

IAC SURVIVAL GUIDE

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AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 10-456

July 14, 2010

Disclosure of Information to Prosecutor When Lawyer's Former Client Brings Ineffective Assistance of Counsel Claim

Although an ineffective assistance of counsel claim ordinarily waives the attorney-client privilege with regard to some otherwise privileged information, that information still is protected by Model Rule 1.6(a) unless the defendant gives informed consent to its disclosure or an exception to the confidentiality rule applies. Under Rule 1.6(b)(5), a lawyer may disclose information protected by the rule only if the lawyer “reasonably believes [it is] necessary” to do so in the lawyer’s self-defense. The lawyer may have a reasonable need to disclose relevant client information in a judicial proceeding to prevent harm to the lawyer that may result from a finding of ineffective assistance of counsel. However, it is highly unlikely that a disclosure in response to a prosecution request, prior to a court-supervised response by way of testimony or otherwise, will be justifiable.

This opinion addresses whether a criminal defense lawyer whose former client claims that the lawyer provided constitutionally ineffective assistance of counsel may, without the former client’s informed consent, disclose confidential information to government lawyers prior to any proceeding on the defendant’s claim in order to help the prosecution establish that the lawyer’s representation was competent.¹ This question may arise, for example, because a prosecutor or other government lawyer defending the former client’s ineffective assistance claim seeks the trial lawyer’s file or an informal interview to respond to the convicted defendant’s claim, or to prepare for a hearing on the claim.

Under *Strickland v. Washington*,² a convicted defendant seeking relief (e.g., a new trial or sentencing) based on a lawyer’s failure to provide constitutionally effective representation, must establish both that the representation “fell below an objective standard of reasonableness” and that the defendant thereby was prejudiced, i.e., that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”³ Claims of ineffective assistance of counsel often are dismissed without taking evidence due to insufficient factual allegations or other procedural deficiencies. Numerous claims also are dismissed without a determination regarding the reasonableness of the trial lawyer’s representation based on the defendant’s failure to show prejudice. The Supreme Court recently expressed confidence “that lower courts – now quite experienced with applying *Strickland* – can effectively and efficiently use its framework to separate specious claims from those with substantial merit.”⁴ Although it is highly unusual for a trial lawyer accused of providing ineffective representation to assist the prosecution in advance of testifying or otherwise submitting evidence in a judicial proceeding, sometimes trial lawyers have done so,⁵ and commentators have expressed concerns about the practice.⁶

In general, a lawyer must maintain the confidentiality of information protected by Rule 1.6 for former clients as well as current clients and may not disclose protected information unless the client or former client gives informed consent. *See* Rules 1.6 & 1.9(c). The confidentiality rule applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.”⁷

¹ This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2010. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

² 466 U.S. 668 (1984).

³ *Id.* at 694.

⁴ *Padilla v. Kentucky*, ___ U.S. ___, 130 S. Ct. 1473, 1485 (2010).

⁵ *See, e.g., Purkey v. United States*, 2009 WL 3160774 (W.D. Mo. Sept. 29, 2009). *motion to amend denied*, 2009 WL 5176598 (Dec. 22, 2009) (lawyer represented criminal defendant at trial and on appeal voluntarily filed 117-page affidavit extensively refuting former client’s ineffective assistance of counsel claim); *State v. Binney*, 683 S.E.2d 478 (S.C. 2009) (defendant’s trial counsel met with law enforcement authorities and provided his case file to them in response to defendant’s ineffective assistance of counsel claim).

⁶ *See, e.g., Lawrence J. Fox, Making the Last Chance Meaningful: Predecessor Counsel’s Ethical Duty to the Capital Defendant*, 31 HOFSTRA L. REV. 1181, 1186-88 (2003); David M. Siegel, *The Role of Trial Counsel in Ineffective Assistance of Counsel Claims: Three Questions to Keep in Mind*, CHAMPION, Feb. 2009, at 14.

⁷ Rule 1.6 cmt. 3. *See, e.g., Perez v. Kirk & Carrigan*, 822 S.W.2d 261 (Tex. App. 1991) (law firm breached its fiduciary duty when, under threat of subpoena, it disclosed former client’s statement to prosecutor without former client’s consent; court stated that “[d]isclosure of confidential communications by an attorney, whether privileged or not under the rules of evidence, is generally

Ordinarily, if a lawyer is called as a witness in a deposition, a hearing, or other formal judicial proceeding, the lawyer may disclose information protected by Rule 1.6(a) only if the court requires the lawyer to do so after adjudicating any claims of privilege or other objections raised by the client or former client. Indeed, lawyers themselves must raise good-faith claims unless the current or former client directs otherwise.⁸ Outside judicial proceedings, the confidentiality duty is even more stringent. Even if information clearly is not privileged and the lawyer could therefore be compelled to disclose it in legal proceedings, it does not follow that the lawyer may disclose it voluntarily. In general, the lawyer may not voluntarily disclose any information, even non-privileged information, relating to the defendant's representation without the defendant's informed consent.

Accordingly, unless there is an applicable exception to Rule 1.6, a criminal defense lawyer required to give evidence at a deposition, hearing, or other formal proceeding regarding the defendant's ineffective assistance claim must invoke the attorney-client privilege and interpose any other objections if there are nonfrivolous grounds on which to do so. The criminal defendant may be able to make non-frivolous objections to the trial lawyer's disclosures even though the ineffective assistance of counsel claim ordinarily waives the attorney-client privilege and work product protection with regard to otherwise privileged communications and protected work product relevant to the claim.⁹ For example, the criminal defendant may be able to object based on relevance or maintain that the attorney-client privilege waiver was not broad enough to cover the information sought. If the court rules that the information sought is relevant and not privileged or otherwise protected, the lawyer must provide it or seek appellate review.

Even if information sought by the prosecution is relevant and not privileged, it does not follow that trial counsel may disclose such information outside the context of a formal proceeding, thereby eliminating the former client's opportunity to object and obtain a judicial ruling. Absent a relevant exception, a lawyer may disclose client information protected by Rule 1.6 only with the client's "informed consent." Such consent "denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Rules 1.0(e) & 1.6(a). A client's express or implied waiver of the attorney-client privilege has the legal effect of forgoing the right to bar disclosure of the client's prior confidential communications in a judicial or similar proceeding. Standing alone, however, it does not constitute "informed consent" to the lawyer's voluntary disclosure of client information outside such a proceeding.¹⁰ A client might agree that the former lawyer may testify in an adjudicative proceeding to the extent the court requires but not agree that the former lawyer voluntarily may disclose the same client

prohibited by the disciplinary rules," *id.* at 265 n.5).

⁸ "Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that ... the information sought [in a judicial or other proceeding] is protected against disclosure by the attorney-client privilege or other applicable law." Rule 1.6, cmt. 13. The lawyer's obligation to protect the attorney-client privilege ordinarily applies when the lawyer is called to testify or provide documents regarding a former client no less than a current client. *See, e.g.*, ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-385 (1994) (Subpoenas of a Lawyer's Files) ("If a governmental agency, or any other entity or person, subpoenas, or obtains a court order for, a lawyer's files and records relating to the lawyer's representation of a current or former client, the lawyer has a professional responsibility to seek to limit the subpoena or court order on any legitimate available grounds so as to protect documents that are deemed to be confidential under Rule 1.6."); *see also* Connecticut Bar Ass'n Eth. Op. 99-38 (absent a waiver, subpoenaed lawyer must invoke the attorney-client privilege if asked to testify regarding inconsistencies between former client's court testimony and former client's communications with lawyer and previous lawyer), 1999 WL 33115188; Maryland State Bar Ass'n Committee on Eth. Op. 2004-17 (2004) (if subpoenaed lawyer's client was "estate," lawyer permitted to turn over documents to successor personal representative and may reveal information; if representation included the former personal representative in both his fiduciary and in his individual capacity, lawyer is subject to constraints of Rule 1.6(a)); Rhode Island Sup. Ct. Eth. Adv. Panel Op. No. 98-02 (1998) (lawyer who received notice of deposition and subpoena must not disclose information relating to representation of former client); South Carolina Bar Ethics Advisory Committee Adv. Op. 98-30 (1998) (in response to third party's request for affidavits and/or depositions, lawyer must assert attorney-client privilege and may only disclose such information by order of court); Utah State Bar Eth. Advisory Op. Committee Op. 05-01, 2005 WL 5302775 (2005) (absent court order requiring lawyer's testimony, and notwithstanding subpoena served on lawyer by prosecution, lawyer may not divulge any attorney-client information, either to prosecution or in open court).

⁹ *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 80(1)(b) & cmt. c (2000) ("A client who contends that a lawyer's assistance was defective waives the privilege with respect to communications relevant to that contention. Waiver affords to interested parties fair opportunity to establish the facts underlying the claim.")

¹⁰ *Cf.* *Clock v. United States*, No. 09-cv-379-JD, slip op. (D.N.H. 2010). In *Clock*, at the prosecution's request, the defendant signed a form explicitly waiving the attorney-client privilege with respect to the issues in her post-conviction petition in order to authorize her trial lawyer to answer questions regarding her ineffective assistance of counsel claim. Based on her office's institutional policy, trial counsel nonetheless declined to respond to the prosecution's questions unless ordered to do so by the court. Based on the defendant's explicit waiver, the court ordered trial counsel to submit an affidavit limited to the issues in the defendant's petition. *Id.* at *2.

confidences to the opposite party prior to the proceeding.

Where the former client does not give informed consent to out-of-court disclosures, the trial lawyer who allegedly provided ineffective representation might seek to justify cooperating with the prosecutor based on the “self-defense exception” of Rule 1.6(b)(5),¹¹ which provides that “[a] lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary ... to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client.” The self-defense exception grows out of agency law and rests on considerations of fairness.¹² Rule 1.6(b)(5) corresponds to a similar exception to the attorney-client privilege that permits the disclosure of privileged communications insofar as necessary to the lawyer’s self-defense.¹³

The self-defense exception applies in various contexts, including when and to the extent reasonably necessary to defend against a criminal, civil or disciplinary claim against the lawyer. The rule allows the lawyer, to the extent reasonably necessary, to make disclosures to a third party who credibly threatens to bring such a claim against the lawyer in order to persuade the third party that there is no basis for doing so.¹⁴ For example, the lawyer may disclose information relating to the representation insofar as necessary to dissuade a prosecuting, regulatory or disciplinary authority from initiating proceedings against the lawyer or others in the lawyer’s firm, and need not wait until charges or claims are filed before invoking the self-defense exception.¹⁵ Although the scope of the exception has expanded over time,¹⁶ the exception is a limited one, because it is contrary to the fundamental premise that client-lawyer confidentiality ensures client trust and encourages the full and frank disclosure necessary to an effective representation.¹⁷ Consequently, it has been said that “[a] lawyer may act in self-defense under [the exception] only to defend against charges that *imminently* threaten the lawyer or the lawyer’s associate or agent with *serious* consequences”¹⁸

When a former client calls the lawyer’s representation into question by making an ineffective assistance of counsel claim, the first two clauses of Rule 1.6(b) (5) do not apply. The lawyer may not

¹¹ Although the confidentiality duty is subject to other exceptions, none of the other exceptions seems applicable to this situation.

¹² See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 64 cmt. b (“in the absence of the exception . . . , lawyers accused of wrongdoing would be left defenseless against false charges in a way unlike that confronting any other occupational group”).

¹³ See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 83.

¹⁴ Rule 1.6 cmt. 10 (“The rule] does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion.”). Cases addressing the self-defense exception to the attorney-client privilege are to the same effect. See, e.g., *Meyerhofer v. Empire Fire & Marine Ins. Co.*, 497 F.2d 1190 (2d Cir.), cert. denied, 419 U.S. 998 (1974) (lawyer named as defendant in class action brought by purchasers of securities who claimed that prospectus contained misrepresentations had right to make appropriate disclosure to lawyers representing stockholders as to his role in public offering of securities).

¹⁵ See, e.g., *First Fed. Sav. & Loan Ass’n v. Oppenheim, Appel, Dixon & Co.*, 110 F.R.D. 557 (S.D.N.Y. 1986) (self-defense exception to attorney-client privilege permits lawyer who is being sued for misconduct in securities matter to disclose in discovery documents within attorney-client privilege if lawyer’s interest in disclosure outweighs interest of client in maintaining confidentiality of communications, and if disclosure will serve truth-finding function of litigation process); Association of the Bar of the City of New York Committee on Prof’l and Jud. Eth. Op. 1986-7, 1986 WL 293096 (1986) (lawyer need not resist disclosure until formally accused because of cost and other burdens of defending against formal charge and damage to reputation); Pennsylvania Bar Association Committee on Legal Eth. and Prof’l Resp Eth. Op. 96-48, 1996 WL 928143 (1996) (lawyer charged by former clients with malpractice in their defense in SEC is permitted to speak to SEC lawyers and reveal information concerning the representation as he reasonably believes necessary to respond to allegations); South Carolina Bar Eth. Adv. Committee Adv. Op. 94-23, 1994 WL 928298, (1994) (lawyer under investigation by Social Security Administration for possible misconduct in connection with his client may reveal confidential information as may be necessary to respond to or defend against allegations; no grievance proceeding pending anywhere else against lawyer).

¹⁶ Disciplinary Rule 4-101(C)(4) of the predecessor ABA Model Code of Professional Responsibility (1980) provided: “A lawyer may reveal . . . [c]onfidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct,” but did not expressly authorize the disclosure of confidences to establish a claim on behalf of a lawyer other than for legal fees.

¹⁷ Rule 1.6 cmt. 2. Commentators have maintained that the exception should be narrowly construed, both because the justifications for the exception are weak, see CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 308 (1986), and because there are strong policy considerations that disfavor the exception, including that it is subject to abuse, frustrates the policy of encouraging candor by clients, and undermines public confidence in the legal profession because it appears inequitable and self-serving. See Henry D. Levine, *Self-Interest or Self-Defense: Lawyer Disregard of the Attorney-Client Privilege for Profit and Protection*, 5 HOFSTRA L. REV. 783, 810-11 (1977).

¹⁸ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 64 cmt. c (emphasis added).

respond in order “to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client,” because the legal controversy is not between the client and the lawyer.¹⁹ Nor is disclosure justified “to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved,” because the defendant’s motion or habeas corpus petition is not a criminal charge or civil claim against which the lawyer must defend.

The more difficult question is whether, in the context of an ineffective assistance of counsel claim, the lawyer may reveal information relating to the representation “to respond to allegations in any proceeding concerning the lawyer’s representation of the client.” This provision enables lawyers to defend themselves and their associates as reasonably necessary against allegations of misconduct in proceedings that are comparable to those involving criminal or civil claims against a lawyer. For example, lawyers may disclose otherwise protected information to defend against disciplinary proceedings or sanctions and disqualification motions in litigation. On its face, the provision also might be read to apply to a proceeding brought to set aside a criminal conviction based on a lawyer’s alleged ineffective assistance of counsel, because the proceeding includes an allegation concerning the lawyer’s representation of the client to which the lawyer might wish to respond.²⁰

Under Rule 1.6(b)(5), however, a lawyer may respond to allegations only insofar as the lawyer reasonably believes it is *necessary* to do so.²¹ It is not enough that the lawyer genuinely believes the particular disclosure is necessary; the lawyer’s belief must be objectively reasonable.²² The Comment explaining Rule 1.6(b)(5) cautions lawyers to take steps to limit “access to the information to the tribunal or other persons having a need to know it” and to seek “appropriate protective orders or other arrangements ... to the fullest extent practicable.”²³ Judicial decisions addressing the necessity for disclosure under the self-defense exception to the attorney-client privilege recognize that when there is a legitimate need for the lawyer to present a defense, the lawyer may not disclose all information relating to the representation, but only particular information that reasonably must be disclosed to avoid adverse legal consequences.²⁴ These limitations are equally applicable to Rule 1.6(b)(5).²⁵

¹⁹ See Utah State Bar Eth. Adv. Op. Committee Eth. Op. 05-01, 2005 WL 5302775, at *6 (criminal defense lawyer may not voluntarily disclose client confidences to prosecutor or in court in response to defendant’s claim that lawyer’s prior advice was confusing; court stated, “[w]hile an arguable case might be made for disclosure under this exception, it ... is fraught with problems. The primary problem is that the ‘controversy’ is not between lawyer and client, except quite tangentially. While there may well be a dispute over the facts between lawyer and client, there is no ‘controversy’ between them in the sense contemplated by the rule. Nor is there a criminal or civil action against the lawyer.”). But see Arizona State Bar Op. 93-02 (1993), available at <http://www.myazbar.org/Ethics/opinionview.cfm?id=652> (interpreting “controversy” to include a disagreement in the public media).

²⁰ Cf. *State v. Madigan*, 68 N.W. 179, 180 (Minn. 1896) (lawyer accused of inadequate criminal defense representation may submit affidavit containing attorney-client privileged information to disprove such charge).

²¹ See Rule 1.6(b)(5) (allowing disclosure only “to the extent the lawyer reasonably believes necessary”); Rule 1.6 cmts. 10 & 14.

²² See Rule 1.0(i) (“‘Reasonable belief’ or ‘reasonably believes’ when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.”)

²³ Rule 1.6 cmt. 14 (emphasis added). Similar restrictions have been held applicable to the related context in which a lawyer seeks to disclose confidences to collect a fee. See, e.g., ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 250 (1943), in *OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS ANNOTATED* 555, 556 (American Bar Foundation 1967) (“where a lawyer does resort to a suit to enforce payment of fees which involves a disclosure, he should carefully avoid any disclosure not clearly necessary to obtaining or defending his rights”).

²⁴ For example, in *In re Nat’l Mortg. Equity Corp. Mortg. Pool Certificates Sec. Litig.*, 120 F.R.D. 687, 692 (C.D. Ca. 1988), the district court “reject[ed] the suggestion made by some parties that ‘selective’ disclosure should not be allowed, that if the exception is permitted to be invoked, all attorney-client communications should be disclosed,” finding that this suggestion was “directly contrary to the reasonable necessity standard.” Accord *RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS* § 83 cmt. e (“The lawyer’s invocation of the exception must be appropriate to the lawyer’s need in the proceeding. The exception should not be extended to communications that are of dubious relevance or merely cumulative of other evidence.”); cf. *Dixon v. State Bar*, 653 P.2d 321, 325 (1982) (lawyer sanctioned for gratuitous disclosure of confidence in response to former client’s motion to enjoin lawyer from harassing her); *Levin v. Ripple Twist Mills, Inc.*, 416 F. Supp. 876, 886-87 (E.D. Pa. 1976) (“In almost any case when an attorney and a former client are adversaries in the courtroom, there will be a credibility contest between them. This does not entitle the attorney to rummage through every file he has on that particular client (regardless of its relatedness to the subject matter of the present case) and to publicize any confidential communication he comes across which may tend to impeach his former client. At the very least, the word ‘necessary’ in the disciplinary rule requires that the probative value of the disclosed material be great enough to outweigh the potential damage the disclosure will cause to the client and to the legal profession.”).

²⁵ Courts further recognize that disclosures may be made to defend against a non-client’s accusation of misconduct only if the accusation is credible enough to put the lawyer at some risk of adverse consequences, such as a criminal indictment or a civil lawsuit; third parties otherwise would have an incentive to raise utterly meritless claims of lawyer misconduct to gain access to confidential information. Cf. *SEC v. Forma*, 117 F.R.D. 516, 519-525 (S.D.N.Y. 1987) (formal charges need not be issued in order for the self defense exception to apply); *First Fed. Sav. & Loan Ass’n v. Oppenheim, Appel, Dixon & Co.*, 110 F.R.D. 557, 566 n.15 (S.D.N.Y. 1986) (former auditor’s evidence against lawyer must “pass muster under Fed. R. Civ. P. 11”).

Permitting disclosure of client confidential information outside court-supervised proceedings undermines important interests protected by the confidentiality rule. Because the extent of trial counsel's disclosure to the prosecution would be unsupervised by the court, there would be a risk that trial counsel would disclose information that could not ultimately be disclosed in the adjudicative proceeding.²⁶ Disclosure of such information might prejudice the defendant in the event of a retrial.²⁷ Further, allowing criminal defense lawyers voluntarily to assist law enforcement authorities by providing them with protected client information might potentially chill some future defendants from fully confiding in their lawyers.

Against this background, it is highly unlikely that a disclosure in response to a prosecution request, prior to a court-supervised response by way of testimony or otherwise, will be justifiable. It will be rare to confront circumstances where trial counsel can reasonably believe that such prior, ex parte disclosure, is necessary to respond to the allegations against the lawyer. A lawyer may be concerned that without an appropriate factual presentation to the government as it prepares for trial, the presentation to the court may be inadequate and result in a finding in the defendant's favor. Such a finding may impair the lawyer's reputation or have other adverse, collateral consequences for the lawyer. This concern can almost always be addressed by disclosing relevant client information in a setting subject to judicial supervision. As noted above, many ineffective assistance of counsel claims are dismissed on legal grounds well before the trial lawyer would be called to testify, in which case the lawyer's self-defense interests are served without the need ever to disclose protected information.²⁸ If the lawyer's evidence is required, the lawyer can provide evidence fully, subject to judicial determinations of relevance and privilege that provide a check on the lawyer disclosing more than is necessary to resolve the defendant's claim. In the generation since *Strickland*, the normal practice has been that trial lawyers do not disclose client confidences to the prosecution outside of court-supervised proceedings. There is no published evidence establishing that court resolutions have been prejudiced when the prosecution has not received counsel's information outside the proceeding. Thus, it will be extremely difficult for defense counsel to conclude that there is a reasonable need in self-defense to disclose client confidences to the prosecutor outside any court-supervised setting.²⁹

²⁶ Cf. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 64 cmt. e (before making disclosures under the self-defense exception, a lawyer ordinarily must give notice to former client).

²⁷ Some courts preclude the prosecution from introducing the trial lawyer's statements in a later trial, *see, e.g.*, *Bittaker v. Woodford*, 331 F.3d 715 (9th Cir.), *cert. denied*, 540 U.S. 1013 (2003) (waiver of privilege for purposes of habeas claim does not necessarily mean extinguishment of the privilege for all time and in all circumstances), but not all courts have done so. *See, e.g.*, *Fears v. Warden*, 2003 WL 23770605 (S.D. Ohio 2003) (scope of habeas petitioner's waiver of privilege not waived for all time and all purposes including possible retrial).

²⁸ *See, e.g.*, Utah State Bar Eth. Advisory Op. Committee Op. 05-01, *supra* notes 8 & 19 (where criminal defense lawyer's former client moved to set aside his guilty plea on ground that lawyer's advice about plea offer confused him, lawyer may not divulge attorney-client information to prosecutor to prevent a possible fraud on court or protect lawyer's reputation; lawyer must assert attorney-client privilege in hearing on former client's motion, and may testify only upon court order).

²⁹ *See* Rule 1.6 cmt. 14.

AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

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APPELLATE ISSUES IN JURY SELECTION

Prepared by Bonnie Phillips-Williams, SD FL

A. Challenges to the jury cross section.

The right to a jury is based on the Sixth Amendment and codified at 28 U.S.C. § 1861 which is entitled, “Jury Selection and Service Act” which provides:

It is the policy of the United States that all litigants in Federal Courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes. It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, and shall have an obligation to serve as jurors when summoned for that purpose.

The purpose of the JSSA is to prevent discrimination, whether it be on account of ‘race, color, religion, sex, national origin, or economic status.’ 29 U.S.C. § 1862.

1. The JSSA provides remedies only for a “substantial failure to comply” with its requirements. A JSSA violation is considered “substantial” when it frustrates one of the three principles underlying the Act: (1) random selection of juror names; (2) from a fair cross-section of the community; and (3) the use of objective criteria for determination of disqualifications, excuses, exemptions and exclusions. *United States v. Gregory*, 730 F.2d 692, 699 (11th Cir. 1984).

A. The Jury Administrator’s policy of granting virtually all deferral requests did not amount to a substantial violation of the JSSA. *United States v. Carmichael*, 560 F.3d 1270, 1278 (11th Cir. 2009).

B. Neither the JSSA nor the Constitution “require that a supplemental source of names be added to voter lists simply because an identifiable group votes in a proportion lower than the rest of the population.” *United States v. Carmichael, id., citing, United States v. Orange*, 447 F.3d 792, 800 (10th Cir. 2006).

2. In order to satisfy the Sixth Amendment’s fair cross-section requirement, the defendant must show: (1) that the group alleged to be excluded is a ‘distinctive’ group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.” *United States v. Carmichael*, at 1280, *citing Duren v. Missouri*, 439 U.S. 357 (1979).

A. To analyze whether an identifiable ethnic group was fairly and

reasonably represented in the jury pool, you must compare the difference between the percentage of people in that population eligible for jury service and the percentage of that identifiable group in the pool. “[I]f the disparity between these two percentages is ten percent or less, the second element is not satisfied.” *United States v. Grisham*, 63 F.3d 1074, 1078 (11th Cir. 1995).

B. The “community” which determines the cross-section can be the entire district, or a division within the district. *United States v. Grisham*, 63 F.3d 1074 (11th Cir. 1995).

C. The defendant has the burden of presenting evidence of a prima facie case that the under-representation of a specific ethnic group was due to the systematic exclusion of the particular class. *United States v. Clarke*, 562 F.3d 1158 (11th Cir. 2009).

D. The requirements for challenge to jury composition set forth in 28 U.S.C. § 1867(a)(d) are strictly enforced. *United States v. Dean*, 487 F.3d 840 (11th Cir. 2007). The JSSA provides: “(a) In criminal cases, before the voir dire examination begins, or within seven days after the defendant discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier, the defendant may move to dismiss the indictment or stay the proceedings against him on the ground of substantial failure to comply with the provisions of this title in selecting the grand or petit jury.” Subsection (d) requires a sworn statement of “facts which, if true would constitute a substantial failure to comply with the provisions of this title.”

B. Challenges to Individual Jurors.

1. “Voir dire conducted by the trial court need only provide reasonable assurance that prejudice will be discovered if present. *United States v. Bennett*, 368 F.3d 1343, 1352 (11th Cir. 2004) (citing *United States v. Vera*, 701 F.2d 1349 (11th Cir. 1983)). In *Bennett* the court wouldn’t permit defense counsel to ask the jurors if they could set aside their knowledge that the defendant was a convicted felon in considering the counts in which that fact was not an element of the offense. The Eleventh Circuit affirmed.

2. A defendant’s exercise of a peremptory challenge pursuant to Rule 24 Fed.R.Crim.P. is not denied or impaired when a defendant is forced to use a peremptory challenge when the court wrongfully denies a challenge for cause. *United States vs. Martinez-Salazar*, 528 U.S. 304, 120 S.Ct. 774 (2004). The Supreme Court held that “challenges are auxiliary; unlike the right to an impartial jury guaranteed by the Sixth Amendment, peremptory challenges are not of a federal constitutional dimension.” At 305.

3. A defendant cannot challenge the failure of a judge to grant a request for extra peremptory challenges where there are multiple co-defendants, if that defendant does not use all of his peremptory challenges. *United Schlei*, 122 F.3d 944, 955 (11th Cir. 1997).

C. Batson challenges.

1. The court must engage in a three step analysis in determine a *Batson* challenge based upon racial animus. *Bui v. Haley*, 321 F.3d 1304 (11th Cir. 2003).

A. The defendant must first establish a prima facie case of discriminatory intent. *United States v. Houston*, 456 F.3d 1328 (11th Cir. 2006), citing, *Kentucky v. Batson*, 476 U.S. 79, at 93-94. (A prima facie case is constructed by a showing by a defendant that ‘he is a member of cognizable racial group’ and that the ‘relevant circumstances raise an inference; that [the prosecution] has ‘exercised peremptory challenges to remove from the venire members of his race.’” *Bui v. Haley*, 321 F.3d 1304, 1313 (citing *Fludd v. Dukes*, 863 F.2d 822, 29 (11th Cir. 1989). However, the defendant can bring a claim a third party challenge to the peremptory striking of jurors based on race whether or not he is of the same race as the jurors who are struck. *Powers v. Ohio*, 499 U.S. 400 (1991). Also, “when a party strikes all or nearly of the members of one race on a venire” may be sufficient by itself to establish a *prima facie case*.” *Cent. Ala. Fair Hous. Ctr., Inc. v. Lowder Realty, Co.*, 236 F.3d 629, 637 (11th Cir. 2000).

B. Once the court has determined that a prima facie case of discrimination the burden shifts to the government to rebut the inference by articulating legitimate, race-neutral reasons for its exercise of its peremptory strikes. *Batson v. Kentucky*, 476 U.S. 79, 97. (Vague explanations are insufficient to refute a prima facie case of racial discrimination. *United States v. Horsley*, 864 F.2d 1543, 1546 (11th Cir. 1989). (The prosecutor must provide a “clear and reasonably specific explanation of his legitimate reasons for exercising the challenges.” *Texas Dept. Of Community Affairs v. Burdine*, 450 U.S. 248, 258 (1981).

C. If the government has cleared that hurdle, the trial court has the responsibility to determine whether the defendant has established purposeful discrimination. *Purkett v. Elem*, 514 U.S. 765, 767-68 (1995). (The “best evidence of the discriminatory intent often will be the demeanor of the attorney who exercises the challenge, as well as the demeanor of the juror. *Hernandez v. New York*, 500

U.S. 352, 365 (1991)).

1. The fact that the defendant has struck some of the venire members of the same race can have no bearing on this determination. *Bui v. Haley*, 321 F.3d 1304 (11th Cir. 2003), FN19 (11th Cir. 2003).

2. However, if the prosecutor leaves jurors on the panel that have the same problems as those he excused that are not of the same race as those excused, it shows he was not sincere in his reasons for excusing those of the suspect race, and is proof of his discriminatory intent. *Snyder v. Louisiana*, 552 U.S. 472 (2008).

2. The use of peremptory challenges based solely on the basis of the prospective juror's gender violates the Fourteenth Amendment. *J.E.B. v. Alabama*, 511 U.S. 127 (1994).

3. A disparate impact theory (i.e. the complaining party alleges racial discrimination through the use of a facially race-neutral sorting device that has the effect of excluding more of an identifiable class, e.g. in this case the jurors had family members with criminal histories), cannot be used by itself to invalidate the prosecution's stated reasons in the second step of the *Batson* inquiry. *United States v. Houston*, 456 F.3d 1328 (11th Cir. 2006).

2. In *United States v. Walker*, 490 F.3d 1282 (11th Cir. 2007), the court held that the *Batson* case applies to defense challenges as well.

Per Curiam

AUSTIN *v.* UNITED STATESON MOTION OF THOMAS N. COCHRAN FOR LEAVE TO
WITHDRAW AS COUNSEL FOR PETITIONER

No. —. Decided October 31, 1994

Having determined that no meritorious grounds existed for an appeal of Anthony Austin's criminal conviction, Thomas Cochran, his appointed counsel, filed a brief in the Fourth Circuit raising only the issue of sentence computation. After the Fourth Circuit affirmed Austin's conviction and sentence, Cochran informed him of his right to petition for certiorari, but applied to this Court for leave to withdraw as counsel before the deadline for filing the petition.

Held: Cochran's application is granted. Under a plan adopted pursuant to the Criminal Justice Act (Act), the Fourth Circuit has a Rule governing the duration of service by appointed counsel. Cochran is correct that the Fourth Circuit Rule imposes a mandatory duty to file a petition even if the legal arguments are frivolous and, thus, conflicts with this Court's Rule 42.2, which allows an award of damages or costs against him for filing such a petition. Nothing in the Act compels counsel to file papers in contravention of this Court's Rules against frivolous filings. If necessary, the Circuits' Criminal Justice Plans should be revised to allow a lawyer to be relieved of the duty to file a petition for certiorari that would present only frivolous claims. The Act does not compel a particular approach. However, from an administrative point of view, it is preferable for a plan to require that the court of appeals approve a withdrawal, because attorneys are more likely to avail themselves of this avenue for relief if they have the court's endorsement to back up their own judgment.

Application granted.

PER CURIAM.

Anthony Austin pleaded guilty to possession of crack cocaine with intent to distribute and was sentenced to 151 months' imprisonment. On appeal to the Fourth Circuit, Thomas Cochran, who had been appointed as Austin's counsel pursuant to the Criminal Justice Act of 1964, 18 U. S. C. § 3006A, submitted a brief in accordance with *Anders v. California*, 386 U. S. 738 (1967). That brief raised the issue of

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sentence computation, but concluded that no meritorious issues existed for appeal. The Fourth Circuit affirmed Austin's conviction and sentence. Cochran then informed Austin of the right to petition for certiorari. Austin responded with a request to file a petition on his behalf. In advance of the deadline for filing the petition, Cochran applied to this Court for leave to withdraw as counsel. We grant his application.

The Criminal Justice Act directs each district court, with the approval of the judicial council of the Circuit, to implement "a plan for furnishing representation for any person financially unable to obtain adequate representation." 18 U. S. C. §3006A(a). The Fourth Circuit plan contains a provision governing the duration of service by appointed counsel. Specifically, it provides:

"2. *Appellate Counsel.* Every attorney, including retained counsel, who represents a defendant in this court shall continue to represent his client after termination of the appeal unless relieved of further responsibility by the Supreme Court. Where counsel has not been relieved:

"If the judgment of this court is adverse to the defendant, counsel shall inform the defendant, in writing, of his right to petition the Supreme Court for a writ of certiorari. If the defendant, in writing, so requests, counsel shall prepare and file a timely petition for such a writ and transmit a copy to the defendant. Thereafter, unless otherwise instructed by the Supreme Court or its clerk, or unless any applicable rule, order or plan of the Supreme Court shall otherwise provide, counsel shall take whatever further steps are necessary to protect the rights of the defendant, until the petition is granted or denied." 4th Circuit Rules App. II, Rule V.2.

Cochran argues that the Rule subjects him to conflicting obligations. On the one hand, the Rule imposes a mandatory duty to file a petition even if the legal arguments are frivo-

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lous. On the other hand, this Court's Rule 42.2 allows an award of damages or costs against him if he were to file a frivolous petition.

As a matter of pure text, Cochran's interpretation is correct. The Fourth Circuit Rule does require the actions of appointed counsel to comply with this Court's Rules, but only *after* the filing of a petition for certiorari. The Rule imposes a very clear mandate to file petitions at the client's request, evidenced by the command "shall prepare and file." The Fourth Circuit keeps plenty of company in mandating representation through the certiorari process, even when it may run counter to our Rules.¹ Although the Fourth Circuit Rule provides a mechanism to seek relief from this obligation, Cochran is the first attorney to move for such relief,² indicating that counsel feel encouraged or perhaps bound by these Rules to file petitions that rest on frivolous claims. These Circuit Rules may explain, in part, the dramatically increased number of petitions for certiorari on direct appeal from federal courts of appeals filed by persons *in forma pauperis*.³

¹See D. C. Circuit Rules App. VIII, Rule IV ("The duties of representation by counsel on appeal, where the appeal has been unsuccessful, shall extend to advising the party of the right to file a petition for writ of certiorari If the party so requests, counsel *shall* prepare and file such a petition") (emphasis added); 3d Circuit Rules Addendum B, Rule III.6 (same); 5th Circuit Rules App. C, Rule 4 (same); 7th Circuit Rules App. II, Rule V.3 (same); 8th Circuit Rules App. Rule V (same); 9th Circuit Rules App. A, §4(c) (same); 10th Circuit Rules Addendum I, Rule II.D (same); 11th Circuit Rules Addendum 4(f)(4) (same).

²Since this Court received Cochran's motion, another attorney has filed a petition for certiorari raising the same issue. *Anderson v. United States*, No. 94-5958.

³For the October 1983 Term, we received 523 petitions for certiorari on direct review in criminal cases from *in forma pauperis* petitioners in federal courts. That number increased fourfold by the October 1993 Term with 2,053 petitions. That increase stands in contrast with the increase in criminal petitions on direct review from state courts—an increase of only 50% in that same 10-year period.

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Consistent with the Criminal Justice Act, we have provided by Rule for the payment of counsel appointed by this Court to represent certain indigent defendants. See Rule 39.7 (“In a case in which certiorari has been granted or jurisdiction has been noted or postponed, this Court may appoint counsel to represent a party financially unable to afford an attorney to the extent authorized by the Criminal Justice Act of 1964, as amended, 18 U. S. C. § 3006A”). But nothing in the Criminal Justice Act compels counsel to file papers in contravention of this Court’s Rules against frivolous filings. And though indigent defendants pursuing appeals as of right have a constitutional right to a brief filed on their behalf by an attorney, *Anders v. California*, *supra*, that right does not extend to forums for discretionary review. *Ross v. Moffitt*, 417 U. S. 600, 616–617 (1974). Our Rules dealing with the grounds for granting certiorari, and penalizing frivolous filings, apply equally to petitioners using appointed or retained counsel. We believe that the Circuit councils should, if necessary, revise their Criminal Justice Plans so that they do not create any conflict with our Rules. The plan should allow for relieving a lawyer of the duty to file a petition for certiorari if the petition would present only frivolous claims.

A few of the Circuits have adopted plans that accommodate this Court’s Rules in some fashion. For instance, the First Circuit only requires appointed counsel to continue representation at the Supreme Court level if “the person requests it and there are reasonable grounds for counsel properly to do so.” 1st Circuit Rule 46.5(c). If counsel determines a petition would be frivolous, he must inform the First Circuit and request leave to withdraw. See also 2d Circuit Rules App. A, Rule III.5. The Sixth Circuit takes a different tack, insulating counsel from violation of its Rules (though not, of course, from violation of our Rules) so long as he proceeds according to his best professional judgment, without resorting to the approval of the appellate court. Its recently amended Rule states: “Court appointed counsel is

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obligated to file a petition for a writ of certiorari in the Supreme Court of the United States if the client requests that such a review be sought *and, in counsel's considered judgment, there are grounds for seeking Supreme Court review.*" 6th Circuit Rule 12(f) (emphasis in original). We do not believe that the Criminal Justice Act compels either approach. From an administrative point of view, however, we think a plan requiring approval of the court of appeals is preferable, because attorneys are more likely to avail themselves of this avenue for relief if they have the endorsement of the court to back up their own judgment.

Syllabus

CARLISLE *v.* UNITED STATESCERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT

No. 94–9247. Argued January 16, 1996—Decided April 29, 1996

At his trial on a federal marijuana charge, petitioner filed his motion for a judgment of acquittal under Federal Rule of Criminal Procedure 29(c) after the jury returned a guilty verdict and was discharged. The District Court granted the motion even though it was filed one day outside the time limit prescribed by Rule 29(c), which provides, *inter alia*, that “[i]f the jury returns a verdict of guilty . . . , a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period.” In reversing and remanding for reinstatement of the verdict and for sentencing, the Sixth Circuit held that under Rule 29 a district court has no jurisdiction to grant an untimely motion for judgment of acquittal, or to enter such a judgment *sua sponte* after submission of the case to the jury.

Held: The District Court had no authority to grant petitioner’s motion for judgment of acquittal filed one day outside the Rule 29(c) time limit. Pp. 419–433.

(a) The Rules do not permit the granting of an untimely postverdict motion for judgment of acquittal. Rule 29(c)’s text, when read with Rule 45(b)’s statement that “the court may not extend the time for taking any action under Rul[e] 29 . . . except to the extent and under the conditions stated in [the Rule],” is plain and unambiguous: If, as in this case, a guilty verdict is returned, a motion for judgment of acquittal must be filed either within seven days of the jury’s discharge or within an extended period fixed by the court during that 7-day period. Furthermore, in light of Rule 29(c)’s clarity, petitioner cannot rely either on Rule 2, which requires that ambiguous Rules “be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay,” or on Rule 57, which allows district courts discretion to regulate practice when there is no controlling law. Pp. 419–425.

(b) This Court rejects petitioner’s invocation of courts’ “inherent supervisory power” as alternative authority for the District Court’s action. Whatever the scope of federal courts’ inherent power to formulate procedural rules not specifically required by the Constitution or the Congress, it does not include the power to develop rules that circumvent or conflict with the Federal Rules of Criminal Procedure.

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See, e. g., *Bank of Nova Scotia v. United States*, 487 U. S. 250, 254–255. Whether the District Court’s action is described as the granting of an untimely motion, or the *sua sponte* entry of a judgment of acquittal, it contradicted Rule 29(c)’s plain language and effectively annulled the 7-day filing limit. The cautionary principle that the Court will not lightly assume that the Rules mean to depart from established principles does not apply in this case, because prior to the enactment of Rule 29, there was no long, unquestioned power of federal district courts to acquit for insufficient evidence *sua sponte*, after return of a guilty verdict. Pp. 425–428.

(c) The Court also rejects petitioner’s remaining arguments: (1) that the District Court had power to order acquittal in this case under the All Writs Act, 28 U. S. C. § 1651, through the writ of *coram nobis*; (2) that the failure to allow the District Court to order acquittal would violate the Fifth Amendment’s Due Process Clause; and (3) that prohibiting a district court from granting an acquittal motion filed only one day late will lead to needless appeals and habeas corpus proceedings. Pp. 428–430.

(d) The Court rebuts arguments put forward by the dissent, including the proposition that permissive rules do not withdraw pre-existing inherent powers, and the dissent’s reliance on this Court’s precedents to support the existence of the “inherent power” petitioner invokes. Pp. 430–433.

48 F. 3d 190, affirmed.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O’CONNOR, SOUTER, THOMAS, GINSBURG, and BREYER, JJ., joined. SOUTER, J., filed a concurring opinion, *post*, p. 434. GINSBURG, J., filed a concurring opinion, in which SOUTER and BREYER, JJ., joined, *post*, p. 434. STEVENS, J., filed a dissenting opinion, in which KENNEDY, J., joined, *post*, p. 436.

James A. Christopherson argued the cause and filed briefs for petitioner. With him on the briefs was *Joel R. Myler*.

Paul A. Engelmayer argued the cause for the United States. With him on the brief were *Solicitor General Days*, *Acting Assistant Attorney General Keeney*, *Deputy Solicitor General Dreeben*, and *David S. Kris*.

JUSTICE SCALIA delivered the opinion of the Court.

This case presents the question whether a district court has authority to grant a postverdict motion for judgment of

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acquittal filed one day outside the time limit prescribed by Federal Rule of Criminal Procedure 29(c).

I

Petitioner Charles Carlisle, along with several co-defendants, was tried by jury in the United States District Court for the Western District of Michigan for conspiracy to possess with intent to distribute marijuana, in violation of 21 U. S. C. §§ 841, 846, 84 Stat. 1260, 1265. He did not move during the trial for a judgment of acquittal under Federal Rule of Criminal Procedure 29(a). On July 13, 1993, the jury returned a guilty verdict and was discharged. On July 23, 1993, Carlisle filed a “Motion for a Judgment of Acquittal Pursuant to Federal Rule of Criminal Procedure 29(c),” arguing that there was insufficient evidence to sustain his conviction. App. 6–9. Rule 29(c) provides that “a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period.” Excluding the intermediate Saturday and Sunday (as Federal Rule of Criminal Procedure 45(a) requires), the 7-day period in this case ended on July 22, 1993. The United States’ response to Carlisle’s motion argued that it should be denied as untimely and, alternatively, that there was sufficient evidence to sustain the conviction. The District Court denied Carlisle’s motion on August 19, 1993. Its written opinion did not address the timeliness issue, but concluded that the evidence was sufficient for a rational trier of fact to find beyond a reasonable doubt that Carlisle knew about, and knowingly and voluntarily joined, the charged conspiracy.

When Carlisle appeared for sentencing on October 14, 1993, the District Court announced that it was reversing its ruling. When it made its decision in August, the court said, it had prepared two opinions, one granting and one denying the motion, and it had now decided to substitute the former for the latter. The court subsequently entered an order that

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(i) withdrew the opinion and order denying the motion to acquit and (ii) granted “Carlisle’s motion for a judgment of acquittal pursuant to Rule 29(c), filed July 23, 1993.” App. 45. An opinion accompanying the order concluded that there was insufficient evidence to prove that Carlisle knowingly and voluntarily joined the conspiracy to possess and distribute marijuana. In a footnote, the opinion acknowledged that the motion for judgment of acquittal was filed one day late, but concluded:

“ . . . I can conceive of no prejudice to the United States which will result from consideration of a motion that is one day lat[e] in this case. Because I believe that refusal to hear this motion would result in grave injustice, and because [Rule 29(c)] permits the Court to extend the deadline, I will consider this motion as if it were filed in a timely manner.” *Id.*, at 37.

The United States Court of Appeals for the Sixth Circuit reversed the judgment of acquittal and remanded to the District Court for reinstatement of the jury’s verdict and for sentencing. It held that under Rule 29 a district court has no jurisdiction to grant an untimely motion for judgment of acquittal, and that a district court has no jurisdiction to enter a judgment of acquittal *sua sponte* after the case has been submitted to the jury. 48 F.3d 190, 192 (1995). We granted certiorari. 515 U. S. 1191 (1995).

II

Petitioner argues that district courts “should be given the power to go outside the strict time limits of Federal Rule of Criminal Procedure 29(c)” when (1) there is a claim that the defendant was legally innocent, (2) the motion is filed prior to sentencing, and (3) the motion was not timely filed because of attorney error. Brief for Petitioner 8. Petitioner seeks to root this argument in, among other places, the Federal Rules of Criminal Procedure.

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Rule 29 is reproduced in its entirety below.¹ Subdivision (c) provides, in relevant part, that “[i]f the jury returns a verdict of guilty . . . , a motion for judgment of acquittal may

¹“Rule 29. Motion for Judgment of Acquittal

“(a) MOTION BEFORE SUBMISSION TO JURY. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant’s motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

“(b) RESERVATION OF DECISION ON MOTION. The court may reserve decision on a motion for judgment of acquittal, proceed with the trial (where the motion is made before the close of all the evidence), submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.

“(c) MOTION AFTER DISCHARGE OF JURY. If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period. If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned the court may enter judgment of acquittal. It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury.

“(d) SAME: CONDITIONAL RULING ON GRANT OF MOTION. If a motion for judgment of acquittal after verdict of guilty under this Rule is granted, the court shall also determine whether any motion for a new trial should be granted if the judgment of acquittal is thereafter vacated or reversed, specifying the grounds for such determination. If the motion for a new trial is granted conditionally, the order thereon does not affect the finality of the judgment. If the motion for a new trial has been granted conditionally and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. If such motion has been denied conditionally, the appellee on appeal may assert error in that denial, and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.”

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be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period.” Federal Rule of Criminal Procedure 45(b) provides that whereas certain untimely acts may be accorded validity upon a showing of excusable neglect, “the court may not extend the time for taking any action under Rul[e] 29 . . . except to the extent and under the conditions stated in [the Rule].” These Rules are plain and unambiguous. If, as in this case, a guilty verdict is returned, a motion for judgment of acquittal must be filed, either within seven days of the jury’s discharge, or within an extended period fixed by the court during that 7-day period. There is simply no room in the text of Rules 29 and 45(b) for the granting of an untimely postverdict motion for judgment of acquittal, regardless of whether the motion is accompanied by a claim of legal innocence, is filed before sentencing, or was filed late because of attorney error.

Unable to offer any reading of Rule 29(c) that would permit an untimely motion for judgment of acquittal to be granted, Carlisle contends that Rule 29(a) gives a district court authority to enter a judgment of acquittal *sua sponte* at any time before sentencing. Rule 29(a), entitled “Motion Before Submission to Jury,” provides in relevant part:

“The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses.”

It would be quite a surprise to find a district court’s *sua sponte* power to grant judgment of acquittal *after* submission of the case to the jury hidden away in a provision entitled “Motion *Before* Submission to Jury.” We are not inclined to adopt an interpretation that creates such a surprise unless the intent that the text exceed its caption is clear.

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Here, to the contrary, the structure of Rule 29 indicates that subdivision (a) is limited as its caption says.

Petitioner's proposed reading would create an odd system in which defense counsel could move for judgment of acquittal for only seven days after the jury's discharge, but the court's power to enter such a judgment would linger. In *United States v. Smith*, 331 U. S. 469 (1947), we declined to read former Federal Rule of Criminal Procedure 33, which placed a 5-day limit on the making of a motion for new trial, as "permit[ting] the judge to order retrial without request and at any time," 331 U. S., at 473. "[I]t would be a strange rule," we said, "which deprived a judge of power to do what was asked when request was made by the person most concerned, and yet allowed him to act without petition," and such an arrangement "would almost certainly subject trial judges to private appeals or application by counsel or friends of one convicted," *id.*, at 474, 475. The same is true here.² In addition, petitioner's reading makes a farce of subdivision (b) of Rule 29, which provides that a court may reserve decision on the motion for judgment of acquittal and decide it after submission to the jury. There would be no need for this procedure if, even without reserving, the court had continuing power to grant judgment of acquittal on its own. In

²The dissent forcefully argues that *Smith* does not compel the result we reach in this case. *Post*, at 452–453. That is an effective rejoinder to an argument we have not made. In response to the argument we *have* made—that some of the considerations supporting the holding in *Smith* apply here—the dissent (i) ignores the portion of *Smith* discussing the strangeness of a rule that would give a judge greater power to act *sua sponte* than on motion; and (ii) transforms *Smith's* desire to spare trial judges "private appeals or application by counsel or friends of the person convicted" into a concern for the "appearance of impropriety" that "*ex parte* approaches" would create, *post*, at 453, which concern in the present context (though presumably for some reason not in the *Smith* context) the dissent regards as "a highly inappropriate comment on the integrity of the federal judiciary," *ibid.*, and the dissent says it was dictum in *Smith* anyway.

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sum, even without the captions (and *a fortiori* with them) it is clear that subdivisions (a) and (b) of Rule 29 pertain to motions made before submission, and subdivisions (c) and (d) to motions made after discharge.

The Government offers an alternative theory of a court's power to act *sua sponte* under Rule 29: Because Rule 29(a) refers to both a "motion of a defendant" and a court's "own motion," whereas Rule 29(c) refers only to "a motion" *simpliciter*, the latter must refer to motions both of defendants and of courts, permitting both such "motions" to be made within seven days after the jury's discharge. We do not find this reading plausible. Rule 29(c) not only provides that "a motion for judgment of acquittal" may be made or renewed within seven days after the jury is discharged. It goes on to provide, in its second and third sentences: "*If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned the court may enter judgment of acquittal.*" The phrase "on such motion" is notably absent from the third sentence—conveying the idea that, where a jury has not returned a verdict, a court can act without motion, but where a jury has returned a guilty verdict, it cannot. But if "on such motion" includes action taken by a court on its own initiative, the limiting phrase "on such motion" in the second sentence has no effect, and a court may act on its own *whether or not* a verdict has been returned. That is to say, the inclusion of the phrase "on such motion" in one sentence but not in the other would be inexplicable.³

³Perhaps even more inexplicable is what precisely would be achieved by the Government's reading, which (unlike petitioner's theories) would permit the court to act *sua sponte* only during the 7-day period specified by the Rule (or any extension thereof ordered by the court during the 7-day period, as Rule 29(c) allows). The sole beneficiary of the Government's textual contortions is the district judge who wants to set aside a verdict, but lacks the wit to invite a motion for that during the 7-day period, or (if defendant's counsel is unavailable) to extend the 7-day period,

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Petitioner contends that even if Rule 29 does not permit a court to grant an untimely motion for judgment of acquittal, Federal Rule of Criminal Procedure 2 vests the court with supervisory power to enter judgment of acquittal. Rule 2 provides:

“These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.”

This Rule is of no aid to petitioner. It sets forth a principle of interpretation to be used in construing ambiguous rules, not a principle of law superseding clear rules that do not achieve the stated objectives. It does not, that is to say, provide that rules shall be construed to mean something other than what they plainly say—which is what petitioner’s proposed construction of Rule 29(c) would require.

We must acknowledge that there is precedent in this Court for using Rule 2 as a basis for deviating from time limits imposed by the Federal Rules of Criminal Procedure. In *Fallen v. United States*, 378 U. S. 139 (1964), we cited Rule 2 in the course of excusing the failure of an incarcerated paraplegic *pro se* petitioner to comply with the time limit for filing a notice of appeal under former Federal Rule of Criminal Procedure 37(a). Concluding that the petitioner “had done all that could reasonably be expected” to file a timely appeal, including mailing a notice of appeal to the clerk’s office two days before the notice was due, we “decline[d] to read the Rules so rigidly as to bar a determination of his appeal on the merits.” 378 U. S., at 144. *Fallen* has been made obsolete by an amendment to Rule 37(a).⁴ And

sua sponte, in order to invite such a motion later. It is our hope and belief that no such district judge exists.

⁴ Rule 37(a) was amended in 1966 to provide that a district court may extend the time for filing a notice of appeal “[u]pon a showing of excusable

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of course *Fallen* was a narrow ruling when it was announced, as is evident from *Berman v. United States*, 378 U. S. 530 (1964) (*per curiam*), a decision announced on the same day as *Fallen*, summarily affirming the dismissal of an appeal that had been filed one day late.

Finally, petitioner cannot rely on Federal Rule of Criminal Procedure 57 as the source of the District Court's authority in this case. The version of Rule 57 in effect when criminal proceedings against petitioner commenced (and which he relied upon at oral argument) states, in relevant part, that, "[i]n all cases not provided for by rule, the district judges . . . may regulate their practice in any manner not inconsistent with these rules." The relevant portion of the current version of Rule 57 is captioned "Procedure When There Is No Controlling Law," and states: "A judge may regulate practice in any manner consistent with federal law, these rules, and local rules of the district." Fed. Rule Crim. Proc. 57(b). We need not decide which version of this Rule controls the present case, because neither authorizes the District Court's action here. A rule permitting a party to submit and prevail on an untimely motion for judgment of acquittal is "inconsistent" (or not "consistent") with Rule 29's 7-day filing limit; and the question of when a motion for judgment of acquittal may be granted does not present a case "not provided for" by Rule 29; and Rule 29 is the "controlling law" governing this question.

III

As alternative authority for the District Court's action, petitioner invokes courts' "inherent supervisory power." Brief for Petitioner 9. We have recognized that federal

neglect." See Fed. Rule Crim. Proc. 37(a) (1966). When Rule 37(a) was abrogated and replaced by Federal Rule of Appellate Procedure 4(b), the substance of this amendment was transferred to Rule 4(b). See Fed. Rule App. Proc. 4(b) (1968).

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courts “may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress.” *United States v. Hastings*, 461 U. S. 499, 505 (1983). Whatever the scope of this “inherent power,” however, it does not include the power to develop rules that circumvent or conflict with the Federal Rules of Criminal Procedure. As we recognized in *Bank of Nova Scotia v. United States*, 487 U. S. 250, 254–255 (1988), holding that federal courts may not invoke supervisory power to circumvent Rule 52(a): “[F]ederal courts have no more discretion to disregard the Rule’s mandate than they do to disregard constitutional or statutory provisions.” Whether the action of the District Court here is described as the granting of an untimely motion, or the *sua sponte* entry of a judgment of acquittal, it contradicted the plain language of Rule 29(c), and effectively annulled the 7-day filing limit.

In *Chambers v. NASCO, Inc.*, 501 U. S. 32, 47 (1991), we said that we would not “‘lightly assume that Congress has intended to depart from established principles’ such as the scope of a court’s inherent power,” *id.*, at 47 (quoting *Weinberger v. Romero-Barcelo*, 456 U. S. 305, 313 (1982)). Similarly, in *Link v. Wabash R. Co.*, 370 U. S. 626, 629–632 (1962), we said that since a district court’s authority to dismiss *sua sponte* for lack of prosecution was a “sanction of wide usage,” we would not assume, in the absence of a clear expression, that Federal Rule of Civil Procedure 41(b), which allowed a party to *move* for dismissal for lack of prosecution, abrogated this “long . . . unquestioned” power. That cautionary principle does not apply in the present case, not only because of the clarity of the text, but also because we are unaware of any “long unquestioned” power of federal district courts to acquit for insufficient evidence *sua sponte*, after return of a guilty verdict. Indeed, we are aware of only two cases prior to the enactment of the Federal Rules of Criminal Procedure that could be read as asserting in dictum the existence of

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such a power. *United States v. McCracken*, 26 F. Cas. 1069, 1069 (No. 15,664) (ED Va. 1878); *United States v. Hayden*, 26 F. Cas. 236, 238 (No. 15,333) (NDNY 1877).⁵

⁵The dissent's extended discussion of pre-Rule federal cases produces a lot of smoke, and no fire. *Ansley v. United States*, 135 F. 2d 207, 208 (CA5 1943), described by the dissent as "establishing a district court's inherent power to review *sua sponte* a jury verdict for sufficiency of the evidence," *post*, at 446, establishes no such thing. There, after noting the appellants' failure to renew their motions for directed verdict at the close of evidence, the Fifth Circuit said:

"[T]he question of the sufficiency of the evidence was not properly saved for review by this court. It is true that the question may and should be raised by the court of its own motion, if necessary to prevent a miscarriage of justice, but this is not such a case. We have examined the record, and have found it to contain ample evidence to support the judgment." 135 F. 2d, at 208.

It is obvious that the statement "the question may and should be raised by the court of its own motion" refers to the power of an *appellate* court to review sufficiency of the evidence where the issue has not been preserved for appeal. The cases cited by the dissent deal with the power of a district court to enter a judgment of acquittal *before* the return of a verdict (*i. e.*, to direct a verdict of acquittal), see *Cady v. United States*, 293 F. 829 (CADC 1923); *Nosowitz v. United States*, 282 F. 575, 578 (CA2 1922); *United States v. Fullerton*, 25 F. Cas. 1225 (No. 15,176) (SDNY 1870); the power of a district court to set aside a verdict and order a new trial, see *Wiborg v. United States*, 163 U. S. 632, 658–659 (1896); *United States v. Harding*, 26 F. Cas. 131, 136 (No. 15,301) (ED Pa. 1846); cf. *Charles v. State*, 4 Port. 107, 109–110 (Ala. 1836); the power of a district court to enter judgment of acquittal where the defendant *has made* a preverdict or postverdict motion to acquit, see *Ex parte United States*, 101 F. 2d 870, 878 (CA7 1939), *aff'd* by an equally divided Court, *United States v. Stone*, 308 U. S. 519 (1939); *United States v. Standard Oil Co.*, 23 F. Supp. 937, 938–939 (WD Wis. 1938); cf. *State v. Meen*, 171 Wis. 36, 38–39 (1920); and even the power of an *appellate* court to reverse a district court's denial of a motion for directed verdict, see *Nosowitz, supra*, at 578; *Cherry v. United States*, 78 F. 2d 334 (CA7 1935); *Reiner v. United States*, 92 F. 2d 823, 824–825 (CA9 1937); *France v. United States*, 164 U. S. 676, 680 (1897); *Romano v. United States*, 9 F. 2d 522, 524 (CA2 1925). Not a single pre-Rule case cited by the dissent purports to exercise the power at issue here: a *district court's* power to enter *judgment of acquittal* for insufficient evidence, *without motion*, and *after the return of a guilty*

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The case law of this Court that petitioner relies upon does not establish any “inherent power” to act in contravention of applicable Rules. In *Gaca v. United States*, 411 U. S. 618 (1973) (*per curiam*), which reinstated an appeal that had been dismissed for want of timely prosecution, there was no suggestion that reinstatement was contrary to any statute or rule of procedure. And in *United States v. Nobles*, 422 U. S. 225 (1975), which approved exercise of a District Court’s inherent authority to order the disclosure of certain witness statements, we felt it necessary to make sure that such exercise did not conflict with Federal Rule of Criminal Procedure 16. Petitioner’s best case is *Thompson v. INS*, 375 U. S. 384 (1964), which, contrary to former Federal Rule of Civil Procedure 73(a), gave effect to a notice of appeal filed more than 60 days from the entry of judgment. *Thompson*, however, is not pertinent here, since it expressly relied upon the “‘unique circumstances’” that the cause of the failure to meet the Rule’s deadline was an erroneous ruling or assurance by the District Court itself. 375 U. S., at 387 (quoting *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U. S. 215, 217 (1962) (*per curiam*)).

IV

Petitioner’s three remaining arguments need not detain us long. First, he argues that the District Court had power to enter a judgment of acquittal in this case under the All Writs Act, 28 U. S. C. §1651, through the writ of *coram nobis*. Apart from the fact that the District Court was not asked to

verdict. The dissent apparently thinks it an adequate explanation for this lack of support that, prior to our decision in *United States v. Smith*, 331 U. S. 469, 474 (1947) (suggesting that *sua sponte* grant of a new trial may raise double jeopardy concerns), district courts could order new trials where there was insufficient evidence to sustain the jury verdict. *Post*, at 442–443. But if these district courts truly had latent inherent power to enter a judgment of acquittal, surely at least *some* of them would have been willing to give a legally innocent defendant that to which he was entitled—viz., a judgment of acquittal—rather than just a new trial.

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issue, and did not purport to be issuing, a writ of *coram nobis*, that writ would not have lain here, since it was traditionally available only to bring before the court factual errors “material to the validity and regularity of the legal proceeding itself,” such as the defendant’s being under age or having died before the verdict. See *United States v. Mayer*, 235 U. S. 55, 67–68 (1914). Moreover, “[t]he All Writs Act is a residual source of authority to issue writs that are not otherwise covered by statute. Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling.” *Pennsylvania Bureau of Correction v. United States Marshals Service*, 474 U. S. 34, 43 (1985). As we noted a few years after enactment of the Federal Rules of Criminal Procedure, “it is difficult to conceive of a situation in a federal criminal case today where [a writ of *coram nobis*] would be necessary or appropriate.” *United States v. Smith*, 331 U. S., at 475, n. 4. In the present case, Rule 29 provides the applicable law.

Second, petitioner asserts that the failure to allow the District Court to enter a judgment of acquittal would violate the Due Process Clause of the Fifth Amendment. His argument on this point consists of nothing more than bald assertions that Rule 29(c) as applied to the facts of this case transgresses principles of fundamental fairness, “shocks the conscience,” and interferes with rights “implicit in the concept of ordered liberty.” Brief for Petitioner 28–29 (internal quotation marks omitted) (citing *Herrera v. Collins*, 506 U. S. 390 (1993); *Rochin v. California*, 342 U. S. 165, 172 (1952); *Palko v. Connecticut*, 302 U. S. 319, 325–326 (1937)). Petitioner has failed to proffer any historical, textual, or controlling precedential support for his argument that the inability of a district court to grant an untimely postverdict motion for judgment of acquittal violates the Fifth Amendment, and we decline to fashion a new due process right out of thin air.

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Third, petitioner argues that prohibiting a district court from granting a motion for judgment of acquittal filed one day late will lead to needless appeals and habeas corpus proceedings, where it will be more difficult for defendants to obtain relief than in motions directed to the trial court. Assuming, *arguendo*, that these contentions are accurate, we cannot permit them to alter our analysis, for we are not at liberty to ignore the mandate of Rule 29 in order to obtain “optimal” policy results. Cf. *United States v. Robinson*, 361 U. S. 220, 229–230 (1960). We are similarly unmoved by petitioner’s contention that the “rationale” behind Rule 29(c)’s time limit does not apply where the motion for judgment of acquittal is filed a mere eight days after the trial. The only evident “rationale” behind Rule 29(c)’s 7-day time limit is that a motion for judgment of acquittal filed eight days after trial is a motion filed one day later than justice and equity demand. As we said in a case involving the filing deadline of the Federal Land Policy and Management Act of 1976, 43 U. S. C. § 1744 (1988 ed.): “If 1-day late filings are acceptable, 10-day late filings might be equally acceptable, and so on in a cascade of exceptions that would engulf the rule erected by the filing deadline; yet regardless of where the cutoff line is set, some individuals will always fall just on the other side of it.” *United States v. Locke*, 471 U. S. 84, 101 (1985).

V

Finally, we may respond to some of the many arguments put forward by the dissent. The dissent makes the sweeping assertion that “a district court clearly has the inherent authority to ensure that a legally innocent defendant is not wrongfully convicted,” *post*, at 442. Perhaps so. As the dissent itself recognizes, however, that power has come to an end once an appeal has been taken. *Post*, at 452–453. We are in accord, then, that there is *some* point at which the district court is rendered powerless to enter a judgment of acquittal, and the disagreement between us and the dissent

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comes down to nothing more cosmic than the question of timing—which we find answered by the text of Rule 29.

In an effort to explain why, if a Rule 29(c) motion is in any event unnecessary, it makes any sense to impose a 7-day *deadline* upon the making of it, the dissent maintains that the untimeliness of a motion gives a district court discretion to ignore it. *Post*, at 445. This presents the disedifying prospect of a court vested with “the inherent authority to ensure that a legally innocent defendant is not wrongfully convicted,” *post*, at 442, exercising its discretion to let an innocent defendant be wrongfully convicted. Quite obviously, this explanation of the deadline is incompatible with the premise that underlies the dissent’s entire argument. As for the dissent’s concern, *post*, at 448, that our decision runs afoul of Rule 2’s mandate that the rules “be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay”: We see neither simplicity, nor fairness, nor elimination of delay in a regime that makes it discretionary whether an untimely motion for judgment of acquittal will be entertained.

The dissent asserts that “permissive rules do not withdraw pre-existing inherent powers.” *Post*, at 452. That assertion is really not relevant to the present case since, as we have discussed, the power to enter postverdict judgments of acquittal *sua sponte* was not a “pre-existing inherent power.” See *supra*, at 426–428, and n. 5. But besides the lack of factual predicate for its application here, the principle the dissent proposes would produce some extraordinary consequences. For example, as the cases cited by the dissent illustrate, see *post*, at 439–440, courts previously have ordered new trials *sua sponte*. Federal Rule of Criminal Procedure 33, however, provides that “[t]he court on motion of a defendant *may* grant a new trial” Following the dissent’s logic, Rule 33, being permissive, does not preclude a court from granting a new trial without motion, thereby leaving open to the court a course of action that may well

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violate the Double Jeopardy Clause. But see Advisory Committee's Notes on 1966 Amendment of Fed. Rule Crim. Proc. 33, 18 U. S. C. App., p. 801 ("The amendments to the first two sentences make it clear that a judge has no power to order a new trial on his own motion, that he can act only in response to a motion timely made by a defendant. Problems of double jeopardy arise when the court acts on its own motion"). Similarly, a pre-existing practice, if there was one, would allow a subpoena to be served by a party or a minor despite Federal Rule of Criminal Procedure 17(d) ("A subpoena may be served by the marshal, by a deputy marshal or by any other person who is not a party and who is not less than 18 years of age"); would allow a judge from another district to take over a jury trial from a disabled judge despite Federal Rule of Criminal Procedure 25(a) ("If . . . the judge before whom a jury trial has commenced is unable to proceed with the trial, any other judge regularly sitting in or assigned to the court . . . may proceed with and finish the trial"); and would allow a court to correct a technical error in a sentence more than seven days after the imposition of the sentence, despite Federal Rule of Criminal Procedure 35(c) ("The court, acting within 7 days after the imposition of sentence, may correct a sentence that was imposed as a result of arithmetical, technical, or other clear error").

The decisions of Justice Harlan relied upon by the dissent to support the proposition that permissive rules do not eliminate inherent powers are not germane. We have discussed *Link* above, see *supra*, at 426. In *United States v. Ohio Power Co.*, 353 U. S. 98, 104 (1957), Justice Harlan noted that this Court has proceeded on the assumption that we have inherent authority to "affect judgments by action which would otherwise be out of time under [our own] Rules." That statement would be relevant if the present case involved a district court's departure from one of its own rules—which of course it does not. In *Fernandez v. United*

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States, 81 S. Ct. 642 (1961), 5 L. Ed. 2d 683 (Harlan, J., in chambers), Justice Harlan recognized that the provision of former Federal Rule of Criminal Procedure 46(a) that a “person arrested for an offense not punishable by death shall be *admitted* to bail” (emphasis added) did not withdraw district courts’ authority to *revoke* bail in a noncapital case. *Fernandez*, *supra*, at 644, and n. 7, 5 L. Ed. 2d, at 685, and n. 7. What admitting to bail implies with respect to revocation of bail is not comparable to what granting judgment on motion implies with respect to granting judgment without motion. What the dissent needs, in the *Fernandez* context, is a case holding that a statute which permits bail for “persons arrested for noncapital offenses” does not preclude bail for persons arrested for capital offenses. Of course, such a case will not be found.

Finally, the dissent contends that *United States v. Sisson*, 399 U. S. 267 (1970), supports existence of the “inherent power” petitioner invokes. See *post*, at 448–449. We think not. *Sisson* did *not* “implicitly conclude” that it was proper to enter a postverdict judgment of acquittal without motion, because the *propriety* of the judgment of acquittal was irrelevant to the decision. The only issue was whether the judgment appealed from *was* a judgment of acquittal (proper *or* improper), because that would mean that the Government’s appeal under the former 18 U. S. C. §3731 (which did not apply to judgments of acquittal) must be dismissed. See *United States v. Wilson*, 420 U. S. 332, 351 (1975) (appeal in *Sisson* “was barred solely by the statute”).

* * *

We conclude that the District Court had no authority to grant petitioner’s motion for judgment of acquittal filed one day outside the time limit prescribed by Rule 29(c). We therefore affirm the judgment of the Sixth Circuit.

It is so ordered.

GINSBURG, J., concurring

JUSTICE SOUTER, concurring.

In Part I of his dissenting opinion, JUSTICE STEVENS makes a persuasive argument that, absent a rule to the contrary, district judges have an “inherent authority” to enter a judgment of acquittal, although, for the reasons offered by the majority, *ante*, at 426, I am not persuaded that this inherent authority extends to the power to act *sua sponte* to grant a judgment of acquittal after the jury has returned a verdict. In any event, I accept the received view that inherent power generally is subject to legislative abrogation, see *Bank of Nova Scotia v. United States*, 487 U. S. 250, 254–255 (1988); *ante*, at 426, and although Congress’s power is not necessarily plenary, its limits are not implicated here. While there may be some point at which legislative interference with a court’s inherent authority would run afoul of Article III, see *Chambers v. NASCO, Inc.*, 501 U. S. 32, 58 (1991) (SCALIA, J., dissenting) (“Some elements of that inherent authority are so essential to ‘[t]he judicial Power,’ U. S. Const., Art. III, § 1, that they are indefeasible”), it is not seriously contended that Rule 29(c) is an unconstitutional interference with the court’s inherent authority. I therefore join the Court’s opinion.

JUSTICE GINSBURG, with whom JUSTICE SOUTER and JUSTICE BREYER join, concurring.

I join the opinion of the Court and highlight features of the case key to my judgment.

It is anomalous to classify time prescriptions, even rigid ones,* under the heading “subject matter jurisdiction.” That most basic requirement relates to the subject matter of the case or controversy or the status of the parties to it. See 13 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 3522, p. 78 (2d ed. 1984); *Restatement (Second) of Judgments* § 11 (1982) (defining “subject matter juris-

*See Fed. Rule Crim. Proc. 45(b) (listing time rules that are not subject to enlargement for “cause shown”).

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diction” as the “authority [of the court] to adjudicate the type of controversy involved in the action”); cf. *United States v. Kember*, 648 F. 2d 1354, 1357–1358 (CADC 1980) (*per curiam*) (commenting on “manifold settings in which we employ the term [jurisdiction]” and distinguishing fundamental “jurisdiction” questions from issues of a less basic character); *Center for Nuclear Responsibility, Inc. v. United States Nuclear Regulatory Comm’n*, 781 F. 2d 935, 945, n. 4 (CADC 1986) (Ginsburg, J., dissenting) (questioning “profligate use” of the word “jurisdiction,” in diverse contexts, “to mean many things—from the absence of a constitutional grant of judicial power to a statutory limit on time to appeal”).

Federal Rule of Criminal Procedure 29(c) concerns a matter less basic. It is simply a time prescription. Rule 29(c)’s prescription is a tight one, to be sure. Federal Rule of Criminal Procedure 45(b) makes that clear by precluding extensions, even for “excusable neglect,” after expiration of the seven days specified in Rule 29(c). But like limitation periods generally, see, e. g., *Irwin v. Department of Veterans Affairs*, 498 U. S. 89, 95 (1990) (“[t]ime requirements in lawsuits . . . are customarily subject to ‘equitable tolling’”), the 29(c)/45(b) constraint is not utterly exceptionless.

This Court has recognized one sharply honed exception to rules of the 29(c)/45(b) genre. That exception covers cases in which the trial judge has misled a party who could have—and probably would have—taken timely action had the trial judge conveyed correct, rather than incorrect, information. See *Thompson v. INS*, 375 U. S. 384, 386–387 (1964) (*per curiam*) (had trial judge not misinformed party that his new trial motion was made “in ample time,” party “could have, and presumably would have, filed the appeal within 60 days of the entry of the original judgment, rather than waiting, as he did, until after the trial court had disposed of the [new trial motion]”); *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U. S. 215, 216–217 (1962) (*per curiam*) (instructing that petitioner’s appeal be heard on the merits

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where petitioner had received from trial court an improperly grounded 14-day extension of the time to file his appeal); see also 4A Wright & Miller, *Federal Practice and Procedure* § 1168, at 501 (describing *Thompson* and *Harris Truck Lines* as “based on a theory similar to estoppel”). As the Court observes, however, this exception “is not pertinent here.” See *ante*, at 428.

Carlisle’s counsel was not misled by any trial court statement or action; rather, he neglected to follow plain instructions. Rule 29(c) clearly instructs that a motion for a judgment of acquittal be filed “within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period.” Just as clearly, Rule 45(b) excludes motions for enlargement once seven days have run. I agree that a rule like 29(c) is framed to resist ad hoc relaxation. A time line must be drawn at some point, and it is not unreasonable to draw the line as the rulemakers did, rather than extend it out to the day set for sentencing.

It bears emphasis, finally, that the Government recognizes legal avenues still open to Carlisle to challenge the sufficiency of the evidence to warrant his conviction: on appeal (subject to “plain error” standard); and through a postconviction motion, under 28 U. S. C. § 2255, asserting ineffective assistance of counsel. Brief for United States 38–39. In the rare situations JUSTICE STEVENS envisions—delay of a meritorious motion due to an Act of God, see *post*, at 454, or cases comparable to those in which we would read and grant an out-of-time rehearing petition, see *post*, at 450–451—these modes of relief should provide an adequate corrective.

JUSTICE STEVENS, with whom JUSTICE KENNEDY joins, dissenting.

As long as a federal court retains jurisdiction over a criminal case, it has the authority to ensure that no conviction is entered unless the prosecutor has proved the defendant’s guilt. The exercise of the court’s inherent power to set

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aside a jury verdict unsupported by evidence is not contingent on the filing of a timely motion by the defendant. The question in this case, therefore, is not whether Rule 29 of the Federal Rules of Criminal Procedure *authorizes* the court to grant an untimely motion for judgment of acquittal; I agree with the Court that it does not. Rather, the question is whether that Rule *withdraws* the court's pre-existing authority to refrain from entering judgment of conviction against a defendant whom it knows to be legally innocent.

Viewed in this light, the majority places more reliance on the negative implication in Rule 29 than its permissive language can bear. Assuming it exists at all, this negative implication is far too weak to justify the conclusion that Rule 29 manifests that Congress desired to withdraw a federal court's inherent authority to acquit an innocent defendant.

I

Trial judges are kept busy responding to motions, objections, and requests by the litigants. It is quite wrong, however, to assume that a judge is nothing more than a referee whose authority is limited to granting or denying motions advanced by the parties. As Learned Hand tersely noted, a "judge, at least in a federal court, is more than a moderator; he is affirmatively charged with securing a fair trial, and he must intervene *sua sponte* to that end, when necessary." *Brown v. Walter*, 62 F. 2d 798, 799 (CA2 1933). That duty encompasses not only the avoidance of error before it occurs, but the correction of error that may have occurred earlier in a proceeding.

The basic principle has been stated many times. There is a "power 'inherent in every court of justice so long as it retains control of the subject matter and of the parties, to correct that which has been wrongfully done by virtue of its process.' *Arkadelphia Co. v. St. Louis Southwestern Ry. Co.*, 249 U. S. 134, 146. See *Northwestern Fuel Co. v. Brock*, 139 U. S. 216, 219." *United States v. Morgan*, 307 U. S. 183,

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197 (1939). Although that statement was made in a civil case, we have made it clear that a federal court has even broader discretion to notice error independently in the trial of a criminal case than in civil cases. *Crawford v. United States*, 212 U. S. 183, 194 (1909).

Examples of the exercise of the federal courts' inherent powers are abundant in both our civil and our criminal jurisprudence.¹ Indeed, when he was serving on the Court of Appeals for the Ninth Circuit, then-Judge Kennedy, after considering a series of cases that recognized various inherent judicial powers,² correctly pointed out:

¹ A few examples illustrate the breadth of that power. We have held that a district court "has inherent power to dismiss a suit pursuant to the doctrine of *forum non conveniens*," *Gulf Oil Corp. v. Gilbert*, 330 U. S. 501, 502 (1947); to dismiss an appeal in a criminal case if the defendant is a fugitive, *Molinaro v. New Jersey*, 396 U. S. 365, 366 (1970); to enforce compliance with lawful orders through civil contempt, *Shillitani v. United States*, 384 U. S. 364, 370 (1966); to order special conferences that will aid in the disposition of a complex antitrust case, *United States v. United States Gypsum Co.*, 340 U. S. 76, 81 (1950); and to stay proceedings "to control the progress of the cause so as to maintain the orderly processes of justice," *Enelow v. New York Life Ins. Co.*, 293 U. S. 379, 381-382 (1935). We have also recognized the court's inherent power to enforce its judgments, see *Peacock v. Thomas*, 516 U. S. 349 (1996), as well as its inherent power to award attorney's fees in exceptional cases, *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U. S. 240, 256 (1975).

² "E. g., *Roadway Express, Inc. v. Piper*, 447 U. S. 752, 764-67 . . . (1980) (assessing costs against parties or attorneys); *Cooke v. United States*, 267 U. S. 517, 534 . . . (1925) (contempt power); *United States v. Armstrong*, 621 F. 2d 951, 954-55 (9th Cir. 1980) (allowing inspection of property belonging to third parties); *Franquez v. United States*, 604 F. 2d 1239 (9th Cir. 1979) (ordering jury trial on an issue when not contemplated by statute); *In re Sealed Affidavit(s) to Search Warrants (Agosto)*, 600 F. 2d 1256 (9th Cir. 1979) (sealing papers filed with the court); *United States v. Simmons*, 536 F. 2d 827, 832-34 (9th Cir.), *cert. denied*, 429 U. S. 854 . . . (1976) (dismissal for want of prosecution); *United States v. Malcolm*, 475 F. 2d 420 (9th Cir. 1973) (ordering a defendant to undergo a psychiatric exam)." *Arizona v. Manypenny*, 672 F. 2d 761, 765 (CA9 1982).

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“Exercise of judicial power by entry of orders not expressly sanctioned by rule or statute in order to correct the legal process or avert its malfunction has been approved in varied circumstances.” *Arizona v. Many-penny*, 672 F. 2d 761, 765, cert. denied, 459 U. S. 850 (1982).

When a federal court declines to enter a judgment of conviction against a defendant whom it should have directed the jury to acquit, it clearly corrects the legal process and averts its malfunctioning. Given the various *sua sponte* powers that district courts unquestionably may exercise in order to ensure that legally innocent defendants are not convicted, it is clear that they also possess the inherent authority *sua sponte* to enter postverdict acquittals when the Government has failed to prove that a defendant is guilty.

District courts have long exercised their inherent power to direct an acquittal *sua sponte* when the prosecution fails to prove its case at the close of evidence. See *Wiborg v. United States*, 163 U. S. 632, 659 (1896); *Cady v. United States*, 293 F. 829 (CA2 1923); *Nosowitz v. United States*, 282 F. 575, 578 (CA2 1922).³ They have also long exercised

³ Indeed, *Cady* referred to “the well-established and oft-repeated principle that, unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, *it is the duty of the trial court to instruct the jury to return a verdict for the accused . . .*” 293 F., at 830 (emphasis added). Moreover, in both of the cases cited by the majority as supporting the existence of the power exercised here, *United States v. McCracken*, 26 F. Cas. 1069 (No. 15,664) (ED Va. 1878), and *United States v. Hayden*, 26 F. Cas. 236, 238 (No. 15,333) (NDNY 1877), see *ante*, at 426–427, the district judges directed the jury to return a verdict of not guilty. In the *Hayden* case, the court went on to describe what I assume was the settled practice among all federal judges at the time: “I have made it a rule to direct a verdict of not guilty where, in my opinion the evidence will not authorize the jury to find a verdict of guilty, or, if so found, I would set aside the verdict as contrary to evidence. I think this is a case of that class, and I therefore direct the jury to find a verdict of not guilty.” 26 F. Cas., at 238.

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their inherent power to set aside a jury verdict for insufficiency of the evidence *sua sponte*. See *United States v. Harding*, 26 F. Cas. 131, 136 (No. 15,301) (ED Pa. 1846); *United States v. Fullerton*, 25 F. Cas. 1225 (No. 15,176) (SDNY 1870); see also F. Wharton, *Criminal Law of the United States* 669 (1846) (“Where, however, evidence is not sufficient in law to authorize a verdict, a new trial will be granted, even though no objection be made at the trial”); *id.*, at 643(s) (explaining that the judge reserves “it to himself, if there be an improper conviction, to arrest the judgment or set aside the verdict”); *Charles v. State*, 4 Port. 107, 109–110 (Ala. 1836).⁴

The District Courts’ longstanding exercise of these inherent powers is entirely consistent with the conclusion that a district court acts within its power when it enters a judgment of acquittal upon setting aside an unsupported jury verdict. To be sure, the early cases reveal that District Courts typically ordered new trials, rather than acquittals, upon concluding that the jury’s verdict was not supported by legally sufficient evidence. However, subsequent cases demonstrate that as courts became concerned that the new

⁴ Out of deference to the King, the rule was apparently different in England. See 1 J. Stephen, *A History of the Criminal Law of England* 312–313 (1883); but cf. 3 W. Blackstone, *Commentaries* *389–*390. Even still, English judges evaded the procedural bar by declining to enter sentence and requesting the Crown to pardon wrongfully convicted defendants. These requests were routinely granted. See *Ex parte United States*, 101 F. 2d 870, 875, n. 15 (CA7 1939). Judge Kane explained that he did “not remember to have read of a single instance in which the judicial recommendation has been disregarded by the ministers of the crown, and [he did] not suppose that it could be without a breach of the constitution of the realm.” *United States v. Harding*, 26 F. Cas. 131, 137 (No. 15,301) (ED Pa. 1846). As a result of this consistent practice, he concluded that “[i]n England, therefore, the denial to the courts of a revisory power over verdicts in any cases is apparent, rather than real. The judge, if dissatisfied with a conviction on the merits, respites the sentence or relieves the prisoner, and the king’s prerogative interposes to do justice as a thing of course.” *Ibid.*

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trial remedy trenched on the prohibition against double jeopardy, they began to enter judgments of acquittals. See *Ex parte United States*, 101 F. 2d 870, 878 (CA7 1939), aff'd by an equally divided Court in *United States v. Stone*, 308 U. S. 519 (1939).

The earliest cases involve appellate courts entering judgments of acquittal in order to remedy a district court's failure to direct the jury to acquit. See *Nosowitz v. United States*, 282 F. 575 (CA2 1922); *Cherry v. United States*, 78 F. 2d 334 (CA7 1935); *Reiner v. United States*, 92 F. 2d 823 (CA9 1937); see also *France v. United States*, 164 U. S. 676 (1897) (remanding to the District Court with directions to enter such judgment); *Romano v. United States*, 9 F. 2d 522 (CA2 1925) (same). Later cases reveal that District Courts soon followed suit, either by ruling on reserved, preverdict acquittal motions or by granting postverdict motions to acquit. See *Ex parte United States*, 101 F. 2d 870 (CA7 1939); *United States v. Standard Oil Co.*, 23 F. Supp. 937 (WD Wis. 1938), aff'd in *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 165, n. 1 (1940); *State v. Meen*, 171 Wis. 36 (1920) (same); see also Advisory Committee's Notes to Rule 29 (endorsing these practices). Moreover, prior to the adoption of Rule 29 in 1944, the Fifth Circuit explained that, even after a jury returns a verdict, a court "may and should" *sua sponte* review the sufficiency of the evidence. *Ansley v. United States*, 135 F. 2d 207, 208 (1943).

In light of this history, it makes no sense to conclude that a federal district court lacks the inherent power to enter *sua sponte* a postverdict judgment of acquittal. A trial court's postverdict entry of a judgment of acquittal is in substance no different from an appellate court's order directing entry of that same judgment. Moreover, the double jeopardy concerns that may bar a district court from ordering a new trial to remedy its failure to have directed an acquittal cannot sensibly be understood to prohibit the district court from providing a defendant some measure of relief from a legally

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insufficient guilty verdict. See *United States v. Smith*, 331 U. S. 469, 474 (1947). Finally, given that a motion was not thought to be needed in order for the District Court to exercise its inherent power either to direct an acquittal, or to set aside an unsupported verdict and order a new trial, there is no reason to conclude that a district court is utterly powerless to remedy a wrongful conviction in the exceedingly rare circumstance in which an unforeseen accident results in the defendant's failure to file a motion for acquittal.

In all events, a district court clearly has the inherent authority to ensure that a legally innocent defendant is not wrongfully convicted. It would be most strange to conclude that this authority, which enables a district court to keep a case from the jury altogether when the Government fails to prove its case, does not permit that same court to revise a guilty verdict that the jury returns despite the Government's insufficient proof. That conclusion is particularly difficult to fathom when one considers that the latter action may be appealed by the Government, while the former may not. *United States v. Wilson*, 420 U. S. 332, 345 (1975). Not surprisingly, therefore, numerous courts have recognized that, prior to the passage of Rule 29, district courts possessed the inherent power to acquit defendants *sua sponte*. See *United States v. Hughes*, 759 F. Supp. 530, 532–536 (WD Ark.), *aff'd sub nom. United States v. Haren*, 952 F. 2d 190 (CA8 1991); *United States v. DiBernardo*, 880 F. 2d 1216, 1225, n. 4 (CA11 1989); *United States v. Coleman*, 811 F. 2d 804 (CA3 1987); *United States v. Giampa*, 758 F. 2d 928, 936, n. 1 (CA3 1985); *Arizona v. Manypenny*, 672 F. 2d, at 765; *Ansley v. United States*, 135 F. 2d, at 208; see also *United States v. Weinstein*, 452 F. 2d 704, 713, 714 (CA2 1971); *United States v. Broadus*, 664 F. Supp. 592, 595–598 (DC 1987).

The majority states that no pre-Rule case establishes the precise power at issue here. *Ante*, at 427–428, n. 5. That

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is true but unremarkable. The majority does not dispute that, prior to the passage of Rule 29, trial courts possessed the inherent power to remedy unsupported guilty verdicts by ordering new trials *sua sponte*. After Rule 29 was adopted, this Court pointed out the double jeopardy concerns raised by the *sua sponte* exercise of the new trial remedy. See *United States v. Smith*, 331 U. S., at 474. Since that time, numerous cases have concluded that courts may remedy unsupported jury verdicts by entering judgments of acquittal. The majority offers no principled reason for concluding that this more recent remedy is beyond the power of district courts, even though the prior remedy was not.

In sum, the error-correcting power that is “inherent in every court of justice so long as it retains control of the subject matter and of the parties,” *Morgan*, 307 U. S., at 197, encompasses the kind of error at issue in this case. Therefore, absent some express indication that Congress intended to withdraw the power that implicitly attends its initial grant of jurisdiction, a district court acts well within its discretion when it sets aside a jury verdict and acquits a defendant because the prosecution failed to prove its case.

II

Because the Acts of Congress investing federal judges with jurisdiction to try criminal cases are the source of a district court’s power to set aside unsupported jury verdicts, I have no occasion to disagree with the Court’s view that petitioner errs in relying on Rule 29 as the source of the District Court’s authority in this case. I do, however, strongly disagree with the Court’s own reliance on that Rule for the quite different conclusion that it clearly prohibits the power exercised by the District Court here.

In Part III of its opinion, the majority asserts that the District Court’s action “contradicted the plain language of Rule 29(c), and effectively annulled the 7-day filing limit,”

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ante, at 426, and that “the clarity of the text” suffices to prohibit the District Court’s action, *ibid.* The majority assumes that these conclusory assertions follow implicitly from its determination in Part II of its opinion that Rule 29 does not authorize the District Court to set aside a jury verdict *sua sponte*.

In my view, the Rule serves three salutary purposes that are in no tension with a district court’s inherent power to enter a judgment of acquittal *sua sponte*. None of these purposes would be frustrated if the Rule were understood to coexist with, though not to authorize, a district court’s power to avoid imposing sentence on an innocent defendant in the truly exceptional case in which evidence of guilt is wholly lacking.

First, subdivision (a) confirms the view that a judge has a duty to direct an acquittal if the prosecution has failed to prove its case at the close of evidence. The Rule’s affirmation of that duty is in no way inconsistent with a court’s exercise of its postverdict power to enter *sua sponte* a judgment of acquittal. As then-Judge Kennedy explained for the Ninth Circuit in *Arizona v. Manypenny*, 672 F. 2d, at 764: “We do not read the mention in Rule 29(a) of a court granting such a judgment ‘on its own motion’ before submission to a jury as an elimination of a court’s inherent power to grant such a judgment after submission to the jury.”

Second, subdivision (b) accommodates the defendant’s right to move for a directed acquittal with the Government’s right to seek appellate review. Indeed, the subdivision was amended in 1994 for the very purpose of striking a more proper balance between those two interests. See Advisory Committee’s Notes to Fed. Rule Crim. Proc. 29(b), 18 U. S. C. App., pp. 784–785. As a result, a district court’s *sua sponte* decision to acquit after the jury returns a guilty verdict can hardly be said to undermine the purpose of subdivision (b). The defendant’s interests are obviously fully protected by an acquittal, while the Government’s right to appeal is pro-

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tected because the jury has already returned its verdict of guilt. See *United States v. Wilson*, 420 U. S., at 345.⁵

Third, subdivision (c) requires defense counsel to file the postverdict motion for judgment of acquittal promptly, while the trial judge presumably retains a firm recollection of the evidence and therefore is able to rule expeditiously and efficiently. The untimeliness of a later motion provides the judge with a sufficient reason for denying it without even reading it or reviewing the transcript. Thus, a judge's entirely discretionary decision to enter *sua sponte* an acquittal after the 7-day period in no way annuls the 7-day deadline. Defendants are still bound by that time limitation, and the Rule thus serves the useful function of limiting a defendant's right to require a judge to reconsider the sufficiency of the evidence. As then-Judge Kennedy explained: "Rule 29(c) creates a deadline by which defendants must present motions for judgment of acquittal to the court; it does not address the court's inherent power to grant such a judgment." *Arizona v. Manypenny*, 672 F. 2d, at 764.

⁵The majority is also wrong to contend that it would make a "farce" of subdivision (b) to construe it to permit judges to act *sua sponte*. *Ante*, at 422. There are sound reasons for setting forth regulations concerning a court's power to reserve a defense motion that it must entertain even if the court also possesses the entirely discretionary power to acquit at any time on its own initiative as long as it possesses jurisdiction over the case. For example, the new Rule 29(b) makes clear that the district court, even if it reserves a motion for acquittal filed after the prosecution's case in chief, may not consider any evidence submitted thereafter in disposing of the motion. That limitation on the district court's authority protects a defendant's right to make a motion for acquittal and to put on rebuttal evidence without risking that new evidence of guilt will emerge. Such a protection serves a useful function even though in the absence of a motion to acquit a court would have the discretionary power to enter judgment in the defendant's favor. Thus, it is simply not true that there "would be no need" for the procedures set forth in Rule 29(b) if, "even without reserving, the court had continuing power to grant judgment of acquittal on its own." *Ibid*.

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The majority nevertheless maintains that the Rule must be read to require judges, in some instances, to enter judgments of conviction against defendants they know to be innocent. The majority does not argue that Rule 29 *expressly* prohibits a district court from acting on its own to set aside an unsupported jury verdict. Rather, it relies solely on the negative inference that it draws from the absence of three words in one sentence of Rule 29(c). *Ante*, at 423.⁶ Specifically, the majority seizes upon the “notabl[e] absen[ce]” of the phrase “on such motion” in the third sentence of the Rule, *ibid.*, and concludes that this omission “convey[s] the idea that, where a jury has not returned a verdict, a court can act without motion, but where a jury has returned a guilty verdict, it cannot,” *ibid.*

In light of the pre-Rule precedent establishing a district court’s inherent power to review *sua sponte* a jury verdict for sufficiency of the evidence, see *Ansley v. United States*, 135 F. 2d, at 208, the majority reads far too much into the omission. The caption to Rule 29(c) makes clear that the subdivision only contemplates judicial action taken in response to a motion. The first sentence explains that a motion may be made after a jury’s discharge whether or not a guilty verdict has been returned. The next sentence sets forth the action that the district court may take when such a motion is filed after the jury returns a guilty verdict. In a similar vein, the third sentence sets forth the action that the district court may take when no verdict has been re-

⁶ Rule 29(c) reads as follows:

“(c) MOTION AFTER DISCHARGE OF JURY. If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period. If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned the court may enter judgment of acquittal. It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury.”

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turned. The omission of the words “on such motion” from the third sentence surely just reflects a draftsman’s sensible decision to avoid a patent redundancy rather than a cryptic intent to change the law by prohibiting a judge from exercising his or her inherent power to enter a judgment of acquittal.⁷

Common sense refutes what the text fails to compel. Under the majority’s reading, Rule 29(c) establishes a most inefficient regime for setting aside unsupported jury verdicts by requiring defendants to file appeals and collateral challenges to judgments of conviction that district judges knew to be unsupported. Given that Federal Rule of Criminal

⁷The inclusion of the phrase “on such motion” in the second sentence of Rule 29(c) is no mystery. Unlike the present Rule, the original version of Rule 29 permitted the defendant to move either for a new trial or for an acquittal after the jury had been discharged. The next sentences of the original Rule stated that the district court was authorized to grant either a new trial or an acquittal whether or not the jury returned a verdict. The inclusion of the phrase “on such motion” was necessary in order to make clear that the judge could not order a new trial unless the defendant first requested one.

Contrary to the majority’s construction of the relevant language, there is no reason to suppose that the phrase “on such motion” in the old Rule applied only to the circumstance in which the jury returned a verdict. Under such a construction, the original Rule would have been intended to “conve[y] the idea,” *ante*, at 423, that the District Court possessed the authority to impose a new trial against the defendant’s wishes whenever the jury had been discharged without having returned a verdict. It is clear that the drafters never intended to convey such a potentially unconstitutional idea. Indeed, it was the drafters’ concern that the original Rule might be subject to the potentially unconstitutional “interpretation that a motion for judgment of acquittal gives the court power to order a new trial even though the defendant does not wish a new trial and has not asked for one” that led them to eliminate all references to new trial orders in what is now Rule 29(c). Advisory Committee’s Notes on Fed. Rule Crim. Proc. 29, 18 U. S. C. App., pp. 784–785. There is no hint in the Advisory Committee’s Notes, or the Rule’s drafting history, that this limiting revision was simultaneously intended to link the district court’s power to acquit for insufficiency of the evidence with the jury’s return of a verdict.

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Procedure 2 directs that the rules “shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay,” there is no reason to read the ambiguity in Rule 29(c) to prohibit a district court from correcting a plain error that would otherwise be challenged in a subsequent court proceeding.⁸

Indeed, our decision in *United States v. Sisson*, 399 U. S. 267 (1970), reveals that when we previously considered Rule 29 we did not understand it to prohibit a district court from *sua sponte* entering a postverdict judgment of acquittal. There, defendant’s counsel moved postverdict to arrest judgment under Federal Rule of Criminal Procedure 34. 399 U. S., at 276. The District Court purported to grant the Rule 34 motion on evidentiary and constitutional grounds that the defendant’s motion did not raise. *Id.*, at 277, n. 6. The Government sought review from this Court pursuant to 18 U. S. C. §3731, which at that time permitted governmental appeals from orders arresting judgment but not from orders entering judgments of acquittal. 399 U. S., at 279–280.

In holding that we lacked jurisdiction to hear the Government’s appeal, we explained that although the District Court termed its order an “arres[t] [of] judgment,” it was in fact an acquittal. *Id.*, at 288. The portion of Justice Harlan’s opinion that five Members of the Court joined equated the District Court’s *sua sponte* acquittal with an acquittal by a jury. As support for the comparison, the opinion explained that, under Rule 29, “judges, like juries, can acquit defendants.” *Id.*, at 290. Moreover, it noted that Rules 29(b) and

⁸The majority dismisses these concerns by suggesting that because we agree that a district court lacks the power to enter a judgment of acquittal after an appeal is taken, we disagree only as to “timing.” *Ante*, at 431. In truth, our point of disagreement is more fundamental. It concerns the power of a court to correct a miscarriage of justice while it retains jurisdiction over a case. Because an appeal can only be taken once a judgment has been entered, the real issue that divides us is whether the Federal Rules of Criminal Procedure compel a district court to enter a judgment of conviction against a defendant whom it knows to be innocent.

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(c) of the Federal Rules of Criminal Procedure “expressly allow a federal judge to acquit a criminal defendant after the jury ‘returns a verdict of guilty.’” *Ibid.*; see also *United States v. Weinstein*, 452 F. 2d, at 713, 714 (explaining that *Sisson* determined that the District Court in that case acted within its jurisdiction in entering the postverdict judgment of acquittal).

Although the merits of the judgment of acquittal were not before the Court in *Sisson*, the trial court’s jurisdiction to enter the judgment plainly was. Just as a trial court’s post-judgment acquittal could not have mooted a pending appeal, neither could a jurisdictionally barred action have prevented an appeal from being taken. Nevertheless, the *Sisson* Court did not identify any jurisdictional bar to the judge’s entry of a postverdict acquittal motion, even though no Rule 29 motion had been filed. I am therefore mystified as to why the Court now concludes that the Rule can only be read to deprive the district court of jurisdiction to acquit postverdict in the absence of a defendant’s motion.

Our prior construction of procedural rules that employ permissive language similar to that used in Rule 29 reinforces the implicit conclusion that we reached in *Sisson*. As we recently explained, our prior cases reveal that although Congress may limit the exercise of the inherent power of lower federal courts, “‘we do not lightly assume that Congress has intended’” to do so. *Chambers v. NASCO, Inc.*, 501 U. S. 32, 47 (1991) (quoting *Weinberger v. Romero-Barcelo*, 456 U. S. 305, 313 (1982)). That interpretive principle suggests that something far more than an ambiguous silence is required to withdraw a district court’s inherent power.

Link v. Wabash R. Co., 370 U. S. 626 (1962), sets forth the proper analysis. In *Link*, we rejected the argument that the authority granted to a defendant by Rule 41 of the Rules of Civil Procedure to move for an involuntary dismissal of a complaint, by negative implication, precluded such a dis-

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missal on the court's own motion. In his opinion for the Court, Justice Harlan explained:

“We do not read Rule 41(b) as implying any such restriction. Neither the permissive language of the Rule—which merely authorizes a motion by the defendant—nor its policy requires us to conclude that it was the purpose of the Rule to abrogate the power of courts, acting on their own initiative, to clear their calendars of cases that have remained dormant because of the inaction or dilatoriness of the parties seeking relief. The authority of a court to dismiss *sua sponte* for lack of prosecution has generally been considered an ‘inherent power,’ governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.” *Id.*, at 630–631 (footnote omitted).⁹

Our practice with respect to petitions for rehearing is also instructive. Such petitions, like motions for a judgment of acquittal, are routinely filed and almost never granted. If not filed within the time specified in our Rules, it is appropriate to deny such a petition without even reading it. On rare occasions, however, we have held that the interest in the evenhanded administration of justice outweighs the interest in finality and granted such petitions even though un-

⁹In an effort to distinguish *Link*, the Court asserts that the practice of setting aside insufficient jury verdicts in criminal cases is far less established than was the practice of dismissing cases for want of prosecution. It further contends that the “clarity of the text,” *ante*, at 426, in this case renders the logic of *Link* inapplicable. *Link* cannot fairly be read to suggest that inherent powers of recent origin may be more easily withdrawn than those of older vintage. In any event, the court's inherent power to set aside criminal convictions unsupported by evidence has been long accepted. Finally, given that Justice Harlan authored both *Link* and *Sisson*, I find most unpersuasive the majority's conclusion that the “clarity of the text” in Rule 29 should occasion a different result from that reached in *Link*.

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timely and even though there is not a word in our Rules that authorized such action.

Thus, in *United States v. Ohio Power Co.*, 351 U. S. 980 (1956), the Court on its own initiative vacated an earlier order denying a petition for rehearing and, in the following Term, granted the previously denied petition. *United States v. Ohio Power Co.*, 353 U. S. 98 (1957). While Justice Harlan dissented from that disposition, he did not disagree with the proposition that “the Court’s inherent power over its judgments” included the authority to take action that “would otherwise be out of time under the Rules.” *Id.*, at 104.

Just three years after the *Ohio Power* decision, Justice Harlan had occasion to endorse the exercise of a District Court’s use of its inherent powers in apparent conflict with the language of the Federal Rules of Criminal Procedure. Explaining his denial of an application for bail, he correctly observed that those Rules should not be construed to withdraw the District Court’s inherent power to revoke bail during the course of a criminal trial. See *Fernandez v. United States*, 81 S. Ct. 642, 644, n. 7, 5 L. Ed. 2d 683, 685, n. 7 (1961) (in chambers). In doing so, he exposed the basic flaw in an argument comparable to the one accepted by the Court today.

Justice Harlan explained that even though Federal Rule of Criminal Procedure 46(a)(1) stated that a “‘person arrested for an offense not punishable by death *shall* be admitted to bail,’” that Rule did not purport to withdraw the district courts’ “authority, as an incident of their inherent powers to manage the conduct of proceedings before them, to revoke bail during the course of a criminal trial, when such action is appropriate to the orderly progress of the trial and the fair administration of justice.” *Fernandez v. United States*, 81 S. Ct., at 644, 645, n. 7, 5 L. Ed. 2d, at 685, n. 7, 686 (in chambers). He properly read the seemingly mandatory language of Rule 46(a)(1) against a pre-Rule legal back-

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ground that afforded district courts a greater measure of discretion. *Ibid.*; see also *United States v. Anguilo*, 755 F. 2d 969, 972 (CA1 1985) (Breyer, J.). Given that Justice Harlan also authored *Link*, which holds that a procedural rule permitting a dismissal on motion does not preclude a dismissal without motion, I doubt that the majority's attempt to distinguish *Fernandez* would have been persuasive to its author.

Our decision in *United States v. Smith*, 331 U. S. 469 (1947), is consistent with our prior cases holding that permissive rules do not withdraw pre-existing inherent powers.¹⁰ Although the majority contends that *Smith* supports the inference that the draftsmen of Rule 29 intended to limit the court's authority to take action in response to a timely motion by counsel, that case actually supports the proposition that the adoption of the Federal Rules of Criminal Procedure did not modify the pre-existing power of the district court to set aside an erroneous judgment while it retains jurisdiction of a case.

The error committed by Judge Smith was his attempt to assert jurisdiction in a criminal case after the *judgment* of conviction had been affirmed on appeal and even after the defendant had started to serve his sentence. There was not even an arguable basis for suggesting that the judge then had jurisdiction to order a new trial. *Id.*, at 474; see *United States v. Mayer*, 235 U. S. 55, 70 (1914).¹¹ The only theory that might have justified his action was his lawyer's argument that the Rules had expanded the District Court's jurisdiction beyond the end of the term of court in which the trial

¹⁰That is not to say that permissive rules *establish* inherent powers. For that reason, the majority's recitation of various permissive rules for which no analogous inherent power exists is quite beside the point. *Ante*, at 431-432.

¹¹As the Court pointed out in *United States v. Smith*, 331 U. S. 469 (1947), new trial orders are particularly problematic because they raise serious double jeopardy concerns. Of course, no such concerns are present here.

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had been conducted. This Court's reasons for holding that the Rules did not enlarge that jurisdiction equally support the proposition that they did not diminish that jurisdiction either.

In fact, if one takes note of the extraordinary character of Judge Smith's attempt to set aside a conviction after it had been affirmed on appeal and after the defendant had been incarcerated for several months, it is easy to understand why Justice Jackson's opinion for the Court expressed concern that such action might give rise to an appearance of impropriety, and therefore provided us with the dictum concerning possible *ex parte* approaches to the judge on which today's majority relies. The suggestion that that dictum has any relevance to the period between the return of the jury's verdict and the imposition of sentence is not only misplaced, but also represents a highly inappropriate comment on the integrity of the federal judiciary. Judge Smith's singularly bizarre action a half century ago provides no basis for either the inference or the rule that today's majority thinks the *Smith* opinion supports. See *Arizona v. Manypenny*, 672 F. 2d, at 765, n. 10 (explaining that "*Smith* cannot be applied indiscriminately outside of the particular factual context at issue there").

The decision in *Smith* was a correct application of the principle that should control the disposition of this case. There is a "power 'inherent in every court of justice so long as it retains control of the subject matter and of the parties, to correct that which has been wrongfully done by virtue of its process.'" *United States v. Morgan*, 307 U. S., at 197. Of course, that power does not survive after the court's jurisdiction of the subject matter has expired. It is surely sufficient, however, to enable the judge to refuse to impose sentence on a defendant when the record does not contain evidence of guilt.

As a result, Rule 29(c) is best read to state the proper procedures for handling and filing defense motions for acquit-

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tals, but to leave unaddressed the court's authority to act on its own initiative.¹² Such a construction comports with the sound historical and commonsense reasons for concluding that Congress would not likely have intended to require a district court to enter a judgment of conviction against a defendant whom it knows to be innocent.¹³

III

A brief final word about the practical significance of today's holding. There is no real danger that district judges will be burdened by a flood of untimely motions. On the other hand, the possibility that an Act of God may preclude the timely filing of a meritorious motion cannot be denied. Because evidence of guilt is "absolutely vital to defendants," *Wiborg*, 163 U. S., at 658, that possibility, no matter how remote, is sufficient to justify a district court's inherent authority to avert the conviction of a legally innocent defendant despite the absence of a timely motion. Because there is no

¹²For this reason, the Government's reliance on Rule 45 of the Federal Rules of Criminal Procedure is misplaced. Although Rule 45 generally permits a district court to hear an untimely motion if the defendant can demonstrate that excusable neglect caused the late filing, it specifically prohibits a district court from extending the time for "tak[ing] any action" under Rule 29. As I have explained, Rule 29(c) only addresses the rules that govern a defendant's postverdict acquittal motion; it does not address the district court's *sua sponte* postverdict acquittal power. Thus, while Rule 45 serves to make clear that district courts may not entertain defense motions for acquittal filed more than seven days after the jury's discharge, it speaks not at all to the court's inherent power to decline to enter a judgment of conviction *sua sponte* when the jury's verdict is not supported by legally sufficient evidence.

¹³The majority contends that if we accept that district courts have the discretion to refuse to consider untimely motions for acquittal, then we must also accept that district courts have the discretion to convict defendants whom they know to be innocent. *Ante*, at 431. The imaginative suggestion that some district judges might choose to convict those they believe to be innocent surely does not justify the conclusion that other judges should be required to do so.

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language in Rule 29 that purports to constrain the authority exercised in this case, I would reject the majority's interpretation of the Rule and adhere to the commonsense understanding revealed by the Court's holding in *Sisson*.

Accordingly, I respectfully dissent.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

CULLEN, ACTING WARDEN *v.* PINHOLSTER**CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT**

No. 09–1088. Argued November 9, 2010—Decided April 4, 2011

A California jury convicted respondent Pinholster on two counts of first-degree murder. At the penalty phase before the same jury, the prosecution produced eight witnesses, who testified about Pinholster’s history of threatening and violent behavior. Pinholster’s trial counsel, who unsuccessfully sought to exclude the aggravating evidence on the ground that the prosecution had not given Pinholster proper notice under California law, called only Pinholster’s mother. Counsel did not call a psychiatrist, though they had consulted with Dr. Stalberg, who had diagnosed Pinholster with antisocial personality disorder. The jury recommended the death penalty, and Pinholster was sentenced to death. Pinholster twice sought habeas relief in the California Supreme Court, alleging, *inter alia*, that his trial counsel had failed to adequately investigate and present mitigating evidence during the penalty phase. He introduced additional evidence to support his claim: school, medical, and legal records; and declarations from family members, one of his trial attorneys, and Dr. Woods, a psychiatrist who diagnosed him with bipolar mood disorder and seizure disorders, and who criticized Dr. Stalberg’s report. Each time, the State Supreme Court unanimously and summarily denied the claim on the merits. Subsequently, a Federal District Court held an evidentiary hearing and granted Pinholster federal habeas relief under 28 U. S. C. §2254. Affirming, the en banc Ninth Circuit considered the new evidence adduced in the District Court hearing and held that the State Supreme Court’s decision “involved an unreasonable application of . . . clearly established Federal law,” §2254(d)(1).

Held:

1. Review under §2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits. Pp. 8–14.

Syllabus

(a) As amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), §2254 sets several limits on a federal court’s power to grant habeas relief to a state prisoner. As relevant here, a claim that has been “adjudicated on the merits in State court proceedings,” “shall not be granted . . . unless the adjudication” “(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law,” or “(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” §2254(d). This “difficult to meet,” *Harrington v. Richter*, 562 U. S. ___, ___, and “‘highly deferential standard’ . . . demands that state-court decisions be given the benefit of the doubt,” *Woodford v. Visciotti*, 537 U. S. 19, 24. Section 2254(d)(1)’s backward-looking language—“resulted in” and “involved”—requires an examination of the state-court decision at the time it was made. It follows that the record under review is also limited to the record in existence at that same time—*i.e.*, the state-court record. This understanding is compelled by “the broader context of the statute as a whole,” which demonstrates Congress’ intent to channel prisoners’ claims first to state courts. *Robinson v. Shell Oil Co.*, 519 U. S. 337, 341. It is also consistent with this Court’s precedents, which emphasize that §2254(d)(1) review focuses on what a state court knew and did. See, *e.g.*, *Lockyer v. Andrade*, 538 U. S. 63, 71–72. Moreover, it is consistent with *Schriro v. Landrigan*, 550 U. S. 465, 474, which explained that a federal habeas court is “not required to hold an evidentiary hearing” when the state-court record “precludes habeas relief” under §2254(d)’s limitations. The Ninth Circuit wrongly interpreted *Williams v. Taylor*, 529 U. S. 420, and *Holland v. Jackson*, 542 U. S. 649, as supporting the contrary view. Pp. 8–12.

(b) This holding does not render superfluous §2254(e)(2)—which limits the federal habeas courts’ discretion to take new evidence in an evidentiary hearing. At a minimum, §2254(e)(2) still restricts their discretion in claims that were not adjudicated on the merits in state court. Although state prisoners may sometimes submit new evidence in federal court, AEDPA’s statutory scheme is designed to strongly discourage them from doing so. Pp. 13–14.

(c) Remand for a properly limited review is inappropriate here, because the Ninth Circuit ruled, in the alternative, that Pinholster merited habeas relief on the state-court record alone. P. 14.

2. On the record before the state court, Pinholster was not entitled to federal habeas relief. Pp. 14’–31.

(a) To satisfy §2254(d)(1)’s “unreasonable application” prong, he must show that “there was no reasonable basis” for the State Supreme Court’s summary decision. *Richter, supra*, at ___. Pp. 15–16.

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(b) *Strickland v. Washington*, 466 U. S. 668, provides the clearly established federal law here. To overcome the strong presumption that counsel has acted competently, *id.*, at 690, a defendant must show that counsel failed to act “reasonabl[y] considering all the circumstances,” *id.*, at 688, and must prove the “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different,” *id.*, at 694. Review here is thus “doubly deferential,” *Knowles v. Mirzayance*, 556 U. S. ____, ____, requiring a “highly deferential” look at counsel’s performance, *Strickland, supra*, at 689, through §2254(d)’s “deferential lens,” *Mirzayance, supra*, at ____, n. 2. Pp. 16–18.

(c) Pinholster has not shown that the State Supreme Court’s decision that he could not demonstrate deficient performance by his trial counsel necessarily involved an unreasonable application of federal law. Pp. 18–26.

(1) The state-court record supports the idea that his counsel acted strategically to get the prosecution’s aggravation witnesses excluded for lack of notice, and if that failed, to put on his mother as a mitigation witness. Billing records show that they spent time investigating mitigating evidence. The record also shows that they had an unsympathetic client who had boasted about his criminal history during the guilt phase, leaving them with limited mitigation strategies. In addition, when Dr. Stalberg concluded that Pinholster had no significant mental disorder or defect, he was aware of Pinholster’s medical and social history. Given these impediments, it would have been a reasonable penalty-phase strategy to focus on evoking sympathy for Pinholster’s mother. Pinholster has responded with only a handful of *post-hoc* nondenials by one of his lawyers. Pp. 18–23.

(2) The Ninth Circuit misapplied *Strickland* when it drew from this Court’s recent cases a “constitutional duty to investigate” and a principle that it was *prima facie* ineffective for counsel to abandon an investigation based on rudimentary knowledge of Pinholster’s background. Beyond the general requirement of reasonableness, “specific guidelines are not appropriate” under *Strickland*. 466 U. S., at 688. Nor did the Ninth Circuit properly apply the strong presumption of competence mandated by *Strickland*. Pp. 23–26.

(d) Even if his trial counsel had performed deficiently, Pinholster also has failed to show that the State Supreme Court must have unreasonably concluded that he was not prejudiced. Pp. 26–31.

(1) To determine “whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that” death was not warranted, *Strickland, supra*, at 695, the aggravating evidence is reweighed “against the totality of available mitigating evidence,” *Wiggins v. Smith*, 539 U. S. 510, 534. Here, the State pre-

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sented extensive aggravating evidence at both the guilt and penalty phases. The mitigating evidence consisted primarily of the penalty-phase testimony of Pinholster’s mother and guilt-phase testimony given by his brother. After considering the evidence, the jury returned a sentence of death, which the state trial court found supported overwhelmingly by the weight of the evidence. Pp. 26–29.

(2) There is no reasonable probability that the additional evidence presented at Pinholster’s state proceedings would have changed the verdict. The “new” evidence largely duplicated the mitigation evidence of his mother and brother at trial. To the extent that there were new factual allegations or evidence, much of it is of questionable mitigating value. Dr. Woods’ testimony would have opened the door to rebuttal by a state expert; and new evidence relating to Pinholster’s substance abuse, mental illness, and criminal problems could lead a jury to conclude that he was beyond rehabilitation. The remaining new material in the state habeas record is sparse. Given what little additional mitigating evidence Pinholster presented in state habeas, the Court cannot say that the State Supreme Court’s determination was unreasonable. Pp. 29–30.

(3) Because this Court did not apply AEDPA deference to the question of prejudice in *Williams v. Taylor*, 529 U. S. 362, and *Rompilla v. Beard*, 545 U. S. 374, those cases lack the important “doubly deferential” standard of *Strickland* and AEDPA, and thus offer no guidance with respect to whether a state court has unreasonably determined that prejudice is lacking. Pp. 30–31.

590 F. 3d 651, reversed.

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA and KENNEDY, JJ., joined in full; in which ALITO, J., joined as to all but Part II; in which BREYER, J., joined as to Parts I and II; and in which GINSBURG and KAGAN, JJ., joined as to Part II. ALITO, J., filed an opinion concurring in part and concurring in the judgment. BREYER, J., filed an opinion concurring in part and dissenting in part. SOTOMAYOR, J., filed a dissenting opinion, in which GINSBURG and KAGAN, JJ., joined as to Part II.

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NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 09–1088

VINCENT CULLEN, ACTING WARDEN, PETITIONER
v. SCOTT LYNN PINHOLSTER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

[April 4, 2011]

JUSTICE THOMAS delivered the opinion of the Court.*

Scott Lynn Pinholster and two accomplices broke into a house in the middle of the night and brutally beat and stabbed to death two men who happened to interrupt the burglary. A jury convicted Pinholster of first-degree murder, and he was sentenced to death.

After the California Supreme Court twice unanimously denied Pinholster habeas relief, a Federal District Court held an evidentiary hearing and granted Pinholster habeas relief under 28 U. S. C. §2254. The District Court concluded that Pinholster’s trial counsel had been constitutionally ineffective at the penalty phase of trial. Sitting en banc, the Court of Appeals for the Ninth Circuit affirmed. *Pinholster v. Ayers*, 590 F. 3d 651 (2009). Considering the new evidence adduced in the District Court hearing, the Court of Appeals held that the California Supreme Court’s decision “was contrary to, or involved an unreasonable application of, clearly established Federal law.” §2254(d)(1).

We granted certiorari and now reverse.

*JUSTICE GINSBURG and JUSTICE KAGAN join only Part II.

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I

A

On the evening of January 8, 1982, Pinholster solicited Art Corona and Paul David Brown to help him rob Michael Kumar, a local drug dealer. On the way, they stopped at Lisa Tapar's house, where Pinholster put his buck knife through her front door and scratched a swastika into her car after she refused to talk to him. The three men, who were all armed with buck knives, found no one at Kumar's house, broke in, and began ransacking the home. They came across only a small amount of marijuana before Kumar's friends, Thomas Johnson and Robert Beckett, arrived and shouted that they were calling the police.

Pinholster and his accomplices tried to escape through the rear door, but Johnson blocked their path. Pinholster backed Johnson onto the patio, demanding drugs and money and repeatedly striking him in the chest. Johnson dropped his wallet on the ground and stopped resisting. Beckett then came around the corner, and Pinholster attacked him, too, stabbing him repeatedly in the chest. Pinholster forced Beckett to the ground, took both men's wallets, and began kicking Beckett in the head. Meanwhile, Brown stabbed Johnson in the chest, "bury[ing] his knife to the hilt." 35 Reporter's Tr. 4947 (hereinafter Tr.). Johnson and Beckett died of their wounds.

Corona drove the three men to Pinholster's apartment. While in the car, Pinholster and Brown exulted, "We got 'em, man, we got 'em good." *Ibid.* At the apartment, Pinholster washed his knife, and the three split the proceeds of the robbery: \$23 and one quarter-ounce of marijuana. Although Pinholster instructed Corona to "lay low," Corona turned himself in to the police two weeks later. *Id.*, at 4955. Pinholster was arrested shortly thereafter and threatened to kill Corona if he did not keep quiet about the burglary and murders. Corona later became the

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State's primary witness. The prosecution brought numerous charges against Pinholster, including two counts of first-degree murder.

B

The California trial court appointed Harry Brainard and Wilbur Dettmar to defend Pinholster on charges of first-degree murder, robbery, and burglary. Before their appointment, Pinholster had rejected other attorneys and insisted on representing himself. During that time, the State had mailed Pinholster a letter in jail informing him that the prosecution planned to offer aggravating evidence during the penalty phase of trial to support a sentence of death.

The guilt phase of the trial began on February 28, 1984. Pinholster testified on his own behalf and presented an alibi defense. He claimed that he had broken into Kumar's house alone at around 8 p.m. on January 8, 1982, and had stolen marijuana but denied killing anyone. Pinholster asserted that later that night around 1 a.m., while he was elsewhere, Corona went to Kumar's house to steal more drugs and did not return for three hours. Pinholster told the jury that he was a "professional robber," not a murderer. 43 *id.*, at 6204. He boasted of committing hundreds of robberies over the previous six years but insisted that he always used a gun, never a knife. The jury convicted Pinholster on both counts of first-degree murder.

Before the penalty phase, Brainard and Dettmar moved to exclude any aggravating evidence on the ground that the prosecution had failed to provide notice of the evidence to be introduced, as required by Cal. Penal Code Ann. §190.3 (West 2008). At a hearing on April 24, Dettmar argued that, in reliance on the lack of notice, he was "not presently prepared to offer anything by way of mitigation." 52 Tr. 7250. He acknowledged, however, that the prosecu-

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tor “possibly ha[d] met the [notice] requirement.” *Ibid.* The trial court asked whether a continuance might be helpful, but Dettmar declined, explaining that he could not think of a mitigation witness other than Pinholster’s mother and that additional time would not “make a great deal of difference.” *Id.*, at 7257–7258. Three days later, after hearing testimony, the court found that Pinholster had received notice while representing himself and denied the motion to exclude.

The penalty phase was held before the same jury that had convicted Pinholster. The prosecution produced eight witnesses, who testified about Pinholster’s history of threatening and violent behavior, including resisting arrest and assaulting police officers, involvement with juvenile gangs, and a substantial prison disciplinary record. Defense counsel called only Pinholster’s mother, Burnice Brashear. She gave an account of Pinholster’s troubled childhood and adolescent years, discussed Pinholster’s siblings, and described Pinholster as “a perfect gentleman at home.” *Id.*, at 7405. Defense counsel did not call a psychiatrist, though they had consulted Dr. John Stalberg at least six weeks earlier. Dr. Stalberg noted Pinholster’s “psychopathic personality traits,” diagnosed him with antisocial personality disorder, and concluded that he “was not under the influence of extreme mental or emotional disturbance” at the time of the murders. App. 131.

After 2½ days of deliberation, the jury unanimously voted for death on each of the two murder counts. On mandatory appeal, the California Supreme Court affirmed the judgment. *People v. Pinholster*, 1 Cal. 4th 865, 824 P. 2d 571 (1992).

C

In August 1993, Pinholster filed his first state habeas petition. Represented by new counsel, Pinholster alleged,

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inter alia, ineffective assistance of counsel at the penalty phase of his trial. He alleged that Brainard and Dettmar had failed to adequately investigate and present mitigating evidence, including evidence of mental disorders. Pinholster supported this claim with school, medical, and legal records, as well as declarations from family members, Brainard, and Dr. George Woods, a psychiatrist who diagnosed Pinholster with bipolar mood disorder and seizure disorders. Dr. Woods criticized Dr. Stalberg's report as incompetent, unreliable, and inaccurate. The California Supreme Court unanimously and summarily¹ denied Pinholster's penalty-phase ineffective-assistance claim "on the substantive ground that it is without merit." App. to Pet. for Cert. 302.

Pinholster filed a federal habeas petition in April 1997. He reiterated his previous allegations about penalty-phase ineffective assistance and also added new allegations that his trial counsel had failed to furnish Dr. Stalberg with adequate background materials. In support of the new allegations, Dr. Stalberg provided a declaration stating that in 1984, Pinholster's trial counsel had provided him with only some police reports and a 1978 probation report. Dr. Stalberg explained that, had he known about the material that had since been gathered by Pinholster's habeas counsel, he would have conducted "further inquiry" before concluding that Pinholster suffered only from a personality disorder. App. to Brief in Opposition 219. He noted that Pinholster's school records showed evidence of "some degree of brain damage." *Ibid.* Dr. Stalberg did not, however, retract his earlier diagnosis. The parties stipulated that this declaration had never been submitted to the California Supreme Court, and the federal petition

¹Although the California Supreme Court initially issued an order asking the State to respond, it ultimately withdrew that order as "improvidently issued." App. to Pet. for Cert. 302.

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was held in abeyance to allow Pinholster to go back to state court.

In August 1997, Pinholster filed his second state habeas petition, this time including Dr. Stalberg's declaration and requesting judicial notice of the documents previously submitted in support of his first state habeas petition. His allegations of penalty-phase ineffective assistance of counsel mirrored those in his federal habeas petition. The California Supreme Court again unanimously and summarily denied the petition "on the substantive ground that it is without merit."² App. to Pet. for Cert. 300.

Having presented Dr. Stalberg's declaration to the state court, Pinholster returned to the District Court. In November 1997, he filed an amended petition for a writ of habeas corpus. His allegations of penalty-phase ineffective assistance of counsel were identical to those in his second state habeas petition. Both parties moved for summary judgment and Pinholster also moved, in the alternative, for an evidentiary hearing.

The District Court concluded that the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214, did not apply and granted an evidentiary hearing. Before the hearing, the State deposed Dr. Stalberg, who stated that none of the new material he reviewed altered his original diagnosis. Dr. Stalberg disagreed with Dr. Woods' conclusion that Pinholster suffers from bipolar disorder. Pinholster did not call Dr. Stalberg to testify at the hearing. He presented two new medical experts: Dr. Sophia Vinogradov, a psychiatrist who diagnosed Pinholster with organic personality syndrome and ruled out antisocial personality disorder, and Dr. Donald Olson, a

²A majority also "[s]eparately and independently" denied several claims, including penalty-phase ineffective assistance of counsel, as untimely, successive, and barred by res judicata. *Id.*, at 300. The State has not argued that these procedural rulings constitute adequate and independent state grounds that bar federal habeas review.

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pediatric neurologist who suggested that Pinholster suffers from partial epilepsy and brain injury. The State called Dr. F. David Rudnick, a psychiatrist who, like Dr. Stalberg, diagnosed Pinholster with antisocial personality disorder and rejected any diagnosis of bipolar disorder.

D

The District Court granted habeas relief. Applying pre-AEDPA standards, the court granted the habeas petition “for inadequacy of counsel by failure to investigate and present mitigation evidence at the penalty hearing.” App. to Pet. for Cert. 262. After *Woodford v. Garceau*, 538 U. S. 202 (2003), clarified that AEDPA applies to cases like Pinholster’s, the court amended its order but did not alter its conclusion. Over a dissent, a panel of the Court of Appeals for the Ninth Circuit reversed. *Pinholster v. Ayers*, 525 F. 3d 742 (2008).

On rehearing en banc, the Court of Appeals vacated the panel opinion and affirmed the District Court’s grant of habeas relief. The en banc court held that the District Court’s evidentiary hearing was not barred by 28 U. S. C. §2254(e)(2). The court then determined that new evidence from the hearing could be considered in assessing whether the California Supreme Court’s decision “was contrary to, or involved an unreasonable application of, clearly established Federal law” under §2254(d)(1). See 590 F. 3d, at 666 (“Congress did not intend to restrict the inquiry under §2254(d)(1) only to the evidence introduced in the state habeas court”). Taking the District Court evidence into account, the en banc court determined that the California Supreme Court unreasonably applied *Strickland v. Washington*, 466 U. S. 668 (1984), in denying Pinholster’s claim of penalty-phase ineffective assistance of counsel.

Three judges dissented and rejected the majority’s conclusion that the District Court hearing was not barred by §2254(e)(2). 590 F. 3d, at 689 (opinion of Kozinski,

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C. J.) (characterizing Pinholster’s efforts as “habeas-by-sandbagging”). Limiting its review to the state-court record, the dissent concluded that the California Supreme Court did not unreasonably apply *Strickland*. 590 F. 3d, at 691–723.

We granted certiorari to resolve two questions. 560 U. S. ___ (2010). First, whether review under §2254(d)(1) permits consideration of evidence introduced in an evidentiary hearing before the federal habeas court. Second, whether the Court of Appeals properly granted Pinholster habeas relief on his claim of penalty-phase ineffective assistance of counsel.

II

We first consider the scope of the record for a §2254(d)(1) inquiry. The State argues that review is limited to the record that was before the state court that adjudicated the claim on the merits. Pinholster contends that evidence presented to the federal habeas court may also be considered. We agree with the State.

A

As amended by AEDPA, 28 U. S. C. §2254 sets several limits on the power of a federal court to grant an application for a writ of habeas corpus on behalf of a state prisoner. Section 2254(a) permits a federal court to entertain only those applications alleging that a person is in state custody “in violation of the Constitution or laws or treaties of the United States.” Sections 2254(b) and (c) provide that a federal court may not grant such applications unless, with certain exceptions, the applicant has exhausted state remedies.

If an application includes a claim that has been “adjudicated on the merits in State court proceedings,” §2254(d), an additional restriction applies. Under §2254(d), that application “shall not be granted with respect to [such a]

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claim . . . unless the adjudication of the claim”:

“(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

“(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.”

This is a “difficult to meet,” *Harrington v. Richter*, 562 U. S. ___, ___ (2011) (slip op., at 12), and “highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt,” *Woodford v. Visciotti*, 537 U. S. 19, 24 (2002) (*per curiam*) (citation and internal quotation marks omitted). The petitioner carries the burden of proof. *Id.*, at 25.

We now hold that review under §2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits. Section 2254(d)(1) refers, in the past tense, to a state-court adjudication that “resulted in” a decision that was contrary to, or “involved” an unreasonable application of, established law. This backward-looking language requires an examination of the state-court decision at the time it was made. It follows that the record under review is limited to the record in existence at that same time—*i.e.*, the record before the state court.

This understanding of the text is compelled by “the broader context of the statute as a whole,” which demonstrates Congress’ intent to channel prisoners’ claims first to the state courts. *Robinson v. Shell Oil Co.*, 519 U. S. 337, 341 (1997). “The federal habeas scheme leaves primary responsibility with the state courts . . .” *Visciotti, supra*, at 27. Section 2254(b) requires that prisoners must ordinarily exhaust state remedies before filing for federal habeas relief. It would be contrary to that purpose to allow a petitioner to overcome an adverse state-court

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decision with new evidence introduced in a federal habeas court and reviewed by that court in the first instance effectively *de novo*.

Limiting §2254(d)(1) review to the state-court record is consistent with our precedents interpreting that statutory provision. Our cases emphasize that review under §2254(d)(1) focuses on what a state court knew and did. State-court decisions are measured against this Court's precedents as of "the time the state court renders its decision." *Lockyer v. Andrade*, 538 U. S. 63, 71–72 (2003). To determine whether a particular decision is "contrary to" then-established law, a federal court must consider whether the decision "applies a rule that contradicts [such] law" and how the decision "confronts [the] set of facts" that were before the state court. *Williams v. Taylor*, 529 U. S. 362, 405, 406 (2000) (*Terry Williams*). If the state-court decision "identifies the correct governing legal principle" in existence at the time, a federal court must assess whether the decision "unreasonably applies that principle to the facts of the prisoner's case." *Id.*, at 413. It would be strange to ask federal courts to analyze whether a state court's adjudication resulted in a decision that unreasonably applied federal law to facts not before the state court.³

³JUSTICE SOTOMAYOR argues that there is nothing strange about allowing consideration of new evidence under §2254(d)(1) because, in her view, it would not be "so different" from some other tasks that courts undertake. *Post*, at 13 (dissenting opinion). What makes the consideration of new evidence strange is not how "different" the task would be, but rather the notion that a state court can be deemed to have unreasonably applied federal law to evidence it did not even know existed. We cannot comprehend how exactly a state court would have any control over its application of law to matters beyond its knowledge. Adopting JUSTICE SOTOMAYOR's approach would not take seriously AEDPA's requirement that federal courts defer to state-court decisions and would effectively treat the statute as no more than a "'mood' that the Federal Judiciary must respect," *Terry Williams*, 529 U. S., at 386

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Our recent decision in *Schriro v. Landrigan*, 550 U. S. 465 (2007), is consistent as well with our holding here. We explained that “[b]ecause the deferential standards prescribed by §2254 control whether to grant habeas relief, a federal court must take into account those standards in deciding whether an evidentiary hearing is appropriate.” *Id.*, at 474. In practical effect, we went on to note, this means that when the state-court record “precludes habeas relief” under the limitations of §2254(d), a district court is “not required to hold an evidentiary hearing.” *Id.*, at 474 (citing with approval the Ninth Circuit’s recognition that “an evidentiary hearing is not required on issues that can be resolved by reference to the state court record” (internal quotation marks omitted)).

The Court of Appeals wrongly interpreted *Williams v. Taylor*, 529 U. S. 420 (2000) (*Michael Williams*), as supporting the contrary view. The question there was whether the lower court had correctly determined that §2254(e)(2) barred the petitioner’s request for a federal evidentiary hearing.⁴ *Michael Williams* did not concern whether evidence introduced in such a hearing could be considered under §2254(d)(1). In fact, only one claim at issue in that case was even subject to §2254(d); the rest had not been adjudicated on the merits in state-court proceedings. See *id.*, at 429 (“Petitioner did not develop, or raise, his claims . . . until he filed his federal habeas petition”).⁵

(opinion of Stevens, J.).

⁴If a prisoner has “failed to develop the factual basis of a claim in State court proceedings,” §2254(e)(2) bars a federal court from holding an evidentiary hearing, unless the applicant meets certain statutory requirements.

⁵JUSTICE SOTOMAYOR’s suggestion that *Michael Williams* “rejected” the conclusion here, see *post*, at 15, is thus quite puzzling. In the passage that she quotes, see *ibid.*, the Court merely explains that §2254(e)(2) should be interpreted in a way that does not preclude a state prisoner, who was diligent in state habeas court and who can

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If anything, the decision in *Michael Williams* supports our holding. The lower court in that case had determined that the one claim subject to §2254(d)(1) did not satisfy that statutory requirement. In light of that ruling, this Court concluded that it was “unnecessary to reach the question whether §2254(e)(2) would permit a [federal] hearing on th[at] claim.” *Id.*, at 444. That conclusion is fully consistent with our holding that evidence later introduced in federal court is irrelevant to §2254(d)(1) review.

The Court of Appeals’ reliance on *Holland v. Jackson*, 542 U. S. 649 (2004) (*per curiam*), was also mistaken. In *Holland*, we initially stated that “whether a state court’s decision was unreasonable [under §2254(d)(1)] must be assessed in light of the record the court had before it.” *Id.*, at 652. We then went on to *assume* for the sake of argument what some Courts of Appeals had held—that §2254(d)(1), despite its mandatory language, simply does not apply when a federal habeas court has admitted new evidence that supports a claim previously adjudicated in state court.⁶ *Id.*, at 653. There was no reason to decide that question because regardless, the hearing should have been barred by §2254(e)(2). Today, we reject that assumption and hold that evidence introduced in federal court has no bearing on §2254(d)(1) review. If a claim has been adjudicated on the merits by a state court, a federal habeas petitioner must overcome the limitation of §2254(d)(1) on the record that was before that state court.⁷

satisfy §2254(d), from receiving an evidentiary hearing.

⁶In *Bradshaw v. Richey*, 546 U. S. 74 (2005) (*per curiam*), on which the Court of Appeals also relied, we made the same assumption. *Id.*, at 79–80 (discussing the State’s “*Holland* argument”).

⁷Pinholster and JUSTICE SOTOMAYOR place great weight on the fact that §2254(d)(2) includes the language “in light of the evidence presented in the State court proceeding,” whereas §2254(d)(1) does not. See *post*, at 6–7. The additional clarity of §2254(d)(2) on this point, however, does not detract from our view that §2254(d)(1) also is plainly limited to the state-court record. The omission of clarifying language

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B

Pinholster’s contention that our holding renders §2254(e)(2) superfluous is incorrect. Section 2254(e)(2) imposes a limitation on the discretion of federal habeas courts to take new evidence in an evidentiary hearing. See *Landrigan, supra*, at 473 (noting that district courts, under AEDPA, generally retain the discretion to grant an evidentiary hearing). Like §2254(d)(1), it carries out “AEDPA’s goal of promoting comity, finality, and federalism by giving state courts the first opportunity to review [a] claim, and to correct any constitutional violation in the first instance.” *Jimenez v. Quarterman*, 555 U. S. 113, ____ (2009) (slip op., at 8) (internal quotation marks omitted).⁸

Section 2254(e)(2) continues to have force where §2254(d)(1) does not bar federal habeas relief. For example, not all federal habeas claims by state prisoners fall within the scope of §2254(d), which applies only to claims “adjudicated on the merits in State court proceedings.” At a minimum, therefore, §2254(e)(2) still restricts the discretion of federal habeas courts to consider new evidence when deciding claims that were not adjudicated on the merits in state court. See, e.g., *Michael Williams*, 529 U. S., at 427–429.⁹

Although state prisoners may sometimes submit new

from §2254(d)(1) just as likely reflects Congress’ belief that such language was unnecessary as it does anything else.

⁸JUSTICE SOTOMAYOR’s argument that §2254(d)(1) must be read in a way that “accommodates” §2254(e)(2), see *post*, at 9, rests on a fundamental misunderstanding of §2254(e)(2). The focus of that section is not on “preserving the opportunity” for hearings, *post*, at 9, but rather on *limiting* the discretion of federal district courts in holding hearings. We see no need in this case to address the proper application of §2254(e)(2). See n. 20, *infra*. But see *post*, at 12 (suggesting that we have given §2254(e)(2) “an unnaturally cramped reading”).

⁹In all events, of course, the requirements of §§2254(a) through (c) remain significant limitations on the power of a federal court to grant habeas relief.

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evidence in federal court, AEDPA’s statutory scheme is designed to strongly discourage them from doing so. Provisions like §§2254(d)(1) and (e)(2) ensure that “[f]ederal courts sitting in habeas are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state proceedings.” *Id.*, at 437; see also *Richter*, 562 U. S., at ___ (slip op., at 13) (“Section 2254(d) is part of the basic structure of federal habeas jurisdiction, designed to confirm that state courts are the principal forum for asserting constitutional challenges to state convictions”); *Wainwright v. Sykes*, 433 U. S. 72, 90 (1977) (“[T]he state trial on the merits [should be] the ‘main event,’ so to speak, rather than a ‘tryout on the road’ for what will later be the determinative federal habeas hearing”).¹⁰

C

Accordingly, we conclude that the Court of Appeals erred in considering the District Court evidence in its review under §2254(d)(1). Although we might ordinarily remand for a properly limited review, the Court of Appeals also ruled, in the alternative, that Pinholster merited habeas relief even on the state-court record alone. 590 F. 3d, at 669. Remand is therefore inappropriate, and we turn next to a review of the state-court record.

III

The Court of Appeals’ alternative holding was also erroneous. Pinholster has failed to demonstrate that the California Supreme Court unreasonably applied clearly established federal law to his penalty-phase ineffective-

¹⁰Though we do not decide where to draw the line between new claims and claims adjudicated on the merits, see n. 11, *infra*, JUSTICE SOTOMAYOR’s hypothetical involving new evidence of withheld exculpatory witness statements, see *post*, at 9–10, may well present a new claim.

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assistance claim on the state-court record. Section 2254(d) prohibits habeas relief.

A

Section 2254(d) applies to Pinholster’s claim because that claim was adjudicated on the merits in state-court proceedings. No party disputes that Pinholster’s federal petition alleges an ineffective-assistance-of-counsel claim that had been included in both of Pinholster’s state habeas petitions. The California Supreme Court denied each of those petitions “on the substantive ground that it is without merit.”¹¹

Section 2254(d) applies even where there has been a summary denial. See *Richter*, 562 U. S., at ____ (slip op., at 8). In these circumstances, Pinholster can satisfy the “unreasonable application” prong of §2254(d)(1) only by showing that “there was no reasonable basis” for the California Supreme Court’s decision. *Id.*, at ____ (slip op., at 8). “[A] habeas court must determine what arguments or theories . . . could have supporte[d] the state court’s decision; and then it must ask whether it is possible fair-minded jurists could disagree that those arguments or

¹¹The State does not contest that the *alleged* claim was adjudicated on the merits by the California Supreme Court, but it asserts that some of the evidence adduced in the federal evidentiary hearing fundamentally changed Pinholster’s claim so as to render it effectively unadjudicated. See Brief for Petitioner 28–31; Reply Brief for Petitioner 4–5; Tr. of Oral Arg. 18. Pinholster disagrees and argues that the evidence adduced in the evidentiary hearing simply supports his alleged claim. Brief for Respondent 33–37.

We need not resolve this dispute because, even accepting Pinholster’s position, he is not entitled to federal habeas relief. Pinholster has failed to show that the California Supreme Court unreasonably applied clearly established federal law on the record before that court, *infra*, at 18–23, 26–30, which brings our analysis to an end. Even if the evidence adduced in the District Court additionally supports his claim, as Pinholster contends, we are precluded from considering it. See n. 20, *infra*.

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theories are inconsistent with the holding in a prior decision of this Court.” *Id.*, at ___ (slip op., at 12). After a thorough review of the state-court record,¹² we conclude that Pinholster has failed to meet that high threshold.

B

There is no dispute that the clearly established federal law here is *Strickland v. Washington*. In *Strickland*, this Court made clear that “the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation . . . [but] simply to

¹²The parties agree that the state-court record includes both the “allegations of [the] habeas corpus petition . . . and . . . ‘any matter of record pertaining to the case.’” *In re Hochberg*, 2 Cal. 3d 870, 874, n. 2, 471 P. 2d 1, 3–4, n. 2 (1970) (quoting Cal. Rule of Court 60), rejected on another ground by *In re Fields*, 51 Cal. 3d 1063, 1070, n. 3, 800 P. 2d 862, 866, n. 3 (1990); see Reply Brief for Petitioner 16–17; Tr. of Oral Arg. 45. Under California law, the California Supreme Court’s summary denial of a habeas petition on the merits reflects that court’s determination that “the claims made in th[e] petition do not state a prima facie case entitling the petitioner to relief.” *In re Clark*, 5 Cal. 4th 750, 770, 855 P. 2d 729, 741–742 (1993). It appears that the court generally assumes the allegations in the petition to be true, but does not accept wholly conclusory allegations, *People v. Duvall*, 9 Cal. 4th 464, 474, 886 P. 2d 1252, 1258 (1995), and will also “review the record of the trial . . . to assess the merits of the petitioner’s claims,” *Clark, supra*, at 770, 855 P. 2d, at 742.

The specific contents of the state-court record depend on which of the two state habeas proceedings is at issue. One *amicus curiae* suggests that both are at issue—that is, Pinholster must prove that *both* California Supreme Court proceedings involved an unreasonable application of law under §2254(d)(1). See Brief for Criminal Justice Legal Foundation 26. By contrast, the most favorable approach for Pinholster would be review of only the second state habeas proceeding, the record of which includes all of the evidence that Pinholster ever submitted in state habeas. We have not previously ruled on how to proceed in these circumstances, and we need not do so here. Even taking the approach most favorable to Pinholster, and reviewing only whether the California Supreme Court was objectively unreasonable in the second state habeas proceeding, we find that Pinholster has failed to satisfy §2254(d)(1).

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ensure that criminal defendants receive a fair trial.” 466 U. S., at 689. Thus, “[t]he benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct *so undermined* the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” *Id.*, at 686 (emphasis added). The Court acknowledged that “[t]here are countless ways to provide effective assistance in any given case,” and that “[e]ven the best criminal defense attorneys would not defend a particular client in the same way.” *Id.*, at 689.

Recognizing the “tempt[ation] for a defendant to second-guess counsel’s assistance after conviction or adverse sentence,” *ibid.*, the Court established that counsel should be “strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment,” *id.*, at 690. To overcome that presumption, a defendant must show that counsel failed to act “reasonabl[y] considering all the circumstances.” *Id.*, at 688. The Court cautioned that “[t]he availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges.” *Id.*, at 690.

The Court also required that defendants prove prejudice. *Id.*, at 691–692. “The defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.*, at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Ibid.* That requires a “substantial,” not just “conceivable,” likelihood of a different result. *Richter*, 562 U. S., at ____ (slip op., at 22).

Our review of the California Supreme Court’s decision is thus “doubly deferential.” *Knowles v. Mirzayance*, 556 U. S. ____, ____ (2009) (slip op., at 11) (citing *Yarborough v. Gentry*, 540 U. S. 1, 5–6 (2003) (*per curiam*)). We take a

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“highly deferential” look at counsel’s performance, *Strickland, supra*, at 689, through the “deferential lens of §2254(d),” *Mirzayance, supra*, at ___, n. 2 (slip op., at 9, n. 2). Pinholster must demonstrate that it was necessarily unreasonable for the California Supreme Court to conclude: (1) that he had not overcome the strong presumption of competence; and (2) that he had failed to undermine confidence in the jury’s sentence of death.

C

1

Pinholster has not shown that the California Supreme Court’s decision that he could not demonstrate deficient performance by his trial counsel necessarily involved an unreasonable application of federal law. In arguing to the state court that his counsel performed deficiently, Pinholster contended that they should have pursued and presented additional evidence about: his family members and their criminal, mental, and substance abuse problems; his schooling; and his medical and mental health history, including his epileptic disorder. To support his allegation that his trial counsel had “no reasonable tactical basis” for the approach they took, Pinholster relied on statements his counsel made at trial. App. to Brief in Opposition 143. When arguing the motion to exclude the State’s aggravating evidence at the penalty phase for failure to comply with Cal. Penal Code Ann. §190.3, Dettmar, one of Pinholster’s counsel, contended that because the State did not provide notice, he “[was] not presently prepared to offer anything by way of mitigation,” 52 Tr. 7250. In response to the trial court’s inquiry as to whether a continuance might be helpful, Dettmar noted that the only mitigation witness he could think of was Pinholster’s mother. Additional time, Dettmar stated, would not “make a great deal of difference.” *Id.*, at 7257–7258.

We begin with the premise that “under the circum-

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stances, the challenged action[s] might be considered sound trial strategy.” *Strickland, supra*, at 689 (internal quotation marks omitted). The Court of Appeals dissent described one possible strategy:

“[Pinholster’s attorneys] were fully aware that they would have to deal with mitigation sometime during the course of the trial, did spend considerable time and effort investigating avenues for mitigation[,] and made a reasoned professional judgment that the best way to serve their client would be to rely on the fact that they never got [the required §190.3] notice and hope the judge would bar the state from putting on their aggravation witnesses.” 590 F. 3d, at 701–702 (opinion of Kozinski, C. J.).

Further, if their motion was denied, counsel were prepared to present only Pinholster’s mother in the penalty phase to create sympathy not for Pinholster, but for his mother. After all, the “family sympathy” mitigation defense was known to the defense bar in California at the time and had been used by other attorneys. *Id.*, at 707. Rather than displaying neglect, we presume that Dettmar’s arguments were part of this trial strategy. See *Gentry, supra*, at 8 (“[T]here is a strong presumption that [counsel took certain actions] for tactical reasons rather than through sheer neglect” (citing *Strickland, supra*, at 690)).

The state-court record supports the idea that Pinholster’s counsel acted strategically to get the prosecution’s aggravation witnesses excluded for lack of notice, and if that failed, to put on Pinholster’s mother. Other statements made during the argument regarding the motion to exclude suggest that defense counsel were trying to take advantage of a legal technicality and were not truly surprised. Brainard and Dettmar acknowledged that the prosecutor had invited them on numerous occasions to

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review Pinholster’s state prison file but argued that such an invitation did not meet with the “strict demands” of §190.3. 52 Tr. 7260. Dettmar admitted that the prosecutor, “being as thorough as she is, possibly ha[d] met the requirement.” *Id.*, at 7250. But if so, he wanted her “to make that representation to the court.”¹³ *Ibid.*

Timesheets indicate that Pinholster’s trial counsel investigated mitigating evidence.¹⁴ Long before the guilty verdict, Dettmar talked with Pinholster’s mother and contacted a psychiatrist.¹⁵ On February 26, two months before the penalty phase started, he billed six hours for “[p]reparation argument, death penalty phase.” See Clerk’s Tr. 864. Brainard, who merely assisted Dettmar for the penalty phase, researched epilepsy and also interviewed Pinholster’s mother.¹⁶ We know that Brainard likely spent additional time, not reflected in these entries, preparing Pinholster’s brother, Terry, who provided some mitigation testimony about Pinholster’s background dur-

¹³Counsel’s argument was persuasive enough to cause the trial court to hold a hearing and take testimony before denying the motion to exclude.

¹⁴Both parties agree that these billing records were before the California Supreme Court. See Tr. of Oral Arg. 45, 48–49.

¹⁵See Clerk’s Tr. 798 (entry on Jan. 13 for “phone call to defendant’s mother re medical history”); *id.*, at 864 (entries on Feb. 21 for “Penal Code research on capital punishment”; Feb. 23 for “conference with defendant’s mother re childhood problems”; Feb. 25 for “Research on Pen. C. 190.3”; and Feb. 29 for “photocopying reports for appointed expert,” “Preparation of Declaration and Order for appointment of psychiatrist,” “Preparation order of visitation for investigator,” and “Further research on Pen. C. 190.3”). The time records for Dettmar unfortunately stop with Mar. 14, so we do not know what he did during the critical weeks leading up to the penalty phase on May 1.

¹⁶See *id.*, at 869 (entries on Feb. 23 for “Conf. with Bernice Brasher, Pinholster’s mother”; and Feb. 25 for “Research re; epilepsy and conf. with nurse”); *id.*, at 1160 (entries on Apr. 11 for “Start prep. for penalty phase”; Apr. 25 for “Prep. penalty phase and conf. with Mrs. Brashear”; and Apr. 26 for “Prep. penalty phase”).

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ing the guilt phase. *Infra*, at 28.

The record also shows that Pinholster’s counsel confronted a challenging penalty phase with an unsympathetic client, which limited their feasible mitigation strategies. By the end of the guilt phase, the jury had observed Pinholster “glor[y]” in “his criminal disposition” and “hundreds of robberies.” *Pinholster*, 1 Cal. 4th, at 945, 907, 824 P. 2d, at 611, 584. During his cross-examination, Pinholster laughed or smirked when he told the jury that his “occupation” was “a crook,” when he was asked whether he had threatened a potential witness, and when he described thwarting police efforts to recover a gun he had once used. 44 Tr. 6225. He bragged about being a “professional robber.” 43 *id.*, at 6204. To support his defense, Pinholster claimed that he used only guns—not knives—to commit his crimes. But during cross-examination, Pinholster admitted that he had previously been convicted of using a knife in a kidnaping. Pinholster also said he was a white supremacist and that he frequently carved swastikas into other people’s property as “a sideline to robbery.” 44 *id.*, at 6246.

Trial counsel’s psychiatric expert, Dr. Stalberg, had concluded that Pinholster showed no significant signs or symptoms of mental disorder or defect other than his “psychopathic personality traits.” App. 131. Dr. Stalberg was aware of Pinholster’s hyperactivity as a youngster, hospitalization at age 14 for incorrigibility, alleged epileptic disorder, and history of drug dependency. Nevertheless, Dr. Stalberg told counsel that Pinholster did not appear to suffer from brain damage, was not significantly intoxicated or impaired on the night in question, and did not have an impaired ability to appreciate the criminality of his conduct.

Given these impediments, it would have been a reasonable penalty-phase strategy to focus on evoking sympathy for Pinholster’s mother. In fact, such a family sympathy

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defense is precisely how the State understood defense counsel's strategy. The prosecutor carefully opened her cross-examination of Pinholster's mother with, "I hope you understand I don't enjoy cross-examining a mother of anybody." 52 Tr. 7407. And in her closing argument, the prosecutor attempted to undercut defense counsel's strategy by pointing out, "Even the most heinous person born, even Adolph Hitler[,] probably had a mother who loved him." 53 *id.*, at 7452.

Pinholster's only response to this evidence is a series of declarations from Brainard submitted with Pinholster's first state habeas petition, seven years after the trial. Brainard declares that he has "no recollection" of interviewing any family members (other than Pinholster's mother) regarding penalty-phase testimony, of attempting to secure Pinholster's school or medical records, or of interviewing any former teachers or counselors. Pet. for Writ of Habeas Corpus in No. S004616 (Cal.), Exh. 3. Brainard also declares that Dettmar was primarily responsible for mental health issues in the case, but he has "no recollection" of Dettmar ever having secured Pinholster's medical records. *Id.*, Exh. 2. Dettmar neither confirmed nor denied Brainard's statements, as he had died by the time of the first state habeas petition. 590 F. 3d, at 700 (Kozinski, C. J., dissenting).

In sum, Brainard and Dettmar made statements suggesting that they were not surprised that the State intended to put on aggravating evidence, billing records show that they spent time investigating mitigating evidence, and the record demonstrates that they represented a psychotic client whose performance at trial hardly endeared him to the jury. Pinholster has responded to this evidence with only a handful of *post-hoc* nondenials by one of his lawyers. The California Supreme Court could have reasonably concluded that Pinholster had failed to rebut the presumption of competence mandated by *Strickland*—

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here, that counsel had adequately performed at the penalty phase of trial.

2

The Court of Appeals held that the California Supreme Court had unreasonably applied *Strickland* because Pinholster’s attorneys “w[ere] far more deficient than . . . the attorneys in *Terry Williams, Wiggins* [v. *Smith*, 539 U. S. 510 (2003)], and *Rompilla* [v. *Beard*, 545 U. S. 374 (2005)], where in each case the Supreme Court upheld the petitioner’s ineffective assistance claim.” 590 F. 3d, at 671. The court drew from those cases a “constitutional duty to investigate,” *id.*, at 674, and the principle that “[i]t is prima facie ineffective assistance for counsel to ‘abandon[] their investigation of [the] petitioner’s background after having acquired only rudimentary knowledge of his history from a narrow set of sources,’” *ibid.* (quoting *Wiggins v. Smith*, 539 U. S. 510, 524–525 (2003)). The court explained that it could not “lightly disregard” a failure to introduce evidence of “excruciating life history” or “nightmarish childhood.” 590 F. 3d, at 684 (internal quotation marks omitted).

The Court of Appeals misapplied *Strickland* and overlooked “the constitutionally protected independence of counsel and . . . the wide latitude counsel must have in making tactical decisions.” 466 U. S., at 689. Beyond the general requirement of reasonableness, “specific guidelines are not appropriate.” *Id.*, at 688. “No particular set of detailed rules for counsel’s conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions . . .” *Id.*, at 688–689. *Strickland* itself rejected the notion that the same investigation will be required in every case. *Id.*, at 691 (“[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary” (emphasis added)). It

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is “[r]are” that constitutionally competent representation will require “any one technique or approach.” *Richter*, 562 U. S., at ___ (slip op., at 17). The Court of Appeals erred in attributing strict rules to this Court’s recent case law.¹⁷

Nor did the Court of Appeals properly apply the strong presumption of competence that *Strickland* mandates. The court dismissed the dissent’s application of the presumption as “fabricat[ing] an excuse that the attorneys themselves could not conjure up.” 590 F. 3d, at 673. But *Strickland* specifically commands that a court “must indulge [the] strong presumption” that counsel “made all significant decisions in the exercise of reasonable professional judgment.” 466 U. S., at 689–690. The Court of Appeals was required not simply to “give [the] attorneys the benefit of the doubt,” 590 F. 3d, at 673, but to affirmatively entertain the range of possible “reasons Pinholster’s counsel may have had for proceeding as they did,” *id.*, at 692 (Kozinski, C. J., dissenting). See also *Richter*, *supra*, at ___ (slip op., at 20) (“*Strickland* . . . calls for an inquiry into the objective reasonableness of counsel’s performance, not counsel’s subjective state of mind”).

JUSTICE SOTOMAYOR questions whether it would have been a reasonable professional judgment for Pinholster’s trial counsel to adopt a family-sympathy mitigation defense. *Post*, at 27. She cites no evidence, however, that such an approach would have been inconsistent with the standard of professional competence in capital cases that prevailed in Los Angeles in 1984. Indeed, she does not contest that, at the time, the defense bar in California had been using that strategy. See *supra*, at 19; *post*, at 28, n. 21. JUSTICE SOTOMAYOR relies heavily on *Wiggins*, but

¹⁷The Court of Appeals was not necessarily wrong in looking to other precedents of this Court for guidance, but “the *Strickland* test ‘of necessity requires a case-by-case examination of the evidence.’” *Terry Williams*, 529 U. S. 362, 391 (2000) (quoting *Wright v. West*, 505 U. S. 277, 308 (1992) (KENNEDY, J., concurring in judgment)).

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in that case the defendant's trial counsel specifically acknowledged a standard practice for capital cases in Maryland that was inconsistent with what he had done. 539 U. S., at 524.

At bottom, JUSTICE SOTOMAYOR's view is grounded in little more than her own sense of "prudence," *post*, at 26 (internal quotation marks omitted), and what appears to be her belief that the only reasonable mitigation strategy in capital cases is to "help" the jury "understand" the defendant, *post*, at 35. According to JUSTICE SOTOMAYOR, that Pinholster was an unsympathetic client "compound[ed], rather than excuse[d], counsel's deficiency" in pursuing further evidence "that could explain why Pinholster was the way he was." *Post*, at 30. But it certainly can be reasonable for attorneys to conclude that creating sympathy for the defendant's *family* is a better idea because the defendant himself is simply unsympathetic.

JUSTICE SOTOMAYOR's approach is flatly inconsistent with *Strickland*'s recognition that "[t]here are countless ways to provide effective assistance in any given case." 466 U. S., at 689. There comes a point where a defense attorney will reasonably decide that another strategy is in order, thus "mak[ing] particular investigations unnecessary." *Id.*, at 691; cf. 590 F. 3d, at 692 (Kozinski, C. J., dissenting) ("The current infatuation with 'humanizing' the defendant as the be-all and end-all of mitigation disregards the possibility that this may be the wrong tactic in some cases because experienced lawyers conclude that the jury simply won't buy it"). Those decisions are due "a heavy measure of deference." *Strickland, supra*, at 691. The California Supreme Court could have reasonably concluded that Pinholster's counsel made such a reasoned decision in this case.

We have recently reiterated that "[s]urmounting *Strickland*'s high bar is never an easy task." *Richter, supra*, at ____ (slip op., at 15) (quoting *Padilla v. Kentucky*, 559 U. S.

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____, ____ (2010) (slip op., at 14)). The *Strickland* standard must be applied with “scrupulous care.” *Richter, supra*, at ____ (slip op., at 15). The Court of Appeals did not do so here.

D

Even if his trial counsel had performed deficiently, Pinholster also has failed to show that the California Supreme Court must have unreasonably concluded that Pinholster was not prejudiced. “[T]he question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.” *Strickland, supra*, at 695. We therefore “reweigh the evidence in aggravation against the totality of available mitigating evidence.” *Wiggins, supra*, at 534.

1

We turn first to the aggravating and mitigating evidence that the sentencing jury considered. See *Strickland, supra*, at 695 (“[A] court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury”). Here, the same jury heard both the guilt and penalty phases and was instructed to consider all the evidence presented. Cf. *Visciotti*, 537 U. S., at 25 (noting that the state habeas court had correctly considered mitigating evidence introduced during the guilt phase).

The State presented extensive aggravating evidence. As we have already discussed, the jury watched Pinholster revel in his extensive criminal history. *Supra*, at 21. Then, during the penalty phase, the State presented evidence that Pinholster had threatened to kill the State’s lead witness, assaulted a man with a straight razor, and kidnaped another person with a knife. The State showed that Pinholster had a history of violent outbursts, including striking and threatening a bailiff after a court proceed-

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ing at age 17, breaking his wife’s jaw,¹⁸ resisting arrest by faking seizures, and assaulting and spitting on police officers. The jury also heard about Pinholster’s involvement in juvenile gangs and his substantial disciplinary record in both county and state jails, where he had threatened, assaulted, and thrown urine at guards, and fought with other inmates. While in jail, Pinholster had been segregated for a time due to his propensity for violence and placed on a “special disciplinary diet” reserved only for the most disruptive inmates. 52 Tr. 7305.

The mitigating evidence consisted primarily of the penalty-phase testimony of Pinholster’s mother, Brashear, who gave a detailed account of Pinholster’s troubled childhood and adolescence. Early childhood was quite difficult. The family “didn’t have lots of money.” *Id.*, at 7404. When he was very young, Pinholster suffered two serious head injuries, first at age 2 or 3 when he was run over by a car, and again at age 4 or 5 when he went through the windshield during a car accident. When he was 5, Pinholster’s stepfather moved in and was abusive, or nearly so.

Pinholster always struggled in school. He was disruptive in kindergarten and was failing by first grade. He got in fights and would run out of the classroom. In third grade, Pinholster’s teacher suggested that he was more than just a “disruptive child.” *Id.*, at 7394. Following tests at a clinic, Pinholster was sent to a school for educationally handicapped children where his performance improved.

At age 10, psychiatrists recommended that Pinholster be sent to a mental institution, although he did not go. Pinholster had continued to initiate fights with his brothers and to act like “Robin Hood” around the neighborhood,

¹⁸Pinholster’s wife waived her spousal privilege to testify to this fact. She acknowledged that her testimony would be used to argue that her husband should be executed.

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“[s]tealing from the rich and giving to the poor.” *Id.*, at 7395. Brashear had thought then that “[s]omething was not working right.” *Id.*, at 7396.

By age 10 or 11, Pinholster was living in boy’s homes and juvenile halls. He spent six months when he was 12 in a state mental institution for emotionally handicapped children. By the time he was 18, Pinholster was in county jail, where he was beaten badly. Brashear suspected that the beating caused Pinholster’s epilepsy, for which he has been prescribed medication. After a stint in state prison, Pinholster returned home but acted “unusual” and had trouble readjusting to life. *Id.*, at 7405.

Pinholster’s siblings were “basically very good children,” although they would get into trouble. *Id.*, at 7401. His brother, Terry, had been arrested for drunk driving and his sister, Tammy, for public intoxication. Tammy also was arrested for drug possession and was self-destructive and “wild.” *Ibid.* Pinholster’s eldest brother, Alvin, died a fugitive from California authorities.¹⁹

In addition to Brashear’s penalty-phase testimony, Pinholster had previously presented mitigating evidence during the guilt phase from his brother, Terry. Terry testified that Pinholster was “more or less in institutions all his life,” suffered from epilepsy, and was “more or less” drunk on the night of the murders. 42 *id.*, at 6015, 6036.

After considering this aggravating and mitigating evidence, the jury returned a sentence of death. The state

¹⁹JUSTICE SOTOMAYOR criticizes Brashear’s testimony as “self-interested,” *post*, at 31, but the whole premise of the family-sympathy defense is *the family’s interest*. She similarly makes much of the fact that the prosecutor “belittle[d]” Brashear’s testimony in closing argument. *Post*, at 33. We fail to see the point. Any diligent prosecutor would have challenged whatever mitigating evidence the defense had put on. And, we would certainly not expect the prosecutor’s closing argument to have described the evidence in the light most favorable to Pinholster. But see *ibid.*, n. 26.

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trial court found that the jury’s determination was “supported overwhelmingly by the weight of the evidence” and added that “the factors in aggravation beyond all reasonable doubt outweigh those in mitigation.” Clerk’s Tr. 1184, 1186.

2

There is no reasonable probability that the additional evidence Pinholster presented in his state habeas proceedings would have changed the jury’s verdict. The “new” evidence largely duplicated the mitigation evidence at trial. School and medical records basically substantiate the testimony of Pinholster’s mother and brother. Declarations from Pinholster’s siblings support his mother’s testimony that his stepfather was abusive and explain that Pinholster was beaten with fists, belts, and even wooden boards.

To the extent the state habeas record includes new factual allegations or evidence, much of it is of questionable mitigating value. If Pinholster had called Dr. Woods to testify consistently with his psychiatric report, Pinholster would have opened the door to rebuttal by a state expert. See, e.g., *Wong v. Belmontes*, 558 U. S. ____, ____ (2009) (*per curiam*) (slip op., at 10–12) (taking into account that certain mitigating evidence would have exposed the petitioner to further aggravating evidence). The new evidence relating to Pinholster’s family—their more serious substance abuse, mental illness, and criminal problems, see *post*, at 22—is also by no means clearly mitigating, as the jury might have concluded that Pinholster was simply beyond rehabilitation. Cf. *Atkins v. Virginia*, 536 U. S. 304, 321 (2002) (recognizing that mitigating evidence can be a “two-edged sword” that juries might find to show future dangerousness).

The remaining new material in the state habeas record is sparse. We learn that Pinholster’s brother Alvin died of

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suicide by drug overdose, and there are passing references to Pinholster's own drug dependency. According to Dr. Stalberg, Pinholster's "school records" apparently evidenced "some degree" of brain damage. App. to Brief in Opposition 219. Mostly, there are just a few new details about Pinholster's childhood. Pinholster apparently looked like his biological father, whom his grandparents "loathed." Pet. for Writ of Habeas Corpus in No. S004616 (Cal.), Exh. 98, p. 1. Accordingly, whenever his grandparents "spanked or disciplined" the kids, Pinholster "always got the worst of it." *Ibid.* Pinholster was mostly unsupervised and "didn't get much love," because his mother and stepfather were always working and "were more concerned with their own lives than the welfare of their kids." *Id.*, at 2. Neither parent seemed concerned about Pinholster's schooling. Finally, Pinholster's aunt once saw the children mixing flour and water to make something to eat, although "[m]ost meals consisted of canned spaghetti and foods of that ilk." *Id.*, at 1.

Given what little additional mitigating evidence Pinholster presented in state habeas, we cannot say that the California Supreme Court's determination was unreasonable. Having already heard much of what is included in the state habeas record, the jury returned a sentence of death. Moreover, some of the new testimony would likely have undercut the mitigating value of the testimony by Pinholster's mother. The new material is thus not so significant that, even assuming Pinholster's trial counsel performed deficiently, it was necessarily unreasonable for the California Supreme Court to conclude that Pinholster had failed to show a "substantial" likelihood of a different sentence. *Richter*, 562 U. S., at ___ (slip op., at 22) (citing *Strickland*, 466 U. S., at 693).

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to be “materially indistinguishable” from *Terry Williams* and *Rompilla v. Beard*, 545 U. S. 374 (2005). 590 F. 3d, at 684. But this Court did not apply AEDPA deference to the question of prejudice in those cases; each of them lack the important “doubly deferential” standard of *Strickland* and AEDPA. See *Terry Williams*, 529 U. S., at 395–397 (reviewing a state-court decision that did not apply the correct legal standard); *Rompilla*, *supra*, at 390 (reviewing *Strickland* prejudice *de novo* because the state-court decision did not reach the question). Those cases therefore offer no guidance with respect to whether a state court has *unreasonably* determined that prejudice is lacking. We have said time and again that “an *unreasonable* application of federal law is different from an *incorrect* application of federal law.” *Richter*, *supra*, at ____ (slip op., at 11) (internal quotation marks omitted). Even if the Court of Appeals might have reached a different conclusion as an initial matter, it was not an unreasonable application of our precedent for the California Supreme Court to conclude that Pinholster did not establish prejudice.²⁰

* * *

The judgment of the United States Court of Appeals for the Ninth Circuit is reversed.

It is so ordered.

²⁰ Because Pinholster has failed to demonstrate that the adjudication of his claim based on the state-court record resulted in a decision “contrary to” or “involv[ing] an unreasonable application” of federal law, a writ of habeas corpus “shall not be granted” and our analysis is at an end. 28 U. S. C. §2254(d). We are barred from considering the evidence Pinholster submitted in the District Court that he contends additionally supports his claim. For that reason, we need not decide whether §2254(e)(2) prohibited the District Court from holding the evidentiary hearing or whether a district court may ever choose to hold an evidentiary hearing before it determines that §2254(d) has been satisfied.

ALITO, J., concurring

SUPREME COURT OF THE UNITED STATES

No. 09–1088

VINCENT CULLEN, ACTING WARDEN, PETITIONER
v. SCOTT LYNN PINHOLSTER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

[April 4, 2011]

JUSTICE ALITO, concurring in part and concurring in the judgment.

Although I concur in the Court’s judgment, I agree with the conclusion reached in Part I of the dissent, namely, that, when an evidentiary hearing is properly held in federal court, review under 28 U. S. C. §2254(d)(1) must take into account the evidence admitted at that hearing. As the dissent points out, refusing to consider the evidence received in the hearing in federal court gives §2254(e)(2) an implausibly narrow scope and will lead either to results that Congress surely did not intend or to the distortion of other provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214, and the law on “cause and prejudice.” See *post*, at 9–12 (opinion of SOTOMAYOR, J.).

Under AEDPA evidentiary hearings in federal court should be rare. The petitioner generally must have made a diligent effort to produce in state court the new evidence on which he seeks to rely. See §2254(e)(2); *Williams v. Taylor*, 529 U. S. 420, 433–434 (2000). If that requirement is not satisfied, the petitioner may establish the factual predicate for a claim in a federal-court hearing only if, among other things, “the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder

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would have found the applicant guilty of the underlying offense.” §2254(e)(2)(B).

Even when the petitioner does satisfy the diligence standard adopted in *Williams v. Taylor, supra*, a hearing should not be held in federal court unless the new evidence that the petitioner seeks to introduce was not and could not have been offered in the state-court proceeding. Section 2254(e)(2) bars a hearing in certain situations, but it does not mean that a hearing is allowed in all other situations. See *Schriro v. Landrigan*, 550 U. S. 465, 473–474 (2007). The whole thrust of AEDPA is essentially to reserve federal habeas relief for those cases in which the state courts acted unreasonably. See §§2254(d)(1), (2), (e)(1). Permitting a petitioner to obtain federal habeas relief on the basis of evidence that could have been but was not offered in state court would upset this scheme.

In this case, for essentially the reasons set out in the dissent from the Court of Appeals’ en banc decision, see *Pinholster v. Ayers*, 590 F. 3d 651, 688–691 (CA9 2009) (opinion of Kozinski, J.), I would hold that the federal-court hearing should not have been held because respondent did not diligently present his new evidence to the California courts. And I join all but Part II of the opinion of the Court, as I agree that the decision of the state court represented a reasonable application of clearly established Supreme Court precedent in light of the state-court record.

Opinion of BREYER, J.

SUPREME COURT OF THE UNITED STATES

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APPEALS FOR THE NINTH CIRCUIT

[April 4, 2011]

JUSTICE BREYER, concurring in part and dissenting in part.

I join Parts I and II of the Court’s opinion. I do not join Part III, for I would send this case back to the Court of Appeals so that it can apply the legal standards that Part II announces to the complex facts of this case. Compare *ante*, at 14–31 (majority opinion), with *post*, at 17–42 (SOTOMAYOR, J., dissenting).

Like the Court, I believe that its understanding of 28 U. S. C. §2254(d)(1) does not leave AEDPA’s hearing section, §2254(e), without work to do. An offender who believes he is entitled to habeas relief must first present a claim (including his evidence) to the state courts. If the state courts reject the claim, then a federal habeas court may review that rejection on the basis of the materials considered by the state court. If the federal habeas court finds that the state-court decision fails (d)’s test (or if (d) does not apply), then an (e) hearing may be needed.

For example, if the state-court rejection assumed the habeas petitioner’s facts (deciding that, *even if* those facts were true, federal law was not violated), then (after finding the state court wrong on a (d) ground) an (e) hearing might be needed to determine whether the facts alleged were indeed true. Or if the state-court rejection rested on a state ground, which a federal habeas court found inade-

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quate, then an (e) hearing might be needed to consider the petitioner’s (now unblocked) substantive federal claim. Or if the state-court rejection rested on only one of several related federal grounds (*e.g.*, that counsel’s assistance was not “inadequate”), then, if the federal court found that the state court’s decision in respect to the ground it decided violated (d), an (e) hearing might be needed to consider other related parts of the whole constitutional claim (*e.g.*, whether the counsel’s “inadequate” assistance was also prejudicial). There may be other situations in which an (e) hearing is needed as well.

In this case, however, we cannot say whether an (e) hearing is needed until we know whether the state court, in rejecting Pinholster’s claim on the basis presented to that state court, violated (d). (In my view, the lower courts’ analysis in respect to this matter is inadequate.)

There is no role in (d) analysis for a habeas petitioner to introduce evidence that was not first presented to the state courts. But that does not mean that Pinholster is without recourse to present new evidence. He can always return to state court presenting new evidence not previously presented. If the state court again denies relief, he might be able to return to federal court to make claims related to the latest rejection, subject to AEDPA’s limitations on successive petitions. See §2244.

I am not trying to predict the future course of these proceedings. I point out only that, in my view, AEDPA is not designed to take necessary remedies from a habeas petitioner but to give the State a first opportunity to consider most matters and to insist that federal courts properly respect state-court determinations.

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[April 4, 2011]

JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG and JUSTICE KAGAN join as to Part II, dissenting.

Some habeas petitioners are unable to develop the factual basis of their claims in state court through no fault of their own. Congress recognized as much when it enacted the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214, and permitted therein the introduction of new evidence in federal habeas proceedings in certain limited circumstances. See 28 U. S. C. §2254(e)(2). Under the Court’s novel interpretation of §2254(d)(1), however, federal courts must turn a blind eye to new evidence in deciding whether a petitioner has satisfied §2254(d)(1)’s threshold obstacle to federal habeas relief—even when it is clear that the petitioner would be entitled to relief in light of that evidence. In reading the statute to “compe[l]” this harsh result, *ante*, at 9, the Court ignores a key textual difference between §§2254(d)(1) and 2254(d)(2) and discards the previous understanding in our precedents that new evidence can, in fact, inform the §2254(d)(1) inquiry. I therefore dissent from the Court’s first holding.

I also disagree with the Court that, even if the §2254(d)(1) analysis is limited to the state-court record, respondent Scott Pinholster failed to demonstrate that the California Supreme Court’s decision denying his ineffec-

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tive-assistance-of-counsel claim was an unreasonable application of *Strickland v. Washington*, 466 U. S. 668 (1984). There is no reason for the majority to decide whether the §2254(d)(1) analysis is limited to the state-court record because Pinholster satisfied §2254(d)(1) on either the state- or federal-court record.

I

The Court first holds that, in determining whether a state-court decision is an unreasonable application of Supreme Court precedent under §2254(d)(1), “review . . . is limited to the record that was before the state court that adjudicated the claim on the merits.” *Ante*, at 9. New evidence adduced at a federal evidentiary hearing is now irrelevant to determining whether a petitioner has satisfied §2254(d)(1). This holding is unnecessary to promote AEDPA’s purposes, and it is inconsistent with the provision’s text, the structure of the statute, and our precedents.

A

To understand the significance of the majority’s holding, it is important to view the issue in context. AEDPA’s entire structure—which gives state courts the opportunity to decide factual and legal questions in the first instance—ensures that evidentiary hearings in federal habeas proceedings are very rare. See N. King, F. Cheesman, & B. Ostrom, *Final Technical Report: Habeas Litigation in U. S. District Courts 35–36* (2007) (evidentiary hearings under AEDPA occur in 0.4 percent of noncapital cases and 9.5 percent of capital cases). Even absent the new restriction created by today’s holding, AEDPA erects multiple hurdles to a state prisoner’s ability to introduce new evidence in a federal habeas proceeding.

First, “[u]nder the exhaustion requirement, a habeas petitioner challenging a state conviction must first at-

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tempt to present his claim in state court.” *Harrington v. Richter*, 562 U. S. ___, ___ (2011) (slip op., at 13); see also §2254(b)(1)(A). With certain narrow exceptions, federal courts cannot consider a claim at all, let alone accept new evidence relevant to the claim, if it has not been exhausted in state court.¹ The exhaustion requirement thus reserves to state courts the first opportunity to resolve factual disputes relevant to a state prisoner’s claim. See *O’Sullivan v. Boerckel*, 526 U. S. 838, 845 (1999).

Second, the exhaustion requirement is “complement[ed]” by the standards set forth in §2254(d). *Harrington*, 562 U. S., at ___ (slip op., at 14). Under this provision, a federal court may not grant habeas relief on any “claim that was adjudicated on the merits in State court proceedings” unless the adjudication

“(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

“(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.”

These standards “control whether to grant habeas relief.” *Schriro v. Landrigan*, 550 U. S. 465, 474 (2007). Accordingly, we have said, if the factual allegations a petitioner seeks to prove at an evidentiary hearing would not satisfy these standards, there is no reason for a hearing. See *id.*, at 481. In such a case, the district court may exercise its “discretion to deny an evidentiary hearing.” *Ibid.*; see also *infra*, at 13–14. This approach makes eminent sense: If district courts held evidentiary hearings without first

¹Relatedly, a state prisoner must, as a general matter, properly exhaust his federal claims in state court to avoid having his claim defaulted on procedural grounds. See *Coleman v. Thompson*, 501 U. S. 722, 750 (1991).

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asking whether the evidence the petitioner seeks to present would satisfy AEDPA's demanding standards, they would needlessly prolong federal habeas proceedings.

Third, even when a petitioner seeks to introduce new evidence that would entitle him to relief, AEDPA prohibits him from doing so, except in a narrow range of cases, unless he “made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court.” *Williams v. Taylor*, 529 U. S. 420, 435 (2000) (*Michael Williams*). Thus, §2254(e)(2) provides:

“If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

“(A) the claim relies on—

“(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

“(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

“(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.”

In *Michael Williams*, we construed the opening clause of this provision—which triggers the bar on evidentiary hearings—to apply when “there is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner’s counsel.”² *Id.*, at 432. AEDPA thus bars an

²Section 2254(e)(2) also governs an attempt to obtain relief “based on new evidence without an evidentiary hearing.” *Holland v. Jackson*, 542 U. S. 649, 653 (2004) (*per curiam*) (emphasis deleted).

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evidentiary hearing for a nondiligent petitioner unless the petitioner can satisfy both §§2254(e)(2)(A) and (B), which few petitioners can. Section 2254(e)(2) in this way incentivizes state petitioners to develop the factual basis of their claims in state court.

To the limited extent that federal evidentiary hearings are available under AEDPA, they ensure that petitioners who diligently developed the factual basis of their claims in state court, discovered new evidence after the state-court proceeding, and cannot return to state court retain the ability to access the Great Writ. See *ante*, at 2 (ALITO, J., concurring in part and concurring in judgment). “When Congress codified new rules governing this previously judicially managed area of law, it did so without losing sight of the fact that the ‘writ of habeas corpus plays a vital role in protecting constitutional rights.’” *Holland v. Florida*, 560 U. S. ____, __ (2010) (slip op., at 16) (quoting *Slack v. McDaniel*, 529 U. S. 473, 483 (2000)). Allowing a petitioner to introduce new evidence at a hearing in the limited circumstance permitted by §2254(e)(2) does not upset the balance that Congress struck in AEDPA between the state and federal courts. By construing §2254(d)(1) to do the work of other provisions in AEDPA, the majority has subverted Congress’ careful balance of responsibilities. It has also created unnecessarily a brand-new set of procedural complexities that lower courts will have to confront.³

B

The majority’s interpretation of §2254(d)(1) finds no support in the provision’s text or the statute’s structure as a whole.

1

Section 2254(d)(1) requires district courts to ask

³See, e.g., nn. 5, 7, and 13, *infra*.

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whether a state-court adjudication on the merits “resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.” Because this provision uses “backward-looking language”—*i.e.*, past-tense verbs—the majority believes that it limits review to the state-court record. *Ante*, at 9. But both §2254(d)(1) and 2254(d)(2) use “backward-looking language,” and §2254(d)(2)—unlike §2254(d)(1)—expressly directs district courts to base their review on “the evidence presented in the State court proceeding.” If use of the past tense were sufficient to indicate Congress’ intent to restrict analysis to the state-court record, the phrase “in light of the evidence presented in the State court proceeding” in §2254(d)(2) would be superfluous. The majority’s construction of §2254(d)(1) fails to give meaning to Congress’ decision to include language referring to the evidence presented to the state court in §2254(d)(2). Cf. *Bates v. United States*, 522 U. S. 23, 29–30 (1997) (“Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion” (internal quotation marks and brackets omitted)).

Ignoring our usual “reluctan[ce] to treat statutory terms as surplusage in any setting,” *TRW Inc. v. Andrews*, 534 U. S. 19, 31 (2001) (internal quotation marks omitted), the majority characterizes the phrase appearing in §2254(d)(2) as mere “clarifying language,” *ante*, at 12, n. 7. It speculates that “[t]he omission of clarifying language from §2254(d)(1) just as likely reflects Congress’ belief that such language was unnecessary as it does anything else.” *Ante*, at 12–13, n. 7. The argument that this phrase is merely “clarifying” might have more force, however, had Congress included this phrase in §2254(d)(1) but not in §2254(d)(2). As between the two provisions, §2254(d)(2)—which re-

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quires review of the state court’s “determination of the facts”—more logically depends on the facts presented to the state court. Because this provision needs less clarification on this point than §2254(d)(1), it is all the more telling that Congress included this phrase in §2254(d)(2) but elected to exclude it from §2254(d)(1).

Unlike my colleagues in the majority, I refuse to assume that Congress simply engaged in sloppy drafting. The inclusion of this phrase in §2254(d)(2)—coupled with its omission from §2254(d)(2)’s partner provision, §2254(d)(1)—provides strong reason to think that Congress did not intend for the §2254(d)(1) analysis to be limited categorically to “the evidence presented in the State court proceeding.”

2

The “broader context of the statute as a whole,” *ante*, at 9 (quoting *Robinson v. Shell Oil Co.*, 519 U. S. 337, 341 (1997)), reinforces this conclusion. In particular, Congress’ decision to include in AEDPA a provision, §2254(e)(2), that permits federal evidentiary hearings in certain circumstances provides further evidence that Congress did not intend to limit the §2254(d)(1) inquiry to the state-court record in every case.

We have long recognized that some diligent habeas petitioners are unable to develop all of the facts supporting their claims in state court.⁴ As discussed above, in

⁴See, e.g., *Michael Williams*, 529 U. S. 420, 432 (2000) (noting that diligent efforts to develop the facts might be “thwarted, for example, by the conduct of another or by happenstance”); *id.*, at 434 (noting that the prosecution might have “concealed the facts” supporting “a claim which was pursued with diligence”); *Townsend v. Sain*, 372 U. S. 293, 313 (1963) (requiring federal courts to grant evidentiary hearings when, *inter alia*, “the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing” or “there is a substantial allegation of newly discovered evidence”), overruled in part on other grounds by *Keeney v. Tamayo-Reyes*, 504 U. S. 1, 5 (1992).

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enacting AEDPA, Congress generally barred evidentiary hearings for petitioners who did not “exercise diligence in pursuing their claims” in state court. *Michael Williams*, 529 U. S., at 436; see also §2254(e)(2). Importantly, it did not impose any express limit on evidentiary hearings for petitioners who had been diligent in state court. See *id.*, at 436 (“[T]he statute does not equate prisoners who exercise diligence in pursuing their claims with those who do not”). For those petitioners, Congress left the decision to hold a hearing “to the sound discretion of district courts.” *Landrigan*, 550 U. S., at 473.

Faced with situations in which a diligent petitioner offers additional evidence in federal court, the courts of appeals have taken two approaches to applying §2254(d)(1). Some courts have held that when a federal court admits new evidence supporting a claim adjudicated on the merits in state court, §2254(d)(1) does not apply at all and the federal court may review the claim *de novo*. See *ante*, at 12; *Holland v. Jackson*, 542 U. S. 649, 653 (2004) (*per curiam*); see, e.g., *Winston v. Kelly*, 592 F. 3d 535, 555–556 (CA4 2010). I agree with the majority’s rejection of this approach. See *ante*, at 12. It would undermine the comity principles motivating AEDPA to decline to defer to a state-court adjudication of a claim because the state court, through no fault of its own, lacked all the relevant evidence.⁵

⁵Of course, §2254(d)(1) only applies when a state court has adjudicated a claim on the merits. There may be situations in which new evidence supporting a claim adjudicated on the merits gives rise to an altogether different claim. See, e.g., Reply Brief for Petitioner 10–11 (evidence withheld by the prosecutor relating to one claim may give rise to a separate claim under *Brady v. Maryland*, 373 U. S. 83 (1963)). The majority opinion does not foreclose this possibility.

I assume that the majority does not intend to suggest that review is limited to the state-court record when a petitioner’s inability to develop the facts supporting his claim was the fault of the state court itself. See generally Tr. of Oral Arg. in *Bell v. Kelly*, O. T. 2008, No. 07–1223.

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Other courts of appeals, including the court below, have struck a more considered balance. These courts have held that §2254(d)(1) continues to apply but that new evidence properly presented in a federal hearing is relevant to the reasonableness of the state-court decision. See *Pinholster v. Ayers*, 590 F. 3d 651, 668 (CA9 2009) (en banc) (“If the evidence is admissible under *Michael Williams* or §2254(e)(2), and if it does not render the petitioner’s claims unexhausted . . . , then it is properly considered in evaluating whether the legal conclusion reached by the state habeas court was a reasonable application of Supreme Court law”); accord, *Wilson v. Mazzuca*, 570 F. 3d 490, 500 (CA2 2009); *Pecoraro v. Walls*, 286 F. 3d 439, 443 (CA7 2002); *Valdez v. Cockrell*, 274 F. 3d 941, 952 (CA5 2001). This approach accommodates the competing goals, reflected in §§2254(d) and 2254(e)(2), of according deference to reasonable state-court decisions and preserving the opportunity for diligent petitioners to present evidence to the federal court when they were unable to do so in state court.

The majority charts a third, novel course that, so far as I am aware, no court of appeals has adopted: §2254(d)(1) continues to apply when a petitioner has additional evidence that he was unable to present to the state court, but the district court cannot consider that evidence in deciding whether the petitioner has satisfied §2254(d)(1). The problem with this approach is its potential to bar federal habeas relief for diligent habeas petitioners who cannot present new evidence to a state court.

Consider, for example, a petitioner who diligently attempted in state court to develop the factual basis of a claim that prosecutors withheld exculpatory witness statements in violation of *Brady v. Maryland*, 373 U. S. 83 (1963). The state court denied relief on the ground that the withheld evidence then known did not rise to the level of materiality required under *Brady*. Before the time for

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filing a federal habeas petition has expired, however, a state court orders the State to disclose additional documents the petitioner had timely requested under the State's public records Act. The disclosed documents reveal that the State withheld other exculpatory witness statements, but state law would not permit the petitioner to present the new evidence in a successive petition.⁶

Under our precedent, if the petitioner had not presented his *Brady* claim to the state court at all, his claim would be deemed defaulted and the petitioner could attempt to show cause and prejudice to overcome the default. See *Michael Williams*, 529 U. S., at 444; see also n. 1, *supra*. If, however, the new evidence merely bolsters a *Brady* claim that was adjudicated on the merits in state court, it is unclear how the petitioner can obtain federal habeas relief after today's holding. What may have been a reasonable decision on the state-court record may no longer be reasonable in light of the new evidence. See *Kyles v. Whitley*, 514 U. S. 419, 436 (1995) (materiality of *Brady* evidence is viewed "collectively, not item by item"). Because the state court adjudicated the petitioner's *Brady* claim on the merits, §2254(d)(1) would still apply. Yet, under the majority's interpretation of §2254(d)(1), a federal court is now prohibited from considering the new evidence in determining the reasonableness of the state-court decision.

The majority's interpretation of §2254(d)(1) thus suggests the anomalous result that petitioners with new claims based on newly obtained evidence can obtain federal habeas relief if they can show cause and prejudice for their default but petitioners with newly obtained evidence supporting a claim adjudicated on the merits in state court

⁶See, *e.g.*, *id.*, at 37–38 (statement by counsel for the respondent warden that Virginia law bars all successive habeas applications, even in cases where the petitioner has new evidence).

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cannot obtain federal habeas relief if they cannot first satisfy §2254(d)(1) without the new evidence. That the majority’s interpretation leads to this anomaly is good reason to conclude that its interpretation is wrong. See *Keeney v. Tamayo-Reyes*, 504 U. S. 1, 7–8 (1992) (“[I]t is . . . irrational to distinguish between failing to properly assert a federal claim in state court and failing in state court to properly develop such a claim”).

The majority responds to this anomaly by suggesting that my hypothetical petitioner “may well [have] a new claim.”⁷ *Ante*, at 14, n. 10. This suggestion is puzzling. New evidence does not usually give rise to a new claim; it merely provides additional proof of a claim already adjudicated on the merits.⁸ The majority presumably means to suggest that the petitioner might be able to obtain federal-court review of his new evidence if he can show cause and prejudice for his failure to present the “new” claim to a state court. In that scenario, however, the federal court would review the purportedly “new” claim *de novo*. The majority’s approach thus threatens to replace deferential review of new evidence under §2254(d)(1) with *de novo* review of new evidence in the form of “new” claims.⁹ Because it is unlikely that Congress intended *de novo* review—the result suggested by the majority’s opinion—it must have intended for district courts to consider newly discovered evidence in conducting the §2254(d)(1) analysis.

⁷The majority declines, however, to provide any guidance to the lower courts on how to distinguish claims adjudicated on the merits from new claims.

⁸Even if it can fairly be argued that my hypothetical petitioner has a new claim, the majority fails to explain how a diligent petitioner with new evidence supporting an existing claim can present his new evidence to a federal court.

⁹In this vein, it is the majority’s approach that “would not take seriously AEDPA’s requirement that federal courts defer to state-court decisions.” *Ante*, at 10, n. 3.

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The majority’s reading of §2254(d)(1) appears ultimately to rest on its understanding that state courts must have the first opportunity to adjudicate habeas petitioners’ claims. See *ante*, at 9–10 (“It would be contrary to [AEDPA’s exhaustion requirement] to allow a petitioner to overcome an adverse state-court decision with new evidence introduced in a federal habeas court and reviewed by that court in the first instance effectively *de novo*”).¹⁰ JUSTICE BREYER takes the same position. See *ante*, at 2 (opinion concurring in part and dissenting in part) (AEDPA is designed “to give the State a first opportunity to consider most matters”). I fully agree that habeas petitioners must attempt to present evidence to state courts in the first instance, as does JUSTICE ALITO, see *ante*, at 2. Where I disagree with the majority is in my understanding that §2254(e)(2) already accomplishes this result. By reading §2254(d)(1) to do the work of §2254(e)(2), the majority gives §2254(e)(2) an unnaturally cramped reading. As a result, the majority either has foreclosed habeas relief for diligent petitioners who, through no fault of their own, were unable to present exculpatory evidence to the state court that adjudicated their claims or has created a new set of procedural complexities for the lower courts to navigate to ensure the availability of the Great Writ for diligent petitioners.

3

These considerations lead me to agree with the courts of appeals that have concluded that a federal court should assess the reasonableness of a state court’s application of clearly established federal law under §2254(d)(1) in light of evidence properly admitted in a federal evidentiary hearing. There is nothing “strange” about this approach.

¹⁰Under my reading of §2254(d)(1), of course, the district court would review properly admitted new evidence through the deferential lens of §2254(d)(1), not *de novo*.

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Ante, at 10. Under §2254(d)(1), federal courts routinely engage in analysis that the state court itself might never have conducted or did not conduct. For example, when a state court summarily denies a claim without explanation, as the California Supreme Court did here, district courts must deny habeas relief pursuant to §2254(d)(1) so long as “there is any reasonable argument” supporting the denial of the petitioner’s claim. *Harrington*, 562 U. S., at ____ (slip op., at 16). We likewise ask whether a state-court decision unreasonably applied clearly established federal law when the state court issued a reasoned decision but failed to cite federal law altogether. See *Early v. Packer*, 537 U. S. 3, 8 (2002) (*per curiam*). Determining whether a state court could reasonably have denied a petitioner relief in light of newly discovered evidence is not so different than determining whether there is any reasonable basis for a state court’s unreasoned decision.

Admittedly, the text of §2254(d)(1), standing alone, does not compel either reading of that provision. But construing §2254(d)(1) to permit consideration of evidence properly introduced in federal court best accords with the text of §2254(d)(2) and AEDPA’s structure as a whole. By interpreting §2254(d)(1) to prevent *nondiligent* petitioners from gaming the system—the very purpose of §2254(e)(2)—the majority potentially has put habeas relief out of reach for *diligent* petitioners with meritorious claims based on new evidence.

C

The majority claims that its holding is “consistent” with our case law. *Ante*, at 10. Quite the opposite is true: Our cases reflect our previous understanding that evidence properly admitted pursuant to §2254(e)(2) is relevant to the §2254(d)(1) analysis.

In *Landrigan*, JUSTICE THOMAS, the author of today’s opinion, confirmed this understanding of the interplay

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between §§2254(d)(1) and 2254(e)(2). As noted above, we admonished district courts to consider whether a petitioner’s allegations, if proved true, would satisfy §2254(d) in determining whether to grant a hearing. After highlighting the deference owed to state courts under §§2254(d) and 2254(e)(1), we stated:

“In deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition’s factual allegations, which, if true, would entitle the applicant to federal habeas relief. Because the deferential standards prescribed by §2254 control whether to grant habeas relief, a federal court must take into account those standards in deciding whether an evidentiary hearing is appropriate.” 550 U. S., at 474 (citation omitted).

By instructing district courts to consider the §2254(d) standards in deciding whether to grant a hearing, we must have understood that the evidence admitted at a hearing could be considered in the §2254(d)(1) analysis. See Brief for American Civil Liberties Union as *Amicus Curiae* 9 (“The whole point of *Landrigan’s* admonition that the court must decide whether to hold a hearing with an eye on §2254(d)(1) is that some proffers of evidence will not justify federal fact-finding in view of §2254(d)(1), but that other proffers of proof *will*”).¹¹

In *Michael Williams*, the warden argued that §2254(e)(2) bars an evidentiary hearing whenever a petitioner was unable to develop the factual record in state court, “whether or not through his own fault or neglect.”

¹¹The majority overlooks this aspect of *Landrigan*. It quotes *Landrigan’s* observation that “if the record refutes the applicant’s factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing,” 550 U. S., at 474, but that statement has no bearing on the question decided by the Court today.

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529 U. S., at 430. Under the warden’s argument, a petitioner who did not develop the record in state court, whatever the reason, would be barred from presenting evidence to the federal court. In rejecting that argument, we observed:

“A prisoner who developed his claim in state court and can prove the state court’s decision was ‘contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,’ is not barred from obtaining relief by §2254(d)(1). If the opening clause of §2254(e)(2) covers a request for an evidentiary hearing on a claim which was pursued with diligence but remained undeveloped in state court because, for instance, the prosecution concealed the facts, a prisoner lacking clear and convincing evidence of innocence could be barred from a hearing on the claim *even if he could satisfy §2254(d)*.” *Id.*, at 434 (citation omitted; emphasis added).

A petitioner in the latter situation would almost certainly be unable to “satisfy §2254(d)” without introducing the concealed facts in federal court. This passage thus reflects our understanding that, in some circumstances, a petitioner might need an evidentiary hearing in federal court to prove the facts necessary to satisfy §2254(d). To avoid foreclosing habeas relief for such petitioners, we concluded that §2254(e)(2) could not bear the warden’s “harsh reading,” which essentially would have held petitioners strictly at fault for their inability to develop the facts in state court. *Ibid.* The majority today gives an equally “harsh reading” to §2254(d)(1) to achieve the result we rejected in *Michael Williams*.¹²

¹² The majority claims that *Michael Williams* supports its reading of §2254(d)(1). With respect to one claim asserted by the petitioner, we observed that “[t]he Court of Appeals rejected this claim on the merits

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None of the other cases cited by the majority supports its result. In *Williams v. Taylor*, 529 U. S. 362 (2000) (*Terry Williams*), we interpreted §2254(d)(1) to ask whether the state-court decision “identifies the correct governing legal principle from this Court’s decisions but unreasonably applies that principle to the facts of the prisoner’s case.” *Id.*, at 413. However, we had no reason to decide whether the §2254(d)(1) inquiry was limited to the state-court record, as the District Court did not hold an evidentiary hearing in that case. See *id.*, at 372.

In *Holland v. Jackson*, we stated that “we have made clear that whether a state court’s decision was unreasonable must be assessed in light of the record the court had before it.” 542 U. S., at 652. In the next sentence, however, we observed that the evidence at issue “could have been the subject of an evidentiary hearing by the District Court, but only if respondent was not at fault in failing to develop that evidence in state court.” *Id.*, at 652–653. We proceeded to find that the evidence was not properly admitted under §2254(e)(2) *before* concluding that the Court of Appeals had erred in its §2254(d)(1) analysis. *Id.*, at 653; see also *Bradshaw v. Richey*, 546 U. S. 74, 79 (2005) (*per curiam*).

In sum, our cases reflect our recognition that it is sometimes appropriate to consider new evidence in deciding whether a petitioner can satisfy §2254(d)(1). In reading our precedent to require the opposite conclusion, the majority disregards the concerns that motivated our decision in *Michael Williams*: Some petitioners, even if diligent,

under §2254(d)(1), so it is unnecessary to reach the question whether §2254(e)(2) would permit a hearing on the claim.” 529 U. S., at 444. That statement merely reflects the fact that the Court of Appeals had rejected that claim under §2254(d)(1) without considering whether the petitioner was entitled to a hearing because the petitioner had not requested a hearing on that claim. See *Williams v. Taylor*, 189 F. 3d 421, 425, 428–429 (CA4 1999).

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may be unable to develop the factual record in state court through no fault of their own. We should not interpret §2254(d)(1) to foreclose these diligent petitioners from accessing the Great Writ when the state court will not consider the new evidence and could not reasonably have reached the same conclusion with the new evidence before it.

II

I also disagree with the Court's conclusion that the Court of Appeals erred in holding that Pinholster had satisfied §2254(d)(1) on the basis of the state-court record.¹³

A

The majority omits critical details relating to the performance of Pinholster's trial counsel, the mitigating evidence they failed to discover, and the history of these proceedings. I therefore highlight several aspects of the facts and history of this case.

¹³I agree with the majority that the state-court record in this case consists of "the 'allegations of [the] habeas corpus petition . . . and . . . any matter of record pertaining to the case.'" *Ante*, at 16, n. 12 (quoting *In re Hochberg*, 2 Cal. 3d 870, 874, n. 2, 471 P. 2d 1, 3–4, n. 2 (1970); some internal quotation marks omitted).

The majority does not decide which of the two state-court decisions should be reviewed. See *ante*, at 15, n. 11. One *amicus* argues that Pinholster must prove that *both* state-court decisions involved an unreasonable application of law. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* 26. This argument is based on *amicus*' understanding that the California Supreme Court rejected the second petition as successive and, alternatively, on the merits. The State has not argued, however, that the second ruling rests on a procedural ground. See *ante*, at 6, n. 2. When a state court denies two petitions on the merits and the difference between the petitions is that the second petition contains additional evidence supporting the petitioner's claim, I see no reason why the petitioner must independently show that the first decision was unreasonable.

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1

After the jury returned a guilty verdict, the court instructed the jury to return six days later for the penalty phase. This prompted discussion at sidebar regarding whether the State had provided notice of its intent to offer aggravating evidence. Pinholster's court-appointed attorney, Wilbur Dettmar, argued that the State should be precluded from offering aggravating evidence:

"I am not presently prepared to offer anything by way of mitigation. If I was going to proceed on mitigation, the people would have the right to rebuttal with or without notice.

"I took the position, since the people had not given notice, *I had not prepared any evidence by way of mitigation*. I would submit it on that basis." 52 Reporter's Tr. 7250 (hereinafter Tr.) (emphasis added).

Undoubtedly anticipating that counsel might need additional time to prepare an adequate mitigation defense, the court asked Dettmar whether a continuance would be helpful in the event it ruled against him. He declined the offer on the spot, stating: "I think we would probably still go forward on Monday. Clearly the one person that comes to mind is the defendant's mother. How much beyond that I don't know. I don't think the pa[ss]age of time would make a great deal of difference." *Id.*, at 7257–7258. After hearing testimony, the court denied Pinholster's motion to preclude aggravating evidence.

At the penalty phase, defense counsel called only one witness: Pinholster's mother, Burnice Brashear. Brashear testified that Pinholster "never really wanted for anything at home too much" and "had everything normally materialwise that most people have." *Id.*, at 7395. She said that Pinholster was "different" from his siblings, whom she characterized as "basically very good children." *Id.*, at 7401–7402. Pinholster, she said, had a "friendly" relation-

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ship with his stepfather, although his stepfather “sometimes would lose his temper” with Pinholster, who “had a mind of his own.” *Id.*, at 7392–7393; see also *id.*, at 7293 (stating that his stepfather was “at times” “abusive or near abusive”).

Brashear provided brief testimony regarding Pinholster’s childhood. She described two car accidents—one when she ran over him in the driveway and one when he went through the windshield. *Id.*, at 7389–7391. She stated that he started failing school in the first grade and that the school eventually “sent him to [an] educationally handicapped class.” *Id.*, at 7393–7394. When Pinholster was 10, a psychologist recommended placing him in a mental institution, but she “didn’t think he was that far gone.” *Id.*, at 7395. A few years later, she testified, he spent six months in a state hospital for emotionally handicapped children. *Id.*, at 7402.

According to Brashear, Pinholster had suffered from epilepsy since age 18, when he was beaten in jail. *Id.*, at 7397. She said that her family doctor, Dr. Dubin, had given him medication to treat the epilepsy. *Ibid.* Brashear also suggested that Pinholster did not have long to live, stating that he had “a chip in his head floating around” and that “they don’t think—he won’t be here very much longer anyway.”¹⁴ *Ibid.*

In closing argument, the prosecutor ridiculed Brashear’s testimony. See 53 *id.*, at 7442 (“She said his stepfather disciplined him. So what? I am sure you have all disciplined your children. I was disciplined myself”); *ibid.* (“He was run over by a car when he was three years old. That’s very unfortunate. There is no evidence of any brain damage. A lot of children get dropped, fall from their cribs or

¹⁴The judge instructed the jury to disregard this testimony upon motion by the prosecutor, but the prosecutor then discussed the testimony in her closing argument. See *infra*, at 33–34.

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whatever”); *id.*, at 7444–7445 (“I submit to you that if this defendant truly had epilepsy, . . . a doctor would have been brought in to tell you that. Medical records, something”). The prosecutor also highlighted Brashear’s testimony about Pinholster’s stable home environment, arguing, “He came from a good home. You heard that he was not a deprived child. Had many things going for him, probably more than many children.” *Id.*, at 7442.

Notwithstanding the meager mitigation case presented by Pinholster’s counsel, it took the jury two days to reach a decision to sentence Pinholster to death. His counsel later moved to modify the sentence to life imprisonment. In denying the motion, the trial judge stated, “The evidence which the defense offered concerning the defendant’s extenuation was merely some testimony from his mother that was not persuasive. His mother did not, in the court’s opinion, present any evidence which the court would find to be a moral justification or extenuation for his conduct. No witness supplied such evidence.” 54 *id.*, at 7514.

2

After his conviction and sentence were affirmed on appeal, Pinholster filed a habeas petition in the California Supreme Court alleging, among other things, that his counsel had “unreasonably failed to investigate, prepare and present available mitigating evidence during penalty phase.” Record ER–103.

Pinholster’s state-court petition included 121 exhibits. In a series of declarations, his trial attorney Harry Brainard (who had by then been disbarred) confirmed what Dettmar had forthrightly told the trial court: Brainard and Dettmar neither expected nor prepared to present mitigation evidence.¹⁵ See *id.*, at ER–333 (“Mr.

¹⁵By the time of Pinholster’s state-court habeas petition, Dettmar was deceased.

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Dettmar and I did not prepare a case in mitigation. We felt there would be no penalty phase hearing inasmuch as we did not receive written notice of evidence in aggravation pursuant to Penal Code §190.3¹⁶). Brainard further confirmed what was apparent from the mitigation case they eventually put on: They conducted virtually no mitigation investigation. See *id.*, at ER–182 (“I have no recollection of Mr. Dettmar having secured or reviewed any of Scott’s medical records, nor did I see any of Scott’s medical records. So far as I recollect, neither Mr. Dettmar nor myself interviewed any of Scott’s previous medical providers”); *id.*, at ER–183 (“I do not recall interviewing or attempting to interview Scott’s family members or any other persons regarding penalty phase testimony, except Mrs. Brashears [*sic*]”); *ibid.* (“I have no recollection of seeing or attempting to secure Scott’s school records, juvenile records, medical records, or records of prior placements”); *ibid.* (“I have no recollection of interviewing or attempting to interview Scott’s former school teachers, counselors, or juvenile officers”).¹⁶

Statements by relatives (none of whom trial counsel had attempted to interview regarding Pinholster’s background) and documentary evidence revealed that the picture of Pinholster’s family life painted by his mother at trial was false. Pinholster was “raised in chaos and poverty.” *Id.*, at ER–312. A relative remembered seeing the children mix together flour and water in an attempt to get something to eat. Pinholster’s stepfather beat him several times a week, including at least once with a two-by-four board. “There was so much violence in [the] home” that Pinholster’s brother “dreaded coming home each day.” *Id.*, at ER–313. Pinholster’s half sister was removed from the home as a result of a beating by his stepfather.

¹⁶ Counsel’s billing records, which were before the California Supreme Court as part of the trial record, confirmed Brainard’s recollection.

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Documentary evidence showed, directly contrary to Brashear's trial testimony, that Pinholster's siblings had very troubled pasts. Pinholster's elder brother was arrested for armed burglary, robbery, and forcible rape of a 14-year-old with a deadly weapon. While in custody, he was diagnosed as "catatonic-like" and "acutely psychotic, probably suffering some type of schizophrenia." *Id.*, at ER-219, ER-224. He later committed suicide.¹⁷ Pinholster's half sister, a recovering alcoholic, had been made a ward of the juvenile court for prostitution and forcible sexual battery on a 14-year-old.

Pinholster's petition and exhibits described a long history of emotional disturbance and neurological problems. A former schoolteacher stated that, as a child, Pinholster "seemed incapable of relating either to his peers or to adults," that "[i]t was even hard to maintain eye contact with him," and that "[h]is hyperactivity was so extreme that [she] formed the opinion it probably had an organic base." *Id.*, at ER-231. School records revealed that he "talk[ed] to self continuously," had "many grimaces," fought in his sleep, and could "control self for only 1 hour per day." *Id.*, at ER-230, ER-233. He "show[ed] progressive deterioration each semester since Kindergarten." *Id.*, at ER-230. School officials recommended placement in a school for emotionally handicapped students and referral to a neurologist. At age nine, he had an abnormal EEG, revealing "an organic basis for his behavior." *Id.*, at ER-157, ER-234. Just months before the homicides, a doctor recommended placement in the Hope Psychiatric Institute, but this did not occur.

This and other evidence attached to the petition was

¹⁷According to Pinholster's half sister, "The death of our brother Alvin was a severe emotional blow to me and to Scott. I believed Scott's substance abuse (heroin) arose following and as a result of Alvin's death." Record ER-314.

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summarized in a declaration by Dr. George Woods. Dr. Woods opined that Pinholster “suffer[ed] from severe and long standing seizure disorders,” *id.*, at ER–156, that his childhood head traumas “may have been the precipitating factors for [his] seizure disorder,” *id.*, at ER–157, and that he suffered from bipolar mood disorder. He pointed to trial testimony that immediately before the burglary on the night of the homicides, Pinholster announced that he “ha[d] a message from God”—which Dr. Woods believed to reflect “[a]uditory hallucinations” and “severe psychosis.” *Id.*, at ER–169. He concluded that at the time of the homicides Pinholster “was suffering from bipolar mood disorder with psychotic ideation and was suffering a complex partial seizure.” *Id.*, at ER–170. He also observed that Pinholster’s “grossly dysfunctional family, the abuse he received as a child, his history of suffering from substantial seizure and mood disorders, his frequently untreated psychiatric and psychological disabilities and his educational handicaps were relevant circumstances which would extenuate the gravity of the crime.” *Id.*, at ER–171.

On the basis of Pinholster’s submission, the California Supreme Court denied Pinholster’s ineffective-assistance-of-counsel claim.

Pinholster then filed a habeas petition in Federal District Court. He included an additional exhibit: a declaration by Dr. John Stalberg, a psychiatrist who had hastily examined Pinholster and produced a two-page report in the middle of the original trial.¹⁸ After reviewing the new material collected by Pinholster’s habeas counsel, Dr. Stalberg stated that the available evidence showed a

¹⁸Counsel had arranged for Dr. Stalberg to examine Pinholster in the middle of his original trial. The only documents they provided to him were police reports relating to the case and a 1978 probation report. In a two-page report that focused primarily on Pinholster’s mental state at the time of the offenses, Dr. Stalberg concluded that Pinholster had “psychopathic personality traits.” *Id.*, at ER–187.

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familial history of “severe psychiatric disorders,” “a history of seizure disorders of unknown etiology,” “repeated head traumas,” “an abnormal EEG,” and “evidence of mental disturbance during Mr. Pinholster’s childhood and some degree of brain damage.” *Id.*, at ER–493. He also opined that “there [was] voluminous mitigating evidence which includes a childhood of physical abuse, emotional neglect, and a family history of mental illness and criminal behavior.” *Id.*, at ER–494.

The District Court stayed the federal proceedings while Pinholster sought state-court review of claims the District Court deemed unexhausted. Pinholster’s second habeas submission to the California Supreme Court included Stalberg’s declaration. That court summarily denied Pinholster’s petition on the merits.

Pinholster returned to Federal District Court and filed an amended petition. After an evidentiary hearing, the District Court concluded that Pinholster had demonstrated deficient performance and prejudice under *Strickland*.¹⁹ The Ninth Circuit, sitting en banc, affirmed. 590 F. 3d 651.

B

As the majority notes, Pinholster’s claim arises under *Strickland v. Washington*. “The benchmark for judging any claim of ineffectiveness [under *Strickland*] must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” 466 U. S.,

¹⁹The District Court based its decision on the evidence adduced at an evidentiary hearing. The District Court did not apply 28 U. S. C. §2254(d) because it thought, erroneously, that the California Supreme Court had not adjudicated Pinholster’s claim on the merits. App. to Pet. for Cert. 257. For the reasons I discuss, however, the District Court could have concluded that Pinholster had satisfied §2254(d)(1) on the basis of the state-court record alone.

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at 686. To satisfy this benchmark, a defendant must show both that “counsel’s performance was deficient” and that “the deficient performance prejudiced the defense.” *Id.*, at 687.

When §2254(d)(1) applies, the question is whether “‘fair-minded jurists could disagree’ on the correctness of the state court’s decision.” *Harrington*, 562 U. S., at ____ (slip op., at 11) (quoting *Yarborough v. Alvarado*, 541 U. S. 652, 664 (2004)). When the state court rejected a *Strickland* claim on the pleadings assuming the allegations to be true, as here, see *ante*, at 16, n. 12, the federal court must ask whether “there is any reasonable argument” supporting the state court’s conclusion that the petitioner’s allegations did not state a claim, *Harrington*, 562 U. S., at ____ (slip op., at 16). This standard is “difficult,” but not impossible, “to meet.” *Id.*, at ____ (slip op., at 12). This case is one in which fairminded jurists could not disagree that the state court erred.

C

Under *Strickland*, “the defendant must show that counsel’s representation fell below an objective standard of reasonableness,” measured according to “prevailing professional norms.” 466 U. S., at 688. We “indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” *Id.*, at 689. When §2254(d) applies, federal-court review is “‘doubly’” deferential. *Harrington*, 562 U. S., at ____ (slip op., at 16) (quoting *Knowles v. Mirzayance*, 556 U. S. ____, ____ (2009) (slip op., at 11)). In the present AEDPA posture, “[t]he question is whether there is any reasonable argument that counsel satisfied *Strickland*’s deferential standard.” *Harrington*, 562 U. S., at ____ (slip op., at 16). Here, there is none.

The majority surmises that counsel decided on a strategy “to get the prosecution’s aggravation witnesses ex-

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cluded for lack of notice, and if that failed, to put on Pinholster’s mother.” *Ante*, at 19. This is the sort of “*post hoc* rationalization’ for counsel’s decisionmaking that contradicts the available evidence of counsel’s actions” that courts cannot indulge. *Harrington*, 562 U. S., at ___ (slip op., at 20) (quoting *Wiggins v. Smith*, 539 U. S. 510, 526–527 (2003)). The majority’s explanation for counsel’s conduct contradicts the best available evidence of counsel’s actions: Dettmar’s frank, contemporaneous statement to the trial judge that he “had not prepared any evidence by way of mitigation.” 52 Tr. 7250. The majority’s conjecture that counsel had in fact prepared a mitigation defense, based primarily on isolated entries in counsel’s billing records, requires it to assume that Dettmar was lying to the trial judge.²⁰

In any event, even if Pinholster’s counsel had a strategic reason for their actions, that would not automatically render their actions reasonable. For example, had counsel decided their best option was to move to exclude the aggravating evidence, it would have been unreasonable to forgo a mitigation investigation on the hope that the motion would be granted. With a client’s life at stake, it would “flou[t] prudence,” *Rompilla v. Beard*, 545 U. S. 374,

²⁰The majority misleadingly cites entries showing that counsel were preparing Brashear’s penalty phase testimony *after* counsel learned that the State intended to present aggravation evidence. The cited entries predating that event show only that counsel conducted about one day’s worth of investigation—consisting of talking to Brashear and researching epilepsy—two months before the penalty phase. See 3 Clerk’s Tr. 798 (1.5-hour phone call to Brashear on Jan. 13); *id.*, at 864, 869 (3-hour meeting with Brashear regarding “childhood problems” on Feb. 23); *id.*, at 869 (3.5 hours for “[r]esearch re; epilepsy and conf. with nurse” on Feb. 25). There is no evidence in the records that counsel actually planned to present mitigating evidence. Indeed, their complete failure to follow up on any of the information they learned in their minimal investigation only confirms that they were not planning to present mitigating evidence. See *infra*, at 29–31.

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389 (2005), for an attorney to rely on the possibility that the court might preclude aggravating evidence pursuant to a “legal technicality” without any backup plan in place in case the court denied the motion, *ante*, at 19. No reasonable attorney would pursue such a risky strategy. I do not understand the majority to suggest otherwise.

Instead, I understand the majority’s conclusion that counsel’s actions were reasonable to rest on its belief that they did have a backup plan: a family-sympathy defense. In reaching this conclusion, the majority commits the same *Strickland* error that we corrected, applying §2254(d)(1), in *Wiggins*: It holds a purportedly “tactical judgment” to be reasonable without assessing “the adequacy of the investigatio[n] supporting [that] judgmen[t],” 539 U. S., at 521. As we stated in *Strickland*:

“[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel’s judgments.” 466 U. S., at 690–691.

We have repeatedly applied this principle since *Strickland*. See *Sears v. Upton*, 561 U. S. ____, ____ (2010) (*per curiam*) (slip op., at 9); *Porter v. McCollum*, 558 U. S. ____, ____ (2009) (*per curiam*) (slip op., at 10); *Wiggins*, 539 U. S.,

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at 527; *Terry Williams*, 529 U. S., at 396.²¹

As these cases make clear, the prevailing professional norms at the time of Pinholster’s trial required his attorneys to “conduct a thorough investigation of the defendant’s background,” *ibid.* (citing 1 ABA Standards for Criminal Justice 4–4.1, commentary, p. 4–55 (2d ed. 1980) (hereinafter ABA Standards)), or “to make a reasonable decision that makes particular investigations unnecessary,” *Strickland*, 466 U. S., at 691.²² “In judging the defense’s investigation, as in applying *Strickland* generally, hindsight is discounted by pegging adequacy to ‘counsel’s perspective at the time’ investigative decisions are made, and by giving a ‘heavy measure of deference to counsel’s judgments.’” *Rompilla*, 545 U. S., at 381 (quoting *Strickland*, 466 U. S., at 689, 691; citation omitted). In some cases, “reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste.” *Rompilla*, 545 U. S., at 383; see, e.g., *Bobby v. Van Hook*, 558 U. S. ___, ___ (2009) (*per curiam*) (slip op., at 8); *Burger v. Kemp*, 483 U. S. 776, 794–795 (1987). In other cases, however, *Strickland* requires further investigation.

²¹I do not doubt that a decision to present a family-sympathy mitigation defense might be consistent “with the standard of professional competence in capital cases that prevailed in Los Angeles in 1984” in some cases. *Ante*, at 24. My point is that even if counsel made a strategic decision to proceed with such a defense, that decision was unreasonable because it was based on an unreasonably incomplete investigation.

²²See also 1 ABA Standards 4–4.1, commentary, at 4–55 (“Information concerning the defendant’s background, education, employment record, mental and emotional stability, family relationships, and the like, will be relevant, as will mitigating circumstances surrounding the commission of the offense itself”). As we recognized in *Strickland*, the ABA Standards, though not dispositive, “are guides to determining what is reasonable.” 466 U. S., at 688; see also *Wiggins v. Smith*, 539 U. S. 510, 524 (2003).

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Wiggins is illustrative of the competence we have required of counsel in a capital case. There, counsel's investigation was limited to three sources: psychological testing, a presentencing report, and Department of Social Services records. 539 U. S., at 523–524. The records revealed that the petitioner's mother was an alcoholic, that he displayed emotional difficulties in foster care, that he was frequently absent from school, and that on one occasion, his mother left him alone for days without food. *Id.*, at 525. In these circumstances, we concluded, "any reasonably competent attorney would have realized that pursuing these leads was necessary to making an informed choice among possible defenses." *Ibid.* Accordingly, we held, the state court's assumption that counsel's investigation was adequate was an unreasonable application of *Strickland*. 539 U. S., at 528.²³

This case is remarkably similar to *Wiggins*. As the majority reads the record, counsel's mitigation investigation consisted of talking to Pinholster's mother, consulting with Dr. Stalberg, and researching epilepsy.²⁴ *Ante*, at 20. What little information counsel gleaned from this "rudimentary" investigation, *Wiggins*, 539 U. S., at 524, would have led any reasonable attorney "to investigate further," *id.*, at 527. Counsel learned from Pinholster's mother that he attended a class for educationally handicapped children, that a psychologist had recommended placing him in a mental institution, and that he spent time in a state

²³As the majority notes, see *ante*, at 24–25, *Wiggins*' trial counsel acknowledged that the investigation he conducted was inconsistent with standard practice in Maryland. See 539 U. S., at 524. We independently concluded, however, that the investigation "was *also* unreasonable in light of what counsel actually discovered in the . . . records." *Id.*, at 525 (emphasis added).

²⁴The majority also posits that Brainard likely spent time preparing Pinholster's brother Terry. However, Terry averred in a declaration that Pinholster's attorneys "never asked [him] any questions relating to Scott's background or [their] family history." Record ER–313.

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hospital for emotionally handicapped children. They knew that Pinholster had been diagnosed with epilepsy.

“[A]ny reasonably competent attorney would have realized that pursuing” the leads suggested by this information “was necessary to making an informed choice among possible defenses.” *Id.*, at 525; see also *Penry v. Lynaugh*, 492 U. S. 302, 319 (1989) (“[E]vidence about the defendant’s background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse” (internal quotation marks omitted)). Yet counsel made no effort to obtain the readily available evidence suggested by the information they learned, such as Pinholster’s schooling or medical records, or to contact Pinholster’s school authorities. They did not contact Dr. Dubin or the many other health-care providers who had treated Pinholster. Put simply, counsel “failed to act while potentially powerful mitigating evidence stared them in the face.” *Bobby*, 558 U. S., at ___ (slip op., at 8) (citing *Wiggins*, 539 U. S., at 525).

The “impediments” facing counsel, *ante*, at 21, did not justify their minimal investigation. It is true that Pinholster was “an unsympathetic client.” *Ibid.* But this fact compounds, rather than excuses, counsel’s deficiency in ignoring the glaring avenues of investigation that could explain why Pinholster was the way he was. See *Sears*, 561 U. S., at ___ (slip op., at 7) (“This evidence might not have made Sears any more likable to the jury, but it might well have helped the jury understand Sears, and his horrendous acts—especially in light of his purportedly stable upbringing”). Nor can Dr. Stalberg’s two-page report, which was based on a very limited record and focused primarily on Pinholster’s mental state at the time of the homicides, excuse counsel’s failure to investigate the

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broader range of potential mitigating circumstances.

“The record of the actual sentencing proceedings underscores the unreasonableness of counsel’s conduct by suggesting that their failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment.” *Wiggins*, 539 U. S., at 526. Dettmar told the trial judge that he was unprepared to present any mitigation evidence. The mitigation case that counsel eventually put on can be described, at best, as “halfhearted.” *Ibid.* Counsel made no effort to bolster Brashear’s self-interested testimony with school or medical records, as the prosecutor effectively emphasized in closing argument. And because they did not pursue obvious leads, they failed to recognize that Brashear’s testimony painting Pinholster as the bad apple in a normal, nondeprived family was false.

In denying Pinholster’s claim, the California Supreme Court necessarily overlooked *Strickland*’s clearly established admonition that “strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations.” 466 U. S., at 690–691. As in *Wiggins*, in light of the information available to Pinholster’s counsel, it is plain that “reasonable professional judgments” could not have supported their woefully inadequate investigation.²⁵ 466 U. S., at 691. Accordingly, the California Supreme Court could not reasonably have concluded that Pinholster

²⁵The majority chastises the Court of Appeals for “attributing strict rules to this Court’s recent case law.” *Ante*, at 24. I agree that courts should not interpret our cases to prescribe strict rules regarding the required scope of mitigation investigations. See *Rompilla v. Beard*, 545 U. S. 374, 394 (2005) (O’Connor, J., concurring) (noting “our longstanding case-by-case approach to determining whether an attorney’s performance was unconstitutionally deficient under *Strickland*”). The Ninth Circuit, however, did no such thing. It appropriately gave thoughtful consideration to the guideposts contained in these cases, just as we have previously done. See, e.g., *Bobby v. Van Hook*, 558 U. S. ___, ___ (2009) (*per curiam*) (slip op., at 8).

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had failed to allege that his counsel's investigation was inadequate under *Strickland*.

D

The majority also concludes that the California Supreme Court could reasonably have concluded that Pinholster did not state a claim of prejudice. This conclusion, in light of the overwhelming mitigating evidence that was not before the jury, is wrong. To establish prejudice, “[t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.*, at 694. When a habeas petitioner challenges a death sentence, “the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.” *Id.*, at 695. This inquiry requires evaluating “the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding—in reweighing it against the evidence in aggravation.” *Terry Williams*, 529 U. S., at 397–398. The ultimate question in this case is whether, taking into account all the mitigating and aggravating evidence, “there is a reasonable probability that at least one juror would have struck a different balance.” *Wiggins*, 539 U. S., at 537; see Cal. Penal Code Ann. §190.4(b) (West 2008) (requiring a unanimous jury verdict to impose a death sentence).

1

Like the majority, I first consider the aggravating and mitigating evidence presented at trial. By virtue of its verdict in the guilt phase, the jury had already concluded that Pinholster had stabbed and killed the victims. As the majority states, the jury saw Pinholster “revel” in his history of burglaries during the guilt phase. *Ante*, at 26.

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The jury heard evidence of Pinholster’s violent tendencies: He had kidnapped someone with a knife, cut a person in the arm with a razor, and had a history of hitting and kicking people. He threatened to kill the State’s lead witness. And he had an extensive disciplinary record in jail.

Brashear offered brief testimony that was apparently intended to be mitigating. See *supra*, at 19–20; see also *ante*, at 27–28.²⁶ However, as the prosecutor argued, Brashear was not a neutral witness. See 53 Tr. 7441 (“A mother clearly loves her son, ladies and gentlemen. Clearly not the most unbiased witness in the world”). Notwithstanding Brashear’s obvious self-interest, counsel failed to offer readily available, objective evidence that would have substantiated and expanded on her testimony. Their failure to do so allowed the prosecutor to belittle her testimony in closing argument. See *supra*, at 19–20. And Brashear’s statement that Pinholster would not be alive much longer because he had “a chip in his head floating around,” 52 Tr. 7397, could only have undermined her credibility, as the prosecutor urged, see 53 *id.*, at 7447 (“Does she want you to believe sometime before he got to

²⁶The majority mischaracterizes several aspects of Brashear’s testimony. Although Brashear testified that the family “didn’t have lots of money,” she followed up that comment by stating that Pinholster did not bring friends to the house because “it was too nice a house.” 52 Tr. 7404. The prosecutor did not understand Brashear to have testified that Pinholster’s childhood was deprived. See 53 *id.*, at 7442 (“You heard that he was not a deprived child”). Nor did the California Supreme Court on direct appeal. *People v. Pinholster*, 1 Cal. 4th 865, 910, 824 P. 2d 571, 587 (1992).

Brashear did testify that Pinholster’s stepfather tried to “discipline” him and that he was “at times” “abusive or near abusive.” 52 Tr. 7392–7393. She suggested, however, that Pinholster deserved the “discipline” he received. See, e.g., *id.*, at 7392 (“Scott was always—he had a mind of his own”). It is unlikely the jury understood Brashear to be suggesting that her husband routinely beat Pinholster. The prosecutor did not come away with this understanding. See 53 *id.*, at 7442.

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country jail some doctor looked in a crystal ball and said, ‘In three years you are going to die?’ That’s ridiculous”). The trial judge was thoroughly unimpressed with Brashear’s testimony. See *supra*, at 20.

Moreover, the evidence presented in Pinholster’s state-court petition revealed that Brashear distorted facts in her testimony in ways that undermined Pinholster’s mitigation case. As in *Sears*, 561 U. S., at ___ (slip op., at 3), the prosecutor used Brashear’s testimony that Pinholster came from a good family against him. See 53 Tr. 7442.

In sum, counsel presented little in the way of mitigating evidence, and the prosecutor effectively used their half-hearted attempt to present a mitigation case to advocate for the death penalty. The jury nonetheless took two days to reach a decision to impose a death sentence.

2

The additional mitigating evidence presented to the California Supreme Court “adds up to a mitigation case that bears no relation” to Brashear’s unsubstantiated testimony. *Rompilla*, 545 U. S., at 393.

Assuming the evidence presented to the California Supreme Court to be true, as that court was required to do, the new mitigating evidence presented to that court would have shown that Pinholster was raised in “chaos and poverty.” Record ER–312. The family home was filled with violence. Pinholster’s siblings had extremely troubled pasts. There was substantial evidence of “mental disturbance during Mr. Pinholster’s childhood and some degree of brain damage.” *Id.*, at ER–493.

Dr. Woods concluded that Pinholster’s aggressive conduct resulted from bipolar mood disorder. Just months before the murders, a doctor had recommended that Pinholster be sent to a psychiatric institute. Dr. Woods also explained that Pinholster’s bizarre behavior before the murders reflected “[a]uditory hallucinations” and “severe

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psychosis.” *Id.*, at ER–169. The available records confirmed that Pinholster suffered from longstanding seizure disorders, which may have been caused by his childhood head injuries.

On this record, I do not see how it can be said that “[t]he ‘new’ evidence largely duplicated the mitigation evidence at trial.” *Ante*, at 29; see *Arizona v. Fulminante*, 499 U. S. 279, 298–299 (1991) (evidence is not “merely cumulative” if it corroborates other evidence that is “unbelievable” on its own). Brashear’s self-interested testimony was not confirmed with objective evidence, as the prosecutor highlighted. The new evidence would have “destroyed the [relatively] benign conception of [Pinholster’s] upbringing” presented by his mother. *Rompilla*, 545 U. S., at 391. The jury heard no testimony at all that Pinholster likely suffered from brain damage or bipolar mood disorder, and counsel offered no evidence to help the jury understand the likely effect of Pinholster’s head injuries or his bizarre behavior on the night of the homicides. The jury heard no testimony recounting the substantial evidence of Pinholster’s likely neurological problems. And it heard no medical evidence that Pinholster suffered from epilepsy.

The majority responds that “much” of Pinholster’s new mitigating evidence “is of questionable mitigating value.” *Ante*, at 29. By presenting psychiatric testimony, it contends, “Pinholster would have opened the door to rebuttal by a state expert.” *Ibid.* But, because the California Supreme Court denied Pinholster’s petition on the pleadings, it had no reason to know what a state expert might have said. Moreover, given the record evidence, it is reasonably probable that at least one juror would have credited his expert. In any event, even if a rebuttal expert testified that Pinholster suffered from antisocial personality disorder, this would hardly have come as a surprise to the jury. See *ante*, at 22 (describing Pinholster as a “psychotic client whose performance at trial hardly endeared

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him to the jury”). It is for this reason that it was especially important for counsel to present the available evidence to help the jury understand Pinholster. See *Sears*, 561 U. S., at ___ (slip op., at 6–7).

Had counsel conducted an adequate investigation, the judge and jury would have heard credible evidence showing that Pinholster’s criminal acts and aggressive tendencies were “attributable to a disadvantaged background, or to emotional and mental problems.” *Penry*, 492 U. S., at 319 (internal quotation marks omitted). They would have learned that Pinholster had the “kind of troubled history we have declared relevant to assessing a defendant’s moral culpability.” *Porter*, 558 U. S., at ___ (slip op., at 12) (quoting *Wiggins*, 539 U. S., at 535). Applying *Strickland*, we have repeatedly found “a reasonable probability,” 466 U. S., at 694, that the sentencer would have reached a different result had counsel presented similar evidence. See, e.g., *Porter*, 558 U. S., at ___ (slip op., at 12–13) (evidence of the defendant’s childhood history of physical abuse, brain abnormality, limited schooling, and heroic military service); *Rompilla*, 545 U. S., at 392 (evidence of severe abuse and neglect as a child, as well as brain damage); *Wiggins*, 539 U. S., at 535 (evidence of the defendant’s “severe privation and abuse” as a child, homelessness, and “diminished mental capacities”); *Terry Williams*, 529 U. S., at 398 (evidence of childhood mistreatment and neglect, head injuries, possible organic mental impairments, and borderline mental retardation).

The majority does not dispute the similarity between this case and the cited cases. However, it criticizes the Court of Appeals for relying on *Rompilla* and *Terry Williams* on the ground that we reviewed the prejudice question *de novo* in those cases. See *ante*, at 31. I do not read *Terry Williams* to review the prejudice question *de novo*.²⁷

²⁷ *Terry Williams* held that the state court’s decision was “unreason-

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More fundamentally, however, I cannot agree with the premise that “[t]hose cases . . . offer no guidance with respect to whether a state court has unreasonably determined that prejudice is lacking.” *Ante*, at 31 (emphasis deleted). In each of these cases, we did not purport to create new law; we simply applied the same clearly established precedent, *Strickland*, to a different set of facts. Because these cases illuminate the kinds of mitigation evidence that suffice to establish prejudice under *Strickland*, they provide useful, but not dispositive, guidance for courts to consider when determining whether a state court has unreasonably applied *Strickland*.

In many cases, a state court presented with additional mitigation evidence will reasonably conclude that there is no “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U. S., at 694. This is not such a case. Admittedly, Pinholster unjustifiably stabbed and killed two people, and his history of violent outbursts and burglaries surely did not endear him to the jury. But the homicides did not appear premeditated. And the State’s aggravation case was no stronger than in *Rompilla* and *Terry Williams*. See 545 U. S., at 378, 383 (the defendant committed murder by torture and had a significant history of violent felonies, including a rape); 529 U. S., at 418 (Rehnquist, C. J., concurring in part and dissenting in part) (the defendant had a lifetime of crime, and after the murder he “savagely beat an elderly woman,” set a home on fire, and stabbed a man (internal quotation marks omitted)). Even on the trial record, it took the jury two days to decide on a penalty. The contrast between the “not

able in at least two respects”: (1) It applied the wrong legal standard, see 529 U. S., at 397, and (2) it “failed to accord appropriate weight to the body of mitigation evidence available to trial counsel,” *id.*, at 398. We did not purport to conduct *de novo* review.

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persuasive” mitigation case put on by Pinholster’s counsel, 54 Tr. 7514, and the substantial mitigation evidence at their fingertips was stark. Given these considerations, it is not a foregone conclusion, as the majority deems it, that a juror familiar with his troubled background and psychiatric issues would have reached the same conclusion regarding Pinholster’s culpability. Fairminded jurists could not doubt that, on the record before the California Supreme Court, “there [was] a reasonable probability that at least one juror would have struck a different balance.” *Wiggins*, 539 U. S., at 537.

III

The state-court record on its own was more than adequate to support the Court of Appeals’ conclusion that the California Supreme Court could not reasonably have rejected Pinholster’s *Strickland* claim. The additional evidence presented in the federal evidentiary hearing only confirms that conclusion.

A

At the hearing, Pinholster offered many of the same documents that were before the state habeas court. He also offered his trial attorneys’ billing records, which were before the state habeas court as part of the trial record. Of the seven lay witnesses who testified at the hearing, six had previously executed declarations in support of Pinholster’s state-court petition. (The seventh, Pinholster’s uncle, provided testimony cumulative of other testimony.)

Two experts testified on Pinholster’s behalf; neither had presented declarations to the state habeas court. The first was Dr. Donald Olson, assistant professor of neurology and neurological sciences and director of the Pediatric Epilepsy Program at Stanford University Medical Center. It appears that Pinholster retained Dr. Olson to rebut the testimony of the expert disclosed by the State in the fed-

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eral proceeding. See Decl. of Michael D. Abzug in Support of Stipulated *Ex Parte* Application to Continue Evidentiary Hearing and Discovery Cut-Off and to Substitute Counsel in *Pinholster v. Calderon*, No. CV 95–6240–GLT (CD Cal.), p. 2. Relying in part on Pinholster’s abnormal EEG, Dr. Olson opined that Pinholster’s childhood accidents “likely result[ed] in brain injury” and that these injuries “conferred a risk of epilepsy.” Record ER–699 to ER–700. He concluded that it was reasonably probable that Pinholster had suffered from partial epilepsy since at least 1968 and had suffered from brain injury since at least 1964. *Id.*, at ER–701.

Pinholster’s second expert was Dr. Sophia Vinogradov, associate professor of psychiatry at the University of California, San Francisco. Dr. Vinogradov’s testimony was based on essentially the same facts as Dr. Woods’ and Dr. Stalberg’s state-court declarations. She highlighted Pinholster’s childhood head traumas, history of epilepsy, abusive and neglected upbringing, history of substance abuse, and bizarre behavior on the night of the homicides. She opined that his aggressive behavior resulted from childhood head traumas:

“All data indicates that there were severe effects of the two serious head injuries sustained at age 2 and age 3, with evidence for behavioral changes related to dysfunction of frontal cortex: severe attentional and learning problems in childhood, hyperactivity, aggressivity, impulsivity, social-emotional impairment, seizure disorder, and explosive dyscontrol.” *Id.*, at ER–731.

She also opined that, right before the homicides, Pinholster was in an “apparently hallucinatory state [that] was likely the result of his intoxication with multiple substances.” *Id.*, at ER–707

The State presented two experts: Dr. Stalberg, the

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psychiatrist who had examined Pinholster in the middle of trial,²⁸ and Dr. David Rudnick. Although Dr. Stalberg maintained that Pinholster suffered from antisocial personality disorder, which was his original diagnosis in the middle of trial, he again emphasized that there was “voluminous” and “compelling” mitigation evidence that had not previously been made available to him or presented to the jury. *Id.*, at ER–926, ER–953. He stated that conversations with Pinholster’s family revealed that he and his siblings were “raised like animals, wild animals,” *id.*, at ER–948, and he opined that Pinholster’s upbringing was a risk factor for antisocial personality disorder. See *ibid.* (Pinholster’s upbringing “would speak volumes, looking at it from a mitigation point of view”). And he agreed that the mitigation evidence presented at trial was “profoundly misleading.” *Id.*, at ER–966. Dr. Rudnick testified that Pinholster suffered from antisocial personality disorder.

The State also introduced into evidence the 1978 probation report that Pinholster’s counsel had in their possession at the time of his trial. The report demonstrated that counsel were aware that Pinholster was in classes for educationally handicapped children, that he was committed to a state hospital for emotionally handicapped children, and that he suffered two “severe head injuries.” *Id.*, at SER–243.

B

Much of the evidence presented at the federal hearing

²⁸ Before the hearing, Dr. Stalberg had opined that Pinholster was “substantially impaired by a bipolar mood disorder operating synergistically with intoxication and a seizure disorder at the time the crime was committed.” Record ER–587. At a prehearing deposition, however, Dr. Stalberg revised his opinion and stated that he continued to believe that Pinholster suffered from psychopathic personality traits. After the deposition, Pinholster elected to proceed with a different expert, presumably in light of Dr. Stalberg’s unexpected change in position. The State then retained Dr. Stalberg as its own expert.

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was duplicative of the evidence submitted to the California Supreme Court. The additional evidence presented at the hearing only confirmed that the California Supreme Court could not reasonably have rejected Pinholster's claim.²⁹

For example, the probation report presented by the State confirmed that counsel had in their possession information that would have led any reasonable attorney "to investigate further." *Wiggins*, 539 U. S., at 527. Counsel nevertheless took no action to investigate these leads.

Pinholster's experts opined that his childhood head traumas likely resulted in brain injury and conferred a risk of epilepsy. Although the State presented testimony that Pinholster had antisocial personality disorder, it was not clear error for the District Court to conclude that jurors could have credited Pinholster's experts. Even the

²⁹The State argues that the District Court was not entitled to rely on the evidence adduced at the hearing because Pinholster was not diligent in developing his claims in state court and the hearing was therefore barred by 28 U. S. C. §2254(e)(2). This argument is somewhat imprecise. Pinholster's allegations in his amended federal petition were "identical" to the allegations he presented to the California Supreme Court, *ante*, at 6, and he diligently requested a hearing in state court. The State presumably means to argue that Pinholster's new expert testimony changed "the factual basis" of his claim such that, by the time of the evidentiary hearing, he no longer satisfied §2254(e)(2). However, at oral argument, the State suggested that Pinholster was presenting an altogether new claim in the federal court. See Tr. of Oral Arg. 18. If that is the case, §2254(d)(1) does not apply at all, and the State should be arguing lack of exhaustion or procedural default. I do not understand Pinholster to have presented a new claim to the District Court.

In any event, Pinholster satisfied §2254(e)(2) in this case. He made "a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court." *Michael Williams*, 529 U. S., at 435. His experts relied on the very same facts and evidence. I cannot read §2254(e)(2) to impose a strict requirement that petitioners must use the same experts they presented to the state court. This rule would result in numerous practical problems, for example in the case of the unanticipated death of an expert.

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State's own expert, Dr. Stalberg, testified to the "voluminous" mitigation evidence in Pinholster's case. Record ER-926.

In sum, the evidence confirmed what was already apparent from the state-court record: Pinholster's counsel failed to conduct an adequate mitigation investigation, and there was a reasonable probability that at least one juror confronted with the "voluminous" mitigating evidence counsel should have discovered would have voted to spare Pinholster's life. *Ibid.* Accordingly, whether on the basis of the state- or federal-court record, the courts below correctly concluded that Pinholster had shown that the California Supreme Court's decision reflected an unreasonable application of *Strickland*.³⁰

* * *

I cannot agree with either aspect of the Court's ruling. I fear the consequences of the Court's novel interpretation of §2254(d)(1) for diligent state habeas petitioners with compelling evidence supporting their claims who were unable, through no fault of their own, to present that evidence to the state court that adjudicated their claims. And the Court's conclusion that the California Supreme Court reasonably denied Pinholster's ineffective-assistance-of-counsel claim overlooks counsel's failure to investigate obvious avenues of mitigation and the contrast between the woefully inadequate mitigation case they presented and the evidence they should and would have discovered. I respectfully dissent.

³⁰The State's challenge in this Court is limited to the questions whether the Federal District Court was entitled to consider the additional evidence in the §2254(d)(1) analysis and whether Pinholster satisfied §2254(d)(1) on the basis of the state-court record. It has not challenged the District Court's ultimate conclusion that Pinholster had proved that he was "in custody in violation of the Constitution or laws or treaties of the United States." §2254(a).

33 to accept a plea offer conditioned on waiver of ineffective assistance of counsel because of
34 Vermont's prohibition that "a lawyer shall not attempt to exonerate himself from or limit his
35 liability to his client for personal malpractice." Similarly, Ohio Ethics Opinion 2001-6 opined
36 that a waiver of ineffective assistance of counsel claims equates to a limitation on the criminal
37 defense lawyer's liability for malpractice, because it "significantly limits and may even destroy
38 the defendant's ability to establish proximate cause, a necessary element of a legal malpractice
39 claim." Ohio also reaches the same conclusion as Missouri that a prosecutor may not make such
40 an offer, because a prosecutor should not seek to insulate his or her misconduct with a waiver.
41 Tennessee Informal Ethics Opinion 94-A-549 states that neither a criminal defense lawyer nor a
42 prosecutor may make an agreement to waive ineffective assistance of counsel or prosecutorial
43 misconduct because of the prohibition in the Ethical Canons and Disciplinary Rules against
44 limiting liability for malpractice.

45 North Carolina Ethics Opinion 129 (1993) opined that a plea offer conditioned on waiver of
46 ineffective assistance of counsel may limit the criminal defendant's ability to seek a remedy for
47 malpractice and, even if not, that any discipline against the prosecutor or criminal defense lawyer
48 "may be hollow and ineffective remedies for the incarcerated Client C and insufficient to assure
49 compliance with the rules." The opinion points out the personal conflict for the criminal defense
50 lawyer in advising the client regarding the agreement. Similarly, an Alabama informal opinion
51 (dated September 1, 2010) concluded that an agreement precluding an ineffective assistance of
52 counsel claim may run afoul of the rule prohibiting prospective limitation of malpractice claims
53 based on the inquirer's statement that the ineffective assistance of counsel claim is "the
54 functional equivalent of a malpractice claim."

55 The National Association of Criminal Defense Counsel has published a proposed opinion,
56 03-02, which indicates that a criminal defense lawyer may not participate in a plea agreement
57 that waives the client's right to collaterally attack the plea with a claim of ineffective assistance
58 of counsel, because of the personal conflict of interest it presents for criminal defense counsel,
59 and because the waiver limits the lawyer's malpractice liability, because the criminal defendant
60 in most jurisdictions must make a successful ineffective assistance of counsel claim in order to
61 bring a malpractice claim against the lawyer. The opinion also states that the prosecutor should
62 not make such offers, because the offer is prejudicial to the administration of justice and because
63 it assists or induces the criminal defense lawyer to violate the rules.

64 Arizona Ethics Opinion 95-08 specifically determined that a plea offer waiving collateral
65 rights, such a later claim of ineffective assistance of counsel, is not a prospective waiver of
66 malpractice and therefore is not prohibited under the rules. The opinion notes that, not only is
67 ineffective assistance of counsel not a claim of malpractice, the agreement is between the
68 prosecutor and the criminal defendant, not between the criminal defendant and the criminal
69 defense lawyer. The Arizona opinion does not discuss the issue of conflicts of interest. A
70 dissent in the opinion vigorously disagreed with the opinion, indicating that the broad policy
71 behind the rule is to permit clients to later challenge the conduct of their lawyers. The dissent
72 quoted from an earlier opinion of the committee finding the rule prohibited an agreement
73 between lawyer and client that client would not file a bar complaint, stating “agreements such as
74 the one the inquiring attorney proposes involve the very same evils that ER 1.8(h) is designed to
75 prevent; the strong potential of coercion and over-reaching on the attorney’s part, and the
76 potential conflict between the lawyer’s interests and those of his client.”

77 Texas is the only state, to date, that has specifically addressed the conflict of interest issue
78 and determined that it may be permissible to advise a criminal defense client regarding waiving
79 an ineffective assistance of counsel claim in making the plea. Texas Ethics Opinion 571 (2006)
80 concludes that a criminal defense lawyer may or may not have a conflict of interest when faced
81 with the plea offer from the prosecutor requiring a waiver of ineffective assistance of counsel,
82 and that in order to advise the client regarding the plea offer, the lawyer must reasonably
83 conclude that the representation will not be affected by the lawyer’s personal interests. The
84 opinion states that the lawyer must decide on a case-by-case basis whether the lawyer has a
85 conflict because of concerns that the client may have a basis to raise ineffective assistance of
86 counsel and whether the lawyer is able to make the full disclosure to the client necessary to
87 obtain consent to continued representation. Additionally, the opinion concludes that the
88 applicability of restrictions on waiving malpractice claims will depend on whether the plea
89 agreement is interpreted to limit the criminal defense lawyer’s liability to the defendant for
90 malpractice. Finally, the Texas opinion indicates that the prosecutor may make such a plea offer,
91 although the prosecutor may still be subject to discipline if the prosecutor in fact engages in
92 prosecutorial misconduct.

93 This Committee agrees with the majority of states that have addressed this issue that it is
94 improper for the prosecutor to make such an offer and for the defense lawyer to advise the client
95 on accepting the offer.

96 Rule 4-1.8(h) addresses agreements limiting a lawyer's liability for malpractice and states:

97

98 **(h) Limiting Liability for Malpractice.** A lawyer shall not make an
99 agreement prospectively limiting the lawyer's liability to a client for malpractice
100 unless permitted by law and the client is independently represented in making the
101 agreement. A lawyer shall not settle a claim for such liability with an
102 unrepresented client or former client without first advising that person in writing
103 that independent representation is appropriate in connection therewith.

104

105 This type of plea agreement is between the prosecutor and the defendant, and an ineffective
106 assistance of counsel claim is not a malpractice claim. Thus, on its face, the rule does not
107 prohibit advising a criminal defense client to enter a plea agreement that waives the client's right
108 to claim ineffective assistance of counsel in a collateral proceeding. However, a lawyer should
109 not be permitted to do indirectly what the lawyer cannot do directly. A defense lawyer's
110 recommendation that a client waive a claim of ineffective assistance of counsel is akin to
111 limiting malpractice liability, which is impermissible if the terms of the rule cannot be met.

112 Unlike malpractice liability, which is a type of conflict that may be waived under specific
113 circumstances with independent representation, the Committee believes that the personal conflict
114 created by such a plea agreement cannot be waived. Rule 4-1.7(a)(2) provides as follows:

115 **(a) Representing Adverse Interests.** Except as provided in subdivision (b), a
116 lawyer shall not represent a client if:

117

118 ***

119

120 (2) there is a substantial risk that the representation of 1 or more clients
121 will be materially limited by the lawyer's responsibilities to another client, a
122 former client or a third person or by a personal interest of the lawyer

123 The Committee concludes that a criminal defense lawyer has a personal conflict of interest
124 when advising a client regarding waiving the right to later collateral proceedings regarding
125 ineffective assistance of counsel. The lawyer has a personal interest in not having the lawyer's
126 own representation of the client determined to be ineffective under constitutional standards. This
127 conflict is not one that the client should be asked to waive as noted in the comment to Rule 4-1.7,
128 which states: "when a disinterested lawyer would conclude that the client should not agree to the
129 representation under the circumstances, the lawyer involved cannot properly ask for such
130 agreement or provide representation on the basis of the client's consent." A disinterested lawyer
131 would be unlikely to reach the conclusion that the criminal defense lawyer could give objective
132 advice about that lawyer's own performance.

133 Regarding the prosecutor's conduct in offering the plea agreement, the committee agrees
134 with those states that find that the conduct is impermissible as both prejudicial to the
135 administration of justice and assisting the criminal defense lawyer in violating the Rules of
136 Professional Conduct under Rule 4-8.4(d) and 4-8.4(a), Rules Regulating The Florida Bar. The
137 Committee believes that the vast majority of prosecutors act in good faith and would not
138 intentionally commit misconduct. However, some prosecutorial misconduct can occur
139 unintentionally and, in the rare instance, even intentionally. Prosecutorial misconduct may be
140 known only to the prosecutor in question, e.g., when the prosecutor has failed to disclose
141 exculpatory information. The Committee's opinion is that it is prejudicial to the administration
142 of justice for a prosecutor to require the criminal defendant to waive claims of prosecutorial
143 misconduct when the prosecutor is in the best position, and indeed may be the only person, to be
144 aware that misconduct has taken place.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

HOLLAND v. FLORIDA**CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT**

No. 09–5327. Argued March 1, 2010—Decided June 14, 2010

Petitioner Holland was convicted of first-degree murder and sentenced to death in Florida state court. After the State Supreme Court affirmed on direct appeal and denied collateral relief, Holland filed a *pro se* federal habeas corpus petition, which was approximately five weeks late under the 1-year statute of limitations set forth in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U. S. C. §2244(d). The record facts reveal, *inter alia*, that Holland’s court-appointed attorney, Bradley Collins, had failed to file a timely federal petition, despite Holland’s many letters emphasizing the importance of doing so; that Collins apparently did not do the research necessary to find out the proper filing date, despite the fact that Holland had identified the applicable legal rules for him; that Collins failed to inform Holland in a timely manner that the State Supreme Court had decided his case, despite Holland’s many pleas for that information; and that Collins failed to communicate with Holland over a period of years, despite Holland’s pleas for responses to his letters. Meanwhile, Holland repeatedly requested that the state courts and the Florida bar remove Collins from his case. Based on these and other record facts, Holland asked the Federal District Court to toll the AEDPA limitations period for equitable reasons. It refused, holding that he had not demonstrated the due diligence necessary to invoke equitable tolling. Affirming, the Eleventh Circuit held that, regardless of diligence, Holland’s case did not constitute “extraordinary circumstances.” Specifically, it held that when a petitioner seeks to excuse a late filing based on his attorney’s unprofessional conduct, that conduct, even if grossly negligent, cannot justify equitable tolling absent proof of bad faith, dishonesty, divided loyalty, mental impairment, or the like.

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Held:

1. Section 2244(d), the AEDPA statute of limitations, is subject to equitable tolling in appropriate cases. Pp. 12–21.

(a) Several considerations support the Court’s holding. First, because AEDPA’s “statute of limitations defense . . . is not ‘jurisdictional,’” *Day v. McDonough*, 547 U. S. 198, 205, 213, it is subject to a “rebuttable presumption” in favor “of equitable tolling,” *Irwin v. Department of Veterans Affairs*, 498 U. S. 89, 95–96. That presumption’s strength is reinforced here by the fact that “equitable principles” have traditionally “governed” substantive habeas law. *Munaf v. Geren*, 553 U. S. 674, ___, and the fact that Congress enacted AEDPA after *Irwin* and therefore was likely aware that courts, when interpreting AEDPA’s timing provisions, would apply the presumption, see, e.g., *Merck & Co. v. Reynolds*, 559 U. S. ___, ___. Second, §2244(d) differs significantly from the statutes at issue in *United States v. Brockamp*, 519 U. S. 347, 350–352, and *United States v. Beggerly*, 524 U. S. 38, 49, in which the Court held that *Irwin*’s presumption had been overcome. For example, unlike the subject matters at issue in those cases—tax collection and land claims—AEDPA’s subject matter, habeas corpus, pertains to an area of the law where equity finds a comfortable home. See *Munaf*, *supra*, at ___. *Brockamp*, *supra*, at 352, distinguished. Moreover, AEDPA’s limitations period is neither unusually generous nor unusually complex. Finally, the Court disagrees with respondent’s argument that equitable tolling undermines AEDPA’s basic purpose of eliminating delays in the federal habeas review process, see, e.g., *Day*, *supra*, at 205–206. AEDPA seeks to do so without undermining basic habeas corpus principles and by harmonizing the statute with prior law, under which a petition’s timeliness was always determined under equitable principles. See, e.g., *Slack v. McDaniel*, 529 U. S. 473, 483. Such harmonization, along with the Great Writ’s importance as the only writ explicitly protected by the Constitution, counsels hesitancy before interpreting AEDPA’s silence on equitable tolling as congressional intent to close courthouse doors that a strong equitable claim would keep open. Pp. 12–16.

(b) The Eleventh Circuit’s *per se* standard is too rigid. A “petitioner” is “entitled to equitable tolling” if he shows “(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way” and prevented timely filing. *Pace v. DiGuglielmo*, 544 U. S. 408, 418. Such “extraordinary circumstances” are not limited to those that satisfy the Eleventh Circuit’s test. Courts must often “exercise [their] equity powers . . . on a case-by-case basis,” *Baggett v. Bullitt*, 377 U. S. 360, 375, demonstrating “flexibility” and avoiding “mechanical rules,” *Holmberg v. Armbrecht*,

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327 U. S. 392, 396, in order to “relieve hardships . . . aris[ing] from a hard and fast adherence” to more absolute legal rules, *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U. S. 238, 248. The Court’s cases recognize that equity courts can and do draw upon decisions made in other similar cases for guidance, exercising judgment in light of precedent, but with awareness of the fact that specific circumstances, often hard to predict, could warrant special treatment in an appropriate case. *Coleman v. Thompson*, 501 U. S. 722, 753, distinguished. No pre-existing rule of law or precedent demands the Eleventh Circuit’s rule. That rule is difficult to reconcile with more general equitable principles in that it fails to recognize that, at least sometimes, an attorney’s unprofessional conduct can be so egregious as to create an extraordinary circumstance warranting equitable tolling, as several other federal courts have specifically held. Although equitable tolling is not warranted for “a garden variety claim of excusable neglect,” *Irwin, supra*, at 96, this case presents far more serious instances of attorney misconduct than that. Pp. 16–19.

2. While the record facts suggest that this case may well present “extraordinary” circumstances, the Court does not state its conclusion absolutely because more proceedings may be necessary. The District Court incorrectly rested its ruling not on a lack of such circumstances, but on a lack of diligence. Here, Holland diligently pursued his rights by writing Collins numerous letters seeking crucial information and providing direction, by repeatedly requesting that Collins be removed from his case, and by filing his own *pro se* habeas petition on the day he learned his AEDPA filing period had expired. Because the District Court erroneously concluded that Holland was not diligent, and because the Court of Appeals erroneously relied on an overly rigid *per se* approach, no lower court has yet considered whether the facts of this case indeed constitute extraordinary circumstances sufficient to warrant equitable tolling. The Eleventh Circuit may determine on remand whether such tolling is appropriate, or whether an evidentiary hearing and other proceedings might indicate that the State should prevail. Pp. 19–21.

539 F. 3d 1334, reversed and remanded.

BREYER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and STEVENS, KENNEDY, GINSBURG, and SOTOMAYOR, JJ., joined. ALITO, J., filed an opinion concurring in part and concurring in the judgment. SCALIA, J., filed a dissenting opinion, in which THOMAS, J., joined as to all but Part I.

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NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 09–5327

ALBERT HOLLAND, PETITIONER *v.* FLORIDA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

[June 14, 2010]

JUSTICE BREYER delivered the opinion of the Court.

We here decide that the timeliness provision in the federal habeas corpus statute is subject to equitable tolling. See Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U. S. C. §2244(d). We also consider its application in this case. In the Court of Appeals’ view, when a petitioner seeks to excuse a late filing on the basis of his attorney’s unprofessional conduct, that conduct, even if it is “negligent” or “grossly negligent,” cannot “rise to the level of egregious attorney misconduct” that would warrant equitable tolling unless the petitioner offers “proof of bad faith, dishonesty, divided loyalty, mental impairment or so forth.” 539 F. 3d 1334, 1339 (CA11 2008) (*per curiam*). In our view, this standard is too rigid. See *Irwin v. Department of Veterans Affairs*, 498 U. S. 89, 96 (1990); see also *Lawrence v. Florida*, 549 U. S. 327, 336 (2007). We therefore reverse the judgment of the Court of Appeals and remand for further proceedings.

I

AEDPA states that “[a] 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State

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court.” §2244(d)(1). It also says that “[t]he time during which a properly filed application for State post-conviction . . . review” is “pending shall not be counted” against the 1-year period. §2244(d)(2).

On January 19, 2006, Albert Holland filed a *pro se* habeas corpus petition in the Federal District Court for the Southern District of Florida. Both Holland (the petitioner) and the State of Florida (the respondent) agree that, unless equitably tolled, the statutory limitations period applicable to Holland’s petition expired approximately five weeks before the petition was filed. See Brief for Respondent 9, and n. 7; Brief for Petitioner 5, and n. 4. Holland asked the District Court to toll the limitations period for equitable reasons. We shall set forth in some detail the record facts that underlie Holland’s claim.

A

In 1997, Holland was convicted of first-degree murder and sentenced to death. The Florida Supreme Court affirmed that judgment. *Holland v. State*, 773 So. 2d 1065 (Fla. 2000). On *October 1, 2001*, this Court denied Holland’s petition for certiorari. 534 U. S. 834. And on that date—the date that our denial of the petition ended further direct review of Holland’s conviction—the 1-year AEDPA limitations clock began to run. See 28 U. S. C. §2244(d)(1)(A); *Jimenez v. Quarterman*, 555 U. S. ___, ___ (2009) (slip op., at 6).

Thirty-seven days later, on *November 7, 2001*, Florida appointed attorney Bradley Collins to represent Holland in all state and federal postconviction proceedings. Cf. Fla. Stat. §§27.710, 27.711(2) (2007). By *September 19, 2002*—316 days after his appointment and 12 days before the 1-year AEDPA limitations period expired—Collins, acting on Holland’s behalf, filed a motion for postconviction relief in the state trial court. Cf. Brief for Respondent 9, n. 7. That filing automatically stopped the running of

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the AEDPA limitations period, §2244(d)(2), with, as we have said, 12 days left on the clock.

For the next three years, Holland’s petition remained pending in the state courts. During that time, Holland wrote Collins letters asking him to make certain that all of his claims would be preserved for any subsequent federal habeas corpus review. Collins wrote back, stating, “I would like to reassure you that we are aware of state-time limitations and federal exhaustion requirements.” App. 55. He also said that he would “presen[t] . . . to the . . . federal courts” any of Holland’s claims that the state courts denied. *Ibid.* In a second letter Collins added, “should your Motion for Post-Conviction Relief be denied” by the state courts, “your state habeas corpus claims will then be ripe for presentation in a petition for writ of habeas corpus in federal court.” *Id.*, at 61.

In mid-May 2003 the state trial court denied Holland relief, and Collins appealed that denial to the Florida Supreme Court. Almost two years later, in February 2005, the Florida Supreme Court heard oral argument in the case. See 539 F. 3d, at 1337. But during that 2-year period, relations between Collins and Holland began to break down. Indeed, between April 2003 and January 2006, Collins communicated with Holland only three times—each time by letter. See No. 1:06-cv-20182-PAS (SD Fla., Apr. 27, 2007), p. 7, n. 6 (hereinafter District Court opinion), App. 91, n. 6.

Holland, unhappy with this lack of communication, twice wrote to the Florida Supreme Court, asking it to remove Collins from his case. In the second letter, filed on June 17, 2004, he said that he and Collins had experienced “a complete breakdown in communication.” App. 160. Holland informed the court that Collins had “not kept [him] updated on the status of [his] capital case” and that Holland had “not seen or spoken to” Collins “since April 2003.” *Id.*, at 150. He wrote, “Mr. Collins has aban-

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doned [me]” and said, “[I have] no idea what is going on with [my] capital case on appeal.” *Id.*, at 152. He added that “Collins has never made any reasonable effort to establish any relationship of trust or confidence with [me],” *id.*, at 155, and stated that he “does not trust” or have “any confidence in Mr. Collin’s ability to represent [him],” *id.*, at 152. Holland concluded by asking that Collins be “dismissed (removed) off his capital case” or that he be given a hearing in order to demonstrate Collins’ deficiencies. *Id.*, at 155, 161. The State responded that Holland could not file any *pro se* papers with the court while he was represented by counsel, including papers seeking new counsel. *Id.*, at 42–45. The Florida Supreme Court agreed and denied Holland’s requests. *Id.*, at 46.

During this same period Holland wrote various letters to the Clerk of the Florida Supreme Court. In the last of these he wrote, “[I]f I had a competent, conflict-free, post-conviction, appellate attorney representing me, I would not have to write you this letter. I’m not trying to get on your nerves. I just would like to know *exactly* what is happening with my case on appeal to the Supreme Court of Florida.” *Id.*, at 147. During that same time period, Holland also filed a complaint against Collins with the Florida Bar Association, but the complaint was denied. *Id.*, at 65–67.

Collins argued Holland’s appeal before the Florida Supreme Court on February 10, 2005. 539 F. 3d, at 1337. Shortly thereafter, Holland wrote to Collins emphasizing the importance of filing a timely petition for habeas corpus in federal court once the Florida Supreme Court issued its ruling. Specifically, on March 3, 2005, Holland wrote:

“Dear Mr. Collins, P. A.:

“How are you? Fine I hope.

“I write this letter to ask that you please write me back, as soon as possible to let me know what the status of my case is on appeal to the Supreme Court of

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Florida.

“If the Florida Supreme Court denies my [postconviction] and State Habeas Corpus appeals, *please file my 28 U. S. C. 2254 writ of Habeas Corpus petition, before my deadline to file it runs out (expires)*.

“Thank you very much.

“Please have a nice day.” App. 210 (emphasis added).

Collins did not answer this letter.

On June 15, 2005, Holland wrote again:

“Dear Mr. Collins:

“How are you? Fine I hope.

“On March 3, 2005 I wrote you a letter, asking that you let me know the status of my case on appeal to the Supreme Court of Florida.

“Also, *have you begun preparing my 28 U. S. C. §2254 writ of Habeas Corpus petition? Please let me know, as soon as possible.*

“Thank you.” *Id.*, at 212 (emphasis added).

But again, Collins did not reply.

Five months later, in November 2005, the Florida Supreme Court affirmed the lower court decision denying Holland relief. *Holland v. State*, 916 So. 2d 750 (*per curiam*). Three weeks after that, on *December 1, 2005*, the court issued its mandate, making its decision final. 539 F. 3d, at 1337. At that point, the AEDPA federal habeas clock again began to tick—with 12 days left on the 1-year meter. See *Coates v. Byrd*, 211 F. 3d 1225 (CA11 2000) (*per curiam*) (AEDPA clock restarts when state court completes postconviction review); *Lawrence*, 549 U. S. 327 (same). Twelve days later, on *December 13, 2005*, Holland’s AEDPA time limit expired.

B

Four weeks after the AEDPA time limit expired, on

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January 9, 2006, Holland, still unaware of the Florida Supreme Court ruling issued in his case two months earlier, wrote Collins a third letter:

“Dear Mr. Bradley M. Collins:

“How are you? Fine I hope.

“I write this letter to ask that you please let me know the status of my appeals before the Supreme Court of Florida. Have my appeals been decided yet?

“Please send me the [necessary information] . . . so that I can determine when the deadline will be to file my 28 U. S. C. Rule 2254 Federal Habeas Corpus Petition, in accordance with all United States Supreme Court and Eleventh Circuit case law and applicable ‘Antiterrorism and Effective Death Penalty Act,’ if my appeals before the Supreme Court of Florida are denied.

“Please be advised that I want to preserve my privilege to federal review of all of my state convictions and sentences.

“Mr. Collins, would you please also inform me as to which United States District Court my 28 U. S. C. Rule 2254 Federal Habeas Corpus Petition will have to be timely filed in and that court’s address?

“Thank you very much.” App. 214.

Collins did not answer.

Nine days later, on January 18, 2006, Holland, working in the prison library, learned for the first time that the Florida Supreme Court had issued a final determination in his case and that its mandate had issued—five weeks prior. 539 F. 3d, at 1337. He immediately wrote out his own *pro se* federal habeas petition and mailed it to the Federal District Court for the Southern District of Florida the next day. *Ibid.* The petition begins by stating,

“Comes now Albert R. Holland, Jr., a Florida death row inmate and states that court appointed counsel

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has failed to undertake timely action to seek Federal Review in my case by filing a 28 U. S. C. Rule 2254 Petition for Writ of Habeas Corpus on my behalf.” App. 181.

It then describes the various constitutional claims that Holland hoped to assert in federal court.

The same day that he mailed that petition, Holland received a letter from Collins telling him that Collins intended to file a petition for certiorari in this Court from the State Supreme Court’s most recent ruling. Holland answered immediately:

“Dear Mr. Bradley M. Collins:

“Since recently, the Supreme Court of Florida has denied my [postconviction] and state writ of Habeas Corpus Petition. I am left to understand that you are planning to seek certiorari on these matters.

“It’s my understanding that the AEDPA time limitations is not tolled during discretionary appellate reviews, such as certiorari applications resulting from denial of state post conviction proceedings.

“Therefore, I advise you *not* to file certiorari if doing so affects or jeopardizes my one year *grace* period as prescribed by the AEDPA.

“Thank you very much.” *Id.*, at 216 (some emphasis deleted).

Holland was right about the law. See *Coates, supra*, at 1226–1227 (AEDPA not tolled during pendency of petition for certiorari from judgment denying state postconviction review); accord, *Lawrence v. Florida*, 421 F. 3d 1221, 1225 (CA11 2005), *aff’d*, 549 U. S., at 331–336.

On January 26, 2006, Holland tried to call Collins from prison. But he called collect and Collins’ office would not accept the call. App. 218. Five days later, Collins wrote to Holland and told him for the very first time that, as

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Collins understood AEDPA law, the limitations period applicable to Holland’s federal habeas application had in fact expired in 2000—*before* Collins had begun to represent Holland. Specifically, Collins wrote:

“Dear Mr. Holland:

“I am in receipt of your letter dated January 20, 2006 concerning operation of AEDPA time limitations. One hurdle in our upcoming efforts at obtaining federal habeas corpus relief will be that the one-year statutory time frame for filing such a petition began to run after the case was affirmed on October 5, 2000 [when your] Judgment and Sentence . . . were affirmed by the Florida Supreme Court. However, it was not until November 7, 2001, that I received the Order appointing me to the case. As you can see, *I was appointed about a year after your case became final.* . . .

“[T]he AEDPA time period [thus] had run before my appointment and therefore before your [postconviction] motion was filed.” *Id.*, at 78–79 (emphasis added).

Collins was wrong about the law. As we have said, Holland’s 1-year limitations period did not begin to run until *this* Court denied Holland’s petition for certiorari from the state courts’ denial of relief on direct review, which occurred on October 1, 2001. See 28 U. S. C. §2244(d)(1)(A); *Jimenez*, 555 U. S., at ___ (slip op., at 6); *Bond v. Moore*, 309 F. 3d 770, 774 (CA11 2002). And when Collins was appointed (on November 7, 2001) the AEDPA clock therefore had 328 days left to go.

Holland immediately wrote back to Collins, pointing this out.

“Dear Mr. Collins:

“I received your letter dated January 31, 2006. You are incorrect in stating that ‘the one-year statutory

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time frame for filing my 2254 petition began to run after my case was affirmed on October 5, 2000, by the Florida Supreme Court.’ As stated on page three of [the recently filed] Petition for a writ of certiorari, October 1, 2001 is when the United States Supreme Court denied my initial petition for writ of certiorari and that is when my case became final. That meant that the time would be tolled once I filed my [postconviction] motion in the trial court.

“Also, Mr. Collins you never told me that my time ran out (expired). I told you to timely file my 28 U. S. C. 2254 Habeas Corpus Petition before the deadline, so that I would not be time-barred.

“You never informed me of oral arguments or of the Supreme Court of Florida’s November 10, 2005 decision denying my postconviction appeals. You never kept me informed about the status of my case, although you told me that you would immediately inform me of the court’s decision as soon as you heard anything.

“Mr. Collins, I filed a motion on January 19, 2006 [in federal court] to preserve my rights, because I did not want to be time-barred. Have you heard anything about the aforesaid motion? Do you know what the status of aforesaid motion is?

“Mr. Collins, please file my 2254 Habeas Petition immediately. Please do not wait any longer, even though it will be untimely filed at least it will be filed without wasting anymore time. (valuable time).

“Again, please file my 2254 Petition at once.

“Your letter is the first time that you have ever mentioned anything to me about my time had run out, before you were appointed to represent me, and that my one-year started to run on October 5, 2000.

“Please find out the status of my motion that I filed on January 19, 2006 and let me know.

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“Thank you very much.” App. 222–223.

Collins did not answer this letter. Nor did he file a federal habeas petition as Holland requested.

On March 1, 2006, Holland filed another complaint against Collins with the Florida Bar Association. See Record, Doc. 41, Exh. 1, p. 8. This time the bar asked Collins to respond, which he did, through his own attorney, on March 21. *Id.*, at 2. And the very next day, over three months after Holland’s AEDPA statute of limitations had expired, Collins mailed a proposed federal habeas petition to Holland, asking him to review it. See *id.*, Doc. 20, Exh. W.

But by that point Holland had already filed a *pro se* motion in the District Court asking that Collins be dismissed as his attorney. App. 192. The State responded to that request by arguing once again that Holland could not file a *pro se* motion seeking to have Collins removed while he was represented by counsel, *i.e.*, represented by Collins. See *id.*, at 47–51. But this time the court considered Holland’s motion, permitted Collins to withdraw from the case, and appointed a new lawyer for Holland. See Record, Docs. 9–10, 17–18, 22. And it also received briefing on whether the circumstances of the case justified the equitable tolling of the AEDPA limitations period for a sufficient period of time (approximately five weeks) to make Holland’s petition timely.

C

After considering the briefs, the Federal District Court held that the facts did not warrant equitable tolling and that consequently Holland’s petition was untimely. The court, noting that Collins had prepared numerous filings on Holland’s behalf in the state courts, and suggesting that Holland was a difficult client, intimidated, but did not hold, that Collins’ professional conduct in the case was at worst merely “negligent.” See District Court opinion 7–8,

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App. 90–93. But the court rested its holding on an alternative rationale: It wrote that, even if Collins’ “behavior could be characterized as an ‘extraordinary circumstance,’” Holland “did not seek any help from the court system to find out the date [the] mandate issued denying his state habeas petition, nor did he seek aid from ‘outside supporters.’” *Id.*, at 8, App. 92. Hence, the court held, Holland did not “demonstrate” the “due diligence” necessary to invoke “equitable tolling.” *Ibid.*

On appeal, the Eleventh Circuit agreed with the District Court that Holland’s habeas petition was untimely. The Court of Appeals first agreed with Holland that “[e]quitable tolling can be applied to . . . AEDPA’s statutory deadline.” 539 F. 3d, at 1338 (quoting *Helton v. Secretary for Dept. of Corrections*, 259 F. 3d 1310, 1312 (CA11 2001)). But it also held that equitable tolling could not be applied in a case, like Holland’s, that involves no more than “[p]ure professional negligence” on the part of a petitioner’s attorney because such behavior can never constitute an “extraordinary circumstance.” 539 F. 3d, at 1339. The court wrote:

“We will assume that Collins’s alleged conduct is negligent, even grossly negligent. But in our view, no allegation of lawyer negligence or of failure to meet a lawyer’s standard of care—in the absence of an allegation and proof of bad faith, dishonesty, divided loyalty, mental impairment or so forth on the lawyer’s part—can rise to the level of egregious attorney misconduct that would entitle Petitioner to equitable tolling.” *Ibid.*

Holland made “no allegation” that Collins had made a “knowing or reckless factual misrepresentation,” or that he exhibited “dishonesty,” “divided loyalty,” or “mental impairment.” *Ibid.* Hence, the court held, equitable tolling was *per se* inapplicable to Holland’s habeas petition.

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The court did not address the District Court’s ruling with respect to Holland’s diligence.

Holland petitioned for certiorari. Because the Court of Appeals’ application of the equitable tolling doctrine to instances of professional misconduct conflicts with the approach taken by other Circuits, we granted the petition. Compare 539 F. 3d 1334 (case below), with, *e.g.*, *Baldayaque v. United States*, 338 F. 3d 145, 152–153 (CA2 2003) (applying a less categorical approach); *Spitsyn v. Moore*, 345 F. 3d 796, 801–802 (CA9 2003) (same).

II

We have not decided whether AEDPA’s statutory limitations period may be tolled for equitable reasons. See *Lawrence*, 549 U. S., at 336; *Pace v. DiGuglielmo*, 544 U. S. 408, 418, n. 8 (2005). Now, like all 11 Courts of Appeals that have considered the question, we hold that §2244(d) is subject to equitable tolling in appropriate cases. See *Neverson v. Farquharson*, 366 F. 3d 32, 41 (CA1 2004); *Smith v. McGinnis*, 208 F. 3d 13, 17 (CA2 2000) (*per curiam*); *Miller v. New Jersey Dept. of Corrections*, 145 F. 3d 616, 617 (CA3 1998); *Harris v. Hutchinson*, 209 F. 3d 325, 329–330 (CA4 2000); *Davis v. Johnson*, 158 F. 3d 806, 810 (CA5 1998); *McClendon v. Sherman*, 329 F. 3d 490, 492 (CA6 2003); *Taliani v. Chrans*, 189 F. 3d 597, 598 (CA7 1999); *Moore v. United States*, 173 F. 3d 1131, 1134 (CA8 1999); *Calderon v. United States Dist. Ct. for Central Dist. of Cal.*, 128 F. 3d 1283, 1289 (CA9 1997); *Miller v. Marr*, 141 F. 3d 976, 978 (CA10 1998); *Sandvik v. United States*, 177 F. 3d 1269, 1272 (CA11 1999) (*per curiam*).

We base our conclusion on the following considerations. First, the AEDPA “statute of limitations defense . . . is not ‘jurisdictional.’” *Day v. McDonough*, 547 U. S. 198, 205 (2006). It does not set forth “an inflexible rule requiring dismissal whenever” its “clock has run.” *Id.*, at 208. See

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also *id.*, at 213 (SCALIA, J., dissenting) (“We have repeatedly stated that the enactment of time-limitation periods such as that in §2244(d), without further elaboration, produces defenses that are nonjurisdictional and thus subject to waiver and forfeiture” (citing cases)); Brief for Respondent 22 (describing AEDPA limitations period as “non-jurisdictional”).

We have previously made clear that a nonjurisdictional federal statute of limitations is normally subject to a “rebuttable presumption” in *favor* “of equitable tolling.” *Irwin*, 498 U. S., at 95–96; see also *Young v. United States*, 535 U. S. 43, 49 (2002) (“It is hornbook law that limitations periods are ‘customarily subject to “equitable tolling” ’” (quoting *Irwin*, *supra*, at 95)).

In the case of AEDPA, the presumption’s strength is reinforced by the fact that “‘equitable principles’” have traditionally “‘governed’” the substantive law of habeas corpus, *Munaf v. Geren*, 553 U. S. 674, 693 (2008), for we will “not construe a statute to displace courts’ traditional equitable authority absent the ‘clearest command,’” *Miller v. French*, 530 U. S. 327, 340 (2000) (quoting *Califano v. Yamasaki*, 442 U. S. 682, 705 (1979)). The presumption’s strength is yet further reinforced by the fact that Congress enacted AEDPA after this Court decided *Irwin* and therefore was likely aware that courts, when interpreting AEDPA’s timing provisions, would apply the presumption. See, e.g., *Merck & Co. v. Reynolds*, 559 U. S. ____, ____ (2010) (slip op., at 12).

Second, the statute here differs significantly from the statutes at issue in *United States v. Brockamp*, 519 U. S. 347 (1997), and *United States v. Beggerly*, 524 U. S. 38 (1998), two cases in which we held that *Irwin*’s presumption had been overcome. In *Brockamp*, we interpreted a statute of limitations that was silent on the question of equitable tolling as foreclosing application of that doctrine. But in doing so we emphasized that the statute at issue (1)

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“se[t] forth its time limitations in unusually emphatic form”; (2) used “highly detailed” and “technical” language “that, linguistically speaking, cannot easily be read as containing implicit exceptions”; (3) “reiterate[d] its limitations several times in several different ways”; (4) related to an “underlying subject matter,” nationwide tax collection, with respect to which the practical consequences of permitting tolling would have been substantial; and (5) would, if tolled, “require tolling, not only procedural limitations, but also substantive limitations on the amount of recovery—a kind of tolling for which we . . . found no direct precedent.” 519 U. S., at 350–352. And in *Beggerly* we held that *Irwin*’s presumption was overcome where (1) the 12-year statute of limitations at issue was “unusually generous” and (2) the underlying claim “deal[t] with ownership of land” and thereby implicated landowners’ need to “know with certainty what their rights are, and the period during which those rights may be subject to challenge.” 524 U. S., at 48–49.

By way of contrast, AEDPA’s statute of limitations, unlike the statute at issue in *Brockamp*, does not contain language that is “unusually emphatic,” nor does it “re-iterat[e]” its time limitation. Neither would application of equitable tolling here affect the “substance” of a petitioner’s claim. Moreover, in contrast to the 12-year limitations period at issue in *Beggerly*, AEDPA’s limitations period is not particularly long. And unlike the subject matters at issue in both *Brockamp* and *Beggerly*—tax collection and land claims—AEDPA’s subject matter, habeas corpus, pertains to an area of the law where equity finds a comfortable home. See *Munaf*, *supra*, at 693. In short, AEDPA’s 1-year limit reads like an ordinary, run-of-the-mill statute of limitations. See *Calderon*, *supra*, at 1288.

Respondent, citing *Brockamp*, argues that AEDPA should be interpreted to foreclose equitable tolling because

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the statute sets forth “explicit exceptions to its basic time limits” that do “not include ‘equitable tolling.’” 519 U. S., at 351; see Brief for Respondent 27. The statute does contain multiple provisions relating to the events that *trigger* its running. See §2244(d)(1); *Clay v. United States*, 537 U. S. 522, 529 (2003); see also *Cada v. Baxter Healthcare Corp.*, 920 F. 2d 446, 450 (CA7 1990) (“We must . . . distinguish between the *accrual* of the plaintiff’s claim and the *tolling* of the statute of limitations . . .”); *Wims v. United States*, 225 F. 3d 186, 190 (CA2 2000) (same); *Wolin v. Smith Barney Inc.*, 83 F. 3d 847, 852 (CA7 1996) (same). And we concede that it is silent as to equitable tolling while containing one provision that expressly refers to a different kind of tolling. See §2244(d)(2) (stating that “[t]he time during which” a petitioner has a pending request for state postconviction relief “shall not be counted toward” his “period of limitation” under AEDPA). But the fact that Congress *expressly* referred to tolling during state collateral review proceedings is easily explained without rebutting the presumption in favor of equitable tolling. A petitioner cannot bring a federal habeas claim without first exhausting state remedies—a process that frequently takes longer than one year. See *Rose v. Lundy*, 455 U. S. 509 (1982); §2254(b)(1)(A). Hence, Congress had to explain how the limitations statute accounts for the time during which such state proceedings are pending. This special need for an express provision undermines any temptation to invoke the interpretive maxim *inclusio unius est exclusio alterius* (to include one item (*i.e.*, suspension during state-court collateral review) is to exclude other similar items (*i.e.*, equitable tolling)). See *Young, supra*, at 53 (rejecting claim that an “express tolling provision, appearing in the same subsection as the [limitations] period, demonstrates a statutory intent *not* to toll the [limitations] period”).

