

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

Woods v. Etherton, ___ U.S. ___, ___ S. Ct. ___, 2016 WL 1278478 (Apr. 4, 2016) (Per Curiam). The Court reversed the Sixth Circuit’s grant of habeas relief because a “fairminded jurist” could have concluded that repetition of an anonymous tip by police officers in state court cocaine possession trial did not establish that the uncontested facts it conveyed were submitted for their truth, in violation of the Confrontation Clause, or that appellate counsel was ineffective for failing to assert plain error or ineffective assistance of trial counsel based on the Confrontation Clause issue. The police stopped the car driven by the defendant based on an anonymous tip. Drugs were found in the driver’s side door compartment. The defendant and his passenger were arrested. The passenger/co-defendant, who testified as part of a plea agreement, testified the drugs were the defendant’s. Three police officers described the content of the anonymous tip leading to the arrest. Trial counsel objected the third time and the prosecution agreed just to move on. The prosecution also discussed the content of the tip during closing arguments. The jury was instructed “that ‘the tip was not evidence,’ but was admitted ‘only to show why the police did what they did.’” In addressing the claim of appellate counsel’s ineffectiveness, the state court reasoned that appellate counsel may reasonably have decided not to raise the issue of trial counsel’s ineffectiveness because trial counsel’s failure to object was a strategic decision. The state court also held that, even if trial counsel’s conduct had been deficient, there was no prejudice because there was ample evidence of guilt. The Sixth Circuit, reviewing the case under AEDPA, held that appellate counsel was ineffective “and that no fairminded jurist could conclude otherwise. *Etherton v. Rivard*, 800 F.3d 737 (2015). Without ruling on the merits of the court’s holding that counsel had been ineffective, we disagree with the determination that no fairminded jurist could reach a contrary conclusion, and accordingly reverse.” The Sixth Circuit concluded that “the contents of the tip were admitted for their truth because the tip was referenced by three different witnesses and mentioned in closing argument.” The Sixth Circuit then found prejudice by finding that the “evidence was not enough to convict” without the co-defendant’s testimony. And that is where the tip came in.” “In reaching these conclusions, the Sixth Circuit did not apply the appropriate standard of review under AEDPA,” because a “fairminded jurist” could conclude otherwise on each of these points. A “fairminded jurist” could also conclude that trial counsel did not object “because the facts of the tip were uncontested and in any event consistent with Etherton’s defense.” Likewise, a “fairminded jurist”

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

I. TRIAL PHASE

A. NUMEROUS DEFICIENCIES AND INADEQUATE DEFENSE

1. U.S. Court of Appeals Cases

Liao v. Junious, 812 F.3d 741 (9th Cir. 2016). Under AEDPA, counsel ineffective in attempted murder case for failing to secure medical evidence to support the defense expert’s opinion that the defendant was sleepwalking at the time of the offense and did not have the requisite criminal intent when he struck the victim on the head with a hammer three times. The victim was the son of the defendant’s girlfriend. He was awakened in the early morning hours after the defendant struck him with the hammer. He pushed the defendant to the ground and asked what he was doing. The defendant did not respond. The victim ran and awakened his mother, who told the defendant to call the police. After several requests, he did so. When his girlfriend asked why he did it, he said that he had been dreaming someone was hitting him and he had fought back. The victim testified that the defendant had argued with the victim’s mother before they went to sleep and he believed the defendant’s anger at her was the reason for the attack, as the victim had known the defendant for five years in which the defendant never struck him and never showed any animosity towards him. In preparation for trial, counsel consulted with an expert in sleep disorders who advised that the defendant should undergo a medical examination and sleep studies. Counsel filed a motion requesting authorization for the procedures, which was initially denied by a court commissioner. Counsel renewed the motion with additional information and the commissioner took the matter under advisement. When counsel’s associate later called to inquire about the status of the request, a court clerk erroneously told him that the motion had been denied when in fact it had been granted. “Instead of conducting any further inquiry into the status of his motion, counsel proceeded to trial without the benefit of the medical examination and study” his expert recommended. The state conceded that counsel’s conduct was deficient in failing “to verify what the court clerk told his associate over the phone.” Prejudice was established. While the defense expert in sleep disorders testified to his opinion that the defendant was sleepwalking at the time of the offense, he did not have the sleep studies or medical examination he had recommended. Thus, the prosecutor was able to discredit the expert’s opinion on cross-examination and in rebuttal from a state expert. Then, “[h]aving set up her summation with the precision of a surgeon, the prosecutor belittled and mocked” the defense expert’s testimony in final argument. If the additional testing had been done, two experts would have been available to testify that the defendant was a sleepwalker and that his behavior on the night of the assault was consistent with sleepwalking as it was not a “focused assault that leads to injuries that might have been expected had there been an intent to really seriously injure or kill” and “there was amnesia and confusion” afterwards. The state court’s determination to the contrary was an unreasonable determination of the facts in light of the evidence presented and was a “demonstrably unreasonable” application of *Strickland*. Thus, the state court’s review was entitled to no deference and the issue was considered *de novo*. “Counsel’s error left Liao’s defense weak and pregnable. It would not have been so with the evidence the jury did not hear because of counsel’s

mistake.”

