he would produce expert witness, but decided not to present expert testimony when he discovered that the expert would disagree with defense theory of case. Counsel then had defendant take stand, which allowed prosecution to show previous conviction for DWI and speeding ticket that defendant received on day of accident.

Heath v. Vose, 747 A.2d 475 (R.I. 2000). Retained counsel ineffective in burglary case for numerous deficiencies. Defendant was arrested in the home of an elderly man who did not know him. Counsel failed to move for a directed verdict following the state's case or to seek instructions on the lesser included offense of breaking and entering even though there was no evidence of a specific intent to commit a felony and no evidence that anything was taken. Counsel also failed to present evidence of the defendant's intoxication and did not argue that he was unable to form the requisite specific intent. Counsel responded that the defendant never provided names of witnesses to the intoxication, but the court found counsel's conduct deficient nonetheless because counsel knew of the intoxication and never discussed the possible defense with the defendant. Counsel also conducted no discovery and failed to timely file a motion for new trial. Prejudice found because the trial transcript was only 54 pages long and the "representation was so wanting in all respects as to amount to a complete absence of defense." *Id.* at 479.

In re K.J.O., 27 S.W.3d 340 (Tex. App. 2000). Counsel ineffective in juvenile proceeding where juvenile was alleged to have engaged in delinquent conduct, but counsel wholly failed to investigate facts and circumstances surrounding juvenile's alleged involvement in underlying offense and indicated to jury that juvenile was guilty. Juvenile was prejudiced because the state's evidence went unchallenged and the defense did not discover and present alibi witness. Apartment security guard

***Capital Case**

attempted to question two Hispanic girls for suspicious conduct and both pulled weapons on him, but the weapons apparently wouldn't work so they ran and were arrested by police nearby. Guard saw that one of them had "Baby" tattooed on neck and the other had white pants and Adidas jacket. Police officer testified that he got report that guard saw the girls get in a blue Cadillac, although it was not the guard who reported this but someone else. Officer drove around area and found blue Cadillac in parking lot of night club with Hispanic male and female in it, "Baby" was one of them. When officer attempted to arrest her, another car rammed the car next to squad car and three men got out and approached officer, who called for backup. Other officers and helicopter closed in on the scene. The defendant, who according to the officer was wearing white pants, got out of a pickup truck in front of the Cadillac with her hands up. An Adidas jacket was found in the truck, but no gun was found. Counsel talked to no witnesses other than defendant and mother and entered plea negotiations without permission, because counsel assumed defendant would plead guilty. When counsel learned during trial that defendant would not plead guilty, counsel did not ask for continuance to prepare even though she had talked to no one and had been unsuccessful in serving subpoenas for defense witnesses. In cross-examination of security guard, counsel asked, "To your knowledge did my client or her companion have a chance to leave the immediate area before the detention by the police?" Counsel's question clearly presupposed that defendant was guilty. Defendant had told counsel that she was not guilty and that her clothes did not match those described by guard and she and mother provided names of witnesses at club that night. One of these witnesses, defendant's friend, would have testified that she was with the defendant the entire night up until very shortly before crimes when she went in the club. Another witness arrived around that time and observed the defendant in truck with her boyfriend until about five minutes before the helicopters arrived. Defendant's clothes at time of arrest, obtained from cops, also revealed that defendant was wearing blue jeans, not white pants as witnesses said assailant was.

1999: *Frederick v. United States*, 741 A.2d 427 (D.C. 1999). Counsel ineffective in murder case for failing to secure the testimony of an exculpatory eyewitness. There were two eyewitnesses to murder, who referred police to Smith. Smith in turn said that the defendant was the principal. Both were indicted and the trials were severed. Smith went to trial first. One of the eyewitnesses testified unequivocally that there were two men and one was Smith. He also testified unequivocally that he knew the defendant well and the defendant was not the second man. When the defendant went to trial, defense counsel moved to admit the witnesses testimony from Smith's trial because the witness could not be located. The judge granted short continuance in midst of trial but witness still was not found. Trial continued. During deliberations, the witness was located. Judge granted a mistrial. A year later when the defendant proceeded to trial again, the defense again said that the witness could not be located. Counsel's conduct was deficient because, at most, counsel sent an investigator to the witnesses mother's house looking for him. As trial court pointed out in first trial, however, the witness frequented the courthouse often due to numerous problems in juvenile court. He was in courthouse several months for hearings prior to trial. Counsel could have easily located him. The court said that in a murder case, "[t]he stakes were . . . exceptionally high . . . and a lawyer who defends a murder case assumes an awesome responsibility. The quality of representation required of counsel must surely reflect the nature of the task at hand and the potential consequences to the

***Capital Case**

client of an inadequate defense.” *Id.* at 437. Counsel’s deficient conduct was not excused because the defendant opted to go to trial without the witness because counsel’s deficient conduct gave the defendant the Hobson’s choice of going to trial without significant exculpatory evidence or remaining in pretrial confinement where he had been for more than three years waiting for his defense counsel to find the witness when he had not done so in three years.

Stephens v. State, 748 So. 2d 1028 (Fla. 1999). Counsel ineffective in battery and resisting arrest case for failing to adequately present evidence of the defendant’s injuries. Defense was that this was a case of police brutality and self defense. Police said the injuries did not occur at the time of arrest but happened afterwards. Defense offered pictures of bruises on the defendant’s thighs and failed to correct witness who said pictures taken on day of arrest when they were actually taken two days later. State brought out on cross. In rebuttal state called emergency room doctor who saw defendant on day of arrest and elicited testimony that the bruises in the pictures taken two days after arrest were at least one day old. Defense counsel should have had doctor testify from his notes and recollection of the injuries rather than the pictures. Prejudice found due to the confusing manner in which all of this information was presented.

State v. Pittman, 744 So. 2d 781 (Miss. 1999). Counsel ineffective in photographing minors for sexual gratification case (5 state charges, 1 fed) because counsel pursued only guilty plea without doing any investigation or research. Counsel did not pursue suppression motion, which would have been supported by a cop, or change of venue motion, which could have been supported by statistician, even though the publicity was described by the post-conviction judge as a “media onslaught.” Counsel also advised client that “mistake of age” was no defense without conducting any research. Research would have revealed a federal case saying this defense was available and no state cases on the issue. Although court reserves judgment, court finds it was certainly not a frivolous defense in state court. Finally, court finds that counsel misled defendant to believe he would get only a five year sentence and he actually got five concurrent 20 year sentences in state court and 41 months in federal court. On a side note, court held that defendant was not barred by res judicata or collateral estoppel from pursuing IAC in state court even though he was previously denied on IAC in appealing the federal conviction.

Dove v. State, 337 S.C. 298, 523 S.E.2d 459 (1999). Counsel ineffective in murder case for failing to obtain victim’s medical and psychiatric records. She was found dead in a hotel room where she had spent a few nights with her estranged husband after they had an argument. The defendant maintained that she had killed herself and the defense counsel was informed that the victim had psychiatric treatment recently. The records revealed that she had been committed twice in the preceding three months for substance abuse and depression and that she was suicidal. Prejudice found because the records could have been used to impeach the victim’s mother who denied that her daughter was suicidal and could have created doubt where the evidence of murder was all circumstantial and the physical evidence was just as consistent with suicide as it was murder.

***Capital Case**

State v. Burns, 6 S.W.3d 453 (Tenn. 1999). Counsel ineffective in murder case for failing to investigate and present evidence of an alternative murder plot to kill the victim. Defendant was charged with hiring two men to kill her ex-husband. Within several months of the murder, however, one of the alleged contract killers and the victim's son by a previous marriage were overheard planning the murder so that the son would inherit his father's share in a hotel. The two men were also seen threatening and physical assaulting the victim. These incidents were reported to the police at the time, but the police took no action. After the victim was murdered, the same three witnesses reported these incidents to the investigators. The statements were memorialized in a report that was disclosed to the defense prior trial. Counsel did not contact the witnesses or otherwise investigate this alternative theory because counsel did not believe the information was exculpatory. If counsel had investigated, however, he would have discovered that the defendant's name was not mentioned in these discussions and that the information was exculpatory. Prejudice found because presentation of this evidence might have raised a reasonable doubt since the state's entire case was built on the testimony of an unreliable witness, who admitted involvement in the murder and had nothing to gain from implicating the defendant, corroborated only by circumstantial evidence.

2001: *People v. Bunning*, 700 N.E.2d 716 (Ill. App. Ct. 1998). Counsel ineffective in armed robbery case for failing to object when the state told the jury during opening statements that the state would call two witnesses to corroborate the testimony of an accomplice and to testify that the defendant had bragged about committing the robbery. The state did not call these witnesses. In addition, counsel was ineffective for failing to move for a mistrial after a police officer testified during cross-examination that the defendant terminated the police interrogation by requesting counsel. Defense counsel had asked only how long the interview lasted.

State v. Sexton, 709 A.2d 288 (N.J. Super. Ct. App. Div. 1998), *aff'd*, 733 A.2d 1125 (N.J. 1999). Counsel ineffective in murder/manslaughter case. Defendant was 15 and charged with murder. Family court waived to criminal court. Defendant was convicted of lesser included offense of reckless manslaughter. Defendant and the victim were friends and neighbors who were in a lot were both handled a handgun. According to the defendant and a witness, the victim assured the defendant the gun was not loaded before the defendant fired one shot that hit the victim and ultimately killed him. The defense was essentially an accident, i.e. mistake of fact based on reasonable belief that gun was not loaded which would have negated recklessness. A firearms examiner testified that an inexperienced person could easily assume there was no bullet in the chamber, when in fact the chamber could hold a bullet with or without the magazine in place and that the sealed chamber could be viewed only by pulling the slide back. The state argued that the gun belonged to the defendant and that he knew how to use it. The state knew or should have known, however, that the gun was registered to the victim's grandmother. The state failed to disclose this evidence and the defense failed to pursue the evidence even though they were on notice that the gun may have belonged to the grandmother and present it to the jury. Court found both prosecutorial misconduct and ineffective assistance which created the "real potential for an unjust result" because the ownership of the gun evidence would have corroborated the defendant's testimony that the victim brought the gun to the lot and offered to show it to the defendant, that the defendant relied on the victim's

***Capital Case**

statement that the gun was not loaded, and that it was reasonable for the defendant to do so. In addition to these errors, the trial court failed to give an explicit instruction that the state had the burden of disproving the reasonable mistake of fact. Court held that the instructional error alone required reversal, but certainly would require reversal as cumulative error when combined with the prosecutorial misconduct and the ineffective assistance of counsel.

Sund v. Weber, 588 N.W.2d 223 (S.D. 1998). Counsel ineffective in grand theft by deception case for failing to adequately investigate and present witnesses to create a reasonable doubt of guilt. Defendant was convicted for taking money for roofing work which he never completed, but the state had to prove a specific intent at the time of the transaction. If counsel had investigated, witnesses were available to testify that the defendant asked a witness about helping him with a roofing job around that time period, that he had completed other jobs around that time, that he had no bank account and always paid for materials with cash (which would explain cashing the check), and that he was going through marital problems and hospitalized for alcoholism around the time.

Brown v. State, 974 S.W.2d 289 (Tex. App. 1998). Counsel ineffective in murder of husband case, where defendant claimed self defense. Counsel was ineffective for eliciting evidence and opening the door for extensive evidence of defendant's drug use and promiscuity when the only evidence of drugs prior to that was a trace of cocaine found on a mirror in the car in which defendant left the scene. Defense opened door to state theory that this was a drug related case and to contradict defendant's statements that she had just experimented with drugs when she used cocaine and alcohol on a regular basis and was promiscuous. One rebuttal witness even testified that she was a drug addict who would do anything for drugs and had a propensity for violence. Court also noted that counsel failed to object when prosecutor improperly told jurors that defense had to prove self defense by a preponderance of the evidence and that defendant had to testify to prove it. Counsel also failed to object to police officer's testimony regarding post-arrest silence after defendant's rights were read. Finally, counsel failed to object to incomplete instructions. While court notes that not all of these instances would justify reversal, but that the totality of the representation, especially that related to the extraneous bad acts evidence, undermined confidence in the conviction.

Cardenas v. State, 960 S.W.2d 941 (Tex. App. 1998). Counsel ineffective for advising defendant to waive record during plea hearing and ineffective in sentencing for failing to object to polygraph results in pre-sentence report when polygraph results are inadmissible for any purpose even if parties consent to admission.

1997: *State v. Simpson*, 946 P.2d 890 (Alaska Ct. App. 1997). Counsel ineffective in sex abuse case involving several juvenile males who the defendant had contact with through shelters and foster homes. Counsel ineffective for failing to move for a severance of the charges and failing to use information made available to him from the juvenile files, medical records, and correspondence, which indicated that one kid was brain-damaged, a chronic liar, on antipsychotic medications, and had made prior unsubstantiated claims of abuse; the second kid had a history of lying and psychosis; and the third had a history as a sexual abuse victim and perpetrator and no credibility.

***Capital Case**

People v. Halawa, 683 N.E.2d 926 (Ill. App. Ct. 1997). Counsel ineffective in unlawful use of weapon case, where counsel filed no discovery, no motions, and waived right to probable cause determination prior to entry of guilty plea. Court found it amounted to “no representation at all” and presumed prejudice.

****State v. Butler***, 951 S.W.2d 600 (Mo. 1997) (en banc). Counsel ineffective in capital case where the victim was the defendant’s wife because counsel failed to adequately investigate and present evidence which showed that the victim was murdered by her nephew and not the defendant and for failing to discredit the state’s witnesses and challenge the evidence. Evidence against the nephew included an eyewitness who saw a car and a driver leaving the scene, which matched the nephew and not the defendant; several days after the murder the nephew was trying to sell a ring similar to the one removed from the body; the victim told her brother that she was afraid of her nephew because he had a drug habit and she had expensive rings; the nephew had stolen from other family members just before this and pawned the stolen items; the nephew’s girlfriend had been killed only 11 days before and her mother would have testified that the nephew had been threatened because he owed drug money and the threat was that if he did not pay his girlfriend would be killed; and the nephew had left work early on the day of the murder and lied about it. In addition to failing to present this evidence, counsel was ineffective for failing to prepare and present evidence that the fibers from the victim’s fingernail scrapings did not match the fibers of the defendant’s clothes and the defendant had no blood on him. Likewise, counsel failed to present evidence that the one witness who said he saw the defendant with a weapon similar to the murder weapon previously had made contradictory statements about the weapon to police and another witness who was present when the weapon was allegedly seen would have testified that she did not see any weapon.

State v. Taylor, 968 S.W.2d 900 (Tenn. Crim. App. 1997). Counsel ineffective in rape of child case for failing to investigate and move to suppress evidence of one of the two alleged incidents prior to trial because one of the alleged incidents was committed in a different county. Counsel instead waited until the conclusion of the state’s case to move to dismiss, which allowed the jury to hear evidence of a second incident involving the same witness. Counsel was also ineffective in telling the jury in opening statement that the medical evidence would not establish anything when the nurse called by the state testified that the victim had a hymenal injury consistent with penetration by a penis or finger. “[T]he cumulative effect” of these two errors “deprived the defense of a meaningful defense.” *Id.* at 912.

State v. Ross, 951 P.2d 236 (Utah Ct. App. 1997). Counsel ineffective for failing to recognize and to argue that under the “unique” facts of this case the third degree forgery charges were a lesser included offense of the communications fraud charges. Thus, counsel failed to recognize the double jeopardy issue involved in the defendant’s conviction of both offenses. “Knowledge of the law is a basic prerequisite to providing competent legal assistance. If an attorney does not investigate clearly relevant law, then he or she has objectively failed to provide effective assistance.” *10

***Capital Case**

1996: *Walker v. State*, 684 So. 2d 170 (Ala. Crim. App. 1996). Counsel ineffective in child sexual abuse case for: failing to present a witness who stated that she observed a state's witness in the hallway coaching the child witness for her in-court identification of defendant; failing to cross-examine the state's witness about her coaching of the child; and failing to object to the testimony of state's rebuttal witness concerning an alleged statement made by the defendant when the statement was inadmissible under the rules because not disclosed in discovery.

****In re Jones***, 917 P.2d 1175 (Cal. 1996). Counsel in capital case ineffective in guilt phase for numerous reasons. 1) Failing to investigate and present evidence which would have been sufficient to require suppression of handguns from evidence. Simple investigation and ballistics tests would have revealed that handguns were not relevant and were not the murder weapon as alleged by state. 2) Failing to locate and call witness who would have rebutted testimony of state witness who said that victim told him that defendant had murdered another woman. (The state's theory was that murder was committed because defendant was afraid victim was going to report his involvement in unrelated murder.) Counsel knew of police report which indicated that another witness who had been confined with victim would testify that victim had told her that someone other than defendant had committed the unrelated murder. This evidence was also relevant to negate the witness-murder special circumstance. 3) Eliciting testimony from the victim's eight-year-old daughter that the victim had told her that defendant had murdered the other woman. 4) Failing to object to admission of testimony from preliminary hearing of an unavailable witness. Prelim had been a joint hearing with co-defendant and the witness' testimony had been admitted at prelim solely as to co-defendant. Thus, under evidentiary rules this testimony was inadmissible at defendant's trial. 5) Failing to seek the exclusion of inadmissible evidence which indicated that defendant had been involved in an armed conflict related to a drug transaction years before. 6) Failing to object when the state elicited testimony that defendant had shot his mother-in-law previously in an accident or, in the alternative, presenting the available evidence which would have revealed that defendant was trying to take gun away from mother-in-law (who was attempting to shoot someone else) when gun went off and shot struck her. 7) Finally, court rules that reversal is required due to individual and cumulative prejudice due to the numerous deficiencies in counsel's conduct.

****State v. Gunsby***, 670 So. 2d 920 (Fla. 1996). Counsel ineffective for failing to adequately investigate and discover evidence which revealed that murder presented as racially motivated killing in family run convenience store was actually a drug-related killing by rival drug gang. Because of Brady violation and defense counsel's ineffectiveness jury did not learn that: the victim's brother and the state's key eyewitness had unrelated charges dropped so he would not be discredited during testimony and was arrested on additional charges which were pending at the time of trial; another state witness was arrested on probation violation prior to testimony; the victim's brother was a well known drug dealer in trouble over drug debts; both the victim's brother and the only other eyewitness to testify told others that they did not know who did the shooting; another alleged eyewitness who did not testify identified two other individuals as perpetrators; and eyewitness told her husband she could not see perpetrator because he was wearing a mask and the same eyewitness was romantically involved with one of the original suspects in the case. Trial court had found

***Capital Case**

counsel ineffective in sentencing for failing to object to numerous prejudicial misstatements of the defendant's prior criminal convictions by the prosecutor and for failing to adequately prepare and present mitigation evidence. Failure to investigate and present evidence to mental health experts resulted in experts testifying at trial that the defendant had no impairments when he was mentally retarded and had organic brain damage and fit within at least one statutory mitigating circumstance when none had been found at trial. Supreme Court did not address this issue because of the ineffective assistance in guilt-or-innocence phase.

People v. Moore, 663 N.E.2d 490 (Ill. App. Ct. 1996). Counsel ineffective in DUI case for: (1) failing to move to suppress damaging statements which were the product of an in-custody interrogation of the defendant without a knowing waiver of constitutional rights; (2) failing to object to the state's improper cross-examination of the defendant in which prosecutor repeatedly asked his opinion of the credibility of other witnesses; (3) failing to object to improper cross-examination of defendant concerning a prior conviction for criminal damage to property; and (4) failing to object to repeated comments by police officers concerning defendant's silence after Miranda rights were administered.

Greene v. State, 928 S.W.2d 119 (Tex. App. 1996). Counsel ineffective in attempted murder case for impeaching their own witness by asking about a conviction that was inadmissible because not yet final; failing to object to state developing this evidence further; asking cop if he was willing to vouch for state's key witness; failing to request an alibi instruction; and failing to object to improper charges on law of parties and mens rea.

****State v. Holland***, 921 P.2d 430 (Utah 1996). Capital defendant initially plead guilty and was sentenced to die but initial appeal resulted in resentencing hearing. On remand, defendant moved to withdraw guilty pleas on basis that he was incompetent at the time of plea. The court denied the motion and at the resentencing counsel presented no evidence to challenge aggravation evidence and no evidence in mitigation. Instead, counsel simply presented the transcript from the prior sentencing and did not even argue that life was an appropriate punishment. The same counsel initially represented the defendant on appeal but was disqualified due to an actual conflict of interest because counsel had taken an adversarial position with defendant in another capital case. New counsel argued that the judge erred in nunc pro tunc finding of competency based on evidence and ineffective assistance. Court found trial court did err in making nunc pro tunc finding of competency. In combination with defense counsel's completely bad and at times adversarial representation throughout, there were certainly questions whether defense counsel ever investigated or advised defendant properly and whether defendant was in fact competent.

1995: *Farmer v. State*, 902 S.W.2d 209 (Ark. 1995). Counsel ineffective in assault case for failing to have defense witness served with subpoena or to request a continuance to secure his testimony when the absent witness was the only person who could corroborate the defendant's testimony of self-defense.

***Capital Case**

Henry v. State, 652 So. 2d 1263 (Fla. Dist. Ct. App. 1995). Counsel ineffective in child sex abuse case for: (1) failing to interview victim's mother prior to calling her as a witness which resulted in mother corroborating victim's testimony; (2) failing to object to investigating officer's testimony that she was an expert in determining credibility based on body language and victim was telling the truth; and (3) failing to object to improper arguments of prosecutor.

People v. Vera, 660 N.E.2d 9 (Ill. App. Ct. 1995). Counsel ineffective in aggravated assault case for: (1) failing to lay an adequate foundation for admission of transcription of tape-recorded conversation between defendant and witness where witness testified at trial that she never saw another suspect with gun but told defendant on the tape that she did see other suspect with gun; (2) failing to properly impeach state witness who identified defendant but had previously been unable to do so when a defense investigator showed witness photographs which included defendant -- witness denied and investigator testified but was not asked about these facts; and (3) failing to have defense investigator testify to clear up question of inaccurate date on report used to refresh the recollection of a very important defense witness even though judge said witness was helpful but he was concerned about the date on the report making the report unreliable.

Triplett v. State, 666 So. 2d 1356 (Miss. 1995). Counsel ineffective in manslaughter case for, *inter alia*: (1) failing to request pre-trial discovery; (2) failing to interview or subpoena witnesses despite fact that almost 20 people present at crime scene; (3) failing to seek continuance in order to better prepare; (4) failing to make any challenges for cause, which resulted in seating of one juror whose nephew died under very similar circumstances only a couple years before; (5) failing to make *Batson* challenge when county was 41% black and no blacks seated; (6) failing to move to suppress defendant's statement; (7) failing to interview witness or defendant and present testimony which revealed that fatal shot had been fired accidentally when witness and defendant were struggling and the police had left this portion out of written statements; (8) failing to introduce knife found at scene into evidence even offer judge told counsel it could be introduced during defendant's testimony; and (9) failing to request an instruction factually embracing the defense of accidental shooting during struggle.

Holland v. State, 656 So. 2d 1192 (Miss. 1995). Counsel ineffective in possession with intent to distribute case for failing to preserve sufficiency of the evidence issue for appeal in that counsel did not move for a directed verdict, request a peremptory instruction, or file any post-trial motions concerning sufficiency of the evidence when the evidence was sufficient only to support a simple possession. Counsel was also ineffective for failing to object to the prosecution's evidence of past drug sales by the defendant.

State v. Clausen, 527 N.W.2d 609 (Neb. 1995). Counsel ineffective in murder case for failing to object to testimony by state witness that counsel for defendant at the preliminary hearing had asked the witness to lie and counsel made problem worse by calling prior counsel as witness which opened door for state to call in rebuttal a police officer who overheard a portion of the conversation.

***Capital Case**

Dumas v. State, 903 P.2d 816 (Nev. 1995). Counsel ineffective in first degree murder case for failing to prepare (by neurological and psychiatric examination) and present mental health evidence where the only issue was defendant's mental state and investigation would have revealed that the defendant was mentally retarded and the state psychiatrist, whom defense counsel may not have interviewed, reported possible organic damage and that defendant lacked capacity to premeditate.

Buffalo v. State, 901 P.2d 647 (Nev. 1995). Counsel ineffective in assault with deadly weapon and sexual assault case for failing to adequately prepare and present defense. Only eyewitness testimony at trial was from victim who said defendant and codefendant assaulted without provocation and one of them (but he couldn't say which) sexually assaulted him with coke bottle in anus. No defense evidence or even opening statement was offered on assault despite fact that defendant, who had no criminal history, would have testified that victim was harassing codefendant and when defendant told him to stop victim assaulted defendant so there was a defense of self-defense available. Codefendant had told police the same thing. On sexual assault defense counsel did argue that legally defendant could not be convicted if he did not get sexual gratification. This argument is legally incorrect. Counsel was ineffective because defendant would have testified that codefendant committed sexual assault because victim had raped codefendant when she was young.

Green v. State, 899 S.W.2d 245 (Tex. App. 1995). Trial counsel ineffective in theft case where defendant paid for a ring with a check that bounced and sole defense was mistake of fact based on defendant's belief that he had sufficient funds. Counsel did not request an instruction on mistake of fact and did not object to the jury charge was omitted "knowingly" from the elements of the offense. Counsel also ineffective because he failed to file discovery motions, did not object to admission of defendant's mug shots which showed earlier unrelated arrests when identity was not an issue, admitted bank records which showed that defendant was in the habit of seriously overdrawing his account when the court had prevented the state from admitting records, and had the defendant to testify without asking about priors and prosecutor crossed on priors.

Smith v. State, 894 S.W.2d 876 (Tex. App. 1995). Trial counsel failed to interview or present witnesses to events resulting in charges of resisting arrest where only evidence was testimony of arresting officer and defendant and witnesses would have corroborated defendant's version of facts.

Everage v. State, 893 S.W.2d 219 (Tex. App. 1995). Counsel ineffective in felony theft case. After state rested, counsel requested recess because he had allowed witnesses to leave based on belief that state's case would take longer. Judge denied recess and declared that both sides had rested, but then adjourned court until the next afternoon (Friday). Counsel did not show up but showed up on Monday and said he didn't show on Friday because unprepared. Did not move to reopen. Judge held counsel in contempt and proceeded with arguments. Because of counsel's errors, the jury did not hear the testimony of witnesses who would have corroborated the defendant's testimony that he was not the primary actor in the fraudulent theft, would have testified that the accomplice alone committed the offense, and that the store clerk had previously testified inconsistently that the accomplice alone committed the offense.

***Capital Case**

Bess v. Legursky, 465 S.E.2d 892 (W. Va. 1995). Counsel ineffective in murder case for failing to investigate circumstances of taking of first confession prior to moving to suppress, for questioning the defendant in the presence of the police officers concerning the first confession, for encouraging the defendant to go with police officers to find car and murder weapon, questioning the defendant during that trip to make incriminating statements which resulted in a second taped confession. All of this help to the police occurred without a deal and court presumed prejudice. At trial, counsel contradicted the defendant's testimony during the motion to suppress the statements, failed to present pathological expert who would have testified that the victim's time of death was inconsistent with the defendant's statements, and failed to present forensic expert to show that none of the numerous footprints and fingerprints at the scene matched the defendant.

State v. Hicks, 536 N.W.2d 487 (Wis. Ct. App. 1995), *aff'd*, 549 N.W.2d 435 (Wis. 1996). Counsel was ineffective in burglary and sexual assault case for not pursuing DNA analysis of Negroid pubic hairs which were a primary factor in defendant's conviction. Hairs were found in victim's apartment and she testified that no black person had been in her apartment for more than two years prior to assault and defendant denied guilt. DNA analysis would have shown that at least one of the hairs was not defendant's.

1994: **State v. Vickers*, 885 P.2d 1086 (Ariz. 1994). Counsel ineffective in capital trial for numerous reasons. The state even filed a motion "to determine counsel" prior to trial alleging specific instances of counsel's failure to investigate or to retain an investigator. During trial for the murder of another inmate, counsel advanced a conspiracy defense in which he implied that the defendant had been framed by the Department of Corrections. Counsel withdrew a prior counsel's successful suppression motion and elicited otherwise inadmissible (and very damaging) testimony of the defendant's admissions and graphic descriptions of the planning and carrying out of the murder. Counsel did so because he believed cross would support the conspiracy defense. Following conviction, a continuance of sentencing and the state's motion for appointment of co-counsel were granted due to counsel's confinement for contempt in a different proceeding. Counsel basically disappeared from the proceedings after that and co-counsel was appointed as sole counsel after he requested an "investigation based upon rumors that [counsel] had abused both drugs and alcohol during trial." Although there was "ample evidence to indicate that [counsel] likely was using drugs and/or alcohol during court proceedings," the court found ineffectiveness without addressing the "causal connection" of this. Counsel's decision to advance a conspiracy defense and his decision to allow the previously adjudicated inadmissible evidence during the state's case-in-chief "constituted errors so egregious that they alone support a claim of ineffective assistance of counsel." Counsel's actions were not supported by any "reasoned basis" because "there was absolutely no evidence to support a conspiracy defense" or "any logical basis" to explain allowing admission of inadmissible, damaging testimony. Prejudice found because these "errors cannot be characterized as mere tactical blunders." Counsel's actions alone "foreclosed any possibility of the jury finding defendant guilty of second-degree rather than first-degree murder."

***Capital Case**

People v. Kozlowski, 639 N.E.2d 1369 (Ill. App. Ct. 1994). Trial counsel ineffective for relying on consent defense only to aggravated criminal sexual abuse charge even after the trial judge warned him that consent was not a defense under the statute.

People v. Bonslater, 633 N.E.2d 830 (Ill. App. Ct. 1994). Counsel ineffective for failing to: challenge police officer's identification, which was the state's entire case, because it was improper; make an opening argument; and move for directed verdict. Counsel also made baseless and legally unsupported assertions during closing argument which were contradicted by the evidence.

Hicks v. State, 314 S.C. 280, 443 S.E.2d 907 (1994). Where defendant was charged with selling stolen goods and the evidence implied that her boyfriend and son were in jail for the burglary of the goods sold, trial counsel was ineffective for failing to introduce evidence that defendant's boyfriend and son were in jail on charges unrelated to the burglary of the goods the defendant was charged with selling.

1993: *Siano v. Warden*, 623 A.2d 1035 (Conn. App. Ct. 1993). Counsel ineffective in burglary case for failing to call defendant's physician to testify when doctor would have testified that it would have been extremely difficult and unlikely that the defendant could have physically committed the crimes charged.

Briones v. State, 848 P.2d 966 (Haw. 1993). Trial and appellate counsel ineffective for failing to object to factually inconsistent guilty verdicts.

People v. Popoca, 615 N.E.2d 778 (Ill. App. Ct. 1993). Counsel ineffective for failing to interview paramedics and hospital personnel and prepare expert testimony to support a defense of voluntary intoxication.

People v. Mejia, 617 N.E.2d 799 (Ill. App. Ct. 1993). Counsel ineffective in reckless homicide prosecution for: failing to call witnesses who he said in opening argument would testify that defendant was not driving; failing to call witnesses who would have contradicted and impeached testimony of state's only eyewitness; and failing to seek a mistrial when he became aware of police report that contradicted prosecution witness' testimony.

People v. Park, 615 N.E.2d 753 (Ill. App. Ct. 1993). Counsel ineffective for failing to object to admission of letter from daughter to father, eliciting testimony which reinforced daughter's claim that father sexually abused her, and failing to request limiting instruction regarding use of other crimes evidence.

Wilson v. State, 501 N.W.2d 68 (Iowa Ct. App. 1993). Counsel ineffective in sex abuse case for failing to ask for continuance or investigate after alleged victim's mother said during cross-examination that she had taken her daughters to a pediatrician to examine for sex abuse prior to the state expert's examination. If counsel had investigated he would have discovered that defendant's

***Capital Case**

last opportunity to abuse the victim was in February and the pediatrician who examined her in April found no evidence of sex abuse. The state's expert who examined child in August found evidence of abuse that was visible to the naked eye. Given these circumstances, the jury could have easily found that abuse was committed by someone other than defendant.

State v. Potter, 612 So. 2d 953 (La. Ct. App. 1993). Counsel ineffective in murder case for: failing to interview or subpoena defendant's girlfriend who would have testified that the victim harassed and threatened the defendant and would have supported the defendant's self-defense theory; arguing that the spent bullet found at the scene came from a gun fired by the victim at the same time the defendant shot the victim when there was absolutely no evidence that the victim had a gun; and failed to argue manslaughter which was supported by the evidence.

Stringer v. State, 627 So. 2d 326 (Miss. 1993). Counsel in drug possession case ineffective for failing to call defendant's roommate, mother, and aunt to testify that the defendant did not live in the home where marijuana was discovered which forced defendant to testify to that effect and he was impeached with prior drug convictions.

Duncan v. Kerby, 851 P.2d 466 (N.M. 1993). Counsel ineffective in sexual penetration and incest case for failing to give notice of alibi or call five credible alibi witnesses that were known to him, failed to call available witnesses to impeach the victims, and failed to move to sever the offenses.

State v. Baker, 428 S.E.2d 476 (N.C. Ct. App. 1993). Trial counsel ineffective for stating in opening that the defendant had no criminal record which opened the door for admission of otherwise inadmissible evidence of prior convictions and then counsel failed to object to an instruction that the prior convictions had been admitted only for purpose of considering the defendant's credibility when they were actually admitted solely to dispel the false impression created by counsel.

Commonwealth v. Strut, 624 A.2d 162 (Pa. 1993). Counsel ineffective in rape of 19 year old retarded son case where credibility was key issue for failing to elicit critical testimony or conduct effective cross-examination of defendant's other son who would have testified that when he came out of bathroom after 15-20 minutes (in which offense alleged), he found door to apartment open, defendant and victim fully dressed and not appearing disheveled, victim not crying, and later on the bus the victim sat with the defendant and they acted normally towards each other.

Commonwealth v. Gillespie, 620 A.2d 1143 (Pa. Super. Ct. 1993). Counsel ineffective in simple assault case where key issue was credibility for failing to call defense character witnesses.

Commonwealth v. Glover, 619 A.2d 1357 (Pa. Super. Ct. 1993). Counsel ineffective in murder case for failing to call character witnesses where the evidence was close call and defendant's good character is always admissible to create reasonable doubt.

***Capital Case**

Winn v. State, 871 S.W.2d 756 (Tex. App. 1993). Counsel ineffective in murder case for failing to procure expert medical testimony that physical evidence was consistent with the victim committing suicide because counsel after 37 years of practice believed expert testimony based on physical evidence was not “real important” and that it was more important to just have people testify about the victim’s long history of suicidal tendencies. Counsel also ineffective for failing to perfect record after the denial of challenge for cause to juror who stated she did not believe she could be fair and impartial and believed if guilty defendant should get death penalty even though not a capital case; failed to adequately voir dire potential jurors and basically asked nothing more than “any reason you could not be fair?”; failed to object to police officer’s testimony that during search defendant said “don’t mess my place up” which the police interpreted as an invocation of rights; and counsel introduced videotape of the defendant invoking his right to counsel and refusing to answer questions.

Ex parte Hill, 863 S.W.2d 488 (Tex. Crim. App. 1993). Trial counsel in robbery case ineffective for calling as an alibi witness a co-defendant, who two days before (unknown to counsel) had plead guilty to the very offense for which the defendant was being prosecuted.

Jackson v. State, 857 S.W.2d 678 (Tex. App. 1993). Counsel ineffective in drug case for failing to investigate which would have revealed that: the money in defendant’s purse came from recent cashing of disability checks; marked money which state used as proof of sale may have come from neighbor; and defendant was mentally retarded. Counsel also did not request competency hearing and did not object to extraneous evidence of delivering narcotics and possession of weapons.

Wenzy (Clarence) v. State, 855 S.W.2d 47 (Tex. App. 1993). Counsel ineffective in aggravated robbery case for failing to cross-examine state witnesses, call witnesses or present evidence, and waiving final argument after the court denied his motion to withdraw because the defendant wanted to fire counsel because of defendant’s dissatisfaction with counsel in brother’s trial when brother/co-defendant was convicted five days earlier.

Wenzy (Maurice) v. State, 855 S.W.2d 52 (Tex. App. 1993). Counsel ineffective in aggravated robbery case because of the cumulative effect of counsel’s behavior in failing to move in limine or ask for instruction to disregard or move for mistrial after witness testified that the defendant’s brother implicated him in crime; failing to view lineup videotape until the trial was in progress; and failing to move to withdraw due to the conflict caused by counsel’s representation of the defendant’s brother/co-defendant in his separate trial.

1992: State v. Terry, 601 So. 2d 161 (Ala. Crim. App. 1992). Trial counsel ineffective in trafficking cannabis case for failing to challenge for cause or strike juror who stated during voir dire that she would tend to side with the state in considering evidence. Counsel also ineffective for failing to interview or call witnesses (because he believed without investigating that testimony would be fabricated) who would have testified that the defendant was not driving the car in which the drugs were found and was only getting a ride to his daughter’s house.

***Capital Case**

McFadden v. United States, 614 A.2d 11 (D.C. 1992). Trial counsel ineffective where he admitted in response to defendant's pretrial claims of IAC that he had not investigated case and had not determined theory or defenses as of scheduled trial date.

Byrd v. United States, 614 A.2d 25 (D.C. 1992). Failure to call three eyewitnesses who were on scene at time defendant allegedly made a drop of narcotics and observed defendant's activities was IAC because eyewitnesses would have contradicted investigator's inculpatory testimony and defendant would not have been required to testify which opened the door for prior convictions impeachment.

Bryant v. State, 420 S.E.2d 801 (Ga. Ct. App. 1992). Trial counsel ineffective in statutory rape and child molestation case for: failing to object to prosecutor's misrepresentation to jury that defendant had previously been sentenced for statutory rape when he had not; failing to object to state proving similar transaction with only a certified record of previous conviction; failing to object to state's effort to attempt to show that defendant committed similar acts without first complying with procedural rule which required prior notice of intent to present such evidence; and failing to object to prosecutor's inflammatory questions to defendant about alleged prior visits to sex crimes unit and having sex with two girls under age 13.

Cochran v. State, 414 S.E.2d 211 (Ga. 1992). Trial counsel ineffective in murder case for failing to prepare and, in spite of appointment only two weeks prior to trial, made no written motion for continuance, spent less than one hour with defendant prior to trial, filed no pretrial motions, interviewed no witnesses listed in indictment, and filed no written requests for jury charges.

State v. Aplaca, 837 P.2d 1298 (Haw. 1992). Trial counsel ineffective for failing to investigate and present good character evidence when defendant and alleged assault victim were only witnesses. Trial counsel also failed to make offer of proof of witness' testimony who would testify concerning victim's prior inconsistent statement and this failure resulted in exclusion of testimony.

People v. Butcher, 608 N.E.2d 496 (Ill. App. Ct. 1992). Counsel ineffective for failing to subpoena two additional witnesses who could have corroborated and buttressed another witness' testimony that defendant was not the perpetrator of armed robbery when identification was the key issue in the case.

People v. Lewis, 609 N.E.2d 673 (Ill. App. Ct. 1992). Counsel ineffective in murder case for: promising jury in opening to introduce defendant's pretrial statement which was inadmissible and court would not admit; failing to move to sever two murder charges arising out of murders which occurred in different locations on different days and had markedly different defenses; pursuing a defense beginning in opening and going all the way to closing that the defendant stabbed victim but did not inflict fatal wound when legally he was still guilty of murder even if he did not inflict fatal wound, thus jury had no choice but to convict of murder; and failing to request an accomplice testimony instruction.

***Capital Case**

People v. Truly, 595 N.E.2d 1230 (Ill. App. Ct. 1992). Counsel ineffective in robbery case for failing to investigate and present evidence of: an alibi; the defendant's physical infirmities due to his slow recuperation from a gunshot wound; and the fact that the victims had a revenge motive against the defendant.

People v. Hayes, 593 N.E.2d 739 (Ill. App. Ct. 1992). Counsel ineffective for failing to present available evidence of insanity because of his mistaken belief that the state had the burden to prove sanity when actually the defense carried the burden.

People v. Ortiz, 586 N.E.2d 1384 (Ill. App. Ct. 1992). Counsel ineffective for arguing in opening that there was another suspect in the assault but not presenting any evidence in support of this argument in part because counsel didn't realize that cross and redirect were limited to the scope of the preceding examination.

Origer v. State, 495 N.W.2d 132 (Iowa Ct. App. 1992). Counsel ineffective in murder case for failing to investigate: when investigation would have disclosed that another man was bragging that he and not the defendant committed the murders and when one witness said defendant was bragging about having committed two murders in California. In addition, counsel didn't object when the state cross-examined the defendant's wife about his proclivity for violence.

Moore v. State, 827 S.W.2d 213 (Mo. 1992). Counsel ineffective in rape case for failing to obtain requested blood tests where the serological evidence would have shown that the defendant could not have been the source of the semen found on the victim's sheet.

State v. Owens, 611 N.E.2d 369 (Ohio Ct. App. 1992). Counsel ineffective in rape case for failing to present evidence or cross-examine state's witnesses after a motion for continuance to obtain presence of defense expert who had not been subpoenaed.

State v. Nolan, 605 N.E.2d 480 (Ohio Ct. App. 1992). Counsel ineffective for: failing to object to improper impeachment evidence, improper prior bad acts evidence, improper character evidence, and improper opinion evidence; failing to object to prosecutor vouching for state's case and arguing for a conviction to deter future crime; introducing improper impeachment evidence against his own witness; and introducing evidence of defendant's KKK involvement which was damaging to the defendant.

Commonwealth v. Nock, 606 A.2d 1380 (Pa. Super. Ct. 1992). Counsel ineffective in murder case for failing to interview and call eyewitness who would have testified that the defendant did not possess gun at the time of shooting.

Shelton v. State, 841 S.W.2d 526 (Tex. App. 1992). Trial counsel in retrial of sexual assault on minor case where the only evidence was defendant's and alleged victim's testimony was ineffective for inexplicably failing to call as a witness an alibi witness who testified in the first trial.

***Capital Case**

Fernandez v. State, 830 S.W.2d 693 (Tex. App. 1992). Trial counsel ineffective in bench trial for theft by receiving stolen property case for calling the defendant's wife, whose testimony included massive amounts of hearsay, prior to the state resting when the state did not intend to call her and failing to object to hearsay when the state's evidence was insufficient to link defendant to stolen property without hearsay and wife's testimony but because of counsel's errors, counsel forfeited opportunity for instructed verdict at end of state's case and defendant was convicted.

Montez v. State, 824 S.W.2d 308 (Tex. App. 1992). Trial counsel ineffective in aggravated possession of cocaine case: for failing to question prospective jurors; eliciting highly prejudicial statements by and about defendant which would have otherwise been inadmissible; admitting he was unprepared; telling jury in opening that the defense would have to prove innocence; and making extravagant promises to jury in opening about what defense would prove and then failing to carry out promise. Defendant had a colorable defense that the drugs were in the car when he purchased it.

Dietz v. Legursky, 425 S.E.2d 202 (W. Va. 1992). Counsel ineffective in murder case for failing to include in the appellate records the reports upon which a doctor would have based his testimony had he been permitted to testify. The trial court refused to allow the expert to testify concerning the victim's propensity for violence and the state supreme court affirmed because the basis for the expert's opinion was not in the record. The omitted reports showed the victim had bouts with alcoholism; drug addiction; hostility; erratic behavior, such as attempted suicide; fighting with her husband and mental health personnel; and a tendency toward violent behavior under the influence of drugs and required reversal of the trial judge's ruling.

State v. Glass, 488 N.W.2d 432 (Wis. Ct. App. 1992). Trial counsel ineffective in assault on child case for stipulating that vaginal swabs were "inconclusive" instead of calling as a witness a state crime lab employee who would have testified that tests conducted on vaginal swabs from 14-year-old alleged victim were negative for semen.

1991: *Smith v. State*, 579 So. 2d 906 (Fla. Dist. Ct. App. 1991). Trial counsel ineffective for agreeing to cautionary instruction which told jurors to ignore proper line of cross concerning victim's bias based on civil suit. Trial counsel also ineptly asked police officer to repeat victim's statements.

Wilson v. State, 406 S.E.2d 293 (Ga. Ct. App. 1991). Trial counsel ineffective in rape case for: failing to challenge juror who was overheard prior to jury selection to say that defendant was guilty; not knowing applicable rules of evidence; failing to cross-examine alleged victims about prior inconsistent statements that they made up allegations; failing to effectively question several defense witnesses who would have testified about victim's prior inconsistent statements and bad reputations for truthfulness; and failing to call witnesses who could have testified that alleged victim denied having sex with defendant.

***Capital Case**

People v. Tillman, 589 N.E.2d 587 (Ill. App. Ct. 1991). Counsel in murder and criminal sexual assault case ineffective for: failing to interview and call alibi witnesses; failing to elicit testimony of no trauma to the victim's vagina or rectum; failing to make meritorious objections to the admissibility of blood samples and semen stains; failing to object to crucial testimony of a surprise witness; and failing to object to improper closing argument.

People v. Young, 581 N.E.2d 371 (Ill. App. Ct. 1991). Counsel ineffective for failing to present evidence of insanity. Presumption of prejudice under *Cronic* because counsel called no witnesses, conducted minimal cross-examination, and advanced a legally invalid defense theory.

People v. Skinner, 581 N.E.2d 252 (Ill. App. Ct. 1991). Counsel ineffective in burglary case for failing to present the testimony of the defendant's parents to corroborate the defendant's testimony that he lived with them on the day of his arrest and contradict his alleged statement to police that he resided in the apartment where he was arrested and failing to cross-examine the alleged identification witness on the fact that he did not tell the police he saw the defendant leaving the scene until six months after alleged crime.

People v. Gunartt, 578 N.E.2d 1081 (Ill. App. Ct. 1991). Counsel ineffective in criminal sexual assault on child case for failing to: investigate; subpoena key records; request pretrial discovery; request continuance to review medical records turned over by the state on the morning of trial; make any effort to exclude harmful evidence; timely challenge competency of victim and brother to testimony; or subpoena their mother to testify. An adequate investigation would have revealed that: child was abused prior to ever coming in contact with the defendant; children and the mother had made prior inconsistent statements; and the mother had been investigated for abuse.

People v. O'Banner, 575 N.E.2d 1261 (Ill. App. Ct. 1991). Counsel ineffective in murder case for failing to call the defendant and her son to present exculpatory testimony that it was the son and not the defendant who shot the defendant's husband and that the defendant only lied to police to protect her son. Counsel also failed to present evidence that the defendant called the police requesting help before the victim was shot and the victim had been under a restraining order prior to the shooting.

Barnes v. State, 577 So. 2d 840 (Miss. 1991). Counsel in drug case failed to: raise speedy trial motion; object to statements made without benefit of Miranda warnings; challenge warrantless nonconsensual search of defendant's car after arrest; conduct discovery or scrutinize state's files; and object to impermissible testimony of drug activity unrelated to the defendant.

State v. Griffin, 810 S.W.2d 956 (Mo. Ct. App. 1991). Counsel ineffective in sale of marijuana case for failing to investigate and present witnesses to the alleged sale who would have testified that the defendant did not hand marijuana to the trooper or accept money when the trooper was the only state witness called.

***Capital Case**

Sanborn v. State, 812 P.2d 1279 (Nev. 1991). Counsel in murder case ineffective for failing to investigate and pursue evidence of self-defense, evidence that the defendant's wounds were not self-inflicted, including ballistics evidence, as the state argued, and the victim's propensity towards violence.

****Wilhoit v. State***, 816 P.2d 545 (Okla. Crim. App. 1991). Counsel ineffective for failing to pursue bite mark evidence or use bite mark expert hired by defendant's family. Counsel was suffering from alcohol dependence and brain damage at time of trial and offered no strategic reason.

Cobbs v. State, 305 S.C. 299, 408 S.E.2d 223 (1991). Trial counsel ineffective for failing to investigate possible defenses when an investigation would have revealed that the prosecuting witness (forgery charge) wanted the charges to be dropped and the defendant had already been convicted in magistrate court for the same burglary.

Martinez v. State, 304 S.C. 39, 403 S.E.2d 113 (1991). Trial counsel in criminal sexual conduct case ineffective for failing to subpoena witness who would have testified that he saw the defendant leaving a lounge three blocks from the victim's home at 1:45 a.m. when the victim testified that she was raped at her home and then she went to her sister's, arriving between 2:00 and 2:15 a.m.

Ex parte Drinkert, 821 S.W.2d 953 (Tex. Crim. App. 1991). Trial counsel in murder case ineffective for failing to object to indictment improperly predicating felony murder on aggravated assault (not a proper underlying felony) and failing to object to jury charge authorizing conviction for murder (properly charged) or felony murder (improperly charged). Counsel didn't object to indictment because it was a retrial and he believed that since it was objected to in first trial objection would be untimely and didn't object to instruction because he didn't object to indictment. Counsel also ineffective for failing to object to prosecutor's argument that self-defense and defense of habitation showed be viewed from victim's perspective when instructions and law were to the contrary, i.e. these defenses had to be viewed from the defendant's perspective.

Banks v. State, 819 S.W.2d 676 (Tex. App. 1991). Trial counsel ineffective in injury to child case for failing to object to prosecutor's argument, verdict forms, and instructions telling the jury that the defendant was guilty if he intentionally or knowingly *engaged in conduct* which caused injury when the law required that he must have intended the *result* in order to be convicted.

State v. Zimmerman, 823 S.W.2d 220 (Tenn. Crim. App. 1991). Counsel ineffective in murder case for promising jury in opening statement that defendant, defense psychiatrist, and other witnesses would testify that the defendant was a battered wife who had killed in self-defense and then counsel presented no witnesses and advised the defendant not to testify.

State v. Templin, 805 P.2d 182 (Utah 1991). Trial counsel ineffective in rape case for failing to interview and present defense witnesses that the defendant identified for him where the state's evidence was all based on victim's testimony with no corroborating physical evidence. Defense

***Capital Case**

witnesses would have established prior consensual physical contact between the defendant and the alleged victim and one witness would have testified that she the alleged victim and the defendant passionately kissing for over 15 minutes within an hour of the alleged rape at the location of the alleged rape.

King v. State, 810 P.2d 119 (Wyo. 1991). Prejudice presumed in drug case because “[s]trategic justification cannot be extended to the failure to investigate,” *id.* at 123, where counsel failed to secure trial testimony or even interview two eyewitnesses to the alleged drug transaction.

1990: Sobel v. State, 564 So. 2d 1110 (Fla. Dist. Ct. App. 1990). Trial counsel ineffective for asserting that he would pursue insanity defense when there was no basis for the defense, calling witnesses who gave testimony adverse to insanity defense, failing to move to suppress evidence seized as a result of a search of the defendant’s handbag, and refusing to leave case when defendant tried to discharge him.

Jowers v. State, 396 S.E.2d 891 (Ga. 1990). Trial counsel was ineffective in murder case for failing to adequately investigate which resulted in failure to discover in state law enforcement reports that experts who conducted gunshot residue tests and other tests could provide testimony that supported the defense theory that fatal wound was self-inflicted.

***People v. House**, 566 N.E.2d 259 (Ill. 1990). Counsel ineffective for failing to call nurses to testify which would have shown that the “dying declaration” of the victim which described assailants (exculpatory to defendant) should have been admitted.

People v. Davis, 560 N.E.2d 1072 (Ill. App. Ct. 1990). Counsel ineffective for failing to interview and subpoena eyewitnesses to robbery who were unable to pick the defendant out of lineups.

Hiner v. State, 557 N.E.2d 1090 (Ind. Ct. App. 1990). Counsel ineffective in distribution case because after judge ruled prior to trial that counsel could not impeach informant with history of substance abuse and alternate sources for drugs which were allegedly received from the defendant counsel opted to “stand mute” in attempt to preserve issue for appeal. Did not participate at all during trial and actually waived issue because to properly preserve issue needed to call witnesses and make proffer after judge refused to allow the evidence.

Bowers v. State, 578 A.2d 734 (Md. 1990). Counsel ineffective in murder case for failing: to make an opening statement; to introduce evidence that a hair from a person other than the defendant was found on the victim’s body when the defendant claimed that the victim had been killed by an accomplice; to cross-examine a state witness concerning accomplice’s identification; and failing to request an intent instruction based on defendant’s alcohol and drug use.

State v. Hayes, 785 S.W.2d 661 (Mo. Ct. App. 1990). Counsel ineffective in rape case for failing to interview and call defendant’s alibi witness to corroborate the defendant’s testimony.

***Capital Case**

***State v. Savage**, 577 A.2d 455 (N.J. 1990). Counsel ineffective for failing to investigate or pursue psychiatric defense despite evidence of bizarre behaviors surrounding crime, evidence that the defendant was using cocaine throughout the night preceding the murders, and evidence that the defendant had previously been hospitalized for mental condition. In sentencing, counsel did not pursue mental evidence and did not present any other mitigation concerning defendant's education, employment, religion, or cultural influences.

State v. Higgins, 572 N.E.2d 834 (Ohio Ct. App. 1990). Counsel ineffective in child assault and endangerment case for failing to examine and object to admission of hospital records which contained specific hearsay references to child abuse.

Ex parte Welborn, 785 S.W.2d 391 (Tex. Crim. App. 1990). Trial counsel ineffective because of cumulative effect of errors in case of attempting to obtain controlled substances by fraud. Counsel's failure to voir dire on law of parties supports defendant's argument that counsel didn't understand that defendant was charged as a party and thus it didn't matter that no one could identify the defendant as the person who actually attempted to write a check at the pharmacy to get controlled substances. Counsel relied solely on the defendant to tell him everything about the case and did not interview the state witnesses so he did not know about the defendant's statement to the police that he had driven to the town with a friend to get a prescription filled and thus did not move to suppress the statement which was the state's key evidence. Counsel did not object to police officer's testimony concerning the extraneous office that defendant was under the influence of controlled substances when he was arrested. Counsel did not object to hearsay from an offense report read solely to establish that the defendant lived in a different town and from a "pen packet" read to establish that the defendant had a prior parole violation. Finally, counsel failed to investigate possible juror misconduct after a juror said that the jury was improperly discussing parole laws during deliberations.

1989: *In re Sixto, 774 P.2d 164 (Cal. 1989). Trial Counsel ineffective in capital case for failing to have defendant's blood sample tested for alcohol level, failing to have defendant's tape-recorded statements to police transcribed prior to trial, and failing to seek additional testing or present available evidence concerning PCP testing where the sole defense theory was diminished capacity based on defendant's assertion that he had 20-24 beers and PCP prior to the offenses. After defendant's arrest, blood samples were taken and state experts found no trace of PCP, but never tested for alcohol, and defense never sought expert to test blood (which has long since been destroyed) for alcohol. In addition, defense experts found a trace of PCP in defendant's urine sample taken during confinement and also found PCP evidence in the blood sample taken after defendant's arrest. The defense experts notified counsel that additional acidification testing was necessary to determine if trace levels of PCP were still in defendant's blood or urine. Counsel never sought additional testing and did not present the testimony of these defense experts or provide this information to defense experts who testified concerning psychotic episode triggered by alcohol and drugs based only on defendant's statements to them about usage. In addition, a police officer who testified in rebuttal said defendant told him he only had six or seven beers, if counsel had defendant's

***Capital Case**

statements transcribed counsel would have been able to impeach police officer by showing that defendant actually said he had “much, much more than six or seven beers.”

People v. Cole, 775 P.2d 551 (Colo. 1989). Trial counsel in theft case (selling insurance to school district) ineffective for failing to interview witnesses, prepare expert witnesses, introduce potentially exculpatory documents, do legal research or any kind of investigation, or file timely notice of appeal. [Counsel ultimately disbarred.]

People v. Williams, 548 N.E.2d 738 (Ill. App. Ct. 1989). Prejudice presumed where counsel in murder case failed to cross-examine any state witnesses, present any evidence, make an opening or closing argument, and did not participate at all in bench trial.

People v. Baldwin, 541 N.E.2d 1315 (Ill. App. Ct. 1989). Counsel ineffective in robbery case for failing to discover and introduce records from jail psychiatric ward which were compiled within 6 weeks of offense and disclosed that defendant suffered from paranoid delusions and had several suicide attempts. Defendant may have been incompetent to stand trial and insane but no evidence presented on these issues.

People v. Lee, 541 N.E.2d 747 (Ill. App. Ct. 1989). Counsel ineffective in murder case for failing to investigate and request competency to testify hearing to show that state witness was mentally retarded and functioned on the level of 8 or 9 year old. Counsel also didn’t cross-examine co-suspect who gave three prior versions of story that were different than testimony at trial, never questioned the witness about grant of immunity by both state and federal authorities to possible perjury charges because prior testimony in federal court was diametrically opposed to that at trial, and actually bolstered witnesses credibility with questions. In addition, counsel’s only opening statement was to say that defendant would testify which she did but counsel did not prepare her for her testimony.

****People v. Chandler***, 543 N.E.2d 1290 (Ill. 1989). Counsel ineffective for: conceding that defendant was present during burglary which resulted in victim’s death, failing to cross-examine key state witnesses; and calling no witnesses despite assertion that defendant would testify. Counsel mistakenly believed that defendant could not be convicted of murder if he did not inflict fatal wound but under felony murder instruction jury had no choice but to convict after counsel conceded defendant’s presence during burglary.

People v. Garza, 535 N.E.2d 968 (Ill. App. Ct. 1989). Counsel ineffective in murder case for failing to pursue discrepancies in description of assailant by only eyewitness, failing to obtain and present photographs of men eyewitness chose from mug book because they “looked similar” to assailant, and failing to present defendant’s alibi witnesses.

****Smith v. State***, 547 N.E.2d 817 (Ind. 1989). Counsel ineffective for: failing to file timely notice of alibi which resulted in exclusion of one of several alibi witness; failing to request an instruction on the affirmative defense of alibi; failing to impeach state’s key witness who was a co-defendant

***Capital Case**

despite prior inconsistent statements, contradictions by another co-defendant, and the available testimony of an inmate who heard witness say he was going to put blame on defendant. The inmate's testimony did not come out because counsel believed incorrectly that it was inadmissible and told witness not to say it. In addition, counsel failed to move to exclude witnesses favorable polygraph evidence even though he knew about it prior to trial and did not object or move for mistrial when witness said he passed polygraph in response to open ended question by defense counsel. Counsel also did not object when state argued based on polygraph. Finally, court noted that sentence would have been reversed anyway because counsel did not prepare at all for sentencing phase because he expected acquittal.

People v. Storch, 440 N.W.2d 14 (Mich. Ct. App. 1989). Counsel in criminal sexual conduct case who took over one week prior to trial because previous counsel learned he was going to be called as a state's witness was ineffective for failing to interview witnesses or review prosecution exhibits and did not ask for a continuance to prepare.

State v. Crislip, 785 P.2d 262 (N.M. Ct. App. 1989). Counsel ineffective in fatal child abuse case for failing to object to the prosecutor's cross-examination of the defendant with the unsworn, out-of-court statement of her husband, who was also a co-defendant, that he had seen her beating the child. Prejudice found because the husband's statement was inadmissible, there was no direct evidence that the defendant beat her child, and the trial court's limiting instruction was insufficient to cure the prejudice because the court failed to instruct the jury not to consider the statement as substantive evidence against the defendant. The court also found that counsel's conduct was deficient in providing the state with the report of a defense neuropsychologist, who was not called as a defense witness, and failing to object when the state called the defense expert to testify. Although the court did not find the requisite prejudice from this conduct, the court considered it in the cumulative analysis, along with counsel's failure to interview the state's key expert witness prior to trial and other conduct that raised "a serious question" concerning the adequacy of counsel's conduct. The "cumulative impact" of counsel's deficient conduct was prejudicial.

People v. Sanford, 539 N.Y.S.2d 231 (N.Y. App. Div. 1989). Counsel ineffective in rape case for: failing to pursue the defendant's pro se speedy trial motion where there was a serious question of whether prosecutor's announcement of readiness for trial in a letter satisfied the state's statutory burden of a timely announcement on the record; failed to file a motion to suppress custodial statements; failing to move to dismiss indictment on ground that integrity of grand jury was impaired by cross-examination of defendant concerning the acts underlying out of state convictions for robbery and attempted rape; failing to object to prosecutor's request to cross defendant about prior rape conviction; failing to object to testimony of several witnesses which impermissibly bolstered the complainant's account of events; failing to make any request for charges; and failing to move to dismiss until asked by court to do so.

Commonwealth v. Stonehouse, 555 A.2d 772 (Pa. 1989). Counsel ineffective in murder case for failing to request a charge that the jury should consider the cumulative effect of three years of

***Capital Case**

physical and psychological abuse suffered by the defendant at the hands of the victim when considering the reasonableness of her fear of imminent danger of death or serious bodily injury for purposes of self-defense. Counsel also ineffective for failing to present expert testimony on battered woman's syndrome.

Grier v. State, 299 S.C. 321, 384 S.E.2d 722 (1989). Counsel ineffective in armed robbery case for failing to call alibi witnesses who would have testified concerning alibi and fact that defendant was wearing a different color of clothes than victim alleged on night in question. Defendant and two alibi witnesses did testify, but there were a number of others available.

Doles v. State 786 S.W.2d 741 (Tex. App. 1989). Trial counsel ineffective in aggravated sexual assault on stepson case for: failing to object to deluge of evidence of extraneous sexual offenses allegedly committed by defendant against other step-children; introducing portion of written statement by victim's sister which allowed the state to introduce all of the statement which contained damaging information about extraneous offenses; and failing to object to state's irrelevant and inadmissible evidence of instability of defendant's family and the sordid conditions of various homes occupied by the family in order to show propensity.

Doherty v. State, 781 S.W.2d 439 (Tex. App. 1989). Trial counsel ineffective in murder/robbery case for: refusing to let the defendant testify although he had no criminal record to be used as impeachment; not having defendant's father testify that there was a legitimate reason to explain large amount of money the day of the shooting; making no independent investigation; and making statements within the hearing of the jury which essentially admitted guilt.

Alvarado v. State, 775 S.W.2d 851 (Tex. App. 1989). Trial counsel ineffective in sexual assault on child case for failing to object to inadmissible testimony of counselor, complainant's mother, and doctor which supported the shaky testimony of the complainant and counsel failed to request an instruction to disregard the inadmissible evidence from the counselor concerning defendant's sexual abuse of complainant's younger brother.

Williamson v. State, 771 S.W.2d 601 (Tex. App. 1989). Trial counsel ineffective in burglary case for failing to object to un-Mirandized statements, failing to object to state argument bolstering police officers, and failing to preserve the reversible error created when the judge invaded fact-finding province of jury and instructed jury that certain facts had been proven.

State v. Thomas, 768 S.W.2d 335 (Tex. App. 1989). Counsel in aggravated sexual assault case failed to interview and call witnesses to support consent defense when witnesses were available to testify about on-going sexual relationship between defendant and victim.

State v. Crestani, 771 P.2d 1085 (Utah Ct. App. 1989). Trial counsel in theft case ineffective for failing to subpoena documents relating to the bank account from which monies were allegedly stolen. The account was that of a title company in which the defendant was the sole shareholder. His

***Capital Case**

defense theory was that the money market account contained customers' money and the defendant's agents fees which were personal funds, but defense counsel failed to obtain and review the documentation until sentencing. An audit done by a CPA prior to sentencing showed that the defendant had deposited into the account \$20,000 more in personal funds than he had allegedly stolen. Counsel was also ineffective for failing to prepare the defendant and his wife for their testimony by having them review records and thus they were forced to attempt to recall five year old financial transactions while on the stand.

1988: *Ex Parte Womack, 541 So. 2d 47 (Ala. 1988). Counsel ineffective where only defense theory was that confession was involuntary because it was beaten out of defendant and counsel testified allegedly to impeach the testimony of a doctor concerning whether other prisoners had sought medical attention as a result of being beaten but during testimony he said that although the defendant said he had bumps and bruises, counsel did not see them. Counsel also ineffective for failing to present the testimony of a disinterested witness who would have testified that the state's two principle witnesses against the defendant came to his house on the day of the murder and that one of them said he had killed someone and both were armed and appeared nervous. Finally, counsel ineffective where he failed to investigate another attorney's statement (the attorney represented one of the state's witnesses) that he had exculpatory information that was protected by attorney-client privilege. Investigation would have revealed that the attorney had a letter from one of the state's key witnesses in which the witness admitted that he committed the crime and also had a copy of a transcript of a meeting between the district attorney and the witness wherein the witness recanted his grand jury testimony in which he implicated the defendant.

In re Cordero, 756 P.2d 1370 (Cal. 1988). Counsel ineffective in first degree murder case for failing to investigate and present available evidence of intoxication at the time of the offense despite the defendant's statements that he knew what he was doing. Police reports referred to a PCP-laced cigarette found at the crime scene and a witness at the scene stated that the defendant "looked fried." In addition, at least three witnesses were available to show that the defendant was intoxicated with PCP and alcohol before and after the offense and this testimony could have been supported by expert testimony and the physical evidence of the PCP-laced cigarette.

People v. Danley, 758 P.2d 686 (Colo. Ct. App. 1988). Trial counsel in case of attempted theft for allegedly attempting to sell unneeded heating equipment was ineffective for failing to investigate the availability of expert testimony or discuss the need for expert testimony with the defendant because of a fee dispute. Expert testimony that the furnace involved in the "sting operation" was indeed defective as the defendant said it was available and there were other weaknesses in prosecution expert's testimony which could have been exploited if counsel had conferred with expert. Indeed, another defendant charged based on the sting operation was acquitted based on the expert testimony. In addition, counsel was aware that an expert had examined one of the furnaces involved and found it to be defective but did not discuss this with defendant or expert because of fee question. Instead, defense counsel had defendant to testify as his own "expert."

***Capital Case**

Richardson v. State, 375 S.E.2d 59 (Ga. Ct. App. 1988). Trial counsel ineffective for failing to interview and present alibi witnesses who would have testified that defendant was with them at time of robbery and failing to object to introduction into evidence a mask illegally seized from defendant's home that was similar to the one the perpetrator had been described as wearing.

People v. Dalessandro, 419 N.W.2d 609 (Mich. Ct. App. 1988). Counsel in assault and child torture case ineffective for calling mother of the alleged victim as a defense witness after she refused to testify when state called her. Prosecution impeached her with prior statements in which she implicated defendant and these statements were the only evidence implicating defendant. In addition, counsel failed to object when the prosecutor referred three times to the fact that another person in the criminal enterprise with defendant had already been convicted.

Yarbrough v. State, 529 So. 2d 659 (Miss. 1988). Counsel ineffective for: failing to conduct independent investigation; submitting police report which reinforced testimony of state's only witness; failing to pursue discovery in appropriate manner; having numerous argumentative outbursts with judge and refusing to follow judge's rulings and instructions; and failing to move to suppress showup ID of defendant.

State v. Deutsch, 551 A.2d 991 (N.J. Super. Ct. App. Div. 1988). Counsel ineffective in kidnapping case for failing to investigate and present witnesses who would have testified that the victim's behavior at the time in question was inconsistent with her claim of being held against her will and would have established that victim had a pattern of leaving the bar, where she met the defendant, with people she just met.

People v. Trait, 527 N.Y.S.2d 920 (N.Y. App. Div. 1988). Counsel ineffective in murder case for: making a rambling and disconnected opening statement which elicited 21 sustained objections; not filing any pretrial motions; excessively and purposelessly cross-examining prosecution witnesses, one of whom gave testimony on cross that was clearly damaging to the defendant; and not preparing defense psychiatrists which resulted in testimony that did not support the insanity defense.

State v. Lascola, 572 N.E.2d 717 (Ohio 1988). Counsel ineffective in rape case for stipulating to admissibility of victim's passing polygraph and then failing to request a limiting instruction.

Frett v. State, 298 S.C. 54, 378 S.E.2d 249 (1988). Trial counsel ineffective for failing to request preliminary hearing, not knowing ahead of time when the trial was scheduled, failing to interview or call defense witnesses, not being aware of all the pending charges, failing to move to require the state to elect, and sleeping during trial. Court held that, although normally a defendant must prove actual prejudice, "such a showing may be exempted where counsel's ineffectiveness is so pervasive as to render a particularized prejudice inquiry unnecessary."

Mitchell v. State, 762 S.W.2d 916 (Tex. App. 1988). Counsel ineffective in aggravated assault case for failing to seek suppression of photographs, failing to seek discovery of and move to suppress

***Capital Case**

videotaped confession, failing to cross-examine victims, advising defendant to enter a nolo plea based on erroneous understanding of law, failing to object to redacted confession excluding exculpatory segments, failing to investigate defense based on long history of mental problems, including hospitalization, and failing to present mitigating evidence in sentencing.

Strickland v. State, 747 S.W.2d 59 (Tex. App. 1988). Counsel ineffective for not meeting with defendant until day set for jury selection, putting on no evidence, and allowing the state to introduce four inadmissible extraneous offenses.

1987: **People v. Ledesma*, 729 P.2d 839 (Cal. 1987). Trial counsel ineffective for failing to investigate and present a diminished capacity defense which would have been supported by the evidence as opposed to the alibi defense which the defendant insisted on because the alibi defense was contradicted by the available evidence. The available evidence of the defendant's troubled childhood, adolescence, and young adulthood, including severe abuse at the hands of his father, and his long and heavy use of PCP, methamphetamine, LSD, and other substances, would have supported a diminished capacity defense. In addition, counsel ineffective where defendant was accused of murdering the sole eyewitness to a prior robbery for failing to object to prosecutor's comments and questions relating to victim's extrajudicial identification of defendant after the prosecution made a pretrial commitment not to introduce this extrajudicial identification and identification was a crucial issue in the case. Finally, counsel ineffective for failing to move pretrial to suppress an intercepted telephone call from the defendant to his house in which he made incriminating statements or to object to its introduction at trial, where the call was intercepted as a result of a presumptively unconstitutional warrantless entry of the defendant's apartment.

People v. Moreno, 233 Cal. Rptr. 863 (Cal. Ct. App. 1987). Trial counsel ineffective in DWI case where police found the defendant some distance from the car and the defendant testified that he had not driven car but given keys to other parties. Counsel ineffective for failing to object to statements of the investigating officer who provided, based on hearsay, the only evidence that the others present at the scene had not driven the car.

People v. Dillon, 739 P.2d 919 (Colo. Ct. App. 1987). Trial counsel in a felony murder case was ineffective, where the only significant evidence against the defendant was from co-defendants who made numerous prior inconsistent statements and never implicated the defendant until several months after their arrest, because: counsel made no real attempt to impeach the co-defendant's; did not interview and present several witnesses who had relevant information, including one witness who started investigation because one of the co-defendants told him the day after the murder that he and others (not including defendant) committed murder; and during closing argument, counsel abandoned defense theory that the defendant was not involved or even present and essentially admitted that the defendant was present and hit the victim in the head with a hammer which was sufficient for the jury to find defendant guilty of first degree felony murder. [Defendant received death sentence, but sentence was reduced to life when state court ruled that death penalty statute was unconstitutional.]

***Capital Case**

Williams v. State, 507 So. 2d 1122 (Fla. Dist. Ct. App. 1987). Trial counsel ineffective for failing to investigate and presenting no witnesses solely to preserve rebuttal argument; advising defendant not to testify; and declining to depose alleged rape victims prior to trial purportedly to retain tactical surprise.

People v. Murphy, 513 N.E.2d 904 (Ill. App. Ct. 1987). Counsel ineffective in sexual assault case for failing to investigate and present either in competency hearing or insanity defense psychiatric history and attempted suicide even though defendant was held in psychiatric ward in jail prior to trial, counsel had difficulty communicating with client, and counsel knew from defendant's brother that defendant had "problem".

People v. Solomon, 511 N.E.2d 875 (Ill. App. Ct. 1987). Counsel ineffective in drug distribution case for failing to locate and present testimony of informant to corroborate defendant's entrapment testimony where informant arranged meeting between defendant and undercover police officer and defendant testified that he was a Quaalude addict and the informant was his sole source and threatened to stop supplying if defendant did not supply to undercover agent. In addition, defense counsel asked defense chemist only to do a visual inspection of alleged drugs instead of actually testing drugs.

People v. Bell, 505 N.E.2d 365 (Ill. App. Ct. 1987). Counsel ineffective in murder case for failing to call witnesses who could have corroborated the defendant's self-defense theory, failed to file a motion to suppress confession, and failed to request an instruction on the lesser included offense of voluntary manslaughter.

Smith v. State, 511 N.E.2d 1042 (Ind. 1987). Counsel ineffective in murder case for failing: to produce evidence of recent knife wounds inflicted on victim by roommate who was the only eyewitness at trial; present evidence to contradict roommate's denial of dispute; to object to admission of evidence concerning defendant's previous entry into roommate's house; present evidence of pretrial statement as to amount of alcohol consumed by roommate; to object on grounds of lack of foundation to roommate's testimony relating to threat by defendant against victim; to object to testimony by roommate's mother concerning misconduct by defendant; and to object to hearsay testimony placing defendant at scene on night of homicide.

Messer v. State, 509 N.E.2d 249 (Ind. Ct. App. 1987). Counsel in burglary case ineffective for eliciting testimony from police officer that defendant invoked right to remain silent and offered to plead guilty to driving without license in exchange for information about other thefts in area where defendant maintained innocence. Counsel also ineffective for failing to object to state arguments: which asked for conviction because defendant had only been out of prison for six months; asked for conviction because prior burglary conviction showed propensity; and told jury they would be subject to public ridicule if they acquitted.

***Capital Case**

Williams v. State, 508 N.E.2d 1264 (Ind. 1987). Counsel whose motion to withdraw was denied five days prior to trial was ineffective for failing to interview state's witnesses, to subpoena alibi witnesses or even contact them except by telephone, or to inform court until first day of trial that witnesses needed travel funds.

Waldrop v. State, 506 So. 2d 273 (Miss. 1987). Counsel ineffective for: questioning state witnesses about reports that defendant was involved in other crimes; making numerous frivolous motions; refusing to follow rulings and instructions of Court; introducing prejudicial inadmissible evidence of other crimes; failing to object to other crimes evidence; and asking elementary stupid questions of judge like how to introduce exhibit.

Perkins-Bey v. State, 735 S.W.2d 170 (Mo. Ct. App. 1987). Counsel ineffective in robbery case for failing to interview and subpoena known alibi witnesses.

State v. Moorman, 358 S.E.2d 502 (N.C. 1987). Counsel ineffective in rape case for stating in opening that he was going to present evidence that the defendant was physically and psychologically incapable of rape and was the victim of a racially motivated conspiracy and then counsel presented no evidence to support these statements. In addition, during closing counsel said that the defendant's testimony that he mistook the victim for someone else was not worthy of belief and that the defense was actually consent by the victim. These improper arguments in combination with counsel's extensive use of multiple "pain killing drugs" during the trial, his frequent migraine headaches, and his drowsiness, lethargy, and inattention during portions of the trial (including sleeping during at least a portion of the cross-examination of the defendant) established prejudice.

State v. Martin, 525 N.E.2d 521 (Ohio Ct. App. 1987). Counsel ineffective in child sex abuse case for: assuming burden of proof in opening; failing to request an alibi instruction despite strong evidence of alibi; and failing to object to inadmissible testimony of prior bad acts.

Jennings v. State, 744 P.2d 212 (Okla. Crim. App. 1987). Counsel ineffective in manslaughter case for failing to investigate and present evidence that the defendant was not driving the vehicle involved in the fatal accident when there were numerous witnesses and the overwhelming physical evidence, according to an accident reconstruction expert, corroborated that theory.

Miller v. State, 728 S.W.2d 133 (Tex. App. 1987). Counsel ineffective for making inflammatory remarks during voir dire and asking jurors if he was making them mad, making inflammatory irrelevant racist remarks during trial, and failing to discover until sentencing that the trial judge had previously represented the defendant on other charges.

State v. Thomas, 743 P.2d 816 (Wash. 1987). Trial counsel ineffective in willfully eluding police vehicle case for failing to ascertain qualifications of defense expert offered to testify concerning defendant's blackouts. Purported expert was only an alcohol counselor trainee and judge would not allow testimony. Counsel also ineffective for failing to offer an instruction that the inference

***Capital Case**

concerning the defendant's mental state based on objective circumstantial evidence was rebuttable by subjective evidence of defendant's mental state where defense was diminished capacity due to intoxication.

Gist v. State, 737 P.2d 336 (Wyo. 1987). Counsel ineffective for failing to interview the defendant's brother even though counsel believed that conflict existed which prevented contact with the brother because counsel had as P.D. sat with brother during arraignment. Counsel knew that the brother was the sole eyewitness to the alleged sale of marijuana for which the defendant was charged and thus brother was potentially available to testify. Brother confessed to the crime after the trial was over.

1986: *State v. Tapia*, 725 P.2d 1096 (Ariz. 1986). Trial counsel ineffective in murder case for failing to interview or present witnesses to corroborate the defendant's alibi that he was present at the hospital for birth of son during the time of the crime.

State v. Bush, 714 P.2d 818 (Ariz. 1986). Trial counsel in aggravated assault case in which there was a real issue of self-defense was ineffective for mishandling crucial testimony concerning whether the victim was shot in front or back, subpoenaing and interviewing witnesses only while the trial was in progress, failing to interview his own medical expert until the day of his testimony, and failing to listen to the taped interview of a witness to which he had access for over a year.

Mason v. State, 712 S.W.2d 275 (Ark. 1986). Trial counsel in murder case ineffective for failing to furnish the defendant with the jury list or question prospective juror concerning whether she had been a crime victim (defendant was not present during voir dire) when the defendant knew of a juror's potential bias on this basis and the juror ultimately was selected as foreman. Counsel also ineffective for stipulating to the cause of the victim's death and allowing the state crime lab report in which deprived the defendant of the right to examine the state's experts as to fact that intervening events could have caused or contributed to the victim's death and the fact that the shotgun blast did not strike the victim directly and was not intended to kill the victim.

Marks v. State, 492 So. 2d 681 (Fla. Dist. Ct. App. 1986). Trial counsel ineffective: for failing to issue subpoenas in a timely manner and thus was prevented from presenting alibi witnesses and advising defendant not to testify concerning alibi where identification was a critical issue; and failed to impeach police officer with available information.

Holley v. State, 484 So. 2d 634 (Fla. Dist. Ct. App. 1986). Ineffective assistance where, only two weeks before trial, retained counsel withdrew and substituted two other counsel who were unfamiliar with case and unprepared due to lack of time and defendant was unaware of substitution until trial and objected. Complete denial of counsel under *Cronic*.

People v. Wilson, 501 N.E.2d 863 (Ill. App. Ct. 1986). Counsel ineffective in attempted murder case for failing to apply recently enacted statute making prior inconsistent statements by witnesses admissible as substantive evidence and compounded error by requesting jury instruction which

***Capital Case**

precluded jury from considering as substantive evidence which resulted in the trial court refusing to give lesser included offense instruction on reckless conduct because the evidence supporting the instruction was contained in the witness' prior inconsistent statement.

People v. Rainey, 500 N.E.2d 602 (Ill. App. Ct. 1986). Counsel ineffective for failing to assert insanity defense because of mistaken belief that raising insanity would act as an admission of acts in bench trial when raising insanity does not admit acts.

People v. Wright, 488 N.E.2d 973 (Ill. 1986). Counsel ineffective for failing to present substantial available evidence of substance abuse history and abuse on day of offenses and failed to argue that the actions of the defendant could be regarded as reckless on basis of intoxication which would have reduced murder charge to involuntary manslaughter. Trial judge, who heard evidence and expert testimony concerning synergistic effects post-trial said he would have convicted only on the lesser included offense if he had heard this evidence at trial.

Warner v. State, 729 P.2d 1359 (Nev. 1986). Counsel ineffective in sexual assault on child case for failing to interview the complainant or have her undergo physical or psychological examination and did not present witnesses in support of defendant's character where credibility was the key issue. Counsel also presented a defense witness that was damaging to the defendant.

People v. Wiley, 507 N.Y.S.2d 928 (N.Y. App. Div. 1986). Counsel ineffective in burglary case for: failing to request an alibi charge or preserve issue for appeal; failing to request an unfavorable inference charge where the prosecutor did not produce the key witness or explain the efforts to obtain the testimony; and elicited admission from the defendant that he had previously been convicted of attempted rape.

Butler v. State, 716 S.W.2d 48 (Tex. Crim. App. 1986). Counsel ineffective in robbery case for failing to interview eyewitnesses when two of them would have testified that someone other than the defendant was the robber.

Frias v. State, 722 P.2d 135 (Wyo. 1986). Counsel ineffective in murder of girlfriend case for failing to investigate and seek expert assistance to support the defense theory that it was a suicide and expert testimony was crucial to refute state expert's who said victim was shot in the back. Defendant consistently denied guilt, called police and cooperated with them at all times, woman had attempted suicide five times, the initial investigators concluded it was suicide, the position of the body and the spatters and bullet fragments were inconsistent with a back shot, state expert admitted that contact wound could make entry wound larger than exit. Expert assistance would have been available to show that the bullet was fired in direct contact with body and that the shot entered the stomach and exited back.

1985: *Gordon v. State*, 469 So. 2d 795 (Fla. Dist. Ct. App. 1985). Trial counsel ineffective for: failing to file notice of alibi defense in a timely manner which resulted in preclusion of alibi evidence;

***Capital Case**

allowing juror to sit who indicated prejudice against defense counsel which would affect her decision; and failing to object to 104 instances of improper questions or comments by prosecution.

Commonwealth v. Rossi, 473 N.E.2d 708 (Mass. App. Ct. 1985). Counsel ineffective in assault case for presenting evidence of three prior convictions for assault which were inadmissible because no sentence had been imposed.

****State v. Harvey***, 692 S.W.2d 290 (Mo. 1985). Counsel ineffective for refusing to participate in the trial because of repeated denial of continuance when he said he was unprepared. Counsel conducted voir dire but then exercised no peremptory challenges, made no opening or closing, did not cross state witnesses, presented no evidence, and submitted no requests for instructions.

People v. Worthy, 492 N.Y.S.2d 423 (N.Y. App. Div. 1985). Counsel in burglary case ineffective for inadequate closing which failed to review the evidence or focus the jury on the critical identification issue and the weaknesses in the case. In addition, at suppression hearing, counsel failed to produce either the photographic array or the police officer who conducted the identification procedures at which the victim was unable to identify the defendant.

People v. Andrew S., 485 N.Y.S.2d 828 (N.Y. App. Div. 1985). Counsel ineffective for: failing to seek preclusion of defendant's statement that was not properly disclosed during discovery; failing to request a hearing on defendant's claim that the statement was coerced; and failing to object to police officer's hearsay testimony.

People v. Butterfield, 484 N.Y.S.2d 946 (N.Y. App. Div. 1985). Counsel ineffective for failing to request hearing to seek suppression of evidence of prior convictions and failing to request a charge instructing the jury on the requirements surrounding the use of circumstantial evidence.

Galloway v. State, 698 P.2d 940 (Okla. Crim. App. 1985). Counsel ineffective in murder case for making no opening statement and failing to introduce tremendous amount of available evidence of insanity, including state expert who examined for competency and found delusions and paranoid schizophrenia, two defense experts who found insanity one of whom had been treating defendant for three months prior to murder, lay witnesses who observed irrational behaviors preceding murder, and minister who talked to defendant the day after murder and defendant said he was Jesus Christ and had killed the devil.

Boyington v. State, 738 S.W.2d 704 (Tex. App. 1985). Counsel ineffective in arson causing bodily injury case for failing to object to confession tainted by unlawful warrantless arrest, failing to object in sentencing to penitentiary packet containing evidence of extraneous offenses and cross-examination of defendant concerning extraneous offenses, and failing to object to state argument inviting the jury to consider parole in sentencing and to put themselves in the victim's place.

State v. Pitsch, 369 N.W.2d 711 (Wis. 1985). Trial counsel ineffective in theft case for failing to verify prior convictions and have court rule on admission prior to defendant's testimony. During

***Capital Case**

direct, defendant said he had two prior convictions, but during cross it came out that he had nine prior convictions on three different occasions. Because defendant had misrepresented facts, judge allowed prosecutor to delve into the nature of the priors which included attempted theft, theft, and entry into vehicle with intent to steal.

1984: *People v. Karamanites*, 480 N.Y.S.2d 395 (N.Y. App. Div. 1984). Counsel in robbery case ineffective for: bringing out inadmissible evidence of defendant's arrest for robbery 10 days prior to this offense; bolstering the complainant's poor memory and ID of defendant; failing to request discovery until asking for it from witness in front of jury and then asked no questions which implied that documents were supportive of the state's case; argued two alternative defense theories when neither was supported by the evidence; and did not argue the inconsistencies in the state's case.