Third, and finally, we disagree with respondent that

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equitable tolling undermines AEDPA's basic purposes. We recognize that AEDPA seeks to eliminate delays in the federal habeas review process. See *Day*, 547 U. S., at 205–206; *Miller-El v. Cockrell*, 537 U. S. 322, 337 (2003). But AEDPA seeks to do so without undermining basic habeas corpus principles and while seeking to harmonize the new statute with prior law, under which a petition's timeliness was always determined under equitable principles. See *Slack v. McDaniel*, 529 U. S. 473, 483 (2000) (“AEDPA's present provisions . . . incorporate earlier habeas corpus principles”); see also *Day*, 547 U. S., at 202, n. 1; *id.*, at 214 (SCALIA, J., dissenting); 2 R. Hertz & J. Liebman, *Federal Habeas Corpus Practice and Procedure* §24.2, pp. 1123–1136 (5th ed. 2005). When Congress codified new rules governing this previously judicially managed area of law, it did so without losing sight of the fact that the “writ of habeas corpus plays a vital role in protecting constitutional rights.” *Slack*, 529 U. S., at 483. It did not seek to end every possible delay at all costs. Cf. *id.*, at 483–488. The importance of the Great Writ, the only writ explicitly protected by the Constitution, Art. I, §9, cl. 2, along with congressional efforts to harmonize the new statute with prior law, counsels hesitancy before interpreting AEDPA's statutory silence as indicating a congressional intent to close courthouse doors that a strong equitable claim would ordinarily keep open.

For these reasons we conclude that neither AEDPA's textual characteristics nor the statute's basic purposes “rebut” the basic presumption set forth in *Irwin*. And we therefore join the Courts of Appeals in holding that §2244(d) is subject to equitable tolling.

III

We have previously made clear that a “petitioner” is “entitled to equitable tolling” only if he shows “(1) that he has been pursuing his rights diligently, and (2) that some

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extraordinary circumstance stood in his way” and prevented timely filing. *Pace*, 544 U. S., at 418 (emphasis deleted). In this case, the “extraordinary circumstances” at issue involve an attorney’s failure to satisfy professional standards of care. The Court of Appeals held that, where that is so, even attorney conduct that is “grossly negligent” can never warrant tolling absent “bad faith, dishonesty, divided loyalty, mental impairment or so forth on the lawyer’s part.” 539 F. 3d, at 1339. But in our view, the Court of Appeals’ standard is too rigid.

We have said that courts of equity “must be governed by rules and precedents no less than the courts of law.” *Lonchar v. Thomas*, 517 U. S. 314, 323 (1996) (internal quotation marks omitted). But we have also made clear that often the “exercise of a court’s equity powers . . . must be made on a case-by-case basis.” *Baggett v. Bullitt*, 377 U. S. 360, 375 (1964). In emphasizing the need for “flexibility,” for avoiding “mechanical rules,” *Holmberg v. Armbrecht*, 327 U. S. 392, 396 (1946), we have followed a tradition in which courts of equity have sought to “relieve hardships which, from time to time, arise from a hard and fast adherence” to more absolute legal rules, which, if strictly applied, threaten the “evils of archaic rigidity,” *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U. S. 238, 248 (1944). The “flexibility” inherent in “equitable procedure” enables courts “to meet new situations [that] demand equitable intervention, and to accord all the relief necessary to correct . . . particular injustices.” *Ibid.* (permitting postdeadline filing of bill of review). Taken together, these cases recognize that courts of equity can and do draw upon decisions made in other similar cases for guidance. Such courts exercise judgment in light of prior precedent, but with awareness of the fact that specific circumstances, often hard to predict in advance, could warrant special treatment in an appropriate case.

We recognize that, in the context of procedural default,

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we have previously stated, without qualification, that a petitioner “must bear the risk of attorney error.” *Coleman v. Thompson*, 501 U. S. 722, 752–753 (1991). But *Coleman* was “a case about federalism,” *id.*, at 726, in that it asked whether *federal* courts may excuse a petitioner’s failure to comply with a *state court’s* procedural rules, notwithstanding the state court’s determination that its own rules had been violated. Equitable tolling, by contrast, asks whether federal courts may excuse a petitioner’s failure to comply with *federal* timing rules, an inquiry that does not implicate a state court’s interpretation of state law. Cf. *Lawrence*, 549 U. S., at 341 (GINSBURG, J., dissenting). Holland does not argue that his attorney’s misconduct provides a substantive ground for relief, cf. §2254(i), nor is this a case that asks whether AEDPA’s statute of limitations should be recognized at all, cf. *Day, supra*, at 209. Rather, this case asks how equity should be applied once the statute is recognized. And given equity’s resistance to rigid rules, we cannot read *Coleman* as requiring a *per se* approach in this context.

In short, no pre-existing rule of law or precedent demands a rule like the one set forth by the Eleventh Circuit in this case. That rule is difficult to reconcile with more general equitable principles in that it fails to recognize that, at least sometimes, professional misconduct that fails to meet the Eleventh Circuit’s standard could nonetheless amount to egregious behavior and create an extraordinary circumstance that warrants equitable tolling. And, given the long history of judicial application of equitable tolling, courts can easily find precedents that can guide their judgments. Several lower courts have specifically held that unprofessional attorney conduct may, in certain circumstances, prove “egregious” and can be “extraordinary” even though the conduct in question may not satisfy the Eleventh Circuit’s rule. See, *e.g.*, *Nara v. Frank*, 264 F. 3d 310, 320 (CA3 2001) (ordering hearing as

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to whether client who was “effectively abandoned” by lawyer merited tolling); *Calderon*, 128 F. 3d, at 1289 (allowing tolling where client was prejudiced by a last minute change in representation that was beyond his control); *Baldayaque*, 338 F. 3d, at 152–153 (finding that where an attorney failed to perform an essential service, to communicate with the client, and to do basic legal research, tolling could, under the circumstances, be warranted); *Spitsyn*, 345 F. 3d, at 800–802 (finding that “extraordinary circumstances” may warrant tolling where lawyer denied client access to files, failed to prepare a petition, and did not respond to his client’s communications); *United States v. Martin*, 408 F. 3d 1089, 1096 (CA8 2005) (client entitled to equitable tolling where his attorney retained files, made misleading statements, and engaged in similar conduct).

We have previously held that “a garden variety claim of excusable neglect,” *Irwin*, 498 U. S., at 96, such as a simple “miscalculation” that leads a lawyer to miss a filing deadline, *Lawrence*, *supra*, at 336, does not warrant equitable tolling. But the case before us does not involve, and we are not considering, a “garden variety claim” of attorney negligence. Rather, the facts of this case present far more serious instances of attorney misconduct. And, as we have said, although the circumstances of a case must be “extraordinary” before equitable tolling can be applied, we hold that such circumstances are not limited to those that satisfy the test that the Court of Appeals used in this case.

IV

The record facts that we have set forth in Part I of this opinion suggest that this case may well be an “extraordinary” instance in which petitioner’s attorney’s conduct constituted far more than “garden variety” or “excusable neglect.” To be sure, Collins failed to file Holland’s peti-

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tion on time and appears to have been unaware of the date on which the limitations period expired—two facts that, alone, might suggest simple negligence. But, in these circumstances, the record facts we have elucidated suggest that the failure amounted to more: Here, Collins failed to file Holland’s federal petition on time despite Holland’s many letters that repeatedly emphasized the importance of his doing so. Collins apparently did not do the research necessary to find out the proper filing date, despite Holland’s letters that went so far as to identify the applicable legal rules. Collins failed to inform Holland in a timely manner about the crucial fact that the Florida Supreme Court had decided his case, again despite Holland’s many pleas for that information. And Collins failed to communicate with his client over a period of years, despite various pleas from Holland that Collins respond to his letters.

A group of teachers of legal ethics tells us that these various failures violated fundamental canons of professional responsibility, which require attorneys to perform reasonably competent legal work, to communicate with their clients, to implement clients’ reasonable requests, to keep their clients informed of key developments in their cases, and never to abandon a client. See Brief for Legal Ethics Professors et al. as *Amici Curiae* (describing ethical rules set forth in case law, the Restatements of Agency, the Restatement (Third) of the Law Governing Lawyers (1998), and in the ABA Model Rules of Professional Conduct (2009)). And in this case, the failures seriously prejudiced a client who thereby lost what was likely his single opportunity for federal habeas review of the lawfulness of his imprisonment and of his death sentence.

We do not state our conclusion in absolute form, however, because more proceedings may be necessary. The District Court rested its ruling not on a lack of extraordinary circumstances, but rather on a lack of diligence—a ruling that respondent does not defend. See Brief for

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Respondent 38, n. 19; Tr. of Oral Arg. 43, 52. We think that the District Court’s conclusion was incorrect. The diligence required for equitable tolling purposes is “reasonable diligence,” see, e.g., *Lonchar*, 517 U. S., at 326, not ““maximum feasible diligence,”” *Starns v. Andrews*, 524 F. 3d 612, 618 (CA5 2008) (quoting *Moore v. Knight*, 368 F. 3d 936, 940 (CA7 2004)). Here, Holland not only wrote his attorney numerous letters seeking crucial information and providing direction; he also repeatedly contacted the state courts, their clerks, and the Florida State Bar Association in an effort to have Collins—the central impediment to the pursuit of his legal remedy—removed from his case. And, the *very day* that Holland discovered that his AEDPA clock had expired due to Collins’ failings, Holland prepared his own habeas petition *pro se* and promptly filed it with the District Court.

Because the District Court erroneously relied on a lack of diligence, and because the Court of Appeals erroneously relied on an overly rigid *per se* approach, no lower court has yet considered in detail the facts of this case to determine whether they indeed constitute extraordinary circumstances sufficient to warrant equitable relief. We are “[m]indful that this is a court of final review and not first view.” *Adarand Constructors, Inc. v. Mineta*, 534 U. S. 103, 110 (2001) (*per curiam*) (internal quotation marks omitted). And we also recognize the prudence, when faced with an “equitable, often fact-intensive” inquiry, of allowing the lower courts “to undertake it in the first instance.” *Gonzalez v. Crosby*, 545 U. S. 524, 540 (2005) (STEVENS, J., dissenting). Thus, because we conclude that the District Court’s determination must be set aside, we leave it to the Court of Appeals to determine whether the facts in this record entitle Holland to equitable tolling, or whether further proceedings, including an evidentiary hearing, might indicate that respondent should prevail.

The judgment below is reversed, and the case is re-

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manded for further proceedings consistent with this opinion.

It is so ordered.

Opinion of ALITO, J.

SUPREME COURT OF THE UNITED STATES

No. 09–5327

ALBERT HOLLAND, PETITIONER *v.* FLORIDA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

[June 14, 2010]

JUSTICE ALITO, concurring in part and concurring in the judgment.

This case raises two broad questions: first, whether the statute of limitations set out in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U. S. C. §2244(d), is subject to equitable tolling; and second, assuming an affirmative answer to the first question, whether petitioner in this particular case has alleged facts that are sufficient to satisfy the “extraordinary circumstances” prong of the equitable tolling test. I agree with the Court’s conclusion that equitable tolling is available under AEDPA. I also agree with much of the Court’s discussion concerning whether equitable tolling is available on the facts of this particular case. In particular, I agree that the Court of Appeals erred by essentially limiting the relevant inquiry to the question whether “gross negligence” of counsel may be an extraordinary circumstance warranting equitable tolling. As the Court makes clear, petitioner in this case has alleged certain facts that go well beyond any form of attorney negligence, see *ante*, at 3–4, 19, and the Court of Appeals does not appear to have asked whether those particular facts provide an independent basis for tolling. Accordingly, I concur in the Court’s decision to reverse the judgment below and remand so that the lower courts may properly apply the correct legal standard.

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Although I agree that the Court of Appeals applied the *wrong* standard, I think that the majority does not do enough to explain the *right* standard. It is of course true that equitable tolling requires “extraordinary circumstances,” but that conclusory formulation does not provide much guidance to lower courts charged with reviewing the many habeas petitions filed every year. I therefore write separately to set forth my understanding of the principles governing the availability of equitable tolling in cases involving attorney misconduct.

I

“Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way.” *Pace v. DiGuglielmo*, 544 U. S. 408, 418 (2005). The dispute in this case concerns whether and when attorney misconduct amounts to an “extraordinary circumstance” that stands in a petitioner’s way and prevents the petitioner from filing a timely petition. I agree with the majority that it is not practical to attempt to provide an exhaustive compilation of the kinds of situations in which attorney misconduct may provide a basis for equitable tolling. In my view, however, it is useful to note that several broad principles may be distilled from this Court’s precedents.

First, our prior cases make it abundantly clear that attorney negligence is not an extraordinary circumstance warranting equitable tolling. In *Lawrence v. Florida*, 549 U. S. 327, 336 (2007), the Court expressly rejected the petitioner’s contention that “his counsel’s mistake in miscalculating the limitations period entitle[d] him to equitable tolling.” “Attorney miscalculation,” the Court held, “is simply not sufficient to warrant equitable tolling, *particularly in the postconviction context where prisoners have no constitutional right to counsel.*” *Id.*, at 336–337 (citing

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Coleman v. Thompson, 501 U. S. 722, 756–757 (1991) (emphasis added)).

The basic rationale for *Lawrence*'s holding is that the mistakes of counsel are constructively attributable to the client, at least in the postconviction context. The *Lawrence* Court's reliance on *Coleman* is instructive. In *Coleman*, the Court addressed whether attorney error provided cause for a procedural default based on a late filing. See 501 U. S., at 752. Because "[t]here is no constitutional right to an attorney in state post-conviction proceedings," the Court explained, "a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings." *Ibid.* In such circumstances, the Court reasoned, there was "no inequity in requiring [the petitioner] to bear the risk of attorney error that results in a procedural default." *Ibid.* (quoting *Murray v. Carrier*, 477 U. S. 478, 488 (1986)); accord, *Coleman*, 501 U. S., at 753 ("'[C]ause' under the cause and prejudice test must be something *external* to the petitioner, something that cannot fairly be attributed to him"); *ibid.* ("Attorney ignorance or inadvertence is not 'cause' because the attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must 'bear the risk of attorney error'"); *id.*, at 754 (what matters is whether "the error [of counsel] must be seen as an external factor, *i.e.*, 'imputed to the State'"); *ibid.* ("In the absence of a constitutional violation, the petitioner bears the risk in federal habeas for all attorney errors made in the course of the representation"); *id.*, at 757 ("Because *Coleman* had no right to counsel to pursue his appeal in state habeas, any attorney error that led to the default of *Coleman*'s claims in state court cannot constitute cause to excuse the default in federal habeas"). As *Lawrence* makes clear, the same analysis applies when a petitioner seeks equitable tolling based on attorney error in the postconviction context. See 549 U. S., at 336–337 (citing *Coleman*).

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While *Lawrence* addressed an allegation of attorney miscalculation, its rationale fully applies to other forms of attorney negligence. Instead of miscalculating the filing deadline, for example, an attorney could compute the deadline correctly but forget to file the habeas petition on time, mail the petition to the wrong address, or fail to do the requisite research to determine the applicable deadline. In any case, however, counsel’s error would be constructively attributable to the client.

Second, the mere fact that a missed deadline involves “gross negligence” on the part of counsel does not by itself establish an extraordinary circumstance. As explained above, the principal rationale for disallowing equitable tolling based on ordinary attorney miscalculation is that the error of an attorney is constructively attributable to the client and thus is not a circumstance beyond the litigant’s control. See *Lawrence, supra*, at 336–337; *Coleman, supra*, at 752–754; see also *Powell v. Davis*, 415 F. 3d 722, 727 (CA7 2005); *Johnson v. McBride*, 381 F. 3d 587, 589–590 (CA7 2004); *Harris v. Hutchinson*, 209 F. 3d 325, 330 (CA4 2000). That rationale plainly applies regardless whether the attorney error in question involves ordinary or gross negligence. See *Coleman*, 501 U. S., at 754 (“[I]t is not the gravity of the attorney’s error that matters, but that it constitutes a violation of petitioner’s right to counsel, so that the error must be seen as an external factor, *i.e.*, ‘imputed to the State’”); *id.*, at 752 (rejecting the contention that “[t]he late filing was . . . the result of attorney error of sufficient magnitude to excuse the default in federal habeas”).

Allowing equitable tolling in cases involving *gross* rather than *ordinary* attorney negligence would not only fail to make sense in light of our prior cases; it would also be impractical in the extreme. Missing the statute of limitations will generally, if not always, amount to negligence, see *Lawrence*, 549 U. S., at 336, and it has been

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aptly said that gross negligence is ordinary negligence with a vituperative epithet added. Therefore, if gross negligence may be enough for equitable tolling, there will be a basis for arguing that tolling is appropriate in almost every counseled case involving a missed deadline. See *ibid.* (argument that attorney miscalculation is an extraordinary circumstance, if credited, “would essentially equitably toll limitations periods for every person whose attorney missed a deadline”). This would not just impose a severe burden on the district courts; it would also make the availability of tolling turn on the highly artificial distinction between gross and ordinary negligence. That line would be hard to administer, would needlessly consume scarce judicial resources, and would almost certainly yield inconsistent and often unsatisfying results. See *Baldayaque v. United States*, 338 F.3d 145, 155 (CA2 2003) (Jacobs, J., concurring) (noting that the “distinction between ordinary and extraordinary attorney malpractice . . . is elusive, hard to apply, and counterintuitive”).

Finally, it is worth noting that a rule that distinguishes between ordinary and gross attorney negligence for purposes of the equitable tolling analysis would have demonstrably “inequitable” consequences. For example, it is hard to see why a habeas petitioner should be effectively penalized just because his counsel was negligent rather than grossly negligent, or why the State should be penalized just because petitioner’s counsel was grossly negligent rather than moderately negligent. Regardless of how one characterizes counsel’s deficient performance in such cases, the petitioner is not personally at fault for the untimely filing, attorney error is a but-for cause of the late filing, and the governmental interest in enforcing the statutory limitations period is the same.

II

Although attorney negligence, however styled, does not

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provide a basis for equitable tolling, the AEDPA statute of limitations may be tolled if the missed deadline results from attorney misconduct that is not constructively attributable to the petitioner. In this case, petitioner alleges facts that amount to such misconduct. See *ante*, at 19 (acknowledging that ordinary attorney negligence does not warrant equitable tolling, but observing that “the facts of this case present far more serious instances of attorney misconduct”). In particular, he alleges that his attorney essentially “abandoned” him, as evidenced by counsel’s near-total failure to communicate with petitioner or to respond to petitioner’s many inquiries and requests over a period of several years. See *ante*, at 3–4. Petitioner also appears to allege that he made reasonable efforts to terminate counsel due to his inadequate representation and to proceed *pro se*, and that such efforts were successfully opposed by the State on the perverse ground that petitioner failed to act through appointed counsel. See *ante*, at 4; Brief for Petitioner 50–51 (stating that petitioner filed “two *pro se* motions in the Florida Supreme Court to remove Collins as counsel (one which, if granted, would have allowed [petitioner] to proceed *pro se*)” (emphasis deleted)).

If true, petitioner’s allegations would suffice to establish extraordinary circumstances beyond his control. Common sense dictates that a litigant cannot be held constructively responsible for the conduct of an attorney who is not operating as his agent in any meaningful sense of that word. See *Coleman, supra*, at 754 (relying on “well-settled principles of agency law” to determine whether attorney error was attributable to client); *Baldayaque, supra*, at 154 (Jacobs, J., concurring) (“[W]hen an ‘agent acts in a manner completely adverse to the principal’s interest,’ the ‘principal is not charged with [the] agent’s misdeeds’”). That is particularly so if the litigant’s reasonable efforts to terminate the attorney’s representation have been

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thwarted by forces wholly beyond the petitioner's control. The Court of Appeals apparently did not consider petitioner's abandonment argument or assess whether the State improperly prevented petitioner from either obtaining new representation or assuming the responsibility of representing himself. Accordingly, I agree with the majority that the appropriate disposition is to reverse and remand so that the lower courts may apply the correct standard to the facts alleged here.

SCALIA, J., dissenting

SUPREME COURT OF THE UNITED STATES

No. 09–5327

ALBERT HOLLAND, PETITIONER *v.* FLORIDA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

[June 14, 2010]

JUSTICE SCALIA, with whom JUSTICE THOMAS joins as to all but Part I, dissenting.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), establishes a 1-year limitations period for state prisoners to seek federal habeas relief, subject to several specific exceptions. 28 U. S. C. §2244(d). The Court concludes that this time limit is also subject to equitable tolling, even for attorney errors that are ordinarily attributable to the client. And it rejects the Court of Appeals’ conclusion that Albert Holland is not entitled to tolling, without explaining why the test that court applied was wrong or what rule it should have applied instead. In my view §2244(d) leaves no room for equitable exceptions, and Holland could not qualify even if it did.

I

The Court is correct, *ante*, at 13, that we ordinarily presume federal limitations periods are subject to equitable tolling unless tolling would be inconsistent with the statute. *Young v. United States*, 535 U. S. 43, 49 (2002). That is especially true of limitations provisions applicable to actions that are traditionally governed by equitable principles—a category that includes habeas proceedings. See *id.*, at 50. If §2244(d) merely created a limitations period for federal habeas applicants, I agree that applying equitable tolling would be appropriate.

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But §2244(d) does much more than that, establishing a detailed scheme regarding the filing deadline that addresses an array of contingencies. In an ordinary case, the clock starts when the state-court judgment becomes final on direct review. §2244(d)(1)(A).¹ But the statute delays the start date—thus effectively tolling the limitations period—in cases where (1) state action unlawfully impeded the prisoner from filing his habeas application, (2) the prisoner asserts a constitutional right newly recognized by this Court and made retroactive to collateral cases, or (3) the factual predicate for the prisoner’s claim could not previously have been discovered through due diligence. §2244(d)(1)(B)–(D). It also expressly tolls the limitations period during the pendency of a properly filed application for state collateral relief. §2244(d)(2). Congress, in short, has considered and accounted for specific circumstances that in its view excuse an applicant’s delay.

The question, therefore, is not whether §2244(d)’s time

¹Title 28 U. S. C. §2244(d) provides:

“(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

“(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

“(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

“(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

“(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

“(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.”

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bar is subject to tolling, but whether it is consistent with §2244(d) for federal courts to toll the time bar for *additional* reasons beyond those Congress included.

In my view it is not. It is fair enough to infer, when a statute of limitations says nothing about equitable tolling, that Congress did not displace the default rule. But when Congress has *codified* that default rule and specified the instances where it applies, we have no warrant to extend it to other cases. See *United States v. Beggerly*, 524 U. S. 38, 48–49 (1998). Unless the Court believes §2244(d) contains an implicit, across-the-board exception that subsumes (and thus renders unnecessary) §2244(d)(1)(B)–(D) and (d)(2), it must rely on the untenable assumption that when Congress enumerated the events that toll the limitations period—with no indication the list is merely illustrative—it implicitly authorized courts to add others as they see fit. We should assume the opposite: that by specifying situations in which an equitable principle applies to a specific requirement, Congress has displaced courts’ discretion to develop ad hoc exceptions. Cf. *Lonchar v. Thomas*, 517 U. S. 314, 326–328 (1996).

The Court’s responses are unpersuasive. It brushes aside §2244(d)(1)(B)–(D), apparently because those subdivisions merely delay the *start* of the limitations period but do not suspend a limitations period already underway. *Ante*, at 15. But the Court does not explain why that distinction makes any difference,² and we have described a

²The Court cites several Court of Appeals cases that support its triggering-tolling distinction, *ante*, at 15, but no case of ours that does so. *Clay v. United States*, 537 U. S. 522, 529 (2003), described §2244(d)(1)(A) as containing “triggers” for the limitations period, but it did not distinguish delaying the start of the limitations period from tolling. The Court of Appeals cases the Court cites, *Cada v. Baxter Healthcare Corp.*, 920 F. 2d 446, 450 (CA7 1990), *Wolin v. Smith Barney Inc.*, 83 F. 3d 847, 852 (CA7 1996), and *Wims v. United States*, 225 F. 3d 186, 190 (CA2 2000), rely on a distinction between accrual rules and tolling that we have since disregarded, see *TRW Inc. v.*

SCALIA, J., dissenting

rule that forestalls the start of a limitations period as “effectively allow[ing] for equitable tolling.” *Beggerly, supra*, at 48.

The Court does address §2244(d)(2), which undeniably provides for poststart tolling, but dismisses it on the basis that Congress had to resolve a contradiction between §2244(d)’s 1-year time bar and the rule of *Rose v. Lundy*, 455 U. S. 509 (1982), that a federal habeas application cannot be filed while state proceedings are pending. But there is no contradiction to resolve unless, in the absence of a statutory tolling provision, equitable tolling would *not* apply to a state prisoner barred from filing a federal habeas application while he exhausts his state remedies. The Court offers no reason why it would not, and our holding in *Young*, 535 U. S., at 50–51, that tolling was justified by the Government’s inability to pursue a claim because of the Bankruptcy Code’s automatic stay, 11 U. S. C. §362, suggests that it would.³

II

A

Even if §2244(d) left room for equitable tolling in some situations, tolling surely should not excuse the delay here. Where equitable tolling is available, we have held that a

Andrews, 534 U. S. 19, 27, 29 (2001).

³The Court reads *Young* as support for disregarding the specific tolling provisions Congress included in §2244(d). *Ante*, at 15. But in the pertinent passage, *Young* explained only that the inclusion of an express tolling rule in a *different* provision regarding a *different* limitations period, 11 U. S. C. §507(a)(8)(A)(ii) (2000 ed.)—albeit a provision within the same subparagraph as the provision at issue, §507(a)(8)(A)(i)—did not rebut the presumption of equitable tolling. See 535 U. S., at 53. Moreover, *Young* stressed that §507(a)(8)(A)(ii) authorized tolling in instances where equity would *not* have allowed it, which reinforced the presumption in favor of tolling. *Ibid.* Here, the Court does not suggest that any of §2244(d)’s exceptions go beyond what equity would have allowed.

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litigant is entitled to it only if he has diligently pursued his rights and—the requirement relevant here—if “some extraordinary circumstance stood in his way.” *Lawrence v. Florida*, 549 U. S. 327, 336 (2007) (quoting *Pace v. DiGuglielmo*, 544 U. S. 408, 418 (2005)). Because the attorney is the litigant’s agent, the attorney’s acts (or failures to act) within the scope of the representation are treated as those of his client, see *Link v. Wabash R. Co.*, 370 U. S. 626, 633–634, and n. 10 (1962), and thus such acts (or failures to act) are necessarily not extraordinary circumstances.

To be sure, the rule that an attorney’s acts and oversights are attributable to the client is relaxed where the client has a constitutional right to effective assistance of counsel. Where a State is constitutionally obliged to provide an attorney but fails to provide an effective one, the attorney’s failures that fall below the standard set forth in *Strickland v. Washington*, 466 U. S. 668 (1984), are chargeable to the State, not to the prisoner. See *Murray v. Carrier*, 477 U. S. 478, 488 (1986). But where the client has no right to counsel—which in habeas proceedings he does not—the rule holding him responsible for his attorney’s acts applies with full force. See *Coleman v. Thompson*, 501 U. S. 722, 752–754 (1991).⁴ Thus, when a state habeas petitioner’s appeal is filed too late because of attorney error, the petitioner is out of luck—no less than if he had proceeded *pro se* and neglected to file the appeal himself.⁵

⁴The Court dismisses *Coleman* as “a case about federalism” and therefore inapposite here. *Ante*, at 18 (internal quotation marks omitted). I fail to see how federalism concerns are not implicated by ad hoc exceptions to the statute of limitations for attempts to overturn state-court convictions. In any event, *Coleman* did not invent, but merely applied, the already established principle that an attorney’s acts are his client’s. See 501 U. S., at 754.

⁵That Holland’s counsel was appointed, rather than, like counsel in

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Congress could, of course, have included errors by state-appointed habeas counsel as a basis for delaying the limitations period, but it did not. Nor was that an oversight: Section 2244(d)(1)(B) expressly allows tolling for state-created impediments that prevent a prisoner from filing his application, but *only if* the impediment violates the Constitution or federal law.

If there were any doubt that equitable tolling is unavailable under §2244(d) to excuse attorney error, we eliminated it in *Lawrence*. The petitioner there asserted that his attorney’s miscalculation of the limitations period for federal habeas applications caused him to miss the filing deadline. The attorney’s error stemmed from his mistaken belief that—contrary to Circuit precedent (which we approved in *Lawrence*)—the limitations period is tolled during the pendency of a petition for certiorari from a state postconviction proceeding. 549 U. S., at 336; see also Brief for Petitioner in *Lawrence v. Florida*, O. T. 2006, No. 05–8820, pp. 31, 36. Assuming *arguendo* that equitable tolling could ever apply to §2244(d), we held that such attorney error did not warrant it, especially since the petitioner was not constitutionally entitled to counsel. *Lawrence, supra*, at 336–337.

Faithful application of *Lawrence* should make short work of Holland’s claim. Although Holland alleges a wide array of misconduct by his counsel, Bradley Collins, the only pertinent part appears extremely similar, if not iden-

Coleman, retained, see Brief for Respondent in *Coleman v. Thompson*, O. T. 1990, No. 89–7662, pp. 33–34, 40, is irrelevant. The Sixth Amendment right to effective assistance of counsel, we have held, applies even to an attorney the defendant himself hires. See *Cuyler v. Sullivan*, 446 U. S. 335, 342–345 (1980). The basis for *Coleman* was not that Coleman had hired his own counsel, but that the State owed him no obligation to provide one. See 501 U. S., at 754. It would be utterly perverse, of course, to penalize the State for *providing* habeas petitioners with representation, when the State could avoid equitable tolling by providing none at all.

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tical, to the attorney's error in *Lawrence*. The relevant time period extends at most from November 10, 2005—when the Florida Supreme Court affirmed the denial of Holland's state habeas petition⁶—to December 15, 2005, the latest date on which §2244(d)'s limitations period could have expired.⁷ Within that period, Collins could have alerted Holland to the Florida Supreme Court's decision, and either Collins or Holland himself could have filed a timely federal habeas application. Collins did not do so, but instead filed a petition for certiorari several months later.

Why Collins did not notify Holland or file a timely federal application for him is unclear, but none of the plausible explanations would support equitable tolling. By far the most likely explanation is that Collins made exactly the same mistake as the attorney in *Lawrence*—*i.e.*, he assumed incorrectly that the pendency of a petition for certiorari in this Court seeking review of the denial of Holland's state habeas petition would toll AEDPA's time bar under §2244(d)(2). In December 2002, Collins had explained to Holland by letter that if his state habeas petition was denied *and* this Court denied certiorari in that proceeding, Holland's claims "*will then be ripe* for presentation in a petition for writ of habeas corpus in federal court." App. 61 (emphasis added). Holland himself interprets that statement as proof that, at that time, "Collins was under the belief that [Holland's] time to file

⁶The Florida Supreme Court did not issue its mandate, and the limitations period did not resume, see *Lawrence*, 549 U. S., at 331, until December 1, 2005. But once the Florida Supreme Court issued its decision (with the mandate still to come), Collins could have notified Holland, who in turn could have filed a *pro se* federal application.

⁷The parties dispute when Holland's state habeas petition was filed, and thus when the limitations period expired. Brief for Petitioner 4–5, and n. 4; Brief for Respondent 8, 9, n. 7. The discrepancy is immaterial, but I give Holland the benefit of the doubt.

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his federal habeas petition would continue to be tolled until this Court denied certiorari” in his state postconviction proceeding. Pet. for Cert. 12, n. 10. That misunderstanding would entirely account for Collins’s conduct—filing a certiorari petition instead of a habeas application, and waiting nearly three months to do so. But it would also be insufficient, as *Lawrence* held it was, to warrant tolling.

The other conceivable explanations for Collins’s failure fare no better. It may be that Collins believed—as he explained to Holland in a January 2006 letter, after Holland had informed him that a certiorari petition in a state postconviction proceeding would not stop the clock—that the certiorari petition in Holland’s *direct* appeal also did not toll the time bar. Consequently, Collins wrote, Holland’s time to file a federal application had expired even before Collins was appointed. App. 78–79. As the Court explains, *ante*, at 8, this view too was wrong, but it is no more a basis for equitable tolling than the attorney’s misunderstanding in *Lawrence*.

Or it may be that Collins (despite what he wrote to Holland) correctly understood the rule but simply neglected to notify Holland; perhaps he missed the state court’s ruling in his mail, or perhaps it simply slipped his mind. Such an oversight is unfortunate, but it amounts to “garden variety” negligence, not a basis for equitable tolling. *Irwin v. Department of Veterans Affairs*, 498 U. S. 89, 96 (1990). Surely it is no more extraordinary than the attorney’s error in *Lawrence*, which rudimentary research and arithmetic would have avoided.

The Court insists that Collins’s misconduct goes beyond garden-variety neglect and mine-run miscalculation. *Ante*, at 19. But the only differences it identifies had no effect on Holland’s ability to file his federal application on time. The Court highlights Collins’s nonresponsiveness while Holland’s state postconviction motions were still

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pending. *Ante*, at 19–20. But even taken at face value, Collins’s silence *prior* to November 10, 2005, did not prevent Holland from filing a timely federal application once the Florida courts were finished with his case. The Court also appears to think significant Collins’s correspondence with Holland in January 2006, *after* the limitations period had elapsed. *Ante*, at 5–10, 20. But unless Holland can establish that the time-bar should be tolled due to events *before* December 15, 2005, any misconduct by Collins after the limitations period elapsed is irrelevant. Even if Collins’s conduct before November 10 and after December 15 was “extraordinary,” Holland has not shown that it “stood in his way and prevented timely filing.” *Lawrence*, 549 U. S., at 336 (internal quotation marks omitted).

For his part, Holland now asserts that Collins did not merely forget to keep his client informed, but deliberately deceived him. As the Court of Appeals concluded, however, Holland did not allege deception in seeking equitable tolling below. See 539 F. 3d 1334, 1339 (CA11 2008) (*per curiam*).⁸ In any event, the deception of which he complains consists only of Collins’s assurance early in the representation that he would protect Holland’s ability to assert his claims in federal court, see App. 55, 62, coupled with Collins’s later failure to do so. That, of course, does not by itself amount to deception, and Holland offers no evidence that Collins meant to mislead him. Moreover, Holland can hardly claim to have been caught off guard. Collins’s failures to respond to Holland’s repeated requests for information *before* the State Supreme Court ruled gave Holland even greater reason to suspect that Collins had fallen asleep at the switch. Holland indeed was under no

⁸Holland insists that he did allege deception below, see Brief for Petitioner 31, n. 29, but cites only a conclusory allegation in an unrelated motion (a motion for appointment of new counsel). See App. 194. His reply to the State’s response to the order to show cause, drafted by new counsel, did not allege deception. 1 Record, Doc. 35.

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illusion to the contrary, as his repeated efforts to replace Collins reflect.⁹

B

Despite its insistence that *Lawrence* does not control this case, the Court does not actually hold that Holland is entitled to equitable tolling. It concludes only that the Eleventh Circuit applied the wrong rule and remands the case for a re-do. That would be appropriate if the Court identified a legal error in the Eleventh Circuit’s analysis and set forth the proper standard it should have applied.

The Court does neither. It rejects as “too rigid,” *ante*, at 17, the Eleventh Circuit’s test—which requires, beyond ordinary attorney negligence, “an allegation and proof of bad faith, dishonesty, divided loyalty, mental impairment or so forth on the lawyer’s part,” 539 F. 3d, at 1339. But the Court never explains why that “or so forth” test, which explicitly leaves room for other kinds of egregious attorney

⁹The concurrence argues that Holland’s allegations suffice because they show, if true, that Collins “essentially ‘abandoned’” Holland by failing to respond to Holland’s inquiries, and therefore ceased to act as Holland’s agent. *Ante*, at 6 (ALITO, J., concurring in part and concurring in judgment). But Collins’s failure to communicate has no bearing unless it ended the agency relationship before the relevant window. The concurrence does not explain why it would—does not contend, for example, that Collins’s conduct amounted to disloyalty or renunciation of his role, which *would* terminate Collins’s authority, see Restatement (Second) of Agency §§112, 118 (1957). Collins’s alleged nonresponsiveness did not help Holland’s cause, but it was no more “adverse to [Holland’s] interest” or “beyond [Holland’s] control,” *ante*, at 6, 7 (internal quotation marks omitted), and thus no more a basis for holding Holland harmless from the consequences of his counsel’s conduct, than mine-run attorney mistakes, cf. *Irwin v. Department of Veterans Affairs*, 498 U. S. 89, 96 (1990). The concurrence also relies upon Holland’s requests to replace Collins with new appointed counsel. But if those requests could prevent imputing Collins’s acts to Holland, every habeas applicant who unsuccessfully asks for a new state-provided lawyer (but who does not seek to proceed *pro se* when that request is denied) would not be bound by his attorney’s subsequent acts.

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error, is insufficiently elastic.

Moreover, even if the Eleventh Circuit had adopted an entirely inflexible rule, it is simply untrue that, as the Court appears to believe, *ante*, at 17, all general rules are *ipso facto* incompatible with equity. We have rejected that canard before, see, e.g., *Grupo Mexicano de Desarrollo, S. A. v. Alliance Bond Fund, Inc.*, 527 U. S. 308, 321–322 (1999), and we have relied on the existence of general rules regarding equitable tolling in particular, see, e.g., *Young*, 535 U. S., at 53. As we observed in rejecting ad hoc equitable *restrictions* on habeas relief, “the alternative is to use each equity chancellor’s conscience as a measure of equity, which alternative would be as arbitrary and uncertain as measuring distance by the length of each chancellor’s foot.” *Lonchar*, 517 U. S., at 323.

Consistent with its failure to explain the error in the Eleventh Circuit’s test, the Court offers almost no clue about what test that court should have applied. The Court unhelpfully advises the Court of Appeals that its test is too narrow, with no explanation besides the assertion that its test left out cases where tolling might be warranted, and no precise indication of what those cases might be. *Ante*, at 18 (“[A]t least sometimes, professional misconduct that fails to meet the Eleventh Circuit’s standard could nonetheless amount to egregious behavior and create an extraordinary circumstance that warrants equitable tolling”). The Court says that “courts can easily find precedents that can guide their judgments,” *ibid.*, citing several Court of Appeals opinions that (in various contexts) permit tolling for attorney error—but notably omitting opinions that disallow it, such as the Seventh Circuit’s opinion in *Powell v. Davis*, 415 F. 3d 722, 727 (2005), which would have “guide[d] . . . judgmen[t]” precisely where this court arrived: “[A]ttorney misconduct, whether labeled negligent, grossly negligent, or willful, is attributable to the client and thus is not a circumstance beyond a petitioner’s

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control that might excuse an untimely petition.” *Ibid.* (internal quotation marks omitted).

The only thing the Court offers that approaches substantive instruction is its implicit approval of “fundamental canons of professional responsibility,” articulated by an ad hoc group of legal-ethicist *amici* consisting mainly of professors of that least analytically rigorous and hence most subjective of law-school subjects, legal ethics. *Ante*, at 20. The Court does not even try to justify importing into equity the “prevailing professional norms” we have held implicit in the right to counsel, *Strickland*, 466 U. S., at 688. In his habeas action Holland has no right to counsel. I object to this transparent attempt to smuggle *Strickland* into a realm the Sixth Amendment does not reach.

C

The Court’s refusal to articulate an intelligible rule regarding the only issue actually before us stands in sharp contrast to its insistence on deciding an issue that is *not* before us: whether Holland satisfied the second prerequisite for equitable tolling by demonstrating that he pursued his rights diligently, see *Pace*, 544 U. S., at 418–419. As the Court admits, only the District Court addressed that question below; the Eleventh Circuit had no need to reach it. More importantly, it is not even arguably included within the question presented, which concerns only whether an attorney’s gross negligence can constitute an “extraordinary circumstance” of the kind we have held essential for equitable tolling. Pet. for Cert. i. Whether tolling is *ever* available is fairly included in that question, but whether Holland has overcome an additional, independent hurdle to tolling is not.

The Court offers no justification for deciding this distinct issue. The closest it comes is its observation that the State “does not defend” the District Court’s ruling regarding diligence. *Ante*, at 20. But the State had no reason to

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do so—any more than it had reason to address the merits of Holland’s habeas claims. Nor, contrary to the Court’s implication, has the State conceded the issue. The footnote of the State’s brief which the Court cites did just the opposite: After observing that only the extraordinary-circumstance prong of the equitable-tolling test is at issue, the State (perhaps astutely apprehensive that the Court might ignore that fact) added that “to the extent the Court considers the matter” of Holland’s diligence, “Respondent relies on the findings of the district court below.” Brief for Respondent 38, n. 19. The Court also cites a statement by the State’s counsel at oral argument, Tr. of Oral Arg. 43, and Holland’s counsel’s characterization of it as a concession, *id.*, at 52. But the remark, in context, shows only that the State does not dispute diligence *in this Court*, where the only issue is extraordinary circumstances:

“Well, that goes to the issue . . . of diligence, of course, which is not the issue we’re looking at. We’re looking at the extraordinary circumstances, not the diligence. . . .

“[W]e’ll concede diligence for the moment” *Id.*, at 43.

Notwithstanding the Court’s confidence that the District Court was wrong, it is not even clear that Holland acted with the requisite diligence. Although Holland repeatedly contacted Collins and the state courts, there were other reasonable measures Holland could have pursued. For example, as we suggested in *Pace, supra*, at 416—decided while Holland’s state habeas petition was still pending—Holland might have filed a “protective” federal habeas application and asked the District Court to stay the federal action until his state proceedings had concluded. He also presumably could have checked the court records in the prison’s writ room—from which he eventually learned of the state court’s decision, 539 F. 3d, at 1337—on a more

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regular basis. And he could have sought permission from the state courts to proceed *pro se* and thus remove Collins from the equation.¹⁰ This is not to say the District Court was correct to conclude Holland was not diligent; but the answer is not as obvious as the Court would make it seem.

* * *

The Court's impulse to intervene when a litigant's lawyer has made mistakes is understandable; the temptation to tinker with technical rules to achieve what appears a just result is often strong, especially when the client faces

¹⁰Holland made many *pro se* filings in state court (which were stricken because Holland was still represented), and he sought to have new counsel appointed in Collins's place, but did not seek to proceed *pro se*. The Court does not dispute this, nor does Holland. The most he asserts is that one of the *pro se* motions he filed, if granted, would have entitled him to proceed *pro se*, see Brief for Petitioner 50–51—an assertion he appears not to have made in the District Court, see 1 Record, Doc. 35, at 15. The concurrence equates that assertion with an allegation that he actually sought to litigate his case on his own behalf. *Ante*, at 6. It is not the same. The filing Holland refers to, see Brief for Petitioner 12, and n. 13, like his earlier filings, requested that Collins be *replaced* by new counsel. App. 149–163. The motion also asked for a hearing pursuant to *Nelson v. State*, 274 So. 2d 256, 259 (Fla. App. 1973), to show Collins's poor performance, App. 149–150, but that did not amount to a request to proceed *pro se*. *Nelson* held that a defendant *facing trial* who seeks to discharge his court-appointed counsel for ineffectiveness is entitled to a hearing to determine if new counsel is required. 274 So. 2d, at 259. If the defendant fails to make that showing, but “continues to demand a dismissal of his court appointed counsel,” *Nelson* explained that “a trial judge may in his discretion discharge counsel and require the defendant to proceed to trial without representation by court appointed counsel.” *Ibid.*; see also *Hardwick v. State*, 521 So. 2d 1071, 1074–1075 (Fla. 1988). There is no reason why requesting that procedure in state habeas proceedings should be construed as a request to proceed *pro se*. Holland, unlike a defendant still facing trial, did not need permission to fire Collins, since there was no right to representation to waive. Once his request for a new attorney was denied, Holland himself could have informed Collins that his services were no longer required.

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a capital sentence. But the Constitution does not empower federal courts to rewrite, in the name of equity, rules that Congress has made. Endowing unelected judges with that power is irreconcilable with our system, for it “would literally place the whole rights and property of the community under the arbitrary will of the judge,” arming him with “a despotic and sovereign authority,” 1 J. Story, *Commentaries on Equity Jurisprudence* §19, p. 19 (14th ed. 1918). The danger is doubled when we disregard our own precedent, leaving only our own consciences to constrain our discretion. Because both the statute and *stare decisis* foreclose Holland’s claim, I respectfully dissent.



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UNITED STATES SUPREME COURT CASES

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

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

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

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

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

Id. at 361.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The right to the effective assistance of counsel is . . . the right of the accused to require the prosecution’s case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted – even if defense counsel may have made demonstrable errors – the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated. As Judge

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Wyzanski has written: “While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators.” *United States ex rel. Williams v. Twomey*, 510 F.2d 634, 640 (CA7), *cert. denied sub nom. Sielaff v. Williams*, 423 U.S. 876, 96 S.Ct. 148, 46 L.Ed.2d 109 (1975).

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

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

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

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

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

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I. TRIAL PHASE

A. NUMEROUS DEFICIENCIES AND INADEQUATE DEFENSE

1. U.S. Court of Appeals Cases

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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when they are added to the first two, the cumulative weight of error” required reversal. *Id.* Case was reviewed under AEDPA. Upon finding that petitioner met *Strickland* standard, court found that state court had unreasonably applied *Strickland* without any further discussion of 28 U.S.C. § 2254(d) standard. Court also reversed other charges not specifically affected because of the prejudicial spillover affect.

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

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

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

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

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

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strategic reason for such failure.” *Id.* at 286 (footnotes omitted). Alternatively, court held that counsel’s failure to object under state evidentiary rules requiring that evidence be relevant and more probative than prejudicial was deficient. Court held that each of these errors alone were sufficiently prejudicial to require reversal, but noted as cumulative prejudice two additional errors by counsel. First, counsel failed to present evidence of wine cooler bottles, beer cans, and a cooler with several unopened beers in it from defendant’s car as additional evidence of intoxication. Second, counsel failed to attempt to redact portions of the videotaped testimony of a witness who was with the defendant when he obtained the gun. The statement included statements that the defendant had stolen items from the witness’s mother, which was inadmissible evidence of prior bad acts.

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

****Stouffer v. Reynolds***, 214 F.3d 1231 (10th Cir. 2000). Counsel ineffective in capital trial for numerous reasons. Counsel waived opening argument and failed to lay foundation for an exhibit

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and additional evidence impeaching key state witness. Counsel could not ask direct examination questions without leading and failed in cross to point out inconsistencies and only brought out greater detail and emphasis on incriminating evidence. Counsel's closing revealed no defense theory. One counsel had been appointed only a week before trial but did not speak with the defendant or the state's experts and cross-examined four key state forensic experts based only on reading their reports during trial because counsel had failed to seek funding for defense experts to assist in attacking the state's theories. Counsel did not call a defense investigator to testify even though the investigator had viewed the crime scene and discovered numerous factual inconsistencies with the state's theory, such as 13 shots rather than 5. Counsel's only reason for this failure was they wanted the investigator to remain in the courtroom and feared sequestration if the investigator was called as a witness. Prejudice found because "it cannot be fairly said that the omissions and failures of trial counsel, while argumentatively explainable, do not raise a reasonable doubt in the guilty verdict."

1999: **Moore v. Johnson*, 194 F.3d 586 (5th Cir. 1999). Counsel ineffective in murder and armed robbery case in trial and sentencing phases but prejudiced only in sentencing. Counsel were ineffective in failing to conduct an adequate pretrial investigation prior to determining whether to present an alibi defense. The alibi presented was extremely weak and the defendant and his sister even contradicted each other on times and other pertinent facts. In addition, as a result of the alibi defense, the state was able to present extraneous evidence of two prior uncharged armed robberies within weeks of these crimes. The prior crimes had similar facts that were admissible to establish identity. Counsel was not prepared to cross-examine these witnesses, however, and did nothing to counter this strong evidence, which was relevant in sentencing to both special issues of deliberateness and future dangerousness. Counsel also failed to insist that the defendant's entire confession be considered by the jury. The state was allowed to present the portions establishing that the defendant was present at the crime scene with a shot gun pointed at the victim during the armed robbery and the portions describing events after the murder. The portion describing the actual events as an accidental shooting were excluded, however, with the defense counsels' consent. Counsel was also ineffective for eliciting very damaging evidence that connected the defendant to the crimes and defeated their own alibi defense from the very first state's witness even prior to the admission of the defendant's confession. Some of the damaging testimony elicited was never repeated by any other state's witness and no witness was more damaging. In other words, the state's best case was presented by the defense. Counsel then contradicted each other in the closing arguments. One argued the alibi, while the other essentially abandoned the alibi and challenged the defendant's confession as forged and argued that the state had not proven its case. Counsel also failed in sentencing to prepare and present mitigation evidence. Counsel knew of some of the defendant's background but did not investigate or present mitigation evidence. The evidence would have established that the defendant's father was an abusive alcoholic, who rarely provided financial support to the family. The father also routinely beat the defendant and his siblings, but the worst beatings were reserved for the defendant, who tried to intervene to assist his mother when she was beaten. The defendant's mother was an absent parent, who was forced to work two jobs to support the family. Ultimately, after a violent episode with his father, the defendant was kicked out of the

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home when he was 14. He had to sleep in the streets and was forced to steal food to survive. School records corroborated this history and reflected that the defendant had borderline intelligence, but functioned at an even lower level and never passed a single grade of school without a social promotion. He was forced to drop out when he began living on the streets. He also may have suffered severe trauma to the head or brain. Counsel also failed to argue that the defendant's prison record defeated a showing of future dangerousness. The state offered the records of four prior convictions and argued dangerousness. The defense failed to point out, however, that all four sentences were pronounced the same day and, while the defendant had been sentenced to eight years, he served only two years due to good behavior. The court rejected the purported strategy reasons offered: that presentation of mitigation evidence or the alternative accidental shooting evidence argument was inconsistent with the alibi defense. Counsel did not conduct an adequate investigation such that the "strategy" chosen was entitled to deference. Moreover, the court observed that, while residual doubt arguments are valid in some instances, this was not a residual doubt case. The alibi evidence was extremely weak and the defense failed to present the alternative argument that the shooting was accidental when this argument was far more plausible and could have been made even in conjunction with the alibi defense in the trial phase. Moreover, counsel did not even attempt to argue the alibi in sentencing. One counsel argued that the shooting was accidental, even though counsel failed to present the portion of the defendant's confession that supported this argument, while the other counsel again argued that the state's case was weak. With respect to prejudice, the court rejected the state's argument "that deficient performance occurring at the guilt phase of a capital trial may not be deemed to prejudice a capital defendant during the punishment phase of a capital trial." *Id.* at 619. "When, as here, the same jury considered guilt and punishment, the question is whether the cumulative errors of counsel rendered the jury's findings, either as to guilt or punishment, unreliable." *Id.* The court found that the errors in the trial phase were prejudicial because they all amounted essentially to failing to challenge the state's proof of deliberateness and future dangerousness. The court also found the errors in sentencing to be prejudicial. While the court was troubled by counsels' failure to investigate the defendant's background, the court was more troubled by counsels' failure to present the mitigating evidence that was already available to them, such as the accidental shooting language in the defendant's confession and the proof of good behavior in prison in the prison records offered by the state. Sentence reversed based on the cumulative prejudice of the errors in the trial phase and the sentencing phase.

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

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

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

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

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Seidel v. Merkle, 146 F.3d 750 (9th Cir. 1998). Counsel ineffective in murder case for failing to prepare and present a mental health defense. Defendant killed another with a knife during a struggle and told cops that he was “scared for his life” and that the victim “fell on the knife.” Counsel presented only a self-defense theory. Counsel failed to investigate mental health even though his notes showed that client informed him of medication from V.A. and that jail was arranging medication. If counsel had gotten jail records or done any investigation, he would have known that defendant’s reports were accurate. Likewise, if counsel had requested an evaluation, he would have learned that defendant had a history of mental illness (Post Traumatic Stress Disorder). This evidence should have been presented in conjunction with the self-defense evidence. Court held, “Counsel’s disregard for conspicuous pieces of evidence that pointed to a potentially fruitful trial strategy cannot be described as anything short of defective representation.” 146 F.3d at 756.

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

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

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

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1997: **Groseclose v. Bell*, 130 F.3d 1161 (6th Cir. 1997) (*affirming* 895 F. Supp. 935 (M.D. Tenn. 1995)). Trial counsel ineffective in capital case because he had no theory of defense, conducted no cross-examination or adversarial testing of state case, allowed co-defendant's attorney to take the lead despite conflicts between defendant's, and failed to communicate with client prior to trial. **More details from District Court opinion:** Trial counsel, who had never tried a murder case and only tried a handful of criminal cases, was ineffective for failing to move for severance and failing to prepare and present evidence in guilt phase where defendant protested innocence and three codefendants implicated him. Counsel filed only five meaningless pretrial motions, did not interview witnesses, did not attempt to impeach or cross-examine critical state witnesses, did not investigate or present defense witnesses, advised defendant not to testify even though defendant had no criminal record, waived closing argument, and failed to object to defendant being placed on medications that made him "foggy." Counsel made independent objection only once in 2400 pages of transcript. In sentencing, counsel also failed to prepare and present mitigation evidence. Counsel waived opening argument and argued for only nine minutes in closing, called four witnesses who hurt the defense, had the defendant testify and protest innocence after he was found guilty, did not request that closing arguments be transcribed and prosecutor argued that defendant would be paroled if given life. Available mitigation included evidence that defendant had no criminal record, served honorably in the military for twelve years including service in Vietnam, was an ordained minister, and did volunteer work in the community. Numerous religious leaders, community volunteers, friends, and family would have testified concerning good character.

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

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to trial and tried repeatedly to contact counsel to inform him, but counsel did not even return her calls. If the experts had all of this information, the testimony would have revealed that the defendant suffers from black-outs or transient psychotic episodes. Court stated, “When the defense’s only expert requests relevant information which is readily available, counsel inexplicably does not even attempt to provide it, and counsel then presents the expert’s flawed testimony at trial, counsel’s performance is deficient.” *12

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

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

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

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DeLuca v. Lord, 77 F.3d 578 (2nd Cir. 1996) (affirming 858 F. Supp. 1330 (S.D.N.Y. 1994)). Trial counsel ineffective for failing to pursue an extreme emotional disturbance defense to murder charge where defendant had been raped by the murder victim and defendant suffered from rape trauma syndrome. Trial counsel also failed to adequately explain to the defendant that she had the right to decide whether to testify or not and advised her not to testify.

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

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

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

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

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

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failure to listen to tape of call before played to jury and failure to attempt to exclude irrelevant, inflammatory references to defendant.

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

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

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

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of his statements as unreliable and dishonest; and failing to request a jury instruction in sentencing to define manslaughter which was an admitted prior conviction even after prosecutor argued that defendant “had killed before.” Moreover, counsel was ineffective for: failing to prepare and present available mitigation evidence which would have shown a well-documented history of delusional thinking, paranoid, suicidal tendencies, substance abuse, and depression; failing to present evidence of successful work history prior to disability; and for allowing admission of prior conviction for manslaughter without admission of its subsequent dismissal or even an explanation of offense. [Yes, there’s more!] Finally, counsel failed to advise defendant of conflict of interest because counsel represented defendant’s step-father in the probate of defendant’s mother’s estate and defendant and step-father had adverse interests.

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

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

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

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By failing to present direct evidence that the brother was the shooter, however, counsel deprived the defense of “its most powerful possible support.” *Id.* at 1458.

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

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

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

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

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present mitigation evidence which would have shown defendant's good character and his adaptability and good behavior in confinement which was easily demonstrated by admission of records from a California prison.

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

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

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

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

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

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

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

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

1988: *Anderson v. Butler*, 858 F.2d 16 (1st Cir. 1988). A defense counsel's decision in murder case not to call expert psychiatric witnesses as he said he would in his opening statement to the jury was not a reasonable change in strategy but was ineffective assistance of counsel. Non-production not only left the jury with the inference that the psychiatrist & psychologist would not testify as counsel said they would, but also cast doubt on the testimony of lay witnesses who testified about the petitioner's mental state.

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

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

**Osborn v. Shillinger*, 861 F.2d 612 (10th Cir. 1988). Counsel was ineffective in capital case due to counsel's failure to adequately prepare and present evidence and due to counsel's obvious sympathies to the prosecution. Counsel believed he could talk the prosecutor out of seeking the death penalty. When that failed, counsel was left unprepared due to his failure to investigate. He advised defendant to plead guilty and in sentencing sought only to show that defendant's participation in the crimes was more limited than his codefendants, who were not sentenced to death. Counsel did not prepare and present mitigating evidence concerning defendant's family background and medical history. Counsel also failed to object to prejudicial *ex parte* information provided to the trial court that indicated defendant was the "ringleader," *id.* at 627, even though counsel knew or should have known that the information was provided to the court. Counsel was not prepared to present the argument chosen because counsel did not have the transcripts from codefendants' plea hearings or interview the codefendants (one of whom admitted that he was the ringleader). Counsel "so abandoned his 'overarching duty to advocate the defendant's cause,' *Strickland*, 466 U.S. at 688, 104 S.Ct. at 2064, that the state proceedings were almost totally non-adversarial." *Id.* at 628. Following the defendant's motion to withdraw his guilty plea, counsel also made statements to the

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press indicating that defendant had no evidence to support the claim and was playing a game to attract attention. “Publicly chastising a client is evidence of ineffectiveness.” *Id.* During sentencing, counsel also made public statements that his client was not amenable to rehabilitation. Counsel did not challenge the *ex parte* information or the state’s assertion that defendant was the ringleader because counsel believed this to be correct. “[T]hat conflicting evidence existed was apparently of no moment to him. Defense counsel must present conflicting evidence to the court, not judge the issue for himself.” During sentencing, counsel also violated the duty of loyalty by stressing the brutality of the crimes and compared his client to “sharks feeding in the ocean in a frenzy; something that’s just animal in all aspects.” *Id.* Following the trial, even though counsel still represented defendant on appeal, counsel, in an evaluation of the trial judge, informed the judge in a letter that his client deserved the death penalty.

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

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

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

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

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

Sullivan v. Fairman, 819 F.2d 1382 (7th Cir. 1987). Trial counsel ineffective for failing to locate & call at murder trial several “occurrence” witnesses when defense counsel was aware, through

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police reports & discovery, that there were five witnesses with no apparent reason to help defendant who made statements to police that were exculpatory or inconsistent with prosecution witness' statements, yet defense counsel's attempts to locate them were perfunctory at best.

***Troedel v. Wainwright**, 828 F.2d 670 (11th Cir. 1987) (*affirming* 667 F. Supp. 1456 (S.D. Fla. 1986)). Trial counsel ineffective in capital case where defense theory was that co-defendant committed the murder: for not investigating and presenting evidence of the co-defendant's background which would have revealed a violent history and a motive for the killing; for failing to interview the state's expert witness who testified that defendant fired the weapon but whose opinion was not based on test results or other scientific evidence; and failure to obtain a statement made by a witness to police or find out name of witness and interview person even after police offered to disclose statement in which witness said that co-defendant had said the day before the murder that he was going to kill the victim.

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

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

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

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

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

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2. U.S. District Court Cases

2003: **Steidl v. Walls*, 267 F. Supp. 2d 919 (C.D. Ill. 2003). Counsel was ineffective in capital trial for a number of reasons. The murder victims were stabbed numerous times in their own home in July 1986. Following their deaths, a fire was deliberately set. The bodies were discovered by firemen. In September 1986, an admitted alcoholic gave the police a statement that he had been present at the victim's home, heard screams, and saw petitioner with blood on him afterwards. In February 1987, another witness, who was an admitted drug addict and alcoholic, gave the police a statement asserting that she had witnessed petitioner and another man commit the murders and she gave them a knife that she claimed was the murder weapon. In addition to these witnesses, the state presented evidence that the knife provided by the witness was consistent with the wounds. The state also presented testimony from a jailhouse snitch, who admitted that he hoped to get consideration in his own sentencing in exchange for his testimony. The defense presented a corroborated alibi defense, testimony that contradicted the witness that came forward in September 1986, and written evidence that the second witness, who allegedly witnessed the murders and provided the murder weapon, was actually at work at the time of the murders. The witness testified, however, that she had someone to log her in, but she was not there. During closing arguments, the defense counsel argued that the witness had been at work and that the knife she provided could not be the murder weapon because the blade was only five inches long when some of the stab wounds were six inches deep. The court found that counsel's conduct was deficient for failing to adequately impeach the alleged eyewitness testimony with evidence of her presence at work. While the defense had presented the records, the defense had no evidence to contradict the argument that the person that filled out the records falsely indicated that the witness was there. That person was available and did testify in post-conviction that she would not have logged the witness into work unless she was actually there. Although the state court find a trial strategy for not calling this witness, trial counsel testified that he did not recall why this witness was not interviewed or called and the record shows that counsel probably "mistakenly and in haste subpoenaed the wrong supervisor." Prejudice was found because this witness' testimony could have led the jury to believe that the alleged eyewitness was clearing lying and that she had not been present at the time of the murders. Counsel's conduct was also deficient in failing to present expert testimony that the knife presented by the alleged eyewitness and the state as the murder weapon could not have been the murder weapon. Although it is possible for a five inch blade to make a six inch cut, contrary to defense counsel's argument, there were other aspects of the knife and the wounds that led a forensic pathologist to testify that this particular knife could not have been the murder weapon. Although counsel argued this, counsel's conduct was deficient in failing to obtain expert assistance or to even cross-examine the state's expert on this point. Instead, counsel chose to wait until argument to present this theory. The court found this strategy to be unreasonable and prejudicial though because expert testimony that this knife was incompatible with the murder weapon would have had a devastating impact on the alleged eyewitness' credibility. Counsel's conduct was also deficient for failing to prepare and present expert testimony concerning the crime scene. The alleged eyewitness' testimony included a broken lamp prior to the fire and the state argued that the presence of a broken lamp corroborated her testimony. Expert evidence from the arson investigator, who actually testified at trial on other points, and a second arson investigator

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established in post-conviction though that the lamp was intact at the time of the fire and was broken afterwards. Counsel's conduct was deficient because counsel did not even consider obtaining such experts or testimony, even though he was trying to discredit the witness. Petitioner was prejudiced because this evidence would have impacted the witness' credibility and the state's argument of corroboration. The court found that each of these errors was prejudicial because, aside from the alleged eyewitness that would have been discredited had counsel performed adequately, the state's evidence consisted only of an admitted drunk, who was contradicted by other witnesses already, and a jailhouse snitch. In addition, the court found that, "even if the individual instances of deficient performance were not, considered alone, sufficient, cumulative consideration required relief. The court analyzed the state court findings thoroughly under the AEDPA. The state court found strategies with "no factual support in the record," *id.* at ____, and relied on "a profoundly mistaken reading of the record," *id.* at ____. The state court also applied the wrong legal standard by requiring petitioner to show that the result "would have been different," rather than the proper "reasonable probability" standard. *Id.* at ____. The state court decision was also "not even minimally consistent with facts and circumstances of this case and was, therefore, unreasonable." *Id.* at ____. In sum, the state court unreasonably determined the facts in light of the evidence presented and unreasonably applied *Strickland* to the facts.

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

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likely would have neutralized the testimony of the state's expert, which would have reduced the case to a credibility determination. Counsel's error in informing the jury of the sister's allegations bolstered the victim's otherwise uncorroborated testimony. In a case that amounted to a credibility contest, counsel's "errors take on a special importance." *Id.* at _____. Although the court cited the appropriate AEDPA standards, the court did not discuss the application of these standards in its analysis of deficient conduct or prejudice.

2002: *United States v. Jasin*, 215 F. Supp. 2d 552 (E.D. Pa. 2002), *recon. denied*, 292 F. Supp. 2d 670 (E.D. Pa. 2003). Counsel was ineffective in arms embargo case for failing to adequately investigate and present a defense at trial. The defendant was charged in a complex prosecution for violation of the United States arms embargo against South Africa during the 1980s. The defense theory at trial was that the defendant acted in good faith and that he had the honest belief that he was acting in compliance with the law. Counsel, who had never tried a criminal case, failed to investigate even though the defendant specifically asked counsel to interview several witnesses and several experts. The defendant was prejudiced because these expert witnesses would have in fact supported the defendant's good faith defense. The court found a reasonable probability that the defendant would have been acquitted.

1999: *Berry v. Gramley*, 74 F. Supp. 2d 808 (N.D. Ill. 1999). Retained counsel ineffective in kidnaping and sexual assault case for failing to prepare and present a defense. Victim alleged that defendant, a probationary police officer, kidnaped her from street, drove her to his home, sexually assaulted her three times in garage, led her naked into his house, sexually assaulted her again will threatening use of pistol, made her give him phone number, drove her home, and gave her his pager number, which alleged victim said was disconnected. Defendant was ultimately arrested after a call to her was traced to his home and a pistol was found, which he asserted he obtained from his father 11 days after the alleged assault. Defendant made statement to police asserting that sex was consensual. Defense counsel met with the defendant only twice prior to trial in the holding cells next to courtroom, but defendant was afraid to talk to him in the crowded room for fear that other inmates would learn that he was a police officer. Defendant could not call lawyer either because he only had pager number. If counsel had adequately prepared and presented a defense, one credible witness would have testified contrary to the alleged victim's assertion of being raped three times in garage and led naked into house that he saw defendant arrive home and come out of the garage after only a minute or so and that the victim was dressed and stood nearby appearing as if everything was normal. This witness had even called defense counsel and told him of available testimony. Another witness, corroborated by defendant's mother who answered phone, would have testified that he called and talked to defendant for 25 minutes during the time in which the alleged victim asserted she was in basement being sexually assaulted. Defendant's mother said he took call upstairs and left alleged victim in the basement where there was a door out. Defendant's father would have corroborated that he gave defendant the pistol found after the alleged assault. Proof was also available that defendant's pager, for which he gave alleged victim the number, contrary to state's testimony, was operational. In state court, counsel provided an affidavit asserting strategic reasons for conduct and defendant was denied an evidentiary hearing. Federal court found after evidentiary

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hearing that counsel was not credible and the state courts had erred in relying on his affidavit. Conduct was deficient because counsel made no strategic decisions due to complete failure to prepare. Prejudice found because defendant was denied material exculpatory and impeachment evidence. Court also considered in cumulative prejudice analysis that counsel made only a very brief opening that described no defense and failed to challenge two jurors who were either the victim of a rape or had a friend who was the victim of a rape and indicated potential bias. Case reversed as “contrary to” and “unreasonable application” of *Strickland* under AEDPA.

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

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

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

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

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

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

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3. Military Cases

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

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

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

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

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

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because the trial judge ordered the production of damaging inculpatory statements made by the accused to his expert witness.

4. State Cases

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

Tenorio v. State, 583 S.E.2d 269 (Ga. Ct. App. 2003). Counsel ineffective in armed robbery case for failing to adequately investigate and present alibi defense that would have established that the defendant was more than a three hour drive from the crime scene only an hour after the crime. Counsel presented alibi evidence at trial from the defendant's supervisor at work and the defendant's step-daughter, but the state argued they were both biased because the supervisor was dating the step-daughter. Time records from the store were also admitted but the store manager had altered them and could not personally say whether the defendant was at work or not. Following trial, two additional witnesses were located. One, an assistant manager, testified that the defendant called him that night saying he left work. The other witness said he saw the defendant at work. Neither of these witnesses had a bias and the defendant had even told counsel of the assistant manager. Counsel had retained an investigator and relied on him, but learned after trial that the investigator had not interviewed anyone and instead had given the defendant's wife a stack of blank subpoenas so she could subpoena anyone that could help. "The fact that [the investigator], rather than trial counsel, shirked his assigned duties does not matter. As trial counsel noted . . . , she was ultimately responsible for ensuring a thorough investigation." *Id.* at _____. Prejudice was found because the disinterested alibi witnesses may well have made the difference where there was no evidence against the defendant except for the alleged victim's eyewitness testimony.

Guzman v. State, 580 S.E.2d 654 (Ga. Ct. App. 2003). Counsel ineffective in burglary case for failing to present medical evidence demonstrating lack of criminal intent the defendant was charged with burglary after breaking down a neighbor's apartment door and entering their residence in the hopes of acquiring "pills." A police officer found the defendant in the apartment searching in the bathroom. He looked "spaced out" and had a "glassy" look in his eyes and told the officer that he was "looking for some pills." The officer testified that the defendant was sweating profusely and

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had a “grayish look on his face.” The defendant had no prior criminal record. At trial, the defendant testified that he suffered from migraine headaches that were so severe at times that he would experience black outs. He testified that on the day of his arrest he had been suffering from a migraine and must have blacked out. He did not deny his guilt but simply testified that he could not recall. In support of this testimony, counsel sought to introduce 25 pages of medical records regarding the defendant’s medical condition and treatment, but the state’s objection to the lack of authentication and lack of foundation was sustained. If counsel had adequately sought expert assistance, he could have presented testimony from a neurologist that the defendant suffers from “confusional” migraines and that a person experiencing a confusional migraine would not know right from wrong when in a confusional state. The court found prejudice because medical testimony would have provided an explanation for the defendant’s actions, which otherwise seemed bizarre in that the defendant had no prior criminal record, no prior problems with his neighbors, and no further problems with them after his arrest.

**Wolfe v. State*, 96 S.W.3d 90 (Mo. 2003). Counsel was ineffective in capital trial for failing to present physical evidence that would have contradicted the testimony of a key state’s witness. The defendant was convicted of two murders, one of which involved a victim found on the front seat of his car, who had likely been shot from the backseat. Four days after the murders, the police received information from a witness that claimed to have witnessed the murders and she implicated the defendant. For her cooperation, she received full immunity. There was very little other evidence against the defendant, except for a jailhouse snitch with a history of serious mental illness. No physical evidence linked the defendant to the killing. During the trial, the theory of defense was that the witness was not credible and was framing the defendant. The counsel presented four impeachment witnesses concerning the witness’ reputation for truthfulness but presented no physical evidence contradicting her testimony. Prior to trial, counsel learned that police discovered human hair in the back seat of the victim’s car and in the ammunition boxes found in the dumpster near the defendant’s hotel. The prosecutor informed counsel that he was not sure whether samples of the witness’ hair had been seized and that no testing had been conducted. Shortly before trial counsel learned that samples of the witness’ hair had been taken, and counsel requested any reports concerning the sample. The prosecutor replied again that he was not sure if the witness’ hair had been taken. Rather than pursuing the issue, counsel resorted during trial to arguing that the hairs found in the car and the dumpster were not the defendants. If counsel had pursued the issue, counsel could have presented testimony that the hair found in the backseat and in the box of ammunition was similar to the witness’ hair and could not have been the defendant’s hair. Prejudice was found because the witness testified that the defendant was sitting in the backseat when he shot the victim and that she, the witness, had never been in the backseat. If counsel had presented this readily obtainable forensic evidence, it would have revealed that the witness was lying. The jury likely would have found the witness’ testimony to lack credibility. Prejudice was found because the evidence of the defendant’s guilt was not overwhelming and, if this testimony had been presented, the jury may well have rejected this witness’s testimony.

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Genetten v. State, 96 S.W.3d 143 (Mo. Ct. App. 2003). Counsel was ineffective in second degree murder case for failing to investigate and call available expert witness to testify in the defense. The defendant was charged with second degree murder after he took a fifteen month old baby to the hospital. He told the emergency room nurses that the baby had choked on a french fry and that he may have shaken her too hard in trying to expel it. Hospital personnel did not find any obstruction in the baby's airway and did not find any food particles in her stomach, but did notice burns on her body and the tops of her feet in different stages of healing. After several days the baby died. The pathologist that conducted the autopsy testified that she died from symptoms consistent with shaken baby syndrome. He also observed that the burns on her chest, back, and the tops of her feet were of three different ages and were inconsistent with accidental causes. The defendant testified in his own defense that the burns on the child had been caused several weeks before when she had accidentally fallen into the bathtub with her socks on and was burnt in hot water. Prior to trial counsel was provided with a death summary that had the stamped signature of the chief of the burn and trauma and critical care unit at the children's hospital, who was also the child's treating physician. Counsel listed this expert as a potential witness, but did not interview him and did not call him to testify. If counsel had interviewed this witness and presented his testimony, the expert would have testified that, in his opinion, the burns on the child's feet occurred at the same time and were very consistent with the type of accidental injury that the defendant claimed. He also would have testified that although the death summary bore his stamped signature, a resident prepared it, and he did not review it before his secretary stamped his name on it. He said he disagreed with the death summary because the burns themselves did not raise a red flag of child abuse as the death summary indicated. Counsel's conduct was deficient in failing to interview a key witness. Counsel also did not make a reasonable decision not to interview this expert witness when the defendant had been charged with both murder and with first degree assault for intentionally burning the child. The questioned expert was clearly a key witness in that he was the child's treating physician. The defendant was prejudiced because without the expert's testimony, the jury heard only expert testimony that the child's burns were intentionally inflicted and the defendant's self-serving testimony that the burns occurred accidentally. If the jury had heard the expert testimony of the child's treating physician, the jury may have believed that the burns were accidental, which would have significantly undermined the state's theory of a pattern of abuse used to support the second-degree murder conviction.

Gardner v. State, 96 S.W.3d 120 (Mo. Ct. App. 2003). Counsel was ineffective in second degree murder trial for calling the victim's wife to testify to immaterial facts, which opened the door to cross examination that elicited prejudicial evidence. The defendant lived with the victim and his wife for some period of time in their home. The victim was sometimes abusive towards his wife and the couple had problems for some period of time. Ultimately, the defendant and the victim had a dispute, and the victim was shot three times. When the police arrived the victim's wife claimed that her husband had been threatening her earlier in the day. The victim's wife and the defendant claimed that the defendant shot the defendant in self-defense and in defense of the victim's wife. A large hunting knife was found at the victim's feet. During the investigation of the case, several people informed the investigating officers that the victim's wife had made statements indicating an

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intent to kill her husband. There were several witnesses to similar statements including the sister of the victim's wife. The defense counsel was aware of these statements. Prior to trial, the court sustained a motion to preclude introduction of the statements of the victim's wife about killing her husband. The state had subpoenaed, but did not call her to testify. Early in the defense case, the defense counsel called her to testify and questioned her only to establish that she had been subpoenaed by the prosecution. The state then cross examined the defendant's wife concerning her statements to others about killing her husband, and the defense did not object to these questions. The victim's wife denied making any of these statements. The defendant then testified in his own behalf that he shot the victim in the course of defending the victim's wife and himself. After the defense rested, the state called rebuttal witnesses concerning the statements of the victim's wife, and her statements were admitted as substantive evidence against the defendant. Trial counsel had called the victim's wife to testify believing that the state's cross examination of her would be limited to the subjects addressed in direct examination. A Missouri statute allows for cross examination without limit, and that has been the rule in Missouri since 1840 and has been codified since 1905. Counsel was unaware of this law and had failed to research the issue. Counsel's conduct was deficient in failing to adequately research the law prior to calling the victim's wife "with little to be gained." Counsel compounded this error by declining the court's offer for a mistrial after the surprise testimony of a rebuttal witness. One of the witnesses called by the state testified that the defendant had actually been present when the victim's wife had made a statement that they had intended to kill her husband. This fact had not been disclosed to the defense and was a surprise even to the prosecutor. The trial court agreed to grant a mistrial for this reason. After discussing the situation with the defendant, trial counsel declined the mistrial, but requested a recess for five days instead. Trial counsel declined the mistrial because this witness's statement might be admissible in a retrial as an adoptive admission. Trial counsel failed to consider, however, that the other witnesses who testified about the hearsay statements would not have been allowed to testify in a retrial. Because of trial counsel's mistake he did not encourage the defendant to take a mistrial and instead sought a continuance to seek impeachment material, which he was unable to find. When the trial resumed, counsel failed to oppose the admissibility of the testimony of the remaining witnesses who testified that the victim's wife had made statements about planning to kill her husband. Counsel's conduct was deficient in failing to consider the risk of calling the victim's wife to testify and to warn his client accordingly. The defendant was prejudiced because of the information presented by the rebuttal witnesses and the prejudice was enhanced because the defense, rather than distancing the defendant from the victim's wife, had called her to the stand "as though she were allied with the defense." While the court would not necessarily reverse based on the failure to accept a mistrial, the court also found this to be an "ill-advised decision." The court found prejudice in counsel's error in calling the victim's wife to testify. This error "transformed a self-defense case, or at the worst a voluntary manslaughter case, into a conspiracy-to-commit-murder case." While the court did not reverse on other grounds, the court also mentioned other defects in counsel's overall performance, including failing to object to several instructional errors, failing to challenge a state's expert who had previously given testimony in a murder trial that was proven to be incorrect, and failing to make an adequate offer of proof concerning testimony that he desired to present. The court concluded:

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

Id. at 133.

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

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

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an attorney fails to interview an eye-witness and the court found this situation to be closely akin to the failure to interview an eyewitness” the court presumed prejudice.

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

Dames v. State, 807 So. 2d 756 (Fla. Dist. Ct. App. 2002). Counsel ineffective in first degree murder case for failing to present the defendant’s testimony on self-defense, which was the only available defense. In the first trial, the defendant testified and the jury hung. In the second trial, counsel told the jury in opening that it would be self-defense but did not present the testimony and did not seek to reopen the evidence to present it even after the trial court refused to give the charge. The prejudice was emphasized in the state’s closing argument.

Blouin v. State, 567 S.E.2d 39 (Ga. Ct. App. 2002). Counsel ineffective in sale of cocaine case for failing to offer the transcript of a co-defendant’s exculpatory testimony in the defendant’s prior probation revocation hearing. The state’s case was based entirely on the testimony of a police officer who testified that during a sting operation the defendant was approached at a gas station and asked about a purchase of cocaine. According to the officer, the defendant spoke to the co-defendant and then got into the officer’s car and directed the officer to go across the street where the co-defendant went behind a toolshed. According to the officer the defendant got out of the car and also went behind the shed. A few minutes later the co-defendant reappeared and sold crack cocaine to the officer. Both defendant and co-defendant were arrested. The defendant testified that he was present at the gas station but was not aware or involved in the sale of drugs. At the time of the defendants arrest he was on probation on a different matter. At a probation revocation hearing, the co-defendant testified that he saw the cocaine and that it was he and not the defendant who got in the car with the

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officer and led the officer to the scene. He testified that the defendant was present at the gas station but had nothing to do with the drug sale. Prior to trial the co-defendant plead guilty to the sale of cocaine. The co-defendant was not called to testify at trial and counsel did not attempt to introduce the transcript of his prior testimony from the probation revocation hearing. Counsel testified that he had kept up with the co-defendant's location in order to subpoena him to testify, but learned shortly before trial that the co-defendant had absconded after his release from prison and counsel had no information about his whereabouts. Counsel was aware that the co-defendant had gave the prior exculpatory statement but counsel did not consider introducing that testimony at trial. Counsel admitted that this was not part of trial strategy and that he could have gotten the transcript if he had considered it. Counsel's conduct was deficient because the defendant's sole defense was that he was not in the car or involved in the transaction. The co-defendant's testimony was easily available and would have corroborated this defense. "The attorney's failure was the equivalent of simply forgetting to call a key witness. We hold that this failure falls below the standard of care." *Id.* at 41-42. The court noted counsel did not decide not to use the evidence, which distinguishes this case from those involving a strategic decision. Prejudice found because there is a, reasonable probability that the outcome of the trial had been different if the co-defendants testimony would have been presented.

People v. Spann, 773 N.E.2d 59 (Ill. App. Ct. 2002). Counsel ineffective in possession with intent to deliver controlled substance case for failing to adequately prepare and present a defense. Counsel made no pretrial motions and no opening statement. He made no objections during the testimony of the single witness for the state, the arresting officer. His cross-examination of the officer was essentially a repeat of the witness' testimony on direct. Counsel presented no witnesses and no evidence and conceded the defendant's guilt of possession of controlled substance in closing. The state's evidence consisted of testimony from a police officer that he was conducting a residential safety check of a Chicago Housing Authority building when he saw the defendant receive money in exchange for an item that defendant retrieved from inside his mouth. The officer testified that he approached the defendant and observed what appeared to be crack cocaine in a plastic bag in the defendant's mouth. He ordered the defendant to spit it out and the defendant complied. The defendant was then arrested and taken to the police station where he made statements that he lived in an apartment in the building and then signed a consent to search form and turned over the apartment key. Additional cocaine and substantial amounts of money were located in the apartment. Counsel was ineffective in failing to move to quash the arrest or evidence because the officer's testimony arguably lacked specific articulate facts which justified an investigative *Terry* stop and search. There was no testimony that the officer was concerned about his safety or the safety of others or that evidence would be destroyed when he ordered the defendant to spit out what was in his mouth. In addition, counsel did not test the credibility of the officer's testimony that he observed cocaine in the defendant's mouth, counsel through cross-examination and closing argument could have made a strong case that the circumstances surrounding the arrest were not as the officer described. Counsel's conduct was not appropriate trial strategy when the pretrial motion that counsel failed to present was the defendant's strongest defense. The court found a reasonable probability that a motion to quash the arrest and suppress evidence would have been successful. The

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court also found that counsel was ineffective in failing to present motions to suppress the key to the apartment, the consent to search the cocaine found in the apartment and defendant's statements about renting and using the apartment. Counsel could have made the challenges as fruit from an unlawful arrest. The court found a reasonable probability of success. The court also concluded that counsel was ineffective for failing to make a separate motion to suppress the statements as the result of the illegal arrest. The court noted that the record does not reflect that the defendant was advised of his *Miranda* rights at anytime before consenting to the search or producing the key or making incriminating statements. The court found a reasonable probability that such a motion would have been successful. The court also found that counsel was deficient for failing to move to dismiss two counts of the indictment based on the failure to satisfy the strict statutory pleading requirements and based on an argument that one count of the indictment was arguably fatally defective for enhancement of the crime. The court found a reasonable probability that a motion to dismiss this portion of the indictment would have been successful. Finally, the court noted that in the closing argument, defense counsel misstated the evidence and stated that his client when approached had spit cocaine from his mouth when in fact the defendant had been ordered to spit out the cocaine. Counsel also conceded the defendant's guilt regarding possession when the defendant had plead not guilty and did not testify. The court noted that admitting guilt is not per se ineffective, but the record in this case did not reflect that the defendant knowingly and intelligently consented to this approach. The court found that based on the "cumulative impact of the ineffective assistance of counsel," *Id.* at 75, the defendant was prejudiced.

People v. Dodson, 771 N.E.2d 586 (Ill. App. Ct. 2002). Counsel ineffective in armed robbery case for failing to provide any meaningful advocacy. Counsel, filed no pre-trial motions, advised the defendant to waive jury trial, stipulated to all the states evidence in a light most favorable to the state, made no opening statement, and in closing sought only to diminish the severity of the crime by arguing that the gun used was a pellet gun that was not loaded and that the robbery victim was not harmed. Counsel filed no post trial motions and no issue was preserved for appeal other than ineffective assistance of counsel. Because this trial lacked any meaningful adversarial testing of the prosecution case, the court declined to apply *Strickland* and instead applied *Cronic*. The court, noted that even if counsel's actions could be characterize as a strategy to gain the trial judges favor resulting in lesser punishment, this strategy would be unreasonable because counsel still could have argued the mitigation following a conviction. The court noted that the argument of strategy ignored the fact that the defendant plead not guilty and nothing in the record demonstrated that he willingly and intelligently waived his right to trial, his right to confront witnesses, or the right to present witnesses. "Capitulation, on a song and a prayer that making it easy for the state somehow accrued to a client's benefit, is not strategy. It is merely a rationalization for failing to take on a hard case and perform in a manner in which criminal defense attorneys are expected to perform. Since there was absolutely no reason to give up without a contest, absent some concession from the state and return, counsel abdicated her role as an advocate."

Mullins v. State, 46 P.3d 1222 (Kan. Ct. App. 2002). Counsel ineffective in child sexual abuse case for failing to retain an expert in child interview techniques either for use as an expert witness or to

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assist in preparation of cross-examination of the state's witnesses. Prejudice found because the conviction rested primarily on the victim's testimony. The court also found that counsel's failure to review a study cited by a nurse (who testified that physical evidence of anal penetration was not present in the majority of cases where children were sodomized) was not prejudicial individually, but added to "the cumulative effect of the trial errors." *Id.* at 1227.

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

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

Bigner v. State, 822 So. 2d 342 (Miss. Ct. App. 2002). Counsel ineffective in statutory rape and sexual battery case for numerous failures. The victim testified that she had visited the defendant's home with friends. All were drinking and the others were snorting, cocaine and smoking marijuana. The victim testified that she left the home after the defendant's girlfriend accused her of flirting with the defendant. The victim testified that she rode with one friend and the defendant and another friend left in a separate vehicle and they all met up at a gas station. According to the victim, the two friends got together in one truck leaving no room for her so she rode with the defendant. According to the victim, they were all supposed to meet up later. The defendant and the alleged victim drove to the appointed meeting place but the others never showed. According to the victim, the defendant held a knife to her throat and ordered her to take off her clothes. According to the alleged victim, she was then sexually assaulted a number of times. Ultimately the defendant drove her back to the gas station and allowed her to make a phone call with him standing beside her. She called her sister-in-law and asked for someone to pick her up. The defendant then left. The sister-in-law sent her father to pick up the alleged victim. She told him that she had been raped. The father took the alleged victim to her home where she informed her sister and mother of the rape. They went to the police department and then the hospital, and a rape test kit was conducted. The state's evidence

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revealed that a knife was found on the drivers side floor board, but there were no traces of body fluids or cleaning products in the truck. When police offices arrived at the defendant's home, the defendant admitted seeing the victim earlier but denied that she had ever been in his vehicle. On cross-examination of an, officer, counsel attempted to inquire concerning the results of the rape test kit, but the states objection was sustained. Counsel informed the court that the state had subpoenaed a doctor and that counsel had relied on this subpoena and this witness' testimony to offer evidence that the rape test kit was negative. The state informed the court that the physician under subpoena was not the person who conducted the rape kit and that the person who conducted the rape kit and analyzed it had been released from subpoena a week prior to trial. Counsel was ineffective for numerous reasons. Counsel failed to make any pre-trial motions or any effort to suppress any of the evidence even though the record did not include any mention of a warrant or a consent to search. The record also did not reveal that the defendant had been advised of his *Miranda* rights prior to making statements. Counsel was also ineffective far failing to inquire in *voir dire* after a juror revealed that his niece and a close friend had both been victims of rape or sexual battery. Counsel did not conduct follow up questioning or seek to strike this juror for cause. Counsel also did not object to armed trooper in full uniform being a member of the jury despite the trial courts hint that this could be a problem. Counsel was also ineffective for failing to object to repeated testimony concerning the use of marijuana and cocaine and supplying minors with alcohol, despite the trial court's hint that this could be a problem. To the extent, that counsels conduct could be characterized as tactics, the court noted that counsel's decision was based on misunderstanding of the law and that statutory rape is a crime that does not involve consent. Counsel was also ineffective for failing to conduct an independent investigation and to subpoena the party responsible for conducting the rape test kit, which showed no sign of sexual activity. Counsel simply relied on the state to call this witness and, after learning that the state did not intend to present this evidence, counsel rested without calling a single witness or offering one piece of evidence. Counsel was ineffective for failing to object to the state's closing argument that asked the jury to "send a message" Finally, counsel was ineffective for submitting only one jury instruction that dealt with chaste character of the victim, a body of law that was abandon by the state years before. The court noted that, while the trial court refused this instruction, offering the instruction illustrates the lack of preparation trial counsel made prior to trial.

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

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

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because this was the only available witness personally acquainted with the victim. The other witnesses testified about possible sightings based only on photographs disseminated in the media.

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

State ex rel. Myers v. Painter, 576 S.E.2d 277 (W. Va. 2002). Counsel was ineffective in sexual assault case for a number of reasons. First, psychological profiles of the victims had been prepared and placed under seal and the judge stated during the hearing that some of the information contained in the profiles was inconsistent with prior statements by the alleged victims. Nonetheless, trial counsel did not attempt to obtain copies of the psychological profiles. The court held that this could not be strategy because counsel could not make a strategic decision without first reviewing the evidence. Second, counsel attended a hearing concerning a continuance, a bench conference during the trial concerning a sitting juror's recognition of an important state witness as a former neighbor, and an in camera meeting several days before trial in which the trial court recused himself and assigned another circuit court judge. None of these hearings were transcribed and the defendant was not present at each of these critical stages. "Taken cumulatively, after a careful review of these and other acts and omissions identified by the appellant in the record," the court found both deficient conduct and prejudice to "the appellant's ability to obtain a fair trial."

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

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the initial misdemeanor of discharging the weapon. Prejudice found because a witness, whose closeness to the scene was corroborated by a police officer, testified that the defendant did not point his weapon at the officer. This witness' testimony had already obtained an acquittal for a codefendant accused of shooting the officer following the defendant's arrest.

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

People v. Anthony Roy W., 754 N.E.2d 866 (Ill. App. Ct. 2001). Counsel ineffective in criminal sexual conduct with a child for failing to present evidence of the child's previous consensual sexual relations with a juvenile one to two months before she alleged that the defendant assaulted and for failing to present evidence that the victim had pending delinquency charges and was in the custody of the juvenile authorities at the time of trial. The alleged victim was the defendant's 12-year-old daughter. After she had gotten in trouble for pulling a knife on another child and the defendant had disciplined her, she alleged sexual assault. By the time of trial she was pending other charges and in custody. The defendant denied the assault and the experts testified that the position of the alleged victim's hymen was consistent with sexual assault. Nonetheless, counsel did not present the evidence of her prior sexual relations with the juvenile because he believed – erroneously – that it was not admissible under the Rape Shield Statute. The court found it to be admissible to explain the physical evidence found by the experts. Counsel did not present the evidence of the pending theft charges and juvenile custody because he also believed this to be inadmissible. The court found it admissible to prove bias and motive. Prejudice found in both instances because outside of the physical evidence, which was explicable with evidence of the juvenile's prior intercourse, the evidence was only the defendant's testimony and the that of the alleged victim.

**Prowell v. State*, 741 N.E.2d 704 (Ind. 2001). Counsel ineffective in capital murder case for failing to adequately investigate the defendant's mental illnesses prior to entry of a guilty plea without a sentencing agreement, which resulted in a death sentence. Investigation would have revealed that

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the defendant was a chronic schizophrenic, who was fearful and threatened by others. Prior incidents included having his stomach pumped because he was convinced that his grandmother, who he was close to, had poisoned his orange juice. Post-conviction experts found likelihood that defendant acted under paranoid delusions at the time of the shootings. Prosecutor rejected plea offer a week before scheduled trial and defendant plead guilty without a deal. Counsel conceded that he was scared to go to trial because he was unprepared, in part due to caseload that exceeded that allowed for capital counsel under state rules. He also relied on the judge's previously expressed reluctance to sentence a mentally ill person to death. Nonetheless, counsel, who believed from the start that defendant was mentally ill, never considered a plea of guilty but mentally ill and did not investigate the defendant's background and family history. During the plea, despite two hours of preparation, the defendant had difficulty stating a factual basis satisfactory to the court and the prosecutor. Defense counsel, however, assured the court that the defendant was competent and of sound mind at the time of the plea and at the time of the murders, which was fundamentally inconsistent with his attempt to argue in sentencing that the defendant was mentally ill. A week after the plea, counsel hired a mitigation investigator. He then sought a continuance prior to sentencing, but waited a full five weeks after obtaining continuance to retain a psychologist, who ultimately testified that the defendant suffered from paranoid personality disorder, "a relatively minor mental disorder in comparison to more severe forms of paranoia." *Id.* at 707. Court found that this was the "inevitable result of the scanty information supplied," *id.* at 714, to the expert only 18 days prior to sentencing, because testimony revealed that no expert could diagnose schizophrenia without information establishing symptoms for more than six months. Moreover, despite having prior experience with an expert in schizophrenia in a capital case, counsel hired an expert known to a new lawyer only through his work in Social Security disability benefits hearings. The trial court found no explanation for the murders and sentenced the defendant to death. Prejudice found because the evidence would possibly have supported an insanity or guilty but mentally ill conviction. While GBMI does not guarantee a life sentence, "as a practical matter, defendants found to be guilty but mentally ill of death- penalty-eligible murders normally receive a term of years or life imprisonment." *Id.* at 717. Indeed, court found that a GBMI plea even without a plea agreement would most likely have resulted in a life sentence. In reaching this conclusion, the court relied, in part, on the testimony of [a] lawyer experienced in capital representation." *Id.* at 714. Court also rejected many of the trial court's findings of fact, which had been written by the state's lawyer, as clearly erroneous. "We recognize that the need to keep the docket moving is properly a high priority of our trial bench. For this reason, we do not prohibit the practice of adopting a party's proposed findings. But when this occurs, there is an inevitable erosion of the confidence of an appellate court that the findings reflect the considered judgment of the trial court. This is particularly true when the issues in the case turn less on the credibility of witnesses than on the inferences to be drawn from the facts and the legal effect of essentially unchallenged testimony." *Id.* at 709.

Latta v. State, 743 N.E.2d 1121 (Ind. 2001). Counsel ineffective in felony murder of baby case. Defendant and her husband, represented by the same lawyer, were jointly tried for setting fire to the house in which the baby died. While court addressed conflict issues due to joint representation, the court reversed based on *Strickland* analysis. Counsel's conduct was deficient in failing to require

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redaction of husband's pre-arrest interview. Husband was asked if his wife set the fire and counsel objected that his answer might tend to incriminate him. Although the question was never answered this portion of the statement was not redacted. Court finds a plain *Bruton* violation because the effect of this question and objection is the same as if the husband had made inculpatory statements that were admitted. Counsel was also ineffective for implying during his closing argument that the husband was possibly innocent but only covering for the defendant.

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

People v. Bass, 636 N.W.2d 781 (Mich. Ct. App. 2001). Counsel ineffective in drug distribution case for failing to investigate and present testimony of corroborating testimony from codefendants. Codefendant A was tried separately in a bench trial and testified that he did not know the defendant or Codefendant B, that he did not see anyone selling drugs, and that he did not sell any drugs. He was acquitted. Codefendant B testified during this trial that he did not know Codefendant A and that he met the defendant at a hotel to help him find a room. They split up and left when they learned the police were outside. He was arrested with heroin on him. Codefendant B later plead guilty. Defendant testified at Scott's trial and his own trial, consistent with Codefendant B. While he had told counsel of both witnesses, she did not interview them or call them as witnesses, but had no recollection of why. Prejudice found.

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

Cravens v. State, 50 S.W.3d 290 (Mo. Ct. App. 2001). Counsel ineffective in murder second case where the defendant said he entered the victim's home and saw her with a shotgun threatening

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

State v. Kole, 750 N.E.2d 148 (Ohio 2001). Both trial and initial appellate counsel were ineffective in abduction, having a weapon under disability, and burglary (with firearm specification) case in which the defendant was a "bounty hunter" or "bail bonding agent," who entered the home of a fugitive's step-brother unannounced and without permission. Defense counsel argued a common law privilege based on an 1872 U.S. Supreme Court case allowing entry into the defendant's home but not the home of another. Counsel did not, however, raise a statutory defense to the abduction and burglary when a state statute allowed arrest "at any time or any place." Counsel's deficient conduct was the result of ineffective research rather than tactics. Prejudice found at least on the abduction and burglary charges. With respect to the firearm charges, the court also found ineffectiveness for failing to raise a possible issue of firearm inoperability since that issue had never been considered by the courts before.

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

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jury's question regarding culpability for not rendering aid and failing to renew the request for an accessory after the fact charge to which the defendant was entitled under the evidence; and (5) failing to object to improper victim impact evidence that went far beyond what was admissible.

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

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

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

**Miller v. State*, 29 P.3d 1077 (Okla. Crim. App. 2001). Counsel ineffective in capital case for numerous reasons. First, counsel waived the opportunity to be present and to attempt to rehabilitate a juror when the judge talked to a juror in chambers during the sentencing phase after the juror became visibly upset and asked to be excused following testimony of the defendant's brother about the defendant "being 'scarred for life' by abuse and about the stress" of the trial on the defendant's family. Counsel also failed to adequately object to the victim impact witnesses' extended testimony that the defendant should be sentenced to death, which had not been included in the state's pretrial disclosure. While this testimony is normally admissible under state law, it should have been excluded in this case due to the lack of notice. In addition, the follow on testimony of *why* the victim impact witnesses believed the defendant should be sentenced to death was improper for the same reason. While state law allows only a straightforward statement of the sentence the victim impact witnesses believe should be imposed, the testimony in this case went well beyond that with "the witnesses' amplified opinions about [the defendant's] lack of remorse, his inability to be

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rehabilitated, and his being dangerous to those inside and outside of prison.” Nonetheless, while counsel had objected generically to the lack of notice, counsel did not object to this testimony as inadmissible for separate reasons. Counsel also failed to object to the court’s failure to properly instruct the jury, in accordance with state law, that a statutory aggravating circumstance must be found before the victim impact testimony could even be considered. Prejudice found due to ineffective assistance and plain error by the trial court found because “the victim impact witnesses essentially testified about ultimate issues in the case, i.e. whether Appellant was a continuing threat to society, whether or not Appellant could be rehabilitated, whether he had remorse, and whether his actions were justified. Such evidence is extremely dangerous, as it could easily lead to jurors substituting their own opinions with those of the victims, those who suffered the most from the crime.” The court was also “troubled by what can only be described as a serious breakdown in communication between Appellant and his attorneys. While this breakdown in communication may not technically fall under the rubric of ineffective assistance, it does to the extent the problems were not presented to the trial judge so that the possibility of appointing new counsel to represent Appellant could be explored.” Shortly before trial counsel had requested a mental health examination stating that the defendant did not trust them, although he would communicate with an investigator and another indigent defense counsel. Counsel also stated in the motion that they believed medication would help since the defendant had a history of depression and possible schizophrenia but was not currently on medications. These issues were never addressed by the court or pursued by counsel, except that counsel asked to have the investigator sit at counsel table during the trial to “assist” in communicating with the defendant. In post-conviction, counsel testified that the relations were strained and the defendant even reached the point of refusing to talk to counsel, in part, because they wanted him to enter an agreement for life but the defendant refused. Other reasons for the possible problems included the lack of medications and that one of the attorneys was on medical leave for three months just prior to trial. The defendant had also told another indigent defense counsel that he would not cooperate with his counsel because one of them had made a racially derogatory comment. Counsel denied saying it to the defendant but admitted that he might have made the comment in private and again in the presence of co-counsel and the investigator. “Whether caused by one of these reasons or a combination of several, the breakdown in communication between Appellant and his attorneys may very well have affected numerous areas of the trial.” “The bottom line is the attorneys could not effectively communicate with their client, for whatever reason, and they should have sought to withdraw from representation and to notify the trial judge regarding their inabilities in this area.”

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

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in this opinion, we cannot in all good conscience say Appellant received a fair trial, a proceeding with a result that can be considered reliable.

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

In re Brett, 16 P.3d 601 (Wash. 2001). Counsel ineffective in capital trial for numerous reasons. As court summarized, “when counsel knew or had reason to know of a mental defect or illness affecting their client in a possible death penalty case, counsel could and should have: (1) promptly sought the appointment of co-counsel; (2) presented a mitigation package to the prosecutor before a death penalty notice was filed; (3) promptly investigated relevant mental health issues; (4) sought a timely appointment of investigators; (5) sought a timely appointment of qualified mental health experts; and (6) adequately prepared for the penalty phase by having relevant mental health issues fully assessed and by retaining, if necessary, qualified mental health experts to testify accordingly. While the failure to perform one of these actions alone is insufficient to establish ineffective assistance of counsel, the failure to perform the combination of these actions establishes that defense counsel’s actions in Brett’s trial were not reasonable under the circumstances of the case.” *Id.* at 608. Despite counsel’s early notice that defendant suffered from diabetes and mental problems, counsel did not seek a mental health expert, a psychologist, until a month before trial. Because there were delays in appointment and obtaining temporary license the expert only had 19 days to prepare and only received the necessary school, medical, and corrections records 2 days before trial. On the day he was scheduled to testify, the psychologist informed counsel that he was not qualified to diagnose and testify about fetal alcohol syndrome and the effect, which was defendant’s central issue. “At the last minute, defense counsel presented a different witness. However, this witness was not qualified to testify concerning Brett’s medical conditions and the mental effects, did not make an individualized diagnosis of Brett, and provided erroneous testimony concerning fetal alcohol effect.” *Id.* at 606 n.1. Court found deficient conduct based on the uncontroverted testimony of three “legal experts”: Miriam Schwartz (a federal public defender experienced in homicide cases), Joan Fisher (a supervising attorney for the capital habeas unit in Moscow, Idaho, and former prosecutor), and John Strait (an experienced criminal litigator, consultant, and professor of law at Seattle University). Prejudice found because, if counsel had performed adequately, the jury would have heard evidence of defendant’s bipolar disorder, fetal alcohol effect or alcohol-related neurodevelopment disorder, and a severe medical and psychiatric consequences of poorly controlled diabetes. The fetal alcohol effect revealed a pattern of brain damage consistent with prenatal alcohol exposure and the brain damage had a “significant impact” on the defendant’s mental abilities.

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

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

**Head v. Taylor*, 538 S.E.2d 416 (Ga. 2000). Counsel ineffective in murder case, where defendant had killed his wife with a knife, for failing to ensure proper medication for defendant, who had long history of mental illness, so defendant could assist in defense and in failing to obtain jail records to refute State’s claim that defendant behaved normally in jail. Defendant had evidence of defendant’s long history of mental illness, including hospitalization and medications, involving among other things delusions that his wife, her family, and others were conspiring against him. Just prior to the murder, wife obtained a warrant to have defendant, who had no prior record except a bad check charge, removed from their apartment because she was afraid of him due to his mental illness. Defendant walked home from courthouse with children, left them outside, and went in and killed wife. He told police right afterwards that wife’s family was going to kill him. Prior to trial, defendant continuously complained to counsel about conspiracies to make him commit suicide, crying, shaking, and nightmares and that he needed his medications, which had run out. Court appointed competence examiner in July 1989 said defendant suffered only from substance abuse problems and that his prior records had indications of malingering. As the trial approached, defendant became more bizarre. In 1990, all he would tell defense investigator was that the furniture in his apartment had been moved to confuse him. In July 1990, defense retained psychologist, but defendant cried and refused testing because he believed that his defense attorneys and the expert were conspiring with his in-laws. Psychologist reported that he did not believe the defendant was malingering and that he was schizophrenic. Psychologist also reported that the defendant’s condition was deteriorating, such that he could not cooperate with defense counsel, and would continue to do so unless he was medicated. Counsel considered making a motion to have the

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defendant medicated but did not do so. During trial, the state presented testimony of psychologist and evidence that defendant behaved normally in jail, including playing basketball and chess with other inmates. The state also argued that if the defendant was truly psychotic, defense counsel would have gotten medications for him. Counsel were aware that State would make those arguments, because the defense expert had specifically warned them that this would likely be the state's theory, but counsel failed to challenge or rebut the state's evidence. Counsel's conduct was deficient in failing to have their client treated and medicated prior to trial. "In effect, trial counsel chose a strategy centered around their ability to convince the jury that their client was a paranoid schizophrenic and not a malingerer, but they proceeded to trial without taking the necessary action to prevent this strategy from being seriously impaired by Taylor's non-cooperation." Counsel's conduct was also deficient in failing to obtain the jail records, which would have reflected, contrary to the jail officers and doctor's testimony of normal behavior, that the defendant made repeated complaints of headaches, stomachaches, uncontrollable crying and shaking, suicidal ideation, difficulty sleeping, bad dreams, "abnormal feelings," and "emotional stress disorder." One of the doctors who testified that the defendant had no problems in confinement had noted that defendant was depressed and had prescribed anti-depressant drugs for him. In addition, although the doctor testified at trial that he could not recall whether he had prescribed psychotropic drugs, the jail records showed that he had actually increased defendant's dosage of Mellaril and prescribed Haldol, both psychotropic drugs, shortly after arrest. The defendant had also repeatedly requested mental health treatment and this same doctor had personally made several notations about contacting a mental health facility regarding the defendant. Nonetheless, the doctor did not mention these requests at trial and denied that he was ever asked to treat the defendant. The records also reflected that the defendant had a suicide attempt prior to trial and that this doctor had advised officers to keep a close check on him. Counsel's conduct was deficient in failing to get the records because their own expert had warned them that the state would present evidence of the defendant's behavior in confinement and because the defendant had told counsel of the problems he was experiencing in confinement. Prejudice found because the key point of contention during trial and sentencing was whether defendant was a paranoid schizophrenic or a malingerer.

***People v. Sutherland**, 742 N.E.2d 306 (Ill. 2000). Counsel ineffective in capital case, involving kidnaping and criminal sexual assault because counsel failed to investigate and present evidence that defendant purchased kind of boots and tires that were linked to crime scene only after crime occurred. Body was found in open area with boot prints on back and tire prints in area. Pubic hairs were found in her rectal area and her neck had been cut. Death was fixed as July 1, 1987, by medical examiner. Tire tracks were narrowed to only two types sold in U.S. and boots were a brand sold by Kmart. Several months later, the defendant was arrested for shooting at park rangers in Montana. He had the Kmart brand boots in his possession and one of the suspect tires on his car. At the time of the murder, he had lived only a few miles from where the body was found. During trial, the state presented expert testimony concerning the tire prints and the boot prints consistent with those found in defendant's possession. Expert testimony also indicated that: (1) dog hairs found on victim's clothing were consistent with hairs from defendant's dog but inconsistent with hairs from victim's dogs; (2) fibers found on victim's clothing could have originated from the carpet

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or upholstery of defendant's vehicle; and (3) fibers found in defendant's vehicle could have originated from victim's clothing. A state expert also testified that two pubic hairs recovered from victim's rectal area could have originated from defendant, but did not originate from 24 other suspects in the case or from any member of Amy's family. The defendant's sister provided alibi testimony and a defense expert testified that fibers found in the defendant's car were inconsistent with fibers from the victim's clothes. On direct appeal, court held that the prosecution at trial improperly argued before the jury that the hair and fiber evidence conclusively established that the victim had been in the defendant's car, when the testimony was only that hair and fibers from the crime scene were "consistent with" those from defendant's car. No prejudice was found on direct appeal though due to the strength of the remainder of the state's evidence. Defendant's mother could have testified that the defendant purchased the boots and the tires after the date of the murder and had even offered the defense counsel the receipt for the purchase of the boots, which were returned to her and in her possession prior to trial. A friend of the defendant could have testified that he had changed tires on the defendant's car at least twice after the date of the murder and that defendant had to change tires frequently because he lived on a very rough road. The friend had told both the police and the defense counsel about this prior to trial, but the friend had also told police that the defendant was at his house on the night of the murder, which was inconsistent with the alibi the defendant presented. Defense counsel said he did not pursue the information provided by the defendant's mother and the defendant concerning the tires and boots and did not examine the boots because he did not think this evidence was significant to the state's case. Counsel's conduct was deficient in light of his strategy to discredit the state's circumstantial evidence. Prejudice found because boot and tire evidence was significant part of the State's circumstantial case, none of which was particularly strong in isolation. Prejudice also found in combination with direct appeal finding that the prosecutor improperly overstated the strength of fiber-comparison evidence in argument.

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

Commonwealth v. Alvarez, 740 N.E.2d 610 (Mass. 2000). Counsel ineffective in murder case for failing to review or to provide to defense experts medical records regarding a serious automobile accident in which the defendant sustained serious head injury. Prior to trial counsel retained an expert that noted history of psychotic disturbances and severe alcohol and substance abuse, which exacerbated the psychotic disorder. In the report, expert noted that defendant told him she had been in a serious automobile accident in 1985, following which she had been in a coma for six months and had a metal plate placed in her head. He also noted repeatedly, however, that she was a poor historian. Nonetheless, counsel failed to obtain the records from the 1985 hospitalization. The state,

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however, requested the records and received them the day before jury selection began. The records were approximately 12" thick, but the state gave its own expert and the defense only the discharge summary. Defense counsel gave the summary to its own expert only 30-40 minutes prior to the expert's testimony and the expert only had time to skim the report. During the expert's testimony, he opined, as he had in the initial report that the defendant suffered from a mixed personality disorder with organic, paranoid, and affective features. For the organic features, the expert relied only on the history of substance abuse and the defendant's self-reported testimony of being in a coma and having a metal plate in her head. The prosecutor on cross established that the expert was relying only on the defendant's self-reports for organic damage, noting that the discharge summary made no reference to a coma or metal plate, and, then, challenged the testimony because the evidence of psychosis relied on by the defense expert was also from self-reported statements. Defense counsel did not address this issue in closing argument, but the prosecutor made repeated reference to the defendants' alleged "lies" about her past. If counsel had obtained the records and provided them to the defense expert, however, the expert would have testified that the records supported a conclusion that she had been in a coma for weeks and had extensive and repeated surgeries involving her scalp, face, and ears. In short, the records provided ample support for the defense expert's conclusion about an "organic" component.

Where, as here, a defendant claiming lack of criminal responsibility has a significant medical history that appears to have contributed to the underlying mental disease or defect, competent counsel would certainly investigate the full extent of that contributing medical history. The possibility that a defendant's mental illness could be explained and confirmed by reference to some demonstrable physical illness or injury would be of such obvious value to the defense that one would expect counsel to explore it both promptly and thoroughly. The opportunity to present the jury with a medical explanation for the defendant's mental illness, an explanation that could both corroborate the existence of the mental disease and portray the defendant's mental illness in a sympathetic light, should not have been squandered.

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

Blankenship v. State, 23 S.W.3d 848 (Mo. Ct. App. 2000). Counsel ineffective in involuntary manslaughter and assault case where counsel thought that he and prosecutor had agreed to a

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continuance but neglected to confirm continuance with judge and thus did not interview expert on accident reconstruction prior to trial. Then in opening statement, counsel told jury that he would produce expert witness, but decided not to present expert testimony when he discovered that the expert would disagree with defense theory of case. Counsel then had defendant take stand, which allowed prosecution to show previous conviction for DWI and speeding ticket that defendant received on day of accident.

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

In re K.J.O., 27 S.W.3d 340 (Tex. Ct. App. 2000). Counsel ineffective in juvenile proceeding where juvenile was alleged to have engaged in delinquent conduct, but counsel wholly failed to investigate facts and circumstances surrounding juvenile's alleged involvement in underlying offense and indicated to jury that juvenile was guilty. Juvenile was prejudiced because the state's evidence went unchallenged and the defense did not discover and present alibi witness. Apartment security guard attempted to question two Hispanic girls for suspicious conduct and both pulled weapons on him, but the weapons apparently wouldn't work so they ran and were arrested by police nearby. Guard saw that one of them had "Baby" tattooed on neck and the other had white pants and Adidas jacket. Police officer testified that he got report that guard saw the girls get in a blue Cadillac, although it was not the guard who reported this but someone else. Officer drove around area and found blue Cadillac in parking lot of night club with Hispanic male and female in it, "Baby" was one of them. When officer attempted to arrest her, another car rammed the car next to squad car and three men got out and approached officer, who called for backup. Other officers and helicopter closed in on the scene. The defendant, who according to the officer was wearing white pants, got out of a pickup truck in front of the Cadillac with her hands up. An Adidas jacket was found in the truck, but no gun was found. Counsel talked to no witnesses other than defendant and mother and entered plea negotiations without permission, because counsel assumed defendant would plead guilty. When counsel learned during trial that defendant would not plead guilty, counsel did not ask for continuance to prepare even though she had talked to no one and had been unsuccessful in serving subpoenas for defense witnesses. In cross-examination of security guard, counsel asked, "To your knowledge did my client or her companion have a chance to leave the immediate area before the detention by the police?" Counsel's question clearly presupposed that defendant was guilty.

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Defendant had told counsel that she was not guilty and that her clothes did not match those described by guard and she and mother provided names of witnesses at club that night. One of these witnesses, defendant's friend, would have testified that she was with the defendant the entire night up until very shortly before crimes when she went in the club. Another witness arrived around that time and observed the defendant in truck with her boyfriend until about five minutes before the helicopters arrived. Defendant's clothes at time of arrest, obtained from cops, also revealed that defendant was wearing blue jeans, not white pants as witnesses said assailant was.

1999: *Frederick v. United States*, 741 A.2d 427 (D.C. 1999). Counsel ineffective in murder case for failing to secure the testimony of an exculpatory eyewitness. There were two eyewitnesses to murder, who referred police to Smith. Smith in turn said that the defendant was the principal. Both were indicted and the trials were severed. Smith went to trial first. One of the eyewitnesses testified unequivocally that there were two men and one was Smith. He also testified unequivocally that he knew the defendant well and the defendant was not the second man. When the defendant went to trial, defense counsel moved to admit the witnesses testimony from Smith's trial because the witness could not be located. The judge granted short continuance in midst of trial but witness still was not found. Trial continued. During deliberations, the witness was located. Judge granted a mistrial. A year later when the defendant proceeded to trial again, the defense again said that the witness could not be located. Counsel's conduct was deficient because, at most, counsel sent an investigator to the witnesses mother's house looking for him. As trial court pointed out in first trial, however, the witness frequented the courthouse often due to numerous problems in juvenile court. He was in courthouse several months for hearings prior to trial. Counsel could have easily located him. The court said that in a murder case, "[t]he stakes were . . . exceptionally high . . . and a lawyer who defends a murder case assumes an awesome responsibility. The quality of representation required of counsel must surely reflect the nature of the task at hand and the potential consequences to the client of an inadequate defense." *Id.* at 437. Counsel's deficient conduct was not excused because the defendant opted to go to trial without the witness because counsel's deficient conduct gave the defendant the Hobson's choice of going to trial without significant exculpatory evidence or remaining in pretrial confinement where he had been for more than three years waiting for his defense counsel to find the witness when he had not done so in three years.

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

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

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

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

2001: *People v. Bunning*, 700 N.E.2d 716 (Ill. App. Ct. 1998). Counsel ineffective in armed robbery case for failing to object when the state told the jury during opening statements that the state would call

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two witnesses to corroborate the testimony of an accomplice and to testify that the defendant had bragged about committing the robbery. The state did not call these witnesses. In addition, counsel was ineffective for failing to move for a mistrial after a police officer testified during cross-examination that the defendant terminated the police interrogation by requesting counsel. Defense counsel had asked only how long the interview lasted.

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

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

Brown v. State, 974 S.W.2d 289 (Tex. Ct. App. 1998). Counsel ineffective in murder of husband case, where defendant claimed self defense. Counsel was ineffective for eliciting evidence and opening the door for extensive evidence of defendant's drug use and promiscuity when the only

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

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

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

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

***State v. Butler**, 951 S.W.2d 600 (Mo. 1997) (en banc). Counsel ineffective in capital case where the victim was the defendant's wife because counsel failed to adequately investigate and present evidence which showed that the victim was murdered by her nephew and not the defendant and for failing to discredit the state's witnesses and challenge the evidence. Evidence against the nephew included an eyewitness who saw a car and a driver leaving the scene, which matched the nephew and not the defendant; several days after the murder the nephew was trying to sell a ring similar to the one removed from the body; the victim told her brother that she was afraid of her nephew because he had a drug habit and she had expensive rings; the nephew had stolen from other family members just before this and pawned the stolen items; the nephew's girlfriend had been killed only 11 days before and her mother would have testified that the nephew had been threatened because he owed drug money and the threat was that if he did not pay his girlfriend would be killed; and the nephew had left work early on the day of the murder and lied about it. In addition to failing to

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present this evidence, counsel was ineffective for failing to prepare and present evidence that the fibers from the victim's fingernail scrapings did not match the fibers of the defendant's clothes and the defendant had no blood on him. Likewise, counsel failed to present evidence that the one witness who said he saw the defendant with a weapon similar to the murder weapon previously had made contradictory statements about the weapon to police and another witness who was present when the weapon was allegedly seen would have testified that she did not see any weapon.

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

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

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

Matter of Appeal in Maricopa County, Juvenile Action No. JV-511576, 925 P.2d 745 (Ariz. Ct. App. 1996). Counsel ineffective in juvenile proceeding for aggravated assault for failing to present an available favorable psychological report or present the testimony of the psychologist, even though evaluation was conducted on counsel's direction and judge expressed dissatisfaction with the available court-appointed evaluation. Counsel also made no offers of proof and did not cross examine state's witnesses even though medical and police reports existed which cast doubt on the validity of the victim's testimony regarding the extent and seriousness of the victim's injuries. Finally, even though it was first offense, juvenile had supportive family, regular job, good school attendance and two state witnesses recommended against transfer, counsel did not argue for transfer deferral program as permitted under juvenile court rule.

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

****State v. Gunsby***, 670 So. 2d 920 (Fla. 1996). Counsel ineffective for failing to adequately investigate and discover evidence which revealed that murder presented as racially motivated killing in family run convenience store was actually a drug-related killing by rival drug gang. Because of Brady violation and defense counsel's ineffectiveness jury did not learn that: the victim's brother and the state's key eyewitness had unrelated charges dropped so he would not be discredited during testimony and was arrested on additional charges which were pending at the time of trial; another state witness was arrested on probation violation prior to testimony; the victim's brother was a well known drug dealer in trouble over drug debts; both the victim's brother and the only other eyewitness to testify told others that they did not know who did the shooting; another alleged eyewitness who did not testify identified two other individuals as perpetrators; and eyewitness told her husband she could not see perpetrator because he was wearing a mask and the same eyewitness was romantically involved with one of the original suspects in the case. Trial court had found counsel ineffective in sentencing for failing to object to numerous prejudicial misstatements of the defendant's prior criminal convictions by the prosecutor and for failing to adequately prepare and present mitigation evidence. Failure to investigate and present evidence to mental health experts resulted in experts testifying at trial that the defendant had no impairments when he was mentally retarded and had organic brain damage and fit within at least one statutory mitigating circumstance when none had been found at trial. Supreme Court did not address this issue because of the ineffective assistance in guilt-or-innocence phase.

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

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

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

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

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

People v. Vera, 660 N.E.2d 9 (Ill. App. Ct. 1995). Counsel ineffective in aggravated assault case for: (1) failing to lay an adequate foundation for admission of transcription of tape-recorded

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conversation between defendant and witness where witness testified at trial that she never saw another suspect with gun but told defendant on the tape that she did see other suspect with gun; (2) failing to properly impeach state witness who identified defendant but had previously been unable to do so when a defense investigator showed witness photographs which included defendant -- witness denied and investigator testified but was not asked about these facts; and (3) failing to have defense investigator testify to clear up question of inaccurate date on report used to refresh the recollection of a very important defense witness even though judge said witness was helpful but he was concerned about the date on the report making the report unreliable.

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

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

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

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

Buffalo v. State, 901 P.2d 647 (Nev. 1995). Counsel ineffective in assault with deadly weapon and sexual assault case for failing to adequately prepare and present defense. Only eyewitness testimony

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

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

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

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

Bess v. Legursky, 465 S.E.2d 892 (W. Va. 1995). Counsel ineffective in murder case for failing to investigate circumstances of taking of first confession prior to moving to suppress, for questioning the defendant in the presence of the police officers concerning the first confession, for encouraging the defendant to go with police officers to find car and murder weapon, questioning the defendant during that trip to make incriminating statements which resulted in a second taped confession. All of this help to the police occurred without a deal and court presumed prejudice. At trial, counsel contradicted the defendant's testimony during the motion to suppress the statements, failed to

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present pathological expert who would have testified that the victim's time of death was inconsistent with the defendant's statements, and failed to present forensic expert to show that none of the numerous footprints and fingerprints at the scene matched the defendant.

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

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

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

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

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

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

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

People v. Mejia, 617 N.E.2d 799 (Ill. App. Ct. 1993). Counsel ineffective in reckless homicide prosecution for: failing to call witnesses who he said in opening argument would testify that defendant was not driving; failing to call witnesses who would have contradicted and impeached

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testimony of state's only eyewitness; and failing to seek a mistrial when he became aware of police report that contradicted prosecution witness' testimony.

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

Wilson v. State, 501 N.W.2d 68 (Iowa Ct. App. 1993). Counsel ineffective in sex abuse case for failing to ask for continuance or investigate after alleged victim's mother said during cross-examination that she had taken her daughters to a pediatrician to examine for sex abuse prior to the state expert's examination. If counsel had investigated he would have discovered that defendant's last opportunity to abuse the victim was in February and the pediatrician who examined her in April found no evidence of sex abuse. The state's expert who examined child in August found evidence of abuse that was visible to the naked eye. Given these circumstances, the jury could have easily found that abuse was committed by someone other than defendant.

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

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

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

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

Commonwealth v. Strut, 624 A.2d 162 (Pa. 1993). Counsel ineffective in rape of 19 year old retarded son case where credibility was key issue for failing to elicit critical testimony or conduct effective cross-examination of defendant's other son who would have testified that when he came

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out of bathroom after 15-20 minutes (in which offense alleged), he found door to apartment open, defendant and victim fully dressed and not appearing disheveled, victim not crying, and later on the bus the victim sat with the defendant and they acted normally towards each other.

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

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

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

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

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

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

Wenzy (Maurice) v. State, 855 S.W.2d 52 (Tex. Ct. App. 1993). Counsel ineffective in aggravated robbery case because of the cumulative effect of counsel's behavior in failing to move in limine or

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ask for instruction to disregard or move for mistrial after witness testified that the defendant's brother implicated him in crime; failing to view lineup videotape until the trial was in progress; and failing to move to withdraw due to the conflict caused by counsel's representation of the defendant's brother/co-defendant in his separate trial.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

State v. Glass, 488 N.W.2d 432 (Wis. Ct. App. 1992). Trial counsel ineffective in assault on child case for stipulating that vaginal swabs were "inconclusive" instead of calling as a witness a state

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crime lab employee who would have testified that tests conducted on vaginal swabs from 14-year-old alleged victim were negative for semen.

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

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

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

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

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

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

People v. O'Banner, 575 N.E.2d 1261 (Ill. App. Ct. 1991). Counsel ineffective in murder case for failing to call the defendant and her son to present exculpatory testimony that it was the son and not

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the defendant who shot the defendant's husband and that the defendant only lied to police to protect her son. Counsel also failed to present evidence that the defendant called the police requesting help before the victim was shot and the victim had been under a restraining order prior to the shooting.

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

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

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

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

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

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

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

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

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

State v. Templin, 805 P.2d 182 (Utah 1991). Trial counsel ineffective in rape case for failing to interview and present defense witnesses that the defendant identified for him where the state's evidence was all based on victim's testimony with no corroborating physical evidence. Defense witnesses would have established prior consensual physical contact between the defendant and the alleged victim and one witness would have testified that she the alleged victim and the defendant passionately kissing for over 15 minutes within an hour of the alleged rape at the location of the alleged rape.

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

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

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

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

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

Hiner v. State, 557 N.E.2d 1090 (Ind. Ct. App. 1990). Counsel ineffective in distribution case because after judge ruled prior to trial that counsel could not impeach informant with history of

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substance abuse and alternate sources for drugs which were allegedly received from the defendant counsel opted to “stand mute” in attempt to preserve issue for appeal. Did not participate at all during trial and actually waived issue because to properly preserve issue needed to call witnesses and make proffer after judge refused to allow the evidence.

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

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

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

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

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

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

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

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

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

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

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

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

***Smith v. State**, 547 N.E.2d 817 (Ind. 1989). Counsel ineffective for: failing to file timely notice of alibi which resulted in exclusion of one of several alibi witness; failing to request an instruction on the affirmative defense of alibi; failing to impeach state's key witness who was a co-defendant despite prior inconsistent statements, contradictions by another co-defendant, and the available testimony of an inmate who heard witness say he was going to put blame on defendant. The inmate's testimony did not come out because counsel believed incorrectly that it was inadmissible and told witness not to say it. In addition, counsel failed to move to exclude witnesses favorable polygraph evidence even though he knew about it prior to trial and did not object or move for mistrial when witness said he passed polygraph in response to open ended question by defense counsel. Counsel also did not object when state argued based on polygraph. Finally, court noted that sentence would have been reversed anyway because counsel did not prepare at all for sentencing phase because he expected acquittal.

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

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

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other conduct that raised “a serious question” concerning the adequacy of counsel’s conduct. The “cumulative impact” of counsel’s deficient conduct was prejudicial.

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

Commonwealth v. Stonehouse, 555 A.2d 772 (Pa. 1989). Counsel ineffective in murder case for failing to request a charge that the jury should consider the cumulative effect of three years of physical and psychological abuse suffered by the defendant at the hands of the victim when considering the reasonableness of her fear of imminent danger of death or serious bodily injury for purposes of self-defense. Counsel also ineffective for failing to present expert testimony on battered woman’s syndrome.

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

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

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

Alvarado v. State, 775 S.W.2d 851 (Tex. Ct. App. 1989). Trial counsel ineffective in sexual assault on child case for failing to object to inadmissible testimony of counselor, complainant’s mother, and

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doctor which supported the shaky testimony of the complainant and counsel failed to request an instruction to disregard the inadmissible evidence from the counselor concerning defendant's sexual abuse of complainant's younger brother.

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

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

State v. Crestani, 771 P.2d 1085 (Utah Ct. App. 1989). Trial counsel in theft case ineffective for failing to subpoena documents relating to the bank account from which monies were allegedly stolen. The account was that of a title company in which the defendant was the sole shareholder. His defense theory was that the money market account contained customers' money and the defendant's agents fees which were personal funds, but defense counsel failed to obtain and review the documentation until sentencing. An audit done by a CPA prior to sentencing showed that the defendant had deposited into the account \$20,000 more in personal funds than he had allegedly stolen. Counsel was also ineffective for failing to prepare the defendant and his wife for their testimony by having them review records and thus they were forced to attempt to recall five year old financial transactions while on the stand.

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

In re Cordero, 756 P.2d 1370 (Cal. 1988). Counsel ineffective in first degree murder case for failing to investigate and present available evidence of intoxication at the time of the offense despite the defendant's statements that he knew what he was doing. Police reports referred to a PCP-laced

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cigarette found at the crime scene and a witness at the scene stated that the defendant “looked fried.” In addition, at least three witnesses were available to show that the defendant was intoxicated with PCP and alcohol before and after the offense and this testimony could have been supported by expert testimony and the physical evidence of the PCP-laced cigarette.

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

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

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

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

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

People v. Trait, 527 N.Y.S.2d 920 (N.Y. App. Div. 1988). Counsel ineffective in murder case for: making a rambling and disconnected opening statement which elicited 21 sustained objections; not

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filing any pretrial motions; excessively and purposelessly cross-examining prosecution witnesses, one of whom gave testimony on cross that was clearly damaging to the defendant; and not preparing defense psychiatrists which resulted in testimony that did not support the insanity defense.

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

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

Mitchell v. State, 762 S.W.2d 916 (Tex. Ct. App. 1988). Counsel ineffective in aggravated assault case for failing to seek suppression of photographs, failing to seek discovery of and move to suppress videotaped confession, failing to cross-examine victims, advising defendant to enter a nolo plea based on erroneous understanding of law, failing to object to redacted confession excluding exculpatory segments, failing to investigate defense based on long history of mental problems, including hospitalization, and failing to present mitigating evidence in sentencing.

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

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

People v. Moreno, 233 Cal. Rptr. 863 (Cal. Ct. App. 1987). Trial counsel ineffective in DWI case where police found the defendant some distance from the car and the defendant testified that he had

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not driven car but given keys to other parties. Counsel ineffective for failing to object to statements of the investigating officer who provided, based on hearsay, the only evidence that the others present at the scene had not driven the car.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

State v. Thomas, 743 P.2d 816 (Wash. 1987). Trial counsel ineffective in willfully eluding police vehicle case for failing to ascertain qualifications of defense expert offered to testify concerning defendant's blackouts. Purported expert was only an alcohol counselor trainee and judge would not allow testimony. Counsel also ineffective for failing to offer an instruction that the inference concerning the defendant's mental state based on objective circumstantial evidence was rebuttable by subjective evidence of defendant's mental state where defense was diminished capacity due to intoxication.

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

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

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

Mason v. State, 712 S.W.2d 275 (Ark. 1986). Trial counsel in murder case ineffective for failing to furnish the defendant with the jury list or question prospective juror concerning whether she had been a crime victim (defendant was not present during voir dire) when the defendant knew of a juror's potential bias on this basis and the juror ultimately was selected as foreman. Counsel also

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ineffective for stipulating to the cause of the victim's death and allowing the state crime lab report in which deprived the defendant of the right to examine the state's experts as to fact that intervening events could have caused or contributed to the victim's death and the fact that the shotgun blast did not strike the victim directly and was not intended to kill the victim.

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

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

People v. Wilson, 501 N.E.2d 863 (Ill. App. Ct. 1986). Counsel ineffective in attempted murder case for failing to apply recently enacted statute making prior inconsistent statements by witnesses admissible as substantive evidence and compounded error by requesting jury instruction which precluded jury from considering as substantive evidence which resulted in the trial court refusing to give lesser included offense instruction on reckless conduct because the evidence supporting the instruction was contained in the witness' prior inconsistent statement.

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

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

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

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

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

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

1985: *Gordon v. State*, 469 So. 2d 795 (Fla. Dist. Ct. App. 1985). Trial counsel ineffective for: failing to file notice of alibi defense in a timely manner which resulted in preclusion of alibi evidence; allowing juror to sit who indicated prejudice against defense counsel which would affect her decision; and failing to object to 104 instances of improper questions or comments by prosecution.

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

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

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

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

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

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

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

State v. Pitsch, 369 N.W.2d 711 (Wis. 1985). Trial counsel ineffective in theft case for failing to verify prior convictions and have court rule on admission prior to defendant's testimony. During direct, defendant said he had two prior convictions, but during cross it came out that he had nine prior convictions on three different occasions. Because defendant had misrepresented facts, judge allowed prosecutor to delve into the nature of the priors which included attempted theft, theft, and entry into vehicle with intent to steal.

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

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

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

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defendant, and called drug dealer's roommate who identified the defendant's voice on the tape even though there was a real issue of identity after the state's case.

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B. ONE DEFICIENCY:

1. JURY SELECTION

a. U.S. Court of Appeals Cases

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

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

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

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

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

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

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

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

b. State Cases

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

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

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

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

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

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

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

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

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

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

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

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

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

***Capital Case**

2. INDICTMENT

a. U.S. Court of Appeals Cases

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

b. State Cases

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

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

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

1994: *Hopkins v. State*, 317 S.C. 7, 451 S.E.2d 389 (1994). Trial counsel ineffective for failing to object to amendment of indictment which changed offenses from DUI causing great bodily injury to DUI causing death and thereby raised maximum punishment from 10 to 25 years. The amendment deprived the court of jurisdiction to accept guilty plea.

1993: *Benbow v. State*, 614 So. 2d 398 (Miss. 1993). Defendant denied effective assistance of counsel in plea to aggravated assault where he was represented by a law student under supervision of counsel,

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but counsel never met defendant and never discussed plea with him, was not in court for plea, and neither counsel nor student questioned potential defects on the face of the indictment.

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3. MOTIONS AND NOTICE

a. U.S. Court of Appeals Cases

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

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

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

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

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

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

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

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

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

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

b. U.S. District Court Cases

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

c. Military Cases

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

d. State Cases

2003: *Evans v. State*, 827 A.2d 157 (Md. Ct. App. 2003). Counsel ineffective in drug case for failing to move to suppress based on an unreasonable search of the defendant's rectal area while in an exposed area of a public street. During a drug task force, an officer purchased one vial of cocaine from the

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

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

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

Page v. State, 63 P.3d 904 (Wyo. 2003). Counsel was ineffective in possession of marijuana case for failing to move to suppress evidence obtained pursuant to a search warrant. The defendant's home was being inspected by a sheriff's deputy conducting a welfare check on a child. During the

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

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

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

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

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

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

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

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

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

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

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

Wilkerson v. State, 728 N.E.2d 239 (Ind. Ct. App. 2000). Counsel ineffective in rape case for failing to move to sever charges of two rapes that occurred three weeks apart. State statute required severance if crimes were not shown to be part of a common scheme and the two alleged rapes here were similar only in that they occurred in the same city and the assailant entered through a window late at night. The defendant was convicted of both rapes and sentenced to 40 years on each to be

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served consecutively. If the trials had been severed, however, the court could not have made the sentences consecutive under state law at the time, which allowed consecutive sentences only when sentencing was contemporaneous. [Statutory amendments in 1994 now allow consecutive sentences even when not contemporaneous.] Thus, prejudice in sentencing is clear. Counsel's conduct was deficient because counsel conceded no strategy and that he was not aware of the sentencing ramifications of the failure to sever. Court ordered that sentences be altered to run concurrently.

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

***People v. Moore*, 716 N.E.2d 851 (Ill. App. Ct. 1999).** Counsel ineffective in felon in possession of gun case for failing to move to quash arrest and to suppress evidence and statements. Cop went to house looking for someone else. Defendant was pulling car out of driveway when cop blocked him in. When defendant got out of car, cop knew who he was and that he was not the man the cop was looking for. Defendant took off running. Cop thought he threw a gun while running. None ever found though. Defendant eventually stopped and handcuffed 150 feet from the car. Cop went back to car and saw a green zippered case in the floorboard of the car. He opened the case and found a gun. After arrest, defendant said he ran because he saw the case in the floorboard of the car. The court held that there was no probable cause for the arrest because flight alone is insufficient and cop had no reason to suspect that defendant had committed or was committing a crime. The search of the car was not incident to the arrest since the defendant was 150 feet away and cuffed. Nor was the search a plain view search because the gun was contained in a zippered bag. The defendant's statements would also be suppressed if the arrest was quashed. While the court could not "determine what the outcome of a hearing on motions to quash arrest and to suppress evidence and statements would have been," the court found prejudice because "without the motions, confidence in the result of defendant's trial is greatly undermined." Slip op. at *5. Post-trial counsel also ineffective for failing to move for new trial on basis of trial counsel's IAC.

***Collier v. State*, 715 N.E.2d 940 (Ind. Ct. App. 1999).** Counsel ineffective in murder, criminal recklessness, and misdemeanor carrying a handgun without a license case for failing to object to trial on both recklessness and carrying handgun charges where they were based on a single act and the

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handgun charge is a lesser included offense of recklessness charge. Court found that trial on both violated double jeopardy and vacated the conviction and sentence on the misdemeanor charge.

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

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

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

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have been suppressed because these acts were sufficiently similar to the crime charged or remote in time.

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

Goines v. State, 708 So. 2d 656 (Fla. Dist. Ct. App. 1998). Counsel ineffective in drug case for failing to move for recusal of the trial judge who had previously prosecuted the defendant on a prior drug case used to enhance punishment to habitual felony offender. The court held that the judge would have been disqualified if the motion had been filed. Based on trial counsel's testimony that the failure to file the motion was not a strategic decision, the court found deficient conduct. Prejudice was found, even though Judge sentenced only to 15 years when he could have sentenced to 30 years, based on "that part of *Lockhart* defining prejudice as a showing that counsel's error rendered the trial fundamentally unfair—in this case because of the risk of judicial bias." 708 So. 2d at 661.

In re A.R., 693 N.E.2d 869 (Ill. App. Ct. 1998). Counsel ineffective in juvenile adjudication as delinquent for aggravated battery and aggravated discharge of firearm because counsel failed to challenge the legality of the juvenile's arrest and the voluntariness of his subsequent statements. Juvenile was arrested, read rights, and questioned before a juvenile officer was notified and possibly

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before the juvenile's parents were notified. State statute requires arresting officer to immediately make a reasonable attempt to notify parents and juvenile officer. Purpose of statute is to allow parent and juvenile officer to consult in order to ensure that confessions are voluntary. Court ordered trial court to hold hearing on motion to quash arrest and suppress statements and either grant new trial or affirm adjudication as appropriate.

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

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

**People v. Birdsall*, 670 N.E.2d 700 (Ill. 1996). Counsel ineffective for failing to request fitness hearing to which the defendant was statutorily entitled because of psychotropic medications prescribed and taken at time of trial. [Note: the statute was subsequently changed so that hearing is not automatically required. See *People v. Gibson*, 687 N.E.2d 1076 (Ill. App. Ct. 1997).

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

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defendant committed acts over a 14 month period but victim could only testify about two acts in a single month with particularity.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Ex parte Menchaca, 854 S.W.2d 128 (Tex. Crim. App. 1993). Counsel ineffective in delivery of controlled substances case for failing to file a motion in limine to prevent cross-examination of the

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defendant based on a rape prior which was inadmissible for impeachment purposes under state rules because probation on the rape charge had been completed.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1986: **State v. Fisher*, 730 P.2d 825 (Ariz. 1986). Counsel ineffective in motion for new trial for failing to prepare and present available evidence to support a post-trial unsworn confession of guilt by the defendant's wife. Physical evidence at trial showed that it was equally as likely that it was defendant or his wife, wife refused to testify based on 5th amendment right, and the state's strongest evidence was the defendant's confession made after the police read his wife's statement to him. At the motion for new trial, counsel did not secure the presence of witness to whom wife confessed prior to defendant's trial and other witnesses who could verify that she had consistently confessed her own guilt.

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

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

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

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4. PROSECUTION EVIDENCE OR ARGUMENT

a. U.S. Court of Appeals Cases

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

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

1996: *Gravley v. Mills*, 87 F.3d 779 (6th Cir. 1996). Ineffective assistance of counsel constituted "cause and prejudice" sufficient to allow federal court to review claim that was not preserved in state court.

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Trial counsel was ineffective for repeatedly failing to object to prosecution's improper comments concerning defendant's postarrest silence and for failing to preserve these issues by way of the post-trial motion for new trial.

Crotts v. Smith, 73 F.3d 861 (9th Cir. 1996). Counsel ineffective in assault on police officer case for failure to object to prosecution's cross-examination of defendant concerning a boastful statement made to a third party that he had previously "killed a cop" where the jury was aware that defendant was on parole for an undisclosed felony and there was no evidence that statement was true.

1994: *Mason v. Scully*, 16 F.3d 38 (2nd Cir. 1994). Counsel ineffective for failure to object to testimony by police detective about hearsay statement of non-testifying co-defendant.

1991: *Atkins v. Atty. Gen. of Alabama*, 932 F.2d 1430 (11th Cir. 1991). Counsel ineffective for failing to object to fingerprint card with notation regarding previous arrest being admitted into evidence.

1988: *Chatom v. White*, 858 F.2d 1479 (11th Cir. 1988). Defense counsel's failure to object to admission of atomic absorption tests results was IAC, in murder prosecution; conditions under which the test was administered were questionable at best, & the question of D's guilt beyond a reasonable doubt was a close one.

1985: *Lyons v. McCotter*, 770 F.2d 529 (5th Cir. 1985). In a state prosecution for aggravated robbery with a deadly weapon, failure of defense counsel to exclude or in any way limit cross-examination testimony indicating that defendant had been previously convicted of a similar offense was IAC where prior conviction would have almost certainly been excluded under Texas law, similar conviction was highly prejudicial, & lack of any limiting instruction enabled prosecutor to refer to defendant's prior conviction in his closing argument.

b. U.S. District Court Cases

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

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

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

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

c. State Cases

2003: *Butler v. State*, 108 S.W.3d 18 (Mo. Ct. App. 2003). Counsel was ineffective in forcible sodomy case for failing to object to inadmissible expert testimony concerning hair analysis and its significance. The defendant was charged with sexually assaulting two teenage boys. Following the assault, an unidentified head hair and an unidentified pubic hair, were recovered from the sixteen year old, who was anally sodomized. Twenty months after the crime, the defendant became a suspect and the police collected hair and blood samples from him. Following his first trial, a mistrial was declared. In his second trial, neither of the two boys was able to give a positive identification, and there was no admission by the defendant. The state’s expert on hair analysis testified that hair

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comparisons were not accepted by the scientific community as reliable in unequivocally making positive identifications. Nonetheless, she testified that she found a “very strong probability” that the two unidentified hairs collected from the victim came from the defendant and she testified that she had never seen a case where both an unidentified head hair and an unidentified pubic hair matched a suspect. She quantified this as “like double significance of evidence.” On direct appeal, the defendant challenged the sufficiency of the evidence and the court split with some judges noting that the expert’s testimony was not admissible but that it could be considered by the court as it could be by the jury because the defense had failed to object. During post-conviction, defense counsel acknowledged that he was aware of what the expert’s testimony would be because she testified in a similar fashion in the first trial. He also acknowledged that he had extensively reviewed treatises and articles on hair comparison analysis and was certain that there was no scientifically accepted basis for her testimony. Nonetheless, he stated that he did not believe that a challenge to admissibility would be granted and he decided instead to try to surprise the expert on cross examination. The court held:

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

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

State v. Faust, 660 N.W.2d 844 (Neb. 2003). Counsel was ineffective in first-degree murder case for failing to object to numerous instances of improper negative character evidence. The defendant was charged with killing her husband’s lover and a bystander, who tried to assist the lover as she was dying. In defense, the theory was that the defendant’s husband had killed his lover and the defendant presented a number of witnesses to testify to her peaceful character. In rebuttal, the state presented witnesses to testify to specific instances of violent and aggressive behavior by the defendant. The state was also allowed to examine the defendant’s daughter in a similar fashion even though she was called as a state’s witness and did not offer any testimony concerning the defendant’s character. During the testimony of the first state’s rebuttal witness, the lover’s husband, counsel objected, on the basis of state Rule 404 (analogous to Federal Rules of Evidence), to testimony that the defendant had cursed and been aggravated previously with the victim. The state

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

2002: *Sanchez v. State*, 351 S.C. 270, 569 S.E.2d 363 (2002). Counsel ineffective in criminal sexual conduct with a minor case for failing to object to hearsay testimony. The six year old alleged victim testified about the alleged assault. Her mother and father also testified and included hearsay statements from the victim concerning details of the assault and the identity of the perpetrator. Counsel testified that he did not object to this hearsay because it did not alter the victim's testimony and that some of the statements were different. Counsel's conduct was deficient because while limited corroborative testimony is allowed in criminal sexual conduct cases the corroborative evidence is limited to the time and place of the assault and can not include details or particulars or

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the identity of the perpetrator. Thus, the mother's and father's testimony was clearly inadmissible. Prejudice found because improper corroboration testimony that is cumulative to the victim's testimony cannot be harmless. "[I]t is precisely this cumulative fact which enhances the devastating impact of improper corroboration." Counsel's conduct was also deficient in failing to object to the testimony of a police officer concerning the alleged victim's statement and actions with anatomically correct dolls. Counsel's alleged strategy to allow this testimony was to show that the victim's statements were vague. "Because the officer's testimony regarding the dolls corroborated the victim's testimony at trial, counsel's strategy was not reasonable given to the judicial effect this testimony had."

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

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

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

Mann v. State, 555 S.E.2d 527 (Ga. Ct. App. 2001). Counsel ineffective in sodomy case for failing to object to the testimony of a police investigator and a professional counselor that they believed the victim when he said he had been sexually abused. After the jury had already heard much of this testimony, the defense objected at a bench conference and the judge sustained. The jury had already heard the testimony though and no instruction was given to the jury to disregard the testimony, and no other type of curative instruction was asked for or given. Prejudice was found due to this improper testimony because the case was otherwise based only on the credibility of the alleged victim and the defendant when the victim refused to answer many of the questions during the trial.

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and had only initially reported the abuse when he had himself been in trouble for committing sexual acts on another child.

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

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

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

2000: *Ridenour v. State*, 768 So.2d 480 (Fla. Dist. Ct. App. 2000). Counsel ineffective in aggravated battery case for failing to object and advising defendant to answer affirmatively when state impeached defendant with a prior conviction that was invalid because "adjudication had been withheld." Prejudice found where the case was solely a credibility contest. Counsel also failed to call witnesses to support defendant's claim of self-defense. Counsel's conduct was deficient and based on an unreasonable strategy to introduce the witnesses' statements through inadmissible hearsay evidence.

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

State v. Caraballo, 750 A.2d 177 (N.J. Super. Ct. App. Div. 2000). Counsel ineffective in murder case for failing to object to improper unsworn statements and improper admission of hearsay. Defendant charged with two murders that occurred in "street confrontation." One witness, who testified, gave a detailed, graphic description of events and identified the defendant as the shooter. Three other witnesses had given statements to police essentially corroborating the first witness and identifying defendant. Each of these witnesses was called to testify during trial. The first refused to take oath or affirm he would testify truthfully. Court instructed him to answer questions anyway and instructed jury to bear in mind that he refused to take the oath. This witness disavowed prior statement to police and court allowed prior statement to be admitted as prior inconsistent statement. Appellate court found this was error because a prior inconsistent statement can be admitted only to impeach "testimony." Because the witness refused to take oath of any kind, these unsworn statements was not "testimony." Second witness also refused oath and affirmatively stated he would not tell the truth and cooperate because he was afraid for his life. This witness acknowledged the statement to police but did not confirm or deny the truth of the identification of the defendant. Prosecutor did not offer the prior statement into evidence but continually introduced the content of the statements in his questions allegedly to "refresh recollection." Appellate court found this was error because witness did not state he could not recall, he simply refused to cooperate. Third witness did take oath but testified that he was intoxicated and could not identify the shooter. He acknowledged prior statement but said he lied to the police to deflect suspicion from himself. Again the prosecutor did not offer statement, but conveyed content to jury allegedly to neutralize the "surprise" harmful testimony of the witness. Appellate court found this was error because even if this testimony was a "surprise" after the other two witnesses, a prior statement used in this case is admissible only as impeachment evidence and not substantive evidence and trial court must give a limiting instruction, which was not done here. Court found that trial court erred in requiring witnesses to answer questions when they refused oath and erred in allowing admission of prior statements. Trial counsel ineffective because counsel sat idly through all of this. "[P]rosecutor was thus given an open sesame to the admission of tainted evidence." *Id.* at 553. Court also noted that trial counsel had filed notice of appeal but refused to file brief despite orders to do so, which

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prompted court to appoint new counsel and refer trial counsel to ethics commitment for lack of diligence.

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

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

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

1999: People v. Burnett, 83 Cal. Rptr. 2d 629 (Cal. Ct. App. 1999). Counsel ineffective in felon in possession of weapon case for failing to object when the state charged on the basis of one incident but then presented evidence of two incidents, which allowed the jury to convict on either incident when the second one was not included in the information or addressed at the preliminary hearing.

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

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

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marijuana and been through drug treatment, and that he had been “cold-blooded” all his life. Prejudice found because the case was solely a credibility issue between the defendant and the prostitute.

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

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

Ramirez v. State, 987 S.W.2d 938 (Tex. Ct. App. 1999). Counsel ineffective in sexual assault on wife and injuring children case. Wife initially made statement to police and then recanted prior to trial. The prior statement was not admissible under the hearsay exception for a statement against penal interest. The state improperly called the wife as a witness for the purpose of impeaching her with the otherwise inadmissible prior statement and the defense counsel failed to object or request a limiting instruction. Prejudice found because this hearsay was the only evidence identifying the defendant as child abuser. Other evidence established only that the defendant was one of several people with the opportunity to abuse.

1998: *Peebles v. State*, 958 S.W.2d 533 (Ark. 1998). Counsel ineffective in rape of three-year old case for failing to introduce the child’s inconsistent statements recanting his incriminating statements. Child did not testify at trial, but his mother was allowed to testify under child-hearsay exception that son told her that he and the defendant bit each other’s “dingdongs.” During a pretrial hearing, the child denied five times that the defendant had done anything to him. Court held counsel was

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ineffective for failing to cross-examine the witnesses mother concerning these statements based on the pretrial transcript, because evidentiary rules allow impeachment of out-of-court declarant when that declarant's hearsay statements are admitted.

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

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

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

Commonwealth v. Drass, 718 A.2d 816 (Pa. Super. Ct. 1998). Counsel ineffective in rape case for failing to move for a mistrial after repeated comments on the defendant's invocation of his right to counsel and right to silence. During examination of police officer, the prosecutor elicited testimony that the defendant's mother said the defendant should talk to a lawyer and the interview ended. During cross of the officer, counsel elicited testimony that the defendant had a constitutional right to do so. During cross of the defendant, the state asked if an innocent person wouldn't go to the police and tell them what happened, and then asked if he was given an opportunity to talk to police. The defense finally objected, but failed to move for a mistrial. The court held that there was no conceivable reason for the failure to move for a mistrial and that the defendant was prejudiced because the evidence of guilt was by no means overwhelming. There was physical evidence of an assault, two witnesses who said the defendant boasted that he raped the victim, and another person who was present and said that the defendant was the rapist. The defendant testified that he was only

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joking about having committed the rape and that it was the other person present who committed the rape.

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

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

1997: *Hidalgo v. State*, 689 So. 2d 1142 (Fla. Dist. Ct. App. 1997). Counsel ineffective in sexual assault of step-daughter case where the case was one of credibility between defendant and step-daughter who was an adult at the time of trial. Counsel moved prior to trial to exclude evidence of Battered Woman's Syndrome and motion was granted. During the trial, however, the state presented the evidence anyway and counsel objected on basis of hearsay and other evidentiary rules, but failed to draw the court's attention to the exclusionary order.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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5. IMPEACHING WITNESS

a. U.S. Court of Appeals Cases

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

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

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

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

Id. The state court finding of no prejudice was also unreasonable. The defendant was prejudiced because the defense presented no defense and because "[t]here is a very reasonable probability that

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the judge would not have entered a finding of guilty had the statement – the sole direct evidence of guilt – been impeached.” *Id.* at 704.

- 1999:** *Steinkuehler v. Meschner*, 176 F.3d 441 (8th Cir. 1999). Counsel ineffective in first degree murder case for failing to adequately impeach a witness. After a long day of consuming large amounts of alcohol, the defendant shot and killed his girlfriend’s ex-husband. Thirty minutes later he turned himself in. The only defense raised at trial was that intoxication negated specific intent required for first degree murder. Prior to trial, counsel deposed the initial officer to come in contact with the defendant. She testified that he was dazed and incoherent, did not recognize her even though she had booked him three times previously, and smelled strongly of alcohol. She concluded that he was intoxicated. Subsequently, this officer informed defense counsel that immediately after the deposition the county attorney told her that he would inform her boss, the Sheriff of her testimony. Later in the day, the attorney wrote a letter to the Sheriff with a copy to the witness. The next day the Sheriff confronted the officer and told her that he was not happy about her testimony and that she should have said she “forgot.” The Sheriff told her “he forgets in court all the time.” At trial, the officer testified as she did in her deposition and the Sheriff testified that the defendant had been drinking but was not drunk. Counsel failed to ask either of them about the events following the officer’s deposition and did not offer the county attorney’s letter into evidence. The court found deficient conduct and prejudice. Although numerous witnesses testified that the defendant was drunk, he was last seen an hour and a half prior to the murder. Thus, the jury could have inferred that he sobered up somewhat, which made the testimony of the officers who saw the defendant 30 minutes after the crime critical. A number of officers testified but only the two addressed here expressed an opinion concerning the level of intoxication. Thus, the credibility of these two officers was critical and, clearly, the first degree murder conviction rested primarily on the Sheriff’s testimony. Impeaching his credibility certainly could have provided a reasonable doubt.
- 1996:** **Driscoll v. Delo*, 71 F.3d 701 (8th Cir. 1995). Trial counsel ineffective in guilt phase for failing to adequately cross-examine serologist and impeach state witness with prior inconsistent statement. (1) Case involved murder of guard in prison riot involving 20-30 inmates. During shakedown afterwards 14 shanks were rounded up and blood was found only on defendant’s. Serologist testified type A (the type of a different guard that was stabbed) on knife, but with the type of test used, type A blood would mask type O (type of murder victim). State argued that type O on knife also but just masked. Trial counsel ineffective because if counsel, who had not talked to state expert prior to trial, had adequately cross-examined, serologist would have admitted that a different blood test was also used and with the other test type A would not mask type O. There was no type O on knife. (2) Witness was another inmate who said defendant confessed stabbing to him after the riot, but had not said the same thing in two prior statements.
- 1991:** *Moffett v. Kolb*, 930 F.2d 1156 (7th Cir. 1991). Trial counsel ineffective in murder case for failing to introduce prior inconsistent statements of state witness who told investigating detective two times that defendant’s brother and not defendant fired the gun at victim.

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- 1989:** *Nixon v. Newsome*, 888 F.2d 112 (11th Cir. 1989). Counsel rendered IAC in defendant's murder trial when he failed to impeach a witness with prior inconsistent testimony she gave at the trial of another individual being tried for the same murder.
- 1984:** **Smith v. Wainwright*, 741 F.2d 1248 (11th Cir. 1984). Trial counsel ineffective for failing to use prior conflicting statements by the state's primary witness and his wife (that witness committed murder) to impeach witness who testified at trial that defendant committed murder.

b. U.S. District Court

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

c. Military Cases

- 1999:** *United States v. Gibson*, 51 M.J. 198 (C.A.A.F. 1999). Counsel ineffective in rape case for failing to investigate and impeach alleged victim's credibility. Only evidence of rape charges was the testimony of the 15 year old alleged victim and DNA and fiber evidence in defendant's vehicle showing only that at some time the defendant had ejaculated in vehicle. Fiber evidence was not unique and showed nothing outside of corroborating victim's testimony. In final investigative report, the police listed witness interviews establishing that the victim had told a number of different versions of the alleged rape to friends, she had a history of exaggerating her sexual exploits, did not have a good reputation for truthfulness, and had a history of behavior problems at school. One teacher even believed she alleged rape to distract attention away from expulsion from school. Evidence revealed that the interim report had been provided to defense counsel early on. Prior to the preliminary hearing in the case, the final report had also been disclosed, which was apparent because all agreed that the prosecutor had an open file policy, two prosecutors testified that the file had been copied and personally delivered to one defense counsel, and defense counsel referred in

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preliminary hearing to a lab report contained only in the final investigative report. The final report with attachments was approximately two inches thick and looked much like the interim report. The information concerning the impeachment information was not in previous reports though and was contained in paragraphs between information disclosed previously. Counsel did not read the final report carefully, however, and failed to learn of this information only through oversight and not strategy. The court found prejudice because the entire case was built on the alleged victim's testimony. The forensic evidence alone revealed no crime.

d. State Cases

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

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

1999: *State v. Dillard*, 998 S.W.2d 750 (Ark. 1999). Counsel ineffective in sex abuse with two minors case for failing to interview and present testimony of two witnesses that one of the victims (S.S.) was untruthful. S.S.'s sister would have testified that her sister was not a truthful person. The brother of the other alleged victim would have testified that S.S. told him she hated the defendant and was going to call the cops and tell them he raped her. Counsel did not offer any explanation for failing to call the brother. He said he did not call the sister because he knew she hated the defendant. Court found prejudice because testimony from relatives of the alleged victim's, who admittedly hated the defendant, would carry great credibility in a case where there were no witnesses and no physical evidence. Both convictions reversed because they were so intertwined.

1998: *Pauling v. State*, 331 S.C. 606, 503 S.E.2d 468 (1998). Counsel ineffective in burglary and criminal sexual conduct case for failing to call triage nurse as witness. Victim testified that she was

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penetrated. Doctor testified that there was no physical evidence of penetration, but that victim said there was penetration but “not all the way.” Triage nurse’s notes showed that victim told her there was no penetration. Although triage nurse did not have any independent recollection, the notes could have been used to refresh her recollection. The court noted in finding prejudice: “Even defense counsel admitted the nurse’s testimony was critical. *Martinez v. State*, 304 S.C. 39, 403 S.E.2d 113 (1991) (where trial counsel admits the testimony of a certain witness may have made the difference in obtaining an acquittal, the Court may find ineffective assistance).” *Id.* at ____.

1997: *Clay v. State*, 954 S.W.2d 344 (Mo. Ct. App. 1997). Counsel ineffective in murder of ex-wife case for failing to interview and present evidence from investigating officers concerning the defendant’s son’s prior inconsistent statements who said assailant could have been defendant or could have been someone else, when the son did not identify the defendant during the trial, and there was no other identification testimony at trial.

1996: *Johnson v. State*, 467 S.E.2d 542 (Ga. 1996). Counsel ineffective in murder case for failing to give notice as required by rules and failing to present evidence of victim’s prior specific acts of violence against third parties where the defense was self-defense and a number of witnesses would have testified that the victim was a drunk and a troublemaker who had shot at or otherwise assaulted others or threatened them with weapons on numerous occasions.

1995: *State v. Delgado*, 535 N.W.2d 450 (Wis. Ct. App. 1995). Counsel ineffective in murder case for failing to impeach the state’s primary witness with readily available evidence that would have shown that the witness had been promised a reduction in charges from murder to aiding a felon and had received a reduction from a \$250,000 bond to personal recognizance in exchange for testimony and that the witness lied about it at trial. Counsel knew from witness’s attorney at preliminary hearing that negotiations were in the works but relied on state’s assertions of no deal rather than contacting witness’s counsel who would have disclosed that there was a deal.

1994: *People v. Salgado*, 635 N.E.2d 1367 (Ill. App. Ct. 1994). Trial counsel ineffective in murder prosecution for failing to impeach prosecution witness, who identified defendant as shooter, with witness’ contradictory statements at co-defendant’s trials that he had not seen the shooting. Counsel did not even investigate to determine whether prior transcripts contained useful impeachment information.

Brown v. State, 877 P.2d 1071 (Nev. 1994). Counsel ineffective in sexual assault and attempted sexual assault case for failing to cross-examine the alleged victim about lies told in prior allegations of sexual assaults. Counsel waited until sur-cross and was denied opportunity. Counsel also ineffective in sentencing for failing to request concurrent sentences because counsel was unaware of possibility or to present witnesses for the defendant.

1993: *Commonwealth v. Bolden*, 622 A.2d 950 (Pa. Super. Ct. 1993). Counsel ineffective in murder case for failing to impeach a police officer whose testimony contradicted alibi witness with his own

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contradictory police report which showed that alibi witness' statement to him was consistent with alibi witness' testimony.

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

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

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

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

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

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

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6. ELICITING DAMAGING EVIDENCE AND MAKING DAMAGING ARGUMENT

a. U.S. Court of Appeals Cases

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

b. State Cases

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

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

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

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

2000: *People v. Jackson*, 741 N.E.2d 1026 (Ill. App. Ct. 2000). Counsel ineffective in possession of controlled substance case for eliciting the only evidence that connected the defendant to the crime. The state's only evidence was the testimony of a police officer that testified he observed the defendant receive money from an unknown person and point to a third person. The third person then walked over to unknown person and then left scene. The unknown person had a bag on him that contained crack cocaine and heroin. During cross, the defense elicited testimony for the first time that the unknown person reached into the paper bag and transferred an object to the unknown person before he left, which was the only link between the defendant and the contraband. Prejudice found because without this evidence the state could not have obtained a conviction.

2000: *Caprood v. State*, 338 S.C. 103, 525 S.E.2d 514 (2000). Counsel ineffective in armed robbery case for eliciting hearsay from officer about the defendant's "rap sheet" and "some type of violation" previously. Trial court had found ineffective and granted relief on a number of bases. Supreme Court reversed on all but this one, because the state had not appealed on this issue and the trial court's ruling was thus the law of the case.

1999: *People v. Young*, 716 N.E.2d 312 (Ill. App. Ct. 1999). Counsel in aggravated battery case ineffective in bench trial for eliciting otherwise inadmissible evidence that the shooting victim had made 14 prior consistent statements identifying the defendant as the shooter.

1998: *State v. Saunders*, 958 P.2d 364 (Wash. Ct. App. 1998). Counsel ineffective in drug possession case for eliciting defendant's prior possession conviction during direct examination. Evidence was probably inadmissible because prior drug convictions are generally not probative of a witness's veracity and because the conviction was more prejudicial than probative since it shifted the focus

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to the defendant's propensity for drug possession when his defense was that the possession was unwitting (not his car).

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

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

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

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

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

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7. CONCEDED GUILT/CONTRADICTING CLIENT

a. U.S. Court of Appeals Cases

1997: **Rickman v. Bell*, 131 F.3d 1150 (6th Cir. 1997) (affirming 864 F. Supp. 686 (M.D. Tenn. 1994)). Prejudice presumed because counsel did not serve as advocate and showed contempt for his client such that he was a “second prosecutor” and defendant would have been “better off to have been merely denied counsel.” Defense counsel presented the most damaging evidence in the case.

1991: *United States v. Swanson*, 943 F.2d 1070 (9th Cir. 1991). Prejudicial per se when trial counsel concedes that there is no reasonable doubt concerning the only factual issues in dispute during closing arguments.

b. State Cases

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

2000: *State v. Carter*, 14 P.3d 1138 (Kan. 2000). Counsel ineffective in murder case for conceding defendant’s involvement despite defendant’s protestations of innocence. Counsel was attempting, in light of strong state evidence, to show that defendant was guilty of felony murder in the course of armed robbery but not premeditated murder. While this may have been strategy, defense counsel betrayed the defendant by overriding his plea of not guilty. Counsel abandoned his client, which required the presumption of prejudice under *Cronic*.

1999: *Christian v. State*, 712 N.E.2d 4 (Ind. 1999). Counsel ineffective in rape case for conceding elements of the offense in closing that contradicted the defendant’s testimony. Defendant had testified in essence that there had been consensual foreplay but there was no penetration, which was a required element of rape. Counsel argued consent, but conceded, contrary to the defendant’s

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testimony, that there was penetration. Concession was unreasonable because the only evidence of penetration was the alleged victim's testimony. Also unreasonable because, even though counsel was arguing consent based on defendant's testimony, he essentially undermined the defendant's credibility by, in effect, informing the court that he didn't believe his own client. These acts resulted in a breakdown of the adversarial process under *Cronic* and the court presumed prejudice.

1998: *State v. Harrington*, 708 A.2d 731 (N.J. Super. Ct. App. Div. 1998). Counsel ineffective in murder case charged as purposeful murder and, alternatively, felony murder for conceding the defendant's guilt of armed robbery. The state's case depended primarily on the testimony of his three accomplices, who all testified pursuant to grants of immunity. The witnesses all had prior inconsistent statements and their testimony "diverged wildly on many key points" at trial. The defendant was convicted of both murder charges and the trial court "merged" the felony murder into the purposeful murder conviction. On appeal, the court reversed the purposeful murder conviction (under plain error rule—no objection) because of the trial court's erroneous instructions on accomplice liability. The court then refused to reinstate the felony murder conviction due to ineffective assistance. The trial court instructed the jury on the statutory "nonslayer" affirmative defense, which essentially would have allowed counsel to concede the defendant's presence without conceding guilt. Nonetheless, despite the affirmative defense and the contradictory evidence, defense counsel, in closing argument, conceded the defendant's guilt of robbery, which amounted to a concession of guilt of felony murder. The court could conceive of no reasonable strategy for doing so in a non-capital case.

1994: **Jones v. State*, 877 P.2d 1052 (Nev. 1994). Trial counsel found ineffective during direct appeal for admitting in closing argument that defendant was guilty of 2nd degree murder where defendant had testified he did not kill victim and did not consent to trial counsel's admission of guilt. Court ruled that since defendant did not consent issue could be decided on direct appeal because it didn't matter what strategic or tactical reason counsel might state in evidentiary hearing.

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

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

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

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

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

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

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

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

1985: *State v. Harbison*, 337 S.E.2d 504 (N.C. 1985). Prejudice presumed in second degree murder case where the defendant pled not guilty and proceeded during the trial on the theory of self-defense, but during the closing argument the defense counsel argued that the defendant should not be found innocent but should be found guilty of manslaughter. Prejudice was presumed because a decision to plead guilty must be made exclusively by the defendant. "When counsel admits his client's guilt without first obtaining the client's consent, the client's rights to a fair trial and to put the state to the burden of proof are completely swept away. The practical effect is the same as if counsel had entered a plea of not guilty without the client's consent."

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8. ARGUING INCONSISTENT THEORIES

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

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9. INSTRUCTIONS

a. U.S. Court of Appeals Cases

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

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

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

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

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

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

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

b. U.S. District Court Cases

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

c. State Cases

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

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

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

Dawson v. State, 352 S.C. 15, 572 S.E.2d 445 (2002). Counsel ineffective for failing to object to a coercive *Allen* charge. During deliberations the jury foreman informed the court that the jury was split 11 to 1 and that he did not know whether the jury could reach a unanimous verdict. The court

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asked the foreman to consult with the other jurors to see if a consensus could be reached and then asked the foreman if the numerical split was the same. The court then gave an *Allen* charge, which could be perceived as being directed toward the minority juror. The charge was coercive, especially in light of the judge's knowledge that there was only one holdout juror. The court also erred in not instructing the jury not to state its numerical division and also inquiring as to the jury's continued numerical division.

Tate v. State, 351 S.C. 418, 570 S.E.2d 522 (2002). Counsel ineffective in murder and assault case for failing to object to jury instructions that unconstitutionally shifted the burden of proof to the defendant by stating that malice was presumed from the use of a deadly weapon. Counsel's conduct was deficient in failing to object to the presumption of malice charge where counsel's sole objection was that the charges were given undue emphasis because the charge was first given as a supplemental charge at the solicitor's request after the jury had been sent out. The charge was given twice more in response to jury questions during deliberations without additional objection from counsel other than the undue emphasis. The court found no prejudice with respect to the murder conviction because malice was clear on that charge and the erroneous instructions would not have contributed to the jury's findings. Prejudice found with respect to the assault and battery with intent to kill conviction though because there was a reasonable probability that the erroneous charges did affect the jury's consideration in deciding guilt on this charge or the lesser included charge of assault and battery of a high and aggravated nature, which did not require a finding of malice. Prejudice found because the evidence of malice on this charge was not overwhelming. Finally, the trial court's proper instruction in conclusion of an inference of malice that was not binding on the jury did not cure the prejudice. This instruction was not given immediately following the malice charges and "was given only once, whereas the erroneous presumption of malice charge was repeated three times."

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

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

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

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

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

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

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

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also ineffective in refusing to file the notice of appeal, despite the defendant's repeated requests to do so, instead of filing the appeal and submitting an *Anders* brief.

Dean v. State, 59 S.W.3d 663 (Tenn. 2001). Trial counsel ineffective in attempted second degree murder case for failing to object to erroneous instruction on range of punishment for attempted second-degree murder where the jury was instructed prior to deliberations on guilt-or-innocence, as then required under state law, that the punishment was 3-10 years when it was actually 8-30 years for this offense. The jury was instructed on other offenses and ranges but convicted on this one. Counsel's conduct was deficient because counsel was unaware of the pertinent sentencing range and unaware of a case finding this same instruction to be error four years before. Prejudice found because the jury may well have relied on this instruction in finding the defendant guilty on this offense. The court also rejected in this case that this issue was not cognizable because the sentencing range was a matter of state statutory law when post-conviction relief was limited to state and federal constitutional law. The court made it clear that ineffective assistance of counsel, regardless of the underlying issue, is always a federal constitutional issue.

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

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

People v. Hoyte, 714 N.Y.S.2d 420 (N.Y. Sup. 2000), *aff'd*, 741 N.Y.S.2d 873 (N.Y. App. Div. 2002). Counsel ineffective in drug possession case for failing to object to jury charge from which court had omitted element of defendant's knowledge of weight of contraband, or to request

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instruction that mental state of “knowingly” applied to all elements of offense, and that defendant’s possession of contraband therefore must also include his knowing possession of the weight of the contraband where weight was an element of the offense. Counsel’s conduct was deficient where counsel was not even aware of cases holding that knowledge of weight of contraband was an element of crime. Prejudice found where the lack of instruction relieved jury of obligation to find that the prosecution proved defendant’s knowledge of weight of drugs possessed.

1999: *Strickland v. State*, 771 So. 2d 1123 (Ala. Crim. App. 1999). Counsel ineffective in first degree theft case for failing to request a jury charge on the meaning of “deprive.” The defendant was a prison inmate but on work assignment. He walked off the job and stole a van. Drove to see his family and after visiting for a few hours called the police and told them where he was. Counsel’s failure to request the appropriate charge basically denied the defendant his true defense, which was that he did not intend to permanently deprive the owner of the vehicle of the property.

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

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

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

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

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

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

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

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

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

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

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

Sanchez v. State, 931 S.W.2d 331 (Tex. Ct. App. 1996), *overruled on other grounds*, *Woods v. State*, 956 S.W.2d 33 (Tex. Crim. App. 1997) (en banc). Counsel ineffective in drug possession case where the border patrol stopped defendant's car without reasonable suspicion. Counsel challenged

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the admissibility of the evidence but failed to request an instruction that if jury had a reasonable doubt of whether the evidence was obtained in violation of the constitution or laws of Texas or the United States then the jury must disregard the evidence.

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

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

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

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

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

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

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

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

1994: *Commonwealth v. Horton*, 644 A.2d 181 (Pa. Super. Ct. 1994). Counsel ineffective in robbery case for failing to request an instruction on the definition of "recklessly" in regards to the defense of

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duress, where eyewitness testified defendant took money from victim's pocket only after told to do so by person pointing gun in his direction and defense of duress was not available if the defendant had "recklessly" placed himself in position where it was probable that he would be subjected to duress.

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

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

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

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

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

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

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

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

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

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

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

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

State v. Marcum, 480 N.W.2d 545 (Wis. Ct. App. 1992). Trial counsel ineffective in multiple count child sexual assault case for failing to object to standard unanimity instruction combined with failure to object to verdict form which lacked specificity about which act of sexual contact related to which count of sexually molesting stepdaughter. Defendant acquitted on 2 of the 3 charges, but because of counsel's failure, the jury could have convicted on the one count even though they disagreed about which incident he was guilty of. Charges dismissed because no way to tell.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1986: *People v. Jaffe*, 493 N.E.2d 600 (Ill. App. Ct. 1986). Counsel ineffective in attempted murder case for failing to request a self-defense instruction when defendant admitted fight so self-defense was the only viable defense theory.

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Commonwealth v. Whiting, 517 A.2d 1327 (Pa. Super. Ct. 1986). Trial counsel ineffective, when defendant raised an alibi defense and named his wife as his alibi but did not call her as a witness, for failing to object to “missing witness” instruction that allowed jury to draw inference that her testimony would have been unfavorable to the defense. Instruction generally allowed but improper in this case because of spousal privilege.

1985: *State v. Talley*, 702 P.2d 353 (N.M. Ct. App. 1985). Counsel ineffective in burglary, larceny, and arson case for failing to request a proper instruction on the defense of inability to form specific intent when each of the offenses included a specific intent element unique to that crime. The defendant was prejudiced because the only defense witness was an expert, who testified that the defendant was a pyromaniac and was unable to avoid impulses to set fires and that, due to intoxication, his behavior was uncontrollable. The court also found that counsel’s conduct was deficient in failing to request an instruction that the defendant’s statements to the defense expert could be considered only with respect to the question of defendant’s insanity. While this error was not prejudicial, standing alone, it was considered cumulatively. Counsel also failed to request an instruction on intoxication, which “was one more thread with which to tie the knot of ineffective assistance of counsel.” *Id.* at 358. Prejudice found due to the “cumulative effect” of the errors.

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10. FAILURE TO CHALLENGE COMPETENCE

a. U.S. Court of Appeals Cases

1999: *Hull v. Kyler*, 190 F.3d 88 (3rd Cir. 1999). Counsel ineffective in murder case for failing to challenge competence to stand trial. Defendant was found incompetent shortly after arrest. Held at hospital for four years and then a competence hearing was held. The court-appointed expert who testified had seen the defendant 3 months before and testified in response to questions of understanding and ability to assist the defendant could “at that time.” Defense counsel failed to cross-examine the expert, did not present any evidence, and conceded competence. Defendant promptly plead guilty to murder. In his third habeas petition, ruling under the amended standards of the AEDPA, the court held that counsel’s conduct was deficient. If counsel had performed adequately the evidence would have revealed that the defendant had been found incompetent by at least eight doctors during his hospital stay on the basis of mental retardation and schizophrenia. One examination only two weeks before the court-appointed expert’s examination found that the defendant was incompetent and there was no change in him from previous examinations. An examination by a hospital doctor following the court-appointed exam also concluded that the defendant was not competent. The discharge report strongly recommended additional hospitalization and treatment because not competent. Cross-examination of the court-appointed expert also would have revealed that his report stated that although the defendant’s schizophrenia was in remission the remission was “fragile.” Likewise, the report stated that although the defendant could exercise judgment that ability could break down easily under stress. The report also concluded that while the defendant was competent in non-stressful situations, his competence should be watched closely during any attempt at trial because he could easily breakdown. The court held that there was prejudice because the defendant need only establish that there was a reasonable probability that he was tried while incompetent not that he would not have been convicted. The court found the standards of the AEDPA met because the state court findings, based primarily on the guilty plea colloquy following the competence hearing, were “objectively unreasonable” under the clear Supreme Court precedents of *Pate v. Robinson* and *Drope v. Missouri*.

b. State Cases

In re Fleming, 16 P.3d 610 (Wash. 2001) (en banc). Counsel ineffective in burglary case for failing to advise the court at time of defendant’s *Alford* plea that the defendant had been found incompetent by a defense expert authorized by the court for purposes of a diminished capacity defense. Deficient conduct found because one must be competent to stand trial or enter plea and competence cannot be waived. Prejudice found even though defendant was medicated prior to plea, no irrational behavior was apparent from the record, and there was no other indication to show that defendant did not understand the proceedings because the defendant “might have been found incompetent and should have had a competency hearing before entering a plea of guilty.” *Id.* at 615.

1999: *Woods v. State*, 994 S.W.2d 32 (Mo. Ct. App. 1999). Counsel ineffective following guilty plea to second degree murder of estranged wife for failing to request a competence hearing when defendant

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attempted suicide on the morning of the scheduled sentencing. The defendant had been found incompetent and hospitalized for a number of months after arrest. Then, although found competent, experts still agreed that he was manic depressive and delusional. Even though defendant attempted suicide the morning the sentencing hearing was first scheduled, counsel failed to request an additional competence evaluation because she thought he seemed competent when she talked to him and the same as always because he was always depressed. The court held that “[t]his was not counsel’s call,” *Id.* at 39, and counsel was ineffective for failing to request a competence evaluation following the suicide attempt.

1994: *State v. Green*, 632 So. 2d 1187 (La. Ct. App. 1994). Counsel ineffective for failing to object to inadequate proceedings used by court to determine competency and permitted mentally retarded defendant to plead guilty despite knowledge that defendant probably could not understand the proceedings.

1990: *People v. Harris*, 460 N.W.2d 239 (Mich. Ct. App. 1990). Counsel ineffective in arson case for requesting trial despite serious doubts concerning defendant’s competency to stand trial and defendant’s request for continuance so she could get mental help. In addition, at sentencing counsel effectively recommended a prison term despite defendant’s request for probation and made no attempt to argue that prison term be short or argue any mitigation.

1988: **Curry v. Zant*, 371 S.E.2d 647 (Ga. 1988). Trial counsel ineffective for failing to obtain independent psychiatric evaluation of defendant which would have rendered evidence that the defendant was not competent to waive his rights and plead guilty and was either incapable of distinguishing right from wrong or incapable of controlling the impulse to commit wrongful acts.

1987: *State v. Haskins*, 407 N.W.2d 309 (Wis. Ct. App. 1987). Trial counsel ineffective for failing to raise issue concerning deaf defendant’s competency where counsel had represented between 6 and 9 times before, defendant had been found incompetent at least once before, and counsel doubted competency. Counsel did not raise because when defendant was found incompetent he spent one year in hospital and counsel felt if incompetent he would do time and then be tried so counsel decided to roll dice with jury. Court held there can be no strategic reason not to raise competency.

1986: *State v. Johnson*, 395 N.W.2d 176 (Wis. 1986) (affirming 374 N.W.2d 637 (Wis. Ct. App. 1985)). Counsel ineffective in first degree murder case for failing to raise competency to stand trial issue where defense experts expressed doubt about competency and recommended that issue be raised to court and trial court even asked counsel about competency issue. Counsel’s reasons (that he did not want to subject defendant to state experts prior to mental health defense and that counsel did not personally believe defendant was incompetent) were insufficient.

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11. INFORMING THE JURY THAT THE DEFENDANT WOULD TESTIFY AND THEN NOT CALLING THE DEFENDANT

a. U.S. Court of Appeals Cases

2002: *Ouber v. Guarino*, 293 F.3d 19 (1st Cir. 2002) (affirming 158 F. Supp. 2d 135 (D. Mass. 2001)). Counsel ineffective, under AEDPA, in third trial of drug trafficking case for promising the jury four times in the opening to call the defendant as a witness, but then failing to keep those promises. As counsel knew from the first two mistrials, the state's evidence was primarily an undercover officer. Counsel argued that the defendant did not know the contents of the envelopes delivered at the insistence of her brother, but counsel did not present the defendant to testify. Defense counsel did, however, present numerous witnesses that the defendant was truthful and that her brother was domineering. Counsel's conduct was deficient because of "a broken promise (or, more precisely put, a series of broken promises): defense counsel's repeated vow that the jurors would hear what happened from the petitioner herself. Thus, the error attributed to counsel consists of two inextricably intertwined events: the attorney's initial decision to present the petitioner's testimony as the centerpiece of the defense (and his serial announcement of that fact to the jury in his opening statement) in conjunction with his subsequent decision to advise the petitioner against testifying. Taken alone, each of these decisions may have fallen within the broad universe of acceptable professional judgments. Taken together, however, they are indefensible." The court found, "A broken promise of this magnitude taints both the lawyer who vouchsafed it and the client on whose behalf it was made." The state court decision to the contrary was unreasonable because it found counsel's behavior to be "cautious," which was contrary to the record. The state court decision was also unreasonable because it found counsel's change to be reasonable based on the testimony of a witness when counsel's decision was made before that witness even testified and because the witness' testimony actually removed part of the rationale for not putting the petitioner on the witness stand. Prejudice found because this case "was exceedingly close," as demonstrated by the two previous hung juries, and "[i]n a borderline case, even a relatively small error is likely to tilt the decisional scales." The state court's finding was unreasonable for reasons similar to those addressed with respect to the finding of deficient conduct.

b. State Cases

1997: *People v. Davis*, 677 N.E.2d 1340 (Ill. App. Ct. 1997). Court says in dicta (case reversed on other grounds) that counsel was ineffective in murder case for telling the jury in the opening statement that the defendant would testify before investigating to find out that the defendant had a prior conviction with which he could be impeached. Thus, the defendant did not testify and counsel had to attempt to explain lack of testimony away during the closing arguments.

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12. FAILURE TO PRESERVE THE RECORD FOR APPEAL

a. U.S. Court of Appeals Cases

2000: *Flores v. Demskie*, 215 F.3d 293 (2nd Cir. 2000). Trial counsel ineffective in child sodomy case for waiving reversible error. Under New York *Rosario* rule, automatic reversal is required if the state fails to provide the defense with all prior statements of testifying witnesses. Following the state's case, defense counsel, who discovered the issue during jury selection, informed the court that the state failed to disclose a prior inconsistent statement of the victim's mother, who testified at trial. The court allowed the case to continue while the state located the statement. Following conviction but before sentencing, the statement was located. Before the court ruled on the issue, however, defense counsel, who was not aware of the automatic reversal rule and believed he had to prove prejudice, waived the issue by stating that he would not have acted any differently during trial if the statement had been disclosed to him. Defendant was sentenced.

b. State Cases

2002: *S.T. v. State*, 764 N.E.2d 632 (Ind. 2002). Counsel ineffective in juvenile delinquency case for failing to object to court's exclusion of testimony from the juvenile's mother and a friend as a sanction for failure to comply with local court rule requiring disclosure of witness list ten days before trial. Failure to object was deficient and prejudicial conduct because the trial court can exclude defense witnesses under this rule only when there is evidence of bad faith on the part of counsel or a showing of substantial prejudice to the state.

1993: *Vaz v. State*, 626 So. 2d 1022 (Fla. Dist. Ct. App. 1993). Trial counsel ineffective for failing to join in co-defendant's counsel's objection to time limitation on closing argument which resulted in reversal on direct appeal for co-defendant.

1992: *People v. Brocksmith*, 604 N.E.2d 1059 (Ill. App. Ct. 1992), *aff'd*, 642 N.E.2d 1230 (Ill. 1994). Counsel ineffective for failing to ascertain applicable statute of limitations period for lesser included offense and failing to advise defendant that, since limitations period had expired for lesser included offense, by submitting instruction on that offense, defendant waived limitations period objection.

1989: *Commonwealth v. Butler*, 566 A.2d 1209 (Pa. Super. Ct. 1989). Counsel ineffective for failing to object to trial court's order granting motion for reconsideration of dismissal of charges where court did not act within 30 days of the dismissal order and therefore lacked jurisdiction under state law to act.

1988: *Gilchrist v. State*, 534 So. 2d 1120 (Ala. Crim. App. 1988). Trial counsel ineffective for failing to object in murder trial to district attorney's participation as counsel after D.A. had already appeared in proceeding as a witness when if objection had been made properly (counsel objected but on wrong basis), the case would have been reversed on appeal.

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1988: *Commonwealth v. Groff*, 548 A.2d 1237 (Pa. Super. Ct. 1988). Counsel ineffective for failing to preserve the issue of whether the statute of limitations defense presented a question of fact for the jury where the defendant was charged with statutory rape, indecent assault, and corruption of minors but there was a factual dispute concerning when the alleged crimes occurred.

1987: *Salkil v. State*, 736 S.W.2d 428 (Mo. Ct. App. 1987). Counsel ineffective in failing to object to ambiguous jury verdict form that contained a provision for a finding of either guilt or innocence on same sheet of paper with only one signature line for the foreman which was applicable to either finding. When jury returned entries had been made for punishment but no portions of verdict form had been stricken.

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13. MISCELLANEOUS

a. U.S. Court of Appeals Cases

2002: *Miller v. Dormire*, 310 F.3d 600 (8th Cir. 2002). Counsel ineffective in cocaine trafficking case for waiving the defendant's right to a jury trial. The defendant was present and silent during the exchange between the trial court and defense counsel concerning the waiver and counsel's request for a bench trial. The trial court did not address the defendant directly. The state court held that the defendant had affirmatively waived his right to a jury because he was present and made no objection. The Eighth Circuit found that the state courts made an unreasonable determination of the facts under 28 U.S.C. § 2254(d)(2), because the record is devoid of any direct testimony from the defendant regarding his consent to waive trial by jury. The evidence revealed that counsel failed to advise the defendant that the decision to waive trial by jury was his and his alone. Under circuit precedent the court held that prejudice is presumed because denial of trial by jury is tantamount to a structural error. Thus, under 28 U.S.C. § 2254(d)(1), the state court's ruling was also an unreasonable determination of the federal law as interpreted by the United States Supreme Court. "When a defendant is deprived of his right to trial by jury, the error is structural and requires automatic reversal of the defendant's conviction." *Id.* at 604.

1989: *Harding v. Davis*, 878 F.2d 1341 (11th Cir. 1989). Defense counsel rendered IAC by failing to object when the trial court directed a verdict against his client. Prejudicial error per se.

b. Military Cases

2000: *United States v. Paaluhi*, 54 M.J. 181 (C.A.A.F. 2000). Counsel ineffective in rape, sodomy with a child, and indecent acts with child case where defense counsel effectively advised accused to confess to government psychologist that he committed charged offenses, in hopes of obtaining favorable sentencing testimony from psychologist. This occurred when communications made by a member of the military to a psychotherapist were not privileged on the basis of the federal civilian psychotherapist-patient privilege. [Military law began recognizing the privilege on November 1, 1999.] Counsel also failed to protect the accused's statements from disclosure by having psychologist assigned to defense team as required by military attorney-client-privilege law. Prejudice found because defendant's confession to psychologist was admitted during the trial. Without the confession, the government's case "was not overwhelming," since it was based only on victim's videotaped interview and out of court statement's presented through testimony of social worker.

1996: *United States v. Sorbera*, 43 M.J. 818 (A.F. Ct. Crim. App. 1996). Counsel ineffective in indecent act with daughter case for advising client pretrial to call ex-wife and offer her child custody and support and explain the ramifications if their daughter continued to lie and testify against him. The phone call resulted in an additional charge of obstruction of justice and that defense counsel fired. At trial, defendant acquitted of indecent acts but convicted of obstruction of justice for call made on advice of counsel.

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1989: *United States v. Ankeny*, 28 M.J. 780 (N.M.C.M.R. 1989), *aff'd on other grounds*, 30 M.J. 10 (C.M.A. 1990). Trial counsel ineffective where the accused came up positive on a urinalysis test and during a pretrial meeting with the assistant staff judge advocate (prosecutor), trial counsel revealed that prior to the urinalysis, the accused had solicited another officer to falsely substitute his urine for that of the accused. The accused was subsequently charged and convicted of using cocaine and soliciting a fellow officer to be derelict in his duties when the Government had no prior knowledge of the solicitation charge and probably never would have but for counsel's disclosure.

c. State Cases

2003: *Schnelle v. State*, 103 S.W.3d 165 (Mo. Ct. App. 2003). Counsel was ineffective in assault case for failing to object to the trial court's striking of the defendant's entire testimony because the defendant refused to answer a question on cross examination concerning one of his prior criminal convictions. The defendant's theory at trial was one of self-defense and that he believed that the alleged victims were trying to rob him. The defendant testified in his own defense, but his counsel did not ask any questions on direct examination about his prior convictions. During cross examination the defendant admitted that he had approximately twenty prior convictions, including a conviction in Kansas, but the defendant refused to answer the question of what his prior conviction in Kansas was for. The court informed the defendant that if he refused to answer the question, the prosecutor's motion to strike all of his testimony would be granted. Trial counsel did not object and did not argue that the trial court could fashion a more appropriate sanction and, in fact, counsel actually stated that striking the entire testimony was the only available remedy. Counsel's conduct was deficient because the case law was not clear and because the defendant's sole defense depended on his own testimony. Counsel's conduct was also deficient because the existing case law supported an argument that the defendant testimony should not be stricken in its entirety because the question he refused to answer was "of such a collateral nature that striking his entire testimony would not be the proper remedy." Prejudice was found because the defendant's testimony was crucial to his theory of self-defense. The fact that a police officer testified about the defendant's statements to him did not negate the reasonable probability that striking the defendant's entire testimony affected the outcome of the case. Likewise, the fact that the defendant's theory was presented in trial counsel's opening statement did not negate the prejudice because opening statements are not evidence.

2002: *Wertz v. State*, 349 S.C. 291, 562 S.E.2d 654 (2002). Counsel ineffective in second degree burglary case for failing to request clarification of jury's verdict with respect to the degree of the burglary conviction where the jury acquitted the defendant of possession of a firearm during the commission of a violent offense but convicted on second degree burglary, which required a finding that the defendant was armed. Prejudice found because the jury was not instructed to specify the degree of burglary found or that a general verdict had the effect of finding petitioner guilty of the offense charged in the indictment.

Patrick v. State, 349 S.C. 203, 562 S.E.2d 609 (2002). Counsel ineffective in burglary case for failing to request mercy from jury. Under state law at the time, jury in burglary case could find

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guilty (which meant, at the time, a mandatory life sentence) or guilty with a recommendation of mercy (which allowed judge to give a lesser sentence of as little as five years).⁵ Per se prejudicial.

Belcher v. State, 93 S.W.3d 593 (Tex. Ct. App. 2002). Counsel was ineffective for failing to alert the trial court of an error in the court's calculation of the deadline for ruling on a motion for new trial. The defendant moved for a new trial alleging among other things that a juror was improperly seated because the juror had lied during voir dire. During the motion for new trial hearing the court expressed concern over the issue and twice referred to its deadline for ruling on the motion for new trial. The court's calculation was incorrect but counsel did not correct the court. Under Texas law, if the trial court does not rule on the motion for new trial within 75 days after the sentence is imposed the motion for new trial is denied by operation of law. Here the trial court entered an order two days late granting the defendants new trial motion. Counsel's conduct was deficient in failing to advise the trial court of the proper deadline. The court presumed prejudice because defense counsel's silence was tantamount to the actual or constructive denial of counsel at a critical stage of the proceedings. The court also found that the defendant had established prejudice because the trial court's entry of the late order clearly indicated that absent counsel's error the motion for new trial would have been granted. The court remanded to the trial court for a new hearing on the motion for a new trial.

2001: ***Owens v. State***, 750 N.E.2d 403 (Ind. Ct. App. 2001). Trial and appellate counsel ineffective in burglary, robbery, and criminal confinement case for failing to object to the trial judge's failure to maintain the role of neutral and passive arbitrator. After both parties rested in a bench trial, the trial court questioned witnesses and requested that the parties conduct additional discovery. Two weeks later when they returned to court, the trial judge heard inadmissible hearsay from both a police officer, who was recalled, and the prosecutor, who was not even a witness, and heard evidence impeaching the defendant's alibi testimony. Prejudice found because when the parties rested, the judge was not convinced of guilt beyond a reasonable doubt and, thus, requested the additional evidence. Instead of ordering dismissal of the charges, however, the court only remanded for a new trial.

State v. Lopez, 27 P.3d 237 (Wash. Ct. App. 2001), *aff'd on other grounds*, 55 P.3d 609 (Wash. 2002). Counsel ineffective in assault and possession of a firearm case for failing to move for dismissal of the firearm charge where one element of the offense was a constitutionally valid predicate conviction and the state had not proven this element. Defense counsel later elicited testimony about a prior conviction for burglary from the defendant, which allowed the jury to convict.

1999: ***State v. Aho***, 975 P.2d 512 (Wash. 1999). Counsel ineffective in indecent liberties case because counsel failed to investigate effective date of child molestation statute and proposed instructions that

⁵South Carolina abolished the "recommendation of mercy" verdict and the mandatory life sentence in 1997.

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permitted a conviction under the statute that was not in effect at the beginning of the charging period and, thus, not in effect at the time the crimes were committed.

1994: *People v. Bailey*, 639 N.E.2d 1313 (Ill. App. Ct. 1994). Trial counsel ineffective in prosecution under Sexually Dangerous Persons Act for successfully opposing state's motion to have court's psychiatrists conduct a reexamination of defendant. Ineffective because it had been two and a half years since evaluation, pertinent inquiry of dangerousness refers to time of court's decision, and the record was replete with defendant's good behavior during period while free on bond, thus counsel should have known that reevaluation could be favorable to defendant.

People v. Taylor, 637 N.E.2d 756 (Ill. App. Ct. 1994). Ineffective for failing to correct trial court's mistake of fact during post-trial motion hearing which led the judge to rule erroneously.

1993: *State v. Edwards*, 507 N.W.2d 506 (Neb. Ct. App. 1993). Counsel ineffective in joint trial for possession with intent to distribute crack for failing to object when co-defendant's counsel asked defendant about prior felony drug conviction and offered a certified copy of the prior conviction.

1992: *Banshee v. State*, 308 S.C. 369, 418 S.E.2d 313 (1992). Trial counsel ineffective for *successfully* moving for dismissal of nonviolent charge of receiving stolen goods thereby leaving the jury with the extreme alternatives of convicting defendant of violent offenses (armed robbery, kidnaping, conspiracy, and possession of sawed-off shotgun) or acquitting him.

In re J.B., 618 A.2d 1329 (Vt. 1992). Counsel in juvenile sexual assault case ineffective for advising defendant and parents to cooperate with the police in interrogation, not accompanying them during interrogation, and not explaining right to silence and consequences of confession. Counsel did not consider whether the state might be willing to settle without litigation in light of the fact that the state's evidence, without the confession, was questionable.

1990: *State v. Iowa Dist. Court for Polk County*, 464 N.W.2d 244 (Iowa 1990). Counsel ineffective for consenting to sequestration of sex abuse defendant during the testimony of the alleged victim who was not a "child" within the meaning of the state statute authorizing separation of defendant and child victim.

1989: *Nunn v. State*, 778 S.W.2d 707 (Mo. Ct. App. 1989). Counsel ineffective where counsel called himself as a witness to testify concerning a prior inconsistent statement by state's witness which was surreptitiously recorded by counsel and when propriety of counsel's conduct was made an issue, counsel failed to move for a mistrial or request to withdraw.

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II. CAPITAL SENTENCING PHASE ERRORS⁶

A. NUMEROUS DEFICIENCIES AND INADEQUATE MITIGATION

1. U.S. Supreme Court Cases

2000: **Williams v. Taylor*, 529 U.S. 362 (2000) (tried in September 1986). Counsel ineffective in capital sentencing for failure to prepare and present mitigation evidence. Counsel did not begin to prepare for the sentencing phase until a week before trial. They failed to get extensive records of Williams's childhood because they incorrectly thought that state law barred access to such records. They failed to discover a number of available mitigation witnesses due to lack of investigation and, in one instance, simply because they failed to return the phone call of a CPA, who saw Williams as a prison minister. At trial, counsel presented testimony only from Williams's mother and two neighbors (one of whom was not interviewed before but was asked to testify on the spot when noticed in the audience during the proceedings). These witnesses testified that he was "nice" and not violent. Counsel also presented a tape of a psychiatrist's testimony simply relating that Williams had removed the bullets from a gun during an earlier robbery to avoid hurting anyone. In closing, counsel argued that Williams had turned himself in and the police would not have solved the crimes otherwise, but noted that it was difficult to find a reason why the jury should spare his life. Prejudice was found because an adequate investigation would have revealed that Williams's parents had been imprisoned for criminal neglect of Williams and his siblings, that Williams had been severely and repeatedly beaten by his father, that he had been committed to the custody of social services for two years during his parents' incarceration (including time spent in an abusive foster home), and that he was returned to his parents' custody when they got out of prison. The evidence also would have revealed that Williams was "borderline mentally retarded" and only completed the 6th grade in school, that he had suffered repeated head injuries and "might have mental impairments organic in nature," that he had received commendations in prison for helping to crack a prison drug ring and for returning a guard's missing wallet, and that prison officials would have testified it was unlikely that he would be dangerous in prison. If counsel had investigated and prepared for sentencing, even the state's experts who testified to future dangerousness would have testified that Williams would not pose a future danger if kept in a structured environment, such as prison.

2. U.S. Court of Appeals Cases

2003: **Powell v. Collins*, 332 F.3d 376 (6th Cir. 2003) (tried in January 1987). Counsel ineffective in capital sentencing for failing to prepare and present mitigation evidence. Prior to trial, counsel repeatedly sought appointment of a psychiatrist or psychologist to assist the defense during the trial. The court denied the motions and instead ordered an evaluation by a court-appointed, neutral examiner, who found that the defendant suffered from antisocial personality disorder. During the trial the defense called the court-appointed examiner as a defense witness. In addition to the

⁶Also look under numerous deficiencies in trial phase because some cases found IAC in both.
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personality disorder information, she testified that the defendant did not enjoy a nurturing environment as a child and had been medicated with anti-psychotic medications for anxiety and behavior problems. She also testified that his IQ scores “fluctuated between the mild and borderline ranges of mental retardation.” *Id.* at 383. Following conviction, counsel again requested expert assistance and the court granted it and ordered the court appointed examiner to address mitigation but refused to allow a continuance. The court-appointed examiner was the only witness called by the defense in sentencing. She repeated her trial testimony and stated that she did not have sufficient time to conduct a sufficient investigation and stated that she was not qualified to conduct the neuropsychological testing the defense wanted, although she believed that the defendant might have organic brain dysfunction. Because the habeas petition was filed in 1994, the court applied the standards applicable prior to the AEDPA. Relying heavily on the ABA Guidelines, the court found counsel’s conduct to be deficient because counsel did not investigate mitigation and, in recalling the court-appointed expert, they presented harmful information that the defendant was not mentally ill and is dangerous. The court rejected a strategic reason for not presenting mitigation because counsel could not have a valid strategic reason when counsel had failed to investigate. Prejudice was found because numerous family members and other individuals that knew the defendant were available and willing to testify. Even though their testimony would have duplicated some of the testimony by the court-appointed expert, prejudice was established because the “jurors would have heard first-hand accounts from those who knew Petitioner best.” *Id.* at 400. This “personal testimony” would have been more powerful than the expert, who had not even interviewed the family and friends. Prejudice was also clear where the prosecutor cited the “mitigation testimony” in support of the state’s closing and the jury almost deadlocked even without any mitigation. In addition to this ineffective assistance of counsel finding, the court also found that relief was required due to the court’s failure to appoint an independent defense expert and the court’s denial of a continuance prior to sentencing.

****Douglas v. Woodford***, 316 F.3d 1079 (9th Cir. 2003) (tried in 1984). Counsel ineffective in failing to adequately prepare and present mitigation evidence. Petitioner, claiming an alibi, was convicted of killing two teenage girls in the desert, primarily based on the immunized testimony of an accomplice. During sentencing, the state presented testimony concerning similar bad acts involving forcing women to pose nude and engage in sex acts with other women for photographs. He also planned to make movies involving torture and killing of young women and had previously pled nolo contendere to charges arising from this planning. In mitigation, the defense presented only the defendant’s wife and son and a neighbor to testify to good character, nonviolent nature, generosity, and a difficult background as an orphan. In “very general terms,” they described a difficult childhood, running away at fifteen to join the Marines, and being very poor and hungry as a child. Prior to trial, counsel retained mental health experts because the defendant was experiencing severe claustrophobia in his cell, which was related to having been locked in closets by abusive parents as a child. Because of the focus on claustrophobia, petitioner was unable to focus on his defense. The experts did brief testing and interviewing and found no mental disorders, but did recommend additional mental health testing. After the defendant was moved to a private cell and the claustrophobia issue addressed, he refused to cooperate with any further mental health testing and insisted on an alibi defense during trial. He was also “less than helpful” in providing background information and reported that “his parents were dead and that his past was a ‘blank.’” *Id.* at 1087.

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He also refused to provide names of relatives or friends to provide information on his childhood abuse. Analyzing the case under pre-AEDPA standards, the court found counsel's conduct deficient for failing to discover and present significant mitigation evidence. Even though petitioner "was not forthcoming with useful information, . . . this does not excuse counsel's obligation to obtain mitigating evidence from other sources." *Id.* at 1088. Counsel had enough information to put him "on notice" that petitioner had "a particularly difficult childhood," but did not attempt to contact persons who could provide the details or even to interview and prepare the witnesses that did testify so their testimony "was less than compelling." *Id.* Counsel did not even present some of the information he was aware of such as the claustrophobia due to being locked in closets as a child. Likewise, counsel had obtained the file pertaining to the defendant's prior conviction and that file contained an order for a psychological examination. If counsel had obtained that testing and interviewed that expert, he would have discovered a conclusion of serious and outstanding mental illness and possible organic impairment. That expert noted severe paranoia, chronic alcoholism, constant exposure to toxic solvents in the furniture refinishing business, and a serious head injury in a car accident, which the expert believed led to diminished capacity. If counsel had investigated the social background further, counsel would have discovered significant evidence that the petitioner was abandoned as a child and placed in foster homes, where an abusive alcoholic foster father would lock him in closets for long periods of time. He was extremely poor and often had to scavenge for food in garbage cans and eat just lard or ketchup sandwiches. He ran away at fifteen to join the Marines, but was arrested and put in a Florida jail where he was beaten and gang-raped by other inmates. When he did join the Marines, he received a number of medals and commendations. Counsel's failure to prepare and present mitigation counsel not be attributed to his client's lack of cooperation, because counsel had already "disregarded his client's wishes and did put on what mitigating evidence he had unearthed." *Id.* at 1089. Moreover, the jury had already convicted the defendant and rejected his alibi evidence, so "'lingering doubt' was not a viable option." *Id.* at 1090. Thus "there was nothing to lose" by presenting social history and mental health evidence. *Id.* at 1091. Prejudice was found, despite "the gruesome nature" of the offenses, *id.*, because the available "social background and mental health" evidence was "critical for a jury to consider when deciding whether to impose a death sentence," *id.* at 1090. This evidence could have "invoked sympathy" from at least one juror. *Id.*

2002: **Karis v. Calderon*, 283 F.3d 1117 (9th Cir. 2002) (tried in 1982). Counsel ineffective for failing to prepare and present mitigating evidence of the defendant's troubled childhood, during which he suffered repeated abuse and watched his mother being regularly and violently abused by men. "[T]he failure to present important mitigating evidence in the penalty phase can be as devastating as a failure to present proof of innocence in the guilt phase." *Id.* at 1135. Counsel's conduct was deficient because counsel failed to investigate and offered no reasonable explanation for the failure. Counsel had intended to present this evidence through a mental health expert but then chose not to do so because there was also damaging evidence in the expert's report. While counsel was not ineffective for not calling the expert, counsel was ineffective for failing to prepare and present the evidence through family members and other witnesses. The duty to investigate is not excused because the family did not readily offer the information because counsel knew the information was there and "should have explained . . . the gravity" of the situation to the family members. *Id.* at

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1136. Prejudice found because counsel presented only 48 minutes of mitigation, which included only that the defendant had artistic and academic talent, that his mother was divorced, and that he had saved his brother from drowning as a child. This evidence allowed the prosecutor to argue that the defendant was “intelligent” and “cunning” and to argue the absence of any mitigation when there was substantial mitigation available. Even with the weak mitigation presented, the sentencing jury took three days to render a verdict.

**Caro v. Woodford*, 280 F.3d 1247 (9th Cir. 2002) (tried in 1981). Counsel ineffective in capital sentencing for failing to prepare and present evidence of the defendant’s brain damage due to a long history of exposure to toxic pesticides and chemicals, history of severe head injuries, and significant abuse as a child. Counsel’s conduct was deficient because counsel knew of the long history of exposure to toxic pesticides, but did not inform the experts that examined the defendant and did not seek out an expert to assess the damage done to the defendant’s brain. Counsel conceded no strategy explained the failure. The defendant was prejudiced because, as the court said at the very beginning of the opinion, “A little explanation can go a long way. In this case, it might have made the difference between life and death.” “Prejudice found because rather than premeditation this evidence revealed the effects of “*physiological defects* . . . on his behavior, such as causing him to have impulse discontrol and irrational aggressiveness. By explaining that his behavior was physically compelled, not premeditated, or even due to a lack of emotional control, his moral culpability would have been reduced.” *Id.* at 1258. The prejudice was heightened where the state’s evidence of premeditation was not particularly strong and where, “[m]ore than any other singular factor, mental defects have been respected as a reason for leniency in our criminal justice system.” Also of significance, the court rejected the state’s arguments that high grades, satisfactory military performance, negative blood results for pesticides, a reasonably high IQ, rationality of actions following the murders, and normal psychiatric and neurological evaluations was inconsistent with the finding of brain damage. As one expert (Jonathan Pincus) explained, damage to a person’s frontal lobes may not affect other brain functions controlled by other parts of the brain.

**Silva v. Woodford*, 279 F.3d 825 (9th Cir. 2002) (tried in January 1982). In pre-AEDPA case, counsel ineffective in capital sentencing for failing to prepare and present mitigation. Deficient conduct found despite the assertion that the defendant instructed counsel that he did not want his family called as witnesses. Such an instruction does not alleviate the need to investigate or at least to adequately inform the defendant of the potential consequences of the decision and to assure that the defendant has made an informed and knowing judgment. Moreover, there was significant mitigation evidence available outside of contacting the defendant’s family, including prior psychiatric reports and presentencing report in a pending drug case. Court notes that the ABA guidelines, cited favorably in *Williams v. Taylor*, “suggest that a lawyer’s duty to investigate is virtually absolute, regardless of a client’s expressed wishes.” *Id.* at 840. “Indeed, if a client forecloses certain avenues of investigation, it arguably becomes even more incumbent upon trial counsel to seek out and find alternative sources of information and evidence, especially in the context of a capital murder trial.” *Id.* at 847. Counsel “could not make a reasoned tactical decision about the trial precisely because counsel did not even know what evidence was available.” *Id.* at 847 (quotation omitted). Prejudice found due to the prosecution’s “emphasis on the utter lack of

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mitigating evidence, “*id.* At 847, and “in spite of the undeniably horrific circumstances” of the murders, “this is not a case in which a death sentence was inevitable,” *id.* at 849 (quotation omitted). Indeed, the court noted that a co-defendant was sentenced to life and that defendant’s jury sought an explanation of “life without parole.” *Id.* at 849. “These questions suggest that a death sentence . . . was not a foregone conclusion. . . .” *Id.* at 849-50. The available and unrepresented mitigation included evidence of abuse and neglect by alcoholic parents, the possibility of brain damage from Fetal Alcohol Syndrome, the possibility of Post-Traumatic Stress Disorder, Attention Deficit Disorder that caused failures in school, self-medication through drug use, and amphetamine-induced organic mental disorders and withdrawal symptoms of the time of the offenses.

**Brownlee v. Haley*, 306 F.3d 1043 (11th Cir. 2002) (tried in January 1987). Counsel ineffective in pre-AEDPA case for failing to prepare and present mitigation in capital sentencing. Defendant was convicted of murder and armed robbery in a bar. Nine eyewitnesses testified during the trial, but none was able to identify the defendant. No forensic evidence linked defendant to the crime. A codefendant, who was identified by four eyewitnesses and had plead guilty in exchange for a life sentence, testified that he participated in the crime along with defendant and another codefendant, but even this witness was unable to state whether defendant shot the victim. Several other witnesses provided incriminating testimony about defendant’s actions and statements before and after the crimes, but their testimony contradicted the codefendant in some respects. Following conviction, in the jury phase of sentencing where an Alabama jury renders an advisory verdict, counsel presented no evidence in mitigation and offered only a brief closing argument. The jury deliberated for 38 minutes and recommended a sentence of death by an 11-1 vote. Prior to the second phase of sentencing where the trial court must “consider” the jury’s recommendation and can consider additional evidence in aggravation and mitigation, the trial court suggested that counsel should have the defendant examined by a clinical psychologist. In the hearing before the trial court, counsel presented the psychologist to testify that defendant has a mixed substance abuse disorder, a mixed personality disorder, and borderline intellectual functioning, with an IQ of 70 (in the mildly retarded range) but adaptive skills at a higher level. Two sisters also testified that defendant had been previously taken to a psychiatric hospital after jumping out a second floor window of the family apartment, a history of mood changes, complaints of severe headaches, and seizures for a couple of years, including one incident where he slashed himself across the chest with a knife. After hearing this evidence and considering a presentence report, the trial court found no mitigating factors and sentenced defendant to death. Counsel’s conduct was deficient because counsel conducted no pretrial discovery and conducted virtually no investigation. Counsel spoke only with one sister and that was after the jury’s recommendation of death and just prior to the sentencing hearing before the judge. Counsel did not have the defendant examined by a psychologist until the court suggested it because counsel observed no mental problems and believed the defendant had above average intelligence. Counsel did not pursue evidence of drug problems because they did not believe the jury would be sympathetic. If counsel had adequately investigated the evidence would have shown that the defendant grew up in a high crime area. On separate occasions, he had been stabbed in the chest and shot multiple times, including in the head. The psychologist, based on the additional information, would have testified that the defendant was either mildly mentally retarded or borderline intelligence and suffered from mental disorders, including schizotypal and antisocial

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personality disorders, multiple drug dependencies, and a seizure disorder (due to seizures for several years following the shot to the head). The psychologist would have testified that the defendant's capacity at the time of the crimes was possibly diminished due to the combination of mental disorders, limited intelligence, and drugs. The psychologist and a correctional officer that had previously supervised defendant in prison also both testified that the defendant was a model inmate and was unlikely to engage in violent behavior in prison. Prejudice found because presentation of this evidence would have provided compelling evidence supporting two statutory mitigating circumstances ((1) influence of extreme mental or emotional disturbance and (2) substantially impaired capacity at the time of the crimes) and several significant non-statutory mitigating factors, including the defendant's "severe intellectual limitations." *Id.* at ____ (citing *Atkins v. Virginia*, 122 S. Ct. 2242 (2002)). The prejudice was also clear because of the weaknesses in the state's evidence linking the defendant to the murder. Due to counsel's failure to present, "anything at all about the defendant [a]n individualized sentence, as required by law, was . . . impossible." *Id.* at ____ . The court found a reasonable probability that the jury would have recommended a life sentence if counsel had adequately presented the mitigation. The prejudice was not cured by the trial court's ultimate review because, under state law, the trial court was required to "consider" the jury's recommendation. "[T]he use of the term 'shall consider' indicates that a court is required to reflect actively and carefully on the jury's recommendation, as consideration clearly involves more than a passing thought." *Id.* at ____ .

2001: **Jermyn v. Horn*, 266 F.3d 257 (3rd Cir. 2001) (tried in August 1985). Counsel ineffective, under AEDPA, in capital sentencing for failing to prepare and present mitigating evidence. During the trial for murder of the defendant's mother, counsel presented two alternative arguments: either the defendant's mother accidentally set the fire that killed her and the defendant was innocent or the defendant committed the crimes and was insane at the time. This evidence included testimony from an expert that the defendant was a chronic paranoid schizophrenic. During sentencing, counsel only presented brief testimony that the defendant should not be sentenced to death because he was adaptable to confinement. He also argued that the defendant was mentally ill and argued about the defendant's deprived childhood, although no evidence about this had been presented. Counsel was only out of law school for "less than two years, this was his first capital case, and the first case he had tried which involved mental health issues." *Id.* at 275. He also did not hire an investigator and admitted that his time prior to trial was largely consumed with other cases. Counsel's conduct was deficient because the trial expert had informed him of the physical abuse suffered by the defendant and the significance of this in explaining the defendant's behavior. Nonetheless, counsel did not present this evidence and offered no strategic reason for the failure to do so. Indeed, counsel did not do anything in preparation for sentencing until after the guilty verdict. Counsel also testified that he did not realize the importance of the childhood until the end of sentencing, which is why he argued – on the basis of no evidence – about the childhood. Prejudice found because, if counsel had adequately investigated, the evidence would have revealed that the defendant's father was physically abusive, showed no affection, and virtually banished the defendant from his presence. At times, he was even chained to a dog leash and made to eat out of a dog bowl. Eventually, his mother placed him in a residential school for "orphans" or "unwanted children," to get him out of the home. Experts, including the defense expert at trial, observed that the defendant's childhood experiences

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were severe and “contributed significantly to his mental illness which they diagnosed as paranoid schizophrenia.” *Id.* at 274. The state court decision was unreasonable, under 28 U.S.C. § 2254(d)(1), because the Pennsylvania Supreme Court unreasonably applied *Strickland*’s prejudice inquiry in light of the totality of mitigating evidence adduced at trial and in the habeas proceedings.

**Coleman v. Mitchell*, 268 F.3d 417 (6th Cir. 2001) (tried in June 1985). Counsel ineffective in pre-AEDPA capital sentencing for failing to prepare and present mitigating evidence. The mitigation evidence presented at trial was limited to the defendant’s unsworn statement. Counsel’s argument in sentencing was limited to two issues: the circumstantial nature of the murder evidence and the evils of execution by the electric chair. Counsel’s conduct was deficient because counsel failed to investigate and present the mitigation evidence. This conduct was not excused by strategy because residual doubt is not a permissible argument in sentencing in Ohio. Likewise, any decision to make “a generalized, mercy-based critique of the electric chair over a particularized account of Petitioner’s social and mental history,” *id.* at 447, without any investigation, was unreasonable. Moreover, despite the District Court’s finding to the contrary, the record did not support the finding that the defendant had waived the presentation of mitigation evidence. Instead, the defendant had waived his right to a pre-sentence investigation and mental examination under state law, which is distinguishable from any mitigation. Furthermore, even assuming that the defendant had instructed counsel not to present mitigation, because of counsel’s failure to investigate counsel could not adequately advise the defendant of what he was waiving and the record did not support a finding “that Petitioner had any understanding of competing mitigation strategies.” *Id.* The court found in this case “involving a defendant with low intelligence, limited education and an unsettling past, whose strongest demand for self-representation [or controlling the presentation of mitigation evidence] consisted of ‘No, I don’t’ responses when asked if he wanted a pre-sentence investigation and mental evaluation,” that a finding that the defendant had knowingly and intelligently waived the presentation of mitigation evidence “hollows the Sixth Amendment.” *Id.* at 449. “Further, defendant resistance to disclosure of information does not excuse counsel’s duty to independently investigate.” *Id.* at 449-50. If counsel had adequately investigated and presented the evidence, they jury would have heard that the defendant’s mother abandoned him as an infant in a garbage can and she spent lengthy periods of time in psychiatric hospitals. His grandmother, who was his primary caretaker, abused him both physically and psychologically, as well as neglecting him while running her home as a brothel and gambling house. She also told him that their home was surrounded by enemies that wanted to poison them and involved him in her voodoo practice by having him kill animals and collect their body parts for use in her magic potions. He was exposed to group sex, sometimes including his mother or grandmother, as well as bestiality and pedophilia. The defendant was also admitted to the hospital on two occasions for head injuries. Petitioner had also been examined previously for competence to stand trial on a federal kidnaping charge. Those examiners, even though only examining competence, had found that the defendant had elevated test results “under the psychopathic--deviant and paranoia categories, as well as a full-scale I.Q. score of 82, falling in the low-normal range, and a verbal I.Q. score of 79, falling at the upper limits of the borderline retarded range.” They also found that he “had probable mixed personality disorder with antisocial, narcissistic and obsessive features.” An earlier examination had also revealed borderline personality. In addition, experts in the post-conviction proceedings found “borderline personality

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disorder, a likelihood of organic brain dysfunction, [and] . . . probable manic- depressive psychosis.” *Id.* at 450-52 (footnotes omitted in quotes).

**Mayfield v. Woodford*, 270 F.3d 915 (9th Cir. 2001) (en banc) (murder and counsel appointed in 1983). The majority in a split decision found counsel ineffective in the capital sentencing hearing (in pre-AEDPA case) for failing to prepare and present mitigation evidence. Counsel’s investigation was deficient where counsel billed only 40 hours in preparation for both the trial and the penalty phases of trial and had only one substantive meeting with his client – the morning trial began – and even then did not discuss with him possible witnesses or trial strategies. Counsel also failed to associate co-counsel to assist in the defense, even though state law entitled the defendant to a second attorney. Counsel also spent less than half the defense investigation budget authorized by the county and did not obtain all of the defendant’s medical records or consult with experts in endocrinology or toxicology, even though his investigator’s limited efforts revealed evidence of diabetes and substance abuse. During sentence, counsel waived the opening statement and called only one witness – an expert – that had interviewed the defendant twice and testified “regarding Mayfield’s family and childhood background, his health history including his diabetes, his work history, his psychiatric profile, and his substance abuse.” *Id.* at 928. The expert also related a story that informed the jury that the defendant “could be a kind, generous human being” and informed the jury that the defendant “had indicated considerable remorse for what he had done.” *Id.* Outside of this one witness, counsel presented no evidence and even stipulated – erroneously – that the defendant’s urine tested negative for PCP the day after the crime, “indicating to the jury both that [the defendant] did not have a substance abuse problem and that [he] had lied about it” in his statement to police. *Id.* Counsel did not call the defendant’s mother and uncle to testify for specific reasons but he did not even attempt to interview or present the testimony of other family members or friends. He also made no effort in his closing argument “to explain to the jury the significance of the mitigating evidence presented” by the one expert witness. “In short, [counsel] did not, as *Williams v. Taylor* requires, adequately investigate and prepare for the penalty phase or present and explain to the jury the significance of all the available mitigating evidence.” *Id.* Prejudice found even though the state’s aggravation evidence was “strong” and the mitigation evidence presented at trial was “substantial.” *Id.* at 929. The evidence counsel presented included evidence that the defendant was diagnosed with diabetes at age nine and was hospitalized 20 to 30 times because his diabetes was never under very good control. The trial expert also testified that the defendant had low average intelligence and had been diagnosed with a child behavioral disorder caused by depression. He began using PCP two or three times a week in his late teens and by the time of the murder was using it on a daily basis. The expert erroneously informed the jury, however, that the defendant was not under the influence of drugs or alcohol the night of the crimes. The defense expert then testified that the defendant’s score was moderately elevated on a “psychopathic deviance” test and that he was “lacking in emotion,” but that he had demonstrated remorse and “had good rapport with the prison guards.” *Id.* at 930. The defense expert also read for the jury the conclusion of a neurologist that the crime “could be explained only on the basis of definite cerebral impairment due to alcohol and drug abuse.” *Id.* On the basis of this evidence, the jury deliberated for a day and a half (and had even sent out a note asking if the jury had to be unanimous in order to sentence the defendant to life without parole) before sentencing the defendant to death. In addition to other evidence, if counsel

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had adequately prepared and presented the evidence, the jury would have also heard that the defendant suffered abdominal and chest pain, dehydration, fatigue, dizziness, nausea, loss of consciousness, and comas due to his diabetes. He sometimes had to be hospitalized as much as five times a month. Prior to the diabetes, he was essentially a normal child, but the physical and psychological traumas caused drastic changes in him and precipitated his drug use. During the months prior to the crime, he was hospitalized again for high blood sugar levels and using increasing amounts of drugs due to stressors, including his pregnant girlfriend leaving him. In addition, the jury could have heard substantial lay witness testimony that the defendant was a good person, that he was non-violent, and that his family loved him and wanted the jury to spare his life. Prejudice found “[i]n light of the quantity and quality of the mitigating evidence [counsel] failed to present at trial, the duration of the jury’s deliberations, and the jury’s communication to the trial judge.” *Id.* at 932.

**Ainsworth v. Woodford*, 268 F.3d 868 (9th Cir. 2001) (trial in January 1982). Counsel ineffective in pre-AEDPA capital sentencing for failing to prepare and present mitigating evidence. Counsel waived the opening statement in sentencing and then called only four witnesses in mitigation that covered “just under nine transcript pages.” These witnesses revealed that the defendant’s father had committed suicide; that the defendant had attended some college and held down a full-time job at which he was a good worker; that he had a three-month old son; and that he was kind, non-violent, and a talented artist. One of these witnesses also testified, however, that the defendant had planned to rob bank before but stopped because there were too many police around. *Id.* at 872. As the court found, “While it is true that the testimony touched upon general areas of mitigation, counsel’s cursory examination of the witnesses failed to adduce any substantive evidence in mitigation. In fact, counsel’s ill-preparation resulted in the testimony of one defense witness . . . contributing to the evidence in aggravation.” *Id.* at 874-75. Counsel’s conduct was deficient because counsel “sought no assistance from a law clerk, paralegal, or another attorney in his preparation for the penalty phase, nor did he seek advice or aid from investigators or experts. In addition, he did not seek any state funds to prepare for the penalty phase although funding for the use of investigators and experts in capital cases was available” under state law. *Id.* at 876. He interviewed only one defense witness and that was on the morning she was scheduled to testify. He also failed to obtain “employment records, medical records, prison records, past probation reports, and military records,” although he did get school records. Counsel even admitted in a deposition “that he abdicated the investigation of Ainsworth’s psychosocial history to one of Ainsworth’s female relatives.” *Id.* at 874. Counsel’s closing argument did not reference even the evidence counsel did present or refute the aggravation. Instead counsel only argued that the defendant was a “nice person” and argued “against the death penalty in general to a jury that had at voir dire already indicated no opposition to the death penalty.” *Id.* at 875. If counsel had adequately prepared and presented the evidence, the jury would have heard evidence of the defendant’s troubled childhood, his history of substance abuse, and his mental and emotional problems. Both of his parents were volatile alcoholics, who argued daily. His father was physically, verbally, and emotionally abusive and attempted to kill the defendant at least twice. His father ultimately committed suicide after four previous unsuccessful attempts. The defendant blamed himself for this and felt an overwhelming sense of guilt following his father’s death. The defendant began ingesting alcohol at age five. By age 16, the defendant had

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attempted suicide and was admitted to a psychiatric ward for treatment for alcoholism. He joined the military at age 17, but was discharged because of his addiction to alcohol and morphine. He was then again admitted to a hospital and diagnosed with acute alcoholic intoxication, psychoneurotic disorder, and depressive reaction. Throughout his adult life, the defendant “regularly abused alcohol and drugs, including heroin, amphetamines, LSD, marijuana, and peyote. He resorted to gasoline when he was unable to access other drugs. He attempted suicide six or seven times by slashing his wrists.” *Id.* at 875. Post-conviction experts supplied all of this information and testified that the substance abuse was a form of self-medication. Prejudice found because the jury heard no evidence of the defendant’s “troubled background and his emotional stability and what led to the development of the person who committed the crime.” *Id.* at 878. Defense counsel also failed to present evidence of the defendant’s “favorable prison record which could be important in deciding whether, if given a life sentence without parole, he would be a danger to other prisoners or prison personnel.” *Id.*

****Battenfield v. Gibson***, 236 F.3d 1215 (10th Cir. 2001) (tried in February 1985). Counsel ineffective in capital sentencing for failing to adequately investigate and present mitigating evidence, despite the purported waiver of mitigation by the defendant and the limited review necessitated by the AEDPA. Counsel’s conduct was deficient because he spent very little time investigating mitigation and planned only to present the defendant’s parents to beg for sympathy and mercy. Counsel never interviewed the parents, the defendant, or anyone else, however, concerning the defendant’s background. Court cites approvingly “Stephen B. Bright, *Advocate in Residence: The Death Penalty As the Answer to Crime: Costly, Counterproductive and Corrupting*, 36 Santa Clara L. Rev. 1069, 1085-86 (1996) (‘The responsibility of the lawyer is to walk a mile in the shoes of the client, to see who he is, to get to know his family and the people who care about him, and then to present that information to the jury in a way that can be taken into account in deciding whether the client is so beyond redemption that he should be eliminated from the human community.’).” 236 F.3d at 1229. No strategy excused counsel’s choice to only beg for sympathy and mercy. “[T]here was no strategic decision at all because [counsel] was ignorant of various other mitigation strategies he could have employed.” *Id.* at 1229. Moreover, counsel knew the state planned to rely on evidence of the defendant’s prior conviction for assault and battery with a dangerous weapon but never investigated to determine the underlying facts of that conviction. The state court did not address the lack of investigative efforts at all so the federal court exercised its independent judgment on this issue. Alternatively, the court concluded that the state court unreasonably applied *Strickland* in finding counsel’s conduct to be reasonable. The court also found that counsel’s failure was not excused by the defendant’s waiver of the right to present mitigation because counsel’s “failure to investigate clearly affected his ability to competently advise Battenfield regarding the meaning of mitigation evidence and the availability of possible mitigation strategies.” *Id.* Counsel could not have discussed the available mitigation with the defendant because he was unaware of the evidence. Thus, counsel informed the defendant only of the intent to have his parents beg for mercy. The defendant thus waived mitigation because he did not want his parents to testify. The state court found the waiver to be knowing and intelligent, but the federal court rejected this finding as both factually and legally unreasonable because neither counsel nor the state court provided sufficient information for the defendant to make a knowing and intelligent choice. The federal court also rejected the state court’s finding that counsel was reasonable for relying on the defendant’s waiver

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because the court failed “to see how [the defendant] can be held responsible for [counsel’s] failure to present mitigating evidence unknown to [the defendant].” *Id.* at 1233. The court found this to be “a patently unreasonable application of *Strickland*.” Prejudice found because the only valid aggravating circumstance found by the jury was a continuing threat based in substantial part on the state’s evidence of a prior violent conviction. If counsel had adequately investigated, however, this evidence could have been rebutted with evidence that the prior assault may have been an act of self defense committed while under the influence of alcohol and drugs. If counsel had adequately investigated, the evidence available in mitigation would have also included (a) the defendant’s involvement in a serious car accident at age 18, during which he sustained a serious head injury and after which he heavily used alcohol and drugs, (b) a family history of alcoholism and possible drug addiction, (c) evidence from family members and friends indicating that the defendant was known for his compassion, gentleness, and lack of violence, even when provoked, and (d) testimony of prison personnel describing the security and drug and alcohol treatment programs where the defendant would be incarcerated if given a life sentence. The federal court’s finding of prejudice was not constrained by the AEDPA standards because the state court never addressed this issue.

2000: **Lockett v. Anderson*, 230 F.3d 695 (5th Cir. 2000) (tried in 1986). Counsel ineffective in murder case for murdering husband and wife for failing to prepare and present adequate mitigation evidence with respect to the wife. Defendant was tried and sentenced separately for these offenses, although they were combined in federal habeas. District Court had already granted new trial on husband’s murder case. Counsel ineffective because counsel failed to adequately prepare due to illness of counsel’s mother, these two murder cases one month apart, and two other capital trials. Counsel lacked basic “familiarity” with “psychological tests” performed on his client, but he knew client had a history of seizure problems and head injuries. Counsel did not investigate, however, even after defendant’s mother retained a psychiatrist who recommended additional testing, including neuropsychological testing. Counsel was aware of recommendations. Counsel was also aware of “black-outs, delusional stories, references to self as another name, family troubles, drug and/or alcohol addiction,” which should have “put him on notice that pursuit of the basic leads that were before him may have led to medical evidence that Lockett had mental and psychological abnormalities that seriously affected his ability to control his behavior. Counsel thus may have had a strong predicate from which to argue to the jury that Lockett was rendered less morally culpable for the ruthless, cruel, and senseless murders he had committed.” *Id.* at _____. Strategic decision does not excuse counsel’s conduct because counsel did not even follow the recommendation for additional testing recommended by defense psychiatrist. Court also rejected argument of strategic decision to avoid devastating cross-examination because trial defense counsel never considered the strategy. Prejudice found even though crimes were particularly aggravated and some of this evidence could have been aggravating because it could support future dangerousness because additional testing and investigation would have revealed temporal lobe lesion or epilepsy and/or schizophrenia and a troubled childhood with trauma. Without this evidence, counsel just asked jury for mercy and presented no real evidence or argument in mitigation.

**Carter v. Bell*, 218 F.3d 581 (6th Cir. 2000) (indicted March 1984 and affirmed on appeal in 1986). Counsel ineffective in capital sentencing where counsel neither investigated nor introduced any

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evidence of mitigating factors. The defense only argued residual doubt when the state's evidence consisted of an eyewitness who saw the defendant with the victim and the testimony of a co-defendant who had already plead guilty and defense evidence was one alibi witness. Counsel spoke to only a few family members and they could not say whether they had even discussed mitigation. Counsel did not even obtain a release from client so they could view his personal or prison records and they did not seek any available records on defendant or his family. Counsel had prepared motion for expert but did not pursue it after defendant said he did not want to pursue insanity defense. Available mitigation evidence included evidence of "illegitimacy, extreme childhood poverty and neglect, family violence and instability during childhood, poor education, mental disability and disorder, military history, and positive relationships with step-children, adult family, and friends." Family history included one sibling dying in fire set by mom's boyfriend, two siblings dying of birth defects as infants, and all six remaining siblings having criminal records. Defendant's mother and sister were both hospitalized in mental health institutions and his grandfather, father, mother, step-father, and brother all suffered from alcoholism. Defendant's childhood home was also violent and unstable in that the family never lived in one place more than two years. Mother drank and would often drink up her welfare check and let the children go hungry. At the age of three, defendant and his then five year old sister were abandoned by their mother for more than a week, subsisting on milk stolen from the neighbors' porches. The welfare department placed the two in a children's home for several weeks. They subsequently lived with their aunt until their mother regained custody a year later. The defendant also suffered seriously from childhood rheumatic fever. He was whipped and beaten as an infant for crying from the illness. He also suffered frequent serious breathing problems as a child that led to numerous trips to the emergency room. The records show both childhood and adult head injuries from accidents and fights. He was also diagnosed with diabetes in 1977, when he apparently was brought to the hospital in a coma. Defendant had limited schooling and an IQ of only 79. Just prior to trial, a corrections doctor recommended "psychiatric hospitalization" because defendant's "nerves seemed stretched to the breaking point." Defendant was ultimately diagnosed after trial with schizophrenia and a history of partial seizures. Counsel's deficient conduct was not excused because defendant did not tell them of history. "The sole source of mitigating factors cannot properly be that information which defendant may volunteer; counsel must make some effort at independent investigation in order to make a reasoned, informed decision as to their utility." *Id.* at 596. Defendant's reluctance to present mental health evidence or testify also does not excuse failure to investigate. Conduct also not excused by argument that state would have rebutted with other crimes and bad character evidence because Tennessee law would permit rebuttal of the mitigating evidence submitted only and not general bad character evidence.

****Jackson v. Calderon***, 211 F.3d 1148 (9th Cir. 2000) (tried in early 1984). Counsel ineffective for failing to prepare and present mitigation evidence. Defendant was smoking PCP and engaging in bizarre behaviors, such as diving head first into pavement and pulling and slapping his hair. A police officer responding to the call to investigate told the defendant to sit and ultimately hit him in the back of the legs with the baton when the defendant attempted to walk away. They struggled and the defendant was maced in the face a number of times. When officer ran to driver's side of patrol car possibly to call for backup, the defendant reached in passenger side and the two struggled for a shotgun. The defendant got it. Evidence conflicting, but it appeared that both put their weapons

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on the roof of the car at some point and then defendant grabbed shotgun up and fired. One pellet entered officer's eye and killed him. When other officers arrived, the defendant would not surrender and threatened to kill. A police dog caused the defendant to drop the weapon and the defendant was subdued after a struggle in which he tried to get another weapon. Shortly after the arrest, the defendant's blood pressure dropped drastically and he was hospitalized due to incoherence, shock, and semiconsciousness. Prior to trial, the defense had the defendant examined by two psychiatrists but did not call either because they could not establish affirmative defense and would reveal potentially damaging information. The defense did call one psychiatrist, who had not examined the defendant, to testify generically about the effects of PCP. During sentencing, the defense presented testimony only from the defendant's estranged wife and mother. The wife testified that the defendant was a good provider, good father, and good husband, except for drug use, which was the reason she left him. She related an instance when he thought the house was charged with electricity due to drug use. The mother testified that the defendant's father was a hustler, who was never around, and that the defendant's troubles started at age 14 when he started sniffing glue. Both witnesses were cross-examined about the defendant's prior offenses. Counsel's conduct was deficient because counsel conducted only two hours of investigation related to sentencing weeks before the trial because of the belief that they would not reach sentencing. Thus, counsel, who had no prior capital case experience, only interviewed the wife and mother and reviewed juvenile and military records. If counsel had adequately investigated, the evidence would have revealed that the defendant suffered repeated beatings in childhood, his mother would choke him when she was angry, his childhood was characterized by neglect and instability, and he showed signs of mental illness as a child and had been diagnosed with schizophrenia at one time. In addition, if counsel had presented the testimony of one of the examining psychiatrists during sentencing, the jury would have heard that the defendant was grossly impaired by PCP at the time of the offenses. Finally, counsel also failed to investigate and object to the testimony of an alleged victim of a prior sodomy because it was questionable that the sodomy was committed by force or threat of force, which was a prerequisite for admissibility in sentencing.

1999: **Smith v. Stewart*, 189 F.3d 1004 (9th Cir. 1999) (tried in 1987 and affirmed on appeal in 1989). Counsel ineffective in sentencing phase for failing to prepare and present mitigation and failing to challenge the state's aggravation evidence related to prior convictions. Defendant was tried for two different rape-murders. After first conviction by jury, defendant plead guilty to the second one, even though the prosecutor argued that defendant was emotionally unstable and his plea may not be voluntary. During first sentencing under statute that allowed only consideration of statutory mitigating circumstances, counsel presented testimony from two experts, who testified that defendant had internal conflicts bordering on psychosis that caused tensions leading to a compulsion to commit sexually sadistic murders. These experts had minimal information about the defendant's history and had conducted only short interviews, but testified in an effort to establish impaired ability to conform conduct to law. Defendant was granted a new sentencing trial after the statute was held to be unconstitutional. Although counsel could now present non-statutory mitigating evidence, he did no investigation, called no witnesses, and only reargued that the court should consider the testimony of the previous experts as mitigation. Complete failure to investigate, when the prosecutor even questioned the defendant's emotional stability, was deficient. Court found

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prejudice because, if counsel had adequately investigated and presented mitigation, the evidence would have at least established that the defense investigator and a pastor had observed multiple personalities in the defendant. His girlfriend would have testified that he treated her well but had wild mood swings. He had attempted suicide in prison. He had developed serious psychosexual problems stemming from his childhood with deeply religious parents, one of whom beat him severely and the other emotionally neglected and abandoned him. This evidence, at a minimum, would have supported the testimony of the previous experts which had been rejected by the courts for lack of foundation and credibility. “A lawyer who should have known but does not inform his expert witnesses about essential information going to the heart of the defendant’s case for mitigation does not function as ‘counsel’ under the Sixth Amendment.” *Id.* at _____. Court also found that counsel was ineffective for failing to challenge the state’s aggravation evidence of two prior rape convictions as a prior violent offense. Both of the convictions occurred when Arizona law did not include violence as an element of rape. Likewise, one of the convictions was obtained when it appeared that the defendant’s counsel had a conflict of interest. The failure to challenge the aggravating circumstances and present mitigation evidence was prejudicial despite the “horrific nature of the crimes” in this case, especially because the Arizona statute requires a death sentence in the absence of mitigating evidence.

**Collier v. Turpin*, 177 F.3d 1184 (11th Cir. 1999) (tried in September 1978). Counsel ineffective in capital sentencing for failing to adequately prepare and present mitigation evidence. The defendant, who lived in Tennessee, drove to Georgia and committed three armed robberies. During his drive back to Tennessee, he was stopped by several officers. He grabbed one of the officers’ weapons and shot both officers killing one. Because of eyewitnesses and a full confession, a conviction was essentially a foregone conclusion. During the sentencing phase, which lasted only an hour and a half, trial counsel presented 10 defense witnesses, including the defendant’s wife but essentially elicited only one or two word answers from them that established that the defendant was a good worker, supported his family, and a good reputation for truth and veracity (which was irrelevant since he did not testify). The claim of ineffective assistance was not raised in the first state habeas petition. Ultimately after navigating the procedural quagmire of bouncing back and forth between federal and state habeas petitions, the Court found counsel to be ineffective in this fourth habeas petition. The Court found cause for the default of not raising the issue in the first state and federal habeas petitions because the trial attorneys had represented the defendant in those proceedings. Counsel were ineffective because they failed to develop the mitigation evidence that they were aware of. The witnesses who testified could have presented substantial evidence that the defendant was a good family man and an upstanding public citizen, who had a background of poverty but who had worked hard as a child and as an adult to support his family and close relatives. Instead of the “hollow shell” of mitigation, *Id.* at _____, trial counsel could have established the defendant had a gentle disposition, his record of helping his family in times of need, specific instances of heroism and compassion, and evidence of his circumstances at the time of the crimes, including his recent loss of his job, his poverty, and his diabetic condition. Counsel was also ineffective for failing to seek and present an expert on diabetes when they were aware of the diabetes and that the defendant’s crimes were totally out of character for him. If counsel had performed adequately, the evidence would have established that the defendant had trouble controlling his

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behavior when he was not properly medicated, which would have mitigated the crime itself. An expert could have testified that the defendant's behavior was possibly caused by an episode of hypoglycemia brought on by the defendant's failure to eat that day in combination with an excessive insulin dose. Prejudice found because a juror who had known of the "stark contrast between [the defendant's] acts on the day of the crimes and his history" may not have voted for death. The Court concludes, "The jury was called upon to determine whether a man whom they did not know would live or die; they were not presented with the particularized circumstances of his past and of his actions on the day of the crime that would have allowed them fairly to balance the seriousness of his transgressions with the conditions of his life. Had they been able to do so, we believe that it is at least reasonably probable that the jury would have returned a sentence other than death." *Id.* at —.

**Bean v. Calderon*, 163 F.3d 1073 (9th Cir. 1998) (crimes in 1980 and affirmed on appeal in 1988). Counsel ineffective in sentencing phase of double murder trial for failing to prepare and present mitigation evidence. First counsel was appointed to represent defendant and investigated competency defense. A second counsel was appointed a month and a half before the penalty hearing. The penalty phase counsel relied solely on the evidence prepared by the guilt-or-innocence phase counsel. The first counsel believed that he was prohibited from participating in the sentencing phase so he did nothing either. Prior to trial, the first counsel had contacted two mental health experts, who strongly recommended neuropsychological testing for brain damage, but this testing was not completed until ten months later during the weekend before the penalty hearing. Counsel were unaware of the results when the penalty phase started. Counsel also failed to furnish other necessary information to the experts who testified during the penalty phase and failed to adequately prepare these experts for their testimony. The only expert who had reviewed any documents did not testify. One expert who did testify had requested social, medical, and educational information, which had not been provided, and met with counsel to prepare for testimony only a day or two before testimony. He could testify only that Bean had an organic personality disorder and was moderately defective in intelligence, but could not definitively state whether Bean had brain damage or whether he was able to appreciate criminality. The other expert to testify also did not have any information other than her last-minute testing. She testified that Bean has brain damage and his ability to appreciate criminality was impaired, but she had not studied the relevant California legal standards. Subsequent review of the evidence by these experts and others resulted in testimony that Bean was functionally mentally retarded, suffered from post-traumatic stress disorder, was brain damaged, was using drugs during the time of the offenses, and was incompetent at the time of trial. The Court stated: "When experts request necessary information and are denied it, when testing requested by expert witnesses is not performed, and when experts are placed on the stand with virtually no preparation or foundation, a capital defendant has not received effective penalty phase assistance of counsel." *Id.* at 1079. The Court also found prejudice because the two experts who did testify lacked preparation and foundational information for their conclusions which severely undercut their credibility. In addition, counsel presented only an "unfocused snapshot" of Bean's life in sentencing so the jury had no knowledge of the "indisputably sadistic treatment Bean received as a child, including repeated beatings which left a permanent indentation in his head." *Id.* at 1081. Counsel also failed to discover and present evidence of Bean's developmental delays, including

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placement in classes for the “educable mentally retarded.” Prejudice was found because this was not a case in which the death sentence was inevitable due to the enormity of the aggravating circumstances. In fact, the state presented little aggravating evidence and the jury initially divided over the appropriateness of the death penalty, deadlocking on both murders. Ultimately, the jury returned with one death verdict and life verdict.

****Smith v. Stewart***, 140 F.3d 1263 (9th Cir. 1998) (tried in 1984). Counsel ineffective in capital sentencing phase for failing to prepare and present mitigation and for failing to make any argument on defendant’s behalf. Counsel stated only that defendant still denied his guilt and that he was only 30-years-old. Counsel spoke with defendant and his mother but asked only a few generalized questions which revealed nothing of significance. While the court recognized that counsel’s task is difficult without the client’s assistance, the court could not “find any reason, tactical or otherwise for the failure of counsel to develop any mitigation at all for the purpose of defending [the defendant] against the death penalty.” 140 F.3d at 1269. Likewise, counsel’s failure to even request leniency amounted to no representation at all. 140 F.3d at 1270. Available evidence included evidence of antisocial personality disorder, extensive drug history, change in personality after a PCP overdose, and good family relationships, including his love and support of his children. In assessing prejudice, the court stated, “we are not asked to imagine what the effect of certain testimony would have been upon us personally,” 140 F.3d at 1271, but what the effect would have been on the sentencer, which under Arizona law is the judge. Prejudice found in this case because facts were “bad” but not “overwhelmingly horrifying” such that it was “highly improbable that mitigating factors of any ordinary stripe would help.” 140 F.3d at 1270. Likewise, under the Arizona sentencing scheme, the judge is required to sentence the defendant to death if there are aggravating circumstances and “no mitigating circumstances sufficiently substantial to call for leniency.” 140 F.3d at 1270. Counsel’s failure to present mitigation or argue for leniency thus amounted to “a virtual admission that the death penalty should be imposed.” 140 F.3d at 1270.

****Dobbs v. Turpin***, 142 F.3d 1383 (11th Cir. 1998) (tried in May 1974). Counsel ineffective in capital sentencing phase because counsel failed to investigate and present any mitigating evidence and made an inadequate closing argument. Counsel spoke to very few potential mitigation witnesses, including the defendant’s mother. Available but unrepresented mitigation included witnesses to testify that defendant had an unfortunate childhood, his mother often would not let him stay in the house with her, and when she did allow him to stay, she ran a brothel where she exposed him to sexual promiscuity, alcohol, and violence. Counsel’s reasons for failure were insufficient. Counsel believed erroneously that evidence of defendant’s childhood was inadmissible and that mitigating evidence could only be admitted to mitigate the crime, as opposed to the sentence. The court held, “[S]trategic decisions based on a misunderstanding of the law are entitled to less deference.” 142 F.3d at 1388. Counsel also stated that the defendant did not want him to present mitigation evidence. The court held “that lawyers may not ‘blindly follow’ such commands. Although the decision whether to use mitigating evidence is for the client, this court has stated, ‘the lawyer first must evaluate potential avenues and advise the client of those offering possible merit.’” 142 F.3d at 1388 (quoting *Thompson v. Wainwright*, 787 F.2d 1447, 1451 (11th Cir. 1986)). Counsel’s argument in sentencing consisted of reading Justice Brennan’s concurring opinion in

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Furman and arguing that the current death penalty statute would also be found unconstitutional. Counsel's argument was ineffective because it minimized the jury's responsibility for determining the appropriateness of the death penalty and failed to focus on the character and record of the defendant and the circumstances of the offense. In addition, counsel's argument was deficient because he never asked the jury for mercy or for a life sentence. He merely asked the jury to impose a sentence with which the jurors could live. Counsel offered no reason for the inadequate argument.

1997: **Austin v. Bell*, 126 F.3d 843 (6th Cir. 1997) (crimes in 1977 and affirmed on appeal in 1981). District court found IAC in both guilt and sentencing, but the court of appeals found only IAC in sentencing. Counsel were ineffective for failing to prepare and present mitigation evidence because they didn't think it would do any good. Relatives, friends, death penalty experts, and a minister were available and willing to testify.

**Hall v. Washington*, 106 F.3d 742 (7th Cir. 1997) (sentenced in April 1984). Trial counsel ineffective (even under AEDPA standards) in sentencing for failing to adequately advise the defendant of the consequences of waiving a jury in a sentencing, for failing to investigate and discover readily available mitigation evidence which included good character and adaptability testimony from a correctional officer when the victim was also a correctional officer and good character evidence from other witnesses. Investigation is required. "This does not mean that only a scorch-the-earth strategy will suffice, . . . but it does mean that the attorney must look into readily available sources of evidence. Where it is apparent from evidence concerning the crime itself, from conversation with the defendant, or from other readily available sources of information, that the defendant has some mental or other condition that would likely qualify as a mitigating factor, the failure to investigate will be ineffective assistance." *Id.* at 749-50. Here, counsel did not contact the defendant in the six weeks after conviction and prior to sentencing to even inquire about possible mitigating evidence or witnesses who might be available to testify on his behalf. They did not even return telephone calls or write back to individuals who were volunteering to offer mitigating testimony. Prejudice found even though judge alone trial because if not for IAC might not have been judge alone and even if it had, trial court found no mitigation evidence at the time of sentencing. Trial counsel also ineffective for sentencing phase closing which did not even focus on defendant, but rather focused on life sentence because the death penalty is barbaric.

1996: **Emerson v. Gramley*, 91 F.3d 898 (7th Cir. 1996) (affirming 883 F. Supp. 225 (N.D. Ill. 1995)) (second trial in March 1985). Trial counsel ineffective for failing to prepare and present mitigation evidence and making no sentencing argument at all where the state presented aggravation evidence of seven prior convictions of robbery. Counsel had failed to conduct *any* investigation, however brief, into the possible existence of evidence of mitigating circumstances. Available mitigation would have shown that at age 8 the defendant was shot when he was an innocent bystander during robbery, he lacked emotional and educational support from his parents, he lost a young child, and had a diminished IQ.

1995: **Glenn v. Tate*, 71 F.3d 1204 (6th Cir. 1995) (sentenced in September 1982). Trial counsel ineffective for failing to adequately prepare and present mitigation evidence in case where defendant

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killed police officer while helping older brother escape from jail. Counsel requested court-appointed examination and examiners reported no organic brain damage although no testing was done. Counsel made virtually no attempt to prepare for the sentencing phase of the trial until after the jury returned its verdict of guilty even though “[i]t was obvious, or should have been, that the sentencing phase was likely” to be reached. Counsel only arranged for the preparation of a videotape, even though the admissibility “was obviously questionable” (and the tape was not admitted), that showed the neighborhood where the defendant grew up, along with commentary by a narrator, the defendant’s mother, and a former employer. Only a teacher with limited knowledge and a minister, who had never met the defendant and testified only to religious principles against the death penalty, testified. Available but unrepresented evidence included mental retardation (school records), physical abuse, hyperactivity as a child. Neurological examination showed global brain damage probably caused by general anesthesia given mother early in pregnancy. “[W]hile juries tend to distrust claims of insanity, they are more likely to react sympathetically when their attention is drawn to organic brain problems such as mental retardation.” *Id.* at 1211. Probation officer if interviewed and called would have testified that defendant was a follower and was particularly susceptible to the influence of his older brother.

****Antwine v. Delo***, 54 F.3d 1357 (8th Cir. 1995) (sentenced in August 1985). Counsel ineffective for failing to investigate and present available mitigation. Counsel was aware that defendant was acting oddly for months before offense and that a cursory 20 minute exam by state experts found abnormal behavior consistent with PCP intoxication but that defendant denied using PCP at the time of the offense and the state examiner’s had conducted no psychological testing. Counsel failed to follow up on this inconsistency by requesting an independent examination. Adequate examination and testing revealed bipolar disorder. Counsel presented only an emotional plea for mercy in sentencing. The proffered “strategic” reason was that counsel believed the jury had already determined that death was appropriate with the guilty verdict and that counsel would have lost credibility since mental health evidence of a manic state at the time of the crime would have contradicted the chosen self-defense theory. The court rejected any strategic explanation because “[c]ounsel’s failure to request a second mental examination is more like inadequate trial preparation than a strategic choice.”

****Hendricks v. Calderon***, 70 F.3d 1032 (9th Cir. 1995) (tried in 1981). Trial counsel ineffective for failing to adequately prepare and present mitigation evidence even though a defense expert was called. *See also Hendricks v. Calderon*, 864 F. Supp. 929 (N.D. Cal. 1994). Neither trial counsel nor his investigators conducted any investigation directed at developing mitigating evidence and decided simply to beg for mercy as had been done in the only other capital case counsel had participated in. This was rejected as strategy because “[t]he choice that must be defended as strategic is not a decision about how best to present mitigating evidence, but one about whether to investigate mitigating evidence at all.” If counsel had adequately prepared and presented the mitigation, the evidence would have shown that defendant: was blamed by his family for his mother’s death giving birth; lived in a two-room house with grandmother and 15 relatives; was beaten with a frying pan and switch by grandmother; had to drink kerosene and sugar as medicine; was sexually abused by prostitutes who worked for father; was raped by a stranger and attempted

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suicide shortly afterwards; had a son who died from rare skin disease; and had a history of drug and alcohol use and male prostitution. A mental health expert would have testified that defendant is genetically predisposed to serious mental illness which was exacerbated by background. Expert testimony would have also shown that defendant suffered from schizoaffective disorder, PTSD, and polysubstance abuse. Expert would have even testified that defendant was insane at the time of the offenses. All of this evidence would have supported at least three statutory mitigating circumstances that were not presented to the jury. Although the jury was given some lay evidence in mitigation, the jury was given no guidance of how to connect the facts and expert testimony about background to the mitigating factors.

***Clabourne v. Lewis**, 64 F.3d 1373 (9th Cir. 1995) (crimes in 1980). Counsel ineffective for failing to prepare and present mitigation evidence. Counsel sought a defense expert evaluation five days prior to sentencing, but took no other action when that was denied. Trial counsel did not call any witnesses in sentencing even though a detective would have testified that it was the co-defendant who was responsible for the depraved manner in which the crime was committed and depravity was the only aggravating circumstance found. Trial counsel also did not prepare and present expert testimony. The defense expert who testified at trial had seen the defendant six years earlier and was not provided with any subsequent records, including records concerning offense. If additional information had been provided, defense expert would have diagnosed schizophrenia instead of anti-social personality. Likewise, state experts testified at trial that defendant was sane, but were never provided with information about defendant's history or offenses or asked about mitigation. If defense counsel had provided the information and talked to them, state experts would also have diagnosed schizophrenia and agreed that co-defendant had manipulated defendant.

***Baxter v. Thomas**, 45 F.3d 1501 (11th Cir. 1995) (sentenced in September 1983). Trial counsel ineffective during penalty phase of capital trial for failing to adequately investigate and present mitigation evidence. Counsel talked to the defendant's mother and brother and visited a boys home he had been committed to. They did not, however, request State Hospital records, school records, or social service records, and did not interview defendant's sister, neighbor, or social worker, even though counsel was aware of defendant's odd behavior and even requested a mental health evaluation. Because of these failures, trial counsel did not discover or present evidence that the defendant spent approximately three years of his teenage life in a psychiatric hospital and that he was mentally retarded.

***Jackson v. Herring**, 42 F.3d 1350 (11th Cir. 1995) (*affirming Jackson v. Thigpen*, 752 F. Supp. 1551 (N.D. Ala. 1990)) (sentenced in December 1981). Trial counsel ineffective during penalty phase of capital trial for failing to adequately investigate and present mitigation evidence. Neither counsel conducted any investigation or preparation for sentencing, in part, because they did not believe the defendant would be convicted of murder and, in part, because each counsel thought the other was responsible for sentencing. Available but unrepresented mitigation evidence included: substantial personal hardships, including having to quit school in 8th grade because defendant was pregnant; brutal and abusive childhood at the hands of an alcoholic mother; devotion to her mother, sister, and daughter; borderline mental retardation; good work history; and abuse by her boyfriend,

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who was the murder victim, both for a long time preceding his death and immediately prior to his death.

1994: **Hill v. Lockhart*, 28 F.3d 832 (8th Cir. 1994) (*affirming* 824 F. Supp. 1327 (E.D. Ark. 1993)) (tried in July 1980). Trial counsel ineffective at penalty phase for failing to prepare and present evidence of defendant's mental state at the time of the offenses, and that defendant had a long history of schizophrenia but he was taking antipsychotic medication at the time of offenses. The defendant told counsel of his past psychiatric hospitalizations in Oklahoma and Arkansas and counsel obtained the Arkansas records but made no attempt to obtain the Oklahoma records until just before trial and never obtained some of them.

**Wade v. Calderon*, 29 F.3d 1312 (9th Cir. 1994) (tried in May 1982). Trial counsel ineffective during penalty phase of capital trial for failing to call defendant's family to corroborate abusive background; calling forth alternate personality that committed crimes (defendant had multiple personality disorder) during defendant's testimony and eliciting damaging statements and essentially a challenge to the jury to execute defendant; and by arguing during closing argument that 1) defendant's life should be spared so doctors could examine him as human "guinea pig"; 2) that jurors had already decided on death; and 3) that executing defendant may "free him from this horror." While evidence of abuse had been mentioned by experts during trial, the jury was instructed not to consider that for the truth and no evidence was presented in sentencing on this other than the defendant's testimony.

1992: **Loyd v. Whitley*, 977 F.2d 149 (5th Cir. 1992) (sentencing in 1985). Trial counsel ineffective in sentencing phase for failing to obtain independent mental health evaluation when funds were available and sanity was a critical issue, but counsel assumed funds were not available and did not pursue issue. Proper investigation would have revealed: evidence that defendant was unable at time of offense to distinguish between right and wrong or appreciate the significance or consequences of his acts because of psychotic delusions; child abuse; substance abuse; psychosis (not anti-social as the state contended at trial); and brain damage (frontal lobe dysfunction).

**Mak v. Blodgett*, 970 F.2d 614 (9th Cir. 1992) (*affirming* 754 F. Supp. 1490 (W.D. Wash. 1991)) (sentenced in October 1983). Trial counsel ineffective for failing to prepare and present mitigating evidence regarding defendant's background, family relationships, and the effects of assimilation problems and cultural conflict on young Chinese immigrants. Counsel spent substantial hours preparing to present evidence that another person actually committed the crimes, which they assumed incorrectly would be admitted in sentencing, even though improper during trial but they prepared no social history information.

**Cave v. Singletary*, 971 F.2d 1513 (11th Cir. 1992) (notice of appeal filed in January 1983). Petitioner given death sentence for robbery and murder. At trial, counsel emphasized the fact that petitioner admitted he was guilty of robbery. Court found that although this demonstrated that counsel did not understand the felony murder rule, petitioner was not prejudiced because the jury would have made the same decision based on the evidence of guilt of the robbery. Counsel was

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found ineffective at sentencing phase, however, because she was under the “grandiose, perhaps even delusional belief” that she would win an acquittal for her client and, therefore, failed to prepare and present available character evidence and the fact that defendant had no prior criminal record in mitigation. State argued lack of character evidence in closing argument. Counsel had even met with some of the defendant’s family members prior to trial but told them their testimony would not be needed. The court characterized the representation in this case as “an embarrassment to the legal profession.” *Id.* at 1519.

1991: **Kenley v. Armontrout*, 937 F.2d 1298 (8th Cir. 1991) (tried in 1984). Counsel ineffective for failing to investigate and present mitigation evidence. Counsel received a letter from a social worker that had previously seen the defendant, who also informed counsel of another prior mental health expert. Counsel requested and received the social worker’s records but never spoke to her and never contacted the other prior mental health expert. Counsel also requested no other records that were referenced in these files or interviewed family members. Instead, counsel requested a court-appointed evaluation, which was conducted, and then consulted a different non-examining expert and decided not to pursue this line because counsel erroneously believed that the evidence was too old and insubstantial, which was based, in part, on the court-appointed psychiatrist’s report which was itself incomplete because based on limited information. Adequate investigation would have revealed a history of “an extreme personality or emotional disorder or disturbance, suicidal tendencies, and alcohol abuse and intoxication.”

**Blanco v. Singletary*, 943 F.2d 1477 (11th Cir. 1991) (*affirming Blanco v. Dugger*, 691 F. Supp. 308 (S.D. Fla. 1988)) (tried in June 1982). At sentencing, counsel failed to present any mitigating evidence. Counsel failed to investigate for sentencing prior to trial even though counsel knew the court intended to proceed straight to sentencing after conviction. Even after the court granted a four-day continuance, counsel still only spoke to the defendant’s brother. He never spoke to other potential witnesses and thus failed to prepare and present the available evidence of childhood poverty, seizures, family history of psychosis, organic brain damage, borderline retardation, epileptic disorders and paranoid and depressive behaviors. Counsel also asked for continuance to procure psychiatric exam and then never had one conducted. Counsel told trial court that no mental health mitigation existed. Counsel also revealed damaging information, violating client confidences, to trial judge.

**Horton v. Zant*, 941 F.2d 1449 (11th Cir. 1991) (sentenced in February 1981). Counsel conducted no sentencing investigation prior to trial and only called the defendant’s mother the night before sentencing to ask if she would attend trial. She declined because of the flu and counsel asked no further questions. The court rejected the proffered “strategic reason” not to present mitigation as unreasonable since counsel erroneously believed that mitigation was appropriate only in gruesome cases involving torture. Available mitigation would have shown that defendant was a hard worker, a good youth, able to provide for his common law wife and their daughter, and had successfully adjusted to previous stays in prison. Counsel also ineffective for arguing that they were local lawyers, not “bleeding heart, anti-death penalty lawyers” and calling the defendant a “worthless

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man” that defense counsel hates and conceding that maybe the defendant “ought to die” during closing argument.

1990: **Brewer v. Aiken*, 935 F.2d 850 (7th Cir. 1990) (sentenced in March 1978). Defense counsel ineffective in death penalty phase of trial for failing to fully investigate defendant’s family and mental history and present evidence in mitigation. This was the first capital case tried under Indiana’s statute passed post-*Furman* and counsel was unaware that the sentencing hearing would begin immediately after conviction. Counsel requested a continuance of a week to prepare because he had just received information of an extensive psychiatric history and problems in childhood. The continuance was denied and no mitigation evidence was presented other than the defendant’s testimony, which was damaging because it opened the door to another armed robbery the same day as these crimes since the defendant claimed a co-defendant was the actual killer. Counsel did not even ask the defendant about his psychiatric history or background. An investigation would have revealed shock therapy, brain damage, mental retardation, susceptibility to the influence of others, and disadvantaged family life.

**Cunningham v. Zant*, 928 F.2d 1006 (11th Cir. 1990) (tried in October 1979). Counsel ineffective during the penalty phase of a capital murder case. Counsel spoke briefly with the defendant’s mother, his employer, and his supervisor on the eve of trial or during trial and presented very limited background information from them in sentencing, but counsel did not thoroughly interview these witnesses or conduct any other background investigation which would have revealed substantial evidence of mental retardation, head injury that resulted in a metal plate in the defendant’s head and substantial headaches and affects, socioeconomic background and reputation as good father and worker in mitigation.

1989: **Kubat v. Thieret*, 867 F.2d 351 (7th Cir. 1989) (*affirming* 679 F. Supp. 788 (N.D. Ill. 1988)) (tried in June 1980). Trial counsel ineffective during sentencing for failing to investigate and present available character evidence in mitigation, making a bizarre and prejudicial closing argument which conceded that counsel “was not going to convince” jury and invited the jury to “decide” between the defendant and victim, and failing to object to improper sentencing instructions which misstated the law by calling for unanimous agreement on a decision not to impose the death sentence. If counsel had adequately investigated “fifteen character witnesses,” of which “most were neighbors and coworkers; all were well-respected citizens in their community; [and] one was a deputy sheriff,” would have testified. Only two of these witnesses had even been contacted prior to trial and not even their testimony was presented. In the district court, the state argued that Kubat’s attorneys made a rational strategic decision to forego character testimony and to rely instead upon a plea for mercy during closing argument. The court rejected this as a reasonable strategy in this case, in part, because the argument could not “even charitably, be called a plea for mercy” and was, instead, an aggravating, “rambling, incoherent discourse” that even invited the jury to choose between the defendant and the victim, which was “utter lunacy for defense counsel” to do. *Id.* at 368. In finding prejudice, the court was particularly impressed

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that at least one of the fifteen available character witnesses was a deputy sheriff. The introduction of testimony by a law enforcement officer that the defendant had a salvageable character might not have gone totally unnoticed by the jury. Indeed, . . . if just *one* juror had been sufficiently influenced by the character testimony, the death penalty could not have been imposed.

Id. at 639.

**Deutscher v. Whitley*, 884 F.2d 1152 (9th Cir. 1989) (decision vacated and remanded by Supreme Court several times; last opinion which again finds IAC is *Deutscher v. Angelone*, 16 F.3d 981 (9th Cir. 1994) (tried in 1977). Trial counsel ineffective in penalty phase of capital trial for not investigating and presenting mitigating evidence despite knowledge of some history and argument in sentencing that the defendant must have had some mental problems. Counsel did not have a strategy to avoid presentation of this evidence, but simply failed to investigate. Adequate investigation would have revealed diagnoses of schizophrenia, pathological intoxication, and organic brain damage; commitments to mental institutions; and a history of good behavior in institutional settings.

**Harris v. Dugger*, 874 F.2d 756 (11th Cir. 1989) (sentenced in September 1981). Attorneys rendered IAC in a capital murder case where they failed to prepare or present mitigation evidence because each lawyer believed that the other was responsible for preparing penalty phase of case. Because neither lawyer had investigated they were ignorant of the types of evidence available and could not make a strategic decision on whether to introduce the available mitigation evidence that the defendant was a devoted father, husband, and brother, and a “decent, loving man.”

1988: **Evans v. Lewis*, 855 F.2d 631 (9th Cir. 1988) (sentenced in March 1979). Trial counsel ineffective for failing to investigate and present evidence in mitigation in resentencing. Counsel was aware the defendant had a history of mental problems from his records of incarceration in state mental facility for inmates and prior suicide attempts. Nonetheless, counsel conducted no investigation to determine the extent of the mental problems. Evidence would have shown that defendant is schizophrenic and possibly insane at time of offenses. Instead of this evidence which would have supported at least one statutory mitigating circumstance, counsel presented no evidence in mitigation, even though Arizona death penalty statute required death penalty if no mitigating factor is established, & at least one aggravating factor is found (at least one aggravating factor, prior conviction, was obviously present).

**Middleton v. Dugger*, 849 F.2d 491 (11th Cir. 1988) (tried in 1980). Counsel ineffective for failure to conduct investigation into petitioner’s background even though counsel discussed the existence of mitigating evidence with the defendant. Investigation and collection of records would have revealed a history of schizophrenia since age 12; childhood neglect, physical, sexual, and drug abuse; and low IQ. In addition, expert testimony would have established that the defendant was under extreme emotional duress at the time of the homicide and had very little capacity to conform his conduct to the law at the time.

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**Stephens v. Kemp*, 846 F.2d 642 (11th Cir. 1988) (tried in 1980). Counsel ineffective for failing to investigate mental health issues, even though counsel learned from the defendant's sister that the defendant had spent five days in a mental hospital four to six months before the shooting occurred. Counsel sought a court-appointed competence and sanity evaluation but pursued his investigation no further after receiving the examiner's report. While this was sufficient for trial issues, the court held that it was inadequate for sentencing purposes.

[W]hen a capital sentencing proceeding is contemplated by counsel aware of the facts of which appellant's trial counsel was aware, professionally reasonable representation requires more of an investigation into the possibility of introducing evidence of the defendant's mental history and mental capacity in the sentencing phase than was conducted by trial counsel in this case. Although trial counsel was aware well in advance of trial that appellant had spent at least a brief period of time in a mental hospital shortly before the shooting, and that for some reason a psychiatric evaluation had already been ordered, he completely ignored the possible ramifications of those facts as regards the sentencing proceeding.

Id. at 653. As a result, the jury was not provided with the available evidence of the defendant's mental history and bizarre behaviors.

1987: **Lewis v. Lane*, 832 F.2d 1446 (7th Cir. 1987) (tried in 1979). Counsel ineffective for stipulating to prior felony convictions the defendant did not have. He failed to ask the State's Attorney whether he had actual proof of those convictions in the form of certified copies and instead relied on petitioner's uninformed representation that he thought the information contained in the "FBI rap sheet" was accurate, without explaining to petitioner the importance of that information and the critical distinctions between arrest and conviction and between felony and misdemeanor. Prejudice found because one charge had been dismissed and a second pled as a misdemeanor when these had been presented to the jury as violent assault with weapons convictions.

**Armstrong v. Dugger*, 833 F.2d 1430 (11th Cir. 1987) (tried in September 1975). Trial counsel ineffective during sentencing phase for failing to prepare and present mitigation evidence. Counsel spoke with the defendant's parole officer and arranged for her to testify at the sentencing trial, but conducted no other investigation other than a single conversation with the petitioner, his mother and stepfather after the conviction. Available evidence would have shown impoverished childhood, good worker, nonviolent, religious, mental retardation, and organic brain damage.

**Magill v. Dugger*, 824 F.2d 879 (11th Cir. 1987) (tried in March 1977). Trial counsel ineffective in sentencing. Counsel began representation on the first day of jury selection, met with defendant for 15 minutes prior to defendant's testimony, failed to discuss with defendant the possibility that the state would seek to prove premeditation during his testimony on cross-examination, failed to object when the prosecutor asked the defendant to concede his guilt to capital murder, and did not develop or present to the jury the defense theory that defendant committed the killing without premeditation. No prejudice on findings, but in combination with errors of counsel in sentencing,

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prejudice found in sentencing phase. Sentencing errors included counsel's failure to argue defendant's emotional problems which would discount defendant's guilt phase testimony admitting that the killing was intentional and premeditated. In addition, counsel failed to prepare and present available mitigating evidence of a history of serious emotional problems. Specifically, counsel was aware of a mental health expert that had previously treated the defendant and would have testified that he exhibited signs of serious emotional problems at the age of thirteen. He described the defendant as "explosive," and "a time bomb." Finally, counsel called a court-appointed psychiatrist, who had never been asked to examine the defendant regarding the applicability of statutory mitigating circumstances, as a *defense* witness and this witness' testimony virtually precluded finding a statutory mitigating circumstance.

1986: **Jones v. Thigpen*, 788 F.2d 1101 (5th Cir. 1986) (tried in December 1977). Trial counsel ineffective during sentencing phase for failing to prepare and present evidence in mitigation when evidence was available to prove that defendant is mentally retarded, 17 at the time of the offense, and did not have any intent to kill victim killed by accomplice during robbery.

**Johnson v. Kemp*, 781 F.2d 1482 (11th Cir. 1986) (*affirming* 615 F. Supp. 355 (D.C. Ga. 1985)) (tried in July 1975). Trial counsel ineffective in sentencing phase for failing to investigate and present available mitigation. Counsel only talked to defendant and defendant's parents without even asking them about possible sentencing witnesses or explaining the need for mitigation and did nothing more. Available mitigation included 19 good character witnesses and no criminal history, neither of which was presented to jury.

1985: **Blake v. Kemp*, 758 F.2d 523 (11th Cir. 1985) (tried in February 1976). Trial counsel ineffective for making no preparations whatsoever for sentencing phase because of his belief that defendant would be found not guilty by reason of insanity. (State psychiatrist found "reactive- depressive" condition, but did not give opinion on sanity question because of insufficient information from defendant.) Counsel met with the defendant's parents but never asked about character witnesses. If trial counsel had adequately investigated he could have presented character evidence that the defendant was "a man who was respectful toward others, who generally got along well with people and who gladly offered to help whenever anyone needed something."

**Tyler v. Kemp*, 755 F.2d 741 (11th Cir. 1985) (tried in 1980). Counsel ineffective in sentencing phase for failing to prepare and present mitigating evidence. Counsel had interviewed members of the family, including the defendant's grandmother, aunt, and brother, concerning the defendant's background prior to trial. When counsel asked them to testify, they declined because "they knew nothing of the murder and had nothing to tell." *Id.* at 744. In essence, counsel never told them that their testimony was needed on any subject other than guilt or innocence and did not explain the sentencing phase of the trial or that evidence of a mitigating nature was needed. If counsel had explained this evidence was available that the defendant had no prior criminal record, had a good work record, had an alcoholic abusive husband (who was the victim in the case), and was a good mother.

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1984: **King v. Strickland*, 748 F.2d 1462 (11th Cir. 1984) (tried in July 1977). Counsel ineffective for failing to prepare mitigation. Following the conviction, counsel sought a continuance of one day because he had not even discussed sentencing with the defendant. The continuance was denied. Counsel presented a minister and former employer to testimony. If counsel had adequately investigated there were available character witnesses. Counsel also heightened the prejudice by emphasizing during closing argument the reprehensible nature of the crime and the fact that he had reluctantly represented the defendant. “In effect, counsel separated himself from his client, conveying to the jury that he had reluctantly represented a defendant who had committed a reprehensible crime. . . . Rather than attempting to humanize King, counsel in his closing argument stressed the inhumanity of the crime.” *King v. Strickland*, 714 F.2d 1481, 1491 (11th Cir. 1983).

3. U.S. District Court Cases

2002: **United States ex rel. Madej v. Schomig*, 223 F. Supp. 2d 968 (N.D. Ill. 2002) (affirmed on appeal in 1985). Even under AEDPA, counsel ineffective in capital sentencing for failing to prepare and present mitigation evidence. The sentencing hearing was held one day after conviction. Defense counsel had not prepared because he mistakenly believed that he would have time to do so after conviction. The only mitigation presented was the defendant’s testimony. Court finds that prejudice should be presumed under *Cronic* because “counsel failed to conduct any investigation that would submit the question of Madej’s eligibility for the death penalty to ‘meaningful adversarial testing,’” (quoting *Cronic*, 466 U.S. at 659), and even conceded eligibility for the death penalty. Court further finds that, even if *Cronic* does not apply, prejudice was shown under *Strickland*. Available but unrepresented evidence included: evidence that the defendant protected her from physical abuse for years; a plea for mercy from the victim’s husband; evidence that petitioner was a good person; evidence of a troubled childhood; and expert testimony about petitioner’s history of substance abuse and its impact on his “psychological and neurological health.” The Illinois Supreme Court’s finding of no prejudice was “clear error” because the state court “looked at each category of mitigating evidence in isolation” rather than considering whether “there is a reasonable probability the outcome would have been different based on all of the mitigating evidence.” Court held: “There can be no confidence in the outcome of a capital sentencing hearing where the defendant was represented by an attorney who failed to present any evidence to counsel against imposition of the death penalty.” Although not considered individually prejudicial, the court included in the cumulative prejudice analysis, counsel’s failure to advise his client that state law required a unanimous jury and only one juror had to hold out in order to avoid death, which resulted in the petitioner waiving his right to jury and being sentenced by judge alone.

**Pursell v. Horn*, 187 F. Supp. 2d 260 (W.D. Pa. 2002) (tried in January 1982). Counsel ineffective in capital sentencing for failing to prepare and present mitigation evidence. Although the case was reviewed under AEDPA, this issue was reviewed *de novo* because the state court did not address the merits of the claim. The district court also held that no evidentiary hearing was required because the state presented no contrary evidence. Thus, the court expanded the record to include Purcell’s affidavits and held that the AEDPA was not violated because Purcell was denied a hearing on this issue in state court. Counsel’s conduct was deficient because “[t]rial counsel has an ‘obligation to

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conduct a thorough investigation of the defendant's background' in capital cases." (quoting *Williams v. Taylor*, 529 U.S. at 396). Here, counsel had no basis for failing to investigate, because counsel focused only on defeating the one aggravating circumstance of torture. Counsel presented no mitigating evidence and his discussion of it in closing covered only one page. This decision could not reasonably "foreclose any investigation into mitigating evidence" though. If counsel had investigated, he would have discovered that the defendant was the son of a prostitute, who lived in squalor in his first four years. After he was abandoned by his mother to another family, he was physically and sexually abused by an alcoholic father. He began self-medicating with drugs at an early age and was a drug addict by the time he was a teenager. These problems caused neurological damage that affected impulse control and ability to understand right from wrong. Despite all of this, the defendant was a loving father, caring brother, a dear friend, and a man to be trusted. Before the jury, the defendant, "the man was a mere skeleton: a young killer with a prior criminal record and a girlfriend, nothing more and nothing less. Had [his] lawyer tapped into the mitigating evidence available to him, however, he would have added flesh, bones, a mind, and a heart" to the defendant. Ultimately, the jury "may have believed that his life, though shattered beyond repair, was still worth saving." The jury also may have found that the murder was not "preplanned or premeditated," due to the impulse control problems caused by his brain damage. This would also have impacted the consideration of the torture aggravator. In short, this jury "did not have the chance to see [the defendant], the man. It did not have the opportunity to feel sympathy or pity. . . . While this evidence may not have swayed every juror, [the defendant] need only show a reasonable probability that one juror would have found death an inappropriate punishment." Here, while "[a] jury in a capital case may not be barred from hearing any mitigation evidence offered by the defendant concerning his character or background[,] [i]n the present case, the jury was prevented from hearing such evidence, not because the court precluded its admission, but merely because [defense] counsel made an objectively unreasonable decision not to look for it."

2001: **Horn v. Holloway*, 161 F. Supp. 2d 452 (E.D. Pa. 2001), *rev'd on other grounds*, 355 F.3d 707 (3rd Cir. 2004) (tried in May 1986).⁷ Counsel ineffective in capital sentencing, under AEDPA, for failing to request appointment of a mental health expert to assist the defense. Although the defendant waived his right to present testimony of family and friends, he did not waive his right to have a mental health expert testify on his behalf. "[E]ven when a defendant is uncooperative, counsel still has a duty to interview friends and relatives and otherwise investigate to discover whether mitigating evidence exists." *Id.* at 567.

Because the post-trial evaluations show that mental health evidence existed prior to trial, both a complete failure to investigate and a partial investigation that failed to uncover such evidence must be considered unreasonable because counsel probably would have discovered such evidence had his investigation been reasonable. Likewise, because such evidence probably would have been discovered, counsel's

⁷The IAC finding was not addressed on appeal. The Court of Appeals granted a new trial on other grounds.

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decision not to make such an investigation, if indeed he made such a decision, must be considered unreasonable. Further, whether or not an investigation was conducted and whether or not evidence as to mental health issues was uncovered, such evidence must have existed, and therefore counsel acted unreasonably in failing to request that a defense mental health expert be appointed. Trial counsel demonstrated a lack of either preparation or knowledge, or both, in failing to request that the trial court appoint a defense expert to assist in the preparation of Petitioner's mitigation defense at the penalty phase.

Id. at 567-68 (citations and footnotes omitted). Prejudice found because, with the assistance of a mental health expert, the available evidence included cognitive defects; the effects of emotional, physical and sexual abuse; and the effects of chronic drug and alcohol abuse. Thus, there is a reasonable probability that a juror would have weighed the aggravating and mitigating factors differently. "Counsel's deficient performance prejudiced Petitioner by depriving him of any informed presentation of mental infirmities." *Id.* at 573. There can be no strategic or tactical reason for counsel's failure to request that a mental health expert be appointed to assist the defense when mental health issues could be a significant factor at either the trial or penalty phases, because such an expert is necessary to effectively develop and present such evidence, as well as to assist counsel and his client in deciding whether such evidence should be presented at trial. With respect to the state court decision, the court held that the state court had not adjudicated this claim on the merits even though it was properly presented. Thus, the court was applying *de novo* review rather than the standard of 2254(d). The court also held that even if 2254(d) applied, the state court decision was unreasonable because the state court purported to deny post-conviction relief because of the denial of relief on direct appeal when this claim was factually and legally different than the claim raised on direct appeal. "A decision based on an analysis of one set of facts and legal theories cannot reasonably be applied to another set of facts and legal theories only tangentially related to the former set." *Id.* at 565 n. 130.

**Jacobs v. Horn*, 129 F. Supp. 2d 390 (M.D. Pa. 2001), *rev'd on other grounds*, 395 F.3d 92 (3rd Cir. 2005) (tried in 1992).⁸ Counsel ineffective in failing to adequately prepare and present mitigation evidence. Counsel made no effort to perform an investigation into the defendant's past other than speaking with a few relatives who attended the trial. Counsel consulted with a psychiatrist, but did not tell him it was a death penalty case and did not ask him to consider mitigation. He was asked only to examine competence and sanity. Counsel also failed to provide the expert with any background information concerning the crimes or the defendant's history. The only mitigation presented was testimony from the defendant and testimony from his mother that he loved his daughter (one of the victims) and that he was sorry. If counsel had adequately performed, the evidence would have established that the defendant has mild mental retardation, organic brain damage, and schizoid personality disorder. He was also a witness and victim of abuse and suffered

⁸The Court of Appeals held that counsel's ineffectiveness also prejudiced the defendant during the trial.

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from drug and alcohol addictions. The state court held that counsel was not ineffective because counsel had retained a psychiatrist. “At issue, currently, however, is whether an evaluation was performed with regard to *mitigating* evidence not whether the petitioner suffered a mental impairment that would have affected his criminal responsibility or competency to stand trial.” In addition, the expert retained explained that “an evaluation for mitigating evidence is different from an evaluation for criminal responsibility/competency to stand trial,” but he was asked only to perform the latter and was not informed that the prosecution was seeking the death penalty. The state court also found that counsel did not have the additional background information that the trial expert required. The state court’s finding was an unreasonable application of Supreme Court precedent because

The important point is not that counsel did not have the information, but rather, we must examine *why* counsel did not have the information. Here, counsel did not have the information because he failed to investigate and obtain the relevant information. The fact that trial counsel did not have such information merely supports the conclusion that he did not fully investigate—it does not justify the failure to investigate and present evidence. . . .

“[T]he great weight of federal law requires defense counsel in a capital case to investigate a defendant’s background, cognitive status and mental health for mitigating evidence.” Because counsel did not do so here, counsel’s conduct was deficient. Prejudice was also found.