4. State Cases

**Ibar v. State*, ___ So. 3d ___, 2016 WL 454038 (Fla. Feb. 4, 2016). Counsel ineffective in capital trial for failure to obtain and present expert testimony from a facial identification expert. There was no physical evidence against the defendant, who steadfastly maintained his innocence and presented an alibi defense. The crux of the state’s case was a grainy video of the murders taken by a video surveillance camera installed in the home of one of the three murder victims. The defendant was identified as one of the perpetrators from photographs distilled from the video. An initial joint trial with a co-defendant, in which the co-defendant presented testimony from a forensic anthropologist, resulted in a hung jury. Following separate trials and convictions, the co-defendant’s case was reversed on appeal and he was acquitted. Each time the co-defendant had the expert testimony. The defendant in his separate trial was convicted without ever retaining a facial identification expert. Counsel conceded deficient conduct and the court agreed. Counsel’s explanation was only that he had “a litany of personal and professional issues that were occurring at the time of trial,” including pneumonia, depression, and other physical ailments, a domestic violence charge, concern over his drug-addicted lover who became pregnant with his child, and child custody disputes. Counsel was hospitalized following conviction, even before sentencing proceeded. Counsel had obtained a second-chair counsel and placed the burden of hiring experts on her. While she believed she had a 12 minute call with a facial identification expert, who was prepared to testify, counsel did not follow through and the expert denied in post-conviction that he had been contacted, although he would have been available for retainer if asked. Prejudice was established. The court considered the similarities with the co-defendant’s case. Here, counsel had objected to testimony from police officers that a number of lay witnesses identified the defendant from the photos as substantive evidence. On appeal, the court agreed that there was error but found it to be harmless. “Our harmless error analysis would have undoubtedly been different in this case had the surveillance videotape and images been challenged by a facial identification expert at trial.”

**Johnson v. Premo*, ___ P.3d ___, 2016 WL 1244367 (Or. Ct. App. Mar. 30, 2016). Counsel ineffective in aggravated murder trial for failing to investigate and present expert testimony that the victim’s death was due to a morphine overdose and not strangulation. The victim’s body was found along a beach in Clatsop County. State experts testified that she had high levels of morphine in her blood but she died from strangulation. Substantial evidence, including DNA from semen in the victim’s vagina, connected the defendant to the case. The State’s theory was that the defendant, who had a history of drugging women and then sexually assaulting them, had done so in this case and killed her at his home in Washington County before taking her body and dumping it from a bridge. The defendant told counsel that the victim had died at his home in Washington County from a drug overdose. Counsel’s conduct was deficient because, without investigating this possibility, defense counsel relied on a theory of “defense” that the victim died from drowning in Clatsop County because she was alive when the defendant threw her off the bridge. Counsel presented several experts to say that drowning was a possibility. In other words, the defense was only a “venue defense,” which “was not a reasonable tactical decision deserving of deference” because counsel did

not investigate the possibility of a drug overdose despite the defendant telling him that's what actually happened. Instead, counsel hoped for an acquittal despite admission that the defendant threw the live victim from a bridge killing her by drowning and despite language in the indictment that permitted venue in the defendant's home county of Washington if the jury could not determine the location of death. Prejudice was established. Two experts testified in post-conviction that the most likely cause of death was a morphine overdose. Even though the jury could still have determined that the defendant was responsible for the victim's death, the defense could have argued that the defendant was guilty of a lesser offense, such as manslaughter, criminally negligent homicide, or unintentional felony murder. Even if the jury still had convicted the defendant of aggravated murder, unless the jury found that it was "deliberate," the defendant would not have been eligible for the death penalty.

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

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

United States v. Freeman, ___ F.3d ___, 2016 WL 1127170 (5th Cir. Mar. 21, 2016). Counsel ineffective in conspiracy to possess cocaine and possession with intent to distribute cocaine case for failing to move to dismiss the possession count, added in the superseding indictment, as barred by the statute of limitations. Counsel's conduct was deficient. "Although counsel's affidavit stated that he considered the issue, the record is silent as to the extent of counsel's research. Even minimal research would have revealed . . . a compelling argument" that the possession charge in the superseding indictment was barred by the statute of limitations. Prejudice established as the defendant had to pay a \$100 special assessment for the possession conviction and the defendant would not have that conviction otherwise.

c. State Cases

People v. Rogers, ___ Cal. Rptr. 3d ___, 2016 WL 1192594 (Cal. Ct. App. Mar. 28, 2016). Counsel ineffective in case with multiple charges arising out of two hours of false imprisonment and assaults by the defendant on his girlfriend for failing to object to the addition of charges and enhancements after the defendant waived preliminary hearing. The defendant was initially charged with two counts and two enhancements. The defendant waived a preliminary hearing. Four days before trial, a different prosecutor than the one that agreed to the waiver of the preliminary hearing, without objection, added two additional counts and an enhancement. The state conceded, based on established California law, that counsel's conduct was deficient in failing to object to the addition of the three additional counts because an information cannot be amended after the defendant has waived his right to a preliminary hearing. The court also found that counsel's conduct was deficient in failing to object to the addition of an enhancement after the defendant waived his right to a preliminary hearing. "While there is apparently no published case prohibiting an amendment to add a conduct enhancement to an information after a preliminary hearing has been waived," based on previously decided cases, "the writing was clearly on the wall. At the very least, under prevailing professional norms, counsel should have objected to preserve the issue." Prejudice established. The remedy was to strike the counts and the enhancement added after the waiver of the preliminary hearing. Remanded for new sentencing.