People v. Wagner, 479 N.Y.S.2d 66 (N.Y. App. Div. 1984). Counsel in robbery case ineffective for: failing to request the court to inspect the grand jury minutes after defendant was reindicted; failing to challenge jurors, either peremptorily or for cause, which resulted in 9 of 12 jurors who had friends or relatives on police forces; confused names, places, and dates in opening; and failing to impeach two of three prosecution witnesses who identified the defendant despite the fact that the witnesses had made prior statements which were significantly at odds with their trial testimony.

Jones v. State, 353 N.W.2d 781 (S.D. 1984). Counsel ineffective in aiding distribution case because counsel in pain as result of several accidents and did not adequately prepare, failed to file motion to suppress tape of phone conversation between defendant and drug agent in which defendant gave agent phone number of drug dealer until the day before trial which was untimely and did not object to admission at trial at all. Counsel also engaged in "high risk" strategy of showing defendant misunderstood drug agent during phone call even after court told him he was on "dangerous" ground. Counsel allowed admission of defendant's prior drug conviction and evidence that defendant's daughter sold drugs, called the principal drug dealer in the case who said he knew the defendant, and called drug dealer's roommate who identified the defendant's voice on the tape even though there was a real issue of identity after the state's case.

****People v. Frierson***, 599 P.2d 587 (Cal. 1979) (sentenced in August 1978). Counsel ineffective in capital trial and sentencing for failing to present evidence of diminished capacity and mitigation. The sole defense at trial was diminished capacity based on lay witness testimony that the defendant used Quaaludes and angel dust on the day of the murder. Counsel did not present any expert testimony or consult with an expert on the effects of PCP.

In a capital case a reasonably diligent preliminary investigation of this type is necessary to provide the factual framework within which to make a competent, informed tactical decision regarding the most effective presentation of a diminished capacity defense.

***Capital Case**

Counsel also failed to present any evidence in mitigation, even though there was the possibility that the defendant's mother or "at least Someone might have been called to testify on defendant's behalf and to urge that his life be spared."

***Capital Case**

B. ONE DEFICIENCY:

1. JURY SELECTION

a. U.S. Court of Appeals Cases

2001: *Hughes v. United States*, 258 F.3d 453 (6th Cir. 2001). Counsel ineffective in theft of government property case for failing to strike a juror who stated during voir dire that she would not be fair. The case involved theft of a federal marshal's weapon at gunpoint and the juror expressed bias because her nephew was a police officer and she was "quite close" to several detectives. Deficient conduct found because the juror's failure to respond to generalized questions of the panel about bias did not constitute an assurance of impartiality because there is a distinction in "individualized from group questioning for purposed of determining juror bias on voir dire." Deficiency also found despite the defendant's expression on the record of satisfaction with counsel because "whether Petitioner was 'satisfied with . . . defense counsel is not at issue.'" The question of whether counsel's performance was objectively unreasonable is the issue. Moreover, the question of satisfaction with counsel was not asked in the context of this specific issue, thus, the court affords it no weight." If counsel had responded in some way to the express admission of bias, counsel may have been able to argue a strategy for the failure to challenge her, but "[t]he question of whether to seat a biased juror is not a discretionary or strategic decision. The seating of a biased juror who should have been dismissed for cause requires reversal of the conviction."

If counsel's decision not to challenge a biased venireperson could constitute sound trial strategy, then sound trial strategy would include counsel's decision to waive, in effect, a criminal defendant's right to an impartial jury. However, if counsel cannot waive a criminal defendant's basic Sixth Amendment right to trial by jury "without the fully informed and publicly acknowledged consent of the client," *Taylor v. Illinois*, 484 U.S. 400, 417 n. 24, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988), then counsel cannot so waive a criminal defendant's basic Sixth Amendment right to trial by an impartial jury. Indeed, given that the presence of a biased juror, like the presence of a biased judge, is a "structural defect in the constitution of the trial mechanism" that defies harmless error analysis, *Johnson*, 961 F.2d at 756 (quoting *Arizona v. Fulminante*, 499 U.S. 279, 309, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991)), to argue sound trial strategy in support of creating such a structural defect seems brazen at best. We find that no sound trial strategy could support counsel's effective waiver of Petitioner's basic Sixth Amendment right to trial by impartial jury.

Prejudice found because the juror had made an express admission of actual bias with no rehabilitation by counsel or the court.

Quintero v. Bell, 256 F.3d 409 (6th Cir. 2001), *vacated*, 535 U.S. 1109 (2002), *reinstated*, 368 F.3d 892 (6th Cir. 2004). Trial counsel's ineffectiveness established cause and prejudice for default of

***Capital Case**

Sixth Amendment jury claim in escape trial. The defendant and two co-defendants were charged with escape. The two co-defendants were convicted. Two months later, the defendant was tried. Seven jurors that had already found the co-defendants guilty were seated on the defendant's jury. The court held that the defendant's right to an impartial jury was violated because juror bias was presumed in these circumstances. A general "attestation of . . . impartiality" was "inadequate to wipe away the taint of bias" from jurors that had already determined the co-defendants' guilt beyond a reasonable doubt. This issue was defaulted because not addressed by the state appellate court because trial counsel had not objected. The default was excused because trial counsel's ineffectiveness established cause and prejudice. Counsel's conduct was deficient because, although defense counsel had represented the co-defendants and should have been aware of the potential that some of the same jurors were in the defendant's panel, counsel asked no questions about involvement in the prior trial. Instead, the jurors were asked only if anything they knew or had heard would affect their ability to be fair and impartial. Prejudice was presumed because the tainted jury composition "amounted to a structural error" exempt from harmless error analysis. This trial thus lost "its character as a confrontation between adversaries" and prejudice was presumed under *Cronic*.

1992: *Johnson v. Armontrout*, 961 F.2d 748 (8th Cir. 1992). Counsel ineffective for failing to request removal for cause of four jurors who had previously sat on a jury convicting a co-defendant for the same crime and had already decided the defendant was guilty and for failing to inform the defendant of his right to remove such jurors.

1991: *Hollis v. Davis*, 941 F.2d 1471 (11th Cir. 1991). Trial counsel's failure to attack systematic exclusion of blacks from grand jury and petit juries at time of state burglary trial in 1959 was cause for procedural default which could not be attributed to petitioner in habeas proceeding.

1989: *Gov't of Virgin Islands v. Forte*, 865 F.2d 59 (3d Cir. 1989). Defense counsel's failure to object to prosecutor's use of peremptory challenges to excuse white prospective jurors in prosecution of white male for rape of black female was unreasonable under prevailing professional standards (*Batson* pending) and prejudiced defendant's direct appeal since *Batson* error had not been reserved.

b. State Cases

2002: *Kirkland v. State*, 560 S.E.2d 6 (Ga. 2002). Counsel ineffective in burglary case for failing to challenge for cause members of the venire with a business relationship to the corporation that was the victim of the burglaries. These jurors were not competent because the corporation was an interested party under Georgia law. Counsel's conduct was deficient because counsel did not know of this law and did not challenge the jurors, one of whom actually set during the trial. Prejudice was implied where the defendant was tried before a biased jury and where state law finds harmful error when a peremptory must be used to excuse a juror that should have been excused for cause. Counsel had used peremptories to remove five of the disqualified jurors.

***Capital Case**

****Knese v. State***, 85 S.W.3d 628 (Mo. 2002). Counsel ineffective in capital case for failing to read two juror questionnaires. In preparing for trial counsel reviewed questionnaires but he did not review those received on the morning of trial, which included questionnaires from two jurors who were actually seated (including the foreman). Both questionnaires suggested that the jurors would automatically vote to impose death after a murder conviction. Counsel's conduct was deficient for failing to read the questionnaires and, at minimum, to *voir dire* to determine whether the jurors could serve. Counsel offered no strategic reason for his conduct and testified that this was the worst mistake he had ever made and that there was no excuse for it. Counsel stated that he would have stuck both jurors had he reviewed the questionnaires. The court conducted no prejudice inquiry because the court found "[t]his complete failure in jury selection was structural error." Because nothing in the questionnaires indicated a predisposition to automatically vote guilt or innocence, judgment was reversed only as to the penalty phase.

State v. Carter, 641 N.W.2d 517 (Wis. Ct. App. 2002). Counsel ineffective in sexual assault case for failing to adequately *voir dire* or challenge juror after juror admitted that he would be biased due to prior sexual assault of brother-in-law. Prejudice found because "[a] guilty verdict without twelve impartial jurors renders the outcome unreliable and fundamentally unfair." *Id.* at 521.

1997: *State v. Chastain*, 947 P.2d 57 (Mont. 1997). Counsel ineffective in child sex case because two jurors stated that they had heard of the case and had strong feelings about it which could affect their ability to be fair and impartial. Nonetheless, counsel did not conduct additional *voir dire*, challenge for cause, and strike.

1996: *State v. Williams*, 679 So. 2d 275 (Ala. Crim. App. 1996). Court denied state's petition for writ of mandamus from trial court's order granting a new trial because counsel was ineffective in failing to make *Batson* objection even though a *prima facie* case of racial discrimination in jury selection existed. Trial court also found other conduct to be ineffective but opinion does not discuss these issues.

Alaniz v. State, 937 S.W.2d 593 (Tex. App. 1996). Counsel ineffective in drug case for failing to correct court's error when court stated on the record that juror #5 was excused for cause based on statement of inability to be fair and impartial but then court erroneously excused juror #6 in his place and juror #5 was empaneled.

1993: *State v. Robertson*, 630 N.E.2d 422 (Ohio Ct. App. 1993). Counsel ineffective for failing to make a timely and specific *Batson* motion when state challenged three African-Americans from jury panel leaving only one African-American as an alternate.

State v. Belcher, 623 N.E.2d 582 (Ohio Ct. App. 1993). Counsel ineffective for failing to make a timely *Batson* motion when state removed all three African-Americans from venire.

***Capital Case**

1992: *State v. McKee*, 826 S.W.2d 26 (Mo. Ct. App. 1992). Counsel ineffective for failing to challenge two venirepersons who said it would bother them if the defendant did not testify.

Knight v. State, 839 S.W.2d 505 (Tex. App. 1992). Trial counsel in burglary case ineffective for failing to challenge 10 jurors who expressed a bias or prejudice including: a burglary conviction should always carry maximum sentence, if convicted should receive death penalty, all people indicted are guilty, and defendant's failure to testify would be held against him. Two of these jurors were impaneled so prejudice presumed.

Nelson v. State, 832 S.W.2d 762 (Tex. App. 1992). Counsel ineffective for failing to challenge jurors who stated that they presumed guilt if a defendant was charged. Three of these jurors were impaneled.

1991: *Ex Parte Yelder*, 575 So. 2d 137 (Ala. 1991). Trial counsel ineffective for failing to make *Batson* objection when the state used peremptories to strike 17 of 18 black jurors. Court held that prejudice would be presumed where a prima facie case of purposeful discrimination exists and trial counsel fails to make *Batson* objection.

1988: *Presley v. State*, 750 S.W.2d 602 (Mo. Ct. App. 1988). Counsel ineffective for failing to challenge for cause a venireman who admitted bias against defendant. Prejudice presumed.

***Capital Case**

2. INDICTMENT

a. U.S. Court of Appeals Cases

2001: *Wilcox v. McGee*, 241 F.3d 1242 (9th Cir. 2001). Counsel ineffective in burglary case for failing to move, on double jeopardy grounds, for dismissal of second indictment charging the same offense. During first witness of first trial, state moved to amend or to dismiss the indictment without prejudice because the indictment listed the wrong date and address of the alleged offense. Defense objected that jeopardy had attached. Court overruled defense objection because not ripe and dismissed. After re-indictment, counsel failed to object. Court found deficient conduct because the grounds for dismissal “were both obvious and meritorious.” Not strategy, “simply a mistake.” Prejudice clear. Case was reviewed under AEDPA. Upon finding that petitioner met *Strickland* standard, court found that state court had unreasonably applied clearly established federal law without any further discussion of 28 U.S.C. § 2254(d) standard.

b. State Cases

2001: *Johnson v. State*, 796 So. 2d 1227 (Fla. Dist. Ct. App. 2001). Counsel ineffective in trafficking of hydrocone case for failing to move to dismiss the indictment prior to trial. At the time, one district court had held that a defendant could be convicted of trafficking hydrocodone by possession by using the aggregate weight of the entire mixture. Another district court had reached the opposite conclusion. This district had not yet ruled. “A reasonably effective criminal defense attorney must keep himself or herself informed of significant developments in the criminal law, including decisions of other district courts around Florida.” *Id.* at 1228. Prejudice found because this District agrees that it is error and the motion to dismiss would have been granted. Even if the trial court had not granted, the error would have been preserved for review and relief granted on direct appeal.

1997: *Padgett v. State*, 324 S.C. 22, 484 S.E.2d 101 (1997). Trial counsel ineffective for failing to object to first-degree burglary indictment which alleged burglary of dwelling, but the evidence revealed that the only building on the property was a barn in which no one lived.

1996: *State v. Crosby*, 927 P.2d 638 (Utah 1996). Counsel ineffective in embezzlement case for failing to object to information which charged three counts of theft instead of one even though state statute required a single information on offenses which were part of a single plan or continuous transaction.

1994: *Hopkins v. State*, 317 S.C. 7, 451 S.E.2d 389 (1994) (*overruled by State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005) “to the extent [the decision] combine[s] the concept of the sufficiency of the indictment and the concept of subject matter jurisdiction”). Trial counsel ineffective for failing to object to amendment of indictment which changed offenses from DUI causing great bodily injury to DUI causing death and thereby raised maximum punishment from 10 to 25 years. The amendment deprived the court of jurisdiction to accept guilty plea.

***Capital Case**

1993: *Benbow v. State*, 614 So. 2d 398 (Miss. 1993). Defendant denied effective assistance of counsel in plea to aggravated assault where he was represented by a law student under supervision of counsel, but counsel never met defendant and never discussed plea with him, was not in court for plea, and neither counsel nor student questioned potential defects on the face of the indictment.

***Capital Case**

3. MOTIONS AND NOTICE

a. U.S. Court of Appeals Cases

2001: *United States v. Jimenez Recio*, 258 F.3d 1069 (9th Cir. 2001). Counsel ineffective in possession with intent to distribute drugs case for failure to move for acquittal on charge where the evidence was insufficient to establish pre-drug seizure conspiracy.

2000: *Hernandez v. Cowan*, 200 F.3d 995 (7th Cir. 2000). Counsel ineffective in murder case for failing to move to sever the trial from a codefendant on the basis of antagonistic defenses, which would require the defendant to defend against both the state and the codefendant. The victim was murdered in a street killing. He was shot times in the head and three times in the trunk. The codefendant was arrested for a separate murder and police found an arsenal of weapons, including the weapon that fired the three shots to the head. He confessed and said the defendant shot the other three shots first and actually killed the victim. During a pretrial motion to suppress the statement, the codefendant asserted that he confessed only because of the state's promise to dismiss other charges if he implicated the defendant. Defense counsel moved to sever the trials based on *Bruton*. The trial court denied the motion but held that the portions of the codefendant's confession implicating the defendant would be excluded. During the joint trial, the state's case in chief against the defendant consisted only of testimony from one witness who said that he had heard shots and saw the defendant and an unidentified second man running away from the scene. The testimony did not establish, however, whether the defendant was running because he was involved or because he was scared and, indeed, the state's witness had been running from the scene because he was scared. Defense counsel moved for an acquittal on directed verdict after the state's case and the court denied the motion. The codefendant then testified consistent with his pretrial confession and added that the murder was committed because the defendant believed the victim was a member of a rival gang. The defendant testified that he was at home in bed at the time of the murder and that he was not a member of a gang. The court found first that the state had waived the argument of procedural default based on the defendant's failure to seek discretionary review of the state supreme court following affirmance on direct appeal because the state failed to make the argument in the District Court. The court then found that counsel's conduct was deficient because counsel failed to attend the suppression hearing or review a transcript and failed to move for a severance on the proper basis that the two defenses were antagonistic. Prejudice found because state law requires a severance if there are antagonistic defenses and the codefendant's defense will actually enhance the state's case against the defendant. Prejudice also found because even if the codefendant chose to testify against the defendant following his own conviction, he would be subject to damaging cross-examination that he had confessed to a prior murder for which he was never charged, the state had dismissed numerous weapons charges against him despite the arsenal of weapons in his home, and he was sentenced to only 25 years for this murder.

1998: *United States v. Alvarez-Tautimez*, 160 F.3d 573 (9th Cir. 1998). Counsel ineffective in drug possession and conspiracy case for failing to move to withdraw guilty plea after co-defendant's

***Capital Case**

motion to suppress the marijuana was granted. Both co-defendants were arrested by border patrol in a car with 252 pounds of marijuana and filed motions to suppress the marijuana due to unlawful search and seizure. Subsequently, Alvarez appeared before a magistrate on his proposed plea agreement and the magistrate recommended that the district court accept the plea. Prior to the district court accepting the plea, however, the co-defendant's motion to suppress the marijuana was granted and charges were ultimately dismissed against him. Co-defendant's counsel recommended that the defendant move to withdraw his plea and renew his motion to suppress. Counsel did not do so, however, because—without any research—he said he saw no legal basis for doing so and advised the defendant of this. The Court held that counsel was clearly deficient in his advice because “rudimentary research,” 160 F.3d at 576, would have revealed that Alvarez had the absolute right to withdraw his guilty plea because it had not yet been accepted by the district court. No tactical reason could justify failure to move to withdraw. Alvarez was also clearly prejudiced, because if he had withdrawn his plea and renewed his motion to suppress, it would probably have been granted because it would have been heard by the same judge on the same set of facts. If the motion had been granted, the government would have had insufficient evidence to proceed and would have dismissed charges just as with co-defendant.

1996: *Huynh v. King*, 95 F.3d 1052 (11th Cir. 1996), *reh'g denied*, 124 F.3d 223 (11th Cir. 1997). Trial counsel ineffective in murder case for failing to timely file a potentially meritorious motion to suppress evidence seized in warrantless pat-down search because he believed the denial of the motion for untimeliness would obtain a more favorable federal habeas review than denial on the merits.

1994: *Tomlin v. Myers*, 30 F.3d 1235 (9th Cir. 1994). Trial counsel ineffective in murder prosecution for failing to seek suppression of witness' lineup identification, conducted outside of counsel's presence, and subsequent in-court identification.

1990: *Murphy v. Puckett*, 893 F.2d 94 (5th Cir. 1990). Trial counsel ineffective in prosecution for armed robbery for not raising a valid double jeopardy claim because defendant had previously been convicted of capital murder with burglary and the same armed robbery as the underlying felonies.

****Smith v. Dugger***, 911 F.2d 494 (11th Cir. 1990). Counsel ineffective for failing to move to suppress defendant's confessions made out of presence of counsel where the waiver of rights form signed by defendant indicated that the defendant had responded negatively when asked whether he waived his right to have attorney present and whether no threats or coercion had been used to make him confess.

1987: *Rice v. Marshall*, 816 F.2d 1126 (6th Cir. 1987). IAC where counsel did not move to suppress evidence that rape defendant was carrying firearm on ground that defendant had been earlier acquitted of weapons charge in connection with the same alleged rape, where only issue presented by weapons charge was whether defendant had possession of firearm during encounter with complaining witness, jury necessarily found that he did not have such weapon, & most pervasive &

***Capital Case**

direct evidence that defendant has used force (or threat of) was witness' testimony about the presence of gun & manner in which it was brandished.

b. U.S. District Court Cases

2000: *Noble v. Kelly*, 89 F. Supp. 2d 443 (S.D.N.Y. 2000), *aff'd*, 246 F.3d 93 (2d Cir. 2001). Counsel ineffective in attempted murder case for failing to file timely notice of alibi, which resulted in exclusion of defense witness. Drug related shooting outside a bar by three men. Defendant and codefendants defended on basis of alibi and mistaken identification. Victim testified he had altercation before shooting with three other men outside the bar, while the defendant was still inside the bar, but identified defendant as shooter. Another state witness from some distance away said defendant was shooter. Two defense witnesses said they could not identify the three men but knew the defendant and codefendants and could say they were not the assailants. Both were impeached with prior statements identifying the defendant as the shooter though. Defense attempted to call a third witness who would have testified that he witnessed the earlier altercation with three other men and was inside the bar when he heard the shots. This witness would also have said that the defendant was also inside the bar at the time of the shots and went outside at the same time as the witness. The state objected to the testimony due to lack of notice of alibi. Defense counsel argued that this was not an alibi because the indictment merely specified the "vicinity" of the bar without saying inside or outside, but the court noted the discovery documents specified the crime scene as outside the bar and excluded the evidence due to the lack of notice. Court held, "Errors caused by counsel's ignorance of the law are errors that run afoul of the objective standard of reasonableness." *Id.* at 463. While there was no controlling law in the state at the time indicating whether the indictment or discovery specification of crime scene was controlling, a reasonable counsel would have erred on the "side of caution." *Id.* Prejudice found because this witness could not have been discredited with prior inconsistent statements as the other defense witnesses were. The court granted relief on this ground as an alternative ground of relief, but also granted relief based on a denial of due process because the trial court excluded the defense witness without considering lesser alternatives even though the defense counsel's conduct was not deliberate.

c. Military Cases

1994: *United States v. Gilbert*, 40 M.J. 652 (N.M.C.M.R. 1994). In wrongful use of marijuana case, counsel ineffective for failing to seek immunity for a defense witness who refused to testify because of fear of self-incrimination. The witness would have testified that he had provided defendant with a marijuana laced cigarette the night before defendant's drug test and that the defendant knew nothing about the marijuana in the cigarette.

d. State Cases

2003: *Evans v. State*, 827 A.2d 157 (Md. Ct. App. 2003). Counsel ineffective in drug case for failing to move to suppress based on an unreasonable search of the defendant's rectal area while in an exposed

***Capital Case**

area of a public street. During a drug task force, an officer purchased one vial of cocaine from the defendant. After this officer left, a search team moved in and conducted a rectal search of the defendant. They seized an additional nine vials of drugs, gave the defendant evidence receipts, and released him. At trial, counsel moved to suppress based on an argument that the defendant had not been arrested and, thus, this was not a lawful search incident to arrest. This argument was rejected. Counsel's conduct was deficient in failing to make the additional argument that the rectal search conducted on a public street was unreasonable under the Fourth Amendment. No strategy could explain counsel's failure because this argument would not have been inconsistent with the argument already made by counsel. Prejudice found because the nine extra vials likely impacted the determination of guilt with respect to the drug buy by the officer. Without additional drugs being found on the defendant, the jury may have viewed credibility in a different light. Prejudice also found because the nine extra vials enhanced the defendant's sentence by at least five years.

Hiligh v. State, 825 A.2d 1108 (Md. Ct. App. 2003). Counsel ineffective in armed robbery case for failing to argue that confession was involuntary due to failure to present defendant to judicial officer without unnecessary delay. Defendant was arrested around 11:00 .m. for an armed robbery in Prince George's County. He was then handcuffed to a one-foot cable connected to the wall in the interrogation room while the charging documents were completed. Even though the documents were ready at 3:30 a.m. and a commissioner was on duty in the building, the defendant was left there until the next morning when a series of questioning occurred concerning the Prince George's charge, as well as robberies in several other Maryland Counties, including Howard County. Following a number of statements, the defendant was finally taken to the commissioner 23 and ½ hours after his arrest. Counsel moved to suppress his statements as involuntary but did not assert as a ground the Maryland court rule and statute requiring, in combination, that defendants be taken before a judicial officer without unnecessary delay and that delay for the purpose of obtaining confessions is a violation of this rule and should be considered as a factor in determining voluntariness of any resulting confession. Counsel's conduct was deficient in failing to assert this clear rule. Prejudice found because there is a reasonable probability that the court – as it did following convictions in another county – would have found the confession to be involuntary. Even if the trial court had allowed admission, the court would have been required to instruct the jury accordingly, and the jury could have determined that the statement was involuntary.

State v. Shaver, 65 P.3d 688 (Wash. Ct. App. 2003). Counsel was ineffective in drug case for failing to make a pre-trial motion to suppress the defendants prior escape and drug convictions. During direct examination of the defendant, counsel elicited testimony about two prior burglary convictions and an escape conviction. During cross examination, the state elicited testimony about a prior drug conviction from another state. The court held that the prior drug convictions and the escape conviction may well have been excluded if a hearing had taken place outside the presence of the jury. Counsel apparently was even unaware of the prior drug conviction from Oregon even though the state had this information.

***Capital Case**

Page v. State, 63 P.3d 904 (Wyo. 2003). Counsel was ineffective in possession of marijuana case for failing to move to suppress evidence obtained pursuant to a search warrant. The defendant's home was being inspected by a sheriff's deputy conducting a welfare check on a child. During the inspection the deputy noticed two pipes with duct-taped handles with burnt residue in them. The defendant claimed they were used for smoking tobacco. After the officer's statement that the pipes did not smell like tobacco, the defendant admitted that he had smoked marijuana from one of the pipes. The deputy then went and secured a search warrant and seized drug paraphernalia and marijuana. The defendant then gave a statement admitting the marijuana was his. Counsel's conduct was deficient because, unlike the Fourth Amendment, the Wyoming Constitution requires an affidavit that contains all of the information necessary to support probable cause for a search. The affidavit submitted in this case was patently deficient, because there was primarily only boilerplate allegations in the affidavit and the only relevant facts were that two pipes with burnt residue were found. There was no indication in the affidavit that the pipes were used to ingest marijuana or any other controlled substance. The owner claimed that he used the pipes to smoke tobacco, and the affidavit did not contradict these statements. Prejudice was found because a motion to suppress the evidence in this case would have been granted and the state would have been left with no evidence with which to prosecute the defendant. Although the state argued that the court should accept a good faith exception to the exclusionary rule under the Wyoming Constitution, the court found that this was not the proper case to address this issue because it had not been separately briefed by either side.

2002: People v. Callahan, 778 N.E.2d 737 (Ill. App. Ct. 2002). Counsel ineffective in murder and armed violence case for failing to move for dismissal of armed violence counts on speedy trial grounds. The defendant was arrested in December 1997 and indicted for murder in January 1998. Following his arrest, the defendant moved for a speedy trial within 120 days. After numerous continuances, the trial was set for May 1999. On the eve of trial, however, the state indicted the defendant on 20 new charges that arose out of the same conduct as the initial murder charge. The defendant was ultimately tried in July 1999 on the murder charge and four counts of armed violence. Counsel failed to object to the filing of the additional charges and did not move to dismiss the new charges on speedy trial grounds even though under state law the new charges related back to the date the original charges were filed and would have been dismissed on speedy trial grounds had counsel made the motion. Counsel's conduct was deficient and prejudicial and the armed violence convictions were reversed.

State v. Bishop, 639 N.W.2d 409 (Neb. 2002). Trial counsel ineffective in possession with intent to distribute case for failing to assert double jeopardy prior to a no contest plea and appellate counsel was ineffective for failing to assert trial IAC. Prior to the plea the state brought a separate successful forfeiture action for the money seized from the defendant. Following the forfeiture but before the criminal plea, the Nebraska court held that double jeopardy was violated by criminal charges following a forfeiture action. Trial counsel failed to investigate and discover the forfeiture action despite knowledge that money was seized. Appellate counsel failed to communicate with the defendant or to discover the forfeiture action and raise the issue the appropriate remedy was a new trial rather than a new direct appeal despite the state's argument that the trial IAC claim was barred

***Capital Case**

because no bar applied where the defendant raised the issue at the earliest opportunity given appellate counsel's ineffective representation.

State v. Allah, 787 A.2d 887 (N.J. 2002). Counsel ineffective in drug case for failing to file a double jeopardy motion prior to retrial. Following the defendant's arrest, his co-defendant entered a plea agreement in which he agreed to testify against the defendant. The state did not call him and defense counsel did. On direct, the co-defendant essentially testified that the defendant was innocent. The co-defendant's attorney then entered the courtroom on an unrelated matter and advised the witness to invoke his right against self-incrimination because he had not yet been sentenced. On cross, he did invoke and the state moved for a mistrial. Defense counsel objected, but the court granted the motion. Defense counsel failed to file a double jeopardy motion prior to retrial though and the defendant was convicted. On appeal, the parties conceded defendant conduct and that counsel had no strategy. Prejudice found because the double jeopardy motion was meritorious. Indictment dismissed.

Hofman v. Weber, 639 N.W.2d 523 (S.D. 2002). Counsel ineffective in first degree murder case for failing to move to suppress tainted confessions in a timely manner. The defendant, who had a history of mental illness, made several confessions without advice of rights. He also made several confessions following the advice of rights, but all of this was in a short time period. Prior to trial, the court suppressed the initial statement. Counsel did not move to suppress the other statements until after the jury was selected. The court denied the motion as untimely. Counsel's conduct was deficient and prejudice was shown because the tainted statements constituted a great bulk of the state's evidence, as the state argued in closing. Moreover, the remainder of the evidence was mostly circumstantial.

2001: *People v. Little*, 750 N.E.2d 745 (Ill. App. Ct. 2001). Counsel ineffective in possession with intent to deliver cocaine case for failing to move to quash warrantless arrest and search incident to arrest that revealed drugs in pocket. Police officer testified that he observed defendant near street after midnight. He watched while two people approached defendant separately. Each time the defendant received money and handed over an "object" out of his pocket. Defendant was arrested and then searched. Drugs in pocket. Court held that counsel was ineffective because there was a reasonable probability that the motion to suppress would have been successful. Convictions reversed and remanded.

Commonwealth v. Segovia, 757 N.E.2d 752 (Mass. App. Ct. 2001). Counsel ineffective in vehicular hit and run causing death case for failing to move to suppress a videotaped statement. Prior to the statement, the defendant, who was a Brazilian national, requested a translator and paralegal and told the police officer he did not understand everything the police officer told him regarding his Miranda rights. Nonetheless, the police officer continued to question the defendant, under the guise of asking "routine booking questions" after he requested legal assistance. Prejudice found because the defendant's statements were contradictory to his prior statements to police and because, during the

***Capital Case**

statement, the defendant had revealed the name of a witness that testified to incriminating statements by the defendant. This witness was viewed as “fruit of the poisonous tree” by the court.

People v. Gil, 729 N.Y.S.2d 121 (N.Y. App. Div. 2001). Counsel ineffective in robbery case for waiving pretrial motions and discovery in order to call the government’s “bluff” as to readiness for trial and accrue speedy trial time if the government was not ready. Counsel only met his client at arraignment and proceeded to trial the same day. Counsel’s “strategy” was not reasonable because there were colorable issues for a motion to suppress evidence seized in warrantless search, a motion to suppress the defendant’s statements because not *Mirandized*, and a motion to suppress eyewitness identifications based on suggestive procedures. There was “everything to gain and nothing to lose by moving for suppression” and very little to gain by accruing speedy trial time. The defendant’s on the record waiver did not negate the issue because counsel’s inducements were not reasonable.

Patterson v. LeMaster, 21 P.3d 1032 (N.M. 2001). Counsel ineffective in armed robbery case for failing to move to suppress suggestive show-up identifications by two key eyewitnesses. Most of perpetrator’s face and head were covered throughout robbery, pre-identification descriptions were very sketchy, one witness described perpetrator as Hispanic, even though defendant was African-American. Witnesses made “identification” of defendant though when police officers had defendant spotlighted with headlights of car. One witness hesitated and was unable to make identification even though until police made defendant put on an additional piece of clothing. Counsel did not challenge this evidence and advised defendant to plead no contest even though defendant maintained innocence. Prejudice found and plea set aside.

2000: *State v. Boddien*, 756 So. 2d 1111 (Fla. Dist. Ct. App. 2000). Counsel ineffective in second degree murder case for failing to timely file a motion for new trial because the conviction was against the greater weight of the evidence. State law allows trial judge to grant a new trial after weighing evidence and determining credibility essentially as an additional juror, but requires that motion for new trial be filed within 10 days after trial. Counsel filed weeks late and trial court granted motion. Appellate court found that trial court lacked jurisdiction to grant new trial but found the record sufficient to review IAC claim and construed the issue as such.

****Turpin v. Bennett***, 525 S.E.2d 354 (Ga. 2000). Counsel ineffective in capital murder trial for failing to seek a continuance to get another expert or seek some other remedy when the defense psychiatrist was suffering from AIDS-related dementia. Witness had previously supported insanity defense, but during his testimony, the witness abandoned his former diagnosis without explanation, appeared “deathly ill,” made “cartoonish” facial expressions, volunteered testimony that whoever committed the murder was a “vicious maniac,” and stated that appropriate psychiatric treatment for the defendant would have been nothing more than Tylenol for his headache, Zantac for his stomach ailment, and follow-up care. The jury laughed out loud at his testimony. The expert’s conduct and the radical change in his testimony was due solely to the expert’s impaired mental condition.

***Capital Case**

Wilkerson v. State, 728 N.E.2d 239 (Ind. Ct. App. 2000). Counsel ineffective in rape case for failing to move to sever charges of two rapes that occurred three weeks apart. State statute required severance if crimes were not shown to be part of a common scheme and the two alleged rapes here were similar only in that they occurred in the same city and the assailant entered through a window late at night. The defendant was convicted of both rapes and sentenced to 40 years on each to be served consecutively. If the trials had been severed, however, the court could not have made the sentences consecutive under state law at the time, which allowed consecutive sentences only when sentencing was contemporaneous. [Statutory amendments in 1994 now allow consecutive sentences even when not contemporaneous.] Thus, prejudice in sentencing is clear. Counsel's conduct was deficient because counsel conceded no strategy and that he was not aware of the sentencing ramifications of the failure to sever. Court ordered that sentences be altered to run concurrently.

1999: *Turpin v. Helmeci*, 518 S.E.2d 887 (Ga. 1999). Counsel ineffective in vehicular homicide, driving under the influence, and possession of amphetamines and methamphetamines case for failing to move to suppress results of urine test with respect to possession charge. Defendant had consented to urine test under implied consent law related to traffic offenses. The urine test was used, however, for a different purpose for which the defendant had not consented when used as the only evidence supported the possession charge for which he was sentenced to 12 years. Counsel had vigorously argued motion to suppress on a different basis. State argued that this basis was not clear under state law at the time of trial. On conduct, the court held that "reasonable professional judgment requires proper investigation. Here, counsel did not adequately research the law. The right to reasonably effective counsel is violated when 'the omissions charged to trial counsel resulted from inadequate preparation rather than from unwise choices of trial tactics and strategy.'" *Id.* at *2 (citations omitted). On prejudice, the court held: "Contrary to the State's contention, the result in this case does not require trial counsel to predict what decisions will be issued in the future. Rather, it affirms that counsel must adequately research the law when choosing trial strategy." *Id.* at *3.

People v. Moore, 716 N.E.2d 851 (Ill. App. Ct. 1999). Counsel ineffective in felon in possession of gun case for failing to move to quash arrest and to suppress evidence and statements. Cop went to house looking for someone else. Defendant was pulling car out of driveway when cop blocked him in. When defendant got out of car, cop knew who he was and that he was not the man the cop was looking for. Defendant took off running. Cop thought he threw a gun while running. None ever found though. Defendant eventually stopped and handcuffed 150 feet from the car. Cop went back to car and saw a green zippered case in the floorboard of the car. He opened the case and found a gun. After arrest, defendant said he ran because he saw the case in the floorboard of the car. The court held that there was no probable cause for the arrest because flight alone is insufficient and cop had no reason to suspect that defendant had committed or was committing a crime. The search of the car was not incident to the arrest since the defendant was 150 feet away and cuffed. Nor was the search a plain view search because the gun was contained in a zippered bag. The defendant's statements would also be suppressed if the arrest was quashed. While the court could not "determine what the outcome of a hearing on motions to quash arrest and to suppress evidence and statements would have been," the court found prejudice because "without the motions, confidence in the result

***Capital Case**

of defendant's trial is greatly undermined." Slip op. at *5. Post-trial counsel also ineffective for failing to move for new trial on basis of trial counsel's IAC.

Collier v. State, 715 N.E.2d 940 (Ind. Ct. App. 1999). Counsel ineffective in murder, criminal recklessness, and misdemeanor carrying a handgun without a license case for failing to object to trial on both recklessness and carrying handgun charges where they were based on a single act and the handgun charge is a lesser included offense of recklessness charge. Court found that trial on both violated double jeopardy and vacated the conviction and sentence on the misdemeanor charge.

State v. Klinger, 980 P.2d 282 (Wash. Ct. App. 1999). Counsel ineffective in drug possession case for failing to move to suppress drugs seized in a storage shed behind the defendant's house. Cops went to the house to serve an outstanding warrant. Observed defendant through window smoking a hand-rolled cigarette and smelled marijuana when he opened the door. Defendant was arrested on the outstanding warrant. The next day, the cops obtained a search warrant for the house and "outbuildings." Drug paraphernalia found in house and 154 grams of marijuana found in shed. The court found counsel ineffective for failing to move to suppress because the affidavit in support of the warrant did not support a search of the shed. Warrant listed only the facts above, the defendant's prior for simple possession of marijuana, and the cop's general statement that in his experience, drug manufacturers and dealers often hide drugs in outbuildings. This case was only a possession case. No nexus or probable cause for outbuilding search.

**Perry v. State*, 741 A.2d 1162 (Md. 1999). Counsel ineffective in capital murder case for failing to make a timely and appropriate objection to a tape made in violation of the Maryland wiretapping laws. State's theory was that defendant was paid by a man in California to kill his ex-wife, son, and son's nurse so man could get son's trust fund. All evidence connecting the defendant with the man was circumstantial, with the exception of testimony from a witness granted immunity who testified that he acted as a go between. Tape was seized from man's answering machine in California and included 22 second call. 22 second call had been made from pay phone near the crime scene shortly after the murder. Although nothing directly incriminating on tape it could be interpreted as incriminating. Defense counsel moved prior to trial in a generic motion to exclude all taped evidence. When they received tape in discovery, counsel did nothing more although they realized the significance of the tape. During trial, counsel objected to admission of the tape because of the quality of the recording. When several witnesses testified that they recognized the voice of the defendant, counsel objected to basis of their opinion. Only after the tape was admitted and played for several witnesses to identify the defendant's voice did counsel object to admissibility on the basis of the Maryland wiretap statute. The trial court and appellate court held that the objection was not timely. Counsel's conduct was deficient in failing to recognize the wiretap issue. Prejudice established because the tape was inadmissible. Maryland wiretap statute requires exclusion unless both parties consent to taping. There is no co-conspirator exception and it does not matter with the taping was wilful or not.

***Capital Case**

People v. Langlois, 697 N.Y.S.2d 360 (N.Y. App. Div. 1999). Counsel ineffective in sexual abuse case for failing to request information in the state's possession and failing to move suppress evidence of prior uncharged sexual acts or comments and failing to request a limiting instruction. Defendant was charged with sexual assault of employee under his supervision. During his testimony, the state cross-examined the defendant about lewd remarks and sexual assaults on eight women that worked under his supervision. The defendant admitted some of the lewd remarks but denied the assaults. Prejudice found because the evidence related to the other eight women should have been suppressed because these acts were sufficiently similar to the crime charged or remote in time.

1998: *People v. Denison*, 79 Cal. Rptr. 2d 524 (Cal. Ct. App. 1998). Counsel ineffective in drug case for failing to challenge defendant's arrest for simple possession of Valium at suppression hearing. Officers went to the defendant's home to conduct a probation search of defendant's roommate. Defendant drove up in his car with the probationer as a passenger. An officer recognized the car as "associated" with the house and the car was stopped. The probationer was searched. During the stop, a paper bag with 50 dosages of Valium was observed in the floor board of the passenger side. The defendant was then arrested for simple possession of Valium and his car and home were searched incident to the arrest. Cocaine and drug paraphernalia were found. Defendant was charged with cocaine offenses, but not charged based on Valium. Counsel moved to suppress due to unlawful stop and detention and unlawful seizure of the paper bag, but did not move to suppress based on arrest without probable cause. Court held that stop, detention, and seizure of bag were all justified by valid probation search, but that defendant's arrest was unlawful because possession of Valium without a prescription is not a crime under California law, as is evidenced by the Health and Safety Code and the legislative history. While possession without a prescription is a crime under federal law, only possession with intent to sell is unlawful in California. The Court found that the arrest could not be justified on the basis of the federal law, however, because there were no federal officers involved, no federal charges brought, and the California legislative history indicated that the Legislature intended that California law enforcement officers not make arrests for simple possession of Valium. In addition, there was no evidence to support a finding that the Valium was possessed with the specific intent to sell it. Counsel was ineffective for failing to challenge the unlawful arrest, because his failure was not based on any tactic, but instead was simply the result of ignorance or an erroneous interpretation of California law. The defendant was prejudiced because all of the cocaine and paraphernalia evidence would have been suppressed as fruit of the poisonous tree following the unlawful arrest. Thus, if counsel had challenged the arrest, the defendant could not have been convicted of any of the offenses to which he ultimately pled guilty.

Goines v. State, 708 So. 2d 656 (Fla. Dist. Ct. App. 1998). Counsel ineffective in drug case for failing to move for recusal of the trial judge who had previously prosecuted the defendant on a prior drug case used to enhance punishment to habitual felony offender. The court held that the judge would have been disqualified if the motion had been filed. Based on trial counsel's testimony that the failure to file the motion was not a strategic decision, the court found deficient conduct. Prejudice was found, even though Judge sentenced only to 15 years when he could have sentenced to 30 years, based on "that part of *Lockhart* defining prejudice as a showing that counsel's error

***Capital Case**

rendered the trial fundamentally unfair—in this case because of the risk of judicial bias.” 708 So. 2d at 661.

In re A.R., 693 N.E.2d 869 (Ill. App. Ct. 1998). Counsel ineffective in juvenile adjudication as delinquent for aggravated battery and aggravated discharge of firearm because counsel failed to challenge the legality of the juvenile’s arrest and the voluntariness of his subsequent statements. Juvenile was arrested, read rights, and questioned before a juvenile officer was notified and possibly before the juvenile’s parents were notified. State statute requires arresting officer to immediately make a reasonable attempt to notify parents and juvenile officer. Purpose of statute is to allow parent and juvenile officer to consult in order to ensure that confessions are voluntary. Court ordered trial court to hold hearing on motion to quash arrest and suppress statements and either grant new trial or affirm adjudication as appropriate.

State v. Gallegos, 967 P.2d 973 (Utah Ct. App. 1998). Counsel ineffective in drug and drug paraphernalia case for failing to renew pretrial motion to suppress evidence once it became apparent from trial testimony that evidence had been erroneously admitted under plain view exception. Officers learned that defendant was staying in his girlfriend’s apartment and went to serve an outstanding burglary warrant. Defendant was found in a hole in the floor of the bedroom. As he was crawling out, he reached right hand between mattresses on bed, but then surrendered. A syringe was found in his pocket and a gun between the mattresses. Defendant was handcuffed and taken to the living room, but officers continued to look in the bedroom. An officer noticed a lidless purple tin on a shelf in the closet containing drugs and paraphernalia. During pretrial suppression motion, the only evidence was from preliminary hearing tape. Court admitted tin as plain view evidence and search incident to arrest. During trial, however, the detective testified that when he observed the tin he could not see the contents and had no reason to suspect that it contained a gun or evidence until he removed the tin from the closet shelf. Trial counsel was ineffective for failing to renew the motion to suppress because this evidence was clearly not in plain view. Likewise, the evidence was not admissible as a search incident to arrest because there was insufficient evidence in the record to support this finding. The defendant was prejudiced because the evidence in the tin was the sole evidence of drugs and the primary evidence of paraphernalia, because the syringe in the defendant’s pocket was not tested for drugs and the state conceded that syringes may be possessed for lawful purposes. The Court remanded for a hearing to determine whether the defendant had standing to challenge the unlawful search (which the trial court had not ruled on previously due to finding the search lawful).

1996: *Grace v. State*, 683 So. 2d 17 (Ala. Crim. App. 1996). Counsel ineffective in cocaine possession case for failing to file a written motion for discovery to discover oral statements made by defendant. Damaging statement made known to prosecutor by state trooper the night before trial would have been excluded for failure to disclose if counsel had filed a discovery motion.

****People v. Birdsall***, 670 N.E.2d 700 (Ill. 1996). Counsel ineffective for failing to request fitness hearing to which the defendant was statutorily entitled because of psychotropic medications

***Capital Case**

prescribed and taken at time of trial. [Note: the statute was subsequently changed so that hearing is not automatically required. See *People v. Gibson*, 687 N.E.2d 1076 (Ill. App. Ct. 1997).

Tidwell v. State, 922 S.W.2d 497 (Tenn. Crim. App. 1996). Counsel ineffective in multi-charge child sexual abuse case for failing to move to require the state to elect the particular offenses upon which conviction would be sought where defendant was convicted of 14 counts of rape, 14 counts of incest, and 14 counts of contributing to the delinquency of a minor based on evidence that defendant committed acts over a 14 month period but victim could only testify about two acts in a single month with particularity.

1995: *Jefferson v. State*, 459 S.E.2d 173 (Ga. Ct. App. 1995). Counsel ineffective in rape case for failing to move to suppress evidence seized after defendant's unlawful arrest. Without probable cause or reasonable suspicion, police stopped defendant's car with "blue lights" and then asked him to accompany them to police station to help with investigation. Defendant was not read Miranda warnings. During the conversation with police, the alleged victim identified the defendant's voice as that of the rapist and then the defendant was formally arrested. The police then seized other incriminating evidence, including defendant's shoes, samples of his head and pubic hair, and a photograph which was included in a photographic lineup.

People v. Steels, 660 N.E.2d 24 (Ill. App. Ct. 1995). Counsel ineffective in cannabis possession case for failing to move to suppress based on illegal detention which was defendant's only possible chance. Observed in train station and questioned because he met profile, defendant refused consent to search suitcase, and officers detained suitcase and defendant left. Ultimately drug dog sniffed and search warrant obtained. Drugs found.

People v. Gutierrez, 648 N.E.2d 928 (Ill. App. Ct. 1995). Counsel ineffective per se for failing to seek hearing on fitness to stand trial pursuant to state statute which grants automatic hearing whenever defendant is under the influence of psychotropic medication and asks for hearing.

Commonwealth v. Digeronimo, 652 N.E.2d 148 (Mass. App. Ct. 1995). Trial counsel ineffective for failing to move to suppress evidence (including defendant's statements, police testimony about observations of defendant, and Breathalyzer) seized after a warrantless police entry into private residence of suspected drunk driver who had recently been in an accident.

1994: *People v. Brandon*, 643 N.E.2d 712 (Ill. 1994). Counsel ineffective for failing to seek hearing on fitness to stand trial on grounds that the defendant was under the influence of psychotropic medication.

People v. Stanley, 641 N.E.2d 1224 (Ill. App. Ct. 1994). Trial counsel ineffective for failing to move for dismissal of charges on statutory speedy trial grounds.

***Capital Case**

People v. Karraker, 633 N.E.2d 1250 (Ill. App. Ct. 1994). Trial counsel ineffective for failing to move for severance of charges or to move for editing of taped conversations between defendant and informant which were played before charged. The charged offenses were completely unrelated to each other and not part of same transaction; there were completely separate defenses; and large portions of the tapes contained irrelevant and prejudicial material.

People v. Pitts, 629 N.E.2d 770 (Ill. App. Ct. 1994). Counsel ineffective for failing to seek continuance in order to subpoena alibi witnesses.

People v. Gwinn, 627 N.E.2d 699 (Ill. App. Ct. 1994). Counsel ineffective for failing to raise statute of limitations as a bar to prosecution.

People v. Clamuextle, 626 N.E.2d 741 (Ill. App. Ct. 1994). Counsel ineffective for failing to seek continuance in order to locate alibi witnesses.

Sikes v. State, 323 S.C. 28, 448 S.E.2d 560 (1994). Trial counsel ineffective for failing to raise a meritorious Fourth Amendment claim that defendant was improperly detained where the only evidence of defendant's guilt was discovered as a result of the unlawful detention.

1993: *In re Neely, 864 P.2d 474 (Cal. 1993). Trial counsel ineffective for failing to adequately investigate and move to suppress a tape recording of defendant's conversation with co-defendant which was taken in violation of *Massiah* during a van ride on the way to the preliminary hearing. Counsel was aware of the pre-existing relationship of the co-defendant as an informant for the police, the co-defendant's bitterness toward defendant and offer to help police apprehend him, the police's conditioning assistance to co-defendant on his cooperation with police, and the co-defendant's meeting with police after van ride to report statements and inquire what the police wanted him to do. Rather than investigate and raise the *Massiah* motion, counsel simply asked the co-defendant's father and attorney and asked a police officer if the co-defendant was acting as a state agent. When they denied that he was, counsel declined to investigate or raise the motion. Adequate investigation would have revealed that the co-defendant was acting as a state agent and pre-arrangements were made by the prosecutor and police to have defendant and co-defendant ride together and to have the conversation recorded. In addition, both men had been provided with newspaper which contained articles relating to the case (although inmates were not normally given papers) so that the co-defendant would have a basis to start a conversation so he could elicit incriminating statements, including the location of the murder weapon.

Pitts v. State, 432 S.E.2d 643 (Ga. Ct. App. 1993). Trial counsel ineffective for failing to make minimal inquiries which would have revealed that defendant's arrest was predicated on warrants issued without showing of probable cause. If counsel had discovered this fact, defendant's post-arrest statement could have been successfully suppressed.

***Capital Case**

People v. McPhee, 628 N.E.2d 523 (Ill. App. Ct. 1993). Counsel ineffective for failing to file a pretrial motion to quash defendant's arrest and suppress evidence seized as a result of unconstitutional entry into his wife's house.

People v. Sifford, 617 N.E.2d 499 (Ill. App. Ct. 1993). Counsel ineffective for failing to raise statute of limitations instead of allowing defendant to plead guilty to an offense for which the statute of limitations had already run.

Ex parte Menchaca, 854 S.W.2d 128 (Tex. Crim. App. 1993). Counsel ineffective in delivery of controlled substances case for failing to file a motion in limine to prevent cross-examination of the defendant based on a rape prior which was inadmissible for impeachment purposes under state rules because probation on the rape charge had been completed.

State v. Snyder, 860 P.2d 351 (Utah Ct. App. 1993). Counsel ineffective for failing to file within the deadline set by state criminal procedure rules a motion to suppress a videotaped confession due to noncompliance with Miranda. Counsel knew of issue more than two months ahead of time but missed deadline.

In Interest of LDO, 858 P.2d 553 (Wyo. 1993). Counsel ineffective in juvenile proceedings for larceny where counsel failed to interview defendant or investigate circumstances of confession prior to adjudicatory hearing and thus failed to move to suppress confession because juvenile had not been given Miranda warnings. Prejudicial even though juvenile testified because he probably would not have if confession had been suppressed.

1992: *In re Wilson, 838 P.2d 1222 (Cal. 1992). Trial counsel ineffective for failing to move to suppress incriminating tape recording of phone conversation and testimony of two state agents pursuant to *Massiah*. While in custody and after appointment of counsel, defendant approached an inmate and said that he needed a "hit man" to get rid of a witness. The inmate contacted the prosecutor and then telephone conversations were arranged (and recorded) in which another snitch/state agent posed as a "hit man" and elicited incriminating responses. Defense counsel did not object to the testimony of the two witnesses because he believed it was merely foundational and because he believed tape recordings were admissible.

Morgan v. State, 847 S.W.2d 538 (Tenn. Crim. App. 1992). Counsel ineffective in aggravated sexual battery case for failing to move to dismiss based on fact that prosecution was barred by statute of limitations.

Wickline v. House, 424 S.E.2d 579 (W. Va. 1992). Trial counsel ineffective in murder case for failing to investigate and adequately attack admission of defendant's confession based on the defendant's lack of capacity to waive *Miranda* rights where counsel was aware of defendant's long-standing neurological problems and that defendant was borderline mentally retarded. If counsel had expert to evaluate, expert would have concluded that defendant did not knowingly waive rights.

***Capital Case**

Dickeson v. State, 843 P.2d 606 (Wyo. 1992). Counsel ineffective for failing to seek to suppress statements made by arson defendant following the seizure of her diary where there was a strong argument that the warrantless seizure of the diary was illegal.

1991: *People v. Stewart*, 577 N.E.2d 175 (Ill. App. Ct. 1991). Counsel ineffective for failing to move to suppress cocaine found on defendant following his arrest where the probable cause to arrest was a close call.

People v. Hawkins, 571 N.E.2d 1049 (Ill. App. Ct. 1991). Trial counsel ineffective for failing to move for dismissal of charges on statutory speedy trial grounds.

People v. Winans, 466 N.W.2d 731 (Mich. Ct. App. 1991). Counsel ineffective in murder case where identification was allowed when counsel knew that there was a prior proceeding against the defendant arising from the same conduct which was dismissed and yet counsel did not review prior proceedings and learn that previous court had suppressed identification testimony.

People v. Jackson, 568 N.Y.S.2d 177 (N.Y. App. Div. 1991). Counsel ineffective for failing to move to dismiss non-felony indictments based on state's noncompliance with statutory speedy trial requirement.

State v. Garrett, 600 N.E.2d 1130 (Ohio Ct. App. 1991). Counsel ineffective for failing to move to suppress a telephonic warrant when no state law permits a telephonic warrant.

Dupree v. State, 305 S.C. 285, 408 S.E.2d 215 (1991). Trial counsel ineffective for failing to pursue at suppression hearing the issue of whether police sergeant's alleged threats rendered the defendant's statement involuntary when there is a reasonable probability that the judge would have suppressed the statement which contained the only evidence of guilty knowledge in the trial for receiving goods.

State v. Smith, 410 S.E.2d 269 (W. Va. 1991). Trial counsel ineffective in murder case for failing to move to suppress the defendant's blood-stained pants seized only after seven hours of "processing" during which defendant was beaten by officers and suffered cuts, bruises, and a perforated eardrum.

1990: *People v. Egge*, 551 N.E.2d 372 (Ill. App. Ct. 1990). Counsel ineffective for failing to move to withdraw guilty plea where trial court failed to admonish the defendant regarding the rights waived by a guilty plea.

People v. Thomas, 459 N.W.2d 65 (Mich. Ct. App. 1990). Counsel in drug case ineffective for failing to move to suppress evidence based on illegal arrest because no probable cause.

***Capital Case**

State v. Fennell, 578 A.2d 329 (N.H. 1990). Counsel ineffective for failing to move to dismiss the indictment where one victim's testimony at best established sexual contact but did not establish penetration required for aggravated felonious sexual assault of seven year old.

Commonwealth v. Lester, 572 A.2d 694 (Pa. Super. Ct. 1990). Counsel ineffective for failing during suppression hearing to elicit the testimony of the defendant who claimed that his confession was involuntary because based on police promised of sexual services.

State v. Tarica, 798 P.2d 296 (Wash. Ct. App. 1990). Trial counsel ineffective in theft of car case for failing to move to suppress evidence seized from the defendant's wallet after he was arrested for a "traffic crime", handcuffed, and placed in the police vehicle.

State v. Glover, 396 S.E.2d 198 (W. Va. 1990). Trial counsel ineffective for failing to file a timely notice of alibi defense where alibi was the only available defense and because of lack of notice the defense was precluded from presenting evidence to corroborate the defendant's alibi testimony.

1989: *Arencibia v. State*, 539 So. 2d 531 (Fla. Dist. Ct. App. 1989). Trial counsel ineffective for failing to raise issue of competency of 7 year old child to testify for state in prosecution for sexual battery of child.

People v. Brown, 535 N.E.2d 66 (Ill. App. Ct. 1989). Counsel ineffective for failing to file a motion to withdraw the defendant's guilty plea after the trial court misinterpreted the sentencing limits.

People v. Vauss, 540 N.Y.S.2d 56 (N.Y. App. Div. 1989). Counsel ineffective for failing to challenge the admissibility of statement to police made after probable cause arrest in motel room without warrant after breaking the lock on the door. (Note: same result is doubtful after *New York v. Harris*, 495 U.S. 14 (1990).)

Perkins v. State, 771 S.W.2d 195 (Tex. App. 1989), *aff'd*, 812 S.W.2d 326 (Tex. Crim. App. 1991). Counsel failed to object to unlawful DWI arrest by police officer who had no authority to arrest because outside his jurisdiction.

State v. Carter, 783 P.2d 589 (Wash. Ct. App. 1989). Trial counsel ineffective for failing to move to dismiss after the amendment of the original charge of robbery to assault following a hung jury on the robbery charge because of state rule requiring dismissal of charge if the defendant has already been tried on a related charge.

1988: *People v. Alcazar*, 527 N.E.2d 325 (Ill. App. Ct. 1988). Trial counsel ineffective for failing to move for dismissal of charges on statutory speedy trial grounds.

***Capital Case**

Peeler v. State, 750 S.W.2d 687 (Mo. Ct. App. 1988). Counsel ineffective in murder case for failing to request an interpreter for defendant who suffered from severe hearing loss and was unable to understand what was being said during trial.

People v. Morgan, 530 N.Y.S.2d 609 (N.Y. App. Div. 1988). Counsel failed to request a hearing to challenge the voluntariness of defendant's confessions when one confession was uttered in response to a direct question without benefit of Miranda warnings and the second confession came in as hearsay.

City of Fairhorn v. Douglas, 550 N.E.2d 201 (Ohio Ct. App. 1988). Counsel ineffective in disorderly conduct case for failing to move to dismiss the charges on the ground that the police had entered the defendant's apartment without a warrant and the alleged disorderly conduct occurred inside the apartment.

Commonwealth v. March, 551 A.2d 232 (Pa. Super. Ct. 1988). Counsel ineffective in failing to move for a bill of particulars where the defendant was charged with rape and nonconsensual acts and the information included a new charge of corruption of a minor but the defendant did not know whether corruption based on consensual or nonconsensual acts and thus could not make knowing decision whether to testify. Defendant testified to consensual acts and was convicted only of corruption.

In re Bruyette, 556 A.2d 568 (Vt. 1988). Trial counsel ineffective for failing to file a motion to suppress defendant's statements made after custodial interrogation in which police refused the defendant's request to call an attorney. Counsel never advised defendant of issue, so defendant plead guilty where the state's evidence would have been insignificant without statements.

1987: *People v. Fernandez*, 516 N.E.2d 366 (Ill. App. Ct. 1987). Trial counsel ineffective in rape case for failing to move for suppression of two retarded defendants' confessions until three days into trial because of mistaken belief that oral statements could not be admitted at trial.

People v. Ellsworth, 520 N.Y.S.2d 386 (N.Y. App. Div. 1987). Counsel ineffective for failing to request a hearing to determine the admissibility of evidence seized from search of defendant where evidence preceding search showed only that the police received a call about an individual who was apparently lost and the defendant fled when police attempted to question him.

Cooke v. State, 735 S.W.2d 928 (Tex. App. 1987). Counsel ineffective for failing to move to suppress based on warrantless arrest in apartment and tainted out of court identification where the defendant was taken to the victim's apartment.

1986: **State v. Fisher*, 730 P.2d 825 (Ariz. 1986). Counsel ineffective in motion for new trial for failing to prepare and present available evidence to support a post-trial unsworn confession of guilt by the defendant's wife. Physical evidence at trial showed that it was equally as likely that it was defendant

***Capital Case**

or his wife, wife refused to testify based on 5th amendment right, and the state's strongest evidence was the defendant's confession made after the police read his wife's statement to him. At the motion for new trial, counsel did not secure the presence of witness to whom wife confessed prior to defendant's trial and other witnesses who could verify that she had consistently confessed her own guilt.

Sanders v. State, 715 S.W.2d 771 (Tex. App. 1986). Counsel ineffective for failing to discuss written statement with defendant or challenge its admissibility when the defendant could not read or write.

1985: *Carter v. State*, 702 P.2d 826 (Idaho 1985). Counsel ineffective in manslaughter prosecution for failing to move to suppress testimony of deputy sheriff to effect that defendant made statement during custodial interrogation that victim was unarmed when final shots were fired. This testimony was inadmissible because defendant had made at least one equivocal request for counsel prior to statements being made.

People v. Carroll, 475 N.E.2d 982 (Ill. App. Ct. 1985). Trial counsel ineffective for failing to apprise trial court of pretrial motion to suppress statements which had been sustained in a previous proceeding when state offered statements into evidence.

***Capital Case**

4. PROSECUTION EVIDENCE OR ARGUMENT

a. U.S. Court of Appeals Cases

2002: *United States v. Hylton*, 294 F.3d 130 (D.C. Cir. 2002). Counsel ineffective in conspiracy to smuggle cocaine case for failing to object to co-conspirator testimony as derivative of the defendant's immunized statements. Following arrest, on the advice of counsel, the defendant entered into a "debriefing agreement," which provided that no statements made would be used directly against the defendant and the government could make derivative use of leads provided by the defendant. The defendant gave statement providing information on the importation of drugs and his relationship with a co-conspirator. Prior to trial, the defense moved to exclude the evidence derived from this debriefing. Because counsel had been involved in the debriefing sessions, counsel withdrew and the court appointed new counsel. The court determined that the defendant's waiver of his Fifth Amendment rights had not been knowing and intelligent. Government did not appeal that finding. The parties then proceeded on the assumption that *Kastigar v. United States*, 406 U.S. 441 (1972), controlled and the defendant would be entitled to a hearing in which the government would have the burden of showing that none of the evidence to be presented at trial was derived from the defendant's debriefing. No hearing was held because government counsel stipulated that a drug courier and co-conspirator would not be called to testify. During the trial the jury found the defendant not guilty on several counts and hung on the remainder of the charges. During the second trial, the government proceeded with the same evidence but also called the co-conspirator to testify. The co-conspirator had plead guilty and entered into a cooperation agreement with the government. Following conviction a newly appointed counsel moved for a new trial on the basis of ineffective assistance of counsel and proffered a witness who would testify that the co-conspirator had agreed to cooperate only after he was confronted with the defendant's debriefing statements. Counsel's failure to raise *Kastigar* was "simply inexcusable." *Id.* at 134. The court found that the defense had nothing to lose in putting government to its burden and the possible benefit in excluding the co-conspirator testimony was significant. Prejudice found because the co-conspirator testimony greatly strengthened the government's case.

2001: *Burns v. Gammon*, 260 F.3d 892 (8th Cir. 2001). Counsel ineffective in pre-AEDPA attempted rape case for failing to object to the prosecutor's improper comment in the rebuttal closing argument that asked the jury to consider that the defendant, by exercising his constitutional right to a jury trial and to confront witnesses, forced the victim to attend trial, take the stand, and relive the attack. The defendant was prejudiced due to the lack of objection because the defense had no opportunity to respond to the rebuttal argument and the defendant was denied an appropriate cautionary instruction. Cause for failure to raise on direct appeal established since the appellate counsel was conflicted because he was employed by the same public defender office as the trial counsel and prejudice established by the prejudice at trial, as opposed to the lack of prejudice on appeal since the ineffective assistance claim could have been brought in post-conviction proceedings.

*Capital Case

2000: *Washington v. Hofbauer*, 228 F.3d 689 (6th Cir. 2000). Under AEDPA, counsel ineffective in criminal sexual conduct case with girlfriend's daughter for failing to object to the prosecutor's acts of misconduct in improperly emphasizing evidence of defendant's bad character during closing argument, and stating that victim's story had not changed over time when there was no evidence to support such an assertion. The prosecutor's argument was improper because, "while the evidence as to [the defendant's] character was admissible for certain limited purposes, the prosecutor went far beyond the bounds of permitted conduct when presenting that evidence to the jury." Specifically, the prosecutor explicitly urged the jury to consider the defendant's unseemly character when rendering their verdict. He attacked the defendant as a "self-serving, illogical selfish non-compassionate, no emotional interest in a family type of person," who acted irrational due to "drugs and alcoholism and a general not caring about other people." He then argued that the crime "[s]ure fits him." "Because this character attack pervaded the closing argument and rebuttal, we find that the prosecutor's misconduct was severe." The prosecutor also mischaracterized the alleged victim's "story as having been consistent over time when there was no evidence supporting that factual assertion." The prosecutor referenced statements to her mother, a doctor, a social worker, a police officer, and preliminary testimony but there was no evidence presented as to what these statements were or whether or not her story had changed. The state court's finding that counsel was not ineffective in failing to object "was not simply incorrect, but was objectively unreasonable, meeting even the high threshold required by the AEDPA." "While a minimally competent lawyer would have recognized these statements to be blatantly improper and highly prejudicial, requiring an objection and curing instructions, [counsel] said nothing." "[H]is silence arose from incompetence and ignorance of the law, rather than strategy." In essence, counsel mistakenly assumed that once he had introduced evidence as part of his defense to explain the alleged victim's motive to make false allegations, the State could use it in any manner it desired. "This basic misunderstanding of universal trial and evidence principles falls well below an objective standard of reasonableness." Finding that the state court had engaged in "an 'objectively reasonable' application of *Strickland* [in finding this conduct to be acceptable] would be to dilute our review under the AEDPA to a generous apology for the clearest of errors." Counsel's conduct in failing to object to the prosecutor's characterization of statements not in evidence was also deficient. Counsel's conduct was not justified by counsel's belief that the jury knew the statement was false or fear that "an objection would do more harm than good because it would focus the jurors' attention on the prosecutor's statement even if the court instructed them otherwise." The "fear" reason was rejected because, "accepting as a proper trial strategy a lawyer's doubts over the effectiveness of objections and curative instructions would preclude ineffectiveness claims in every case such as this, no matter how outrageous the prosecutorial misconduct might be." In addition, the court "must presume that juries follow their instructions." The belief that the jury knew the prosecutor's argument was false was "not strategy, but absolute folly" because there was no evidence in the record either way. "[t]he failure to object was based on simple incompetence, and not on sound trial strategy." Prejudice established because "this trial was a credibility contest." Counsel's ineffectiveness served as cause and prejudice for the default of the prosecutorial misconduct claim, which required relief on its own merits.

***Capital Case**

- 1996:** *Gravley v. Mills*, 87 F.3d 779 (6th Cir. 1996). Ineffective assistance of counsel constituted “cause and prejudice” sufficient to allow federal court to review claim that was not preserved in state court. Trial counsel was ineffective for repeatedly failing to object to prosecution’s improper comments concerning defendant’s postarrest silence and for failing to preserve these issues by way of the post-trial motion for new trial.
- Crotts v. Smith*, 73 F.3d 861 (9th Cir. 1996). Counsel ineffective in assault on police officer case for failure to object to prosecution’s cross-examination of defendant concerning a boastful statement made to a third party that he had previously “killed a cop” where the jury was aware that defendant was on parole for an undisclosed felony and there was no evidence that statement was true.
- 1994:** *Mason v. Scully*, 16 F.3d 38 (2d Cir. 1994). Counsel ineffective for failure to object to testimony by police detective about hearsay statement of non-testifying co-defendant.
- 1991:** *Atkins v. Atty. Gen. of Alabama*, 932 F.2d 1430 (11th Cir. 1991). Counsel ineffective for failing to object to fingerprint card with notation regarding previous arrest being admitted into evidence.
- 1988:** *Chatom v. White*, 858 F.2d 1479 (11th Cir. 1988). Defense counsel’s failure to object to admission of atomic absorption tests results was IAC, in murder prosecution; conditions under which the test was administered were questionable at best, & the question of D’s guilt beyond a reasonable doubt was a close one.
- 1985:** *Lyons v. McCotter*, 770 F.2d 529 (5th Cir. 1985). In a state prosecution for aggravated robbery with a deadly weapon, failure of defense counsel to exclude or in any way limit cross-examination testimony indicating that defendant had been previously convicted of a similar offense was IAC where prior conviction would have almost certainly been excluded under Texas law, similar conviction was highly prejudicial, & lack of any limiting instruction enabled prosecutor to refer to defendant’s prior conviction in his closing argument.

b. U.S. District Court Cases

- 2003:** *Leonard v. Michigan*, 256 F. Supp. 2d 723 (W.D. Mich. 2003). Counsel was ineffective in rape case for failing to adequately prepare and to challenge the state’s DNA evidence. The crime was committed in 1986 by two assailants. In February 1991 the police identified all but one of the unknown fingerprints at the crime scene to a suspect. That suspect agreed to plead guilty in exchange for dismissal of several charges, recommendation of a lower sentence, and identification of his accomplice. The suspect identified the defendant as his accomplice. The one remaining fingerprint from the crime scene did not match the defendant. The defendant was tried in a bench trial in 1994 and convicted on all charges. Despite his knowledge that the only evidence aside from the suspect’s testimony was an alleged DNA match from the crime scene, the defense counsel waited until just prior to trial to request an expert and failed to file a formal motion for an expert. During the pretrial suppression hearing, “Defense counsel’s cross-examination of the State’s experts was

***Capital Case**

minimal and failed to address any area of controversy, such as methodology, human error, contamination, lack of expertise, or bias.” Then, following the suppression hearing, defense counsel agreed to stipulate to admission of the expert’s testimony during the trial, which relieved the prosecutor of the burden to recall these experts, “even though the issue at trial, weight of the DNA evidence, was different from the issue at the suppression hearing, which was admission of the DNA evidence.” Counsel never challenged the validity of the DNA analysis even though a different procedure was used to identify the defendant’s DNA and the DNA from the samples from the crime scene and the co-defendant’s DNA. While the court recognized that there is no requirement that the defense counsel be an expert in DNA analysis to satisfy Sixth Amendment standards, the court held that “[r]eading an academic article is not sufficient in a case where the critical evidence is complicated biological evidence requiring expert understanding to challenge.” Counsel’s failure to prepare to challenge this evidence was unreasonable. The defendant was prejudiced because the trial court that had conducted the bench trial provided testimony that he credited the state’s DNA evidence because it was unchallenged. Counsel also admitted “his lack of preparedness and ignorance with respect to DNA analysis.” Nonetheless, the state court ignored this evidence. “While a court should not critique an attorney’s performance with the benefit of hindsight, in this case, the court is only reiterating what the trial judge identified as defense counsel’s deficiencies and accepting defense counsel’s own statements.” Defense counsel had not even obtained copies of documents to which witnesses were referring and reviewed those documents at the time of the suppression hearing.

How defense counsel could have proceeded to trial, knowing the critical piece of information against his client was DNA evidence, without further reviewing the experts’ reports, protocol, and analysis is almost incomprehensible and certainly unreasonable. Defense counsel’s almost complete lack of preparation for this trial is indefensible. He himself admitted he lacked the requisite knowledge to question the experts and expressed jealousy for the prosecutor’s access to an expert. In light of the circumstances of this case and the central role the DNA evidence played in conviction, defense counsel’s lack of preparation is the definition of ineffective assistance of counsel and for the court of appeals to have found otherwise is unreasonable.

Under the AEDPA the state court’s decision was unreasonable because “[o]bjective review of the facts demonstrates Petitioner’s defense counsel did not ensure Petitioner was provided a fair trial having a just result.”

c. State Cases

2003: *Butler v. State*, 108 S.W.3d 18 (Mo. Ct. App. 2003). Counsel was ineffective in forcible sodomy case for failing to object to inadmissible expert testimony concerning hair analysis and its significance. The defendant was charged with sexually assaulting two teenage boys. Following the assault, an unidentified head hair and an unidentified pubic hair, were recovered from the sixteen year old, who was anally sodomized. Twenty months after the crime, the defendant became a

***Capital Case**

suspect and the police collected hair and blood samples from him. Following his first trial, a mistrial was declared. In his second trial, neither of the two boys was able to give a positive identification, and there was no admission by the defendant. The state's expert on hair analysis testified that hair comparisons were not accepted by the scientific community as reliable in unequivocally making positive identifications. Nonetheless, she testified that she found a "very strong probability" that the two unidentified hairs collected from the victim came from the defendant and she testified that she had never seen a case where both an unidentified head hair and an unidentified pubic hair matched a suspect. She quantified this as "like double significance of evidence." On direct appeal, the defendant challenged the sufficiency of the evidence and the court split with some judges noting that the expert's testimony was not admissible but that it could be considered by the court as it could be by the jury because the defense had failed to object. During post-conviction, defense counsel acknowledged that he was aware of what the expert's testimony would be because she testified in a similar fashion in the first trial. He also acknowledged that he had extensively reviewed treatises and articles on hair comparison analysis and was certain that there was no scientifically accepted basis for her testimony. Nonetheless, he stated that he did not believe that a challenge to admissibility would be granted and he decided instead to try to surprise the expert on cross examination. The court held:

Based on the foregoing, it is apparent that counsel's trial strategy in not objecting to the testimony was formed on the basis of either erroneous interpretations of the law or failure to sufficiently review the relevant case law. Counsel could not have made an intelligent and informed decision about trial strategy without adequately assessing his chances of success in asserting a *Frye* challenge and the consequences of failing to make such a challenge. Given the existence of a meritorious objection to the positive identification and quantification testimony, the State's obvious need to rely upon the hair comparison evidence, and the inability of counsel to later challenge the reliability of that testimony in arguing the insufficiency of the evidence, the strategy adopted by counsel was simply not reasonable."

Prejudice was found because, if counsel had objected to the inadmissible testimony, there is a reasonable likelihood that the court would have found that there was insufficient evidence to submit the case to the jury at trial or that the court would have found insufficient evidence on appeal. Nonetheless, because of trial counsel's failure to object and the uncertainties of how the state would have proceeded otherwise, the court remanded for a new trial rather than dismissing the charges.

State v. Faust, 660 N.W.2d 844 (Neb. 2003). Counsel was ineffective in first-degree murder case for failing to object to numerous instances of improper negative character evidence. The defendant was charged with killing her husband's lover and a bystander, who tried to assist the lover as she was dying. In defense, the theory was that the defendant's husband had killed his lover and the defendant presented a number of witnesses to testify to her peaceful character. In rebuttal, the state presented witnesses to testify to specific instances of violent and aggressive behavior by the defendant. The state was also allowed to examine the defendant's daughter in a similar fashion even

***Capital Case**

though she was called as a state's witness and did not offer any testimony concerning the defendant's character. During the testimony of the first state's rebuttal witness, the lover's husband, counsel objected, on the basis of state Rule 404 (analogous to Federal Rules of Evidence), to testimony that the defendant had cursed and been aggravated previously with the victim. The state abandoned its argument that this testimony was independently admissible under Rule 404 and asserted that the testimony was admissible as rebuttal evidence to the defendant's character evidence. The court admitted the testimony for that purpose and gave a limiting instruction without ever considering the application of Rule 405 and/or Rule 403. Everyone involved "was on the wrong page," because they stopped at Rule 404 that allowed rebuttal of character evidence, but they failed to consider Rule 405 prohibiting rebuttal with specific instances of conduct. *Id.* at 875. The trial court committed the initial error, but then defense counsel's conduct was deficient because counsel failed to object after that to improper specific instance rebuttal evidence of numerous annoying calls to the lover's husband, testimony concerning an angry exchange with the husband's friend, and aggressive and violent behavior to the husband, including pointing a gun at him twice. The state was also improperly allowed to elicit through the defendant's daughter, who did not offer character evidence, testimony and extraneous evidence of yelling and lying about her husband's conduct. Counsel's conduct was deficient because Rule 405 limits character evidence and its rebuttal to reputation or opinion, unless the character trait is an essential element of a charge, claim, or defense. Here, a character trait for violence or peacefulness was not an element of the crime charged or an asserted defense. Under Rule 405, the state was limited to cross-examining the defendant's character witnesses with specific instances to test the basis of their knowledge, but the state was required to accept the witness' answers. Even in circumstances, like here, where the defense was improperly allowed to use specific examples of good conduct, the door was not opened to the state's improper rebuttal evidence. Prejudice was found because "the State was able to parade before the jury a series of witnesses whose testimony was not only inadmissible but also prejudicial." *Id.* at 869. This testimony also came "at the end of the trial where it was fresh in the juror's memories and wafted an unwarranted innuendo into the jury box just before the jury entered deliberations." *Id.* While this court had never reversed a conviction on direct appeal for ineffective assistance of counsel, the Court found that there could be no reasonable strategy to explain counsel's conduct. Even if counsel wanted to avoid continuously objecting and emphasizing the evidence before the jury, "such a strategy is not reasonable when the objectionable testimony is so extensive and damaging. Further, counsel could have requested a continuing objection." *Id.* at 871-72. The court also noted that *Massaro* still allows, in instances of obvious deficiencies, for appellate courts can still address ineffective assistance of counsel claims. *Id.* at 870. While not addressing the actual ineffectiveness of other issues, the court also stated that counsel should have: (1) objected to an instruction on self-defense when that was not the defendant's theory and the defense had not presented any evidence on the issue; and (2) objected to pictures of the victim's while still alive, which had no evidentiary value.

2002: *Sanchez v. State*, 351 S.C. 270, 569 S.E.2d 363 (2002). Counsel ineffective in criminal sexual conduct with a minor case for failing to object to hearsay testimony. The six year old alleged victim testified about the alleged assault. Her mother and father also testified and included hearsay

***Capital Case**

statements from the victim concerning details of the assault and the identity of the perpetrator. Counsel testified that he did not object to this hearsay because it did not alter the victim's testimony and that some of the statements were different. Counsel's conduct was deficient because while limited corroborative testimony is allowed in criminal sexual conduct cases the corroborative evidence is limited to the time and place of the assault and can not include details or particulars or the identity of the perpetrator. Thus, the mother's and father's testimony was clearly inadmissible. Prejudice found because improper corroboration testimony that is cumulative to the victim's testimony cannot be harmless. "[I]t is precisely this cumulative fact which enhances the devastating impact of improper corroboration." Counsel's conduct was also deficient in failing to object to the testimony of a police officer concerning the alleged victim's statement and actions with anatomically correct dolls. Counsel's alleged strategy to allow this testimony was to show that the victim's statements were vague. "Because the officer's testimony regarding the dolls corroborated the victim's testimony at trial, counsel's strategy was not reasonable given to the judicial effect this testimony had."

Matthews v. State, 350 S.C. 272, 565 S.E.2d 766 (2002). Counsel ineffective for failing to object to prosecutor vouching for the credibility of a state witness in her argument. Counsel agreed remarks were improper but did not object because he did not want judge to admonish him for objecting during argument or give the state additional time to argue (both of which had already happened). Counsel's reasons insufficient because "counsel cannot assert trial strategy as a defense for failure to object to comments which constitute an error of law and are inherently prejudicial." Prejudice also found because this was a mass drug conspiracy trial with numerous witnesses where the state's evidence was pretty much all people "higher" in the conspiracy testifying for reduced sentences.

Gilchrist v. State, 350 S.C. 221, 565 S.E.2d 281 (2002). Counsel ineffective in attempted common law robbery case due to counsel's failure to object to prosecutor's improper vouching for witness's credibility in opening statements. The prosecutor essentially gave personal assurance of the witness's veracity in "religiously-tinged language." Prejudice found because the witness at issue was the state's key witness and his credibility was crucial to the state's case.

2001: People v. Donaldson, 113 Cal. Rept. 2d 548 (Cal. Ct. App. 2001). Counsel ineffective in child endangerment case for failing to object to prosecutor calling herself as a witness to impeach the credibility of a key prosecution witness, whose credibility was the critical issue at trial. The witness testified at trial that her previous inculpatory statements to police were lies. Counsel did not object to the prosecutor testifying, instead objecting only to the narrative fashion of that testimony. Counsel even elicited information from the prosecutor on cross that the prosecutor believed the initial inculpatory statements. Counsel also failed to object to the prosecutor's closing argument expressing her personal belief in the defendant's guilt.

Mann v. State, 555 S.E.2d 527 (Ga. Ct. App. 2001). Counsel ineffective in sodomy case for failing to object to the testimony of a police investigator and a professional counselor that they believed the victim when he said he had been sexually abused. After the jury had already heard much of this

***Capital Case**

testimony, the defense objected at a bench conference and the judge sustained. The jury had already heard the testimony though and no instruction was given to the jury to disregard the testimony, and no other type of curative instruction was asked for or given. Prejudice was found due to this improper testimony because the case was otherwise based only on the credibility of the alleged victim and the defendant when the victim refused to answer many of the questions during the trial and had only initially reported the abuse when he had himself been in trouble for committing sexual acts on another child.

Schaefer v. State, 750 N.E.2d 787 (Ind. Ct. App. 2001). Counsel ineffective in child molestation and incest case for failing to properly preserve the record with respect to the state's improper admission of medical records with only an affidavit from the records custodian as foundation. Counsel objected that the records were not properly admissible under the hearsay exception for statements made for purposes of treatment and objected that the records had not been provided until the morning of trial. The court held that both of these objections were properly overruled, but found that admission was improper because the records contained opinions, which are not admissible under the business records hearsay exception. The opinions included "blunt force trauma" causing vaginal injuries. The court held that admission of the records was thus improper because there was no showing that the person giving the opinion was properly qualified as an expert and because the defendant was denied the right to cross-examination of this person. Prejudice found because aside from these records the trial was a credibility contest between the defendant and the alleged victim.

State v. Robinson, 784 So. 2d 781 (La. Ct. App. 2001), *writ granted*, 816 So. 2d 846 (2002). Counsel ineffective in possession of drug case for failing to request a mistrial or admonition following the prosecutor's improper argument that the defendant had previously "earned a living selling crack." The evidence during trial revealed only a prior arrest related to narcotics and that the defendant hung out with drug dealers. Counsel objected and the court sustained but counsel failed to move for mistrial or admonition. Prejudice found because sole defense was that officers planted drugs and the trial was simply a credibility contest. Thus, this argument may have improperly influenced the jury.

Dawkins v. State, 346 S.C. 151, 551 S.E.2d 260 (2001). Counsel ineffective in criminal sexual conduct case for failing to object to the hearsay testimony of four witnesses that the alleged victim told them the identity of the perpetrator. While limited hearsay corroborative testimony is allowed in sexual assault cases, this corroboration is limited to the time and place of the assault and cannot include details or particulars, such as identification of the perpetrator. The defendant was prejudiced because improper corroboration that is merely cumulative to the victim's testimony cannot be harmless. Moreover, where the alleged victim's credibility was the central issue at trial, counsel's ineffectiveness could not be excused by a strategy to avoid upsetting or confusing the jury, especially since this issue could have been litigated outside the presence of the jury.

2000: *Ridenour v. State*, 768 So.2d 480 (Fla. Dist. Ct. App. 2000). Counsel ineffective in aggravated battery case for failing to object and advising defendant to answer affirmatively when state

***Capital Case**

impeached defendant with a prior conviction that was invalid because “adjudication had been withheld.” Prejudice found where the case was solely a credibility contest. Counsel also failed to call witnesses to support defendant’s claim of self-defense. Counsel’s conduct was deficient and based on an unreasonable strategy to introduce the witnesses’ statements through inadmissible hearsay evidence.

Eure v. State, 764 So.2d 798 (Fla. Dist. Ct. App. 2000). Counsel in drug possession and sale case ineffective for failing to object to prosecutor’s numerous improper statements during closing argument. Prosecutor argued “you can tell your families you were in court with a drug dealer. That’s the drug dealer,” which effectively made the prosecutor a witness. Prosecutor also improperly sought to buttress the former police officer’s testimony by reference to matters outside the evidence, when he told jury that it should release defendant if it believed the former officer lied when making two police reports while he was conducting investigation and when he swore to arrest warrant, all matters not in evidence. Prosecutor also argued that the jury should acquit if they believed the officer was lying about defendant selling him cocaine, and they should convict if they believed the officer was not lying, amounted to a misinstruction on the law, as jury could have determined that the State had not met its burden of proof without finding that the officer deliberately lied. Finally, prosecutor’s statement, that cocaine was bane of our existence and that defendant was man who caused it, was an improper “message to the community” argument, aimed at the jurors’ most elemental fears of a lawless community that could endanger the jurors and their families.

