

SUMMARIES OF PUBLISHED SUCCESSFUL  
INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS  
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UNITED STATES SUPREME COURT CASES

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

I. TRIAL PHASE

A. NUMEROUS DEFICIENCIES AND INADEQUATE DEFENSE

2. U.S. District Court Cases

*United States v. Army*, \_\_\_ F. Supp. 3d \_\_\_, 2015 WL 5698542 (E.D. Ky. Sep. 28, 2015). Counsel ineffective in case of physician charged with unlawfully dispensing controlled substances for lying to his client and failing to adequately investigate and present a defense. The physician was a retired military pathologist, who returned to work due to financial problems. He went to work at a pain clinic, even though he was not a specialist in pain management. A month after he started, he gave notice that he was leaving because the clinic expected him to see 30-35 patients a day and he did not believe he could adequately treat so many patients in so short a time. The clinic convinced him to stay by doubling his salary and agreeing to make changes to allow him to better serve the patients. For many of the patients, the physician simply continued to use the treatment plans of the prior clinic doctor (Saxman), who was a specialist in pain management. Ultimately, the doctor was charged, along with the clinic owners, for conspiring to distribute controlled substances. For conviction, the government had to prove that the physician was operating “outside the course of ordinary medical practice,” which required a showing that the defendant “did not issue the drugs for a legitimate medical purpose and in the usual course of medical practice.” The physician asked counsel to call Dr. Saxman and some of his patients in his defense. Counsel told his client that the prosecutor informed him that Dr. Saxman “either had a deal in place or soon will be indicted,” which was not true. Counsel’s conduct was deficient in lying to his client and in failing to interview Dr. Saxman, who was not indicted and was still practicing medicine. As the defendant was following many of her treatment plans, she could have provided a legitimate medical reason for the treatment plans she created. Counsel’s conduct was also deficient in failing to interview and present the testimony of some of the defendant’s patients, who would have testified that the defendant prescribed pain medication for a legitimate medical purpose after regular examinations and adjustments in medications when necessary. Cumulative prejudice established.

*Marion v. Woods*, \_\_\_ F. Supp. 3d \_\_\_, 2015 WL 5216006 (E.D. Mich. Sep. 4, 2015). Under AEDPA, counsel ineffective in second degree murder case for failing to investigate and present an alibi defense. Counsel filed a notice of alibi prior to trial, indicating that he intended to call Lewis and Arnell as alibi witnesses, but failed to present their testimony. Lewis and several other witnesses, along with a receipt from the store the defendant visited during the relevant time period covered by his alibi witnesses to account for his whereabouts, were submitted in support of an appellate motion for remand based on newly discovered evidence. While there was a question of whether the state court adjudicated the claim on the merits in denying the remand, it was unnecessary to resolve the issue because petitioner was entitled to relief, even under the AEDPA standards. Counsel’s conduct was deficient in not investigating and presenting the available alibi evidence. While counsel claimed that he did not present Lewis’ testimony because there was no corroborating evidence, this rationale “is untenable.” Lewis’ testimony alone was “quite useful” in establishing an alibi. Moreover, counsel did nothing “to investigate or discover” the available corroborating evidence. Prejudice established. The evidence against the defendant was “neither significant nor compelling” as the only person to identify the defendant as the shooter did so nine months after the crime when the witness faced serious drug charges in federal court. The witness

testified as part of a plea bargain “in hope of obtaining a lighter sentence.” There were no other eyewitnesses identifying the defendant and no physical evidence linking him to the crime.”

#### 4. State Cases

***\*Starling v. State***, \_\_\_ A.3d \_\_\_, 2015 WL 8758197 (Del. Dec. 14, 2015). Counsel ineffective in capital trial for: (1) failing to cross-examine an eyewitness about prior exculpatory statements to an investigator; and (2) failing to object to admission of the defendant’s brother’s statement to police, which was likely involuntary. The case involved the shooting of a man and 5-year-old boy in a barbershop. A month later, Gaines, the victim of an unrelated shooting, identified the defendant as his shooter and the barbershop shooter after Gaines had been arrested for violating probation and possession of drugs. Gaines also told the police that he and the defendant’s brother were present after the shooting when the defendant expressed remorse for shooting the child. The defendant’s 23-year-old brother was questioned extensively without any rights warnings and while being denied outside contact. He was threatened with being charged in the barbershop murders and obstruction of justice, which the police admitted, unless he told the police what they already knew, i.e., that the defendant expressed remorse for shooting the child. The defendant’s brother finally acquiesced. An eyewitness from the barbershop, who chased the shooter when he ran from the barbershop, told an investigator after seeing photographs of the two suspects in the newspapers, one of which was the defendant, that neither man “had the same appearance as the shooter.” Counsel’s conduct was deficient. First, during trial, counsel intended to cross-examine the eyewitness with this statement but forgot to do so. Afterwards, when he remembered he was unable to locate the witness to recall him to testify. This error was prejudicial. This witness “arguably had the best view of the shooter,” other witnesses had given contradictory descriptions of the shooter, and there was no physical evidence linking the defendant to the crime scene. Second, counsel’s conduct was deficient in failing to object to admission of the defendant’s brother’s statement through a police officer. Under state law, voluntary out-of-court prior statements of a witness who is present and subject to cross-examination is admissible. A threshold determination of voluntariness must be made by the court before admission. Here, because of counsel’s failure to object no such determination was made despite “substantial evidence pointing to the involuntariness” of the statement. Trial counsel did not object because he believed the statement to be admissible. This conduct was unreasonable and prejudicial. These two errors in combination with a *Brady* violation due to the state’s affirmative misinformation that the charges against Gaines remained pending – when, in fact, they had been dismissed prior to trial – required reversal due to the “cumulative effect of the[] mistakes.”

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

*State v. Pierre*, \_\_\_ A.3d \_\_\_, 2015 WL 9107530 (N.J. Dec. 17, 2015). Counsel ineffective in murder case for failing to adequately investigate and corroborate the alibi defense. The defendant was one of several suspects charged in a shooting in Elizabeth, New Jersey, at 3:19 a.m. on March 20, 2004. His defense was that he and one of his codefendants were on their way to visit the defendant's relatives in Florida at that time. During trial, a speeding ticket issued in his name as the driver of his car was admitted into evidence. The ticket had been issued 750 miles away in South Carolina less than four hours before the crime. The defendant's cell phone records showing a call to his girlfriend from South Carolina about three hours before the time of the crime. The state argued that the defendant's brother, who had a similar appearance and the defendant's driver's license and phone, was the driver and caller from South Carolina. While counsel's decision to present an alibi surrounding the speeding ticket was a sound strategic choice, counsel's conduct was deficient in failing to adequately investigate and present corroborating evidence "that could have reinforced that alibi." Counsel failed to interview and present the testimony of the brother and a sister who would have testified that the brother did not know how to drive, had no driver's license at the time, had never taken the defendant's car, and was in New Jersey at the time of the crime. Counsel also failed to offer into evidence the defendant's additional cell phone records showing a number of calls to his girlfriend from Florida in the week after the crime. Finally, counsel failed to interview relatives in Florida and failed to present the testimony of three of them that it was the defendant and not his brother who had visited in March 2004. Prejudice was established. The evidence implicating the defendant at trial was "sparse." The defendant was not identified by any witness in the days and weeks following the crime, although the other three men charged were identified by witnesses. The only witness to identify the defendant from a photo array did not do so until ten months after the crime. Prior to that time she had provided no description of the man whom she identified as the defendant. The only other witness placing the defendant in New Jersey on the night of the crime was an acquaintance of the defendant, who "was a frequent cocaine user at the time of the shooting as well as when she provided her statement to police."

*State v. Reeves*, \_\_\_ S.C. \_\_\_, \_\_\_ S.E.2d \_\_\_, 2015 WL 7008531 (Ct. App. Nov. 12, 2015). Counsel ineffective in criminal sexual conduct with a minor and lewd acts case for failing to call a medical expert to challenge the state's medical evidence. The alleged victim testified that the defendant had inappropriately touched her from age four (lewd acts) and "stuck his finger" in her vagina when she was 10-years-old (CSC). About three weeks later, she reported the abuse and was examined by an emergency room doctor, who testified that he observed a "healing scar" on the alleged victim's hymen that was consistent with penetration within 30 days earlier. A month later, the alleged victim was examined by an expert in pediatrics, who found no abnormalities. Retained counsel's conduct was deficient in failing to investigate and present the testimony of a gynecological expert, even though counsel was aware that the state would rely on evidence of physical trauma. While counsel recalled that "there was a question about money," counsel never sought funding, which may have been available, through the Office of Indigent Defense and never discussed hiring a medical expert with the defendant. This was not "a legitimate trial strategy" excusing counsel's behavior. Prejudice established because a defense expert could have testified, contrary to the state's argument that the injury could only have been caused by abuse, that an injury to the hymen could have been caused by means other than sexual abuse. Likewise, a defense expert could have testified

that an injury would have to be substantial to be apparent three weeks later and there was no evidence of substantial injury here.

- B. ONE DEFICIENCY:
  - 3. MOTIONS AND NOTICE
    - c. State Cases

*Ayotte v. State*, \_\_\_ A.3d \_\_\_, 2015 WL 7770654 (Me. Dec. 24, 2015). Counsel ineffective in possession of stolen goods case for failing to move to dismiss the indictment on double jeopardy grounds. The defendant plead guilty in Cumberland County to theft by unauthorized taking or transfer as a result of the theft of items from an apartment in Cumberland County on November 29, 2012. A month later, he was indicted in York County for theft by receiving stolen property “for allegedly receiving, retaining, or disposing of some of the same stolen property – silverware – to pawnshops” in York County. Counsel in York County considered the possibility of double jeopardy but concluded that there was no double jeopardy violation. Counsel thus negotiated a plea agreement for a suspended jail sentence and consecutive probation to the Cumberland County sentence. Counsel’s conduct was deficient as double jeopardy, under the test of *Blockburger v. United States*, 284 U.S. 299 (1932), clearly barred the York County prosecution. The Cumberland County theft was a continuing theft, given that the defendant continually exercised authorized control over the stolen silverware until he pawned it in York County. While counsel researched the issue, his conducted was not insulated as “strategy” where he reached “an erroneous conclusion about the state of the law and Ayotte’s rights.” Prejudice established.