People v. Tayborn, ___ N.E.3d ___, 2016 WL 868917 (Ill. App. Ct. Mar. 7, 2016). Counsel ineffective in drug case for failing to file a motion to suppress the defendant's custodial statements made in response to police questioning without having received *Miranda* warnings. The defendant was a passenger in a car stopped because it did not have a registration plate. After the driver was removed from the car and arrested, the defendant was removed from the car while the car was searched incident to the arrest. Police officer testimony was contradictory about whether the defendant was handcuffed then. A search of the car revealed cocaine in the driver's purse. An officer asked the defendant about the cocaine and the defendant admitted that he obtained it in Chicago and was taking it to Iowa. Counsel's conduct was deficient as the trial court found that the defendant was in custody at the time the cocaine was discovered. Even if he had not been then, he certainly would have been when the cocaine was discovered. Prejudice also established because a motion to suppress would have been successful. Without the defendant's statement, there is a reasonable probability that the outcome of the trial would have been different.

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

5. IMPEACHING WITNESS
c. State Cases

Hannon v. State, ___ S.W.3d ___, 2016 WL 1085644 (Mo. Ct. App. Mar. 15, 2016). Counsel ineffective in sodomy of a child case for failing to obtain the child’s school records which would have contradicted the child’s testimony. The child testified that he was molested by the defendant the day before his mother overdosed on drugs and his grandmother took custody of him. The day was named in the indictment and the state’s arguments as October 3, 2005. The child testified that he was out of school sick that day and it was during that time that he was molested. Counsel’s conduct was deficient in failing to obtain the child’s school records, which reflected that he was in school on the day in question. While counsel testified that he had been informed by the school that the child was out sick all that week, the trial court rejected this testimony finding that counsel lacked credibility. Prejudice was established.

Rutland v. State, ___ S.C. ___, ___ S.E.3d ___, 2016 WL 1239869 (Mar. 30, 2016). Counsel ineffective in murder case for failing to cross-examine the state’s “key” witness with prior inconsistent statements to the police and to newspaper reporters. The defendant was involved with the deceased’s estranged wife. On the day of the shooting, the defendant and his girlfriend were at a pet grooming business to inquire about purchasing the business. The deceased came in and was shot and killed by the defendant. The only other person present besides the defendant’s girlfriend was an employee of the business, Kestner. Kestner initially told law enforcement that the deceased was armed when he entered the business and pulled a gun before he was shot and killed. She made a similar statement to a newspaper reporter. At trial, however, she testified that the deceased had nothing in his hands when he entered the business, except a pack of cigarettes. She said she never saw him with a gun, but after the shooting there was a second gun lying on the floor. Counsel’s conduct was deficient in failing to question her about the prior inconsistent statements to law enforcement and the newspaper reporter. Counsel conceded knowledge of these prior statements and an “oversight” in failing to cross-examine on this basis. While the post-conviction court found that counsel’s conduct was deficient, the court found no prejudice because the defendant failed to produce extrinsic evidence of the prior inconsistent statements in the post-conviction hearing. This finding was not supported by the evidence in the record as the defendant produced the prior statement to law enforcement, as well as affidavits from individuals attesting to having heard the witness say that the deceased was armed at the time of the shooting. Prejudice established because, if trial counsel had adequately cross-examined the witness, the evidence would have demonstrated that “all three witnesses to the incident attested at some juncture the victim was armed at the time of the shooting.” Additionally, the prosecutor relied on the witness’ testimony in closing arguments, which “highlights trial counsel’s deficient performance.” Likewise, the jury sent out several relevant questions during deliberations indicating that “the jury was focusing on whether the victim was armed” and that the jury was having difficulty reaching a unanimous verdict.

Ex Parte Saenz, ___ S.W.3d ___, 2016 WL 1359214 (Tex. Crim. App. Apr. 6, 2016). Counsel ineffective in murder case for failing to impeach Gonzalez, the State’s primary witness, with a prior inconsistent statement. The defendant was charged with shooting four people, including Gonzalez,

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

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
c. State Cases

Bolden v. State, ___ S.E.2d ___, 2016 WL 517977 (Ga. Ct. App. Feb. 10, 2016). Counsel ineffective in burglary and aggravated assault case to failing to object to improper instructions by

the court on the required elements of burglary. The indictment charged the defendant with entering the victim's home with the intent to rape her. The facts presented at trial, however, were that he entered the home and demanded money saying he would leave if she gave it to him. When the victim said she had none, he then assaulted her, she got away to the bathroom, and he then entered her bedroom and raped her. The court's instructions informed the jury that the defendant could be convicted of burglary if the defendant entered the home or any room of the home with the intent to commit a felony, which was broader than the indictment of entering the home with the intent to rape the victim. During deliberations, the jury returned with a question asking what happened if the defendant entered the home with one intent and then remained in the home with a different intent. The court referred the jury to the indictment but again gave the improper instruction broadening the circumstances under which the defendant could be convicted of burglary. Counsel's conduct was deficient in failing to object and prejudicial.

McNeal v. State, ___ S.W.3d ___, 2016 WL 616297 (Mo. Ct. App. Feb. 16, 2016). Counsel ineffective in felony burglary and theft case for failing to request an instruction on the lesser-included misdemeanor offense of trespass. The defendant entered an apartment and stole a drill. For a burglary conviction, a required element was that the defendant entered the apartment with the intent to steal. The defendant's testimony was that he entered the apartment looking for the person who lived there to collect money she owed him, but when he found the apartment empty except a radio and a drill, he decided to steal the drill. This testimony supported only a conviction of trespass. Counsel argued that the defendant did not form the intent to steal until after he was in the apartment. Counsel's conduct was deficient, however, in failing to request an instruction on trespass. Counsel testified that he did not ask for the instruction because it was inconsistent with his strategy of arguing for an acquittal. This strategy was not reasonable because counsel actually conceded the defendant's guilt of trespass but did not request the instruction. Prejudice was clear as the jury returned during deliberations asking whether the intent to steal supporting burglary had to be formed prior to entry of the apartment or whether it could be formed while in the apartment. The court answered that the jury should simply follow the instructions already given.