State v. Caraballo, 750 A.2d 177 (N.J. Super. Ct. App. Div. 2000). Counsel ineffective in murder case for failing to object to improper unsworn statements and improper admission of hearsay. Defendant charged with two murders that occurred in “street confrontation.” One witness, who testified, gave a detailed, graphic description of events and identified the defendant as the shooter. Three other witnesses had given statements to police essentially corroborating the first witness and identifying defendant. Each of these witnesses was called to testify during trial. The first refused to take oath or affirm he would testify truthfully. Court instructed him to answer questions anyway and instructed jury to bear in mind that he refused to take the oath. This witness disavowed prior statement to police and court allowed prior statement to be admitted as prior inconsistent statement. Appellate court found this was error because a prior inconsistent statement can be admitted only to impeach “testimony.” Because the witness refused to take oath of any kind, these unsworn statements was not “testimony.” Second witness also refused oath and affirmatively stated he would not tell the truth and cooperate because he was afraid for his life. This witness acknowledged the statement to police but did not confirm or deny the truth of the identification of the defendant. Prosecutor did not offer the prior statement into evidence but continually introduced the content of the statements in his questions allegedly to “refresh recollection.” Appellate court found this was error because witness did not state he could not recall, he simply refused to cooperate. Third witness did take oath but testified that he was intoxicated and could not identify the shooter. He acknowledged prior statement but said he lied to the police to deflect suspicion from himself. Again the prosecutor did not offer statement, but conveyed content to jury allegedly to neutralize the “surprise” harmful testimony of the witness. Appellate court found this was error because even if

***Capital Case**

this testimony was a “surprise” after the other two witnesses, a prior statement used in this case is admissible only as impeachment evidence and not substantive evidence and trial court must give a limiting instruction, which was not done here. Court found that trial court erred in requiring witnesses to answer questions when they refused oath and erred in allowing admission of prior statements. Trial counsel ineffective because counsel sat idly through all of this. “[P]rosecutor was thus given an open sesame to the admission of tainted evidence.” *Id.* at 553. Court also noted that trial counsel had filed notice of appeal but refused to file brief despite orders to do so, which prompted court to appoint new counsel and refer trial counsel to ethics commitment for lack of diligence.

McFadden v. State, 342 S.C. 637, 539 S.E.2d 391 (2000). Counsel ineffective in drug case for failing to object to prosecutor’s argument that he only had one closing because the defense presented no evidence,³ which was essentially a comment on defendant’s right to silence. Defendant was prejudiced by this single reference because his exculpatory story was not totally implausible, the evidence of guilt was not overwhelming, and the trial court’s general charge on defendant’s right not to testify did not cover this situation. Counsel also ineffective for failing to object to the prosecutor’s argument that the jury could infer guilt because the defendant left after jury selection and was tried in absentia and failing to request an instruction provided by state law that the jury could not infer guilt from the defendant’s absence.

Edmond v. State, 341 S.C. 340, 534 S.E.2d 682 (2000). Counsel ineffective in burglary and grand larceny case for failing to object to detective’s testimony and prosecutor’s comments regarding petitioner’s invocation of his rights to counsel and to remain silent, as jurors may have used testimony and comments to infer petitioner was guilty simply because he exercised his rights, and circumstantial evidence of petitioner’s guilt was not overwhelming.

Green v. State, 338 S.C. 428, 527 S.E.2d 98 (2000). Counsel ineffective in distribution of crack cocaine case for failing to object that the probative value of two prior possession of cocaine charges used to impeach the defendant was outweighed by the prejudice. Defendant was arrested in an undercover sting operation but the evidence essentially was a match of credibility between the defendant’s testimony and that of the officers. Prejudice found because of the limited impeachment value of the prior offenses, the remoteness of the prior convictions, the similarity between the past crimes and the charged crime, the importance of the defendant’s testimony, and the centrality of the credibility issue in this case.

1999: *People v. Burnett*, 83 Cal. Rptr. 2d 629 (Cal. Ct. App. 1999). Counsel ineffective in felon in possession of weapon case for failing to object when the state charged on the basis of one incident

³Under state law, the defendant was entitled to the final closing argument only if he presented no evidence in defense. Otherwise, the state was entitled to open and close.

***Capital Case**

but then presented evidence of two incidents, which allowed the jury to convict on either incident when the second one was not included in the information or addressed at the preliminary hearing.

Woody v. State, 745 So.2d 1033 (Fla. Dist. Ct. App. 1999). Counsel ineffective in attempted murder case for failing to object to admission of a videotape of the defendant's voluntary pretrial statement. Counsel did not review the tape prior to trial. Defendant was charged with slashing a prostitute's throat after consensual sex. He admitted act but said it was self-defense. The tape included the defendant's statements that he had stolen a motorcycle, was on probation, "trolled" for prostitutes, "horniness" had cost him lots of money, agreement to take a polygraph, that he had smoked marijuana and been through drug treatment, and that he had been "cold-blooded" all his life. Prejudice found because the case was solely a credibility issue between the defendant and the prostitute.

Garland v. State, 719 N.E.2d 1184 (Ind. 1999). Counsel ineffective in murder case for failing to properly object to admission of co-defendant's videotaped statement in joint trial where codefendant did not testify and statement implicated defendant. Defendant was charged along with son/codefendant of killing her husband. Son implicated mom/defendant in lengthy statement. Defense counsel objected to relevance and the fact that son was in prison clothes but failed to object on Bruton grounds.

1999: *Hudgins v. Moore, 337 S.C. 333, 524 S.E.2d 105 (1999). Trial counsel was ineffective for failing to object when the solicitor cross-examined the defendant at the guilt or innocence phase of trial by reading back to him his own answers to true-false questions that were part of an MMPI-A (a standardized psychological test) administered as part of a pretrial competency evaluation at the State Hospital. The cross-examination was intended to impeach the defendant's character for truthfulness where he initially said he was the shooter but then testified at trial that his co-defendant was the shooter and he had told the police otherwise only because the codefendant was like a brother and he thought if he accepted responsibility the state would be more lenient with him since he was only 17 and his codefendant was 18. While the court found no constitutional violation, the court held that the state's use of test materials derived from a pretrial competency evaluation to assist in winning a conviction violated *State v. Myers*, 67 S.E.2d 506 (S.C. 1951), which precludes use of information gathered during court-ordered examination except for purposes ordered by the court. The failure to prevent this cross-examination was prejudicial both because of the importance of the defendant's credibility given the facts of the case, codefendant said he was the shooter and he testified that codefendant was the shooter, and because defense counsel's attempt to explain away the test results led them to call a psychiatrist who made damaging and otherwise inadmissible statements (in the trial phase) about the defendant's antisocial character on cross-examination.

Ramirez v. State, 987 S.W.2d 938 (Tex. App. 1999). Counsel ineffective in sexual assault on wife and injuring children case. Wife initially made statement to police and then recanted prior to trial. The prior statement was not admissible under the hearsay exception for a statement against penal interest. The state improperly called the wife as a witness for the purpose of impeaching her with

***Capital Case**

the otherwise inadmissible prior statement and the defense counsel failed to object or request a limiting instruction. Prejudice found because this hearsay was the only evidence identifying the defendant as child abuser. Other evidence established only that the defendant was one of several people with the opportunity to abuse.

1998: *Peebles v. State*, 958 S.W.2d 533 (Ark. 1998). Counsel ineffective in rape of three-year old case for failing to introduce the child's inconsistent statements recanting his incriminating statements. Child did not testify at trial, but his mother was allowed to testify under child-hearsay exception that son told her that he and the defendant bit each other's "dingdongs." During a pretrial hearing, the child denied five times that the defendant had done anything to him. Court held counsel was ineffective for failing to cross-examine the witnesses mother concerning these statements based on the pretrial transcript, because evidentiary rules allow impeachment of out-of-court declarant when that declarant's hearsay statements are admitted.

Ross v. State, 726 So. 2d 317 (Fla. Dist. Ct. App. 1998). Counsel ineffective in battery on law enforcement case for failing to object to the state's improper closing argument that bolstered the officer's credibility and attacked and ridiculed the defendant, the defense, and the defense witnesses.

Kegler v. State, 712 So. 2d 1167 (Fla. Dist. Ct. App. 1998). Counsel ineffective in murder case for failing to impeach an alleged eyewitness with statements he made to police on the night of the murder which were inconsistent with trial testimony. At trial, witness testified that he had seen the defendant and another shoot the victim and run. On the night of the shooting, the witness told police that he heard two gunshots and saw two men running, but that he could not identify the man or the location of the crime. The victim had gunpowder residue and was initially arrested for the murder. His statements changed five months later only after another witness surfaced.

People v. Valentine, 700 N.E.2d 700 (Ill. App. Ct. 1998). Counsel ineffective in aggravated battery case where defendant charged with beating girlfriend. He said she shot at him so he beat her; she said he beat her so she shot him. Case was he said/she said. Defendant had a prior theft conviction and had four prior battery arrests. Court allowed state to use conviction as impeachment over defense objection. During defendant's testimony, defense counsel asked if he had ever been arrested for anything involving violence in 1993-94 and the trial court held that defense had opened the door. State was then allowed to question the defendant about his prior battery arrests from 1986-88. Counsel was ineffective because the state could not have independently used the prior battery arrests to impeach the defendant. Counsel did not challenge this evidence prior to calling the defendant to testify and opened the door to the impeachment by eliciting testimony that gave a false impression of the defendant's criminal history. The court finds prejudice because the outcome depended on credibility of defendant and victim and defendant's credibility was undermined by the introduction of inadmissible evidence of the prior arrests.

Commonwealth v. Drass, 718 A.2d 816 (Pa. Super. Ct. 1998). Counsel ineffective in rape case for failing to move for a mistrial after repeated comments on the defendant's invocation of his right to

***Capital Case**

counsel and right to silence. During examination of police officer, the prosecutor elicited testimony that the defendant's mother said the defendant should talk to a lawyer and the interview ended. During cross of the officer, counsel elicited testimony that the defendant had a constitutional right to do so. During cross of the defendant, the state asked if an innocent person wouldn't go to the police and tell them what happened, and then asked if he was given an opportunity to talk to police. The defense finally objected, but failed to move for a mistrial. The court held that there was no conceivable reason for the failure to move for a mistrial and that the defendant was prejudiced because the evidence of guilt was by no means overwhelming. There was physical evidence of an assault, two witnesses who said the defendant boasted that he raped the victim, and another person who was present and said that the defendant was the rapist. The defendant testified that he was only joking about having committed the rape and that it was the other person present who committed the rape.

Simmons v. State, 331 S.C. 333, 503 S.E.2d 164 (1998). Counsel ineffective in burglary case for failing to object to improper argument by solicitor concerning the meaning of a life sentence. Under state law, jury in burglary case could find guilty (which meant, at the time, a mandatory life sentence) or guilty with a recommendation of mercy (which allowed judge to give a lesser sentence).⁴ The prosecutor's argument that a life sentence "is not the entire natural life of a person" injected the issue of parole into the proceedings. Likewise, the prosecutor's argument equated a recommendation of mercy with a much lighter sentence or an acquittal. The trial court instructed the jury that the court would sentence the defendant but gave no instruction which cured the errors.

State v. DeKeyser, 585 N.W.2d 668 (Wis. Ct. App. 1998). Counsel ineffective in sexual contact with 15-year-old granddaughter case for failing to know about the state law possibility of and failing to stipulate to elements of the offense in order to prohibit the introduction of other acts evidence. Granddaughter testified that defendant improperly touched her through blue jeans. Defendant testified to alibi. Essentially he said/she said. State called a second granddaughter who testified that four years earlier the defendant had touched her breasts when she was 15. If counsel had stipulated that the purpose of the alleged touching would have been for sexual gratification and that the victim was under 16, the state would not have been allowed to present the other acts evidence because it was relevant only to issue of sexual gratification. Counsel deficient for failing to know "the law relevant to his or her case" and the defendant was prejudiced despite the trial court's cautionary instruction because without this evidence the case was simply one of credibility.

1997: *Hidalgo v. State*, 689 So. 2d 1142 (Fla. Dist. Ct. App. 1997). Counsel ineffective in sexual assault of step-daughter case where the case was one of credibility between defendant and step-daughter who was an adult at the time of trial. Counsel moved prior to trial to exclude evidence of Battered Woman's Syndrome and motion was granted. During the trial, however, the state presented the

⁴South Carolina abolished the "recommendation of mercy" verdict and the mandatory life sentence in 1997.

***Capital Case**

evidence anyway and counsel objected on basis of hearsay and other evidentiary rules, but failed to draw the court's attention to the exclusionary order.

Commonwealth v. Scheffer, 683 N.E.2d 1043 (Mass. App. Ct. 1997). Counsel ineffective in child sexual abuse case where the only evidence of digital penetration was the five year old child's testimony. Counsel was ineffective for failing to seek voir dire of the child to determine whether prior allegations of abuse were sufficiently similar to the allegations against the defendant to explain the child's knowledge of sexual acts and terminology.

1996: *Rhue v. State*, 693 So. 2d 567 (Fla. Dist. Ct. App. 1996). Counsel ineffective in child sex abuse case for failing to object to testimony of psychologist and family members vouching for child's credibility.

Warren v. Baldwin, 915 P.2d 1016 (Or. Ct. App. 1996). Counsel ineffective in manslaughter case for failing to object to prosecutor's argument that the "reckless" element of manslaughter had been proven and the jury could find the element based on the defendant's alleged drug dealing earlier in the day, his prior convictions, and his assaultive behavior towards other victims earlier in the day. While this other evidence was admissible in the trial for other purposes related to other charges, this evidence was not relevant and could not be used to prove "recklessness" as required for manslaughter conviction.

German v. State, 325 S.C. 25, 478 S.E.2d 687 (1996). Counsel ineffective in possession with intent to distribute crack case for failing to object to prosecutor's argument and police officer's testimony that police had received several tips that the defendant was distributing or selling crack cocaine as this evidence was inadmissible as comment on defendant's character.

Owens v. State, 916 S.W.2d 713 (Tex. App. 1996). Counsel ineffective in aggravated assault case where girlfriend made statement and signed charges but then recanted at trial and defense counsel failed to object to prior written statement or request limiting instruction when the prior statement was the only evidence of guilt and it was admissible if at all solely for the purposes of impeachment and not as substantive evidence.

1995: *People v. Flewellen*, 652 N.E.2d 1316 (Ill. App. Ct. 1995). Counsel ineffective in attempted murder case for failing to object to inadmissible double hearsay from police officer and argument by prosecutor that the victim told the officer she had a conversation with an anonymous person who gave the victim the assailant's first name and address.

Fossick v. State, 317 S.C. 375, 453 S.E.2d 899 (1995). Counsel ineffective for failing to object to prosecutor's closing argument on guilt that the defendant showed no remorse.

***Capital Case**

1994: *Mincey v. State*, 314 S.C. 355, 444 S.E.2d 510 (1994). Trial counsel ineffective for failing to object to prosecutor's suggestions during closing argument that defense witnesses testified falsely due to intimidation by the defendant when there was no evidence of intimidation.

Jolly v. State, 314 S.C. 17, 443 S.E.2d 566 (1994). Trial counsel ineffective in criminal sexual conduct case for failing to object to witness' hearsay testimony that the alleged victim told the witness that the defendant had sexually assaulted her.

1993: *State v. Allen*, 853 P.2d 625 (Idaho Ct. App. 1993). Counsel ineffective in trial for lewd conduct with child where defendant and child were only witnesses for failing to object to child psychiatrist's inadmissible testimony that, in his opinion, the child was telling the truth when she reported that defendant had fondled and penetrated her vagina.

State v. Gay, 616 So. 2d 1290 (La. Ct. App. 1993). Counsel in drug case ineffective for failing to object to cross-examination of defendant which implied that there were more drugs and drug paraphernalia at the defendant's trailer.

Commonwealth v. Sugrue, 607 N.E.2d 1045 (Mass. App. Ct. 1993). Counsel in rape of child case ineffective for failing to object when fresh complaint witness testified to statements made by child victim about instances of sexual abuse other than the one incident which was the subject of the witness' testimony. Other statements were outside bounds of fresh complaint evidence.

Commonwealth v. Clark, 626 A.2d 154 (Pa. Super. Ct. 1993). Counsel ineffective for failing to object to cross-examination of defendant which compelled defendant to admit he did not tell police of claim of self-defense which amounted to comment on post-warnings silence.

Commonwealth v. Hyneman, 622 A.2d 988 (Pa. Super. Ct. 1993). Counsel ineffective for failing to object to state trooper's testimony commenting on defendant's post-warnings silence.

Commonwealth v. Doswell, 621 A.2d 104 (Pa. 1993). Counsel ineffective for failing to object to the state's impeachment of credibility of defense witness with a criminal charge because defense counsel failed to investigate and discover the witness had not yet been convicted and sentenced on charge.

State v. Hallett, 856 P.2d 1060 (Utah 1993). Trial counsel failed to object to trial court's erroneous construction that "age" in a state statute allowing admission of out-of-court statements of children under 10. Judge interpreted statute to mean mental age as well as chronological age and admitted out of court statements of a 19-year-old with the mental age of 8-9 which formed the basis of a count of sex abuse.

***Capital Case**

1992: *Johnson v. State*, 495 N.W.2d 528 (Iowa Ct. App. 1992). Counsel ineffective in sex abuse case for failing to object to testimony of social worker that the alleged victims were telling the truth and they were credible.

State v. Tracy, 482 N.W.2d 675 (Iowa 1992). Counsel ineffective in sex abuse case for failing to object to inadmissible hearsay evidence offered to impeach the alleged victim's recantation of prior allegation of sex abuse.

Simmons v. State, 308 S.C. 481, 419 S.E.2d 225 (1992). Trial counsel ineffective in narcotics case for failing to object to solicitor's cross-examination and jury argument concerning defendant's refusal to allow warrantless search of his vehicle.

In re Ross, 605 A.2d 524 (Vt. 1992). Counsel ineffective in child sex abuse case for failing to object to expert testimony on credibility of child victim of alleged sexual assault.

1991: *Johns v. State*, 592 So. 2d 86 (Miss. 1991). Counsel in sale of drugs case ineffective for failing to object to testimony that accomplice had been convicted of sale offense for which defendant was being tried.

***State v. Wells**, 804 S.W.2d 746 (Mo. 1991). Counsel ineffective for failing to obtain a letter by a state witness to the defendant which stated she knew the defendant was innocent and another state witness had committed murder and thus counsel did not use the letter to impeach the two state witnesses and cast doubt on truth of defendant's confession.

Thomas v. State, 812 S.W.2d 346 (Tex. App. 1991). Trial counsel in robbery case ineffective for failing to object to cross-examination of defendant and state's argument which linked the implausibility of the defendant's exculpatory story to the seemingly inconsistent post-Miranda silence.

State v. Humphries, 818 P.2d 1027 (Utah 1991). Trial counsel ineffective for failing to object to prosecutor's statement during closing argument that a defense witness invoked her 5th Amendment right to silence because she did not want to lie.

1990: *State v. Walters*, 813 P.2d 857 (Idaho 1990). Counsel ineffective in arson prosecution for failing to object to state fire investigator's testimony that it was his opinion that defendant started fire.

People v. Vazquez, 551 N.E.2d 656 (Ill. App. Ct. 1990). Counsel ineffective for failing to remind trial court that it had previously ruled that the state could not disclose to jury the nature of the defendant's prior convictions because the court specifically found that the priors were unduly prejudicial.

***Capital Case**

People v. Sommerville, 549 N.E.2d 1315 (Ill. App. Ct. 1990). Counsel ineffective for failing to object to the improper testimony of a police officer, fiancée, and nurse concerning alleged rape victim's prior consistent statements.

Pemberton v. State, 560 N.E.2d 524 (Ind. 1990). Counsel in robbery case ineffective for failing to preserve by contemporaneous objection issue of admissibility of identification testimony where identification was the only real issue and the identification procedures had already been condemned by the court in accomplice's trial.

Riascos v. State, 792 S.W.2d 754 (Tex. App. 1990). Trial counsel ineffective in murder case for failing to object to prosecutor's repetitive comments referring to defendant as an illegal Colombian alien, referring to drug traffic and saying the killing was drug-related which was unsupported by the evidence, and referring to extraneous offenses.

1989: *Mitchell v. State*, 298 S.C. 186, 379 S.E.2d 123 (1989). Trial counsel in murder case ineffective for failing to object to inadmissible evidence of defendant's devil worship and Mafia membership which tended to prove only that defendant was a bad person with a propensity to commit crime.

1988: *People v. Stratton*, 252 Cal. Rptr. 157 (Cal. Ct. App. 1988). Trial counsel ineffective in robbery case for failing to object to the introduction of a knife and hand grenade seized from the defendant's person at the time of his arrest because the complainant testified that the robber used an entirely different weapon.

Norris v. State, 525 So. 2d 998 (Fla. Dist. Ct. App. 1988). Counsel ineffective in child sex abuse case for failing to object to social worker's testimony that she had scientifically "validated" the testimony of victim.

People v. Rogers, 526 N.E.2d 655 (Ill. App. Ct. 1988). Counsel ineffective for failing to object to the improper closing argument where prosecutor argued facts not in evidence, argued his personal belief in credibility of police officers, and argued that prior convictions were substantive proof of guilt.

Bonner v. State, 765 S.W.2d 286 (Mo. App. 1988). Counsel ineffective for: failing to object to admission of evidence seized during warrantless search of defendant's truck where the officers also lacked probable cause to stop the truck or conduct search; failing to impeach a state witness after he denied prior convictions when counsel knew of priors from defendant but did not conduct discovery to obtain documentation; and failing to object to admission of allegedly stolen wire seized from the defendant when there was no evidence that the wire was the same as that stolen from victim.

Miller v. State, 757 S.W.2d 880 (Tex. App. 1988). Counsel in aggravated sexual assault case failed to object to extensive inadmissible testimony of experts and parents concerning the only real issue, which was the complainant's credibility.

***Capital Case**

1987: *Williams v. State*, 515 So. 2d 1042 (Fla. Dist. Ct. App. 1987). Trial counsel ineffective for failing to make hearsay objection when police detective testified and repeated co-conspirators post-arrest statements describing defendant's participation in conspiracy.

People v. Stubli, 413 N.W.2d 804 (Mich. Ct. App. 1987). Counsel ineffective in criminal sexual conduct for failing to invoke the defendant's state law marital privilege to prevent wife from testifying for the state that the defendant told her he made a move toward intercourse with girl by undoing his pants, but then stopped.

1986: *Martin v. State*, 501 So. 2d 1313 (Fla. Dist. Ct. App. 1986). Trial counsel ineffective for failing to object to comments by state witnesses and prosecutor in closing argument concerning defendant's post-arrest silence.

Garcia v. State, 712 S.W.2d 249 (Tex. App. 1986). Counsel in burglary with intent to commit indecency with child case failed to object to inadmissible testimony of detective and expert with respect to their opinion of truthfulness of the testimony of the complaining witness.

1985: *People v. White*, 370 N.W.2d 405 (Mich. Ct. App. 1985). Counsel in criminal sexual conduct case ineffective for failing to object to inadmissible testimony concerning hearsay statements by alleged victim to witnesses which contradicted the defense theory that child victim had been "persuaded" or led into believing that she was sexually assaulted.

Aycox v. State, 702 P.2d 1057 (Okla. Crim. App. 1985). Counsel in burglary case ineffective for failing to object to police officer's inadmissible testimony that a witness had identified the defendant in a lineup when state law permitted admission of this testimony only from person who identified defendant and this was the only identification evidence which linked the defendant to the crime.

***Commonwealth v. Bricker**, 487 A.2d 346 (Pa. 1985). Counsel ineffective in failing to object to the prosecutor's repeated misconduct during trial. The prosecutor: cross-examined a defense witness about being a drug dealer when there was no evidence supporting this claim and improperly expressed a personal opinion as to the truth of the witness' testimony (declaring explicitly "That's a lie" and telling the witness to look jurors "in the eye because they're staring at you"). The prosecutor also made improper references alleging prior criminal activity by the defendant by examining a state witness with a lengthy prison record about his knowledge of the defendant, who he could only have known initially from prison. The prosecutor also elicited testimony from a state witness that he knew the defendant was a "coldblooded killer" and then used this in argument. During closing, the prosecutor also argued that a defense witness had threatened him during the trial and asserted that the defense used its right of discovery to present false testimony. Counsel was ineffective in failing to object to much of this misconduct.

***Capital Case**

1984: *Collis v. State*, 685 P.2d 975 (Okla. Crim. App. 1984). Counsel ineffective in shooting with intent to kill case for failing to object to blatant hearsay concerning death threats and essentially conceding guilt in his closing argument.

***Capital Case**

5. IMPEACHING WITNESS

a. U.S. Court of Appeals Cases

2002: **Beltran v. Cockrell*, 294 F.3d 730 (5th Cir. 2002). Under pre-AEDPA analysis, counsel was ineffective in capital murder trial for failing to adequately investigate and to impeach eyewitness testimony that the defendant was the only person they had picked from photographic lineups. The victim was killed in a murder and armed robbery. Eyewitnesses stated that the robber carried a Derringer pistol and jumped into the passenger side of the co-defendant's car when leaving. Eyewitnesses described the robber as having a tattoo of the initials LX or LT on his upper left arm or forearm. Following the murder a witness drove around with the police and located the car outside the co-defendant's apartment. The co-defendant had four hours earlier committed an aggravated assault with a Derringer pistol. Eyewitnesses were shown photo lineups with a picture of the co-defendant and three eyewitnesses tentatively identified the co-defendant. Several days later a photo lineup including the defendant's picture was shown to the witnesses and three witnesses identified the co-defendant and also made in-court identifications of the co-defendant as the robber. During trial the state sought to introduce the photo lineup including the co-defendant and to introduce testimony that the witnesses had initially identified the co-defendant but defense counsel objected to the relevance. The state's theory at trial was that the defendant committed the murder and the co-defendant drove the getaway car. The state's case depended solely on witness identifications. The court found that counsel's conduct was deficient and not explained by any relevant strategic choice because counsel sought only to show that the defendant did not have the tattoo shown in the composite made on the day of the incident. Counsel did nothing more than testify that defendant did not have such a tattoo. Counsel failed, however, to introduce evidence that the eyewitnesses had tentatively identified the co-defendant, who did have such a tattoo, because counsel had failed to investigate. Counsel was not aware that the co-defendant had the tattoo and that the co-defendant and his brother had been seen together in the getaway car 15 minutes after the murder. Even without knowledge of the co-defendant's tattoo, counsel's conduct was unreasonable in failing to use tentative identifications of the witnesses to impeach their testimony. The court found prejudice.

2001: *Dixon v. Snyder*, 266 F.3d 693 (7th Cir. 2001). Counsel ineffective in murder case for failure to adequately prepare and to cross-examine the state's sole eyewitness. The eyewitness was standing next to the victim when he was shot. When the police arrived at the scene, the eyewitness stated that a black male, without any additional information, was the shooter. The next day, May 12, the eyewitness made a statement identifying Dixon as the shooter. Months before trial, defense counsel learned that the eyewitness was willing to recant the May 12 statement and counsel obtained an affidavit and a recantation in front of a court reporter from the eyewitness stating that Dixon was not the shooter. Before trial, defense counsel assured his client that, because the State's main witness had recanted, there was no need to prepare a defense. At trial, Dixon waived his right to a jury. The sole eyewitness, when called by the state, testified that Dixon was not the shooter. The state was then permitted to call the person who took the witness' May 12 statement and allowed to admit the statement under a state rule of criminal procedure passed in 1984 that allows prosecutors to introduce

***Capital Case**

prior inconsistent statements as substantive evidence rather than solely for impeachment purposes. This was a substantial change from the previous Illinois law, under which a prior inconsistent statement could only be used for impeachment. The state rule sets forth three foundational requirements that had to be met in order to admit the eyewitness' prior inconsistent statement as substantive evidence: 1) the prior statement had to be inconsistent with the testimony at trial; 2) the witness had to be subject to cross-examination concerning the statement; and 3) the statement had to describe an event of which the witness had personal knowledge and had to be signed by the witness. Rather than arguing that one of the three statutory requirements had not been met, however, defense counsel relied upon a state court rule that was irrelevant and a case which predated the passage of the pertinent rule in arguing that the prior statement was inadmissible. The defense did not cross-examine the eyewitness or recall him as a rebuttal witness after the prior statement was admitted. The court convicted the defendant of first degree murder. In a post-trial motion and on appeal, the defense argued that the state failed to meet the foundational requirements of the criminal rule, but the issue was found to be barred because defense counsel had not even attempted to cross-examine the eyewitness or to call him as a rebuttal witness. Trial counsel's conduct was deficient because counsel was not aware of the pertinent state court evidentiary rule even though it had been in effect for seven years prior to trial and counsel knew more than eight months before trial that the sole eyewitness had recanted (thus, the court reasoned, he should have investigated the law concerning prior inconsistent statements). The state court's finding in this regard was unreasonable because the state court "did not dismiss the possibility that counsel was not aware of the statute, yet it nonetheless analyzed counsel's actions as if the only issue was whether counsel should have cross-examined a witness. This analysis ignored the fact that counsel's decision not to cross-examine Carlisle would not have been reasonable if counsel was completely unaware of the legal effects of his failure to cross-examine Carlisle." *Id.* at 703.

We thus determine that, assuming counsel was unaware of the statute, it was unreasonable under Supreme Court precedent for the Illinois Appellate Court to conclude that the decision not to cross-examine was a decision that could be considered "sound trial strategy." Even if counsel was aware of the statute (and all indications are that he was not), it would still have been an unreasonable trial strategy to decide not to attempt to render the sole piece of direct evidence against your client inadmissible, even if you were not certain you would be successful. Indeed, it would have been even more unreasonable for counsel to have made the decision not to cross Carlisle if he had been aware of the statute and equally unreasonable for the appellate court to have found it to be a reasonable strategic decision. As for defense counsel's decision not to present Carlisle's previous recantations, the Illinois courts did not rule on this issue thus we may determine, *de novo*, whether counsel's actions fell below the permissible level of performance. We find that there was no rational explanation for why counsel did not introduce Carlisle's two recantations as evidence. There was absolutely no risk in doing so.

***Capital Case**

Id. The state court finding of no prejudice was also unreasonable. The defendant was prejudiced because the defense presented no defense and because “[t]here is a very reasonable probability that the judge would not have entered a finding of guilty had the statement – the sole direct evidence of guilt – been impeached.” *Id.* at 704.

1999: *Steinkuehler v. Meschner*, 176 F.3d 441 (8th Cir. 1999). Counsel ineffective in first degree murder case for failing to adequately impeach a witness. After a long day of consuming large amounts of alcohol, the defendant shot and killed his girlfriend’s ex-husband. Thirty minutes later he turned himself in. The only defense raised at trial was that intoxication negated specific intent required for first degree murder. Prior to trial, counsel deposed the initial officer to come in contact with the defendant. She testified that he was dazed and incoherent, did not recognize her even though she had booked him three times previously, and smelled strongly of alcohol. She concluded that he was intoxicated. Subsequently, this officer informed defense counsel that immediately after the deposition the county attorney told her that he would inform her boss, the Sheriff of her testimony. Later in the day, the attorney wrote a letter to the Sheriff with a copy to the witness. The next day the Sheriff confronted the officer and told her that he was not happy about her testimony and that she should have said she “forgot.” The Sheriff told her “he forgets in court all the time.” At trial, the officer testified as she did in her deposition and the Sheriff testified that the defendant had been drinking but was not drunk. Counsel failed to ask either of them about the events following the officer’s deposition and did not offer the county attorney’s letter into evidence. The court found deficient conduct and prejudice. Although numerous witnesses testified that the defendant was drunk, he was last seen an hour and a half prior to the murder. Thus, the jury could have inferred that he sobered up somewhat, which made the testimony of the officers who saw the defendant 30 minutes after the crime critical. A number of officers testified but only the two addressed here expressed an opinion concerning the level of intoxication. Thus, the credibility of these two officers was critical and, clearly, the first degree murder conviction rested primarily on the Sheriff’s testimony. Impeaching his credibility certainly could have provided a reasonable doubt.

1996: **Driscoll v. Delo*, 71 F.3d 701 (8th Cir. 1995). Trial counsel ineffective in guilt phase for failing to adequately cross-examine serologist and impeach state witness with prior inconsistent statement. (1) Case involved murder of guard in prison riot involving 20-30 inmates. During shakedown afterwards 14 shanks were rounded up and blood was found only on defendant’s. Serologist testified type A (the type of a different guard that was stabbed) on knife, but with the type of test used, type A blood would mask type O (type of murder victim). State argued that type O on knife also but just masked. Trial counsel ineffective because if counsel, who had not talked to state expert prior to trial, had adequately cross-examined, serologist would have admitted that a different blood test was also used and with the other test type A would not mask type O. There was no type O on knife. (2) Witness was another inmate who said defendant confessed stabbing to him after the riot, but had not said the same thing in two prior statements.

***Capital Case**

- 1991:** *Moffett v. Kolb*, 930 F.2d 1156 (7th Cir. 1991). Trial counsel ineffective in murder case for failing to introduce prior inconsistent statements of state witness who told investigating detective two times that defendant's brother and not defendant fired the gun at victim.
- 1989:** *Nixon v. Newsome*, 888 F.2d 112 (11th Cir. 1989). Counsel rendered IAC in defendant's murder trial when he failed to impeach a witness with prior inconsistent testimony she gave at the trial of another individual being tried for the same murder.
- 1984:** **Smith v. Wainwright*, 741 F.2d 1248 (11th Cir. 1984). Trial counsel ineffective for failing to use prior conflicting statements by the state's primary witness and his wife (that witness committed murder) to impeach witness who testified at trial that defendant committed murder.

b. U.S. District Court

- 2003:** *Thomas v. Kuhlman*, 255 F. Supp. 2d 99 (E.D.N.Y. 2003). Counsel was ineffective in murder case for failing to inspect the crime scene. During the trial a key witness testified that he observed the defendant on the fire escape of the victim's apartment building shortly before the victim was killed. This testimony placed the defendant precisely at the window of the victim's apartment just before the murder. If counsel had investigated counsel would have been able to establish that it was physically impossible for the witness to have seen the defendant at the victim's window because the fire escape next to the victim's apartment was not visible from the witness' alleged vantage point. Counsel's conduct was deficient where the state evidence relied heavily on this alleged eyewitness, who was at the time of trial in confinement on pending charges testifying pursuant to a deal with the state. Counsel's conduct was also deficient even if, as counsel alleged, the defendant had told him the witness testimony about the layout of the building was correct. Court found, "it was a dereliction for defense counsel to rely on the assurances of a defendant who, as a layman, may or may not have understood the critical nature of the layout of the buildings." Prejudice found where the government's case relied primarily on the alleged eyewitness that would have been contradicted. Prejudice was also clear in that the jury at one point announced that they were deadlocked and only reached a decision after being given an *Allen* charge. The court noted that the decision was being made under the AEDPA but did not really address application of the standards to this case.

c. Military Cases

- 1999:** *United States v. Gibson*, 51 M.J. 198 (C.A.A.F. 1999). Counsel ineffective in rape case for failing to investigate and impeach alleged victim's credibility. Only evidence of rape charges was the testimony of the 15 year old alleged victim and DNA and fiber evidence in defendant's vehicle showing only that at some time the defendant had ejaculated in vehicle. Fiber evidence was not unique and showed nothing outside of corroborating victim's testimony. In final investigative report, the police listed witness interviews establishing that the victim had told a number of different versions of the alleged rape to friends, she had a history of exaggerating her sexual exploits, did not have a good reputation for truthfulness, and had a history of behavior problems at school. One

***Capital Case**

teacher even believed she alleged rape to distract attention away from expulsion from school. Evidence revealed that the interim report had been provided to defense counsel early on. Prior to the preliminary hearing in the case, the final report had also been disclosed, which was apparent because all agreed that the prosecutor had an open file policy, two prosecutors testified that the file had been copied and personally delivered to one defense counsel, and defense counsel referred in preliminary hearing to a lab report contained only in the final investigative report. The final report with attachments was approximately two inches thick and looked much like the interim report. The information concerning the impeachment information was not in previous reports though and was contained in paragraphs between information disclosed previously. Counsel did not read the final report carefully, however, and failed to learn of this information only through oversight and not strategy. The court found prejudice because the entire case was built on the alleged victim's testimony. The forensic evidence alone revealed no crime.

d. State Cases

2002: *People v. Williams*, 769 N.E.2d 518 (Ill. App. Ct. 2002). Counsel ineffective in attempted aggravated robbery case for failing to call officers or to present the police reports to impeach the victims' testimony that the defendant had his hand under his shirt suggesting that he had a gun. While defense counsel questioned the two witnesses, the questioning did not resolve the issue of what the witnesses actually stated to the officers on the scene. While the state stipulated to the contents of the police report that was an inadequate substitute for impeachment testimony by the police. Prejudice found because this was a "close case."

Horn v. Hill, 41 P.3d 1127 (Or. Ct App. 2002). Counsel ineffective in sexual abuse case for failing to introduce recantation testimony of child victim, who did not testify at trial. The child was two when the abuse allegedly started and five at the time of trial. In a pretrial hearing, the child recanted her prior statements of abuse. The court found her incompetent as a witness and she did not testify at trial. Her mother and medical workers testified concerning her hearsay statements, behavior, and physical examination. During trial, the defense presented expert medical testimony regarding the physical exam and the unreliability of child witness recall. The defendant also testified and denied the charges, but counsel did not present the child's recantation at the pretrial hearing. Court found prejudice under the state standard of "tendency to affect the result" because the physical evidence was contradicted and the mother and child's credibility were central issues since the defense theory was that the child's mother was angry because the defendant broke up with her and, thus, influenced the child to make these allegations.

1999: *State v. Dillard*, 998 S.W.2d 750 (Ark. 1999). Counsel ineffective in sex abuse with two minors case for failing to interview and present testimony of two witnesses that one of the victims (S.S.) was untruthful. S.S.'s sister would have testified that her sister was not a truthful person. The brother of the other alleged victim would have testified that S.S. told him she hated the defendant and was going to call the cops and tell them he raped her. Counsel did not offer any explanation for failing to call the brother. He said he did not call the sister because he knew she hated the defendant. Court

***Capital Case**

found prejudice because testimony from relatives of the alleged victim's, who admittedly hated the defendant, would carry great credibility in a case where there were no witnesses and no physical evidence. Both convictions reversed because they were so intertwined.

- 1998: *Pauling v. State***, 331 S.C. 606, 503 S.E.2d 468 (1998). Counsel ineffective in burglary and criminal sexual conduct case for failing to call triage nurse as witness. Victim testified that she was penetrated. Doctor testified that there was no physical evidence of penetration, but that victim said there was penetration but "not all the way." Triage nurse's notes showed that victim told her there was no penetration. Although triage nurse did not have any independent recollection, the notes could have been used to refresh her recollection. The court noted in finding prejudice: "Even defense counsel admitted the nurse's testimony was critical. *Martinez v. State*, 304 S.C. 39, 403 S.E.2d 113 (1991) (where trial counsel admits the testimony of a certain witness may have made the difference in obtaining an acquittal, the Court may find ineffective assistance)." *Id.* at ____.
- 1997: *Clay v. State***, 954 S.W.2d 344 (Mo. Ct. App. 1997). Counsel ineffective in murder of ex-wife case for failing to interview and present evidence from investigating officers concerning the defendant's son's prior inconsistent statements who said assailant could have been defendant or could have been someone else, when the son did not identify the defendant during the trial, and there was no other identification testimony at trial.
- 1996: *Johnson v. State***, 467 S.E.2d 542 (Ga. 1996). Counsel ineffective in murder case for failing to give notice as required by rules and failing to present evidence of victim's prior specific acts of violence against third parties where the defense was self-defense and a number of witnesses would have testified that the victim was a drunk and a troublemaker who had shot at or otherwise assaulted others or threatened them with weapons on numerous occasions.
- 1995: *State v. Delgado***, 535 N.W.2d 450 (Wis. Ct. App. 1995). Counsel ineffective in murder case for failing to impeach the state's primary witness with readily available evidence that would have shown that the witness had been promised a reduction in charges from murder to aiding a felon and had received a reduction from a \$250,000 bond to personal recognizance in exchange for testimony and that the witness lied about it at trial. Counsel knew from witnesses attorney at preliminary hearing that negotiations were in the works but relied on state's assertions of no deal rather than contacting witnesses counsel who would have disclosed that there was a deal.
- 1994: *People v. Salgado***, 635 N.E.2d 1367 (Ill. App. Ct. 1994). Trial counsel ineffective in murder prosecution for failing to impeach prosecution witness, who identified defendant as shooter, with witness' contradictory statements at co-defendant's trials that he had not seen the shooting. Counsel did not even investigate to determine whether prior transcripts contained useful impeachment information.
- Brown v. State***, 877 P.2d 1071 (Nev. 1994). Counsel ineffective in sexual assault and attempted sexual assault case for failing to cross-examine the alleged victim about lies told in prior allegations

***Capital Case**

of sexual assaults. Counsel waited until sur-cross and was denied opportunity. Counsel also ineffective in sentencing for failing to request concurrent sentences because counsel was unaware of possibility or to present witnesses for the defendant.

1992: *Ellyson v. State*, 603 N.E.2d 1369 (Ind. Ct. App. 1992). Counsel ineffective in rape of wife case for failing to lay an adequate foundation for admission of wife's prior inconsistent statement.

Thomas v. State, 308 S.C. 123, 417 S.E.2d 531 (1992). In rape case where the victim was the sole witness and she identified the defendant as her attacker, trial counsel was ineffective for failing to call emergency medical personnel who would have testified that the victim stated immediately after the attack that she did not know her assailant.

1991: *Wright v. State*, 581 N.E.2d 978 (Ind. Ct. App. 1991). Counsel ineffective in child molestation case for failing to lay an adequate foundation for admission of witness' testimony concerning prior inconsistent statement by alleged victim saying that she lied about her step-father molesting her.

**Commonwealth v. Murphy*, 591 A.2d 278 (Pa. 1991). Counsel ineffective for failing to cross-examine the only eyewitness on bias based on juvenile probationary status.

1990: *Russell v. State*, 789 S.W.2d 720 (Ark. 1990). Trial counsel ineffective in murder case for failing to interview and call witnesses suggested by the defendant who would have impeached the state's primary witness who claimed he saw the defendant commit the murder by essentially showing that it was the witness who had the motive to commit the murder, the witness was in possession of some of the victim's belongings after the crime, and the witness had previously killed someone else and buried them close to where the victim was buried.

1987: *Commonwealth v. Bolden*, 534 A.2d 456 (Pa. 1987). Counsel ineffective in murder case for failing to impeach a police officer whose testimony contradicted alibi witness with his own contradictory police report which showed that alibi witness' statement to him was consistent with alibi witness' testimony.

State v. Marty, 404 N.W.2d 120 (Wis. Ct. App. 1987). Trial counsel ineffective in sexual assault case for failing to introduce testimony that the victim's window had been nailed and painted shut prior to alleged sexual assaults to impeach victim's pretrial statements that the defendant entered her room through the window on two prior occasions and on one of the current charges and assaulted her. Counsel also ineffective for failing to attempt to impeach state's witnesses who provided other crimes evidence against defendant.

1983: **Commonwealth v. Smith*, 467 A.2d 1120 (Pa. 1983). Counsel ineffective in failing to cross-examine a state witness regarding her self-admitted robbery-homicide of another man while defendant was incarcerated. She was also present at the capital murder with another woman and testified defendant had committed the murder and she was merely an unwilling participant due to

***Capital Case**

fear of the defendant. The defense was that the witness had actually committed the murder and the defendant was not present. Nonetheless, trial counsel erroneously agreed with the trial court that the evidence of the witness' prior murder, which was strikingly similar to the capital murder, was not relevant or proper since she had not been convicted. "We can perceive no reasonable basis for trial counsel's failure to recognize the significance of the [prior] murder and his subsequent failure to properly advocate its relevancy to the trial court." Reversal also required due to the trial court's error in finding that, because there was no conviction, the witness' confession to the prior murder was not admissible to impeach her. Although mere allegations of a prior crime are not permissible impeachment, here the witness confessed and led police to the body.

***Capital Case**

6. ELICITING DAMAGING EVIDENCE AND MAKING DAMAGING ARGUMENT

a. U.S. Court of Appeals Cases

2001: *United States v. Villalpando*, 259 F.3d 934 (8th Cir. 2001). Counsel ineffective in drug conspiracy and felon in possession of firearms case for eliciting testimony from a government's witness on cross-examination that the defendant made threats to her and told her that he had ordered a murder. Although the court normally would not address an issue of ineffective assistance of counsel on direct appeal, the court found that this error could not be explained by any possible strategy. *Id.* at 939. Prejudice found only on drug charges because the defendant stipulated that he was a felon and had admitted on cross-examination that he had possessed the firearms in question.

b. State Cases

2002: *Chatmon v. United States*, 801 A.2d 92 (D.C. 2002). Counsel ineffective in armed robbery and murder case for eliciting testimony concerning a prior identification of the defendant which had been suppressed prior to trial. Evidence consisted of testimony of a co-defendant who had entered a plea agreement in exchange for testimony and several other witnesses. The co-defendant identified the defendant as the shooter. One eyewitness was unable to identify. The defendant the other eyewitness had tentatively identified the defendant from a photographic lineup but qualified the identification by saying that the robber had longer hair than the person in the picture. At a pretrial hearing, the witness was unable to identify the defendant and the prosecutor agreed not to ask for an in-court identification. The identification from the photo line-up was excluded because the array was unduly suggestive. The prosecutor also agreed not to use the defendant's statement to police that he had gotten a haircut a few days after the murder because without identification from the photo line-up it was not relevant. While excluding the evidence, the trial court warned counsel not to open the door. During testimony from a detective, counsel asked if he tried to have anyone identify the defendant or co-defendant as the robbers. The detective stated that he could not recall and counsel asked him to review his police reports to refresh his memory. The detective then testified that the eyewitness identified the defendant. Counsel then elicited testimony that the witness had qualified the identification by stating that the robber had longer hair. The state, without objection from the defense, then questioned the detective about the identification. The detective stated that the eyewitness "immediately selected" the defendant and co-defendant from the photo array. The court then *sua sponte* interrupted the redirect and called the attorneys to the bench. Counsel then objected to the admission of the defendant's statement about the haircut, but the court overruled the objection because counsel had opened the door. The prosecutor then elicited testimony from the detective that the defendant stated he had gotten a haircut the day after the murder. Following the claim of ineffective assistance, counsel stated that his strategy was to show that no one other than the co-defendant could identify the defendant. Counsel stated that as part of this strategy, he asked the detective whether anyone else had identified the defendant because counsel believed that the eyewitness statement was not a positive identification, but the detective testified that the eyewitness

***Capital Case**

identified the defendant. Counsel stated that he then attempted to impeach the detective with the eyewitness statement that he was unsure because of the robber's hair length. The appellate court initially addressed the threshold question of whether the court is bound by defense counsel's actual statements of strategy or whether the court could consider that there was any reasonable strategy to explain counsel's actions. The court held that "once the record establishes the actual tactical explanation for counsel's actions, the government is not free to invent a better-reasoned explanation of it's own." *Id.* at 108-09. The court found deficient conduct because counsel's strategy made no sense and in the introduction of the prior identification eviscerated the defense strategy. Court rejected the government's argument that counsel could not have anticipated the testimony that the eyewitness immediately identified the defendant. This argument violates a cardinal rule of examination – "if the defense counsel did not know what [the witness] would say, he should not have asked." *Id.* at 109. The court also found that counsel was aware of the testimony that would be elicited. The defense counsel's introduction of a prior identification in light of the expressed strategy of the defense was "simply illogical and could only be counterproductive." The court also found prejudice because without the prior identification counsel could have argued that the government's case rested solely on the testimony of the co-defendant who had a significant incentive to lie. The court rejected government argument of no prejudice because defense counsel argued that the detective was over Zealous in focusing the investigation on the defendant and perhaps had even lied about defendant statement about the haircut. The court noted that the arguments "were not part of a defense strategy as much as they were necessary to contain the, damage done by counsel's mistakes." *Id.* at 111. The court also noted that while the eyewitness identification was initially tentative, the jury could have perceived this as a mark of his scrupulousness. In addition, however tentative the identification was, it was corroborated by the defendant statement that he had a haircut. Finally, the court noted that the state focused on the eyewitness identification during both its closing and rebuttal argument. The court concluded that without the prior identification evidence there is a reasonable probability that the jury would have had a reasonable doubt as to defendant's guilt. The court also discussed, in a lengthy footnote, counsel's failure to object to graphic photographs of the body or to at least try to limit their use. The court noted that the photographs introduced in this case were neither independently relevant or corroborative of other evidence during closing argument and the closing rebuttal argument. The government attorney also improperly showed each juror an enlarged photograph of the body while arguing that the jury should reach a verdict that it could live with. The trial court *sua sponte* noted that the prosecutor's display of the photographs was not relevant to any issue and was improper. The defense counsel did not object or request an appropriate curative instruction. The court declined to evaluate prejudice from these errors because reversal was already required due to counsel's introduction to the prior identification.

People v. Fletcher, 780 N.E.2d 365 (Ill. App. Ct. 2002). Counsel was ineffective in vehicular burglary and theft case for asking the defendant to disclose his entire criminal history to the jury when much of the history was inadmissible otherwise. The state's case rested almost entirely on the testimony of three accomplices who were arrested in possession of the stolen items but not charged with any offense. The defendant also testified and claimed that he was a witness to the state's witnesses committing the burglary. Counsel then elicited testimony from the defendant about

***Capital Case**

his extensive criminal history. On cross-examination the state elicited even more information and detail. The defendant's history included repeated bouts with underage drinking, numerous episodes of trampling state property, two uninvited entries into other people's homes, misdemeanor thefts from a gas station and a liquor store, a car theft at the age of 14, and obstructing police. The appellate court held that none of this evidence was admissible with the exception of possibly the defendant's misdemeanor theft convictions and the state's cross-examination about those offenses would have been limited if defense counsel had acted appropriately. Instead the defendant was cross-examined extensively that he had actually committed felony offenses, but escaped conviction solely due to plea bargaining. Deficient conduct found because "[n]o reasonable defense lawyer would ask his client to tell the jury about an extensive history of criminality and have the client readily admit that he was guilty on every occasion, in order to convince the jury that he is innocent of a like crime because he denies his guilt instead of pleading guilty." The court also found deficient conduct because if counsel had filed a motion in limine prior to calling his client to the stand the trial court may well have prohibited cross-examination on the misdemeanor convictions as well because the probative value is outweighed by the undue prejudice. Prejudice found because all of the state's evidence of guilt was evidence that needed to be viewed with great caution. The court also noted that the defendant was charged with burglary and theft and that if the jury had taken the state's witnesses at their word they would have convicted on both offenses. Instead the jury convicted only on the theft offense.

- 2000: *People v. Jackson***, 741 N.E.2d 1026 (Ill. App. Ct. 2000). Counsel ineffective in possession of controlled substance case for eliciting the only evidence that connected the defendant to the crime. The state's only evidence was the testimony of a police officer that testified he observed the defendant receive money from an unknown person and point to a third person. The third person then walked over to unknown person and then left scene. The unknown person had a bag on him that contained crack cocaine and heroin. During cross, the defense elicited testimony for the first time that the unknown person reached into the paper bag and transferred an object to the unknown person before he left, which was the only link between the defendant and the contraband. Prejudice found because without this evidence the state could not have obtained a conviction.
- 2000: *Caprood v. State***, 338 S.C. 103, 525 S.E.2d 514 (2000). Counsel ineffective in armed robbery case for eliciting hearsay from officer about the defendant's "rap sheet" and "some type of violation" previously. Trial court had found ineffective and granted relief on a number of bases. Supreme Court reversed on all but this one, because the state had not appealed on this issue and the trial court's ruling was thus the law of the case.
- 1999: *People v. Young***, 716 N.E.2d 312 (Ill. App. Ct. 1999). Counsel in aggravated battery case ineffective in bench trial for eliciting otherwise inadmissible evidence that the shooting victim had made 14 prior consistent statements identifying the defendant as the shooter.
- 1998: *State v. Saunders***, 958 P.2d 364 (Wash. Ct. App. 1998). Counsel ineffective in drug possession case for eliciting defendant's prior possession conviction during direct examination. Evidence was

***Capital Case**

probably inadmissible because prior drug convictions are generally not probative of a witness's veracity and because the conviction was more prejudicial than probative since it shifted the focus to the defendant's propensity for drug possession when his defense was that the possession was unwitting (not his car).

1992: *People v. Phillips*, 592 N.E.2d 233 (Ill. App. Ct. 1992). Counsel ineffective for eliciting hearsay from detective on cross-examination regarding defendant's prior criminal record where the only evidence of armed robbery was the victim's weak identification.

1990: *People v. Salgado*, 558 N.E.2d 271 (Ill. App. Ct. 1990). Counsel ineffective in burglary case for calling defendant as a witness and eliciting a confession during direct examination where the trial judge indicated he would have found the defendant guilty of only the lesser included offense of theft but for the defendant's admissions.

1986: *State v. Smith*, 712 P.2d 496 (Haw. 1986). Trial counsel ineffective for referring to defendant's prior convictions and incarcerations and other lewd conduct and eliciting from defendant during direct examination in prosecution for attempted sodomy where the success of the asserted defense that defendant was merely exposing himself hinged on defendant's credibility.

State v. Dornbusch, 384 N.W.2d 682 (S.D. 1986). Counsel ineffective in burglary case where state's evidence was only circumstantial for eliciting the victim's testimony that he suspected the defendant of having committed a previous theft and for asking detective if he asked defendant to take polygraph which opened the door to presentation of evidence that defendant refused to take polygraph.

1985: *Kornegay v. State*, 329 S.E.2d 601 (Ga. Ct. App. 1985). Trial counsel's closing argument in interracial rape case in which he referred to defendants as "niggers" and said they would have been lynched for the same conduct 40-50 years ago injected race into the case and allowed jury to consider race.

***Capital Case**

7. CONCEDING GUILT/CONTRADICTING CLIENT

a. U.S. Court of Appeals Cases

- 1997:** **Rickman v. Bell*, 131 F.3d 1150 (6th Cir. 1997) (affirming 864 F. Supp. 686 (M.D. Tenn. 1994)). Prejudice presumed because counsel did not serve as advocate and showed contempt for his client such that he was a “second prosecutor” and defendant would have been “better off to have been merely denied counsel.” Defense counsel presented the most damaging evidence in the case.
- 1991:** *United States v. Swanson*, 943 F.2d 1070 (9th Cir. 1991). Prejudicial per se when trial counsel concedes that there is no reasonable doubt concerning the only factual issues in dispute during closing arguments.
- 1983:** **Francis v. Scroggins*, 720 F.2d 1190 (11th Cir. 1983). Counsel was ineffective for effectively conceding the defendant’s guilt during trial and concentrating on a line of argument more properly directed to sentencing. The defendant pled not guilty and testified during trial denying any participation in the crimes and denying that he had made exculpatory statements to police.

Where a capital defendant, by his testimony as well as his plea, seeks a verdict of not guilty, counsel, though faced with strong evidence against his client, may not concede the issue of guilt merely to avoid a somewhat hypocritical presentation during the sentencing phase and thereby maintain his credibility before the jury.

b. State Cases

- 2001:** **Jackson v. State*, 41 P.3d 395 (Okla. Crim. App. 2001). Counsel ineffective in capital case for admitting during voir dire and the guilt-or-innocence phase arguments that the defendant was guilty of capital murder. Counsel had decided that the best strategy was to admit guilt and to focus on presenting mitigation in sentencing, but neither counsel could recall even discussing this strategy with the defendant. When counsel conceded guilt, however, the defendant expressed his objections to them because he wanted to argue self-defense. While counsel may have had a valid strategy, the court held that “a complete concession of guilt is a serious strategic decision that must only be made after consulting with the client and after receiving the client’s consent or acquiescence.” *Id.* at _____. In this case, the evidence revealed that counsel did not consult with their client before conceding guilt. Prejudice found because “Appellant wanted to raise the issue of self-defense and was effectively prevented from presenting such a defense by the concession of guilt made by trial counsel.” *Id.* at _____. Court holds that in the future if defense counsel’s strategy is to concede guilt counsel must inform the court prior to making any concessions and the trial court must “determine from counsel and the defendant, on the record, whether this strategy is one in which the client has consented or acquiesced. If the client does not consent to or acquiesce in the strategy, then counsel shall follow the client’s wishes.” *Id.* at _____.

***Capital Case**

- 2000:** *State v. Carter*, 14 P.3d 1138 (Kan. 2000). Counsel ineffective in murder case for conceding defendant's involvement despite defendant's protestations of innocence. Counsel was attempting, in light of strong state evidence, to show that defendant was guilty of felony murder in the course of armed robbery but not premeditated murder. While this may have been strategy, defense counsel betrayed the defendant by overriding his plea of not guilty. Counsel abandoned his client, which required the presumption of prejudice under *Cronic*.
- 1999:** *Christian v. State*, 712 N.E.2d 4 (Ind. 1999). Counsel ineffective in rape case for conceding elements of the offense in closing that contradicted the defendant's testimony. Defendant had testified in essence that there had been consensual foreplay but there was no penetration, which was a required element of rape. Counsel argued consent, but conceded, contrary to the defendant's testimony, that there was penetration. Concession was unreasonable because the only evidence of penetration was the alleged victim's testimony. Also unreasonable because, even though counsel was arguing consent based on defendant's testimony, he essentially undermined the defendant's credibility by, in effect, informing the court that he didn't believe his own client. These acts resulted in a breakdown of the adversarial process under *Cronic* and the court presumed prejudice.
- 1998:** *State v. Harrington*, 708 A.2d 731 (N.J. Super. Ct. App. Div. 1998). Counsel ineffective in murder case charged as purposeful murder and, alternatively, felony murder for conceding the defendant's guilt of armed robbery. The state's case depended primarily on the testimony of his three accomplices, who all testified pursuant to grants of immunity. The witnesses all had prior inconsistent statements and their testimony "diverged wildly on many key points" at trial. The defendant was convicted of both murder charges and the trial court "merged" the felony murder into the purposeful murder conviction. On appeal, the court reversed the purposeful murder conviction (under plain error rule—no objection) because of the trial court's erroneous instructions on accomplice liability. The court then refused to reinstate the felony murder conviction due to ineffective assistance. The trial court instructed the jury on the statutory "nonslayer" affirmative defense, which essentially would have allowed counsel to concede the defendant's presence without conceding guilt. Nonetheless, despite the affirmative defense and the contradictory evidence, defense counsel, in closing argument, conceded the defendant's guilt of robbery, which amounted to a concession of guilt of felony murder. The court could conceive of no reasonable strategy for doing so in a non-capital case.
- 1994:** **Jacobs v. Commonwealth*, 870 S.W.2d 412 (Ken. 1994). The defendant's right to present his defense of innocence on the merits was denied by his counsel's presentation of an insanity defense over the defendant's objection. "There was an incompatibility of the two defenses." While "defense counsel generally controls strategic and tactical defense," the decision to assert an insanity defense "seriously compromise[s]" the defendant's assertion of innocence.
- *Jones v. State*, 877 P.2d 1052 (Nev. 1994). Trial counsel found ineffective during direct appeal for admitting in closing argument that defendant was guilty of 2d degree murder where defendant had testified he did not kill victim and did not consent to trial counsel's admission of guilt. Court

***Capital Case**

ruled that since defendant did not consent issue could be decided on direct appeal because it didn't matter what strategic or tactical reason counsel might state in evidentiary hearing.

1991: *People v. Torres*, 568 N.E.2d 157 (Ill. App. Ct. 1991). Counsel ineffective in criminal sexual assault case because he conceded that there was oral-vaginal contact but argued no penetration. Counsel was ignorant of legal definition of "penetration" which only required contact. Counsel also argued that defendant was a family member which was not a defense.

State v. Anaya, 592 A.2d 1142 (N.H. 1991). Counsel ineffective for asking jury during closing to convict the defendant as accomplice to second degree murder instead of first degree murder despite the facts that the defendant had rejected a plea offer to plead to the lesser offense, testified that he was completely innocent, and told counsel he wanted innocence argued in closing.

1989: *Long v. State*, 764 S.W.2d 30 (Tex. App. 1989). Counsel ineffective for pleading insanity and then stipulating that the defendant was voluntarily intoxicated.

1988: *State v. Burgins*, 542 N.E.2d 707 (Ohio Ct. App. 1988). Counsel ineffective in theft case for telling the jury during closing that he did not believe the defendant and he expected a guilty verdict.

1987: *Ferguson v. State*, 507 So. 2d 94 (Miss. 1987). Counsel per se ineffective for calling the defendant a liar in front of the jury. No showing of prejudice required.

1986: *People v. Woods*, 502 N.E.2d 1103 (Ill. App. Ct. 1986). Counsel ineffective in burglary case for conceding in closing argument that defendants' were guilty of theft which contradicted their theory of innocence which had been maintained throughout trial. Prejudice presumed.

****People v. Hattery***, 488 N.E.2d 513 (Ill. 1986). Counsel ineffective for admitting guilt in opening statement, failing to advance any theory of defense, and attempting to establish only that the defendant was compelled to kill the victims. Court recognized that counsel pursued this course in an effort to avoid the death penalty but presumed prejudice because a defendant who pleads not guilty is entitled to a defense.

Commonwealth v. Triplett, 500 N.E.2d 262 (Mass. 1986). Counsel ineffective in murder case for implying during the closing argument that he did not believe defendant's testimony and asking the jury to accept the testimony of the defendant's mother which eroded any theory of voluntary manslaughter which was the defendant's theory.

1985: *State v. Harbison*, 337 S.E.2d 504 (N.C. 1985). Prejudice presumed in second degree murder case where the defendant pled not guilty and proceeded during the trial on the theory of self-defense, but during the closing argument the defense counsel argued that the defendant should not be found innocent but should be found guilty of manslaughter. Prejudice was presumed because a decision to plead guilty must be made exclusively by the defendant. "When counsel admits his client's guilt

***Capital Case**

without first obtaining the client's consent, the client's rights to a fair trial and to put the state to the burden of proof are completely swept away. The practical effect is the same as if counsel had entered a plea of not guilty without the client's consent."

***Capital Case**

8. ARGUING INCONSISTENT THEORIES

1990: **Ross v. Kemp*, 393 S.E.2d 244 (Ga. 1990). Trial counsel ineffective where appointed counsel cross-examined state's witnesses and argued a theory of mental illness and insufficiency of evidence while retained counsel presented unprepared testimony of defendant (which appointed counsel opposed) and argued an inconsistent alibi theory.

***Capital Case**

9. INSTRUCTIONS

a. U.S. Court of Appeals Cases

2002: *Everett v. Beard*, 290 F.3d 500 (3d Cir. 2002). Under AEDPA, counsel ineffective in murder case for failing to object to the trial court's repeated instructions that permitted the jury to convict the defendant of intentional murder if his accomplice intended the death of the victim. The defendant was the get-away driver only and there was no allegation that he personally intended that anyone would be shot. Because the state courts had addressed this issue only on a state law basis, even though the claim was before them, the court's review was *de novo*. Counsel's conduct was deficient because "[a] reasonably competent attorney patently is required to know the state of the applicable law." *Id.* at 509. While the Pennsylvania Supreme Court had not addressed this precise issue prior to trial in 1980, state Superior Court decisions were applicable and were law. Competent counsel would have known of these decisions and objected on that basis.

Counsel's status as a reasonably competent attorney is not strictly confined to the law as enunciated by the decisions of the jurisdiction's highest court. More is expected from a reasonably competent attorney, especially one in a major criminal case, than merely to parrot Supreme Court cases. A law student could do as much. Instead, a reasonably competent attorney will have reason to rely on authority, especially favorable authority, even if it had not yet been enunciated by the United States Supreme Court of the state's supreme court.

Id. at 513. Regardless of the status of state law at the time, "a reasonably competent lawyer at the time of [] trial in 1980 should have noted the glaring lack of evidence that [the defendant] had the requisite intent to kill and should have objected to the charge as inconsistent with due process." *Id.* at 514. "Counsel must not file frivolous objections but at the same time counsel must not neglect to suggest instructions that represent the law that would be favorable to his or her client supported by reasonably persuasive authority." *Id.* Prejudice was clear.

***Pirtle v. Morgan**, 313 F.3d 1160 (9th Cir. 2002). Counsel was ineffective in a capital trial for failing to request a diminished capacity instruction. Counsel presented substantial evidence through expert testimony that the defendant lacked the capacity to premeditate due to right temporal lobe seizures caused by chronic drug use. Counsel did not, however, request an instruction on capacity and instead requested only an instruction on voluntary intoxication. Counsel's conduct was deficient because the defendant had testified that he was "coming down" from drugs approximately three hours before the murders. Prejudice was found because the defense focused primarily on the defendants mental capacity at the time of the killings. The issue of premeditation was critical because if the jury had not found premeditation and had convicted only on second degree murder the defendant would not have been eligible for the death penalty.

***Capital Case**

1996: *Luchenburg v. Smith*, 79 F.3d 388 (4th Cir. 1996). Counsel ineffective for failure to request expanded instruction that more accurately explained to jury that, under Maryland law, it could not convict defendant of compound handgun charge unless it first found him guilty of predicate crime of violence, and that common-law assault was not predicate “crime of violence.”

United States v. Span, 75 F.3d 1383 (9th Cir. 1996). Counsel ineffective in assault on federal officer case for: failing to request instruction on affirmative defense of self-defense in face of excessive force; failing to request instruction explaining that excessive use of force is not included within pursuit of official duty; and failing to object to self-defense instructions which essentially negated excessive force defense by telling jury that there was no right of self-defense unless the defendants were unaware of status as federal officer.

1993: *Gray v. Lynn*, 6 F.3d 265 (5th Cir. 1993). Trial counsel ineffective for failing to object to erroneous jury instruction on elements of attempted murder which allowed jury to convict based on finding of intent to inflict great bodily harm even if it had a reasonable doubt that defendant had specific intent to kill.

1992: *United States v. Stracener*, 959 F.2d 31 (5th Cir. 1992). District court found IAC where defendant was charged with aiding and abetting armed bank robbery, kidnaping, and carrying weapon but counsel failed to object to instructions which allowed convictions for aiding and abetting aggravated bank robbery without requiring jury to find that defendant had specifically aided and abetted aggravating element. District court resentenced on lesser included offense and Fifth Circuit found that resentencing was proper remedy.

1990: *Capps v. Sullivan*, 921 F.2d 260 (10th Cir. 1990). Trial counsel ineffective for failing to request an entrapment instruction after the defendant testified in his own behalf and admitted all the elements of the offense when there was evidence to support an entrapment defense.

1989: *Crowe v. Sowders*, 864 F.2d 430 (6th Cir. 1989). Trial counsel ineffective for failing to seek new trial or mistrial after trial court’s improper instructions about parole consequences.

b. U.S. District Court Cases

1991: *Patterson v. Dahm*, 769 F. Supp. 1103 (D. Neb. 1991). Trial counsel ineffective in first degree murder case for offering an instruction on conspiracy to commit murder as a lesser included offense, because conspiracy was not a lesser included offense under state law so trial counsel effectively charged defendant with a crime not in the information. The evidence before the jury supported acquittal but because of the conspiracy instruction offered by trial counsel, defendant was convicted of conspiracy.

c. State Cases

***Capital Case**

2003: *Wakefield v. State*, 583 S.E.2d 155 (Ga. Ct. App. 2003). Counsel ineffective in fraud and forgery case for failing to object to the trial court's failure to charge the jury that a witness may be impeached by convictions of crimes "involving moral turpitude." The primary state witness was a co-defendant, who admitted on direct examination that he had plead guilty to a number of felonies involving these same charges. Counsel requested the charge in writing, but raised on objection during the charge conference when the court stated that the charge would be omitted because no one in the case had been convicted of crimes of moral turpitude. Counsel admitted that there was no tactical decision in the failure to object and that it was an oversight. Prejudice found because this witness presented crucial testimony for the state.

State v. Kruger, 67 P.3d 1147 (Wash. Ct. App. 2003). Counsel ineffective in third-degree assault case for failing to request a jury instruction on voluntary intoxication. The defendant was charged with head-butting a police officer and intent was an element of the offense. While voluntary intoxication is not a true defense, under state law, the defendant was entitled to an instruction that the jury could consider the intoxication in determining whether the defendant acted with the requisite intent. Here, counsel's conduct was deficient in failing to request this instruction because there was ample evidence that the defendant was intoxicated, including vomiting shortly after his arrest. Prejudice was found because intent was the only contested element at trial and the jury asked a question and had to refuse additional instructions on this element. "Even if the issue of . . . intoxication was before the jury, without the instruction, the defense was impotent." *Id.* at 1151.

2002: *Walker v. State*, 779 N.E.2d 1158 (Ind. Ct. App. 2002). Counsel ineffective in murder case for failing to object to instruction that jurors should presume that the defendant had the same intent as the actual shooter. "[T]he failure to object to an incorrect instruction cannot be attributed to trial tactics." Prejudice found.

Dawson v. State, 352 S.C. 15, 572 S.E.2d 445 (2002). Counsel ineffective for failing to object to a coercive *Allen* charge. During deliberations the jury foreman informed the court that the jury was split 11 to 1 and that he did not know whether the jury could reach a unanimous verdict. The court asked the foreman to consult with the other jurors to see if a consensus could be reached and then asked the foreman if the numerical split was the same. The court then gave an *Allen* charge, which could be perceived as being directed toward the minority juror. The charge was coercive, especially in light of the judge's knowledge that there was only one holdout juror. The court also erred in not instructing the jury not to state its numerical division and also inquiring as to the jury's continued numerical division.

Tate v. State, 351 S.C. 418, 570 S.E.2d 522 (2002). Counsel ineffective in murder and assault case for failing to object to jury instructions that unconstitutionally shifted the burden of proof to the defendant by stating that malice was presumed from the use of a deadly weapon. Counsel's conduct was deficient in failing to object to the presumption of malice charge where counsel's sole objection was that the charges were given undue emphasis because the charge was first given as a supplemental charge at the solicitor's request after the jury had been sent out. The charge was given

***Capital Case**

twice more in response to jury questions during deliberations without additional objection from counsel other than the undue emphasis. The court found no prejudice with respect to the murder conviction because malice was clear on that charge and the erroneous instructions would not have contributed to the jury's findings. Prejudice found with respect to the assault and battery with intent to kill conviction though because there was a reasonable probability that the erroneous charges did affect the jury's consideration in deciding guilt on this charge or the lesser included charge of assault and battery of a high and aggravated nature, which did not require a finding of malice. Prejudice found because the evidence of malice on this charge was not overwhelming. Finally, the trial court's proper instruction in conclusion of an inference of malice that was not binding on the jury did not cure the prejudice. This instruction was not given immediately following the malice charges and "was given only once, whereas the erroneous presumption of malice charge was repeated three times."

Pauling v. State, 350 S.C. 278, 565 S.E.2d 769 (2002). Counsel ineffective in case involving two murder charges and numerous other charges. The defense contested only the murder charges. After the jury indicated that it was hung only on the murder charges and inquired whether failure to agree would require a complete new trial or only a new trial on the murder charges, the court, without objection, instructed the jury that failure to agree would require a new trial on all issues. Counsel ineffective for failing to object because the court's instruction was wrong. Failure to reach agreement on the murder charges would not result in mistrial on charges where the jury did reach a verdict. Prejudice found because jury, following the erroneous instruction convicted defendant on one murder and acquitted on the other when there was no evidence in record distinguishing his conduct such to convict on one and not the other, where state's theory was accomplice liability.

Green v. Young, 571 S.E.2d 135 (Va. 2002). Counsel ineffective in felony murder case for failing to object to an erroneous jury charge that allowed the jury to find the defendant guilty even if the Commonwealth failed to prove guilt beyond a reasonable doubt. The court held that prejudice was presumed because of a structural defect. Even assuming prejudice is required, the defendant had shown prejudice.

2001: *Forget v. State*, 782 So.2d 410 (Fla. Dist. Ct. App. 2001). Counsel ineffective in possession of cocaine and drug paraphernalia case because counsel admitted defendant's guilt on paraphernalia charge but failed to request an instruction that the state must establish defendant's knowledge of the presence of cocaine residue in the pipe since the residue was the essence of the possession charge. Prejudice found because counsel effectively admitted guilt on both charges in absence of the knowledge instruction and jury asked a number of questions indicating a split and some confusion.

Lee v. State, 779 So.2d 607 (Fla. Dist. Ct. App. 2001). Counsel ineffective in battery on a law enforcement officer case because counsel requested and received an instruction on a "lesser included offense" of resisting arrest without violence and jury convicted on this charge. This was ineffective because resisting arrest is not included in battery on officer and is, in fact, a more severe offense.

***Capital Case**

Stanford v. Stewart, 554 S.E.2d 480 (Ga. 2001). Trial counsel ineffective in arson case for failing to object to an erroneous instruction on the elements of the offense. Appellate counsel ineffective for failing to raise ineffective assistance of trial counsel. Defendant was indicted for arson for setting fire to a dwelling house. The evidence at trial showed that he set fire to an apartment and that other residents of the apartment building were displaced. At the conclusion of the trial, the court instructed on the elements of setting fire to a building under circumstances where “human life might be in danger.” Following these instructions, the prosecutor asked for an additional instruction on the indicted offense. The defense counsel responded that either was sufficient. The court brought the jury back in and instructed on the indicted offense and repeated the erroneous instruction. Following these instructions, counsel did not object but stated that he reserved his right to object later. Trial counsel was ineffective because a mistrial would have been granted if he had objected. Appellate counsel was ineffective because he raised the substantive issue but did not raise ineffective assistance of trial counsel because he believed the issue was properly preserved. The appellate court found error but found that the issue was not preserved because of trial counsel’s acquiescence in the error. “No reasonably effective appellate counsel would have failed to recognize that the charging error was not preserved for review.” *Id.* at ____.

Perez v. State, 748 N.E.2d 853 (Ind. 2001). Counsel ineffective in murder case for failing to object to a self-defense instruction that essentially informed the jury that intentional use of a weapon was murder, which eliminated the requirement of a “knowing and intentional killing.” Prejudice found because jury might well have found no “knowing and intentional killing” if it had been properly instructed.

State v. Rogers, 32 P.3d 724 (Mont. 2001). Counsel ineffective in felony sexual assault case for failing to request a failure-to-agree instruction that would have allowed the jury to consider the lesser included offenses of misdemeanor sexual assault and misdemeanor assault if it were unable to reach a verdict on the greater offenses of attempted sexual intercourse without consent and felony sexual assault. While the court had agreed to give lesser-included- offense instructions, counsel failed to request this instruction and offered no strategic reason. Prejudice found even though the jury convicted only of felony assault, apparently rejecting the sexual intent element, because hold-out jurors may have reached this verdict as a compromise rather than voting to acquit. Counsel was also ineffective in refusing to file the notice of appeal, despite the defendant’s repeated requests to do so, instead of filing the appeal and submitting an *Anders* brief.

Dean v. State, 59 S.W.3d 663 (Tenn. 2001). Trial counsel ineffective in attempted second degree murder case for failing to object to erroneous instruction on range of punishment for attempted second-degree murder where the jury was instructed prior to deliberations on guilt-or-innocence, as then required under state law, that the punishment was 3-10 years when it was actually 8-30 years for this offense. The jury was instructed on other offenses and ranges but convicted on this one. Counsel’s conduct was deficient because counsel was unaware of the pertinent sentencing range and unaware of a case finding this same instruction to be error four years before. Prejudice found because the jury may well have relied on this instruction in finding the defendant guilty on this

***Capital Case**

offense. The court also rejected in this case that this issue was not cognizable because the sentencing range was a matter of state statutory law when post-conviction relief was limited to state and federal constitutional law. The court made it clear that ineffective assistance of counsel, regardless of the underlying issue, is always a federal constitutional issue.

***Ex Parte Varelas**, 45 S.W.3d 627 (Tex. Crim. App. 2001) (en banc). Counsel ineffective in capital murder for death of two year old daughter for failing to request proper instructions to limit consideration of evidence of prior bad acts. The victim died as a result of a forceful blow to the abdomen. Autopsy also revealed fractured ribs, bruises all over body, burn on arm, and cut on face. No eyewitness connected defendant to crimes and defense asserted that defendant's wife caused the injuries. During trial, the state presented evidence of defendant's extraneous acts of excessively dunking daughter in pool, "thumping" her on the back of the head, pushing her with his foot, making her sit still for over two hours, and hitting her the night before her death. State argued that because he committed these acts, he was the killer. Counsel was deficient for failing to request two instructions that defendant was entitled to under state law: (1) that jury could not consider extraneous acts unless they believed beyond a reasonable doubt that the defendant had committed those acts; and (2) that the jury could consider the extraneous acts only for the limited purposes of proving state of mind, intent, relationship, and motive. Prejudice found because the state's burden of proof on extraneous acts was removed even though extraneous acts were central to the state's case in that the state produced little other evidence linking the defendant to the death. This evidence also undermined the defense theory that the defendant's wife committed the murder.

2000: Reynolds v. State, 18 S.W.3d 331 (Ark. 2000). Counsel ineffective in murder case for failing to object to the trial court's erroneous instructions on first degree murder. Court charged on first and second degree and manslaughter, but on first degree charged that the jury must find either a purpose of causing death or serious physical injury. First degree could be based only on purpose of causing death and this charge essentially allowed the conviction on first degree murder based on findings only of second degree murder.

People v. Hoyte, 714 N.Y.S.2d 420 (N.Y. Sup. 2000), *aff'd*, 741 N.Y.S.2d 873 (N.Y. App. Div. 2002). Counsel ineffective in drug possession case for failing to object to jury charge from which court had omitted element of defendant's knowledge of weight of contraband, or to request instruction that mental state of "knowingly" applied to all elements of offense, and that defendant's possession of contraband therefore must also include his knowing possession of the weight of the contraband where weight was an element of the offense. Counsel's conduct was deficient where counsel was not even aware of cases holding that knowledge of weight of contraband was an element of crime. Prejudice found where the lack of instruction relieved jury of obligation to find that the prosecution proved defendant's knowledge of weight of drugs possessed.

1999: Strickland v. State, 771 So. 2d 1123 (Ala. Crim. App. 1999). Counsel ineffective in first degree theft case for failing to request a jury charge on the meaning of "deprive." The defendant was a prison inmate but on work assignment. He walked off the job and stole a van. Drove to see his

***Capital Case**

family and after visiting for a few hours called the police and told them where he was. Counsel's failure to request the appropriate charge basically denied the defendant his true defense, which was that he did not intend to permanently deprive the owner of the vehicle of the property.

Adams v. State, 727 So. 2d 997 (Fla. Dist. Ct. App. 1999). Counsel ineffective in manslaughter case for proposing an erroneous jury instruction that dramatically and improperly shifted the burden of proving self defense to the defendant when the state had the burden to prove lack of self defense beyond a reasonable doubt.

State v. Jackson, 733 So. 2d 736 (La. Ct. App. 1999). Counsel ineffective in perjury case for failing to request a charge on justification, i.e. if she lied under duress to protect her life in a reasonable manner and no acceptably alternative, she could not be convicted. Defendant had been a witness to murder. Testified before grand jury that she identified the killer. Testified at trial that she could not identify killer and murder charge was dismissed. In her own trial, she said that she told the truth before grand jury but was told that her identity would remain secret. She and her family had been threatened by the killer and that's the reason she changed her testimony. Defense counsel argued that fear justified her change of testimony, but failed to request charge on justification. Court found prejudice because the jury asked if the defendant had any other options to perjury such as invoking Fifth Amendment and ultimately convicted her only of attempted perjury even though she admitted she lied.

Jones v. Baldwin, 990 P.2d 345 (Or. Ct. App. 1999). Counsel ineffective in conspiracy to commit murder case for failing to object to the trial court's ambiguous instructions that allowed the jury to convict even if it found that the defendant did not actually intend to carry out the murder that was the subject of the conspiracy. Defendant admitted that he engaged in discussions of murder, but said that it was just "bar talk" and he did not actually intend to carry it out. During deliberations the jury asked the court if intent to actually carry out the plan had to be proven. The court gave ambiguous instructions. An interesting side note is that in finding prejudice, the court relied in part on evidence of a news videotape interview of jurors after the trial in which several jurors said that if they had been properly instructed that the defendant must have intended to carry out the plan, the verdict would have been different.

**Commonwealth v. Mikell*, 729 A.2d 566 (Pa. 1999). Counsel ineffective for failing to request alibi instruction. The state's evidence consisted primarily of the testimony of an immunized witness that admitted being a "lookout" during the crime and had previously given an exculpatory statement to a defense investigator. The defense presented alibi testimony from the defendant's mother and sister. Counsel's conduct was deficient for failing to request an alibi instruction. No strategy existed because the court could "discern no reasonable basis for counsel's dereliction." Prejudice established because, without the instruction, the defendant "was effectively deprived of a substantive defense."

***Capital Case**

Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999). Counsel ineffective for failing to request a specific charge required by state law (but not any longer after this opinion) that informs the jury that any reasonable doubt between lesser and greater offenses must be resolved in the defendant's favor.

1998: *State v. Rose*, 972 P.2d 321 (Mont. 1998). Counsel ineffective in burglary case for failing to request an accomplice testimony instruction when an accomplice testified that the defendant planned and carried out the burglary.

Howard v. State, 972 S.W.2d 121 (Tex. App. 1998). Counsel ineffective in drug possession case for failing to request to accomplice-witness testimony instruction. Under state law, accomplice testimony must be corroborated by other evidence connecting the defendant with the offense before a conviction is warranted. In this case, there was only weak inferential corroboration evidence. The court states, "a single error of omission can constitute impermissibly ineffective assistance." 972 S.W.2d at 129.

1997: *State v. Cole*, 702 So. 2d 832 (La. Ct. App. 1997). Counsel ineffective in drug distribution case for failing to object to instructions which failed to instruct on the lesser included offense of attempted distribution and failed to object to the verdict form which failed to include attempted distribution and jury even returned with a question about attempts during deliberations.

State v. Henderson, 689 A.2d 1336 (N.H. 1997). Counsel ineffective in robbery case for requesting instruction which allowed conviction if defendant "attempted to" cause injury which expanded the offense indicted which required a showing that the defendant actually caused serious injury.

1996: *State v. Gittins*, 921 P.2d 754 (Idaho Ct. App. 1996). Counsel ineffective in rape case for acquiescing in jury instruction which stated that question of penetration was not in dispute even though penetration was an essential element of the offense and was obviously in dispute as evidenced by jury request for additional instructions only as to penetration. Direct appeal case, but court found that ineffectiveness was apparent from the record.

Sharkey v. State, 672 N.E.2d 937 (Ind. Ct. App. 1996). Counsel ineffective in murder case for failing to request instruction on lesser included offenses of involuntary manslaughter and reckless homicide which were supported by the evidence.

Brunson v. State, 324 S.C. 117, 477 S.E.2d 711 (1996). Counsel ineffective in possession with intent to distribute crack case for failing to request a mere presence charge when the evidence revealed that the drugs seized were not found on either of the two co-defendants who were tried jointly.

***Capital Case**

Sanchez v. State, 931 S.W.2d 331 (Tex. App. 1996), *overruled on other grounds*, *Woods v. State*, 956 S.W.2d 33 (Tex. Crim. App. 1997) (en banc). Counsel ineffective in drug possession case where the border patrol stopped defendant's car without reasonable suspicion. Counsel challenged the admissibility of the evidence but failed to request an instruction that if jury had a reasonable doubt of whether the evidence was obtained in violation of the constitution or laws of Texas or the United States then the jury must disregard the evidence.

Waddell v. State, 918 S.W.2d 91 (Tex. App. 1996). Counsel ineffective in burglary case for failing to request an instruction on the lesser included offense of criminal trespass when the evidence warranted such an instruction but trial counsel did not request it because he misunderstood elements of criminal trespass.

State v. Doogan, 917 P.2d 155 (Wash. Ct. App. 1996). Counsel ineffective in promotion of prostitution case where state law allowed conviction if defendant profited from prostitution (which was charged by state) or if defendant advanced prostitution (which was not charged). Counsel requested and received an instruction on the uncharged means of advancing prostitution which raised reasonable probability that defendant was convicted on a theory not charged by the state.

1995: *Pearson v. State*, 454 S.E.2d 205 (Ga. Ct. App. 1995). Counsel ineffective in robbery case for failing to request lesser included offense instructions when the whole theory of the defense was that the defendant was not armed at the time of the offense.

People v. Campbell, 657 N.E.2d 87 (Ill. App. Ct. 1995). Counsel ineffective for failing to request an accomplice testimony instruction where defendant was convicted on the basis of the testimony of two accomplices, when one had the charges dismissed in exchange for testimony and the other entered into an agreement and got a reduced sentence in exchange for testimony.

State v. Williams, 531 N.W.2d 222 (Neb. 1995). Counsel ineffective in murder case for failing to object to instruction which omitted the element of malice.

State v. Wilson, 530 N.W.2d 925 (Neb. 1995). Counsel ineffective in murder case for failing to object to instruction which omitted the element of malice.

Commonwealth v. Buksa, 655 A.2d 576 (Pa. Super. Ct. 1995). Counsel ineffective in aggravated assault case for failing to request a self-defense instruction because of erroneous belief that defendant's claim of accidental stabbing was inconsistent with self-defense when it was actually consistent because defendant testified he accidentally stabbed the victim while trying to defend himself from victim's assault.