*People v. Harris*, \_\_\_ N.E.3d \_\_\_, 2015 WL 7356114 (N.Y. Nov. 23, 2015). Counsel ineffective in burglary in the second degree and petit larceny case for failing to move for dismissal of the larceny charge, which was brought after the passage of the applicable statute of limitations had expired. The defendant entered a home while the alleged victim was asleep. She awoke after the defendant ejaculated on her and he ran taking with him a pair of her earrings. Seven years later, based on the defendant’s DNA in the semen, he was charged with burglary and petit larceny. The state argued burglary because of the intent to steal in the home. Defense counsel argued that there was no burglary because the intent was only to masturbate over the victim, which was not at the time a crime under state law. Counsel’s conduct in failing to object to the larceny charge, which had a two-year statute of limitations, was deficient and “there could have been no strategic purpose” for failing to object, particularly in light of counsel’s arguments in defense of the burglary charge. Prejudice established, such that the larceny charge was dismissed.

- 4. PROSECUTION EVIDENCE OR ARGUMENT
  - a. U.S. Court of Appeals Cases

*Etherton v. Rivard*, 800 F.3d 737 (6th Cir. 2015). Appellate counsel ineffective in possession with intent to deliver cocaine case for failing to assert plain error and ineffective assistance of trial counsel due to admission of hearsay concerning anonymous tip offered into evidence through police detectives and trooper without objection by trial counsel. The police stopped the car driven by the defendant based on an anonymous tip. Drugs were found in the driver’s side map compartment

under a potato chip bag, which had no usable fingerprints on it. The defendant, who owned the car, denied knowledge of the drugs. The passenger/co-defendant, who testified as part of a plea agreement, testified the drugs were the defendant's. The only other evidence of the defendant's knowledge was testimony about the anonymous tip that was introduced for its truth. The anonymous tip was elicited by the prosecution on three separate occasions. The prosecution also used the content of the tip during closing arguments, both opening and rebuttal. The state post-conviction court declined review of the Confrontation Clause issue and trial counsel ineffectiveness issue because these claims had not been raised on direct appeal. These issues were thus procedurally defaulted in habeas. The state court did review the claim of appellate counsel's ineffectiveness. Appellate counsel's conduct was deficient in failing to challenge admission of the anonymous tip, which "should have alerted" counsel "to the presence of a serious Confrontation Clause issue." As a number of less meritorious issues were raised on appeal, this failure "was an oversight and not deliberate strategy." While trial counsel had eventually objected, the objection was inadequate to preserve the issue for appeal. The admission of the anonymous tip amounted to plain error, however, and that error was prejudicial notwithstanding the trial court's attempt at a curative instruction. Prejudice was also clear because, "absent the tip, the evidence was underwhelming as to Etherton's knowledge of the presence of the cocaine." The government's case rested "almost entirely on the uncorroborated testimony of a codefendant." Moreover, the fact that the state's case largely corroborated the information in the anonymous tip otherwise "exacerbates the error" rather than rendering it harmless. There is a reasonable probability that the defendant would have prevailed if this issue had been raised on direct review. The state court determination otherwise was an unreasonable application of clearly established Federal law. Belated appeal granted. Likewise, if appellate counsel had asserted the ineffectiveness of trial counsel on appeal, he likely would have prevailed. Belated appeal was granted on that issue also.

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c. State Cases

*State v. Johnson*, \_\_\_ N.E.3d \_\_\_, 2015 WL 9594317 (Ohio Ct. App. Dec. 18, 2015). Counsel ineffective in failing to object to the prosecutor's closing argument asking the jury to consider hearsay statements admitted for a limited purpose as substantive evidence of guilt. The defendant was convicted of assault for firing shots into a car occupied by his girlfriend and two other women. One of those women (Starks) did not testify but the state was permitted to introduce her statements during the investigation through a police officer over the defendant's objection. Prior to the testimony, the court instructed the jury that the testimony could be considered only for the limited purpose of describing the ongoing investigation. The officer testified that Starks said the defendant and his girlfriend were arguing and after the girlfriend got in the car and they were living, the defendant fired shots into the car. The cautionary instruction was not repeated in the final instructions. Following the defense closing asserting that no one testified that the defendant had a gun, the state argued in closing that Starks identified the defendant as the shooter. Counsel's conduct was deficient in failing to object to this argument because use of Starks' hearsay statements as probative evidence of guilt violated the defendant's right to confrontation. Prejudice established because without evidence identifying the defendant as the shooter, the state's case was weak and based entirely on inference as no gun was recovered and the shell casings in the parking lot near where the defendant was standing did not match the bullets removed from the car. The prejudice

was enhanced because the improper arguments came in the state's rebuttal when the defense had no opportunity to respond. "As the last argument heard by the jury prior to deliberations, there is a substantial likelihood that its impact was prejudicial."

*\*Oatney v. Premo*, \_\_\_ P.3d \_\_\_, 2015 WL 8316856 (Or. Ct. App. Dec. 9, 2015). Counsel ineffective in capital murder trial for failing to move to suppress the testimony and out-of-court statements of the codefendant which were used in violation of a use and derivative use immunity agreement between the state and the defendant. The victim disappeared after leaving home to meet with the defendant. The defendant was questioned but denied seeing her for three weeks. A week or so later the victim's badly decomposed body was found. The defendant retained counsel and informed counsel he was innocent but knew who had committed the crime. Counsel arranged a recorded interview of the defendant by the prosecutor and detectives. At the beginning of the interview, throughout the interview, and at the end of the interview, the prosecutor "promised petitioner that 'anything you say during the course of this interview' and 'any information that we derive from what you tell us' 'cannot ever be used against you.'" The defendant then made a statement that, while he was away from his apartment, his associate, Johnston, kidnaped the victim, sexually assaulted, and murdered her in the defendant's apartment. When the defendant returned, he helped clean up and dispose of the body because he feared being charged. Johnston was in custody on unrelated charges and had been interviewed several times about the murder, but he denied any knowledge. After the defendant's taped statement was played for Johnston, he became angry and then implicated the defendant. Over the next two days, he made additional statements ultimately admitting that both he and the defendant had sexually assaulted the victim and murdered her. Johnston and the defendant were jointly charged. In pretrial proceedings, counsel argued that the defendant's statements and Johnston's statements were inadmissible against the defendant due to the immunity agreement. Johnston subsequently entered into a plea agreement in which he agreed to plead guilty and testify against the defendant in exchange for a life sentence. Trial counsel continued to argue that the defendant's statements were inadmissible under the agreement but inexplicably did not move to suppress Johnston's statements and testimony. The prosecutor conceded that the defendant's statements were inadmissible. During trial, Johnston testified consistent with his statements. The defendant also testified consistent with his statement. The only physical evidence of significance was the victim's blood in the defendant's apartment. Counsel's conduct was deficient in failing to move to suppress Johnston's testimony and prior statements. While counsel testified that he believed these statements were admissible, this "subjective belief, apparently belatedly arrived at," was unreasonable in light of the plain language of the agreement and counsel's earlier challenges to the statements. Likewise, while the state argued that the agreement was premised on the defendant's statements being true, this was inconsistent with the plain language of the agreement and was never argued before by the prosecutor who made the agreement and conceded that the agreement precluded use of the defendant's prior statements. While the state also argued that Johnston's statements were not derivative because they were from an independent source and would have inevitably been discovered, those arguments were also rejected. The record was clear that Johnston had consistently denied knowledge of the crimes and confessed only after the defendant's recorded statement was played for him. Prejudice was "readily" found, as the state made no argument otherwise and Johnston's statements and testimony were the only direct evidence against the defendant.

*Mangal v. State*, \_\_\_ S.C. \_\_\_, \_\_\_ S.E.2d \_\_\_, 2015 WL 9583810 (Ct. App. Dec. 30, 2015). Counsel ineffective in criminal sexual conduct with a minor case for failing to object to improper bolstering. The alleged victim, who was 19 years old at the time of trial, alleged sexual abuse by her father between the ages of 10 and 16. A pediatrician testified that the alleged victim’s hymen was intact but had a “marked narrowing” on a portion. When asked if this was indicative of penetration, the expert responded: “Based on the history that she shared with me and based on my examination I felt that it was consistent . . . that she had been abused.” She repeated these opinions based “on the history” shared by the alleged victims several times. “[T]here is no other way to interpret these comments other than to mean Dr. Henderson believed Victim was truthful.” Counsel’s conduct was, thus, deficient in failing to object to this testimony. Prejudice was established because the alleged victim’s credibility was the key issue as the defense claimed the allegations was fabricated and there was no physical evidence. Thus, the expert’s “testimony was critical because she explained how Victim – who claimed full penetration occurred on multiple occasions – had a narrowed but otherwise intact hymen. As a result, Dr. Henderson’s improper testimony insinuating that she found Victim credible was particularly prejudicial.” While the state argued that this error was not preserved in this post-conviction appeal because the issue was not raised in the application or amended application, trial counsel was examined on this issue and post-conviction counsel specifically argued the issue, with case citations, in his closing summation. When the post-conviction court’s order failed to address this issue, counsel filed a Rule 59(e) motion raising the issue. No more was required under *Simpson v. Moore*, 367 S.C. 587, 627 S.E.2d 701 (2006) to preserve the issue.