State v. Garcia, ___ P.3d ___, 2016 WL 1273356 (Utah Ct. App. Mar. 31, 2016). Counsel ineffective in attempted murder case for proposing an erroneous instruction on the lesser-included offense of attempted manslaughter, after the state conceded that the defendant was entitled to the lesser-included instruction. The instruction given was that the jury could convict of attempted manslaughter "only if imperfect self-defense *does not apply* beyond a reasonable doubt" when the jury should have been instructed that the jury should convict on attempted manslaughter "if the State *has not disproved* the affirmative defense of imperfect self-defense." Prejudice established, as the erroneous instruction "effectively removed from the jury's consideration the option of convicting Garcia of the lesser-included offense."

11. MISCELLANEOUS
d. State Cases

2016: *State v. Garland*, 781 S.E.2d 787 (Ga. 2016). Counsel ineffective in motion for new trial of sexual

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

II. CAPITAL SENTENCING PHASE ERRORS

A. NUMEROUS DEFICIENCIES AND INADEQUATE MITIGATION

3. U.S. District Court Cases

**McNish v. Westbrook*, ___ F. Supp. 3d ___, 2016 WL 755634 (E.D. Tenn. Feb. 25, 2016) (trial and sentencing in 1984). Counsel ineffective in capital sentencing for failing to adequately investigate and present mitigating evidence. This issue was first raised on appeal of the denial of state post-conviction. The District Court held the issue was procedurally defaulted but the Sixth Circuit remanded following the decisions in *Martinez v. Ryan* and *Trevino v. Thaler*. On remand, the District Court held that post-conviction counsel's conduct was deficient in failing to assert trial counsel's ineffectiveness and the issue was "substantial." Therefore, the procedural default was excused. Trial counsel's conduct was deficient because trial counsel "failed to explore a wealth of evidence that was available" concerning the defendant's social, mental, and family history. While counsel had available records that indicated "a history of attempted suicides, depression, blackouts, and drug abuse," as well as indications of the defendant's traumatic childhood, counsel "chose not to investigate petitioner's family history any further because of their decision to pursue a reasonable doubt defense." This decision was not a valid strategic decision "because counsel did not fulfill their obligation to independently investigate this evidence in order to make an informed decision." Moreover, the decision to "limit their investigation" was not reasonable, "particularly considering that counsel had a general knowledge of the difficulties of Petitioner's family history." Prejudice was established. "The sum of the testimony portrayed Petitioner as a good-hearted, tender, and compassionate person who was not violent and loved his family and friends," which was "undermined by the nature of the crime for which Petitioner had been convicted." If counsel had adequately investigated and presented the evidence, the jury would have heard evidence of the "degenerative environment Petitioner grew up in" with parents that ran a bootleg business in a dry county. The petitioner was physically and sexually abused by his parents, their customers, and his older siblings. He became addicted to prescription medications after back and head injuries. He

attempted suicide and was admitted to a mental health center where he was diagnosed with “hysterical personality and drug dependence.”

5. State Cases

**Salazar v. State*, ___ So. 3d ___, 2016 WL 636103 (Fla. Feb. 18, 2016) (trial and sentencing in 2006). Counsel ineffective in capital sentencing for failing to adequately investigate and present mitigating evidence. The state conceded that counsel’s conduct was deficient, as counsel failed to conduct any investigation. Counsel also failed to followup on the recommendations of the one expert who conducted a preliminary evaluation of the defendant one week before trial. The expert noted the possibility of mental health impairments and possible organic brain damage that should be investigated. Instead, counsel presented only the testimony of the defendant’s two sisters about the love and support the defendant provided to his family. Prejudice was established as there was significant available evidence of the defendant’s low IQ, borderline intellectual functioning, and deficits in adaptive behavior. There was also significant mitigating evidence about the defendant’s family history and traumatic childhood.

B. ONE DEFICIENCY

3. MISCELLANEOUS

b. U.S. District Court Cases

**McLaughlin v. Steele*, ___ F. Supp. 3d ___, 2016 WL 1106884 (E.D. Mo. Mar. 22, 2016) (tried and sentenced in 2006). Under AEDPA, counsel ineffective in capital sentencing for failing to investigate, retain, and present the testimony of a qualified psychiatrist. Without independent investigation of the expert’s credentials, counsel retained a psychiatrist based on the recommendation of his mitigation specialist, who had seen the psychiatrist speak at a capital defense seminar. After examining the defendant for at least seven hours, the psychiatrist opined, among other things, that the defendant was under the influence of extreme mental or emotional distress at the time of the murder and that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law were substantially impaired at the time of the murder. While the jury was out deliberating on guilt-or-innocence, the retained psychiatrist disclosed to defense counsel that he had engaged in professional misconduct during medical school that might subject him to serious impeachment. The next day in opening statements in the sentencing phase, defense counsel told the jury that it would hear from the psychiatrist and summarized in detail his expected testimony, but then counsel decided not to call him to testify because of the likely impeachment. Prior to closing arguments in sentencing, counsel informed the trial court that he did so because after the opening he had done an internet search of the retained psychiatrist’s name and quickly found information about the expert’s prior misconduct. He then met with co-counsel and their bosses in the public defender office and decided not to call the expert because the potential for impeachment might seriously harm the defendant’s case. Instead, in sentencing, counsel presented two mental health experts, who had evaluated the defendant at age 9; the testimony of a psychologist (Mark Cunningham, Ph.D.), who had reviewed the defendant’s records and interviewed family members but who had not interviewed the defendant; and a mental health expert who treat the defendant