**Pirtle v. Lambert*, 150 F. Supp. 2d 1078 (E.D. Wash. 2001), *aff’d on other grounds*, 313 F.3d 1160 (9th Cir. 2002) (sentenced in July 1993). Trial and appellate counsel ineffective in capital sentencing for failing to interview officers prior to trial and failing to object to admission of statement taken in violation of Miranda. While the defendant was on the ground, handcuffed, with an officer’s knee in his back, and officers threatening to “blow his head off” if he was not cooperative, an officer, without prior Miranda warnings, asked the defendant if he knew why he was under arrest and the defendant said, “Of course I do, you might as well shoot me now.” The officers did not include this statement in their reports and the state did not disclose the statement prior to trial. During the trial, the state offered the statement in evidence without objection and argued on the basis of the statement in both the trial and sentencing. With respect to the lack of Miranda warnings, the court found that “the Washington Supreme Court unreasonably determined that Deputy Walker was not interrogating [the defendant], but rather was just asking background booking questions.” The district court found this to be unreasonable because this clearly was not a booking situation or question. With respect to the state’s failure to disclose the statement and hold a hearing on voluntariness, the state court held that no disclosure or hearing was required because the prosecutor did not know of the statement until the officer’s testimony. The District Court found this to be an unreasonable application of Supreme Court law since “the United States Supreme Court has clearly held that knowledge of police officers is imputed to the prosecution.” With respect to the ineffective assistance claim, the court was “firmly convinced that the Washington Supreme Court erred and failed to reasonably apply the holding of *Strickland* to the facts of this case.” The court found no prejudice during the trial due to “extremely strong” evidence, including the defendant’s testimony admitting guilt.

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Prejudice found in sentencing though, but the court analyzed the “prejudice” in conjunction with the analysis of whether “‘actual prejudice’ resulted because a constitutional violation had substantial and injurious effect or influence in determining the jury’s verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993).”⁹ In any event, the court could not “find that no juror was influenced or persuaded by the fact that [the defendant] had acknowledged he should die for what he had done which then became a part of that juror or jurors’ s moral judgment analysis.”

1998: **Christy v. Horn*, 28 F. Supp. 2d 307 (W.D. Pa. 1998) (tried in December 1993). Counsel ineffective in capital sentencing phase for failing to adequately prepare and present mental health mitigation evidence, presenting damaging character evidence, failing to object to state’s improper arguments in sentencing, and misstating the law in closing argument. From 1973-79, the defendant, while incarcerated for other crimes had been involuntarily committed to a number of mental health institutions due to mental illness. The medical records established that he suffered from paranoid schizophrenia, organic brain syndrome, depression, personality disorder, psychosis, delusions, and long-term drug and alcohol addiction. Within months of his release from confinement, the defendant broke into a business and ran into the night watchman. The guard shot the defendant in the wrist, but was apparently unaware that the wound was superficial and put down his gun and walked away. The defendant grabbed the gun and shot the watchman as the watchman rushed him. He then shot him in the head while the watchman was crouched on the floor. During a trial on unrelated charges, the defendant confessed to this murder. Prior to trial, the defense requested appointment of a defense psychiatrist, but the trial court denied the motion and appointed a court psychiatrist instead. The court psychiatrist testified during a competence hearing that the defendant was competent and sane and suffered only from antisocial personality disorder. The defense did not cross-examine the psychiatrist concerning diminished capacity or mitigation and sought only to introduce the defendant’s medical records. The trial court held that the records would not be admitted without testimony from persons who prepared them. Counsel presented a diminished capacity defense and self defense arguments and had the defendant testify, but did not contact any of the defendant’s previous doctors or present any psychiatric evidence at all. The state, despite the fact that the prosecutor had previously presided over a number of the defendant’s commitment hearings as a county mental health officer, argued without objection that the defendant was faking mental illness and that if any evidence were available it would have been presented. Counsel also elicited testimony of the defendant’s prior incarcerations and failed to object to state’s argument that the defendant just cycled back and forth between prison, mental health facilities, and the streets. During sentencing the defense presented only two witnesses—the defendant’s mother and a prosecution witness who had previously been incarcerated with the defendant. He testified to the defendant’s good character, but also testified that the defendant was not “crazy” and had told him that he would

⁹Note that under the Court’s analysis in *Kyles v. Whitley*, 514 U.S. 419 (1995), the Court stated that no additional harmless error review is necessary after materiality is found. Because the “materiality” standard of *Kyles* is the same as the “reasonable probability” standard of *Strickland, United States v. Bagley*, 473 U.S. 667, 682, 685 (1985), it was unnecessary for the court to address *Brecht* at all with respect to the ineffective assistance of counsel claim.

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kill people, especially any witnesses to a murder that he might commit. During arguments, the state argued without objection and contrary to Pennsylvania law, that the defendant posed a future danger, that the jurors should sentence him to death to avoid becoming another victim, and even if the jury found one aggravating circumstance, the sentence must be death. Defense counsel then argued, contrary to Pennsylvania law, that all 12 jurors had to agree on whatever the verdict was. The Court held that trial counsels' conduct was deficient because they failed to "investigate the mountain of mitigating evidence readily available to them." Slip Op. at *15. Trial counsels' statements that they were hard pressed to find mitigation only proved that they failed to prepare for sentencing. Failure to present the mental health evidence was not a tactical decision, especially in light of the state's arguments that the defendant was only faking mental illness. Counsel simply stated that they did not present psychiatric evidence because of the court psychiatrist's testimony that the defendant was sane and competent. Counsel simply failed to comprehend that this finding did not preclude a finding of mitigating circumstances as defined under state law. This "failure to comprehend the law of mitigating circumstances is objectively unreasonable." Slip Op. at *15-16. Counsel was also unreasonable for failing to object to the state's arguments on the revolving door and the return of the defendant to the community, because under state law, the defendant would not have been eligible for parole. Likewise, counsel failed to object to the state's argument that if one aggravator was found, state law required death, when state law actually required that aggravating and mitigating factors be weighed. Counsel's only offered reason was that they did not want to appear to be a jack-in-the-box. This reason clearly is insufficient. Counsel were also ineffective for presenting evidence of the defendant's good character, because they knew that would open the door to cross-examination and knew that the witness would state that the defendant had told him that he would kill any witnesses. Counsel stated that they called the witness to impeach his testimony for the state by showing that he had been incarcerated previously. Counsel could have done that without presenting him as a character witness and presenting evidence that the defendant had previously been incarcerated. Finally, counsel was ineffective for arguing that all jurors had to agree when, under state law, a less than unanimous agreement for death would result in a life sentence. Making the legally incorrect argument was unreasonable. Prejudice was found based solely on the failure to present the mental health evidence which would have established that the defendant was not "the totally evil person," Slip Op. at *16, the jury found him to be, and would have undermined the state's argument that he was faking. It would have given the jury a reason to be lenient after weighing the aggs and the mits. As it was, the jury found two aggs (one of which was set aside on direct appeal) and no mits. Thus, the jury could not properly fulfill its sentencing function. [In addition to IAC, the Court also held that reversal of the convictions and sentence was required under *Ake v. Oklahoma*, 470 U.S. 68 (1985), due to the court's refusal to appoint a defense psychiatrist, and that reversal of the sentence was required due to the state's improper arguments.]

1994: **Ford v. Lockhart*, 861 F. Supp. 1447 (E.D. Ark. 1994), *aff'd on other grounds*, 67 F.3d 162 (8th Cir. 1995) (tried in June 1981). Trial counsel ineffective for failing to prepare and present mitigation evidence. Counsel admitted that he never investigated the defendant's background or talked to family members about his background. Investigation would have revealed that: defendant suffered severe physical and psychological abuse from father, including being hung from the rafters in a cotton sack or by his wrists all day long and being beaten periodically with extension cord; and

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defendant witnessed father beating mother and siblings. In addition, counsel failed to investigate and present evidence of intoxication at time of the offense despite the fact that hospital records after capture showed that he was “vomiting and drunk.”

1989: **Eutzy v. Dugger*, 746 F. Supp. 1492 (N.D. Fla. 1989) (tried in 1983). Trial counsel ineffective for failing to prepare and present mitigation evidence. Counsel conducted virtually no investigation at all. He never asked the defendant himself about his family background, his marriages, his children, or his employment history, never asked the defendant about possible sources of mitigating evidence, never initiated contact with anyone to determine whether there were facts about the defendant which could be helpful at sentencing, and never sought copies of any of the defendant's school, medical or prison records. Even assuming that the defendant did not want his family involved, counsel's failure to investigate was not excused. Available mitigation would have shown: defendant was a non-violent, caring person, with good character and an outstanding work history; a turbulent family history marked by poverty, chaotic home, alcoholic mother; defendant began drinking at age 12 and had a long history of alcoholism and amphetamine abuse; defendant had been hospitalized twice for psychiatric reasons; and prior prison records reflected adaptability.

**Mathis v. Zant*, 704 F. Supp. 1062 (N.D. Ga. 1989) (tried in May 1981). Trial counsel ineffective in sentencing phase for failing to investigate and present evidence in mitigation. Even though counsel had limited knowledge of the defendant's “troubled background,” he “made inquiries that amounted to an investigation in name only.” Specifically, he only interviewed one family member, consulted a three page psychiatric report based on a single visit with petitioner, neglected to contact petitioner's employer, and failed to obtain copies of any of petitioner's school or prison records. Investigation would have shown: impoverished childhood marked by emotional and physical abuse of alcoholic father; borderline mental retardation and low intellectual functioning; history of alcohol and drug abuse marked by blackouts; and evidence of good behavior in prison. In addition to the lack of mitigation evidence, counsel was ineffective for failing to ask for mercy, but rather essentially apologizing to the jury in sentencing argument for representing defendant.

1988: **Newlon v. Armontrout*, 693 F. Supp. 799 (W.D. Mo. 1988), *aff'd on other grounds*, 885 F.2d 1328 (8th Cir. 1989) (tried in August 1979). Trial counsel ineffective for completely failing to prepare and present mitigation evidence. Counsel failed to even ask explained the importance of mitigation or discuss a sentencing defense strategy with the defendant. Investigation would have shown that defendant had a low IQ, a turbulent family history, a non-violent history, and a reputation as a follower. In addition, trial counsel was ineffective for failing to object to prosecutor's improper closing argument or rebutting in his own argument. Prosecutor improperly argued his personal belief that death was appropriate based on his position of authority; compared defendant to Charles Manson and Son of Sam; personalized decision by asking jurors to consider that it had been their own children killed; told jury (incorrectly) that the trial judge would review their decision; argued that life sentence was only temporary confinement because parole laws could be changed or sentence commuted; argued courage; and argued that all murders should be punished by death.

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1987: **Gaines v. Thieret*, 665 F. Supp. 1342 (N.D. Ill. 1987), *rev'd on other grounds*, 846 F.2d 402 (7th Cir. 1988) (tried in October 1979). Trial counsel ineffective in sentencing phase for failing to investigate and present evidence in mitigation. Counsel talked with the defendant, some family members, “a girlfriend,” and an employer, but could not remember specifically asking about the existence of mitigating evidence. If counsel had adequately investigated, the evidence would have shown that defendant: was repeatedly and severely beaten by father, sometimes while naked and tied up; had a good work history during six months prior to murder; was kind to his live-in girlfriend and her son and helped to support them; had a good character; and was placed in an adult prison when he was 15 and spent time in isolation ward and psychiatric ward and witnesses would have testified that this confinement had a seriously disturbing effect on defendant. In addition to failing to present evidence, counsel’s entire closing argument was simply to ask for a life sentence without offering any reason why it should be given.

4. Military Cases

1998: **United States v. Murphy*, 50 M.J. 4 (C.A.A.F.1998) (sentenced in December 1987). Court held that death sentence must be set aside based on the inexperience of trial counsel, a conflict of interest, failure to investigate and present evidence of social history, and failure to adequately explore mental health evidence. With respect to the experience of counsel, the Court noted that neither trial counsel had ever been involved in a capital case or received any capital litigation training. The counsel responsible for voir dire and mitigation evidence had only been a defense counsel for four months. The Court noted “inexperience—even if not a flaw *per se* might well lead to inadequate representation.” With respect to the conflict, the Court noted that an inmate testified that he had overheard Murphy making incriminating statements while in pretrial confinement. The inmate told his attorney, who was also Murphy’s attorney, and the attorney negotiated a pretrial agreement for the inmate before moving to withdraw as the inmate’s counsel. The same judge who presided at Murphy’s trial presided over the inmate’s plea. Nonetheless, neither the judge nor counsel mentioned the conflict on the record and the inmate was not cross-examined. Counsel also made no attempt to impeach him even though he had recently been convicted of several crimes involving dishonesty and deceit. While the inmate’s testimony was mostly cumulative to other evidence, he added one important fact: the motive for killing his own son was to leave no witnesses. [Murphy had been convicted of killing his ex-wife, stepson, and his own son.] Because the court could not “say with confidence that [the inmate’s] testimony about why appellant killed his son had no impact on the members’ deliberations on sentence . . . we are compelled not to affirm appellant’s death sentence without resolving the conflict-of-interest question.” Slip Op. at 11. With respect to mitigation evidence, trial counsel’s investigation consisted only of correspondence and telephone calls from Germany to family and friends in North Carolina, which did not result in any mention of abuse or maltreatment. Defense offered evidence of good character, non-violence, good soldier, and remorse in mitigation. While the lower court characterized the sentencing case as a “tactical judgment,” this Court held that “counsel’s lack of training and experience contributed to questionable tactical judgments, leading us to the ultimate conclusion that there are no tactical decisions to second-guess.” Slip. Op. at 13. The evidence that would have been discovered,

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according to post-trial evidence, was that Murphy has indications of neuropsychological dysfunction, post-traumatic features, and persistent and severe traumatic childhood abuse. He also may have fetal alcohol syndrome. One expert even declared that he was insane at the time of the offenses. Based on all of these factors, the Court held, “we are satisfied that appellant did not get a full and fair sentencing hearing. There are too many questions arising out of the conflict of interest issue, the potential mitigating effect of the posttrial [sic] evidence as to his mental status, and the lack of training and experience of his trial defense counsel in the defense of capital cases to allow us to affirm a death sentence here.” Slip Op. at 16-17. The Court was uncertain as to the impact of the post trial evidence on the convictions, however. Thus, the Court remanded the case to the Army Court to either decide the issue or to grant a complete new trial. At a minimum, however, the Court ordered that the Army Court either commute Murphy’s sentence to life or order a new trial on sentence.

1997: **United States v. Curtis*, 46 M.J. 129 (C.A.A.F. 1997) (sentenced in August 1987). On reconsideration court reversed itself and held without discussion (only citation to prior dissent) that counsel was ineffective in sentencing. Details found in prior dissent are that counsel was ineffective for failing to adequately prepare and present evidence of extreme intoxication at the time of the offenses. Counsel was aware from witness statements, discovery, a court-ordered evaluation of how much the defendant drank, how he was behaving before the murders, the defendant’s own statements, the statements of the arresting officer who noted hours after the murders that the defendant was extremely impaired, and the statements of the sanity board (government examination) which noted that the crimes probably would not have happened but for the alcohol intoxication at the time of the offenses. Nonetheless, counsel did not present this evidence in sentencing. While counsel reasonably explained that this evidence was not presented during findings because of concern that it enhanced premeditation, no explanation was offered for sentencing. This evidence “was consistent with the unsuccessful ‘rage’ defense” used during trial, “and thus did not require a change of tactics after findings. Once the court members rejected the ‘rage’ theory, there was no explanation offered to the members why a previously good Marine or a shy, introverted, young man from a good Christian home would commit these offenses.” The answer appears to be the intoxication. *See United States v. Curtis*, 44 M.J. 106, 172 (C.A.A.F. 1996) (Gierke, J., Dissenting).

5. State Cases

2003: **State v. Coney*, 845 So. 2d 120 (Fla. 2003) (sentenced in March 1992). Counsel was ineffective in capital sentencing for failing to adequately prepare and present mitigation evidence. Coney was convicted of killing his jailhouse lover who had spurned him by dousing him with a flammable liquid and setting him on fire when the lover ended their homosexual relationship. In sentencing, counsel presented testimony in general terms concerning the defendant’s childhood and upbringing but did not present any mental health evidence. Eleven months prior to trial counsel requested a psychological evaluation, but made no attempt to have the evaluation conducted until just prior to the sentencing hearing. Following the conviction the court-appointed examiner apparently did not evaluate the defendant because of a fee dispute. Counsel did obtain an examination several days prior to sentencing from both a psychiatrist and a neurologist, but neither of these experts was

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provided with any background information and their testimony and reports made it clear that they were not familiar with the meaning of statutory mitigating factors. The neurologist found no evidence of neurologic disease but did recommend neuropsychological testing, which trial counsel never obtained. Counsel's conduct was deficient, because if counsel had obtained qualified experts and provided them with sufficient background information in time to adequately evaluate the defendant, counsel could have presented testimony both from a neurologist and a neuropsychologist that the defendant suffered from frontal lobe dysfunction and deficits in his right brain functioning that resulted in impulsive behavior and revealed that the defendant was suffering from an extreme mental or emotional impairment at the time of the commission of the offenses. Prejudice was found because the jury recommended imposition of the death penalty only by a seven to five vote, and if only one of the seven jurors had changed his or her vote, the recommendation would have been for a life sentence. In view of the law requiring the presence of compelling evidence to override a jury's recommendation of life, the court would likely have followed a recommendation for a life sentence. The court also found prejudice because, even though the state vigorously challenged the mental health evidence and presented contrary evidence, the court found "it is peculiarly within the province of the jury to sift through evidence, assess the credibility of the witnesses, and determine which evidence is the most persuasive." *Id.* at 132.

***Head v. Thomason**, 578 S.E.2d 426 (Ga. 2003) (tried in October 1996). Counsel ineffective in capital case for failing to call mental health experts he knew could provide mitigating evidence in sentencing. The defendant "is a burglar who shot and killed the homeowner who came upon him while he was burglarizing the victim's home." Following a bench trial, the defense presented mitigation evidence that showed only the defendant's profession of remorse, his lack of violent tendencies, that he is easily influenced, and that he had previously been hospitalized for marijuana use. Counsel was aware of mental health experts who could have testified but did not present their testimony. One of the experts, a clinical psychologist, had testified at the competence hearing that the defendant had an IQ of 77. The expert, a psychiatrist, had interviewed the defendant during a forensic evaluation and informed counsel that there were indications of intellectual impairment, low self esteem, and depression. Counsel possessed the defendant's prior school, medical, and institutional records, but never gave the records to the psychiatrist or presented this evidence in mitigation because counsel testified they did not know how to do it without an expert. Counsel did not have the expert to execute an affidavit stating the need for additional funding, but instead simply requested an additional \$25,000 for mental health expert assistance. When the trial court rejected the additional funding trial counsel never contacted the expert again even though the expert testified that he would have worked with counsel without further funding or for an amount significantly less than \$25,000. "We conclude, given the importance of mitigating evidence in death penalty cases, that an attorney has not acted reasonably when he fails to call mental health experts he knows have mitigating evidence and explains his failure to present lay mitigating evidence by asserting that he had no experts to call."

2002: ***State v. Lewis**, 838 So. 2d 1102 (Fla. 2002) (sentenced in August 1988). Counsel was ineffective in capital sentencing for failing to adequately prepare for presentation of mitigation evidence in sentencing, which resulted in the defendant's waiver of his right to present mitigation evidence

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being not a knowing, voluntary, and intelligent waiver. Trial counsel spent a significant amount of time preparing for the guilt or innocence phase of trial, but did not make any attempt to prepare for sentencing until after the conviction. Counsel then attempted to talk with the defendant's mother but "this attempt was hampered because of [the] delay in starting the investigation." The mother was angry that her son had been convicted and blamed the trial attorney. The only other witness interviewed by counsel was the defendant's father, who was also a convicted felon. Counsel never attempted to interview any other potential mitigating witness or obtain any background records, including the defendant's hospitalization records, school records, and foster care information. Counsel did request a mental health expert but did so only two weeks after the defendant had already been convicted. The expert interviewed the defendant but told counsel that he needed documented corroboration before he could render a professional opinion or conclusion. The expert discussed possible theories with defense counsel but did not receive any additional information prior to sentencing. On the day sentencing began, the expert was the only witness willing and able to testify for the defense and the defendant stated that he did not want the expert to testify and waived mitigation. If counsel had adequately investigated the evidence would have revealed that the defendant's mother was an alcohol, he was exposed to violence and severe neglect as a child, he suffered a skull fracture at the age of 2 or 3 that required 2 weeks of hospitalization, and he observed his fathers violence and domestic abuse on a daily basis. After his parents separated, the parents tried to kidnap the children from each other. The defendant was turned over to foster care and shuffled back and forth between numerous homes. He had diminished mental capacity and brain damage. He had a recorded history of serious alcohol and drug abuse and he had consumed a considerable amount of alcohol on the night of the crimes. The trial expert testified that, if he had been provided with the background records and documentation, he would have been able to render a complete diagnoses and testify to substantial mitigation. The court held, "Although a defendant may waive mitigation, he can not do so blindly; counsel must first investigate all avenues and advise the defendant so that the defendant reasonably understands what is being waived and its ramifications and hence is able to make an informed, intelligent decision." Counsel's conduct was both deficient and prejudicial in failing to adequately investigate and prepare for the penalty phase.

***Commonwealth v. Ford**, 809 A.2d 325 (Pa. 2002) (sentenced in March 1992). Counsel ineffective in capital case for failing to adequately investigate and present mitigation evidence in sentencing. Appellate counsel was also ineffective for failing to assert trial counsel's ineffectiveness. In sentencing, trial counsel presented the defendant's sister to testify but not prepare her testimony, which amounted to only a plea of mercy. Counsel also presented evidence of the defendant's low IQ and that his educational achievement was at the 2nd or 3rd grade level. The jury found two aggravating circumstances and no mitigating circumstances. Trial counsel was aware of a competency evaluation that revealed that the defendant had a troubled childhood and learning problems. Counsel did not investigate to obtain prior hospitalizations, mental health records, or school records. He also did not obtain additional information form the defendant's family or have a mental health professional evaluate the defendant with respect to mitigation. Counsel's conduct was deficient because there was no reasonable basis for failing to investigate and present this mitigating evidence. Although counsel did state that he did not present psychiatric records because the prosecution informed him that they contained reports that the defendant was "explosive," this

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decision was based on very little information and without actually reviewing the supporting documents. If counsel had adequately investigated, the evidence would have revealed schizophrenia, brain impairments including mental retardation, learning disabilities, and post traumatic stress. The defendant showed signs of dementia early in life and had a long history of psychiatric treatment for impaired reality, including hearing voices, and alcohol dependence. The defendant also had an extensive history of abuse and family dysfunction. The available evidence would have supported three statutory mitigating circumstances. The Commonwealth presented rebuttal evidence in post-conviction showing that the defendant had previously been convicted of sexual assault of a 12 year old boy, had been a gang member in his youth, and had threatened to kill his grandparents. The Commonwealth also presented psychiatric evidence of antisocial personality disorder and a clinical psychologist that would have testified that the defendant does not suffer from organic brain damage or learning disabilities. The court still found prejudice because the jury was given no meaningful evidence of mitigation to consider in their weighing process. Moreover, even without any mitigation evidence, the jury was still deadlocked at one point during the penalty phase deliberations.

2001: **Ragsdale v. State*, 798 So. 2d 713 (Fla. 2001) (tried in May 1988). Counsel ineffective in failing to prepare and present mitigation evidence in sentencing. Counsel was a sole practitioner with only his wife assisting. Counsel did not conduct any investigation and relied only on a few calls made by his wife to Ragsdale's family members. Counsel did not even know who his wife contacted or the content of the conversations. Counsel only called one witness to testify that Ragsdale suffered several head injuries as a child without any explanation of how or whether this affected him. If counsel had investigated, the evidence would have established that defendant grew up in an impoverished home with numerous moves and had an abusive father. He observed violence towards his mother, was made to fight with his siblings until they bled, and was sometimes handcuffed to a pole for hours at a time. In addition, Ragsdale's father had shot at him twice with a pistol. It was so bad that Ragsdale began to run away to an aunt's by age eight and quit school and moved out permanently at age 15-16 to live with a cousin. He had extensive alcohol and drug abuse. He also had numerous head injuries, including having an eye shot out accidentally with an arrow, being thrown through a car windshield in an accident, and being hit with a metal pipe. Following these incidents, he would have severe headaches and behavioral changes, including violent snaps. A defense expert found that Ragsdale was psychotic at the time of the offense, and thus the statutory mitigating circumstances of extreme mental or emotional disturbance and inability to conform to the requirements of law applied in the instant case. This doctor also identified a list of nonstatutory mitigating factors including organic brain damage, physical and emotional child abuse, history of alcohol and drug abuse, marginal intelligence, depression, and a developmental learning disability. Prejudice was established because even the state's expert, who disagreed with the conclusion that Ragsdale was psychotic and suffered organic brain damage, expressed no opinion on the statutory mitigators. He did, however, testify to the existence of mitigating evidence which was not presented at the penalty phase, including a severe learning disability and that Ragsdale's IQ score was in the borderline retarded range. He also concluded that Ragsdale's brain was impaired and that Ragsdale had a personality disorder with paranoid features. The court, thus, found it be "inescapable" that

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there was available evidence from experts which would have supported substantial mitigation had counsel performed adequately. *Id.* at *5.

2000: **Sanford v. State*, 25 S.W.3d 414 (Ark. 2000) (sentenced in 1996). Counsel ineffective in capital sentencing for failing to investigate and present mitigation evidence concerning defendant's school records showing long-standing mental retardation, age, medical records, family history, and jail records, reflecting commendations he had received. Counsel conceded that he did little to prepare for sentencing, even though he had a social worker available to him, because he was "disappointed" with guilty verdicts and "tired." Counsel called only the 16-year-old defendant's parents, who testified generally that defendant was young, had been a good son, had a mental problem, and his life was worth saving. Counsel did not recall the defense expert from the trial, but did argue additionally based on that expert's testimony that defendant was mentally retarded, which was disputed by state based on one IQ score of 75. If counsel had investigated he would have discovered that the school records showed defendant had been in special education, had been considered mildly mentally retarded during much of his time in school, and had a good record with only one disciplinary incident. His medical history reflects he almost suffocated to death as a child when a load of cotton seed fell on him; and defendant's mother testified he acted a "bit slower" after the cotton-seed incident. Later he suffered a blow to the head with a two-by-four wielded by his sister. Proof also available, but not investigated or presented, showed siblings and other family members to be either slow or retarded. Although the court did not specifically discuss prejudice, the court noted that the jury found three aggravating factors and no mitigating factors and state law prohibited the death penalty if the jury concluded the defendant was mentally retarded at the time of the crimes.

**State v. Riechmann*, 777 So. 2d 342 (Fla. 2000) (sentenced in August 1988). Counsel ineffective in capital sentencing for failing to prepare and present mitigation. Defendant and his girlfriend had moved to Florida from Germany. Girlfriend was killed. State's theory was that she had been a prostitute for the defendant and, once she stopped prostituting, he killed her for insurance proceeds. The defense did not investigate or contact any witnesses in Germany and presented no mitigation evidence at all. Available yet unrepresented mitigation revealed that defendant had positive personal qualities and good character and at least 15 witnesses were available to testify for him. No real discussion of prejudice. [Court also found error because the prosecutor prepared the trial court's sentencing order after an ex parte discussion and the defense was not provided with the draft order, which found no mitigation.]

**People v. Thompkins*, 732 N.E.2d 553 (Ill. 2000) (tried in June 1982). Counsel ineffective in capital sentencing for failing to prepare and present mitigation evidence. Counsel never met with defendant's brothers, children, aunt, supervisors, coworkers, friends, or writers of letters on defendant's behalf, nor did he seek records as to defendant's education, employment, military service or prison incarceration. If counsel had prepared, evidence could have been presented to show that, in witnesses' opinions, defendant was a good son, husband, father, friend, and worker, that he may have helped save the life of a youth officer who later became a police chief, and that he was kind to, and protective of, women. Counsel presented only four stipulations concerning the possible origin of bullets used in the murders. Counsel also presented brief testimony from

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defendant's wife concerning his history. Following the court's sua sponte order for a presentence report, counsel presented more than 50 letters in defendant's behalf, including some of the information listed above. Many of the letter writers acknowledged that they hardly knew the defendant though. The court acknowledged reading the letters but found no mitigation. "[B]ecause counsel failed to conduct an investigation and uncover what the possible mitigation witnesses would have to say, he was in no position to make a reasoned decision whether their testimony would have any impact on the judge. . . . In conclusion, counsel's rationale for failing to investigate mitigating evidence stemmed not from a reasonable strategy, but from an objectively unreasonable failure to investigate. As such, counsel's performance was constitutionally deficient." *Id.* at 571 (citations omitted). Counsel's conduct was not excused by uncooperativeness of defendant. "The mere fact that a client is uncooperative will not excuse a failure to investigate in a capital case." *Id.* at 572. Counsel's conduct also was not excused by fear of the aggravating evidence that could be introduced in response. This was the finding of the lower court, but there was no evidence to support the finding. Counsel simply failed to investigate and did not know of the available evidence. *Id.* at 573.

1999: **People v. Morgan*, 719 N.E.2d 681 (Ill. 1999) (sentenced in June 1983). Counsel ineffective for failing to prepare and present mitigation evidence. Defendant convicted of several murders and rape by jury and then proceeded to sentence before the judge alone. In opening statement, defense counsel argued statute unconstitutional and made a religious appeal. He told the judge he would hear from the defendant and his family and would here evidence of medical problems. State presented numerous violent convictions and incidents in defendant's past in aggravation. In 10 pages of mitigation, the defense presented the defendant's girlfriend and mother to say they loved him. Mother also testified that the defendant has had seizures since age 8 due to a spot on brain caused by trauma and that he sometimes blanks out. Counsel also cited 1978 presentence report that revealed seizures. In closing prosecutor pointed out that there was no medical testimony as promised and no showing of how the seizures were relevant as mitigation evidence. Defense closing was basically just an irrelevant and nonsensical religious appeal citing "love" as mitigation. In sentencing, the judge found no "rhyme" or "reason" for the "senseless" crimes and found no mitigation. Although the judge expressed distaste for the death penalty, because the statute required a death sentence if no mitigating evidence found, he sentenced the defendant to death. Post-conviction evidence revealed that counsel had been retained the day of arrest and told shortly thereafter by mother of seizure history. Counsel did not talk to other family members or witnesses. If he had investigated, he would have discovered lay witnesses who would testify that the defendant suffered from an illness at age 20 months that likely caused the seizures. He has suffered severe seizures since that time. He was frequently hospitalized as a child. He has fainting and black-outs and engages in violent behavior for no apparent reason. He also has features of paranoia and drug and alcohol problems. Eyewitnesses, including even the rape victim, would have established that he was paranoid and using drugs and alcohol at the time of these offenses. Experts, including neurologist, Dr. Pincus, would have testified that the defendant has severe frontal lobe damage and other diffuse damage. The combination of the brain damage, drugs and alcohol, and paranoia rendered the defendant under extreme mental or emotional disturbance for these offenses and explains prior violent episodes because defendant can not control violence. In addition to this evidence, the evidence would have also established that the defendant was physically abused by his

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mother during his childhood. Deficient conduct found because defense counsel's recollections that he knew nothing of seizure history and defendant appeared normal to him were not credible. Counsel was clearly, as is apparent from sentencing hearing, that the defendant had a history of seizures. Moreover, even if the defendant appeared normal and neither he or his family mentioned history, counsel's conduct was still deficient for failing to investigate. "We have repeatedly held that the duty to make a reasonable investigation concerning potential mitigation evidence is imposed on counsel and not upon a defendant. Moreover, we have also held that defense counsel's duty to investigate is not limited to matters about which defendant [or his family] has informed defense counsel." *23 (citations omitted). Prejudice found because the available evidence would have mitigated the aggravation evidence of prior violent episodes and would have provided the "rhyme" and "reason" for these offenses found lacking by the sentencing judge.

***Rondon v. State**, 711 N.E.2d 506 (Ind. 1999) (tried in 1985). Counsel ineffective in sentencing phase for failing to prepare and present mitigating evidence. Counsel focused primarily on guilt phase and did not prepare at all for sentencing until the night before the penalty phase of trial, except interviewing a minister. At that point, they arbitrarily agreed to limit their investigation of background to the two years the defendant had lived in the county. They did not even ask the defendant to summarize his experiences prior to 1982. Counsel presented only three witnesses in sentencing who testified about good work habits and friendliness, but counsel waived opening statement and in closing did not even argue that this evidence should be considered as mitigating evidence. A simple interview of client would have revealed, as a competence evaluation following the jury's recommendation of sentence did, that the defendant had a second grade education, had been treated for psychiatric problems in Cuba where he was born and raised, had been given shock treatment for psychiatric problems, and possibly had brain damage from being hit in the head with a machete.

1998: *In re Gay, 968 P.2d 476 (Cal. 1998) (tried in June 1983). Counsel ineffective in sentencing phase and the cumulative prejudicial effect of counsels' errors required that death sentence be vacated. Defendant was charged with killing a police officer and numerous armed robberies. The defense counsel tricked the defendant into retaining him with the help of a psychologist/minister and then got himself appointed. Counsel then advised the defendant to confess to the numerous armed robbery charges, based on an alleged deal that the defense did not have, even though the state's evidence was based only on weak circumstantial evidence and accomplice testimony. The confession allowed the state to convict and to portray the defendant as a serial robber, which was devastating in light of the absence of substantial mitigating evidence in sentencing. Counsel then selected and used the psychologist and a psychiatrist based on a fee arrangement. The psychologist would help trick people to get the attorney retained and in turn the attorney would retain these "experts" who worked together. The psychiatrist was unwilling to take the case if extensive work was required, but counsel assured him that death was a foregone conclusion and extensive time was not required. The psychologist, who was not licensed, did only a Bender Gestalt (neuropsychological screening test) and a WISC test, which is a children's intelligence test. The psychiatrist interviewed the defendant and reviewed a single parole report. He did not request and was not provided with any additional information. He testified only that the defendant is

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sociopathic, but adapts well to structured environments. A few other defense witnesses that counsel spoke to briefly, if at all, prior to their testimony, testified that the defendant has good character. Counsel did virtually no investigation for mitigation and relied only on interviews of the defendant. If counsel had adequately investigated, the evidence would have revealed that the defendant was raised in a deprived, physically and emotionally abusive, and chaotic home. His alcoholic father suffered from substantial mental impairments and subjected defendant to extreme physical abuse. His mother was emotionally neglectful and abusive. The defendant suffered from PTSD and was dissociating at the time of the offense. He had organic impairments, including areas of the temporal and parietal lobes, and had temporal lobe seizures. He had attention deficits, learning disabilities, a mood disorder, characterized by periods of depression and manic activity, and substance abuse disorder, as well, and was using drugs prior to the offenses. His impairments made him susceptible to the aggressive influence of his codefendant. In addition to being mitigating, much of this evidence would have lessened the impact of the state's aggravating evidence by explaining it from a mental health standpoint. Counsel's failure to investigate was not excused by reliance on the defendant or by his preoccupation with the guilt-or-innocence phase. His failure to investigate apparently resulted from his uninformed belief that if the defendant was found guilty, the death penalty was inevitable. In addition to all of these problems, during his representation of the defendant, counsel was being investigated by the same prosecutor for misappropriation of funds, which presented a potential conflict of interest that was undisclosed. Reversed based on cumulative prejudice.

***Turpin v. Lipham**, 510 S.E.2d 32 (Ga. 1998) (sentenced in February 1987). Counsel ineffective in sentencing for failing to adequately prepare and present mitigation evidence. During sentencing for rape, murder, burglary, and robbery counsel presented 2500 pages of records from the Department of Family and Children Services and the Anneewakee Treatment Center (a home for children with behavioral problems), but did not present any testimony concerning these records other than the brief testimony of the records custodians. The only other mitigation evidence offered was the defendant's wife asking for mercy because of their son. Trial counsel obtained the records but did not have a mental health expert to examine them. Instead, trial counsel asked a friend, who was a family counselor to review the records. The friend reported that the records were both aggravating and mitigating. While they established childhood abuse and neglect, they also chronicled violent, antisocial behavior from an early age and that he was not insane or incompetent. One expert also examined the defendant and found that he was not insane or incompetent. Based on these findings and the two-edged nature of the records, trial counsel decided not to hire a mental health expert. The Court stated, "While trial counsel is afforded tremendous deference over matters of trial strategy, the strategy that is selected must be supported by adequate investigation." *Id.* at _____. Trial counsel were deficient in relying only on the family counselor's review of the records, because he had no medical or doctorate degree and is not even licensed as a counselor. In addition, the counselor only reviewed the records in his spare time as a favor to a friend, without any anticipation that he might be called to testify, and he did not even see all the records. The records he did see were not reviewed in depth. In addition, the counselor testified that he was only told to look at the records for competence and sanity, not for mitigation evidence. Trial counsels' failure to read these records or hire a mental health expert to examine the records was not reasonable under the circumstances,

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because trial counsel knew the defendant had been institutionalized in mental hospitals, children's homes, and treatment centers for nine years. The records revealed that he had been subjected to, or diagnosed with, chronic poverty, physical abuse, alcoholic parents, severe neglect, isolation from his family, severe behavioral problems, conduct disorders, anxiety disorders, a possible learning disability, inadequate socialization, and head injuries. Even though counsel made the records the center piece of the mitigation case, they did not hire an expert to review the records and did not contact any of doctors or psychologists identified in the records. If counsel had even had an expert to review the records, they would have been told that the disparity between verbal and performance IQ scores and the results of the Minnesota Multiphasic Personality Inventory suggested organic brain damage and post-traumatic stress disorder. The Court stated that no reasonable lawyer would have given the jury 2500 pages of raw institutional documents and asked them, without any guidance, to read through them for mitigation evidence. In addition to the sheer volume, the records were at times illegible handwriting, difficult to understand because there was wording and abbreviations used by the institutions that were meaningless to outsiders, jurors would not understand medical and psychological terms in the records, and jurors could not understand raw test data and diagnoses "without the proper interpretive expertise." Slip Op. at *9. The Court observed, "It is usually true that evidence of a defendant's troubled childhood will present him in a more sympathetic light to a jury." Slip Op. at *9. Nonetheless, "the average juror is not able, without expert assistance, to understand the effect [the defendant's] troubled youth, emotional instability and mental problems might have had on his culpability for the murder." Slip Op. at *9. Trial counsels' deficient conduct was not excused by the strategy to avoid the two-edged nature of the records, because counsel presented the records in evidence. Thus, the jury could have easily discovered the aggravating aspect of the records. The Court also found prejudice because, even though the crimes were "horrific," presentation of the evidence of the defendant's mental disorders and the abuse, neglect and isolation he experienced as a child may have resulted in a sentence less than death.

***State v. Johnson**, 968 S.W.2d 686 (Mo. 1998) (en banc) (tried in May 1995). Counsel ineffective for failing to present the testimony of a forensic psychiatrist that the defendant suffered from "cocaine intoxication delirium" at the time of the offenses. Counsel never spoke directly to psychiatrist (paralegal spoke to him) prior to trial because of work on another capital case. A motion for continuance was denied a week before trial and counsel never renewed until just before penalty phase arguments. Counsel scheduled a few conference calls with psychiatrist during the trial, but missed for a variety of reasons. Finally, counsel had paralegal to call psychiatrist to drive the 120 miles to testify and the psychiatrist responded that he would not come until he spoke personally to the attorney. Without requesting a continuance, the attorney presented mitigation and rested. The jury heard testimony concerning the defendant's background and expert testimony from a pharmacist about the long term effects of cocaine abuse, but the expert was prohibited from testifying concerning mental state at the time of the offense because he had not examined the defendant and was not a forensic expert. Trial counsel testified that there was no strategic reason for not calling the forensic psychiatrist and that the defense strategy was based on the psychiatrist as a cornerstone. Counsel repeatedly requested instruction on the mitigating circumstance concerning diminished capacity to appreciate criminality of to conform conduct to law but was denied because there was no evidence to support the mitigator. In evaluating prejudice, the court declared: "The evaluation

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of the aggravating and the mitigating evidence offered during the penalty phase is more complicated than a determination of which side proves the most statutory factors beyond a reasonable doubt,” because the jury still has the discretion to sentence to life. 968 S.W.2d at 700. “In analyzing the existence of this reasonable probability [under *Strickland*], we must consider the weight of evidence supporting each statutory aggravating and mitigating factor on which the jurors would have been instructed had they been presented with . . . [the questioned] testimony. We must also consider the impact of . . . [the questioned] testimony in the context of all the evidence presented.” *Id.* Prejudice found in this case regardless of whether the judge would have instructed on the additional statutory mitigator or not because the jury still could have considered the psychiatrist’s testimony in mitigation.

1997: **People v. Ruiz*, 686 N.E.2d 574 (Ill. 1997) (tried in 1980). Counsel ineffective in sentencing where, even though counsel couldn’t remember whether he investigated or not, it was apparent from the record that he conducted no investigation, gathered no school records, no criminal records, retained no experts, and talked to no family members. Counsel presented only evidence that defendant was 19 and was not the triggerman. If counsel had adequately prepared and presented the mitigation the evidence would have also revealed that the defendant had been physically abused by his father, his father was involved in organized crime and gave the defendant drugs when he was only 11-14 years old, the defendant’s older brother was in gangs, the defendant had no male role model, he was involved in drugs and alcohol by age 11 due to the influence of his brother, and he had a learning disability.

**People v. Howery*, 687 N.E.2d 836 (Ill. 1997) (sentenced in February 1991). Counsel ineffective for failing to prepare and present mitigation evidence because counsel believed it would be futile. There was extensive evidence available from witnesses who would have testified that the defendant made extensive civic contributions and worked for the betterment of the community, he had no criminal history, was under emotional distress, and had an alcohol problem. No evidence was presented even though some witnesses had contacted counsel and volunteered to testify and the sentencing judge had asked for more information regarding the defendant. The court found that the “sentencing proceedings were a mere post-script to the trial” and added nothing to the guilt-or-innocence trial.

**Games v. State*, 684 N.E.2d 466, *modified on reh’g*, 690 N.E.2d 211 (Ind. 1997) (tried in February 1984). Trial court PCR granted a new sentencing based on ineffective assistance. The state did not appeal on this issue, so there is no discussion of facts on issue.

1996: **Rose v. State*, 675 So. 2d 567 (Fla. 1996) (sentenced in July 1983). Counsel ineffective in resentencing for failing to prepare and present mitigation evidence. Counsel failed to investigate the defendant’s background or obtain school, hospital, prison, and other records. Counsel proceeded with an accidental death theory that even he believed was weak because he was inexperienced, had only 79 days to prepare (during which he got married and honeymooned for 10 days) and another attorney told him that was the best defense. If counsel had investigated available evidence would have included expert and lay testimony to prove poverty, emotional abuse and neglect, slow learner

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and low IQ, organic brain damage, personality disorder, and chronic alcoholism. Evidence would have supported at least two statutory mitigating circumstances when the trial court had found none.

**State v. Van Cleave*, 674 N.E.2d 1293 (Ind. 1996), *affirmed on reh'g*, 681 N.E.2d 181 (Ind. 1997) (sentenced in May 1983). Counsel ineffective in sentencing for failing to adequately investigate and present evidence of a difficult childhood, including parents' divorce and racial issues, and a nonverbal learning disorder.

**Doleman v. State*, 921 P.2d 278 (Nev. 1996) (sentenced in May 1990). Counsel ineffective for failing to adequately investigate and present testimony from family members and employees of resident school. Family members would have testified that mother was a prostitute and drug addict, the defendant was physically abused, and was abandoned to a series of foster homes and reform schools beginning at age 4. Although school records contained some of this information, live testimony "could have effectively humanized Doleman in the eyes of the jury." (281). Moreover, the testimony of school teachers at a resident school would have revealed that the defendant flourished in a structured environment and was able to adhere to and adapt to institutional rules. In addition, the testimony would have supported defense theory that defendant was a follower and had been dominated by his accomplice.

**Goad v. State*, 938 S.W.2d 363 (Tenn. 1996) (sentenced in 1984). Counsel ineffective in sentencing where theory of mitigation was mental illness based on Vietnam experience, but counsel presented only lay testimony and failed to prepare or present the available PTSD testimony of an expert who had examined the defendant at the VA hospital several months prior to trial. Counsel knew the defendant had been examined at the VA hospital and intended to present expert evidence based on this. Counsel did not, however, subpoena the doctor they intended to call or make an adequate proffer of his testimony to preserve the issue when a continuance was denied due to his absence during sentencing and did not investigate to determine that it was a different doctor that actually examined the defendant and, thus, counsel never spoke to him or subpoenaed him either.

1995: **Hildwin v. Dugger*, 654 So. 2d 107 (Fla. 1995) (tried in 1987). Trial counsel ineffective in sentencing phase for failing to investigate and present mitigation evidence. Counsel did present "quite limited" lay testimony that the defendant's mother died before he was three, that his father abandoned him on several occasions, that he had a substance abuse problem, and that he was a pleasant child and is a nice person. Nonetheless, the court held:

Trial counsel's sentencing investigation was woefully inadequate. As a consequence, trial counsel failed to unearth a large amount of mitigating evidence which could have been presented at sentencing. For example, trial counsel was not even aware of [the defendant's] psychiatric hospitalizations and suicide attempts.

Id. at 109. Available evidence included prior psychiatric hospitalizations and suicide attempts; childhood abuse and neglect; history of substance abuse; organic brain damage; and adaptability to

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prison. This evidence would have supported two statutory mitigating circumstances when trial court had found none.

***State v. Brooks**, 661 So. 2d 1333 (La. 1995) (tried in October 1985). Counsel ineffective for failing to prepare and present mitigation evidence. Neither counsel had conducted any investigation or even obtained the defendant's records, even though the defendant had signed a release for them. Lead counsel, who was later disbarred was drinking and using cocaine during the trial. Just prior to sentencing, he told co-counsel to take over for sentencing. He had reviewed the previous transcript and met with the defendant for a half an hour before trial only and presented no evidence and gave only very limited argument. Adequate investigation would have revealed available evidence from psychologists, medical records, and family members to show that the defendant had a history of mental problems, including borderline personality disorder; was taking prescription antidepressants at the time of the offense; and was dominated by his homosexual lover/co-defendant.

1994: *Torres-Arboleda v. Dugger, 636 So. 2d 1321 (Fla. 1994) (tried in 1987). Trial counsel ineffective in sentencing phase for failing to adequately investigate. Counsel made no attempt to investigate the defendant's family history and background, work history, or school record in Colombia and never even applied to the court for funds to investigate in Colombia because he did not think the court would approve such a request. Adequate investigation would have revealed evidence of abject poverty as a child; supported his family after his father's death; and his co-defendant was granted immunity in exchange for testimony. Evidence was also available of good prison behavior in California, no police record, and college attendance, which would have supported the defense psychologist's opinion testimony that the defendant was adaptable to prison.

***State v. Sanders**, 648 So. 2d 1272 (La. 1994) (sentenced in January 1991). Counsel ineffective where: counsel's opening was little more than apology for being unprepared because he didn't expect a first degree conviction and didn't address mitigation; counsel failed to object to inadmissible hearsay which showed that the defendant was guilty of the unadjudicated crime of being a felon in possession of firearms in violation of probation and allowed prosecutor to argue "shocking array" of weapons; counsel did not present any mitigation evidence other than testimony of defendant and wife which caused more damage than good because of grilling cross-examination; and counsel did not make a closing argument at all.

***Commonwealth v. Perry**, 644 A.2d 705 (Pa. 1994) (tried in March 1990). Counsel ineffective for completely failing to interview eyewitnesses or defense character witnesses or prepare at all for capital sentence hearing because counsel did not even realize until four days prior to trial that it was a capital case.

1993: *Heiney v. State, 620 So. 2d 171 (Fla. 1993) (tried in 1978). Trial counsel ineffective in sentencing phase. Counsel did not conduct or arrange for an investigation into the defendant's background. Adequate investigation would have revealed evidence of chronic substance abuse and use of drugs and alcohol at time of the offenses; borderline personality disorder; chronic physical and emotional abuse as child; and possible organic brain damage.

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***Averhart v. State**, 614 N.E.2d 924 (Ind. 1993) (tried in 1982). Counsel ineffective for failing to prepare and present mitigation evidence. Counsel conducted no investigation and spoke only with the defendant and his mother and he did not even discuss their testimony with them. In their testimony, he simply asked if they had anything to say and gave no guidance or direction. If counsel had adequately investigated the evidence would have established a disadvantaged background, education, and good character.

***Woodward v. State**, 635 So. 2d 805 (Miss. 1993) (tried in April 1987). Counsel ineffective for failing to present available mitigation, i.e. counsel allowed expert witness to testify only about test results and did not offer detailed history of mental illness because of mistaken belief that it would open the door to unlimited character evidence. Counsel also told jury in sentencing argument that he could not ask the jury to spare the defendant's life.

1992: *In re Marquez, 822 P.2d 435 (Cal. 1992) (tried in March 1984). Trial counsel ineffective for failing to investigate and present mitigation evidence. Counsel and his investigator only spent two days in the El Pilon area of Mexico investigating the defendant's birth records and interviewing the defendant's family and doctor. They spent a total of 20 to 25 minutes at the defendant's home in El Pilon and interviewed petitioner's parents at a nearby hotel for only an hour or two. There was no other follow-up contact or investigation. Counsel's purported strategy for the failure to investigate further was because of his fear that an investigation would turn up only aggravating evidence after a police officer and an uncle alleged prior uncharged criminal acts. Available mitigation included testimony from family members who supported the defendant and were willing to travel from Mexico to testify in his behalf that the defendant was a good son and brother who worked hard and had positive, good character traits.

***Phillips v. State**, 608 So. 2d 778 (Fla. 1992) (tried in 1983). Trial counsel ineffective in sentencing for failing to prepare and present evidence. Counsel conducted no background investigation and spoke only to the defendant's mother. Adequate investigation would have revealed deficits in adaptive functioning; schizoid personality; borderline intelligence; and impoverished, physically abusive childhood. This evidence would have supported two statutory mitigating circumstances and also provided rebuttal to aggravation evidence because the defendant lacked capacity to calculate or premeditate.

***People v. Perez**, 592 N.E.2d 984 (Ill. 1992) (tried in June 1983). Counsel ineffective for failing to adequately investigate and present evidence. Counsel reviewed the defendant's prison records and possessed his school records and attempted to interview the defendant through an interpreter several times about his background without success. Although the prison records and school records contained evidence of a low IQ and some other mitigating evidence, along with addresses for the defendant's family in Chicago, counsel did not attempt any further investigation until after conviction when the defendant did provide some background information and signed an affidavit because he did not want to testify. The affidavit was not admitted and no other mitigation was available or offered other than the report and testimony of a prison psychiatrist that was more

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damaging than mitigating. If counsel had adequately investigated, the evidence would have shown the defendant's mental deficiency, substance abuse, an abusive father, and abandonment.

**State v. Sullivan*, 596 So. 2d 177 (La. 1992), *rev'd on other grounds*, 508 U.S. 275 (1993) (tried in May 1982). Counsel ineffective for failing to investigate mitigation because of belief that jury would return a conviction for 2nd degree murder only. "[A]ny time a defendant is charged with first degree murder, defense counsel must prepare for the eventuality that a guilty verdict may be returned." *Id.* at 191. A reasonable investigation would have uncovered evidence of severe abuse as a child, paranoid schizophrenia, and family would have testified.

1991: **State v. Lara*, 581 So. 2d 1288 (Fla. 1991) (tried in 1982). Trial counsel ineffective in sentencing because counsel "virtually ignored the penalty phase of trial" and did not investigate in any detail the defendant's background and did not properly utilize expert witnesses regarding defendant's psychological state. If counsel had adequately investigated, the evidence would have shown: defendant's father was brutally abusive (had to eat dirt because dad wouldn't feed; tied and hung upside down over well; left in cane fields alone for days); began drinking at age 8; heard voice of devil; beat head against wall at school; prior hospitalization for mental illness. This evidence would have supported two statutory mitigating circumstances.

**State v. Twenter*, 818 S.W.2d 628 (Mo. 1991) (crimes in May 1988). Counsel ineffective in murder case for killing parents for failing to investigate and present mitigation where friends, relatives, and coworkers would have testified that the defendant was a loving mother and had been beaten as a child.

1990: **Burris v. State*, 558 N.E.2d 1067 (Ind. 1990) (sentenced in December 1980). Counsel ineffective in penalty phase for failing to investigate for sentencing; arguing in guilt phase closing that defendant is a "street person" and counsel didn't even like him; and arguing intoxication as a mitigator when the only evidence presented was that defendant had one sip of gin. Available evidence would have shown that defendant was abandoned by parents and raised by a man with a long criminal record which included running a whorehouse and manslaughter. Witnesses would have testified that the defendant worked in the whorehouse as a child and his job was to let whores know when time was up. He wasn't allowed to go to school until all chores were finished. He was declared neglected and became a ward of the county at age 12. He didn't know who he was or even his birthday. Witnesses would have also testified to his good character, good employment record, and adaptability to prison.

**State v. Tokman*, 564 So. 2d 1339 (Miss. 1990) (sentenced in September 1981). Counsel ineffective for failing to conduct any mitigation investigation. Counsel had intended to present only testimony from the defendant but then presented nothing when the defendant indicated that he would ask for death. Adequate investigate would have revealed good character evidence and evidence of domination by accomplice.

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1989: **Stevens v. State*, 552 So. 2d 1082 (Fla. 1989) (sentenced in August 1979). Counsel was ineffective in sentencing phase for failing to adequately investigate and present mitigating evidence. Counsel spoke with the defendant and his aunt but never even asked them about the defendant's background. Counsel also made no attempt to contact other background witnesses in Kentucky, even though the defendant had been in Florida for only one year at the time of his arrest. Adequate investigation would have revealed a history of poverty and neglect; abusive childhood including being shot by father; serious drinking problem which worsened just before offenses; and defendant's responsible adulthood. Counsel also made misrepresentations about defendant's background and criminal history including statements that defendant had been dishonorably discharged from military (actually honorably discharged) and had served time in jail in Kentucky (when he hadn't). Counsel also failed to provide trial court with an answer brief in response to State's brief urging the imposition of the death penalty; and failed to correct errors in State's brief including argument concerning two aggravating factors never presented to jury.

**Bassett v. State*, 541 So. 2d 596 (Fla. 1989) (sentenced in January 1980). Trial counsel ineffective in sentencing phase for failing to investigate and present evidence that 18 year old defendant was acting under the domination of the 29 year old co-defendant. Available evidence included evidence that: defendant was raised in economically depressed and violent family environment with abusive father figures; defendant was a follower who frequently attempted to gain attention in negative ways; defendant was a "punching bag" for other boys in school and was not accepted in peer groups.

1988: **State ex rel. Busby v. Butler*, 538 So. 2d 164 (La. 1988) (tried in February 1984). Counsel ineffective for failing to make an opening statement, not asking that client's life be spared, not contesting elements of the state's case, and failing to prepare and present mitigation despite the fact that counsel was aware that the defendant had been in and out of mental institutions since he was 12. Adequate investigation would have revealed severe mental and emotional problems including anti-social personality disorder. Family would have also testified if asked.

1986: **People v. Burgener*, 714 P.2d 1251 (Cal. 1986) (tried in 1981). Reversal required due to counsel's failure to present any mitigating evidence or argument in penalty phase even though it was available because of client's belief and statement that he deserved to die and did not want to present mitigation evidence.

**State v. Johnson*, 494 N.E.2d 1061 (Ohio 1986) (tried in October 1983). Counsel ineffective for failing to prepare and present mitigation evidence and presented only an unsworn statement of the defendant and counsel's argument which damaged defendant by berating jury for guilty verdict. Counsel did not investigate and did not even speak with the defendant about mitigation until after the guilty verdict. Available mitigation evidence included supportive family, no emotional or mental problems, high school graduate who held same job seven years and owned his own home, wife and child, conquered his own drug abuse problem, lost eye at age 10 and spent several months in hospital, mother died of cancer one year prior to trial, and defendant voluntarily turned himself in when he learned of arrest warrant. Counsel was also ineffective for failing to object to submission of non-statutory aggravating circumstance that the defendant had a firearm in his possession which

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is not a circumstance that is permitted in aggravated murder indictment or as statutory aggravating circumstance in sentencing.

1985: **People v. Deere*, 710 P.2d 925 (Cal. 1985) (sentenced in October 1982). Trial Counsel ineffective for failing to present any mitigating evidence in penalty phase because of his client's belief and statement to the judge that he deserved to die and where counsel told the judge that mitigation evidence was available but would not be presented because of counsel's belief that he had no right to present mitigation where the defendant was asking for a death sentence.

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B. ONE DEFICIENCY

1. STATE AGGRAVATION EVIDENCE OR ARGUMENT

a. U.S. Court of Appeals Cases

1999: **Parker v. Bowersox*, 188 F.3d 923 (8th Cir. 1999). Counsel ineffective in sentencing phase for failing to present evidence to rebut the only two aggravating circumstances (both involving murder of a potential witness). The defendant had been arrested for assaulting his girlfriend. He was charged with assault and with probation violation because he was then on probation. His attorney notified him two weeks prior to the murder that she had worked out a plea agreement. He would admit the probation violation and the assault charge would be dismissed. The murder occurred the night before the scheduled probation hearing, but because the state was unaware of the murder, the deal went through. The defendant admitted the probation violation and got 90 days. The assault charge was dismissed that day. The only aggravating circumstances presented by the state was that the victim was killed because she was a witness to the probation violation and the assault. The prosecutor testified about the pending charges and the resolution, but defense counsel failed to present the testimony of the previous defense counsel who would have testified that the defendant knew two weeks before the murder that the victim was no longer a witness against him. Deficient conduct easily found because the previous counsel had called new counsel when she saw publicity saying that the state was alleging that the murder was committed because the victim was a potential witness. State's arguments of no prejudice rejected. No one revealed any damaging information that would have been revealed due to waiver of attorney-client privilege and any possible danger was outweighed by the value of the testimony. Likewise, the testimony would not have been cumulative. While the prosecutor testified to the ultimate outcome, the defense counsel could have testified that the defendant was aware that the victim was no longer a witness against him. Prejudice found because the jury rejected the aggravator that she was killed because a witness in the probation violation where the defendant entered a guilty plea. If the jury had heard defense counsel's testimony that the defendant knew that the assault charge was going to be dropped and that the victim would not be a witness against him, the jury may also have rejected that aggravating circumstance and the defendant would not have been eligible for a death sentence.

1986: **Summit v. Blackburn*, 795 F.2d 1237 (5th Cir. 1986). Trial counsel ineffective for failing to object to or argue the lack of corroborating evidence of the sole aggravating factor (attempted armed robbery) when state law holds that a defendant cannot be convicted based solely on uncorroborated confession and the only evidence of aggravating factor was defendant's confession.

b. State Cases

2001: **Evans v. State*, 28 P.3d 498 (Nev. 2001). Both trial and appellate counsel were ineffective in capital sentencing for failing to object to (1) the state's improper rebuttal argument in which the prosecutor challenged the jurors to have the "intestinal fortitude" to sentence the defendant to death and (2) improper argument that the jury should consider evidence of the defendant's "other crimes"

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before deciding death eligibility. The first argument was improper because the United States Supreme Court has said it is improper “to exhort the jury to ‘do its job’; that kind of pressure . . . has no place in the administration of criminal justice.” *United States v. Young*, 470 U.S. 1, 18 (1985). The second argument was improper because, under state law, “other crimes” evidence can only be considered after finding the defendant death-eligible, i.e., after a statutory aggravator is found and each juror has found that the mitigation does not outweigh the aggravation. Prejudice found due to the tremendous risk that character evidence would mislead the jury.

1995: **State v. Storey*, 901 S.W.2d 886 (Mo. 1995). Counsel ineffective for failing to object to state’s improper closing argument which argued facts outside the record (most brutal slaying in history of county); injected personal opinion (what victim accomplished in life and difficulty of getting out of abusive relationship); personalized to jury (put yourself in victim’s place); argued death sentence was justified (because victim’s husband would have been justified to kill in self-defense); and argued relative worth of victim and defendant. Prejudice was found due to the four “egregious errors, each compounding the other.” *Id.* at 902.

**Commonwealth v. Lacava*, 666 A.2d 221 (Pa. 1995). Counsel ineffective for failing to object to prosecutor’s sentencing phase closing argument which improperly invited the jury to sentence appellant to die because he was a drug dealer. The focus was shifted from the one aggravating circumstance of killing a police officer to retribution for society’s victimization by drug dealers.

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2. INSTRUCTIONS

- 2002:** **Carpenter v. Vaughn*, 296 F.3d 138 (3rd Cir. 2002). Under pre-AEDPA analysis, counsel was ineffective in capital sentencing for failure to object to trial court's misleading response to jury's question about availability of parole if the defendant received a life sentence. The defendant was convicted for murder and the state presented evidence of only one aggravating circumstance that defendant had a significant history of felony convictions involving the use or threat of violence. Under Pennsylvania law the defendant could be sentenced to death or life imprisonment without parole. The only mechanism for parole under state law would be that the sentence was first commuted by the governor to a term of years. During sentencing deliberations the jury sent out a note asking "can we recommend life imprisonment with a guarantee of no parole." The court responded, "the answer is that simply no absolutely not." The court went on to instruct the jury that its decision would be the sentence and not a recommendation and that the question of parole was irrelevant. Counsel's failure to object or to ask for more clarification was deficient under state law because the court's response that the jury could not give such a sentence was a misstatement of state law since a person serving a life sentence would not be eligible for parole. The court also found prejudice because the jury was aware that the defendant had previously been convicted of murder and assault and had been released on parole. The jury deliberated for less than nine minutes after the court's improper response to its question. The court made it clear that this decision was not based on Simmons or any federal constitution right, but was simply a finding of ineffectiveness of counsel for failing to object based on state law.
- 1994:** **Starr v. Lockhart*, 23 F.3d 1280 (8th Cir. 1994). Trial counsel ineffective for failing to object to "heinous, atrocious, or cruel" aggravating circumstance because of previous Supreme Court decisions finding this circumstance unconstitutionally vague.
- 1986:** **Woodard v. Sargent*, 806 F.2d 153 (8th Cir. 1986). Trial counsel ineffective in penalty phase of capital trial for failing to request a jury instruction on lack of a prior history of significant criminal activity when record supported such an instruction. (No evidence either way so its doubtful same conclusion would be reached now in light of *Delo v. Lashley*.)

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3. MISCELLANEOUS

a. U.S. Court of Appeals Cases

2002: **Roche v. Davis*, 291 F.3d 473 (7th Cir. 2002). Counsel ineffective in capital sentencing for the failure to object to the petitioner’s shackling and the failure to ensure that the jury could not see the shackles. The state court decision was unreasonable because the court only considered counsel’s efforts to reveal the shackles during his testimony but not when seated at the defense table when the record revealed the shackles were visible to the jurors. No prejudice during the trial due to the overwhelming evidence of guilt. Prejudice found in sentencing – even though the “final determination about the appropriate sentence” rested with the trial judge – because there was considerable mitigation available and the jury deliberated for eight hours and was unable to recommend the death penalty.

2000: **Skaggs v. Parker*, 235 F.3d 261 (6th Cir. 2000). Counsel ineffective in capital sentencing for calling appointed expert witness after having observed the “expert’s” testimony during the trial. During trial, appointed clinical and forensic psychologist’s testimony in support of insanity defense was “rambling, confusing, and, at times, incoherent to the point of being comical.” *Id.* at 879. Jury convicted. Counsel did not call expert in sentencing, but jury hung and mistrial was declared. Four months later in new sentencing, defense called “expert,” who again testified that defendant was of average intelligence but had insanity defense at time of crimes based on depressive disorder and a paranoid personality disorder. Counsel’s decision to call expert in sentencing was deficient because the knew the testimony could be more harmful than helpful, but they did not ask for a different expert because counsel simply did not believe the court would grant the motion. On appeal, defense discovered that court-appointed defense “expert” was not actually a licensed clinical or forensic psychologist, and had no academic degrees or training as a psychologist whatsoever. His diagnosis of the defendant, who was actually mentally retarded, was also incorrect. Prejudice found, not based on lack of competent expert but on lack of competent counsel, because counsel’s actions denied defendant his only real mitigation, which was evidence of mental retardation and abnormal neuropsychological tests indicating brain damage. Counsel also presented no other real mitigation evidence.

1995: **Thomas-Bey v. Nuth*, 67 F.3d 296 (4th Cir. 1995) (*affirming Thomas-Bey v. Smith*, 869 F. Supp. 1214 (D. Md. 1994)). Counsel ineffective for consenting to a post-conviction interview of the defendant by a psychiatrist retained by the state for sentencing and the psychiatrist testified that defendant had no mitigating mental impairments and was a serious risk of future dangerousness to society and prison population.

b. State Cases

2001: **Warner v. State*, 29 P.3d 569 (Okla. Crim. App. 2001). Counsel ineffective in capital case for failing to properly request one day continuance with written motion supported by an affidavit. During sentence on a Friday, defense counsel orally requested a continuance until Monday because

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the defendant's mother was supposed to testify but could not arrive until Monday due to transportation and health problems. Counsel did not, however, follow the proper procedures for request. The result was that the defense presented no mitigation at all. Court blurs this issue with trial court error by saying that regardless of the defense counsel's failure the court should have granted the one day continuance, especially since the court had allowed the jury to consider whether they wanted to delay instructions. Also not necessary for court to discuss this issue at all since the case was reversed due to trial court errors in jury selection anyway.

1997: **Clark v. State*, 690 So. 2d 1280 (Fla. 1997). Counsel ineffective in sentencing phase because closing argument virtually encouraged giving the death penalty by telling jury, inter alia, that counsel had no choice, it was the worst case he had seen, and that the defendant was from the "underbelly of society."

1993: **Garcia v. State*, 622 So. 2d 1325 (Fla. 1993). Trial Counsel ineffective in sentencing phase for failing to seek admission of statement made by co-defendant to cellmate which corroborated defendant's statement that he was not the triggerman in shootings during robbery.

**People v. Pugh*, 623 N.E.2d 255 (Ill. 1993). Counsel ineffective for stipulating to defendant's eligibility for death penalty based on counsel's mistaken belief that defendant was eligible solely because of felony murder conviction. Counsel unaware that to be death eligible defendant must have intended to kill the victim. Defendant continuously maintained that shooting was accidental.

1985: **People v. Frierson*, 705 P.2d 396 (Cal. 1985). Counsel ineffective for waiting to sentencing phase to present diminished capacity defense when the defendant demanded on the record that it be presented at the special circumstances phase.

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III. NON-CAPITAL SENTENCING ERRORS

A. U.S. Court of Appeals Cases

2002: *Johnson v. United States*, 313 F.3d 815 (2nd Cir. 2002). Counsel was ineffective in possession with intent to distribute crack cocaine case because counsel failed to object to the erroneous calculation of the defendant's base offense level in sentencing. The drugs the defendant sold was less than fifty grams but the government alleged that the defendant had agreed to sell more than fifty grams. The pre-sentence report recommended that the base offense level be set based on over fifty grams. Counsel did not object. At sentencing, the court noted that the defendant showed a lot of promise and a lot of capability and sentenced him to the minimum allowed of 151 months. Counsel's conduct was deficient because the notes in the sentencing guidelines provide that, if a sale is completed, the amount delivered should be used to establish the defendant's base level. The defendant was prejudiced because the district court's favorable comments revealed that if the proper offense level of 121 to 151 months had been used it is unlikely that the district court would have sentenced the defendant to the maximum of 151 months.

2000: *Coss v. Lackawanna County Dist. Atty.*, 204 F.3d 453 (3rd Cir. 2000). Counsel ineffective in aggravated assault case for failing to challenge prior conviction used to enhance sentence. Defendant had been convicted of assault in 1986 and completed sentence, but federal court had jurisdiction to review the underlying conviction since the offense was used to enhance the present sentence. Counsel were ineffective during the 1986 representation because counsel met with defendant only twice prior to trial and was given names of witnesses present at the high school party where the assault on a police officer allegedly occurred. Counsel did not subpoena these witnesses and gave the defendant only one hour of notice prior to trial so the defendant had time only to pick up his brother and show up. During trial, police testified to assault and the defendant and his brother denied that there was a party, denied that they were drinking, and denied the assault. Prejudice found even though the other witnesses contradicted the defense testimony at trial that there was no party and no drinking because they were consistent in the major point that the defendant was not guilty of assault and because the defendant and his brother may not have testified or would have testified differently if these witnesses had been available. Court gave the state the option of resentencing on the present conviction or new trial on the prior conviction.

United States v. Franks, 230 F.3d 811 (5th Cir. 2000). Counsel ineffective in sentencing for armed bank robbery and using a firearm in connection with a crime of violence for failing to object to enhancement for an express threat of death where, under sentencing guidelines, offense level enhancement for an express threat of death may not be applied where defendant is also convicted on charge of using firearm in connection with the crime, if the threat of death is related to the possession, use, or discharge of the firearm. Defendant was sentenced to 74 months on armed robbery charge, which was three months more than that actually allowed. Thus, prejudice found because there was a specific, demonstrable increase in sentence.

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- 1999:** *Prou v. United States*, 199 F.3d 37 (1st Cir. 1999). Counsel ineffective in drug case for failing to challenge the enhancement of sentence based on a prior drug conviction because the government's notice was untimely. At the time, the government was required to give notice prior to trial, which included jury selection. Notice was given in this case 19 days after the jury was empaneled. Counsel challenged the enhancement on other grounds but not on timeliness. The issue was not raised on direct appeal. Petitioner raised in a pro se motion under § 2255. Cause and prejudice found for the default because the same counsel represented the defendant on appeal. Counsel's conduct was deficient because there was no plausible reason for failing to challenge enhancement based on untimeliness. Prejudice found because the sentence given exceeded the authority of the court, due to the untimely enhancement which was jurisdictional, and surpassed the proper guideline by almost two years. Sentence vacated and resentencing ordered.
- 1997:** *United States v. Soto*, 132 F.3d 56 (D.C. Cir. 1997). Trial counsel was ineffective in drug case for failing to specifically request a downward departure from the sentencing guidelines based on minimal or minor participation despite fact that facts appear to warrant such a departure.
- Patrasso v. Nelson*, 121 F.3d 297 (7th Cir. 1997). Counsel ineffective in sentencing of attempted murder and aggravated battery case because counsel by his own admission did absolutely nothing in preparation for or during the sentencing. It was so bad that the defendant personally had to object to prosecutor's misstatement of a prior conviction and defense counsel only argued a couple of sentences because the judge told him he should. Court used *Cronic* standard of complete denial of counsel and presumed prejudice.
- 1996:** *United States v. Breckenridge*, 93 F.3d 132 (4th Cir. 1996). Remanded for evidentiary hearing to determine whether prior offenses were related, but declared that if they are trial counsel was ineffective for failing to raise this issue to prevent defendant from being sentenced as a career criminal. Ordered district court to vacate sentence if prior offenses related.
- 1994:** *United States v. Castro*, 26 F.3d 557 (5th Cir. 1994). Trial counsel ineffective for failing to seek judicial recommendation against deportation even though it could not be said with certainty that the sentencing court would have granted relief.
- 1993:** *Prichard v. Lockhart*, 990 F.2d 352 (8th Cir. 1993). Defendant denied effective assistance of counsel when counsel failed to object to court's use of a prior out of state marijuana conviction for enhancement of sentence in violation of a statute prohibiting the use of such priors.
- 1992:** *Tucker v. Day*, 969 F.2d 155 (5th Cir. 1992). At resentencing hearing, court appointed counsel failed to provide any assistance to defendant at all and the sentencing judge based the resentencing entirely on his familiarity with the original sentencing hearing. Per se violation despite inability to show prejudice.

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1991: *United States v. Headley*, 923 F.2d 1079 (3rd Cir. 1991). Trial counsel ineffective for failing to argue that defendant was entitled to downward adjustment in base-offense level under Sentencing Guidelines on basis that she was a minimal or minor participant in criminal activity.

1989: *United States v. Ford*, 918 F.2d 1343 (8th Cir. 1989). Counsel ineffective for not objecting to base offense level at sentencing hearing on ground of defendant's acceptance of responsibility which could have lowered the sentence by over three years.

Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989). Counsel was ineffective during the sentencing phase of defendant's trial by failing to object to the use of one prior conviction resulting from a plea of nolo contendere and another prior conviction for an offense that relied on the nolo contendere conviction. Under state law, admission of nolo contendere conviction was improper. As a result, inmate received enhanced punishment under the state Habitual Felony Offender Act.

1987: *Cook v. Lynaugh*, 821 F.2d 1072 (5th Cir. 1987). Trial counsel ineffective for failing to investigate whether prior conviction used to enhance defendant's sentence was assisted by counsel because facts of case would have alerted reasonably competent attorney to issue. If counsel had investigated and raised issue, there would have been no conviction usable to enhance defendant's sentence.

Burley v. Cabana, 818 F.2d 414 (5th Cir. 1987). Trial counsel ineffective for failing to inform judge of sentencing alternative under state youthful offender act when judge mistakenly believed that life imprisonment was only sentence available and stated his opinion that sentence was too harsh.

B. U.S. District Court Cases

2000: *Hill v. United States*, 118 F. Supp. 2d 910 (E.D. Wis. 2000). Counsel ineffective in sentencing in possession of firearm case because counsel failed to contest a sentence enhancement for armed career criminal status when circumstantial evidence revealed that defendant had received discharge certificates from previous felonies that contained no firearm restrictions. Prejudice found because without the improper enhancement the maximum sentence would have been 10 years rather than 15 years.

1995: *Cabello v. United States*, 884 F. Supp. 298 (N.D. Ind. 1995). Trial counsel ineffective in sentencing for not objecting to the erroneous application of the career offender provision of the Sentencing Guidelines to petitioner's case which resulted in sentence that was too long. Habeas relief granted despite procedural default of not raising on appeal because trial counsel was also appellate counsel.

1994: *Wogan v. United States*, 846 F. Supp. 135 (D. Me. 1994). Trial counsel ineffective for failing to advise defendant that government could appeal downward departure of sentence and obtain resentencing based on 750 grams of heroin. Based on counsel's advice that he would get the same sentence as his co-conspirator, defendant waived his right to testify to challenge the finding of 750 grams even though defendant's testimony could have reduced it to only 50 grams.

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- 1991:** *Butler v. Sumner*, 783 F. Supp. 519 (D. Nev. 1991). Trial counsel ineffective during sentencing for complete failure to present argument or evidence in mitigation. Defendant had been convicted of numerous sexual assaults on a young boy and was sentenced to maximum possible (21 consecutive life sentences) even though state didn't ask for maximum.
- 1988:** *Gardiner v. United States*, 679 F. Supp. 1143 (D. Me. 1988). Trial counsel ineffective in cocaine distribution case where counsel completely failed to speak on the defendant's behalf in sentencing or present any evidence in mitigation. Prejudice presumed.
- 1987:** *Janvier v. United States*, 659 F. Supp. 827 (N.D.N.Y. 1987). Counsel ineffective for failing to petition the sentencing court to issue a recommendation against deportation because counsel was ignorant of the deportation consequence.

C. Military Cases

- 2002:** *United States v. Saintaude*, 56 M.J. 888 (Army Ct. Crim. App. 2002), *review granted*, 60 M.J. 311 (2004). Counsel ineffective in rape, robbery, and adultery case for conceding that the defendant's pre-service Florida pleas of nolo contendere "with adjudication withheld" were civil convictions and for failing to investigate and present mitigation evidence. If counsel had researched, counsel would have learned that the nolo contendere pleas would have been inadmissible if the defendant were being sentenced in Florida and they were, therefore, inadmissible under R.C.M. 1001(b)(3), which looks to the law of the jurisdiction to determine whether prior convictions are "convictions" admissible in sentencing. Instead of researching this issue, counsel conceded the convictions but simply argued undue prejudice. Counsel were also ineffective for failing to prepare and present mitigation evidence, which would have included volunteer work, evidence that the defendant was an exemplary soldier, and a good father.
- 1998:** *United States v. Boone*, 49 M.J. 187 (C.A.A.F. 1998) (*affirming* 44 M.J. 742 (Army Ct. Crim. App. 1996)). Counsel ineffective in sentencing phase of rape case where appointed military defense counsel had developed available evidence from members of the chain of command who would have testified to rehabilitative potential and from defendant's uncle who was a Major in the Air Force who would have testified concerning the defendant's background, upbringing, and peaceful nature. When civilian defense counsel was retained, military counsel turned over notes of interviews but there was no discussion of sentencing witnesses between counsel and the available mitigation evidence was not presented.
- 1986:** *United States v. Howes*, 22 M.J. 704 (A.C.M.R. 1986). Trial counsel ineffective in possession of marijuana with intent to distribute case where the defense produced three witnesses, during the sentencing hearing, who recommended that he be retained in the service. During cross-examination of two of these witnesses, the prosecution asked them if they were aware that the accused had been previously enrolled in the Army's Alcohol and Drug Abuse Prevention and Control Program. Information concerning participation in this program is privileged and, pursuant to Congressional

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mandate and an Army regulation, cannot be used in a court-martial. Thus, counsel was ineffective for failing to object to this line of questioning.

D. State Cases

2003: *Turner v. State*, 578 S.E.2d 570 (Ga. Ct. App. 2003). Counsel was ineffective in drug distribution case for failing to object to the use of a prior conviction in sentencing when the defendant had received no notice it would be used. The defendant pled guilty and the prosecutor recommended a sentence of 15 years with four or five to serve, but the trial court had been provided with a probation report that revealed two prior convictions for selling drugs. Based on this, the judge rejected the prosecutor's recommendation and sentenced the defendant to 20 years with 10 years to serve. State law provides that only such evidence in aggravation as the state has made known to the defendant prior to trial shall be admissible. The court has interpreted this statutory provision to prohibit use of an undisclosed probation report showing prior convictions in sentencing. Counsel's conduct was deficient in failing to object to the state's use of the undisclosed probation report in sentencing. The defendant was prejudiced "because the length of his sentence was fixed based in part on the improper evidence."

State v. Washington, 68 P.3d 134 (Kan. 2003). Counsel was ineffective in sentencing hearing for premeditated murder. Following the trial, initial counsel was suspended from the practice of law and relieved by the trial court. New counsel was appointed and requested a copy of the trial transcript, but that was denied. She attempted several times to meet with the prior counsel but he did not meet with her. She did nothing more to prepare for sentencing even though she had four months to do so. Although ineffectiveness was not raised on appeal (just a general unfairness of the sentencing proceedings argument, the court addressed the issue *sua sponte*. Counsel's conduct was deficient because counsel apparently did not read the court file or talk to defense witnesses that had testified in the trial to learn of the defendant's PTSD. She also was aware even of the statutory provisions that required a 50 year sentence without parole. She presented no evidence and made no argument in sentencing. Prejudice found because "counsel simply abdicated her position with the excuse that she had not been given a trial transcript." *Id.* at 159.

2000: *West v. Waters*, 533 S.E.2d 88 (Ga. 2000). Counsel ineffective in sentencing in sale of cocaine case for failing to object to a prior conviction presented in aggravation of sentence without timely notice, since statute requires "clear notice" prior to the jury being sworn for trial. Prejudice found even when defense counsel was aware of conviction. [This opinion reverses prior Georgia cases to the contrary.]

State v. Jones, 769 So.2d 28 (La. Ct. App. 2000). Counsel ineffective in sentencing in drug case for failing to object that deferred adjudication probation, which was not a valid conviction under state law, should not have been used as predicate conviction for sentence enhancement under Habitual Offender Law.

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Gary v. State, 760 So. 2d 743 (Miss. 2000). Counsel ineffective in armed robbery case for failing to argue for sentencing under Youth Court Act. Defendant was 17 years old with no priors and did not possess gun during robbery (as he codefendant did). State law did not require the court to sentence under the youth act but did require the court to consider it. Counsel's conduct in failing to request youth sentencing was deficient and prejudice was found because the defendant was sentenced to 45 years when he could have gotten only a year under the Youth Act if the court had accepted the argument.

Milburn v. State, 15 S.W.3d 267 (Tex. Ct. App. 2000). Counsel ineffective in drug case for failing to prepare and present mitigation evidence. Counsel conducted no investigation. Numerous witnesses were available to testify that defendant was a good father to his daughter who had severe medical problems and that he was a good employee. Counsel presented no evidence and made only a benign argument responding to the state's argument that the defendant was previously on probation, that he had not been rehabilitated, and that he should be given 30 years and a \$50,000 fine. Jury gave 40 years and \$75,000 fine. Court found that this was a close call of constructive denial of counsel because essentially no different that if trial court had prohibited the defense from presenting mitigation in light of strong state case. Prejudice found "even though it is sheer speculation that character witnesses in mitigation would have in fact favorably influenced the jury's assessment of punishment," *Id.* at 271, because any mitigation better than none and the jury gave even harsher sentence than state asked for.

1999: Kellett v. State, 716 N.E.2d 975 (Ind. Ct. App. 1999). Counsel ineffective in DUI causing serious injury case for failing to object to the admission of a ledger in sentencing or to adequately cross-examine the witness concerning facial errors in the ledger. The injured victim's mother prepared the ledger to show uncompensated medical bills and testified that the total was approximately \$140,000. State allowed the trial court to order restitution of the actual costs and the court did so based solely on the mother's testimony and the ledger. Review of the ledger, however, would have revealed that several charges for over \$30,000 and \$10,000 were duplicated and that there were mathematical errors in the document. While the court did not find deficient conduct solely related to admission of the ledger or solely related to failure to cross-examine the witness, the court found that counsel's conduct was deficient in failing to do one or the other and the defendant was prejudiced.

State v. Robinson, 744 So. 2d 119 (La. Ct. App. 1999). Counsel ineffective in armed robbery case for failing to properly move to reconsider the sentence on the basis of excessiveness following the trial. Defendant was convicted of armed robbery for stealing tennis shoes and was sentenced to 30 years (without parole) out of a possible 5 to 99 years. Under state law, counsel can raise excessive sentence issue in motion to reconsider either orally at the time of sentencing or in written motion following sentencing. Counsel made no oral motion and filed a form motion afterwards but did not check the block on excessive sentence. He instead checked the block for statute being unconstitutional with respect to maximum or minimum punishment, which appellate counsel conceded was frivolous in this case. Failure to raise excessiveness of sentence in the motion to reconsider waives the issue for appeal. Thus, excessiveness issue procedurally barred. Nonetheless,

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the court vacated the sentence on the basis of ineffective assistance of counsel. The trial court stated no basis for sentencing the defendant to 30 years, other than guilt and that he lied on the witness stand. Likewise, the facts did not support such a harsh sentence. The defendant was 19 years old and had no prior convictions or arrests. Counsel should have moved to reconsider because the sentence was excessive on this record.

Davis v. State, 336 S.C. 329, 520 S.E.2d 801 (1999). Counsel ineffective for failing to object to trial court's consideration of exercise of right to trial in sentencing the defendant to ten years for distribution of crack. Following sentence, counsel moved to reconsider on the basis that several similarly situated defendants got lesser sentences. The court said that the other sentences were lower because the other defendants plead guilty. Because it is an abuse of discretion for the trial court to consider the defendant's exercise of his right to trial as an aggravating factor, counsel was ineffective for failing to object.

Scott v. State, 334 S.C. 248, 513 S.E.2d 100 (1999). Counsel ineffective in drug trafficking case for failing to object to the court considering a 1987 misdemeanor conviction for simple possession and sentencing the defendant as a second offender under the statute. The 1987 charge was actually a bond forfeiture for failure to appear and not a "conviction" for purposes of sentencing under the drug statute. A bond forfeiture may be considered a "conviction" only when the legislature specifically provides that the two are equivalent. Because the legislature has done so in other contexts, the court infers the legislature did not intend for a bond forfeiture to be the equivalent of a conviction in this context. The defendant was prejudiced because the maximum sentence for a first offense is 10 years and for a second offense 30 years. The defendant was sentenced to 30 years.

1998: *Trinh v. State*, 974 S.W.2d 872 (Tex. Ct. App. 1998).¹⁰ Counsel ineffective in possession of weapon case because counsel filed a motion for probation and to have the jury assess punishment which she intended to amend after conviction to elect that the trial court assess punishment because Trinh would have been ineligible for probation from a jury due to a previous felony offense. Counsel was unaware, however, that the sentencing election could not be withdrawn after the verdict without the State's consent. Thus, the defendant was denied any possibility of probation.

State v. Anderson, 588 N.W.2d 75 (Wis. Ct. App. 1998). Counsel ineffective in child sexual assault case for failing to seek an adjournment of the sentencing hearing to permit him to finish reviewing the presentence investigation report with the defendant. Counsel received the report only 30 minutes prior to the hearing and notified the court that the defendant objected to the report because the victims' had recanted some of the information included, and that some of the allegations of sexual abuse in the report had not been substantiated. The trial court offered to allow the defendant to

¹⁰Prior to *Hernandez v. State*, 988 S.W.2d 770 (Tex. Crim. App. 1999) (en banc), Texas did not apply the *Strickland* standard in non-capital sentencing hearings. Texas previously applied a state law standard of "reasonably effective assistance," *Ex parte Duffy*, 607 S.W.2d 507 (Tex. Crim. App. 1980), in non-capital sentencing hearings.

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withdraw his pleas or to adjourn the hearing in order to allow the defense more time to prepare. The defense declined both offers. Counsel only noted that the defendant's pleas were only two fondling two children as opposed to the more aggravated allegations of sexual abuse in the PSI. The appellate court held that counsel was ineffective in failing to seek the adjournment in order to prepare to refute the inaccurate information and to argue the defendant's theory that much of the sexual abuse was done by others. The court found prejudice because it was clear from the trial court's statements that the court relied on much of the disputed information in sentencing the defendant to 80 years out of a possible 100 year sentence.

1997: *State v. Jones*, 700 So. 2d 1034 (La. Ct. App. 1997). Counsel ineffective in a case where the state sought habitual offender status because counsel did not file the required written response denying the allegations which would have placed burden on state to prove. Likewise, counsel did not object to the state's documentary evidence which failed to prove a required element that the defendant had been advised of his privilege against self-incrimination prior to pleading guilty to the prior offenses.

Oliva v. State, 942 S.W.2d 727 (Tex. Ct. App. 1997). Counsel ineffective in sentencing because counsel failed to object to the prosecutor's closing argument which referred to defendant's lack of remorse and failure to testify in the sentencing despite the fact that defendant testified in the guilt-or-innocence phase.

1996: *People v. Siedlinski*, 666 N.E.2d 42 (Ill. App. Ct. 1996). Counsel ineffective for failing to request sentencing credit against fine where statute allowed credit of \$5/day for each day of pretrial confinement.

Glivens v. State, 918 S.W.2d 30 (Tex. Ct. App. 1996). Counsel ineffective in sentencing of aggravated robbery case where extraneous unadjudicated prior robbery admitted during guilt phase for limited purpose of establishing identity, motive, etc., but counsel did not object to consideration of the extraneous offense in sentencing and the record does not reflect that judge did not consider. Law changed in 1993, however, and under current law not applicable here extraneous unadjudicated offenses could be considered in sentencing.

People v. Brasseaux, 660 N.E.2d 1321 (Ill. App. Ct. 1996). Counsel ineffective where defendant was seeking to attack sentences and filed pro se motion to reconsider sentences but counsel did not contact defendant or conduct any investigation prior to the hearing at which the defendant was not present.

1995: *Kucel v. State*, 907 S.W.2d 890 (Tex. Ct. App. 1995). Counsel ineffective in sentencing for aggravated sexual assault on child for arguing that defendant would not be eligible for parole for at least two years when it was actually fifteen years. Counsel also ineffective for failing to correct error or object to erroneous jury charge even after prosecutor pointed out error.

Thomas v. State, 923 S.W.2d 611 (Tex. Ct. App. 1995). Counsel ineffective in sentencing for organized crime activity for failing to object to evidence concerning extraneous unadjudicated

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crimes of threatening police officers, stalking police officers and the prosecutor, and soliciting the murder of police officers. [Statute has since been amended effective 9/1/93 to allow evidence of extraneous unadjudicated crimes in sentencing.]

Durst v. State, 900 S.W.2d 134 (Tex. Ct. App. 1995). Counsel ineffective in sentencing after guilty plea for possession of marijuana for eliciting during direct examination of defendant testimony concerning six other unadjudicated extraneous marijuana hauling trips which would have been inadmissible otherwise under the state law at the time of this trial.

1994: *Ware v. State*, 875 S.W.2d 432 (Tex. Ct. App. 1994). Trial counsel ineffective for failing to offer evidence in jury sentencing to prove that the defendant had no prior felony convictions (or ask the defendant that question during his testimony) and was thus eligible for probation where counsel sought probation and jury asked for information on probation eligibility and unsuccessfully attempted to probate portion of sentence.

1993: *Craig v. State*, 847 S.W.2d 434 (Tex. Ct. App. 1993). Counsel ineffective in murder case for jury sentencing purposes where counsel: did not object to state argument in guilt phase that jurors now understand why prosecutors ask for certain verdicts in drug cases in order to avoid these tragedies; elicited damaging information about defendant; argued in guilt phase that defendant and “bandito” friends not looking for victim when there was no evidence of “bandito” friends; argued in sentencing that the verdict would not have any deterrent effect on any participants including defendant; elicited testimony that defendant bragged about killing; suggested in argument that there was no favorable evidence for defense and that’s why defense called no witnesses; misquoted witness who said defendant said victim was dead and told jury that defendant said “I killed or I shot him”; and during guilt argument summarized evidence in a state-oriented fashion.

1992: *Commonwealth v. Batterson*, 601 A.2d 335 (Pa. Super. Ct. 1992). Counsel ineffective for failing to move for reconsideration of sentence applying deadly weapon enhancement because a motor vehicle is not a “weapon.”

1991: *Jenkins v. State*, 591 So. 2d 149 (Ala. Crim. App. 1991). Trial counsel ineffective for failing to investigate and object to admission of prior Florida convictions which were all based on nolo contendere pleas and were thus improperly admitted under Alabama law for purpose of sentence enhancement under habitual offender act.

Weaver v. Warden, 822 P.2d 112 (Nev. 1991). Counsel ineffective in robbery case for failing to present evidence that defendant had PTSD from Vietnam service.

Chubb v. State, 303 S.C. 395, 401 S.E.2d 159 (1991). Trial counsel ineffective in burglary case, where a burglary conviction mandated a life sentence unless the jury recommended mercy, for failing to present mitigation evidence or argue for mercy during the guilt phase because of her erroneous expectation that a separate sentencing proceeding would be held.

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Ex parte Canedo, 818 S.W.2d 814 (Tex. Crim. App. 1991). Counsel ineffective for advising defendant in aggravated sexual assault on child case to request judge alone sentencing based on belief that defendant was eligible for shock probation when in fact judge could not give shock probation but jury could have assessed probation.

Ex parte Felton, 815 S.W.2d 733 (Tex. Crim. App. 1991). Trial counsel ineffective for failing to determine that a prior conviction used to enhance punishment from 5 to 15 years was invalid under state law. The prior was robbery by firearm in 1961 which was a capital offense. State law prior to 1965 provided that the court could not accept a guilty plea to a capital offense unless the state affirmatively waived the capital element which they didn't in this case.

Schofield v. West Virginia Department of Corrections, 406 S.E.2d 425 (W. Va. 1991). Trial counsel ineffective in murder case for failing to present mitigation evidence concerning defendant's limited mental ability, her history of social and emotional problems, and her family background, and argue for mercy recommendation where without recommendation there was a mandatory life without parole sentence. Counsel did not argue mercy because defendant insisted she was guilty only of manslaughter and counsel feared that to argue for mercy recommendation would be considered by jury as a concession of guilt to murder.

1990: *Ex parte Walker*, 794 S.W.2d 36 (Tex. Crim. App. 1990). Trial counsel ineffective for failing to file in timely manner the defendant's motion electing to have the jury assess punishment.

1989: *People v. Barocio*, 264 Cal. Rptr. 573 (Cal. Ct. App. 1989). Trial counsel ineffective for failing to inform the defendant of his right to request a recommendation against deportation at his sentencing hearing because counsel was unaware of the recommendation possibility.

Commonwealth v. Lykus, 546 N.E.2d 159 (Mass. 1989). Counsel ineffective in murder, extortion, and kidnaping case for failing: to argue defendant's employment history, charitable activities, and civic contributions; to call witnesses on defendant's behalf; and to argue for concurrent sentences.

Commonwealth v. Kozarian, 566 A.2d 304 (Pa. Super. Ct. 1989). Counsel ineffective for failing to preserve claim that sentencing guidelines were improperly applied to enhance punishment.

Commonwealth v. Albert, 561 A.2d 736 (Pa. 1989). Counsel ineffective for filing brief in support of petition for post-conviction adjustment of sentence which was "completely lacking in substance."

Commonwealth v. Arthur, 559 A.2d 936 (Pa. Super. Ct. 1989). Counsel ineffective for failing to raise and preserve issue of legality of sentence which ordered uncompensated confiscation and destruction of defendant's firearms collection as it had never been claimed that the firearms were used in any illegal act.

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Ex parte Walker, 777 S.W.2d 427 (Tex. Crim. App. 1989). Trial counsel ineffective for not objecting during sentencing to otherwise inadmissible evidence of the defendant's prior aggravated robbery conviction and defendant's involvement in three other aggravated robberies.

Cooper v. State, 769 S.W.2d 301 (Tex. Ct. App. 1989). Counsel ineffective for failing to object to void conviction used for enhancement, allowing defendant to testify about it which opened door to 14 prior convictions from other jurisdictions which would not have been presented otherwise, and failing to object to inadmissible portion of penitentiary packet regarding another conviction.

1988: *State v. Brown*, 525 So. 2d 454 (Fla. Dist. Ct. App. 1988). Trial counsel ineffective per se for failure to advise defendant that he could elect to be sentenced under sentencing guidelines after guilty pleas.

People v. Sagstetter, 532 N.E.2d 1029 (Ill. App. Ct. 1988). Counsel ineffective for failing to assert therapist-recipient privilege with regard to statements made by defendant at suggestion of therapist which were admitted in sentencing hearing.

Gallegos v. State, 756 S.W.2d 45 (Tex. Ct. App. 1988). Trial counsel ineffective for failing to inform the defendant that under state law the jury but not the trial court could grant probation prior to defendant electing judge sentencing.

Turner v. State, 755 S.W.2d 207 (Tex. Ct. App. 1988). Trial counsel ineffective for failing to inform the defendant that under state law the jury but not the trial court could grant probation prior to defendant electing judge sentencing.

Stone v. State, 751 S.W.2d 579 (Tex. Ct. App. 1988). Trial counsel ineffective for advising the defendant that trial court could grant probation when only jury could prior to defendant electing judge sentencing.

1987: *People v. Plager*, 242 Cal. Rptr. 624 (Cal. Ct. App. 1987). Trial counsel ineffective for failing to advise the defendant that the state could not have established that the alleged prior felony convictions were residential burglaries as required to be adjudicated serious felony for enhancement purposes, and counsel even stipulated to the factual basis for the alleged priors.

Medeiros v. State, 733 S.W.2d 605 (Tex. Ct. App. 1987). Trial counsel ineffective for failing to inform the defendant that under state law the jury but not the trial court could grant probation prior to defendant electing judge sentencing.

1986: *Steffans v. Keeney*, 728 P.2d 948 (Or. Ct. App. 1986). Counsel ineffective for failing to object to orders for restitution and costs when sentenced to long term confinement and failing to object to order in present case to pay restitution previously ordered in three earlier cases as a condition of probation.

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1985: *State v. Stacey*, 482 So. 2d 1350 (Fla. 1985). Trial and appellate counsel ineffective for failing to research and recognize that trial court's retention of jurisdiction over first one third of 99 year sentence was a violation of ex post facto clause because robbery occurred before effective date of statute which allowed retention of jurisdiction.

State v. Davidson, 335 S.E.2d 518 (N.C. Ct. App. 1985). Trial counsel ineffective in kidnaping and armed robbery case for failing to argue in the defendant's favor, stressing counsel's status as appointed counsel, and making arguments that were almost exclusively negative to the defendant.

Watson v. State, 287 S.C. 356, 338 S.E.2d 636 (1985). Trial counsel ineffective in burglary case, where a burglary conviction mandated a life sentence unless the jury recommended mercy, for failing to advise defendant who pled guilty that he had the right to have a jury impaneled following the guilty plea to consider a recommendation a mercy.

Snow v. State, 697 S.W.2d 663 (Tex. Ct. App. 1985). Trial counsel ineffective for failing to request a sentencing instruction on probation and asking for prison sentence based on erroneous belief that defendant was not entitled to probation.

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IV. ADVISING CLIENT

A. GUILTY PLEA AFTER INADEQUATE INVESTIGATION OR RESEARCH

1. U.S. Court of Appeals Cases

1997: *United States v. Kauffman*, 109 F.3d 186 (3rd Cir. 1997). Counsel ineffective in advising client to plead guilty to being a felon in possession of a firearm where the defendant had been institutionalized numerous times for bipolar disorder, had been released only a few days prior to the offense against the doctor's advice, and a psychiatrist wrote the attorney a letter stating that the defendant was clearly psychotic at the time of the offense. Nonetheless, the attorney never investigated or talked to the psychiatrist and advised the defendant to plead guilty because he did not think there was a good chance of succeeding on an insanity defense. "Only if [counsel] had investigated [petitioner's] long history of serious mental illness, and conducted some legal research regarding the insanity defense could his counseling be characterized as 'strategy.'" 109 F.3d at 190.

1995: *Esslinger v. Davis*, 44 F.3d 1515 (11th Cir. 1995). Trial counsel ineffective for recommending that defendant enter a guilty plea without having first investigated defendant's prior criminal history. Defendant plead guilty to a felony subject to enhanced penalty under state habitual offender law. He would not have entered guilty plea if he had known of enhanced punishment.

1994: **Agan v. Singletary*, 12 F.3d 1012 (11th Cir. 1994). Counsel ineffective for failing to investigate prior to guilty plea and death sentence. If counsel had investigated he would have discovered that defendant had a long history of psychosis (schizophrenia) and was taking psychotropic drugs at the time of the plea and the sentence. Court found that defendant may have been incompetent at time of plea and sentencing.

1990: *Bouchillon v. Collins*, 907 F.2d 589 (5th Cir. 1990). Trial counsel ineffective for failing to investigate defendant's competency to stand trial and or viability of insanity defense prior to entry of guilty plea when attorney was aware that defendant had been in mental institutions, but did not request a mental health evaluation. Investigation would have revealed that defendant had a long history of mental problems and substance abuse and was repeatedly diagnosed as suffering from PTSD.

2. State Cases

2003: *Cordes v. State*, 842 So. 2d 874 (Fla. Dist. Ct. App. 2003). Counsel was ineffective in felony driving-related charges case for advising the defendant to enter a plea of no contest to five felony charges. The charges ranged in date from 1990 to 1998 with one charge being a misdemeanor and five being felony charges. The defendant, relying on counsel's advice, entered an open plea of no contest to all of the charges. If counsel had adequately investigated or pursued a defense of statute of limitations, two of the felony charges would have been prohibited by the statute of limitations. One of the felony charges was wrongly charged as a felony and this count was voluntarily dismissed

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by the state in post-conviction. With respect to the remaining two felony charges, the record was insufficient to establish whether these charges were prohibited by the statute of limitations, but these charges also arguably were prohibited. Counsel's conduct was deficient because the face of the information revealed the statute of limitations problems. The defendant was prejudiced because he would not have entered a plea of no contest to the felony charges had counsel investigated and adequately advised him.

1998: *Melton v. State*, 987 S.W.2d 72 (Tex. Ct. App. 1998). Counsel ineffective in plea to armed robbery case for failing to adequately investigate prior to advising the defendant to plead guilty. Defendant was arrested and told counsel he wanted to plead not guilty because he was innocent. Based on state representation that there "might" be a videotape, counsel informed defendant either that there was a videotape or, at a minimum, might be a videotape with the defendant on it committing the robbery. Because the defendant was an alcoholic with an extensive history of black outs, he took the defense counsel at his word and assumed that he must be guilty, so he pled guilty. If counsel had investigated, however, he would have discovered that there was no videotape at all and no indication that there ever had been. Prejudice found because defendant would not have plead guilty, as is evidenced by his insistence on not guilty plea until counsel told him of alleged videotape.

1996: *State ex rel. Strogon v. Trent*, 469 S.E.2d 7 (W. Va. 1996). Counsel ineffective in murder case failing to adequately investigate the circumstances surrounding the defendant's confession and failing to move to suppress the statement prior to advising the defendant to plead guilty.

1995: *Copas v. Commissioner of Correction*, 662 A.2d 718 (Conn. 1995) (*affirming* 621 A.2d 1378 (Conn. App. Ct. 1993)). Counsel ineffective in murder case for advising defendant to plead guilty without an agreement. Counsel was a self-described tax and corporate law specialist who did not understand (and thus did not advise defendant) that a mental status defense could be presented which did not rise to the level of insanity. Counsel knew of defendant's long history of mental, emotional, and substance abuse problems but did not request an independent evaluation which would have revealed that defendant suffered from alcohol and cannabis abuse, atypical impulse control and a mixed personality disorder which caused a severely diminished capacity to control his behavior at the time of the offense. The lower court had also found counsel ineffective in sentencing for failing to point out inconsistencies in two mental health evaluations conducted at different times in the proceedings and failing to present mitigation evidence or family member testimony on behalf of defendant.

State v. Carr, 665 So. 2d 1234 (La. Ct. App. 1995). Counsel ineffective in unauthorized use of vehicle case for advising client already on probation to plead guilty without conducting an investigation which would have revealed that there was no evidence against the defendant other than the fact that he was a passenger in the vehicle which was insufficient to sustain a conviction.

Diaz v. State, 905 S.W.2d 302 (Tex. Ct. App. 1995). Counsel ineffective in drug case for not interviewing witnesses and arresting officer; accepting the approximate weight and contraband nature of substance without an independent examination; advising the defendant to plead guilty

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without a deal after the state rejected plea offer; telling defendant he would get probation (got 54 years); and not personally explaining various waivers and documents to non-English speaking defendant despite telling court that he had.

1993: *People v. Andretich*, 614 N.E.2d 489 (Ill. App. Ct. 1993). Counsel ineffective for failing to investigate prior to advising defendant to plead guilty to theft when investigation would have revealed that defendant's actions did not amount to a criminal offense.

1991: *Williams v. State*, 596 So. 2d 620 (Ala. Crim. App. 1991). Trial counsel ineffective where he did not meet with client until day before scheduled trial, never discussed case with client, and did not prepare to try but did not request continuance until morning of trial. When continuance was denied, counsel told defendant to sign forms to enter plea agreement without explaining forms and told defendant that if he did not sign forms counsel would not represent him.

Smith v. State, 565 N.E.2d 1114 (Ind. Ct. App. 1991). Counsel ineffective in two thefts case for failing to investigate the availability of the two alleged victims and inform the defendant prior to his guilty plea that one victim was dead and the other could not be located.

Haynes v. State, 790 S.W.2d 824 (Tex. Ct. App. 1990). Trial counsel ineffective in evading arrest case for failing to investigate prior to defendant's nolo contendere plea when defendant wanted to go to trial and investigation would have revealed witnesses who would have cast doubt on whether police had probable cause to stop the defendant's vehicle.

1989: *State v. Taylor*, 535 N.E.2d 161 (Ind. Ct. App. 1989). Counsel ineffective in murder case for advising defendant that possible sentences were only 50 years or life which induced defendant to plead guilty under 50 year deal. Actual minimum sentence was 30 years. Counsel also failed to interview key state witness when he would have discovered that state witness had recanted and said he lied in statement because cops threatened to charge with murder.

***Leatherwood v. State**, 539 So. 2d 1378 (Miss. 1989). Counsel ineffective for advising defendant to plead guilty based on belief that state would be limited in sentencing and could not present evidence of offenses which was an erroneous interpretation of law.

1988: *Sherrill v. State*, 772 S.W.2d 60 (Tenn. Crim. App. 1988). Counsel ineffective when counsel did not meet with the defendant until 15 minutes prior to trial and then advising defendant to plead guilty without ever consulting with defendant or investigating the case.

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B. ERRONEOUS ADVICE ON SENTENCING OR COLLATERAL CONSEQUENCES THAT LEADS TO PLEA

1. U.S. Court of Appeals Cases

2002: *United States v. Couto*, 311 F.3d 179 (2nd Cir. 2002). Counsel ineffective in charge of bribing a public official plea case for affirmatively misrepresenting the deportation consequences of guilty plea. The defendant was charged with attempting to bribe an INS Agent in order to secure a green card. Although a guilty plea meant virtually automatic and unavoidable deportation, counsel advised the defendant that there were things that could be done to prevent her from being deported if she entered a guilty plea to a felony, including asking the judge for a letter recommending against deportation. Although the rule in the circuit remains undetermined on whether an attorney is incompetent for failing to inform a defendant of the deportation consequences of a plea, the court held that an affirmative misrepresentation by counsel is clearly objectively unreasonable. The court also found prejudice because the facts of this case clearly demonstrate that the defendant would not have plead guilty had she known of the deportation consequences.

2000: *United States v. McCoy*, 215 F.3d 102 (D.C. Cir. 2000). Counsel ineffective in drug case for advising client that he would only face 188 to 235 months under the Sentencing Guidelines if he accepted the government's plea, when in fact he faced 262 to 327 months. Defendant prejudiced because he would not have pleaded guilty if he had been given the correct information and he had legally cognizable defenses to present if he proceeded to trial.

1998: *United States v. Gordon*, 156 F.3d 376 (2nd Cir. 1998). Counsel ineffective for failing to properly advise the defendant during plea negotiations of the sentence he faced. The defendant was charged with multiple counts of aiding and abetting false statements to licensed firearms dealers and receipt or possession of firearms by a convicted felon. Trial counsel advised the defendant that he would face 120 months confinement if convicted on all, but with a guilty plea to one count he would face approximately 84 months confinement. The defendant proceeded to trial and was convicted on all counts. The actual sentencing range was 262 to 327 months and he was sentenced to 210 months. Court held that counsel was ineffective for failing to accurately advise the defendant and the defendant was prejudiced because he would have plead guilty to one count if he had known the true maximum. New trial ordered.

***Meyers v. Gillis**, 142 F.3d 664 (3rd Cir. 1998). Counsel ineffective in capital murder case plead to second degree. Counsel advised defendant he would get life sentence but parole was typically granted after seven years, but counsel failed to advise the defendant the it was actually life without parole and parole could be granted only if the governor first commuted the sentence to a term of years and the current governor did not have a history of commuting. Counsel was not aware of the LWOP provision and relied on a report showing parole typically granted after seven years when a different governor, who did typically commute, was in office. Counsel's deficiency was prejudicial because the defendant would not have plead guilty even though it was a capital case because he was not concerned with the possibility of a death sentence (only concerned about impact on family and

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parole eligibility). The court found a reasonable possibility based on the evidence of lack of premeditation and self-defense that, if defendant had gone to trial, he would only have been convicted of third degree (manslaughter) which has a maximum of 20 year sentence.

- 1996:** *United States v. Guerra*, 94 F.3d 989 (5th Cir. 1996). Counsel ineffective for failing to advise defendant of the correct maximum punishment before defendant entered plea based on court's advice that defendant faced a maximum of 60 years when the defendant actually only faced 30 year maximum. No procedural bar due to failure to raise on direct appeal because defense counsel failed to file direct appeal even though the defendant requested that he do so. Counsel's actions satisfied the "cause" prong of the standard for surmounting the procedural bar.
- 1995:** *Finch v. Vaughn*, 67 F.3d 909 (11th Cir. 1995). Counsel ineffective for advising defendant to plead guilty to state drug charges with understanding that his state sentence would run concurrently to his federal sentence, where federal government was not bound by plea agreement and had a parole violation policy of suspending or tolling federal sentence so that parole could be revoked and sentence served in full after completion of a state term.
- 1991:** *Garmon v. Lockhart*, 938 F.2d 120 (8th Cir. 1991). Trial counsel ineffective for incorrectly advising defendant that he would only serve 1/6 of his plea bargain sentence.
- 1990:** *Hill v. Lockhart*, 894 F.2d 1009 (8th Cir. 1990) (en banc). Defendant was denied EAC by counsel's failure to ascertain through minimal research applicable statute governing parole eligibility for second offenders and to inform his client accurately when asked about that eligibility, as basic minimum amount of time that defendant would have to serve was integral factor in plea negotiation, particularly given attorney's knowledge that timing of eligibility was dispositive issue in accepting plea bargain.

2. U.S. District Court Cases

- 2001:** *Fowler-Cornwell v. United States*, 159 F. Supp. 2d 291 (N.D.W. Va. 2001). Counsel ineffective in firearm and drug distribution case for failing to advise the defendant that her sentence for the firearm offense could not be made to run totally concurrent with her sentence on the distribution offense. Counsel's conduct was deficient because he was not familiar with the pertinent provisions of the sentencing guidelines. Prejudice found where the defendant had already rejected a proposed plea that would have resulted in a 25 year sentence, and it was probable that, but for her counsel's failure to inform her that her sentences would have to run consecutively, she would have proceeded to trial and rejected the plea agreement under which she faced an absolute minimum sentence of 27 years.
- 1996:** *Kates v. United States*, 930 F. Supp. 189 (E.D. Pa. 1996). Counsel ineffective in drug case for failing to advise defendant that, under sentencing guidelines, he faced a sentence of between 30 years and life, as opposed to government's plea offer of five to 40 years, with possible downward departure below five years. Prejudice found even though counsel testified that defendant was

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adamant about not accepting a plea agreement, because of reasonable probability that he would have changed his mind if he had known the true facts.

3. State Cases

2003: *State v. Rojas-Martinez*, 73 P.3d 967 (Utah Ct. App.), cert. granted, 80 P.3d 152 (Utah 2003). Counsel ineffective in affirmatively misrepresenting the deportation consequences prior to entry of guilty plea. While deportation is a collateral consequence and an attorney has no duty to inform a client of deportation consequences of a guilty plea, if counsel addresses the subject the advice must be accurate. Here where deportation was a virtually automatic, unavoidable consequence but counsel informed the defendant that he “might or might not” get deported this was an affirmative misrepresentation of the truth. Prejudice found because the defendant would not have plead guilty if he had known the truth.

2001: *Crabbe v. State*, 546 S.E.2d 65 (Ga. Ct. App. 2001). Counsel ineffective in negotiated plea for kidnaping and other charges for erroneously advising the defendant that he would be eligible for parole after 10 years when defendant would, in fact, have to serve the entire 20 years without parole eligibility. While “[t]here is no requirement that a defendant be advised of his eligibility or ineligibility for parole for his guilty plea to be valid . . . [if] the defense strategy in plea negotiations is an attempt to ensure the defendant’s eligibility for parole, and the defendant’s attorney misinforms his client that he will be eligible for parole, the attorney renders ineffective assistance.”

State v. Kress, 636 N.W.2d 12 (Iowa 2001). Counsel ineffective in plea to obtaining prescription drug by forgery case for failing to file a motion in arrest of judgment, which was required to challenge the voluntariness of the plea on appeal, because the trial court incorrectly advised the defendant of the minimum sentence. The court advised her that the minimum was one third of the maximum indeterminate sentence but that it could be waived by the court. The court initially did waive but then reopened the record and declared no discretion to do so. The court was correct that it had no discretion but defense counsel did not object or file the motion. Counsel was deficient because there was no strategy, just “legal misadvice.” Defendant was prejudiced because she may not have pled guilty absent the misadvice.

Bronson v. State, 786 So. 2d 1083 (Miss. Ct. App. 2001). Counsel ineffective in armed robbery plea for misleading the defendant about the possible minimum sentence, which rendered the plea invalid because it was not knowingly and voluntarily made. The court reversed due to the combination of the judge’s failure to apprise the defendant of the minimum sentence, the petition to enter the plea contained incorrect and misleading information, and the attorney misled the defendant to believe that he could possibly get off without serving any jail time, when in reality the minimum sentence for his crime was three years.

2000: *Aldus v. State*, 748 A.2d 463 (Me. 2000). Counsel ineffective in aggravated assault case for failing to request a continuance in plea hearing in order to learn why the INS was “looking for” the defendant and to advise her accordingly. Defendant plead guilty in a plea arrangement unaware that

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the plea made her “conclusively presumed” deportable. While the court did not find that every defense lawyer should know immigration consequences and did not review the issue of whether this was a collateral consequence for which no advice was required, deficient conduct found for not seeking continuance in order to answer defendant’s question about INS. Prejudice found because she would not have plead guilty if she had known of deportation consequence.

State v. Vieira, 760 A.2d 840 (N.J. Super. Ct. 2000). Counsel ineffective in failing to address deportation issue for defendant from Portugal, who had resided in U.S. for 30 years, prior to plea for third degree case. While deportation may not be a penal consequence of guilty plea and counsel is not obligated to make specific inquiry as to residency status of a defendant, when a defendant previously discloses that he is a resident alien, the knowledge is imputed to defense counsel and the defendant discloses in open court that he has problems reading and writing English, counsel’s performance is constitutionally deficient if counsel does not address issue of deportation with defendant and defendant is not aware of risk of deportation. “When counsel makes a strategic choice based on inadequate investigation, however, the strategic choice is robbed of its presumption of competence and must be judged on whether reasonable professional judgments support the limitations on investigation.” *Id.* at 685-86.

1999: *People v. Brown*, 723 N.E.2d 362 (Ill. App. Ct. 1999). Counsel ineffective in plea negotiations in aggravated battery and firearms case because counsel was not aware that the defendant was subject to a mandatory life term as habitual criminal if convicted of aggravated battery. Defendant had told the investigator of prior convictions and information was in counsel’s file. The state had offered a plea agreement that still would have subjected the defendant to mandatory life. Prejudice found though because there was a reasonable probability that if defense counsel had known of the mandatory life problem, counsel may have been able to negotiate a better deal to avoid the issue.

Coker v. State, 995 S.W.2d 7 (Mo. Ct. App. 1999). Counsel ineffective in burglary, theft, damage to property, and possession of drug case for failing to adequately advise defendant on sentence possibilities prior to guilty plea. Guilty plea to possession of controlled substance was rendered involuntary by defense counsel’s ineffective assistance in representing that sentence for possession, which was initially sentence of probation, would run concurrently with sentences for two other offenses, without disclosing that trial court had discretion to order consecutive sentences if probation was revoked, though defendant understood possible sentencing range for possession offense. Probation revoked and defendant’s sentences ran consecutively.

Turner v. State, 335 S.C. 382, 517 S.E.2d 442 (1999). Counsel ineffective for failing to adequately advise prior to plea. Defendant entered plea to pending charges after his probation was revoked and he was sentenced to serve the remaining 14 years on prior charges. He actually only had 7 years remaining on prior though and would not have plead guilty for 15 year concurrent sentence if he had known that.

Ex parte Moody, 991 S.W.2d 856 (Tex. Ct. App. 1999). Counsel ineffective in drug possession case for advising defendant erroneously that, if he plead guilty in state court, he would be transferred

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back to federal prison to serve a previously imposed sentence and his state and federal sentences would run concurrently. This advice was false and defendant had to serve 15 year state sentence and then serve all of federal sentence. Defendant would not have plead guilty but for this erroneous advice.

1998: *Ward v. State*, 708 So. 2d 11 (Miss. 1998). Counsel ineffective in sale of cocaine and escape from jail plea case for failing to adequately advise the defendant of the possible punishments. Even though the escape charge the defendant faced carried only a six month maximum, counsel allowed defendant to plead guilty to the more serious violent felony escape charge and the defendant was sentenced to five years on that charge. Defendant also argued that he was not advised of the possible punishment range on the cocaine charge and the record and the state's evidence did not rebut that claim. Because counsel made such an egregious error on the escape charge, the court was not satisfied that counsel rendered adequate assistance on the cocaine charge. Thus, both pleas set aside because not voluntarily and knowingly made. Court held, "Effective assistance of counsel contemplates counsel's familiarity with the law that controls his client's case." 708 So. 2d at 14.

State v. Thomsen, 719 A.2d 1288 (N.J. Super. Ct. App. Div. 1998). Counsel ineffective in case of eluding police by motor vehicle, which was charged as fourth degree. Even though statute had been amended effective prior to this crime to make these offenses second degree, counsel was unaware of the change in the statute and did not advise the defendant of the possible increase in penalty. No one discovered the change until after conviction, but before sentencing, and the judge changed the conviction to second degree. The Court held that the lack of knowledge prejudiced the defendant in his consideration of the proffered pre-trial plea offer when he was unaware of his potential criminal exposure in rejecting it. The Court declined, however, to conduct *Strickland* prejudice analysis because the result was that the defendant was denied a fair criminal process and notice similar to the problem in *Lankford v. Idaho*, 500 U.S. 110 (1991) (failure to give notice that defendant was subject to death penalty prior to death sentence violated due process).

1995: *Morales v. State*, 910 S.W.2d 642 (Tex. Ct. App. 1995). Counsel ineffective in child abuse case for failing to advise non-English speaking client prior to entering plea with no deal that judge could sentence her to up to 99 years and that she would be deported. Counsel never mentioned deportation and told client that she would get no more than 30 years. She got 75 years.

Tallant v. State, 866 S.W.2d 642 (Tex. Ct. App. 1993). Trial counsel ineffective in aggravated sexual assault case for advising defendant that if he plead guilty and waived jury sentencing that he would probably get probation when the court was precluded from granting probation in aggravated sexual assault case.

1992: *People v. Blommart*, 604 N.E.2d 1054 (Ill. App. Ct. 1992). Counsel ineffective in murder of child prosecution for misinforming defendant as to potential penalty for murder, misleading her concerning eligibility for work release, and possibility of losing parental rights to other son. Based on incorrect advice, defendant rejected plea agreement in which she could have pled guilty to involuntary manslaughter and did not even request a manslaughter instruction at trial.

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Williams v. State, 605 A.2d 103 (Md. 1992). Counsel ineffective for failing to advise defendant that he faced a mandatory sentence of 25 years which resulted in defendant turning down a plea offer for a lesser included offense and 10 years.

1991: *Reeves v. State*, 564 N.E.2d 550 (Ind. Ct. App. 1991). Counsel ineffective for advising defendant to accept plea offer to avoid being charged as habitual offender when defendant was not eligible for habitual offender status.

Alexander v. State, 303 S.C. 539, 402 S.E.2d 484 (1991). Trial counsel ineffective for advising client that he would face potential life sentence if he proceeded to trial when he would have actually faced a 7-25 year sentence for one charge and a 25 year sentence for the second charge. Based on trial counsel's erroneous advice, defendant pled guilty.

Ray v. State, 303 S.C. 374, 401 S.E.2d 151 (1991). Counsel ineffective for advising defendant he would get life without parole if convicted which prompted guilty pleas when sentence actually ranged from 75 years without parole to as little as 10 years if sentences ran concurrently.

Ex parte Battle, 817 S.W.2d 81 (Tex. Crim. App. 1991). Trial counsel ineffective in aggravated sexual assault case for advising defendant that if he pled guilty he could get probation when state law prohibited probation for that offense.

1990: *Howard v. State*, 783 S.W.2d 61 (Ark. 1990). Trial counsel in kidnaping and rape case (defendant's husband was accomplice) ineffective for recommending that the defendant plead guilty without the benefit of a plea bargain. Counsel's advice was based on reliance on outdated statutes and counsel's belief that all or part of the sentence would be suspended and the defendant would spend no more than 90 days in prison when the defendant actually got 20 and 40 year consecutive sentences. In addition, during the representation, the defendant was undergoing psychiatric treatment, having problems with alcohol abuse, and having sexual relations with counsel.

Lotero v. People, 560 N.E.2d 1104 (Ill. App. Ct. 1990). Counsel ineffective for incorrectly advising client that he could not be deported if he pled guilty to narcotics charge.

People v. Maranovic, 559 N.E.2d 126 (Ill. App. Ct. 1990). Counsel ineffective for failing to realize defendant's alien status and advise him of deportation consequence of pleading guilty to felony even though presentence report indicated that defendant was born in Yugoslavia and counsel had to have an interpreter at times to communicate with client.

1989: *People v. Miranda*, 540 N.E.2d 1008 (Ill. App. Ct. 1989). Counsel ineffective for failing to advise alien defendant of deportation consequence of pleading guilty to felony.

Hinson v. State, 297 S.C. 456, 377 S.E.2d 338 (1989). Trial counsel in murder case ineffective for advising client that he would be eligible for parole in 10 years if he pled guilty when in fact he

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would not be eligible for parole until 20 years had passed. Defendant pled guilty based on this erroneous advice.

1987: *Ex parte Pool*, 738 S.W.2d 285 (Tex. Crim. App. 1987). Counsel ineffective for misadvising based on prosecutor's assertions that defendant could get a minimum 25 year sentence for felony DWI if he didn't accept state's plea offer.

1986: *People v. Padilla*, 502 N.E.2d 1182 (Ill. App. Ct. 1986). Counsel ineffective for incorrectly advising client that he could not be deported if he pled guilty to felony charge.

1985: *People v. Correa*, 485 N.E.2d 307 (Ill. 1985) (affirming 465 N.E.2d 507 (Ill. App. Ct. 1984)). Counsel ineffective for incorrectly advising client that he could not be deported if he pled guilty to felony.

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C. FAILURE TO INFORM DEFENDANT OR STATE OF PLEA OFFER

1. U.S. District Court Cases

1993: *United States v. Busse*, 814 F. Supp. 760 (E.D. Wis. 1993). Trial counsel ineffective during plea negotiations for failing to advise the defendant concerning the sentencing guidelines and failing to provide the defendant with a copy of the plea agreement offered by the prosecution which if it had been accepted would have given the defendant a lower sentence than what he got.

2. State Cases

2001: *Turner v. State*, 49 S.W.3d 461 (Tex. Ct. App. 2001), *petition for review dismissed*, 118 S.W.3d 772 (Tex. Crim. App. 2003). Counsel ineffective in murder case for failing to inform the defendant of the deadline attached to a plea offer. State had offered a sentence of 35 years in exchange for plea. Counsel communicated the plea offer but not the deadline and the deadline passed before the defendant notified counsel and counsel notified the state that offer would be accepted. State would not accept deal and defendant went to trial and received a life sentence. Remedy was to reverse and order reinstatement of plea offer.

2000: *Atkins v. State*, 26 S.W.3d 580 (Tex. Ct. App. 2000). Counsel ineffective in felony DWI case for failure to inform defendant of state's plea bargain offer of 12 years. Defendant had refused offer of fifteen years, but defense counsel never relayed offer of 12. At a pretrial hearing, when the state announced it had offered 12, the defendant said he would take it, but the state said it was no longer offering a plea bargain. Defendant prejudiced because he would have accepted plea bargain and would not have gone to trial where he was sentenced as habitual offender to 25 years.

Paz v. State, 28 S.W.3d 674 (Tex. Ct. App. 2000). Counsel ineffective in drug possession case for failing to inform the defendant of state's plea offer. Prejudice found where defendant would have accepted plea bargain offer, which would have resulted in sentence of 5 years probation and \$2,900 fine, rather than 5 years and \$5,000 fine imposed when defendant later pleaded guilty without plea bargain.

Ex parte Lemke, 13 S.W.3d 791 (Tex. Crim. App. 2000). Counsel ineffective for failing to advise drug possession defendant of two plea offers by the state, first for 20 years, then for 16 years. Defendant plead guilty for 40 years. Prejudice found even though trial court not required to accept state's recommendation. Court reinstated the 20 year plea offer because that was the first offer made and defendant indicated he would have accepted it.

1999: *Becton v. Hun*, 516 S.E.2d 762 (W. Va. 1999). Counsel ineffective for failing to communicate plea offer to client indicted for one burglary and six aggravated robberies. State offered a recommendation of 10 years confinement, which was the statutory minimum sentence for aggravated robbery, in exchange for a plea to only one robbery. The deal was not communicated and defendant went to trial facing four armed robbery charges. Convicted of one and sentenced to 40 years. Court

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held that where defendant's evidence showed he was not told of the deal and trial counsel could not remember and had no evidence, the "benefit of the doubt," 516 S.E.2d at 767, went to the defendant that counsel's conduct was deficient. On prejudice, court said no prejudice on plea because the trial resulted in only one conviction. The court remanded for sentencing, however, noting that while the trial court was under no obligation to accept the state's offer, the fact that the state recommended minimum sentence of 10 years certainly could have resulted in a sentence less than 40 years.

1994: *Harris v. State*, 875 S.W.2d 662 (Tenn. 1994). Counsel ineffective in assault with intent to murder case for failing to discuss the state's five year plea offer with defendant who went to trial without knowledge of offer and got 35 years.

1993: *Randle v. State*, 847 S.W.2d 576 (Tex. Crim. App. 1993). Counsel ineffective in aggravated robbery case for failing to inform prosecution prior to the prosecution's deadline that the defendant accepted the plea offer in which the state would recommend a 35 year sentence. Defendant plead guilty without deal and got life.

1990: *Flores v. State*, 784 S.W.2d 579 (Tex. Ct. App. 1990). Counsel ineffective in robbery case for failing to inform prosecution prior to the prosecution's deadline that the defendant accepted the plea offer which called for 10 year sentence. Defendant plead guilty without deal and got life.

1988: *Pennington v. State*, 768 S.W.2d 740 (Tex. Ct. App. 1988). Counsel ineffective in felony indecency with child case for failing to advise the defendant of plea offers in which state was willing to accept misdemeanor plea and not oppose probation. Defendant got 7 years.

1987: *People v. Hartley*, 418 N.W.2d 391 (Mich. Ct. App. 1987), *modified*, 418 N.W.2d 897 (Mich. 1988). Counsel ineffective for failing to advise client that judge told counsel in chambers that she was not inclined to give probation which deprived defendant of the opportunity to withdraw guilty plea.

Ex parte Wilson, 724 S.W.2d 72 (Tex. Crim. App. 1987). Counsel ineffective for failing to tell the defendant about the state's plea offer for 13 years when defendant got automatic life sentence after trial.

1984: *Hanzelka v. State*, 682 S.W.2d 385 (Tex. Ct. App. 1984). Counsel ineffective for failing to advise defendant of plea offer for probation when defendant got a year confinement.

***Capital Case**

D. OTHER ERRONEOUS LEGAL ADVICE LEADING TO PLEA

1. U.S. Court of Appeals Cases

2002: *Lyons v. Jackson*, 299 F.3d 588 (6th Cir. 2002). Counsel ineffective for failing to inform 16-year-old juvenile murder defendant, prior to guilty plea, that, while sentencing judge had discretion to sentence the defendant as juvenile, the prosecutor could appeal any juvenile sentence imposed.¹¹ Defendant plead guilty knowing that the judge could sentence him as a juvenile or as an adult, which would result in a life without parole sentence. Judge sentenced juvenile to confinement until age 21. Prosecutor appealed and court of appeals ordered sentencing as adult to life without parole. The court held that the state court application of *Strickland* and *Hill v. Lockhart* was objectively unreasonable. In finding deficient conduct, the court held that petitioner's "age and his heavy reliance on [counsel] . . . enhanced [counsel's] duty to make certain that [petitioner] understood all the risks associated with his guilty plea." *Id.* at 599. Prejudice found under the circumstances, especially in light of counsel's advice to plead guilty to an offense punishable by life without parole. If defendant had known prosecutor could appeal juvenile sentence, a reasonable probability existed that he would not have plead guilty.

Miller v. Straub, 299 F.3d 570 (6th Cir. 2002) (affirming *Haynes v. Burke*, 115 F. Supp. 2d 813 (E.D. Mich. 2000)). Counsel ineffective for failing to inform 15 and 16-year-old juvenile murder defendants, prior to guilty plea, that, while sentencing judge had discretion to sentence the defendants as juveniles, the prosecutor could appeal any juvenile sentence imposed. Defendants plead guilty knowing that the judge could sentence as a juvenile or as an adult, which would result in a life without parole sentence. Judge sentenced both juveniles to confinement until age 21. Prosecutor appealed and court of appeals ordered sentencing as adults to life without parole. The court held that the state court application of *Strickland* and *Hill v. Lockhart* was objectively unreasonable. In finding deficient conduct, the court held that petitioner's "age and his heavy reliance on [counsel] . . . enhanced [counsel's] duty to make certain that [petitioner] understood all the risks associated with his guilty plea." *Id.* at 581. Prejudice found under the circumstances, especially in light of counsel's advice to plead guilty to an offense punishable by life without parole. If defendants had known prosecutor could appeal juvenile sentence, a reasonable probability existed that they would not have plead guilty.

1995: *United States v. Streater*, 70 F.3d 1314 (D.C. Cir. 1995). Counsel ineffective in advising client in drug case that after he argued and lost a suppression motion in which it was contended that car searched was the defendant's and that search was illegal that he could not then argue (or the suppression hearing would be brought up) during trial that he was unaware of the drugs in the car which induced defendant to plead guilty. Counsel misunderstood law which simply stated that if

¹¹Michigan law has since been changed and the trial court no longer has discretion to sentence murder defendants to juvenile sentence.

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defendant testified in suppression hearing and then testified in a contrary manner during trial that he could be impeached based on hearing testimony.

United States v. Hansel, 70 F.3d 6 (2nd Cir. 1995). Counsel ineffective for failing to advise defendant prior to guilty plea to eight counts of false statements that two of the counts were barred by the statute of limitations. Defendant's waiver of defense not knowing and intelligent because defense counsel did not recognize issue or inform defendant of it.

1990: *United States v. Loughery*, 908 F.2d 1014 (D.C. Cir. 1990). Trial counsel ineffective for allowing defendant to plead guilty without advising her that Supreme Court decision invalidated the charges.

2. Military Cases

1991: *United States v. Kelly*, 32 M.J. 813 (N.M.C.M.R. 1991). Counsel ineffective for advising accused to plead guilty to unauthorized absence, solicitation of distribution of methamphetamine and of possession, use and distribution of the methamphetamine solicited because the sole evidence supporting these charges was the accused's confession and under military law an accused can not be convicted solely on the basis of an uncorroborated confession.

3. State Cases

2002: *Harris v. State*, 806 So. 2d 1127 (Miss. 2002). Counsel ineffective in drug distribution plea for erroneously advising the defendant that he could withdraw the plea at any time prior to sentencing. Counsel moved to dismiss charges based on entrapment and asserted that the state had failed to disclose the informant's phone records and tapes of at least 15 calls made prior to the sell. The court denied the motion to dismiss and deferred the discovery requests. The defendant then plead guilty based on counsel's advice that he could plead, continue to investigate, and withdraw at any time prior to sentencing 60-90 days later. Prejudice found because the defendant would not have plead guilty "but for" counsel's misadvice.

2001: *MacDonald v. State*, 778 A.2d 1064 (Del. 2001). Counsel ineffective in plea to conspiracy to commit murder and solicitation case, which arose from alleged plot to kill witness who testified against defendant with respect to first degree murder charge for which defendant was confined and awaiting sentencing when conspiracy and solicitation offenses allegedly occurred. Counsel conducted no investigation, including failing to even question the defendant, and instead just informed the defendant that he had no choice but to plead guilty to conspiracy and solicitation charges. Counsel had only examined the probable cause sheet supporting the defendant's arrest. Counsel had also consented to and even encouraged the defendant's placement in solitary confinement where he remained for four days with little sleep before being presented with and agreeing to the plea agreement, and counsel permitted the defendant to surrender not only the claim of error that they believed provided a strong basis for overturning the murder conviction on appeal, but also permitted the defendant to waive his right to post-conviction relief without even any attempt at negotiations. Prejudice found because the plea agreement secured no direct benefit to the

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defendant, who essentially pleaded guilty in order to protect his father when the state had no real basis for charging his father in any event. The court was also troubled about counsel's acquiescence and even participation in having the defendant put in solitary confinement prior to the plea offer and acceptance.

2000: *Jackson v. State*, 342 S.C. 95, 535 S.E.2d 926 (2000). Counsel ineffective in threatening a public official case for failing to advise the defendant that the crime was a felony. During plea hearing counsel said it was a misdemeanor. Prejudice found because defendant testified he would not have plead guilty if he had known it was a felony. Trial judge found this testimony was not credible, but appellate court reversed because regardless of credibility there no contrary evidence supporting the court's finding that petitioner would have plead guilty anyway.

1998: **State v. Ysea*, 956 P.2d 499 (Ariz. 1998) (en banc). Counsel ineffective in first degree murder case for advising client erroneously that he could receive a death sentence if he did not accept the state's manslaughter plea offer. The defendant had a prior conviction for solicitation to commit aggravated assault. The prosecutor offered the plea with a statement that the death penalty would be avoided. The defense counsel simply accepted the state's position and advised his client to plead guilty to avoid the death penalty. If counsel had adequately researched the issue, however, he would have discovered that the only arguable aggravating factor was the prior conviction and that the capital aggravating factor required a felony conviction "involving the use or threat of violence on another person."¹² At the time of trial, the Arizona Supreme Court had already interrupted the aggravating factor to require that the statutory definition of the prior conviction (and not the underlying facts) controlled the determination of whether a prior conviction was one of violence. In this case, the statutory definition of solicitation does not include an element of violence. Thus, Ysea's prior conviction could not have supported the aggravating factor. In finding deficient conduct, the court held, "Surely, in a capital case one might expect reasonably competent counsel to research the question of whether the seemingly non-violent act of solicitation qualified as a capital aggravating factor under a statute that required previous conviction of a crime involving the use or threat of violence." 956 P.2d at 503. In finding prejudice, the court held that the issue was not whether counsel's errors prejudiced the outcome of a trial that was never held.; rather, the appropriate question was whether counsel's errors prejudiced the defendant by inducing him to make an involuntary plea agreement and giving up his right to trial.

Wayrynen v. Class, 586 N.W.2d 499 (S.D. 1998). Counsel ineffective for identifying client to police and having her confess to 15 arson charges without any prior attempt to negotiate a deal with the state. The defendant, who suffered from depression. approached counsel, who had represented her previously and knew about depression, and indicated that she wanted to confession to numerous arsons committed on the same day. Counsel contacted police and learned that they were investigating but had no suspects. He then told defendant that she could remain silent or confess and

¹²Arizona has since amended the statute to supercede the portion of the opinion discussing the requirements for the statutory aggravating factor. See *State v. Martinez*, 999 P.2d 795 (Ariz. 2000).

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that if she confessed incarceration was likely. He did not, however, inform her that she would be facing a punishment of up to 140 years confinement. The defendant indicated that she wanted to confess and counsel called the state's attorney and identified her and said that she wanted to talk about the fires. He went with her and even assisted the police in eliciting information from her. He subsequently agreed to a sentencing recommendation that sentences be concurrent from the state but knew that the court was not bound them and that judges in that circuit rejected them. The judge sentenced her consecutively so she got 75 years. He also notified prison that each count should be considered separately so that she would not be eligible for parole for almost 20 years. The Court held that counsel was ineffective for failing to seek a limit on the number of charges filed against the defendant prior to identifying her to the state's attorney and failing to advise the defendant that they should attempt to negotiate prior to identifying her to police and having her confess. Counsel left her only with the alternative of doing nothing or being charged with 15 crimes. Prejudice was established because the state's attorney conceded that, based on the evidence the state had prior to the confession, she would have entertained a plea to limit the number of charges prior to the identification of the defendant. Thus, there is a reasonable probability that the defendant would not have plead guilty to 15 charges and faced 140 years confinement.

1997: *People v. Cunningham*, 676 N.E.2d 998 (Ill. Ct. App. 1997). Counsel ineffective in drug possession case for advising client to plead guilty when counsel believed that plea would preserve right to appeal denial of motion to suppress but counsel did not understand that plea waived right to appeal.

1996: *Shelton v. Commonwealth*, 928 S.W.2d 817 (Ky. Ct. App. 1996). Counsel ineffective for advising defendant to plead guilty to two drug charges when possession of methamphetamine and cocaine was one offense for purposes of double jeopardy clause of Kentucky Constitution.

1993: *State v. May*, 429 S.E.2d 360 (N.C. Ct. App. 1993). Trial court found counsel ineffective in case where defendant charged with first degree murder for advising the defendant erroneously that he would probably get the death penalty. Counsel conducted inadequate investigation and relied on incomplete and faulty analysis of the law. Defendant plead guilty to second degree murder. Trial court held harmless error, however, because the evidence at trial would have been sufficient to prove first degree murder. Appellate court found evidence sufficient to support finding of IAC and ordered a new trial because harmless error analysis may not be applied in this context.

State v. Stowe, 858 P.2d 267 (Wash. Ct. App. 1993). Trial counsel ineffective for advising client that an Alford plea (no admission of guilt but accepting plea agreement) to a charge of second degree murder would probably not end defendant's military career. Counsel only asked the military liaison who was not a lawyer and did not investigate further. Proper investigation would have revealed that the military does not distinguish between an Alford plea and a guilty plea.

1992: *Murdock v. State*, 311 S.C. 16, 426 S.E.2d 740 (1992). Trial counsel was ineffective for advising defendant to plead guilty to possession of counterfeit substance with intent to distribute when the defendant was actually in possession of an imitation, not counterfeit, substance and possession of an imitation substance with intent to distribute is not a crime.

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1991: *Shirley v. State*, 306 S.C. 241, 411 S.E.2d 215 (1991). Trial counsel ineffective for failing to advise defendant, prior to his entry of guilty plea, that his incriminating statements made which were induced by the investigating officer's promise of a four-year sentence cap may have been made involuntarily and, if so, would be inadmissible at trial.

Kerrigan v. State, 304 S.C. 561, 406 S.E.2d 160 (1991). Trial counsel ineffective for failing to advise defendant, who continuously declared his intent to return the car, that if he went to trial on grand larceny of automobile charge, he could have requested an instruction on the lesser offense of use of vehicle without permission and might have been convicted of the lesser offense. Without this advice, the defendant pled guilty to the grand larceny charge.

Jivers v. State, 304 S.C. 556, 406 S.E.2d 154 (1991). Trial counsel ineffective for advising defendant that double jeopardy clause would not bar prosecution on charge of assault and battery which was based on the same conduct which supported a previous conviction for criminal domestic violence. Defendant pled guilty based on this erroneous advice.

1990: *Commonwealth v. Nelson*, 574 A.2d 1107 (Pa. Super. Ct. 1990). Counsel ineffective for advising defendant to plead guilty to perjury and false swearing without considering that the defendant's testimony from another trial was inadmissible because it was compelled.

Davenport v. State, 301 S.C. 39, 389 S.E.2d 649 (1990). Counsel ineffective for advising defendant to plead guilty but mentally ill to murder despite knowledge that state's psychiatrist diagnosed as insane at time of offense and counsel failed to discuss insanity with defendant.

1989: *Fretwell v. State*, 772 S.W.2d 334 (Ark. 1989). Counsel ineffective in first degree murder case for advising the defendant to plead guilty as an accomplice when her conduct was insufficient to make her an accomplice to murder committed by her husband. At time of murder, she was in another location asleep and knew nothing about murder until her husband told her afterwards.

1988: *Teague v. State*, 772 S.W.2d 932 (Tenn. Crim. App. 1988). Counsel ineffective for incorrectly advising the defendant that nolo contendere plea to second degree murder would have no effect on capital murder case when the plea was used in the sentencing phase of the subsequent capital trial.

1987: *McKinney v. State*, 511 So. 2d 220 (Ala. 1987) (affirming 511 So. 2d 218 (Ala. Crim. App. 1986)). Trial Counsel ineffective for advising the defendant to plead guilty to murder and attempted murder in exchange for concurrent sentences where both offenses were based on single shotgun blast which killed one person and injured another. Under Alabama law at that time, the defendant could have been convicted of only one offense and but for the erroneous advice would not have plead guilty.

Booth v. State, 725 S.W.2d 521 (Tex. Ct. App. 1987). Counsel failed to advise the defendant prior to murder plea how a heated argument between the defendant and the victim immediately preceding the shooting could reduce offense to voluntary manslaughter.

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1986: *State v. Washington*, 491 So. 2d 1337 (La. 1986). Counsel ineffective in forgery case for failing to advise the defendant prior to his guilty plea that he was probably only guilty of attempted forgery or attempted theft because the check was not signed.

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E. BAD ADVICE LEADING TO REJECTION OF PLEA OFFER

1. U.S. Court of Appeals Cases

2002: *United States v. Day*, 285 F.3d 1167 (9th Cir. 2002). Counsel ineffective in drug case for incorrectly advising the defendant that he would have to go to trial in order to argue that the government “had engaged in sentencing entrapment.” This erroneous advice caused the defendant to reject a plea offer that included a three-point reduction for acceptance of responsibility. Prejudice found because the defendant may well have pled guilty if adequately advised. Remanded for resentencing and for the District Court to make specific findings on deficient conduct because the District Court did not address this issue in the first instance.

2001: *Magana v. Hofbauer*, 263 F.3d 542 (6th Cir. 2001). Counsel ineffective in drug case involving two counts and mandatory consecutive terms of ten to twenty years’ imprisonment for advising the defendant incorrectly in rejecting plea offer to ten years that he could not receive consecutive sentences and that he would get ten years whether he went to trial or not. Because the state courts did not discuss the question of deficient performance, the court assumed that they concluded that counsel’s performance was objectively deficient under *Strickland*. *Id.* at 549. The state courts’ determination of no prejudice was unreasonable because the state court applied a standard that required that the defendant prove that he would have accepted the offer to show prejudice rather than *Strickland*’s standard of a reasonable probability that he would have accepted the state’s offer. *Id.* at 550. The sentence was set aside with instructions to reinstate the plea offer or else overcome a presumption of vindictiveness.

Wanatee v. Ault, 259 F.3d 700 (8th Cir. 2001) (affirming 101 F. Supp. 2d 1189 (N.D. Iowa 2000)). Counsel ineffective in murder case for failing to properly advise defendant about the felony-murder rule while the defendant was considering the state’s oral plea offer to plead guilty to second degree murder in exchange for “cooperation” with the government. As a result, the defendant rejected plea offer and was tried and convicted of first degree murder. The state court determination that petitioner was not prejudiced because he ultimately received a fair trial was an unreasonable application of clearly established federal law. The District Court’s finding of prejudice was not clearly erroneous. [District court held: While the defendant repeatedly expressed unwillingness to cooperate with government and be branded a “snitch,” court found a reasonable probability that he would have accepted the plea agreement and cooperated if he had been properly advised of the law and had known that he could receive some real benefit in exchange for cooperation. Instead, defendant rejected plea offer and was tried and convicted of first degree murder. Prejudice found because, although defendant knew there was a great disparity of possible sentences between first and second degree when he chose to reject offer and go to trial, he was not aware due to lack of adequate advice that he would almost probably be found guilty of first degree murder if he proceeded to trial.]

2000: *Mask v. McGinnis*, 233 F.3d 132 (2nd Cir. 2000) (affirming 28 F. Supp. 2d 122 (S.D.N.Y. 1998)). Counsel ineffective in robbery case for failing to discover that a conviction would make the

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defendant a second violent offender instead of a persistent felony offender under state law. Prior to trial, the state offered a deal to plead to one of the three robberies charged for a sentence of 10 years to life, the minimum sentence under persistent offender statute. During trial, the state again repeated the offer and said that was as low as she could go. Trial counsel was ineffective for failing to recognize that the defendant was not a persistent offender under state law. The defendant was prejudiced because had he been properly qualified as a second offender he would have accepted a reasonable offer from the prosecution and the record reflects that the prosecutor would have offered a more favorable deal if she had not been under the mistaken impression that he was a persistent offender. Actual minimum was 6-12 years instead of 10-life. At trial, defendant got 20-40 years. Convictions set aside unless state would agree to reduce sentence to 8-16 years. State court decision found to be contrary to federal law because state court insisted on “certainty” that outcome would have been different and failed to refer to “reasonable probability.” State court fact-findings also given no deference because based on unreasonable application of facts to wrongful “certainty” standard.

1997: *Boria v. Keane*, 99 F.3d 492, *clarified on reh’g*, 90 F.3d 36 (2nd Cir. 1996). Counsel ineffective in drug case for failing to advise client concerning the advisability of accepting the state’s offered plea bargain even though counsel believed that “his client’s decision to reject the plea bargain was suicidal.” Client rejected deal for one to three years and got twenty to life.

1988: *Turner v. Tennessee*, 858 F.2d 1201 (6th Cir. 1988) (*affirming* 664 F. Supp. 1113 (M.D. Tenn. 1987)), *vacated on other grounds*, 492 U.S. 902 (1989). Petitioner was denied EAC when his trial counsel advised him against accepting two-year plea offer after co-defendant received 70 year sentence and he received sentence of life imprisonment for murder plus 40 years on each of two kidnaping counts.

2. U.S. District Court Cases

2002: *United States v. Quiroz*, 228 F. Supp. 2d 1259 (D. Kan. 2002). Counsel was ineffective in cocaine distribution case for giving erroneous advice regarding the defendant’s possible sentences, which resulted in the defendant rejecting a plea offer. Counsel had sent the defendant a letter advising him of the possible penalties for possession of marijuana when the defendant was actually charged with possession of cocaine and there was a great difference in the possible penalties. As a result the defendant believed that the differences between the plea offer and conviction at trial was only a matter of six months. The court found that counsel’s conduct was deficient and prejudicial because the defendant had been advised that he could face 21 to 27 months when he actually faced 120 months. There was objective evidence that the defendant would have accepted the government’s plea offer had he known his true sentencing exposure. The court set aside the plea and ordered that the defendant would be given the opportunity to except the plea offer with new counsel.

1998: *United States v. Robertson*, 29 F. Supp. 2d 567 (D. Minn. 1998). Acting on its own motion, the Court vacated the jury’s guilty verdicts – after convictions but prior to sentencing – on the basis of ineffective assistance of counsel. The defendant along with five co-defendants was charged with

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a number of violent armed robberies of jewelry stores. Prior to trial, three co-defendants entered pleas in exchange for a downward departure from sentencing guidelines and received sentences of 60-90 months. Prior to Robertson's trial, the Government stated that he had confessed to the crimes and was facing over 85 years, but the Government was willing to enter a plea agreement that would allow a sentence commensurate with co-defendants if he would testify against another co-defendant. Defense counsel stated, however, that he was philosophically opposed to entering agreements to testify for the government. Even with the defendant facing a mandatory sentence of over 90 years, the defense still rejected the government's offer—after conviction—to testify against co-defendant in exchange for government filing a motion for downward departure from guidelines. The Court held, however, that in “the interests of justice,” Slip Op. at *3, the convictions would be set aside, because where the legal representation was so inadequate as to violate Sixth Amendment rights, “a trial court's failure to take notice sua sponte may be a plain error.” Slip Op. at *4. The Court held that given the overwhelming evidence against Robertson, including his confession and the testimony of co-defendants, and the potential penalties involved, counsel was ineffective for not advising his client to accept the plea agreements offered by the government. “[I]t is [counsel's] absolute duty as a criminal defense attorney to put his client's interests before his own.” Slip Op. at *4. The Court was also troubled by the fact that only two motions were filed by counsel prior to trial; during the trial, counsel was admonished several times and held in contempt for sexist and racist comments; and following convictions, counsel filed no objections or position paper in sentencing even though client was facing in excess of 90 years in prison. The Court did not act until sentencing because prejudice was not established until the government announced during sentencing that it would no longer offer plea agreement. Court set aside convictions and appointed new counsel. [Subsequently, the portion of the order vacating convictions was vacated due to a Post Conviction Agreement negotiated by new counsel.]

3. State Cases

2002: *Freeman v. State*, 94 S.W.3d 827 (Tex. Ct. App. 2002). Counsel was ineffective in felony D.U.I case for giving the defendant erroneous advice on sentencing, which caused the defendant to reject the state's offer of a plea agreement. The defendant pled guilty and pleaded “true” to having previously been convicted of two felonies. The trial court sentenced the defendant to 25 years, which was the minimum range possible due to the defendant's prior felony convictions. Prior to entry of the plea, the state had offered a fifteen-year sentence. The defendant rejected it based on his counsel's advice that he could receive community supervision. Under the state's statutes, the trial court could not grant community supervision when the minimum punishment available was greater than ten years. Counsel's advice was clearly erroneous and no sound trial strategy could exist to rationalize counsel's actions. The defendant was prejudiced because, absent the misinformation, the defendant would have accepted the state's offer to abandon one of the sentencing enhancement allegations and the state would have agreed to a fifteen-year sentence.

State v. Williams, 83 S.W.3d 371 (Tex. Ct. App. 2002). Counsel ineffective in aggravated sexual assault case for failing to explain to the defendant the terms of a plea bargain offer. Prior to trial counsel informed the defendant of a plea offer of five years deferred adjudication community

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supervision, but counsel did not explain to the defendant what deferred adjudication meant. Counsel's conduct was deficient because "counsel's duty to a client includes fully explaining any plea offers in order to help a client make an informed decision." Prejudice found because counsel's failure to fully explain the offer effectively denied the defendant the opportunity to make an informed decision about whether to accept or reject the offer. Had counsel explained the offer the defendant likely would have plead guilty and received the deferred adjudication community supervision rather than the five years imprisonment he received as a result of trial.

1997: *State v. Lentowski*, 569 N.W.2d 758 (Wis. Ct. App. 1997). Counsel ineffective in sexual exploitation with child over 16 case for erroneously advising client that he had defenses of consent and mistake of age which caused the defendant to reject a plea offer and go to trial when the defenses were not available to him.

State v. Fritz, 569 N.W.2d 48 (Wis. Ct. App. 1997). Counsel ineffective in sexual assault on child case. Initially counsel retained by defendant's parents worked out plea agreement, based on defendant's statements that he had consensual sex with the 15-year-old victim. The deal would involve lesser offense and no jail time. Retained counsel then withdrew in order to save the family some money and public defender took over. Public defender advised defendant to reject the deal because there was nothing to lose and to lie and say there was no sex. The state added an additional charge after deal rejected and defendant convicted on both and got 7 years in prison.

1988: *Larson v. State*, 766 P.2d 261 (Nev. 1988). Counsel ineffective in murder of husband case where defendant got life without parole for recommending that the defendant reject state's plea offers and then after defendant entered plea to voluntary manslaughter which was a probationable offense counsel refused to disclose for sentencing purposes the defendant's psychological report which indicated PTSD and BWS based on husband's abuse and advised the defendant to withdraw her plea when the court asked for the report. All of this was done because counsel wanted to make a name for himself by establishing precedent for a "battered wife" self-defense theory which had not been previously established in state.

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F. INADEQUATE ADVICE ON RIGHT TO TRIAL OR TO PLEAD

1. U.S. Court of Appeals Cases

1998: *McGurk v. Stenberg*, 163 F.3d 470 (8th Cir. 1998). Counsel ineffective in DUI third case for failing to inform the defendant that he had the right to trial by jury prior to his bench trial. The court found that prejudice would be presumed because this is a “structural error” that can never be harmless.

2. State Cases

2003: *State v. Stallings*, 658 N.W.2d 106 (Iowa 2003). Counsel was ineffective in a first degree murder bench trial for failing to ensure that the defendant had adequately waived his right to trial by jury. A state court rule requires that a waiver of jury trial must be done in writing and on the record neither of which appeared to have been done in this case. The court held that prejudice is presumed because “this is one of those rare cases of a ‘structural’ defect.”

1998: *State v. S.M.*, 996 P.2d 1111 (Wash. Ct. App. 2000). Counsel ineffective for failing to adequately advise juvenile prior to plea to child rape. Counsel delegated responsibility to advise the defendant to his wife/legal assistant and her advice was incomplete and misleading. She did not advise the defendant that his silence could not be used against him at trial or that state would have burden of proof beyond a reasonable doubt. She instead told him that since he admitted to charges he would have to plead guilty and never discussed with him the right to trial or the possibility of negotiating a plea. She also did not read to him or insure that he read the plea form before he signed it. Counsel met with defendant only briefly prior to plea and discussed only the hearing procedure with him. Court held that conduct was deficient because legal assistant is not “counsel” at all and because defendant was misinformed and not adequately advised in any event. Prejudice found because the record did not indicate that the defendant even understood the nature of the charges, let alone that the plea was knowing and voluntary.

1985: *State v. Ludwig*, 369 N.W.2d 722 (Wis. 1985). Trial counsel ineffective for failing to advise the defendant that choice whether to accept or reject plea offer was hers because defendant rejected plea to misdemeanor on advice of counsel because she did not know choice was hers and was convicted of felony.

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G. INADEQUATE ADVICE ON RIGHT TO TESTIFY OR TO MAKE CLOSING ARGUMENT

1. U.S. Court of Appeals Cases

1992: *Nichols v. Butler*, 953 F.2d 1550 (11th Cir. 1992). Defendant was charged with the robbery of a convenience store, but the only evidence was a “quick glimpse” of the defendant by the employee. The defendant had originally agreed not to testify, but one day into a two-day trial, he changed his mind and wanted to testify. Counsel did not inform him of his constitutional right to testify, and stated that he would withdraw from representation if he decided to testify. Feeling that he would be left without counsel if he did in fact testify, the defendant decided to follow counsel’s advise and not testify. He was convicted. Counsel ineffective for threatening to withdraw during the trial if the defendant in robbery trial chose to testify when the only evidence against him was the identification by the store employee who got only a glimpse of the robber. The threat to withdraw was seen by the court as unprofessional conduct, and but for this conduct there was a good probability that the defendant would have been found not guilty. New trial granted.

2. U.S. District Court Cases

1998: *United States v. Lore*, 26 F. Supp. 2d 729 (D.N.J. 1998). Counsel ineffective for failing to advise the defendant, who wanted to testify in his own defense, that he could overrule the tactical decision by his attorney that he should not testify. Defendant charged with two co-defendants in loansharking activities. It was undisputed that he repeatedly told counsel he wanted to testify and that counsel told him that it was counsel’s decision to make and that he would not testify. Prejudice found because the government’s evidence against Lore was weaker than against other co-defendants and the testimony Lore proffered in motion to vacate could have provided a rational non-criminal explanation for what the government alleged were extortionate activities.

1996: *Campos v. United States*, 930 F. Supp. 787 (E.D.N.Y. 1996). Counsel in drug case was ineffective where government evidence consisted almost solely of testimony of DEA agent, defendant expressed desire to testify, but counsel refused to allow testimony and never advised defendant that whether he testified or not was defendant’s choice to make. Court found reasonable probability that outcome may have been different if defendant had testified.

1985: *United States v. Frappier*, 615 F. Supp. 51 (D.C. Mass. 1985). Counsel ineffective for advising defendant to testify where testimony could have been brought in by proffer under Bail Reform Act and counsel did not properly prepare the defendant to testify.

3. Military Cases

1991: *United States v. Henriques*, 32 M.J. 832 (N.M.C.M.R. 1991). Military defense counsel ineffective in desertion case where accused pled guilty to absence without leave (AWOL) and then defense counsel called accused to the witness stand to testify that he intended to return to the Navy but did

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not intend to return to his unit. Defense counsel's belief that this testimony negated guilt of desertion was erroneous because only an intent to return to his unit would have negated an element of the offense. Without the testimony of the accused probably would have been convicted only of AWOL.

4. State Cases

2004: *People v. Calhoun*, 815 N.E.2d 492 (Ill. App. Ct. 2004). Counsel ineffective in burglary case for coercing the defendant to waive his right to testify because counsel did not believe the defendant's version of events, which contradicted the victim's testimony. Counsel cannot "force his client to choose between testifying without his counsel's assistance or not testifying at all, when defense counsel's determination that his client will commit perjury on the witness stand is based solely on counsel's assessment of the evidence."

2002: **Cooper v. Moore*, 351 S.C. 207, 569 S.E.2d 330 (2002). Counsel ineffective in murder capital case for failing to advise defendant that he had a statutory right to personally address the jury regarding all charges in trial closing argument. Defendant was convicted of murder, kidnaping, armed robbery, and conspiracy to commit armed robbery and sentenced to death. On direct appeal the court, applying *in favorem vitae* review, found that reversal of the murder conviction was required because the trial court failed to advise the defendant of his right to make a closing argument. Because *in favorem vitae* review (which required a review of the record for error regardless of counsel's failure to object) applied only to murder charges, the court did not address whether the non-capital convictions should also be reversed. In post-conviction relief proceedings, defendant asserted that counsel was ineffective in failing to advise him of his statutory right to make a closing argument on all charges. The court held that S.C. Code Section 16-3-28 provides that "in any criminal trial where the maximum penalty is death or in separate sentencing proceeding following such trial, the defendant and his counsel shall have the right to make the last argument." The court held that the plain language of this statute allows the capital defendant to address the jury regarding all charges whether or not all of the charges carry the death penalty. Counsel's conduct was deficient in failing to advise the defendant of his statutory right to make a closing argument during the trial. Prejudice was found because the defendant had not testified during trial in order to avoid cross-examination with prior conviction. Thus, the jury did not have the opportunity to hear him argue for his innocence or to hear and consider his side of the story. Prejudice found because the evidence against the defendant was mostly circumstantial and not overwhelming. Thus, the defendant's statement could have swayed the jury to find him not guilty on the non-capital charges.

1999: *Perrero v. State*, 990 S.W.2d 896 (Tex. Ct. App. 1999). Counsel ineffective in assault and resisting arrest case for failing to prepare the defendant for his testimony, which resulted in the defendant opening the door for impeachment with otherwise inadmissible evidence of a prior criminal history.

1992: *Commonwealth v. Neal*, 618 A.2d 438 (Pa. Super. Ct. 1992). Counsel ineffective for failing to advise the defendant of his right to testify.

***Capital Case**

1991: *Horton v. State*, 306 S.C. 252, 411 S.E.2d 223 (1991). Trial counsel ineffective for advising defendant that if he testified he could be cross-examined about prior convictions for simple possession of marijuana (not a crime of moral turpitude) and assault and battery with intent to kill (15 years previously and defense counsel to did get a rule from judge concerning remoteness). Defendant did not testify because of this advice.

***Capital Case**

H. INADEQUATE ADVICE ON RIGHT TO APPEAL

1. U.S. Court of Appeals Cases

1999: *White v. Johnson*, 180 F.3d 648 (5th Cir. 1999). Counsel ineffective for failing to advise client, who knew generically that he had a right to appeal, that he only had 30 days to file a notice of appeal and that he could get counsel appointed to assist in appeal. Prejudice presumed.

1992: *United States v. Gipson*, 985 F.2d 212 (5th Cir. 1992). Trial counsel ineffective for failing to inform defendant of time limit for filing appeal.

1991: *Baker v. Kaiser*, 929 F.2d 1495 (10th Cir. 1991). Trial counsel ineffective for failing to advise and assist defendant in filing appeal.

2. State Cases

1997: *Johnson v. State*, 325 S.C. 182, 480 S.E.2d 733 (1997). Trial counsel ineffective for failing to timely notify defendant of right to appeal so direct appeal issues were reviewed on the merits in PCR appeal.

1989: *Zant v. Cook*, 379 S.E.2d 780 (Ga. 1989). Counsel ineffective after 1950 guilty plea to murder for failing to advise defendant of right to appeal. Conviction was subsequently used as aggravating factor in 1985 capital case.

***Capital Case**

I. INADEQUATE ADVICE ON CONSEQUENCE OF APPEAL

1. U.S. Court of Appeals Cases

- 1991:** *Lewandowski v. Makel*, 949 F.2d 884 (6th Cir. 1991) (*affirming* 754 F. Supp. 1142 (W.D. Mich. 1990)). Trial counsel ineffective for giving incorrect advice. Defendant was charged with first degree murder of his wife. On the advice of counsel, originally pled nolo contendere to second degree murder, which was punishable by 15-25 years. Prior to sentencing, defendant sent letter to judge expressing dissatisfaction with attorney and withdrawing plea. First attorney allowed to withdraw. New attorney advised defendant -- incorrectly -- that if he was granted withdrawal of plea to lesser offense, he couldn't be charged with greater offense. Judge denied the motion to withdraw. Counsel, who subsequently became aware of fact that defendant could be retried on greater offense failed to advise the defendant of this fact, but appealed the denial of the motion. After the appeal was successful, defendant was retried and convicted of first degree murder and received a mandatory life without parole sentence.
- 1986:** *Bell v. Lockhart*, 795 F.2d 655 (8th Cir. 1986). Defendant convicted of capital murder but sentenced to life without parole. Defense counsel ineffective for erroneously advising defendant that he would again face the possibility of a death sentence if he filed direct appeal and succeeded. Defendant waived direct appeal as result.

***Capital Case**

V. FAILURE TO COMPEL COMPLIANCE WITH PLEA AGREEMENT

A. U.S. Court of Appeals Cases

1987: *Betancourt v. Willis*, 814 F.2d 1546 (11th Cir. 1987). Counsel ineffective for inducing defendant to enter into a plea agreement by telling defendant that the judge had agreed to reduce his sentence at a later time to ensure that it was commensurate with the federal sentences of the co-defendants, but counsel failed to memorialize the plea agreement and neglected to put it on record.

B. State Cases

2000: *Thompson v. State*, 340 S.C. 112, 531 S.E.2d 294 (2000). Counsel ineffective following plea to voluntary manslaughter for failing to object to the state's request for the maximum sentence of 30 years in violation of the negotiated plea agreement. State had agreed to make no sentencing recommendation. Court had stated during plea negotiations that he would give a sentence of no less than 20 years but would not give the maximum sentence. State recommended maximum. Defense failed to object and even stated prosecutor had complied with the agreement. Court gave a sentence of 25 years. Supreme Court held defendant was prejudiced even though the defendant was sentenced within the range previously stated by the court because the relevant question for prejudice was whether the defendant would have entered the plea knowing that the prosecutor would recommend the maximum punishment. Court found a reasonable probability that the defendant would not have plead guilty based on the defendant's indecision to plead until just prior to trial and reliance on the agreement. The court remanded only for resentencing though.

1999: *State v. Scott*, 602 N.W.2d 296 (Wis. Ct. App. 1999). Counsel ineffective for failing to move to compel the state to comply with pretrial agreement and failing to advise the defendant of this option. Defendant was on probation at time of arrest and charged with fleeing officer, resisting arrest, disorderly conduct, and a few other offenses. Plea agreement entered to plead no contest to the offenses listed above in exchange for the state dismissing several charges and recommending that the sentence on each charge be concurrent and also run concurrent with sentence on probation revocation. After the defendant plead no contest, the prosecutor stated that her predecessor who negotiated the plea did not have the permission of the District Attorney to enter this agreement. The court allowed the state then to violate the agreement and recommend that all sentences be consecutive. Because counsel erroneously believed that the defendant had to prove detrimental reliance, counsel advised the defendant that the only options were to withdraw the pleas or to accept the state's position. Counsel's conduct deficient because once the defendant complies with the plea agreement the state is constitutionally bound by the agreement and counsel should have moved to compel compliance. Prejudice found even though the trial court is not bound to accept the state's recommendation. New sentencing granted.

1997: *State v. Smith*, 558 N.W.2d 379 (Wis. 1997). Counsel ineffective for failing to object to prosecutor's recommendation of a specific sentence which violated plea agreement. No prejudice analysis because of deficient performance combined with prosecutor violating plea agreement.

***Capital Case**

- 1991:** *People v. Von Gethicker*, 475 N.W.2d 415 (Mich. Ct. App. 1991). Counsel ineffective for failing to place on record entire plea agreement, including the prosecutor's agreement to recommend lifetime probation, when the prosecution failed to make the recommendation, and state law requires that where the court declines to abide by the terms of a sentence recommendation as part of a plea agreement, the court must explain why, state the sentence it believes to be appropriate, and allow the defendant the opportunity to affirm or withdraw the guilty plea.
- 1988:** *Jordan v. State*, 297 S.C. 52, 374 S.E.2d 683 (1988). Trial counsel ineffective for failing to move to withdraw the guilty plea entered only because the prosecution promised not to oppose probation when in fact the prosecution reneged and vigorously opposed probation.

***Capital Case**

VI. PERFECTING APPEAL

A. U.S. Court of Appeals Cases

2002: *Garcia v. United States*, 278 F.3d 134 (2nd Cir. 2002). Counsel ineffective following plea to drag offense for incorrectly advising the defendant that he could not appeal his sentence. Plea agreement noted disagreement about whether a prior could be used in sentencing. Defendant agreed not to appeal a sentence of 46 months or less. He got 60 months, but his counsel and the court told him on the record that he could not appeal. When counsel incorrectly advises the defendant that no appeal can be taken, there is no requirement that the defendant show that he requested counsel to appeal. Prejudice is that defendant was deprived of right to appeal; the defendant need not make a showing of the merits of the appeal. Sentence vacated and remanded for resentencing.

Johnson v. Champion, 288 F.3d 1215 (10th Cir. 2002). Prejudice presumed in felony murder case due to appellate counsel's failure to timely file appellate brief, which resulted in dismissal of the appeal. The state court decision was objectively unreasonable because the court inferred that the defendant deliberately abandoned his appeal because he did not personally contact the court. This was unreasonable and contrary to the record, which indicated petitioner informed his counsel that he desired to appeal. Release ordered unless state authorities afford an appeal out of time.

2000: *Hernandez v. United States*, 202 F.3d 486 (2nd Cir. 2000). Prejudice presumed where retained counsel failed to timely file the notice of appeal.

White v. Schotten, 201 F.3d 743 (6th Cir. 2000). Where the Ohio rule imposed a 90 day time limit to file application to reopen the direct appeal to assert ineffective assistance of appellate counsel claims, appellate counsel's failure to timely file the motion to reopen was cause excusing procedural default but the court remanded for a determination of prejudice. Court found that there was a constitutional right to effective assistance in this instance because the motion to reopen is part of the direct appeal proceedings.

1999: *McHale v. United States*, 175 F.3d 115 (2nd Cir. 1999). When counsel files a notice of appeal but then fails to perfect the appeal in a timely fashion, the defendant is entitled to reinstate the direct appeal without making any showing concerning the likelihood of success on direct appeal. This rule applies at least so long as the defendant seeks relief in the time allowed for a collateral attack and establishes deficient conduct in failing to perfect the appeal.

1995: *United States v. Nagib*, 56 F.3d 798 (7th Cir. 1995) (affirming 844 F. Supp. 480 (E.D. Wis. 1993)). Counsel ineffective for failing to perfect appeal. Prejudice presumed.

1993: *United States v. Peak*, 992 F.2d 39 (4th Cir. 1993). Trial counsel's failure to file notice of appeal when requested by defendant to do so is a per se deprivation of Sixth Amendment right to counsel.

*Capital Case

1992: *Bonneau v. United States*, 961 F.2d 17 (1st Cir. 1992). Counsel's late filing which caused defendant to lose his right to direct appeal was per se violation of Sixth Amendment.

Hannon v. Maschner, 981 F.2d 1142 (10th Cir. 1992) (affirming 781 F. Supp. 1547 (D. Kan.)). Counsel ineffective for failing to perfect appeal on non-frivolous issue. Prejudice presumed.

United States v. Ruth, 963 F.2d 383 (10th Cir. 1992) (affirming 768 F. Supp. 1428 (D. Kan. 1991)). Counsel ineffective for failing to file a timely notice of appeal.

B. U.S. District Court Cases

2003: *Benoit v. Bock*, 237 F. Supp. 2d 804 (E.D. Mich. 2003). Counsel's failure to perfect appeal in second-degree murder case was deficient and prejudiced the defendant. Retained counsel filed the notice of appeal and then filed a motion to withdraw because he had not been paid. The court notified counsel of defects and his motion and then struck the motion when counsel did not fix the defects. The court then dismissed the appeal because it had not been perfected. Under the AEDPA analysis, the state court's rejection of the appellate ineffectiveness claim was manifestly contrary to the holding in *Evitts v. Lucey*.

Edwards v. United States, 246 F. Supp. 2d 911 (E.D. Tenn. 2003). Counsel was ineffective for failing to perfect the appeal or to withdraw from representation. Counsel was retained and represented the defendant during his guilty plea and sentencing. Counsel assisted the defendant in filing his notice of appeal, but counsel did not perfect the appeal and never sought to withdraw from representation. Prejudice was presumed in that the appeal was dismissed.

2001: *Dumas v. Kelly*, 162 F. Supp. 2d 170 (E.D.N.Y. 2001). Counsel ineffective for failing to file a notice of appeal even though the defendant requested him to do so. No showing of prejudice required under *Peguero v. United States*, 526 U.S. 23 (1999) (“[W]hen counsel fails to file a requested appeal, a defendant is entitled to [a new] appeal without showing that his appeal would likely have had merit”).

1997: *Turner v. United States*, 961 F. Supp. 189 (E.D. Mich. 1997). Counsel ineffective where the defendant wanted to appeal his sentence, but counsel failed to file appeal due to misunderstanding or miscommunication.

Dumer v. Berge, 975 F. Supp. 1165 (E.D. Wis. 1997). Appellate counsel ineffective for failing to file a brief and filing only an inadequate *Anders* brief explaining why no brief was filed on direct appeal.

1988: *Simmons v. Beyer*, 689 F. Supp. 432 (D.N.J. 1988). Counsel ineffective for failing to file timely appeal. Prejudice presumed.

*Capital Case

1987: *Harris v. Kuhlman*, 601 F. Supp. 987 (E.D.N.Y. 1987). Counsel ineffective for failing to perfect appeal in a timely manner.

C. State Cases

2003: *Miles v. Sheriff*, 581 S.E.2d 191 (Va. 2003). Counsel's failure to file a notice of appeal following a guilty plea, despite the express request of the defendant to do so, was ineffective. Although the potential grounds for an appeal are limited following a guilty plea, the defendant still had a statutory right to file a notice of appeal and to pursue the appeal. Prejudice presumed and defendant allowed to appeal.

2001: *State v. Wicker*, 20 P.3d 1007 (Wash. Ct. App. 2001). Trial counsel ineffective for failing to timely file motion for revision in Superior Court following conviction of assault before Commissioner. Per se prejudicial even though appeal allowed because the Superior Court has broader review powers than appellate court and reviews claims de novo.

2000: *State v. Trotter*, 609 N.W.2d 33 (Neb. 2000). Counsel ineffective in child abuse and manslaughter case for failing to file a proper affidavit of poverty in lieu of a docket fee, which resulted in the dismissal of the direct appeal. Counsel had filed a poverty affidavit and motion to proceed in forma pauperis, but had obtained a form affidavit of indigence from the district court clerk's office, which was found to be inadequate by the court of appeals. Prejudice presumed.

1996: *P.M.W. v. State*, 678 So. 2d 484 (Fla. Dist. Ct. App. 1996). Appellate counsel ineffective for failing to file initial brief on behalf of juvenile in a timely fashion which resulted in appeal being dismissed. No requirement that defendant show possibility of success on the merits.

1995: *People v. Swanson*, 657 N.E.2d 1169 (Ill. App. Ct. 1995). Failure to file notice of appeal despite defendant's request to do so raised presumption of prejudice.

1994: *Beasley v. State*, 883 P.2d 714 (Idaho Ct. App. 1994). Counsel's failure to file appeal despite defendant's request to do so raised presumption of prejudice.

1993: *State v. Manuelito*, 851 P.2d 516 (N.M. Ct. App. 1993). Counsel ineffective for failing to file a timely notice of appeal when counsel was aware of defendant's desire to appeal.

1992: *In Interest of A.P.*, 617 A.2d 764 (Pa. Super. Ct. 1992). Counsel ineffective for failing to file a timely appeal of juvenile disposition.

1991: *Frasier v. State*, 306 S.C. 158, 410 S.E.2d 572 (1991). Trial counsel ineffective for failing to perfect the direct appeal after defendant informed him that he desired to appeal but could not afford cost of transcript. Counsel merely advised defendant to try to qualify for indigent status and took no further steps.

***Capital Case**

1990: *Commonwealth v. Cardenuto*, 548 N.E.2d 864 (Mass. 1990). Counsel failed to appeal denial of motions for required finding of not guilty where evidence was insufficient to sustain guilty verdicts.

1989: *Coleman v. State*, 552 So. 2d 156 (Ala. Crim. App. 1989). Prejudice presumed where counsel failed to file a brief on first appeal as of right.

Schlup v. State, 771 S.W.2d 895 (Mo. Ct. App. 1989). Trial counsel ineffective for failing to file an appeal or seek to withdraw after the defendant told counsel he wanted to appeal. Prejudice presumed.

1988: *People v. Wilk*, 529 N.E.2d 218 (Ill. 1988). Counsel ineffective for failing to timely file a motion to withdraw guilty plea based on defendant's argument that state failed to comply with plea agreement which caused dismissal of appeal because filing of motion to withdraw plea is a condition precedent to filing appeal.

State v. Miller, 541 N.E.2d 105 (Ohio Ct. App. 1988). Counsel ineffective for filing timely notice of appeal but then failing to file a brief.

1987: *Hiatt v. State*, 548 So. 2d 483 (Ala. Crim. App. 1987). Prejudice presumed where counsel failed to file a brief on first appeal as of right.

People v. Weger, 506 N.E.2d 1072 (Ill. App. Ct. 1987). Counsel ineffective for failing to perfect appeal even after defendant directed to do so and defendant was prejudiced because the evidence was insufficient to sustain armed violence conviction.

1986: *Moore v. State*, 485 So. 2d 1368 (Fla. Dist. Ct. App. 1986). Denial of EAC where defendant not given opportunity to assign error for appeal when his counsel could not do so in good faith, which denied defendant a trial record on which to base appeal.

Loop v. Solem, 398 N.W.2d 140 (S.D. 1986). Counsel per se ineffective for failing to file a brief which was required to perfect appeal.

1985: *Carroll v. State*, 468 So. 2d 186 (Ala. Crim. App. 1985). Prejudice presumed where counsel failed to file a brief on direct appeal.

***Capital Case**

VII. APPEAL

A. U.S. Court of Appeals Cases

2002: *United States v. Bass*, 310 F.3d 321 (5th Cir. 2002). Appellate counsel ineffective in drug and conspiracy case for failing to challenge the sufficiency of the evidence to support the continuing criminal enterprise conviction, which requires proof that the defendant organized, supervised, or managed at least five persons. Here, the government alleged that the defendant organized six people, but the defendant had only buyer-seller relationship with several of these people. While the Fifth Circuit had not addressed the issue before, the court joined a number of other circuits in finding that a buyer-seller relationship by itself was not sufficient. Counsel's conduct was deficient. Prejudice found "albeit minimally." Setting aside the CCE conviction did not affect prison time because sentence was concurrent with other charges, but \$50 assessment for CCE conviction was set aside.

2001: *Eagle v. Linahan*, 279 F.3d 926 (11th Cir. 2001). Appellate counsel in pre-AEDPA murder case ineffective for failing to assert *Batson* issue when the trial judge, in rejecting the defendant's *Batson* challenge, stated that he believed that both sides were using their strikes in a discriminatory manner but failed to require the prosecution to produce a race neutral explanation for challenging black venirepersons. The government used nine of its ten peremptory challenges to remove blacks from the venire and the fact that the ultimate racial composition of the jury closely approximated that of the venire or even that the defense counsel may have also used strikes in a discriminatory manner did not negate the issue. Prejudice found since the trial judge already stated that the prosecution's strikes were racially motivated and the state court, in all probability, would have granted a new trial if the issue had been raised on appeal.

2000: *United States v. Mannino*, 212 F.3d 835 (3rd Cir. 2000). Counsel ineffective for failing to assert on appeal that the sentencing court in drug conspiracy case erred in attributing to the defendants the amount of heroin distributed throughout the life of the conspiracy without specific, individualized inquiry to determine whether, given defendants' individual roles, they could reasonably foresee that the conspiracy would distribute the quantity of heroin attributed to them at sentencing and whether the quantity allocated to them was part of their undertaking. New sentencing required despite trial court's assertion that he would have imposed the same sentence regardless because this would amount to sentencing outside the defendant's presence and the government must be required to present sufficient evidence to support the sentence.

Harris v. Day, 226 F.3d 361 (5th Cir. 2000). Constructive denial of appellate counsel in robbery case for filing only an "errors patent" brief and withdrawing with *Anders* brief that failed to even mention any arguable issues of appeal. *Anders* requires the attorney seeking withdrawal on appeal to at least file a brief referring to anything in the record that might arguably support an issue, even if attorney believes appeal is frivolous.

*Capital Case

Delgado v. Lewis, 223 F.3d 976 (9th Cir. 2000). Appellate counsel ineffective in drug case where counsel did not pursue issues certified by state court as providing probable cause for appeal and simply filed *Wende* brief (*Anders*-type) despite trial counsel's constructive withdrawal and the significant issues in these proceedings, including representation by only a conflicted co-defendant's counsel at sentencing. In assessing whether state court decision was "objectively unreasonable," under 28 U.S.C. § 2254(d), the court determines whether the state court clearly erred, in other words, whether the court is left "with a definite and firm conviction that an error has been committed." Here, where state court did not discuss rationale for decision, federal habeas review is not *de novo*, but an independent review of the record is required to determine whether the state court's decision was objectively reasonable. In this case, it clearly was.

1999: *Brown v. United States*, 167 F.3d 109 (2nd Cir. 1999). Appellate counsel ineffective in narcotics and firearms case for failing to raise an issue on appeal concerning an obviously deficient instruction on reasonable doubt. The instruction equated reasonable doubt with a "substantial doubt" and advised the jury that it "need not find every fact beyond a reasonable doubt." New trial granted.

Lucas v. O'Dea, 179 F.3d 412 (6th Cir. 1999). Murder case in which the defendant was indicted for intentional murder which requires that the defendant killed the victim. At trial, the defense was that a codefendant actually shot the victim. The jury was charged, however, that the defendant could be convicted so long as the jury found that the victim was killed in the course of robbery and the defendant engaged in wanton conduct creating a grave risk of death. The jury was specifically instructed that it could convict of murder regardless of whether the defendant or the codefendant shot the victim. The jury convicted the defendant of wanton murder. The fatal variance between the indictment and the conviction was not raised on direct appeal. In post-conviction, the state courts found that the issue was defaulted because it could have been raised on direct appeal. The Sixth Circuit held that counsel's failure to raise the issue on direct appeal constituted a procedural default. Nonetheless, petitioner established cause and prejudice because appellate counsel's failure to raise the issue concerning the jury instructions rendered his defense—that he did not shoot the victim—meaningless. Likewise, the court found prejudice because the instruction had the effect of directing a verdict of "guilty" on the murder charge. Thus, the default was excused and a new trial granted.

1998: *Jackson v. Leonardo*, 162 F.3d 81 (2nd Cir. 1998). Appellate counsel ineffective for failing to challenge armed robbery and criminal use of firearm conviction based on the same facts as double jeopardy. Counsel's failure could not be based on any kind of strategy because she failed to raise this sure winner in favor of raising two highly dubious claims in a cursory appellate brief. Despite the fact that the defendant received no additional jail time for the second conviction (sentences were concurrent), the Court found prejudice because if the defendant were to commit additional criminal offenses in the future, the number of convictions could be considered in some sentencing schemes and guidelines. Thus, the Court ordered that the firearms conviction be removed from the defendant's record.

***Capital Case**

Roe v. Delo, 160 F.3d 416 (8th Cir. 1998). Appellate counsel ineffective for failing to request plain error review of erroneous first degree murder instruction. The trial court instructed the jury that the defendant could be convicted of first degree murder if there was an intent to cause serious physical injury, but first degree murder in Missouri requires proof of intent to cause death. Intent to cause serious physical injury is the mental state required for second degree murder which was instructed in this case. Thus, the instructional error blurred the distinction between the two murder offenses. Trial counsel failed to preserve the error. Nonetheless, the court found appellate counsel was ineffective in failing to raise the issue and the defendant was prejudiced because Missouri courts often reviewed instructional errors on the elements of offenses under plain error review. Because the facts at trial could support a finding that Roe deliberately shot the victim only with the intent to seriously injure him, there is a reasonable probability that Missouri courts may also grant relief. Writ granted unless Roe afforded a new appeal or granted a new trial.

1995: ****Banks v. Reynolds***, 54 F.3d 1508 (10th Cir. 1995). Appellate counsel ineffective for failing to raise *Brady* claim or, in the alternative, IAC claim when trial counsel had failed to challenge the prosecution's failure to disclose exculpatory material.

United States v. Cook, 45 F.3d 388 (10th Cir. 1995). Ineffectiveness of appellate counsel, who also served as trial counsel, for failing to raise obvious conflict of interest issue caused by the trial court established cause and prejudice for failing to raise the issue on direct appeal. In essence, the trial record reflected that three defendants in a drug trial retained the same counsel. Prior to trial, the government entered into a plea agreement with one of the defendants in exchange for her testifying against her co-defendants. The court then appointed new counsel for the witness because of the conflict of interest. During trial, the witness refused to testify and the court ordered the defendant's counsel to advise his former client of the consequences of failure to comply with plea agreement which required her to testify in government's case-in-chief against defendant in exchange for the government's recommendation of leniency at sentencing. Counsel objected and pointed out the conflict but the court ordered him to advise his former client to testify against his present client creating a clear, actual conflict of interest which required reversal. Nonetheless, counsel failed to raise the issue on direct appeal despite the fact that reversal was required based on the conflict.

1994: ***Mayo v. Henderson***, 13 F.3d 528 (2nd Cir. 1994). Appellate counsel ineffective for failing to raise a claim on direct appeal when the New York Court of Appeals had previously held that it would apply a per se reversal rule on this issue and claim was preserved at trial.

1992: ***Claudio v. Scully***, 982 F.2d 798 (2nd Cir. 1992). During homicide investigation, attorney convinced client to surrender to police and give confession. Without the confession police had no case against the client. On appeal a pre-trial order to suppress the statement was overturned because the sixth amendment right to counsel had not yet attached. The state constitutional right to counsel had attached but the court held that it did not include a right to effective assistance in pretrial matters. Appellate counsel raised the constitutional issue in the state's highest court, yet failed to raise the state claim. Court found that the state claim was a "probable winner" and failure to raise it was IAC.

*Capital Case

- 1991:** *Freeman v. Lane*, 962 F.2d 1252 (7th Cir. 1991). Appellate defense counsel's performance in failing to raise on direct appeal issue of whether prosecutor improperly commented on defendant's failure to testify during closing argument was objectively unreasonable and deficient. Thus, defendant's failure to raise issue on direct appeal was excusable under *Wainwright v. Sykes* "cause and prejudice test."
- 1990:** *Lofton v. Whitley*, 905 F.2d 885 (5th Cir. 1990). Appellate counsel ineffective for filing a two page brief (when nonfrivolous issue could have been raised) requesting that the court of review simply check the record for errors patent without identifying any specific grounds for appeal.
- 1989:** *Orazio v. Dugger*, 876 F.2d 1508 (11th Cir. 1989). Appellate counsel rendered IAC by failing to raise on appeal a *Faretta* claim, the right to voluntarily elect self-representation. Because counsel did not fully review trial court file or talk with defendant or defendant's trial counsel, appellate counsel did not know of the state trial court's denial of defendant's request to proceed pro se.
- Lombard v. Lynaugh*, 868 F.2d 1475 (5th Cir. 1989). Appellate counsel ineffective for filing of conclusory "no merit" brief (when nonfrivolous issues existed) which pointed to nothing in record constituted a constructive denial of any assistance of appellate counsel for which no showing of prejudice is required.
- Evans v. Clarke*, 868 F.2d 267 (8th Cir. 1989) (affirming 680 F. Supp. 1351 (D. Neb. 1988)). Appellate counsel ineffective for arguing against client in *Anders* brief. Prejudice presumed.
- 1988:** *Thomas v. O'Leary*, 856 F.2d 1011 (7th Cir. 1988). Counsel ineffective for failing to file appellate brief during state's appeal of trial court's suppression order in homicide case; appeal of the motion was a critical stage of the defendant's criminal proceedings as admission of his statement would increase the likelihood of his conviction while suppression might cause him never to be tried. As this was a case of complete denial of counsel, prejudice was presumed.
- Freels v. Hills*, 843 F.2d 958 (6th Cir. 1988). Failure of defendant's appellate counsel to provide defendant with copy of his brief, which claimed no trial error below, to address questions raised by defendant in his own pro se brief, and failure of appellate court to address defendant's points on appeal, raised presumption that counsel's assistance was ineffective and prejudicial, even if absence of trial error appeared in record.
- 1987:** *Jenkins v. Coombe*, 821 F.2d 158 (2nd Cir. 1987). Defendant was completely denied assistance of appellate counsel where counsel filed a clearly deficient five page brief containing only one point. The court found *Strickland* inapplicable & decided the case on 14th amend. due process grounds, holding that defendant had a right to an attorney until a proper appellate brief had been filed. As his attorney was dismissed, appellant was left without counsel. Although appellant was still able, by copying co-defendant's brief, to arguably submit all claims, the complete absence of counsel which is guaranteed as of right made this arguable lack of prejudice moot.

***Capital Case**

Robinson v. Black, 812 F.2d 1084 (8th Cir. 1987). IAC where attorney filed *Anders* brief resolving issues in favor of government & concluding claims were meritless rather than acting as an advocate on behalf of petitioner & briefing all issues that might arguably support an appeal, thus forcing defendant to proceed pro se.

Matire v. Wainwright, 811 F.2d 1430 (11th Cir. 1987). Appellate counsel ineffective for failing to raise on appeal issue of error in admitting evidence of defendant's post-arrest silence – where comment violated defendant's 5th Amend. right & was not harmless.

1986: ***Peoples v. Bowen***, 791 F.2d 861 (11th Cir. 1986). In view of prior state court decision that habitual felony offender statute was mandatory, appellate counsel who took “no merit” appeal & failed to inform defendant that case might be remanded for resentencing was ineffective for exposing his client to the risks of further litigation where Court of Appeals, of its own motion, took note of failure of trial court to follow statute & vacated 20 year sentence & remanded for resentencing, at which time defendant was sentenced to life.

B. U.S. District Court Cases

2001: ****United States ex rel. Erickson v. Schomig***, 162 F. Supp. 2d 1020 (N.D. Ill. 2001). Appellate counsel ineffective, under AEDPA, in failing to assert ineffective assistance of trial counsel in sentencing for failing to verify the background of witness presented as a defense mental health expert or to interview him to determine the content of his testimony. The “expert” was retained by the defendant's family and had provided a report prior to trial that described the defendant as “manipulative” and “narcissistic” with a “grandiose sense of self-importance,” “feelings of entitlement,” “lack of empathy for the pain of others,” and a preoccupation with sexual fantasies of women. Nonetheless, counsel did not interview the witness to determine whether or not to present his testimony and did not check his credentials. During the sentencing hearing, the “expert” claimed that, among other degrees, he held a masters degree in psychology from Harvard University and a doctorate in psychology from the University of Chicago. During cross, he admitted, however, that the masters was in theology from the Harvard Divinity School and that his doctorate was a ministry degree in pastoral counseling and psychology from the Chicago Theological Seminary, an entity associated with the University of Chicago. He also admitted that he had previously testified only as a pastoral counselor. The trial judge refused to qualify him as an expert, but did permit him to offer lay testimony. The court denied a continuance in order for counsel to get a “real” expert. Counsel's conduct was deficient even though the defendant's family had retained this “expert.” Counsel's conduct was also deficient despite the findings of the state's psychiatrist after one brief interview that the defendant was fit for trial, sane at the time of the offense, and not suffering from a mental defect or disease. This evaluation was expressly limited to the defendant's fitness for trial and sanity at the time of the murder, and did not address the statutory mitigating factors of extreme mental or emotional distress. No strategic decision explains counsel's conduct because “a strategic decision necessarily rests on knowledge about what a witness will say and the pros and cons of presenting that testimony.” *Id.* at 1044. Counsel's conduct was also prejudicial because the “expert” testimony that the defendant was “raised in a supportive home and had a personality

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disorder which allowed him to function normally, albeit with a grandiose sense of self-importance and a need for attention, is not mitigating.” *Id.* at 1048. If counsel had investigated and retained qualified experts, however, mitigating evidence was available. The defendant had a number of head traumas that resulted in blurred vision, spells of unconsciousness, and concussions from at least eight separate falls. He also had headaches, vomiting, and nerve injuries related to the head trauma. His mother was schizophrenic and he was sexually abused by a priest as a child. In response to the traumas, he began to abuse drugs and alcohol at an early age. He also turned to psychotropic drugs known to alter brain functioning and to cause brain damage. When he was thirteen years old, he was admitted to the emergency room due to severe alcohol intoxication and he also unsuccessfully attempted to commit suicide by taking a drug overdose. Neuropsychological tests showed that he had brain damage in the dominant cerebral hemisphere which caused him to have difficulty understanding what was expected of him, processing information, dealing with quickly evolving situations, and learning from his own or other’s behavior and mistakes. The state court’s finding of no prejudice was unreasonable because the state court examined whether it was “unlikely” that the trial court would have drawn a different conclusion if the “expert” witness had not testified, imposing a higher standard than *Strickland*’s “reasonable probability” test. The state court also did not consider the defendant’s new psychological evidence presented on collateral attack in determining prejudice. Finally, the Illinois Supreme Court’s finding that the sentencing court did not rely on the “expert” prejudicial testimony is contradicted by the record, which shows that the sentencing court expressly considered this testimony. Thus, the state court decision was also an unreasonable determination of the facts in light of the evidence presented at sentencing. The issue of trial counsel’s ineffectiveness was procedurally barred because not raised by appellate counsel, but appellate counsel was clearly ineffective for not raising the issue since even trial counsel had acknowledged a mistake at the time of trial and sought a continuance to retain a qualified expert.

1999: *Walker v. McCaughtry*, 72 F. Supp. 2d 1025 (E.D. Wis. 1999). Complete denial of appointed appellate counsel where counsel failed to move to withdraw or file *Anders* brief. Prejudice presumed.

1997: *Green v. United States*, 972 F. Supp. 917 (E.D. Pa. 1997). Appellate counsel ineffective for failing to raise as issue the fact that a juror, who both parties agreed should be stricken for cause due to bias and the judge initially said juror would be stricken but then did not strike, had to be removed by a defense peremptory which resulted in the defense exhausting all peremptory challenges and being denied a peremptory challenge.

1996: *Grady v. Artuz*, 931 F. Supp. 1048 (S.D.N.Y. 1996). Appellate counsel ineffective for failing to challenge the duplicitous nature of the indictment which alleged rape, sodomy, and sexual abuse crimes as continuous offenses over a one to two month when state law prohibited multi-count indictments and prohibited charging rape, sodomy, or sexual abuse as a continuing offense.

Evans v. Clarke, 680 F. Supp. 1351 (D. Neb. 1988), modified, 868 F.2d 267 (8th Cir. 1989). Appellate counsel ineffective for filing a brief which affirmatively argued against the client’s case on the petition to withdraw under *Anders*. Prejudice presumed.

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C. State Cases

2002: *Cupon v. State*, 833 So. 2d 302 (Fla. Dist. Ct. App. 2002). Appellate counsel was ineffective in escape case for failing to raise a preserved and meritorious issue on direct appeal. The defendant had been detained by the federal Immigration and Naturalization Service (INS) when he and others escaped. Following his recapture, he was convicted of grand theft and escape. During the trial, his attorney asserted that he was not a “prisoner” subject to conviction for escape under the relevant Florida statutes. Appellate counsel did not raise this issue and the escape conviction was affirmed without written opinion on direct appeal. The court later overturned the escape conviction for the co-defendant on this basis. Following denial of post conviction relief and initial petition for writ of habeas corpus, the defendant asserted in a second petition for writ of habeas corpus in state court that his appellate counsel was ineffective for failing to raise the issue. The court held that counsel’s conduct was deficient in failing to raise a preserved meritorious issue and the defendant was prejudiced because if the issue had been raised the defendant’s escape conviction would have been reversed on direct appeal.

Nelson v. Hall, 573 S.E.2d 42 (Ga. 2002). Appellate counsel ineffective in aggravated assault and kidnaping with bodily injury case for failing to challenge a jury instruction that had omitted the essential element of bodily injury from the kidnaping offense. Counsel’s conduct was deficient and prejudicial. The state argued that in analyzing prejudice the court should look not to the outcome on appeal, but to the ultimate resolution on remand or retrial since the defendant would be subject to the same punishment for both kidnaping with bodily injury and simple kidnaping. The court rejected this analysis and held that “the inquiry does not focus on the projected result on remand or retrial, but whether there is a reasonable probability that the result of the *appeal* would have been different.”

Benson v. State, 780 N.E.2d 413 (Ind. Ct. App. 2002). Appellate counsel was ineffective in child molestation case for failing to assert as error the trial court’s initial acceptance and then subsequent rejection of a plea agreement. The defendant was charged with three charges of child molestation and entered a plea agreement with the government to plead guilty to two of these charges in exchange for a 16 year sentence, dismissal of the third charge, and the state would not pursue a habitual offender enhancement. During the plea hearing, the court accepted the plea agreement. During sentencing a month later, following testimony from two social workers concerning the lightness of the 16 year sentence, the trial court informed the defendant that it would not accept the plea agreement unless the defendant also plead guilty to the third charge. The defense counsel stated that the defendant would not agree to anything beyond the plea agreement. The trial court then declared that the plea agreement would be rejected and sent the case to trial. The jury convicted the defendant on all three counts of child molesting and he was sentenced to 66 years. Under state law if a trial court accepts a guilty plea as part of a plea agreement the court must accept the terms of the agreement. The appellate counsel, who had also been the trial counsel, did not assert this error on appeal. The court found this to be deficient conduct because “the vacation of the guilty plea was a significant and obvious issue.” Prejudice was found because if the issue had been raised on direct appeal the court would have reversed the conviction and reinstated the plea agreement.

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***Commonwealth v. Ford**, 809 A.2d 325 (Pa. 2002). Counsel ineffective in capital case for failing to adequately investigate and present mitigation evidence in sentencing. Appellate counsel was also ineffective for failing to assert trial counsel's ineffectiveness. In sentencing, trial counsel presented the defendant's sister to testify but not prepare her testimony, which amounted to only a plea of mercy. Counsel also presented evidence of the defendant's low IQ and that his educational achievement was at the 2nd or 3rd grade level. The jury found two aggravating circumstances and no mitigating circumstances. Trial counsel was aware of a competency evaluation that revealed that the defendant had a troubled childhood and learning problems. Counsel did not investigate to obtain prior hospitalizations, mental health records, or school records. He also did not obtain additional information from the defendant's family or have a mental health professional evaluate the defendant with respect to mitigation. Counsel's conduct was deficient because there was no reasonable basis for failing to investigate and present this mitigating evidence. Although counsel did state that he did not present psychiatric records because the prosecution informed him that they contained reports that the defendant was "explosive," this decision was based on very little information and without actually reviewing the supporting documents. If counsel had adequately investigated, the evidence would have revealed schizophrenia, brain impairments including mental retardation, learning disabilities, and post traumatic stress. The defendant showed signs of dementia early in life and had a long history of psychiatric treatment for impaired reality, including hearing voices, and alcohol dependence. The defendant also had an extensive history of abuse and family dysfunction. The available evidence would have supported three statutory mitigating circumstances. The Commonwealth presented rebuttal evidence in post-conviction showing that the defendant had previously been convicted of sexual assault of a 12 year old boy, had been a gang member in his youth, and had threatened to kill his grandparents. The Commonwealth also presented psychiatric evidence of antisocial personality disorder and a clinical psychologist that would have testified that the defendant does not suffer from organic brain damage or learning disabilities. The court still found prejudice because the jury was given no meaningful evidence of mitigation to consider in their weighing process. Moreover, even without any mitigation evidence, the jury was still deadlocked at one point during the penalty phase deliberations.

Patrick v. State, 349 S.C. 203, 562 S.E.2d 609 (2002). Appellate counsel ineffective in burglary, armed robbery assault and battery with intent to kill, and unauthorized use of motor vehicle case for failing to adequately assert claim of prosecutorial retaliation. Applicant was initially indicted in 1975. All of the charges except burglary were nol prossed prior to trial and applicant was tried and convicted of burglary. Following reversal in 1992 in post-conviction proceedings, the state reindicted, tried, and convicted on all charges. Trial counsel adequately preserved the issue of vindictive prosecution. The same counsel on appeal, however, "devoted three short paragraphs to the issue, did not give any useful analysis, and only cited one case." The appellate court did not address this issue and instead simply held that the nol prossed charges could be brought since they were nol prossed before the jury was impaneled. Counsel did not address the retaliation argument in his petition for rehearing and then when directed by the court to address the issue in a supplemental petition for rehearing, counsel's "argument was conclusory at best. He did not even mention the seminal case" that he had cited earlier in his brief. Prejudice found because this issue

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was a winner on appeal when analyzed under Supreme Court precedent (oddly enough the one case that was cited by appellate counsel).

2001: *Hudson v. Warden, Nevada State Prison*, 22 P.3d 1154 (Nev. 2001) (en banc). Appellate counsel ineffective for failing to assert that the trial court erred in relying on a presentence report to prove prior convictions for enhancement of sentence in DUI causing substantial bodily harm case. The issue was properly preserved at trial and the appellate court held that this was insufficient proof of the prior convictions. Remand allowed state to offer proper proof though.

Ezell v. State, 345 S.C. 312, 548 S.E.2d 852 (2001). Appellate counsel provided ineffective assistance for failing to adequately complete record in order to challenge admission of hearsay taped statements wherein non-testifying confidential informant identified applicant as the person who sold crack cocaine to the informant. Appellate counsel, who was also the trial counsel, preserved the issue at trial and raised it on appeal, but failed to include the audio tape in the Record on Appeal. The post-conviction court found ineffective assistance and granted a new direct appeal. The Supreme Court found, however, that if the appellate court had been provided with the tapes during the appeal the court would have granted a new trial because the evidence of guilt was not overwhelming and admission of the tapes was not harmless error. Thus, the appropriate remedy for the ineffective assistance of appellate counsel was a new trial.

2000: *Smith v. State*, 762 So. 2d 969 (Fla. Dist. Ct. App. 2000). Appellate counsel ineffective in failing to argue the correct standard of harmless error analysis and that the burden could not be placed on the defendant. During the direct appeal, the court of appeals found that the court erred in admitting inadmissible hearsay from the alleged sexual assault victim's friend bolstering the victim's credibility but found the error harmless relying on a case holding that a state statute placed the burden of proving harm on the defendant. Appellate counsel's conduct was deficient in not arguing to the court that the case they relied on had been reversed by the Florida Supreme Court based on finding that, under *Chapman v. California*, the burden could not be shifted to the defendant. "[T]he failure of a criminal appellate counsel to argue the applicable harmless error standard is so basic as to be well below the standard of professional practice for such counsel." *Id.* at _____. Prejudice found because this was a sexual battery case that, without the improper bolstering by inadmissible hearsay, amounted to only a credibility contest between the defendant and the alleged victim.

State v. Barnard, 14 S.W.3d 264 (Mo. Ct. App. 2000). Appellate counsel ineffective in sodomy case for failing to inform Court of Appeals of statute allowing for lesser sentence. Defendant charged with sodomy in 1994, but was not tried until 1995, after the relevant statutes were amended effective after crime but before trial. State law provided, however, that the defendant was entitled to amended statute provisions that provided for lesser sentences effective prior to the trial date.

1999: *Guerra-Villafane v. Singletary*, 729 So. 2d 972 (Fla. Dist. Ct. App. 1999). Appellate counsel ineffective in drug case. Entrapment defense raised at trial and counsel objected to the standard charge. Appellate counsel failed to raise the issue even though the charge given was on an objective standard applied in Florida prior to a statutory change in 1987 to a subjective standard.

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Sloan v. Sanders, 519 S.E.2d 219 (Ga. 1999). Appellate counsel ineffective for failing to raise issue of trial counsel's ineffectiveness for failing to move to dismiss pursuant to a statutory speedy trial demand, which was a strong issue. Appellate counsel conceded that he was not aware of the issue, even though the initial demand for speedy trial was in the record, and had raised only two weak issues on appeal.

**People v. West*, 719 N.E.2d 664 (Ill. 1999). Appellate counsel ineffective in capital murder appeal for failing to challenge the sufficiency of the evidence proving the only statutory aggravating circumstance that made the defendant death eligible. The only aggravating circumstance submitted and found by the jury was that the defendant had a prior murder conviction, i.e. two murders in "separate premeditated acts." The court construed the statute to allow proof of premeditation either by proof of an intent to kill or proof of knowledge that the defendant's acts would cause death or great bodily harm. During sentencing, the state proved only that the defendant had previously plead guilty to murder in 1978. At the time of that conviction, however, the defendant could have been convicted on one of three theories, two that required the requisite mens rea, but the third, felony murder, that required no specific intent. The state did not present any evidence establishing that the defendant had the requisite mens rea with respect to the 1978 murder. Appellate counsel was ineffective for raising this issue on appeal and the defendant was prejudiced because the issue was meritorious and precludes death eligibility. Court precludes imposition of the death penalty on retrial based on double jeopardy.

**Southerland v. State*, 337 S.C. 610, 524 S.E.2d 833 (1999). Appellate counsel provided ineffective assistance of counsel that required a new sentencing trial. Trial counsel requested an instruction on life without parole, but the trial court refused. Trial counsel then requested a charge that life is to be understood in its "ordinary and plain meaning," pursuant to *State v. Norris*, 285 S.C. 86, 328 S.E.2d 339 (1985) (requiring instruction when the issue of parole was raised), and the trial court also denied that request. Appellate counsel raised only the life without parole issue, but the court affirmed because the state had not argued future dangerousness and this instruction was not required under *Simmons v. South Carolina*, 512 U.S. 154 (1994). If appellate counsel had asserted the *Norris* claim, reversal would have been required because the portion of the subsequent opinion in *State v. Atkins*, 293 S.C. 294, 360 S.E.2d 302 (1987), requiring that the court give the charge upon request by the defense was applicable. Prejudice found because failure to give the ordinary and plain meaning charge upon request requires automatic reversal under state law.

1997: *Matter of Maxfield*, 945 P.2d 196 (Wash. 1997) (en banc). Counsel ineffective for failing to raise on appeal the state constitutional issue of privacy with respect to electricity consumption records where records had been voluntarily provided by commissioner to drug task force.

1996: *State v. Reed*, 660 N.E.2d 456 (Ohio 1996). Appellate counsel ineffective for failing to raise issue concerning the trial court's denial of appellant's request to represent himself in his drug abuse trial.

1995: *People v. Mack*, 658 N.E.2d 437 (Ill. 1995). Appellate counsel ineffective for failing to raise as issue the fact that the jury verdict form finding an aggravating circumstance (commission during

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robbery with intent or knowledge of strong probability of death or great bodily harm) and finding death eligibility omitted an essential element of the factor (intent or knowledge). Retrial on sentence.

1994: *People v. Salazar*, 643 N.E.2d 698 (Ill. 1994). Appellate counsel ineffective for failing to raise during direct appeal issue of whether voluntary manslaughter instructions erroneously gave the prosecution the burden of proving mental status which reduced murder to manslaughter. This instruction in effect required the jury to convict defendant of murder rather than manslaughter.

1993: *Clark v. State*, 851 P.2d 426 (Nev. 1993). Appellate counsel ineffective for failing to raise abuse of discretion in adjudicating defendant a habitual criminal where he was not actually adjudicated as such and trial court may have mistakenly believed that his authority to punish the defendant was limited to deciding what sentence to impose once the requisite number of felony convictions had been established.

Ex parte Daigle, 848 S.W.2d 691 (Tex. Crim. App. 1993). Appellate counsel ineffective for failing to raise as issue trial court's denial of defendant's timely motion for jury shuffle which was a reversible error.

1992: **Watkins v. State*, 632 So. 2d 555 (Ala. Crim. App. 1992). Appellate counsel ineffective for failing to supplement record to establish *Batson* claim. Trial was held four years prior to *Batson*, but Alabama courts applied *Batson* retroactively under plain error rule to cases still on direct appeal when *Batson* was decided. Appellate counsel, who was also trial counsel, raised *Batson* on direct appeal but the record did not reflect race of jurors. If counsel had properly supplemented the record would have shown that the state used 12 of its 13 peremptory challenges to remove 12 of 13 blacks from the jury. If this evidence had been presented on direct appeal, the court would have granted a *Batson* hearing.

Meyer v. Singletary, 610 So. 2d 1329 (Fla. Dist. Ct. App. 1992). Appellate counsel ineffective for failing to raise per se reversible error that judge failed to provide notice to prosecution and defense before responding to deliberating jury's request to review evidence.

Williams v. State, 844 S.W.2d 562 (Mo. Ct. App. 1992). Appellate counsel ineffective for failing to argue that a newly amended drug sentencing provision should be applied to reduce the defendant's sentence.

1991: *Griffin v. United States*, 598 A.2d 1174 (D.C. 1991). Appellate counsel IAC for failure to raise double jeopardy issue on appeal where obstruction of justice conviction was based on same conduct that formed basis for prior contempt conviction.

People v. Logan, 586 N.E.2d 679 (Ill. App. Ct. 1991). Appellate counsel ineffective in murder case for failing to argue issue pertaining to admission of victim impact evidence in guilt phase where

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state referred to families during opening and closing, widow testified about children, and a picture of the victim's family was put in evidence.

State v. Sumlin, 820 S.W.2d 487 (Mo. 1991). Appellate counsel ineffective for failing to argue that a newly amended drug sentencing provision should be applied to reduce the defendant's sentence.

Simpkins v. State, 303 S.C. 364, 401 S.E.2d 142 (1991). Appellate counsel ineffective for failing to raise an obvious reversible error on direct appeal, i.e., the guardian ad litem of the child criminal sexual assault victim was the only person to testify regarding the identity of the perpetrator and the details of the incident.

1990: *People v. Ferro*, 551 N.E.2d 1378 (Ill. App. Ct. 1990). Appellate counsel ineffective for failing to raise issue concerning trial court's comments which forced jury to reach a verdict by threatening that they would stay at hotel until they did.

Ex parte Dietzman, 790 S.W.2d 305 (Tex. Crim. App. 1990). Appellate counsel ineffective where out of 27 grounds raised the court was unable to review 23 of them because counsel did not properly present the issue or failed to conform to appellate rules. Counsel did not designate for inclusion in the record testimony related to motion to suppress statements which was necessary for review of 16 of the grounds of error raised; did not show what witness would have stated to support an error raised concerning denial of continuance to obtain witness; and raised issues in a manner different than they were raised at trial so they were not preserved.

Dunn v. Cook, 791 P.2d 873 (Utah 1990). Direct appeal counsel ineffective for filing a brief that merely recited the prosecution and defense evidence, stated only four issues in single short sentences, presented no argument, listed cases but did not state case facts, did not even cite record in 2 of the 4 issues, and failed to raise a number of substantive issues later identified by habeas counsel. Because of IAC, prior appeal was not a bar to raising issues in habeas.

1989: *Sutherland v. State*, 771 S.W.2d 264 (Ark. 1989). Appellate counsel in burglary case ineffective for failing to abstract confession so court was unable to review issue of whether it was error to use the defendant's confession to burglary at trial, where the confession was made after the defendant had been appointed counsel on unrelated drug charges so that his subsequent waiver of right to counsel after the police initiated the interrogation with respect to the burglary was invalid. [Note: confession issue would probably not be decided the same in light of *McNeil v. Wisconsin*, 501 U.S. 171 (1991).]

Ragan v. Dugger, 544 So. 2d 1052 (Fla. Dist. Ct. App. 1989). Appellate counsel ineffective for failing to allege as error trial court's failure to state with particularity its justification for retention of jurisdiction (based on state law requirement).

People v. Reyes, 542 N.Y.S.2d 178 (N.Y. App. Div. 1989). Appellate counsel ineffective for failing to raise *Batson* when the prosecution removed all Hispanics from the jury.

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***Matter of Frampton**, 726 P.2d 486 (Wash. Ct. App. 1986). Presumption of prejudice in capital case where appellate counsel failed to submit a brief on any guilt phase issues even though the defendant plead not guilty, desired to appeal guilt phase issues, and there were nonfrivolous guilt phase issues that could have been raised.

Whitt v. Holland, 342 S.E.2d 292 (W. Va. 1986). Appellate counsel ineffective for failing to communicate with his client, failing to raise several important issues, including ineffective assistance during the trial, and exhibiting “a lack of conscientious attentiveness to the record.”

1985: ***Wilson v. Wainwright**, 474 So. 2d 1162 (Fla. 1985). Appellate counsel ineffective for failing to brief issues of sufficiency of evidence of premeditation and propriety of death sentence and failing to adequately prepare and present oral argument.

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VIII. POST-CONVICTION

A. U.S. Court of Appeals Cases

1990: *Lawrence v. Armontrout*, 900 F.2d 127 (8th Cir. 1990). Defendant was denied Effective Assistance when post-conviction counsel failed to call several witnesses in PCR, despite defendant's request to do so, in order to establish prejudice from trial counsel's admitted failure to find and interview potential alibi witnesses, even though counsel had planned to assert misidentification as the main defense. No procedural default because of PCR ineffectiveness.

B. State Cases

Graves v. State, 784 N.E.2d 959 (Ind. Ct. App.), *transfer granted*, 792 N.E.2d 49 (Ind. 2003). Counsel was ineffective in post-conviction proceeding for failing to adequately reconstruct the record or to prove that reconstruction was not possible. The defendant had plead guilty to burglary in 1981 and challenged the voluntariness of his plea in post-conviction. Counsel presented evidence that the plea hearing tape could not be located but did not otherwise present evidence that reconstruction of the record was not possible or otherwise attempt to actually reconstruct the record so that the merits of the claim could be addressed. Although the defendant had no constitutional right to counsel under either the U.S. Constitution or the Indiana Constitution, the defendant was entitled to representation in "a procedurally fair setting." Because counsel's conduct was deficient, the court ordered that the defendant would be allowed to file a new petition for post-conviction relief.

2000: *State v. Velez*, 746 A.2d 1073 (N.J. Super. Ct. App. Div. 2000). Post-conviction counsel ineffective in aggravated sexual assault and kidnaping case. Defendant convicted and sentenced to 60 years for crime involving multiple assailants raping a three year old child. Three year old identified defendant, who was known to her family, but the defense was alibi corroborated by the defendant's girlfriend. Pine needles in defendant's car similar to that found on girl and jailer said defendant stated "he did it," but DNA of semen either didn't match the defendant or was inconclusive and the pubic hair found was Caucasian when the defendant was Hispanic. After the defendant failed a pro se post-conviction application raising ineffective assistance of counsel and asking for a new type of DNA testing, post-conviction counsel was appointed as required by state law. Counsel met with client just before the beginning of the hearing, but did not otherwise investigate or prepare for the hearing and argued only those issues filed in the pro se petition without preparation. Court cited *Cronic* and presumed prejudice because there was no meaningful adversarial testing.

1997: *Iovieno v. Commissioner of Correction*, 699 A.2d 1003 (Conn. 1997). After first state habeas proceeding counsel failed to file a petition for certification to appeal even though defendant desired to appeal. Habeas counsel found ineffective in second state habeas for failure to timely file the petition for certification to appeal. Based on a state statutory right to effective assistance of counsel in habeas, the court restored the opportunity to timely file the petition for certification to appeal.

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- 1993:** **People v. Johnson*, 609 N.E.2d 304 (Ill. 1993). Post-conviction counsel ineffective for failing to investigate and present evidence to support death-sentenced inmate's allegations of ineffective assistance at trial because trial counsel: failed to investigate and present witnesses, including experts, to contradict the state's evidence; stipulated improperly to disciplinarys in prison; and failed to investigate and present mitigation evidence. Post-conviction counsel did not investigate and present evidence to support these claims and did not even review prison records and present evidence that trial counsel improperly stipulated to disciplinarys.
- 1991:** *Waters v. State*, 574 N.E.2d 911 (Ind. 1991). Post-conviction counsel ineffective where he entered notice of appearance but did not actually represent defendant and the only evidence submitted was prepared pro se by defendant.
- 1989:** *People v. Butler*, 541 N.E.2d 171 (Ill. App. Ct. 1989). Post-conviction counsel ineffective for failing to raise issue concerning the trial court's imposition of consecutive sentences for theft and burglary even though court did not admonish defendant prior to guilty plea of the possibility of consecutive sentences as required by state law.
- Patton v. State*, 537 N.E.2d 513 (Ind. Ct. App. 1989). Post-conviction counsel ineffective for failing to present evidence of attempt to reconstruct record of guilty plea hearing or evidence which established that reconstruction was not possible which caused dismissal of PCR.

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IX. PROBATION REVOCATION

- 2002:** *Lambert v. State*, 811 So.2d 805 (Fla. Dist. Ct. App. 2002). Counsel ineffective in probation revocation hearing for failing to seek to exclude evidence of alleged new law violation while there was a pending motion to suppress the same evidence in the related criminal prosecution. Prejudice found because the evidence was excluded in the criminal case. If it had been also excluded in the probation revocation hearing, the state would have been unable to prove the violation.
- 2000:** *Torres v. State*, 39 S.W.3d 631 (Tex. Ct. App. 2000). Counsel ineffective in community supervision revocation due to counsel's failure to object to state's lack of due diligence in serving the defendant with warrant. In June 1992, defendant was sentenced to seven years confinement probated for seven years. On April 22, 1999, the state moved to revoke community supervision. Warrant was issued on April 26, 1999, but defendant was not served until August 3, 1999. Under Texas law, the state must exercise due diligence to serve notice of revocation hearing, but the defense must first raise the issue. Here, counsel failed to raise the issue despite the fact that the defendant and his mother had lived at the same address and worked at the same address, known to his probation officer, from the time the warrant was issued until it was served. Moreover, the state established only that police officer had been to defendant's home only once to find no one home, but there was no showing of time of visit. Deficient conduct and prejudice found because the defendant had a valid defense against revocation of his community supervision that was not raised by counsel.
- 1996:** *In re A.V.*, 674 N.E.2d 118 (Ill. App. Ct. 1996). Counsel ineffective for failing to object to consolidation hearing on both the state's petition to adjudicate juvenile's delinquency, which required proof beyond a reasonable doubt, and the state's petition to revoke juvenile's probation, which required proof by preponderance of the evidence, based on the same alleged acts. Juvenile acquitted on delinquency charge but probation revoked.
- 1993:** *People v. Porter*, 608 N.E.2d 1210 (Ill. App. Ct. 1993). Counsel ineffective for failing to object to consolidation of prosecution for delivery of cocaine and proceeding to revoke probation for alleged possession of cocaine. Jury acquitted on delivery charge, but judge found possession. If probation revocation hearing had been separate, possession allegation would have been collaterally estopped.
- 1992:** *Nichols v. State*, 308 S.C. 334, 417 S.E.2d 860 (1992). Counsel ineffective at proceeding to revoke probation for failing to make restitutionary payments because counsel did not object to state's failure to present evidence that the unemployed defendant had not made a bona fide effort to pay.

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X. JUVENILE WAIVER OR TRANSFER HEARINGS

2000: *In re R.D.B.*, 20 S.W.3d 255 (Tex. Ct. App. 2000). Counsel ineffective for failing to seek appointment of mental health expert to assist defense in transfer hearing. Defendant adjudicated as juvenile at age 16 for aggravated assault, robbery, burglary, and theft and sentenced to 15 years to Youth Commission. Under state statute, Youth Commission could petition court for transfer to adult system if defendant between 16 to 21, portion of sentence remains, and “welfare of community” requires. Youth Commission requested transfer when defendant was 18. One witness, whose qualifications were not in record, testified that defendant had IQ of 79 and brain damage from a self-inflicted gunshot wound, which caused seizures. Based on reports of other people, who did not testify, witness said that brain damage could contribute to behavior problems, but Youth Commission experts believed behavior was due to antisocial character and that defendant was a high risk to reoffend. The only witness for the defense was the defendant’s mother who testified that son had been in hospital for 3 months and had to relearn to talk, etc. Court held that there was a duty to investigate “such plainly evident background of mental health problems” and the defense clearly needed an expert in the face of such unfavorable reports. Prejudice found because if defense had their own experts, state would have been forced to call its own experts to testify instead of relying just on hearsay and admission of reports from people who did not testify and the defense could have tested the state’s case.

1988: *State v. Bryant*, 567 A.2d 212 (N.J. Super. Ct. App. Div. 1988), *rev’d in part on other grounds*, 569 A.2d 770 (N.J. 1989). Counsel ineffective for failing to adduce any meaningful evidence with respect to juvenile’s likelihood of rehabilitation during hearing on waiver of family court jurisdiction when state law established rehabilitative potential as a basis for denying waiver.

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XI. INVOLUNTARY COMMITMENT PROCEEDINGS

1996: *People v. Shelton*, 667 N.E.2d 562 (Ill. App. Ct. 1996). Attempted murder defendant who was acquitted by reason of insanity and remanded to custody of Dept. of Mental Health petitioned for release. Court held that both Sixth Amendment and statutory rights to counsel were violated and counsel was ineffective for failing to oppose state's motion to strike the petition which resulted in petition for discharge being dismissed and a denial of review.

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XII. POST-TRIAL CLEMENCY (MILITARY)¹³

2000: *United States v. Passmore*, 54 M.J. 515 (N.M. Ct. Crim. App. 2000). Counsel ineffective in post-trial proceedings in drug case. On appeal, the court set aside the convening authority's action and returned the record for a new staff judge advocate's recommendation (SJAR) and convening authority's action because convening authority reviewed prosecutor's recommendation of denial of clemency that had not been served on defense counsel. After remand, counsel was served with the additional matters but submitted no new clemency matters or response. Counsel was ineffective, however, because he failed to even contact the accused to determine whether he wished to submit any new clemency materials despite passage of 17 months. While the defense counsel is responsible for post-trial tactical decisions, he should act only after consultation with the client where feasible and appropriate. Prejudice found because, regardless of whether it would have made any difference to convening authority's decision or not, the accused's life had changed dramatically and he desired to submit additional information to the convening authority but was not afforded the opportunity due to counsel's deficient conduct. Convening authority's action set aside and case remanded for new recommendation and action.

1999: *United States v. Lowe*, 50 M.J. 654 (N.M. Ct. Crim. App. 1999). Counsel ineffective in drug case for failing to submit clemency matters to the convening authority post-trial when client had expressed desire to do so. Court found prejudice because: "We believe no appellant should be totally deprived of the opportunity to make their "best case" before the convening authority. In this case, we will not speculate on what the convening authority would have done if he had been presented with the clemency information the appellant desired to submit. The appellant has made a 'colorable showing of possible prejudice,' and he will receive the benefit of our doubt where it is clear that his post-trial representation was nonexistent." *Id.* at 657 (citation omitted).

1994: *United States v. MacCulloch*, 40 M.J. 236 (C.M.A. 1994). Military counsel ineffective for submitting a letter written by the defendant's civilian counsel to the convening authority when the letter effectively negated any plea for clemency because it included references to defendant's signed confession, an indication that defendant had committed more crimes than that for which he was charged, a statement that the plea bargain was a forgone conclusion, and a statement that counsel believed the sentence would not be reduced.

1992: *United States v. Frueh*, 35 M.J. 550 (A.C.M.R. 1992). Defense counsel ineffective when he failed to submit clemency matters to the convening authority despite the fact that accused did not waive his right to file clemency petition.

United States v. Jackson, 34 M.J. 783 (A.C.M.R. 1992). Civilian counsel's unilateral termination of the contract between counsel and defendant (due to a fee dispute) denied defendant of effective assistance of counsel in preparing post-trial clemency submission to convening authority. In

¹³After trial and prior to appeal, the convening authority or commanding general must approve the findings and sentencing. The convening authority does not have to review legal issues but is required to consider sentence. In essence, this post-trial review is a clemency proceeding.

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military proceedings, trial counsel's duties do not cease at the end of the trial but extend to completion of the post-trial clemency proceedings.

1991: *United States v. Stephenson*, 33 M.J. 79 (C.M.A. 1991). Defense counsel ineffective for advising accused to forego right to submit clemency petition to the convening authority when the accused was sentenced to 50 years and review at the convening authority level was the best hope for sentence relief.

1990: *United States v. Harris*, 30 M.J. 580 (A.C.M.R. 1990). Counsel ineffective for failing to submit accused's certificates, awards, and efficiency reports received during his eleven years of service to the convening authority in clemency proceedings.

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XIII. DENIAL OF RIGHT TO COUNSEL ISSUES

A. SLEEPING COUNSEL

2001: **Burdine v. Johnson*, 262 F.3d 336 (5th Cir. 2001) (en banc). In a heavily split court, prejudice was presumed under *Cronic* in capital trial where the defense counsel repeatedly slept as evidence was being introduced against the defendant because the defendant was denied counsel at a critical stage of his trial due to “the consistent unconsciousness of his counsel.” *Id.* at 341. The court first rejected the state’s argument that this creates a new rule under *Teague v. Lane*, since this ruling is inevitable under both *Cronic* and *Strickland*. The court also rejected the state’s argument that *Cronic* only applies if state action interferes with the right to counsel. The court then found that a presumption of prejudice is appropriate. “Unconscious counsel equates to no counsel at all. Unconscious counsel does not analyze, object, listen or in any way exercise judgment on behalf of a client.” *Id.* at 349.

Even the intoxicated attorney exercises judgment, though perhaps impaired, on behalf of his client at all times during a trial. Yet, the attorney that is unconscious during critical stages of a trial is simply not capable of exercising judgment. The unconscious attorney is in fact no different from an attorney that is physically absent from trial since both are equally unable to exercise judgment on behalf of their clients.

Id.

1996: *Tippins v. Walker*, 77 F.3d 682 (2nd Cir. 1996). Prejudice presumed when counsel was sufficiently asleep to amount to being unconscious for extended periods of time during 12-day drug trial and slept through a key prosecution witness and through damaging testimony.

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B. ATTORNEY LICENSING ISSUES

1. U.S. Court of Appeals Cases

2003: *Mitchell v. Mason*, 325 F.3d 732 (6th Cir. 2003). The defendant in a second degree murder case was completely denied counsel prior to trial and prejudice was presumed. Counsel was appointed in October 1988 and represented the defendant at a preliminary hearing. Four months later counsel attended a final conference. Then on April 5, 1989, counsel was suspended from practicing law. He was reinstated the day jury selection began. During the time following counsel's appointment, the defendant wrote six separate letters to the trial court indicating that counsel had not visited him at all and requesting a new attorney. Eleven days prior to trial the court held a hearing on the defendant's motion and counsel did not even attend the hearing. Nonetheless, the court denied the motion for new counsel. The state court in reviewing this issue applied the analysis of *Strickland*. The Sixth Circuit held, however, "we are convinced that the undisputed amount of time that [counsel] spent with [the defendant] prior to jury selection and the start of trial – approximately six minutes, spanning three separate meetings in the bullpen, when viewed in light of [counsel's] month-long suspension from practice immediately prior to trial – constituted a complete denial of counsel at a critical stage of the proceedings." The court thus found under the standards of the AEDPA that the Michigan Supreme Court erroneously and unreasonably applied clearly established Supreme Court law set forth in *Cronic*. The court held that in addition to the month-long suspension just prior to trial, the evidence showed that during the entire six months of counsel's representation, he met with the defendant no more than six minutes. In light of the Supreme Court's holding in *Powell v. Alabama*, the Sixth Circuit held that the pretrial period constitutes a critical stage of the proceedings because the pretrial period "encompasses counsel's constitutionally imposed duty to investigate the case."

The illogic of applying *Strickland* to these facts is manifest in that there are no conceivable tactical or strategic reasons for defense counsel to fail to consult with a client prior to trial. Such a meeting is vital if counsel is competently to develop a defense. If counsel does not meet with his client for more than two minutes at a time, the defendant is unable to confide truthfully in his lawyer, and counsel will not know, for example, which investigative leads to pursue, whether there are witnesses for the defense, or what kind of alibi the defendant may have.

Id. at ____.

1990: *United States v. Novak*, 903 F.2d 883 (2nd Cir. 1990). Representation at trial by individual who had obtained admission to bar through fraudulent means and thus was never properly licensed was per se violation of Sixth Amendment.

2. State Cases

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- 2003:** *State v. Joubert*, 847 So.2d 1023 (Fla. Dist. Ct. App. 2003). Counsel was denied effective assistance of counsel where counsel had petitioned for disciplinary resignation, which was tantamount to disbarment, and had no license at the time of trial. This was a *per se* violation of the Sixth Amendment, because “[t]he right to effective assistance of counsel means access to a licensed attorney, A disbarred, or even suspended, attorney is simply not ‘counsel’ for purposes of ‘effective assistance of counsel.’” *Id.* at ____.
- 1996:** *Butler v. State*, 668 N.E.2d 266 (Ind. Ct. App. 1996). Prejudice presumed where defendant was represented solely by an attorney licensed in another state but not licensed or otherwise admitted to practice law in Indiana.
- 1992:** *In re Johnson*, 822 P.2d 1317 (Cal. 1992). Prejudice presumed where, prior to trial and without defendant’s knowledge, counsel been suspended from practice and had submitted his resignation to state bar while disciplinary charges were pending.
- 1989:** *People v. Chin Moo Foo*, 545 N.Y.S.2d 55 (N.Y. Sup. 1989). Per se reversal required where defendant was represented by a person who obtained attorney’s license through fraud upon the licensing authorities.
- State v. Newcome*, 577 N.E.2d 125 (Ohio Ct. App. 1989). Prejudice presumed when counsel was under suspension at the time his guilty plea was entered.
- 1988:** *People v. Williams*, 530 N.Y.S.2d 472 (N.Y. Sup. 1988). Per se reversal required where attorney was disbarred and was never properly licensed.

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C. ATTORNEY MEDICAL PROBLEMS

1. U.S. Court of Appeals Cases

1991: *Pilchak v. Camper*, 935 F.2d 145 (8th Cir. 1991) (*affirming* 741 F. Supp. 782 (W.D. Mo. 1990)). Fundamental injustice, even if procedurally defaulted, when defendant convicted by a jury hand-picked by deputy sheriff and counsel had Alzheimer's which resulted in calling defendant as a witness which opened the floodgates to rebuttal and failure to present evidence that defendant was coerced by co-defendant..

2. State Cases

State v. Antoine, 774 So. 2d 353 (La. Ct. App. 2000). Counsel ineffective in possession with intent to distribute case due to medical problems. During trial, counsel raised the issue of his own ineffectiveness during voir dire, jury selection, and beginning of trial because at the end of that day he went to his doctor, learned that he had low blood sugar, and had to be hospitalized, which continued the trial. Counsel conceded that he "had no idea what was happening" during that first day and record supported this because counsel had failed to object to state back-striking jurors after they were sworn and failed to object to inadmissible hearsay through an expert. Counsel raised the issue when the trial resumed and a mistrial should have been granted because the prejudice standard had been met.

1998: *State v. Gill*, 967 S.W.2d 540 (Tex. Ct. App. 1998). Counsel ineffective in aggravated assault of girlfriend case. Trial court found counsel ineffective after several evidentiary hearings related to counsel's physical and mental health and ordered a new trial without making specific findings of fact or conclusions of law. Court reviewed under abuse of discretion standard and found that there was sufficient evidence to support the trial court's ruling. Record reflected that counsel struck a potential juror (against the court's advice that juror bias could favor defendant), who stated that he would be hesitant to sentence a person to prison because his brother was a prison guard, and the inmate might harm brother. Counsel also failed in several instances to object or make timely objections, including when the arresting officer testified that defendant told a third party that the "bitch" (referring to girlfriend) had him arrested (although she testified for the defense at trial. Counsel also failed to adequately examine the girlfriend by essentially conceding the defendant's guilt by asking in the guilt-or-innocence phase, "Are you asking the jury to be lenient with him and not send him to the penitentiary?" Finally, counsel failed to adequately cross-examine defendant's ex-wife when she testified concerning past domestic violence. Counsel could have impeached her with criminal history as well as an alleged history of psychiatric hospitalization. Based on these errors, the court found this to be "a close case," but found no abuse of discretion when the record was viewed in light of the "mental and physical deficiencies of counsel." 967 S.W.2d at 543. "Medical records entered into evidence at the hearing on the motion for new trial showed that [attorney] had been hospitalized less than a month before trial. The records indicate that [attorney] was diagnosed with nineteen illnesses including: glaucoma, continuous alcohol abuse, severe heart problems, and cerebral atrophy." 967 S.W.2d at 543 n.2. Court noted that the record reflected that

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the court or the defendant had to consistently remind counsel when it was his turn to cross-examine a witness, counsel was often confused by trial court's rulings and evidentiary rules, and counsel's paralegal (a disbarred lawyer and convicted felon) was continuously feeding counsel with notes for witness examination.

***Capital Case**

D. MISCELLANEOUS

1. U.S. Court of Appeals Cases

2001: *Fields v. Bagley*, 275 F.3d 478 (6th Cir. 2001). Without any discussion of the AEDPA standards,¹⁴ the court found counsel ineffective in drug trafficking case for failing to represent the defendant on the state's interlocutory appeal of the trial court's suppression order. Retained counsel successfully moved to suppress the cocaine that was obtained in an unreasonable search and seizure. The state filed an interlocutory appeal and served counsel, who stated he was not retained for the appeal, but did not serve the defendant. The state submitted an incomplete record on appeal but won a reversal while the defendant was not represented by any counsel. The state's interlocutory appeal of a trial court's order suppressing evidence is essentially a first appeal of right requiring the effective assistance of counsel under *Evitts*. In this case, counsel failed to represent the defendant at all in the appeal, failed to notify the defendant that the state was appealing the suppression order, failed to advise the defendant that he no longer represented the defendant, and failed to obtain an order withdrawing as counsel. The defendant was prejudiced because, without counsel, the defendant was unable to argue any reason to uphold the suppression order and was unable to point out to appellate court that the portion of the suppression hearing transcript where the trial court stated that it did not find the police officers' testimony to be credible was missing. This finding was entitled to deference on appeal.

2000: *Delgado v. Lewis*, 223 F.3d 976 (9th Cir. 2000). Counsel ineffective in drug case because trial counsel was absent from every important court proceeding except hearing on change of plea, where defendant, who barely spoke English, plead guilty after continuously maintaining innocence. Counsel was also absent for sentencing, where defendant was not given the opportunity to speak and a co-defendant's counsel simply asked for mercy for defendant but otherwise presented no evidence or argument. Defendant got maximum sentence while codefendants got much lower sentences. In assessing whether state court decision was "objectively unreasonable," under 28 U.S.C. § 2254(d), the court determines whether the state court clearly erred, in other words, whether the court is left "with a definite and firm conviction that an error has been committed." Here, where state court did not discuss rationale for decision, federal habeas review is not *de novo*, but an independent review of the record is required to determine whether the state court's decision was objectively reasonable. In this case, it clearly was.

2. State Cases

1997: *State v. Classon*, 935 P.2d 524 (Utah Ct. App. 1997). Counsel ineffective in aggravated sexual assault case because counsel represented brothers/co-defendants and counsel believed to be the lead counsel did not show up for trial and the co-counsel and a third counsel conducted the trial. Court

¹⁴It is not clear from the opinion whether the AEDPA was applicable or not.

***Capital Case**

did not conduct *Strickland* prejudice analysis but instead found a Sixth Amendment violation because none of the three public defenders involved actually accepted responsibility for the case.

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XIV. RELATED ISSUES

A. U.S. Court of Appeals Cases

2002: *Reagan v. Norris*, 279 F.3d 651 (8th Cir. 2002). Ineffectiveness of appellate counsel in failing to assert on appeal trial counsel's conflict of interest established cause and prejudice excusing procedural default. Trial counsel represented both the defendant and his girlfriend, who were charged with murdering the girlfriend's two-year-old daughter. Counsel negotiated a lesser charge for the girlfriend in exchange for her testimony against the defendant. In post-trial motions, the defendant asserted (pro se) numerous claims of ineffective assistance, including the conflict. Newly appointed post-trial and appellate counsel failed to raise the conflict issue though. Counsel was ineffective for failing to recognize the seriousness of the conflict and to assert the issue. Prejudice found because the error denied the defendant appellate review of the conflict claim. Remanded for consideration of the merits of the habeas petition. [Ultimately reversed due to ineffective assistance of trial counsel. See *Reagan v. Norris*, 365 F.3d 616 (8th Cir. 2004)]

2001: *Hasan v. Galaza*, 254 F.3d 1150 (9th Cir. 2001). Limitations period for filing federal habeas petition asserting claim of ineffective assistance of counsel, based on counsel's failure to pursue jury tampering concerns, did not begin to run until petitioner knew, or with exercise of due diligence could have discovered, relationship between prosecution witness and person who was overheard on courthouse telephone mentioning defendant's name and who allegedly approached juror with note reading "be sure to call me." While the petitioner was aware, prior to that time, of the possibility of jury tampering and counsel's failure to investigate or pursue it, it was only the awareness of the relationship to the prosecution that gave petitioner reasonable grounds for asserting that, had counsel investigated properly, he could have contested prosecution's claim that person who approached juror had no connection to defendant's case, so as to show requisite prejudice.

B. State Cases

2002: *State v. Howard*, 805 So.2d 1247 (La. Ct. App. 2002). Denial of continuance deprived defendant of effective assistance of counsel in multiple bill and sentencing hearing. Following conviction of possession with intent to distribute the state filed a multiple bill of information, which defendant objected to. Following this objection, the defendant released his retained counsel. The court appointed counsel on the morning of the multiple bill hearing and appointed counsel's motion for continuance was denied. Prejudice found because counsel did not argue the motion to quash, object to any of the state's evidence, or cross-examine the state's expert.

Stovall v. State, 800 A.2d 31 (Md. Ct. App. 2002). The statutory right to counsel in a post-conviction proceeding means the right to the effective assistance of counsel. A petitioner has a right to reopen a post-conviction proceeding by asserting facts that, if proven to be true at a subsequent hearing, establish that post-conviction relief would have been granted, but for the ineffective assistance of post-conviction counsel.

*Capital Case

- 2001:** *Jackson v. Weber*, 637 N.W.2d 19 (S.D. 2001). Statutory right to appointed counsel in post-conviction case means the right to competent counsel under the *Strickland* standard. The ultimate issue in a second habeas asserting ineffective assistance in the first habeas must, however, be directed to some error in the trial court.
- 2000:** *State v. Vera*, 769 So.2d 1059 (Fla. Dist. Ct. App. 2000) (per curiam). Counsel ineffective in murder case. Grounds not in order. Court simply found that counsel conceded ineffectiveness in several respects and the post-conviction judge that granted relief was also the trial judge. “The trial judge who considered the post-conviction motion was the one who tried the original case, and we must accord weight to the trial judge’s superior vantage point in having observed the trial.”
- 1999:** **In re Sanders*, 981 P.2d 1038 (Cal. 1999). Court held that “abandonment” by first appointed counsel for direct appeal and state habeas in essentially a unitary system constituted good cause for substantial delay in filing state habeas. Counsel was appointed in 1983 and filed direct appeal brief in 1984. Although he raised issue on direct appeal that trial counsel was ineffective for failing to adequately prepare and present mitigation evidence, which clearly required proof outside the record, counsel did little to investigate. He requested funds to do so and was given only \$3,000. Based on this information, counsel conceded that he was aware that a full-scale investigation was needed. He did not pursue the issue any further though by seeking additional funds or taking any other action. Counsel simply asserted that because of his busy schedule that he did not have time to do a full-scale investigation or file the state habeas petition. Thus, despite the imposition of new court rules in 1989 requiring that counsel investigate if “triggering” information obviously requiring additional investigation was known to counsel and requiring the filing of state habeas without “substantial delay,” counsel did nothing. Ultimately after case was affirmed on appeal and new counsel appointed in federal court, state habeas was filed in 1994. Court held that previous counsel had essentially abandoned his client by not investigating. Busy schedule was no excuse, because counsel could have sought associate counsel or moved to withdraw. Lack of funds also no excuse, because he didn’t seek additional funds. Court rejected state’s argument that there was no requirement of effectiveness in state habeas under federal law. While court agreed on federal issues, it noted that this was a matter of state law because state law and court rules required appointment of counsel. Thus, court would consider state habeas despite the substantial delay. Court warned, however, that in future, the court would refer cases of “abandonment” to bar for disciplinary action and may seek reimbursement on fees paid.
- 1998:** *State v. Samuels*, 965 S.W.2d 913 (Mo. Ct. App. 1998). Court held that it was improper in retrial of murder case to allow the state to use the defendant’s testimony given in the post-conviction hearing to support his claim of ineffective assistance of counsel. In essence, the court held that the Fifth Amendment privilege against self-incrimination protected the defendant’s statements because the incriminating testimony was given only in order to secure the defendant’s Sixth Amendment right to effective counsel. Thus, the defendant essentially had no choice but to testify in the post-conviction proceedings.

**SUMMARIES OF SUCCESSFUL
INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS
POST-*WIGGINS V. SMITH* INVOLVING
ADVICE TO CLIENT AND PLEA-RELATED ISSUES**

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I. ADVISING CLIENT

A. GUILTY PLEA AFTER INADEQUATE INVESTIGATION OR RESEARCH

1. U.S. Court of Appeals Cases

2007: *United States v. Mooney*, 497 F.3d 397 (4th Cir. 2007). Counsel ineffective in felon in possession of firearm case for advising the defendant to plead guilty based on the erroneous assumption that no justification defense existed. The defendant was in his home when his ex-wife, who had been drinking and had shot or shot at several former boyfriends, put a gun to his temple. He took the gun from her, called his boss at work (7 blocks away), and told him he was coming in to turn the gun over to police. His ex-wife threatened to have him arrested for possession of the gun so the defendant attempted twice to call 911 from the home to report it himself but the wife disconnected the calls. He left then and walked the seven blocks to work where the police, who had been called by his ex-wife showed up and arrested him. Counsel's conduct was deficient because the defendant insisted from the beginning that he had done the right thing and was not guilty. Counsel told him that justification was no defense though and advised him to plead guilty. When the defendant attempted to raise this question with the court at the plea hearing, defense counsel undermined him and informed the court that justification was not a defense. This advice was clearly erroneous because every circuit to consider the issue, including the Fourth Circuit, had recognized justification as an affirmative defense to this charge.

Counsel's erroneous legal advice resulted from a failure to conduct the necessary legal investigation. Counsel in criminal cases are charged with the responsibility of conducting "appropriate investigations, both factual and legal, to determine if matters of defense can be developed."

Id. at 404. Prejudice established because it was "incontrovertibly clear" that the defendant would not have plead guilty but for counsel's erroneous advice. He even attempted to withdraw his plea at sentencing asserting his innocence in doing the right thing. Had he proceeded to trial, the court would have been required to present the defense to the jury and the jury likely would have been persuaded of justification on these facts.

2005: *Maples v. Stegall*, 427 F.3d 1020 (6th Cir. 2005). Counsel ineffective in distributing cocaine case in which the defendant pled guilty following jury selection based on counsel's incorrect advice that he could retain his speedy trial claim for appeal. The defendant was prejudiced because he would not have pled guilty absent this incorrect advice. Although the case was reviewed under AEDPA, the court reviewed the merits de novo because the state court had not adjudicated the merits.

2. U.S. District Court Cases

2010: *Cerda v. Hedgpeth*, 744 F.Supp.2d (C.D. Cal. 2010). Counsel ineffective in drug possession plea for failing to adequately investigate and give proper advice prior to plea. The complaint alleged a prior violent felony conviction enhancement under the Three Strikes Law. The state's initial offer was for six years. Due to the 1993 conviction, counsel was uncertain whether the petitioner would be eligible for a "Prop 36 disposition," which would allow for drug treatment, a noncustodial sentence, and eventual dismissal of the charge. The state agreed that if the petitioner was eligible, which would mean that he did not either personally use a weapon or cause great bodily injury, he could have a "Prop 36 disposition." Counsel was aware there was a preliminary hearing transcript for the prior, but he was unsure whether this would be admissible to prove the strike. Counsel was also aware that the petitioner had been convicted of drug possession in 2003 and sentenced to 32 months, which suggested that the petitioner had admitted in 2003 that the 1993 conviction was a strike. With this information, counsel recommended an offer of four-years without a Prop 36 recommendation. The state agreed to either of two plea options: (1) a Prop 36 referral, but 6 years if he was found ineligible; or (2) 4 years with no Prop 36 referral. The petitioner chose the former. He clearly would not have done so if he had known he was not eligible for Prop 36. Counsel's conduct was deficient as his advice was legally and factually incorrect. While he was uncertain of Prop 36 eligibility, etc., he did nothing to research or investigate to determine the correct answer. Only after the guilty plea, did counsel obtain the documents related to the 2003 conviction, which contained an admission that the 1993 conviction was a strike. Under California law, this was equivalent to a guilty plea. Aside from that, under settled state law, the preliminary hearing transcript, which contained information that the 1993 prior did involve great bodily injury, was admissible in evidence. "Competent counsel would have been aware of this law or would have taken the time to learn the answer to his discrete, uncomplicated legal question." Likewise, the plea the petitioner entered at counsel's advice also admitted, per the complaint, that the 1993 conviction was a strike, precluding Prop 36 eligibility. Prejudice was clear as "common sense" dictates that any defendant offered a deal for four years or six years will take the four year deal. Under AEDPA, the state court's determination to the contrary was an unreasonable application of Supreme Court law.

United States v. DeSimone, 736 F.Supp.2d 477 (D.R.I. 2010). Counsel in mail fraud and money laundering case ineffective during plea proceedings, such that the defendant had a fair and just reason to withdraw his guilty plea. Although the defendant maintained innocence throughout, he pled guilty the morning trial was scheduled to begin based on counsel's advice that he would likely be convicted. The problem, however, was that counsel advised the defendant he could plead guilty even if he was not and that it "happens all the time." Likewise, during the state's recitation of facts during the plea hearing, the defendant complained to counsel that the statements were "bullshit" but

counsel told the defendant that he had to accept the recitation. While counsel did not explicitly tell the defendant to lie to the court in the plea colloquy, the defendant was justified in his understanding that lying was not only permissible, but even necessary, to get his plea accepted. This undermined the finding that the plea was “knowing, voluntary, and intelligent.”

Williams v. United States, 684 F. Supp. 2d 807 (W.D. Tex. 2010). Counsel ineffective in “conspiracy to attempt to possess with the intent to distribute” marijuana plea case for advising the defendant to plead guilty to a count in the indictment that failed to charge an offense. In short, under Fifth Circuit precedent and under the relevant statute, a defendant could be charged for “conspiracy” or “attempt,” but not “conspiracy to attempt.” Counsel’s conduct was deficient and prejudicial and relief was not barred by guilty plea.

2009: *United States v. Winsor*, 675 F. Supp. 2d 1069 (D. Ore. 2009). Counsel ineffective in receipt of child pornography case for allowing the defendant to plead to one count of receipt when the defendant was charged with two counts of receipt and one count of possession of child pornography. Under Ninth Circuit precedent decided more than eight months prior to the plea, convictions for receipt and possession would violate double jeopardy. Thus, counsel should have advised the defendant to plead guilty to all three charges. Counsel could then have asked the court to dismiss the receipt charges, which had a five-year mandatory minimum sentence, rather than the possession charge

Given the known general distaste for statutory mandatory minimum sentences of judges around the country, and the belief that sentences of these types of cases are too lengthy, a lawyer exercising reasonable professional skill and judgment would have counseled his client about this strategy.

Alternatively, counsel could have advised the defendant to stipulate the facts and proceed in a bench trial in order to preserve his right to appeal the denial of his motion to suppress evidence. Prejudice established as the court likely would have dismissed the receipt charge and sentenced the defendant to less than five years on the possession charge because the defendant was 62 years old and a professional engineer, the crimes were more than four years old, the defendant passed a polygraph confirming he had never had sexual contact with a child, and he had been attending therapy at the time of sentencing.

2008: *McBroom v. Warren*, 542 F. Supp. 2d 730 (E.D. Mich. 2008). Counsel ineffective under AEDPA in incorrectly advising the defendant of the law which resulted in a no contest plea in assault with intent to commit murder case. The state initially made a plea offer with a cap of a one year sentence, which defense counsel never advised the defendant of. The defendant indicated a willingness to accept the deal on the day of trial, but the state declared the offer was withdrawn. The defendant proceeded to trial and was convicted. Prior to sentencing, he obtained new counsel who negotiated withdrawal of the

conviction, entry of a no contest plea, a sentence of 11-17 years, and a waiver of appellate issues relating to the initial representation and the trial. Counsel's conduct was deficient because counsel incorrectly advised the defendant that the state's initial offer could not be reinstated despite the ineffectiveness of his initial counsel. Prejudice established because the defendant received a much higher sentence. In ruling on this issue, the state court incorrectly viewed it as a challenge to initial counsel's actions rather than a challenge to the plea counsel's actions.

3. State Cases

2011: *Harley v. State*, ___ N.E.2d ___, 2011 WL 3240764 (Ind. App. July 29, 2011). Counsel ineffective in non-support of child case for failing to inform the defendant and court prior to entry of guilty plea that the defendant's sole income was from SSI. SSI is a federal social welfare program and is specifically excluded from a parent's income for the purpose of computing child support under state law. Thus, the defendant had a defense that he was unable to pay child support.

People v. Edmonson, 946 N.E.2d 997 (Ill. App. 2011). Counsel ineffective in burglary and stolen vehicle case for misinforming the defendant prior to his negotiated plea for a 20-year-sentence cap that he would be able to challenge his sentence on appeal. The defendant faced a sentencing range of 12 to 60 years. The state recommended a 20 year sentence and the court imposed a 15 year sentence. The defendant sought to appeal this sentence. While the court and prosecutor also did not recognize it, state law was clear that the defendant could not challenge a negotiated sentence as excessive on appeal. Prejudice found, as the defendant would not have pled guilty had he been adequately advised.

2010: *Garcia v. State*, 237 P.3d 716 (N.M. 2010). Counsel ineffective for erroneously advising the 18-year-old defendant prior to his plea to intentional child abuse resulting in death that he could be convicted even if the child's death was "an accident." In essence, counsel advised the defendant that both negligent and intentional child abuse resulting in death were punishable by 30 years. While counsel's advice was correct based on the law prior to 2005, it was not correct at the time of trial, which was almost two years after the statutes had been amended. Under correct law, when intentional child abuse is charged, there is no lesser included offense. Thus, if the defendant acted only negligently, he must be acquitted. The defendant was charged here with only intentional child abuse. Nonetheless, counsel even informed the court at the time of the plea that the defendant had been advised that even negligent abuse and "an accident" was sufficient to establish guilt. Counsel's advice about sentencing was also incorrect as negligent abuse was punishable only up to 24 years, while intentional was punishable up to life with a mandatory minimum of 30. Counsel's conduct was deficient. Prejudice established as a conviction of *intentional* child abuse resulting in death "was by no means a foregone conclusion." Thus, there was a reasonable probability that the defendant would have

proceeded to trial if he had been adequately advised. Alternatively, with adequate advice, the defendant may have sought a more favorable plea arrangement. Regardless, the defendant's plea was not knowing or voluntary.

Kolle v. State, 386 S.E.2d 578 (S.C. 2010). Counsel ineffective in drug trafficking plea case for advising the defendant to plead guilty without sufficiently investigating and arguing the motion to suppress evidence seized from an apartment in which the defendant was an invited guest. Police officers testified that they received a call about loud music from the apartment. When an officer arrived, he heard music and observed fresh "forced entry marks" on the door, but no one responding to knocking. Believing there were exigent circumstances, officers entered and observed powder cocaine and materials used for processing and manufacturing cocaine in plain sight. The officers seized the powder cocaine and obtained a search warrant, which yielded a find of 63 grams of cocaine in the apartment. Counsel moved to suppress the evidence, but the motion was denied, due to the court's finding of exigent circumstances followed by plain view. The defendant pled guilty the same day. Counsel's conduct was deficient during the motion hearing, because counsel had failed to obtain discovery and, therefore, failed to question the officers about time discrepancies, such as the warrant being issued and executed even before the initial "loud music complaint." Likewise, counsel failed to point out that the arrest and search warrant affidavits and incident reports referred to crack cocaine rather than powder and made no reference to "fresh damage" or "forced entry." If counsel had adequately performed, there is a reasonable probability that the court would have granted the suppression motion. Even if the trial court had ruled erroneously, counsel could have advised the defendant to proceed to trial and then challenge the denial of the suppression motion on direct appeal.

2009: ***Ex parte Imoudu***, 284 S.W.3d 866 (Tex. Crim. App. 2009). Counsel ineffective in plea to murder case for failing to investigate the possibility of an insanity defense prior to advising the defendant to plead guilty. Six months prior to the crimes, the defendant had been in jail for a month for misdemeanor theft. During that time, he was prescribed an antipsychotic medication. The murder consisted of the defendant stealing a car and driving into oncoming traffic (causing a death) in the ensuing chase. In confinement, his family and a social worker at the jail immediately noted mental health problems. Both attempted to contact court-appointed counsel without success and the family retained private counsel, based on the advice of the social worker. Both retained counsel observed that the defendant seemed "incoherent" and there was "something wrong" with him and asked for a competence evaluation. A month after the defendant was found competent by court-appointed examiners, he plead guilty. Despite counsel's knowledge of the defendant's problems, counsel did not review the jail records, including those following arrest in this case that reflected numerous referrals for mental health services and evaluation, a determination of "mental illness," antipsychotic medications, and housing in an area used to house the mentally ill inmates. Counsel also never spoke to any jail personnel, did not request an insanity evaluation, did not hire a psychiatrist to evaluate

the defendant, and did not advise the defendant of the insanity defense. Counsel's conduct was deficient. Prejudice established because "there is a reasonable probability that if his attorneys had informed him of the possibility of pursuing an insanity defense, he would not have pled guilty and would have gone to trial."

Berry v. State, 675 S.E.2d 425 (S.C. 2009). Counsel ineffective in drug case in failing to inform the defendant who pled guilty to a drug charge of a potential challenge to the use of his prior conviction for possession of drug paraphernalia for sentencing enhancement purposes. Counsel's conduct was deficient because a conviction for possession of drug paraphernalia may not be used for enhancement purposes as it does not "relate to" drugs as statutorily mandated. Nonetheless, counsel did not challenge the State's reliance on the paraphernalia conviction for enhancement purposes or inform the defendant of the potential challenge. Indeed "counsel never gave any thought to the issue." While the validity of the legal challenge may have been "unclear" at the time of the plea, "uncertainty concerning a potential legal challenge may well provide a defendant a catalyst in plea negotiations with the State." Counsel's conduct was deficient because "[s]imply saying 'I never gave it a thought' falls short of the Sixth Amendment guarantee of effective assistance of counsel." Prejudice established because the defendant testified in PCR that he would have gone to trial if he had known that his paraphernalia conviction did not qualify as a prior offense for enhancement purposes.

2008: Stewart v. State, 987 So. 2d 729 (Fla. App. 2008). Counsel ineffective in failing to advise the defendant of a statute of limitations defense prior to entry of plea. The defendant had five charges relating to non-dwelling burglaries, felony theft, and auto thefts and pled guilty as charged in exchange for a five year sentence for burglary and probation on all other charges. The statute of limitations had already passed on all of the charges except the felony theft by the time of the plea regardless of the prior placement of detainers on the defendant, who was already serving a prison sentence when the charges arose.

Knight v. State, 983 So. 2d 348 (Miss. App. 2008). Counsel ineffective in manslaughter and carrying concealed weapon case for allowing the defendant to plead guilty to carrying a concealed weapon, which resulted in a sentence to five years of confinement. The defendant had a pistol in a motor vehicle only, which is not illegal under Mississippi law.

2006: State v. Hunter, 143 P.3d 168 (N.M. 2006). Counsel ineffective in custodial interference case for failing to adequately advise the defendant prior to his no contest plea. Custody of the defendant's children had been granted to him in Missouri in 1992. He moved to New Mexico in 1994. His ex-wife, who had lived in Texas since prior to 1992, sought a change in custody in Missouri in 1997. Because the defendant objected to jurisdiction in Missouri and did not appear, the Missouri court granted custody to the ex-wife. She did not attempt enforcement through the New Mexico courts, but sought the help of the local police in taking physical custody. They declined. In 2001, she again sought the help of the

local police and the defendant was charged with custodial interference. He plead no contest because counsel advised him incorrectly that he had no viable argument for a motion to dismiss due to the Missouri court's lack of jurisdiction and counsel's failure to discuss a conditional plea with the defendant that would have preserved that issue for appeal. This was deficient conduct because it was clear under Missouri law that the court lacked proper jurisdiction with neither of the parties or the children living outside that state for years. This would have been a viable basis for the motion to dismiss because the criminal custodial interference statute applies only to custody orders issued by a court of competent jurisdiction. The defendant was prejudiced because he would likely have refused the no contest plea and accepted a conditional plea if counsel had performed adequately.

2005: *Julien v. State*, 917 So. 2d 213 (Fla. App. 2005), *review denied*, 931 So.2d 901 (Fla. 2006). Counsel ineffective in grand theft plea case for failing to inform the defendant of his option to apply for the pretrial intervention (PTI) program. The defendant was a first-time offender charged with shoplifting a pair of shoes. He pled guilty and was given probation, but then the government commenced removal proceedings to rescind his permanent residence status and remove him to Haiti. Counsel's conduct was deficient because the state rules of criminal procedure required counsel to advise the defendant of "any possible alternatives that may be open to the defendant" and the defendant was eligible for PTI, which would have resulted in dismissal of the charges if the program was successfully completed. Prejudice found because, if he had been adequately advised, the defendant would not have pled guilty but would have applied for the PTI program instead.

Petty v. Smith, 612 S.E.2d 276 (Ga. 2005). Counsel ineffective in felony murder and aggravated assault case for inadequate advice to the defendant that resulted in a guilty plea. The defendant was charged with (1) malice murder; (2) felony murder; and (3) aggravated assault. All three indictments were based on the defendant shooting the victim with a shotgun after a codefendant beat him. Counsel believed, however, that the assault charge was based on the codefendant beating the victim. Counsel believed that, if convicted, the defendant would be sentenced to life and 20 years consecutively. Based on counsel's advice, the defendant plead guilty to felony murder and aggravated assault and received life and a concurrent 20 year sentence. Counsel's conduct was deficient because the indictment clearly revealed that the alleged assault was shooting the victim. Thus, the aggravated assault count merged into the murder count and the accused could not be separately convicted of this offense. Counsel's conduct was deficient because "[a]ny reasonably competent attorney" would have realized this fact and that the defendant did not benefit from the plea agreement. The defendant was prejudiced because he would not have plead guilty and would not have received a harsher sentence than could legally be imposed on him if had been gone to trial and been convicted on all counts.

Stevens v. State, 617 S.E.2d 366 (S.C. 2005). Counsel ineffective in plea to receiving stolen goods case where the defendant was charged and pled to eighteen counts. If counsel had adequately investigated and researched the issue, counsel could have challenged the number of indictments because, under the “plain meaning of the statute,” the receipt of multiple items in a single transaction or event constitutes a single offence. Prejudice found because the defendant likely would not have pled guilty to 18 counts and may well have received a lighter sentence if the court had 4 or 5 counts before it rather than 18.

Ex parte Briggs, 187 S.W.3d 458 (Tex. Crim. App. 2005). Counsel ineffective in felony injury to child case for failing to adequately investigate prior to the seventeen year old defendant’s guilty plea. The defendant was charged in the death of her two month old son, who had been very sick from the time of his birth. The defendant took him to doctors and hospitals five different times in two months. Ultimately on the day of his death, the defendant called 911 and attempted mouth-to-mouth when she found him blue and limp. The admitting diagnosis at the hospital was hypoxia (lack of oxygen to the brain). Emergency room personnel tried to intubate and placed the tube in the baby’s esophagus instead of his trachea, which was not discovered for 30 minutes. By the time it was discovered, the baby was brain dead. He died seven days later. The original autopsy report concluded that the death was a homicide. After the defendant was charged, she retained counsel, but could only pay \$10,400 of the \$15,000 fee. He threatened to withdraw and stated that he could not retain experts without an additional \$2500-\$7500 for experts. He did not withdraw, did not obtain experts or adequately investigate, and advised the defendant to plead guilty. Counsel was aware of the child’s medical history. His conduct was deficient in failing to consult with experts and “[t]his was not a ‘strategic’ decision, it was an economic one.”

Counsel is most assuredly not required to pay expert witness fees or the costs of investigation out of his own pocket, but a reasonably competent attorney—regardless of whether he is retained or appointed—must seek to advance his client’s best defense in a reasonably competent manner.

Here, counsel had several options that could have been pursued: (1) subpoena the doctors that had previously treated the child and offer their records and opinions into evidence; (2) counsel could have withdrawn and requested appointment of counsel for the indigent defendant; or (3) remained as counsel, but requested investigatory and expert witness fees from the trial court due to the defendant’s indigency. “If any reasonable attorney appointed to represent an indigent defendant would be expected to investigate and request expert assistance to determine a deceased infant’s cause of death, a privately retained attorney should be held no lower standard.” If counsel had adequately investigated, substantial testimony from a number of doctors would have revealed that there was no medical evidence of child abuse and that the child died from an undiagnosed birth defect,

which led to a urinary infection, sepsis and severe pneumonia, which was made worse by the faulty intubation which led to brain death. Prejudice found because, absent counsel's deficient conduct, there is a reasonable probability that the defendant would not have pled guilty.

2004: *Gerisch v. Meadows*, 604 S.E.2d 462 (Ga. 2004). Counsel was ineffective in aggravated battery case for failing to recognize and adequately advise the defendant concerning a valid double jeopardy claim prior the defendant's guilty plea on the charge. The defendant was involved in a fight. He was initially charged in municipal court and plead guilty to disorderly conduct by fighting and public drunk. He was sentenced to probation. He was subsequently indicted for aggravated battery, arising from the same fight, and additional charges. The defendant accepted the prosecution's plea agreement to plead guilty in exchange for a sentence of 20 years (10 in prison and 10 on probation) for aggravated battery and concurrent sentences for the remaining offenses. On the day of the plea, the defendant, who was functionally illiterate, told counsel that he had been convicted in municipal court and asked why he was charged with the same offenses. Counsel discussed the issue with the prosecutor, who asserted that a double jeopardy claim would have no merit. Counsel also verified the city court convictions, but assumed there was no double jeopardy because the prior prosecution was under a municipal ordinance rather than state law. Counsel thus advised the defendant that a double jeopardy claim would be fruitless and would cause the state to withdraw the plea recommendation and to seek greater punishment. Counsel's conduct was deficient because counsel did not adequately research or evaluate the issue and instead relied on the advice of the prosecutor and her own misunderstanding of the law when the defendant did have a viable double jeopardy claim. Prejudice was found because, but for counsel's error, the defendant would not have pled guilty to the charge of aggravated battery.

Heath v. State, 601 S.E.2d 758 (Ga. App. 2004). Counsel ineffective in injury by vehicle case for wholly failing to prepare or investigate prior to advising the defendant to plead guilty. The defendant had no memory of the collision, but he and his niece advised counsel that a co-worker may have been driving. Counsel did not investigate, conduct any research, or even consult with the defendant in person during the 13 months between arraignment and plea. Prejudice found because the defendant would not have plead guilty if counsel had performed adequately.

Heyward v. Humphrey, 592 S.E.2d 660 (Ga. 2004). Counsel was ineffective in aggravated assault case for failing to adequately investigate prior to advising the defendant to plead guilty and failing to advise the defendant to withdraw from the plea agreement once it became apparent in the plea hearing that the state's case was unraveling. The defendant was charged with shooting a lounge owner. The state's case depended on the victim and four eyewitnesses. At the plea hearing, the prosecutor disclosed that one of these witnesses had given a written statement asserting that the alleged victim drew his weapon on the defendant before the defendant fired. The state

also disclosed that one of the witness' could not be located even though he had a probation violation charge pending. Another witness was reluctant to testify and failed to appear the last time the case had been scheduled. Another witness had recanted her initial version of events. Even the alleged victim was reluctant to testify. Despite this information, counsel did not advise the defendant to withdraw from the plea agreement. Counsel's conduct was deficient in failing to investigate and to pursue the defense of justification prior to the plea hearing. Even during the hearing, counsel did not attempt to subpoena the witness that had stated the victim pulled his weapon first. There could be no valid strategy for counsel's action because counsel's action "was based on a lack of vital information." Counsel's conduct was also deficient in failing to reassess the plea agreement and advise the client to withdraw from the agreement when it was apparent that the state would have grave difficulties if the defendant went to trial. Prejudice found because, if counsel had adequately investigated and adequately advised the defendant, the defendant would have insisted on going to trial.

State v. Henderson, 93 P.3d 1231 (Mont. 2004). Counsel ineffective in drug case for failing to adequately consult with client, investigate, or conduct any research prior to advising defendant to plead guilty. Counsel "did nothing more than request a plea agreement and facilitate the conviction of his client without a trial." Prejudice found because there was at least a colorable argument and the defendant maintained his innocence in *Alford* plea. Had counsel performed adequately, the defendant would not have entered a guilty plea.

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

1. U.S. Court of Appeals Cases

2011: *United States v. Bonilla*, ___ F.3d ___, 2011 WL 833293 (9th Cir. Mar. 11, 2011). Counsel ineffective in felon in possession of firearm case for failing to advise the defendant of immigration consequences of a plea. The 33-year-old Mexican-born defendant had been a lawful permanent resident for over 30 years and his wife and children were U.S. citizens. The defendant's wife often spoke for him "due to his mental health condition." Prior to the plea she asked counsel about immigration consequences of a plea. Counsel told her he would look into it but never did until after the plea hearing. When the defendant's wife asked again, counsel informed her of the immigration consequences, which was that deportation was "presumptively mandatory." Counsel stated that, at the time of the plea, she believed the defendant was a U.S. citizen. This was not just a case of "inadequate legal advice." Here, the defendant "received no advice about immigration consequences of his plea." "A criminal defendant who faces almost certain deportation is entitled to know more than that it is possible that a guilty plea could lead to removal; he is entitled to know that it is a virtual certainty." It was reasonable for

the defendant here “to have inferred that he likely would not be deported if he pled” from the fact that counsel did not say differently after having been asked the question by the defendant’s wife.

2010: *Tovar Mendoza v. Hatch*, 620 F.3d 1261 (10th Cir. 2010). Counsel ineffective in kidnaping, criminal sexual penetration and aggravated battery case for making blatant and significant misrepresentations regarding the sentence the petitioner would receive if he entered a no contest plea. Counsel had only a brief phone call with the petitioner and then met with him briefly prior to three scheduled plea hearings. Counsel informed petitioner that he had a special relationship with the judge and that the judge had agreed to sentence the petitioner to only three years. The defendant signed a plea agreement, which was in English, at counsel’s instruction. Petitioner, a native Spanish speaker, could not read the agreement and it was not translated for him. Petitioner entered no contest pleas and faced up to 30 years confinements. He answered the court’s questions during the plea colloquy with counsel instructing him how to answer each question. He was sentenced to 25 years. The court did not apply AEDPA standards because the federal court had held an evidentiary hearing while the state court had decided the issue without a hearing despite petitioner’s diligence in attempting to develop the factual basis for his claims in state court. Thus, the court reviewed the claims *de novo* and held that the no contest pleas were involuntary and therefore constitutionally invalid.

Bauder v. Dept. of Corrections, 619 F.3d 1272 (11th Cir. 2010). Counsel ineffective in aggravated stalking of minor plea for affirmatively misinforming petitioner that his no contest plea would not expose him to subsequent sexually violent predator civil commitment proceedings. Counsel’s conduct was deficient because the law was clear. Even assuming it was unclear, counsel did not inform petitioner that there was a possible risk of civil commitment, or that the law was unclear, or that counsel simply did not know. Rather counsel affirmatively advised petitioner incorrectly that his plea would *not* subject him to civil commitment exposure. Prejudice established because the evidence of guilt was not overwhelming, petitioner maintained his innocence throughout, and petitioner would not have entered a no contest plea if he had been correctly advised on the potential for civil commitment.

2005: *United States v. Kwan*, 407 F.3d 1005 (9th Cir. 2005). Counsel in bank fraud case ineffective for affirmatively misleading the defendant as to the immigration consequences of his conviction. Counsel advised the defendant that deportation was not a “serious possibility.” After the plea but prior to sentencing, statutory amendments, however, resulted in the guilty plea “almost certainly” resulting in deportation. “[W]here, as here, counsel has not merely failed to inform, but has effectively misled, his client about the immigration consequences of a conviction, counsel's performance is objectively unreasonable under contemporary standards for attorney competence.” That counsel may have misled [the defendant] out of ignorance is no excuse. It is a basic rule of professional conduct that a lawyer must maintain competence by keeping abreast of

changes in the law and its practice. *See, e.g.*, ABA Model Rules of Professional Conduct, Rule 1.1[6]. Although counsel was a criminal defense attorney and not an immigration attorney, counsel made an affirmative representation . . . that he had knowledge and experience regarding the immigration consequences of criminal convictions; as a result, counsel had a professional responsibility to inform himself and his client of significant changes in the law that drastically affected the immigration consequences of his client's plea. *See generally* ABA Model Rules of Professional Conduct, Rule 1.1. . . . If counsel did not have the requisite competence in immigration law, or if counsel did not plan on maintaining the requisite competence, he should not have advised [the defendant] regarding the immigration consequences of his plea without referring [him] to an immigration lawyer or consulting himself with an immigration lawyer in the first place. *See id.* "Counsel's representations regarding the deportation consequences of [the] plea may not have been erroneous at the time he made them, but he failed to correct those representations when they became grossly misleading, and when counsel still had the opportunity, and responsibility, to do so." Prejudice established because, if counsel had adequately advised the defendant and the court of the deportation consequences if sentenced to confinement for more than one year (rather than five as before), "there is a reasonable probability that the court would have imposed a sentence of less than one year." Alternatively, there is a reasonable probability the defendant would have moved to withdraw his guilty plea and then gone to trial or renegotiated his plea agreement to avoid deportation.

2003: *Moore v. Bryant*, 348 F.3d 238 (7th Cir. 2003) (*affirming* 237 F. Supp. 2d 955 (C.D. Ill. 2002)). Counsel was ineffective in murder case for giving erroneous advice on sentencing to the defendant prior to entry of his guilty plea. The defendant was fifteen years old and charged as an adult with first degree murder. Although the defendant maintained his innocence, counsel recommended that the defendant enter a plea in order to receive a recommendation of a 20 year sentence, which was the minimum allowed. Counsel informed the defendant that if he plead guilty he would only be required to serve fifty percent of the 20 year sentence, but that if he went to trial he would be given a higher sentence and would be subject to the new state statute that would require that the defendant serve at least 85 percent of his sentence. Although the defendant was very reluctant he followed counsel's advice. Counsel's advice was wrong because the new statute did not become effective until after the defendant's trial and did not apply retroactively. Counsel's conduct was deficient because "[a] reasonably competent counsel will attempt to learn all of the facts of the case, make an estimate of a likely sentence, and communicate the results of that analysis before allowing his client to plead guilty." Here, counsel recognized that his understanding of the statute might be incorrect, but he did not review the statute or case law to research the issue. Prejudice was found because the defendant, while maintaining innocence throughout, plead guilty solely because of counsel's advice that he would only have to serve 10 years as opposed to 22 to 27 years if he went to trial and was found guilty. The state court's decision was rejected under AEDPA for two reasons. First, the state court's reliance on the adequacy of the plea

judge's colloquy was irrelevant to the underlying question of counsel's effectiveness and, thus, was an unreasonable application of *Strickland*. Second, the state court's finding that the record did not show that the defendant relied on counsel's bad advice contradicted the testimony of the defendant and his counsel and, thus, was an unreasonable application of the facts to the law.

2. U.S. District Court Cases

- 2009:** *Alam v. United States*, 630 F. Supp. 2d 647 (W.D.N.C. 2009). Counsel ineffective in illegal gambling case for failing to adequately advise the defendant on deportation consequences prior to entry of the plea and failing to seek to withdraw the plea after counsel learned his previous advice to the defendant was erroneous. The defendant, a Pakistani citizen with permanent legal resident status, was one of 41 defendants indicted in a public corruption case. From the beginning he informed counsel that he was concerned about the impact of a conviction on his immigration status. Counsel allegedly contacted several immigration attorneys and personally researched the issue prior to advising the defendant that he would not be deported following a plea. Based on this advice, the defendant pled guilty. Prior to sentencing, counsel received a letter from one of those immigration lawyers alerting him to the fact that the conviction would result in deportation. Nonetheless, counsel advised the defendant not to move to withdraw the plea because it might impact his usefulness to the government at the upcoming trial of the former County Sheriff. Counsel suggested that he would take up the deportation issue with the prosecutors, who had no desire for the defendant to be deported, after sentencing and the trial of the Sheriff in which the defendant testified. The question of deportation was not even addressed in court until the court made an inquiry in a hearing related to the government's subsequent motion to reduce the defendant's sentence. Original trial counsel had been replaced by that point and this 2255 was then filed. Regardless of whether counsel consulted with other attorneys, his "advice regarding the immigration consequences of petitioner's plea was undeniably grossly inaccurate, given that the governing statute . . . explicitly enumerates" petitioner's crime as one requiring removal. "[T]he plain language of the applicable immigration statutes compels the conclusion that Counsel grossly misinformed petitioner on this subject." Counsel also "grossly misinformed" the defendant that he could prevent deportation later by obtaining the government's cooperation when "the government has no such discretion" in cases of conviction of these crimes. Prejudice established because the defendant provided a credible affidavit stating that he would not have pled guilty if he had been adequately advised. The court also found no reason to doubt this where the defendant had been a U.S. resident for 25 years, was married to a permanent legal resident, had children that were native-born U.S. citizens, had a successful business independent of the illegal gambling, and had few, if any, remaining ties to "Pakistan, a currently unstable country."
- 2008:** *United States v. Choi*, 581 F. Supp. 2d 1162 (N.D. Fla. 2008). Counsel ineffective in relying on the advice of an employee of the Bureau of Immigration and Customs

Enforcement that the defendant would probably not be deported if he pled guilty. Counsel's conduct was deficient because, "under the facts of this case, relying on a government agent's advice rather than performing one's own legal research fell short of an objective level of reasonableness. The governing statutes made clear on their face that this conviction would result in [the defendant's] mandatory deportation, subject only to narrow exceptions that [the defendant] plainly could not meet."

Sasonov v. United States, 575 F. Supp. 2d 626 (D.N.J. 2008). Counsel in bribery of public official case ineffective for several reasons. First, counsel affirmatively misrepresented the immigration consequences of a guilty plea. Counsel's conduct was deficient because counsel informed the defendant that, as a resident alien with a green card, he would not be subject to deportation following his plea. Prejudice established because "it is likely that Petitioner would have taken his chances at trial because he faced only six to twelve months more than the sentence he received," due to his guilty plea. Second, counsel failed to conduct discovery and, thus, failed to argue petitioner's minor role in the crimes and failed to establish that the value of the benefit received from the bribe was less than \$10,000, which would have prevented a four-point enhancement of the offense level. Prejudice established because the court might otherwise have reduced the sentence to less than one year or at least allowed the defendant "to negotiate a more favorable plea agreement with the Government."

2007: *U.S. v. Marcos-Quiroga*, 478 F. Supp. 2d 1114 (N.D. Iowa 2007). Counsel ineffective in guilty plea to drug trafficking offense for erroneously advising the defendant he would not qualify for sentencing as a career offender. The court's ruling was entered based on a motion to withdraw the guilty plea and a pro se motion for appointment of new counsel prior to sentencing. Counsel's conduct was deficient because the defendant had prior convictions in Iowa for felony delivering cocaine and misdemeanor assault with intent to commit sexual abuse. "[T]here should have been no doubt . . . [that the] two prior convictions . . . would qualify him for career offender status. Thus, counsel certainly could have predicted with a fair degree of certainty that [he] would be sentenced as a career offender." *Id.* at 1135 (emphasis in original). Prejudice found because the defendant likely would not have plead guilty absent counsel's erroneous advice. Motion to withdraw guilty plea and for appointment of new counsel granted.

3. State Cases

2011: *Ex parte Romero*, ___ S.W.3d ___, 2011 WL 3328821 (Tex. App. Aug. 3, 2011). Counsel ineffective in aggravated sexual assault on child case for failing to advise the defendant of the immigration consequences of his plea. Under the federal immigration statutes, it was "truly clear" that the conviction "made [the defendant] not just at risk for possible deportation but automatically deportable." The general immigration admonishment given by the trial court and counsel "did not satisfy trial counsel's duty . . . to inform [the defendant] of the specific consequences of his plea."

Booth v. State, ___ P.3d ___, 2011 WL 3191545 (Idaho July 28, 2011). Counsel ineffective in non-capital murder case for inadequate advice leading to plea. Although the state was not seeking the death penalty, the prosecutor gave notice pretrial that he intended to request a special verdict form in sentencing to submit statutory aggravators found in the capital statute to the jury. The statute provided that if death was sought and the jury found statutory aggravators, but did not return a death sentence, the court was to impose a fixed life sentence. If the jury did not find aggravators when death was sought or if death was not sought, the court would impose an indeterminate life sentence with a minimum period of at least ten years to be served. The prosecutor interpreted this statute to mean that in a non-capital case if aggravators were found the court had to impose a fixed life sentence. Defense counsel agreed with this interpretation. Counsel thus convinced the defendant to plead guilty in exchange for the state not pursuing statutory aggravating circumstances and an indeterminate life sentence with thirty years fixed. Counsel's conduct was deficient as his advice regarding potential penalties was "contrary to the plain and unambiguous language of the statute." Statutory aggravating circumstances were relevant only if death was sought. Counsel's "blatantly erroneous reading" of the statute was not made "reasonable" simply because the prosecutor and the judge made the same mistake. Prejudice was clear.

Frost v. State, ___ So.3d ___, 2011 WL 2094777 (Ala. Crim. App. May 27, 2011). Counsel ineffective in sodomy and sexual abuse of child plea case for failing to advise the defendant that he would not be eligible for parole if he pled guilty. Counsel gave his standard advice that parole was "up to the Department of Corrections." The statutes were clear, however, that a defendant convicted of these crimes "shall not be eligible for parole." "The effect of a sentence is one of the most important matters about which a criminal defense lawyer should be cognizant." Here, counsel's advice was incorrect in implying that parole was a possibility at the discretion of the Department of Corrections. Prejudice established as the defendant would not have pled guilty knowing that the required sentence was life without the possibility of parole.

Ex parte Tanklevskaya, ___ S.W.3d ___, 2011 WL 2132722 (Tex. App. May 26, 2011). Counsel ineffective in misdemeanor marijuana plea case for failing to specifically advise the defendant that her guilty plea would render her presumptively inadmissible upon leaving and attempting to re-enter the country. The defendant was a Ukrainian citizen granted legal permanent residence in the country. Counsel, the court, and plea paperwork advised the defendant generally that there may be immigration consequences, but that did not cure the problem in these facts. Counsel knew that the defendant had an out-of-country trip planned and the statutes were clear that if she left the country after her plea, her inadmissibility and removal were not merely a possibility but were presumptively mandatory. Counsel, therefore, had a duty to inform the defendant of the specific consequences of her guilty plea. Prejudice established because the defendant would not have pled guilty had she known of the true immigration consequences of the plea.

Stith v. State, ___ So.3d ___, 2011 WL 1604934 (Ala. Crim. App. Apr. 29, 2011). Counsel ineffective in sodomy plea for failing to inform the defendant that “good time” or “correctional incentive time” was not available for a Class A felony. The defendant turned down a plea agreement to a “20-year sentence, split to serve 5 years, day for day,” and insisted on a plea to a 10-year “straight” sentence, which he believed would require service of less than 5 years due to “good time” eligibility. A simple reading of the statute, however, would have informed counsel that incentive time deductions were not available. Thus, counsel’s statement that only the Department of Corrections could calculate or determine application of “good time” was “incorrect and amounted to a misrepresentation regarding the law.”

It is axiomatic that the reason way counsel is appointed is to advise a client about the law. The effect of a sentence is one of the most important matters about which a criminal-defense lawyer should be cognizant. . . . The fact that Stith, being ignorant of the law, instigated a renegotiation of his plea that effectively doubled the duration of his imprisonment is not a factor that prevents him from pleading or prevailing on a claim of ineffective assistance of counsel.

Counsel’s conduct was deficient and prejudicial.