***Capital Case**

Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995). Counsel ineffective for failing to request alibi charge in criminal sexual conduct case when state's case was circumstantial, alibi witnesses testified, and prosecutor disparaged alibi during closing argument. Strategic decision was unreasonable.

1994: *Commonwealth v. Horton*, 644 A.2d 181 (Pa. Super. Ct. 1994). Counsel ineffective in robbery case for failing to request an instruction on the definition of "recklessly" in regards to the defense of duress, where eyewitness testified defendant took money from victim's pocket only after told to do so by person pointing gun in his direction and defense of duress was not available if the defendant had "recklessly" placed himself in position where it was probable that he would be subjected to duress.

****Commonwealth v. Chmiel***, 639 A.2d 9 (Pa. 1994). Counsel was ineffective in failing to request accomplice instruction with respect to testimony of defendant's brother, who while not present at the time of the offenses, suggested the victims' home to the defendant as a source for fast money and helped plan the robbery that resulted in murders. "[T]here was no reasonable basis" for counsel's conduct. Prejudice established "the jurors might well have concluded, under proper instructions, that [the brother] was an accomplice whose testimony was of little value."

Chalk v. State, 313 S.C. 25, 437 S.E.2d 19 (1994), , *overruled by Brightman v. State*, 336 S.C. 348, 520 S.E.2d 614 (1999). Trial counsel ineffective for failing to request an instruction to resolve any reasonable doubt as to whether defendant was guilty of murder or manslaughter in favor of the lesser included offense.

1993: *Commonwealth v. Allison*, 622 A.2d 950 (Pa. Super. Ct. 1993). Counsel ineffective for failing to object to generalized alibi instruction instead of specific instruction based on facts of case and state's burden of proof.

Commonwealth v. Hutchinson, 621 A.2d 681 (Pa. Super. Ct. 1993). Counsel ineffective in homicide by vehicle case for failing to request an instruction on the lighting requirement where there was evidence that tractor operator's violation of lighting requirement of motor vehicle code may have been a substantial cause of fatal accident.

Taylor v. State, 312 S.C. 179, 439 S.E.2d 820 (1993). Trial counsel ineffective for failing to object to burden shifting instruction on issue of intent to distribute controlled substances.

1992: *Kuk v. State*, 602 So. 2d 1213 (Ala. Crim. App. 1992). Trial counsel ineffective for failing to object to instruction on reckless murder when defendant had been indicted only for intentional murder and instruction could have permitted jury to convict defendant without finding that he had intent to kill.

***Capital Case**

State v. Laraby, 842 P.2d 1275 (Alaska Ct. App. 1992). Counsel ineffective for failing due to oversight to object to omission of lesser included offense instruction on one charge where the instruction was given on a second charge.

State v. Wright, 598 So. 2d 493 (La. Ct. App. 1992). Counsel failed to object to omission of lesser included offense in responsive verdicts despite a state law requiring submission of all charged and lesser included offenses to jury.

Commonwealth v. Roxberry, 602 A.2d 826 (Pa. 1992). Counsel ineffective for failing to request an alibi instruction where defendant's testimony supported one.

Riddle v. State, 308 S.C. 361, 418 S.E.2d 308 (1992). Trial counsel ineffective for failing to request an alibi instruction when the sole theory of defense was alibi.

Gallman v. State, 307 S.C. 273, 414 S.E.2d 780 (1992). Trial counsel ineffective for failing to object to judge's comment, prior to closing arguments and instructions, that jurors were free to talk about the case among themselves.

Watrous v. State, 842 S.W.2d 792 (Tex. App. 1992). Trial counsel in aggravated sexual assault on child case ineffective for failing to request a jury instruction on the statutory defense of medical care which was the sole theory of defense. Defendant testified that he touched child's genitals to apply salve after the child complained of painful urination and admitted conduct which was sufficient to find penetration. Thus, counsel's failure to request instruction left jury with no alternative but to convict.

Vasquez v. State, 830 S.W.2d 948 (Tex. Crim. App. 1992). Trial counsel in possession of firearm by felon case was ineffective for failing to request an instruction on the statutory defense of necessity where the evidence showed that the defendant had been a "building tender" (duties like a guard) while in prison and was therefore hated by prison gang members; defendant had been hospitalized after he was kicked in the back by a former inmate; defendant testified he had been kidnapped from hospital and held hostage by ex-gang members but grabbed gun and escaped when his guard was distracted and was arrested shortly afterwards. Defendant told police officer that someone was out to get him and there were men close by with machine-guns who would shoot him if they saw him.

State v. Marcum, 480 N.W.2d 545 (Wis. Ct. App. 1992). Trial counsel ineffective in multiple count child sexual assault case for failing to object to standard unanimity instruction combined with failure to object to verdict form which lacked specificity about which act of sexual contact related to which count of sexually molesting stepdaughter. Defendant acquitted on 2 of the 3 charges, but because

***Capital Case**

of counsel's failure, the jury could have convicted on the one count even though they disagreed about which incident he was guilty of. Charges dismissed because no way to tell.

1991: *Palmer v. State*, 573 N.E.2d 1256 (Ind. 1991) (*affirming* 553 N.E.2d 1256 (Ind. Ct. App. 1990)). Counsel ineffective for failing to object to voluntary manslaughter charge which misstated elements of the offense.

People v. Gridiron, 475 N.W.2d 879 (Mich. Ct. App.), *amended on appeal*, 475 N.W.2d 879 (Mich. 1991). Trial counsel ineffective for requesting instruction on lesser included offense of simple possession in prosecution for possession with intent to deliver, because penalty for either was the same, conviction for the lesser required proof of fewer elements, and state law prohibited instruction on the lesser offense. Retrial prohibited where defendant acquitted of greater offense and convicted on lesser.

Battle v. State, 305 S.C. 460, 409 S.E.2d 400 (1991). Trial counsel ineffective for failing to request specific instructions on appearances to defendant and retreat as it related to self-defense.

Ex parte Zepeda, 819 S.W.2d 874 (Tex. Crim. App. 1991). Trial counsel ineffective in murder case for failing to request an instruction on accomplice witness testimony when witnesses indicted for the lesser included offense of voluntary manslaughter testified for the state and the only state evidence connecting the defendant to the commission of the murder was these witnesses.

1990: *People v. Newbolds*, 562 N.E.2d 1051 (Ill. App. Ct. 1990). Counsel ineffective in unlawful use of weapons by felon case for failing to request an instruction on the defense of necessity where one version of facts was that defendant's girlfriend pulled a gun on him and the weapon discharged while he was taking the weapon away from her.

State v. Rubin, 559 So. 2d 550 (La. Ct. App. 1990). Counsel in attempted murder case ineffective for failing to object to state argument and judge's erroneous instructions which told jury that intent to inflict bodily harm would support the conviction because an attempted murder requires a specific intent to kill.

State v. Carter, 559 So. 2d 539 (La. Ct. App. 1990). Counsel in attempted murder case ineffective for failing to object to state argument and judge's erroneous instructions which told jury that intent to inflict bodily harm would support the conviction because an attempted murder requires a specific intent to kill.

Commonwealth v. Gainer, 580 A.2d 333 (Pa. Super. Ct. 1990). Counsel ineffective for failing to request an alibi instruction after presenting alibi evidence and arguing alibi to jury.

***Capital Case**

Carter v. State, 301 S.C. 396, 392 S.E.2d 184 (1990), *overruled in part by Brightman v. State*, 336 S.C. 348, 520 S.E.2d 614 (1999). Trial counsel ineffective in murder/manslaughter case for failing to object to instruction which created a mandatory presumption of malice (rather than allowing a permissive inference) and precluded a finding of manslaughter. Trial counsel also ineffective for failing to request the required instruction that the jury had a duty to resolve doubt as to level of guilt in defendant's favor and find him guilty only of the lesser offense.

Dandy v. State, 301 S.C. 303, 391 S.E.2d 581 (1990). Counsel ineffective for failing to object to a self-defense charge which erroneously stated that defendant must prove self-defense by a preponderance of the evidence.

1989: *State v. Ball*, 554 So. 2d 114 (La. Ct. App. 1989). Counsel in attempted murder case ineffective for failing to object to state argument and judge's erroneous instructions which told jury that intent to inflict bodily harm would support the conviction because an attempted murder requires a specific intent to kill.

****Commonwealth v. Billa***, 555 A.2d 835 (Pa. 1989). Counsel ineffective for failing to request a limiting instruction to inform jury that the evidence that the defendant raped and attempted to murder a prior victim was admissible only to prove motive and intent in rebuttal to defendant's claim of accidental death.

High v. State, 300 S.C. 88, 386 S.E.2d 463 (1989). Counsel ineffective for failing to object when judge instructed during manslaughter charge that the law "presumes" intent from the doing of an unlawful act.

State v. Moritzsky, 771 P.2d 688 (Utah Ct. App. 1989). Counsel in aggravated assault case was ineffective for requesting a defense of habitation instruction in accordance with a prior version of the applicable statute which failed to incorporate the current statute's presumption that the defendant was acting reasonably assuming the jury found the defense otherwise applicable.

1988: *Spaziano v. State*, 522 So. 2d 525 (Fla. Dist. Ct. App. 1988). Trial counsel ineffective for failing to object to incomplete and misleading instruction of excusable homicide and manslaughter. Appellate counsel also ineffective for failing to raise issue on direct appeal.

People v. Pegram, 529 N.E.2d 506 (Ill. 1988) (*affirming* 504 N.E.2d 958 (Ill. App. Ct. 1987)). Counsel ineffective in robbery case for failing to request an instruction on defense of compulsion and prosecution's burden of proof on that issue where defendant testified that he participated in robbery because he was being forced at gun point.

***Capital Case**

Tarwater v. Cupp, 748 P.2d 125 (Or. 1988). Counsel ineffective for failing to object to erroneous instruction that the jurors should consider lesser included offenses only if they did not find the defendant guilty of the greater offenses beyond a reasonable doubt.

Stone v. State, 294 S.C. 286, 363 S.E.2d 903 (1988). Trial counsel ineffective for failing to request a self-defense instruction when the facts of the case clearly supported such an instruction.

Conaty v. Solem, 422 N.W.2d 102 (S.D. 1988). Counsel ineffective for failing to request a self-defense instruction where the issue was raised by the evidence.

1987: *Perkins v. Keeney*, 731 P.2d 1047 (Or. Ct. App. 1987). Counsel ineffective for failing to object to instruction requiring jury to find defendant not guilty of greater offense of murder before considering lesser included offense of manslaughter because instruction was contrary to state law.

Peaslee v. Keeney, 726 P.2d 398 (Or. Ct. App. 1987). Counsel ineffective for failing to object to instruction requiring jury to find defendant not guilty of greater offense of murder before considering lesser included offense of manslaughter because instruction was contrary to state law.

Commonwealth v. Gass, 523 A.2d 741 (Pa. 1987). Counsel ineffective in murder case for failing to request an instruction on verdict of not guilty by reason of insanity when sanity was clearly in issue.

Sosebee v. Leeke, 293 S.C. 531, 362 S.E.2d 22 (1987). Trial counsel in criminal sexual conduct case ineffective for failing to object to judge's improper comments in the presence of the jury which clearly reflected that the judge believed the victim's testimony.

1986: *People v. Jaffe*, 493 N.E.2d 600 (Ill. App. Ct. 1986). Counsel ineffective in attempted murder case for failing to request a self-defense instruction when defendant admitted fight so self-defense was the only viable defense theory.

Commonwealth v. Whiting, 517 A.2d 1327 (Pa. Super. Ct. 1986). Trial counsel ineffective, when defendant raised an alibi defense and named his wife as his alibi but did not call her as a witness, for failing to object to "missing witness" instruction that allowed jury to draw inference that her testimony would have been unfavorable to the defense. Instruction generally allowed but improper in this case because of spousal privilege.

1985: *State v. Talley*, 702 P.2d 353 (N.M. Ct. App. 1985). Counsel ineffective in burglary, larceny, and arson case for failing to request a proper instruction on the defense of inability to form specific intent when each of the offenses included a specific intent element unique to that crime. The defendant

***Capital Case**

was prejudiced because the only defense witness was an expert, who testified that the defendant was a pyromaniac and was unable to avoid impulses to set fires and that, due to intoxication, his behavior was uncontrollable. The court also found that counsel's conduct was deficient in failing to request an instruction that the defendant's statements to the defense expert could be considered only with respect to the question of defendant's insanity. While this error was not prejudicial, standing alone, it was considered cumulatively. Counsel also failed to request an instruction on intoxication, which "was one more thread with which to tie the knot of ineffective assistance of counsel." *Id.* at 358. Prejudice found due to the "cumulative effect" of the errors.

***Capital Case**

10. FAILURE TO CHALLENGE COMPETENCE

a. U.S. Court of Appeals Cases

1999: *Hull v. Kyler*, 190 F.3d 88 (3d Cir. 1999). Counsel ineffective in murder case for failing to challenge competence to stand trial. Defendant was found incompetent shortly after arrest. Held at hospital for four years and then a competence hearing was held. The court-appointed expert who testified had seen the defendant 3 months before and testified in response to questions of understanding and ability to assist the defendant could “at that time.” Defense counsel failed to cross-examine the expert, did not present any evidence, and conceded competence. Defendant promptly plead guilty to murder. In his third habeas petition, ruling under the amended standards of the AEDPA, the court held that counsel’s conduct was deficient. If counsel had performed adequately the evidence would have revealed that the defendant had been found incompetent by at least eight doctors during his hospital stay on the basis of mental retardation and schizophrenia. One examination only two weeks before the court-appointed expert’s examination found that the defendant was incompetent and there was no change in him from previous examinations. An examination by a hospital doctor following the court-appointed exam also concluded that the defendant was not competent. The discharge report strongly recommended additional hospitalization and treatment because not competent. Cross-examination of the court-appointed expert also would have revealed that his report stated that although the defendant’s schizophrenia was in remission the remission was “fragile.” Likewise, the report stated that although the defendant could exercise judgment that ability could break down easily under stress. The report also concluded that while the defendant was competent in non-stressful situations, his competence should be watched closely during any attempt at trial because he could easily breakdown. The court held that there was prejudice because the defendant need only establish that there was a reasonable probability that he was tried while incompetent not that he would not have been convicted. The court found the standards of the AEDPA met because the state court findings, based primarily on the guilty plea colloquy following the competence hearing, were “objectively unreasonable” under the clear Supreme Court precedents of *Pate v. Robinson* and *Drope v. Missouri*.

b. State Cases

In re Fleming, 16 P.3d 610 (Wash. 2001) (en banc). Counsel ineffective in burglary case for failing to advise the court at time of defendant’s *Alford* plea that the defendant had been found incompetent by a defense expert authorized by the court for purposes of a diminished capacity defense. Deficient conduct found because one must be competent to stand trial or enter plea and competence cannot be waived. Prejudice found even though defendant was medicated prior to plea, no irrational behavior was apparent from the record, and there was no other indication to show that defendant did not

***Capital Case**

understand the proceedings because the defendant “might have been found incompetent and should have had a competency hearing before entering a plea of guilty.” *Id.* at 615.

- 1999:** *Woods v. State*, 994 S.W.2d 32 (Mo. Ct. App. 1999). Counsel ineffective following guilty plea to second degree murder of estranged wife for failing to request a competence hearing when defendant attempted suicide on the morning of the scheduled sentencing. The defendant had been found incompetent and hospitalized for a number of months after arrest. Then, although found competent, experts still agreed that he was manic depressive and delusional. Even though defendant attempted suicide the morning the sentencing hearing was first scheduled, counsel failed to request an additional competence evaluation because she thought he seemed competent when she talked to him and the same as always because he was always depressed. The court held that “[t]his was not counsel’s call,” *Id.* at 39, and counsel was ineffective for failing to request a competence evaluation following the suicide attempt.
- 1994:** *State v. Green*, 632 So. 2d 1187 (La. Ct. App. 1994). Counsel ineffective for failing to object to inadequate proceedings used by court to determine competency and permitted mentally retarded defendant to plead guilty despite knowledge that defendant probably could not understand the proceedings.
- 1990:** *People v. Harris*, 460 N.W.2d 239 (Mich. Ct. App. 1990). Counsel ineffective in arson case for requesting trial despite serious doubts concerning defendant’s competency to stand trial and defendant’s request for continuance so she could get mental help. In addition, at sentencing counsel effectively recommended a prison term despite defendant’s request for probation and made no attempt to argue that prison term be short or argue any mitigation.
- 1988:** **Curry v. Zant*, 371 S.E.2d 647 (Ga. 1988). Trial counsel ineffective for failing to obtain independent psychiatric evaluation of defendant which would have rendered evidence that the defendant was not competent to waive his rights and plead guilty and was either incapable of distinguishing right from wrong or incapable of controlling the impulse to commit wrongful acts.
- 1987:** *State v. Haskins*, 407 N.W.2d 309 (Wis. Ct. App. 1987). Trial counsel ineffective for failing to raise issue concerning deaf defendant’s competency where counsel had represented between 6 and 9 times before, defendant had been found incompetent at least once before, and counsel doubted competency. Counsel did not raise because when defendant was found incompetent he spent one year in hospital and counsel felt if incompetent he would do time and then be tried so counsel decided to roll dice with jury. Court held there can be no strategic reason not to raise competency.
- 1986:** *State v. Johnson*, 395 N.W.2d 176 (Wis. 1986) (affirming 374 N.W.2d 637 (Wis. Ct. App. 1985)). Counsel ineffective in first degree murder case for failing to raise competency to stand trial issue

***Capital Case**

where defense experts expressed doubt about competency and recommended that issue be raised to court and trial court even asked counsel about competency issue. Counsel's reasons (that he did not want to subject defendant to state experts prior to mental health defense and that counsel did not personally believe defendant was incompetent) were insufficient.

***Capital Case**

11. INFORMING THE JURY THAT THE DEFENDANT WOULD TESTIFY AND THEN NOT CALLING THE DEFENDANT

a. U.S. Court of Appeals Cases

2002: *Ouber v. Guarino*, 293 F.3d 19 (1st Cir. 2002) (affirming 158 F. Supp. 2d 135 (D. Mass. 2001)). Counsel ineffective, under AEDPA, in third trial of drug trafficking case for promising the jury four times in the opening to call the defendant as a witness, but then failing to keep those promises. As counsel knew from the first two mistrials, the state's evidence was primarily an undercover officer. Counsel argued that the defendant did not know the contents of the envelopes delivered at the insistence of her brother, but counsel did not present the defendant to testify. Defense counsel did, however, present numerous witnesses that the defendant was truthful and that her brother was domineering. Counsel's conduct was deficient because of "a broken promise (or, more precisely put, a series of broken promises): defense counsel's repeated vow that the jurors would hear what happened from the petitioner herself. Thus, the error attributed to counsel consists of two inextricably intertwined events: the attorney's initial decision to present the petitioner's testimony as the centerpiece of the defense (and his serial announcement of that fact to the jury in his opening statement) in conjunction with his subsequent decision to advise the petitioner against testifying. Taken alone, each of these decisions may have fallen within the broad universe of acceptable professional judgments. Taken together, however, they are indefensible." The court found, "A broken promise of this magnitude taints both the lawyer who vouchsafed it and the client on whose behalf it was made." The state court decision to the contrary was unreasonable because it found counsel's behavior to be "cautious," which was contrary to the record. The state court decision was also unreasonable because it found counsel's change to be reasonable based on the testimony of a witness when counsel's decision was made before that witness even testified and because the witness' testimony actually removed part of the rationale for not putting the petitioner on the witness stand. Prejudice found because this case "was exceedingly close," as demonstrated by the two previous hung juries, and "[i]n a borderline case, even a relatively small error is likely to tilt the decisional scales." The state court's finding was unreasonable for reasons similar to those addressed with respect to the finding of deficient conduct.

b. State Cases

1997: *People v. Davis*, 677 N.E.2d 1340 (Ill. App. Ct. 1997). Court says in dicta (case reversed on other grounds) that counsel was ineffective in murder case for telling the jury in the opening statement that the defendant would testify before investigating to find out that the defendant had a prior conviction with which he could be impeached. Thus, the defendant did not testify and counsel had to attempt to explain lack of testimony away during the closing arguments.

***Capital Case**

***Capital Case**

12. FAILURE TO PRESERVE THE RECORD FOR APPEAL

a. U.S. Court of Appeals Cases

2000: *Flores v. Demskie*, 215 F.3d 293 (2d Cir. 2000). Trial counsel ineffective in child sodomy case for waiving reversible error. Under New York *Rosario* rule, automatic reversal is required if the state fails to provide the defense with all prior statements of testifying witnesses. Following the state's case, defense counsel, who discovered the issue during jury selection, informed the court that the state failed to disclose a prior inconsistent statement of the victim's mother, who testified at trial. The court allowed the case to continue while the state located the statement. Following conviction but before sentencing, the statement was located. Before the court ruled on the issue, however, defense counsel, who was not aware of the automatic reversal rule and believed he had to prove prejudice, waived the issue by stating that he would not have acted any differently during trial if the statement had been disclosed to him. Defendant was sentenced.

b. State Cases

2002: *S.T. v. State*, 764 N.E.2d 632 (Ind. 2002). Counsel ineffective in juvenile delinquency case for failing to object to court's exclusion of testimony from the juvenile's mother and a friend as a sanction for failure to comply with local court rule requiring disclosure of witness list ten days before trial. Failure to object was deficient and prejudicial conduct because the trial court can exclude defense witnesses under this rule only when there is evidence of bad faith on the part of counsel or a showing of substantial prejudice to the state.

1993: *Vaz v. State*, 626 So. 2d 1022 (Fla. Dist. Ct. App. 1993). Trial counsel ineffective for failing to join in co-defendant's counsel's objection to time limitation on closing argument which resulted in reversal on direct appeal for co-defendant.

1992: *People v. Brocksmith*, 604 N.E.2d 1059 (Ill. App. Ct. 1992), *aff'd*, 642 N.E.2d 1230 (Ill. 1994). Counsel ineffective for failing to ascertain applicable statute of limitations period for lesser included offense and failing to advise defendant that, since limitations period had expired for lesser included offense, by submitting instruction on that offense, defendant waived limitations period objection.

1989: *Commonwealth v. Butler*, 566 A.2d 1209 (Pa. Super. Ct. 1989). Counsel ineffective for failing to object to trial court's order granting motion for reconsideration of dismissal of charges where court did not act within 30 days of the dismissal order and therefore lacked jurisdiction under state law to act.

***Capital Case**

- 1988:** *Gilchrist v. State*, 534 So. 2d 1120 (Ala. Crim. App. 1988). Trial counsel ineffective for failing to object in murder trial to district attorney's participation as counsel after D.A. had already appeared in proceeding as a witness when if objection had been made properly (counsel objected but on wrong basis), the case would have been reversed on appeal.
- 1988:** *Commonwealth v. Groff*, 548 A.2d 1237 (Pa. Super. Ct. 1988). Counsel ineffective for failing to preserve the issue of whether the statute of limitations defense presented a question of fact for the jury where the defendant was charged with statutory rape, indecent assault, and corruption of minors but there was a factual dispute concerning when the alleged crimes occurred.
- 1987:** *Salkil v. State*, 736 S.W.2d 428 (Mo. Ct. App. 1987). Counsel ineffective in failing to object to ambiguous jury verdict form that contained a provision for a finding of either guilt or innocence on same sheet of paper with only one signature line for the foreman which was applicable to either finding. When jury returned entries had been made for punishment but no portions of verdict form had been stricken.

***Capital Case**

13. MISCELLANEOUS

a. U.S. Court of Appeals Cases

2002: *Miller v. Dormire*, 310 F.3d 600 (8th Cir. 2002). Counsel ineffective in cocaine trafficking case for waiving the defendant's right to a jury trial. The defendant was present and silent during the exchange between the trial court and defense counsel concerning the waiver and counsel's request for a bench trial. The trial court did not address the defendant directly. The state court held that the defendant had affirmatively waived his right to a jury because he was present and made no objection. The Eighth Circuit found that the state courts made an unreasonable determination of the facts under 28 U.S.C. § 2254(d)(2), because the record is devoid of any direct testimony from the defendant regarding his consent to waive trial by jury. The evidence revealed that counsel failed to advise the defendant that the decision to waive trial by jury was his and his alone. Under circuit precedent the court held that prejudice is presumed because denial of trial by jury is tantamount to a structural error. Thus, under 28 U.S.C. § 2254(d)(1), the state court's ruling was also an unreasonable determination of the federal law as interpreted by the United States Supreme Court. "When a defendant is deprived of his right to trial by jury, the error is structural and requires automatic reversal of the defendant's conviction." *Id.* at 604.

1989: *Harding v. Davis*, 878 F.2d 1341 (11th Cir. 1989). Defense counsel rendered IAC by failing to object when the trial court directed a verdict against his client. Prejudicial error per se.

1982: **Holtan v. Parratt*, 683 F.2d 1163 (8th Cir. 1982). Counsel ineffective in failing to move to withdraw the defendant's plea of nolo contendere as requested by the defendant five days prior to sentencing. Although the defendant was not entitled as a matter of right to withdraw the plea, the prosecution conceded it would not have been prejudiced, the defendant entered the plea with a misunderstanding that the state could not present additional adverse evidence in sentencing, and, under state law, the request was within the discretion of the trial judge and "the possibility that he would have been allowed to withdraw his plea is not insubstantial." Remanded with instructions to allow the defendant to pursue the motion in the state courts or the writ would be issued.

b. Military Cases

2000: *United States v. Paaluhi*, 54 M.J. 181 (C.A.A.F. 2000). Counsel ineffective in rape, sodomy with a child, and indecent acts with child case where defense counsel effectively advised accused to confess to government psychologist that he committed charged offenses, in hopes of obtaining favorable sentencing testimony from psychologist. This occurred when communications made by a member of the military to a psychotherapist were not privileged on the basis of the federal civilian psychotherapist-patient privilege. [Military law began recognizing the privilege on November 1,

***Capital Case**

1999.] Counsel also failed to protect the accused's statements from disclosure by having psychologist assigned to defense team as required by military attorney-client-privilege law. Prejudice found because defendant's confession to psychologist was admitted during the trial. Without the confession, the government's case "was not overwhelming," since it was based only on victim's videotaped interview and out of court statement's presented through testimony of social worker.

1996: *United States v. Sorbera*, 43 M.J. 818 (A.F. Ct. Crim. App. 1996). Counsel ineffective in indecent act with daughter case for advising client pretrial to call ex-wife and offer her child custody and support and explain the ramifications if their daughter continued to lie and testify against him. The phone call resulted in an additional charge of obstruction of justice and that defense counsel fired. At trial, defendant acquitted of indecent acts but convicted of obstruction of justice for call made on advice of counsel.

1989: *United States v. Ankeny*, 28 M.J. 780 (N.M.C.M.R. 1989), *aff'd on other grounds*, 30 M.J. 10 (C.M.A. 1990). Trial counsel ineffective where the accused came up positive on a urinalysis test and during a pretrial meeting with the assistant staff judge advocate (prosecutor), trial counsel revealed that prior to the urinalysis, the accused had solicited another officer to falsely substitute his urine for that of the accused. The accused was subsequently charged and convicted of using cocaine and soliciting a fellow officer to be derelict in his duties when the Government had no prior knowledge of the solicitation charge and probably never would have but for counsel's disclosure.

c. State Cases

2003: *Schnelle v. State*, 103 S.W.3d 165 (Mo. Ct. App. 2003). Counsel was ineffective in assault case for failing to object to the trial court's striking of the defendant's entire testimony because the defendant refused to answer a question on cross examination concerning one of his prior criminal convictions. The defendant's theory at trial was one of self-defense and that he believed that the alleged victims were trying to rob him. The defendant testified in his own defense, but his counsel did not ask any questions on direct examination about his prior convictions. During cross examination the defendant admitted that he had approximately twenty prior convictions, including a conviction in Kansas, but the defendant refused to answer the question of what his prior conviction in Kansas was for. The court informed the defendant that if he refused to answer the question, the prosecutor's motion to strike all of his testimony would be granted. Trial counsel did not object and did not argue that the trial court could fashion a more appropriate sanction and, in fact, counsel actually stated that striking the entire testimony was the only available remedy. Counsel's conduct was deficient because the case law was not clear and because the defendant's sole defense depended on his own testimony. Counsel's conduct was also deficient because the existing case law supported an argument that the defendant testimony should not be stricken in its entirety because the question he refused to answer

***Capital Case**

was “of such a collateral nature that striking his entire testimony would not be the proper remedy.” Prejudice was found because the defendant’s testimony was crucial to his theory of self-defense. The fact that a police officer testified about the defendant’s statements to him did not negate the reasonable probability that striking the defendant’s entire testimony affected the outcome of the case. Likewise, the fact that the defendant’s theory was presented in trial counsel’s opening statement did not negate the prejudice because opening statements are not evidence.

2002: **Ex parte Pierce*, 851 So.2d 618 (Ala. 2002). Counsel ineffective in capital trial for failing to object to Sheriff’s “close and continual contact with the jury” when the Sheriff was a key witness for the State in the trial.

Wertz v. State, 349 S.C. 291, 562 S.E.2d 654 (2002). Counsel ineffective in second degree burglary case for failing to request clarification of jury’s verdict with respect to the degree of the burglary conviction where the jury acquitted the defendant of possession of a firearm during the commission of a violent offense but convicted on second degree burglary, which required a finding that the defendant was armed. Prejudice found because the jury was not instructed to specify the degree of burglary found or that a general verdict had the effect of finding petitioner guilty of the offense charged in the indictment.

Patrick v. State, 349 S.C. 203, 562 S.E.2d 609 (2002). Counsel ineffective in burglary case for failing to request mercy from jury. Under state law at the time, jury in burglary case could find guilty (which meant, at the time, a mandatory life sentence) or guilty with a recommendation of mercy (which allowed judge to give a lesser sentence of as little as five years).⁵ Per se prejudicial.

Belcher v. State, 93 S.W.3d 593 (Tex. App. 2002). Counsel was ineffective for failing to alert the trial court of an error in the court’s calculation of the deadline for ruling on a motion for new trial. The defendant moved for a new trial alleging among other things that a juror was improperly seated because the juror had lied during voir dire. During the motion for new trial hearing the court expressed concern over the issue and twice referred to its deadline for ruling on the motion for new trial. The court’s calculation was incorrect but counsel did not correct the court. Under Texas law, if the trial court does not rule on the motion for new trial within 75 days after the sentence is imposed the motion for new trial is denied by operation of law. Here the trial court entered an order two days late granting the defendant’s new trial motion. Counsel’s conduct was deficient in failing to advise the trial court of the proper deadline. The court presumed prejudice because defense counsel’s silence was tantamount to the actual or constructive denial of counsel at a critical stage of

⁵South Carolina abolished the “recommendation of mercy” verdict and the mandatory life sentence in 1997.

***Capital Case**

the proceedings. The court also found that the defendant had established prejudice because the trial court's entry of the late order clearly indicated that absent counsel's error the motion for new trial would have been granted. The court remanded to the trial court for a new hearing on the motion for a new trial.

2001: *Owens v. State*, 750 N.E.2d 403 (Ind. Ct. App. 2001). Trial and appellate counsel ineffective in burglary, robbery, and criminal confinement case for failing to object to the trial judge's failure to maintain the role of neutral and passive arbitrator. After both parties rested in a bench trial, the trial court questioned witnesses and requested that the parties conduct additional discovery. Two weeks later when they returned to court, the trial judge heard inadmissible hearsay from both a police officer, who was recalled, and the prosecutor, who was not even a witness, and heard evidence impeaching the defendant's alibi testimony. Prejudice found because when the parties rested, the judge was not convinced of guilt beyond a reasonable doubt and, thus, requested the additional evidence. Instead of ordering dismissal of the charges, however, the court only remanded for a new trial.

State v. Lopez, 27 P.3d 237 (Wash. Ct. App. 2001), *aff'd on other grounds*, 55 P.3d 609 (Wash. 2002). Counsel ineffective in assault and possession of a firearm case for failing to move for dismissal of the firearm charge where one element of the offense was a constitutionally valid predicate conviction and the state had not proven this element. Defense counsel later elicited testimony about a prior conviction for burglary from the defendant, which allowed the jury to convict.

1999: *State v. Aho*, 975 P.2d 512 (Wash. 1999). Counsel ineffective in indecent liberties case because counsel failed to investigate effective date of child molestation statute and proposed instructions that permitted a conviction under the statute that was not in effect at the beginning of the charging period and, thus, not in effect at the time the crimes were committed.

1997: **State v. Tenace*, 700 N.E.2d 899 (Ohio Ct. App. 1997). Counsel ineffective in withdrawing the defendant's plea of not guilty by reason of insanity despite the defendant's repeated statements that he wished to pursue that defense because of his belief that he suffered brain damage from a cocaine addiction. Counsel's conduct was deficient because "an attorney is free to make a tactical decision regarding what plea to enter only when a client does not choose to make the decision or does not object on the record." Reversal required because "a breakdown occurred in the attorney-client relationship of such magnitude that appellant was deprived of the right to effective assistance of counsel."

1994: *People v. Bailey*, 639 N.E.2d 1313 (Ill. App. Ct. 1994). Trial counsel ineffective in prosecution under Sexually Dangerous Persons Act for successfully opposing state's motion to have court's

***Capital Case**

psychiatrists conduct a reexamination of defendant. Ineffective because it had been two and a half years since evaluation, pertinent inquiry of dangerousness refers to time of court's decision, and the record was replete with defendant's good behavior during period while free on bond, thus counsel should have known that reevaluation could be favorable to defendant.

People v. Taylor, 637 N.E.2d 756 (Ill. App. Ct. 1994). Ineffective for failing to correct trial court's mistake of fact during post-trial motion hearing which led the judge to rule erroneously.

1993: *State v. Edwards*, 507 N.W.2d 506 (Neb. Ct. App. 1993). Counsel ineffective in joint trial for possession with intent to distribute crack for failing to object when co-defendant's counsel asked defendant about prior felony drug conviction and offered a certified copy of the prior conviction.

1992: *Banshee v. State*, 308 S.C. 369, 418 S.E.2d 313 (1992). Trial counsel ineffective for *successfully* moving for dismissal of nonviolent charge of receiving stolen goods thereby leaving the jury with the extreme alternatives of convicting defendant of violent offenses (armed robbery, kidnaping, conspiracy, and possession of sawed-off shotgun) or acquitting him.

In re J.B., 618 A.2d 1329 (Vt. 1992). Counsel in juvenile sexual assault case ineffective for advising defendant and parents to cooperate with the police in interrogation, not accompanying them during interrogation, and not explaining right to silence and consequences of confession. Counsel did not consider whether the state might be willing to settle without litigation in light of the fact that the state's evidence, without the confession, was questionable.

1990: *State v. Iowa Dist. Court for Polk County*, 464 N.W.2d 244 (Iowa 1990). Counsel ineffective for consenting to sequestration of sex abuse defendant during the testimony of the alleged victim who was not a "child" within the meaning of the state statute authorizing separation of defendant and child victim.

1989: *Nunn v. State*, 778 S.W.2d 707 (Mo. Ct. App. 1989). Counsel ineffective where counsel called himself as a witness to testify concerning a prior inconsistent statement by state's witness which was surreptitiously recorded by counsel and when propriety of counsel's conduct was made an issue, counsel failed to move for a mistrial or request to withdraw.

1985 **Trimble v. State*, 693 S.W.2d 267 (Mo. Ct. App. 1985). Counsel ineffective in ignoring allegation that victim's mother had paid two State's witnesses during trial recess after the witnesses testified and told them they "did well." "The issue is not whether the witnesses were bribed. The issue is that of ineffectiveness in not taking advantage of the evidence in some fashion."

***Capital Case**

It was not “reasonable” under “prevailing professional norms” for movant's counsel to ignore the incident in question. The actions described would have been admissible in movant's case to show interest and bias on the part of the state's witnesses. There was no tactical reason not to present the evidence to the jury. The evidence did not depend for reliability on the witnesses related to movant, as [a neutral party] also saw and corroborated the incident.

Prejudice established even though the jury was aware the witnesses testified pursuant to deals.

When the evidence of the money passing to the witnesses is added to the testimony, an entirely different implication is raised as to credibility. The seeking or acceptance of cash reward for testimony is something legally and morally different from acceptance of immunity from prosecution before testimony is given.

***Capital Case**

II. CAPITAL SENTENCING PHASE ERRORS⁶

A. NUMEROUS DEFICIENCIES AND INADEQUATE MITIGATION

1. U.S. Supreme Court Cases

2000: **Williams v. Taylor*, 529 U.S. 362 (2000) (tried in September 1986). Counsel ineffective in capital sentencing for failure to prepare and present mitigation evidence. Counsel did not begin to prepare for the sentencing phase until a week before trial. They failed to get extensive records of Williams's childhood because they incorrectly thought that state law barred access to such records. They failed to discover a number of available mitigation witnesses due to lack of investigation and, in one instance, simply because they failed to return the phone call of a CPA, who saw Williams as a prison minister. At trial, counsel presented testimony only from Williams's mother and two neighbors (one of whom was not interviewed before but was asked to testify on the spot when noticed in the audience during the proceedings). These witnesses testified that he was "nice" and not violent. Counsel also presented a tape of a psychiatrist's testimony simply relating that Williams had removed the bullets from a gun during an earlier robbery to avoid hurting anyone. In closing, counsel argued that Williams had turned himself in and the police would not have solved the crimes otherwise, but noted that it was difficult to find a reason why the jury should spare his life. Prejudice was found because an adequate investigation would have revealed that Williams's parents had been imprisoned for criminal neglect of Williams and his siblings, that Williams had been severely and repeatedly beaten by his father, that he had been committed to the custody of social services for two years during his parents' incarceration (including time spent in an abusive foster home), and that he was returned to his parents' custody when they got out of prison. The evidence also would have revealed that Williams was "borderline mentally retarded" and only completed the 6th grade in school, that he had suffered repeated head injuries and "might have mental impairments organic in nature," that he had received commendations in prison for helping to crack a prison drug ring and for returning a guard's missing wallet, and that prison officials would have testified it was unlikely that he would be dangerous in prison. If counsel had investigated and prepared for sentencing, even the state's experts who testified to future dangerousness would have testified that Williams would not pose a future danger if kept in a structured environment, such as prison.

⁶Also look under numerous deficiencies in trial phase because some cases found IAC in both.

***Capital Case**

2. U.S. Court of Appeals Cases

2003: **Powell v. Collins*, 332 F.3d 376 (6th Cir. 2003) (tried in January 1987). Counsel ineffective in capital sentencing for failing to prepare and present mitigation evidence. Prior to trial, counsel repeatedly sought appointment of a psychiatrist or psychologist to assist the defense during the trial. The court denied the motions and instead ordered an evaluation by a court-appointed, neutral examiner, who found that the defendant suffered from antisocial personality disorder. During the trial the defense called the court-appointed examiner as a defense witness. In addition to the personality disorder information, she testified that the defendant did not enjoy a nurturing environment as a child and had been medicated with anti-psychotic medications for anxiety and behavior problems. She also testified that his IQ scores “fluctuated between the mild and borderline ranges of mental retardation.” *Id.* at 383. Following conviction, counsel again requested expert assistance and the court granted it and ordered the court appointed examiner to address mitigation but refused to allow a continuance. The court-appointed examiner was the only witness called by the defense in sentencing. She repeated her trial testimony and stated that she did not have sufficient time to conduct a sufficient investigation and stated that she was not qualified to conduct the neuropsychological testing the defense wanted, although she believed that the defendant might have organic brain dysfunction. Because the habeas petition was filed in 1994, the court applied the standards applicable prior to the AEDPA. Relying heavily on the ABA Guidelines, the court found counsel’s conduct to be deficient because counsel did not investigate mitigation and, in recalling the court-appointed expert, they presented harmful information that the defendant was not mentally ill and is dangerous. The court rejected a strategic reason for not presenting mitigation because counsel could not have a valid strategic reason when counsel had failed to investigate. Prejudice was found because numerous family members and other individuals that knew the defendant were available and willing to testify. Even though their testimony would have duplicated some of the testimony by the court-appointed expert, prejudice was established because the “jurors would have heard first-hand accounts from those who knew Petitioner best.” *Id.* at 400. This “personal testimony” would have been more powerful than the expert, who had not even interviewed the family and friends. Prejudice was also clear where the prosecutor cited the “mitigation testimony” in support of the state’s closing and the jury almost deadlocked even without any mitigation. In addition to this ineffective assistance of counsel finding, the court also found that relief was required due to the court’s failure to appoint an independent defense expert and the court’s denial of a continuance prior to sentencing.

**Douglas v. Woodford*, 316 F.3d 1079 (9th Cir. 2003) (tried in 1984). Counsel ineffective in failing to adequately prepare and present mitigation evidence. Petitioner, claiming an alibi, was convicted of killing two teenage girls in the desert, primarily based on the immunized testimony of an accomplice. During sentencing, the state presented testimony concerning similar bad acts involving forcing women to pose nude and engage in sex acts with other women for photographs. He also planned to make movies involving torture and killing of young women and had previously pled nolo

***Capital Case**

contendre to charges arising from this planning. In mitigation, the defense presented only the defendant's wife and son and a neighbor to testify to good character, nonviolent nature, generosity, and a difficult background as an orphan. In "very general terms," they described a difficult childhood, running away at fifteen to join the Marines, and being very poor and hungry as a child. Prior to trial, counsel retained mental health experts because the defendant was experiencing severe claustrophobia in his cell, which was related to having been locked in closets by abusive parents as a child. Because of the focus on claustrophobia, petitioner was unable to focus on his defense. The experts did brief testing and interviewing and found no mental disorders, but did recommend additional mental health testing. After the defendant was moved to a private cell and the claustrophobia issue addressed, he refused to cooperate with any further mental health testing and insisted on an alibi defense during trial. He was also "less than helpful" in providing background information and reported that "his parents were dead and that his past was a 'blank.'" *Id.* at 1087. He also refused to provide names of relatives or friends to provide information on his childhood abuse. Analyzing the case under pre-AEDPA standards, the court found counsel's conduct deficient for failing to discover and present significant mitigation evidence. Even though petitioner "was not forthcoming with useful information, . . . this does not excuse counsel's obligation to obtain mitigating evidence from other sources." *Id.* at 1088. Counsel had enough information to put him "on notice" that petitioner had "a particularly difficult childhood," but did not attempt to contact persons who could provide the details or even to interview and prepare the witnesses that did testify so their testimony "was less than compelling." *Id.* Counsel did not even present some of the information he was aware of such as the claustrophobia due to being locked in closets as a child. Likewise, counsel had obtained the file pertaining to the defendant's prior conviction and that file contained an order for a psychological examination. If counsel had obtained that testing and interviewed that expert, he would have discovered a conclusion of serious and outstanding mental illness and possible organic impairment. That expert noted severe paranoia, chronic alcoholism, constant exposure to toxic solvents in the furniture refinishing business, and a serious head injury in a car accident, which the expert believed led to diminished capacity. If counsel had investigated the social background further, counsel would have discovered significant evidence that the petitioner was abandoned as a child and placed in foster homes, where an abusive alcoholic foster father would lock him in closets for long periods of time. He was extremely poor and often had to scavenge for food in garbage cans and eat just lard or ketchup sandwiches. He ran away at fifteen to join the Marines, but was arrested and put in a Florida jail where he was beaten and gang-raped by other inmates. When he did join the Marines, he received a number of medals and commendations. Counsel's failure to prepare and present mitigation counsel not be attributed to his client's lack of cooperation, because counsel had already "disregarded his client's wishes and did put on what mitigating evidence he had unearthed." *Id.* at 1089. Moreover, the jury had already convicted the defendant and rejected his alibi evidence, so "'lingering doubt' was not a viable option." *Id.* at 1090. Thus "there was nothing to lose" by presenting social history and mental health evidence. *Id.* at 1091. Prejudice was found, despite "the gruesome nature" of the offenses, *id.*, because the available

***Capital Case**

“social background and mental health” evidence was “critical for a jury to consider when deciding whether to impose a death sentence,” *id.* at 1090. This evidence could have “invoked sympathy” from at least one juror. *Id.*

2002: **Simmons v. Luebbers*, 299 F.3d 929 (8th Cir. 2002) (direct appeals in 1997). Under AEDPA, counsel ineffective in failing to prepare and present mitigating evidence in two separate capital trials. Counsel presented only the defendant’s mother to testify that she loved her son and wanted a continued relationship with him. Counsel’s conduct was deficient. Four mental health professionals examined the defendant on the issue of competence and “the evaluations uncovered character and background issues that his attorneys could have presented to the jury as mitigating evidence during the penalty phase.” Prejudice established because the evidence could have shown: he was raised in poverty in a “neighborhood frequented by street violence”; his mother was extremely religious and very strict; he was beaten with rulers, straps, and belts and often had welts and bruises until age 17; he was so afraid of being beaten that he would urinate on himself prior to the beatings; his father had a drinking problem and would frequently beat his mother with the defendant trying to intervene to protect his mother; he ran away from home at 12 and was robbed, beaten, and possibly raped (he would not discuss it) at a bus terminal in Chicago; and he had an IQ of 83. The state court’s decision of reasonable strategy was an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. The state court held that the evidence had been presented and rejected in the initial trial and sentencing, but the record did not support this finding and reflected instead that counsel presented evidence that the defendant’s mother was “an upstanding person.” Counsel’s conduct was unreasonable in failing to present the evidence of the “childhood experiences.” By the time the defense case in sentencing began, “the jury had yet to hear any evidence that was sympathetic to [him]. Instead, the jury had only heard evidence of his ruthless character.” In addition, counsel “should have been aware that they could not rely on pleas from [the defendant’s] mother in an effort to spare [his] life” because this evidence had been presented unsuccessfully twice before. Counsel also did not make a reasonable strategic decision not to present this evidence in order to avoid comparisons to the defendant’s successful brother. There was no evidence the brother “was beaten as consistently or severely” or had “sexually assaulted during his childhood.”

Moreover, considering the overwhelming amount of aggravating evidence that had been proffered by the state, . . . comparisons to a successful brother would [not] have made the jury’s perception . . . any worse. . . . Mitigating evidence was essential to provide some sort of explanation for [the defendant’s] abhorrent behavior.”

Id. at 938-39. Prejudice found because the state portrayed the defendant as violent to women that rejected him. The defense could have countered this with evidence “that his compulsive, violent reactions were the result of an abusive and traumatic childhood. In addition, “a vivid description of

***Capital Case**

[the defendant's] poverty stricken childhood, particularly the physical abuse, and the assault in Chicago, may have influenced the jury's assessment of his moral culpability."

***Karis v. Calderon**, 283 F.3d 1117 (9th Cir. 2002) (tried in 1982). Counsel ineffective for failing to prepare and present mitigating evidence of the defendant's troubled childhood, during which he suffered repeated abuse and watched his mother being regularly and violently abused by men. "[T]he failure to present important mitigating evidence in the penalty phase can be as devastating as a failure to present proof of innocence in the guilt phase." *Id.* at 1135. Counsel's conduct was deficient because counsel failed to investigate and offered no reasonable explanation for the failure. Counsel had intended to present this evidence through a mental health expert but then chose not to do so because there was also damaging evidence in the expert's report. While counsel was not ineffective for not calling the expert, counsel was ineffective for failing to prepare and present the evidence through family members and other witnesses. The duty to investigate is not excused because the family did not readily offer the information because counsel knew the information was there and "should have explained . . . the gravity" of the situation to the family members. *Id.* at 1136. Prejudice found because counsel presented only 48 minutes of mitigation, which included only that the defendant had artistic and academic talent, that his mother was divorced, and that he had saved his brother from drowning as a child. This evidence allowed the prosecutor to argue that the defendant was "intelligent" and "cunning" and to argue the absence of any mitigation when there was substantial mitigation available. Even with the weak mitigation presented, the sentencing jury took three days to render a verdict.

***Caro v. Woodford**, 280 F.3d 1247 (9th Cir. 2002) (tried in 1981). Counsel ineffective in capital sentencing for failing to prepare and present evidence of the defendant's brain damage due to a long history of exposure to toxic pesticides and chemicals, history of severe head injuries, and significant abuse as a child. Counsel's conduct was deficient because counsel knew of the long history of exposure to toxic pesticides, but did not inform the experts that examined the defendant and did not seek out an expert to assess the damage done to the defendant's brain. Counsel conceded no strategy explained the failure. The defendant was prejudiced because, as the court said at the very beginning of the opinion, "A little explanation can go a long way. In this case, it might have made the difference between life and death." "Prejudice found because rather than premeditation this evidence revealed the effects of "*physiological defects* . . . on his behavior, such as causing him to have impulse discontrol and irrational aggressiveness. By explaining that his behavior was physically compelled, not premeditated, or even due to a lack of emotional control, his moral culpability would have been reduced." *Id.* at 1258. The prejudice was heightened where the state's evidence of premeditation was not particularly strong and where, "[m]ore than any other singular factor, mental defects have been respected as a reason for leniency in our criminal justice system." Also of significance, the court rejected the state's arguments that high grades, satisfactory military performance, negative blood results for pesticides, a reasonably high IQ, rationality of actions

***Capital Case**

following the murders, and normal psychiatric and neurological evaluations was inconsistent with the finding of brain damage. As one expert (Jonathan Pincus) explained, damage to a person's frontal lobes may not affect other brain functions controlled by other parts of the brain.

****Silva v. Woodford***, 279 F.3d 825 (9th Cir. 2002) (tried in January 1982). In pre-AEDPA case, counsel ineffective in capital sentencing for failing to prepare and present mitigation. Deficient conduct found despite the assertion that the defendant instructed counsel that he did not want his family called as witnesses. Such an instruction does not alleviate the need to investigate or at least to adequately inform the defendant of the potential consequences of the decision and to assure that the defendant has made an informed and knowing judgment. Moreover, there was significant mitigation evidence available outside of contacting the defendant's family, including prior psychiatric reports and presentencing report in a pending drug case. Court notes that the ABA guidelines, cited favorably in *Williams v. Taylor*, "suggest that a lawyer's duty to investigate is virtually absolute, regardless of a client's expressed wishes." *Id.* at 840. "Indeed, if a client forecloses certain avenues of investigation, it arguably becomes even more incumbent upon trial counsel to seek out and find alternative sources of information and evidence, especially in the context of a capital murder trial." *Id.* at 847. Counsel "could not make a reasoned tactical decision about the trial precisely because counsel did not even know what evidence was available." *Id.* at 847 (quotation omitted). Prejudice found due to the prosecution's "emphasis on the utter lack of mitigating evidence," *id.* at 847, and "in spite of the undeniably horrific circumstances" of the murders, "this is not a case in which a death sentence was inevitable," *id.* at 849 (quotation omitted). Indeed, the court noted that a co-defendant was sentenced to life and that defendant's jury sought an explanation of "life without parole." *Id.* at 849. "These questions suggest that a death sentence . . . was not a foregone conclusion. . . ." *Id.* at 849-50. The available and unrepresented mitigation included evidence of abuse and neglect by alcoholic parents, the possibility of brain damage from Fetal Alcohol Syndrome, the possibility of Post-Traumatic Stress Disorder, Attention Deficit Disorder that caused failures in school, self-medication through drug use, and amphetamine-induced organic mental disorders and withdrawal symptoms of the time of the offenses.

****Hooper v. Mullin***, 314 F.3d 1162 (10th Cir. 2002) (tried in June 1995). Under AEDPA, counsel ineffective in failing to adequately prepare and present mitigation. Eight months prior to the crimes, the defendant received anger management counseling and was given several neuropsychological tests. The doctor reported that his testing showed a possible learning disability, some emotional and psychological problems, and that he had difficulty controlling his anger and coping with everyday problems. Prior to trial counsel retained another psychologist to review this report. This doctor issued a one-page summary stating that there was evidence of "mild but probable brain damage" that could increase the likelihood of violence, especially if the defendant was under the influence of alcohol or other substances, and the possibility of a "serious psychiatric thought disorder." The doctor qualified his "impressions" by noting that "further diagnostic investigation" was needed "to

***Capital Case**

confirm.” Six months later (and the day the defendant was convicted), counsel called the expert asking him to testify the following day. Despite the expert’s objection that he ethically could not testify because he had not personally examined the defendant and that his testimony “likely would be aggravating rather than mitigating,” counsel subpoenaed him to testify and sought permission to treat him as a hostile witness, “in light of the extreme hostility [the doctor] directed toward defense counsel and court personnel.” His report and the previous doctor’s report were admitted through his testimony in which he asserted the prior doctor would be in the best position to address whether there was brain damage. The State called the prior doctor in rebuttal and he testified that there was no brain damage or psychological problem that would cause the defendant to lose touch with reality or make him incapable of controlling himself or his anger. As the state court found, prejudice was established because neither doctor “offered any mitigating evidence and their combined testimony was disastrous” for the defense. The state court’s finding that counsel’s conduct was not deficient was an objectively unreasonable application of *Strickland*. While counsel did have a strategy to suggest the defendant “might have brain damage which could have produced violent conduct,” this was not reasonable because “counsel deliberately pursued this strategy without conducting a thorough investigation.” Counsel asserted additional testing was not done because counsel feared further investigation might negate the argument that there might be brain damage. Counsel also failed to speak to either of these experts “and had no idea what these experts would say on the witness stand.”

In addition, although the defense did not intend to call [the first doctor] as a mitigation witness, defense counsel should have foreseen that the State might use him in rebuttal after the defense specifically relied on his report as mitigating evidence. Had counsel not offered this testimony, [this] report would have remained privileged and inadmissible.

***Brownlee v. Haley**, 306 F.3d 1043 (11th Cir. 2002) (tried in January 1987). Counsel ineffective in pre-AEDPA case for failing to prepare and present mitigation in capital sentencing. Defendant was convicted of murder and armed robbery in a bar. Nine eyewitnesses testified during the trial, but none was able to identify the defendant. No forensic evidence linked defendant to the crime. A codefendant, who was identified by four eyewitnesses and had plead guilty in exchange for a life sentence, testified that he participated in the crime along with defendant and another codefendant, but even this witness was unable to state whether defendant shot the victim. Several other witnesses provided incriminating testimony about defendant’s actions and statements before and after the crimes, but their testimony contradicted the codefendant in some respects. Following conviction, in the jury phase of sentencing where an Alabama jury renders an advisory verdict, counsel presented no evidence in mitigation and offered only a brief closing argument. The jury deliberated for 38 minutes and recommended a sentence of death by an 11-1 vote. Prior to the second phase of sentencing where the trial court must “consider” the jury’s recommendation and can consider

***Capital Case**

additional evidence in aggravation and mitigation, the trial court suggested that counsel should have the defendant examined by a clinical psychologist. In the hearing before the trial court, counsel presented the psychologist to testify that defendant has a mixed substance abuse disorder, a mixed personality disorder, and borderline intellectual functioning, with an IQ of 70 (in the mildly retarded range) but adaptive skills at a higher level. Two sisters also testified that defendant had been previously taken to a psychiatric hospital after jumping out a second floor window of the family apartment, a history of mood changes, complaints of severe headaches, and seizures for a couple of years, including one incident where he slashed himself across the chest with a knife. After hearing this evidence and considering a presentence report, the trial court found no mitigating factors and sentenced defendant to death. Counsel's conduct was deficient because counsel conducted no pretrial discovery and conducted virtually no investigation. Counsel spoke only with one sister and that was after the jury's recommendation of death and just prior to the sentencing hearing before the judge. Counsel did not have the defendant examined by a psychologist until the court suggested it because counsel observed no mental problems and believed the defendant had above average intelligence. Counsel did not pursue evidence of drug problems because they did not believe the jury would be sympathetic. If counsel had adequately investigated the evidence would have shown that the defendant grew up in a high crime area. On separate occasions, he had been stabbed in the chest and shot multiple times, including in the head. The psychologist, based on the additional information, would have testified that the defendant was either mildly mentally retarded or borderline intelligence and suffered from mental disorders, including schizotypal and antisocial personality disorders, multiple drug dependencies, and a seizure disorder (due to seizures for several years following the shot to the head). The psychologist would have testified that the defendant's capacity at the time of the crimes was possibly diminished due to the combination of mental disorders, limited intelligence, and drugs. The psychologist and a correctional officer that had previously supervised defendant in prison also both testified that the defendant was a model inmate and was unlikely to engage in violent behavior in prison. Prejudice found because presentation of this evidence would have provided compelling evidence supporting two statutory mitigating circumstances ((1) influence of extreme mental or emotional disturbance and (2) substantially impaired capacity at the time of the crimes) and several significant non-statutory mitigating factors, including the defendant's "severe intellectual limitations." *Id.* at ____ (citing *Atkins v. Virginia*, 122 S. Ct. 2242 (2002)). The prejudice was also clear because of the weaknesses in the state's evidence linking the defendant to the murder. Due to counsel's failure to present, "anything at all about the defendant . . . [a]n individualized sentence, as required by law, was . . . impossible." *Id.* at ____ . The court found a reasonable probability that the jury would have recommended a life sentence if counsel had adequately presented the mitigation. The prejudice was not cured by the trial court's ultimate review because, under state law, the trial court was required to "consider" the jury's recommendation. "[T]he use of the term 'shall consider' indicates that a court is required to reflect actively and carefully on the jury's recommendation, as consideration clearly involves more than a passing thought." *Id.* at ____ .

***Capital Case**

2001: **Jermyn v. Horn*, 266 F.3d 257 (3d Cir. 2001) (tried in August 1985). Counsel ineffective, under AEDPA, in capital sentencing for failing to prepare and present mitigating evidence. During the trial for murder of the defendant's mother, counsel presented two alternative arguments: either the defendant's mother accidentally set the fire that killed her and the defendant was innocent or the defendant committed the crimes and was insane at the time. This evidence included testimony from an expert that the defendant was a chronic paranoid schizophrenic. During sentencing, counsel only presented brief testimony that the defendant should not be sentenced to death because he was adaptable to confinement. He also argued that the defendant was mentally ill and argued about the defendant's deprived childhood, although no evidence about this had been presented. Counsel was only out of law school for "less than two years, this was his first capital case, and the first case he had tried which involved mental health issues." *Id.* at 275. He also did not hire an investigator and admitted that his time prior to trial was largely consumed with other cases. Counsel's conduct was deficient because the trial expert had informed him of the physical abuse suffered by the defendant and the significance of this in explaining the defendant's behavior. Nonetheless, counsel did not present this evidence and offered no strategic reason for the failure to do so. Indeed, counsel did not do anything in preparation for sentencing until after the guilty verdict. Counsel also testified that he did not realize the importance of the childhood until the end of sentencing, which is why he argued – on the basis of no evidence – about the childhood. Prejudice found because, if counsel had adequately investigated, the evidence would have revealed that the defendant's father was physically abusive, showed no affection, and virtually banished the defendant from his presence. At times, he was even chained to a dog leash and made to eat out of a dog bowl. Eventually, his mother placed him in a residential school for "orphans" or "unwanted children," to get him out of the home. Experts, including the defense expert at trial, observed that the defendant's childhood experiences were severe and "contributed significantly to his mental illness which they diagnosed as paranoid schizophrenia." *Id.* at 274. The state court decision was unreasonable, under 28 U.S.C. § 2254(d)(1), because the Pennsylvania Supreme Court unreasonably applied *Strickland*'s prejudice inquiry in light of the totality of mitigating evidence adduced at trial and in the habeas proceedings.

**Coleman v. Mitchell*, 268 F.3d 417 (6th Cir. 2001) (tried in June 1985). Counsel ineffective in pre-AEDPA capital sentencing for failing to prepare and present mitigating evidence. The mitigation evidence presented at trial was limited to the defendant's unsworn statement. Counsel's argument in sentencing was limited to two issues: the circumstantial nature of the murder evidence and the evils of execution by the electric chair. Counsel's conduct was deficient because counsel failed to investigate and present the mitigation evidence. This conduct was not excused by strategy because residual doubt is not a permissible argument in sentencing in Ohio. Likewise, any decision to make "a generalized, mercy-based critique of the electric chair over a particularized account of Petitioner's social and mental history," *id.* at 447, without any investigation, was unreasonable. Moreover, despite the District Court's finding to the contrary, the record did not support the finding that the

***Capital Case**

defendant had waived the presentation of mitigation evidence. Instead, the defendant had waived his right to a pre-sentence investigation and mental examination under state law, which is distinguishable from any mitigation. Furthermore, even assuming that the defendant had instructed counsel not to present mitigation, because of counsel's failure to investigate counsel could not adequately advise the defendant of what he was waiving and the record did not support a finding "that Petitioner had any understanding of competing mitigation strategies." *Id.* The court found in this case "involving a defendant with low intelligence, limited education and an unsettling past, whose strongest demand for self-representation [or controlling the presentation of mitigation evidence] consisted of 'No, I don't' responses when asked if he wanted a pre-sentence investigation and mental evaluation," that a finding that the defendant had knowingly and intelligently waived the presentation of mitigation evidence "hollows the Sixth Amendment." *Id.* at 449. "Further, defendant resistance to disclosure of information does not excuse counsel's duty to independently investigate." *Id.* at 449-50. If counsel had adequately investigated and presented the evidence, they jury would have heard that the defendant's mother abandoned him as an infant in a garbage can and she spent lengthy periods of time in psychiatric hospitals. His grandmother, who was his primary caretaker, abused him both physically and psychologically, as well as neglecting him while running her home as a brothel and gambling house. She also told him that their home was surrounded by enemies that wanted to poison them and involved him in her voodoo practice by having him kill animals and collect their body parts for use in her magic potions. He was exposed to group sex, sometimes including his mother or grandmother, as well as bestiality and pedophilia. The defendant was also admitted to the hospital on two occasions for head injuries. Petitioner had also been examined previously for competence to stand trial on a federal kidnapping charge. Those examiners, even though only examining competence, had found that the defendant had elevated test results "under the psychopathic--deviant and paranoia categories, as well as a full-scale I.Q. score of 82, falling in the low-normal range, and a verbal I.Q. score of 79, falling at the upper limits of the borderline retarded range." They also found that he "had probable mixed personality disorder with antisocial, narcissistic and obsessive features." An earlier examination had also revealed borderline personality. In addition, experts in the post-conviction proceedings found "borderline personality disorder, a likelihood of organic brain dysfunction, [and] . . . probable manic-depressive psychosis." *Id.* at 450-52 (footnotes omitted in quotes).

***Mayfield v. Woodford**, 270 F.3d 915 (9th Cir. 2001) (en banc) (murder and counsel appointed in 1983). The majority in a split decision found counsel ineffective in the capital sentencing hearing (in pre-AEDPA case) for failing to prepare and present mitigation evidence. Counsel's investigation was deficient where counsel billed only 40 hours in preparation for both the trial and the penalty phases of trial and had only one substantive meeting with his client – the morning trial began – and even then did not discuss with him possible witnesses or trial strategies. Counsel also failed to associate co-counsel to assist in the defense, even though state law entitled the defendant to a second attorney. Counsel also spent less than half the defense investigation budget authorized by the county

***Capital Case**

and did not obtain all of the defendant's medical records or consult with experts in endocrinology or toxicology, even though his investigator's limited efforts revealed evidence of diabetes and substance abuse. During sentence, counsel waived the opening statement and called only one witness – an expert – that had interviewed the defendant twice and testified “regarding Mayfield's family and childhood background, his health history including his diabetes, his work history, his psychiatric profile, and his substance abuse.” *Id.* at 928. The expert also related a story that informed the jury that the defendant “could be a kind, generous human being” and informed the jury that the defendant “had indicated considerable remorse for what he had done.” *Id.* Outside of this one witness, counsel presented no evidence and even stipulated – erroneously – that the defendant's urine tested negative for PCP the day after the crime, “indicating to the jury both that [the defendant] did not have a substance abuse problem and that [he] had lied about it” in his statement to police. *Id.* Counsel did not call the defendant's mother and uncle to testify for specific reasons but he did not even attempt to interview or present the testimony of other family members or friends. He also made no effort in his closing argument “to explain to the jury the significance of the mitigating evidence presented” by the one expert witness. “In short, [counsel] did not, as *Williams v. Taylor* requires, adequately investigate and prepare for the penalty phase or present and explain to the jury the significance of all the available mitigating evidence.” *Id.* Prejudice found even though the state's aggravation evidence was “strong” and the mitigation evidence presented at trial was “substantial.” *Id.* at 929. The evidence counsel presented included evidence that the defendant was diagnosed with diabetes at age nine and was hospitalized 20 to 30 times because his diabetes was never under very good control. The trial expert also testified that the defendant had low average intelligence and had been diagnosed with a child behavioral disorder caused by depression. He began using PCP two or three times a week in his late teens and by the time of the murder was using it on a daily basis. The expert erroneously informed the jury, however, that the defendant was not under the influence of drugs or alcohol the night of the crimes. The defense expert then testified that the defendant's score was moderately elevated on a “psychopathic deviance” test and that he was “lacking in emotion,” but that he had demonstrated remorse and “had good rapport with the prison guards.” *Id.* at 930. The defense expert also read for the jury the conclusion of a neurologist that the crime “could be explained only on the basis of definite cerebral impairment due to alcohol and drug abuse.” *Id.* On the basis of this evidence, the jury deliberated for a day and a half (and had even sent out a note asking if the jury had to be unanimous in order to sentence the defendant to life without parole) before sentencing the defendant to death. In addition to other evidence, if counsel had adequately prepared and presented the evidence, the jury would have also heard that the defendant suffered abdominal and chest pain, dehydration, fatigue, dizziness, nausea, loss of consciousness, and comas due to his diabetes. He sometimes had to be hospitalized as much as five times a month. Prior to the diabetes, he was essentially a normal child, but the physical and psychological traumas caused drastic changes in him and precipitated his drug use. During the months prior to the crime, he was hospitalized again for high blood sugar levels and using increasing amounts of drugs due to stressors, including his pregnant girlfriend leaving him. In addition, the jury

***Capital Case**

could have heard substantial lay witness testimony that the defendant was a good person, that he was non-violent, and that his family loved him and wanted the jury to spare his life. Prejudice found “[i]n light of the quantity and quality of the mitigating evidence [counsel] failed to present at trial, the duration of the jury’s deliberations, and the jury’s communication to the trial judge.” *Id.* at 932.

***Ainsworth v. Woodford**, 268 F.3d 868 (9th Cir. 2001) (trial in January 1982). Counsel ineffective in pre-AEDPA capital sentencing for failing to prepare and present mitigating evidence. Counsel waived the opening statement in sentencing and then called only four witnesses in mitigation that covered “just under nine transcript pages.” These witnesses revealed that the defendant’s father had committed suicide; that the defendant had attended some college and held down a full-time job at which he was a good worker; that he had a three-month old son; and that he was kind, non-violent, and a talented artist. One of these witnesses also testified, however, that the defendant had planned to rob bank before but stopped because there were too many police around. *Id.* at 872. As the court found, “While it is true that the testimony touched upon general areas of mitigation, counsel’s cursory examination of the witnesses failed to adduce any substantive evidence in mitigation. In fact, counsel’s ill-preparation resulted in the testimony of one defense witness . . . contributing to the evidence in aggravation.” *Id.* at 874-75. Counsel’s conduct was deficient because counsel “sought no assistance from a law clerk, paralegal, or another attorney in his preparation for the penalty phase, nor did he seek advice or aid from investigators or experts. In addition, he did not seek any state funds to prepare for the penalty phase although funding for the use of investigators and experts in capital cases was available” under state law. *Id.* at 876. He interviewed only one defense witness and that was on the morning she was scheduled to testify. He also failed to obtain “employment records, medical records, prison records, past probation reports, and military records,” although he did get school records. Counsel even admitted in a deposition “that he abdicated the investigation of Ainsworth’s psychosocial history to one of Ainsworth’s female relatives.” *Id.* at 874. Counsel’s closing argument did not reference even the evidence counsel did present or refute the aggravation. Instead counsel only argued that the defendant was a “nice person” and argued “against the death penalty in general to a jury that had at voir dire already indicated no opposition to the death penalty.” *Id.* at 875. If counsel had adequately prepared and presented the evidence, the jury would have heard evidence of the defendant’s troubled childhood, his history of substance abuse, and his mental and emotional problems. Both of his parents were volatile alcoholics, who argued daily. His father was physically, verbally, and emotionally abusive and attempted to kill the defendant at least twice. His father ultimately committed suicide after four previous unsuccessful attempts. The defendant blamed himself for this and felt an overwhelming sense of guilt following his father’s death. The defendant began ingesting alcohol at age five. By age 16, the defendant had attempted suicide and was admitted to a psychiatric ward for treatment for alcoholism. He joined the military at age 17, but was discharged because of his addiction to alcohol and morphine. He was then again admitted to a hospital and diagnosed with acute alcoholic intoxication, psychoneurotic disorder, and depressive reaction. Throughout his adult life, the defendant “regularly abused alcohol

***Capital Case**

and drugs, including heroin, amphetamines, LSD, marijuana, and peyote. He resorted to gasoline when he was unable to access other drugs. He attempted suicide six or seven times by slashing his wrists.” *Id.* at 875. Post-conviction experts supplied all of this information and testified that the substance abuse was a form of self-medication. Prejudice found because the jury heard no evidence of the defendant’s “troubled background and his emotional stability and what led to the development of the person who committed the crime.” *Id.* at 878. Defense counsel also failed to present evidence of the defendant’s “favorable prison record which could be important in deciding whether, if given a life sentence without parole, he would be a danger to other prisoners or prison personnel.” *Id.*

****Battenfield v. Gibson***, 236 F.3d 1215 (10th Cir. 2001) (tried in February 1985). Counsel ineffective in capital sentencing for failing to adequately investigate and present mitigating evidence, despite the purported waiver of mitigation by the defendant and the limited review necessitated by the AEDPA. Counsel’s conduct was deficient because he spent very little time investigating mitigation and planned only to present the defendant’s parents to beg for sympathy and mercy. Counsel never interviewed the parents, the defendant, or anyone else, however, concerning the defendant’s background. Court cites approvingly “Stephen B. Bright, *Advocate in Residence: The Death Penalty As the Answer to Crime: Costly, Counterproductive and Corrupting*, 36 Santa Clara L. Rev. 1069, 1085-86 (1996) (‘The responsibility of the lawyer is to walk a mile in the shoes of the client, to see who he is, to get to know his family and the people who care about him, and then to present that information to the jury in a way that can be taken into account in deciding whether the client is so beyond redemption that he should be eliminated from the human community.’).” 236 F.3d at 1229. No strategy excused counsel’s choice to only beg for sympathy and mercy. “[T]here was no strategic decision at all because [counsel] was ignorant of various other mitigation strategies he could have employed.” *Id.* at 1229. Moreover, counsel knew the state planned to rely on evidence of the defendant’s prior conviction for assault and battery with a dangerous weapon but never investigated to determine the underlying facts of that conviction. The state court did not address the lack of investigative efforts at all so the federal court exercised its independent judgment on this issue. Alternatively, the court concluded that the state court unreasonably applied *Strickland* in finding counsel’s conduct to be reasonable. The court also found that counsel’s failure was not excused by the defendant’s waiver of the right to present mitigation because counsel’s “failure to investigate clearly affected his ability to competently advise Battenfield regarding the meaning of mitigation evidence and the availability of possible mitigation strategies.” *Id.* Counsel could not have discussed the available mitigation with the defendant because he was unaware of the evidence. Thus, counsel informed the defendant only of the intent to have his parents beg for mercy. The defendant thus waived mitigation because he did not want his parents to testify. The state court found the waiver to be knowing and intelligent, but the federal court rejected this finding as both factually and legally unreasonable because neither counsel nor the state court provided sufficient information for the defendant to make a knowing and intelligent choice. The federal court also rejected the state court’s finding that counsel was reasonable for relying on the defendant’s waiver

***Capital Case**

because the court failed “to see how [the defendant] can be held responsible for [counsel’s] failure to present mitigating evidence unknown to [the defendant].” *Id.* at 1233. The court found this to be “a patently unreasonable application of *Strickland*.” Prejudice found because the only valid aggravating circumstance found by the jury was a continuing threat based in substantial part on the state’s evidence of a prior violent conviction. If counsel had adequately investigated, however, this evidence could have been rebutted with evidence that the prior assault may have been an act of self defense committed while under the influence of alcohol and drugs. If counsel had adequately investigated, the evidence available in mitigation would have also included (a) the defendant’s involvement in a serious car accident at age 18, during which he sustained a serious head injury and after which he heavily used alcohol and drugs, (b) a family history of alcoholism and possible drug addiction, (c) evidence from family members and friends indicating that the defendant was known for his compassion, gentleness, and lack of violence, even when provoked, and (d) testimony of prison personnel describing the security and drug and alcohol treatment programs where the defendant would be incarcerated if given a life sentence. The federal court’s finding of prejudice was not constrained by the AEDPA standards because the state court never addressed this issue.

2000: **Lockett v. Anderson*, 230 F.3d 695 (5th Cir. 2000) (tried in 1986). Counsel ineffective in murder case for murdering husband and wife for failing to prepare and present adequate mitigation evidence with respect to the wife. Defendant was tried and sentenced separately for these offenses, although they were combined in federal habeas. District Court had already granted new trial on husband’s murder case. Counsel ineffective because counsel failed to adequately prepare due to illness of counsel’s mother, these two murder cases one month apart, and two other capital trials. Counsel lacked basic “familiarity” with “psychological tests” performed on his client, but he knew client had a history of seizure problems and head injuries. Counsel did not investigate, however, even after defendant’s mother retained a psychiatrist who recommended additional testing, including neuropsychological testing. Counsel was aware of recommendations. Counsel was also aware of “black-outs, delusional stories, references to self as another name, family troubles, drug and/or alcohol addiction,” which should have “put him on notice that pursuit of the basic leads that were before him may have led to medical evidence that Lockett had mental and psychological abnormalities that seriously affected his ability to control his behavior. Counsel thus may have had a strong predicate from which to argue to the jury that Lockett was rendered less morally culpable for the ruthless, cruel, and senseless murders he had committed.” *Id.* at _____. Strategic decision does not excuse counsel’s conduct because counsel did not even follow the recommendation for additional testing recommended by defense psychiatrist. Court also rejected argument of strategic decision to avoid devastating cross-examination because trial defense counsel never considered the strategy. Prejudice found even though crimes were particularly aggravated and some of this evidence could have been aggravating because it could support future dangerousness because additional testing and investigation would have revealed temporal lobe lesion or epilepsy and/or schizophrenia and a

***Capital Case**

troubled childhood with trauma. Without this evidence, counsel just asked jury for mercy and presented no real evidence or argument in mitigation.

***Carter v. Bell**, 218 F.3d 581 (6th Cir. 2000) (indicted March 1984 and affirmed on appeal in 1986). Counsel ineffective in capital sentencing where counsel neither investigated nor introduced any evidence of mitigating factors. The defense only argued residual doubt when the state's evidence consisted of an eyewitness who saw the defendant with the victim and the testimony of a co-defendant who had already plead guilty and defense evidence was one alibi witness. Counsel spoke to only a few family members and they could not say whether they had even discussed mitigation. Counsel did not even obtain a release from client so they could view his personal or prison records and they did not seek any available records on defendant or his family. Counsel had prepared motion for expert but did not pursue it after defendant said he did not want to pursue insanity defense. Available mitigation evidence included evidence of "illegitimacy, extreme childhood poverty and neglect, family violence and instability during childhood, poor education, mental disability and disorder, military history, and positive relationships with step-children, adult family, and friends." Family history included one sibling dying in fire set by mom's boyfriend, two siblings dying of birth defects as infants, and all six remaining siblings having criminal records. Defendant's mother and sister were both hospitalized in mental health institutions and his grandfather, father, mother, step-father, and brother all suffered from alcoholism. Defendant's childhood home was also violent and unstable in that the family never lived in one place more than two years. Mother drank and would often drink up her welfare check and let the children go hungry. At the age of three, defendant and his then five year old sister were abandoned by their mother for more than a week, subsisting on milk stolen from the neighbors' porches. The welfare department placed the two in a children's home for several weeks. They subsequently lived with their aunt until their mother regained custody a year later. The defendant also suffered seriously from childhood rheumatic fever. He was whipped and beaten as an infant for crying from the illness. He also suffered frequent serious breathing problems as a child that led to numerous trips to the emergency room. The records show both childhood and adult head injuries from accidents and fights. He was also diagnosed with diabetes in 1977, when he apparently was brought to the hospital in a coma. Defendant had limited schooling and an IQ of only 79. Just prior to trial, a corrections doctor recommended "psychiatric hospitalization" because defendant's "nerves seemed stretched to the breaking point." Defendant was ultimately diagnosed after trial with schizophrenia and a history of partial seizures. Counsel's deficient conduct was not excused because defendant did not tell them of history. "The sole source of mitigating factors cannot properly be that information which defendant may volunteer; counsel must make some effort at independent investigation in order to make a reasoned, informed decision as to their utility." *Id.* at 596. Defendant's reluctance to present mental health evidence or testify also does not excuse failure to investigate. Conduct also not excused by argument that state would have rebutted with other crimes and bad character evidence because Tennessee law would permit rebuttal of the mitigating evidence submitted only and not general bad character evidence.

***Capital Case**

****Jackson v. Calderon***, 211 F.3d 1148 (9th Cir. 2000) (tried in early 1984). Counsel ineffective for failing to prepare and present mitigation evidence. Defendant was smoking PCP and engaging in bizarre behaviors, such as diving head first into pavement and pulling and slapping his hair. A police officer responding to the call to investigate told the defendant to sit and ultimately hit him in the back of the legs with the baton when the defendant attempted to walk away. They struggled and the defendant was maced in the face a number of times. When officer ran to driver's side of patrol car possibly to call for backup, the defendant reached in passenger side and the two struggled for a shotgun. The defendant got it. Evidence conflicting, but it appeared that both put their weapons on the roof of the car at some point and then defendant grabbed shotgun up and fired. One pellet entered officer's eye and killed him. When other officers arrived, the defendant would not surrender and threatened to kill. A police dog caused the defendant to drop the weapon and the defendant was subdued after a struggle in which he tried to get another weapon. Shortly after the arrest, the defendant's blood pressure dropped drastically and he was hospitalized due to incoherence, shock, and semiconsciousness. Prior to trial, the defense had the defendant examined by two psychiatrists but did not call either because they could not establish affirmative defense and would reveal potentially damaging information. The defense did call one psychiatrist, who had not examined the defendant, to testify generically about the effects of PCP. During sentencing, the defense presented testimony only from the defendant's estranged wife and mother. The wife testified that the defendant was a good provider, good father, and good husband, except for drug use, which was the reason she left him. She related an instance when he thought the house was charged with electricity due to drug use. The mother testified that the defendant's father was a hustler, who was never around, and that the defendant's troubles started at age 14 when he started sniffing glue. Both witnesses were cross-examined about the defendant's prior offenses. Counsel's conduct was deficient because counsel conducted only two hours of investigation related to sentencing weeks before the trial because of the belief that they would not reach sentencing. Thus, counsel, who had no prior capital case experience, only interviewed the wife and mother and reviewed juvenile and military records. If counsel had adequately investigated, the evidence would have revealed that the defendant suffered repeated beatings in childhood, his mother would choke him when she was angry, his childhood was characterized by neglect and instability, and he showed signs of mental illness as a child and had been diagnosed with schizophrenia at one time. In addition, if counsel had presented the testimony of one of the examining psychiatrists during sentencing, the jury would have heard that the defendant was grossly impaired by PCP at the time of the offenses. Finally, counsel also failed to investigate and object to the testimony of an alleged victim of a prior sodomy because it was questionable that the sodomy was committed by force or threat of force, which was a prerequisite for admissibility in sentencing.

1999: **Smith v. Stewart*, 189 F.3d 1004 (9th Cir. 1999) (tried in 1987 and affirmed on appeal in 1989). Counsel ineffective in sentencing phase for failing to prepare and present mitigation and failing to challenge the state's aggravation evidence related to prior convictions. Defendant was tried for two

***Capital Case**

different rape-murders. After first conviction by jury, defendant plead guilty to the second one, even though the prosecutor argued that defendant was emotionally unstable and his plea may not be voluntary. During first sentencing under statute that allowed only consideration of statutory mitigating circumstances, counsel presented testimony from two experts, who testified that defendant had internal conflicts bordering on psychosis that caused tensions leading to a compulsion to commit sexually sadistic murders. These experts had minimal information about the defendant's history and had conducted only short interviews, but testified in an effort to establish impaired ability to conform conduct to law. Defendant was granted a new sentencing trial after the statute was held to be unconstitutional. Although counsel could now present non-statutory mitigating evidence, he did no investigation, called no witnesses, and only reargued that the court should consider the testimony of the previous experts as mitigation. Complete failure to investigate, when the prosecutor even questioned the defendant's emotional stability, was deficient. Court found prejudice because, if counsel had adequately investigated and presented mitigation, the evidence would have at least established that the defense investigator and a pastor had observed multiple personalities in the defendant. His girlfriend would have testified that he treated her well but had wild mood swings. He had attempted suicide in prison. He had developed serious psychosexual problems stemming from his childhood with deeply religious parents, one of whom beat him severely and the other emotionally neglected and abandoned him. This evidence, at a minimum, would have supported the testimony of the previous experts which had been rejected by the courts for lack of foundation and credibility. "A lawyer who should have known but does not inform his expert witnesses about essential information going to the heart of the defendant's case for mitigation does not function as 'counsel' under the Sixth Amendment." *Id.* at _____. Court also found that counsel was ineffective for failing to challenge the state's aggravation evidence of two prior rape convictions as a prior violent offense. Both of the convictions occurred when Arizona law did not include violence as an element of rape. Likewise, one of the convictions was obtained when it appeared that the defendant's counsel had a conflict of interest. The failure to challenge the aggravating circumstances and present mitigation evidence was prejudicial despite the "horrific nature of the crimes" in this case, especially because the Arizona statute requires a death sentence in the absence of mitigating evidence.

***Collier v. Turpin**, 177 F.3d 1184 (11th Cir. 1999) (tried in September 1978). Counsel ineffective in capital sentencing for failing to adequately prepare and present mitigation evidence. The defendant, who lived in Tennessee, drove to Georgia and committed three armed robberies. During his drive back to Tennessee, he was stopped by several officers. He grabbed one of the officers' weapons and shot both officers killing one. Because of eyewitnesses and a full confession, a conviction was essentially a foregone conclusion. During the sentencing phase, which lasted only an hour and a half, trial counsel presented 10 defense witnesses, including the defendant's wife but essentially elicited only one or two word answers from them that established that the defendant was a good worker, supported his family, and a good reputation for truth and veracity (which was

***Capital Case**

irrelevant since he did not testify). The claim of ineffective assistance was not raised in the first state habeas petition. Ultimately after navigating the procedural quagmire of bouncing back and forth between federal and state habeas petitions, the Court found counsel to be ineffective in this fourth habeas petition. The Court found cause for the default of not raising the issue in the first state and federal habeas petitions because the trial attorneys had represented the defendant in those proceedings. Counsel were ineffective because they failed to develop the mitigation evidence that they were aware of. The witnesses who testified could have presented substantial evidence that the defendant was a good family man and an upstanding public citizen, who had a background of poverty but who had worked hard as a child and as an adult to support his family and close relatives. Instead of the “hollow shell” of mitigation, *Id.* at ___, trial counsel could have established the defendant had a gentle disposition, his record of helping his family in times of need, specific instances of heroism and compassion, and evidence of his circumstances at the time of the crimes, including his recent loss of his job, his poverty, and his diabetic condition. Counsel was also ineffective for failing to seek and present an expert on diabetes when they were aware of the diabetes and that the defendant’s crimes were totally out of character for him. If counsel had performed adequately, the evidence would have established that the defendant had trouble controlling his behavior when he was not properly medicated, which would have mitigated the crime itself. An expert could have testified that the defendant’s behavior was possibly caused by an episode of hypoglycemia brought on by the defendant’s failure to eat that day in combination with an excessive insulin dose. Prejudice found because a juror who had known of the “stark contrast between [the defendant’s] acts on the day of the crimes and his history” may not have voted for death. The Court concludes, “The jury was called upon to determine whether a man whom they did not know would live or die; they were not presented with the particularized circumstances of his past and of his actions on the day of the crime that would have allowed them fairly to balance the seriousness of his transgressions with the conditions of his life. Had they been able to do so, we believe that it is at least reasonably probable that the jury would have returned a sentence other than death.” *Id.* at ___.