months before the murder. Because this issue had not been raised until the appeal of the denial of state post-conviction relief, the issue was procedurally defaulted. Thus, the court first considered whether “cause” and “prejudice,” based on post-conviction counsel’s ineffectiveness, excused the default under *Martinez*. This standard was met because the court found the underlying claim of ineffective assistance of trial counsel to be “substantial.” Likewise, the court found that post-conviction counsel’s conduct was deficient in that counsel was aware of the issue simply from reading the trial transcripts, as trial counsel had expressed concern to the trial court that he may have been ineffective. In addition, post-conviction counsel intended to raise the issue, but unintentionally omitted the issue. Thus, there was no tactical decision for the omission. The prejudice analysis was intertwined with the sentencing prejudice discussed below. On the issue of trial counsel’s ineffectiveness for failing to present the testimony of a psychiatrist, which had been raised, the state court held that counsel’s decision not to present testimony from the retained psychiatrist was reasonable trial strategy. The state court also found no prejudice because the psychiatrist’s testimony would have been largely cumulative to Dr. Cunningham’s testimony. The District Court held that counsel’s “ultimate decision” not to call the retained psychiatrist to testify was reasonable.

But counsel’s representation during trial is not the extent of his constitutional duty to his client. Counsel should never have been in the situation of deciding, at the last minute, between calling an expert with a serious truthfulness problem and calling no expert at all.

It is, of course, common practice for capital defense attorneys to rely on mitigation specialists to *propose* potential experts, whom they may eventually call to testify in mitigation. But in making the decision whether to retain a potential expert, counsel must do something beyond reviewing what the expert says about himself on his resume.

Id. at ___ (citations omitted.) Here, counsel did nothing more than review the resume and, as such, “had not done the groundwork reasonably necessary to make a strategic decision” about whether to hire the expert. This is not a case about failing to engage in expert-shopping. It is instead, a case where counsel failed “to investigate the expert he *did* hire and to reasonably develop the strategy he *had* settled on.” Counsel’s conduct was deficient in failing to conduct “*some* investigation” of the expert prior to his retainer. He could have easily done an internet search, spoken to other lawyers who had previously hired the expert, or even asked the expert about potential impeachment. “But he did none of these things.” This was not strategy, as “[n]othing in the record suggests any strategic rationale, no matter how farfetched, for failing to conduct this investigation.” Counsel’s conduct was also established as “there was no built-in redundancy to counsel’s penalty-phase strategy. . . . None of the other experts that were presented by the defense presented opinions based on current evaluations of the Petitioner or his mental state at the time of the crime.” Moreover, the State “emphasized this gap repeatedly in its closing argument.” Thus, the jury heard no testimony about two statutory mitigating factors that were present. The deficiency in counsel’s conduct was heightened because, “even *after*” counsel became aware of the problem, “counsel went on to make an opening statement wherein he described [the psychiatrist’s] anticipated testimony in detail,

mentioning him by name six times.” Even if there was not constitutional error before, the “decision to plow forward with an unedited opening statement would have magnified the error into one of constitutional proportion.” Prejudice was also established. A competent, qualified psychiatrist could have opined that the defendant suffered from borderline personality disorder with narcissistic features and intermittent explosive disorder and that two statutory mitigating factors were present. This “would have comprised the only evidence from a mental-health expert bearing on Petitioner’s psychological state at the time of the murder. The defense also would not have broken its promise to the jury about what it would hear as mitigation evidence.” This likely would have made a difference in what the jury “obviously found . . . to be a close case,” as the jury “rejected three statutory aggravators and ultimately deadlocked” sending the decision to the trial court, which imposed a death sentence.

III. NON-CAPITAL SENTENCING ERRORS

A. U.S. Court of Appeals Cases

United States v. Abney, 812 F.3d 1079 (D.C. Cir. 2016). Counsel ineffective in crack cocaine case for failing to seek a continuance of the defendant’s sentencing until after the Fair Sentencing Act (FSA), which lowered the mandatory minimum sentences for crack cocaine offenses, became effective. The act was passed by Congress five days before sentencing. Counsel’s conduct was deficient in failing to seek a continuance as Presidential approval was virtually assured. In addition, it was “reasonably probable – if not more likely still – that courts would interpret the FSA’s new mandatory minimums to apply to defendants sentenced after its effective date.” “Any competent criminal defense attorney familiar with federal sentencing principles would have understood that” and the defense bar was universally seeking continuances in sentencing until after the FSA took effect. In short, counsel’s conduct was deficient. “The FSA’s impending enactment was so important and widely publicized – and the reasonable likelihood of its retroactive effect so apparent – that objectively reasonable counsel would have known about it and the open retroactivity question, irrespective of what Abney’s counsel subjectively knew.” Prejudice was also established in that application of the FSA cut the mandatory minimum sentence from ten years to five years.