People v. Fonville, ___ N.W.2d ___, 2011 WL 222127 (Mich. App. Jan. 25, 2011). Counsel ineffective in child enticement plea bargain, which included provision that the trial court would sentence the defendant at the low end of the sentencing guidelines or 51 months or allow the defendant to withdraw his plea. Defendant had been babysitting for his girlfriend and failed to timely return the children for a day as he had been out drinking and drugging. The children were not harmed in any way. Counsel’s conduct was deficient because counsel had failed to advise the defendant that his plea would require him to register as a sex offender. As the statute was “succinct, clear, and explicit,” as in *Padilla v. Kentucky*, 130 S. Ct. 4235 (2010), counsel had a duty to advise the defendant that registration would be a consequence of his guilty plea. “[G]iven the lack of any sexual component to [the defendant’s] conduct, it was all the more imperative that his counsel advise him of the unique registration consequences of his plea.”

Calvert v. State, 342 S.W.3d 477 (Tenn. 2011). Counsel ineffective in sex offense case for failing to advise the defendant about the mandatory lifetime community consequence of his pleas prior to entry of the pleas. The defendant pled guilty to multiple counts and was sentenced concurrently so that he effectively received a 10 year sentence suspended to probation upon service of nine months. On the judgment forms, he was also sentenced, as required by law due to the nature of his offenses, to lifetime community supervision, including the payment of supervision fees and regular reporting to a parole officer who has the discretion to impose conditions of supervision. This part of the sentence was

never discussed with him by counsel or the court, however. Counsel's conduct was deficient as the law was clear from "the plain language of the community supervision statute" that lifetime community supervision would be a consequence of the plea. Prejudice established as the defendant would not have pled guilty if he had been adequately advised.

State v. Martinez, 253 P.3d 445 (Wash. App. 2011). Counsel ineffective in plea case for failing to adequately warn the defendant of the deportation consequences of his plea to possession of a controlled substance with intent to deliver. Because the law "is clear" that this is a deportable offense, under *Padilla* and subsequent state rulings, counsel's conduct was deficient. Deficient conduct found even though the paperwork associated with the plea and the trial court informed the defendant that deportation may be a consequence of the plea. These warnings were not a substitute for the advice of counsel. Likewise, prejudice established even though "it may not seem rational that [the defendant] would refuse a very favorable plea offer," he claimed he would not have pled guilty if he had known deportation was a consequence and his counsel conceded that deportation was a "material factor" in the defendant's consideration. This was enough to establish prejudice.

State v. Sandoval, 249 P.3d 1015 (Wash. App. 2011). Counsel ineffective in third degree rape case for giving erroneous advice regarding deportation consequences of a plea. The noncitizen permanent resident defendant expressly told counsel that he did not want to plead guilty if the plea would result in deportation. Counsel told him that he would not "be immediately deported," and that he would have time to retain an "immigration counsel to ameliorate any potential immigration consequences of the plea." During the plea hearing and signed plea statement, the defendant was warned that a guilty plea is "grounds for deportation." Predictably, before he was released from jail, Customs put a "hold" on him and deportation proceedings began. Counsel's conduct was deficient as "the law was straightforward enough for a constitutionally competent lawyer to conclude" that a guilty plea would subject the defendant to deportation. Therefore, "counsel was required to correctly advise, or seek consultation to correctly advise" the defendant of the deportation consequences. The court's and plea statement warnings did not resolve the matter as counsel's advice impermissibly left the defendant with the impression that deportation was a remote possibility. With respect to prejudice, it did not matter that the plea made the sentencing range 6-12 months, while without a plea the sentencing range would have been 78-102 months with life as a maximum. The defendant "had earned permanent residency and made this country his home." Although he would have risked a longer prison term by going to trial, the court held: "Given the severity of the deportation consequence, we think [the defendant] would have been rational to take his chances at trial."

2010: *Greene v. Commissioner of Correction*, 2 A.3d 29 (Conn. App. 2010). Counsel ineffective in theft of weapons case for advising the defendant to plead guilty but failing

to ensure that the State would not be allowed to introduce the guilty pleas in evidence in the defendant's murder and conspiracy trial. While counsel's strategy was to preclude the jury in the murder case from learning of the earlier theft of weapons, counsel failed to take any action to prohibit the state's use of the guilty pleas. Prejudice established as the defendant would not have plead guilty to the weapons charges if he had been adequately advised.

Johnson v. State, 318 S.W.3d 313 (Mo. App. 2010). Counsel ineffective in drug case for incorrectly advising the defendant that, as part of his negotiated plea agreement, that he could get sentence credit for time he spent on bond pretrial. Counsel's conduct was deficient because counsel made positive misrepresentations suggesting that bond time credit was available when it clearly was not under state law. The defendant was entitled to rely on counsel's advice, especially because the prosecutor and the trial court agreed with counsel and the trial court pronounced he would receive credit toward his sentence for the time he spent on bond. Prejudice was clear, as the decision to plead guilty rested on the mistaken belief that both the written agreement and the bond credit agreement would be honored.

People v. Garcia, 907 N.Y.S.2d 398 (N.Y. Sup. Ct. 2010). Counsel was ineffective in misdemeanor drug plea case for failing to advise the defendant, a native of the Dominican Republic, of immigration consequences of his guilty plea. The defendant was charged with multiple drug counts, but pled guilty to a single misdemeanor charge in exchange for dismissal of the remaining charges. Prior to his plea, he asked counsel about immigration consequences, but counsel admitted his ignorance concerning immigration law, declined to research the issue, and informed the defendant that he should seek advice from an immigration specialist. The defendant paid "an immigration paralegal to assess his situation and was erroneously informed that a single misdemeanor conviction would have no adverse immigration consequences." Counsel's conduct was deficient. *Padilla v. Kentucky*, 130 S. Ct. 4235 (2010), did not create a new rule of law as *Padilla* merely applied *Strickland* precedents to a new set of facts. Here, the immigration consequences were readily ascertainable and "merely advising a client to seek outside immigration advice, without more, now fails to meet the affirmative duty set forth in *Padilla*, at least where the immigration implications of the plea were fairly straightforward, . . . ad where the 'specialist's' advice was wrong." *Garcia*, 907 N.Y.S.2d at 405. Prejudice was established because the defendant likely would not have pled guilty if he had been accurately advised. He clearly was concerned enough to ask counsel and to follow counsel's advice to get further guidance from an immigration specialist. "That defendant went to a paralegal does not alter this Court's finding that defendant would not have pleaded guilty but for the deficiencies in the representation by his counsel." The more difficult issue was that during the plea hearing, the trial court had advised the defendant that, while he did not know for certain, conviction could lead to deportation and that he should "assume that he's deportable" if convicted. "[W]here, as here, defendant is found in fact to have been misled by bad advice from a so-called retained specialist and by a

lack of advice from his defense attorney, the Court's general warning will not automatically cure counsel's failure nor erase the consequent prejudice." *Id.* at 407.

State v. Powell, 935 N.E.2d 85 (Ohio App. 2010). Counsel was ineffective in providing inadequate and inaccurate advice concerning sex offender registration requirements that resulted in the defendant pleading guilty to voyeurism. The defendant was charged with obstructing official business, criminal trespass, and voyeurism, all of which were misdemeanors. The state initially offered to allow a plea to the obstruction and trespass charges in exchange for dismissing the voyeurism charges. This was rejected on the advice of counsel to litigate mental health issues and attempt to gain dismissal. After the court found the defendant competent, counsel advised him to accept the state's offer to plead guilty to voyeurism in exchange for dismissing the remaining charges. The possibility of required registration was never mentioned to the defendant until the middle of the plea hearing. The court allowed a brief recess for counsel to discuss the issue with the defendant. Counsel informed the defendant that he would have to register but that he would only have to be on the list for a year or so. Almost a year after sentencing and having completed his probation, the defendant sought relief. Counsel's conduct was deficient because, under applicable state law at the time, the defendant was exempt from registration (because he had no prior offenses and the victim was over age 18) unless the trial court may findings and entered an order removing the exemption. Further, counsel misadvised the defendant that the registration could be expunged within a brief time. Prejudice established and the plea vacated.

Hart v. State, 314 S.W.3d 37 (Tex. App. 2010). Counsel ineffective in sexual assault of child plea for advising the defendant that he was eligible to receive community supervision if he pled guilty. The defendant was 19 and mentally retarded, as he had an IQ between 47-52 and a mental age of a six year old. "Even a person of genius status requires somewhat correct data in order to make an informed decision." Here, under state law the defendant was not eligible for community supervision due to the nature of the convictions. Prejudice established as the defendant would not have pled guilty absent the erroneous advice.

State v. A.N.J., 225 P.3d 956 (Wash. 2010). Counsel ineffective in juvenile case where defendant pleaded guilty to first degree child molestation. Counsel erroneously advised the defendant and his parents about the consequences of the plea by advising them that the conviction could be removed from the defendant's record when he turned 18 or 21. While the court has discretion to relieve the requirement to register as a sex offender, the conviction never goes away. Based on counsel's ineffectiveness, the defendant was entitled to withdraw his guilty plea.

2009: *Grindstaff v. State*, 297 S.W.3d 208 (Tenn. 2009). Counsel ineffective in aggravated sexual battery plea case for advising the defendant incorrectly that he would be eligible for probation if he pled guilty. Under state law, the defendant could not be given

probation and was subject to a sentence of not less than eight nor more than twelve years on each of the five counts. The court gave the defendant an effective sentence of thirty years confinement without parole eligibility. Counsel's conduct was deficient because the defendant was not eligible for probation under state law, even though counsel submitted evidence and argued for imposition of probation at sentencing. Counsel "obviously did not know" the law on this point and the prosecutor and court never corrected him. The court cited the ABA Standards for Criminal Justice as "guidelines" for gauging counsel's conduct. "Criminal defense attorneys must conduct adequate legal research in order to meet the required range of competence." Absent counsel's deficient advice, the defendant would not have plead guilty, which was evidenced by his rejection of prior plea offers by the state, which demanded a period of confinement.

State v. Nunez-Valdez, 975 A.2d 418 (N.J. 2009). Counsel ineffective in criminal sexual contact plea for providing false or misleading information as to the deportation consequences of the plea. Retained counsel advised the defendant to plead guilty in exchange for five years of probation or he would get a 10 year sentence. When the defendant asked about immigration consequences, counsel informed him "nothing like that" would ever happen. A different attorney appeared for the actual plea and conferred with the defendant through an interpreter. At best, he informed the defendant that deportation was a "possibility." The trial court found that deportation consequences were a central concern for the defendant, who had been in the U.S. for 18 years with his wife and children. The appellate court decided the case under the state constitution "because we recognize that a federal remedy may depend on whether deportation is a penal or collateral consequence." The trial court's finding that the defendant would not have pled guilty if properly advised was supported by sufficient credible evidence.

2008: *Polite v. State*, 990 So. 2d 1242 (Fla. App. 2008). Counsel ineffective in robbery, carjacking, and violation of probation plea for incorrectly advising the defendant of the maximum sentence he could receive upon revocation of the community control/probation when the plea entailed a sentence of two years in prison followed by two years of community control with the possibility of conversion to probation. Counsel advised the defendant that the maximum would be six years upon revocation, which was incorrect.

2007: *Sial v. State*, 862 N.E.2d 702 (Ind. App. 2007). Counsel ineffective in theft case for failing to advise the defendant that his guilty plea carried possible deportation consequences. Counsel's conduct was deficient and he admitted—"with admirable candor"—"that he dropped the proverbial ball." *Id.* at 707. The fact that the probation officer preparing the presentence investigation report may have advised the defendant of the deportation causes a month after the plea was irrelevant to what the defendant knew at the time of the plea. Prejudice found because the defendant, a native of Pakistan, had been in the U.S. for 20 years and had a wife and 13-year-old daughter, who was presumably born here and a U.S. citizen. Thus, sufficient circumstances existed to establish a reasonable probability that the defendant would not have plead guilty if he had

been adequately advised.

2006: *State v. Patel*, 626 S.E.2d 121 (Ga. 2006). Counsel was ineffective in sexual battery plea of nolo contendere for making affirmative misrepresentations to the defendant with respect to the effect of the plea on the defendant's future participation as a physician in federal health care programs, such as Medicare and Medicaid. The defendant entered a plea only after specifically asking counsel about this issue. Without conducting "the basic research" necessary, counsel incorrectly advised the defendant that there would not be any long-term consequence when, in fact, the defendant was prohibited from participation in these programs for 10 years. Although there is no constitutional requirement to advise defendant's of collateral consequences of a plea, counsel here made an affirmative misrepresentation in response to the defendant's specific inquiries. Prejudice found because the defendant would not have entered a plea of nolo contendere if he had been properly advised.

2005: *Davis v. Murrell*, 619 S.E.2d 662 (Ga. 2005). Counsel was ineffective in armed robbery plea case. The defendant was charged with six armed robberies and other offenses and plead guilty to one armed robbery in exchange for dismissing the other charges and a sentence of 20 years that was made concurrent to a sentence he was serving in Florida. Counsel's conduct was deficient because counsel affirmatively misinformed the defendant that he would be eligible for parole and sentence review when neither was true. Prejudice found.

2004: *Cobb v. State*, 895 So. 2d 1044 (Ala. Crim. App. 2004). Counsel ineffective in driving under the influence case for failing to adequately investigate and advise the defendant prior to his entry of a guilty plea. The defendant plead guilty under the assumption that he would be accepted into drug court and would receive no prison time. Because of a prior conviction of which counsel was unaware, the defendant was ineligible for drug court. Counsel admitted in his post-trial motions and conceded that his conduct was deficient. Prejudice found because the defendant consistently maintained innocence and would not have plead guilty if he had been adequately advised.

Hernandez v. Commissioner of Correction, 846 A.2d 889 (Conn. App. 2004). Counsel ineffective in murder nolo contendere plea case for erroneously advising the defendant concerning parole eligibility. During the first day of trial, the defendant withdraw his not guilty plea and entered a nolo plea in exchange for a 25 year sentence. He had been informed by counsel that he would be eligible for parole after serving half of the sentence, when the defendant was ineligible for parole under state law. Counsel's conduct was deficient and the defendant was prejudiced because he likely would not have entered the plea absent counsel's misadvice because the defendant had a plausible self-defense argument and the court had already excluded the testimony of the only state's witness that could testify about the defendant's motive to commit murder.

Rollins v. State, 591 S.E.2d 796 (Ga. 2004). Counsel was ineffective in drug plea for giving the defendant erroneous advise concerning the collateral consequences of pleading guilty, which resulted in the defendant pleading guilty. The defendant was a native of Barbados and a resident alien when she entered a first offender guilty plea to a drug charge based on trace amounts of cocaine discovered on a dollar bill in her purse. Although the defendant maintained innocence and the state's evidence was very weak, she entered a plea on the advice of counsel. Prior to entry of the plea, the defendant asked counsel if there would be any negative repercussions from the plea that would effect the defendant's desire to go to law school and become a lawyer and her INS status. Without conducting any research, counsel advised the defendant that there would be no repercussions. Counsel's conduct was deficient because basic research would have revealed that the defendant was subject to deportation upon a drug conviction. Basic research also would have revealed that it is standard practice for any state bar to require the applicant to provide information concerning prior convictions. Prejudice was found because both the defendant and counsel testified unequivocally that the defendant would not have entered a plea had she known of the adverse impact on either her intension to become a lawyer or her immigration status.

State v. Lamb, 804 N.E.2d 1027 (Ohio App. 2004). Counsel ineffective in sexual imposition plea for failing to object to the trial court's failure to inform the defendant, at the time of his guilty pleas, that he was subject to a mandatory five-year post-release control period, due to a prior felony sex offense and the determination that he was a sexually oriented offender. Prior to accepting a guilty plea, state law requires the trial court to inform the defendant of the maximum penalty involved. Post-release control is part of an offender's sentence. Thus, the trial court's failure to provide any explanation of the mandatory period of post-release control at the time of the plea was error. Without the proper instruction, the defendant here could not have fully understood the implications of the plea. Counsel's conduct was deficient and prejudicial in failing to object to the trial court's error.

C. FAILURE TO INFORM DEFENDANT OR STATE OF PLEA OFFER

1. U.S. Court of Appeals Cases

2006: ***Satterlee v. Wolfenbarger***, 453 F.3d 362 (6th Cir. 2006) (*affirming* 374 F. Supp. 2d 562 (E.D. Mich. 2005)). Counsel ineffective in drug conspiracy case for failing to inform the defendant of the prosecution's plea offer on the day of trial to allow the defendant to plead guilty in exchange for a sentence of six to 20 years so the defendant proceeded to trial and received a sentence of 20 to 30 years. The defendant was facing up to life imprisonment on the indicted charges and from the beginning cooperated with police in order to obtain release on bond. Prior to counsel's retainer, the government had offered a deal to 12 to 20 years. The defendant rejected this offer but continued cooperating with the police. Ultimately, prior to trial, the prosecutor offered a deal of 7 to 20 years, but this

was never conveyed to the defendant. On the day of trial, the prosecutor offered 6 to 20, but again this was not conveyed to the defendant. In finding counsel's conduct deficient the court found the defendant's testimony to be more credible than counsel's because it was supported by the defendant's mother and the prosecutor. The district court granted a conditional writ ordering reinstatement of the plea offer. When the state failed to reinstate the plea offer, the district court ordered immediate release and expungement of the record of conviction. The Sixth Circuit affirmed.

2. U.S. District Court Cases

2010: *Merzbacher v. Shearin*, 732 F. Supp. 2d 527 (D. Md. 2010). Counsel ineffective in multiple count child rape case for failing to inform the petitioner of a pre-trial offer of a plea agreement in which the state agreed to recommend and the trial court agreed to impose a sentence of ten years. Unaware of this offer, the petitioner proceeded to trial and was sentenced to life. Due to the multiple charges, petitioner was represented by both private counsel and a public defender. Private counsel did not inform the petitioner of the offer because she was busy with other matters. The public defender, believing that it was more appropriate for retained counsel to discuss the offer and assuming that she had, also did not inform the petitioner of the offer. The state court rejected their explicit admissions of deficient conduct, however, and found that neither testified truthfully. The court explicitly found that private counsel had perjured herself. In doing so, the state court relied on three outside sources of evidence: (1) counsel had been admitted to the bar despite a negative character committee report because she concealed two shoplifting convictions; (2) counsel had been accused of lying to another judge; and (3) counsel consented to disbarment due to acceptance of fees from clients and failure to provide the contracted legal services. Under AEDPA, the state court record itself provides clear and convincing evidence rebutting the presumptive correctness of the dispositive facts and establishing that the state court's holding was reached in an objectively unreasonable manner. In sum, there was no probative evidence that private counsel perjured herself or that the public defender was "out of the loop" on the issue. "Their testimony cut significantly against their own interests since it suggests professional malfeasance." *Id.* at 551.

Further, there is little evidence to answer the question of what could possibly motivate a lawyer to sacrifice her legacy and good name and commit perjury for a defendant like Merzbacher, a convicted child rapist. . . . Although one could at least conceive that a lawyer might sacrifice herself to save a wrongly convicted defendant from lethal injection, that is hardly the situation here.

Id. at 552-53. Counsel's testimony was entirely credible and uncontradicted by record evidence. The state court "relied heavily" and impermissibly "on information imported from outside the record" to find to the contrary. In addition to being outside the record,

the state court's reliance on the bar admission, which was more than 25 years old, was incredible as this type of information would not be admissible in any case. Likewise, counsel's acceptance of disbarment was not probative of credibility. Counsel's conduct was deficient. Likewise, the petitioner was prejudiced. Although he repeatedly asserted his innocence, this "does not preclude accepting a future plea offer, as defendants often accept plea agreements despite previously, often vigorously, proclaiming innocence." *Id.* at 564. Here, the petitioner had 16 independent charges, insufficient funds to retain counsel on all of them, and "incessant and constant media attention." The plea bargain offered was exceptionally generous, such that even the trial judge that prompted the plea discussions was "taken aback" by the generosity of the offer. Likewise, both defense counsel believed the plea offer was a beneficial arrangement for the petitioner. For all of these reasons, there is more than a reasonable probability that the petitioner would have taken the plea agreement if he was provided that opportunity. Convictions and sentence set aside with order for the state to reinstate the plea offer.

Williams v. Booker, 715 F. Supp. 2d 756 (E.D. Mich. 2010). Trial counsel was ineffective in failing to inform the defendant of a favorable plea offer. The defendant was charged with conspiracy to commit first degree murder, assault with intent to commit murder, felon in possession of weapon, and two counts of felony firearm. Counsel unilaterally rejected the prosecution's offer to have the defendant plead guilty to the weapons charges in return for dismissal of the other charges. While counsel's recollections diverged from the defendant's, the court explicitly found the defendant "to be more credible than his trial attorney." Appellate counsel's ineffectiveness served as cause and prejudice to excuse the state court procedural default. "A reasonable appellate attorney would have asked Petitioner whether there was a plea offer. . . . [and] would have consulted with Petitioner and his trial attorney about issues to be raised on appeal before filing the appellate brief." Had appellate counsel performed adequately and presented this issue during appeal, the defendant "in all likelihood would have prevailed."

2008: ***Leatherman v. Palmer***, 583 F. Supp. 2d 849 (W.D. Mich. 2008). Counsel ineffective in criminal sexual conduct case for failing to properly advise the defendant of the government's plea offer for probation and up to one year of confinement when the defendant faced a possible life sentence. Prejudice established.

2004: ***Shiwlochan v. Portuondo***, 345 F. Supp. 2d 242 (E.D.N.Y. 2004), *aff'd*, 150 Fed. Appx. 58 (2d Cir. 2005). Counsel was ineffective in failing to advise the defendant of the court's plea offer in second degree murder case. Although the prosecution never made a plea offer, the trial court offered to impose a sentence of 15 years to life—the minimum sentence for second degree murder—if the defendant plead guilty to the charge of second degree murder and the other offenses included in the indictment. [It is common practice in New York for trial courts to engage in plea offers independent of the prosecution.] Following conviction, the defendant was sentenced to 41 2/3 years to life, which was the maximum possible sentence. Counsel did not inform the defendant of the offer because

counsel: (1) did not think the defendant would accept the offer since he maintained innocence; (2) believed that there was a viable defense of misidentification; and (3) did not believe that the defendant would receive a “severe sentence” if convicted. Counsel’s conduct was deficient and the state court’s finding to the contrary was, under the AEDPA standard, an unreasonable determination of the facts in light of the evidence presented. The state court’s finding that counsel did convey the offer was contradicted by counsel’s affidavit. Moreover, even though counsel knew the maximum sentence, he never informed the defendant of the actual maximum sentence or that he could be sentenced consecutively because counsel did not believe the defendant would receive a “severe sentence” if convicted. Instead, he left the defendant with the impression that the maximum sentence he faced was 25 years to life. The state court’s finding that counsel’s conduct was reasonable was an unreasonable application of *Strickland* under the AEDPA because

By underestimating petitioner’s exposure, [counsel] breached his duty ‘to advise his client fully on whether a particular plea to a charge appears desirable. . . . Merely advising petitioner as to possible sentences rather than advising him on his full sentencing exposure is insufficient.

Despite the defendant’s assertion of innocence, the court found a reasonable probability that the defendant would have accepted the plea offer for 15 years had he known of the court’s offer. The court thus ordered resentencing according to the plea offer.

3. State Cases

2011: *Johnson v. State*, ___ S.E.2d ___, 2011 WL 2302855 (Ga. June 13, 2011). Counsel ineffective in armed robbery and aggravated assault case for failing to adequately advise the defendant of the state’s plea offer of 25 years. A series of public defenders did not advise the defendant for various reasons. Thus, the defendant was not advised of the offer or that he was facing a mandatory sentence of life without parole if convicted until two days before trial. The defendant proposed a counteroffer of 20 years to serve 10, which was conveyed to the state. When that offer was rejected, within minutes, the defendant agreed to accept the 25 year offer. This was rejected due to the standing policy of the prosecutor that plea offers were closed after the docket call when the defendant pled not guilty. While there was conflicting evidence of whether the defendant was ever advised of the 25 year offer prior to two days before trial, it was undisputed that no one attempted to negotiate a plea prior to the docket call. Likewise, counsel made no investigation and did not advise the defendant of the mandatory life sentence, prior to the docket call. Final counsel did not even meet with the defendant until after the docket call, even though he was aware of the prosecutor’s docket call deadline for plea offers. Prejudice established as there is a reasonable probability the defendant would have accepted the state’s offer if he had been adequately advised.

2009: *Carmichael v. People*, 206 P.3d 800 (Colo. 2009). Counsel ineffective in case involving numerous charges related to child sexual assault for inadequately advising the defendant about the state's plea offer. The defendant faced a sentence of 20 years to life. The state offered a plea bargain that included an indeterminate sentence of probation with a minimum of ten years. On counsel's advice, the defendant rejected this offer. He was ultimately sentenced to twenty years of probation. Counsel's conduct was deficient because counsel never informed the defendant he faced two indeterminate life sentences if convicted. He also did not inform the defendant that the minimum length of probationary supervision he would receive if convicted at trial would be twenty years, twice the minimum he would be facing if he accepted the plea offer. Instead, counsel incorrectly advised the defendant he would "end up with the same probationary sentence offered in the plea bargain" if convicted at trial. Counsel "fundamentally misunderstood the potential consequences of the charges" and was "unaware of the specialized sentencing requirements for sex offenders" under state law. Counsel mistakenly believed the defendant "would be subject to general felony sentencing guidelines. This mistake, combined with a failure to conduct adequate research," led counsel to incorrectly advise the defendant, who as a result "was unable to properly evaluate the attractiveness of" the state's offer and did not have "an opportunity to make a reasonably informed decision regarding the relative benefits of the offered plea bargain." Prejudice established because there is a reasonable probability that the defendant would have accepted the plea offer if he had been adequately advised. Indeed, the defendant, "though his counsel, was affirmatively pursuing a plea bargain despite his proclamations of innocence." "[A] defendant's protestations of innocence, standing alone, are insufficient to support a finding of no prejudice when weighed against objective evidence of prejudice."

A large number of defendants will enter into the criminal justice system maintaining their innocence, only to later admit to the criminal acts they have committed. In addition, a defense attorney's accurate presentation of available outcomes may encourage a defendant to admit his actions and face the applicable consequences.

New trial granted without any order to reinstate the plea offer.

Davie v. State, 675 S.E.2d 416 (S.C. 2009). Counsel ineffective in drug trafficking case for failing to inform the defendant of the state's initial written plea offer in which the State offered a fifteen-year sentence in exchange for a guilty plea. Counsel was unaware of the state's offer until after its expiration because counsel was relocating his office and changing his mailing address. Ultimately, the defendant entered a "straight up" plea to eight charges in return for the state dismissing three charges and the state recommended life without parole. The defendant was sentenced to 27 years. Even though counsel may not have been aware of the plea offer until after the expiration date, counsel's conduct was deficient in failing to object at the plea hearing to lack of notice of the first offer

when it was mentioned by the state. “Had counsel done so, he might have been able to convince the solicitor to reinstate this plea offer or persuade the circuit court judge to impose a fifteen-year sentence.” Prejudice established based on the difference in the sentence the defendant received and that offered by the state initially and the fact that counsel and the defendant testified that he would have accepted the initial plea offer if it had been communicated to him. Remanded for resentencing not to exceed the original twenty-seven year sentence.

2006: *Jiminez v. State*, 144 P.3d 903 (Okla. App. 2006). Counsel ineffective in second-degree burglary and other offenses case for failing to inform the defendant of a plea offer until the day set for trial. Prejudice found because the plea offer was not open when defense counsel did inform the defendant about it and the defendant probably would have accepted the offer and received a sentence of five years in prison rather than the 12-year sentence assessed by jury. Sentence modified to five years.

2004: *Sanders v. Commissioner of Correction*, 851 A.2d 313 (Conn. App. 2004). Counsel ineffective in robbery and conspiracy case for failing to meaningfully advise the defendant of a plea offer from the state. The defendant rejected an initial plea offer by the state and the state made a second offer. Although counsel informed the defendant of the offer, counsel did not inform the defendant of the statements of the witnesses against him or advise him of the likely outcome if the case proceeded to trial. Although *Strickland* presumes counsel’s conduct to be reasonable,

Nowhere is it said, though, that such a presumption is irrebutable. As with any refutable presumption, the petitioner may rebut the presumption on adequate proof of sufficient facts indicating a less than competent performance by counsel. In determining whether the presumption should apply, . . . other acts of ineffective assistance in the same matter may be considered in making that determination.

Prejudice found because the defendant would have accepted the second plea offer limiting his sentence if it had been meaningfully explained. Although the only evidence of this was the defendant’s testimony, this was sufficient because the court assessed the defendant’s demeanor and credibility.

D. BAD ADVICE LEADING TO REJECTION OF PLEA OFFER

1. U.S. Court of Appeals Cases

2009: *Dasher v. Attorney General, Florida*, 574 F.3d 1310 (11th Cir. 2009). Counsel ineffective in drug case for advising client to reject plea offer from judge and to plead guilty without any agreement on sentence. The prosecutor offered the defendant a two

year sentence, which was rejected. Due to a huge backlog of cases and overflowing jails, the trial court, who rarely involved himself in plea negotiations, made his own offer of 13 months in a Florida State prison. The defendant, however, preferred a 12 month sentence that could be served in a county jail. Counsel advised the defendant that if he rejected the plea offer, pled straight up, and offered mitigation evidence, the trial court likely would not sentence the defendant to more than 13 months. The defendant pled guilty the same day and, considering a presentence report prepared by defense counsel that revealed numerous juvenile and adult priors, the court sentenced the defendant to 10 years. Counsel's conduct was deficient in that "the advice he gave . . . was a piece of foolishness," because, with the 13 month offer, the judge was already "giving away the store." Once the defendant rejected the judge's offer and pled straight up, the judge "had no reason to give him the thirteen month sentence he offered to induce a plea." In addition, although counsel suggested presenting mitigation to convince the judge, "it was obvious that he was not then aware of any."

We do not suggest that there are no circumstances where it would be reasonable for a lawyer to advise his client to plead guilty without an agreement and throw himself at the mercy of the judge. But this was not such a case. Whether or not he had a lengthy prior criminal record, [the defendant] was clearly risking a sentence of substantially more than thirteen months, and there was certainly no reason to believe he would do better.

Because the defendant had served all but 5 months of his sentence, the sentence was modified to time served.

Williams v. Jones, 571 F.3d 1086 (10th Cir. 2009). The state court failed to fashion a constitutionally permissible remedy following a finding of ineffective assistance in rejecting a plea offer in first-degree murder case. The Oklahoma prosecutor offered the defendant a 10-year sentence in exchange for a plea to second-degree murder. Believing the defendant was innocent, counsel threatened to withdraw if the defendant accepted the offer. Against his own desires and following counsel's advice, the defendant proceeded to trial, was convicted, and sentenced to life without parole. The Oklahoma Court of Criminal Appeals found ineffective assistance and, as a remedy, modified the defendant's sentence to life *with* parole eligibility, which was the minimum punishment allowed under state law for first-degree murder. The federal court declined to determine whether deference was due under AEDPA or whether review was *de novo* "because even under a deferential standard of review the remedy was objectively unreasonable." "[A]ny correction for a federal constitutional violation must be consistent with federal law," which requires "a remedy that comes as close as possible to remedying the constitutional violation, and is not limited by state law." Remanded to District Court to determine remedy.

2007: *Julian v. Bartley*, 495 F.3d 487 (7th Cir. 2007). Counsel ineffective in plea negotiations for incorrectly advising the defendant on the maximum punishment he could receive if he did not accept the state's proposed plea offer, which led the defendant to reject the plea offer. The defendant was charged with two robberies and faced a maximum sentence of 60 years. The state offered a concurrent 23 year sentence for both. Just before entry of a plea, the court informed the defendant that his sentence would have to be served consecutive to his separate sentence imposed for parole violation. The defendant conferred with counsel, who informed him that under the recent decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), he could only be sentenced to 30 years because the indictments did not mention the prior conviction. The defendant then rejected the plea and proceeded to trial and got 40 years concurrent. Counsel's conduct was deficient and the state court's determination to the contrary was based on an unreasonable determination of the facts in light of the evidence presented in state court. The state court decision was also an unreasonable application of *Strickland*. Counsel's conduct was deficient because, in the context of advice concerning a plea agreement, "[a] reasonably competent attorney will attempt to learn all the facts of the case, make an estimate of the likely sentence, and communicate the result of that analysis before allowing the client to plead guilty." *Id.* at 495. Here, counsel's advice was plainly wrong because "the holding of *Apprendi* is clear on first, second, or third glance that the fact of a prior conviction need not be submitted to a jury and proved beyond a reasonable doubt." *Id.* at 497. Thus, counsel's interpretation of *Apprendi* "simply cannot constitute an objectively reasonable analysis of the law." Prejudice established because the information counsel provided was "precisely the type of information that is likely to impact a plea decision." The defendant might risk seven extra years in prison for a chance at acquittal, but a reasonable defendant would not risk an extra 37 years for this gamble. In addition, the defendant rejected the plea immediately after counsel's erroneous advice. While the defendant argued that the remedy was to reinstate the state's initial plea offer, the court rejected this as inappropriate because "the State had no hand in denying [the defendant] his Sixth Amendment right to effective assistance of counsel, and [the defendant] never actually accepted the terms of the original plea offer." *Id.* at 500. New trial granted.

2006: *United States v. Morris*, 470 F.3d 596 (6th Cir. 2006) (*affirming in part United States v. Morris*, 377 F. Supp. 2d 630 (E.D. Mich. 2005)). Counsel was ineffective in felon in possession of a firearm case brought under Project Safe Neighborhoods, a joint program of the federal and state prosecutors in Michigan, for failing to adequately advise the defendant with respect to the state's plea offer. The defendant was initially charged in state court and offered a deal for one to four years on a marijuana charge and two additional years on the weapons charge. The state prosecutor required an immediate decision, however, and the defendant was informed that if he declined the deal, he would be transferred to federal court which could result in a more severe sentence. Counsel, who did not have complete discovery at that time, was able to speak only briefly with the defendant in the "bull pen" with others present and no ability for privileged communications prior to a hearing. State counsel was not familiar with the federal

sentencing guidelines and relied on what the state prosecutor told her based on his information from the federal prosecutor. She, thus, informed the defendant that if transferred to federal court, he could receive a sentence of 62 to 68 months when he actually faced 101 to 111 months under the federal guidelines. The defendant rejected the deal and was transferred to federal court where he filed a motion to dismiss the federal indictment and to “remand” him to state court and to reinstate the plea. The District Court granted the motion on the basis of ineffective assistance of counsel. The Sixth Circuit found that it was proper to dismiss the indictment because the federal prosecutor was involved in the state court plea offer, which included dismissal of the federal charges as part of the agreement, but the federal court could not remand to state court and order reinstatement of the plea offer. The court held that the defendant was constructively denied counsel under *United States v. Cronin*, 466 U.S. 648 (1984), and prejudice was presumed.

The fact that . . . counsel gave him some advice does not preclude a finding of constructive denial of counsel under this standard. Rather, the circumstances, such as the lack of time for adequate preparation and the lack of privacy for attorney-client consultation, would have precluded any lawyer from providing effective advice. This is demonstrated here in part by the fact that . . . counsel was precluded from taking basic preparatory steps such as looking at his prior record in conjunction with the federal sentencing guidelines so as to make an accurate prediction of his guideline range, and instead had to rely on the erroneous estimate provided by an Assistant United States Attorney. . . .

Alternatively, the court held that counsel provided ineffective assistance of counsel under *Strickland*. Counsel’s conduct was deficient in failing to adequately inform the defendant of the likely consequences of rejecting the plea offer and being transferred to federal court. Prejudice found because the defendant would likely have accepted the plea offer and entered a plea of guilty if he had been adequately advised.

2004: *United States v. Grammas*, 376 F.3d 433 (5th Cir. 2004). Counsel ineffective in altering vehicle identification number case for failing to realize (and, therefore, failing to advise the defendant) that his prior convictions were crimes of violence that raised the base offense level for sentencing. Counsel’s conduct was deficient because failure to properly advise the defendant of the maximum sentence that he could receive falls below an objective standard of reasonableness. The defendant was prejudiced because there is a reasonable probability that if he had known of the greater sentencing exposure, he would have plead guilty and availed himself of a guidelines reduction for acceptance of responsibility.

2003: *Nunes v. Mueller*, 350 F. 3d 1045 (9th Cir. 2003). Counsel was ineffective in second

degree murder case for giving the defendant incorrect information and advice concerning the state's plea offer, which resulted in the defendant rejecting the offer. The defendant was initially charged with murder during the first two trials, the jury hung. After the third trial, the defendant was convicted of second degree murder but that conviction was reversed on appeal. Prior to the fourth trial, the state offered the defendant a sentence of eleven years in exchange for a guilty plea to voluntary manslaughter. Counsel met only briefly with the defendant and did not adequately explain the offer. The defendant believed the offer was for a 22 year sentence. The first time the defendant was able to talk to counsel again and clarify the offer was on the day of trial when the offer had expired. The defendant was convicted of second degree murder and received a 15 year to life sentence. Without holding an evidentiary hearing, the state court held that the defendant had not made out a prima facie case for prejudice and denied relief. Analyzing the case under the AEDPA, the Ninth Circuit found that the state court decision was an unreasonable application of the law to the facts and an unreasonable application of clearly established Supreme Court law. The court held that there was ample evidence in the record to establish a prima facie. The state court also unreasonably required the defendant to prove prejudice with absolute certainty when he needed only to demonstrate that there was a reasonable probability that he would have accepted the plea offer. Here, the defendant met that burden. To the extent the state court demanded more, it applied the *Strickland* test unreasonably. To the extent that the state court had made findings of fact, the court held that deference was not required because the state court did so without holding a hearing. Prejudice was clear here in that the defendant's strategy through all four trials was to argue that he was guilty only of voluntary manslaughter. Thus, the court found that it was reasonable to infer that he would have accepted an offer to plead guilty to voluntary manslaughter. To the extent that the state court made contrary inferences without a hearing, the court found that the state court decision was objectively unreasonable because there were equally valid inferences that could have been drawn in the defendant's favor. The court ordered the defendant released unless the state made an identical plea offer to the defendant.

2. U.S. District Court Cases

2011: *Young v. Zon*, ___ F.Supp.2d ___, 2011 WL 691631 (W.D.N.Y. Feb. 18, 2011).

Counsel ineffective in attempted murder case in failing to render any advice concerning state's plea offer. The state made an offer of a maximum of seven years in exchange for a guilty plea when the petitioner was facing a possible sentence of 25 years. While retained counsel sent his associate to inform the petitioner of the offer, counsel did not advise the petitioner "about the pros and cons" or whether he should accept or reject the plea and gave his standard answer that "it was not his policy to recommend to his client whether a sentence [sic] offer should be accepted or rejected." The court found this "extremely troubling," as counsel's policy applied "*especially* when the potential sentence was 'significant' - a situation where the defendant is arguably in the most need of an attorney's professional recommendation." Counsel's conduct was deficient.

[T]his is not a case where trial counsel's advice about the wisdom of accepting a plea could be placed on a continuum of reasonableness because, as trial counsel admitted, he gave no advice whatsoever. The failure to give any advice was entirely contrary to the minimum professional norms of practice.

There was also prejudice. There were eyewitnesses that positively identified the petitioner as the shooter, he had a motive, he was arrested shortly after the crime in a police chase, GSR results were "inconclusive" but did not exclude him as the shooter, and he had made statements to a jailhouse snitch. Under AEDPA, the state court unreasonably applied clearly established Supreme Court law.

2010: *Wolford v. United States*, 722 F. Supp. 2d 644 (E.D. Va. 2010). Counsel ineffective in drug case for failing to adequately advise the defendant during plea negotiations, which resulted in the defendant rejecting a very favorable plea agreement. The defendant was initially charged with several co-conspirators on one count of conspiracy to distribute drugs over a five year period out of the defendant's house, which was located within 1,000 feet of an elementary school. The majority of the controlled substances involved were pain medications the defendant and her boyfriend obtained through the use of physician-issued medical prescriptions. A search of the house revealed nearly 100 empty prescription bottles, totaling more than 8,000 pills, and other evidence. While there was substantial evidence of distribution, significant quantities of the substances were also used by the defendant and her boyfriend, as both were addicted to prescription pain killers. Counsel was appointed in February 2006. Several weeks later, while the defendant was in an inpatient drug treatment program, the government extended its first written plea offer, which would have allowed the defendant to plead to conspiracy at a base level of 28 to 30 and health care fraud. In exchange the government would agree not to charge her with distribution within a school zone and would not seek any additional adjustments or enhancements to the offense level. There is no evidence that counsel informed the defendant of this initial offer. Several months later, in May 2006, the defendant and counsel met with government agents for a "de-brief and proffer session" where the defendant signed an immunity agreement and agreed to show an undercover agent how she obtained the prescriptions from various doctor's offices. Several weeks later, counsel finally spoke with the defendant about the government's plea offer. Only a few days after this, the defendant and counsel met with the government and covered the plea offer with the defendant in detail. The offer was the same, except the health care fraud charge was eliminated at counsel's request. The defendant was "not comfortable" with the offer. While she did not dispute that she had distributed *some* drugs, she contested the amount of drugs she would be held responsible for under the plea. She also did not accept the plea because she sought probation and no jail time if she entered a plea. A few days after this, the prosecution renewed the offer, which would expire in two weeks. While could discussed the offer with the defendant, he did not inform her of the expiration date. The offer expired and the government indicted on the initial charge, on two counts of

distribution, and distribution within a school zone. The next day, the defendant and counsel again met with the prosecution to discuss a plea. She remained reluctant about the quantity of drugs, although she understood the government agent's explanation that if you distributed one pill out of a bottle the whole bottle was counted in the charge. The government suggested they meet again in two weeks, presumably to continue plea discussions, and the defendant agreed. Afterwards, counsel advised her, however, that the government would never agree to anything she wanted. Nonetheless, at the end of August 2006, the government extended the same offer without a deadline attached to it. Counsel informed the defendant of the offer and continued to discuss the offer, trial strategy, etc., with her but had no additional plea discussions with the government before a superseding indictment in October 2006 that added additional drugs to the conspiracy charge, which now was charged as within the school zone, and added six additional counts for distribution. Following this indictment, the government extended no additional offer and the case was set for trial. She was ultimately convicted of the conspiracy and two substantive counts of distribution. In sentencing, the court found her accountable for more than 21,000 kilograms of marijuana placing her base offense level at 36. With enhancements, she was sentenced at a base level of 42, with a guidelines range of 360 months to life. The court sentenced her, however, to concurrent 108 month sentences. Counsel's conduct was deficient because counsel advised the defendant throughout that there was a "household or family member" defense. In essence, she believed, based on counsel's bad advice and his "faith" in the defense that it was legal to distributed prescription drugs to family and household members if no money was exchanged. She also believed, based on counsel's bad advice, that she could not be held responsible for any drug quantity that she personally ingested. There was clear Fourth Circuit precedent contrary to counsel's advice. Counsel also never advised the defendant of his belief that she would be convicted of conspiracy. He also never advised her that conviction on the conspiracy charge would render her accountable for all "reasonably foreseeable" controlled substances that she and her co-conspirators distributed and possessed with intent to distribute during the course of the conspiracy. Counsel also never informed her that the trial judge would make this finding based on a preponderance of the evidence and could consider amounts even from substantive charges of which she was acquitted. In short, there were "no viable defenses" available to the defendant, but, based on counsel's bad advice, the defendant believed she did have viable defenses.

This incorrect and incomplete advice, in turn, prevented [the defendant] from making a knowing and voluntary decision whether to accept the government's plea offer rather than proceed to trial. Of course, it is important to note that the Sixth Amendment does not require defense counsel to be 100% correct or perfect in advising his or her client in the course of a criminal prosecution, as such a standard would sometimes be impossible to meet. Indeed, defense counsel, on occasion, must make predictions in areas of unsettled law or perhaps make new arguments in areas of unsettled

law, and in both of these instances, defense counsel will likely be unable to be 100% accurate. Yet where, as here, the legal advice at issue involves areas of settled law and no reasonable arguments could be made to alter these settled rules, defense counsel clearly has an affirmative duty to advise his or her client correctly in all material respects. And significantly, the incorrect and incomplete legal advice trial counsel provided [the defendant] in this instance was not only material, it was indeed central to [her] decision whether to accept the government's plea offer or instead proceed to trial.

Prejudice established because "there is ample objective evidence establishing a reasonable probability" the defendant would have accepted the plea offer if she had "received complete and accurate advice from trial counsel." The defendant never disputed that she distributed *some* quantity of drugs. "[T]he most compelling objective evidence in the prejudice analysis is the significant—indeed striking—disparity between the government's plea offer and [her] sentencing exposure were she to be convicted at trial." In essence, there was about 17 levels difference, which would have given her a guidelines range of 63-78 months rather than 360 months-life.

United States v. Wilson, 719 F. Supp. 2d 1260 (D. Ore. 2010). Counsel ineffective in drug case in failing to adequately advise the defendant in pretrial negotiations. At the time of arrest, the defendant had 116 ecstasy pills, scales, and drug packaging materials in his home. He confessed involvement in smuggling more than 100,000 ecstasy pills on the day of arrest. He cooperated with law enforcement for three weeks, including recording phone calls, and assisting agents in seizing additional drugs and locating his co-defendant in Amsterdam. The defendant believed the agents had offered him an immunity agreement. When he insisted on speaking to the prosecutor about a "deal" in exchange for his cooperation, the AUSA facilitated the appointment of counsel for him. The AUSA offered a pre-indictment plea bargain of six years with a one day time limit and no discovery. Despite counsel's awareness of the evidence seized in the defendant's possession, his confession, and his cooperation for weeks, counsel refused to advise the defendant on whether to accept the offer because counsel could not do so without obtaining discovery. Counsel made a counter "offer" of continued cooperation in exchange for full immunity, which the AUSA rejected immediately. Without evening informing the defendant that immunity had been rejected, counsel informed the AUSA that the six year offer was rejected. Post-indictment, counsel did not pursue any plea negotiations other than continuing to push for full immunity. Due to counsel's grossly inadequate advice, the defendant went to trial believing that he faced between 30-80 months in prison when he actually faced a possible 20 year sentence. The Court rejected the government's argument that there was no right to the effective assistance of counsel pre-indictment. This was a "critical stage of the criminal process" that was "the functional equivalent of the initiation of formal adversarial proceedings." Moreover,

when counsel was appointed at the request of the government, a finding that there was no right to effective assistance of that counsel “would make a mockery of the judicial appointment of counsel.” Counsel’s conduct was deficient. He failed to inform the defendant that he could be held liable for all the ecstasy imported or delivered during the conspiracy. He failed to inform the defendant he was facing a much longer possible sentence than 6 years and that acquittal was unlikely given the evidence against him. Counsel also provided inaccurate advice by informing the defendant the guideline range at that time was 41-51 months, which was based on an outdated version of the Sentencing Guidelines. These errors were compounded by counsel’s failure to advise the defendant that full immunity in these circumstances was extremely unlikely. Even assuming the defendant was not entitled to effective assistance pre-indictment, counsel was ineffective post-indictment in failing to aggressively pursue a plea agreement comparable to the initial six year offer. He never accurately advised the defendant of his sentencing exposure. At the time of trial, the defendant believed he faced 30-80 months when he faced 20 years. Prejudice established. The Court found the defendant’s testimony that he would have taken the six year deal if adequately advised to be credible and validated by the objective circumstances. Counsel’s affidavit was rejected as incredible, where the affidavit contradicted counsel’s notes and correspondence at the time. The remedy ordered was reinstatement of the government’s initial six-year plea offer.

Harris v. United States, 701 F. Supp. 2d 1084 (S.D. Iowa 2010). Counsel ineffective in cocaine distribution case for incorrectly advising the defendant, which resulted in the defendant rejecting the government’s offer to plead guilty and accept responsibility for 100 grams of cocaine in exchange for a 10 year sentence. The defendant was charged with distributing on four occasions a total amount of 7.5 grams, but a superseding indictment included special findings that she was responsible for 500 grams to 1.5 kilograms. Due to counsel’s misunderstanding of the role of “relevant conduct” under the sentence guidelines and his belief that the defendant could not be held responsible for more than 7.5 grams if she plead guilty, the defendant rejected the plea offer and entered an open guilty plea. Over her objection, the court accepted the PSI finding that she was responsible for 315 grams and sentenced her under the guidelines to 151 months, which was later reduced to 121 months. Counsel’s conduct was deficient as counsel did not understand the application of *Booker* or the sentencing guidelines to the case.

The court recognizes that counsel cannot be expected to predict the eventual sentence that a defendant will receive. Counsel should be expected, however, to advise a defendant on at least the fundamental provisions of the guidelines so that she can make an intelligent decision whether to accept or reject a plea.

Id. at 1094. Prejudice found as the defendant would have accepted the government’s plea offer if she had been adequately advised. The remedy granted was reinstatement of the offer to plead to 100 grams of cocaine base for a 10 year sentence.

2009: *Carrion v. Smith*, 644 F. Supp. 2d 452 (S.D.N.Y. 2009). Under AEDPA, counsel ineffective in drug and attempted murder case for inadequately advising the defendant, which resulted in rejection of the state's pre-trial plea offer. The defendant had numerous charges arising from a shootout with the police, in which he was shot twice, and possession of five kilograms of cocaine. Conviction of just the least serious offence required a mandatory sentence of 15 years to life. Conviction on all carried the potential of 125 years to life. While the defendant was still hospitalized following his arrest, counsel informed him that the prosecution would agree to 10 years to life in exchange for pleas on all, which counsel thought was a "good offer." Counsel did not, however, inform the defendant of these sentencing ranges or discuss the strength of the state's case.

When a plea offer is made and there is a reasonable probability that the defendant is uncertain about the sentencing exposure he faces, whether or not he accepts the plea, a lawyer unquestionably has a duty to inform his client of the sentencing exposure he faces if he accepts the plea offer and if he does not.

Counsel "knew that an acquittal on the drug charge was virtually impossible." As a matter of practice, counsel never made recommendations to his clients on whether to accept or reject plea offers. "Under these unique circumstances, where nothing could be gained by proceeding to trial, counsel should have made an explicit recommendation to take the plea offer, at the very least." Prejudice was clear in that the defendant had proceeded to trial and received a sentence of 125 years to life. There was sufficient objective evidence to support the conclusion that there is a reasonable probability that the defendant would have accepted the offer if properly advised. The state court decision to the contrary unreasonably applied *Strickland*. Court ordered reinstatement of plea offer.

United States v. Kimes, 624 F. Supp. 2d 565 (W.D. La. 2009). Counsel ineffective in methamphetamine and conspiracy case for failing to advise the defendant of the potential sentencing benefits of pleading guilty. Counsel failed to advise the defendant of how the Sentencing Guidelines might affect his sentence or that he could potentially receive a three-point reduction in sentence for acceptance of responsibility if he pled guilty. Although the government never made a specific plea offer, the prosecutor did state that a general offer of sentence reduction was made if the defendant pleaded guilty prior to one of his co-defendants. Regardless of whether the government officially made a plea offer to the defendant, counsel's conduct was objectively unreasonable. Because he was not adequately advised, the defendant was "under the impression" that he was going to be sentenced in the same fashion whether he pled guilty or proceeded to trial. Prejudice established because the court found the defendant's testimony that he would have pled guilty if he had been adequately advised to be "credible and substantially uncontradicted." Although the defendant had denied guilt in one letter to counsel prior to trial, this did not refute his credible testimony that he would have plead guilty. "An individual whose

lawyer, through action or inaction alike, has left him with the impression that there is no benefit to a guilty plea would certainly be more inclined to rely on claims of actual innocence once resigned to the fact that trial was imminent.” Prejudice found because the court routinely granted sentence reductions for acceptance of responsibility, even though not required to do so under the Guidelines. Thus, it was “reasonably likely” that the defendant would have received a lower sentence if he had been adequately advised and pled guilty. Sentence vacated and resentencing ordered as if the defendant had plead guilty.

- 2006:** *United States v. Hernandez*, 450 F. Supp. 2d 950 (N.D. Iowa 2006). Counsel ineffective in conspiracy to distribute methamphetamine case for failing to adequately advise the defendant concerning the possible sentence, which resulted in the defendant declining to plead guilty and testifying during the trial rather than just relying on his pretrial statement, which had negative consequences under the Guidelines due to an obstruction of justice enhancement. While counsel believed that the defendant should plead guilty, even without a plea agreement, he never told the defendant that he believed he would be convicted and did not lean on him to plead guilty. He simply advised the defendant incorrectly that he would likely get a sentence of about 14 years rather than the 360 months to life range of the guidelines and the 360 months the defendant got. Prejudice established because the defendant would have entered a guilty plea, if counsel had performed adequately, and would have received a lesser sentence. At minimum, he would not have had the obstruction of justice enhancement because he would not have testified at trial, falsely or otherwise, and would have received a reduction for acceptance of responsibility. The court ordered resentencing based on a guilty plea with no plea agreement, with a range of 210 to 262 months of imprisonment.
- 2005:** *United States v. White*, 371 F. Supp. 2d 378 (W.D.N.Y. 2005), *aff'd*, 257 Fed.Appx. 382 (2nd Cir. 2007). Counsel was ineffective in drugs and weapons case for failing to know of and to adequately advise the defendant of the consequences of a second conviction of possessing a firearm in furtherance of a drug crime, which resulted in the defendant rejecting a plea agreement. Counsel’s conduct was deficient, because even conviction of more than one count of the statute, even if contained in a single indictment, required a 30-year mandatory consecutive sentence. If the defendant had been adequately advised, he most likely would have accepted the plea offer that would have required a plea to only one count of this offense and would have required a sentence of 147 to 168 months under the Sentencing Guidelines. Although the defendant had been convicted at trial, but not yet sentenced, the court found that habeas review under 28 U.S.C. 2241(c) was appropriate. The court ordered that the rejected plea agreement would be enforced and set aside the convictions not in line with that agreement and scheduled sentencing for a later date.

3. State Cases

2011: *Riley v. State*, ___ S.W.3d ___, 2011 WL 3209175 (Tex. App. July 29, 2011). Counsel ineffective in advising the defendant to proceed to trial in murder case. Counsel's primary argument and evidence sought community supervision for the defendant. Counsel's conduct was deficient because, under state law, a defendant who proceeded to trial and was convicted was not eligible for community supervision, but counsel did not realize this until the charge conference. State law did allow a judge to enter deferred adjudication community supervision following a guilty plea or plea of nolo contendere. If the defendant had known the jury could not grant community supervision, he would have pled nolo contendere. Thus, prejudice established.

H.P.T. v. Commissioner of Correction, 14 A.3d 1047 (Conn. App. 2011). Counsel ineffective in pretrial negotiations which resulted in the defendant rejecting a plea offer in sexual assault on child case. In a pretrial conference, the prosecutor made an offer, including a recommendation of a 25 year sentence, suspended after 12 years. The trial court made its own offer, which the prosecutor acquiesced to by silence, of a 20 year sentence, suspended after 9 years. Counsel did not retain the services of an interpreter, even though the defendant's native language was Vietnamese, and did not advise the defendant to accept the court's offer. After the defendant rejected the offer, initial counsel withdrew and the case proceeded to trial. Following conviction, the defendant was sentenced to 23 years, suspended after 13 years. The court affirmed the lower court's finding of ineffective assistance and in remanding for sentencing only not to exceed the court's pretrial plea offer of 20 years, suspended after 9.

2010: *Kolle v. State*, 690 S.E.2d 73 (S.C. 2010). Counsel ineffective in drug trafficking plea case for failing to adequately advise the defendant with respect to the state's initial plea offer of ten years suspended on service of five. The defendant was facing a sentence of 7-25 years, but counsel advised the defendant the offer was not a "good deal." Counsel also misinformed the defendant that the offer would still be open after the suppression hearing, when it was not. If the defendant had been aware that the state would withdraw the offer after the suppression hearing, he may have decided to accept it and receive a lower sentence.

People v. McCauley, 782 N.W.2d 520 (Mich. App. 2010). Counsel ineffective in first-degree murder case for failing to adequately advise the defendant prior to his rejection of a plea offer to plead to second-degree murder with an 18-year minimum sentence. Counsel failed to advise the defendant about aiding and abetting, even though counsel was aware that the defendant denied being the shooter and that the state would proceed under an aiding and abetting theory. Thus, the defendant was not aware that he could be convicted of first-degree murder even if he did not fire the fatal shot. Counsel's conduct "fell below an objective standard of reasonableness" and was prejudicial because the 18 year old defendant would have accepted the plea offer rather than proceeding to trial and

being sentenced to life. Remanded although the state was free to present a new offer in excess of the original offer if it could rebut the presumption of vindictiveness.

2009: *Lester v. State*, 15 So. 3d 728 (Fla. App. 2009). Counsel was ineffective in robbery case for failing to adequately advise the defendant of the potential sentence, which led the defendant to reject a favorable pretrial plea offer. The defendant was initially charged with robbery by sudden snatching. The state offered a deal for 41.7 months, but this offer was rejected after counsel advised the defendant of the five year maximum punishment. Just before trial, the state amended the charge to indictment by force. The deal was still rejected after counsel advised the defendant of the possible fifteen year sentence and recommended the defendant take the deal. Counsel did not, however, advise the defendant of the possibility that the state would seek habitual felony offender status, which happened prior to sentencing. The defendant was thus subject to a 30 year mandatory sentence. The remedy ordered was that the state could elect whether to retry the defendant or simply to withdraw the habitual offender notice, subjecting the defendant only to the fifteen year maximum.

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

2008: *Revell v. State*, 989 So. 2d 751 (Fla. App. 2008). Counsel ineffective in driving while license suspended or revoked case for failing to advise the defendant, who had two prior felony convictions, that he was eligible for habitual felony offender (HFO) enhanced sentencing prior to the State withdrawing its plea offer. The state offered nine months in the county jail in exchange for a plea; counsel advised the defendant he faced a maximum sentence of five years; and the defendant rejected the plea offer. The state then withdrew the offer and two weeks later filed a notice of intent to seek enhanced sentencing. The defendant was sentenced to ten years. Counsel’s conduct was deficient because counsel conceded he was not aware of the possibility of an enhanced sentence until after the state’s notice was filed. “Counsel’s failure to accurately advise his client of the maximum sentence he faced when considering the offer of a plea negotiation amounts to ineffective assistance.”

2006: *Hall v. State*, 929 So. 2d 1148 (Fla. App. 2006). Counsel ineffective in advising client prior to guilty pleas to various property crimes because counsel erroneously believed and advised the defendant that he would be sentenced to no more than seven years of confinement and that he was eligible for probation. Prejudice found because the

defendant had been offered a plea agreement for 10 years in prison and five years of probation, but turned it down and then inexplicably pled guilty and got the mandatory 15 year prison sentence due to his prison releasee reoffender status.

2004: *McKeeth v. State*, 103 P.3d 460 (Idaho 2004). Trial counsel was ineffective in sexual exploitation by a medical care provider for failing to draft the conditional plea agreement in accordance with the terms that he and the defendant intended. The defendant, a licensed professional counselor, was charged with sexual contact with six patients. He offered a conditional plea agreement that was intended to reserve his right to appeal the denial of pre-trial motions and to withdraw all of his guilty pleas if he prevailed on appeal with respect to even one count. The defendant entered *Alford* pleas to all six counts. On appeal, three counts were dismissed but the court did not allow the defendant to withdraw his guilty pleas on the remaining three counts because the language of the plea agreement only allowed the defendant to withdraw his plea to those counts on which he prevailed on appeal. Counsel's conduct was deficient in failing to draft the conditional plea agreement according to the terms that he and the defendant intended to proffer. The defendant was prejudiced because but for counsel's error the defendant would have pleaded not guilty to all the offenses. The defendant's guilty pleas to the remaining three counts were vacated.

E. ERRONEOUS ADVICE ON RIGHT TO TESTIFY (State Cases Only)

2007: *Reeves v. State*, 974 So. 2d 314 (Ala. Crim. App. 2007). Counsel ineffective in burglary case for preventing the defendant from testifying on his own behalf after the defendant insisted that he wanted to do so. The defendant was charged with entering the home of his wife's ex-husband and had made a statement to police that he had gone to the home but he did not enter the home. Counsel's conduct was deficient because "[a] defendant has a fundamental right to testify on his own behalf, that right is personal to the defendant, and defense counsel may not waive that right." Counsel's conduct was not explained by strategy to avoid cross about the defendant's prior actions and stalking his wife because she had already testified to these events and the existence of a restraining order against the defendant. The denial of the right to testify was not "harmless," even though the defendant's testimony to police was admitted into evidence because he implied in the statement that he did not enter the home but did not specifically state that and because his testimony would have allowed the jury to "judge[] his credibility against the victim's," who was the only person to testify that he entered the home. Even without the defendant's testimony the jury had sought additional instruction on the elements of the charge and reached a verdict only after receiving an *Allen* charge.

Visger v. State, 953 So. 2d 741 (Fla. App. 2007). Counsel ineffective in burglary and battery case for advising the defendant not to testify. Counsel's conduct was deficient because the defense theory was that the defendant was invited into the home, but without the defendant's testimony there was no evidence to support that theory. Counsel's strategy to keep out information concerning the defendant's prior conviction of

aggravated battery was not reasonable under these circumstances, particularly where there was already evidence that the state's two primary witnesses had drugs in their home and one of them was a convicted felon "thus reducing any effect of appellant's convictions on his credibility, as compared to that of the state's witnesses." *Id.* at 744. Strategic decisions must be informed decisions, where the alternatives have been considered and rejected. Where those decisions are uninformed, counsel's judgment may be deficient. That is the case here." *Id.* It was also not "strategy" that counsel believed that some of the defendant's version of events was "preposterous," but counsel failed to investigate.

Furthermore, we find it unreasonable and deficient performance to believe that counsel could argue to the jury a theory that appellant was invited in without any evidence whatsoever to support it and all the evidence clearly contrary to that theory. Such an argument amounts to sheer speculation.

Id. at 745. Prejudice found in light of the inconsistencies in the state witnesses' testimony, the fact that some of their testimony "strains credulity," and the fact that much of the actions of the state witnesses, even according to their own testimony, "may appear more consistent with having been involved in an attack on the appellant [who was shot in the encounter] rather than the other way around." *Id.* at 746.

2006: *People v. Whiting*, 849 N.E.2d 125 (Ill. App. 2006). Counsel ineffective in aggravated battery case for advising the defendant, who desired to testify, that she could not do so. The defendant was charged with assaulting an investigator of the Department of Children and Family Services who was in the defendant's home to investigate an incident between the defendant's son and local police days before. While the defendant's husband and son testified, the defendant was prejudiced because she did not herself testify.

F. ERRONEOUS ADVICE ON RIGHT TO JURY OR BENCH TRIAL

2011: *State v. Sampson*, ___ A.3d ___, 2011 WL 2670182 (R.I. July 8, 2011). Counsel ineffective in child abuse case for refusing to comply with the defendant's request to waive a jury and proceed to a bench trial. Under state law, the defendant had the right to waive the jury and proceed with a bench trial. Moreover, the Rhode Island Supreme Court had "explicitly stated that the decision whether or not to waive the jury is ultimately the decision of the defendant and not of counsel." Here, however, counsel mistakenly informed the court that it was his decision and the court accepted this. Faced with this, the defendant waived counsel and proceeded pro se to his bench trial. The court offered the defendant two choices: (1) trial by jury, against his wishes, represented by counsel; or (2) a pro se bench trial. The correct, third option of a bench trial, in accordance with his wishes, represented by counsel was never offered or considered by the court. Thus, the defendant's waiver of his right to counsel was not knowing, voluntary, or intelligent.

G. INADEQUATE ADVICE ON RIGHT TO APPEAL

1. U.S. Court of Appeals Cases

2009: *Bostick v. Stevenson*, 589 F.3d 160 (4th Cir. 2009). Under AEDPA, counsel ineffective following murder trial in failing to consult with the defendant about filing an appeal. While the defendant had told counsel prior to trial that he would be satisfied with the jury's verdict, he told his daughter in open court prior to sentencing not to worry because he would "get an appeal." Counsel did not speak with the defendant about an appeal after that, but he told the defendant's then-wife, who inquired about an appeal, that there were no possible grounds for an appeal. Counsel's failure to consult with the defendant was deficient and "flew in the face of a duty to do so." *Id.* at 166.

An attorney must consult with a client about filing an appeal either where a reasonable defendant would have wanted to appeal, typically because there were non-frivolous grounds to pursue, or because the particular defendant adequately demonstrated to counsel an interest in appealing. Though there is no per-se rule, a lawyer who fails to consult with a defendant about an appeal following a jury trial almost always acts unreasonably.

Id. at 166-67. "Here, trial counsel had a duty to consult with [the defendant] because he went to trial, there were non-frivolous grounds to pursue, and, most importantly, [the defendant] unequivocally demonstrated his interest in an appeal post-verdict." *Id.* at 167. He did so "in open court, which was sufficient, in and of itself, to implicate his attorney's duty to consult." *Id.*

2007: *Thompson v. United States*, 504 F.3d 1203 (11th Cir. 2007). Trial counsel ineffective following plea to conspiracy to possess cocaine with intent to distribute for failing to adequately advise the defendant of the right to appeal. The defendant and his two codefendants were sentenced the same day and the codefendants, who had filed motions for reduction based on "minor rule," were given lesser sentences than the defendant, whose counsel made only an oral motion, which was denied. Counsel's conduct was deficient because counsel did not adequately advise the defendant concerning the right to appeal following the trial court's advice to the defendant and the defendant's question to counsel about a possible appeal. Counsel told the defendant, in a five minute conversation, only that he could appeal but counsel did not think an appeal would be successful or worthwhile. Counsel had a duty to consult with the defendant because the defendant "demonstrated an interest in an appeal by asking his attorney about that right." Counsel's advice was deficient because the defendant was given no information from which he could have intelligently and knowingly either asserted or waived his right to appeal. Prejudice established because there is a reasonable probability the defendant would have appealed if he had been adequately advised.

2. U.S. District Court Cases

2010: *United States v. Ibersen*, 705 F. Supp. 2d 504 (W.D. Va. 2010). Counsel ineffective in drug case for failing to adequately consult with the defendant during plea negotiations regarding the true advantages of appealing his sentence enhancement, which rendered the plea agreement waivers of appeal rights and collateral rights invalid. Prior to trial, the defendant unsuccessfully challenged a sentence enhancement based on prior felony drug convictions that increased the statutory mandatory minimum sentence from 10 to 20 years. The defendant wanted to appeal, but counsel believed the chances of the Fourth Circuit reversing the trial court were not great. “Advise regarding an appeal’s chances for success is not the equivalent of discussing the advantages and disadvantages of appeal.” Counsel advised the defendant his only other chance to reduce the length of the sentence was to offer substantial assistance to the government in hopes of achieving a motion for reduction below the statutory minimum. Based on counsel’s advice, the defendant entered a plea agreement in which one charge was dismissed, the government recommended credit for acceptance of responsibility, and the defendant waived appeal and collateral attack rights. Counsel’s conduct was deficient in failing to advise the defendant of the possibility of pleading guilty “straight up” without a plea agreement. This would not have exposed the defendant to a greater sentence, would have allowed the defendant to appeal the sentence enhancement, and left open the possibility of seeking a sentence reduction based on substantial assistance. Likewise, counsel did not “fully explore” the “minimal benefit” the defendant got from the plea agreement, which dismissed one count “but did not reduce his sentence exposure in the least.” Likewise, “the reduction for acceptance of responsibility was swallowed up” by the sentence enhancement. Prejudice established as the defendant had expressed his dissatisfaction and desire to appeal the sentencing enhancement. There was a reasonable probability that if adequately advised the defendant would have entered a “straight up” plea to both counts and pursued an appeal. Judgment reentered and appeal allowed.

2009: *United States v. Purcell*, 667 F. Supp. 2d 498 (E.D. Pa. 2009). Counsel ineffective in drug case for failing to adequately consult with the defendant about filing an appeal. Prior to sentencing, counsel spoke to the defendant and told the defendant he did not see any meritorious issues for appeal. Nonetheless, the defendant said he wanted to file an appeal. Counsel’s failure to follow through on this was deficient and prejudicial, despite the defendant’s failure to identify any specific appealable issues. Direct appeal allowed.

Walton v. Hill, 652 F. Supp. 2d 1148 (D. Ore. 2009). Under AEDPA, counsel ineffective in murder case for failing to notify the defendant about the amended judgment following resentencing imposed without a hearing following remand. Counsel attempted to notify the defendant by letter, but the initial letter was “refused” by the prison mail room because counsel’s secretary failed to put a return address on the envelope. After that counsel forgot to resend it. Thus, the defendant did not learn of the amended judgment until after the time to appeal had expired. The state court decision was contrary to

established federal law under *Roe v. Flores-Ortega*, 528 U.S. 470, 486 (2000) because “[t]he question is not, as the PCR judge framed it, whether the appeal might have had merit, but instead, ‘but for counsel’s deficient conduct [the petitioner] would have appealed.’” Here, the defendant had taken a “pro-active role in his defense at all stages of this case, over the course of many years.” Counsel had a constitutional duty to confer with him about an appeal, because he had “reasonably demonstrated to counsel that he was interested in appealing” and would have if counsel had performed adequately. “[R]egardless of the apparent lack of non-frivolous grounds for appeal,” habeas relief was required to allow the defendant to prosecute an appeal.

II. FAILURE TO COMPEL COMPLIANCE WITH PLEA AGREEMENT (State Cases Only)

2011: *State v. Fannon*, 799 N.W.2d 515 (Iowa 2011). Counsel ineffective in negotiated plea to sexual abuse for failing to adequately address the prosecutor’s breach of the agreement during the plea hearing. The initial prosecutor agreed to make no sentencing recommendation during the sentencing hearing. A different prosecutor argued for up to ten year terms on both counts and asked for consecutive sentences before defense counsel interrupted for a bench trial. Following this, the prosecutor attempted to withdraw his statements in compliance with the plea agreement and the case proceeded to sentencing. Counsel’s conduct was deficient in failing to move to withdraw the plea, failing to move for specific performance before a different judge, and failing to even consult with the defendant on these matters. While the court recognized the sentencing court’s ability to disregard the improper argument, the court found it appropriate in light of the interests of justice to remand for sentencing before a different court with strict compliance by the state with the agreement.

2008: *Baldrige v. Weber*, 746 N.W.2d 12 (S.D. 2008). Counsel ineffective in sentencing following drug charge plea for failing to object to the state’s failure to comply with the plea agreement. The agreement required, among other things, that the defendant cooperate in the investigation and reveal sources, contacts, and associates and that the state would inform the sentencing judge of the level of his cooperation. The defendant complied with other terms and provided information about people in the Aberdeen area. The prosecution indicated that they wanted information only on people in the Watertown area. The defendant was not from the area, but obtained information from his girlfriend about people in the Watertown area and supplied this as well. Without any allegation that his information was untruthful or his cooperation insufficient, the state failed to inform the sentencing court of the cooperation as required. This information was also not included in the presentencing report. Defense counsel did not object and the court sentenced the defendant to the maximum sentence. Counsel’s conduct was deficient and not based on strategy. With respect to prejudice, the court held that “[i]t is immaterial that the sentencing judge may not have been influenced by the State fulfilling its end of the bargain.” Prejudice was presumed because the defendant “had a substantial right to

the fulfillment of the terms of his plea agreement” and the court viewed this as an instance whether there was an “[a]ctual or constructive denial of the assistance of counsel.”

2007: *Custodio v. State*, 644 S.E.2d 36 (S.C. 2007). Counsel ineffective in burglary and grand larceny case for failing to have the defendant’s plea agreement enforced based on detrimental reliance. Shortly after his arrest, the defendant met with police and two assistant prosecutors and was promised a 15 year cap if he would cooperate with officers. He did so in admitting to “a string of at least seventy-five burglaries” and assisting in the recovery of a half million dollars worth of property. Following his cooperation, the elected prosecutor chose not to honor the initial agreement and the defendant pled guilty and was sentenced to 45 years. Counsel’s conduct was deficient in failing to pursue enforcement of the initial agreement, which the defendant told her about and the police and the assistant prosecutors confirmed it. The lower court’s finding that there was no agreement was “without any evidence of probative value” because the defendant and his counsel testified and the state presented no contrary evidence. Thus, “[t]he only evidence presented was that an agreement in fact existed.” Prejudice established because the defendant was entitled to enforcement of the deal. “[T]he State may withdraw a plea bargain offer before a defendant pleads guilty, provided the defendant has not detrimentally relied on the offer.” Here, the defendant had detrimentally relied on the offer. Initial plea bargain enforced.

2006: *Taylor v. State*, 919 So. 2d 669 (Fla. App. 2006). Counsel ineffective in negotiated plea drug case for failing to ensure enforcement of the plea agreement. The agreement had a maximum of nine months confinement, but defense counsel and the prosecutor that negotiated the agreement were not present for sentencing. New defense counsel informed the court that it was a “straight up plea” and the prosecution sought confinement resulting in two concurrent five year prison sentences.

Eskridge v. State, 193 S.W.3d 849 (Mo. App. 2006). Counsel ineffective in drug case for failing to inform the sentencing court that the negotiated plea agreement had been for concurrent time and failing to object to imposition of consecutive sentences.

2005: *Barber v. State*, 901 So. 2d 364 (Fla. App. 2005). Counsel in unlawful sex with child case was ineffective in failing to move to withdraw the defendant’s guilty plea. The defendant had a deal to plead guilty in exchange for the state’s recommendation of a sentence of 15 years, but the defendant failed to appear at sentencing. The state recommended a sentence of 30 years and the court sentenced the defendant to 22 years. Counsel did not move to withdraw the guilty plea even though the state violated the plea agreement, which did not include any agreement concerning the defendant’s appearance for sentencing. Under state law, if the trial court declined to honor the terms of the agreement, the defendant was entitled to withdraw the plea. Counsel’s conduct was deficient and prejudicial.

**SUMMARIES OF SUCCESSFUL
INEFFECTIVE ASSISTANCE OF COUNSEL
CLAIMS POST-*WIGGINS V. SMITH*
INVOLVING APPEAL-RELATED ISSUES**

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I. PERFECTING APPEAL

A. U.S. Court of Appeals Cases

2011: *Hardaway v. Robinson*, 637 F.3d 640 (6th Cir. 2011). Appellate counsel ineffective in murder case for failing to file an appellate brief and depriving the petitioner of his direct appeal. While collateral proceedings and appeal was allowed, this was different than direct appeal and not an adequate substitute. Prejudice presumed under *Flores-Ortega*.

2009: *Hodge v. United States*, 554 F.3d 372 (3rd Cir. 2009). Counsel ineffective following murder plea for failing to file a timely appeal. Counsel filed numerous post-trial motions alleging that the government violated the plea-agreement, but his conduct was deficient because he “failed to file an appeal only because he mistakenly believed his motions practice had put off the pertinent deadline.” Although the record was unclear about discussions between counsel and the defendant, the court could not “envision a scenario, aside from following a client's thoroughly informed and perfectly explicit direction, where it would be reasonable for an attorney not to appeal the life sentence of a client with a nonfrivolous argument as to why the sentence is unlawful.” The prejudice “is manifest” in that there was a nonfrivolous argument that the government had breached its plea agreement and a codefendant with the same issue had timely appealed and won on this issue. Sentence vacated and ordered to be reentered so the defendant would have another opportunity to file a timely appeal.

2007: *Corral v. United States*, 498 F.3d 470 (7th Cir. 2007). Counsel ineffective following drug plea for failing to perfect appeal. The defendant entered a conditional plea agreement reserving his right to appeal the adverse ruling on the motion to suppress seized evidence. Shortly before sentencing the defendant indicated that he did not desire to appeal and counsel indicated that he would no longer be representing the defendant. Afterwards, while still in time to file the notice of appeal, the defendant changed his mind and attempted to call counsel but counsel blocked prison calls. The defendant’s family members also left messages for counsel, in addition to contacting the court and the public defender about getting an attorney appointed for the appeal. Counsel’s conduct was deficient in not “remaining available” and taking “affirmative steps to prevent his client from reaching him” by not returning the calls from family members. Prejudice was clear because the defendant would otherwise have filed the appeal as his father-in-law/co-defendant did with success.

United States v. Poindexter, 492 F.3d 263 (4th Cir. 2007). Counsel ineffective following guilty plea to narcotics trafficking for disregarding the defendant’s unequivocal instruction to file a notice of appeal, even though the defendant had executed an appeal waiver as part of his plea agreement and appealing could be “harmful to the client’s interests” in the long run.

2005: *Frazier v. South Carolina*, 430 F.3d 696 (4th Cir. 2005). Counsel ineffective in plea to trafficking and weapon case where the court rejected the state's offer of concurrent five years sentences and gave consecutive sentences of five years each and a \$100,000 fine. While counsel moved for reconsideration, counsel failed to consult with the defendant concerning his right to appeal. *Flores-Ortega* was not a new constitutional rule for *Teague* purposes because it only applied *Strickland*. Counsel's conduct was deficient because "[w]here, as here, the defendant has not specifically requested an appeal, counsel is under a professional obligation to 'consult' with the defendant regarding that fundamental decision, unless the circumstances demonstrate that consultation is unnecessary." Under AEDPA, the state court's holding was an unreasonable application of *Strickland*. "[W]hen there are non-frivolous issues to appeal or the defendant has manifested an interest in appealing, *Strickland* requires that counsel consult with the defendant in deciding whether to go forward . . . even if the defendant has pled guilty." Here, the defendant had two non-frivolous issues: (1) the maximum possible fine was only \$25,000; and (2) an allegation that the court's unexpectedly harsh sentence was impermissibly motivated. The written form the defendant signed notifying him of his right to appeal was insufficient to relieve counsel of the obligation to "consult" with the defendant because "[t]he duty to consult identified in *Strickland* is broader than the narrow obligation to inform a defendant of his right to appeal." Prejudice found because the defendant "need only demonstrate an interest in appealing." Here, the defendant's interest was unwavering and ongoing.

United States v. Sandoval-Lopez, 409 F.3d 1193 (9th Cir. 2005). Counsel was ineffective for refusing to comply with the defendant's specific instructions to file a notice of appeal, even though the defendant had a "remarkably favorable" plea agreement in which his waived his right to appeal. Counsel's conduct was deficient, even though the court recognized that "[s]ometimes demanding that one's lawyer appeal is like demanding that one's doctor perform surgery, when the surgery is risky and has an extremely low likelihood of improving the patient's condition." Although the court only remanded for an evidentiary hearing to determine whether counsel did refuse, the court made it clear that the state could choose not to oppose the petition and to allow the appeal, which would free the state from the plea agreement, and "because getting the appeal dismissed would be less work than an evidentiary hearing."

2004: *Lewis v. Johnson*, 359 F.3d 646 (3rd Cir. 2004). Counsel ineffective in robbery plea case for failing to file a notice of appeal, even though the defendant filed a pro se motion challenging the validity of his pleas on multiple grounds, including ineffective assistance of counsel. As the court noted, Petitioner relied on *Flores-Ortega* for his assertion that counsel had a constitutional duty to consult and advise him of his appellate rights, even though *Flores-Ortega* was decided after Petitioner's appeal. Analyzing the case under the AEDPA, the court held that *Flores-Ortega* did not create a "new rule" under *Teague* because "*Flores-Ortega*'s application of the *Strickland* standard was dictated by

precedent and merely clarified the law as it applied to the particular facts of that case.” *Id.* at 655. Thus, the holding in *Flores-Ortega* was applicable to the claim of ineffectiveness. The state court had applied a state court opinion holding, as a matter of law, that counsel acts reasonably in all cases where a notice of appeal is not filed and the defendant is silent. Application of this state law was “contrary to” clearly established law in *Strickland* and *Flores-Ortega*. Because counsel never met with Petitioner or filed an appeal, even though Petitioner clearly indicated an interest in challenging his conviction, counsel’s conduct was objectively unreasonable. No strategic reason could excuse this conduct because even if counsel “concluded that any appeal would be frivolous,” he could not disregard Petitioner’s desire to appeal. Prejudice found because Petitioner was denied his appeal. First appeal of right reinstated.

2003: *United States v. Snitz*, 342 F.3d 1154 (10th Cir. 2003). Appellate counsel’s failure to perfect the appeal requested by his client in a drug case was presumptively prejudicial.

B. U.S. District Court Cases

2010: *Brown v. United States*, 707 F. Supp. 2d 1009 (E.D. Mo. 2010). Counsel ineffective in drug case for failing to file a notice of appeal. The defendant sent counsel a letter the day after sentencing requesting that he file a notice of appeal, but counsel never received it. The defendant also called counsel’s office and spoke with his assistants, and counsel conceded this was possible. New appeal granted.

2009: *Richardson v. United States*, 612 F. Supp. 2d 709 (N.D. W. Va. 2009). Retained counsel per se ineffective in drug case for failing to file a notice of appeal. The defendant plead guilty, pursuant to a plea agreement that included a waiver of appeal. Following sentencing and while still timely, the defendant sent counsel a letter asking that he file an appeal of the sentence. Counsel responded with a letter to the defendant stating that he was no longer the attorney as the defendant terminated his services after sentencing and that he would have to pay counsel if he wanted him to do the appeal, as the appeal was not included in the retainer agreement. Counsel’s conduct was deficient because counsel is still obligated to protect the interests of the client upon termination. Here, counsel’s proper course was to file the notice of appeal and then inform the defendant the attorney client relationship had been terminated. This would have “adequately protect[ed] petitioner’s interests ‘to the extent reasonably practicable’ until such time as petitioner was able to retain other counsel or determine what other documents needed to be filed in conjunction with his appeal.” In short, until it is clear to both counsel and the defendant that the relationship has terminated, “the prudent and professionally responsible action is to presume that the relationship is still intact.”

2008: *Rivera v. Goode*, 540 F. Supp. 2d 582 (E.D. Pa. 2008). Appellate counsel ineffective under AEDPA for failing to perfect the direct appeal. Although a notice of appeal and

appellate brief was filed, counsel failed to file a statement of issues for appeal in the trial court as required by state law, which resulted in appellate issues being procedurally barred.

2007: *Espinal-Martinez v. United States*, 499 F. Supp. 2d 213 (N.D.N.Y. 2007). Counsel was ineffective in failing to timely notify the defendant that the court had declined to resentence him after the appellate court remanded after the decision in *United States v. Booker*, 543 U.S. 220 (2005), allowing the court that option. By the time, the petitioner got notice, he was time-barred from direct appeal. Prejudice established because the petitioner would have filed an appeal, which was evidenced by his initial appeal of the sentence. Leave to file a direct appeal granted.

Del Valle v. United States, 497 F. Supp. 2d 346 (D.R.I. 2007). Counsel was ineffective in failing to consult with the defendant about appealing. Prior to sentencing, the defendant informed counsel of his objection to enhancement based on a codefendant's possession of a gun and the possibility of appeal was discussed but no decision made since the court had not ruled yet. Following sentencing and the application of this enhancement the defendant and his wife attempted to contact counsel but counsel did not return their calls until after the time for filing a notice of appeal had passed. Prejudice established because the defendant would have filed an appeal. Judgment reentered in order to allow direct appeal.

2004: *Waldron v. Jackson*, 348 F. Supp. 2d 877 (N.D. Ohio 2004). Appellate counsel was ineffective in rape case for filing the notice of appeal four days late, which caused the defendant's appeal to be dismissed as untimely. Although more than one year passed before the filing of a habeas corpus petition, the court found that the petition was timely filed under 28 U.S.C. § 2244(d)(1)(B) because of "the impediment to filing an application created by State action." Appellate counsel was ineffective in failing to perfect a timely appeal in direct contravention of the petitioner's wishes and this ineffective assistance is "imputed to the state, and constitutes an impediment to filing an application created by the state." This state action "reverberate[d] over time" and prevented a timely habeas petition because counsel's failure could only be cured by requesting a delayed appeal in order to exhaust the issues in state court, which necessarily delayed the filing of the federal habeas petition. Thus, the "habeas clock did not begin until the disposition of his motion for leave to file a delayed appeal." On the merits, the court held that because the failure to perfect the appeal was caused by appellate counsel's ineffectiveness, the state courts refusal to allow a delayed appeal amounted to a due process violation. Writ granted on condition of the state courts allowing a delayed appeal in forma pauperis and with court-appointed counsel.

McIntyre v. Klem, 347 F. Supp. 2d 206 (E.D. Pa. 2004). Counsel was ineffective in failing to file a notice of appeal. Trial counsel was informed by the defendant's parents

following the trial that a new lawyer would be retained to represent the defendant. Counsel withdrew without following a notice of appeal. Counsel's conduct was deficient because counsel knew or reasonably should have known that the defendant desired to appeal and only had a few weeks to file the notice of appeal. Nonetheless, counsel failed to consult with the defendant about his desires. While the Pennsylvania courts held that counsel could not be ineffective for failing to file an appeal unless the client had asked counsel to do so, this holding was contrary to the Supreme Court's holding in *Strickland* and did not consider whether counsel had an obligation to consult with counsel as required by *Roe v. Flores-Ortega*, 528 U.S. 470 (2000). Thus, under the AEDPA, the state court ruling did not preclude habeas relief. The court held that counsel's conduct was deficient in failing to consult with the defendant because he knew that the defendant wanted to pursue an appeal and knew that the period to file an appeal might expire before the defendant's parents could retain new counsel. Counsel also knew that the defendant had contested guilt and been given a severe sentence and, therefore, had "every incentive to pursue an appeal." Under these circumstances, counsel should have consulted with the defendant and filed the notice of appeal and then moved to withdraw, which was permitted by state law. While the state court found that the defendant refused to speak to counsel, this finding did "not bar a finding of ineffective assistance of counsel" in light of the facts of *Roe* itself. Furthermore, the state court's finding was an unreasonable determination of the facts" because counsel testified that the defendant's parents informed him that the defendant refused to talk to him but counsel never attempted to contact the defendant directly. Prejudice was found because the evidence established that the defendant would have timely appealed but for counsel's failure to consult with him. The writ was granted conditioned upon the state allowing a new appeal.

Linen v. United States, 337 F. Supp. 2d 403 (N.D.N.Y. 2004). Counsel ineffective in felon in possession of firearm plea case for failing to file a notice of appeal as requested by the defendant. Although the court found that the "appeal likely has no merit," prejudice was presumed and the sentence reimposed in order to allow an appeal.

United States v. Edwards, 297 F. Supp. 2d 813 (E.D. Pa. 2004). Counsel was ineffective following guilty pleas to conspiracy and firearm offenses for failing to file a notice of appeal as his client specifically requested. Counsel's conduct was deficient because "[t]he decision to file an appeal is the petitioner's and counsel must complete this 'purely ministerial task' even if he disagrees with his client's decision." The court granted the petitioner leave to file a notice of appeal.

2003: *Bishawi v. United States*, 292 F. Supp. 2d 1122 (S.D.N.Y. 2003), *aff'd*, 109 Fed.Appx. 813 (7th Cir. 2004) . Appellate counsel was ineffective in failing to file a consolidated appeal raising issues from both a new trial motion and from the conviction and sentence. Petitioner was convicted of narcotics trafficking charges and filed an appeal. While the direct appeal was pending, counsel learned that the trial court may have had ex-parte

communication with the jury during its deliberations. The Seventh Circuit issued a general remand to the district court and included in its order the directive that, a new notice of appeal had to be filed by any party dissatisfied with the district court's judgment. The district court initially granted a motion for new trial. The Seventh Circuit vacated the district court opinion because the district court failed to hold an evidentiary hearing to determine prejudice. Following an evidentiary hearing, the district court denied the motion for new trial. Petitioner appealed but appellate counsel raised only the issue concerning the denial of new trial. Petitioner filed a 2255 petition asserting numerous issues some of which had been raised on appeal. The government conceded and the court held that appellate counsel had been ineffective in failing to file a consolidated appeal as had been clearly directed by the seventh circuit. Counsel's failure was not a strategic decision because counsel incorrectly believed petitioner could later challenge his conviction and sentence on direct appeal if his appeal from the denial of the motion for new trial was denied. Prejudice was found because counsel's failure was the equivalent of the failure to file a notice of appeal under *Flores-Ortega*. Prejudice was presumed. The court vacated the judgment and reimposed the sentence in order to permit petitioner to file an appeal. In essence, the court found that appellate counsel's ineffectiveness established cause and prejudice for the petitioner's failure to raise the substantive issues on direct appeal.

C. State Cases

2011: *Albright v. State*, 251 P.3d 52 (Kan. 2011). Appointed post-conviction counsel ineffective in failing to timely file notice of appeal in murder case. As there was a statutory right to counsel, the court found there was "a right to receive effective assistance of counsel" and applied *Flores-Ortega*. Appeal allowed.

2008: *State v. Patton*, 195 P.3d 753 (Kan. 2008). Counsel ineffective following plea in drug case for failing to perfect direct appeal when the defendant clearly expressed a desire to appeal his sentence.

Andrades v. Commissioner of Correction, 948 A.2d 365 (Conn. App.), *certification denied*, 957 A.2d 868 (Conn. 2008). Counsel ineffective in murder case for failing to file application for sentence review by the "sentence review division," as allowed by state law, when counsel had told the defendant he would do so.

People v. Ross, 891 N.E.2d 865 (Ill. 2008). Counsel ineffective for failing to file a timely notice of appeal in armed robbery case when the defendant had communicated his desire to appeal to counsel. Prejudice presumed and appeal allowed.

2007: *King v. State*, 154 P.3d 545 (Kan. App. 2007). Counsel ineffective following no contest plea to second-degree murder for failing to timely file the appellate brief which resulted

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in dismissal of the appeal of a sentence that was twice the guidelines range. Appeal reinstated.

2006: *Woepfel v. City of Billings*, 146 P.3d 789 (Mont. 2006). Appellate counsel ineffective in assault case for failing to perfect the appeal by filing a brief. Prejudice found because the defendant clearly indicated an intent to appeal by filing a notice of appeal. Appeal reinstated.

2005: *Louberti v. State*, 895 So.2d 479 (Fla. App.), *review denied*, 907 So.2d 1171 (Fla. 2005). Trial counsel ineffective for failing to file defendant's post-trial motion with 10 days. Although the trial court had allowed counsel 30 days, the time for post-trial motions under state law could not be extended. Counsel's conduct was prejudicial because of a double jeopardy violation that required reversal. The defendant was convicted of organized scheme to defraud but acquitted on two counts of grand theft based on the same alleged conduct. Acquittal on the theft charges required reversal and dismissal of the fraud charge.

2003: *Wallace v. State*, 121 S.W.3d 652 (Tenn. 2003). Counsel was ineffective in murder case for failing to file a timely motion for new trial which resulted in the waiver of all issues on direct appeal except for sufficiency of the evidence. Counsel had been retained for representation solely at trial. After conviction, counsel sent the defendant a letter instructing him on preparation of a motion for new trial and advising him of the legal issues to raise. Because counsel had not been given court approval to withdraw as attorney of record, the court refused to consider the defendant's timely filed pro se motion for new trial. Trial counsel later filed a motion for new trial and the defendant filed a second pro se motion for new trial, but these motions were denied as untimely. Counsel's conduct was deficient because counsel failed to file a timely motion for new trial or a motion to withdraw so the defendant could file his own pro se motion. While the retainer agreement purported to limit counsel's representation to trial work, "Taking necessary steps to preserve post-trial remedies, including filing of a motion for new trial are clearly responsibilities of counsel." *Id.* at 657. Prejudice found because counsel failure amounted to a denial of appeal, with the exception of sufficiency of the evidence claim. Prejudice presumed and a delayed appeal allowed.

II. APPEAL

A. U.S. Court of Appeals Cases

2011: *Showers v. Beard*, 635 F.3d 625 (3rd Cir. 2011). Appellate counsel ineffective in murder case for failing to assert ineffectiveness of trial counsel in failing to prepare and present rebuttal expert testimony regarding the properties of Roxanol or liquid morphine. The petitioner was convicted of murdering her husband, who died from oral consumption of a

lethal dose of the drug. The state's case was built on circumstantial evidence and testimony of a forensic pathologist that Roxanol is capable of being masked. The defense argued that the deceased committed suicide. Counsel consulted a psychiatrist prior to trial, who recommended that counsel secure an expert to address the impossibility of disguising Roxanol. This expert gave counsel the names and contact information for three qualified experts but counsel did not pursue this. Instead, counsel presented a lay witness friend on this issue. Counsel failed to establish key facts that would have established that a large dose of Roxanol cannot be masked without a large amount of liquid or food, if at all, and that no such substance was found in the deceased's stomach. Counsel explained that he did not ask some questions on this of the state's expert "because he feared asking questions for which he did not know the answers." While "it may be risky for an attorney to ask questions for which he believes the answer may be harmful," this "is no excuse for failing to elicit significant evidence when the risk of an adverse response has been created by counsel's failure to conduct a thorough investigation or understand key, undisputed facts in the record." "Even the most minimally competent attorney here would have consulted at least one of the experts suggested to him" by the defense psychiatrist. While not dispositive, the court noted the 1989 Guidelines calls for retention of necessary expert witnesses. Prejudice established as rebuttal expert testimony would have injected significant doubt of guilt. Appellate counsel's conduct was deficient and prejudicial as he relied solely on the record, did not conduct an independent investigation, and failed to assert trial counsel's ineffectiveness. Under AEDPA, the state court's conclusion to the contrary was an unreasonable application of clearly established federal law.

2010: *Theus v. United States*, 611 F.3d 441 (8th Cir. 2010). Counsel ineffective in failing to object either in the trial court or on appeal to the district court's error in imposing a ten-year mandatory minimum sentence for a quantity of cocaine that required only a five-year minimum sentence. The defendant was charged along with five co-defendants with conspiracy to distribute or possess with intent to distribute five kilograms or more of cocaine. The evidence at trial established, and the district court held post-trial, that the defendant was not a member of the conspiracy charged, but he was a member of a different conspiracy with two individuals not charged in the indictment. The presentence investigation report (PSR) attributed only 1.02 kilograms of cocaine to the defendant and explicitly concluded "there is not enough evidence to support that the defendant was involved with 5 kilograms of cocaine." The guidelines range for the defendant at 1.02 kilograms was 70-87 months, but the PSR inexplicably concluded that the 10 year mandatory minimum at 5 kg had to be applied rather than the 5 year mandatory minimum at 1.02 kg. The district court rejected the government's argument that the guidelines range should be based on 5 kg, but still imposed the mandatory minimum sentence based on that amount, despite announcing that the court would like to impose a sentence in the 70 - 87 month range. Counsel's conduct was deficient and prejudicial under these circumstances.

***Goff v. Bagley**, 601 F.3d 445 (6th Cir. 2010). Under AEDPA, appellate counsel ineffective in capital case ineffective for failing to assert the trial court's state law error in failing to afford the petitioner his right to allocution prior to sentencing. Although "there is no right to allocution under the federal constitution, there is a constitutional right to the effective assistance of appellate counsel," *id.* at 464 (internal quotations and citations omitted), "regardless of the fact that counsel's underlying failure is a matter of state law," *id.* Here, Ohio law provides the right of allocution prior to sentencing. State law also required reversal and resentencing if the trial court failed to address the defendant concerning this right. Thus, this was "an obviously winning claim" and counsel's failure to assert it on appeal was deficient and prejudicial. Although the defendant was advised of and waived his right to make an unsworn statement to the jury, this is "not equivalent" and is not a substitution for the right of allocution. The state court's denial of relief was an unreasonable application of federal law.

Ramchair v. Conway, 601 F.3d 66 (2nd Cir. 2010) (*affirming* 671 F. Supp. 2d 371 (E.D.N.Y. 2009)). Under AEDPA, appellate counsel ineffective in robbery case in failing to assert as error the trial court's denial of a motion for mistrial. During trial, the defense argued that the line-up conducted pretrial with the sole identification witness was suggestive, as the defendant was South Asian and the others in the line-up were Hispanics and an African-American. In response, although it had not done so during the suppression hearing or the first two trials, the state elicited evidence that defense counsel had been present at the line-up and failed to object, which cast the defense counsel as a witness against his client on the central issue in the case. Counsel requested permission to testify, but the court refused believing that counsel should have anticipated this prior to trial and sought to withdraw. Counsel then sought a mistrial, which the court denied without explanation. Appellate counsel asserted only that the trial court erred in refusing to allow counsel to testify. Counsel believed the mistrial claim was not separately preserved and was only another way of preserving the denial of the right to testify. Thus, she believed erroneously that relief could be granted only if the appellate court found that counsel should have been allowed to testify. The state court decision denying relief was an unreasonable application of *Strickland*. Rather than granting a new appeal, the court granted a new trial because it had already been almost 13 years since the defendant's trial.

King v. United States, 595 F.3d 844 (8th Cir. 2010). Appellate counsel ineffective in drug plea case where the defendant was sentenced as a career offender. Under the defendant's plea agreement, he was to be sentenced using a base offense level of 32 and he was waiving his right to appeal. Based on the PSR, which concluded he was a career offender, the court actually used a base offense level of 34. The defendant appealed and filed a pro se brief asserting that, under the sentencing guidelines, he did not qualify as a career offender. Appellate counsel was ineffective in failing to rebut the state's argument that the appeal had to be dismissed due to the pretrial agreement. In short, because the

defendant had not been sentenced in accord with the agreement, the provision that he waived appeal was not valid. If appellate counsel had adequately asserted this basis, the defendant's pro se brief would have been considered. The issue asserted had merit and required that the sentence be vacated.

- 2008:** *Suggs v. United States*, 513 F.3d 675 (7th Cir. 2008). Appellate counsel was ineffective in failing to challenge the enhancement of the defendant's sentence based on possession of a dangerous weapon during a drug conspiracy. Counsel sent the defendant a letter outlining three issues he intended to assert on appeal, which included the enhancement issue, but then inexplicably raised only one of the other issues. Counsel's conduct was deficient in failing to assert the two-point enhancement issue. The witness testified only that he had seen the defendant with "weapons," but the district court concluded that the witness testified he had seen the defendant with a "gun." This was error because the testimony about weapons was not sufficient to establish a "dangerous" weapon as required for the enhancement. This error was "obvious" and had been objected to by trial counsel. The issue was also "significant" and "clearly stronger" than the indictment variance issue argued on appeal. Prejudice established because the enhancement put the guideline range from 292-365 months and the defendant was sentenced to 300 months. Without the enhancement the range was reduced to 235-293 months "[t]hat could very well net [the defendant] a much shorter sentence on the conspiracy count."
- 2006:** **Franklin v. Anderson*, 434 F.3d 412 (6th Cir. 2006). Appellate counsel was ineffective in failing to assert as error the trial court's failure to excuse a biased juror. While this issue was defaulted, cause and prejudice was also established due to the ineffectiveness of counsel. The voir dire indicated that the juror "so completely misunderstood the presumption of innocence and burden of proof that she could not have made a fair assessment of the evidence of . . . guilt." "Even after she was corrected three times by the judge, she still insisted with her last statement that the defendant had to be proven innocent." Because the seating of a biased juror can never be harmless, "the State can make no argument that . . . trial counsel acted strategically" in not excusing this juror. "To permit this would be to allow trial counsel to waive the defendant's right to an impartial jury." Aside from this issue, "counsel did not meet the ABA standards in their dealings with him concerning his appeals," including failing to meet with the defendant or even have phone conversations.
- 2005:** *Cirilo-Munoz v. United States*, 404 F.3d 527 (1st Cir. 2005). Appellate counsel ineffective for failing to assert sentencing error on charge of aiding and abetting the murder of an on-duty policeman. The trial court found that the murder was motivated by the officer's status, which elevated the defendant's sentence range from 27-34 years to life. Trial counsel objected because there was no evidence the defendant knew the victim was a police officer. Appellate counsel was ineffective because the jury had made no determination on this issue and the trial court's finding was not supported by the evidence. The court rejected the

government's argument of strategy because this issue would have "built upon" the issues raised challenging the conviction and because "[o]ne would need a potent reason for omitting the enhancement argument" when the difference in potential sentences was so great.

Assuming that the omission of the argument was deliberate, the best one can say for counsel is this: that in some situations lawyers think—usually in error—that by omitting a good argument, they can thereby increase the chance of prevailing on a more doubtful argument directed to a more far-reaching result. However, in this instance, such a calculation would have been manifestly unreasonable. . . .

Prejudice found because reversal would have been required if the issue had been raised on direct appeal. Remanded for new sentencing.

Ballard v. United States, 400 F.3d 404 (6th Cir. 2005). Appellate counsel ineffective in conspiracy to distribute drugs case for failing to challenge the defendant's sentence. The evidence established that the defendant had been a "mule" involved in transporting cocaine and marijuana. The jury returned only a general verdict of guilt, which did not specify what substances the defendant had transported. The court found that the evidence established only that she had transported cocaine and sentenced her accordingly. While her case was pending on appeal, the Sixth Circuit held in another case that a when a general verdict was returned in a conspiracy involving multiple drugs, the defendant should be sentenced only as if he had distributed only the drug carrying the lower penalty. After the Supreme Court's decision in *Apprendi*, the Circuit also held that failure to instruct the jury to determine both the type of drug and the drug quantity involved amounts to plain error. Counsel's conduct was deficient in not raising this issue. "[W]hile we do not require attorneys to foresee changes in the law, once a change—particularly an important and relevant change—does come about, we do expect counsel to be aware [of] it." *Id.* at 408. Counsel's conduct was also deficient because counsel was aware that one of the co-defendant's won on appeal on these same issues. "There is simply no rational basis for completely foregoing an argument that was not only potentially, but actually, successful." *Id.* at 409. The court found *Strickland* prejudice by applying a plain error standard to determine whether the trial court improperly determined the sentence.

Sanders v. Cotton, 398 F.3d 572 (7th Cir. 2005). Appellate counsel ineffective in murder case for failing to challenge on appeal the trial court's failure to properly instruct the jury on the elements of murder, which required that the state prove the absence of sudden heat. The trial court's instructions on murder did not mention sudden heat. The instructions on voluntary manslaughter allowed conviction if the state proved the defendant was acting under sudden heat. Trial counsel proposed an instruction that would have properly required the State to prove the absence of sudden heat for murder. On appeal, trial

counsel did not raise this issue, but counsel did not state a strategy. Instead, counsel could not remember why he did not raise the issue. In addressing the substantive due process claim, the court held that the issue was not procedurally defaulted in state court and even if it was the default was overcome because appellate counsel's ineffectiveness established cause and prejudice for the default. Under the AEDPA, the court found that the state court's finding that the instructions were adequate was unreasonable because the jury instructions not only failed to properly state the burden of proof, but affirmatively misstated it when the manslaughter instructions included the element of proving the existence of sudden heat rather than proving the absence of it for murder. Counsel's conduct was deficient because counsel raised three issues concerning instructions on transferred intent, admission of prior bad acts, and abuse of discretion in ordering consecutive prison terms. The sentencing issue was clearly weaker because the trial court was given "wide discretion." The two other issues were also weaker because "neither argument relied on controlling Indiana precedent that would have warranted a new trial." This issue was "an obvious and stronger argument than the arguments" made by appellate counsel. With respect to prejudice, the court held that the state court's finding that trial counsel's proposed instruction was a misstatement of the law was also an unreasonable determination of the facts, thus requiring no deference. The state court also unreasonably applied the law because "Indiana law requires reversal and a new trial" under the facts of this case. If the issue had been raised, the state court "would have been bound by law" to grant a new trial.

2004: **Mapes v. Tate*, 388 F.3d 187 (6th Cir. 2004). Appellate counsel was ineffective in capital case for failing to assert on appeal that the trial court erred in instructing the jury in sentencing that it was not permitted to consider mitigating evidence related to a prior murder conviction used in aggravation. Trial counsel objected to this instruction, but appellate counsel asserted only trial phase issues and one unrelated sentencing issue on appeal. In determining whether an attorney on direct appeal performed in a competent fashion, the court listed eleven factors to be considered. In applying the factors to this case, the court held that the issue not raised was "significant and obvious" because the jury was not allowed to consider mitigation in violation of the holding of *Eddings v. Oklahoma*, 455 U.S. 104 (1982), which had been decided a year before this trial. The omitted issue was also much stronger than any of the issues raised, which mostly challenged the trial phase despite evidence of overwhelming guilt and in some instances "were asserted in the face of established law to the contrary." The court also discussed other factors before concluding that "[n]o competent attorney, in the circumstances of this case, would have failed to raise this issue." The court also found a reasonable probability that the defendant would have prevailed on appeal and conditioned the writ on the state courts allowing a new direct appeal.

United States v. Reinhart, 357 F.3d 521 (5th Cir. 2004). Appellate counsel was ineffective in conspiracy to commit sexual exploitation of children case for failing to

assert the trial court's sentencing error on appeal. The district court held the defendant accountable in sentencing for two minor males depicted in a pornographic videotape created by the defendant's co-conspirator prior to the formation of the conspiracy. Counsel objected during sentencing to the court's consideration of these two minors, but did not challenge the district court's action on appeal. The court held that consideration of these two minors was inappropriate under the sentencing guidelines, because the defendant played no part in the creation of the videotape, which was created well before the conspiracy began. Counsel was deficient for failing to assert this meritorious issue on appeal. Prejudice found because the appropriate sentencing guideline range would have resulted in a sentence shorter by five years than the sentence imposed on the defendant, which is sufficient to establish prejudice under *Glover v. United States*.

2003: *Caver v. Straub*, 349 F.3d 340 (6th Cir. 2003). Appellate counsel was ineffective in assault with intent to commit armed robbery case for failing to assert trial counsel's ineffective assistance. On appeal, counsel asserted a claim of instructional error and insufficiency of the evidence. Following affirmance, the petitioner filed a pro-se application to the state Supreme Court asserting generally that appellate counsel was ineffective for failing to assert the claim of ineffective assistance of trial counsel. In state post-conviction, the petitioner asserted appellate ineffectiveness for failing to raise trial counsel ineffectiveness because trial counsel was not present during a jury question and re-instruction of the jury. The state court held that the petitioner had not demonstrated good cause to excuse the failure to present the issue in his direct appeal. The state court also found that appellate counsel was not ineffective. On appeal, the petitioner asserted appellate counsel ineffectiveness for failing to assert trial counsel's ineffectiveness for different specific reasons. The Sixth Circuit first held that the claim of appellate ineffectiveness was not procedurally defaulted due to failure to fairly present the claim in state court because the state did not raise the issue of default before the district court and instead argued only the merits. The petitioner also did not procedurally default his claim of ineffective assistance of trial counsel because, while it was not raised in his direct appeal, he did raise it in his pro se appeal to the state Supreme Court in a general fashion. Because it was a pro se application and less stringent standards apply the court found that the issue was fairly presented to the state court. Deficient conduct found because the issue of trial counsel's absence during the jury re-instruction was a much stronger issue than the two plain error issues asserted by appellate counsel. Prejudice was found because, if the issue had been raised on appeal, there is a reasonable probability that the result of the state appeal would have been different. In finding prejudice, the court noted that the Supreme Court has not expressly considered whether jury instruction is a critical stage that requires the presence of counsel. The Sixth Circuit held, however, that it is a critical stage. Therefore, trial counsel's absence required a presumption of prejudice. In analyzing the case under the AEDPA, the court found that the state court's decision was an unreasonable application of clearly established federal law in *Strickland*. In essence, the court characterized the finding of appellate counsel's ineffectiveness as both cause and

prejudice for failure to assert trial counsel's ineffectiveness on appeal and as a free standing constitutional error.

United States v. Skurdal, 341 F.3d 921 (9th Cir. 2003). Appellate counsel was ineffective in drug case for failing to file a proper *Anders* brief in support of his motion to be relieved as counsel. In the § 2255 proceeding, the district court found that all issues raised were procedurally barred because the defendant had failed to raise them on direct appeal. The ineffectiveness of appellate counsel was found to excuse the procedural default and the district court was ordered to address the issues.

Joshua v. Dewitt, 341 F.3d 430 (6th Cir. 2003). Trial and appellate counsel were ineffective in drug case for failing to move to suppress evidence. The defendant was stopped by a highway patrolman for speeding. The highway patrolman did a license check on the defendant and learned that there was an entry in the station's "read and sign" book, which contained police intelligence information. The entry in the book reported that the defendant was a known drug courier who transported illegal narcotics between several cities. Based on this information, the defendant was detained for approximately forty-two minutes in order to allow time for a drug dog to come to the scene. When the dog arrived, it alerted, and a large quantity of cocaine was found. The defendant's girlfriend then told the police that the drugs belonged to the defendant. Prior to trial, counsel moved to suppress the evidence solely on the basis that the length of the traffic stop alone required suppression. The trial court denied the motion, and the defendant entered a no contest plea. The court found that counsel's conduct was deficient in failing to move for suppression under *United States v. Hensley*, 469 U.S. 221 (1985), which held that reliance on a flyer or bulletin can justify a brief detention but can do so only if the officer who issued the flyer or bulletin had articulable facts supporting reasonable suspicion that the person wanted had committed an offense. The court found a reasonable trial attorney would have raised the *Hensley* issue at trial. Prejudice was found because the state failed to offer any evidence from the officer who provided the information from the "read and sign" book and because the state had never contended that there was a justifiable basis for the entry. The court likewise found appellate counsel ineffective for failing to raise the issue on appeal under the state plain error rule. Prejudice was found because *Hensley* bars the admissibility of the evidence seized at the scene of the defendant's arrest, including both the drugs and his girlfriend's statement. Without this evidence, there was a substantial probability that the defendant would not have been convicted. Analyzing the case under the AEDPA, the court found that the state court decision was contrary to clearly established Supreme Court precedent in *Hensley*.

B. U.S. District Court Cases

2011: ****Richardson v. Branker***, 769 F.Supp.2d 896 (E.D.N.C. 2011). Appellate counsel ineffective in failing to argue that petitioner was prejudiced because the trial court failed

to submit a statutory mitigating circumstance relating to petitioner's mental age to the jury. Under state law, established months before this trial and appeal, the "age" mitigator refers not just to "chronological age" but also to "mental age or emotional immaturity." A court's failure to give a required statutory mitigating circumstance instruction is reversible error, unless the State can show that it was harmless beyond a reasonable doubt. Here, defense experts testified the defendant had an IQ of 73 and that his overall functioning was that of an 11-12 year-old. Counsel's conduct was deficient as he had "a mistaken understanding of the law." Prejudice was clear, especially since the jury sent out a note indicating difficulty reaching a unanimous decision on whether the mitigating factors outweighed the aggravating factors in sentencing. Two aggravators and two mitigators were found. If the jury had been instructed on the age mitigator, it clearly "could have influenced the jury, or at least a single juror." The state court's determination to the contrary was an unreasonable determination of the facts and an unreasonable application of *Smith v. Robbins* and *Strickland*.

2010: *United States v. Monnier*, 718 F. Supp. 2d 1040 (D. Neb. 2010). Appellate counsel was ineffective in failing to challenge the defendant's sentence imposed prior to *Booker*. The defendant was convicted of conspiracy to distribute 500 grams or more of methamphetamine and distribution of less than 50 grams that resulted in death. The court found the guidelines range to be 360 months to life. The court invited argument on a downward-departure based on the victim's contributory conduct, but ultimately concluded there was no authority for a downward departure on that basis. The court sentenced the defendant to 360 months on each count to be served concurrently. Appellate counsel did not appeal the denial of the downward departure or otherwise address sentencing issues, even though the appellate court had invited supplemental briefing after the Supreme Court's decision in *Blakely v. Washington*, 542 U.S. 296 (2004), and cert. had been granted in *Booker* several weeks prior to oral argument in this case. Worse yet, in response to court questions, counsel reported that there was nothing in the trial record to indicate the court would have imposed a lower sentence if the Guidelines were advisory only. Counsel still did nothing even after *Booker* was decided, even though this case remained pending for another six months. Counsel's conduct was deficient as "[c]ounsel was aware, or should have been aware" of the trial court's reluctance to impose the "then-mandatory" sentence of 360 months, as "the record contained numerous indications that the court was predisposed to give a lower sentence if possible," including referring to the mandatory minimum sentence as "harsh" and "too long," stating the court had no other choice, urging counsel to pursue the downward departure issue on appeal, and urging the defendant to pursue this via 2255. Counsel was also ineffective in failing to appeal the denial of the downward departure based on the victim's contributory conduct. Even before *Blakely* or *Booker*, this was appealable and the court urged him to appeal. Sentence reimposed at the statutory mandatory minimum of twenty years.

Contreras v. United States, 682 F. Supp. 2d 771 (S.D. Tex. 2010). Appellate counsel ineffective in failing to file a *Booker* claim on appeal in drug trafficking case. The defendant was sentenced prior to *Booker* under the mandatory sentencing guidelines. His appeal was filed ten months after *Booker*, which allowed re-sentencing from cases decided prior to *Booker* but still on direct appeal. Nonetheless, counsel failed to assert this issue on appeal. Remanded for resentencing.

2009: *Hicks v. Howton*, 675 F. Supp. 2d 1050 (D. Ore. 2009). Under AEDPA, trial and appellate counsel ineffective in sexual abuse case. Appellate counsel was ineffective in failing to assert error in the trial court's overruling objection to the prosecutor's improper arguments in closing. The prosecutor repeatedly argued that if the jury believed the alleged victim's testimony, it had to convict. This argument was outrageous and misleading as a required element of the offense was that the touching had to be for the purpose of sexual gratification or arousal. Counsel erred in filing a "no merits" brief, as this issue was meritorious. In addition, by filing a "no merits" brief, "appellate counsel put a client with significantly impaired reading, writing and reasoning skills in the position of having to formulate and write legal claims and supporting arguments for his appeal, something he was incapable of. This in effect denied [the defendant] his right to appeal."

**Albrecht v. Beard*, 636 F. Supp. 2d 468 (E.D. Pa. 2009) (Sentencing in August 1980). Under AEDPA, appellate counsel was ineffective in failing to assert *Mills* error. Because the state appellate court did not reach the merits of the question, review was *de novo*. Even though trial counsel did not assert this issue, "[i]n 1986, Pennsylvania courts applied a relaxed waiver doctrine in capital cases on direct appeal." Thus, appellate counsel could have asserted this issue and obtained merits review. Although *Mills v. Maryland*, 486 U.S. 367 (1988) was decided after the direct appeal, "*Mills* is not a substantial departure from the principle announced in the *Lockett* line of cases, and competent appellate counsel could have, and should have, recognized and litigated the mitigation unanimity issue based on established U.S. Supreme Court precedent." Likewise, "there was no conceivable strategic basis for failing to do so." Prejudice was also established.

[T]here is a reasonable probability that competent appellate counsel would have persuaded the court that the *Lockett* line of cases rendered the sentencing-phase jury instructions unconstitutional. Even if the Supreme Court of Pennsylvania had denied the claim, the United States Supreme Court granted certiorari on an identical claim only months later. Accordingly, it is reasonable to presume Petitioner would have obtained relief on direct review on the mitigation unanimity issue had it been raised.

Id. at ___ (citations omitted).

**Judge v. Beard*, 611 F. Supp. 2d 415 (E.D. Pa. 2009) (sentenced in April 1987). Trial and appellate counsel ineffective for failing to assert *Mills* error based on the trial court's instructions that "erroneously led the jury to believe that it could not return a verdict at the penalty phase of the trial without agreeing unanimously both as to individual mitigating circumstances and the ultimate penalty." Counsel's conduct was deficient, even though the case was tried before the Supreme Court granted cert. or issued the opinion in *Mills v. Maryland*, 486 U.S. 367 (1988). The case was pending on direct appeal at the time of the decision. Although the Supreme Court determined in *Beard v. Banks*, 542 U.S. 406 (2004) that *Mills* announced a new rule that could not be retroactively applied to cases on collateral, Third Circuit cases prior to *Beard* concluded that *Mills* was simply an extension of *Lockett v. Ohio*, 438 U.S. 586 (1978) and *Eddings v. Oklahoma*, 455 U.S. 104 (1982). Thus, the court held that "reasonably competent defense counsel would or should have been aware of the ongoing developments in the state of capital law in April, 1987, and subsequent thereto." There was also no conceivable strategy for failing to object, "as the worst that could have happened would have been its denial."

2008: *Showers v. Beard*, 586 F. Supp. 2d 310 (M.D. Pa. 2008). Under AEDPA, trial counsel was ineffective in murder trial for failing to present rebuttal expert testimony and appellate counsel was ineffective for failing to assert this issue on direct appeal. Petitioner was charged with the murder of her husband, who died from ingestion of liquid morphine Roxanol. The defense asserted that his death was a suicide. The state presented an expert who testified: (1) the taste of Roxanol could be disguised in food or drink, and (2) there was no evidence of forced swallowing. While counsel attempted to refute this in cross and in closing argument, the only evidence the defense presented was a lay witness to testify that the taste of Roxanol could not be masked. Counsel's conduct was deficient because counsel had retained a forensic psychiatrist prior to trial to review the victim's state of mind. The psychiatrist interviewed pharmacists and nurses that administered the drug, along with the pharmacist that prescribed the medication used in this case, and learned that it is difficult to disguise the taste. He informed counsel that they needed to call an expert to testify about the drug, which he could not do because he was not a toxicologist, and gave the expert names of three possible experts. "[W]hile . . . this case does not involve the death penalty, the guidelines associated with defending a death penalty case are nevertheless instructive as to the role of defense counsel in preparing a defense in a criminal case potentially involving the use of a medical expert." Counsel failed to adequately investigate here. *Id.* (citing ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989)). Counsel knew the administration of the Roxanol was a crucial issue, but did not present a rebuttal defense expert. The cross-examination and counsel's arguments "did nothing to negate" the state evidence because the jury was instructed that counsel's arguments do not constitute evidence. The state court finding to the contrary "cannot be reasonably justified under *Strickland*" and the factual determination that counsel adequately

performed “is plainly controverted by the evidence.” Prejudice found because counsel could have presented the testimony of a forensic pathologist to establish: (1) the taste of the Roxanol could be disguised only in a large amount of a sweet-tasting or bitter substance; (2) the autopsy report showed no evidence of any such diluting or masking substance; and (3) the autopsy report did not indicate forced swallowing. Thus, the pathologist concluded the Roxanol was swallowed voluntarily. This testimony “would have been more convincing than testimony from a close family friend” and would have made the “innocence claim . . . considerably more compelling than a simple denial of guilt.” The state court’s finding of no prejudice “cannot be reasonably justified under *Strickland*.” Appellate counsel’s decision to pursue only eight issues on appeal, excluding this issue, was deficient and prejudicial.

United States v. Stover, 576 F. Supp. 2d 134 (D.D.C. 2008). Appellate counsel ineffective in drug conspiracy case for failing to challenge the drug quantity calculation. Counsel’s conduct was deficient because the court calculated the sentence based on an understanding that the heroin involved was diluted to 20% purity. The co-defendants challenged this because the heroin that was actually seized had purity levels between 27%-29%. Prejudice established.

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

****Moore v. Mitchell***, 531 F. Supp. 2d 845 (S.D. Ohio 2008) (sentencing in November 1994). Under AEDPA, trial counsel was ineffective in capital sentencing for failing to adequately interview the retained defense expert prior to presenting his testimony, which undercut the mitigation argument and established that the defendant intentionally killed the victim. Appellate counsel was ineffective for failing to assert the preserved issues that the court’s instructions improperly allowed “the unconstitutional interpretation that a life verdict could only be rendered if the jury *unanimously* found that the aggravating circumstances did not outweigh the mitigating factors, or in other words, only if the jury unanimously rejected death.” As part of this, counsel did not assert the preserved issue

that the trial court erred in refusing to instruct the jury that mitigating circumstances need not be found unanimously.

2007: *Hays v. Farwell*, 482 F. Supp. 2d 1180 (D. Nev. 2007). Under AEDPA review, trial/appellate counsel was ineffective for numerous reasons in case where the petitioner was convicted of four counts of sexual assault on a minor and four counts of lewdness with a minor for alleging sexually abusing his oldest daughter, who was then eight years old. While many of the petitioner's claims had not been presented in state court and there was no showing of cause and prejudice, "the default was forgiven based on his preliminary evidence demonstrating to this court that he is actually innocent of the charges against him." Most of the claims were reviewed de novo because they had not been raised in state court or had been procedurally barred in state court. The charges arose because the petitioner's wife, who "was an abusive and neglectful mother" of their five children, "wanted desperately to be released from the responsibility of her five young children and from her marriage." In order to achieve her goals, she "schooled and coached eight-year old Jennifer about adult sexual behavior and then threatened and coerced her into making accusations of sexual abuse against her father," who was not himself abusive to the children but "was unable, or unwilling to stop his wife's actions" in general. Before reaching the issues related to counsel, the court granted relief on the bases of: (1) insufficient evidence to support the convictions; (2) improper denial of a new trial when the daughter, who was no longer in her mother's custody, immediately confessed after the trial that her testimony was false and had been coerced; (3) double jeopardy; and (4) prosecutorial misconduct. Counsel was also held to be ineffective during trial for: (1) failing to request an evidentiary hearing on the motion for new trial in order to present the daughter's testimony concerning the recantation; (2) failing to seek an independent medical expert to challenge the testimony of the examining nurse, which would have resulted in testimony (supported even by the state's expert in habeas) that the photographs taken of the girls genitalia revealed no evidence of abuse or anything abnormal; (3) conceding guilt in closing argument; (4) failing to challenge the veracity or expertise of the social worker and the examining nurse called as state's witnesses and "merely enhancing the State's evidence by reinforcement"; (5) failing to object to the prosecutor's improper argument denigrating the presumption of innocence; and (6) failing to argue on the defendant's behalf at sentencing. The same counsel was also ineffective on direct appeal because counsel challenged only the sufficiency of the evidence and the denial of the motion for new trial. While the defendant personally filed a supplemental brief asserting additional errors, including the prosecutorial misconduct and double jeopardy, "[t]hose claims received little consideration by the state high court." Because those claims were also meritorious, as reflected in the district court's holdings, counsel was ineffective on appeal.

Richardson v. United States, 477 F. Supp. 2d 392 (D. Mass. 2007). Appellate counsel ineffective in perjury case for failing to file supplemental briefs on appeal concerning the

sudden change in law caused by the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), in which the mandatory nature of the Sentencing Guidelines was found to be unconstitutional and the Guidelines were made advisory. Counsel's conduct was deficient because, under Circuit law, the issue had been preserved at trial due to *Apprendi* arguments. Counsel's conduct was also unreasonable given the "sea change" in the law caused by *Booker*, which could not be explained by a tactical decision. Prejudice found. Even though the 2255 judge was the trial judge, the court declined comment on whether he would give the same sentence after *Booker* and noted that it was his practice, because of a prior "professional rebuke" discussed in detail in the opinion, to reassign cases to a different court when remanded to him for resentencing. While he found it difficult to determine a reasonable probability of a different sentence "from publically available materials" of a different District Court judge in Boston, he found, based on confidential data that he was "privy to," "a slightly less than even chance of obtaining a reduced sentence" from another judge and, therefore, vacated the sentence and ordered the case be reassigned to another judge.

2004: *Banyard v. Duncan*, 342 F. Supp. 2d 865 (C.D. Cal. 2004). Trial counsel was ineffective in failing to investigate and object to the use of a prior assault conviction as a "serious felony" in sentencing the defendant to 25 years to life under the "Three Strikes Law" following a conviction for possession of a controlled substance. Appellate counsel was also ineffective for failing to assert trial counsel's ineffectiveness. Counsel's conduct was deficient because counsel advised the defendant to admit to two prior serious felony convictions even though the defendant's second strike was not a "serious felony," as required by state law. The second strike was for an assault conviction, "which arose from a domestic dispute and is the only arguably violent behavior in [the defendant's] record." The court found that the record on this offense revealed that, although the defendant was initially charged with a serious felony, he ultimately plead no contest only to assault, which was not a serious felony, and was sentenced to time served and probation. The court found that the state court erred in its judgment in finding that the defendant entered a no contest plea to a serious felony when the plea transcript revealed otherwise. Even if the alleged victim of the assault was believed, the "minor nature" of the defendant's "assault conviction show that it was outside the heartland of what would normally constitute assault." In addition, the "sentence of probation is not consistent with a desire to punish [the] crime as a serious felony." Without any real analysis, the court held, under the AEDPA, that the state court's decision was an unreasonable application of clearly established federal law."

Casey v. Frank, 346 F. Supp. 2d 1000 (E.D. Wis. 2004). Trial and appellate counsel were ineffective in sexual assault case for failing to obtain the case file from the defendant's previous attorney, which contained numerous witness statements undermining the credibility of the alleged victims and an alleged corroborating eyewitness. The defendant was initially charged in 1993 for sexually assaulting a girl in the neighborhood. He was

represented by a public defender, who assigned an investigator to interview potential witnesses. The investigator took a number of statements that raised questions about the credibility of the alleged victim and the prosecutor ultimately dismissed the charge without prejudice. A year later, the defendant's step-daughter alleged that the defendant sexually assaulted her, but the prosecutor brought no charges. In 1997, the stepdaughter alleged that the defendant had assaulted her in 1992 and that she witnessed the defendant assaulting the neighbor girl in the same time period. The defendant was charged with both assaults and retained counsel. Counsel requested two specific documents from the defendant's prior counsel, but did not request the entire file, which contained numerous witness statements challenging the credibility of both alleged victims and an alleged corroborating eyewitness. He also failed to independently discover the witnesses that previously gave exculpatory statements. As discussed in the section on numerous deficiencies by trial counsel, the court found that trial counsel was ineffective. New appellate counsel was also ineffective in failing to obtain the file and to assert trial counsel's ineffectiveness in a post-conviction motion. Unconstrained by the AEDPA because the state court did not address the issue raised before it, the court held that counsel knew the prior attorney's file contained witness statements but chose to proceed without obtaining them. This conduct was unreasonable because "[a] lawyer may not make a strategic decision of such significance without conducting an investigation." While counsel faced a filing deadline, counsel did not request an extension to obtain the file, when such requests were routinely granted, or discuss the matter with the defendant. Although the state court did not specifically address the prejudice analysis under *Strickland* and it was "debatable whether AEDPA applies to the court's determination on this point," *id.*, the court applied the AEDPA standard. The state court's determination was unreasonable because the court "turned a blind eye to the potential impact of the witnesses who gave statements" to prior counsel. Indeed, the state court

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

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

C. State Cases

2011: *Commonwealth v. Fink*, ___ A.3d ___, 2011 WL 2650193 (Pa. Super. Ct. July 7, 2011). Appellate counsel in murder case ineffective for failing to sufficiently brief the circumstances of the defendant's confession. Trial counsel filed a pre-trial motion seeking suppression. While this issue was raised on appeal, counsel failed to provide

adequate citation to authority and analysis in briefing, which resulted in waiver and no merits review. Prejudice was presumed under *Cronic*.

Mauicio v. State, 941 N.E.2d 497 (Ind. 2011). Appellate counsel ineffective in murder case for failing to assert sentencing error in direct appeal. At the time of trial, there were two conflicting statutory amendments on the books: one providing a presumptive sentence of 50 years and the other a presumptive sentence of 40 years. The court applied the 50 year amendment here and sentenced the defendant to 50 years. Appellate counsel clearly should have raised this issue on appeal. As the court and the legislature later determined that the 40 year presumptive sentence was the appropriate one, case remanded for resentencing.

2010: *Brown v. Baskin*, 690 S.E.2d 822 (Ga. 2010). Appellate counsel ineffective in armed robbery case for failing to assert trial counsel's ineffectiveness during direct appeal. At the time of trial, the alleged victim was facing criminal charges for possession of cocaine with intent to distribute and counsel sought to cross-examine him on that issue. The trial court ruled initially that the cross would not be permitted absent proof of conviction, but allowed counsel the opportunity to establish an entitlement to cross on the basis of a pending indictment. Trial counsel failed to pursue the issue further and appellate counsel failed to assert trial counsel's ineffectiveness. Prejudice established because the victim was a key witness and the jury had indicated a deadlock at one point prior to conviction.

Whitmore v. State, 27 So. 3d 168 (Fla. App. 2010). Appellate counsel ineffective in aggravated battery case for failing to assert as error the trial court's consideration of the defendant's continued protestation of innocence against him in sentencing, which was error under state law.

State v. Aberegg, 945 N.E.2d 1148 (Ohio App. 2010). Appellate counsel ineffective in telecommunications harassment case for failing to challenge the defendant's overbroad and unreasonable conditions on probation. The defendant was convicted for harassing calls to the prosecutor's office. As part of the probation conditions, he could not be on any property owned or operated by the City of Wadsworth, which could include any street or sidewalk of the city, and could not call any city office. The only exception was the Probation Department. Appellate counsel's conduct deficient and prejudice established.

Rhoiney v. State, 940 N.E.2d 841 (Ind. App. 2010). Appellate counsel ineffective in murder and criminal confinement case for failing to assert error in court imposing consecutive sentences. The defendant was sentenced prior to 2005 statutory amendment changing presumptive sentences to advisory sentences. Under state law the court could impose the sentences consecutively only if the court found at least one aggravating circumstance and found that the aggravating circumstances outweighed mitigating

circumstances. Here, the court found the aggravating and mitigating factors to be in equipoise so state law required that the sentences run only concurrently. Appellate counsel should have recognized this error as significant and asserted the issue on appeal.

2009: *Ex parte Miller*, 330 S.W.3d 610 (Tex. Crim. App. 2009) (*rehearing granted* January 27, 2010). Appellate counsel was ineffective in murder case for failing to assert, for purposes of habitual offender sentencing, that the evidence was insufficient to prove that the defendant's 1976 burglary conviction was for an offense committed after his 1972 possession of heroin conviction became final. Counsel's conduct was deficient because the state's proof was based only on the defendant's penitentiary packet, which did not contain the indictment or offense report for the 1976 judgment, "so it is impossible to tell from the face of the burglary judgment exactly when this second offense was committed." While there was evidence available to show that the burglary was committed in November 1975, this evidence was not presented in sentencing. Thus, if counsel had asserted this error, reversal of sentence was required.

Powers v. State, 38 So. 3d 764 (Ala. Crim. App. 2009). Appellate counsel in theft of property case was ineffective for failing to challenge the trial court's denial of the defendants' request to withdraw their waiver of the right to counsel. The defendants, husband and wife, initially waived counsel but then sought to withdraw the waiver. The trial court offered to appoint counsel for them but they declined while still saying they wanted to withdraw the waiver. The trial court took no other action and proceeded to trial with them representing themselves. Counsel's conduct was deficient in failing to challenge this issue because a state criminal rule allows a waiver of counsel to be withdrawn at any time and for any reason. The defendants were thus entitled to counsel from that point forward. Although they declined court-appointed counsel, the trial court never offered them the other options under state law of a continuance to obtain retained counsel or appointment of a standby counsel. "Unless a defendant has or waives assistance of counsel, the Sixth Amendment is a jurisdictional bar to a valid conviction and sentence." "Appellate counsel's failure to challenge a jurisdictional defect was deficient performance and per se prejudicial." The court also reversed on the substantive issue of deprivation of the right to representation at trial.

2008: *Wright v. State*, 881 N.E.2d 1018 (Ind. App.), *transfer denied*, 898 N.E.2d 1219 (Ind. 2008). Appellate counsel ineffective in attempted rape case for failing to assert the ineffectiveness of trial counsel or the fundamental error in the sentence enhancement for being "a repeat sex offender." Under the plain language of the statute and prior state law interpreting similar language in other statutes, a rape conviction could be used to apply the "repeat" enhancement but an attempted rape conviction could not. Thus, appellate counsel was ineffective for failing to assert the ineffectiveness of trial counsel in eliciting an admission from the defendant that he was a repeat sex offender and failing to argue that the sentencing enhancement was fundamental error. Prejudice was clear since the

enhancement had added eight years to the defendant's sentence.

2007: *Yecovenko v. State*, 173 P.3d 684 (Mont. 2007). Trial and appellate counsel ineffective in sexual abuse and sexual assault case for failing to adequately assert a motion for severance. The sexual assault charges alleged offenses involving the daughters of the defendant's former girlfriend. The sexual abuse charges were based on ten unrelated child pornography pictures. Trial counsel moved to sever but did not provide any specific detail to allege prejudice even after the state noted the deficiency and the court denied on this basis. While appellate counsel asserted error in the denial of the motion, counsel did not assert the ineffectiveness of trial counsel as a basis. Thus, the appellate court also denied on a procedural basis. Trial and appellate counsel's conduct was deficient. Specifically, with respect to appellate counsel: "Presenting new arguments on appeal without justification for doing so, in light of the volume of cases holding that such arguments will not be entertained, falls short of reasonable professional assistance." Prejudice was found with respect to the sexual assault conviction because the unrelated pictures "were, quite simply, horrific," such that the trial court had cleared the courtroom and allowed each image to be displayed to the jury for only five seconds.

****Commonwealth v. Williams***, 936 A.2d 12 (Pa. 2007) (sentenced in August 1993). Appellate counsel ineffective in capital case for failing to challenge the defendant's conviction under the state Corrupt Organizations Act. Under the statute applicable at the time of the 1993 trial, the court had interpreted the statute to include only legitimate organizations and the defendant's "organization" was a wholly illegitimate enterprise. This issue was decided approximately a year before the direct appeal was filed. Although the legislature had shortly afterwards amended the statute and a lower court had held the amendment was retroactive, counsel's conduct was deficient and prejudicial for failing to assert this issue, because the Supreme Court had ultimately ruled that the amendment was not retroactive. Only the Corrupt Organizations Act conviction was reversed leaving intact the murder and criminal conspiracy convictions, which were remanded for consideration of other issues asserted.

****State v. Loftin***, 922 A.2d 1210 (N.J. 2007). Trial and appellate counsel were ineffective in failing to adequately address the presence of a possibly racially biased juror, who had predetermined guilt before hearing all the evidence, in the jury panel during the trial although he ultimately served as an alternate and did not deliberate on findings and a separate jury was empaneled under state law for sentencing. The juror, who was white and worked at the post office, admitted making comments early in the trial to other postal workers that he was "going to buy a rope to hang" the defendant, a black man charged with killing a white man. He denied, however, that the comments were intended to be racist or that he had already formed an opinion of guilt. Trial counsel sought to remove the juror, which was denied, but failed to request that the remainder of the jury be questioned to determine whether this juror had made similar comments to other jurors.

The trial court ultimately ordered that the juror would serve only as an alternate. Appellate counsel failed to assert error in the trial court's failure to remove the juror and to assert as plain error the court's failure to question the remaining jurors. Under state law, the court found "a decided racial undertone [in the juror's comments] that evokes an era of vigilante and mindless mob justice that reigned during a dark period in American history." *Id.* at 1219. Likewise, even without racial bias, the juror violated the court's instructions not to discuss the case with others and not to determine guilt prior to deliberations. The court held that prejudice would be presumed and that "even allowing a non-deliberating juror suspected of racial bias to sit on a panel will lead to a presumption that other members of the panel may have been tainted." *Id.* at 1222. Thus, the court presumed that the biased juror shared his views with fellow jurors and, thus, it did not matter that he did not deliberate. Although trial and appellate counsel's ineffectiveness was asserted under both the state and federal constitutions, the court addressed the merits under only the state constitution but still applying the *Strickland* standard. Deficient conduct found because the need for the removal of the predisposed juror and a voir dire of the remaining jurors should have been self-evident." Counsel's conduct was not excused by strategy. Appellate counsel was also ineffective because failure to assert these issues on appeal deprived the court of the opportunity to address the issue, which would have required reversal on direct appeal.

Mintun v. State, 168 P.3d 40 (Idaho App. 2007). Appellate counsel ineffective in sexual abuse of a minor case for failing to challenge one of the convictions, which required a solicitation "to participate in a sexual act." On this charge, the defendant had asked a 10 year old boy to watch him and to take pictures of him masturbating, which "although repugnant, is not prohibited by the statute in question."

Harris v. State, 861 N.E.2d 1182 (Ind. 2007). Appellate counsel ineffective for failing to provide the appellate court with an adequate record to support a valid claim raised on appeal but unsupported by the record provided. Here, following the testimony of both victim's and his own testimony, the defendant changed his plea and entered pleas of guilty to two counts of sexual misconduct with minors. He was sentenced to twenty years on each count to be served consecutively for a total of 40 years. At the time of trial, state law limited the aggregate for crimes "arising out of an episode of criminal conduct." In this case, the limit was 30 years if found and appellate counsel asserted that the crimes were in a "single episode" of criminal conduct but did not include in the appellate record the trial testimony prior to the guilty plea. Based just on the record before it, the court rejected the argument. Counsel's conduct was deficient in failing to include the necessary record and was not based on any strategy. Counsel had simply not read the trial testimony because he believed it unnecessary given the guilty plea. This was deficient because the issue on appeal required a factual record and the necessary facts were in the portion counsel did not read or provide to the court. Prejudice found because the testimony of the two victims provided the necessary facts to support a "single episode" where the crimes

occurred 5 minutes apart in the same bed and both victims were induced by the same need for a place to stay. The court revised the aggregate sentence to 30 years.

2006: *Burnside v. State*, 858 N.E.2d 232 (Ind. App. 2006). Appellate counsel was ineffective in murder case for failing to assert as error the trial court's instructions on self-defense and the lesser-included offense of reckless homicide. Trial counsel requested jury instructions on both self defense and reckless homicide and the trial court instructed the jury regarding both theories. The State objected to the instruction because it intermingled the self defense and reckless homicide theories but trial counsel did not object. Appellate counsel's conduct was deficient because the instructions improperly required a finding of self-defense as a precondition to a reckless homicide verdict, which deprived the defendant of his right to have the jury consider his guilt on reckless homicide as a lesser-included offense. This issue was significant and obvious from the face of the record and was clearly stronger than the issues raised in the direct appeal. Prejudice found.

Reed v. State, 856 N.E.2d 1189 (Ind. 2006). Appellate counsel ineffective in attempted murder case for failing to assert that the imposition of consecutive sentences for convictions arising out of a single "episode of criminal conduct," contravened the state sentencing statute. The defendant was convicted of two counts of attempted murder for firing a weapon at police officers during a car chase. Although the issue was a novel one under a new sentencing statute, a plain reading of the statute revealed that the issue was a clear winner and was a much stronger issue than those raised on appeal. Prejudice found, because based upon the state of the law at the time of the direct appeal, this claim would more than likely have resulted in reversal.

Grinstead v. State, 845 N.E.2d 1027 (Ind. 2006). Appellate counsel ineffective in murder, theft, and conspiracy case for failing to make a double jeopardy objection under the state constitution. The state law had been interpreted to prohibit conviction and punishment for the crime of conspiracy where the overt act that constitutes an element of the conspiracy charge is the same act as another crime for which the defendant has been convicted and punished. Under this standard, the convictions for conspiracy to commit theft and theft in this case violated double jeopardy. The theft conviction was vacated.

Taylor v. State, 840 N.E.2d 324 (Ind. 2006). Appellate counsel ineffective in murder case for failing to challenge the imposition of an enhanced sentence of 60 years. At the time of trial, the presumptive sentence for murder under state law was 40 years. Counsel's conduct was deficient and prejudicial because the trial court improperly considered a number of aggravating circumstances contrary to state law and contrary to the presentence report, which recommended the presumptive sentence.

**Commonwealth v. Gorby*, 900 A.2d 346 (Pa. 2006). Trial counsel ineffective in capital sentencing for failing to adequately investigate and present mitigation evidence. Appellate counsel was also ineffective in failing to assert the issue of trial counsel's ineffectiveness during direct appeal. In sentencing, counsel called only the step-father to testify that the defendant sometimes assisted him in work around the home. Appellate counsel was also ineffective in failing to assert this issue on appeal because the "claim merited exploration based on the apparent weakness of trial counsel's penalty-phase presentation alone, as reflected on the face of the trial record." Prejudice found. (Facts discussed in list covering capital sentencing phase errors).

Ex parte Owens, 206 S.W.3d 670 (Tex. Crim. App. 2006). Appellate counsel was ineffective in aggravated sexual assault of a child case for failing to inform the defendant that he had a right to file a pro se petition to the Court of Criminal Appeals after counsel had filed an Anders brief in the court of appeals. Prejudice found because the petitioner had filed a pro se brief in the court of appeals. It was, therefore, likely that he would have filed the petition for discretionary review. Leave granted for an out-of-time petition.

2005: *Shepard v. Crosby*, 916 So. 2d 861 (Fla. App. 2005), *review denied*, 930 So.2d 622 (Fla. 2006). Appellate counsel was ineffective in murder case and aggravated battery case for failing to assert on appeal the issue of the trial court's erroneous self-defense instruction, given over objection by trial counsel, which "was circular in nature and, thus, vitiated his defense." The trial court instructed the jury that the defendant's use of force against the victim was not justifiable if the jury found that the defendant was attempting to commit, committing or escaping after the commission of a murder or aggravated battery with a firearm. This instruction is not to be given "in cases where the defendant is charged with an offense as to which the defendant relies on self-defense." Prejudice found.

Laymon v. State, 122 P.3d 326 (Kan. 2005). Appellate counsel ineffective in conspiracy to manufacture methamphetamine case where the defendant pled guilty and was sentenced based on "a drug severity level 1 felony." Two lines of argument were being pursued under state law at the time challenging sentence for this offense. One asserted that sentencing should occur under a misdemeanor provision and the other asserted that sentencing should occur under the drug severity 3 statutes. Appellate counsel raised only the first of these arguments, which was ultimately rejected by the state courts. The other argument, not raised by counsel, was ultimately accepted by the state courts. Counsel's conduct was deficient in failing to assert this issue "despite the icy reception that had been given both lines of argument by the Court of Appeals" because the Supreme Court "had not finally rejected either." *Id.* at 328. Counsel's conduct could not be explained by any plausible strategy or "avoidance of a 'shotgun' approach" because counsel's entire appellate brief was only five pages long. Moreover, counsel was in the same state office with the lawyer who initially asserted the ultimately successful argument. Thus, "we should charge his direct appeal counsel with knowledge that the *McAdam* issue was

worthy of preservation and pursuit. Although *McAdam* was not yet the law of Kansas, the line of argument was in no worse position than the misdemeanor/felony line argument . . . counsel did pursue.” *Id.* at 334.

People v. Turner, 840 N.E.2d 123 (N.Y. App. 2005). Trial and appellate counsel ineffective in manslaughter case for failing to assert a statute of limitations defense. The defendant was arrested 16 years after the crime and charged with second degree murder, which has no statute of limitations. During trial, the prosecutor requested an instruction on the lesser included offense of manslaughter. Counsel objected only on the basis of not offering the jury a compromise. The jury convicted only on manslaughter, which had a five year limitations period. Although the statute allows some tolling, the maximum period for tolling is an additional five years. Trial and appellate counsel’s conduct was deficient because there was case law from 1914 supporting the argument, which was old but still valid. In addition, while there was some contrary precedent and the law may not have been definitively settled at the time of trial, “[a] reasonable defense lawyer at the time of defendant’s trial might have doubted that the statute of limitations argument was a clear winner—but no reasonable defense lawyer could have found it so weak as to be not worth raising.” Trial counsel should have asserted the issue. Appellate counsel should have asserted the ineffectiveness of trial counsel on this point.

2004: ***Davis v. State***, 886 So. 2d 332 (Fla. App. 2004), *review denied*, 898 So.2d 81 (Fla. 2005). Appellate counsel was ineffective in aggravated battery of elderly person over age 25 case for failing to assert as error the trial court’s improper instruction on the use of force, which effectively negated the defense of self-defense. Although the defense of self-defense was prohibited only if the person claiming self-defense was engaged in the commission of another independent forcible felony, the trial court informed the jury, over trial counsel’s objection, that a finding of the very act of aggravated battery the defendant sought to excuse on the basis of self-defense precluded a finding of justification. Appellate counsel’s conduct was deficient because this instruction was circular and improper and the issue was preserved for appeal. Although no case had clearly held that this instruction was error under the circumstances at the time of the defendant’s appeal, this holding was “clearly foreshadowed” by earlier case law and had been addressed previously in a “compelling dissent.” “Where a preserved issue such as this appears in the appellate record, has facial merit, has some support in the case law, and is not foreclosed by controlling case law, it should be raised.” The court, thus, granted a belated appeal on this issue.

Bruce v. State, 879 So.2d 686 (Fla. App. 2004). Appellate counsel was ineffective for failing to assert as fundamental error the trial court’s erroneous charge on burglary that failed to include the necessary of element of an intent to commit a crime within the structure or conveyance.

Hickson v. State, 873 So.2d 474 (Fla. App. 2004). Appellate counsel ineffective in aggravated battery of police officer case for failing to assert fundamental error with respect to the trial court's instruction on forcible felony, which essentially negated his only defense (self-defense). Belated appeal allowed.

Smith v. Crosby, 872 So.2d 279 (Fla. App. 2004). Appellate counsel ineffective in attempted murder, attempted burglary, and attempted robbery case for failing to challenge the attempted burglary conviction. Appellant counsel asserted only that the trial court erred in denying Petitioner's motion to suppress his statements. At the time of the appeal the Florida Supreme Court required reversal of the attempted burglary conviction because a conviction could not be sustained on a "remaining in" theory where the defendant initially entered the premises lawfully and then later formed a criminal intent to commit a crime therein. (Although the legislature subsequently nullified the Supreme Court's ruling, the legislation does not apply to the defendant in this case). Appellate counsel's conduct was deficient in failing to challenge the validity of the attempted burglary conviction because the evidence presented at trial showed that the defendant entered the premises with the victim's consent and remained there openly. Since any alleged intent to rob or assault was formed subsequent to his consensual entry, the defendant could not be convicted of burglary or attempted burglary. Although trial counsel did not preserve the issue, a fundamental error occurs when the evidence is insufficient to show that a crime was committed at all and the appellate court will review the legal sufficiency of the conviction on appeal. A belated appeal allowed only on this issue.

Crawford v. Thompson, 603 S.E.2d 259 (Ga. 2004). Appellate counsel ineffective in armed robbery case for failing to assert that trial counsel was ineffective in failing to adequately assert a speedy trial motion. Counsel raised the speedy trial issue, but the appellate court found that it was procedurally defaulted because not addressed fully at trial under the applicable statute. Prejudice found because reversal would have been required if the issue had been asserted as an ineffectiveness of trial counsel claim.

Carew v. State, 817 N.E.2d 281 (Ind. App. 2004), *transfer denied*, 831 N.E.2d 735 (Ind. 2005). Appellate counsel was ineffective for failing to challenge the trial court's exclusion of expert's opinion testimony that tactics used by the police during the defendant's interrogation would increase the likelihood of a false confession from someone with the defendant's low IQ. Trial counsel preserved this issue by proffering expert testimony on this issue. While appellate counsel asserted five issues on appeal, including the involuntariness of the defendant's confession, counsel did not assert the issue of the trial court's exclusion of the expert testimony. Appellate counsel did not raise this issue because he did not believe the issue to be meritorious. Counsel's conduct was unreasonable because the issue was meritorious as subsequently found by the court in *Miller v. State*, 770 N.E.2d 763 (Ind. 2002). Although *Miller* had not been decided at the time of the defendant's direct appeal, the case the *Miller* court "relied on extensively" had

been decided. Prejudice was found, even though the interview techniques and the defendant's IQ were already before the jury, because "an expert's opinion is helpful to the jury to tie up the relationship between the police interview techniques and individuals with diminished intellectual functioning, which is outside the common knowledge and experience of jurors." Prejudice was also apparent based on *Miller*. Although the two cases were not identical, they were similar enough to establish that the defendant—like the defendant in *Miller*—would have received a new trial if the issue had been raised on appeal. New trial granted.

Haggard v. State, 810 N.E.2d 751 (Ind. App. 2004). Appellate counsel ineffective in multiple charge case starting with attempted suicide by use of cocaine, which precipitated violent resistance to officers upon their arrival. Counsel's conduct was deficient in failing to assert that the trial court erred in determining that the sentence for one of the five resulting charges (unlawful use of body armor) should be served consecutively. Because the time, place, and circumstances of the criminal acts were causally related and the evidence overlapped, state law prohibited consecutive sentences. Prejudice found even though the direct appeal opinion implied that the sentence was appropriate. The court held that it was "a gratuitous comment upon an issue not before the court. As such, it is not res judicata and does not control this decision."

****Browning v. State***, 91 P.3d 39 (Nev. 2004). Appellate counsel was ineffective in failing to challenge the court's instruction on the "depravity of mind" aggravating circumstance, which did not include any reference to torture or mutilation. Although the Nevada court had rejected two challenges to instructions on "depravity" previously, counsel's conduct was deficient in failing to assert the issue in this case based upon *Godfrey v. Georgia*, 446 U.S. 420 (1980), because the other rejected state cases both included references to torture in the instruction and one of them also referenced mutilation. In both cases, there was also evidence of torture and mutilation, which was also lacking in this case. Prejudice found even though four other aggravating factors were present because the state's closing argument focused primarily on the "depravity of mind" aggravator.

State v. Madan, 840 A.2d 874 (N.J. Super. 2004). Appellate counsel was ineffective in murder case for failing to assert on appeal that the trial court abused its discretion in rejecting the defendant's plea agreement. The defendant was charged with murder and entered an agreement with the state to plead guilty to aggravated manslaughter in exchange for a state recommendation for a 20 year sentence with 7 years of parole ineligibility. A pre-sentence report recommended that the plea agreement be accepted. The defendant admitted stabbing the victim, but disputed some of the surrounding circumstances, which revealed that the victim may have well been the initial aggressor. At the hearing, the trial court discussed the issue with the victim's father and learned that the victim's family was opposed to the plea agreement. The court rejected the pre-trial agreement. Following trial, the defendant was convicted of murder and sentenced to life

imprisonment with 30 years of parole ineligibility. The trial court abused its discretion in rejecting the plea because this case is a classic case for an aggravated manslaughter plea. The reasons listed by the trial court for rejecting the plea were inadequate and based upon incorrect statements concerning the potential length of sentences. The exercise of discretion to reject the plea was erroneous under these circumstances. Although the views of the victim's family may be taken into consideration, the victim's family's dissatisfaction with the plea cannot be controlling.

A defendant may not be entitled to an offer of a plea bargain from the prosecutor, but when such an offer is made, accepted, and entered on the record, a defendant is entitled to a judicial assessment of that agreement grounded in a correct understanding of the law and the proper exercise of that discretion.

The court reinstated the defendant's plea agreement.

**Garrison v. State*, 103 P.3d 590 (Okla. Crim. App. 2004). Appellate counsel was ineffective for failing to adequately preserve the issue that trial counsel was ineffective for failing to adequately prepare and present mitigation. The defendant was convicted, on largely circumstantial evidence, of the murder and subsequent dismemberment of a thirteen-year-old boy. On appeal, appellate counsel asserted the issue of ineffectiveness of counsel supported by affidavits and records and the court remanded for an evidentiary hearing. Because the trial court held the hearing only two weeks after the remand and the defendant's primary expert witness was unavailable to testify due to stage four cancer, appellate counsel presented no evidence at the evidentiary hearing and refused to even question trial counsel concerning the mitigation case. Thus, the court found, "[u]nder these unique and utterly bizarre circumstances," that appellate counsel "effectively waived" the issue of trial counsel's ineffectiveness. *Id.* at 619. Nonetheless, the court found that the defendant "was likely denied the effective assistance of trial counsel" with respect to sentencing and ordered a new sentencing trial. Trial counsel's conduct was deficient because the case in mitigation was limited to a single counseling psychologist who spent less than four hours with the defendant and had not reviewed the defendant's medical, psychiatric, or school records. The court did not condemn the expert, but noted that "[i]t appears he did what he was asked to do in the brief amount of time he was asked to do it." His testimony, which covered only nineteen pages of the transcript, provided "a quick overview" of the defendant's background, but he "sis not go over any of these matters in any detail. He simply mentioned them casually in a sentence or two, without amplification." *Id.* at 617. Because this expert spent an "extremely short amount of time" with the defendant and lacked "access to key records and people familiar with" the defendant, he "was vulnerable to attack by the State on cross-examination. The State was thus able to point out that most of the mitigation case was based upon a short interview, i.e., Appellant's own self-reporting." Overall, this "testimony did little to educate the jury

about Petitioner's adolescent life or give jurors any mitigating reason to render a verdict less than death.” *Id.* at 617. If counsel had adequately investigated, the evidence would have established that the defendant never knew his father; was abandoned by his mother, who tried to abort him; was raised by his verbally abusive grandmother; was abused by a schizophrenic and alcoholic uncle; was abused by his alcoholic, abusive mother after she moved back in to the extent of smothering him until he passed out; was sexually abused by his brother beginning at age 3-4, including “anal rapes,” pulling his testicles and twisting his penis with pliers, binding him hand and foot, hanging him from a tree, and beating him to the point he required hospitalization. When he was thirteen, the defendant killed his four-year-old step-cousin and was committed to a hospital for 19 months. During this time, his brother was found dead from burning and a possible drug overdose. When the defendant was released on a pass from the hospital, he smothered a 3-year-old neighbor boy and severed the boy’s penis post-mortem. In short, the defendant is “a thrice-convicted child-killer” and counsel’s best hope after avoiding conviction “was to focus on the reasons why anyone would commit such inconceivable atrocities. And this would have necessarily required a close examination of Appellant's horrendous past.” *Id.* at 619.

**Commonwealth v. Moore*, 860 A.2d 88 (Pa. 2004). Appellate counsel was ineffective in failing to assert trial counsel’s ineffectiveness for failure to prepare and present mitigation evidence. Counsel presented no mitigation evidence. He asserted that the defendant declined to testify and he had no other mitigating evidence. Thus, counsel presented no opening and no evidence and only referred generically to possible mitigating circumstances in closing. The jury found two aggravating circumstances and no mitigating circumstances. On appeal, counsel alleged trial counsel’s ineffectiveness but failed to specify what mitigating evidence had been available. Thus, the issue of trial counsel’s ineffectiveness was denied on appeal. Appellate counsel was ineffective for failing to adequately present the available mitigating evidence, which included testimony from the defendant’s mother, sister, and wife of the defendant’s traumatic and abusive childhood, including witnessing his father slash his mother’s throat. The mother and sister had not been subpoenaed and had not been advised of the need for their testimony in sentencing. Although the ex-wife did not appear under subpoena to testify at trial concerning an alibi, she would have testified in sentencing if counsel had explained the nature of the proceeding to her. While these witnesses were “obviously more cooperative in 2000 than in 1983,” *id.* at 99, and the defendant was an “uncooperative client,” *id.* at 100, counsel’s conduct was deficient because counsel was not “relieved of the duty to investigate potential mitigating evidence, particularly where counsel had no other penalty phase strategy,” *id.* at 100. Counsel’s conduct was not excused by any strategic reason. Prejudice was found because without any mitigating evidence, the defendant’s only chance for a life sentence would have been if the jury did not find either of the aggravating circumstances, which was unlikely based on the evidence presented by the state. New sentencing granted.

***In re Orange**, 100 P.3d 291 (Wash. 2004). Appellate counsel was ineffective in failing to assert as error the trial court's closure of the courtroom during more than half of the voir dire, which violated the defendant's constitutional right to a public trial. Counsel's conduct was deficient because there was no compelling reason to close the proceedings. Even assuming that a compelling reason existed, the trial court did not narrowly tailor its order or consider alternatives to full closure. The trial court's actions thus violated the state constitution. In addition to denying the public's right to presence, the court denied the defendant's family the opportunity "to contribute their knowledge or insight to the jury selection" and denied the jury the opportunity "to see the interested individuals." What the jury saw instead was the "conspicuous" absence of the defendant's family. Because of the denial of the right to a public trial, prejudice would have been presumed had the issue been raised on appeal. Thus, prejudice was found and a new trial ordered.

In re Personal Restraint Petition of Dalluge, 100 P.3d 279 (Wash. 2004). Appellate counsel was ineffective in rape case for failing to assert that the adult court had no jurisdiction to try and convict the defendant, who was seventeen years old at the time. The state initially charged the defendant with first degree rape, which automatically gave the adult court exclusive jurisdiction. The state later reduced the charges to second degree rape and a charge of third degree rape by complicity. Although these charges no longer resulted in automatic adult court jurisdiction and rested jurisdiction solely in the juvenile court unless the juvenile court declined jurisdiction "in the best interest of the juvenile or the public," the trial court did not remand to the juvenile court and the defendant was tried and convicted in adult court. Counsel's conduct was deficient and prejudicial in failing to raise this "meritorious issue." Because the defendant had since turned 18, the appropriate remedy was remand to the adult court for a hearing on whether declination by the juvenile court would have been appropriate. If so, the conviction would stand. If not, a new trial would be granted.

2003: Estevez v. Crosby, 858 So. 2d 376 (Fla. App. 2003). Appellate counsel was ineffective in aggravated battery case for failing to assert on appeal the issue of the trial court's erroneous self-defense instruction. The trial court instructed the jury that the defendant's use of force against the victim was not justifiable if the jury found that the defendant was attempting to commit, committing or escaping after the commission of an aggravated battery. This instruction is only to be given when the accused is charged with at least two offenses, the one for which the accused claimed self-defense as well a separate forcible felony. Although trial counsel did not object to this instruction, appellate counsel's conduct was deficient because counsel should have raised this issue as a fundamental error on direct appeal. Appellate counsel's failure to raise the issue in direct appeal prejudiced the defendant. As a result, the court reinstated the defendant direct appeal.

Milliken v. Stewart, 583 S.E.2d 30 (Ga. 2003). Appellate counsel was ineffective in kidnaping case for failing to assert on appeal that the trial court had improperly intimidated

*Capital Case

his opinion on the evidence and guilt of the accused. Because the trial court's actions were not harmless, the appropriate remedy was a new trial rather than a new appeal.

Minor v. State, 792 N.E.2d 59 (Ind. App.), *transfer denied*, 804 N.E.2d 760 (Ind. 2003). Appellate counsel ineffective for failing to cite recent case establishing defendant's entitlement to 12-person jury (rather than 6) on felony count of carrying a handgun without a license. While appellate counsel had already completed briefing, the controlling case was decided two months before the appeal was decided. Counsel's conduct was deficient in failing to read the Advance Sheets and bring the case to the court's attention. Prejudice established because reversal was required.

**SUMMARIES OF PUBLISHED SUCCESSFUL
CONFLICT OF INTEREST CLAIMS SINCE 1982¹**

Updated August 27, 2011

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This document does not contain trial court rulings, primarily those of U.S. District Courts, disqualifying counsel.

* denotes a capital case.

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I. U.S. Supreme Court Cases

2006: *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006). The trial court's erroneous deprivation of a criminal defendant's counsel of choice required reversal. The defendant's family had retained counsel for him. The defendant contacted his own counsel of choice who was out of state and sought to retain him. The trial court declined to admit counsel *pro hac vice* and prohibited further contact finding that counsel violated rules against contacting someone already represented without counsel's permission. The Court held that "the Sixth Amendment guarantees the defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire, or who is willing to represent the defendant even though he is without funds." *Id.* at ___ (quoting *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624-625 (1989)). In short, "the Sixth Amendment right to counsel of choice . . . commands, not that a trial be fair, but that a particular guarantee of fairness be provided-to wit, that the accused be defended by the counsel he believes to be best." *Id.* at ___. When that right is violated, no showing of prejudice (under the *Strickland* standard or otherwise) is required for reversal to be mandated and no harmless error analysis may be applied because this is a structural error. The right to counsel of choice is limited, however, and "does not extend to defendants who require counsel to be appointed for them." *Id.* at ___. Likewise, a defendant is not entitled to representation by a person who is not an attorney or to counsel with a conflict of interests.

2002: **Mickens v. Taylor*, 535 U.S. 162 (2002). Petitioner was convicted of murder and sentenced to death. His lead counsel during the trial had also represented the victim and was representing him in juvenile proceedings at the time of the murder. Counsel had only met with the victim one time for 15-30 minutes. Following the murder, he was appointed to represent petitioner by the same judge that had appointed him to represent the victim previously. Counsel did not disclose the conflict to the court, his co-counsel, or petitioner. Although the trial court knew or should have known about the potential conflict, the court conducted no inquiry. In these circumstances, the Court rejected an automatic reversal rule and held that in order to obtain relief, petitioner must establish an actual conflict and that the conflict adversely affected the representation. The Court also noted that both *Cuyler v. Sullivan* and *Holloway v. Arkansas* were cases involving simultaneous representation of codefendants and the question whether these holdings apply to successive representation and other potential conflicts remains open.

1988: *Wheat v. United States*, 486 U.S. 153 (1988). There is a presumption in favor of allowing a defendant to have counsel of choice, but a trial court may disqualify counsel of choice, over objection, when there is an actual conflict or a showing of a serious potential for conflict. *Id.* at 164. Counsel in a widespread drug distribution case had previously represented one of the alleged kingpins and gotten an acquittal. Subsequently, the alleged kingpin agreed to plead guilty to tax evasion charges, but had not yet gone to trial. Counsel had also represented a smaller player in his guilty plea. Just before the defendant's trial, counsel proposed to also represent the defendant who was an intermediate player. The government objected because the minor player would be called as a witness in the defendant's trial and, if the kingpin's deal fell through, the defendant would likely be called as a witness in his trial. All three defendants waived the potential conflict and said that it was merely speculative. The district court denied

the motion to substitute counsel and allow counsel to represent the defendant. On review, the Court reasoned that it is difficult for an attorney to evaluate the risks of conflict because unforeseen testimony or evidence can significantly shift the relationship between multiple defendants. “These imponderables are difficult enough for a lawyer to assess, and even more difficult to convey by way of explanation to a criminal defendant untutored in the niceties of legal ethics.” *Id.* at 163. The Court also noted that “the willingness of an attorney to obtain . . . waivers [of conflicts] from his clients may bear an inverse relation to the care with which he conveys all the necessary information to them.” *Id.* Thus, the Court held that trial courts “must be allowed substantial latitude in refusing waivers of conflicts of interests not only in those rare cases where an actual conflict may be demonstrated before trial, but in the more common cases where a potential for conflict exists which may or may not burgeon into an actual conflict as the trial progresses.” *Id.*

1987: **Burger v. Kemp*, 483 U.S. 776 (1987). Counsel in murder case did not have an actual conflict that adversely affected representation due to his partner’s representation of codefendant in severed trial. Petitioner was charged along with codefendant in murder. Both defendants confessed. They were tried separately. During defendant’s trial, his codefendant’s statement was not offered and the codefendant did not testify. Following defendant’s trial, while still representing defendant on appeal, counsel assisted his partner in representing the codefendant at his trial and on appeal. The court found no “active representation of competing interests” and that the joint efforts may have actually benefitted the defendant. *Id.* at 784. “Moreover, we generally presume that the lawyer is fully conscious of the overarching duty of complete loyalty to his or her client.” *Id.* While counsel did not assert defendant’s lesser culpability on appeal when he was also representing the codefendant, this was a proper strategic decision.

As we reaffirmed in *Smith v. Murray*, 477 U.S. 527, 536, 106 S.Ct. 2661, 2667, 91 L.Ed.2d 434 (1986), the “process of ‘winnowing out weaker claims on appeal and focusing on’ those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy. *Jones v. Barnes*, 463 U.S. 745, 751-752, 103 S.Ct. 3308, 3312-3313, 77 L.Ed.2d 987 (1983).

Id. In addition, in order to show an actual conflict, petitioner must show that counsel’s motive for not raising the issue was his partner’s representation of the codefendant or his involvement in that case. The court also found that even if counsel had an actual conflict, it did not affect counsel’s advocacy. Counsel attempted to plea bargain but was rebuffed by state. Counsel also was not prohibited from arguing petitioner’s lesser culpability because he was tried separately from the codefendant.

1984: **Strickland v. Washington*, 466 U.S. 668 (1984). In conflict of interest cases, prejudice is presumed “if the defendant demonstrates that counsel ‘actively represented conflicting interests’ and that ‘an actual conflict of interest adversely affected his lawyer’s performance.’” *Id.* at 692 (quoting *James v. Kentucky*, 466 U.S. at 350, 348)). In cases not involving a conflict of interests, in order to establish ineffective assistance of counsel, the defendant must show that counsel’s performance was deficient and that counsel’s performance prejudiced the defense.

Flanagan v. United States, 465 U.S. 259 (1984). A district court's decision to disqualify counsel due to potential conflicts is not immediately appealable.

1981: *Wood v. Georgia*, 450 U.S. 261 (1981). The trial court erred in failing to inquire into the possibility of a conflict of interest created by the representation of the defendants by their employer who allegedly operated the criminal enterprise for which they were prosecuted. The defendants were charged with distributing obscene materials and convicted. They were sentenced to probation with substantial fines, but failed to pay the fines. After three months, the court held a revocation hearing in which the defendants presented evidence that they were unable to pay the fines. The trial court ordered payment of the fines within three days or confinement. The Court granted cert. to determine whether the Equal Protection Clause was violated by imprisonment of a probationer solely because of his inability to make installment payments on fines. Rather than deciding this issue, however, the Court noted that the record reflected that the three defendants had been represented throughout by one lawyer, who was paid by their employer. In addition, the employer had paid all fines and posted all bonds with the sole exception of the fines under review. The attorney never argued in the initial sentencing that the fines were excessive and the court imposed stiff fines because the court was aware that the employer had been paying all fines and expenses of the defendants. The defendants never paid even small amounts of the fine to indicate good faith because of their assumption that the employer would pay the fines. Even at the revocation hearing where the defendants presented evidence of their indigence, counsel did not argue for a reduction of the fines. Thus, the Court held that the risk of conflict was evident, because the record suggested that the employer desired to create a test case to present the current claim to the Court, which meant that the defendants had to be jailed for non-payment of the fines. The Court recognized an inherent danger in a criminal defendant being represented by a lawyer hired and paid for by a third party, particularly when the third party is the operator of the alleged criminal enterprise. One risk is that the lawyer will not seek leniency for the defendant by offering testimony against the employer who retained counsel. A second risk, present in this case, is that the employer's long-range interest in establishing legal precedent could subject the defendants to harsher treatment. *Id.* at 269. Under these facts, the Court held that "the *possibility* of a conflict of interest was sufficiently apparent at the time of the revocation hearing to impose upon the court a duty to inquire further." *Id.* at 272. Moreover, even the state raised the conflict issue and requested that the court inquire further. *Id.* at 273. The Court remanded and ordered that if the court found an actual conflict of interest and that there was no valid waiver, then a new revocation hearing should be held with counsel free of conflicts.

1980: *Cuyler v. Sullivan*, 446 U.S. 335 (1980). Court held that in multiple representation cases where there is no objection at trial, the defendant must demonstrate that an actual conflict of interest adversely affected counsel's performance in order to get relief under the Sixth Amendment. Two retained counsel represented three co-defendants in murder case. The defendants were tried separately. Sullivan was tried first and convicted. The state's case was entirely circumstantial and the defense presented no evidence. None of the defendants objected to multiple representation. The Court held that nothing in the Sixth Amendment requires state courts to initiate inquiries into multiple representation "[a]bsent special circumstances." *Id.* at 346. "Unless the trial court knows or reasonably should know that a particular conflict exists, the

court need not initiate an inquiry.” *Id.* at 347. In this case, there was no objection to the multiple representation and the risk of conflict was reduced by the provision of separate trials. Likewise, the court of appeals found that the decision to rest with no defense evidence was on its face a reasonable tactical response to the weakness of the state’s circumstantial evidence. *Id.* at 347. Thus, the trial court did not have an affirmative duty to inquire into the propriety of multiple representation. *Id.* at 348. Likewise, the Court held, “In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer’s performance.” *Id.* at 348. Once the defendant shows that the conflict “actually affected the adequacy” of representation, there is no requirement that the defendant “demonstrate prejudice.” *Id.* at 349. The Court remanded this case to the court of appeals to apply these standards in Sullivan’s case.

1978: *Holloway v. Arkansas*, 435 U.S. 475 (1978). The trial court erred in requiring joint representation of three co-defendants by a single lawyer over their objections. The defendants were charged with armed robbery and two counts of rape. One defendant confessed to police officers and said that he was the lookout while others raped women. Weeks before trial, the public defender moved to have separate attorneys appointed because, based on his discussions with the defendants, there was a potential conflict. The court denied the motion for counsel and motions to sever the trials. Just before trial, counsel renewed the motion for separate counsel, because several of the defendants had indicated a desire to testify and he could not cross-examine them because of confidential information that he had received. Judge denied again. After the state’s case, in which various eyewitnesses testified but were not consistent, counsel announced that all three defendants wanted to testify and that he could not cross-examine or even examine the defendants due to the conflicts. The court required counsel to just put them on the stand and let them tell their story. All three defendants denied involvement, but were convicted. The Court held that joint representation is not unconstitutional *per se*, *id.* at 482, but in this case the trial court “failed to either appoint separate counsel or to take adequate steps to ascertain whether the risk of conflict was too remote to warrant separate counsel,” *id.* at 484. The Court recognized that most courts recognize that an attorney’s request for separate counsel should be granted because attorneys are in the best position professionally and ethically to determine whether there is a conflict, have a duty to report a conflict to the court, and are officers of the court when making statements to the court. *Id.* at 485-86. In response to state arguments that such a rule would allow abuses by defense counsel, the court stated that trial courts would still have power to deal with counsel who made an untimely motion for dilatory purposes. *Id.* at 486. Likewise, the Court held that its “holding [does not] preclude a trial court from exploring the adequacy of the basis of defense counsel’s representations regarding a conflict of interests without improperly requiring disclosure of the confidential communications of the client.” *Id.* at 487. In addressing the standard to be applied to trial court errors in these circumstances, the Court recognized that “[j]oint representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing.” *Id.* at 489-90. Examples listed by the Court included: 1) plea bargaining for one defendant to testify against another; 2) challenging admission of evidence prejudicial to one client but favorable to another; and 3) arguing differing culpabilities of clients in sentencing in order to minimize the culpability of one by emphasizing that of another. *Id.* at 490. Given these factors, the Court recognized that “it would be difficult to judge intelligently the impact of a conflict on the attorney’s representation

of a client.” *Id.* at 490-91. Thus, the Court held that “whenever a trial court improperly requires joint representation over timely objection reversal is automatic.” *Id.* at 488.

II. Conflicted Representation Required Over Objection

A. Simultaneous Representation of Jointly Tried Codefendants

1. U.S. Supreme Court Cases

1978: *Holloway v. Arkansas*, 435 U.S. 475 (1978). The trial court erred in requiring joint representation of three co-defendants by a single lawyer over their objections. The defendants were charged with armed robbery and two counts of rape. One defendant confessed to police officers and said that he was the lookout while others raped women. Weeks before trial, the public defender moved to have separate attorneys appointed because, based on his discussions with the defendants, there was a potential conflict. The court denied the motion for counsel and motions to sever the trials. Just before trial, counsel renewed the motion for separate counsel, because several of the defendants had indicated a desire to testify and he could not cross-examine them because of confidential information that he had received. Judge denied again. After the state’s case, in which various eyewitnesses testified but were not consistent, counsel announced that all three defendants wanted to testify and that he could not cross-examine or even examine the defendants due to the conflicts. The court required counsel to just put them on the stand and let them tell their story. All three defendants denied involvement, but were convicted. The Court held that joint representation is not unconstitutional *per se*, *id.* at 482, but in this case the trial court “failed to either appoint separate counsel or to take adequate steps to ascertain whether the risk of conflict was too remote to warrant separate counsel,” *id.* at 484. The Court recognized that most courts recognize that an attorney’s request for separate counsel should be granted because attorneys are in the best position professionally and ethically to determine whether there is a conflict, have a duty to report a conflict to the court, and are officers of the court when making statements to the court. *Id.* at 485-86. In response to state arguments that such a rule would allow abuses by defense counsel, the court stated that trial courts would still have power to deal with counsel who made an untimely motion for dilatory purposes. *Id.* at 486. Likewise, the Court held that its “holding [does not] preclude a trial court from exploring the adequacy of the basis of defense counsel’s representations regarding a conflict of interests without improperly requiring disclosure of the confidential communications of the client.” *Id.* at 487. In addressing the standard to be applied to trial court errors in these circumstances, the Court recognized that “[j]oint representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing.” *Id.* at 489-90. Examples listed by the Court included: 1) plea bargaining for one defendant to testify against another; 2) challenging admission of evidence prejudicial to one client but favorable to another; and 3) arguing differing culpabilities of clients in sentencing in order to minimize the culpability of one by emphasizing that of another. *Id.* at 490. Given these factors, the Court recognized that “it would be difficult to judge intelligently the impact of a conflict on the attorney’s representation of a client.” *Id.* at 490-91. Thus, the Court held that “whenever a trial court improperly requires joint representation over timely objection reversal is automatic.” *Id.* at 488.

2. U.S. Court of Appeals Cases

1996: *Selsor v. Kaiser*, 81 F.3d 1492 (10th Cir. 1996). Trial court erred in requiring joint representation in capital case where counsel represented defendant and codefendant and counsel objected to the conflicted representation. Defendants were charged with the murder and robbery of a convenience store and jointly represented by the same counsel from the public defender's office. The single eyewitness, who had also been shot numerous times, identified the codefendant as the shooter and the sole assailant she saw at the scene. The codefendant, however, implicated the defendant. According to police, the defendant then made incriminating statements admitting his participation and that he shot the fatal shots. The codefendant's weapon was recovered. The defendant's alleged weapon was not. Prior to trial, counsel, on behalf of defendant, moved for a severance because the codefendant could attempt to implicate the defendant. Counsel informed the court that the codefendant was pleading not guilty by reason of insanity and that his testimony could be very damaging to the defendant. Counsel noted, however, that the motion was in the defendant's interest but contrary to the codefendant's interest and that counsel had a conflict. Counsel renewed the motion for severance and requested that outside counsel be appointed for one of the defendants. Counsel noted that the codefendant's defense would admit guilt and being present at scene and defendant was simply asserting not guilty defense. Just prior to jury selection counsel renewed the motion for severance again and stated counsel could not possibly represent the interests of both defendants. Counsel noted that they only had one witness lined up and that would be in support of the codefendant's defense. During the joint trial, counsel made no opening statement, called one witness to testify concerning the codefendant's mental statement, and then gave only a brief closing asserting that the defendants should not get the death penalty. (This trial occurred before bifurcated sentencing proceedings and death was a mandatory punishment if convicted). Counsel renewed the motion for severance three times during the trial though. All motions were denied and the court never inquired into the conflict. The defendant was convicted and sentenced to death. (His sentence was commuted to life by the appellate court after finding the statute unconstitutional). Dodson was convicted of related charges, but acquitted of murder. The Tenth Circuit held that the trial court erred in conducting an inquiry under *Holloway*. Although this case was tried before *Holloway*, the state conceded that *Holloway* was not new law and simply applied *Glasser*. The court held that the trial court can require counsel who has raised the objection to joint representation to continue such representation only if, after a searching inquiry, it is clear that counsel's claim of conflict of interest is 'groundless.'" *Id.* at 1501. "[A]n adequate inquiry must be targeted at the conflict issue and that the inquiry must be searching, without improperly requiring defense counsel to disclose confidential communications." *Id.* Here, there was no inquiry into how defendant's representation and defense might be adversely affected by the joint representation even though the potential conflict of interest was patent. Prejudice is presumed in this *Holloway* type situation where the issue was raised and not adequately addressed by the trial court. The defendant is not required to show an actual conflict. Even if more was required, court finds that there was an actual conflict that adversely affected representation. In attempting to defend the codefendant, counsel implicated the defendant in cross-examining the police officers about the codefendant's statements. No unconflicted counsel would had conducted that cross-examination.

1992: *Hamilton v. Ford*, 969 F.2d 1006 (11th Cir. 1992). Trial court erred in requiring joint representation in attempted robbery and felony murder case where counsel moved for a severance or appointment of separate counsel for one of the defendants before trial due to conflict. Defendant and codefendant (his cousin) were represented by same appointed counsel in pretrial motions. Counsel moved for severance. Motion was denied. On the first day of trial, counsel renewed the motion for severance and requested appointment of separate counsel to represent one of the defendants because counsel's investigation led him to believe that a conflict had developed. The prosecution objected that the defendants had waived any conflicts at a pretrial hearing. Counsel responded that the conflicts were not apparent three months before when the defendants waived and that there would be conflicting defenses putting the defendants in different places at the time of the crimes. The motions were denied and the trial proceeded. During the state's evidence, an eyewitness identified both defendant and codefendant but did not testify about who the shooter was. There were also witnesses that testified that the codefendant had made statements that he and defendant committed the crimes but the defendant was the actual shooter. Following this testimony, counsel renewed the motions noting that he needed to cross-examine the codefendant concerning his alleged statements but could not do so because he represented the codefendant. The court denied the motions, but required a public defender to sit in in case independent cross-examination was necessary. Both defendants testified and asserted alibis. The codefendant denied that he had made any statements concerning the robbery. The Eleventh Circuit held that "when defendants make timely objections to joint representation, they need not show an actual conflict of interest when a trial court fails to inquire adequately into the basis of the objection. In such circumstances the trial court has failed to discharge its constitutional duty under *Holloway* to determine whether the defendants are receiving adequate assistance of counsel, a duty separate from the *Cuyler* framework. Reversal, therefore is automatic." *Id.* at 1011. Here, although counsel did not object until the day of trial, the objection was timely because the delay was caused by the prosecution's failure to provide the information in a more timely manner. The trial court also did not conduct an adequate inquiry. Instead, the court asked counsel a single question about trial strategies in open court to which counsel did not respond. "[B]y asking defense counsel to disclose trial strategy in open court, the trial court improperly placed counsel in a situation where in order to adequately respond he would have had to disclose client confidences, thereby breaching attorney/client confidentiality." *Id.* at 1012-13. Court also finds that even if the *Cuyler* standard applied, counsel's representation was adversely affected because counsel did not object to the hearsay concerning the codefendant's statements, which were not admissible against the defendant, and did not cross-examination the codefendant concerning these statements. The court also noted that counsel did not seriously challenge the identification testimony against the defendant although it was much weaker than the identification of the codefendant.

1984: *United States v. Caceres*, 745 F.2d 935 (5th Cir. 1984). Trial court erred in denying motion to withdraw in drug case where counsel represented defendant and codefendant in joint trial and repeatedly requested appointment of separate counsel for the codefendant due to conflicting interests and on the second day of trial brought in another attorney to represent codefendant.

1983: *United States v. Punch*, 722 F.2d 146 (5th Cir. 1983). Trial court erred in denying motion to withdraw in drug case where counsel represented defendant and codefendant in joint trial and

repeatedly requested appointment of separate counsel for the defendant due to conflicting interests and on the second day of trial brought in another attorney to represent defendant.

3. U.S. District Court Cases

1995: *Harjo v. Reynolds*, 894 F. Supp. 1496 (N.D. Okla. 1995), *aff'd*, 99 F.3d 1149 (10th Cir. 1996). Trial court erred in failing to conduct adequate inquiry to determine whether potential conflict of interest existed due to counsel's representation of codefendants in conspiracy and murder trial. Two attorneys from the public defender office were appointed to represent all four codefendants. At a motions hearing, counsel moved to withdraw from representing Harjo, the petitioner here, due to potential conflicts. Counsel stated that the three codefendants implicated Harjo, while Harjo's pretrial statement implicated the three codefendants. The court stated that it had no jurisdiction until after the preliminary hearing. At the preliminary hearing, Harjo, through counsel, objected to the conflicted representation. Counsel then filed a motion for severance detailing some of the ramifications of the conflict. On the first day of trial, counsel renewed the motion for severance and pointed out the conflicts. The court denied the motions. Because petitioner made timely objections to the conflicts, *Holloway* is controlling. The inquiry at trial was inadequate because the trial judge did not inquire whether the codefendants intended to testify and portray defendant as the one in command of the situation. Likewise, the court did not address the defendants personally and inquire as to their reasons for desiring separate counsel. Moreover, defense counsel did not have burden of proving that conflict from multiple representation was more than potential conflict warranting separate counsel. The burden was on the court to conduct an adequate inquiry and to make a determination.

4. State Cases

2007: *State v. Tensley*, 955 So. 2d 227 (La. App. 2007). Both defendants (a mother and her boyfriend) in second degree murder while engaged in cruelty to a juvenile case were granted a new trial due to counsel's conflict of interest the adversely affected the representation. Counsel A & B were originally appointed to represent the mother. Later, both were also appointed to represent the boyfriend. Prior to meeting with the boyfriend, counsel A's motion to withdraw from the boyfriend's case was granted based on the likely conflict of interest. Counsel B did not similarly move to withdraw from either case and represented both for more than a year before being relieved as the mother's counsel (without explanation) prior to trial. Immediately prior to trial, the mother moved to disqualify Counsel B from continued representation of the boyfriend due to his conflict of interest. A hearing was held in which Counsel B testified, with no objections, concerning the substance of discussions with both defendants, who both maintained innocence but also did not cast blame on the other defendant. The trial court denied the motion, but was not aware at the time that the mother would testify at trial and be cross-examined by Counsel B. The court held that under state law "a defense attorney required to cross-examine a current or former client on behalf of a current defendant suffers from an actual conflict." When the defendant asserts the issue prior to trial, no showing of prejudice is required. Instead, the court must appoint separate counsel or determine if the conflict is "too remote." Here, the conflict clearly was not too remote and "culminated in the ghastly unrestrained process" of counsel cross-examining the mother at trial. The mother's conviction was thus reversed. Although the

boyfriend did not object to the conflict prior to trial, the issue was disclosed to the trial court, which then had a duty to advise him of the conflict. Because the boyfriend was never advised of his right to conflict-free counsel, his conviction was also reversed.

1996: *Eveland v. State*, 929 S.W.2d 165 (Ark. App. 1996). Trial court erred in denying counsel's motion for severance and to withdraw from representation in rape case due to conflicts. Following arrest, each of the three codefendants made statements incriminating themselves and their codefendants. All three retained the same counsel. Just prior to trial that counsel was suspended from the practice of law and new counsel was retained. Just prior to trial, the prosecutor notified counsel that the prior statements would be used for impeachment during cross-examination. Counsel moved for severance and to be allowed to withdraw from representation of the two least culpable codefendants due to the conflict. Counsel noted that there were defenses available to them that would be adverse to the more culpable defendant. The trial court denied the motion as untimely. The appellate court noted that there were conflicting interests and antagonistic defenses. Even according to the rape victim, one defendant was the actual perpetrator and one codefendant actually assisted her following the rape. Moreover, the court noted that under "*Holloway*, trial counsel was in the best position to evaluate the possible conflicts and requested to be relieved as counsel for two of the appellants." *Id.* at 169. The trial court abused its discretion in denying the motion for severance and for separate counsel for each codefendant.

1993: *Hernandez v. State*, 862 S.W.2d 193 (Tex. App. 1993). Trial court abused its discretion in refusing to appoint separate counsel for five prisoners, who were jointly tried, for assaulting a correctional officer. The trial court granted the state's motion for a joint trial. Prior to trial, counsel moved for appointment of separate counsel for each of the five defendants. The court denied the motion. Automatic reversal required due to joint representation over objection. Even if prejudice showing was necessary, "It is not speculation . . . that the separate lawyers could, and we submit would, have argued the differing degrees of assault and differing criminal backgrounds of each of the defendants; attempting to put their own client in the best possible light." *Id.* at 196.

1992: *People v. DeBusk*, 595 N.E.2d 1156 (Ill. App. 1992). Trial court erred in armed robbery case in failing to either appoint separate counsel or to take adequate steps to ascertain whether risk of conflict was too remote to warrant separate counsel where counsel represented defendant and codefendant and asserted conflicts a number of times. Defendant and codefendant were charged with home invasion and armed robbery. A single public defender was appointed to represent them. Prior to trial, counsel informed the court a number of times that there was a conflict between the defenses, that the defendant was exercising undue influence over the codefendant, that the defendant had made pre-trial statements implicating the codefendant, and that there was evidence that was admissible against defendant but not against codefendant. Because both defendants stated that they wanted the same attorney and a joint trial, the trial judge refused to appoint separate counsel. Counsel then moved to withdraw, but the court did not rule on the motion. Ultimately, the defendant requested separate counsel, but the court denied the motion. The defendant then proceeded *pro se* with a different stand-by counsel. Following conviction, the defendant again requested different counsel and the court denied. The defendant again

proceeded *pro se*. “The trial court’s failure to appoint separate counsel or to take adequate steps to ascertain whether the risk was too remote to warrant separate counsel was reversible error.” *Id.* at 1163.

- 1991:** *State v. Velarde*, 806 P.2d 1190 (Utah App. 1991). The court erred in failing to conduct adequate inquiry where counsel representing defendant and codefendant requested appointment of separate counsel. Defendant was charged with burglary and theft. He and his codefendant were appointed separate counsel, but both were members of the same public defenders office. Defendant’s counsel requested appointment of outside counsel because defendant and codefendant were both prepared to accuse the other of the crimes. The state objected to a possible delay and the court denied the motion. The appellate court held that when a conflict is raised, the trial court must take adequate steps to resolve the issue or prejudice is presumed. Here, the trial court did not determine whether there was a conflict, whether appointing new counsel would delay the case or the defendant’s desires. The court asked several times but the defendant only addressed other motions in response and never addressed the conflict issue.
- 1990:** *Main v. State*, 557 So.2d 946 (Fla. App. 1990). Trial court erred in requiring joint representation in drug case where counsel represented defendant and codefendant in joint trial in drug distribution case. Counsel repeatedly objected to the joint representation. During trial, on direct examination, the state’s primary witness implicated only the codefendant in one transaction. On cross, counsel elicited testimony that it was actually only the defendant, which was necessarily damaging to defendant but counsel was obliged to conduct the cross in representing the codefendant counsel has a actual conflict that adversely affected representation.
- 1988:** *State v. Knight*, 770 S.W.2d 771 (Tenn. Crim. App. 1988). Trial court erred in failing to conduct an adequate inquiry in drug case where counsel represented both defendant and codefendant and counsel informed the court that he had a conflict and should not represent defendant. The judge failed to explore the conflict and proceeded on. Defendant then plead guilty despite having an arguable defense of entrapment, which would have highlighted the codefendant’s greater culpability.
- 1987:** *Wilson v. State*, 359 S.E.2d 661 (Ga. 1987). Trial court erred in requiring counsel in robbery case to jointly represent two defendant when counsel informed the court of a conflict of interest and requested appointment of separate counsel.
- 1983:** *Reid v. Superior Court*, 189 Cal. Rptr. 644 (Cal. App. 1983). Trial court erred in failing to adequately inquire in forgery case where counsel represented defendant and codefendant and codefendant raised a conflict objection at the preliminary examination. Defendant’s failure to object was excused because, after the magistrate brushed aside codefendant’s objection, defendant had no reason to expect he would respond differently to any objection she raised. Information dismissed.
- 1982:** *Commonwealth v. Nicolella*, 452 A.2d 1055 (Pa. Super. Ct. 1982). Trial court erred in denying continuance in drug case where counsel represented defendant and codefendant, who was the principal witness against defendant, and also represented defendant’s mother, a codefendant still

pending trial. It was improper for defendant's counsel to continue to represent either defendant or his co-defendant (who was the principal witness against the defendant), since counsel created at least the appearance of impropriety by his continued involvement in the case. Furthermore, the record shows that an actual conflict continued even after counsel was removed from co-defendant's case. In addition to representing defendant, counsel also represented defendant's mother. The trial record clearly shows the judge chiding counsel for acting out of concern for the mother's upcoming case, not defendant's on-going one. The trial court abused its discretion in refusing appellant's request for a continuance to obtain new counsel.

Lerma v. State, 679 S.W.2d 488 (Tex. Crim. App. 1982). Trial court erred in refusing to conduct an adequate inquiry in involuntary manslaughter case where counsel represented defendant and codefendant in joint trial and defendant objected to joint representation due to conflicts.

1982: *Shiver v. State*, 417 So.2d 1140 (Fla. App. 1982). Trial court failed to adequately inquire in drug case when counsel represented defendant and codefendant in joint trial and asserted conflict.

B. Simultaneous Representation of Codefendants in Plea Negotiations

1. U.S. Court of Appeals Cases

2000: *United States v. Henke*, 222 F.3d 633 (9th Cir. 2000). Trial court erred in failing to grant motion to withdraw due to conflict in prosecution for conspiracy to make false statements to the Securities and Exchange Commission (SEC), making false statements, securities fraud, and insider trading. Three defendants were indicted. They participated with their lawyers in joint defense meetings during which confidential information was discussed. Communications made during these pre-trial meetings were protected by the lawyers' duty of confidentiality imposed by a joint defense privilege agreement. [Court held that such agreements are valid and implies an attorney-client relationship with the co-defendants and all counsel involved.] Before trial, one codefendant entered a plea agreement with the government in exchange for his testimony against the remaining two codefendants. Counsel for the remaining codefendants moved for a mistrial and to withdraw because the duty of confidentiality to the witness under the joint defense agreement prevented counsel from adequately cross-examining the witness. The court granted the motion for a mistrial to allow counsel to prepare, but denied the motion to withdraw. The court reasoned that any privileged impeaching information counsel learned about the witness would not be known to new counsel and the defendants were therefore no worse off for being represented by their original attorneys. During the new trial, the witness testified, in a manner allegedly contrary to statements made in the pretrial meetings, but neither counsel conducted any cross-examination for fear of violating the privilege agreement. Counsel had even been threatened with action by the witness' new counsel if the agreement was violated. Given this situation, counsel was in the best position to evaluate the conflict and the motion to withdraw should have been granted.

1995: *United States v. Cook*, 45 F.3d 388 (10th Cir. 1995). Trial court erred in drug prosecution by requiring defendant's counsel to advise his former client/codefendant to testify in accordance with plea agreement thereby creating a conflict. Three codefendants in a drug trial retained the same counsel. Before trial, the government entered into a plea agreement with codefendant to testify against defendant and remaining defendant. On motion of the government – conceded by counsel – the court then appointed new counsel for the witness because of the conflict of interest. During trial, the witness refused to testify and the court ordered the defendant's counsel to advise his former client of the consequences of failure to comply with plea agreement that required her to testify in government's case-in-chief against defendant in exchange for the government's recommendation of leniency at sentencing. Counsel noted that he had previously been disqualified due to a conflict but attended the meeting with the prosecutor and the witness' new counsel where the witness was advised. Conflicted counsel did not speak during the meeting though. The codefendant/witness then gave damaging testimony against the defendant. Appellate court finds that counsel's statement to court of conflict was an objection and that counsel's conflict was patent in being required to advise witness to give damaging testimony against defendant. Court finds that it does not matter that counsel said nothing at the meeting because, "[u]nder *Holloway*, it is the improper actions of the *trial court*, following a defendant's timely objection, that define our conflict of interest inquiry." *Id.* at 394 n.6. Habeas relief granted even though this issue was not raised on direct appeal in state court, because counsel, who also served as appellate counsel, was ineffective in failing to raise this issue. Thus, cause and prejudice for failing to raise the issue in state court was established.

1983: *United States v. Unger*, 700 F.2d 445 (8th Cir. 1983). Trial court erred in failing to adequately inquire in kidnapping case where counsel represented defendant and codefendant in sentencing. While the court found that her guilty plea was not affected by the conflict, the defendant should have been specifically warned of the dangers of joint representation. Accordingly, she did not knowingly waive her right to separate counsel, since she could not be said to have waived an unperceived conflict that was not brought to her attention. In particular, a single-syllable answer to the clerk's question, of whether she had been satisfied with counsel's representation, was inadequate to show an informed and intelligent waiver of the right to conflict-free representation.

2. State Cases

2001: *State v. Ryan*, 26 P.3d 707 (Kan. App. 2001). Counsel represented brother and sister codefendants charged with possession of cocaine. Counsel negotiated a plea for the defendant that required her to testify against her brother. Defendant claimed she did not know of the requirement to testify until just prior to the plea hearing when she admitted both her guilt and her brother's. Following the plea, counsel moved to withdraw from representing the brother and he retained separate counsel. Charges against him were dismissed. The defendant retained new counsel prior to sentencing and moved to withdraw her guilty plea due to counsel's conflict. The trial court denied without inquiry into what actions counsel may have taken if he had not been laboring under a conflict of interest. The Court held, under these circumstances, that *Holloway* required a presumption of prejudice. "[A] showing defendant's attorney had an actual conflict of interest when negotiating a plea agreement requires the district court to grant defendant leave to withdraw the guilty plea prior to sentencing." *Id.* at 710.

1992: *Ross v. State*, 829 P.2d 58 (Okla. Crim. App. 1992). Trial court erred in failing to inquire or to appoint separate counsel where counsel represented three codefendants and asserted a conflict. Defendant and two others were arrested for armed robbery. Defendant initially admitted that he was the driver for a planned robbery. He later denied knowledge of any robbery but admitted that the three were planning a burglary. A single public defender was appointed to represent all three. Counsel informed the court that there was a conflict and twice requested appointment of separate counsel. The court denied the motion. The two codefendants plead guilty and the state notified counsel that they would be witnesses. Just prior to trial counsel renewed his motion for appointment of separate counsel because he could not cross-examine his own clients. The appellate court held that, "given the circumstances in this case, it was the duty of the trial judge to either appoint separate counsel or to take adequate steps to ascertain whether the risk was too remote to warrant separate counsel." *Id.* at 61. Prejudice presumed.

1983: *Commonwealth v. Davis*, 455 A.2d 168 (Pa. Super. Ct. 1983). Trial court erred in denying motion to withdraw in unlawful taking, receiving stolen property, criminal conspiracy, and burglary case where the same public defender officer represented defendant and codefendant and negotiated a plea in exchange for testimony for codefendant and moved to withdraw from defendant's case.

1982: *State v. Rowe*, 416 So.2d 87 (La. 1982). Trial court erred in denying motion to withdraw in robbery case where counsel represented defendant and codefendant who plead guilty and became a witness. During trial, the codefendant testified counsel had advised him to testify against defendant. Counsel moved to withdraw as defense counsel was obviously unable to adequately cross-examine the codefendant.

Commonwealth v. Evans, 451 A.2d 1373 (Pa. Super. Ct. 1982). Trial court erred in denying motion to withdraw in theft by unlawful taking, receiving stolen property, and criminal conspiracy case where public defender office represented defendant and codefendant and codefendant plead guilty and testified for state.

C. Simultaneous Representation of Codefendants in Severed Trials

1982: **State v. Marshall*, 414 So.2d 684 (La. 1982). Trial court erred in denying motion for appointment of separate counsel in capital trial where counsel represented defendant and codefendant in severed trials. Reversal required even though severance was granted and made it highly unlikely that any prejudice would arise because of a conflict. When a defendant raises a pretrial objection because of a possible conflict, the trial court must, in accordance with *Holloway*, appoint separate counsel or take adequate steps to determine if claimed risk is too remote. If it fails to take those measures, then reversal is automatic even in absence of specific prejudice.

1982: *Commonwealth v. Nicolella*, 452 A.2d 1055 (Pa. Super. Ct. 1982). Trial court erred in denying continuance in drug case where counsel represented defendant and codefendant, who was the principal witness against defendant, and also represented defendant's mother, a codefendant still

pending trial. It was improper for defendant's counsel to continue to represent either defendant or his co-defendant (who was the principal witness against the defendant), since counsel created at least the appearance of impropriety by his continued involvement in the case. Furthermore, the record shows that an actual conflict continued even after counsel was removed from co-defendant's case. In addition to representing defendant, counsel also represented defendant's mother. The trial record clearly shows the judge chiding counsel for acting out of concern for the mother's upcoming case, not defendant's on-going one. The trial court abused its discretion in refusing appellant's request for a continuance to obtain new counsel.

D. Simultaneous Representation of Government Witness on Related Charges

2008: *Scott v. State*, 991 So. 2d 971 (Fla. App. 2008). The trial court erred when it denied the public defender's motion to withdraw on the basis of a conflict of interest in prosecution for drug offense because the public defender's office also previously and simultaneously represented the confidential informant who had obtained the evidence that would be used against the defendant at trial, and the defendant's defense at trial involved implicating the informant as the source of the drugs.

By requiring the public defender to represent appellant despite simultaneously representing the client whom it had apparently advised to provide assistance to the state, assistance that consisted of procuring evidence against appellant, the trial court impermissibly obligated the public defender to serve a dual and adverse stewardship. . . . A disqualifying conflict of interest plainly exists when the public defender represents a defendant against whom the state obtained inculpatory evidence, with the assistance of another of the public defender's clients, where the public defender's office advances the latter's interests, based upon damage the latter did to the first defendant's legal position. Here, if an assistant public defender advised the confidential informant to cooperate with the state, the public defender's office would itself have helped produce most of the evidence used against appellant at trial.

In addition, "[b]ecause part of appellant's defense was to suggest that the confidential informant framed him, appellant's interests conflicted starkly with those of the informant."

1983: *Lerversen v. Superior Court*, 668 P.2d 755 (Cal. 1983). Trial court erred in denying motion to withdraw in robbery case where counsel simultaneously represented a government witness, who was also a suspect in the same case. Counsel informed the court that he had confidential information received in course of his representation of the witness. The state supreme court held that attorney's good-faith representations to court, coupled with evidence in the record and posture of trial, proved that to deny his motion to be relieved would have deprived defendant of his constitutional right to assistance of counsel free from any conflict adversely affecting counsel's performance.

E. Simultaneous Representation of Persons Implicated (But Not Jointly Charged) in Crimes

2007: *Duvall v. State*, 923 A.2d 81 (Md. 2007). The trial court erred in burglary, robbery, and assault case for failing to grant the public defender's motion for continuance in order to cure an actual conflict of interest. The defendant was charged with breaking into a home in order to steal marijuana. The defense theory was that the defendant had an alibi from his mother and that the crime had been committed by a third party who fit the physical descriptions of the eyewitnesses, had committed a similar crime at the same home previously, and had knowledge of the location of marijuana in the home. Defense counsel filed a motion for continuance well before trial in order to reassign the case to a panel attorney because the same public defender office represented the third party on unrelated charges. The trial court erred in failing to adequately inquire into the conflict or to grant the continuance motion in order to allow counsel to cure the conflict. The trial court asked only if the defendant wanted a continuance, which he did not, and whether he wanted to proceed without counsel, to which he responded that he would if counsel could not represent him. The defendant was not, however, adequately advised about the conflict or whether he wanted to waive the conflict prior to counsel continuing to represent him. The court found that there was an actual conflict and it was irrelevant that the third party was not a co-defendant, the state's witnesses testified that the defendant and not the third party was the perpetrator, and the defense elicited evidence and argument during trial to try to shift the blame to the third party. The conflict existed prior to trial and what happened during trial is irrelevant to the court's error.

2000: *Letley v. State*, 746 A.2d 392 (Md. App. 2000). Trial court erred in denying retained defense counsel's motion to withdraw (which was supported by the defendant after consultation with unconflicted counsel) from representation in attempted murder case because defense counsel faced actual conflict of interest, created by dual representation of defendant and another client, who was not charged in crime at issue but who had allegedly confessed to counsel that he had in fact committed that crime. The court denied the motion and a continuance. The court of appeals held:

the trial court's decision to require counsel's continued representation was improper. The record is clear that there was indeed an actual conflict of interest which endangered Appellant's right to undivided loyalty and assistance. In order to properly defend Appellant counsel had, by implication, to incriminate her other client.

Id. at 401-02. The fact that no other lawyer would have had access to the confidential information that someone else confessed does not change the result. "The conflict is inherent in the divided loyalties. It mattered little that new counsel would not be privy to the confidential information known to Appellant's counsel; a conflict nonetheless existed." *Id.* at 402. The court also notes that defense counsel's representations of a conflict should be given deference. "Defense counsel is in the best position to make this judgment, and will often be ethically barred from giving the court sufficient information to make it independently." *Id.* at 404.

1984: *State v. Gonsalves*, 476 A.2d 108 (R.I. 1984). Trial court erred in summarily denying counsel's motion to withdraw in fraudulent use of credit card case where counsel informed the court of a conflict of interest because he also represented the individual who actually committed the crime for which defendant was being tried.

F. Simultaneous Representation of Prosecutor, Government Witness, or Confidential Informant in Unrelated Case

2010: *Beard v. Commonwealth*, 302 S.W.3d 643 (Ky. 2010). Counsel in drug trafficking case had a conflict of interest in simultaneous representation of the defendant and a confidential informant (CI), such that the trial court's denial of the defendant's *pro se* motion to dismiss counsel was error. The CI was on probation after having been represented by counsel. He was in danger of having his probation revoked for failure to report and counsel had been appointed again. During this time, the police did not know he was on probation and accepted his offer to work as a CI, which would have been rejected if police had known of his probationary status. He made controlled buys that led to the defendant's arrest. During trial, counsel attacked the CI's credibility and the police non-compliance with their own rules regarding use of informants. "Though *Holloway*, specifically addressed joint representation in the same trial, ultimately a conflict is a conflict." Here, the "obvious conflict" was that counsel owed a duty of zealous representation to both the defendant and the CI and was required to "help one client at the expense of the other" or "to balance the interests of his clients," which "would require doing only half the job for both clients" and harm both of them "by denying them full representation." In short, by representing the defendant and a witness against him, who had an interest in the defendant being convicted, counsel "had a dog in both fights." While counsel did challenge the CI's credibility at trial, "we cannot know what he may have refrained from doing because of his concurrent representation" of the CI. Because this was a structural error, automatic reversal was required.

2005: *State v. Gregory*, 612 S.E.2d 449 (S.C. 2005). The trial court erred in denying counsel's motion to withdraw and to allow the defendant a continuance in a lewd acts case. After counsel began representation of the defendant, counsel began representing the prosecutor in his case in her own divorce action. After counsel began negotiating for the defendant, the defendant was indicted on an additional charge. Counsel moved to withdraw on the morning of trial because the defendant's confidence in his abilities was diminished. The court denied the motion and ordered only that a different prosecutor would try the case. The trial court erred because there was an actual conflict of interest due to counsel's divided loyalties. Prejudice presumed.

2001: *State v. Santacruz-Hernandez*, 40 P.3d 672 (Wash. App. 2001). Court erred in failing to grant counsel's motion to withdraw or to allow a 24-hour continuance in order for counsel to prepare and present evidence that would have established an actual conflict that would adversely affect the defendant. Defendant was charged with drug distributions, based in part on two confidential informants. The day before trial, counsel realized that she also represented one of the confidential informants on unrelated charges. Counsel moved to withdraw, but the court denied. On the morning of trial, counsel, through her own lawyer, again moved to withdraw and asked for a 24-hour continuance in order to prepare and present evidence that would establish a conflict

that would adversely affect the defendant. The trial court denied the motions, based in part, on the state's argument that the informant would not be a witness. Court held reversal was required under *Holloway*.

- 2000:** *Ramirez v. State*, 13 S.W.3d 482 (Tex. App. 2000). Defendant was denied effective assistance of counsel in prosecution for unlawful possession of a firearm by a felon because defense counsel labored under an actual conflict of interest that adversely effected her performance. During trial, the state called as a witness a client of defense counsel in another pending criminal case. Counsel moved for a mistrial because she had no notice of the witness and because she had confidential information from him and could not adequately represent the witness or the defendant in cross-examining her own client. The court denied the motion for mistrial and pressed on. The witness/client testified that the defendant made incriminating statements to him in confinement. During cross, counsel attempted to establish that she had confidential information that she could not use in cross because the witness/client was not waiving his privilege. The court would not allow this testimony. Counsel again moved for a mistrial due to the prejudice to defendant. The court of appeals held, "Great deference should be accorded the representations of an attorney who feels a division of loyalty." *Id.* at 486. "It is well-established that a defendant is denied the effective assistance of counsel in those instances where an attorney is unable to cross-examine, or is chilled in the cross-examination of, a government witness because of the attorney/client privilege arising from counsel's prior representation of the witness or from his duty to advance the interests of the witness as a current client." *Id.* at 487. Counsel in this case had an actual conflict of interest that had an adverse effect on appellant's trial. In addition, the trial court failed to conduct an inquiry into the apparent conflict.
- 1997:** *Maricopa County Public Defender's Office v. Superior Court In and For County of Maricopa*, 927 P.2d 822 (Ariz. App. 1996). Trial court erred in two unrelated cases in denying public defender's motions to withdraw where the office either currently or previously represented government witness. The trial court denied the motions absent disclosure of confidential information concerning former clients. Court held that the trial court cannot condition ruling on conflict on disclosure of confidential information and counsel's assertion of conflict must be given great weight.
- 1994:** **Guzman v. State*, 644 So. 2d 996 (Fla. 1994). The trial court erroneously denied motions to withdraw filed by the appointed public defender based on conflicts of interest between the defendant and two jailhouse snitches, who had been his cellmate prior to trial and were also clients of the public defender's office. One of these witnesses testified and denied making statements to counsel that he would do anything to avoid conviction. Nonetheless, counsel chose not to testify to rebut this testimony. "We can think of few instances where a conflict is more prejudicial than when one client is being called to testify against another." The conflict was not resolved by the witness' waiver because this could not waive the defendant's right to conflict-free counsel.
- 1991:** *Mitchell v. State*, 405 S.E.2d 38 (Ga. 1991). Trial court erred in requiring counsel to proceed with representation in murder case where counsel also represented a government witness on pending unrelated charges. During the trial, the government notified counsel for the first time

that witness would be called. Counsel objected and informed the court of the conflict. The court attempted to resolve the conflict by relieving counsel as the witness' lawyer. Counsel objected and moved for a mistrial. The witness then testified that defendant had confessed to him in confinement. Counsel declined to cross-examine and moved for a mistrial or, in the alternative, for a continuance until another attorney could be appointed to represent defendant. The trial court denied the motions. The court erred in requiring the conflicted representation.

King v. State, 810 P.2d 119 (Wyo. 1991). Trial court erred in failing to adequately inquire into conflict when defendant requested different counsel because counsel had previously represented a government witness. Witness was arrested on drug charges. She agreed to participate in sting operation targeting defendant, her former boyfriend. The witness's initial attorney, who arranged to get her out of jail and into the hospital for treatment, was appointed to represent defendant following his arrest. The witness represented by other counsel from the public defender's office entered into a deferred plea, which would ultimately result in dismissal of charges, and testified against defendant. At trial, defendant asked for appointment of different counsel due to allegations of ineffective assistance and due to counsel's prior representation of witness. The court denied the motion without discussion. "The trial judge should have evaluated [defendant's] claim and put into the record the reasons for rejecting [defendant's] claim for ineffectiveness of counsel based upon conflict of interest. The failure to do so constituted an abuse of discretion." *Id.* at 124 (citations omitted).

G. Prior Representation of Victim, Government Witness, or Codefendant's Witness on Unrelated Charges

1. U.S. Court of Appeals Cases

1997: *United States v. Gallegos*, 108 F.3d 1272 (10th Cir. 1997). Trial court erred in failing to conduct inquiry in drug conspiracy and money laundering case where counsel had previously represented a witness that would be called by codefendant in joint trial. Prior to trial, counsel became aware that the codefendant intended to call a witness that counsel had previously represented in a drug case. Counsel informed the court that he was concerned about his ability to cross-examine his former client because of the attorney-client privilege. The court said the matter would be addressed if the witness was called. During the trial, when the witness was called, the court instructed counsel to consult with his prior client to determine whether he would invoke his Fifth Amendment rights. After talking with the witness, counsel informed the court that the witness had information exculpatory to the defendant, but counsel advised him to invoke his Fifth Amendment rights. Counsel stated that he felt that he had a conflict in representing competing interests and moved to sever defendant's trial. The government requested appointment of independent counsel for the witness, but the witness declined. The trial proceeded and the witness did not testify. Following conviction, the defendant moved for a new trial due to the conflict. Court denied finding that the witness would have refused to testify regardless of who represented him. Appellate court held, under *Holloway*, that "where timely objection is made to joint representation of conflicting interests, and where the trial court fails to adequately address the conflicting interests, reversal is automatic." *Id.* at 1280. Here, counsel raised the conflict issue in a timely fashion and moved for severance in order to resolve the issue. Rather than

inquire of defendant or the witness concerning waiver of the conflict, as was required, the trial court instructed counsel to consult with and advise the witness. As counsel explained to the court, he was in a very precarious situation. Because the witness possessed information that was exculpatory to the defendant, counsel's duty to the defendant was to encourage the witness to testify and to attempt to elicit this exculpatory information from him. On the other hand, counsel's obligation to his former client was to discourage him from testifying. If the former client had testified, he would have subjected himself to the risk of additional criminal charges. Thus, there was a real conflict of interest present, and the trial court erred in failing to either obtain a waiver from the defendant or take adequate steps to protect her right to conflict-free representation.

2. State Cases

- 2004:** *State v. Reeves*, 890 So.2d 590 (La. App. 2004). The trial court erred in simple escape case for failing to take adequate steps to assure that defendant's right to conflict-free counsel was protected after the court found that defense counsel did have an actual conflict of interest. Prior to trial, the defendant moved for the appointment of conflict-free counsel. The trial court denied the motion stating any potential conflicts with specific witnesses could be dealt with at trial. During the trial, the State indicated that it would call an inmate that had previously been represented by counsel, who was the director of the Public Defender's Office. Counsel informed the court of the conflict in having to cross-examine his former client, especially since he had confidential information gained from his representation of the inmate. The court found that an actual conflict existed, but, over objection, allowed the representation to continue based on the witness' waiver of the privilege. The court held that "[t]he conflict was not the witness' to waive. . . . [T]he only proper recourse to protect Defendant's right to effective counsel was to appoint conflict-free counsel."
- 2000:** *Valle v. State*, 763 So.2d 1175 (Fla. App. 2000). Interlocutory appeal. Trial court erred in denying public defender's motion to withdraw because of conflict of interest in manslaughter case where two state witnesses, who received injuries as passengers in defendant's vehicle, were previously represented by the public defender's office. The public defender involved in this case had not represented the witness/victims or obtained any confidential information from their files. The trial court, thus, denied the motion to withdraw. The appellate court held that the motion should have been granted because the public defender office is like a law firm and if one person is conflicted, all are conflicted.
- 1998:** *Reardon v. State*, 715 So.2d 348 (Fla. App. 1998). Court erred in aggravated battery case in denying public defender's motion to withdraw due to conflict since public defender had previously represented victim at his arraignment in DUI case. Court held that although *Holloway* did not require that counsel be relieved, Florida law does because the Florida Supreme Court interpreting a state statute requires that the public defender be relieved anytime the public defender certifies a conflict.
- 1996:** *Brooks v. State*, 686 So.2d 1285 (Ala. Crim. App. 1996). Trial court erred in denying counsel's motion to withdraw in drug case, where counsel had previously represented the confidential

informant who was instrumental in defendant's arrest and even represented him in the case that led to the defendant's arrest. The appellate court held, "An actual conflict of interest existed here, and the trial court erred to reversal in denying counsel's motion to withdraw." *Id.* at 1287.

1986: *State v. Serpas*, 485 So. 2d 999 (La. App. 1986). Trial court erred in denying counsel's motion to withdraw in stolen goods case where counsel previously represented a state witness on unrelated charges and had negotiated a plea for him that required his testimony against defendant.

H. Prior Prosecution of Defendant on Unrelated Charges

1990: *People v. Martin*, 168 A.D.2d 794 (N.Y. App. Div. 1990). Trial court erred in failing to appoint different counsel for defendant where defendant repeatedly requested different counsel because counsel had previously prosecuted defendant on unrelated charge and because defendant asserted that counsel was ineffective. The conflict itself was sufficient to require appointment of different counsel.

I. Counsel Retained by Codefendant or Third-Party With Adverse Interest

1986: *People v. Palmer*, 490 N.E.2d 154 (Ill. App. 1986). Trial court erred in denying counsel's motion to withdraw in arson and battery case where counsel was retained by the defendant's wife, who was the battery victim and a state's witness. She sometimes indicated that she wanted the defendant's charges dropped and at other times stated that she wanted the state to prosecute defendant. Counsel thus labored under at least a possible conflict in his representation of defendant and reversal was required even though there was no showing that counsel did not represent defendant in competent fashion.

J. Counsel Was Necessary or Potential Witness

2004: *Flores v. State*, 155 S.W.3d 144 (Tex. Crim. App. 2004). The trial court erred in aggravated assault case in ordering defense counsel to testify over objection. Counsel elicited testimony that the victim had been unable to identify the defendant during a pretrial hearing and had to ask the court interpreter who the defendant was. The state was allowed to call counsel to testify to his recollection of the incident and testified that he did not hear the victim ask the interpreter to identify the defendant. Analyzing the issue as a right to fair trial rather than one of effective assistance of counsel, the court held that counsel may not be called as a witness unless the state establishes no feasible alternative to counsel's testimony and that the testimony is "essential, not merely relevant" to the state's case. The trial court erred under both prongs in this case and the error was harmful. "The harm flows, in part, from placing the lawyer in a dual role and the impressions created thereby. . . ." Thus, "the State may indeed call defense counsel to the stand, and the court may require the lawyer [to] testify, but the State will do so at its own peril."

1983: *Koza v. Eighth Judicial Dist. Court In and For Clark County*, 665 P.2d 244 (Nev. 1983). Trial court erred in failing to disqualify counsel on motion of defendant in murder case where the public defender counsel had represented the codefendant for six days prior to his retention of

private counsel and a deputy public defender was scheduled to be called as witness at trial on whether defendant's statement to police was voluntary.

Brewer v. State, 649 S.W.2d 628 (Tex. Crim. App. 1983). Trial court erred in denying motion to withdraw in promotion of prostitution case where counsel was implicated as possible suspect in same case and was a possible witness. Counsel's conversation with defendants was recorded by informant and were so damaging to counsel's character and that of defendants as to make reasonably effective assistance impossible. Counsel made disparaging remarks against the police and the criminal justice system and also made remarks that could be construed as being involved in a coverup, which was argued by the prosecutor. In view of counsel's irreconcilable conflicts, it was abuse of discretion to deny counsel's motion to withdraw.

K. Defendant Had Filed Lawsuit or Ethics Complaint Against Counsel

1. U.S. Court of Appeals Cases

1991: *Smith v. Lockhart*, 923 F.2d 1314 (8th Cir. 1991). Trial court erred in terroristic threat and false imprisonment case for failing to appoint unconflicted counsel in pretrial stage where defendant had filed a federal lawsuit against counsel and requested substitute counsel. At arraignment, defendant objected to appointment of local public defender, in part, because he served as a municipal judge. The court informed defendant that he could proceed with counsel or proceed *pro se*. Defendant proceeded *pro se*. Then, at a pre-trial omnibus hearing, defendant requested appointment of different counsel again because there was a complete breakdown in communications and he intended to file (and did four days later) a federal lawsuit against counsel, the judge, and others alleging a conspiracy to violate his rights. The court again refused. Defendant represented himself in hearing, which included speedy trial motion and motion to reduce bond. This hearing was also important because all motions had to be raised then or would be considered untimely. Twelve days before trial, the court did appoint separate counsel. The Eighth Circuit held that the trial court erred in failing to inquire into the potential conflicts. The federal lawsuit against the attorney suggested divided loyalties and gave the attorney a personal interest. This lawsuit and the breakdown in communications were sufficient to require substitution on counsel. Because of the trial court's failure, however, defendant was completely denied counsel at the omnibus hearing, which was a critical stage of trial.

2. U.S. District Court Cases

Hays v. Farwell, 482 F. Supp. 2d 1180 (D. Nev. 2007). Under AEDPA review, trial/appellate counsel was ineffective for numerous reasons and had a conflict of interest, due to the petitioner's pending lawsuit against him, in case where the petitioner was convicted of four counts of sexual assault on a minor and four counts of lewdness with a minor for alleging sexually abusing his oldest daughter, who was then eight years old. Counsel did move to withdraw but that motion was denied by the trial court. Due to the cumulative error, the court granted the petition unconditionally and ordered the petitioner's immediate release from custody.

3. State Cases

2001: *Connor v. State*, 630 N.W.2d 846 (Iowa App. 2001). Court in post-conviction case erred in failing to inquire into claimed conflict of interest on part of counsel. Defendant had been convicted of sexual abuse, kidnapping, and gang participation. He filed post-conviction application. His counsel filed motion to withdraw because the petition was frivolous. The petitioner informed the court that he had filed an ethics complaint against counsel and requested appointment of new counsel due to the conflict. The court denied both motions and ultimately denied relief. The court of appeals held that state law entitled the petitioner to appointment of counsel and that necessarily included the right to effective counsel. Thus, the claim of a conflict of interest on part of counsel appointed for postconviction proceedings should be addressed in the same manner as if defendant were making a constitutional claim of ineffective assistance of counsel. The trial court erred under *Holloway* in failing to conduct an adequate inquiry and prejudice is presumed.

State v. McDonald, 22 P.3d 791 (Wash. 2001) (affirming 979 P.2d 857 (Wash App. 1999)). Trial court erred in failing to conduct inquiry into conflict of stand-by counsel for pro se defendant in arson case. Early in case, defendant was granted permission to proceed pro se and the public defender was appointed as standby counsel. Prior to trial, defendant informed the trial court that he had filed bar complaints and civil rights suits against the local public defenders, including standby counsel. The State filed a motion to discharge counsel because of the pending federal civil action and the potential conflict of interest. The court denied the motion based upon counsel's belief there was no conflict of interest at that time. The defendant then reasserted his motion to dismiss counsel. The prosecutor made another motion to dismiss counsel as standby counsel because the prosecutor's office had been assigned to defend him against the defendant's lawsuit in federal court, thereby creating a conflict of interest. The trial court denied the motion. Ultimately, standby counsel moved to withdraw as standby counsel because he believed a real conflict was created when the prosecutor's office was assigned to defend him against the defendant's lawsuit. The defendant also reiterated his earlier motion to remove counsel as standby counsel. The trial court denied the motions, believing the federal suit was frivolous and would proceed more slowly than the criminal case before it. The court initially determined that "[a] defendant possesses a right to have conflict-free standby counsel because standby counsel must be (1) candid and forthcoming in providing technical information/advice, (2) able to fully represent the accused on a moment's notice, in the event termination of the defendant's self-representation is necessary, and (3) able to maintain attorney-client privilege." *Id.* at 795. Court also held that when the trial court knows or should know of a conflict of interest between the defendant and standby counsel, it must conduct an inquiry into the nature and extent of the conflict. Failure to make an inquiry and take appropriate action constitutes reversible error and prejudice will be presumed. *Id.* Here, the true conflict at issue here is the one created when the prosecutor's office was assigned to represent counsel in the civil suit brought by the defendant during the same time period the prosecution was pending. While counsel only acted as standby counsel, the attorney-client privilege still attached to that relationship. The representation of counsel by the prosecutor's office undermines the duties counsel owed to the defendant, including the attorney-client privilege. The lack of an inquiry by the trial court in this situation requires reversal.

L. Defendant Alleged Ineffective Assistance

1. U.S. Court of Appeals Cases

1996: *United States v. Del Muro*, 87 F.3d 1078 (9th Cir. 1996). Trial court erred in case of falsely claiming to be a U.S. citizen in requiring counsel's continued representation following the defendant's claim of ineffective assistance of counsel in motion for new trial. Following conviction, defendant filed a motion for new trial asserting ineffective assistance of counsel and requesting new counsel to represent him in the motion. The trial court denied the motion for new counsel and required counsel to examine the witnesses concerning the allegations of his own ineffectiveness.

There was an actual, irreconcilable conflict between [defendant] and his trial counsel at the hearing on the motion for new trial. The interests of counsel were diametrically opposed to those of [defendant]. The trial court's determination that an evidentiary hearing was warranted heightened the conflict. When [defendant]'s allegedly incompetent trial attorney was compelled to produce new evidence and examine witnesses to prove his services to the defendant were ineffective, he was burdened with a strong disincentive to engage in vigorous argument and examination, or to communicate candidly with his client. The conflict was not only actual, but likely to affect counsel's performance.

Id. at 1080. Prejudice presumed. Remanded for new hearing on motion for new trial with unconflicted counsel.

2. U.S. District Court Cases

2000: *Guzman v. Sabourin*, 124 F. Supp. 2d 828 (S.D.N.Y. 2000). Counsel in robbery case had actual conflict of interest that adversely affected the defendant in motion to withdraw guilty plea. Prior to plea, the petitioner twice requested appointment of new counsel based, in part, on counsel's admission in a motion to suppress evidence that the defendant possessed a box cutter when the evidence actually showed that the box cutter was on the ground. These motions were denied. Petitioner then accepted the government's plea offer for nine years, under the condition that he be immediately transferred to the hospital because of significant pain for which he was being medicated due to carpal tunnel syndrome. During the plea hearing, there was ambiguity and significant delays in whether petitioner was ready to plead and whether he was admitting guilt. He initially said no, then gave satisfactory answers up to what weapon he used, where he said "Whatever they have. I don't know. [Pause] A sharp object." The court went on to accept the plea without inquiring into the medications taken by petitioner. Prior to sentencing counsel notified the court of a pro se motion to withdraw the plea, due, in part, to coercion by counsel. Counsel suggested that new counsel should be appointed to represent petitioner in the motion. The court allowed petitioner to argue in his own behalf but also asked defense counsel for information. Counsel denied petitioner's allegations. "Throughout the hearing, [counsel] obviously attempted to heed the tenuous line between advocacy for his client, the professional

obligations not to make false proffers to the court, and protecting his own professional reputation. However, under repeated questioning from the trial judge about [counsel's] own conduct, [counsel] crossed the line into defending himself at the expense of his client's motion." *Id.* at 835. The trial court necessarily considered counsel's statements in denying the motion to withdraw the plea. The trial court erred, however, in not appointing new counsel to argue the motion to withdraw because "[r]epresentation by conflicted counsel is tantamount to no representation at all." *Id.* at 836 (citing *Strickland*, 466 U.S. at 686, 692). Remanded for hearing with unconflicted counsel on motion to withdraw guilty plea.

3. State Cases

1999: *State v. Taylor*, 975 P.2d 1196 (Kan. 1999). Trial court erred in failing to allow a continuance for defendant to obtain new counsel prior to sentencing due to complaints against appointed counsel in coercing plea. Defendant initially charged with felony murder. During the year leading up to trial, the possibility of a plea bargain was never discussed with the defendant by appointed counsel. The night before trial, counsel advised the defendant that she could win his case and that he should reject a deal for 10-year sentences to run concurrent. The next morning her advice changed. The defendant, with only 20-90 minutes to consider it, accepted the offer and she told Taylor a plea agreement had been offered and he should accept it. Martin did not contradict Taylor's version of these events. Taylor had somewhere between 20 minutes and 1 1/2 hours to make the decision. Taylor decided to accept the offer and entered an *Alford* plea to second degree burglary, aggravated battery, and theft. A week after the plea, the defendant expressed his dissatisfaction to counsel, but counsel waited until three weeks later on the day of sentencing to file a motion to withdraw. The defendant requested a continuance to obtain new counsel because he felt coerced into taking the plea agreement. The court denied the motions and informed the defendant he could proceed with counsel or represent himself at sentencing. Counsel did not participate in the hearing and the court rejected the plea agreement due to the defendant's "lack of remorse" in maintaining his innocence and sentenced the defendant to life and to consecutive terms. The trial court's actions denied the defendant an adequate hearing on his motion to withdraw his guilty plea. The court never conducted an inquiry into the defendant's concerns about the adequacy of counsel. Remanded for a new sentencing and opportunity to raise the motion to withdraw plea with unconflicted counsel and a new judge.

1996: *Kennebrew v. State*, 480 S.E.2d 1 (Ga. 1996). Trial court erred in murder case in refusing to appoint unconflicted counsel to argue claims of ineffectiveness in motion for new trial. Defendant was represented at trial by a public defender. Following trial, defendant filed a motion for new trial assisted by retained counsel, who later withdrew. The court then appointed another public defender from the same office. Defendant requested different counsel because of the ineffectiveness claims in the motion for new trial. The court instead required the defendant to proceed *pro se* on those claims. The trial court erred in failing to appoint different counsel because a public defender cannot argue claims of ineffectiveness asserted against a member of the same office.

1995: *Carey v. State*, 902 P.2d 1116 (Okla. Crim. App. 1995). Trial court erred in denying counsel's motion to withdraw in sex abuse of minor case following defendant's motion to withdraw his

guilty plea on the basis that trial counsel coerced plea. Trial counsel moved to withdraw, but the court denied the motion and assigned co-counsel to assist. Counsel did not participate in the hearing. Co-counsel's examination of defendant was geared more toward clearing counsel's name than proving the defendant's allegations. The trial court committed error in denying the motion to withdraw because counsel had an actual conflict at that point due to the allegations against him. The trial court's actions left the defendant unrepresented on his motion to withdraw his guilty plea.

M. Connection to Prosecutor or Law Enforcement

1. U.S. Court of Appeals Cases

1999: *Atley v. Ault*, 191 F.3d 865 (8th Cir. 1999) (*affirming* 29 F. Supp. 2d 949 (S.D. Iowa 1998)). Trial court erred in denying counsel's motion to withdraw (supported by the state and defendant) due to conflict of interest where counsel, who represented petitioner charged with numerous drug-related crimes, was pending appointment to county attorney's office where he would prosecute drug cases in cooperation with the same officers that were witnesses in petitioner's case. Court did not even conduct an inquiry into the potential conflict. The state court held that the proceedings conducted by the trial court were adequate because the "hearing" demonstrated that the trial court was "well aware of the possible conflicts of interest" and further inquiry was unlikely to uncover additional facts from which it could base its decision. *Id.* at 868. The state court's decision was an "unreasonable application of clearly established federal law" under *Holloway*, because the trial court was constitutionally obligated when counsel moved to withdraw to either substitute new counsel or take adequate steps to ascertain the seriousness of the risk presented by the conflict. The undisputed record makes clear, however, that the trial court asked no questions of counsel or of the defendant. Although the record reflects that the trial court was aware of the areas in which a conflict of interest could have arisen, such knowledge alone does not satisfy the requirement of *Holloway* that the court conduct an inquiry to "ascertain whether the risk [is] too remote to warrant [new] counsel." *Id.* at 871 (quoting *Holloway*, 435 U.S. at 484). Prejudice is presumed under *Holloway* where the trial court failed to discharge its duty to inquire into a known potential conflict.

2. State Cases

1982: *Kelly v. State*, 640 S.W.2d 605 (Tex. Crim. App. 1982). Trial court erred in denying motion to withdraw in robbery case where counsel was a prosecutor for municipal court, and his law firm partner served on city planning and zoning commission, and counsel asserted a conflict.

White v. Reiter, 640 S.W.2d 586 (Tex. Crim. App. 1982). Trial court erred in denying motion to withdraw in burglary case where counsel was staff attorney for state department of corrections and the burglaries were allegedly committed by inmate following his escape from correctional facility and there was a question of the validity of arrest by DOC employees.

N. Irreconcilable or Unspecified Conflict

1. U.S. Court of Appeals Cases

1998: *United States v. Moore*, 159 F.3d 1154 (9th Cir. 1998). Trial court erred in failing to conduct additional inquiry or to substitute counsel where there was an irreconcilable conflict of interest between defendant and counsel in drug distribution case due to defendant's threat to sue counsel and counsel's fear of defendant physically assaulting him. Defendant and counsel informed the court of the conflicts four times prior to trial and the court conducted only minimal inquiry and declined to allow substitution of counsel unless counsel could be ready by the time of the scheduled trial date. While the court did not find an actual conflict, the court held that "[a] defendant need not show prejudice when the breakdown of a relationship between attorney and client from irreconcilable differences results in the complete denial of counsel." *Id.* at 1158.

The factors we consider are the same as those we apply to determine if the district court erred in denying a motion to substitute counsel. These factors are: (1) the extent of the conflict; (2) the adequacy of the inquiry; and (3) the timeliness of the motion.

Id. at 1158-59 (footnote omitted). Here, defendant timely raised the issue of the irreconcilable conflict and the court conducted only minimal inquiry when the court had a duty to conduct additional inquiry.

2. State Cases

1996: *Aceves v. Superior Court*, 59 Cal. Rptr. 2d 280 (Cal. App. 1996). Trial court erred in denying public defender's motion to withdraw in attempted murder case based on conflict of interest. The public defender stated that due to statements by the defendant there was a complete breakdown of the relationship but counsel declined to say more for fear of violating the attorney-client privilege. Counsel did state, however, that it had nothing to do with alleged threats to witnesses as the government asserted. Counsel also stated that there was no third party involved. While counsel stated that the conflict could potentially arise with successor counsel, counsel believed there was an irreparable conflict with all members of the public defender's office. While the court accepted counsel's representations, it found that it could not grant the motion to withdraw unless counsel supplied more information. The appellate court found that the motion to withdraw should have granted where counsel's statements revealed "a classic conflict where duty of loyalty to the client is compromised by the attorney's own interests" and counsel stated, as an officer of the court, that he could not reveal more without violating the attorney-client privilege. Citing state law and *Holloway*, the court held, "Where as here the duty not to reveal confidences prevented counsel from further disclosure and the court accepted the good faith of counsel's representations, the court should find the conflict sufficiently established and permit withdrawal." *Id.* at 284.

1983: *Avera v. State*, 436 So.2d 1115 (Fla. App. 1983). Trial court erred in denying motion to withdraw in escape case where counsel moved to withdraw due to conflict.

Volk v. State, 436 So.2d 1064 (Fla. App. 1983). Trial court in denying motion to withdraw where the same public defender office represented codefendants and asserted a conflict of interests.

Commonwealth v. Davis, 455 A.2d 168 (Pa. Super. Ct. 1983). Trial court erred in denying motion to withdraw in theft case where public defender represented defendant and codefendant and asserted a conflict.

O. Miscellaneous

2010: *McCamey v. Epps*, 696 F. Supp. 2d 667 (N.D. Miss. 2010). Under AEDPA, counsel in drug case had actual conflict of interest in post-trial “waiver of rights” hearing that rendered waivers invalid. During voir dire, one of the jurors, who had made a professional negligence claim and bar complaints against counsel for missing a statute of limitations in a personal injury action, did not respond when asked if the jurors knew defense counsel. Because counsel was “at least negligent” in failing to obtain the names or failing to pay attention to the names of jurors, counsel did not realize the identity of the juror until the jury was polled following the conviction. Counsel then informed the trial judge, who believed counsel had deliberately “sandbagged” the issue. The court proceeded with sentencing, but two days later brought the defendant back to the courthouse for a “waiver” hearing at which the defendant purportedly waived his right to new counsel and waived the “juror problem.” The state court found that the defendant was deprived of a fair trial by a panel of impartial jurors, but held that the defendant had waived the issue. The federal court held that the defendant had not made a knowing, voluntary, and intelligent waiver because of counsel’s conflict during the waiver hearing, compounded by “time pressure” placed on the defendant who was held in lockup at the courthouse until he decided whether he wanted new counsel. The court held that “the trial judge sought a waiver of fundamental constitutional structural error (in the jury claim) under circumstances where no waiver would be attained upon full and proper disclosures by the court and appropriate advocacy by counsel.” In addition, there was no adequate waiver. Although counsel recognized she had a conflict and asked two other attorneys to consult with the defendant, no one, including the court, mentioned the conflict to the defendant or explained the conflicts. The court “never tackled the rights he sought waiver on directly but attempted to approach them obliquely by asking [the defendant] if he wanted a new attorney.” Because counsel was conflicted, the waiver was also “worse than merely uncounseled.” Counsel had three actual conflicts. First, she feared losing her job because of the trial court’s anger and the fact that the trial judge was one of two judges that had the power to hire and fire counsel, who was the public defender. Second, counsel had a conflict growing out of the need for her to be a witness on a motion for new trial based on the jury issue. Finally, counsel had a conflict in the second part of the hearing where the court sought a waiver of an ineffective assistance of counsel claim because “[a] lawyer cannot ethically seek a waiver of their client’s rights and claims against the attorney.” The federal court observed that determining the difference between a “wrong” and an “unreasonably wrong” application of the law in applying AEDPA “veers towards a judicial attempt at nailing Jell-O to a wall.”

Nonetheless, the court found that the state court decision was “unreasonably wrong” as it was “contrary to, and an unreasonable application of federal law.”

III. Court Had Sua Sponte Duty But Failed to Adequately Inquire

A. Simultaneous Representation of Jointly Tried Codefendants

1. U.S. Court of Appeals Cases

1982: *Smith v. Anderson*, 689 F.2d 59 (6th Cir. 1982). Counsel had conflict that adversely affected representation and trial court failed to adequately inquire in robbery case where counsel represented defendant and codefendant and informed the court of conflicts. An attorney’s timely statement that conflict adheres in joint representation is a grave representation requiring meticulous consideration. Thus, the trial judge’s terse reply that he saw no conflict of interest in joint representation of defendants charged with armed robbery was not justified or sufficient response, even if defendant’s counsel could have been more detailed in his expression of possible conflict. Here, joint representation of defendants by counsel had adverse effect on defendant’s right to representation. Defendant sat, against his will, at same table with co-defendant, who admitted being in store when it was robbed and who was implicated by all but one *res gestae* witness. Defendant, in contrast, was implicated by only one, and defendant claimed he was not at scene of robbery. Counsel’s ability to bolster defendant’s defense suffered because of counsel’s inability to highlight lesser number of witnesses adverse to defendant and the fewer incriminating acts to which those witnesses testified.

2. U.S. District Court Cases

2004: *Robinson v. Stegall*, 343 F. Supp. 2d 626 (E.D. Mich. 2004). Counsel had an actual conflict of interest that adversely affected counsel’s representation in kidnaping case and the trial court erred in failing to inquire concerning counsel’s conflict of interest. Until the final pre-trial conference, the defendant and his co-defendant were represented by the same counsel, who was retained by the co-defendant’s family. During the final pre-trial conference and trial, the defendant was represented by an associate and salaried employee of co-defendant’s counsel. Although the indictment revealed that the defendant and his co-defendant could have been charged with the same crimes, the defendant was indicted for kidnaping of one sister, which carried a life sentence, while the co-defendant was charged only with attempted kidnaping of a different sister, which carried only a potential five year sentence. The kidnaping and attempted kidnaping arose from the same events. Upon the advice of counsel, both defendants waived their right to a preliminary examination. No motions were filed on the defendant’s behalf. On the advice of counsel, the defendant waived his right to a jury trial. Shortly before trial, the prosecution moved to amend the charges to charge the defendant and his co-defendant with kidnaping and attempted kidnaping. This motion was denied, but the prosecution issued a new warrant charging the defendant with the additional attempt charge, but did not similarly issue a new warrant against the co-defendant. At the close of the state’s case during trial, the defendant informed the court that he wanted to discharge counsel because he did not believe he was being adequately represented. The court informed the defendant that he must continue with counsel or

represent himself. When the trial resumed, the defendant again informed the court that he wanted to discharge counsel and that he wanted to testify but not with this counsel. The court again denied the motion and the defendant did not testify. Following a continuance of almost two weeks to locate two potential defense witnesses, the defendant again informed the court that he desired to discharge counsel and that his family was seeking new counsel for him. The court again denied the motion. The defendant was convicted of kidnaping and he and the co-defendant were both acquitted of attempted kidnaping. The defendant was sentenced to 10-20 years. The court found that an actual conflict of interest was present in this case. Because of the differing charges, the co-defendant had a “strong incentive” to proceed to trial as rapidly as possible to prevent the filing of additional charges against him. Thus, counsel advised both to waive the preliminary examination, although the preliminary examination could have benefitted the defendant by allowing the development of impeachment material regarding weaknesses and inconsistencies in the child victim’s testimony. This was apparent because the defendant was acquitted of the attempted kidnaping charge based on impeachment testimony developed during the preliminary examination on that charge. The conflict was also apparent because counsel did not file a pretrial motion to suppress identification testimony or request a hearing on the constitutionality of the pretrial identification procedures pursuant to *United States v. Wade*, 388 U.S. 218 (1967). While these motions would have been potentially harmful for the co-defendant by alerting the prosecution that he should be charged with kidnaping, they would have potentially benefitted the defendant. Although these motions were raised after the witnesses testified during trial, “a prudent attorney, unencumbered by any conflict of interest, would have preferred to know before trial whether the identification testimony was admissible” in order to prepare for trial and cross-examination of the witnesses. Moreover, an evidentiary hearing on the motions prior to trial could also have allowed development of additional impeachment material. Counsel’s explanations for waiving the preliminary examination and failing to make the pretrial motions were inadequate to provide an explanation of counsel’s conduct independent of the conflict. While counsel stated that he did not want to preserve the testimony of the complaining witnesses in a preliminary examination, the witnesses were young and not likely to be absent from trial. Moreover, their age and the stress of the events “suggest[ed] that valuable impeachment material might be developed at pretrial proceedings.” Likewise, “the importance of a preliminary examination is magnified when dealing with a child witness” because of the possibility that the testimony was enhanced during pretrial preparation due to the “suggestibility of child witnesses.” Counsel’s explanation for failing to file the pretrial motions was also inadequate because counsel stated only that he had not reviewed the photos in the photographic lineup prior to trial even though the defense was mistaken identity. The court found that the state court decision was an unreasonable application of clearly established Supreme Court law under the AEDPA in several respects. First, the state court misunderstood both the facts and the law and “inexplicably limit[ed] its examination to potential adverse effects *during* trial.” While the state court found that the defendant and co-defendant were represented by associates in the same firm, they were actually represented by the same counsel throughout all proceedings until the final pretrial conference. The state court thus ignored the “many important strategic, trial preparation decisions” made when the defendant and co-defendant were represented by the same attorney in “direct contravention” of *Holloway* and contrary to counsel’s testimony, which acknowledged a conflict prior to trial and advice to the defendant to retain different counsel. Although defendant did have different counsel for the final pretrial conference and trial, the state

court's reliance on this fact was unreasonable because the petitioner's counsel during the final conference and trial was "not an independent attorney." He was "an employee" of the co-defendant's attorney. The court also held that, although the defendant did not specifically object on the basis of a conflict of interest, the defendant's repeated requests to discharge counsel and the court's awareness of the discrepancy in the charges between co-defendants was sufficient under *Holloway* and *Mickens* to trigger the trial court's duty to inquire. The state court's finding that the defendant did not object was an unreasonable determination of the facts under the AEDPA and an unreasonable application of *Holloway* and *Mickens*.

2002: *United States v. Burraston*, 178 F. Supp.2d 730 (W.D. Tex. 2002). District court suppressed the deposition testimony of a witness cross-examined by the defendant's conflicted lawyer. Lawyer initially agreed to represent both codefendants in prosecution for smuggling people across the US-Mexico border, but it was understood that both would pay retainer fees and if conflict developed counsel would continue to represent only the codefendant. Counsel informed the Magistrate that a conflict potential was present. Following a detention hearing, the defendant was unable to pay the retainer and announced that he would get another lawyer. Before he could, the government deposed four witnesses that were allegedly smuggled in by the defendants. Counsel conducted the depositions for both defendants. During three of them, the defendant raised no issue. During the last, he stated that the lawyer did not represent him. Court held that the magistrate judge was obligated to inquire into possible conflicts when counsel informed him initially of the potential problem. In order to resolve the problem, the District Court suppressed the one deposition the defendant had objected to at the time because defendant had not been able to cross-examine through unconflicted counsel.

3. State Cases

2007: *State v. Tensley*, 955 So. 2d 227 (La. App. 2007). Both defendants (a mother and her boyfriend) in second degree murder while engaged in cruelty to a juvenile case were granted a new trial due to counsel's conflict of interest the adversely affected the representation. Counsel A & B were originally appointed to represent the mother. Later, both were also appointed to represent the boyfriend. Prior to meeting with the boyfriend, counsel A's motion to withdraw from the boyfriend's case was granted based on the likely conflict of interest. Counsel B did not similarly move to withdraw from either case and represented both for more than a year before being relieved as the mother's counsel (without explanation) prior to trial. Immediately prior to trial, the mother moved to disqualify Counsel B from continued representation of the boyfriend due to his conflict of interest. A hearing was held in which Counsel B testified, with no objections, concerning the substance of discussions with both defendants, who both maintained innocence but also did not cast blame on the other defendant. The trial court denied the motion, but was not aware at the time that the mother would testify at trial and be cross-examined by Counsel B. The court held that under state law "a defense attorney required to cross-examine a current or former client on behalf of a current defendant suffers from an actual conflict." When the defendant asserts the issue prior to trial, no showing of prejudice is required. Instead, the court must appoint separate counsel or determine if the conflict is "too remote." Here, the conflict clearly was not too remote and "culminated in the ghastly unrestrained process" of counsel cross-examining the mother at trial. The mother's conviction was thus reversed. Although the

boyfriend did not object to the conflict prior to trial, the issue was disclosed to the trial court, which then had a duty to advise him of the conflict. Because the boyfriend was never advised of his right to conflict-free counsel, his conviction was also reversed.

2000: *Lewis v. State*, 757 A.2d 709 (Del. Super. Ct. 2000). Trial court in burglary, unlawful imprisonment, and conspiracy case erred in failing to inquire into the propriety of joint representation prior to trial. Counsel represented both the defendant and his codefendant in the same proceedings. Both alleged mistaken identity and alibi as defense. In sentencing, the codefendant admitted his guilt and stated that the defendant was not with him. While a state rule required the judge to inquire into potential conflicts of joint representation, the trial judge simply noted that the codefendants had separate alibi defenses and were represented by the same attorney in the context of deciding how many total preemptory challenges to allow for the defense during the jury selection process. The trial court never conducted an inquiry. The Delaware Supreme Court held that automatic reversal was not required absent a showing of an actual conflict and an adverse affect on counsel's representation. In this case, the evidence against the codefendant was strong and the evidence against the defendant was weak. The conflict this worked against the defendant in possible pleas negotiations and trial itself. Any attempt to exploit the weakness of the evidence against the defendant would necessarily enhance the apparent strength of such evidence against the co-defendant. To the extent that the strength of the state's case against the codefendant undermined the credibility of his alibi defense, it had the potential for "spilling over" and undermining the jury's assessment of defendant's alibi defense. Finally, the ability to argue for a lesser sentence for defendant was compromised, where the codefendant had a gun during the crime and the second assailant was unarmed.

State v. Bowen, 999 P.2d 286 (Kan. App. 2000). Trial court failed to make an adequate inquiry into a conflict of interest in counsel's dual representation of codefendants in drug manufacture case. Separate counsel were initially appointed, but then defendant retained counsel. At defendant's request, after initial resistance, counsel agreed to also represent the codefendant without an additional retainer. The state objected to the joint representation and asked for an on-the-record waiver. Counsel indicated that each defendant had signed a waiver but declined to produce it because "it was confidential." In a post-trial hearing, the document was introduced into evidence. It indicated only that the defendants "may be precluded from asserting defenses which would be detrimental to one or the other of us" and an agreement to share confidential information. It also indicated that either defendant could prevent the other from accepting a plea offer. *Id.* at 290. The trial court questioned counsel about the joint representation but never addressed either defendant. During trial, the defendant testified, contrary to counsel's expectation. He admitted attempting to manufacture methamphetamine and possessing drug paraphernalia but denied that he had ever been successful in making the drug. He also said that the codefendant was angry at him and not involved. During closing, counsel argued that the defendant was honest and admitted some guilt and that the codefendant committed no crime – she was only loyal to the man she lived with. The defendant was convicted of all charges. The court of appeals held that the trial court did not conduct an adequate inquiry because the court questioned only counsel. An in-depth hearing or inquiry should be conducted and should result in one of three outcomes: (1) a determination that the risk of conflict is too remote to warrant separate counsel; (2) the appointment of separate counsel; or (3) a determination that defendants

waive the right to conflict-free representation. Here, none of those things happened. There was also no adequate waiver of the conflict.

Mere assurances from a defense counsel, whose representation is in question, cannot provide the basis for finding a waiver of such a fundamental right. The trial court also did not examine the memorandum of understanding. The fact [counsel] was unwilling to divulge the memorandum establishing his joint representation should have heightened concern over the sufficiency of the waiver. Even if the trial court had examined the memorandum, it would not have been sufficient to establish waiver. The memorandum did not establish the extent of [counsel's] consultation with [the defendant]. The memorandum also did not spell out the possible consequences if certain defenses were precluded.

Id. at 293. The defendant's silence during the hearing did not lessen the trial court's duty to conduct an adequate inquiry. This case also reveals an actual conflict because "[t]he memorandum of understanding not only recognized the potential for conflict, it created actual conflict by purporting to give each defendant a veto over a course of action, a plea agreement, contemplated by the other." *Id.* No showing of prejudice required "because the evil here is what an advocate *refrains* from doing, 'not only at trial but also as to possible pretrial plea negotiations....'" *Id.* (quoting *Holloway*, 435 U.S. at 490). While defendant also argues that counsel's argument showed actual conflict, the argument is weakened because counsel argued based on the defendant's testimony, which was clearly designed to exonerate his codefendant. The court recognized though that "[a]n assessment of the impact of the conflict on [counsel's] tactics and decisions, however, would require unguided speculation" and the defendant only had to show actual conflict. "Where an attorney owed a duty to two defendants, yet argued one defendant's testimony incriminated him and cleared the other defendant, one may reasonably conclude the attorney labored under an actual conflict." *Id.* at 294.

1987: *Matter of Jason S.*, 126 A.D.2d 951 (N.Y. App. Div. 1987). Trial court failed to adequately inquire where counsel represented juvenile in delinquency proceedings and also represented the other youths involved.

1984: *People v. Green*, 101 A.D.2d 1009 (N.Y. App. Div. 1984). Trial court failed to adequately inquire in promoting gambling case where counsel represented both codefendants in joint trial.

B. Simultaneous Representation of Codefendants in Plea Negotiations

1. U.S. Court of Appeals Cases

1990: *Hoffman v. Leeke*, 903 F.2d 280 (4th Cir. 1990). Counsel in accessory to murder case had conflict that adversely affected representation where counsel jointly represented defendant and two codefendants, who plead guilty and testified against defendant. The trial court also failed to conduct an adequate inquiry and should have rejected defendant's purported waiver even if it was valid. Prior to trial, the court inquired of the defendants jointly and individually about the joint representation and counsel informed the court that he saw no conflict. A mistrial was

granted shortly after jury selection. Prior to the new trial, a local co-counsel was retained. Each defendant again expressed a desire to continue with the joint representation. After that, both codefendants accepted plea agreements and agreed to testify against defendant. The state repeatedly brought out during the trial that counsel represented the codefendants. A codefendant was the state's primary witness. The co-counsel conducted the cross-examination. The court reached "an inescapable and unavoidable conclusion" of an actual conflict that adversely affected the representation. *Id.* at 286. The conflict was "patent" where defendant "was in the unacceptable position of having his own attorney help the state procure a witness against him." *Id.* The adverse affects were clear in that counsel negotiated a plea agreement for the codefendant that required him to implicate the defendant and did not even inform the defendant that the codefendant would testify against him. Counsel also could not cross-examine the codefendant and attack what amounted to the state's entire case against him. "To cross-examine [the witness] effectively, [counsel] would have had to question his own client's truthfulness. This he could not do." *Id.* Finally, the adverse affect was clear in the prosecutor's repeated references during trial that counsel also represented the codefendants. The adverse affect was not lessened by the fact that it was the unconflicted cocounsel that cross-examined the codefendant. Conflicted counsel was the lead counsel who prepared the case without the cocounsel's preparation. Conflicted counsel also examined 14 of the 17 witnesses during the trial. "Therefore, regardless of the effectiveness of [co-counsel's] efforts at trial, upon which we need not pass judgment, those efforts could not have overcome the presumed prejudice arising from [lead counsel's] actual conflict of interest." *Id.* at 287. In discussing whether defendant had waived the conflict, the court declared that "[n]ot even the proffer of admittedly valid waivers of conflict-free counsel can restrict a trial court's power to insist on separate representation." *Id.* at 288. Even if defendant made a valid waiver, "permitting multiple representation in a case of this type" would be improper. *Id.*

[W]e believe that a member of the public would be shocked to observe a criminal trial in which the same attorney represented both the defendant and the state's star witness, in which the attorney had cut the deal that made that witness available to the state, and in which the prosecutor pointed out the defense attorney's untenable position at every opportunity.

Id. In any event, the court found no valid waiver because "[a] defendant cannot knowingly and intelligently waive what he does not know." *Id.* at 289. Here, no one explained the meaning of a conflict of interest and defendant was not informed that his counsel had advised the codefendant to testify against him. Counsel also insisted that he saw no conflict. "If [counsel] was suffering from such myopia, we cannot insist on greater appreciation of the risk of conflict on the part of a layman whom [counsel] advised." *Id.* When it became obvious that counsel had negotiated a plea bargain for the codefendant that required him to testify, "the judge had a duty to conduct further inquiry and secure a further waiver if [defendant] wished to make one." *Id.*

2. State Cases

1986: *People v. Mattison*, 494 N.E.2d 1374 (N.Y. 1986). Trial court erred in failing to adequately inquire once it became apparent during trial that counsel had actual conflict in robbery case

where a member of counsel's firm represented the codefendant and negotiated a plea for him to testify against defendant.

C. Simultaneous Representation of Codefendants in Severed Trials

1. U.S. Court of Appeals Cases

2004: *McFarland v. Yukins*, 356 F.3d 688 (6th Cir. 2004). Drug conviction reversed due to the trial court's failure to adequately inquire into counsel's conflict, counsel's actual conflict of interest that adversely effected his performance, and trial counsel's ineffectiveness in failing to present an adequate defense. The petitioner and her daughter were charged as co-defendants where drugs were found during a search of the home they shared. Both the defendant and her daughter were represented by the same retained attorney. On the day of the scheduled bench trial, counsel informed the court that the defendant and co-defendant had concerns about sharing the same attorney and that the evidence might well raise antagonistic defenses. The petitioner also informed the court that she believed she needed a separate attorney and that she had attempted to hire a different attorney but could not afford one. Rather than appoint a second attorney, the court severed the cases and ordered that they be tried in front of different judges. The trials proceeded at pretty much the same time. In the co-defendant's trial, the state presented evidence that the bedroom where most of the drugs were found belonged to the co-defendant. A caller to the crack hotline also made complaints about a woman with the co-defendant's name. A confidential informant also identified the co-defendant as the person discussing drugs. During the petitioner's trial, the state did not present any evidence that the co-defendant lived in the house or in the bedroom where most of the drugs were found and did not present any evidence that the crack hotline telephone complaints and the confidential informant had both identified the co-defendant. Defense counsel did not bring any of this information out in cross-examination or present any evidence on its own. In closing argument, the defense argued only that the drugs belonged to one of two men that were also initially suspected. One of the men was present at the time of the search, but did not have a key to the locked bedroom where most of the drugs were found. The other man was not present at the time of the search and was connected to the house only by some paperwork identifying him as the co-defendant's husband. Both the defendant and co-defendant were convicted. They were represented on appeal by a different attorney but still had the same attorney between them. Appellate counsel did not raise any issue concerning ineffective assistance of counsel or a conflict of interest. In state post-conviction, the petitioner asserted ineffectiveness of trial counsel and of appellate counsel for failing to argue that trial counsel was ineffective but the state court denied on procedural grounds that the petitioner did not show good cause for a failure to assert the issue on direct appeal as required in state court. The court first found that the petitioner was entitled to relief under *Holloway v. Arkansas* because the petitioner objected to the joint representation and the trial court was aware that there was an issue about who possessed the drugs in the house shared by the defendant and her co-defendant daughter. The trial court was also aware that the petitioner had attempted to hire separate counsel, but was unable to afford a different lawyer. Under the circumstances, the notice to the court of a concrete conflict of interest was sufficient to bring the case within the *Holloway* rule, which required automatic reversal due to the trial court's failure to inquire and to resolve the issue. The trial court's action in severing the trials did not resolve the issue because

counsel was still actively involved in the co-defendant's trial when he represented the petitioner. Although his actions in the petitioner's trial were not automatically before the trier of fact "in the co-defendant's case, still any evidence or argumentation developed against [the co-defendant] would instantly be made available to the prosecutor for use in [the co-defendant's] case." Thus, if counsel had attempted to exonerate the petitioner by showing that the co-defendant controlled the bedroom where most of the drugs were found, counsel would have compromised his duty to the co-defendant. Independent of the trial court's failure to inquire, reversal was also required because counsel had an actual conflict of interest that adversely affected representation and because counsel provided ineffective assistance of counsel. The court found that, with respect to all three of these arguments, the petitioner would have won on direct appeal had appellate counsel adequately raised the issues. Appellate counsel was ineffective in failing to assert these issues, which were clearly stronger than the arguments made by counsel on direct appeal. The conflict issue was an obvious one, and the petitioner was entitled to automatic reversal under the rule in *Holloway*. Because appellate counsel also represented the co-defendant, however, appellate counsel also had a conflict of interest. The court found that appellate counsel's ineffectiveness was the cause for petitioner's failure to assert ineffectiveness of trial counsel on appeal. Thus, the petitioner had established cause and prejudice for failing to assert these issues on appeal. Because the state court never ruled on the actual conflict of interest and the ineffective assistance claim under *Strickland*, the court reviewed these claims *de novo*. The only state court decision on the *Holloway* claim was the trial court's decision. Under the AEDPA, the court found that the trial court's actions contradicted the clearly established precedent of *Holloway v. Arkansas* because the state court confronted a set of facts that were materially indistinguishable from *Holloway* and yet arrived at a different result.

2003: *Harris v. Carter*, 337 F.3d 758 (6th Cir. 2003). The trial court failed to adequately inquire into the potential conflict after being advised by counsel that he represented the co-defendant, who was called to testify. The defendant and codefendant were charged with offenses arising from a drive-by shooting and retained the same attorney. Prior to trial, counsel did not foresee a conflict because neither client was interested in a plea bargain in exchange for testimony and they planned a common defense for a joint trial. The trial court *sua sponte* severed the trial's though. After the co-defendant was convicted, but before his sentencing, he was called as a witness in the defendant's trial. He invoked his right to remain silent but was granted immunity for any additional charges, other than perjury and falsification. Defense counsel then requested that the court appoint counsel for the co-defendant because counsel represented him and the defendant and could not adequately advise the co-defendant. The court denied the motion and proceeded. The co-defendant provided damaging testimony, but counsel did not cross-examine him at all because he feared subjecting him to further prosecution and revealing client confidences. The court held that counsel's request for separate counsel was a sufficient objection under *Holloway* to alert the trial court and trigger the court's duty to inquire. The fact that counsel did not raise the conflict until the midst of trial was of no concern because the conflict did not arise until the co-defendant was granted immunity and compelled to testify. The court's failure to inquire once on notice required the presumption of prejudice and reversal. Applying the AEDPA standards, the court held that the state court's finding to the contrary was an unreasonable application of *Holloway*.

2. State Cases

1992: *Kenney v. State*, 837 P.2d 664 (Wyo. 1992). Prejudice presumed under state law where counsel represented defendant and co-defendant in drug case in separate trials. Defendant and her codefendant/boyfriend were charged. They initially retained separate counsel. Defendant was represented by retained counsel in pretrial motions. Three days prior to trial, defendant sought to retain different counsel of her choice. It was apparent, due to her limited education and other factors, that defendant had received assistance from someone with legal training in drafting her “*pro se*” documents. The court allowed her retained counsel to withdraw and granted a short continuance. The codefendant’s retained counsel then begin representing the defendant. Counsel informed the court that defendant had been unable to retain other counsel because she was indigent. The defendant proceeded to trial and was convicted. She was convicted and sentenced to 18-36 months. The codefendant then entered a plea and received a suspended sentence and probation. The court held that “[w]hile the United States Supreme Court reviews claims of ineffective assistance of counsel due to conflicts of interest under the standard of review adopted in *Cuyler*, Wyoming recently adopted a more stringent approach. Absent a valid waiver, prejudice is presumed in all instances of multiple representation of criminal defendants.” *Id.* at 672-73. Here, the trial court did not inquire concerning the joint representation and there was no evidence of a valid waiver of the conflict.

1997: *Rice v. State*, 487 S.E.2d 517 (Ga. App. 1997). Trial court erred in finding purported waiver of conflict in case involving theft by police officer of public funds where finding was made in a hearing held without the defendant’s presence. Defendant and codefendant retained the same counsel. Codefendant proceeded to trial first. The state raised the conflict issue and defendant’s absence. The court stated it would address the issue later with the defendant and proceeded with the hearing. Counsel produced a “waiver” signed by both defendants. Without even questioning the codefendant, who was present, the court found the waiver to be valid, even though it did not mention the fact that both defendants were scheduled to be witnesses against the other. The court did not inform the codefendant of the possible conflicts inherent in dual representation and did not inquire of the codefendant if he understood the agreement and voluntarily signed it. The court ruled that the agreement constituted a waiver of any conflict and satisfied the court’s responsibility to determine whether the defendants agreed to the joint representation. Counsel suggested that the court bring the defendant into the courtroom and review the situation with him but the court ruled the agreement was as binding upon the defendant as it was upon the codefendant and no such action was necessary. Defendant then testified in codefendant’s trial and his testimony was later used to impeach his testimony in his own trial. Appellate court found that reversal was required because the “waiver” hearing was a critical stage conducted outside his presence. Further, because the defendant may well have chosen not to testify in the codefendant’s trial if he had been adequately advised by unconflicted counsel, the court prohibits use of his testimony in the codefendant’s trial at his own retrial.

D. Simultaneous Representation of Government Witness on Unrelated Charges

2000: *State v. Watson*, 620 N.W.2d 233 (Iowa 2000). Trial court erred in failing to sua sponte conduct inquiry into potential conflict of interest in murder case where one of two appointed counsel

simultaneously represented a key prosecution witness, a jailhouse snitch who testified that the defendant admitted shooting his father. The defense was that the shooting was accidental or self-inflicted and even the expert witnesses conflicted on whether the evidence showed an intentional shooting. The witness was cross-examined and admitted that he was pending sentencing on contempt charges at the time of his initial statement. He also testified that he was represented in those contempt charges by defendant's counsel, but not the counsel that conducted the cross-examination. The trial court failed to conduct an inquiry into the potential conflict even following this testimony. The appellate court held, based on its interpretation of *Wood v. Georgia*, that "where the trial court knew or should have known of a particular conflict, reversal is required without a showing that the conflict adversely affected counsel's performance, even though no objection was made at trial." *Id.* at 237. In its analysis, the court observed, "Unlike the joint representation of codefendants, where there may be a benefit to presenting a united defense, in the case of dual representation of the defendant and an adverse witness, there is no benefit to common representation. To the contrary, the potential for less zealous representation of the defendant is obvious." *Id.* at 239. The court also rejected the state's claims that the problem was solved because the witness' case was resolved by the time of trial and because the conflicted counsel did not conduct the cross-examination. On the former, the court noted that counsel's ethical obligation to his former client did not cease with the conclusion of the case. On the latter, the court noted that the counsel that conducted the cross-examination of the witness was in the same public defender office and, thus, shared the same ethical obligation to the former client. "Moreover, [counsel's] obligation to zealously represent his client, the defendant, was not suspended simply because his co-counsel was the one who asked [the witness] questions on the witness stand. [Counsel] still had an obligation to [the defendant] to contribute what he could to the defense team's preparation for [the witness'] cross-examination, including pre-trial investigation. We conclude, therefore, that [counsel's] decision not to personally examine [the witness] insufficient to remove the actual conflict of interest that burdened [the] defense team." *Id.* at 241.

1995: *State v. Jenkins*, 898 P.2d 1121 (Kan. 1995). Trial court erred in failing to conduct inquiry when the court was informed that counsel represented a government witness/informant on charges incurred while working as a confidential informant. Defendant was charged with sale of cocaine to a police informant. At preliminary hearing, appointed counsel raised concerns about a possible conflict because she had represented the informant on unrelated burglary charges while he was working as an informant. Counsel questioned the informant and the defendant and both agreed to have her continue to represent the defendant, but the questions and answers did not amount to a waiver of the conflict. Following this hearing and prior to defendant's trial, counsel represented the informant in a motion to modify his sentence. During defendant's trial, he presented an alibi defense. The appellate court found an actual conflict where counsel represented the defendant and the key state's witness at the same time. Because the trial court was informed of the actual conflict, the court had a duty to inquire, even though there was no objection to the conflict. Failure to inquire required automatic reversal under *Holloway*. Even assuming that *Cuyler* controls and adverse affect must be shown, the court finds that counsel's representation was adversely affected because counsel did not cross-examine the witness on the affects of cocaine, even though he admitted being under the influence when he allegedly bought cocaine from the defendant. Counsel also did not question the witness regarding his admitted

addiction to cocaine or to what lengths he might go to obtain drugs or the money necessary to buy drugs for himself. This was especially important in light of evidence that the witness received money from the police each time he made a sale.

1987: **State v. Carmouche*, 508 So.2d 792 (La. 1987). Trial court erred in capital murder case in failing to adequately inquire when defense counsel informed the court that he simultaneously represented a state witness on unrelated charges.

E. Simultaneous Representation of Persons Implicated (But Not Jointly Charged) in Unrelated Case

1986: *State v. Martin*, 513 A.2d 116 (Conn. 1986). Trial court failed to adequately inquire in robbery case where counsel informed the court that he had a conflict and moved for a mistrial following testimony implicating another client.

F. Prior Representation of Persons Implicated (But Not Jointly Charged) in Related Case

1995: *Ciak v. United States*, 59 F.3d 296 (2nd Cir. 1995). In 2255 action, the court held that the trial court erred in failing to conduct an inquiry in weapons possession case where the court was aware that counsel had previously represented an important government witness in a substantially related matter and presented in that case a theory that was possibly at odds with the position he took in defendant's trial. Defendant was arrested following a domestic disturbance while driving a car owned by his sister and her fiancé. Weapons were found in the car. Defendant retained counsel. While meeting with defendant's sister and her fiancé concerning his defense, counsel agreed to represent the sister and her fiancé in the related forfeiture action. The car was recovered, but then the sister and her fiancé broke up and the fiancé took the car. At defendant's subsequent trial, the defense was that the defendant did not own the guns or put them in the car but counsel did not call the sister to testify even though she had informed him that she put the guns in the car. The government called the ex-fiancé in rebuttal. In cross-examining him, counsel spent most of his time questioning the witness on the collateral issue of the location of the car because counsel's fee for representing petitioner had been based on funds from the anticipated sell of the car. The cross degenerated into an argument between counsel and the witness with the witness accusing counsel of misstating the facts. In the midst of this, counsel informed the court that he had represented the witness and the defendant's sister in the forfeiture action. The trial court did not inquire further. Counsel then cross-examined the witness about prior statements allegedly made to counsel in the course of his representation of the witness. Still the court did not inquire. The appellate court first noted that no procedural bar would be applied due to defendant's failure to assert the conflict issue on appeal because the conflicted counsel and his associate represented defendant at the time. Next, the appellate court found that counsel had a clear conflict in attempting to impeach his former client and making himself an unsworn witness. This was "an 'unavoidable conflict of interest,' in part because defense counsel cannot impeach the government witness in such circumstances without undermining his own credibility. Standing alone, becoming an unsworn witness is a basis for disqualification of an attorney." *Id.* at 304. Even worse, the court notes that the cross-examination of his former client

raised questions about where counsel's loyalty was, i.e., himself, the defendant, or his former client. Second, counsel clearly had a conflict in presenting competing theories in the forfeiture action and in defendant's trial and counsel may have developed his own financial interest in protecting the sister from testifying due to his interest in the car. As the court noted, counsel could not call the sister to testify because it could have resulted in (1) the disclosure that counsel had presented a contrary argument in the forfeiture action, i.e., that the gun was defendant's; and (2) the possibility of state reopening forfeiture proceedings and the loss of the car, which was the source of his retainer. Under these circumstances, the district court erred in denying an evidentiary hearing on defendant's claim of a conflict of interest that adversely affected the representation. Because the trial court erred, however, in failing to conduct an inquiry when it had a duty to do so though, the case would be remanded for new trial rather than a hearing.

G. Prior Representation of Victim or Government Witness on Unrelated Charges

1. U.S. Supreme Court Cases

2002: **Mickens v. Taylor*, 535 U.S. 162 (2002). Petitioner was convicted of murder and sentenced to death. His lead counsel during the trial had also represented the victim and was representing him in juvenile proceedings at the time of the murder. Counsel had only met with the victim one time for 15-30 minutes. Following the murder, he was appointed to represent petitioner by the same judge that had appointed him to represent the victim previously. Counsel did not disclose the conflict to the court, his co-counsel, or petitioner. Although the trial court knew or should have known about the potential conflict, the court conducted no inquiry. In these circumstances, the Court rejected an automatic reversal rule and held that in order to obtain relief, petitioner must establish an actual conflict and that the conflict adversely affected the representation. The Court also noted that both *Cuyler v. Sullivan* and *Holloway v. Arkansas* were cases involving simultaneous representation and the question whether these holdings apply to successive representation and other potential conflicts remains open.

2. State Cases

2010: *Hannah v. State*, 42 So. 3d 951 (Fla. App. 2010). The trial court erred in failing to inquire into potential conflict in burglary and theft case. The defendant was charged with breaking into a trailer and stealing equipment that belonged to a company. Several employees of the company were State witnesses. Prior to trial, counsel disclosed that he had previously represented one of these State witnesses in a probation matter. Without advising the defendant about the potential conflict or taking any other action, the court simply proceeded to trial.

2001: *Thomas v. State*, 785 So.2d 626 (Fla. App. 2001). Trial court erred in escape, battery on officer, and resisting arrest prosecution for failing to inquire into potential conflict and obtain waiver where the court was aware that counsel had previously represented a key prosecution witness. Counsel informed the court of the prior representation, but stated that he did not believe it presented a problem. He asked, however, that the witness be instructed not to mention the prior representation. The trial court found no conflict because the prior representation had nothing to

do with this case. During trial, the witness testified that he was a cellmate and saw the defendant hit the officer. He admitted prior convictions and that he had a pending charge. Counsel cross-examined his former client briefly regarding how many people were in the cell and whether he expected favorable treatment for his testimony. The trial court erred because the court did not address the defendant at all and did not inquire to determine whether the witness had given defense counsel privileged information. Prejudice presumed.

Singley v. United States, 548 A.2d 780 (D.C. 1988). The trial court erred in failing to conduct an adequate inquiry before acting to defendant's detriment when possible conflict became apparent in robbery case where counsel had previously represented the victim on unrelated charges. The court's actions in treating the conflict as an actual conflict created an adverse affect on the representation. After counsel cross-examined the victim to establish motive to testify to help himself and that he was acting on the advice of his lawyer, the government informed the court that counsel had been the victim's lawyer until he had to withdraw due to representation of the defendant. Counsel denied recollection that he had represented the victim and moved to withdraw. The court did not inquire of the witness or the defendant and denied the motion to withdraw. The court then instructed the jury that it should disregard the impeachment cross-examination of the victim. By these actions the court treated the conflict as an actual conflict and defendant's representation was adversely affected.

1983: *Matter of Richardson*, 675 P.2d 209 (Wash. 1983). Trial court erred in failing to adequately inquire in assault case where counsel either previously or simultaneously represented a defense witness. A trial court commits reversible error if it knows or reasonably should know of a particular conflict on part of counsel into which it fails to inquire. No prejudice need be shown, and rule is not limited to joint representation of co-defendants, but includes representation of both defendant and witness.

H. Counsel Retained by Codefendant or Third-Party With Adverse Interest (U.S. Supreme Court Cases Only)

1981: *Wood v. Georgia*, 450 U.S. 261 (1981). The trial court erred in failing to inquire into the possibility of a conflict of interest created by the representation of the defendants by their employer who allegedly operated the criminal enterprise for which they were prosecuted. The defendants were charged with distributing obscene materials and convicted. They were sentenced to probation with substantial fines, but failed to pay the fines. After three months, the court held a revocation hearing in which the defendants presented evidence that they were unable to pay the fines. The trial court ordered payment of the fines within three days or confinement. The Court granted certiorari to determine whether the Equal Protection Clause was violated by imprisonment of a probationer solely because of his inability to make installment payments on fines. Rather than deciding this issue, however, the Court noted that the record reflected that the three defendants had been represented throughout by one lawyer, who was paid by their employer. In addition, the employer had paid all fines and posted all bonds with the sole exception of the fines under review. The attorney never argued in the initial sentencing that the fines were excessive and the court imposed stiff fines because the court was aware that the employer had been paying all fines and expenses of the defendants. The defendants never paid

even small amounts of the fine to indicate good faith because of their assumption that the employer would pay the fines. Even at the revocation hearing where the defendants presented evidence of their indigence, counsel did not argue for a reduction of the fines. Thus, the Court held that the risk of conflict was evident, because the record suggested that the employer desired to create a test case to present the current claim to the Court, which meant that the defendants had to be jailed for non-payment of the fines. The Court recognized an inherent danger in a criminal defendant being represented by a lawyer hired and paid for by a third party, particularly when the third party is the operator of the alleged criminal enterprise. One risk is that the lawyer will not seek leniency for the defendant by offering testimony against the employer who retained counsel. A second risk, present in this case, is that the employer's long-range interest in establishing legal precedent could subject the defendants to harsher treatment. *Id.* at 269. Under these facts, the Court held that "the *possibility* of a conflict of interest was sufficiently apparent at the time of the revocation hearing to impose upon the court a duty to inquire further." *Id.* at 272. Moreover, even the state raised the conflict issue and requested that the court inquire further. *Id.* at 273. The Court remanded and ordered that if the court found an actual conflict of interest and that there was no valid waiver, then a new revocation hearing should be held with counsel free of conflicts.

I. Counsel Was Necessary or Potential Witness

1. U.S. Court of Appeals Cases

1998: *United States v. Kliti*, 156 F.3d 150 (2nd Cir. 1998). Trial court in counterfeit check case committed reversible error in failing to inquire into the potential conflict when the court learned that counsel was a witness to an exculpatory statement by co-defendant/witness. During a bond hearing, counsel also represented the co-defendant at the request of his attorney, who was absent. After the bond hearing, the co-defendant had said in front of the defendant, the counsel, and another witness that the defendant was not involved in any way and he would make sure the government knew that. Ultimately, however, he entered into a deal and testified against defendant. During trial, counsel informed the court of these events. The court held, however, that counsel could ask if the codefendant had made the statements but could not inform the jury that counsel had heard it so that counsel would not be an unsworn witness. The codefendant denied making the statement. The only other witness to the statement invoked his Fifth Amendment right leaving only counsel and the defendant to testify about the codefendant's statement. No evidence was presented about the statement. The Second Circuit held that a hearing is required whenever a defendant would forgo important testimony by his attorney because of his attorney's continued representation of him. Thus, the trial court erred in failing to conduct a hearing to ensure that the defendant was fully aware of the conflict and that he could have a different lawyer and call this lawyer as a witness. "When faced with an attorney as a sworn or unsworn witness, the proper recourse is to disqualify the attorney, not to exclude the testimony." To establish a violation of the Sixth Amendment right to effective assistance of counsel, the defendant must show that counsel had either (1) a potential conflict of interest that resulted in prejudice to the defendant, or (2) an actual conflict of interest that adversely affected the attorney's performance. Even assuming that the conflict was only a potential conflict and the defendant had to prove prejudice, the prejudice was clear. The codefendant provided the only

direct evidence of the defendant's guilt and his credibility was essential. Counsel was the only person who could impeach his testimony.

2. State Cases

2003: *State v. Lopez*, 835 A.2d 126 (Conn. App. 2003), *aff'd on other grounds*, 859 A.2d 898 (Conn. 2004). A defendant's convictions for risk of injury to a child were reversed because the trial court failed to adequately inquire into the potential conflict of interest of the defense counsel, who was a potential witness. The victim alleged that the defendant had molested her numerous times after she and her mother had moved into the defendant's home. The defendant was arrested and charged with sexual assault and risk of injury to a child. Prior to trial, the victim wrote and signed a statement recanting her previous accusation against the defendant. She testified that she did so at the insistence of her mother and the defendant, and that the defendant dictated this statement and forced her to sign it. Following this signing, the victim's mother and the defendant took the victim to defense counsel's office, where she met in private with counsel, and, according to her own testimony, told him that the handwritten statement was true. Her statement was then typed and signed again. Prior to trial, outside the defendant's presence and off the record, the prosecutor informed the court that defense counsel may testify at trial. Defense counsel informed the judge that he did not intend to testify. The court conducted no further inquiry even though there was clearly a potential for conflict and the defendant was not present for this discussion. The court held that there was a potential conflict because counsel's testimony at trial concerning the victim's demeanor while in his office may have been beneficial to the defendant. The court also noted concern that testimony regarding defense counsel's role in securing and witnessing the victim's statement may have affected counsel's credibility with the jury. The court held that, under the circumstances, the defendant was not required to show an actual adverse consequence from the conflicted representation. While addressing *Mickens v. Taylor* and distinguishing it, the court held that the trial court did not fulfill its obligation of conducting a thorough and searching inquiry into the potential conflict. Prejudice was presumed.

J. Defendant Alleged Ineffective Assistance

1. U.S. Court of Appeals Cases

1995: *United States v. Shorter*, 54 F.3d 1248 (7th Cir. 1995). Trial court erred in failing to inquire into potential conflict when the defendant accused counsel of misconduct and counsel moved to withdraw. Defendant was charged with multiple counts of conspiracy and distributing cocaine. During trial, defendant plead guilty to cocaine conspiracy and perjury counts. Before sentencing, counsel moved to withdraw. At sentencing, counsel stated that the defendant had accused her of forcing him to plead guilty. The attorney also asserted that defendant was making false statements to the court. The trial court proceeded to sentencing without ruling on the motion to withdraw. "When a defendant accuses his counsel of improper behavior and the counsel disputes his client's accusations, an actual conflict of interest results because 'any contention by counsel that defendant's allegations were not true would (and did) contradict his client.'" *Id.* at 1252-53. "Because the district court failed to conduct a hearing and determine the

impact of the conflict of interest, we will presume that the conflict prejudiced [defendant] if he has shown a possibility of prejudice.” *Id.* at 1253 (citation omitted). This possibility was apparent because counsel did not argue for a downward departure from the Sentencing Guidelines.

2. U.S. District Court Cases

1984: *White v. White*, 602 F. Supp. 173 (W.D. Mo. 1984). Trial court failed to adequately inquire in drug case where defendant repeatedly expressed ineffective assistance and irreconcilable conflicts with attorney. “Prejudice should be presumed from a fractured attorney-client relationship just as it would be if the petitioner had been denied the assistance of counsel or if petitioner’s appointed counsel had a conflict of interest.” *Id.* at 178.

3. State Cases

2006: *State v. Vann*, 127 P.3d 307 (Kan. 2006). The court had a duty to inquire into the possible conflict between the defendant and his counsel in attempted murder trial. Prior to trial the defendant moved to discharge counsel and to proceed pro se in several letters to the court because the attorney-client relationship had deteriorated such that the defendant had no confidence in counsel and that counsel would not respond to his letters and in formal motions. The court never addressed the motions because of the court’s practice not to deal with the defendant who was represented by counsel and the defendant did not raise the issues in court until a motion for new trial hearing following his conviction. He stated that he had not raised the issue earlier because he had been advised that it was not in his best interest to do so. He requested new counsel for sentencing but the court still did not inquire and stated only that new counsel would be appointed after sentencing. The defendant again raised the issue in sentencing, but the court again ignored him. The trial court’s failure to inquire was an abuse of discretion. While the court would normally remand for a determination of whether there was a conflict of interest that adversely affected counsel’s performance, this case was remanded for new trial because of the court’s failure to address the defendant’s motion to proceed pro se.

1990: *Brooks v. State*, 555 So.2d 929 (Fla. App. 1990). Trial court erred in failing to conduct inquiry about defendant’s request to discharge court-appointed counsel. Defendant filed several written motions alleging conflict of interest and requesting dismissal, but judge failed to inquire and summarily denied the motions. Because district court of appeal was unable to say that error of trial court in failing to conduct inquiry about defendant’s request to discharge court-appointed counsel was harmless beyond a reasonable doubt, reversal and remand for new trial was required.

People v. Vaughn, 558 N.E.2d 479 (Ill. App. 1990). Trial court erred in failing to inquire into potential conflict when defendant raised the issue. Defendant plead guilty to sexual assault. He then filed a *pro se* motion to vacate the plea alleging ineffective assistance by his public defender counsel. The court offered to appoint another public defender but defendant declined because that counsel had assisted his counsel in the case. Defendant requested outside counsel,

but the court informed him that it was the public defender or *pro se*. Defendant went *pro se*. The trial court erred in failing to determine whether a conflict existed.