5. IMPEACHING WITNESS  
c. State Cases

*Ex parte Bowman*, \_\_\_ S.W.3d \_\_\_, 2016 WL 143546 (Tex. Ct. App. Jan. 12, 2016). Counsel ineffective in misdemeanor driving while intoxicated (DWI) case for failing to investigate and impeach the arresting officer with his payroll and disciplinary records. The officer testified that he stopped the defendant for speeding and smelled alcohol. The defendant failed field sobriety tests. The videotape of the stop did not reveal intoxication. Thus, the officer’s testimony was the state’s primary evidence. Trial counsel elicited testimony that the officer, who was part of the DWI task force, had made 476 arrests for DWI in the prior year, only made DWI arrests, and received overtime pay of time and a half for court appearances. Counsel did not, however, obtain the officer’s records, which revealed that from 1992-2004, the officer’s overtime pay exceeded his regular pay and he was suspended in 1990 for submitting four requests for overtime that he did not work and forging a prosecutor’s signature on an overtime form. Counsel’s alleged strategy not to pursue this evidence was not reasonable. Prejudice established.

8. INSTRUCTIONS  
a. U.S. Court of Appeals Cases

*Crace v. Herzog*, 798 F.3d 840 (9th Cir. 2015). Under AEDPA, counsel ineffective in felony attempted second-degree assault case for failing to request an instruction on the misdemeanor lesser-included offense of unlawful display of a weapon. The defendant, who had consumed a great deal

of drugs and alcohol, was hallucinating and believed that someone was out to kill him. He was running down the street with a sword at night and screaming for help. When he spotted an officer, he ran towards him seeking protection. When the officer pulled his weapon and ordered him to stop, the defendant dropped the sword but continued running towards the officer because he was afraid. He stopped seven feet from the officer and got down on the ground. The Washington Court of Appeals found deficient conduct and prejudice, but the Washington Supreme Court reversed, without deciding whether counsel's conduct was deficient, because the court found no prejudice. In doing so, the state court assumed the jury would have reached the same verdict even if it had been instructed on the lesser-included-offense because the evidence was sufficient to support the verdict reached. By doing so, the state court "in essence converted *Strickland*'s prejudice inquiry into a sufficiency-of-the-evidence question." "This approach to *Strickland* is not merely wrong, but 'objectively unreasonable' under AEDPA." This issue was thus entitled to *de novo* review. The defendant was entitled to the lesser-included offense instruction because there was evidence to support an inference that the defendant displayed the sword without any intent to create reasonable fear or apprehension of bodily injury, which is the specific intent required for assault and attempted assault. The defense presented lay and expert testimony in support of a diminished capacity defense. Prejudice was clear, because with proper instruction, "a jury could rationally choose to convict Crace *only* of unlawful display of a weapon." Because the Washington Supreme Court did not address whether counsel's conduct was deficient, that question was also reviewed *de novo*. Where counsel admitted that he did not consider the issue, the "failure to request the instruction was neither strategic nor deliberate." Failure to consider the issue was deficient performance. Even if counsel had considered the issue and then failed to request the instruction, counsel's actions would still be "manifestly unreasonable."

b. U.S. District Court Cases

***Ruiz v. United States***, \_\_\_ F. Supp. 3d \_\_\_, 2015 WL 7568174 (D. Md. Nov. 25, 2015). Counsel ineffective in drugs and possession of a machine gun case for failing to request an instruction that conviction of the machine gun count required proof that the defendant knew the weapon was a machine gun. The defendant was "a first-time non-violent offender," who participated in a drug trafficking ring led by another. Because of the machine gun charge, the defendant, "a minor participant in the drug conspiracy, was sentenced to 480 months, which was greater than the combined total sentence for all of his co-conspirators and the "undisputed ringleader." Counsel's conduct was deficient in failing to request a *mens rea* instruction because "bedrock principles of Anglo-American jurisprudence" and the Supreme Court's interpretation of a similar automatic weapon offense required proof that the defendant knew the features of the weapon. Prejudice established. There was no direct evidence that the defendant knew the weapon was a machine gun, and the circumstantial evidence was minimal, at best, as forensic evidence showed the weapon had never been fired and the co-conspirators referred to the weapon as a "rifle" of "semi-automatic," while a machine gun is "automatic." There simply was no evidence that the defendant knew the weapon was a machine gun. If this issue had been raised, a reasonable jury would have found the defendant not guilty or the court would have granted a motion to dismiss. Conviction vacated and sentence reduced to 120 months.

c. State Cases

*State v. Revish*, \_\_\_ So. 3d \_\_\_, 2015 WL 7008188 (La. Ct. App. Nov. 9, 2015). Counsel ineffective in second degree murder case for failing to object to the trial court’s instruction that self-defense was not available as a defense if the jury determined that the homicide occurred as a result of drug activity. The defendant, who had drugs for sale, was riding around with two other men doing some drug dealing. He shot both when the car was stopped because he believed that he was about to be killed. State law at the time provided that a homicide is justifiable when committed in self-defense by one who reasonably believes that he is in imminent danger of losing his life or receiving great bodily harm and that the killing is necessary to save himself from that danger. La. R.S. 14:20(A)(1). In an unrelated portion of the self-defense statute, a homicide is justifiable in a motor vehicle when the person reasonably believes that the use of deadly force is necessary to prevent entry of an intruder or to compel the intruder to leave, except when the person committing the homicide is engaged, at the time of the homicide, in drug activity. La. R.S. 14:20(A)(4). The trial court erred in its instruction because the plain language of the statute made the drug activity exception applicable only to paragraph 4 of the statute and not paragraph 1, which was the provision applicable to the defendant. Counsel’s conduct was deficient in failing to object to the instruction. Prejudice established because, “[e]ven if the jury had fully believed defendant’s version of the facts, . . . the erroneous jury instruction would have categorically denied defendant from availing himself of a claim of self-defense.”

*State v. Liti*, 355 P.3d 1078 (Utah Ct. App. 2015). Counsel ineffective in manslaughter case for failing to object to the trial court’s inadequate instruction on the elements of manslaughter. Under state law, “[a] defendant, who ‘recklessly causes the death of another’ is guilty of manslaughter.” Recklessness requires both that the defendant is “aware of but consciously disregards a substantial and unjustifiable risk” and that “[t]he risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances.” The trial court failed to include the “gross deviation” instruction. Counsel’s conduct in failing to object was deficient and prejudicial.

9. FAILURE TO CHALLENGE COMPETENCE  
b. U.S. District Court Cases

*Watkins v. Haas*, \_\_\_ F. Supp. 3d \_\_\_, 2015 WL 6438905 (E.D. Mich. Oct. 23, 2015). Counsel ineffective in second-degree murder case for failing to request an additional competence evaluation, even though the defendant continued to “engage in bizarre behavior” and made “incoherent, delusional, and nonsensical remarks” at pre-trial and trial proceedings after the defendant was found competent. An initial evaluation found the defendant to be incompetent. A report of an evaluation two weeks later indicated that the defendant was malingering and that he was competent. Counsel requested an independent evaluation but the court never ruled on this request before finding the defendant competent. The trial court subsequently ordered a criminal responsibility evaluation. This examiner also found that the defendant was malingering and added a finding of competence, even though that was not part of the exam ordered. Four months later, counsel again requested an independent evaluation, which was granted, but counsel asked the expert to evaluate only criminal

responsibility. During jury selection, the defendant made a number of bizarre statements and flipped over a desk in the courtroom. He was removed to a room equipped with a closed-circuit video monitor and re-entered the courtroom only to testify over counsel's objection. His testimony also included a number of bizarre statements. During sentencing, the defendant's brother testified that the defendant had a long history of bizarre, delusional, and paranoid thoughts and behavior. The black defendant also spoke in sentencing and continued with his bizarre statements, including that he was "born a white baby." The judge acknowledged in sentencing that the defendant was "clearly mentally ill" and "seriously mentally disturbed." Shortly after sentencing, an examiner in the Michigan Department of Corrections diagnosed a psychotic disorder. Counsel's conduct was deficient and prejudicial. New trial or unconditional release ordered.

11. MISCELLANEOUS  
d. State Cases

*State v. Garland*, \_\_\_ S.E.2d \_\_\_, 2016 WL 225129 (Ga. Jan. 19, 2016). Counsel ineffective in motion for new trial of sexual battery involving a child case for withdrawing the motion without the defendant's consent and failing to challenge trial counsel's ineffectiveness for failing to adequately investigate and present mental health evidence challenging competence to stand trial and capacity at the time of the offenses. The defendant was convicted of initially touching a child's buttocks as he picked her up during a church conference. He was sentenced to one year imprisonment followed by four years of probation. Following sentencing, new counsel filed a motion for new trial asserting ineffective assistance of counsel. Prior to the motion hearing, the defendant had served his confinement and had been re-incarcerated on a probation violation. Without the defendant's knowledge, counsel entered an agreement with the state to re-instate probation in exchange for withdrawing the motion for new trial. Counsel's conduct was deficient in entering this agreement without the defendant's knowledge and for failing to pursue the issue of trial counsel's ineffectiveness, which was a meritorious claim. Uncontradicted expert testimony was available that the defendant had a cognitive disorder caused by multiple mini-strokes that impaired the defendant's ability to assist counsel and rendered the defendant unable to discern right from wrong or to conform his behavior to socially acceptable norms at the time of the crime.

*State v. Banks*, \_\_\_ N.E.3d \_\_\_, 2015 WL 9460577 (Ohio Ct. App. Dec. 24, 2015). Counsel ineffective in multi-count conviction case for failing to seek a bench trial on the repeat violent offender specifications. Counsel's conduct was deficient and not based on strategy. Prejudice established because the error allowed the jury to hear evidence of the defendant's prior conviction, even though the defendant had stipulated to the conviction and did not testify. The prejudice was compounded because the trial court erroneously informed the jury that it could consider the repeat violent offender specification as "other acts evidence."