IV. ADVISING CLIENT

A. GUILTY PLEA AFTER INADEQUATE INVESTIGATION OR RESEARCH

3. State Cases

People v. Armstrong, ___ N.E.2d ___, 2016 WL 1315376 (Ill. App. Ct. Mar. 22, 2016). Counsel ineffective in failure to register as a sex offender case for advising the defendant to plead guilty without adequately researching or investigating the issue first. The defendant’s obligation to register was allegedly triggered by his 1997 conviction of unlawful restraint. As unlawful restraint was not inherently a sex offense, he was required to register as a sex offender only if the victim was under 18 years-of-age. Thus, counsel’s conduct was deficient in failing to examine the record of the 1997 case. The record revealed that the complaint, nor testimony in the preliminary hearing, nor the facts as agreed upon in the defendant’s plea agreement mentioned the victim’s name. Likewise, neither

the judge nor the written judgment mentioned the victim's age or a requirement that the defendant register as a sex offender. Thus, the defendant was not required to register as a sex offender based on the 1997 conviction. Prejudice established because the defendant would not have entered a guilty plea to failure to register as a sex offender if counsel had investigated and adequately advised him.

State v. Schlemmer, ___ N.E.3d ___, 2016 WL 525960 (Ohio Ct. App. Feb. 5, 2016). Counsel ineffective in plea to sex offense with sexually violent predator (SVP) specification case for advising the defendant to plead guilty to the SVP specification without adequately researching the issue. The defendant was charged with five counts of gross sexual imposition with the SVP specification and, on the advice of counsel pled guilty to one count with the SVP specification, which required a mandatory two years to life imprisonment sentence, and the state dismissed the other four counts. Counsel's conduct was deficient because gross sexual imposition did not constitute a "violent sex offense" that allowed for the SVP specification. Prejudice was clear as the maximum punishment for gross sexual imposition was 18 months. Thus, even if the defendant had pled guilty to all five counts and the sentences were made consecutive, the sentence would have been much less than the two years to life imprisonment mandatory sentence the SVP specification required. While the defendant asked the court to vacate just the SVP specification, the court held that since it was part of a plea deal the whole deal was vacated. Thus, a new trial was ordered.

State v. Diaz-Bonilla, ___ S.W.3d ___, 2016 WL 519681 (Tex. Ct. App. Feb. 9, 2016). Counsel ineffective in failing to adequately the defendant of possible defenses prior to the defendant's guilty plea to engaging in organized criminal activity. In order to be guilty of that offense, was required to show that the defendant be a member of a criminal street gang, who conspired to commit the offense, and performed an "overt act" in pursuit of the agreement. Here, the defendant was a member of the MS-13 street gang. He was present when the gang leader ordered that the victim be murdered. He rode in the backseat of the leader's car to the crime scene but only watched the murder without participating. He then rode away still in the backseat of the car until he was dropped off at home. Counsel was ineffective in failing to advise the defendant of this possible defense or the possibility of challenging the sufficiency of the evidence on appeal if convicted. The state conceded prejudice.

- E. ERRONEOUS ADVICE ON RIGHT TO SILENCE OR TO TESTIFY,
LEADING TO DETRIMENTAL OUTCOME
 - 1. U.S. Court of Appeals Cases

Casiano-Jimenez v. United States, ___ F.3d ___, 2016 WL 1211859 (1st Cir. Mar. 29, 2016). Counsel ineffective in drug case for failing to inform the defendant of his right to testify on his own behalf. The defendant was one of seven defendants tried for smuggling narcotics by ship into the country. Defense counsel conceded that the lawyers for all the defendants collectively decided that rather than have the defendants testify they should retain a single expert to present a "lack of knowledge" defense. The expert thus testified that – based on the hidden location of the contraband – it was possible that none of the crew members were aware that drugs were on board. Counsel's conduct was deficient because counsel did not inform the defendant, who was "an alien who had

limited proficiency in English and no experience with the American criminal justice system,” as well as no criminal history, of his right to testify or have any discussion that would “enable the defendant to make an informed decision about whether to take the stand.” Prejudice was established as the government’s case was entirely circumstantial and three of the codefendant’s, who were “all ordinary seamen,” were acquitted. If defendant had testified, he could have explained that he was new to the crew; had never been on the ship before; signed on as an ordinary seaman; was pressed into service as “first officer,” as the government portrayed him, after he was on board; and had no knowledge of the drugs. This testimony would have been far more exculpatory than the expert’s testimony and “could have been a game changer.”

G. INADEQUATE ADVICE ON RIGHT TO APPEAL

3. State Cases

State v. Perry, ___ P.3d ___, 2016 WL 1170089 (Kan. Mar. 25, 2016). Counsel’s advice on the right to appeal sentence following a no-contest plea was inadequate. Following sentencing, the defendant asked counsel what his appeal options were, but counsel advised him there was nothing to appeal. The defendant untimely appealed based on a Kansas Supreme Court decision that came out the day of her sentencing, which if applicable would reduce her sentence. The Court of Appeals held that she was entitled to a belated appeal. The Court of Appeals also determined that her claim was meritorious and that she was entitled to a reduction in sentence. The Kansas Supreme Court considered only the issue of whether she was entitled to a belated appeal. The court held, as in *Shelly* (below), which was the case of her husband and co-defendant, counsel’s conduct was deficient and prejudicial in failing to advise the defendant “of the current state of the law so that she could make an informed decision about whether to take an appeal.”

State v. Shelly, ___ P.3d ___, 2016 WL 1168301 (Kan. Mar. 25, 2016). Counsel’s advice on the right to appeal sentence following a no-contest plea was inadequate. Following sentencing, the defendant asked counsel what his appeal options were, but counsel advised him there was nothing to appeal. Later, the defendant again asked the defendant about appeal based on a Kansas Supreme Court decision that came out the day of his sentencing, which if applicable would reduce his sentence. The defendant’s *pro se* appeal was found to be untimely by the Court of Appeals. The Kansas Supreme Court held that counsel’s conduct was deficient. Because a rational defendant in the defendant’s place would want to appeal on the basis of the decision released by the Kansas Supreme Court on the day of sentencing, counsel had a duty to consult with the defendant about his right to appeal. “The minimal advice given – that there was nothing to appeal – unreasonably overlooked at least potentially meritorious grounds for appeal and did not allow Shelly to knowingly and intelligently waive his right to appeal.” Prejudice established as the defendant had expressed interest in appealing several times. A belated appeal allowed and remanded to the Court of Appeals for consideration of the merits of the issue raised.