K. Counsel Had Conflicting Interests Due to Connection With Law Enforcement

2000: *United States v. Rogers*, 209 F.3d 139 (2nd Cir. 2000). Trial court erred in failing to inquire prior to trial into counsel's conflict in drug conspiracy case. Following his conviction, the defendant learned that his appointed defense counsel was a police commissioner and requested new counsel. A police commissioner is involved, amongst other things, in making departmental policy and hiring, firing, and promotions decisions. The judge denied the motion, while acknowledging that he (the judge) had known for years that counsel was a police commissioner, and proceeded to sentencing. The Second Circuit held that the court had a duty to advise the defendant prior to trial of the potential conflict and to conduct an inquiry into the issue because the case involved the same police department for which counsel was a commissioner. Failure to do so required automatic reversal and the court's post-trial analysis of the issue, once the defendant's motion was made, did not change the required result.

L. Conflicting Interests Due to Potential Ethics Violations or Criminal Conduct

1995: *Ciak v. United States*, 59 F.3d 296 (2nd Cir. 1995). In 2255 action, the court held that the trial court erred in failing to conduct an inquiry in weapons possession case where the court was aware that counsel had previously represented an important government witness in a substantially related matter and presented in that case a theory that was possibly at odds with the position he took in defendant's trial. Defendant was arrested following a domestic disturbance while driving a car owned by his sister and her fiancé. Weapons were found in the car. Defendant retained counsel. While meeting with defendant's sister and her fiancé concerning his defense, counsel agreed to represent the sister and her fiancé in the related forfeiture action. The car was recovered, but then the sister and her fiancé broke up and the fiancé took the car. At defendant's subsequent trial, the defense was that the defendant did not own the guns or put them in the car but counsel did not call the sister to testify even though she had informed him that she put the guns in the car. The government called the ex-fiancé in rebuttal. In cross-examining him, counsel spent most of his time questioning the witness on the collateral issue of the location of the car because counsel's fee for representing petitioner had been based on funds from the anticipated sell of the car. The cross degenerated into an argument between counsel and the witness with the witness accusing counsel of misstating the facts. In the midst of this, counsel informed the court that he had represented the witness and the defendant's sister in the forfeiture action. The trial court did not inquire further. Counsel then cross-examined the witness about prior statements allegedly made to counsel in the course of his representation of the witness. Still the court did not inquire. The appellate court first noted that no procedural bar would be applied due to defendant's failure to assert the conflict issue on appeal because the conflicted counsel and his associate represented defendant at the time. Next, the appellate court found that counsel had a clear conflict in attempting to impeach his former client and making himself an unsworn witness. This was "an 'unavoidable conflict of interest,' in part because defense counsel cannot impeach the government witness in such circumstances without undermining his own

credibility. Standing alone, becoming an unsworn witness is a basis for disqualification of an attorney.” *Id.* at 304. Even worse, the court notes that the cross-examination of his former client raised questions about where counsel’s loyalty was, i.e., himself, the defendant, or his former client. Second, counsel clearly had a conflict in presenting competing theories in the forfeiture action and in defendant’s trial and counsel may have developed his own financial interest in protecting the sister from testifying due to his interest in the car. As the court noted, counsel could not call the sister to testify because it could have resulted in (1) the disclosure that counsel had presented a contrary argument in the forfeiture action, i.e., that the gun was defendant’s; and (2) the possibility of state reopening forfeiture proceedings and the loss of the car, which was the source of his retainer. Under these circumstances, the district court erred in denying an evidentiary hearing on defendant’s claim of a conflict of interest that adversely affected the representation. Because the trial court erred, however, in failing to conduct an inquiry when it had a duty to do so though, the case would be remanded for new trial rather than a hearing.

1992: *United States v. Greig*, 967 F.2d 1018 (5th Cir. 1992). Trial court erred in drug conspiracy case for failing to inquire after the court learned that counsel had an actual conflict of interest due to counsel’s unethical and criminal conduct in approaching codefendant without his counsel’s permission. Defendant was along with several codefendants. Prior to trial, a codefendant’s counsel informed the court that defendant and defendant’s counsel had improperly approached his client several times without permission and advised that client to reject his counsel’s plea negotiations, which required testimony against the defendant, and to seek different counsel. The court informed defendant’s counsel that disciplinary proceedings would be held but went forward with the trial without inquiry. The court held a hearing on the issue following conviction but did not rule. At the defendant’s sentencing, the court increased the guidelines level finding obstruction of justice for the defendant’s part in acting with his counsel in discussions with codefendant. Following sentencing the court permanently barred counsel from appearing in the District Court again. The Fifth Circuit held that the trial court erred in not conducting a hearing to determine whether defendant was fully informed of this counsel’s ethical violations and whether he desired to continue with representation. ‘While we recognize that a trial court does not always have an affirmative duty to inquire into the possibility of a conflict of interest, it does have a duty to conduct a hearing once it has been alerted and certainly when it knows of the existence of an actual conflict of interest.” *Id.* at 1022. There was an actual conflict here that required inquiry because “counsel was in the position of simultaneously having to defend himself as well as his client regarding their potentially criminal activity. Like his client, counsel was open to an indictment for obstruction of justice. . . . At the very least, counsel faced severe disciplinary measures, including monetary sanctions, and indeed the very loss of the right to appear as counsel in the whole Western District of Texas. His alleged conduct was highly unethical and clearly violated the Model Code of Professional Responsibility as well as the American Bar Association’s Model Rules of Professional Conduct.” *Id.* at 1022-23. Because the trial court conducted no inquiry, there could be no finding of a knowing and intelligent waiver of the conflict. The court required, however, that defendant establish that counsel’s representation was adversely affected by the representation. Adverse affect shown because counsel would have been preoccupied during trial with his own thoughts of the pending disciplinary proceedings and possible indictment. Likewise, during the codefendant’s testimony, counsel did not object to discussions of meetings with defendant and his counsel and only cross-

examined the codefendant to try to minimize his own improper acts. Further, at the hearing concerning counsel's actions, counsel questioned defendant in a fashion to shift responsibility to him. And, this hearing was prior to sentencing and adversely impacted the defendant. New trial granted.

1983: *United States v. White*, 706 F.2d 506 (5th Cir. 1983). Trial court failed to adequately inquire in escape case where counsel was under investigation for participation in escape charges. Defendant was convicted of escape from the US Marshal. Before trial, he retained counsel, who were under investigation regarding their participation in his escape. Although the defendant was fully informed of his right to have counsel dismissed and was questioned extensively by the court about his awareness of the existence of a conflict, at no point did the record show that the court, the defense attorney, or the prosecutor informed the defendant of the precise manner in which he might be prejudiced by counsel's representation. The defendant's waiver was thus deprived of the knowing, intelligent, and voluntary nature required for the waiver of a constitutional right, and constituted an invalid waiver of the defendant's Sixth Amendment right to effective assistance of counsel.

IV. Actual Conflict of Interest That Adversely Affected Representation and No Valid Waiver²

A. Simultaneous Representation of Jointly Tried Codefendants

1. U.S. Court of Appeals Cases

2010: *McElrath v. Simpson*, 595 F.3d 624 (6th Cir. 2010). Under AEDPA, counsel had an actual conflict that adversely affected representation in complicity to murder case where counsel also represented a jointly tried co-defendant and presented a joint or mutual defense. Neither defendant testified and counsel pursued a joint defense theory that both were innocent and a state's witness was the actual shooter. This theory "was contradicted by the evidence, rather than pursuing the obviously stronger defense of pointing the finger at [the co-defendant] and arguing that there was reasonable doubt concerning [the defendant's] intent to aid the commission of the offenses." The co-defendant had a motive and was identified by a state witness as a shooter. The defendant was alleged only to have transported the shooters with intent to aid. The mutual defense also led counsel to elicit harmful testimony implying that the defendant was one of the shooters when even the state did not maintain that he was a shooter. Although the defendant had executed a waiver, the trial court did not advise the defendant as required by state rules so the waiver was invalid. Because the state court had not addressed the constitutional claim, although it was raised in state court, "AEDPA deference did not apply."

2008: *Boykin v. Webb*, 541 F.3d 638 (6th Cir. 2008). Under AEDPA, trial and appellate counsel in complicity to murder and wanton endangerment case had an actual conflict of interest that

² This category also includes per se reversals where the court found that no showing of even adverse affect was required due to state law.

adversely affected representation in simultaneously representing the defendant and his co-defendant (cousin) in a joint trial. The adverse affect was evident in counsel's failure to point to the co-defendant as the shooter and to develop an alibi for the defendant at the time of the shooting. The only adult eyewitness immediately identified the co-defendant as the shooter and only identified the defendant several days later after extensive police questioning. The murder weapon was found in their grandmother's house where they both lived but the clip was in the co-defendant's car and their grandmother provided an alibi only for the defendant. Nonetheless, counsel did not move for severance for the defendant, sought to establish the adult eyewitness as the shooter with no supporting evidence, and failed to impeach the eyewitness who changed his identification or call the child eyewitness that identified the co-defendant. "[T]he failure to call witnesses beneficial to client A but detrimental to client B, coupled with the failure to cross-examine client B, is the very definition of a conflict of interest, and a violation of the Sixth Amendment." The state court's analysis in finding no actual conflict was "flawed."

This weighing of the relative merits of the different choices available to trial counsel overlooks the fact that trial counsel decided against the best theory of defense for [the defendant], and instead pursued a common-defense theory that failed to call witnesses favorable to [the defendant] and unfavorable to [the co-defendant], and failed to cross-examine [the co-defendant]. . . . Namely, trial counsel refrained from what was objectively [the defendant=s] best defense in order to pursue a doomed mutual defense to protect [the co-defendant].

The state court decision was "an unreasonable application of Federal law" established in *Holloway* and *Sullivan*.

2002: *United States v. Newell*, 315 F.3d 510 (5th Cir. 2002). The defendant's purported waiver of a conflict of interest in his money-laundering trial was not a knowing and intelligent waiver of the actual conflict that developed at trial. The defendant and his co-defendant were charged with money-laundering and fraud and were represented by the same attorney. The co-defendant was acquitted while the defendant was convicted. Prior to trial the court questioned the defendant about the potential conflict of interest and the defendant elected to proceed. During the trial, however, it became apparent and "palpable" that counsel presented a lopsided defense strategy focusing on the co-defendant's innocence, which made it appear that the defendant was the go-between the codefendant and the undisputed mastermind of the illegal operation and that the co-defendant engaged in "simple-minded trust" of the defendant. Counsel followed this theme throughout his arguments and also presented the co-defendant to testify and the testimony largely consisted of pointing the finger at the defendant. Although the trial court advised the defendant prior to trial of "the general dangers of dual representation, the scope of the waiver did not include the actual conflicts that arose during trial." "At the outset of a criminal case the district court can often offer little more than a general warning of possible harm. Such an inquiry does not end the matter of conflicted counsel, and the court remains under a continuing obligation during the course of trial to remedy an actual conflict if it emerges."

1996: *Griffin v. McVicar*, 84 F.3d 880 (7th Cir. 1996). Trial counsel in triple murder and assault case had an actual conflict of interest that adversely affected representation where counsel represented the defendant and co-defendant during the same trial. Defendant initially retained different counsel and attempted to negotiate a plea to testify against codefendant. That counsel was unsuccessful and defendant's family then retained counsel, who was already representing the codefendant. Defendant informed counsel that he was present at the scene of the crime but that he did not shoot anyone. Counsel moved to sever the trials on grounds that the codefendant's extensive criminal record might prejudice defendant and that either defendant might have made admissions which could prove damaging to the other. The motion was denied. Prior to trial, when questioned by the trial court, counsel asserted that there was no conflict in the joint representation. During the state's evidence, eyewitnesses identified the codefendant as the shooter of at least two of the victim's. The evidence against the defendant was conflicting on whether he may have shot anyone. Even though defendant appeared to be the least culpable, counsel failed to present a defense asserting that defendant was just an innocent bystander and co-defendant was guilty party. Instead, counsel tried to discredit the eyewitness testimony. His efforts were organized around a theory that the shootings were linked to the drug-related killing of defendant's brother, which had occurred just a few weeks earlier. He also presented a joint alibi defense, through defendant's and another witness' testimony. He did not even mention the alibi in either his opening or closing statements though, perhaps because the alibi witness could not account for the relevant time period. Defendant in post-conviction admitted that he lied in alibi testimony because counsel told him that if he admitted being present at the scene he would be convicted as accomplice. There was an actual conflict in the joint representation. Counsel clearly possess information which would have suggested to an unconflicted counsel the availability of a defense focused on discrediting the identification of defendant and shifting the blame onto the codefendant. Although defendant gave perjured testimony at trial, the court held:

Even if [defendant] did represent that the alibi story was true, an effective attorney would have discussed with [defendant] the disadvantages of linking his fortunes to those of [the co-defendant], given the strength of the eyewitness identifications of [the co-defendant] and [the co-defendant]'s extensive criminal history. An attorney free to consider [defendant]'s singular interests would, particularly in light of [defendant]'s waffling on his story, have pointed out the possibility of resting a defense on the weakness and contradictions in the testimony implicating him in the shootings. This approach would have compared favorably with bringing in an alibi which left [defendant] with the task of refuting the evidence against [the co-defendant] as well.

Id. at 888. Moreover, the decision to present the alibi defense was clearly favorable to the defendant, who otherwise had no defense, but detrimental to the defendant, who had a much stronger, credible defense available.

Edens v. Hannigan, 87 F.3d 1109 (10th Cir. 1996). Trial counsel had actual conflict of interest that adversely affected representation in robbery and felony murder case where counsel represented the defendant and co-defendant during the same trial. Defendant was charged with two-codefendants. The evidence showed that the three conspired to commit the robbery. The two co-defendants entered the pharmacy and codefendant one shot two people in the course of the robbery. Defendant was not present at the crime scene, but was an accomplice according to the state's evidence. During trial, both the defendant and codefendant two, who had entered the pharmacy, were represented by the same attorney, who was retained by codefendant two's family. Codefendant one testified and claimed self-defense. Codefendant two testified and claimed that he was compelled by fear of codefendant one. The defendant did not testify or present any evidence. Counsel did not even make any opening or closing argument for defendant. Because defendant did not object to the conflict at trial, he must show an actual conflict that adversely affected representation under *Cuylar*. Court held that there was an actual conflict because the only way defendant could have avoided criminal liability in this case would have been for him to have presented the defense that he had not participated in any way in the robbery. A successful effort on his behalf, however, necessarily would have damaged codefendant two, because counsel would have had to contradict and impeach his own client and allow the defendant to testify, which would have contradicted codefendant two. Adverse affect is found because the record reflects that the conflict between the defenses was consistently resolved in favor of codefendant two at defendants' expense. Counsel never articulated what defense, if any, was contemplated for defendant and he put on no evidence on defendant's behalf. Defendant was not permitted to testify and counsel never cross-examined either codefendant concerning their inculpatory testimony that defendant had provided a ride to the car used in the robbery. Counsel also failed to pursue separate plea negotiations on defendant's behalf. Counsel attempted to negotiate a joint deal for defendant and codefendant two, but never tried to negotiate solely for defendant, even though negotiations on his behalf alone might have produced a plea offer from the government since he could have provided valuable testimony undermining codefendant two's defense. He had also witnessed the conspiratorial conversation that took place between the two codefendants and arguably could have testified that codefendant two was not forced to participate in the robbery, contrary to his claim. No effort was made to bargain solely for the defendant though because such an arrangement would have been in direct conflict with codefendant two's defense. Counsel also failed to call a witness that would have contradicted some of the incriminating information against defendant because counsel was more concerned with codefendant two's defense. The court also rejected the government's argue of waiver. "[W]e must indulge every reasonable presumption against the waiver of fundamental rights." *Id.* at 1118 (citing *Glasser v. United States*, 315 U.S. 60, 70 (1942)). The record revealed that counsel told the defendant that he could be convicted or sentenced differently the codefendant. There was no discussion during the hearing, however, of the risks associated with the dual representation and there was no inquiry by the court on this matter.

1992: ***United States v. Martin***, 965 F.2d 839 (10th Cir. 1992). Counsel had actual conflict that adversely affected representation in drug conspiracy case where counsel jointly represented defendant and codefendant. Furthermore, while the District Court conducted an inquiry, the court did not adequately advise defendant and the resulting purported waiver was invalid. In an

undercover drug operation, defendant was initially involved in discussions concerning the possible purchase of marijuana. Defendant did not ultimately make the purchase, but someone else did. Following the arrests of the persons involved in the purchase, defendant turned himself in after learning that he was included in the indictment. At trial, defendant and a codefendant were jointly represented by counsel. Several other codefendants had independent counsel, but defendant's counsel largely orchestrated the defense for all. The trial court conducted only a brief inquiry prior to trial. Counsel had an actual conflict because he convinced defendant not to testify due to a "united we stand, divided we fall" philosophy of defense." *Id.* at 842. Defendant, who was clearly less culpable than his codefendants, would have testified that he withdrew from the conspiracy after the initial meeting and had nothing more to do with it. An actual conflict that adversely affected representation was clear in these circumstances. The court gives deference to the District Court's finding in 2255 hearing that the same court had conducted an inadequate hearing prior to trial to ensure an adequate waiver.

- 1985:** *United States ex. rel. Zembowski v. DeRobertis*, 771 F.2d 1057 (7th Cir. 1985) (*affirming* 598 F. Supp. 914 (N.D. Ill. 1984)). Counsel had actual conflict that adversely affected representation in robbery case where counsel also represented codefendant in joint trial. Prior to trial, the state moved to join the cases. Counsel opposed joinder, in part, by noting that defenses would conflict. The court held that this was sufficient objection to trigger trial court's duty to inquire and failure to do so required reversal. Even assuming trial court's duty was not triggered, reversal required because counsel had an actual conflict that adversely affected representation since counsel actually elicited testimony during trial that strengthened the identification of the defendant. Counsel also argued that defendant was more culpable than codefendant and duped her into involvement. In sentencing, counsel argued only on behalf of codefendant.
- 1984:** *United States v. Auerbach*, 745 F.2d 1157 (8th Cir. 1984). Counsel had conflict that adversely affected representation in illegal sale of firearms case where counsel represented defendant and codefendant in joint trial. Defendant and his son were represented by the same counsel. Adverse affect found because the son had a prior felony conviction and no objection was posed to the prejudicial affect of this on defendant.
- 1983:** *United States ex rel. Gray v. Director, Dept. of Corrections, State of Ill.*, 721 F.2d 586 (7th Cir. 1983). Counsel had conflict that adversely affected representation in murder and rape case where counsel represented defendant and codefendant in joint trial before separate juries. Defendant had defense of coercion by co-defendant, and an independent, conflict-free, competent attorney for defendant would have carefully considered continued cooperation with state as way of avoiding any prosecution, or immunity agreement with state, or plea bargain with state, or strong defense of coercion, or, in event of conviction, strong plea for leniency based on minimum participation. Defendant's counsel, in contrast, could not adopt any of those options because each of them would put co-defendant in jeopardy.
- 1982:** *Smith v. Anderson*, 689 F.2d 59 (6th Cir. 1982). Counsel had conflict that adversely affected representation and trial court failed to adequately inquire in robbery case where counsel represented defendant and codefendant and informed the court of conflicts. An attorney's timely statement that conflict adheres in joint representation is a grave representation requiring

meticulous consideration. Thus, the trial judge's terse reply that he saw no conflict of interest in joint representation of defendants charged with armed robbery was not justified or sufficient response, even if defendant's counsel could have been more detailed in his expression of possible conflict. Here, joint representation of defendants by counsel had adverse effect on defendant's right to representation. Defendant sat, against his will, at same table with co-defendant, who admitted being in store when it was robbed and who was implicated by all but one *res gestae* witness. Defendant, in contrast, was implicated by only one, and defendant claimed he was not at scene of robbery. Counsel's ability to bolster defendant's defense suffered because of counsel's inability to highlight lesser number of witnesses adverse to defendant and the fewer incriminating acts to which those witnesses testified.

United States ex rel. Williams v. Franzen, 687 F.2d 944 (7th Cir. 1982). Counsel had actual conflict that adversely affected representation in burglary case where counsel represented defendant and codefendants in joint trial. Codefendant's testimony was not only inconsistent with defendant's defense, but tended to incriminate defendant. Due to the conflict, counsel could not impeach the codefendant. Where two or more defendants have inconsistent stories about crime charged, joint representation is impermissible, particularly where one defendant cannot be effectively prevented by counsel from taking stand or where counsel is precluded from cross-examining or impeaching witness because of conflicting loyalties.

2. U.S. District Court Cases

2010: *Salts v. Epps*, 696 F. Supp. 2d 639 (N.D. Miss. 2010). Under AEDPA, counsel in embezzlement case, who represented both husband and wife defendants, had an actual conflict of interest that adversely affected representation. The case involved allegations of embezzlement of burial insurance payments the defendants collected in connection with their family home business. The husband handled most of the money and dealt with customers while the wife took care of the accounting and books. Initially retained counsel withdrew after consultation with the defendants on the basis of a conflict. Second counsel received a number of continuances, some due to health issues in his family and the need to prepare, and a number of which were due to several judges recusing themselves and work being done on the courthouse. Days before trial, counsel again moved for a continuance based on his father's illness and the need for additional time to prepare. This motion was never ruled on because the defendant's notified the judge they were terminating second counsel's services and retaining new counsel. The judge refused to grant a continuance and the defendants represented themselves in a motions hearing. On the day of trial, new counsel filed a motion to dismiss or, alternatively, for a continuance based on the obvious conflict of interest that one of the parties was operating the business at some points in time and the other party was operating it at other times. The motion was denied. The district court did not fault the defendants for the delay in relieving second counsel as counsel's conduct was clearly lacking, there was nothing to suggest the defendants should have realized that fact sooner, and given the many delays in the case that were not caused by the defendants, "the sudden rush to trial speaks of too much concern for speed and not enough for justice and due process." The state court's finding of a waiver of the right to the effective assistance of counsel was unsupported by the record, as well as "contrary to law and an unreasonable application of federal law to the facts." The district court held that objection had been made to the conflict both

by initial counsel two years before trial and by final trial counsel and yet the trial court failed to inquire into the conflict as required by *Holloway v. Arkansas*. Automatic reversal was required due to the court's failure to inquire. The state court in applying *Cuyler v. Sullivan* "applied the wrong law and reached a conclusion contrary to federal law." Even assuming the standard of *Cuyler v. Sullivan* was the applicable law, counsel did have an actual conflict of interest that adversely impacted representation. The state court's holding to the contrary was "based upon an unreasonable finding of facts and/or unreasonable application of federal law to the facts." Counsel had no option but to attempt to present a unified front. Unconflicted counsel for the husband would have highlighted the wife's testimony that she was in charge of all bookkeeping. Likewise, unconflicted counsel for the wife would have highlighted the fact that the state's case concentrated almost entirely on the husband's role as the leader of the business and his contact with the customers, as well as evidence related to one count pointing solely to the husband cashing one of the embezzled checks at a gas station.

2005: *Williams v. Jones*, 391 F. Supp. 2d 603 (E.D. Mich. 2005). Counsel had an actual conflict of interest that adversely affected his representation in cocaine case due to his representation of the defendant and co-defendant in a joint trial and the purported waiver was not knowing, intelligent, or voluntary. The defendant and his brother/co-defendant were arrested following execution of a search warrant at their home, which was shared by their mother. The defendant was downstairs and observed by an officer throwing a brown paper bag that contained drugs. The brother, who was upstairs, was observed by an officer outside throwing out a clear plastic bag that also contained drugs, but a lesser amount. Counsel was retained by the mother to represent both. The joint representation impacted counsel in at least six ways: (1) counsel could not argue that the brother was responsible for all the drugs even though that was the best defense in a case "involving shared possessions"; (2) counsel had to argue that both defendants were innocent, which "was far less plausible" than only one of them being innocent; (3) the joint representation "may have led the jury to believe that Petitioner and his brother were a unit and were actively employed together in the narcotics trade"; (4) due to the significant difference in the severity of the charges against each, the co-defendant had a strong incentive to proceed to trial rapidly so the complaint against him would not be amended to higher charges while the defendant "might well have benefitted from a delay in the trial and additional negotiations"; (5) counsel elicited testimony that the seller of drugs on the day before the warrant was executed matched the defendant and not the co-defendant, which further incriminated the defendant; and (6) counsel called a witness who was upstairs with the co-defendant and testified that the co-defendant was asleep at the time of the raid, which made the defendant look like the only guilty party. Under AEDPA, the state court applied the "wrong standard. Petitioner was not required to prove that the outcome of the trial would have been different if he had been represented by a separate attorney." *Id.* at 613. The state court decision was also based on an unreasonable application of Supreme Court precedent. The purported waiver was invalid because the trial court did not apprise the defendant of the "disadvantages of dual representation, and it did not say whether it would appoint counsel if Petitioner requested a separate attorney." In addition, because counsel was retained, the defendant may have "felt obliged for financial reasons to waive representation by a separate attorney." The trial court also waited until after voir dire to make a record of the purported waiver and did not offer to postpone the trial if the defendant wanted separate counsel. "By waiting until after the jury was impaneled to place the defendants'

waiver on the record, the trial court exerted subtle pressure on the defendants to accept the current situation.” *Id.* at 615.

2004: *Robinson v. Stegall*, 343 F. Supp. 2d 626 (E.D. Mich. 2004). Counsel had an actual conflict of interest that adversely affected counsel’s representation and the trial court erred in kidnaping case in failing to inquire concerning counsel’s conflict of interest. Until the final pre-trial conference, the defendant and his co-defendant were represented by the same counsel, who was retained by the co-defendant’s family. During the final pre-trial conference and trial, the defendant was represented by an associate and salaried employee of co-defendant’s counsel. Although the indictment revealed that the defendant and his co-defendant could have been charged with the same crimes, the defendant was indicted for kidnaping of one sister, which carried a life sentence, while the co-defendant was charged only with attempted kidnaping of a different sister, which carried only a potential five year sentence. The kidnaping and attempted kidnaping arose from the same events. Upon the advice of counsel, both defendants waived their right to a preliminary examination. No motions were filed on the defendant’s behalf. On the advice of counsel, the defendant waived his right to a jury trial. Shortly before trial, the prosecution moved to amend the charges to charge the defendant and his co-defendant with kidnaping and attempted kidnaping. This motion was denied, but the prosecution issued a new warrant charging the defendant with the additional attempt charge, but did not similarly issue a new warrant against the co-defendant. At the close of the state’s case during trial, the defendant informed the court that he wanted to discharge counsel because he did not believe he was being adequately represented. The court informed the defendant that he must continue with counsel or represent himself. When the trial resumed, the defendant again informed the court that he wanted to discharge counsel and that he wanted to testify but not with this counsel. The court again denied the motion and the defendant did not testify. Following a continuance of almost two weeks to locate two potential defense witnesses, the defendant again informed the court that he desired to discharge counsel and that his family was seeking new counsel for him. The court again denied the motion. The defendant was convicted of kidnaping and he and the co-defendant were both acquitted of attempted kidnaping. The defendant was sentenced to 10-20 years. The court found that an actual conflict of interest was present in this case. Because of the differing charges, the co-defendant had a “strong incentive” to proceed to trial as rapidly as possible to prevent the filing of additional charges against him. Thus, counsel advised both to waive the preliminary examination, although the preliminary examination could have benefitted the defendant by allowing the development of impeachment material regarding weaknesses and inconsistencies in the child victim’s testimony. This was apparent because the defendant was acquitted of the attempted kidnaping charge based on impeachment testimony developed during the preliminary examination on that charge. The conflict was also apparent because counsel did not file a pretrial motion to suppress identification testimony or request a hearing on the constitutionality of the pretrial identification procedures pursuant to *United States v. Wade*, 388 U.S. 218 (1967). While these motions would have been potentially harmful for the co-defendant by alerting the prosecution that he should be charged with kidnaping, they would have potentially benefitted the defendant. Although these motions were raised after the witnesses testified during trial, “a prudent attorney, unencumbered by any conflict of interest, would have preferred to know before trial whether the identification testimony was admissible” in order to prepare for trial and cross-examination of the witnesses. Moreover, an evidentiary hearing on

the motions prior to trial could also have allowed development of additional impeachment material. Counsel's explanations for waiving the preliminary examination and failing to make the pretrial motions were inadequate to provide an explanation of counsel's conduct independent of the conflict. While counsel stated that he did not want to preserve the testimony of the complaining witnesses in a preliminary examination, the witnesses were young and not likely to be absent from trial. Moreover, their age and the stress of the events "suggest[ed] that valuable impeachment material might be developed at pretrial proceedings." Likewise, "the importance of a preliminary examination is magnified when dealing with a child witness" because of the possibility that the testimony was enhanced during pretrial preparation due to the "suggestibility of child witnesses." Counsel's explanation for failing to file the pretrial motions was also inadequate because counsel stated only that he had not reviewed the photos in the photographic lineup prior to trial even though the defense was mistaken identity. The court found that the state court decision was an unreasonable application of clearly established Supreme Court law under the AEDPA in several respects. First, the state court misunderstood both the facts and the law and "inexplicably limit[ed] its examination to potential adverse effects *during* trial." While the state court found that the defendant and co-defendant were represented by associates in the same firm, they were actually represented by the same counsel throughout all proceedings until the final pretrial conference. The state court thus ignored the "many important strategic, trial preparation decisions" made when the defendant and co-defendant were represented by the same attorney in "direct contravention" of *Holloway* and contrary to counsel's testimony, which acknowledged a conflict prior to trial and advice to the defendant to retain different counsel. Although defendant did have different counsel for the final pretrial conference and trial, the state court's reliance on this fact was unreasonable because the petitioner's counsel during the final conference and trial was "not an independent attorney." He was "an employee" of the co-defendant's attorney. The court also held that, although the defendant did not specifically object on the basis of a conflict of interest, the defendant's repeated requests to discharge counsel and the court's awareness of the discrepancy in the charges between co-defendants was sufficient under *Holloway* and *Mickens* to trigger the trial court's duty to inquire. The state court's finding that the defendant did not object was an unreasonable determination of the facts under the AEDPA and an unreasonable application of *Holloway* and *Mickens*.

1986: *Hudson v. Lockhart*, 679 F. Supp. 891 (E.D. Ark. 1986). Counsel had actual conflict that adversely affected representation in aggravated robbery case where counsel also represented codefendant in joint trial. During trial, the codefendant was positively identified as shotgun wielding robber and the defendant was merely placed at the scene in a passive role of customer who left premises before robbery commenced, and other evidence against defendant was sparse. Nonetheless, counsel did not attempt to shift blame to codefendant.

3. State Cases

2003: *State v. Thomas*, 840 So.2d 25 (La. App. 2003). Counsel in possession of stolen automobile case had an actual conflict that adversely affected his performance where counsel represented defendant and a testifying co-defendant with contrary interest. The defendant was arrested as a passenger in the back seat of a stolen vehicle. There were three co-defendants. One of the co-defendants testified that she had been driving the car, which had no key in the ignition and had

clearly been started with a screwdriver or some other instrument. She testified that it was dark and the car was already running when she started driving though and that the defendant had been driving the vehicle before her and had picked her up. The court held that there were conflicting interests because the co-defendant could only benefit by testifying that she assumed control of the vehicle from the defendant while it was running. In presenting this testimony, however, she provided the jury with a much stronger basis to conclude that the defendant either knew or should have known that the car was stolen. Without the co-defendant's testimony, the state's case would have demonstrated only that the defendant was a rear passenger. The attorney's action in eliciting the co-defendant's testimony was clearly detrimental to the defendant.

2000: *Lewis v. State*, 757 A.2d 709 (Del. 2000). Trial court in burglary, unlawful imprisonment, and conspiracy case erred in failing to inquire into the propriety of joint representation prior to trial. Counsel represented both the defendant and his codefendant in the same proceedings. Both alleged mistaken identity and alibi as defense. In sentencing, the codefendant admitted his guilt and stated that the defendant was not with him. While a state rule required the judge to inquire into potential conflicts of joint representation, the trial judge simply noted that the codefendants had separate alibi defenses and were represented by the same attorney in the context of deciding how many total preemptory challenges to allow for the defense during the jury selection process. The trial court never conducted an inquiry. The Delaware Supreme Court held that automatic reversal was not required absent a showing of an actual conflict and an adverse affect on counsel's representation. In this case, the evidence against the codefendant was strong and the evidence against the defendant was weak. The conflict this worked against the defendant in possible pleas negotiations and trial itself. Any attempt to exploit the weakness of the evidence against the defendant would necessarily enhance the apparent strength of such evidence against the co-defendant. To the extent that the strength of the state's case against the codefendant undermined the credibility of his alibi defense, it had the potential for "spilling over" and undermining the jury's assessment of defendant's alibi defense. Finally, the ability to argue for a lesser sentence for defendant was compromised, where the codefendant had a gun during the crime and the second assailant was unarmed.

1996: *Maya v. State*, 932 S.W.2d 633 (Tex. Crim. App. 1996). Counsel had actual conflict that adversely affected representation in attempted murder case where counsel represented two codefendants, who were husband and wife. The defendants were arrested following a "road rage" type shooting. They retained the same counsel. During trial, the husband asserted self-defense. The wife, however, had made a prior statement and testified in a manner that revealed that the shooting was not self-defense but anger that the victim had been following too closely while driving. When the wife was called to testify, counsel attempted to minimize her involvement without casting the blame on the defendant. "This is an impossible task, and the tactic compromised the defense of both clients. These dilemmas represent *actual*, not *possible*, conflicts of interest." *Id.* at 636. Prejudice presumed and reversal required under *Cuyler* because counsel failed to advise his clients of the potential conflict and to obtain a waiver.

1995: *Meyers v. State*, 454 S.E.2d 490 (Ga. 1995). Counsel in murder case had actual conflict that adversely affected joint representation of defendant and his codefendant, who was defendant's identical twin. Defendant was convicted and codefendant was acquitted. An eyewitness

testified that one of the twins entered a pawnshop with another codefendant and the non-twin codefendant shot and killed one employee, shot her, and robbed the store. The witness could not identify, which twin entered the store. The twins' testimony at trial was virtually identical. Prior to trial, however, one twin (Aaron) stated that the non-twin codefendant took his mother's gun and had not returned it. The other twin (Arthur) stated that Aaron took his mother's gun on the morning of the murder and had given it to the codefendant that actually shot the victims. Aaron was convicted and Arthur was acquitted. Counsel had conflict that adversely affected representation. Counsel harmed Aaron by putting Arthur on the stand in light of his prior inconsistent statement that was damaging to Aaron and in light of his inability to attack or impeach Arthur's testimony since he represented him as well. Moreover, if counsel had not called Arthur to testify, he might well have prejudiced Arthur and caused Arthur rather than Aaron to be convicted on all charges.

People v. Lee, 649 N.E.2d 457 (Ill. App. 1995). Counsel in drug possession case had actual conflict that adversely affected representation where counsel represented three codefendants with adverse interests in joint trial. Defendant and his wife were visiting codefendant's apartment when a search warrant was served and drugs were found. According to police, defendant admitted the apartment was his. The codefendant informed counsel, however, that the apartment was hers and that the defendant and his wife rarely even visited. Counsel did not present this information at trial, however, and the court directed a verdict acquitting codefendant and wife. The court found "that defense counsel was between the proverbial rock and a hard place." *Id.* at 460. Had counsel challenged the evidence that the apartment was not the defendant's, he might have broken link between defendant and the drugs, but only at the cost of establishing for the state the fact of co-defendant's control over the apartment.

1993: ***People v. Reyes***, 622 N.E.2d 86 (Ill. App. 1993). Counsel in unlawful use of weapon case had actual conflict that adversely affected representation where counsel represented both the defendant and codefendant. Defendant was stopped for being on school grounds, from which he was barred because he was suspended, and because it was reported that he had a gun in the car. He had just picked up some of his friends as school let out. When the car was stopped, the defendant and the four other occupants were patted down. The car was then searched and a pistol was found in a gym bag. All were arrested. Defendant admitted that the gun was solely his. Another codefendant also admitted that the gun was solely his. Both were charged. Prior to trial, the court *sua sponte* raised concerns about a potential conflict. Counsel declared that there were none. Counsel admitted, however, that he did not argue the motion to suppress and lack of probable cause for the defendant as forcefully as he might have otherwise because of the joint representation. Counsel had an actual conflict that adversely affected representation. In order to adequately defend the defendant, counsel had to argue that the codefendant's statement was true and that the gun belonged to him. He could not do this because he represented the codefendant also.

1992: ***Gee v. State***, 611 A.2d 1081 (Md. App. 1992). Counsel in drug case had actual conflict that adversely affected representation where counsel represented both buyer and seller in joint trial. Defendant and codefendant were arrested after police officers observed defendant purchasing heroin from codefendant. A public defender was appointed to represent both. At a pretrial

hearing, counsel informed the court of a conflict because the government was offering a plea to defendant in exchange for cooperation against counsel's other client. The trial court found no conflict and instructed counsel to proceed with joint representation. The appellate court found that conflict adversely affected defendant prior to trial. He had no defense at trial and the conclusion was foregone. Because of the conflicted representation though, defendant was deprived of the advice of counsel in rejecting the government's plea offer, which would have resulted in only a seven-month sentence rather than the four years defendant ultimately got.

When still debating within himself as to whether to make such a bargain, [defendant] was entitled to the best advice and wise experience of single-minded counsel. Notwithstanding [defendant]'s tentative decision to stand by his codefendant, a lawyer concerned only with [defendant]'s temporal welfare would have read him the riot act, expatiated at length upon the folly of misguided loyalty, and persuaded him to take the "deal" and run. [Defendant]'s lawyer, because of his mutual allegiance to [the codefendant], however, was obviously paralyzed from giving such tactically sound advice. It was in the very failure to receive such advice that [defendant] was deprived of effective assistance.

Id. at 1090. The codefendant, however, was prejudiced at trial. His only defense was to deny any involvement in criminal activity. An advocate for him would have argued that defendant was found with drugs on him, the codefendant had nothing on him. Unconflicted counsel would have argued that the exchange between the two had nothing to do with drugs. Because counsel was conflicted, however, codefendant was unable to place all the blame on defendant. Both defendants granted new trial.

1990: *State v. Martinez-Serna*, 803 P.2d 416 (Ariz. 1990). Counsel in drug case had actual conflict that adversely affected representation where counsel represented defendant and codefendant in joint trial. Codefendant and defendant were arrested after drugs were found in the truck driven by codefendant. Shortly after arrest, codefendant admitted that the drugs were his and that the defendant knew nothing about the drugs. Nonetheless, during trial both codefendant and defendant testified that they were coerced at gunpoint to transport the drugs. Counsel had an actual conflict that adversely affected representation because counsel's conflict dictated a united defense when codefendant had previously admitted the drugs were his.

Armstrong v. State, 573 So.2d 1329 (Miss. 1990). Counsel had actual conflict that adversely affected representation where counsel represented defendant and codefendant in joint sentencing. Trial court also erred in failing to inquire given the obvious conflict. Defendant was 14 years old. His codefendant was 17. Both plead guilty to armed robbery. The evidence was clear that the codefendant was the main culprit and the defendant's participation was minimal. Nonetheless, in sentencing, counsel presented no evidence or argument for defendant or codefendant "for fear that to do so would characterize one as being more culpable than the other." *Id.* at 1333. Counsel also refrained from arguing any other mitigation although defendant had much available mitigation but instead defendant "graduated from the seventh grade to the Mississippi State Penitentiary." *Id.*

1988: *People v. Jones*, 520 N.E.2d 325 (Ill. 1988). Counsel had conflict in robbery and murder case that adversely affected representation where counsel represented defendant and codefendant in joint trial. Defendant and codefendant made pretrial statements admitting participation but claiming only to be the lookout. During trial, defendant testified and denied all involvement for him and codefendant. The codefendant did not testify at trial. Counsel argued only that their confessions had been coerced. The court held that the defendant was prejudiced by the conflict because the presence in evidence of codefendant's statement implicating defendant violated defendant's right to confrontation. The joint representation of the two defendants in one trial created a clear conflict as to defendant, because when co-defendant declined to testify, there was no way that defendant's attorney could effectively deal with the implicating statement.

People v. Taylor, 520 N.E.2d 907 (Ill. App. 1988). Counsel had actual conflict that adversely affected representation where counsel represented jointly tried codefendants with antagonistic defenses. Counsel represented defendant and her nephew/codefendant. Prior to trial, the court inquired into the conflict, but counsel assured the court that there was no conflict and each defendant's testimony would support the other. During trial, however, defendant testified, contrary to the state's evidence that she was the leader, that codefendant was actually the aggressor. Counsel was surprised by the testimony and opted at that point not to cross-examine her to discredit her testimony. The appellate court held that counsel had an actual conflict at that point that adversely affected his representation of codefendant because counsel did not attempt to discredit defendant's testimony. The court also reversed defendant's conviction because she also was impacted by counsel's divided loyalties. Despite the purported pretrial waiver, the court held that the waiver was inadequate because the conflict was not apparent prior to trial. The court also held that "the right to conflict-free counsel is so fundamental that a conflict of interest affecting legal representation amounts to plain error when the record plainly indicates the existence of an actual conflict of interest precluding counsel's undivided loyalty." *Id.* at 911.

Cole v. White, 376 S.E.2d 599 (W. Va. 1988). Counsel had actual conflict that adversely affected representation where counsel represented both defendant and defendant's father in joint trial for malicious assault. Evidence admitted in the trial showed that the father had a motive for the victim's beating and the father's alibi witness had been beaten by the father on several occasions. That evidence would not have been admissible against the defendant if he and his father had been represented separately or if the trials had been severed.

1987: *Fitzgerald v. United States*, 530 A.2d 1129 (D.C. 1987). Counsel had actual conflict that adversely affected representation in drug case where counsel represented defendant and codefendant in joint trial and court did not adequately inform defendants of their right to separate counsel. In addition, differing amounts of evidence against each defendant with respect to different counts of indictment foreclosed the attorney who represented both defendants from using blame-shifting defense.

People v. Pico, 514 N.E.2d 224 (Ill. App. 1987). Counsel had actual conflict that adversely affected representation in aggravated battery case where counsel represented defendant and codefendants in joint trial, where credibility of each defendant was called into question, and could not be restored without proving that at least one of the others was lying.

Tate v. State, 515 N.E.2d 1145 (Ind. App. 1987). Counsel had actual conflict that adversely affected representation in theft case where counsel represented both defendants in joint trial. One defendant testified professing his own innocence, by suggesting that it was co-defendant who stole groceries. Once that conflict arose, performance of joint counsel was impaired as to both co-defendants by attorney's continued active representation, which precluded attorney from cross-examining witnesses on behalf of each of co-defendants.

State v. James, 739 P.2d 1161 (Wash. App. 1987). Counsel had actual conflict that adversely affected representation in robbery case where counsel represented defendant and codefendant in joint trial and female defendant chose not to testify in her own defense because it would be prejudicial to the other defendant, and where female defendant was implicated in a robbery for which the other defendant was charged and she was not.

1986: *People v. Rhinehart*, 385 N.W.2d 640 (Mich. App. 1986). Counsel had actual conflict that adversely affected representation in drug case where counsel represented both defendant and codefendant in joint trial. Defendant consented to joint represent based on counsel's initial decision not to have either testify, but counsel without consulting defendant called codefendant to testify about alibi and the testimony proved damaging to defendant. Reversal also required because the trial court failed to adequately inquire.

Matter of Delfin A., 123 A.D.2d 318 (N.Y. App. Div. 1986). Counsel had conflict that required presumption of prejudice in delinquency case involving sexual abuse where counsel had been retained by residential facility where juvenile had been voluntarily placed in foster care, and where alleged incident of sexual abuse occurred, to represent the facility in proceedings against the juvenile. At those proceedings it was expected that employees of the facility would testify. Furthermore, counsel represented two alleged accomplices whose statements about the incident of sexual abuse differed from that of the juvenile.

1985: *Armstrong v. People*, 701 P.2d 17 (Colo. 1985). Counsel who jointly represented husband and wife in aggravated robbery case had a conflict that adversely affected representation of both where husband and wife defendants were charged with differing degrees of criminal activity and the great bulk of the evidence introduced was directed toward proving the husband's culpability. The wife elected to testify in her own defense, and offered testimony in support of her husband's defense as well. The only evidence against the wife was circumstantial, but this was used to try and benefit both clients, rather than have her acquitted.

Davis v. State, 461 So.2d 291 (Fla. App. 1985). Counsel had conflict that adversely affected representation in drug case where counsel represented defendant and codefendant in drug case and elicited testimony from defendant in motion to sever cases that defendant was solely responsible and the codefendant had no knowledge of the drugs.

State v. Lem'Mons, 705 P.2d 552 (Kan. 1985). Counsel had conflict and prejudice was presumed where counsel's husband/law partner represented codefendant and defendant and codefendant each claimed innocence and implicated the other.

1984: **Barclay v. Wainwright*, 444 So.2d 956 (Fla. 1984). Counsel had conflict that adversely affected representation in direct appeal of murder case where counsel represented defendant and codefendant in joint appeal. Counsel failed to make plausible argument of lesser culpability that could have benefitted defendant immensely but would have harmed co-defendant and counsel had been retained by family of codefendant and ultimately married the codefendant's sister.

Amaya v. State, 677 S.W.2d 159 (Tex. Crim. App. 1984). Counsel had conflict that adversely affected representation in rape case where counsel represented three defendants, who were brothers, in joint trial. All three defendants were adversely affected in light of differing culpabilities, such as one of them was not present during abduction and only two of them had weapons. Witnesses repeated facts that were consistent with only one of the brothers' story. Defense counsel could not redirect witness to clarify her factual account without damaging the credibility of his other two clients.

Ex parte Acosta, 672 S.W.2d 470 (Tex. Crim. App. 1984). Counsel had conflict that adversely affected representation in probation revocation case where counsel represented defendant and codefendant with adverse interests in joint hearing.

1983: **People v. Mroczko*, 672 P.2d 835 (Cal. 1983). Counsel had a conflict of interest due to representation of a codefendant in joint trial and a witness who was an uncharged suspect in the murder committed in prison. Because of the conflict, counsel was unable to assert that the defendant, "instead of being the chief culprit, was, at worst, an accessory whose involvement was marginal and, to some extent, unwilling." Thus, "the conflicts that developed assume gigantic importance" in sentencing. While unconflicted counsel may have made similar trial decisions, "[t]he point is, of course, that if that had happened, it would have happened because each attorney decided that it should, thinking only of his own client's interests and not those of another defendant and two other clients." In addition, counsel was conflicted in plea bargaining. The state made a plea offer to the codefendant to testify and plead as an accessory after the fact, which was rejected. If the codefendant had accepted the plea and testified it may have benefitted the defendant. The state also made a second "package" offer for the defendant to plead to second degree murder and the codefendant to plead as an accessory. Counsel clearly "was in no position to lean on one client on behalf of the other. As matters turned out, each defendant would have benefited by some friendly persuasion on behalf of the other." The purported waivers were fatally flawed because the "courts' comments did not fully convey a number of actual and severe conflicts that were apparent even pretrial. Instead, each judge who addressed the defendants

concerning the conflicts did so in language implying that they were merely potential conflicts. Most importantly, however, defense counsel reinforced this notion by repeatedly-and erroneously-asserting that no conflict existed.” Indeed, “[i]nstead of facilitating the trial court’s attempts to explore the conflicts and to obtain a valid waiver, counsel did everything in his power to prevent a penetrating inquiry. . . . Counsel not only refused to admit to the conflicts that the prosecution had unearthed, but actively prevented the court and the prosecution from discovering others.”

In Interest of V.W., 445 N.E.2d 445 (Ill. App. 1983). Counsel had conflict that adversely affected representation in delinquency case for aggravated battery where counsel represented three codefendants in joint trial and the three gave inconsistent testimony. Counsel was thus presented with a situation in which it appeared that at least one of his three clients was lying, but he could not examine his own clients in detail to bring out the truth.

State v. Morrow, 440 So.2d 98 (La. 1983). Counsel had conflict that adversely affected representation in kidnapping case where counsel represented defendant and codefendant in joint trial. Counsel did not present evidence, cross-examine witnesses or make arguments to jury on state’s failure to prove defendant’s participation in initial abduction of victim and on his undisputed lesser culpability in entire sequence of events. That evidence and argument might have influenced jurors to return different verdict

****Ex parte McCormick***, 645 S.W.2d 801 (Tex. Crim. App. 1983). Counsel had conflict that adversely affected representation in capital case where counsel represented two codefendants in joint trial. Evidence supported findings that defendants did not waive their right to conflict-free counsel, that there was irreconcilable conflict of interest in representing both defendants, and that such conflict adversely affected counsels’ performance of duties to defendants in that helping one defendant necessarily hurt the other. Defendants were denied effective assistance of counsel by such joint representation, especially in capital case where jury must consider particularized circumstances of individual offense and individual offenders.

1982: *People v. Elston*, 182 Cal. Rptr. 30 (Cal. App. 1982). Counsel had actual conflict that adversely affected representation in child abuse case where counsel represented defendant and codefendant in joint trial. Trial court erred in failing to conduct inquiry when faced at outset with possibility that conflict of interest existed precluding joint representation of defendants. Actual conflict and deprivation of effective representation arose where judge had to fix penalties for both defendants, and it appeared that defendant could have attacked probation report’s allocation of responsibility and its disparate sentencing recommendations. Each defendant’s statements about origin of child abuse was affront to other’s credibility, defense counsel did not make arguments on defendant’s behalf that could have been made, defendants had disparate criminal records, and each defense rested upon contradictory and inconsistent interpretation of facts.

B. Simultaneous Representation of Codefendants in Pleas Negotiations, Testimony for Prosecution, or Sentencing

1. U.S. Court of Appeals Cases

1994: **Burden v. Zant*, 24 F.3d 1298 (11th Cir. 1994). Counsel had an actual conflict that adversely affected his representation due to his simultaneous representation of a codefendant, who became a state witness. The defendant while pending trial on a burglary charge was charged with four murders based on the statements of the witness, who was also arrested. Counsel was then appointed to represent both on the murder charges. At the preliminary hearing for the witness, the court held that there was insufficient evidence to charge him with murder but ordered that he be held in custody as a material witness. The witness remained in confinement until the conclusion of the defendant's trial. In exchange for his testimony at trial, the witness "received informal guarantees from the prosecution that he would not be charged in connection with the murders. . . . This informal agreement was never transformed into a formal grant of transactional immunity, which generally requires court approval under Georgia law, and which the district attorney's office apparently granted as a matter of policy only in writing." *Id.* at 1300-01 (citation omitted). Prior to trial, the public defender representing the defendant, who had the informal discussions with the prosecutor on behalf of the state witness, was replaced by another public defender in the same office as the defendant's counsel. This counsel represented the defendant during trial in which the prosecution conceded the witness had "a promise of immunity from prosecution."

In this case, an actual conflict of interest occurred when . . . pretrial counsel, while representing two persons under suspicion for a murder, reached an informal understanding with the prosecutor that one of his clients would not be prosecuted in exchange for his testimony against the other. . . . This agreement effectively placed [counsel] in the position of having to sacrifice one client, [the defendant, in order to protect another client, [the state witness]. Given that [the defendant] was indicted and tried on the strength of [the witness'] testimony, it is impossible to say that an actual conflict of interest was not created.

Adverse affect was established.

First, by negotiating an informal immunity deal for [the witness], [counsel] effectively terminated his opportunity to reach a plea agreement with the State on [the defendant's] behalf. . . . Furthermore, after reaching the understanding with the prosecutor, [counsel], to enforce the agreement, had to advise a key witness to implicate his own client. The informal nature of [the witness'] understanding with the district attorney made the corrosive effect of the conflict upon [counsel's] representation of [the defendant] all the more invidious. Because [counsel] had not obtained in writing the terms of the understanding that [the witness] would not be charged in connection with the murders if he testified . . . , [the witness] had no way to demonstrate that he was immune from subsequent prosecution because he had met his end of the bargain. Instead, [the witness] could only rely

on the State's acceptance of his performance as sufficient. That ambiguity would have made [the witness], and . . . his counsel, all the more solicitous of the prosecution's needs and wishes. As a result, [counsel's] pretrial representation of [the defendant] was clearly compromised.

1992: *United States v. Swartz*, 975 F.2d 1042 (4th Cir. 1992). Counsel in bank fraud conspiracy had an actual conflict that adversely affected representation in sentencing where counsel represented defendant and codefendant and counsel objected to a lower sentence for defendant because in counsel's view both were equally culpable. During the investigation, defendant retained counsel. Counsel later agreed to represent the co-defendant as well and a written waiver was signed by both. At the initial appearance and arraignment, the Magistrate Judge conducted an inquiry and determined that the waivers were valid. Defendant then negotiated a plea in which she would cooperate in the prosecution of other coconspirators and would receive a downward departure in sentencing. The codefendant also agreed to plead guilty in exchange for some charges being dropped but his plea did not include a downward departure in sentencing agreement. At the time of the pleas, the District Court was informed that the Magistrate had held a hearing and, thus, did not inquire further into the conflict. Following the pleas, defendant and codefendant testified against another coconspirator. During that trial, defendant became concerned that the codefendant was lying and increasing defendant's involvement. Defendant was concerned that counsel could not properly represent her in sentencing if counsel could not say anything derogatory about the codefendant. Defendant asked counsel to withdraw from codefendant's representation and represent only her. Counsel offered instead to withdraw from her representation and proceed only with codefendant and then counsel assured her that he could proceed with both cases. Later, defendant learned that she would be called as a witness at codefendant's sentencing. She again asked counsel to withdraw from representing the codefendant because of the conflict, but counsel assured her that he could represent both. During codefendant's sentencing, counsel argued that he and the defendant were equally culpable and should be sentenced the same, even though codefendant was higher in the guidelines than defendant even without her downward departure due to cooperation with the government and the evidence was clear that defendant was less culpable than the codefendant. Counsel's strategy, while good for the codefendant, clearly harmed the defendant. Later in the proceeding, defendant was called to testify that codefendant was not coerced, as he had previously testified. The court asked counsel why he persisted in representing both and counsel just assured the court that defendant had waived and the Magistrate Judge had inquired and resolved the issue. Later the same day, defendant was sentenced. Represented by new counsel she then filed a motion for new sentencing due to counsel's conflict. The Fourth Circuit held that counsel had an actual conflict in sentencing when counsel argued in a fashion damaging to the defendant and when the defendant testified. The conflict also adversely affected counsel's representation. Although defendant had previously signed a waiver and the Magistrate Judge inquired, the Fourth Circuit has "recognized that a single waiver pursuant to rule 44(c) may not serve to waive all conflicts of interest that arise throughout the course of that defendant's criminal proceedings. The district court has a continuing obligation under rule 44(c) to guard against conflicts of interest that may worsen as circumstances change during the course of the representation." *Id.* at 1049. Defendant's initial waiver was insufficient to waive the conflict

that ultimately developed at sentencing when counsel's argument was directly adverse to defendant.

1990: *Hoffman v. Leeke*, 903 F.2d 280 (4th Cir. 1990). Counsel in accessory to murder case had conflict that adversely affected representation where counsel jointly represented defendant and two codefendants, who plead guilty and testified against defendant. The trial court also failed to conduct an adequate inquiry and should have rejected defendant's purported waiver even if it was valid. Prior to trial, the court inquired of the defendants jointly and individually about the joint representation and counsel informed the court that he saw no conflict. A mistrial was granted shortly after jury selection. Prior to the new trial, a local co-counsel was retained. Each defendant again expressed a desire to continue with the joint representation. After that, both codefendants accepted plea agreements and agreed to testify against defendant. The state repeatedly brought out during the trial that counsel represented the codefendants. A codefendant was the state's primary witness. The co-counsel conducted the cross-examination. The court reached "An inescapable and unavoidable conclusion" of an actual conflict that adversely affected the representation. *Id.* at 286. The conflict was "patent" where defendant "was in the unacceptable position of having his own attorney help the state procure a witness against him." *Id.* The adverse affects were clear in that counsel negotiated a plea agreement for the codefendant that required him to implicate the defendant and did not even inform the defendant that the codefendant would testify against him. Counsel also could not cross-examine the codefendant and attack what amounted to the state's entire case against him. "To cross-examine [the witness] effectively, [counsel] would have had to question his own client's truthfulness. This he could not do." *Id.* Finally, the adverse affect was clear in the prosecutor's repeated references during trial that counsel also represented the codefendants. The adverse affect was not lessened by the fact that it was the unconflicted cocounsel that cross-examined the codefendant. Conflicted counsel was the lead counsel who prepared the case without the cocounsel's preparation. Conflicted counsel also examined 14 of the 17 witnesses during the trial. "Therefore, regardless of the effectiveness of [co-counsel's] efforts at trial, upon which we need not pass judgment, those efforts could not have overcome the presumed prejudice arising from [lead counsel's] actual conflict of interest." *Id.* at 287. In discussing whether defendant had waived the conflict, the court declared that "[n]ot even the proffer of admittedly valid waivers of conflict-free counsel can restrict a trial court's power to insist on separate representation." *Id.* at 288. Even if defendant made a valid waiver, "permitting multiple representation in a case of this type" would be improper. *Id.*

[W]e believe that a member of the public would be shocked to observe a criminal trial in which the same attorney represented both the defendant and the state's star witness, in which the attorney had cut the deal that made that witness available to the state, and in which the prosecutor pointed out the defense attorney's untenable position at every opportunity.

Id. In any event, the court found no valid waiver because "[a] defendant cannot knowingly and intelligently waive what he does not know." *Id.* at 289. Here, no one explained the meaning of a conflict of interest and defendant was not informed that his counsel had advised the codefendant to testify against him. Counsel also insisted that he saw no conflict. "If [counsel] was suffering

from such myopia, we cannot insist on greater appreciation of the risk of conflict on the part of a layman whom [counsel] advised.” *Id.* When it became obvious that counsel had negotiated a plea bargain for the codefendant that required him to testify, “the judge had a duty to conduct further inquiry and secure a further waiver if [defendant] wished to make one.” *Id.*

1987: *Thomas v. Foltz*, 818 F.2d 476 (6th Cir. 1987). Counsel had actual conflict that adversely affected representation in murder case where counsel represented defendant and two-codefendants and negotiated a “package deal” plea for all three to plead to second-degree murder. Counsel’s joint representation of defendant and two co-defendants precluded counsel from engaging in separate plea negotiations on defendant’s behalf even though he was less culpable than the others because that would have been detrimental to the interests of co-defendants who wished to plead guilty.

1985: **Ruffin v. Kemp*, 767 F.2d 748 (11th Cir. 1985). Counsel had actual conflict that adversely affected representation in murder case where counsel also represented codefendant and attempted to negotiate a plea for him in exchange for testimony against defendant. While the codefendant did not ultimately plead guilty, the court found an actual conflict that adversely affected representation because counsel did not attempt to negotiate a plea for defendant.

**Ford v. Ford*, 749 F.2d 681 (11th Cir. 1985). Counsel had conflict that adversely affected representation in murder case where counsel represented both defendant and his codefendant/brother and defendant plead guilty despite desire to go to trial because state offered only a joint agreement to avoid death penalty and defendant’s brother desired to plead guilty and ask for mercy. Because counsel was in a position of divided loyalties and the defendant and codefendant had divergent interests, he could not represent both co-defendants without some conflict arising.

2. U.S. District Court Cases

1999: *Trejo v. United States*, 66 F. Supp.2d 1274 (S.D. Fla. 1999). Counsel had actual conflicts that adversely affected representation. Five codefendants signed agreement with government for joint cooperation where the defendants understood that cooperation by one would inure to the benefit of all. Ultimately, one codefendant got a downward departure but the three involved here did not. The court, although finding the government’s actions shaky, found that the agreement did not prohibit this and that defense counsel should have ensured that their understanding of the agreement was included in the signed document. In a 2255 proceeding, the court learned that initially all codefendants were cooperating. The three codefendants had counsel, who shared office space, and “stood in” for each other at various proceedings representing multiple defendants. One of the lawyers essentially abandoned his client without notice to him. The remaining two lawyers assured the defendants that the cooperation agreement was a “group agreement” that would benefit all, that the agreement would not be included in the plea agreement but was clear with the government, and that they would receive sentences of only 5-10 years, which did not happen. Counsel’s conduct was deficient in failing to include their understanding of the plea agreement in the actual agreement and the defendants would not have plead guilty if the government refused this agreement. Counsel’s failures were due to severe

conflicts of interest. “The clients’ concept of cooperation as ‘one for all and all for one’ appears to have spilled over to their attorneys’ concept of representation. Examples of this haphazard ‘group representation’ abound in the record.” *Id.* at 1286. Counsel were meeting with other codefendants. In meetings with the government, at times, some counsel and some defendants were missing. One counsel withdrew from representation without his client or the court knowing because of the “musical chairs” method of representation. *Id.* As a result, the “taint” of conflict spread to all three defendants. *Id.* at 1287. Guilty pleas set aside.

3. Military Cases

1987: *United States v. Newak*, 24 M.J. 238, amended, 25 M.J. 164 (1987). Counsel had actual conflict that adversely affected representation in conduct unbecoming an officer case where counsel represented both the accused and the enlisted woman with whom she allegedly had homosexual relations and counsel negotiated a plea on behalf of the enlisted woman that required her testimony against the accused.

4. State Cases

2010: *Mitchell v. Commonwealth*, 323 S.W.3d 755 (Ky. App. 2010). Counsel (two public defenders from the same office) had actual conflict of interest in representing father and son co-defendants where son confessed and negotiated a plea, agreeing to testify against his father, who maintained innocence. Although both defendants signed purported waivers, the waivers were invalid as the trial court had failed to advise the defendants of the dangers and consequences of dual representation as required by state rules.

2008: *Lomax v. State*, 665 S.E.2d 164 (S.C. 2008). Counsel in drug case plea had an actual conflict of interest due to counsel’s simultaneous representation and plea of the petitioner’s husband on related offenses arising from the same facts. In essence, the defendant was initially arrested for distribution to an undercover officer and had three subsequent similar distributions. Her husband’s charges arose from removing the drugs and money from their home after her initial arrest and prior to execution of a search warrant for their home. Nonetheless, counsel spent more time preparing the husband’s case, even though the Petitioner was charged with the majority of the offenses and faced a more severe sentence. Counsel also advised the husband of the conflict, but could not recall whether she advised Petitioner. Counsel also argued for leniency, specifically arguing his limited involvement as compared to the petitioner, and then argued reconsideration of sentencing for the husband, but did not argue for leniency or reconsideration for the defendant. The husband was sentenced to three years, while the petitioner was given concurrent sentences of ranging between 5 and 25 years. Counsel’s actual conflict was also clear in that the petitioner pleaded guilty to the majority of the drug charges while the husband plead guilty to a single count because counsel was able to convince the prosecutor to dismiss additional charges for him, which “essentially pitted Husband against Petitioner, which was clearly detrimental to Petitioner’s interests.”

2001: *Thomas v. State*, 551 S.E.2d 254 (S.C. 2001). Counsel in drug case had actual conflict where counsel represented husband and wife charged with drug charges. Counsel initially informed defendant about dangers of joint representation and received a waiver. Later, however, the prosecutor offered deal to allow both to plead to lesser offenses for an eight year sentence or to allow one to plead guilty to all and receive the maximum sentence while the other had charges dismissed. The defendant plead guilty and received the maximum sentence and charges against her husband were dismissed. Counsel acted on his divided loyalty by failing to advise the defendant, whom he believed to be the less culpable of the two, that she had nothing to lose by proceeding to trial since she was receiving the maximum punishment in the plea agreement. "Although petitioner initially waived a conflict of interest, once it became clear an actual conflict existed due to the plea bargain, counsel should have either withdrawn from representing one or both of them or acquired another waiver covering this specific conflict. To be valid, a waiver of a conflict of interest must not only be voluntary, it must be done knowingly and intelligently." 346 S.C. at 144, 551 S.E.2d at 256.

2000: *Ellis v. State*, 534 S.E.2d 414 (Ga. 2000). Defense counsel had actual conflict of interest that adversely affected her representation of robbery defendant. Three defendants were charged. There was a positive identification of one. The non-identified codefendant retained counsel and asked her to also represent the defendant. Both initially claimed mere presence and that they remained in the car while the identified codefendant and two other men committed the robbery. A month before trial, the defendant told counsel that he had been shown a weapon and asked to participate but he declined showing prior knowledge of the planned robbery. Following that counsel told both clients that if they went to trial they would need different lawyers and arranged two other lawyers for them. Counsel continued, however, to advise the two clients about possible pleas. On her advice, the defendant entered an *Alford* plea. He subsequently filed a motion to withdraw the plea due to the conflict of interest. The court held that counsel had an actual conflict because she continued to represent both defendants even though they had different versions of their innocence defense. The conflict had an adverse affect because counsel did not pursue a possible plea agreement for the defendant to testify against his codefendant where the state's evidence was weak.

1998: **Sheridan v. State*, 959 S.W.2d 29 (Ark. 1998). Counsel in capital trial had actual conflict of interest that adversely affected representation due to counsel's simultaneous representation of defendant and his codefendant/brother. Both defendants were charged with murder. Prior to trial, represented by counsel who negotiated the plea, the codefendant agreed to plead guilty to hindering apprehension and to testify against codefendant. Following the defendant's trial, the state dismissed the charges against the codefendant. The defense at trial was self-defense. Defendant alleged that he intended to scare the victim and she pulled knife out threatening him. The codefendant testified that the victim had informed the police that the defendant was dealing drugs and the defendant took her out to a cemetery presumably to scare her. The codefendant left for a few minutes and returned to find the defendant with blood on him. Counsel asserted strategy because the codefendant would testify anyway and he utilized the codefendant to corroborate defendant's account of events, but admitted that he "relaxed" his cross-examination of the codefendant for fear that it might backfire. Court found that the

codefendant's testimony was not helpful. While he corroborated some of the defendant's testimony, he also described the defendant as cool and methodical following the killing, described the defendant's activities in attempting to cover for the killing, and the defendant's threats to kill another witness. Court also found that codefendant's testify was not inevitable because with different counsel he may have invoked right to remain silent, which would have resulted in a much weaker case for the state. Counsel's representation was adversely affected because counsel did not elicit the fact that the codefendant had been initially charged with capital murder and had pled guilty to a much lesser charge in exchange for his testimony. Counsel also did not point out that the codefendant had not been sentenced for the hindering-apprehension charge and had the potential to avoid serving time in prison if his testimony met with the approval of the State. He also did not explore why the codefendant was testifying against his brother and the fact that the victim's sister and the codefendant were romantically involved. Counsel even admitted that he had treated the codefendant carefully during cross-examination.

Garcia v. State, 979 S.W.2d 809 (Tex. App. 1998). Counsel in drug case had an actual conflict that adversely affected representation due to simultaneous representation of defendant and codefendant. Defendant plead nolo contendere to drug distribution and was placed on deferred adjudication. Following a subsequent arrest, defendant moved to set aside the plea due to counsel's conflict of interest in representing her and her boss. Counsel was informed by the state that if the defendant did not plead both would be tried, but if the defendant entered a plea the charges against her boss would be dismissed. Counsel informed the defendant that if she did not plead her boss would lose his liquor license, with the implication being that she would lose her job. Counsel admitted that his primary interest was in getting the charges dismissed for the boss/codefendant. Prejudice presumed.

1997: *Netters v. State*, 957 S.W.2d 844 (Tenn. Crim. App. 1997). Counsel had conflict of interest that adversely affected representation. Defendant and codefendant were charged with two counts of attempted murder and aggravated burglary. Both were assigned public defenders from the same office. The defendant wanted to go to trial. The codefendant wanted to plead. Several days before trial, the codefendant's attorney, without defendant's counsel being present (and possibly without his knowledge), informed the defendant that if he did not plead his codefendant would be forced to go to trial. He advised the defendant to plead guilty to lesser charges and the defendant gave in and entered a plea. His own counsel was not in the courtroom during the beginning of the plea. He entered in the middle and took issue with defendant's statements that he had not properly represented him, but the defendant continued with an *Alford* plea. The defendant got eight years and his codefendant got three. Court found that the public defender's office was viewed as a whole and the office had a conflict regardless of the appointment of two separate attorneys. The proper focus is solely upon whether counsel's conflict affected counsel's actions and the defendant's decision; therefore, it is inappropriate to consider whether another attorney, untainted by a conflict of interest, would also have recommended a guilty plea. *Id.* at 848. In this case, counsel's representation was adversely affected where he negotiated a joint plea, despite the defendant's expressed desires to go to trial. Prejudice presumed.

- 1995:** *Edgemon v. State*, 455 S.E.2d 500 (S.C. 1995). Counsel in burglary case had actual conflict that adversely affected representation where counsel represented defendant and two co-defendants. Initially, the state was negotiating with both codefendants to plead guilty and testify against the defendant. One of the codefendants entered an agreement to testify against defendant in exchange for Pretrial Intervention (ultimate dismissal of charges possible). Defendant ultimately plead guilty. Counsel testified in post-conviction that he did not negotiate the codefendants' deals but did emphasize to the prosecutor that the codefendants were less culpable than the defendant. Counsel should have withdrawn from the joint representation.
- 1994:** *State v. Dadas*, 526 N.W.2d 818 (Wis. App. 1994). Trial court erred in failing to inquire into conflict. Defendant and codefendant charged with commercial gambling. Counsel initially advised both of a potential conflict, which they purportedly waived. After consulting with the government, counsel advised both that if they cooperated with authorities, no prison time would be sought. Each gave statements incriminating themselves and the other. Counsel then entered plea negotiations that would allow jail time with more time for defendant. Defendant plead no contest pursuant to the agreement. The trial court never conducted an inquiry as required by state law into the potential conflict, although the court knew about the dual representation. The appellate court declined automatic reversal and held that when the trial court failed to inquire the appellate court would conduct *de novo* review to determine whether an actual conflict existed. Appellate court found actual conflict because counsel advised codefendant to cooperate with law enforcement and provide incriminating information against defendant. This information could serve as a basis for additional criminal charges, either federal or state, against defendant and could affect sentencing in which the information was also used. New sentencing granted.
- 1993:** *State v. Padilla*, 859 P.2d 191 (Ariz. App. 1993). Counsel in drug case had actual conflict that adversely affected representation where counsel represented the defendant and his codefendant/wife. Defendant was arrested after making a sale to an informant. His family members were separately charged in "companion cases." Counsel was retained to represent defendant, defendant's wife, his brother, and his sister-in-law at a package rate on all the drug charges stemming from the same investigation and involving the same informant. The defendant entered an *Alford* plea pursuant to a plea agreement. Although counsel did not attempt to plea bargain in exchange for the defendant's testimony against other family members, no adverse affect found because defendant testified in post-trial hearing that he would have rejected such a deal. Adverse affect was found in sentencing, however, because an unconflicted counsel would have asserted defendant's reduced culpability in the family enterprise as compared to his brother. More importantly, counsel acted adversely to defendant when he indirectly shifted the blame to defendant from his wife at her sentencing hearing immediately before defendant's sentencing. Seeking leniency for the wife, counsel implied – before the same judge that sentenced defendant – that defendant had led his wife astray. This implicit advocacy against the defendant amounted to ineffective assistance and adversely affected representation. Remanded for new sentencing.

1992: *Littlejohn v. State*, 593 So. 2d 20 (Miss. 1992). Counsel in drug conspiracy case had actual conflict that adversely affected representation where counsel simultaneously represented the government's primary witness for same offense. Following arrest, defendant retained counsel. The retainer agreement noted a potential conflict with witness. Counsel then represented witness in entering a plea to drug conspiracy charges in exchange for a reduced sentence and testimony "in a subsequent proceeding." During trial, three codefendants, who had entered pleas, and witness testified against defendant. The testimony revealed that, although the witness had been separately indicted, he was part of the same conspiracy with the defendant and her codefendants. In cross-examining the codefendants, counsel established that they had plead guilty in exchange for their testimony. Counsel did not ask that question of the witness, however. And, although counsel objected, the state brought out that counsel had represented the witness in his plea. The Mississippi Supreme Court's analysis begins with the brilliant observation that "[u]nder our system of jurisprudence, if a lawyer is not one hundred percent loyal to his client, he flunks." *Id.* at 23. When dealing with actual conflicts of interest in representation of codefendants,

Competency of defense counsel is not then the issue; loyalty of counsel is. And when the reviewing court concludes that the defense lawyer in fact had "an actual conflict of interest," it does not "indulge in nice calculations as to the amount of prejudice attributable to the conflict. The conflict itself demonstrates a denial of the right to have the effective assistance of counsel."

Id. The court notes that the witness waived grand jury proceedings and was charged and plead guilty on the same day. "This would not have occurred in the absence of preceding serious, meaningful negotiation and a clear and distinct understanding between the prosecution and defense counsel." *Id.* And, the court notes that when the witness plead guilty the others had not even been indicted yet. In its analysis, the court discusses the prosecution's duty to inform the court of conflicts and not to proceed without doing so when the prosecution knows of a conflict.

***Austin v. State*, 609 A.2d 728 (Md. 1992).** Counsel had actual conflict in drug case that adversely affected representation where two partners represented defendant and codefendant that testified against him. Defendant was indicted with six codefendants. Defendant retained counsel. A codefendant retained same counsel. Initially they were represented by same counsel and then later a partner in the same firm took over representation of the codefendant. At a pretrial hearing, the court inquired about status of each of the cases without the presence of the other codefendants and counsel. The codefendant indicated she had agreed to plead guilty in exchange for her testimony against the defendant. The trial court noted a potential conflict and instructed codefendant's counsel not to inform defendant's counsel, his partner, that the codefendant had agreed to plead guilty and would be testifying against defendant. Defendant proceeded to trial. Counsel objected to the gag order against his partner and requested a transcript of the hearing held concerning the codefendant's status. The prosecutor informed the court (different judge) that the prior actions were necessary due to counsel's conflict and that the prior judge had not conducted a hearing on the conflict. The court did not inquire but sent the case back to the initial judge, who refused to lift the gag order. The case then proceeded to trial. The codefendant testified against defendant. At defendant's sentencing, counsel indicated that

he had talked to the codefendant a number of times during his representation of her prior to her plea agreement and that she had never implicated the defendant. The appellate court held that “the presence or absence of an actual conflict of interest should be resolved by the same principles, regardless of whether the codefendants are represented by the same attorney or by law partners.” *Id.* at 731-32. Actual conflict clear here where counsel represented defendant and codefendant/witness in the same proceeding. Adverse affect found where counsel stated in sentencing that the codefendant/witness had made numerous statements to him that did not implicate the defendant, but counsel made no attempt at trial to cross-examine the codefendant concerning these prior statements. The court declines to determine whether this would be sufficient for reversal though because the court found that the trial court’s gag order that in effect reduced defendant’s defense team clearly adversely affected representation. The trial court should have instead made a determination of whether the defendant was willing to waive the conflict. The court also declined to hold that the question could only be resolved in post-conviction proceedings because it was the trial court’s actions that created the adverse affect here.

1989: *Tarwater v. State*, 383 S.E.2d 883 (Ga. 1989). Counsel in murder case had actual conflict that adversely affected representation where counsel represented all three defendants in pleas where “plea bargain required that unless all three plead guilty, none could.” *Id.* at 884. Actual conflict found because counsel not bargain for defendant without jeopardizing the bargains for the codefendants. *Per se* adverse affect found “when counsel representing multiple defendants negotiates a plea bargain conditioned upon more than one pleading guilty.” *Id.* at 885.

1988: *Ingle v. State*, 742 S.W.2d 939 (Ark. 1988). Counsel in drug case had actual conflict that adversely affected representation where counsel represented both defendant and codefendant in plea negotiations. Initially, defendant and codefendant had the same charges and counsel attempted to negotiate an equal deal. After the defendant was charged with additional offenses, however, counsel argued in negotiating for the codefendant that defendant was more culpable even on the initial charges. The court observed that “[w]hen a substantial disparity of evidence or of charges exists, it is unusual if an actual conflict does not also exist.” *Id.* at 941. Here, an actual conflict was apparent because counsel was “was playing one client against the other.” *Id.* Counsel’s representation was adversely affected because he virtually abandoned defendant in order to get a better offer for codefendant.

1988: *Williams v. State*, 529 N.E.2d 1313 (Ind. App. 1988). Counsel in robbery case had actual conflict that adversely affected representation where counsel represented both defendant and codefendant. Prior to trial, counsel negotiated a plea to a lesser charge for codefendant. During the plea hearing codefendant provided factual statements implicating defendant. Defendant then proceeded to a bench trial before the same judge who took codefendant’s plea. In sentencing, counsel argued for leniency for codefendant his participation was minimal and defendant had greater culpability.

Commonwealth v. Green, 550 A.2d 1011 (Pa. Super. Ct.1988). Counsel had actual conflict that adversely affected representation in burglary case where defendant's counsel and codefendant, who pled guilty and testified against defendant, were members of the same public defender office. Defendant denied knowledge of burglary, but codefendant testified that defendant was involved. Defendant asserted a conflict of interest and the trial court properly granted defendant a new trial.

1984: ***People v. Simmons***, 352 N.W.2d 275 (Mich. App. 1984). Counsel had conflict that adversely affected representation in manslaughter case where counsel simultaneously represented defendant and codefendant in sentencing. Conflict developed when counsel in order to arguing for more lenient sentence for defendant would have had to emphasize codefendant's greater degree of culpability. Remanded for resentencing of defendant.

1982: ***State v. Ross***, 410 So.2d 1388 (La. 1982). Counsel had a conflict that adversely affected representation where counsel represented defendant and codefendant and negotiated a plea for codefendant to testify against defendant. During trial, the codefendant testified that it was defendant who had initiated the armed robbery, struck the victim, and robbed the cash register. Defense counsel did not extensively cross-examine codefendant, who was sentenced to five years for his participation in the robbery, while defendant was sentenced to hard labor for a period of thirty-five years without benefit of probation, parole, or suspension of sentence.

1980: ****Foster v. State***, 387 So. 2d 344 (Fla. 1980). Counsel had a conflict of interest due to counsel's simultaneous representation of a co-defendant who testified against the defendant during trial. Counsel elicited her testimony that she had charges pending and that he represented her and at the end of her testimony the state dismissed the charges against her.

C. Simultaneous Representation of Codefendants in Severed Trials

1. U.S. Supreme Court Cases

1980: ***Cuyler v. Sullivan***, 446 U.S. 335 (1980). Court held that in multiple representation cases where there is no objection at trial, the defendant must demonstrate that an actual conflict of interest adversely affected counsel's performance in order to get relief under the Sixth Amendment. Two retained counsel represented three co-defendants in murder case. The defendants were tried separately. Sullivan was tried first and convicted. The state's case was entirely circumstantial and the defense presented no evidence. None of the defendants objected to multiple representation. The Court held that nothing in the Sixth Amendment requires state courts to initiate inquiries into multiple representation "[a]bsent special circumstances." *Id.* at 346. "Unless the trial court knows or reasonably should know that a particular conflict exists, the court need not initiate an inquiry." *Id.* at 347. In this case, there was no objection to the multiple representation and the risk of conflict was reduced by the provision of separate trials. Likewise, the court of appeals found that the decision to rest with no defense evidence was on its face a reasonable tactical response to the weakness of the state's circumstantial evidence. *Id.* at 347. Thus, the trial court did not have an affirmative duty to inquire into the propriety of multiple

representation. *Id.* at 348. Likewise, the Court held, “In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer’s performance.” *Id.* at 348. Once the defendant shows that the conflict “actually affected the adequacy” of representation, there is no requirement that the defendant “demonstrate prejudice.” *Id.* at 349. The Court remanded this case to the court of appeals to apply these standards in Sullivan’s case.

**Burger v. Kemp*, 483 U.S. 776 (1987). Counsel in murder case did not have an actual conflict that adversely affected representation due to his partner’s representation of codefendant in severed trial. Petitioner was charged along with codefendant in murder. Both defendants confessed. They were tried separately. During defendant’s trial, his codefendant’s statement was not offered and the codefendant did not testify. Following defendant’s trial, while still representing defendant on appeal, counsel assisted his partner in representing the codefendant at his trial and on appeal. The court found no “active representation of competing interests” and that the joint efforts may have actually benefitted the defendant. *Id.* at 784. “Moreover, we generally presume that the lawyer is fully conscious of the overarching duty of complete loyalty to his or her client.” *Id.* While counsel did not assert defendant’s lesser culpability on appeal when he was also representing the codefendant, this was a proper strategic decision.

As we reaffirmed in *Smith v. Murray*, 477 U.S. 527, 536, 106 S.Ct. 2661, 2667, 91 L.Ed.2d 434 (1986), the “process of ‘winnowing out weaker claims on appeal and focusing on’ those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy. *Jones v. Barnes*, 463 U.S. 745, 751-752, 103 S.Ct. 3308, 3312-3313, 77 L.Ed.2d 987 (1983).

Id. In addition, in order to show an actual conflict, petitioner must show that counsel’s motive for not raising the issue was his partner’s representation of the codefendant or his involvement in that case. The court also found that even if counsel had an actual conflict, it did not affect counsel’s advocacy. Counsel attempted to plea bargain but was rebuffed by state. Counsel also was not prohibited from arguing petitioner’s lesser culpability because he was tried separately from the codefendant.

2. U.S. Court of Appeals Cases

2004: *McFarland v. Yukins*. 356 F.3d 688 (6th Cir. 2004). Drug conviction reversed due to the trial court’s failure to adequately inquire into counsel’s conflict, counsel’s actual conflict of interest that adversely affected his performance, and trial counsel’s ineffectiveness in failing to present an adequate defense. The petitioner and her daughter were charged as co-defendants where drugs were found during a search of the home they shared. Both the defendant and her daughter were represented by the same retained attorney. On the day of the scheduled bench trial, counsel informed the court that the defendant and co-defendant had concerns about sharing the same attorney and that the evidence might well raise antagonistic defenses. The petitioner also informed the court that she believed she needed a separate attorney and that she had attempted to hire a different attorney but could not afford one. Rather than appoint a second attorney, the court severed the cases and ordered that they be tried in front of different judges. The trials

proceeded at pretty much the same time. In the co-defendant's trial, the state presented evidence that the bedroom where most of the drugs were found belonged to the co-defendant. A caller to the crack hotline also made complaints about a woman with the co-defendant's name. A confidential informant also identified the co-defendant as the person discussing drugs. During the petitioner's trial, the state did not present any evidence that the co-defendant lived in the house or in the bedroom where most of the drugs were found and did not present any evidence that the crack hotline telephone complaints and the confidential informant had both identified the co-defendant. Defense counsel did not bring any of this information out in cross-examination or present any evidence on its own. In closing argument, the defense argued only that the drugs belonged to one of two men that were also initially suspected. One of the men was present at the time of the search, but did not have a key to the locked bedroom where most of the drugs were found. The other man was not present at the time of the search and was connected to the house only by some paperwork identifying him as the co-defendant's husband. Both the defendant and co-defendant were convicted. They were represented on appeal by a different attorney but still had the same attorney between them. Appellate counsel did not raise any issue concerning ineffective assistance of counsel or a conflict of interest. In state post-conviction, the petitioner asserted ineffectiveness of trial counsel and of appellate counsel for failing to argue that trial counsel was ineffective but the state court denied on procedural grounds that the petitioner did not show good cause for a failure to assert the issue on direct appeal as required in state court. The court first found that the petitioner was entitled to relief under *Holloway v. Arkansas* because the petitioner objected to the joint representation and the trial court did not adequately resolve the issue. Independent of the trial court's failure to inquire, reversal was also required because counsel had an actual conflict of interest that adversely affected representation. The petitioner's best defense would have been to contend that the drugs belonged to the co-defendant and there was strong evidence indicating that the co-defendant and not the petitioner actually controlled the drugs. During petitioner's trial, however, counsel not only failed to argue that the co-defendant was guilty, but he affirmatively argued that she was innocent and seemed to concede that the co-defendant's room was actually the petitioner's room and that the petitioner was the person identified by the confidential informant, which was not the case. While attempting to present a common defense, counsel took on a heavier burden than would have been necessary in defending the petitioner alone because, while it was plausible that one woman in the house was innocent of involvement with the drugs, it was far less plausible that both were. Nonetheless, counsel failed to even present any evidence that the co-defendant lived in the home. Instead of this obvious defense, counsel chose to point the finger at two other men because his duty of loyalty to the co-defendant would have been breached had he actively pursued a theory that she was guilty of the charges while he was currently representing her in a trial on those same charges. Here, where counsel chose to forego an obvious and strong defense to avoid inculpating another client, the court found that counsel labored under an actual conflict of interest establishing a Sixth Amendment violation under *Cuyler v. Sullivan*. The court also found that counsel was ineffective under the standard of *Strickland v. Washington* because counsel failed to present a strong argument in petitioner's case that the co-defendant actually possessed the drugs. The court found that, with respect to all three of these arguments, the petitioner would have won on direct appeal had appellate counsel adequately raised the issues. Appellate counsel was ineffective in failing to assert these issues, which were clearly stronger than the arguments made by counsel on direct appeal. The conflict issue was an obvious one,

and the petitioner was entitled to automatic reversal under the rule in *Holloway*. Because appellate counsel also represented the co-defendant, however, appellate counsel also had a conflict of interest. The court found that appellate counsel's ineffectiveness was the cause for petitioner's failure to assert ineffectiveness of trial counsel on appeal. Thus, the petitioner had established cause and prejudice for failing to assert these issues on appeal. Because the state court never ruled on the actual conflict of interest and the ineffective assistance claim under *Strickland*, the court reviewed these claims *de novo*. The only state court decision on the *Holloway* claim was the trial court's decision. Under the AEDPA, the court found that the trial court's actions contradicted the clearly established precedent of *Holloway v. Arkansas* because the state court confronted a set of facts that were materially indistinguishable from *Holloway* and yet arrived at a different result.

1994: *United States v. Levy*, 25 F.3d 146 (2nd Cir. 1994). Counsel had actual conflict of interests that adversely affected representation in drug conspiracy case. Counsel had previously represented the defendant. After arrest warrants were issued for the defendant and his nephew, counsel informed the government that he represented both defendants, although the defendant was out of the country. During plea negotiations on the nephew's behalf, counsel and the defendant made statements incriminating the defendant. After the nephew rejected plea negotiations, he was inadvertently released from custody and fled the country. The government believed counsel was involved in this flight. When the defendant was arrested and brought back to the country, counsel continued representation of both. While the government never formally moved to disqualify counsel, the prosecutors did repeatedly alert the trial court of (1) counsel's joint representation; (2) counsel's status as a defendant awaiting his own sentencing in the same district on an unrelated criminal charge; (3) counsel's status as the object of a grand jury investigation into the nephew's flight; and (4) counsel's status as a possible witness concerning statements made by the defendant during the plea negotiations on behalf of the nephew. The District Court inquired but accepted counsel's distortions of the truth and false statements. "[T]he very nature of [counsel's] predicaments strongly indicates that he labored under actual and not merely potential, conflicts of interest." He had "continuing legal and ethical obligations to protect" the nephew, whose interests diverged from the defendant, whose most likely defense was to blame the nephew who had been directly involved in controlled buys by a confidential informant when the defendant was not even in the country. Counsel also had a personal interest to avoid being called as a witness since he would likely have to cease representing the defendant. Likewise, counsel's own charges presented a conflict because counsel may have believed he should temper his defense for the defendant here in order to curry favor with the prosecution in his own case. Finally, counsel obviously had a strong personal interest in avoiding any exploration of the nephew's flight from the country as counsel could be incriminated. Counsel's representation was adversely affected as counsel did not pursue a plausible defense strategy of trying to pin greater blame on the nephew because counsel had obligations to him and also did not want to expose counsel to prosecution for his role in the flight. Because the trial court had not obtained a knowing waiver from the defendant, reversal was required.

1986: *Nealy v. Cabana*, 782 F.2d 1362 (5th Cir. 1986). Counsel had actual conflict that adversely affected representation in robbery case where counsel simultaneously represented a codefendant in severed trials. During trial, the state presented evidence that the codefendant made statements

to police that incriminated defendant. The codefendant denied making these statements but was not called to testify because of counsel's concern that codefendant would be harmed in his upcoming trial. While the state argued that the codefendant's testimony would have incriminated the defendant and no counsel would have called him to testify, the court held that whether the codefendant's testimony would or would not ultimately have incriminated defendant or not was not the issue. The issue was that counsel was unable to decide whether to call the codefendant to testify unfettered by the conflict.

1983: *Sullivan v. Cuyler*, 723 F.2d 1077 (3d Cir. 1983) (affirming 553 F. Supp. 1236 (E.D. Pa. 1982)). Counsel had conflict that adversely affected representation in murder case where counsel represented defendant and codefendant in severed trials. Defendant proved that the joint representation generated a conflict that adversely affected his representation, in that his attorneys decided not to call co-defendant to testify on a crucial matter because co-defendant was awaiting trial for the same murders.

3. Military Cases

1999: *United States v. Henry*, 50 M.J. 647 (N.M. Crim. App. 1999). Actual conflict of interest existed which adversely impacted accused as result of accused's representation on conspiracy charge by assistant defense counsel who had previously represented four other alleged co-conspirators. Some of the representations were in unrelated courts-martials. One, who testified in appellant's trial, was in an administrative discharge proceeding possibly related to this case. One was in a court-martial on these same charges. Counsel did not disclose the conflicts to the client and left discussions and advice to a junior counsel with little experience, but the junior counsel was not even aware of all of the conflicts. Although the accused decided to plead guilty, he was adversely affected by the conflict because he was not fully informed of the conflict and the potential impact of that conflict on his detailed assistant defense counsel. The accused did not make a knowing waiver. He did not even know of the conflicts until after he plead guilty and then he was not allowed the opportunity to talk to independent counsel and the judge informed him of the apparent conflict, but did not inform him of the exact nature or possible impact of the conflicts. Finally, the court held that the "burden to show the non-existence of an adverse impact lies with the Government." *Id.* at 653. Here, "[a]lthough appellant need not show any adverse impact, a review of the record shows that it existed, *id.* at 654, because conflicted counsel limited his own representation by limiting contact with the accused and leaving that to less experienced counsel. Counsel also recognized that if the case were contested, he would be limited in his participation because conflict issues would arise. Thus, "[h]e had at least an arguable interest in getting appellant to plead guilty to avoid the conflict of interest appearing on the record." *Id.* at 654.

4. State Cases

2007: *Staggs v. State*, 643 S.E.2d 690 (S.C. 2007). Counsel in murder case had an actual conflict that adversely affected his performance at trial where counsel also simultaneously represented the defendant's father, mother, and brother who were charged as accessories after the fact. The defendant did not testify at trial based on trial counsel's advice to him that he wanted to preserve

the right to the final closing argument. Counsel had told the defendant's father and sister-in-law, however, that he would not allow the defendant to testify and they should encourage him not to because his testimony could harm his family members' cases.

1988: *State v. Livingston*, 366 S.E.2d 654 (W. Va. 1988). Trial court erred in failing to appoint separate counsel for defendant and her husband in breaking and entering case where their interests clearly conflicted since the only evidence of husband's guilt was the defendant's statement. The same counsel was appointed to represent them and their cases were severed. Defendant was convicted and the charges were then dismissed against the husband.

1987: *Dowell v. Commonwealth*, 351 S.E.2d 915 (Va. App. 1987). Trial court failed to adequately inquire in grand larceny case where counsel represented defendant and two co-defendants called as witnesses to testify against her. Counsel objected to the state calling the two witnesses whom he also represented in connection with this same offense. Conviction vacated and proceeding remanded for the trial court to decide whether the defendant validly waived her right to independent counsel. If not, then a new trial would be required.

D. Simultaneous Representation of Codefendants in Post-Trial Proceedings

1. U.S. Court of Appeals Cases

2001: *Reynolds v. Chapman*, 253 F.3d 1337 (11th Cir. 2001). Counsel in rape and kidnapping case had an actual conflict that adversely affected post-trial representation. Defendant and two codefendants were all represented by the same public defender's office. Another codefendant retained private counsel. The codefendants represented by the public defender office negotiated pleas, but the defendant rejected any possible plea agreement and went to trial along with the codefendant that was represented by private counsel. The codefendants that pled out did not testify. During the trial, counsel argued that the codefendant also on trial was more culpable. Both defendants were convicted. Following the trial and sentencing, private counsel for the codefendant withdrew and counsel was also appointed to represent him in his motion for new trial. Counsel ultimately filed the same motion for new trial on behalf of both the defendant and his codefendant. The defendant was not aware of any of the potential conflicts at the time. The court held that the public defender office's concurrent representation (in rape and kidnapping trial) of defendant and two codefendants was only a potential conflict that did not have adverse affect on counsel. With respect to the post-trial representation, however, the court observed that counsel "was in the untenable position of advancing arguments urging that two defendants be granted a new trial after each of those defendants had spent the entire trial attempting to foist blame on the other." *Id.* at 1345. Counsel made arguments about the lack of evidence against the defendant but did not argue the relative strength of the evidence, which pointed primarily to the codefendant. Counsel also did not argue that the defendant was unduly prejudiced by the codefendant's false testimony supported by his mother, who was held in contempt for giving false testimony. Reversal required under *Cuyler v. Sullivan* to allow new post-trial proceedings.

2. State Cases

1984: **Dougan v. Wainwright*, 448 So. 2d 1005 (Fla. 1984) (direct appeal in 1981). Appellate counsel failed to provide effective assistance due both to a conflict of interest and to the failure to raise meritorious legal claims. Trial counsel represented the defendant and two co-defendants on appeal and filed a combined appeal for the defendant and one co-defendant, whose case was previously reversed due to ineffective assistance of counsel. *Barclay v. Wainwright*, 444 So.2d 956 (Fla.1984). Counsel was ineffective and had a conflict of interest in this case for the same reasons.

**Barclay v. Wainwright*, 444 So. 2d 956 (Fla. 1984). Appellate counsel failed to provide effective assistance due both to a conflict of interest and to the failure to raise meritorious legal claims. Counsel represented the defendant (for whom the jury recommended life) and a codefendant (for whom the jury recommended death) but “made absolutely no attempt to draw our attention to this difference or to emphasize the rationality of the jury's differentiation.” In addition, counsel had represented the codefendant at trial, was paid to do the appeal for both clients by the codefendant's father, and he approached the defendant about representing him rather than the other way around. In addition, during the representation, counsel divorced his wife and married the co-defendant's sister. Aside from the conflicts, counsel only argued seven of 27 issues asserted in the brief. “[O]ther than the several points arguing the constitutionality of the death penalty, the points which contain discussion deal only with [the co-defendant]. Other than on the title page, [the defendant's] name does not appear in this brief.” Likewise, the brief did not argue against aggravating circumstances or assert mitigating circumstances and “the most recent case cited in the original brief is *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).”

E. Simultaneous Representation of Government Witness in Related Case

1. U.S. Court of Appeals Cases

2000: **Perillo v. Johnson*, 205 F.3d 775 (5th Cir. 2000). Counsel in capital trial had actual conflict of interest that adversely affected defendant's representation due to prior and concurrent representation of the state's star witness. Defendant initially indicted for murder along with two codefendants. She was tried, sentenced to death, and then had the case reversed. The first codefendant ultimately had the murder charges dropped and proceeded to trial on two aggravated robbery charges represented by counsel, who argued that all of the blame should be placed on the defendant and the other codefendant. The codefendant was convicted but sentenced to only five years probation. Following the trial, counsel remained close to the codefendant and even flew from Texas to California to serve in her wedding by giving the bride away. When the second codefendant was tried, counsel was instrumental in putting the first codefendant in touch with the victim's family and obtaining her immunized testimony against the second defendant. The immunity negotiated for the codefendant would not, however, have protected her from perjury charges if her testimony was later proven false. The testimony against the second codefendant ensured death for him but also was more damaging for the defendant than any prior statement and painted her as the most culpable. Counsel represented the first codefendant during

the second codefendant's trial and she stayed in counsel's one-bedroom apartment for 7-10 days during that proceeding. Ultimately, the defendant's retrial was scheduled and counsel was appointed to represent her. The defendant was not made aware of any of the above information other than the fact that counsel represented the codefendant in her trial and secured a favorable sentence for her. When the trial court issued a subpoena for the first codefendant (living in California) to testify, she indicated a desire to quash the subpoena. Counsel flew to California to represent her in that proceeding. Counsel also represented the first codefendant during the time that she was offered immunity for her testimony against the defendant. During the trial, the first codefendant/witness again stayed in counsel's home. Counsel had his associate meet with the witness. The associate informed counsel that he had a conflict of interest due to the dual representation. Outside the associate's presence, counsel also went over with the witness her prior testimony and what he intended to ask her in cross-examination. On the day, the witness appeared for trial, there is some question as to whether counsel stated that he had advised her to lie in the second codefendant's trial and that she needed to continue that lie. During the witness' testimony, the state attempted to establish that she had an on-going relationship with counsel and counsel's associate intervened to say that he represented her and advised her to assert the attorney-client privilege. Once it became apparent that the witness would not follow his advice, the associate left. The witnesses' testimony again revealed only the prior trial representation without more and the trial court did not inquire further. The witness repeated her damaging testimony from the second codefendant's trial but also expanded upon it to add new details without objection from counsel. During cross, counsel actually bolstered the witness' credibility and did not impeach her credibility or expose her ulterior motives although both avenues were ripe. Counsel also brought out in cross alleged prior bad acts not developed by the state in direct examination. He even brought out false testimony, such as testimony that the witness did not receive any benefit for her testimony against the second codefendant and that counsel was not present then. During much of this cross, the defendant told counsel that the witness was lying and asked him to conduct a more vigorous cross-examination. Counsel only called one witness in defense and that was to say that the defendant had made a statement, that went unsigned, claiming sole responsibility for the murder. The state had not offered this statement in evidence. Counsel's argument during the trial was aggravating. In sentencing, counsel did present mitigation and argued for mercy, but stated that the case was never about guilt-or-innocence. The court also noted that counsel was ultimately disbarred for lying to a client. The court found an actual conflict that adversely affected representation. Counsel had a continuing duty of loyalty based upon his former and concurrent representation of the witness. If he had impeached her, she could have been prosecuted for perjury. By not impeaching her, he gave up plausible defense strategies that could have had significant impact with respect to the defendant's guilt and punishment. Moreover, counsel elicited damaging testimony from the witness/client that the state had not even elicited.

1990: *McConico v. Alabama*, 919 F.2d 1543 (11th Cir. 1990). Counsel had conflict that adversely affected representation in murder case where defendant claimed self-defense and counsel simultaneously represented a witness who was the victim's life insurance beneficiary. Defendant was tried and convicted of the shooting death of his brother-in-law. His wife was a beneficiary of victim's life insurance policy, which included a clause excluding payment if the defendant's self-defense claim were established. Defendant and wife, who was also a witness, were represented

by the same counsel. Counsel had conflict because he had to cross-examine his own client and the “success of one client depend[ed] on discrediting another.” *Id.* at 1547. The representation was adversely affected because counsel did not call important witnesses, did not adequately cross-examine or impeach the wife with prior inconsistent statements, and did not attempt to exclude her testimony on the basis of privileged marital communications. A petitioner need not show that the trial outcome would be different, but merely that the conflict had some adverse effect on counsel’s performance.

2. State Cases

2011: *Kiker v. State*, 55 So.3d 1060 (Miss. 2011). Counsel in murder case had actual conflict of interest due to counsel’s concurrent representation of a State’s witness and the trial court failed to adequately advise the defendant. The only direct evidence of guilt came from a jailhouse snitch. The defendant had two lawyers. During cross by non-conflicted counsel, the snitch was asked whether he was under criminal indictment. He responded first by saying “ask my lawyer” and pointing to co-counsel as his lawyer. Counsel’s representation continued through direct appeal. Two weeks after the direct appeal was concluded, the snitch still represented by the defendant’s counsel entered a guilty plea. While trial counsel had informed the prosecutor and the trial judge during trial that he represented the snitch, this was not disclosed to the defendant except through the snitch’s testimony. Counsel clearly had an active conflict, which was not resolved by having his co-counsel cross-examine his snitch client. The conflict was imputed to the other counsel “by virtue of their association in the joint undertaking” of representing the defendant. The court also had an affirmative duty, upon being informed of the conflict to advise the defendant, but failed to do so. Prejudice presumed due to the absence of a knowing and intelligent waiver by the defendant.

2008: *People v. Miera*, 183 P.3d 672 (Colo. App. 2008). Counsel had actual conflict of interest that adversely affected representation in sexual assault on child case. The defendant was the legal guardian of the alleged victim. Social services suspected child abuse by the defendant and for almost 18 months periodically interviewed the alleged victim, who denied that the defendant was abusing her. Finally, after a friend and neighbor of the defendant was accused by six eyewitnesses of assaulting the alleged victim, she told investigators that he and the defendant had been sexually molesting her. The neighbor was arrested first and counsel was appointed. The neighbor entered a guilty plea and was scheduled for sentencing. The defendant was then arrested and the same counsel appointed. The neighbor soon after withdrew his guilty plea. Counsel continued to represent both for an additional five months or so and then withdrew from the neighbor’s case. Several months later, the neighbor entered a deal to provide a videotaped statement against the defendant in exchange for dismissing the charges against him. Four to six months later, the state noticed the neighbor as a witness against the defendant, but then advised counsel shortly before trial that he would not be called. Counsel did not prepare to cross-examine him, but he was called after counsel elicited his name during the testimony of a social services caseworker. He testified and his testimony resulted in conviction on two of the six sexual assault convictions. These two were reversed on direct appeal. While recognizing that the presumption of prejudice of *Cuyler v. Sullivan* was not clear under U.S. Supreme Court precedent for successive representation, the court applied the presumption as a matter of state

law and a finding that the representation was not just successive but was concurrent through much of the litigation, which lower federal courts had also applied the presumption to post-*Mickens*. Counsel had an actual conflict of interest in failing to cross-examine the neighbor on relevant points and in failing to seek a deal for the defendant in exchange for his testimony against the neighbor. Counsel also failed to cross-examine the alleged victim about the neighbor and the ensuing allegation against the defendant. Counsel's failures were "inextricably linked to his duty of confidentiality owed to" the neighbor. Prejudice presumed.

People v. Hernandez, 896 N.E.2d 297 (Ill. 2008). Counsel's dual representation of the defendant and the alleged victim in solicitation of murder case was a *per se* conflict of interest. In a prior drug conviction, drugs were seized from the defendant. Following his release confinement, he was kidnaped and beaten by the alleged victim and his family was threatened if he did not pay for the seized drugs. While the alleged victim was outside the defendant's home making these threats to the defendant's wife, police were called and the alleged victim was charged with unlawful use of a weapon. Counsel was retained and represented him for over a year, but the alleged victim fled the country while charges were still pending. Around the same time, the alleged victim fled, the defendant was charged with solicitation of murder for soliciting undercover agents to kill the alleged victim in exchange for a reduced price on their purchase of drugs from the defendant. Two years later, defendant retained the same counsel. Although counsel had no contact with the alleged victim during those two years, he continued to be counsel of record for him even after his name appeared on the State's list as a potential witness in the defendant's case. Counsel and the prosecutor were aware of (and discussed) the dual representation but did not advise the defendant or the court. "When a defendant's attorney has a tie to a person or entity that would benefit from an unfavorable verdict for the defendant, a *per se* conflict arises" and, absent a waiver by the defendant, is grounds for automatic reversal. The court rejected the state's argument that the *per se* rule was contrary to *Mickens*. "[A] defendant's right to effective assistance of counsel is given effect, the *per se* conflict rule applies whenever an attorney represents a defendant and the alleged victim of the defendant's crime, regardless of whether the attorney's relationship with the alleged victim is active or not, and without inquiring into the specific facts concerning the nature and extent of counsel's representation of the victim."

2007: *Gibbs v. State*, 652 S.E.2d 591 (Ga. App. 2007). Counsel had an actual conflict that adversely affected representation in child sexual abuse case. The defendant was charged with molesting a neighbor child. Counsel, who was retained, had three months earlier been appointed to serve as the child's guardian ad litem in a Department of Family and Children Services action to remove the child from the home of her aunt and uncle. Counsel continued to serve as her guardian through the final hearing in that action so there was a period of eight months where counsel served as her guardian while also representing the defendant. Counsel had a conflict because "he could either zealously defend [the defendant] or protect the interests and confidential information of [the child]. He could not, however, do both." *Id.* at 700. There was an adverse affect because counsel could not and did not seek access to the sealed juvenile court records in which counsel had served as the guardian and use the information to impeach the alleged victim. Those records revealed a motive for the child to falsely accuse the defendant and that the idea that the defendant had previously been convicted of molesting children (when there were prior allegations but no charges or convictions) had been planted in her mind by her aunt and uncle.

Rael v. Blair, 153 P.3d 657 (N.M. 2007). Counsel in trafficking in controlled substance case had an actual conflict of interest that adversely affected the representation due to his contemporaneous representation of a state witness on a matter related to the defendant's trial. The defendant's charges were based on sales to an undercover agent, who had been introduced to the defendant by a confidential informant. Counsel had represented the confidential informant on previous charges, which included dismissal of drug charges in exchange for his agreement to become a confidential informant. The identity of the confidential informant and notice he would be a witness was disclosed a month prior to trial. Counsel also apparently continued representing the informant on a pending probation violation charge that was later dismissed apparently in exchange for his testimony against the defendant. Counsel's conduct was adversely affected because counsel elicited information from the informant about his prior use of drugs, but did not cross-examine him concerning his plea agreement or attack his character or credibility. The court also expressed disapproval for the state's late disclosure of the identity of the informant and, therefore, the conflict and failure to move for disqualification because "of the prosecution's using defense counsel's conflict of interest as a means of affecting the evidence going before the jury instead of moving for his disqualification prior to trial."

2005: Harmon v. State, 122 P.3d 861 (Okla. Crim. App. 2005). Counsel had an actual conflict that adversely affected representation in burglary and weapon case due to counsel's simultaneous representation of a state's witness on the same charges. The defendant and his son were charged with several burglaries and some of the property went to the defendant's daughter, who also helped plan the burglaries. The daughter, represented by counsel, pled guilty in exchange for probation and testified against the defendant, who was represented by the same counsel. The court "presume[d] prejudice from the adverse effect of inability to fully cross-examine for bias," *id.* at 863, because while counsel thoroughly cross-examined the daughter on other matters, including prior convictions, he did not cross-examine her on any "bias matters relating to her plea or the facts in this case," *id.*

2003: *State v. Cisco, 861 So. 2d 118 (La. 2003). Counsel in capital murder trial had an actual conflict of interest for which the defendant did not make a knowing and intelligent waiver due to counsel's representation of the lead investigator, who was also a key witness for the state. The record reflected only that counsel represented the lead investigator and his wife in separate family law matters without any additional detail. The crime for which the defendant was arrested remained unsolved for a year before the defendant became a suspect. In initial questioning, he denied involvement, but then confessed to involvement in more than nineteen contradictory statements, with the majority being given to the lead detective. There was no physical evidence linking the defendant to the crime scene. Outside of the defendant's confessions, the only other inculpatory evidence was the identification of the defendant in a physical lineup by an eyewitness. This witness had never been able to give a detailed description of the assailant and allegedly remembered for the first time during the physical lineup that one of the assailants had a tattoo on his hand as the defendant did. During the trial, the defense theory was that the defendant gave false confessions as a result of his turbulent upbringing and long-term substance abuse beginning when he was six years old. The defense also challenged the reliability of the identification. On the day that counsel was appointed, she requested that the physical lineup be postponed, but the

detective had already obtained the defendant's permission to proceed without her presence. It was during that lineup that the eye-witness identified the defendant. When counsel first met with the defendant, he apparently recognized the potential for conflicting interests and sent the defendant a letter in which she informed the defendant of her representation of the detective. She, nevertheless, left it up to the defendant to decide whether she had a conflict and whether he wanted to continue with her representing him. Several weeks later at the defendant's arraignment, counsel informed the court of the dual representation and presented a written document that the defendant had signed, allegedly waiving the conflict. The trial judge made only a cursory inquiry and, like the defense counsel, effectively left it to the defendant to decide for himself whether an actual conflict of interest existed. The defendant was arraigned before a different judge, who was also aware of the potential conflict, but, nonetheless, without conducting a hearing, found that counsel could continue representation. In another court hearing held more than a year prior to trial, counsel informed the court that the defendant had made several written allegations of collusion between counsel and the lead detective. Without inquiring into any detail, the court elicited a statement that the defendant wanted counsel to continue representing him. Ultimately, eleven months later, the case went to trial, and the defendant was convicted and sentenced to death. The court held that a defense attorney required to cross-examine a current or former client on behalf of a current defendant suffers from an actual conflict. Here, there was such an actual conflict, but neither trial judge adequately informed the defendant that counsel's representation could be negatively affected in an attempt to obtain a knowing and intelligent waiver from the defendant. Likewise, neither counsel nor the trial court, ever explained to the defendant that he had a right to obtain other counsel. Under these circumstances, the court found that the defendant had not made a knowing and intelligent waiver of his right to the assistance of conflict-free counsel.

1988: **People v. Easley*, 759 P.2d 490 (Cal. 1988). Counsel in retrial had a conflict of interest in sentencing because he simultaneously represented a state's witness, who provided damaging evidence in aggravation alleging that the defendant had committed "the violent crime of burning down the Chicken Ranch brothel" for another. Counsel was representing the witness, the owner of the Chicken Ranch, in a federal civil suit related to the arson in which it was alleged that the defendant had committed the arson. Thus, counsel "had two irreconcilable obligations: on behalf of defendant, to negate any evidence suggesting that defendant had committed the Chicken Ranch arson; and on behalf of [the] prosecution witness . . . , to prove in the civil suit that defendant had committed the Chicken Ranch arson." Indeed, counsel obtained the defendant's confession to involvement in the arson in exchange for the witness' payment for counsel's services to represent the defendant during his initial direct appeal. Counsel's conduct was adversely affected because counsel failed to expose the witness' obvious financial interest in establishing the defendant's involvement in the arson and failing to present any evidence to negate or mitigate that involvement. Although the defendant repeatedly stated his desire for counsel to represent him, there was no valid waiver because there was no indication that counsel had discussed the conflict with the defendant or that "defendant was offered the opportunity to discuss that matter with independent counsel. Although it appears the trial court informed defendant of his right to conflict-free counsel, defendant was never asked for a waiver." In addition, the defendant was never "advised of the full range of dangers and possible consequences of the conflicted representation in his case."

1987: *People v. Stewart*, 511 N.Y.S.2d 715 (N.Y. App. Div. 1987). Counsel had actual conflict that adversely affected representation in murder case where counsel simultaneously represented the defendant's father, who was the state's primary witness, and the father turned defendant in because he wanted defendant to get treatment for mental illness.

1985: *Gordon v. State*, 684 S.W.2d 888 (Mo. App. 1985). Counsel had conflict that required automatic reversal where counsel previously represented the state's primary witness on unrelated charges and simultaneously represented government witness in related parole revocation proceedings.

F. Simultaneous Representation of Persons Implicated (But Not Jointly Charged)

1. U.S. Court of Appeals Cases

2001: *Lockhart v. Terhune*, 250 F.3d 1223 (9th Cir. 2001). Counsel in murder and attempted murder trial had an actual conflict of interest that adversely affected counsel's representation where prosecutors presented evidence that petitioner had committed a second, earlier murder and his appointed counsel was also representing another man implicated (but not charged) in that earlier homicide. According to the district court, after being appointed to represent both Lockhart and Galbert, Defense counsel learned during the simultaneous representation of the conflict and had both clients to sign waivers. The waiver signed by petitioner did not, however, disclose the nature of the conflict. Counsel also informed the court his other client's alleged possession of the gun used in the prior shooting was the only basis of the conflict, when the other client had also been identified by two people as one of the shooters in the prior murder. Likewise, there was no evidence that counsel ever told petitioner that he had decided not to pursue the allegations against the other man as part of petitioner's defense. Actual conflict clear because could not fairly represent the conflicting interests where (1) allegations that the other client actually shot the prior victim suggested that he was more culpable than the petitioner, but (2) it was in the other client's interest to have petitioner convicted of the offenses with which he was charged because of the connection between those crimes and the uncharged murder. Also clear that the conflict adversely affected petitioner's defense. The state court required petitioner to show that the conflict of interest "prejudicially affected" his representation. This was contrary to clearly established federal law holding that prejudice must be presumed if adverse affect shown, whether it rises to the level of actual prejudice or not. The state court also held that petitioner could not show prejudice because proof of the other client's guilt would not exculpate petitioner. Under clearly established federal law, a conflict gives rise to an adverse effect when it "prevent[s] an attorney ... from arguing ... the relative involvement and culpability of his clients in order to minimize the culpability of one by emphasizing that of another." *Wheat v. United States*, 486 U.S. 153, 160 (1988) (quoting *Holloway*, 435 U.S. at 490. Here, counsel was unable to emphasize other client's involvement in uncharged murder to minimize petitioner's involvement and a number of counsel's actions and inactions can "likely" be attributed to the conflict and counsel's desire to protect his other client. This is sufficient to satisfy the "adverse effect" prong of the conflict of interest test. The state court also denied relief based on a finding

of a valid knowing and intelligent waiver. The state court's conclusion was an unreasonable application of Supreme Court precedent, however, because a valid waiver requires that the petitioner be sufficiently informed of what he is waiving and the ramifications. Here, petitioner did not know that counsel's other client had actually been accused of the prior murder by two people. He, therefore, could not have known the risk that counsel's inability to target the other man as an alternative suspect actually posed to his defense.

2. State Cases

- 2011:** *People v. DiPippo*, 918 N.Y.S.2d 136 (N.Y. App. Div. 2011). Counsel in rape and murder case had an actual conflict of interest that adversely affected his representation. The initial police investigation identified counsel's former client, who had a lengthy arrest record and prior rape charge that counsel had represented him on. According to witness statements, victim was last seen in a car driven by the former client. Counsel failed to pursue the plausible defense that the former client was the actual perpetrator even though counsel had been provided these statements in discovery several months prior to trial. Counsel also failed to disclose his prior representation of this initial suspect to the court or to the defendant.
- 2010:** *Shepherd v. State*, 924 N.E.2d 1274 (Ind. App. 2010). Counsel in drug case had an actual conflict of interest that adversely affected representation. Counsel simultaneously represented the defendant's girlfriend, who was a state witness and the daughter of the state's primary witness. Due to the conflict, counsel failed to cross-examine the girlfriend as to her pending charges and the amount of time she faced, even though her testimony was directly related to ownership of the cigarette package containing cocaine that was in the car that both she and the defendant had driven on the day in question. The possession conviction was vacated, but other convictions and sentences affirmed.
- 2008:** *State v. Alexander*, 958 A.2d 66 (N.J. Super. Ct. App. Div. 2008). Trial counsel had a *per se* conflict of interest in weapon and drug offense case following guilty plea because counsel simultaneously represented the defendant in sentencing and also represented another, who allegedly participated in the crimes with the defendant. Prejudice presumed and new sentencing ordered.
- 2005:** *Jones v. State*, 937 So. 2d 96 (Ala. Crim. App. 2005). Counsel in drug case had an actual conflict of interest due to simultaneous representation of a potential defense witness. The defendant's sole defense at trial was that the drugs found in her apartment belonged to her boyfriend. Counsel told the jury of this during the opening statement and intended to call the boyfriend to testify that the drugs were his. He was not called as a witness though because the State asserted that he would be charged if he gave this testimony. The defendant's counsel represented the boyfriend on federal drug charges and he had initially retained counsel for the defendant, but then counsel was paid by the defendant's parents. Although trial counsel informed the trial court of the conflict and requested to withdraw, the court denied the motion and did not squarely address the issue. Nonetheless, the record revealed that the sole reason that counsel did not call the boyfriend to testify was his fear of exposing the boyfriend to state prosecution and harsher sentencing, which was still pending, in federal court.

2000: *People v. Woidtke*, 729 N.E.2d 506 (Ill. App. 2000). Court found per se conflict of interest that required reversal of murder conviction. During his representation of defendant, counsel was also representing another client on misdemeanor charges related to impersonation of investigator into murder with which defendant was charged. Counsel was aware that his other client was a suspect in the murder and even subpoenaed him as a witness but did not call him to testify. Counsel never made defendant, his other client, or the court aware of his conflict. Reversal required even though counsel's representation of the other suspect ended seven months prior to trial. Where, as here, defense counsel has a tie to a person or entity that would benefit from an unfavorable verdict for the defendant, a per se conflict arises requiring reversal because the knowledge that a favorable result for defendant would inevitably conflict with the interests of counsel's other clients or employer might subliminally affect counsel's performance in ways difficult to detect and show.

1995: *Smith v. State*, 666 So. 2d 810 (Miss. 1995). Counsel in drug distribution case had actual conflict of interest that adversely affected representation where he simultaneously represented witness (implicated but not charged in this case) in plea negotiations on other charges. Witness testified that he had distributed drugs to a confidential informant at the same time and in the same location as defendant's sale. The witness was not charged though. The witness did have prior drug charges though in which counsel had represented the witness in plea negotiations. The witness was still pending sentencing at the time of defendant's trial. Counsel attempted to cross-examine the witness. When he asked about the witness' plea, the witness pointed out that counsel represented him, and counsel asked nothing else. The court found, "The sudden curtailing of what had been up to that point a vigorous cross-examination of [the witness] by the public defender is compellingly indicative of an actual conflict of interest which adversely affected the public defender's performance as counsel for [defendant]." *Id.* at 813.

1990: **People v. Singer*, 275 Cal. Rptr. 911 (Cal. App. 1990). Counsel in murder case had a conflict that adversely affected representation where counsel was having an affair with defendant's wife and also representing her because she was potentially implicated in crimes. Defendant was arrested for the murder of his wife's ex-husband. A first trial ended in hung jury. Defendant was convicted in the second trial. During both trials counsel had a sexual relationship with defendant's wife, which was disclosed after trial to defendant by counsel's former employee. The court noted that an actual conflict must be shown under *Cuylar*, but California law requires a showing of a potential conflict if the record "supports 'an informed speculation' that appellant's right to effective representation was prejudicially affected." *Id.* at 921. Here, counsel's affair with defendant's wife "introduced deception and duplicity into the advocate-client relationship, which by definition must be grounded in trust and fidelity." *Id.* at 920. Counsel may have had an interest in defendant being convicted so the affair could continue or remain undiscovered. Counsel may also have had an interest in protecting his lover from being implicated in the crimes, especially where counsel also represented her.

State v. Santillanes, 790 P.2d 1062 (N.M. App. 1990). Counsel had actual conflict of interest that adversely affected representation in assault case where counsel simultaneously represented defendant and his brother who was implicated but not charged with crime. Defendant and his

brother, who bore a strong resemblance to defendant, were arrested following a fight. Defendant was charged with one shooting and the brother was charged with two stabbings. They retained counsel. The brother entered a plea to the two stabbings and swore under oath, that he was not the shooter. Following the plea, but before defendant's trial, the brother informed counsel that he was the shooter also. During trial, one eyewitness testified that the brother was the shooter. Counsel did not call the brother to testify. Counsel had an actual conflict that adversely affected representation. Counsel told one witness before trial not to mention the brother's confession to the shootings. Counsel also did not call the brother to testify and advised defendant not to testify in order to protect the brother from perjury charges.

1984: *Commonwealth v. Hurley*, 461 N.E.2d 754 (Mass. 1984). Counsel had conflict that required presumption of prejudice in murder case where counsel simultaneously represented a prosecution witness who was also a potential suspect as an accessory to the crime in an unrelated case. The witness was also counsel's friend.

G. Simultaneous Representation of Government or Defense Witness or Confidential Informant in Unrelated Case

2000: *Ramirez v. State*, 13 S.W.3d 482 (Tex. App. 2000). Defendant was denied effective assistance of counsel in prosecution for unlawful possession of a firearm by a felon because defense counsel labored under an actual conflict of interest that adversely affected her performance. During trial, the state called as a witness a client of defense counsel in another pending criminal case. Counsel moved for a mistrial because she had no notice of the witness and because she had confidential information from him and could not adequately represent the witness or the defendant in cross-examining her own client. The court denied the motion for mistrial and pressed on. The witness/client testified that the defendant made incriminating statements to him in confinement. During cross, counsel attempted to establish that she had confidential information that she could not use in cross because the witness/client was not waiving his privilege. The court would not allow this testimony. Counsel again moved for a mistrial due to the prejudice to defendant. The court of appeals held, "Great deference should be accorded the representations of an attorney who feels a division of loyalty." *Id.* at 486. "It is well-established that a defendant is denied the effective assistance of counsel in those instances where an attorney is unable to cross-examine, or is chilled in the cross-examination of, a government witness because of the attorney/client privilege arising from counsel's prior representation of the witness or from his duty to advance the interests of the witness as a current client." *Id.* at 487. Counsel in this case had an actual conflict of interest that had an adverse effect on appellant's trial. In addition, the trial court failed to conduct an inquiry into the apparent conflict.

1998: *People v. Coleman*, 703 N.E.2d 137 (Ill. App. 1998). Trial court erred in denying state's motion to disqualify counsel in first-degree murder case where counsel represented three state witnesses, each of whom faced future uncertain punishment for previously adjudicated guilt on unrelated cases and hoped to gain the State's favor in return for their testimony. Counsel did not attempt to impeach one witness. For several other witnesses it appeared that counsel had actually brokered the deal to testify against the defendant. Under state law, where defense counsel has represented a State's witness, a *per se* conflict of interest exists if the professional relationship between the

attorney and the witness is contemporaneous with counsel's representation of the defendant. Even though counsel withdrew right before the testimony of one of the witnesses, the representation was still contemporaneous because counsel still owed a duty to that client and had represented him in all pretrial proceedings, including the interview of him for this case. There was also no knowing waiver here. When the state raised the issue repeatedly, the defendant was merely informed that counsel represented witnesses for the prosecution and then he was asked if he had any problem with it. His response indicated that he had no problem provided the contemporaneous representation caused him no harm. This was not a valid waiver, however, because the judge did not determine whether the defendant fully understood the significance of counsel's conflicting loyalties and understood how the loyalties to the prosecution witnesses could hamper counsel's effectiveness.

1997: *Commonwealth v. Martinez*, 681 N.E.2d 818 (Mass. 1997). Trial court conducted an inadequate inquiry into conflict in murder case. Defendant was charged with drug-related murder. Only one witness (independent of codefendant) placed defendant near the scene of the crime and had first hand-knowledge of defendant's drug dealing. This witness had been interviewed several times and did not implicate the defendant. At defendant's insistence, the witness was listed as a defense witness, which prompted the state to interview the witness again. The witness implicated the defendant and testified for the state at trial. Just prior to the witness' testimony, defense counsel disclosed that he had previously represented the witness and represented him on pending charges when he first made statements in this case. He informed the defendant of this information and then interviewed the witness. He was not aware that the witness would be called as a state's witness at the time of his discussions with the witness though. Counsel stated that his representation of the witness was concluded, except for a "technical" matter to conclude a disorderly conduct case that had been part of a negotiated package deal to resolve 24 charges. The court found no simultaneous representation and no conflict. Nonetheless, the court asked the defendant if he had heard what counsel said and if he still wanted counsel to represent him. The appellate court found that the representation was simultaneous because counsel still represented the witness on one charge for which he had not be sentenced at the time of the defendant's trial. While the witness' pending charge was minor and might not rise to the level of a conflict in another case, in this case it was sufficient to raise genuine concerns about counsel's divided loyalty. Counsel was also facing pending ethics charges at the time of defendant's trial and likely felt constrained in cross-examining the witness. Counsel had also violated his confidential relationship with the defendant by informing the witness that counsel did not believe defendant's alibi. "Taking into account [counsel's] relationship with [the witness], [counsel's] ethical problems, and the undenied allegations of broken client confidence, . . . the defendant's claim of a conflict of interest 'is supported by adequate evidence of its existence.'" *Id.* at 825-26. The trial court's inquiry was inadequate to establish defendant's intelligent waiver of conflict where judge did not inform defendant that he had constitutional right to attorney who was free of divided loyalties, did not give defendant opportunity to raise or discuss any concerns that he might have, and did not make sure that defendant understood that other counsel could be retained in his behalf. In addition, the colloquy included no discussion of counsel's alleged disclosure to his other client, no discussion of counsel's disbelief of defendant. Trial court also failed to advise defendant in such a way that he could understand or appreciate the possible implications of counsel's relationship with witness. The court was most troubled by counsel's

statements of disbelief to the witness and held, “In this special context, the colloquy to procure the defendant's waiver was insufficient.” *Id.* at 827.

1995: *State v. Jenkins*, 898 P.2d 1121 (Kan. 1995). Trial court erred in failing to conduct inquiry when the court was informed that counsel represented a government witness/informant on charges incurred while working as a confidential informant. Defendant was charged with sale of cocaine to a police informant. At preliminary hearing, appointed counsel raised concerns about a possible conflict because she had represented the informant on unrelated burglary charges while he was working as an informant. Counsel questioned the informant and the defendant and both agreed to have her continue to represent the defendant, but the questions and answers did not amount to a waiver of the conflict. Following this hearing and prior to defendant's trial, counsel represented the informant in a motion to modify his sentence. During defendant's trial, he presented an alibi defense. The appellate court found an actual conflict where counsel represented the defendant and the key state's witness at the same time. Because the trial court was informed of the actual conflict, the court had a duty to inquire, even though there was no objection to the conflict. Failure to inquire required automatic reversal under *Holloway*. Even assuming that *Cuylar* controls and adverse affect must be shown, the court finds that counsel's representation was adversely affected because counsel did not cross-examine the witness on the affects of cocaine, even though he admitted being under the influence when he allegedly bought cocaine from the defendant. Counsel also did not question the witness regarding his admitted addiction to cocaine or to what lengths he might go to obtain drugs or the money necessary to buy drugs for himself. This was especially important in light of evidence that the witness received money from the police each time he made a sale.

Smith v. State, 666 So. 2d 810 (Miss. 1995). Counsel in drug distribution case had actual conflict of interest that adversely affected representation where he simultaneously represented witness (implicated but not charged in this case) in plea negotiations on other charges. Witness testified that he had distributed drugs to a confidential informant at the same time and in the same location as defendant's sale. The witness was not charged though. The witness did have prior drug charges though in which counsel had represented the witness in plea negotiations. The witness was still pending sentencing at the time of defendant's trial. Counsel attempted to cross-examine the witness. When he asked about the witness' plea, the witness pointed out that counsel represented him, and counsel asked nothing else. The court found, “The sudden curtailing of what had been up to that point a vigorous cross-examination of [the witness] by the public defender is compellingly indicative of an actual conflict of interest which adversely affected the public defender's performance as counsel for [defendant].” *Id.* at 813.

People v. Carillo, 218 A.D.2d 505 (N.Y. App. Div. 1995). Counsel had actual conflict that adversely affected representation in murder case where counsel simultaneously represented an eyewitness and had previously represented the actual shooter. Defense counsel's prior representation of witness, whose testimony could have exculpated defendant but who did not testify in defendant's trial – despite counsel's indication during opening argument that witness would testify – affected his representation of defendant and conduct of defense. It was possible that witness did not testify because of a pending drug case in which he was represented by counsel and was concerned that if he was subjected to cross-examination, his testimony about his

drug activities might have been used against him in the pending case. The conflict may have been created by fact that counsel had represented witness on more than one occasion, giving him pecuniary interest, in that counsel may have been motivated to guard witness's interests to ensure that counsel would be retained in future. Otherwise, once witness "bolted" as time to testify drew near, conflict-free counsel would have hired investigator or sought witness to ensure witness's presence at trial. Furthermore, defense counsel's prior representation (only a short time before) of another client, the alleged triggerman in the murder with which defendant was charged, affected his representation of defendant and conduct of defense in this prosecution. Counsel had continued duty to maintain triggerman's confidences. In addition, although every eyewitness identified triggerman as the murderer and counsel had heard on street that triggerman was real culprit, counsel did absolutely nothing to verify this information or locate triggerman.

1989: **People v. Thomas*, 545 N.E. 2d 654 (Ill. 1989). Counsel had *per se* conflict in capital murder where counsel simultaneously represented government witness on unrelated charges. Defendant was arrested based on information provided by witness, who was defendant's cousin. Following his arrest, he retained counsel. The witness also retained the same counsel to represent her on charges of welfare fraud. Counsel moved to suppress defendant's statement and evidence due to lack of probable cause for arrest but did not call witness to testify. During trial, witness either denied making statements or said she could not remember. On cross, counsel attempted to establish that witness had history of mental illness. On redirect, prosecutor sought to prove that counsel represented witness and the objection was sustained. Counsel intended to call another witness mental illness, but backed off when court indicated it would allow the government to rebut with evidence that counsel represented the witness. Court held that counsel had duty to withdraw from representation and that contemporaneous representation of government witness was a *per se* conflict where prejudice would be presumed. Adverse affect on representation found even if not *per se* conflict where counsel failed to call witness at suppression hearing and altered her trial strategy to avoid revelation of her representation of witness.

1986: *People v. McDonald*, 496 N.E.2d 844 (N.Y. 1986). Counsel had actual conflict that required reversal in arson case where counsel simultaneously represented the corporation, whose building was damaged in the fire, and a corporate officer gave testimony tending to prove defendant's guilt.

In Interest of Saladin, 518 A.2d 1258 (Pa. Super. Ct.1986). Counsel had actual conflict that adversely affected representation in juvenile delinquency hearing for robbery where another attorney in counsel's office simultaneously represented the victim/witness on unrelated charges. Adverse affect found because counsel did not cross-examine prosecution witness vigorously about his mental health because of the attorney-client privilege.

1984: *Commonwealth v. Hurley*, 461 N.E.2d 754 (Mass. 1984). Counsel had conflict that required presumption of prejudice in murder case where counsel simultaneously represented a prosecution witness who was also a potential suspect as an accessory to the crime in an unrelated case. The witness was also counsel's friend.

1982: *Commonwealth v. Hodge*, 434 N.E.2d 1246 (Mass. 1982). Counsel had a conflict that required presumption of prejudice in murder case where counsel's law partner simultaneously represented prosecution witness in unrelated civil matter, which created a financial interest for counsel.

H. Simultaneous Representation of Prosecutor or Third Party With Adverse Interest

1. U.S. Court of Appeals Cases

2010: *United States v. Nicholson*, 611 F.3d 191 (4th Cir. 2010). Counsel in felon in possession of weapon case had actual conflict of interest that adversely impacted counsel's performance in sentencing in that counsel failed to move for a downward departure on the basis of self-defense necessity. The defendant's brother had agreed to cooperate with law enforcement in their investigation of a major drug dealer, which resulted in threats against the whole family. The brother was shot and there was a subsequent attempt on his life while he was hospitalized. The defendant and his mother were informed by law enforcement that the drug dealer had placed a contract out for them. The defendant's stepfather was then murdered. The defendant then obtained a gun for which he was subsequently charged. He told law enforcement that he had the gun for protection. Counsel was retained by the defendant. Only weeks later, counsel also began representing the drug dealer, who was charged with murder in state court. Counsel never informed the defendant that he also represented the drug dealer. While counsel maintained that the defendant never said he was in fear and said that he had the gun because he was a drug dealer, counsel was aware from written police reports that the defendant told officers he had the gun for self-defense. The defendant pled guilty. Prior to sentencing, counsel received a presentencing report (PSR) in the dealer's case, which contained information implicating him in the shooting of the defendant's brother and murder of his stepfather. The court adopted the PSR in the dealer's sentencing. Counsel appealed on behalf of the dealer claiming error in these findings. Counsel then obtained the defendant's PSR containing the same information and that the defendant carried the weapon for self-defense. The defendant learned from the probation officer that he might be entitled to a downward departure and asked counsel to seek one in at least two letters to counsel. The Government conceded the self-defense motive for the gun (and the other relevant facts for the departure) in the defendant's sentencing hearing. Nonetheless, counsel failed to move for a self-defense departure. The District Court found trial counsel's testimony that he did not seek a departure based on the defendant's statements to him and "ethics" to be credible. The Fourth Circuit did not disturb this finding, but noted that all the other evidence supported the defendant's claims, including the fact that, while the defendant had a lengthy history of convictions for drugs and weapons, he had never been convicted of having both at the same time. Here, irrespective of what statements the defendant may have made to counsel, "a motion for a self-defense departure was a plausible defense strategy. . . . Simply put, there is overwhelming evidence—believed and even endorsed by the Government—that [the defendant] faced not only a threat of physical injury, but also a genuine threat of death, at the time he was found with the firearm and claimed he possessed it for self-protection." Moreover, regardless of counsel's alleged subjective reasons for not seeking the departure, which the District Court relied on, "the ultimate question involves a conclusion of law reached under an objective standard: whether, considering the facts known to the lawyer, the alternative defense

strategy was ‘objectively reasonable.’” Here, “it is manifest that [counsel] could have requested a self-defense departure without compromising his ethical duties.” Counsel could have done so without making any false statements or offering any evidence he had reason to suspect was false. The “undisputed evidence” was that the drug dealer “posed a genuine threat” to the defendant’s life, the defendant told authorities he possessed the gun for protection against the dealer, and “the authorities believed him.” Even in appellate argument, the government conceded these facts. Here, this “alternative defense was inherently in conflict with . . . the attorney’s other loyalties or interests.” *Id.* at ___ (quoting *Freund v. Butterworth*, 165 F.3d 839, 860 (11th Cir. 1999)). In other words, a self-defense departure motion was inherently in conflict with counsel’s loyalties to the drug dealer.

In such a situation, it is unnecessary—and even inappropriate—to accept and consider evidence of any benign motives for the lawyer’s tactics, including the lawyer’s testimony about his subjective state of mind.

Thus, there was an adverse impact and prejudice was presumed. The state argued that remand for resentencing was unnecessary because of counsel’s testimony that the defendant told him he had the gun due to his drug-dealing activities instead of fear. The Fourth Circuit held the defendant was “entitled to a protective order prohibiting the Government from using privileged information revealed by [counsel] in litigating [the defendant’s] actual conflict of interest claim.” In addition, the Fourth Circuit ordered that a different trial judge here the resentencing in order to avoid even the appearance or “suspicion of partiality.”

2. State Cases

2005: *Howerton v. Danenberg*, 621 S.E.2d 738 (Ga. 2005). Counsel had an actual conflict that required presumption of prejudice in capital case that resulted in plea in exchange for a life sentence. During the defendant’s representation, counsel simultaneously represented the prosecutor in a highly publicized federal challenge to the prosecutor’s use of peremptory strikes to remove minorities from juries. This information was not disclosed to the defendant, even though “[g]iven the enormity of the penalty, the conflict was completely impermissible.” Although there was no evidence that counsel’s conduct was influenced by the conflict, “even the performance of the most honorable attorney under similar circumstances could be subtly or unknowingly affected in ways difficult to detect on review. The mere existence of such an obvious and deleterious conflict undermines the adversarial process and calls into question the reliability of the outcome of the proceedings.”

1996: *Derrington v. United States*, 681 A.2d 1125 (D.C. 1996). Counsel in drug distribution case had actual conflict that adversely affected representation where counsel simultaneously represented another person about whom the defendant might have had information of use to the prosecutor. Prior to trial, counsel informed the court that he believed defendant served as a confidential informant for government in the investigation of counsel’s other client. While the other client had already plead guilty, he was still pending sentencing. Counsel noted that he would not be able to adequately negotiate for the defendant though on the basis of his cooperation with the government. The court continued the hearing for counsel to obtain additional information. At

the later hearing, counsel informed the court that he did not believe there was an actual conflict. The defendant proceeded to trial with counsel never attempting to negotiate a plea based on his cooperation or advising the defendant about the possibility of doing so. Counsel had an actual conflict and his representation was adversely affected as evidenced by his failure to attempt to negotiate a deal for his client.

1986: *Matter of Delfin A.*, 123 A.D.2d 318 (N.Y. App. Div. 1986). Counsel had conflict that required presumption of prejudice in delinquency case involving sexual abuse where counsel had been retained by residential facility where juvenile had been voluntarily placed in foster care, and where alleged incident of sexual abuse occurred, to represent the facility in proceedings against the juvenile. At those proceedings it was expected that employees of the facility would testify. Furthermore, counsel represented two alleged accomplices whose statements about the incident of sexual abuse differed from that of the juvenile.

1983: *United States v. Carducci*, 557 F. Supp. 531 (W.D. Pa. 1983). Counsel had conflict that adversely affected representation in drug case where counsel simultaneously represented suspect charged with murder of codefendant. A mistrial was declared in initial trial due to codefendant's murder. During second trial, counsel did not call witnesses that corroborated entrapment defense, even though he intended to in the first trial because the witnesses would be adverse to the suspect in the murder of codefendant. While counsel stated other valid reasons for not calling these witnesses, the court found that reversal was required where counsel also considered the conflicted reasons in making decision to exclude exculpatory testimony.

1982: *Mannon v. State*, 645 P.2d 433 (Nev. 1982). Counsel had conflict that adversely affected representation in drug case where during trial counsel, who represented defendant's girlfriend on an unrelated charge, was informed by girlfriend that she was guilty of the offense with which defendant was charged, but counsel remained silent until after trial due to obligation to protect confidentiality of statement.

I. Retained by Codefendant or Third-Party With Adverse Interest

1. U.S. District Court Cases

2000: *United States v. Duran-Benitez*, 110 F. Supp.2d 133 (E.D.N.Y. 2000). Defendant convicted of various drug offenses moved for downward departure on the basis of his attorney's conflict that has adverse affect on representation. Defendant and codefendant were initially appointed separate attorneys. Defendant initially rejected plea offers. After a new attorney entered an appearance for him, his codefendant started cooperating with the government. On the basis of her information, new charges were brought against the defendant and charges were brought against a second codefendant. The first codefendant's cooperation eventually earned her a "§ 5K1.1 letter," *see* U.S. Sentencing Guidelines ("USSG") Manual § 5K1.1 (1998), from the Government and a significant downward departure at her sentencing. In contrast, the defendant, who pled guilty and was awaiting sentence, had not received a § 5K1.1 letter from the Government because the information he sought to provide was deemed stale. Defendant moved for a downward departure because his new attorney had been retained and paid for by the second

codefendant without defendant even making a request that he do so. The second codefendant also retained counsel for the first codefendant and other persons implicated but they rejected the representation. In order to protect the person paying his retainer, counsel prevented the defendant from offering cooperation with the government. Ultimately, the defendant petitioned the court for new counsel and informed the court of the reason. The court appointed new counsel for the defendant. The defendant then cooperated but the government deemed the information to be stale and not warranting a § 5K1.1 letter. In order to remedy the Sixth Amendment violation, the court sentenced the defendant if he had provided earlier cooperation, provided substantial assistance to the Government, and secured a § 5K1.1 letter, which cut the sentencing range to about half of what he had faced.

2. State Cases

2011: *State v. Mamedov*, 708 S.E.2d 279 (Ga. 2011). Counsel had an actual conflict of interest that adversely affected representation in false imprisonment plea case. The defendant, a refugee from Uzbekistan with lawful permanent residence in the country, was arrested along with a codefendant. Defendant was driving the car. When his co-defendant passenger spotted a woman he had a “romantic interest” in he told the defendant to stop the car. The co-defendant forced her into the car and the defendant drove around for two to three minutes before returning her to the point where she had been forced into the car. The alleged victim informed the prosecutor that it “was customary” in her country for a man to kidnap the woman he loves in this fashion and she was not harmed, the case was prosecuted as there were a number of witnesses, including a newspaper photographer who captured the episode. The co-defendant’s family retained counsel for both men. Aside from an initial brief meeting, the defendant never met counsel without either his co-defendant or the co-defendant’s family being present. Counsel never addressed the possibility of a conflict and never addressed the possibility of a separate defense. The mere fact that counsel was paid entirely by the co-defendant’s family “created a strong incentive for counsel to prioritize [the co-defendant’s] interests in the matter over [the defendant’s].” In addition, even though the defendant was the less culpable and his participation was limited to being a passive witness in the co-defendant’s unpremeditated interaction with the victim, counsel never considered anything other than a unified defense. Prejudice presumed.

1997: *State v. Norman*, 697 A.2d 511 (N.J. 1997). Counsel had actual conflict that adversely affected representation due to payment of counsel’s fees by the more culpable codefendant. Codefendants were tried separately for drug-related murder. Following their arrest defendant admitted that he was an accomplice and chased the victim with a gun but stated that the victim had been shot before he arrived. The codefendant admitted that he was closest to the victim but asserted that both he and the defendant had fired their weapons. The victim was shot only once. Codefendant retained an attorney. At codefendant’s request, the attorney arranged counsel for the defendant. The attorneys shared office space but were not partners. Both counsel were paid by the codefendant and the defendant was aware of that fact. The trials were severed and both were convicted. In post-conviction, counsel for defendant testified that approached the state in plea negotiations but no agreement was reached. Counsel denied that he was influenced in the negotiations by the fact that the codefendant paid his fees. No waiver found, even though the defendant was aware at the time that his counsel was paid by the codefendant. “There is a

presumption against waiver, and waiver will be found only when it is on the record and when the trial court has assured itself that the defendant waiving the conflict is aware of the potential hazards of joint representation.” *Id.* at 525. Court found that the state clearly would have been interested in the defendant’s cooperation because he had substantial knowledge of the shooting and presumably about the codefendant’s drug dealings. Court also finds that codefendant paid counsel’s fees presumably because he was concerned about defendant’s potential cooperation. “In such circumstances, where the defendants have starkly conflicting interests, we would be remiss if we did not recognize a significant conflict and strong likelihood of prejudice.” *Id.* at 526. Defendant’s conviction reversed, but not codefendant’s.

1985: **State v. Chandler*, 698 S.W.2d 844 (Mo. 1985). Counsel had conflict that adversely affected representation in murder case where counsel X was implicated in the same murder and had been represented by counsel Y when counsel X was indicted but the charge was later dismissed and counsel X paid counsel Y to represent defendant. The victim was an attorney. The defendant’s brother, who was represented by counsel X at the time of his initial statements, implicated defendant in murder and testified at trial that he stood watch while defendant and another brother committed murder. The other brother that had already been convicted of murder and sentenced to death had initially been represented by counsel X but discharged him and testified before a grand jury that defendant was hired by counsel X to kill the victim. He testified in a deposition that he committed the murder alone and defendant had nothing to do with it. Adverse affect shown because counsel did not call this brother, who exculpated defendant to testify allegedly because he had no credibility. Defendant was entitled to counsel that could make decision whether to call the brother or not without a conflict.

J. Prior Representation of Government or Defense Witness in Same Case

1995: *United States v. Malpiedi*, 62 F.3d 465 (2nd Cir. 1995). Trial counsel in fraud (based on contractor kickback scheme) and obstruction of justice (based on altering checking records when they were subpoenaed by grand jury) had actual conflict of interest that adversely affected representation due to counsel’s prior representation of key government witness. Witness had testified in two grand jury proceedings as custodian of defendant’s records (which were altered according to government). Counsel accompanied her to first grand jury proceeding and arguably served as her counsel at the time. Just prior to her testimony, the government disclosed the potential conflict to the court. Counsel responded that he did not represent the witness previously. The government and the defense agreed that counsel would question the witness only about whether she was alone with the documents in a conference room while preparing for the first grand jury appearance and that the government would elicit from her only that counsel had accompanied her to that proceeding. She was called to testify. Counsel conducted in depth cross about the first grand jury proceeding. The court interrupted. The witness, through another attorney, then invoked her attorney-client privilege. The court prohibited counsel from any argument concerning the first grand jury testimony. Following the testimony, the court asked the defendant if he was satisfied with counsel’s cross. Although he said he was, the appellate court found that this clearly was not an adequate hearing on whether he waived conflict-free representation. Following trial, the defendant, through different counsel, asserted the conflict. District court denied relief. Appellate court held that counsel had an actual conflict and his

representation was adversely affected because he was unable to adequately cross-examine the witness concerning her testimony in the grand jury proceedings, in which she failed to give the damaging testimony she offered at trial and committed perjury.

1991: *United States v. Tatum*, 943 F.2d 370 (4th Cir. 1991). Counsel had actual conflict in bankruptcy case that adversely affected representation where counsel was a member of a law firm implicated in crimes and counsel had previously represented a government witness, who was also his law partner, in the same proceeding. Defendant, who was in the business of restoring expensive and collectible automobiles, filed bankruptcy petition but hid three cars from the trustee and creditors, allegedly upon advice of counsel. The cars were transferred to one of counsel's law partners. During the grand jury proceedings, defendant, his business partner, and the lawyer that obtained the cars were all represented by a different lawyer in the same firm as bankruptcy counsel and the lawyer that obtained the cars. After the government notified the firm of its concern about the conflicts (but only several months prior to trial), an outside lawyer entered an appearance and conducted the trial, but conflicted counsel was present and assisting him. The government informed the court of the conflicts but the court did nothing. The Fourth Circuit held that counsel had an actual conflict because counsel could not assert that defendant relied on the advice of counsel without inculcating his law partners and increasing the risk of civil malpractice liability of the firm. Counsel also had a conflict because counsel could not present himself as a witness concerning a "missing file" from the law firm that defendant claimed contained exculpatory information. Counsel also had a conflict because counsel had represented the defendant's business partner, who was the government's primary witness, in the grand jury proceedings. Counsel also had a conflict because his law partners, the one that obtained the cars and the one that advised defendant in the bankruptcy proceedings, were witnesses during the trial. Counsel's conduct was adversely affected because counsel could not seek a plea agreement for defendant to testify against his law partners. He also could not call himself to testify concerning the missing file or effectively cross-examine his partners or his former client at trial. The fact that outside counsel conducted the trial did not change the required result because that counsel entered the case only several months prior to trial and relied heavily on conflicted counsel's knowledge of the facts and prior proceedings. Thus, outside counsel's performance was infected by the conflicts.

K. Prior Representation of Government Witness or Confidential Informant in Related Case

1. U.S. Court of Appeals Cases

1986: *United States v. Iorizzo*, 786 F.2d 52 (2nd Cir. 1986). Counsel had actual conflict that adversely affected representation in mail fraud case where counsel had previously represented a government witness in related proceedings. Defendant was charged with mail fraud based on a scheme to evade state gasoline taxes by filing false information through use of the mail. The government witness worked for the defendant and had testified in a related tax commission case with counsel, paid by defendant representing him. Adverse affect found on representation because counsel did not attack witness's credibility on the stand, even though he had made prior

inconsistent statements at the time defense counsel was representing him. Counsel broached this issue but the government objected due to the conflict.

2. Military Cases

1991: *United States v. Augusztin*, 30 M.J. (N.M.C.M.R. 1990). Purported waiver of conflict was inadequate in solicitation of homosexual acts cases where counsel simultaneously represented the government's primary witness on overlapping charges and the trial court failed to conduct an adequate inquiry. The witness made a statement against the accused and later recanted the statement. He was then tried and convicted of charges, including an overlapping solicitation to commit sexual acts with the accused. During the accused's trial, the witness' incriminating statement and recantation were admitted without any objection by counsel.

The *quid pro quo* arrangement to permit both [the witness]'s original statement and subsequent recantation to come into evidence without objection from either side and thus avert the need to cross-examine [the witness] was not the result of a tactical judgment by a conflict-free lawyer that such evidence would not be helpful to appellant. Rather, the decision to forgo confrontation of the witness . . . must be viewed in some measure as being made to protect the interest of defense counsel. Defense counsel abandoned appellant's right to confront and cross-examine [the witness] in favor of a two sentence retraction that did little to deflect the straightforward impact of the initial statement. At the time, defense counsel's abandonment was viewed by all concerned as necessary to allow defense counsel to avoid ethically improper conduct. This simply reverses the priorities that the attorney owes to his client because it puts the lawyer's concerns ahead of the client's needs, and then shapes the client's needs to eliminate the attorney's problems created by a direct conflict of interest.

Id. at 709 (footnotes and citations omitted). Although the trial court inquired, the inquiry was inadequate to elicit a valid waiver because the trial court did not inform the accused of the specific nature of the conflict or explain or elicit the accused's understanding of the details and potential perils of the conflict. The court instead apparently relied on identical written "waivers" signed by the accused and the witness on the morning of trial. The "waiver," which the court noted was "apparently drafted just prior to coming into trial by the counsel whose capacity to act in appellant's interests was at issue," *id.* at 713, stated that counsel had advised the accused of the conflict but did not detail the advice.

3. State Cases

2003: *People v. Daly*, 792 N.E.2d 446 (Ill. App. 2003). Trial counsel had *per se* conflict in drug distribution case where trial counsel had represented the confidential informant, who was the primary witness for the state. The CI had been arrested on drug charges and represented by counsel had those charges dismissed in exchange for an agreement to make undercover drug buys. While doing so, the CI had other charges dropped because of his work for the state. The CI testified during trial that he made three buys from the defendant. Counsel established in

cross-examination that the CI had had charges dismissed and was working as a CI, but did not elicit the fact that the dismissed charges and the work as a CI were linked. Counsel also did not establish that the CI had a financial arrangement with the state where he was paid for drug busts, but only given expense money if he failed to make a buy. Although counsel no longer represented the CI, the court held that there was a “continuing” relationship to the extent that counsel would be required to cross-examine the CI about matters occurring during the time that counsel represented him. Prejudice presumed.

2000: *Nethery v. State*, 29 S.W.3d 178 (Tex. App. 2000). Defendant’s trial counsel had actual conflict of interest that prejudiced defendant in trial for organized criminal activity for theft arising out of illegal use of landfill. Counsel had also represented the defendant and codefendant in a civil suit brought against them for the same activities. Following the civil trial, the codefendant obtained different counsel. The defendant’s counsel then represented one of the complaining witnesses in that suit in unrelated criminal charges for theft by a public servant. That case was pending at the same time as the defendant’s charges and counsel sought to withdraw prior to defendant’s trial, but did so primarily on defendant’s failure to pay his retainer with the possible conflict mentioned only as a sideline. During trial, counsel called his other client as a witness. Counsel apparently hoped to establish that defendant thought his permits were legal, but the witness/client testified, amongst numerous damaging points, that he informed defendant his dumping was illegal. Counsel’s conflict and the adverse affect on his representation was clear, because counsel did nothing to minimize this damaging testimony. The court notes that there was no reason to call the witness in the first place, but after he was there counsel should have attacked his credibility with information that he had been fired from his position with the City and had no contact with the defendant at the time of the alleged offenses in this case. Prejudice presumed.

L. Prior Representation of Government Witness on Unrelated Charges

1. U.S. Court of Appeals Cases

2004: *Lewis v. Mayle*, 391 F.3d 989 (9th Cir. 2004). Defense counsel had actual conflict of interest that adversely affected the defense in second degree murder case and the defendant’s waiver of his right to conflict-free counsel was invalid. Counsel had represented the defendant’s nephew, who was the state’s primary witness, in an unrelated felony charge of driving under the influence just prior to beginning representation of the defendant. The witness pled no contest to DUI and was placed on probation. At a post-trial hearing on a motion for new trial, counsel was asked to represent the defendant with the nephew paying a portion of the fee. The defendant and his nephew signed nearly identical waivers of any conflict of interest. The potential conflict and waiver was also discussed in a preliminary hearing. At trial, counsel raised the question of whether the nephew was the actual killer, pointed out inconsistencies in his testimony, and elicited an admission that he had been convicted of four separate burglary charges. Counsel did not, however, question the nephew about his most recent DUI charge or about his probation status. He also did not bring out the fact that he was in a substance abuse treatment program as a condition of his probation or that he had helped arrange for counsel to represent the defendant and offered to pay his fee. Under the AEDPA, the court held that the state court’s finding that

the conflict did not adversely affect the defense was an objectively unreasonable application of clearly established federal law because counsel refrained from eliciting evidence on at least three significant points as a result of his prior representation of the witness. First counsel failed to cross-examine the witness concerning his recent felony DUI conviction. This was significant because this conviction was in the last year while the other prior convictions were more than nine years old and the witness attempted to portray himself as a reformed man. Although the state court found that the conflict did not lead to counsel's omission, this finding was objectively unreasonable because counsel believed that at least some of the information he had about the DUI conviction was privileged and because unconflicted counsel would have raised the DUI conviction. Second, adverse affect was demonstrated by counsel's failure to present evidence of the witness' probation and participation in a court-ordered substance abuse program. The probation status was significant and the substance abuse program would have contradicted the witness' attempt to portray himself as having voluntarily undertaken a lifestyle change. The state court's finding that counsel believed there was no connection was unreasonable because it accepted counsel's "explanations at face value" without regard to the full record. Third, the adverse affect was evidenced by counsel's failure to elicit information from the witness about his role in arranging for the defendant's counsel. The state court's analysis was unreasonable because the state court focused only on whether the witness actually influenced counsel, rather than on whether the conflict prevented counsel from making an issue of the witness' involvement.

In a case where so much turned on the credibility of one prosecution witness, a suggestion that that witness *sought* to influence the defense in any way—regardless of whether he succeeded in doing so—could have raised a reasonable doubt in the mind of jurors. . . . Had a non-conflicted lawyer represented [the defendant] and come across evidence that the only other possible suspect, and the prosecution's main witness, had offered to pay for the defense, the non-conflicted lawyer undoubtedly would have raised that evidence to impeach the prosecution witness.

Because the state court did not rule on the waiver issue, the court reviewed this issue de novo. While the defendant signed a written waiver, discussed the potential conflict with counsel, and was advised to seek outside counsel on the matter, there was no evidence that the defendant understood the specific ramifications of his waiver since he did not seek the advice of outside counsel and had only a cursory discussion with the judge. There was no evidence that the defendant knew of counsel's continuing obligations to the witness or that he foresaw potential consequences of the waive, such as the impeachment value of the DUI charges. Thus, the defendant did not validly waive his right to conflict-free counsel.

2. State Cases

1997: *Lee v. State*, 690 So. 2d 664 (Fla. App. 1997). Trial court obtained inadequate waiver in murder case where the public defender office had previously represented the state's key witness, who was a jailhouse snitch, at the time of the alleged statements. In addition, defendant's counsel had personally represented the snitch years before, although counsel had no recollection of it. The trial court conducted an inquiry and the defendant purported to waive the conflict. Later, after

the defendant raised concerns about counsel's performance, the defendant sought to withdraw the waiver but the court refused to revisit the issue because the defendant had purportedly made a knowing and intelligent waiver. As additional concerns arose, the court refused to appoint different counsel and defendant went pro se. He then changed his mind and proceeded forward with the assigned public defender. The appellate court held that there clearly was an actual conflict in counsel's prior representation of the snitch and because counsel's office represented the snitch at the time of the alleged statements in this case. The court held that, "[f]or a waiver to be valid, the record must show that the defendant was aware of the conflict of interest, that the defendant realized the conflict could affect the defense, and that the defendant knew of the right to obtain other counsel." *Id.* at 667. Here, the purported waiver was not a valid waiver because the defendant was unaware at the time that he was entitled to different court-appointed counsel. Record reflected defendant's understanding that if he did not accept conflicted counsel, then he would have to represent himself. Because the issue had been raised at trial and preserved for appeal, automatic reversal required.

1995: *Livingston v. State*, 907 P.2d 1088 (Okla. Crim. App. 1995). Counsel in murder case had an actual conflict that adversely affected representation due to counsel's prior representation of the defendant's son, who was the primary state's witness. Defendant was charged with murdering his ex-wife's boyfriend. Defendant was charged six months later, primarily on the statements of his son, who said that defendant admitted murder to him. Prior to the son's allegations, represented by counsel, he was adjudicated a juvenile on charges of lewd molestation and obscene telephone calls. The defendant testified against his son in the juvenile adjudication proceedings. At a pretrial motions hearing in defendant's case, counsel indicated he wanted to cross-examine the son about these juvenile adjudication proceedings and to impeach him by showing the son's bias against his father and his motive to testify. He also initially asked to use records of the son's psychological examinations to show bias. He informed the court that he had represented the son in the juvenile proceedings. The trial court ruled that counsel could ask the son if he was biased because the defendant did not support him when he was charged with juvenile offenses, but could not cross-examine him on the substance of the offenses. The court did not conduct an inquiry into the conflict, however. Counsel's planned cross was not conducted, even though the son testified that defendant admitted killing to him. Counsel had an actual conflict due to duty of loyalty to both defendant and his son. The representation was adversely affected because counsel did not pursue cross-examination of the son to show motive and bias in testimony. Prejudice presumed.

1993: *State v. James*, 433 S.E.2d 755 (N.C. App. 1993). Counsel in murder case had an actual conflict that adversely affected representation where he previously represented a key prosecution witness on an unrelated charge. Counsel was appointed to represent the defendant following his arrest for a shooting that occurred outside a nightclub. Counsel was then retained by witness to represent him on a state charge of possession of a firearm by a felon and in a federal investigation for conspiracy to possess and traffic in crack cocaine, for which he was ultimately indicted. The witness plead guilty in exchange for cooperation with the government. The witness was called to testify in the defendant's trial. Both the state and federal charges were still pending against the witness. Counsel brought out in cross that he represented the witness. The court found an actual conflict where counsel simultaneously represented the defendant a

government witness. Adverse affect found because counsel did not cross examine the witness concerning his plea bargain arrangement in federal court (which involved a downward departure for cooperation). Counsel did, however, conduct this type of cross-examination with another witness. The court also observed that the trial court had an independent duty to conduct an inquiry once the conflict became apparent. Normally, the court would remand for a hearing on whether there was an actual conflict when the court failed to conduct an inquiry, but reversal was required here anyway because of the actual conflict and adverse affect on representation.

1989: *Self v. State*, 564 So.2d 1023 (Ala. Crim. App. 1989). Counsel in drug trafficking case had actual conflict that adversely affected representation where both defendants were represented by counsel who had previously represented the state's confidential informant. The informant and her husband were indicted for trafficking in cocaine. The husband, represented by defendant's counsel, was convicted. The informant, represented by codefendant's counsel, provided information supporting the search warrant that led to defendant's and codefendant's arrest as part of a plea agreement allowing probation. Some of the husband's convictions were reversed and his case was remanded for resentencing represented by defendant's counsel. Defendant and codefendant were then tried while represented by conflicted counsel. During the trial, the identity of the informant was revealed. Both counsel, based on statements previously made to them by the informant, had reason to be aware of the informant's identity prior to indictment and to believe that the information in the affidavit supporting the search warrants was untrue. Nonetheless, neither counsel called her as a witness or informed their clients because the informant was still on probation and might suffer. While the court recognized that a good argument could be made that the conflicted representation was simultaneous, the court treated it as successive representation. *Id.* at 1033. An actual conflict that adversely affected representation was found due to both counsel's failure to call the informant to testify.

1983: *In re Darr*, 191 Cal. Rptr. 882 (Cal. App. 1983). Counsel had conflict that adversely affected representation in murder case where counsel previously represented government witness on unrelated charges. The trial court erred in failing to inquire about the possible conflict or to advise the defendant of his right to conflict-free representation when it was revealed during trial that the defendant's attorney had represented the witness. Counsel did not seek timely probation revocation hearing in witness's felony case, which would have provided further grounds for impeachment of witness, and unexplained omissions existed in cross-examination of witness for bias.

M. Counsel Was Necessary or Potential Witness

1. U.S. Court of Appeals Cases

2002: *Rubin v. Gee*, 292 F.3d 396 (4th Cir. 2002) (*affirming* 128 F. Supp. 2d 848 (D. Md. 2001)). Counsel in murder case had an actual conflict of interest that adversely affected petitioner's representation. Following the shooting of her husband, petitioner contacted two attorneys, who both came to the crime scene. After learning that petitioner had taken a lot of medication, the attorneys instructed their assistant to take petitioner to the hospital and have her admitted under a false name. The attorneys notified the police that the victim was dead, but did not disclose any

other information. The day after the shooting, one of the lawyers drove Petitioner to the bank to withdraw \$105,000 for counsel's retainer fee and expenses. The other attorney took the evidence in the case to his office. Only after the attorneys discovered that a warrant was out for petitioner's arrest did they turn the petitioner in to the police. Counsel then advised petitioner who to retain as her trial counsel. They also remained part of the defense team and continued to collect fees from the petitioner, even though they did not sit at counsel table during her trial. During trial, the state brought out (in cross-examination of petitioner) the events following the homicide, without any mention of the lawyer's activities, to refute petitioner's self-defense claim by arguing that she had fled the scene of the crime, lied about her identity, and showed consciousness of guilt. Neither attorney was called to testify. The state court concluded that counsel's actions following the homicide did not create an actual conflict of interest. The state court also did not consider the continuing effects of counsel's conflict when evaluating the effectiveness of petitioner's trial representation. The Fourth Circuit held that this was an "objectively unreasonable" application of clearly established federal law because counsel plainly had a conflict of interest that adversely affected their own performance and the performance of petitioner's trial counsel. Counsel's personal interests fundamentally conflicted with the objectives of petitioner's representation from the moment they arrived at the scene of the crime until the completion of her trial. Counsel utterly failed to function as petitioner's advocates. Instead, they assisted her in evasive action and functioned almost as accessories after the fact in order to secure their retainer fee. Following counsel's advice created serious problems for petitioner at trial. Petitioner thus had a strong interest in having counsel testify that she acted on the advice of her own lawyers following the homicide. Counsel had no interest in testifying, however, because of potential criminal charges for obstruction of justice and hindering the apprehension of a criminal defendant. In fact, both counsel were the subject of a grand jury investigation that began prior to petitioner's trial and continued until after it was complete. One of the attorneys had even engaged his own attorney to represent him in the investigation. Furthermore, both attorneys were also the targets of an inquiry by the Maryland Attorney Grievance Commission during which they had to justify the \$150,000 fee they eventually collected for representing petitioner. Given these facts, the Fourth Circuit said, "At all times, the attorneys' fidelity to their own interests superseded any sense of obligation they may have had to their client." *Id.* at 404. Counsel's continued representation of petitioner was adversely affected by their conflict of interest. They cloaked themselves in the attorney-client privilege to assure that they would not be asked to testify at trial and never considered withdrawing so they could testify and assist petitioner as witnesses. Counsel's conflict of interest also ultimately tainted and adversely affected petitioner's representation by her three trial attorneys. Counsel "violated the most basic principles of the attorney-client compact from the beginning to the end. . . . The taint from their conflict of interest could not be cleansed simply by bringing in independent counsel to make trial decisions." *Id.* at 405. The state court decision to the contrary was an objectively unreasonable application of the *Cuyler v. Sullivan* standard. Counsel's "representation of Rubin was more than ineffective - it was a perversion of the attorney-client relationship. [Counsel's conflict of interest was so severe that it led to a corruption of the adversarial process that our system relies on to produce just results. It is hard to imagine a case that would call the fundamental fairness of a trial into more question than this one. What happened here should never happen in our system. Rubin is entitled to a new trial with conflict-free representation." *Id.* at 406.

1994: *United States v. Levy*, 25 F.3d 146 (2nd Cir. 1994). Counsel had actual conflict of interests that adversely affected representation in drug conspiracy case. Counsel had previously represented the defendant. After arrest warrants were issued for the defendant and his nephew, counsel informed the government that he represented both defendants, although the defendant was out of the country. During plea negotiations on the nephew's behalf, counsel and the defendant made statements incriminating the defendant. After the nephew rejected plea negotiations, he was inadvertently released from custody and fled the country. The government believed counsel was involved in this flight. When the defendant was arrested and brought back to the country, counsel continued representation of both. While the government never formally moved to disqualify counsel, the prosecutors did repeatedly alert the trial court of (1) counsel's joint representation; (2) counsel's status as a defendant awaiting his own sentencing in the same district on an unrelated criminal charge; (3) counsel's status as the object of a grand jury investigation into the nephew's flight; and (4) counsel's status as a possible witness concerning statements made by the defendant during the plea negotiations on behalf of the nephew. The District Court inquired but accepted counsel's distortions of the truth and false statements. "[T]he very nature of [counsel's] predicaments strongly indicates that he labored under actual and not merely potential, conflicts of interest." He had "continuing legal and ethical obligations to protect" the nephew, whose interests diverged from the defendant, whose most likely defense was to blame the nephew who had been directly involved in controlled buys by a confidential informant when the defendant was not even in the country. Counsel also had a personal interest to avoid being called as a witness since he would likely have to cease representing the defendant. Likewise, counsel's own charges presented a conflict because counsel may have believed he should temper his defense for the defendant here in order to curry favor with the prosecution in his own case. Finally, counsel obviously had a strong personal interest in avoiding any exploration of the nephew's flight from the country as counsel could be incriminated. Counsel's representation was adversely affected as counsel did not pursue a plausible defense strategy of trying to pin greater blame on the nephew because counsel had obligations to him and also did not want to expose counsel to prosecution for his role in the flight. Because the trial court had not obtained a knowing waiver from the defendant, reversal was required.

1982: *Uptain v. United States*, 692 F.2d 8 (5th Cir. 1982). Counsel had actual conflict that adversely affected representation in bail jumping case where counsel also served as the state's primary witness. The district court's appointment of another attorney to cross-examine defense counsel did not resolve the ineffectual-assistance problem, because defense counsel resumed primary responsibility for the defense once prosecution's questioning of him ended. Nor did defendant waive his Sixth Amendment right to effective counsel. The record reflected no discussion with defendant by judge, prosecutor, or either appointed defense counsel, of problems inherent in defense counsel's serving dual role as chief prosecution witness.

2. State Cases

2008: *State v. Regan*, 177 P.3d 783 (Wash. App. 2008). The trial court erred in compelling defense counsel to testify against the defendant, which resulted in an actual conflict of interest that adversely affected the representation. In addition to other charges, the defendant was charged

with bail jumping when he showed up an hour late for his trial date. The court ordered that co-counsel, who was acting as supervising counsel for counsel due to her lack of experience, would be required to testify that he advised the defendant of the trial date and to be early. The trial was then continued at the request of the counsel so as not to interrupt with co-counsel's vacation plans even though this was to the defendant's detriment since he was placed in pretrial confinement when he showed up late. While recognizing that the presumption of prejudice of *Cuyler v. Sullivan* was not clear under U.S. Supreme Court precedent for this type of conflict, the court applied the presumption as a matter of state law. The court found an actual conflict that adversely affected the representation because counsel agreed to the continuance which was "helpful to defense counsel's own interests and harmful" to the defendant. The court also found error in the trial court's ruling because the court did not balance the competing interests of the state and the defendant, which would have revealed that defense counsel's testimony, which was used in the case in chief, was cumulative of other testimony.

2007: *Alessi v. State*, 969 So. 2d 430 (Fla. App. 2007). Counsel had a conflict of interest in murder case where he was a necessary witness and the conflict adversely affected his representation. The defendant was an experienced police officer undergoing divorce proceedings. He shot and killed his wife and shot and injured her brother. His family quickly retained counsel for him. In an early phone call, the defendant expressed a suicidal intent and counsel told him to get rid of the gun, which was disposed of in a storm drain. Counsel and the defendant subsequently agreed that the location of the gun must be disclosed to the state, but counsel did not do so for four months. During cross-examination, the state elicited testimony from the defendant that he had hid the gun and its location was not disclosed for four months and that could have told him to get rid of the gun because he was contemplating suicide. Due to counsel's objection, however, the defendant was not allowed to explain that it was counsel rather than the defendant that delayed the disclosure. Counsel then failed to object to the state's closing argument that hiding the gun and delaying the disclosure evidenced consciousness of guilt. While recognizing that the presumption of prejudice of *Cuyler v. Sullivan* was not clear under U.S. Supreme Court precedent for this type of conflict, the court applied the presumption as a matter of state law. Prejudice presumed because counsel had an active conflict and it adversely affected his performance when he prevented the defendant from fully explaining counsel's advice and his actions "in an attempt to protect his role as counsel."

2004: *People v. Lewis*, 809 N.E.2d 1106 (N.Y. 2004). Reversal of drug convictions required where counsel testified against the defendant in a hearing on admissibility of unavailable witness' statement. The charges were based primarily on drugs found on the defendant's premises with a search warrant. Shortly after jury selection, the state notified counsel that the state would call a witness that purchased drugs from the defendant at the premises. Within an hour of the notice, the witness was threatened by an unidentified caller and intimidated into refusing to testify. At the hearing on the admissibility of the witnesses' statement, the defendant denied making the threat, but then the state called defense counsel to establish that counsel had told no one about the witness other than the defendant. Counsel did not object and provided the adverse testimony. Although counsel's testimony was "neither earth-shattering nor insignificant," reversal was required because counsel's actions were "enough to rupture the attorney-client relationship not only for the *Sirois* hearing but for the balance of the trial itself."

2000: *Commonwealth v. Patterson*, 739 N.E.2d 682 (Mass. 2000). Reversal required under state law where counsel failed to move to withdraw when it became obvious that she was a necessary witness for the defendant in murder of off-duty police officer (serving as store security guard) case. Initial investigation in search of car seen in the area of murder led to the defendant's brother to whom the car was registered. The brother informed the police that the car was actually owned and driven by the defendant. The brother then suggested that the defendant go with him to meet with counsel, who represented the brother in an unrelated civil matter. The defendant informed his brother that he had been present at the time of the murder. Counsel assumed representation of the defendant after the initial meeting. With counsel present, the defendant then made a statement to police in which he admitted being at the store on the evening of the murder with his codefendant but denied knowledge of the murder. Counsel later received a search warrant affidavit alleging that the defendant stated to police that his codefendant was the triggerman. Counsel immediately informed the state's attorney in writing and orally with a copy to codefendant's counsel that she had been present for the defendant's statement and that he was not asked and did not state that the codefendant was the triggerman. Both defendant's moved to sever the trials, in part, because of the possibility that counsel could be called to testify by the codefendant's counsel. These motions were granted. At the defendant's trial, there was testimony indicating that a man fitting the defendant's description was present in the area of the store on the night of the murder and eyewitness identification of the codefendant. There was also other evidence linking the codefendant to the murder but nothing directly linking the defendant other than fingerprint testimony of admittedly questionable methodology. A police officer then testified that the defendant said in his statement that his codefendant was the triggerman. Counsel did not testify or call the defendant to testify so this testimony was un rebutted. The court held that counsel should have moved to withdraw based on state ethical rules that, at the time, required an attorney to withdraw as counsel if the lawyer learned or if it became "obvious" that the lawyer "ought to be called as a witness on behalf of his client." Under state law, once the defendant has shown that his attorney should have withdrawn because of the likelihood that the attorney's testimony would be necessary, the defendant need not demonstrate any actual prejudice stemming from his attorney's failure to testify.

1989: *Nunn v. State*, 778 S.W.2d 707 (Mo. App. 1989). Counsel had an actual conflict that adversely affected representation in arson case where counsel testified and counsel was implicated in possible ethical misconduct related to the case. Prior to trial, counsel interviewed three state's witnesses by phone and tape-recorded the calls without the witness' knowledge. Counsel also subpoenaed one state witness to his office for a deposition without notifying the state and without actually setting up a deposition. At trial, this witness testified and denied talking to counsel on the phone. Counsel then called himself to testify concerning the witness' prior inconsistent statement and had his brother who was also a lawyer conduct the examination. During cross, the state brought out the tape-recording and subpoena activities. Counsel then resumed representation and called a former law clerk as a witness to testify that he and not counsel was responsible for the subpoena. During closing, the state vigorously attacked counsel's credibility. Court found an actual conflict for four reasons. First counsel had an obvious interest in the outcome of the case because he was retained, not appointed. Second, through its intimation of impropriety in counsel's tape-recording telephone conversations

without the other side's knowledge and issuing a subpoena for an improper purpose, the state made defense counsel's credibility an issue for the jury. Third, defense counsel called a witness for the sole purpose of rehabilitating defense counsel's own credibility. Finally, defense counsel's appearance in the inconsistent roles of advocate and witness may have undermined the jury's ability to decide the facts and its perception of movant. The court held that counsel should have withdrawn when he decided to testify.

Counsel was caught between the obligation to do his best for movant and the need to justify his own conduct as legal and ethical. An accused is entitled to representation which is uncluttered by counsel's efforts to vindicate his own conduct. A conflict of interest resulting in ineffective assistance of counsel may arise from an interest adverse to the accused or an interest simply personal to the attorney.

The only issue which should have been before the jury was defendant's conduct, not that of his attorney.

Id. at 711 (citations omitted). Adverse affect was clear since counsel injected his credibility as an issue and the jury may have "unintentionally imputed the alleged improprieties of defense counsel to his client." *Id.*

N. Defendant or Counsel Had Filed Lawsuit or Ethics Complaint Against Counsel

1. U.S. Court of Appeals Cases

1991: *Mathis v. Hood*, 937 F.2d 790 (2nd Cir. 1991). Appellate counsel had actual conflict that adversely affected representation in robbery appeal where defendant had filed a grievance against counsel. Following conviction, defendant filed a notice of appeal and the Legal Aid Society was appointed. Almost 18 months later, Legal Aid notified the defendant that there was a conflict because the office had represented the codefendant at trial. The court then appointed private counsel. Private counsel did nothing for a year and then was replaced with another private counsel. This counsel also did not file an appellate brief ultimately two and half years after appointment. By the time he filed his brief, defendant had filed a grievance against him. The court found an actual conflict that adversely affected representation because counsel's interest was in having the conviction affirmed, otherwise counsel faced disciplinary proceedings or could be liable for his part in the delay in setting aside an erroneous conviction. The court also noted the poor quality of counsel's briefs and that counsel waived oral argument. New appeal ordered.

2. State Cases

1992: *Clark v. State*, 831 P.2d 1374 (Nev. 1992). Counsel had actual conflict and prejudice was presumed where counsel filed civil suit against defendant to resolve retainer issues while representing him in criminal case. Defendant retained counsel to represent him in murder case.

The fee was supposed to come from a personal injury settlement handled by counsel's firm on behalf of defendant. When the settlement proceeds from the personal injury case were disbursed, however, it was discovered that a medical lien had been overlooked. The clinic holding the lien filed a complaint against defendant, his wife, and counsel. Counsel filed a cross-claim against defendant and his wife, and obtained a default judgment against defendant while defendant was in jail awaiting sentencing on his first-degree murder conviction. The appellate court noted that counsel ultimately only got about \$5,000 for representing defendant in murder case. Court expressed concern that this may have caused counsel to be "conservative in his efforts to interview potential witnesses or hire necessary experts," *id.* at 1376, even though the state's case was circumstantial and involved a lot of medical evidence. Court was also concerned that counsel had less incentive in murder case because "an incarcerated client would be less apt to vigorously oppose an entry of default and subsequent enforcement of the civil judgment." *Id.*

Accordingly, we determine that there is a significant possibility that [counsel's] performance was adversely affected by this conflict, or, equally compelling, that the appearance of impropriety created by the conflict was too great to be judicially excused. Under the fact-specific circumstances of this case we conclude that [defendant] was relieved of the obligation to show prejudice.

Id. at 1376-77. Court notes though that this ruling is fact-specific and that *Cuyler* will be applied in other cases.

1991: *People v. Cano*, 581 N.E.2d 236 (Ill. App. 1991). Counsel had actual conflict that adversely affected representation in criminal sexual assault case where defendant filed a grievance against counsel and asserted ineffective assistance. Defendant's complaints were made following trial, but before sentencing. At the hearing on the motion for new trial, counsel informed the court of the grievance. The court considered appointing different counsel but counsel's supervisor informed the court that counsel was the most competent. Counsel proceeded on the motion for new trial. Defendant then requested different counsel and moved to reopen the trial. The court denied new counsel and appointed counsel's supervisor to argue the motion to reopen the trial. The supervisor informed the court of the conflict and asked not to be put in the position of arguing against his subordinate. Defendant later withdrew his pro se motion to reopen the trial and his claims of ineffectiveness and proceeded to sentencing with the original counsel representing him. Counsel had an actual conflict due to the grievance pending against him. "It was possible for [him] to render allegiance to defendant." *Id.* at 241. Counsel's supervisor also had an interest in protecting the professional reputation of his subordinate, which conflicted with defendant's interests. The representation was adversely affected because the court required conflicted counsel to proceed unless defendant withdrew his ineffectiveness claims. This prompted defendant to withdraw his claims. Prejudice presumed.

O. Defendant Alleged Ineffective Assistance or Had Grounds For a Claim

1. U.S. Court of Appeals Cases

1995: *Lopez v. Scully*, 58 F.3d 38 (2nd Cir. 1995). Counsel had actual conflict that adversely affected representation in sentencing where the defendant had asserted improper conduct by counsel. During trial, after several evidentiary rulings against the defendant, defendant plead guilty in exchange for reduced sentence of 18 years. Prior to sentencing, defendant filed pro se motion to withdraw plea, in part, because of alleged coercion and ineffective assistance by counsel. Defense counsel denied defendant's allegations and court denied motion and proceeded to sentencing. Appellate court finds that counsel had an actual conflict due to the allegations against him. Court denies new hearing on motion to withdraw plea because court finds that would have been denied regardless of whether defendant had unconflicted representation or not. Court does grant new sentencing though because counsel's conflict had adverse affect in that counsel made no argument for leniency. The fact that court had previously indicated that she would sentence the defendant to 18 years and would not consider a lower sentence did not matter. Counsel should have argued for leniency in light of a number of mitigating factors. District court found harmless error but appellate court stated, "Harmless error analysis is inappropriate in this context. Once a petitioner has shown that an actual conflict of interest adversely affected defense counsel's performance, prejudice to the petitioner is presumed and no further showing is necessary for reversal." *Id.* at 43.

1986: *United States v. Ellison*, 798 F.2d 1102 (7th Cir. 1986). Counsel had actual conflict that adversely affected representation in motion to withdraw plea to kidnapping where motion based on allegations against counsel. Counsel's representation was adversely affected because he not only failed to represent defendant but testified and denied the allegations.

2. U.S. District Court Cases

2006: *United States v. Livingston*, 425 F. Supp. 2d 554 (D. Del. 2006). Counsel had an actual conflict of interest and was ineffective in felon in possession of weapon case. Counsel had previously represented the defendant on criminal matters and had advised the Defendant that he could possess a gun after he completed his probation for that offense. After the defendant's son accidentally shot a friend with the defendant's gun, counsel advised the defendant that it was "fine" to cooperate with law enforcement. Counsel was retained in an agreement to assign to counsel any money received in connection with the settlement of a pending civil lawsuit being pursued by counsel. Counsel told the defendant that he was charged in error because he was not a felon and erroneously advised the defendant concerning the punishment range if the defendant were convicted. During trial, counsel did not present any evidence that he had advised the defendant that he could own a gun. Counsel also made no argument for leniency in sentencing "because such arguments would have necessarily implicated and exposed [counsel's] incorrect legal advice." If counsel had adequately advised the defendant, the defendant would have plead guilty in order to receive a lesser sentence. Counsel's conduct was deficient because his "legal advice was not just erroneous as a matter of law, it was manifestly unreasonable in light of the totality of the circumstances" and compounded by counsel's failure to take any steps to correct

the misapprehensions created by his erroneous advice. Counsel's fee arrangement was also "questionable ethical conduct." The defendant was prejudiced because, if he had been adequately advised, the defendant likely would have plead guilty in exchange for a lesser sentence.

3. Military Cases

1992: *United States v. Jeter*, 35 M.J. 674 (A.C.M.R. 1992). Counsel in larceny and forgery case had actual conflict of interest in post-trial matters due to accusations of ineffective assistance of counsel. Following the trial, counsel submitted a request for clemency to the convening authority and attached a letter from the accused, which included allegations that she had been denied effective assistance of counsel. The Army Court held that counsel should not have continued representation in light of these allegations because counsel could not adequately represent the accused's interests in these circumstances. Remanded for new post-trial proceedings.

4. State Cases

2008: *State v. Toney*, 187 P.3d 138 (Kan. App. 2008). Counsel had actual conflict of interest that adversely affected representation in post-trial motion to withdraw plea to burglary in exchange for sentence concurrent with previously imposed federal sentence. The defendant asserted counsel was ineffective in failing to investigate. During the hearing, defense counsel suffered "divided loyalties" in that she could not advocate her own ineffectiveness while at the same time defending herself against the allegations. "[H]er conflicted representation necessarily undermined any possibility that [the defendant's] motion would be successful. Under these circumstances, . . . the divided loyalties . . . adversely affected her performance as . . . counsel and created an actual conflict of interest." Remanded for appointment of conflict-free counsel to represent the defendant on his motion to withdraw the plea.

2002: *State v. Griddine*, 75 S.W.3d 741 (Mo. App. 2002). Counsel in rape case had an actual conflict that adversely affected the defendant. The defendant was convicted of forcible rape and sentenced as a prior offender. He appealed, and on appeal was represented by the same counsel. At the start of the appeal, the defendant asked counsel to file a motion challenging counsel's effectiveness at trial. State law at the time allowed only 30 days after the filing of the transcript in his direct appeal to do so. Counsel refused and told the defendant that filing such a motion would hurt the defendant's case and cause him to be incarcerated for a longer period of time. The defendant took counsel's advice and never filed the motion. The direct appeal was denied. Defendant then requested a recall of the mandate because of his counsel's conflict of interest. Actual conflict found because counsel had an interest in protecting his own representation by not filing the ineffectiveness claim. The conflict adversely affected the defendant because the defendant listened to counsel and did not file his claim. He was therefore denied review. As a result, the court recalled the mandate, vacated its previous opinion, and remanded the case to the trial court for resentencing.

2000: *Zeiszler v. State*, 765 So.2d 128 (Fla. App. 2000). Trial court erred in failing to appoint conflict-free counsel to represent defendant on his motion to withdraw a guilty plea where the motion was based, in part, on allegations that counsel coerced him take the plea.

1999: *Blackwood v. State*, 755 So.2d 699 (Fla. App. 1999). Trial court erred in failing to appoint conflict-free counsel in aggravated battery case. The public defender initially moved to withdraw because the office had previously represented the alleged victim. Counsel then asked the court to hold the motion because they were attempting to resolve the case. Counsel represented the defendant in his plea and sentencing and then filed a motion to withdraw the plea based in part on counsel's conflict of interest. Trial court denied. Appellate court held that the defendant was entitled to appointment of new counsel to represent him on his motion to withdraw the guilty plea because the public defender was placed in the "impossible" position of attempting to argue motion to withdraw plea even though he certified that he had conflict of interest in representing defendant.

Padgett v. State, 743 So.2d 70 (Fla. App. 1999). Trial court erred in failing to appoint conflict-free counsel to represent defendant on his motion to withdraw a guilty plea to child sex offenses where the motion was based, in part, on allegations that counsel coerced him take the plea and counsel's and defendant's versions of events were contradictory. Under state law, indigent defendant had the right to new court-appointed counsel in this situation.

State v. Taylor, 1 S.W.3d 610 (Mo. App. 1999). Defense counsel's advice in murder case that client should not file a post-conviction motion asserting ineffectiveness of counsel was actual conflict of interest from which prejudice would be presumed for purposes of supporting recall of appellate mandate. State law at the time allowed only 30 days after the filing of the transcript in his direct appeal to do so. Counsel, who continued representation post-trial, advised the defendant not to file the post-conviction motion but instead to raise all issues as plain error in the direct appeal. None of the claims of ineffective assistance of trial counsel were presented to any court. "A trial attorney's representing a defendant on direct appeal and in a postconviction motion in which the claim is ineffective assistance of trial counsel creates an inherent conflict of interest for the attorney. . . . It puts the attorney in the untenable position of litigating his or her own incompetence." *Id.* at 612. Here, by advising the defendant not to file his motion, counsel, "in essence, was caught between his obligation to do his best for [the defendant] and a desire to protect his own reputation and financial interests." *Id.* Counsel also incorrectly advised the defendant that his claims could be asserted in the direct appeal. Counsel had an actual conflict that adversely affected his representation. Mandate recalled and remanded for resentencing after which the defendant could pursue a new direct appeal and postconviction relief.

1998: *Holifield v. State*, 717 So.2d 69 (Fla. App. 1998). Trial court erred in failing to appoint conflict-free counsel to represent defendant on his motion to withdraw a guilty plea where the motion was based, in part, on allegations that counsel coerced him take the plea

1996: *State v. Harell*, 911 P.2d 1034 (Wash. App. 1996). Trial court erred in failing to appoint unconflicted counsel to argue motion to withdraw guilty plea in rape case. Following guilty plea, defendant moved to withdraw plea due to allegations of ineffective assistance of counsel.

Counsel refused to assist defendant and testified as a witness against him. Court finds that counsel had a conflict and that defendant was essentially denied any counsel on his motion to withdraw plea.

1991: *People v. Cano*, 581 N.E.2d 236 (Ill. App. 1991). Counsel had actual conflict that adversely affected representation in criminal sexual assault case where defendant filed a grievance against counsel and asserted ineffective assistance. Defendant's complaints were made following trial, but before sentencing. At the hearing on the motion for new trial, counsel informed the court of the grievance. The court considered appointing different counsel but counsel's supervisor informed the court that counsel was the most competent. Counsel proceeded on the motion for new trial. Defendant then requested different counsel and moved to reopen the trial. The court denied new counsel and appointed counsel's supervisor to argue the motion to reopen the trial. The supervisor informed the court of the conflict and asked not to be put in the position of arguing against his subordinate. Defendant later withdrew his pro se motion to reopen the trial and his claims of ineffectiveness and proceeded to sentencing with the original counsel representing him. Counsel had an actual conflict due to the grievance pending against him. "It was possible for [him] to render allegiance to defendant." *Id.* at 241. Counsel's supervisor also had an interest in protecting the professional reputation of his subordinate, which conflicted with defendant's interests. The representation was adversely affected because the court required conflicted counsel to proceed unless defendant withdrew his ineffectiveness claims. This prompted defendant to withdraw his claims. Prejudice presumed.

1985: *People v. Willis*, 479 N.E.2d 1184 (Ill. App. 1985). Counsel had conflict that required presumption of prejudice in burglary case where defendant moved to withdraw guilty plea based on part on allegations of ineffective assistance of counsel. Therefore, defendant was entitled to new hearing on his motion to withdraw his guilty plea.

People v. Thompson, 477 N.E.2d 532 (Ill. App. 1985). Counsel had conflict that required presumption of prejudice in armed robbery case where defendant moved to withdraw guilty plea based on part on allegations of ineffective assistance of counsel and was represented by a counsel in the same public defender's office on the motion to withdraw. Therefore, defendant was entitled to new hearing on his motion to withdraw his guilty plea.

P. Conflicting Interests Due to Potential Ethics Violations or Criminal Conduct

1. U.S. Court of Appeals Cases

2004: *United States v. Williams*, 372 F.3d 96 (2nd Cir. 2004). Counsel had actual conflict of interest during pretrial phase of criminal enterprise, money laundering, drugs, and weapons case. Counsel's conflict arose because counsel had engaged in criminal transactions relevant to the defendant's crimes and, in an effort to conceal his own misconduct, actively discouraged the defendant from engaging in plea discussions and cooperating with the government. Three months prior to trial, counsel pled guilty to facilitating the murder of his business partner, money laundering, and drug trafficking. The "requisite adversity" was apparent in counsel's failure to make any effort to negotiate a plea on behalf of the defendant, even though the defendant "may

well have had knowledge valuable to the government, especially at the early stages of the proceedings.” No waiver found because the defendant did not necessarily know the full extent of counsel’s criminal activities of know “how these facts translate into a conflict of interest.” Although counsel’s conflict did not affect the trial, it did affect the “likely result [the defendant] would have obtained had he not had conflicted counsel.” Remanded for the court to determine whether the same sentence would have resulted without conflicted counsel.

2002: *Rubin v. Gee*, 292 F.3d 396 (4th Cir. 2002) (*affirming* 128 F. Supp. 2d 848 (D. Md. 2001)). Counsel in murder case had an actual conflict of interest that adversely affected petitioner’s representation. Following the shooting of her husband, petitioner contacted two attorneys, who both came to the crime scene. After learning that petitioner had taken a lot of medication, the attorneys instructed their assistant to take petitioner to the hospital and have her admitted under a false name. The attorneys notified the police that the victim was dead, but did not disclose any other information. The day after the shooting, one of the lawyers drove Petitioner to the bank to withdraw \$105,000 for counsel’s retainer fee and expenses. The other attorney took the evidence in the case to his office. Only after the attorneys discovered that a warrant was out for petitioner’s arrest did they turn the petitioner in to the police. Counsel then advised petitioner who to retain as her trial counsel. They also remained part of the defense team and continued to collect fees from the petitioner, even though they did not sit at counsel table during her trial. During trial, the state brought out (in cross-examination of petitioner) the events following the homicide, without any mention of the lawyer’s activities, to refute petitioner’s self-defense claim by arguing that she had fled the scene of the crime, lied about her identity, and showed consciousness of guilt. Neither attorney was called to testify. The state court concluded that counsel’s actions following the homicide did not create an actual conflict of interest. The state court also did not consider the continuing effects of counsel’s conflict when evaluating the effectiveness of petitioner’s trial representation. The Fourth Circuit held that this was an “objectively unreasonable” application of clearly established federal law because counsel plainly had a conflict of interest that adversely affected their own performance and the performance of petitioner’s trial counsel. Counsel’s personal interests fundamentally conflicted with the objectives of petitioner’s representation from the moment they arrived at the scene of the crime until the completion of her trial. Counsel utterly failed to function as petitioner’s advocates. Instead, they assisted her in evasive action and functioned almost as accessories after the fact in order to secure their retainer fee. Following counsel’s advice created serious problems for petitioner at trial. Petitioner thus had a strong interest in having counsel testify that she acted on the advice of her own lawyers following the homicide. Counsel had no interest in testifying, however, because of potential criminal charges for obstruction of justice and hindering the apprehension of a criminal defendant. In fact, both counsel were the subject of a grand jury investigation that began prior to petitioner’s trial and continued until after it was complete. One of the attorneys had even engaged his own attorney to represent him in the investigation. Furthermore, both attorneys were also the targets of an inquiry by the Maryland Attorney Grievance Commission during which they had to justify the \$150,000 fee they eventually collected for representing petitioner. Given these facts, the Fourth Circuit said, “At all times, the attorneys’ fidelity to their own interests superseded any sense of obligation they may have had to their client.” *Id.* at 404. Counsel’s continued representation of petitioner was adversely affected by their conflict of interest. They cloaked themselves in the attorney-client privilege to assure

that they would not be asked to testify at trial and never considered withdrawing so they could testify and assist petitioner as witnesses. Counsel's conflict of interest also ultimately tainted and adversely affected petitioner's representation by her three trial attorneys. Counsel "violated the most basic principles of the attorney-client compact from the beginning to the end. . . . The taint from their conflict of interest could not be cleansed simply by bringing in independent counsel to make trial decisions." *Id.* at 405. The state court decision to the contrary was an objectively unreasonable application of the *Cuyler v. Sullivan* standard. Counsel's "representation of Rubin was more than ineffective - it was a perversion of the attorney-client relationship. [Counsel's] conflict of interest was so severe that it led to a corruption of the adversarial process that our system relies on to produce just results. It is hard to imagine a case that would call the fundamental fairness of a trial into more question than this one. What happened here should never happen in our system. Rubin is entitled to a new trial with conflict-free representation." *Id.* at 406.

1993: *United States v. Fulton*, 5 F.3d 605 (2nd Cir. 1993). Counsel had an actual conflict in drug case where a government witness, who was a cooperating co-defendant, alleged, during trial, that he had once imported drugs for counsel. This created one of two actual conflicts. First, if the allegations were true, counsel would fear that a spirited defense when disclose evidence of counsel's guilt or provoke the government to pursue action against him. Second, even if the allegations were false, the defense would be impaired in cross-examination because it would put counsel in the position of being an unsworn witness. "However viewed, the allegations present an actual conflict." This conflict was "of the sort that requires application of the *per se* rule" and automatic reversal. In addition, the defendant's purported waiver was invalid. "Where a government witness implicates defense counsel in a related crime, the resultant conflict so permeates the defense that no meaningful waiver can be obtained."

1992: *United States v. Greig*, 967 F.2d 1018 (5th Cir. 1992). Trial court erred in drug conspiracy case for failing to inquire after the court learned that counsel had an actual conflict of interest due to counsel's unethical and criminal conduct in approaching codefendant without his counsel's permission. Defendant was along with several codefendants. Prior to trial, a codefendant's counsel informed the court that defendant and defendant's counsel had improperly approached his client several times without permission and advised that client to reject his counsel's plea negotiations, which required testimony against the defendant, and to seek different counsel. The court informed defendant's counsel that disciplinary proceedings would be held but went forward with the trial without inquiry. The court held a hearing on the issue following conviction but did not rule. At the defendant's sentencing, the court increased the guidelines level finding obstruction of justice for the defendant's part in acting with his counsel in discussions with codefendant. Following sentencing the court permanently barred counsel from appearing in the District Court again. The Fifth Circuit held that the trial court erred in not conducting a hearing to determine whether defendant was fully informed of this counsel's ethical violations and whether he desired to continue with representation. "While we recognize that a trial court does not always have an affirmative duty to inquire into the possibility of a conflict of interest, it does have a duty to conduct a hearing once it has been alerted and certainly when it knows of the existence of an actual conflict of interest." *Id.* at 1022. There was an actual conflict here that required inquiry because "counsel was in the position of simultaneously having

to defend himself as well as his client regarding their potentially criminal activity. Like his client, counsel was open to an indictment for obstruction of justice. . . . At the very least, counsel faced severe disciplinary measures, including monetary sanctions, and indeed the very loss of the right to appear as counsel in the whole Western District of Texas. His alleged conduct was highly unethical and clearly violated the Model Code of Professional Responsibility as well as the American Bar Association's Model Rules of Professional Conduct." *Id.* at 1022-23. Because the trial court conducted no inquiry, there could be no finding of a knowing and intelligent waiver of the conflict. The court required, however, that defendant establish that counsel's representation was adversely affected by the representation. Adverse affect shown because counsel would have been preoccupied during trial with his own thoughts of the pending disciplinary proceedings and possible indictment. Likewise, during the codefendant's testimony, counsel did not object to discussions of meetings with defendant and his counsel and only cross-examined the codefendant to try to minimize his own improper acts. Further, at the hearing concerning counsel's actions, counsel questioned defendant in a fashion to shift responsibility to him. And, this hearing was prior to sentencing and adversely impacted the defendant. New trial granted.

1991: *United States v. Tatum*, 943 F.2d 370 (4th Cir. 1991). Counsel had actual conflict in bankruptcy case that adversely affected representation where counsel was a member of a law firm implicated in crimes and counsel had previously represented a government witness, who was also his law partner, in the same proceeding. Defendant, who was in the business of restoring expensive and collectible automobiles, filed bankruptcy petition but hid three cars from the trustee and creditors, allegedly upon advice of counsel. The cars were transferred to one of counsel's law partners. During the grand jury proceedings, defendant, his business partner, and the lawyer that obtained the cars were all represented by a different lawyer in the same firm as bankruptcy counsel and the lawyer that obtained the cars. After the government notified the firm of its concern about the conflicts (but only several months prior to trial), an outside lawyer entered an appearance and conducted the trial, but conflicted counsel was present and assisting him. The government informed the court of the conflicts but the court did nothing. The Fourth Circuit held that counsel had an actual conflict because counsel could not assert that defendant relied on the advice of counsel without inculcating his law partners and increasing the risk of civil malpractice liability of the firm. Counsel also had a conflict because counsel could not present himself as a witness concerning a "missing file" from the law firm that defendant claimed contained exculpatory information. Counsel also had a conflict because counsel had represented the defendant's business partner, who was the government's primary witness, in the grand jury proceedings. Counsel also had a conflict because his law partners, the one that obtained the cars and the one that advised defendant in the bankruptcy proceedings, were witnesses during the trial. Counsel's conduct was adversely affected because counsel could not seek a plea agreement for defendant to testify against his law partners. He also could not call himself to testify concerning the missing file or effectively cross-examine his partners or his former client at trial. The fact that outside counsel conducted the trial did not change the required result because that counsel entered the case only several months prior to trial and relied heavily on conflicted counsel's knowledge of the facts and prior proceedings. Thus, outside counsel's performance was infected by the conflicts.

1988: *Mannhalt v. Reed*, 847 F.2d 576 (9th Cir. 1988). Counsel had conflict in robbery and possession of stolen property case that adversely affected representation where counsel was implicated in purchasing stolen goods from a codefendant/witness. Following the witness' testimony that counsel had purchased stolen goods from him, counsel offered his own unsworn testimony that the accusation was false, but did not actually testify. Counsel also failed to question the defendant in his testimony about whether counsel had ever purchased stolen property. "Although *Cuylar* involved a conflict of interest between clients, . . . the presumption of prejudice extends to a conflict between a client and his lawyer's personal interest." *Id.* at 580.

We find that when an attorney is accused of crimes similar or related to those of his client, an actual conflict exists because the potential for diminished effectiveness in representation is so great. For example, a vigorous defense might uncover evidence of the attorney's own crimes, and the attorney could not give unbiased advice to his client about whether to testify or whether to accept a guilty plea.

Id. at 581. Counsel's representation was also adversely affected in four areas: 1) counsel's failure to testify to rebut the witness' allegations, 2) counsel's cross-examination of the witness, 3) counsel's failure to question the defendant on direct about the allegations, and 4) counsel's failure to explore possible plea bargains for defendant to testify against counsel.

1984: *United States v. Cancilla*, 725 F.2d 867 (2nd Cir. 1984). Counsel had conflict that required presumption of prejudice in mail fraud case where counsel was implicated in same crime. During appeal process, information emerged that tended to implicate counsel in criminal dealings with defendant and codefendants before their arrest. The court held that prejudice would be presumed in these circumstances.

Gov' of Virgin Islands v. Zepp, 748 F.2d 125 (3d Cir. 1984). Counsel had conflict that adversely affected representation in drug case where counsel faced potential criminal liability on the same charges and stimulated testimony that was adverse to defendant. Defendant faced charges of destruction of evidence and simple possession of a controlled substance. Even though there was no direct evidence of wrongdoing by defense counsel, on day of events giving rise to the prosecution, defense counsel had equal access and opportunity, while in house with defendant, to flush cocaine down the toilet. Bags of cocaine were later recovered from the house's septic tank.

2. U.S. District Court Cases

2004: *Rugiero v. United States*, 330 F. Supp. 2d 900 (E.D. Mich. 2004). Counsel had an actual conflict of interest that adversely affected representation in drug case because counsel was the subject of a criminal investigation by the same prosecutor during the pretrial and trial proceedings. Counsel was being investigated for possible extortion, money laundering, and conspiracy and was aware of the investigation well prior to trial. The defendant did not learn of the investigation until the time of jury deliberations when the defendant saw TV broadcasts about the government's intent to indict counsel. Although the court acknowledged the dicta in

Mickens v. Taylor, 535 U.S. 162 (2002), the court held that the rule in the Sixth Circuit is that the *Cuyler v. Sullivan* standard applies in all conflict cases. The court found an actual conflict because of “the attorney’s obvious self-serving bias in protecting his own liberty interests and financial interests.” The conflict adversely affected counsel’s performance in a number of ways. First, counsel did not pursue pre-trial negotiations because he was being investigated for taking unreported large cash payments and had solicited large cash payments from the defendant. Thus, counsel’s interest was to keep the defendant away from negotiations. Second, counsel delayed the defendant’s trial in order to delay his own case. The delay resulted in the government strengthening its case against the defendant by gaining the cooperation of co-defendants. Third, counsel failed to protect the defendant when a key government witness violated a sequestration order. Rather than fight on this issue, counsel “curried favor” with the government. Fourth, although the court polled the jurors about the impact of TV broadcasts concerning counsel, counsel’s presence at the time called into question the reliability of the juror’s responses. Counsel’s presence and questioning were “manipulated” by counsel contrary to the defendant’s interests. Reversal was required, even though the defendant subsequently retained counsel to continue representation during the sentencing and appeal.

3. U.S. Military Cases

2004: *United States v. Cain*, 59 M.J. 285 (C.A.A.F. 2004). Counsel had an inherent conflict in indecent assault plea case because of his homosexual affair with the Appellant, which could have resulted in counsel being charged with the same offenses that the Appellant already faced. Appellant was charged with three specifications of homosexual forcible sodomy. The Senior Defense Counsel assigned himself to represent the Appellant. Due to his case load, counsel detailed an assistant defense counsel. Appellant entered a negotiated plea to two specifications of indecent assault, in exchange for dismissal of the third forcible sodomy specification and a sentence limitation of 24 months confinement. Shortly after the plea, counsel was questioned about Appellant’s parents’ allegations that counsel had pressured the Appellant for sexual favors. Counsel denied the allegations, but committed suicide the next morning. On appeal, the Army Court ordered an evidentiary hearing. The evidence showed that counsel had a sexual relationship with the Appellant from the outset and that the relationship was initiated by counsel. Appellant did not want to engage in a sexual relationship with counsel, who was married and had a son, but believed that he would go to prison for a long-time without counsel as his attorney. Although he was advised by several civilian attorneys to seek other counsel, he did not. While the court found that there was a relationship between counsel and the Appellant, the court found that it was not coerced and played no role in the guilty plea. The court also found that Appellant had waived any conflict of interest when he declined to follow the recommendation of the two civilian attorneys to sever his relationship with counsel. The Court of Appeals for the Armed Forces held that counsel’s actions exposed him and the Appellant to the possibility of prosecution, conviction, and substantial confinement for the military crimes of fraternization and sodomy (which Appellant was already charged with). Likewise, counsel’s actions exposed him and the Appellant to administrative proceedings that could have resulted in involuntary termination for homosexuality. Counsel’s actions also violated ethical rules. Under these circumstances, any testimony by the Appellant at trial would have been risky to defense counsel because the prosecution might have sought to question Appellant about similar sexual

misconduct. Thus, counsel faced a conflict between his personal interests and his responsibility to Appellant. The court held that “[t]he uniquely proscribed relationship before us was inherently prejudicial and created a per se conflict of interest in counsel's representation of the Appellant.” The problems from this conflict are not overcome by the actions of the assistant defense counsel, who negotiated the pretrial agreement, because conflicted counsel was the experienced, lead counsel in the case. The Court rejected a finding of waiver because, while Appellant had been advised that counsel's conduct was unethical, he was not advised that the relationship could impact the merits of his case. Thus, there was no knowing and intelligent waiver.

4. State Cases

2009: *People v. Curren*, 228 P.3d 253 (Colo. App. 2009). Counsel had an actual conflict of interest in murder case because the defendant alleged to a second counsel that counsel advised him to flee to Mexico following his arrest for the murders. The defendant had retained second counsel to review original counsel's work because of concern that original counsel was not adequately preparing for trial. During this review, the second counsel disclosed to original counsel the defendant's allegations, which upset original counsel and prompted him to refuse cooperation with second counsel. Original counsel's law partner met with the defendant about the conflict and told him he would have to choose either original counsel or second counsel. He chose original counsel. No one ever informed the court of the problem, however, as was required by state law so there was no valid waiver of the conflict. During trial, counsel's motion to exclude evidence of the defendant's absconding to Mexico was granted. The defendant did not testify. Counsel had “conflicting interests [that] were not trivial.” Even if the defendant's allegations were “not based in fact,” counsel faced possible sanctions for unethical conduct or even criminal implications. “An actual conflict of interest arises when it places counsel in the position of having to simultaneously defend his or her client and himself or herself, particularly in those instances in which counsel faces professional and criminal sanctions.” Counsel's conflict adversely affected the representation as he advised the defendant not to testify, which could open the door to testimony that the defendant had absconded to Mexico prior to trial.

2001: *State v. Martinez*, 31 P.3d 1018 (N.M. App. 2001). Counsel in murder case had conflict due to his own self-interest and possible implication in the murder that adversely affected representation. Witness testified that she saw three men beating the victim inside a home. The victim ran out and was shot. The witness left and called 911. She gave only a general description of the shooter. When the police arrived, defendant was standing over the body. The witness returned and said that he fit the description of the shooter. At the preliminary hearing, the witness testified that she had learned that defense counsel's car was at the murder scene following the shooting and she observed that the defense counsel fit the general description of the shooter as well. Counsel did not move to preclude the information about his vehicle being at the scene or withdrew. Likewise, the trial court (not the same as preliminary hearing) was not notified of the problem. During trial, the state presented evidence that defense counsel's vehicle was at the scene following the murder. There was also evidence suggesting that a white car described by the witness as having been there after the murder (and, given tire track evidence, possibly at the time of the murder) was owned by an employee of defense counsel's law firm.

After the state's evidence, the court questioned the propriety of defense counsel's representation since there was evidence that he was at the crime scene and the jury could infer from the evidence that counsel's employee removed the murder weapon, which was never found, from the scene. The court also observed that the defendant at the scene requested that his hands be tested for gunpowder residue and counsel made the same request the following morning from which the jury could infer that counsel had been there and advised the defendant to make the request. Counsel stated that he had not been at the scene, but that he and the defendant were business partners and the defendant often drove counsel's vehicle. Counsel also stated that the defendant informed him that counsel's employee had not been to the scene on the night of the murder. Counsel even denied that the employee worked for him, although the court observed that he had been in the courtroom assisting counsel during the trial. Following these discussions, which the defendant heard, the court simply asked him if wanted to continue with counsel's representation. The defendant responded that he did because he just wanted to get the trial over with. The trial continued. During the defendant's testimony, counsel asked fourteen questions on the collateral issue of why his vehicle had been at the scene. The defendant also testified that counsel's employee had been to the house earlier in the day but was not there at the time of the murder. Defendant claimed that victim was leaving his home when he heard a shot and went out to find the victim dead. The prosecution argued on the basis of tire track evidence showing the investigator's car left after the witness though that the defendant was lying. Counsel did not rebut this evidence, but instead argued only that if someone left the scene the defendant would have gone too. Counsel also did not argue the person driving the car leaving the scene was the real killer. Counsel had a conflict due to his own self-interest in not being implicated in the murder. If he was present at the crime scene, then he was not in a position to give unbiased advice to the defendant. If he was not present, then he should have considered testifying to clear up the suspicion that he was present and advising the defendant at the time. The representation was adversely affected because counsel did not call his employee to testify. Counsel also could have persuaded the defendant not to testify and argued to implicate the driver of the car leaving the scene, which he could not do, of course, because the driver worked for him. This theory though was plausible under the state's evidence and also would have explained the absence of the murder weapon. Prejudice is presumed. Court also found that defendant did not make a knowing and intelligent waiver because the trial court never asked the defendant if he understood the nature of the conflict or if he understood that he had a constitutional right to conflict-free counsel.

1998: **In re Gay*, 968 P.2d 476 (Cal. 1998). Counsel had several conflicts, including pending charges against him in the same jurisdiction. The cumulative prejudice of the conflicts, in addition, to overall ineffective representation in sentencing required that death sentence be vacated. Defendant was charged with killing a police officer and numerous armed robberies. The defense counsel tricked the defendant into retaining him with the help of a psychologist/minister and then got himself appointed. Counsel then advised the defendant to confess to the numerous armed robbery charges, based on an alleged deal that the defense did not have, even though the state's evidence was based only on weak circumstantial evidence and accomplice testimony. The confession allowed the state to convict and to portray the defendant as a serial robber, which was devastating in light of the absence of substantial mitigating evidence in sentencing. Counsel then selected and used the psychologist and a psychiatrist based on a fee arrangement. The

psychologist would help trick people to get the attorney retained and in turn the attorney would retain these “experts” who worked together. The psychiatrist was unwilling to take the case if extensive work was required, but counsel assured him that death was a foregone conclusion and extensive time was not required. The psychologist, who was not licensed, did only a Bender Gestalt (neuropsychological screening test) and a WISC test, which is a children’s intelligence test. The psychiatrist interviewed the defendant and reviewed a single parole report. He did not request and was not provided with any additional information. He testified only that the defendant is sociopathic, but adapts well to structured environments. A few other defense witnesses that counsel spoke to briefly, if at all, prior to their testimony, testified that the defendant has good character. Counsel was ineffective for numerous reasons. In addition to all of these problems, during his representation of the defendant, counsel was being investigated by the same prosecutor for misappropriation of funds, which presented a potential conflict of interest that was undisclosed. “Whether [counsel’s] failure to aggressively defend petitioner at the penalty phase of the trial is solely attributable to the conflict precipitated by the capping relationship or was influenced by the distraction of the fund misappropriation investigation cannot be determined on this record. The per se rule of prejudice arising from an actual conflict of interest does not apply therefore. Nonetheless these conflicts contribute to our lack of confidence in the verdict when considered with [counsel’s] other failings.” *Id.* at 510-11 (citation omitted).

1995: *Burnside v. State*, 656 So.2d 241 (Fla. App. 1995). Counsel had actual conflict of interest that adversely affected representation where counsel was implicated with possible unethical behavior in offering to sell the defendant’s testimony to a codefendant. Defendant was charged conspiracy and murder. He was persuaded, along with codefendant one to arrange the murder of the wife of codefendant two. He hired codefendant three to carry out the murder. Codefendant three instead murdered four men at the wife’s home. Defendant then furnished money for codefendant three to flee the state. Defendant initially attempted to work out a deal with the government to testify against codefendant two, and made statements to the government. He was then listed as a witness for the government. Defendant’s counsel then approached codefendant two’s counsel to discuss possible favorable testimony for codefendant two. Codefendant two’s counsel understood this to mean that the defendant was offering perjured testimony in exchange for financial assistance to defendant’s family. The government filed a bar complaint and defendant’s counsel answered that he just passed along the defendant’s message in an attempt to inform codefendant two’s counsel of defendant’s propensity to lie. The government then placed counsel on its witness list to rebut the defendant’s testimony if he strayed from his prior statements to the government and moved to disqualify counsel. Defendant moved to strike counsel from the witness list and opposed the motion to disqualify. The court refused to strike counsel as a potential rebuttal witness, but denied the motion to disqualify counsel. Appellate court held that counsel had an actual conflict “because of the state’s threat to call trial counsel as a witness if [the defendant] testified contrary to his proffer, trial counsel had a personal stake in the decision whether to put [the defendant] on the stand. That is, if [the defendant] did not testify, trial counsel would avoid again having to give sworn testimony regarding the alleged offer to sell testimony.” *Id.* at 244. Adverse affect on representation found where counsel advised defendant not to testify when defendant could have testified that the murders of the four men were not part of the conspiracy to kill codefendant two’s wife.

People v. Jackson, 218 A.D.2d 556 (N.Y. App. Div. 1995). Trial counsel created an actual conflict when he testified in rebuttal in robbery and endangering welfare of child case and distanced himself from his client. In response to prosecution witness's testimony that defendant offered him \$150 to provide false alibi testimony, which was allowed over defense objection (also found improper on appeal), defense counsel took stand and testified that he told defendant to tell that witness that, if he appeared, he would get witness appearance fee, if necessary. Reversal required because when defense counsel took the witness stand, he essentially distanced himself from defendant's alleged bribe offer. Since that conflict actually operated on the conduct of the defense, the judgment had to be reversed and the case remanded for a new trial.

1991: *State v. Johnson*, 823 P.2d 484 (Utah App. 1991). Counsel had an actual conflict of interest in securities law case that adversely affected representation where counsel was implicated as a conspirator. Prior to trial, the state notified the court of the potential conflict. Counsel denied involvement and asserted that he would call the defendant to rebut any such allegations. Defendant stated that he wished to proceed with counsel. During trial, a codefendant that had plead guilty testified that he, the defendant, and counsel had committed the crimes. Counsel had an actual conflict because his interest in exonerating himself was not consistent with defending his client. The adverse affect of the conflict was apparent in counsel's questioning of the codefendant only in an attempt to exonerate himself, failure to call the defendant as a witness, and his failure to object to the state's closing argument. The allegations against counsel also affected his integrity and credibility, which made him less effective as counsel. The purported waiver of the conflict was not valid because it was based on counsel's statement that he would not be implicated and if he was it would be rebutted with defendant's testimony. This did not happen. Moreover, while defendant was advised that counsel could not be a witness and counsel in the same proceeding, he was not advised of the possible effects on the jury if his defense counsel were implicated in the crimes.

1989: *Nunn v. State*, 778 S.W.2d 707 (Mo. App. 1989). Counsel had an actual conflict that adversely affected representation in arson case where counsel testified and counsel was implicated in possible ethical misconduct related to the case. Prior to trial, counsel interviewed three state's witnesses by phone and tape-recorded the calls without the witness' knowledge. Counsel also subpoenaed one state witness to his office for a deposition without notifying the state and without actually setting up a deposition. At trial, this witness testified and denied talking to counsel on the phone. Counsel then called himself to testify concerning the witness' prior inconsistent statement and had his brother who was also a lawyer conduct the examination. During cross, the state brought out the tape-recording and subpoena activities. Counsel then resumed representation and called a former law clerk as a witness to testify that he and not counsel was responsible for the subpoena. During closing, the state vigorously attacked counsel's credibility. Court found an actual conflict for four reasons. First counsel had an obvious interest in the outcome of the case because he was retained, not appointed. Second, through its intimation of impropriety in counsel's tape-recording telephone conversations without the other side's knowledge and issuing a subpoena for an improper purpose, the state made defense counsel's credibility an issue for the jury. Third, defense counsel called a witness for the sole purpose of rehabilitating defense counsel's own credibility. Finally, defense

counsel's appearance in the inconsistent roles of advocate and witness may have undermined the jury's ability to decide the facts and its perception of movant. The court held that counsel should have withdrawn when he decided to testify.

Counsel was caught between the obligation to do his best for movant and the need to justify his own conduct as legal and ethical. An accused is entitled to representation which is uncluttered by counsel's efforts to vindicate his own conduct. A conflict of interest resulting in ineffective assistance of counsel may arise from an interest adverse to the accused or an interest simply personal to the attorney.

The only issue which should have been before the jury was defendant's conduct, not that of his attorney.

Id. at 711 (citations omitted). Adverse affect was clear since counsel injected his credibility as an issue and the jury may have "unintentionally imputed the alleged improprieties of defense counsel to his client." *Id.*

1987: *Morales v. State*, 513 So.2d 695 (Fla. App. 1987). Counsel had actual conflict that adversely affected representation in robbery case where counsel had instructed defendant to unlawfully tape record conversation with codefendant who testified for state, but counsel did not use tape to impeach witness because of concerns about the propriety of his actions.

State v. Cyrs, 529 A.2d 947 (N.H. 1987). Counsel had conflict in drug case that required per se reversal where counsel was a state's witness against confidential informant and in order to avoid those charges informant agreed to be a confidential informant against defendant. Counsel also had a conflict because counsel was the subject of the same drug investigation in which the defendant was implicated. Prosecutor had inferential knowledge of those conflicts but did not notify the court. The prosecutor's silence also required reversal.

1986: *Smith v. State*, 717 P.2d 402 (Alaska App. 1986). Counsel had conflict that required presumption of prejudice in rape case where counsel failed to adequately advise defendant, due in part, to concerns about ethics. Defendant had entered into agreement to be tried on one of two rape charges, and to have second charge dismissed if he were acquitted, but to plead guilty to second charge if he were convicted. He was under no legally enforceable obligation to enter a plea of guilty to the second charge after he was convicted on the first charge, but defense counsel did not inform defendant of his right to persist in a plea of not guilty to second charge. Because of the manner in which this "double or nothing" plea agreement was implemented in this case, defendant's counsel may have considered himself foreclosed as a matter of both personal integrity and professional ethics from giving defendant any advice that would encourage him to renege on the agreement. To the extent that this precluded counsel from fully advising his client of the options legally open to him, however, the concern of counsel with his own ethical and moral dilemma was squarely at odds with his duty to protect his client's interest conscientiously, undeflected by conflicting considerations. If counsel believed himself precluded from informing defendant of his right to persist in his plea of no contest, then, the court opined, he was under a

duty to seek withdrawal from the case. Trial court's order denying motion to withdraw plea reversed.

1985: **State v. Chandler*, 698 S.W.2d 844 (Mo. 1985). Counsel had conflict that adversely affected representation in murder case where counsel X was implicated in the same murder and had been represented by counsel Y when counsel X was indicted but the charge was later dismissed and counsel X paid counsel Y to represent defendant. The victim was an attorney. The defendant's brother, who was represented by counsel X at the time of his initial statements, implicated defendant in murder and testified at trial that he stood watch while defendant and another brother committed murder. The other brother that had already been convicted of murder and sentenced to death had initially been represented by counsel X but discharged him and testified before a grand jury that defendant was hired by counsel X to kill the victim. He testified in a deposition that he committed the murder alone and defendant had nothing to do with it. Adverse affect shown because counsel did not call this brother, who exculpated defendant to testify allegedly because he had no credibility. Defendant was entitled to counsel that could make decision whether to call the brother or not without a conflict.

1982: *State v. Loye*, 289 S.E.2d 860 (N.C. App. 1982). Counsel had a conflict that required presumption of prejudice in robbery case where counsel was under investigation for his own participation in criminal conduct involving the defendant.

Q. Counsel Had Conflicting Interests Due to Financial Interest or Connection or Clear Sympathies with Prosecutor, Law Enforcement, or Judge

1. U.S. Court of Appeals Cases

2008: 1997: *Blankenship v. Johnson*, 118 F.3d 312 (5th Cir. 1997). Appellate counsel had a conflict of interest that adversely affected representation in discretionary review process in Texas Court of Criminal Appeals. Defendant was convicted of aggravated robbery. On direct appeal to the Court of Appeals, the conviction was reversed. By the time of the reversal, counsel had been elected as county attorney. Counsel did not withdraw or inform the defendant though. The state sought discretionary review in the Court of Criminal Appeals, which was granted, and the defendant's conviction reinstated without response from counsel, who was aware of the proceedings. Counsel had an actual conflict because he was serving as a prosecutor. The adverse affect was clear because counsel did nothing and did not even inform his client that he was no longer representing him until after the defendant's conviction had been reinstated. Prejudice presumed.

**Rickman v. Bell*, 131 F.3d 1150 (6th Cir. 1997) (*affirming* 864 F. Supp. 686 (M.D. Tenn. 1994)). Counsel had conflict due to his sympathies with the prosecution case that adversely affected his representation and resulted in constructive denial of counsel. Defendant was charged with murder, rape, and kidnapping as a contract killer hired by the victim's husband to kill his wife. During trial, counsel "combined a total failure to actively advocate his client's cause with repeated expressions of contempt for his client for his alleged actions. The effect of all this was to provide [the defendant] not with a defense counsel, but with a second prosecutor."

Id. at 1157. Following his initial meeting with client, when client confirmed that his statement to police was true, counsel did not interview any witnesses, conduct any legal research, or obtain and review any records. Counsel spent only 16 hours preparing for trial and his preparation consisted solely of meetings with the defendant. During trial, counsel pursued “a strategy” to convince the jury that the defendant was a sick man. The appellate court observed though, “In our view, [the defendant] would have been better off to have been merely denied counsel; as it was, he had to endure attacks from his own attorney that equaled or exceeded those of the prosecution.” *Id.* at 1157. What counsel actually did “was to convey to the jurors an unmistakable personal antagonism toward [the defendant], characterized both by attacks on [the defendant] and by repeatedly eliciting information detrimental to [the defendant’s] interests.” *Id.* at 1158. Counsel elicited testimony of careful planning when the facts suggested otherwise. He also elicited testimony of the defendant’s alleged threats to commit other crimes. His attacks “took the form of portraying [the defendant] as crazed and dangerous.” *Id.* During sentencing phase arguments, counsel even apologized to the prosecutors and said that he was ashamed to represent the defendant. The court views this abandonment of the duty of loyalty as a conflict of interest. “[A]n attorney who is burdened by a conflict between his client’s interests *and his own sympathies* to the prosecution’s position is considerably worse than an attorney with loyalty to other defendants, because the interests of the state and the defendant are necessarily in opposition.” *Id.* at 1159 (quoting *Osborn v. Shillinger*, 861 F.2d 612, 629 (10th Cir.1988) (emphasis added)).

1991: *United States v. Swanson*, 943 F.2d 1070 (9th Cir. 1991). Prejudice presumed where counsel conceded defendant’s guilt in his closing argument in bank robbery case. The Ninth Circuit held that this abandonment of the duty of loyalty by assisting the prosecutor created a conflict of interest.

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

defendant was the ringleader because counsel believed this to be correct. “[T]hat conflicting evidence existed was apparently of no moment to him. Defense counsel must present conflicting evidence to the court, not judge the issue for himself.” During sentencing, counsel also violated the duty of loyalty by stressing the brutality of the crimes and compared his client to “sharks feeding in the ocean in a frenzy; something that’s just animal in all aspects.” *Id.* Following the trial, even though counsel still represented defendant on appeal, counsel, in an evaluation of the trial judge, informed the judge in a letter that his client deserved the death penalty.

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

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

1986: *United States ex rel. Duncan v. O’Leary*, 806 F.2d 1307 (7th Cir. 1986). Counsel had actual conflict that adversely affected representation in murder case where counsel conspired with the prosecutor and a police officer, who was the prosecutor’s girlfriend, to get defendant to retain him. Counsel was manager of the prosecuting attorney’s campaign for state’s attorney and they believed that it would be good for the campaign for counsel to represent defendant. Counsel entered appearance as petitioner’s attorney less than ten days before trial, but did not seek continuance, failed to interview state’s witnesses, and his cross-examination of those witnesses at trial was rather limited.

1985: *Wilson v. Mintzes*, 761 F.2d 275 (6th Cir. 1985). Counsel had conflict that adversely affected representation in rape case where counsel informed the jury that he no longer represented the defendant and refused to cross-examine a witness after the trial court questioned his competence. “[C]ounsel’s decision to continue his battle of wits with the trial judge rather than attend to his client’s case” constituted a conflict. *Id.* at 286. “[C]ounsel’s loyalty to his own interests rather than those of his client adversely affected his performance in terms of appearance before the jury as well as his tactical conduct of the case.” *Id.* at 287.

Walberg v. Israel, 766 F.2d 1071 (7th Cir. 1985). Counsel had conflict and prejudice was presumed since the trial court created the conflict by his bias against counsel, which would have caused counsel concern that he would not get paid or appointed on other cases if he represented defendant vigorously. The trial judge was outwardly biased against defense counsel during pre-trial hearings, disrupted the mode of witness examination by answering for the witness, and relayed thinly veiled threats to never appoint defense counsel to another case or to pay him. The court’s actions created a conflict between the defendant and counsel that opened the door to a potentially less-than-vigorous defense because “the state, here in the person of the trial judge,

‘interfered in certain ways with the ability of counsel to make independent decisions about how to conduct the defense.’” *Id.* at 1076 (quoting *Strickland*, 104 S. Ct. at 2064). “It is not right that the state should be able to say, ‘sure, we impeded your defense-now prove it made a difference.’” *Id.*

2. U.S. District Court Cases

2005: **Stitt v. United States*, 369 F. Supp. 2d 679 (E.D. Va. 2005). Retained counsel in capital trial had an actual conflict of interest that adversely affected representation due to counsel’s own personal, financial conflicting interests. While there was no written fee arrangement, counsel were paid a flat fee for their services (although the source of the payments was unclear), with costs and expenses to be paid by Petitioner’s family as they arose. The court found counsel was “not credible in answering questions about the source of the funds, his expenditures, and his record-keeping.” The court also found that counsel “sought to avoid a Court inquiry into the source of funds paid to him in order to protect his own self-interest.” The conflict arose because counsel intended to hire a number of experts but knew the family could not pay for the services. Nonetheless, counsel never discussed with petitioner the possibility of having the court appoint the experts.

[Counsel] took it upon himself to determine that the inquiry which would accompany a request for appointed experts would cause too many problems, problems which [counsel] cannot-or will not-now articulate to the Court. However, [counsel] does make clear that his concern was not only for the protection of his client and his client's family. [Counsel] also sought to protect his own financial interests because of the Government's inquiry into the source of payments made to him. . . . It is obvious that [counsel] labored under an actual conflict of interest.

The conflict adversely affected performance because, rather than request funding for the experts counsel wanted to use, including Mark Cunningham, Ph.D., he “settled on one expert he could afford” and did so “solely . . . because of the financial situation. This is not a reasonable basis for the decision” since counsel could have obtained court-appointed experts. The court found that Dr. Cunningham would have been the stronger expert and that a mitigation investigator might have discovered more thorough documentation of the Petitioner’s background. Prejudice presumed.

1994: *United States v. Harris*, 846 F. Supp. 121 (D.D.C. 1994). Counsel had actual conflict of interest that adversely affected representation in drug distribution case. Defendant was charged following execution of a search warrant. Counsel was appointed. Before meeting with defendant, counsel questioned a police officer, her lover, about his role in the arrest. He told her that he was present at the scene but had no knowledge of the arrest of defendant but had been involved in the arrest of the codefendant. During the joint trial, counsel’s lover testified. In addition to discussing the arrest of the codefendant, he stated that he was present during portions of the defendant’ arrest. During the entire period of counsel’s representation of defendant, she was involved in a longstanding, adulterous, intimate affair with her officer lover. He even had a

key to her home. The court found that defense counsel's substantial personal relationship with an adverse witness in the case established an actual conflict of interest. Adverse affect found because the officer's testimony conflicted with other accounts of the circumstances surrounding the execution of the search warrant that led to the arrest but counsel failed to adequately exploit these differences on cross-examination. Codefendant's counsel used this tactic on the jury hung in his case.

1991: *United States v. Marshank*, 777 F. Supp. 1507 (N.D. Cal. 1991). Government's collaboration with defendant's attorney during investigation and prosecution of drug case violated defendant's Fifth and Sixth Amendment rights and required dismissal of the indictment. Counsel assisted the government by bringing in several clients, who were not charged or being investigated, to offer information in exchange for immunity. Based on information they provided, the government initially targeted an "insider" in the drug operation. Counsel contacted a former client, who was already indicted on charges, and arranged for him to surrender and cooperate. He provided information that led to indictment of another of counsel's former clients, who on the advice of counsel also cooperated and provided information that led to defendant's indictment. In the initial grand jury proceedings, all of the witnesses were clients of counsel. When the defendant was arrested, law enforcement, who had been working with counsel, encouraged the defendant to call an attorney. Defendant called the same counsel, who had previously represented him in divorce proceedings and with whom he had an ongoing relationship. Counsel advised him to provide some incriminating information as a showing of good faith when the government had not even been aware of the information. Ultimately, defendant retained separate counsel. The initial indictment was dismissed. In the second grand jury proceedings, counsel even testified against the defendant. [There's more to the horror story, but you get the picture]. The court held that the government's conduct created a conflict of interest between defendant and counsel and the government took advantage of it without alerting the defendant, the court, or even the "oblivious" counsel to the conflicts. "While the government may have no obligation to caution defense counsel against straying from the ethical path, it is not entitled to take advantage of conflicts of interest of which the defendant and the court are unaware." *Id.* at 1519. Moreover, the government here assisted in efforts to hide the conflicts from defendant. "In light of the astonishing facts of this case, it is beyond question that [counsel's] representation of [defendant] was rendered completely ineffectual and that the government was a knowing participant in the circumstances that made the representation ineffectual." *Id.* at 1520.

3. Military Cases

1992: *United States v. Bryant*, 35 M.J. 739 (A.C.M.R. 1992). Military defense counsel had actual conflict that adversely affected representation where counsel considered the needs of the Army over the needs of his client. Accused was charged with disobeying orders and disrespect in Saudi Arabia during Gulf War. Despite believing that the accused should proceed to trial before a panel because of problems with the government's proof, counsel advised the accused to waive a panel trial and proceed with a bench trial because counsel knew the ground war was about to start (and it did the next day) and he was concerned about the consequences of calling soldiers to court to serve as panel members when they were needed in combat. Although the record

reflected a waiver by the accused, the court found that counsel's own affidavit attesting to his divided loyalties could not be ignored.

1989: *United States v. Whidbee*, 28 M.J. 823 (C.G.C.M.R. 1989). Reversal of two general court-martial convictions required where the prosecutor was the defense counsel's immediate supervisor and rater in all non-military justice matters and this conflict was not explored by the court prior to trial because the court was not informed of the problem. While defense counsel had disclosed to the accuseds that trial counsel was his supervisor, defense counsel did not recognize an actual conflict and it was thus "impossible for him to provide the kind of explanation to an accused necessary for a knowing waiver." *Id.* at 827. Absent proof of an adequate waiver when such an "inherent and irrefutable" conflict is present, *id.* at 826, prejudice is presumed.

1985: *United States v. Kidwell*, 20 M.J. 1020 (A.C.M.R. 1985). Counsel had conflict that adversely affected representation in drug case where counsel negotiated a deal to dismiss charges and administratively discharge the accused in exchange for accused working as informant but counsel did not move for discharge following provision of some information because he believed it was in best interest of military to keep the accused providing information to the government. The accused then picked up additional charges and the government prosecuted and convicted him of all. The court held that counsel's failure to move for administrative discharge was due to counsel's desire to keep accused operating as an informant about whereabouts of blank military identification cards, which the government believed could be used by terrorists in a time when there had been widespread terrorism against the U.S. and its installations. Counsel's interest was adverse to appellant's interests at that point. Thus, counsel actively represented competing interests. The convictions on the initial charges were reversed. Resentencing ordered.

4. State Cases

2009: *People v. Ragusa*, 220 P.3d 1002 (Colo. App. 2009). Privately-retained counsel had an actual conflict of interest in theft and computer crimes case, in which the state had offered a plea agreement that counsel believed the defendant should take but she refused. Counsel breached the attorney-client privilege by revealing matters to the court and prosecutors during *in camera* hearings from which the defendant was excluded. They "actively represented conflicting interests" by making a record which could be used in their favor and against defendant in some unspecified proceeding that they anticipated would later occur." In addition, by using pretext to obtain the *in camera* hearings and concealing the substance of those proceedings from the defendant, rather than advising her about the nature of the conflict, they "prevented her from knowingly and intelligently exercising her right to conflict-free counsel. Counsel also had a "stated intention of not letting her fire them." "[T]he cumulative effect . . . created an actual conflict of interest that adversely affected the attorneys' performance." In addition, the defendant was deprived of her right to be present at the hearings, which was not harmless. Likewise, she was effectively denied her right to counsel of choice by the trial court's participation in keeping her "in the dark" and this was structural error that did not require a showing of prejudice.

2008: *Edwards v. Lewis*, 658 S.E.2d 116 (Ga. 2008). Trial and appellate counsel, both employed by the Public Defender Office of DeKalb County labored under an actual conflict of interest that adversely affected the representation in drug case. At the time of the defendant's indictment and trial in 2001, the county was still using 1990 Census data (54% white, 36% black) in summoning jurors though data from the 2000 Census (54% black; 36% white) was available but not used because it "had not yet been declared 'official.'" Trial counsel filed a motion challenging the racial composition of the grand and traverse jury arrays, but did not pursue it with the presentation of evidence because the Public Defender Office negotiated with the county judges that the jury database would be updated quickly in exchange for agreement not to raise the issue in the defendant's case or any other counsel. While trial and appellate counsel believed this was a strong issue for the defendant, they did not pursue it because of their boss' directive, which was supported by the county courts. Prejudice presumed.

2006: *Smith v. State*, 905 A.2d 315 (Md. 2006). Counsel had a conflict in criminal contempt case where the defendant, an inmate, was called to testify as a prosecution witness in another case. When the witness sought to invoke his Fifth Amendment right against self-incrimination, the court appointed counsel for him. Counsel informed the court, after discussions with the witness and the prosecutor, that he had advised the witness that he could find no legitimate basis for assertion of the Fifth Amendment privileges. The witness continued refusing to answer questions, although not on the asserted basis of the Fifth Amendment. The court found him in contempt and subsequently imposed a sentence of five months. In essence, counsel had a conflict due to his attempt to advise the witness and be a friend of the court. He could not do both here and the trial court relied on counsel's statement in finding that the witness did not have a Fifth Amendment privilege.

Commonwealth v. Downey, 842 N.E.2d 955 (Mass. App. 2006). Counsel had an actual conflict of interest and was ineffective due to counsels' agreements with a television company to record with concealed microphones without the defendants' consent during the defendants' trial for second degree murder. Under state law, prejudice was presumed due to counsels' divided loyalties. Counsel was also ineffective and prejudice was found because the defendants discovered the existence of the microphones during the course of the trial. After that point, the defendants were intimidated and "were not as forthcoming with their attorneys as the otherwise might have been."

2004: *In re S.G.*, 807 N.E.2d 1246 (Ill. App. 2004). Counsel in parental rights termination case had a per se conflict of interest due to his previous representation of the minors as a guardian ad litem. The state sought to terminate parental rights due to neglect and abuse of the children. In the initial hearing, counsel served as a guardian for the children asserting that parental rights should be terminated. Two months later, the court appointed a different guardian for the children and appointed counsel to represent the parent. A per se conflict was found because counsel represented parties with adverse objectives at different times in the same proceedings. Prejudice presumed in accord with state law per se holdings.

1998: **Sallie v. State*, 499 S.E.2d 897 (Ga. 1998). Counsel in capital case had actual conflict because counsel simultaneously worked as a full-time judicial law clerk for the circuit judges, including

the trial judge. The defendant was never informed of the conflict. “There is no need to embark on an analysis of *Cuyler, supra*, and its progeny: the conflict here is obvious and, given the enormity of the penalty in this case, completely impermissible.” *Id.* at 448.

1996: *State v. Holland*, 921 P.2d 430 (Utah 1996). Prejudice presumed where counsel did very little and was ultimately disqualified from representation on appeal due to counsel’s breach of loyalty in arguing in another case that defendant is a prime candidate for the death penalty. Capital defendant initially plead guilty and was sentenced to die but initial appeal resulted in resentencing hearing. On remand, defendant moved to withdraw guilty pleas on basis that he was incompetent at the time of plea. The court denied the motion and at the resentencing counsel presented no evidence to challenge aggravation evidence and no evidence in mitigation rather counsel simply presented the transcript from the prior sentencing and did not even argue that life was an appropriate punishment. The same counsel initially represented the defendant on appeal but was disqualified due to actual conflict of interest for taking adversarial position with defendant in another capital case. New counsel argued that judge erred in nunc pro tunc finding of competency based on evidence and ineffective assistance. Court found trial court did err in making nunc pro tunc finding of competency in combination with defense counsel’s completely bad and at times adversarial representation throughout certainly draws into question whether defense counsel ever investigated or advised defendant properly and whether defendant was in fact competent.

1994: **People v. Lawson*, 644 N.E.2d 1172 (Ill. 1994). Prejudice presumed in capital murder case where court-appointed defense counsel had previously served in the same case as a prosecutor. Counsel had appeared as a prosecutor at defendant’s arraignment, where he filed two discovery motions, and presented then defense counsel with copies of indictments and warrant for defendant’s arrest. Counsel then became an assistant public defender and advised the court, some seven months after appearing for the state at defendant’s arraignment, that he had entered his appearance as defendant’s newly appointed defense counsel. Counsel represented defendant through pretrial, trial, and sentencing. Counsel then filed a motion for new trial. New counsel was appointed following defendant’s *pro se* motion raising issues of ineffectiveness. The conflict was never raised until appeal. The Illinois Supreme Court found no default, however, because there was no indication in the record that defendant was aware that counsel had served as a prosecutor in his case. “[U]nder the circumstances here, where defendant’s court-appointed defense counsel also previously served in the same criminal proceeding as the prosecuting assistant State’s Attorney, a possible conflict of interests existed. Fairness to both the accused as well as his attorney dictates application of a *per se* rule. In such case, it is unnecessary for the defendant to show actual prejudice in order to be entitled to a reversal of his conviction.” *Id.* at 1186-87.

**State v. Holland*, 876 P.2d 357 (Utah 1994). Counsel disqualified from representation on appeal due to counsel’s breach of loyalty in arguing in another case that defendant is a prime candidate for the death penalty. Defendant plead guilty to capital homicide and was sentenced to death. Based on an issue not raised by counsel in trial or in first appeal, the court set aside the death sentence. In the second capital sentencing, counsel introduced only the transcript from the first penalty hearing and, otherwise, presented no evidence or argument. The death sentence was

again imposed. The Utah Supreme Court held that the direct appeal would not be addressed until new counsel was appointed because counsel violated his duty of loyalty to defendant. After filing this appeal, counsel sought to call defendant to testify in an unrelated capital trial concerning his criminal acts and background so that the jury could compare defendant's background and criminal activities with those of the other capital defendant. "The purpose of the testimony was to demonstrate that, when compared to [defendant], [counsel's other client] did not deserve the death penalty." *Id.* at 358. The testimony was excluded from the other case, and counsel appealed on behalf of that client arguing that defendant, unlike counsel's other client "is a prime candidate for the death penalty." *Id.* at 359. The state moved to disqualify counsel in the other case and that motion was granted. Although the state did not move to disqualify counsel in this case, the court found the issue to be unavoidable and addressed counsel's actions *sua sponte*. The court found a violation of the duty of loyalty. "At a minimum, an attorney's duty of loyalty to his or her client requires the attorney to refrain from acting as an advocate against the client, even in a case unrelated to the cause for which the attorney is retained." *Id.* at 359-60.

If an attorney's loyalty is compromised because he believes that his client should be convicted or because he is influenced by a conflict in loyalties to other defendants, third parties, or the government, the law cannot tolerate the risk that the attorney will fail to subject the prosecution's case to the kind of adversarial challenge necessary to ensure that the accused receives the effective assistance of counsel as guaranteed by the Sixth Amendment.

Id. at 360. Here, by asserting that defendant was a prime candidate for the death penalty, counsel essentially aligned himself with the state. "[A]n attorney is not justified in asserting that his client deserves the death penalty, even if his client desires to have that penalty imposed." *Id.* at 361 n.3. "Given the direct and fundamental nature of the duty of loyalty, we will not inquire into the issue of whether the breach of that duty was prejudicial." *Id.* at 361. New counsel appointed.

1992: *Browning v. State*, 607 So.2d 339 (Ala. Crim. App. 1992). Counsel had an actual conflict in drug case that adversely affected represent where counsel in the same case, acting as a municipal judge, had signed the search warrant for defendant's home. The court found an actual conflict and a violation of the judicial canons prohibiting a part-time judge from appearing as counsel in a proceeding in which he has appeared as a judge. The conflict was clear. Counsel as a judge relied on information supplied him by the officers working on the case in authorizing search of defendant's home. As defendant's counsel, on the other hand, counsel and was obliged to question the reliability of the information from the same officers whom he had previously relied upon. Defendant did not make a valid waiver either. While counsel informed the trial court of the conflict, the court conducted an inquiry of counsel in chambers outside the defendant's presence. The court also found that the error was not harmless, even though no evidence was obtained in the search authorized by counsel. Prejudice is presumed when an actual conflict is shown.

1987: *State v. Bolen*, 514 So.2d 691 (La. App. 1987). Counsel had actual conflict in burglary case that required reversal regardless of the absence of prejudice where counsel was the son of the sentencing judge.

1986: *Worthen v. State*, 715 P.2d 81 (Okla. Crim. App. 1986). Counsel had actual conflict that required reversal in drug case where counsel had previously prosecuted defendant for two prior crimes used to enhance his punishment.

State v. Reedy, 352 S.E.2d 158 (W. Va. 1986). Failure of defense counsel to disclose to defendant before trial the existence of a family relationship between defense counsel and burglary victim denied defendant his right to effective assistance of counsel.

1985: *People v. Jackson*, 213 Cal. Rptr. 521 (Cal. App. 1985). Counsel had potential conflict that required automatic reversal where counsel failed to inform defendant of counsel's ongoing "dating" relationship with prosecutor. Reversal required even though counsel and prosecutor were never married or engaged to each other and did not live together, and counsel never divulged any confidential defense information to prosecutor.

1984: *People v. Washington*, 461 N.E.2d 393 (Ill. 1984). Counsel had conflict that required automatic reversal in murder case where counsel was employed as the prosecutor in another city and some of the police officers from his city were called to show probable cause for defendant's arrest. Counsel's conflict centered on the simultaneous obligation to oppose and to attempt to discredit a police officer and representative of the municipality he was serving as its prosecutor. The attorney was obliged to cross-examine and attempt to discredit one of the officers whose veracity and credibility he vouched for when acting as a prosecutor for his municipality. Counsel's statement to trial judge showed that attorney was aware of the possible conflict, but there was no showing that the conflict was explained to the defendant. And there was nothing to show that defendant understood the nature of an attorney's conflict of interest. As such, defendant's waiver of the possible conflict was not knowing and understanding.

1983: *People v. Castro*, 657 P.2d 932 (Colo. 1983). Counsel had conflict that required presumption of prejudice in murder case where counsel simultaneously represented the district attorney in separate litigation involving recall petition and criminal charges of overspending his office's budget, even though the case was not personally tried by the district attorney. Right to effective assistance of counsel may be violated not only by representation falling below the level of competence to be expected of a reasonably competent attorney practicing criminal law, but also by representation that is intrinsically improper because of a conflict.

State v. Franklin, 331 N.W.2d 633 (Wis. App. 1983). Counsel had actual conflict that adversely affected representation in theft case where counsel at sentencing argued that defendant's bond money had been assigned to him for payment of legal fees, thus opposing state's plan to use bond money as restitution provided for by plea agreement. Defendant was thereby denied effective assistance of counsel, requiring vacation of sentence, regardless of whether plea agreement actually called for use of bond money as restitution.

1982: *Howerton v. State*, 640 P.2d 566 (Okla. Crim. App. 1982). Counsel had a conflict that required presumption of prejudice where counsel was a part-time prosecutor.

R. Pending Criminal Investigation or Charges in Same Jurisdiction

1. U.S. Court of Appeals Cases

1994: *United States v. Levy*, 25 F.3d 146 (2nd Cir. 1994). Counsel had actual conflict of interests that adversely affected representation in drug conspiracy case. Counsel had previously represented the defendant. After arrest warrants were issued for the defendant and his nephew, counsel informed the government that he represented both defendants, although the defendant was out of the country. During plea negotiations on the nephew's behalf, counsel and the defendant made statements incriminating the defendant. After the nephew rejected plea negotiations, he was inadvertently released from custody and fled the country. The government believed counsel was involved in this flight. When the defendant was arrested and brought back to the country, counsel continued representation of both. While the government never formally moved to disqualify counsel, the prosecutors did repeatedly alert the trial court of (1) counsel's joint representation; (2) counsel's status as a defendant awaiting his own sentencing in the same district on an unrelated criminal charge; (3) counsel's status as the object of a grand jury investigation into the nephew's flight; and (4) counsel's status as a possible witness concerning statements made by the defendant during the plea negotiations on behalf of the nephew. The District Court inquired but accepted counsel's distortions of the truth and false statements. "[T]he very nature of [counsel's] predicaments strongly indicates that he labored under actual and not merely potential, conflicts of interest." He had "continuing legal and ethical obligations to protect" the nephew, whose interests diverged from the defendant, whose most likely defense was to blame the nephew who had been directly involved in controlled buys by a confidential informant when the defendant was not even in the country. Counsel also had a personal interest to avoid being called as a witness since he would likely have to cease representing the defendant. Likewise, counsel's own charges presented a conflict because counsel may have believed he should temper his defense for the defendant here in order to curry favor with the prosecution in his own case. Finally, counsel obviously had a strong personal interest in avoiding any exploration of the nephew's flight from the country as counsel could be incriminated. Counsel's representation was adversely affected as counsel did not pursue a plausible defense strategy of trying to pin greater blame on the nephew because counsel had obligations to him and also did not want to expose counsel to prosecution for his role in the flight. Because the trial court had not obtained a knowing waiver from the defendant, reversal was required.

1987: *United States v. McLain*, 823 F.2d 1457 (11th Cir. 1987). Counsel had an actual conflict that adversely affected representation in RICO case where counsel was being investigated for Hobbs Act violations by the same prosecutor involved in defendant's case and the prosecutor's was delaying indictment of counsel until the conclusion of the defendant's case. While counsel was aware of the investigations and had his records subpoenaed four times during defendant's case, neither counsel nor the prosecutor informed the court or the defendant. Counsel had an actual conflict manifested by counsel's interest in prolonging the defendant's trial. Adverse affect was apparent in counsel's failure to engage in plea negotiations for the defendant. The prosecutor, in

RICO cases, required cooperation against co-defendants for negotiated pleas. While the defendant was reluctant to testify against one co-defendant out of fear, counsel did not press negotiations to testify against other co-defendants and did not explore the option of going over the prosecutor's head to the Justice Department as he later did in his own case.

2. U.S. District Court Cases

1985: *United States v. Marin*, 630 F. Supp 64 (N.D. Ill. 1985). Counsel had conflict and prejudice was presumed where counsel was under criminal investigation by the same prosecutor and was cooperating with the US Attorney in an attempt to avoid indictment. While there was no showing of adverse affect, the court held that, in his desire to ingratiate himself with representatives of the US Attorney's office or in his fear of offending them in the course of his negotiations seeking consideration for himself from them, counsel may have done less than he might otherwise have done for his client. The court found that prejudice should be presumed.

3. State Cases

2008: *State v. Cottle*, 946 A.2d 550 (N.J. 2008). Counsel in murder case had a *per se* conflict of interest under state law where counsel also had pending charges for criminal stalking in the same county and was involved in pretrial intervention proceedings requiring that he report to the state. Prejudice presumed.

1998: **In re Gay*, 968 P.2d 476 (Cal. 1998). Counsel had several conflicts, including pending charges against him in the same jurisdiction. The cumulative prejudice of the conflicts, in addition, to overall ineffective representation in sentencing required that death sentence be vacated. Defendant was charged with killing a police officer and numerous armed robberies. The defense counsel tricked the defendant into retaining him with the help of a psychologist/minister and then got himself appointed. Counsel then advised the defendant to confess to the numerous armed robbery charges, based on an alleged deal that the defense did not have, even though the state's evidence was based only on weak circumstantial evidence and accomplice testimony. The confession allowed the state to convict and to portray the defendant as a serial robber, which was devastating in light of the absence of substantial mitigating evidence in sentencing. Counsel then selected and used the psychologist and a psychiatrist based on a fee arrangement. The psychologist would help trick people to get the attorney retained and in turn the attorney would retain these "experts" who worked together. The psychiatrist was unwilling to take the case if extensive work was required, but counsel assured him that death was a foregone conclusion and extensive time was not required. The psychologist, who was not licensed, did only a Bender Gestalt (neuropsychological screening test) and a WISC test, which is a children's intelligence test. The psychiatrist interviewed the defendant and reviewed a single parole report. He did not request and was not provided with any additional information. He testified only that the defendant is sociopathic, but adapts well to structured environments. A few other defense witnesses that counsel spoke to briefly, if at all, prior to their testimony, testified that the defendant has good character. Counsel was ineffective for numerous reasons. In addition to all of these problems, during his representation of the defendant, counsel was being investigated by the same prosecutor for misappropriation of funds, which presented a potential conflict of

interest that was undisclosed. “Whether [counsel’s] failure to aggressively defend petitioner at the penalty phase of the trial is solely attributable to the conflict precipitated by the capping relationship or was influenced by the distraction of the fund misappropriation investigation cannot be determined on this record. The per se rule of prejudice arising from an actual conflict of interest does not apply therefore. Nonetheless these conflicts contribute to our lack of confidence in the verdict when considered with [counsel’s] other failings.” *Id.* at 510-11 (citation omitted).

1996: *People v. Edebohls*, 944 P.2d 552 (Colo. App. 1996). Trial court failed to conduct adequate inquiry into counsel’s conflict where counsel had pending criminal charges in the same jurisdiction. Defendant charged with numerous Organized Crime Act violations including alleged that he headed a drug distribution conspiracy. Counsel was retained. Prior to trial, counsel was charged with two counts of tampering with a witness and one count of bribery in a matter unrelated to defendant's case. Counsel informed the defendant of the charges pending against him. At the request of the defendant counsel withdrew but was then retained again two days later. On the morning of trial, the court, having read about counsel’s charges in the newspapers, inquired about the pending charges against counsel. The court conducted an inquiry of the defendant without the prosecutor or counsel being present and determined that the defendant waived any potential conflict. Trial proceeded and the defendant was convicted. The appellate court held that counsel’s pending charges, in the same jurisdiction, created an actual conflict of interest.

Because the same district attorney's office was responsible for the prosecutions of both defendant and defense counsel, defense counsel may well have been "subject to the encumbrance that the prosecutor might take umbrage at a vigorous defense" of defendant and become more ardent in the prosecution of defense counsel. Under these circumstances, we conclude that an actual conflict of interest existed.

Id. at 556. Although the trial court conducted an inquiry, the court did not specifically ascertain whether defense counsel and defendant had discussed the conflict of interest and did not appoint independent counsel to consult with the defendant on this matter. Moreover, at no point did the trial court explain the conflict or advise defendant of his right to conflict-free representation. Thus, defendant was never given a "clear choice" between exercising or waiving his right to conflict-free counsel. Moreover, his answers about whether he desired to continue with this counsel were equivocal. Because the inquiry was inadequate, there could be no finding of a knowing and intelligent waiver. Prejudice presumed.

1991: *Phillips v. Warden, State Prison*, 595 A.2d 1356 (Conn. 1991). Counsel in sexual assault case had actual conflict that adversely affected representation where counsel had been convicted of murder in a highly publicized case, but allowed to continue his law practice until he had completed the appeals process. Counsel had been a prominent politician in the local area before he was charged with murdering his wife. He was convicted, the trial court set aside the conviction, and then the Supreme Court reinstated the conviction and counsel was sentenced. He then appealed. During that time there were numerous headlines in the local papers. He had moved twice for a change of venue. Following defendant’s arrest, his girlfriend retained

counsel's former associate for the arraignment and that lawyer recommended counsel. Defendant was not from the local area and was not aware of counsel's convictions. Three days later, defendant's girlfriend told him that counsel had been convicted but that his conviction had been overturned, which was not accurate since counsel's conviction had been reinstated by then. Defendant retained counsel anyway on the advice of his friends and relatives. Counsel did not inform defendant of his problems until close to trial, but assured him that he could continue as his attorney. Counsel did not withdraw because he needed the money. During voir dire, counsel did not question the jurors concerning their knowledge of his own murder conviction. The court found an inherent conflict because counsel's "duties of undivided loyalty and independent exercise of professional judgment demanded that he withdraw from representing the [defendant]." *Id.* at 1371. Counsel's representation was adversely affected because counsel had to choose between inquiring on voir dire about his own murder conviction or not – "either of which was fraught with peril for the [defendant's] right to a fair trial before an impartial jury." *Id.* Under these circumstances, there was a risk that the jurors "would transfer to the [defendant] the distaste or revulsion that they may have felt for his lawyer." *Id.*

S. Counsel Having Affair With Defendant' Wife or Defense Investigator Having Personal Relationship With Victim's Mother

1990: **People v. Singer*, 275 Cal. Rptr. 911 (Cal. App. 1990). Counsel in murder case had a conflict that adversely affected representation where counsel was having an affair with defendant's wife and also representing her because she was potentially implicated in crimes. Defendant was arrested for the murder of his wife's ex-husband. A first trial ended in hung jury. Defendant was convicted in the second trial. During both trials counsel had a sexual relationship with defendant's wife, which was disclosed after trial to defendant by counsel's former employee. The court noted that an actual conflict must be shown under *Cuyler*, but California law requires a showing of a potential conflict if the record "supports 'an informed speculation' that appellant's right to effective representation was prejudicially affected." *Id.* at 921. Here, counsel's affair with defendant's wife "introduced deception and duplicity into the advocate-client relationship, which by definition must be grounded in trust and fidelity." *Id.* at 920. Counsel may have had an interest in defendant being convicted so the affair could continue or remain undiscovered. Counsel may also have had an interest in protecting his lover from being implicated in the crimes, especially where counsel also represented her.

V. Court Erred in Accepting Waiver of Unwaivable Conflict

A. Simultaneous Representation of Jointly Tried Codefendants

2000: *United States v. Hall*, 200 F.3d 962 (6th Cir. 2000). Trial court erred in accepting waiver in drug conspiracy case where counsel represented both defendants, who were brothers. The court held that the "younger brother, Stanley Hall, was obviously led astray by his older brother." And, although both defendants "waived their rights to separate counsel, this is one of the unusual cases where the court should have stepped in to ensure an adequate legal defense for Stanley Hall." *Id.* at 963. Government counsel raised the issue and the conflict was discussed repeatedly. In a hearing just prior to trial, counsel stated that he had represented the older

brother for years and would represent only him if the dual representation was not allowed. The younger brother indicated he would continue with counsel, “but the record remains cloudy as to whether Stanley understood the full ramifications of what he was doing.” *Id.* at 964. During the trial, the older brother asserted that he was working undercover as an informant for the government, which he had done in the past but there was no evidence of in this case. The younger brother asserted that he had been informed by his brother that he was assisting in an undercover operation. Both were convicted. The conflict of interest was evident in Stanley Hall’s case by counsel’s failure to successfully negotiate a plea agreement for the younger brother. Prior to trial, both brothers entered into plea agreements which were signed but withdrawn at the last moment. Under the plea agreement, the older brother, who had two prior convictions, would have received a life sentence and the younger brother, who had no prior convictions, would have been sentenced to between three years and ten months and four years and nine months rather than receiving the mandatory minimum sentence of ten years. While the older brother’s interest was to go to trial, the younger brother’s interest was clearly better served by entering into the plea agreement. Likewise, during the trial, counsel focused only on the older brother’s defense, even when questioning the younger brother. And, while counsel did not focus on the lack of evidence connecting the younger brother to a portion of the drugs, the jury even sent out a question noting that there was no direct evidence of the connection, only counsel’s concession. This was clear evidence not only of the conflict, but that the conflict had prejudiced Stanley Hall. The trial court should have intervened and severed Stanley Hall’s trial from that of his brother with unconflicted counsel.

B. Simultaneous Representation of Codefendants in Pleas Negotiations

1990: *Hoffman v. Leeke*, 903 F.2d 280 (4th Cir. 1990). Counsel in accessory to murder case had conflict that adversely affected representation where counsel jointly represented defendant and two codefendants, who plead guilty and testified against defendant. The trial court also failed to conduct an adequate inquiry and should have rejected defendant’s purported waiver even if it was valid. Prior to trial, the court inquired of the defendants jointly and individually about the joint representation and counsel informed the court that he saw no conflict. A mistrial was granted shortly after jury selection. Prior to the new trial, a local co-counsel was retained. Each defendant again expressed a desire to continue with the joint representation. After that, both codefendants accepted plea agreements and agreed to testify against defendant. The state repeatedly brought out during the trial that counsel represented the codefendants. A codefendant was the state’s primary witness. The co-counsel conducted the cross-examination. The court reached “An inescapable and unavoidable conclusion” of an actual conflict that adversely affected the representation. *Id.* at 286. The conflict was “patent” where defendant “was in the unacceptable position of having his own attorney help the state procure a witness against him.” *Id.* The adverse affects were clear in that counsel negotiated a plea agreement for the codefendant that required him to implicate the defendant and did not even inform the defendant that the codefendant would testify against him. Counsel also could not cross-examine the codefendant and attack what amounted to the state’s entire case against him. “To cross-examine [the witness] effectively, [counsel] would have had to question his own client’s truthfulness. This he could not do.” *Id.* Finally, the adverse affect was clear in the prosecutor’s repeated references during trial that counsel also represented the codefendants. The adverse affect was

not lessened by the fact that it was the unconflicted cocounsel that cross-examined the codefendant. Conflicted counsel was the lead counsel who prepared the case without the cocounsel's preparation. Conflicted counsel also examined 14 of the 17 witnesses during the trial. "Therefore, regardless of the effectiveness of [co-counsel's] efforts at trial, upon which we need not pass judgment, those efforts could not have overcome the presumed prejudice arising from [lead counsel's] actual conflict of interest." *Id.* at 287. In discussing whether defendant had waived the conflict, the court declared that "[n]ot even the proffer of admittedly valid waivers of conflict-free counsel can restrict a trial court's power to insist on separate representation." *Id.* at 288. Even if defendant made a valid waiver, "permitting multiple representation in a case of this type" would be improper. *Id.*

[W]e believe that a member of the public would be shocked to observe a criminal trial in which the same attorney represented both the defendant and the state's star witness, in which the attorney had cut the deal that made that witness available to the state, and in which the prosecutor pointed out the defense attorney's untenable position at every opportunity.

Id. In any event, the court found no valid waiver because "[a] defendant cannot knowingly and intelligently waive what he does not know." *Id.* at 289. Here, no one explained the meaning of a conflict of interest and defendant was not informed that his counsel had advised the codefendant to testify against him. Counsel also insisted that he saw no conflict. "If [counsel] was suffering from such myopia, we cannot insist on greater appreciation of the risk of conflict on the part of a layman whom [counsel] advised." *Id.* When it became obvious that counsel had negotiated a plea bargain for the codefendant that required him to testify, "the judge had a duty to conduct further inquiry and secure a further waiver if [defendant] wished to make one." *Id.*

C. Counsel Retained by Third-Party With Adverse Interest in Litigation

2002: *United States v. Schwarz*, 283 F.3d 76 (2nd Cir. 2002). Counsel had unwaivable conflict in case where police officer was convicted of violating the civil rights of Abner Louima, who was sodomized with a stick in an NYPD restroom. Four officers were charged. One plead guilty and admitted committing the sexual assault. Louima testified that the other officer that drove him to the police station was also present during the attack, but could not identify him. The Policeman's Benevolent Association (PBA), the police officers' union, hired two outside attorneys to represent Schwartz and another defendant to avoid any conflicts of interest that might arise if the union's regular retained law firm were to represent multiple defendants. After Schwartz was indicted, however, the two attorneys formed a firm that soon entered into a two-year, ten million dollar retainer agreement with the PBA to represent all police officers in administrative, disciplinary, civil, and criminal matters. At the government's urging, the district court held a hearing to explore conflicts issues. The government argued that the conflicts flowing from the retainer agreement were so serious as to be unwaivable, but the district court disagreed and allowed Schwartz to waive the right to conflict-free counsel. Represented by new counsel on appeal, Schwartz argued that the loyalties owed by his trial counsel to the PBA and trial counsel's pecuniary interest in the retainer created an actual conflict of interest that deprived him of his Sixth Amendment right to effective assistance of counsel. The appeals court agreed.

Counsel's representation of Schwartz was in conflict not only with his ethical obligation to the PBA as his client, but also with his own substantial self-interest in the two-year, ten million dollar retainer agreement his newly formed firm had entered into with the PBA. Counsel's conflict so permeated the defense that no rational defendant in Schwartz's position would have knowingly and intelligently desired counsel's representation. Therefore, the conflict was unwaivable.

D. Simultaneous Representation of the Victim

State ex rel. Horn v. Ray, 325 S.W.3d 500 (Mo. App. 2010). The trial court erred in domestic assault case in finding that counsel's conflict in representing both the defendant and the victim could be waived. Prior to the preliminary hearing, defense counsel notified the State that he represented the victim and she did not wish to testify against the defendant or speak to the prosecutor. The prosecutor sought to disqualify counsel but the trial court held that any potential conflict had been waived by the defendant and the victim. The court held that the interests of the defendant and the victim "are necessarily adverse." This conflict is of a nature that cannot be waived. Aside from the inherent conflicts, the interests of the court and public weighed in favor of disqualification of counsel. "The dual representation smells of collusion between counsel, the defendant, and the victim." Even if there is no collusion, the appearance of impropriety "threatens the integrity of our judicial system and undermines public confidence in the system."

VI. Court Abused Discretion in Disqualifying Counsel Over Objection

A. Simultaneous Representation of Jointly Tried Codefendants

1999: *Hanna v. State*, 714 N.E.2d 1162 (Ind. App. 1999). Interlocutory appeal. Trial court erred in disqualifying counsel in joint representation over objection. Hanna, a police officer, was charged with criminal recklessness, pointing firearm, operating motor vehicle while intoxicated, operating motor vehicle while intoxicated causing serious bodily injury, obstruction of justice, and official misconduct. Five other police officers were indicted for obstruction of justice and/or official misconduct. All retained the same law firms to represent them. The state moved to disqualify joint counsel. All defendants, after consultation with unconflicted counsel, waived the conflict in a hearing. The trial court granted the state's motion and ordered the defendants to retain separate counsel. The appellate court held, "Where it is the government which moves to disqualify defense counsel, the burden is on the government to show that any infringement on the defendant's choice of counsel is justified." *Id.* at 1165. Here, the trial court erred because there was no showing of an actual conflict and the defendant's right to counsel of choice must be respected. "[A] defendant's right to the counsel of his choice should prevail over his or her right to conflict-free counsel" when the defendant makes a knowing and intelligent waiver of the conflict. *Id.* at 1166.

1995: *Tyson v. District Court for Fourth Judicial Dist., El Paso County, State of Colo.*, 891 P.2d 984 (Colo. 1995). Trial court erred in disqualifying counsel from joint representation when the defendants entered valid waivers. The defendants, husband and wife, were charged with a variety of offenses arising out of a drive-by-shooting on an interstate. At a preliminary hearing,

the court conducted a thorough inquiry of the defendants and also appointed independent counsel for each to advise them. The defendants waived the potential conflicts at the hearing and subsequently in writing. Later, on motion of the government, the trial court addressed the issue again and reversed the prior ruling because of the government's assertions including: (1) the evidence is stronger against one person than it is against another person; (2) a plea agreement had been offered to one of the defendants which would include testifying against the other; and (3) both defendants statements that they would not enter plea agreements. The appellate court held that the trial court erred in disqualifying counsel since both defendants had made a knowing, intelligent, and voluntary waiver of the conflict. The court also ruled that both defendants were waiving any future allegation of ineffective assistance due to a conflict of interest.

B. Simultaneous Representation of Codefendants in Severed Trials

1. U.S. Court of Appeals Cases

United States v. Turner, 594 F.3d 946 (7th Cir. 2010). The trial court erred in disqualifying counsel of choice in drug conspiracy case. Following arrest, the defendant retained counsel, who was also represented a co-defendant, who was awaiting sentencing following a retrial at the time of the defendant's arrest. The court disqualified counsel because of the *possibility*, which was not "a serious potential" in this case, that one defendant might provide information or testimony against the other despite the fact that the prosecutors had shown no interest in securing either defendant's testimony against the other, multiple other co-defendants were cooperating with the government, and both defendants had waived any conflict.

2. State Cases

2003: *Valdez v. State*, 847 So.2d 602 (Fla. App. 2003). The trial court improperly disqualified counsel in drug case over objection. Defendant was charged, along with her boyfriend, with drug charges. They retained the same attorney. The state moved to disqualify counsel because the boyfriend would be called to testify during the defendant's trial. The trial court erred in disqualifying counsel because the defendant, after being fully informed of the potential conflict, made a knowing waiver.

C. Simultaneous Representation of Government Witness on Related Charges

1988: *Alcocer v. Superior Court*, 254 Cal. Rptr. 72 (Cal. App. 1988). Trial court erred in disqualifying counsel in lying to grand jury case where counsel also represented a potential state witness. Defendant was charged with lying about knowledge that a judge had been using drugs. He retained counsel who also represented a witness the state intended to call to say the defendant was present when the witness sold drugs to the judge. The state moved to disqualify counsel. The court had independent counsel to advise defendant and defendant chose to continue with counsel. The court disqualified counsel anyway. The appellate court held that the trial court erred because "California courts have held that a defendant, upon *proper advisement*, may waive his right to retain counsel free from conflict of interest." *Id.* at 77. The court established

guidelines for the advisement and remanded due to finding that trial court had prematurely granted the motion to disqualify counsel.

D. Prior Representation of Government Witness in Related Case

1989: *Commonwealth v. Cassidy*, 568 A.2d 693 (Pa. Super. Ct. 1989). Trial court erred in disqualifying counsel in racketeering case involving police narcotics unit defendants where counsel had previously represented a potential government witness (also a police officer) in a federal prosecution. Appellate court found that the government's disqualification motion was premature and that there was no showing of an actual conflict or serious potential for conflict to overcome the presumption that defendant was entitled to counsel of choice.

E. Prior Representation of Government Witness in Unrelated Case

2011: *Bowen v. Carnes*, ___ S.W.3d ___, 2011 WL 2408749 (Tex. Crim. App. June 15, 2011). The trial court abused its discretion in capital murder trial by disqualifying retained counsel, based on his prior representation in an unrelated criminal matter of a state's witness. The witness, a jailhouse snitch, had already entered a negotiated plea but was awaiting sentencing when the state gave notice that he would be a witness in this case. Both the defendants (husband and wife) and the snitch waived their rights, but the court disqualified counsel anyway due to concern for the integrity of the judicial process and the public's perception. The presumption in favor of ... counsel of choice is overcome only by an actual conflict or a serious potential for conflict. Concern about the public's perception of fairness, without more, is insufficient to overcome the *Wheat* presumption.

2005: *People v. Frisco*, 119 P.3d 1093 (Colo. 2005). The trial court erred in disqualifying counsel in case involving numerous charges under the state Organized Crime Control Act because counsel had previously represented a prospective prosecution witness a year before when he had pending drug charges. Counsel's only action on the witness' behalf was to arrange for continued release on bond, which ended when the witness was arrested. Counsel withdrew then and had nothing to do with the plea arrangement that ultimately led the witness to agree to testify against the defendant. The court erred in disqualifying counsel because the cases did not involve the same transaction or legal dispute or even offenses allegedly involving the defendant and counsel played only a limited role in representing the witness.

2004: *State v. Carver*, 95 P.3d 104 (Kan. 2004). The trial court erred in disqualifying counsel over objection in aggravated battery case where the defendant was charged with assault and kidnaping of his former girlfriend. The defendant retained counsel, who had been his family attorney for 15 years. Counsel had also previously represented the victim's mother five years before in an action to obtain custody of two of the victim's children. The state moved to disqualify counsel and, without the defendant being present, the court disqualified counsel following an off-the-record discussion and appointed the public defender. The defendant objected to the disqualification and appointment of the public defender office, but the motion on the disqualification was never heard. Ultimately the court allowed a 30 day trial continuance in order to allow the defendant to retain a different lawyer. The court held that it was error to

disqualify counsel because counsel had not represented the victim's mother in a "substantially related matter" and counsel would not have been required to use information concerning his prior representation during the trial. Indeed, the state's motion in limine preventing the defense from inquiring about the prior child custody actions ensured that the prior representation would not cause a conflict during the trial. Finally, the victim's mother was not a key witness and would testify only to background information. The court found that the error was not harmless.

1996: *Ex Parte Tegner*, 682 So.2d 396 (Ala. 1996). Trial court erred in disqualifying counsel in murder case without sufficient inquiry. Counsel had previously represented an eyewitness. The state moved to disqualify counsel. The trial court, relying on an ethics opinion from the state bar in this specific case, disqualified counsel. Defendant sought a writ of mandamus. Appellate court held that the trial court erred in disqualifying counsel without sufficient inquiry. The trial court should have evaluated the evidence regarding the question of disqualification, weighed the constitutional rights in issue, and determined whether the first representation was substantially related to the second. It did not do so; because it had to do so before it could properly disqualify counsel, the ordering disqualifying counsel was set aside.

F. Prior Representation of Codefendants in Same Case

1995: *State v. Parrott*, 919 S.W.2d 60 (Tenn. Crim. App. 1995). Trial court erred in disqualifying counsel where defendant made a knowing and intelligent waiver of conflict. Defendant and her husband were charged with drug possession and intent to distribute. They initially were jointed represented by two attorneys. They then requested separate representation but defendant did not change counsel. The government moved to disqualify counsel. Both the defendant and her husband waived any potential conflict, but the trial court disqualified counsel anyway. The trial court erred because no actual conflict was shown, only a potential conflict was present. The trial court also erred because the defendant made a knowing and intelligent waiver of any conflict.

1990: *People v. Burrows*, 269 Cal. Rptr. 206 (Cal. App. 1990). Trial court erred in disqualifying counsel in murder case despite waivers of conflict. Defendant and his brother were arrested. Following the preliminary hearing, their trials were severed. Defendant retained counsel, who had represented his codefendant at the preliminary hearing. Defendant and codefendant signed waivers, but the court disqualified counsel. The appellate court found error because "California makes a defendant the master of his fate and allows him to proceed uninterrupted, with the exceptions of flagrant circumstances of attorney misconduct or incompetence..., with counsel of his choice if the parties involved in the conflict properly waived any potential or actual conflicts." *Id.* at 212.

G. Prior Representation of Person Implicated (but not charged) in Same Crime

1988: *Coffey v. Pack*, 524 So. 2d 498 (Fla. App. 1988). Trial court erred in disqualifying counsel without conducting an adequate inquiry to determine whether disqualification was necessary where it was discovered that a member of counsel's office also represented the person the defendant claimed was the actual perpetrator on unrelated charges.

H. Counsel Was Necessary or Potential Witness

1. Military Cases

2006: *United States v. Barnes*, 63 M.J. 563 (A.F. Ct. Crim. App. 2006). The military judge erred in disqualifying the accused's civilian defense counsel before trial in desertion and indecent assault case. Counsel was disqualified because the court was concerned that counsel would have to be a witness concerning the desertion charge, that counsel had rendered ineffective assistance in giving pretrial advice on desertion charge, and that his continued representation would give rise to a conflict of interest. The military judge erred by disqualifying counsel before the prosecution had even presented its case and the issues had ripened.

2. State Cases

2003: *State v. Peeler*, 828 A.2d 1216 (Conn. 2003). The trial court improperly disqualified defendant's retained counsel in a murder case. Defendant was initially charged with attempting to murder his partner in a crack cocaine operation and two minor children. All three of the victims were identified by name in the police arrest warrant and information. Subsequently, while the defendant was free on bond, the defendant was charged with murdering his drug partner. The defendant retained counsel to represent him. The state subsequently filed a motion for a protective order to preclude disclosure to the defense of the identity of certain witnesses, including the two minor victims of the initial drive-by shooting. The court allowed disclosure to the defense but ordered that the names and addresses of the witnesses could not be disclosed to the defendant. Subsequently, one of the minor children and his mother were murdered in their apartment where they had recently moved. The state charged the defendant and his brother with these murders. The state then moved to disqualify the defendant's counsel, because the state intended to call counsel as a witness in the defendant's capital trial for the murder of the young witness and his mother. Over objection, the trial court granted the state's motion to disqualify counsel. Counsel was called as a witness during the defendant's separate capital trial. The court held that the record did not demonstrate that the state had met its burden of proving that counsel's testimony was necessary or that there was a compelling need for counsel's testimony. Here the minor witness had already been mentioned by name in both the arrest warrant, affidavit, and substitute information before his death. In addition, the state's notice of service upon defense counsel of the witness' statement was a matter of public record. Therefore, the state did not need counsel's testimony in order to establish that the defense had been served with the statement. Even when given the opportunity to question counsel, the state never asked him what he did in connection with any of the statements he had been given pursuant to the court order. Prejudice was presumed. "If the decision of the trial court deprived the defendant of his constitutional right to counsel of choice," reversal was required.

1991: *State ex rel. Fleer v. Conley*, 809 S.W.2d 405 (Mo. App. 1991). Trial court erred in disqualifying counsel in light of defendant's waiver and only a remote chance that counsel would be called as a witness for the defense. On information from witness, defendant was arrested for murder. He retained counsel, who had previously represented the witness on unrelated charges. Witness refused to cooperate or to testify in defendant's case though. He claimed that he had

told counsel of defendant's confession during counsel's prior representation of him and that counsel advised him not to disclose the information or to use it in plea bargaining. In an initial trial, counsel informed the jury that he might be a witness. That trial ended in a mistrial for other reasons. Prior to retrial, the court appointed independent counsel to consult with defendant concerning potential conflicts. The independent counsel reported that it would be a substantial hardship to defendant if his counsel was removed. The state moved to disqualify counsel. A hearing was held and defendant informed the court he desired to waive the conflict. The court disqualified counsel because of the likelihood that he would testify. Defendant appealed. The Court of Appeals held that the trial court erred because it was doubtful that counsel's former client would testify in light of his refusals to cooperate. The court also did not consider the substantial hardships for defendant in delaying trial and in obtaining new counsel since defendant was confined and did not have sufficient money to retain new counsel.

State v. Shores, 402 S.E. 2d 162 (N.C. App. 1991). Trial court erred in disqualifying counsel in murder case where it was early in the proceeding and had not yet been determined whether counsel's testimony would be needed. Following arrest, counsel entered appearance. The state moved to disqualify counsel based on a witness' statement that the defendant talked to counsel after the victim's disappearance and counsel said there was no evidence if the authorities had no body. After that the defendant burned the body. The trial court erred in disqualifying counsel early in the proceedings because no determination had even been made that the witness' testimony was admissible or that counsel could testify despite the attorney-client privilege.

I. Counsel Previously Worked for Prosecutor and Had Limited Involvement in Case

1988: *Anaya v. People*, 764 P.2d 779 (Colo. 1988). Trial court erred in disqualifying counsel in kidnapping and assault case over objection where member of counsel's firm had previously worked in the prosecutor's office and was involved in limited discussions of this case. The court of appeals held that the error was harmless because defendant had not shown that replacement counsel was ineffective. The Colorado Supreme Court held, however, that erroneous disqualification of counsel over objection cannot be considered harmless error.

J. Miscellaneous

1. U.S. Supreme Court Cases

2006: *United States v. Gonzalez-Lopez*, 548 U.S. 149 (2006). The trial court's erroneous deprivation of a criminal defendant's counsel of choice required reversal. The defendant's family had retained counsel for him. The defendant contacted his own counsel of choice who was out of state and sought to retain him. The trial court declined to admit counsel *pro hac vice* and prohibited further contact finding that counsel violated rules against contacting someone already represented without counsel's permission. The Court held that "the Sixth Amendment guarantees the defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire, or who is willing to represent the defendant even though he is without funds." *Id.* at ___ (quoting *Caplin & Drysdale, Chartered v. United States*, 491 U.S.

617, 624-625 (1989)). In short, “the Sixth Amendment right to counsel of choice . . . commands, not that a trial be fair, but that a particular guarantee of fairness be provided—to wit, that the accused be defended by the counsel he believes to be best.” *Id.* at _____. When that right is violated, no showing of prejudice (under the *Strickland* standard or otherwise) is required for reversal to be mandated and no harmless error analysis may be applied because this is a structural error. The right to counsel of choice is limited, however, and “does not extend to defendants who require counsel to be appointed for them.” *Id.* at _____. Likewise, a defendant is not entitled to representation by a person who is not an attorney or to counsel with a conflict of interests.

2. U.S. Court of Appeals Cases

1989: *Fuller v. Diesslin*, 868 F.2d 604 (3d Cir. 1989). Trial court abused discretion in arbitrarily denying motion to admit out-of-state counsel *pro hac vice* due only to concerns that admission would cause delay in the trial of drug and weapons charges. Court held that “a request for counsel *pro hac vice* should [not] be treated any differently by a trial court than any other request for counsel of choice.” *Id.* at 607. The court held that *per se* reversal is required whenever, as here, there is an arbitrary denial of counsel of choice.

3. State Cases

2009: *State v. Smith*, 761 N.W.2d 63 (Iowa 2009). The trial court abused its discretion in murder case for disqualifying retained counsel despite the defendant's express waiver of the potential conflict, and notwithstanding the availability of appointed co-counsel, who was independent of retained counsel, to handle all matters related to the State's witness whose involvement in the case was the subject of the claimed conflict. The claimed conflict was that a member of counsel's firm represented a state's witness on an unrelated criminal charge. The witness was expected to testify about two tape-recorded phone conversations he had with his girlfriend and her brother while the witness was in jail. He was to identify the voices on the recordings, which included shots and the brother's statement that the defendant was shooting. Although counsel did not anticipate a need to impeach this “foundational testimony,” counsel decided that co-counsel would examine this witness with no involvement from retained counsel. Counsel also took steps within his firm to avoid any information or involvement with the witness' case.

2008: *State v. Peterson*, 757 N.W.2d 834 (Wis. App. 2008). The post-conviction court abused its discretion in *sua sponte* disqualifying retained counsel due to his prior partnership and, at times, acrimonious dissolution of the partnership (including a law suit) with trial counsel.

2002: **People v. Harlan*, 54 P.3d 871 (Colo. 2002). The trial court erred in capital post conviction proceedings in disqualifying counsel of choice after counsel filed a motion for appointment of alternate defense counsel to investigate potential ineffective assistance of counsel claims.