II. CAPITAL SENTENCING PHASE ERRORS  
A. NUMEROUS DEFICIENCIES AND INADEQUATE MITIGATION  
2. U.S. Court of Appeals Cases

*\*Saranchak v. Secretary, Pennsylvania Dept. of Corrections*, 802 F.3d 579 (3rd Cir. 2015)

(sentenced in September 1994). Under AEDPA, counsel was ineffective in failing to adequately investigate and present mitigation evidence in sentencing. The defendant entered an open plea of guilty to murdering his grandmother and uncle, which was followed by a nonjury degree-of-guilt hearing and then jury sentencing. The defendant challenged counsel's effectiveness in the degree-of-guilt hearing, *inter alia*, for (1) failing to move to suppress the defendant's confession to police following his arrest in which the defendant "acted as if the officers questioning him were drill sergeants," and (2) failing to investigate and introduce evidence of the defendant's mental health and family history to rebut a finding of intent. No expert testimony was presented during the degree-of-guilt hearing, but counsel presented lay witnesses, including the defendant's girlfriend, to establish that the defendant was intoxicated at the time of the crimes. The girlfriend also testified concerning the defendant's strange militaristic behavior when he was intoxicated. In sentencing, the mitigation testimony, including the state's cross of the girlfriend, consisted of only 40 pages. Her testimony was similar to that during the degree-of-guilt hearing and repeated that the defendant "thinks he's a sergeant" and gives orders when intoxicated. Trial counsel also presented the testimony of Dr. Kruszewski, a court-appointed psychiatrist, who examined the defendant only for purposes of competency and capacity at the time of the offenses and the statements to the police. The psychiatrist met the defendant only once and was not provided with any background information or records other than police records and the defendant's confession, but he was aware and testified that the defendant had a prior psychiatric hospitalization following a suicide attempt. On cross, Dr. Kruszewski conceded that the defendant had no major psychiatric diagnosis or any mental disability. The jury found no mitigating circumstances, which in light of the jury's finding of two statutory aggravating circumstances, made the death penalty a mandatory sentence. In post-conviction, after having reviewed the background records denied him prior to sentencing, Dr. Kruszewski's findings "changed drastically." He testified to a "Jekyll and Hyde type syndrome" under the influence of alcohol, in which the defendant experienced delusions. He also found a history of depression with two prior suicide attempts and hospitalizations. He concluded that the defendant suffered from "a psychoactive . . . alcohol induced delusional disorder and alcohol induced depressive disorder when drinking" at the time of the crimes. The defendant also presented a psychologist in post-conviction, who testified concerning the defendant's "highly dysfunctional' family history," including an alcoholic, abusive father and depressed mother, a developmental disorder and special education classes, self-medicating with drugs and alcohol at an early age, and a failed attempt to join the military followed by a "pronounced downward spiral" into a "fantasy world about being in the military." The psychologist found a history of "atypical pervasive developmental disorder" as a child, adult attention deficit disorder, depressive disorder, and a "personality disorder . . . with paranoid and anti-social features." The psychologist agreed with the "Jekyll and Hyde" type psychological problems under the influence of alcohol, which manifested as a "full blown paranoid disorder" or 'a delusional disorder.'" He concluded that the defendant was experiencing an extreme mental or emotional disturbance at the time of the crimes. The state post-conviction court held that counsel's conduct was deficient in failing to adequately investigate and present the mitigation evidence. The Pennsylvania Supreme Court reversed finding that counsel ended his investigation at a reasonable point because the defendant, his mother, and his girlfriend failed to provide counsel with information concerning the defendant's background. This finding was rejected under AEDPA review because "the evidence before the Pennsylvania Supreme Court clearly and convincingly demonstrates that this premise was false." Trial counsel was aware of the defendant's odd

militaristic behavior at times, which was reflected in the police reports, the defendant's confession, and the girlfriend's testimony. With this knowledge, trial counsel sought a court-appointed competence evaluation and focused his theory of defense on "the mental health issue." Counsel's conduct was deficient in failing to obtain a mental health evaluation despite his belief that this was the primary issue and despite the red flags in Dr. Kruszewski's report. The state court's finding to the contrary was an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. The state court's analysis was also an objectively unreasonable application of *Strickland*. Under *Strickland*, especially in light of *Wiggins* and *Rompilla* and a consideration of the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, "a defendant's failure personally to inform his counsel of possible avenues of investigation does not absolve his attorney from pursuing those avenues, particularly where counsel is aware of facts demonstrating that such an investigation may be fruitful." With respect to prejudice, the state post-conviction court found no prejudice. While the Pennsylvania Supreme Court did not reach this issue, the habeas court reviewed "through AEDPA's lens" due to the post-conviction court's adjudication. While the post-conviction court, at times, described the *Strickland* prejudice test correctly, it also, at times incorrectly described the prejudice test as outcome-determinative or a sufficiency-of-the-evidence test. "Thus, at the very least, the PCRA court's analysis constituted an unreasonable application of clearly established federal law." The state court's analysis was also unreasonable because of "[t]he PCRA court's failure to discuss the vast majority of the relevant evidence presented at the PCRA hearing." In short, "the PCRA court brushed aside Saranchak's childhood and mental health problems without analysis," even though "the portrait of Saranchak's troubled life that could have been presented to the jury and the one actually presented were stark." Prejudice was established. The state court's finding to the contrary was an unreasonable application of clearly established Supreme Court case law.

***\*Hardwick v. Secretary, Fla. Dept. of Corrections***, 803 F.3d 541 (11th Cir. 2015) (sentenced in March 1986). Under pre-AEDPA law, counsel was ineffective in capital sentencing for failing to adequately investigate and present mitigation evidence. Rather than present any evidence in mitigation, counsel simply relied on his closing argument: (1) attempting to undermine the statutory aggravating circumstances; and (2) appealing for mercy based on the defendant's age (25 at the time of the crime) and the sanctity of human life. Trial counsel concluded his sentencing argument with an assertion that the defendant was innocent of murder. The jury recommended death by a seven-to-five vote and the trial court imposed a death sentence. On initial review, the Eleventh Circuit rejected the state court's findings of fact and conclusions of law and remanded to the District Court for an evidentiary hearing. During the hearing "three experienced capital defense attorneys testified as to the standard among defense attorneys in the mid-1980's for investigating and presenting mitigation evidence." Counsel's conduct was deficient. Counsel believed the defendant would be convicted and that the state would seek the death penalty. Counsel was aware of "a number of red flags," that "should have highlighted the need to conduct at least some life-history investigation and at least some mitigation investigation," such as information that the defendant had been physically and sexually abused, and had lived in foster homes and been in the care of social services for a great deal of his youth. Counsel also was aware of "potential sources of mitigating evidence" from notes a public defender had taken during a preliminary interview, which listed the names of family members, schools, and contact information for a prior mental health evaluation center where the

defendant had been diagnosed with schizophrenia. Counsel even had the benefit of an evaluation by a court-appointed psychiatrist. Although this evaluation was focused solely on competence and sanity and counsel failed to provide the expert with any background information or records, the report still contained “many red flags” for potential mitigation. Prejudice also established. If counsel had adequately investigated and presented the mitigation, the evidence would have supported a statutory mitigating circumstance of impaired capacity at the time of the murder. Likewise, there was “ample evidence of ‘the kind of troubled history [the Supreme Court] ha[s] declared relevant to assessing a defendant’s moral culpability.’” *Id.* at \_\_\_ (quoting *Wiggins*, 539 U.S. at 535). The jury and the trial judge heard none of this evidence.

All they had was a brief snapshot of the instant Hardwick’s life hit rock bottom; absent was the decades-long slide of childhood neglect, abandonment, abuse, instability, mental and emotional problems, intoxication, and addiction that led to that moment.

Without this evidence, the prosecutor was free to emphasize repeatedly in closing arguments that there was no mitigation. Even without this evidence, the jury came within a single vote of recommending life. Under these circumstances, there is at least a reasonable probability that the defendant would not have received a death sentence if counsel had performed adequately.

### 3. U.S. District Court Cases

*\*Apelt v. Ryan*, \_\_\_ F. Supp. 3d \_\_\_, 2015 WL 7732670 (D. Ariz. Dec. 1, 2015) (sentenced in 1990). Counsel ineffective in capital sentencing in failing to adequately investigate and present mitigating evidence. The district court previously held that the state court’s rejection of the claim was unreasonable and invited briefing on whether an evidentiary hearing was necessary. As both parties argued that no hearing was necessary, the court proceeded to the merits. Likewise, because the state did not argue that counsel performed competently, the court focused only on the issue of prejudice. The state argued in sentencing that the defendant had a “normal” childhood and no evidence was presented to the contrary despite substantial available evidence of “extreme poverty, physical abuse, developmental delays, . . . mental health problems,” and evidence that the defendant, as a child, had been sexually assaulted twice by older men, once at knife point. “As a result, the court was given a picture of Apelt’s background that bore ‘no relation’ to the picture that could have been presented if sentencing counsel had performed competently.” *Id.* at \_\_\_ (quoting *Rompilla v. Beard*, 545 U.S. 374, 392-93 (2005)). Prejudice established.