VII. APPEAL

A. U.S. Court of Appeals Cases

Overstreet v. Warden, 811 F.3d 1283 (11th Cir. 2016). Under AEDPA, appellate counsel ineffective in armed robbery and kidnaping case for failing to challenge the sufficiency of the evidence on the kidnaping convictions under the Georgia Supreme Court’s decision in *Garza v. State*, 670 S.E.2d 73 (Ga. 2008). The defendant was convicted of 35 counts arising from his role in the armed robberies of five fast-food restaurants. The four kidnaping convictions were based on the defendant leading the restaurant manager to the restaurant safe in a back room or office and then ordering the manager to open the safe. On two of the four occasions, the defendant led the restaurant manager back to the front of the restaurant, where the remaining employees were being held. At the time of conviction in 2007, this was sufficient to satisfy the asportation element of kidnaping. In 2008, however, the Georgia Supreme Court decided *Garza*, which held that “movement of a victim that is ‘part and parcel’ of an independent crime, such as armed robbery, would generally not be considered asportation.” *Id.* at 1285. In 2009, the Georgia Supreme Court held that the new rule of *Garza* was applicable to any kidnaping conviction that had not yet been adjudicated on direct appeal. Thereafter, appellate counsel filed the direct appeal brief challenging, among other things, the sufficiency of the evidence without any citation or argument under *Garza*. Thereafter, the defendant challenged the sufficiency of the evidence under *Garza* in pro se petitions but was denied relief in state habeas and in federal habeas. Appellate counsel’s conduct was deficient in failing to assert the *Garza* issue. “[H]e either failed to recognize or elected not to raise this strong basis for reversal of four criminal convictions. Either way, counsel’s performance is patently deficient.” Counsel’s conduct was not excused as a reasonable strategy because “[e]ven if meritorious, none of appellate counsel’s arguments was as compelling as *Garza*, which almost certainly would have resulted in reversal of the kidnaping counts.” *Id.* at 1287. Prejudice also established. “The state court’s determination to the contrary was an unreasonable application of *Strickland*.”

B. U.S. District Court Cases

Speight v. Warner, ___ F. Supp. 3d ___, 2016 WL 397908 (W.D. Wash. Feb. 1, 2016). Under AEDPA, appellate counsel ineffective in rape case for failing to raise claim on direct appeal that the defendant’s right to a public trial under Washington law was violated. Prior to trial, the court issued a jury questionnaire on which prospective jurors were permitted to request individual questioning. Fourteen prospective jurors asked for individual questioning and they were questioned in chambers with the defendant and counsel for the parties present. The denial of a public trial was first raised in state post-conviction. While the court held that there was a violation, which would have required the presumption of prejudice on direct appeal, relief was denied in post-conviction where the defendant was required to show “actual and substantial prejudice.” In federal habeas, the defendant asserted the issue of appellate counsel’s ineffectiveness for the first time. Because the issue was procedurally defaulted, the defendant asserted “cause” and “prejudice” to overcome the default because state post-conviction counsel was ineffective in failing to assert the issue of appellate counsel’s ineffectiveness. Appellate counsel’s conduct was deficient in failing to raise the public trial issue because, at the time of the direct appeal, “the case law in Washington made clear that the trial court violated Mr. Speight’s right to a public trial and this structural error entitled him to a new trial.” Counsel’s conduct was not excused by reasonable strategy as “a reasonable attorney could not have concluded that the public trial violation was a ‘weak issue,’ especially in comparison to

those issues that appellate counsel chose to raise.” The deficient conduct finding was bolstered by the state court’s conclusion that there was a public trial violation. Prejudice was also clear as the issue would have required automatic reversal if raised on direct appeal. Because the issue was not just “substantial” but also meritorious, the procedural default was excused due to post-conviction counsel’s failure to assert this error.

C. State Cases

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

Branton v. State, ___ So. 3d ___, 2016 WL 1062742 (Fla. Dist. Ct. App. Mar. 18, 2016). Appellate counsel ineffective in robbery resentencing case for failing to assert the trial court’s error in refusing to consider evidence of the defendant’s rehabilitation and mitigation during the 10-year period from the time of the initial sentencing to the resentencing. While the trial court “applauded” the defendant for his exceptional behavior in confinement, including completion of vocational and drug programs, and his Christian “redemption,” the court stated that it was precluded from considering evidence from the period after the initial sentence and reimposed the 40-year sentence initially given. Appellate counsel’s conduct was deficient in failing to assert this error because Florida law is clear that in a new sentencing proceeding there is a “clean slate” and the court should proceed “de novo on all issues.” Prejudice established as the trial court refused to consider the defendant’s case in mitigation prior to imposing the sentence.

Grant v. State, ___ So. 3d ___, 2016 WL 717961 (Fla. Dist. Ct. App. Feb. 24, 2016). Appellate counsel ineffective in attempted armed robbery with a firearm for failing to assert as error on appeal the trial court’s failure to instruct on the lesser-included offense of attempted armed robbery with a weapon. Counsel’s conduct was deficient as this issue had been preserved at trial. Prejudice also established as automatic reversal would have been required on direct appeal for the failure to charge the lesser-included offense. New trial granted.