****Bean v. Calderon***, 163 F.3d 1073 (9th Cir. 1998) (crimes in 1980 and affirmed on appeal in 1988). Counsel ineffective in sentencing phase of double murder trial for failing to prepare and present mitigation evidence. First counsel was appointed to represent defendant and investigated competency defense. A second counsel was appointed a month and a half before the penalty hearing. The penalty phase counsel relied solely on the evidence prepared by the guilt-or-innocence phase counsel. The first counsel believed that he was prohibited from participating in the sentencing phase so he did nothing either. Prior to trial, the first counsel had contacted two mental health experts, who strongly recommended neuropsychological testing for brain damage, but this testing was not completed until ten months later during the weekend before the penalty hearing. Counsel were unaware of the results when the penalty phase started. Counsel also failed to furnish other necessary information to the experts who testified during the penalty phase and failed to adequately prepare these experts for their testimony. The only expert who had reviewed any documents did not testify.

***Capital Case**

One expert who did testify had requested social, medical, and educational information, which had not been provided, and met with counsel to prepare for testimony only a day or two before testimony. He could testify only that Bean had an organic personality disorder and was moderately defective in intelligence, but could not definitively state whether Bean had brain damage or whether he was able to appreciate criminality. The other expert to testify also did not have any information other than her last-minute testing. She testified that Bean has brain damage and his ability to appreciate criminality was impaired, but she had not studied the relevant California legal standards. Subsequent review of the evidence by these experts and others resulted in testimony that Bean was functionally mentally retarded, suffered from post-traumatic stress disorder, was brain damaged, was using drugs during the time of the offenses, and was incompetent at the time of trial. The Court stated: “When experts request necessary information and are denied it, when testing requested by expert witnesses is not performed, and when experts are placed on the stand with virtually no preparation or foundation, a capital defendant has not received effective penalty phase assistance of counsel.” *Id.* at 1079. The Court also found prejudice because the two experts who did testify lacked preparation and foundational information for their conclusions which severely undercut their credibility. In addition, counsel presented only an “unfocused snapshot” of Bean’s life in sentencing so the jury had no knowledge of the “indisputably sadistic treatment Bean received as a child, including repeated beatings which left a permanent indentation in his head.” *Id.* at 1081. Counsel also failed to discover and present evidence of Bean’s developmental delays, including placement in classes for the “educable mentally retarded.” Prejudice was found because this was not a case in which the death sentence was inevitable due to the enormity of the aggravating circumstances. In fact, the state presented little aggravating evidence and the jury initially divided over the appropriateness of the death penalty, deadlocking on both murders. Ultimately, the jury returned with one death verdict and life verdict.

****Smith v. Stewart***, 140 F.3d 1263 (9th Cir. 1998) (tried in 1984). Counsel ineffective in capital sentencing phase for failing to prepare and present mitigation and for failing to make any argument on defendant’s behalf. Counsel stated only that defendant still denied his guilt and that he was only 30-years-old. Counsel spoke with defendant and his mother but asked only a few generalized questions which revealed nothing of significance. While the court recognized that counsel’s task is difficult without the client’s assistance, the court could not “find any reason, tactical or otherwise for the failure of counsel to develop any mitigation at all for the purpose of defending [the defendant] against the death penalty.” 140 F.3d at 1269. Likewise, counsel’s failure to even request leniency amounted to no representation at all. 140 F.3d at 1270. Available evidence included evidence of antisocial personality disorder, extensive drug history, change in personality after a PCP overdose, and good family relationships, including his love and support of his children. In assessing prejudice, the court stated, “we are not asked to imagine what the effect of certain testimony would have been upon us personally,” 140 F.3d at 1271, but what the effect would have been on the sentencer, which under Arizona law is the judge. Prejudice found in this case because facts were “bad” but not

***Capital Case**

“overwhelmingly horrifying” such that it was “highly improbable that mitigating factors of any ordinary stripe would help.” 140 F.3d at 1270. Likewise, under the Arizona sentencing scheme, the judge is required to sentence the defendant to death if there are aggravating circumstances and “no mitigating circumstances sufficiently substantial to call for leniency.” 140 F.3d at 1270. Counsel’s failure to present mitigation or argue for leniency thus amounted to “a virtual admission that the death penalty should be imposed.” 140 F.3d at 1270.

***Dobbs v. Turpin**, 142 F.3d 1383 (11th Cir. 1998) (tried in May 1974). Counsel ineffective in capital sentencing phase because counsel failed to investigate and present any mitigating evidence and made an inadequate closing argument. Counsel spoke to very few potential mitigation witnesses, including the defendant’s mother. Available but unrepresented mitigation included witnesses to testify that defendant had an unfortunate childhood, his mother often would not let him stay in the house with her, and when she did allow him to stay, she ran a brothel where she exposed him to sexual promiscuity, alcohol, and violence. Counsel’s reasons for failure were insufficient. Counsel believed erroneously that evidence of defendant’s childhood was inadmissible and that mitigating evidence could only be admitted to mitigate the crime, as opposed to the sentence. The court held, “[S]trategic decisions based on a misunderstanding of the law are entitled to less deference.” 142 F.3d at 1388. Counsel also stated that the defendant did not want him to present mitigation evidence. The court held “that lawyers may not ‘blindly follow’ such commands. Although the decision whether to use mitigating evidence is for the client, this court has stated, ‘the lawyer first must evaluate potential avenues and advise the client of those offering possible merit.’” 142 F.3d at 1388 (quoting *Thompson v. Wainwright*, 787 F.2d 1447, 1451 (11th Cir. 1986)). Counsel’s argument in sentencing consisted of reading Justice Brennan’s concurring opinion in *Furman* and arguing that the current death penalty statute would also be found unconstitutional. Counsel’s argument was ineffective because it minimized the jury’s responsibility for determining the appropriateness of the death penalty and failed to focus on the character and record of the defendant and the circumstances of the offense. In addition, counsel’s argument was deficient because he never asked the jury for mercy or for a life sentence. He merely asked the jury to impose a sentence with which the jurors could live. Counsel offered no reason for the inadequate argument.

1997: *Austin v. Bell, 126 F.3d 843 (6th Cir. 1997) (crimes in 1977 and affirmed on appeal in 1981). District court found IAC in both guilt and sentencing, but the court of appeals found only IAC in sentencing. Counsel were ineffective for failing to prepare and present mitigation evidence because they didn’t think it would do any good. Relatives, friends, death penalty experts, and a minister were available and willing to testify.

***Hall v. Washington**, 106 F.3d 742 (7th Cir. 1997) (sentenced in April 1984). Trial counsel ineffective (even under AEDPA standards) in sentencing for failing to adequately advise the defendant of the consequences of waiving a jury in a sentencing, for failing to investigate and

***Capital Case**

discover readily available mitigation evidence which included good character and adaptability testimony from a correctional officer when the victim was also a correctional officer and good character evidence from other witnesses. Investigation is required. “This does not mean that only a scorch-the-earth strategy will suffice, . . . but it does mean that the attorney must look into readily available sources of evidence. Where it is apparent from evidence concerning the crime itself, from conversation with the defendant, or from other readily available sources of information, that the defendant has some mental or other condition that would likely qualify as a mitigating factor, the failure to investigate will be ineffective assistance.” *Id.* at 749-50. Here, counsel did not contact the defendant in the six weeks after conviction and prior to sentencing to even inquire about possible mitigating evidence or witnesses who might be available to testify on his behalf. They did not even return telephone calls or write back to individuals who were volunteering to offer mitigating testimony. Prejudice found even though judge alone trial because if not for IAC might not have been judge alone and even if it had, trial court found no mitigation evidence at the time of sentencing. Trial counsel also ineffective for sentencing phase closing which did not even focus on defendant, but rather focused on life sentence because the death penalty is barbaric.

1996: **Emerson v. Gramley*, 91 F.3d 898 (7th Cir. 1996) (affirming 883 F. Supp. 225 (N.D. Ill. 1995)) (second trial in March 1985). Trial counsel ineffective for failing to prepare and present mitigation evidence and making no sentencing argument at all where the state presented aggravation evidence of seven prior convictions of robbery. Counsel had failed to conduct *any* investigation, however brief, into the possible existence of evidence of mitigating circumstances. Available mitigation would have shown that at age 8 the defendant was shot when he was an innocent bystander during robbery, he lacked emotional and educational support from his parents, he lost a young child, and had a diminished IQ.

1995: **Glenn v. Tate*, 71 F.3d 1204 (6th Cir. 1995) (sentenced in September 1982). Trial counsel ineffective for failing to adequately prepare and present mitigation evidence in case where defendant killed police officer while helping older brother escape from jail. Counsel requested court-appointed examination and examiners reported no organic brain damage although no testing was done. Counsel made virtually no attempt to prepare for the sentencing phase of the trial until after the jury returned its verdict of guilty even though “[i]t was obvious, or should have been, that the sentencing phase was likely” to be reached. Counsel only arranged for the preparation of a videotape, even though the admissibility “was obviously questionable” (and the tape was not admitted), that showed the neighborhood where the defendant grew up, along with commentary by a narrator, the defendant’s mother, and a former employer. Only a teacher with limited knowledge and a minister, who had never met the defendant and testified only to religious principles against the death penalty, testified. Available but unrepresented evidence included mental retardation (school records), physical abuse, hyperactivity as a child. Neurological examination showed global brain damage probably caused by general anesthesia given mother early in pregnancy. “[W]hile juries tend to distrust claims

***Capital Case**

of insanity, they are more likely to react sympathetically when their attention is drawn to organic brain problems such as mental retardation.” *Id.* at 1211. Probation officer if interviewed and called would have testified that defendant was a follower and was particularly susceptible to the influence of his older brother.

****Antwine v. Delo***, 54 F.3d 1357 (8th Cir. 1995) (sentenced in August 1985). Counsel ineffective for failing to investigate and present available mitigation. Counsel was aware that defendant was acting oddly for months before offense and that a cursory 20 minute exam by state experts found abnormal behavior consistent with PCP intoxication but that defendant denied using PCP at the time of the offense and the state examiner’s had conducted no psychological testing. Counsel failed to follow up on this inconsistency by requesting an independent examination. Adequate examination and testing revealed bipolar disorder. Counsel presented only an emotional plea for mercy in sentencing. The proffered “strategic” reason was that counsel believed the jury had already determined that death was appropriate with the guilty verdict and that counsel would have lost credibility since mental health evidence of a manic state at the time of the crime would have contradicted the chosen self-defense theory. The court rejected any strategic explanation because “[c]ounsel’s failure to request a second mental examination is more like inadequate trial preparation than a strategic choice.”

****Hendricks v. Calderon***, 70 F.3d 1032 (9th Cir. 1995) (tried in 1981). Trial counsel ineffective for failing to adequately prepare and present mitigation evidence even though a defense expert was called. *See also Hendricks v. Calderon*, 864 F. Supp. 929 (N.D. Cal. 1994). Neither trial counsel nor his investigators conducted any investigation directed at developing mitigating evidence and decided simply to beg for mercy as had been done in the only other capital case counsel had participated in. This was rejected as strategy because “[t]he choice that must be defended as strategic is not a decision about how best to present mitigating evidence, but one about whether to investigate mitigating evidence at all.” If counsel had adequately prepared and presented the mitigation, the evidence would have shown that defendant: was blamed by his family for his mother’s death giving birth; lived in a two-room house with grandmother and 15 relatives; was beaten with a frying pan and switch by grandmother; had to drink kerosene and sugar as medicine; was sexually abused by prostitutes who worked for father; was raped by a stranger and attempted suicide shortly afterwards; had a son who died from rare skin disease; and had a history of drug and alcohol use and male prostitution. A mental health expert would have testified that defendant is genetically predisposed to serious mental illness which was exacerbated by background. Expert testimony would have also shown that defendant suffered from schizoaffective disorder, PTSD, and polysubstance abuse. Expert would have even testified that defendant was insane at the time of the offenses. All of this evidence would have supported at least three statutory mitigating circumstances that were not presented to the jury. Although the jury was given some lay evidence in mitigation, the jury was

***Capital Case**

given no guidance of how to connect the facts and expert testimony about background to the mitigating factors.

***Clabourne v. Lewis**, 64 F.3d 1373 (9th Cir. 1995) (crimes in 1980). Counsel ineffective for failing to prepare and present mitigation evidence. Counsel sought a defense expert evaluation five days prior to sentencing, but took no other action when that was denied. Trial counsel did not call any witnesses in sentencing even though a detective would have testified that it was the co-defendant who was responsible for the depraved manner in which the crime was committed and depravity was the only aggravating circumstance found. Trial counsel also did not prepare and present expert testimony. The defense expert who testified at trial had seen the defendant six years earlier and was not provided with any subsequent records, including records concerning offense. If additional information had been provided, defense expert would have diagnosed schizophrenia instead of anti-social personality. Likewise, state experts testified at trial that defendant was sane, but were never provided with information about defendant's history or offenses or asked about mitigation. If defense counsel had provided the information and talked to them, state experts would also have diagnosed schizophrenia and agreed that co-defendant had manipulated defendant.

***Baxter v. Thomas**, 45 F.3d 1501 (11th Cir. 1995) (sentenced in September 1983). Trial counsel ineffective during penalty phase of capital trial for failing to adequately investigate and present mitigation evidence. Counsel talked to the defendant's mother and brother and visited a boys home he had been committed to. They did not, however, request State Hospital records, school records, or social service records, and did not interview defendant's sister, neighbor, or social worker, even though counsel was aware of defendant's odd behavior and even requested a mental health evaluation. Because of these failures, trial counsel did not discover or present evidence that the defendant spent approximately three years of his teenage life in a psychiatric hospital and that he was mentally retarded.

***Jackson v. Herring**, 42 F.3d 1350 (11th Cir. 1995) (*affirming Jackson v. Thigpen*, 752 F. Supp. 1551 (N.D. Ala. 1990)) (sentenced in December 1981). Trial counsel ineffective during penalty phase of capital trial for failing to adequately investigate and present mitigation evidence. Neither counsel conducted any investigation or preparation for sentencing, in part, because they did not believe the defendant would be convicted of murder and, in part, because each counsel thought the other was responsible for sentencing. Available but unrepresented mitigation evidence included: substantial personal hardships, including having to quit school in 8th grade because defendant was pregnant; brutal and abusive childhood at the hands of an alcoholic mother; devotion to her mother, sister, and daughter; borderline mental retardation; good work history; and abuse by her boyfriend, who was the murder victim, both for a long time preceding his death and immediately prior to his death.

***Capital Case**

1994: **Hill v. Lockhart*, 28 F.3d 832 (8th Cir. 1994) (*affirming* 824 F. Supp. 1327 (E.D. Ark. 1993)) (tried in July 1980). Trial counsel ineffective at penalty phase for failing to prepare and present evidence of defendant's mental state at the time of the offenses, and that defendant had a long history of schizophrenia but he was taking antipsychotic medication at the time of offenses. The defendant told counsel of his past psychiatric hospitalizations in Oklahoma and Arkansas and counsel obtained the Arkansas records but made no attempt to obtain the Oklahoma records until just before trial and never obtained some of them.

**Wade v. Calderon*, 29 F.3d 1312 (9th Cir. 1994) (tried in May 1982). Trial counsel ineffective during penalty phase of capital trial for failing to call defendant's family to corroborate abusive background; calling forth alternate personality that committed crimes (defendant had multiple personality disorder) during defendant's testimony and eliciting damaging statements and essentially a challenge to the jury to execute defendant; and by arguing during closing argument that 1) defendant's life should be spared so doctors could examine him as human "guinea pig"; 2) that jurors had already decided on death; and 3) that executing defendant may "free him from this horror." While evidence of abuse had been mentioned by experts during trial, the jury was instructed not to consider that for the truth and no evidence was presented in sentencing on this other than the defendant's testimony.

1992: **Loyd v. Whitley*, 977 F.2d 149 (5th Cir. 1992) (sentencing in 1985). Trial counsel ineffective in sentencing phase for failing to obtain independent mental health evaluation when funds were available and sanity was a critical issue, but counsel assumed funds were not available and did not pursue issue. Proper investigation would have revealed: evidence that defendant was unable at time of offense to distinguish between right and wrong or appreciate the significance or consequences of his acts because of psychotic delusions; child abuse; substance abuse; psychosis (not anti-social as the state contended at trial); and brain damage (frontal lobe dysfunction).

**Mak v. Blodgett*, 970 F.2d 614 (9th Cir. 1992) (*affirming* 754 F. Supp. 1490 (W.D. Wash. 1991)) (sentenced in October 1983). Trial counsel ineffective for failing to prepare and present mitigating evidence regarding defendant's background, family relationships, and the effects of assimilation problems and cultural conflict on young Chinese immigrants. Counsel spent substantial hours preparing to present evidence that another person actually committed the crimes, which they assumed incorrectly would be admitted in sentencing, even though improper during trial but they prepared no social history information.

**Cave v. Singletary*, 971 F.2d 1513 (11th Cir. 1992) (notice of appeal filed in January 1983). Petitioner given death sentence for robbery and murder. At trial, counsel emphasized the fact that petitioner admitted he was guilty of robbery. Court found that although this demonstrated that counsel did not understand the felony murder rule, petitioner was not prejudiced because the jury

***Capital Case**

would have made the same decision based on the evidence of guilt of the robbery. Counsel was found ineffective at sentencing phase, however, because she was under the “grandiose, perhaps even delusional belief” that she would win an acquittal for her client and, therefore, failed to prepare and present available character evidence and the fact that defendant had no prior criminal record in mitigation. State argued lack of character evidence in closing argument. Counsel had even met with some of the defendant’s family members prior to trial but told them their testimony would not be needed. The court characterized the representation in this case as “an embarrassment to the legal profession.” *Id.* at 1519.

1991: *Kenley v. Armontrout, 937 F.2d 1298 (8th Cir. 1991) (tried in 1984). Counsel ineffective for failing to investigate and present mitigation evidence. Counsel received a letter from a social worker that had previously seen the defendant, who also informed counsel of another prior mental health expert. Counsel requested and received the social worker’s records but never spoke to her and never contacted the other prior mental health expert. Counsel also requested no other records that were referenced in these files or interviewed family members. Instead, counsel requested a court-appointed evaluation, which was conducted, and then consulted a different non-examining expert and decided not to pursue this line because counsel erroneously believed that the evidence was too old and insubstantial, which was based, in part, on the court-appointed psychiatrist’s report which was itself incomplete because based on limited information. Adequate investigation would have revealed a history of “an extreme personality or emotional disorder or disturbance, suicidal tendencies, and alcohol abuse and intoxication.”

***Blanco v. Singletary**, 943 F.2d 1477 (11th Cir. 1991) (*affirming Blanco v. Dugger*, 691 F. Supp. 308 (S.D. Fla. 1988)) (tried in June 1982). At sentencing, counsel failed to present any mitigating evidence. Counsel failed to investigate for sentencing prior to trial even though counsel knew the court intended to proceed straight to sentencing after conviction. Even after the court granted a four-day continuance, counsel still only spoke to the defendant’s brother. He never spoke to other potential witnesses and thus failed to prepare and present the available evidence of childhood poverty, seizures, family history of psychosis, organic brain damage, borderline retardation, epileptic disorders and paranoid and depressive behaviors. Counsel also asked for continuance to procure psychiatric exam and then never had one conducted. Counsel told trial court that no mental health mitigation existed. Counsel also revealed damaging information, violating client confidences, to trial judge.

***Horton v. Zant**, 941 F.2d 1449 (11th Cir. 1991) (sentenced in February 1981). Counsel conducted no sentencing investigation prior to trial and only called the defendant’s mother the night before sentencing to ask if she would attend trial. She declined because of the flu and counsel asked no further questions. The court rejected the proffered “strategic reason” not to present mitigation as unreasonable since counsel erroneously believed that mitigation was appropriate only in gruesome

***Capital Case**

cases involving torture. Available mitigation would have shown that defendant was a hard worker, a good youth, able to provide for his common law wife and their daughter, and had successfully adjusted to previous stays in prison. Counsel also ineffective for arguing that they were local lawyers, not “bleeding heart, anti-death penalty lawyers” and calling the defendant a “worthless man” that defense counsel hates and conceding that maybe the defendant “ought to die” during closing argument.

1990: **Brewer v. Aiken*, 935 F.2d 850 (7th Cir. 1990) (sentenced in March 1978). Defense counsel ineffective in death penalty phase of trial for failing to fully investigate defendant’s family and mental history and present evidence in mitigation. This was the first capital case tried under Indiana’s statute passed post-*Furman* and counsel was unaware that the sentencing hearing would begin immediately after conviction. Counsel requested a continuance of a week to prepare because he had just received information of an extensive psychiatric history and problems in childhood. The continuance was denied and no mitigation evidence was presented other than the defendant’s testimony, which was damaging because it opened the door to another armed robbery the same day as these crimes since the defendant claimed a co-defendant was the actual killer. Counsel did not even ask the defendant about his psychiatric history or background. An investigation would have revealed shock therapy, brain damage, mental retardation, susceptibility to the influence of others, and disadvantaged family life.

**Cunningham v. Zant*, 928 F.2d 1006 (11th Cir. 1990) (tried in October 1979). Counsel ineffective during the penalty phase of a capital murder case. Counsel spoke briefly with the defendant’s mother, his employer, and his supervisor on the eve of trial or during trial and presented very limited background information from them in sentencing, but counsel did not thoroughly interview these witnesses or conduct any other background investigation which would have revealed substantial evidence of mental retardation, head injury that resulted in a metal plate in the defendant’s head and substantial headaches and affects, socioeconomic background and reputation as good father and worker in mitigation.

1989: **Kubat v. Thieret*, 867 F.2d 351 (7th Cir. 1989) (*affirming* 679 F. Supp. 788 (N.D. Ill. 1988)) (tried in June 1980). Trial counsel ineffective during sentencing for failing to investigate and present available character evidence in mitigation, making a bizarre and prejudicial closing argument which conceded that counsel “was not going to convince” jury and invited the jury to “decide” between the defendant and victim, and failing to object to improper sentencing instructions which misstated the law by calling for unanimous agreement on a decision not to impose the death sentence. If counsel had adequately investigated “fifteen character witnesses,” of which “most were neighbors and coworkers; all were well-respected citizens in their community; [and] one was a deputy sheriff,” would have testified. Only two of these witnesses had even been contacted prior to trial and not even their testimony was presented. In the district court, the state argued that Kubat’s attorneys made a

***Capital Case**

rational strategic decision to forego character testimony and to rely instead upon a plea for mercy during closing argument. The court rejected this as a reasonable strategy in this case, in part, because the argument could not “even charitably, be called a plea for mercy” and was, instead, an aggravating, “rambling, incoherent discourse” that even invited the jury to choose between the defendant and the victim, which was “utter lunacy for defense counsel” to do. *Id.* at 368. In finding prejudice, the court was particularly impressed

that at least one of the fifteen available character witnesses was a deputy sheriff. The introduction of testimony by a law enforcement officer that the defendant had a salvageable character might not have gone totally unnoticed by the jury. Indeed, . . . if just *one* juror had been sufficiently influenced by the character testimony, the death penalty could not have been imposed.

Id. at 639.

****Deutscher v. Whitley***, 884 F.2d 1152 (9th Cir. 1989) (decision vacated and remanded by Supreme Court several times; last opinion which again finds IAC is *Deutscher v. Angelone*, 16 F.3d 981 (9th Cir. 1994) (tried in 1977). Trial counsel ineffective in penalty phase of capital trial for not investigating and presenting mitigating evidence despite knowledge of some history and argument in sentencing that the defendant must have had some mental problems. Counsel did not have a strategy to avoid presentation of this evidence, but simply failed to investigate. Adequate investigation would have revealed diagnoses of schizophrenia, pathological intoxication, and organic brain damage; commitments to mental institutions; and a history of good behavior in institutional settings.

****Harris v. Dugger***, 874 F.2d 756 (11th Cir. 1989) (sentenced in September 1981). Attorneys rendered IAC in a capital murder case where they failed to prepare or present mitigation evidence because each lawyer believed that the other was responsible for preparing penalty phase of case. Because neither lawyer had investigated they were ignorant of the types of evidence available and could not make a strategic decision on whether to introduce the available mitigation evidence that the defendant was a devoted father, husband, and brother, and a “decent, loving man.”

1988: **Evans v. Lewis*, 855 F.2d 631 (9th Cir. 1988) (sentenced in March 1979). Trial counsel ineffective for failing to investigate and present evidence in mitigation in resentencing. Counsel was aware the defendant had a history of mental problems from his records of incarceration in state mental facility for inmates and prior suicide attempts. Nonetheless, counsel conducted no investigation to determine the extent of the mental problems. Evidence would have shown that defendant is schizophrenic and possibly insane at time of offenses. Instead of this evidence which would have supported at least one statutory mitigating circumstance, counsel presented no evidence in

***Capital Case**

mitigation, even though Arizona death penalty statute required death penalty if no mitigating factor is established, & at least one aggravating factor is found (at least one aggravating factor, prior conviction, was obviously present).

****Middleton v. Dugger***, 849 F.2d 491 (11th Cir. 1988) (tried in 1980). Counsel ineffective for failure to conduct investigation into petitioner's background even though counsel discussed the existence of mitigating evidence with the defendant. Investigation and collection of records would have revealed a history of schizophrenia since age 12; childhood neglect, physical, sexual, and drug abuse; and low IQ. In addition, expert testimony would have established that the defendant was under extreme emotional duress at the time of the homicide and had very little capacity to conform his conduct to the law at the time.

****Stephens v. Kemp***, 846 F.2d 642 (11th Cir. 1988) (tried in 1980). Counsel ineffective for failing to investigate mental health issues, even though counsel learned from the defendant's sister that the defendant had spent five days in a mental hospital four to six months before the shooting occurred. Counsel sought a court-appointed competence and sanity evaluation but pursued his investigation no further after receiving the examiner's report. While this was sufficient for trial issues, the court held that it was inadequate for sentencing purposes.

[W]hen a capital sentencing proceeding is contemplated by counsel aware of the facts of which appellant's trial counsel was aware, professionally reasonable representation requires more of an investigation into the possibility of introducing evidence of the defendant's mental history and mental capacity in the sentencing phase than was conducted by trial counsel in this case. Although trial counsel was aware well in advance of trial that appellant had spent at least a brief period of time in a mental hospital shortly before the shooting, and that for some reason a psychiatric evaluation had already been ordered, he completely ignored the possible ramifications of those facts as regards the sentencing proceeding.

Id. at 653. As a result, the jury was not provided with the available evidence of the defendant's mental history and bizarre behaviors.

1987: **Lewis v. Lane*, 832 F.2d 1446 (7th Cir. 1987) (tried in 1979). Counsel ineffective for stipulating to prior felony convictions the defendant did not have. He failed to ask the State's Attorney whether he had actual proof of those convictions in the form of certified copies and instead relied on petitioner's uninformed representation that he thought the information contained in the "FBI rap sheet" was accurate, without explaining to petitioner the importance of that information and the critical distinctions between arrest and conviction and between felony and misdemeanor. Prejudice

***Capital Case**

found because one charge had been dismissed and a second pled as a misdemeanor when these had been presented to the jury as violent assault with weapons convictions.

***Armstrong v. Dugger**, 833 F.2d 1430 (11th Cir. 1987) (tried in September 1975). Trial counsel ineffective during sentencing phase for failing to prepare and present mitigation evidence. Counsel spoke with the defendant's parole officer and arranged for her to testify at the sentencing trial, but conducted no other investigation other than a single conversation with the petitioner, his mother and stepfather after the conviction. Available evidence would have shown impoverished childhood, good worker, nonviolent, religious, mental retardation, and organic brain damage.

***Magill v. Dugger**, 824 F.2d 879 (11th Cir. 1987) (tried in March 1977). Trial counsel ineffective in sentencing. Counsel began representation on the first day of jury selection, met with defendant for 15 minutes prior to defendant's testimony, failed to discuss with defendant the possibility that the state would seek to prove premeditation during his testimony on cross-examination, failed to object when the prosecutor asked the defendant to concede his guilt to capital murder, and did not develop or present to the jury the defense theory that defendant committed the killing without premeditation. No prejudice on findings, but in combination with errors of counsel in sentencing, prejudice found in sentencing phase. Sentencing errors included counsel's failure to argue defendant's emotional problems which would discount defendant's guilt phase testimony admitting that the killing was intentional and premeditated. In addition, counsel failed to prepare and present available mitigating evidence of a history of serious emotional problems. Specifically, counsel was aware of a mental health expert that had previously treated the defendant and would have testified that he exhibited signs of serious emotional problems at the age of thirteen. He described the defendant as "explosive," and "a time bomb." Finally, counsel called a court-appointed psychiatrist, who had never been asked to examine the defendant regarding the applicability of statutory mitigating circumstances, as a *defense* witness and this witness' testimony virtually precluded finding a statutory mitigating circumstance.

1986: *Jones v. Thigpen, 788 F.2d 1101 (5th Cir. 1986) (tried in December 1977). Trial counsel ineffective during sentencing phase for failing to prepare and present evidence in mitigation when evidence was available to prove that defendant is mentally retarded, 17 at the time of the offense, and did not have any intent to kill victim killed by accomplice during robbery.

***Thomas v. Kemp**, 796 F.2d 1322 (11th Cir. 1986) (direct appeal in 1980). Counsel ineffective in capital sentencing for failing to adequately prepare and present mitigation.

Thomas' lawyer made little effort to investigate possible sources of mitigation evidence. Although Thomas' mother, who was to be the main witness at the penalty phase, was interviewed, she was not present, for reasons not apparent from the

***Capital Case**

record. No attempt was made to obtain possible mitigation testimony from other family members or individuals who knew Thomas from school, work, or the neighborhood. The lawyer testified that he made little effort to produce mitigating evidence because Thomas had stated that he did not want to take the stand and did not “want anyone to cry for him.”

Id. at 1324. The record supports the District Court’s finding of deficient conduct and prejudice. The evidence would have established that the defendant was mentally and physically abused, his mother had a drinking problem, and, although he was a slow learner, he worked to improve his grades. In addition, he was an excellent worker when given simple work assignments, was always punctual, and was a loving son who cared deeply for his mother. A psychiatrist could have presented testimony showing him “as a pathetically sick youngster who had struggled to succeed in life, both in school and on the job, despite a chaotic home environment and a major mental illness.” *Id.* at 1325.

***Johnson v. Kemp**, 781 F.2d 1482 (11th Cir. 1986) (*affirming* 615 F. Supp. 355 (D.C. Ga. 1985)) (tried in July 1975). Trial counsel ineffective in sentencing phase for failing to investigate and present available mitigation. Counsel only talked to defendant and defendant’s parents without even asking them about possible sentencing witnesses or explaining the need for mitigation and did nothing more. Available mitigation included 19 good character witnesses and no criminal history, neither of which was presented to jury.

1985: *Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985) (tried in February 1976). Trial counsel ineffective for making no preparations whatsoever for sentencing phase because of his belief that defendant would be found not guilty by reason of insanity. (State psychiatrist found “reactive- depressive” condition, but did not give opinion on sanity question because of insufficient information from defendant.) Counsel met with the defendant’s parents but never asked about character witnesses. If trial counsel had adequately investigated he could have presented character evidence that the defendant was “a man who was respectful toward others, who generally got along well with people and who gladly offered to help whenever anyone needed something.”

***Tyler v. Kemp**, 755 F.2d 741 (11th Cir. 1985) (tried in 1980). Counsel ineffective in sentencing phase for failing to prepare and present mitigating evidence. Counsel had interviewed members of the family, including the defendant’s grandmother, aunt, and brother, concerning the defendant’s background prior to trial. When counsel asked them to testify, they declined because “they knew nothing of the murder and had nothing to tell.” *Id.* at 744. In essence, counsel never told them that their testimony was needed on any subject other than guilt or innocence and did not explain the sentencing phase of the trial or that evidence of a mitigating nature was needed. If counsel had explained this evidence was available that the defendant had no prior criminal record, had a good

***Capital Case**

work record, had an alcoholic abusive husband (who was the victim in the case), and was a good mother.

1984: **King v. Strickland*, 748 F.2d 1462 (11th Cir. 1984) (tried in July 1977). Counsel ineffective for failing to prepare mitigation. Following the conviction, counsel sought a continuance of one day because he had not even discussed sentencing with the defendant. The continuance was denied. Counsel presented a minister and former employer to testimony. If counsel had adequately investigated there were available character witnesses. Counsel also heightened the prejudice by emphasizing during closing argument the reprehensible nature of the crime and the fact that he had reluctantly represented the defendant. “In effect, counsel separated himself from his client, conveying to the jury that he had reluctantly represented a defendant who had committed a reprehensible crime. . . . Rather than attempting to humanize King, counsel in his closing argument stressed the inhumanity of the crime.” *King v. Strickland*, 714 F.2d 1481, 1491 (11th Cir. 1983).

3. U.S. District Court Cases

2002: **United States ex rel. Madej v. Schomig*, 223 F. Supp. 2d 968 (N.D. Ill. 2002) (affirmed on appeal in 1985). Even under AEDPA, counsel ineffective in capital sentencing for failing to prepare and present mitigation evidence. The sentencing hearing was held one day after conviction. Defense counsel had not prepared because he mistakenly believed that he would have time to do so after conviction. The only mitigation presented was the defendant’s testimony. Court finds that prejudice should be presumed under *Cronic* because “counsel failed to conduct any investigation that would submit the question of Madej’s eligibility for the death penalty to ‘meaningful adversarial testing,’” (quoting *Cronic*, 466 U.S. at 659), and even conceded eligibility for the death penalty. Court further finds that, even if *Cronic* does not apply, prejudice was shown under *Strickland*. Available but unrepresented evidence included: evidence that the defendant protected her from physical abuse for years; a plea for mercy from the victim’s husband; evidence that petitioner was a good person; evidence of a troubled childhood; and expert testimony about petitioner’s history of substance abuse and its impact on his “psychological and neurological health.” The Illinois Supreme Court’s finding of no prejudice was “clear error” because the state court “looked at each category of mitigating evidence in isolation” rather than considering whether “there is a reasonable probability the outcome would have been different based on all of the mitigating evidence.” Court held: “There can be no confidence in the outcome of a capital sentencing hearing where the defendant was represented by an attorney who failed to present any evidence to counsel against imposition of the death penalty.” Although not considered individually prejudicial, the court included in the cumulative prejudice analysis, counsel’s failure to advise his client that state law required a unanimous jury and only one juror had to hold out in order to avoid death, which resulted in the petitioner waiving his right to jury and being sentenced by judge alone.

***Capital Case**

***Pursell v. Horn**, 187 F. Supp. 2d 260 (W.D. Pa. 2002) (tried in January 1982). Counsel ineffective in capital sentencing for failing to prepare and present mitigation evidence. Although the case was reviewed under AEDPA, this issue was reviewed *de novo* because the state court did not address the merits of the claim. The district court also held that no evidentiary hearing was required because the state presented no contrary evidence. Thus, the court expanded the record to include Purcell's affidavits and held that the AEDPA was not violated because Purcell was denied a hearing on this issue in state court. Counsel's conduct was deficient because "[t]rial counsel has an 'obligation to conduct a thorough investigation of the defendant's background' in capital cases." (quoting *Williams v. Taylor*, 529 U.S. at 396). Here, counsel had no basis for failing to investigate, because counsel focused only on defeating the one aggravating circumstance of torture. Counsel presented no mitigating evidence and his discussion of it in closing covered only one page. This decision could not reasonably "foreclose any investigation into mitigating evidence" though. If counsel had investigated, he would have discovered that the defendant was the son of a prostitute, who lived in squalor in his first four years. After he was abandoned by his mother to another family, he was physically and sexually abused by an alcoholic father. He began self-medicating with drugs at an early age and was a drug addict by the time he was a teenager. These problems caused neurological damage that affected impulse control and ability to understand right from wrong. Despite all of this, the defendant was a loving father, caring brother, a dear friend, and a man to be trusted. Before the jury, the defendant, "the man was a mere skeleton: a young killer with a prior criminal record and a girlfriend, nothing more and nothing less. Had [his] lawyer tapped into the mitigating evidence available to him, however, he would have added flesh, bones, a mind, and a heart" to the defendant. Ultimately, the jury "may have believed that his life, though shattered beyond repair, was still worth saving." The jury also may have found that the murder was not "preplanned or premeditated," due to the impulse control problems caused by his brain damage. This would also have impacted the consideration of the torture aggravator. In short, this jury "did not have the chance to see [the defendant], the man. It did not have the opportunity to feel sympathy or pity. . . . While this evidence may not have swayed every juror, [the defendant] need only show a reasonable probability that one juror would have found death an inappropriate punishment." Here, while "[a] jury in a capital case may not be barred from hearing any mitigation evidence offered by the defendant concerning his character or background[,] [i]n the present case, the jury was prevented from hearing such evidence, not because the court precluded its admission, but merely because [defense] counsel made an objectively unreasonable decision not to look for it."

2001: *Horn v. Holloway, 161 F. Supp. 2d 452 (E.D. Pa. 2001), *rev'd on other grounds*, 355 F.3d 707 (3d Cir. 2004) (tried in May 1986).⁷ Counsel ineffective in capital sentencing, under AEDPA, for failing

⁷The IAC finding was not addressed on appeal. The Court of Appeals granted a new trial on other (continued...)

***Capital Case**

to request appointment of a mental health expert to assist the defense. Although the defendant waived his right to present testimony of family and friends, he did not waive his right to have a mental health expert testify on his behalf. “[E]ven when a defendant is uncooperative, counsel still has a duty to interview friends and relatives and otherwise investigate to discover whether mitigating evidence exists.” *Id.* at 567.

Because the post-trial evaluations show that mental health evidence existed prior to trial, both a complete failure to investigate and a partial investigation that failed to uncover such evidence must be considered unreasonable because counsel probably would have discovered such evidence had his investigation been reasonable. Likewise, because such evidence probably would have been discovered, counsel’s decision not to make such an investigation, if indeed he made such a decision, must be considered unreasonable. Further, whether or not an investigation was conducted and whether or not evidence as to mental health issues was uncovered, such evidence must have existed, and therefore counsel acted unreasonably in failing to request that a defense mental health expert be appointed. Trial counsel demonstrated a lack of either preparation or knowledge, or both, in failing to request that the trial court appoint a defense expert to assist in the preparation of Petitioner’s mitigation defense at the penalty phase.

Id. at 567-68 (citations and footnotes omitted). Prejudice found because, with the assistance of a mental health expert, the available evidence included cognitive defects; the effects of emotional, physical and sexual abuse; and the effects of chronic drug and alcohol abuse. Thus, there is a reasonable probability that a juror would have weighed the aggravating and mitigating factors differently. “Counsel’s deficient performance prejudiced Petitioner by depriving him of any informed presentation of mental infirmities.” *Id.* at 573. There can be no strategic or tactical reason for counsel’s failure to request that a mental health expert be appointed to assist the defense when mental health issues could be a significant factor at either the trial or penalty phases, because such an expert is necessary to effectively develop and present such evidence, as well as to assist counsel and his client in deciding whether such evidence should be presented at trial. With respect to the state court decision, the court held that the state court had not adjudicated this claim on the merits even though it was properly presented. Thus, the court was applying *de novo* review rather than the standard of 2254(d). The court also held that even if 2254(d) applied, the state court decision was unreasonable because the state court purported to deny post-conviction relief because of the denial of relief on direct appeal when this claim was factually and legally different than the claim raised on

⁷(...continued)
grounds.

***Capital Case**

direct appeal. “A decision based on an analysis of one set of facts and legal theories cannot reasonably be applied to another set of facts and legal theories only tangentially related to the former set.” *Id.* at 565 n. 130.

****Laird v. Horn***, 159 F. Supp. 2d 58 (E.D. Pa. 2001), *aff’d on other grounds*, 414 F.3d 419 (3d Cir. 2005) (sentenced in May 1988). Under AEDPA, counsel ineffective in capital sentencing for failing to adequately prepare and present mitigation. Counsel presented an innocence defense during the trial. “There is no evidence that trial counsel conducted any inquiry into petitioner’s background and medical history in connection with the penalty phase.” Counsel presented only the defendant’s fiancé (and the mother of one of his children) to plead for mercy and did not prepare her or explain mitigation to her. If counsel had adequately investigated the jury would have heard evidence of the defendant’s traumatic childhood, severe childhood physical and sexual abuse, a significant history of mental and emotional disturbance, including Attention Deficit Hyperactivity Disorder, a history of significant head traumas including a skull fracture; the effects of his history of alcohol and drug addiction, and that he suffers from Post-Traumatic Stress Disorder. In short, there was “an overwhelming amount of highly compelling evidence.” The state court’s decision was based on an unreasonable determination of the facts in light of the evidence presented in the State court. In addition, the state court’s conclusion that “[c]ounsel will not be deemed ineffective for pursuing a particular strategy, as long as the course chosen was reasonable,” . . . does not comport with *Strickland*’s holding that counsel has a duty to “make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” Likewise, “the fact trial counsel presented some mitigating evidence does not warrant the conclusion that his failure to investigate other potential sources of mitigating evidence was thus reasonable.”

Finally, the state supreme court’s post-hoc speculation regarding possible reasons for trial counsel’s actions does not somehow render trial counsel’s performance constitutionally adequate. As explained by the Fourth Circuit, “courts should not conjure up tactical decisions an attorney could have made, but plainly did not.... Tolerance of tactical miscalculations is one thing; fabrication of tactical excuses is quite another.”

Id. at ____ (quoting *Griffin v. Warden*, 970 F.2d 1355, 1358-59 (4th Cir.1992)). Reversal also required for other reasons.

***Capital Case**

****Jacobs v. Horn***, 129 F. Supp. 2d 390 (M.D. Pa. 2001), *rev'd on other grounds*, 395 F.3d 92 (3d Cir. 2005) (tried in 1992).⁸ Counsel ineffective in failing to adequately prepare and present mitigation evidence. Counsel made no effort to perform an investigation into the defendant's past other than speaking with a few relatives who attended the trial. Counsel consulted with a psychiatrist, but did not tell him it was a death penalty case and did not ask him to consider mitigation. He was asked only to examine competence and sanity. Counsel also failed to provide the expert with any background information concerning the crimes or the defendant's history. The only mitigation presented was testimony from the defendant and testimony from his mother that he loved his daughter (one of the victims) and that he was sorry. 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 state court held that counsel was not ineffective because counsel had retained a psychiatrist. "At issue, currently, however, is whether an evaluation was performed with regard to *mitigating* evidence not whether the petitioner suffered a mental impairment that would have affected his criminal responsibility or competency to stand trial." In addition, the expert retained explained that "an evaluation for mitigating evidence is different from an evaluation for criminal responsibility/competency to stand trial," but he was asked only to perform the latter and was not informed that the prosecution was seeking the death penalty. The state court also found that counsel did not have the additional background information that the trial expert required. The state court's finding was an unreasonable application of Supreme Court precedent because

The important point is not that counsel did not have the information, but rather, we must examine *why* counsel did not have the information. Here, counsel did not have the information because he failed to investigate and obtain the relevant information. The fact that trial counsel did not have such information merely supports the conclusion that he did not fully investigate—it does not justify the failure to investigate and present evidence. . . .

"[T]he great weight of federal law requires defense counsel in a capital case to investigate a defendant's background, cognitive status and mental health for mitigating evidence." Because counsel did not do so here, counsel's conduct was deficient. Prejudice was also found.

****Pirtle v. Lambert***, 150 F. Supp. 2d 1078 (E.D. Wash. 2001), *aff'd on other grounds*, 313 F.3d 1160 (9th Cir. 2002) (sentenced in July 1993). Trial and appellate counsel ineffective in capital sentencing

⁸The Court of Appeals held that counsel's ineffectiveness also prejudiced the defendant during the trial.

***Capital Case**

for failing to interview officers prior to trial and failing to object to admission of statement taken in violation of Miranda. While the defendant was on the ground, handcuffed, with an officer's knee in his back, and officers threatening to "blow his head off" if he was not cooperative, an officer, without prior Miranda warnings, asked the defendant if he knew why he was under arrest and the defendant said, "Of course I do, you might as well shoot me now." The officers did not include this statement in their reports and the state did not disclose the statement prior to trial. During the trial, the state offered the statement in evidence without objection and argued on the basis of the statement in both the trial and sentencing. With respect to the lack of Miranda warnings, the court found that "the Washington Supreme Court unreasonably determined that Deputy Walker was not interrogating [the defendant], but rather was just asking background booking questions." The district court found this to be unreasonable because this clearly was not a booking situation or question. With respect to the state's failure to disclose the statement and hold a hearing on voluntariness, the state court held that no disclosure or hearing was required because the prosecutor did not know of the statement until the officer's testimony. The District Court found this to be an unreasonable application of Supreme Court law since "the United States Supreme Court has clearly held that knowledge of police officers is imputed to the prosecution." With respect to the ineffective assistance claim, the court was "firmly convinced that the Washington Supreme Court erred and failed to reasonably apply the holding of *Strickland* to the facts of this case." The court found no prejudice during the trial due to "extremely strong" evidence, including the defendant's testimony admitting guilt. Prejudice found in sentencing though, but the court analyzed the "prejudice" in conjunction with the analysis of whether "'actual prejudice' resulted because a constitutional violation had substantial and injurious effect or influence in determining the jury's verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993)."⁹ In any event, the court could not "find that no juror was influenced or persuaded by the fact that [the defendant] had acknowledged he should die for what he had done which then became a part of that juror or jurors' s moral judgment analysis."

1998: *Christy v. Horn, 28 F. Supp. 2d 307 (W.D. Pa. 1998) (tried in December 1993). Counsel ineffective in capital sentencing phase for failing to adequately prepare and present mental health mitigation evidence, presenting damaging character evidence, failing to object to state's improper arguments in sentencing, and misstating the law in closing argument. From 1973-79, the defendant, while incarcerated for other crimes had been involuntarily committed to a number of mental health institutions due to mental illness. The medical records established that he suffered from paranoid

⁹Note that under the Court's analysis in *Kyles v. Whitley*, 514 U.S. 419 (1995), the Court stated that no additional harmless error review is necessary after materiality is found. Because the "materiality" standard of *Kyles* is the same as the "reasonable probability" standard of *Strickland*, *United States v. Bagley*, 473 U.S. 667, 682, 685 (1985), it was unnecessary for the court to address *Brecht* at all with respect to the ineffective assistance of counsel claim.

***Capital Case**

schizophrenia, organic brain syndrome, depression, personality disorder, psychosis, delusions, and long-term drug and alcohol addiction. Within months of his release from confinement, the defendant broke into a business and ran into the night watchman. The guard shot the defendant in the wrist, but was apparently unaware that the wound was superficial and put down his gun and walked away. The defendant grabbed the gun and shot the watchman as the watchman rushed him. He then shot him in the head while the watchman was crouched on the floor. During a trial on unrelated charges, the defendant confessed to this murder. Prior to trial, the defense requested appointment of a defense psychiatrist, but the trial court denied the motion and appointed a court psychiatrist instead. The court psychiatrist testified during a competence hearing that the defendant was competent and sane and suffered only from antisocial personality disorder. The defense did not cross-examine the psychiatrist concerning diminished capacity or mitigation and sought only to introduce the defendant's medical records. The trial court held that the records would not be admitted without testimony from persons who prepared them. Counsel presented a diminished capacity defense and self defense arguments and had the defendant testify, but did not contact any of the defendant's previous doctors or present any psychiatric evidence at all. The state, despite the fact that the prosecutor had previously presided over a number of the defendant's commitment hearings as a county mental health officer, argued without objection that the defendant was faking mental illness and that if any evidence were available it would have been presented. Counsel also elicited testimony of the defendant's prior incarcerations and failed to object to state's argument that the defendant just cycled back and forth between prison, mental health facilities, and the streets. During sentencing the defense presented only two witnesses—the defendant's mother and a prosecution witness who had previously been incarcerated with the defendant. He testified to the defendant's good character, but also testified that the defendant was not "crazy" and had told him that he would kill people, especially any witnesses to a murder that he might commit. During arguments, the state argued without objection and contrary to Pennsylvania law, that the defendant posed a future danger, that the jurors should sentence him to death to avoid becoming another victim, and even if the jury found one aggravating circumstance, the sentence must be death. Defense counsel then argued, contrary to Pennsylvania law, that all 12 jurors had to agree on whatever the verdict was. The Court held that trial counsels' conduct was deficient because they failed to "investigate the mountain of mitigating evidence readily available to them." Slip Op. at *15. Trial counsels' statements that they were hard pressed to find mitigation only proved that they failed to prepare for sentencing. Failure to present the mental health evidence was not a tactical decision, especially in light of the state's arguments that the defendant was only faking mental illness. Counsel simply stated that they did not present psychiatric evidence because of the court psychiatrist's testimony that the defendant was sane and competent. Counsel simply failed to comprehend that this finding did not preclude a finding of mitigating circumstances as defined under state law. This "failure to comprehend the law of mitigating circumstances is objectively unreasonable." Slip Op. at *15-16. Counsel was also unreasonable for failing to object to the state's arguments on the revolving door and the return of the defendant to the community, because under state law, the defendant would not have been eligible

***Capital Case**

for parole. Likewise, counsel failed to object to the state's argument that if one aggravator was found, state law required death, when state law actually required that aggravating and mitigating factors be weighed. Counsel's only offered reason was that they did not want to appear to be a jack-in-the-box. This reason clearly is insufficient. Counsel were also ineffective for presenting evidence of the defendant's good character, because they knew that would open the door to cross-examination and knew that the witness would state that the defendant had told him that he would kill any witnesses. Counsel stated that they called the witness to impeach his testimony for the state by showing that he had been incarcerated previously. Counsel could have done that without presenting him as a character witness and presenting evidence that the defendant had previously been incarcerated. Finally, counsel was ineffective for arguing that all jurors had to agree when, under state law, a less than unanimous agreement for death would result in a life sentence. Making the legally incorrect argument was unreasonable. Prejudice was found based solely on the failure to present the mental health evidence which would have established that the defendant was not "the totally evil person," Slip Op. at *16, the jury found him to be, and would have undermined the state's argument that he was faking. It would have given the jury a reason to be lenient after weighing the aggs and the mits. As it was, the jury found two aggs (one of which was set aside on direct appeal) and no mits. Thus, the jury could not properly fulfill its sentencing function. [In addition to IAC, the Court also held that reversal of the convictions and sentence was required under *Ake v. Oklahoma*, 470 U.S. 68 (1985), due to the court's refusal to appoint a defense psychiatrist, and that reversal of the sentence was required due to the state's improper arguments.]

1994: **Ford v. Lockhart*, 861 F. Supp. 1447 (E.D. Ark. 1994), *aff'd on other grounds*, 67 F.3d 162 (8th Cir. 1995) (tried in June 1981). Trial counsel ineffective for failing to prepare and present mitigation evidence. Counsel admitted that he never investigated the defendant's background or talked to family members about his background. Investigation would have revealed that: defendant suffered severe physical and psychological abuse from father, including being hung from the rafters in a cotton sack or by his wrists all day long and being beaten periodically with extension cord; and defendant witnessed father beating mother and siblings. In addition, counsel failed to investigate and present evidence of intoxication at time of the offense despite the fact that hospital records after capture showed that he was "vomiting and drunk."

1989: **Eutzy v. Dugger*, 746 F. Supp. 1492 (N.D. Fla. 1989) (tried in 1983). Trial counsel ineffective for failing to prepare and present mitigation evidence. Counsel conducted virtually no investigation at all. He never asked the defendant himself about his family background, his marriages, his children, or his employment history, never asked the defendant about possible sources of mitigating evidence, never initiated contact with anyone to determine whether there were facts about the defendant which could be helpful at sentencing, and never sought copies of any of the defendant's school, medical or prison records. Even assuming that the defendant did not want his family involved, counsel's failure to investigate was not excused. Available mitigation would have shown: defendant was a

***Capital Case**

non-violent, caring person, with good character and an outstanding work history; a turbulent family history marked by poverty, chaotic home, alcoholic mother; defendant began drinking at age 12 and had a long history of alcoholism and amphetamine abuse; defendant had been hospitalized twice for psychiatric reasons; and prior prison records reflected adaptability.

***Mathis v. Zant**, 704 F. Supp. 1062 (N.D. Ga. 1989) (tried in May 1981). Trial counsel ineffective in sentencing phase for failing to investigate and present evidence in mitigation. Even though counsel had limited knowledge of the defendant's "troubled background," he "made inquiries that amounted to an investigation in name only." Specifically, he only interviewed one family member, consulted a three page psychiatric report based on a single visit with petitioner, neglected to contact petitioner's employer, and failed to obtain copies of any of petitioner's school or prison records. Investigation would have shown: impoverished childhood marked by emotional and physical abuse of alcoholic father; borderline mental retardation and low intellectual functioning; history of alcohol and drug abuse marked by blackouts; and evidence of good behavior in prison. In addition to the lack of mitigation evidence, counsel was ineffective for failing to ask for mercy, but rather essentially apologizing to the jury in sentencing argument for representing defendant.

1988: *Newlon v. Armontrout, 693 F. Supp. 799 (W.D. Mo. 1988), *aff'd on other grounds*, 885 F.2d 1328 (8th Cir. 1989) (tried in August 1979). Trial counsel ineffective for completely failing to prepare and present mitigation evidence. Counsel failed to even explain the importance of mitigation or discuss a sentencing defense strategy with the defendant. Investigation would have shown that defendant had a low IQ, a turbulent family history, a non-violent history, and a reputation as a follower. In addition, trial counsel was ineffective for failing to object to prosecutor's improper closing argument or rebutting in his own argument. Prosecutor improperly argued his personal belief that death was appropriate based on his position of authority; compared defendant to Charles Manson and Son of Sam; personalized decision by asking jurors to consider that it had been their own children killed; told jury (incorrectly) that the trial judge would review their decision; argued that life sentence was only temporary confinement because parole laws could be changed or sentence commuted; argued courage; and argued that all murders should be punished by death.

1987: *Gaines v. Thieret, 665 F. Supp. 1342 (N.D. Ill. 1987), *rev'd on other grounds*, 846 F.2d 402 (7th Cir. 1988) (tried in October 1979). Trial counsel ineffective in sentencing phase for failing to investigate and present evidence in mitigation. Counsel talked with the defendant, some family members, "a girlfriend," and an employer, but could not remember specifically asking about the existence of mitigating evidence. If counsel had adequately investigated, the evidence would have shown that defendant: was repeatedly and severely beaten by father, sometimes while naked and tied up; had a good work history during six months prior to murder; was kind to his live-in girlfriend and her son and helped to support them; had a good character; and was placed in an adult prison when he was 15 and spent time in isolation ward and psychiatric ward and witnesses would have testified

***Capital Case**

that this confinement had a seriously disturbing effect on defendant. In addition to failing to present evidence, counsel's entire closing argument was simply to ask for a life sentence without offering any reason why it should be given.

1980: **Voyles v. Watkins*, 489 F. Supp. 901 (N.D. Miss. 1980) (tried in June 1977). Counsel ineffective in trial and sentencing for failing to adequately investigate and present a defense and mitigation. The defendant was initially arrested with a codefendant and each of them implicated the other in the murder. Ultimately, after the defendant's trial, the codefendant was allowed to plead guilty to accessory. Although counsel learned shortly before trial that the codefendant would testify for the state, he made no inquiry "as to what arrangements, if any, had been made" with him and made no effort to obtain witnesses concerning the codefendant's bad reputation for veracity or the defendant's good character, despite being given the names of several possible witnesses by the defendant. Counsel made no effort to interview them because of counsel's belief that they had a poor reputation in the community when in fact "[t]hey had an established automobile business, were persons without criminal convictions and were regular churchgoers in a family having three ministers" and would have given "impressive, unimpeached testimony." Other witnesses were also available as character witnesses but never interviewed. During trial, counsel cross-examined the codefendant about his prior criminal convictions, but failed to produce the records when the codefendant denied the prior convictions. Counsel also failed to elicit the codefendant's testimony, which would have been given, that he expected to receive favorable consideration from the state if the defendant was convicted. Counsel also failed to elicit testimony about the codefendant's prior inconsistent statements or that he had initially been charged with the murder and defendant only as an accessory until he agreed to testify against the defendant. Counsel then failed to request that the court issue the standard jury instruction that uncorroborated testimony of an accomplice should be viewed by the jury with care and caution. Following conviction, counsel offered no evidence in mitigation. Counsel did not have the defendant to even testify because counsel believed he had not been a good witness in the trial and that the jury had reacted unfavorably to his testimony. "The wisdom of this course, in a death case, is debatable." In any event, a number of witnesses could have testified that the defendant had a stable employment record, was a hardworking, dependable person, and had a "mild and nonviolent disposition." He also had two children and "made personal sacrifices to aid destitute members of his family." All of the available witnesses could have been located with a single phone call to the two witnesses (who were brothers) initially named by the defendant.

4. Military Cases

1998: **United States v. Murphy*, 50 M.J. 4 (C.A.A.F.1998) (sentenced in December 1987). Court held that death sentence must be set aside based on the inexperience of trial counsel, a conflict of interest, failure to investigate and present evidence of social history, and failure to adequately explore mental health evidence. With respect to the experience of counsel, the Court noted that neither trial counsel

***Capital Case**

had ever been involved in a capital case or received any capital litigation training. The counsel responsible for voir dire and mitigation evidence had only been a defense counsel for four months. The Court noted “inexperience—even if not a flaw *per se* might well lead to inadequate representation.” With respect to the conflict, the Court noted that an inmate testified that he had overheard Murphy making incriminating statements while in pretrial confinement. The inmate told his attorney, who was also Murphy’s attorney, and the attorney negotiated a pretrial agreement for the inmate before moving to withdraw as the inmate’s counsel. The same judge who presided at Murphy’s trial presided over the inmate’s plea. Nonetheless, neither the judge nor counsel mentioned the conflict on the record and the inmate was not cross-examined. Counsel also made no attempt to impeach him even though he had recently been convicted of several crimes involving dishonesty and deceit. While the inmate’s testimony was mostly cumulative to other evidence, he added one important fact: the motive for killing his own son was to leave no witnesses. [Murphy had been convicted of killing his ex-wife, stepson, and his own son.] Because the court could not “say with confidence that [the inmate’s] testimony about why appellant killed his son had no impact on the members’ deliberations on sentence . . . we are compelled not to affirm appellant’s death sentence without resolving the conflict-of-interest question.” Slip Op. at 11. With respect to mitigation evidence, trial counsel’s investigation consisted only of correspondence and telephone calls from Germany to family and friends in North Carolina, which did not result in any mention of abuse or maltreatment. Defense offered evidence of good character, non-violence, good soldier, and remorse in mitigation. While the lower court characterized the sentencing case as a “tactical judgment,” this Court held that “counsels’ lack of training and experience contributed to questionable tactical judgments, leading us to the ultimate conclusion that there are no tactical decisions to second-guess.” Slip Op. at 13. The evidence that would have been discovered, according to post-trial evidence, was that Murphy has indications of neuropsychological dysfunction, post-traumatic features, and persistent and severe traumatic childhood abuse. He also may have fetal alcohol syndrome. One expert even declared that he was insane at the time of the offenses. Based on all of these factors, the Court held, “we are satisfied that appellant did not get a full and fair sentencing hearing. There are too many questions arising out of the conflict of interest issue, the potential mitigating effect of the posttrial [sic] evidence as to his mental status, and the lack of training and experience of his trial defense counsel in the defense of capital cases to allow us to affirm a death sentence here.” Slip Op. at 16-17. The Court was uncertain as to the impact of the post trial evidence on the convictions, however. Thus, the Court remanded the case to the Army Court to either decide the issue or to grant a complete new trial. At a minimum, however, the Court ordered that the Army Court either commute Murphy’s sentence to life or order a new trial on sentence.

1997: **United States v. Curtis*, 46 M.J. 129 (C.A.A.F. 1997) (sentenced in August 1987). On reconsideration court reversed itself and held without discussion (only citation to prior dissent) that counsel was ineffective in sentencing. Details found in prior dissent are that counsel was ineffective

***Capital Case**

for failing to adequately prepare and present evidence of extreme intoxication at the time of the offenses. Counsel was aware from witness statements, discovery, a court-ordered evaluation of how much the defendant drank, how he was behaving before the murders, the defendant's own statements, the statements of the arresting officer who noted hours after the murders that the defendant was extremely impaired, and the statements of the sanity board (government examination) which noted that the crimes probably would not have happened but for the alcohol intoxication at the time of the offenses. Nonetheless, counsel did not present this evidence in sentencing. While counsel reasonably explained that this evidence was not presented during findings because of concern that it enhanced premeditation, no explanation was offered for sentencing. This evidence "was consistent with the unsuccessful 'rage' defense" used during trial, "and thus did not require a change of tactics after findings. Once the court members rejected the 'rage' theory, there was no explanation offered to the members why a previously good Marine or a shy, introverted, young man from a good Christian home would commit these offenses." The answer appears to be the intoxication. *See United States v. Curtis*, 44 M.J. 106, 172 (C.A.A.F. 1996) (Gierke, J., Dissenting).

5. State Cases

2003: **State v. Coney*, 845 So. 2d 120 (Fla. 2003) (sentenced in March 1992). Counsel was ineffective in capital sentencing for failing to adequately prepare and present mitigation evidence. Coney was convicted of killing his jailhouse lover who had spurned him by dousing him with a flammable liquid and setting him on fire when the lover ended their homosexual relationship. In sentencing, counsel presented testimony in general terms concerning the defendant's childhood and upbringing but did not present any mental health evidence. Eleven months prior to trial counsel requested a psychological evaluation, but made no attempt to have the evaluation conducted until just prior to the sentencing hearing. Following the conviction the court-appointed examiner apparently did not evaluate the defendant because of a fee dispute. Counsel did obtain an examination several days prior to sentencing from both a psychiatrist and a neurologist, but neither of these experts was provided with any background information and their testimony and reports made it clear that they were not familiar with the meaning of statutory mitigating factors. The neurologist found no evidence of neurologic disease but did recommend neuropsychological testing, which trial counsel never obtained. Counsel's conduct was deficient, because if counsel had obtained qualified experts and provided them with sufficient background information in time to adequately evaluate the defendant, counsel could have presented testimony both from a neurologist and a neuropsychologist that the defendant suffered from frontal lobe dysfunction and deficits in his right brain functioning that resulted in impulsive behavior and revealed that the defendant was suffering from an extreme mental or emotional impairment at the time of the commission of the offenses. Prejudice was found because the jury recommended imposition of the death penalty only by a seven to five vote, and if only one of the seven jurors had changed his or her vote, the recommendation would have been for a life sentence. In view of the law requiring the presence of compelling evidence to override a jury's

***Capital Case**

recommendation of life, the court would likely have followed a recommendation for a life sentence. The court also found prejudice because, even though the state vigorously challenged the mental health evidence and presented contrary evidence, the court found “it is peculiarly within the province of the jury to sift through evidence, assess the credibility of the witnesses, and determine which evidence is the most persuasive.” *Id.* at 132.

***Head v. Thomason**, 578 S.E.2d 426 (Ga. 2003) (tried in October 1996). Counsel ineffective in capital case for failing to call mental health experts he knew could provide mitigating evidence in sentencing. The defendant “is a burglar who shot and killed the homeowner who came upon him while he was burglarizing the victim’s home.” Following a bench trial, the defense presented mitigation evidence that showed only the defendant’s profession of remorse, his lack of violent tendencies, that he is easily influenced, and that he had previously been hospitalized for marijuana use. Counsel was aware of mental health experts who could have testified but did not present their testimony. One of the experts, a clinical psychologist, had testified at the competence hearing that the defendant had an IQ of 77. The expert, a psychiatrist, had interviewed the defendant during a forensic evaluation and informed counsel that there were indications of intellectual impairment, low self esteem, and depression. Counsel possessed the defendant’s prior school, medical, and institutional records, but never gave the records to the psychiatrist or presented this evidence in mitigation because counsel testified they did not know how to do it without an expert. Counsel did not have the expert to execute an affidavit stating the need for additional funding, but instead simply requested an additional \$25,000 for mental health expert assistance. When the trial court rejected the additional funding trial counsel never contacted the expert again even though the expert testified that he would have worked with counsel without further funding or for an amount significantly less than \$25,000. “We conclude, given the importance of mitigating evidence in death penalty cases, that an attorney has not acted reasonably when he fails to call mental health experts he knows have mitigating evidence and explains his failure to present lay mitigating evidence by asserting that he had no experts to call.”

2002: *State v. Lewis, 838 So. 2d 1102 (Fla. 2002) (sentenced in August 1988). Counsel was ineffective in capital sentencing for failing to adequately prepare for presentation of mitigation evidence in sentencing, which resulted in the defendant’s waiver of his right to present mitigation evidence being not a knowing, voluntary, and intelligent waiver. Trial counsel spent a significant amount of time preparing for the guilt or innocence phase of trial, but did not make any attempt to prepare for sentencing until after the conviction. Counsel then attempted to talk with the defendant’s mother but “this attempt was hampered because of [the] delay in starting the investigation.” The mother was angry that her son had been convicted and blamed the trial attorney. The only other witness interviewed by counsel was the defendant’s father, who was also a convicted felon. Counsel never attempted to interview any other potential mitigating witness or obtain any background records, including the defendant’s hospitalization records, school records, and foster care information.

***Capital Case**

Counsel did request a mental health expert but did so only two weeks after the defendant had already been convicted. The expert interviewed the defendant but told counsel that he needed documented corroboration before he could render a professional opinion or conclusion. The expert discussed possible theories with defense counsel but did not receive any additional information prior to sentencing. On the day sentencing began, the expert was the only witness willing and able to testify for the defense and the defendant stated that he did not want the expert to testify and waived mitigation. If counsel had adequately investigated the evidence would have revealed that the defendant's mother was an alcohol, he was exposed to violence and severe neglect as a child, he suffered a skull fracture at the age of 2 or 3 that required 2 weeks of hospitalization, and he observed his fathers violence and domestic abuse on a daily basis. After his parents separated, the parents tried to kidnap the children from each other. The defendant was turned over to foster care and shuffled back and forth between numerous homes. He had diminished mental capacity and brain damage. He had a recorded history of serious alcohol and drug abuse and he had consumed a considerable amount of alcohol on the night of the crimes. The trial expert testified that, if he had been provided with the background records and documentation, he would have been able to render a complete diagnoses and testify to substantial mitigation. The court held, "Although a defendant may waive mitigation, he can not do so blindly; counsel must first investigate all avenues and advise the defendant so that the defendant reasonably understands what is being waived and its ramifications and hence is able to make an informed, intelligent decision." Counsel's conduct was both deficient and prejudicial in failing to adequately investigate and prepare for the penalty phase.

**Valdez v. State*, 46 P.3d 703 (Okla. Crim. App. 2002) (arrest in 1989). In a successor post-conviction action after the denial of clemency, the court held that counsel was ineffective in failing to adequately prepare and present mitigation for Mexican National client. Counsel's conduct was deficient because counsel did not seek funding to conduct the investigation "trial counsel's inexperience in capital litigation caused him to believe such funds were unavailable." Likewise, if counsel had sought assistance from the Mexican Consulate, "the Government of Mexico would have intervened in the case, assisted with Petitioner's defense, and provided resources to ensure that he received a fair trial and sentencing hearing." Investigation of the defendant's background and medical history revealed severe organic brain damage, extreme poverty, limited education, and "a family plagued by alcohol abuse and instability."

In hindsight, and so many years following Petitioner's conviction and direct appeal, it is difficult to assess the effect consular assistance, a thorough background investigation and adequate legal representation would have had. However, this Court cannot have confidence in the jury's sentencing determination and affirm its assessment of a death sentence where the jury was not presented with very significant and important evidence bearing upon Petitioner's mental status and psyche at the time of the crime.

***Capital Case**

***Commonwealth v. Ford**, 809 A.2d 325 (Pa. 2002) (sentenced in March 1992). Counsel ineffective in capital case for failing to adequately investigate and present mitigation evidence in sentencing. Appellate counsel was also ineffective for failing to assert trial counsel's ineffectiveness. In sentencing, trial counsel presented the defendant's sister to testify but not prepare her testimony, which amounted to only a plea of mercy. Counsel also presented evidence of the defendant's low IQ and that his educational achievement was at the 2d or 3d grade level. The jury found two aggravating circumstances and no mitigating circumstances. Trial counsel was aware of a competency evaluation that revealed that the defendant had a troubled childhood and learning problems. Counsel did not investigate to obtain prior hospitalizations, mental health records, or school records. He also did not obtain additional information from the defendant's family or have a mental health professional evaluate the defendant with respect to mitigation. Counsel's conduct was deficient because there was no reasonable basis for failing to investigate and present this mitigating evidence. Although counsel did state that he did not present psychiatric records because the prosecution informed him that they contained reports that the defendant was "explosive," this decision was based on very little information and without actually reviewing the supporting documents. If counsel had adequately investigated, the evidence would have revealed schizophrenia, brain impairments including mental retardation, learning disabilities, and post traumatic stress. The defendant showed signs of dementia early in life and had a long history of psychiatric treatment for impaired reality, including hearing voices, and alcohol dependence. The defendant also had an extensive history of abuse and family dysfunction. The available evidence would have supported three statutory mitigating circumstances. The Commonwealth presented rebuttal evidence in post-conviction showing that the defendant had previously been convicted of sexual assault of a 12 year old boy, had been a gang member in his youth, and had threatened to kill his grandparents. The Commonwealth also presented psychiatric evidence of antisocial personality disorder and a clinical psychologist that would have testified that the defendant does not suffer from organic brain damage or learning disabilities. The court still found prejudice because the jury was given no meaningful evidence of mitigation to consider in their weighing process. Moreover, even without any mitigation evidence, the jury was still deadlocked at one point during the penalty phase deliberations.

2001: *Ragsdale v. State, 798 So. 2d 713 (Fla. 2001) (tried in May 1988). Counsel ineffective in failing to prepare and present mitigation evidence in sentencing. Counsel was a sole practitioner with only his wife assisting. Counsel did not conduct any investigation and relied only on a few calls made by his wife to Ragsdale's family members. Counsel did not even know who his wife contacted or the content of the conversations. Counsel only called one witness to testify that Ragsdale suffered several head injuries as a child without any explanation of how or whether this affected him. If counsel had investigated, the evidence would have established that defendant grew up in an impoverished home with numerous moves and had an abusive father. He observed violence towards his mother, was made to fight with his siblings until they bled, and was sometimes handcuffed to a pole for hours at a time. In addition, Ragsdale's father had shot at him twice with a pistol. It was

***Capital Case**

so bad that Ragsdale began to run away to an aunt's by age eight and quit school and moved out permanently at age 15-16 to live with a cousin. He had extensive alcohol and drug abuse. He also had numerous head injuries, including having an eye shot out accidentally with an arrow, being thrown through a car windshield in an accident, and being hit with a metal pipe. Following these incidents, he would have severe headaches and behavioral changes, including violent snaps. A defense expert found that Ragsdale was psychotic at the time of the offense, and thus the statutory mitigating circumstances of extreme mental or emotional disturbance and inability to conform to the requirements of law applied in the instant case. This doctor also identified a list of nonstatutory mitigating factors including organic brain damage, physical and emotional child abuse, history of alcohol and drug abuse, marginal intelligence, depression, and a developmental learning disability. Prejudice was established because even the state's expert, who disagreed with the conclusion that Ragsdale was psychotic and suffered organic brain damage, expressed no opinion on the statutory mitigators. He did, however, testify to the existence of mitigating evidence which was not presented at the penalty phase, including a severe learning disability and that Ragsdale's IQ score was in the borderline retarded range. He also concluded that Ragsdale's brain was impaired and that Ragsdale had a personality disorder with paranoid features. The court, thus, found it be "inescapable" that there was available evidence from experts which would have supported substantial mitigation had counsel performed adequately. *Id.* at *5.

2000: **Sanford v. State*, 25 S.W.3d 414 (Ark. 2000) (sentenced in 1996). Counsel ineffective in capital sentencing for failing to investigate and present mitigation evidence concerning defendant's school records showing long-standing mental retardation, age, medical records, family history, and jail records, reflecting commendations he had received. Counsel conceded that he did little to prepare for sentencing, even though he had a social worker available to him, because he was "disappointed" with guilty verdicts and "tired." Counsel called only the 16-year-old defendant's parents, who testified generally that defendant was young, had been a good son, had a mental problem, and his life was worth saving. Counsel did not recall the defense expert from the trial, but did argue additionally based on that expert's testimony that defendant was mentally retarded, which was disputed by state based on one IQ score of 75. If counsel had investigated he would have discovered that the school records showed defendant had been in special education, had been considered mildly mentally retarded during much of his time in school, and had a good record with only one disciplinary incident. His medical history reflects he almost suffocated to death as a child when a load of cotton seed fell on him; and defendant's mother testified he acted a "bit slower" after the cotton-seed incident. Later he suffered a blow to the head with a two-by-four wielded by his sister. Proof also available, but not investigated or presented, showed siblings and other family members to be either slow or retarded. Although the court did not specifically discuss prejudice, the court noted that the jury found three aggravating factors and no mitigating factors and state law prohibited the death penalty if the jury concluded the defendant was mentally retarded at the time of the crimes.

***Capital Case**

***State v. Riechmann**, 777 So. 2d 342 (Fla. 2000) (sentenced in August 1988). Counsel ineffective in capital sentencing for failing to prepare and present mitigation. Defendant and his girlfriend had moved to Florida from Germany. Girlfriend was killed. State's theory was that she had been a prostitute for the defendant and, once she stopped prostituting, he killed her for insurance proceeds. The defense did not investigate or contact any witnesses in Germany and presented no mitigation evidence at all. Available yet unrepresented mitigation revealed that defendant had positive personal qualities and good character and at least 15 witnesses were available to testify for him. No real discussion of prejudice. [Court also found error because the prosecutor prepared the trial court's sentencing order after an ex parte discussion and the defense was not provided with the draft order, which found no mitigation.]

***People v. Thompkins**, 732 N.E.2d 553 (Ill. 2000) (tried in June 1982). Counsel ineffective in capital sentencing for failing to prepare and present mitigation evidence. Counsel never met with defendant's brothers, children, aunt, supervisors, coworkers, friends, or writers of letters on defendant's behalf, nor did he seek records as to defendant's education, employment, military service or prison incarceration. If counsel had prepared, evidence could have been presented to show that, in witnesses' opinions, defendant was a good son, husband, father, friend, and worker, that he may have helped save the life of a youth officer who later became a police chief, and that he was kind to, and protective of, women. Counsel presented only four stipulations concerning the possible origin of bullets used in the murders. Counsel also presented brief testimony from defendant's wife concerning his history. Following the court's sua sponte order for a presentence report, counsel presented more than 50 letters in defendant's behalf, including some of the information listed above. Many of the letter writers acknowledged that they hardly knew the defendant though. The court acknowledged reading the letters but found no mitigation. "[B]ecause counsel failed to conduct an investigation and uncover what the possible mitigation witnesses would have to say, he was in no position to make a reasoned decision whether their testimony would have any impact on the judge. . . . In conclusion, counsel's rationale for failing to investigate mitigating evidence stemmed not from a reasonable strategy, but from an objectively unreasonable failure to investigate. As such, counsel's performance was constitutionally deficient." *Id.* at 571 (citations omitted). Counsel's conduct was not excused by uncooperativeness of defendant. "The mere fact that a client is uncooperative will not excuse a failure to investigate in a capital case." *Id.* at 572. Counsel's conduct also was not excused by fear of the aggravating evidence that could be introduced in response. This was the finding of the lower court, but there was no evidence to support the finding. Counsel simply failed to investigate and did not know of the available evidence. *Id.* at 573.

1999: *People v. Morgan, 719 N.E.2d 681 (Ill. 1999) (sentenced in June 1983). Counsel ineffective for failing to prepare and present mitigation evidence. Defendant convicted of several murders and rape by jury and then proceeded to sentence before the judge alone. In opening statement, defense counsel argued statute unconstitutional and made a religious appeal. He told the judge he would hear

***Capital Case**

from the defendant and his family and would here evidence of medical problems. State presented numerous violent convictions and incidents in defendant's past in aggravation. In 10 pages of mitigation, the defense presented the defendant's girlfriend and mother to say they loved him. Mother also testified that the defendant has had seizures since age 8 due to a spot on brain caused by trauma and that he sometimes blanks out. Counsel also cited 1978 presentence report that revealed seizures. In closing prosecutor pointed out that there was no medical testimony as promised and no showing of how the seizures were relevant as mitigation evidence. Defense closing was basically just an irrelevant and nonsensical religious appeal citing "love" as mitigation. In sentencing, the judge found no "rhyme" or "reason" for the "senseless" crimes and found no mitigation. Although the judge expressed distaste for the death penalty, because the statute required a death sentence if no mitigating evidence found, he sentenced the defendant to death. Post-conviction evidence revealed that counsel had been retained the day of arrest and told shortly thereafter by mother of seizure history. Counsel did not talk to other family members or witnesses. If he had investigated, he would have discovered lay witnesses who would testify that the defendant suffered from an illness at age 20 months that likely caused the seizures. He has suffered severe seizures since that time. He was frequently hospitalized as a child. He has fainting and black-outs and engages in violent behavior for no apparent reason. He also has features of paranoia and drug and alcohol problems. Eyewitnesses, including even the rape victim, would have established that he was paranoid and using drugs and alcohol at the time of these offenses. Experts, including neurologist, Dr. Pincus, would have testified that the defendant has severe frontal lobe damage and other diffuse damage. The combination of the brain damage, drugs and alcohol, and paranoia rendered the defendant under extreme mental or emotional disturbance for these offenses and explains prior violent episodes because defendant can not control violence. In addition to this evidence, the evidence would have also established that the defendant was physically abused by his mother during his childhood. Deficient conduct found because defense counsel's recollections that he knew nothing of seizure history and defendant appeared normal to him were not credible. Counsel was clearly, as is apparent from sentencing hearing, that the defendant had a history of seizures. Moreover, even if the defendant appeared normal and neither he or his family mentioned history, counsel's conduct was still deficient for failing to investigate. "We have repeatedly held that the duty to make a reasonable investigation concerning potential mitigation evidence is imposed on counsel and not upon a defendant. Moreover, we have also held that defense counsel's duty to investigate is not limited to matters about which defendant [or his family] has informed defense counsel." *23 (citations omitted). Prejudice found because the available evidence would have mitigated the aggravation evidence of prior violent episodes and would have provided the "rhyme" and "reason" for these offenses found lacking by the sentencing judge.

***Rondon v. State**, 711 N.E.2d 506 (Ind. 1999) (tried in 1985). Counsel ineffective in sentencing phase for failing to prepare and present mitigating evidence. Counsel focused primarily on guilt phase and did not prepare at all for sentencing until the night before the penalty phase of trial, except

***Capital Case**

interviewing a minister. At that point, they arbitrarily agreed to limit their investigation of background to the two years the defendant had lived in the county. They did not even ask the defendant to summarize his experiences prior to 1982. Counsel presented only three witnesses in sentencing who testified about good work habits and friendliness, but counsel waived opening statement and in closing did not even argue that this evidence should be considered as mitigating evidence. A simple interview of client would have revealed, as a competence evaluation following the jury's recommendation of sentence did, that the defendant had a second grade education, had been treated for psychiatric problems in Cuba where he was born and raised, had been given shock treatment for psychiatric problems, and possibly had brain damage from being hit in the head with a machete.

**Washington v. State*, 989 P.2d 960 (Okla. Crim. App. 1999) (trial in 1996). Counsel ineffective in capital sentencing because "counsel did little to contest the State's case in second stage." Counsel made no opening statement. Counsel then acquiesced in the admission of the state's only evidence in sentencing: two letters that were termed "impact" or "victim impact" evidence. Under state law, "victim impact evidence should be restricted to the financial, emotional, psychological, and physical effect of the crime itself on survivors and include [only] a few personal characteristics of the victim." Here, one of the letters was written by the victim to her parents prior to the murder and, thus, "does not constitute impact evidence . . . and does not address how [her] murder affected her family." While the letter arguably contained some information about the victim's personal characteristics, "the letter is hearsay for which no exception applies and its admission was error." Likewise, the other letter was a letter written by the victim's father to the prosecutor that "exceeded the bounds of permissible victim impact evidence given the overamplified request for the death penalty and the biblical references," including "eye for eye."

We have condemned prosecutors who attempt to make the capital sentencing decision somehow easier by implying God is on the side of a death sentence as an intolerable self-serving perversion of Christian faith as well as the criminal law of Oklahoma. We can neither permit such references in victim impact evidence because victim impact evidence is limited to the financial, emotional, psychological, and physical effect of the crime itself on survivors. . . .

Following the state's uncontested victim impact evidence, counsel presented no evidence "either to rebut the alleged aggravating circumstances or to mitigate punishment" and relied only on the defendant's trial testimony to argue that death for the murder of his ex-wife was not warranted because the defendant "served in the military, . . . did not have a history of criminal acts, . . . did not resist the police and he was under emotional stress at the time of the shooting." Counsel made a "disjointed and rambling closing argument" in which counsel conceded the murder in this case was (as are all murders) heinous, atrocious, or cruel and failed to challenge the state's case even though

***Capital Case**

the physical evidence did not support the state's "uncontested theory" that the defendant shot the victim "in non-vital areas as she crawled away from him over four minutes before delivering the fatal shot." Finally, counsel "failed to object to the prosecutor's second stage closing argument in which the prosecutor exceeded the bounds of proper argument by invoking societal alarm and improperly arguing the jury had a duty to impose death based on the prosecutor's personal sense of justice." Counsel failed to object even though the argument "contain[ed] remarks strikingly similar to those condemned" by the court in a case decided years before this trial. Cumulative prejudice found based on "the combination of this improper argument, the admission of improper victim impact evidence and the deficient performance of trial counsel." Sentence modified to life without parole.

1998: **In re Gay*, 968 P.2d 476 (Cal. 1998) (tried in June 1983). Counsel ineffective in sentencing phase and the cumulative prejudicial effect of counsels' errors required that death sentence be vacated. Defendant was charged with killing a police officer and numerous armed robberies. The defense counsel tricked the defendant into retaining him with the help of a psychologist/minister and then got himself appointed. Counsel then advised the defendant to confess to the numerous armed robbery charges, based on an alleged deal that the defense did not have, even though the state's evidence was based only on weak circumstantial evidence and accomplice testimony. The confession allowed the state to convict and to portray the defendant as a serial robber, which was devastating in light of the absence of substantial mitigating evidence in sentencing. Counsel then selected and used the psychologist and a psychiatrist based on a fee arrangement. The psychologist would help trick people to get the attorney retained and in turn the attorney would retain these "experts" who worked together. The psychiatrist was unwilling to take the case if extensive work was required, but counsel assured him that death was a foregone conclusion and extensive time was not required. The psychologist, who was not licensed, did only a Bender Gestalt (neuropsychological screening test) and a WISC test, which is a children's intelligence test. The psychiatrist interviewed the defendant and reviewed a single parole report. He did not request and was not provided with any additional information. He testified only that the defendant is sociopathic, but adapts well to structured environments. A few other defense witnesses that counsel spoke to briefly, if at all, prior to their testimony, testified that the defendant has good character. Counsel did virtually no investigation for mitigation and relied only on interviews of the defendant. If counsel had adequately investigated, the evidence would have revealed that the defendant was raised in a deprived, physically and emotionally abusive, and chaotic home. His alcoholic father suffered from substantial mental impairments and subjected defendant to extreme physical abuse. His mother was emotionally neglectful and abusive. The defendant suffered from PTSD and was dissociating at the time of the offense. He had organic impairments, including areas of the temporal and parietal lobes, and had temporal lobe seizures. He had attention deficits, learning disabilities, a mood disorder, characterized by periods of depression and manic activity, and substance abuse disorder, as well, and was using drugs prior to the offenses. His impairments made him susceptible to the aggressive influence of his codefendant. In addition to being mitigating, much of this evidence would have

***Capital Case**

lessened the impact of the state's aggravating evidence by explaining it from a mental health standpoint. Counsel's failure to investigate was not excused by reliance on the defendant or by his preoccupation with the guilt-or-innocence phase. His failure to investigate apparently resulted from his uninformed belief that if the defendant was found guilty, the death penalty was inevitable. In addition to all of these problems, during his representation of the defendant, counsel was being investigated by the same prosecutor for misappropriation of funds, which presented a potential conflict of interest that was undisclosed. Reversed based on cumulative prejudice.