State ex rel. Youngblood v. Sanders, 575 S.E.2d 864 (W. Va. 2002). The trial court erred in disqualifying counsel in felony murder case over the objection of the defendant. Counsel's paralegal had initially met with the co-defendant wife for the purpose of exploring the possibility

of counsel representing the co-defendant. The co-defendant did not retain counsel because of financial reasons. Later the defendant retained counsel. The co-defendant plead guilty and agreed to testify against the defendant. The state move for disqualification of counsel. The court found that disqualification was not required because the information provided to counsel by the co-defendant's wife was also contained in several police reports and was therefore generally known information.

- 1996:** *People v. Johnson*, 547 N.W.2d 65 (Mich. App. 1996). Trial court improperly disqualified counsel in armed robbery and assault case. Counsel was appointed to represent defendant. Court ordered that counsel discover defendant's prior convictions and details concerning their validity. Counsel moved to set aside the order and the court removed counsel. The court's order was found to be improper and violative of both state and federal law. Clearly, counsel was relieved because he challenged the court's order. This was improper because a court cannot relieve counsel simply because the court disagrees with counsel's actions.
- 1989:** **Stearns v. Clinton*, 780 S.W.2d 216 (Tex. Crim. App. 1989). Trial court erred in disqualifying counsel in capital trial where court was upset about counsel interviewing a witness without prosecutor's permission. The prosecutor moved for disqualification because counsel could be a witness after interviewing the witness. [Yes. That is what the opinion says.] The court erred in removing counsel because "the power of the trial court to appoint counsel to represent indigent defendants does not carry with it the concomitant power to remove counsel at his discretionary whim." *Id.* at 223. The prosecutor's rule requiring permission to interview witnesses is "in conflict with principles of fair play." *Id.* at 224.
- 1982:** **Maxwell v. Superior Court*, 639 P.2d 248 (Cal. 1982). Trial court erred in disqualifying counsel in murder case over objection where defendant validly waived any conflict due to contract with counsel giving counsel the right to exploit defendant's life story.

VII. Miscellaneous

A. Appearance of Impropriety

- 2011:** *United States v. Lee*, ___ M.J. ___, 2011 WL 3200686 (N.M. Crim. App. July 28, 2011). Counsel's failure to fully disclose his conflict of interest due to transfer to the prosecution and supervision by the trial prosecutor by the time of trial required reversal. The accused was represented by military counsel and civilian counsel. Well before trial, the military counsel was re-assigned to prosecution duties. By the time of trial, he had "a respectable load" of prosecution duties and was directly supervised and given his military ratings by the prosecutor in the accused's case. While counsel had disclosed to civilian counsel and the accused that he was moving to the prosecution, he did not disclose that he would be working directly for the trial prosecutor. The problem was not disclosed to the trial court at all. While the court could not identify any adverse effect of the conflict, the court was troubled by the length of time that had passed, the inconsistent testimony in the hearing on the conflict, and "the reluctance of the various participants to lay bare the facts." That concern, in addition to the concern that this trial "might not appear to the general public to be 'fair,'" the court granted relief.

B. Trial Court Abused Discretion in Failing to Disqualify Codefendant's Counsel on Motion of Defendant

1992: *State v. Sanders*, 616 A.2d 1345 (N.J. Super. Ct. App. Div. 1992). Trial court in drug case erred in failing to disqualify counsel, who had previously represented defendant in pretrial bail hearing from representing codefendant with adverse interests during joint trial. Defendant and codefendant were arrested following a traffic stop during which cocaine was discovered in the car. Each of the defendants claimed that the drugs belonged to the other. Prior to trial, defendant moved to disqualify his codefendant's counsel because counsel had represented defendant at a bail reduction hearing and had engaged in confidential discussions with defendant concerning the charges. The trial court denied the motion. During trial, the codefendant's counsel vigorously cross-examined defendant and asserted that the drugs belonged to the defendant. The appellate court held that the codefendant's counsel should have been disqualified due to the prior representation of defendant in the same proceedings, which is prohibited by ethics rules. Prejudice presumed.

C. Trial Court Abused Discretion in Failing to Disqualify the Prosecutor Due to Prior Representation of the Defendant

1991: *Reaves v. State*, 574 So. 2d 105 (Fla. 1991). Reversal required due to the trial court's failure to disqualify a prosecutor given the appearance of impropriety in that the prosecutor had previously represented the defendant in a grand larceny case involving many of the mitigating factors involved in sentencing.

[A] conviction must be reversed if the trial court denies a *pretrial* defense motion to disqualify a prosecutor who previously has defended the defendant in any criminal matter that involved or likely involved confidential communications with the same client.

D. Defendant Entitled to Be Present During Discussions of Potential Conflict of Interest

2006: *State v. Sam*, 907 A.2d 99 (Conn. App. 2006). The trial court erred in robbery and other charges case for discussing counsel's potential conflicts, due to his concurrent representation of the defendant's brother, in an off-the-record and in chambers conference while the defendant was absent. As a result of the discussions, counsel severed the defendant's trial from his brother/codefendant's trial and ordered the co-defendant to get new counsel, but proceeded forward with the defendant's trial the same day with the defendant objecting that he also wanted new counsel (but for other reasons than the conflict). The discussions were "a critical stage" of the case where the defendant was entitled to hear counsel's representations and respond. The defendant's failure to object on this basis was not a waiver. While the court informed the defendant that there had been a meeting, he was not advised of the contents of the meeting in terms of representations by counsel or the prosecutor or the basis for the court's conclusions. This was a structural error mandating reversal.

**SUMMARIES OF SUCCESSFUL
CLAIMS POST-*WIGGINS V. SMITH*
INVOLVING DENIAL OF RIGHT TO COUNSEL**

*Updated Aug. 27, 2011

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*Capital Case

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A. U.S. Court of Appeals Cases

2005: *Pazden v. Maurer*, 424 F.3d 303 (3rd Cir. 2005). The trial court violated the defendant's right to counsel by denying a continuance, which forced the defendant to proceed pro se in this fraud case related to the sale of condominiums. In December 1993, the defendant was appointed counsel from the Public Defender Office on charges contained in a 131-count indictment. In October 1995, a new PD was assigned. Trial was scheduled for February 1996. Counsel requested a three-month continuance due to her late appointment and the state's delay in discovery, which ultimately involved almost 5,000 pages of discovery. The court denied a continuance. The defendant, while not hostile at all to counsel and supportive of her request for a continuance, "believing that he was more familiar with the case than his attorney, given the witnesses and materials his attorney had not had an opportunity to explore, . . . informed the court that he believed he had no alternative but to represent himself." *Id.* at 308. He was permitted to proceed pro se with the PD as stand-by counsel. Under AEDPA, the state court's ruling that the "waiver of counsel was both 'contrary to' and 'an unreasonable application of . . . clearly established' Supreme Court pronouncements" in *Johnson v. Zerbst*, 304 U.S. 458 (1938) and *Faretta v. California*, 422 U.S. 806 (1975).

**Daniels v. Woodford*, 428 F.3d 1181 (9th Cir. 2005), *cert. denied*, 127 S.Ct. 2876 (2007). Analyzing this capital case under pre-AEDPA standards, the court held that the defendant was constructively denied counsel due to a conflict created by a series of events related to the appointment of counsel. The defendant had previously been convicted of a bank robbery in which he had been shot nine times by police officers rendering him a paraplegic. He negotiated a plea in exchange for being permitted to remain free for six months so he could seek medical treatment and rehabilitation. Despite the agreement, the court sentenced him to 13 years and immediately remanded him to custody. On appeal, Roth, a new attorney (who had previously represented the defendant on other matters) took over and the defendant was released on bond. While on bond, he was mistakenly arrested by an officer who believed there was a warrant for him. He sued the state alleging mistreatment in jail and lack of appropriate medical care. After his appeal was denied, he failed to surrender to custody. When two officers went to his home, he shot and killed both officers. Following his arrest, the court appointed a Public Defender, who moved to substitute Roth because the PD had a conflict due to the prior representation on the robbery. The PD in that case that negotiated the plea and release left the PD's office to join the prosecutor's interest and the new PD assigned was unaware of the plea agreement so the judge was never informed of the deal for release. A federal habeas petition alleging IAC on the robbery was pending at the time of the murder case appointment. Nonetheless, the court refused to relieve the PD office and Roth remained in a pro bono capacity. Roth was ultimately appointed as co-counsel, but then the state moved to relieve him because he was be a witness for the state. Roth was relieved even though the defendant agreed to stipulate to the information the state sought to present through Roth and agreed to waive

the conflict. After this, the PD assigned became ill and the case was reassigned to two new PD's. Ultimately, nine months into the case and only three months prior to trial, the court relieved the PD office on its motion due to the conflict. Appointed this time was a former prosecutor who had just started in private practice and had no capital case experience and a co-counsel with only a few years under his belt. From the beginning, the defendant's relationship with these lawyers "was strained." The defendant informed the court that he didn't trust his counsel and sent a letter to that effect before the trial started. The federal court held that, "[g]iven this history, it is understandable that the [defendant] would mistrust the judicial process and his counsel" and the trial court should have granted the defendant's motion to substitute counsel. In this instance, because of the "serious conflict" between the defendant and counsel, the court presumed prejudice and found error in the trial court's failure to inquire into the conflict even though the defendant informed the court three months prior to trial that he did not trust counsel and informed the court again prior to the beginning of the trial.

B. State Cases

2011: *State v. Chavez*, ___ P.3d ___, 2011 WL 2568889 (Wash. App. June 30, 2011). Counsel provided no representation during motion to withdraw guilty plea to violations of no-contact order. The defendant was initially charged with domestic violence and ordered to have no contact with his wife, but he contacted her four times from the jail. The state amended the charges to add violations of the "no-contact" order and witness tampering. Due to statements made by the defendant and his wife in recorded jail calls, defense counsel expressed concern that he had a potential conflict of interest on the witness tampering count as, according to statements in the calls, he was a "purported accomplice to the witness tampering claim." The court allowed counsel to withdraw and appointed new counsel on that charge only. With potentially-conflicted counsel, the defendant entered guilty pleas on the four no-contact order charges but, subsequently, moved to withdraw the pleas. The initial counsel was allowed to withdraw and the new counsel took over, but filed only an *Anders* brief in which counsel "clearly distanced" himself from his client and suggested "his client's position was frivolous." The court noted that an "*Anders* brief is an appellate procedure that is not appropriate for a trial court." Here, counsel's action amounted to a complete denial of counsel during a critical stage of the proceedings. Prejudice presumed.

2010: *Commonwealth v. Grant*, 992 A.2d 152 (Pa. 2010). Rape defendant denied effective assistance due to representation by attorney whose license to practice law had been put on inactive status due to attorney's failure to comply with the continuing legal education (CLE) requirements for lawyers. This failure was not a "technical licensing defect" because it reflected "directly on his lack of competence to practice law" as counsel had not attended CLE programs for almost five years and could not regain his license simply by completing the CLE classes.

2008 *State v. Hemphill*, 186 P.3d 777 (Kan. 2008). Counsel ineffective in drug case following no contest pleas when the defendant filed a pre-sentence motion to withdraw his pleas. Counsel abandoned his advocacy role during the hearing. “Appointed counsel for the defendant *argued against* his client's interest by explaining to the court why he did not believe the defendant's motions had merit,” and the defendant had to argue his own motion. Prejudice established because the motion to withdraw raised questions about the voluntariness of the pleas and their factual basis sufficiently that the trial court did not summarily deny the motion and instead appointed counsel for the defendant. Counsel also failed to advise the defendant of his right to appeal the denial of his motion.

Cannon v. State, 252 S.W.3d 342 (Tex. Crim. App. 2008). The defendant was constructively denied counsel in misdemeanor DWI case by counsel’s refusal to participate in the trial following denial of a motion for continuance to obtain expert assistance and statements that he was not prepared for trial. Prejudice presumed under *Cronic*.

2007: *Brown v. Commonwealth*, 226 S.W.3d 74 (Ky. 2007). The defendant was denied his right to counsel in drug case when the court allowed counsel to leave the courtroom during the defendant’s testimony, cross-examination, and closing argument. Counsel informed the court that he had an ethical conflict with the defendant and implied that the defendant intended to offer perjured testimony. Counsel acted properly and the court appropriately addressed the defendant and allowed the defendant to testify in narrative form, but the error occurred in allowing counsel to leave the courtroom rather than remaining present to make appropriate objections to the state’s cross-examination during portions of the testimony counsel did not believe were perjured.

State v. Blair, 872 N.E.2d 986 (Ohio App. 2007). Counsel ineffective in violation of a protective order case where counsel’s motion for continuance due to lack of notice and lack of preparation was denied and then counsel refused to participate in the trial. A trial date was set at a hearing where the defendant was represented by a member of the public defender office. A different member of the same public defender office appeared for the defendant during trial. Prejudice was presumed. In addition, the court found that prejudice was apparent because the defendant was forced to have a bench trial due to counsel’s untimely request for a jury trial and the defendant was denied his best defense because counsel had failed to file a timely notice of alibi. While the state argued that counsel and the defendant “acted in concert as a trial strategy to create error and thereby gain additional time,” the trial court did not question the defendant and the court declined “to presume such outrageous and clearly unethical behavior by counsel.”

**SUMMARIES OF SUCCESSFUL
INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS
POST-*WIGGINS V. SMITH* INVOLVING
NON-CAPITAL SENTENCING PHASE ERRORS**

*Updated Aug. 27, 2011

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A. U.S. Court of Appeals Cases

2010: *United States v. Washington*, 619 F.3d 1252 (10th Cir. 2010). Counsel ineffective in drug distribution case failing to understand the impact of “relevant conduct” under the sentencing guidelines and, as a result, failing to adequately advise the defendant of the consequences. The defendant was convicted of distributing 61.98 grams of cocaine base. Another four kilograms was attributed to him by a confidential government informant. During his interview by a probation officer for his presentence report, the defendant admitted an additional 2.5 kilograms attributable to him. Thus, a total of 6.5 kilograms was considered in sentencing. Counsel’s conduct was deficient.

The instant case is not one of misinformation by counsel; rather, the record reflects that [the defendant] was never *in any way* informed about the applicability or impact of relevant conduct because his counsel did not understand its significance in the sentencing scheme. As a panel of this court has pointed out, “failing to predict a sentence correctly is not the same as failing to understand the mechanics of the sentencing guidelines. . . .”

Id. at 1259. Here, “counsel failed to understand the basic structure and mechanics of the sentencing guidelines and was therefore incapable of helping the defendant to make reasonably informed decisions throughout the criminal process.” *Id.* at 1260. Prejudice established. The defendant’s admissions ultimately resulted in his loss of a downward adjustment in sentence under the 2007 Crack Cocaine Amendments. The two level reduction of these amendments could not be applied if the offense involved 4.5 kilograms or more. The defendant’s admissions moved his drug quantity from 4 kilograms to 6.5. If the amendments could be applied, the defendant’s sentencing range would be 324 - 405 months rather than being even above the statutory maximum sentence of 40 years.

Theus v. United States, 611 F.3d 441 (8th Cir. 2010). Counsel ineffective in failing to object either in the trial court or on appeal to the district court’s error in imposing a ten-year mandatory minimum sentence for a quantity of cocaine that required only a five-year minimum sentence. The defendant was charged with five co-defendants to conspiracy to distribute or possess with intent to distribute five kilograms or more of cocaine. The evidence at trial established, and the district court held post-trial, that the defendant was not a member of the conspiracy charged, but he was a member of a different conspiracy with two individuals not charged in the indictment. The presentence investigation report (PSR) attributed only 1.02 kilograms of cocaine to the defendant and explicitly concluded “there is not enough evidence to support that the defendant was involved with 5 kilograms of cocaine.” The guidelines range for the defendant (at 1.02 kilograms) was 70-87 months, but the PSR inexplicably concluded that the 10 year mandatory minimum (at 5 kg) had to be applied rather than the 5 year mandatory minimum (at 1.02 kg). The district court rejected the government’s argument that the guidelines range should be

based on 5 kg, but still imposed the mandatory minimum sentence based on that amount, despite announcing that the court would like to impose a sentence in the 70 - 87 month range. Counsel's conduct was deficient and prejudicial under these circumstances.

United States v. Tucker, 603 F.3d 260 (4th Cir. 2010). Counsel ineffective in felon in possession of weapon sentencing for failing to object to the use of a prior misdemeanor conviction as a predicate violent felony conviction for purposes of designating him as an armed career criminal in sentencing. To be a felony, the crime must be punishable by imprisonment exceeding one year. Nonetheless, without objection, the prosecution relied on a common law assault and battery conviction in state magistrate court which had jurisdiction to impose punishment not to exceed 30 days in confinement. Counsel's conduct was deficient. It was also prejudicial. The government had relied on four prior convictions and had to prove three that "arose out of a separate and distinct criminal episode" to prove the enhancement. Two of the remaining three convictions were burglaries of storage units with an accomplice on the same night. Because the evidence was insufficient to establish these offenses occurred sequentially on separate occasions rather than simultaneously with the aid of the accomplice, these two burglaries had to be considered as one offense. Thus, without consideration of the improper misdemeanor conviction, the defendant could not be punished as an armed career criminal.

2009: *United States v. Polk*, 577 F.3d 515 (3rd Cir. 2009). Counsel ineffective in sentencing for possession of a weapon by prison inmate for failing to object to the court's characterization of the offense as a "crime of violence" in calculating the Guidelines range of 37-46 months. Without the enhancement, the range would have been 27-33 months.

2007: *United States v. Otero*, 502 F.3d 331 (3rd Cir. 2007). Counsel ineffective for failing to object to improper sentencing enhancement for a prior crime of violence. The defendant's prior was a simple assault in Pennsylvania, which does not require the "the use of force." Counsel's conduct was deficient just based on the statutory language but there was also available case law that should have alerted counsel to the issue. "[C]ounsel does have a duty to make reasonable investigations of the law," including citing "favorable decisions from other courts of appeals." Prejudice established because, absent the enhancement, the guideline range would have been only 18 to 24 months but the defendant was sentenced to 60 months.

Miller v. Martin, 481 F.3d 468 (7th Cir. 2007). Counsel in securities violations and frauds case deprived the defendant of representation by standing silent during sentencing and prejudice was presumed. The petitioner was convicted following trial in absentia. He retained new counsel for sentencing. Due to counsel's belief that the convictions would be reversed due to the absentia trial, counsel advised him to remain silent because he was concerned the court would learn that the defendant had been noticed with the trial date. Counsel also remained silent other than to inform the court that they would not

participate. The state court applied *Strickland* and found that while counsel's choice to stand mute was "unorthodox" it was a "purely strategic decision" that was not unreasonable and not prejudicial. The court held that the state court ruling was contrary to Supreme Court precedent because the issue should have been addressed under *Cronic*. Even assuming that *Strickland* was the appropriate standard, the court held that the state court findings were unreasonable under AEDPA. Counsel's "advocacy" at sentencing was "non-existent" by his own admission. While counsel explained a "strategy" for the petitioner to remain silent during sentencing, he "never explained his own silence." Even if he had been concerned that the court would question him about his client's knowledge, he could have declined to discuss this issue. Likewise, even if he were concerned that a presentation at sentencing could have somehow prejudiced the appeal, "which is not the reason he gave the sentencing court for his decision," he was wrong and had not conducted any research or consulted the court about his concerns. The state court decision of "strategy" was unreasonable. Prejudice was presumed under *Cronic*. Prejudice was found under *Strickland* in the alternative. Counsel's silence allowed the sentencing court to rely on errors in the petitioner's criminal record, the state's aggravating factors to go unchallenged, and offered no mitigation, even though the petitioner had already paid restitution to some victims. Counsel said nothing even though the court was clearly considering imposing maximum punishments and running some of the sentences consecutively.

2003: *Alaniz v. United States*, 351 F.3d 365 (8th Cir. 2003). Trial and appellate counsel were ineffective for failing to object to the trial court's error in adding a second uncharged drug type to the charged drug type in order to trigger a higher quantity-based statutory penalty range. The defendant was convicted of conspiring to possess marijuana with intent to distribute and distributing marijuana. In determining the penalty range for the conspiracy count, however, the trial court applied the penalty range applicable to a person with a prior felony drug conviction involving 1000 kg or more of marijuana for which the sentence was 20 years to life. The court held that the defendant had a total of almost 1150 kg of marijuana by aggravating two different drug types. The judge added the approximately 800 kg of marijuana involved in the conspiracy with 12 ounces of methamphetamine the defendant sold during the conspiracy period, which the court converted to its equivalent of approximately 340 kg. If the court had not added the methamphetamine, the defendant's statutory penalty range would have been 2 years to life as opposed to 20 years to life. Under the sentencing guidelines, there was a difference of 210 to 262 months versus 240 to 262 months. While the Eighth Circuit had not previously addressed the aggravation issue, the court noted that every circuit that has addressed the issue has concluded that a second uncharged drug type cannot be added to the charged drug type in order to trigger a higher statutory penalty range. The court, therefore, found that counsel's conduct was deficient in failing to raise this issue in sentencing or on appeal. The court found prejudice because, under *Glover*, an error increasing a defendant's sentence by as little as six months can be prejudicial within the meaning of *Strickland*. If counsel had objected and the appropriate guideline range had

been used, the district court would have been authorized to impose a sentence up to 30 months shorter than the one the defendant actually received. The court remanded to the district court to determine what sentence it would have imposed if it had used the appropriate guideline range and, if the sentence would have been less than the original sentence, the district court was instructed to re-sentence the defendant.

United States v. Conley, 349 F.3d 837 (5th Cir. 2003). Trial and appellate counsel were ineffective in conspiracy and mail fraud case for failing to object to the defendant's sentence, which was greater than the maximum set for the crime for which he was convicted. The defendant was initially charged in a 15-count indictment with conspiracy, mail fraud, and money laundering. he was convicted of one count of conspiracy and four counts of mail fraud, but acquitted on the 10 counts of money laundering. The conspiracy indictment and verdict was ambiguous but "a sentence imposed for a conviction on a count charging violations of multiple statutes or provisions of statutes may not exceed the lowest of the potentially applicable maximums." Nonetheless, the judge sentenced the defendant for conspiracy with respect to the money laundering allegation to 121 months. The maximum sentence for conspiracy with respect to mail fraud though was only 60 months. Because the error "was obvious" and greatly increased the defendant's sentence, trial and appellate counsel were ineffective in failing to assert this meritorious issue.

B. U.S. District Court Cases

2010: *Carter v. United States*, 731 F.Supp.2d 262 (D. Conn. 2010). Counsel was ineffective in robbery and other offense case sentencing for failing to challenge enhancements under career offender sentencing guidelines and the Armed Career Criminal Act (ACCA). The defendant had five prior convictions in state court: (1) 1985 robbery; (2) 1988 risk of injury to minor; (3) 1992 sale of narcotics; (4) 1992 possession of narcotics; and (5) 1994 sale of narcotics. To apply the career offender sentencing guidelines, the government had to prove two prior felony convictions involving either a "crime of violence" or a "controlled substance offense." The 1985 robbery did not qualify as a "crime of violence" because the government did not count it in the PSR in the criminal history. The 1988 conviction did not qualify as the state statute included conduct outside the guideline range. Specifically, the defendant could be convicted in state court for "psychological harm" only, when the guideline required physical force or harm. The government had not attempted to prove that the defendant's specific facts met the standard. Of the defendant's three drug offenses, only one qualified as a "controlled substance offense" under the guideline because again the state statute was broader and included "any form of delivery which includes barter, exchange or gift" rather than just "selling" and the like. The government had included sufficient information in the PSR to establish that the 1994 conviction qualified, but had not attempted to prove the facts of the other two. To apply ACCA, the government was required to prove three felony convictions that were either a "violent felony" or a "serious drug offense." While the 1985 robbery qualified and the 1994 sale of narcotics qualified, the other three did not for basically the same reasons that

the did not qualify under the career offender sentencing guidelines.

Parks v. United States, 687 F. Supp. 2d 564 (W.D.N.C. 2010). Counsel ineffective in sentencing following guilty plea in drug case for failing to understand the importance of the fact that the indictment did not set forth a specific drug amount. Counsel objected to a drug quantity in sentencing but withdrew the objection without explanation. This conduct was deficient as “no matter what evidence the Government might have presented at the sentencing hearing, the fact would remain that such evidence had not been found by a jury beyond a reasonable doubt.” There could be no reasonable strategy for withdrawing the objection because, in doing so, “counsel automatically increased Petitioner’s sentence 120 months beyond that to which he was otherwise exposed.” In short, the defendant was prejudiced because the court sentenced him to 360 months when the maximum statutory sentence based on the indictment was 20 years. Sentence vacated.

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

Baxter v. United States, 634 F. Supp. 2d 897 (N.D. Ill. 2009). Counsel ineffective in sentencing of criminal tax case for failing to retain and consult with tax expert and stipulating to the tax loss compilation included in the presentence investigation report by the U.S. Probation Office. Counsel's conduct was deficient because counsel failed to independently examine the loss and simply accepted the government's position. While "[d]efense counsel in criminal tax cases need not always retain a tax expert to assist, . . . [t]he tax-loss question as it relates to [the defendant] was sufficiently complicated so as to require expert assistance." Reasonable counsel would have obtained expert assistance prior to entering a plea bargain in the case, especially in light of the fact that the defendant, a CPA, believed at the time she prepared the questioned tax documents for her clients that the tax returns were lawful. When she discovered they were not, she attempted to correct the error by cooperating with the IRS, which resulted in the clients paying all of the back taxes, etc., and not being criminally charged. The defendant was "duped . . . into believing it was legal." Prejudice established. The government asserted that the defendant was responsible for more than 5 million tax-loss. The court rejected this, finding that the government had not proven that the defendant was accountable for that loss. The more than \$500,000 tax-loss the defense stipulated to was included in the amount already rejected by the court but the court was not aware of that fact. Both government and defense experts in 2255 agreed the actual tax-loss related to the defendant's actions was only about \$22,000. Sentence vacated.

United States v. Frost, 612 F. Supp. 2d 903 (N.D. Ohio 2009). Counsel ineffective following plea to drug distribution for failing to object to a career offender sentence enhancement. The government sought the enhancement based on two prior convictions, one of which was for a 1996 Attempted Drug Trafficking offense under Ohio state law. Defense counsel conceded that this offense met the requirement for consideration but argued for a downward departure because the career offender designation substantially overstated the defendant's criminal record. The Court found a guideline range of 168-210 months, but granted the downward departure to 135 months. Under the guideline, a prior controlled substance offense had to involve distribution or an intent to distribute to qualify as a predicate offense for career offender status. Under the statutory definition, the defendant's state conviction involved only simple possession. There were conflicting unpublished decisions in the circuit at the time of defendant's trial as to whether the determination would be made only on the statutory language or whether the court would look through to the facts of the defendant's offense. There was a case pending in the Sixth Circuit addressing this issue. That case (*Montanez*), decided one month after sentencing, held that the determination would be made solely on the statutory definition. Counsel's conduct "was deficient in light of the conflicting Sixth Circuit caselaw and the pending *Montanez* litigation. . . . Simply put, caselaw in the Sixth Circuit at the time of . . . sentencing was conflicted and none was controlling" and there was one case squarely in the defendant's favor. Counsel's conduct was not excused by strategy because "there was nothing to lose, regardless how *Montanez* came out." Even if the defendant would

not have succeeded in sentencing the record would have been preserved for appeal. Prejudice was thus established.

2008: *Sasonov v. United States*, 575 F. Supp. 2d 626 (D.N.J. 2008). Counsel in bribery of public official case ineffective for several reasons. First, counsel affirmatively misrepresented the immigration consequences of a guilty plea. Counsel's conduct was deficient because counsel informed the defendant that, as a resident alien with a green card, he would not be subject to deportation following his plea. Prejudice established because "it is likely that Petitioner would have taken his chances at trial because he faced only six to twelve months more than the sentence he received," due to his guilty plea. Second, counsel failed to conduct discovery and, thus, failed to argue petitioner's minor role in the crimes and failed to establish that the value of the benefit received from the bribe was less than \$10,000, which would have prevented a four-point enhancement of the offense level. Prejudice established because the court might otherwise have reduced the sentence to less than one year or at least allowed the defendant "to negotiate a more favorable plea agreement with the Government."

Potts v. United States, 566 F. Supp. 2d 525 (N.D. Tex. 2008). Counsel ineffective in child pornography case for failing to object to the district court's impermissible double counting of sentencing enhancements. Specifically, the court enhanced his offense level by two for possession of ten or more items of pornography under one section and by four for possession of more than three hundred images under another section. Guideline amendments effective in November 2004 should have alerted counsel to this problem. Prejudice established. "When the Court imposes a sentence at the bottom of an erroneously calculated sentencing range, that sentence demonstrates prejudice even when the imposed sentence also falls within the accurately calculated guideline range." Here, the court had imposed a sentencing "at the very bottom of the erroneously calculated range."

2007: *Veal v. United States*, 486 F. Supp. 2d 564 (N.D. W. Va. 2007). Counsel ineffective in sentencing following guilty plea to drug offenses for failing to review the presentence report prior to sentencing. He also did not prepare objections or even review the objections submitted by the defendant pro se.

Abraham v. United States, 477 F. Supp. 2d 1232 (S.D. Fla. 2007). Counsel ineffective in sentencing on conspiracy, kidnaping a postal employee, and other charges for failure to assert that a prior escape conviction was a non-qualifying offense under the affirmative defense provision of the federal three strikes law. Counsel argued that the escape was not a serious violent felony, under 28 U.S.C. § 3559(c), because it did not involve weapons or violence. The court found it was and that the court was, therefore, required to impose the mandatory life sentence. Counsel's conduct was deficient in failing to make the additional argument, under § 3599(c)(3)(A), of an affirmative defense, which allowed the defendant the opportunity to establish that the conviction was a non-qualifying conviction by

showing by clear and convincing evidence that no weapons or guns were used or threatened to be used, and no injuries or death occurred in the commission of his escape. Counsel's conduct was deficient because counsel "failed to simply turn the page of the statute and continue the analysis under § 3599." Prejudice found because the sentencing record made clear that the court believed it had no alternative other than to impose a mandatory life sentence. Likewise, although the court found the movant's trial testimony to be less than truthful, it had accepted as true the proffer on this issue, which was proven by clear and convincing evidence with the supporting state court record in this proceeding. Sentence vacated and resentencing ordered.

2006: *United States v. Gentry*, 429 F. Supp. 2d 806 (W.D. La. 2006). Counsel ineffective following guilty plea to bank robbery for failing to file any objections to the loss calculation in the presentence report (PSR). The loss calculation included not only the robbery proceeds but worker's compensation indemnity and medical expenses associated with a police officer's wounds incurred during pursuit of the defendant and co-defendants when he was shot by a co-defendant and certain home repairs that were necessary due to a co-defendant's actions in breaking into a home during the pursuit. Counsel's conduct was deficient because his notes indicated that he was aware of a potential issue, but he failed to object and could not articulate any strategy or rationale for the failure. Although there was no existing case authority supporting the objection at the time, the plain language of the guidelines excluded consideration of the worker's compensation payments and medical payments associated with the injuries to the police officer. Moreover, the fact that the sentencing court rejected the objections raised by co-defendants did not excuse the omission. "[R]easonably effective criminal defense counsel do not shy from confrontation and must zealously present their client's arguments." *Id.* at _____. Prejudice found because the defendant received a sentence that was 16 months over the guidelines maximum. If counsel had objected and appealed, as two co-defendants did, the Fifth Circuit would have held that the worker's compensation indemnity benefits and medical expenses associated with the officer's wounds were not properly included in the computation. New sentencing ordered.

2005: *United States v. Holland*, 380 F. Supp. 2d 1264 (N.D. Ala. 2005). Counsel ineffective in sentencing and on appeal in bank robbery case where the defendant and his co-defendant separately plead guilty and received an order of restitution payment under the Victim and Witness Protection Act (VWPA) as part of their sentence. The amount of restitution was not addressed by a jury and was based solely on hearsay in the probation officer's report. Counsel's conduct was deficient in failing to object because "[e]verybody in the courtroom knew that this court considered the federal restitution scheme constitutionally flawed" and the court ended up imposing "an ambiguous and impossible restitution obligation" on the defendant that was also inconsistent with the terms placed on the co-defendant, even though restitution was to be "paid jointly and severally." To make matters worse, the BOP informed the defendant on numerous occasions while he was in confinement that his restitution had been paid and then 9 years later informed him that he

owed the full amount without even accounting for the \$999 paid by the co-defendant. While the government challenged jurisdiction, the court held that the defendant “is not barred from access to this court to right a wrong that is partly the fault of this court.” The court found that the disparity in treatment between the defendant and his codefendant “is a travesty that calls for correction,” especially since the VWPA “limited the collectibility of restitution to ‘five years from the date of the sentence.’” The court thus allowed equitable tolling in these 2255 proceedings. Although this case preceded *Booker*, *Ring*, *Apprendi*, and *Jones* (decided a month after this sentencing), the court found that counsel was ineffective in failing to test the constitutionality of the restitution award procedure since restitution was not charged in the indictment, not found by a jury, and the amount ordered to be paid was based on a standard other than proof by the Government beyond a reasonable doubt. Counsel “was required to recognize the potential constitutional claim” that came later in court rulings because “[t]he law has long recognized that defense counsel, both trial and appellate, is required to raise potential constitutional claims in view of developing law.” Here, “this court was on record as doubting the constitutionality of the VWPA, and counsel in other cases had raised the issue in this court.”

2004: *Banyard v. Duncan*, 342 F. Supp. 2d 865 (C.D. Cal. 2004). Trial counsel was ineffective in failing to investigate and object to the use of a prior assault conviction as a “serious felony” in sentencing the defendant to 25 years to life under the “Three Strikes Law” following a conviction for possession of a controlled substance. Appellate counsel was also ineffective for failing to assert trial counsel’s ineffectiveness. Counsel’s conduct was deficient because counsel advised the defendant to admit to two prior serious felony convictions even though the defendant’s second strike was not a “serious felony,” as required by state law. The second strike was for an assault conviction, “which arose from a domestic dispute and is the only arguably violent behavior in [the defendant’s] record.” The court found that the record on this offense revealed that, although the defendant was initially charged with a serious felony, he ultimately plead no contest only to assault, which was not a serious felony, and was sentenced to time served and probation. The court found that the state court erred in its judgment in finding that the defendant entered a no contest plea to a serious felony when the plea transcript revealed otherwise. Even if the alleged victim of the assault was believed, the “minor nature” of the defendant’s “assault conviction show that it was outside the heartland of what would normally constitute assault.” In addition, the “sentence of probation is not consistent with a desire to punish [the] crime as a serious felony.” Without any real analysis, the court held, under the AEDPA, that the state court’s decision was an unreasonable application of clearly established federal law.”

Blount v. United States, 330 F. Supp. 2d 493 (E.D. Pa. 2004). Counsel was ineffective in sentencing on drug charges for failing to request a downward departure for time the defendant had already served in state and county custody on unrelated charges.

Garcia v. United States, 301 F. Supp. 2d 1275 (D.N.M. 2004). Counsel ineffective in

sentencing for drug conspiracy for failing to object to the pre-sentence report, which improperly calculated points based on the erroneous finding that the instant offense occurred while the defendant was a probationer for a DWI offense. The defendant was investigated by the DEA for a conspiracy to sell marijuana. Several co-defendants were arrested long before him with the last being on February 19, 1999. Following these arrests, but prior to his own arrest, the defendant was arrested and plead guilty to DWI. He was ordered to serve one-year of probation on March 8, 1999. He was indicted for these offenses in June 1999. He plead guilty pursuant to a plea agreement in which the state would recommend the lowest penalty available under the sentencing guidelines as long as the defendant participated in a “debriefing.” Counsel at sentencing had not represented the defendant in the plea negotiations. During sentencing, although the petitioner asserted he was entitled to “the safety valve” downward departure, counsel asserted that he was ineligible without having a full understanding of the underlying facts. Because of the confusion, the court continued sentencing to allow counsel to investigate. Nonetheless, because the court had stated earlier that he would not give the “safety valve,” counsel convinced the defendant that he was ineligible and the case proceeded to sentencing the same day. Because the court’s statement of ineligibility was based on counsel’s inaccurate summation of the facts, the court rejected the government’s argument that the court had already exercised its discretion to reject the “safety valve.” The court found a guideline range of 168 to 210 months and sentenced the defendant to 168 months. Counsel’s conduct was deficient in convincing the court and the defendant that the safety valve did not apply because there was no evidence and the government never argued that the defendant was involved in any distribution after February 1999. Indeed, the pre-sentence report attributed no drug activity to the defendant after July 1998. Thus, any activity alleged preceded the defendant’s DWI arrest. Thus, the defendant was entitled to application of the “safety valve,” so long as the defendant participated in the agreed upon debriefing, which counsel never scheduled because of the erroneous belief that the defendant was not eligible for the “safety valve.” Counsel’s failure to object to the pre-sentence report was deficient because it “was based entirely on his lack of understanding of the underlying facts.” Prejudice was found because absent counsel’s error, under the appropriate sentencing guidelines and the government’s agreement to recommend the low end, the defendant would have been given a sentence 53 months shorter than the one he actually received. The court ordered the government to afford the defendant an opportunity to comply with the debriefing requirements prior to resentencing.

2003: *Somerville v. Conway*, 281 F. Supp. 2d 515 (E.D.N.Y. 2003). Counsel was ineffective in sentencing in a burglary and assault case where he failed to challenge the legality of the defendant’s sentence as a second violent felony offender. The defendant’s status as a second violent offender was predicated on a previous conviction in Maryland for robbery with a deadly weapon. Under New York law, however, the Maryland offense could not be used as a first offense if the Maryland offense was not equivalent to any New York felony. In state court, the prosecution conceded that if trial counsel had raised the issue

that the Maryland prior offense should not have been used. Nonetheless, the state court affirmed the sentence stating that the defendant received meaningful assistance from his trial counsel. In federal court, the state no longer conceded that the crime for which the defendant was convicted in Maryland could not be used as a predicate for the second violent felony offender status. The court found that the prior conviction from Maryland could not be used under New York law because the defendant in Maryland could be convicted of armed robbery if he used force without an intent to take property and afterwards stole from the victim. While this would be felony robbery in Maryland, it would not in New York under the statute. The court found prejudice because if counsel had raised this issue, the defendant would not have been adjudicated a second violent felony offender and would have been eligible for, although not guaranteed, a sentence far below what he was given. Even if the trial court had sentenced the defendant to the exact same sentence without finding a second violent felony offender status, the defendant was nonetheless prejudiced by being adjudicated as a second violent offender because “[i]n the event he commits another felony at some point in the future, he will be exposed to a mandatory maximum prison term of life in prison.” The court also found deficient conduct because “[e]ffective counsel must be familiar with the sentencing law governing a defendant’s case.” Here, the New York law was manifested both in statute and in case law, and the Maryland law was clear from its case law.

Given that the only legal question open at petitioner’s sentencing was his status as a second violent felony offender and that resolution of the court’s adjudication of that status might have significant effects on both petitioner’s current sentence and on any sentence he might receive if he were to commit a subsequent felony, defense counsel was obliged to be familiar with this law.

The court also found that counsel’s failure could not have been motivated by any strategic rationale. Analyzing the case under the AEDPA, the court found that the state court’s decision was an unreasonable application of clearly established Supreme Court precedent as set forth in *Strickland*.

C. Military Cases

2006: *United States v. Dobrava*, 64 M.J. 503 (Army Crim. App. 2006). Counsel was ineffective in false statement and larceny case for failing to call the accused to the stand for an unsworn statement in sentencing. The accused had been stationed in Afghanistan, near the Pakistan border, in an area where the threat level was high and several soldiers had been killed in the months prior to the accused’s theft of money from a local national’s house during a search of weapons. Counsel and the accused had agreed that an unsworn statement would be important but counsel did not call the accused. While the accused alleged that counsel simply forgot to call him, counsel asserted that he determined at the last moment that the statement would only dilute strong mitigation evidence and made a

tactical decision not to call the accused. Regardless of the reason, counsel's conduct was deficient because the decision to make a statement or not was personal to the accused. Prejudice established because the accused's express statements of apology, contrition, and a desire to be rehabilitated might have persuaded the judge to give a lesser sentence.

2005: *United States v. Davis*, 60 M.J. 469 (2005). Counsel ineffective in rape and sexual abuse of stepdaughter (over a period of seven years) case for basing the entire sentencing strategy on an erroneous conclusion that the accused officer would be allowed to retire from the military with benefits if not sentenced to a dismissal. Prior to these charges, the accused had been passed over twice for promotion and, in order to avoid involuntary separation, had applied for voluntary retirement under the discretionary Temporary Early Retirement Authority (TERA). He was approved for TERA, but these charges arose before his separation and the TERA retirement was terminated. The accused plead guilty to some charges and was found guilty on other contested charges. In sentencing, counsel argued for a longer period of confinement in order to avoid a punitive discharge so the accused could obtain retirement benefits for his family. The panel sentenced the accused to life but did not order dismissal. After sentencing, counsel finally learned that eligibility for TERA required that an adverse action be "resolved in favor of the member." The accused, thus, was not eligible for TERA and was separated with an "other than honorable" discharge. Counsel's conduct was deficient in failing to research the TERA eligibility or to even make a phone call, which would have revealed a policy that a felony conviction disqualified the accused from TERA retirement. There was no reasonable strategy because the sentencing strategy was "fundamentally flawed from its inception because of a failure to research the critical law." *Id.* at 474-75. Prejudice was found because the accused would not have asked for increased confinement if he had been adequately advised. If defense counsel had not asked for the increased punishment, the panel likely would have accepted the government's recommendation of 40 years and a dismissal rather than sentencing the accused to life with no dismissal.

D. State Cases

2011: *People v. Roberts*, 125 Cal. Rptr. 3d 810 (Cal. App. 2011). Counsel ineffective in assault on officer case for failing to object to statements from the underlying proceeding in the sentencing findings under the Three Strikes Law. The State enhanced punishment with a prior felony conviction for second degree assault from Washington. Counsel's conduct was deficient in failing to object to transcripts of unsworn statements following the defendant's Washington plea. Enhancement required showing that the defendant had personally inflicted "great bodily harm." When the record does not disclose the underlying facts, the court presumes the prior conviction was for the least offense punishable under the foreign law. The elements of the prior conviction in Washington were most similar to California crimes that did not qualify as a strike under the Three Strike Law. The documents showing conviction in Washington did not provide details of the underlying offense and alleged only infliction of "substantial bodily harm."

Washington law distinguishes between “substantial bodily harm” and “great bodily harm.” Even if they were the same, Washington law allows conviction for second degree assault without the defendant having personally inflicted the harm. The state thus had to rely on the specific underlying facts. Under state law, the court could consider “otherwise admissible evidence from the entire record of the conviction.” Here, the defendant’s statements, his counsel’s statements, and the alleged victim’s statements made after the court had accepted the *Alford* plea and were not “part of the record of conviction” and should not have been relied on to establish a strike. While counsel objected to this evidence as hearsay, he did not object of this basis even though state law had been established on this point almost three years prior to trial. As counsel did object, albeit on the wrong ground, there clearly was no tactical reason for failing to make this meritorious objection to the same evidence. Prejudice established as the evidence supporting the enhancement was clearly insufficient without this evidence.

Fegley v. Commonwealth, 337 S.W.3d 657 (Ky. App. 2011). Counsel ineffective in sentencing on six counts of complicity to first-degree robbery for failing to object to erroneous testimony of a probation and parole officer that the maximum possible sentence was 120 years when it was actually “only 70 years.” The state asked for a sentence “in the middle” of 60 years, which was returned by the jury.

State v. Hess, 23 A.3d 373 (N.J. 2011). Counsel ineffective in sentencing for aggravated manslaughter in failing to present relevant Battered Women’s Syndrome mitigation evidence and failing to object to lengthy, unduly prejudicial victim-impact video. The defendant shot and killed her husband, a police officer, in his bed. “The only issue was, why.” After going to work, the defendant called authorities. In her initial statement she described a history of domestic violence, psychological belittlement, and victimization leading up to the killing. She said that she had only intended to scare the victim by pointing a gun at his head, as he had done to her the evening before, but it went off accidentally. The day after her arrest, the defendant was admitted to a psychiatric hospital for four days due to suicidal ideations. A defense investigator interviewed nine friends and co-workers who corroborated the victim’s physical abuse, threats, and attempts to dominate and control the defendant. Nonetheless, a year and a half later, counsel allowed the prosecutor and a detective to take a second statement from the defendant in counsel’s absence. In this one, with prompting and leading by the prosecutor, the defendant “downplayed the level of abuse” and said that she had decided to kill the victim the night before. The defendant entered a negotiated plea agreement that included: (1) a 30-year sentence, subject to service of 25; (2) defendant’s concession that aggravating factors outweighed the mitigating factors; and (3) defendant’s agreement that neither she nor her attorney would seek a lesser term of imprisonment. After hearing a “tour-de-force presentation” by the state and no evidence or argument by the defense, the court imposed the agreed upon sentence. Counsel was ineffective in failing to present the substantial mitigation evidence the investigator had developed. Nothing in the plea agreement prohibited counsel from presenting the evidence or arguing that the defendant was “a

physically and psychologically battered woman to explain her motivations.” In addition to the Battered Women’s Syndrome evidence, there were four other mitigating factors, including provocation by the victim, that the evidence would have supported. To the extent counsel believed he was “handcuffed by the restrictive plea agreement,” the agreement itself was improper and the court had expressly prohibited “this type of gag provision” less than a year after this plea. This type of agreement deprives the court of necessary information in order to impose an appropriate sentence. Counsel was also ineffective in failing to object to the victim-impact video. “The music [religious and pop] and the photographs of the victim’s childhood and of his tombstone, and the television segment about his funeral do not project anything meaningful about the victim’s life as it related to his family and others at the time of his death.” While the court would not have found prejudice only with respect to the video, the court discussed this in order to resolve the issue on remand. The restrictions on defense counsel in the plea agreement was stricken. The State was free to hold a new sentencing without the restrictions or to vacate the plea.

Branch v. State, 335 S.W.3d 893 (Tex. App. 2011). Counsel ineffective in sentencing for possession of cocaine with intent to deliver case for failing to object to the prosecutor’s improper statements about the way in which parole law would affect the sentence during closing arguments. While the jury was instructed and the prosecutor could properly generally address parole law, the State here commented specifically on how the parole law and good-conduct time would affect this particular defendant. Instead of addressing when he would be eligible for parole, the State affirmatively argued in language of certainty that he would be released by a certain time. These comments were an inaccurate statement of the law, inappropriate, and prejudicial. Two trial counsel were ineffective for failing to object. The first testified that he recognized the objectionable nature of the comments but did not object because second counsel was handling sentencing. The second counsel stated that he had simply missed the argument when it was made and had no trial strategy not to object. Even if there was an alleged strategy, “[t]here can be no reasonable trial strategy in failing to correct a misstatement of law that is detrimental to the client.” Prejudice established as jury was misled into believing that a life sentence would result in the defendant serving only seven to twenty years.

2010: *Gonzalez v. Commissioner of Correction*, 1 A.3d 705 (Conn. App. 2010). Counsel ineffective in threat and violation of protective order case due to counsel’s failure to take adequate steps to ensure that the defendant received sentencing credit for all time served in pretrial confinement. The defendant was initially arrested on a threat charge, but was released the same day on a \$500 nonsurety bond. A month later he was arrested on a breach of peace and violation of protective order charge. Bond was set at \$35,000 and he remained in confinement for several weeks until the court reduced his bond to a promise to appear. Six months later the defendant was arrested for the third time on violation of protective order and harassment charges. Bond was set at \$65,000 and the defendant remained in confinement thereafter. After 73 days had passed since his third arrest,

counsel moved successfully to increase the defendant's first two bonds so the defendant could get presentence confinement credit for those arrests. When the defendant entered guilty pleas on charges involved in the first two arrests and received some confinement time, counsel did not request presentence confinement credit for the 73 days counsel had waited in filing the motion to increase the bond. Counsel's conduct was deficient because, under state law, the defendant could get presentence confinement credit only if inability to obtain bail or the denial of bail was the reason the defendant remained in confinement. Thus, "a reasonably competent attorney not only would have known to ask for an increase in bond, but also would have asked for bond to be increased during the . . . third arraignment, not two and one-half months later." Prejudice established as the defendant was entitled to credit for the 73 days.

DeLeon v. State, 322 S.W.3d 375 (Tex. App. 2010). Trial counsel ineffective in sentencing of indecency with a child by sexual contact case for calling as an expert witness a probation officer who gave highly inflammatory testimony about risks posed by sex offenders on probation. Counsel was pleading for probation and presented the officer to testify about treatment for sex offenders on probation and the protections in place in the community. On cross-examination, however, he testified that a sex offender will always have the sex offender impulses and "[i]f you want to protect the public, then you put them in a situation where they can't have access to children." Counsel's conduct was deficient in calling this witness in the first place and in failing to object to this highly inflammatory testimony. Prejudice established, given the nature of this testimony, the emphasis placed upon it (with more than half of the sentencing transcript covered by this testimony), and that this witness was the only expert in sentencing.

Boan v. State, 695 S.E.2d 850 (S.C. 2010). Counsel ineffective in criminal sexual conduct and lewd acts case for failing to move for clarification of the sentence when the trial court announced a twenty year sentence on the most serious charge but signed a sentencing order increasing the sentence to thirty years. Prejudice was clear as, ruling on this issue of first impression, the oral pronouncement controls.

Vaca v. State, 314 S.W.3d 331 (Mo. 2010). Counsel ineffective in robbery and assault sentencing for failing to consider whether to call a psychiatrist as a witness to present evidence of the defendant's low intelligence and mental health issues. By the time of counsel's appointment, the jail psychiatrist had already seen the defendant and prescribed medications for him because he suspected mental illness. Aware of this, counsel retained a psychologist to evaluate competence to stand trial and diminished capacity. The defendant had an IQ of 73, which was confirmed by his school records. Testing suggested the presence of schizophrenia and Social Security Administration records revealed that the defendant was on disability due in part to schizophrenia. Medical records revealed prior head traumas. Counsel knew from the beginning that the state's evidence was "substantial" and that the case "would probably be going to the sentencing phase." "Because defense counsel conceded that conviction was probable, he knew that strategy

during the sentencing phase was vital to the representation of his client.” Prior to the defense case, the state moved successfully to preclude any mental condition evidence due to counsel’s failure to provide notice to the state. Counsel’s theory during trial was complete innocence due to misidentification by key witnesses. He attempted to elicit testimony from the defendant’s brother about his mental condition, however, but was prevented from doing so. Counsel never attempted to call his psychologist or present his report. During deliberations, the jury sent out four questions asking about the defendant’s housing since arrest, psychological testing, and medications. These questions went unanswered. In sentencing, counsel again did not call the psychologist or submit his report. Counsel simply failed to consider whether to call the expert. “This omission, in front of *this particular jury*, undermines . . . confidence in the sentencing phase’s outcome.” In short, “the holding of this case is not that counsel was ineffective for not calling [the expert]. Rather, this case rests on the fact that the question of whether to call [the expert] was never considered.”

Ex parte Harrington, 310 S.W.3d 452 (Tex. Crim. App. 2010). Counsel ineffectiveness in felony driving while intoxicated (DWI) plea case, due to counsel’s failure to investigate a prior DWI conviction used to enhance the defendant’s misdemeanor DWI to a felony charge. The indictment listed prior DWI convictions in 1986 and 2003 for purposed of enhancement. The defendant informed counsel that the 1986 conviction was not his. A man who had stolen his driver’s license used it when he was arrested and was convicted using his name. Nonetheless, counsel failed to investigate and the defendant pled guilty. Subsequently, a police department fingerprint analysis confirmed that the defendant was not person attached to the 1986 conviction. There was a reasonable probability that the defendant would not have entered a plea to the felony charge if counsel had performed adequately.

Hernandez v. State, 30 So. 2d 610 (Fla. App. 2010). Counsel ineffective in aggravated battery case for failing to object to the trial court’s reclassification of the conviction from a second-degree felony to a first-degree felony. The trial court’s instructions and the jury verdict form failed to distinguish between aggravated battery causing great bodily harm and aggravated battery using a deadly weapon. Either would be a 2nd degree felony, except the court can reclassify to a 1st degree felony when a firearm is used, except where the firearm is already an essential element of the crime. Here, the record was unclear and the court’s reclassification resulted in an illegal sentence. Remanded for resentencing as 2nd degree felony.

Patterson v. State, 926 N.E.2d 90 (Ind. App. 2010). Counsel in drug case was ineffective in failing to move to recuse the sentencing judge, who had previously signed the information and participated in the probable cause hearing ten years before as a prosecutor. The delay was caused by the defendant’s failure to appear for sentencing following his guilty plea. Counsel’s conduct was deficient and prejudicial, as the judge should have recused himself. Likewise, even though the 10 year sentence imposed was

within the maximum of 10 years agreed to in the plea agreement, the denial of the right to an impartial judge only established prejudice.

State v. Ott, 247 P.3d 344 (Utah App. 2010). Counsel ineffective in non-capital murder case for failing to object to inadmissible victim-impact evidence in jury sentencing where the defendant could be sentenced to life with or without the possibility of parole. Specifically, counsel failed to object to a six-minute videotape of pictures of the victim set to “moving music,” and testimony of family members about the impact on them and their opinions of the defendant’s character and the appropriate sentence. The opinions of the defendant’s character (i.e. that he could not be rehabilitated) and opinions on the appropriate sentence were “at odds with United States Supreme Court precedent” in *Payne* and *Booth*. Thus, counsel’s conduct was deficient. Prejudice also established.

2009: *Ex parte Lane*, 303 S.W.3d 702 (Tex. Crim. App. 2009). Counsel ineffective in methamphetamine sentencing for failing to object to improper testimony during the trial and sentencing about “the methamphetamine problem.” During trial, counsel’s conduct was deficient in failing to object to an officer’s testimony “that there is a methamphetamine epidemic in Texas.” Counsel’s conduct was also deficient in failing to object to the prosecutor’s closing argument, which was not supported by evidence, asserting that the defendant was bringing methamphetamine into the county to poison the children and turn them into addicts and that children were in fact shooting up and smoking methamphetamine. The defendant suffered no prejudice during trial, but counsel’s deficient conduct continued in sentencing. Counsel failed to object to testimony by a DEA agent about the societal problems caused by methamphetamine. Counsel also failed to request pre-trial notice of the State’s experts, including the DEA agent, to properly object to his testimony about addiction and that 45,000 people could get high from the amount of methamphetamine possessed by the defendant, and to call an expert in rebuttal. The DEA agent was not qualified to testify about the addictive nature of the drug or about the number of people who could get high on the amount possessed by the defendant. Prejudice was established as the state asked for and obtained a life sentence, relying heavily on the objectionable testimony and argument in both phases of the trial.

Ramirez v. State, 301 S.W.3d 410 (Tex. App. 2009). Counsel ineffective in intoxication manslaughter sentencing for failing to elect jury sentencing based on counsel’s misunderstanding of the law. The state alleged use of a vehicle as a “deadly weapon,” which, if found by the jury, meant that only the jury (and not the judge) could assess a punishment of probation in sentencing. In order for the jury to be eligible to assess probation, defense counsel was required to file a sworn motion prior to voir dire that the defendant had not previously been convicted of a felony. Here, counsel filed the sworn statement, but failed to elect jury sentencing prior to voir dire, which meant under state law that the jury could assess punishment only if the prosecutor consented. Counsel did this because she believed the defendant could get probation if he had judge sentencing

and she advised the defendant that he would have a better chance of getting probation before the judge. When counsel learned of her error, she met with the prosecutor in an attempt to resolve the problem. The state did consent to jury sentencing, but only on the condition the defendant waive his right to appeal on the basis that the jury had not been asked any questions relating to punishment in voir dire. Defense counsel believed she could not do this, but failed to even consult with the defendant about it. The prosecutor, who had offered a probationary sentence in pre-trial and post-guilty verdict negotiations, then agreed to a 10 year probationary sentence, but the trial court refused to accept this agreement and sentenced the defendant to 18 years' confinement. Counsel's conduct was admittedly deficient as it was "based on her misunderstanding of the law" and precluded a probationary sentence even though counsel argued that the defendant was "a good candidate for probation." Prejudice was also clear in that the jury may well have assessed probation as evidenced by the prosecutor's actions in the case in attempting to negotiate for a probationary sentence even after the guilty verdict. The prosecutor also testified in post-conviction that the victim's family agreed that probation was an appropriate punishment.

In re A.E., 922 N.E.2d 1017 (Ohio App. 2009). Counsel ineffective in juvenile sex offender case for failing to advise the juvenile and the court of the proper classification procedures related to the statutory duty to register as a sex offender for the rest of the juvenile's life and failing to advocate on the defendant's behalf. The defendant was 15 and had no prior sex offense adjudications. Under state law, registrations requirements for a 14-15 year old with no prior sex offense adjudications was discretionary. Nonetheless, defense counsel sat silently in court when the court stated incorrectly that registration for the juvenile would be mandatory. Even assuming that counsel and the court understood the discretionary nature of the determination, counsel made no argument that the court should decline registration requirements or that the court should consider the mandatory factors listed in the state statute.

Gordon v. Hall, 221 P.3d 763 (Ore. App. 2009). Counsel ineffective in sentencing of first degree sexual abuse case where the defendant was given an enhanced sentence of life imprisonment without the possibility of parole (LWOP). Under state law, the presumptive sentence for a felony sex crime was LWOP if the defendant had been "sentenced" for two prior felony sex crimes. The state presented evidence of two prior sex "convictions" and counsel did not challenge this evidence, despite informing the court that the defendant did not believe he had a second conviction. Counsel's conduct was deficient in failing to investigate the defendant's prior criminal record and in failing to challenge the imposition of the enhanced sentence. First, the plain text of the statute required two prior "sentences" for the enhancement. Second, while counsel discussed prior "convictions" with the defendant, he did not discuss prior "sentences" with him and "failed to look beyond the face of the documents offered by the prosecutor to determine whether they had actually involved the imposition of sentences." Third, counsel failed to object to the enhanced sentence on the basis that the state had failed to prove two prior

“sentences.” The defendant was prejudiced because one of his prior convictions did not result in the imposition of a sentence because his sentence was suspended and he was placed on probation in California. At the completion of the probation, the court sentence aside the guilty plea, entered a not guilty plea, and dismissed the complaint. Thus, no prison sentence was ever imposed. Under the applicable law at the time in both California and Oregon, “probation was not a sentence.” Thus, the defendant did not have two prior sentences for felony sex offenses and the presumptive LWOP sentence did not apply to him.

State v. Bounhiza, 294 S.W.3d 78 (Tex. App. 2009). Trial court did not err in granting a motion for mistrial in sexual assault case based on ineffective assistance of counsel. Prior to trial, the defendant filed an application for probation. After conviction, however, the parties realized that the trial court was statutorily prohibited from considering probation as a sentence. The punishment range was 2-20 years. Counsel conceded his error and that he had incorrectly advised the defendant to choose the court rather than the jury for sentencing based on this error.

State v. Adamy, 213 P.3d 627 (Wash. App. 2009). Counsel ineffective in child rape and assault case for failing to advise the court that it could consider a special sex offender sentencing alternative (SSOSA) under state law, despite a federal immigration hold. The defendant’s parents were U.S. citizens and he always believed he was also, but learned shortly before the charges were filed that he had been born during a visit to Mexico and his mother had never filled out the required paperwork for citizenship. The defendant pled guilty and the state agreed he could seek a SSOSA if he was, in fact, a citizen and eligible. The court denied the SSOSA believing it could not grant a SSOSA because the defendant was subject to a deportation order. Under state law, however, the court could have sentenced under SSOSA regardless of the defendant’s citizenship or immigration status. Counsel’s conduct “was deficient for failing to recognize and cite the appropriate case law . . . to the sentencing court.” Prejudice shown.

People v. Heinz, 910 N.E.2d 610 (Ill. App. 2009). Counsel ineffective in burglary and theft case for failing to object to restitution order in sentencing. The defendant was ordered to pay \$7,000 in restitution following convictions from breaking into and stealing from a bowling alley. Counsel’s conduct was deficient and not based on strategy because the State’s restitution request “was cursory at best” and the supporting evidence was inconsistent, ambiguous, vague, or completely absent. Counsel’s conduct was deficient in “remaining silent under these circumstances.” Prejudice found because if counsel had objected, the trial court would have held a hearing to determine the actual amount of damages.

Farris v. State, 907 N.E.2d 985 (Ind. 2009). Counsel ineffective for failing to challenge consecutive habitual offender sentence. Defendant was initially charged with robbery and while pending trial was charged with murder committed by someone he hired and who

was attempting to kill his robbery co-defendant who was cooperating with the state. The defendant was convicted first of the robbery and his sentence was enhanced by 30 years as a habitual offender. Following his murder conviction, his sentence in that case was also enhanced by 30 years and ordered to run consecutive to sentence in robbery case. Counsel's conduct was deficient and prejudicial because state case law from at least seven years before the defendant's offenses or trial prohibited the state from seeking multiple enhancements by bringing successive prosecutions for charges that could have been consolidated for trial. These charges could have been consolidated because they were based on a "series of acts connected together" as required by statute.

In re Personal Restraint Petition of Crawford, 209 P.3d 507 (Wash. App. 2009).

Counsel ineffective in sentencing following robbery and assault convictions for failing to challenge the use of an out-of-state conviction in designating the defendant as a persistent offender, which resulted in a sentence of life without parole. The prior conviction was for sex abuse in Kentucky. State law required the court to classify this according to the comparable offense in Washington law, based on the elements of the offense (legal comparability) or based on the defendant's conduct as evidenced by the indictment or information (factual comparability). Here, the Washington statute included several elements that the Kentucky statute did not and, although the defendant's conduct almost certainly violated the Washington statute, the necessary information to establish the elements was not contained in the Kentucky documents. Thus, counsel's conduct was deficient and the defendant was prejudiced because the Kentucky offense was improperly counted as a strike under the persistent offender statute.

2008: *Thompson v. State*, 990 So. 2d 482 (Fla. 2008). Counsel ineffective in burglary, false imprisonment, and sexual battery case for failing to timely move to disqualify the presiding judge from sentencing. Prior to trial, counsel moved to withdraw stating the defendant had threatened to kill him, his family, and anyone associated with the case following conviction. The defendant denied the allegations and the motion was denied based on the court's finding that he would likely be sentenced to life and unable to carry out his threat if he was convicted. Counsel filed a motion to disqualify the court 14 days later, which was denied as untimely under state rules requiring that a motion for disqualification be made within 10 days after the discovery of the facts constituting the grounds for disqualification. Following conviction, the court sentenced the defendant to concurrent life sentences. Counsel's conduct was deficient and not based on strategy. Prejudice found because "the statements made by the judge . . . sufficiently evince judicial bias and predisposition so as to undermine confidence in the eventual sentence imposed."

Robinson v. State, 669 S.E.2d 588 (S.C. 2008). Counsel ineffective following plea to drug trafficking offense for failing to challenge the use of a prior uncounseled magistrate court conviction to enhance the sentence, which resulted in a 20 year sentence. Prejudice found even though the sentence imposed was less than the maximum allowable

punishment for a first trafficking offense. No sentencing ordered.

Lair v. State, 265 S.W.3d 580 (Tex. App. 2008). Counsel ineffective in sentencing in possession of ecstasy case. Counsel presented only the defendant's sister-in-law to testify, despite the availability and willingness of over twenty witnesses, including the defendant's mother, relatives, and neighbors, who would have given good character type evidence. Counsel's conduct was deficient because he "did not even interview these witnesses, let alone present their testimony at the punishment hearing. This fact . . . necessarily defeats counsel's subsequent representation that the testimony of these additional witnesses would have been merely cumulative since, without conducting any sort of investigation into their testimony, he could not know whether the testimony was cumulative or not." Counsel's alleged concern about the state cross-examining these witnesses with the defendant's prior 50-year sentence also did not explain the failure because the jurors were already aware of the prior sentence. Prejudice found because the evidence the jury heard "was brief and lacking in the detail and information that the additional witnesses would have offered." In addition, the jury sentenced the defendant to 70 years when the State had requested only a 50 year sentence.

2007: *Pettis v. State*, 212 S.W.3d 189 (Mo. App. 2007). Counsel ineffective in sentencing following guilty plea to possession of a controlled substance within a correctional institution for affirmatively misstating the parole consequences of a consecutive sentence to the court. The defendant was serving a life sentence and had been approved for parole prior to these charges. Following these charges, his parole was cancelled and a new parole hearing was scheduled. The defendant entered a plea in this case pursuant to an agreement wherein the state agreed to maximum of five years but left to the court the determination of whether the sentence should be concurrent or consecutive to the life sentence. During the sentencing, the court inquired about the impact on parole and clearly wanted to impose a sentence with some deterrent effect but also to show some leniency to the defendant. In response to the court's inquiries, counsel stated that his "release date is to going to be pushed backward" and urged the court not to impose a consecutive sentence. The court gave the defendant a sentence of four years consecutive. Counsel's conduct was deficient because counsel affirmatively misstated the real consequence, which was that a consecutive sentence of any length effectively converted the life sentence to one of life without parole. Prejudice was clear because the court had no inkling the defendant's parole eligibility would be extinguished by a consecutive sentence when the court clearly wanted to show some leniency in sentencing the defendant to four years rather than the five recommended by the state.

State v. Thiefault, 158 P.3d 580 (Wash. 2007). Counsel ineffective in sentencing following indecent liberties and attempted rape convictions for failing to object to the sentencing court's comparability analysis regarding the defendant's prior Montana conviction for attempted robbery, which led to the sentencing court counting that offense as a strike under the Persistent Offender Accountability Act (allowing a life without

parole sentence based on three prior convictions or “strikes) and sentencing the defendant to life without parole. Counsel’s conduct was deficient because the Montana offense was broader than its Washington counterpart because the Montana statute required a lesser mens rea. There was also insufficient evidence in the record for the court to factually compare the offense to make a proper comparability determination. Prejudice found because counting the Montana offense as a strike allowed the court to sentence the defendant to life without parole.

2006: *People v. Thimmes*, 41 Cal. Rptr. 3d 925 (Cal. App. 2006). Counsel ineffective in sentencing for felony drug case for failing to advise the court that the defendant had been warned of the consequences of his prior conviction and the Three Strikes Law prior to the defendant’s no contest plea in exchange for a sentence of 32 months. The strike offense admitted was a 1999 criminal threat for which the defendant was sentenced to probation. Counsel’s conduct was deficient because the trial court assumed that the defendant had been advised that the 1999 conviction would count under the Three Strikes Law even though criminal threat was not included for purposes of that provision until 2000. Prejudice found because the trial court was permitted to decline to apply the Three Strikes Law and had stated that the case was “a pitiful one,” but applied the law based on the assumption that the defendant had previously been advised of the consequences.

People v. Le, 39 Cal. Rptr. 3d 146 (Cal. App. 2006). Counsel ineffective in robbery and burglary case for failing to object based on double jeopardy to consideration of both offenses in calculating the restitution fine. Counsel’s conduct was deficient and prejudicial because state law precluded multiple punishment for a single act or omission and the defendant’s sole intent was to steal from a drugstore. Thus, the defendant should have been sentenced solely on the robbery conviction but the burglary conviction was included, which essentially doubled the restitution fine.

Estrada v. State, 149 P.3d 833 (Idaho 2006). Counsel ineffective in plea to rape case for failing to advise the defendant of his right to refuse to cooperate with a court-ordered psychosexual evaluation for purposes of sentencing. After accepting the plea, the trial court ordered a psychosexual evaluation of the defendant, which counsel informed the defendant must be completed, even though the defendant initially refused to participate. Counsel’s conduct was deficient in failing to advise the defendant that he still retained his right against self-incrimination following his plea and he was not required to participate in the psychosexual evaluation. Prejudice found because the sentencing judge’s specific, repeated references to the psychosexual evaluation suggest that it played an important role in the sentencing and the evaluation report included a number of unfavorable and derogatory comments, including references to the defendant’s potential for future violent actions.

2005: *Matthews v. State*, 868 A.2d 895 (Md. App. 2005). Counsel ineffective and prejudice presumed in probation violation case for failing to file a motion for modification of

sentence when requested to do so by the defendant. Defendant entitled to file a belated motion for modification of sentence.

Shanklin v. State, 190 S.W.3d 154 (Tex. App. 2005). Counsel ineffective in punishment phase of non-capital murder case for failing to investigate or present evidence from at least 20 available witnesses and instead called only the defendant to testify that he was sorry. The prosecutor requested a sentence of 25 to 35 years but the jury imposed a sentence twice that length. The available witnesses would have testified that the defendant was an excellent father, helped his friends and relatives, and worked hard.

Freeman v. State, 167 S.W.3d 114 (Tex. App. 2005). Counsel ineffective in sentencing on aggravated sexual assault charge for failing to adequately investigate and present evidence of the defendant's history of mental illness. While counsel was aware that the defendant had previously been hospitalized on a couple of occasions (and the defendant testified about this during trial), counsel presented only testimony from the defendant's mother in sentencing asking the jury to take his illness into account. If counsel had adequately investigated, the evidence would have shown that the defendant had another prior hospitalization following an attempted suicide and had been receiving regular outpatient treatment for more than a year prior to the crime. He had last been seen three weeks before the crime. Counsel's conduct was deficient under *Wiggins* because counsel failed to investigate and there was no strategy for this failure. Prejudice was found because counsel only presented lay testimony from the defendant and his mother on this issue. Although "it is sheer speculation" that the jury would have given a lighter sentence if additional evidence had been presented, the court found a reasonable probability of a different outcome.

Andrews v. State, 159 S.W.3d 98 (Tex. Crim. App. 2005). Counsel ineffective in sentencing for indecency and sexual assault of child case for failing to object to the prosecutor's argument that the defendant's sentences could not be made consecutive, which was a misstatement of law and contrary to the state's pretrial motion asking to make the sentences consecutive or cumulative. Counsel's conduct was deficient (and could not be explained by trial strategy) because "counsel has a duty to correct misstatements of law that are detrimental to his client." Prejudice was found because the argument left the jury with the false impression that the maximum the defendant would serve was 20 years when the maximum sentence was actually 80 years.

2004: ***Barger v. State***, 895 So. 2d 385 (Ala. Crim. App. 2004). Counsel ineffective in theft case for failing to appear at the restitution hearing, which was "a component of the criminal-sentencing proceeding." Remanded for new restitution hearing.

McCarty v. State, 802 N.E.2d 959 (Ind. App. 2004). Counsel was ineffective in failing to prepare and present mitigating evidence in sentencing following the defendant's plea to child molestation. Counsel's conduct was deficient because he met with the defendant

only once, conducted no investigation, and did not retain an investigator or mental health expert. Prejudice was found because adequate investigation and presentation would have revealed that the defendant was mentally retarded, he had been molested himself as a child, there was a likelihood that he could be successfully rehabilitated, and his confession admitted acts beyond what the victims had reported. Because of the trial court's reluctance to find prejudice and grant relief, the court exercised its state constitutional authority to revise the defendant's sentence and reduced his sentence by 10 years to the presumptive term of 30 years.

Storr v. State, 126 S.W.3d 647 (Tex. App. 2004). Counsel was ineffective in sentencing in aggravated kidnaping case for failing to obtain an instruction on voluntary release of kidnaping victim in a safe place. The defendant was charged with aggravated kidnaping, which is a felony in the first degree. Under state law, however, if the defendant raises the issue of voluntary release of the victim at the punishment stage and proves that by a preponderance of the evidence, the offense is a felony in the second degree. The first degree felony is punishable by imprisonment of 5 to 99 year. The second degree felony is punishable by a term of 2 to 20 years. Counsel's conduct was deficient in failing to request the instruction because the evidence conclusively established that the appellant voluntarily released the victim in a safe place. The victim was left in his car at a post office which is exactly the point were he had been abducted to start with. The court found that it was inconceivable that counsel had some trial strategy for not requesting an instruction on safe release given the significant difference in punishment. Prejudice found because the defendant was sentenced to 35 years which is 15 years more then the maximum imprisonment allowed for the second degree felony.

State v. Saunders, 86 P.3d 232 (Wash. App. 2004). Trial counsel was ineffective in sentencing in murder, rape, and kidnaping case for failing to argue that rape and kidnaping constituted the "same criminal conduct" for purposes of calculating offender score. "Same criminal conduct" refers to the situation where there are two or more crimes that (1) require the same criminal intent, (2) are committed at the same time and place, and (3) involve the same victim. Here, the primary motivation for sexually assaulting the victim by inserting a television antenna in her anus was to dominate her and to cause her pain and humiliation. Because this intent arguably was similar to the motivation for the kidnap, defense counsel was deficient for failing to make this argument. Prejudice was found because the case law provides strong support for this argument. New sentencing granted.

2003: *Carswell v. State*, 589 S.E.2d 605 (Ga. App. 2003). Counsel's performance was deficient in an aggravated assault case for failing to object to two prior convictions used by the state in aggravation of sentence because those guilty pleas may not have been entered into voluntarily. Because the court found that reversal was required on the substantive issue, the court found that the question of prejudice with respect to the ineffectiveness of counsel was moot.

**SUMMARIES OF SUCCESSFUL
INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS
POST-*WIGGINS V. SMITH* INVOLVING
NUMEROUS DEFICIENCIES AND INADEQUATE
DEFENSE AT TRIAL**

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TRIAL PHASE - NUMEROUS DEFICIENCIES AND INADEQUATE DEFENSE

1. U.S. Court of Appeals Cases

2011: *United States v. Coutentos*, ___ F.3d ___, 2011 WL 3477190 (8th Cir. Aug. 10, 2011). Counsel ineffective in possession of child pornography case for failing to raise statute of limitations defense. The allegations were made by two 14-year-old girls, who alleged events eight years earlier. The government charged the defendant with possession “in or around 2001.” A general statute provided a five-year statute-of-limitations period. A later statute enacted July 27, 2006, extended the statute-of-limitations period, but only if the original period had not run. Thus, July 27, 2001, was the cut-off date for determining whether the statutory time was extended in this case. Counsel’s conduct was deficient in failing to challenge this issue because the government did not present any specific evidence that the alleged conduct occurred before July 27, 2001. According to the girls’ testimony, the acts could have occurred any time between 2000 and 2002. Convictions vacated on these charges, although there remained valid convictions on other offenses.

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

Sussman v. Jenkins, 636 F.3d 329 (7th Cir. 2011). Counsel ineffective in child pornography and sexual assault of minor case for failure to adequately present evidence of the minor's prior false accusation against his father during divorce proceedings. The petitioner was a former school mentor for the child, who also saw him frequently outside of school. Once the mentoring concluded, the child's mother, acting on the advice of friends, asked the child if he had been abused. The child told his mother that petitioner had sexually abused him and the authorities were called. Counsel was initially precluded from eliciting testimony about the prior false allegation because he had not timely raised the issue pretrial as required by the Wisconsin rape shield statute. After the child testified that he did not report the abuse because he thought it "was right," the trial court revisited the ruling and permitted counsel to inquire whether he had previously reported an unlawful touching. Counsel interpreted the court's ruling to allow only cross of the child on this point. Thus, counsel did not seek to present evidence from the child's father or counselor to establish the prior false accusations against the father or to establish that the child had denied to the counselor, as documented in his records, that petitioner had abused him. Because the state court addressed only prejudice, review of counsel's conduct was *de novo* under AEDPA. While there is a presumption of reasonable professional judgment "as a general proposition of law," that presumption "has little bearing" here. Counsel's failure to file the pretrial motion was an oversight. Counsel's failure to introduce the counselor's note was due simply to a misunderstanding of the breadth of the trial court's ruling. With respect to prejudice, the state court's determination that the evidence would have been excluded even with a timely pretrial motion under the statute could not be reviewed as it was a matter of state law. The court could, however, consider the Confrontation Clause issue as the state court ruling precluded petitioner from confronting the witnesses against him. Here, with the evidence of the prior false accusations against his father, the jury could reasonably have concluded that the child was prone to use allegations of sexual abuse against father figures as a means either of gaining their attention or as a means of punishing them for abandoning him. This type of "evidence that exposes a motive to fabricate a specific kind of lie under a specific set of circumstances" directly implicated the petitioner's confrontation rights. In failing to even address this confrontation issue, the state court unreasonably applied the law as construed by the Supreme Court. Prejudice established even though the jury heard evidence of the prior allegations. "[T]here is an obvious difference between an accusation and a false accusation." Counsel did not establish that the prior allegation was false and did not explore the child's motives for the false allegations against his father or draw parallels to the current case. While the child's credibility was impeached generally, this evidence would have demonstrated that he "lies specifically about sexual abuse when he feels abandoned by father figures." The child's testimony was the only evidence of guilt. Even without the false-accusation testimony, the jury acquitted on some charges. Thus, "the jury harbored doubts as to some aspects of [the child's] testimony." Likewise, while a lay witness testified that the child had stated previously that his allegations against petitioner was false, failure to include the counselor's note and testimony was

prejudicial. The lay witness was thoroughly discredited as biased. The counselor was an objective third party with no motive to lie. The jury would “have given far more credence” to the counselor’s note. While this single note error might not require reversal due to required deference to “reasonable” state court determinations, the cumulative impact when combined with counsel’s failure to present the false allegation evidence required reversal.

Couch v. Booker, 632 F.3d 241 (6th Cir. 2011), *affirming* 650 F.Supp.2d 683 (E.D. Mich. 2009). Counsel ineffective in second-degree murder case for failing to investigate a “causation” defense. The murder “arises from an incident that occurred when a party went awry.” In essence, the victim was drinking, smoking marijuana, and using cocaine at a party. A woman at the party called the petitioner and two other men asking for assistance with “a situation.” When the men arrived they discovered that the victim had raped a woman. They pulled him outside and “punched him repeatedly.” The petitioner punched the victim 5-7 times and kicked him once. An ambulance was called, but the victim later died. The pathologist that conducted the autopsy found a chronic heart problem, possibly related to drugs, a .17 blood-alcohol level, noticeable levels of “cannabinoids” from marijuana, and significant levels of cocaine. There was blood in the lung tissue. The doctor concluded that the cause of death was asphyxia from inhaled blood that resulted from blunt-force injury to the face. Counsel’s conduct was deficient in failing to pursue a causation defense after receiving this information. Counsel did not seek the records or interview the medics. Counsel claimed he did not get the report because he did not want to emphasize the victim’s “fear and the effect of the attack.” While this kind of fear might explain not offering the evidence during trial, “that is no reason not to *read* the report. How can one exercise reasonable professional judgment about whether to stop a causation-based investigation before reading the key report that might support it?” *Id.* at 246. Likewise, counsel’s conduct was not excused by a defense medical expert agreeing with the cause of death found by the state’s pathologist. The defense expert never saw the incident report or talked to the medics. “An attorney cannot hire an expert, give him whatever evidence he happens to have on hand (but not the evidence the client pointed to) and accept the report without further discussion.” *Id.* at 247. “Hiring a medical expert to review an autopsy report does not amount to the outsourcing of all investigation into plausible causation theories, including a theory that may have nothing to do with the autopsy report.” Prejudice found. Investigation revealed that the victim was conscious when medics arrived, he fought medics when they tried to put him in the ambulance, and his mouth and nose were not flooded with blood, even though the state repeatedly argued that he “drowned in his own blood.” With this information, a defense expert could have testified that the cause of death was actually “cardio respiratory failure” due to cocaine toxicity from an “accidental” cocaine overdose. Prejudice especially with respect to the petitioner, as he was arguably the least culpable of assailants, such that there was no evidence of premeditation or anything else to suggest that he meant to kill the victim.

2010: *White v. Thaler*, 610 F.3d 890 (5th Cir. 2010). Under AEDPA, counsel was ineffective in murder case for eliciting evidence about the defendant's post-arrest silence and for failing to object to evidence the murder victim was pregnant at the time of her death. After a confrontation with a woman in a bar, the defendant ran over her and a second woman with his pickup while leaving the parking lot. The second woman, who was pregnant, died. The defendant never gave his exculpatory version of events—that he was fleeing from an angry mob—until his trial testimony. During direct, counsel elicited this fact. During cross, the state questioned the defendant “extensively about his post-arrest silence.” Because the state court did not adjudicate deficiency on the merits, the court reviewed this *de novo*. Counsel conceded he did not elicit this evidence as part of a strategy. Because the police did not advise the defendant of his *Miranda* rights at the time of arrest, there was no violation under federal constitutional law. Under the Texas Constitution, however, state cases held “that a defendant’s post-arrest, pre-*Miranda* silence could not be used against him at trial.” In short, “Texas law prohibits a prosecutor from impeaching a defendant with his post-arrest silence.” By opening the door, defense counsel allowed the prosecutor to “verbally pound[]” the defendant and to “mock[]” his testimony that he feared for his life. The prosecutor used the silence as “prior inconsistent conduct” and argued the defendant was not “credible” on this basis. The state court’s finding of no prejudice was “objectively unreasonable.” Counsel’s conduct was also deficient in failing to object or file a motion in limine to exclude evidence that the victim was pregnant. Again, because the state court did not adjudicate deficiency, this was reviewed *de novo*. Counsel’s conduct was deficient as the evidence of pregnancy was “irrelevant” under state evidence rules as the only disputed issue at trial was whether the defendant “intended to hit the victims with his truck.” Moreover, there was no evidence to show the defendant knew the victim was pregnant, as this only became apparent during the autopsy. Counsel conceded there was no strategy for failing to object to this evidence. Prejudice established, as the state referred to the death of the “unborn child” nine times in closing arguments. Prejudice was also clear as the murder conviction rested on the jury finding intent to kill the victim. By its verdict, however, the jury acquitted him of (finding no intent) attempted murder of the other woman, who was the person he had argued with. “Under these circumstances, the jury’s verdict of intentional murder is not reliable.” The state court’s finding of no prejudice was “objectively unreasonable.” While both of these issues were prejudicial, standing alone, the cumulative of “combined prejudicial effect . . . inexorably leads” to reversal.

English v. Romanowski, 602 F.3d 714 (6th Cir. 2010) (*affirming in part and reversing in part*, 589 F. Supp. 2d 893 (E.D. Mich. 2008)). Under AEDPA, counsel ineffective in assault with intent to commit murder case for failing to adequately investigate prior to informing the jury in opening statements that the defendant’s girlfriend would be called as a witness to corroborate the claim of self-defense. Because the state court had failed to address the issue, although raised in state court, review was *de novo*. Counsel’s conduct

was deficient, even though there were arguably valid strategic reasons for counsel's decision not to call the girlfriend as a witness. "This is not a case where counsel simply failed to pursue a potential witness. . . . Here, counsel was actually prepared to call" the witness and informed the jury of this intent before discovering the problems and concerns that caused counsel to change his mind. Simple pretrial interviews of witnesses would have revealed the problems, but counsel "failed to interview any of the witnesses outside of the courthouse or prior to trial." Reasonable trial strategy could not be developed on guesses of what witnesses would say. The unfulfilled promise to the jury to call the girlfriend as a witness was prejudicial because the unfulfilled promise (1) created a negative inference against the defendant generally; (2) caused a negative inference against the defendant's own testimony, which counsel promised would be corroborated by the girlfriend; and (3) prejudicial, inflammatory evidence of the girlfriend's witness tampering and alleged false evidence planting would not have been admitted if defense counsel had not identified her as a witness. In addition, the state's evidence was not overwhelming as there were "no unbiased witnesses" and no physical evidence.

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

this must be weighed against the flaws in the prosecution's case.” The state court's conclusions unreasonably applied *Strickland*.

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

particularly in the face of the trial court's warnings, not to have understood that eliciting reputation testimony would lead to the introduction of [the defendant's] criminal history." In short:

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

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

Richards v. Quarterman, 566 F.3d 553 (5th Cir. 2009) (*affirming* 578 F. Supp. 2d 849 (N.D. Tex. 2008)). Under AEDPA, counsel was ineffective in murder case (with death a day or so after assault) for a number of reasons. The case involved a number of homeless people living on the streets near a church tent known as the "slab church." Two eyewitnesses testified that they observed the victim and defendant in a minor altercation and returned later to see the victim standing over the defendant, who appeared to be asleep, with a stick and length of steel. The defendant got up, picked up a piece of asphalt, and hit the victim 9 or 10 times around the head and face. The defendant's brother later discovered the victim's body and testified that the defendant told him, consistent with the eyewitness testimony, that the victim had choked him into unconsciousness. When he awoke, he hit the victim in self defense. First, counsel's conduct was deficient in failing to present evidence (and preventing the state from presenting evidence) of the victim's pre-death statements that significantly varied from the state's evidence and theory. In essence, the victim had gone to a nearby house at 3:00 a.m. and told a witness there he had been attacked by 3-5 men after he had fallen asleep and that another man [not the defendant] was the principal assailant that hit him in the head with a brick. Due to counsel's sustained hearsay objections, the victim's statements were excluded. The victim also told the police officer that responded to the house that he was attacked by 4 men around 3:00 a.m. and that he knew the men. Again, counsel's sustained hearsay objections excluded the victim's statements. Another homeless man testified that he was with the victim in the area around 6:00-7:00 a.m. when a man (not matching the defendant's description) walked by and the victim became agitated and said he was the attacker from the night before. Again, the victim's statements were excluded

based on counsel's objections. Finally, counsel failed to present the defendant's testimony that his fight with the victim occurred around 10:00 or 10:30 p.m. Counsel's conduct was deficient and not based on any legitimate strategic reason. The state court's contrary findings were an unreasonable application of *Strickland*. Second, counsel's conduct was deficient in failing to request instruction on aggravated assault, a lesser-included offense. This was not the result of any reasoned trial strategy. Counsel initially stated she thought the request would have been frivolous. But, counsel's "testimony strongly suggests that she both failed to recognize" that it "was entirely possible for the jury to believe that [the defendant] did not act in self-defense but also believe that he did not kill [the victim]." Counsel "misunderstood the law governing lesser-included offenses." Thus, her additional explanation that she did not want to give the jury the option of convicting of a lesser offense was "a 'post-hoc rationalization' rather than a genuine account of her decision-making process." The state court's contrary finding was an unreasonable application of *Strickland*. Third, counsel's conduct was deficient in failing to put into evidence the defendant's VA medical records to establish the defendant's physical problems, which included a triple bypass surgery, left side weakness, frequent chest pains, and an inability to walk more than half a block without stopping. Counsel's "ethical" explanations for not presenting this evidence "were developed after the fact" and "make no sense." "[T]here is nothing implausible about being strong enough to hit someone two to three times with a rock in self-defense but not strong enough to kill the person." The medical evidence also might have made the self-defense claim "more plausible." Counsel's conduct was deficient and not based on reasonable strategy. The state court's contrary findings were an unreasonable application of *Strickland* and the state court's factual findings on this were rebutted by clear and convincing evidence. Finally, counsel was ineffective in failing to interview important witnesses prior to trial. Again, the state court's contrary findings were an unreasonable application of *Strickland* and the state court's factual findings on this were rebutted by clear and convincing evidence. Prejudice established based on the "cumulative effect" of the errors. "But for the deficiencies in [counsel's] performance . . . , the jury would have heard compelling evidence that there was another, more serious assault on [the victim] after the one described by the prosecution's witnesses and [the defendant] himself, as well as of [the defendant's] documented frailties."

2008: *Avery v. Preslesnik*, 548 F.3d 434 (6th Cir. 2008), *cert. denied*, 130 S.Ct. 80 (2009), (*affirming* 524 F. Supp. 2d 903 (W.D. Mich. 2007)). Under AEDPA, counsel ineffective in second degree murder case for failing to investigate and interview alibi witnesses. The defendant gave counsel three names and the business address for alibi witnesses. Counsel's investigator went there and interviewed one of the individuals, who was not personally an alibi, but told the investigator that his brother, who the defendant had named, and another person had been with the defendant. The investigator left his business card but neither the investigator nor counsel took any other action to investigate. Counsel's conduct was deficient because, at bare minimum, counsel should have sought

the witness' phone number and made a reasonable attempt to contact them. Failure to do so was not excused by strategy. "[T]he limitations on [the] investigation rendered it impossible for [counsel] to have made a 'strategic choice' not to have [the alibi witnesses] testify because he had no idea what they would have said." Prejudice was reviewed *de novo* because the state court did not rule on this issue. Although the state post-conviction judge found at least one of the witnesses to be "totally incredible," the Sixth Circuit noted that the hearing was more than a year after the trial. In addition, "evaluation of the credibility of alibi witnesses is 'exactly the task to be performed by a rational jury,' not by a reviewing court." The court also noted that there was "otherwise flimsy evidence" supporting the conviction, which was basically one eyewitness, "peeking" out a window in the dark. This witness also had made inconsistent statements and identifications.

**Duncan v. Ornoski*, 528 F.3d 1222 (9th Cir. 2008) (sentenced in March 1986). Under pre-AEDPA standards, counsel ineffective as to alleged special circumstance (i.e., what creates eligibility for a death sentence in California) for failing to investigate and present evidence that the blood samples from the crime scene that did not belong to the victim, who was stabbed to death in a struggle, also did not belong to the defendant. Such evidence supported an inference that the defendant had an accomplice and that the accomplice killed the victim. There was no prejudice during trial, but prejudice was established with respect to the special circumstance findings that required an intentional killing or an intent to kill. The state's serologist was given no blood to compare to samples other than the victim's and could state only what did not match the victim. The defense argued in closing that the state should have tested the defendant's blood, but the prosecutor responded that if inconsistent blood evidence had been present, the defense would have presented this evidence.

Although it may not be necessary in every instance to consult with or present the testimony of an expert, when the prosecutor's expert witness testifies about pivotal evidence or directly contradicts the defense theory, defense counsel's failure to present expert testimony on that matter may constitute deficient performance.

Here, the defense argued that the defendant was not the killer, but "did not advance any plausible alternative theory or present any specific evidence that he was not the murderer." Counsel had the serology report and understood the significance but opposed the state's motion for blood testing of the defendant and did not consult a serologist or have the defendant's blood tested.

It is especially important for counsel to seek the advice of an expert when he has no knowledge or expertise about the field. . . . Additionally, the central role that the potentially exculpatory blood

evidence could have played in [the] defense increased [the] duty to seek the assistance of an expert.

Counsel did not have a valid strategy not to incriminate the defendant further because the defendant admitted presence and his fingerprints and palm prints were present at the scene. In addition, state law allowed “confidential testing by defense experts,” which the prosecutor even pointed out to the jury in closing in arguing the unfavorable inferences. Even if defense counsel was concerned about maintaining confidentiality, counsel could have obtained a small sample of the defendant’s saliva in a vial or cloth and used that to determine his blood type without notifying the court or the State so there was “nothing to *lose* by testing [the defendant’s] blood, but he stood to *gain* crucial evidence by doing so.” Prejudice found

especially considering that the blood evidence was the only physical evidence that had not been linked to [the defendant] at the time of the trial. The evidence that [counsel] failed to present would have been highly significant because it would have suggested that [the defendant] had an accomplice and that the accomplice was likely the actual killer. Under the State's own theory, the small money room likely would have accommodated only one killer. Given the blood found at the crime scene that did not belong to the victim or to [the defendant] and that was likely shed in the course of the attack, it appears probable that [the defendant] was not in the money room during the murder.

Id. at ____.

2007: *Bell v. Miller*, 500 F.3d 149 (2nd Cir. 2007). Counsel ineffective in robbery and assault case for failing to consult with a medical expert regarding the reliability of the victim’s identification of the defendant. The victim was robbed and shot in the thigh with a shotgun in the street. When police arrived he had lost half his blood. He described his assailant as a black male with a lemon-colored shirt in a fashion that implied he did not know the shooter. He then lapsed into a coma for eleven days. He identified the defendant by name when he recovered although he continued to take painkillers every four hours and suffered from memory lapses and dizziness for a month. Counsel’s conduct was deficient because he asked no questions about the medications or memory loss. He also asked no questions of the ER doctor concerning the effect of blood loss on consciousness and memory or the effect of the medications. Counsel’s conduct was deficient in failing to consult a “medical expert regarding the effects of trauma, blood loss and painkillers” on the victim’s memory. No strategy explained this failure. Prejudice found because there was evidence of “retrograde amnesia,” which was exacerbated by the medications he was likely given in the ER, and that he likely had not fully regained consciousness when he

first identified the defendant. While state law prohibited testimony on the reliability of eyewitness identification from social scientists, it is likely the trial court would have permitted a “medical expert” to testify to these factors. [It should be noted that while the court repeatedly referred to a “medical expert,” the defendant’s post-conviction evidence of prejudice was from a “neuropsychologist.”] There was no evidence linking the defendant to the crime other than the victim’s identification and he had three alibi witnesses. Under AEDPA, the court’s review was conducted de novo because the state court had applied a state rule that was not regularly applied to deny relief and was, therefore, not adequate to bar habeas review. The state court’s alternative statement that “if the merits were reached, the result would be the same” was not an adjudication on the merits requiring application of § 2254(d).

Fadiga v. Attorney General U.S., 488 F.3d 142 (3rd Cir. 2007). Counsel ineffective in immigration proceedings where the issue of ineffectiveness is cognizable under the Fifth Amendment as a violation of due process but the courts often and in this case essentially used the *Strickland* standard. Here, the alien was a native of Guinea, who entered the country in 1991 on a visa that expired after one month. Eleven years later, INS brought removal proceedings. The alien applied for withholding of removal and protection under the Convention Against Torture. During the hearing, the alien testified that he had left Guinea due to political issues in the country, which rose to the level of his uncle being murdered due to political motivations, and his fear that he would be “arrested, tortured, or killed.” Shortly after his departure, an arrest warrant had been issued for him charging “public disorder.” The Immigration Judge (IJ) found dramatic inconsistencies in his testimony and the application filed and noted the lack of supporting witnesses and documents to corroborate the alien’s testimony. Although the alien and his counsel essentially explained that the fault lay with counsel, the IJ ruled against the alien. The alien appealed to the Board of Immigration Appeals (BIA) and, represented by new counsel, asserted only the ineffectiveness of initial counsel, who provided an affidavit in support of the issue. The BIA denied relief and the case proceeded to the Third Circuit. Counsel admitted (and the court found) that counsel’s conduct was deficient because a law student prepared the application and counsel assumed it was complete and accurate. Thus, counsel did not review the application with the alien or advise him to review it before signing it. He also did not discuss with the alien the need for additional witnesses and corroboration other than a simple generic letter about a month before the hearing, which is the only reason the alien was able to provide some documentation. In discussing a threshold procedural requirement applied by the BIA for ineffectiveness claims, the court held that the “Lozada requirements” do not require a bar or disciplinary complaint against counsel. Those requirements are aimed at serving, in essence, the interests of ensuring adequate counsel, deterring meritless claims of ineffectiveness, and prohibiting “collusion between counsel and the client” on these issues.

All of these interests—save the last—are served without a complaint

where, as here, prior counsel has fully and openly owned up to his error and provided a detailed affidavit attesting to the problems in the representation. As to the "collusion" rationale, it seems unlikely that a lawyer would go so far as to commit perjury (i.e., intentionally filing a false affidavit) in furtherance of such collusion. Therefore, we find that the requirement of a complaint was excused in this case where counsel acknowledged the ineffectiveness and made every effort to remedy the situation.

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

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

[I]t is inconceivable that a reasonably competent attorney would have failed to know what his expert was doing to test the State arson conclusion, would have failed to work with the expert to understand the basics of the science involved, at least for purposes of cross-examining the State's experts, and would have failed to inquire about why his expert agreed with the State. A lawyer cannot be deemed effective where he hires an expert consultant and then either willfully or negligently keeps himself in the dark about what that expert is doing, and what the basis for the expert's opinion is. . . . The point is not that [counsel] had a duty to shop around for another expert who would refute the conclusions of [the defense expert] and the State's experts. The point is that [counsel] had a duty to know enough to make a reasoned determination about whether he should abandon a possible defense based on his expert's opinion. . . . Having simply been served up with [the

defense expert's] flat agreement with the State, and not having known either what [he] did to arrive at his conclusion or why he came out where he did, [counsel] was in no position to make this determination.

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

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

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

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

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

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

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

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

In the end, weighing the prosecution's case against the proposed witness testimony is at the heart of the ultimate question of the *Strickland* prejudice prong, and thus it is a mixed question of law and fact not within the Section 2254(e)(1) presumption. Even though the jury could have discredited the potential witnesses here based on factors such as bias and inconsistencies in their respective stories, there certainly remained a reasonable probability that the jury would not have.

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

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

Id. at ____.

Raygoza v. Hulick, 474 F.3d 958 (7th Cir.), *cert. denied*, 128 S.Ct. 613 (2007). Under AEDPA, trial counsel was ineffective in murder trial for failing to adequately investigate and present an alibi defense. The defendant, a gang member, was charged with the murder and a second shooting of rival gang members in a Chicago Pizzeria. A confession was suppressed because of a Sixth Amendment violation as a result of extended interrogations despite the petitioner’s representation by counsel. The petitioner waived jury trial. During the ensuing bench trial, the state’s eyewitness testimony consisted of three rival gang members and a passerby who did not see the shooter’s face and was only able to give a general description of the perpetrator’s clothing as they fled from the scene. Another witness testified that Petitioner had been at a party near the scene shortly before the murder and trial counsel did not impeach her even though she had previously told police he was not present and never said that he was until two years after his arrest. Trial counsel conducted almost no cross-examination of the state witnesses and presented one alibi witness, the Petitioner’s girlfriend, but argued the defendant was at home with his mother, girlfriend, and others. The state hammered in closing on the lack of additional alibi witnesses and the trial court found the petitioner guilty. Counsel’s conduct was deficient in failing to prepare and present the alibi evidence. Although counsel met with

the Petitioner's mother numerous times, he never inquired and never learned that the date of the alleged crime, the Petitioner's mother had a birthday party in her home which the defendant and nine others, including relatives and non-relatives, attended. The court also noted that "Mapquest (a popular internet site)" put the party an hours drive away from the murder scene. Available alibi evidence included testimony from people at the party; testimony of an attorney, who was the mother's employer, and her husband, that they had called the home during the party and spoken to the Petitioner, who answered the phone; and phone records and train tickets corroborating the available testimony in parts. Although trial counsel asserted his trial strategy was to attack the identification witnesses, he never attempted to interview any of them or the state's other witnesses. In addition, "[i]n a first-degree murder trial, it is almost impossible to see why a lawyer would not at least have investigated the alibi witnesses more thoroughly." *Id.* at 964. The court noted that counsel may have been influenced by his own opinion of the petitioner's guilt, but held that this "would hardly distinguish him from legions of defense counsel who undoubtedly do the same every day, yet who conscientiously investigate their clients' cases before coming to a final decision about trial strategy." *Id.* Counsel also asserted that each of the alibi witnesses could be impeached due to some alleged bias. Even if this were true, counsel "does not seem to have considered what impact they would have cumulatively." *Id.* The court also found prejudice, "even taking into account both the AEDPA standard or review and the fact that the trial judge [who was also the post-conviction judge] subjectively believed that the array of additional alibi witnesses would not have swayed his judgment." *Id.* at 965. The state's case was "not particularly strong."

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

Id. at 965.

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

testimony that the defendant made death threats against the victim shortly before the murder.

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

Stanley v. Bartley, 465 F.3d 810 (7th Cir. 2006). Counsel ineffective in murder case for failing to interview any witnesses or prospective witnesses. According to the state’s case, three gang members were present at the time of the murder, including the state’s primary witness, who was a cocaine addict and convicted felon. The petitioner’s sister also testified, following a question directing her attention to a day and time shortly after the

murder, that the petitioner told her he had killed someone. Other testimony was only secondary. Counsel read the statements prospective witnesses gave the police, but he did not interview anyone. He sought instead to only cross-examine the witnesses concerning any discrepancies. Counsel was aware of the statement of a prospective witness, who did not testify at trial, that a few hours before the murder, the state's primary witness and the murder victim had had a quarrel over cocaine that had involved pushing and shoving. Counsel cross-examined the state's principal witness about this argument, but he denied that the argument had been serious or had involved pushing or shoving. If counsel had interviewed the prospective witness, he would have been aware and could have cross-examined the witness and presented evidence that the murder victim had struck the witness with a wine bottle, punched him, and had knocked him down. Afterwards, the witness told the murder victim that he would catch "his ass later on." Counsel also had failed to interview the petitioner's sister, who had told officers that she saw him with a gun a week before the murder when he had been drinking, which always led him to talk about beating someone or killing them. Counsel was aware of her statement but failed to cross-examine her at trial about the date of the confession or the date on which she had seen her brother with the gun. He also failed to object to the prosecutor's having led her by prefacing his question about the confession with the statement that he was directing her attention to the night of the murder. The state's primary witness also testified in post-conviction that he had been drinking the night of the murder (he had denied that at trial), that he hadn't seen the defendant shoot the victim, and that in fact he didn't know who had the gun. Prejudice found.

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

**Rolan v. Vaughn*, 445 F.3d 671 (3rd Cir. 2006). Counsel ineffective in capital trial for failing to adequately investigate and present two witnesses who would have supported the claim of self-defense. The defendant told counsel about the witnesses and counsel

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

2005: **Daniels v. Woodford*, 428 F.3d 1181 (9th Cir. 2005). Analyzing this capital case under pre-AEDPA standards, the court held that the defendant was constructively denied counsel due to a conflict created by a series of events related to the appointment of counsel. The defendant had previously been convicted of a bank robbery in which he had been shot nine times by police officers rendering him a paraplegic. He negotiated a plea in exchange for being permitted to remain free for six months so he could seek medical treatment and rehabilitation. Despite the agreement, the court sentenced him to 13 years and immediately remanded him to custody. On appeal, Roth, a new attorney (who had previously represented the defendant on other matters) took over and the defendant was released on bond. While on bond, he was mistakenly arrested by an officer who believed there was a warrant for him. He sued the state alleging mistreatment in jail and lack of appropriate medical care. After his appeal was denied, he failed to surrender to custody. When two officers went to his home, he shot and killed both officers. Following his arrest, the court appointed a Public Defender, who moved to substitute Roth because the PD had a conflict due to the prior representation on the robbery. The PD in that case that negotiated the plea and release left the PD's office to join the prosecutor's interest and the new PD assigned was unaware of the plea agreement so the judge was never informed of the deal for release. A federal habeas petition alleging IAC on the robbery was pending at the time of the murder case appointment. Nonetheless, the court refused to relieve the PD office and Roth remained in a pro bono capacity. Roth was ultimately appointed as co-counsel, but then the state moved to relieve him because he was be a witness for the state. Roth was relieved even though the defendant agreed to stipulate to the information the state sought to present through Roth and agreed to waive the conflict. After this, the PD assigned became ill and the case was reassigned to two new PD's. Ultimately, nine months into the case and only three months prior to trial, the court relieved the PD office on its motion due to the conflict. Appointed this time was a former prosecutor who had

just started in private practice and had no capital case experience and a co-counsel with only a few years under his belt. From the beginning, the defendant's relationship with these lawyers "was strained." The defendant informed the court that he didn't trust his counsel and sent a letter to that effect before the trial started. The federal court held that, "[g]iven this history, it is understandable that the [defendant] would mistrust the judicial process and his counsel" and the trial court should have granted the defendant's motion to substitute counsel. In this instance, because of the "serious conflict" between the defendant and counsel, the court presumed prejudice and found error in the trial court's failure to inquire into the conflict even though the defendant informed the court three months prior to trial that he did not trust counsel and informed the court again prior to the beginning of the trial. The federal court also found that counsel was ineffective, particularly given counsel's "ineffective efforts to overcome the impasse" with his client. Counsel did not inform the court of the problems, attempt to adequately advise the defendant, or even call Roth for assistance even though the defendant trusted and confided in him. Counsel also failed to conduct a thorough investigation concerning mental health. "Even though [the defendant] refused to speak to his counsel, [counsel] still had an independent duty to investigate the facts of his case and possible mitigation evidence." Counsel retained a psychologist to do a preliminary screening of the defendant to determine whether additional evaluation was needed. He found suggestions of organic brain damage but counsel never sought further testing and did not even request funds until one week before sentencing (which was granted a month after sentencing). Counsel also did not follow up on a prior psychiatric evaluation of the defendant done after the defendant had been shot. Although the defendant had a good relationship with this expert, counsel retained a different psychiatrist, who the defendant refused to speak to. Thus, the defense was left only with the screening psychologist. In addition, counsel did not investigate or present evidence explaining the defendant's fear of returning to custody, most of which was available, regardless of the defendant's lack of cooperation, in police records and public records of the defendant's law suit against the county. "Instead of seeking further mental evaluations, [the defendant's] counsel relied on the expert witness testimony of [a] psychologist . . . , who was not qualified to testify in a capital case and whose testimony toyed with the idea that [the defendant] could be a sociopath. This alone constituted a significant error." *Id.* at 1204. Counsel's conduct was not the result of strategy "but of a communication breakdown with their client, the court's refusal to grant a continuance, a shortage of time, and repeated problems with securing state funding." *Id.* at 1206. Prejudice found during trial and sentencing. During trial, despite overwhelming evidence of guilt, the defense argued that the defendant was not the perpetrator. Counsel did not pursue the more viable mental health defense even though the defendant was diagnosed as schizophrenic by prison psychiatrists many years before the murders. The psychiatrist retained by counsel was not provided with these records and was only able to do a cursory exam because of the defendant's lack of cooperation. If counsel had performed adequately, the evidence would have established that the defendant has posttraumatic stress disorder from his shooting, paranoid delusions, and organic brain

damage. This evidence could have been used in a diminished capacity defense (which has been abolished now in California, but is still available for crimes committed prior to June 1982) or an imperfect self-defense argument, which would have defeated a first-degree murder finding. Prejudice also found in sentencing because the jury deliberated for two days, which suggests that additional mitigation may have influenced the jury. Instead, the only mitigation presented was from the screening psychologist “who was woefully unprepared and who suggested [the defendant] may be a sociopath. This alone is sufficient for a finding of prejudice.” *Id.* at 1210. The defendant was also prejudiced in sentencing by the implausible trial phase defense that the defendant was not the shooter. “As a result, [the defendant] faced a jury that could only be profoundly annoyed by this ludicrous defense in the face of overwhelming evidence of culpability.” *Id.*

**Draughon v. Dretke*, 427 F.3d 286 (5th Cir. 2005), *cert. denied*, 547 U.S. 1019 (2006). Counsel ineffective for failing to retain a ballistics expert. The defendant was fleeing the scene of an armed robbery and shot and killed a pursuing bystander. He testified that he did not intend to harm anyone and had attempted to fire over the heads of his pursuers. The State’s evidence from another pursuing witness was that the victim had been shot from only about 10 steps away and a ballistics expert testified that the bullet recovered from the body had not ricocheted before striking the victim. Counsel’s conduct was deficient because counsel was aware that the State’s argument of intent to kill and for death was based on the witnesses’ testimony about the distance of the shot and the ballistics evidence. Prejudice found because a defense expert could have presented a strong case that the fatal bullet struck the pavement in front of the victim and was fired at a much greater distance than the witness’ testimony reflected. The prejudice increased in sentencing because the only way to counter the state’s argument was for the defendant to testify and in cross examination the prosecutor marched the defendant through the horrible details of a prior rape conviction, which the prosecutor had not elicited from the prior victim out of deference to her. Under the AEDPA, the court found that the state court had unreasonably applied *Strickland*.

Gersten v. Senkowski, 426 F.3d 588 (2nd Cir. 2005) (*affirming* 299 F. Supp. 2d 84 (E.D.N.Y. 2004)). Counsel was ineffective in sodomy and sexual abuse of daughter case for failing to consult with or call expert medical witness and psychological expert to rebut the testimony of the state’s experts. The defendant was charged with sexually abusing his daughter when she was between the ages of 10 and 13. During the trial, however, the daughter testified that the sexual abuse began when she was five years old with anal intercourse beginning when she was 7 years old and the sexual abuse occurring almost every night. The state called a medical expert that testified that physical examination revealed that the victim had suffered penetrating trauma to her hymen and tearing of the anus. The state presented a psychologist to testify about child sexual abuse accommodation syndrome, which corroborated the victim’s statements. The defense presented no witnesses. Analyzing the case under the AEDPA, the court found that

defense counsel's conduct was deficient. "In sexual abuse case, because of the centrality of medical testimony, the failure to consult with or call a medical expert is often indicative of ineffective assistance of counsel." *Id.* at 607. Here, counsel "essentially conceded" that the physical evidence was significant without investigating when a defense medical expert could have testified that the physical evidence was not indicative of sexual abuse, which would have cast doubt on the alleged victim's credibility. A defense psychological expert also would have testified that the prosecution's evidence of "Child Sexual Abuse Accommodation Syndrome" lacked any scientific validity for the purpose for which the prosecution used it. Counsel had no valid strategy for this course because "counsel settled on a defense theory and cut off further investigation of other theories without having first conducted any investigation whatsoever into the possibility of challenging the prosecution's medical or psychological evidence." *Id.* at 610. Prejudice found because the state's entire case, aside from the expert evidence that should have been challenged, rested on the credibility of the alleged victim. The state court holding was an unreasonable application of *Strickland*.

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

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

****White v. Roper***, 416 F.3d 728 (8th Cir. 2005), *cert. denied*, 546 U.S. 1157 (2006). Counsel was ineffective in failing to investigate and present exculpatory testimony of two witnesses in the guilt-or innocence phase of trial. Because the state court did not address the merits of this claim, no deference was given under AEDPA. The defendant was charged, along with two other men, who did not receive a death sentence, in a drug-related murder. While there were witnesses that connected the defendant to the other men, no physical evidence connected the defendant to the crime scene. The defense was that the third man was not the defendant but a man named A.J. Constantine, who had a Jamaican accent. Two witnesses present at the time of the murder. One of them, who said that the defendant was not the killer, but who could not identify the third man, was called at trial. The other, who said that the defendant was not the killer and who also identified the killer as A.J., was never interviewed by counsel and did not testify. Another witness, who saw one of the co-defendants earlier in the evening looking for drugs and arranging to go to the victim's house, would have testified that it was A.J. with the co-defendant at the time. She was also never interviewed by counsel, who also did not attend the co-defendant's bench trial or obtain deposition transcripts from that trial until the eve of trial. Counsel's conduct was deficient because "counsel's investigation was too superficial." *Id.* at 732. "In other words, the presumption of sound trial strategy founders in this case on the rocks of ignorance, as in *Wiggins*." *Id.* (The district court had also found counsel ineffective in sentencing for failing to investigate and present mitigation, but the court did not address this issue because Missouri appealed only the guilt-or-innocence phase determination.)

Tenny v. Dretke, 416 F.3d 404 (5th Cir. 2005). Counsel was ineffective in murder case for failing to adequately prepare and present evidence of self-defense. Because the state did not address the District Court's finding of deficient conduct in its opening brief, the court held that the State had waived argument on this issue and assumed deficient

conduct. Prejudice was found because the evidence counsel failed to prepare and present included evidence that the victim, the defendant's live-in girlfriend, had threatened to kill him in the days prior to her death and even on that day, she had stabbed him within the week before, she had threatened to burn the house down, she had violent tendencies and would have "insane rages," and she was strong enough to throw almost any grown man to the ground. In addition, a doctor, who examined the defendant in the hospital after the fight with the victim would have testified that the defendant had a black eye, his ear was cut, and he had a punctured lung from being stabbed and had "nearly lost his life." The defendant also could have provided additional testimony that he knew of the threats made against him and that the victim had stabbed her previous husband. Counsel did not call some of these witnesses because they worked at a monastery and had been involved in a sex-abuse scandal. This did not justify not presenting the evidence, however, because their testimony was corroborated by another witness not involved in any scandal and this testimony was significant. Under the AEDPA standards, the state court's decision was unreasonable.

Henry v. Poole, 409 F.3d 48 (2nd Cir. 2005), *cert. denied*, 547 U.S. 1040 (2006).

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

Towns v. Smith, 395 F.3d 251 (6th Cir. 2005). Counsel was ineffective in first degree murder case for failing to investigate a witness who had admitted to police, among others, that he had been involved in the crimes of which the defendant was ultimately convicted and that the defendant had played no part in these crimes. The witness was arrested with the murder weapon and he admitted that he drove the get-away car. He informed police in two statements that the defendant's brothers were the perpetrators. For unknown reasons, the police focused on the defendant rather than one of the brothers. When placed in a line-up, the single eyewitness to the murder tentatively identified him but only on the basis of size, which was similar to his brother. The prosecution initially intended to call the driver as a witness but then changed his mind at the last minute. Defense counsel insisted that he have the opportunity to interview him so the driver was held overnight in

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

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

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conduct a proper evaluation.” This was an unreasonable application of *Strickland* because “*Strickland* mandates that counsel’s decision ‘must be directly assessed for reasonableness in all the circumstances.’” (quoting *Strickland v. Washington*, 466 U.S. 668, 691 (1984)).

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

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

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

Id. at 1029.

**Soffar v. Dretke*, 368 F.3d 441, *amended*, 391 F.3d 703 (5th Cir. 2004). Counsel ineffective in capital trial for failing to interview living victim, who was the only eyewitness to the crimes, and failing to consult with a ballistics expert. The basic facts are that four people were shot in a bowling alley armed robbery and shooting and only one of these people lived. The surviving victim made a number of statements, including under hypnosis, describing the events and the lone assailant. After weeks with no suspect, the

defendant, who had a history of confessing to crimes that he did not commit, was arrested on other charges and confessed in a number of statements. He initially said that he was the getaway driver for the assailant and ultimately said that his “accomplice” shot two of the victims and then the defendant shot the last two. Analyzing the case under pre-AEDPA amendments, the court found that counsel’s conduct was deficient in failing to interview the surviving victim even though counsel was aware that there were significant discrepancies between his statements and the defendant’s “confession” and the victim had been unable to identify the defendant or his “accomplice” in a pretrial lineup. Counsel was also ineffective for failing to retain a ballistics expert, who could have established that the crime scene was consistent with the surviving victim’s statements and inconsistent with the defendant’s “confession.” Counsel’s conduct was inexplicable because the sole defense theory at trial was that the defendant’s “confession” was false and should not be believed. Although the state argued that there were potential pitfalls if counsel had called the surviving victim to testify, the court held that “an actual failure to investigate cannot be excused by a hypothetical decision not to use its unknown results.” Prejudice was found because the state’s case was “predominantly” based on the defendant’s “confession,” which would have been contradicted by the surviving victim and the ballistics evidence if counsel had adequately investigated.

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

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

had concerns about sharing the same attorney and that the evidence might well raise antagonistic defenses. The petitioner also informed the court that she believed she needed a separate attorney and that she had attempted to hire a different attorney but could not afford one. Rather than appoint a second attorney, the court severed the cases and ordered that they be tried in front of different judges. The trials proceeded at pretty much the same time. In the co-defendant's trial, the state presented evidence that the bedroom where most of the drugs were found belonged to the co-defendant. A caller to the crack hotline also made complaints about a woman with the co-defendant's name. A confidential informant also identified the co-defendant as the person discussing drugs. During the petitioner's trial, the state did not present any evidence that the co-defendant lived in the house or in the bedroom where most of the drugs were found and did not present any evidence that the crack hotline telephone complaints and the confidential informant had both identified the co-defendant. Defense counsel did not bring any of this information out in cross-examination or present any evidence on its own. In closing argument, the defense argued only that the drugs belonged to one of two men that were also initially suspected. One of the men was present at the time of the search, but did not have a key to the locked bedroom where most of the drugs were found. The other man was not present at the time of the search and was connected to the house only by some paperwork identifying him as the codefendant's husband. Both the defendant and co-defendant were convicted. They were represented on appeal by a different attorney but still had the same attorney between them. Appellate counsel did not raise any issue concerning ineffective assistance of counsel or a conflict of interest. In state post-conviction, the petitioner asserted ineffectiveness of trial counsel and of appellate counsel for failing to argue that trial counsel was ineffective but the state court denied on procedural grounds that the petitioner did not show good cause for a failure to assert the issue on direct appeal as required in state court. The court first found that the petitioner was entitled to relief under *Holloway v. Arkansas* because the petitioner objected to the joint representation and the trial court did not resolve the issue. Independent of the trial court's failure to inquire, reversal was also required because counsel had an actual conflict of interest that adversely affected representation. Finally, the court also found that counsel was ineffective under the standard of *Strickland v. Washington* because counsel failed to present a strong argument in petitioner's case that the co-defendant actually possessed the drugs. Prejudice was found under *Strickland* because the trial judge in petitioner's case mentioned her misgivings about the sufficiency of the evidence connecting the petitioner to the drugs. If counsel had adequately presented the evidence pointing to the co-defendant, trial court may well have ruled differently in the case. The court found that, with respect to all three of these arguments, the petitioner would have won on direct appeal had appellate counsel adequately raised the issues. Appellate counsel was ineffective in failing to assert these issues, which were clearly stronger than the arguments made by counsel on direct appeal. The conflict issue was an obvious one, and the petitioner was entitled to automatic reversal under the rule in *Holloway*. Because appellate counsel also represented the co-defendant, however, appellate counsel also had a conflict of interest. The court found

that appellate counsel's ineffectiveness was the cause for petitioner's failure to assert ineffectiveness of trial counsel on appeal. Thus, the petitioner had established cause and prejudice for failing to assert these issues on appeal. Because the state court never ruled on the actual conflict of interest and the ineffective assistance claim under *Strickland*, the court reviewed these claims de novo. The only state court decision on the *Holloway* claim was the trial court's decision. Under the AEDPA, the court found that the trial court's actions contradicted the clearly established precedent of *Holloway v. Arkansas* because the state court confronted a set of facts that were materially indistinguishable from *Holloway* and yet arrived at a different result.

2003: *U.S. ex rel. Hampton v. Leibach*, 347 F.3d 219 (7th Cir. 2003). Counsel was ineffective in sexual assault and robbery case for failing to investigate and interview exculpatory eyewitnesses and for making promises in his opening statement to the jury that he did not keep. The crimes were committed by gang members and occurred at a rhythm and blues concert near the stage. The defendant was tried with two co-defendants but a separate jury for each. In his opening statement, counsel promised that the defendant would testify that he had witnessed the attacks but was not involved and promised that the evidence would show that the defendant was not a gang member. During trial, the three victims and a security guard identified the defendant, but the evidence was shaky. The defendant's counsel presented only one witness concerning an identification of the defendant near the scene. In closing, counsel attacked the weakness of the state's case and the eyewitness identifications. Counsel's conduct in failing to interview exculpatory eyewitnesses identified by the defendant and to independently investigate was deficient. Although the state court found that counsel had a reasonable strategy for this failure, this finding was not supported by any evidence. Moreover, even if counsel had such a strategy it was based on an inadequate investigation and was unreasonable. While counsel vigorously attacked the eyewitnesses, he presented no exculpatory eyewitness evidence. The state court's "assertion that such testimony would have been 'redundant' is' plainly wrong; testimony by one eyewitness to a crime that the perpetrator was not the person named by another eyewitness is the antithesis of redundancy." The state court's finding that counsel also had a reasonable strategy to avoid "guilt by association" by establishing the defendant's presence at the scene with some suspected individuals was also unreasonable. Presence at the concert, knowing the perpetrators, and riding the same bus home was not incriminating since they and many of the witnesses lived in the same neighborhood as the defendant. Prejudice was found because of "the central role that eyewitness testimony played in this case, the vulnerabilities in the testimony of the State's eyewitnesses, and the shortcomings in human perception that so frequently render eyewitness testimony less reliable than other types of evidence." The codefendant's acquittal highlighted the prejudice because he presented the type of evidence in question. The state court's finding of no prejudice was also an unreasonable application of *Strickland*. "[U]nder *Strickland*, [the defendant] need not convince the court that such testimony more likely than not would have resulted in his acquittal; he need only establish that this is a reasonable

probability, a better than negligible likelihood.” Counsel’s conduct was also deficient in failing to fulfill his promises to the jury. While it may have been reasonable not to call the defendant to testify or to decide not to call witnesses to establish that the defendant was not a gang member, “the foundation for this claim is the broken promise as opposed to the decision not to pursue a particular line of testimony.” “[L]ittle is more damaging than to fail to produce important evidence that had been promised in an opening.” (quoting *Anderson v. Butler*, 858 F.2d 16, 17 (1st Cir.1988)). While the state court found that counsel changed his mind due to a reasonable strategy this finding was unreasonable because “[t]he potential disadvantages of [the defendant’s] testimony were ones that would have been obvious from the outset of the case.” While the broken promises to the jury “was not so prejudicial that it would support relief in and of itself, the breach serves to underscore the more important failure to investigate exculpatory occurrence witnesses.” The defendant’s “unexplained failure to take the witness stand” may have given the jury the impression that the state’s witnesses were correct in their testimony.

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

her daughter made three years after the crime. There was no other evidence connecting the defendant to the crimes. The court also considered the fact that the first jury to hear the same evidence hung. Finally, the court found, applying the AEDPA standards, that the state court's ultimate legal conclusion was an objectively unreasonable application of *Strickland*.

**Alcala v. Woodford*, 334 F.3d 862 (9th Cir. 2003). Counsel ineffective in capital case for failing to adequately present alibi evidence. The underlying crime involved the disappearance of a twelve-year old girl, whose body was found several weeks later 50 miles away. The evidence connecting the defendant was only circumstantial identifications that put him in the area where the victim disappeared taking pictures of people on the beach. The girl with the victim on the afternoon of her disappearance did not identify the defendant as the man that took their pictures and an adult that was present then could not identify the defendant in photo lineups but then positively identified him seven years later during trial. The only evidence directly connecting the defendant to the crime was a jailhouse informant and a discredited forest service worker, who was interviewed twelve times prior to trial and initially provided nothing but gradually progressed up to placing the defendant with the body. During the second trial, following reversal, this witness denied even testifying in the first trial. During trial, the defense presented a number of alibi witnesses to establish that the defendant had been at a theme park seeking freelance photography work at the time when the one eyewitness placed him taking pictures of the victim shortly before her disappearance. While the witnesses confirmed that he had been at the park, none of them was able to give an actual date or time for the alibi. In federal court, the defendant presented testimony from another park employee, who had actual business records and her own personal calendar, who could testify that the defendant was at the park during the pertinent time and that it was, therefore, impossible for him to have committed the crime. The District Court granted relief and the state appealed. Applying the law prior to the AEDPA (because the federal habeas petition was filed in 1994), the court found counsel ineffective for failing to present the alibi witness and records that could establish the date and time of the alibi. Counsel's conduct was deficient because this was by far the strongest alibi evidence available, counsel had listed this witness and subpoenaed her as a trial witness prior to trial and could not remember why she was not called, and the witness had told a defense investigator that her personal calendar would support the alibi. The court rejected the state's argument that counsel made a strategic decision not to present the witness "because it would have us find a strategic basis . . . in the absence of any evidence" and because the court would not "assume facts not in the record in order to manufacture a reasonable strategic decision." *Id.* at _____. Moreover, even if counsel had a strategic reason not to call this witness, it would have been an unreasonable strategy. Here, "counsel made a sound strategic choice to present an alibi defense," but did not adequately present the evidence supporting the chosen defense theory. *Id.* at _____. Prejudice was found because the state's case "was far from compelling" and was entirely

circumstantial. Counsel's failure at trial also harmed the credibility of the alibi evidence that was presented because trial counsel told the jurors that they would establish an alibi and then "utterly failed to do so, harming the credibility of [the] entire defense." *Id.* at _____.

2. U.S. District Court Cases

2011: *Jackson v. Conway*, 765 F.Supp.2d 192 (W.D.N.Y. 2011). Counsel ineffective in rape, sodomy, and incest case in failing to consult with a physician expert or call a physician expert witness despite the incompleteness of the state's physical examination and lack of clarity in the medical records. Petitioner was charged with sexually assaulting his wife, his ex-wife, and his 15-year-old daughter, who all lived together, multiple times in a 24-hour period. The ineffectiveness concerned only the charges relating to the daughter. The state called a pediatrician to testify. While the state had given no notice of an expert witness, based on the prosecution's representations to the court, the pediatrician was allowed to testify "as a treating physician." The doctor testified there were "abrasions" that were "consistent with penetration." After this testimony, on a Friday, the defense and the court realized that the pediatrician was not a "treating physician" and was a retained expert consult, who had only reviewed the records. The court offered to instruct the jury to disregard the testimony or allow the testimony to continue and allow defense counsel the weekend to prepare a rebuttal witness. Believing that it was "impossible" to obtain and prepare a rebuttal witness over the weekend, counsel had no real choice. The court gave the jury a "tepid" curative instruction to disregard the pediatrician's testimony. Counsel's conduct was deficient in failing to obtain expert assistance to start with. Counsel testified that he had consulted with a registered nurse, who gave him an oral report basically stating there were no physical findings and that the records were deficient in their lack of description or depiction of the location, depth, size, and healing characteristics of the abrasion. Counsel's "strategy" was to address these issues in argument rather than testimony. He did not want to retain an expert out of fear that the prosecution would follow suit. Counsel made the statement in opening that there was no physical evidence. He testified he would not have made this statement if he had known the state would offer expert testimony. Counsel's strategy was "dubious" to start with as it "left him totally unprepared" to address the state's "surprise" expert testimony. His failure to retain an expert was compounded by his lack of preparation which led to his belated objection to the state's expert. Habeas relief granted as to convictions related to the 15-year-old on IAC grounds. The state court's rulings denying relief were unreasonable under the AEDPA standards. Habeas relief granted as to all convictions due to prosecutorial misconduct with the "surprise" expert being only a drop in the bucket.

2010: **Williams v. Thaler*, 756 F.Supp.2d 809 (S.D. Tex. 2010). Counsel ineffective in failing to seek expert assistance related to autopsy and firearms in capital trial. Following the

shooting, the petitioner fled the state, but his co-participant turned himself into the police. His “self-serving confession became the backbone of a flawed prosecution.” He pled guilty and testified in exchange for a 10-year sentence. The state’s theory was that the petitioner and the witness conspired to steal from two drug dealers and that the murder victim died from a massive shotgun wound to his head and that the wound was inflicted by the petitioner. “A less-than-thorough autopsy and a careless forensic investigation led to the controversy now before the Court.” During the autopsy, a mutilated bullet slug was found, along with the shotgun pellets. The medical examiner did not see the bullet in the now-destroyed X-ray of the victim’s head and did not document an entrance wound for the bullet. The problem was compounded when the firearms examiner identified this bullet as a .25-caliber slug. While the co-participant admitted firing shots from his .22 pistol that night, he “minimized his role in the planning and commission of the murder.” The state’s theory, based primarily on the co-participant’s testimony, was that the petitioner had shot the victim with the .25 pistol and, because he was not yet dead, finished him off with the shotgun. The pathologist could not provide a sequence of the shots but opined the cause of death was the shotgun wound. Post-trial investigation revealed that the bullet slug was actually a .22 caliber slug and it matched the co-participant’s weapon. The case was reviewed *de novo* following remand by the Fifth Circuit. The parties stipulated that counsel’s conduct was deficient so the only question before the court was prejudice.

The prejudice inquiry operates in the context of the reasonable-doubt standard; in other words, a defendant must show “reasonable probability that . . . the factfinder would have had a reasonable doubt respecting guilt.” This requires showing “at least one juror would have” entertained reasonable doubt.

Id. at 815. Prejudice found as the evidence developed drastically altered: (1) the prosecution’s theory of the case; (2) the co-participant’s culpability; and (3) the view of the cause of death. While the defense sought to blame the co-participant for the fatal bullet during trial, “this strategy was toothless” because counsel did not obtain expert assistance. With the true evidence before it, “the jury likely would disregard much of, if not the whole of,” the co-participant’s testimony. Even the trial prosecutor admitted that the evidence in post-conviction “gutted” his credibility. Moreover, with the accurate information, the jury may never even have heard the co-participant’s testimony because: (1) the prosecution may well have reconsidered its plea offer or (2) the witness may have asserted his Fifth Amendment rights as he likely “would have been a codefendant, not a star witness.” Thus, the court ignored his testimony entirely in the prejudice analysis. Without him, lay witnesses could not establish causation of death or sequence of shoots, etc. Thus, the state would have had to rely on expert testimony. While the defense “provided a substantively weak and emotionally tepid response” to the state expert at trial, a defense expert in pathology could have testified with substantial credibility that

the .22 caliber may have been the fatal shot. “This Court’s role is not to decide which expert was correct, but to evaluate how the testimony likely would have influenced the jury.” *Id.* at 825. A reasonable juror could have believed the defense expert and entertained reasonable doubts of guilt. The court also found fault with the failings by the state’s forensic examiners and the “lack of professionalism” of the prosecutors who, during trial, were “unnecessarily mocking, derisive, and sneering.” “Irony dripped” because the state ridiculed the defense trial theory which forensic testing “has proven to be true.” Cumulative prejudice found. Even if the court had to apply “AEDPA deference,” it would find the state court’s decision to be an unreasonable application of *Strickland*.

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

It is not an understatement to say that Lynch, the dog handler, was permitted to testify to an almost mythical account of Billy’s powers and her unique olfactory capabilities. He presented unsubstantiated claims about the dog’s accuracy. He was allowed to go on at great

length about his emotional relationship with the dog and his entirely subjective ability to interpret her face, what she thought, intended, and the “strength” of the alert she gave in this case. Finally, Lynch was permitted to testify that the dog did not alert to anything else on the premises, as if the dog had been allowed to range widely on the fire scene (*she was not*), and as if the dog’s failure to alert had evidential value (*it did not*).

Even though “scientific literature cast doubt on the significance of the dog’s *failure* to alert (false negatives) and even raised concerns about canine ‘proficiency’ testing,” counsel did not challenge this evidence. “Billy, like the traditional Ouija board, was simply allowed to point to [the defendant] as an arsonist.” Counsel also did not challenge the “cause-and-origin testimony,” even though no photographs were taken, except in the area the government expert believed relevant, and the “building was razed to the ground” making further investigation impossible. While no prejudice was found with respect to the cause-and-origin testimony which simply purported to identify where the fire began, the canine evidence and the lab results were essential to prove that the fire was “an arson, not an accident. Without it, there is simply no crime.”

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

Freeman v. Trombley, 744 F.Supp.2d 697 (E.D. Mich. 2010). Counsel ineffective in murder case for obstructing the petitioner’s right to testify and for failing to present testimony of the petitioner’s girlfriend as an alibi witness. Counsel failed to inform the petitioner that he had a right to testify and even threatened to abandon the case if he

persisted with his desires to testify. The petitioner also alerted the judge to the problem, but was not heard on the issue. The petitioner's live-in girlfriend would have provided a credible "strong alibi" and corroborated the petitioner's account. Appellate counsel was ineffective in failing to assert these two issues, as well as, prosecutorial misconduct in presenting perjured testimony from a jailhouse snitch who later recanted. Likewise, appellate counsel should have presented an overall issue about trial counsel's ineffectiveness given his "substance abuse problem, involvement with the criminal justice system as a result of his drug use, prior litigation where defense counsel was found to be ineffective based on his drug use, . . . , allegations that defense counsel was stealing from Petitioner . . . in order to support his drug habit, and Petitioner's own account of what he observed about defense counsel during the trial proceedings."

Graham v. Portuondo, 732 F.Supp.2d 99 (E.D.N.Y. 2010). Counsel ineffective in second-degree depraved indifference murder case for failing to obtain records and expert advice with respect to viable psychiatric defense. During trial counsel sought a charge on extreme emotional distress, but the only evidence presented by the defense was in the petitioner's testimony. Counsel knew prior to trial that the petitioner reported a history of psychiatric admissions, including treatment in the months prior to the killing, but counsel did not investigate further. Counsel's conduct was deficient in failing to investigate or consult an expert. There were voluminous records available. Prejudice was also clear as the petitioner was mentally ill and suffering from extreme emotional disturbance at the time of the killing. Counsel was also ineffective in sentencing for the same reason and the writ was granted on this basis as well.

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

Daniel v. Palmer, 719 F. Supp. 2d 817 (E.D. Mich. 2010). Under AEDPA, counsel was ineffective in murder case for failing to adequately investigate and present a defense. The victim was shot, according to state witnesses, by an unknown assailant getting out of the defendant's gray van, which was driven at the time by the defendant. Counsel never visited the crime scene, never examined the defendant's van, and did not interview two eyewitness, whose statements had been provided to counsel. These witnesses stated that a

white mini-van, different in style and color from the defendant's, was used in the shooting. They also stated that more than one person entered the victim's car and removed equipment after the shooting, which would have contradicted a state witness description of only one person. The court applied *de novo* review, due to the state court's denial of investigative finding and failure to adjudicate "the gravamen of petitioner's claim" on the merits. Regardless, counsel's conduct was deficient, even if the AEDPA "deference standard" was applied. Counsel "made no effort" to interview the witnesses and based his strategy "only on the reports." In essence, counsel "feared that they might bolster the prosecution's evidence and undermine petitioner's [alibi] defense." If counsel had interviewed them, however, counsel would have also been aware that these witnesses stated the shots were fired from the van, while it was moving, which contradicted all of the state's evidence and theory that a passenger emerged, shot the victim, and stole an item from his car. These were "disinterested" eyewitnesses. "[I]t was objectively unreasonable for counsel to make the decision not to call [them] to testify without first investigating these witnesses, or at least making a reasoned professional judgment that such investigation was unnecessary." Counsel's conduct was also "deficient for choosing to rely solely on [their] statements to the police in making his determination not to interview" them. Prejudice established "in light of the weak and questionable evidence" presented by the state. Two of the state's three witnesses connecting the defendant to the crime were incarcerated at the time of his trial and only "assumed petitioner was driving" because it was his van. Only one of the three witnesses positively identified the defendant as the driver and he failed to appear for trial because he had outstanding warrants. "Most of the witnesses in this case were drug dealers or drug users. None of the witnesses reported the shooting to the police on the night of the murder or close to that date." The key state witnesses knew the petitioner and the victim. There was no physical evidence linking the petitioner to the crime. The medical examiner's finding that there was no close-range shooting in this case contradicted the state's witnesses and theory.

Larsen v. Adams, 718 F. Supp. 2d 1201 (C.D. Cal. 2010). Under AEDPA, counsel ineffective in possession of dagger case (which resulted in "three strikes" enhanced sentencing) for failing to adequately investigate and present exculpatory evidence. (The court excused the failure to comply with the federal statute of limitations based on "the 'actual innocence' gateway set forth in *Schlup v. Delo*, 513 U.S. 298 . . . (1995)"). The charge resulted from a 1:00 a.m. call to police of an assault with a deadly weapon in progress, with shot fired, in a bar parking lot. Two police officers approached in a single car with flashing lights and a siren, then with roof-mounted floodlights, side spotlights, and high beams. Ten to 20 people were in the parking lot. One officer testified he saw the defendant remove an object from underneath his clothing and throw it. The object turned out to be the dagger found underneath a car. There were numerous significant inconsistencies in this officer's testimony from his testimony in two preliminary hearings. The second officer testified generally about the call and arrest with the defendant giving a false name. The only other state witness was a detective, who ran fingerprints and

discovered the defendant's true identity. Counsel's conduct was deficient in failing to investigate and failing to obtain crucial information about witnesses from the prosecutor, even though the defendant informed counsel he was innocent and counsel was aware that numerous other people were in the parking lot. Counsel had even informed the prosecution that the defense theory at trial would be that it was Hewitt's dagger. "A reasonable defense attorney would have attempted to interview as many percipient witnesses as possible." Counsel of at least three eyewitnesses, who were not interviewed. If counsel had pursued the investigation, it would have led to exculpatory evidence, including the parents of one of the known eyewitnesses. While not directly relevant, the court detailed counsel's "record of indifference to his professional responsibilities" and his disbarment after this trial, as evidence "bolster[ing]" the court's findings. If counsel had adequately investigated, a military retiree, who had also been a police officer for eight years, would have testified that he was in the parking lot when police arrived and observed another man (Hewitt) throw the dagger. This witness was initially handcuffed, but was released without being questioned after officer's saw his police identification in his wallet. This man's wife also would have testified generally consistently, including that she had seen Hewitt through an object under a car. Another man, who had been inside the bar would have testified that he had been threatened with "the" dagger inside the bar by another man. This witness knew the defendant, who was inside the bar at the time, but was not in possession of "the" dagger. This prompted the bartender to make the call to police. Aside from these witnesses, Hewitt himself submitted an affidavit in federal court admitting the dagger was his. Hewitt's girlfriend also gave an affidavit stating Hewitt had told her the night of the incident that the defendant had been arrested for possession of Hewitt's knife. She also said that Hewitt felt bad and sold his motorcycle to post bail for the defendant. Even if counsel's conduct pretrial was not deficient, he was informed of the existence of the former police witness and his wife after conviction, but prior to sentencing and still failed to investigate or move for a new trial.

Barco v. Tilton, 694 F. Supp. 2d 1122 (C.D. Cal. 2010). Counsel ineffective in murder and conspiracy case for failing to adequately investigate and present defense evidence. Although AEDPA applied, the court reviewed counsel's conduct *de novo* because the state courts had denied an evidentiary hearing and evidence was presented in federal court that further developed the claim. Prejudice was reviewed *de novo* because the state courts did not reach the issue. Petitioner's son had been assaulted with life-threatening injuries and was hospitalized for several months. While there were rumors that the victim's father committed the assault, the police were unable to assemble any evidence against him and the investigation was suspended. Four months after the assault on petitioner's son, there was a drive-by shooting at the victim's home, which resulted in death. The father of petitioner's grandson, who lived with petitioner, was arrested a short distance away with the murder weapon and other damning evidence on him. He had a cellphone call with someone at Petitioner's home (and a number of people lived there) shortly before the shooting. No additional arrests were made until after petitioner's daughter

broke up with her boyfriend and had him arrested for breaking into her home. Only then, despite previously denying any knowledge, the boyfriend/accomplice went to police claiming a conspiracy led by petitioner. He was granted immunity in exchange for his trial testimony. Counsel was ineffective in: (1) failing to investigate and introduce the boyfriend/accomplice's numerous crimes of moral turpitude, readiness to violently retaliate, and motive to falsely implicate petitioner; (2) failing to introduce the testimony of petitioner's family and friends to rebut the boyfriend/accomplice's testimony that numerous conversations about retaliation took place in their presence and were led by petitioner; and (3) failing to present testimony of character witnesses, particularly a veteran of the prison system to attest to petitioner's character for non-violence. Petitioner was a teacher who taught inmates in the state prison and at the California Youth Authority. The character witness would have also rebutted the allegation of a connection between Petitioner and the Mexican Mafia. Counsel's conduct was deficient in failing to retain an investigator despite the family's willingness to fund necessary investigation. Counsel also did not interview family members about the alleged discussions because, contrary to the trial record, he recalled that all of these conversations allegedly took place privately. Finally, counsel alleged a strategy not to present character evidence, but this decision was made "without even interviewing any of the character witnesses himself, to assess their demeanor and how they would have held up on cross-examination." *Id.* at 1145. It was "objectively unreasonable for [counsel] to make the decision not to call the character witnesses without interviewing them." *Id.* at 1146. His decision "cannot be deemed a fully informed one." *Id.* Prejudice established because the state's evidence was "weak" and the boyfriend/accomplice was "the critical witness" for the state. Without him, the state "would have been unable to proceed" against petitioner. Yet, the jury heard none of the evidence impeaching his credibility and rebutting his testimony and the jury did not hear credible evidence of petitioner's own character for non-violence.

United States v. Bass, 712 F. Supp. 2d 931 (D. Neb. 2010). Counsel ineffective in drug conspiracy case for three reasons. First, counsel failed to move in limine to exclude the testimony of one of the government witnesses who had an admitted history of telling numerous contradictory lies in the case. Second, counsel failed to object to the prosecutor vouching for its witnesses in closing when the only government witness without "something substantial to gain—downward departures" was the defendant's brother, who had made proffers against the other witnesses, which also gave them motive against the defendant as revenge against his brother. Finally, counsel failed to object to testimony and the prosecutor's argument about a man who was expelled from college for dealing drugs and continued to do so because there was no evidence this man had any connection with the alleged conspiracy in this case.

Usher v. Ercole, 710 F. Supp. 2d 287 (E.D.N.Y. 2010). Under AEDPA, counsel ineffective in child sex abuse case for: (1) failing to consult a medical expert to rebut the state's expert witness; (2) introducing unredacted medical records that contained

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

2009: *United States v. Montgomery*, 676 F. Supp. 2d 1218 (D. Kan. 2009). Counsel ineffective in possession of 100 or more marijuana plants with intent to distribute case for failing to let the defendant testify and in failing to move to dismiss based on the government’s destruction of evidence. The government searched the defendants home and took photographs and videotape but it is impossible to determine the number of plants from the photos and video. Nonetheless, the government destroyed all the marijuana plants, except for ten samples, two days after the search. During trial, agents testified that they counted 101 plants with roots, stems, and leaves. The defendant told counsel that he wanted to testify. Counsel’s conduct was deficient in this regard because he told the defendant he would withdraw from the case if he did, so the defendant dropped the subject. While counsel denied this, the court found the defendant’s testimony credible as defense counsel had “a very long history of attorney discipline which involves complaints of improper withdrawal, communications terminating representation and truthfulness in communicating with others.” The defendant would have testified that he routinely counted his plants and on the day of the search he had 91 plants and ten cuttings that did

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

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

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

Likewise, trial counsel failed to adequately investigate and present a defense. Trial counsel met with the defendant only briefly prior to trial and his "file contained no evidence witnesses were investigated or interviewed." "A file devoid of notes pertaining to investigation in preparation for trial is clear evidence that no investigation occurred." During trial, "counsel did not subject the State's case to meaningful adversarial testing." Counsel did not raise or challenge ambiguities and discrepancies in the witnesses

accounts of the touching. Counsel's failure could not be justified or explained because the defense theory was that the state could not prove its case and witness credibility was central to the state's case. In addition, proof that the defendant's acts were done for the "purpose of sexual arousal or gratification" was a required element of the offense but the state made no attempt to prove this. Nonetheless, counsel failed to seize on this opportunity and to offer the plausible explanation that the defendant did not have the required criminal intent. Instead, counsel "performed little cross-examination" and "did nothing to test the State's case" or consider the motives of the defendant's wife. Likewise, counsel waited until after conviction to "investigate his client's cognitive impairments," even though he had been receiving social security disability benefits for seven years by the time of trial. Counsel was also obviously aware of the impairments since he mentioned this in opening statements and sought to have the defendant's mother testify about this. The state court's finding that trial counsel was not ineffective was an unreasonable application of *Strickland*.

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

reasonable to conclude that the jury nevertheless did so here.”

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

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

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

Couch v. Booker, 650 F. Supp. 2d 683 (E.D. Mich. 2009), *affirmed*, 632 F.3d 241 (6th Cir. 2011). Counsel ineffective in murder case for failing to investigate and rebut the medical examiner’s conclusions that the victim died as a result of drowning in his own blood from the beating. The victim had consumed extremely large amounts of cocaine at a party gone awry. He was subsequently found sexually assaulting a woman and then beaten by the defendant and other men. Counsel’s conduct was deficient in failing to investigate, which would have revealed that the victim was still speaking and coherent when police and firefighters arrived. He was combative when emergency medical personnel tried to render care and had to be restrained by five people. He was subsequently intubated and there was not blood in the airway leading to his lungs. The

death was caused by pulmonary edema, “which has been associated by researchers with fatal levels of cocaine, such as the amounts found by toxicologists in the decedent.” In short, the death “fit the pattern of a typical, sudden cocaine death occurring during a struggle while the person is subjected to police restraint” and was “accidental.” While counsel had retained a defense expert, counsel did not provide the expert with the reports of the first or second responders and never talked to the expert, leaving that to co-counsel. By failing to provide the expert with the information, “defense counsel precluded [the expert] from conducting a complete review of [the state pathologist’s] findings as to the cause of death.”

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

rested only on the victim's identification of him and his later arrest in the company of a man, who possessed the victim's property. Counsel was also ineffective in failing to adequately prepare and present the expert witness on the issue of eyewitness identification. Counsel should have prepared the expert for cross-examination about the studies he relied on by advising him "to come prepared with this information." Likewise, counsel should have prepared the expert for cross on the facts of this case "by providing him with materials pertinent to the case, such as the police reports and the transcript of [the] first trial, which information was readily available." Prejudice established because the expert's "credentials are extensive" and the "problems of cross-racial identification are well known." The expert "would have provided important support for [the] defense of mistaken identity." The state court's conclusions to the contrary were an "objectively unreasonable application of the *Strickland* standard." Reversal was also required on due process violations related to the state's misconduct in threatening the co-defendant with prosecution if he testified and related to the pretrial identification, which was suggestive.

2008: *Espinal v. Bennett*, 588 F. Supp. 2d 388 (E.D.N.Y. 2008). Under AEDPA, counsel ineffective in second degree murder case for a number of reasons. First, counsel failed to investigate and discover the witness whose interview was recounted in a police report with the witness' name redacted. Counsel's conduct was deficient because this witness corroborated the defendant's alibi, which counsel had investigated without success prior to receipt of this document. Counsel thus had already chosen not to present an alibi. "Nonetheless, an existing trial strategy, even if initially reasonable, cannot excuse counsel's failure to investigate new evidence that could potentially exonerate his client or create reasonable doubt in the minds of the jury." Prejudice established because counsel's deficient conduct "eliminat[ed] his best opportunity to cast significant doubt on the prosecution's case at trial."

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

The state court's holding to the contrary was an unreasonable application of *Strickland* and was based on an unreasonable determination of the facts in light of the evidence presented. Second, counsel's conduct was deficient in failing to introduce the victim's statement, given to police before he died, that identified someone other than the defendant as the shooter. This statement was admissible under New York's

“constitutional” exception to the hearsay rule and could have been used to rebut the prosecution’s argument that the defendant was a shooter. While the court did not find prejudice based solely on this issue, the court considered “the cumulative effect of counsel’s errors at trial.” Third, counsel’s conduct was deficient in failing to impeach a government witness with his prior inconsistent statements that did not mention that there were two shooters rather than one. Again, while not finding individual prejudice, the court held that “counsel's failure to investigate evidence that might have corroborated petitioner's alibi defense was error of constitutional importance.”

Byrd v. Trombley, 580 F. Supp. 2d 542 (E.D. Mich. 2008). Under AEDPA, counsel ineffective in criminal sexual conduct case for several reasons. First, counsel failed to object to the introduction of Petitioner's ten-year-old forgery conviction and the prosecution's use of the conviction as “bad man” evidence. Second, counsel failed to investigate and present an expert witness to counter the prosecution's witnesses. The failure to obtain a defense expert was not excused by cross-examination of the state expert. “Thorough cross-examination . . . does not excuse the abject failure of counsel to procure or even consult with an expert.” Prejudice established because “the case turned on the credibility of Petitioner, as weighed against the credibility of the victim.”

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

The most successful criminal attorneys are often those who can create a reasonable doubt in the jurors’ minds by throwing up one or two or more plausible alternatives to the defendant’s guilt.

Individual jurors need not be persuaded by the same plausible alternative to guilt to vote an acquittal.

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

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

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

Id. at ___ (citations omitted). Counsel here "sought to create reasonable doubt by attacking the prosecution's witnesses and calling into question the work done by the

investigating officers” and two of four counts were dismissed. Nonetheless, counsel’s “decision cannot be labeled a strategic choice between putting on an alibi defense, on one hand, versus merely seeking to create reasonable doubt, on the other” because counsel failed to investigate.

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

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

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

have presented affirmative evidence that the defendant had not been given any traffic citations. While the court did not find prejudice with respect to the trial, the court did find prejudice with respect to the motion to suppress the gun, which the court had denied under the inevitable discovery doctrine, but now finds was error. New trial granted and the motion to suppress hearing reopened.

2007: *Schulz v. Marshall*, 528 F. Supp. 2d 77 (E.D.N.Y. 2007), *aff'd*, 2009 WL 2837644 (2d Cir. Sep 04, 2009). Under ADEPA, counsel ineffective in robbery case for failing to interview and adequately examine the only witness to identify the defendant pre-trial and in failing to present alibi evidence. If the eyewitness had been interviewed, counsel would have learned that when the police showed the witness a photo array the day after the robbery, the owner of the restaurant robbed, who was serving as an interpreter, pointed to the defendant's picture and told the witness that he was the person. He also told the witness that if she did not help put him in jail, he would be released and hurt her. The eyewitness also would have told counsel that the defendant was innocent and she was 90% certain of her identification of another man, who had some similar physical characteristics to the defendant and had been arrested for numerous robberies, including a robbery on the same night three hours earlier, at a location about 10-12 miles away. The defendant's roommate also would have given alibi testimony. In failing to find ineffective assistance the state court unreasonably applied the *Strickland* standard. During trial, the eyewitness did not identify the defendant, but the restaurant owner did. Nonetheless, counsel did not present the alibi witness. Counsel's conduct was deficient and not based on valid strategy. "The fact that only one of the two eyewitnesses had identified petitioner at the trial and [counsel] viewed the prosecution case as weak does not justify the failure to call an alibi witness with no known credibility issues." Likewise, counsel's concern that the jury would wonder why the defendant did not also testify to the alibi was insufficient in light of counsel's other major failure in not interviewing the eyewitness prior to her testimony and to show her the picture of the man the defense asserted was the guilty party. While counsel stated that he wanted to interview the witness, he testified the prosecutor prohibited this. This testimony was contradicted by the prosecutor, though. Even if counsel's testimony was accurate, "the decision to abandon such an interview attempt certainly cannot be considered strategic." Counsel's conduct was deficient in failing to pursue this because there was "nothing to lose" and "no 'downside' at all" in interviewing the witness. If counsel had conducted the interview, counsel could have introduced the evidence against the other man and impeached the restaurant owner who identified the defendant during trial. Prejudice established because "[t]his [was] a case of underwhelming evidence. . . . All of the evidence against [the defendant] was affected by his counsel's failures." *Id.* (quoting *Lindstadt v. Keane*, 239 F.3d 191, 205 (2d Cir. 2001)).

Hays v. Farwell, 482 F. Supp. 2d 1180 (D. Nev. 2007). Under AEDPA review, trial/appellate counsel was ineffective for numerous reasons in case where the petitioner

was convicted of four counts of sexual assault on a minor and four counts of lewdness with a minor for alleging sexually abusing his oldest daughter, who was then eight years old. While many of the petitioner's claims had not been presented in state court and there was no showing of cause and prejudice, "the default was forgiven based on his preliminary evidence demonstrating to this court that he is actually innocent of the charges against him." Most of the claims were reviewed de novo because they had not been raised in state court or had been procedurally barred in state court. The charges arose because the petitioner's wife, who "was an abusive and neglectful mother" of their five children, "wanted desperately to be released from the responsibility of her five young children and from her marriage." In order to achieve her goals, she "schooled and coached eight-year old Jennifer about adult sexual behavior and then threatened and coerced her into making accusations of sexual abuse against her father," who was not himself abusive to the children but "was unable, or unwilling to stop his wife's actions" in general. Before reaching the issues related to counsel, the court granted relief on the bases of: (1) insufficient evidence to support the convictions; (2) improper denial of a new trial when the daughter, who was no longer in her mother's custody, immediately confessed after the trial that her testimony was false and had been coerced; (3) double jeopardy; and (4) prosecutorial misconduct. Counsel was also held to be ineffective during trial for: (1) failing to request an evidentiary hearing on the motion for new trial in order to present the daughter's testimony concerning the recantation; (2) failing to seek an independent medical expert to challenge the testimony of the examining nurse, which would have resulted in testimony (supported even by the state's expert in habeas) that the photographs taken of the girls genitalia revealed no evidence of abuse or anything abnormal; (3) conceding guilt in closing argument; (4) failing to challenge the veracity or expertise of the social worker and the examining nurse called as state's witnesses and "merely enhancing the State's evidence by reinforcement"; (5) failing to object to the prosecutor's improper argument denigrating the presumption of innocence; and (6) failing to argue on the defendant's behalf at sentencing.

2006: *Garcia v. Portuondo*, 459 F. Supp. 2d 267 (S.D.N.Y. 2006). Under AEDPA, counsel ineffective in second-degree murder case for failing to adequately investigate and present alibi evidence, including foreign public documents. The defendant consistently maintained his innocence and asserted that he was in jail in the Dominican Republic on the day of the murder, but the jury heard almost nothing of this alibi. Counsel gave notice of the alibi with supporting documents prior to trial, but realized admissibility might be an issue. The trial court expressed doubt as to admissibility but suggested that counsel brief the issue. Counsel failed to do so and never offered the documents into evidence. The state's case consisted of a single eyewitness. This witness, who was on Valium at the time of the crime and Thorazine during trial, identified the defendant as one of three assailants in a lineup five months after the murder after initially identifying someone else in the same lineup. This witness had made a number of inconsistent statements. The defense presented the victim's sister as its sole witness. She testified that the defendant

and her brother were friends, she did not see the defendant getting into the car when she saw her brother on the ground, and that she had talked to the defendant on the phone shortly after the murder and he was in the Dominican Republic. The prosecution discredited this testimony because she had no personal knowledge of his whereabouts and had not dialed the phone. In habeas, the District Court denied the state's "motion to dismiss the petition as untimely, finding that the statute of limitations was tolled because Garcia's was one of the "exceedingly rare case[s] in which the petitioner makes out a credible claim of actual innocence." Counsel's performance was deficient because the defendant's family had provided him with numerous official documents from the Dominican Republic to establish the defendant's alibi, but he made no efforts to verify the authenticity of any of the documents in his possession and made no effort to obtain additional documentary evidence to support the alibi. Counsel was also aware of several alibi witnesses who were prepared to testify, but they were not called. While counsel believed that the witnesses were truthful, he did not interview them because they were relatives and friends of the defendant's wife and counsel believed they would not likely be credited by the jury. If counsel had investigated, he could have found additional documentary and testimonial evidence to support the alibi and could have established the admissibility of the foreign documents.

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

Id. at ___ (citations omitted). Likewise,

Deciding that investigation is costly is not, as *Strickland* requires, equivalent to a reasonable and informed decision that investigation is unnecessary. Indeed, as one court has held, "There are costs involved whenever defense counsel is obliged to undertake an investigation. These costs are often substantial.... [However, h]aving accepted the responsibility of representing a criminal defendant, counsel owes a duty to his client that will on occasion require him to make financial outlays that might be considered unfair for an ordinary businessman who, unlike a licensed attorney,

has not voluntarily adopted an enhanced ethical obligation to society.”

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

2004: *Casey v. Frank*, 346 F. Supp. 2d 1000 (E.D. Wis. 2004). Trial counsel was ineffective in sexual assault case for failing to obtain the case file from the defendant’s previous attorney, which contained numerous witness statements undermining the credibility of the alleged victims and an alleged corroborating eyewitness. The defendant was initially charged in 1993 for sexually assaulting a girl in the neighborhood. He was represented by a public defender, who assigned an investigator to interview potential witnesses. The investigator took a number of statements that raised questions about the credibility of the alleged victim and the prosecutor ultimately dismissed the charge without prejudice. A year later, the defendant’s step-daughter alleged that the defendant sexually assaulted her, but the prosecutor brought no charges. In 1997, the stepdaughter alleged that the defendant had assaulted her in 1992 and that she witnessed the defendant assaulting the neighbor girl in the same time period. The defendant was charged with both assaults and retained counsel. Counsel requested two specific documents from the defendant’s prior counsel, but did not request the entire file, which contained numerous witness statements challenging the credibility of both alleged victims and an alleged corroborating eyewitness. He also failed to independently discover the witnesses that previously gave exculpatory statements. While the state court held that trial counsel requested the previous attorney’s entire file, this finding was an unreasonable determination of the facts under the AEDPA because the evidence showed only that counsel asked for two specific documents. Counsel’s conduct was deficient because counsel failed “to obtain predecessor counsel’s investigative reports” or to otherwise adequately investigate. While the state court found that counsel’s failure was excused because counsel did not know the additional documents existed, this finding was unpersuasive.

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

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

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

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

United States v. Ramsey, 323 F. Supp.2d 27 (D.D.C. 2004). Under the AEDPA, counsel was ineffective in drug distribution case for a number of reasons, but primarily failing to move for mistrial after the court suppressed an inculpatory statement after it was already heard by the jury. Counsel failed to realize until he heard the testimony that the defendant was questioned after he invoked his rights. This error was considered in conjunction, *inter alia*, with counsel’s ignorance of the law and failure to understand the implications of an entrapment defense with respect to allowing evidence of predisposition until advised of the implications by the court. This resulted in counsel abandoning the sole defense in the midst of trial without having the defendant testify. Counsel’s conduct was deficient and the proffered strategy reasons for failing to seek a mistrial were “so nonsensical that the Court is left to conclude that [counsel] simply abandoned what he had decided at some point during the trial was an unwinnable case, and had been unwilling to invest the time and effort that would be required by a second trial.” Prejudice found, regardless of the likely outcome of a new trial, because counsel’s deficient conduct deprived the defendant of a mistrial and, thus, “the opportunity for a second trial he otherwise would have had, untainted by an opening statement to the jury of an entrapment defense he could not present.” A mistrial would have afforded counsel an opportunity to advise the defendant “of the substantial advantages of . . . pleading guilty in view of the strength of the government’s case” after counsel had heard all of the evidence and realized that an entrapment defense could not be mounted.

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

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

3. Military Cases

2004: *United States v. Garcia*, 59 M.J. 447 (C.A.A.F. 2004). Counsel ineffective in robbery, conspiracy, and stolen property case for two reasons. First, civilian defense counsel waived the Article 32 pre-trial investigation without the accused's knowledge. This was deficient because waiver of this hearing must be personal to the accused. It was prejudicial because this hearing serves as a discovery proceeding for the accused and "stands as a bulwark against baseless charges." Here, if the accused had seen the potential strength of the government's case, he might have sought a plea agreement limiting his sentence. Second, military counsel (who tried the case alone) was ineffective for failing to adequately advise the accused of his options mid-trial when the strength of the government's case was clear and the accused first confessed his full involvement in the crimes to counsel. Without explaining the options to the accused, such as exploring the possibility of a plea agreement or changing the plea to guilty, counsel advised the accused to testify admitting his full involvement in the crimes. Counsel's conduct was deficient and prejudicial. Much of what counsel elicited bolstered the government's case and opened the door to cross eliciting aggravating and damaging details not previously established by the government. Counsel also did not elicit any expressions of remorse or contrition so the testimony "had no mitigating impact." Counsel's argument in sentencing also highlighted the accused's culpability and including a statement that the accused was only "three-and-a-half pounds of trigger pull away from" murder. Under the circumstances, there was no discernable trial strategy for counsel's actions. "The extreme harshness of the sentence returned by the members is strong evidence" of prejudice. The government requested a sentence of a \$23,000 fine and 86 years, but the panel returned a sentence including a \$60,000 fine and 125 years of confinement.

4. State Cases

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

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

the victim's credibility and did not probe this in cross. Prejudice established as the alleged victim's testimony was the only direct evidence against the defendant.

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

People v. Gioglio, ___ N.W.2d ___, 2011 WL 1273182 (Mich. App. Apr. 5, 2011). Counsel ineffective under the *Cronic* standard in case where defendant was charged with criminal sexual conduct with his six-year-old niece. Counsel gave no opening statement; did not cross-examine the child's teacher about the circumstances of the child's disclosure of abuse to her classmates; did not cross-examine the alleged victim even though her testimony was inconsistent with prior statements; did not object to testimony of the child's mother that the defendant had been abused as a child, did not understand the wrongfulness of his actions, and had to be kicked out of the home due to his criminal propensities; did not cross-examine the child's mother; did not cross-examine the police officer, who testified that she manipulated the mentally challenged defendant into making seemingly incriminating statements; and called no defense witnesses. The only real affirmative acts by counsel were to cross-examine the state's expert who testified generally about characteristics and behaviors common in children who have been sexually abused. In the cross, counsel elicited testimony that, while children sometimes make false allegations, it only happens about two percent of the time. In other words, it was 98% likely the child in this case was telling the truth. In counsel's closing, she argued reasonable doubt, which made little sense as she had not pointed out any inconsistencies or weaknesses in the state's case during the trial. Counsel's conduct was so bad that the veteran prosecutor wrote to the court administrator following the trial expressing her concerns. Counsel told the prosecutor prior to trial that the defendant admitted his guilt to her and that she could not bring herself to cross-examine child sexual assault victims. Following sentencing, counsel gave the prosecutor a "thumb's-up" and said "he's toast." Defense counsel carefully avoided denying these allegations in responding, and instead professed that it was "possible" these things happened but that she did not remember. In testimony during a motion for new trial, the prosecutor added that counsel told her the defendant "made her sick" and that she could not look at him. The prosecutor also observed counsel mimic the defendant's speech impediment two to three times. In short, the prosecutor testified that she felt "we were both prosecuting him." "[A]lthough an attorney might offer meaningful testing of a prosecution's case through objections, cross-examination, and closing arguments alone, this is not such a case." Here, counsel

“threw defendant into the ring with no defense whatsoever. . . . Indeed, the prosecutor herself characterized defendant’s trial as one where there were two prosecutors.”
Prejudice presumed.

Timms v. State, 54 So.3d 310 (Miss. App. 2011). Counsel ineffective in possession of firearm by a felon case for failing to ensure accurate portrayal of the defendant’s status as a convicted felon. The defendant had been convicted of felony possession of cocaine, but counsel mistakenly believed he had been convicted of possession of a stolen firearm. While he had been arrested on this charge, he was never convicted but counsel failed to object when the State introduced documents showing that the defendant had been charged for this offense. This was compounded by counsel asking the defendant and other witnesses about this non-existence prior conviction. This was especially prejudicial due to the similarity of that charge with the current charge. Likewise, the State introduced documents about the cocaine conviction that showed that he was charged with possession enhanced by possession of a stolen firearm when his plea and conviction was without the firearm enhancement. Counsel should have sought a stipulation as to the defendant’s status prior to trial.

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

People v. Boddin, 918 N.Y.S.2d 141 (N.Y. App. Div. 2011). Counsel ineffective in criminal possession of weapon and reckless endangerment case due to the cumulative effect of counsel’s conduct. Examples included distancing himself from the defendant in jury selection, failing to adequately cross-examine state witnesses, allowing the state to introduce evidence counsel had not even reviewed, stipulating that a lay fact witness was an expert, stipulating to testimony he had not reviewed, failing to adequately examine defense witnesses, interrupting court numerous times and being admonished before jury, making untimely requests for important jury instructions, and arguing only rhetoric in

closing arguments when there were serious weaknesses in the state's case. The representation was so bad that the court noted on the record before sentencing that he was troubled by counsel's behavior and believed the defendant had a viable appellate claim of ineffective assistance of counsel.

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

Gaines v. Commissioner of Correction, 7 A.3d 395 (Conn. App. 2010), *appeal granted*, 14 A.3d 1005 (Conn. 2011). Counsel ineffective in murder and conspiracy case for failing to adequately investigate and present alibi testimony. Two people were killed in a parked car. They were shot with .22 and .45 bullets. Five months after the murders, the 16-year-old defendant was arrested. He informed counsel he was not involved in the murders but he could not remember his whereabouts on the night of the murders. He gave counsel names of two potential witnesses for him, but counsel never interviewed these witnesses. During trial, the defense theory was that the two primary state witnesses were the killers. One of them testified that the defendant had lived with him and admitted that he and another man had committed the murders with weapons the other man had borrowed from the witness. This witness' girlfriend testified that, after the defendant's arrest, he had confessed to her that he had committed the murders for payment. The defendant testified that he sold drugs to pay his rent, the state witness was his “lieutenant,” and there had been problems between them. He testified that the “lieutenant's” girlfriend had attempted to get him to admit involvement in the shooting but he did not. Counsel's conduct was deficient in failing to investigate. If counsel had called the two people, whose names had been given to him by the defendant, he would have discovered an alibi witness. This witness would have testified that the defendant was with her on the evening of the murders assisting her in moving. This witness also

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

**State v. Smith*, ___ So.3d ___, 2010 WL 3834332 (Ala. Crim. App. Oct. 1, 2010) (sentenced in August 1995). Retained counsel was ineffective in failing to adequately investigate and present a defense during capital trial and sentencing. The victim, a friend of the defendant's, had been missing for approximately 10 days when his body was found. He had been shot in the back of the head with a .25 pistol. Based on information from a single state witness, police focused the investigation on the defendant. The witness testified that he and the defendant had discussed robbing the victim initially as a joke but later the defendant was serious about it and the witness said he wanted nothing to do with it. This same witness testified that he had seen the defendant with a .25 pistol. A different witness testified that he had purchased a .25 caliber pistol that the defendant had offered to buy. This gun was later missing and the witness confronted the defendant who denied taking the gun. A third man testified that he saw the defendant and the victim together on a Friday in September. The prosecutor argued, without objection, that this witness had seen the defendant with the victim on September 23, the date on which the victim disappeared. Finally, police testified that the defendant had been interrogated and then confessed after a second interrogation in a tape-recorded statement. The defendant testified that had an alibi and that he had not seen the victim on Friday, September 23, the last day he was seen alive. Because the circuit court had found ineffective assistance, the court applied the abuse-of-discretion standard. Counsel's conduct was deficient in failing to adequately investigate. While counsel testified that he had interviewed a "whole list of people" and "everybody we could talk to," the circuit court found this testimony to be incredible. First, none of the witnesses called to testify in post-conviction proceedings had been interviewed and only the defendant's mother, who had testified during trial, recalled meeting counsel. The mother never spoke to counsel prior to the morning the trial started and counsel spent no time with her preparing her for her testimony. Second, counsel described his efforts in "broadest generalities" but could provide neither names or

details of his alleged investigation. He produced no witness list nor any interview notes although he claimed he would have made notes and those notes would be in his file. Finally, when counsel did remember speaking to a particular person, what he remembered was trial testimony—“not anything that occurred in his purported pretrial investigation.” While counsel also claimed to have employed others to assist with the investigation, no evidence supported this other than a mere three hours of investigation within the week before trial by a man who had never before and never since performed any investigation in a criminal case. The failure to investigate adequately could not be blamed on the family’s failure to pay all of counsel’s retainer either. The defendant was indigent, but counsel never sought money from the court to pay for a professional investigator. While counsel believed “the Court would not have granted such assistance,” this assertion was not supported by the evidence. If counsel had interviewed the witness, who allegedly saw the defendant with the victim on September 23 and inquired further, he would have testified that it was actually September 16 when he saw the two together. Thus, there would have been no evidence suggesting the defendant had been with the victim on the date of his disappearance. Likewise, counsel failed to adequately investigate whether the primary state witness, who police relied on in focusing on the defendant, was the actual killer, although counsel believed he was. Counsel did not interview the witness’ ex-wife, who had made a statement to police consistent with her husband’s statement. By the time of trial, she was divorced from the witness and would have testified if asked that she and the witness were having financial problems at the time of the murder. Her husband had proposed the idea of robbing the victim to the defendant, who dismissed the idea because the victim was a good friend, who would loan him money any time he needed it. She would have testified further than her husband had purchased a handgun several months before the murder, that he was gone the afternoon the witness disappeared and came home muddy and wet with torn clothing that he disposed of, that he was unusually interested in news accounts of the discovery of the body, and that he had threatened her, prior to police interviewing them, that he would kill her and her parents if she “ever went against him.” She and her husband had been interviewed together and she merely substituted the defendant’s name for her husband’s in the statement and parroted her husband’s statement. The court found this witness to be credible. The court also found deficient conduct for failing to present expert testimony relating to the police procedures used in interviewing this witness with her husband and in interrogating the defendant. The police did not preserve a recording or transcript of the initial interview, which “was highly unusual” and undermined the credibility of the subsequent taped confession. The circuit court also made extensive findings on counsel’s failure to present testimony in the “area of false confessions.” Counsel was also ineffective in failing to adequately present evidence in sentencing. Counsel presented only two witnesses. The circuit court’s findings with respect to both the trial and sentencing phase ineffective assistance of counsel was supported by the record and upheld.

Henderson v. Hames, 397 S.E.2d 798 (Ga. 2010). Counsel ineffective in misuse of a

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

Michael T. V. Commissioner of Correction, 999 A.2d 818 (Conn. App. 2010), *appeal granted*, 4 A.3d 832 (Conn. 2010). Counsel ineffective in sexual assault and risk of injury to a young child case for failing to present expert testimony to challenge the state's presentation of incriminatory expert evidence. 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, she claimed the defendant had abused her. During trial, the state presented four experts, who stated that Trichomonas is a sexually transmitted disease. The state also presented an expert to explain the reasonableness of the delay in the child's report of abuse. The defendant was the only defense witness. Counsel's conduct was deficient in failing to present an expert witness, who would have testified that a child could contract Trichomonas by living in the home with someone with the infection if the family was not careful about hygiene issues. In other words, community bath towels or bath water could transmit the disease. In addition, the American Academy of Pediatrics does not include Trichomonas as a disease that is diagnostic of sexual abuse. This same expert could also have cast doubt on the reliability of the child's information in light of the delay.

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

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

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

State v. A.N.J., 225 P.3d 956 (Wash. 2010). Counsel ineffective in juvenile case where defendant pleaded guilty to first degree child molestation. Counsel was contracted by the county to provide public defender services for a flat yearly fee, which provided that counsel had to pay experts and investigators from this fee. Under state rules, “it is now unethical for an attorney to sign a public defender contract” of this nature. This contract “created an incentive” for counsel not to investigate. Counsel met with his 12-year old client and his parents for no more than an hour before the plea hearing, did no independent investigation, consulted with no experts, and did not carefully review the plea agreement before advising the defendant and his parents to accept it believing incorrectly that the conviction could be removed from the defendant’s record when he turned 18 or 21. Counsel’s failure to investigate was not excused by counsel’s belief that the defendant was going to confess or even that he was guilty. “[A]t the very least, counsel must reasonably evaluate the evidence against the accused and the likelihood of a

conviction if the case proceeds to trial so that the defendant can make a meaningful decision as to whether or not to plead guilty.” Counsel also erroneously advised the defendant and his parents about the consequences of the plea by advising them that the conviction could be removed from the defendant’s record when he turned 18 or 21. While the court has discretion to relieve the requirement to register as a sex offender, the conviction never goes away. Based on counsel’s ineffectiveness, the defendant was entitled to withdraw his guilty plea.

2009: *State v. Moore*, 223 P.3d 1137 (Utah App. 2009), 238 P.3d 443 (Utah 2010). Counsel ineffective in aggravated sexual abuse of child and dealing in harmful material case for failing to present evidence and argument as to the timing of the alleged offense. The defendant was charged with offenses committed in the summer of 2002. The testimony at trial from the defendant’s sisters contradicted the evidence that the crimes could have been committed in 2002. Nonetheless, counsel did not pursue this evidence or challenge a police officer’s testimony that the alleged victim was not clear of the date of the crimes in the initial interview, when a recording clearly revealed the alleged victim initially stated he was 14 at the time of the crimes, which would have been the summer of 2003, and only later said he was 13. Counsel’s conduct was deficient as the one-year discrepancy in the alleged victim’s age could have made the difference between first-degree sexual abuse, if the alleged victim was 13, and a second degree felony or class A misdemeanor, if he was 14. Likewise, the Information charged that the crimes were committed in the summer of 2002. Thus, under the instructions presented to the jury, if there was a reasonable doubt as to whether the charged conduct occurred in 2002, the jury would have been obligated to acquit the defendant.

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

alternative. Counsel's conduct "[i]n its totality" (or cumulatively) required reversal.

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

Gravitt v. State, 687 S.E.2d 150 (Ga. App. 2009). Counsel ineffective in DUI case for failing to adequately investigate and present testimony of two readily available eyewitnesses, who were riding in the defendant's vehicle at the time of the alleged incident. There was a two car crash allegedly caused by unsafe driving by the defendant, whose vehicle was not involved in the crash. Counsel called no witnesses and argued only that the defendant's actions were not the proximate cause of the accident. Counsel's conduct was deficient in making only minimal attempts to locate the eyewitnesses and waiting until close to trial to subpoena them, even though counsel knew they would be

hard to locate. Prejudice established because these witnesses denied that the defendant appeared to be under the influence or was driving recklessly and explained how the accident happened through no fault of the defendant. In rejecting this finding, the trial court erred in measuring the credibility of these witnesses' testimony, "not against the witnesses who testified at the hearing, but against the witnesses who testified at . . . trial." In short, "the trial court judged the credibility of the witnesses had they testified at trial, and that is 'solely a matter to be resolved by the jury.'" The trial court also failed to consider that the state capitalized on counsel's error by arguing that these witnesses were not called by the defense because they might testify against the defendant.

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

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

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

People v. Bryant, 907 N.E.2d 862 (Ill. App. 2009). Counsel ineffective in murder case for failing to call any witnesses in support of the defense theory that the murder was committed by others. Counsel represented two defendants, husband and wife, who allegedly killed a cocaine dealer in their home. They were accused along with two other men, one of whom was not prosecuted in exchange for his testimony. The victim's blood and driver's license was discovered in the defendants' home and the victim's blood was on the shoe of the other man charged. The only direct evidence that the defendant committed the murder came from the immunized witness, who had made numerous inconsistent statements. In opening statements, defense counsel said the defendants were in their bedroom asleep when the victim was killed by the other men. Counsel repeatedly said the defendants would testify to this. Counsel also told the jury it would hear evidence that the other two men met together prior to arrest to plan their story and that

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

Bryant v. Commissioner of Correction, 964 A.2d 1186 (Conn. 2009). Counsel ineffective in manslaughter case for failing to present four independent witnesses whose testimony would have supported a third party culpability defense and substantially impeached the evidence presented against the petitioner. The testimony of these witnesses "would have worked in concert to create a credible scenario in which the cause

of . . . death was a gunshot wound to the head perpetrated by a small group of unidentified Hispanic males driving a white Cadillac or Lincoln, not the actions of the petitioner.” Counsel’s conduct was deficient and not explained by strategy because the witness’ statements were given contemporaneous to the events and “there was no evidence in the record to suggest that any of these witnesses’ statements . . . were influenced by the statements made by the other witnesses.” Prejudice established. “When reviewed in its totality, the testimony of these neutral witnesses, each of whom the habeas court found to be credible and highly persuasive, creates a plausible, well supported third party culpability defense.” The state’s evidence, on the other hand, was limited to the eyewitness testimony of two witnesses who were both “subject to substantial impeachment evidence.” “[N]ot only was the testimony that linked the petitioner to the attack of dubious credibility, it also was internally inconsistent with respect to significant facts.”

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

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

him the first time on the day of his testimony, which was more than 8 months after the crime and, by that time, the witness incorrectly believed he had identified the defendant. Counsel's conduct was deficient in failing to interview these eyewitnesses and subpoena them. Counsel's conduct was also unreasonable in "fail[ing] to adequately prepare the one man who eventually did testify." Prejudice established because the jury asked to rehear testimony and asked questions relating to identification during deliberations. "In light of the record, there is a real possibility that but for counsel's deficient performance in this case, the jury would have returned a different verdict."

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

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

Lounds v. State, 670 S.E.2d 646 (S.C. 2008). Counsel, who was since suspended from the practice of law indefinitely for other reasons, was ineffective in armed robbery and kidnaping trial for failing to adequately investigate and present the defense and for making harmful arguments contradictory to the petitioner's testimony in closing. Counsel's conduct was deficient because counsel did not speak to petitioner until the morning the trial began and admitted on the record that he had just learned the name of

possible defense witnesses, who were not called because they could not be located during the trial and because counsel “believed the witnesses would not add much to petitioner's defense.” Even if this could be considered as a strategic reason, it was “not objectively reasonable given the defense theory of the case.” In essence, the petitioner testified that he asked the alleged victim for money owed to him due to previous drug dealings and the victim went with him voluntarily to the victim’s parents house to get money. The victim denied knowing the petitioner, owing him money, or ever buying or using drugs. The defense witnesses the petitioner sought during trial and who testified in PCR would have testified that the victim did know the petitioner through drug dealing, which “would have added significantly to the credibility of petitioner's case.” Counsel’s conduct was also deficient in closing argument for asserting that the petitioner had a friend with him for “extra muscle” when the defendant had denied robbery or kidnaping or any attempt to threaten the victim. Prejudice was found on each individual count because the jury necessarily rejected the victim’s testimony in acquitting on the armed robbery.

Anfinson v. State, 758 N.W.2d 496 (Iowa 2008). Counsel ineffective in murder case arising from the drowning death of the defendant’s infant son for failing to investigate and present evidence of the defendant's postpartum depression in furtherance of claim that the infant's death was an accident. Counsel was aware from interviews of the defendant’s sisters about the defendant’s behavior (including self-mutilation by plucking leg and pubic hairs) of the probability of postpartum depression, but “categorically rejected any suggestion that this condition be explored in her defense,” including in statements in the media made “without the benefit of a reasonable investigation of [the defendant’s] mental health.” Counsel believed that asserting postpartum depression was tantamount to admitting an intentional killing. Thus, counsel did not request or obtain copies of medical records from the defendant’s post-arrest hospitalization and treatment for depression, suicidal ideation, and panic attacks. He also failed to conduct an investigation which would have divulged the defendant’s prior episodes of depression after she gave birth and consented to the adoption of her first child in 1980, and again following an abortion in 1985. Trial counsel was also dismissive of the opinion of the defendant’s post-arrest/post-hospitalization counselor that the defendant had symptoms consistent with postpartum depression. Retained counsel also rejected the defendant’s father’s request for a mental evaluation at the Menninger Clinic, even though the father offered to pay for the evaluation and the father was paying counsel. Counsel told the family that it would be “fuel for the prosecution.” Counsel’s conduct was deficient because the evidence of postpartum depression would have supported the accidental death defense to explain three things: (1) why the defendant was distracted enough to leave the infant in the bath to use the telephone; (2) why the defendant acted irrationally in hiding the body in a lake after she discovered his death; and (3) why her affect was flat and emotionless later that day when being questioned by investigators. Instead of investigating and presenting the mental health evidence, counsel simply used the “defense of ‘accidents happen’” without supporting evidence. Counsel “closed not only his ears,

but also his eyes as he neglected to obtain medical records evidencing [the defendant's] mental state." Even if the court accepted "trial counsel's assessment that insanity and diminished responsibility defenses are rarely successful, the decision to ignore evidence of . . . compromised mental state was not a reasonable professional judgment excusing an investigation of the extent to which that mental state supported the defense theory of accidental death." The court found "a reasonable probability that if a reasonable investigation had been undertaken, evidence would have been developed and presented at trial tending to establish [the defendant's] conduct from the time of [the infant's] birth until his death was profoundly affected by postpartum depression" and that an expert could have connected the evidence of severe postpartum depression "with her bizarre behavior in furtherance of the accidental death defense." While the court was "mindful of the deference owed by postconviction courts to counsel's strategic choices," the court held that "[d]eference for such choices is not unlimited, however, and it will not be stretched to deny [the defendant] a new trial under the circumstances presented here."

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

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

Id. at ____.

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

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

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

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

Id. at 242. Likewise, “[t]here are few rules of cross-examination that could be said to be set in stone, but it is hard to conceive of a situation where sound trial strategy would include asking a law enforcement officer why he believed your client was guilty.” Counsel also failed to demand notice of the State’s intent to present evidence of uncharged misconduct and failed to challenge admissibility prior to trial, which resulted in evidence of: (1) a prior sexual assault on the victim in this case; (2) involvement in a homosexual child pornography ring; and (3) involvement in two murders. “[N]o reasonable attorney in this situation would forfeit the opportunity to prevent the jury from learning about the different instances of uncharged misconduct noted above. While the appellant may have been subject to an attack upon his credibility through introduction of evidence . . . of the *fact* of the two murder convictions, there was a solid legal basis for defense counsel to attempt to prevent the jury from hearing the *details* of those crimes, or from hearing about the other alleged misconduct.” Reversal was also required due to the plain error in the state’s improper elicitation of polygraph information and improper cross and argument concerning the “lying” witnesses and the prior conviction evidence.

Vazquez v. Commissioner of Correction, 944 A.2d 429 (Conn. App. 2008). Counsel ineffective in robbery case for failing to present alibi testimony establishing that the defendant was at home asleep with his girlfriend at the time of the robbery. Counsel's conduct was deficient because he failed to prepare and present this evidence only because he believed incorrectly that the alleged victim/eyewitness would not show up for trial because she was an illegal alien. Prejudice established because the PCR court found the defendant and his girlfriend to be credible and there was no evidence of any credible impeachment evidence.

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

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

McKnight v. State, 661 S.E.2d 354 (S.C. 2008). Counsel ineffective for numerous reasons in retrial of homicide by child abuse case involving a full-term stillborn baby with

cocaine in its system. The initial autopsy listed three causes of death, one of which was cocaine consumption. The state's theory was that other causes were ruled out and the cocaine use alone caused the death. In an initial trial, the defense presented two experts. The first completely contradicted the state's theory, testified that the cocaine studies the state's experts relied on were outdated, and ruled on cocaine as a cause of death. The second ruled out other causes, but could not rule out cocaine, which the state argued effectively supported the state's theory. The first trial resulted in a mistrial due to jury misconduct after seven hours of deliberations. In the second trial, the same defense counsel did not call the first defense expert because he was unavailable and recalled only the second that supported the state's theory, which resulted in conviction after only 30 minutes of deliberations. Counsel was ineffective both in calling the defense expert that undermined the defense and in failing to call the same (by obtaining a continuance or videotaped testimony) or a different available (and local) expert that supported the defense theory. Counsel was also ineffective in failing to investigate and present the medical evidence that contradicted the state's experts' testimony on the link between cocaine and stillbirth and failing to challenge the state's evidence. Counsel was also ineffective in failing to object to improper instructions that confused the measure of intent required for homicide by child abuse. The court initially charged the required "extreme indifference to human life" and then gave a general charge of criminal intent. While this was proper, in response to a jury question on intent, the court repeated only the general charge which confused the issue further and resulted in conviction only five minutes later. Finally, counsel was ineffective in failing to introduce the autopsy report into evidence simply because counsel "just forgot" when the report contradicted the state's theory of the case. Prejudice found individually on each of these issues.

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

Cosio v. United States, 927 A.2d 1106 (D.C. 2007). Counsel was ineffective in child sexual abuse and carnal knowledge case for failing to ask the defendant's coworkers about his interactions with the alleged victim, who was the defendant's younger half-sister. The alleged victim testified that she had been repeatedly sexually assaulted by the defendant over a seven year period starting when she was seven or eight, but she did not report the abuse until she was fifteen due to her fear of the defendant. The government's case rested primarily on the alleged victim's testimony, but also included evidence from a pediatrician that the condition of the child's hymen was "strongly

indicative of sexual abuse.” A defense expert testified in a similar fashion. Three of the defendant’s coworkers also testified that he was a good worker and a law-abiding citizen. Counsel’s conduct was deficient because counsel failed to interview the coworkers concerning their knowledge of the defendant’s relationship with the alleged victim even though counsel received a memo from his investigator that should have led counsel to investigate further rather than choosing to focus only a theory that the child resented the defendant due to discipline within the home, jealousy, and other matters, enough to fabricate charges against him. Reasonable counsel would also have seen the need to investigate the allegations that the alleged victim was afraid of the defendant. Further investigation would have revealed five coworkers with substantial knowledge of the relationship, who would have testified that the alleged victim voluntarily sought out the defendant at work and in other places, was very affectionate with him, and showed no sign of fear of him. Likewise, even in interviewing the coworkers to determine who would testify concerning the defendant’s character, counsel should have asked about any knowledge of the defendant’s relationship with the alleged victim because of the need to anticipate wide-ranging cross-examination. Counsel’s failure is also not explained by counsel’s “resentment” theory because counsel settled on this “theory prematurely, without having thoroughly investigated the relationship.” This “was not the kind of ‘reasonable professional judgment[.]’ that could support the curtailment of further defense investigation.” Prejudice found because the coworkers would have undermined the alleged victim’s testimony of fearing the defendant and the believability of the remainder of her testimony. Likewise, counsel would also have been able to confront the alleged victim in cross-examination with the contradiction between her words and her deeds.

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

Starling v. State, 646 S.E.2d 695 (Ga. App. 2007). Counsel ineffective in aggravated assault and possession of a firearm by a convicted felon for failing to stipulate to the defendant’s felon status, eliciting the defendant’s testimony on the details of his criminal history, and failing to obtain a jury instruction on the use of the evidence of the defendant’s criminal history. Counsel’s conduct was deficient because a stipulation would have avoided exposing the jury to information that the defendant had previously been convicted of receiving stolen property, of aggravated assault that involved a gun, and

possession of a gun by a first offender. Although counsel requested a limiting instruction at the conclusion of the evidence and the trial court agreed, counsel failed to renew the request the next day when the charges were given but the trial court failed to include the limiting charge. Prejudice found because the defense case rested largely on the defendant's credibility, only a single eyewitness testified that he saw the shooting, and the state emphasized the defendant's criminal history in closing arguments.

People v. Sims, 869 N.E.2d 1115 (Ill. App. 2007). Counsel ineffective in felony murder case for failing to timely give notice of the affirmative defense of compulsion and to seek instruction on the defense. According to the state's evidence, the defendant had been part of an armed robbery of a restaurant. The state's primary witness was a co-defendant who had plead guilty in a cooperation agreement with the state. He testified that the defendant was 15 while the other four participants were adults. After the robbery was discussed but before they entered the car to go to the crime scene, the defendant indicated that he was scared and did not want to participate. A codefendant, who was holding a gun at the time, told him that "he was there when it started, he got to be there when it finished." The state's witness testified that everyone knew "what that meant." During the robbery, the defendant was outside at a pay phone as a lookout and never entered the building. During the robbery, an employee of the store was hit and several shots were fired. The employee who was hit and close by the shooting died 5 ½ hours after the robbery. The state's expert testified that the victim died from cardiac arrest caused by the stress of the robbery. A defense expert disputed this finding. Counsel's conduct was deficient in failing to give timely notice of a compulsion defense or to, at least, give notice when he learned of this aspect of the codefendant's testimony 1 ½ hours before he testified. Although the court expressed concern about trial by ambush, the court allowed the codefendant's testimony in this regard, but informed counsel that the issue concerning arguments and instructions would be addressed later. During the instruction conference, counsel did not request a compulsion instruction even though there was sufficient evidence to require the instruction on the affirmative defense, which required only a showing that the defendant acted under the threat or menace of imminent infliction of death or great bodily harm. Prejudice found because "this case was close" in light of the issues concerning the cause of death, a co-defendant's prior acquittal on the murder because of that issue, the defendant's age in comparison to his adult codefendants, and his role in the crimes as only a "look out."

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

People v. Cyrus, 848 N.Y.S.2d 67 (N.Y. App. Div. 2007). Counsel ineffective in

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

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

Kincek v. Hall, 175 P.3d 496 (Ore. App. 2007). Counsel ineffective in attempted murder case for failing to present expert testimony about the defendant's mental state at the time of the shooting. The defendant and his wife of 25 years separated and he suspected her of having an affair. When he entered her bedroom to find her having phone sex with the other man, an argument ensued and he ultimately shot her in the ankle. Although he had told officers that he had intended to kill her and himself, he testified that he did not intend to kill her and had only accidentally shot her. Defense counsel sought prior to trial to introduce the testimony of a clinical psychologist, who concluded that the defendant was acutely depressed at the time of the shooting and had not intended to shoot his wife. The trial court held that the expert could not testify as to the ultimate issue of petitioner's intent, but would otherwise be permitted to testify. Counsel did not call the expert to testify. Counsel's conduct was deficient and prejudicial.

**Ard v. Catoe*, 642 S.E.2d 590 (S.C.), *cert. denied*, 128 S.Ct. 370 (2007). Counsel ineffective in capital case for failing to adequately develop and present gunshot residue evidence. The defendant was charged with killing his pregnant girlfriend, which resulted in the viable fetus dying from a lack of oxygen. The defense theory and the defendant's testimony was that his girlfriend was holding a gun during an argument and that it fired when he grabbed it to take it away from her. The state examiner issued a report that there was no gunshot residue on the victim's hands but testified that several particles were "very interesting, but there was not any or enough material for us to be able to call gunshot residue." Citing to the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty cases, the court held that counsel's conduct was deficient in failing to interview the state examiner or to cross-examine him on this point. Counsel's conduct was also deficient because the expert they retained had been the state expert's supervisor at the time the test was done and he reviewed and approved the report. This expert was not an "independent expert" because casting doubt on the state examiner's findings would have implicitly cast doubt on his own oversight of the analysis. Counsel's actions "were unreasonable and clearly deficient, especially given the fact that this was a capital case with an arguable defense to the guilt phase." Prejudice found because interviewing or cross-examining the state expert and hiring an independent expert would have revealed that, although the tests were not conclusive for gun powder, the "interesting" particles contained the three required elements of gunshot residue and the particles were "consistent with gunshot residue and could have come from her handling a weapon." Prejudice was also established because the defense's critical theory relied on this evidence and the state capitalized in argument on the lack of gunshot residue evidence and even called the "defense expert" to testify that he agreed with that finding and that he had been hired by the defense. Finally, the court noted that "the jury apparently did not believe this to be an open-and-shut case of murder" because the jury sought additional instructions on involuntary manslaughter during deliberations.

Dillon v. Weber, 737 N.W.2d 420 (S.D. 2007). Counsel ineffective in rape and criminal peophilia case for numerous errors. The defendant was charged with abusing his eight-year-old daughter and four of her friends on two occasions. Counsel failed to object on double jeopardy grounds to charges of rape and peophilia based on the same acts. Counsel did not investigate a prior allegation of sexual abuse by two of the alleged victim's that the state declined to prosecute against another man. Counsel failed to prepare his expert witnesses (social worker and psychologist) even though the entire case hinged on the credibility of the alleged victim's. Counsel also failed to provide the trial court with a sufficient offer of proof concerning his expert witnesses and did not establish an adequate foundation for some of the testimony counsel sought to present. Counsel also made numerous errors during the trial including failing to impeach the testimony of the mother of two of the alleged victims. She testified they were healthy and normal prior to the alleged sexual assault but their medical records revealed an extensive history including more than 50 emergency room visits. "Possibly the most disturbing trial error"

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

In re Hubert, 158 P.3d 1282 (Wash. App. 2007). Counsel ineffective in attempted rape case for failing to discover and present the defense that the defendant reasonably believed that the victim was not mentally incapacitated. The defendant had met up with three women out drinking and dancing and had been invited back to the home of two of the women for drinks. He was also invited to spend the night on the couch. He later entered the room of one of the women, who testified that she awoke undressed with the defendant having sex with her. She ended the encounter and left the home for over an hour while he remained in her room. He left after her roommate insisted he leave. The defendant testified that he believed the alleged victim’s was awake and consenting the entire time. Counsel’s conduct was deficient because it is a defense to second degree rape that the defendant reasonably believed the person was not mentally incapacitated. Counsel was also aware that both the defendant and the alleged victim confirmed that he stopped physical advances to the woman when she did insist and that he remained in her room for a substantial time even after she left. Counsel did not pursue this defense simply because he was not aware of the statutory defense. Counsel needed only to review the relevant

statutes and pattern jury instructions to learn of the defense. “An attorney’s failure to investigate the relevant statutes under which his client is charged cannot be characterized as a legitimate tactic.” *Id.* at 1285. Prejudice found because the defendant was convicted of attempted rape, which required a finding of specific intent to have sexual intercourse with a victim incapable of consent. Here, the jury was unaware that a reasonable belief that the alleged victim had capacity to consent was a defense to this charge.

State v. Hales, 152 P.3d 321 (Utah 2007). Counsel ineffective in murder of a child victim case for failing to obtain a qualified expert to give an independent interpretation of CT scans of the child victim. The defendant was charged with the murder 14 years after the child was allegedly injured by being violently shaken as a five-month-old infant. The child lived until the age of 12 but was mostly in a persistent vegetative state. The defendant was not charged until two years later. The child had been in the defendant’s care for only 20 to 30 minutes on the alleged date of the crime when he called 911. The state’s case that the injury occurred while the child was in the defendant’s care and that the cause of death was a violent shaking that caused immediate unconsciousness was almost entirely based on a state expert’s interpretation of CT scans of the child’s brain taken after admission to the hospital. Counsel did not seek to have a defense expert to review the CT scans until the morning of trial and then asked a defense-retained pathologist to conduct this review. The pathologist testified that shaking could injure a child’s neck but not the brain and that the most likely cause of death was an alleged near miss car accident in which the child had hit its head several days before followed by a “lengthy ‘lucid interval.’” The pathologist was not permitted to testify concerning the CT scan though because he admitted in voir dire that he was not qualified to interpret the scan and did not do so in his practice. Counsel’s conduct was deficient in failing to adequately investigate. It was clear from the preliminary hearing that the interpretation of the CT scans was critical to the State’s case because there was no witness to the child’s injuries. Counsel’s conduct was not explained by strategy because counsel made the choice to rely only on the pathologist without having conducted the investigation with an expert review of the CT scans. It is also clear from the opinion (although not clearly relied on by the court on this point) that counsel did ask the pathologist to review the scans and sought to introduce his testimony on this point, but counsel had failed to ascertain beforehand his qualification to do so and had not sought review by a defense expert until the morning of trial. The court also noted that, while counsel may sometimes have a valid strategy to rely on cross-examination or other strategy such that a defense expert need not be retained in every instance, “the centrality of this medical evidence to the jury’s determination of . . . guilt or innocence made an expert necessary in this case.” *Id.* at 341. Prejudice was also established because review of the CT scans by a qualified pediatric neuroradiologist “would likely alter the defense’s theory at trial as well as the entire evidentiary picture presented to the jury.” *Id.* at 342. Here, a qualified expert could have countered the state expert’s testimony with testimony that the initial CT scans showed changes in cell structures that would not be present until 6 to 12 hours after

injury. This testimony alone would have been significant because the child was not in the defendant's care during that time frame. A defense expert also could have countered the state's expert conclusion that the injuries were a result of shaking because nothing in the scans suggested shaking as a cause as opposed to an impact injury or other possible causes. Likewise, a defense expert could have testified that the scans did not support any conclusion of immediate unconsciousness and were not inconsistent with a period of lucidity following the injury. In short, a defense expert could have countered most of the state's expert testimony because the "[t]he scan shows the point to which the injury had progressed—not how it got there."

State ex rel. Shelton v. Painter, 655 S.E.2d 794 (W. Va. 2007). Counsel ineffective in sentencing of murder case for several reasons. The jury returned a verdict of murder without a recommendation of mercy, which resulted in a life sentence without parole eligibility. While the defendant testified and conceded his guilt, counsel's conduct violated the duty of loyalty by, among other things, expressing that he "did not know" whether the defendant "even deserved mercy"; distanced himself from the defendant "with suggestions that it was his duty, or his job to ask for mercy; and reminding the jury that it had no obligation to recommend mercy. The court also noted that counsel overly emphasized the defendant's guilt in argument, failed to request bifurcation for sentencing, and failed to make even a minimal effort to obtain a life with mercy verdict. Prejudice found and remanded for a jury trial limited only to the question of whether mercy should or should not be granted.

State ex rel. Humphries v. McBride, 647 S.E.2d 798 (W. Va. 2007). Counsel ineffective in murder case for numerous reasons. The defendant was convicted of accessory before the fact of murder and conspiracy to commit murder in the bombing death of his wife's ex-husband, which was originally determined to be an accidental death by a bomb the victim built, 22 years before trial. Counsel's conduct was so bad that the state even conceded ineffective assistance of counsel and other reversible errors. (1) Counsel had an actual conflict and should have withdrawn from the case or should have been removed by the court when the state moved to disqualify counsel prior to trial. At that time, counsel admitted that his father and law partner had represented the victim in divorce proceedings from the defendant's wife, which went "to the very heart of the alleged motive" for murder. He stated that he was not involved in that representation and that the defendant waived any potential conflict. The post-conviction evidence, however, established that counsel was likely the last attorney to see the victim before his death, he did work on the divorce case, and he could have been a necessary witness for the defense to refute some of the state's assertions. Because counsel had misrepresented his involvement in the divorce case prior to trial, the court also questioned whether the defendant's waiver was "truly an informed decision" following adequate disclosure. (2) Counsel failed to object to testimony that the defendant had consulted with counsel and declined to speak with investigators during the initial investigation of the death, which violated the defendant's

Fifth Amendment rights. (3) Counsel failed to offer an FBI report into evidence or to cross-examine an FBI agent with his original report that revealed that all of the components of the bomb were also found in the alleged victim's home, which supported the defense theory that he constructed the bomb himself and accidentally detonated it. (4) Counsel failed to retain a bomb expert or an independent investigator even though the case was very complex. (5) Counsel failed to object to testimony that the defendant's co-defendants had already been convicted even though counsel had sought a change of venue because of the publicity generated by those trials. (6) Counsel failed to object to numerous instances of hearsay testimony even though the state and the trial court were even posing their own objections to counsel's questions eliciting hearsay because "even they feared that [the defendant] was being 'done in' by his defense counsel." Counsel's deficient conduct was not excused by his "strategy" to "put it all out on the table" because "no reasonable attorney would have pursued a like 'strategy.'" Prejudice found due to the "cumulative effect of these errors."

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

2006: *Douglas v. State*, 937 So. 2d 825 (Fla. App. 2006). Without any detail or explanation of the case, the court held that counsel was ineffective for failing to investigate appellant's treating physician due to counsel's speculation that the physician's opinions, which counsel was unaware of, would be successfully challenged on cross-examination.

Goldstein v. State, 640 S.E.2d 599 (Ga. App. 2006). Counsel ineffective in child molestation and aggravated sexual battery case for several reasons: (1) failing to cross-examine the alleged victim's mother about her many prior allegations of child molestation extending from childhood into adulthood; and (2) failing to present expert medical testimony to refute the state's experts' opinions. The mother's own family members had provided information concerning her numerous false allegations to defense counsel, but this evidence was not pursued. Likewise, experts were available to contradict the state's expert's medical testimony concerning the elasticity of a prepubescent hymen, which counsel had notice of but did not attempt to rebut. Prejudice found because the

state's evidence was far from overwhelming. There was no physical trauma to the alleged victim, no eyewitnesses, and the first witness to report the "crime" had a history of making false accusations of molestation.

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

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

Testerman v. State, 907 A.2d 294 (Md. App. 2006). Counsel ineffective in eluding a uniformed officer and DWI case for failing to challenge the sufficiency of the evidence of eluding. The charge was based on the defendant's changing seats with the passenger as the arresting officer was getting out of his patrol car. Counsel's conduct was deficient because these actions may have been an attempt to evade arrest, but was not an evasion of the police officer, which was required under the statute for this offense. Prejudice established.

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

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

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

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

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

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

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

Smith v. State, 144 P.3d 159 (Okla. Crim. App. 2006). Counsel ineffective in murder case for failing to prepare and present a Battered Woman's Syndrome defense. The defendant called a neighbor and asked him to come to her house where she admitted to shooting her husband and killing him because she said she couldn't take another beating from him. The weapon was located at the scene with a live round jammed in the chamber. She told police that her husband was physically abusive throughout their marriage and his abuse had gotten worse through the years. In the month before the shooting, he had kicked the dog and shot the defendant's cat. His abuse of her escalated. During an episode of physical and mental abuse, she picked up a gun that was lying on a table. With her husband still yelling at her, the defendant, who feared another beating, shot him and then attempted to kill herself but the gun jammed. While counsel presented nine witnesses at trial concerning the victim's abusiveness to the defendant, counsel did not present an

expert on Battered Woman's Syndrome and instead relied on a generalized self-defense argument. Counsel's conduct was deficient in failing to file an application with the court for appointment of an expert when the defendant said that she could not afford to pay for the expert. Prejudice established even though the defendant had been convicted of the lesser offense of second degree murder because, if counsel had obtained an expert, the defendant may have been acquitted.

**Nance v. Ozmint*, 626 S.E.2d 878 (S.C.), *cert. denied*, 549 U.S. 943 (2006). On remand from the U.S. Supreme Court for consideration under *Florida v. Nixon*, 543 U.S. 175 (2004), the court reinstated its opinion finding that trial counsel's failure to investigate, plan, and present a defense in this capital trial constituted "a classic example of a complete breakdown in the adversarial process" and prejudice was presumed for eight reasons. (1) Lead counsel was suffering from numerous health problems, including alcoholism, and was taking numerous medications that impaired his memory and caused other problems. Co-counsel had been practicing law for only 18 months. (2) Counsel sought to show that the defendant was mentally ill and wanted the jury to view him in his unmedicated state and successfully got the judge to order such, but then failed to inform the jail personnel of the court's order so the jury saw "a drug-influenced demeanor" during trial. (3) Counsel pronounced in opening statements that they were appointed and neither of them "wanted to be there." (4) Counsel presented a defense of guilty but mentally ill but failed to qualify their only expert and presented supporting testimony of the defendant's sister only after the expert testified denying him the opportunity to inform the jury of how the sister's testimony supported a finding of mental illness. (5) Counsel presented no evidence of adaptability to confinement in sentencing when they had presented the only bad incident of urine-throwing in confinement during the trial. Evidence was available to establish that the defendant had been selected as an institution's inmate of the year and nominated for the entire state's inmate of the year and testimony was available from a jail administrator and prison minister that the defendant was a "model inmate." (6) Counsel presented "no mitigating social history evidence," even though the evidence would have established physical abuse throughout the defendant's childhood, an alcoholic, abusive father; being "treated with alcohol as a child in lieu of over-the-counter medication"; and growing up "in a family of extreme poverty and physical deprivation." (7) "[D]efense counsel's seven-minute mitigation presentation failed to provide the jury with any insight concerning Petitioner's mental illness," even though he has a family history of schizophrenia, history of hearing voices, and suffered from neurological damage. (8) In closing arguments in sentencing, counsel "failed to plead for Petitioner's life and referred to him as a 'sick' man." [C]ounsel abandoned his role as defense counsel and in fact helped bolster the case against his client. . . . We again recognize that this type of "consistently inept form of lawyer conduct [is not] acceptable in this state, nor will we employ a prejudice analysis, for '[defense] counsel's ineffectiveness [is] so pervasive as to render a particularized prejudice inquiry unnecessary.'" *Id.* (quoting *Nance v. Frederick*, 596 S.E.2d 62, 67 (S.C. 2004)).

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

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

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

child victims and conducive to false allegations. The expert also could have assisted counsel in preparing cross-examination of the state's witnesses.

Walker v. State, 195 S.W.3d 250 (Tex. App. 2006). Counsel ineffective in resisting arrest case for several reasons. First, counsel's conduct was deficient in failing to ask any questions in voir dire even after six members of the jury venire identified themselves as working or having close relatives who worked in law enforcement and made statements indicating potential prejudice or bias. Counsel used peremptories to remove two of these jurors but otherwise failed to conduct voir dire or challenge these biased jurors for cause. Counsel was also ineffective in failing to conduct an appropriate investigation and to object to inadmissible evidence of extraneous offenses and bad acts that were irrelevant to the trial for resisting arrest. This evidence included evidence of another person at the scene being arrested for possession of drugs, the defendant having previously disturbed the peace by firing an automatic weapon, and a 20-year-old misdemeanor conviction for assault on an officer. Counsel failed to object to this evidence because he was not familiar with the appropriate admissibility standards and also failed to request a limiting instruction. Here, where the defendant's credibility was critical to the defense, counsel should have investigated, filed appropriate discovery, prepared the defendant for his testimony, filed motions in limine to prevent the inadmissible evidence from coming before the jury, and objected and requested a limiting instruction when the evidence did come before the jury. Counsel was also ineffective in sentencing for failing to adequately investigate and opening the door to cross-examination of the defendant about numerous arrests for concealed weapons, criminal mischief, assault, and reckless conduct. Counsel also failed to object to the court's failure to instruct the jury in sentencing that evidence of unadjudicated offenses could not be considered unless the offenses were proven beyond a reasonable doubt. The defendant was prejudiced even though unadjudicated offenses were admissible under state law because the state did not offer any of this evidence or raise the issue until counsel asked the defendant broadly in redirect if he had "any problems with law violations." Prejudice found because evidence of extraneous offenses is inherently prejudicial. The prejudice in sentencing was particularly clear because the state recommended probation only, but the jury sentenced the defendant to 180 days in jail and a \$2000 fine in addition to probation.

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

Lee v. State, 899 So. 2d 348 (Fla. App.), *review denied*, 914 So.2d 955 (Fla. 2005). Counsel ineffective in capital sexual battery of child under 12 case for failing to adequately investigate and present a defense. This was a “classic familial sexual abuse situation, with no eyewitnesses, no direct physical evidence of abuse, nor even similar fact evidence.” The defendant’s 10-year-old stepdaughter alleged abuse on three occasions. The allegations were not made until the defendant left her mother for another woman, her mother was incarcerated, and her step-sister (who had found a letter to the alleged victim’s mother stating that the defendant “was doing it with her”) urged her to tell her grandmother, with whom she was living although she did not know her well. The only alleged physical evidence was from the testimony of a pediatrician, who testified that the victim’s hymen had been torn and formed a scar as it healed. The pediatrician concluded that the hymenal ring was abnormal and indicated repeated penetration. She acknowledged that it was possible that the abnormality was caused by excessive masturbation “but virtually excluded that possibility.” The only defense presented (other than the defendant maintaining his innocence) was that the alleged victim’s mother had previously caught her masturbating and had been told then that a man (other than the defendant) had showed her how. Counsel’s conduct was deficient. Counsel had never tried a capital sexual battery case and did not consider retaining an expert even though counsel could not read the state expert’s notes and did not know the meaning of some of the terms used in the notes. Counsel also did not retain an expert because counsel dismissed the pediatrician’s opinion because she “was not an expert.” Counsel even advised the defendant that “he had a good trial case because there was no physical evidence of abuse.” The defendant “had the right to an attorney who understood the ramifications of the pediatrician’s testimony.” Moreover, counsel’s conduct was not excused by the defendant’s request that the case not be continued for counsel to investigate because counsel had not done any investigation until two weeks before trial even though the defendant had informed counsel from the beginning that the alleged victim had previously alleged sexual abuse by someone else. Moreover, counsel’s erroneous belief that there was no physical evidence of abuse, even though the pediatrician corroborated the alleged victim’s testimony, “significantly contributed” to the defendant’s decision. By finding that counsel’s conduct was excused by the defendant’s conduct, “[i]ronically, the circuit court thus held the defendant to a higher standard than his attorney for understanding the significance of the evidence against him.”

The trial court made no factual findings or legal conclusions about the fact that the attorney had information about previous allegations available to him almost six months before trial and did nothing about it until the eve of trial, despite knowing that his client had been unable to make bond, had been held in jail since his arrest, and was anxious for his case to be concluded. Thus, when [the defendant] insisted on going to trial, he did so without the benefit of all of the relevant information that a reasonably prompt

and thorough investigation by an effective attorney would have revealed. The circuit court erred when it found that [the defendant's] decision to go forward with the trial negated the deficiencies in his counsel's preparation.

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

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

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

People v. Moore, 824 N.E.2d 1162 (Ill. App. 2005). Counsel ineffective in burglary of car case for two reasons. First, counsel failed to object to the prosecutor's improper closing argument urging the jury to convict the defendant in order to prevent their insurance rates from increasing. This was an inflammatory argument that "served no purpose other than to appeal to the jurors' fears, prejudice defendant, and inflame the passions of the jury." *Id.* at 1165. The argument was also based on "irrelevant speculation" and not on the evidence because there was no mention of auto insurance during the trial. *Id.* at 1166. Second, counsel elicited incriminating hearsay during cross-examination of two of the state's key witnesses. The witnesses testified that they had seen the defendant burglarize the car and take a camera bag. When the defendant was arrested, however, he did not have the camera bag and it was nowhere near him so the defense was arguing mistaken identity and a reasonable doubt. During cross-examination of these witnesses, however,

counsel elicited hearsay information from “members of the crowd” that the defendant dropped the bag during a struggle and a man with the defendant grabbed the bag and took it with him. “The members of the crowd who allegedly provided this information were not named, never testified during trial, and were never cross-examined.” *Id.* at 1170. Counsel’s conduct was deficient because this evidence was inadmissible, the trial court informed counsel in the midst of the cross that it was inadmissible (but the court did not exclude it since the state did not object), and any alleged strategy was unreasonable because the hearsay elicited “served to further incriminate” the defendant. *Id.* at 1171. Prejudice found on each of these issues.

Parish v. State, 838 N.E.2d 495 (Ind. App. 2005). Counsel ineffective in attempted murder and robbery case for failing to adequately investigate and present a defense and failing to object to an improper Allen charge. The state’s witnesses testified that they were in the victim’s apartment watching a movie. After a knock on the door, intruders entered demanding drugs, money, and guns. After a struggle with the co-defendant the victim was shot in the stomach. The defendant allegedly threatened the witnesses with a gun if they moved. The co-defendant was tried separately. Counsel presented an alibi defense supported by seven witnesses, all family members, during trial. Counsel’s conduct was deficient in failing to adequately investigate because he just “assumed” that the crime did occur in the fashion the state alleged. *Id.* at 501. In short, counsel “did not make a reasonable decision not to investigate the shooting, which would have uncovered evidence that perhaps the crime did not occur as the State’s eyewitnesses testified at trial.” *Id.* at 502. If counsel had investigated, he would have discovered two independent witnesses who would have testified that the victim was selling drugs in the parking lot of the building when he was shot. This was also supported by a witness that did not testify for the state during trial but his statement to officers and identification of the defendant was admitted into evidence. This witness testified in post-conviction that he had been coerced by police into identifying the defendant. The state’s crime technician would have testified that no blood was found in the apartment, although there was blood in the car used to transport the victim to a nearby fire station. Likewise, DNA evidence from a hat allegedly belonging to the co-defendant revealed that it was not the co-defendant’s hat. Prejudice found because, at the least, this evidence would have seriously undermined the credibility of the state’s witnesses. “That is, if the eyewitnesses were not telling the truth about where the crime occurred, then that could cast doubt on their account of how the crime occurred and who was involved,” strengthening the alibi defense. In addition, five additional alibi witnesses, one of whom was not a family member, were available but not presented by counsel. This was complicated by the trial court’s Allen charge, which had been modified from the state’s standard charge, in an impermissible fashion and was included in pre-deliberation charges. During deliberations, the jury submitted several questions concerning the state’s primary witnesses, which went unanswered. After 9 hours of deliberations, the jury returned with a verdict of guilt. If counsel had “independently investigated the shooting, presented that evidence, and then objected to

the Allen charge, the result of the proceeding would be different.” *Id.* at 503.

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

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

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

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

In sum:

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

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

confidence in the outcome of the case.

Johnson v. State, 172 S.W.3d 6 (Tex. App. 2005). Counsel ineffective in assault on public servant case where the defendant and her husband had fought, he called 911 asking for an ambulance but then called back saying the defendant did not want an ambulance, and police went to the home anyway. When no one answered the door they kicked the door in and refused to leave when asked to do so insisting on questioning the two individually. The defendant became agitated and fought with officers. Afterwards another officer arrived and was audiotaping events as he talked with the defendant, her minister talked to her, and she talked to an officer that was allegedly assaulted. Counsel's conduct was deficient because, although counsel filed a discovery motion seeking all statements of the defendant, counsel never obtained a ruling on the motion and, thus, was not provided with this tape. When he learned of the tape during the trial, he ignored the defendant's request to personally review the tape, did not seek a continuance or recess, and reviewed the tape just over a lunch recess without the benefit of a transcript. He did not object to admission of a redacted tape that excluded the only arguably exculpatory portion of the tape. Counsel's conduct was deficient because the defense was clearly entitled to receive this tape in discovery but "a discovery request alone, without an order or follow-up in some manner, is a hollow gesture." Moreover, counsel's attempt to redact the tape, without the benefit of a transcript, just over a lunch recess was "difficult and virtually meaningless." Counsel also did not correct and, in fact, agreed with the state's evidence that the redacted tape contained the entire dialogue between the defendant and officers when it did not and the portion excluded was the only arguably exculpatory portion. Prejudice was found because if the defendant had been provided with the tape prior to trial her trial strategy might have changed. She might have considered a plea or been better prepared to testify. Counsel might have considered filing a motion to suppress when counsel otherwise was not even aware that the defendant had not been read her rights prior to the taping. Here, the recording was the "lynchpin of a case that turned on" the defendant's credibility and she was prejudiced by counsel's actions.

Hall v. State, 161 S.W.3d 142 (Tex. App. 2005). Counsel was ineffective in drug trafficking case for numerous reasons. The defendant was a passenger in a car stopped for speeding. The officer asked for consent to search the vehicle and found cocaine in a cooler in the back of the car. The driver pled guilty and testified. State law required an accomplice testimony instruction under these circumstances and precluded conviction on the testimony of an accomplice unless there was other evidence tending to connect the defendant to the crime. Here, because the jury was not properly instructed, the jury was authorized to convict the defendant with no corroborating evidence and the nonaccomplice testimony provided only a weak inference of guilt. Counsel's conduct was deficient because the failure to request a proper instruction "relieved the State from proving the portion of its case that would have been the most difficult to prove." Counsel's conduct was also deficient in failing to object the state's cross-examination of

the defendant based on inadmissible, unadjudicated offenses that the state referred to as “gang-banging” offenses. Counsel’s conduct was also deficient in failing to object to the state’s comment on the defendant’s post-arrest silence in the opening statement and closing argument. Counsel’s conduct was not excused by strategy because the court could not “envision a reason” for counsel’s failures in each respect. The court found prejudice with respect to each deficiency and found that “the combined effects” required reversal.

Keats v. State, 115 P.3d 1110 (Wyo. 2005). Counsel ineffective in first degree arson case for failing to investigate the possibility of a plea of not guilty by reason of mental illness (NGMI). After the defendant set a fire in his mobile home, his roommate put it out and called police because he was threatening to burn the home down with him in it. After police arrived he vacillated between suicidal, threatening, anger, laughter, and depression. He set several fires that officers and firemen were able to put out, but ultimately set a fire that spread and filled the home with smoke. He was finally subdued but the mobile home was damaged beyond repair. After his arrest, the defendant was involuntarily committed to a mental health unit and found to have a major depressive disorder and reality distortion. He also had symptoms consistent with bipolar disorder. He was later transferred to another mental health facility where he was diagnosed with substance abuse and a bipolar disorder. Counsel was aware of these facts and had also been informed by the defendant’s mother that he had a history of mental health problems and an inability to stabilize his moods. While counsel discussed the possibility of an NGMI plea with the defendant and his mother, his strategy was to argue that the defendant’s specific intent was suicide and not to burn down the house. He believed that NGMI was incompatible with this argument. Prior to trial, the court granted the state’s motion to exclude mental state evidence because counsel had not entered an NGMI plea. Counsel’s conduct was deficient because his trial strategy was to make some sort of diminished capacity argument that the defendant was depressed and suicidal when state law did not recognize a diminished capacity defense. Counsel’s belief that the NGMI argument was inconsistent with his theory of the case was also “puzzling” and “not a reasonable decision that made further investigation unnecessary.” “[F]urther investigation was essential” under these facts. Nonetheless, counsel did not obtain the defendant’s medical records, did not consult with a mental health expert, or obtain an opinion about the defendant’s mental state at the time of the crimes. Prejudice was found because the only question during trial was the defendant’s intent. Counsel’s deficient conduct deprived him “of the only true defense available to him,” which had a reasonable likelihood of success.

2004: *People v. Callahan*, 21 Cal. Rptr. 3d 226 (Cal. App. 2004). Counsel was ineffective in first degree murder case for three reasons. Following the arrest of four people, who believed that the victim had “ratted” on them, the defendant sought the assistance of two men who were members of “The Skin Head Dogs (SHD), a male white supremacist group,” to obtain money to bail one of the arrested persons out. The victim subsequently asked the defendant to assist her in obtaining money to bail out a different arrested

person. The defendant met with the victim at the defendant's home. The victim ingested two pills from a prescription drug on the defendant's dresser. In a pretrial statement, the defendant said that the victim took the pills to alleviate withdrawal symptoms of other drugs, even though the defendant warned her that the pills were strong and she would probably pass out. Two witnesses at trial testified, however, that the defendant stated that she deliberately gave the victim the pills to cause her to pass out within a few hours. According to the defendant's pretrial statement, which was admitted in evidence, after the victim took the pills, she and the defendant picked up some stolen electronic equipment that they intended to sell for bail money. They then met up with the SHD men and went to a hotel. By the time they reached the hotel, the victim had passed out. While at the hotel room, the stolen equipment was sold and the SHD exited the room. When the victim woke up, the defendant allowed her to call her mother. While she was on the phone, the SHD men returned to the room. One of them became upset because he feared the victim would report them for stealing the electronic equipment. Although the defendant argued that the victim should be allowed to leave, the SHD men killed the victim by slashing her throat while the defendant was in another room. The defendant assisted in disposing of the body. The state's theory was based on felony murder. While a duress defense would not apply to murder, it would apply to the underlying felonies of robbery and kidnaping, which were necessary to support first degree murder and the punishment of life without parole. Because counsel was aware of this, competent counsel would have sought to refute the testimony of the witnesses who asserted that the defendant deliberately gave the victim pills to cause her to pass out. This would have allowed counsel to portray any robbery and kidnaping as beginning inside the motel room, so that a duress jury instruction would be given, and counsel would have had a factual and legal basis to argue against application of the felony murder rule. Counsel's conduct was deficient in failing to adequately cross examine the witnesses concerning the defendant's alleged statements concerning the suspicious circumstances under which they came forward, which caused even the prosecutor's investigator to doubt their truthfulness. Counsel's conduct was also deficient in failing to call the defendant to testify since she would have testified that she never met these witnesses until after the victim's death. She would have also testified that she was afraid of being killed if she did not comply with the SHD man's orders. Counsel's conduct was also deficient in failing to present expert testimony in support of a duress defense in that the defendant's fear was reasonable under the circumstances because of the history of the SHD members in being controlling and threatening the defendant previously. The duress defense was also supported by evidence that the defendant suffered from drug addiction and dissociation at the time of the murder, which would have impaired her thinking. Prejudice was found because counsel's actions "effectively" left the defendant with "no defense to the charged crimes," which allowed her conviction on felony murder despite her "concedely peripheral involvement" in the victim's death.

Woods v. Commissioner of Correction, 857 A.2d 986 (Conn. App. 2004). Counsel

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

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

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

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

errors.

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

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

State v. Davis, 85 P.3d 1164 (Kan. 2004). Counsel ineffective in kidnaping and attempted rape case for failing to seek a competence evaluation and failing to understand and adequately present a mental state defense. The defendant suffers from schizophrenia and had been committed to psychiatric hospitals 31 times since age 13. His last release was two months prior to the offenses. Following his arrest, he was found to be incompetent and treated in a hospital for six months before competence was restored. He was found competent in May and new counsel was appointed in August. Counsel did not seek a

competence evaluation prior to the November bench trial. Counsel was ineffective in failing to seek a competence evaluation because the defendant's letters to him were at times incoherent and clearly revealed confusion about the defense. If counsel had investigated, he would also have discovered that the defendant was not taking his medications after his return to the county jail. He had also reported an increase in hallucinations in the months prior to trial. Counsel was also ineffective in presenting a defense. Kansas has abolished the insanity or diminished capacity defense, but allows a defense that the defendant "lacked the mental state required as an element of the offense charged." During trial, counsel argued insanity and presented an expert that was also not familiar with the state law requirements. Moreover, the expert testified, consistent with his pretrial report, that the defendant's ability to control his behavior was compromised, but he was capable of forming the intent required for the crimes. Thus, because counsel was unfamiliar with the standards and did not adequately prepare his own expert, counsel presented the expert's testimony that "destroy[ed] the very defense he was attempting to establish."

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

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

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

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

Law v. State, 797 N.E.2d 1157 (Ind. App. 2003). Counsel was ineffective in child molesting and sexual misconduct with a minor case for failing to present evidence of the victim's age at the time of the offenses. The victim testified that the defendant began sexually abusing her when she was ten years old and the defendant was charged with multiple counts. One of the elements of a number of the offenses that the defendant was charged with was that the victim was under twelve years old when the crimes occurred. There was a significant difference in sentencing range for a child under twelve and a child over twelve. While the defendant presented a theory that he was not guilty, the court found that defense counsel's failure to present evidence that the victim was over twelve

years old at the time of the alleged offenses was deficient in light of the sentencing consequences. The court also found that counsel made no strategic decision to avoid the apparent contradiction in defense theories because counsel had intended to introduce evidence of the victim's age through the defendant's wife and had not obtained other evidence to establish the victim's age because he did not anticipate that the defendant's wife would refuse to give this testimony. While the court found no prejudice with respect to some of the counts, the court did find prejudice with respect to several counts of the conviction and reversed in part.

State v. Thiel, 665 N.W.2d 305 (Wis. 2003). Counsel was ineffective in sexual exploitation by a therapist case for numerous deficiencies. The alleged victim asserted that she had repeated sexual relations with her psychiatrist and had been to his house more than one hundred times. When she first went to police, she also took a vial of semen that she claimed was the defendant's, but DNA testing revealed that it was not his. She explained that she had hoped to force him to confess with this false evidence. An assistant prosecutor, who had also had a sexual relationship with the alleged victim, testified that she had informed him of the relationship long before she reported it to police. The defendant's ex-wife, who had also been a former patient, and another former patient provided "other acts" evidence in corroboration. The defendant testified and denied the allegations and asserted the defense theory that the alleged victim made the complaint against him because he refused to assist her in filing for government disability benefits. He claimed that she had been to his house only three times when she showed up unannounced, but he had not documented these visits in her chart. The state called the victim's new psychiatrist in rebuttal to say that any contact with patients should be documented, but this was his personal opinion and not a standard of care requirement. Counsel's conduct was deficient in failing to read police reports and medical notes that had been provided in discovery. Counsel's conduct was also deficient in failing to conduct an independent investigation when they already knew of the lie concerning the semen. Finally, counsel's conduct was deficient in failing to file a motion that would have allowed the defense to present relevant evidence of the alleged victim's prior personal and medical history. If counsel had read the discovery documents, counsel would have discovered and been able to use numerous items that would further impeach the alleged victim, including giving the wrong address for the defendant, and even items consistent with the defense theory that her motive was anger at the defendant for not helping the victim to seek disability benefits. They would also have discovered that the statement to the assistant prosecutor used as a prior consistent statement was made only shortly before her report to police, which would have rendered this statement likely inadmissible. If counsel had investigated they would have discovered that the alleged victim had no driver's license during the time she claimed to have driven to the defendant's house 100 times, she had difficulty finding the defendant's house when police asked her to show them, none of the defendant's neighbors recalled seeing her, and she had numerous phone calls with the assistant prosecutor at his home and his work, which was inconsistent with

*Capital Case

the way that relationship had been portrayed in court. If counsel had filed the motion, the state may not have called the rebuttal witness due to concern that the defense could use his notes to impeach the credibility of the alleged victim further. No strategy could explain the failure to read discovery or to independently investigate when counsel knew the alleged victim had already lied about the semen. Likewise, counsel's purported strategy for not filing the motion prior to trial was based on "an erroneous view of the law" and, therefore, could not be a reasonable strategy. While finding that the deficiencies found did not "individually prejudice[]" the defendant to such a degree as to warrant a new trial, the court concluded "that the cumulative effective" of the deficiencies warranted a new trial, *id.* at ____, in this case, which "was a classic instance of the 'he-said-she-said' dilemma," *id.* at ____. While counsel had performed well in most areas of representation, "the proper inquiry for assessing prejudice is not the totality of counsel's performance, but rather the effect of counsel's acts or omissions on the reliability of the trial's outcome." *Id.* at ____.

**SUMMARIES OF SUCCESSFUL
INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS
POST-*WIGGINS V. SMITH* INVOLVING
ONE DEFICIENCY AT TRIAL**

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1. JURY SELECTION

a. U.S. Court of Appeals Cases

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

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

Quintero v. Bell, 368 F.3d 892 (6th Cir. 2004), *cert. denied*, 544 U.S. 936 (2005). Counsel was ineffective for failing to object to the presence of seven jurors who had served on the juries that convicted his co-conspirators. Prejudice was presumed under *Cronic*. *Bell v. Cone* was distinguished "[b]ecause the alleged deficient performance in Cone affected only specified parts of Cone's trial." Here, "allowing seven jurors who had convicted petitioner's co-conspirators to sit in judgment of his case surely amounted to an abandonment of 'meaningful adversarial testing' throughout the proceeding." The Court

*Capital Case

reinstated its prior opinion, *Quintero v. Bell*, 256 F.3d 409 (6th Cir. 2001), which had been vacated and remanded for reconsideration in light of *Cone*.

b. State Cases

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

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

Prejudice presumed.

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

2007: *James v. State*, 222 S.W.2d 302 (Mo. App. 2007). Counsel ineffective in second-degree murder and armed criminal action case for failing to challenge for cause a venireperson who indicated that she would draw a negative inference from a defendant's failure to testify in his own defense. If counsel had objected, the trial court would have been required to strike the juror. Counsel's conduct was not explained by any strategy. Prejudice presumed because the defendant was “tried in violation of his constitutional right to an impartial jury.”

**State v. Loftin*, 922 A.2d 1210 (N.J. 2007). Trial and appellate counsel were ineffective in failing to adequately address the presence of a possibly racially biased juror, who had predetermined guilt before hearing all the evidence, in the jury panel during the trial

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

2006: **Anderson v. State*, 196 S.W.3d 28 (Mo. 2006), *cert. denied*, 549 U.S. 1223 (2007). Counsel ineffective in capital case for failing to move to strike, for cause, prospective juror who, during voir dire, indicated he would vote for death unless the defense could convince him otherwise. Counsel’s failure was not a decision based on trial strategy and instead occurred because of a note-taking error. Moreover,

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

Prejudice established because this was a structural error.

- 2005:** *State v. Lamere*, 112 P.3d 1005 (Mont. 2005). Counsel in aggravated assault case was ineffective in failing to question a prospective juror on whether she could remain impartial even though her daughter was a paralegal assisting the prosecutor (even in the courtroom during the trial) and someone else in her family was retired from the police force. The juror disclosed this information on her questionnaire but, due to oversight, counsel did not question her about it. When counsel learned of the problem during trial and moved to excuse the juror, the motion was denied. Counsel's conduct was deficient because the juror's relationship to her daughter obviously raised legitimate questions about her impartiality. Because errors in jury selection are "structural errors," prejudice was presumed.
- 2004:** *State v. Garza*, 143 S.W.3d 144 (Tex. App. 2004). Counsel ineffective in aggravated sexual assault case for failing to challenge a juror for cause or to use a peremptory strike even though the juror (who became foreman) admitted that he would be biased because a family member had been the victim of sexual assault and admitted that he would believe a police officer rather than the defendant simply because it was a police officer. Counsel admitted that he had no strategy and failed to challenge the juror only because he was distracted and simply made a mistake after learning shortly before that his wife had been diagnosed with cancer. Even though there might have been a hypothetical plausible strategy for not challenging the juror, the record here clearly established no strategy. Prejudice found because "one improper juror destroys the integrity of the verdict." Finally, the court rejected the state's argument that the court should consider the fact that the defendant was an experienced criminal defense counsel as a factor in the ineffective assistance claim.
- 2003:** *Fortson v. State*, 587 S.E.2d 39 (Ga. 2003). Counsel was ineffective in a murder case for using a peremptory strike on a juror that had already been excused for cause by the trial court but inexplicably remained on the strike list. Defense used his entire allotment of peremptory strikes. Because Georgia law requires automatic reversal when a defendant is required to use a peremptory strike on a juror that should have been excused for cause, the court found prejudice under *Strickland*.

2. INDICTMENT

a. U.S. Court of Appeals Cases

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

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

b. State Cases

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

3. MOTIONS AND NOTICE

a. U.S. Court of Appeals Cases

2011: *Tice v. Johnson*, ___ F.3d ___, 2011 WL 1491063 (4th Cir. Apr. 20, 2011). Counsel in murder and rape case ineffective for failing to move to suppress the petitioner's confession. The petitioner was one of the "Norfolk Four." The initial suspect in the murder, who lived nearby, was Joseph Dick. After making numerous contradictory statements, Dick testified that he and six other men, including the petitioner and Omar Ballard, participated in the rape and murder. The petitioner also confessed saying that he and five other men (Ballard not included) committed the crimes. The petitioner's statement, however, contained three incontrovertible errors or omissions of fact: (1) while he claimed forced entry, there was no evidence of such; (2) while he said he ejaculated, the only DNA evidence at the scene belonged to Ballard; and (3) while he did not name Ballard as an accomplice, Ballard undeniably was involved. His was the only DNA, he was convicted of severely beating a woman and raping a 14-year-old girl in the area within just weeks of this crime, and he plead guilty to the murder and rape and agreed to testify against his codefendants in order to avoid a capital murder charge. The investigatory process "was characterized by grim repetition." Initially, based on Dick's statements, Williams was the target. He confessed to the murder stating that he acted alone. After the DNA did not match him, the police went back to Dick who implicated himself. He then implicated Wilson. Then Tice. And then Tice implicated himself and three others, who ultimately had their charges dismissed. No one implicated Ballard and he was not even a suspect until after he wrote a letter while in confinement incriminating himself. He then confessed and admitted that he was the sole actor in the rape and murder. Tice was initially questioned for about an hour before he agreed to and did undergo a polygraph examination. After that three hour examination, Tice's interrogation continued and the officer took written notes, which included: "He told me he decide[d] not to say any more I told him he would be given time to think about it." A different officer resumed the questioning 13 minutes later without giving fresh *Miranda* warnings. Tice then confessed and signed a confession. The state court held that Tice had unambiguously invoked his constitutional right to stop questioning, that his confession would have been suppressed had a motion been made, and that counsel had performed deficiently in failing to so move. The state court found no prejudice, however, based on Dick's testimony. While the case was reviewed under AEDPA, the federal court first conducted its own independent review as "our perception of how reasonably another court applies the law in a particular case is best informed by conducting our own, independent application so that we may gauge how the two compare." Counsel's conduct was deficient as the detective's notes were in the court record for more than three years prior to the retrial and defense counsel had a copy of the notes in his file. "As with any record of an accused's statements made in police custody, and especially a statement volunteered without the benefit of a lawyer's advice, the notes should have been parsed to

ascertain not only the havoc the accused might have wreaked upon his own defense, but also any boon he may have unwittingly bestowed.” The duty to investigate does not apply “only to facts yet unknown, as opposed to those already in the litigation file.” A reasonable investigation of counsel’s own file would have revealed the officer’s notes, which should “give pause to even the greenest of criminal defense lawyers.” Counsel could not remember seeing these notes, let alone any strategy not to move to suppress the confession. “One might think that such an important and irrevocable decision concerning trial tactics would have left an indelible imprint upon the memory of the strategist.” Given this, the Court rejected the State’s “invitation to engage in after-the-fact rationalization of a litigation strategy that almost certainly was never contemplated” and concluded that counsel simply overlooked the notes. Due to counsel’s “otherwise laudably effective and competent” representation, the court was reluctant to find deficient conduct based on this “singular instance” of deficient conduct but did so because “[t]he error was of sufficient magnitude” to be “constitutionally deficient within the meaning of *Strickland*.” The court also found that the motion to suppress would have been granted if filed under *Michigan v. Mosley*, 423 U.S. 96 (1975). The invocation of the right to cease questioning was “clear and unequivocal” and a “reasonable police officer under the circumstances” would have ceased questioning. Prejudice also found. Dick’s credibility was shaky at best. His story evolved from denying all involvement, to merely being present, to being an actor, back to mere presence, and then adding additional actors including Tice. A reasonable jury would have grave doubts about his veracity. The state court in finding no prejudice “misapprehended the *Strickland* standard” by essentially finding that because Tice still could have been convicted there was no prejudice. The prosecution even recognized the relative weights of the evidence by focusing its arguments on Tice’s confession rather than on the persuasiveness of Dick’s testimony. Moreover, the jury’s questions during deliberations indicated that it was struggling to accord the proper weight to the confession. While it “is generally tricky business to try to divine a jury’s thought processes by considering only its questions and speculating as to the reasons therefor,” the Court found it “safe to say” that the jury did not consider Dick’s testimony to be conclusive evidence of guilt.

2010: *Hodgson v. Warren*, 622 F.3d 591 (6th Cir. 2010). Counsel ineffective in attempted murder trial for failing to seek an adjournment when an eyewitness with exculpatory testimony failed to appear after being subpoenaed. The state had 4-5 eyewitnesses implying that petitioner was the shooter but none could say affirmatively that they saw a gun in his hands or saw him fire the shots. The physical evidence, shell casings found away from where petitioner was, was inconsistent with the testimony that petitioner was the shooter. The eyewitness who failed to appear would have testified that she was only a few feet from petitioner at the time of the shooting, that she could see his hands, and she could state affirmatively that he did not have a gun. This witness also “had no obvious motive to lie.” Reasonably competent counsel would “do as much as humanly possible” to ensure the jury heard this witness’ testimony. Thus, counsel’s conduct was deficient in

failing to seek an adjournment to locate this witness. Under AEDPA, the state court's finding that counsel had a strategic reason for not calling her was unreasonable. Court had refused the prosecution's request to waive presentation of her testimony, which made clear that counsel "did not make a strategic choice to forgo her testimony." The state court's decision was also unreasonable in finding that her testimony would have been cumulative. Prejudice established as this witness if believed would have impeached the government's eyewitness and undercut the prosecution's case.

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

2009: ***Gentry v. Sevier***, 597 F.3d 838 (7th Cir. 2009). Under AEDPA, counsel ineffective in burglary and theft case for failing to move to suppress evidence seized from the defendant and his wheelbarrow. Police were investigating a "suspicious person" report when they encountered the defendant pushing a wheelbarrow with a rain coat partially covering it. Although officers did not have a reasonable suspicion to warrant a *Terry* stop, they conducted one and patted the defendant down. During the pat-down, a garage door opener was found. By locating the garage the opener worked with and by searching the wheelbarrow officers obtained additional evidence against the defendant. Counsel's conduct was deficient because the Fourth Amendment issues "should have been apparent" to counsel. Moreover, the defendant even filed his own *pro se* motion to suppress the evidence, but counsel still did not assert the issue. Prejudice established because a motion to suppress was meritorious. The state court unreasonably applied federal law by concluding the evidence was admissible despite the improper *Terry* stop based on the inevitable discovery doctrine. Because there were no intervening circumstances, all of the evidence obtained during the encounter was inadmissible as fruit of the poisonous tree.

2007: ***United States v. Weathers***, 493 F.3d 229 (D.C. Cir. 2007). Counsel ineffective for failing to challenge multiplicitous counts in case arising out of the defendant's attempts to arrange for the murder of several witnesses and a prosecutor on pending rape charges. Two of the counts related to the prosecutor. Under the U.S. Code, the defendant was convicted of threatening a federal official. Under D.C. law, he was convicted of

threatening to injure a person. Counsel's conduct was deficient and not explained by strategy. Prejudice found because there was a reasonable possibility that a challenge would have been granted. The conviction under D.C. law was vacated and the case remanded for resentencing.

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

Owens v. United States, 387 F.3d 607 (7th Cir. 2004). Counsel was ineffective in drug case for failing to adequately move to suppress evidence seized pursuant to a search of the defendant's house. The evidence was seized pursuant to a warrant based on a barebones affidavit, signed by a detective, that stated that an informant had bought some crack from the defendant at the house three months earlier. There was no indication of the quantity of crack or the reliability of the informant. Counsel moved to suppress the evidence because the affidavit did not establish probable cause to believe that a search of the same premises three months later would reveal evidence. The court held that the affidavit was insufficient and the search could not be saved by *United States v. Leon*, 468 U.S. 897 (1984), because the officers that conducted the search could not have reasonably believed that the warrant was supported by probable cause. Although counsel moved to suppress the evidence, counsel's conduct was deficient because counsel argued that the house did not belong to the defendant, which allowed denial of the motion on the grounds that the defendant had no standing to contest the search. The evidence that the house was the defendant's was overwhelming and the lawyer's argument otherwise, which "forfeit[ed] a compelling ground for excluding evidence essential to convict his client was therefore a blunder of the first magnitude." *Id.* at 608. Prejudice was found because if counsel had acknowledged that it was the defendant's house, the motion to suppress would have been granted and the defendant would have been acquitted. Alternatively, even if the court had denied the motion to suppress, counsel could have still argued that the house was not the defendant's under the rule of *Simmons v. United States*, 390 U.S. 377 (1968), which prohibits use of the defendant's suppression hearing testimony during the trial.

The "prejudice" essential to a violation of the Sixth Amendment right to the effective assistance of counsel is not being convicted though one is innocent, although that is the worst kind; it is being

convicted when one would have been acquitted, or at least would have had a good shot at acquittal, had one been competently represented.

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

Clinkscale v. Carter, 375 F.3d 430 (6th Cir. 2004), *cert. denied*, 543 U.S. 1177 (2005). Counsel ineffective in murder and robbery case (that was a capital case but jury gave life) for failing to timely file notice of an alibi defense, which resulted in the trial court's exclusion of the evidence. The defendant had informed counsel immediately of his alibi and the defense investigator reported that there were at least three alibi witnesses. Nonetheless, counsel gave only "verbal notice" a few days before trial of a "possible alibi." Only after the jury was empaneled did counsel file a written notice of alibi identifying the witnesses. Counsel's conduct was deficient because "there is nothing reasonable about failing to file an alibi notice within the time prescribed by the applicable rules when such failure risks wholesale exclusion of the evidence." Prejudice found because the state's evidence was weak and the trial amounted to a credibility contest between the alleged victim/witness and the defendant. The exclusion of the alibi witnesses, who would have corroborated the defendant's testimony, was prejudicial in these circumstances. Although only one of the alibi witnesses provided an affidavit, there is no requirement that a defendant claiming ineffectiveness of counsel in these circumstances "produce an affidavit from the potential alibi witnesses documenting the substance of their anticipated testimony." Here, the investigator's notes and affidavit established the facts that the remaining witnesses could have testified to.

2003: *Joshua v. Dewitt*, 341 F.3d 430 (6th Cir. 2003). Trial and appellate counsel were ineffective in drug case for failing to move to suppress evidence. The defendant was stopped by a highway patrolman for speeding. The highway patrolman did a license check on the defendant and learned that there was an entry in the station's "read and sign" book, which contained police intelligence information. The entry in the book reported that the defendant was a known drug courier who transported illegal narcotics between several cities. Based on this information, the defendant was detained for approximately forty-two minutes in order to allow time for a drug dog to come to the scene. When the dog arrived, it alerted, and a large quantity of cocaine was found. The defendant's girlfriend then told the police that the drugs belonged to the defendant. Prior to trial, counsel moved to suppress the evidence solely on the basis that the length of the traffic stop alone required suppression. The trial court denied the motion, and the defendant entered a no contest plea. The court found that counsel's conduct was deficient in failing to move for

suppression under *United States v. Hensley*, 469 U.S. 221 (1985), which held that reliance on a flyer or bulletin can justify a brief detention but can do so only if the officer who issued the flyer or bulletin had articulable facts supporting reasonable suspicion that the person wanted had committed an offense. The court found a reasonable trial attorney would have raised the *Hensley* issue at trial. Prejudice was found because the state failed to offer any evidence from the officer who provided the information from the “read and sign” book and because the state had never contended that there was a justifiable basis for the entry. The court likewise found appellate counsel ineffective for failing to raise the issue on appeal under the state plain error rule. Prejudice was found because *Hensley* bars the admissibility of the evidence seized at the scene of the defendant’s arrest, including both the drugs and his girlfriend’s statement. Without this evidence, there was a substantial probability that the defendant would not have been convicted. Analyzing the case under the AEDPA, the court found that the state court decision was contrary to clearly established Supreme Court precedent in *Hensley*.

b. U.S. District Court Cases

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

Robinson v. United States, 638 F. Supp. 2d 764 (E.D. Mich. 2009). Counsel ineffective in drug conspiracy case for failing to file motion for new trial, even though the defendant filed a post-trial motion for judgment of acquittal, and failing to challenge the sufficiency of the evidence of the drug quantity attributable to the defendant. The defendant, who was from Indiana, was charged with his brother and others of growing a large crop of marijuana in between rows of corn on a rural farm. The government’s only evidence connecting the defendant to the farm was in January of February, which, of course, was not in the growing season. The only other evidence connected the defendant to the operation was the testimony of the defendant’s ex-sister-in-law, whose testimony was not credible in the court’s view. Another woman had also testified that the sister-in-law bragged that she lied at trial to get even with the brothers. Despite a month long trial, the

jury deliberated less than four hours before convicting all six defendants. During the trial, the defendant had moved a judgment of acquittal under Federal Rule of Criminal Procedure 29, which the Court took under advisement. After trial, counsel filed a brief in support of this motion but did not file a motion for new trial under Rule 33. Counsel's conduct was deficient because, under Rule 29, the court must consider the evidence in the light most favorable to the government. Under Rule 33, the court can consider the credibility of witnesses. Counsel's conduct was not strategy because he was unaware of Rule 33 or its standards. "A decision based on a misunderstanding of the law is not a strategic decision." Here, "counsel's failure to file the motion was not a strategic choice; it was based on ignorance of the law." Prejudice found because "the present case represents one [of] those extraordinary matters in which a motion for a new trial would have been appropriately considered and granted." Likewise, counsel's conduct was deficient in failing to challenge the sufficiency of the evidence of the drug quantity attributable to the defendant. "Again, it does not appear that it could have been a strategic decision to challenge guilt but not the amount for which the [defendant] was to be held accountable." Prejudice established because "the statutory mandatory minimum sentence in this case was tied directly to the amount of drugs charged." A successful challenge could have reduced the sentence exposure by half.

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

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

2008: *Showers v. Beard*, 586 F. Supp. 2d 310 (M.D. Pa. 2008). Under AEDPA, trial counsel was ineffective in murder trial for failing to present rebuttal expert testimony and appellate counsel was ineffective for failing to assert this issue on direct appeal. Petitioner was charged with the murder of her husband, who died from ingestion of liquid morphine Roxanol. The defense asserted that his death was a suicide. The state presented an expert who testified: (1) the taste of Roxanol could be disguised in food or drink, and (2) there was no evidence of forced swallowing. While counsel attempted to refute this in cross and in closing argument, the only evidence the defense presented was a lay witness to testify that the taste of Roxanol could not be masked. Counsel’s conduct was deficient because counsel had retained a forensic psychiatrist prior to trial to review the victim’s state of mind. The psychiatrist interviewed pharmacists and nurses that administered the drug, along with the pharmacist that prescribed the medication used in this case, and learned that it is difficult to disguise the taste. He informed counsel that they needed to call an expert to testify about the drug, which he could not do because he was not a toxicologist, and gave the expert names of three possible experts. “[W]hile . . . this case does not involve the death penalty, the guidelines associated with defending a death penalty case are nevertheless instructive as to the role of defense counsel in preparing a defense in a criminal case potentially involving the use of a medical expert.” Counsel failed to adequately investigate here. *Id.* (citing ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989)). Counsel knew the administration of the Roxanol was a crucial issue, but did not present a rebuttal defense expert. The cross-examination and counsel’s arguments “did nothing to negate” the state evidence because the jury was instructed that counsel’s arguments do not constitute evidence. The state court finding to the contrary “cannot be reasonably justified under *Strickland*” and the factual determination that counsel adequately performed “is plainly controverted by the evidence.” Prejudice found because counsel could have presented the testimony of a forensic pathologist to establish: (1) the taste of the Roxanol could be disguised only in a large amount of a sweet-tasting or bitter substance; (2) the autopsy report showed no evidence of any such diluting or masking substance; and (3) the autopsy report did not indicate forced swallowing. Thus, the pathologist concluded the Roxanol was swallowed voluntarily. This testimony “would have been more convincing than testimony from a close family friend” and would have made the “innocence claim . . . considerably more compelling than a simple denial of guilt.” The state court’s finding of no prejudice “cannot be reasonably justified under *Strickland*.” Appellate counsel’s decision to pursue only eight issues on appeal, excluding this issue, was deficient and prejudicial.

Jones v. Wilder-Tomlinson, 577 F. Supp. 2d 1064 (N.D. Iowa 2008). Under AEDPA,

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

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

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

2007: *United States v. Baker*, 492 F. Supp. 2d 1167 (D. Neb. 2007). Counsel ineffective in drug conspiracy and possession of a firearm by a felon case for failing to file a motion for new trial. Following the jury's verdict, the trial court granted a judgment of acquittal on the conspiracy charge and asking for briefing on whether the court should grant of a motion for new trial. Counsel responded only that no new trial could be granted because of

double jeopardy. The government appealed and the Eighth Circuit reversed the judgment of acquittal on the conspiracy charge and remanded for sentencing. Counsel's conduct was deficient because Fed. R. Crim. P. Rule 29 provides that "if the court enters a judgment of acquittal after a guilty verdict, the court must also conditionally determine whether any motion for a new trial should be granted if the judgment of acquittal is later vacated or reversed." Here counsel did not move for a new trial, even after the court asked both parties to brief the new trial issue and instead advised the court that a new trial would be barred by double jeopardy. Prejudice established because the court would have granted "a motion for new trial or a conditional motion for new trial under Rule 29," especially since the court found that "the evidence at trial was so deficient that it warranted the granting of the motion for judgment of acquittal."

c. State Cases

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

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

2010: *Suluki v. State*, 691 S.E.2d 622 (Ga. App. 2010). Counsel ineffective in felon in possession of weapon case for failing to move to suppress the gun. The police went to a hotel with arrest warrants to arrest two murder suspects and the defendant was in the company of one of them. When he arrived at his room, officers surprised him from within, took him down to the floor, cuffed him, and questioned him about a murder before the gun was located in the back of his waistband. Counsel was ineffective for failing to move to suppress the evidence.

Lewis v. State, 929 N.E.2d 261 (Ind. App. 2010). Counsel ineffective for failing to timely file request for jury trial in misdemeanor battery case. At the defendant's initial hearing, he informed the court that he wanted a jury trial. The trial court's "Case Summary" clearly indicated that fact. Counsel was appointed, thereafter, but counsel should have known from the court paperwork of the defendant's desires and should have timely filed the motion instead of waiting until the day of the scheduled trial. Because the motion had not been filed 10 days prior to trial, as required under the rules, the motion was denied. Because counsel's error deprived the defendant of his constitutional right to "trial by jury," prejudice was presumed.

2009: *Thrasher v. State*, 684 S.E.2d 318 (Ga. App. 2009). Counsel ineffective in driving under the influence of methamphetamine case for failing to move to suppress the chemical test of the defendant's blood sample because the defendant was not read his implied consent rights at the time of his arrest at the scene of the accident as required by state law.

State v. Veney, 977 A.2d 570 (N.J. Super. App. Div. 2009). Counsel ineffective in possession of weapon case for failing to move for dismissal of charge prior to plea because the state had previously tried the defendant on another charge arising from the same core set of facts and was, thus, barred from prosecuting this charge, pursuant to the state mandatory joinder rule.

Frazier v. State, 680 S.E.2d 553 (Ga. App. 2009). Counsel ineffective in aggravated assault case for waiving any objection to the admission of the defendant's videotaped statement taken in violation of *Miranda*. The defendant was charged with shooting at his business partner, with whom he had a pending lawsuit, from outside the business. After his arrest, while in custody, the defendant repeatedly stated that he did not want to talk and asked for a lawyer. The police ignored him though and got him to sign a *Miranda* waiver and interrogated him. Counsel specifically waived a pretrial hearing on admissibility and did not object when the state played the videotaped statement in its case-in-chief. On the videotape, the defendant appeared intoxicated and repeatedly used profanity. He initially denied being at the scene but then admitted that he "probably" shot at the building. He repeatedly denied shooting at the victim and said he would be dead if he had. He repeatedly asked if he was dead. The defendant testified during the trial. He admitted firing his gun but testified that he only fired into the air as a warning to possible intruders because he heard "a crash." Shell casings from his gun were found at the scene. Bullets recovered from the building were similar to his gun, but could not be specifically linked to his gun. Counsel testified that he did not object to admission of the videotaped statement because he knew the defendant planned to testify and counsel assumed the entire statement would be admissible for impeachment purposes. Counsel's conduct was deficient because the statement "was simply not admissible during the prosecution's case-in-chief." Prejudice found because "the jury's verdict likely turned on the credibility of the witnesses," including the defendant. "Given the inflammatory nature of [the

videotaped] statement, we cannot conclude that its admission did not affect his credibility; certainly, admission of the statement undermines our confidence in the verdict.”

State v. Sutherby, 204 P.3d 916 (Wash. 2009). Counsel ineffective in failing to move to sever charges for possession of child pornography from charges for child rape and molestation. Counsel’s conduct was deficient and not based on legitimate strategic or tactical reasons. “There is no indication of any possible advantage to the defendant in having a joint trial on all charges, given the State’s announced intent to use the pornography counts to show [the defendant’s] predisposition to molest children. Even the trial judge appeared to expect a severance motion because he asked at a pretrial hearing if severance was a possibility.” Prejudice established because “the trial judge likely would have granted a severance under the relevant considerations, with the result that the outcome at a separate trial on child rape and molestation charges would likely have been different.” While the state’s evidence was strong on the pornography charges, it was weaker on the rape and molestation charges. Thus, the state consistently argued that the presence of child pornography on the defendant’s computers proved he sexually abused his granddaughter and there was no limiting instruction directing the jury that the evidence of one crime could not be used to decide guilt for a separate crime. If the charges had been severed, it is “highly likely” that the pornography evidence would have been excluded in a separate trial for rape and molestation.

2008: *People v. Givens*, 892 N.E.2d 1098 (Ill. App. 2008). Counsel in drug case ineffective in withdrawing motion to quash arrest and suppress evidence motion because the police officers’ warrantless entry into the bedroom occupied by the defendant as an overnight guest of the apartment holder who consented to search of the apartment was not justified by any of the factors supporting a finding of exigency and the defendant had a reasonable expectation of privacy in the bedroom. Prejudice found because “the 21 bags of drugs would not have been admitted in evidence.”

Sparkman v. State, 281 S.W.3d 277 (Ark. 2008). Counsel ineffective of rape of child case for failing to move to suppress the defendant’s custodial statement taken after the appointment of counsel and, thus, in violation of the Sixth Amendment right to counsel. Counsel’s conduct was deficient in that counsel moved to suppress the statement for other reasons but not on this one which was valid and would have been granted. Prejudice was clear because the only other evidence was a taped interview of the child. On direct appeal, the defendant’s confrontation issue was rejected because the tape was merely cumulative of the defendant’s confession and, therefore, harmless.

2007: *McNabb v. State*, 967 So. 2d 1086 (Fla. App. 2007). Counsel ineffective in case involving two separate but similar drug offenses for failing to secure a severance of the charges.

Spioch v. State, 954 So. 2d 47 (Fla. App. 2007). Counsel ineffective in case of four counts of sexual activity with a minor in a custodial relationship, one count of attempt, and 23 counts of lewd and lascivious assault on a minor for failing to adequately move for a judgment of acquittal on 13 counts of lewd and lascivious assault. While counsel did move for acquittal, counsel's conduct was deficient because "his motion was simply a bare-bones motion" that "did not sufficiently set forth the grounds upon which relief was requested." Prejudice established because an adequate motion would have led to seven counts being dismissed for lack of evidence to support the conviction, one count being dismissed because the charging document did not allege sufficient elements to define a crime, and five counts being dismissed on double jeopardy grounds because these acts occurred when the sexual activity counts occurred. Acquittal entered on these 13 grounds and remanded for resentencing.

Maymon v. State, 870 N.E.2d 523, amended on rehearing, 875 N.E.2d 375 (Ind. App. 2007). Counsel ineffective in burglary case for failing to move for severance of charges. The defendant was charged with four burglaries with four separate victims over a period of three months. Two of the burglaries involved thefts while two did not. Counsel's conduct was deficient because, under state law, the burglaries were not connected together in a single scheme or plan and the defendant was entitled to severance. Prejudice found because the evidence of the two burglaries where thefts occurred would not be admissible at separate trials for the two burglaries where thefts did not occur. Those convictions remanded for new trial on rehearing.

Alexandre v. State, 927 A.2d 1155 (Me. 2007). Counsel ineffective in manslaughter and kidnaping case for failing to move to dismiss the kidnaping charge based on the statute of limitations. The limitations period was five years, but was extended for six years due to the defendant's absence from the state. Nonetheless, the indictment was not returned until more than 12 years after the date of the alleged offense. Counsel's conduct was deficient and was not explained by counsel's "reason" for not filing the motion, which was that he thought the defendant would be acquitted on that charge. Prejudice found even though the defendant's manslaughter conviction and length of sentence were not affected.

[T]he simple reality that one or two or more simultaneous criminal convictions may result in a longer sentence of incarceration for a defendant's future convictions, create liability under recidivist statutes, impose a stigma, be used for impeachment, or "act as an impediment to clemency, pardon, more lenient conditions of imprisonment, and professional licensing. This is certainly true for a conviction for a crime as serious and socially abhorrent as kidnapping.

Id. at 1168.

Gant v. State, 211 S.W.3d 655 (Mo. App. 2007). Counsel ineffective in second-degree trafficking case by eliciting—during cross-examination of the state’s witness during the suppression hearing—the evidence that established probable cause for arrest. Drugs and a weapon had been found in a hotel room registered to another person and officers had that man’s photo ID. Officers waited nearby and arrested the defendant, who looked nothing like the man in the ID, as he approached the room with a key in his hand. This was all that the state’s evidence in the suppression hearing established, which alone was insufficient to establish probable cause. On cross-examination, however, defense counsel elicited the testimony that established probable cause for the arrest. Specifically, a motel employee connected a man fitting the defendant’s description to the room and recognized his car and police informants described a man fitting the defendant’s description as being connected with drug activity in the area. “Trial counsel’s elicitation of evidence that supported the State’s case constitutes conduct falling below that of a reasonably competent and diligent attorney.” *Id.* at 660. Prejudice found because the defendant was not charged with the drugs or weapon in the room but was instead charged with possession of drugs found in his pocket in a search incident to arrest. This evidence likely would have been suppressed if counsel had performed adequately. New trial granted.

Yecovenko v. State, 173 P.3d 684 (Mont. 2007). Trial and appellate counsel ineffective in sexual abuse and sexual assault case for failing to adequately assert a motion for severance. The sexual assault charges alleged offenses involving the daughters of the defendant’s former girlfriend. The sexual abuse charges were based on ten unrelated child pornography pictures. Trial counsel moved to sever but did not provide any specific detail to allege prejudice even after the state noted the deficiency and the court denied on this basis. While appellate counsel asserted error in the denial of the motion, counsel did not assert the ineffectiveness of trial counsel as a basis. Thus, the appellate court also denied on a procedural basis. Trial and appellate counsel’s conduct was deficient. Specifically, with respect to appellate counsel: “Presenting new arguments on appeal without justification for doing so, in light of the volume of cases holding that such arguments will not be entertained, falls short of reasonable professional assistance.” Prejudice was found with respect to the sexual assault conviction because the unrelated pictures “were, quite simply, horrific,” such that the trial court had cleared the courtroom and allowed each image to be displayed to the jury for only five seconds.

State v. Miner, 733 N.W.2d 891 (Neb. 2007). Counsel ineffective in theft by unlawful taking case for failing to assert a double jeopardy bar to prosecution. The defendant was tried and convicted in Holt County for the theft of 62 steers from a Livestock Market in Holt County. Some of these steers (26 to be precise) were sold through a livestock market in Nance County where the defendant had been tried and convicted of theft by receiving stolen property prior to the case in Holt County coming to trial. Counsel’s conduct was

deficient because “counsel was charged with knowledge of the legal principles with respect to consolidation of theft offenses in Nebraska,” which precluding two theft charges based on “‘one scheme or course of conduct from one person’ on the same day.” Counsel’s conduct was not explained by strategy. Prejudice found because the double defense was meritorious.

**State v. Brown*, 873 N.E.2d 858 (Ohio 2007). Counsel ineffective in capital trial for failing to request a formal ruling on whether the defendant and the state’s primary witness were actually married. Counsel’s conduct was deficient because there was a spousal privilege under state law and evidence from a marriage license and witnesses that the defendant was married to the witness. Although the witness denied it at trial, she had made contradictory pretrial statements. If counsel had requested a pretrial ruling and the court found that there was a marriage, state law required the court to instruct the witness on the spousal competency and make a finding on the record that she voluntarily chose to testify. Prejudice found because state law holds that failure to do so is reversible plain error. In addition, this was the only eyewitness testimony and the defendant was eligible for the death penalty only because he was convicted of aggravated murder based on a finding of prior calculation and design. Even if the only difference was in the “final sentence, in this case, that difference is monumental—it is the difference between life and death.” *Id.* at 870. The court also found a Brady violation and considered cumulative prejudice from both because “it might be possible to conclude that [the defendant] was not prejudiced” on the individual claims. Reversal required.

West v. Director of Dept. of Corrections, 639 S.E.2d 190 (Va. 2007). Counsel ineffective in aggravated involuntary manslaughter, involuntary manslaughter, and DUI case for failing to assert a double jeopardy objection to convictions both for statutory offense of aggravated involuntary manslaughter and common law offense of involuntary manslaughter. While counsel objected to sentencing on both offenses he did not state that his argument rested on constitutional or double jeopardy grounds. Counsel’s conduct was deficient because the common law offense does not require proof of a fact different from those required for conviction of the statutory offense. Even though the trial court gave concurrent sentences, prejudice was found because the defendant was convicted of two felonies and given two punishments. The common law conviction and sentence were set aside.

2006: *People v. Boyd*, 845 N.E.2d 921 (Ill. App. 2006). Counsel ineffective in multiple charge case for failing to invoke the defendant’s statutory speedy-trial rights with respect to home invasion charges. The defendant was entitled to trial within 120 days from the date he was taken into custody unless his own acts occasioned delay. Here, although all of the charges arose from a single incident, the state filed charges against the defendant on three different dates. While the defendant had agreed to a continuance on initial charges, the home invasion charges were filed after the defendant agreed to continue the initial

charges. The speedy-trial clock expired on the home invasion charges prior to trial, but counsel failed to request the discharge.

Morris v. State, 639 S.E.2d 53 (S.C. 2006). Counsel ineffective in assault and battery with intent to kill trial for failing to request a continuance, which resulted in the defendant being tried in absentia. The defendant showed up on the scheduled trial date, signed a sentencing sheet in anticipation of entering a guilty plea to the lesser-included charge of assault and battery of a high and aggravated nature, and then left the courthouse. He could not be located when his case was called so he was tried in absentia. Counsel's conduct was deficient because she objected to trial in absentia, but failed to move for a continuance in order to enter the guilty plea agreed to with the State. Prejudice found because the refusal of a continuance would have amounted to an abuse of discretion where ABHAN, the crime the defendant agreed to plead guilty to, is a common law misdemeanor punishable by up to ten years in prison, while ABIK, for which he was tried and convicted, is a violent crime felony punishable by up to twenty years in prison.

Compton v. State, 202 S.W.3d 416 (Tex. App. 2006). Counsel ineffective in aggravated perjury case for failing to move to dismiss the indictment even though the indictment was filed 75 days after the expiration of the two year statute of limitations period. Counsel's conduct was deficient because he assumed the three year period for all other felonies applied and "[a] modest amount of research . . . would have disclosed an uncontradicted line of recent cases holding that aggravated perjury has a two year limitation period." "Without a firm command of the law governing the case, a lawyer cannot render effective assistance to the defendant." Prejudice found because "undeniable" since the motion to dismiss had merit.

State v. Horton, 146 P.3d 1227 (Wash. App. 2006), *review denied*, 178 P.3d 1032 (Wash. 2008). Counsel ineffective in possession with intent to manufacture and possession of drugs case for failing to move to suppress evidence from a pat-down search. The officer stopped a vehicle for traffic violations and observed materials in the back seat, which led to a valid search warrant for the car. Prior to obtaining the warrant, the officer performed a pat-down search of the defendant, who was a passenger in the car, and found a cigarette pack with a small baggie of methamphetamine inside. Counsel's conduct was deficient because counsel moved to suppress the evidence due to a pretextual stop but failed to move to suppress on the basis that the pat-down was an illegal search. A valid pat-down search is limited to objects that might be used as weapons, which would not include the cigarette pack or its contents or items subsequently found in the defendants pockets, which included a pill bottle containing ephedrine and a digital scale. Prejudice found.

State v. Meckelson, 135 P.3d 991 (Wash. App. 2006), *review denied*, 154 P.3d 919 (Wash. 2007). Counsel ineffective in drug case for failing to move to suppress evidence on the basis that the officer's traffic stop was pretextual. While the officer stopped the

defendant after the defendant made a right turn without signaling, the officer had begun following the defendant's car for the legally insufficient reason that the defendant had given the officer a "deer-in-the-headlight" look. Counsel's conduct was deficient because it is not enough for the state to show that there was a traffic violation, but rather the question is whether the traffic violation was the real reason for the stop. Prejudice found because there was a reasonable probability the motion to suppress would have been granted.

State v. Perez-Avila, 131 P.3d 864 (Utah App. 2006). Counsel ineffective in DUI and felony automobile homicide case for failing to move to consolidate the charges because under state law the DUI was a lesser included offense of the felony automobile homicide.

2005: *Thompson v. Commissioner of Correction*, 880 A.2d 965 (Conn. App. 2005). Counsel ineffective for failing to file a motion to dismiss a count of failure to appear because of the delay between the issuance and the execution of the warrant such that the statute of limitations had expired. The defendant was charged with various sexual assault charges in addition to two charges of failure to appear for earlier scheduled court dates. Prejudice found because there is a reasonable probability that the charge would have been dismissed by the trial court because the defendant lived in state the whole time and had been arrested 15 times since the warrant for failure to appear had issued and each time provided his correct address and driver's license number.

People v. Hernandez, 840 N.E.2d 1254 (Ill. App. 2005), *appeal denied*, 852 N.E.2d 243 (Ill. 2006). Counsel ineffective in murder case for failing to move to suppress the defendant's videotaped statement to an assistant prosecutor, which clearly revealed that the defendant had invoked his right to silence in a clear and unequivocal fashion. Nonetheless, the prosecutor continued the interrogation. Counsel moved to suppress the statement on other grounds, but not this ground and this failure was not explained by strategy. Prejudice found because the statement would have been excluded and the state's case was largely based just on this statement because there was no eyewitness testimony or physical evidence.

State v. Becker, 110 P.3d 1 (Mont. 2005). Counsel ineffective in drug possession and drug manufacture case for failing to move to dismiss the possession charge as a violation of double jeopardy under the state constitution and statutes. Because the state could not prove manufacture of drugs without first proving possession, state law prohibited conviction on both because the possession was a lesser included offense of the manufacturing charge. Possession charge dismissed and case remanded for resentencing.

People v. Turner, 840 N.E.2d 123 (N.Y. App. 2005). Trial and appellate counsel ineffective in manslaughter case for failing to assert a statute of limitations defense. The defendant was arrested 16 years after the crime and charged with second degree murder,

which has no statute of limitations. During trial, the prosecutor requested an instruction on the lesser included offense of manslaughter. Counsel objected only on the basis of not offering the jury a compromise. The jury convicted only on manslaughter, which had a five year limitations period. Although the statute allows some tolling, the maximum period for tolling is an additional five years. Trial and appellate counsel's conduct was deficient because there was case law from 1914 supporting the argument, which was old but still valid. In addition, while there was some contrary precedent and the law may not have been definitively settled at the time of trial, "[a] reasonable defense lawyer at the time of defendant's trial might have doubted that the statute of limitations argument was a clear winner—but no reasonable defense lawyer could have found it so weak as to be not worth raising." Trial counsel should have asserted the issue. Appellate counsel should have asserted the ineffectiveness of trial counsel on this point.

Commonwealth v. McClellan, 887 A.2d 291 (Pa. Super. 2005), *appeal denied*, 897 A.2d 453 (Pa. 2006). Counsel ineffective in third degree murder and conspiracy case for failing to provide, in a timely manner, the identity and opinion of the defense expert, which resulted in the exclusion of the expert's testimony. The defendant's child died only about 15 minutes after the defendant returned from a convenience store where she was caught on the surveillance tape. When she returned home, she and her boyfriend were alone with baby for a few minutes before a friend entered and found the defendant with the child saying something was wrong with him. Paramedics were called, but the child died from extensive, recently inflicted injuries. Appellant and her boyfriend were charged. From the beginning, counsel discussed the need to secure an expert witness in forensic pathology to understand the scientific principles involved and present testimony concerning the timing of the injuries. Counsel initially retained a different expert and fought the court's orders for disclosure before ultimately disclosing this expert's report and allowing a deposition. Even prior to his deposition, counsel had retained a second expert, however, but counsel never disclosed this information until shortly before the conclusion of the trial. The trial court excluded this expert's testimony because of the untimely disclosure. Counsel expressed no strategy for the untimely disclosure. Counsel simply did not expect that the court would exclude the testimony. Counsel's conduct was deficient because "counsel were or should have been aware the trial court required disclosure of their experts' opinions and reports, based in particular on their previous experience" with their first expert. "[C]ounsel's actions exhibited either a lack of knowledge of the Rules of Criminal Procedure, constituting incomplete investigation into the law, or a deliberate attempt to frustrate the Commonwealth's right to learn of the witness, constituting a violation of both the Rules of Professional Conduct and the ABA Standards." Prejudice found because this expert would have testified that, in his opinion, the child's injuries were inflicted during the time period when the defendant was clearly away from home.

2004: ***United States v. Little***, 851 A.2d 1280 (D.C. 2004). Counsel ineffective in murder case for failing to timely move to suppress the defendant's unwarned custodial statement.

Counsel's conduct was deficient and prejudicial because the defendant was in custody at the time of his written confession, but he had not been given the *Miranda* warnings. Thus, the statement should have been suppressed. Although counsel asserted a weak strategic reason and that there was no merit to the motion, counsel had made a motion, during the trial, to suppress the statement, which was denied as untimely. If counsel had adequately investigated, counsel would have also been aware that the issue had merit. There was also a reasonable probability of a different outcome at trial if the statement had been suppressed.

Bruton v. State, 875 So. 2d 1255 (Fla. App. 2004). Counsel ineffective in exploitation of an elderly person and third degree grand theft case for failing to move to dismiss the grand theft charge as a lesser included offense. The basic facts were that the defendant wore a nurse's uniform in a hospital, pretending to be a care giver, and stole the victim's diamond ring. Because the two crimes involved one act of taking the same property, convictions on both counts violated double jeopardy. Even though the precedent for this ruling had not been decided at the time of trial, "this is an issue that trial counsel should have recognized."

Collier v. State, 598 S.E.2d 373 (Ga. App. 2004), *aff'd on other grounds*, 612 S.E.2d 281 (Ga. 2005). Counsel ineffective in homicide by vehicle case for failing to move to suppress blood and urine samples taken from the defendant. The defendant ran a red light and collided with another car, killing two people. The defendant refused to consent to blood and urine tests, but police threatened to obtain a search warrant and to forcibly use a catheter to obtain the samples if he did not consent. In the face of the threat, the defendant consented. Counsel's conduct was deficient because the consequences of refusing under state law did not include the possibility of a search warrant and forcible testing. The police, thus, misled the defendant and his consent was coerced and invalid. Prejudice found because the admission of the blood and urine results showing methamphetamine and amphetamine unquestionably harmed the defense.

Vann v. State, 596 S.E.2d 722 (Ga. App. 2004). Counsel ineffective in robbery and assault case for failing to move to sever the charge of possession of a firearm by a convicted felon. The evidence against the defendant for robbery and assault was based on shaky eyewitness testimony and a codefendant's statement. Because of the weapons charge, the defendant's prior conviction for receiving stolen property was admitted in evidence. Counsel did not move for severance because counsel wanted the jury to know about the prior conviction rather than wondering whether the defendant had prior convictions. Counsel's conduct was deficient because "counsel misunderstood the law concerning admission of bad character evidence." When the State introduced the prior conviction, the defendant's character was undoubtedly placed in evidence, even though the prior conviction was unrelated to the charges for which he was being tried. Prejudice found because even though the prior conviction was admitted only through certified

documents referred to only once in the state's closing argument, trial counsel did not request a charge that the jury limit its consideration of the prior conviction to the charges of possession of a firearm by a convicted felon. Thus, the jurors were free to consider this evidence with respect to character and credibility when the evidence against the defendant was otherwise "far from overwhelming."

People v. Miller, 806 N.E.2d 759 (Ill. App. 2004). Counsel ineffective in drug possession with intent to deliver plea case for failing to challenge third-party consent to search the defendant's zipped duffle bag where the drugs were found. Counsel moved to suppress the evidence, which was located in a home shared with the third-party in a locked storage cabinet containing some of the third-party's property but for which only the defendant had keys. The third-party consented to police opening the cabinet with a crowbar and drugs were found inside. The motion was denied, without any evidence that the drugs were actually in a zipped duffle bag, which the third-party informed police belonged to the defendant, but the police searched it anyway and found the drugs. Following the denial of the suppression motion, the defendant plead guilty. Counsel's conduct was deficient in failing to present evidence of the zipped duffle bag. Counsel did not do so only because counsel's "mistake of law" in believing it was immaterial since the police had consent to open the storage cabinet. Prejudice found because, but for counsel's errors, the defendant would not have pleaded guilty and would have insisted on going to trial.

State v. Reichenbach, 101 P.3d 80 (Wash. 2004). Trial counsel was ineffective in possession of methamphetamine case for failing to move to suppress the methamphetamine that was involuntarily abandoned in the course of an illegal seizure of the defendant. An informant notified the police on several occasions that the defendant was forcing him to drive to Canada so that the defendant could purchase drugs. On the last of these occasions, the police obtained a search warrant for the informant's car and the defendant's person. After the warrant was obtained, however, the informant notified the police that the defendant had been unable to purchase drugs and that he was not sure whether he would be able to do so. The police then staged an accident to stop the informant's car. With weapons drawn and pointed at the defendant, officers ordered the defendant to raise his hands. Before doing so, the defendant dropped a bag of methamphetamine on the floor next to the passenger seat. The defendant was removed from the car and the drugs were discovered during the search of the car. Counsel's conduct was deficient in failing to move to suppress the drugs because the search warrant was invalid because the information supplied by the informant after the warrant was obtained negated probable cause. Failure to object could not be explained by any legitimate tactic. Moreover, although the informant consented to search of the car, the informant could not consent to seizure of the defendant's person. The defendant was "seized" at gunpoint, however, and his abandonment of the bag of drugs was in response to the unlawful seizure and, thus, involuntary. The seizure of the bag of drugs thus violated the state constitution. Prejudice was found because the conviction was dependent

on admission of the bag of drugs.

Firestone v. State, 83 P.3d 279 (Nev. 2004). Trial and appellate counsel ineffective in leaving the scene of an accident case for failing to challenge multiple convictions arising from one accident involving three victims. State statutes were clear that, “Since there was only accident, and one ‘leaving,’ the statute allows only one charge of leaving the scene of an accident, regardless of the number of people involved.” Counsel’s conduct was deficient and prejudicial in failing to raise this meritorious issue. Two of the three convictions were vacated and the case was remanded for further proceedings.

2003: *State v. Johnson*, 837 A. 2d 1131 (N.J. Super. App. Div. 2003). Counsel ineffective in weapons case for failing to move to suppress a handgun seized from the defendant. The police obtained warrant to arrest the defendant’s half-brother on domestic violence charges. When the police arrived at the defendant’s stepfather’s home, they asked for permission to enter after advising him they had multiple arrest warrants and they were concerned about the presence of a handgun. The stepfather allowed the police to enter the home to arrest his son. Following the arrest, the police frisked the son and then took him outside to the squad car. The officer’s went back into the home to begin searching for the gun. The defendant was on the phone in the kitchen and stated that he was just visiting. The police officer frisked him and then asked him to leave until the police finished with their search. The defendant agreed to leave but said he needed to gather his things. He took a DVD box and another small box from a closet and proceeded to leave. The police officer stopped him and questioned him about the contents of the box. After receiving conflicting answers, the officer searched the box and found a loaded handgun inside. Counsel did not move to suppress the handgun because he believed the motion would have lacked merit because the owner of the home had consented to police entry. Counsel’s conduct was deficient because it was based on a fundamental misunderstanding of the law. The homeowner’s consent may well not have been knowingly and voluntarily given in that the homeowner was confronted with multiple warrants for his son’s arrest and may not have been advised of his right to refuse consent. Moreover, the homeowner’s permission appeared to be limited to entry for purposes of affecting his son’s arrest on the second floor. The police officer’s far exceeded the scope of this invitation because, by their own admission, they re-entered the premises once the son had been safely secured in the squad car in order to search the home. The search was also outside the scope of the limited area included in a search incident to arrest. A search warrant was, therefore, required. Prejudice found due to the critical significance of the handgun to the prosecution’s case. The court ordered that a suppression hearing be conducted. If the court granted suppression, the convictions would be set aside. If the court denied suppression, the judgment of conviction will stand.

4. PROSECUTION EVIDENCE OR ARGUMENT

a. U.S. Court of Appeals Cases

2007: *Girts v. Yanal*, 501 F.3d 743 (6th Cir. 2007), *cert. denied*, 129 S.Ct. 92 (2008). Counsel ineffective in aggravated murder case for failing to object to the prosecutor commenting on the petitioner's silence three separate times during closing arguments. Prejudice found because trial counsel's "failure to object exacerbated the prejudicial effect of the prosecutor's statements." The court found "a strong likelihood that at least one juror would have changed his mind if the improper and prejudicial statements would not have been made, especially because the prosecutor presented weak and limited evidence at trial." The IAC also served as cause and prejudice to excuse the procedural default of the prosecutorial misconduct issue, which had been reviewed by the state court only under a plain error analysis. Relief granted on the misconduct issue also.

2005: *Hodge v. Hurley*, 426 F.3d 368 (6th Cir. 2005). Counsel ineffective in child rape case for failing to object to the prosecutor's "egregiously improper closing argument, the prosecutor commented on the credibility of witnesses, misrepresented the facts of the case, made derogatory remarks about the defendant, and generally tried to convince the jury to convict on the basis of bad character." The prosecutor's arguments, among other things, incorrectly informed the jury that they would have to disbelieve all of the victim's family members to acquit, which was not true since two family members testified to seeing blood in the child's underwear and abnormal behavior. The jury could have believed this without convicting the defendant. The prosecutor also implied that disagreement between state and defense experts "(who could very well have legitimate professional disagreements) meant that one of those witnesses must be perjuring him or herself." *Id.* at 383. With respect to character, the prosecutor argued that the defendant, who was underage, regularly drank alcohol illegally and wanted to live off his family and not work, which was irrelevant and not based on any evidence before the court. The prosecutor also urged the jury to "put [itself] in the place of someone that might run into [the defendant] at night," which is "a version of the impermissible 'golden rule argument.'" *Id.* at 384. Under AEDPA, the state court's decision was an unreasonable application of Supreme Court precedent. Prejudice found because the result of the trial depended primarily on the jury's credibility determination between the defendant and the 3 year old child's mother, who claimed to have seen the rape. In addition, the trial court's "generic jury instructions . . . were insufficient to dispel any prejudice from these statements." *Id.* at 388 n.27.