### 5. State Cases

*Commonwealth v. Solano*, \_\_\_ A.3d \_\_\_, 2015 WL 9283031 (Pa. Dec. 21, 2015). Counsel ineffective in capital sentencing for failing to adequately investigate and present mitigating evidence “of the cognitive and psychological impact of Solano’s traumatic and abusive childhood.” Counsel, who had only graduated from law school two years earlier and had no experience in homicide or capital cases, did not use available investigators in the public defender office and instead conducted her own mitigation investigation. Counsel met with the defendant only about five times and found

him to be “guarded,” but “she did nothing to foster a rapport with him in an effort to enable him to be more open with her.” Counsel contacted only the defendant’s mother and brother, despite having the names and locations of extended family members. Counsel did not interview the defendant’s Children and Youth Services (CYS) caseworker. While she obtained a mental health evaluation, she did not discuss the evaluation with the examiner before deciding not to call him as a witness because of his anti-social personality diagnosis. In sentencing, counsel presented testimony only from the CYS caseworker, who had not been interviewed or provided a copy of the CYS records, the defendant’s mother, and former foster parents. If counsel had adequately investigated, a number of the defendant’s school teachers and aunts and uncles would have testified. The presentencing mental health expert, who had not been provided with information from these witnesses or the records of the defendant’s parents, also would have provided substantial mitigating testimony. The CYS caseworker would have provided much stronger mitigating testimony, if he had been interviewed and provided the prior records. Neuropsychological testing would have established a cognitive disorder. Prejudice established. Even though the jury found the “catch-all mitigator,” if counsel had adequately investigated and presented the evidence, “the jury may have given this mitigator more weight had counsel presented additional life-history mitigating evidence.” The available but unrepresented evidence “was not merely cumulative – it provided significant details concerning Solano’s background that were not mentioned at the penalty phase.”

B. ONE DEFICIENCY

1. STATE AGGRAVATION EVIDENCE OR ARGUMENT

a. U.S. District Court Cases

*\*Roybal v. Davis*, \_\_\_ F. Supp. 3d \_\_\_, 2015 WL 7961358 (S.D. Cal. Dec. 2, 2015). Under AEDPA, the death sentence was vacated due to counsel’s failure to object to the prosecution’s improper closing arguments in sentencing based on “biblical law,” which diminished the jury’s sense of responsibility for sentencing under *Caldwell v. Mississippi*, 472 U.S. 320 (1985). The state court held that the arguments were improper but found no prejudice because the bulk of the state’s closing was focused primarily on the brutal circumstances of the crime” and the biblical references were brief and “amounted to little more than commonplaces, to emphasize his point that the jurors should . . . judge defendant primarily by his acts.” The district court rejected this finding as objectively unreasonable because “[t]he circumstances of this case strongly suggest the prosecutor’s remarks were anything but harmless.” The prosecutor “clearly and improperly advocated that religious authority supported a death verdict” and included “direct biblical quotations demanding a sentence of death.” In finding that this argument could not have diminished the jury’s responsibility, the state court’s holding was objectively unreasonable because it focused only on the remainder of the prosecutor’s closing argument rather than reviewing the prejudice in the context of the entire trial. Considering that context, the district court noted that the state’s case on guilt was entirely circumstantial and the death verdict was “obviously close and difficult” because: (1) the jury heard substantial mitigation evidence “replete with physical and emotional abuse and neglect, substance abuse that started before age ten, and significant brain dysfunction and damage”; (2) the jury deliberated for portions of six court days, after hearing sentencing evidence for nine days, before reaching a verdict; (3) the jury requested to rehear the testimony of the defendant’s “alcoholic and neglectful mother”; (4) the jury requested to rehear the testimony of two mental health experts

who testified at length about the defendant's "brain dysfunction, long-standing substance abuse, personality disorders, and the possibility that he suffered from fetal alcohol effects from his mother's alcohol use when pregnant") and (5) the jury twice sent out notes "expressing their inability to reach a verdict." "By any measure, this was an extremely close penalty phase trial where the prosecution sought to impermissibly minimize the jury's sense of personal decision-making in violation of the Eighth Amendment." The trial court's general instructions that arguments of counsel were not evidence and that the jury must base the verdict on the evidence and the law were "insufficient to cure the misconduct or blunt the impact of this highly improper argument." Counsel's conduct in failing to object was deficient and not based on any strategy. If counsel had raised a timely objection to the prosecutor's initial biblical argument, "he could have at the very least curtailed the remainder of the argument and requested a curative instruction neutralizing the condemnable misconduct." Prejudice was clear.

### III. NON-CAPITAL SENTENCING ERRORS

#### B. U.S. District Court Cases

***Petrillo v. United States***, \_\_\_ F. Supp. 3d \_\_\_, 2015 WL 7574744 (D. Conn. Nov. 25, 2015). Counsel ineffective in sentencing of bank robbery plea case for failing to object to sentencing as a career offender, even though the plea agreement explicitly left this question open for argument. The government argued the defendant was a career offender because his two prior convictions qualified as "crimes of violence" under the statute. One of those convictions was a 1996 Connecticut conviction for attempted assault on a police officer. Under that statute, the Second Circuit had held that the actual causing of physical injury to an officer qualified as a crime of violence but no determination had been made concerning other crimes under the statute, which included throwing paint or dye or similar substances on an officer. Because it was unclear which subsection the defendant had been convicted of, counsel's failure to challenge the career offender designation was deficient conduct. Prejudice established because the career offender designation raised the sentencing range from 151-188 months to 188-235 months.

***Bowers v. McFadden***, \_\_\_ F. Supp. 3d \_\_\_, 2015 WL 9294981 (D.S.C. Dec. 21, 2015). Under AEDPA, counsel ineffective in failing to challenge imposition of mandatory life sentence under "two strikes" statute. The defendant was convicted of common law assault with intent to ravish in 1976. In 2004, he was convicted of armed robbery. In sentencing, the state asserted that the "two strikes" statute was applicable. Under the statute, only a "most serious offense" qualifies as a strike. Qualifying offenses, not including common law assault with intent to ravish, are listed in the statute, but some other criminal sexual conduct offenses (CSC) are. The CSC rubric was established by statute in 1977 and includes varying degrees of offense. First and second degree CSC offenses do qualify as a "most serious offense" under the two strikes law. Other CSC offenses do not. Trial counsel's conduct was deficient because counsel failed to conduct any research which would have revealed that common law assault with intent to ravish included only two elements: (1) an assault by a male on a female, (2) with the intent to rape. No aggravated circumstance, such as force or coercion, was required. *State v. Lindsay*, 355 S.C. 15, 583 S.E.2d 740 (2003), which was decided just a year before trial, was all the research counsel would have needed. Nonetheless, in sentencing trial counsel conceded that assault with intent to ravish was "the same basically" as CSC 1st or 2nd

and the mandatory life sentence was imposed. Prejudice was clear. Post-conviction counsel failed to raise the issue of trial counsel's ineffectiveness until the appeal to the Court of Appeals from the denial of post-conviction. The state court recognized that assault with intent to ravish may not be a "most serious offense" for purposes of the "two strikes" statute but declined to reach the merits because of the procedural default. After reviewing the elements of the offenses, the federal court also rejected the state's argument that the underlying facts of the assault with intent to ravish qualified as a "most serious offense." The indictment did not contain sufficient information to reach this conclusion and the court held that it would be improper to rely on an affidavit from an arresting officer. South Carolina courts had never relied on this type of information and federal courts would not do so in the analogous circumstance of the Armed Career Criminal Act (ACCA) where only "conclusive judicial record[s]" could be considered. Finally, under *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), the federal court held that it could reach the merits of the trial ineffectiveness claim, despite the state court procedural default, because the claim "is a substantial one that state PCR counsel was ineffective in failing to raise the issue and such failure was obviously prejudicial."

#### D. State Cases

***Davis v. Commissioner of Correction***, 126 A.3d 538 (Conn. 2015). Counsel in manslaughter plea case ineffective in sentencing for agreeing with the prosecutor's recommendation of the maximum sentence allowed under the plea agreement even though the agreement contained a provision entitling defense counsel to advocate for a lesser sentence. The Court of Appeals denied relief by applying the prejudice test of *Strickland*. This was error, however, because there was a complete breakdown in the adversarial process, such that prejudice was presumed under *Cronic*. The defendant had been charged with murder. Believing that the defendant only had a few prior drug convictions, counsel negotiated the plea agreement to manslaughter with a range of 20-25 years punishment and each party free to argue within that range. Counsel learned from the presentence investigation report (PSI) recommending a 25-year sentence that the defendant had a much more extensive criminal record than he thought. Because counsel believed, based on this information, that 25 years was appropriate, counsel did not argue on the defendant's behalf in sentencing and, instead, affirmatively agreed with the prosecutor's recommendation of the maximum 25-year sentence. It was this affirmative agreement that distinguished this case from *Bell v. Cone*, 535 U.S. 685 (2002), and revealed the lack of any strategic decision. "The petitioner's sentence was already capped at twenty-five years pursuant to the plea agreement and, thus, assenting to that sentence did nothing to advance the petitioner's interests." Under *Cronic*, prejudice was presumed.

***Lampkin v. State***, 470 S.W.3d 876 (Tex. Ct. App. 2015). Counsel ineffective in sentencing of driving while intoxicated case for failing to adequately investigate and present mental health mitigation evidence. Counsels' conduct was deficient because counsel had concerns about the defendant's mental health prior to trial, including concern about whether the defendant was competent to stand trial. While counsel's conduct was not deficient in failing to challenge trial competence, counsel was deficient in failing to discovery and present the same evidence as mitigating evidence in sentencing. Counsel did not retain an investigator or speak to family members or even inquire of any jail personnel about whether the defendant was receiving or had received mental health treatment, despite counsels' concerns. This conduct was not reasonable and was not based on strategy. Prejudice was established because the jury was precluded from

considering the defendant's mental health history in mitigation where the defendant was facing up to 99 years' confinement for the non-violent offense of driving while intoxicated where no one was injured. The information that the defendant "had been homeless and impoverished, had diminished capacity, suffered from psychotic delusions and major depressive disorders, had attempted suicide, and had a long history of drug abuse" might well have influenced the jury, especially in "cast[ing] a better light" on the defendant's prior convictions.