***Turpin v. Lipham**, 510 S.E.2d 32 (Ga. 1998) (sentenced in February 1987). Counsel ineffective in sentencing for failing to adequately prepare and present mitigation evidence. During sentencing for rape, murder, burglary, and robbery counsel presented 2500 pages of records from the Department of Family and Children Services and the Anneewakee Treatment Center (a home for children with behavioral problems), but did not present any testimony concerning these records other than the brief testimony of the records custodians. The only other mitigation evidence offered was the defendant's wife asking for mercy because of their son. Trial counsel obtained the records but did not have a mental health expert to examine them. Instead, trial counsel asked a friend, who was a family counselor to review the records. The friend reported that the records were both aggravating and mitigating. While they established childhood abuse and neglect, they also chronicled violent, antisocial behavior from an early age and that he was not insane or incompetent. One expert also examined the defendant and found that he was not insane or incompetent. Based on these findings and the two-edged nature of the records, trial counsel decided not to hire a mental health expert. The Court stated, "While trial counsel is afforded tremendous deference over matters of trial strategy, the strategy that is selected must be supported by adequate investigation." *Id.* at _____. Trial counsel were deficient in relying only on the family counselor's review of the records, because he had no medical or doctorate degree and is not even licensed as a counselor. In addition, the counselor only reviewed the records in his spare time as a favor to a friend, without any anticipation that he might be called to testify, and he did not even see all the records. The records he did see were not reviewed in depth. In addition, the counselor testified that he was only told to look at the records for competence and sanity, not for mitigation evidence. Trial counsels' failure to read these records or hire a mental health expert to examine the records was not reasonable under the circumstances, because trial counsel knew the defendant had been institutionalized in mental hospitals, children's homes, and treatment centers for nine years. The records revealed that he had been subjected to, or diagnosed with, chronic poverty, physical abuse, alcoholic parents, severe neglect, isolation from his family, severe behavioral problems, conduct disorders, anxiety disorders, a possible learning disability, inadequate socialization, and head injuries. Even though counsel made the records the center piece of the mitigation case, they did not hire an expert to review the records and did not contact any of doctors or psychologists identified in the records. If counsel had even had an expert to review the records, they would have been told that the disparity between verbal and performance IQ scores and the results of the Minnesota Multiphasic Personality Inventory suggested organic brain damage and

***Capital Case**

post-traumatic stress disorder. The Court stated that no reasonable lawyer would have given the jury 2500 pages of raw institutional documents and asked them, without any guidance, to read through them for mitigation evidence. In addition to the sheer volume, the records were at times illegible handwriting, difficult to understand because there was wording and abbreviations used by the institutions that were meaningless to outsiders, jurors would not understand medical and psychological terms in the records, and jurors could not understand raw test data and diagnoses “without the proper interpretive expertise.” Slip Op. at *9. The Court observed, “It is usually true that evidence of a defendant’s troubled childhood will present him in a more sympathetic light to a jury.” Slip Op. at *9. Nonetheless, “the average juror is not able, without expert assistance, to understand the effect [the defendant’s] troubled youth, emotional instability and mental problems might have had on his culpability for the murder.” Slip Op. at *9. Trial counsels’ deficient conduct was not excused by the strategy to avoid the two-edged nature of the records, because counsel presented the records in evidence. Thus, the jury could have easily discovered the aggravating aspect of the records. The Court also found prejudice because, even though the crimes were “horrific,” presentation of the evidence of the defendant’s mental disorders and the abuse, neglect and isolation he experienced as a child may have resulted in a sentence less than death.

***Turpin v. Christenson**, 497 S.E.2d 216 (Ga. 1998) (sentenced in March 1990). Counsel ineffective in sentencing due to a number of errors in the trial and sentencing and due to counsel’s failure to adequately prepare and present mitigation. Counsel knew from the beginning that “there would likely be a conviction and that the crucial phase of the trial would be the penalty phase,” but assigned primary responsibility for the penalty phase to the least experienced counsel who had “no experience trying a murder case, let alone a death penalty case.” Counsel did virtually nothing to prepare “until the eve of trial.” During the opening statement of the trial, counsel asserted that the defense would show that the victim, had been a drug-dealing homosexual who had initiated the events which led to his death by attempting to trade sex for drugs.” There was no evidence to support this theory, including no evidence of drug involvement or any credible evidence that the victim was even a homosexual and there was no mention of this “theory” even in the defendant’s confessions. Nonetheless, counsel “persisted with this theme on closing argument.” No prejudice during trial due to the overwhelming evidence, including the confessions, but these actions added to the prejudice in sentencing “[b]ecause the evidence introduced in the guilt/innocence phase carries over into the penalty phase.” Counsel was also deficient in preparing and presenting mitigation. Counsel knew from the beginning that the defendant “seemed aloof and detached” and often uncommunicative without his father’s intervention. They were also aware that he had been treated in an in-patient psychiatric facility three years before when he was 15 years old. These files revealed diagnoses of “dysthymic disorder, alcohol abuse, conduct disorder, and under-socialized, non-aggressive, narcissistic personality disorder with features of sociopathy.” The files also contained information of: a “genetic disposition toward alcohol abuse” in the family; the defendant’s alcohol abuse history, including blackouts; and problems with reality perception. While lengthy treatment was

***Capital Case**

recommended, treatment ended after six weeks because the defendant's parents "reached the limits of their insurance coverage." Counsel asked for a psychiatric evaluation but, because they "believed that this evidence would be more relevant to guilt/innocence issues, such as competency to stand trial or a verdict of guilty but mentally ill," the counsel dealing with the guilt/innocence phase primarily handled this aspect. The court-appointed examiner found the defendant competent and sane but diagnosed "a Personality Disorder Not Otherwise Specified and Psychoactive Substance Abuse Not Otherwise Specified" and also "noted a dramatic 20-point decline in . . . IQ" in the three years since his hospitalization, which she attributed to drug usage. Despite all of this information, "counsel did no further investigation of his mental health" and did not even ask the court-appointed examiner about "her opinion on mitigation issues or consider using her report." Counsel did seek funding for a private psychiatrist and file a second motion for psychiatric evaluation but "they did not argue specific findings" from the available information "other than the decline in IQ." These motions were denied and counsel "did not seek any other means of obtaining expert assistance," such as seeking "the advice or resources of any criminal defense or capital defense organizations in Georgia, although they admitted at the habeas hearing that they were aware of these organizations. They did not contact any mental health professionals for reduced fee or pro bono support, or for referrals. They completely abandoned the mental health issue and did not use it at trial." If counsel had pursued the issue, the evidence would have revealed "an anxiety disorder characterized by a 'pervasive sense of nervousness or anxiety [even] in a normal, non-threatening environment,' . . . an obsessive-compulsive disorder and an impulse-control disorder." A "licensed clinical social worker" could have testified in detail about the extensive family history of "alcoholism and mental illness." Counsel were not aware of much of this information because they had not even thoroughly reviewed the prior psychiatric records and relied on the defendant's father, who the prior records revealed was "estranged from his son" for years. Counsel's conduct was not excused by strategy or their belief that "drug usage and 'narcissistic' personality would not go over well in . . . [the] County," because "before selecting a strategy, counsel must conduct a reasonable investigation into the defendant's background for mitigation evidence to use at sentencing." Here "counsel possessed a wealth of information regarding . . . psychiatric problems and drug abuse, which they essentially ignored." They failed almost completely to investigate or to even understand this information. "They did not understand the mental health material that they did review and took no steps to further their understanding."

Although trial counsel acknowledged they believed that the penalty phase would be the crucial phase of the trial, they failed to investigate adequately . . . possible defenses to a death sentence. The decision to forego a line of defense, without a substantial investigation, must be reasonable under the circumstances. Trial counsel's abandonment of the mental health mitigation issues, after only a cursory investigation of their client's psychological health, was not reasonable under the circumstances.

***Capital Case**

A more complete investigation would have only entailed a more careful reading of the materials already in their possession and a few phone calls.

The decision not to investigate further . . . was also not strategic. Trial counsel ceased any investigation of . . . mental health after the trial court denied their second request for a psychiatric examination. It is apparent from the record that this failure to proceed may have stemmed in part from the division of labor.

Id. at ____ (citations omitted). In essence, the attorney investigating mental health stopped after learning that competency and sanity were not issues and the other attorney responsible for sentencing and mitigation “failed to pick up where . . . [he] left off.” During sentencing, the state presented only one witness in aggravation in the form of a detective who testified that the defendant told him that he had previously planned to kill another man in a car theft like the one involved in this case. Counsel was aware that the detective had not included this information in his report and only “remembered” this a year later when he issued a supplemental report. In mitigation, the defense “presented 19 witnesses and 27 exhibits” focused on establishing the defendant’s “happy and normal childhood.” The witnesses testified, most very briefly, that he was a good child until his grandmother died when he was 14 and then he “became withdrawn, his grades dropped and he began to get into trouble due to drugs.” Even the school records admitted in evidence by the defense contradicted the mitigation theory because the records “clearly showed that [the defendant’s] grades began to plunge two years before the death of his grandmother.” Because counsel had failed to prepare the witnesses, the state was able to impeach each witness because most were not aware of the defendant’s “extensive juvenile and criminal record” and some had had no contact with him since “he was an adolescent.” Counsel was also unaware of the extent of the juvenile record because, even though they were aware that he had been in trouble with the law, counsel “did not seek to obtain a copy of his juvenile record under the mistaken belief that specific juvenile offenses could not be referred to on cross-examination (trial counsel did no research on this point).”

[T]rial counsel's mitigation defense, to ‘humanize; their client, was inadequately presented and appears to have been cobbled together at the last minute. Trial counsel did not contact some mitigation witnesses until the trial had already begun. Witnesses were put on the stand who had only limited contact with [the defendant] in the several years before the crime. Witnesses were unprepared for the State's cross-examination about . . . prior offenses and had to admit that they did not know the extent of his criminal record. Witnesses, after having testified (at trial counsel's urging) about how [the defendant] was a good but troubled kid with a supportive family, were forced on cross-examination to validate the State's theme that [he] had deliberately squandered his opportunities in order to become a criminal. In addition, a key defense exhibit contradicted the testimony of the family witnesses about when

***Capital Case**

and why [he] began to have trouble as an adolescent. [Counsel] could draw no support in his closing argument from the mitigation evidence that trial counsel had presented; he admitted that the defense had *no* explanation for why [the defendant] had committed the crimes or why he should be spared, other than to show his family mercy.

Not surprisingly, the prosecutor “hammered home” that the defendant had squandered his opportunities and chose to become a criminal. Without objection, the prosecutor also argued, contrary to the autopsy report and the medical examiner, who could not determine the order of the shots, that it was the last of five shots that was fatal. The prosecutor also argued lack of remorse based in part on the defendant’s “fish-eyed” demeanor during trial, which could have been but was not rebutted with the information from the prior psychiatric records that the defendant’s “unresponsive demeanor” was caused by “his mental disorders” and the fact that “he would simply withdraw in stressful situations.” Finally, the prosecutor “reminded the jury that . . . [the] main trial defense had been a vicious, wholly unsupported attack on the dead victim’s character.” Prejudice was established. The trial argument “that the victim was a drug-dealing homosexual, without any evidence to support this assertion, could only have prejudiced the jury against their client.” In addition, counsel failed to challenge the allegation that the defendant had planned to kill someone else and “permitted [the state] to argue, without objection, that [the defendant] had inflicted four non-lethal wounds before deciding to fire the fatal shot. Lastly, in the closing argument, trial counsel specifically declined to ask for mercy for their client and implied that their client did not deserve mercy.” In addition:

The psychiatric evidence, if properly investigated and presented, could have totally changed the evidentiary picture. Psychiatric evidence may have provided the jury with an explanation for [the defendant’s] actions; trial counsel admitted to the jury that the mitigation evidence which they had presented provided no explanation for the crime.

Finally, prejudice was clear because there was only one aggravating circumstance (armed robbery), “no torture and the shooting was not execution-style,” and “the evidence at trial showed that [the defendant] had not planned to kill the victim during the robbery but had shot the victim during a struggle over the gun.”

***State v. Johnson**, 968 S.W.2d 686 (Mo. 1998) (en banc) (tried in May 1995). Counsel ineffective for failing to present the testimony of a forensic psychiatrist that the defendant suffered from “cocaine intoxication delirium” at the time of the offenses. Counsel never spoke directly to psychiatrist (paralegal spoke to him) prior to trial because of work on another capital case. A motion for continuance was denied a week before trial and counsel never renewed until just before penalty

***Capital Case**

phase arguments. Counsel scheduled a few conference calls with psychiatrist during the trial, but missed for a variety of reasons. Finally, counsel had paralegal to call psychiatrist to drive the 120 miles to testify and the psychiatrist responded that he would not come until he spoke personally to the attorney. Without requesting a continuance, the attorney presented mitigation and rested. The jury heard testimony concerning the defendant's background and expert testimony from a pharmacist about the long term effects of cocaine abuse, but the expert was prohibited from testifying concerning mental state at the time of the offense because he had not examined the defendant and was not a forensic expert. Trial counsel testified that there was no strategic reason for not calling the forensic psychiatrist and that the defense strategy was based on the psychiatrist as a cornerstone. Counsel repeatedly requested instruction on the mitigating circumstance concerning diminished capacity to appreciate criminality of to conform conduct to law but was denied because there was no evidence to support the mitigator. In evaluating prejudice, the court declared: "The evaluation of the aggravating and the mitigating evidence offered during the penalty phase is more complicated than a determination of which side proves the most statutory factors beyond a reasonable doubt," because the jury still has the discretion to sentence to life. 968 S.W.2d at 700. "In analyzing the existence of this reasonable probability [under *Strickland*], we must consider the weight of evidence supporting each statutory aggravating and mitigating factor on which the jurors would have been instructed had they been presented with . . . [the questioned] testimony. We must also consider the impact of . . . [the questioned] testimony in the context of all the evidence presented." *Id.* Prejudice found in this case regardless of whether the judge would have instructed on the additional statutory mitigator or not because the jury still could have considered the psychiatrist's testimony in mitigation.

***Brimmer v. State**, 29 S.W.3d 497 (Tenn. Crim. App. 1998) (sentenced in March 1991). Counsel ineffective in failing to adequately prepare and present mental health evidence in sentencing.

Here, defense counsel did present all of the then available mitigating evidence during the sentencing phase. The concern is not that defense counsel failed to present the available mitigating evidence. It is that he presented expert testimony in such a deficient manner that it justified the trial court's refusal to instruct on the two available mitigating circumstances. Defense counsel did not establish an adequate foundation for either mitigating circumstance to be charged to the jury.

Counsel had concerns about the defendant's mental condition and obtained a psychological evaluation. This expert diagnosed "borderline personality disorder" and noted "the possibilities associated with Abandoned Child Syndrome and Burned Child Syndrome." He found no issue related to competence or sanity, but informed co-counsel six weeks before trial that there was some evidence of mitigation. Nonetheless, counsel did not talk to the expert about mitigation evidence until "an hour or so" before the penalty phase began and then "defense counsel never specifically

***Capital Case**

asked about the statutory mitigating circumstances.” During sentencing, the defense expert testified that the defendant “suffered from borderline personality disorder.” He listed a number of factors that led to the disorder: abandonment by an alcoholic mother; no contact with his father; transfer from one foster home to another; emotional and physical abuse and neglect; and placement in a home for severely emotionally disturbed children.” These factors also led to “‘Burned’ or Abandoned Child Syndrome,” which is where a person who has “repeatedly suffered emotional injuries . . . withdraw[s] ‘into [a] shell.’” After leaving the home, the defendant was essentially “a drifter.” He was hospitalized at one time and diagnosed with “factitious disorder, which occurs when an individual feels so helpless and isolated that he seeks to play the role of patient.” Following this testimony, the trial court refused to instruct on two statutory mitigating circumstances: (1) the “murder was committed while the defendant was under the influence of extreme mental or emotional disturbance”; and (2) the “capacity of the defendant to appreciate the wrongfulness of [his] conduct or to conform [his] conduct to the requirements of the law was substantially impaired as a result of mental disease or defect or intoxication which was insufficient to establish a defense to the crime but which substantially affected the defendant's judgment.” The court reasoned that the defense had not proved a “connection” between the defendant’s background and disorder to the offense. If the expert had been asked, he could have provided testimony supporting both statutory mitigating circumstances. Prejudice established because state law required a death sentence if the “statutory aggravating circumstance[s] . . . outweigh any mitigating circumstance.” Here, it was “inevitable” that the jury would find the aggravating circumstance (murder committed during a felony), but the only instruction they received on mitigating circumstances was “brief and general” and “failed to address the defendant's mental illness or mental condition at the time of the offense.” Thus, “the errors by the defense made a sentence of death more likely.”

1997: **People v. Ruiz*, 686 N.E.2d 574 (Ill. 1997) (tried in 1980). Counsel ineffective in sentencing where, even though counsel couldn’t remember whether he investigated or not, it was apparent from the record that he conducted no investigation, gathered no school records, no criminal records, retained no experts, and talked to no family members. Counsel presented only evidence that defendant was 19 and was not the triggerman. If counsel had adequately prepared and presented the mitigation the evidence would have also revealed that the defendant had been physically abused by his father, his father was involved in organized crime and gave the defendant drugs when he was only 11-14 years old, the defendant’s older brother was in gangs, the defendant had no male role model, he was involved in drugs and alcohol by age 11 due to the influence of his brother, and he had a learning disability.

****People v. Howery***, 687 N.E.2d 836 (Ill. 1997) (sentenced in February 1991). Counsel ineffective for failing to prepare and present mitigation evidence because counsel believed it would be futile. There was extensive evidence available from witnesses who would have testified that the defendant made extensive civic contributions and worked for the betterment of the community, he had no

***Capital Case**

criminal history, was under emotional distress, and had an alcohol problem. No evidence was presented even though some witnesses had contacted counsel and volunteered to testify and the sentencing judge had asked for more information regarding the defendant. The court found that the “sentencing proceedings were a mere post-script to the trial” and added nothing to the guilt-or-innocence trial.

***Games v. State**, 684 N.E.2d 466, *modified on reh'g*, 690 N.E.2d 211 (Ind. 1997) (tried in February 1984). Trial court PCR granted a new sentencing based on ineffective assistance. The state did not appeal on this issue, so there is no discussion of facts on issue.

***State v. Hamilton**, 699 So. 2d 29 (La. 1997) (tried in January 1992). Counsel ineffective for failing to investigate and present mitigation. Counsel told the jury in opening statements in the trial that the only issue was sentencing. During trial, two court-appointed examiners testified that the defendant suffers from paranoid schizophrenia or psychotic illness but was legally sane. In sentencing counsel made no opening statement, called no witnesses and presented a two paragraph closing argument in which he failed to discuss mitigating circumstances relevant to defendant's mental impairment. If counsel had adequately investigated, the evidence would have revealed prior hospitalization and a diagnosis of “acute schizophrenic disorder” from the Texas Department of Corrections. Additional out-patient records covering almost a year revealed a diagnosis of “chronic undifferentiated schizophrenia” and continued treatment up until a few months of the crime. Counsel did not present this evidence. In addition, one of the court-appointed examiners “recommended a full neurological examination of defendant. This was never done.” Finally, counsel presented no family members to “elaborate on defendant's history of mental problems or to make a plea for a life sentence.” Counsel’s conduct was not excused by strategy because counsel presented an insanity defense. Prejudice established because the evidence of mental illness “had the potential to totally change the evidentiary picture by altering the causal relationship which can exist between mental illness and homicidal behavior. Psychiatric mitigating evidence not only can act in mitigation, but it also can significantly weaken the aggravating factors.” Here, the evidence would have established that the “defendant had suffered [for years] from the same visual and auditory hallucinations that he told authorities about upon his arrest.

1996: *Rose v. State, 675 So. 2d 567 (Fla. 1996) (sentenced in July 1983). Counsel ineffective in resentencing for failing to prepare and present mitigation evidence. Counsel failed to investigate the defendant's background or obtain school, hospital, prison, and other records. Counsel proceeded with an accidental death theory that even he believed was weak because he was inexperienced, had only 79 days to prepare (during which he got married and honeymooned for 10 days) and another attorney told him that was the best defense. If counsel had investigated available evidence would have included expert and lay testimony to prove poverty, emotional abuse and neglect, slow learner

***Capital Case**

and low IQ, organic brain damage, personality disorder, and chronic alcoholism. Evidence would have supported at least two statutory mitigating circumstances when the trial court had found none.

***State v. Van Cleave**, 674 N.E.2d 1293 (Ind. 1996), *affirmed on reh'g*, 681 N.E.2d 181 (Ind. 1997) (sentenced in May 1983). Counsel ineffective in sentencing for failing to adequately investigate and present evidence of a difficult childhood, including parents' divorce and racial issues, and a nonverbal learning disorder.

***Doleman v. State**, 921 P.2d 278 (Nev. 1996) (sentenced in May 1990). Counsel ineffective for failing to adequately investigate and present testimony from family members and employees of resident school. Family members would have testified that mother was a prostitute and drug addict, the defendant was physically abused, and was abandoned to a series of foster homes and reform schools beginning at age 4. Although school records contained some of this information, live testimony "could have effectively humanized Doleman in the eyes of the jury." (281). Moreover, the testimony of school teachers at a resident school would have revealed that the defendant flourished in a structured environment and was able to adhere to and adapt to institutional rules. In addition, the testimony would have supported defense theory that defendant was a follower and had been dominated by his accomplice.

***Commonwealth v. Smith**, 675 A.2d 1221 (Pa. 1996) (sentenced in September 1991). Counsel ineffective in capital sentencing for failing to prepare and present evidence of the defendant's "mental problems." Counsel was told by a witness that the defendant had mental problems but did not pursue this with investigation or presentation. Prejudice found because the jury found mental state as a mitigating factor (although possibly just a verdict form error) anyway.

***Goad v. State**, 938 S.W.2d 363 (Tenn. 1996) (sentenced in 1984). Counsel ineffective in sentencing where theory of mitigation was mental illness based on Vietnam experience, but counsel presented only lay testimony and failed to prepare or present the available PTSD testimony of an expert who had examined the defendant at the VA hospital several months prior to trial. Counsel knew the defendant had been examined at the VA hospital and intended to present expert evidence based on this. Counsel did not, however, subpoena the doctor they intended to call or make an adequate proffer of his testimony to preserve the issue when a continuance was denied due to his absence during sentencing and did not investigate to determine that it was a different doctor that actually examined the defendant and, thus, counsel never spoke to him or subpoenaed him either.

1995: *Hildwin v. Dugger, 654 So. 2d 107 (Fla. 1995) (tried in 1987). Trial counsel ineffective in sentencing phase for failing to investigate and present mitigation evidence. Counsel did present "quite limited" lay testimony that the defendant's mother died before he was three, that his father

***Capital Case**

abandoned him on several occasions, that he had a substance abuse problem, and that he was a pleasant child and is a nice person. Nonetheless, the court held:

Trial counsel's sentencing investigation was woefully inadequate. As a consequence, trial counsel failed to unearth a large amount of mitigating evidence which could have been presented at sentencing. For example, trial counsel was not even aware of [the defendant's] psychiatric hospitalizations and suicide attempts.

Id. at 109. Available evidence included prior psychiatric hospitalizations and suicide attempts; childhood abuse and neglect; history of substance abuse; organic brain damage; and adaptability to prison. This evidence would have supported two statutory mitigating circumstances when trial court had found none.

****Spranger v. State***, 650 N.E.2d 1117 (Ind. 1995). Counsel ineffective in capital sentencing for a number of reasons. Counsel changed the defense strategy just days before trial and tried the case on the theory that the co-defendant shot the victim while the two were fighting. Up until just a few weeks before trial, counsel “had pursued a strategy of not denying the crime but attempting to maximize mitigators,” but this theory was changed within days of appointment of second counsel. The post-conviction court found counsel ineffective in sentencing because “[t]he eleventh hour change in the defense's guilt phase strategy necessitated a different approach to presentation of mitigation and the development of additional factors to compensate for those eliminated by the new defense.” Counsel’s conduct was deficient because counsel’s did not present available “significant evidence of the defendant's psychological make-up including intelligence, intellectual deficits, learning disability, impulsivity, immaturity, family and social history, academic records, the effect of alcohol and the ability to make appropriate decisions in rapidly changing circumstances.” Prejudice established because, “[e]ven without this information, the jury deliberated for seven hours before recommending the death penalty” and the trial court gave this recommendation great weight. The Indiana Supreme Court upheld this decision finding that it was not “clearly erroneous.”

****State v. Brooks***, 661 So. 2d 1333 (La. 1995) (tried in October 1985). Counsel ineffective for failing to prepare and present mitigation evidence. Neither counsel had conducted any investigation or even obtained the defendant’s records, even though the defendant had signed a release for them. Lead counsel, who was later disbarred was drinking and using cocaine during the trial. Just prior to sentencing, he told co-counsel to take over for sentencing. He had reviewed the previous transcript and met with the defendant for a half an hour before trial only and presented no evidence and gave only very limited argument. Adequate investigation would have revealed available evidence from psychologists, medical records, and family members to show that the defendant had a history of mental problems, including borderline personality disorder; was taking prescription antidepressants at the time of the offense; and was dominated by his homosexual lover/co-defendant.

***Capital Case**

1994: **State v. Wright*, 653 A.2d 288 (Del. Supr. Ct. 1994) (sentencing in October 1992). Counsel ineffective in sentencing. Counsel presented testimony only from the defendant's mother and girlfriend about general background information. Counsel failed to present evidence that the defendant had been in special education programs and had failed three grades before quitting school in the eighth grade. In addition, counsel did not obtain a mental health evaluation. Although counsel asserted this was due to lack of funding, this reason was not accurate. Although counsel was retained and the family lacked funds to pay for experts, the court approved payments for the experts. The court also rejected as insufficient counsel's statements that "he did not believe a psychiatric examination would have been helpful because there was no indication that [the defendant] was insane or incompetent to stand trial. The fact that a defendant is not mentally defective or incompetent does not mean that the defendant does not have other potentially mitigating conditions and disorders." Expert evaluation would have supported diagnoses of mixed personality disorder and drug dependence, along with other mitigating information.

Defense counsel knew that [the defendant] was young, poor, of marginal intelligence, and had dropped out of school at an early age. A reasonable investigation of a client with those characteristics should have included a psychiatric evaluation, an investigation of that client's school records, and an investigation into his prior criminal history. Only upon this proper investigation could defense counsel have known what potential mitigating factors were available for [the] defense. . . .

[I]t is acceptable for defense counsel to choose not to use certain information which, in one sense, may be considered mitigation; however, before deciding not to use such information, defense counsel must have adequately investigated the mitigating evidence available and made a strategic choice not to use it. In the case at hand, defense counsel did not investigate the evidence in mitigation sufficiently to support a contention that he made a strategic choice not to use it.

**Torres-Arboleda v. Dugger*, 636 So. 2d 1321 (Fla. 1994) (tried in 1987). Trial counsel ineffective in sentencing phase for failing to adequately investigate. Counsel made no attempt to investigate the defendant's family history and background, work history, or school record in Colombia and never even applied to the court for funds to investigate in Colombia because he did not think the court would approve such a request. Adequate investigation would have revealed evidence of abject poverty as a child; supported his family after his father's death; and his co-defendant was granted immunity in exchange for testimony. Evidence was also available of good prison behavior in California, no police record, and college attendance, which would have supported the defense psychologist's opinion testimony that the defendant was adaptable to prison.

***Capital Case**

***State v. Sanders**, 648 So. 2d 1272 (La. 1994) (sentenced in January 1991). Counsel ineffective where: counsel's opening was little more than apology for being unprepared because he didn't expect a first degree conviction and didn't address mitigation; counsel failed to object to inadmissible hearsay which showed that the defendant was guilty of the unadjudicated crime of being a felon in possession of firearms in violation of probation and allowed prosecutor to argue "shocking array" of weapons; counsel did not present any mitigation evidence other than testimony of defendant and wife which caused more damage than good because of grilling cross-examination; and counsel did not make a closing argument at all.

***State v. Haight**, 649 N.E.2d 294 (Ohio Ct. App. 1994). Counsel ineffective for inadequately advising the defendant prior to his waiver of the right to jury trial and for essentially abandoning their role as adversaries. Counsel urged the defendant "to waive his right to a trial by jury" because "an agreement had been reached between the prosecution and the defense that if [he] waived his right to a trial by jury and minimized objections to certain evidence in the prosecution's case, the prosecution would inform the three-judge panel during the mitigation phase of the trial that the prosecution and the next of kin were not in favor of the death penalty being imposed." Counsel spent minimal time, at most around 40 hours, working on the case prior to trial. Counsel waived opening statement in the trial; stipulated to allow the prosecution to present almost 100 photographs, 40 other exhibits through testimony of people with a lack of personal knowledge, and the defendant's prior conviction of aggravated burglary. Indeed, counsel "objected to none of the state's exhibits." The only defense witness (in support of the Not Guilty By Reason of Insanity plea) was a psychiatrist. He testified that the defendant had been raised in poverty; had been in special education classes because he was "a slow learner with attention deficit disorder; was treated with Ritalin starting at an early age; began abusing substances at approximately age eight, with the substance abuse increasing until his incarceration; was hospitalized at age eleven for taking an overdose of Valium in what may have been a suicide attempt, and suffered from complex partial seizures. Prior prison records showed that the defendant "had been medicated with Thorazine . . . to assist with his hyperactivity." He was also medicated at various times with Haldol, Stelazine, Lithium, and Visteril. The records also revealed that the defendant "had been observed making peculiar, unexplained moves and had been found hiding under a table" and that the defendant reported a history of hallucinations. The psychiatrist testified that the defendant denied guilt to him and "attributed the fingerprints and other evidence indicating his responsibility to a conspiracy to frame him," although he acknowledged prior blackouts in which he might have committed offenses. The psychiatrist diagnosed organic personality disorder, alcohol dependency, cannabis dependency, and mixed substance dependency. He testified that the defendant was "unable to appreciate the wrongfulness of the acts he committed or, in [his] mind, may have committed." Two experts testified for the prosecution as rebuttal witnesses. One, a psychiatrist, testified that the defendant had been "dysfunctional practically all his life," and diagnosed mixed substance abuse, antisocial personality disorder, and organic personality disorder based on his view that the defendant "is

***Capital Case**

mentally retarded,” but he disagreed with the defense expert about other symptoms and signs of the disorder. The other state expert, a psychologist, found the defendant’s “performance I.Q. to be in the low forties and his verbal I.Q. to be in the lower seventies.” She diagnosed “the borderline range of intellectual functioning,” however, but also testified about his “serious learning disabilities, probably based on minimal brain dysfunction,” based on evidence of brain injury from psychological tests administered. Both state experts rejected the insanity defense. Counsel then gave a closing argument “which consumes less than forty lines of transcript.” In sentencing, the defense expert testified again that the defendant denied guilt and could be suffering from “posttraumatic stress disorder and from amnesia secondary to repression.” He testified that the defendant was not “competent to proceed with the mitigation hearing because of his inability to recall the occurrences surrounding the death of [the victim.” The inability of recall foreclosed the availability of certain potential mitigating factors.” The psychologist that had testified for the state during the trial as a rebuttal witness also testified in mitigation, based on additional records and information provided by the defense, “that she felt the mitigating factors outweighed the aggravating circumstances.” Counsel’s conduct was deficient.

Because death is unique as a penalty, more is and should be expected of attorneys who undertake the responsibility to represent individuals who face the prospect of being executed. . . . The work is personally demanding, because counsel in death penalty cases are expected to develop a personal relationship with the accused so that the accused can feel he or she is represented by someone who cares whether he or she lives or dies.

Even if a higher standard were not expected of counsel here, their performance as counsel was deficient.

Counsel had only “a minimum of consultation with the client”; filed only two pretrial motions, but did not challenge the “constitutionality of the death penalty as a penalty for someone who suffers from the mental deficiencies and defects from which [the defendant] suffers” or that he was arrested and/or seized without benefit of a warrant and without probable cause, both of which had arguable merit; did not retain an investigator or otherwise conduct “significant investigation”; “talked their client into signing a jury waiver form,” even though “the vote of a single juror could spare [the defendant] the death penalty.” Prejudice found because the court found “it hard to conceive of all twelve jurors agreeing with a death penalty sentence.” Counsel’s alleged strategy was rejected as reasonable. “Counsel apparently relied upon a theory that if, after all the evidence had been presented, the prosecution told the court that it was not asking for the death penalty and that the widow of the victim was not requesting the death penalty, then the three-judge panel would not order the death penalty.” Counsel did not, however, inform the court of this strategy, did not offer the

***Capital Case**

stipulated testimony of the widow in mitigation so it was not in evidence, and “the statement of the prosecution was no more evidence than if given in a closing argument.”

The concealing of the defense agreement with the prosecutor from the trial court at the time that a waiver of jury was being discussed in open court robbed the court of the ability to assess accurately whether the waiver of jury was knowing, intelligent and voluntary, and deprived counsel of the opportunity to be advised whether the agreement had any meaning whatsoever to the three-judge panel.

After this, counsel’s “strategy” resulted in counsel “pretty much abandon[ing] their role as adversaries.” They did not object to the presence of a judge on the panel “who had held a responsible position in the prosecutor’s office while the office was prosecuting” the case. During trial, in addition to waiving opening, counsel “engaged in minimal cross-examination,” stipulated the testimony of a state forensic expert “[w]hen the prosecution ran into difficulty in presenting the testimony,” and gave a closing that “consumes only one and one-half pages of transcript.” The sentencing hearing was “only marginally better” with no opening statement, the defense expert’s brief direct examination that covered “less than seven full pages,” the state psychologist’s direct examination “runs approximately four and one-half pages” and the closing argument “was minimal, and is recorded on less than four full pages of transcript.” Prejudice found, especially as to sentencing. The court also found reversible error because the record did not support a finding that the defendant made “a knowing, intelligent and voluntary waiver of his right to a trial by jury.”

***Commonwealth v. Perry**, 644 A.2d 705 (Pa. 1994) (tried in March 1990). Counsel ineffective for completely failing to interview eyewitnesses or defense character witnesses or prepare at all for capital sentence hearing because counsel did not even realize until four days prior to trial that it was a capital case.

***Adkins v. State**, 911 S.W.2d 334 (Tenn. Crim. App. 1994) (sentenced in June 1985). Counsel ineffective in capital sentencing for failing to adequately investigate and present mitigation evidence. Counsel “spoke extensively” with some family members and friends, as well as a jail official, and learned about the petitioner’s alcoholic and abusive father. Counsel sought a mental examination to determine competence and sanity “but did not request a psychiatric background and personal history evaluation which might have been used as mitigating evidence or as a means to gather such evidence.” In sentencing, counsel presented no evidence. Counsel was concerned that presentation of mitigation would open the door to rebuttal aggravation evidence. Counsel did not, however, file a motion to limit questionable state proof” and “made no attempt to determine the validity of possible mitigation testimony.” “Counsel’s decision not to introduce mitigating evidence without taking adequate steps to determine the existence of mitigation testimony was . . . likely based on inexperience rather than a sound strategic choice.” Prejudice established because “the jury heard no

***Capital Case**

evidence whatsoever about the petitioner's social background, psychiatric or psychological condition, or post-incarceration behavior.” If counsel had adequately investigated and presented the evidence, the jury would have heard from an inmate counselor and a records custodian that the petitioner had not had any disciplinary problems while in prison between 1979 and 1985. A psychiatrist could also have testified about the effects of the petitioner’s father’s alcoholism and “the extreme nature of the physical abuse that [the petitioner] apparently encountered as a child without reason.” In essence, “the petitioner's violent nature was due to his social background,” but his “chances of rehabilitation” were “good.”

1993: **Deaton v. Dugger*, 635 So. 2d 4 (Fla. 1993) (direct appeal in 1985). Counsel ineffective in failing to adequately investigate, such that “the defendant was not given the opportunity to knowingly and intelligently make the decision as to whether or not to testify or to call these witnesses” prior to waiving the presentation of mitigation. Because substantial mitigation evidence, including mental health testimony, was available, the trial court’s findings were affirmed.

**Heiney v. State*, 620 So. 2d 171 (Fla. 1993) (tried in 1978). Trial counsel ineffective in sentencing phase. Counsel did not conduct or arrange for an investigation into the defendant's background. Adequate investigation would have revealed evidence of chronic substance abuse and use of drugs and alcohol at time of the offenses; borderline personality disorder; chronic physical and emotional abuse as child; and possible organic brain damage.

**Averhart v. State*, 614 N.E.2d 924 (Ind. 1993) (tried in 1982). Counsel ineffective for failing to prepare and present mitigation evidence. Counsel conducted no investigation and spoke only with the defendant and his mother and he did not even discuss their testimony with them. In their testimony, he simply asked if they had anything to say and gave no guidance or direction. If counsel had adequately investigated the evidence would have established a disadvantaged background, education, and good character.

**Woodward v. State*, 635 So. 2d 805 (Miss. 1993) (tried in April 1987). Counsel ineffective for failing to present available mitigation, i.e. counsel allowed expert witness to testify only about test results and did not offer detailed history of mental illness because of mistaken belief that it would open the door to unlimited character evidence. Counsel also told jury in sentencing argument that he could not ask the jury to spare the defendant’s life.

1992: **In re Marquez*, 822 P.2d 435 (Cal. 1992) (tried in March 1984). Trial counsel ineffective for failing to investigate and present mitigation evidence. Counsel and his investigator only spent two days in the El Pilon area of Mexico investigating the defendant’s birth records and interviewing the defendant's family and doctor. They spent a total of 20 to 25 minutes at the defendant's home in El Pilon and interviewed petitioner's parents at a nearby hotel for only an hour or two. There was no

***Capital Case**

other follow-up contact or investigation. Counsel's purported strategy for the failure to investigate further was because of his fear that an investigation would turn up only aggravating evidence after a police officer and an uncle alleged prior uncharged criminal acts. Available mitigation included testimony from family members who supported the defendant and were willing to travel from Mexico to testify in his behalf that the defendant was a good son and brother who worked hard and had positive, good character traits.

****Phillips v. State***, 608 So. 2d 778 (Fla. 1992) (tried in 1983). Trial counsel ineffective in sentencing for failing to prepare and present evidence. Counsel conducted no background investigation and spoke only to the defendant's mother. Adequate investigation would have revealed deficits in adaptive functioning; schizoid personality; borderline intelligence; and impoverished, physically abusive childhood. This evidence would have supported two statutory mitigating circumstances and also provided rebuttal to aggravation evidence because the defendant lacked capacity to calculate or premeditate.

****Bates v. Dugger***, 604 So. 2d 457 (Fla. 1992). Counsel ineffective in failing to adequately investigate and present mitigation. Trial court's findings affirmed.

****Mitchell v. State***, 595 So. 2d 938 (Fla. 1992) (crimes in 1986 and direct appeal in 1988). Counsel ineffective in capital sentencing because counsel "presented no evidence" at the penalty phase. Counsel thought the defendant would be acquitted and had not prepared for sentencing. While the defendant had been examined by two mental health experts, counsel had not made arrangements for them to testify. The available but unrepresented evidence would have supported statutory and non-statutory factors, including a history of child abuse, a history of substance abuse, and brain damage.

****People v. Perez***, 592 N.E.2d 984 (Ill. 1992) (tried in June 1983). Counsel ineffective for failing to adequately investigate and present evidence. Counsel reviewed the defendant's prison records and possessed his school records and attempted to interview the defendant through an interpreter several times about his background without success. Although the prison records and school records contained evidence of a low IQ and some other mitigating evidence, along with addresses for the defendant's family in Chicago, counsel did not attempt any further investigation until after conviction when the defendant did provide some background information and signed an affidavit because he did not want to testify. The affidavit was not admitted and no other mitigation was available or offered other than the report and testimony of a prison psychiatrist that was more damaging than mitigating. If counsel had adequately investigated, the evidence would have shown the defendant's mental deficiency, substance abuse, an abusive father, and abandonment.

****State v. Sullivan***, 596 So. 2d 177 (La. 1992), *rev'd on other grounds*, 508 U.S. 275 (1993) (tried in May 1982). Counsel ineffective for failing to investigate mitigation because of belief that jury

***Capital Case**

would return a conviction for 2d degree murder only. “[A]ny time a defendant is charged with first degree murder, defense counsel must prepare for the eventuality that a guilty verdict may be returned.” *Id.* at 191. A reasonable investigation would have uncovered evidence of severe abuse as a child, paranoid schizophrenia, and family would have testified.

***Cooper v. State**, 847 S.W.2d 521 (Tenn. Crim. App. 1992) (tried in February 1985). Counsel ineffective in capital sentencing for failing to interview court-appointed mental health experts prior to trial or to present expert mental health testimony in sentencing. Considering the ABA Standards for Criminal Justice, counsel’s conduct was deficient because counsel received reports on competence and sanity issues from two court-appointed examiners but did not talk to them about sentencing issues or provide them with any background information. He talked only with the defendant’s sister, who was the only brief mitigation witness called in sentencing. He was aware from her that the defendant had been in special education classes in school, suffered from depression, and had a number of suicide attempts. Counsel spoke to no one else and did not obtain any of the defendant’s prior records, including hospital records of prior drug overdose suicide attempts. Just 90 days prior to killing his estranged wife, the defendant’s sister had taken him to a mental health facility for an emergency evaluation. He was diagnosed with dysthymic disorder and the doctor recommended in-patient treatment, which the defendant refused. On the day of the crimes, the defendant’s sister had obtained an involuntary commitment order. In short, the defendant was suffering from recurrent major depression and expert testimony would have established that he was under the influence of extreme mental and emotional disturbance and acting under extreme duress at the time of the crimes. Counsel was focused only on “mental condition [that] was guilt phase related.” Counsel also expressed concern that testimony by the court-appointed examiners in sentencing would have opened the door to evidence of a ten-year old conviction for assaulting a former girl-friend. Despite this, counsel had failed to object to cross-examination of the defendant during trial about a prior violent assault and counsel’s last question to the defendant’s sister in sentencing elicited information about the defendant’s violent temper. “When the record shows a substantial deficiency in investigation, the normal deference afforded trial counsel’s strategies is particularly inappropriate.” *Id.* at 530. Here, “the trial attorney stated that he wanted to invoke sympathy for the petitioner, but he did not investigate the readily available evidence which would have bolstered his position.” *Id.* at 531. If counsel had adequately performed, “he would have obtained substantial information, both expert and lay, which would have explained the violence as a result of his mental problems.” Prejudice was clear because counsel did not elicit even much of the information the defendant’s sister possesses and the state “strongly argued” in sentencing that there was no credible evidence or documentation that the defendant “suffered from real emotional problems,” when “substantial evidence corroborating the petitioner’s problems was readily available to be used.” *Id.* at 532. The evidence would have established several statutory mitigating circumstances and non-statutory mitigating circumstances.

***Capital Case**

1991: **State v. Lara*, 581 So. 2d 1288 (Fla. 1991) (tried in 1982). Trial counsel ineffective in sentencing because counsel “virtually ignored the penalty phase of trial” and did not investigate in any detail the defendant's background and did not properly utilize expert witnesses regarding defendant's psychological state. If counsel had adequately investigated, the evidence would have shown: defendant's father was brutally abusive (had to eat dirt because dad wouldn't feed; tied and hung upside down over well; left in cane fields alone for days); began drinking at age 8; heard voice of devil; beat head against wall at school; prior hospitalization for mental illness. This evidence would have supported two statutory mitigating circumstances.

**State v. Twenter*, 818 S.W.2d 628 (Mo. 1991) (crimes in May 1988). Counsel ineffective in murder case for killing parents for failing to investigate and present mitigation where friends, relatives, and coworkers would have testified that the defendant was a loving mother and had been beaten as a child.

1990: **Burris v. State*, 558 N.E.2d 1067 (Ind. 1990) (sentenced in December 1980). Counsel ineffective in penalty phase for failing to investigate for sentencing; arguing in guilt phase closing that defendant is a “street person” and counsel didn't even like him; and arguing intoxication as a mitigator when the only evidence presented was that defendant had one sip of gin. Available evidence would have shown that defendant was abandoned by parents and raised by a man with a long criminal record which included running a whorehouse and manslaughter. Witnesses would have testified that the defendant worked in the whorehouse as a child and his job was to let whores know when time was up. He wasn't allowed to go to school until all chores were finished. He was declared neglected and became a ward of the county at age 12. He didn't know who he was or even his birthday. Witnesses would have also testified to his good character, good employment record, and adaptability to prison.

**State v. Tokman*, 564 So. 2d 1339 (Miss. 1990) (sentenced in September 1981). Counsel ineffective for failing to conduct any mitigation investigation. Counsel had intended to present only testimony from the defendant but then presented nothing when the defendant indicated that he would ask for death. Adequate investigation would have revealed good character evidence and evidence of domination by accomplice.

1989: **Stevens v. State*, 552 So. 2d 1082 (Fla. 1989) (sentenced in August 1979). Counsel was ineffective in sentencing phase for failing to adequately investigate and present mitigating evidence. Counsel spoke with the defendant and his aunt but never even asked them about the defendant's background. Counsel also made no attempt to contact other background witnesses in Kentucky, even though the defendant had been in Florida for only one year at the time of his arrest. Adequate investigation would have revealed a history of poverty and neglect; abusive childhood including being shot by father; serious drinking problem which worsened just before offenses; and defendant's responsible adulthood. Counsel also made misrepresentations about defendant's background and criminal

***Capital Case**

history including statements that defendant had been dishonorably discharged from military (actually honorably discharged) and had served time in jail in Kentucky (when he hadn't). Counsel also failed to provide trial court with an answer brief in response to State's brief urging the imposition of the death penalty; and failed to correct errors in State's brief including argument concerning two aggravating factors never presented to jury.

****Bassett v. State***, 541 So. 2d 596 (Fla. 1989) (sentenced in January 1980). Trial counsel ineffective in sentencing phase for failing to investigate and present evidence that 18 year old defendant was acting under the domination of the 29 year old co-defendant. Available evidence included evidence that: defendant was raised in economically depressed and violent family environment with abusive father figures; defendant was a follower who frequently attempted to gain attention in negative ways; defendant was a "punching bag" for other boys in school and was not accepted in peer groups.

****Wilson v. State***, 771 P.2d 583 (Nev. 1989) (sentenced in 1979). Counsel for one defendant in joint trial was ineffective in failing to present a wealth of available mitigation evidence and making a number of damaging remarks to the three-judge panel in sentencing. Counsel presented only the defendant's parents to testify. "Although their testimony was relevant, it would naturally appear somewhat biased." Counsel also did not elicit their testimony of the defendant's difficult childhood following their divorce and his father's remarriage to an emotionally unstable woman, his dyslexia, or that he saved his cousin's life as a child. He also did not elicit information that the 18-year-old defendant called both parents two days before the crimes asking for permission to return home, but was rejected by both parents. Counsel believed "it would be a waste of time to present that type of background" evidence. Counsel also did not employ investigators allowed by statute, even after the defendant's father personally offered to hire an investigator. Counsel also rejected the defendant's sister's assistance when she provided the names of approximately 20 people willing to testify in sentencing. Counsel also did not produce "the hundred some-odd letters" he had received attesting that the defendant was "a good kid; he's not violent." Counsel also did not present the father's testimony that he had been present during the defendant's confession, but the detectives turned off the tape when the defendant became emotional and expressed remorse for his crime and sympathy for the victim's family. Counsel also did not present the testimony of a Mormon bishop who visited the defendant in jail and would have testified about the defendant's sorrow, remorse and repentance. Finally, "[i]n both his opening statement and closing argument, [counsel] alternated between comments intended to spare his client from the death penalty, and remarks that were more appropriate for the district attorney," including downplaying the defendant's remorse, distancing himself from the defendant ("I have a job as an attorney. I took an oath to do a job."), and stressing "the horror of the crime and his status as an appointed representative. Reminding the sentencer that the undertaking is not by choice represents a breach of counsel's duty of loyalty to his client."

***Capital Case**

1988: **State v. Michael*, 530 So. 2d 929 (Fla. 1988) (direct appeal in 1983). Counsel was ineffective in sentencing in failing to obtain expert opinions on the applicability of statutory mental mitigating factors, even though counsel was on notice of the defendant's "disturbed condition." The trial court's findings upheld on appeal.

**State ex rel. Busby v. Butler*, 538 So. 2d 164 (La. 1988) (tried in February 1984). Counsel ineffective for failing to make an opening statement, not asking that client's life be spared, not contesting elements of the state's case, and failing to prepare and present mitigation despite the fact that counsel was aware that the defendant had been in and out of mental institutions since he was 12. Adequate investigation would have revealed severe mental and emotional problems including anti-social personality disorder. Family would have also testified if asked.

1987: **People v. Bloyd*, 729 P.2d 802 (Cal. 1987) (arrested in 1981). Reversal required due to counsel's failure to present any mitigating evidence or argument in penalty phase even though it was available because client did not want to present mitigation evidence.

1986: **People v. Burgener*, 714 P.2d 1251 (Cal. 1986) (tried in 1981). Reversal required due to counsel's failure to present any mitigating evidence or argument in penalty phase even though it was available because of client's belief and statement that he deserved to die and did not want to present mitigation evidence.

**State v. Johnson*, 494 N.E.2d 1061 (Ohio 1986) (tried in October 1983). Counsel ineffective for failing to prepare and present mitigation evidence and presented only an unsworn statement of the defendant and counsel's argument which damaged defendant by berating jury for guilty verdict. Counsel did not investigate and did not even speak with the defendant about mitigation until after the guilty verdict. Available mitigation evidence included supportive family, no emotional or mental problems, high school graduate who held same job seven years and owned his own home, wife and child, conquered his own drug abuse problem, lost eye at age 10 and spent several months in hospital, mother died of cancer one year prior to trial, and defendant voluntarily turned himself in when he learned of arrest warrant. Counsel was also ineffective for failing to object to submission of non-statutory aggravating circumstance that the defendant had a firearm in his possession which is not a circumstance that is permitted in aggravated murder indictment or as statutory aggravating circumstance in sentencing.

***Capital Case**

- 1985:** **People v. Deere*, 710 P.2d 925 (Cal. 1985) (sentenced in October 1982). Trial counsel ineffective for failing to present any mitigating evidence in penalty phase because of his client's belief and statement to the judge that he deserved to die and where counsel told the judge that mitigation evidence was available but would not be presented because of counsel's belief that he had no right to present mitigation where the defendant was asking for a death sentence.
- 1984:** **Mazzan v. State*, 675 P.2d 409 (Nev. 1984) (crimes in December 1978). Counsel ineffective in capital sentencing for "harshly berat[ing] the jury for returning its guilty verdict during the prior phase," failing to present any evidence in mitigation, and "virtually invit[ing] the jurors to condemn his client to death" in argument that "covers only four pages." In short, the defendant's "cause would have been far better served without benefit of his counsel's representation during the penalty phase."
- 1983:** **State v. Smith*, 665 P.2d 995 (Ariz. 1983) (tried in March 1982). Counsel ineffective in sentencing for advising the defendant not to discuss the facts of the crimes with the presentence investigator and not to present any mitigation evidence in sentencing. Counsel's gave "bad legal advice" because of concern that any cooperation with the presentence report would be admissible in a new trial. Under state law, however, a defendant's statements made in connection with the preparation of the presentence report are not admissible at any new trial. "We do not believe that advising a client incorrectly about the black letter Rules of Criminal Procedure, especially in a matter of life and death, can be called minimally competent representation."
- *Holmes v. State*, 429 So. 2d 297 (Fla. 1983) (sentenced in November 1975). Counsel ineffective in sentencing.

Instead of arguing that the crime was not heinous, atrocious, or cruel, defense counsel conceded the existence of this questionable aggravating circumstance. Furthermore he made no reference to the reports of the two court-appointed psychiatrists who suggested that [the defendant] may have been in some kind of disturbed psychological state at the time of the murder. Although these reports were delivered after the sentencing hearing was held, counsel made no attempt to reopen the proceeding for the purpose of presenting the reports or testimony of the psychiatrists. As a result, the court imposed sentence without the benefit of available expert opinion pertaining to [the defendant's] mental and emotional condition. . . . Defense counsel also avowed that it did not occur to him to request a presentence investigation even though appellant's lack of a criminal record would have rendered the report, at least in part, a favorable one for mitigation.

***Capital Case**

***Zant v. Hamilton**, 307 S.E.2d 667 (Ga. 1983) (direct appeal in 1979). Counsel ineffective in sentencing for failing to adequately prepare and present mitigation. Trial court's findings affirmed.

1982: *State v. Carriger, 645 P.2d 816 (Ariz. 1982) (direct appeal in 1979). Counsel ineffective in sentencing for failing to present or argue mitigation because of counsel's assertion that presentation of mitigation would be an admission of guilt when the defendant was innocent.

At the punishment or sentencing stage, the duty of the attorney is clearer and easier to evaluate. At a minimum, defendant's attorney had the obligation to challenge the admission of aggravating evidence where reasonably possible and to present available pertinent mitigating evidence.

Here, however, "the attorney's conduct approached that of a neutral observer."

1981: *Neal v. Arkansas, 623 S.W.2d 191 (Ark. 1981). Counsel ineffective in sentencing. Evidence of counsel's diminished capacity was presented during trial, but counsel did not pursue mental health issues in sentencing. "Because Appellant's diminished mental capacity did not render him insane does not mean that Appellant has sufficient mental capacity to be able to conform his conduct to the requirements of law." "[T]rial counsel did little to impress the jury with the significance of this evidence as mitigating against a sentence of death." Counsel also failed to introduce available expert testimony "that Appellant could have been influenced by others to commit the criminal acts with which he was charged, but this testimony was never introduced."

1979: *State v. Myles, 389 So. 2d 12 (La. 1979) (sentenced in May 1978). Counsel ineffective in sentencing for failing to present any evidence in mitigation and failing to expressly ask the jury to spare the defendant's life. In short, "[t]he advocacy for [the defendant's] life was tepid and virtually nonexistent."

In his closing argument the defense counsel did little more than acknowledge the existence of an aggravating circumstance, state that the confession may be regarded as a mitigating circumstance, and submit the matter to the jury. He did not ask the jury to spare the defendant's life. He did not remind the jury that [the defendant] is a human being or urge the jurors to be mindful of their awesome responsibility in deliberately choosing whether he should live or die. Nor did he emphasize to the jurors any of their legal obligations designed to prevent the arbitrary or capricious imposition of the death penalty, e. g., the requirement that they base their findings upon a beyond a reasonable doubt certainty; their duty to weigh any aggravating circumstance found against any and all mitigating circumstances; the duty of each individual juror to hold fast to his honest convictions and to vote to prevent a

***Capital Case**

unanimous verdict in the event he is convinced that the death penalty is inappropriate. Moreover, the defense attorney's lack-luster argument followed his submission of the case for his client's life without evidence.

Id. at 30. Evidence was available to establish the defendant's severely deprived childhood resulting from the death of his mother at the hand of his father.

***Capital Case**

B. ONE DEFICIENCY

1. STATE AGGRAVATION EVIDENCE OR ARGUMENT

a. U.S. Court of Appeals Cases

1999: **Parker v. Bowersox*, 188 F.3d 923 (8th Cir. 1999). Counsel ineffective in sentencing phase for failing to present evidence to rebut the only two aggravating circumstances (both involving murder of a potential witness). The defendant had been arrested for assaulting his girlfriend. He was charged with assault and with probation violation because he was then on probation. His attorney notified him two weeks prior to the murder that she had worked out a plea agreement. He would admit the probation violation and the assault charge would be dismissed. The murder occurred the night before the scheduled probation hearing, but because the state was unaware of the murder, the deal went through. The defendant admitted the probation violation and got 90 days. The assault charge was dismissed that day. The only aggravating circumstances presented by the state was that the victim was killed because she was a witness to the probation violation and the assault. The prosecutor testified about the pending charges and the resolution, but defense counsel failed to present the testimony of the previous defense counsel who would have testified that the defendant knew two weeks before the murder that the victim was no longer a witness against him. Deficient conduct easily found because the previous counsel had called new counsel when she saw publicity saying that the state was alleging that the murder was committed because the victim was a potential witness. State's arguments of no prejudice rejected. No one revealed any damaging information that would have been revealed due to waiver of attorney-client privilege and any possible danger was outweighed by the value of the testimony. Likewise, the testimony would not have been cumulative. While the prosecutor testified to the ultimate outcome, the defense counsel could have testified that the defendant was aware that the victim was no longer a witness against him. Prejudice found because the jury rejected the aggravator that she was killed because a witness in the probation violation where the defendant entered a guilty plea. If the jury had heard defense counsel's testimony that the defendant knew that the assault charge was going to be dropped and that the victim would not be a witness against him, the jury may also have rejected that aggravating circumstance and the defendant would not have been eligible for a death sentence.

1986: **Summit v. Blackburn*, 795 F.2d 1237 (5th Cir. 1986). Trial counsel ineffective for failing to object to or argue the lack of corroborating evidence of the sole aggravating factor (attempted armed robbery) when state law holds that a defendant cannot be convicted based solely on uncorroborated confession and the only evidence of aggravating factor was defendant's confession.

b. State Cases

***Capital Case**

- 2001:** **Evans v. State*, 28 P.3d 498 (Nev. 2001). Both trial and appellate counsel were ineffective in capital sentencing for failing to object to (1) the state's improper rebuttal argument in which the prosecutor challenged the jurors to have the "intestinal fortitude" to sentence the defendant to death and (2) improper argument that the jury should consider evidence of the defendant's "other crimes" before deciding death eligibility. The first argument was improper because the United States Supreme Court has said it is improper "to exhort the jury to 'do its job'; that kind of pressure . . . has no place in the administration of criminal justice." *United States v. Young*, 470 U.S. 1, 18 (1985). The second argument was improper because, under state law, "other crimes" evidence can only be considered after finding the defendant death-eligible, i.e., after a statutory aggravator is found and each juror has found that the mitigation does not outweigh the aggravation. Prejudice found due to the tremendous risk that character evidence would mislead the jury.
- 1996:** *Commonwealth v. McNeil*, 679 A.2d 1253 (Pa. 1996) (superceded by statute). Counsel ineffective for failing to object to victim impact testimony that "the victim was gracious, kind and generous and that he had concern for the underdog and the elderly." Prejudice found because there was only one aggravating circumstance and one mitigating circumstance found and "the jury may have improperly relied upon [this] testimony to tilt the balance of evidence in favor of the death penalty."
- 1995:** **State v. Storey*, 901 S.W.2d 886 (Mo. 1995). Counsel ineffective for failing to object to state's improper closing argument which argued facts outside the record (most brutal slaying in history of county); injected personal opinion (what victim accomplished in life and difficulty of getting out of abusive relationship); personalized to jury (put yourself in victim's place); argued death sentence was justified (because victim's husband would have been justified to kill in self-defense); and argued relative worth of victim and defendant. Prejudice was found due to the four "egregious errors, each compounding the other." *Id.* at 902.
- *Commonwealth v. Lacava*, 666 A.2d 221 (Pa. 1995). Counsel ineffective for failing to object to prosecutor's sentencing phase closing argument which improperly invited the jury to sentence appellant to die because he was a drug dealer. The focus was shifted from the one aggravating circumstance of killing a police officer to retribution for society's victimization by drug dealers.

***Capital Case**

2. INSTRUCTIONS

a. U.S. Court of Appeals Cases

2002: **Carpenter v. Vaughn*, 296 F.3d 138 (3d Cir. 2002). Under pre-AEDPA analysis, counsel was ineffective in capital sentencing for failure to object to trial court's misleading response to jury's question about availability of parole if the defendant received a life sentence. The defendant was convicted for murder and the state presented evidence of only one aggravating circumstance that defendant had a significant history of felony convictions involving the use or threat of violence. Under Pennsylvania law the defendant could be sentenced to death or life imprisonment without parole. The only mechanism for parole under state law would be that the sentence was first commuted by the governor to a term of years. During sentencing deliberations the jury sent out a note asking "can we recommend life imprisonment with a guarantee of no parole." The court responded, "the answer is that simply no absolutely not." The court went on to instruct the jury that its decision would be the sentence and not a recommendation and that the question of parole was irrelevant. Counsel's failure to object or to ask for more clarification was deficient under state law because the court's response that the jury could not give such a sentence was a misstatement of state law since a person serving a life sentence would not be eligible for parole. The court also found prejudice because the jury was aware that the defendant had previously been convicted of murder and assault and had been released on parole. The jury deliberated for less than nine minutes after the court's improper response to its question. The court made it clear that this decision was not based on Simmons or any federal constitution right, but was simply a finding of ineffectiveness of counsel for failing to object based on state law.

1994: **Starr v. Lockhart*, 23 F.3d 1280 (8th Cir. 1994). Trial counsel ineffective for failing to object to "heinous, atrocious, or cruel" aggravating circumstance because of previous Supreme Court decisions finding this circumstance unconstitutionally vague.

1986: **Woodard v. Sargent*, 806 F.2d 153 (8th Cir. 1986). Trial counsel ineffective in penalty phase of capital trial for failing to request a jury instruction on lack of a prior history of significant criminal activity when record supported such an instruction. (No evidence either way so its doubtful same conclusion would be reached now in light of *Delo v. Lashley*.)

b. State Cases

2002: **Deck v. State*, 68 S.W.3d 418 (Mo. 2002). Counsel ineffective in capital sentencing in failing to request two pattern mitigation instructions during the penalty phase. Due to a printer or operator error two paragraphs were excluded from the standard jury instructions. The excluded paragraphs included the instruction that the jury should consider non-statutory mitigation ("any (other) facts or

***Capital Case**

circumstances which you find from the evidence in mitigation of punishment”) and that unanimity was not required on mitigation. Counsel’s conduct was deficient. “Although counsel’s actions should be judged by her overall performance, the right to effective assistance of counsel ‘may in a particular case be violated by even an isolated error of counsel if that error is sufficiently egregious and prejudicial.’” *Id.* at ____ (quoting *Murray v. Carrier*, 477 U.S. 478, 496 (1986)). Prejudice established because “the jury is never required to impose the death penalty, no matter how egregious the crime.” Here, the defense relied heavily on mitigation and presented substantial evidence concerning the defendant’s abuse, neglect, poverty, multiple foster home placements, and eventual return to his mother despite a loving family’s desire to adopt him. “The missing paragraphs of the instruction told the jury about the need to balance this mitigating evidence with the aggravating circumstances focused on by the State, and what evidence the jury could consider in deciding mitigation.” In addition, counsel did not explain “the concept of mitigation during voir dire,” which made “the jurors more dependent on the instructions.” “Most tellingly, the jurors themselves indicated that they were confused about the very issue of mitigation” in their questions during deliberations.” Finally, reversal was required even though the court had reviewed this issue for plain error on direct appeal and affirmed. The failure to find plain error on direct appeal was not a rejection of a prejudice finding under *Strickland*.

More specifically, while, under Missouri law, plain error can serve as the basis for granting a new trial on direct appeal only if the error was outcome determinative, *Strickland* clearly and explicitly holds that an outcome-determinative test cannot be applied in a post-conviction setting. Therefore, the two tests are not equivalents.

Id. at ____ (citations and footnote omitted).

1994: **Commonwealth v. DeHart*, 650 A.2d 38 (Pa. 1994). Counsel ineffective in sentencing for failing to object to use of verdict slip that stated: “We the jury have found unanimously one aggravating circumstance which outweighs any mitigating *circumstance*” rather than “mitigating circumstances” after jury was presented with one aggravating circumstance and two separate mitigating circumstances to consider. Prejudice established because the jury could have weighed the sole aggravating circumstance against each mitigating circumstance individually rather than collectively and improper weighing process could have resulted in sentence of death even though mitigating circumstances, when taken as whole, would have outweighed aggravating circumstances. The mitigating circumstances were: (1) the age of the defendant at the time of the crime and (2) any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense.

***Capital Case**

3. MISCELLANEOUS

a. U.S. Court of Appeals Cases

- 2002:** **Roche v. Davis*, 291 F.3d 473 (7th Cir. 2002). Counsel ineffective in capital sentencing for the failure to object to the petitioner's shackling and the failure to ensure that the jury could not see the shackles. The state court decision was unreasonable because the court only considered counsel's efforts to reveal the shackles during his testimony but not when seated at the defense table when the record revealed the shackles were visible to the jurors. No prejudice during the trial due to the overwhelming evidence of guilt. Prejudice found in sentencing – even though the “final determination about the appropriate sentence” rested with the trial judge – because there was considerable mitigation available and the jury deliberated for eight hours and was unable to recommend the death penalty.
- 2000:** **Skaggs v. Parker*, 235 F.3d 261 (6th Cir. 2000). Counsel ineffective in capital sentencing for calling appointed expert witness after having observed the “expert's” testimony during the trial. During trial, appointed clinical and forensic psychologist's testimony in support of insanity defense was “rambling, confusing, and, at times, incoherent to the point of being comical.” *Id.* at 879. Jury convicted. Counsel did not call expert in sentencing, but jury hung and mistrial was declared. Four months later in new sentencing, defense called “expert,” who again testified that defendant was of average intelligence but had insanity defense at time of crimes based on depressive disorder and a paranoid personality disorder. Counsel's decision to call expert in sentencing was deficient because the knew the testimony could be more harmful than helpful, but they did not ask for a different expert because counsel simply did not believe the court would grant the motion. On appeal, defense discovered that court-appointed defense “expert” was not actually a licensed clinical or forensic psychologist, and had no academic degrees or training as a psychologist whatsoever. His diagnosis of the defendant, who was actually mentally retarded, was also incorrect. Prejudice found, not based on lack of competent expert but on lack of competent counsel, because counsel's actions denied defendant his only real mitigation, which was evidence of mental retardation and abnormal neuropsychological tests indicating brain damage. Counsel also presented no other real mitigation evidence.
- 1995:** **Thomas-Bey v. Nuth*, 67 F.3d 296 (4th Cir. 1995) (*affirming Thomas-Bey v. Smith*, 869 F. Supp. 1214 (D. Md. 1994)). Counsel ineffective for consenting to a post-conviction interview of the defendant by a psychiatrist retained by the state for sentencing and the psychiatrist testified that defendant had no mitigating mental impairments and was a serious risk of future dangerousness to society and prison population.

***Capital Case**

1994: **Foster v. Delo*, 11 F.3d 1451 (8th Cir. 1994). Counsel ineffective in capital sentencing for failing to inform the defendant of his right to testify in sentencing and failing to inform him that his own plea for mercy was necessary. During trial, counsel relied on an alibi defense but the defendant did not testify because of counsel's concerns that his prior convictions would be used to impeach him. During sentencing, counsel believed a plea for mercy would be inconsistent with the alibi, but counsel failed to advise the defendant of his right to testify, which is a fundamental constitutional guarantee that can only be waived by the defendant himself. The defendant's knowledge of his right to testify during trial did not justify a finding that he knew he could testify in sentencing. Likewise, counsel's reason for advising him not to testify during trial was gone as his prior convictions were admissible in sentencing regardless of whether he testified. Prejudice established because "[h]is only chance to escape the death penalty required a plea for his own life, asking the jury for mercy, portraying himself as a human being." *Id.* at 1458.

b. State Cases

2001: **Warner v. State*, 29 P.3d 569 (Okla. Crim. App. 2001). Counsel ineffective in capital case for failing to properly request one day continuance with written motion supported by an affidavit. During sentence on a Friday, defense counsel orally requested a continuance until Monday because the defendant's mother was supposed to testify but could not arrive until Monday due to transportation and health problems. Counsel did not, however, follow the proper procedures for request. The result was that the defense presented no mitigation at all. Court blurs this issue with trial court error by saying that regardless of the defense counsel's failure the court should have granted the one day continuance, especially since the court had allowed the jury to consider whether they wanted to delay instructions. Also not necessary for court to discuss this issue at all since the case was reversed due to trial court errors in jury selection anyway.

1997: **Clark v. State*, 690 So. 2d 1280 (Fla. 1997). Counsel ineffective in sentencing phase because closing argument virtually encouraged giving the death penalty by telling jury, inter alia, that counsel had no choice, it was the worst case he had seen, and that the defendant was from the "underbelly of society."

1993: **Garcia v. State*, 622 So. 2d 1325 (Fla. 1993). Trial Counsel ineffective in sentencing phase for failing to seek admission of statement made by co-defendant to cellmate which corroborated defendant's statement that he was not the triggerman in shootings during robbery.

**People v. Pugh*, 623 N.E.2d 255 (Ill. 1993). Counsel ineffective for stipulating to defendant's eligibility for death penalty based on counsel's mistaken belief that defendant was eligible solely because of felony murder conviction. Counsel unaware that to be death eligible defendant must have intended to kill the victim. Defendant continuously maintained that shooting was accidental.

***Capital Case**

1985: **People v. Frierson*, 705 P.2d 396 (Cal. 1985). Counsel ineffective for waiting to sentencing phase to present diminished capacity defense when the defendant demanded on the record that it be presented at the special circumstances phase.

***Capital Case**

III. NON-CAPITAL SENTENCING ERRORS

A. U.S. Court of Appeals Cases

2002: *Johnson v. United States*, 313 F.3d 815 (2d Cir. 2002). Counsel was ineffective in possession with intent to distribute crack cocaine case because counsel failed to object to the erroneous calculation of the defendant's base offense level in sentencing. The drugs the defendant sold was less than fifty grams but the government alleged that the defendant had agreed to sell more than fifty grams. The pre-sentence report recommended that the base offense level be set based on over fifty grams. Counsel did not object. At sentencing, the court noted that the defendant showed a lot of promise and a lot of capability and sentenced him to the minimum allowed of 151 months. Counsel's conduct was deficient because the notes in the sentencing guidelines provide that, if a sale is completed, the amount delivered should be used to establish the defendant's base level. The defendant was prejudiced because the district court's favorable comments revealed that if the proper offense level of 121 to 151 months had been used it is unlikely that the district court would have sentenced the defendant to the maximum of 151 months.

2000: *Coss v. Lackawanna County Dist. Atty.*, 204 F.3d 453 (3d Cir. 2000). Counsel ineffective in aggravated assault case for failing to challenge prior conviction used to enhance sentence. Defendant had been convicted of assault in 1986 and completed sentence, but federal court had jurisdiction to review the underlying conviction since the offense was used to enhance the present sentence. Counsel were ineffective during the 1986 representation because counsel met with defendant only twice prior to trial and was given names of witnesses present at the high school party where the assault on a police officer allegedly occurred. Counsel did not subpoena these witnesses and gave the defendant only one hour of notice prior to trial so the defendant had time only to pick up his brother and show up. During trial, police testified to assault and the defendant and his brother denied that there was a party, denied that they were drinking, and denied the assault. Prejudice found even though the other witnesses contradicted the defense testimony at trial that there was no party and no drinking because they were consistent in the major point that the defendant was not guilty of assault and because the defendant and his brother may not have testified or would have testified differently if these witnesses had been available. Court gave the state the option of resentencing on the present conviction or new trial on the prior conviction.

United States v. Franks, 230 F.3d 811 (5th Cir. 2000). Counsel ineffective in sentencing for armed bank robbery and using a firearm in connection with a crime of violence for failing to object to enhancement for an express threat of death where, under sentencing guidelines, offense level enhancement for an express threat of death may not be applied where defendant is also convicted on charge of using firearm in connection with the crime, if the threat of death is related to the possession, use, or discharge of the firearm. Defendant was sentenced to 74 months on armed

***Capital Case**

robbery charge, which was three months more than that actually allowed. Thus, prejudice found because there was a specific, demonstrable increase in sentence.

1999: *Prou v. United States*, 199 F.3d 37 (1st Cir. 1999). Counsel ineffective in drug case for failing to challenge the enhancement of sentence based on a prior drug conviction because the government's notice was untimely. At the time, the government was required to give notice prior to trial, which included jury selection. Notice was given in this case 19 days after the jury was empaneled. Counsel challenged the enhancement on other grounds but not on timeliness. The issue was not raised on direct appeal. Petitioner raised in a pro se motion under § 2255. Cause and prejudice found for the default because the same counsel represented the defendant on appeal. Counsel's conduct was deficient because there was no plausible reason for failing to challenge enhancement based on untimeliness. Prejudice found because the sentence given exceeded the authority of the court, due to the untimely enhancement which was jurisdictional, and surpassed the proper guideline by almost two years. Sentence vacated and resentencing ordered.

1997: *United States v. Soto*, 132 F.3d 56 (D.C. Cir. 1997). Trial counsel was ineffective in drug case for failing to specifically request a downward departure from the sentencing guidelines based on minimal or minor participation despite fact that facts appear to warrant such a departure.

Patrasso v. Nelson, 121 F.3d 297 (7th Cir. 1997). Counsel ineffective in sentencing of attempted murder and aggravated battery case because counsel by his own admission did absolutely nothing in preparation for or during the sentencing. It was so bad that the defendant personally had to object to prosecutor's misstatement of a prior conviction and defense counsel only argued a couple of sentences because the judge told him he should. Court used *Cronic* standard of complete denial of counsel and presumed prejudice.

1996: *United States v. Breckenridge*, 93 F.3d 132 (4th Cir. 1996). Remanded for evidentiary hearing to determine whether prior offenses were related, but declared that if they are trial counsel was ineffective for failing to raise this issue to prevent defendant from being sentenced as a career criminal. Ordered district court to vacate sentence if prior offenses related.

1994: *United States v. Castro*, 26 F.3d 557 (5th Cir. 1994). Trial counsel ineffective for failing to seek judicial recommendation against deportation even though it could not be said with certainty that the sentencing court would have granted relief.

1993: *Prichard v. Lockhart*, 990 F.2d 352 (8th Cir. 1993). Defendant denied effective assistance of counsel when counsel failed to object to court's use of a prior out of state marijuana conviction for enhancement of sentence in violation of a statute prohibiting the use of such priors.

***Capital Case**

- 1992:** *Tucker v. Day*, 969 F.2d 155 (5th Cir. 1992). At resentencing hearing, court appointed counsel failed to provide any assistance to defendant at all and the sentencing judge based the resentencing entirely on his familiarity with the original sentencing hearing. Per se violation despite inability to show prejudice.
- 1991:** *United States v. Headley*, 923 F.2d 1079 (3d Cir. 1991). Trial counsel ineffective for failing to argue that defendant was entitled to downward adjustment in base-offense level under Sentencing Guidelines on basis that she was a minimal or minor participant in criminal activity.
- 1989:** *United States v. Ford*, 918 F.2d 1343 (8th Cir. 1989). Counsel ineffective for not objecting to base offense level at sentencing hearing on ground of defendant's acceptance of responsibility which could have lowered the sentence by over three years.
- Harrison v. Jones*, 880 F.2d 1279 (11th Cir. 1989). Counsel was ineffective during the sentencing phase of defendant's trial by failing to object to the use of one prior conviction resulting from a plea of nolo contendere and another prior conviction for an offense that relied on the nolo contendere conviction. Under state law, admission of nolo contendere conviction was improper. As a result, inmate received enhanced punishment under the state Habitual Felony Offender Act.
- 1987:** *Cook v. Lynaugh*, 821 F.2d 1072 (5th Cir. 1987). Trial counsel ineffective for failing to investigate whether prior conviction used to enhance defendant's sentence was assisted by counsel because facts of case would have alerted reasonably competent attorney to issue. If counsel had investigated and raised issue, there would have been no conviction usable to enhance defendant's sentence.
- Burley v. Cabana*, 818 F.2d 414 (5th Cir. 1987). Trial counsel ineffective for failing to inform judge of sentencing alternative under state youthful offender act when judge mistakenly believed that life imprisonment was only sentence available and stated his opinion that sentence was too harsh.

B. U.S. District Court Cases

- 2000:** *Hill v. United States*, 118 F. Supp. 2d 910 (E.D. Wis. 2000). Counsel ineffective in sentencing in possession of firearm case because counsel failed to contest a sentence enhancement for armed career criminal status when circumstantial evidence revealed that defendant had received discharge certificates from previous felonies that contained no firearm restrictions. Prejudice found because without the improper enhancement the maximum sentence would have been 10 years rather than 15 years.
- 1995:** *Cabello v. United States*, 884 F. Supp. 298 (N.D. Ind. 1995). Trial counsel ineffective in sentencing for not objecting to the erroneous application of the career offender provision of the Sentencing

***Capital Case**

Guidelines to petitioner's case which resulted in sentence that was too long. Habeas relief granted despite procedural default of not raising on appeal because trial counsel was also appellate counsel.

- 1994:** *Wogan v. United States*, 846 F. Supp. 135 (D. Me. 1994). Trial counsel ineffective for failing to advise defendant that government could appeal downward departure of sentence and obtain resentencing based on 750 grams of heroin. Based on counsel's advice that he would get the same sentence as his co-conspirator, defendant waived his right to testify to challenge the finding of 750 grams even though defendant's testimony could have reduced it to only 50 grams.
- 1991:** *Butler v. Sumner*, 783 F. Supp. 519 (D. Nev. 1991). Trial counsel ineffective during sentencing for complete failure to present argument or evidence in mitigation. Defendant had been convicted of numerous sexual assaults on a young boy and was sentenced to maximum possible (21 consecutive life sentences) even though state didn't ask for maximum.
- 1988:** *Gardiner v. United States*, 679 F. Supp. 1143 (D. Me. 1988). Trial counsel ineffective in cocaine distribution case where counsel completely failed to speak on the defendant's behalf in sentencing or present any evidence in mitigation. Prejudice presumed.
- 1987:** *Janvier v. United States*, 659 F. Supp. 827 (N.D.N.Y. 1987). Counsel ineffective for failing to petition the sentencing court to issue a recommendation against deportation because counsel was ignorant of the deportation consequence.

C. Military Cases

- 2002:** *United States v. Saintau*, 56 M.J. 888 (Army Ct. Crim. App. 2002), *review granted*, 60 M.J. 311 (2004). Counsel ineffective in rape, robbery, and adultery case for conceding that the defendant's pre-service Florida pleas of nolo contendere "with adjudication withheld" were civil convictions and for failing to investigate and present mitigation evidence. If counsel had researched, counsel would have learned that the nolo contendere pleas would have been inadmissible if the defendant were being sentenced in Florida and they were, therefore, inadmissible under R.C.M. 1001(b)(3), which looks to the law of the jurisdiction to determine whether prior convictions are "convictions" admissible in sentencing. Instead of researching this issue, counsel conceded the convictions but simply argued undue prejudice. Counsel were also ineffective for failing to prepare and present mitigation evidence, which would have included volunteer work, evidence that the defendant was an exemplary soldier, and a good father.
- 1998:** *United States v. Boone*, 49 M.J. 187 (C.A.A.F. 1998) (*affirming* 44 M.J. 742 (Army Ct. Crim. App. 1996)). Counsel ineffective in sentencing phase of rape case where appointed military defense counsel had developed available evidence from members of the chain of command who would have

***Capital Case**

testified to rehabilitative potential and from defendant's uncle who was a Major in the Air Force who would have testified concerning the defendant's background, upbringing, and peaceful nature. When civilian defense counsel was retained, military counsel turned over notes of interviews but there was no discussion of sentencing witnesses between counsel and the available mitigation evidence was not presented.

1986: *United States v. Howes*, 22 M.J. 704 (A.C.M.R. 1986). Trial counsel ineffective in possession of marijuana with intent to distribute case where the defense produced three witnesses, during the sentencing hearing, who recommended that he be retained in the service. During cross-examination of two of these witnesses, the prosecution asked them if they were aware that the accused had been previously enrolled in the Army's Alcohol and Drug Abuse Prevention and Control Program. Information concerning participation in this program is privileged and, pursuant to Congressional mandate and an Army regulation, cannot be used in a court-martial. Thus, counsel was ineffective for failing to object to this line of questioning.

D. State Cases

2003: *Turner v. State*, 578 S.E.2d 570 (Ga. Ct. App. 2003). Counsel was ineffective in drug distribution case for failing to object to the use of a prior conviction in sentencing when the defendant had received no notice it would be used. The defendant pled guilty and the prosecutor recommended a sentence of 15 years with four or five to serve, but the trial court had been provided with a probation report that revealed two prior convictions for selling drugs. Based on this, the judge rejected the prosecutor's recommendation and sentenced the defendant to 20 years with 10 years to serve. State law provides that only such evidence in aggravation as the state has made known to the defendant prior to trial shall be admissible. The court has interpreted this statutory provision to prohibit use of an undisclosed probation report showing prior convictions in sentencing. Counsel's conduct was deficient in failing to object to the state's use of the undisclosed probation report in sentencing. The defendant was prejudiced "because the length of his sentence was fixed based in part on the improper evidence."

State v. Washington, 68 P.3d 134 (Kan. 2003). Counsel was ineffective in sentencing hearing for premeditated murder. Following the trial, initial counsel was suspended from the practice of law and relieved by the trial court. New counsel was appointed and requested a copy of the trial transcript, but that was denied. She attempted several times to meet with the prior counsel but he did not meet with her. She did nothing more to prepare for sentencing even though she had four months to do so. Although ineffectiveness was not raised on appeal (just a general unfairness of the sentencing proceedings argument, the court addressed the issue *sua sponte*. Counsel's conduct was deficient because counsel apparently did not read the court file or talk to defense witnesses that had testified in the trial to learn of the defendant's PTSD. She also was aware even of the statutory provisions

***Capital Case**

that required a 50 year sentence without parole. She presented no evidence and made no argument in sentencing. Prejudice found because “counsel simply abdicated her position with the excuse that she had not been given a trial transcript.” *Id.* at 159.

2000: *West v. Waters*, 533 S.E.2d 88 (Ga. 2000). Counsel ineffective in sentencing in sale of cocaine case for failing to object to a prior conviction presented in aggravation of sentence without timely notice, since statute requires “clear notice” prior to the jury being sworn for trial. Prejudice found even when defense counsel was aware of conviction. [This opinion reverses prior Georgia cases to the contrary.]

State v. Jones, 769 So.2d 28 (La. Ct. App. 2000). Counsel ineffective in sentencing in drug case for failing to object that deferred adjudication probation, which was not a valid conviction under state law, should not have been used as predicate conviction for sentence enhancement under Habitual Offender Law.

Gary v. State, 760 So. 2d 743 (Miss. 2000). Counsel ineffective in armed robbery case for failing to argue for sentencing under Youth Court Act. Defendant was 17 years old with no priors and did not possess gun during robbery (as he codefendant did). State law did not require the court to sentence under the youth act but did require the court to consider it. Counsel’s conduct in failing to request youth sentencing was deficient and prejudice was found because the defendant was sentenced to 45 years when he could have gotten only a year under the Youth Act if the court had accepted the argument.

Milburn v. State, 15 S.W.3d 267 (Tex. App. 2000). Counsel ineffective in drug case for failing to prepare and present mitigation evidence. Counsel conducted no investigation. Numerous witnesses were available to testify that defendant was a good father to his daughter who had severe medical problems and that he was a good employee. Counsel presented no evidence and made only a benign argument responding to the state’s argument that the defendant was previously on probation, that he had not been rehabilitated, and that he should be given 30 years and a \$50,000 fine. Jury gave 40 years and \$75,000 fine. Court found that this was a close call of constructive denial of counsel because essentially no different that if trial court had prohibited the defense from presenting mitigation in light of strong state case. Prejudice found “even though it is sheer speculation that character witnesses in mitigation would have in fact favorably influenced the jury’s assessment of punishment,” *Id.* at 271, because any mitigation better than none and the jury gave even harsher sentence than state asked for.

1999: *Kellett v. State*, 716 N.E.2d 975 (Ind. Ct. App. 1999). Counsel ineffective in DUI causing serious injury case for failing to object to the admission of a ledger in sentencing or to adequately cross-examine the witness concerning facial errors in the ledger. The injured victim’s mother prepared

***Capital Case**

the ledger to show uncompensated medical bills and testified that the total was approximately \$140,000. State allowed the trial court to order restitution of the actual costs and the court did so based solely on the mother's testimony and the ledger. Review of the ledger, however, would have revealed that several charges for over \$30,000 and \$10,000 were duplicated and that there were mathematical errors in the document. While the court did not find deficient conduct solely related to admission of the ledger or solely related to failure to cross-examine the witness, the court found that counsel's conduct was deficient in failing to do one or the other and the defendant was prejudiced.

State v. Robinson, 744 So. 2d 119 (La. Ct. App. 1999). Counsel ineffective in armed robbery case for failing to properly move to reconsider the sentence on the basis of excessiveness following the trial. Defendant was convicted of armed robbery for stealing tennis shoes and was sentenced to 30 years (without parole) out of a possible 5 to 99 years. Under state law, counsel can raise excessive sentence issue in motion to reconsider either orally at the time of sentencing or in written motion following sentencing. Counsel made no oral motion and filed a form motion afterwards but did not check the block on excessive sentence. He instead checked the block for statute being unconstitutional with respect to maximum or minimum punishment, which appellate counsel conceded was frivolous in this case. Failure to raise excessiveness of sentence in the motion to reconsider waives the issue for appeal. Thus, excessiveness issue procedurally barred. Nonetheless, the court vacated the sentence on the basis of ineffective assistance of counsel. The trial court stated no basis for sentencing the defendant to 30 years, other than guilt and that he lied on the witness stand. Likewise, the facts did not support such a harsh sentence. The defendant was 19 years old and had no prior convictions or arrests. Counsel should have moved to reconsider because the sentence was excessive on this record.