State v. Johnson, ___ N.E.3d ___, 2016 WL 817035 (Ohio Ct. App. Feb. 26, 2016). Appellate counsel ineffective in passing bad checks and theft case for failing to assert on appeal the trial court’s error in failing to apply new sentencing laws that had been in effect for more than six months when the defendant was sentenced. Even though trial counsel had not raised the objection, appellate

counsel's conduct was deficient because compliance with the sentencing law was mandated regardless of whether an objection had been raised. Prejudice was also established as the court's charge and verdict forms under the old law made 17 of the 18 counts of a more serious degree than they were under the new sentencing law. The higher degrees allowed for imposition of greater punishment. Remanded for new sentencing on the 17 counts impacted.

Removed Due to Reversal

Etherton v. Rivard, 800 F.3d 737 (6th Cir. 2015), *rev'd*, 2016 WL 1278478 (U.S. Apr. 4, 2016). Appellate counsel ineffective in possession with intent to deliver cocaine case for failing to assert plain error and ineffective assistance of trial counsel due to admission of hearsay concerning anonymous tip offered into evidence through police detectives and trooper without objection by trial counsel. The police stopped the car driven by the defendant based on an anonymous tip. Drugs were found in the driver's side map compartment under a potato chip bag, which had no usable fingerprints on it. The defendant, who owned the car, denied knowledge of the drugs. The passenger/co-defendant, who testified as part of a plea agreement, testified the drugs were the defendant's. The only other evidence of the defendant's knowledge was testimony about the anonymous tip that was introduced for its truth. The anonymous tip was elicited by the prosecution on three separate occasions. The prosecution also used the content of the tip during closing arguments, both opening and rebuttal. The state post-conviction court declined review of the Confrontation Clause issue and trial counsel ineffectiveness issue because these claims had not been raised on direct appeal. These issues were thus procedurally defaulted in habeas. The state court did review the claim of appellate counsel's ineffectiveness. Appellate counsel's conduct was deficient in failing to challenge admission of the anonymous tip, which "should have alerted" counsel "to the presence of a serious Confrontation Clause issue." As a number of less meritorious issues were raised on appeal, this failure "was an oversight and not deliberate strategy." While trial counsel had eventually objected, the objection was inadequate to preserve the issue for appeal. The admission of the anonymous tip amounted to plain error, however, and that error was prejudicial notwithstanding the trial court's attempt at a curative instruction. Prejudice was also clear because, "absent the tip, the evidence was underwhelming as to Etherton's knowledge of the presence of the cocaine." The government's case rested "almost entirely on the uncorroborated testimony of a codefendant." Moreover, the fact that the state's case largely corroborated the information in the anonymous tip otherwise "exacerbates the error" rather *than* rendering it harmless. There is a reasonable probability that the defendant would have prevailed if this issue had been raised on direct review. The state court determination otherwise was an unreasonable application of clearly established Federal law. Belated appeal granted. Likewise, if appellate counsel had asserted the ineffectiveness of trial counsel on appeal, he likely would have prevailed. Belated appeal was granted on that issue also.

State v. McSwine, 860 N.W.2d 776 (Neb. Ct. App. 2015), *rev'd*, 873 N.W.2d 405 (Neb. 2016). Counsel was ineffective in kidnaping and first degree sexual assault case for failing to object to misleading and improper closing arguments by the prosecutor. The defendant was charged with kidnaping and sexually assaulted a woman he met at the gas station where he worked. He had

visited her apartment before asking to use the bathroom, which she allowed while she was entertaining friends. When he visited a second time asking to use the bathroom, her boyfriend was asleep on the couch. After he used the bathroom, according to her, he kidnaped her at knife point and forced her into his car. He drove to three separate locations where he sexually assaulted her. After five hours, he released her and she ran to a nearby home and called law enforcement. The state presented evidence of text messages the defendant sent to his wife and a friend. The messages to his wife apologized to her and indicated that he “messed up bad” and that the police were probably looking for him. The messages to the friend also indicated that he was in trouble and planning to run. The state asserted these messages demonstrated feelings of guilt and remorse about the kidnaping and sexual assault. The defendant testified alleging that the woman had voluntarily gone with him and that the sex was consensual. He testified she became upset with him afterwards for just “using [her] for sex.” He testified that the text messages related to an incident from earlier in the day when he was high on amphetamines and selling drugs. He assaulted a buyer, whom he believed was going to rob him. He hit the man and then ran into a home where he was confronted by a woman. He apologized and ran away. He testified that he assumed he would be facing multiple charges from this and, because he was on parole, the charges would be significant. During argument, without objection, the state asserted that his testimony about this other incident was completely unsupported by the evidence. During deliberations, the jury sent out a note specifically asking whether there was a police report of the earlier incident. The court responded that the jury had all the evidence it was going to receive. In support of the motion for new trial, counsel presented evidence that the prosecutor knew that there were multiple police reports concerning the trespassing, which had been provided to defense counsel in discovery. On the issue of prosecutorial misconduct, the appellate court reviewed only for plain error as defense counsel had failed to object. The prosecutor’s arguments were false and misleading. “The effect these comments had on the jury is especially concerning in a case like this, where the credibility of the witnesses was a key factor.” Moreover, the comments were repeated two separate times right before deliberations. Plain error was found requiring reversal. Ineffective assistance of counsel was also found. Counsel’s conduct was both deficient and prejudicial.