*Director of the Dept. of Corrections v. Kozich*, 779 S.E.2d 555 (Va. 2015). Counsel was ineffective in grand larceny and obtaining money by false pretenses case for failing to timely file a motion to reconsider the sentence, which had been invited by the sentencing judge. In sentencing, counsel submitted some evidence and argued that the defendant's crimes, including his extensive prior criminal record, were a direct result of his drug addictions and, therefore, he should be sentenced to a drug treatment program rather than prison. The judge sentenced the defendant to three consecutive two year terms but added that she would grant leave to file a motion to reconsider if counsel wanted to submit a specific recommendation for an appropriate treatment program. The final sentencing order was issued two and a half weeks later with no mention of leave to file a motion for reconsideration. Counsel did not file the motion to reconsider until more than three months later when the defendant had already been moved to a state penitentiary, which, under state law, deprived the sentencing court of jurisdiction. While there is no right to the effective assistance of counsel to file a post-trial motion to reconsider the sentence after a final sentencing order has been issued, there was a right in this case during the time between the sentencing and issuance of the written order two and a half weeks later. While there may not be a "categorical" right, there was in this case because the motion to reconsider was "expressly invited" by the court during sentencing. Thus, the defendant "remained in a critical stage of his criminal prosecution even after the conclusion of the sentencing hearing." Counsel's conduct was deficient in failing to pursue the matter by filing a motion to reconsider and by simultaneously making efforts to ensure that the motion would be heard before entry of the final sentencing order. This could have been accomplished by delayed entry of the sentencing order or by including language in the sentencing order that leave to file a motion to reconsider had been granted and that the matter would be held in abeyance until further order of the court. Prejudice was also established even though it likely would not have been with a different post-conviction judge and just an objective record. Here, however, the post-conviction court was the sentencing court and the judge relied on her own recollections that she had intended to order drug treatment, if the motion to reconsider had been filed, and that she would have reduced the defendant's sentences and ordered his confinement in a drug treatment program, as she did in issuing the writ. While the court questioned "the propriety of a habeas court's reliance on subjective intentions of this kind for purposes of establishing prejudice," the court "accept[ed] the judge at her word" in this case because the state failed to object in post-conviction or to raise the issue on appeal.

#### IV. ADVISING CLIENT

##### A. GUILTY PLEA AFTER INADEQUATE INVESTIGATION OR RESEARCH

##### 3. State Cases

*State v. Alexander*, \_\_\_ A.3d \_\_\_, 2015 WL 5943738 (N.J. Sup. Ct. App. Div. Sep. 22, 2015). Counsel ineffective in failing to move to dismiss the indictment for bail jumping and allowing the

defendant to plead guilty to the charge of which he was not guilty. The underlying facts were that the defendant was scheduled for a violation of parole hearing. The defendant appeared at the courthouse but left without permission before his case was heard. This was the conduct that alleged supported the bail-jumping charge. Under the plain language of the bail-jumping statute, however, this charge was not applicable to appearances “incident to release . . . on probation or parole.” Thus, counsel’s conduct was deficient and prejudicial because the bail-jumping statute was inapplicable to the failure to appear at the violation of parole hearing.

B. ERRONEOUS ADVICE (OR FAILURE TO ADVISE) ON SENTENCING  
OR COLLATERAL CONSEQUENCES THAT LEADS TO PLEA

1. U.S. Court of Appeals Cases

*United States v. Rodriguez-Vega*, 797 F.3d 781 (9th Cir. 2015). Trial counsel ineffective in plea to misdemeanor attempted transportation of aliens case for failing to inform the defendant of the virtual certainty of her deportation following the plea. The defendant, who was born in Mexico, came to the United States with her family in 2001 when she was 12 years old. She became a lawful resident in 2002. She was charged in 2012 and initially rejected a plea agreement requiring her to stipulate to deportation following her criminal sentence. The revised plea agreement that she accepted included a general statement that “pleading guilty may have consequences with respect to her immigration status,” including the possibility of “automatic removal.” Counsel’s conduct was deficient in failing to adequately advise the defendant. Counsel recognized and stated in sentencing that the misdemeanor plea would “probably” be considered an aggravated felony under immigration law and, therefore, there was “a high likelihood” of deportation. Nonetheless, counsel failed to investigate or research further, which would have revealed that deportation was a virtual certainty. The general provisions in the plea agreement and the trial court’s general warnings during the plea hearing were “simply irrelevant to the question whether *counsel’s* performance fell below an objective standard of reasonableness.” Prejudice was also established. If counsel had adequately advised the defendant, she could have negotiated a plea agreement not requiring removal, as four similarly situated defendants in the same district (S.D. Cal.) had been allowed to do. Even without a plea agreement, it was clear that the defendant would not have entered a guilty plea if she had been adequately advised. This was clear from her rejection of the initial plea offer.

4. State Cases

*Commonwealth v. Steckley*, \_\_\_ A.3d \_\_\_, 2015 WL 8124153 (Pa. Nov. 30, 2015). Counsel ineffective in possession of child pornography case for failing to inform the defendant of the possibility of a mandatory minimum sentence during plea negotiations. Prior to trial, the prosecutor provided the defense with sentencing guideline range worksheet showing a sentencing range of nine to sixteen months. Just prior to jury selection, the state offered a to recommend a sentence of three to six years in exchange for guilty pleas. After the defendant rejected this offer, the state offered a term of two to six years, which was also rejected. Prior to sentencing, due to the defendant’s prior conviction, the state served notice, under the state sentencing scheme for repeat sex offenders, of its intent to seek imposition of a mandatory minimum sentence of twenty-five years’ imprisonment. The court imposed the mandatory minimum sentence of 25 years. Counsel was unaware of the mandatory sentencing requirements under state law and, therefore, did not advise the defendant of

this possibility during plea negotiations. Because of counsel's deficient conduct, and believing, based on the state's pretrial sentencing guidelines worksheets, that the sentencing range was nine to sixteen months, the defendant rejected the state's plea offers. Prejudice established. "A defendant's assertion of innocence does not necessarily belie his later claim that he would have accepted a guilty plea offer." While the initial prosecutor was also unaware of the mandatory sentencing statute, this did not negate prejudice because the prosecution did not discover its error until seven months after the defendant rejected the plea offer and proceeded to trial. Thus, the defendant would have been allowed to plead guilty under the state's pretrial offer if the deal had been accepted. There was also no reason to believe that the court would have rejected the offer. Resentencing under the terms of plea offer previously rejected by the defendant.

### C. FAILURE TO INFORM DEFENDANT OR STATE OF PLEA OFFER

#### 3. State Cases

*Woods v. State*, \_\_\_ N.E.3d \_\_\_, 2015 WL 9478052 (Ind. Ct. App. Dec. 29, 2015). Counsel was ineffective in robbery case for failing to inform the defendant of a favorable plea offer prior to trial. The fifteen-year-old defendant was charged as an adult, along with a codefendant, of robbery resulting in serious bodily injury, a Class A felony. He already had pending charges: car jacking (Class B), auto theft (Class D), and drug possession charges (Class D). The state made a written plea offer. In exchange for the defendant's pleas of guilty to robbery (Class B), and the Class D auto theft and drug charges, the state would dismiss the car jacking charge. The sentence would be left to the Court's discretion. Counsel's conduct was deficient in failing to inform the defendant of this offer. The defendant subsequently rejected an offer to plead to Class A robbery and proceeded to a bench trial in which he admitted to Class B robbery. He was convicted of Class A robbery and sentenced to 45 years with 10 suspended. Prejudice was established. The maximum sentence under the proposed plea agreement was 20 years for the Class B robbery and an aggregate sentence of 26 years for all three offenses. The fact that the defendant would have accepted this offer was clear as he conceded guilt of the Class B offense in his bench trial. There was also no evidence of intervening circumstances like an arrest that would have led the state to retract the offer or the trial court to reject the plea agreement. The plea offer was reinstated. If the defendant rejected it, he was entitled to a new trial.

### D. BAD ADVICE LEADING TO REJECTION OF PLEA OFFER

#### 4. State Cases

*Rodriguez v. State*, 424 S.W.3d 153 (Tex. Crim. App. 2015) (reversing in part 424 S.W.3d 155 (Tex. Ct. App. 2014)). The Court of Appeals held that counsel was ineffective for advising the defendant to reject a plea offer of ten years in sexual assault of child and indecency with child case where the defendant was sentenced to multiple life sentences following conviction. On motion for new trial, the trial court granted the motion due to counsel's admission of ineffectiveness in that this was his first criminal jury trial and that he provided inadequate advice due to his lack of experience and knowledge in criminal law. The trial court rejected the subsequent plea agreement instead advising the defendant that he had the option to withdraw his guilty plea and proceed to trial or to accept a sentence of years. The defendant filed a motion to recuse, which was granted. The new trial judge believed she was bound by the initial court's ruling and denied the defendant's request that the State

be required to reinstate the offer of ten years. She accepted the subsequent negotiated plea of 25 years. While the initial trial court correctly found that the defendant refused the 10-year offer prior to trial, the Court of Appeals did not find the earlier refusal to accept a plea determinative in this case because he was relying upon trial counsel's improvident opinion that an acquittal would be easy to obtain at the time. "We cannot allow the same incompetent advice that rendered trial counsel's assistance ineffective to be used as a means of preventing appellant from demonstrating that counsel's ineffective assistance was prejudicial." Because the defendant accepted a plea agreement with a 25 year sentence when new counsel was obtained, the court concluded that there is a reasonable probability that he would have accepted the original ten-year plea-bargain offer if he had received competent advice prior to trial. On remand, the defendant was entitled to have the original plea offer re-instated. The Court of Criminal Appeals affirmed the finding of ineffective assistance of counsel but reversed the Court of Appeals' finding that the defendant was entitled to have the original plea agreement reinstated. In reaching this finding, the Court of Appeals assumed that the original trial judge recused herself on the basis of prejudice when there was no evidence in the record to support that assumption. The trial judge was within her discretion to reject the 10-year sentence and the 25-year sentence she imposed was still at the low range for the charged offenses. When the new judge was assigned, "the slate [was] wiped clean" meaning "the case started over from the beginning, and it was as if no plea negotiations had ever occurred." The 25-year sentence imposed as a result of the proceedings before the second judge was reinstated.