Davis v. State, 336 S.C. 329, 520 S.E.2d 801 (1999). Counsel ineffective for failing to object to trial court's consideration of exercise of right to trial in sentencing the defendant to ten years for distribution of crack. Following sentence, counsel moved to reconsider on the basis that several similarly situated defendants got lesser sentences. The court said that the other sentences were lower because the other defendants plead guilty. Because it is an abuse of discretion for the trial court to consider the defendant's exercise of his right to trial as an aggravating factor, counsel was ineffective for failing to object.

Scott v. State, 334 S.C. 248, 513 S.E.2d 100 (1999). Counsel ineffective in drug trafficking case for failing to object to the court considering a 1987 misdemeanor conviction for simple possession and sentencing the defendant as a second offender under the statute. The 1987 charge was actually a bond forfeiture for failure to appear and not a "conviction" for purposes of sentencing under the drug statute. A bond forfeiture may be considered a "conviction" only when the legislature specifically provides that the two are equivalent. Because the legislature has done so in other

***Capital Case**

contexts, the court infers the legislature did not intend for a bond forfeiture to be the equivalent of a conviction in this context. The defendant was prejudiced because the maximum sentence for a first offense is 10 years and for a second offense 30 years. The defendant was sentenced to 30 years.

1998: *Trinh v. State*, 974 S.W.2d 872 (Tex. App. 1998).¹⁰ Counsel ineffective in possession of weapon case because counsel filed a motion for probation and to have the jury assess punishment which she intended to amend after conviction to elect that the trial court assess punishment because Trinh would have been ineligible for probation from a jury due to a previous felony offense. Counsel was unaware, however, that the sentencing election could not be withdrawn after the verdict without the State's consent. Thus, the defendant was denied any possibility of probation.

State v. Anderson, 588 N.W.2d 75 (Wis. Ct. App. 1998). Counsel ineffective in child sexual assault case for failing to seek an adjournment of the sentencing hearing to permit him to finish reviewing the presentence investigation report with the defendant. Counsel received the report only 30 minutes prior to the hearing and notified the court that the defendant objected to the report because the victims' had recanted some of the information included, and that some of the allegations of sexual abuse in the report had not been substantiated. The trial court offered to allow the defendant to withdraw his pleas or to adjourn the hearing in order to allow the defense more time to prepare. The defense declined both offers. Counsel only noted that the defendants pleas were only two fondling two children as opposed to the more aggravated allegations of sexual abuse in the PSI. The appellate court held that counsel was ineffective in failing to seek the adjournment in order to prepare to refute the inaccurate information and to argue the defendant's theory that much of the sexual abuse was done by others. The court found prejudice because it was clear from the trial court's statements that the court relied on much of the disputed information in sentencing the defendant to 80 years out of a possible 100 year sentence.

1997: *State v. Jones*, 700 So. 2d 1034 (La. Ct. App. 1997). Counsel ineffective in a case where the state sought habitual offender status because counsel did not file the required written response denying the allegations which would have placed burden on state to prove. Likewise, counsel did not object to the state's documentary evidence which failed to prove a required element that the defendant had been advised of his privilege against self-incrimination prior to pleading guilty to the prior offenses.

¹⁰Prior to *Hernandez v. State*, 988 S.W.2d 770 (Tex. Crim. App. 1999) (en banc), Texas did not apply the *Strickland* standard in non-capital sentencing hearings. Texas previously applied a state law standard of "reasonably effective assistance," *Ex parte Duffy*, 607 S.W.2d 507 (Tex. Crim. App. 1980), in non-capital sentencing hearings.

***Capital Case**

Oliva v. State, 942 S.W.2d 727 (Tex. App. 1997). Counsel ineffective in sentencing because counsel failed to object to the prosecutor's closing argument which referred to defendant's lack of remorse and failure to testify in the sentencing despite the fact that defendant testified in the guilt-or-innocence phase.

1996: *People v. Siedlinski*, 666 N.E.2d 42 (Ill. App. Ct. 1996). Counsel ineffective for failing to request sentencing credit against fine where statute allowed credit of \$5/day for each day of pretrial confinement.

Glivens v. State, 918 S.W.2d 30 (Tex. App. 1996). Counsel ineffective in sentencing of aggravated robbery case where extraneous unadjudicated prior robbery admitted during guilt phase for limited purpose of establishing identity, motive, etc., but counsel did not object to consideration of the extraneous offense in sentencing and the record does not reflect that judge did not consider. Law changed in 1993, however, and under current law not applicable here extraneous unadjudicated offenses could be considered in sentencing.

People v. Brasseaux, 660 N.E.2d 1321 (Ill. App. Ct. 1996). Counsel ineffective where defendant was seeking to attack sentences and filed pro se motion to reconsider sentences but counsel did not contact defendant or conduct any investigation prior to the hearing at which the defendant was not present.

1995: *Kucel v. State*, 907 S.W.2d 890 (Tex. App. 1995). Counsel ineffective in sentencing for aggravated sexual assault on child for arguing that defendant would not be eligible for parole for at least two years when it was actually fifteen years. Counsel also ineffective for failing to correct error or object to erroneous jury charge even after prosecutor pointed out error.

Thomas v. State, 923 S.W.2d 611 (Tex. App. 1995). Counsel ineffective in sentencing for organized crime activity for failing to object to evidence concerning extraneous unadjudicated crimes of threatening police officers, stalking police officers and the prosecutor, and soliciting the murder of police officers. [Statute has since been amended effective 9/1/93 to allow evidence of extraneous unadjudicated crimes in sentencing.]

Durst v. State, 900 S.W.2d 134 (Tex. App. 1995). Counsel ineffective in sentencing after guilty plea for possession of marijuana for eliciting during direct examination of defendant testimony concerning six other unadjudicated extraneous marijuana hauling trips which would have been inadmissible otherwise under the state law at the time of this trial.

1994: *Ware v. State*, 875 S.W.2d 432 (Tex. App. 1994). Trial counsel ineffective for failing to offer evidence in jury sentencing to prove that the defendant had no prior felony convictions (or ask the

***Capital Case**

defendant that question during his testimony) and was thus eligible for probation where counsel sought probation and jury asked for information on probation eligibility and unsuccessfully attempted to probate portion of sentence.

1993: *Craig v. State*, 847 S.W.2d 434 (Tex. App. 1993). Counsel ineffective in murder case for jury sentencing purposes where counsel: did not object to state argument in guilt phase that jurors now understand why prosecutors ask for certain verdicts in drug cases in order to avoid these tragedies; elicited damaging information about defendant; argued in guilt phase that defendant and “bandito” friends not looking for victim when there was no evidence of “bandito” friends; argued in sentencing that the verdict would not have any deterrent effect on any participants including defendant; elicited testimony that defendant bragged about killing; suggested in argument that there was no favorable evidence for defense and that’s why defense called no witnesses; misquoted witness who said defendant said victim was dead and told jury that defendant said “I killed or I shot him”; and during guilt argument summarized evidence in a state-oriented fashion.

1992: *Commonwealth v. Batterson*, 601 A.2d 335 (Pa. Super. Ct. 1992). Counsel ineffective for failing to move for reconsideration of sentence applying deadly weapon enhancement because a motor vehicle is not a “weapon.”

1991: *Jenkins v. State*, 591 So. 2d 149 (Ala. Crim. App. 1991). Trial counsel ineffective for failing to investigate and object to admission of prior Florida convictions which were all based on nolo contendere pleas and were thus improperly admitted under Alabama law for purpose of sentence enhancement under habitual offender act.

Weaver v. Warden, 822 P.2d 112 (Nev. 1991). Counsel ineffective in robbery case for failing to present evidence that defendant had PTSD from Vietnam service.

Chubb v. State, 303 S.C. 395, 401 S.E.2d 159 (1991). Trial counsel ineffective in burglary case, where a burglary conviction mandated a life sentence unless the jury recommended mercy, for failing to present mitigation evidence or argue for mercy during the guilt phase because of her erroneous expectation that a separate sentencing proceeding would be held.

Ex parte Canedo, 818 S.W.2d 814 (Tex. Crim. App. 1991). Counsel ineffective for advising defendant in aggravated sexual assault on child case to request judge alone sentencing based on belief that defendant was eligible for shock probation when in fact judge could not give shock probation but jury could have assessed probation.

Ex parte Felton, 815 S.W.2d 733 (Tex. Crim. App. 1991). Trial counsel ineffective for failing to determine that a prior conviction used to enhance punishment from 5 to 15 years was invalid under

***Capital Case**

state law. The prior was robbery by firearm in 1961 which was a capital offense. State law prior to 1965 provided that the court could not accept a guilty plea to a capital offense unless the state affirmatively waived the capital element which they didn't in this case.

Schofield v. West Virginia Department of Corrections, 406 S.E.2d 425 (W. Va. 1991). Trial counsel ineffective in murder case for failing to present mitigation evidence concerning defendant's limited mental ability, her history of social and emotional problems, and her family background, and argue for mercy recommendation where without recommendation there was a mandatory life without parole sentence. Counsel did not argue mercy because defendant insisted she was guilty only of manslaughter and counsel feared that to argue for mercy recommendation would be considered by jury as a concession of guilt to murder.

1990: *Ex parte Walker*, 794 S.W.2d 36 (Tex. Crim. App. 1990). Trial counsel ineffective for failing to file in timely manner the defendant's motion electing to have the jury assess punishment.

1989: *People v. Barocio*, 264 Cal. Rptr. 573 (Cal. Ct. App. 1989). Trial counsel ineffective for failing to inform the defendant of his right to request a recommendation against deportation at his sentencing hearing because counsel was unaware of the recommendation possibility.

Commonwealth v. Lykus, 546 N.E.2d 159 (Mass. 1989). Counsel ineffective in murder, extortion, and kidnaping case for failing: to argue defendant's employment history, charitable activities, and civic contributions; to call witnesses on defendant's behalf; and to argue for concurrent sentences.

Commonwealth v. Kozarian, 566 A.2d 304 (Pa. Super. Ct. 1989). Counsel ineffective for failing to preserve claim that sentencing guidelines were improperly applied to enhance punishment.

Commonwealth v. Albert, 561 A.2d 736 (Pa. 1989). Counsel ineffective for filing brief in support of petition for post-conviction adjustment of sentence which was "completely lacking in substance."

Commonwealth v. Arthur, 559 A.2d 936 (Pa. Super. Ct. 1989). Counsel ineffective for failing to raise and preserve issue of legality of sentence which ordered uncompensated confiscation and destruction of defendant's firearms collection as it had never been claimed that the firearms were used in any illegal act.

Ex parte Walker, 777 S.W.2d 427 (Tex. Crim. App. 1989). Trial counsel ineffective for not objecting during sentencing to otherwise inadmissible evidence of the defendant's prior aggravated robbery conviction and defendant's involvement in three other aggravated robberies.

***Capital Case**

Cooper v. State, 769 S.W.2d 301 (Tex. App. 1989). Counsel ineffective for failing to object to void conviction used for enhancement, allowing defendant to testify about it which opened door to 14 prior convictions from other jurisdictions which would not have been presented otherwise, and failing to object to inadmissible portion of penitentiary packet regarding another conviction.

1988: *State v. Brown*, 525 So. 2d 454 (Fla. Dist. Ct. App. 1988). Trial counsel ineffective per se for failure to advise defendant that he could elect to be sentenced under sentencing guidelines after guilty pleas.

People v. Sagstetter, 532 N.E.2d 1029 (Ill. App. Ct. 1988). Counsel ineffective for failing to assert therapist-recipient privilege with regard to statements made by defendant at suggestion of therapist which were admitted in sentencing hearing.

Gallegos v. State, 756 S.W.2d 45 (Tex. App. 1988). Trial counsel ineffective for failing to inform the defendant that under state law the jury but not the trial court could grant probation prior to defendant electing judge sentencing.

Turner v. State, 755 S.W.2d 207 (Tex. App. 1988). Trial counsel ineffective for failing to inform the defendant that under state law the jury but not the trial court could grant probation prior to defendant electing judge sentencing.

Stone v. State, 751 S.W.2d 579 (Tex. App. 1988). Trial counsel ineffective for advising the defendant that trial court could grant probation when only jury could prior to defendant electing judge sentencing.

1987: *People v. Plager*, 242 Cal. Rptr. 624 (Cal. Ct. App. 1987). Trial counsel ineffective for failing to advise the defendant that the state could not have established that the alleged prior felony convictions were residential burglaries as required to be adjudicated serious felony for enhancement purposes, and counsel even stipulated to the factual basis for the alleged priors.

Medeiros v. State, 733 S.W.2d 605 (Tex. App. 1987). Trial counsel ineffective for failing to inform the defendant that under state law the jury but not the trial court could grant probation prior to defendant electing judge sentencing.

1986: *Steffans v. Keeney*, 728 P.2d 948 (Or. Ct. App. 1986). Counsel ineffective for failing to object to orders for restitution and costs when sentenced to long term confinement and failing to object to order in present case to pay restitution previously ordered in three earlier cases as a condition of probation.

***Capital Case**

1985: *State v. Stacey*, 482 So. 2d 1350 (Fla. 1985). Trial and appellate counsel ineffective for failing to research and recognize that trial court's retention of jurisdiction over first one third of 99 year sentence was a violation of ex post facto clause because robbery occurred before effective date of statute which allowed retention of jurisdiction.

State v. Davidson, 335 S.E.2d 518 (N.C. Ct. App. 1985). Trial counsel ineffective in kidnaping and armed robbery case for failing to argue in the defendant's favor, stressing counsel's status as appointed counsel, and making arguments that were almost exclusively negative to the defendant.

Watson v. State, 287 S.C. 356, 338 S.E.2d 636 (1985). Trial counsel ineffective in burglary case, where a burglary conviction mandated a life sentence unless the jury recommended mercy, for failing to advise defendant who pled guilty that he had the right to have a jury impaneled following the guilty plea to consider a recommendation a mercy.

Snow v. State, 697 S.W.2d 663 (Tex. App. 1985). Trial counsel ineffective for failing to request a sentencing instruction on probation and asking for prison sentence based on erroneous belief that defendant was not entitled to probation.

***Capital Case**

IV. ADVISING CLIENT

A. GUILTY PLEA AFTER INADEQUATE INVESTIGATION OR RESEARCH

1. U.S. Court of Appeals Cases

- 1997:** *United States v. Kauffman*, 109 F.3d 186 (3d Cir. 1997). Counsel ineffective in advising client to plead guilty to being a felon in possession of a firearm where the defendant had been institutionalized numerous times for bipolar disorder, had been released only a few days prior to the offense against the doctor's advice, and a psychiatrist wrote the attorney a letter stating that the defendant was clearly psychotic at the time of the offense. Nonetheless, the attorney never investigated or talked to the psychiatrist and advised the defendant to plead guilty because he did not think there was a good chance of succeeding on an insanity defense. "Only if [counsel] had investigated [petitioner's] long history of serious mental illness, and conducted some legal research regarding the insanity defense could his counseling be characterized as 'strategy.'" 109 F.3d at 190.
- 1995:** *Esslinger v. Davis*, 44 F.3d 1515 (11th Cir. 1995). Trial counsel ineffective for recommending that defendant enter a guilty plea without having first investigated defendant's prior criminal history. Defendant plead guilty to a felony subject to enhanced penalty under state habitual offender law. He would not have entered guilty plea if he had known of enhanced punishment.
- 1994:** **Agan v. Singletary*, 12 F.3d 1012 (11th Cir. 1994). Counsel ineffective for failing to investigate prior to guilty plea and death sentence. If counsel had investigated he would have discovered that defendant had a long history of psychosis (schizophrenia) and was taking psychotropic drugs at the time of the plea and the sentence. Court found that defendant may have been incompetent at time of plea and sentencing.
- 1990:** *Bouchillon v. Collins*, 907 F.2d 589 (5th Cir. 1990). Trial counsel ineffective for failing to investigate defendant's competency to stand trial and or viability of insanity defense prior to entry of guilty plea when attorney was aware that defendant had been in mental institutions, but did not request a mental health evaluation. Investigation would have revealed that defendant had a long history of mental problems and substance abuse and was repeatedly diagnosed as suffering from PTSD.
- 1984:** *Thomas v. Lockhart*, 738 F.2d 304 (8th Cir. 1984). Counsel ineffective in forcible rape case for failing to adequately investigate and advise the defendant prior to the defendant's guilty plea. The plea was held only a week after appointment of counsel in exchange for the state's recommendation of a 30 year sentence. Counsel's conduct was deficient in numerous ways. First, counsel failed to move for a continuance or withdraw "where the circumstances suggested an unseemly desire by the

***Capital Case**

state trial judge to rush resolution of the case.” Second, counsel did not investigate prior to advising the defendant to plead guilty, even though the defendant maintained his innocence, named three alibi witnesses, and disclosed to counsel a history of mental problems. The investigation “consisted of reviewing the investigate file of the prosecuting attorney” only. *Id.* at 308. Third, counsel never explained the presumption of innocence or the state’s burden of proof. Fourth, counsel led the defendant and his family to believe that a trial would be futile with the black defendant accused of raping a white woman. Counsel made statements indicating his own racial prejudice and indicating that the defendant’s testimony would not be believed based on race. Fifth, counsel never investigated the recent case on which the prosecutor based his 30 year recommendation. Investigation would have revealed that that case also involved a burglary and theft and the defendant had no mental illness history. “[J]ust as hindsight cannot be used to condemn counsel’s performance, it cannot be used to justify it.” *Id.* at 309. Prejudice established because “[t]here is a ‘reasonable probability that, but for [the various failures of the attorney], the result of the [plea proceedings] would have been different.’” *Id.* at 307 (quoting *Strickland*).

2. State Cases

2003: *Cordes v. State*, 842 So. 2d 874 (Fla. Dist. Ct. App. 2003). Counsel was ineffective in felony driving-related charges case for advising the defendant to enter a plea of no contest to five felony charges. The charges ranged in date from 1990 to 1998 with one charge being a misdemeanor and five being felony charges. The defendant, relying on counsel’s advice, entered an open plea of no contest to all of the charges. If counsel had adequately investigated or pursued a defense of statute of limitations, two of the felony charges would have been prohibited by the statute of limitations. One of the felony charges was wrongly charged as a felony and this count was voluntarily dismissed by the state in post-conviction. With respect to the remaining two felony charges, the record was insufficient to establish whether these charges were prohibited by the statute of limitations, but these charges also arguably were prohibited. Counsel’s conduct was deficient because the face of the information revealed the statute of limitations problems. The defendant was prejudiced because he would not have entered a plea of no contest to the felony charges had counsel investigated and adequately advised him.

1998: *Melton v. State*, 987 S.W.2d 72 (Tex. App. 1998). Counsel ineffective in plea to armed robbery case for failing to adequately investigate prior to advising the defendant to plead guilty. Defendant was arrested and told counsel he wanted to plead not guilty because he was innocent. Based on state representation that there “might” be a videotape, counsel informed defendant either that there was a videotape or, at a minimum, might be a videotape with the defendant on it committing the robbery. Because the defendant was an alcoholic with an extensive history of black outs, he took the defense counsel at his word and assumed that he must be guilty, so he pled guilty. If counsel had investigated, however, he would have discovered that there was no videotape at all and no indication

***Capital Case**

that there ever had been. Prejudice found because defendant would not have plead guilty, as is evidenced by his insistence on not guilty plea until counsel told him of alleged videotape.

1996: *State ex rel. Stroger v. Trent*, 469 S.E.2d 7 (W. Va. 1996). Counsel ineffective in murder case failing to adequately investigate the circumstances surrounding the defendant's confession and failing to move to suppress the statement prior to advising the defendant to plead guilty.

1995: *Copas v. Commissioner of Correction*, 662 A.2d 718 (Conn. 1995) (*affirming* 621 A.2d 1378 (Conn. App. Ct. 1993)). Counsel ineffective in murder case for advising defendant to plead guilty without an agreement. Counsel was a self-described tax and corporate law specialist who did not understand (and thus did not advise defendant) that a mental status defense could be presented which did not rise to the level of insanity. Counsel knew of defendant's long history of mental, emotional, and substance abuse problems but did not request an independent evaluation which would have revealed that defendant suffered from alcohol and cannabis abuse, atypical impulse control and a mixed personality disorder which caused a severely diminished capacity to control his behavior at the time of the offense. The lower court had also found counsel ineffective in sentencing for failing to point out inconsistencies in two mental health evaluations conducted at different times in the proceedings and failing to present mitigation evidence or family member testimony on behalf of defendant.

State v. Carr, 665 So. 2d 1234 (La. Ct. App. 1995). Counsel ineffective in unauthorized use of vehicle case for advising client already on probation to plead guilty without conducting an investigation which would have revealed that there was no evidence against the defendant other than the fact that he was a passenger in the vehicle which was insufficient to sustain a conviction.

Diaz v. State, 905 S.W.2d 302 (Tex. App. 1995). Counsel ineffective in drug case for not interviewing witnesses and arresting officer; accepting the approximate weight and contraband nature of substance without an independent examination; advising the defendant to plead guilty without a deal after the state rejected plea offer; telling defendant he would get probation (got 54 years); and not personally explaining various waivers and documents to non-English speaking defendant despite telling court that he had.

1993: *People v. Andretich*, 614 N.E.2d 489 (Ill. App. Ct. 1993). Counsel ineffective for failing to investigate prior to advising defendant to plead guilty to theft when investigation would have revealed that defendant's actions did not amount to a criminal offense.

1991: *Williams v. State*, 596 So. 2d 620 (Ala. Crim. App. 1991). Trial counsel ineffective where he did not meet with client until day before scheduled trial, never discussed case with client, and did not prepare to try but did not request continuance until morning of trial. When continuance was denied,

***Capital Case**

counsel told defendant to sign forms to enter plea agreement without explaining forms and told defendant that if he did not sign forms counsel would not represent him.

Smith v. State, 565 N.E.2d 1114 (Ind. Ct. App. 1991). Counsel ineffective in two thefts case for failing to investigate the availability of the two alleged victims and inform the defendant prior to his guilty plea that one victim was dead and the other could not be located.

Haynes v. State, 790 S.W.2d 824 (Tex. App. 1990). Trial counsel ineffective in evading arrest case for failing to investigate prior to defendant's nolo contendere plea when defendant wanted to go to trial and investigation would have revealed witnesses who would have cast doubt on whether police had probable cause to stop the defendant's vehicle.

1989: *State v. Taylor*, 535 N.E.2d 161 (Ind. Ct. App. 1989). Counsel ineffective in murder case for advising defendant that possible sentences were only 50 years or life which induced defendant to plead guilty under 50 year deal. Actual minimum sentence was 30 years. Counsel also failed to interview key state witness when he would have discovered that state witness had recanted and said he lied in statement because cops threatened to charge with murder.

****Leatherwood v. State***, 539 So. 2d 1378 (Miss. 1989). Counsel ineffective for advising defendant to plead guilty based on belief that state would be limited in sentencing and could not present evidence of offenses which was an erroneous interpretation of law.

1988: *Sherrill v. State*, 772 S.W.2d 60 (Tenn. Crim. App. 1988). Counsel ineffective when counsel did not meet with the defendant until 15 minutes prior to trial and then advising defendant to plead guilty without ever consulting with defendant or investigating the case.

***Capital Case**

B. ERRONEOUS ADVICE ON SENTENCING OR COLLATERAL CONSEQUENCES THAT LEADS TO PLEA

1. U.S. Court of Appeals Cases

2002: *United States v. Couto*, 311 F.3d 179 (2d Cir. 2002). Counsel ineffective in charge of bribing a public official plea case for affirmatively misrepresenting the deportation consequences of guilty plea. The defendant was charged with attempting to bribe an INS Agent in order to secure a green card. Although a guilty plea meant virtually automatic and unavoidable deportation, counsel advised the defendant that there were things that could be done to prevent her from being deported if she entered a guilty plea to a felony, including asking the judge for a letter recommending against deportation. Although the rule in the circuit remains undetermined on whether an attorney is incompetent for failing to inform a defendant of the deportation consequences of a plea, the court held that an affirmative misrepresentation by counsel is clearly objectively unreasonable. The court also found prejudice because the facts of this case clearly demonstrate that the defendant would not have plead guilty had she known of the deportation consequences.

2000: *United States v. McCoy*, 215 F.3d 102 (D.C. Cir. 2000). Counsel ineffective in drug case for advising client that he would only face 188 to 235 months under the Sentencing Guidelines if he accepted the government's plea, when in fact he faced 262 to 327 months. Defendant prejudiced because he would not have pleaded guilty if he had been given the correct information and he had legally cognizable defenses to present if he proceeded to trial.

1998: *United States v. Gordon*, 156 F.3d 376 (2d Cir. 1998). Counsel ineffective for failing to properly advise the defendant during plea negotiations of the sentence he faced. The defendant was charged with multiple counts of aiding and abetting false statements to licensed firearms dealers and receipt or possession of firearms by a convicted felon. Trial counsel advised the defendant that he would face 120 months confinement if convicted on all, but with a guilty plea to one count he would face approximately 84 months confinement. The defendant proceeded to trial and was convicted on all counts. The actual sentencing range was 262 to 327 months and he was sentenced to 210 months. Court held that counsel was ineffective for failing to accurately advise the defendant and the defendant was prejudiced because he would have plead guilty to one count if he had known the true maximum. New trial ordered.

***Meyers v. Gillis**, 142 F.3d 664 (3d Cir. 1998). Counsel ineffective in capital murder case plead to second degree. Counsel advised defendant he would get life sentence but parole was typically granted after seven years, but counsel failed to advise the defendant the it was actually life without parole and parole could be granted only if the governor first commuted the sentence to a term of years and the current governor did not have a history of commuting. Counsel was not aware of the

***Capital Case**

LWOP provision and relied on a report showing parole typically granted after seven years when a different governor, who did typically commute, was in office. Counsel's deficiency was prejudicial because the defendant would not have plead guilty even though it was a capital case because he was not concerned with the possibility of a death sentence (only concerned about impact on family and parole eligibility). The court found a reasonable possibility based on the evidence of lack of premeditation and self-defense that, if defendant had gone to trial, he would only have been convicted of third degree (manslaughter) which has a maximum of 20 year sentence.

1996: *United States v. Guerra*, 94 F.3d 989 (5th Cir. 1996). Counsel ineffective for failing to advise defendant of the correct maximum punishment before defendant entered plea based on court's advice that defendant faced a maximum of 60 years when the defendant actually only faced 30 year maximum. No procedural bar due to failure to raise on direct appeal because defense counsel failed to file direct appeal even though the defendant requested that he do so. Counsel's actions satisfied the "cause" prong of the standard for surmounting the procedural bar.

1995: *Ostrander v. Green*, 46 F.3d 347 (4th Cir. 1995), *overruled on other grounds by O'Dell v. Netherland*, 95 F.3d 1214 (4th Cir. 1996). Counsel ineffective in child molestation case for misadvising the defendant of the possible sentence, which resulted in a guilty plea. Counsel advised the defendant that he would be eligible for work release and had a good chance of receiving it. Counsel's conduct was deficient because the defendant was ineligible for work release due to the nature of his conviction. While counsel is not required to advise the defendant of collateral consequences of pleading guilty, "where the client asks for advice about a 'collateral consequence' and relies upon it in deciding whether to plead guilty, the attorney must not grossly misinform his client about the law." *Id.* at 355.

[T]here is a difference between a bad prediction within an accurate description of the law and gross misinformation about the law itself. . . . We cannot expect criminal defense lawyers to be seers, but we must demand that they at least apprise themselves of the applicable law and provide their clients with a reasonably accurate description of it.

Id. Prejudice established. The court considered the strength of the state's case "inasmuch as a reasonable defendant would surely take it into account." Here, the defendant consistently maintained innocence and the state's case depended almost exclusively on the credibility of the alleged victim, but trial counsel assessed her as no excellent, unshakable witness based on her preliminary hearing testimony. But for counsel's "confident, though grossly uninformed, prediction that he would probably be breathing free air within days," there is a reasonable probability that the defendant would have insisted on going to trial. *Id.* at 356.

***Capital Case**

Finch v. Vaughn, 67 F.3d 909 (11th Cir. 1995). Counsel ineffective for advising defendant to plead guilty to state drug charges with understanding that his state sentence would run concurrently to his federal sentence, where federal government was not bound by plea agreement and had a parole violation policy of suspending or tolling federal sentence so that parole could be revoked and sentence served in full after completion of a state term.

1991: *Garmon v. Lockhart*, 938 F.2d 120 (8th Cir. 1991). Trial counsel ineffective for incorrectly advising defendant that he would only serve 1/6 of his plea bargain sentence.

1990: *Hill v. Lockhart*, 894 F.2d 1009 (8th Cir. 1990) (en banc). Defendant was denied effective assistance by counsel's failure to ascertain through minimal research applicable statute governing parole eligibility for second offenders and to inform his client accurately when asked about that eligibility, as basic minimum amount of time that defendant would have to serve was integral factor in plea negotiation, particularly given attorney's knowledge that timing of eligibility was dispositive issue in accepting plea bargain.

2. U.S. District Court Cases

2001: *Fowler-Cornwell v. United States*, 159 F. Supp. 2d 291 (N.D.W. Va. 2001). Counsel ineffective in firearm and drug distribution case for failing to advise the defendant that her sentence for the firearm offense could not be made to run totally concurrent with her sentence on the distribution offense. Counsel's conduct was deficient because he was not familiar with the pertinent provisions of the sentencing guidelines. Prejudice found where the defendant had already rejected a proposed plea that would have resulted in a 25 year sentence, and it was probable that, but for her counsel's failure to inform her that her sentences would have to run consecutively, she would have proceeded to trial and rejected the plea agreement under which she faced an absolute minimum sentence of 27 years.

1999: *United States v. Khalaf*, 116 F. Supp. 2d 210 (D. Mass. 1999). Counsel ineffective in drug case for incorrectly advising the defendant of the deportation consequences of his guilty plea. Counsel was aware that the conviction could result in deportation but believed and advised the defendant that he would be protected by a Judicial Recommendation Against Deportation ("JRAD"), which would be requested by counsel and the prosecutor jointly. Counsel's conduct was deficient because "counsel neglected to research the applicable law and neglected to consult with counsel who had expertise in the immigration area, despite having sufficient time to do so." If counsel had adequately performed, counsel and the defendant would have been aware that a JRAD would have no effect in this case. Prejudice established because the defendant would not have pled guilty if he had been adequately advised.

***Capital Case**

1996: *Kates v. United States*, 930 F. Supp. 189 (E.D. Pa. 1996). Counsel ineffective in drug case for failing to advise defendant that, under sentencing guidelines, he faced a sentence of between 30 years and life, as opposed to government's plea offer of five to 40 years, with possible downward departure below five years. Prejudice found even though counsel testified that defendant was adamant about not accepting a plea agreement, because of reasonable probability that he would have changed his mind if he had known the true facts.

3. State Cases

2003: *State v. Rojas-Martinez*, 73 P.3d 967 (Utah Ct. App.), *cert. granted*, 80 P.3d 152 (Utah 2003). Counsel ineffective in affirmatively misrepresenting the deportation consequences prior to entry of guilty plea. While deportation is a collateral consequence and an attorney has no duty to inform a client of deportation consequences of a guilty plea, if counsel addresses the subject the advice must be accurate. Here where deportation was a virtually automatic, unavoidable consequence but counsel informed the defendant that he "might or might not" get deported this was an affirmative misrepresentation of the truth. Prejudice found because the defendant would not have plead guilty if he had known the truth.

2001: *Crabbe v. State*, 546 S.E.2d 65 (Ga. Ct. App. 2001). Counsel ineffective in negotiated plea for kidnapping and other charges for erroneously advising the defendant that he would be eligible for parole after 10 years when defendant would, in fact, have to serve the entire 20 years without parole eligibility. While "[t]here is no requirement that a defendant be advised of his eligibility or ineligibility for parole for his guilty plea to be valid . . . [if] the defense strategy in plea negotiations is an attempt to ensure the defendant's eligibility for parole, and the defendant's attorney misinforms his client that he will be eligible for parole, the attorney renders ineffective assistance."

State v. Kress, 636 N.W.2d 12 (Iowa 2001). Counsel ineffective in plea to obtaining prescription drug by forgery case for failing to file a motion in arrest of judgment, which was required to challenge the voluntariness of the plea on appeal, because the trial court incorrectly advised the defendant of the minimum sentence. The court advised her that the minimum was one third of the maximum indeterminate sentence but that it could be waived by the court. The court initially did waive but then reopened the record and declared no discretion to do so. The court was correct that it had no discretion but defense counsel did not object or file the motion. Counsel was deficient because there was no strategy, just "legal misadvice." Defendant was prejudiced because she may not have pled guilty absent the misadvice.

Bronson v. State, 786 So. 2d 1083 (Miss. Ct. App. 2001). Counsel ineffective in armed robbery plea for misleading the defendant about the possible minimum sentence, which rendered the plea invalid because it was not knowingly and voluntarily made. The court reversed due to the combination of

***Capital Case**

the judge's failure to apprise the defendant of the minimum sentence, the petition to enter the plea contained incorrect and misleading information, and the attorney misled the defendant to believe that he could possibly get off without serving any jail time, when in reality the minimum sentence for his crime was three years.

2000: *Aldus v. State*, 748 A.2d 463 (Me. 2000). Counsel ineffective in aggravated assault case for failing to request a continuance in plea hearing in order to learn why the INS was "looking for" the defendant and to advise her accordingly. Defendant plead guilty in a plea arrangement unaware that the plea made her "conclusively presumed" deportable. While the court did not find that every defense lawyer should know immigration consequences and did not review the issue of whether this was a collateral consequence for which no advice was required, deficient conduct found for not seeking continuance in order to answer defendant's question about INS. Prejudice found because she would not have plead guilty if she had known of deportation consequence.

State v. Vieira, 760 A.2d 840 (N.J. Super. Ct. 2000). Counsel ineffective in failing to address deportation issue for defendant from Portugal, who had resided in U.S. for 30 years, prior to plea for third degree case. While deportation may not be a penal consequence of guilty plea and counsel is not obligated to make specific inquiry as to residency status of a defendant, when a defendant previously discloses that he is a resident alien, the knowledge is imputed to defense counsel and the defendant discloses in open court that he has problems reading and writing English, counsel's performance is constitutionally deficient if counsel does not address issue of deportation with defendant and defendant is not aware of risk of deportation. "When counsel makes a strategic choice based on inadequate investigation, however, the strategic choice is robbed of its presumption of competence and must be judged on whether reasonable professional judgments support the limitations on investigation." *Id.* at 685-86.

1999: *People v. Brown*, 723 N.E.2d 362 (Ill. App. Ct. 1999). Counsel ineffective in plea negotiations in aggravated battery and firearms case because counsel was not aware that the defendant was subject to a mandatory life term as habitual criminal if convicted of aggravated battery. Defendant had told the investigator of prior convictions and information was in counsel's file. The state had offered a plea agreement that still would have subjected the defendant to mandatory life. Prejudice found though because there was a reasonable probability that if defense counsel had known of the mandatory life problem, counsel may have been able to negotiate a better deal to avoid the issue.

Coker v. State, 995 S.W.2d 7 (Mo. Ct. App. 1999). Counsel ineffective in burglary, theft, damage to property, and possession of drug case for failing to adequately advise defendant on sentence possibilities prior to guilty plea. Guilty plea to possession of controlled substance was rendered involuntary by defense counsel's ineffective assistance in representing that sentence for possession, which was initially sentence of probation, would run concurrently with sentences for two other

***Capital Case**

offenses, without disclosing that trial court had discretion to order consecutive sentences if probation was revoked, though defendant understood possible sentencing range for possession offense. Probation revoked and defendant's sentences ran consecutively.

Turner v. State, 335 S.C. 382, 517 S.E.2d 442 (1999). Counsel ineffective for failing to adequately advise prior to plea. Defendant entered plea to pending charges after his probation was revoked and he was sentenced to serve the remaining 14 years on prior charges. He actually only had 7 years remaining on prior though and would not have plead guilty for 15 year concurrent sentence if he had known that.

Ex parte Moody, 991 S.W.2d 856 (Tex. App. 1999). Counsel ineffective in drug possession case for advising defendant erroneously that, if he plead guilty in state court, he would be transferred back to federal prison to serve a previously imposed sentence and his state and federal sentences would run concurrently. This advice was false and defendant had to serve 15 year state sentence and then serve all of federal sentence. Defendant would not have plead guilty but for this erroneous advice.

1998: Ward v. State, 708 So. 2d 11 (Miss. 1998). Counsel ineffective in sale of cocaine and escape from jail plea case for failing to adequately advise the defendant of the possible punishments. Even though the escape charge the defendant faced carried only a six month maximum, counsel allowed defendant to plead guilty to the more serious violent felony escape charge and the defendant was sentenced to five years on that charge. Defendant also argued that he was not advised of the possible punishment range on the cocaine charge and the record and the state's evidence did not rebut that claim. Because counsel made such an egregious error on the escape charge, the court was not satisfied that counsel rendered adequate assistance on the cocaine charge. Thus, both pleas set aside because not voluntarily and knowingly made. Court held, "Effective assistance of counsel contemplates counsel's familiarity with the law that controls his client's case." 708 So. 2d at 14.

State v. Thomsen, 719 A.2d 1288 (N.J. Super. Ct. App. Div. 1998). Counsel ineffective in case of eluding police by motor vehicle, which was charged as fourth degree. Even though statute had been amended effective prior to this crime to make these offenses second degree, counsel was unaware of the change in the statute and did not advise the defendant of the possible increase in penalty. No one discovered the change until after conviction, but before sentencing, and the judge changed the conviction to second degree. The Court held that the lack of knowledge prejudiced the defendant in his consideration of the proffered pre-trial plea offer when he was unaware of his potential criminal exposure in rejecting it. The Court declined, however, to conduct *Strickland* prejudice analysis because the result was that the defendant was denied a fair criminal process and notice similar to the problem in *Lankford v. Idaho*, 500 U.S. 110 (1991) (failure to give notice that defendant was subject to death penalty prior to death sentence violated due process).

***Capital Case**

1995: *Morales v. State*, 910 S.W.2d 642 (Tex. App. 1995). Counsel ineffective in child abuse case for failing to advise non-English speaking client prior to entering plea with no deal that judge could sentence her to up to 99 years and that she would be deported. Counsel never mentioned deportation and told client that she would get no more than 30 years. She got 75 years.

Tallant v. State, 866 S.W.2d 642 (Tex. App. 1993). Trial counsel ineffective in aggravated sexual assault case for advising defendant that if he plead guilty and waived jury sentencing that he would probably get probation when the court was precluded from granting probation in aggravated sexual assault case.

1992: *People v. Blommart*, 604 N.E.2d 1054 (Ill. App. Ct. 1992). Counsel ineffective in murder of child prosecution for misinforming defendant as to potential penalty for murder, misleading her concerning eligibility for work release, and possibility of losing parental rights to other son. Based on incorrect advice, defendant rejected plea agreement in which she could have pled guilty to involuntary manslaughter and did not even request a manslaughter instruction at trial.

Williams v. State, 605 A.2d 103 (Md. 1992). Counsel ineffective for failing to advise defendant that he faced a mandatory sentence of 25 years which resulted in defendant turning down a plea offer for a lesser included offense and 10 years.

1991: *Reeves v. State*, 564 N.E.2d 550 (Ind. Ct. App. 1991). Counsel ineffective for advising defendant to accept plea offer to avoid being charged as habitual offender when defendant was not eligible for habitual offender status.

Alexander v. State, 303 S.C. 539, 402 S.E.2d 484 (1991). Trial counsel ineffective for advising client that he would face potential life sentence if he proceeded to trial when he would have actually faced a 7-25 year sentence for one charge and a 25 year sentence for the second charge. Based on trial counsel's erroneous advice, defendant pled guilty.

Ray v. State, 303 S.C. 374, 401 S.E.2d 151 (1991). Counsel ineffective for advising defendant he would get life without parole if convicted which prompted guilty pleas when sentence actually ranged from 75 years without parole to as little as 10 years if sentences ran concurrently.

Ex parte Battle, 817 S.W.2d 81 (Tex. Crim. App. 1991). Trial counsel ineffective in aggravated sexual assault case for advising defendant that if he pled guilty he could get probation when state law prohibited probation for that offense.

1990: *Howard v. State*, 783 S.W.2d 61 (Ark. 1990). Trial counsel in kidnaping and rape case (defendant's husband was accomplice) ineffective for recommending that the defendant plead guilty without the

***Capital Case**

benefit of a plea bargain. Counsel's advice was based on reliance on outdated statutes and counsel's belief that all or part of the sentence would be suspended and the defendant would spend no more than 90 days in prison when the defendant actually got 20 and 40 year consecutive sentences. In addition, during the representation, the defendant was undergoing psychiatric treatment, having problems with alcohol abuse, and having sexual relations with counsel.

Lotero v. People, 560 N.E.2d 1104 (Ill. App. Ct. 1990). Counsel ineffective for incorrectly advising client that he could not be deported if he pled guilty to narcotics charge.

People v. Maranovic, 559 N.E.2d 126 (Ill. App. Ct. 1990). Counsel ineffective for failing to realize defendant's alien status and advise him of deportation consequence of pleading guilty to felony even though presentence report indicated that defendant was born in Yugoslavia and counsel had to have an interpreter at times to communicate with client.

1989: *People v. Miranda*, 540 N.E.2d 1008 (Ill. App. Ct. 1989). Counsel ineffective for failing to advise alien defendant of deportation consequence of pleading guilty to felony.

Hinson v. State, 297 S.C. 456, 377 S.E.2d 338 (1989). Trial counsel in murder case ineffective for advising client that he would be eligible for parole in 10 years if he pled guilty when in fact he would not be eligible for parole until 20 years had passed. Defendant pled guilty based on this erroneous advice.

1987: *Ex parte Pool*, 738 S.W.2d 285 (Tex. Crim. App. 1987). Counsel ineffective for misadvising based on prosecutor's assertions that defendant could get a minimum 25 year sentence for felony DWI if he didn't accept state's plea offer.

1986: *People v. Padilla*, 502 N.E.2d 1182 (Ill. App. Ct. 1986). Counsel ineffective for incorrectly advising client that he could not be deported if he pled guilty to felony charge.

1985: *People v. Correa*, 485 N.E.2d 307 (Ill. 1985) (affirming 465 N.E.2d 507 (Ill. App. Ct. 1984)). Counsel ineffective for incorrectly advising client that he could not be deported if he pled guilty to felony.

***Capital Case**

C. FAILURE TO INFORM DEFENDANT OR STATE OF PLEA OFFER

1. U.S. District Court Cases

1993: *United States v. Busse*, 814 F. Supp. 760 (E.D. Wis. 1993). Trial counsel ineffective during plea negotiations for failing to advise the defendant concerning the sentencing guidelines and failing to provide the defendant with a copy of the plea agreement offered by the prosecution which if it had been accepted would have given the defendant a lower sentence than what he got.

2. State Cases

2001: *Turner v. State*, 49 S.W.3d 461 (Tex. App. 2001), *petition for review dismissed*, 118 S.W.3d 772 (Tex. Crim. App. 2003). Counsel ineffective in murder case for failing to inform the defendant of the deadline attached to a plea offer. State had offered a sentence of 35 years in exchange for plea. Counsel communicated the plea offer but not the deadline and the deadline passed before the defendant notified counsel and counsel notified the state that offer would be accepted. State would not accept deal and defendant went to trial and received a life sentence. Remedy was to reverse and order reinstatement of plea offer.

2000: *Atkins v. State*, 26 S.W.3d 580 (Tex. App. 2000). Counsel ineffective in felony DWI case for failure to inform defendant of state's plea bargain offer of 12 years. Defendant had refused offer of fifteen years, but defense counsel never relayed offer of 12. At a pretrial hearing, when the state announced it had offered 12, the defendant said he would take it, but the state said it was no longer offering a plea bargain. Defendant prejudiced because he would have accepted plea bargain and would not have gone to trial where he was sentenced as habitual offender to 25 years.

Paz v. State, 28 S.W.3d 674 (Tex. App. 2000). Counsel ineffective in drug possession case for failing to inform the defendant of state's plea offer. Prejudice found where defendant would have accepted plea bargain offer, which would have resulted in sentence of 5 years probation and \$2,900 fine, rather than 5 years and \$5,000 fine imposed when defendant later pleaded guilty without plea bargain.

1999: *Becton v. Hun*, 516 S.E.2d 762 (W. Va. 1999). Counsel ineffective for failing to communicate plea offer to client indicted for one burglary and six aggravated robberies. State offered a recommendation of 10 years confinement, which was the statutory minimum sentence for aggravated robbery, in exchange for a plea to only one robbery. The deal was not communicated and defendant went to trial facing four armed robbery charges. Convicted of one and sentenced to 40 years. Court held that where defendant's evidence showed he was not told of the deal and trial counsel could not remember and had no evidence, the "benefit of the doubt," 516 S.E.2d at 767, went to the defendant

***Capital Case**

that counsel's conduct was deficient. On prejudice, court said no prejudice on plea because the trial resulted in only one conviction. The court remanded for sentencing, however, noting that while the trial court was under no obligation to accept the state's offer, the fact that the state recommended minimum sentence of 10 years certainly could have resulted in a sentence less than 40 years.

- 1994:** *Harris v. State*, 875 S.W.2d 662 (Tenn. 1994). Counsel ineffective in assault with intent to murder case for failing to discuss the state's five year plea offer with defendant who went to trial without knowledge of offer and got 35 years.
- 1993:** *Randle v. State*, 847 S.W.2d 576 (Tex. Crim. App. 1993). Counsel ineffective in aggravated robbery case for failing to inform prosecution prior to the prosecution's deadline that the defendant accepted the plea offer in which the state would recommend a 35 year sentence. Defendant plead guilty without deal and got life.
- 1990:** *Flores v. State*, 784 S.W.2d 579 (Tex. App. 1990). Counsel ineffective in robbery case for failing to inform prosecution prior to the prosecution's deadline that the defendant accepted the plea offer which called for 10 year sentence. Defendant plead guilty without deal and got life.
- 1988:** *Pennington v. State*, 768 S.W.2d 740 (Tex. App. 1988). Counsel ineffective in felony indecency with child case for failing to advise the defendant of plea offers in which state was willing to accept misdemeanor plea and not oppose probation. Defendant got 7 years.
- 1987:** *People v. Hartley*, 418 N.W.2d 391 (Mich. Ct. App. 1987), *modified*, 418 N.W.2d 897 (Mich. 1988). Counsel ineffective for failing to advise client that judge told counsel in chambers that she was not inclined to give probation which deprived defendant of the opportunity to withdraw guilty plea.
- Ex parte Wilson*, 724 S.W.2d 72 (Tex. Crim. App. 1987). Counsel ineffective for failing to tell the defendant about the state's plea offer for 13 years when defendant got automatic life sentence after trial.
- 1984:** *Hanzelka v. State*, 682 S.W.2d 385 (Tex. App. 1984). Counsel ineffective for failing to advise defendant of plea offer for probation when defendant got a year confinement.

***Capital Case**

D. OTHER ERRONEOUS LEGAL ADVICE LEADING TO PLEA

1. U.S. Court of Appeals Cases

2002: *Lyons v. Jackson*, 299 F.3d 588 (6th Cir. 2002). Counsel ineffective for failing to inform 16-year-old juvenile murder defendant, prior to guilty plea, that, while sentencing judge had discretion to sentence the defendant as juvenile, the prosecutor could appeal any juvenile sentence imposed.¹¹ Defendant plead guilty knowing that the judge could sentence him as a juvenile or as an adult, which would result in a life without parole sentence. Judge sentenced juvenile to confinement until age 21. Prosecutor appealed and court of appeals ordered sentencing as adult to life without parole. The court held that the state court application of *Strickland* and *Hill v. Lockhart* was objectively unreasonable. In finding deficient conduct, the court held that petitioner's "age and his heavy reliance on [counsel] . . . enhanced [counsel's] duty to make certain that [petitioner] understood all the risks associated with his guilty plea." *Id.* at 599. Prejudice found under the circumstances, especially in light of counsel's advice to plead guilty to an offense punishable by life without parole. If defendant had known prosecutor could appeal juvenile sentence, a reasonable probability existed that he would not have plead guilty.

Miller v. Straub, 299 F.3d 570 (6th Cir. 2002) (affirming *Haynes v. Burke*, 115 F. Supp. 2d 813 (E.D. Mich. 2000)). Counsel ineffective for failing to inform 15 and 16-year-old juvenile murder defendants, prior to guilty plea, that, while sentencing judge had discretion to sentence the defendants as juveniles, the prosecutor could appeal any juvenile sentence imposed. Defendants plead guilty knowing that the judge could sentence as a juvenile or as an adult, which would result in a life without parole sentence. Judge sentenced both juveniles to confinement until age 21. Prosecutor appealed and court of appeals ordered sentencing as adults to life without parole. The court held that the state court application of *Strickland* and *Hill v. Lockhart* was objectively unreasonable. In finding deficient conduct, the court held that petitioner's "age and his heavy reliance on [counsel] . . . enhanced [counsel's] duty to make certain that [petitioner] understood all the risks associated with his guilty plea." *Id.* at 581. Prejudice found under the circumstances, especially in light of counsel's advice to plead guilty to an offense punishable by life without parole. If defendants had known prosecutor could appeal juvenile sentence, a reasonable probability existed that they would not have plead guilty.

1995: *United States v. Streater*, 70 F.3d 1314 (D.C. Cir. 1995). Counsel ineffective in advising client in drug case that after he argued and lost a suppression motion in which it was contended that car

¹¹Michigan law has since been changed and the trial court no longer has discretion to sentence murder defendants to juvenile sentence.

***Capital Case**

searched was the defendant's and that search was illegal that he could not then argue (or the suppression hearing would be brought up) during trial that he was unaware of the drugs in the car which induced defendant to plead guilty. Counsel misunderstood law which simply stated that if defendant testified in suppression hearing and then testified in a contrary manner during trial that he could be impeached based on hearing testimony.

United States v. Hansel, 70 F.3d 6 (2d Cir. 1995). Counsel ineffective for failing to advise defendant prior to guilty plea to eight counts of false statements that two of the counts were barred by the statute of limitations. Defendant's waiver of defense not knowing and intelligent because defense counsel did not recognize issue or inform defendant of it.

1990: *United States v. Loughery*, 908 F.2d 1014 (D.C. Cir. 1990). Trial counsel ineffective for allowing defendant to plead guilty without advising her that Supreme Court decision invalidated the charges.

2. Military Cases

1991: *United States v. Kelly*, 32 M.J. 813 (N.M.C.M.R. 1991). Counsel ineffective for advising accused to plead guilty to unauthorized absence, solicitation of distribution of methamphetamine and of possession, use and distribution of the methamphetamine solicited because the sole evidence supporting these charges was the accused's confession and under military law an accused can not be convicted solely on the basis of an uncorroborated confession.

3. State Cases

2002: *Harris v. State*, 806 So. 2d 1127 (Miss. 2002). Counsel ineffective in drug distribution plea for erroneously advising the defendant that he could withdraw the plea at any time prior to sentencing. Counsel moved to dismiss charges based on entrapment and asserted that the state had failed to disclose the informant's phone records and tapes of at least 15 calls made prior to the sell. The court denied the motion to dismiss and deferred the discovery requests. The defendant then plead guilty based on counsel's advice that he could plead, continue to investigate, and withdraw at any time prior to sentencing 60-90 days later. Prejudice found because the defendant would not have plead guilty "but for" counsel's misadvice.

2001: *MacDonald v. State*, 778 A.2d 1064 (Del. 2001). Counsel ineffective in plea to conspiracy to commit murder and solicitation case, which arose from alleged plot to kill witness who testified against defendant with respect to first degree murder charge for which defendant was confined and awaiting sentencing when conspiracy and solicitation offenses allegedly occurred. Counsel conducted no investigation, including failing to even question the defendant, and instead just informed the defendant that he had no choice but to plead guilty to conspiracy and solicitation

***Capital Case**

charges. Counsel had only examined the probable cause sheet supporting the defendant's arrest. Counsel had also consented to and even encouraged the defendant's placement in solitary confinement where he remained for four days with little sleep before being presented with and agreeing to the plea agreement, and counsel permitted the defendant to surrender not only the claim of error that they believed provided a strong basis for overturning the murder conviction on appeal, but also permitted the defendant to waive his right to post-conviction relief without even any attempt at negotiations. Prejudice found because the plea agreement secured no direct benefit to the defendant, who essentially pleaded guilty in order to protect his father when the state had no real basis for charging his father in any event. The court was also troubled about counsel's acquiescence and even participation in having the defendant put in solitary confinement prior to the plea offer and acceptance.

2000: *Jackson v. State*, 342 S.C. 95, 535 S.E.2d 926 (2000). Counsel ineffective in threatening a public official case for failing to advise the defendant that the crime was a felony. During plea hearing counsel said it was a misdemeanor. Prejudice found because defendant testified he would not have plead guilty if he had known it was a felony. Trial judge found this testimony was not credible, but appellate court reversed because regardless of credibility there no contrary evidence supporting the court's finding that petitioner would have plead guilty anyway.

1998: **State v. Ysea*, 956 P.2d 499 (Ariz. 1998) (en banc). Counsel ineffective in first degree murder case for advising client erroneously that he could receive a death sentence if he did not accept the state's manslaughter plea offer. The defendant had a prior conviction for solicitation to commit aggravated assault. The prosecutor offered the plea with a statement that the death penalty would be avoided. The defense counsel simply accepted the state's position and advised his client to plead guilty to avoid the death penalty. If counsel had adequately researched the issue, however, he would have discovered that the only arguable aggravating factor was the prior conviction and that the capital aggravating factor required a felony conviction "involving the use or threat of violence on another person."¹² At the time of trial, the Arizona Supreme Court had already interrupted the aggravating factor to require that the statutory definition of the prior conviction (and not the underlying facts) controlled the determination of whether a prior conviction was one of violence. In this case, the statutory definition of solicitation does not include an element of violence. Thus, Ysea's prior conviction could not have supported the aggravating factor. In finding deficient conduct, the court held, "Surely, in a capital case one might expect reasonably competent counsel to research the question of whether the seemingly non-violent act of solicitation qualified as a capital aggravating factor under a statute that required previous conviction of a crime involving the use or threat of

¹²Arizona has since amended the statute to supercede the portion of the opinion discussing the requirements for the statutory aggravating factor. See *State v. Martinez*, 999 P.2d 795 (Ariz. 2000).

***Capital Case**

violence.” 956 P.2d at 503. In finding prejudice, the court held that the issue was not whether counsel’s errors prejudiced the outcome of a trial that was never held.; rather, the appropriate question was whether counsel’s errors prejudiced the defendant by inducing him to make an involuntary plea agreement and giving up his right to trial.

Wayrynen v. Class, 586 N.W.2d 499 (S.D. 1998). Counsel ineffective for identifying client to police and having her confess to 15 arson charges without any prior attempt to negotiate a deal with the state. The defendant, who suffered from depression, approached counsel, who had represented her previously and knew about depression, and indicated that she wanted to confession to numerous arsons committed on the same day. Counsel contacted police and learned that they were investigating but had no suspects. He then told defendant that she could remain silent or confess and that if she confessed incarceration was likely. He did not, however, inform her that she would be facing a punishment of up to 140 years confinement. The defendant indicated that she wanted to confess and counsel called the state’s attorney and identified her and said that she wanted to talk about the fires. He went with her and even assisted the police in eliciting information from her. He subsequently agreed to a sentencing recommendation that sentences be concurrent from the state but knew that the court was not bound them and that judges in that circuit rejected them. The judge sentenced her consecutively so she got 75 years. He also notified prison that each count should be considered separately so that she would not be eligible for parole for almost 20 years. The Court held that counsel was ineffective for failing to seek a limit on the number of charges filed against the defendant prior to identifying her to the state’s attorney and failing to advise the defendant that they should attempt to negotiate prior to identifying her to police and having her confess. Counsel left her only with the alternative of doing nothing or being charged with 15 crimes. Prejudice was established because the state’s attorney conceded that, based on the evidence the state had prior to the confession, she would have entertained a plea to limit the number of charges prior to the identification of the defendant. Thus, there is a reasonable probability that the defendant would not have plead guilty to 15 charges and faced 140 years confinement.

- 1997: *People v. Cunningham***, 676 N.E.2d 998 (Ill. Ct. App. 1997). Counsel ineffective in drug possession case for advising client to plead guilty when counsel believed that plea would preserve right to appeal denial of motion to suppress but counsel did not understand that plea waived right to appeal.
- 1996: *Shelton v. Commonwealth***, 928 S.W.2d 817 (Ky. Ct. App. 1996). Counsel ineffective for advising defendant to plead guilty to two drug charges when possession of methamphetamine and cocaine was one offense for purposes of double jeopardy clause of Kentucky Constitution.
- 1993: *State v. May***, 429 S.E.2d 360 (N.C. Ct. App. 1993). Trial court found counsel ineffective in case where defendant charged with first degree murder for advising the defendant erroneously that he would probably get the death penalty. Counsel conducted inadequate investigation and relied on

***Capital Case**

incomplete and faulty analysis of the law. Defendant plead guilty to second degree murder. Trial court held harmless error, however, because the evidence at trial would have been sufficient to prove first degree murder. Appellate court found evidence sufficient to support finding of IAC and ordered a new trial because harmless error analysis may not be applied in this context.

State v. Stowe, 858 P.2d 267 (Wash. Ct. App. 1993). Trial counsel ineffective for advising client that an Alford plea (no admission of guilt but accepting plea agreement) to a charge of second degree murder would probably not end defendant's military career. Counsel only asked the military liaison who was not a lawyer and did not investigate further. Proper investigation would have revealed that the military does not distinguish between an Alford plea and a guilty plea.

1992: *Murdock v. State*, 311 S.C. 16, 426 S.E.2d 740 (1992). Trial counsel was ineffective for advising defendant to plead guilty to possession of counterfeit substance with intent to distribute when the defendant was actually in possession of an imitation, not counterfeit, substance and possession of an imitation substance with intent to distribute is not a crime.

1991: *Shirley v. State*, 306 S.C. 241, 411 S.E.2d 215 (1991). Trial counsel ineffective for failing to advise defendant, prior to his entry of guilty plea, that his incriminating statements made which were induced by the investigating officer's promise of a four-year sentence cap may have been made involuntarily and, if so, would be inadmissible at trial.

Kerrigan v. State, 304 S.C. 561, 406 S.E.2d 160 (1991). Trial counsel ineffective for failing to advise defendant, who continuously declared his intent to return the car, that if he went to trial on grand larceny of automobile charge, he could have requested an instruction on the lesser offense of use of vehicle without permission and might have been convicted of the lesser offense. Without this advice, the defendant pled guilty to the grand larceny charge.

Jivers v. State, 304 S.C. 556, 406 S.E.2d 154 (1991). Trial counsel ineffective for advising defendant that double jeopardy clause would not bar prosecution on charge of assault and battery which was based on the same conduct which supported a previous conviction for criminal domestic violence. Defendant pled guilty based on this erroneous advice.

1990: *Commonwealth v. Nelson*, 574 A.2d 1107 (Pa. Super. Ct. 1990). Counsel ineffective for advising defendant to plead guilty to perjury and false swearing without considering that the defendant's testimony from another trial was inadmissible because it was compelled.

Davenport v. State, 301 S.C. 39, 389 S.E.2d 649 (1990). Counsel ineffective for advising defendant to plead guilty but mentally ill to murder despite knowledge that state's psychiatrist diagnosed as insane at time of offense and counsel failed to discuss insanity with defendant.

***Capital Case**

- 1989:** *Fretwell v. State*, 772 S.W.2d 334 (Ark. 1989). Counsel ineffective in first degree murder case for advising the defendant to plead guilty as an accomplice when her conduct was insufficient to make her an accomplice to murder committed by her husband. At time of murder, she was in another location asleep and knew nothing about murder until her husband told her afterwards.
- 1988:** *Teague v. State*, 772 S.W.2d 932 (Tenn. Crim. App. 1988). Counsel ineffective for incorrectly advising the defendant that nolo contendere plea to second degree murder would have no effect on capital murder case when the plea was used in the sentencing phase of the subsequent capital trial.
- 1987:** *McKinney v. State*, 511 So. 2d 220 (Ala. 1987) (affirming 511 So. 2d 218 (Ala. Crim. App. 1986)). Trial counsel ineffective for advising the defendant to plead guilty to murder and attempted murder in exchange for concurrent sentences where both offenses were based on single shotgun blast which killed one person and injured another. Under Alabama law at that time, the defendant could have been convicted of only one offense and but for the erroneous advice would not have plead guilty.
- Booth v. State*, 725 S.W.2d 521 (Tex. App. 1987). Counsel failed to advise the defendant prior to murder plea how a heated argument between the defendant and the victim immediately preceding the shooting could reduce offense to voluntary manslaughter.
- 1986:** *State v. Washington*, 491 So. 2d 1337 (La. 1986). Counsel ineffective in forgery case for failing to advise the defendant prior to his guilty plea that he was probably only guilty of attempted forgery or attempted theft because the check was not signed.

***Capital Case**

E. BAD ADVICE LEADING TO REJECTION OF PLEA OFFER

1. U.S. Court of Appeals Cases

2002: *United States v. Day*, 285 F.3d 1167 (9th Cir. 2002). Counsel ineffective in drug case for incorrectly advising the defendant that he would have to go to trial in order to argue that the government “had engaged in sentencing entrapment.” This erroneous advice caused the defendant to reject a plea offer that included a three-point reduction for acceptance of responsibility. Prejudice found because the defendant may well have pled guilty if adequately advised. Remanded for resentencing and for the District Court to make specific findings on deficient conduct because the District Court did not address this issue in the first instance.

2001: *Magana v. Hofbauer*, 263 F.3d 542 (6th Cir. 2001). Counsel ineffective in drug case involving two counts and mandatory consecutive terms of ten to twenty years’ imprisonment for advising the defendant incorrectly in rejecting plea offer to ten years that he could not receive consecutive sentences and that he would get ten years whether he went to trial or not. Because the state courts did not discuss the question of deficient performance, the court assumed that they concluded that counsel’s performance was objectively deficient under *Strickland*. *Id.* at 549. The state courts’ determination of no prejudice was unreasonable because the state court applied a standard that required that the defendant prove that he would have accepted the offer to show prejudice rather than *Strickland*’s standard of a reasonable probability that he would have accepted the state’s offer. *Id.* at 550. The sentence was set aside with instructions to reinstate the plea offer of else overcome a presumption of vindictiveness.

Wanatee v. Ault, 259 F.3d 700 (8th Cir. 2001) (affirming 101 F. Supp. 2d 1189 (N.D. Iowa 2000)). Counsel ineffective in murder case for failing to properly advise defendant about the felony-murder rule while the defendant was considering the state’s oral plea offer to plead guilty to second degree murder in exchange for “cooperation” with the government. As a result, the defendant rejected plea offer and was tried and convicted of first degree murder. The state court determination that petitioner was not prejudiced because he ultimately received a fair trial was an unreasonable application of clearly established federal law. The District Court’s finding of prejudice was not clearly erroneous. [District court held: While the defendant repeatedly expressed unwillingness to cooperate with government and be branded a “snitch,” court found a reasonable probability that he would have accepted the plea agreement and cooperated if he had been properly advised of the law and had known that he could receive some real benefit in exchange for cooperation. Instead, defendant rejected plea offer and was tried and convicted of first degree murder. Prejudice found because, although defendant knew there was a great disparity of possible sentences between first and second degree when he chose to reject offer and go to trial, he was not aware due to lack of adequate

***Capital Case**

advice that he would almost probably be found guilty of first degree murder if he proceeded to trial.]

- 2000:** *Mask v. McGinnis*, 233 F.3d 132 (2d Cir. 2000) (*affirming* 28 F. Supp. 2d 122 (S.D.N.Y. 1998)). Counsel ineffective in robbery case for failing to discover that a conviction would make the defendant a second violent offender instead of a persistent felony offender under state law. Prior to trial, the state offered a deal to plead to one of the three robberies charged for a sentence of 10 years to life, the minimum sentence under persistent offender statute. During trial, the state again repeated the offer and said that was as low as she could go. Trial counsel was ineffective for failing to recognize that the defendant was not a persistent offender under state law. The defendant was prejudiced because had he been properly qualified as a second offender he would have accepted a reasonable offer from the prosecution and the record reflects that the prosecutor would have offered a more favorable deal if she had not been under the mistaken impression that he was a persistent offender. Actual minimum was 6-12 years instead of 10-life. At trial, defendant got 20-40 years. Convictions set aside unless state would agree to reduce sentence to 8-16 years. State court decision found to be contrary to federal law because state court insisted on “certainty” that outcome would have been different and failed to refer to “reasonable probability.” State court fact-findings also given no deference because based on unreasonable application of facts to wrongful “certainty” standard.
- 1997:** *Boria v. Keane*, 99 F.3d 492, *clarified on reh’g*, 90 F.3d 36 (2d Cir. 1996). Counsel ineffective in drug case for failing to advise client concerning the advisability of accepting the state’s offered plea bargain even though counsel believed that “his client’s decision to reject the plea bargain was suicidal.” Client rejected deal for one to three years and got twenty to life.
- 1988:** *Turner v. Tennessee*, 858 F.2d 1201 (6th Cir. 1988) (*affirming* 664 F. Supp. 1113 (M.D. Tenn. 1987)), *vacated on other grounds*, 492 U.S. 902 (1989). Petitioner was denied EAC when his trial counsel advised him against accepting two-year plea offer after co-defendant received 70 year sentence and he received sentence of life imprisonment for murder plus 40 years on each of two kidnaping counts.

2. U.S. District Court Cases

- 2002:** *United States v. Quiroz*, 228 F. Supp. 2d 1259 (D. Kan. 2002). Counsel was ineffective in cocaine distribution case for giving erroneous advice regarding the defendant’s possible sentences, which resulted in the defendant rejecting a plea offer. Counsel had sent the defendant a letter advising him of the possible penalties for possession of marijuana when the defendant was actually charged with possession of cocaine and there was a great difference in the possible penalties. As a result the defendant believed that the differences between the plea offer and conviction at trial was only a

***Capital Case**

matter of six months. The court found that counsel's conduct was deficient and prejudicial because the defendant had been advised that he could face 21 to 27 months when he actually faced 120 months. There was objective evidence that the defendant would have accepted the government's plea offer had he known his true sentencing exposure. The court set aside the plea and ordered that the defendant would be given the opportunity to except the plea offer with new counsel.

1998: *United States v. Robertson*, 29 F. Supp. 2d 567 (D. Minn. 1998). Acting on its own motion, the Court vacated the jury's guilty verdicts – after convictions but prior to sentencing – on the basis of ineffective assistance of counsel. The defendant along with five co-defendants was charged with a number of violent armed robberies of jewelry stores. Prior to trial, three co-defendants entered pleas in exchange for a downward departure from sentencing guidelines and received sentences of 60-90 months. Prior to Robertson's trial, the Government stated that he had confessed to the crimes and was facing over 85 years, but the Government was willing to enter a plea agreement that would allow a sentence commensurate with co-defendants if he would testify against another co-defendant. Defense counsel stated, however, that he was philosophically opposed to entering agreements to testify for the government. Even with the defendant facing a mandatory sentence of over 90 years, the defense still rejected the government's offer–after conviction–to testify against co-defendant in exchange for government filing a motion for downward departure from guidelines. The Court held, however, that in “the interests of justice,” Slip Op. at *3, the convictions would be set aside, because where the legal representation was so inadequate as to violate Sixth Amendment rights, “a trial court's failure to take notice sua sponte may be a plain error.” Slip Op. at *4. The Court held that given the overwhelming evidence against Robertson, including his confession and the testimony of co-defendants, and the potential penalties involved, counsel was ineffective for not advising his client to accept the plea agreements offered by the government. “[I]t is [counsel's] absolute duty as a criminal defense attorney to put his client's interests before his own.” Slip Op. at *4. The Court was also troubled by the fact that only two motions were filed by counsel prior to trial; during the trial, counsel was admonished several times and held in contempt for sexist and racist comments; and following convictions, counsel filed no objections or position paper in sentencing even though client was facing in excess of 90 years in prison. The Court did not act until sentencing because prejudice was not established until the government announced during sentencing that it would no longer offer plea agreement. Court set aside convictions and appointed new counsel. [Subsequently, the portion of the order vacating convictions was vacated due to a Post Conviction Agreement negotiated by new counsel.]

3. State Cases

2002: *Freeman v. State*, 94 S.W.3d 827 (Tex. App. 2002). Counsel was ineffective in felony D.U.I case for giving the defendant erroneous advice on sentencing, which caused the defendant to reject the state's offer of a plea agreement. The defendant pled guilty and pleaded “true” to having previously

***Capital Case**

been convicted of two felonies. The trial court sentenced the defendant to 25 years, which was the minimum range possible due to the defendant's prior felony convictions. Prior to entry of the plea, the state had offered a fifteen-year sentence. The defendant rejected it based on his counsel's advice that he could receive community supervision. Under the state's statutes, the trial court could not grant community supervision when the minimum punishment available was greater than ten years. Counsel's advice was clearly erroneous and no sound trial strategy could exist to rationalize counsel's actions. The defendant was prejudiced because, absent the misinformation, the defendant would have accepted the state's offer to abandon one of the sentencing enhancement allegations and the state would have agreed to a fifteen-year sentence.

State v. Williams, 83 S.W.3d 371 (Tex. App. 2002). Counsel ineffective in aggravated sexual assault case for failing to explain to the defendant the terms of a plea bargain offer. Prior to trial counsel informed the defendant of a plea offer of five years deferred adjudication community supervision, but counsel did not explain to the defendant what deferred adjudication meant. Counsel's conduct was deficient because "counsel's duty to a client includes fully explaining any plea offers in order to help a client make an informed decision." Prejudice found because counsel's failure to fully explain the offer effectively denied the defendant the opportunity to make an informed decision about whether to accept or reject the offer. Had counsel explained the offer the defendant likely would have plead guilty and received the deferred adjudication community supervision rather than the five years imprisonment he received as a result of trial.

2000: *Lewis v. State*, 751 So. 2d 715 (Fla. Dist. Ct. App. 2000). Counsel ineffective in drug and habitual felon case for failing to inform the defendant of the consequences of habitualization and the possibility of 30-year sentence. Although counsel thought that the possibility of a 30 year sentence was extremely remote, the defendant was still entitled to be informed of this possibility in making his decision to decline the state's offer. Prejudice shown because the defendant would have accepted the state's plea offer had he been adequately noticed, which would have resulted in a reduced sentence.

**Commonwealth v. Bradley*, 715 A.2d 1121 (Pa. 1998). Counsel was ineffective in capital case for filing a motion to withdraw the defendant's guilty plea to third degree murder without meeting with the defendant or advising him. After the court accepted the plea and the defendant had written letters to the victim's family confessing, the defendant discussed with counsel's paralegal the possibility of withdrawing his plea. The paralegal obtained this request in writing and gave it to counsel. Counsel, without talking to the defendant, filed a motion to withdraw the plea. The state concurred and the motion was granted without a hearing. Trial proceeded and the defendant was convicted and sentenced to death. Counsel did not talk to the defendant solely because counsel had a "difficult relationship" with him and believed that if they talked him out of withdrawing the plea, he would "later claim our ineffectiveness . . . and if we didn't go up to talk to him, he would then claim our

***Capital Case**

ineffectiveness.” Counsel believed that by filing the motion, they could inform the court that the defendant was acting against counsel’s instructions, and that they could then convince the defendant not to do it. In short:

It appears that there had developed an adverse relationship between the appellant and his attorneys and that the attorneys believed the appellant was irrational and likely to claim their ineffectiveness, no matter what they did. Their way of dealing with this, . . . was to attempt to use the court to do what they thought they could not do: viz., coerce their client into maintaining his plea bargain.

Counsel’s justification for filing the motion without talking to their client “is no justification at all; and it is plain that appellant was prejudiced by their inaction.”

The withdrawal of a guilty plea to third degree murder in a case which might involve the death penalty is a momentous event. To say that the advice of counsel should be available before a criminal defendant undertakes the withdrawal of his plea is an understatement, especially in a case in which counsel has stated that he was uncertain whether [the defendant] knew all of the ramifications of his decision to withdraw the plea. Counsels' duty was to discuss the decision to withdraw the plea, to explain its risks and ramifications, and to give their advice as to what he should do. If the client chose to ignore their advice to maintain the plea following this discussion, then the attorneys had done all they could do and they would have discharged their duty. That the client would later claim their ineffectiveness after he was sentenced to death is hardly justification for the failure of counsel to discuss the ramifications with the client before he withdrew his plea. That irresponsible, frustrated, and vindictive clients, clutching at straws, may later assert counsel's ineffectiveness can hardly be used as a justification to in fact become ineffective. Suffering such claims is merely part of the business of criminal defense.

1997: *State v. Lentowski*, 569 N.W.2d 758 (Wis. Ct. App. 1997). Counsel ineffective in sexual exploitation with child over 16 case for erroneously advising client that he had defenses of consent and mistake of age which caused the defendant to reject a plea offer and go to trial when the defenses were not available to him.

***State v. Fritz*, 569 N.W.2d 48 (Wis. Ct. App. 1997).** Counsel ineffective in sexual assault on child case. Initially counsel retained by defendant’s parents worked out plea agreement, based on defendant’s statements that he had consensual sex with the 15-year-old victim. The deal would involve lesser offense and no jail time. Retained counsel then withdrew in order to save the family some money and public defender took over. Public defender advised defendant to reject the deal

***Capital Case**

because there was nothing to lose and to lie and say there was no sex. The state added an additional charge after deal rejected and defendant convicted on both and got 7 years in prison.

1988: *Larson v. State*, 766 P.2d 261 (Nev. 1988). Counsel ineffective in murder of husband case where defendant got life without parole for recommending that the defendant reject state's plea offers and then after defendant entered plea to voluntary manslaughter which was a probationable offense counsel refused to disclose for sentencing purposes the defendant's psychological report which indicated PTSD and BWS based on husband's abuse and advised the defendant to withdraw her plea when the court asked for the report. All of this was done because counsel wanted to make a name for himself by establishing precedent for a "battered wife" self-defense theory which had not been previously established in state.

***Capital Case**

F. INADEQUATE ADVICE ON RIGHT TO TRIAL OR TO PLEAD

1. U.S. Court of Appeals Cases

1998: *McGurk v. Stenberg*, 163 F.3d 470 (8th Cir. 1998). Counsel ineffective in DUI third case for failing to inform the defendant that he had the right to trial by jury prior to his bench trial. The court found that prejudice would be presumed because this is a “structural error” that can never be harmless.

2. State Cases

1998: *State v. S.M.*, 996 P.2d 1111 (Wash. Ct. App. 2000). Counsel ineffective for failing to adequately advise juvenile prior to plea to child rape. Counsel delegated responsibility to advise the defendant to his wife/legal assistant and her advice was incomplete and misleading. She did not advise the defendant that his silence could not be used against him at trial or that state would have burden of proof beyond a reasonable doubt. She instead told him that since he admitted to charges he would have to plead guilty and never discussed with him the right to trial or the possibility of negotiating a plea. She also did not read to him or insure that he read the plea form before he signed it. Counsel met with defendant only briefly prior to plea and discussed only the hearing procedure with him. Court held that conduct was deficient because legal assistant is not “counsel” at all and because defendant was misinformed and not adequately advised in any event. Prejudice found because the record did not indicate that the defendant even understood the nature of the charges, let alone that the plea was knowing and voluntary.

1985: *State v. Ludwig*, 369 N.W.2d 722 (Wis. 1985). Trial counsel ineffective for failing to advise the defendant that choice whether to accept or reject plea offer was hers because defendant rejected plea to misdemeanor on advice of counsel because she did not know choice was hers and was convicted of felony.

***Capital Case**

G. INADEQUATE ADVICE ON RIGHT TO TESTIFY OR TO MAKE CLOSING ARGUMENT

1. U.S. Court of Appeals Cases

1992: *Nichols v. Butler*, 953 F.2d 1550 (11th Cir. 1992). Defendant was charged with the robbery of a convenience store, but the only evidence was a “quick glimpse” of the defendant by the employee. The defendant had originally agreed not to testify, but one day into a two-day trial, he changed his mind and wanted to testify. Counsel did not inform him of his constitutional right to testify, and stated that he would withdraw from representation if he decided to testify. Feeling that he would be left without counsel if he did in fact testify, the defendant decided to follow counsel’s advice and not testify. He was convicted. Counsel ineffective for threatening to withdraw during the trial if the defendant in robbery trial chose to testify when the only evidence against him was the identification by the store employee who got only a glimpse of the robber. The threat to withdraw was seen by the court as unprofessional conduct, and but for this conduct there was a good probability that the defendant would have been found not guilty. New trial granted.

2. U.S. District Court Cases

1998: *United States v. Lore*, 26 F. Supp. 2d 729 (D.N.J. 1998). Counsel ineffective for failing to advise the defendant, who wanted to testify in his own defense, that he could overrule the tactical decision by his attorney that he should not testify. Defendant charged with two co-defendants in loansharking activities. It was undisputed that he repeatedly told counsel he wanted to testify and that counsel told him that it was counsel’s decision to make and that he would not testify. Prejudice found because the government’s evidence against Lore was weaker than against other co-defendants and the testimony Lore proffered in motion to vacate could have provided a rational non-criminal explanation for what the government alleged were extortionate activities.

1996: *Campos v. United States*, 930 F. Supp. 787 (E.D.N.Y. 1996). Counsel in drug case was ineffective where government evidence consisted almost solely of testimony of DEA agent, defendant expressed desire to testify, but counsel refused to allow testimony and never advised defendant that whether he testified or not was defendant’s choice to make. Court found reasonable probability that outcome may have been different if defendant had testified.

1985: *United States v. Frappier*, 615 F. Supp. 51 (D.C. Mass. 1985). Counsel ineffective for advising defendant to testify where testimony could have been brought in by proffer under Bail Reform Act and counsel did not properly prepare the defendant to testify.

3. Military Cases

***Capital Case**

1991: *United States v. Henriques*, 32 M.J. 832 (N.M.C.M.R. 1991). Military defense counsel ineffective in desertion case where accused pled guilty to absence without leave (AWOL) and then defense counsel called accused to the witness stand to testify that he intended to return to the Navy but did not intend to return to his unit. Defense counsel's belief that this testimony negated guilt of desertion was erroneous because only an intent to return to his unit would have negated an element of the offense. Without the testimony of the accused probably would have been convicted only of AWOL.

4. State Cases

2004: *People v. Calhoun*, 815 N.E.2d 492 (Ill. App. Ct. 2004). Counsel ineffective in burglary case for coercing the defendant to waive his right to testify because counsel did not believe the defendant's version of events, which contradicted the victim's testimony. Counsel cannot "force his client to choose between testifying without his counsel's assistance or not testifying at all, when defense counsel's determination that his client will commit perjury on the witness stand is based solely on counsel's assessment of the evidence."

2002: **Cooper v. Moore*, 351 S.C. 207, 569 S.E.2d 330 (2002). Counsel ineffective in murder capital case for failing to advise defendant that he had a statutory right to personally address the jury regarding all charges in trial closing argument. Defendant was convicted of murder, kidnaping, armed robbery, and conspiracy to commit armed robbery and sentenced to death. On direct appeal the court, applying *in favorem vitae* review, found that reversal of the murder conviction was required because the trial court failed to advise the defendant of his right to make a closing argument. Because *in favorem vitae* review (which required a review of the record for error regardless of counsel's failure to object) applied only to murder charges, the court did not address whether the non-capital convictions should also be reversed. In post-conviction relief proceedings, defendant asserted that counsel was ineffective in failing to advise him of his statutory right to make a closing argument on all charges. The court held that S.C. Code Section 16-3-28 provides that "in any criminal trial where the maximum penalty is death or in separate sentencing proceeding following such trial, the defendant and his counsel shall have the right to make the last argument." The court held that the plain language of this statute allows the capital defendant to address the jury regarding all charges whether or not all of the charges carry the death penalty. Counsel's conduct was deficient in failing to advise the defendant of his statutory right to make a closing argument during the trial. Prejudice was found because the defendant had not testified during trial in order to avoid cross-examination with prior conviction. Thus, the jury did not have the opportunity to hear him argue for his innocence or to hear and consider his side of the story. Prejudice found because the evidence against the defendant was mostly circumstantial and not overwhelming. Thus, the defendant's statement could have swayed the jury to find him not guilty on the non-capital charges.

***Capital Case**

- 1999:** *Perrero v. State*, 990 S.W.2d 896 (Tex. App. 1999). Counsel ineffective in assault and resisting arrest case for failing to prepare the defendant for his testimony, which resulted in the defendant opening the door for impeachment with otherwise inadmissible evidence of a prior criminal history.
- 1992:** *Commonwealth v. Neal*, 618 A.2d 438 (Pa. Super. Ct. 1992). Counsel ineffective for failing to advise the defendant of his right to testify.
- 1991:** *Horton v. State*, 306 S.C. 252, 411 S.E.2d 223 (1991). Trial counsel ineffective for advising defendant that if he testified he could be cross-examined about prior convictions for simple possession of marijuana (not a crime of moral turpitude) and assault and battery with intent to kill (15 years previously and defense counsel to did get a rule from judge concerning remoteness). Defendant did not testify because of this advice.

***Capital Case**

H. INADEQUATE ADVICE ON RIGHT TO APPEAL

1. U.S. Court of Appeals Cases

- 1999:** *White v. Johnson*, 180 F.3d 648 (5th Cir. 1999). Counsel ineffective for failing to advise client, who knew generically that he had a right to appeal, that he only had 30 days to file a notice of appeal and that he could get counsel appointed to assist in appeal. Prejudice presumed.
- 1992:** *United States v. Gipson*, 985 F.2d 212 (5th Cir. 1992). Trial counsel ineffective for failing to inform defendant of time limit for filing appeal.
- 1991:** *Baker v. Kaiser*, 929 F.2d 1495 (10th Cir. 1991). Trial counsel ineffective for failing to advise and assist defendant in filing appeal.

2. State Cases

- 1997:** *Johnson v. State*, 325 S.C. 182, 480 S.E.2d 733 (1997). Trial counsel ineffective for failing to timely notify defendant of right to appeal so direct appeal issues were reviewed on the merits in PCR appeal.
- 1989:** *Zant v. Cook*, 379 S.E.2d 780 (Ga. 1989). Counsel ineffective after 1950 guilty plea to murder for failing to advise defendant of right to appeal. Conviction was subsequently used as aggravating factor in 1985 capital case.

***Capital Case**

I. INADEQUATE ADVICE ON CONSEQUENCE OF APPEAL

1. U.S. Court of Appeals Cases

- 1991:** *Lewandowski v. Makel*, 949 F.2d 884 (6th Cir. 1991) (*affirming* 754 F. Supp. 1142 (W.D. Mich. 1990)). Trial counsel ineffective for giving incorrect advice. Defendant was charged with first degree murder of his wife. On the advice of counsel, originally pled nolo contendere to second degree murder, which was punishable by 15-25 years. Prior to sentencing, defendant sent letter to judge expressing dissatisfaction with attorney and withdrawing plea. First attorney allowed to withdraw. New attorney advised defendant -- incorrectly -- that if he was granted withdrawal of plea to lesser offense, he couldn't be charged with greater offense. Judge denied the motion to withdraw. Counsel, who subsequently became aware of fact that defendant could be retried on greater offense failed to advise the defendant of this fact, but appealed the denial of the motion. After the appeal was successful, defendant was retried and convicted of first degree murder and received a mandatory life without parole sentence.
- 1986:** *Bell v. Lockhart*, 795 F.2d 655 (8th Cir. 1986). Defendant convicted of capital murder but sentenced to life without parole. Defense counsel ineffective for erroneously advising defendant that he would again face the possibility of a death sentence if he filed direct appeal and succeeded. Defendant waived direct appeal as result.

***Capital Case**

V. FAILURE TO COMPEL COMPLIANCE WITH PLEA AGREEMENT

A. U.S. Court of Appeals Cases

1987: *Betancourt v. Willis*, 814 F.2d 1546 (11th Cir. 1987). Counsel ineffective for inducing defendant to enter into a plea agreement by telling defendant that the judge had agreed to reduce his sentence at a later time to ensure that it was commensurate with the federal sentences of the co-defendants, but counsel failed to memorialize the plea agreement and neglected to put it on record.