Martin v. Grosshans, 424 F.3d. 588 (7th Cir. 2005). Counsel ineffective in sexual assault case for failing to object to improper testimony and argument. The defendant was an ordained Episcopal priest charged with molesting a boy prior to 1988. The boy first raised the allegation in 1993 and the defendant learned about the allegation in 1994. During the

state's evidence, without objection from counsel, the state presented the testimony of a former prosecutor who had worked with the defendant in 1993 to develop a policy for dealing with allegation of sexual misconduct in the parish. She testified that his focus was greatly on protecting the accused clergymen and not the accusers. Counsel also did not object to testimony from a police officer, who met with the defendant in the presence of his counsel, that the defendant refused to answer questions about the allegations. Finally, counsel did not object or move for a mistrial based on the prosecutor's argument that the jury should not be swayed by the defense's strong character witnesses because even Jeffrey Dahmer had character witnesses. Counsel's conduct was deficient because: (1) the former prosecutor's testimony was irrelevant and prejudicial because the defendant was not even aware of allegations against him when these conversations occurred in a completely different jurisdiction years after the crimes alleged here and the defendant's beliefs did not necessarily imply a guilty conscience; (2) the officer's testimony was an improper comment on the defendant's right to counsel; and (3) the prosecutor's argument was inflammatory and improper, especially since this trial occurred in 1995 in Wisconsin when Dahmer's case was fresh in people's minds. Under AEDPA, the state court's decision was contrary to *Strickland* because it placed the burden on the defendant to prove that, but for counsel's errors, "the result of the proceeding would have different. Prejudice was, therefore, considered de novo. "[E]ven if these errors, in isolation, were not sufficiently prejudicial, their cumulative effect prejudiced . . . [the] defense" where "the prosecution's evidence was not overwhelming."

b. U.S. District Court Cases

2011: **Rogers v. McDaniel*, ___ F.Supp.2d ___, 2011 WL 2680763 (D. Nev. July 8, 2011). Counsel ineffective in failing to challenge prior conviction supporting aggravating circumstance in capital sentencing. The jury found two aggravating circumstances: (1) prior violent felony conviction; and (2) torture, depravity of mind or mutilation of the victim. The state offered evidence through a probation officer of two prior felony convictions in Ohio. On one of those, the defendant pled guilty but failed to appear for sentencing. Under Nevada law at the time, this meant there was no conviction, but counsel failed to recognize that and instead conceded that there was a conviction. Counsel's conduct was deficient in "failing to conduct even the most basic research" regarding the purported prior convictions. Prejudice also established as there were no other constitutionally valid aggravating circumstances and there was significant mitigation of mental illness and extreme mental and emotional disturbance at the time of the offenses. The state court ruling to the contrary was an unreasonable application of *Strickland*. With respect to the other aggravating circumstance found by the jury, the court found that the instruction was unconstitutionally vague under *Godfrey v. Georgia*, 446 U.S. 420 (1980). With respect to cumulative error, the state court found with respect to both aggravators that the underlying evidence was admissible in sentencing regardless of whether it supported a valid statutory aggravating circumstance. As a nonstatutory

circumstance, “[h]owever, such evidence does not factor into the weighing of aggravating and mitigating circumstances [under state law]; only the valid aggravating circumstances are part of that weighing.”

2009: *Daly v. Burt*, 613 F. Supp. 2d 916 (E.D. Mich. 2009). Under AEDPA, the District Court found a Confrontation Clause violation due to admission of nontestifying codefendants’ statement and that the state court ruling was an unreasonable application of *Crawford v. Washington*, 541 U.S. 36 (2004). The District Court also specifically adopted the Magistrate Judge’s Report and Recommendation as “the opinion of this Court.” The R&R included an alternative finding of ineffective assistance of counsel, in the event the Confrontation Clause issue was found to be procedurally defaulted, for failing to object to the admission of these statements or to move for severance. The defendant was charged with attempted armed robbery and conspiracy to commit armed robbery. Following a tip to the police of a pending robbery at a McDonalds, the defendant was arrested outside the McDonalds with a ski mask and a hammer. One codefendant was with him and another was nearby waiting in a getaway car. Both codefendants confessed in writing that they intended to rob that manager as he was taking a bank deposit to the bank and that the hammer was to be used as a weapon. The defendant made only an oral statement. While a police officer testified that his statement was consistent with the codefendants, the defendant testified that he had intended to break and enter the McDonalds and steal from the safe rather than committing an armed robbery and that this is what he told police. Prior to their joint trial, counsel for one co-defendant moved for a severance or, alternatively, to exclude the statements of the others. The District Court denied the motion. The District Court’s finding of admissibility was erroneous under *Crawford*, which was decided while the case was pending on appeal. Under *Crawford*, testimonial statements of nontestifying witnesses, including those made while in police custody, are inadmissible. Under pre-*Crawford* law in *Ohio v. Roberts*, 448 U.S. 56 (1980), the statements were also inadmissible because they did not bear “adequate indicia of reliability.” Specifically, the codefendants were shifting or stretching the blame while in police custody, which “weighed heavily against finding that there was an adequate indicia of reliability” even though the codefendants also admitted their own guilt. Counsel’s conduct was deficient and not based on sound strategy.

[A] knowledge of the applicable law is essential to providing effective assistance, and considering the extensive Supreme Court case law discussed above, no competent attorney could have failed to recognize the confrontation clause violations that occurred because of the introduction of the out-of court statements of the non-testifying codefendants at the joint trial.

Prejudice established because “the out-of-court statements . . . were extremely persuasive proof” of the attempted armed robbery and the conspiracy, which carries a potential life

sentence.

2008: *Neri v. Hornbeak*, 550 F. Supp. 2d 1143 (C.D. Cal. 2008). Counsel ineffective in murder of her 16-month-old daughter under AEDPA for failing to object to the prosecutor's cross-examination of the defendant in violation of the trial court's previous ruling. In support of a pretrial motion, counsel had presented an unsigned "declaration" of the defendant. Prior to trial, the state requested a signed version. The hearings revealed that counsel had drafted the declaration on the basis of his notes of a discussion with the defendant, who was just learning English, and had shown it to her, but had not had it translated for her. She testified that there were inaccuracies in the declaration and it was corrected through her testimony and changes made to the declaration, which she then signed. The court ruled that she could be impeached if she testified by using her signed declaration or testimony, but not the unsigned declaration. Nonetheless, the prosecutor cross-examined her extensively about inconsistencies from the unsigned declaration without objection from defense counsel. Counsel's conduct was deficient. Prejudice was established because the defendant's credibility was a central issue. The major inconsistencies came from the unsigned declaration. Although there were some inconsistencies from her prior testimony and signed declaration, these inconsistencies were relatively minor in comparison and would not have been as harmful to her credibility. Prejudice was also clear because the jury deliberated for four days and nearly deadlocked even without this improper cross-examination.

2006: *Wynters v. Poole*, 464 F. Supp. 2d 167 (W.D.N.Y. 2006). Under AEDPA review for pro se petitioner, counsel ineffective in first degree rape case for failing to object to the prosecutor's cross-examination of the investigator who interrogated the petitioner. The investigator testified that he requested that the petitioner take a polygraph after he denied guilt and the petitioner terminated the interview and requested counsel. The alleged victim had made numerous inconsistent statements and did not report the rape for more than a year. Appellate counsel asserted that the prosecutor committed misconduct and that trial counsel had been ineffective in failing to object. The District Court construed the pro se pleadings to assert trial counsel's ineffectiveness as "cause" and "prejudice" to overcome the procedural default of the state misconduct issue and found that counsel was ineffective. Counsel's conduct was deficient in failing to object to the prosecutor's misconduct, which "effectively decimated" the petitioner's credibility in a case where his credibility and the alleged victim's credibility was the only real issue. The prosecutor's conduct rendered the trial "fundamentally unfair." The state court's holding to the contrary (on the merits, despite finding a procedural default) was an unreasonable application of clearly established Supreme Court precedent. *Id.* at ___ (citing *Darden v. Wainwright*, 477 U.S. 168, 181-82 (1986)). In addressing this issue, the state court "approved of the way defense counsel handled the situation" and, therefore, summarily dismissed the ineffective assistance claim as "without merit." Because this was an adjudication on the merits, the District Court applied the AEDPA standards to this claim

also. Counsel's conduct was deficient and prejudicial because the prosecutor deliberately implicated the petitioner's Fifth Amendment right to remain silent, his Sixth Amendment right to counsel, and conveyed to the jury that it could infer guilt due to the petitioner's failure to submit to the polygraph. Although counsel attempted to mitigate the damage, "there is no evidence that he made an intelligent, tactical decision not to object." Instead, trial counsel "only reinforced the negative evidence elicited on direct examination" by having it repeated rather than objecting and moving for a mistrial or a curative instruction. "While the instance in which a single error will rise to the level of Sixth Amendment ineffectiveness is clearly the exception and not the rule, this case is one of those exceptions." *Id.* at ___ (quoting *Chatom v. White*, 858 F.2d 1479, 1486 (11th Cir. 1988)). The state court's summary denial was an unreasonable application of *Strickland*.

2005: *Wade v. White*, 368 F. Supp. 2d 695 (E.D. Mich. 2005). Counsel ineffective in manslaughter case for failing to object to evidence regarding the shooting of a key prosecution witness and the state's closing argument concerning this evidence. The victim was killed when he was hit by a stolen car being pursued by police. The witness was a passenger in the car, who, at the scene of the accident, initially identified his friend as the driver, but changed his statement the next day to identify the defendant as the driver. He was later shot numerous times and testified about this, but he did not know of any connection between the shooter and the defendant and no evidence connecting the defendant to the shooting was presented. Nonetheless, the prosecutor focused on this incident in sentencing and strongly implied that there was some connection between the defendant and the shooting. Although this issue had been raised in state court, the state court failed to address this issue so the court's review, under the AEDPA, was de novo. Counsel's conduct was deficient because the evidence of the shooting of the witness was clearly inadmissible and the prosecutor's argument was improper. There could be no reasonable strategy not to object to this testimony and argument. The court found that the state court's finding that the testimony was properly admitted was irrelevant because it was wrong in that no evidence established any connection between the defendant and the shooting of the witness. Prejudice was found because the witness was the key witness identifying the defendant as the driver.

c. State Cases

2011: *State v. Washington*, ___ So.3d ___, 2011 WL 3586149 (La. App. Aug. 17, 2011). Counsel ineffective in possession of cocaine with intent to distribute case for failing to move for mistrial or to request a jury admonishment after the trial court sustained counsel's objection to the prosecution's improper closing argument on the defendant's post-*Miranda* silence. Counsel had elicited testimony of the defendant's silence in cross-examination of a police officer and the state had properly explored this in redirect. The prosecution's argument crossed the line, however, "by asking the jurors to speculate what they would have done if wrongly accused of possessing drugs. With these remarks,

the prosecutor was openly using the defendant's silence as substantive evidence of the defendant's guilt." While counsel objected and the court sustained the objection, counsel did not request mistrial or admonishment. Prejudice established as the state's case against the defendant was circumstantial. While the cocaine was in his home, it was in plain view on top of a television where four young men were playing video games when officers searched the home and found the drugs. In addition, while drugs were found in a bedroom, there was no proof that the bedroom belonged to the defendant, who was not the sole resident of the house. At minimum, an admonishment from the court would have lessened the impact of the improper argument on the jury.

People v. Fillyaw, 948 N.E.2d 1116 (Ill. App. 2011). Counsel ineffective in murder case for failing to object to admission, as substantive evidence, of a written statement by a state witness that was given to a detective pretrial and included alleged inculpatory statements by the defendant to the witness. The witness testified during trial but maintained that the entire prior statement was false. Counsel's conduct was deficient.

The constitutional guarantee of effective assistance of counsel requires a criminal defense attorney to use the applicable rules of evidence to shield his client from a trial based upon unreliable evidence.

Counsel's conduct was also prejudicial.

State v. Gieser, 248 P.3d 300 (Mont. 2011). Counsel ineffective in driving under the influence case for failing to object to admission of horizontal gaze nystagmus (HGN) evidence that was not supported by expert testimony and breath tests done on "un-certified apparatus." State law allowed HGN evidence only with a showing that the test was properly administered by the officer and supported by expert testimony. State law also required that breath test instruments be regularly inspected and calibrated. Prejudice established as the HGN and breath test evidence had "an appearance of precision and scientific reliability" and the breath test numbers from the machine could be used to infer intoxication under state law.

State v. Thompson, 20 A.3d 242 (N.H. 2011). Counsel ineffective in aggravated sexual assault on child case for failing repeatedly to object to hearsay testimony of the child's babysitter, the child's mother, and a police officer about the child's out-of-court statements, even though counsel was aware the child had recanted her statements prior to trial and told the jury this in opening. This hearsay was the only substantive evidence of guilt as the child denied in her trial testimony, even with leading questions and coaxing by the prosecutor, that the defendant had touched her. Counsel did object at times, but counsel's "erratic and inconsistent decisions . . . clearly fall below the constitutional bar." Counsel's behavior was "completely irrational" and could "only be attributed to a lack of

understanding of the rules of evidence or extreme carelessness.” Prejudice established as counsel allowed a legally insufficient case to go to the jury. The court relied exclusively on the hearsay in denying the motion for directed verdict. “The inaction was so fundamental and flawed that the State was able to prove the case only because of defense counsel’s failure.”

Menefield v. State, ___ S.W.3d ___, 2011 WL 2297684 (Tex. App. June 10, 2011). Counsel ineffective in drug possession case for failing to object to admission of the laboratory’s drug report stating that there was a trace amount of cocaine in a pipe. The report, prepared by the previous supervisor of the lab, was offered through the manager of the lab as a business record. Counsel’s conduct was deficient as the Confrontation Clause barred admission of this report. Prejudice established as this was the state’s only evidence showing the presence of a controlled substance.

2010: *People v. Sanchez*, 935 N.E.2d 1099 (Ill. App. 2010). Counsel ineffective in bench trial of drug case for failing to object to admission of the defendant’s prior drug conviction that was more than 10 years old to impeach him. Although the defendant’s release from parole was only 9 years prior to trial, state law calculates the period from the date of the prior conviction “or of the release of the witness from confinement, whichever is the later date.” The defendant’s release from confinement was more than 10 years prior to trial. There was no valid strategic reason for the failure to object. Either counsel failed to investigate the details of the prior conviction or was aware of those details and misapprehended the law. Under either scenario, counsel was ineffective. Prejudice established as this was a credibility contest between the defendant and police officers and the trial court twice expressly relied on the prior conviction in weighing the defendant’s credibility.

State v. Banks, 790 N.W.2d 526 (Wis. App. 2010). Counsel ineffective in felon in possession of firearm and resisting or obstructing an officer case for failing to object to testimony and argument implying guilt based on the defendant’s refusal to consent to DNA testing prior to the state obtaining a search warrant. The defendant and two other men were in a van that the police attempted to stop due to an expired license plate. All three men jumped and ran. A gun was found in the area. The driver of the van testified that the defendant had been in the backseat and the driver was not aware of there being a gun in the van. The frontseat passenger of the van testified that the defendant had the gun in the van but threw it in the lap of the passenger during the attempted stop. The passenger then dropped the gun as he attempted to run. Both the driver and frontseat passenger had at least five prior criminal convictions. Counsel’s conduct was deficient in failing to object to testify by two officers and subsequent argument in closing that the defendant had twice refused to consent to DNA testing and that he did so “because his DNA might have been on that gun, and because he was the one that tossed the gun from the back of the van to the front into [the State witness’] lap.”

[I]t is a violation of the defendant's right to due process for a prosecutor to comment on a defendant's failure to consent to a warrantless search. It has long been a tenet of federal jurisprudence that a defendant's invocation of a constitutional right cannot be used to imply guilt.

Id. at 533-34 (citations omitted). Prejudice established because the court could not "say with any confidence that the jury's verdict was untainted by the inadmissible evidence. . . . Consequently, there is a reasonable probability that, but for counsel's deficient performance, the result at trial would have been different." *Id.* at 535.

Higgins v. State, 698 S.E.2d 335 (Ga. App. 2010). Counsel was ineffective in rape and sodomy case for failing to object to the state's admission of an "unredacted juvenile disposition order . . . that the state used to prove a similar transaction." Counsel had raised the need for redaction of the sentence and obtained the state's agreement to redact prior to trial. Nonetheless, the order was not redacted and included information about the "need for protection" of the community, "sex offender treatment," and the like, for the defendant. Counsel's conduct was deficient and there was no strategic reason not to object. Prejudice established as "this case was not overwhelming because evidence was introduced that the encounter may have been consensual."

Purvis v. State, 43 So. 3d 734 (Fla. App. 2010). Counsel was ineffective for failing to object to the commingling of the contents of packages of suspected cocaine in trafficking of more than 400 grams case. Officers seized 27 small packets of white powder, a bag of white powder, and a bag of rock-like substance. The two bags were separately tested for cocaine and weighed 10.78 grams. The small packets were commingled 4-7 bags at a time in five different measures *without testing the contents of each bag before commingling*. The total weight of the substance from these bags was over 600 grams. The failure to test each bag was notable because officers had also found a large bag of benzocaine, which is not a controlled substance. In any event, the evidence was insufficient to establish that there were 400 grams of cocaine, as each individual packet contained approximately 14-28 grams and the court could be sure only that 5 of the packets contained cocaine.

Smith v. State, 689 S.E.2d 629 (S.C. 2010). Counsel ineffective in criminal sexual conduct with minor case for failing to object to improper hearsay from a "forensic interviewer" corroborating the alleged victim and asserting her statements were "believable" and that she had no reason "not to be truthful." Counsel's conduct was deficient, as corroborative witness testimony, under SCRE Rule 801(d)(1) is limited to time and place of the alleged assault. The testimony here far exceeded that and there was no valid strategy by counsel to allow this. Prejudice established as the case "hinged" on the alleged victim's credibility, there was otherwise an absence of overwhelming evidence of guilt, and the state relied heavily on this improper testimony in closing

arguments.

State v. King, 248 P.3d 984 (Utah App. 2010). Counsel ineffective in attempted forcible sexual abuse case for failing to object to the prosecutor's improper statements in closing argument urging the jury to consider matters not in evidence. The defendant was accused of inappropriately touching his daughter's friend during a "tickle fight" with both girls during a sleep over at his home. The alleged victim testified the touching lasted for "two to three minutes." The daughter testified she saw no inappropriate touching during the "tickle fight" After making the allegations, an acquaintance of the alleged victim who testified for the defense, overheard her say, "I am so glad that nobody found out that I lied." During closing arguments, the prosecutor suggested, without evidentiary basis, that the reason for this statement was that she was only expressing concern that people would think she was a liar. Likewise, without evidentiary basis, the prosecutor argued the incident lasted just "a few seconds" during which the defendant's daughter had been looking away or distracted. While counsel can argue inferences, the prosecutor "went much further in 'spinning' the evidence to suit his purposes" and encouraged the jury to consider matters not in evidence. Likewise, the defense counsel, rather than objecting, basically agreed that "the encounter 'was probably fairly quick,' arguably conceding that the sexual touching actually occurred." Cumulative prejudice established, in combination with the "plain error" in the prosecution's misconduct, as the evidence of guilt was "scant" and relied almost exclusively on the alleged victim.

2009: ***State v. Shanklin***, 925 N.E.2d 161 (Ohio App. 2009). Counsel ineffective in grand theft case for failing to object to numerous instances of inadmissible hearsay by detectives. In essence, the defendant borrowed money from the alleged victim using a purchase order as collateral. Charges were brought when the defendant's "payment" checks were bounced for insufficient funds. During trial, without objection, detectives testified, based on information received only through third parties who did not testify at trial, that the purchase order was invalid and fictitious. This testimony was not only inadmissible hearsay, but, in one instance, left the jury with the impression that one third party admitted the purchase order was phony, when the transcript of the officer's phone interview with that third party revealed that the third party said the purchase order was okay. Counsel's conduct was deficient and prejudicial as the state's whole case was based on the argument that the purchase order was "a sham."

Holman v. State, 674 S.E.2d 171 (S.C. 2009). Trial counsel ineffective in case involving multiple charges arising from a shooting incident due to counsel's failure to object to admission of handgun found in defendant's apartment that had no relevance to the offenses for which the defendant was charged. "[T]he failure to object to this clearly inadmissible evidence was ineffective assistance of counsel" not explained by a valid trial strategy. Prejudice established.

2008: *Antunes-Salgado*, 987 So. 2d 222 (Fla. App. 2008). Counsel ineffective in cocaine trafficking and conspiracy case for stipulating to the admissibility of the postarrest and post-*Miranda* statements of co-defendants through the police officer who took their statements. Each of the statements “minimized the respective declarant's involvement in the offenses and shifted the bulk of the involvement to [the defendant].” The statements were not admissible as being in furtherance of the conspiracy, statements against interest to the extent the statements inculpated the defendant, nonhearsay “verbal acts” (showing the effect of a statement on the defendant), or under any hearsay exception. The statements were inadmissible under *Crawford v. Washington*, 541 U.S. 36 (2004), which specifically holds that statements made during police interrogations are testimonial and therefore inadmissible. Prejudice found because, without these statements, the state could not establish the “agreement” element of the conspiracy charge, which was established solely through the inadmissible hearsay statements. Prejudice also found on trafficking charge when the evidence was disputed at trial. No strategy could excuse the ineffectiveness because “counsel conceded the admissibility of inadmissible statements that ultimately convicted his client without having researched the admissibility issue. Generally, important legal concessions are made after, not before, the applicable law is researched.”

Cobb v. State, 658 S.E.2d 750 (Ga. 2008). Counsel ineffective in murder case for failing to object to improper hearsay testimony from a state firearms examiner. The examiner testified that bullets and casings found at the crime scene were from a .45 caliber pistol. A holster had been found in a search of the defendant's apartment. The expert testified that she called the manufacturer, gave the model number, and was told the holster was a Colt .45 pistol. Counsel's conduct was deficient because counsel failed to object to this testimony until the state attempted to elicit the testimony a second time. Prejudice was established because the testimony bolstered the only eyewitness, who was a crack addict with inconsistencies in her testimony, and the state's evidence was not overwhelming as evidenced by two prior hung juries.

State v. Reynolds, 746 N.W.2d 837 (Iowa 2008). Counsel was ineffective in counterfeit money orders case for failing to object to hearsay testimony. An employee of the bank that cashed the money orders testified, without objection, that she received emails from the Federal Reserve indicating the money orders were counterfeit. While counsel objected successfully to admission of those emails, counsel failed to object to this testimony, which was inadmissible as offered under the Business Records exception.

Wood v. State, 260 S.W.3d 146 (Tex. App. 2008). Counsel ineffective in DWI trial for failing to object to admission of evidence of a prior DWI conviction. Prejudice found because the evidence of guilt was not overwhelming.

Crawford v. State, 256 S.W.3d 150 (Mo. App. 2008). Counsel ineffective in murder case for failing to consistently object to the state's repeated cross-examination of the defendant about the veracity of other witnesses.

2007: *People v. Davis*, 879 N.E.2d 996 (Ill. App. 2007), *appeal denied*, 888 N.E.2d 1186 (Ill. 2008). Counsel ineffective in murder case for failing to adequately challenge and rebut "lip print" identification testimony alleging that the defendant's lip prints were on duct tape found at the crime scene. Counsel's conduct was deficient because this was the only physical evidence against the defendant and counsel knew it should be challenged. Counsel informed the defendant's family, who did not have additional funds to retain an expert, but did not attempt to retain an expert from his retainer fees or attempt to establish the defendant's indigence and get a court-appointed expert. The court found other bases, including court's extremely ill health prior to and during trial and failing to challenge the inconsistent eyewitness testimony, and found that "the cumulative effect of his errors was prejudicial."

**Sims v. State*, 967 So. 2d 148 (Fla. 2007). Counsel ineffective in capital trial for failing to object to evidence of a "canine-alert" to drugs in a car that had been driven by the defendant at the time of the murder. The defendant had been stopped by an officer on suspicion of driving a stolen vehicle, which the defendant had borrowed but had failed to return. During the stop, the defendant shot and killed the officer. The defendant abandoned the car, which was subsequently searched. Although there was a "canine-alert" for drugs, no drugs were found in the car and there was no evidence the defendant had ever used drugs or been involved in the sale of them. Counsel's conduct was deficient in failing to object to this "canine-alert" evidence or an officer's testimony that "the dog would alert to the scent of narcotics after the drugs had been removed." Counsel objected only when the defendant's parole officer was called to testify that parole would have been revoked if the defendant had been found in possession of drugs. The court overruled this objection. Counsel's conduct was also deficient in moving to strike the "canine-alert" evidence that laid the foundation for this testimony. All of this evidence supported the state's theory that the officer was killed because the defendant possessed drugs and was attempting to avoid a return to prison for violation of parole. Counsel admitted that there was no strategic reason for the failure to object and that he knew before trial that the state intended to offer this evidence, which was irrelevant since the defendant did not own the vehicle and no drugs were actually found in the car. Prejudice found because this evidence was essential to the state's motive theory and the state repeatedly relied on it in closing arguments.

People v. Hoerer, 872 N.E.2d 572 (Ill. App. 2007). Counsel ineffective in drug and involuntary manslaughter case for stipulating to the admission of the defendant's testimony from a codefendant's trial admitting that he entered into plea negotiations with the state. Counsel's conduct was deficient because a state rule of evidence prohibited this

testimony. Prejudice established because, under state law, admission of this evidence is “considered so devastating and prejudicial to a defendant that it constitutes reversible error absent a contemporaneous objection from trial counsel and even in the fact of overwhelming evidence of guilt.” *Id.* at 578.

State v. Butcher, 866 N.E.2d 13 (Ohio App. 2007). Counsel ineffective in rape and kidnaping case for failing to adequately object to hearsay testimony. The defendant was charged with raping two sisters in the same room at the same time. One sister was five and the other was six. Almost two months after the alleged incident the sister’s reported the alleged abuse and the identity of the abuser, the boyfriend of the aunt of one of the girls, to their grandmother, who relayed the information to the mother. During trial, counsel objected to the grandmother’s testimony concerning statements the girls had made to her but the trial court improperly admitted this testimony. During the mother’s testimony, which included double hearsay of what the girls said to the grandmother, who told her, counsel failed to object, however. Counsel also failed to timely object to improper hearsay testimony of the state’s medical expert. The mother had taken the girls to a private doctor initially for treatment. On the advice of Child Services, the mother then took the children for examination at the “Child Advocacy Center” where they were physically examined and interviewed in depth by the doctor. The Detective on the case did not interview the children and deferred to the doctor’s interview. Prior to trial, counsel had filed a motion in limine to exclude the doctor’s testimony about statements of the children because these were not made for the purpose of medical treatment. The court conditionally granted this motion unless a hearsay exception was established. When the doctor’s testimony and report, which also included the hearsay statements, was offered, however, counsel failed to object. Counsel’s conduct was deficient in failing to object to the mother’s double-hearsay testimony, which was based on the grandmother’s statements that counsel had objected to, and in failing to object to the Doctor’s testimony and report because “[t]he granting of a motion in limine alone will not preserve error for review.” It was also clear here that the doctor was “a ‘manufactured witness’” that “assume[d] the role of a police investigator” and testified to hearsay statements “under the guise that they were given for the purpose of medical diagnosis or treatment.” For example, the doctor testified that the identity of the perpetrator was important medically due to concerns about sexually transmitted diseases, but clearly was not concerned about that since the girls were not tested for STD. Considering both the court’s error and the IAC, the court found the denial of a fair trial because four different adults (grandmother, mother, doctor, and detective) testified and the doctor’s report also concluded that the defendant was the perpetrator based on inadmissible hearsay. Although the girls also testified,

The prejudice arises when numerous adults repeat the girls’ stories in court. If a statement is repeated often enough, it is more believable. Additionally, the repetition has the effect of the adults’

vouching for the veracity of the statements.

Prejudice was also clear because portions of the girls' testimony were suspect because inconsistent with each other and one girl could not even identify the defendant in the courtroom and the medical evidence was equivocal because it was "consistent with" but not "diagnostic of" abuse.

Fuller v. State, 224 S.W.3d 823 (Tex. App. 2007). Counsel ineffective in sexual assault of a child and indecency with a child case for failing to object to improper testimony from four witnesses "bolstering" the 15-year-old alleged victim's truthfulness and credibility. The child's teacher testified in the state's case-in-chief that she was a credible and truthful person. This testimony was improper because the relevant rule of evidence allowed testimony concerning the victim's character for truthfulness only after her character had been attacked. The defense cross-examination of her does not "open the door" to character for truthfulness evidence. Likewise, "a defense theory of fabrication (as opposed to recent fabrication) which generally denies the charges against a defendant is not the equivalent of an attack on the victim's general character for truthfulness so as to warrant the admission of character testimony." The alleged victim's mother, an expert in child sexual assault investigations, and a forensic interviewer also testified that they believed the alleged victim's allegations against the defendant. This testimony was improper and inadmissible. Counsel's conduct was deficient in failing to object to this evidence because "counsel's conduct in allowing the State unfettered and unchecked bolstering of the victim was so outrageous that no competent attorney would have engaged in it." The failure to object was not explained by strategy or tactics. "Where counsel's strategy is premised on an incorrect understanding of the law, we need not defer to that as a reasonable strategy." Prejudice found because the alleged victim's credibility was the only real issue at trial and the repeated objectionable testimony was also "emphasized . . . to the jury during [the state's] closing argument."

State v. Hendrickson, 158 P.3d 1257 (Wash. App. 2007), *aff'd on other grounds*, 198 P.3d 1029 (Wash. 2009). Counsel ineffective in second-degree identity theft case for failing to object to hearsay testimony from a Social Security Administration special agent that the owner of the social security card stated that his card had been lost and that no one had permission to use it. These statements were not admissible as business or government records and were "testimonial" and barred under *Crawford v. Washington*, 541 U.S. 36 (2004). Counsel's conduct was deficient and not explained by strategy. Prejudice found because this was the only evidence that the defendant did not have a valid reason to possess this card. Thus, absent counsel's error, there is a reasonable probability that the defendant would have been acquitted on this charge.

2006: McIntosh v. State, 941 So. 2d 1 (Fla. App. 2006). Counsel ineffective in attempted murder case for failing to object to the improper use of demonstrative evidence and

improper prosecutorial questioning and argument. The defense theory was that the defendant stabbed the victim in the neck with a pocketknife in self-defense. The stab wound was less than 3/4 inch across but left the victim partially paralyzed. Counsel was ineffective in failing to object when, during cross examination of the defendant, the prosecutor pulled out his own knife to demonstrate his theory that the defendant could not have pulled out his knife during the struggle and had come prepared to fight. Although the defendant had used an ordinary pocketknife, the prosecutor pulled out a knife that was 8 to 10 inches long, which was 3 times larger than what the defendant had used. Counsel did not object even though this knife was not in evidence and the prosecutor had given no notice of his intent to use it. Counsel also failed to address this issue when the jury returned from deliberations and asked, "What happened to the knife? And what are its dimensions?" Counsel did not request an instruction to clarify that the knife used by the prosecutor was not in evidence and was not intended to replicate the knife the defendant used, which was also not in evidence. Instead, counsel said nothing when the court instructed that "you've heard all of the evidence you're going to hear and seen all of the evidence you're going to see." Prejudice established because the evidence of self-defense was fairly strong and the jury's question revealed that the jury was influenced by the prosecutor's improper actions. Counsel also failed to object to the prosecutor's "completely improper" question to the defendant about whether he believed one of the defense witnesses, whose testimony was mostly helpful to the defendant, but included some bad information, which the defendant denied. This error was compounded when the prosecutor repeatedly restated in his closing arguments that the defendant called his own witness a liar, again without objection. While this error alone may not have been sufficiently prejudicial to require reversal, when "added to" the other error there was cumulative prejudice.

State v. Milne, 921 So. 2d 792 (Fla. App. 2006). Counsel ineffective in sexual battery and false imprisonment case for failing to request a mistrial due to the prosecutor's unsupported allegations during closing arguments. The defendant had told police at the time of arrest, consistent with his trial testimony, that he had consensual sex with the victim. The state had successfully excluded evidence of the prior consistent statements from evidence with a motion in limine. During arguments, however, the prosecutor implied that the defendant had tailored his trial testimony after hearing all the other witnesses testify.

Rose v. State, 846 N.E.2d 363 (Ind. App. 2006). Counsel ineffective in child molestation case for failing to object to the treating physician's opinion that the victim's allegations were truthful. Prejudice found in light of the inconclusive physical evidence in the case.

Bowman v. State, 710 N.W.2d 200 (Iowa 2006). Counsel ineffective in kidnaping and assault case for failing to object to the prosecutor's repeated cross-examination questions asking the defendant if the state's witnesses fabricated their testimony. These questions

were prohibited under clear state law. The defendant was prejudiced because the case depended on witness credibility to such a great extent that counsel presented two expert witnesses to testify concerning the impaired credibility of the state's intoxicated witnesses.

State v. Roberson, 924 So. 2d 1201 (La. App. 2006). Counsel ineffective in robbery case for failing to object to admission in evidence of the defendant's letter to the prosecution and cross-examination concerning the defendant's pretrial offer to plead guilty to a lesser included offense. Counsel's conduct was deficient because counsel was unaware of the state law making this information clearly inadmissible. Prejudice found.

2004: *Joncamlae v. State*, 598 S.E.2d 923 (Ga. App. 2004). Counsel ineffective in aggravated assault case for failing to object to tainted in-court identifications of the defendant by the two victims. Defense counsel learned only during the testimony of the victims that they had been shown a photo line-up, including the defendant's picture, the day before trial. Counsel conceded that her conduct was deficient because she was "in shock" at that point and failed to object or move for mistrial. Prejudice found because the witnesses "were not absolutely certain of their in-court identifications, and did not have excellent views of the defendants at the time of the attacks." One witness even admitted outright his reliance on the photograph of the defendant he had seen in the prosecutor's office.

Collier v. State, 596 S.E.2d 795 (Ga. App. 2004). Counsel ineffective in aggravated assault case for failing to object to the prosecutor's improper comments during closing argument. The defendant was charged in connection with several unrelated bar fights that he initiated. During the trial, evidence was admitted concerning two similar incidents, one of which resulted in a guilty plea to terroristic threats. The defendant claimed self defense or defense of others with respect to all four incidents. During the closing argument, the prosecutor, without objection, commented that he had taken part in a negotiated plea with respect to defendant's prior conviction for terroristic threats and was now asking for the jury's "forgiveness" for making the deal, which involved no confinement time, and that the jury should ensure confinement to protect the community from future danger. The prosecutor's arguments were impermissible use of similar transaction evidence and argument on future dangerousness, which was irrelevant to guilt or innocence. Counsel did not object solely because of his policy not to object in closing argument absent "blatant" error because objection just draws attention to the argument. The court rejected this as a "reasonable trial tactic" because of numerous state cases rejecting these same arguments as improper. Prejudice found, "not because the jury would have reached a different verdict, but because the case would never have been submitted to it for deliberation if defense counsel had moved for a mistrial."

People v. Jura, 817 N.E.2d 968 (Ill. App. 2004). Counsel ineffective in use of weapon by felon case for failing to object to the admission of hearsay portions of a radio call and to

the prosecution's use of that evidence. Three police officers testified and included hearsay statements identifying the suspect in initial radio calls about the incident. They further testified that the defendant matched these initial descriptions and the state relied on this testimony in closing argument, without objection, even though the court had sustained an objection to the testimony about the match. Prejudice found because the trial amounted to a credibility contest between the three officers and the defendant but the improper hearsay was repeatedly used by the state in argument and evidence as substantive evidence from a "concerned citizen" that made the radio call but never testified at trial.

People v. Young, 807 N.E.2d 1125 (Ill. App. 2004). Counsel ineffective in first degree murder case involving a shooting at a backyard barbecue where the defense was self-defense because counsel failed to object to the prosecutor's improper questions to the defendant and argument. The prosecutor improperly questioned the defendant concerning the veracity of other witnesses, confused the jury about the state's burden of proof, cross-examined the defendant about his post-arrest silence and prior bad acts, improperly vouched for witnesses and injected his own opinions in the proceedings. Counsel was also ineffective for admitting during cross-examine that he lacked the expertise to adequately cross-examine the state's pathologist, but failing to ask for a continuance that would likely have been granted. The cross of the expert actually bolstered the testimony of the expert. Counsel was also ineffective in failing to order gunshot residue tests of the victim's clothing, which the state had declined to order. The court declined to address whether each instance of deficient conduct would require reversal on its own because "[t]he process was tainted by the prosecution such that the arguable failures of the defense acting in concert therewith denied this defendant a fair trial.

Peterson v. State, 149 S.W.3d 583 (Mo. App. 2004). Counsel was ineffective in second degree murder case for failing to object to the prosecutor's improper rebuttal closing argument that suggested that the state had more than one eyewitness implicating the defendant, although only one eyewitness testified. Counsel's conduct was deficient because the prosecutor's argument was not supported by the evidence. Prejudice was found because "a prosecutor's assertions of personal knowledge . . . are apt to carry much weight against the accused when they should carry none. . . ." The improper arguments were "especially troublesome" in this case because there was no physical evidence implicating the defendant and the only eyewitness was a convicted felon with credibility problems.

Vaughn v. State, 607 S.E.2d 72 (S.C. 2004). Counsel was ineffective in drug case for failing to object to the prosecutor's closing argument stating what uncalled witnesses would have testified to. The state presented only the testimony of the arresting officer to support a finding that the defendant possessed drugs. In response to defense counsel's argument that there had been another officer in the car at the scene who did not testify, the prosecutor argued that the other officer would have testified consistently if called to

testify. Although the prosecutor was entitled to “some response” to the defense argument, the prosecutor’s argument was unfair. Prejudice was found because the state’s evidence was limited to the arresting officer. Moreover, during deliberations, the jury asked to see the “testimony” of the officer who was not called to testify.

Roberts v. State, 602 S.E.2d 768 (S.C. 2004). Counsel was ineffective in murder case for failing to adequately impeach a jailhouse snitch, who testified that he was 10 feet away in the cell next to the defendant in pretrial confinement and the defendant confessed to him. While counsel discussed with the defendant that the conversation was impossible due to the layout of the cells, counsel did not question the snitch about this or present any evidence on the issue. Counsel’s conduct was deficient because, if counsel had adequately prepared and presented the evidence, the evidence would have established that the snitches’ cell was 35-100 feet from the defendant and the cell block was extremely noisy. Any conversation between the snitch and the defendant would have been heard by numerous guards and inmates because the defendant would have had to yell to be heard over the noise. Although a “close case,” prejudice found because the snitch was a key witness and the state’s remaining evidence consisted almost entirely of testimony of a codefendant who had made four contradictory statements, including implicating a clearly innocent man in three of those statements. The jury had also asked “who was on trial” during deliberations.

Sessums v. State, 129 S.W.3d 242 (Tex. App. 2004). Counsel ineffective in indecency with a child case for failing to object to inadmissible expert testimony that improperly commented on the alleged victim’s truthfulness. The evidence at trial showed that the alleged victim’s mother found the five-year-old boy performing oral sex on her husband’s stepfather. Child Protective Services (CPS) investigated. During interviews of the victim, he stated that he was also sexually abused by the Defendant, who was his paternal grandfather. At trial, the State’s evidence consisted of testimony of four expert witnesses and the testimony of the victim’s step-grandfather, who said the victim had told him his bottom was sore because the Defendant had been “playing with it.” Each of the experts testified about the alleged victim’s statements to them and were then asked to explain and then to comment directly on the factors they used in determining if this child was telling the truth. This testimony was inadmissible. Counsel’s conduct was deficient “in failing to object to [this] clearly and unquestionably objectionable testimony of the most outrageous and destructive type. There is no conceivable strategy or tactic that would justify allowing this testimony in front of a jury.” Prejudice found because the entire trial hinged on statements of the alleged victim, who did not even testify, and the state specifically argued in closing that the child must be truthful because he had convinced these four experts.

*Capital Case

2003: *Orr v. State*, 584 S.E.2d 720 (Ga. App. 2003). Counsel ineffective in statutory rape case for failing to object to police officer's testimony that impermissibly bolstered the credibility of the alleged victim where credibility was a major issue on the element of penetration.

State v. Graves, 668 N.W.2d 860 (Iowa 2003). Counsel was ineffective in manufacturing and possession of marijuana case for failing to object to the prosecutor asking the defendant whether a police officer was lying, failing to object to the prosecutor's argument in which he accused the defendant of calling the officer a liar, and failing to object in the prosecutor's rebuttal argument when he repeatedly characterized the defendant as lying. In addition, the prosecutor improperly called the defense argument a "smokescreen," improperly asserted that the police officer had no motivation to lie because he would keep his job regardless of the outcome of the case, argued that he personally did not leave cash at other people's homes, and inaccurately declared that if the jury believed the police officer it would have to find the defendant guilty. The court found that all of these arguments were improper and that counsel could not reasonably have concluded that failing to object was sound trial strategy. Prejudice was found because the police officer's and the defendant's credibility were the primary issue in the case, and the state's case was relatively weak and circumstantial outside of the credibility issue.

5. IMPEACHING WITNESS

a. U.S. Court of Appeals Cases

2008: *Brown w. Smith*, 551 F.3d 424 (6th Cir. 2008). Counsel ineffective in sexual molestation of teenage daughter case for failing to investigate and obtain daughter's counseling records. Counsel's conduct was deficient because the state's case depended almost entirely on the daughter's credibility and counsel knew that the counselor, who saw the daughter both before and after the alleged assault, did not believe her. Counsel's alleged belief that the counselor would not have been a credible witness did not excuse the conduct.

[O]ur quarrel is not with trial counsels' decision to forego calling [the counselor] as a witness *per se*, but rather with the lack of any reasonable, timely investigation into what she might have offered the defense. Without ever seeking *in camera* review of the counseling records, . . . counsel could not reasonably have determined what value, if any, those records might have been to his defense, and could not properly have weighed the potential benefit of calling [the counselor] to the stand (whatever her perceived credibility) against the potential risk. Moreover, even if [the counselor] were never called as a witness, defense counsel could still have used the counseling records to impeach the daughter on cross-examination. But by the time defense counsel met directly with [the counselor] (for two to three minutes on the third day of trial), the daughter had already testified, and the opportunity to impeach her testimony directly had passed.

Prejudice established because the records also revealed inconsistencies in the daughter's statements to the counselor and her trial testimony. The court reviewed the issue *de novo* rather than under AEDPA's standards because the state court did not adjudicate this claim on the merits because the state court did not have the daughter's records before it through no fault of the defendant who had requested hearings and discovery and been denied until federal court.

2006: *Higgins v. Renico*, 470 F.3d 624 (6th Cir. 2006) (*affirming Higgins v. Renico*, 362 F. Supp. 2d 904 (E.D. Mich. 2005)). Under AEDPA, counsel was ineffective in murder case for failing to cross-examine the key prosecution witness because of lack of preparation. The defendant and the state's witness were the only people present when the victim was shot. The defendant made a statement, which was admitted in evidence, that the state's witness shot the victim. The witness, who said that the defendant was the shooter, did not show up for his scheduled testimony during trial and his preliminary hearing testimony

was read into the record. Two days later, the witness showed up and testified. Counsel informed the court that he had been provided with the witness' two prior statements several days before but had not reviewed the statements or prepared for cross-examination. The court recessed for 30 minutes, but counsel informed the court that he still was not prepared. The court would not delay longer and counsel asked no questions on cross-examination. The state court made a conclusory finding that there was no prejudice but did not address the issue of deficient conduct so this issue was reviewed de novo. Counsel's conduct in failing to adequately prepare for cross-examination was deficient and not justified by strategy. Prejudice was found because the witness at issue was the only witness that directly implicated the defendant as the shooter. There was no cross even though the witness (1) had a strong interest in the jury's finding since he was the only other person present at the time of the shooting; (2) had made two prior statements with inconsistencies; and (3) had gunshot residue on his hands after the shooting. In addition, the failure to challenge the testimony left the impression that the defense accepted the testimony. Likewise, the witness testified that he had not shown up earlier in the trial because he had been threatened by "people" and the failure to cross-examine left the impression that the threats came from the defendant when there was no evidence to support that inference. Finally, the preliminary cross-examination testimony was inadequate because counsel had been conducting only non-confrontational discovery at that time. In its AEDPA analysis, citing *Strickland*, the court held that the state court's finding of no prejudice was an unreasonable application of Supreme Court precedent.

Reynoso v. Giurbino, 462 F.3d 1099 (9th Cir. 2006). Counsel ineffective in murder case for failing to cross-examine state witnesses about their motivation for testifying. The crime went unsolved for two years and then a jail house snitch, after seeing advertisements about a \$25,000 reward on television, contacted police saying the defendant had confessed to him shortly after the crime. After another year, with the reward still being advertised on television and in newspapers, the police reinterviewed a witness interviewed the night of the murder and another witness, who allegedly saw the defendant near the scene the night of the murder, contacted the police. Although there was no physical evidence, both of these witnesses also identified the defendant. During trial, counsel cross-examined the snitch about his motivation in seeking the reward (\$10,000 of which he ultimately collected). Although counsel cross-examined the other two witnesses on other matters concerning credibility, counsel did not cross-examine them about the reward motivation. Counsel's conduct was deficient in failing to investigate or to question the witnesses on this matter because counsel knew about the reward. Prejudice was found because, if counsel had asked, she would have learned that both witnesses were aware of the reward and had asked police about it. Thus, they "may have had a motive to lie." (Both witnesses did ultimately collect \$7,500 each). Prejudice was also clear because the prosecutor emphasized in closing that these witnesses had no bias and "that neither had any reason or motive to lie." Under AEDPA, the state court's

decision was an unreasonable application of federal law. *Id.* at ____ (citing *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000)).

b. U.S. District Court Cases

2010: *Schoenauer v. United States*, 759 F.Supp.2d 1090 (S.D. Iowa 2010). Counsel ineffective in drug conspiracy case for failing to investigate and present impeachment evidence. The government presented expert testimony from an ATF auditor to establish the petitioner's wealth exceeded his income during the relevant time period. While he earned \$262,000, according to the government, he had available 2.9 million. While the defendant had requested that counsel obtain discovery and investigate to rebut this testimony, counsel believed this was a "side issue" and that this was a drug case, not a tax case." Thus, counsel did not move to exclude this testimony or investigate even though the defendant had been investigated by the IRS, who had seized all of his financial records. The defendant, who was an accountant, informed counsel the IRS found no unexplained income. At trial, there was no "direct evidence" of the defendant participating in the conspiracy. Thus, his conviction was primarily because of this "unexplained income" testimony. If counsel had investigated, a special agent with the IRS, would have testified that he had investigated a five year period at the prosecution's request looking for criminal violations and found none. He also would have testified explicitly that he found no evidence of unreported or unexplainable funds. The court noted in a footnote that the defense had not asserted a *Brady* claim due to the government's failure to disclose this information. Nonetheless, the court was "troubled" by the government's actions and, on rehearing, dismissed the indictment citing the impracticalities of retrial due to the passage of time and the "significant expense" to the defendant in defending himself the first time.

2004: *Harris v. Senkowski*, 298 F. Supp. 2d 320 (E.D.N.Y. 2004). Counsel was ineffective in second degree robbery case for failing to challenge the testimony of the robbery victim with her prior inconsistent description of the robber. Only thirty minutes after the robbery, the victim described her assailant as a black male standing 5'4" tall and weighing 130 pounds. The next evening, the victim, who was Asian, rode around the neighborhood with police officers and identified the defendant, who was then arrested. The defendant was 6' tall and 220 pounds. Prior to trial, counsel moved to suppress the identification as being unduly suggestive, but counsel never addressed the victim's prior description and the motion was denied. During the trial, the victim and the police officer that drove her around were the only state's witness. Counsel did not cross-examine the victim concerning her prior description of the defendant even though his sole argument in defense was mistaken identification. The defendant never squarely claimed that trial counsel was ineffective on this basis in state court and, therefore, the state courts never ruled on the issue. The government explicitly waived any procedural or exhaustion issues though. Analyzing the case under pre-AEDPA standards, the court found that counsel's conduct was deficient and that "[a] more compelling example of ineffective

representation is difficult to fathom.” While counsel alleged strategic reasons for his failure, the court found that each reason was “ludicrous.” Even if counsel chose not to cross-examine the victim for an alleged strategy, counsel still could have offered the complaint report into evidence as a business record or called the police officer that took the complaint as a witness. Prejudice found because the government’s case rose or fell on the strength of the victim’s testimony, but the jury never heard about her prior, strikingly inconsistent identification in the case.

c. State Cases

2008: *Miller v. State*, 665 S.E.2d 596 (S.C. 2008). Counsel ineffective in armed robbery case for failing to cross-examine the defendant’s girlfriend, a state witness, regarding the similarities of three armed robberies she and the defendant’s nephew were charged with. Specifically, the girlfriend’s car was used in each robbery, a similar handgun was used, and the victim’s description of the assailant more closely matched the nephew than the defendant. Prejudice established because the defense argued mistaken identity and third-party guilt, which was the primary defense. In addition, the girlfriend’s credibility was “questionable at best” because she had initially implicated the defendant in an armed robbery, in which she and the nephew were charged, before she learned he could not have committed the crime because he was in jail at the time.

Millam v. State, 745 N.W.2d 719 (Iowa 2008). Counsel ineffective in sexual abuse case for failing to present evidence of the alleged victim’s prior, false accusation of sexual abuse. The alleged victim was the daughter of the defendant’s girlfriend and she had previously alleged sexual abuse by her mother’s previous boyfriend but then recanted the accusation. Counsel made no attempt to present this evidence even though there was no physical evidence and no witnesses other than the alleged victim. Counsel believed the evidence was inadmissible under the rape-shield law which excluded evidence of “past sexual behavior” of the victim. The Iowa court had held, prior to the enactment of the rape-shield law, that prior false allegations were not inadmissible under general relevance considerations, but had not addressed the issue under the statute at the time of the defendant’s trial. The court subsequently held that prior false allegations are not “sexual behavior” prohibited by the statute and this evidence is admissible if the defendant making a showing that the alleged victim made the statements and the statements were false, based on a preponderance of the evidence. Counsel’s conduct was deficient because “the test to determine whether counsel is required to raise an issue” is based on “a normally competent attorney.” “This test does not require an attorney to be clairvoyant, but rather to research the relevant legal issues and determine whether, given the circumstances of the particular case, the issue is ‘worth raising.’” Here counsel conducted no research. If he had researched, he would have found “that many jurisdictions had concluded that prior false claims of sexual abuse were not protected by their rape-shield laws.” In addition the plain wording of the statute was clear because “it

refers to sexual behavior, and quite simply, claims of sexual abuse are not sexual behavior.” Prejudice was clear in that this evidence “could have greatly impugned” the alleged victim’s credibility. This was especially so since “her own mother doubted her claims . . . due to her prior false claims.”

2006: *J.J. v. State*, 858 N.E.2d 244 (Ind. App. 2006). Counsel ineffective in burglary and theft case for failing to inform the jury that the defendant’s alleged accomplice had been granted use immunity. Prejudice found because the witness’ testimony was of great consequence to the jury’s consideration of the case and the prosecutor commented that the witness had “cooked himself” by his testimony that he had participated in the crime with the defendant, implying that the witness was credible because he would suffer for his own admission when the prosecutor knew he would not.

2005: *Thompson v. Commonwealth*, 177 S.W.3d 782 (Ky. 2005). Counsel ineffective in reckless homicide and persistent felony offender case for failing to challenge the accident reconstruction testimony of the investigating officer. The case involved the death of an eight year old child that ran into the street chasing a puppy and was hit by the defendant’s motorcycle. Testing revealed alcohol in the defendant’s blood, along with traces of marijuana, pain reliever, and anti-depressant medication. The investigating officer used an English study based on the running speed of eight year olds, distance, and the defendant’s estimated speed and concluded that the defendant should have been able to stop with 26 feet to spare. Even without a defense expert, counsel should have realized that the officer made a mathematical error and his own formula would have revealed that the defendant could not have stopped his motorcycle until 40 feet after the point of impact. Counsel did not retain his own expert because the defendant consistently told him that he never saw the child before the impact. Thus, counsel believed the possible braking distance was irrelevant. Counsel’s conduct was deficient because his only defense was that the accident was unavoidable and counsel knew that the prosecution would rely on the officer’s testimony that it was avoidable with normal reaction times. It was unreasonable to fail to attempt to challenge this testimony because “jurors are undoubtedly greatly influenced by the testimony of someone deemed an ‘expert.’ This is especially true if the only countervailing testimony comes from the defendant, the sole person with a strong motive to lie (if the truth would deem him guilty of the crime charged).” In addition, the expert’s testimony was so clearly erroneous in this case that “a non-mathematical expert discovered it on simple review of the calculations.” Prejudice found because if counsel had performed adequately, the expert would have had to admit that the defendant “could not have stopped” in time.

2004: **Black v. State*, 151 S.W.3d 49 (Mo. 2004). Counsel ineffective in capital trial for failing to impeach three state witnesses with prior inconsistent statements that supported the defense theory that the killing was committed in self-defense rather than as the result of deliberation. The case involved a black victim and a white defendant in a road fight that

*Capital Case

“grew out of [the defendant’s] race-based reaction to the victim's behavior toward [the defendant’s girlfriend].” Counsel failed to cross-examination one eyewitness with his prior statement, omitted at trial, that he saw the victim get out of his vehicle and hit the defendant with a beer bottle. Another eyewitness was not crossed on his prior statement that the two men both got out and exchanged blows, which was at odds with his trial testimony. Finally, another eyewitness was not crossed with evidence the victim was yelling and exited his vehicle without injury, even though she testified at trial that the victim remained in his vehicle. Counsel also failed to cross-examine a state witness concerning inconsistent statements about how alcohol the victim had prior to the altercation. Prejudice established because “counsel's failures went to the key issue of deliberation” as evidenced by the jury’s request for additional instructions defining “cool reflection” in the first-degree murder verdict form. Reversal required even though each of the state witnesses did not testify in post-conviction. “[A] movant is not required to reenact how a hypothetical trial would have proceeded had particular evidence been utilized, but to show that counsel knew of the evidence and was ineffective in failing to use it, to movant's prejudice.”

6. ELICITING DAMAGING EVIDENCE AND MAKING DAMAGING ARGUMENT

a. U.S. District Court Cases

2009: *Ramos v. Lawler*, 615 F. Supp. 2d 347 (M.D. Pa. 2009). Under AEDPA, counsel ineffective in conspiracy to commit murder case for eliciting testimony from the victim that the co-defendant had pled guilty to conspiracy to commit murder. Counsel's conduct was deficient because this evidence in no way negated the defendant's culpability and was damaging. "[T]he prosecutor relied extensively, almost exclusively, on the [evidence of the co-defendant's guilty plea] during his closing argument." Prejudice established even though the trial court instructed that the substance of the guilty plea could not be used as evidence of guilt.

[T]here is a presumption that a jury will obey a jury instruction. However, this is only a *presumption* and can be rebutted by record evidence and the circumstances of the case.

Here, there was prejudice because there was very little, if any, evidence of a conspiracy to commit murder, although there was of conspiracy to assault and assault. The jury's guilty verdict on the conspiracy to commit murder charge "indicates that it necessarily and improperly considered [the] guilty plea as substantive evidence" of the defendant's guilt. The state court's decision was an unreasonable application of clearly established law.

b. State Cases

2007: *People v. Bailey*, 872 N.E.2d 420 (Ill. App.), *appeal denied*, 879 N.E.2d 933 (Ill. 2007). Counsel ineffective in bench trial for possession of crack with intent to distribute for eliciting damaging evidence in cross-examination. A police officer testified that he observed an "unknown person" yelling "Rocks" to passing cars. When cars stopped, he would direct them to an alley where the defendant would exchange money for drugs. The officer witnessed four such transactions in about 35 minutes before arresting the defendant who had cash and drugs on him. Counsel's conduct was deficient because during cross counsel elicited further information that the officer witnessed the defendant provide money to the "unknown person" several times and included that information in his case report, which counsel either had not read or did not think about. Counsel's lack of knowledge of the report, failure to move to strike the officer's initial non-responsive answer, and "digging the hole deeper" with further questioning was not explicable by any valid trial strategy. Prejudice found because this was "key" evidence in the case and the trial court clearly relied on it and said so.

Robertson v. State, 214 S.W.3d 665 (Tex. App. 2007). Counsel ineffective in aggravated

assault case for eliciting testimony from the defendant that he was incarcerated on two convictions and that he was in possession of a knife at the time of the previous arrests. Prejudice found because this testimony opened the door for the state to elicit testimony on cross-examination that the defendant had two prior drug convictions with “deadly weapon findings on both charges.” The state used this evidence in argument to undermine the defendant’s credibility in arguing self-defense.

2006: *Glancy v. State*, 941 So. 2d 1201 (Fla. App. 2006). Counsel ineffective in burglary with a sexual battery case for eliciting damaging character evidence against the defendant. Specifically, counsel’s conduct was deficient for eliciting testimony from the alleged victim that she did not like the defendant because he gave her minor children pot, booze, and cigarettes and because she believed that he had been breaking into her house for two years, stealing her underwear, and leaving “dirty magazines” behind. Counsel also elicited testimony from her son that the alleged victim did not like the defendant because he had been “in and out of prison.” Prejudice found.

Bowers v. State, 929 So. 2d 1199 (Fla. App. 2006). Counsel ineffective in burglary and grand theft case for questioning the defendant concerning his prior criminal convictions and eliciting numerous details that the State would not have been entitled to elicit since the state’s examination would have been limited to the number of felony convictions or convictions for misdemeanors involving dishonesty or false statement. Prejudice found because there was no physical evidence and the trial hinged on credibility issues. By eliciting information concerning prior convictions for burglary and grand theft, trial counsel impugned his client’s credibility in front of the jury. While counsel’s strategy to be completely candid with the jury so that the defendant’s testimony would be more believable, “counsel’s execution of the strategy defeated the intent” because the information was presented in such a manner, due to counsel’s failure to properly prepare with the defendant, that it appeared the defendant was trying to withhold some information. Thus, the court held “that counsel’s strategy to bolster his client’s credibility with candor was ‘patently unreasonable.’”

2005: *Whitaker v. State*, 622 S.E.2d 916 (Ga. App. 2005). Counsel ineffective in burglary case for introducing an unredacted copy of previous convictions for two of the state’s key witnesses that also showed that the defendant had been charged with the same crimes (possession of tools for the commission of a crime, criminal trespass, and burglary). Counsel’s conduct was deficient and not explained simply by counsel’s strategy to impeach the witnesses. Counsel “did not offer any explanation for failing to redact the exhibits, which she knew implicated her client in other crimes.” Prejudice found because the state’s case rested primarily on the testimony of these two alleged accomplices. The evidence showing that the defendant had been previously charged along with these witnesses was especially damaging because it “may have caused the jury to give additional credence to the testimony of the state’s star witnesses.”

People v. Orta, 836 N.E.2d 811 (Ill. App. 2005), *appeal denied*, 844 N.E.2d 970 (Ill. 2006). Counsel ineffective in bench trial for possession of drugs with intent to deliver drugs case for eliciting testimony from police officers that enabled the State to prove an essential element of the charge. Counsel's conduct was deficient because counsel elicited information that a prior "control transaction" in which the defendant sold drugs to an informant, over the state's objection. Counsel also elicited testimony that there were a lot of male clothes in the apartment (when the defendant's argument was that he had no control or possession) and the drugs were found in a shaving bag, along with money, a scale, and the defendant's mail, which the state later attempted to move into evidence. Counsel's conduct was deficient. "A person charged with a crime has the right to expect his lawyer's questions to prosecution witnesses will not help the State prove its accusations." Prejudice found primarily because counsel elicited testimony about the prior "control transaction" with the state objecting and the trial court trying to discourage counsel from presenting this evidence. Counsel's reason for offering this evidence was because he was attacking the officer's credibility. The court rejected this as a valid strategy. This evidence was prejudicial because the court relied on it in finding an intent to deliver. The evidence about the clothes was also prejudicial because the court relied on it in finding constructive possession. Without all of the evidence elicited by the defense counsel the state's case for possession was solely that the defendant had keys to the apartment where the drugs were found.

2004: **State v. Davis*, 872 So. 2d 250 (Fla. 2004). Counsel ineffective in capital case for his statements during voir dire expressing racial animus and admitting his own racial prejudice where the Defendant, an African-American male who was 22 at the time, was accused of stabbing to death a 73-year-old white woman, but there was no apparent racial motivation for the crime. During voir dire counsel stated, "Sometimes I just don't like black people. Sometimes black people make me mad just because they're black." In closing in sentencing, counsel reminded the jurors that none had expressed the same feelings and that they promised not to consider race. Counsel's strategy in making the comments was to get the jurors to "drop the mask" and acknowledge hidden feelings about race. The court found that "an explicit expression of racial prejudice can[not] be considered a legitimate tactical approach. Whether or not counsel is in fact a racist, his expressions of prejudice against African-Americans cannot be tolerated." Prejudice was found because "the expressions of racial animus voiced by trial counsel" would have "unnecessarily tended either to alienate jurors who did not share his animus against African Americans . . . or to legitimize racial prejudice without accomplishing counsel's stated objective of bringing latent bias out into the open." Counsel's expressions of racial bias also may have affected his performance in both the guilt and penalty phases of trial. In the guilt phase, trial counsel rested without presenting a case, rather than present two African-American witnesses whose testimony would have implicated others in the murder because another white witness would contradict their testimony and counsel found the white witness to be more credible. The trial court also found counsel to be

ineffective in sentencing for failing to obtain records and witnesses and never visiting the Defendant's family or neighborhood.

**People v. Morris*, 807 N.E.2d 377, *overruled on other grounds*, 813 N.E.2d 93 (Ill. 2004). Counsel ineffective in capital case for discussing in great detail an unrelated murder committed by the defendant in opening, even though the trial court had previously agreed to exclude all evidence of the unrelated murder from trial. Defendant was charged, along with several codefendants, with the robbery and murder in Chicago of someone believed to be a drug dealer. Several days before, the defendant had killed a man in a drug-deal gone bad scenario. In opening counsel conceded the defendant's participation in the charged crimes and discussed the unrelated murder in great detail. The defendant subsequently testified with respect to his involvement in both murders and the state offered evidence on both. In closing argument, the State repeatedly reminded the jury of the unrelated murder. Counsel conceded guilt in opening because her strategy was to minimize the defendant's culpability and essentially plead for jury nullification. While this was a proper strategy, in light of the significant evidence against the defendant, the problem in this case is that counsel also conceded guilt to an unrelated murder that had been excluded from the state's case prior to trial. Counsel did so because she misunderstood the court's pretrial ruling to allow the state to use this evidence in rebuttal. Likewise, the defendant's acquiescence was immaterial because it was undoubtedly based on the same misunderstanding. Thus, counsel's actions "were not the product of an informed, strategic choice. Rather, these actions were the product of a mistaken belief that the trial court had ruled evidence of the [unrelated] murder admissible at trial when, in fact, the trial court had ruled just the opposite." Prejudice was found because of the "severe repercussions at trial." First, counsel's jury nullification strategy was dependent on the jury sympathizing with the defendant to some extent. This strategy was completely destroyed by evidence of the defendant's guilt of the unrelated murder committed just 36 hours before the charged offense. Thus, counsel's actions "eviscerated the minimal trial strategy that was available to her." "Counsel's deficiencies in this case are distinguishable from typical trial error 'not [in] degree but [in] kind.' *Bell v. Cone*, 535 U.S. 685, ----, 122 S.Ct. 1843, 1851, 152 L.Ed.2d 914, 928 (2002). For in all practical effect, as a result of defense counsel's actions, defendant stood before the jury throughout the trial with no defensive strategy whatsoever."

State v. Barr, 814 N.E.2d 79 (Ohio App. 2004). Counsel was ineffective in fleeing and eluding case for opening the door in cross-examination of a police officer to admission of the defendant's statements that had previously been suppressed as involuntary. Prejudice found because without the statements there was no evidence the defendant knew he was being followed by police.

*Capital Case

2003: *Emilio v. State*, 588 S.E.2d 797 (Ga. App. 2003). Counsel was ineffective in drug trafficking case for admitting evidence of bad character. The defendant and his girlfriend had been arrested following a traffic stop for drugs found in the car. The girlfriend, who had been driving, pled guilty to a lesser offense and testified at the defendant's trial. During cross-examination of her, counsel offered into evidence a letter the girlfriend had written the defendant, which revealed that the girlfriend had asked the defendant to commit a crime, but also included a statement that the defendant was wanted in five different states. Counsel was ineffective for failing to redact the damaging portions of the letter or to even inform the jury that the defendant was not actually wanted in five states. Counsel's conduct was prejudicial because the bad character evidence created a reasonable probability that the outcome would have been different since the evidence of the defendant's guilt was not overwhelming.

7. CONCEDED GUILT/CONTRADICTING CLIENT (State Cases Only)

- 2011:** *Benitez-Saldana v. State*, ___ So.3d ___, 2011 WL 2462964 (Fla. App. June 22, 2011). Counsel ineffective in robbery and burglary with assault or battery for conceding that the defendant was guilty on both charges. Counsel informed the court prior to trial that he would concede theft, consistent with the defendant's statement to police. During cross-examination and argument, however, counsel conceded facts sufficient to establish both charges. Thus, while counsel argued the defendant was not guilty of the charged crimes, he made factual assertions that amounted to admissions to the charges. These admissions "were unintentional and not a matter of trial strategy." Even assuming counsel was attempting to convince the jury to misapply the law, this was not a reasonable strategy when the jury could have acquitted if it believed the defendant's statement. Prejudice found as "this case boiled down to a credibility contest" and the state's case was not overwhelming.
- 2010:** *State v. Maready*, 695 S.E.2d 771 (N.C. App. 2010). Counsel was *per se* ineffective in murder case for conceding guilt of involuntary manslaughter in closing arguments. Because North Carolina courts require the defendant's explicit consent prior to any concession of guilt, even after *Florida v. Nixon*, 543 U.S. 175 (2004), reversal was required. The record did not reflect that "Defendant was asked if he consented to these admissions, or that Defendant had given informed and voluntary consent to these admissions of his guilt."
- 2009:** **Cooke v. State*, 977 A.2d 803 (Del. Supr. 2009). Prejudice was presumed, on direct appeal, due to ineffective assistance of counsel and the trial court's failure to intervene when defense counsel pursued a guilty but mentally ill verdict over the objection of the defendant and while the defendant was arguing and testifying that he was innocent and not mentally ill. The trial court was informed of the conflict more than a year prior to trial. The defendant repeatedly objected to counsel's theory. The state moved *in limine* to preclude defense counsel from presenting the defense over the defendant's objections. Nonetheless, the trial court did not inquire and made no real effort to resolve the conflict. From defense counsel's opening statement focusing entirely on pursuit of a GBMI verdict, the stage was set for chaos. Throughout the state's case, there were repeated outbursts by the defendant in the jury's presence and in the jury's absence, all related to his objections to the GBMI defense. The defendant was removed from the courtroom at times. During some of those times, he was not even allowed to watch the proceedings. During other times, he was in a holding cell watching the proceedings by television. Some of the removals from the courtroom were requested by defense counsel. During the defense case, counsel presented evidence that the defendant confessed to a mental health expert, although the defendant in his own testimony denied making the statement. Defense counsel did not question the defendant during his testimony. He was instead allowed to testify on direct without anyone questioning him. In his testimony, he

informed the jury that he disagreed with defense counsel, that he was innocent, and that he was not mentally ill. The defendant was excluded from the courtroom during the state's rebuttal, summations, and the charge, but watched by television. Defense counsel argued that the defendant's denials of mental illness was proof of it and argued that the defendant was guilty despite his testimony that he was innocent. After conviction, defense counsel continued to assert the defendant's guilt in sentencing, but argued that his mental illness was mitigating. The court held that the trial court violated the defendant's Sixth Amendment rights by permitting defense counsel's arguments and by failing to inquire into the issue and to resolve it. "[C]ounsel cannot undermine the defendant's right to make . . . personal and fundamental decisions by ignoring the defendant's choice and arguing affirmatively against the defendant's chosen objective." Here, counsel's actions infringed the defendant's right to plead not guilty and negated the defendant's right to testify in his own defense. Counsel refused to call him, although they believed his claims of innocence were due to mental illness rather than perjury. They also presented evidence of his confession to a mental health expert without obtaining the defendant's waiver of the psychotherapist-patient privilege. Counsel also deprived the defendant of his right to an impartial jury because counsel stated from the opening that he was guilty but mentally ill. The jury's impartiality was also likely affected by the defendant's frequent outbursts and his absences from the courtroom when these were caused by defense counsel's actions. The affect on the jury is also "apparent" from counsel's argument directly contradicting the defendant's testimony and asserting his guilt despite his not guilty plea and claims of innocence. The impartiality of the jury was also compromised in sentencing because counsel conceded the presence of the aggravating factors that made the defendant death eligible. This situation was not comparable to that in *Florida v. Nixon*, 543 U.S. 175 (2004) because the defendant here did not acquiesce silently to counsel's actions. Here, the defendant adamantly objected repeatedly to counsel's actions prior to and during trial. Thus, this was not a situation where the standard from *Strickland v. Washington*, 466 U.S. 668 (1984) was applicable. This was a case to be reviewed under *United States v. Cronin*, 466 U.S. 648 (1984). There was a breakdown in the adversarial system in this case in two ways. First, counsel did not "assist" the defendant in obtaining his objective of a not guilty verdict. Second:

[C]ounsel not only failed to subject the prosecution's case to meaningful adversarial testing, but also undermined the due process requirement that the State prove [the defendant's] guilt—and his eligibility for the death penalty—beyond a reasonable doubt. . . . [O]n the issue of his guilt and his eligibility for a death sentence—the elements of capital murder—[the] defense attorneys' alignment with the prosecutors was complete.

Counsel's conduct "was inherently prejudicial and does not require a separate showing of prejudice." Reversal was also required due to the trial court's failure to inquire into the propriety of the representation. In essence, the trial court failed to protect the defendant's

right to a fair trial “by failing to intervene and provide a remedy for this error, notwithstanding [the defendant’s] explicit requests.” “In this instance, the trial judge’s obligation to ensure that the defendant receives a fair trial required the trial judge to instruct counsel not to pursue a verdict of guilty but mentally ill against [the defendant’s] wishes.”

2004: *In re Welfare of B.R.C.*, 675 N.W.2d 348 (Minn. App. 2004). Counsel ineffective in juvenile damaging property case where counsel conceded the juvenile’s guilt of shooting at a pickup truck and the record failed to show that the juvenile consented in this strategy. The court declined to assume acquiescence. “Given a juvenile’s lack of maturity, we believe that a juvenile defendant’s consent should be express and placed on the record before a concession of guilt can be made.” Counsel’s concession was inconsistent with the juvenile’s prior statements to police and the statements of his accomplices. Counsel’s references to admissions in the juvenile’s withdrawn guilty plea were improper, because evidence regarding a withdrawn guilty plea may not be admitted in a criminal trial under state law. Counsel apparently made the concession in an attempt to convince the court to find the juvenile guilty of a misdemeanor and avoid a felony conviction. “While it may be a reasonable trial strategy to concede an adult defendant’s guilt to a lesser-included offense in the hope of persuading the fact finder to acquit him or her of the greater charge, juvenile dispositions are not necessarily tied to a misdemeanor/felony distinction. Thus, the strategy of appellant’s attorney was not reasonable in this juvenile proceeding.” Counsel also incorrectly assumed that by conceding guilt to a misdemeanor, the juvenile could not be held accountable for the entire amount of restitution.

**State v. Matthews*, 591 S.E.2d 535 (N.C. 2004). Prejudice presumed in capital trial where defense counsel conceded the defendant’s guilt to second degree murder without the defendant’s consent, which must be established by “more than implicit consent based on an overall trial strategy and the defendant’s intelligence.”

People v. Washington, 785 N.Y.S.2d 885 (N.Y. Co. Ct. 2004). Counsel ineffective in robbery case for conceding guilt to a lesser included offense where the defendant did not consent and objected during the trial to counsel’s strategy. While counsel’s strategy was sound, “an attorney cannot concede guilt at trial . . . without consent of the accused” because this is the equivalent of a guilty plea which “must be entered voluntarily by the defendant.” While the court acknowledged that most courts reviewing this issue require a showing of prejudice under *Strickland* and that such an analysis might result in affirmance, the court held that New York courts have declined to follow *Strickland* because “the state constitution has been interpreted to set a higher standard of effectiveness for criminal attorneys than the federal constitution.” Here, counsel’s concession not only denied the effective assistance of counsel but also denied the defendant a fair trial because the state was not required to prove identification.

9. INSTRUCTIONS

a. U.S. Court of Appeals Cases

- 2010:** *United States v. Luck*, 611 F.3d 183 (4th Cir. 2010). Counsel ineffective in drug case for failing to request an “informant instruction,” when the government’s evidence consisted only of the investigating officer and two paid informants. One of the informants approached police offering assistance because “she wanted to reduce her exposure for a robbery charge she was facing.” The other approached police to benefit the first informant, who was the mother of his child, and to “earn money.” While a buy in which the first informant was wired was conducted, the image and sound quality was too poor to record events. The officer also did not do a thorough search of the informant prior to the “buy.” A search warrant of the defendant’s house revealed scales and baggies commonly used to package narcotics, but no drugs. Without deciding “whether and when an informant instruction is required,” the court held that “on these facts . . . counsel erred in failing to request an informant instruction.” “This case presents the classic case of a professional informant paid for his services,” with “little corroborating evidence.” “[A] reasonable lawyer would have been concerned that the uncorroborated testimony of paid informants could have been ‘manufactured . . . out of whole cloth’ for the benefit of the informant alone. Because ‘counsel’s defense strategy seem[ed] to be focused on discrediting the government’s witnesses,’ there was no indication counsel’s failure to request the instruction was strategy. Prejudice established, even though the court gave ‘general instructions’ on witness credibility. “[T]he informant instruction is *sui generis*; it alerts jurors to the potentially unique problems that inhere where an individual is paid to inculcate a defendant.”
- 2005:** *Cox v. Donnelly*, 432 F.3d 388 (2nd Cir. 2005). Counsel ineffective in second degree murder case for failing to object to an erroneous jury instruction that impermissibly shifted to the defendant the burden of proving that he did not intend “the ordinary consequences of his voluntary acts.” The failure was due to counsel’s “ignorance of the law on point.” Under AEDPA, the state court holding was an unreasonable application of *Strickland*.
- 2004:** *Reagan v. Norris*, 365 F.3d 616 (8th Cir. 2004). Counsel ineffective in first-degree murder case for failing to object to the trial court’s instructions that failed to include an essential element of the crime – that the defendant “knowingly” caused the death. Counsel conceded that the failure to object was not strategic. Analyzing the case under the AEDPA, the court found that counsel’s conduct was deficient and prejudicial because the jury could have believed every aspect of the defense case (that the death was accidental) and still convicted of first-degree murder under the erroneous instructions.

b. U.S. District Court Cases

2005: **Baker v. Horn*, 383 F. Supp. 2d 720 (E.D. Pa. 2005). Counsel was ineffective in capital trial for failing to object to the trial court's instructions that permitted the jury to convict the petitioner of first degree murder under an accomplice liability theory without finding that the petitioner himself possessed the specific intent to kill, which was a required element under Pennsylvania law. Counsel's conduct was deficient because the state law was clearly established at the time of trial. Prejudice was found even though the jury could have convicted the petitioner either as a principal or an accomplice because the verdict sheet did not reveal which theory the jury used and the evidence was contradictory concerning the identity of the shooter. Although AEDPA applied the state court had not addressed the merits of this claim and the court reviewed the issues de novo.

c. State Cases

2011: *State v. Soboroff*, 798 N.W.2d 1 (Iowa 2011). Counsel ineffective in threat to contaminate a water supply case for failing to request instructions that defined "true threat." The defendant was convicted based on internet postings of a slide show referring to putting 500 pounds of Thorazine in the city water tower with pictures of the tower. Conviction required a showing of "true threat," i.e., a threat that a reasonable person of ordinary intelligence would have understood as such. While there was some evidence that the threats were real, there was also evidence from which the jury could have concluded the statements were not real threats. For example, the state's own expert testified it would be nearly impossible to obtain 500 pounds of Thorazine, the defendant did not disseminate the threats other than on his own website, and, although double-edged, the defendant was known generally as an unstable person. If the jury had been adequately advised on the "reasonable person" standard, there is a reasonable probability the outcome of the trial would have been different.

Blunt v. State, 55 So.3d 207 (Miss. App. 2011). Counsel ineffective in murder case for requesting an erroneous self defense instruction that had been condemned by the Mississippi Supreme Court ten years prior to trial. Prejudice established as the misstatement of law on the instruction essentially left the defendant with no instruction on his theory of defense.

Bailey v. State, 709 S.E.2d 671 (S.C. 2011). Counsel ineffective in homicide by child abuse case for failing to object to supplemental jury instructions that allowed the jury to convict the defendant based on an act that was not alleged in the indictment. The indictment alleged "infliction of physical injuries" by the defendant. During deliberations, the jury sent out notes asking whether the defendant had to have "caused" the death as a result of "neglect and abuse." During the discussion with court, the foreperson informed the court that the jury could see "neglect" but no evidence that the

defendant had struck the child. The judge gave supplemental instructions allowing the jury to convict for “abuse or neglect” that was a proximate cause of the harm. Nine minutes later the jury returned a guilty verdict. “[T]he trial judge’s instructions improperly enlarged” the indictment. The indictment alleged a specific “act” by the defendant, while the charge allowed conviction for an “omission” or neglect. This was a material variance or a constructive amendment to the indictment.

State v. Thomas, 796 N.W.2d 706 (S.D. 2011). Counsel ineffective in reckless burning case for failing to request appropriate instructions on accomplice testimony. At trial, the only direct evidence of guilt was from two accomplices who had made prior inconsistent statements and had entered into plea agreements requiring their testimony. At the very least, counsel was ineffective in failing to request an instruction allowed under state law that accomplice testimony should be examined “with great care and caution.” Likewise, counsel was ineffective in failing to request instructions that state law required corroboration of accomplice testimony and one accomplice could corroborate the other and that the remaining circumstantial evidence merely showing the circumstances and commission of the offense was not sufficient corroboration. Prejudice established.

State v. Sellers, 248 P.3d 70 (Utah App. 2011). Counsel ineffective in child sexual abuse case for failing to object to erroneous voluntary intoxication instructions. The crime charged required two intent elements for conviction: a general intent to touch and a specific intent to cause pain or to arouse or gratify sexual desires. Voluntary intoxication was raised as an affirmative defense to the specific intent element. While the court gave a voluntary intoxication instruction, the instructions failed to inform the jury that the State had the burden of disproving the defense beyond a reasonable doubt. Counsel’s conduct was deficient and there could not be any reasonable trial strategy for the deficiency. Prejudice found.

2010: *Sloss v. State*, 45 So. 3d 66 (Fla. App. 2010). Trial counsel ineffective in aggravated battery case for failing to object to the inclusion of a forcible felony jury instruction, which informed the jury that the use of force likely to cause death or great bodily harm is not justifiable if the defendant was committing an aggravated battery. This instruction is appropriate only if the defendant “is charged with an independent forcible felony in addition to the offense for which he claims self-defense. When an instruction is read in the absence of a charge of an independent forcible felony, it essentially negates the defendant’s theory of self-defense.” Prejudice found as the evidence of guilt was “hardly overwhelming” and essentially amounted to a “swearing contest” between the defendant on one side and the alleged victim and his nephew on the other side.

Smith v. State, 991 A.2d 1169 (Del. 2010). Counsel ineffective in murder case for failing to request a specific instruction of the credibility of accomplice testimony. The state’s case rested almost entirely on the testimony of an accomplice, who had actually fired the

bullet that killed the victim, and another eyewitness and the their testimony was conflicting, internally inconsistent, and arguably inconsistent with prior statements. Under state law, the defendant was entitled, upon request, to a specific accomplice testimony instruction. Counsel's conduct was deficient in failing to request the instruction. Prejudice establish even though a general credibility of witnesses instruction was given.

In re Crace, 236 P.3d 914 (Wash. App. 2010). Counsel was ineffective in second-degree assault case for failing to request an instruction on unlawful display of weapon, as a lesser included offense. The defendant consumed substantial amounts of alcohol and drugs, including cocaine, and fell asleep watching Planet of the Apes. When he awoke in the middle of the night, he believed there were humans or demons trying to murder him and went screaming through the trailer park, including entering other people's homes. Ultimately, when a police officer arrived, the defendant was armed with a sword and screaming "they are after me, someone help me." The defendant ran toward the officer, who drew his gun and demanded the defendant drop the sword and get on the ground. When the defendant realized it was a police officer, he did drop the sword about 50 feet away from the officer but kept running towards the officer and did not get on the ground until he was five to seven feet anyway. The defendant testified he did so because he wanted to be near the officer for protection. After being put in the police car and left there alone, the defendant kicked out a window because, as he testified, he was afraid of being alone. The officer "based on his experience as a law enforcement officer, . . . suspected substance abuse." The defendant was charged with second-degree assault, which requires a "specific intent to create reasonable fear and apprehension of bodily injury." The court charged on second-degree and attempted second-degree. The jury deadlocked on second-degree, but convicted of the attempt. Because he had two prior violent convictions, the defendant was sentenced to life without parole. Under state law, unlawful display of a weapon, which requires either "an intent to intimidate another person" or circumstances "warrant[ing] alarm for the safety of other persons," is a lesser included offense of second-degree assault. Counsel's conduct was deficient in failing to request a charge on this offense as the evidence, including the defendant's testimony and expert testimony of diminished capacity due to a drug-induced psychotic break, supported an inference that the defendant had "no intent to create reasonable fear or apprehension of bodily harm." While "pursuing an all-or-nothing strategy" is not *per se* deficient conduct, in this case it was because conviction of unlawful display of a weapon would have resulted in a sentence of less than a year as opposed to life without parole. "Pursuing an all-or-nothing strategy in these circumstances was not a reasonable trial tactic." Prejudice established.

State v. Johnston, 237 P.3d 70 (Mont. 2010). Counsel was ineffective in obstructing a peace officer case for failing to object to charge that eliminated the crucial "knowing" element. Officers were responding to reports of gunshots during winter weather conditions. After stopping their vehicle, due to bad road conditions, they observed the

defendant walking towards them. He informed them his car was stuck in the snow and other individuals and cars were further up the “snowy mountain road” having problems. The officers spent 30-40 minutes “attempting to assess the matter,” before taking the defendant and the two others in his car to the police station. Based on the defendant’s a search and rescue team was sent out looking for another man, who was not located. Due to the defendant’s “various statements to police,” he was charged with misdemeanor obstructing a peace officer. The offense requires that the person “knowingly obstructs, impairs, or hinders . . . the performance of a governmental function.” Under state law, the court must also instruct on the meaning of “knowingly,” which, depending on context, is awareness “of the person’s own conduct” or awareness “that it is highly probable that the result will be caused by the person’s conduct.” Here, the court instructed only on awareness of his “own conduct” and the state argued repeatedly that the defendant was guilty because he was aware of his own conduct, as he admitted in his testimony that he made false statements to the officers. Counsel’s conduct was deficient as “knowing” in this context required awareness that “it is highly probable that his conduct will obstruct, impair or hinder the officers’ performance of their governmental function.” To hold otherwise would only an obstruction conviction by “merely proving that a person gave a dishonest answer in response to an officer’s question,” and “the statute clearly requires more.” There was no plausible justification for failing to object to the court’s inadequate instructions. Counsel “had nothing to lose” and “failed to use the law to strike at the heart of the State’s case.” *Id.* at ___ (quoting *State v. Koughl*, 97 P.3d 1095, ___ (Mont. 2004)).

People v. Wheeler, 929 N.E.2d 99 (Ill. App. 2010). Counsel ineffective in murder trial for failing to request an accomplice-witness instruction. The state’s key witness was a friend of the victim, a convicted felon, and an admitted accomplice testifying in exchange for a deal. No physical evidence linked the defendant to the crimes. Prejudice established, because the only other witness connecting the defendant to the crimes with a jailhouse snitch, who had been promised help with parole in exchange for his testimony.

Taylor v. State, 922 N.E.2d 710 (Ind. App. 2010). Counsel ineffective in felony-murder case for failing to object to the trial court’s instructions that did not include the elements of the underlying felony (robbery). While the lower court had found the error harmless based on the trial evidence, “[h]armless-error analysis has no place where, as here, an essential instruction on the underlying offense is missing entirely.”

Hatcher v. Commonwealth, 310 S.W.3d 691 (Ky. App. 2010). Counsel ineffective in murder case for failing to object to the trial court’s failure to provide a separate self-protection instruction, failure to define self-protection, failure to provide an imperfect self-defense instruction, failure to define extreme emotional disturbance, and failure to instruct on the lesser-included offense of second degree manslaughter. The court noted, “[i]n all fairness to defense counsel,” that counsel “had already been in court for nearly 13 hours by the time the court asked him to state his objections to the instructions.”

State v. Breitung, 230 P.3d 614 (Wash. App. 2010), *review granted*, 253 P.3d 392 (Wash. 2011). Counsel ineffective in second degree assault case for failing to propose a lesser included offense instruction on fourth degree assault where the only real issue in the case, even based on the defendant's testimony, was whether the defendant pointed a gun or a microscope lens at the alleged victims.

2009: *Spicer v. State*, 22 So. 3d 706 (Fla. App. 2009). Counsel ineffective in aggravated battery case for imposing the burden of proving self-defense on the defendant through argument and requested instructions. Under state law, once a defendant has made a prima facie showing of self-defense, the burden is on the state to prove that the defendant did not act in self-defense. Counsel "was obviously unaware of the law on this point" and repeatedly argued in closing that the defendant had the burden of proof. Counsel also requested an outdated jury instruction, which had been replaced by an amended instruction nine months prior to trial, on this same point. "[C]ounsel's burden-shifting error caused a breakdown in the adversary process."

State v. Smith, 223 P.3d 1262 (Wash. App. 2009). Counsel ineffective in first-degree animal cruelty case for failing to request a jury instruction on lesser-included offense. Where there was evidence that the llama may have died from a parasite rather than starvation, the evidence supported a rational inference that the defendant committed only a second degree offense by failing to seek appropriate medical attention for the animal. Counsel's "all or nothing strategy was not a legitimate trial tactic."

State v. Kylo, 215 P.3d 177 (Wash. 2009). Counsel ineffective in assault case for proposing an erroneous "act on appearances" self-defense instruction that lowered the state's burden of proof. While the law required only that the defendant reasonably apprehend that he is about to be injured, the jury was instructed that he must reasonably apprehend that he was in actual danger of great bodily harm. "Failing to research or apply relevant law was deficient performance." Prejudice also established as the instruction and counsel's argument in closing misstated the law.

State v. Powell, 206 P.3d 703 (Wash. App. 2009). Counsel ineffective in second degree rape case, based on sexual intercourse with another person who was incapable of consent by reason of being physically helpless or mentally incapacitated, for failing to request instruction on the statutory affirmative defense of "reasonable belief" that the person had capacity to consent. Counsel's conduct was deficient and not based on a reasonable trial tactic because even the alleged victim's version of events was that she had blacked out from drug and alcohol use, woke up with the defendant (who she did not know previously), having sex with her, and then willingly participated in it because she was afraid. There was no indication that she told the defendant she was afraid or not a willing participant. In addition, independent state witnesses, who mostly agreed she appeared intoxicated, did not believe she appeared too drunk or otherwise incapacitated to make

decisions. Prejudice established because, without the instruction, the jury had no way of acquitting the defendant even if it accepted his testimony and the defense argument that he reasonably believed the alleged victim was not mentally incapacitated or physically helpless. In short, “[t]he absence of this instruction essentially nullified [the] defense.” *Id.* at 711.

2008: *Michel v. State*, 989 So. 2d 679 (Fla. App. 2008). Counsel ineffective in simple battery case for failing to request an instruction on justifiable use of non-deadly force, which negated the defendant’s self-defense argument.

Stoute v. State, 987 So. 2d 748 (Fla. App. 2008). Counsel ineffective in attempted murder case for failing to object to forcible felony instruction, which was not applicable and deprived him of his theory of self defense. This instruction is only appropriate when the accused is charged with at least two criminal acts, the act for which the accused is claiming self defense and a separate forcible felony. Here, the defendant was charged with one crime, the shooting, and no other forcible felony. The state supreme court reached this conclusion in an opinion issued after this trial, but “[i]t does not follow . . . [that] it constituted a change in the law.” The decision was based on a statute and the court had not previously construed the statute in a contrary manner. Thus, counsel’s conduct was deficient and prejudicial.

People v. Gonzalez, 895 N.E.2d 982 (Ill. App. 2008). Counsel ineffective in sexual abuse case for failing to object when the jury was not adequately instructed on the state's burden to disprove the affirmative defense, a reasonable belief that the victim was 17 years of age or older. The relationship began when the victim was 14 and the defendant 23, but there was conflicting evidence on whether she ever told the defendant her age. The charges arose when the 16 year old victim became pregnant with the defendant’s child. The trial court held that the evidence was sufficient to support the affirmative defense and agreed to give the necessary instruction. In the instructions, however, the court did not define “reasonable belief” and did not instruct on the State’s burden to disprove the affirmative defense. Counsel’s conduct was deficient. “Where defense counsel argues a theory of the case, such as an affirmative defense, but then fails ensure that the jury is properly instructed on that theory, that failure cannot be called trial strategy.” Prejudice found.

Tisdale v. State, 662 S.E.2d 410 (S.C. 2008). Counsel ineffective in murder case for failing to request charges on involuntary manslaughter and accident. Counsel’s conduct was deficient because the defendant’s testimony supported the involuntary manslaughter charge by providing evidence of a struggle over a weapon and supported an accident charge because of an accidental discharge of a gun with the defendant lawfully armed for self-defense.

Lowry v. State, 657 S.E.2d 760 (S.C. 2008). Counsel ineffective in murder case for failing to object to a burden-shifting instruction on malice. The court initially gave proper instructions but because of the state's concern that the court had failed to instruct on felony murder, the court gave a supplemental instruction. While the initial charge contained permissive language allowing the inference of malice from participation in a felony, the supplemental charge created a presumption of malice from participation in a felony and shifted the burden of proof to the defendant. This charge was improper, was not alleviated by the early proper charge, and was especially problematic as "the last thing the jurors heard before beginning deliberations." Counsel's conduct was deficient in failing to object. Prejudice also established because the error was not "harmless" beyond a reasonable doubt. There was "little direct probative evidence of malice" in the defendant's statements and other evidence was questionable or minimal, such that "the only undisputed relevant facts . . . are that Petitioner was near the scene of the crime at the time it occurred, but was neither the gunman, nor in the getaway car."

2007: Nickens v. State, 981 So. 2d 1165 (Ala. Crim. App. 2007). Counsel ineffective in theft of property case for failing to request an instruction defining the term "deprive" and failing to object when the trial court failed to give this instruction when the defense theory was that the defendant used the vehicle to escape from police but did not intend to permanently deprive the owner of the property, did not damage it, and merely abandoned it not far from the scene of the theft.

Berdecia v. State, 971 So. 2d 846 (Fla. App. 2007). Counsel ineffective in manslaughter and battery case for requesting an erroneous charge on manslaughter. The defendant was on trial with a codefendant. They had fought with two other men and the co-defendant shot and killed one of them. Both were charged with second degree murder. The co-defendant was convicted, but the defendant was convicted of the lesser included offense of manslaughter. Counsel's conduct was deficient because counsel requested a charge that repeatedly informed the jury that the defendant could be convicted based on his acts and intentions "and/or" his co-defendant's acts and intentions. State law held that "and/or" instructions can result in fundamental error. Prejudice was established because the jury could have convicted the defendant based solely on the acts and intentions of the co-defendant even if the jurors thought the defendant was innocent with regard to the death.

Aversano v. State, 966 So. 2d 493 (Fla. App. 2007). Counsel ineffective in grant theft case for failing to seek instruction on good faith defense or advice of counsel defense. Following several major impacts in the area, the defendant allowed a third-party to temporarily store restaurant equipment in her garage. There was no agreement on length of time. Subsequently, she notified the third-party to remove the equipment. She contacted an attorney and followed his advice to send a registered letter and then hire a process server notifying the third-party that she would dispose of the equipment if not

picked up by a stated deadline. The deadline passed and she sold the equipment to an auctioneer. Counsel's conduct was deficient because counsel called the prior attorney to testify, but failed to request an instruction of either the good faith or the advice of counsel defense, both of which were available under state law. "[I]s patently unreasonable to fail to request an instruction that provides a legal defense to undisputed facts." Prejudice established because omission of these instructions "essentially deprived her of a defense."

Stiers v. State, 229 S.W.3d 257 (Mo. App. 2007). Counsel ineffective in forcible restraint case for failing to request a self-defense instruction. The defendant was charged with two counts of forcible sodomy, two counts of armed criminal action, and felonious restraint following an altercation with his girlfriend. He was acquitted on all charges other than felonious restraint. Their testimony and evidence of her injuries was basically the entire case. The defendant's testimony alleged that the altercation began when she attempted to steal property from him and he defended with non-deadly force, which was permitted under state law. The altercation that elevated when she grabbed a knife and he then defended himself with deadly force. Under state law, he was entitled to a self-defense finding if he reasonably believed that deadly force was necessary to protect himself from serious physical injury. Counsel was ineffective in failing to request the self-defense instruction. Prejudice found because, without the self-defense instruction, the jury was obligated to convict if the defendant forcibly restrained the alleged victim and, in so doing, exposed her to risk of serious physical injury, regardless of the reason.

State v. Eyre, 179 P.3d 792 (Utah 2007). Counsel ineffective in tax evasion case for failing to object to instructions that did not require the jury to find the existence of a tax deficiency, which was a necessary element of the crime. Counsel's conduct was deficient and prejudicial because the defense argued that the defendant did not file his taxes because he did not believe he owed any taxes, but counsel failed to object to the court's failure to give the necessary charge.

2006: *Mathis v. State*, 941 So. 2d 1 (Fla. App. 2006). Counsel ineffective in aggravated battery on a fellow inmate case for failing to request a jury instruction on the justifiable use of non-deadly force where the defense argued that the victim was the aggressor and the defendant was acting only in self-defense.

Tillman v. Massey, 637 S.E.2d 720 (Ga. 2006). Counsel ineffective in malice murder case for failing to object to an erroneous instruction on the presumption of innocence in the court's final charge. The court instructed the jury that the presumption protects only the innocent, which implies that the jury's assessment of guilt is separate and distinct from the prosecution's burden to prove guilt beyond a reasonable doubt, thereby eviscerating the presumption of innocence. Prejudice found even though a correct charge on the presumption of innocence was given in preliminary instructions.

People v. Pollards, 854 N.E.2d 705 (Ill. App.), *appeal denied*, 861 N.E.2d 661 (Ill. 2006). Counsel ineffective in stolen motor vehicle case for failing to request jury instructions on definitions of stolen property and theft. Prejudice found because the defendant's intent was an issue in the case.

Vaughn v. State, 202 S.W.3d 106 (Tenn. 2006). Counsel ineffective in murder and other offenses case for failing to object to the court's erroneous jury instruction regarding the defendant's release eligibility dates. The trial court informed the jury that, if convicted of murder, the defendant would not be eligible for parole for 25 years, but a new statute had been passed so that the defendant actually would not have been eligible for parole for 51 years. Counsel's conduct was deficient at trial because he was unaware of the new provision. After trial counsel learned of the new provision but still did not assert the issue. While there were two conflicting provisions in the statutes, such that it may not have been clear at the time whether it was 25 or 51 years, "this conflict in the provisions, far from excusing counsel from raising the issue, should have brought to their attention the very need to raise the issue." Even after the Attorney General issued an opinion clarifying that it was 51 years, counsel still did not raise the issue as plain error in the direct appeal which was still pending. Trial and appellate counsel's conduct was deficient. Prejudice established because "prejudice occurs when a defendant receives a sentence greater than the range of punishment contemplated by the jury." If the jury had been properly instructed, it was reasonably likely the jury would have convicted the defendants of a lesser offense.

State v. Pittman, 166 P.3d 730 (Wash. App. 2006). Counsel ineffective in attempted residential burglary case for failing to request a lesser included offense instruction on first degree attempted criminal trespass, which was supported by the evidence.

2005: ***State v. Dabney***, 908 So.2d 60 (La. App. 2005). Counsel was ineffective in armed robbery case for failing to object to a modified *Allen* charge to a deadlocked jury. The jury announced a guilty verdict but polling revealed an 8 to 4 vote when at least 10 votes were needed for a conviction. When the jury asked what happened if they could not agree, the court gave a modified *Allen* charge, without objection. Counsel's conduct was deficient because Louisiana law prohibited an *Allen* charge and approved only of following ABA Standards in this situation. Prejudice was found because the charge given was confusing, coerced jurors to reach a verdict, and coerced jurors in the minority to conform their views to the majority. Two jurors changed their votes within 35 minutes, which suggested that they "surrendered their beliefs in order to achieve a verdict."

2004: ***Benham v. State***, 591 S.E.2d 824 (Ga. 2004). Counsel was ineffective in aggravated assault case for failing to request an instruction on the use of force in defense of a habitation. The defendant and the alleged victim had a history of animosity because the victim's husband had fathered children with both women. The victim confronted the

defendant while the defendant was sitting in her car with her three young children talking to friends. Following a heated conversation, the victim admittedly threw the first blow. The women fought with the victim standing outside the car reaching in and the defendant inside her car. The defendant had attempted to drive away but her path was blocked by onlookers in the street. Ultimately, the defendant grabbed a box cutter from the car console and slashed the victim. Counsel argued self defense but did not request an instruction on defense of habitation. Under state law, deadly force is permitted to prevent or terminate the unlawful entry into or attack upon a habitation, including a motor vehicle, if the entry is made or attempted in a violent and tumultuous manner and there is a reasonable belief that the entry is made for the purpose of assault or personal violence therein. The uncontradicted evidence at trial clearly would have authorized such a charge because the victim threw the first punch and eyewitnesses testified that it took two attempts for on lookers to restrain the victim from continuing the attack. Counsel stated that her strategy was to present self-defense as the best defense because she wanted the jury to believe that the defendant was in fear for her safety and the safety of her children and not just that she was protecting her vehicle. The court held this was not a reasonable strategy because counsel failed to appreciate that the defense of habitation may have justified the use of deadly force. “In failing to adequately research and understand the defenses available to [the] client, defense counsel rendered assistance that fell below the minimum standard set forth in *Strickland*.” Prejudice found because it was reasonably probable that the jury would have accepted the substantial evidence that the victim unlawfully entered the defendant’s car in a violent and tumultuous manner for the purpose of offering personal violence to the occupants.

State v. Kougl, 97 P.3d 1095 (Mont. 2004). Counsel ineffective in operation of unlawful methamphetamine lab case for failing to request jury instructions on accomplice testimony. Although the prosecutor and counsel both informed the jury that accomplice testimony should be viewed with suspicion, counsel did not request instructions that accomplice testimony should be viewed with distrust and that it must be corroborated. In direct appeal, counsel’s conduct was found to be deficient because there was no plausible reason not to request the instructions. Prejudice found because the state’s case was built almost entirely on accomplice testimony with little corroboration. In addition, although counsel informed the jury to view accomplice testimony with suspicion, “hearing this from counsel, . . . is not the same as hearing it from the court.”

2003: *Patterson v. State*, 110 S.W.3d 896 (Mo. App. 2003). Counsel was ineffective in second-degree robbery case for failing to present the trial court with a properly worded instruction for the lesser included offense of felony stealing. Under state law, second degree robbery required the forcible stealing of property, whereas the lesser included offense of stealing did not include the element of force. Counsel argued the lack of force and requested an instruction on the lesser included offense of stealing but proposed a stealing instruction that improperly included the “forcibly stole” language, which

*Capital Case

materially misstated the elements of stealing. Counsel did not have a reasonable trial strategy for proposing the incorrect instruction and counsel even argued that the jury could find that there was no use or threat of use of physical force. “Counsel clearly made a strategic decision to have the jury instructed on the lesser-included offense of stealing but then failed to execute that strategy when he submitted instructions to the court that did not properly track the language” of the lesser-included offense. *Id.* at 903. The court found prejudice because the lesser included offense instruction was warranted by the evidence, where the witnesses never saw a weapon and a juror could reasonably find that the defendant did not actually use physical force or threaten immediate physical harm to anyone during the theft. Where doubt exists over whether a lesser included offense should be instructed, the court should give the instruction. Even assuming that the state’s argument was correct that the defendant must also prove a reasonable possibility that he would not have been convicted of the greater offense had the lesser-included instruction been given, the court found prejudice where “the evidence of either an explicit or an implicit threat of physical force in the stealing was not overwhelming.”

10. FAILURE TO CHALLENGE COMPETENCE

a. U.S. Court of Appeals Cases

2009: *Hummel v. Rosemeyer*, 564 F.3d 290 (3rd Cir. 2009). Under AEDPA, counsel ineffective in murder case for stipulating the defendant was competent to stand trial and failing to challenge competence. The defendant was charged with shooting and killing his wife because of her affair with another man. Shortly after shooting her, the defendant shot himself in the head and, thereafter, was “missing a portion of his brain.” *Id.* at 291. Counsel was appointed and was informed by the defendant’s parents, who were his legal guardians, that he was not competent. The parents requested evaluation by a psychiatrist and even gave counsel a list of possible experts. Rather than a psychiatrist, the defendant was examined by a psychologist retained by the prosecutor and a psychologist retained by the defense. The state’s expert reported the defendant had an I.Q. of 65, which placed him in the mentally retarded range of intelligence. Due to the head trauma, he had only limited cognitive skills and deficits in short-term memory. This expert was unable to state to a reasonable degree of certainty that the defendant was competent, but noted that at best understood things only in a concrete, simplified fashion and it would be necessary during trial to continually make sure he was understanding the proceedings. The defense psychologist reached similar conclusions in finding the defendant “marginally competent” but recommending frequent breaks in the trial for counsel to explain things to the defendant. Without seeking any additional evaluation or even meeting with the defendant himself, counsel stipulated that the defendant was competent. Counsel met with the defendant only briefly prior to the preliminary hearing and never saw him again until the day jury selection began. Counsel never talked to the defendant about his version of events but asserted a provocation defense. He convinced the defendant and his father that the defendant should not testify. Counsel had concerns about the defendant’s ability to focus during the trial and even had to request a recess when the defendant was sleeping at the defense table. During the state’s closing argument, the defendant woke up and shouted “[t]ell them about the blowjobs.” The defendant’s father took him out of the courtroom so he was not present for the rest of closing arguments. He was also absent during the jury instructions because counsel could not wake him. Following trial, counsel moved for a new trial based on concerns about competence but did not present any medical evidence. Counsel’s conduct was deficient in stipulating to competence based on the psychologists reports.

We must ask whether either of these reports presented such an unqualified affirmation of [the defendant's] competency to stand trial so as to lead a reasonable attorney under these circumstances to stipulate that [the defendant] was competent. The answer is self-evident. Neither does. The reports from the psychologists were hardly ringing endorsements of [the defendant's] competency. There is little reason to believe that testimony

from a psychiatrist would not have been enough to tip the scales, and it was unreasonable for [the defendant's] counsel not to pursue this further.

Id. at 301. “[A] reasonable attorney would not have stipulated to his client’s competency without insisting on more information and further proceedings.” Under the state statutes, counsel could have sought a court-order evaluation of competence, which would have been “conducted by at least one psychiatrist.” Prejudice found. The state court’s decision was rejected as an unreasonable application of *Strickland* and as contrary to clearly established United States Supreme Court law in that rather than the appropriate standard of “reasonable probability” the state court used “the more stringent requirement of “show” in finding no prejudice.

2005: **Burt v. Uchtman*, 422 F.3d 557 (7th Cir. 2005). Counsel ineffective in capital murder case (where the death sentence was later commuted by Governor Ryan) for failing to request a competence evaluation when the defendant plead guilty without any concessions and against the advice of counsel near the end of the state’s case-in-chief. Counsel’s conduct was deficient because counsel was aware that the defendant had been consistently medicated with anti-depressants and psychotropic drugs while in pretrial confinement. The only competence examination was conducted eight months prior to trial by an expert who did not even review the defendant’s prison mental health records. A defense psychologist examined the defendant in connection to a motion to suppress statements and found a borderline IQ, neurological impairments, and severe depression. During jury selection, the defense requested a continuance, which was denied, because the defendant was having difficulty sleeping and expressing his inability to assist counsel. Counsel’s conduct was deficient because counsel were aware of the defendant’s medications, his frequent mood swings and that the defendant did not appear to comprehend legal advice. The state court had not addressed this prong of the *Strickland* test. The court found prejudice because there was “a reasonable probability that [the defendant] would have been found incompetent at the time he pleaded guilty if his attorneys had requested a competency hearing” because the only competence evaluation was 8 months prior to trial, failed to consider the effects of heavy medications, and could not have accounted for the repeated changes in prescriptions in the time after that evaluation until trial. Under AEDPA, the state court “unreasonably applied *Strickland* to the facts” because it “ignored a wealth of evidence.” [The court also held that the trial court should have sua sponte ordered a competence evaluation.]

b. U.S. District Court Cases

2010: **Deere v. Cullen*, 713 F. Supp. 2d 1011 (C.D. Cal. 2010). Counsel ineffective in failing to challenge competence to stand trial. The defendant was charged with killing three members of his girlfriend’s family shortly after she left him. When he was arrested the defendant informed officers he had been living on ditch water and raw birds for five days.

He was dressed in a bizarre fashion and had picture of his girlfriend with him. At the request of police, he was examined by a “doctor” shortly after his arrest, but the doctor found no mental illness or cause for concern. At counsel’s first meeting with the defendant he noticed a significant gash on the defendant’s arm and numerous scars on his abdomen and chest that appeared to be self-inflicted wounds. By the time of trial, counsel was aware of the defendant’s “self-inflicted mutilation, alcoholism, and drug abuse” and that these were red flags for “mental issues.” Counsel had no doubts about the defendant’s competence, but sought funding for a mental evaluation and was granted \$5000, although he only used \$1700. Counsel gave his psychologist only police reports and the “doctor” report from shortly after arrest and asked for testing and a “general psychological evaluation, because he wanted background information before focusing upon any particular mental defense.” Counsel obtained the defendant’s medical, school, juvenile court, and sheriff’s records, but did not provide these to his expert. When the defendant sought to plead guilty, the prosecution asked for a competence evaluation by the “doctor,” who had examined the defendant shortly after his arrest. Counsel consented “despite knowing that [this “doctor”] had no formal psychiatric training whatsoever,” knowing that the doctor had previously reported no mental illness, and knowing that his report was “a joke.” The doctor basically was a routine prison doctor without credentials or training in mental health. Counsel consented because he believed the defendant was competent without question. The defense expert reported that the defendant had a full scale IQ of 77. The doctor reported that the defendant was guarded and emotionally over-controlled, he was depressed and lonely, had feelings of helplessness and abandonment, and was fatalistic and exhibiting “some suicidal ‘acting out.’” The doctor noted the defendant’s dependence on his girlfriend and great stress during his breakup with her. He diagnosed adjustment disorder with depressed mood, mixed substance abuse disorder, and borderline personality disorder with antisocial aspects. Although counsel did not ask his expert to examine competence, the expert believed that competence “was very questionable,” as the expert believed the defendant’s “mental disorders rendered him unable to assist counsel in the conduct of a defense in a rational manner.” In short, the defendant’s demand to plead guilty and to ask for the death penalty were “an outgrowth of his mental disturbances.” The expert recalled informing counsel of his concerns. Nonetheless, defense counsel stipulated to competence and the defendant pled guilty and admitted the special circumstances. Counsel stood quietly while the defendant informed the court he had told counsel all the facts and circumstances of the case, even though he had refused to discuss the case with counsel and had cooperated only minimally with the defense expert and despite being aware that there was a “substantial mental defense.” The defendant also waived his right to a jury. Counsel presented no evidence in sentencing. Counsel’s conduct was deficient.

While a client’s choices about the direction the litigation should take may influence the reasonableness of counsel’s actions, *see Strickland*, 466 U.S. at 691, that influence is circumscribed where

the client's competency is at issue. Where there are "sufficient indicia of incompetence to give objectively reasonable counsel reason to doubt the defendant's competency," counsel must "request the trial court to order a hearing or evaluation on the issue of the defendant's competency." *Jermyn v. Horn*, 266 F.3d 257, 283, 301 (3d Cir. 2001).

Counsel's "belief" the defendant was competent was "based in part upon an erroneous estimation of [the defendant's] intelligence and overall mental health. For example, counsel believed he was "very intelligent" when he had an IQ of 77. Regardless, counsel's assessment was "unreliable" and "not determinative," given that his own expert at the time had concerns about competence. Prejudice was established. The defendant grew up in chronic poverty with his parents working as farm laborers, around pesticides and fertilizers. He had convulsions as a baby. He grew up eating fish from polluted water. This water was also used to irrigate the family's vegetable garden. Areas when the children played were sprayed with pesticides. The well water the family drank often had "an odd taste." The defendant's father was a violent alcoholic, who beat his wife and children. The defendant was placed in special education classes in the third grade due to emotional problems and learning difficulties. Testing at age 10 revealed a full scale IQ of 76. The defendant was electrocuted at age 10 or 11. He began cutting himself. By age 12, he was running away from home. He quit school in the 8th grade to work in the fields full time. By 14, he was committed to the California Youth Authority and spent several years in and out of institutions. After age 16, he was addicted to drugs and alcohol and often asked his girlfriend and others to kill him. He was well known to police and had refused medical treatment they offered several times. In the six months prior to the murders, he had numerous arrests for public drunkenness and disturbing the peace and his self-mutilation increased. He was drinking a fifth of vodka daily. Several months before the murders, his girlfriend left him and took their baby. Several weeks later, he and his girlfriend met with a social worker in an effort to prevent losing custody of their baby. The social worker recognized immediately that the defendant had psychiatric problems and discussed his self mutilation with him. She recommended mental health treatment and he agreed. The intake worker at the mental health center diagnosed on alcohol abuse and antisocial personality disorder, but did recommend a treatment plan for "his periods of depression." As the defendant's relationship and mental health continued to spiral down and he became more threatening to himself and others, the social work advised the defendant's girlfriend to get him into mental health treatment. The social worker viewed the situation as an emergency and called the Mental Health Department and probation herself in an unsuccessful attempt to have him picked up for a 72-hour psychiatric hold. In the two weeks before the murders, the defendant's girlfriend called the social worker multiple times daily and the social worker personally visited law enforcement offices daily informing them of the defendant's threats to kill his girlfriend or his family members. In short, there is a "reasonable probability" that the defendant would have been

found to be incompetent if counsel had performed adequately.

c. State Cases

2009: *Mast v. State*, 914 N.E.2d 851 (Ind. App. 2009). Counsel ineffective in failing to ensure that psychiatrists' reports were given to the court and a competence hearing conducted prior to the defendant's guilty plea to rape and sentence to 30 years. Initial counsel gave notice of a defense or mental disease or defect and the court appointed two doctors to examine competency and sanity issues. With substitute counsel, the defendant entered a guilty plea without obtaining the reports. The first doctor's report was received by the clerk's office on the day of the plea. It stated that he was unable to form an opinion about competency and that he requested repeated interviews and an in-patient evaluation. It was not clear whether the trial court had this report at the time of the plea. The second doctor's report, submitted four days after the plea, explicitly stated the doctor's "doubt[s]" that the defendant was competent. Counsel's conduct was deficient in advising the defendant to plead guilty without awaiting the results of the competency evaluations. Prejudice established as "there is a reasonable probability that the outcome of the case would have been different had the trial court been aware of the psychiatrists' reports."

2008: *Coker v. State*, 978 So. 2d 809 (Fla. App. 2008). Counsel ineffective prior to plea for failing to obtain a competence hearing. Counsel's conduct was deficient because the trial court gave oral authorization for an evaluation, but counsel never presented a written order and failed to otherwise followup. Prejudice established because the defendant may well have been incompetent at the time of his plea. Remanded for a competence determination.

2004: *People v. Shanklin*, 814 N.E.2d 139 (Ill. App.), *appeal denied*, 824 N.E.2d 289 (Ill. 2004). Counsel ineffective in attempted murder plea for failing to request a hearing on the defendant's competence or fitness or, alternatively, asking the trial court to question the defendant carefully as to the plea he entered and the consequences. Following the defendant's guilty plea, a presentence report disclosed that the defendant had been hospitalized three times for mental-health problems as a teenager. In addition, he was mildly mentally retarded and had significant problems retaining and receiving verbal information.

When confronted by a defendant, who may be mentally retarded, the trial court and both prosecution and defense may not simply rely on affirmative answers to rote questions to conclude the defendant understands the proceedings and the consequences of his plea.

Id. at ____.

*Capital Case

It is incumbent on the attorney representing a mentally retarded defendant to make that fact known to the trial court and for the trial court to proceed with care in accepting a plea.

Id. at _____. Counsel's conduct was deficient and prejudicial.

Matthews v. State, 596 S.E.2d 49 (S.C. 2004). Counsel ineffective in armed robbery, car jacking, and accessory after the fact to murder plea for failing to request a competence hearing prior to the defendant's plea. The defendant had learning disabilities and took special education classes in school. Just one year before the crimes, the defendant had been in a near fatal car accident that caused significant frontal lobe, neurological damage.

12. FAILURE TO PRESERVE THE RECORD FOR APPEAL

a. U.S. Court of Appeals Cases

2003: *Davis v. Secretary for Dept. of Corrections*, 341 F.3d 1310 (11th Cir. 2003). Counsel was ineffective in murder case in failing to adequately preserve a *Batson* claim for appellate review. While counsel did object, counsel failed to renew the motion before accepting the jury, which was required in order to preserve the issue for appeal. Because counsel's negligence affected only the appeal, the relevant focus in assessing prejudice was the appeal. Because the state court had already recognized that the *Batson* claim was meritorious, the court found that there was a reasonable probability that the state court would have granted reversal on appeal. This claim had been raised in state post-conviction, but the state court failed to resolve the merits of the claim. Thus, the court found that this case fell outside of § 2254(d)(1) requirement of deference to the state court decision.

b. State Cases

2008: *People v. Owens*, 894 N.E.2d 187 (Ill. App. 2008). Counsel ineffective in residential burglary case for failing to consult with the defendant concerning a motion to reconsider sentence. The defendant informed the court he wished to appeal his 18 year sentence and the court informed him he must file a motion to reconsider the sentence in order to preserve the appellate issue. Retained counsel withdrew without taking any action and the court entered a notice of appeal for the defendant. "[T]he attorney's failure to consult with the defendant during a critical stage of the proceedings" was deficient and the defendant's ability to preserve his sentencing arguments for appeal was prejudiced.

2004: *Heckelsmiller v. State*, 687 N.W.2d 454 (N.D. 2004). Counsel ineffective in criminal trespass case for failing to preserve the record for appeal after two potential defense corroborating witnesses were excluded during the trial because counsel failed to ensure that they were sequestered as all other witnesses were. The defense was that the defendant had permission to be on the premises, but counsel considered this unsubstantiated and decided not to present the corroborating witnesses due to credibility concerns because they were family members. (Alleged victim was also a family member.) During the trial, counsel changed his mind and decided to present the testimony. Counsel's conduct was deficient because, when the court excluded the evidence, counsel did not make a proffer or preserve the record for appeal. Prejudice found because the excluded witnesses would have corroborated the only defense presented. Although the court was unaware of the substance of the witnesses' statements, the court held that "the significant point is that counsel's failure to make an offer of proof prevented a meaningful appeal on the issue."

13. MISCELLANEOUS

a. U.S. Court of Appeals Cases

2005: *United States v. Scott*, 394 F.3d 111 (2nd Cir. 2005). The indictment in illegal reentry case was dismissed because counsel was ineffective in the underlying deportation case for failing to apply for a waiver of deportation even though the immigration judge stated that he believed the defendant was eligible for a waiver and instructed counsel to file an application. Prejudice was found because the defendant could have made a strong showing that he was eligible for a waiver and his subsequent criminal charges were irrelevant because they would not have been considered at the time.

b. Military Cases

2006: *United States v. Edmond*, 63 M.J. 343 (C.A.A.F. 2006). Counsel ineffective in conspiracy, larceny, and other offenses case for failing to secure the testimony of a subpoenaed defense witness. The alleged conspiracy and larceny concerned two cellular telephones. The subpoenaed witness had also been charged but had been discharged from the military in lieu of a court-martial. He would have testified that there was no conspiracy and that he and the accused, who had both worked in the supply room, believed that they were authorized to obtain the cell phones and that they had intended to return them to the unit but kept the phones after the unit said they no longer wanted the cell phones. When the witness arrived for court, the prosecutor warned him of the possibility of a perjury charge if he testified falsely. When the prosecutor told defense counsel that the witness did not want to testify, counsel did not speak to the witness before he was allowed to leave but instead entered into a stipulation that the witness was invoking his Fifth Amendment rights. Counsel's conduct was deficient and prejudicial because the witness not only did not testify but the implication of the stipulation to the panel members was that the accused's coconspirator could not testify without incriminating himself. The case was remanded either for dismissal of the larceny and conspiracy charges and reassessment of the sentence or for a rehearing.

c. State Cases

2010: *State v. Middleton*, 41 So. 3d 357 (Fla. App. 2010). Counsel was ineffective in failing to adequately advise the defendant in capital murder prosecution. During trial, the state moved to strike a juror, who had failed to disclose (when asked) that he had a prior felony conviction. The court struck the juror and informed the defendant he could consent to proceeding with 11 jurors or replacing the struck juror with a previously-dismissed alternate juror. Counsel's conduct was deficient in failing to advise the defendant of the third option—a motion for mistrial—in light of the defendant's absolute right under state law to have a jury of 12. Without this advice, the defendant consented to proceeding with

11 jurors and was convicted of second degree murder. On initial review, the court found counsel's conduct was deficient and remanded for a determination of whether the defendant would have moved for a mistrial if he had been adequately advised. On remand, the court found that he would have moved for a mistrial, but found no prejudice because the defendant could not demonstrate that the "outcome of a new trial would have been any different." This was erroneous because the defendant needed only to demonstrate a reasonable probability that he would have requested a mistrial and that a mistrial would have been granted.

2009: *People v. Centeno*, 916 N.E.2d 70 (Ill. App. 2009). Counsel was ineffective in stolen vehicle plea case for failing to surrender the defendant on his recognizance bond in Will County while he was in custody in Cook County on an unrelated offense. Prejudice established because, if counsel had performed adequately, the defendant would have been in simultaneous custody on both offenses and would have received credit for both offenses. Presentence credit given.

Bass v. State, 674 S.E.2d 255 (Ga. 2009). Counsel ineffective in arson and robbery case for failing to object when the county sheriff assumed the duties of the bailiff after providing key testimony for the state. Counsel's conduct was deficient because "no competent attorney could reasonably have believed that [the Sheriff's] service as bailiff would not compromise appellant's constitutional right to a fair jury." Prejudice established where the Sheriff acted as bailiff for half of the trial or a two day period from the beginning of the defense case to the verdict. "[E]ven if it could be assumed that [the Sheriff] never did discuss the case directly with any members of the jury, it would be blinking reality not to recognize the extreme prejudice inherent in this continual association throughout [half of] the trial between the jurors and th[is] key witness[] for the prosecution." *Id.* at ___ (quoting *Turner v. Louisiana*, 379 U.S. 466, 473 (1965)). In addition, the state's case was circumstantial and hinged on credibility and a prior jury hung on 23 of 24 counts.

2008: *McCombs v. State*, 3 So. 3d 950 (Ala. Crim. App. 2008). Counsel ineffective in murder case for advising the 18-year-old defendant to lie in his testimony and deny that he stabbed the victim, which resulted in the defendant giving up the right to assert self-defense. In light of *Nix v. Whiteside*, 475 U.S. 157, 171 (1986) ("under no circumstance may a lawyer either advocate or passively tolerate a client's giving false testimony"), "[t]here can be no question that the performance of . . . trial counsel falls outside prevailing professional norms and was unreasonable under any circumstance." Prejudice found because the evidence was undisputed that the defendant was told he was outnumbered and was going to get his "butt whooped," that he had been hit by three people, and that he was attempted to run when the victim was killed. Thus, "a defense that [he] acted out of a reasonable belief that an assault was imminent was a viable defense."

Williams v. State, 254 S.W.3d 70 (Mo. App. 2008). Counsel ineffective in murder case for failing to adequately establish the defendant's indigence in support of a motion for a psychiatric expert to evaluate the defendant's capacity at the time of the offense and to assist counsel. The defendant was indigent, but counsel was retained for him by his father. Counsel requested funds for a defense expert and presented evidence that the defendant had twice been involuntarily committed and diagnosed with a schizophreniform type psychosis within several years of the crime. Counsel also presented testimony from the defendant to establish indigence that was inadequate under the state statute requiring an affidavit of indigence and specific information. Counsel's conduct was deficient for failing to present adequate testimony of evidence, which would have entitled the defendant to appointment of an independent expert. Prejudice was found because the court appointed competence evaluation was insufficient. In addition, prejudice was found despite the defendant's failure to establish the expected testimony of an independent expert. "It would be useless to require such a movant, now proven to have been indigent, to produce at a post-conviction hearing the same expert testimony he could not afford at trial."

2007: State v. Grogan, 163 P.3d 494 (N.M. 2007). Court affirmed trial court's grant of new trial on its own motion following conviction for great bodily harm by vehicle. The court found that counsel was ineffective. On appeal, the court held that it was appropriate to presume prejudice "when a trial court witnesses gross or obvious incompetence." Here, the defense counsel's failure to secure and review his own expert's opinion before permitting the expert to write the report. While the state examiners had found cocaine and methamphetamines in the defendant's blood it was not quantified. The defense expert did so and his written report was provided to the state, which called him to testify and admitted the report. This was the most harmful evidence against the defendant.

2006: In re R.K.S., 905 A.2d 201 (D.C. 2006). Juvenile adjudicated for unauthorized use of motor vehicle and receiving stolen property was completely denied counsel and prejudice was presumed under *Cronic* due to counsel's refusal to participate in the first day of trial after being denied a continuance. While counsel refused to participate, the juvenile's statement to police and an officer's testimony that the juvenile was a passenger in the car were admitted without objection or even cross examination.

Smith v. State, 905 A.2d 315 (Md. 2006). Counsel ineffective in criminal contempt case. The witness, an inmate, was called to testify as a prosecution witness in another case. When the witness sought to invoke his Fifth Amendment right against self-incrimination, the court appointed counsel for him. Counsel informed the court, after discussions with the witness and the prosecutor, that he had advised the witness that he could find no legitimate basis for assertion of the Fifth Amendment privileges. The witness continued refusing to answer questions, although not on the asserted basis of the Fifth Amendment. The court found him in contempt and subsequently imposed a sentence of five months.

Counsel's conduct was deficient because counsel, in violation of the attorney-client privilege, disclosed the nature of his advice to the witness and advised the trial judge as to his opinion regarding the application of the Fifth Amendment. In essence, counsel had a conflict due to his attempt to advise the witness and be a friend of the court. He could not do both here. Prejudice found because the trial court relied on counsel's statement in finding that the witness did not have a Fifth Amendment privilege.

- 2005:** *Jackson v. Washington*, 619 S.E.2d 92 (Va. 2005). Counsel was ineffective in burglary and grand larceny case for failing to object to the defendant being tried before a jury while wearing a jail issued "jumpsuit" after the jail misplaced the defendant's civilian clothes and failed to replace them or allow him an adequate opportunity to obtain new clothing. There was no valid strategy where counsel did not object simply because he believed the defendant wanted to go to trial quickly because counsel knew that the defendant also objected to being tried in jail clothing and that his credibility would be a critical issue during the trial. Prejudice found because "[r]eason and common human experience dictate, at a minimum, that the accused's appearance in jail clothes is such a badge of guilt that it would render an accused's assertion of innocence less than fully credible to the jury."
- 2004:** *State v. Guerard*, 682 N.W.2d 12 (Wis. 2004). Counsel ineffective in armed robbery and burglary case for failing to adequately seek admission of the defendant's brother's statements against penal interest. The state relied on the victim and an eyewitness, who identified the defendant as the perpetrator. The defendant's brother confessed to his sister and a defense investigator though that he was the perpetrator. During trial, the brother invoked his right to silence. Counsel initially sought to admit the brother's confession to his sister, but did not pursue this or inform the court about the brother's additional confession to the defense investigator. Counsel's conduct was deficient because the brother's statements against penal interest were sufficiently corroborated (by their repetition to several people) to be admissible. Prejudice found because the defense sought to establish that the brother and not the defendant committed the crimes. If the jury had heard the brother's confessions, there was a reasonable probability of a different result.
- 2003:** **Commonwealth v. Brooks*, 839 A.2d 245 (Pa. 2003). Counsel was ineffective in capital trial for failing to meet with his client face-to-face prior to trial. Counsel's conduct was deficient in that counsel never once met with the defendant prior to the beginning of jury selection. Counsel spoke only briefly with the defendant by telephone.

It should go without saying that no lawyer, no matter how talented and efficient, can possibly forge a meaningful relationship with his client and obtain adequate information to defend that client against first-degree murder charges in a single thirty minute telephone conversation.

*Capital Case

The court found that face-to-face meetings were important, because

Without such a meeting, there is little to no hope that the client will develop a fundamental base of communication with his attorney, such that the client will freely share important information and work comfortably with the lawyer in developing a defense plan. Moreover, only a face-to-face meeting allows an attorney to assess the client's demeanor, credibility, and the overall impression he might have on a jury. This is of particular importance in cases in which the client may take the stand in his defense or at the penalty phase in an attempt to establish the existence of particular mitigating circumstances.

The court held that there was no reasonable basis for the attorney's failure to meet with the defendant and that "failure to do so is 'simply an abdication' of the most basic expectations of defense counsel in a capital case." Prejudice found because, in this instance, the attorney's failure to meet with the client and develop a relationship resulted in the defendant proceeding *pro se* with counsel serving only as standby counsel.

**SUMMARIES OF SUCCESSFUL
INEFFECTIVE ASSISTANCE OF COUNSEL
CLAIMS POST-*WIGGINS V. SMITH*
INVOLVING POST-CONVICTION COUNSEL**

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2009: *State v. Hicks*, 986 A.2d 690 (N.J. Super. App. Div. 2010). Appointed post-conviction counsel failed to adequately prosecute the post-conviction petition. The petitioner submitted a *pro se* petition and brief asserting two issues and counsel was appointed. Counsel argued those two issues but demonstrated a “fundamental ignorance of the salient facts underpinning defendant’s conviction.” Counsel also did not file a brief in support of the petition or even personally and independently review the case to determine whether other grounds for relief were available. The relief was not based on *Strickland* or a constitutional standard but was based instead on state case law and court rules.

2008: *Taylor v. State*, 882 N.E.2d 777 (Ind. App. 2008). Post-conviction counsel’s conduct was deficient and in violation of due process under state law in felony murder case. The defendant was jointly tried with two co-defendants. One co-defendant’s conviction was reversed on direct appeal based on argument and finding of fundamental error by the trial court in failing to instruct on the elements of the underlying felony of robbery. The defendant asserted ineffective assistance of trial and appellate counsel in post-conviction proceedings for the failure to assert this same error. Post-conviction counsel presented no evidence or argument other than providing a copy of the co-defendant’s direct appeal decision and asserting that it was binding on the trial court. Under state law, this was deficient, such that the defendant “was deprived of a procedurally fair hearing.”

2006: **Menzies v. Galetka*, 150 P.3d 480 (Utah 2006). Post-conviction counsel ineffective in capital case for “willfully disregard[ing] nearly every aspect of Menzies' case. As a result, the court imposed discovery sanctions, granted summary judgment in favor of the State, and ultimately dismissed Menzies' petition for post-conviction relief.” With new counsel, the death-sentenced inmate filed a Rule 60(b) motion alleging gross negligence and ineffective assistance. The Utah Supreme Court held that the district court erred in denying the Rule 60(b) motion and in compelling disclosure of work product. The defendant had initially been represented in post-conviction proceedings by pro bono counsel. After the state imposed rules for qualification and payment of counsel, the court sought qualified counsel for four months and all declined, but then Brass volunteered for appointment. He was appointed without the court ever conducting an inquiry to determine whether he was qualified under the state rule. Brass served as counsel for over five years and it would “be an understatement” to say he did little. His representation was “deplorable” in that he “willfully disregarded nearly every aspect of this case” and, in effect, “defaulted Menzies' entire post-conviction proceeding, resulting in the dismissal of Menzies' case.” Counsel only met with the inmate a few times, avoided or refused his phone calls and did not respond to letters and cards. Counsel never conducted or hired anyone to conduct an investigation, notwithstanding repeated prior requests and the fact that the record indicates that extensive investigation on actual innocence and mitigation was needed. Prior counsel had obtained \$2,000, but counsel did not even request these funds or consult with the prior pro bono team. Counsel also never challenged the

inadequacy of the funding as prior counsel had and collected only his initial \$5,000 appointment fee. Counsel also failed to meet numerous court deadlines and, ultimately, filed an amended petition that did little more than re-state the arguments that had been made in the first amended petition by pro bono counsel. Counsel failed to oppose the state's discovery requests, which resulted in orders for disclosure of trial counsel's file and the inmate's deposition. Counsel did not even appear for the inmate's deposition and instead sent an unqualified counsel. Counsel was ultimately prohibited from presenting evidence in support of the claims because of his numerous violations of court orders and procedures. Likewise, counsel failed to respond to the state's motion for summary judgment, which was granted in its entirety with prejudice. For more than a year, counsel never even informed the defendant that the case had been dismissed. Counsel filed a notice of appeal, but never filed a docketing statement, which resulted in dismissal of the appeal. When the court allowed the appeal anyway, counsel never filed an appellate brief, despite being granted two extensions of time. Counsel did file a motion in the district court to set aside the summary judgment under Rule 60(b) stating only that the grounds would be set forth in a subsequent memo, which counsel never filed. More than a year after the event, counsel finally informed the defendant that summary judgment had been granted. Counsel still did not communicate with the defendant beyond this other than to inform the defendant that he would need new counsel without telling him why. Ultimately, another attorney from the state attended a capital litigation seminar and was asked to check on the status of Utah's death row. When she followed up on the case and learned of the events, she contacted the inmate and then filed an appearance as counsel and a memorandum in support of the Rule 60(b) motion focusing primarily on counsel's ineffectiveness. Ineffective counsel finally withdrew and admitted his inadequacies to a great extent. On appeal, the court held that the defendant has a statutory right to effective assistance of counsel, which the court analyzed under *Strickland*.

While the ABA standards are not determinative of whether counsel's performance was ineffective and courts should examine counsel's conduct in light of all the contemporary circumstances, they do represent "well-defined norms" that provide guidance to courts. Because Utah's post-conviction rules do not currently contain any provisions regarding counsel's performance in post-conviction death penalty proceedings, and because it is traditionally the duty of the courts to supervise the performance of counsel we rely on the ABA Death Penalty Guidelines to the extent they are relevant to our decision.

Id. at ___ (citations and footnotes omitted). The court analyzed the case under the Guidelines but found that counsel's "ineffective representation went far beyond a failure to comply with the ABA Death Penalty Guidelines" and that counsel's "willful disregard for Menzies' case cannot possibly be construed as sound strategy." Prejudice presumed

*Capital Case

due to counsel's complete failure to "provide meaningful adversarial testing" in the case. Relief was required on the Rule 60(b) because, while an attorney's negligent acts are ordinarily chargeable to the client, a client should not be held liable for the attorney's actions where those actions are grossly negligent and the defendant has alleged a meritorious defense. Here, the defendant had alleged multiple errors that, if proven, would require relief. Remanded to the district court to reinstate the post-conviction proceedings and to allow the defendant to investigate his claims.

**SUMMARIES OF ALL U.S. SUPREME COURT
INEFFECTIVE ASSISTANCE OF COUNSEL CASES
INCLUDING AND FOLLOWING *WIGGINS V. SMITH***

*Updated August 27, 2011

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UNITED STATES SUPREME COURT CASES

**Cullen v. Pinholster*, 131 S. Ct. 1388 (2011) (sentenced in May 1984). The Court reversed the Ninth Circuit's finding of ineffective assistance of counsel and held that federal habeas review under 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits. Prior to sentencing, trial counsel moved to exclude any aggravating evidence due to the state's failure to provide notice of the evidence to be introduced as required by state law. That motion was denied and trial counsel rejected the court's offer of a continuance. In sentencing, trial counsel presented only testimony from the petitioner's mother concerning the petitioner's troubled childhood and adolescent years. In state habeas, counsel asserted ineffectiveness in failing to adequately investigate and in failing to furnish the defense expert with adequate background materials. The petitioner presented evidence from Dr. George Woods that the petitioner suffers from bipolar mood disorder and seizure disorders. The state court summarily rejected the claims on the merits. In federal court, the district court granted an evidentiary hearing and received additional evidence from two new medical experts. The district court and the Ninth Circuit granted habeas relief. The Supreme Court found error in the federal courts considering evidence that was not before the state court when the claim was adjudicated on the merits. The Court also found error in the federal courts' finding of ineffective assistance of counsel. Review of the state court's decision is "doubly deferential." First, there is a "highly deferential" look at counsel's performance. Second, this must be done through the "deferential lens of § 2254(d)." Here, "[t]he state court record supports the idea that [petitioner's] counsel acted strategically to get the prosecution's aggravation witnesses excluded for lack of notice, and if that failed, to put on [petitioner's] mother." Counsel interviewed the mother and retained a psychiatrist. Counsel "confronted a challenging penalty phase with an unsympathetic client, which limited their feasible strategies." Specifically, the petitioner bragged in his trial testimony about "his criminal disposition" and "hundreds of robberies." The defense expert, who did not testify, had noted "psychopathic personality traits" and diagnosed antisocial personality disorder. "Given these impediments, it would have been a reasonable penalty-phase strategy to focus on evoking sympathy for [petitioner's] mother." "[I]t certainly can be reasonable for attorneys to conclude that creating sympathy for the defendant's family is a better idea because the defendant himself is simply unsympathetic." In finding that the state court had unreasonably applied *Strickland*, the Ninth Circuit "erred in attributing strict rules to this Court's recent case law" in *Williams v. Taylor*, 529 U.S. 362 (2000), *Wiggins v. Smith*, 539 U.S. 510 (2003), and *Rompilla v. Beard*, 545 U.S. 374 (2005). Here, just as the relevant standard in *Wiggins* was the standard of practice for capital cases in Maryland at the time of trial, the relevant standard of professional competence here was the standard "that prevailed in Los Angeles in 1984." Even if trial counsel performed deficiently, there was no showing that the state court unreasonably concluded there was no prejudice in light of the extensive aggravating evidence and the unsympathetic defendant. The "new" evidence presented in state habeas

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

Harrington v. Richter, 131 S. Ct. 770 (2011). The Supreme Court reversed the Ninth Circuit’s finding of ineffective assistance of counsel in murder and attempted murder case for failing to consult with blood evidence experts. The State’s case was built on the testimony of the attempted murder victim and circumstantial evidence. While the state had not planned to present blood pattern evidence, the approach was altered following defense counsel’s opening statement. The State presented expert testimony by both a blood spatter expert and a serologist to contradict the defense theory.

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

Id. at 785. In this case, the state court’s decision was “unaccompanied by any explanation.”

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

Id. at 786. “[E]ven a strong case for relief does not mean the state court(s) conclusion was unreasonable.” *Id.*

As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court’s ruling on the claim being presented in federal court was so lacking in justification that

there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.

Id. at 786-87. In assessing the effectiveness of representation, “[t]he question is whether an attorney’s representation amounted to incompetence under ‘prevailing professional norms,’ not whether it deviated from best practices or most common custom.” *Id.* at 788. “Counsel was entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies.” *Id.* at 789. “Reliance on ‘the harsh light of hindsight’ to cast doubt on a trial that took place now more than 15 years ago is precisely what *Strickland* and AEDPA seek to prevent.” *Id.* at 789. Counsel’s failure to consult a blood expert was not unreasonable. Even if it was apparent that expert testimony would support the defense, competent counsel might elect not to use this evidence. “Counsel was entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies.” Here, counsel had reason to question the truth of his client’s account, given his initial denial of involvement and then production of evidence. Thus, concentrating on the blood pool carried its own serious risks, such as exposing the petitioner’s story as “an invention.” “An attorney need not pursue an investigation that would be fruitless, much less one that might be harmful to the defense.” “Even apart from this danger, there was the possibility that expert testimony could shift attention to esoteric matters of forensic science, distract the jury from whether [the petitioner] was telling the truth, or transform the case into a battle of the experts.” *Id.* at 790.

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

Id. at 790. Counsel also was not ineffective in failing to anticipate that the state would offer expert testimony. “Just as there is no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities.” *Id.* at 790. Here, the prosecution did not anticipate that it would present expert testimony until the eve of trial. “Even if counsel had anticipated the state would call an expert, *Strickland* does not enact Newton’s third law for the presentation of evidence, requiring for every prosecution expert an equal and opposite expert from the defense.” *Id.*

In many instances, cross-examination will be sufficient to expose defects in an expert’s presentation. When defense counsel does not have a solid case, the best strategy can be to say that there

is too much doubt about the State's theory for a jury to convict.

Id. at 791. Prejudice was not established.

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

Id. at 792 (citations omitted). "There was ample basis for the California Supreme Court to think any real possibility of [the petitioner's] being acquitted was eclipsed by the remaining evidence pointing to guilt." *Id.*

Premo v. Moore, 131 S. Ct. 733 (2011). The Supreme Court reversed the Ninth Circuit's finding of ineffective assistance of counsel for recommending a plea bargain in felony murder case without first seeking suppression of a confession assumed to have been properly obtained. Counsel asserted he did not move to suppress the confession in light of the petitioner's admissible confessions to two other witnesses. The state court decision was not an unreasonable application of either part of the *Strickland* rule. "With a potential capital charge lurking, [petitioner's] counsel made a reasonable choice to opt for a quick plea bargain." The Ninth Circuit erred in resting its holding on *Arizona v. Fulminante*, 499 U.S. 279 (1991) because *Fulminante* may not be incorporated into the *Strickland* performance inquiry. *Fulminante* involved the admission into evidence of an involuntary confession. It "says nothing about the *Strickland* standard of effectiveness." Thus, "a finding of constitutionally adequate performance under *Strickland* cannot be contrary to *Fulminante*."

There are certain differences between inadequate assistance of counsel claims in cases where there was a full trial on the merits and those, like this one, where a plea was entered even before the prosecution decided upon all the charges...

Hindsight and second guesses are ... inappropriate, and often more so, where a plea has been entered without a full trial or, as in this case, eve before the prosecution decided on the charges. . . . There is a most substantial burden on the claimant to show ineffective assistance. The plea process brings to the criminal justice system a stability and a certainty that must not be undermined by the prospect of collateral challenges in cases not only where witnesses and evidence have disappeared, but also in

cases where witnesses and evidence were not presented in the first place.

**Sears v. Upton*, 130 S. Ct. 3259 (2010). The Court held that the state postconviction court failed to apply the proper prejudice inquiry in determining that counsel’s facially inadequate mitigation investigation did not prejudice the petitioner. Because “*some* mitigation evidence” had been presented, “the state court determined it could not speculate as to what the effect of additional evidence would have been.” “[I]t is plain from the face of the state court’s opinion that it failed to apply the correct prejudice inquiry . . . for evaluating [petitioner’s] Sixth Amendment claim.” At trial, “counsel presented evidence describing his childhood as stable, loving, and essentially without incident” in an effort to “portray the adverse impact of [his] execution on his family and loved ones.” This strategy backfired as the prosecutor “used the evidence of [petitioner’s] purportedly stable and advantaged upbringing against him during the State’s closing argument.” Rather than being “privileged in every way,” as the state argued, petitioner’s parents had a physically abusive relationship and divorced when the petitioner was young. He suffered sexual abuse from a male cousin. He was demeaned by his mother referring to him and his brothers as “little mother fuckers.” His father was also “verbally abusive,” even berating him in front of his school principal during a parent-teacher conference. His father disciplined him “with age-inappropriate military-style drills.” He “struggled in school, demonstrating substantial behavior problems from a very young age.” He repeated the second grade and was referred at age nine to a local mental health center for evaluation. By the time he reached high school, he was described as “severely learning disabled” and “severely behaviorally handicapped.” His older brother was “a convicted drug dealer and user, who introduced [petitioner] to a life of crime. “Environmental factors aside, and more significantly,” the postconviction evidence revealed that petitioner “performs at or below the bottom first percentile in several measures of cognitive functioning and reasoning,” likely due to “significant frontal lobe damage [the petitioner] suffered as a child, as well as drug and alcohol abuse in his teens.” He had a “grandiose self-conception” and beliefs of “magical thinking,” due to a “profound personality disorder.” “[T]he fact that some of this evidence may have been ‘hearsay’ does not necessarily undermine its value—or its admissibility—for penalty phase purposes” because:

We have . . . recognized that reliable hearsay evidence that is relevant to a capital defendant’s mitigation defense should not be excluded by rote application of a state hearsay rule. *See Green v. Georgia*, 442 U.S. 95, 97, 99 S. Ct. 2150, 60 L.Ed.2d 738 (1979) (*per curiam*) (“Regardless of whether the proffered testimony comes within Georgia’s hearsay rule, under the facts of this case its exclusion constituted a violation of the Due Process Clause. . . . The excluded testimony was highly relevant to a critical issue in the punishment phase of the trial); *see also Chambers v.*

Mississippi, 410 U.S. 284, 302, 93 S. Ct. 1038, 35 L.Ed.2d 297 (1973) (“In these circumstances, where constitutional directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice”).

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

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

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

Berghuis v. Thompkins, 130 S. Ct. 2250 (2010). Under AEDPA, counsel was not ineffective in murder trial for failing to request a limiting instruction, informing the jury that it could consider an accomplice's acquittal in a prior trial only in assessing the accomplice's credibility and not as substantive evidence of the defendant's guilt. Here, without considering whether the state court used an incorrect legal standard or applying "AEDPA's deferential standard," prejudice could not be shown in light of significant evidence of guilt independent of the accomplice, including an eyewitness and a surveillance photo of the crime identifying the defendant, as well as, the defendant's friend's testimony that the defendant confessed to him.

****Jefferson v. Upton***, 130 S. Ct. 2217 (2010). The state court rejected Jefferson's claim of "constitutionally inadequate" assistance due to counsel's failure "to investigate a traumatic head injury that he suffered as a child" because of "a finding that the attorneys were advised by an expert that such investigation was unnecessary." The Eleventh Circuit erred in presuming this finding was correct, under pre-AEDPA law, without having fully considered the applicable exceptions to a presumption of correctness under 28 U.S.C. § 2254(d) and *Townsend v. Sain*, 372 U.S. 293 (1963). The court considered only whether the finding were "fairly supported by the record," even though Jefferson had consistently argued that "the state court's *process* was deficient" because: "those findings were drafted exclusively by the attorneys for the State pursuant to an *ex parte* request from the state-court judge, who made no such request of Jefferson, failed to notify Jefferson of the request made to opposing counsel, and adopted the State's proposed opinion verbatim even though it recounted evidence from a nonexistent witness." Remanded for further proceedings.

Padilla v. Kentucky, 130 S. Ct. 4235 (2010). Padilla, a native of Honduras who had lived in the U.S. for 40 years legally and fought for the U.S. in the Vietnam War, pleaded guilty based on counsel's incorrect advice that deportation was unlikely. Starting with the premise that "the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel," the Court found deficient conduct in counsel's failure to advise Padilla that his conviction for drug distribution made him subject to automatic deportation. The Court declined to consider whether there is some "distinction between direct and collateral consequences" for *Strickland* purposes because of the "unique nature of deportation," which is "an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes." "The first prong [of *Strickland*]—constitutional deficiency—is necessarily linked to the practices and expectations of the legal community," described in *Strickland* as "prevailing professional norms." While ABA standards and the like "are 'only guides,' and not 'inexorable commands,' these standards may be valuable measures of the prevailing professional norms of effective representation, especially as these standards have been adapted to deal with the intersection of modern criminal prosecutions and immigration law." Here, the

Court cited the ABA Standards for Criminal Justice, NLADA standards, and others in finding, with some qualification, that “[t]he weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation.”

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

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

**Wood v. Allen*, 130 S. Ct. 841 (2010) (crimes in 1993 and direct appeal in 1996). Under AEDPA, the Court upheld the Eleventh Circuit’s finding that counsel was not ineffective in failing to pursue and present mitigating evidence of the defendant’s borderline mental retardation as the failure was a strategic decision rather than a negligent omission. The state court’s factual findings in denying relief were reasonable. Counsel were aware of a favorable expert report about low IQ, but that report also contained the expert’s conclusion that the defendant had a high level of adaptive functioning. In addition, the report contained details of the defendant’s 19 prior arrests and his attempt to murder a prior ex-girlfriend when the capital murder involved the killing of an ex-girlfriend. All of the defendant’s counsel read the report. Lead counsel told the counsel handling sentencing that nothing in the report merited further investigation. Sentencing counsel told the judge that counsel did not intend to introduce the expert report before the jury. Thus, the failure to present the report “was not mere oversight or neglect but was instead the result of a deliberate decision to focus on other defenses.” While *Wood*’s counsel asserted that counsel’s strategic judgment was not reasonable due to the failure to make a reasonable investigation of *Wood*’s mental deficiencies before deciding not to pursue or present such evidence, the Court declined to reach that question because the argument was not “fairly included” in the questions presented.

Whether the state court reasonably determined that there was a strategic decision under § 2254(d)(2) is a different question from whether the strategic decision itself was a reasonable exercise of professional judgment under *Strickland* or whether the application of *Strickland* was reasonable under § 2254(d)(1).

**Smith v. Spisak*, 130 S. Ct. 676 (2010) (sentenced in 1983). Without deciding whether “deference” to the state court decision was required under AEDPA, the Court reversed the Sixth Circuit’s finding of ineffective assistance due to an inadequate closing argument

in the capital sentencing phase. Counsel described the crimes in detail, acknowledged that the defendant's "admiration for Hitler inspired his crimes," referred to the defendant as "sick," "twisted," and "demented," and said that he would never change. Counsel did argue, however, that the defendant should not be executed due to mental illness (schizotypal and borderline personality disorders characterized by bizarre and paranoid thinking), despite the "substantial" aggravating factors. The Court assumed that counsel's conduct was deficient, but found no prejudice, as the defendant admitted three murders and two other shootings by asserting a not guilty by reason of insanity plea. In addition, the defendant himself gave very damaging testimony admitting his "Aryan" admiration of Hitler and his crimes. He also testified that he would continue to commit similar crimes if he had the chance.

***Porter v. McCollum**, 130 S. Ct. 447 (2009) (Per Curiam) (sentenced in 1988). Under AEDPA, counsel ineffective in capital sentencing for failing to adequately investigate and present mitigation evidence. The defendant, after proceeding *pro se* with stand-by counsel, plead guilty to shooting his former girlfriend. His stand-by counsel was appointed to represent him in sentencing and presented only his ex-wife's testimony and an excerpt from a deposition. "The sum total of the mitigating evidence was inconsistent testimony about [the defendant's] behavior when intoxicated and testimony that [he] had a good relationship with his son." *Id.* at 449. No mental health evidence was presented and the trial court found no mitigating circumstances. Because the state court did not decide whether counsel's conduct was deficient, the Court reviewed this element of the claim *de novo*. While "counsel had an 'obligation to conduct a thorough investigation of the defendant's background,'" *id.* at 452 (quoting *Williams v. Taylor*, 529 U.S. 362, 396 (2000)), counsel "did not satisfy those norms," *id.* at 453. Counsel was appointed a month before sentencing and had only one short meeting with the defendant about the sentencing phase. "He did not obtain any of [the defendant's] school, medical, or military service records or interview any members of [the defendant's] family." Where counsel in *Wiggins* failed to "expand[] their investigation," counsel here "did not even take the first step of interviewing witnesses or requesting records." *Id.* at 453. "[H]e ignored pertinent avenues for investigation of which he should have been aware." *Id.* Even court-ordered competency evaluations revealed his limited education, his military service and combat record, and his father's "over-discipline." While counsel asserted that the defendant was "fatalistic and uncooperative," the defendant had instructed him not to talk to his ex-wife or son, but otherwise "did not give him any other instructions limiting the witnesses he could interview." *Id.* In short, while the defendant "may have been fatalistic or uncooperative, . . . that does not obviate the need for defense counsel to conduct *some* sort of mitigation investigation." *Id.* There was also prejudice. In short, the judge and jury at sentencing "heard almost nothing that would humanize [the defendant] or allow them to accurately gauge his moral culpability. They learned about [his] turbulent relationship with [the victim], his crimes, and almost nothing else." *Id.* at 454. Evidence was available that the defendant had routinely witnessed his father beat his mother. He

was also routinely beaten by his father, particularly when he tried to protect his mother. His father even shot at him once. He attended classes for slow learners and left school when he was 12 or 13. He joined the Army at 17 and fought in the Korean War. His company commander testified that he fought in two major battles within a 3 month period and was wounded in both. In one of the battles his unit suffered more than 50% casualties. He was individually decorated for his actions in both battles. When he returned to the U.S., he went AWOL and was sentenced to six months' confinement, but he was honorably discharged. After his discharge, he suffered from posttraumatic stress disorder (PTSD), which the Court noted is "not uncommon among veterans returning from combat," *id.* at 450, as the Secretary of Veteran Affairs testified before Congress in 2009 "that approximately 23 percent of the Iraq and Afghanistan war veterans seeking treatment at a VA medical facility had been preliminarily diagnosed with PTSD" *id.* at 450 n.4. He also developed a serious drinking problem. An expert in neuropsychology also found that he suffered from "brain damage that could manifest in impulsive, violent behavior." *Id.* at 452. The expert testified that two statutory mitigating circumstances were present: substantially impaired ability to conform conduct and extreme mental or emotional disturbance.

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

Id. at 449. The aggravation evidence "[o]n the other side of the ledger" was not substantial. *Id.* at 454.

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

Porter, 130 S. Ct. at 454. Thus, under AEDPA, the state court's finding of no prejudice was "an unreasonable application of our clearly established law." *Id.* at 455. The state court did not consider the expert testimony for purposes of nonstatutory mitigation and "unreasonably discounted the evidence of [the defendant's] childhood abuse and military service." *Id.* The evidence of childhood abuse "may have particular salience" in a case like this where the defendant killed his former girlfriend. *Id.* The military service was important as "[o]ur Nation has a long tradition of according leniency to veterans in recognition of their service, especially for those who fought on the front lines." *Id.* The

military service was also relevant mitigation because of “the intense stress and mental and emotional toll that combat took.” *Id.*

**Wong v. Belmontes*, 130 S. Ct. 383 (2009) (Per Curiam) (reversing *Belmontes v. Ayers*, 529 F.3d 834 (9th Cir. 2008)) (sentenced in 1982). The Court reversed the Ninth Circuit’s finding of ineffective assistance of counsel for failing to adequately investigate and present mitigation evidence. The Court did not resolve whether counsel’s conduct was deficient because it found that prejudice was not established.

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

Id. at 386 (quoting *Wiggins v. Smith*, 539 U.S. 510, 535, 536 (2003)). The Court accepted the lower court’s conclusion that a reasonably competent lawyer would have introduced more mitigation evidence, but found no likelihood of a different result.

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

Id. In this case, counsel had put on nine lay witnesses for testimony spanning two days to testify about the defendant’s terrible childhood, with an alcoholic and abusive father, living in a small house, and not doing well in school. His younger sister died when she was only 10 months old and his grandmother drowned. He had plead guilty to accessory after the fact of murder and had a religious conversion in custody where he adapted well. The evidence counsel did not present was “merely cumulative” or “would have triggered admission” of powerful aggravation evidence in rebuttal. *Id.* at 387. Specifically, there was extensive evidence that the defendant had committed the prior “execution style” murder to which he plead guilty as an accessory. *Id.* at 385. He had boasted to several people and admitted to his counselor while in custody that he had committed the murder. Counsel had structured the mitigation evidence to keep this evidence out. There was no prejudice from not using expert testimony because the mitigating evidence “was neither complex nor technical” and the jury could “use its common sense or own sense of mercy” to “understand the ‘humanizing’ evidence.” *Id.* at 388. Moreover, presenting expert testimony would have opened the door to the evidence of the prior murder, which was the “elephant in the courtroom” kept out only by counsel’s careful presentation of the mitigation. *Id.* at 390.

***Bobby v. Van Hook**, 130 S. Ct. 13 (2009) (Per Curiam) (reversing *Van Hook v. Anderson*, 560 F.3d 523 (6th Cir. 2009)) (sentenced in 1985). In this pre-AEDPA case, the Court reversed the Sixth Circuit’s finding of ineffective assistance of counsel for failing to adequately investigate and present mitigation evidence. The Court reiterated that the *Strickland* “standard is necessarily a general one.” *Id.* at 16.

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

Id. In this case, the Sixth Circuit erred by “relying on ABA guidelines announced 18 years after Van Hook went to trial” in 1985. In short, “[t]he ABA standards in effect in 1985 described defense counsel’s duty to investigate both the merits and mitigating circumstances in general terms,” *id.* at 16-17, rather than the “detailed prescriptions for legal representation of capital defendants” in the 2003 Guidelines, *id.* at 17. It was error to judge counsel’s conduct based on the 2003 Guidelines and to treat the Guidelines “not merely as evidence of what reasonably diligent attorneys would do, but as inexorable commands with which all capital defense counsel ‘must fully comply.’” *Id.* The Court noted that it was expressing “no views” on how post-2003 representation should be changed, *id.* at 17 n.1, but declared here:

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

Id. at 17. The Court also held that, applying the appropriate standards, counsel was not ineffective. While the lower court held that counsel “began their mitigation investigation too late,” counsel had three months from the time of indictment to trial and “contacted their lay witnesses early and often,” including talking nine times with the defendant’s mother. *Id.* at 18. They contacted one of their experts a month before trial and met with the other expert a week before the trial court verdict. They attempted to obtain VA medical records seven weeks before trial. They also “looked into enlisting a mitigation specialist when the trial was still five weeks away.” *Id.* The scope of counsel’s investigation was also not unreasonable. Counsel presented evidence that the defendant’s parents were “heavy drinkers” that encouraged his drug and alcohol use as a child and that he continued abusing drugs and alcohol into adulthood. *Id.* He grew up in a “combat zone” with his father holding his mother at gun and knife-point and engaging in “sexual violence.” *Id.* His drug and alcohol abuse resulted in him being forced out of the military. He had attempted suicide five times in the month before the murder. There was

also expert testimony about his diminished capacity at the time of the offenses—a “homosexual panic”—from his borderline personality disorder and drugs and alcohol. *Id.* at 19. While counsel did not interview a stepsister, two uncles, two aunts, and a psychiatrist that had treated the defendant’s mother, this conduct was not deficient.

[T]here comes a point at which evidence from more distant relatives can reasonably be expected to be only cumulative, and the search for it distractive from more important duties. The ABA Standards prevailing at the time called for . . . counsel to cover several broad categories of mitigating evidence, which they did. And given all the evidence they unearthed from those closest to [the defendant’s] upbringing and the experts who reviewed his history, it was not unreasonable for his counsel not to identify and interview every other living family member or every therapist who once treated his parents.

Id. at 19 (citations omitted). In short, this was not a case like *Wiggins v. Smith*, 539 U.S. 510 (2003), where counsel “failed to act while potentially powerful mitigating evidence stared them in the face,” or *Rompilla v. Beard*, 545 U.S. 374 (2005), where evidence “would have been apparent from documents any reasonable attorney would have obtained.” *Bobby*, 130 S. Ct. at 19.

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

Id. at 19 (quoting *Strickland v. Washington*, 466 U.S. 668, 699 (1984)). Finally, even if counsel’s conduct was deficient, there was no prejudice as only two witnesses “even arguably would have added new, relevant information.” *Id.* In addition, the lower court failed to consider the aggravation evidence “[o]n the other side of the scales,” which included a history of luring homosexual men into secluded settings to rob them many times in the past, as he did in this case that resulted in murder. *Id.* at 20.

Knowles v. Mirzayance, 129 S. Ct. 1411 (2009). Reversing the Ninth Circuit’s and holding, under AEDPA review, that the decision of the California Court of Appeal, that defendant was not deprived of effective assistance of counsel when his attorney recommended withdrawing his insanity defense, was not contrary to or an unreasonable application of clearly established federal law, and defense counsel was not ineffective. Defendant was charged with murder and plead not guilty and not guilty by reason of insanity. Under California law, this required a bifurcated trial, first on guilt or innocence (with the burden of proof on the state) and then on insanity (with the burden of proof on the defendant.) Although the defendant confessed, the defense first sought conviction

only on the lesser included offense of second-degree murder based on the defendant's inability to premeditate or deliberate. Counsel presented medical testimony in the guilt-or-innocence phase, but the jury rejected this evidence and convicted of first-degree murder. Counsel had intended to present the same medical testimony in the insanity phase, along with testimony of the defendant's parents, but the parents refused to testify. On the advice of counsel, who believed it was unlikely the defense would prevail, the defendant withdrew the insanity plea. Following confusion from the Ninth Circuit's remand, the Magistrate Judge and District Court granted relief and the Ninth Circuit affirmed even though it appeared that the District Court had "evaluated counsel's strategy under a 'nothing to lose' standard," meaning counsel had no true tactical reason for withdrawing the plea because there was "nothing to lose" in pursuing insanity. Even following the Supreme Court's remand for consideration in light of *Carey v. Musladin*, 549 U.S. 70 (2006), the Ninth Circuit granted "because defense counsel's failure to pursue the insanity defense constituted deficient performance as it 'secured ... [n]o actual tactical advantage.'" The Supreme Court reversed.

The question "is not whether a federal court believes the state court's determination" under the *Strickland* standard "was incorrect but whether that determination was unreasonable—a substantially higher threshold." *Schriro v. Landrigan*, 127 S. Ct. 1933 (2007)]. And, because the *Strickland* standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard. See *Yarborough v. Alvarado*, 541 U.S. 652, 664, 124 S.Ct. 2140, 158 L.Ed.2d 938 (2004) ("[E]valuating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations").

Id. at 1420.

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

standard for evaluating *Strickland* claims.

Id. at 1419 (citations omitted). The Court also rejected the Court’s “nothing to lose” reasoning: “Finding that counsel is deficient by abandoning a defense where there is nothing to gain from that abandonment is equivalent to finding that counsel is deficient by declining to pursue a strategy where there is nothing to lose from pursuit of that strategy.” *Id.* at 1419 n.3.

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

Id. at 1420. Moreover, “Even if Mirzayance's ineffective-assistance-of-counsel claim were eligible for *de novo* review, it would still fail” under *Strickland*. Counsel’s conduct was not deficient because his counsel merely recommended the withdrawal of what he reasonably believed was a claim doomed to fail.” *Id.* Counsel reasoned that “[t]he jury had already rejected medical testimony about Mirzayance's mental state in the guilt phase, during which the State carried its burden of proving guilt beyond a reasonable doubt” and, thus, the defense could not meet its burden in the insanity phase because “there was almost no chance that the same jury would have reached a different result when considering similar evidence.” *Id.* at 1421. Counsel also believed the experts could be impeached for other reasons.

We are aware of no “prevailing professional norms” that prevent counsel from recommending that a plea be withdrawn when it is almost certain to lose. And in this case, counsel did not give up “the only defense available.” Counsel put on a defense to first-degree murder during the guilt phase. Counsel also defended his client at the sentencing phase [where he received the lowest possible sentence for his first-degree murder conviction]. The law does not require counsel to raise every available nonfrivolous defense. Counsel also is not required to have a tactical reason above and beyond a reasonable appraisal of a claim's dismal prospects for success for recommending that a weak claim be dropped altogether.

Id. at 1421-22 (citations omitted). While the Court of Appeals faulted counsel for not

persuading the reluctant parents to testify, the Magistrate Judge and District Court had found more than reluctance. They found refusal.

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

Id. at 1421. “Competence does not require an attorney to browbeat a reluctant witness into testifying, especially when the facts suggest that no amount of persuasion would have succeeded.” *Id.* There was also no prejudice. “It was highly improbable that a jury, which had just rejected testimony about Mirzayance's mental condition when the State bore the burden of proof, would have reached a different result when Mirzayance presented similar evidence at the NGI phase.”

Wright v. Van Patten, ___ U.S. ___, 128 S. Ct. 743 (2008) (Per Curiam). The Court vacated the Seventh Circuit's holding that the defendant had been denied the assistance of counsel under *Cronic* during his plea hearing for reckless homicide because his lawyer was not physically present “but was linked to the courtroom by speaker phone.” Because the Court's precedents have not addressed this question, it could not be said that the state court's had unreasonably applied clearly established Federal law under AEDPA in applying *Strickland* rather than *Cronic* as the Seventh Circuit did.

**Schriro v. Landrigan*, 127 S. Ct. 1933 (2007). The Court reversed the Ninth Circuit's grant of an evidentiary hearing on the question of whether counsel was ineffective for failing to adequately investigate and present mitigation despite the defendant's instruction to counsel not to offer any mitigating evidence. In sentencing, counsel attempted to present the testimony of the defendant's ex-wife and birth mother, but, at the defendant's request, both refused to testify. The defendant also informed the court that he did not want to present any mitigating evidence. Counsel proffered that the witnesses would have testified that the defendant's birth mother used drugs and alcohol (including while she was pregnant with the defendant), that the defendant had abused drugs and alcohol, and that he had been a good father. When counsel tried to proffer additional mitigating evidence, the defendant “would have none of it” and contradicted counsel. The defendant also informed the court that “if you to give me the death penalty, just bring it right on. I'm ready for it.” In reversing the Ninth Circuit, the Court held that, if the defendant “instructed his counsel not to offer any mitigating evidence” then “counsel's failure to investigate further could not have been prejudicial under *Strickland*.” *Id.* at 1941. The Court also rejected the Ninth Circuit's finding that, “due to counsel's failure to

investigate, [the defendant] could not have known about the mitigating evidence he now wants to explore.” This finding was rejected because the proffered evidence “overlaps” with the evidence relied on in the habeas proceedings and because it was plain from the transcript “that Landrigan would have undermined the presentation of any mitigating evidence that his attorney might have uncovered.” *Id.*

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

Id. at 1942. The Court also rejected the Ninth Circuit's finding that the decision not a present mitigation was informed and knowing. “We have never imposed an ‘informed and knowing’ requirement upon a defendant's decision not to introduce evidence. Even assuming, however, that an ‘informed and knowing’ requirement exists in this case, Landrigan cannot benefit from it. . . .” *Id.* (citation omitted). First, this issue was not raised in state court. Second, counsel informed the trial court that he had carefully explained the importance of mitigation to the defendant and it is “doubtful that Landrigan would have sat idly by” if this were not true. Finally, Landrigan's final statement to the court to “bring it right on” clearly indicates the defendant understood the consequences of not presenting mitigation. Finally, the Court rejected the Ninth Circuit's finding of a “colorable” showing of prejudice because most of the evidence available could have been presented through the defendant's birth mother and ex-wife and was proffered to the sentencing court anyway. Thus, “[t]he District Court could reasonably conclude that any additional evidence would have made no difference in the sentencing.” *Id.* at 1943. The “mitigation evidence was weak,” the defendant had an “exceedingly violent past” (“before he was 30 years of age, Landrigan had murdered one man, repeatedly stabbed another one, escaped from prison, and within two months murdered still another man”), the defendant showed no remorse, and the defendant was “belligerent” and “flaunted his menacing behavior.” In sum, “[o]n this record, assuring the court that genetics made him the way he is could not have been very helpful.”

**Rompilla v. Beard*, 545 U.S. 374 (2005). Counsel ineffective in capital sentencing for failing “to make reasonable efforts to obtain and review material that counsel [knew] the prosecution [would] probably rely on as evidence of aggravation at the sentencing phase of the trial,” *id.* at 377, which would have led to significant mitigation. Counsel interviewed the defendant, who provided minimal assistance in mitigation and “was actively obstructive by sending counsel off on false leads,” *id.* at 381, and a few of the defendant's family members, and reviewed the reports of court-appointed examiners, who assessed only competence and capacity at the time of the offenses. Finding nothing “particularly helpful” in these sources, *id.*, counsel did not conduct additional

investigation for information “that might have cast light on [the defendant’s] mental condition,” *id.* at 382. Counsel also did not obtain the file of a prior conviction for rape and assault, even though counsel knew the state intended to rely on the aggravating circumstance of a significant history of felony convictions indicating the use or threat of violence and knew that the state specifically intended to read the testimony of the prior rape victim into evidence in sentencing. In mitigation, the defense presented brief testimony from the defendant’s family members, who “argued in effect for residual doubt, and beseeched the jury for mercy.” *Id.* at 378. In addressing the ineffective assistance claim, the Court noted that, in a capital sentencing, “defense counsel’s job is to counter the State’s evidence of aggravated culpability with evidence in mitigation.” *Id.* at 380-81. While “reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste,” *id.* at 383, counsel’s conduct in this case was “deficient in failing to examine the court file,” *id.*, on the prior conviction because counsel knew the state intended to rely on it and “the prior conviction file was a public document, readily available for the asking at the very courthouse where [the defendant] was to be tried,” *id.* at 384. While counsel opposed admission of the evidence, this was insufficient because “[c]ounsel’s obligation to rebut aggravating evidence extended beyond arguing it ought to be kept out.” *Id.* at 386 n.5. Here, despite knowing of the state’s intent to rely on the evidence, counsel did not look at any part of the file, until the day before the sentencing phase began and then looked only at the transcript of the victim’s testimony. The obligation to review the remainder of the file

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

Id. at 386. In reaching this conclusion, the Court emphasized “[t]he ease with which counsel could examine the entire file. . . . Suffice it to say that when the State has warehouses of records available in a particular case, review of counsel’s performance will call for greater subtlety.” *Id.* at 386 n.5. The Court also noted that “[t]he notion that defense counsel must obtain information that the State has and will use against the defendant is not simply a matter of common sense.” *Id.* at 387. It is described “in terms no one could misunderstand” in the ABA Standards for Criminal Justice “in circulation,” *id.*, at the time of trial and the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases promulgated in 1989, “shortly after” this trial, and made “even more explicit” in the 2003 revisions. *Id.* at 387 n.7. “[I]n any case, [we] cannot think of any situation in which defense counsel should not make some effort to learn the information in the possession of the prosecution and law enforcement authorities.” *Id.* at 387 n.6. The state court’s application of Strickland was objectively unreasonable because

the court reasoned that “defense counsel’s efforts to find mitigating evidence by other means excused them from looking at the prior conviction file.” *Id.* at 388. The Court rejected this reasoning because “[n]o reasonable lawyer would forgo examination of the file thinking he could do as well by asking the defendant or family relations whether they recalled anything helpful or damaging in the prior victim’s testimony.” *Id.* at 389. Counsel is not required to look

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

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

v. Smith, 539 U.S. 510, 538 (2003) and *Williams v. Taylor*, 529 U.S. 362, 398 (2000)).

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

the gravity of the potential sentence in a capital trial and the proceeding's two-phase structure vitally affect counsel's strategic calculus. Attorneys representing capital defendants face daunting challenges in developing trial strategies, not least because the defendant's guilt is often clear. Prosecutors are more likely to seek the death penalty, and to refuse to accept a plea to a life sentence, when the evidence is overwhelming and the crime heinous. In such cases, "avoiding execution [may be] the best and only realistic result possible." ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases § 10.9.1, Commentary (rev. ed.2003), reprinted in 31 Hofstra L.Rev. 913, 1040 (2003).

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

To summarize, in a capital case, counsel must consider in

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

Id.

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

Yarborough v. Gentry, 540 U.S. 1 (2003). The Court reversed the Ninth Circuit's grant of relief because the state court determination that counsel was not ineffective was not objectively unreasonable under the AEDPA. The defendant had been convicted of assault with a deadly weapon for stabbing his girlfriend. On appeal, he argued that his trial counsel's closing argument deprived him of his right to effective assistance of counsel. The state court denied relief, as did the federal district court, but the Ninth Circuit reversed. The court held that the right to effective assistance extends to closing arguments. Nonetheless, counsel has wide latitude in deciding how best to represent a client, and deference to counsel's tactical decisions in his closing presentation is particularly important because of the broad range of legitimate defense strategy at that

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

**Wiggins v. Smith*, 539 U.S. 510 (2003). Counsel ineffective in capital habeas case, decided under the AEDPA, for failing to adequately prepare and present mitigation. Counsel relied on arguments that the defendant was not directly responsible for the murder and did not present any social history or other mitigation, despite knowledge of at

least some of the defendant’s background information. The issue before the Court was “whether the investigation supporting counsel’s decision not to introduce mitigating evidence of Wiggins’ background was *itself reasonable*.” *Id.* at 523 (emphasis in original). “In assessing counsel’s investigation, we must conduct an objective review of their performance, measured for ‘reasonableness under prevailing professional norms,’ which includes a context-dependent consideration of the challenged conduct as seen ‘from counsel’s perspective at the time.’” *Id.* (quoting *Strickland*, 466 U.S. at 688). In this case, where counsel had only limited records available and did not investigate further, counsel’s conduct “fell short of the professional standards that prevailed in Maryland in 1989,” because no “social history report” was prepared even though counsel had funds available to retain a “forensic social worker.” *Id.* at 524.

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

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

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

Id. at 527. In this case, “counsel were not in a position to make a reasonable strategic

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

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

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

**Court Findings of Ineffective Assistance of Counsel Claims in
Post-Conviction Appeals
Among the First 255 DNA Exoneration Cases**

Prepared by:

**Dr. Emily M. West
Director of Research
Innocence Project
September 2010**

Introduction

The Sixth Amendment of the U.S. Constitution establishes the right to assistance of counsel for individuals accused of crimes, and the U.S. Supreme Court has established that states must provide representation for indigent defendants. Unfortunately, the lack of national standards for creating and funding such a system has left most states with inadequate, underfunded systems¹. This problem has led to overburdened and sometimes incompetent defense lawyers and a lack of funding for the investigative process, all of which can contribute to inadequate defense, and in some cases, wrongful convictions.

Yet, the standard set in the landmark decision in *Strickland v. Washington* creates an extremely high burden on the defendant to establish ineffectiveness. In *Strickland v. Washington*, the Supreme Court set a two-prong test to determine ineffectiveness - the counsel's representation must fall below an objective standard of reasonableness, and there must be reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different². Further, in evaluating the performance of counsel, the Supreme Court stated that courts "must be highly deferential...A court must indulge a strong presumption that counsel's performance was within the wide range of reasonable professional assistance."³

Allowing such deference to the defense sets a low bar for defining effectiveness, making it difficult for defendants to gain post conviction relief via claims of ineffective assistance of counsel. Review studies of post conviction appeals have demonstrated that ineffective assistance of counsel is the most commonly raised issue. One study by NCSC, reviewing Habeas Corpus claims, found that while nearly half of state claims involved allegations of ineffective assistance of counsel, only eight percent found relief⁴.

DNA exoneration cases offer a unique perspective on this issue, given that we know the clients in these cases were convicted of crimes they did not commit. However, as this review will demonstrate DNA exonerees do not seem more likely to find relief on this claim than those in the larger prison population. A review of published appeals among the DNA exoneration reveals that 54 exonerees (about 1 in 5) raised claims of ineffective assistance of counsel and courts rejected these claims in the overwhelming majority of cases⁵.

Methodology

In order to locate appeals involving ineffective assistance of counsel, WestLaw was accessed to conduct searches using specific search terms, as well as more general searches by exoneree name and state of conviction. This summary relies on published appellate decisions and therefore does not

¹ The Constitution Project (2009). *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel*.

² *Strickland v. Washington*, 466 U.S. 668 (1984).

³ *Id.*

⁴ Brandon Garrett, *Judging Innocence*, 108 *Columbia Law Review*, 107 (2008); Victor E. Flango, *Habeas Corpus in State and Federal Courts* (1994) at http://www.ncsonline.org/WC/Publications/KIS_StaFedHabCorpStFedCts.pdf#search=%22habeas%20study%22 ("NCSC study").

⁵ Six others raised IAC claims, but court findings were not available (they did not respond or address the claim) and were therefore excluded from this analysis.

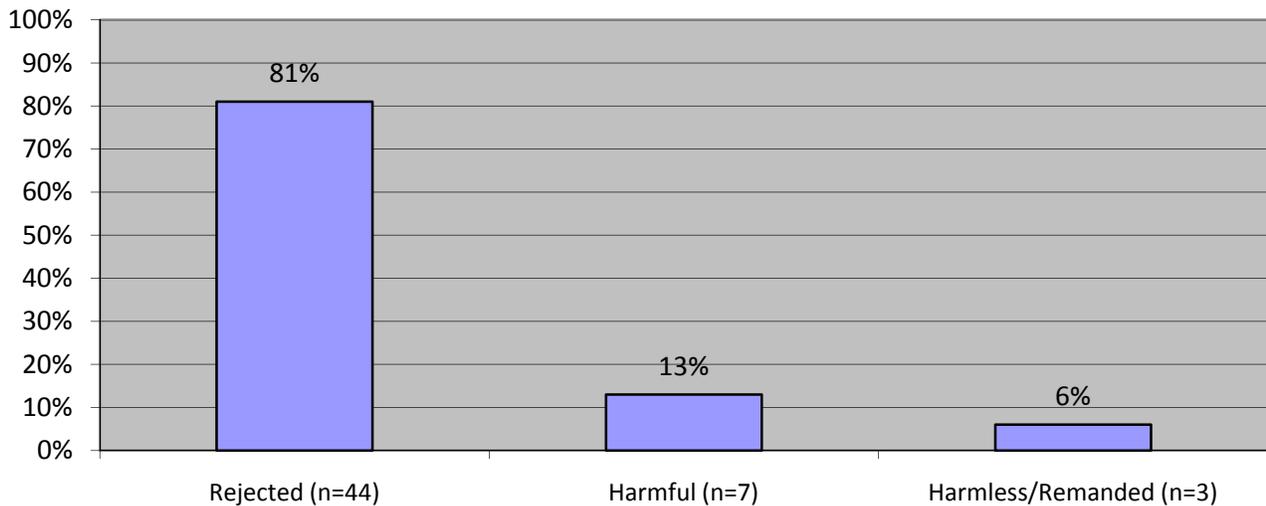
capture the full scope of all appeals that exonerees may have filed involving ineffective assistance of counsel.

Court Findings in Appeals Involving Ineffective Assistance of Counsel Claims

A review of published appeals revealed that 54 of the first 255 DNA exonerees (21%) raised claims of ineffective assistance of counsel. In the overwhelming majority of these appeals, the courts rejected the claims (81%), however in seven cases, courts agreed with appellants and found ineffective assistance of counsel, leading to reversals of convictions for six exonerees and new representation in one case (additional details of these seven cases are presented in the last section of this summary).

In three other cases courts either determined that the actions, or lack thereof, of the counsel were harmless (counsel deficient, but no prejudice) or courts remanded the case to lower courts for further review.

**Court Findings of Ineffective Assistance of Counsel Claims
in DNA Exoneration Cases
N=54**



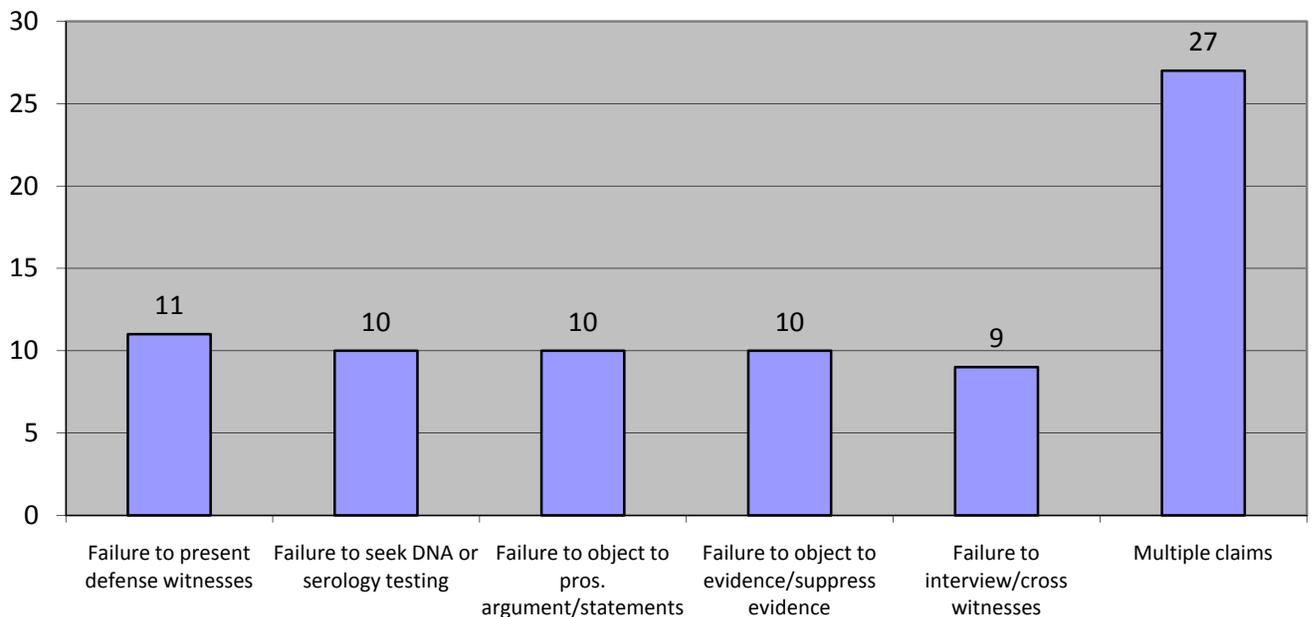
Types of Claims Pursued

While there was great variation in the specific types of claims pursued in these appeals, a few trends emerge. As presented in the figure below, the most common types of claims included defense lawyers who: failed to present defense witnesses (often to establish/confirm an alibi); failed to seek DNA testing or have serology testing done to try to exclude the client; failed to object to prosecutor arguments or to evidence introduced by the state; and failed to interview witnesses in preparation for trial or to cross examine state witnesses. Other examples of less frequently reported claims included failure to investigate, failure to object to an ID, and failure to present expert testimony. Half of exonerees who presented ineffective assistance of counsel claims in appeals raised multiple claims.

Since most of these cases were rejected on appeal, it is difficult to determine whether some claims are more likely than others to find relief in the courts. Among the seven appeals where courts confirmed ineffective assistance of counsel, the types of claims varied widely (conflict of interest issue; failure to seek expert; failure to seek DNA testing; failure to investigate). When examining the appeals where courts rejected the claims, here again no distinct patterns emerged, however, it did appear that simple negligence without awareness in pursuit of a 'reasonable strategy' did not meet the court's definition of ineffective assistance of counsel. If the record was silent on strategy, the courts tended to give defense counsel the benefit of doubt.

Examples of Types of Ineffective Assistance of Counsel Claims

N=54



Details of the 7 Appeals Where Courts Confirmed Allegations of Ineffective Assistance of Counsel:

Jimmy Bromgard, MT

Bromgard's court-appointed lawyer failed to file an appeal after his conviction.

- *Court's reasoning:* Appellate court agreed that defense counsel was inadequate by not filing appeals.
 - In 1991 Bromgard was granted a new lawyer (cited in State v. Bromgard, 261 Mont. 291). His new lawyer filed subsequent appeals but Bromgard did not find relief until DNA testing later exonerated him.

Anthony Hicks, WI

Anthony Hicks' private lawyer decided not to do a DNA test, which he never discussed with the client. Counsel claims he did not because 1. Strategy – none of the serology evidence could be conclusively linked to the defendant. 2. He thought that the hair evidence would be inadmissible. 3. He said the cost of DNA testing was an issue.

[NOTE: DNA testing had already been performed when this appeal was heard. However, the prosecutor refused to drop charges, suggesting that since only one of the pubic hairs excluded him, the others could have been his (these other hairs were not suitable for DNA testing).]

- *Court's reasoning:*
 - The court did not agree with the defense counsel's reasoning – strategy argument was not convincing (testing DNA would have complimented the strategy he did follow) (State v. Hicks, 536 N.W.2d 487). **NOTE:** see Josiah Sutton's case below – this similar claim was rejected by another court, revealing the broad variation in the way different courts interpret and apply the test for ineffective assistance of counsel.
 - "Hicks' trial counsel understood that the hair samples were going to be a major issue in the case. But he has provided no reasoned basis for failing to pursue a testing process that he knew had the potential to provide exculpatory evidence on this major issue. We do not intend to suggest that failure to obtain DNA test results is always deficient circumstances of each case. We hold here only that, under the circumstances of this case, Hicks' trial counsel's decision not to pursue DNA analysis of the hair specimens was not "a strategic or tactical decision...based upon rationality founded on the facts and the law," (State v. Hicks, 536 N.W.2d 487, 492).
 - He should have known that the court may have let the hair evidence in (which it did).
 - While defense counsel said that the cost of testing was an issue, he admitted that he never looked into how much it would cost.
 - In 1995, this court reversed the conviction. The State appealed this decision and lost and eventually dropped the charges based on this appellate decision and the DNA results.

Willie Jackson, LA

Willie Jackson's private lawyer did not request funds from the state for an odontology expert to rebut state's expert, despite acknowledging the need for a rebuttal expert by requesting funds from Jackson's parent and Jackson's own request to seek the funds from the state.

- *Court's reasoning:* The court found that the fact that defense counsel did not call an expert witness to challenge another expert witness is not enough on its own to overturn the decision. However, the lawyer's decision here not to obtain an expert was based on non-strategic reasons, having more to do with convenience for him - he had asked the defendant's parents for money for an expert and they refused. He did not then ask for the court to appoint one (Jackson v. Day, 1996 WL 225021).
 - In 1996 this court reversed the conviction. The State appealed and this lower court's decision was reversed – conviction was reinstated. He remained incarcerated until DNA testing later exonerated him.

Ron Williamson, OK

Williamson's court-appointed lawyer in this case failed to investigate mental competency; investigate last person to see victim alive (whose hairs could not be excluded from the crime scene evidence); cross examine snitch; and introduce videotape of another person's confession.

- *Court's reasoning:* The court found that the cumulative nature of these failures was enough to overturn the conviction and retry with new counsel (Williamson v. Reynolds, 904 F.Supp. 1529).
 - In preparation for the new trial, DNA testing was performed and exonerated Williamson. Charges were dropped.

Ford Heights Four Case (Gray, Williams, Rainge, and Adams)

Paula Gray, IL: Paula Gray's case relied on the conflict of interest which arose from her sharing a private lawyer with her codefendants (Williams and Rainge-Adams had his own lawyer). The court said that the test is not whether the defenses given for each client actually conflict, but whether the decision-making process of the lawyer was impacted by conflicting loyalties.

- *Court's reasoning:* "The Appellate Court of Illinois, in affirming Paula's conviction, rejected any argument that there was a conflict of interest between Paula and Williams, primarily for the reason, mistaken we believe, that their defenses at trial did not conflict because both denied having had anything to do with the crimes. The test for conflict between defendants is not whether the defenses actually chosen by them are consistent but whether in *making the choice* of defenses the interests of the defendants were in conflict," (U.S. ex rel. Gray v. Director, Department of Corrections, State of IL, 721 F.2d 586, 597).
 - The court reversed and Gray was granted a new trial, but she struck a deal with the prosecutor to testify against the others in exchange for time served, before DNA testing eventually exonerated her and her co-defendants

Willie Rainge, IL: Private defense lawyer's misconduct in another case (for which he was disbarred), during the same time period he tried this case, led to new trials for Rainge (and Williams-see below). The defense counsel had testified in the other case that he was so stressed during the Williams, Adams, and Rainge case that he couldn't think straight. Rainge (and Williams) were each granted relief (in separate appeals).

- *Court's reasoning:* The court gave them new trials, saying that the totality of events warranted throwing out the standard tests for IAC, and by merely judging the case as a capital offense, they decided that the totality of events and the inattentiveness of the counsel warranted a new trial (People v. Williams, 93 Ill.2d 309, People v. Rainge, 445 N.E.2d 535).
 - The court reversed and Rainge (and Williams) received new trials and were reconvicted before DNA later exonerated them.

Dennis Williams, IL: See Willie Range above: same issue and reasoning applies, although relief was granted in a separate appeal (People v. Williams, 93 Ill.2d 309).

Details of Appeals Where Courts Rejected Allegations of Ineffective Assistance of Counsel (3 case examples):

Jeffrey Pierce, OK

(1) Counsel (type of lawyer unknown) failed to raise issue of Gilchrist's disobedience of a court order, which had directed her to submit a hair sample for testing. Counsel failed to follow up on this despite knowing two months in advance of the trial that the sample had not been sent. (2) Defense counsel's cross-examination of a witness elicited other crimes evidence of the defendant.

- *Court's reasoning:*
 - "Counsel's strategy at trial is readily apparent. He sought to establish that the police had not done a good job in the investigation of the case. By his introduction of the other crimes evidence, he sought to prove that other suspects were known, but had been excluded through improper scientific means. He tried to use the fact that the State failed to send the hair evidence to his advantage as well, by claiming it was another instance of sloppy police work. Considering each of the errors set out by Appellant, we cannot say that "counsel's errors were so serious as to deprive the defendant of a fair trial," (Pierce v. State, 786 P.2d 1255, 1267).

Josiah Sutton, TX

Sutton's court-appointed lawyer told Josiah's mother and her family that he would need money to conduct independent DNA testing, and the family was able to raise \$600-650, which they gave to Herbert. Herbert, however, simply failed to obtain the testing—and kept the money.

- *Court's reasoning:*
 - The Texas appellate court refused to grant Sutton relief on ineffective assistance grounds, commenting that Sutton had failed to show how testing might have established innocence. Notably, this finding was made even while the court acknowledged that the case "raises questions about [XXX's] handling of client funds" (Sutton v. State, 2001 WL 40349)—but it deferred that issue and suggested the Sutton family take it up with the state's Bar Grievance Committee.

Earl Washington, VA

Washington's private lawyer did not present exculpatory results of tests on the semen stains found on the blanket recovered from the bed where the rape of the victim allegedly occurred.

- *Court's reasoning:*

- Court felt that there was enough other inculpatory evidence so that counsel's failure here would not have changed the outcome of the verdict. "...nothing extrinsic in laboratory reports made them so manifestly unreliable to identification issue that failure to use them could be deemed justified without further explanation, and evidence consisted essentially of confession obtained by interrogation almost a year after crime," (Washington v. Murray, 952 F.2d 1472, 1473).

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

LAFLER v. COOPER**CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT**

No. 10–209. Argued October 31, 2011—Decided March 21, 2012

Respondent was charged under Michigan law with assault with intent to murder and three other offenses. The prosecution offered to dismiss two of the charges and to recommend a 51-to-85-month sentence on the other two, in exchange for a guilty plea. In a communication with the court, respondent admitted his guilt and expressed a willingness to accept the offer. But he rejected the offer, allegedly after his attorney convinced him that the prosecution would be unable to establish intent to murder because the victim had been shot below the waist. At trial, respondent was convicted on all counts and received a mandatory minimum 185-to-360-month sentence. In a subsequent hearing, the state trial court rejected respondent’s claim that his attorney’s advice to reject the plea constituted ineffective assistance. The Michigan Court of Appeals affirmed, rejecting the ineffective-assistance claim on the ground that respondent knowingly and intelligently turned down the plea offer and chose to go to trial. Respondent renewed his claim in federal habeas. Finding that the state appellate court had unreasonably applied the constitutional effective-assistance standards laid out in *Strickland v. Washington*, 466 U. S. 668, and *Hill v. Lockhart*, 474 U. S. 52, the District Court granted a conditional writ and ordered specific performance of the original plea offer. The Sixth Circuit affirmed. Applying *Strickland*, it found that counsel had provided deficient performance by advising respondent of an incorrect legal rule, and that respondent suffered prejudice because he lost the opportunity to take the more favorable sentence offered in the plea.

Held:

1. Where counsel’s ineffective advice led to an offer’s rejection, and where the prejudice alleged is having to stand trial, a defendant must

Syllabus

show that but for the ineffective advice, there is a reasonable probability that the plea offer would have been presented to the court, that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the actual judgment and sentence imposed. Pp. 3–11.

(a) Because the parties agree that counsel's performance was deficient, the only question is how to apply *Strickland's* prejudice test where ineffective assistance results in a rejection of the plea offer and the defendant is convicted at the ensuing trial. Pp. 3–4.

(b) In that context, the *Strickland* prejudice test requires a defendant to show a reasonable possibility that the outcome of the plea process would have been different with competent advice. The Sixth Circuit and other federal appellate courts have agreed with the *Strickland* prejudice test for rejected pleas adopted here by this Court. Petitioner and the Solicitor General propose a narrow view—that *Strickland* prejudice cannot arise from plea bargaining if the defendant is later convicted at a fair trial—but their reasoning is unpersuasive. First, they claim that the Sixth Amendment's sole purpose is to protect the right to a fair trial, but the Amendment actually requires effective assistance at critical stages of a criminal proceeding, including pretrial stages. This is consistent with the right to effective assistance on appeal, see, e.g., *Halbert v. Michigan*, 545 U. S. 605, and the right to counsel during sentencing, see, e.g., *Glover v. United States*, 531 U. S. 198, 203–204. This Court has not followed a rigid rule that an otherwise fair trial remedies errors not occurring at trial, but has instead inquired whether the trial cured the particular error at issue. See, e.g., *Vasquez v. Hillery*, 474 U. S. 254, 263. Second, this Court has previously rejected petitioner's argument that *Lockhart v. Fretwell*, 506 U. S. 364, modified *Strickland* and does so again here. *Fretwell* and *Nix v. Whiteside*, 475 U. S. 157, demonstrate that “it would be unjust to characterize the likelihood of a different outcome as legitimate ‘prejudice.’” *Williams v. Taylor*, 529 U. S. 362, 391–392, where defendants would receive a windfall as a result of the application of an incorrect legal principle or a defense strategy outside the law. Here, however, respondent seeks relief from counsel's failure to meet a valid legal standard. Third, petitioner seeks to preserve the conviction by arguing that the Sixth Amendment's purpose is to ensure a conviction's reliability, but this argument fails to comprehend the full scope of the Sixth Amendment and is refuted by precedent. Here, the question is the fairness or reliability not of the trial but of the processes that preceded it, which caused respondent to lose benefits he would have received but for counsel's ineffective assistance. Furthermore, a reliable trial may not foreclose relief when counsel has failed to assert rights that may have

Syllabus

altered the outcome. See *Kimmelman v. Morrison*, 477 U. S. 365, 379. Petitioner’s position that a fair trial wipes clean ineffective assistance during plea bargaining also ignores the reality that criminal justice today is for the most part a system of pleas, not a system of trials. See *Missouri v. Frye*, *ante*, at _____. Pp. 4–11.

2. Where a defendant shows ineffective assistance has caused the rejection of a plea leading to a more severe sentence at trial, the remedy must “neutralize the taint” of a constitutional violation, *United States v. Morrison*, 449 U. S. 361, 365, but must not grant a windfall to the defendant or needlessly squander the resources the State properly invested in the criminal prosecution, see *United States v. Mechanik*, 475 U. S. 66, 72. If the sole advantage is that the defendant would have received a lesser sentence under the plea, the court should have an evidentiary hearing to determine whether the defendant would have accepted the plea. If so, the court may exercise discretion in determining whether the defendant should receive the term offered in the plea, the sentence received at trial, or something in between. However, resentencing based on the conviction at trial may not suffice, *e.g.*, where the offered guilty plea was for less serious counts than the ones for which a defendant was convicted after trial, or where a mandatory sentence confines a judge’s sentencing discretion. In these circumstances, the proper remedy may be to require the prosecution to reoffer the plea. The judge can then exercise discretion in deciding whether to vacate the conviction from trial and accept the plea, or leave the conviction undisturbed. In either situation, a court must weigh various factors. Here, it suffices to give two relevant considerations. First, a court may take account of a defendant’s earlier expressed willingness, or unwillingness, to accept responsibility for his or her actions. Second, it is not necessary here to decide as a constitutional rule that a judge is required to disregard any information concerning the crime discovered after the plea offer was made. Petitioner argues that implementing a remedy will open the floodgates to litigation by defendants seeking to unsettle their convictions, but in the 30 years that courts have recognized such claims, there has been no indication that the system is overwhelmed or that defendants are receiving windfalls as a result of strategically timed *Strickland* claims. In addition, the prosecution and trial courts may adopt measures to help ensure against meritless claims. See *Frye*, *ante*, at _____. Pp. 11–14.

3. This case arises under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), but because the Michigan Court of Appeals’ analysis of respondent’s ineffective-assistance-of-counsel claim was contrary to clearly established federal law, AEDPA presents no bar to relief. Respondent has satisfied *Strickland*’s two-part test.

Syllabus

The parties concede the fact of deficient performance. And respondent has shown that but for that performance there is a reasonable probability he and the trial court would have accepted the guilty plea. In addition, as a result of not accepting the plea and being convicted at trial, he received a minimum sentence 3½ times greater than he would have received under the plea. As a remedy, the District Court ordered specific performance of the plea agreement, but the correct remedy is to order the State to reoffer the plea. If respondent accepts the offer, the state trial court can exercise its discretion in determining whether to vacate respondent's convictions and resentence pursuant to the plea agreement, to vacate only some of the convictions and resentence accordingly, or to leave the conviction and sentence resulting from the trial undisturbed. Pp. 14–16.

376 Fed. Appx. 563, vacated and remanded.

KENNEDY, J., delivered the opinion of the Court, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. SCALIA, J., filed a dissenting opinion, in which THOMAS, J., joined, and in which ROBERTS, C. J., joined as to all but Part IV. ALITO, J., filed a dissenting opinion.

Opinion of the Court

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 10–209

BLAINE LAFLER, PETITIONER *v.* ANTHONY COOPER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

[March 21, 2012]

JUSTICE KENNEDY delivered the opinion of the Court.

In this case, as in *Missouri v. Frye, ante*, p. ____, also decided today, a criminal defendant seeks a remedy when inadequate assistance of counsel caused nonacceptance of a plea offer and further proceedings led to a less favorable outcome. In *Frye*, defense counsel did not inform the defendant of the plea offer; and after the offer lapsed the defendant still pleaded guilty, but on more severe terms. Here, the favorable plea offer was reported to the client but, on advice of counsel, was rejected. In *Frye* there was a later guilty plea. Here, after the plea offer had been rejected, there was a full and fair trial before a jury. After a guilty verdict, the defendant received a sentence harsher than that offered in the rejected plea bargain. The instant case comes to the Court with the concession that counsel's advice with respect to the plea offer fell below the standard of adequate assistance of counsel guaranteed by the Sixth Amendment, applicable to the States through the Fourteenth Amendment.

I

On the evening of March 25, 2003, respondent pointed a gun toward Kali Mundy's head and fired. From the rec-

Opinion of the Court

ord, it is unclear why respondent did this, and at trial it was suggested that he might have acted either in self-defense or in defense of another person. In any event the shot missed and Mundy fled. Respondent followed in pursuit, firing repeatedly. Mundy was shot in her buttock, hip, and abdomen but survived the assault.

Respondent was charged under Michigan law with assault with intent to murder, possession of a firearm by a felon, possession of a firearm in the commission of a felony, misdemeanor possession of marijuana, and for being a habitual offender. On two occasions, the prosecution offered to dismiss two of the charges and to recommend a sentence of 51 to 85 months for the other two, in exchange for a guilty plea. In a communication with the court respondent admitted guilt and expressed a willingness to accept the offer. Respondent, however, later rejected the offer on both occasions, allegedly after his attorney convinced him that the prosecution would be unable to establish his intent to murder Mundy because she had been shot below the waist. On the first day of trial the prosecution offered a significantly less favorable plea deal, which respondent again rejected. After trial, respondent was convicted on all counts and received a mandatory minimum sentence of 185 to 360 months' imprisonment.

In a so-called *Ginther* hearing before the state trial court, see *People v. Ginther*, 390 Mich. 436, 212 N. W. 2d 922 (1973), respondent argued his attorney's advice to reject the plea constituted ineffective assistance. The trial judge rejected the claim, and the Michigan Court of Appeals affirmed. *People v. Cooper*, No. 250583, 2005 WL 599740 (Mar. 15, 2005) (*per curiam*), App. to Pet. for Cert. 44a. The Michigan Court of Appeals rejected the claim of ineffective assistance of counsel on the ground that respondent knowingly and intelligently rejected two plea offers and chose to go to trial. The Michigan Supreme Court denied respondent's application for leave to file an

Opinion of the Court

appeal. *People v. Cooper*, 474 Mich. 905, 705 N. W. 2d 118 (2005) (table).

Respondent then filed a petition for federal habeas relief under 28 U. S. C. §2254, renewing his ineffective-assistance-of-counsel claim. After finding, as required by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), that the Michigan Court of Appeals had unreasonably applied the constitutional standards for effective assistance of counsel laid out in *Strickland v. Washington*, 466 U. S. 668 (1984), and *Hill v. Lockhart*, 474 U. S. 52 (1985), the District Court granted a conditional writ. *Cooper v. Lafler*, No. 06–11068, 2009 WL 817712, *10 (ED Mich., Mar. 26, 2009), App. to Pet. for Cert. 41a–42a. To remedy the violation, the District Court ordered “specific performance of [respondent’s] original plea agreement, for a minimum sentence in the range of fifty-one to eighty-five months.” *Id.*, at *9, App. to Pet. for Cert. 41a.

The United States Court of Appeals for the Sixth Circuit affirmed, 376 Fed. Appx. 563 (2010), finding “[e]ven full deference under AEDPA cannot salvage the state court’s decision,” *id.*, at 569. Applying *Strickland*, the Court of Appeals found that respondent’s attorney had provided deficient performance by informing respondent of “an incorrect legal rule,” 376 Fed. Appx., at 570–571, and that respondent suffered prejudice because he “lost out on an opportunity to plead guilty and receive the lower sentence that was offered to him.” *Id.*, at 573. This Court granted certiorari. 562 U. S. ____ (2011).

II

A

Defendants have a Sixth Amendment right to counsel, a right that extends to the plea-bargaining process. *Frye, ante*, at 8; see also *Padilla v. Kentucky*, 559 U. S. ____, ____ (2010) (slip op., at 16); *Hill, supra*, at 57. During plea negotiations defendants are “entitled to the effective assis-

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tance of competent counsel.” *McMann v. Richardson*, 397 U. S. 759, 771 (1970). In *Hill*, the Court held “the two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel.” 474 U. S., at 58. The performance prong of *Strickland* requires a defendant to show “that counsel’s representation fell below an objective standard of reasonableness.” 474 U. S., at 57 (quoting *Strickland*, 466 U. S., at 688). In this case all parties agree the performance of respondent’s counsel was deficient when he advised respondent to reject the plea offer on the grounds he could not be convicted at trial. In light of this concession, it is unnecessary for this Court to explore the issue.

The question for this Court is how to apply *Strickland*’s prejudice test where ineffective assistance results in a rejection of the plea offer and the defendant is convicted at the ensuing trial.

B

To establish *Strickland* prejudice a defendant must “show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.*, at 694. In the context of pleas a defendant must show the outcome of the plea process would have been different with competent advice. See *Frye, ante*, at 12 (noting that *Strickland*’s inquiry, as applied to advice with respect to plea bargains, turns on “whether ‘the result of the proceeding would have been different’” (quoting *Strickland, supra*, at 694)); see also *Hill*, 474 U. S., at 59 (“The . . . ‘prejudice,’ requirement . . . focuses on whether counsel’s constitutionally ineffective performance affected the outcome of the plea process”). In *Hill*, when evaluating the petitioner’s claim that ineffective assistance led to the improvident acceptance of a guilty plea, the Court required the petitioner to show “that there is a reasonable probability that, but for counsel’s

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errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial.” *Ibid.*

In contrast to *Hill*, here the ineffective advice led not to an offer’s acceptance but to its rejection. Having to stand trial, not choosing to waive it, is the prejudice alleged. In these circumstances a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer’s terms would have been less severe than under the judgment and sentence that in fact were imposed. Here, the Court of Appeals for the Sixth Circuit agreed with that test for *Strickland* prejudice in the context of a rejected plea bargain. This is consistent with the test adopted and applied by other appellate courts without demonstrated difficulties or systemic disruptions. See 376 Fed. Appx., at 571–573; see also, *e.g.*, *United States v. Rodriguez Rodriguez*, 929 F. 2d 747, 753, n. 1 (CA1 1991) (*per curiam*); *United States v. Gordon*, 156 F. 3d 376, 380–381 (CA2 1998) (*per curiam*); *United States v. Day*, 969 F. 2d 39, 43–45 (CA3 1992); *Beckham v. Wainwright*, 639 F. 2d 262, 267 (CA5 1981); *Julian v. Bartley*, 495 F. 3d 487, 498–500 (CA7 2007); *Wanatee v. Ault*, 259 F. 3d 700, 703–704 (CA8 2001); *Nunes v. Mueller*, 350 F. 3d 1045, 1052–1053 (CA9 2003); *Williams v. Jones*, 571 F. 3d 1086, 1094–1095 (CA10 2009) (*per curiam*); *United States v. Gaviria*, 116 F. 3d 1498, 1512–1514 (CAD9 1997) (*per curiam*).

Petitioner and the Solicitor General propose a different, far more narrow, view of the Sixth Amendment. They contend there can be no finding of *Strickland* prejudice arising from plea bargaining if the defendant is later convicted at a fair trial. The three reasons petitioner and

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the Solicitor General offer for their approach are unpersuasive.

First, petitioner and the Solicitor General claim that the sole purpose of the Sixth Amendment is to protect the right to a fair trial. Errors before trial, they argue, are not cognizable under the Sixth Amendment unless they affect the fairness of the trial itself. See Brief for Petitioner 12–21; Brief for United States as *Amicus Curiae* 10–12. The Sixth Amendment, however, is not so narrow in its reach. Cf. *Frye, ante*, at 11 (holding that a defendant can show prejudice under *Strickland* even absent a showing that the deficient performance precluded him from going to trial). The Sixth Amendment requires effective assistance of counsel at critical stages of a criminal proceeding. Its protections are not designed simply to protect the trial, even though “counsel’s absence [in these stages] may derogate from the accused’s right to a fair trial.” *United States v. Wade*, 388 U. S. 218, 226 (1967). The constitutional guarantee applies to pretrial critical stages that are part of the whole course of a criminal proceeding, a proceeding in which defendants cannot be presumed to make critical decisions without counsel’s advice. This is consistent, too, with the rule that defendants have a right to effective assistance of counsel on appeal, even though that cannot in any way be characterized as part of the trial. See, e.g., *Halbert v. Michigan*, 545 U. S. 605 (2005); *Evitts v. Lucey*, 469 U. S. 387 (1985). The precedents also establish that there exists a right to counsel during sentencing in both noncapital, see *Glover v. United States*, 531 U. S. 198, 203–204 (2001); *Mempa v. Rhay*, 389 U. S. 128 (1967), and capital cases, see *Wiggins v. Smith*, 539 U. S. 510, 538 (2003). Even though sentencing does not concern the defendant’s guilt or innocence, ineffective assistance of counsel during a sentencing hearing can result in *Strickland* prejudice because “any amount of [additional] jail time has Sixth Amendment significance.” *Glover, supra*,

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at 203.

The Court, moreover, has not followed a rigid rule that an otherwise fair trial remedies errors not occurring at the trial itself. It has inquired instead whether the trial cured the particular error at issue. Thus, in *Vasquez v. Hillery*, 474 U. S. 254 (1986), the deliberate exclusion of all African-Americans from a grand jury was prejudicial because a defendant may have been tried on charges that would not have been brought at all by a properly constituted grand jury. *Id.*, at 263; see *Ballard v. United States*, 329 U. S. 187, 195 (1946) (dismissing an indictment returned by a grand jury from which women were excluded); see also *Stirone v. United States*, 361 U. S. 212, 218–219 (1960) (reversing a defendant’s conviction because the jury may have based its verdict on acts not charged in the indictment). By contrast, in *United States v. Mechanik*, 475 U. S. 66 (1986), the complained-of error was a violation of a grand jury rule meant to ensure probable cause existed to believe a defendant was guilty. A subsequent trial, resulting in a verdict of guilt, cured this error. See *id.*, at 72–73.

In the instant case respondent went to trial rather than accept a plea deal, and it is conceded this was the result of ineffective assistance during the plea negotiation process. Respondent received a more severe sentence at trial, one 3½ times more severe than he likely would have received by pleading guilty. Far from curing the error, the trial caused the injury from the error. Even if the trial itself is free from constitutional flaw, the defendant who goes to trial instead of taking a more favorable plea may be prejudiced from either a conviction on more serious counts or the imposition of a more severe sentence.

Second, petitioner claims this Court refined *Strickland*’s prejudice analysis in *Fretwell* to add an additional requirement that the defendant show that ineffective assistance of counsel led to his being denied a substantive or

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procedural right. Brief for Petitioner 12–13. The Court has rejected the argument that *Fretwell* modified *Strickland* before and does so again now. See *Williams v. Taylor*, 529 U. S. 362, 391 (2000) (“The Virginia Supreme Court erred in holding that our decision in *Lockhart v. Fretwell*, 506 U. S. 364 (1993), modified or in some way supplanted the rule set down in *Strickland*”); see also *Glover, supra*, at 203 (“The Court explained last Term [in *Williams*] that our holding in *Lockhart* does not supplant the *Strickland* analysis”).

Fretwell could not show *Strickland* prejudice resulting from his attorney’s failure to object to the use of a sentencing factor the Eighth Circuit had erroneously (and temporarily) found to be impermissible. *Fretwell*, 506 U. S., at 373. Because the objection upon which his ineffective-assistance-of-counsel claim was premised was meritless, *Fretwell* could not demonstrate an error entitling him to relief. The case presented the “unusual circumstance where the defendant attempts to demonstrate prejudice based on considerations that, as a matter of law, ought not inform the inquiry.” *Ibid.* (O’Connor, J., concurring). See also *ibid.* (recognizing “[t]he determinative question—whether there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different—remains unchanged” (internal quotation marks and citation omitted)). It is for this same reason a defendant cannot show prejudice based on counsel’s refusal to present perjured testimony, even if such testimony might have affected the outcome of the case. See *Nix v. Whiteside*, 475 U. S. 157, 175 (1986) (holding first that counsel’s refusal to present perjured testimony breached no professional duty and second that it cannot establish prejudice under *Strickland*).

Both *Fretwell* and *Nix* are instructive in that they demonstrate “there are also situations in which it would be unjust to characterize the likelihood of a different

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outcome as legitimate ‘prejudice,’” *Williams, supra*, at 391–392, because defendants would receive a windfall as a result of the application of an incorrect legal principle or a defense strategy outside the law. Here, however, the injured client seeks relief from counsel’s failure to meet a valid legal standard, not from counsel’s refusal to violate it. He maintains that, absent ineffective counsel, he would have accepted a plea offer for a sentence the prosecution evidently deemed consistent with the sound administration of criminal justice. The favorable sentence that eluded the defendant in the criminal proceeding appears to be the sentence he or others in his position would have received in the ordinary course, absent the failings of counsel. See Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 Cal. L. Rev. 1117, 1138 (2011) (“The expected post-trial sentence is imposed in only a few percent of cases. It is like the sticker price for cars: only an ignorant, ill-advised consumer would view full price as the norm and anything less a bargain”); see also *Frye, ante*, at 7–8. If a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it. If that right is denied, prejudice can be shown if loss of the plea opportunity led to a trial resulting in a conviction on more serious charges or the imposition of a more severe sentence.

It is, of course, true that defendants have “no right to be offered a plea . . . nor a federal right that the judge accept it.” *Frye, ante*, at 12. In the circumstances here, that is beside the point. If no plea offer is made, or a plea deal is accepted by the defendant but rejected by the judge, the issue raised here simply does not arise. Much the same reasoning guides cases that find criminal defendants have a right to effective assistance of counsel in direct appeals even though the Constitution does not require States to provide a system of appellate review at all. See *Evitts*, 469

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U. S. 387; see also *Douglas v. California*, 372 U. S. 353 (1963). As in those cases, “[w]hen a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution.” *Evitts, supra*, at 401.

Third, petitioner seeks to preserve the conviction obtained by the State by arguing that the purpose of the Sixth Amendment is to ensure “the reliability of [a] conviction following trial.” Brief for Petitioner 13. This argument, too, fails to comprehend the full scope of the Sixth Amendment’s protections; and it is refuted by precedent. *Strickland* recognized “[t]he benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” 466 U. S., at 686. The goal of a just result is not divorced from the reliability of a conviction, see *United States v. Cronin*, 466 U. S. 648, 658 (1984); but here the question is not the fairness or reliability of the trial but the fairness and regularity of the processes that preceded it, which caused the defendant to lose benefits he would have received in the ordinary course but for counsel’s ineffective assistance.

There are instances, furthermore, where a reliable trial does not foreclose relief when counsel has failed to assert rights that may have altered the outcome. In *Kimmelman v. Morrison*, 477 U. S. 365 (1986), the Court held that an attorney’s failure to timely move to suppress evidence during trial could be grounds for federal habeas relief. The Court rejected the suggestion that the “failure to make a timely request for the exclusion of illegally seized evidence” could not be the basis for a Sixth Amendment violation because the evidence “is ‘typically reliable and often the most probative information bearing on the guilt or innocence of the defendant.’” *Id.*, at 379 (quoting *Stone v. Powell*, 428 U. S. 465, 490 (1976)). “The constitutional

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rights of criminal defendants,” the Court observed, “are granted to the innocent and the guilty alike. Consequently, we decline to hold either that the guarantee of effective assistance of counsel belongs solely to the innocent or that it attaches only to matters affecting the determination of actual guilt.” 477 U. S., at 380. The same logic applies here. The fact that respondent is guilty does not mean he was not entitled by the Sixth Amendment to effective assistance or that he suffered no prejudice from his attorney’s deficient performance during plea bargaining.

In the end, petitioner’s three arguments amount to one general contention: A fair trial wipes clean any deficient performance by defense counsel during plea bargaining. That position ignores the reality that criminal justice today is for the most part a system of pleas, not a system of trials. Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas. See *Frye, ante*, at 7. As explained in *Frye*, the right to adequate assistance of counsel cannot be defined or enforced without taking account of the central role plea bargaining plays in securing convictions and determining sentences. *Ibid.* (“[I]t is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process”).

C

Even if a defendant shows ineffective assistance of counsel has caused the rejection of a plea leading to a trial and a more severe sentence, there is the question of what constitutes an appropriate remedy. That question must now be addressed.

Sixth Amendment remedies should be “tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests.” *United States v. Morrison*, 449 U. S. 361, 364 (1981). Thus, a remedy must “neutralize the taint” of a constitu-

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tional violation, *id.*, at 365, while at the same time not grant a windfall to the defendant or needlessly squander the considerable resources the State properly invested in the criminal prosecution. See *Mechanik*, 475 U. S., at 72 (“The reversal of a conviction entails substantial social costs: it forces jurors, witnesses, courts, the prosecution, and the defendants to expend further time, energy, and other resources to repeat a trial that has already once taken place; victims may be asked to relive their disturbing experiences”).

The specific injury suffered by defendants who decline a plea offer as a result of ineffective assistance of counsel and then receive a greater sentence as a result of trial can come in at least one of two forms. In some cases, the sole advantage a defendant would have received under the plea is a lesser sentence. This is typically the case when the charges that would have been admitted as part of the plea bargain are the same as the charges the defendant was convicted of after trial. In this situation the court may conduct an evidentiary hearing to determine whether the defendant has shown a reasonable probability that but for counsel’s errors he would have accepted the plea. If the showing is made, the court may exercise discretion in determining whether the defendant should receive the term of imprisonment the government offered in the plea, the sentence he received at trial, or something in between.

In some situations it may be that resentencing alone will not be full redress for the constitutional injury. If, for example, an offer was for a guilty plea to a count or counts less serious than the ones for which a defendant was convicted after trial, or if a mandatory sentence confines a judge’s sentencing discretion after trial, a resentencing based on the conviction at trial may not suffice. See, *e.g.*, *Williams*, 571 F. 3d, at 1088; *Riggs v. Fairman*, 399 F. 3d 1179, 1181 (CA9 2005). In these circumstances, the proper exercise of discretion to remedy the constitutional

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injury may be to require the prosecution to reoffer the plea proposal. Once this has occurred, the judge can then exercise discretion in deciding whether to vacate the conviction from trial and accept the plea or leave the conviction undisturbed.

In implementing a remedy in both of these situations, the trial court must weigh various factors; and the boundaries of proper discretion need not be defined here. Principles elaborated over time in decisions of state and federal courts, and in statutes and rules, will serve to give more complete guidance as to the factors that should bear upon the exercise of the judge's discretion. At this point, however, it suffices to note two considerations that are of relevance.

First, a court may take account of a defendant's earlier expressed willingness, or unwillingness, to accept responsibility for his or her actions. Second, it is not necessary here to decide as a constitutional rule that a judge is required to prescind (that is to say disregard) any information concerning the crime that was discovered after the plea offer was made. The time continuum makes it difficult to restore the defendant and the prosecution to the precise positions they occupied prior to the rejection of the plea offer, but that baseline can be consulted in finding a remedy that does not require the prosecution to incur the expense of conducting a new trial.

Petitioner argues that implementing a remedy here will open the floodgates to litigation by defendants seeking to unsettle their convictions. See Brief for Petitioner 20. Petitioner's concern is misplaced. Courts have recognized claims of this sort for over 30 years, see *supra*, at 5, and yet there is no indication that the system is overwhelmed by these types of suits or that defendants are receiving windfalls as a result of strategically timed *Strickland* claims. See also *Padilla*, 559 U. S., at ____ (slip op., at 14) ("We confronted a similar 'floodgates' concern in *Hill*," but

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a “flood did not follow in that decision’s wake”). In addition, the “prosecution and the trial courts may adopt some measures to help ensure against late, frivolous, or fabricated claims after a later, less advantageous plea offer has been accepted or after a trial leading to conviction.” *Frye, ante*, at 10. See also *ibid.* (listing procedures currently used by various States). This, too, will help ensure against meritless claims.

III

The standards for ineffective assistance of counsel when a defendant rejects a plea offer and goes to trial must now be applied to this case. Respondent brings a federal collateral challenge to a state-court conviction. Under AEDPA, a federal court may not grant a petition for a writ of habeas corpus unless the state court’s adjudication on the merits was “contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.” 28 U. S. C. §2254(d)(1). A decision is contrary to clearly established law if the state court “applies a rule that contradicts the governing law set forth in [Supreme Court] cases.” *Williams v. Taylor*, 529 U. S. 362, 405 (2000) (opinion for the Court by O’Connor, J.). The Court of Appeals for the Sixth Circuit could not determine whether the Michigan Court of Appeals addressed respondent’s ineffective-assistance-of-counsel claim or, if it did, “what the court decided, or even whether the correct legal rule was identified.” 376 Fed. Appx., at 568–569.

The state court’s decision may not be quite so opaque as the Court of Appeals for the Sixth Circuit thought, yet the federal court was correct to note that AEDPA does not present a bar to granting respondent relief. That is because the Michigan Court of Appeals identified respondent’s ineffective-assistance-of-counsel claim but failed to apply *Strickland* to assess it. Rather than applying

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Strickland, the state court simply found that respondent's rejection of the plea was knowing and voluntary. *Cooper*, 2005 WL 599740, *1, App. to Pet. for Cert. 45a. An inquiry into whether the rejection of a plea is knowing and voluntary, however, is not the correct means by which to address a claim of ineffective assistance of counsel. See *Hill*, 474 U. S., at 370 (applying *Strickland* to assess a claim of ineffective assistance of counsel arising out of the plea negotiation process). After stating the incorrect standard, moreover, the state court then made an irrelevant observation about counsel's performance at trial and mischaracterized respondent's claim as a complaint that his attorney did not obtain a more favorable plea bargain. By failing to apply *Strickland* to assess the ineffective-assistance-of-counsel claim respondent raised, the state court's adjudication was contrary to clearly established federal law. And in that circumstance the federal courts in this habeas action can determine the principles necessary to grant relief. See *Panetti v. Quarterman*, 551 U. S. 930, 948 (2007).

Respondent has satisfied *Strickland*'s two-part test. Regarding performance, perhaps it could be accepted that it is unclear whether respondent's counsel believed respondent could not be convicted for assault with intent to murder as a matter of law because the shots hit Mundy below the waist, or whether he simply thought this would be a persuasive argument to make to the jury to show lack of specific intent. And, as the Court of Appeals for the Sixth Circuit suggested, an erroneous strategic prediction about the outcome of a trial is not necessarily deficient performance. Here, however, the fact of deficient performance has been conceded by all parties. The case comes to us on that assumption, so there is no need to address this question.

As to prejudice, respondent has shown that but for counsel's deficient performance there is a reasonable

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probability he and the trial court would have accepted the guilty plea. See 376 Fed. Appx., at 571–572. In addition, as a result of not accepting the plea and being convicted at trial, respondent received a minimum sentence 3½ times greater than he would have received under the plea. The standard for ineffective assistance under *Strickland* has thus been satisfied.

As a remedy, the District Court ordered specific performance of the original plea agreement. The correct remedy in these circumstances, however, is to order the State to reoffer the plea agreement. Presuming respondent accepts the offer, the state trial court can then exercise its discretion in determining whether to vacate the convictions and resentence respondent pursuant to the plea agreement, to vacate only some of the convictions and resentence respondent accordingly, or to leave the convictions and sentence from trial undisturbed. See Mich. Ct. Rule 6.302(C)(3) (2011) (“If there is a plea agreement and its terms provide for the defendant’s plea to be made in exchange for a specific sentence disposition or a prosecutorial sentence recommendation, the court may . . . reject the agreement”). Today’s decision leaves open to the trial court how best to exercise that discretion in all the circumstances of the case.

The judgment of the Court of Appeals for the Sixth Circuit is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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SUPREME COURT OF THE UNITED STATES

No. 10–209

BLAINE LAFLER, PETITIONER *v.* ANTHONY COOPER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

[March 21, 2012]

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, and with whom THE CHIEF JUSTICE joins as to all but Part IV, dissenting.

“If a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it. If that right is denied, prejudice can be shown if loss of the plea opportunity led to a trial resulting in a conviction on more serious charges or the imposition of a more severe sentence.” *Ante*, at 9.

“The inquiry then becomes how to define the duty and responsibilities of defense counsel in the plea bargain process. This is a difficult question. . . . Bargaining is, by its nature, defined to a substantial degree by personal style. . . . This case presents neither the necessity nor the occasion to define the duties of defense counsel in those respects” *Missouri v. Frye*, *ante*, at 8.

With those words from this and the companion case, the Court today opens a whole new field of constitutionalized criminal procedure: plea-bargaining law. The ordinary criminal process has become too long, too expensive, and unpredictable, in no small part as a consequence of an intricate federal Code of Criminal Procedure imposed on the States by this Court in pursuit of perfect justice. See

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Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 Cal. L. Rev. 929 (1965). The Court now moves to bring perfection to the alternative in which prosecutors and defendants have sought relief. Today's opinions deal with only two aspects of counsel's plea-bargaining inadequacy, and leave other aspects (who knows what they might be?) to be worked out in further constitutional litigation that will burden the criminal process. And it would be foolish to think that "constitutional" rules governing *counsel's* behavior will not be followed by rules governing the *prosecution's* behavior in the plea-bargaining process that the Court today announces "'is the criminal justice system,'" *Frye, ante*, at 7 (quoting approvingly from Scott & Stuntz, *Plea Bargaining as Contract*, 101 Yale L. J. 1909, 1912 (1992) (hereinafter Scott)). Is it constitutional, for example, for the prosecution to withdraw a plea offer that has already been accepted? Or to withdraw an offer before the defense has had adequate time to consider and accept it? Or to make no plea offer at all, even though its case is weak—thereby excluding the defendant from "the criminal justice system"?

Anthony Cooper received a full and fair trial, was found guilty of all charges by a unanimous jury, and was given the sentence that the law prescribed. The Court nonetheless concludes that Cooper is entitled to some sort of habeas corpus relief (perhaps) because his attorney's allegedly incompetent advice regarding a plea offer *caused* him to receive a full and fair trial. That conclusion is foreclosed by our precedents. Even if it were not foreclosed, the constitutional right to effective plea-bargainers that it establishes is at least a new rule of law, which does not undermine the Michigan Court of Appeals' decision and therefore cannot serve as the basis for habeas relief. And the remedy the Court announces—namely, whatever the state trial court in its discretion prescribes, down to and including no remedy at all—is unheard-of and quite ab-

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surd for violation of a constitutional right. I respectfully dissent.

I

This case and its companion, *Missouri v. Frye*, *ante*, p. ___, raise relatively straightforward questions about the scope of the right to effective assistance of counsel. Our case law originally derived that right from the Due Process Clause, and its guarantee of a fair trial, see *United States v. Gonzalez-Lopez*, 548 U. S. 140, 147 (2006), but the seminal case of *Strickland v. Washington*, 466 U. S. 668 (1984), located the right within the Sixth Amendment. As the Court notes, *ante*, at 6, the right to counsel does not begin at trial. It extends to “any stage of the prosecution, formal or informal, in court or out, where counsel’s absence might derogate from the accused’s right to a fair trial.” *United States v. Wade*, 388 U. S. 218, 226 (1967). Applying that principle, we held that the “entry of a guilty plea, whether to a misdemeanor or a felony charge, ranks as a ‘critical stage’ at which the right to counsel adheres.” *Iowa v. Tovar*, 541 U. S. 77, 81 (2004); see also *Hill v. Lockhart*, 474 U. S. 52, 58 (1985). And it follows from this that *acceptance* of a plea offer is a critical stage. That, and nothing more, is the point of the Court’s observation in *Padilla v. Kentucky*, 559 U. S. ___, ___ (2010) (slip op., at 16), that “the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel.” The defendant in *Padilla* had accepted the plea bargain and pleaded guilty, abandoning his right to a fair trial; he was entitled to advice of competent counsel before he did so. The Court has never held that the rule articulated in *Padilla*, *Tovar*, and *Hill* extends to all aspects of plea negotiations, requiring not just advice of competent counsel before the defendant accepts a plea bargain and pleads guilty, but also the advice of competent counsel before the defendant rejects a

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plea bargain and stands on his constitutional right to a fair trial. The latter is a vast departure from our past cases, protecting not just the constitutionally prescribed right to a fair adjudication of guilt and punishment, but a judicially invented right to effective plea bargaining.

It is also apparent from *Strickland* that bad plea bargaining has nothing to do with ineffective assistance of counsel in the constitutional sense. *Strickland* explained that “[i]n giving meaning to the requirement [of effective assistance], . . . we must take its purpose—to ensure a fair trial—as the guide.” 466 U. S., at 686. Since “the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial,” *United States v. Cronin*, 466 U. S. 648, 658 (1984), the “benchmark” inquiry in evaluating any claim of ineffective assistance is whether counsel’s performance “so undermined the proper functioning of the adversarial process” that it failed to produce a reliably “just result.” *Strickland*, 466 U. S., at 686. That is what *Strickland*’s requirement of “prejudice” consists of: Because the right to effective assistance has as its purpose the assurance of a fair trial, the right is not infringed unless counsel’s mistakes call into question the basic justice of a defendant’s conviction or sentence. That has been, until today, entirely clear. A defendant must show “that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *Id.*, at 687. See also *Gonzalez-Lopez*, *supra*, at 147. Impairment of fair trial is how we distinguish between unfortunate attorney error and error of constitutional significance.¹

¹Rather than addressing the constitutional origins of the *right to effective counsel*, the Court responds to the broader claim (raised by no one) that “the sole purpose of the *Sixth Amendment* is to protect the right to a fair trial.” *Ante*, at 6 (emphasis added). Cf. Brief for United States as *Amicus Curiae* 10–12 (arguing that the “purpose of the Sixth

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To be sure, *Strickland* stated a rule of thumb for measuring prejudice which, applied blindly and out of context, could support the Court's holding today: "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U. S., at 694. *Strickland* itself cautioned, however, that its test was not to be applied in a mechanical fashion, and that courts were not to divert their "ultimate focus" from "the fundamental fairness of the proceeding whose result is being challenged." *Id.*, at 696. And until today we have followed that course.

In *Lockhart v. Fretwell*, 506 U. S. 364 (1993), the deficient performance at issue was the failure of counsel for a defendant who had been sentenced to death to make an objection that would have produced a sentence of life

Amendment *right to counsel* is to secure a fair trial" (emphasis added)); Brief for Petitioner 12–21 (same). To destroy that straw man, the Court cites cases in which violations of rights *other* than the right to effective counsel—and, perplexingly, even rights found outside the Sixth Amendment and the Constitution entirely—were not cured by a subsequent trial. *Vasquez v. Hillery*, 474 U. S. 254 (1986) (violation of equal protection in grand jury selection); *Ballard v. United States*, 329 U. S. 187 (1946) (violation of statutory scheme providing that women serve on juries); *Stirone v. United States*, 361 U. S. 212 (1960) (violation of Fifth Amendment right to indictment by grand jury). Unlike the right to effective counsel, no showing of prejudice is required to make violations of the rights at issue in *Vasquez*, *Ballard*, and *Stirone* complete. See *Vasquez, supra*, at 263–264 ("[D]iscrimination in the grand jury undermines the structural integrity of the criminal tribunal itself, and is not amenable to harmless-error review"); *Ballard, supra*, at 195 ("[R]eversible error does not depend on a showing of prejudice in an individual case"); *Stirone, supra*, at 217 ("Deprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error"). Those cases are thus irrelevant to the question presented here, which is whether a defendant can establish *prejudice* under *Strickland v. Washington*, 466 U. S. 668 (1984), while conceding the fairness of his conviction, sentence, and appeal.

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imprisonment instead. The objection was fully supported by then-extant Circuit law, so that the sentencing court would have been compelled to sustain it, producing a life sentence that principles of double jeopardy would likely make final. See *id.*, at 383–385 (Stevens, J., dissenting); *Bullington v. Missouri*, 451 U. S. 430 (1981). By the time Fretwell’s claim came before us, however, the Circuit law had been overruled in light of one of our cases. We determined that a prejudice analysis “focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable,” would be defective. *Fretwell*, 506 U. S., at 369. Because counsel’s error did not “deprive the defendant of any substantive or procedural right to which the law entitles him,” the defendant’s sentencing proceeding was fair and its result was reliable, even though counsel’s error may have affected its outcome. *Id.*, at 372. In *Williams v. Taylor*, 529 U. S. 362, 391–393 (2000), we explained that even though *Fretwell* did not mechanically apply an outcome-based test for prejudice, its reasoning was perfectly consistent with *Strickland*. “Fretwell’s counsel had not deprived him of any substantive or procedural right to which the law entitled him.” 529 U. S. at 392.²

²*Kimmelman v. Morrison*, 477 U. S. 365 (1986), cited by the Court, *ante*, at 10–11, does not contradict this principle. That case, which predated *Fretwell* and *Williams*, considered whether our holding that Fourth Amendment claims fully litigated in state court cannot be raised in federal habeas “should be extended to Sixth Amendment claims of ineffective assistance of counsel where the principal allegation and manifestation of inadequate representation is counsel’s failure to file a timely motion to suppress evidence allegedly obtained in violation of the Fourth Amendment.” 477 U. S., at 368. Our negative answer to that question had nothing to do with the issue here. The parties in *Kimmelman* had not raised the question “whether the admission of illegally seized but reliable evidence can ever constitute ‘prejudice’ under *Strickland*”—a question similar to the one presented here—and

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Those precedents leave no doubt about the answer to the question presented here. As the Court itself observes, a criminal defendant has no right to a plea bargain. *Ante*, at 9. “[T]here is no constitutional right to plea bargain; the prosecutor need not do so if he prefers to go to trial.” *Weatherford v. Bursey*, 429 U. S. 545, 561 (1977). Counsel’s mistakes in this case thus did not “deprive the defendant of a substantive or procedural right to which the law entitles him,” *Williams, supra*, at 393. Far from being “beside the point,” *ante*, at 9, that is critical to correct application of our precedents. Like *Fretwell*, this case “concerns the unusual circumstance where the defendant attempts to demonstrate prejudice based on considerations that, as a matter of law, ought not inform the inquiry,” 506 U. S., at 373 (O’Connor, J., concurring); he claims “that he might have been denied ‘a right the law simply does not recognize,’” *id.*, at 375 (same). *Strickland, Fretwell*, and *Williams* all instruct that the pure outcome-based test on which the Court relies is an erroneous measure of cognizable prejudice. In ignoring *Strickland*’s “ultimate focus . . . on the fundamental fairness of the proceeding whose result is being challenged,” 466 U. S., at 696, the Court has lost the forest for the trees, leading it to accept what we have previously rejected, the “novel argument that constitutional rights are infringed by trying the defendant rather than accepting his plea of guilty.” *Weatherford, supra*, at 561.

the Court therefore did not address it. *Id.*, at 391 (Powell, J., concurring in judgment); see also *id.*, at 380. *Kimmelman* made clear, however, how the answer to that question is to be determined: “The essence of an ineffective-assistance claim is that counsel’s unprofessional errors so upset the adversarial balance between defense and prosecution *that the trial was rendered unfair and the verdict rendered suspect*,” *id.*, at 374 (emphasis added). “Only those habeas petitioners who can prove under *Strickland* that they have been denied a fair trial . . . will be granted the writ,” *id.*, at 382 (emphasis added). In short, *Kimmelman*’s only relevance is to prove the Court’s opinion wrong.

II

Novelty alone is the second, independent reason why the Court's decision is wrong. This case arises on federal habeas, and hence is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Since, as the Court acknowledges, the Michigan Court of Appeals adjudicated Cooper's ineffective-assistance claim on the merits, AEDPA bars federal courts from granting habeas relief unless that court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U. S. C. §2254(d)(1). Yet the Court concludes that §2254(d)(1) does not bar relief here, because "[b]y failing to apply *Strickland* to assess the ineffective-assistance-of-counsel claim respondent raised, the state court's adjudication was contrary to clearly established federal law." *Ante*, at 15. That is not so.

The relevant portion of the Michigan Court of Appeals decision reads as follows:

"To establish ineffective assistance, the defendant must demonstrate that his counsel's performance fell below an objective standard of reasonableness and that counsel's representation so prejudiced the defendant that he was deprived of a fair trial. With respect to the prejudice aspect of the test, the defendant must demonstrate a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different, and that the attendant proceedings were fundamentally unfair and unreliable.

"Defendant challenges the trial court's finding after a *Ginther* hearing that defense counsel provided effective assistance to defendant during the plea bargaining process. He contends that defense counsel failed to convey the benefits of the plea offer to him and ignored his desire to plead guilty, and that these fail-

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ures led him to reject a plea offer that he now wishes to accept. However, the record shows that defendant knowingly and intelligently rejected two plea offers and chose to go to trial. The record fails to support defendant's contentions that defense counsel's representation was ineffective because he rejected a defense based on [a] claim of self-defense and because he did not obtain a more favorable plea bargain for defendant." *People v. Cooper*, No. 250583 (Mar. 15, 2005), App. to Pet. for Cert. 45a, 2005 WL 599740, *1 (*per curiam*) (footnote and citations omitted).

The first paragraph above, far from ignoring *Strickland*, recites its standard with a good deal more accuracy than the Court's opinion. The second paragraph, which is presumably an application of the standard recited in the first, says that "defendant knowingly and intelligently rejected two plea offers and chose to go to trial." This can be regarded as a denial that there was anything "fundamentally unfair" about Cooper's conviction and sentence, so that no *Strickland* prejudice had been shown. On the other hand, the entire second paragraph can be regarded as a contention that Cooper's claims of inadequate representation were unsupported by the record. The state court's analysis was admittedly not a model of clarity, but federal habeas corpus is a "guard against extreme malfunctions in the state criminal justice systems," not a license to penalize a state court for its opinion-writing technique. *Harrington v. Richter*, 562 U. S. ____, __ (2011) (slip op., at 13) (internal quotation marks omitted). The Court's readiness to find error in the Michigan court's opinion is "inconsistent with the presumption that state courts know and follow the law," *Woodford v. Visciotti*, 537 U. S. 19, 24 (2002) (*per curiam*), a presumption borne out here by the state court's recitation of the correct legal standard.

Since it is ambiguous whether the state court's holding

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was based on a lack of prejudice or rather the court’s factual determination that there had been no deficient performance, to provide relief under AEDPA this Court must conclude that *both* holdings would have been unreasonable applications of clearly established law. See *Premo v. Moore*, 562 U. S. ___, ___ (2011) (slip op., at 7). The first is impossible of doing, since this Court has never held that a defendant in Cooper’s position can establish *Strickland* prejudice. The Sixth Circuit thus violated AEDPA in granting habeas relief, and the Court now does the same.

III

It is impossible to conclude discussion of today’s extraordinary opinion without commenting upon the remedy it provides for the unconstitutional conviction. It is a remedy unheard-of in American jurisprudence—and, I would be willing to bet, in the jurisprudence of any other country.

The Court requires Michigan to “reoffer the plea agreement” that was rejected because of bad advice from counsel. *Ante*, at 16. That would indeed be a powerful remedy—but for the fact that Cooper’s acceptance of that re-offered agreement is not conclusive. Astoundingly, “the state trial court can then *exercise its discretion* in determining whether to vacate the convictions and resentence respondent pursuant to the plea agreement, to vacate only some of the convictions and resentence respondent accordingly, *or to leave the convictions and sentence from trial undisturbed.*” *Ibid.* (emphasis added).

Why, one might ask, require a “reoffer” of the plea agreement, and its acceptance by the defendant? If the district court finds (as a necessary element, supposedly, of *Strickland* prejudice) that Cooper *would have accepted* the original offer, and would thereby have avoided trial and conviction, why not skip the reoffer-and-reacceptance minuet and simply leave it to the discretion of the state

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trial court what the remedy shall be? The answer, of course, is camouflage. Trial courts, after all, *regularly* accept or reject plea agreements, so there seems to be nothing extraordinary about their accepting or rejecting the new one mandated by today's decision. But the acceptance or rejection of a plea agreement that has no status whatever under the United States Constitution is worlds apart from what this is: "discretionary" specification of a remedy for an unconstitutional criminal conviction.

To be sure, the Court asserts that there are "factors" which bear upon (and presumably limit) exercise of this discretion—factors that it is not prepared to specify in full, much less assign some determinative weight. "Principles elaborated over time in decisions of state and federal courts, and in statutes and rules" will (in the Court's rosy view) sort all that out. *Ante*, at 13. I find it extraordinary that "statutes and rules" can specify the remedy for a criminal defendant's unconstitutional conviction. Or that the remedy for an unconstitutional conviction should *ever* be subject *at all* to a trial judge's discretion. Or, finally, that the remedy could *ever* include no remedy at all.

I suspect that the Court's squeamishness in fashioning a remedy, and the incoherence of what it comes up with, is attributable to its realization, deep down, that there is no real constitutional violation here anyway. The defendant has been fairly tried, lawfully convicted, and properly sentenced, and *any* "remedy" provided for this will do nothing but undo the just results of a fair adversarial process.

IV

In many—perhaps most—countries of the world, American-style plea bargaining is forbidden in cases as serious as this one, even for the purpose of obtaining testimony that enables conviction of a greater malefactor, much less

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for the purpose of sparing the expense of trial. See, *e.g.*, World Plea Bargaining 344, 363–366 (S. Thaman ed. 2010). In Europe, many countries adhere to what they aptly call the “legality principle” by requiring prosecutors to charge all prosecutable offenses, which is typically incompatible with the practice of charge-bargaining. See, *e.g.*, *id.*, at xxii; Langbein, Land Without Plea Bargaining: How the Germans Do It, 78 Mich. L. Rev. 204, 210–211 (1979) (describing the “Legalitätsprinzip,” or rule of compulsory prosecution, in Germany). Such a system reflects an admirable belief that the law is the law, and those who break it should pay the penalty provided.

In the United States, we have plea bargaining a-plenty, but until today it has been regarded as a necessary evil. It presents grave risks of prosecutorial overcharging that effectively compels an innocent defendant to avoid massive risk by pleading guilty to a lesser offense; and for guilty defendants it often—perhaps usually—results in a sentence well below what the law prescribes for the actual crime. But even so, we accept plea bargaining because many believe that without it our long and expensive process of criminal trial could not sustain the burden imposed on it, and our system of criminal justice would grind to a halt. See, *e.g.*, Alschuler, Plea Bargaining and its History, 79 Colum. L. Rev. 1, 38 (1979).

Today, however, the Supreme Court of the United States elevates plea bargaining from a necessary evil to a constitutional entitlement. It is no longer a somewhat embarrassing adjunct to our criminal justice system; rather, as the Court announces in the companion case to this one, “it *is* the criminal justice system.” *Frye, ante*, at 7 (quoting approvingly from Scott 1912). Thus, even though there is no doubt that the respondent here is guilty of the offense with which he was charged; even though he has received the exorbitant gold standard of American justice—a full-dress criminal trial with its innumerable

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constitutional and statutory limitations upon the evidence that the prosecution can bring forward, and (in Michigan as in most States³) the requirement of a unanimous guilty verdict by impartial jurors; the Court says that his conviction is invalid because he was deprived of his *constitutional entitlement* to plea-bargain.

I am less saddened by the outcome of this case than I am by what it says about this Court's attitude toward criminal justice. The Court today embraces the sporting-chance theory of criminal law, in which the State functions like a conscientious casino-operator, giving each player a fair chance to beat the house, that is, to serve less time than the law says he deserves. And when a player is excluded from the tables, his *constitutional rights* have been violated. I do not subscribe to that theory. No one should, least of all the Justices of the Supreme Court.

* * *

Today's decision upends decades of our cases, violates a federal statute, and opens a whole new boutique of constitutional jurisprudence ("plea-bargaining law") without even specifying the remedies the boutique offers. The result in the present case is the undoing of an adjudicatory process that worked *exactly* as it is supposed to. Released felon Anthony Cooper, who shot repeatedly and gravely injured a woman named Kali Mundy, was tried and convicted for his crimes by a jury of his peers, and given a punishment that Michigan's elected representatives have deemed appropriate. Nothing about that result is unfair or unconstitutional. To the contrary, it is wonderfully just, and infinitely superior to the trial-by-bargain that today's opinion affords constitutional status. I respectfully dissent.

³See *People v. Cooks*, 446 Mich. 503, 510, 521 N. W. 2d 275, 278 (1994); 6 W. LaFave, J. Israel, N. King, & O. Kerr, *Criminal Procedure* §22.1(e) (3d ed. 2007 and Supp. 2011–2012).

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SUPREME COURT OF THE UNITED STATES

No. 10–209

BLAINE LAFLER, PETITIONER *v.* ANTHONY COOPER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

[March 21, 2012]

JUSTICE ALITO, dissenting.

For the reasons set out in Parts I and II of JUSTICE SCALIA’s dissent, the Court’s holding in this case misapplies our ineffective-assistance-of-counsel case law and violates the requirements of the Antiterrorism and Effective Death Penalty Act of 1996. Respondent received a trial that was free of any identified constitutional error, and, as a result, there is no basis for concluding that respondent suffered prejudice and certainly not for granting habeas relief.

The weakness in the Court’s analysis is highlighted by its opaque discussion of the remedy that is appropriate when a plea offer is rejected due to defective legal representation. If a defendant’s Sixth Amendment rights are violated when deficient legal advice about a favorable plea offer causes the opportunity for that bargain to be lost, the only logical remedy is to give the defendant the benefit of the favorable deal. But such a remedy would cause serious injustice in many instances, as I believe the Court tacitly recognizes. The Court therefore eschews the only logical remedy and relies on the lower courts to exercise sound discretion in determining what is to be done.

Time will tell how this works out. The Court, for its part, finds it unnecessary to define “the boundaries of proper discretion” in today’s opinion. *Ante*, at 13. In my view, requiring the prosecution to renew an old plea offer

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would represent an abuse of discretion in at least two circumstances: first, when important new information about a defendant's culpability comes to light after the offer is rejected, and, second, when the rejection of the plea offer results in a substantial expenditure of scarce prosecutorial or judicial resources.

The lower court judges who must implement today's holding may—and I hope, will—do so in a way that mitigates its potential to produce unjust results. But I would not depend on these judges to come to the rescue. The Court's interpretation of the Sixth Amendment right to counsel is unsound, and I therefore respectfully dissent.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

**MAPLES v. THOMAS, COMMISSIONER, ALABAMA
DEPARTMENT OF CORRECTIONS****CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT**

No. 10–63. Argued October 4, 2011—January 18, 2012

Petitioner Cory R. Maples was found guilty of murder and sentenced to death in Alabama state court. In 2001, Maples sought postconviction relief in state court under Alabama Rule 32. Maples alleged, among other things, that his underpaid and inexperienced trial attorneys failed to afford him the effective assistance guaranteed by the Sixth Amendment. His petition was written by two *pro bono* attorneys, Jaasai Munanka and Clara Ingen-Housz, both associated with the New York offices of the Sullivan & Cromwell law firm. As required by Alabama law, the two attorneys engaged an Alabama lawyer, John Butler, to move their admission *pro hac vice*. Butler made clear, however, that he would undertake no substantive involvement in the case.

In 2002, while Maples' state postconviction petition was pending, Munanka and Ingen-Housz left Sullivan & Cromwell. Their new employment disabled them from representing Maples. They did not inform Maples of their departure and consequent inability to serve as his counsel. In disregard of Alabama law, neither sought the trial court's leave to withdraw. No other Sullivan & Cromwell attorney entered an appearance, moved to substitute counsel, or otherwise notified the court of a change in Maples' representation. Thus, Munanka, Ingen-Housz, and Butler remained Maples' listed, and only, attorneys of record.

The trial court denied Maples' petition in May 2003. Notices of the order were posted to Munanka and Ingen-Housz at Sullivan & Cromwell's address. When those postings were returned, unopened, the trial court clerk attempted no further mailing. Butler also received a copy of the order, but did not act on it. With no attorney of

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record in fact acting on Maples' behalf, the 42-day period Maples had to file a notice of appeal ran out.

About a month later, an Alabama Assistant Attorney General sent a letter directly to Maples. The letter informed Maples of the missed deadline and notified him that he had four weeks remaining to file a federal habeas petition. Maples immediately contacted his mother, who called Sullivan & Cromwell. Three Sullivan & Cromwell attorneys, through Butler, moved the trial court to reissue its order, thereby restarting the 42-day appeal period. The court denied the motion. The Alabama Court of Criminal Appeals then denied a writ of mandamus that would have granted Maples leave to file an out-of-time appeal, and the State Supreme Court affirmed.

Thereafter, Maples sought federal habeas relief. Both the District Court and the Eleventh Circuit denied his request, pointing to the procedural default in state court, *i.e.*, Maples' failure timely to appeal the state trial court's order denying his Rule 32 petition for postconviction relief.

Held: Maples has shown the requisite "cause" to excuse his procedural default. Pp. 11–22.

(a) As a rule, a federal court may not entertain a state prisoner's habeas claims "when (1) 'a state court [has] declined to address [those] claims because the prisoner had failed to meet a state procedural requirement,' and (2) 'the state judgment rests on independent and adequate state procedural grounds.'" *Walker v. Martin*, 562 U. S. ___, ___. The bar to federal review may be lifted, however, if "the prisoner can demonstrate cause for the [procedural] default [in state court] and actual prejudice as a result of the alleged violation of federal law." *Coleman v. Thompson*, 501 U. S. 722, 750.

Cause for a procedural default exists where "something *external* to the petitioner, something that cannot fairly be attributed to him[,] . . . 'impeded [his] efforts to comply with the State's procedural rule.'" *Id.*, at 753. A prisoner's postconviction attorney's negligence does not qualify as "cause," *ibid.*, because the attorney is the prisoner's agent, and under "well-settled" agency law, the principal bears the risk of his agent's negligent conduct, *id.*, at 753–754. Thus, a petitioner is bound by his attorney's failure to meet a filing deadline and cannot rely on that failure to establish cause. *Ibid.*

A markedly different situation arises, however, when an attorney abandons his client without notice, and thereby occasions the default. In such cases, the principal-agent relationship is severed and the attorney's acts or omissions "cannot fairly be attributed to [the client]." *Id.*, at 753. Nor can the client be faulted for failing to act on his own behalf when he lacks reason to believe his attorneys of record, in fact, are not representing him.

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Holland v. Florida, 560 U. S. ____, is instructive. There, the Court found that the one-year deadline for filing a federal habeas petition can be tolled for equitable reasons, and that an attorney’s unprofessional conduct may sometimes be an “extraordinary circumstance” justifying equitable tolling. *Id.*, at ____, ____–____. The Court recognized that an attorney’s negligence does not provide a basis for tolling a statutory time limit. *Id.*, at _____. Holland’s claim that he was abandoned by his attorney, however, if true, “would suffice to establish extraordinary circumstances beyond his control,” *id.*, at ____ (opinion of ALITO, J.). Pp. 11–15.

(b) From the time of his initial Rule 32 petition until well after time ran out for appealing the trial court’s denial of that petition, Maples’ sole attorneys of record were Munanka, Ingen-Housz, and Butler. Unknown to Maples, none of those lawyers was in fact serving as his attorney during the 42-day appeal period. Pp. 15–21.

(1) The State contends that Sullivan & Cromwell represented Maples throughout his state postconviction proceedings, and that, as a result, Maples cannot establish abandonment by counsel during the 42-day period. But it is undisputed that Munanka and Ingen-Housz severed their agency relationship with Maples long before the default occurred. Furthermore, because the attorneys did not seek the trial court’s permission to withdraw, they allowed court records to convey that they remained the attorneys of record. As such, the attorneys, not Maples, would be the addressees of court orders Alabama law requires the clerk to furnish.

The State asserts that, after Munanka’s and Ingen-Housz’s departure, other Sullivan & Cromwell attorneys came forward to serve as Maples’ counsel. At the time of the default, however, those attorneys had not been admitted to practice in Alabama, had not entered their appearances on Maples’ behalf, and had done nothing to inform the Alabama court that they wished to substitute for Munanka and Ingen-Housz. Thus, they lacked the legal authority to act on Maples’ behalf before his time to appeal expired. Pp. 15–19.

(2) Maples’ only other attorney of record, local counsel Butler, did not even begin to represent Maples. Butler told Munanka and Ingen-Housz that he would serve as local counsel only for the purpose of enabling them to appear *pro hac vice* and would play no substantive role in the case. Other factors confirm that Butler was not Maples’ “agent in any meaningful sense of that word.” *Holland*, 560 U. S., at ____ (opinion of ALITO, J.). Upon receiving a copy of the trial court’s order, Butler did not contact Sullivan & Cromwell to ensure that firm lawyers were taking appropriate action. Nor did the State treat Butler as Maples’ actual representative. Notably, the Alabama Assistant Attorney General wrote directly and only to Maples, notwithstanding

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an ethical obligation to refrain from communicating directly with an opposing party known to be represented by counsel. Pp. 19–20.

(3) Not only was Maples left without any functioning attorney of record; the very listing of Munanka, Ingen-Housz, and Butler as his representatives meant that he had no right personally to receive notice. He in fact received none within the 42 days allowed for commencing an appeal. Given no reason to suspect that he lacked counsel able and willing to represent him, Maples surely was blocked from complying with the State’s procedural rule. Pp. 20–21.

(c) “The cause and prejudice requirement shows due regard for States’ finality and comity interests while ensuring that ‘fundamental fairness [remains] the central concern of the writ of habeas corpus.’” *Dretke v. Haley*, 541 U. S. 386, 393. In the unusual circumstances of this case, agency law principles and fundamental fairness point to the same conclusion: there was indeed cause to excuse Maples’ procedural default. Through no fault of his own, he lacked the assistance of any authorized attorney during the 42-day appeal period. And he had no reason to suspect that, in reality, he had been reduced to *pro se* status. Pp. 21–22.

(d) The question of prejudice, which neither the District Court nor the Eleventh Circuit reached, remains open for decision on remand. P. 22.

586 F. 3d 879, reversed and remanded.

GINSBURG, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, BREYER, ALITO, SOTOMAYOR, and KAGAN, JJ., joined. ALITO, J., filed a concurring opinion. SCALIA, J., filed a dissenting opinion, in which THOMAS, J., joined.

Opinion of the Court

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 10–63

CORY R. MAPLES, PETITIONER *v.* KIM T. THOMAS,
COMMISSIONER, ALABAMA DEPARTMENT OF
CORRECTIONS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

[January 18, 2012]

JUSTICE GINSBURG delivered the opinion of the Court.

Cory R. Maples is an Alabama capital prisoner sentenced to death in 1997 for the murder of two individuals. At trial, he was represented by two appointed lawyers, minimally paid and with scant experience in capital cases. Maples sought postconviction relief in state court, alleging ineffective assistance of counsel and several other trial infirmities. His petition, filed in August 2001, was written by two New York attorneys serving *pro bono*, both associated with the same New York-based large law firm. An Alabama attorney, designated as local counsel, moved the admission of the out-of-state counsel *pro hac vice*. As understood by New York counsel, local counsel would facilitate their appearance, but would undertake no substantive involvement in the case.

In the summer of 2002, while Maples' postconviction petition remained pending in the Alabama trial court, his New York attorneys left the law firm; their new employment disabled them from continuing to represent Maples. They did not inform Maples of their departure and conse-

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quent inability to serve as his counsel. Nor did they seek the Alabama trial court's leave to withdraw. Neither they nor anyone else moved for the substitution of counsel able to handle Maples' case.

In May 2003, the Alabama trial court denied Maples' petition. Notices of the court's order were posted to the New York attorneys at the address of the law firm with which they had been associated. Those postings were returned, unopened, to the trial court clerk, who attempted no further mailing. With no attorney of record in fact acting on Maples' behalf, the time to appeal ran out.

Thereafter, Maples petitioned for a writ of habeas corpus in federal court. The District Court and, in turn, the Eleventh Circuit, rejected his petition, pointing to the procedural default in state court, *i.e.*, Maples' failure timely to appeal the Alabama trial court's order denying him postconviction relief. Maples, it is uncontested, was blameless for the default.

The sole question this Court has taken up for review is whether, on the extraordinary facts of Maples' case, there is "cause" to excuse the default. Maples maintains that there is, for the lawyers he believed to be vigilantly representing him had abandoned the case without leave of court, without informing Maples they could no longer represent him, and without securing any recorded substitution of counsel. We agree. Abandoned by counsel, Maples was left unrepresented at a critical time for his state postconviction petition, and he lacked a clue of any need to protect himself *pro se*. In these circumstances, no just system would lay the default at Maples' death-cell door. Satisfied that the requisite cause has been shown, we reverse the Eleventh Circuit's judgment.

I

A

Alabama sets low eligibility requirements for lawyers

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appointed to represent indigent capital defendants at trial. American Bar Association, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Alabama Death Penalty Assessment Report* 117–120 (June 2006) (hereinafter *ABA Report*); Brief for Alabama Appellate Court Justices et al. as *Amici Curiae* 7–8 (hereinafter *Justices Brief*). Appointed counsel need only be a member of the Alabama bar and have “five years’ prior experience in the active practice of criminal law.” Ala. Code §13A–5–54 (2006). Experience with capital cases is not required. *Justices Brief* 7–8. Nor does the State provide, or require appointed counsel to gain, any capital-case-specific professional education or training. *ABA Report* 129–131; *Justices Brief* 14–16.

Appointed counsel in death penalty cases are also undercompensated. *ABA Report* 124–129; *Justices Brief* 12–14. Until 1999, the State paid appointed capital defense attorneys just “\$40.00 per hour for time expended in court and \$20.00 per hour for time reasonably expended out of court in the preparation of [the defendant’s] case.” Ala. Code §15–12–21(d) (1995). Although death penalty litigation is plainly time intensive,¹ the State capped at \$1,000 fees recoverable by capital defense attorneys for out-of-court work. *Ibid.*² Even today, court-appointed attorneys receive only \$70 per hour. 2011 Ala. Acts no. 2011–678, pp. 1072–1073, §6.

¹One study of federal capital trials from 1990 to 1997 found that defense attorneys spent an average of 1,480 out-of-court hours preparing a defendant’s case. Subcommittee on Federal Death Penalty Cases, Committee on Defender Services, Judicial Conference of the United States, *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation* 14 (May 1998).

²In 1999, the State removed the cap on fees for out-of-court work in capital cases. Ala. Code §15–12–21(d) (2010 Cum. Supp.). Perhaps not coincidentally, 70% of the inmates on Alabama’s death row in 2006, including Maples, had been convicted when the \$1,000 cap was in effect. *ABA Report* 126.

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Nearly alone among the States, Alabama does not guarantee representation to indigent capital defendants in postconviction proceedings. ABA Report 111–112, 158–160; Justices Brief 33. The State has elected, instead, “to rely on the efforts of typically well-funded [out-of-state] volunteers.” Brief in Opposition in *Barbour v. Allen*, O. T. 2006, No. 06–10605, p. 23. Thus, as of 2006, 86% of the attorneys representing Alabama’s death row inmates in state collateral review proceedings “either worked for the Equal Justice Initiative (headed by NYU Law professor Bryan Stevenson), out-of-state public interest groups like the Innocence Project, or an out-of-state mega-firm.” Brief in Opposition 16, n. 4. On occasion, some prisoners sentenced to death receive no postconviction representation at all. See ABA Report 112 (“[A]s of April 2006, approximately fifteen of Alabama’s death row inmates in the final rounds of state appeals had no lawyer to represent them.”).

B

This system was in place when, in 1997, Alabama charged Maples with two counts of capital murder; the victims, Stacy Alan Terry and Barry Dewayne Robinson II, were Maples’ friends who, on the night of the murders, had been out on the town with him. Maples pleaded not guilty, and his case proceeded to trial, where he was represented by two court-appointed Alabama attorneys. Only one of them had earlier served in a capital case. See Tr. 3081. Neither counsel had previously tried the penalty phase of a capital case. Compensation for each lawyer was capped at \$1,000 for time spent out-of-court preparing Maples’ case, and at \$40 per hour for in-court services. See Ala. Code §15–12–21 (1995).

Finding Maples guilty on both counts, the jury recommended that he be sentenced to death. The vote was 10 to 2, the minimum number Alabama requires for a death

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recommendation. See Ala. Code §13A–5–46(f) (1994) (“The decision of the jury to recommend a sentence of death must be based on a vote of at least 10 jurors.”). Accepting the jury’s recommendation, the trial court sentenced Maples to death. On direct appeal, the Alabama Court of Criminal Appeals and the Alabama Supreme Court affirmed the convictions and sentence. *Ex parte Maples*, 758 So. 2d 81 (Ala. 1999); *Maples v. State*, 758 So. 2d 1 (Ala. Crim. App. 1999). We denied certiorari. *Maples v. Alabama*, 531 U. S. 830 (2000).

Two out-of-state volunteers represented Maples in postconviction proceedings: Jaasi Munanka and Clara Ingen-Housz, both associates at the New York offices of the Sullivan & Cromwell law firm. At the time, Alabama required out-of-state attorneys to associate local counsel when seeking admission to practice *pro hac vice* before an Alabama court, regardless of the nature of the proceeding. Rule Governing Admission to the Ala. State Bar VII (2000) (hereinafter Rule VII).³ The Alabama Rule further prescribed that the local attorney’s name “appear on all notices, orders, pleadings, and other documents filed in the cause,” and that local counsel “accept joint and several responsibility with the foreign attorney to the client, to opposing parties and counsel, and to the court or administrative agency in all matters [relating to the case].” Rule VII(C).

Munanka and Ingen-Housz associated Huntsville, Alabama attorney John Butler as local counsel. Notwithstanding his obligations under Alabama law, Butler informed Munanka and Ingen-Housz, “at the outset,” that he would serve as local counsel only for the purpose of

³In 2006, Alabama revised Rule VII. See Rule Governing Admission to the Ala. State Bar VII (2009). Under the new rule, the State allows out-of-state counsel to represent *pro bono* indigent criminal defendants in postconviction proceedings without involvement of local counsel. *Ibid.*

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allowing the two New York attorneys to appear *pro hac vice* on behalf of Maples. App. to Pet. for Cert. 255a. Given his lack of “resources, available time [and] experience,” Butler told the Sullivan & Cromwell lawyers, he could not “deal with substantive issues in the case.” *Ibid.* The Sullivan & Cromwell attorneys accepted Butler’s conditions. *Id.*, at 257a. This arrangement between out-of-state and local attorneys, it appears, was hardly atypical. See Justices Brief 36 (“The fact is that local counsel for out-of-state attorneys in post-conviction litigation most often do nothing other than provide the mechanism for foreign attorneys to be admitted.”).

With the aid of his *pro bono* counsel, Maples filed a petition for postconviction relief under Alabama Rule of Criminal Procedure 32.⁴ Among other claims, Maples asserted that his court-appointed attorneys provided constitutionally ineffective assistance during both guilt and penalty phases of his capital trial. App. 29–126. He alleged, in this regard, that his inexperienced and underfunded attorneys failed to develop and raise an obvious intoxication defense, did not object to several egregious instances of prosecutorial misconduct, and woefully underprepared for the penalty phase of his trial. The State responded by moving for summary dismissal of Maples’ petition. On December 27, 2001, the trial court denied the State’s motion.

Some seven months later, in the summer of 2002, both Munanka and Ingen-Housz left Sullivan & Cromwell. App. to Pet. for Cert. 258a. Munanka gained a clerkship with a federal judge; Ingen-Housz accepted a position with the European Commission in Belgium. *Ibid.* Neither attorney told Maples of their departure from Sullivan & Cromwell or of their resulting inability to continue to

⁴Originally filed in August 2001, the petition was resubmitted, with only minor alterations, in December 2001. See App. 22–24, 28–142.

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represent him. In disregard of Alabama law, see Ala. Rule Crim. Proc. 6.2, Comment, neither attorney sought the trial court's leave to withdraw, App. to Pet. for Cert. 223a. Compounding Munanka's and Ingen-Housz's inaction, no other Sullivan & Cromwell lawyer entered an appearance on Maples' behalf, moved to substitute counsel, or otherwise notified the court of any change in Maples' representation. *Ibid.*

Another nine months passed. During this time period, no Sullivan & Cromwell attorneys assigned to Maples' case sought admission to the Alabama bar, entered appearances on Maples' behalf, or otherwise advised the Alabama court that Munanka and Ingen-Housz were no longer Maples' attorneys. Thus, Munanka and Ingen-Housz (along with Butler) remained Maples' listed, and only, "attorneys of record." *Id.*, at 223a.

There things stood when, in May 2003, the trial court, without holding a hearing, entered an order denying Maples' Rule 32 petition. App. 146–225.⁵ The clerk of the Alabama trial court mailed copies of the order to Maples' three attorneys of record. He sent Munanka's and Ingen-Housz's copies to Sullivan & Cromwell's New York address, which the pair had provided upon entering their appearances.

When those copies arrived at Sullivan & Cromwell, Munanka and Ingen-Housz had long since departed. The notices, however, were not forwarded to another Sullivan & Cromwell attorney. Instead, a mailroom employee sent the unopened envelopes back to the court. "Returned to Sender—Attempted, Unknown" was stamped on the envelope addressed to Munanka. App. to Reply to Brief in

⁵One of Maples' attorneys observed, without contradiction, that the trial court's order was a "word for word copy of the proposed Order that the State had submitted [with] its [December 2001] Motion to Dismiss." *Id.*, at 300.

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Opposition 8a. A similar stamp appeared on the envelope addressed to Ingen-Housz, along with the handwritten notation “Return to Sender—Left Firm.” *Id.*, at 7a.

Upon receiving back the unopened envelopes he had mailed to Munanka and Ingen-Housz, the Alabama court clerk took no further action. In particular, the clerk did not contact Munanka or Ingen-Housz at the personal telephone numbers or home addresses they had provided in their *pro hac vice* applications. See Ingen-Housz Verified Application for Admission to Practice Under Rule VII, p. 1; and Munanka Verified Application for Admission to Practice Under Rule VII, p. 1, in *Maples v. State*, No. CC–95–842.60 (C. C. Morgan Cty., Ala.). Nor did the clerk alert Sullivan & Cromwell or Butler. Butler received his copy of the order, but did not act on it. App. to Pet. for Cert. 256a. He assumed that Munanka and Ingen-Housz, who had been “CC’d” on the order, would take care of filing an appeal. *Ibid.*

Meanwhile, the clock ticked on Maples’ appeal. Under Alabama’s Rules of Appellate Procedure, Maples had 42 days to file a notice of appeal from the trial court’s May 22, 2003 order denying Maples’ petition for postconviction relief. Rule 4(a)(1) (2000). No appeal notice was filed, and the time allowed for filing expired on July 7, 2003.

A little over a month later, on August 13, 2003, Alabama Assistant Attorney General Jon Hayden, the attorney representing the State in Maples’ collateral review proceedings, sent a letter directly to Maples. App. to Pet. for Cert. 253a–254a. Hayden’s letter informed Maples of the missed deadline for initiating an appeal within the State’s system, and notified him that four weeks remained during which he could file a federal habeas petition. *Ibid.* Hayden mailed the letter to Maples only, using his prison address. *Ibid.* No copy was sent to Maples’ attorneys of record, or to anyone else acting on Maples’ behalf. *Ibid.*

Upon receiving the State’s letter, Maples immediately

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contacted his mother. *Id.*, at 258a. She telephoned Sullivan & Cromwell to inquire about her son's case. *Ibid.* Prompted by her call, Sullivan & Cromwell attorneys Marc De Leeuw, Felice Duffy, and Kathy Brewer submitted a motion, through Butler, asking the trial court to reissue its order denying Maples' Rule 32 petition, thereby restarting the 42-day appeal period. *Id.*, at 222a.

The trial court denied the motion, *id.*, at 222a–225a, noting that Munanka and Ingen-Housz had not withdrawn from the case and, consequently, were “still attorneys of record for the petitioner,” *id.*, at 223a. Furthermore, the court added, attorneys De Leeuw, Duffy, and Brewer had not “yet been admitted to practice in Alabama” or “entered appearances as attorneys of record.” *Ibid.* “How,” the court asked, “can a Circuit Clerk in Decatur, Alabama know what is going on in a law firm in New York, New York?” *Id.*, at 223a–224a. Declining to blame the clerk for the missed notice of appeal deadline, the court said it was “unwilling to enter into subterfuge in order to gloss over mistakes made by counsel for the petitioner.” *Ibid.*

Maples next petitioned the Alabama Court of Criminal Appeals for a writ of mandamus, granting him leave to file an out-of-time appeal. Rejecting Maples' plea, the Court of Criminal Appeals determined that, although the clerk had “assumed a duty to notify the parties of the resolution of Maples's Rule 32 petition,” the clerk had satisfied that obligation by sending notices to the attorneys of record at the addresses those attorneys provided. *Id.*, at 234a–235a. Butler's receipt of the order, the court observed, sufficed to notify all attorneys “in light of their apparent co-counsel status.” *Id.*, at 235a–236a (quoting *Thomas v. Kellett*, 489 So. 2d 554, 555 (Ala. 1986)). The Alabama Supreme Court summarily affirmed the Court of Criminal Appeals' judgment, App. to Pet. for Cert. 237a, and this Court denied certiorari, *Maples v. Alabama*, 543 U. S. 1148 (2005).

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Having exhausted his state postconviction remedies, Maples sought federal habeas corpus relief. Addressing the ineffective-assistance-of-trial-counsel claims Maples stated in his federal petition, the State urged that Maples had forever forfeited those claims. Maples did, indeed, present the claims in his state postconviction (Rule 32) petition, the State observed, but he did not timely appeal from the trial court’s denial of his petition. That procedural default, the State maintained, precluded federal-court consideration of the claims.⁶ Maples replied that the default should be excused, because he missed the appeal deadline “through no fault of his own.” App. 262 (internal quotation marks omitted).

The District Court determined that Maples had defaulted his ineffective-assistance claims, and that he had not shown “cause” sufficient to overcome the default. App. to Pet. for Cert. 49a–55a. The court understood Maples to argue that errors committed by his postconviction counsel, not any lapse on the part of the court clerk in Alabama, provided the requisite “cause” to excuse his failure to meet Alabama’s 42-days-to-appeal Rule. *Id.*, at 55a. Such an argument was inadmissible, the court ruled, because this Court, in *Coleman v. Thompson*, 501 U. S. 722 (1991), had held that the ineffectiveness of postconviction appellate counsel could not qualify as cause. App. to Pet. for Cert. 55a (citing *Coleman*, 501 U. S., at 751).

A divided panel of the Eleventh Circuit affirmed. *Maples v. Allen*, 586 F. 3d 879 (2009) (*per curiam*). In accord with the District Court, the Court of Appeals’ majority held that Maples defaulted his ineffective-assistance

⁶In opposing Maples’ request for an out-of-time appeal, the State argued to the Alabama Supreme Court that such an appeal was unwarranted. In that context, the State noted that Maples “may still present his postconviction claims to [the federal habeas] court.” 35 Record, Doc. No. 55, p. 22, n. 4. The State’s current position is in some tension with that observation.

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claims in state court by failing to file a timely notice of appeal, *id.*, at 890, and that *Coleman* rendered Maples' assertion of "cause" unacceptable, 586 F. 3d, at 891.

Judge Barkett dissented. *Id.*, at 895–898. She concluded that the Alabama Court of Criminal Appeals had acted "arbitrarily" in refusing to grant Maples' request for an out-of-time appeal. *Id.*, at 896. In a case involving "indistinguishable facts," Judge Barkett noted, the Alabama appellate court had allowed the petitioner to file a late appeal. *Ibid.* (citing *Marshall v. State*, 884 So. 2d 898, 899 (Ala. Crim. App. 2002)). Inconsistent application of the 42-days-to-appeal rule, Judge Barkett said, "render[ed] the rule an inadequate ground on which to bar federal review of Maples's claims." 586 F. 3d, at 897. The interests of justice, she added, required review of Maples' claims in view of the exceptional circumstances and high stakes involved, and the absence of any fault on Maples' part. *Ibid.*

We granted certiorari to decide whether the uncommon facts presented here establish cause adequate to excuse Maples' procedural default. 562 U. S. ____ (2011).

II

A

As a rule, a state prisoner's habeas claims may not be entertained by a federal court "when (1) 'a state court [has] declined to address [those] claims because the prisoner had failed to meet a state procedural requirement,' and (2) 'the state judgment rests on independent and adequate state procedural grounds.'" *Walker v. Martin*, 562 U. S. ____, ____ (2011) (slip op., at 7) (quoting *Coleman*, 501 U. S., at 729–730). The bar to federal review may be lifted, however, if "the prisoner can demonstrate cause for the [procedural] default [in state court] and actual prejudice as a result of the alleged violation of federal law." *Id.*, at 750; see *Wainwright v. Sykes*, 433 U. S. 72, 84–85

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(1977).

Given the single issue on which we granted review, we will assume, for purposes of this decision, that the Alabama Court of Criminal Appeals' refusal to consider Maples' ineffective-assistance claims rested on an independent and adequate state procedural ground: namely, Maples' failure to satisfy Alabama's Rule requiring a notice of appeal to be filed within 42 days from the trial court's final order. Accordingly, we confine our consideration to the question whether Maples has shown cause to excuse the missed notice of appeal deadline.

Cause for a procedural default exists where "something *external* to the petitioner, something that cannot fairly be attributed to him[,] . . . 'impeded [his] efforts to comply with the State's procedural rule.'" *Coleman*, 501 U. S., at 753 (quoting *Murray v. Carrier*, 477 U. S. 478, 488 (1986); emphasis in original). Negligence on the part of a prisoner's postconviction attorney does not qualify as "cause." *Coleman*, 501 U. S., at 753. That is so, we reasoned in *Coleman*, because the attorney is the prisoner's agent, and under "well-settled principles of agency law," the principal bears the risk of negligent conduct on the part of his agent. *Id.*, at 753–754. See also *Irwin v. Department of Veterans Affairs*, 498 U. S. 89, 92 (1990) ("Under our system of representative litigation, 'each party is deemed bound by the acts of his lawyer-agent.'" (quoting *Link v. Wabash R. Co.*, 370 U. S. 626, 634 (1962))). Thus, when a petitioner's postconviction attorney misses a filing deadline, the petitioner is bound by the oversight and cannot rely on it to establish cause. *Coleman*, 501 U. S., at 753–754. We do not disturb that general rule.

A markedly different situation is presented, however, when an attorney abandons his client without notice, and thereby occasions the default. Having severed the principal-agent relationship, an attorney no longer acts, or fails to act, as the client's representative. See 1 Restatement

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(Third) of Law Governing Lawyers §31, Comment *f* (1998) (“Withdrawal, whether proper or improper, terminates the lawyer’s authority to act for the client.”). His acts or omissions therefore “cannot fairly be attributed to [the client].” *Coleman*, 501 U. S., at 753. See, e.g., *Jamison v. Lockhart*, 975 F.2d 1377, 1380 (CA8 1992) (attorney conduct may provide cause to excuse a state procedural default where, as a result of a conflict of interest, the attorney “ceased to be [petitioner’s] agent”); *Porter v. State*, 339 Ark. 15, 16–19, 2 S. W. 3d 73, 74–76 (1999) (finding “good cause” for petitioner’s failure to file a timely habeas petition where the petitioner’s attorney terminated his representation without notifying petitioner and without taking “any formal steps to withdraw as the attorney of record”).

Our recent decision in *Holland v. Florida*, 560 U. S. ____ (2010), is instructive. That case involved a missed one-year deadline, prescribed by 28 U. S. C. §2244(d), for filing a federal habeas petition. *Holland* presented two issues: first, whether the §2244(d) time limitation can be tolled for equitable reasons, and, second, whether an attorney’s unprofessional conduct can ever count as an “extraordinary circumstance” justifying equitable tolling. 560 U. S., at ___, ___–___ (slip op., at 1, 16–17) (internal quotation marks omitted). We answered yes to both questions.

On the second issue, the Court recognized that an attorney’s negligence, for example, miscalculating a filing deadline, does not provide a basis for tolling a statutory time limit. *Id.*, at ___ (slip op., at 19); *id.*, at ___–___ (ALITO, J., concurring in part and concurring in judgment) (slip op., at 5–6); see *Lawrence v. Florida*, 549 U. S. 327, 336 (2007). The *Holland* petitioner, however, urged that attorney negligence was not the gravamen of his complaint. Rather, he asserted that his lawyer had detached himself from any trust relationship with his client: “[My lawyer] has abandoned me,” the petitioner complained to

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the court. 560 U. S., at ___–___ (slip op., at 3–4) (brackets and internal quotation marks omitted); see *Nara v. Frank*, 264 F. 3d 310, 320 (CA3 2001) (ordering a hearing on whether a client’s effective abandonment by his lawyer merited tolling of the one-year deadline for filing a federal habeas petition).

In a concurring opinion in *Holland*, JUSTICE ALITO homed in on the essential difference between a claim of attorney error, however egregious, and a claim that an attorney had essentially abandoned his client. 560 U. S., at ___–___ (slip op., at 5–7). *Holland*’s plea fit the latter category: He alleged abandonment “evidenced by counsel’s near-total failure to communicate with petitioner or to respond to petitioner’s many inquiries and requests over a period of several years.” *Id.*, at ___ (slip op., at 6); see *id.*, at ___–___, ___ (majority opinion) (slip op., at 3–4, 20). If true, JUSTICE ALITO explained, “petitioner’s allegations would suffice to establish extraordinary circumstances beyond his control[:]. Common sense dictates that a litigant cannot be held constructively responsible for the conduct of an attorney who is not operating as his agent in any meaningful sense of that word.” *Id.*, at ___ (slip op., at 6).⁷

We agree that, under agency principles, a client cannot be charged with the acts or omissions of an attorney who has abandoned him. Nor can a client be faulted for failing to act on his own behalf when he lacks reason to believe his attorneys of record, in fact, are not representing him. We therefore inquire whether Maples has shown that his attorneys of record abandoned him, thereby supplying the

⁷*Holland v. Florida*, 560 U. S. ___ (2010), involved tolling of a federal time bar, while *Coleman v. Thompson*, 501 U. S. 722 (1991), concerned cause for excusing a procedural default in state court. See *Holland*, 560 U. S., at ___ (slip op., at 18). We see no reason, however, why the distinction between attorney negligence and attorney abandonment should not hold in both contexts.

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“extraordinary circumstances beyond his control,” *ibid.*, necessary to lift the state procedural bar to his federal petition.

B

From the time he filed his initial Rule 32 petition until well after time ran out for appealing the trial court’s denial of that petition, Maples had only three attorneys of record: Munanka, Ingen-Housz, and Butler. Unknown to Maples, not one of these lawyers was in fact serving as his attorney during the 42 days permitted for an appeal from the trial court’s order.

1

The State contends that Sullivan & Cromwell represented Maples throughout his state postconviction proceedings. Accordingly, the State urges, Maples cannot establish abandonment by counsel continuing through the six weeks allowed for noticing an appeal from the trial court’s denial of his Rule 32 petition. We disagree. It is undisputed that Munanka and Ingen-Housz severed their agency relationship with Maples long before the default occurred. See Brief for Respondent 47 (conceding that the two attorneys erred in failing to file motions to withdraw from the case). Both Munanka and Ingen-Housz left Sullivan & Cromwell’s employ in the summer of 2002, at least nine months before the Alabama trial court entered its order denying Rule 32 relief. App. to Pet. for Cert. 258a. Their new employment—Munanka as a law clerk for a federal judge, Ingen-Housz as an employee of the European Commission in Belgium—disabled them from continuing to represent Maples. See Code of Conduct for Judicial Employees, Canon 4(D)(3) (1999) (prohibiting judicial employees from participating in “litigation against federal, state or local government”); Staff Regulations of Officials of the European Commission, Tit. I, Art. 12b

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(2004) (employees cannot perform outside work without first obtaining authorization from the Commission), available at http://ec.europa.eu/civil_service/docs/toc100_en.pdf (as visited Jan. 13, 2012, and in Clerk of Court's case file). Hornbook agency law establishes that the attorneys' departure from Sullivan & Cromwell and their commencement of employment that prevented them from representing Maples ended their agency relationship with him. See 1 Restatement (Second) of Agency §112 (1957) (hereinafter Restatement (Second)) ("[T]he authority of an agent terminates if, without knowledge of the principal, he acquires adverse interests or if he is otherwise guilty of a serious breach of loyalty to the principal."); 2 *id.*, §394, Comment *a* ("[T]he agent commits a breach of duty [of loyalty] to his principal by acting for another in an undertaking which has a substantial tendency to cause him to disregard his duty to serve his principal with only his principal's purposes in mind.").

Furthermore, the two attorneys did not observe Alabama's Rule requiring them to seek the trial court's permission to withdraw. See Ala. Rule Crim. Proc. 6.2, Comment. Cf. 1 Restatement (Second) §111, Comment *b* ("[I]t is ordinarily inferred that a principal does not intend an agent to do an illegal act."). By failing to seek permission to withdraw, Munanka and Ingen-Housz allowed the court's records to convey that they represented Maples. As listed attorneys of record, they, not Maples, would be the addressees of court orders Alabama law requires the clerk to furnish. See Ala. Rule Crim. Proc. 34.5 ("Upon the entry of any order in a criminal proceeding made in response to a motion, . . . the clerk shall, without undue delay, furnish all parties a copy thereof by mail or by other appropriate means.") and 34.4 ("[W]here the defendant is represented by counsel, service shall be made upon the attorney of record.").

Although acknowledging that Munanka and Ingen-

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Housz severed their agency relationship with Maples upon their departure from Sullivan & Cromwell, the State argues that, nonetheless, Maples was not abandoned. Other attorneys at the firm, the State asserts, continued to serve as Maples' counsel. Regarding this assertion, we note, first, that the record is cloudy on the role other Sullivan & Cromwell attorneys played. In an affidavit submitted to the Alabama trial court in support of Maples' request that the court reissue its Rule 32 order, see *supra*, at 9, partner Marc De Leeuw stated that he had been "involved in [Maples'] case since the summer of 2001." App. to Pet. for Cert. 257a. After the trial court initially denied the State's motion to dismiss in December 2001, De Leeuw informed the court, Sullivan & Cromwell "lawyers working on this case for Mr. Maples prepared for [an anticipated] evidentiary hearing." *Id.*, at 258a. Another Sullivan & Cromwell attorney, Felice Duffy, stated, in an affidavit submitted to the Alabama trial court in September 2003, that she "ha[d] worked on [Maples'] case since October 14, 2002." App. 231. But neither De Leeuw nor Duffy described what their "involve[ment]" or "wor[k] on [Maples'] case" entailed. And neither attorney named the lawyers, other than Munanka and Ingen-Housz (both of them still with Sullivan & Cromwell in December 2001), engaged in preparation for the expected hearing. Nor did De Leeuw identify the specific work, if any, other lawyers performed on Maples' case between Munanka's and Ingen-Housz's departures and the firm's receipt of the telephone call from Maples' mother.⁸

⁸The unclear state of the record is perhaps not surprising, given Sullivan & Cromwell's representation of Maples after the default. As *amici* for Maples explain, a significant conflict of interest arose for the firm once the crucial deadline passed. Brief for Legal Ethics Professors et al. as *Amici Curiae* 23–27. Following the default, the firm's interest in avoiding damage to its own reputation was at odds with Maples' strongest argument—*i.e.*, that his attorneys had abandoned him,

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The slim record on activity at Sullivan & Cromwell, however, does not warrant a remand to determine more precisely the work done by firm lawyers other than Munanka and Ingen-Housz. For the facts essential to our decision are not in doubt. At the time of the default, the Sullivan & Cromwell attorneys who later came forward—De Leeuw, Felice Duffy, and Kathy Brewer—had not been admitted to practice law in Alabama, had not entered their appearances on Maples’ behalf, and had done nothing to inform the Alabama court that they wished to substitute for Munanka and Ingen-Housz. Thus, none of these attorneys had the legal authority to act on Maples’ behalf before his time to appeal expired. Cf. 1 Restatement (Second) §111 (The “failure to acquire a qualification by the agent without which it is illegal to do an authorized act . . . terminates the agent’s authority to act.”).⁹ What they did or did not do in their New York offices is therefore

therefore he had cause to be relieved from the default. Yet Sullivan & Cromwell did not cede Maples’ representation to a new attorney, who could have made Maples’ abandonment argument plain to the Court of Appeals. Instead, the firm represented Maples through briefing and oral argument in the Eleventh Circuit, where they attempted to cast responsibility for the mishap on the clerk of the Alabama trial court. Given Sullivan & Cromwell’s conflict of interest, Maples’ federal habeas petition, prepared and submitted by the firm, is not persuasive evidence that Maples, prior to the default, ever “viewed himself” as represented by “the firm,” see *post*, at 4, rather than by his attorneys of record, Munanka and Ingen-Housz.