G. INADEQUATE ADVICE ON RIGHT TO APPEAL  
3. State Cases

*Anderson v. State*, \_\_\_ So. 3d \_\_\_, 2015 WL 9491860 (Fla. Dist. Ct. App. Dec. 31, 2015). Counsel ineffective in DUI manslaughter case for incorrectly advising the incompetent defendant to enter a "conditional" plea of no contest in order to preserve the right to appeal the trial court's competency determination. The defendant suffered traumatic brain injury in the car wreck in 2000 that formed the basis of the DUI manslaughter. Over the next ten years, he was examined multiple times and found to be incompetent. He was committed to the state hospital for treatment for three months but still found to be incompetent with experts agreeing that he would likely remain incompetent. Nonetheless, the trial court found him competent based on a limited in-court appearance. In order to preserve the issue, trial counsel recommended the "conditional" plea. Counsel's conduct was deficient because this advice was "patently wrong." Under state law, a trial court's finding of competence is generally not reviewable until after a conviction at trial. Where the defendant enters a plea of guilty or no contest, the competence finding is not a dispositive order and can be reviewed only if the defendant first files a motion to withdraw his plea. When the issue was raised on direct appeal, relief was denied because there had been no motion to withdraw the plea. Afterwards, counsel filed a motion to withdraw the plea, which was denied. On appeal, the court denied relief because the motion to withdraw was untimely. Post-conviction relief was denied because the trial court held that counsel's failure to timely file the motion to withdraw was a strategic choice. "Assuming arguendo that the decision to enter a plea rather than proceed to trial was a strategic choice, there was nothing strategic about failing to file a timely motion to withdraw the plea in order to preserve the issue for appellate review."

Strategy presupposes a course of action that, at least theoretically, would be of

benefit to the client. The course of action taken by Anderson’s counsel did nothing more than ensure he would not obtain the review Anderson desired; it was in all respects ineffective.

Prejudice established. Plea set aside.

## V. FAILURE TO COMPEL COMPLIANCE WITH PLEA AGREEMENT

*State v. Lopez*, 872 N.W.2d 159 (Iowa 2015). Counsel ineffective in plea to child endangerment causing bodily injury for failing to object to the prosecution’s breach of the plea agreement. The defendant was charged with abusing the two-year-old son of his girlfriend after she discovered bruises, a bite mark, and a cigarette burn on her son. The parties entered an agreement in which the prosecution agreed that, in exchange for the guilty plea, the prosecution jointly recommended probation, fines, mental health evaluation and treatment, and no contact orders. A presentence investigation report (PSI) recommended a five-year suspended prison sentence. In sentencing, the child’s father and the child’s *guardian ad litem* gave victim-impact statements recommending harsh punishment. The prosecution offered into evidence pictures of the child’s injuries and cross-examined defense witnesses with these photographs “in a manner suggesting a more onerous sentence was warranted” than the probation supported by the defense witnesses. In argument, however, the prosecutor correctly cited the terms of the plea agreement, never overtly advocated for a tougher sentence, and never referred to the PSI report recommendation. The trial court rejected the joint recommendation of probation and imposed an indeterminate prison term of up to five years. Counsel’s conduct was deficient in failing to object to the prosecution’s breach of the plea agreement. While the prosecutor has no right or duty to prevent victim-impact statements, the prosecutor cannot solicit such statements in order to evade its obligations under the plea agreement. Here, however, the prosecutor did not solicit the victim-impact statements, did not examine the father or guardian, and made no argument concerning these statements. With respect to the photographs, however, the prosecutor did violate the plea agreement. The sentencing judge would not otherwise have had access to the photographs. Additionally, the defendant did not deny the injuries, thus, “[t]he introduction of the photos was unprovoked and unnecessary.” And, of course, the prosecutor did not stop there but also used the photographs to cross-examine the defense witnesses. In short, “[t]he prosecutor’s conduct was flatly inconsistent with the State’s plea agreement to recommend probation.” Counsel’s conduct in failing to object was deficient. Prejudice is presumed when the state violates a plea agreement. Thus, the defendant was entitled to resentencing before a different judge and the state’s compliance with the agreement.

*State v. Sidzyk*, 871 N.W.2d 803 (Neb. 2015). Counsel ineffective in second degree sexual assault no contest plea case for failing to object to the state’s breach of the plea agreement. The defendant was charged with first degree sexual assault. In the plea agreement, the state agreed to reduce the charge to second degree and to “stand silent” on sentencing. In sentencing, however, the prosecutor endorsed the recommendation of the presentence investigation report (PSI), which recommended “a substantial period of incarceration.” Counsel did not object. Counsel testified that he did not think the state had violated the plea agreement, as it was common for the state to endorse the recommendations of the PSI. Counsel also stated that he did not object because he thought the only option was to withdraw the plea, which would have subjected the defendant to trial on the greater

charge and the risk of greater punishment. “Counsel was mistaken on both counts.” First, the state clearly violated the agreement. Second, state law provided two options to remedy the violation: (1) withdraw the plea; or (2) demand specific performance of the plea agreement before a different judge.

We realize that even seasoned criminal attorneys . . . are not walking repositories of the entire body of the criminal law. But trial strategy based on a misunderstanding of the law is not reasonable.

Prejudice was established. The defendant did not have to show that he would have received a lesser punishment. “Instead, the focus is whether counsel’s silence sacrificed Sidzyik’s ability to protect the bargain he struck with the State, thereby making the proceedings unfair.” Remanded with instructions to allow the defendant to withdraw the plea or to be sentenced before a different judge.

## VII. APPEAL

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

*Etherton v. Rivard*, 800 F.3d 737 (6th Cir. 2015). Appellate counsel ineffective in possession with intent to deliver cocaine case for failing to assert plain error and ineffective assistance of trial counsel due to admission of hearsay concerning anonymous tip offered into evidence through police detectives and trooper without objection by trial counsel. The police stopped the car driven by the defendant based on an anonymous tip. Drugs were found in the driver’s side map compartment under a potato chip bag, which had no usable fingerprints on it. The defendant, who owned the car, denied knowledge of the drugs. The passenger/co-defendant, who testified as part of a plea agreement, testified the drugs were the defendant’s. The only other evidence of the defendant’s knowledge was testimony about the anonymous tip that was introduced for its truth. The anonymous tip was elicited by the prosecution on three separate occasions. The prosecution also used the content of the tip during closing arguments, both opening and rebuttal. The state post-conviction court declined review of the Confrontation Clause issue and trial counsel ineffectiveness issue because these claims had not been raised on direct appeal. These issues were thus procedurally defaulted in habeas. The state court did review the claim of appellate counsel’s ineffectiveness. Appellate counsel’s conduct was deficient in failing to challenge admission of the anonymous tip, which “should have alerted” counsel “to the presence of a serious Confrontation Clause issue.” As a number of less meritorious issues were raised on appeal, this failure “was an oversight and not deliberate strategy.” While trial counsel had eventually objected, the objection was inadequate to preserve the issue for appeal. The admission of the anonymous tip amounted to plain error, however, and that error was prejudicial notwithstanding the trial court’s attempt at a curative instruction. Prejudice was also clear because, “absent the tip, the evidence was underwhelming as to Etherton’s knowledge of the presence of the cocaine.” The government’s case rested “almost entirely on the uncorroborated testimony of a codefendant.” Moreover, the fact that the state’s case largely corroborated the information in the anonymous tip otherwise “exacerbates the error” rather than rendering it harmless. There is a reasonable probability that the defendant would have prevailed if this issue had been raised on direct review. The state court determination otherwise was an unreasonable application of clearly established Federal law. Belated appeal granted. Likewise, if appellate counsel had asserted the ineffectiveness of trial counsel on appeal, he likely would have

prevailed. Belated appeal was granted on that issue also.

*Long v. Butler*, \_\_\_ F.3d \_\_\_, 2015 WL 6500128 (7th Cir. Oct. 27, 2015). Habeas relief granted under AEDPA, due to appellate counsel's ineffectiveness in murder case for failing to assert on appeal a due process claim due to the state's use of perjured testimony. The defendant was charged with a shooting outside a housing development. When the police arrived, 50-60 people were gathered around the shooting victim. No physical evidence linked the defendant to the crime, but four witnesses identified the defendant as the shooter. During trial, however, two of these witnesses recanted. The other alleged eyewitnesses were Edwards and Irby. Irby also recanted her identification. She testified that she told the prosecutors prior to trial that her story about seeing the defendant shoot the victim was a lie compelled by police threats to have her children removed from her care. The defendant's initial conviction was reversed. During the second trial, the state again presented the same four witnesses. Edwards testified that she saw the defendant shoot the victim and then cradled the victim's head in her hands afterwards. The two recanting witnesses again recanted pretrial statements identifying the defendant as the shooter. Irby testified that she saw the defendant shoot the victim but did not see anyone cradle his head in their hands. On cross-examination, she denied ever telling prosecutors that her statements were false. The state did nothing to correct this testimony, but the defense called a police officer who testified that Irby had recanted her identification of the defendant during the first trial. In a *pro se* state post-conviction petition, the defendant asserted ineffective assistance of appellate counsel for failing to challenge admission of Irby's perjured testimony. The state court rejected this claim by finding that the defendant was not prejudiced by the State's failure to correct the false testimony at trial. Therefore, appellate counsel was not ineffective. In federal habeas, the defendant raised the substantive due process/state misconduct claim under *Napue v. Illinois*, 360 U.S. 264 (1959) and also raised the appellate ineffectiveness claim. On the substantive claim, the district court rejected the state's arguments of procedural because: (1) the *pro se* petition was given "generous interpretation"; (2) the issue was "embedded" in the ineffectiveness claim and fairly presented to the state court; and (3) the state court actually considered the claim on its merits. On this claim, the district court held that the state court's finding of no prejudice was an unreasonable application of Supreme Court precedent, which required reversal, due to the knowing use of perjured testimony, "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Id.* at \_\_\_ (quoting *United States v. Agurs*, 427 U.S. 97, 103 (1976)). Here, the same prosecutor from the initial trial presented Irby's testimony identifying the defendant without correcting her testimony that she had never recanted and then argued in closing that, if she changed her story prior to trial, it was only because she did not want to testify, which only made her trial testimony more credible. The prejudice was not diminished by the defense counsel's efforts "to minimize the damage of Irby's perjured testimony."