B. State Cases

2000: *Thompson v. State*, 340 S.C. 112, 531 S.E.2d 294 (2000). Counsel ineffective following plea to voluntary manslaughter for failing to object to the state's request for the maximum sentence of 30 years in violation of the negotiated plea agreement. State had agreed to make no sentencing recommendation. Court had stated during plea negotiations that he would give a sentence of no less than 20 years but would not give the maximum sentence. State recommended maximum. Defense failed to object and even stated prosecutor had complied with the agreement. Court gave a sentence of 25 years. Supreme Court held defendant was prejudiced even though the defendant was sentenced within the range previously stated by the court because the relevant question for prejudice was whether the defendant would have entered the plea knowing that the prosecutor would recommend the maximum punishment. Court found a reasonable probability that the defendant would not have plead guilty based on the defendant's indecision to plead until just prior to trial and reliance on the agreement. The court remanded only for resentencing though.

1999: *State v. Scott*, 602 N.W.2d 296 (Wis. Ct. App. 1999). Counsel ineffective for failing to move to compel the state to comply with pretrial agreement and failing to advise the defendant of this option. Defendant was on probation at time of arrest and charged with fleeing officer, resisting arrest, disorderly conduct, and a few other offenses. Plea agreement entered to plead no contest to the offenses listed above in exchange for the state dismissing several charges and recommending that the sentence on each charge be concurrent and also run concurrent with sentence on probation revocation. After the defendant plead no contest, the prosecutor stated that her predecessor who negotiated the plea did not have the permission of the District Attorney to enter this agreement. The court allowed the state then to violate the agreement and recommend that all sentences be consecutive. Because counsel erroneously believed that the defendant had to prove detrimental reliance, counsel advised the defendant that the only options were to withdraw the pleas or to accept the state's position. Counsel's conduct deficient because once the defendant complies with the plea agreement the state is constitutionally bound by the agreement and counsel should have moved to compel compliance. Prejudice found even though the trial court is not bound to accept the state's recommendation. New sentencing granted.

***Capital Case**

- 1997:** *State v. Smith*, 558 N.W.2d 379 (Wis. 1997). Counsel ineffective for failing to object to prosecutor's recommendation of a specific sentence which violated plea agreement. No prejudice analysis because of deficient performance combined with prosecutor violating plea agreement.
- 1991:** *People v. Von Gethicker*, 475 N.W.2d 415 (Mich. Ct. App. 1991). Counsel ineffective for failing to place on record entire plea agreement, including the prosecutor's agreement to recommend lifetime probation, when the prosecution failed to make the recommendation, and state law requires that where the court declines to abide by the terms of a sentence recommendation as part of a plea agreement, the court must explain why, state the sentence it believes to be appropriate, and allow the defendant the opportunity to affirm or withdraw the guilty plea.
- 1988:** *Jordan v. State*, 297 S.C. 52, 374 S.E.2d 683 (1988). Trial counsel ineffective for failing to move to withdraw the guilty plea entered only because the prosecution promised not to oppose probation when in fact the prosecution reneged and vigorously opposed probation.

***Capital Case**

VI. PERFECTING APPEAL

A. U.S. Court of Appeals Cases

2002: *Garcia v. United States*, 278 F.3d 134 (2d Cir. 2002). Counsel ineffective following plea to drag offense for incorrectly advising the defendant that he could not appeal his sentence. Plea agreement noted disagreement about whether a prior could be used in sentencing. Defendant agreed not to appeal a sentence of 46 months or less. He got 60 months, but his counsel and the court told him on the record that he could not appeal. When counsel incorrectly advises the defendant that no appeal can be taken, there is no requirement that the defendant show that he requested counsel to appeal. Prejudice is that defendant was deprived of right to appeal; the defendant need not make a showing of the merits of the appeal. Sentence vacated and remanded for resentencing.

Johnson v. Champion, 288 F.3d 1215 (10th Cir. 2002). Prejudice presumed in felony murder case due to appellate counsel's failure to timely file appellate brief, which resulted in dismissal of the appeal. The state court decision was objectively unreasonable because the court inferred that the defendant deliberately abandoned his appeal because he did not personally contact the court. This was unreasonable and contrary to the record, which indicated petitioner informed his counsel that he desired to appeal. Release ordered unless state authorities afford an appeal out of time.

2000: *Hernandez v. United States*, 202 F.3d 486 (2d Cir. 2000). Prejudice presumed where retained counsel failed to timely file the notice of appeal.

White v. Schotten, 201 F.3d 743 (6th Cir. 2000). Where the Ohio rule imposed a 90 day time limit to file application to reopen the direct appeal to assert ineffective assistance of appellate counsel claims, appellate counsel's failure to timely file the motion to reopen was cause excusing procedural default but the court remanded for a determination of prejudice. Court found that there was a constitutional right to effective assistance in this instance because the motion to reopen is part of the direct appeal proceedings.

1999: *McHale v. United States*, 175 F.3d 115 (2d Cir. 1999). When counsel files a notice of appeal but then fails to perfect the appeal in a timely fashion, the defendant is entitled to reinstate the direct appeal without making any showing concerning the likelihood of success on direct appeal. This rule applies at least so long as the defendant seeks relief in the time allowed for a collateral attack and establishes deficient conduct in failing to perfect the appeal.

1995: *United States v. Nagib*, 56 F.3d 798 (7th Cir. 1995) (affirming 844 F. Supp. 480 (E.D. Wis. 1993)). Counsel ineffective for failing to perfect appeal. Prejudice presumed.

***Capital Case**

1993: *United States v. Peak*, 992 F.2d 39 (4th Cir. 1993). Trial counsel's failure to file notice of appeal when requested by defendant to do so is a per se deprivation of Sixth Amendment right to counsel.

1992: *Bonneau v. United States*, 961 F.2d 17 (1st Cir. 1992). Counsel's late filing which caused defendant to lose his right to direct appeal was per se violation of Sixth Amendment.

Hannon v. Maschner, 981 F.2d 1142 (10th Cir. 1992) (affirming 781 F. Supp. 1547 (D. Kan.)). Counsel ineffective for failing to perfect appeal on non-frivolous issue. Prejudice presumed.

United States v. Ruth, 963 F.2d 383 (10th Cir. 1992) (affirming 768 F. Supp. 1428 (D. Kan. 1991)). Counsel ineffective for failing to file a timely notice of appeal.

B. U.S. District Court Cases

2003: *Benoit v. Bock*, 237 F. Supp. 2d 804 (E.D. Mich. 2003). Counsel's failure to perfect appeal in second-degree murder case was deficient and prejudiced the defendant. Retained counsel filed the notice of appeal and then filed a motion to withdraw because he had not been paid. The court notified counsel of defects and his motion and then struck the motion when counsel did not fix the defects. The court then dismissed the appeal because it had not been perfected. Under the AEDPA analysis, the state court's rejection of the appellate ineffectiveness claim was manifestly contrary to the holding in *Evitts v. Lucey*.

Edwards v. United States, 246 F. Supp. 2d 911 (E.D. Tenn. 2003). Counsel was ineffective for failing to perfect the appeal or to withdraw from representation. Counsel was retained and represented the defendant during his guilty plea and sentencing. Counsel assisted the defendant in filing his notice of appeal, but counsel did not perfect the appeal and never sought to withdraw from representation. Prejudice was presumed in that the appeal was dismissed.

2001: *Dumas v. Kelly*, 162 F. Supp. 2d 170 (E.D.N.Y. 2001). Counsel ineffective for failing to file a notice of appeal even though the defendant requested him to do so. No showing of prejudice required under *Peguerio v. United States*, 526 U.S. 23 (1999) ("[W]hen counsel fails to file a requested appeal, a defendant is entitled to [a new] appeal without showing that his appeal would likely have had merit").

1997: *Turner v. United States*, 961 F. Supp. 189 (E.D. Mich. 1997). Counsel ineffective where the defendant wanted to appeal his sentence, but counsel failed to file appeal due to misunderstanding or miscommunication.

***Capital Case**

Dumer v. Berge, 975 F. Supp. 1165 (E.D. Wis. 1997). Appellate counsel ineffective for failing to file a brief and filing only an inadequate *Anders* brief explaining why no brief was filed on direct appeal.

1988: *Simmons v. Beyer*, 689 F. Supp. 432 (D.N.J. 1988). Counsel ineffective for failing to file timely appeal. Prejudice presumed.

1987: *Harris v. Kuhlman*, 601 F. Supp. 987 (E.D.N.Y. 1987). Counsel ineffective for failing to perfect appeal in a timely manner.

C. State Cases

2003: *Miles v. Sheriff*, 581 S.E.2d 191 (Va. 2003). Counsel's failure to file a notice of appeal following a guilty plea, despite the express request of the defendant to do so, was ineffective. Although the potential grounds for an appeal are limited following a guilty plea, the defendant still had a statutory right to file a notice of appeal and to pursue the appeal. Prejudice presumed and defendant allowed to appeal.

2001: *State v. Wicker*, 20 P.3d 1007 (Wash. Ct. App. 2001). Trial counsel ineffective for failing to timely file motion for revision in Superior Court following conviction of assault before Commissioner. Per se prejudicial even though appeal allowed because the Superior Court has broader review powers than appellate court and reviews claims de novo.

2000: *State v. Trotter*, 609 N.W.2d 33 (Neb. 2000). Counsel ineffective in child abuse and manslaughter case for failing to file a proper affidavit of poverty in lieu of a docket fee, which resulted in the dismissal of the direct appeal. Counsel had filed a poverty affidavit and motion to proceed in forma pauperis, but had obtained a form affidavit of indigence from the district court clerk's office, which was found to be inadequate by the court of appeals. Prejudice presumed.

1996: *P.M.W. v. State*, 678 So. 2d 484 (Fla. Dist. Ct. App. 1996). Appellate counsel ineffective for failing to file initial brief on behalf of juvenile in a timely fashion which resulted in appeal being dismissed. No requirement that defendant show possibility of success on the merits.

1995: *People v. Swanson*, 657 N.E.2d 1169 (Ill. App. Ct. 1995). Failure to file notice of appeal despite defendant's request to do so raised presumption of prejudice.

1994: *Beasley v. State*, 883 P.2d 714 (Idaho Ct. App. 1994). Counsel's failure to file appeal despite defendant's request to do so raised presumption of prejudice.

***Capital Case**

- 1993:** *State v. Manuelito*, 851 P.2d 516 (N.M. Ct. App. 1993). Counsel ineffective for failing to file a timely notice of appeal when counsel was aware of defendant's desire to appeal.
- 1992:** *In Interest of A.P.*, 617 A.2d 764 (Pa. Super. Ct. 1992). Counsel ineffective for failing to file a timely appeal of juvenile disposition.
- 1991:** *Frasier v. State*, 306 S.C. 158, 410 S.E.2d 572 (1991). Trial counsel ineffective for failing to perfect the direct appeal after defendant informed him that he desired to appeal but could not afford cost of transcript. Counsel merely advised defendant to try to qualify for indigent status and took no further steps.
- 1990:** *Commonwealth v. Cardenuto*, 548 N.E.2d 864 (Mass. 1990). Counsel failed to appeal denial of motions for required finding of not guilty where evidence was insufficient to sustain guilty verdicts.
- 1989:** *Coleman v. State*, 552 So. 2d 156 (Ala. Crim. App. 1989). Prejudice presumed where counsel failed to file a brief on first appeal as of right.
- Schlup v. State*, 771 S.W.2d 895 (Mo. Ct. App. 1989). Trial counsel ineffective for failing to file an appeal or seek to withdraw after the defendant told counsel he wanted to appeal. Prejudice presumed.
- 1988:** *People v. Wilk*, 529 N.E.2d 218 (Ill. 1988). Counsel ineffective for failing to timely file a motion to withdraw guilty plea based on defendant's argument that state failed to comply with plea agreement which caused dismissal of appeal because filing of motion to withdraw plea is a condition precedent to filing appeal.
- State v. Miller*, 541 N.E.2d 105 (Ohio Ct. App. 1988). Counsel ineffective for filing timely notice of appeal but then failing to file a brief.
- 1987:** *Hiatt v. State*, 548 So. 2d 483 (Ala. Crim. App. 1987). Prejudice presumed where counsel failed to file a brief on first appeal as of right.
- People v. Weger*, 506 N.E.2d 1072 (Ill. App. Ct. 1987). Counsel ineffective for failing to perfect appeal even after defendant directed to do so and defendant was prejudiced because the evidence was insufficient to sustain armed violence conviction.
- 1986:** *Moore v. State*, 485 So. 2d 1368 (Fla. Dist. Ct. App. 1986). Denial of EAC where defendant not given opportunity to assign error for appeal when his counsel could not do so in good faith, which denied defendant a trial record on which to base appeal.

***Capital Case**

Loop v. Solem, 398 N.W.2d 140 (S.D. 1986). Counsel per se ineffective for failing to file a brief which was required to perfect appeal.

1985: ***Carroll v. State***, 468 So. 2d 186 (Ala. Crim. App. 1985). Prejudice presumed where counsel failed to file a brief on direct appeal.

***Capital Case**

VII. APPEAL

A. U.S. Court of Appeals Cases

2002: *United States v. Bass*, 310 F.3d 321 (5th Cir. 2002). Appellate counsel ineffective in drug and conspiracy case for failing to challenge the sufficiency of the evidence to support the continuing criminal enterprise conviction, which requires proof that the defendant organized, supervised, or managed at least five persons. Here, the government alleged that the defendant organized six people, but the defendant had only buyer-seller relationship with several of these people. While the Fifth Circuit had not addressed the issue before, the court joined a number of other circuits in finding that a buyer-seller relationship by itself was not sufficient. Counsel's conduct was deficient. Prejudice found "albeit minimally." Setting aside the CCE conviction did not affect prison time because sentence was concurrent with other charges, but \$50 assessment for CCE conviction was set aside.

2001: **Carter v. Bowersox*, 265 F.3d 705 (8th Cir. 2001). Under AEDPA, appellate counsel was ineffective in failing to assert as error that the trial court failed to instruct the jury, as required by state law, that if it failed to make a unanimous finding that the death penalty was warranted by evidence in aggravation of punishment, it was required to return a life sentence. The jury ultimately reported that it could not reach a verdict (after one juror sought to change his guilty verdict to not guilty in sentencing) and the trial court sentenced the defendant to death. Counsel's conduct was deficient because the defendant "was deprived of a state-created liberty interest without due process." Prejudice found and not cured by the court ultimately being the sentencer because "there is a reasonable probability that had the jury been properly instructed, it would have sentenced petitioner to life imprisonment, and the question of punishment never would have reached the trial judge." The state court decision to the contrary was an unreasonable application of *Strickland* and *Hicks v. Oklahoma*. 447 U.S. 343 (1980).

Eagle v. Linahan, 279 F.3d 926 (11th Cir. 2001). Appellate counsel in pre-AEDPA murder case ineffective for failing to assert *Batson* issue when the trial judge, in rejecting the defendant's *Batson* challenge, stated that he believed that both sides were using their strikes in a discriminatory manner but failed to require the prosecution to produce a race neutral explanation for challenging black venirepersons. The government used nine of its ten peremptory challenges to remove blacks from the venire and the fact that the ultimate racial composition of the jury closely approximated that of the venire or even that the defense counsel may have also used strikes in a discriminatory manner did not negate the issue. Prejudice found since the trial judge already stated that the prosecution's strikes were racially motivated and the state court, in all probability, would have granted a new trial if the issue had been raised on appeal.

***Capital Case**

2000: *United States v. Mannino*, 212 F.3d 835 (3d Cir. 2000). Counsel ineffective for failing to assert on appeal that the sentencing court in drug conspiracy case erred in attributing to the defendants the amount of heroin distributed throughout the life of the conspiracy without specific, individualized inquiry to determine whether, given defendants' individual roles, they could reasonably foresee that the conspiracy would distribute the quantity of heroin attributed to them at sentencing and whether the quantity allocated to them was part of their undertaking. New sentencing required despite trial court's assertion that he would have imposed the same sentence regardless because this would amount to sentencing outside the defendant's presence and the government must be required to present sufficient evidence to support the sentence.

Harris v. Day, 226 F.3d 361 (5th Cir. 2000). Constructive denial of appellate counsel in robbery case for filing only an "errors patent" brief and withdrawing with *Anders* brief that failed to even mention any arguable issues of appeal. *Anders* requires the attorney seeking withdrawal on appeal to at least file a brief referring to anything in the record that might arguably support an issue, even if attorney believes appeal is frivolous.

Delgado v. Lewis, 223 F.3d 976 (9th Cir. 2000). Appellate counsel ineffective in drug case where counsel did not pursue issues certified by state court as providing probable cause for appeal and simply filed *Wende* brief (*Anders*-type) despite trial counsel's constructive withdrawal and the significant issues in these proceedings, including representation by only a conflicted co-defendant's counsel at sentencing. In assessing whether state court decision was "objectively unreasonable," under 28 U.S.C. § 2254(d), the court determines whether the state court clearly erred, in other words, whether the court is left "with a definite and firm conviction that an error has been committed." Here, where state court did not discuss rationale for decision, federal habeas review is not *de novo*, but an independent review of the record is required to determine whether the state court's decision was objectively reasonable. In this case, it clearly was.

1999: *Brown v. United States*, 167 F.3d 109 (2d Cir. 1999). Appellate counsel ineffective in narcotics and firearms case for failing to raise an issue on appeal concerning an obviously deficient instruction on reasonable doubt. The instruction equated reasonable doubt with a "substantial doubt" and advised the jury that it "need not find every fact beyond a reasonable doubt." New trial granted.

Lucas v. O'Dea, 179 F.3d 412 (6th Cir. 1999). Murder case in which the defendant was indicted for intentional murder which requires that the defendant killed the victim. At trial, the defense was that a codefendant actually shot the victim. The jury was charged, however, that the defendant could be convicted so long as the jury found that the victim was killed in the course of robbery and the defendant engaged in wanton conduct creating a grave risk of death. The jury was specifically instructed that it could convict of murder regardless of whether the defendant or the codefendant shot the victim. The jury convicted the defendant of wanton murder. The fatal variance between the

***Capital Case**

indictment and the conviction was not raised on direct appeal. In post-conviction, the state courts found that the issue was defaulted because it could have been raised on direct appeal. The Sixth Circuit held that counsel's failure to raise the issue on direct appeal constituted a procedural default. Nonetheless, petitioner established cause and prejudice because appellate counsel's failure to raise the issue concerning the jury instructions rendered his defense—that he did not shoot the victim—meaningless. Likewise, the court found prejudice because the instruction had the effect of directing a verdict of “guilty” on the murder charge. Thus, the default was excused and a new trial granted.

1998: *Jackson v. Leonardo*, 162 F.3d 81 (2d Cir. 1998). Appellate counsel ineffective for failing to challenge armed robbery and criminal use of firearm conviction based on the same facts as double jeopardy. Counsel's failure could not be based on any kind of strategy because she failed to raise this sure winner in favor of raising two highly dubious claims in a cursory appellate brief. Despite the fact that the defendant received no additional jail time for the second conviction (sentences were concurrent), the Court found prejudice because if the defendant were to commit additional criminal offenses in the future, the number of convictions could be considered in some sentencing schemes and guidelines. Thus, the Court ordered that the firearms conviction be removed from the defendant's record.

Roe v. Delo, 160 F.3d 416 (8th Cir. 1998). Appellate counsel ineffective for failing to request plain error review of erroneous first degree murder instruction. The trial court instructed the jury that the defendant could be convicted of first degree murder if there was an intent to cause serious physical injury, but first degree murder in Missouri requires proof of intent to cause death. Intent to cause serious physical injury is the mental state required for second degree murder which was instructed in this case. Thus, the instructional error blurred the distinction between the two murder offenses. Trial counsel failed to preserve the error. Nonetheless, the court found appellate counsel was ineffective in failing to raise the issue and the defendant was prejudiced because Missouri courts often reviewed instructional errors on the elements of offenses under plain error review. Because the facts at trial could support a finding that Roe deliberately shot the victim only with the intent to seriously injure him, there is a reasonable probability that Missouri courts may also grant relief. Writ granted unless Roe afforded a new appeal or granted a new trial.

1995: **Banks v. Reynolds*, 54 F.3d 1508 (10th Cir. 1995). Appellate counsel ineffective for failing to raise *Brady* claim or, in the alternative, IAC claim when trial counsel had failed to challenge the prosecution's failure to disclose exculpatory material.

United States v. Cook, 45 F.3d 388 (10th Cir. 1995). Ineffectiveness of appellate counsel, who also served as trial counsel, for failing to raise obvious conflict of interest issue caused by the trial court established cause and prejudice for failing to raise the issue on direct appeal. In essence, the trial

***Capital Case**

record reflected that three defendants in a drug trial retained the same counsel. Prior to trial, the government entered into a plea agreement with one of the defendants in exchange for her testifying against her co-defendants. The court then appointed new counsel for the witness because of the conflict of interest. During trial, the witness refused to testify and the court ordered the defendant's counsel to advise his former client of the consequences of failure to comply with plea agreement which required her to testify in government's case-in-chief against defendant in exchange for the government's recommendation of leniency at sentencing. Counsel objected and pointed out the conflict but the court ordered him to advise his former client to testify against his present client creating a clear, actual conflict of interest which required reversal. Nonetheless, counsel failed to raise the issue on direct appeal despite the fact that reversal was required based on the conflict.

- 1994:** *Mayo v. Henderson*, 13 F.3d 528 (2d Cir. 1994). Appellate counsel ineffective for failing to raise a claim on direct appeal when the New York Court of Appeals had previously held that it would apply a per se reversal rule on this issue and claim was preserved at trial.
- 1992:** *Claudio v. Scully*, 982 F.2d 798 (2d Cir. 1992). During homicide investigation, attorney convinced client to surrender to police and give confession. Without the confession police had no case against the client. On appeal a pre-trial order to suppress the statement was overturned because the sixth amendment right to counsel had not yet attached. The state constitutional right to counsel had attached but the court held that it did not include a right to effective assistance in pretrial matters. Appellate counsel raised the constitutional issue in the state's highest court, yet failed to raise the state claim. Court found that the state claim was a "probable winner" and failure to raise it was IAC.
- 1991:** *Freeman v. Lane*, 962 F.2d 1252 (7th Cir. 1991). Appellate defense counsel's performance in failing to raise on direct appeal issue of whether prosecutor improperly commented on defendant's failure to testify during closing argument was objectively unreasonable and deficient. Thus, defendant's failure to raise issue on direct appeal was excusable under *Wainwright v. Sykes* "cause and prejudice test."
- 1990:** *Lofton v. Whitley*, 905 F.2d 885 (5th Cir. 1990). Appellate counsel ineffective for filing a two page brief (when nonfrivolous issue could have been raised) requesting that the court of review simply check the record for errors patent without identifying any specific grounds for appeal.
- 1989:** *Orazio v. Dugger*, 876 F.2d 1508 (11th Cir. 1989). Appellate counsel rendered IAC by failing to raise on appeal a *Faretta* claim, the right to voluntarily elect self-representation. Because counsel did not fully review trial court file or talk with defendant or defendant's trial counsel, appellate counsel did not know of the state trial court's denial of defendant's request to proceed pro se.

***Capital Case**

Lombard v. Lynaugh, 868 F.2d 1475 (5th Cir. 1989). Appellate counsel ineffective for filing of conclusory “no merit” brief (when nonfrivolous issues existed) which pointed to nothing in record constituted a constructive denial of any assistance of appellate counsel for which no showing of prejudice is required.

Evans v. Clarke, 868 F.2d 267 (8th Cir. 1989) (affirming 680 F. Supp. 1351 (D. Neb. 1988)). Appellate counsel ineffective for arguing against client in *Anders* brief. Prejudice presumed.

1988: Thomas v. O’Leary, 856 F.2d 1011 (7th Cir. 1988). Counsel ineffective for failing to file appellate brief during state’s appeal of trial court’s suppression order in homicide case; appeal of the motion was a critical stage of the defendant’s criminal proceedings as admission of his statement would increase the likelihood of his conviction while suppression might cause him never to be tried. As this was a case of complete denial of counsel, prejudice was presumed.

Freels v. Hills, 843 F.2d 958 (6th Cir. 1988). Failure of defendant’s appellate counsel to provide defendant with copy of his brief, which claimed no trial error below, to address questions raised by defendant in his own pro se brief, and failure of appellate court to address defendant’s points on appeal, raised presumption that counsel’s assistance was ineffective and prejudicial, even if absence of trial error appeared in record.

1987: Jenkins v. Coombe, 821 F.2d 158 (2d Cir. 1987). Defendant was completely denied assistance of appellate counsel where counsel filed a clearly deficient five page brief containing only one point. The court found *Strickland* inapplicable & decided the case on 14th amend. due process grounds, holding that defendant had a right to an attorney until a proper appellate brief had been filed. As his attorney was dismissed, appellant was left without counsel. Although appellant was still able, by copying co-defendant’s brief, to arguably submit all claims, the complete absence of counsel which is guaranteed as of right made this arguable lack of prejudice moot.

Robinson v. Black, 812 F.2d 1084 (8th Cir. 1987). IAC where attorney filed *Anders* brief resolving issues in favor of government & concluding claims were meritless rather than acting as an advocate on behalf of petitioner & briefing all issues that might arguably support an appeal, thus forcing defendant to proceed pro se.

Matire v. Wainwright, 811 F.2d 1430 (11th Cir. 1987). Appellate counsel ineffective for failing to raise on appeal issue of error in admitting evidence of defendant’s post-arrest silence – where comment violated defendant’s 5th Amend. right & was not harmless.

1986: Peoples v. Bowen, 791 F.2d 861 (11th Cir. 1986). In view of prior state court decision that habitual felony offender statute was mandatory, appellate counsel who took “no merit” appeal & failed to

***Capital Case**

inform defendant that case might be remanded for resentencing was ineffective for exposing his client to the risks of further litigation where Court of Appeals, of its own motion, took note of failure of trial court to follow statute & vacated 20 year sentence & remanded for resentencing, at which time defendant was sentenced to life.

B. U.S. District Court Cases

2001: **United States ex rel. Erickson v. Schomig*, 162 F. Supp. 2d 1020 (N.D. Ill. 2001). Appellate counsel ineffective, under AEDPA, in failing to assert ineffective assistance of trial counsel in sentencing for failing to verify the background of witness presented as a defense mental health expert or to interview him to determine the content of his testimony. The “expert” was retained by the defendant’s family and had provided a report prior to trial that described the defendant as “manipulative” and “narcissistic” with a “grandiose sense of self- importance,” “feelings of entitlement,” “lack of empathy for the pain of others,” and a preoccupation with sexual fantasies of women. Nonetheless, counsel did not interview the witness to determine whether or not to present his testimony and did not check his credentials. During the sentencing hearing, the “expert” claimed that, among other degrees, he held a masters degree in psychology from Harvard University and a doctorate in psychology from the University of Chicago. During cross, he admitted, however, that the masters was in theology from the Harvard Divinity School and that his doctorate was a ministry degree in pastoral counseling and psychology from the Chicago Theological Seminary, an entity associated with the University of Chicago. He also admitted that he had previously testified only as a pastoral counselor. The trial judge refused to qualify him as an expert, but did permit him to offer lay testimony. The court denied a continuance in order for counsel to get a “real” expert. Counsel’s conduct was deficient even though the defendant’s family had retained this “expert.” Counsel’s conduct was also deficient despite the findings of the state’s psychiatrist after one brief interview that the defendant was fit for trial, sane at the time of the offense, and not suffering from a mental defect or disease. This evaluation was expressly limited to the defendant’s fitness for trial and sanity at the time of the murder, and did not address the statutory mitigating factors of extreme mental or emotional distress. No strategic decision explains counsel’s conduct because “a strategic decision necessarily rests on knowledge about what a witness will say and the pros and cons of presenting that testimony.” *Id.* at 1044. Counsel’s conduct was also prejudicial because the “expert” testimony that the defendant was “raised in a supportive home and had a personality disorder which allowed him to function normally, albeit with a grandiose sense of self-importance and a need for attention, is not mitigating.” *Id.* at 1048. If counsel had investigated and retained qualified experts, however, mitigating evidence was available. The defendant had a number of head traumas that resulted in blurred vision, spells of unconsciousness, and concussions from at least eight separate falls. He also had headaches, vomiting, and nerve injuries related to the head trauma. His mother was schizophrenic and he was sexually abused by a priest as a child. In response to the traumas, he began to abuse drugs and alcohol at an early age. He also turned to psychotropic drugs known to alter brain

***Capital Case**

functioning and to cause brain damage. When he was thirteen years old, he was admitted to the emergency room due to severe alcohol intoxication and he also unsuccessfully attempted to commit suicide by taking a drug overdose. Neuropsychological tests showed that he had brain damage in the dominant cerebral hemisphere which caused him to have difficulty understanding what was expected of him, processing information, dealing with quickly evolving situations, and learning from his own or other's behavior and mistakes. The state court's finding of no prejudice was unreasonable because the state court examined whether it was "unlikely" that the trial court would have drawn a different conclusion if the "expert" witness had not testified, imposing a higher standard than *Strickland*'s "reasonable probability" test. The state court also did not consider the defendant's new psychological evidence presented on collateral attack in determining prejudice. Finally, the Illinois Supreme Court's finding that the sentencing court did not rely on the "expert" prejudicial testimony is contradicted by the record, which shows that the sentencing court expressly considered this testimony. Thus, the state court decision was also an unreasonable determination of the facts in light of the evidence presented at sentencing. The issue of trial counsel's ineffectiveness was procedurally barred because not raised by appellate counsel, but appellate counsel was clearly ineffective for not raising the issue since even trial counsel had acknowledged a mistake at the time of trial and sought a continuance to retain a qualified expert.

1999: *Walker v. McCaughtry*, 72 F. Supp. 2d 1025 (E.D. Wis. 1999). Complete denial of appointed appellate counsel where counsel failed to move to withdraw or file *Anders* brief. Prejudice presumed.

1997: *Green v. United States*, 972 F. Supp. 917 (E.D. Pa. 1997). Appellate counsel ineffective for failing to raise as issue the fact that a juror, who both parties agreed should be stricken for cause due to bias and the judge initially said juror would be stricken but then did not strike, had to be removed by a defense peremptory which resulted in the defense exhausting all peremptory challenges and being denied a peremptory challenge.

1996: *Grady v. Artuz*, 931 F. Supp. 1048 (S.D.N.Y. 1996). Appellate counsel ineffective for failing to challenge the duplicitous nature of the indictment which alleged rape, sodomy, and sexual abuse crimes as continuous offenses over a one to two month when state law prohibited multi-count indictments and prohibited charging rape, sodomy, or sexual abuse as a continuing offense.

Evans v. Clarke, 680 F. Supp. 1351 (D. Neb. 1988), *modified*, 868 F.2d 267 (8th Cir. 1989). Appellate counsel ineffective for filing a brief which affirmatively argued against the client's case on the petition to withdraw under *Anders*. Prejudice presumed.

C. State Cases

***Capital Case**

2002: *Cupon v. State*, 833 So. 2d 302 (Fla. Dist. Ct. App. 2002). Appellate counsel was ineffective in escape case for failing to raise a preserved and meritorious issue on direct appeal. The defendant had been detained by the federal Immigration and Naturalization Service (INS) when he and others escaped. Following his recapture, he was convicted of grand theft and escape. During the trial, his attorney asserted that he was not a “prisoner” subject to conviction for escape under the relevant Florida statutes. Appellate counsel did not raise this issue and the escape conviction was affirmed without written opinion on direct appeal. The court later overturned the escape conviction for the co-defendant on this basis. Following denial of post conviction relief and initial petition for writ of habeas corpus, the defendant asserted in a second petition for writ of habeas corpus in state court that his appellate counsel was ineffective for failing to raise the issue. The court held that counsel’s conduct was deficient in failing to raise a preserved meritorious issue and the defendant was prejudiced because if the issue had been raised the defendant’s escape conviction would have been reversed on direct appeal.

Nelson v. Hall, 573 S.E.2d 42 (Ga. 2002). Appellate counsel ineffective in aggravated assault and kidnaping with bodily injury case for failing to challenge a jury instruction that had omitted the essential element of bodily injury from the kidnaping offense. Counsel’s conduct was deficient and prejudicial. The state argued that in analyzing prejudice the court should look not to the outcome on appeal, but to the ultimate resolution on remand or retrial since the defendant would be subject to the same punishment for both kidnaping with bodily injury and simple kidnaping. The court rejected this analysis and held that “the inquiry does not focus on the projected result on remand or retrial, but whether there is a reasonable probability that the result of the *appeal* would have been different.”

Benson v. State, 780 N.E.2d 413 (Ind. Ct. App. 2002). Appellate counsel was ineffective in child molestation case for failing to assert as error the trial court’s initial acceptance and then subsequent rejection of a plea agreement. The defendant was charged with three charges of child molestation and entered a plea agreement with the government to plead guilty to two of these charges in exchange for a 16 year sentence, dismissal of the third charge, and the state would not pursue a habitual offender enhancement. During the plea hearing, the court accepted the plea agreement. During sentencing a month later, following testimony from two social workers concerning the lightness of the 16 year sentence, the trial court informed the defendant that it would not accept the plea agreement unless the defendant also plead guilty to the third charge. The defense counsel stated that the defendant would not agree to anything beyond the plea agreement. The trial court then declared that the plea agreement would be rejected and sent the case to trial. The jury convicted the defendant on all three counts of child molesting and he was sentenced to 66 years. Under state law if a trial court accepts a guilty plea as part of a plea agreement the court must accept the terms of the agreement. The appellate counsel, who had also been the trial counsel, did not assert this error on appeal. The court found this to be deficient conduct because “the vacation of the guilty plea was

***Capital Case**

a significant and obvious issue.” Prejudice was found because if the issue had been raised on direct appeal the court would have reversed the conviction and reinstated the plea agreement.

***Commonwealth v. Ford**, 809 A.2d 325 (Pa. 2002). Counsel ineffective in capital case for failing to adequately investigate and present mitigation evidence in sentencing. Appellate counsel was also ineffective for failing to assert trial counsel’s ineffectiveness. In sentencing, trial counsel presented the defendant’s sister to testify but not prepare her testimony, which amounted to only a plea of mercy. Counsel also presented evidence of the defendant’s low IQ and that his educational achievement was at the 2d or 3d grade level. The jury found two aggravating circumstances and no mitigating circumstances. Trial counsel was aware of a competency evaluation that revealed that the defendant had a troubled childhood and learning problems. Counsel did not investigate to obtain prior hospitalizations, mental health records, or school records. He also did not obtain additional information from the defendant’s family or have a mental health professional evaluate the defendant with respect to mitigation. Counsel’s conduct was deficient because there was no reasonable basis for failing to investigate and present this mitigating evidence. Although counsel did state that he did not present psychiatric records because the prosecution informed him that they contained reports that the defendant was “explosive,” this decision was based on very little information and without actually reviewing the supporting documents. If counsel had adequately investigated, the evidence would have revealed schizophrenia, brain impairments including mental retardation, learning disabilities, and post traumatic stress. The defendant showed signs of dementia early in life and had a long history of psychiatric treatment for impaired reality, including hearing voices, and alcohol dependence. The defendant also had an extensive history of abuse and family dysfunction. The available evidence would have supported three statutory mitigating circumstances. The Commonwealth presented rebuttal evidence in post-conviction showing that the defendant had previously been convicted of sexual assault of a 12 year old boy, had been a gang member in his youth, and had threatened to kill his grandparents. The Commonwealth also presented psychiatric evidence of antisocial personality disorder and a clinical psychologist that would have testified that the defendant does not suffer from organic brain damage or learning disabilities. The court still found prejudice because the jury was given no meaningful evidence of mitigation to consider in their weighing process. Moreover, even without any mitigation evidence, the jury was still deadlocked at one point during the penalty phase deliberations.

***Commonwealth v. Chambers**, 807 A.2d 872 (Pa. 2002). Appellate counsel ineffective for failing to assert as error the trial court’s instruction that once the jurors “have unanimously found an aggravating circumstance, before they can weigh aggravating circumstances against any mitigating circumstances, they must all find the existence of at least one mitigating circumstance. This is not a correct articulation of the law and is the exact situation that *Mills* [*v. Maryland*] mandates we dare not risk.” Prejudice found “because the instruction could easily have confused the jury into believing

***Capital Case**

that all members of the panel had to find a mitigating circumstance before weighing the aggravating and mitigating circumstances.”

Patrick v. State, 349 S.C. 203, 562 S.E.2d 609 (2002). Appellate counsel ineffective in burglary, armed robbery assault and battery with intent to kill, and unauthorized use of motor vehicle case for failing to adequately assert claim of prosecutorial retaliation. Applicant was initially indicted in 1975. All of the charges except burglary were nol prossed prior to trial and applicant was tried and convicted of burglary. Following reversal in 1992 in post-conviction proceedings, the state reindicted, tried, and convicted on all charges. Trial counsel adequately preserved the issue of vindictive prosecution. The same counsel on appeal, however, “devoted three short paragraphs to the issue, did not give any useful analysis, and only cited one case.” The appellate court did not address this issue and instead simply held that the nol prossed charges could be brought since they were nol prossed before the jury was impaneled. Counsel did not address the retaliation argument in his petition for rehearing and then when directed by the court to address the issue in a supplemental petition for rehearing, counsel’s “argument was conclusory at best. He did not even mention the seminal case” that he had cited earlier in his brief. Prejudice found because this issue was a winner on appeal when analyzed under Supreme Court precedent (oddly enough the one case that was cited by appellate counsel).

2001: *Hudson v. Warden, Nevada State Prison*, 22 P.3d 1154 (Nev. 2001) (en banc). Appellate counsel ineffective for failing to assert that the trial court erred in relying on a presentence report to prove prior convictions for enhancement of sentence in DUI causing substantial bodily harm case. The issue was properly preserved at trial and the appellate court held that this was insufficient proof of the prior convictions. Remand allowed state to offer proper proof though.

Ezell v. State, 345 S.C. 312, 548 S.E.2d 852 (2001). Appellate counsel provided ineffective assistance for failing to adequately complete record in order to challenge admission of hearsay taped statements wherein non-testifying confidential informant identified applicant as the person who sold crack cocaine to the informant. Appellate counsel, who was also the trial counsel, preserved the issue at trial and raised it on appeal, but failed to include the audio tape in the Record on Appeal. The post-conviction court found ineffective assistance and granted a new direct appeal. The Supreme Court found, however, that if the appellate court had been provided with the tapes during the appeal the court would have granted a new trial because the evidence of guilt was not overwhelming and admission of the tapes was not harmless error. Thus, the appropriate remedy for the ineffective assistance of appellate counsel was a new trial.

2000: *Smith v. State*, 762 So. 2d 969 (Fla. Dist. Ct. App. 2000). Appellate counsel ineffective in failing to argue the correct standard of harmless error analysis and that the burden could not be placed on the defendant. During the direct appeal, the court of appeals found that the court erred in admitting

***Capital Case**

inadmissible hearsay from the alleged sexual assault victim's friend bolstering the victim's credibility but found the error harmless relying on a case holding that a state statute placed the burden of proving harm on the defendant. Appellate counsel's conduct was deficient in not arguing to the court that the case they relied on had been reversed by the Florida Supreme Court based on finding that, under *Chapman v. California*, the burden could not be shifted to the defendant. "[T]he failure of a criminal appellate counsel to argue the applicable harmless error standard is so basic as to be well below the standard of professional practice for such counsel." *Id.* at _____. Prejudice found because this was a sexual battery case that, without the improper bolstering by inadmissible hearsay, amounted to only a credibility contest between the defendant and the alleged victim.

***People v. Johnson**, 735 N.E.2d 577 (Ill. 2000). Appellate counsel ineffective due to counsel's failure to comply with Supreme Court rules by inadequately stating facts necessary to an understanding of case and by failing to cite to authorities and pages of record relied on. Rather than deem the issues waived, the court ordered rebriefing.

State v. Barnard, 14 S.W.3d 264 (Mo. Ct. App. 2000). Appellate counsel ineffective in sodomy case for failing to inform Court of Appeals of statute allowing for lesser sentence. Defendant charged with sodomy in 1994, but was not tried until 1995, after the relevant statutes were amended effective after crime but before trial. State law provided, however, that the defendant was entitled to amended statute provisions that provided for lesser sentences effective prior to the trial date.

1999: Guerra-Villafane v. Singletary, 729 So. 2d 972 (Fla. Dist. Ct. App. 1999). Appellate counsel ineffective in drug case. Entrapment defense raised at trial and counsel objected to the standard charge. Appellate counsel failed to raise the issue even though the charge given was on an objective standard applied in Florida prior to a statutory change in 1987 to a subjective standard.

Sloan v. Sanders, 519 S.E.2d 219 (Ga. 1999). Appellate counsel ineffective for failing to raise issue of trial counsel's ineffectiveness for failing to move to dismiss pursuant to a statutory speedy trial demand, which was a strong issue. Appellate counsel conceded that he was not aware of the issue, even though the initial demand for speedy trial was in the record, and had raised only two weak issues on appeal.

***People v. West**, 719 N.E.2d 664 (Ill. 1999). Appellate counsel ineffective in capital murder appeal for failing to challenge the sufficiency of the evidence proving the only statutory aggravating circumstance that made the defendant death eligible. The only aggravating circumstance submitted and found by the jury was that the defendant had a prior murder conviction, i.e. two murders in "separate premeditated acts." The court construed the statute to allow proof of premeditation either by proof of an intent to kill or proof of knowledge that the defendant's acts would cause death or great bodily harm. During sentencing, the state proved only that the defendant had previously plead

***Capital Case**

guilty to murder in 1978. At the time of that conviction, however, the defendant could have been convicted on one of three theories, two that required the requisite mens rea, but the third, felony murder, that required no specific intent. The state did not present any evidence establishing that the defendant had the requisite mens rea with respect to the 1978 murder. Appellate counsel was ineffective for raising this issue on appeal and the defendant was prejudiced because the issue was meritorious and precludes death eligibility. Court precludes imposition of the death penalty on retrial based on double jeopardy.

****Southerland v. State***, 337 S.C. 610, 524 S.E.2d 833 (1999). Appellate counsel provided ineffective assistance of counsel that required a new sentencing trial. Trial counsel requested an instruction on life without parole, but the trial court refused. Trial counsel then requested a charge that life is to be understood in its “ordinary and plain meaning,” pursuant to *State v. Norris*, 285 S.C. 86, 328 S.E.2d 339 (1985) (requiring instruction when the issue of parole was raised), and the trial court also denied that request. Appellate counsel raised only the life without parole issue, but the court affirmed because the state had not argued future dangerousness and this instruction was not required under *Simmons v. South Carolina*, 512 U.S. 154 (1994). If appellate counsel had asserted the *Norris* claim, reversal would have been required because the portion of the subsequent opinion in *State v. Atkins*, 293 S.C. 294, 360 S.E.2d 302 (1987), requiring that the court give the charge upon request by the defense was applicable. Prejudice found because failure to give the ordinary and plain meaning charge upon request requires automatic reversal under state law.

- 1997: *Matter of Maxfield***, 945 P.2d 196 (Wash. 1997) (en banc). Counsel ineffective for failing to raise on appeal the state constitutional issue of privacy with respect to electricity consumption records where records had been voluntarily provided by commissioner to drug task force.
- 1996: *State v. Reed***, 660 N.E.2d 456 (Ohio 1996). Appellate counsel ineffective for failing to raise issue concerning the trial court’s denial of appellant’s request to represent himself in his drug abuse trial.
- 1995: *People v. Mack***, 658 N.E.2d 437 (Ill. 1995). Appellate counsel ineffective for failing to raise as issue the fact that the jury verdict form finding an aggravating circumstance (commission during robbery with intent or knowledge of strong probability of death or great bodily harm) and finding death eligibility omitted an essential element of the factor (intent or knowledge). Retrial on sentence.
- 1994: *People v. Salazar***, 643 N.E.2d 698 (Ill. 1994). Appellate counsel ineffective for failing to raise during direct appeal issue of whether voluntary manslaughter instructions erroneously gave the prosecution the burden of proving mental status which reduced murder to manslaughter. This instruction in effect required the jury to convict defendant of murder rather than manslaughter.

***Capital Case**

1993: *Clark v. State*, 851 P.2d 426 (Nev. 1993). Appellate counsel ineffective for failing to raise abuse of discretion in adjudicating defendant a habitual criminal where he was not actually adjudicated as such and trial court may have mistakenly believed that his authority to punish the defendant was limited to deciding what sentence to impose once the requisite number of felony convictions had been established.

Ex parte Daigle, 848 S.W.2d 691 (Tex. Crim. App. 1993). Appellate counsel ineffective for failing to raise as issue trial court's denial of defendant's timely motion for jury shuffle which was a reversible error.

1992: **Watkins v. State*, 632 So. 2d 555 (Ala. Crim. App. 1992). Appellate counsel ineffective for failing to supplement record to establish *Batson* claim. Trial was held four years prior to *Batson*, but Alabama courts applied *Batson* retroactively under plain error rule to cases still on direct appeal when *Batson* was decided. Appellate counsel, who was also trial counsel, raised *Batson* on direct appeal but the record did not reflect race of jurors. If counsel had properly supplemented the record would have shown that the state used 12 of its 13 peremptory challenges to remove 12 of 13 blacks from the jury. If this evidence had been presented on direct appeal, the court would have granted a *Batson* hearing.

Meyer v. Singletary, 610 So. 2d 1329 (Fla. Dist. Ct. App. 1992). Appellate counsel ineffective for failing to raise per se reversible error that judge failed to provide notice to prosecution and defense before responding to deliberating jury's request to review evidence.

Williams v. State, 844 S.W.2d 562 (Mo. Ct. App. 1992). Appellate counsel ineffective for failing to argue that a newly amended drug sentencing provision should be applied to reduce the defendant's sentence.

1991: *Griffin v. United States*, 598 A.2d 1174 (D.C. 1991). Appellate counsel IAC for failure to raise double jeopardy issue on appeal where obstruction of justice conviction was based on same conduct that formed basis for prior contempt conviction.

People v. Logan, 586 N.E.2d 679 (Ill. App. Ct. 1991). Appellate counsel ineffective in murder case for failing to argue issue pertaining to admission of victim impact evidence in guilt phase where state referred to families during opening and closing, widow testified about children, and a picture of the victim's family was put in evidence.

State v. Sumlin, 820 S.W.2d 487 (Mo. 1991). Appellate counsel ineffective for failing to argue that a newly amended drug sentencing provision should be applied to reduce the defendant's sentence.

***Capital Case**

Simpkins v. State, 303 S.C. 364, 401 S.E.2d 142 (1991). Appellate counsel ineffective for failing to raise an obvious reversible error on direct appeal, i.e., the guardian ad litem of the child criminal sexual assault victim was the only person to testify regarding the identity of the perpetrator and the details of the incident.

1990: *People v. Ferro*, 551 N.E.2d 1378 (Ill. App. Ct. 1990). Appellate counsel ineffective for failing to raise issue concerning trial court's comments which forced jury to reach a verdict by threatening that they would stay at hotel until they did.

Ex parte Dietzman, 790 S.W.2d 305 (Tex. Crim. App. 1990). Appellate counsel ineffective where out of 27 grounds raised the court was unable to review 23 of them because counsel did not properly present the issue or failed to conform to appellate rules. Counsel did not designate for inclusion in the record testimony related to motion to suppress statements which was necessary for review of 16 of the grounds of error raised; did not show what witness would have stated to support an error raised concerning denial of continuance to obtain witness; and raised issues in a manner different than they were raised at trial so they were not preserved.

Dunn v. Cook, 791 P.2d 873 (Utah 1990). Direct appeal counsel ineffective for filing a brief that merely recited the prosecution and defense evidence, stated only four issues in single short sentences, presented no argument, listed cases but did not state case facts, did not even cite record in 2 of the 4 issues, and failed to raise a number of substantive issues later identified by habeas counsel. Because of IAC, prior appeal was not a bar to raising issues in habeas.

1989: *Sutherland v. State*, 771 S.W.2d 264 (Ark. 1989). Appellate counsel in burglary case ineffective for failing to abstract confession so court was unable to review issue of whether it was error to use the defendant's confession to burglary at trial, where the confession was made after the defendant had been appointed counsel on unrelated drug charges so that his subsequent waiver of right to counsel after the police initiated the interrogation with respect to the burglary was invalid. [Note: confession issue would probably not be decided the same in light of *McNeil v. Wisconsin*, 501 U.S. 171 (1991).]

Ragan v. Dugger, 544 So. 2d 1052 (Fla. Dist. Ct. App. 1989). Appellate counsel ineffective for failing to allege as error trial court's failure to state with particularity its justification for retention of jurisdiction (based on state law requirement).

People v. Reyes, 542 N.Y.S.2d 178 (N.Y. App. Div. 1989). Appellate counsel ineffective for failing to raise *Batson* when the prosecution removed all Hispanics from the jury.

***Capital Case**

1986: **Johnson v. Wainwright*, 498 So. 2d 938 (Fla. 1986). Appellate counsel ineffective for failing to raise separation of jury as an issue on appeal, even though trial counsel objected to separation after the guilt-innocence deliberations had begun, requested that the jury be sequestered overnight, and moved for a mistrial after the request was denied. Under state law, the jury must be sequestered in a capital case during deliberations.

**Fitzpatrick v. Wainwright*, 490 So. 2d 938 (Fla. 1986). Appellate counsel ineffective in failing to appeal state's error in presenting anticipatory rebuttal of statutory mitigating circumstance before petitioner had presented any evidence of the circumstance and after petitioner's stated intention not to rely on or present any evidence on the issue. Under state law it is error to allow the state to present evidence of past criminal activity (not falling within the definitions of any statutory aggravating circumstances) to rebut the existence of the mitigating factor of lack of prior criminal record, where the defense has expressly waived any reliance on lack of prior record.

**Matter of Frampton*, 726 P.2d 486 (Wash. Ct. App. 1986). Presumption of prejudice in capital case where appellate counsel failed to submit a brief on any guilt phase issues even though the defendant plead not guilty, desired to appeal guilt phase issues, and there were nonfrivolous guilt phase issues that could have been raised.

Whitt v. Holland, 342 S.E.2d 292 (W. Va. 1986). Appellate counsel ineffective for failing to communicate with his client, failing to raise several important issues, including ineffective assistance during the trial, and exhibiting "a lack of conscientious attentiveness to the record."

1985: **Wilson v. Wainwright*, 474 So. 2d 1162 (Fla. 1985). Appellate counsel ineffective for failing to brief issues of sufficiency of evidence of premeditation and propriety of death sentence and failing to adequately prepare and present oral argument.

1984: **Dougan v. Wainwright*, 448 So. 2d 1005 (Fla. 1984) (direct appeal in 1981). Appellate counsel failed to provide effective assistance due both to a conflict of interest and to the failure to raise meritorious legal claims. Trial counsel represented the defendant and two co-defendants on appeal and filed a combined appeal for the defendant and one co-defendant, whose case was previously reversed due to ineffective assistance of counsel. *Barclay v. Wainwright*, 444 So.2d 956 (Fla.1984). Counsel was ineffective and had a conflict of interest in this case for the same reasons.

**Barclay v. Wainwright*, 444 So. 2d 956 (Fla. 1984). Appellate counsel failed to provide effective assistance due both to a conflict of interest and to the failure to raise meritorious legal claims. Counsel represented the defendant (for whom the jury recommended life) and a codefendant (for whom the jury recommended death) but "made absolutely no attempt to draw our attention to this difference or to emphasize the rationality of the jury's differentiation." In addition, counsel had

***Capital Case**

represented the codefendant at trial, was paid to do the appeal for both clients by the codefendant's father, and he approached the defendant about representing him rather than the other way around. In addition, during the representation, counsel divorced his wife and married the co-defendant's sister. Aside from the conflicts, counsel only argued seven of 27 issues asserted in the brief. "[O]ther than the several points arguing the constitutionality of the death penalty, the points which contain discussion deal only with [the co-defendant]. Other than on the title page, [the defendant's] name does not appear in this brief." Likewise, the brief did not argue against aggravating circumstances or assert mitigating circumstances and "the most recent case cited in the original brief is *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972)."

***Capital Case**

VIII. POST-CONVICTION

A. U.S. Court of Appeals Cases

1990: *Lawrence v. Armontrout*, 900 F.2d 127 (8th Cir. 1990). Defendant was denied effective assistance when post-conviction counsel failed to call several witnesses in PCR, despite defendant's request to do so, in order to establish prejudice from trial counsel's admitted failure to find and interview potential alibi witnesses, even though counsel had planned to assert misidentification as the main defense. No procedural default because of PCR ineffectiveness.

B. State Cases

2003: *Graves v. State*, 784 N.E.2d 959 (Ind. Ct. App.), *transfer granted*, 792 N.E.2d 49 (Ind. 2003). Counsel was ineffective in post-conviction proceeding for failing to adequately reconstruct the record or to prove that reconstruction was not possible. The defendant had plead guilty to burglary in 1981 and challenged the voluntariness of his plea in post-conviction. Counsel presented evidence that the plea hearing tape could not be located but did not otherwise present evidence that reconstruction of the record was not possible or otherwise attempt to actually reconstruct the record so that the merits of the claim could be addressed. Although the defendant had no constitutional right to counsel under either the U.S. Constitution or the Indiana Constitution, the defendant was entitled to representation in "a procedurally fair setting." Because counsel's conduct was deficient, the court ordered that the defendant would be allowed to file a new petition for post-conviction relief.

2000: *State v. Velez*, 746 A.2d 1073 (N.J. Super. Ct. App. Div. 2000). Post-conviction counsel ineffective in aggravated sexual assault and kidnaping case. Defendant convicted and sentenced to 60 years for crime involving multiple assailants raping a three year old child. Three year old identified defendant, who was known to her family, but the defense was alibi corroborated by the defendant's girlfriend. Pine needles in defendant's car similar to that found on girl and jailer said defendant stated "he did it," but DNA of semen either didn't match the defendant or was inconclusive and the pubic hair found was Caucasian when the defendant was Hispanic. After the defendant failed a pro se post-conviction application raising ineffective assistance of counsel and asking for a new type of DNA testing, post-conviction counsel was appointed as required by state law. Counsel met with client just before the beginning of the hearing, but did not otherwise investigate or prepare for the hearing and argued only those issues filed in the pro se petition without preparation. Court cited *Cronic* and presumed prejudice because there was no meaningful adversarial testing.

***Capital Case**

- 1999:** **People v. Turner*, 719 N.E.2d 725 (Ill. 1999). Under state statutes, performance of post-conviction counsel, who failed to amend petition to avoid procedural bar or present evidentiary support, was unreasonable and fell below level of assistance required by rule.
- 1997:** *Iovieno v. Commissioner of Correction*, 699 A.2d 1003 (Conn. 1997). After first state habeas proceeding counsel failed to file a petition for certification to appeal even though defendant desired to appeal. Habeas counsel found ineffective in second state habeas for failure to timely file the petition for certification to appeal. Based on a state statutory right to effective assistance of counsel in habeas, the court restored the opportunity to timely file the petition for certification to appeal.
- 1993:** **People v. Johnson*, 609 N.E.2d 304 (Ill. 1993). Post-conviction counsel ineffective for failing to investigate and present evidence to support death-sentenced inmate's allegations of ineffective assistance at trial because trial counsel: failed to investigate and present witnesses, including experts, to contradict the state's evidence; stipulated improperly to disciplinarys in prison; and failed to investigate and present mitigation evidence. Post-conviction counsel did not investigate and present evidence to support these claims and did not even review prison records and present evidence that trial counsel improperly stipulated to disciplinarys.
- 1991:** *Waters v. State*, 574 N.E.2d 911 (Ind. 1991). Post-conviction counsel ineffective where he entered notice of appearance but did not actually represent defendant and the only evidence submitted was prepared pro se by defendant.
- 1989:** *People v. Butler*, 541 N.E.2d 171 (Ill. App. Ct. 1989). Post-conviction counsel ineffective for failing to raise issue concerning the trial court's imposition of consecutive sentences for theft and burglary even though court did not admonish defendant prior to guilty plea of the possibility of consecutive sentences as required by state law.
- Patton v. State*, 537 N.E.2d 513 (Ind. Ct. App. 1989). Post-conviction counsel ineffective for failing to present evidence of attempt to reconstruct record of guilty plea hearing or evidence which established that reconstruction was not possible which caused dismissal of PCR.

***Capital Case**

IX. PROBATION REVOCATION

- 2002:** *Lambert v. State*, 811 So.2d 805 (Fla. Dist. Ct. App. 2002). Counsel ineffective in probation revocation hearing for failing to seek to exclude evidence of alleged new law violation while there was a pending motion to suppress the same evidence in the related criminal prosecution. Prejudice found because the evidence was excluded in the criminal case. If it had been also excluded in the probation revocation hearing, the state would have been unable to prove the violation.
- 2000:** *Torres v. State*, 39 S.W.3d 631 (Tex. App. 2000). Counsel ineffective in community supervision revocation due to counsel's failure to object to state's lack of due diligence in serving the defendant with warrant. In June 1992, defendant was sentenced to seven years confinement probated for seven years. On April 22, 1999, the state moved to revoke community supervision. Warrant was issued on April 26, 1999, but defendant was not served until August 3, 1999. Under Texas law, the state must exercise due diligence to serve notice of revocation hearing, but the defense must first raise the issue. Here, counsel failed to raise the issue despite the fact that the defendant and his mother had lived at the same address and worked at the same address, known to his probation officer, from the time the warrant was issued until it was served. Moreover, the state established only that police officer had been to defendant's home only once to find no one home, but there was no showing of time of visit. Deficient conduct and prejudice found because the defendant had a valid defense against revocation of his community supervision that was not raised by counsel.
- 1996:** *In re A.V.*, 674 N.E.2d 118 (Ill. App. Ct. 1996). Counsel ineffective for failing to object to consolidation hearing on both the state's petition to adjudicate juvenile's delinquency, which required proof beyond a reasonable doubt, and the state's petition to revoke juvenile's probation, which required proof by preponderance of the evidence, based on the same alleged acts. Juvenile acquitted on delinquency charge but probation revoked.
- 1993:** *People v. Porter*, 608 N.E.2d 1210 (Ill. App. Ct. 1993). Counsel ineffective for failing to object to consolidation of prosecution for delivery of cocaine and proceeding to revoke probation for alleged possession of cocaine. Jury acquitted on delivery charge, but judge found possession. If probation revocation hearing had been separate, possession allegation would have been collaterally estopped.
- 1992:** *Nichols v. State*, 308 S.C. 334, 417 S.E.2d 860 (1992). Counsel ineffective at proceeding to revoke probation for failing to make restitutionary payments because counsel did not object to state's failure to present evidence that the unemployed defendant had not made a bona fide effort to pay.

***Capital Case**

X. JUVENILE HEARINGS

- 2000:** *In re R.D.B.*, 20 S.W.3d 255 (Tex. App. 2000). Counsel ineffective for failing to seek appointment of mental health expert to assist defense in transfer hearing. Defendant adjudicated as juvenile at age 16 for aggravated assault, robbery, burglary, and theft and sentenced to 15 years to Youth Commission. Under state statute, Youth Commission could petition court for transfer to adult system if defendant between 16 to 21, portion of sentence remains, and “welfare of community” requires. Youth Commission requested transfer when defendant was 18. One witness, whose qualifications were not in record, testified that defendant had IQ of 79 and brain damage from a self-inflicted gunshot wound, which caused seizures. Based on reports of other people, who did not testify, witness said that brain damage could contribute to behavior problems, but Youth Commission experts believed behavior was due to antisocial character and that defendant was a high risk to reoffend. The only witness for the defense was the defendant’s mother who testified that son had been in hospital for 3 months and had to relearn to talk, etc. Court held that there was a duty to investigate “such plainly evident background of mental health problems” and the defense clearly needed an expert in the face of such unfavorable reports. Prejudice found because if defense had their own experts, state would have been forced to call its own experts to testify instead of relying just on hearsay and admission of reports from people who did not testify and the defense could have tested the state’s case.
- 1996:** *Matter of Appeal in Maricopa County, Juvenile Action No. JV-511576*, 925 P.2d 745 (Ariz. Ct. App. 1996). Counsel ineffective in juvenile proceeding for aggravated assault for failing to present an available favorable psychological report or present the testimony of the psychologist, even though evaluation was conducted on counsel’s direction and judge expressed dissatisfaction with the available court-appointed evaluation. Counsel also made no offers of proof and did not cross examine state’s witnesses even though medical and police reports existed which cast doubt on the validity of the victim’s testimony regarding the extent and seriousness of the victim’s injuries. Finally, even though it was first offense, juvenile had supportive family, regular job, good school attendance and two state witnesses recommended against transfer, counsel did not argue for transfer deferral program as permitted under juvenile court rule.
- 1988:** *State v. Bryant*, 567 A.2d 212 (N.J. Super. Ct. App. Div. 1988), *rev’d in part on other grounds*, 569 A.2d 770 (N.J. 1989). Counsel ineffective for failing to adduce any meaningful evidence with respect to juvenile’s likelihood of rehabilitation during hearing on waiver of family court jurisdiction when state law established rehabilitative potential as a basis for denying waiver.

***Capital Case**

XI. INVOLUNTARY COMMITMENT PROCEEDINGS

1996: *People v. Shelton*, 667 N.E.2d 562 (Ill. App. Ct. 1996). Attempted murder defendant who was acquitted by reason of insanity and remanded to custody of Dept. of Mental Health petitioned for release. Court held that both Sixth Amendment and statutory rights to counsel were violated and counsel was ineffective for failing to oppose state's motion to strike the petition which resulted in petition for discharge being dismissed and a denial of review.

***Capital Case**

XIII. POST-TRIAL CLEMENCY (MILITARY)¹³

- 2000:** *United States v. Passmore*, 54 M.J. 515 (N.M. Ct. Crim. App. 2000). Counsel ineffective in post-trial proceedings in drug case. On appeal, the court set aside the convening authority's action and returned the record for a new staff judge advocate's recommendation (SJAR) and convening authority's action because convening authority reviewed prosecutor's recommendation of denial of clemency that had not been served on defense counsel. After remand, counsel was served with the additional matters but submitted no new clemency matters or response. Counsel was ineffective, however, because he failed to even contact the accused to determine whether he wished to submit any new clemency materials despite passage of 17 months. While the defense counsel is responsible for post-trial tactical decisions, he should act only after consultation with the client where feasible and appropriate. Prejudice found because, regardless of whether it would have made any difference to convening authority's decision or not, the accused's life had changed dramatically and he desired to submit additional information to the convening authority but was not afforded the opportunity due to counsel's deficient conduct. Convening authority's action set aside and case remanded for new recommendation and action.
- 1999:** *United States v. Lowe*, 50 M.J. 654 (N.M. Ct. Crim. App. 1999). Counsel ineffective in drug case for failing to submit clemency matters to the convening authority post-trial when client had expressed desire to do so. Court found prejudice because: "We believe no appellant should be totally deprived of the opportunity to make their "best case" before the convening authority. In this case, we will not speculate on what the convening authority would have done if he had been presented with the clemency information the appellant desired to submit. The appellant has made a 'colorable showing of possible prejudice,' and he will receive the benefit of our doubt where it is clear that his post-trial representation was nonexistent." *Id.* at 657 (citation omitted).
- 1994:** *United States v. MacCulloch*, 40 M.J. 236 (C.M.A. 1994). Military counsel ineffective for submitting a letter written by the defendant's civilian counsel to the convening authority when the letter effectively negated any plea for clemency because it included references to defendant's signed confession, an indication that defendant had committed more crimes than that for which he was charged, a statement that the plea bargain was a forgone conclusion, and a statement that counsel believed the sentence would not be reduced.
- 1992:** *United States v. Frueh*, 35 M.J. 550 (A.C.M.R. 1992). Defense counsel ineffective when he failed to submit clemency matters to the convening authority despite the fact that accused did not waive his right to file clemency petition.

¹³After trial and prior to appeal, the convening authority or commanding general must approve the findings and sentencing. The convening authority does not have to review legal issues but is required to consider sentence. In essence, this post-trial review is a clemency proceeding.

***Capital Case**

United States v. Jackson, 34 M.J. 783 (A.C.M.R. 1992). Civilian counsel's unilateral termination of the contract between counsel and defendant (due to a fee dispute) denied defendant of effective assistance of counsel in preparing post-trial clemency submission to convening authority. In military proceedings, trial counsel's duties do not cease at the end of the trial but extend to completion of the post-trial clemency proceedings.

- 1991:** *United States v. Stephenson*, 33 M.J. 79 (C.M.A. 1991). Defense counsel ineffective for advising accused to forego right to submit clemency petition to the convening authority when the accused was sentenced to 50 years and review at the convening authority level was the best hope for sentence relief.
- 1990:** *United States v. Harris*, 30 M.J. 580 (A.C.M.R. 1990). Counsel ineffective for failing to submit accused's certificates, awards, and efficiency reports received during his eleven years of service to the convening authority in clemency proceedings.

***Capital Case**

XIV. DENIAL OF RIGHT TO COUNSEL ISSUES

A. SLEEPING COUNSEL

2001: **Burdine v. Johnson*, 262 F.3d 336 (5th Cir. 2001) (en banc). In a heavily split court, prejudice was presumed under *Cronic* in capital trial where the defense counsel repeatedly slept as evidence was being introduced against the defendant because the defendant was denied counsel at a critical stage of his trial due to “the consistent unconsciousness of his counsel.” *Id.* at 341. The court first rejected the state’s argument that this creates a new rule under *Teague v. Lane*, since this ruling is inevitable under both *Cronic* and *Strickland*. The court also rejected the state’s argument that *Cronic* only applies if state action interferes with the right to counsel. The court then found that a presumption of prejudice is appropriate. “Unconscious counsel equates to no counsel at all. Unconscious counsel does not analyze, object, listen or in any way exercise judgment on behalf of a client.” *Id.* at 349.

Even the intoxicated attorney exercises judgment, though perhaps impaired, on behalf of his client at all times during a trial. Yet, the attorney that is unconscious during critical stages of a trial is simply not capable of exercising judgment. The unconscious attorney is in fact no different from an attorney that is physically absent from trial since both are equally unable to exercise judgment on behalf of their clients.

Id.

1996: *Tippins v. Walker*, 77 F.3d 682 (2d Cir. 1996). Prejudice presumed when counsel was sufficiently asleep to amount to being unconscious for extended periods of time during 12-day drug trial and slept through a key prosecution witness and through damaging testimony.

***Capital Case**

B. ATTORNEY LICENSING ISSUES

1. U.S. Court of Appeals Cases

2003: *Mitchell v. Mason*, 325 F.3d 732 (6th Cir. 2003). The defendant in a second degree murder case was completely denied counsel prior to trial and prejudice was presumed. Counsel was appointed in October 1988 and represented the defendant at a preliminary hearing. Four months later counsel attended a final conference. Then on April 5, 1989, counsel was suspended from practicing law. He was reinstated the day jury selection began. During the time following counsel's appointment, the defendant wrote six separate letters to the trial court indicating that counsel had not visited him at all and requesting a new attorney. Eleven days prior to trial the court held a hearing on the defendant's motion and counsel did not even attend the hearing. Nonetheless, the court denied the motion for new counsel. The state court in reviewing this issue applied the analysis of *Strickland*. The Sixth Circuit held, however, "we are convinced that the undisputed amount of time that [counsel] spent with [the defendant] prior to jury selection and the start of trial – approximately six minutes, spanning three separate meetings in the bullpen, when viewed in light of [counsel's] month-long suspension from practice immediately prior to trial – constituted a complete denial of counsel at a critical stage of the proceedings." The court thus found under the standards of the AEDPA that the Michigan Supreme Court erroneously and unreasonably applied clearly established Supreme Court law set forth in *Cronic*. The court held that in addition to the month-long suspension just prior to trial, the evidence showed that during the entire six months of counsel's representation, he met with the defendant no more than six minutes. In light of the Supreme Court's holding in *Powell v. Alabama*, the Sixth Circuit held that the pretrial period constitutes a critical stage of the proceedings because the pretrial period "encompasses counsel's constitutionally imposed duty to investigate the case."

The illogic of applying *Strickland* to these facts is manifest in that there are no conceivable tactical or strategic reasons for defense counsel to fail to consult with a client prior to trial. Such a meeting is vital if counsel is competently to develop a defense. If counsel does not meet with his client for more than two minutes at a time, the defendant is unable to confide truthfully in his lawyer, and counsel will not know, for example, which investigative leads to pursue, whether there are witnesses for the defense, or what kind of alibi the defendant may have.

Id. at ____.

1990: *United States v. Novak*, 903 F.2d 883 (2d Cir. 1990). Representation at trial by individual who had obtained admission to bar through fraudulent means and thus was never properly licensed was per se violation of Sixth Amendment.

***Capital Case**

2. State Cases

- 2003:** *State v. Joubert*, 847 So.2d 1023 (Fla. Dist. Ct. App. 2003). Counsel was denied effective assistance of counsel where counsel had petitioned for disciplinary resignation, which was tantamount to disbarment, and had no license at the time of trial. This was a *per se* violation of the Sixth Amendment, because “[t]he right to effective assistance of counsel means access to a licensed attorney, . . . A disbarred, or even suspended, attorney is simply not ‘counsel’ for purposes of ‘effective assistance of counsel.’” *Id.* at ____.
- 1996:** *Butler v. State*, 668 N.E.2d 266 (Ind. Ct. App. 1996). Prejudice presumed where defendant was represented solely by an attorney licensed in another state but not licensed or otherwise admitted to practice law in Indiana.
- 1992:** *In re Johnson*, 822 P.2d 1317 (Cal. 1992). Prejudice presumed where, prior to trial and without defendant’s knowledge, counsel been suspended from practice and had submitted his resignation to state bar while disciplinary charges were pending.
- 1989:** *People v. Chin Moo Foo*, 545 N.Y.S.2d 55 (N.Y. Sup. 1989). Per se reversal required where defendant was represented by a person who obtained attorney’s license through fraud upon the licensing authorities.
- State v. Newcome*, 577 N.E.2d 125 (Ohio Ct. App. 1989). Prejudice presumed when counsel was under suspension at the time his guilty plea was entered.
- 1988:** *People v. Williams*, 530 N.Y.S.2d 472 (N.Y. Sup. 1988). Per se reversal required where attorney was disbarred and was never properly licensed.

***Capital Case**

C. ATTORNEY MEDICAL PROBLEMS

1. U.S. Court of Appeals Cases

1991: *Pilchak v. Camper*, 935 F.2d 145 (8th Cir. 1991) (*affirming* 741 F. Supp. 782 (W.D. Mo. 1990)). Fundamental injustice, even if procedurally defaulted, when defendant convicted by a jury hand-picked by deputy sheriff and counsel had Alzheimer's which resulted in calling defendant as a witness which opened the floodgates to rebuttal and failure to present evidence that defendant was coerced by co-defendant.

2. State Cases

State v. Antoine, 774 So. 2d 353 (La. Ct. App. 2000). Counsel ineffective in possession with intent to distribute case due to medical problems. During trial, counsel raised the issue of his own ineffectiveness during voir dire, jury selection, and beginning of trial because at the end of that day he went to his doctor, learned that he had low blood sugar, and had to be hospitalized, which continued the trial. Counsel conceded that he "had no idea what was happening" during that first day and record supported this because counsel had failed to object to state back-striking jurors after they were sworn and failed to object to inadmissible hearsay through an expert. Counsel raised the issue when the trial resumed and a mistrial should have been granted because the prejudice standard had been met.

1998: *State v. Gill*, 967 S.W.2d 540 (Tex. App. 1998). Counsel ineffective in aggravated assault of girlfriend case. Trial court found counsel ineffective after several evidentiary hearings related to counsel's physical and mental health and ordered a new trial without making specific findings of fact or conclusions of law. Court reviewed under abuse of discretion standard and found that there was sufficient evidence to support the trial court's ruling. Record reflected that counsel struck a potential juror (against the court's advice that juror bias could favor defendant), who stated that he would be hesitant to sentence a person to prison because his brother was a prison guard, and the inmate might harm brother. Counsel also failed in several instances to object or make timely objections, including when the arresting officer testified that defendant told a third party that the "bitch" (referring to girlfriend) had him arrested (although she testified for the defense at trial. Counsel also failed to adequately examine the girlfriend by essentially conceding the defendant's guilt by asking in the guilt-or-innocence phase, "Are you asking the jury to be lenient with him and not send him to the penitentiary?" Finally, counsel failed to adequately cross-examine defendant's ex-wife when she testified concerning past domestic violence. Counsel could have impeached her with criminal history as well as an alleged history of psychiatric hospitalization. Based on these errors, the court found this to be "a close case," but found no abuse of discretion when the record was viewed in light of the "mental and physical deficiencies of counsel." 967 S.W.2d at 543. "Medical records entered

***Capital Case**

into evidence at the hearing on the motion for new trial showed that [attorney] had been hospitalized less than a month before trial. The records indicate that [attorney] was diagnosed with nineteen illnesses including: glaucoma, continuous alcohol abuse, severe heart problems, and cerebral atrophy.” 967 S.W.2d at 543 n.2. Court noted that the record reflected that the court or the defendant had to consistently remind counsel when it was his turn to cross-examine a witness, counsel was often confused by trial court’s rulings and evidentiary rules, and counsel’s paralegal (a disbarred lawyer and convicted felon) was continuously feeding counsel with notes for witness examination.

***Capital Case**

D. MISCELLANEOUS

1. U.S. Court of Appeals Cases

2001: **Appel v. Horn*, 250 F.3d 203 (3d Cir. 2001) (sentenced in September 1986). Under AEDPA, the defendant was constructively denied counsel in two hearings, including the competence hearing, over the ten days after appointment (but with the defendant saying he did not want them) and prior to counsel being relieved and the defendant being permitted to proceed *pro se*. Because the state court reviewed this as an ineffectiveness claim under *Strickland* rather than a constructive denial of counsel claim under *Cronic*, this issue was reviewed *de novo*. Counsel failed to provide any representation with respect to the “competency hearing [which] was a critical stage of his trial.” Counsel did not investigate the defendant’s background, speak to his family or friends, or obtain his health or employment records. Even a minimal inquiry would have revealed the defendant’s strange behavior, suicide attempts, a “prior incident of babbling incoherently on a staircase” when he worked at the county jail, and a belief that he was an agent for military intelligence.

Fields v. Bagley, 275 F.3d 478 (6th Cir. 2001). Without any discussion of the AEDPA standards,¹⁴ the court found counsel ineffective in drug trafficking case for failing to represent the defendant on the state’s interlocutory appeal of the trial court’s suppression order. Retained counsel successfully moved to suppress the cocaine that was obtained in an unreasonable search and seizure. The state filed an interlocutory appeal and served counsel, who stated he was not retained for the appeal, but did not serve the defendant. The state submitted an incomplete record on appeal but won a reversal while the defendant was not represented by any counsel. The state’s interlocutory appeal of a trial court’s order suppressing evidence is essentially a first appeal of right requiring the effective assistance of counsel under *Evitts*. In this case, counsel failed to represent the defendant at all in the appeal, failed to notify the defendant that the state was appealing the suppression order, failed to advise the defendant that he no longer represented the defendant, and failed to obtain an order withdrawing as counsel. The defendant was prejudiced because, without counsel, the defendant was unable to argue any reason to uphold the suppression order and was unable to point out to appellate court that the portion of the suppression hearing transcript where the trial court stated that it did not find the police officers’ testimony to be credible was missing. This finding was entitled to deference on appeal.

2000: *Delgado v. Lewis*, 223 F.3d 976 (9th Cir. 2000). Counsel ineffective in drug case because trial counsel was absent from every important court proceeding except hearing on change of plea, where defendant, who barely spoke English, plead guilty after continuously maintaining innocence.

¹⁴It is not clear from the opinion whether the AEDPA was applicable or not.

***Capital Case**

Counsel was also absent for sentencing, where defendant was not given the opportunity to speak and a co-defendant's counsel simply asked for mercy for defendant but otherwise presented no evidence or argument. Defendant got maximum sentence while codefendants got much lower sentences. In assessing whether state court decision was "objectively unreasonable," under 28 U.S.C. § 2254(d), the court determines whether the state court clearly erred, in other words, whether the court is left "with a definite and firm conviction that an error has been committed." Here, where state court did not discuss rationale for decision, federal habeas review is not *de novo*, but an independent review of the record is required to determine whether the state court's decision was objectively reasonable. In this case, it clearly was.

1996: *Snook v. Wood*, 89 F.3d 605 (9th Cir. 1996). Reversal required because the defendant was allowed to proceed *pro se* in his appeal from murder conviction without advice from anyone about the dangers and potential consequences of self-representation.

2. State Cases

1997: **Robinson v. State*, 702 So. 2d 213 (Fla. 1997). Convictions and death sentence vacated because the defendant did not receive fair and impartial trial, and, thus, was entitled to new trial, where original trial judge was indicted for bribery which occurred during time defendant's trial was ongoing, and defense counsel, who had been the judge's law partner, was disciplined for his conduct in trial, failed to adequately prepare for trial, lied to jury, put on almost no evidence in mitigation, and accepted money from defendant's family even though he had been appointed and was bound to represent defendant without charge to him or his family.

State v. Classon, 935 P.2d 524 (Utah Ct. App. 1997). Counsel ineffective in aggravated sexual assault case because counsel represented brothers/co-defendants and counsel believed to be the lead counsel did not show up for trial and the co-counsel and a third counsel conducted the trial. Court did not conduct *Strickland* prejudice analysis but instead found a Sixth Amendment violation because none of the three public defenders involved actually accepted responsibility for the case.

1992: **State v. Ivey*, 844 P.2d 703 (Idaho 1992). The defendant was effectively denied representation in sentencing due to the trial court's failure to adequately resolve the defendant's motion to relieve counsel. During trial, the defendant expressed his desire to terminate counsel's representation following conviction. The trial court delayed any ruling until that time, but then did not resolve the issues prior to proceeding to sentencing even though reminded of the issue by defense counsel who presented a letter he received from the defendant ordering him to cease his representation. As a result, the defendant was effectively denied counsel in sentencing.

***Capital Case**

XV. RELATED ISSUES

A. U.S. Court of Appeals Cases

2002: *Reagan v. Norris*, 279 F.3d 651 (8th Cir. 2002). Ineffectiveness of appellate counsel in failing to assert on appeal trial counsel's conflict of interest established cause and prejudice excusing procedural default. Trial counsel represented both the defendant and his girlfriend, who were charged with murdering the girlfriend's two-year-old daughter. Counsel negotiated a lesser charge for the girlfriend in exchange for her testimony against the defendant. In post-trial motions, the defendant asserted (pro se) numerous claims of ineffective assistance, including the conflict. Newly appointed post-trial and appellate counsel failed to raise the conflict issue though. Counsel was ineffective for failing to recognize the seriousness of the conflict and to assert the issue. Prejudice found because the error denied the defendant appellate review of the conflict claim. Remanded for consideration of the merits of the habeas petition. [Ultimately reversed due to ineffective assistance of trial counsel. See *Reagan v. Norris*, 365 F.3d 616 (8th Cir. 2004)]

2001: *Hasan v. Galaza*, 254 F.3d 1150 (9th Cir. 2001). Limitations period for filing federal habeas petition asserting claim of ineffective assistance of counsel, based on counsel's failure to pursue jury tampering concerns, did not begin to run until petitioner knew, or with exercise of due diligence could have discovered, relationship between prosecution witness and person who was overheard on courthouse telephone mentioning defendant's name and who allegedly approached juror with note reading "be sure to call me." While the petitioner was aware, prior to that time, of the possibility of jury tampering and counsel's failure to investigate or pursue it, it was only the awareness of the relationship to the prosecution that gave petitioner reasonable grounds for asserting that, had counsel investigated properly, he could have contested prosecution's claim that person who approached juror had no connection to defendant's case, so as to show requisite prejudice.

B. State Cases

2002: *State v. Howard*, 805 So.2d 1247 (La. Ct. App. 2002). Denial of continuance deprived defendant of effective assistance of counsel in multiple bill and sentencing hearing. Following conviction of possession with intent to distribute the state filed a multiple bill of information, which defendant objected to. Following this objection, the defendant released his retained counsel. The court appointed counsel on the morning of the multiple bill hearing and appointed counsel's motion for continuance was denied. Prejudice found because counsel did not argue the motion to quash, object to any of the state's evidence, or cross-examine the state's expert.

Stovall v. State, 800 A.2d 31 (Md. Ct. App. 2002). The statutory right to counsel in a post-conviction proceeding means the right to the effective assistance of counsel. A petitioner has a right

***Capital Case**

to reopen a post-conviction proceeding by asserting facts that, if proven to be true at a subsequent hearing, establish that post-conviction relief would have been granted, but for the ineffective assistance of post-conviction counsel.

- 2001:** *Jackson v. Weber*, 637 N.W.2d 19 (S.D. 2001). Statutory right to appointed counsel in post-conviction case means the right to competent counsel under the *Strickland* standard. The ultimate issue in a second habeas asserting ineffective assistance in the first habeas must, however, be directed to some error in the trial court.
- 2000:** *State v. Vera*, 769 So.2d 1059 (Fla. Dist. Ct. App. 2000) (per curiam). Counsel ineffective in murder case. Grounds not in order. Court simply found that counsel conceded ineffectiveness in several respects and the post-conviction judge that granted relief was also the trial judge. “The trial judge who considered the post-conviction motion was the one who tried the original case, and we must accord weight to the trial judge’s superior vantage point in having observed the trial.”
- 1999:** **In re Sanders*, 981 P.2d 1038 (Cal. 1999). Court held that “abandonment” by first appointed counsel for direct appeal and state habeas in essentially a unitary system constituted good cause for substantial delay in filing state habeas. Counsel was appointed in 1983 and filed direct appeal brief in 1984. Although he raised issue on direct appeal that trial counsel was ineffective for failing to adequately prepare and present mitigation evidence, which clearly required proof outside the record, counsel did little to investigate. He requested funds to do so and was given only \$3,000. Based on this information, counsel conceded that he was aware that a full-scale investigation was needed. He did not pursue the issue any further though by seeking additional funds or taking any other action. Counsel simply asserted that because of his busy schedule that he did not have time to do a full-scale investigation or file the state habeas petition. Thus, despite the imposition of new court rules in 1989 requiring that counsel investigate if “triggering” information obviously requiring additional investigation was known to counsel and requiring the filing of state habeas without “substantial delay,” counsel did nothing. Ultimately after case was affirmed on appeal and new counsel appointed in federal court, state habeas was filed in 1994. Court held that previous counsel had essentially abandoned his client by not investigating. Busy schedule was no excuse, because counsel could have sought associate counsel or moved to withdraw. Lack of funds also no excuse, because he didn’t seek additional funds. Court rejected state’s argument that there was no requirement of effectiveness in state habeas under federal law. While court agreed on federal issues, it noted that this was a matter of state law because state law and court rules required appointment of counsel. Thus, court would consider state habeas despite the substantial delay. Court warned, however, that in future, the court would refer cases of “abandonment” to bar for disciplinary action and may seek reimbursement on fees paid.

***Capital Case**

***Commonwealth v. Chmiel**, 738 A.2d 406 (Pa. 1999). Counsel's testimony given in prior post-conviction hearing on the issue of ineffectiveness was improperly admitted during retrial granted due to testifying counsel's ineffectiveness in first trial. Despite pretrial litigation and objection by the defendant, the state was permitted to use this prior testimony (because counsel had died) to cross-examine the defendant, who was asserting an alibi, "concerning his whereabouts at the time of the murders" when the defendant had allegedly told his prior counsel that he saw his brother, who was the state's primary witness, leaving the scene of the crime. Because the court did not give a limiting instruction, the jury could have considered counsel's prior testimony as substantive evidence rather than just impeachment evidence. Use of the post-conviction testimony violated the defendant's right against compelled self-incrimination. "Just as an attorney may not respond to allegations of ineffectiveness by disclosing client confidences unrelated to such allegations, so the client confidences properly disclosed by an attorney at an ineffectiveness hearing may not be imported into the client's subsequent trial on criminal charges." New trial granted. Because asking "the jury to consider former counsel's testimony for the purpose of impeachment but not as substantive evidence would be to ask the impossible," use of counsel's testimony for any purpose was prohibited in the retrial.

1998: State v. Samuels, 965 S.W.2d 913 (Mo. Ct. App. 1998). Court held that it was improper in retrial of murder case to allow the state to use the defendant's testimony given in the post-conviction hearing to support his claim of ineffective assistance of counsel. In essence, the court held that the Fifth Amendment privilege against self-incrimination protected the defendant's statements because the incriminating testimony was given only in order to secure the defendants' Sixth Amendment right to effective counsel. Thus, the defendant essentially had no choice but to testify in the post-conviction proceedings.