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

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

C. State Cases

***Paul v. State***, \_\_\_ So. 3d \_\_\_, 2015 WL 9491817 (Fla. Dist. Ct. App. Dec. 31, 2015). Appellate counsel ineffective in 2009 murder case for failing to assert on appeal that the trial court fundamentally erred in giving the manslaughter by intentional act instruction disapproved of in *State v. Montgomery*, 39 So. 3d 252 (Fla 2010). Defendant’s brother, who was his codefendant tried separately, raised this issue on appeal. While the District Court of Appeals denied relief, the brother appealed to the Florida Supreme Court, which accepted jurisdiction. Following its decision in *Haygood v. State*, 109 So. 3d 735 (Fla. 2013) holding that this instruction was reversible error in the circumstances of this case, the brother’s case was remanded to the District Court of Appeals for reconsideration and the brother was granted a new trial. The defendant’s counsel did not raise this issue on appeal. The issue was first raised in a petition for writ of habeas corpus before the District Court of Appeals, which was denied without opinion. A second habeas, denied without opinion, was filed before the District Court after the brother was granted a new trial. The issue of trial counsel’s ineffectiveness for failing to object to the instruction was timely raised in post-conviction. Relief was denied because no prejudice could be established given the past two denials of relief. Exercising its power to reconsider and grant relief to avoid “manifest injustice,” relief was granted.

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C. State Cases

***In the Interest of S.S.***, 360 P.3d 16 (Utah Ct. App. 2015). Counsel ineffective in termination of mother’s parental rights proceeding. While the mother had complained about counsel’s failure to assist her and sought a continuance to retain different counsel, the proceedings went forward without inquiry by the court. Counsel made no opening statement, failed to cross-examine the state’s witnesses, failed to present evidence in mother’s favor, and made no closing argument. Counsel’s only affirmative acts, including questioning the mother’s credibility about her allegations that counsel had not communicated with her, were harmful to the mother. “In other words, not only did Mother lack an advocate in the courtroom, but her own attorney appeared to take an adversarial

position against her.” Counsel’s conduct was deficient and prejudicial.

### Conflicts Cases

***People v. Poole***, 39 N.E.3d 1086 (Ill. App. Ct. 2015). Counsel in armed robbery case had a *per se* conflict of interest under state law due to simultaneous representation of the defendant’s girlfriend in an unrelated forgery case where the girlfriend was also a witness against the defendant. Although the girlfriend was declared a hostile witness, she was clearly a witness for the state as her testimony was damaging to the defendant. While a *per se* conflict requires no showing of prejudice, actual prejudice could be established here because counsel acquiesced to admission of the girlfriend’s prior statements even though they were likely inadmissible because she conceded making prior inconsistent statements. Counsel also failed to cross-examine the girlfriend or impeach her with a prior conviction. The purported waiver was invalid. Because the trial court was not made aware of the potential conflict until after the trial, the court could not advise the defendant of the potential consequences. Instead, counsel “took it upon himself to determine whether a conflict existed, and then sought to secure defendant’s waiver on his own when he thought a conflict might be present. At best, this was improper.”

***State v. Jackson***, \_\_\_ P.3d \_\_\_, 2015 WL 7566282 (Kan. Nov. 25, 2015). Counsel in attempted murder case had an actual conflict of interest, due to counsel’s concurrent representation of a state’s witness (Beltran), that adversely affected plea negotiations. Beltran had been a codefendant in an unrelated case but was concurrently facing probation revocation charges from that prior case. In this case, Jackson had tied up his girlfriend during an argument and attempted to drown her in the bathtub, but she got loose. Jackson then took her to his sister’s home, where the sister was present with Beltran, who was her boyfriend. Jackson told his sister, in Beltran’s presence, that he was going to kill his girlfriend. The four then went to a gas station where Jackson sent his girlfriend inside to make a purchase. She called the police from the station. Counsel was appointed to represent the defendant and also appointed to represent Beltran, a state’s witness, on probation revocation charges. The defendant agreed, on advice of counsel, to a no contest plea. Counsel had a conflict of interest. While counsel testified that the defendant orally waived the conflict, under state law, a valid waiver required a signed written waiver. There was also no evidence that the defendant was properly advised concerning the potential conflicts. Additionally, there was no evidence that Beltran waived the conflict and “it seems unworkable for this court to find that Jackson made a valid waiver of the conflict given that there is no evidence that Gipson ever even discussed that a conflict of interest existed with Beltran.” The conflict adversely affected the plea negotiations because counsel encouraged the defendant to accept the plea deal to avoid further conflicts of interests. “To avoid drawing attention to this obvious conflict of interest, [counsel] had an incentive to make sure Jackson pleaded guilty in this case.”

***DePriest v. State***, \_\_\_ S.W.3d \_\_\_, 2015 WL 7455009 (Mo. Ct. App. Nov. 24, 2015). Counsel in possession of drugs with intent to distribute case had an actual conflict of interest in representing both the defendant and her brother during plea negotiations. The defendant lived with her brother. A search of the home revealed marijuana plants growing in the brother’s bathroom and closet, as well as package marijuana, pipes, and a digital scale in the common area of the residence. Both were charged and represented by the same counsel. The state made joint plea offers. On advice of

counsel, both defendants rejected an offer of a 10-year sentence with parole possibility after 120 days. The state then offered a 15-year sentence with parole possibility after 120 days. The defendant, while out on bond, was charged with a separate misdemeanor relating to a bad check. The state moved to revoke her bond and informed counsel that, if she did not accept the 15-year offer, the state would call her as a witness against her brother and move to disqualify counsel. The defendant again rejected the deal on the advice of counsel. Ultimately, both defendants entered open guilty pleas (in a group plea hearing involving five other defendants, as well) and the state agreed to dismiss the bad check charges and reinstate the defendant's bond. The trial court was informed that the dismissal of the check charge and reinstatement of bond were contingent upon the brother's plea, but the court made no inquiry. Sentencing followed at a later date and the defendant was sentenced to 15 years, concurrent, on both charges. From the beginning, counsel believed the defendant was less culpable than her brother. He believed that she should not plead guilty at all, but that her brother should take the best deal he could obtain. Counsel had an actual conflict of interest and prejudice was presumed from counsel's continued representation. Even if prejudice were not presumed, the group-plea procedure used by the trial court, without any inquiry into counsel's conflicts, rendered the defendant's plea involuntary. The court ordered reinstatement of the state's plea offer.

#### **Removed from list due to Reversal**

*Kulbicki v. State*, 99 A.3d 730 (Md. 2014), *rev'd*, 136 S. Ct. 2 (2015). Counsel ineffective in murder case for failing to challenge the state's evidence based on comparative bullet lead analysis (CBLA). The defendant was a married 36-year-old police officer accused of killing his 22-year-old extra-marital lover with whom he had fathered a child shortly after she ended the relationship. He was convicted in 1995. An FBI Agent examined a bullet fragment found in the defendant's truck and a bullet from the victim and testified that the results were "what you would expect if you were examining two pieces of the same bullet." Additionally, the FBI Agent examined a bullet recovered from a handgun in the defendant's home and testified that it "could have been in the same box" as the bullet taken from the victim. The state relied heavily on this testimony in closing arguments. In 2006, the Maryland Court of Appeals held CBLA evidence was not generally accepted by the scientific community and was inadmissible. Post-conviction counsel in this case did not assert ineffective assistance of counsel based on the CBLA evidence or brief the issue at all but the court raised the issue after the state argued, during oral arguments, that admission of the evidence was not a due process violation because trial counsel "should have been able to test the flawed assumptions upon which CBLA was based at trial." Counsel's conduct was deficient in failing to investigate and challenge this evidence because the FBI Agent that testified at trial had co-authored a report in 1991 that "presaged the flaws in CBLA evidence." Specifically, the flaws revealed in the 1991 report were the same flaws that led the court to hold in 2006 "that CBLA evidence was invalid and unreliable – the faulty assumption that bullets produced from different sources of lead would have a unique chemical composition." Specifically, the 1991 report indicated that two bullets – produced fifteen months apart – had the same chemical composition. Counsel's conduct was deficient in failing to research what the state's expert "had published about the forensic evidence about which he was testifying and having also failed to conduct an adequate cross-examination." Prejudice established because this evidence was central to the state's case.

***Michael T. v. Commissioner of Correction***, 71 A.3d 660 (Conn. Ct. App. 2013), *rev'd*, 126 A.3d 558 (Conn. 2015). Counsel ineffective in sexual assault and risk of injury to a young child case for failing to present expert testimony on the reliability of the alleged victim's disclosure of sexual abuse. When the alleged victim was four, she was diagnosed with Trichomonas. When other family members were tested, her mother was also diagnosed with Trichomonas. The defendant, who had previously lived with the mother, failed to appear for testing. The alleged victim was interviewed by a social worker and a pediatric nurse and denied any abuse. A year later after being educated about sexual abuse in "a school-sponsored good touch-bad touch presentation," followed by additional questioning by her mother several days later, she claimed the defendant had abused her. The forensic interview was conducted only after all of this. An expert could have helped point out the problems, including that "the child recited what sounded like a rehearsed litany of complaints" in the interview. Likewise, her trial testimony "reflected extensive preparation" having previously "undergone three investigations for sexual abuse, each involving multiple interviews by her mother and various professional interviewers." In short, the child had been questioned at least six separate times prior to the forensic interview. More than a year before that, a social services worker had warned the child's mother to refrain from questioning her further to avoid tainting any subsequent disclosure.