⁹The dissent argues that the Sullivan & Cromwell attorneys had no basis “to infer that Maples no longer wanted them to represent him, simply because they had *not yet* qualified before the Alabama court.” *Post*, at 6–7. While that may be true, it is irrelevant. What the attorneys could have inferred is that Maples would not have wanted them to file a notice of appeal on his behalf prior to their admission to practice in Alabama, for doing so would be “illegal,” *post*, at 7 (internal quotation marks omitted). See also 1 Restatement (Second) §111, Comment *b*, quoted *supra*, at 16. For the critical purpose of filing a notice of appeal, then, the other Sullivan & Cromwell attorneys had no authority to act for Maples.

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beside the point. At the time critical to preserving Maples' access to an appeal, they, like Munanka and Ingen-Housz, were not Maples' authorized agents.

2

Maples' only other attorney of record, local counsel Butler, also left him abandoned. Indeed, Butler did not even begin to represent Maples. Butler informed Munanka and Ingen-Housz that he would serve as local counsel only for the purpose of enabling the two out-of-state attorneys to appear *pro hac vice*. *Supra*, at 5–6. Lacking the necessary “resources, available time [and] experience,” Butler told the two Sullivan & Cromwell lawyers, he would not “deal with substantive issues in the case.” *Ibid*. That the minimal participation he undertook was inconsistent with Alabama law, see Rule VII, *supra*, at 5, underscores the absurdity of holding Maples barred because Butler signed on as local counsel.

In recognizing that Butler had no role in the case other than to allow Munanka and Ingen-Housz to appear *pro hac vice*, we need not rely solely on Butler's and De Leeuw's statements to that effect. App. to Pet. for Cert. 255a–258a. Other factors confirm that Butler did not “operat[e] as [Maples'] agent in any meaningful sense of that word.” *Holland*, 560 U. S., at ____ (ALITO, J., concurring in part and concurring in judgment) (slip op., at 6). The first is Butler's own conduct. Upon receiving a copy of the trial court's Rule 32 order, Butler did not contact Sullivan & Cromwell to ensure that firm lawyers were taking appropriate action. Although Butler had reason to believe that Munanka and Ingen-Housz had received a copy of the court's order, see App. 225 (indicating that Munanka and Ingen-Housz were CC'd on the order), Butler's failure even to place a phone call to the New York firm substantiates his disclaimer of any genuinely representative role in the case.

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Notably, the State did not treat Butler as Maples’ actual representative. Assistant Attorney General Hayden addressed the letter informing Maples of the default directly to Maples in prison. See *supra*, at 8. Hayden sent no copy to, nor did he otherwise notify, any of the attorneys listed as counsel of record for Maples. Lawyers in Alabama have an ethical obligation to refrain from communicating directly with an opposing party known to be represented by counsel. See Ala. Rule of Professional Conduct 4.2 (2003); Ala. Rule Crim. Proc. 34.4 (requiring that the service of all documents “be made upon the attorney of record”). In writing directly and only to Maples, notwithstanding this ethical obligation, Assistant Attorney General Hayden must have believed that Maples was no longer represented by counsel, out-of-state or local.¹⁰

In sum, the record admits of only one reading: At no time before the missed deadline was Butler serving as Maples’ agent “in any meaningful sense of that word.” *Holland*, 560 U. S., at ___ (opinion of ALITO, J.) (slip op., at 6).

3

Not only was Maples left without any functioning attorney of record, the very listing of Munanka, Ingen-Housz, and Butler as his representatives meant that he had no right personally to receive notice. See *supra*, at 16. He in

¹⁰It bears note, as well, that the State served its response to Maples’ Rule 32 petition only on Munanka at Sullivan & Cromwell’s New York address, not on Butler. App. 26. While the State may not be obligated to serve more than one attorney of record, its selection of New York rather than local counsel is some indication that, from the start, the State was cognizant of the limited role Butler would serve. Conforming the State’s Rule to common practice, in 2006, the Alabama Supreme Court amended the provision on appearances by out-of-state counsel to eliminate the requirement that such attorneys associate local counsel when representing indigent criminal defendants *pro bono* in postconviction proceedings. See *supra*, at 5, n. 3.

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fact received none or any other warning that he had better fend for himself. Had counsel of record or the State's attorney informed Maples of his plight before the time to appeal ran out, he could have filed a notice of appeal himself¹¹ or enlisted the aid of new volunteer attorneys.¹² Given no reason to suspect that he lacked counsel able and willing to represent him, Maples surely was blocked from complying with the State's procedural rule.

C

"The cause and prejudice requirement," we have said, "shows due regard for States' finality and comity interests while ensuring that 'fundamental fairness [remains] the central concern of the writ of habeas corpus.'" *Dretke v. Haley*, 541 U. S. 386, 393 (2004) (quoting *Strickland v. Washington*, 466 U. S. 668, 697 (1984)). In the unusual circumstances of this case, principles of agency law and fundamental fairness point to the same conclusion: There was indeed cause to excuse Maples' procedural default. Through no fault of his own, Maples lacked the assistance of any authorized attorney during the 42 days Alabama allows for noticing an appeal from a trial court's denial of postconviction relief. As just observed, he had no reason to suspect that, in reality, he had been reduced to *pro se* status. Maples was disarmed by extraordinary circumstances quite beyond his control. He has shown ample cause, we hold, to excuse the procedural default into which

¹¹The notice is a simple document. It need specify only: the party taking the appeal, the order or judgment appealed from, and the name of the court to which appeal is taken. Ala. Rule App. Proc. 3(c) (2000).

¹²Alabama grants out-of-time appeals to prisoners proceeding *pro se* who were not timely served with copies of court orders. See *Maples v. Allen*, 586 F. 3d 879, 888, and n. 6 (CA11 2009) (*per curiam*) (citing *Ex parte Miles*, 841 So. 2d 242, 243 (Ala. 2002), and *Ex parte Robinson*, 865 So. 2d 1250, 1251–1252 (Ala. Crim. App. 2003) (*per curiam*)). Though Maples was not a *pro se* petitioner on the record, he was, in fact, without authorized counsel.

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he was trapped when counsel of record abandoned him without a word of warning.

III

Having found no cause to excuse the failure to file a timely notice of appeal in state court, the District Court and the Eleventh Circuit did not reach the question of prejudice. See *supra*, at 10–11. That issue, therefore, remains open for decision on remand.

* * *

For the reasons stated, the judgment of the Court of Appeals for the Eleventh Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

ALITO, J., concurring

SUPREME COURT OF THE UNITED STATES

No. 10–63

CORY R. MAPLES, PETITIONER *v.* KIM T. THOMAS,
COMMISSIONER, ALABAMA DEPARTMENT OF
CORRECTIONS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

[January 18, 2012]

JUSTICE ALITO, concurring.

I join the opinion of the Court. Unbeknownst to petitioner, he was effectively deprived of legal representation due to the combined effect of no fewer than eight unfortunate events: (1) the departure from their law firm of the two young lawyers who appeared as counsel of record in his state postconviction proceeding; (2) the acceptance by these two attorneys of new employment that precluded them from continuing to represent him; (3) their failure to notify petitioner of their new situation; (4) their failure to withdraw as his counsel of record; (5) the apparent failure of the firm that they left to monitor the status of petitioner’s case when these attorneys departed; (6) when notice of the decision denying petitioner’s request for state postconviction relief was received in that firm’s offices, the failure of the firm’s mail room to route that important communication to either another member of the firm or to the departed attorneys’ new addresses; (7) the failure of the clerk’s office to take any action when the envelope containing that notice came back unopened; and (8) local counsel’s very limited conception of the role that he was obligated to play in petitioner’s representation. Under these unique circumstances, I agree that petitioner’s attorneys effectively abandoned him and that this aban-

ALITO, J., concurring

donment was a “cause” that is sufficient to overcome petitioner’s procedural default.

In an effort to obtain relief for his client, petitioner’s counsel in the case now before us cast blame for what occurred on Alabama’s system of providing legal representation for capital defendants at trial and in state collateral proceedings. See Brief for Petitioner 3–6. But whatever may be said about Alabama’s system, I do not think that Alabama’s system had much if anything to do with petitioner’s misfortune. The quality of petitioner’s representation at trial obviously played no role in the failure to meet the deadline for filing his notice of appeal from the denial of his state postconviction petition. Nor do I see any important connection between what happened in this case and Alabama’s system for providing representation for prisoners who are sentenced to death and who wish to petition the state courts for collateral relief. Unlike other States, Alabama relies on attorneys who volunteer to represent these prisoners *pro bono*, and we are told that most of these volunteers work for large, out-of-state firms. *Id.*, at 4. Petitioner’s brief states that the Alabama system had “a direct bearing on the events giving rise . . . to the procedural default at issue,” *id.*, at 3, but a similar combination of untoward events could have occurred if petitioner had been represented by Alabama attorneys who were appointed by the court and paid for with state funds. The firm whose lawyers represented petitioner *pro bono* is one of the country’s most prestigious and expensive, and I have little doubt that the vast majority of criminal defendants would think that they had won the lottery if they were given the opportunity to be represented by attorneys from such a firm. See *id.*, at 9 (stating that it “seemed as though Maples had won the lottery when two attorneys working at an elite New York law firm . . . agreed to represent Maples *pro bono*”).

What occurred here was not a predictable consequence

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of the Alabama system but a veritable perfect storm of misfortune, a most unlikely combination of events that, without notice, effectively deprived petitioner of legal representation. Under these unique circumstances, I agree that petitioner's procedural default is overcome.

SCALIA, J., dissenting

SUPREME COURT OF THE UNITED STATES

No. 10–63

CORY R. MAPLES, PETITIONER *v.* KIM T. THOMAS,
COMMISSIONER, ALABAMA DEPARTMENT OF
CORRECTIONS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

[January 18, 2012]

JUSTICE SCALIA, with whom JUSTICE THOMAS joins,
dissenting.

The Alabama Court of Criminal Appeals held that Cory Maples’ appeal from the denial of his state postconviction petition was barred because he had not filed a notice of appeal within the allotted time. The Court now concludes that Maples has established cause for his procedural default by reason of abandonment by his attorneys. Because I cannot agree with that conclusion, and because Maples’ alternative argument fares no better, I would affirm the judgment.

I
A

Our doctrine of procedural default reflects, and furthers, the principle that errors in state criminal trials should be remedied in state court. As we have long recognized, federal habeas review for state prisoners imposes significant costs on the States, undermining not only their practical interest in the finality of their criminal judgments, see *Engle v. Isaac*, 456 U. S. 107, 126–127 (1982), but also the primacy of their courts in adjudicating the constitutional rights of defendants prosecuted under state law, *id.*, at 128. We have further recognized that “[t]hese costs are

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particularly high . . . when a state prisoner, through a procedural default, prevents adjudication of his constitutional claims in state court.” *Coleman v. Thompson*, 501 U. S. 722, 748 (1991). In that situation, the prisoner has “deprived the state courts of an opportunity to address those claims in the first instance,” *id.*, at 732, thereby leaving the state courts without “a chance to mend their own fences and avoid federal intrusion,” *Engle*, 456 U. S., at 129. For that reason, and because permitting federal-court review of defaulted claims would “undercu[t] the State’s ability to enforce its procedural rules,” *ibid.*, we have held that when a state court has relied on an adequate and independent state procedural ground in denying a prisoner’s claims, the prisoner ordinarily may not obtain federal habeas relief. *Coleman*, 501 U. S., at 729–730.

To be sure, the prohibition on federal-court review of defaulted claims is not absolute. A habeas petitioner’s default in state court will not bar federal habeas review if “the petitioner demonstrates cause and actual prejudice,” *id.*, at 748—“cause” constituting “something *external* to the petitioner, something that cannot fairly be attributed to him,” that impeded compliance with the State’s procedural rule, *id.*, at 753. As a general matter, an attorney’s mistakes (or omissions) do not meet the standard “because the attorney is the petitioner’s agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must ‘bear the risk of attorney error.’” *Ibid.* (quoting *Murray v. Carrier*, 477 U. S. 478, 488 (1986)). See also *Link v. Wabash R. Co.*, 370 U. S. 626, 633–634, and n. 10 (1962).

When an attorney’s error occurs at a stage of the proceedings at which the defendant has a constitutional right to effective assistance of counsel, that error may constitute cause to excuse a resulting procedural default. A State’s failure in its duty to provide an effective attorney, as measured by the standard set forth in *Strickland v. Wash-*

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ington, 466 U. S. 668 (1984), makes the attorney’s error chargeable to the State, and hence external to the defense. See *Murray*, *supra*, at 488. But when the client has no right to counsel—as is the case in the postconviction setting, see *Pennsylvania v. Finley*, 481 U. S. 551, 555 (1987)—the client bears the risk of all attorney errors made in the course of the representation, regardless of the egregiousness of the mistake. *Coleman*, *supra*, at 754 (“[I]t is not the gravity of the attorney’s error that matters, but that it constitutes a violation of petitioner’s right to counsel, so that the error must be seen as an external factor”).

B

In light of the principles just set out, the Court is correct to conclude, *ante*, at 14, that a habeas petitioner’s procedural default may be excused when it is attributable to abandonment by his attorney. In such a case, *Coleman*’s rationale for attributing the attorney’s acts and omissions to the client breaks down; for once the attorney has ceased acting as the client’s agent, “well-settled principles of agency law,” 501 U. S., at 754, no longer support charging the client with his lawyer’s mistakes. The attorney’s mistakes may therefore be understood as an “external factor,” *ibid.*, and in appropriate circumstances may justify excusing the prisoner’s procedural default.

I likewise agree with the Court’s conclusion, *ante*, at 15, that Maples’ two out-of-state attorneys of record, Jaasi Munanka and Clara Ingen-Housz, had abandoned Maples by the time the Alabama trial court entered its order denying his petition for postconviction relief. As the Court observes, *ante*, at 15–16, without informing Maples or seeking leave from the Alabama trial court to withdraw from Maples’ case, both Munanka and Ingen-Housz left Sullivan & Cromwell’s employ and accepted new positions that precluded them from continuing to represent Maples.

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This conduct amounted to renunciation of their roles as Maples' agents, see 1 Restatement (Second) of Agency §119, Comment *b* (1957) (hereinafter Restatement 2d), and thus terminated their authority to act on Maples' behalf, *id.*, §118. As a result, Munanka's and Ingen-Housz's failure to take action in response to the trial court's order should not be imputed to Maples.

It is an unjustified leap, however, to conclude that Maples was left unrepresented during the relevant window between the Alabama trial court's dismissal of his postconviction petition and expiration of the 42-day period for filing a notice of appeal established by Alabama Rule of Appellate Procedure 4(a)(1) (2009). Start with Maples' own allegations: In his amended federal habeas petition, Maples alleged that, at the time he sought postconviction relief in Alabama trial court, he "was represented by Sullivan & Cromwell of New York, New York." App. 256. Although the petition went on to identify Munanka and Ingen-Housz as "the two Sullivan lawyers handling the matter," *id.*, at 257, its statement that Maples was "represented" by the firm itself strongly suggests that Maples viewed himself as having retained the services of the firm as a whole, a perfectly natural understanding. "When a client retains a lawyer who practices with a firm, the presumption is that both the lawyer and the firm have been retained." 1 Restatement (Third) of the Law Governing Lawyers §31, Comment *f*, p. 222 (1998). Admittedly, in connection with the attempt before the Alabama trial court to extend the time for appeal, Sullivan & Cromwell partner Marc De Leeuw submitted an affidavit stating that the firm's lawyers "handle *pro bono* cases on an individual basis" and that the lawyers who had appeared in Maples' case had followed that practice, "attempt[ing] not to use the firm name on correspondence or court papers." App. to Pet. for Cert. 257a. But Maples' habeas petition is the pleading that initiated the current litigation; and

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surely the allegations that it contained should be given priority over representations made to prior courts.*

In any case, even if Maples had no attorney-client relationship with the Sullivan & Cromwell firm, Munanka and Ingen-Housz were surely not the only Sullivan & Cromwell lawyers who represented Maples on an individual basis. De Leeuw's affidavit acknowledged that he had "been involved in [Maples'] case since the summer of 2001," *ibid.*, roughly a year before Munanka and Ingen-Housz left Sullivan & Cromwell, and it further stated that after "Ms. Ingen-Housz and Mr. Munanka" learned of the court's initial order denying the State's motion to dismiss Maples' postconviction petition in December 2001, "the lawyers working on this case for Mr. Maples prepared for the evidentiary hearing" Maples had requested, *id.*, at 258a. Moreover, when Sullivan & Cromwell attorney Felice Duffy filed a motion to appear *pro hac vice* before the Alabama trial court in connection with the attempt to extend the deadline, she stated that she had "worked on [Maples'] case since October 14, 2002," App. 231, months before the procedural default took place.

According to the Court, see *ante*, at 17, De Leeuw's affidavit does not make clear how he was "involved" in

*The Court says that the allegations in Maples' own habeas petition are not "persuasive evidence," *ante*, at 17–18, n. 8, because Maples' lawyers at Sullivan & Cromwell labored under a conflict of interest when they prepared the document. This is a curious point, since the effect of Maples' statement was to *implicate* Sullivan & Cromwell as a firm in missing the filing deadline. The conflict would have induced the Sullivan & Cromwell lawyers to *exonerate* the firm. To be sure, as the case later developed (at this stage abandonment had not yet been conceived as the litigating strategy), it would have been in Maples' interest to say he had no lawyers. But the issue the petition's statement raises is not whether Maples was cleverly represented; it is whether the statement was *true*. And if Sullivan & Cromwell's involvement in preparing the petition has any bearing upon that, it only reinforces the truth.

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Maples' case or whether lawyers other than Munanka and Ingen-Housz were among those who prepared for the anticipated evidentiary hearing; and Duffy's motion does not make clear what her "wor[k]" entailed. But there is little doubt that Munanka and Ingen-Housz were not the only attorneys who engaged in the preparations; and that De Leeuw was "involved" and Duffy "worked" as lawyers for Maples (what other role could they have taken on?). De Leeuw's distinction between "Ms. Ingen-Housz and Mr. Munanka" and "the lawyers working on his case for Mr. Maples" would have been senseless if the latter category did not extend beyond the two named attorneys.

In sum, there is every indication that when the trial court entered its order dismissing Maples' postconviction petition in May 2003, Maples continued to be represented by a team of attorneys in Sullivan & Cromwell's New York office. The Court nonetheless insists that the actions of these attorneys are irrelevant because they had not been admitted to practice law in Alabama, had not entered appearances in the Alabama trial court, and had not sought to substitute for Munanka and Ingen-Housz. See *ante*, at 18–19. The Court does not, however, explain why these facts establish that the attorneys were not Maples' agents for the purpose of attending to those aspects of the case that did not require court appearance—which would certainly include keeping track of orders issued and filing deadlines. The Court's quotation from the Restatement of Agency, *ante*, at 18, that the "failure to acquire a qualification by the agent without which it is illegal to do an authorized act . . . terminates the agent's authority to act," 1 Restatement 2d, §111, at 290, omits the crucial condition contained at the end of the section: "if thereafter he [the agent] should infer that the principal, if he knew the facts, would not consent to the further exercise of the authority." There was no basis whatever for these attorneys to infer that Maples no longer wanted them to represent him,

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simply because they had *not yet* qualified before the Alabama court. Though it would have been “illegal” for these attorneys to file a notice of appeal without being authorized to practice in Alabama, nothing prevented them from first seeking to secure admission to practice, as Munanka and Ingen-Housz initially had done, and *then* filing a notice of appeal.

It would create a huge gap in our *Coleman* jurisprudence to disregard all attorney errors committed before admission to the relevant court; and an even greater gap to disregard (as the Court suggests) all errors committed before the attorney enters an appearance. Moreover, even if these attorneys cannot be regarded as Maples’ agents for purposes of conducting the Alabama litigation, they were *at least* his agents for purposes of advising him of the impending deadline. His unawareness was the fault of counsel who were his agents, and must be charged to him. What happened here is simply “[a]ttorney ignorance or inadvertence” of the sort that does not furnish cause to excuse a procedural default. *Coleman*, 501 U. S., at 753.

But even leaving aside the question of Maples’ “unadmitted” attorneys at Sullivan & Cromwell, Maples had a fully admitted attorney, who had entered an appearance, in the person of local counsel, John Butler. There is no support for the Court’s conclusion that Butler “did not even begin to represent Maples.” *Ante*, at 19. True, the affidavit Butler filed with the Alabama trial court in the proceeding seeking extension of the deadline stated that he had “no substantive involvement” with the case, and that he had “agreed to serve as local counsel only.” App. to Pet. for Cert. 255a. But a disclaimer of “substantive involvement” in a case, whether or not it violates a lawyer’s ethical obligations, see *ante*, at 19, is not equivalent to a denial of any agency role at all. A local attorney’s “non-substantive” involvement would surely include, *at a minimum*, keeping track of local court orders and advising

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“substantive” counsel of impending deadlines. Nor did Butler’s explanation for his failure to act when he received a copy of the trial court’s order sound in abandonment. Butler did not say, for instance, that he ignored the order because he did not consider Maples to be his client. Instead, based on “past practice” and the content of the order, Butler “assumed” that Maples’ lawyers at Sullivan & Cromwell would receive a copy. App. to Pet. for Cert. 256a.

The Court gets this badly wrong when it states that “Butler’s failure even to place a phone call to the New York firm” demonstrates Butler’s “disclaimer of any genuinely representative role.” *Ante*, at 19. By equating the very attorney error that contributed to Maples’ procedural default with the absence of an agency relationship, the Court ensures that today’s opinion will serve as a template for future habeas petitioners seeking to evade *Coleman*’s holding that ineffectiveness of postconviction counsel will not furnish cause to excuse a procedural default. See 501 U. S., at 752–754. The trick will be to allege, not that counsel was ineffective, but rather that counsel’s ineffectiveness demonstrates that he was not a genuinely representative agent. No precedent should be so easily circumvented by word games, but the damage is particularly acute when the affected precedent is so firmly “grounded in concerns of comity and federalism.” *Id.*, at 730.

The Court’s last-gasp attempt to justify its conclusion that Butler was not Maples’ agent is to point out that a prosecutor sent a letter to Maples directly, informing him of the defaulted appeal. See *ante*, at 20. The Court reasons that the prosecutor must have thought that Maples had been abandoned by his lawyers, since to communicate with a represented party would have been a violation of ethical standards. *Ibid.* But even if this supposition is correct, it is hard to understand what it proves. What matters, after all, is not whether the prosecutor *thought*

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Maples had been abandoned, but whether Maples *really was* abandoned. And as it turns out, Butler’s conduct after learning about the default further belies any such contention. Almost immediately, Butler began to cooperate with Maples’ lawyers at Sullivan & Cromwell, filing papers as “Counsel for Mr. Maples” or “Local Counsel for Petitioner Cory Maples” in multiple courts in an attempt to rectify the mistake. See App. 229, 230, 236, 238. Had Butler reassumed his representational duties after having abandoned them? Hardly. There is no proper basis for a conclusion of abandonment *interruptus*.

II

Maples argues in the alternative that his default should be excused because his right to due process was violated when the trial-court clerk failed to take action after Munka’s and Ingen-Housz’s copies of the court’s dismissal order were returned undeliverable. According to Maples, our decision in *Jones v. Flowers*, 547 U. S. 220 (2006), establishes that the clerk had a duty to do more.

We held in *Jones* that, when a mailed notice of a tax sale is returned unclaimed, a State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property. See *id.*, at 234. It is questionable whether that holding has any relevance to the circumstances here, which involved not the institution of proceedings against an unwitting litigant, but rather the issuance of an order in a pending case that was instituted by Maples himself. Indeed, I think it doubtful whether due process entitles a litigant to *any* notice of a court’s order in a pending case. The Federal Rules certainly reject the notion that notice is an absolute requirement. Federal Rule of Civil Procedure 77(d)(2) provides that “[l]ack of notice of the entry [of an order or judgment] does not affect the time for appeal or relieve—or authorize the court to relieve—a party for failing to appeal within

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the time allowed, except as allowed by Federal Rule of Appellate Procedure 4(a).” And although Federal Rule of Appellate Rule 4(a)(6) in turn provides that the time for filing an appeal can be reopened when a litigant did not receive notice, it establishes 180 days after the judgment or order is entered as the outer limit by which a motion to reopen must be filed. See Fed. Rule App. Proc. 4(a)(6)(B).

There is no need to grapple with this question, however, because Butler received a copy of the trial court’s order. “Under our system of representative litigation, ‘each party . . . is considered to have notice of all facts, notice of which can be charged upon [his] attorney.’” *Irwin v. Department of Veterans Affairs*, 498 U. S. 89, 92 (1990) (quoting *Link v. Wabash R. Co.*, 370 U. S. 626, 634 (1962)). The notice to Butler was therefore constitutionally sufficient.

* * *

One suspects that today’s decision is motivated in large part by an understandable sense of frustration with the State’s refusal to waive Maples’ procedural default in the interest of fairness. Indeed, that frustration may well explain the Court’s lengthy indictment of Alabama’s general procedures for providing representation to capital defendants, *ante*, at 2–4, a portion of the Court’s opinion that is so disconnected from the rest of its analysis as to be otherwise inexplicable.

But if the interest of fairness justifies our excusing Maples’ procedural default here, it does so whenever a defendant’s procedural default is caused by his attorney. That is simply not the law—and cannot be, if the states are to have an orderly system of criminal litigation conducted by counsel. Our precedents allow a State to stand on its rights and enforce a habeas petitioner’s procedural default even when counsel is to blame. Because a faithful application of those precedents leads to the conclusion that Maples has not demonstrated cause to excuse his proce-

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dural default; and because the reasoning by which the Court justifies the opposite conclusion invites future evisceration of the principle that defendants are responsible for the mistakes of their attorneys; I respectfully dissent.

Syllabus

MARTINEZ *v.* COURT OF APPEAL OF CALIFORNIA,
FOURTH APPELLATE DISTRICT

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

No. 98–7809. Argued November 9, 1999—Decided January 12, 2000

Accused of converting a client's money to his own use while employed as a paralegal, petitioner Martinez was charged by California with grand theft and the fraudulent appropriation of another's property. He chose to represent himself at trial before a jury, which acquitted him of theft but convicted him of embezzlement. He then filed a timely notice of appeal, a motion to represent himself, and a waiver of counsel. The California Court of Appeal denied his motion to represent himself based on its prior holding that there is no constitutional right to self-representation on direct appeal under *Faretta v. California*, 422 U. S. 806, in which this Court held that a criminal defendant has a constitutional right to conduct his own defense at trial when he voluntarily and intelligently elects to proceed without counsel, *id.*, at 807, 836. The state court had explained that the right to counsel on appeal stems from the Due Process and Equal Protection Clauses of the Fourteenth Amendment, not from the Sixth Amendment on which *Faretta* was based, and held that the denial of self-representation at this level does not violate due process or equal protection. The California Supreme Court denied Martinez' application for a writ of mandate.

Held: Neither *Faretta's* holding nor its reasoning requires a State to recognize a constitutional right to self-representation on direct appeal from a criminal conviction. Although some of *Faretta's* reasoning is applicable to appellate proceedings as well as to trials, there are significant distinctions. First, the historical evidence *Faretta* relied on as identifying a right of self-representation, 422 U. S., at 812–817, is not useful here because it pertained to times when lawyers were scarce, often mistrusted, and not readily available to the average person accused of crime, whereas it has since been recognized that every indigent defendant in a criminal trial has a constitutional right to the assistance of appointed counsel, see *Gideon v. Wainwright*, 372 U. S. 335. Moreover, unlike the right recognized in *Faretta*, the historical evidence does not provide any support for an affirmative constitutional right to appellate self-representation. Second, *Faretta's* reliance on the Sixth Amendment's structure interpreted in light of its English and colonial background, 422 U. S., at 818–832, is not relevant here. Because the Amend-

Syllabus

ment deals strictly with trial rights and does not include any right to appeal, see *Abney v. United States*, 431 U. S. 651, 656, it necessarily follows that the Amendment itself does not provide any basis for finding a right to appellate self-representation. *Faretta's* inquiries into historical English practices, 422 U. S., at 821–824, do not provide a basis for extending that case to the appellate process because there was no appeal from a criminal conviction in England until 1907. Third, although *Faretta's* conclusion that a knowing and intelligent waiver of the right to trial counsel must be honored out of respect for individual autonomy, *id.*, at 834, is also applicable in the appellate context, this Court has recognized that the right is not absolute, see *id.*, at 835. Given the Court's conclusion that the Sixth Amendment does not apply to appellate proceedings, any individual right to self-representation on appeal based on autonomy principles must be grounded in the Due Process Clause. Under the practices prevailing in the Nation today, the Court is entirely unpersuaded that the risk of disloyalty by a court-appointed attorney, or the suspicion of such disloyalty, that underlies the constitutional right of self-representation at trial, see *id.*, at 834, is a sufficient concern to conclude that such a right is a necessary component of a fair appellate proceeding. The States are clearly within their discretion to conclude that the government's interests in ensuring the integrity and efficiency of the appellate process outweigh an invasion of the appellant's interest in self-representation, although the Court's narrow holding does not preclude the States from recognizing a constitutional right to appellate self-representation under their own constitutions. Pp. 156–164.

Affirmed.

STEVENS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, KENNEDY, SOUTER, THOMAS, GINSBURG, and BREYER, JJ., joined. KENNEDY, J., *post*, p. 164, and BREYER, J., *post*, p. 164, filed concurring opinions. SCALIA, J., filed an opinion concurring in the judgment, *post*, p. 165.

Ronald D. Maines, by appointment of the Court, 526 U. S. 1110, argued the cause and filed briefs for petitioner.

Robert M. Foster, Supervising Deputy Attorney General of California, argued the cause for respondent. With him on the brief were *Bill Lockyer*, Attorney General, *David P. Druliner*, Chief Assistant Attorney General, *Gary W.*

Schons, Senior Assistant Attorney General, and *Laura Whitcomb Halgren*, Supervising Deputy Attorney General.*

JUSTICE STEVENS delivered the opinion of the Court.

The Sixth and Fourteenth Amendments of our Constitution guarantee that a person brought to trial in any state or federal court must be afforded the right to the assistance of counsel before he can be validly convicted and punished by imprisonment.¹ In *Faretta v. California*, 422 U. S. 806 (1975), we decided that the defendant also “has a constitutional right to proceed *without* counsel when he voluntarily and intelligently elects to do so.” *Id.*, at 807. Although that statement arguably embraces the entire judicial proceeding, we also phrased the question as whether a State may “constitutionally hale a person into its criminal courts and there force a lawyer upon him, even when he insists that he wants to conduct his own defense.” *Ibid.* Our conclusion in *Faretta* extended only to a defendant’s “constitutional right to conduct his own defense.” *Id.*, at 836. Accordingly, our specific holding was confined to the right to defend oneself at trial. We now address the different question whether the reasoning in support of that holding also applies when the defendant becomes an appellant and assumes the burden of persuading a reviewing court that the conviction should be reversed. We have concluded that it does not.

I

Martinez describes himself as a self-taught paralegal with 25 years’ experience at 12 different law firms. See App. 13.

**Kent S. Scheidegger* and *Charles L. Hobson* filed a brief for the Criminal Justice Legal Foundation as *amicus curiae* urging affirmance.

Barbara E. Bergman and *Ephraim Margolin* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae*.

¹See, e. g., *Powell v. Alabama*, 287 U. S. 45 (1932); *Johnson v. Zerbst*, 304 U. S. 458 (1938); *Gideon v. Wainwright*, 372 U. S. 335 (1963); *Argersinger v. Hamlin*, 407 U. S. 25 (1972).

Opinion of the Court

While employed as an office assistant at a firm in Santa Ana, California, Martinez was accused of converting \$6,000 of a client's money to his own use. He was charged in a two-count information with grand theft and the fraudulent appropriation of the property of another. He chose to represent himself at trial before a jury, because he claimed "there wasn't an attorney on earth who'd believe me once he saw my past [criminal record]." *Id.*, at 15. The jury acquitted him on Count 1, grand theft, but convicted him on Count 2, embezzlement. The jury also found that he had three prior convictions; accordingly, under California's "three strikes" law, the court imposed a mandatory sentence of 25-years-to-life in prison. See Cal. Penal Code Ann. §§ 667(d) and (e)(2) (West 1999). Martinez filed a timely notice of appeal as well as a motion to represent himself and a waiver of counsel. The California Court of Appeal denied his motion, and the California Supreme Court denied his application for a writ of mandate. While the California Supreme Court did not issue an opinion in this case, the Court of Appeal previously had explained:

"There is no constitutional right to self-representation on the initial appeal as of right. The right to counsel on appeal stems from the due process and equal protection clauses of the Fourteenth Amendment, not from the Sixth Amendment, which is the foundation on which *Faretta* is based. The denial of self-representation at this level does not violate due process or equal protection guarantees." *People v. Scott*, 64 Cal. App. 4th 550, 554, 75 Cal. Rptr. 2d 315, 318 (1998).

We granted certiorari because Martinez has raised a question on which both state and federal courts have expressed conflicting views.² 526 U. S. 1064 (1999). We now affirm.

²Compare *Myers v. Collins*, 8 F. 3d 249, 252 (CA5 1993) (finding right of self-representation extends to appeals); *Campbell v. Blodgett*, 940 F. 2d 549 (CA9 1991) (same); *Chamberlain v. Ericksen*, 744 F. 2d 628, 630

II

The *Faretta* majority based its conclusion on three inter-related arguments. First, it examined historical evidence identifying a right of self-representation that had been protected by federal and state law since the beginning of our Nation, 422 U.S., at 812–817. Second, it interpreted the structure of the Sixth Amendment, in the light of its English and colonial background, *id.*, at 818–832. Third, it concluded that even though it “is undeniable that in most criminal prosecutions defendants could better defend with counsel’s guidance than by their own unskilled efforts,” a knowing and intelligent waiver “must be honored out of ‘that respect for the individual which is the lifeblood of the law.’” *Illinois v. Allen*, 397 U.S. 337, 350–351 [(1970)].” *Id.*, at 834. Some of the Court’s reasoning is applicable to appellate proceedings as well as to trials. There are, however, significant distinctions.

The historical evidence relied upon by *Faretta* as identifying a right of self-representation is not always useful because it pertained to times when lawyers were scarce, often mistrusted, and not readily available to the average person accused of crime.³ For one who could not obtain a lawyer,

(CA8 1984) (same); *Commonwealth v. Rogers*, 537 Pa. 581, 583, 645 A. 2d 223, 224 (1994) (same); *State v. Van Pelt*, 305 Ark. 125, 127, 810 S. W. 2d 27, 28 (1991) (same); *Webb v. State*, 274 Ind. 540, 542, 412 N. E. 2d 790, 792 (1980) (same); *Webb v. State*, 533 S. W. 2d 780, 784 (Tex. Crim. App. 1976) (same), with *United States v. Gillis*, 773 F. 2d 549, 560 (CA4 1985) (finding no right of self-representation on appeal); *Lumbert v. Finley*, 735 F. 2d 239, 246 (CA7 1984) (same); *Hill v. State*, 656 So. 2d 1271, 1272 (Fla. 1995) (same); *State v. Gillespie*, 898 S. W. 2d 738 (Tenn. Crim. App. 1994) (same).

³“The colonists brought with them an appreciation of the virtues of self-reliance and a traditional distrust of lawyers. When the Colonies were first settled, ‘the lawyer was synonymous with the cringing Attorneys-General and Solicitors-General of the Crown and the arbitrary Justices of the King’s Court, all bent on the conviction of those who opposed the King’s prerogatives, and twisting the law to secure convictions.’ This prejudice gained strength in the Colonies where ‘distrust of lawyers became an institution.’ Several Colonies prohibited pleading for hire in the

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self-representation was the only feasible alternative to asserting no defense at all. Thus, a government's recognition of an indigent defendant's right to represent himself was comparable to bestowing upon the homeless beggar a "right" to take shelter in the sewers of Paris. Not surprisingly, early precedent demonstrates that this "right" was not always used to the defendant's advantage as a shield, but rather was often employed by the prosecution as a sword. The principal case cited in *Faretta* is illustrative. In *Adams v. United States ex rel. McCann*, 317 U. S. 269 (1942), the Court relied on the existence of the right of self-representation as the basis for finding that an unrepresented defendant had waived his right to a trial by jury.⁴

17th century. The prejudice persisted into the 18th century as 'the lower classes came to identify lawyers with the upper class.' The years of Revolution and Confederation saw an upsurge of antilawyer sentiment, a 'sudden revival, after the War of the Revolution, of the old dislike and distrust of lawyers as a class.'" *Faretta*, 422 U. S., at 826–827 (footnotes omitted).

⁴Similarly, in the state cases cited by the Court in *Faretta*, see 422 U. S., at 813, n. 9, the defendant's right to represent himself was often the predicate for upholding the waiver of an important right. See, e. g., *Mackreth v. Wilson*, 31 Ala. App. 191, 193, 15 So. 2d 112, 113 (1943) (failure of the defendant to request counsel equaled an "election" to proceed *pro se*); *Lockard v. State*, 92 Idaho 813, 822, 451 P. 2d 1014, 1023 (1969) (court relied on defendant's right of self-representation to uphold an uncounseled guilty plea, despite claims that it was coerced); *People v. Nelson*, 47 Ill. 2d 570, 268 N. E. 2d 2, 3 (1971) (defendant's *pro se* status is predicate for upholding waiver of indictment and jury trial and also to uphold guilty plea); *Allen v. Commonwealth*, 324 Mass. 558, 562–563, 87 N. E. 2d 192, 195 (1949) (life sentence upheld despite fact that indigent defendant was unable to procure counsel); *Westberry v. State*, 254 A. 2d 44, 46 (Me. 1969) (guilty plea upheld because defendant failed to claim indigency or to request counsel); *State v. Hollman*, 232 S. C. 489, 499, 102 S. E. 2d 873, 878 (1958) (right of defendant to represent himself used as basis for finding he had no right to appointed counsel). But see *State v. Thomlinson*, 78 S. D. 235, 237, 100 N. W. 2d 121, 122 (1960) (vacating conviction based on court's failure to allow defendant to represent himself); *State v. Penderville*, 2 Utah 2d 281, 287, 272 P. 2d 195, 199 (1954) (same); *Cappetta v. State*, 204 So. 2d 913, 918 (Fla. App. 1967) (same), rev'd, *State v. Cappetta*, 216 So. 2d

It has since been recognized, however, that an indigent defendant in a criminal trial has a constitutional right to the assistance of appointed counsel, see *Gideon v. Wainwright*, 372 U. S. 335 (1963). Thus, an individual's decision to represent himself is no longer compelled by the necessity of choosing self-representation over incompetent or nonexistent representation; rather, it more likely reflects a genuine desire to "conduct his own cause in his own words." *Faretta*, 422 U. S., at 823 (footnote omitted). Therefore, while *Faretta* is correct in concluding that there is abundant support for the proposition that a right to self-representation has been recognized for centuries, the original reasons for protecting that right do not have the same force when the availability of competent counsel for every indigent defendant has displaced the need—although not always the desire—for self-representation.

The scant historical evidence pertaining to the issue of self-representation on appeal is even less helpful. The Court in *Faretta* relied upon the description of the right in §35 of the Judiciary Act of 1789, 1 Stat. 92, which states that "the parties may plead and manage their own causes personally or by the assistance of such counsel" 422 U. S., at 812. It is arguable that this language encompasses appeals as well as trials. Assuming it does apply to appellate proceedings, however, the statutory right is expressly limited by the phrase "as by the rules of the said courts." 1 Stat. 92. Appellate courts have maintained the discretion to allow litigants to "manage their own causes"—and some such litigants have done so effectively.⁵ That opportunity, however, has been consistently subject to each court's own rules.

749, 750 (Fla. 1968) (finding voluntary and intelligent waiver of right to proceed *pro se*).

⁵ See, e. g., *SEC v. Sloan*, 436 U. S. 103 (1978) (*pro se* respondent argued, briefed, and prevailed in the Court of Appeals for the Second Circuit and this Court).

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We are not aware of any historical consensus establishing a right of self-representation on appeal. We might, nonetheless, paraphrase *Faretta* and assert: No State or Colony ever forced counsel upon a convicted appellant, and no spokesman ever suggested that such a practice would be tolerable or advisable. 422 U. S., at 832. Such negative historical evidence was meaningful to the *Faretta* Court, because the fact that the “[dog] had not barked”⁶ arguably demonstrated that early lawmakers intended to preserve the “long-respected right of self-representation” at trial. *Ibid.* Historical silence, however, has no probative force in the appellate context because there simply was no long-respected right of self-representation on appeal. In fact, the right of appeal itself is of relatively recent origin.

Appeals as of right in federal courts were nonexistent for the first century of our Nation, and appellate review of any sort was “rarely allowed.” *Abney v. United States*, 431 U. S. 651, 656, n. 3 (1977). The States, also, did not generally recognize an appeal as of right until Washington became the first to constitutionalize the right explicitly in 1889.⁷ There was similarly no right to appeal in criminal cases at common law, and appellate review of any sort was “limited” and “rarely used.”⁸ Thus, unlike the inquiry in *Faretta*, the historical evidence does not provide any support for an affirmative constitutional right to appellate self-representation.

The *Faretta* majority’s reliance on the structure of the Sixth Amendment is also not relevant. The Sixth Amendment identifies the basic rights that the accused shall enjoy

⁶ A. Conan Doyle, *Silver Blaze*, in *The Complete Sherlock Holmes* 383, 400 (1938).

⁷ See Lobsenz, *A Constitutional Right to An Appeal: Guarding Against Unacceptable Risks of Erroneous Conviction*, 8 U. Puget Sound L. Rev. 375, 376 (1985). Although Washington was the first State to constitutionalize an appeal as of right, almost all of the States historically had some form of discretionary appellate review. See generally L. Orfield, *Criminal Appeals in America* 215–231 (1939).

⁸ 1 J. Stephen, *A History of the Criminal Law of England* 308–310 (1883).

in “all criminal prosecutions.” They are presented strictly as rights that are available in preparation for trial and at the trial itself. The Sixth Amendment does not include any right to appeal. As we have recognized, “[t]he right of appeal, as we presently know it in criminal cases, is purely a creature of statute.” *Abney*, 431 U. S., at 656. It necessarily follows that the Amendment itself does not provide any basis for finding a right to self-representation on appeal.

The *Faretta* majority’s nontextual interpretation of the Sixth Amendment also included an examination of British criminal jurisprudence and a reference to the opprobrious trial practices before the Star Chamber. 422 U. S., at 821–824. These inquiries into historical English practices, however, again do not provide a basis for extending *Faretta* to the appellate process, because there was no appeal from a criminal conviction in England until 1907. See *Griffin v. Illinois*, 351 U. S. 12, 21 (1956) (Frankfurter, J., concurring in judgment); 7 Edw. VII, ch. 23 (1907). Indeed, none of our many cases safeguarding the rights of an indigent appellant has placed any reliance on either the Sixth Amendment or on *Faretta*. See, e. g., *Douglas v. California*, 372 U. S. 353, 356–358 (1963); *Griffin*, 351 U. S., at 12.

Finally, the *Faretta* majority found that the right to self-representation at trial was grounded in part in a respect for individual autonomy. See 422 U. S., at 834. This consideration is, of course, also applicable to an appellant seeking to manage his own case. As we explained in *Faretta*, at the trial level “[t]o force a lawyer on a defendant can only lead him to believe that the law contrives against him.” *Ibid.* On appellate review, there is surely a similar risk that the appellant will be skeptical of whether a lawyer, who is employed by the same government that is prosecuting him, will serve his cause with undivided loyalty. Equally true on appeal is the related observation that it is the appellant personally who will bear the consequences of the appeal. See *ibid.*

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In light of our conclusion that the Sixth Amendment does not apply to appellate proceedings, any individual right to self-representation on appeal based on autonomy principles must be grounded in the Due Process Clause. Under the practices that prevail in the Nation today, however, we are entirely unpersuaded that the risk of either disloyalty or suspicion of disloyalty is a sufficient concern to conclude that a constitutional right of self-representation is a necessary component of a fair appellate proceeding. We have no doubt that instances of disloyal representation are rare. In both trials and appeals there are, without question, cases in which counsel's performance is ineffective. Even in those cases, however, it is reasonable to assume that counsel's performance is more effective than what the unskilled appellant could have provided for himself.

No one, including Martinez and the *Faretta* majority, attempts to argue that as a rule *pro se* representation is wise, desirable, or efficient.⁹ Although we found in *Faretta* that the right to defend oneself at trial is "fundamental" in nature, *id.*, at 817, it is clear that it is representation by counsel that is the standard, not the exception. See *Patterson v. Illinois*, 487 U. S. 285, 307 (1988) (noting the "strong presumption against" waiver of right to counsel). Our experience has taught us that "a *pro se* defense is usually a bad defense, particularly when compared to a defense provided by an experienced criminal defense attorney."¹⁰

As the *Faretta* opinion recognized, the right to self-representation is not absolute. The defendant must "'voluntarily and intelligently'" elect to conduct his own defense,

⁹Some critics argue that the right to proceed *pro se* at trial in certain cases is akin to allowing the defendant to waive his right to a fair trial. See, e. g., *United States v. Farhad*, 190 F. 3d 1097, 1106–1107 (CA9 1999) (Reinhardt, J., concurring specially), cert. pending, No. 99–7127.

¹⁰Decker, *The Sixth Amendment Right to Shoot Oneself in the Foot: An Assessment of the Guarantee of Self-Representation Twenty Years after Faretta*, 6 Seton Hall Const. L. J. 483, 598 (1996).

422 U. S., at 835 (quoting *Johnson v. Zerbst*, 304 U. S. 458, 464–465 (1938)), and most courts require him to do so in a timely manner.¹¹ He must first be “made aware of the dangers and disadvantages of self-representation.” 422 U. S., at 835. A trial judge may also terminate self-representation or appoint “standby counsel”—even over the defendant’s objection—if necessary. *Id.*, at 834, n. 46. We have further held that standby counsel may participate in the trial proceedings, even without the express consent of the defendant, as long as that participation does not “seriously undermin[e]” the “appearance before the jury” that the defendant is representing himself. *McKaskle v. Wiggins*, 465 U. S. 168, 187 (1984). Additionally, the trial judge is under no duty to provide personal instruction on courtroom procedure or to perform any legal “chores” for the defendant that counsel would normally carry out. *Id.*, at 183–184. Even at the trial level, therefore, the government’s interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant’s interest in acting as his own lawyer.

In the appellate context, the balance between the two competing interests surely tips in favor of the State. The status of the accused defendant, who retains a presumption of innocence throughout the trial process, changes dramatically when a jury returns a guilty verdict. We have recognized this shifting focus and noted:

“[T]here are significant differences between the trial and appellate stages of a criminal proceeding. The purpose of the trial stage from the State’s point of view is to convert a criminal defendant from a person presumed innocent to one found guilty beyond a reasonable doubt. . . .

“By contrast, it is ordinarily the defendant, rather than the State, who initiates the appellate process, seeking not to fend off the efforts of the State’s prosecutor

¹¹ See *id.*, at 544–550 (collecting cases).

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but rather to overturn a finding of guilt made by a judge or a jury below.” *Ross v. Moffitt*, 417 U. S. 600, 610 (1974).

In the words of the *Faretta* majority, appellate proceedings are simply not a case of “hal[ing] a person into its criminal courts.” 422 U. S., at 807.

The requirement of representation by trained counsel implies no disrespect for the individual inasmuch as it tends to benefit the appellant as well as the court. Courts, of course, may still exercise their discretion to allow a lay person to proceed *pro se*. We already leave to the appellate courts’ discretion, keeping “the best interests of both the prisoner and the government in mind,” the decision whether to allow a *pro se* appellant to participate in, or even to be present at, oral argument. *Price v. Johnston*, 334 U. S. 266, 284 (1948). Considering the change in position from defendant to appellant, the autonomy interests that survive a felony conviction are less compelling than those motivating the decision in *Faretta*. Yet the overriding state interest in the fair and efficient administration of justice remains as strong as at the trial level. Thus, the States are clearly within their discretion to conclude that the government’s interests outweigh an invasion of the appellant’s interest in self-representation.

III

For the foregoing reasons, we conclude that neither the holding nor the reasoning in *Faretta* requires California to recognize a constitutional right to self-representation on direct appeal from a criminal conviction. Our holding is, of course, narrow. It does not preclude the States from recognizing such a right under their own constitutions. Its impact on the law will be minimal, because a lay appellant’s rights to participate in appellate proceedings have long been limited by the well-established conclusions that he has no right to be present during appellate proceedings, *Schwab v. Berggren*, 143 U. S. 442 (1892), or to present oral argument,

BREYER, J., concurring

Price, 334 U. S., at 285–286. Meanwhile the rules governing appeals in California, and presumably those in other States as well, seem to protect the ability of indigent litigants to make *pro se* filings. See, e. g., *People v. Wende*, 25 Cal. 3d 436, 440, 600 P. 2d 1071, 1074 (1979); see also *Anders v. California*, 386 U. S. 738 (1967). In requiring Martinez, under these circumstances, to accept against his will a state-appointed attorney, the California courts have not deprived him of a constitutional right. Accordingly, the judgment of the California Supreme Court is affirmed.

It is so ordered.

JUSTICE KENNEDY, concurring.

To resolve this case it is unnecessary to cast doubt upon the rationale of *Faretta v. California*, 422 U. S. 806 (1975). *Faretta* can be accepted as quite sound, yet it does not follow that a convicted person has a similar right of self-representation on appeal. Different considerations apply in the appellate system, and the Court explains why this is so. With these observations, I join the opinion of the Court.

JUSTICE BREYER, concurring.

I agree with the Court and join its opinion. Because JUSTICE SCALIA writes separately to underscore the continuing constitutional validity of *Faretta v. California*, 422 U. S. 806 (1975), I note that judges closer to the firing line have sometimes expressed dismay about the practical consequences of that holding. See, e. g., *United States v. Farhad*, 190 F. 3d 1097, 1107 (CA9 1999) (concurring opinion) (right of self-representation “frequently, though not always, conflicts squarely and inherently with the right to a fair trial”). I have found no empirical research, however, that might help determine whether, in general, the right to represent oneself furthers, or inhibits, the Constitution’s basic guarantee of fairness. And without some strong factual basis for believing that *Faretta*’s holding has proved counterproductive in

SCALIA, J., concurring in judgment

practice, we are not in a position to reconsider the constitutional assumptions that underlie that case.

JUSTICE SCALIA, concurring in the judgment.

I do not share the apparent skepticism of today's opinion concerning the judgment of the Court (often curiously described as merely the judgment of "the majority") in *Faretta v. California*, 422 U. S. 806 (1975). I have no doubt that the Framers of our Constitution, who were suspicious enough of governmental power—including judicial power—that they insisted upon a citizen's right to be judged by an independent jury of private citizens, would not have found acceptable the compulsory assignment of counsel *by the government* to plead a criminal defendant's case. While I might have rested the decision upon the Due Process Clause rather than the Sixth Amendment, I believe it was correct.

That asserting the right of self-representation may often, or even usually, work to the defendant's disadvantage is no more remarkable—and no more a basis for withdrawing the right—than is the fact that proceeding without counsel in custodial interrogation, or confessing to the crime, usually works to the defendant's disadvantage. Our system of laws generally presumes that the criminal defendant, after being fully informed, knows his own best interests and does not need them dictated by the State. Any other approach is unworthy of a free people. As Justice Frankfurter eloquently put it for the Court in *Adams v. United States ex rel. McCann*, 317 U. S. 269 (1942), to require the acceptance of counsel "is to imprison a man in his privileges and call it the Constitution." *Id.*, at 280.

In any event, *Faretta* is relevant to the question before us only to the limited extent that we must decide whether its holding applies to self-representation on appeal. It seems to me that question is readily answered by the fact that there is no constitutional right to appeal. See *McKane v. Durston*, 153 U. S. 684, 687–688 (1894). Since a State could, as

far as the Federal Constitution is concerned, subject its trial-court determinations to no review whatever, it could *a fortiori* subject them to review which consists of a nonadversarial reexamination of convictions by a panel of government experts. Adversarial review with counsel appointed by the State is even less questionable than that.

For these reasons, I concur in the judgment of the Court.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

MISSOURI v. FRYE**CERTIORARI TO THE COURT OF APPEALS OF MISSOURI, WESTERN DISTRICT**

No. 10–444. Argued October 31, 2011—Decided March 21, 2012

Respondent Frye was charged with driving with a revoked license. Because he had been convicted of the same offense three times before, he was charged, under Missouri law, with a felony carrying a maximum 4-year prison term. The prosecutor sent Frye’s counsel a letter, offering two possible plea bargains, including an offer to reduce the charge to a misdemeanor and to recommend, with a guilty plea, a 90-day sentence. Counsel did not convey the offers to Frye, and they expired. Less than a week before Frye’s preliminary hearing, he was again arrested for driving with a revoked license. He subsequently pleaded guilty with no underlying plea agreement and was sentenced to three years in prison. Seeking postconviction relief in state court, he alleged his counsel’s failure to inform him of the earlier plea offers denied him the effective assistance of counsel, and he testified that he would have pleaded guilty to the misdemeanor had he known of the offer. The court denied his motion, but the Missouri appellate court reversed, holding that Frye met both of the requirements for showing a Sixth Amendment violation under *Strickland v. Washington*, 466 U. S. 668. Specifically, the court found that defense counsel had been ineffective in not communicating the plea offers to Frye and concluded that Frye had shown that counsel’s deficient performance caused him prejudice because he pleaded guilty to a felony instead of a misdemeanor.

Held:

1. The Sixth Amendment right to effective assistance of counsel extends to the consideration of plea offers that lapse or are rejected. That right applies to “all ‘critical’ stages of the criminal proceedings.” *Montejo v. Louisiana*, 556 U. S. 778, 786. *Hill v. Lockhart*, 474 U. S. 52, established that *Strickland*’s two-part test governs ineffective-

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assistance claims in the plea bargain context. There, the defendant had alleged that his counsel had given him inadequate advice about his plea, but he failed to show that he would have proceeded to trial had he received the proper advice. 474 U. S., at 60. In *Padilla v. Kentucky*, 559 U. S. ___, where a plea offer was set aside because counsel had misinformed the defendant of its immigration consequences, this Court made clear that “the negotiation of a plea bargain is a critical” stage for ineffective-assistance purposes, *id.*, at ___, and rejected the argument made by the State in this case that a knowing and voluntary plea supersedes defense counsel’s errors. The State attempts to distinguish *Hill* and *Padilla* from the instant case. It notes that *Hill* and *Padilla* concerned whether there was ineffective assistance leading to acceptance of a plea offer, a process involving a formal court appearance with the defendant and all counsel present, while no formal court proceedings are involved when a plea offer has lapsed or been rejected; and it insists that there is no right to receive a plea offer in any event. Thus, the State contends, it is unfair to subject it to the consequences of defense counsel’s inadequacies when the opportunities for a full and fair trial, or for a later guilty plea albeit on less favorable terms, are preserved. While these contentions are neither illogical nor without some persuasive force, they do not suffice to overcome the simple reality that 97 percent of federal convictions and 94 percent of state convictions are the result of guilty pleas. Plea bargains have become so central to today’s criminal justice system that defense counsel must meet responsibilities in the plea bargain process to render the adequate assistance of counsel that the Sixth Amendment requires at critical stages of the criminal process. Pp. 3–8.

2. As a general rule, defense counsel has the duty to communicate formal prosecution offers to accept a plea on terms and conditions that may be favorable to the accused. Any exceptions to this rule need not be addressed here, for the offer was a formal one with a fixed expiration date. Standards for prompt communication and consultation recommended by the American Bar Association and adopted by numerous state and federal courts, though not determinative, serve as important guides. The prosecution and trial courts may adopt measures to help ensure against late, frivolous, or fabricated claims. First, a formal offer’s terms and processing can be documented. Second, States may require that all offers be in writing. Third, formal offers can be made part of the record at any subsequent plea proceeding or before trial to ensure that a defendant has been fully advised before the later proceedings commence. Here, as the result of counsel’s deficient performance, the offers lapsed. Under *Strickland*, the question then becomes what, if any, prejudice resulted from the

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breach of duty. Pp. 8–11.

3. To show prejudice where a plea offer has lapsed or been rejected because of counsel’s deficient performance, defendants must demonstrate a reasonable probability both that they would have accepted the more favorable plea offer had they been afforded effective assistance of counsel and that the plea would have been entered without the prosecution’s canceling it or the trial court’s refusing to accept it, if they had the authority to exercise that discretion under state law. This application of *Strickland* to uncommunicated, lapsed pleas does not alter *Hill*’s standard, which requires a defendant complaining that ineffective assistance led him to accept a plea offer instead of going to trial to show “a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” 474 U. S., at 59. *Hill* correctly applies in the context in which it arose, but it does not provide the sole means for demonstrating prejudice arising from counsel’s deficient performance during plea negotiations. Because Frye argues that with effective assistance he would have accepted an earlier plea offer as opposed to entering an open plea, *Strickland*’s inquiry into whether “the result of the proceeding would have been different,” 466 U. S., at 694, requires looking not at whether the defendant would have proceeded to trial but at whether he would have accepted the earlier plea offer. He must also show that, if the prosecution had the discretion to cancel the plea agreement or the trial court had the discretion to refuse to accept it, there is a reasonable probability neither the prosecution nor the trial court would have prevented the offer from being accepted or implemented. This further showing is particularly important because a defendant has no right to be offered a plea, see *Weatherford v. Bursey*, 429 U. S. 545, 561, nor a federal right that the judge accept it, *Santobello v. New York*, 404 U. S. 257, 262. Missouri, among other States, appears to give the prosecution some discretion to cancel a plea agreement; and the Federal Rules of Criminal Procedure, some state rules, including Missouri’s, and this Court’s precedents give trial courts some leeway to accept or reject plea agreements. Pp. 11–13.

4. Applying these standards here, the Missouri court correctly concluded that counsel’s failure to inform Frye of the written plea offer before it expired fell below an objective reasonableness standard, but it failed to require Frye to show that the plea offer would have been adhered to by the prosecution and accepted by the trial court. These matters should be addressed by the Missouri appellate court in the first instance. Given that Frye’s new offense for driving without a license occurred a week before his preliminary hearing, there is reason to doubt that the prosecution would have adhered to the agreement or that the trial court would have accepted it unless they were re-

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quired by state law to do so. Pp. 13–15.
311 S. W. 3d 350, vacated and remanded.

KENNEDY, J., delivered the opinion of the Court, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. SCALIA, J., filed a dissenting opinion, in which ROBERTS, C. J., and THOMAS and ALITO, JJ., joined.

Opinion of the Court

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 10–444

MISSOURI, PETITIONER *v.* GALIN E. FRYE

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF
MISSOURI, WESTERN DISTRICT

[March 21, 2012]

JUSTICE KENNEDY delivered the opinion of the Court.

The Sixth Amendment, applicable to the States by the terms of the Fourteenth Amendment, provides that the accused shall have the assistance of counsel in all criminal prosecutions. The right to counsel is the right to effective assistance of counsel. See *Strickland v. Washington*, 466 U. S. 668, 686 (1984). This case arises in the context of claimed ineffective assistance that led to the lapse of a prosecution offer of a plea bargain, a proposal that offered terms more lenient than the terms of the guilty plea entered later. The initial question is whether the constitutional right to counsel extends to the negotiation and consideration of plea offers that lapse or are rejected. If there is a right to effective assistance with respect to those offers, a further question is what a defendant must demonstrate in order to show that prejudice resulted from counsel’s deficient performance. Other questions relating to ineffective assistance with respect to plea offers, including the question of proper remedies, are considered in a second case decided today. See *Lafler v. Cooper*, *post*, at 3–16.

I

In August 2007, respondent Galin Frye was charged with driving with a revoked license. Frye had been convicted for that offense on three other occasions, so the State of Missouri charged him with a class D felony, which carries a maximum term of imprisonment of four years. See Mo. Rev. Stat. §§302.321.2, 558.011.1(4) (2011).

On November 15, the prosecutor sent a letter to Frye's counsel offering a choice of two plea bargains. App. 50. The prosecutor first offered to recommend a 3-year sentence if there was a guilty plea to the felony charge, without a recommendation regarding probation but with a recommendation that Frye serve 10 days in jail as so-called "shock" time. The second offer was to reduce the charge to a misdemeanor and, if Frye pleaded guilty to it, to recommend a 90-day sentence. The misdemeanor charge of driving with a revoked license carries a maximum term of imprisonment of one year. 311 S. W. 3d 350, 360 (Mo. App. 2010). The letter stated both offers would expire on December 28. Frye's attorney did not advise Frye that the offers had been made. The offers expired. *Id.*, at 356.

Frye's preliminary hearing was scheduled for January 4, 2008. On December 30, 2007, less than a week before the hearing, Frye was again arrested for driving with a revoked license. App. 47–48, 311 S. W. 3d, at 352–353. At the January 4 hearing, Frye waived his right to a preliminary hearing on the charge arising from the August 2007 arrest. He pleaded not guilty at a subsequent arraignment but then changed his plea to guilty. There was no underlying plea agreement. App. 5, 13, 16. The state trial court accepted Frye's guilty plea. *Id.*, at 21. The prosecutor recommended a 3-year sentence, made no recommendation regarding probation, and requested 10 days shock time in jail. *Id.*, at 22. The trial judge sentenced Frye to three years in prison. *Id.*, at 21, 23.

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Frye filed for postconviction relief in state court. *Id.*, at 8, 25–29. He alleged his counsel’s failure to inform him of the prosecution’s plea offer denied him the effective assistance of counsel. At an evidentiary hearing, Frye testified he would have entered a guilty plea to the misdemeanor had he known about the offer. *Id.*, at 34.

A state court denied the postconviction motion, *id.*, at 52–57, but the Missouri Court of Appeals reversed, 311 S. W. 3d 350. It determined that Frye met both of the requirements for showing a Sixth Amendment violation under *Strickland*. First, the court determined Frye’s counsel’s performance was deficient because the “record is void of any evidence of any effort by trial counsel to communicate the Offer to Frye during the Offer window.” 311 S. W. 3d, at 355, 356 (emphasis deleted). The court next concluded Frye had shown his counsel’s deficient performance caused him prejudice because “Frye pled guilty to a felony instead of a misdemeanor and was subject to a maximum sentence of four years instead of one year.” *Id.*, at 360.

To implement a remedy for the violation, the court deemed Frye’s guilty plea withdrawn and remanded to allow Frye either to insist on a trial or to plead guilty to any offense the prosecutor deemed it appropriate to charge. This Court granted certiorari. 562 U. S. ____ (2011).

II

A

It is well settled that the right to the effective assistance of counsel applies to certain steps before trial. The “Sixth Amendment guarantees a defendant the right to have counsel present at all ‘critical’ stages of the criminal proceedings.” *Montejo v. Louisiana*, 556 U. S. 778, 786 (2009) (quoting *United States v. Wade*, 388 U. S. 218, 227–228 (1967)). Critical stages include arraignments, postindict-

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ment interrogations, postindictment lineups, and the entry of a guilty plea. See *Hamilton v. Alabama*, 368 U. S. 52 (1961) (arraignment); *Massiah v. United States*, 377 U. S. 201 (1964) (postindictment interrogation); *Wade, supra* (postindictment lineup); *Argersinger v. Hamlin*, 407 U. S. 25 (1972) (guilty plea).

With respect to the right to effective counsel in plea negotiations, a proper beginning point is to discuss two cases from this Court considering the role of counsel in advising a client about a plea offer and an ensuing guilty plea: *Hill v. Lockhart*, 474 U. S. 52 (1985); and *Padilla v. Kentucky*, 559 U. S. ___ (2010).

Hill established that claims of ineffective assistance of counsel in the plea bargain context are governed by the two-part test set forth in *Strickland*. See *Hill, supra*, at 57. As noted above, in Frye’s case, the Missouri Court of Appeals, applying the two part test of *Strickland*, determined first that defense counsel had been ineffective and second that there was resulting prejudice.

In *Hill*, the decision turned on the second part of the *Strickland* test. There, a defendant who had entered a guilty plea claimed his counsel had misinformed him of the amount of time he would have to serve before he became eligible for parole. But the defendant had not alleged that, even if adequate advice and assistance had been given, he would have elected to plead not guilty and proceed to trial. Thus, the Court found that no prejudice from the inadequate advice had been shown or alleged. *Hill, supra*, at 60.

In *Padilla*, the Court again discussed the duties of counsel in advising a client with respect to a plea offer that leads to a guilty plea. *Padilla* held that a guilty plea, based on a plea offer, should be set aside because counsel misinformed the defendant of the immigration consequences of the conviction. The Court made clear that “the negotiation of a plea bargain is a critical phase of litiga-

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tion for purposes of the Sixth Amendment right to effective assistance of counsel.” 559 U. S., at ____ (slip op., at 16). It also rejected the argument made by petitioner in this case that a knowing and voluntary plea supersedes errors by defense counsel. Cf. Brief for Respondent in *Padilla v. Kentucky*, O. T. 2009, No. 08–651, p. 27 (arguing Sixth Amendment’s assurance of effective assistance “does not extend to collateral aspects of the prosecution” because “knowledge of the consequences that are collateral to the guilty plea is not a prerequisite to the entry of a knowing and intelligent plea”).

In the case now before the Court the State, as petitioner, points out that the legal question presented is different from that in *Hill* and *Padilla*. In those cases the claim was that the prisoner’s plea of guilty was invalid because counsel had provided incorrect advice pertinent to the plea. In the instant case, by contrast, the guilty plea that was accepted, and the plea proceedings concerning it in court, were all based on accurate advice and information from counsel. The challenge is not to the advice pertaining to the plea that was accepted but rather to the course of legal representation that preceded it with respect to other potential pleas and plea offers.

To give further support to its contention that the instant case is in a category different from what the Court considered in *Hill* and *Padilla*, the State urges that there is no right to a plea offer or a plea bargain in any event. See *Weatherford v. Bursey*, 429 U. S. 545, 561 (1977). It claims Frye therefore was not deprived of any legal benefit to which he was entitled. Under this view, any wrongful or mistaken action of counsel with respect to earlier plea offers is beside the point.

The State is correct to point out that *Hill* and *Padilla* concerned whether there was ineffective assistance leading to acceptance of a plea offer, a process involving a formal court appearance with the defendant and all coun-

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sel present. Before a guilty plea is entered the defendant's understanding of the plea and its consequences can be established on the record. This affords the State substantial protection against later claims that the plea was the result of inadequate advice. At the plea entry proceedings the trial court and all counsel have the opportunity to establish on the record that the defendant understands the process that led to any offer, the advantages and disadvantages of accepting it, and the sentencing consequences or possibilities that will ensue once a conviction is entered based upon the plea. See, *e.g.*, Fed. Rule Crim. Proc. 11; Mo. Sup. Ct. Rule 24.02 (2004). *Hill* and *Padilla* both illustrate that, nevertheless, there may be instances when claims of ineffective assistance can arise after the conviction is entered. Still, the State, and the trial court itself, have had a substantial opportunity to guard against this contingency by establishing at the plea entry proceeding that the defendant has been given proper advice or, if the advice received appears to have been inadequate, to remedy that deficiency before the plea is accepted and the conviction entered.

When a plea offer has lapsed or been rejected, however, no formal court proceedings are involved. This underscores that the plea-bargaining process is often in flux, with no clear standards or timelines and with no judicial supervision of the discussions between prosecution and defense. Indeed, discussions between client and defense counsel are privileged. So the prosecution has little or no notice if something may be amiss and perhaps no capacity to intervene in any event. And, as noted, the State insists there is no right to receive a plea offer. For all these reasons, the State contends, it is unfair to subject it to the consequences of defense counsel's inadequacies, especially when the opportunities for a full and fair trial, or, as here, for a later guilty plea albeit on less favorable terms, are preserved.

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The State’s contentions are neither illogical nor without some persuasive force, yet they do not suffice to overcome a simple reality. Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas. See Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics Online, Table 5.22.2009, <http://www.albany.edu/sourcebook/pdf/t5222009.pdf> (all Internet materials as visited Mar. 1, 2012, and available in Clerk of Court’s case file); Dept. of Justice, Bureau of Justice Statistics, S. Rosenmerkel, M. Durose, & D. Farole, *Felony Sentences in State Courts, 2006-Statistical Tables*, p. 1 (NCJ226846, rev. Nov. 2010), <http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc06st.pdf>; *Padilla, supra*, at ____ (slip op., at 15) (recognizing pleas account for nearly 95% of all criminal convictions). The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages. Because ours “is for the most part a system of pleas, not a system of trials,” *Lafler, post*, at 11, it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process. “To a large extent . . . horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it *is* the criminal justice system.” Scott & Stuntz, *Plea Bargaining as Contract*, 101 *Yale L. J.* 1909, 1912 (1992). See also Barkow, *Separation of Powers and the Criminal Law*, 58 *Stan. L. Rev.* 989, 1034 (2006) (“[Defendants] who do take their case to trial and lose receive longer sentences than even Congress or the prosecutor might think appropriate, because the longer sentences exist on the books largely for

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bargaining purposes. This often results in individuals who accept a plea bargain receiving shorter sentences than other individuals who are less morally culpable but take a chance and go to trial” (footnote omitted). In today’s criminal justice system, therefore, the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant.

To note the prevalence of plea bargaining is not to criticize it. The potential to conserve valuable prosecutorial resources and for defendants to admit their crimes and receive more favorable terms at sentencing means that a plea agreement can benefit both parties. In order that these benefits can be realized, however, criminal defendants require effective counsel during plea negotiations. “Anything less . . . might deny a defendant ‘effective representation by counsel at the only stage when legal aid and advice would help him.’” *Massiah*, 377 U. S., at 204 (quoting *Spano v. New York*, 360 U. S. 315, 326 (1959) (Douglas, J., concurring)).

B

The inquiry then becomes how to define the duty and responsibilities of defense counsel in the plea bargain process. This is a difficult question. “The art of negotiation is at least as nuanced as the art of trial advocacy and it presents questions farther removed from immediate judicial supervision.” *Premo v. Moore*, 562 U. S. ___, ___ (2011) (slip op., at 8–9). Bargaining is, by its nature, defined to a substantial degree by personal style. The alternative courses and tactics in negotiation are so individual that it may be neither prudent nor practicable to try to elaborate or define detailed standards for the proper discharge of defense counsel’s participation in the process. Cf. *ibid.*

This case presents neither the necessity nor the occasion to define the duties of defense counsel in those respects,

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however. Here the question is whether defense counsel has the duty to communicate the terms of a formal offer to accept a plea on terms and conditions that may result in a lesser sentence, a conviction on lesser charges, or both.

This Court now holds that, as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused. Any exceptions to that rule need not be explored here, for the offer was a formal one with a fixed expiration date. When defense counsel allowed the offer to expire without advising the defendant or allowing him to consider it, defense counsel did not render the effective assistance the Constitution requires.

Though the standard for counsel's performance is not determined solely by reference to codified standards of professional practice, these standards can be important guides. The American Bar Association recommends defense counsel "promptly communicate and explain to the defendant all plea offers made by the prosecuting attorney," ABA Standards for Criminal Justice, Pleas of Guilty 14–3.2(a) (3d ed. 1999), and this standard has been adopted by numerous state and federal courts over the last 30 years. See, e.g., *Davie v. State*, 381 S. C. 601, 608–609, 675 S. E. 2d 416, 420 (2009); *Cottle v. State*, 733 So. 2d 963, 965–966 (Fla. 1999); *Becton v. Hun*, 205 W. Va. 139, 144, 516 S. E. 2d 762, 767 (1999); *Harris v. State*, 875 S. W. 2d 662, 665 (Tenn. 1994); *Lloyd v. State*, 258 Ga. 645, 648, 373 S. E. 2d 1, 3 (1988); *United States v. Rodriguez Rodriguez*, 929 F. 2d 747, 752 (CA1 1991) (*per curiam*); *Pham v. United States*, 317 F. 3d 178, 182 (CA2 2003); *United States ex rel. Caruso v. Zelinsky*, 689 F. 2d 435, 438 (CA3 1982); *Griffin v. United States*, 330 F. 3d 733, 737 (CA6 2003); *Johnson v. Duckworth*, 793 F. 2d 898, 902 (CA7 1986); *United States v. Blaylock*, 20 F. 3d 1458, 1466 (CA9 1994); cf. *Diaz v. United States*, 930 F. 2d

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832, 834 (CA11 1991). The standard for prompt communication and consultation is also set out in state bar professional standards for attorneys. See, e.g., Fla. Rule Regulating Bar 4–1.4 (2008); Ill. Rule Prof. Conduct 1.4 (2011); Kan. Rule Prof. Conduct 1.4 (2010); Ky. Sup. Ct. Rule 3.130, Rule Prof. Conduct 1.4 (2011); Mass. Rule Prof. Conduct 1.4 (2011–2012); Mich. Rule Prof. Conduct 1.4 (2011).

The prosecution and the trial courts may adopt some measures to help ensure against late, frivolous, or fabricated claims after a later, less advantageous plea offer has been accepted or after a trial leading to conviction with resulting harsh consequences. First, the fact of a formal offer means that its terms and its processing can be documented so that what took place in the negotiation process becomes more clear if some later inquiry turns on the conduct of earlier pretrial negotiations. Second, States may elect to follow rules that all offers must be in writing, again to ensure against later misunderstandings or fabricated charges. See N. J. Ct. Rule 3:9–1(b) (2012) (“Any plea offer to be made by the prosecutor shall be in writing and forwarded to the defendant’s attorney”). Third, formal offers can be made part of the record at any subsequent plea proceeding or before a trial on the merits, all to ensure that a defendant has been fully advised before those further proceedings commence. At least one State often follows a similar procedure before trial. See Brief for National Association of Criminal Defense Lawyers et al. as *Amici Curiae* 20 (discussing hearings in Arizona conducted pursuant to *State v. Donald*, 198 Ariz. 406, 10 P. 3d 1193 (App. 2000)); see also N. J. Ct. Rules 3:9–1(b), (c) (requiring the prosecutor and defense counsel to discuss the case prior to the arraignment/status conference including any plea offers and to report on these discussions in open court with the defendant present); *In re Alvernaz*, 2 Cal. 4th 924, 938, n. 7, 830 P. 2d 747, 756, n. 7 (1992)

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(encouraging parties to “memorialize in some fashion prior to trial (1) the fact that a plea bargain offer was made, and (2) that the defendant was advised of the offer [and] its precise terms, . . . and (3) the defendant’s response to the plea bargain offer”); Brief for Center on the Administration of Criminal Law, New York University School of Law as *Amicus Curiae* 25–27.

Here defense counsel did not communicate the formal offers to the defendant. As a result of that deficient performance, the offers lapsed. Under *Strickland*, the question then becomes what, if any, prejudice resulted from the breach of duty.

C

To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel’s deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel. Defendants must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law. To establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time. Cf. *Glover v. United States*, 531 U. S. 198, 203 (2001) (“[A]ny amount of [additional] jail time has Sixth Amendment significance”).

This application of *Strickland* to the instances of an uncommunicated, lapsed plea does nothing to alter the standard laid out in *Hill*. In cases where a defendant complains that ineffective assistance led him to accept a plea offer as opposed to proceeding to trial, the defendant will have to show “a reasonable probability that, but for

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counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill*, 474 U. S., at 59. *Hill* was correctly decided and applies in the context in which it arose. *Hill* does not, however, provide the sole means for demonstrating prejudice arising from the deficient performance of counsel during plea negotiations. Unlike the defendant in *Hill*, Frye argues that with effective assistance he would have accepted an earlier plea offer (limiting his sentence to one year in prison) as opposed to entering an open plea (exposing him to a maximum sentence of four years' imprisonment). In a case, such as this, where a defendant pleads guilty to less favorable terms and claims that ineffective assistance of counsel caused him to miss out on a more favorable earlier plea offer, *Strickland's* inquiry into whether "the result of the proceeding would have been different," 466 U. S., at 694, requires looking not at whether the defendant would have proceeded to trial absent ineffective assistance but whether he would have accepted the offer to plead pursuant to the terms earlier proposed.

In order to complete a showing of *Strickland* prejudice, defendants who have shown a reasonable probability they would have accepted the earlier plea offer must also show that, if the prosecution had the discretion to cancel it or if the trial court had the discretion to refuse to accept it, there is a reasonable probability neither the prosecution nor the trial court would have prevented the offer from being accepted or implemented. This further showing is of particular importance because a defendant has no right to be offered a plea, see *Weatherford*, 429 U. S., at 561, nor a federal right that the judge accept it, *Santobello v. New York*, 404 U. S. 257, 262 (1971). In at least some States, including Missouri, it appears the prosecution has some discretion to cancel a plea agreement to which the defendant has agreed, see, e.g., 311 S. W. 3d, at 359 (case below); Ariz. Rule Crim. Proc. 17.4(b) (Supp. 2011). The Federal

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Rules, some state rules including in Missouri, and this Court's precedents give trial courts some leeway to accept or reject plea agreements, see Fed. Rule Crim. Proc. 11(c)(3); see Mo. Sup. Ct. Rule 24.02(d)(4); *Boykin v. Alabama*, 395 U. S. 238, 243–244 (1969). It can be assumed that in most jurisdictions prosecutors and judges are familiar with the boundaries of acceptable plea bargains and sentences. So in most instances it should not be difficult to make an objective assessment as to whether or not a particular fact or intervening circumstance would suffice, in the normal course, to cause prosecutorial withdrawal or judicial nonapproval of a plea bargain. The determination that there is or is not a reasonable probability that the outcome of the proceeding would have been different absent counsel's errors can be conducted within that framework.

III

These standards must be applied to the instant case. As regards the deficient performance prong of *Strickland*, the Court of Appeals found the “record is void of *any* evidence of *any* effort by trial counsel to communicate the [formal] Offer to Frye during the Offer window, let alone any evidence that Frye's conduct interfered with trial counsel's ability to do so.” 311 S. W. 3d, at 356. On this record, it is evident that Frye's attorney did not make a meaningful attempt to inform the defendant of a written plea offer before the offer expired. See *supra*, at 2. The Missouri Court of Appeals was correct that “counsel's representation fell below an objective standard of reasonableness.” *Strickland, supra*, at 688.

The Court of Appeals erred, however, in articulating the precise standard for prejudice in this context. As noted, a defendant in Frye's position must show not only a reasonable probability that he would have accepted the lapsed plea but also a reasonable probability that the prosecution

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would have adhered to the agreement and that it would have been accepted by the trial court. Frye can show he would have accepted the offer, but there is strong reason to doubt the prosecution and the trial court would have permitted the plea bargain to become final.

There appears to be a reasonable probability Frye would have accepted the prosecutor's original offer of a plea bargain if the offer had been communicated to him, because he pleaded guilty to a more serious charge, with no promise of a sentencing recommendation from the prosecutor. It may be that in some cases defendants must show more than just a guilty plea to a charge or sentence harsher than the original offer. For example, revelations between plea offers about the strength of the prosecution's case may make a late decision to plead guilty insufficient to demonstrate, without further evidence, that the defendant would have pleaded guilty to an earlier, more generous plea offer if his counsel had reported it to him. Here, however, that is not the case. The Court of Appeals did not err in finding Frye's acceptance of the less favorable plea offer indicated that he would have accepted the earlier (and more favorable) offer had he been apprised of it; and there is no need to address here the showings that might be required in other cases.

The Court of Appeals failed, however, to require Frye to show that the first plea offer, if accepted by Frye, would have been adhered to by the prosecution and accepted by the trial court. Whether the prosecution and trial court are required to do so is a matter of state law, and it is not the place of this Court to settle those matters. The Court has established the minimum requirements of the Sixth Amendment as interpreted in *Strickland*, and States have the discretion to add procedural protections under state law if they choose. A State may choose to preclude the prosecution from withdrawing a plea offer once it has been accepted or perhaps to preclude a trial court from rejecting

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a plea bargain. In Missouri, it appears “a plea offer once accepted by the defendant can be withdrawn without recourse” by the prosecution. 311 S. W. 3d, at 359. The extent of the trial court’s discretion in Missouri to reject a plea agreement appears to be in some doubt. Compare *id.*, at 360, with Mo. Sup. Ct. Rule 24.02(d)(4).

We remand for the Missouri Court of Appeals to consider these state-law questions, because they bear on the federal question of *Strickland* prejudice. If, as the Missouri court stated here, the prosecutor could have canceled the plea agreement, and if Frye fails to show a reasonable probability the prosecutor would have adhered to the agreement, there is no *Strickland* prejudice. Likewise, if the trial court could have refused to accept the plea agreement, and if Frye fails to show a reasonable probability the trial court would have accepted the plea, there is no *Strickland* prejudice. In this case, given Frye’s new offense for driving without a license on December 30, 2007, there is reason to doubt that the prosecution would have adhered to the agreement or that the trial court would have accepted it at the January 4, 2008, hearing, unless they were required by state law to do so.

It is appropriate to allow the Missouri Court of Appeals to address this question in the first instance. The judgment of the Missouri Court of Appeals is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

SCALIA, J., dissenting

SUPREME COURT OF THE UNITED STATES

No. 10–444

MISSOURI, PETITIONER *v.* GALIN E. FRYE

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF
MISSOURI, WESTERN DISTRICT

[March 21, 2012]

JUSTICE SCALIA, with whom THE CHIEF JUSTICE, JUSTICE THOMAS, and JUSTICE ALITO join, dissenting.

This is a companion case to *Lafler v. Cooper*, *post*, p. _____. The principal difference between the cases is that the fairness of the defendant’s conviction in *Lafler* was established by a full trial and jury verdict, whereas Frye’s conviction here was established by his own admission of guilt, received by the court after the usual colloquy that assured it was voluntary and truthful. In *Lafler* all that could be said (and as I discuss there it was quite enough) is that the *fairness* of the conviction was clear, though a unanimous jury finding beyond a reasonable doubt can sometimes be wrong. Here it can be said not only that the process was fair, but that the defendant acknowledged the correctness of his conviction. Thus, as far as the reasons for my dissent are concerned, this is an *a fortiori* case. I will not repeat here the constitutional points that I discuss at length in *Lafler*, but I will briefly apply those points to the facts here and comment upon a few statements in the Court’s analysis.

* * *

Galin Frye’s attorney failed to inform him about a plea offer, and Frye ultimately pleaded guilty without the benefit of a deal. Counsel’s mistake did not deprive Frye of any substantive or procedural right; only of the oppor-

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tunity to accept a plea bargain to which he had no entitlement in the first place. So little entitlement that, had he known of and accepted the bargain, the prosecution would have been able to withdraw it right up to the point that his guilty plea pursuant to the bargain was accepted. See 311 S. W. 3d 350, 359, and n. 4 (Mo. App. 2010).

The Court acknowledges, moreover, that Frye's conviction was untainted by attorney error: "[T]he guilty plea that was accepted, and the plea proceedings concerning it in court, were all based on accurate advice and information from counsel." *Ante*, at 5. Given the "ultimate focus" of our ineffective-assistance cases on "the fundamental fairness of the proceeding whose result is being challenged," *Strickland v. Washington*, 466 U. S. 668, 696 (1984), that should be the end of the matter. Instead, here, as in *Lafler*, the Court mechanically applies an outcome-based test for prejudice, and mistakes the possibility of a different result for constitutional injustice. As I explain in *Lafler, post*, p. ___ (dissenting opinion), that approach is contrary to our precedents on the right to effective counsel, and for good reason.

The Court announces its holding that "as a general rule, defense counsel has the duty to communicate formal offers from the prosecution" as though that resolves a disputed point; in reality, however, neither the State nor the Solicitor General argued that counsel's performance here was adequate. *Ante*, at 9. The only issue was whether the inadequacy deprived Frye of his constitutional right to a fair trial. In other cases, however, it will not be so clear that counsel's plea-bargaining skills, which must now meet a constitutional minimum, are adequate. "[H]ow to define the duty and responsibilities of defense counsel in the plea bargain process," the Court acknowledges, "is a difficult question," since "[b]argaining is, by its nature, defined to a substantial degree by personal style." *Ante*, at 8. Indeed. What if an attorney's "personal style" is to

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establish a reputation as a hard bargainer by, for example, advising clients to proceed to trial rather than accept anything but the most favorable plea offers? It seems inconceivable that a lawyer could compromise his client's *constitutional rights* so that he can secure better deals for other clients in the future; does a hard-bargaining "personal style" now violate the Sixth Amendment? The Court ignores such difficulties, however, since "[t]his case presents neither the necessity nor the occasion to define the duties of defense counsel in those respects." *Ante*, at 8. Perhaps not. But it does present the necessity of confronting the serious difficulties that will be created by constitutionalization of the plea-bargaining process. It will not do simply to announce that they will be solved in the sweet by-and-by.

While the inadequacy of counsel's performance in this case is clear enough, whether it was prejudicial (in the sense that the Court's new version of *Strickland* requires) is not. The Court's description of how that question is to be answered on remand is alone enough to show how unwise it is to constitutionalize the plea-bargaining process. Prejudice is to be determined, the Court tells us, by a process of retrospective crystal-ball gazing posing as legal analysis. First of all, of course, we must estimate whether the defendant *would have accepted* the earlier plea bargain. Here that seems an easy question, but as the Court acknowledges, *ante*, at 14, it will not always be. Next, since Missouri, like other States, permits accepted plea offers to be withdrawn by the prosecution (a reality which alone should suffice, one would think, to demonstrate that Frye had no entitlement to the plea bargain), we must estimate whether the prosecution *would have withdrawn* the plea offer. And finally, we must estimate whether the trial court *would have approved* the plea agreement. These last two estimations may seem easy in the present case, since Frye committed a new infraction

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before the hearing at which the agreement would have been presented; but they assuredly will not be easy in the mine run of cases.

The Court says “[i]t can be assumed that in most jurisdictions prosecutors and judges are familiar with the boundaries of acceptable plea bargains and sentences.” *Ante*, at 13. Assuredly it can, just as it can be assumed that the sun rises in the west; but I know of no basis for the assumption. Virtually no cases deal with the standards for a prosecutor’s withdrawal from a plea agreement beyond stating the general rule that a prosecutor may withdraw any time prior to, but not after, the entry of a guilty plea or other action constituting detrimental reliance on the defendant’s part. See, *e.g.*, *United States v. Kuchinski*, 469 F. 3d 853, 857–858 (CA9 2006). And cases addressing trial courts’ authority to accept or reject plea agreements almost universally observe that a trial court enjoys broad discretion in this regard. See, *e.g.*, *Missouri v. Banks*, 135 S. W. 3d 497, 500 (Mo. App. 2004) (trial court abuses its discretion in rejecting a plea only if the decision “is so arbitrary and unreasonable that it shocks the sense of justice and indicates a lack of careful consideration” (internal quotation marks omitted)). Of course after today’s opinions there will be cases galore, so the Court’s *assumption* would better be cast as an optimistic *prediction* of the certainty that will emerge, many years hence, from our newly created constitutional field of plea-bargaining law. Whatever the “boundaries” ultimately devised (if that were possible), a vast amount of discretion will still remain, and it is extraordinary to make a defendant’s constitutional rights depend upon a series of retrospective mind-readings as to how that discretion, in prosecutors and trial judges, *would have been* exercised.

The plea-bargaining process is a subject worthy of regulation, since it is the means by which most criminal convictions are obtained. It happens not to be, however, a

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subject covered by the Sixth Amendment, which is concerned not with the fairness of bargaining but with the fairness of conviction. “The Constitution . . . is not an all-purpose tool for judicial construction of a perfect world; and when we ignore its text in order to make it that, we often find ourselves swinging a sledge where a tack hammer is needed.” *Padilla v. Kentucky*, 559 U. S. ____, ____ (2010) (SCALIA, J., dissenting) (slip op., at 1). In this case and its companion, the Court’s sledge may require the reversal of perfectly valid, eminently just, convictions. A legislature could solve the problems presented by these cases in a much more precise and efficient manner. It might begin, for example, by penalizing the attorneys who made such grievous errors. That type of sub-constitutional remedy is not available to the Court, which is limited to penalizing (almost) everyone else by reversing valid convictions or sentences. Because that result is inconsistent with the Sixth Amendment and decades of our precedent, I respectfully dissent.

*Immigration Consequences
of Criminal Convictions:
Padilla v. Kentucky*

Office of Immigration Litigation

U.S. Department of Justice

Civil Division

Washington, DC

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Preface

This monograph has been prepared by the Office of Immigration Litigation (“OIL”) within the Department of Justice. The mission of OIL is to defend and preserve the Executive Branch’s authority to administer the Immigration and Nationality Act. In that capacity, OIL is responsible for handling and coordinating all federal court immigration litigation. OIL attorneys routinely litigate cases involving immigration statutes described in this monograph and are experts in interpreting and applying these statutes.

In addition to handling litigation, OIL provides resource materials and educational training to various Government components and agencies, including the United States Attorneys’ Offices, the Department of Homeland Security (“DHS”), and the Executive Office for Immigration Review (“EOIR”). As part of its resource and training function, OIL has created this monograph in response to the Supreme Court’s decision in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010). The Court’s holding in *Padilla* requires defense counsel to have a basic understanding of immigration law – an area in which they “may not be well versed” – in order to effectively advise their clients. *Id.* at 1483. The Court’s holding, however, affects not only defense attorneys, but also federal and state prosecutors and judges, as well as other interested parties. This monograph is intended to assist these parties in understanding the immigration consequences of an alien’s guilty plea in a criminal case.

OIL regularly provides immigration law training to various Government components. If you are interested in having OIL provide training for your office or organization at the state or federal level you may contact:

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Purpose and Use of the Monograph

I. Purpose of the Monograph

In *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), the Supreme Court held that the Sixth Amendment requires defense counsel to advise a noncitizen client of the risk of deportation arising from a guilty plea. Defense counsel's failure to so advise, or defense counsel's misadvice regarding the immigration consequences of the plea, may constitute ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984). The Court held specifically that when the risk of removal resulting from a guilty plea is "clear," counsel must advise his or her client that "deportation [is] presumptively mandatory"; on the other hand, when that risk is less clear, counsel need only advise the defendant "that pending criminal charges may carry a risk of adverse immigration consequences." *Padilla*, 130 S. Ct. at 1483. The Court acknowledged that a "[l]ack of clarity in the law . . . will affect the scope and nature of counsel's advice." *Id.* at 1483 n.10.

Applying these rules to Padilla's claim, the Court concluded that "constitutionally competent counsel would have advised him that his conviction for drug distribution made him subject to automatic deportation." *Padilla*, 130 S. Ct. at 1478. It observed that Padilla's "is not a hard case in which to find deficiency," because the consequences of the plea "could easily be determined from reading the removal statute," which is "succinct, clear, and explicit in defining the removal consequence for Padilla's conviction," and counsel's advice was incorrect. *Id.* at 1483.

In light of *Padilla*, it is even more important than ever for prosecutors, defense counsel, judges, and other interested parties at the federal and local levels to have a basic understanding of the immigration consequences that flow from an alien's guilty plea. This is true for at least three reasons. First, going forward, knowledge of immigration consequences will ensure that defendants enter knowing and intelligent pleas that will not be subject to challenge under *Padilla*. Second, a basic understanding of immigration law will assist those litigating and evaluating challenges to already-entered plea agreements based on the alleged failure to advise of the immigration consequences. Third, as the Supreme Court noted in *Padilla*, "informed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process." 130 S. Ct. at 1486. "By bringing deportation consequences into this process," the parties may not only preserve the finality of pleas, but may also negotiate better agreements on behalf of the State and the noncitizen defendant. *Id.*

Accordingly, the Office of Immigration Litigation ("OIL") has prepared this monograph to provide a basic overview of the immigration consequences of a guilty plea. We emphasize that this monograph does not attempt to provide an interpretation of the scope and applicability of *Padilla*. Nor does it provide in-depth analyses of issues that arise under the Immigration and Nationality Act ("INA") and its implementing regulations, or a summary of immigration case law. Indeed, administrative and judicial precedents on immigration matters are far from uniform, and determining

what precedent to apply might be difficult because the removal proceeding may not be completed in the same jurisdiction as the criminal proceeding. For these reasons, and because the Supreme Court's decision requires defense attorneys to advise aliens of the potential risks of immigration consequences from the "terms of the relevant immigration statute," *Padilla*, 130 S. Ct. at 1483, we have focused our efforts on presenting a brief, cogent, and clear introduction that summarizes and cites the relevant statutory provisions bearing on those consequences.

II. How to Use the Monograph

This monograph is organized in a way that makes it easy for the reader to use both as an introduction to immigration consequences of criminal convictions, and as a resource for future reference when specific issues arise. The opening section provides an overview of the removal process and an introduction to relevant immigration terminology. This section covers basic concepts, including how the Government places an alien in removal proceedings, what occurs during such proceedings, and what happens after a final order of removal is issued against the alien. If the reader is unfamiliar with this process, we recommend that he or she briefly review the opening section.

For the reader who is preparing for a plea colloquy or a settlement negotiation, or who for some other reason needs to evaluate the potential consequences of a particular crime, he or she should consult Sections 2 and 3. These sections provide a framework for evaluating immigration consequences, beginning with the most direct and immediate consequences.

Section 2 addresses when a conviction may trigger removal proceedings by summarizing the criminal grounds of deportability and inadmissibility set forth in the INA. This includes the INA's classification of an "aggravated felony," which constitutes a ground of deportability. Commencement of immigration proceedings against an alien may be the most immediate and significant consequence of a guilty plea. A federal or state conviction may trigger removal proceedings rendering an alien defendant ineligible either (a) to remain in the United States, (b) to be admitted into the United States, if he or she travels abroad, or (c) both. Therefore, the reader should begin his or her analysis of immigration consequences here.

An alien found removable based on a crime may still be able to avoid removal through an immigration agency adjudicator's favorable grant of various forms of discretionary relief and protection from removal. A conviction, however, may also render aliens ineligible for these forms of relief and protection. Accordingly, it is important for the reader to be aware of these immigration consequences. Section 3 of the monograph provides an overview of the various forms of immigration "relief" and "protection" from removal in the INA (*e.g.*, asylum, cancellation of removal, adjustment of status), and sets forth the crimes that render an alien ineligible for such relief and protection.

The plea consequence of ineligibility for relief or protection is particularly important for aliens who are not currently in lawful immigration status. These aliens are already removable from

the United States for having entered the country illegally or for violating the terms of their visa or on some other basis. The overview of relief and protection in Section 3 summarizes which classes of aliens (lawful permanent residents, illegal aliens, etc.) are eligible for the various forms of relief and protection.

In addition to triggering removability and ineligibility for relief, a plea may also have other immigration consequences which are more attenuated. Section 4 describes these consequences, which include restrictions on judicial review and readmission to the United States, ineligibility for naturalization, mandatory detention, exposure to summary removal, and enhanced sentences for criminal reentry. While it is unclear whether *Padilla* requires defense counsel to advise an alien of these consequences, we include them so that the reader is aware of such consequences.

The reader who is determining the immigration consequences of a plea entered prior to the *Padilla* decision should consult Section 5. This section provides an overview of the significant amendments to the INA over the last few decades, including the creation and subsequent expansion of the aggravated felony ground of removability and the enactment of criminal bars to eligibility for immigration relief and protection. If courts conclude that *Padilla*'s holding applies retroactively to enable aliens to challenge pre-*Padilla* pleas, the adequacy of defense counsel's advice will be determined in large part by an analysis of the law existing at the time of the plea. This section offers a broad narrative of how that law has changed as it relates to the immigration consequences of a guilty plea. We note that this section is not an exhaustive summary for every change in the INA over the last few decades. The reader should also research the case law and legislative history.

Lastly, at the end of the monograph are detailed appendices that will provide the reader with helpful tools for understanding immigration consequences and, more broadly, immigration law. Appendix A contains a list of definitions of immigration terms that are used in the monograph. Appendix B provides a detailed list of further resources for the reader, including primary sources, secondary sources, internet resources, and other basic research tools. Appendix C contains the definition and examples of what constitutes a conviction for immigration purposes. Appendix D provides a quick reference guide to the method that is generally used for evaluating immigration consequences of criminal convictions.

In sum, it is our hope that the monograph will serve as a useful tool for those who need to quickly review the potential immigration consequences of a guilty plea.

Section 1: *Overview of the Removal Process*

- I. Introduction**
 - II. Removal Proceedings with a Hearing Before an Immigration Judge**
 - A. Commencement**
 - B. The Alien’s Rights**
 - C. Resolving Removability Issues**
 - 1. Burdens of Proof**
 - 2. Procedure**
 - D. Relief and Protection from Removal**
 - E. Administrative Finality of a Removal Order**
 - F. Enforcement of a Removal Order**
 - G. Judicial Review**
 - III. Removal Without a Hearing Before an Immigration Judge**
 - A. Administrative Removal**
 - B. Expedited Removal**
 - C. Visa Waiver Program**
 - D. Reinstatement of Removal**
 - E. Judicial Removal**
-

I. Introduction.

The procedures for determining whether an alien is to be removed from the United States are set forth in the Immigration and Nationality Act (“INA”) and corresponding regulations. This section provides a brief overview of those procedures.

The procedure used in a given case depends on the alien’s circumstances. Some classes of aliens are not entitled to a hearing before an immigration judge and may be ordered removed by an immigration enforcement officer. Most aliens, however, are entitled to an on-the-record proceeding before an immigration judge, who is authorized to grant applications for relief and protection from removal (which are described in Section 3). All immigration proceedings include the following features: the proceeding is commenced by or with the consent of a relevant component of the United States Department of Homeland Security (“DHS”) – either Immigration and Customs Enforcement (“ICE”), Customs and Border Protection (“CBP”), or Citizenship and Immigration Services (“CIS”); the alien is provided written notice of the grounds upon which the alien’s removal is sought, an opportunity to address whether the charged grounds apply, and an opportunity to be considered for protection from persecution and/or torture; and, when a removal order is enforced, the alien is provided written notice of the consequences of illegally returning to the United States.

II. Removal Proceedings with a Hearing Before an Immigration Judge.

At issue in a removal hearing is the alien's right to remain in the United States.¹ A removal hearing has two phases – determining whether the alien is removable (inadmissible or deportable) from the United States, and if so, determining whether the alien will be granted relief or protection from removal. The hearing resembles a trial in many respects but is not a purely adversarial process. Among other things, the immigration judge, a Department of Justice employee, is required to consider whether a removable alien may be eligible for any form of relief or protection, and to advise an alien when it appears he or she may be eligible. As described below, the allocation of the burdens of proof will depend on the alien's personal circumstances, and the stage of the proceeding. The proceedings are not governed by the Federal Rules of Evidence.

- A. Commencement.** A removal proceeding commences when DHS files a charge that an alien is deportable or inadmissible with the immigration court. At or before that time, the alien is also served with the charging document. The charging document is referred to as a Notice to Appear (“NTA”) or, in hearings commenced before April 1997, as an Order to Show Cause (“OSC”). The document refers to the statutory provision(s) upon which removal is sought, and alleges the facts believed to underlie the charge(s).

An alien is charged as “deportable” under statutory provisions in 8 U.S.C. § 1227(a) when the alien is present in the United States pursuant to a prior admission. “Admission” means lawful entry into the United States pursuant to authorization by an immigration officer, following inspection. 8 U.S.C. § 1101(a)(13)(A). An alien is charged as “inadmissible” under the statutory provisions in 8 U.S.C. § 1182(a) when the alien is not present in the United States pursuant to a prior admission (including when an alien is stopped at a port of entry, and when the alien is apprehended in the interior of the United States). DHS in its prosecutorial discretion may prioritize enforcement of the immigration laws. The more common criminal grounds of deportability and inadmissibility are summarized in Section 2.

¹ Before the enactment of Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”), there were two distinct types of proceedings used to determine whether an alien would be permitted to remain in the United States. An alien who had effected an “entry” into the United States was placed into a “deportation proceeding” and charged with being deportable; an alien who had not effected an “entry” was placed into an “exclusion proceeding” and charged with being excludable. IIRIRA consolidated deportation proceedings and exclusion proceedings into a single “removal proceeding.” IIRIRA also replaced the concept of “entry” with “admission,” and substituted the term “inadmissible” for “excludable.”

B. The Alien's Rights. An alien in civil immigration proceedings is not afforded the same rights as a defendant in a criminal trial. The alien has a right to representation at no expense to the Government, to an interpreter if necessary, to contact an attorney or legal representative, and to communicate with a consular official from his or her home country. *See* 8 U.S.C. § 1229a(b)(4); 8 C.F.R. §§ 1236.1(e) and 1240.3-1240.10. The alien is also provided a list of free or low-cost legal service providers. 8 U.S.C. § 1229(b)(2). The alien is entitled to a reasonable opportunity to examine the evidence against him or her, to present evidence on his or her own behalf, and to cross-examine witnesses presented by the Government. 8 U.S.C. § 1229a(b)(4)(B).

C. Resolving Removability Issues.

1. Burdens of Proof.

- If an alien is an applicant for admission, he or she has the burden of establishing that he or she is “clearly and beyond a doubt” entitled to be admitted and is not inadmissible. 8 U.S.C. § 1229a(c)(2)(A).
- If the alien is *not* an applicant for admission, he or she has the burden to demonstrate by “clear and convincing evidence” that he or she is present pursuant to a prior admission. 8 U.S.C. § 1229a(c)(2)(B). DHS then has the burden to establish that the alien is deportable as charged by “clear and convincing evidence.” 8 U.S.C. § 1229a(c)(3).

2. Procedure.

- The immigration judge reads the charges of deportability or inadmissibility to the alien, obtains confirmation that the alien understands the charges, and then requires the alien to admit or deny the charges.
- When removability depends on a conviction, DHS may prove the charges by using documents from the criminal prosecution, such as the judgment and charging instrument or other evidence. What documents and evidence may be considered, and how they may be used, is an important and commonly-litigated issue. *See* Appendix D (The Method for Evaluating Immigration Consequences of Criminal Convictions).

D. Relief and Protection from Removal. If the immigration judge concludes that the alien is removable as charged, the immigration judge must then consider whether the alien may be eligible for any relief or protection from removal. The alien bears the

burden not only of establishing eligibility, but also, where applicable, of persuading the immigration judge to exercise discretion in favor of the alien. 8 U.S.C. § 1229a(c)(4)(A). Frequently requested forms of relief from removal, and related protections from persecution and torture, are described in Section 3.

- E. Administrative Finality of a Removal Order.** Both an alien and DHS may appeal the decision of an immigration judge to the Board of Immigration Appeals (“Board”), an administrative appellate authority located in Falls Church, Virginia. Under the Board’s case management system, cases involving aliens detained in ICE custody are given priority. In general, a removal order becomes administratively final upon: (a) waiver of the right to appeal; (b) expiration of the time for filing an appeal, without an appeal having been filed; or (c) a decision from the Board affirming the order of removability. *See* 8 U.S.C. § 1101(a)(47)(B).
- F. Enforcement of a Removal Order.** The final step in the removal process is the enforcement of the removal order. Except in cases where the alien leaves the United States, the alien is required to surrender for removal, and is transported to the designated country of removal at the cost of the Government. At the time of removal, the alien is also provided a written notice of the consequences of illegally re-entering the United States. There are a number of bars to readmission, as well as other consequences, that attach once an alien has been deported or leaves the country under an order of removal. Those consequences are discussed in Section 4.
- G. Judicial Review.** An alien may also petition a federal appeals court to review a Board decision within 30 days of that decision. 8 U.S.C. § 1252(a)(1) & (b)(1). The venue for filing a petition for review lies with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings. 8 U.S.C. § 1252(b)(2). Because of statutory limits on judicial review, an alien ordered removed because of certain criminal conduct may be able to receive judicial review only of the determination that the alien is deportable or inadmissible and of certain constitutional and legal claims. An alien may request a stay of removal, but if the court does not grant the stay, DHS may enforce the removal order while the case is pending and the alien must litigate the petition for review from abroad. If the court concludes that the Board decision is erroneous after the removal order is enforced, the alien will be permitted to return to the United States to obtain any remedy required by the court.

III. Removal Without a Hearing Before an Immigration Judge.

The following classes of aliens are among those who are not entitled to a full removal hearing before an immigration judge:

- A. **Administrative Removal.** An alien who has not been lawfully admitted for permanent residence to the United States or has permanent resident status on a conditional basis, and has been convicted of an aggravated felony can be removed by an administrative order issued by a designated DHS official. 8 U.S.C. § 1228(b).
- B. **Expedited Removal.** An arriving or recently-arrived alien (*i.e.*, an alien who has been in the United States less than two weeks and is encountered within 100 miles of the border) who has not been admitted to the United States and who lacks a valid immigration document or who is inadmissible pursuant to 8 U.S.C. § 1182(a)(6)(C) (fraud or willful misrepresentation) can be removed by a designated DHS official. 8 U.S.C. § 1225(b); *see also* “Designating Aliens For Expedited Removal,” 69 Fed. Reg. 48877, 48880 (Aug. 11, 2004).
- C. **Visa Waiver Program.** Since 1986, aliens from specified countries have been allowed to come to the United States for short periods of time without first obtaining a tourist visa, provided that the alien waives any right to contest removal from the United States, except for asylum. If an alien permitted entry through the visa waiver program fails to depart, the alien may be removed by an administrative order issued by a designated DHS official. 8 U.S.C. § 1187(a)-(b).
- D. **Reinstatement of Removal.** An alien who has illegally re-entered the United States after removal is not entitled to a hearing before an immigration judge. Instead, DHS can reinstate the previous removal order, and enforce it. 8 U.S.C. § 1231(a)(5).
- E. **Judicial Removal.** At the request of the United States Attorney, and with the concurrence of DHS, a federal district court may enter an order of removal at the time of sentencing. 8 U.S.C. § 1228(c).

Section 2: *Consequences of Criminal Acts*

Part A: Criminal Grounds of Removability

- I. Introduction**
- II. Conviction-Related Removal Grounds**
 - A. Crimes That Trigger Deportability**
 - 1. Controlled Substance Offenses**
 - 2. Crimes Involving Moral Turpitude**
 - 3. Multiple Moral Turpitude Convictions**
 - 4. Aggravated Felonies**
 - 5. Firearm and Destructive Device Convictions**
 - 6. Espionage, Sabotage, Treason, and Other Crimes**
 - 7. Crimes of Domestic Violence, Stalking, Child Abuse, Child Abandonment, or Neglect**
 - 8. Failure to Register as a Sex Offender**
 - 9. Violating a Protective Order**
 - 10. High Speed Flight From an Immigration Checkpoint**
 - 11. Failure to Register or Falsification of Documents**
 - B. Crimes That Trigger Inadmissibility**
 - 1. Crimes Involving Moral Turpitude**
 - 2. Controlled Substance Offenses**
 - 3. Multiple Criminal Convictions**
- III. Conduct-Related Removal Grounds (No Conviction Required)**
 - A. Crimes Involving Moral Turpitude**
 - B. Controlled Substance Offenses**
 - C. Prostitution**
 - D. Fraud or Misrepresentation**
 - E. False Claim to United States Citizenship**
 - F. Alien Smuggling**
 - G. Marriage Fraud**
 - H. Human Trafficking**
 - I. Money Laundering**
 - J. Espionage, Sabotage, and Treason**
 - K. Terrorism**
 - L. Alien With a Physical or Mental Disorder Who Poses Danger to Self or Others**
 - M. Unlawful Voters**
 - N. Polygamy**
 - O. International Child Abduction**

I. Introduction.

In the Immigration and Nationality Act (“INA”), Congress has provided grounds for an alien’s removal based on various immigration violations, only some of which are related to criminal activity. An alien, therefore, may be removable from the United States for reasons separate and apart from having committed certain crimes. Even so, a removal action against an alien may be the most immediate and significant consequence of a guilty plea. Thus, in evaluating the immigration consequences of a plea, it is critical to determine whether the crime may make the defendant alien removable. This section sets forth the more common criminal grounds of removal.

An alien’s removability for a crime depends on whether his or her state or federal conviction fits within one or more classes of removable offenses identified in the INA. The INA separates removal grounds into two categories: inadmissibility grounds codified at 8 U.S.C. § 1182(a) and deportability grounds codified at 8 U.S.C. § 1227(a). Both inadmissible and deportable aliens are referred to as “removable” aliens. The question of which category applies turns on whether the alien has been admitted to the United States, *i.e.*, whether the alien has made a lawful entry after inspection and authorization by an immigration officer. 8 U.S.C. § 1101(a)(13)(A). An alien who has not been admitted to the United States is subject to removal based on one or more grounds of inadmissibility. In contrast, an alien who has been admitted to the United States, and thereafter commits a crime, may be subject to removal based on one or more grounds of deportability.

An alien’s removability based on a plea may also depend upon whether such a plea would result in a “conviction,” as that term is defined in the INA. Deferred adjudications, for example, are generally considered “convictions” for immigration purposes. *See* Appendix C (What Constitutes A Conviction For Immigration Purposes). Also, any reference to a term of imprisonment or a sentence in the INA includes the period of incarceration or confinement ordered by a court, as well as any suspension of the imposition or execution of that term of imprisonment or sentence.

The INA also includes grounds of removal based on an alien’s criminal conduct alone, regardless of whether there is a conviction. These grounds are generally based on: (1) an alien’s admission that he or she committed a crime; or (2) a finding by immigration authorities that there is reason to believe that an alien has engaged in criminal activity. Most of these grounds are set forth as grounds of inadmissibility. While the reader should be most familiar with the conviction-based grounds of removal, it is also important to be aware of the “non-conviction” grounds because:

- they often overlap or are similar to grounds that do require convictions, thus making the issue potentially relevant in evaluating prejudice under a *Strickland* analysis.
- an alien’s guilty plea may not provide a ground of removal based on the conviction but may do so based on the admitted conduct.

II. Conviction-Related Removal Grounds.

A. Crimes That Trigger Deportability.

The criminal grounds of deportability are found at 8 U.S.C. § 1227(a)(2).

1. ***Controlled Substance Offenses.*** The INA provides that any alien who at any time after admission is convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation (foreign or domestic (federal or state)) relating to a controlled substance (as defined in schedules in 21 U.S.C. § 802) is deportable.² 8 U.S.C. § 1227(a)(2)(B)(i). The only exception is for “a single offense” of possession of 30 grams or less of marijuana for one’s own use. A conviction for a drug paraphernalia offense may also “relate to” a controlled substance violation under this provision.

2. ***Crimes Involving Moral Turpitude.*** Any alien convicted of a crime involving moral turpitude (“CIMT”) is deportable, when the potential term of imprisonment is one year or longer, and the offense was committed within five years of the alien’s admission to the United States, or within ten years of admission if the alien was granted lawful permanent resident status due to the alien’s substantial contribution and assistance in a criminal investigation or prosecution. 8 U.S.C. § 1227(a)(2)(A)(i); *see also* 8 U.S.C. § 1255(j). The President of the United States or a Governor of any State may grant a full and unconditional pardon to waive this ground of deportability. 8 U.S.C. § 1227(a)(2)(A)(vi).
 - “Moral turpitude” is not defined in the INA. The Board and various courts have recognized that moral turpitude generally refers to conduct that is inherently dishonest, base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general.
 - Offenses that may be morally turpitudinous include: murder, voluntary manslaughter, kidnaping, mayhem, rape, fraud, spousal abuse, child abuse, incest, assault with intent to commit another specific intent offense, aggravated assaults, assaults on vulnerable classes (*e.g.*, children, the elderly, or the mentally disabled), communication with a minor for immoral purposes, lewd and lascivious conduct toward a child, knowing possession of child pornography, driving under the influence without a license, theft

² The full list of controlled substances in 21 U.S.C. § 802 is provided at <http://www.deadiversion.usdoj.gov/schedules/index.html>.

offenses, robbery, receiving stolen goods with guilty knowledge, forgery, embezzlement, extortion, perjury, and willful tax evasion. Offenses that may fall outside the definition include: simple assault, unlawful entry, damaging private property, escape, possession of an altered or fraudulent document, and indecent exposure.

3. ***Multiple Moral Turpitude Convictions.*** Any alien who at any time after admission is convicted of two or more CIMTs is deportable if the offenses do not arise out of a single scheme of criminal misconduct. 8 U.S.C. § 1227(a)(2)(A)(ii). This ground of deportability does not require the imposition of a sentence of confinement. The President of the United States or a Governor of any State may grant a full and unconditional pardon to waive this ground of deportability. 8 U.S.C. § 1227(a)(2)(A)(vi).
4. ***Aggravated Felonies.*** Any alien who is convicted of an aggravated felony at any time after admission is deportable. 8 U.S.C. § 1227(a)(2)(A)(iii). The President of the United States or a Governor of any State may grant a full and unconditional pardon to waive this ground of deportability. 8 U.S.C. § 1227(a)(2)(A)(vi). This category of deportable offenses includes numerous crimes and is covered specifically in part B of this section.
5. ***Firearm and Destructive Device Convictions.*** Any alien who at any time after admission is convicted of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying (or of attempting or conspiring to do any of the foregoing) any weapon, part, or accessory which is a firearm or destructive device (as defined in 18 U.S.C. § 921) in violation of any law is deportable. 8 U.S.C. § 1227(a)(2)(C).
6. ***Espionage, Sabotage, Treason, and Other Crimes.*** Any alien who at any time has been convicted of committing, or conspiring or attempting to commit espionage, sabotage, treason, and sedition for which a term of imprisonment of five or more years may be imposed, or convicted of any offense under 18 U.S.C. § 871 (threats against the President or his or her successors) or 18 U.S.C. § 960 (expedition against friendly nation), or a violation of the Military Selective Service Act or the Trading With The Enemy Act, or a violation of 8 U.S.C. § 1185 (travel control of citizens and aliens entering or departing the United States) or 8 U.S.C. § 1328 (importation of an alien for prostitution or other immoral purposes), is deportable. 8 U.S.C. § 1227(a)(2)(D).
7. ***Crimes of Domestic Violence, Stalking, Child Abuse, Child Abandonment, or Neglect.*** Any alien who at any time after admission is convicted of any one of the following crimes is deportable: domestic violence, stalking, child abuse, child neglect, or child abandonment. 8 U.S.C. § 1227(a)(2)(E)(i).

8. ***Failure To Register as a Sex Offender.*** Any alien who is convicted of knowingly failing to register or update a registration as required by the Sex Offender Registration and Notification Act, in violation of 18 U.S.C. § 2250, is deportable. 8 U.S.C. § 1227(a)(2)(A)(v).
9. ***Violating a Protective Order.*** Any alien who at any time after admission is enjoined under a protective order issued by a court and whom the court determines has engaged in conduct that violates a portion of the protective order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protective order was issued, is deportable. 8 U.S.C. § 1227(a)(2)(E)(ii).
10. ***High Speed Flight From an Immigration Checkpoint.*** Any alien who is convicted of violating 18 U.S.C. § 758 (relating to high speed flight from an immigration checkpoint) is deportable. 8 U.S.C. § 1227(a)(2)(A)(iv). The President of the United States or a Governor of any State may grant a full and unconditional pardon to waive this ground of deportability. 8 U.S.C. § 1227(a)(2)(A)(vi).
11. ***Failure to Register or Falsification of Documents.*** Any alien who is convicted under 8 U.S.C. § 1306(c) (relating to filing a registration application with information known to be false or procuring, or attempting to procure, registration through fraud) or section 36(c) of the Alien Registration Act, 1940 (same), or of a violation of, or attempt or conspiracy to violate the Foreign Agents Registration Act of 1938 (22 U.S.C. §§ 611 et seq.) (requiring persons acting as agents of foreign principals in a political or quasi-political capacity to make periodic public disclosure of their relationship with the foreign principal, as well as activities, receipts and disbursements in support of those activities) or 18 U.S.C. § 1546 (relating to fraud and misuse of visas, permits, and other admission documents), is deportable. 8 U.S.C. § 1227(a)(3)(B).

B. Crimes That Trigger Inadmissibility.

The criminal grounds of inadmissibility are found at 8 U.S.C. § 1182(a)(2).

1. ***Crimes Involving Moral Turpitude.*** An alien is inadmissible if he or she has been convicted of a CIMT, or attempts or conspires to commit such a crime. 8 U.S.C. § 1182(a)(2)(A)(i)(I). There are two exceptions to this ground of inadmissibility. 8 U.S.C. § 1182(a)(2)(A)(ii)(I) & (ii)(II). First, this ground of inadmissibility does not apply to an alien who committed a CIMT when he or she was under 18 years of age, and the crime was committed more than 5 years before the alien's application for a visa or other entry document and

the date of his or her application for admission to the United States. Second, the ground does not apply to offenses for which the maximum possible term of imprisonment was one year or less and the alien was not sentenced to more than six months in prison. Also, a limited waiver for this ground of inadmissibility may be granted by the Attorney General, in his or her discretion, in certain circumstances. 8 U.S.C. § 1182(h) (discussed in detail in Section 3).

2. ***Controlled Substance Offenses.*** An alien convicted of a violation of (or conspiracy or attempt to violate) any controlled substance law or regulation (foreign or domestic (federal or state)) is inadmissible. 8 U.S.C. § 1182(a)(2)(A)(i)(II). A limited waiver for this ground of inadmissibility may be granted by the Attorney General, in his or her discretion, for “a single offense of simple possession of 30 grams or less of marijuana.” 8 U.S.C. § 1182(h) (discussed in detail in Section 3). “Controlled substance” is defined at 21 U.S.C. § 802. A conviction for a drug paraphernalia offense may also fall within the “relating to” language in the controlled substance provision.
3. ***Multiple Criminal Convictions.*** An alien convicted of two or more offenses for which the aggregate sentences of confinement were 5 years or more is inadmissible. 8 U.S.C. § 1182(a)(2)(B). A limited waiver for this ground of inadmissibility may be granted by the Attorney General, in his or her discretion, in certain circumstances. 8 U.S.C. § 1182(h) (discussed in detail in Section 3).

III. Conduct-Related Removal Grounds (No Conviction Required).

As discussed above, there are certain grounds of removal (mostly set forth in the grounds of inadmissibility) that are based on criminal conduct, but do not require a conviction. An alien who engages in such conduct may, in DHS’ discretion, be placed in removal proceedings even if not prosecuted criminally. These grounds are summarized below.

- A. ***Crimes Involving Moral Turpitude.*** An alien who admits having committed a CIMT (or attempting or conspiring to commit a CIMT), or who admits having committed the essential elements of a CIMT (or of attempting or conspiring to commit the essential elements of a CIMT), is inadmissible. 8 U.S.C. § 1182(a)(2)(A)(i)(I). There are two exceptions – the juvenile and petty offense exceptions – which are described above. 8 U.S.C. § 1182(a)(2)(A)(ii)(I) & (ii)(II). Also, a limited waiver of this ground of inadmissibility may be granted by the Attorney General, in his or her discretion, in certain circumstances. 8 U.S.C. § 1182(h) (discussed in detail in Section 3).

B. *Controlled Substance Offenses.*

- An alien who admits having committed a controlled substance offense (or attempting or conspiring to commit such offense), or who admits having committed the essential elements of a controlled substance offense (or of attempting or conspiring to commit the essential elements of such offense), is inadmissible. 8 U.S.C. § 1182(a)(2)(A)(i)(II). A limited discretionary waiver of this ground of inadmissibility is available for “a single offense of simple possession of 30 grams or less of marijuana.” 8 U.S.C. § 1182(h) (discussed in detail in Section 3).
- Any alien who the consular officer or Attorney General knows or has reason to believe is or has been an illicit trafficker in any controlled substance or in any listed chemical (as defined in 21 U.S.C. § 802), is inadmissible. 8 U.S.C. § 1182(a)(2)(C)(i).
- Any alien who the consular officer or Attorney General knows or has reason to believe is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking of any controlled or listed substance or chemical, or endeavored to do so, is inadmissible. 8 U.S.C. § 1182(a)(2)(C)(i).
- Any alien who the consular officer or the Attorney General knows or has reason to believe is the spouse, son, or daughter of an alien who is an illicit trafficker of a controlled or listed substance or chemical (including an alien who is an aider, abettor, assister, conspirator, or colluder with others in such illicit trafficking), and the spouse, son, or daughter has obtained, within the previous five years, any financial or other benefit from the illicit trafficking activity, and the spouse, son, or daughter knew or reasonably should have known that the financial or other benefit was the product of such illicit activity, is inadmissible. 8 U.S.C. § 1182(a)(2)(C)(ii).
- Any alien who is determined by the immigration authorities to be a drug abuser or addict is subject to removal under either a ground of inadmissibility or deportability. 8 U.S.C. §§ 1182(a)(1)(A)(iv) and 1227(a)(2)(B)(ii) (drug abuser or addict after admission into the United States).

C. *Prostitution.*

- Any alien who is coming to the United States solely, principally, or incidentally to engage in prostitution, is inadmissible. 8 U.S.C. § 1182(a)(2)(D)(i).

- Any alien who has engaged in prostitution within ten years of the date of an application for a visa, admission, or adjustment of status, is inadmissible. 8 U.S.C. § 1182(a)(2)(D)(i).
- Any alien who directly or indirectly procures, or attempts to procure, or (within ten years of the date of an application for a visa, admission, or adjustment of status) procured or attempted to procure or to import, prostitutes or persons for the purpose of prostitution, is inadmissible. 8 U.S.C. § 1182(a)(2)(D)(ii).
- Any alien who receives or received within ten years of the date of an application for a visa, admission, or adjustment of status, in whole or part, the proceeds of prostitution, is inadmissible. 8 U.S.C. § 1182(a)(2)(D)(ii).
- Any alien who is coming to the United States to engage in any unlawful commercialized vice, whether or not related to prostitution, is inadmissible. 8 U.S.C. § 1182(a)(2)(D)(iii).
- A limited waiver for these grounds of inadmissibility may be granted by the Attorney General, in his or her discretion, in certain circumstances. 8 U.S.C. § 1182(h) (discussed in detail in Section 3).

D. *Fraud or Misrepresentation.*

- Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or sought to procure or has procured) a visa, other documentation, or admission into the United States or other immigration benefit, is inadmissible. 8 U.S.C. § 1182(a)(6)(C)(i). A waiver of this ground of inadmissibility may be granted in the discretion of the Attorney General in the case of an alien who is the spouse, son, or daughter of a United States citizen or of an alien lawfully admitted for permanent residence upon the requisite showing of hardship. 8 U.S.C. § 1182(i).
- Under 8 U.S.C. § 1324c it is a crime for any person to knowingly engage in various aspects of document fraud for the purpose of satisfying a requirement or obtaining a benefit under the INA. Any alien who is the subject of a final order for a violation of 8 U.S.C. § 1324c is inadmissible and deportable. 8 U.S.C. §§ 1182(a)(6)(F)(i) and 1227(a)(3)(C)(i). The Attorney General may waive this ground of inadmissibility and deportability in the case of an alien lawfully admitted for permanent residence if no civil monetary penalty was imposed for violating section 1324c, and the offense was incurred solely to assist, aid, or support the alien's spouse or child. 8 U.S.C. §§ 1182(a)(6)(F)(ii) and 1227(a)(3)(C)(ii).

E. *False Claim to United States Citizenship.* Any alien who falsely represents or has falsely represented himself or herself to be a citizen of the United States for any purpose or immigration benefit or any federal or state law is inadmissible and deportable. 8 U.S.C. §§ 1182(a)(6)(C)(ii)(I) and 1227(a)(3)(D)(i). Representations of citizenship made by an alien who reasonably believed that he or she was a citizen at the time of the representations are excluded from this ground of inadmissibility and deportability, so long as the alien's natural parents are or were citizens and the alien permanently resided in the United States prior to the age of sixteen. 8 U.S.C. §§ 1182(a)(6)(C)(ii)(II) and 1227(a)(3)(D)(ii).

F. *Alien Smuggling.*

- Any alien who at any time knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law is inadmissible. 8 U.S.C. § 1182(a)(6)(E)(i).
- Any alien who (prior to the date of entry, at the time of entry, or within five years of the date of any entry) knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law is deportable. 8 U.S.C. § 1227(a)(1)(E)(i).
- There is a limited exception for this ground of inadmissibility and deportability on the basis of family reunification, 8 U.S.C. §§ 1182(a)(6)(E)(ii) and 1227(a)(1)(E)(ii), and there is a limited waiver at the discretion of the immigration authorities to assure family unity or when it is in the public interest, 8 U.S.C. §§ 1182(a)(6)(E)(iii) and 1227(a)(1)(E)(iii). *But see* 8 U.S.C. §§ 1227(a)(2)(D)(iv) and 1185(a)(2) (an alien convicted of unlawfully transporting or attempting to transport another person from or into the United States is deportable and no waiver or exception is available).

G. *Marriage Fraud.*

- An alien is deportable for having procured a visa or other documentation by fraud (within the meaning of 8 U.S.C. § 1182(a)(6)(C)(i) (fraud or willful misrepresentation of a material fact to procure a benefit)) and for being in the United States in violation of 8 U.S.C. § 1227(a)(1)(B) (alien present in violation of law) if:
 - The alien is admitted into the United States with an immigrant visa or other documentation procured on the basis of a marriage entered into less than two years prior to such admission and the marriage is judicially annulled or terminated within two years after any admission to the United States. There is an exception for aliens who establish

to the satisfaction of the Attorney General that the marriage was not contracted for the purpose of evading immigration laws. 8 U.S.C. § 1227(a)(1)(G)(i).

- The alien, as it appears to the satisfaction of the Attorney General, failed or refused to fulfill the alien's marital agreement which in the opinion of the Attorney General was made for the purpose of procuring the alien's admission as an immigrant. 8 U.S.C. § 1227(a)(1)(G)(ii).
- A limited waiver exists for aliens who were "inadmissible at the time of admission" based on fraud or misrepresentation, including marriage fraud as described above. 8 U.S.C. § 1227(a)(1)(H).
- The waiver is available at the Attorney General's discretion to any alien (other than an alien who participated in Nazi persecution, genocide, or the commission of any act of torture or extrajudicial killing) who: (1) is the spouse, parent, son, or daughter of a United States citizen or lawful permanent resident and (2) was in possession of an immigrant visa or equivalent document and was otherwise admissible except for those grounds at 8 U.S.C. § 1182(a)(5)(A) (labor certification) & (a)(7)(A) (documentation requirements) which were a direct result of that fraud or misrepresentation. 8 U.S.C. § 1227(a)(1)(H)(i).
- The waiver is also available at the Attorney General's discretion to an alien who is a Violence Against Women Act ("VAWA") self-petitioner. 8 U.S.C. § 1227(a)(1)(H)(ii).

H. *Human Trafficking.*

- Any alien who commits or conspires to commit human trafficking offenses in or outside of the United States, or who the immigration authorities know or have reason to believe is or has been a knowing aider, abettor, assister, conspirator, or colluder with a human trafficker in severe forms of human trafficking, is inadmissible. 8 U.S.C. § 1182(a)(2)(H)(i).
- Any alien that the immigration authorities know or have reason to believe is the spouse, son, or daughter of an alien inadmissible under 8 U.S.C. § 1182(a)(2)(H)(i) is inadmissible, if, within the previous five years, the spouse, son, or daughter benefitted financially or in some other way from the illicit activity of his or her family member, and knew or reasonably should have know that the benefit was the product of illicit activity. 8 U.S.C.

§ 1182(a)(2)(H)(ii). This ground does not apply to a son or daughter who was “a child” at the time of receiving the benefit. 8 U.S.C. § 1182(a)(2)(H)(iii).

- In addition, any alien who is described as inadmissible under section 1182(a)(2)(H) is deportable. 8 U.S.C. § 1227(a)(2)(F).

I. *Money Laundering.* Any alien who the immigration authorities know or have reason to believe has engaged, is engaging in, or seeks to enter the United States to engage in, an offense relating to money laundering is inadmissible. 8 U.S.C. § 1182(a)(2)(I)(i). Similarly, any alien who the immigration authorities know is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in a money laundering offense, is inadmissible. 8 U.S.C. § 1182(a)(2)(I)(ii).

J. *Espionage, Sabotage, and Treason.*

- Generally, any alien who seeks to enter the United States to engage in espionage, sabotage, or treason, or who has been convicted of such misconduct after admission is inadmissible or deportable.
- Any alien who the immigration authorities know or have reasonable ground(s) to believe, is seeking to enter the United States to engage solely, principally, or incidentally in espionage, sabotage, violating or evading any law relating to the export control of goods, technology, or sensitive information, or any activity a purpose of which is the opposition to, or the control or overthrow of, the United States Government by force, violence, or other unlawful means, is inadmissible. 8 U.S.C. § 1182(a)(3)(A).
- Any alien who has engaged, is engaged, or at any time after admission engages in the foregoing activities or any other criminal activity which endangers public safety or national security, is deportable. 8 U.S.C. § 1227(a)(4)(A); *see also* 8 U.S.C. § 1227(a)(2)(D)(i), (ii) & (iii) (conviction-based ground of deportability discussed above).

K. *Terrorism.*

- Any alien who has engaged in terrorist activity, incited terrorist activity, is a representative of a terrorist organization or a group that endorses or espouses terrorist activity, is a member of a terrorist organization, endorses or espouses or persuades others to engage in terrorist activity or support a terrorist organization, or who the immigration authorities know or reasonably believe is engaged in or is likely to engage after entry in any terrorist activity, is inadmissible. 8 U.S.C. § 1182(a)(3)(B).

- A spouse or child of an alien inadmissible under this section is also inadmissible if the activity occurred within the last 5 years. There is a limited exception for a spouse or child who did not know or should not reasonably have known of the terrorist activities or who has renounced the terrorist activities to the satisfaction of the consular official or the Attorney General. 8 U.S.C. § 1182(a)(3)(B)(ii).
- Any alien who the Secretary of State or the Attorney General determines has been associated with a terrorist organization and intends while in the United States to engage in activities that could endanger the welfare, safety, or security of the United States, is inadmissible. 8 U.S.C. § 1182(a)(3)(F).
- In addition, any alien who is described in 8 U.S.C. § 1182(a)(3)(B) & (F) is deportable. 8 U.S.C. § 1227(a)(4)(B).

L. *Alien With a Physical or Mental Disorder Who Poses Danger to Self or Others.*

- Any alien who is determined to have a physical or mental disorder and behavior associated with the disorder that may pose, or has posed a threat to the alien or others, is inadmissible. 8 U.S.C. § 1182(a)(1)(A)(iii)(I). A waiver of this ground of inadmissibility may be granted in the discretion of the Attorney General. 8 U.S.C. § 1182(g)(3).
- Any alien who is determined to have had a physical or mental disorder and a history of behavior associated with the disorder, which behavior has posed a threat to the alien or others and which behavior is likely to recur or to lead to other harmful behavior, is inadmissible. 8 U.S.C. § 1182(a)(1)(A)(iii)(II). A waiver of this ground of inadmissibility may be granted in the discretion of the Attorney General. 8 U.S.C. § 1182(g)(3).

M. *Unlawful Voters.* Any alien who voted in a federal, state, or local election in violation of any federal, state, or local constitutional provision, statute, ordinance, or regulation may be removable on either a ground of inadmissibility or deportability. 8 U.S.C. §§ 1182(a)(10)(D)(i) and 1227(a)(6)(A). Aliens who violate a lawful restriction of voting to citizens are neither inadmissible nor deportable if the alien reasonably believed that he or she was a citizen at the time of the unlawful voting, so long as the alien's natural parents are or were citizens and the alien permanently resided in the United States prior to the age of sixteen. 8 U.S.C. §§ 1182(a)(10)(D)(ii) and 1227(a)(6)(B).

N. *Polygamy.* Any alien coming to the United States to practice polygamy is inadmissible. 8 U.S.C. § 1182(a)(10)(A).

- O. *International Child Abduction.*** Any alien who, in violation of a court's custody order relating to a United States citizen child, detains or retains the child, or withholds custody of the child, outside the United States from the person granted custody by the court is inadmissible until the child is surrendered to the person granted custody. 8 U.S.C. § 1182(a)(10)(C)(i). Additionally, anyone known to have intentionally assisted or to have provided material support or safe haven to such an abductor is inadmissible. 8 U.S.C. § 1182(a)(10)(C)(ii)(I) & (II). A spouse, child, parent, sibling, or agent of an alien inadmissible for child abduction is inadmissible until the abducted child is surrendered to the person granted custody. 8 U.S.C. § 1182(a)(10)(C)(ii)(III). Among other exceptions, these provisions do not apply if the child is abducted to a country that is a party to the Hague Convention. 8 U.S.C. § 1182(a)(10)(C)(iii).

Section 2: *Consequences of Criminal Acts*

Part B: Aggravated Felonies

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 - S. Obstruction of Justice, Perjury, or Subornation
 - T. Failure to Appear Before a Court to Answer to a Charge of Felony
 - U. Attempt or Conspiracy to Commit an Aggravated Felony
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I. Introduction.

As introduced in Part A of this section, the INA provides that an alien who is convicted of an aggravated felony offense is deportable. 8 U.S.C. § 1227(a)(2)(A)(iii). “Aggravated felony” is a term of art created by Congress to describe a discrete set of criminal offenses that subject an alien convicted of such an offense to more serious immigration consequences. The INA sets forth a multi-

part definition of the term “aggravated felony,” which applies to violations of federal and state law as well as violations “of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years.” 8 U.S.C. § 1101(a)(43).

As a general matter, an alien convicted of an aggravated felony offense (also referred to as an “aggravated felon”) is statutorily ineligible for most forms of discretionary relief from removal, including cancellation of removal and asylum, although the alien may, under certain narrow circumstances, be eligible for adjustment of status and a waiver of inadmissibility under 8 U.S.C. § 1182(h). Notwithstanding an aggravated felony conviction, any alien may apply for deferral of removal under the United Nations Convention Against Torture regulations if they fear torture upon returning to their home country. Aliens might also be able to apply for withholding of removal if they fear persecution upon removal and their aggravated felony conviction is not a “particularly serious crime.” A conviction for an aggravated felony offense may subject the alien to expedited removal procedures. 8 U.S.C. § 1228. Further, an aggravated felon deportee is permanently barred, regardless of the date of the aggravated felony conviction, from readmission to the United States, unless the Attorney General has consented to the alien reapplying for admission. 8 U.S.C. § 1182(a)(9)(A).

II. Aggravated Felony Removal Grounds.

The “aggravated felony” ground of deportability is found at 8 U.S.C. § 1227(a)(2)(A)(iii). The term “aggravated felony” is defined at 8 U.S.C. § 1101(a)(43), and the various aggravated felony offenses are enumerated in subsections A-U.

- A. *Murder, Rape, Sexual Abuse of a Minor Offenses.*** 8 U.S.C. § 1101(a)(43)(A) provides that “murder,” “rape” and “sexual abuse of a minor” are aggravated felonies. The INA provides no definition or cross-reference to another part of the United States Code for these terms.
- B. *Illicit Trafficking in a Controlled Substance, Including a Drug Trafficking Crime.*** 8 U.S.C. § 1101(a)(43)(B) provides that illicit trafficking in a “controlled substance” (as defined in 21 U.S.C. § 802) is an aggravated felony. “Illicit trafficking” is not otherwise defined. The offense also includes a “drug trafficking crime” (as defined in 18 U.S.C. § 924(c)).
- “Drug trafficking crime” is defined as “any felony punishable under the Controlled Substances Act (21 U.S.C. 801, et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951, et seq.), or chapter 705 of title 46.”
 - “Trafficking” means some sort of commercial dealing. *Lopez v. Gonzales*, 549 U.S. 47, 53 (2006).

- A state offense constitutes a felony punishable under the Controlled Substances Act only if it proscribes conduct that is punishable as a felony under federal law. *Lopez*, 549 U.S. at 60.
- A second or subsequent simple possession offense constitutes a felony under the Controlled Substances Act only if the conviction has been enhanced based on the fact of a prior conviction. *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577, 2589 (2010).
- “Controlled substance” means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of subchapter I (21 U.S.C. §§ 811-814). 21 U.S.C. § 802.³

C. *Illicit Trafficking in Firearms, Destructive Devices, or Explosive Materials.* 8 U.S.C. § 1101(a)(43)(C) provides that “illicit trafficking in firearms or destructive devices (as defined in [18 U.S.C. § 921]) or in explosive materials (as defined in [18 U.S.C. § 841(c)])” is an aggravated felony.

D. *Laundering of Monetary Instruments.* 8 U.S.C. § 1101(a)(43)(D) provides that “an offense described in [18 U.S.C. § 1956] (relating to laundering of monetary instruments) or [18 U.S.C. § 1957] (relating to engaging in monetary transactions in property derived from specific unlawful activity)” is an aggravated felony “if the amount of the funds exceeded \$10,000.”

E. *Explosive Materials and Firearms Offenses.* 8 U.S.C. § 1101(a)(43)(E) provides that an offense described in:

- (i) 18 U.S.C. § 842(h) or (i), or 18 U.S.C. §§ 844(d), (e), (f), (g), (h), or (i) “(relating to explosive materials offenses);”
- (ii) 18 U.S.C. § 922(g)(1), (2), (3), (4), or (5), (j), (n), (o), (p), or (r) or 18 U.S.C. § 924(b) or (h) “(relating to firearms offenses);” or
- (iii) 26 U.S.C. § 5861 “(relating to firearms offenses)”

is an aggravated felony.

³ The full list of controlled substances in 21 U.S.C. § 802 is provided at <http://www.deadiversion.usdoj.gov/schedules/index.html>.

- F. *Crimes of Violence.*** 8 U.S.C. § 1101(a)(43)(F) provides that “a crime of violence (as defined in [18 U.S.C. § 16], but not including a purely political offense) for which the term of imprisonment [is] at least one year” is an aggravated felony.
- 18 U.S.C. § 16 defines a “crime of violence” as “(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.”
 - 18 U.S.C. § 16(b) requires a higher *mens rea* than merely accidental or negligent conduct. *Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004).
- G. *Theft or Burglary Offenses.*** 8 U.S.C. § 1101(a)(43)(G) provides that “a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year” is an aggravated felony.
- The INA provides no definition or cross-reference to another part of the United States Code to define “a theft offense,” “receipt of stolen property,” or “burglary offense.”
 - The generally accepted judicial definition of burglary is: an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime.
 - The generally accepted judicial definition of theft is: the taking of property or an exercise of control over property without consent with the criminal intent to deprive the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent.
- H. *Crimes Relating to Ransom Demands or Receipt.*** 8 U.S.C. § 1101(a)(43)(H) provides that “an offense described in” 18 U.S.C. §§ 875, 876, 877, or 1202 “(relating to the demand for or receipt of ransom)” is an aggravated felony.
- I. *Child Pornography.*** 8 U.S.C. § 1101(a)(43)(I) provides that “an offense described in [18 U.S.C. §§ 2251, 2251A, or 2252] (relating to child pornography)” is an aggravated felony.
- J. *Racketeering and Gambling Offenses.*** 8 U.S.C. § 1101(a)(43)(J) provides that “an offense described in [18 U.S.C. § 1962] (relating to racketeer influenced corrupt organizations), or an offense described in [18 U.S.C. § 1084] (if it is a second or subsequent offense) or [18 U.S.C. § 1955] (relating to gambling offenses), for which

a sentence of one year imprisonment or more may be imposed” is an aggravated felony.

K. *Prostitution, Peonage, Slavery, Involuntary Servitude, and Trafficking in Persons.* 8 U.S.C. § 1101(a)(43)(K) provides an offense that:

- (i) “relates to the owning, controlling, managing, or supervising of a prostitution business;”
- (ii) “is described in [18 U.S.C. §§ 2421, 2422, or 2423] (relating to transportation for the purpose of prostitution) if committed for commercial advantage; or”
- (iii) “is described in any of [18 U.S.C. §§ 1581-1585 or 1588-1591] (relating to peonage, slavery, involuntary servitude, and trafficking in persons)”

is an aggravated felony.

L. *Crimes Relating to National Defense Information, Classified Information, Sabotage, Treason, and Protection of Undercover Agents.* 8 U.S.C. § 1101(a)(43)(L) provides that an offense described in 18 U.S.C. § 793 “(relating to gathering or transmitting national defense information), [18 U.S.C. § 798] (relating to disclosure of classified information), [18 U.S.C. § 2153] (relating to sabotage) or [18 U.S.C. §§ 2381 or 2382] (relating to treason),” or 50 U.S.C. § 421 (relating to protecting the identity of undercover agents and undercover intelligence agents), is an aggravated felony.

M. *Fraud and Deceit Offenses.* 8 U.S.C. § 1101(a)(43)(M) provides “an offense that – (i) involves fraud or deceit in which the loss to the victim or victims exceeds \$10,000; or (ii) is described in [26 U.S.C. § 7201] (relating to tax evasion) in which the revenue loss to the Government exceeds \$10,000” is an aggravated felony.

- The \$10,000 loss requirement need not be an element of the statute under which the alien was convicted. *Nijhawan v Holder*, 129 S. Ct. 2294, 2298 (2009).

N. *Alien Smuggling.* 8 U.S.C. § 1101(a)(43)(N) provides that “an offense described in [8 U.S.C. § 1324(a)(1)(A) or (2)] (relating to alien smuggling)” is an aggravated felony “except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien’s spouse, child, or parent (and no other individual) to violate a provision of” the immigration laws.

- O. *Improper Entry or Reentry by an Alien Deported for an Aggravated Felony.*** 8 U.S.C. § 1101(a)(43)(O) provides that “an offense described in [8 U.S.C. §§ 1325(a) or 1326] committed by an alien who was previously deported on the basis of a conviction for an offense described in another subparagraph of this paragraph” is an aggravated felony.
- 8 U.S.C. § 1325(a) relates to entering or attempting to enter the United States at the improper time or place, eluding examination or inspection by immigration officials, or entering or attempting to enter the United States through misrepresentation or concealment of a material fact.
 - 8 U.S.C. § 1326 relates to the reentry of removed aliens.
- P. *Forging, Counterfeiting, Altering Passport or Similar Instrument.*** 8 U.S.C. § 1101(a)(43)(P) provides that “an offense (i) which either is falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument in violation of [18 U.S.C. § 1543] or is described in [18 U.S.C. § 1546(a)] (relating to document fraud) and (ii) for which the term of imprisonment is at least 12 months” is an aggravated felony “except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien’s spouse, child, or parent (and no other individual) to violate a provision of” the immigration laws.
- Q. *Failure to Appear for Service of Sentence.*** 8 U.S.C. § 1101(a)(43)(Q) provides that “an offense relating to a failure to appear by a defendant for service of sentence if the underlying offense is punishable by imprisonment for a term of 5 years or more” is an aggravated felony.
- R. *Offense of or Relating to Commercial Bribery, Counterfeiting, or Trafficking in Vehicles with Altered ID Number.*** 8 U.S.C. § 1101(a)(43)(R) provides that “an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered for which the term of imprisonment is at least one year” is an aggravated felony.
- S. *Obstruction of Justice, Perjury, or Subornation.*** 8 U.S.C. § 1101(a)(43)(S) provides that “an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year” is an aggravated felony.
- T. *Failure to Appear Before a Court to Answer to a Charge of Felony.*** 8 U.S.C. § 1101(a)(43)(T) provides that “an offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for

which a sentence of 2 years' imprisonment or more may be imposed" is an aggravated felony.

- U.** *Attempt or Conspiracy to Commit an Aggravated Felony.* 8 U.S.C. § 1101(a)(43)(U) provides that "an attempt or conspiracy to commit an offense described in this paragraph [8 U.S.C. § 1101(a)(43)]" is also an aggravated felony.

Section 3: *Relief and Protection From Removal*

Part A: Discretionary Relief

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I. Introduction.

An alien who is inadmissible or deportable may avoid removal from the United States by being granted discretionary relief from removal. The Attorney General and the Secretary of Homeland Security are authorized by Congress to grant several forms of relief, and they have delegated that authority to lower officials. An alien's criminal conduct and resulting guilty plea may

prevent him or her from qualifying for, or being granted, relief. This section outlines the most common forms of relief from removal that may provide the alien with lawful status to remain in the United States and sets forth the requirements that must be met to obtain the relief and the circumstances that bar an alien from obtaining relief. The section also includes other common forms of discretionary protection that do not provide an alien with lawful status. While it is unclear whether *Padilla* requires defense counsel to advise an alien if a plea may make the alien ineligible for these grounds of relief from removal, we include them for the reader's information.

All of the forms of relief discussed in this section are discretionary, which means that the applicant must convince the adjudicator that discretion should be exercised in favor of the applicant. For some forms of relief, the adjudicator may be guided by special policies. As a general matter, however, the adjudicator decides whether to exercise discretion by balancing the positive equities shown by the applicant against any adverse factors. Adverse factors include such matters as the alien's criminal activities or convictions, and violations or evasions of immigration law or other laws. Positive equities include the applicant's length of residence in the United States, family and personal ties in the United States, honorable military or maritime service, reputation and integration into the community, and good conduct and accomplishments while in the United States.

II. Discretionary Relief Conferring Lawful Status.

A. Cancellation of Removal for Permanent Resident Aliens and Non-Permanent Resident Aliens. Cancellation of removal is a one-time forgiveness of grounds of deportability or inadmissibility for certain lawful permanent resident ("LPR") aliens. An alien who is not a LPR may also apply for cancellation and obtain LPR status if he or she meets a more stringent set of eligibility requirements. Specific cancellation of removal provisions offering relaxed eligibility standards have been enacted for the benefit of certain classes of aliens, including battered children and spouses, *see* 8 U.S.C. § 1229b(b)(2), and aliens from Guatemala and El Salvador, *see* Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, 111 Stat. 2160, 2193 (1997), as amended by Pub. L. No. 105-139, 111 Stat. 2644 (1997).

1. Qualifying for Cancellation.

- **Lawful Permanent Residents.** An alien who is a LPR must show at least seven continuous years of residence in the United States following an admission in any status, plus five years of lawful permanent resident status. The commission of a crime that renders the alien deportable or inadmissible under 8 U.S.C. §§ 1182(a)(2), 1227(a)(2) or (a)(4), or the service of a charging document alleging that the alien is inadmissible or deportable interrupts a period of residence. 8 U.S.C. § 1229b(a) & (d)(1).

- **Non-Lawful Permanent Residents.** An alien who is not a LPR must meet stringent requirements before being considered for a grant of cancellation of removal. Those requirements, set forth in 8 U.S.C. § 1229b(b)(1), include a showing of:
 - A period of 10 years of continuous physical presence (the commission of a crime that renders the alien deportable or inadmissible under 8 U.S.C. §§ 1182(a)(2), 1227(a)(2) or (a)(4), or the service of a charging document alleging that the alien is inadmissible or deportable interrupts a period of residence);
 - A period of 10 years of “good moral character;” and
 - “[E]xceptional and extremely unusual” hardship to the alien’s parent(s), spouse, or child(ren) who are themselves either United States citizens or LPR aliens.

2. Criminal Bars to Cancellation.

- **Lawful Permanent Residents.** To qualify for cancellation of removal, a LPR alien is required to prove that he or she has not been convicted of an aggravated felony, as defined at 8 U.S.C. § 1101(a)(43), and is not inadmissible or deportable for security and related grounds under 8 U.S.C. §§ 1182(a)(3) and 1227(a)(4). 8 U.S.C. § 1229b(a)(3) & (c)(4).
- **Non-Lawful Permanent Residents.** To qualify for cancellation of removal, an applicant who is not a LPR is required to prove that he or she has not been convicted of an offense under 8 U.S.C. §§ 1182(a)(2) (criminal and related grounds), 1227(a)(2) (criminal offenses), or 1227(a)(3) (failure to register and falsification of documents), and is not inadmissible or deportable for security and related grounds under 8 U.S.C. §§ 1182(a)(3) and 1227(a)(4). 8 U.S.C. § 1229b(b)(1)(C) & (c)(4).
- **Good Moral Character.** Non-LPRs must demonstrate that they are persons of good moral character to be eligible for cancellation of removal. Whether an applicant possesses “good moral character” is a discretionary determination. The statute does not define good moral character; rather, it sets forth a non-exclusive list of circumstances that foreclose a finding of good moral character. 8 U.S.C. § 1101(f). A catchall provision makes clear that these *per se* rules are not

exclusive: “The fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character.” Pursuant to 8 U.S.C. § 1101(f), the following criminal acts preclude an alien from establishing good moral character if committed within the required period:

- At any time convicted of an aggravated felony (as defined in 8 U.S.C. § 1101(a)(43)), 8 U.S.C. § 1101(f)(8);
- Crimes involving moral turpitude (whether inadmissible or not, described in 8 U.S.C. § 1182(a)(2)(A)(i)(I)), 8 U.S.C. § 1101(f)(3);
- Controlled substance violations, except as it relates to a single offense of simple possession of 30 grams or less of marijuana (whether inadmissible or not, described in 8 U.S.C. § 1182(a)(2)(A)(i)(II) & (a)(2)(C)), 8 U.S.C. § 1101(f)(3);
- Multiple convictions resulting in cumulative sentences of at least five years’ imprisonment (whether inadmissible or not, described in 8 U.S.C. § 1182(a)(2)(B)), 8 U.S.C. § 1101(f)(3);
- Prostitution and commercialized vice (whether inadmissible or not, described in 8 U.S.C. § 1182(a)(2)(D)), 8 U.S.C. § 1101(f)(3);
- Alien smuggling (whether inadmissible or not, described in 8 U.S.C. § 1182(a)(6)(E)), 8 U.S.C. § 1101(f)(3);
- Polygamy (whether inadmissible or not, described in 8 U.S.C. § 1182(a)(10)(A)), 8 U.S.C. § 1101(f)(3);
- Habitual drunkard, 8 U.S.C. § 1101(f)(1);
- Any individual “whose income is derived principally from illegal gambling activities,” 8 U.S.C. § 1101(f)(4);
- Any individual convicted of two or more gambling offenses, 8 U.S.C. § 1101(f)(5);
- Any individual who has given false testimony in order to obtain an immigration benefit, 8 U.S.C. § 1101(f)(6);

- Any individual who has been imprisoned for an aggregate period of 180 days during the time in which he or she has to establish good moral character, regardless of when the offense or offenses for which he or she was incarcerated were committed, 8 U.S.C. § 1101(f)(7);
- Any individual who, at any time as a foreign government official, was responsible for a “particularly severe violation of religious freedom” (as described in 8 U.S.C. § 1182(a)(2)(G)), 8 U.S.C. § 1101(f)(9);
- Any individual who, at any time, participated in Nazi persecution, genocide, torture, or extrajudicial killing (as described in 8 U.S.C. § 1182(a)(3)(E)), 8 U.S.C. § 1101(f)(9).

3. Other Bars to Cancellation. An alien is ineligible for cancellation of removal if the alien was previously granted cancellation of removal, suspension of deportation under 8 U.S.C. § 1254 (repealed), or a waiver under 8 U.S.C. § 1182(c) (repealed). 8 U.S.C. § 1229b(c)(6).

B. Adjustment or Re-Adjustment of Status. Through an adjustment or re-adjustment of status, an alien present in the United States can obtain, or (in the case of re-adjustment) be permitted to retain, LPR status. In general, adjustment of status refers to the procedure for obtaining LPR status without having to leave the United States for consular processing abroad and then applying for admission as a LPR through a port of entry. 8 U.S.C. § 1255. Re-adjustment of status refers to a grant of adjustment of status to an alien who is already a LPR, principally to avoid grounds of deportability that are not also grounds of inadmissibility, such as a firearms offense or certain aggravated felonies. Specific adjustment provisions have been enacted for the benefit of certain classes of aliens from specific countries, including Cambodia (1989) (2000), the People’s Republic of China, Cuba, Haiti, Laos (1989) (2000), Nicaragua, the former Soviet Union, Syria, and Vietnam (1989) (2000). Generally, adjustment of status under any of these country-specific provisions requires physical presence in the United States on or before a fixed date.

1. Qualifying for Adjustment or Re-Adjustment of Status. Adjustment of status requires an applicant to establish that an immigrant visa is immediately available to him or her. As a practical matter, this means that the alien must be the beneficiary of an approved petition for an immigrant visa, be able to show that the visa number is current, and that the alien is not inadmissible under any provision of law. To qualify for adjustment or re-adjustment under the general adjustment of status provision, 8 U.S.C. § 1255(a), the alien must have been inspected and admitted or paroled into the United States, rather

than having entered illegally. Adjustment under 8 U.S.C. § 1255(i), enacted in 1994 and amended several times, is available irrespective of the form of the alien's entry, but is limited to aliens who are beneficiaries of a visa petition or application for labor certification (in most cases, the first filing required for an employment-based immigration preference) filed on or before April 30, 2001.

2. **Criminal Bars to Adjustment or Re-Adjustment of Status.** Because eligibility for adjustment of status requires the alien to be admissible, any crime that renders an alien inadmissible also makes the alien ineligible for adjustment of status, unless the alien is eligible for and can obtain a waiver of the inadmissibility ground. *See* Section 2, part A (addressing the criminal grounds of inadmissibility).
3. **Other Bars to Adjustment of Status.** Subject to narrow exceptions, an alien is barred from being granted adjustment of status for a period of 10 years from the date of entry of an *in absentia* order of removal. 8 U.S.C. § 1229a(b)(7). An alien is also barred from being granted adjustment of status for a period of 10 years from the date that the alien fails to depart the United States in accordance with any grant of voluntary departure. 8 U.S.C. § 1229c(d)(1)(B). An alien may also be barred from adjusting status if he or she entered the United States through a visa waiver program. 8 U.S.C. §§ 1187(b)(2) and 1255(c)(4). An alien deportable under 8 U.S.C. § 1227(a)(4)(B) (terrorist activities) may also be ineligible for adjustment of status. 8 U.S.C. § 1255(c)(6).

C. **Adjustment of Status for Asylees and Refugees Under 8 U.S.C. § 1159.** An alien admitted to the United States as a refugee or granted asylum while in the United States may obtain LPR status.

1. **Qualifying for Adjustment of Status Under 8 U.S.C. § 1159.** Adjustment of status under this provision requires, among other things, that an alien admitted as a refugee or granted asylum be physically present in the United States for at least one year and otherwise be admissible. An alien admitted as a refugee who has already acquired LPR status is not eligible to readjust. 8 U.S.C. § 1159(a)(1)(C). An alien granted asylum is not eligible to adjust unless he or she continues to be a refugee within the meaning of 8 U.S.C. § 1101(a)(42)(A) and has not firmly resettled in a foreign country. 8 U.S.C. § 1159(b).
2. **Criminal Bars to Adjustment of Status Under 8 U.S.C. § 1159.** Because eligibility for adjustment of status under this provision requires the alien to be admissible, any crime that renders an alien inadmissible also makes the

alien ineligible for adjustment of status. Most grounds of inadmissibility either do not apply to aliens seeking to adjust under 8 U.S.C. § 1159 or can be waived for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest. 8 U.S.C. § 1159(c). Aliens inadmissible for offenses relating to illicit trafficking in a controlled substance under 8 U.S.C. § 1182(a)(2)(C) or offenses relating to national security, terrorism, Nazi persecution, torture, extrajudicial killings, and genocide under 8 U.S.C. § 1182(a)(3)(A), (B), (C), & (E) are not eligible for a waiver. 8 U.S.C. § 1159(c).

D. Waiver of Inadmissibility Under 8 U.S.C. § 1182(h). Pursuant to 8 U.S.C. § 1182(h), INA § 212(h) (“section 212(h)”), the Attorney General or Secretary may waive the application of particular grounds of inadmissibility in 8 U.S.C. § 1182, including inadmissibility resulting from criminal conduct. A grant of a section 212(h) waiver, by itself (in the case of certain LPRs seeking admission) or in conjunction with a grant of adjustment of status or re-adjustment of status, may permit an alien to avoid removal based on convictions for particular types of crimes when those crimes are also grounds of inadmissibility.

- 1. Qualifying for Section 212(h) Waiver.** An alien may qualify for a section 212(h) waiver in a variety of ways, but the most common is where the alien is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence, and the alien establishes that denying him or her admission to the United States would result in extreme hardship to such person(s). *See* 8 U.S.C. § 1182(h)(1)(A)-(C). For an alien previously admitted to the United States as a LPR to qualify for a section 212(h) waiver, he or she must have resided continuously in the United States for a period of at least 7 years immediately preceding the date of initiation of removal proceedings.
- 2. Classes of Criminal Activity Whose Consequences May Be Waived Under Section 212(h).** A section 212(h) waiver may be used to waive application of grounds of inadmissibility stemming from crimes involving moral turpitude, multiple criminal convictions resulting in cumulative sentences of at least five years’ imprisonment, prostitution and commercialized vice-related activities, and assertions of immunity from prosecution. The waiver also applies to grounds of inadmissibility based on a conviction for violating a law relating to a controlled substance, but the waiver is limited to a single offense of simple possession of 30 grams or less of marijuana.

3. **Criminal Bars to Section 212(h) Waiver.** An alien may not be granted a section 212(h) waiver if he or she has been convicted of, or admitted committing or conspiring to commit, acts that constitute murder or criminal acts involving torture. An alien may also not be granted a section 212(h) waiver if he or she was previously admitted to the United States as a LPR alien and, since the date of admission, has been convicted of an aggravated felony.

III. Discretionary Relief Not Conferring Lawful Status.

A. **Temporary Protected Status.** Temporary protected status (“TPS”) stays or delays an alien’s removal for six to eighteen months if his or her home country has been designated by the United States Government to be unsafe due to armed conflict, natural disaster, or extraordinary temporary conditions. 8 U.S.C. § 1254a. Countries whose nationals are eligible for TPS are published in the Federal Register. An alien granted TPS may not be deported during the authorized time period and can obtain employment authorization.

1. **Limits on Applying for Temporary Protected Status.** An alien may not apply for TPS unless he or she has been in the United States continuously since his or her home country was designated for that status. 8 U.S.C. § 1254a(c)(1)(A).

2. **Bars to Temporary Protected Status.** The following classes of aliens are ineligible for TPS:

- An alien who is inadmissible to the United States. Most grounds of inadmissibility can be waived for humanitarian purposes, to ensure family unity, or when otherwise in the public interest. Several grounds, however, may not be waived, including a crime involving moral turpitude, a controlled substance offense, two or more offenses with an aggregate sentence of 5 years or more, a drug trafficking offense (with a limited exception), or offenses relating to national security. 8 U.S.C. § 1254a(c)(2)(A).
- An alien who has been convicted of any felony or of two or more misdemeanors. 8 U.S.C. § 1254a(c)(2)(B).

B. **Voluntary Departure.** If an alien is inadmissible or deportable from the United States, the alien may request, either prior to the conclusion of the removal proceedings or at the conclusion of the proceedings, the privilege of departing the United States voluntarily at his or her own expense. 8 U.S.C. § 1229c. Opting for voluntary departure over removal has several advantages, including that the alien

may choose (within limits) the time and manner of departure and the destination to which the alien will travel. One of the most significant advantages is that the alien will not be subjected to a bar on readmission that applies to aliens who are deported. See 8 U.S.C. § 1182(a)(9)(A).

1. **Pre-Hearing Voluntary Departure.** If an alien requests voluntary departure prior to the completion of proceedings, an immigration judge may grant up to 120 days of voluntary departure. An alien convicted of an aggravated felony offense or deportable for terrorist activities (8 U.S.C. § 1227(a)(2)(A)(iii) & (a)(4)(B)) is not eligible for pre-hearing voluntary departure. 8 U.S.C. § 1229c(a).

2. **Post-Hearing Voluntary Departure.** If the alien requests voluntary departure at the conclusion of a removal proceeding, the immigration judge may grant up to 60 days of voluntary departure. 8 U.S.C. § 1229c(b). To qualify for post-hearing voluntary departure, an alien must:
 - Be physically present in the United States for at least one year immediately preceding the date the alien is served with the notice to appear;
 - Be a person of good moral character (as defined above) for at least 5 years immediately preceding the application for voluntary departure;
 - Not be deportable as an aggravated felon or based on security and related grounds (8 U.S.C. § 1227(a)(2)(A)(iii) & (a)(4)); and
 - Have the means and the intent to depart the United States.

3. **Consequences of Failing to Comply with Grant of Voluntary Departure.** An alien who fails to depart after being granted voluntary departure is subject to fines and is ineligible for a period of 10 years from receiving cancellation of removal, adjustment of status, and other forms of relief from removal. 8 U.S.C. § 1229c(d). Since 2007, however, an alien who files a motion to reopen, motion to reconsider, or petition for judicial review before the period of voluntary departure expires is not subject to this bar because the alien's act is deemed to terminate the grant of voluntary departure. 8 C.F.R. § 1240.26(e)(1) & (i).

Section 3: *Relief and Protection from Removal*

Part B: Relief and Protection from Removal Based on a Fear of Persecution or Torture

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 - A. Asylum**
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 - B. Withholding of Removal**
 - 1. General**
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 - 3. Particularly Serious Crime**
 - C. Protection Under the Convention Against Torture**
 - 1. General**
 - 2. No Criminal Bars to Torture Protection**
-

I. Introduction.

An alien who is inadmissible or deportable may also seek relief or protection based on a fear of persecution (and in some limited circumstances past persecution alone) or torture in his or her home country. Relief from removal based on a well-founded fear of persecution is discretionary and may lead to lawful permanent resident status in the United States. There are also mandatory, non-discretionary forms of protection from removal available to an alien who proves that it is more likely than not that he or she will be persecuted or tortured. Except for asylum, these forms of protection do not provide the alien with lawful status while he or she remains in the United States. An alien's criminal conduct and resulting guilty plea may prevent him or her from qualifying for, or being granted, these various forms of relief or protection. This section provides a brief description of these forms of relief and protection from removal, their requirements, and their bars and exceptions. While it is unclear whether *Padilla* requires defense counsel to advise an alien if a plea may make the alien ineligible for these grounds of relief and protection from removal, we include them for the reader's information.

II. Relief and Protection from Removal Based on a Fear of Persecution or Torture.

A. Asylum. An alien who establishes that he or she is unable or unwilling to return to his or her home country (or, if the alien is stateless, the country of last habitual residence) because of past persecution or a “well-founded fear” of future persecution in that country may be granted asylum. 8 U.S.C. § 1158. Asylum is discretionary and, as with other forms of relief discussed in Part A of this section, can be denied even if the statutory requirements are met.

1. General. The persecution (or feared persecution) must be motivated by the applicant’s race, religion, nationality, membership in a particular social group, or political opinion (imputed or actual). 8 U.S.C. § 1101(a)(42). Asylum is not permanent and may be terminated under certain circumstances. 8 U.S.C. § 1158(c)(2). However, an asylee cannot be removed from the United States while in that status, and may apply for lawful resident alien status a year after being granted asylum. *See* 8 U.S.C. § 1159. To be granted LPR status, the asylee must establish that he or she is not inadmissible, or obtain an asylum-specific waiver of inadmissibility. *See* 8 U.S.C. § 1159(c). An asylee’s immediate family (the asylee’s spouse and unmarried children under 21 years of age) may obtain asylum through the asylee. Asylees may obtain employment authorization and permission to travel abroad.

2. Limits on Applying for Asylum. Generally, an alien is expected to apply for asylum within a year of arriving in the United States, and may not file successive applications (*i.e.*, must not have previously applied for asylum and had such application denied). An alien may be considered for asylum notwithstanding these limits, however, if the alien demonstrates changed circumstances that materially affect his or her eligibility for asylum, or extraordinary circumstances relating to his or her delay in filing an application within the one-year filing period. 8 U.S.C. § 1158(a)(2)(D).

3. Exceptions and Bars to Asylum. The following classes of aliens are not eligible for asylum:

- Aliens who have persecuted others, 8 U.S.C. § 1158(b)(2)(A)(i);
- Aliens who have been convicted of a “particularly serious” crime, constituting a danger to the community, 8 U.S.C. § 1158(b)(2)(A)(ii);
- Aliens who have committed a serious nonpolitical crime outside the United States, 8 U.S.C. § 1158(b)(2)(A)(iii);

- Aliens who pose a danger to the security of the United States, 8 U.S.C. § 1158(b)(2)(A)(iv);
- With limited exceptions, aliens who are tied to terrorist activities, 8 U.S.C. § 1158(b)(2)(A)(v); and
- Aliens who have “firmly resettled” in another country before coming to the United States, 8 U.S.C. § 1158(b)(2)(A)(vi).

4. **Particularly Serious Crime.** For purposes of asylum eligibility, all aggravated felony offenses are expressly declared by statute to be “particularly serious” crimes constituting a danger to the community. 8 U.S.C. § 1158(b)(2)(B)(i). Other crimes may also be determined to be “particularly serious,” considering (i) the nature or elements of the offense; (ii) the circumstances and underlying facts of the conviction; and (iii) the type of sentence imposed. Crimes against the person are likely considered “particularly serious” crimes constituting a danger to the community, as are aggravated property offenses and drug trafficking crimes. A crime for which no term of imprisonment is imposed may also be considered a “particularly serious” crime, depending on its nature and underlying circumstances.

B. Withholding of Removal. Unless an exception applies, an alien who can establish a “clear probability” that his or her life or freedom would be threatened in a particular country because of the alien’s race, religion, nationality, membership in a particular social group, or political opinion (actual or imputed) may not be returned to that country. 8 U.S.C. § 1231(b)(3). If an alien qualifies for withholding of removal, the grant is mandatory and cannot be denied in the exercise of discretion.

1. **General.** An inadmissible or deportable alien who obtains withholding of removal to a particular country may be removed from the United States to any other country that will receive the alien, but as a practical matter, removal to such countries is relatively rare. An alien granted withholding of removal may be granted work authorization. A grant of withholding of removal is not a form of lawful status, however, and an alien granted withholding is not entitled for that reason to be re-admitted to the United States if he or she travels internationally.

2. **Exceptions and Bars to Withholding of Removal.** The following classes of aliens are ineligible for withholding of removal:

- Aliens who have persecuted others, 8 U.S.C. § 1231(b)(3)(B)(i);

- Aliens who have been convicted of a “particularly serious” crime, constituting a danger to the community, 8 U.S.C. § 1231(b)(3)(B)(ii);
- Aliens who have committed a serious nonpolitical crime outside the United States, 8 U.S.C. § 1231(b)(3)(B)(iii); and
- Aliens who pose a danger to United States security, 8 U.S.C. § 1231(b)(3)(B)(iv), including aliens who are deportable under 8 U.S.C. § 1227(a)(4)(B) & (D) (involving terrorist activities, Nazi persecution, genocide, commission of torture or extrajudicial killing).

3. **Particularly Serious Crime.** A particularly serious crime constituting a danger to the community pursuant to 8 U.S.C. § 1231(b)(3)(B)(ii) includes an aggravated felony for which a 5-year or longer sentence is ordered (whether imposed or suspended). 8 U.S.C. § 1231(b)(3)(B). Other crimes may also be determined to be “particularly serious,” considering: (i) the nature or elements of the offense; (ii) the circumstances and underlying facts of the conviction; and (iii) the type of sentence imposed. Crimes against the person are likely to be considered “particularly serious” crimes constituting a danger to the community, as are aggravated property offenses and drug trafficking crimes. A crime for which no term of imprisonment is imposed may also be considered “particularly serious,” depending on its nature and underlying circumstances.

C. **Protection Under the Convention Against Torture.** Under regulations implementing certain protections under the United Nations Convention Against Torture, 1465 U.N.T.S. 85, G.A. Res. 39/46, 39th Sess., U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984), an alien may not be returned to a country where it is “more likely than not” that the alien will be tortured. “Torture” is defined as “an extreme form of cruel and inhuman treatment” that “must cause severe pain or suffering.” To qualify for a grant of protection, the alien must show that the torture will be inflicted by or at the instigation of, or with the consent or acquiescence of a public official or person acting in an official capacity. *See generally* 8 C.F.R. §§ 208.18 and 1208.18. If an alien qualifies for torture protection, the grant is mandatory and cannot be denied in the exercise of discretion.

1. **General.** An inadmissible or deportable alien granted protection under the Convention Against Torture regulations may be removed from the United States to another country that will receive the alien, but in practice, such removals are relatively rare. An alien granted protection may be given work authorization. A grant of protection is not a form of lawful status, however, and an alien granted such protection is not entitled for that reason to be re-admitted to the United States if he or she travels internationally.

2. **No Criminal Bars to Torture Protection.** An alien may apply for protection under the Convention Against Torture regulations regardless of the ground of removability or the severity of his or her criminal conduct. Accordingly, even an alien convicted of an aggravated felony remains eligible for torture protection. *See* 8 C.F.R. § 1208.17(a) (providing for deferral of removal under the Convention Against Torture).

Section 4: *Other Immigration Consequences of Guilty Pleas*

- I. Introduction**
- II. Restrictions on Readmission to the United States**
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I. Introduction.

Beyond removability and ineligibility for relief, a guilty plea may implicate other immigration consequences. This section discusses some of these consequences, including restrictions on readmission to the United States and judicial review, ineligibility for naturalization,

mandatory detention, exposure to summary removal, and enhanced sentences for criminal reentry. While it is unclear whether *Padilla* requires defense counsel to advise an alien of these consequences, we include them for the reader's information.

II. Restrictions on Readmission to the United States.

The Immigration and Nationality Act ("INA") provides that aliens who have been convicted of certain crimes face restrictions on readmission.

A. Aliens Convicted of Aggravated Felonies.

- An alien who: (1) has been convicted of an aggravated felony; (2) has been ordered removed; and (3) again seeks admission is **inadmissible at any time** he or she seeks admission. By contrast, aliens previously removed who have not been convicted of aggravated felonies do not face a permanent bar to readmission but instead face a 5-year bar (arriving aliens), 10-year bar (aliens other than arriving aliens), or a 20-year bar (in the case of a second or subsequent removal). *See* 8 U.S.C. § 1182(a)(9)(A)(i) & (ii).
- **Exception:** Although ineligible for readmission, an alien convicted of an aggravated felony (and other aliens), may apply to the Attorney General for consent to apply for readmission. 8 U.S.C. § 1182(a)(9)(A)(iii). An alien must apply for such advance consent from outside of the United States.

B. Aliens Whose Criminal Conduct or Convictions Make Them Inadmissible.

In addition to aliens convicted of aggravated felonies, aliens who commit crimes that make them inadmissible face restrictions on readmission because of their inadmissibility. The grounds of inadmissibility presented below have already been discussed previously in Section 2, Part A. But we reference them again to emphasize that a plea which renders an alien inadmissible not only may result in a risk of removal, but also may restrict an alien's readmission to the United States. In fact, it is not necessary for an alien to be placed in removal proceedings to trigger the bar to readmission. If an alien is convicted of, or commits an inadmissible offense, and thereafter voluntarily departs the United States, even on a short trip, he or she is inadmissible to return because of the offense. Finally, in some instances (as noted below), no waiver is available for an alien who is outside of the United States to cure the ground of inadmissibility.

The following aliens are inadmissible, and therefore ineligible to apply for readmission unless a waiver of inadmissibility is available, and the Attorney General, in his or her discretion, grants such waiver.

1. *Controlled Substance Offenses.*

- Any alien who the consular officer or Attorney General knows or has reason to believe is or has been an illicit trafficker in any controlled substance or in any listed chemical (as defined in 21 U.S.C. § 802), is inadmissible. 8 U.S.C. § 1182(a)(2)(C)(i).
- Any alien who the consular officer or Attorney General knows or has reason to believe is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any controlled or listed substance or chemical, or endeavored to do so, is inadmissible. 8 U.S.C. § 1182(a)(2)(C)(i).
- A spouse, son or daughter of an alien covered in section 1182(a)(2)(C)(i) who has, within the previous 5 years, benefitted from the illicit activity of the alien described in (C)(i), and knew or reasonably should have known that the benefit was illicit, is inadmissible. 8 U.S.C. § 1182(a)(2)(C)(ii).
- Any alien who is determined by the immigration authorities to be a drug abuser or addict is inadmissible. 8 U.S.C. § 1182(a)(1)(A)(iv).
- Any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of a violation of (or a conspiracy or attempt to violate) any law or regulation relating to a controlled substance, is inadmissible. 8 U.S.C. § 1182(a)(2)(A)(i)(II).
- **Note:** For these drug offenses, there is no waiver of inadmissibility available (except as it relates to a single offense of simple possession of 30 grams or less of marijuana). See 8 U.S.C. § 1182(h).

2. *Fraud or Misrepresentation.*

- Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or sought to procure or has procured) a visa, other documentation, or admission into the United States or other immigration benefit is inadmissible. 8 U.S.C. § 1182(a)(6)(C)(i).
Note: A waiver of this ground of inadmissibility may be granted in

the discretion of the Attorney General if the alien is eligible. See 8 U.S.C. § 1182(i).

- Any alien who is the subject of a final order for a violation of 8 U.S.C. § 1324c (document fraud) is inadmissible. 8 U.S.C. § 1182(a)(6)(F)(i). **Note:** A waiver of this ground of inadmissibility may be granted in the discretion of the Attorney General if the alien is eligible. 8 U.S.C. § 1182(a)(6)(F)(ii).
3. ***False Claim to United States Citizenship.*** Any alien who falsely represents himself or herself to be a U.S. citizen for any purpose or immigration benefit is inadmissible. 8 U.S.C. § 1182(a)(6)(C)(ii)(I). This does not include representations of citizenship made by an alien who reasonably believed that he or she was a citizen at the time of the representation as long as the alien's parents (natural or adopted) are or were citizens and the alien permanently resided in the United States prior to the age of sixteen. 8 U.S.C. § 1182(a)(6)(C)(ii)(II). **Note:** There is no waiver available for this ground.
4. ***Alien Smuggling.*** Any alien who at any time knowingly has encouraged, induced, assisted, abetted or aided any other alien to enter or to try to enter the United States in violation of law is inadmissible. 8 U.S.C. § 1182(a)(6)(E)(i). **Note:** There is a limited exception for this ground of inadmissibility on the basis of family reunification, 8 U.S.C. § 1182(a)(6)(E)(ii), and there is a limited waiver at the discretion of the immigration authorities to assure family unity or when it is in the public interest, 8 U.S.C. § 1182(a)(6)(E)(iii).
5. ***Other Grounds of Inadmissibility Restricting Readmission.*** Any alien who falls within the following grounds is inadmissible.
- Crimes involving moral turpitude (or an attempt or conspiracy to commit such a crime), 8 U.S.C. § 1182(a)(2)(A)(i)(I). **Note:** There are two exceptions to this ground of inadmissibility: the juvenile and petty offense exceptions. 8 U.S.C. § 1182(a)(2)(A)(ii)(I) & (ii)(II).
 - Multiple criminal convictions resulting in cumulative sentences of at least 5 years' imprisonment, 8 U.S.C. § 1182(a)(2)(B).
 - Prostitution-related offenses, 8 U.S.C. § 1182(a)(2)(D).
 - **Note:** For the three crimes above, there is waiver of inadmissibility at 8 U.S.C. § 1182(h) that aliens may be eligible to apply for, and the

Attorney General may grant in his or her discretion (*see* Section 3 for a summary of the eligibility requirements for a 212(h) waiver).

- Threats by an alien with a physical or mental disorder, 8 U.S.C. § 1182(a)(1)(A)(iii). **Note:** A waiver of this ground may be granted at the discretion of the Attorney General. 8 U.S.C. § 1182(g)(3).
- Human trafficking-related offenses, 8 U.S.C. § 1182(a)(2)(H). **Note:** There is a limited exception to this ground of inadmissibility for a son or daughter who was a “child” at the time of receiving a benefit from the illicit activity of his or her parent. 8 U.S.C. § 1182(a)(2)(H)(iii).
- Money laundering, 8 U.S.C. § 1182(a)(2)(I). **Note:** There is no waiver available for this ground.
- Espionage, Sabotage, Treason, and Terrorism, 8 U.S.C. § 1182(a)(3)(A), (B) & (F). **Note:** There is a limited exception to the terrorist ground of inadmissibility for a spouse or child of the inadmissible alien. 8 U.S.C. § 1182(a)(3)(B)(ii).
- Polygamy, 8 U.S.C. § 1182(a)(10)(A). **Note:** There is no waiver available for this ground.
- International Child Abduction, 8 U.S.C. § 1182(a)(10)(C). **Note:** There are exceptions, including instances where a child is abducted to a country that is a party to the Hague Convention.
- Unlawful Voters, 8 U.S.C. § 1182(a)(10)(D)(i). **Note:** There is an exception for an alien who reasonably believed that he or she was a citizen at the time of the unlawful voting, subject to certain requirements. 8 U.S.C. § 1182(a)(10)(D)(ii).

III. Mandatory Detention.

Some criminal convictions may trigger mandatory detention provisions in the INA. In such cases, detention is mandatory while removal proceedings are pending. 8 U.S.C. § 1226(a) & (c)(1). Specifically, aliens who fall within the following grounds of inadmissibility or deportability may be subject to mandatory detention:

- A. Criminal and Related Grounds of Inadmissibility.** 8 U.S.C. § 1182(a)(2) (various grounds of inadmissibility based on crimes involving moral turpitude, drug offenses, multiple convictions resulting in cumulative sentences of at least 5 years’ imprisonment, prostitution, human trafficking, and money laundering);

- B. Multiple Criminal Convictions, Aggravated Felonies, Controlled Substance Violations, Firearm Offenses, and Miscellaneous Crimes.** 8 U.S.C. § 1227(a)(2)(A)(ii), (iii), (B), (C), & (D) (various grounds of deportability including two crimes involving moral turpitude, aggravated felonies, drug offenses, firearm offenses, and certain crimes relating to treason, sabotage, espionage);
- C. Crimes Involving Moral Turpitude.** 8 U.S.C. § 1227(a)(2)(A)(i) (ground of deportability for a crime involving moral turpitude for which the alien has been sentenced to a term of imprisonment of at least one year and if committed within five years (or ten years in the case of a lawful permanent resident provided status under 8 U.S.C. § 1255(j)) after the date of admission);
- D. Terrorist and Related Activities.** 8 U.S.C. § 1182(a)(3)(B) (ground of inadmissibility for terrorist activities), or 8 U.S.C. § 1227(a)(4)(B) (ground of deportability based on terrorist and related activities).

Note: Even where an alien's crime does not require his or her mandatory detention, the crime is an adverse factor that reduces the chance the alien will be released on bond at the discretion of the Attorney General and his or her delegates. *See* 8 U.S.C. § 1226(a) (providing the Attorney General with discretion to release an alien on bond pending removal proceedings).

IV. Bar to Naturalization.

Aliens who have committed certain crimes are ineligible for naturalization. Typically, in order to be eligible for naturalization, applicants must establish good moral character in the five years preceding their application, and in the period between their application and admission to citizenship. 8 U.S.C. § 1427(a). Pursuant to 8 U.S.C. § 1101(f), the following criminal acts preclude an alien from establishing good moral character if committed within the required periods:

- At any time convicted of an aggravated felony (as defined in 8 U.S.C. § 1101(a)(43)), 8 U.S.C. § 1101(f)(8);
- Crimes involving moral turpitude (whether inadmissible or not, described in 8 U.S.C. § 1182(a)(2)(A)(i)(I)), 8 U.S.C. § 1101(f)(3);
- Controlled substance violations, except as it relates to a single offense of simple possession of 30 grams or less of marijuana (whether inadmissible or not, described in 8 U.S.C. § 1182(a)(2)(A)(i)(II) & (a)(2)(C)), 8 U.S.C. § 1101(f)(3);
- Multiple convictions resulting in cumulative sentences of at least five years' imprisonment (whether inadmissible or not, described in 8 U.S.C. § 1182(a)(2)(B)), 8 U.S.C. § 1101(f)(3);

- Prostitution and commercialized vice (whether inadmissible or not, described in 8 U.S.C. § 1182(a)(2)(D)), 8 U.S.C. § 1101(f)(3);
- Alien smuggling (whether inadmissible or not, described in 8 U.S.C. § 1182(a)(6)(E)), 8 U.S.C. § 1101(f)(3);
- Polygamy (whether inadmissible or not, described in 8 U.S.C. § 1182(a)(10)(A)), 8 U.S.C. § 1101(f)(3);
- Habitual drunkard, 8 U.S.C. § 1101(f)(1);
- Any individual “whose income is derived principally from illegal gambling activities,” 8 U.S.C. § 1101(f)(4);
- Any individual convicted of two or more gambling offenses, 8 U.S.C. § 1101(f)(5);
- Any individual who has given false testimony in order to obtain an immigration benefit, 8 U.S.C. § 1101(f)(6);
- Any individual who has been imprisoned for an aggregate period of 180 days during the time in which he or she has to establish good moral character, regardless of when the offense or offenses for which he or she was incarcerated were committed, 8 U.S.C. § 1101(f)(7);
- Any individual who, at any time as a foreign government official, was responsible for a “particularly severe violation of religious freedom” (as described in 8 U.S.C. § 1182(a)(2)(G)), 8 U.S.C. § 1101(f)(9);
- Any individual who, at any time, participated in Nazi persecution, genocide, torture, or extrajudicial killing (as described in 8 U.S.C. § 1182(a)(3)(E)), 8 U.S.C. § 1101(f)(9).

Additionally, acts committed by the applicant outside the required statutory periods specified above may be considered in adjudicating the application for naturalization, and may render an applicant ineligible for naturalization as a matter of discretion. 8 U.S.C. § 1427(e). Furthermore, the fact that the applicant does not fall within any of the *per se* categories listed above does not preclude a finding that such person is or was not of good moral character. *See* 8 U.S.C. § 1101(f). Finally, any of the acts described above, if committed before an alien naturalizes, can be a basis for denaturalization. 8 U.S.C. § 1451(a). Failing to disclose such acts or making false statements regarding them on the naturalization application or during the interview, may also be independent grounds for denaturalization.

V. Restriction on Judicial Review.

Certain criminal aliens (*i.e.* aliens who commit crimes that subject them to removal) are barred from seeking judicial review of their removal orders, except to the extent they raise challenges to their removability and certain questions of law or constitutional claims. *See* 8 U.S.C. § 1252(a)(2)(C) & (D). Specifically, aliens who fall within the following grounds of inadmissibility or deportability, and are subject to this judicial review bar, are precluded from seeking judicial review of non-legal questions:

- A. **Criminal and Related Grounds of Inadmissibility.** 8 U.S.C. § 1182(a)(2) (various grounds of inadmissibility based on crimes involving moral turpitude, drug offenses, multiple convictions resulting in cumulative sentences of at least 5 years' imprisonment, prostitution, human trafficking and money laundering);
- B. **Aggravated Felonies, Controlled Substance Violations, Firearm Offenses, and Miscellaneous Crimes.** 8 U.S.C. § 1227(a)(2)(A)(iii), (B), (C), (D) (various grounds of deportability including aggravated felonies, drug offenses, firearm offenses, and certain crimes relating to treason, sabotage, espionage);
- C. **Multiple Criminal Convictions.** 8 U.S.C. § 1227(a)(2)(A)(ii) (ground of deportability based on two crimes involving moral turpitude for which both offenses are, without regard to their date of conviction, otherwise covered in 8 U.S.C. § 1227(a)(2)(A)(i), which is the ground of deportability based on one crime involving moral turpitude).

VI. Exposure to Summary Removal.

Aliens who commit certain crimes may be subject to summary removal, *i.e.*, they will not have the opportunity to go before an immigration judge to apply for discretionary immigration relief, other than to assert claims that they fear persecution or torture.

- A. **Aliens Convicted of Aggravated Felonies Who Are Not Lawful Permanent Residents, Asylees, or Refugees.**
 - These aliens are subject to “administrative removal” under 8 U.S.C. § 1228(b).
 - The removal cases are heard before Department of Homeland Security (“DHS”) officers rather than immigration judges, and the aliens are ineligible for discretionary relief. 8 U.S.C. § 1228(b)(5); 8 C.F.R. § 238.1.
 - Such aliens, however, may raise a claim of persecution or torture, and if a DHS officer finds the fear to be reasonable, the alien is referred for a full

hearing before an immigration judge to apply for withholding of removal (if eligible) and protection under the Convention Against Torture. 8 C.F.R. §§ 238.1(f)(3) and 208.31.

B. Aliens Who Illegally Enter the United States After Previously Being Deported.

- These aliens are subject to “reinstatement of removal” under 8 U.S.C. § 1231(a)(5).
- The removal cases are heard before DHS officers rather than immigration judges, and the aliens are ineligible for relief. 8 U.S.C. § 1231(a)(5).
- Such aliens, however, may raise a claim of persecution or torture, and if a DHS officer finds the fear to be reasonable, the alien is referred for a full hearing before an immigration judge to apply for withholding of removal (if eligible) and protection under CAT. 8 C.F.R. §§ 241.8(e) and 208.31.

VII. Enhanced Criminal Penalties for Unlawful Reentry By Aliens Who Have Committed Certain Crimes.

Aliens who have been removed from the United States face criminal prosecution if they re-enter, attempt to re-enter, or are found in the United States. 8 U.S.C. § 1326. Generally, such aliens may be imprisoned for **not more than two years** and may assert a defense to prosecution if they obtain advance permission from the Attorney General to reapply for admission, or establish that such advance consent was not required. 8 U.S.C. § 1326(a).

Aliens whose removal was subsequent to a conviction for certain crimes, however, face enhanced sentences as set forth below and may be ineligible for advanced consent for readmission.

- An aggravated felony - alien may be imprisoned for not more than **20 years**, 8 U.S.C. § 1326(b)(2).
- A felony (other than an aggravated felony) - alien may be imprisoned for not more than **10 years**, 8 U.S.C. § 1326(b)(1).
- Three or more misdemeanors involving drugs, crimes against the person, or both - alien may be imprisoned for not more than **10 years**, 8 U.S.C. § 1326(b)(1).
- Additionally, aliens convicted of certain non-violent crimes who are removed prior to completion of their prison sentence pursuant to 8 U.S.C. § 1231(a)(4)(B) face enhanced sentences. These aliens may be imprisoned for not more than **10 years**, and may assert a defense based on advance consent. 8 U.S.C. § 1326(b)(4).

Section 5: *Brief Overview of Criminal Law-Related Amendments to the Immigration and Nationality Act*

- I. Introduction**
 - II. The Immigration and Nationality Act of 1952**
 - III. The 1986 and 1988 Amendments**
 - IV. The Immigration Act of 1990**
 - V. The Miscellaneous and Technical Immigration and Naturalization Amendments of 1991**
 - VI. The Immigration and Technical Corrections Act of 1994**
 - VII. Act of August 26, 1994 (Pertaining to Adjustment of Status under 8 U.S.C. § 1255(i) and Subsequent Acts Regarding 8 U.S.C. § 1255(i))**
 - VIII. The Antiterrorism and Effective Death Penalty Act of 1996**
 - IX. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996**
 - X. The REAL ID Act of 2005**
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I. Introduction.

The Supreme Court's holding in *Padilla* is likely to result in collateral challenges to pre-*Padilla* convictions based on ineffective assistance of counsel. If courts conclude that *Padilla*'s holding applies retroactively, thus enabling aliens to raise such challenges, the adequacy of defense counsel's advice will be determined in large part by an analysis of the law existing at the time of the plea. This section offers the reader a broad narrative of how that law has changed as it relates to the immigration consequences of a guilty plea by describing some of the most significant amendments to the Immigration and Nationality Act ("INA") over the last few decades. This section is not an exhaustive summary for every change in the INA during this period of time. The reader should also research the case law and legislative history.

II. The Immigration and Nationality Act of 1952.

The nation's earliest immigration laws were animated by the primary objectives of public welfare and national security. *See, e.g.*, Naturalization Act, ch. 54, 1 Stat. 567 (1798); Page Act, ch. 141, 18 Stat. 477 (1875); Immigration Act of 1917, ch. 29, 39 Stat. 874 (repealed 1974); Immigration Act of 1921, ch. 8, 42 Stat. 5 (repealed 1952). With the Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (1952) ("1952 Act," current version at 8 U.S.C. §§ 1101, *et seq.*), Congress completely and comprehensively revised and codified the nation's laws governing

immigration, naturalization, and nationality, and, as amended in the interim, it remains in effect today.

The 1952 Act contained a few provisions concerning the regulation of criminal aliens. Criminal activities that would subject an alien to the denial of admission (“exclusion”) or deportation included, but were not limited to: (1) crimes involving moral turpitude (“CIMT”); (2) offenses relating to prostitution; (3) violations of the drug laws; and (4) offenses relating to espionage and sabotage. 1952 Act §§ 212 and 241. Criminal aliens generally remained eligible for various forms of relief from deportation, such as waivers of inadmissibility under sections 212(c) and 212(h) of the 1952 Act, judicial recommendations against deportation (“JRADs”),⁴ suspension of deportation, asylum and withholding of deportation, and voluntary departure.

III. The 1986 and 1988 Amendments.

In the late 1980s, Congress enacted a series of amendments to the INA “[i]n an effort to deal more effectively and expeditiously with the involvement of aliens in serious criminal activities, particularly narcotics trafficking.” 55 Fed. Reg. 24,858-01 (June 19, 1990). In 1986, Congress classified all controlled substances as drugs for purposes of establishing grounds of exclusion and deportation under the immigration regulations. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207. That same year, Congress established the Criminal Alien Hearing Program, which allowed immigration authorities to place a convicted criminal alien in deportation proceedings while the alien was still in criminal detention as a means to expedite deportation. Immigration Reform and Control Act of 1986 (“IRCA”), § 701, Pub. L. No. 99-603, 100 Stat. 3359 (codified at 8 U.S.C. § 1254(i) (1986)).

In 1988, Congress passed an omnibus drug enforcement law, the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (“ADAA”), which introduced the term “aggravated felony” into the immigration law lexicon and resulted in the creation of a new class of deportable criminal aliens. Section 7342 of the ADAA defined an aggravated felony as including murder, drug trafficking crimes, illicit trafficking in firearms or destructive devices, or any attempt or conspiracy to commit such acts in the United States. *See* INA § 101(a)(43) (1988). Although the ADAA did not provide an effective date for section 7342’s amendments, the Board of Immigration Appeals (“Board”) subsequently held that the aggravated felony definition applied to all convictions occurring “before, on, or after” the November 18, 1988 enactment date. *Matter of A-A-*, 20 I. & N. Dec. 492, 495 (BIA 1992).

In addition to mandating the detention of aliens convicted of aggravated felony offenses (“aggravated felons”) during the pendency of their deportation proceedings and following the completion of their criminal incarcerations, *see* ADAA § 7343(a), the ADAA: (1) rendered aliens

⁴ The Supreme Court’s decision in *Padilla v. Kentucky*, discusses the history and purpose of JRADs. 130 S. Ct. 1473, 1479-80 (2010).

deportable as aggravated felons ineligible for voluntary departure, ADAA § 7343(b); (2) reduced (from 180 to 60 days) the period within which aggravated felons could petition the courts of appeals for review of their deportation orders, ADAA § 7347(b); and (3) prohibited a deported aggravated felon from applying for admission to the United States during the ten-year period following his or her deportation, even if the alien was otherwise eligible for admission, ADAA § 7349.

IV. The Immigration Act of 1990.

On November 29, 1990, Congress enacted the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (“IMMACT90”), which broadly impacted criminal aliens, most notably in its expansion of the definition of “aggravated felony” to include:

- Any offense for money laundering, as defined in 18 U.S.C. § 1956, *see* IMMACT90 § 501(a)(3);
- “[C]rimes of violence,” as defined in 18 U.S.C. § 16 (but not including “purely political offense[s]”), for which “the term of imprisonment imposed (regardless of any suspension of such imprisonment) is at least five years,” *see* IMMACT90 § 501(a)(3); and
- Additional grounds of controlled substance trafficking, *see* IMMACT90 § 501(a)(2), and attempts to violate these drug laws, *id.* at § 508.

The Act clarified that the definition of aggravated felony was applicable to both federal and state convictions, *see* IMMACT90 § 501(a)(5), as well as to convictions for comparable foreign offenses if the term of imprisonment was completed within the previous fifteen years, *id.* at § 501(a)(6). Congress specified that the amendments applied to offenses occurring on or after the enactment date of November 29, 1990, except for drug trafficking offenses and offenses in violation of state law, which went into effect as if enacted as part of the ADAA in 1988. *See* IMMACT90 § 501(b).

IMMACT90 also affected aggravated felons’ procedural rights with respect to detention and bond. *See* IMMACT90 § 504(a) & (b). It further reduced the time period, from 60 to 30 days, within which an alien ordered deported as an aggravated felon could seek review of his or her deportation order in the federal courts of appeals, *id.* at § 502(a), and eliminated the automatic stay of deportation that was triggered upon the filing of a petition for judicial review, *id.* at § 513. Thus, to obtain a stay of deportation pending judicial review, an alien ordered deported as an aggravated felon was required to file a motion for a stay of removal or risk having the court lose jurisdiction over the case upon his or her deportation. Additionally, Congress increased the period of inadmissibility for aggravated felons so that once deported, an aggravated felon was now barred from applying for admission for at least twenty years following the date of deportation. *Id.* at § 514.

The legislation also placed limitations on the availability of deportation relief to aggravated felons:

- JRADs were eliminated for aggravated felony offenses and CIMTs. IMMACT90 § 505. Congress specified that section 505 applies to convictions entered before, on, or after November 29, 1990, *id.*, and the former Immigration and Naturalization Service (“INS”) took the position that the provision applied to “all final convictions except those for which JRADs had been granted prior to date of enactment.” 67 Interpreter Releases 1362 (Dec. 3, 1990) (reproducing INS IMMACT90 Wire 5 (Nov. 28, 1990)).
- Aggravated felons were barred from demonstrating “good moral character,” a prohibition that rendered them statutorily ineligible for such immigration benefits as suspension of deportation under 8 U.S.C. § 1254(a) (1988), registry under 8 U.S.C. § 1259 (1988), voluntary departure under 8 U.S.C. § 1254(e) (1988), and naturalization under 8 U.S.C. § 1247 (1988). IMMACT90 § 509.
- Lawful permanent residents who had served prison terms of at least five years because of aggravated felony convictions were barred from applying for a waiver of inadmissibility under section 212(c) of the INA, 8 U.S.C. § 1182(c). IMMACT90 § 511.
- Aggravated felons were barred from applying for or being granted asylum. IMMACT90 § 515(a)(1). This amendment applied to asylum applications made on or after November 29, 1990. *Id.* at § 515(b)(1).
- Aggravated felons were deemed to have *per se* committed a “particularly serious crime” and, therefore, were ineligible for withholding of deportation. IMMACT90 § 515(a)(2).

V. The Miscellaneous and Technical Immigration and Naturalization Amendments of 1991.

One year later, Congress passed a bill making technical changes to IMMACT90 and further substantive changes to the INA. Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, 105 Stat. 1733 (“Immigration Technical Corrections Act of 1991”). In addition to amending the bail and detention provisions applicable to criminal aliens, the legislation clarified that for purposes of determining a criminal alien’s eligibility for section 212(c) relief, the period of time an alien has served in prison for any aggravated felony convictions must be considered in the aggregate. *Id.* at § 306(a)(10). Congress also mandated that a murder conviction, regardless of the date, will be a bar to a finding of good moral character. *Id.* at § 306(a)(7). Moreover, aggravated felons would have only 30 days to seek judicial review of an *in absentia* deportation order (other criminal aliens continued to have 60 days). *Id.* at § 306(c)(6)(G).

Congress further clarified that, regardless of the date of the aggravated felony conviction, the INS was not required to stay an aggravated felon's deportation pending judicial review, unless otherwise ordered by a court. *Id.* at § 306(a)(11).

VI. The Immigration and Technical Corrections Act of 1994.

With the passage of the Immigration and Technical Corrections Act of 1994, Pub. L. No. 103-416, 108 Stat. 4305 ("INTCA"), Congress again expanded the definition of "aggravated felony" to include the following types of crimes:

- Offenses relating to explosives and firearms;
- Theft and burglary offenses with sentences of at least five years;
- Kidnaping for ransom;
- Child pornography;
- Offenses relating to a racketeer influenced organization ("RICO") for which a sentence of five years or more could be imposed;
- Managing, owning, controlling, or supervising a prostitution business;
- Involuntary servitude-related offenses;
- Offenses relating to espionage, sabotage, and treason;
- Fraud or deceit involving a loss of more than \$200,000 to the victim(s);
- Tax evasion involving the loss of more than \$200,000 to the Government;
- Alien smuggling for commercial advantage;
- Document fraud for which a minimum sentence of five years could be imposed; and
- Failure to appear for service of sentence if the underlying sentence is punishable by a term of 15 years or more.

Id. at § 222(a) (amending 8 U.S.C. § 1101(a)(43)).

VII. Act of August 26, 1994 (Pertaining to Adjustment of Status under 8 U.S.C. § 1255(i) And Subsequent Acts Regarding 8 U.S.C. § 1255(i).

In 1994, Congress enacted section 245(i) of the INA, 8 U.S.C. § 1255(i). Pub. L. No. 103-317, § 506(b), 108 Stat. 1766-67, *reprinted in* 8 U.S.C.A. § 1182 note. Generally, aliens who enter the country without inspection are ineligible to seek adjustment to lawful permanent resident status. *See* 8 U.S.C. § 1255(a). Section 245(i) of the INA provided an exception to this general rule, permitting any alien who entered the country without inspection to seek adjustment of status upon the payment of an increased filing fee if the alien has an immigrant visa “immediately available.” *Id.* at § 1255(i)(2)(B). In the 1994 Act, Congress specified that its amendment “shall cease to have effect on October 1, 1997.” Act of Aug. 26, 1994 § 506(c). The law expired on that date but Congress revived it later that same year and extended its availability to aliens who were the beneficiaries of qualifying classification petitions or labor certification applications filed on or before January 14, 1998. *See* Pub. L. No. 105-119, § 111(a)(1)(i)(B)(i), 111 Stat. 2440 (1997). Congress again extended the provision in the Legal Immigration Family Equity Act of 2000, Pub. L. No. 106-554, § 1502(a)(1)(B), 114 Stat. 2763, making section 1255(i) available as long as the visa petition or adjustment application was filed on or before April 30, 2001. Following the 2000 legislative amendment, adjustment of status under section 1255(i) is presently unavailable except for those aliens who qualify as being grandfathered into the section. *See* 8 C.F.R. § 245.10(b).

VIII. The Antiterrorism and Effective Death Penalty Act of 1996.

In the wake of the 1995 Oklahoma City bombing, Congress enacted on April 24, 1996, legislation designed to deter and punish terrorism, which also included, among other significant changes to the immigration laws, an expansion of the grounds of deportability, broader mandates for detention of criminal aliens, and tighter restrictions on the availability of discretionary relief and judicial review. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (“AEDPA”). AEDPA amended the aggravated felony definition to include:

- Gambling offenses and the transmission of wagering information;
- Transportation for purposes of prostitution;
- Document fraud offenses, such as falsely making, forging, counterfeiting, mutilating, or altering a passport for which a sentence of at least eighteen months is imposed;
- Improper entry or re-entry, or misrepresentation or concealment of facts by an alien previously deported as an aggravated felon;
- Offenses for commercial bribery, counterfeiting, forgery, or trafficking in vehicles with altered identification numbers for which a sentence of five years or more may be imposed;

- Offenses for obstruction of justice, perjury, subornation of perjury, or bribery of a witness for which a sentence of five years or more may be imposed; and
- Failure to appear for service of sentence if the underlying sentence is for a felony punishable by a term of two years or more.

AEDPA § 440(e). These amendments applied prospectively to convictions entered on or after the April 24, 1996 date of enactment. *Id.* at § 440(f).

Additionally, AEDPA amended the aggravated felony alien smuggling provision by deleting the requirement that the offense be committed for commercial gain and instead providing that any conviction for alien smuggling for which a five-year sentence is imposed qualifies as an aggravated felony. AEDPA § 440(e)(3). This change applied retroactively to convictions entered on or after October 24, 1994. *Id.* at § 440(f).

Until the enactment of AEDPA, aggravated felons who had served less than five years in prison for their aggravated felony convictions remained eligible to seek relief from deportation under section 212(c) of the INA. In AEDPA, however, Congress expressly disallowed section 212(c) relief for aggravated felons and aliens convicted of other specified categories of criminal offenses, including controlled substance offenses, firearm offenses, and multiple criminal convictions. AEDPA § 440(d). AEDPA also removed the *per se* bar to withholding of deportation for aggravated felons convicted of a particularly serious crime. *Id.* at § 413(f).

IX. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996.

A few months after AEDPA was enacted, Congress passed legislation that amended and overhauled the immigration laws, with particularly significant effects on criminal aliens. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (“IIRIRA”). Taken together, AEDPA and IIRIRA created enhanced penalties for immigration-related crimes and also significantly increased the number of consequences for aliens convicted of serious crimes. IIRIRA carried forward AEDPA’s statutory prohibition on judicial review of criminal aliens’ deportation orders and expanded it to include excludable criminal aliens as well. IIRIRA § 242(a)(2).

For the first time, Congress enacted a statutory definition of “conviction” for immigration purposes. IIRIRA § 322(a) (codified at 8 U.S.C. § 1101(a)(48)(A)). The statutory definition had a stated purpose of “deliberately broaden[ing] the scope of [the Board’s] definition of ‘conviction’ [as set forth in *Matter of Ozkok*, 19 I. & N. Dec. 546 (BIA 1988)],” which, in Congress’s view, did “not go far enough to address situations where a judgment of guilt or imposition of sentence is suspended.” Joint Explanatory Statement of the Committee of Conference, 142 Cong. Rec. H10,899 (daily ed. Sept. 24, 1996). Section 322 of IIRIRA therefore “clarifies Congressional intent that even in cases where adjudication is ‘deferred,’ the original finding or confession of guilt is sufficient to

establish a ‘conviction’ for purposes of the immigration laws.” *Id.*; see Appendix C (detailed discussion of what constitutes a conviction for immigration purposes).

IIRIRA also eliminated the distinction between the “imposed” and “actually imposed” requirement of most of the “term of imprisonment” provisions of the INA. In its place, Congress enacted a new definition of imprisonment for immigration purposes which provided that “[a]ny reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.” IIRIRA § 322(a)(1)(B).

Additionally, the definition of aggravated felony was once again expanded (in many instances, by lowering the sentence or monetary thresholds for offenses already included in the definition) to encompass:

- Crimes of rape and sexual abuse of a minor;
- Theft and burglary offenses for which the term of imprisonment is at least one year;
- RICO-related and gambling offenses for which a one-year term of imprisonment may be imposed;
- Offenses relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles for which the term of imprisonment was at least one year;
- Offenses relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness for which a sentence of one year or more may be imposed;
- Money laundering offenses involving funds over \$10,000 (a lowering of the previous requirement of \$100,000);
- Fraud or deceit involving a loss of more than \$10,000 to the victim(s); and
- Tax evasion involving the loss of more than \$10,000 to the Government.

IIRIRA § 321. Similarly, IIRIRA broadened the document fraud offenses that qualify as aggravated felonies by lowering the sentence threshold from eighteen to twelve months, but created an exception for aliens whose convictions were for a first offense committed on behalf of their spouse, child, or parent. *Id.* at § 321(a)(9). A similar exception was created for persons convicted of alien smuggling if the conviction was a first offense that was committed on behalf of a spouse, child, or parent only. *Id.* at § 321(a)(8). However, Congress also eliminated the requirement that a sentence of at least five years be imposed for an alien smuggling conviction to qualify as an aggravated felony. *Id.* Thus, all alien smuggling convictions that do not fall within the narrow family/first offense exception are

now aggravated felonies. Congress expressly made IIRIRA's amendments to the aggravated felony definition retroactive by providing that they "appl[y] regardless of whether the conviction was entered before, on, or after the [September 30, 1996] date of enactment[.]" *Id.* at § 321(b).

In IIRIRA, Congress consolidated deportation and exclusion proceedings into unified "removal" proceedings, and created a new procedure that authorized expedited removal of criminal aliens. Under this change, non-permanent resident aggravated felons and lawful permanent residents who have fewer than two years of permanent residency can be placed in expedited administrative removal proceedings and ordered removed without appearing before an immigration judge. *See* IIRIRA § 308(b)(5). Additionally, aggravated felons are subject to expedited removal proceedings which are required by statute to be completed "to the extent possible . . . before the alien's release from incarceration for the underlying aggravated felony." IIRIRA § 242A; *see* 8 C.F.R. § 238.1 (procedures for expedited removal proceedings). In a further attempt to streamline the removal of criminal aliens, IIRIRA authorized federal judges to issue judicial orders of removal at the time of sentencing for aliens who are deportable. IIRIRA § 374. Judicial removal must be requested by the United States Attorney *with the concurrence* of the Department of Homeland Security ("DHS"). *Id.* Additionally, IIRIRA created the "stipulated deportation" process, in which a deportable alien can enter into a plea agreement, subject to the concurrence of DHS, in which the alien stipulates to being deported as part of his or her criminal sentence. *Id.* The stipulated deportation process eliminates the need for an immigration hearing (and further DHS detention), and ensures that DHS will immediately remove the alien from the United States upon completion of the alien's sentence. The statute requires the alien and his or her representative to waive an immigration hearing and waive the right to appeal from the order of removal. *Id.*

Congress also repealed section 212(c) relief entirely, and replaced it with cancellation of removal, a new discretionary form of relief that excludes aggravated felons from eligibility. IIRIRA § 304. Many criminal aliens challenged the retroactivity of AEDPA and IIRIRA's amendments, arguing that they detrimentally relied on the availability of section 212(c) relief in choosing to plead guilty. The Supreme Court decided this issue in *INS v. St. Cyr*, 533 U.S. 289 (2001), and held that criminal aliens who pleaded guilty prior to April 24, 1996, and who reasonably relied on the availability of a section 212(c) waiver at the time of their plea, remained eligible. In light of *St. Cyr*, an alien who entered a plea before April 24, 1996, and who was not convicted of an aggravated felony or felonies for which he or she was incarcerated for five years or more, was generally eligible to apply for a section 212(c) waiver. An alien who entered a plea between April 24, 1996, and April 1, 1997, and was not convicted of an aggravated felony, a controlled substance offense, a firearms offense, or two or more crimes involving moral turpitude for which he or she received a sentence of at least one year, was also generally eligible to apply for a section 212(c) waiver.

In section 348 of IIRIRA, Congress eliminated the availability of a section 212(h) waiver of inadmissibility for any lawful permanent resident who has been convicted of an aggravated felony. The waiver, however, remains available to non-lawful permanent resident aliens. There is no judicial review of the Attorney General's decision to grant or deny a section 212(h) waiver. *See* IIRIRA § 348(a).

IIRIRA also restored the automatic bar to withholding of deportation (now called “restriction on removal”) that AEDPA briefly removed for aggravated felons by establishing that an alien who has been convicted of one or more aggravated felonies and sentenced to an aggregate of five years or more, has been convicted of a “particularly serious crime.” IIRIRA § 305. Additionally, IIRIRA carried forward the bar to voluntary departure for aggravated felons and further prohibited judicial review of grants or denials of voluntary departure. IIRIRA § 304(a). Finally, in IIRIRA § 306, Congress created a specific jurisdictional bar for certain criminal aliens, precluding such aliens from seeking judicial review in any court. *See* 8 U.S.C. § 1252(a)(2)(C). While IIRIRA § 306 states that “no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense,” the Supreme Court in *St. Cyr*, 553 U.S. 289, held that criminal aliens who fell within the terms of the bar could challenge their removal orders in district court habeas corpus proceedings.

X. The REAL ID Act of 2005.

The most recent major legislative change to the INA occurred on May 11, 2005, when President Bush signed into law the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (“REAL ID Act”). The REAL ID Act amended the jurisdictional provisions of the INA, the asylum provisions and other sections governing relief and protection, and the terrorism-related provisions of the immigration statute. Relevant here, the jurisdictional amendments were effective immediately, and were designed to overturn existing case law enabling aliens convicted of crimes in the United States to challenge their removal orders in district court. *See, e.g., St. Cyr*, 553 U.S. 289. To that end, the amendments provided that all aliens, including criminal aliens, may obtain review of constitutional claims and “questions of law” through petitions for review in the courts of appeals. REAL ID Act § 106(a). Specified categories of criminal aliens, including aggravated felons, are precluded from seeking review over the agency’s factual determinations. *Id.* The provisions are fully retroactive and apply to removal proceedings instituted before, on, or after the date of enactment, and to events or circumstances that occurred or arose before, on, or after enactment. REAL ID Act § 106(b).

Immigration Consequences Of Criminal Convictions: Appendices

Appendix A: *Glossary of Terms*

Appendix B: *Immigration Law Sources and Resources*

Appendix C: *What Constitutes a Conviction for Immigration Purposes*

Appendix D: *The Method for Evaluating Immigration Consequences of Criminal Convictions*

Appendix A: *Glossary of Terms*

Adjustment of Status. A procedure allowing certain aliens in the United States to apply for lawful permanent resident status (Green Card) without having to depart the United States and appear at an American consulate in a foreign country. *See* 8 U.S.C. § 1255(a) & (i).

Admission/Admitted. With respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer. 8 U.S.C. § 1101(a)(13)(A).

Aggravated Felony. A select group of offenses for which conviction entails significant additional immigration consequences. The INA bars aliens convicted of aggravated felonies from obtaining certain forms of discretionary relief, such as asylum, cancellation of removal, and voluntary departure. Such aliens generally are precluded from obtaining judicial review to the greatest extent permitted under the Constitution. *See* 8 U.S.C. § 1252(a)(2)(C). The definition of “aggravated felony” is found at 8 U.S.C. § 1101(a)(43).

Alien. Any person not a citizen or national of the United States. 8 U.S.C. § 1101(a)(3). This includes immigrants (Lawful Permanent Residents) and non-immigrants.

Alien File/A-File. A file maintained by the Department of Homeland Security (“DHS”) containing an alien’s biographical information, applications for immigration benefits, documentation from any prior immigration proceedings, a photograph, and fingerprints.

Alien Number/A-Number. A registration number assigned by DHS to each alien and used for identification and tracking by DHS, the immigration courts, and the Board of Immigration Appeals. Currently, A-numbers consist of the letter “A” followed by nine digits. For example: A012-345-678.

Anti-Drug Abuse Act of 1988 (“ADAA”), Pub. L. 100-690, 102 Stat. 4181 (Nov. 18, 1988). Section 7342 of the ADAA added the definition of “aggravated felony” to the Immigration and Nationality Act (“INA”).

Anti-Terrorism and Effective Death Penalty Act of 1996 (“AEDPA”), Pub. L. No. 132, 110 Stat. 1273 (Apr. 24, 1996). Amended the Immigration and Nationality Act to provide for expedited removal of criminal and terrorist aliens.

Asylee. An alien within the United States who has been granted the protection of the United States asylum laws because of persecution or a well-founded fear of persecution in his or her home country.

Board of Immigration Appeals (“Board” or “BIA”). The appellate body within the Department of Justice’s Executive Office For Immigration Review (“EOIR”) that hears administrative appeals from decisions of Immigration Judges and from certain decisions made by the United States Citizen and Immigration Services and by Customs and Border Protection.

Cancellation of Removal. A form of relief from removal for permanent residents and non-permanent residents. *See* 8 U.S.C. § 1229b(a) & (b).

Child. For immigration purposes, an unmarried person under the age of 21 years. 8 U.S.C. § 1101(b)(1). There are specific provisions regarding children born out of wedlock, stepchildren, and adopted children, which can be found in the comprehensive definition at 8 U.S.C. § 1101(b)(1)(A)-(F).

Conviction. With respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where: (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed. 8 U.S.C. § 1101(a)(48)(A). Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part. 8 U.S.C. § 1101(a)(48)(B).

Crime Involving Moral Turpitude (“CIMT”). A ground of deportability and inadmissibility under the INA. *See* 8 U.S.C. §§ 1182(a)(2)(A) and 1227(a)(2)(A). “Moral turpitude” is not defined in the INA, but various courts have recognized that moral turpitude generally refers to conduct that involves fraud or is inherently base, vile, and depraved, and contrary to the accepted rules of morality and the duties owed between persons and to society in general.

Department of Homeland Security (“DHS”). The department created by the Homeland Security Act, and to which the functions of the former Immigration and Naturalization Service (“INS”) were transferred.

Deportation. The term used prior to April 1, 1997, to refer to the formal removal of an alien from the United States. It also refers to the type of immigration proceedings commenced prior to April 1, 1997, to remove an illegal or criminal alien who has made an entry into the United States.

Entry Without Inspection (“EWI”). Formerly, aliens who entered without inspection by an immigration officer were considered deportable under 8 U.S.C. § 1251(a)(1)(B) (1990). Under the amended INA, they are now known as aliens present without admission or parole (and may alternatively be referred to as “PWI” or “PWAP”), and are considered to be inadmissible. *See* 8 U.S.C. § 1182(a)(6)(A). Aliens who entered at a place or time other than as designated by DHS may be criminally prosecuted. *See* 8 U.S.C. § 1325.

Exclusion. Prior to the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, the formal denial of an alien’s entry into the United States, or the formal removal of the alien from the United States following an exclusion hearing.

Executive Office for Immigration Review (“EOIR”). An office within the U.S. Department of Justice that oversees the activities of the Office of the Chief Immigration Judge (including the immigration court system) and the Board of Immigration Appeals.

Good Moral Character. An element aliens must demonstrate in order to be eligible for various immigration benefits. *See, e.g.*, 8 U.S.C. §§ 1229a (cancellation of removal) and 1427(a) (naturalization). The INA does not define “good moral character,” but sets forth a non-exclusive list of circumstances that foreclose a finding of good moral character. 8 U.S.C. § 1101(f). A catchall provision makes clear that these *per se* rules are not exclusive: “The fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character.”

Green Card. Commonly used term to describe the Alien Registration Receipt Card (Form I-551) issued to lawful permanent residents in lieu of a visa. The first such cards were issued in 1946 and were green in color. Although the cards later ceased to be green, they are still commonly called “green cards.”

Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (Sept. 30, 1996). IIRIRA replaced “deportation” and “exclusion” proceedings with a single type of proceeding before immigration judges: “removal proceedings.” It also stripped courts of jurisdiction to review discretionary decisions by the Attorney General (*i.e.*, the Board of Immigration Appeals), including immigration bond, parole, and certain relief from removal.

Immigrant. Every alien seeking to enter the U.S. is presumed to be an immigrant, that is intending to settle here permanently, unless he or she can prove that he or she is a non-immigrant as defined in 8 U.S.C. § 1101(a)(15)(A)-(V). 8 U.S.C. § 1184(b).

Immigration Judge. An attorney appointed by the Attorney General as an administrative judge to conduct removal proceedings. 8 U.S.C. § 1101(b)(4); 8 C.F.R. § 1003.10.

Immigration Act of 1990 (“IMMACT90”), Pub. L. No. 101-649, 104 Stat. 5005 (Nov. 29, 1990). Effective as of November 29, 1990. Among other things, it added two types of crimes to the INA’s definition of “aggravated felony”: (1) crimes of violence for which the alien is sentenced to or confined for a period of five years, and (2) money laundering.

Immigration and Nationality Act of 1952 (“INA”), Pub. L. No. 82-414, 66 Stat. 163 (June 27, 1952). Establishes the basic structure of our immigration laws. The INA sometimes is referred to as the McCarran-Walter Act after the bill’s sponsors: Senator Pat McCarran (D-Nevada) and Congressman Francis Walter (D-Pennsylvania). Although it stands alone as a body of law, the INA is also codified at 8 U.S.C. § 1101 *et seq.* Congress has amended the INA numerous times, but it remains the basic statutory body of immigration law.

Immigration and Nationality Technical Corrections Act of 1994 (“INTCA”), Pub. L. No. 103-416, 108 Stat. 4320 (Oct. 25, 1994). Among other things, it expanded the class of aggravated felonies.

Immigration Marriage Fraud Amendments of 1986 (“IMFA”), Pub. L. No. 99-639, 100 Stat. 3537 (1986). These amendments impose strict conditions on any alien seeking to become a lawful permanent resident through marriage to a United States citizen or permanent resident, including conditional residency for a two-year period.

Immigration Reform Control Act of 1986 (“IRCA”), Pub. L. No. 99-603, 100 Stat. 3359 (Nov. 6, 1986). Among other things, IRCA established the Criminal Alien Hearing Program, which allowed immigration authorities to place convicted criminal aliens in deportation proceedings while the alien was still in criminal detention as a means to expedite deportation.

Institutional Hearing Program (“IHP”). Refers to removal hearings held inside correctional institutions while the alien is serving his or her criminal sentence.

Judicial Removal. The procedure through which a United States District Judge may order the removal of a criminal alien during the sentencing phase of criminal proceedings. *See* 8 U.S.C. § 1228(c).

Lawful Permanent Resident (“LPR”). An alien who has been conferred permanent resident status, or an alien who has a “Green Card.” Upon meeting the statutory prerequisites for naturalization, an LPR may apply to become a naturalized citizen. 8 U.S.C. § 1427.

Naturalization. The process of conferring citizenship of a state on a person after birth. 8 U.S.C. § 1101(a)(23). *See also* 8 U.S.C. § 1400, *et seq.*

Nicaraguan Adjustment and Central American Relief Act of 1997 (“NACARA”), Pub. L. No. 105-119, 111 Stat. 2193 (Nov. 19, 1997). NACARA provided various forms of immigration benefits and relief from deportation to certain Nicaraguans, Cubans, Salvadorans, Guatemalans, nationals of former Soviet bloc countries and their dependents.

Non-Immigrant. An alien admitted to the United States for a temporary duration. 8 U.S.C. § 1101(a)(15)(A)-(V).

Notice to Appear (“NTA”). The NTA (Form I-862) is the charging document used by DHS to place an alien in removal proceedings. The charging document was formerly called an Order to Show Cause (“OSC”).

Parolee. An alien seeking admission at a port of entry who appears to DHS to be inadmissible, but for “urgent humanitarian reasons” or “significant public benefit” is allowed to come into the United States, provided the alien is not a security or flight risk. *See* 8 C.F.R. § 212.5(b).

Particularly Serious Crime. Crime for which a conviction will render an alien ineligible for asylum or withholding of removal. For purposes of asylum eligibility, all aggravated felony offenses are expressly declared by statute to be “particularly serious” crimes constituting a danger to the community. 8 U.S.C. § 1158(b)(2)(B)(i). Other crimes may also be determined to be “particularly serious” for asylum purposes. *See* 8 U.S.C. § 1158(b)(2)(A)(ii) & (B)(ii). For purposes of withholding of removal, a particularly serious crime includes an aggravated felony for which a five-year or longer sentence is ordered (whether imposed or suspended). 8 U.S.C. § 1231(b)(3)(B)(ii). Other crimes may also be determined to be “particularly serious” despite the length of sentence imposed. 8 U.S.C. § 1231(b)(3)(B).

REAL ID Act, Pub. L. No. 109-13, 119 Stat. 302 (May 11, 2005). Among other things, the REAL ID Act streamlined the piecemeal judicial review of orders of removal by channeling them all to the United States Courts of Appeals and tightened laws on applications for asylum and removal of aliens for terrorist activity.

Refugee. A person who is outside the country of his or her nationality who is unable or unwilling to return to that country because of past persecution or a well-founded fear of persecution based on race, religion, nationality, political opinion, or membership in a particular social group. 8 U.S.C. § 1101(a)(42).

Removal. Following IIRIRA, the removal of an alien from the United States after a removal proceeding commenced on or after April 1, 1997. Among other things, IIRIRA consolidated deportation and exclusion proceedings into unified “removal” proceedings in which an immigration judge determines (1) whether an alien is subject to removal from the United States based on charges of inadmissibility or deportability filed by DHS and (2) whether the alien is eligible for any relief or protection from removal.

“S” Visa. A limited number of non-immigrant visas granted to aliens who have crucial, reliable information concerning criminal or terrorist activity, and are willing to provide such information to United States law enforcement authorities in ongoing investigations or prosecutions. *See* 8 U.S.C. § 1101(a)(15)(S).

Serious Criminal Offense. For purposes of 8 U.S.C. § 1182(a)(2)(E) (certain aliens involved in serious criminal activity who assert immunity from prosecution): (1) any felony; (2) any crime of violence, as defined in section 18 U.S.C. §16; or (3) any crime of reckless driving or of driving while intoxicated or under the influence of alcohol or of prohibited substances if such crime involves personal injury to another. 8 U.S.C. § 1101(h).

Voluntary Departure (“VD”). The privilege of voluntarily departing the United States in lieu of being removed.

U.S. Citizenship and Immigration Services (“CIS”). The agency within DHS responsible for adjudicating applications for immigration benefits, including claims for refugee status and asylum.

U.S. Customs and Border Protection (“CBP”). An agency within DHS responsible for enforcing the immigration laws at our nation’s borders and ports of entry. The U.S. Border Patrol and the functions of the former INS inspectors have been transferred to this agency.

U.S. Immigration and Customs Enforcement (“ICE”). The agency within DHS principally responsible for enforcing the immigration laws in the interior of the United States.

Appendix B: *Immigration Law Sources and Resources*

I. Introduction.

The discussion of sources and list of resources in this appendix is not comprehensive but is intended to direct interested parties to key legislative and regulatory provisions, administrative and judicial decisions, and select resources that may be helpful in better understanding immigration law in general and particularly in analyzing potential immigration consequences of guilty pleas in criminal proceedings.

II. Constitutional and Federal Statutory Authority.

The United States Constitution gives Congress plenary authority to regulate immigration. *See* U.S. Const. art. I, § 8, cl. 4 (“Congress shall have [p]ower . . . [t]o establish an uniform [r]ule of [n]aturalization”). Pursuant to this authority, Congress enacted the Immigration and Nationality Act of 1952 (“INA”), Pub. L. No. 82-414, 66 Stat. 163 (1952), over President Truman’s veto and established the basic structure of our immigration laws. The INA is codified at 8 U.S.C. § 1101 *et seq.*

Congress has amended the INA numerous times, but it remains the basic statutory body of immigration law. Some of the more significant amendments relevant to this monograph include:

- A. **Anti-Drug Abuse Act of 1988 (“ADAA”)**, Pub. L. No. 100-690, 102 Stat. 4181 (Nov. 18, 1988). Section 7342 of the ADAA added the definition of “aggravated felony” to the INA.
- B. **Immigration Act of 1990 (“IMMACT90”)**, Pub. L. No. 101-649, 104 Stat. 4978 (Nov. 29, 1990). Among other things, IMMACT § 501 added two types of crimes to the INA’s definition of “aggravated felony”: (1) crimes of violence for which the alien is sentenced to or confined for a period of five years, and (2) money laundering.
- C. **Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”)**, Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996). AEDPA amended the INA to provide for the expedited removal of criminal and terrorist aliens. These amendments included a provision to eliminate discretionary relief for most criminal aliens illegally present in the United States, as well as a statutory bar to judicial review of deportation orders for such aliens.

- D. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”)**, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (Sept. 30, 1996). IIRIRA replaced “deportation” and “exclusion” proceedings with a single type of proceeding before immigration judges: “removal proceedings.” It also stripped courts of jurisdiction to review discretionary decisions by the Attorney General and his or her delegates, including those related to immigration bond, parole, and certain relief from removal.
- E. REAL ID Act of 2005**, Pub. L. No. 109-13, 119 Stat. 302 (May 11, 2005). Among other things, the REAL ID Act streamlined the piecemeal judicial review of orders of removal by channeling them all to the United States Courts of Appeals and tightened laws on applications for asylum and removal of aliens for terrorist activity.

For a more detailed description of significant amendments to the INA, *see* Section 5, Brief Overview of Criminal Law-Related Amendments to the Immigration and Nationality Act.

III. Federal Regulations and Agencies with Immigration Authority.

The general provisions of the INA, as enacted and amended by Congress, are interpreted and implemented by regulations issued by various agencies. After these regulations are published in the Federal Register, they are collected and published in the Code of Federal Regulations (“C.F.R.”). The C.F.R. is arranged by subject title and generally parallels the structure of the United States Code.

Title 8 of the C.F.R. deals with “Aliens and Nationality,” as does Title 8 of the United States Code. Thus, most regulations dealing with immigration are found within this title, including those promulgated by the Department of Homeland Security and the Department of Justice. Other departments with authority over immigration matters, namely the Department of Labor and Department of State, have regulations in titles 20 and 22 of the C.F.R., respectively.

A. Department of Homeland Security.

On March 1, 2003, the Immigration and Naturalization Service (“INS”), which was an agency within the Department of Justice, was abolished by the Homeland Security Act of 2002 (“HSA”), Pub. L. No. 107-296, 116 Stat. 2135 (Nov. 25, 2002). The INS’s functions were divided among three agencies within the newly created United States Department of Homeland Security (“DHS”): (1) Immigration and Customs Enforcement (“ICE”), which principally is responsible for enforcing the immigration laws in the interior of the United States; (2) Citizenship and Immigration Services (“CIS”), which is responsible for adjudicating applications for immigration benefits, including affirmative claims for asylum and refugee status; and (3) Customs and Border Protection (“CBP”), which is responsible for enforcing the immigration laws at the nation’s borders.

Although the INS has been abolished and its functions transferred to DHS agencies, the regulations – and even the INA – still contain references to the Attorney General and INS officials. According to the Homeland Security Act, 6 U.S.C. § 557:

With respect to any function transferred by or under this chapter (including under a reorganization plan that becomes effective under section 542 of this title) and exercised on or after the effective date of this chapter, reference in any other Federal law to any department, commission, or agency or any officer or office the functions of which are so transferred shall be deemed to refer to the Secretary, other official, or component of the Department to which such function is so transferred.

Regulations governing DHS are located at 8 C.F.R. chapter I (8 C.F.R. §§ 1.1-507).

B. Department of Justice.

Within the Department of Justice, the Executive Office for Immigration Review (“EOIR”) is responsible for adjudicating immigration cases. Specifically, under delegated authority from the Attorney General, EOIR interprets and administers federal immigration laws by conducting immigration court proceedings, appellate review, and administrative hearings. For a more detailed explanation of removal proceedings, *see* Section 1, Overview of Removal Process.

EOIR consists of three components: (1) the Office of the Chief Immigration Judge, which is responsible for managing the numerous immigration courts located throughout the United States where immigration judges adjudicate individual cases; (2) the Board of Immigration Appeals (“Board”), which primarily conducts appellate review of immigration judge decisions and certain decisions by DHS; and (3) the Office of the Chief Administrative Hearing Officer, which adjudicates immigration-related employment cases.

After the transfer of INS’s functions to DHS on March 1, 2003, a new 8 C.F.R. chapter V was established to recodify the regulations governing EOIR, which remained within the Department of Justice. *See* 68 Fed. Reg. 10349 (March 5, 2003). Within 8 C.F.R. chapter V, regulations governing the Board are found in Subpart A (8 C.F.R. §§ 1003.1-1003.8); those governing the Office of the Chief Immigration Judge are found in Subpart B (8 C.F.R. §§ 1003.9-1003.11); and those governing the immigration court’s rules of procedure are found in Subpart C (8 C.F.R. §§ 1003.12-47).

C. Department of Labor.

The Department of Labor is involved in those cases in which an alien seeks admission to the United States on the basis of his or her occupational qualifications. The relevant regulations promulgated by the Department of Labor are found at 20 C.F.R. §§ 655-56.

D. Department of State.

The Department of State's primary responsibility in the immigration context is issuing (or denying) visas for aliens to enter the United States. The relevant regulations promulgated by the Department of State are found at 22 C.F.R. §§ 41-62.

IV. Administrative Agency Decisions.

A. Department of Justice: EOIR.

As discussed above, EOIR is responsible for adjudicating the removability of aliens in removal proceedings and any defensive applications for relief and protection filed therein. Decisions issued by immigration judges are not published and are not binding precedent; however, the Board publishes administrative appellate decisions, which are binding on all DHS officers and immigration judges unless overruled by the Attorney General or a federal court.

There currently are 25 bound volumes of Board decisions from August 1940 to the present, titled "Administrative Decisions Under Immigration and Nationality Laws of the United States." Many of these decisions analyze whether an alien is removable for a conviction under certain state or federal statutes. Published – and some unpublished – Board decisions also are available on private online legal databases (*e.g.*, LexisNexis and Westlaw). Unpublished Board decisions are not binding authority. The Board posts new published decisions on EOIR's website at <http://www.justice.gov/eoir/vl/libindex.html>.

B. Department of Homeland Security: USCIS–AAO.

The Administrative Appeals Office ("AAO"), or Administrative Appeals Unit ("AAU"),¹ is an office within USCIS, a component agency of DHS, which has appellate jurisdiction over certain decisions of USCIS field offices and regional service centers, including, among other things, various waiver applications, certain visa petitions, and naturalization applications.²

¹ The regulations refer to this entity as the "Administrative Appeals Unit"; however, it is now called the "Administrative Appeals Office." 59 Fed. Reg. 60,065, 60,066 (Nov. 22, 1994).

² Specifically, AAO has appellate jurisdiction over those matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003), with two exceptions: (1) petitions for approval of schools and the appeals of denials of such petitions have been the responsibility of ICE since November 1, 2004; and (2) applications for S non-immigrant status have been the responsibility of the Office of Fraud Detection and National Security of USCIS since October 2004. *See USCIS Adjudicator's Field Manual* § 3.5(c). Current regulations do not contain 8 C.F.R. § 103.1(f)(3)(iii). The 2003 version of this regulation is available at:

Historically, AAO decisions were deemed precedent decisions or non-precedent decisions. 8 C.F.R. § 103.3(c) (2003). Precedent AAO decisions are published along with precedent Board decisions in bound volumes titled “Administrative Decisions Under Immigration and Nationality Laws of the United States” and are available through private online legal databases (e.g., LexisNexis and Westlaw). Non-precedential decisions have no binding authority on other USCIS adjudications. In 2005, AAO began publishing “USCIS Adopted Decisions.” These decisions are available at <http://www.uscis.gov> and provide guidance to applicants, petitioners, practitioners, and Government officials in the correct interpretation of immigration law, regulations, and policy.

V. Judicial Decisions.

The Board is not a federal court, but its decisions generally are subject to judicial review in the United States Court of Appeals in the Circuit where the immigration judge completed the alien’s removal proceedings. The Circuit Courts can vary greatly in their case law, so it is important to research decisions in the relevant circuit.

The AAO similarly is not a federal court, but its decisions generally are subject to judicial review in the United States District Courts. The district court decisions may then be appealed to the United States Courts of Appeals.

The Supreme Court may review Circuit Court decisions on immigration matters, and has published decisions of its own, which are binding on all courts.

United States Supreme Court: <http://www.supremecourtus.gov>

United States Courts of Appeals: http://www.uscourts.gov/Court_Locator.aspx

United States District Courts: http://www.uscourts.gov/courtlinks/Court_Locator.aspx

VI. Researching Immigration Law on Westlaw and LexisNexis.

Both Westlaw (<http://www.westlaw.com>) and LexisNexis (<http://www.lexis.com>) offer users specialized research tools in the immigration context. Westlaw has an “Immigration Practitioner” tab, which allows users to search databases of statutes and regulations, administrative and judicial decisions, administrative resources, practice guides, law review and news articles, and recent developments in immigration law.

On LexisNexis, when performing a “Quick Search,” users can specify that their search be performed in the “Immigration” practice area. LexisNexis also has an “Immigration” tab that users can select under the “Look for a Source” option on the “Search” page. The “Immigration” tab allows

http://edocket.access.gpo.gov/cfr_2003/8cfr103.1.htm (last visited June 14, 2010).

users to find statutes and regulations, judicial and administrative decisions, law review articles, and emerging issues in immigration law.

VII. Official Government Agency Websites.

- A. **Department of Homeland Security:** <http://www.dhs.gov>
U.S. Immigration and Customs Enforcement: <http://www.ice.gov>
U.S. Customs and Border Protection: <http://www.cbp.gov>
U.S. Citizenship and Immigration Services: <http://www.uscis.gov>
U.S. Citizenship and Immigration Services Historical Reference Library:
<http://207.67.203.70/U95007Staff/OPAC/>
- B. **Department of Justice:** <http://www.justice.gov>
Executive Office for Immigration Review: <http://www.justice.gov/eoir>
Executive Office for U.S. Attorneys: <http://www.justice.gov/usao/eousa>
Office of Immigration Litigation: <http://www.justice.gov/civil/oil/index.htm>
- C. **Department of Labor:** <http://www.dol.gov>
- D. **Department of State:** <http://www.state.gov>

VIII. Government Publications.

- A. ***EOIR's Immigration Law Advisor.*** This is a professional monthly newsletter that is intended solely as an educational resource to disseminate information on developments in immigration law pertinent to the immigration courts and the Board. Any views expressed therein are those of the authors and do not represent the positions of EOIR, the Department of Justice, the Attorney General, or the U.S. Government. Past issues are available at:
http://www.justice.gov/eoir/vll/ILA-Newsletter/lib_ila.html.
- B. ***OIL's Immigration Litigation Bulletin.*** The Immigration Litigation Bulletin is an internal publication about immigration litigation matters. The purpose of the publication is to keep litigating attorneys within the Departments of Justice and Homeland Security informed about immigration litigation matters and to increase the sharing of information between the field offices and Main Justice. The views expressed in this publication do not necessarily reflect the views of the Office of Immigration Litigation or the Department of Justice. Past issues of the Immigration Litigation Bulletin that have been released pursuant to Freedom of Information Act requests are available at: <http://www.justice.gov/civil/oil/ImmigrationBulletin.htm>.

- C. ***United States Attorneys' Manual.*** The United States Attorneys' Manual is designed as a quick and ready reference for United States Attorneys, Assistant United States Attorneys, and Department of Justice Attorneys responsible for the prosecution of violations of federal law. It contains general policies and some procedures relevant to the work of the United States Attorneys' Offices and to their relations with the legal divisions, investigative agencies, and other components within the Department of Justice. Title 4 of the manual discusses immigration litigation. The manual is available at: http://www.justice.gov/usao/eousa/foia_reading_room/usam/.

IX. Non-Governmental Resources.³

A. Treatises and Casebooks.

1. **Thomas Alexander Aleinikoff, David A. Martin, and Hiroshi Motomura, *Immigration and Citizenship: Process and Policy* (5th ed., Thompson/West 2003).** This is a leading law school case book.
2. **Robert C. Divine and R. Blake Chisam, *Immigration Practice (2010-2011 ed., Juris Publishing)*.** This annually published book covers all aspects of immigration law in one volume with over 3,000 footnote citations to the wide range of statutes, regulations, court and administrative agency cases, policy memos, operations instructions, agency interpretive letters, and internet sites.
3. **Charles Gordon, Stanley Mailman and Stephen Yale-Loehr, *Immigration Law and Procedure (Matthew Bender 1966 - present)*.** This is a leading treatise on immigration law. It contains case citations supporting statements made in the text. The looseleaf publication consists of 20 volumes and is updated on a regular basis.
4. **Ira J. Kurzban, *Kurzban's Immigration Law Sourcebook: A Comprehensive Outline and Reference Tool* (12th ed., American Immigration Lawyer's Association 2010).** This is a popular outline with citations to Supreme Court, Federal Court, and Board decisions, as well as federal regulations.

³ **Disclaimer:** The listing of these resources should not be viewed as an endorsement by the Department of Justice. The Department takes no responsibility for, and exercises no control over, the views, accuracy, accessibility, copyright or trademark compliance or legality of the material contained therein.

5. **Stephen H. Legomsky, *Immigration and Refugee Law and Policy* (4th ed., Foundation Press 2005).** This is a leading law school case book.

B. Periodicals.

1. ***AILA – Immigration and Nationality Law Handbook.*** This is a “how to” annual publication by the American Immigration Lawyers’ Association. It contains sections on various topics prepared by AILA members in conjunction with their annual conference.
2. ***Bender’s Immigration Bulletin (Matthew Bender).*** This biweekly newsletter provides updates on immigration law and summaries of administrative and federal courts decisions. A daily edition with a searchable archive is available online at <http://bibdaily.com/>.
3. ***Georgetown Immigration Law Journal.*** This student-edited law journal is exclusively devoted to the study of immigration.
4. ***Immigration and Nationality Law Review.*** This student-edited annual law journal is published by William S. Hein & Co. of New York and is affiliated with the University of Cincinnati College of Law.
5. ***Interpreter Releases (West Group).*** This is a weekly newsletter on all aspects of immigration law.

C. Private Internet Resources.

1. **American Immigration Lawyers Association (AILA).** AILA is the national association of attorneys and law professors who practice and/or teach immigration law. Its website includes links to online resources and AILA publications.
2. **ILW.COM.** ILW.COM is a leading immigration law publisher. Its website offers thousands of pages of information on immigration law. ILW also publishes *Immigration Daily*, a daily “newspaper” on immigration law.
3. **Siskind’s Immigration Bulletin.** An electronic newsletter covering developments in immigration law.

X. Jurisdiction-Specific Resources: Immigration Consequences of Select Convictions.⁴

A. Federal.

- Dan Kesselbrenner & Sandy Lin, *Immigration Consequences of Select Federal Convictions Chart* (National Immigration Project 2010), (last visited June 15, 2010).
- Defending Immigrants Partnership, *Representing Noncitizen Criminal Defendants: A National Guide* (2008), (last visited June 15, 2010).
- Immigrant Defense Project and Defending Immigrants Partnership, *Duty of Criminal Defense Counsel Representing an Immigrant Defendant After Padilla v. Kentucky* (2010), (last visited June 15, 2010).

B. Arizona. Katherine Brady, Holly Cooper, et al., *Quick Reference Chart & Annotations for Determining Immigration Consequences of Selected Arizona Offenses* (Immigrant Legal Resource Center 2006), (last visited June 15, 2010).

C. California.

- Katherine Brady, Norton Tooby, et al., *Defending Immigrants in the Ninth Circuit: Impact of Crimes Under California and Other State Laws* (2009).
- Katherine Brady, Holly Cooper, et al., *Quick Reference Chart for Determining Selected Immigration Consequences of Selected California Offenses* (Immigrant Legal Resource Center 2005), (last visited June 15, 2010).

D. Connecticut. Jorge L. Baron and Alix Walmsley, *A Brief Guide to Representing Noncitizen Criminal Defendants in Connecticut* (2005), (last visited June 15, 2010).

⁴ **Disclaimer:** The listing of these resources should not be viewed as an endorsement by the Department of Justice. The Department takes no responsibility for the accuracy of the following resources or the conclusions reached therein. It should be noted that these resources may be of limited use for predicting immigration consequences of particular crimes because an alien's removal proceedings may arise in a federal circuit different from that of the convicting criminal court.

- E. District of Columbia.** Gwendolyn Washington, *PDS Immigrant Defense Project's Quick Reference Sheet* (Public Defenders Service for the District of Columbia 2008), (last visited June 15, 2010).
- F. Florida.**
- Florida Immigrant Advocacy Center, *Immigration Consequences of Selected Florida Offenses: A Quick Reference Chart* (2003), (last visited June 15, 2010).
 - Florida Immigrant Advocacy Center, *Quick Reference Guide to the Basic Immigration Consequences of Select Florida Crimes* (2003), (last visited June 15, 2010).
- G. Illinois.**
- Maria Theresa Baldini-Potermin, *Defending Non-Citizens in Illinois, Indiana, and Wisconsin* (Heartland Alliance National Immigrant Justice Center 2009), (last visited June 15, 2010).
 - National Immigration Project, *Selected Immigration Consequences of Certain Illinois Offenses* (2003), (last visited June 15, 2010).
- H. Indiana.** Maria Theresa Baldini-Potermin, *Defending Non-Citizens in Illinois, Indiana, and Wisconsin* (Heartland Alliance National Immigrant Justice Center 2009), (last visited June 15, 2010).
- I. Maryland.** *Abbreviated Chart for Criminal Defense Practitioners of the Immigration Consequences of Criminal Convictions Under Maryland State Law* (Maryland Office of the Public Defender & University of Maryland School of Law Clinical Office 2007), (last visited June 15, 2010).
- J. Massachusetts.** Dan Kesselbrenner & Wendy Wayne, *Selected Immigration Consequences of Certain Massachusetts Offenses* (National Immigration Project 2006), (last visited June 15, 2010).
- K. Michigan.** *Immigration Consequences of Criminal Convictions* (2008), (last visited June 15, 2010).
- L. New Jersey.** Joanne Gottesman, *Quick Reference Chart for Determining the Immigration Consequences of Selected New Jersey Criminal Offenses* (2005), (last visited June 15, 2010).

- M. New Mexico.** Jacqueline Cooper, *Reference Chart for Determining Immigration Consequences of Selected New Mexico Criminal Offenses* (2005), (last visited June 15, 2010).
- N. New York.**
- Association of the Bar of the City of New York, *The Immigration Consequences of Deferred Adjudication Programs in New York City* (2007), (last visited June 15, 2010).
 - Manny Vargas, *Appendix A: Quick Reference Chart for Determining Key Immigration Consequences of Common New York Offenses* (2003), (last visited June 15, 2010).
- O. North Carolina.** Sejal Zota and John Rubin, *Immigration Consequences of a Criminal Conviction in North Carolina* (Office of Indigent Defense Services 2008), (last visited June 15, 2010).
- P. Texas.** Jodi Goodwin and Thomas Esparza, Jr., *Immigration Consequences of Selected Texas Offenses: A Quick Reference Chart* (2008), (last visited June 15, 2010).
- Q. Vermont.** Rebecca Turner, *Reference Chart for Immigration Consequences of Select Vermont Criminal Offenses* (2006), (last visited June 15, 2010).
- R. Virginia.** Mary Holper, *Immigration Consequences of Selected Virginia Statutes* (2007), (last visited June 15, 2010).
- S. Washington.** Ann Benson and Johnathan Moore, *Quick Reference Chart for Determining Immigration Consequences of Selected Washington State Offenses Under the RCW* (Washington Defender Association's Immigration Project 2006), (last visited June 15, 2010).
- T. Wisconsin.** Maria Theresa Baldini-Potermin, *Defending Non-Citizens in Illinois, Indiana, and Wisconsin* (Heartland Alliance National Immigrant Justice Center 2009), (last visited June 15, 2010).

Appendix C: *What Constitutes a Conviction For Immigration Purposes*

I. Definition of Conviction in the INA.

The INA provides the following definition of what constitutes a conviction for immigration purposes:

- (A) The term “conviction” means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where-
 - (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
 - (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed.
- (B) Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.

8 U.S.C. § 1101(a)(48).

The definition discusses two types of convictions:

1. Under the first prong, there must be a “formal judgment of guilt.”
2. Under the second prong, there must be both (i) a jury verdict, guilty plea, plea of nolo contendere, or admission of facts sufficient to warrant a finding of guilt, and (ii) an imposition of punishment.

II. Finality of Conviction.

- A. The statutory definition of “conviction” does not contain any requirement that the conviction be final before it results in immigration consequences. Immigration consequences can therefore attach even if the alien has a pending challenge against the validity of his or her conviction.

- B. Generally, an alien cannot collaterally attack a conviction in immigration proceedings.
- C. With some limited, circuit-specific exceptions, only convictions vacated by a state court on the basis of procedural and substantive defects are not valid convictions for immigration purposes. Convictions vacated for rehabilitative reasons remain valid convictions.

III. Examples of Possible Valid and Invalid Convictions Under the INA.

The following are some examples of what may or may not constitute convictions for immigration purposes. It is by no means an exhaustive list, but comes from published Board of Immigration Appeals (“Board”) decisions and federal district and circuit court opinions.

A. Possible Valid Convictions Under the INA.

1. **Pleas.** An Alford plea, no contest plea, and nolo contendere plea all satisfy the “formal judgement of guilt” requirement for a conviction.
2. **Deferred Adjudication.** Both the Board and the federal courts have held that a deferred adjudication is a conviction for immigration purposes where it involves an admission of guilt and limitations on the defendant’s liberty. *See* H.R. Conf. Rep. No. 104-828 at 224 (1996) (“Joint Explanatory Statement”) (clarifying “Congressional intent that even in cases where adjudication is ‘deferred,’ the original finding or confession of guilt is sufficient to establish a ‘conviction’ for purposes of the immigration laws”).
 - **Note:** New York’s Pretrial Diversion Agreement (“PDA”) is generally not considered a conviction because guilt has not been established by trial, plea or admission; nor have sufficient facts been admitted to support a finding of guilt.
 - **Note:** A “guilty-filed” disposition under Massachusetts law may or may not constitute a conviction under the INA.
 - **Note:** One court has held that a Massachusetts conviction, in which the defendant admitted to facts sufficient for a finding of guilt, with a continuation without a finding (“CWOFF”), and with the imposition of a restitution order, is a conviction under the INA.
3. **Court Martial.** A judgment of guilt that has been entered by a general court-martial of the United States Armed Forces qualifies as a “conviction” under the INA.

4. **Probation Before Judgment.** A court's grant of probation before judgment generally constitutes a conviction under the INA.
5. **Guilty Pleas Held In Abeyance.** A guilty plea held in abeyance may satisfy the statutory definition of conviction.
6. **Punishments and Penalties.** The imposition of costs and surcharges in the criminal sentencing context constitutes a form of "punishment" or "penalty" for purposes of establishing that an alien has a "conviction" under the INA. Also, a term of probation counts as punishment for purposes of defining conviction. Where the only consequence of a criminal judgment is a suspended non-incarceratory sanction, however, it may not constitute a conviction for immigration purposes.

B. Possible Invalid Convictions Under the INA.

1. **Juvenile Delinquency Proceedings.** Juvenile delinquency proceedings are not criminal proceedings, and findings of juvenile delinquency are not convictions for immigration purposes.
 - **Note:** At least one court has held that a defendant's status as a "youthful trainee" under Michigan's Holmes Youthful Trainee Act constitutes a conviction under the INA because the state court retains discretion to "revoke that status at any time . . . [and] enter an adjudication of guilt and proceed as provided by law."
 - **Note:** One court has held that a conviction under the District of Columbia Code's Youth Rehabilitation Act is a criminal conviction for immigration purposes.
2. **Violations.** "Violations" are mutually exclusive from "convictions," where no disability or legal disadvantage attached to a "violation," and "violation" proceedings are not the same as criminal proceedings.
 - **Note:** One court has held that a defendant found guilty of a "violation" under Oregon law in a proceeding conducted pursuant to section 153.076 of the Oregon Revised Statutes does not have a "conviction" for immigration purposes.

Appendix D: *The Method for Evaluating Immigration Consequences of Criminal Convictions**

I. Introduction.

This reference guide summarizes a two-step process that is generally used for evaluating the immigration consequences of a conviction, which is often referred to as the “categorical” and “modified categorical” analysis. In some instances, a simple reading of the statute will not be sufficient to determine whether a crime falls within the INA’s definition of a deportable or inadmissible offense. Rather, the reader will need to utilize the categorical and modified categorical analyses, and consult relevant case law to determine the immigration consequences. While it is unclear whether *Padilla* requires an attorney to apply this analysis in ascertaining the risk of removal given that the analysis often turns on ever-evolving and conflicting administrative and judicial precedents, we include this reference guide for the reader’s information.

II. The Categorical Analysis.

- A. Introduction.** The Board of Immigration Appeals (“Board”) and courts employ a method for evaluating the immigration consequences of a criminal conviction that resembles the “categorical” approach outlined by the Supreme Court in *Taylor v. United States*, 495 U.S. 575 (1990).
- B. The Categorical Analysis.** In general, the categorical approach consists of comparing the elements of the federal or state criminal statute of conviction with the elements of the “generic definition” of the criminal ground of removal under the INA. This approach looks only at the statutory definition of the offense (as defined by the statute or the courts) – not the underlying facts of the actual crime – to determine whether the alien’s conviction falls under the generic definition. If it does, the alien is removable under the ground at issue. In order to find that a statute of conviction describes a crime that falls outside of the generic definition, it must be shown that there is a realistic probability, not a theoretical possibility, that the state would apply its statute to conduct falling outside the generic definition.

* This methodology applies only where the immigration statute requires a conviction to render an alien removable or inadmissible.

C. Relevant Definitions.

1. **Generic Definition.** The generic definition consists of the elements/criteria of the immigration criminal ground of removal. The generic definition of the immigration offense may be found in a statute (like the INA), Board case law, or judicial decisions. For example, the Supreme Court provided the “generic definition” of “burglary” in *Taylor*.
2. **Statute of Conviction.** The state or federal statute under which the alien was convicted.
3. **Categorical Match.** When the mere fact of conviction necessarily meets the criteria of the criminal ground of removal under the INA (*i.e.* all the elements of the statute of conviction match the elements of the generic definition), there is a categorical match.
4. **Elements.** The elements of the statute of conviction are those factors that must be established (beyond a reasonable doubt) by the prosecutor in order to prove a conviction. The elements of the “generic definition” are those criteria that must be established (by clear and convincing evidence) in order to render an alien removable.

D. Example of a Categorical Match.

Maine’s burglary statute: A person is guilty of burglary if he/she enters or remains in a structure knowing that he/she is not licensed or privileged to do so, with the intent to commit a crime therein. Me. Rev. Stat. Ann. tit. 17-A, § 401 (modified).

The elements of Maine’s statute of conviction are:

- (1) unlawful or unprivileged
- (2) entry or remaining in
- (3) a structure
- (4) with the intent to commit a crime therein

The elements of the generic definition of burglary under *Taylor* are:

- (1) unlawful or unprivileged
- (2) entry into, or remaining in
- (3) a building or structure
- (4) with intent to commit a crime

This statute has all of the elements of the generic definition as set forth in *Taylor* and thus appears to be a categorical match. It will often require research of the state/federal case law and other sources to determine whether the definition of each element of the statute of

conviction matches or is narrower than the definition of each element of the generic offense. Merely imagining a scenario where the statute of conviction could be violated in a way that falls outside of the generic definition (for example, suggesting that under the Maine statute above, “structure” could include a fenced, but open field), is insufficient; rather the alien must identify an actual case where the statute has been so applied. *See Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007).

Note: It does not matter if the statute of conviction required more elements than the generic definition (*i.e.* if it is narrower than the generic definition). For example, if the above statute also required that the act be done at night, it would still be a categorical match with the elements of the generic definition.

III. The Modified Categorical Analysis.

A. Introduction. If the statute of conviction covers a broader range of offenses than the generic definition – *i.e.*, a person can be convicted of violating the statute in a way that may or may not meet the generic definition – the Board and the courts may go beyond the “mere fact of conviction” and look at a limited set of conviction documents to determine whether the alien was convicted of an offense falling within the generic definition.

B. Divisible Statute of Conviction. The Board and most circuits use the term “divisible” to describe the process for when they can resort to the documents of conviction to establish that a certain conviction constitutes a removable offense. There is a split among the circuits as to what “divisible” means, but in general it means that a statute of conviction criminalizes acts which constitute a removable offense as well as acts that do not.

C. Examples.

1. Example Of An Overbroad Statute.

State X’s Burglary Statute: Whoever unlawfully and intentionally breaks and enters a locked shelter with intent to commit a felony is guilty of a felony. Assume that under State X’s law, a shelter includes a tent.

The elements of State X’s statute of conviction are:

(1) unlawfully and intentionally

(2) breaking and entering

The elements of the generic definition of burglary under *Taylor* are:

(1) unlawful or unprivileged

(2) entry into, or remaining in

- | | |
|------------------------------------|-----------------------------------|
| (3) a locked shelter | (3) a building or structure |
| (4) with intent to commit a felony | (4) with intent to commit a crime |

In this case, element #3 would appear to make this statute broader than the generic definition's element requiring a building or structure because a "shelter" includes a tent. In some circuits this is sufficient to resort to a modified categorical approach to determine what type of shelter was broken into. If the documents establish that it was a building, rather than a tent, then this is a match with the elements of the generic definition of burglary.

2. Example of a Statute Written in the Disjunctive.

Massachusetts Burglary Statute: Whoever unlawfully breaks and enters a building, ship, vessel, or vehicle, with intent to commit a felony. . . shall be punished by imprisonment. Mass. Gen. Laws Ann. ch. 266, § 16 (modified).

- | | |
|--|---|
| The elements of the state statute of conviction are: | The elements of the generic definition of burglary under <i>Taylor</i> are: |
| (1) unlawful | (1) unlawful or unprivileged |
| (2) breaking or entering | (2) entry into, or remaining in |
| (3) a building, ship, vessel, or vehicle | (3) a building or structure |
| (4) with intent to commit a felony | (4) with intent to commit a crime |

In this case, element #3 is not a categorical match because the statute provides a list of options, one that would match the elements of the generic definition of burglary (a building) and others that would not (a ship, vessel, or vehicle). In most, if not all, circuits a modified categorical approach can be used to determine what type of shelter was burglarized. If the permissible conviction documents establish that the alien was convicted of breaking into a building, then this is a match with the elements of the generic definition of burglary.

3. Example of A Statute Missing an Element.

California's burglary statute: Every person who enters any house, room, apartment or other building with intent to commit grand or petit larceny or any felony is guilty of burglary. Cal. Penal Code § 459 (modified).

The elements of California's burglary statute are:

- (1)
- (2) entry into
- (3) any house, room, apartment or other building
- (4) with intent to commit grand or petit larceny or any felony

The elements of the generic definition of burglary under *Taylor* are:

- (1) unlawful or unprivileged
- (2) entry into, or remaining in
- (3) a building or structure,
- (4) with intent to commit a crime

In this case, element #1 is missing because the statute does not require that the entry be *unlawful* or *unprivileged*. At least one circuit has found that one cannot resort to the criminal record to establish removability under such circumstances because the record can never show that the jury or trier of fact was actually required to find (or that the defendant actually pled to) all the elements of the generic offense.

- D. Permissible Documents under the Modified Categorical Approach.** Documents that may be considered under a modified categorical approach include: a charging document (such as an indictment, information, or complaint); a plea agreement or transcript of the colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant; or some comparable judicial record of this information (such as an official record of judgment). Courts can only consider a police report insofar as it is incorporated into the terms of a plea agreement. The amount of information and detail on a permissible criminal document is often the most critical factor in determining removability.

IV. Circumstance-Specific Approach.

- A. Introduction.** The Supreme Court in *Nijhawan v. Holder*, 129 S. Ct. 2294 (2009), recognized that in certain circumstances the INA refers to "generic crimes" and in other circumstances it refers to the specific acts in which an offender engaged on a specific occasion. In the latter circumstance, the "categorical" approach was found to be inapplicable.

B. Circumstance-Specific Approach. Where the “generic definition” refers to a “circumstance-specific requirement,” the courts will apply a “circumstance-specific” approach and look to the facts and circumstances underlying an offender’s conviction.

C. Permissible Evidence under the “Circumstance Specific” Approach. Documents that may be considered under a circumstance specific approach include sentencing-related documents (such as a sentencing stipulation or restitution order); consideration is not limited to the documents approved under the modified categorical approach.

D. Relevant Definitions.

1. Generic Crime. A “generic” crime does not refer to criteria that invites inquiry into the underlying facts that led to a conviction. “Generic crimes” are relatively unitary categorical concepts like murder, fraud, or theft.

2. Circumstance-Specific Requirement. A circumstance-specific requirement refers to the specific way in which an offender committed a crime on a specific occasion and thus invites inquiry into the underlying facts of the crime. “Circumstance-specific requirements” need not be elements of the statute of conviction, but must be established before the immigration court in accordance with the relevant burden of proof.

E. Example.

State X’s Bank Fraud statute: Whoever knowingly executes, or attempts to execute, a scheme or artifice to defraud a financial institution shall be guilty of a felony.

INA ground of removal: Any alien convicted of an aggravated felony offense that involves fraud or deceit in which the loss to the victim or victims exceeds \$10,000 is deportable. 8 U.S.C. §§ 1101(a)(43)(M)(i) and 1227(a)(2)(A)(iii).

The relevant element of State X’s statute of conviction is:

(1) knowingly executes, or attempts to execute, a scheme or artifice to defraud

(2) _____

The elements/criteria of the generic definition under the INA are:

(1) involves fraud or deceit

(2) loss to the victim or victims exceeds \$10,000

In this case, criteria #2 is missing because the statute of conviction does not require that the fraud involve a particular loss to the victims. The Supreme Court held that the loss requirement under 8 U.S.C. § 1101(a)(43)(M)(i) does not need to be an element of the fraud or deceit crime of conviction, but rather “the monetary threshold applies to the specific circumstances surrounding an offender’s commission of a fraud and deceit crime on a specific occasion.” *Nijhawan*, 129 S. Ct. at 2298, 2302. Issues of divisibility and evidentiary limitations under the modified categorical approach, therefore, are inapplicable in this inquiry. Rather, the evidence considered must be fair and demonstrate by the relevant burden of proof the amount of loss associated with the particular conviction at issue.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

PADILLA *v.* KENTUCKY

CERTIORARI TO THE SUPREME COURT OF KENTUCKY

No. 08–651. Argued October 13, 2009—Decided March 31, 2010

Petitioner Padilla, a lawful permanent resident of the United States for over 40 years, faces deportation after pleading guilty to drug-distribution charges in Kentucky. In postconviction proceedings, he claims that his counsel not only failed to advise him of this consequence before he entered the plea, but also told him not to worry about deportation since he had lived in this country so long. He alleges that he would have gone to trial had he not received this incorrect advice. The Kentucky Supreme Court denied Padilla postconviction relief on the ground that the Sixth Amendment’s effective-assistance-of-counsel guarantee does not protect defendants from erroneous deportation advice because deportation is merely a “collateral” consequence of a conviction.

Held: Because counsel must inform a client whether his plea carries a risk of deportation, Padilla has sufficiently alleged that his counsel was constitutionally deficient. Whether he is entitled to relief depends on whether he has been prejudiced, a matter not addressed here. Pp. 2–18.

(a) Changes to immigration law have dramatically raised the stakes of a noncitizen’s criminal conviction. While once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation, immigration reforms have expanded the class of deportable offenses and limited judges’ authority to alleviate deportation’s harsh consequences. Because the drastic measure of deportation or removal is now virtually inevitable for a vast number of noncitizens convicted of crimes, the importance of accurate legal advice for noncitizens accused of crimes has never been more important. Thus, as a matter of federal law, deportation is an integral part of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes. Pp. 2–6.

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(b) *Strickland v. Washington*, 466 U. S. 668, applies to Padilla’s claim. Before deciding whether to plead guilty, a defendant is entitled to “the effective assistance of competent counsel.” *McMann v. Richardson*, 397 U. S. 759, 771. The Supreme Court of Kentucky rejected Padilla’s ineffectiveness claim on the ground that the advice he sought about deportation concerned only collateral matters. However, this Court has never distinguished between direct and collateral consequences in defining the scope of constitutionally “reasonable professional assistance” required under *Strickland*, 466 U. S., at 689. The question whether that distinction is appropriate need not be considered in this case because of the unique nature of deportation. Although removal proceedings are civil, deportation is intimately related to the criminal process, which makes it uniquely difficult to classify as either a direct or a collateral consequence. Because that distinction is thus ill-suited to evaluating a *Strickland* claim concerning the specific risk of deportation, advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel. Pp. 7–9.

(c) To satisfy *Strickland*’s two-prong inquiry, counsel’s representation must fall “below an objective standard of reasonableness,” 466 U. S., at 688, and there must be “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different,” *id.*, at 694. The first, constitutional deficiency, is necessarily linked to the legal community’s practice and expectations. *Id.*, at 688. The weight of prevailing professional norms supports the view that counsel must advise her client regarding the deportation risk. And this Court has recognized the importance to the client of “[p]reserving the . . . right to remain in the United States” and “preserving the possibility of” discretionary relief from deportation. *INS v. St. Cyr*, 533 U. S. 289, 323. Thus, this is not a hard case in which to find deficiency: The consequences of Padilla’s plea could easily be determined from reading the removal statute, his deportation was presumptively mandatory, and his counsel’s advice was incorrect. There will, however, undoubtedly be numerous situations in which the deportation consequences of a plea are unclear. In those cases, a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry adverse immigration consequences. But when the deportation consequence is truly clear, as it was here, the duty to give correct advice is equally clear. Accepting Padilla’s allegations as true, he has sufficiently alleged constitutional deficiency to satisfy *Strickland*’s first prong. Whether he can satisfy the second prong, prejudice, is left for the Kentucky courts to consider in the first instance. Pp. 9–12.

(d) The Solicitor General’s proposed rule—that *Strickland* should

Syllabus

be applied to Padilla’s claim only to the extent that he has alleged affirmative misadvice—is unpersuasive. And though this Court must be careful about recognizing new grounds for attacking the validity of guilty pleas, the 25 years since *Strickland* was first applied to ineffective-assistance claims at the plea stage have shown that pleas are less frequently the subject of collateral challenges than convictions after a trial. Also, informed consideration of possible deportation can benefit both the State and noncitizen defendants, who may be able to reach agreements that better satisfy the interests of both parties. This decision will not open the floodgates to challenges of convictions obtained through plea bargains. Cf. *Hill v. Lockhart*, 474 U. S. 52, 58. Pp. 12–16.

253 S. W. 3d 482, reversed and remanded.

STEVENS, J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, BREYER, and SOTOMAYOR, JJ., joined. ALITO, J., filed an opinion concurring in the judgment, in which ROBERTS, C. J., joined. SCALIA, J., filed a dissenting opinion, in which THOMAS, J., joined.

Opinion of the Court

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 08–651

JOSE PADILLA, PETITIONER *v.* KENTUCKY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF
KENTUCKY

[March 31, 2010]

JUSTICE STEVENS delivered the opinion of the Court.

Petitioner Jose Padilla, a native of Honduras, has been a lawful permanent resident of the United States for more than 40 years. Padilla served this Nation with honor as a member of the U. S. Armed Forces during the Vietnam War. He now faces deportation after pleading guilty to the transportation of a large amount of marijuana in his tractor-trailer in the Commonwealth of Kentucky.¹

In this postconviction proceeding, Padilla claims that his counsel not only failed to advise him of this consequence prior to his entering the plea, but also told him that he “did not have to worry about immigration status since he had been in the country so long.” 253 S. W. 3d 482, 483 (Ky. 2008). Padilla relied on his counsel’s erroneous advice when he pleaded guilty to the drug charges that made his deportation virtually mandatory. He alleges that he would have insisted on going to trial if he had not received incorrect advice from his attorney.

Assuming the truth of his allegations, the Supreme

¹Padilla’s crime, like virtually every drug offense except for only the most insignificant marijuana offenses, is a deportable offense under 8 U. S. C. §1227(a)(2)(B)(i).

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Court of Kentucky denied Padilla postconviction relief without the benefit of an evidentiary hearing. The court held that the Sixth Amendment’s guarantee of effective assistance of counsel does not protect a criminal defendant from erroneous advice about deportation because it is merely a “collateral” consequence of his conviction. *Id.*, at 485. In its view, neither counsel’s failure to advise petitioner about the possibility of removal, nor counsel’s incorrect advice, could provide a basis for relief.

We granted certiorari, 555 U. S. ____ (2009), to decide whether, as a matter of federal law, Padilla’s counsel had an obligation to advise him that the offense to which he was pleading guilty would result in his removal from this country. We agree with Padilla that constitutionally competent counsel would have advised him that his conviction for drug distribution made him subject to automatic deportation. Whether he is entitled to relief depends on whether he has been prejudiced, a matter that we do not address.

I

The landscape of federal immigration law has changed dramatically over the last 90 years. While once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation, immigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation. The “drastic measure” of deportation or removal, *Fong Haw Tan v. Phelan*, 333 U. S. 6, 10 (1948), is now virtually inevitable for a vast number of noncitizens convicted of crimes.

The Nation’s first 100 years was “a period of unimpeded immigration.” C. Gordon & H. Rosenfield, *Immigration Law and Procedure* §1.(2)(a), p. 5 (1959). An early effort to empower the President to order the deportation of those

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immigrants he “judge[d] dangerous to the peace and safety of the United States,” Act of June 25, 1798, ch. 58, 1 Stat. 571, was short lived and unpopular. Gordon §1.2, at 5. It was not until 1875 that Congress first passed a statute barring convicts and prostitutes from entering the country, Act of Mar. 3, 1875, ch. 141, 18 Stat. 477. Gordon §1.2b, at 6. In 1891, Congress added to the list of excludable persons those “who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude.” Act of Mar. 3, 1891, ch. 551, 26 Stat. 1084.²

The Immigration and Nationality Act of 1917 (1917 Act) brought “radical changes” to our law. S. Rep. No. 1515, 81st Cong., 2d Sess., pp. 54–55 (1950). For the first time in our history, Congress made classes of noncitizens deportable based on conduct committed on American soil. *Id.*, at 55. Section 19 of the 1917 Act authorized the deportation of “any alien who is hereafter sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States” 39 Stat. 889. And §19 also rendered deportable noncitizen recidivists who commit two or more crimes of moral turpitude at any time after entry. *Ibid.* Congress did not, however, define the term “moral turpitude.”

While the 1917 Act was “radical” because it authorized deportation as a consequence of certain convictions, the Act also included a critically important procedural protection to minimize the risk of unjust deportation: At the time of sentencing or within 30 days thereafter, the sentencing judge in both state and federal prosecutions had the power to make a recommendation “that such alien

²In 1907, Congress expanded the class of excluded persons to include individuals who “admit” to having committed a crime of moral turpitude. Act of Feb. 20, 1907, ch. 1134, 34 Stat. 899.

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shall not be deported.” *Id.*, at 890.³ This procedure, known as a judicial recommendation against deportation, or JRAD, had the effect of binding the Executive to prevent deportation; the statute was “consistently . . . interpreted as giving the sentencing judge conclusive authority to decide whether a particular conviction should be disregarded as a basis for deportation,” *Janvier v. United States*, 793 F. 2d 449, 452 (CA2 1986). Thus, from 1917 forward, there was no such creature as an automatically deportable offense. Even as the class of deportable offenses expanded, judges retained discretion to ameliorate unjust results on a case-by-case basis.

Although narcotics offenses—such as the offense at issue in this case—provided a distinct basis for deportation as early as 1922,⁴ the JRAD procedure was generally

³As enacted, the statute provided:

“That the provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned, nor shall such deportation be made or directed if the court, or judge thereof, sentencing such alien for such crime shall, at the time of imposing judgment or passing sentence or within thirty days thereafter, . . . make a recommendation to the Secretary of Labor that such alien shall not be deported in pursuance of this Act.” 1917 Act, 39 Stat. 889–890.

This provision was codified in 8 U. S. C. §1251(b) (1994 ed.) (transferred to §1227 (2006 ed.)). The judge’s nondeportation recommendation was binding on the Secretary of Labor and, later, the Attorney General after control of immigration removal matters was transferred from the former to the latter. See *Janvier v. United States*, 793 F. 2d 449, 452 (CA2 1986).

⁴Congress first identified narcotics offenses as a special category of crimes triggering deportation in the 1922 Narcotic Drug Act. Act of May 26, 1922, ch. 202, 42 Stat. 596. After the 1922 Act took effect, there was some initial confusion over whether a narcotics offense also had to be a crime of moral turpitude for an individual to be deportable. See *Weedin v. Moy Fat*, 8 F. 2d 488, 489 (CA9 1925) (holding that an individual who committed narcotics offense was not deportable because offense did not involve moral turpitude). However, lower courts eventually agreed that the narcotics offense provision was “special,” *Chung*

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available to avoid deportation in narcotics convictions. See *United States v. O'Rourke*, 213 F. 2d 759, 762 (CA8 1954). Except for “technical, inadvertent and insignificant violations of the laws relating to narcotics,” *ibid.*, it appears that courts treated narcotics offenses as crimes involving moral turpitude for purposes of the 1917 Act’s broad JRAD provision. See *ibid.* (recognizing that until 1952 a JRAD in a narcotics case “was effective to prevent deportation” (citing *Dang Nam v. Bryan*, 74 F. 2d 379, 380–381 (CA9 1934))).

In light of both the steady expansion of deportable offenses and the significant ameliorative effect of a JRAD, it is unsurprising that, in the wake of *Strickland v. Washington*, 466 U. S. 668 (1984), the Second Circuit held that the Sixth Amendment right to effective assistance of counsel applies to a JRAD request or lack thereof, see *Janvier*, 793 F. 2d 449. See also *United States v. Castro*, 26 F. 3d 557 (CA5 1994). In its view, seeking a JRAD was “part of the sentencing” process, *Janvier*, 793 F. 2d, at 452, even if deportation itself is a civil action. Under the Second Circuit’s reasoning, the impact of a conviction on a noncitizen’s ability to remain in the country was a central issue to be resolved during the sentencing process—not merely a collateral matter outside the scope of counsel’s duty to provide effective representation.

However, the JRAD procedure is no longer part of our law. Congress first circumscribed the JRAD provision in the 1952 Immigration and Nationality Act (INA),⁵ and in

Que Fong v. Nagle, 15 F. 2d 789, 790 (CA9 1926); thus, a narcotics offense did not need also to be a crime of moral turpitude (or to satisfy other requirements of the 1917 Act) to trigger deportation. See *United States ex rel. Grimaldi v. Ebey*, 12 F. 2d 922, 923 (CA7 1926); *Todaro v. Munster*, 62 F. 2d 963, 964 (CA10 1933).

⁵The Act separately codified the moral turpitude offense provision and the narcotics offense provision within 8 U. S. C. §1251(a) (1994 ed.) under subsections (a)(4) and (a)(11), respectively. See 66 Stat. 201, 204,

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1990 Congress entirely eliminated it, 104 Stat. 5050. In 1996, Congress also eliminated the Attorney General’s authority to grant discretionary relief from deportation, 110 Stat. 3009–596, an authority that had been exercised to prevent the deportation of over 10,000 noncitizens during the 5-year period prior to 1996, *INS v. St. Cyr*, 533 U. S. 289, 296 (2001). Under contemporary law, if a noncitizen has committed a removable offense after the 1996 effective date of these amendments, his removal is practically inevitable but for the possible exercise of limited remnants of equitable discretion vested in the Attorney General to cancel removal for noncitizens convicted of particular classes of offenses.⁶ See 8 U. S. C. §1229b. Subject to limited exceptions, this discretionary relief is not available for an offense related to trafficking in a controlled substance. See §1101(a)(43)(B); §1228.

These changes to our immigration law have dramatically raised the stakes of a noncitizen’s criminal conviction. The importance of accurate legal advice for noncitizens accused of crimes has never been more important. These changes confirm our view that, as a matter of federal law, deportation is an integral part—indeed, sometimes the most important part⁷—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.

206. The JRAD procedure, codified in 8 U. S. C. §1251(b) (1994 ed.), applied only to the “provisions of subsection (a)(4),” the crimes-of-moral-turpitude provision. 66 Stat. 208; see *United States v. O’Rourke*, 213 F. 2d 759, 762 (CA8 1954) (recognizing that, under the 1952 Act, narcotics offenses were no longer eligible for JRADs).

⁶The changes to our immigration law have also involved a change in nomenclature; the statutory text now uses the term “removal” rather than “deportation.” See *Calcano-Martinez v. INS*, 533 U. S. 348, 350, n. 1 (2001).

⁷See Brief for Asian American Justice Center et al. as *Amici Curiae* 12–27 (providing real-world examples).

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II

Before deciding whether to plead guilty, a defendant is entitled to “the effective assistance of competent counsel.” *McMann v. Richardson*, 397 U. S. 759, 771 (1970); *Strickland*, 466 U. S., at 686. The Supreme Court of Kentucky rejected Padilla’s ineffectiveness claim on the ground that the advice he sought about the risk of deportation concerned only collateral matters, *i.e.*, those matters not within the sentencing authority of the state trial court.⁸ 253 S. W. 3d, at 483–484 (citing *Commonwealth v. Fuardado*, 170 S. W. 3d 384 (2005)). In its view, “collateral consequences are outside the scope of representation required by the Sixth Amendment,” and, therefore, the “failure of defense counsel to advise the defendant of possible deportation consequences is not cognizable as a claim for ineffective assistance of counsel.” 253 S. W. 3d, at 483. The Kentucky high court is far from alone in this view.⁹

⁸There is some disagreement among the courts over how to distinguish between direct and collateral consequences. See Roberts, Ignorance is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process, 95 Iowa L. Rev. 119, 124, n. 15 (2009). The disagreement over how to apply the direct/collateral distinction has no bearing on the disposition of this case because, as even JUSTICE ALITO agrees, counsel must, at the very least, advise a noncitizen “defendant that a criminal conviction may have adverse immigration consequences,” *post*, at 1 (opinion concurring in judgment). See also *post*, at 14 (“I do not mean to suggest that the Sixth Amendment does no more than require defense counsel to avoid misinformation”). In his concurring opinion, JUSTICE ALITO has thus departed from the strict rule applied by the Supreme Court of Kentucky and in the two federal cases that he cites, *post*, at 2.

⁹See, *e.g.*, *United States v. Gonzalez*, 202 F. 3d 20 (CA1 2000); *United States v. Del Rosario*, 902 F. 2d 55 (CADC 1990); *United States v. Yearwood*, 863 F. 2d 6 (CA4 1988); *Santos-Sanchez v. United States*, 548 F. 3d 327 (CA5 2008); *Broomes v. Ashcroft*, 358 F. 3d 1251 (CA10 2004); *United States v. Campbell*, 778 F. 2d 764 (CA11 1985); *Oyekoya v. State*, 558 So. 2d 990 (Ala. Ct. Crim. App. 1989); *State v. Rosas*, 183

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We, however, have never applied a distinction between direct and collateral consequences to define the scope of constitutionally “reasonable professional assistance” required under *Strickland*, 466 U. S., at 689. Whether that distinction is appropriate is a question we need not consider in this case because of the unique nature of deportation.

We have long recognized that deportation is a particularly severe “penalty,” *Fong Yue Ting v. United States*, 149 U. S. 698, 740 (1893); but it is not, in a strict sense, a criminal sanction. Although removal proceedings are civil in nature, see *INS v. Lopez-Mendoza*, 468 U. S. 1032, 1038 (1984), deportation is nevertheless intimately related to the criminal process. Our law has enmeshed criminal convictions and the penalty of deportation for nearly a century, see Part I, *supra*, at 2–7. And, importantly, recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders. Thus, we find it “most difficult” to divorce the penalty from the conviction in the deportation context. *United States v. Russell*, 686 F. 2d 35, 38 (CADC 1982). Moreover, we are quite confident that noncitizen defendants facing a risk of deportation for a particular offense find it even more difficult. See *St. Cyr*, 533 U. S., at 322 (“There can be little doubt that, as a general matter, alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions”).

Deportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence. The collateral versus direct distinction

Ariz. 421, 904 P. 2d 1245 (App. 1995); *State v. Montalban*, 2000–2739 (La. 2/26/02), 810 So. 2d 1106; *Commonwealth v. Frometa*, 520 Pa. 552, 555 A. 2d 92 (1989).

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is thus ill-suited to evaluating a *Strickland* claim concerning the specific risk of deportation. We conclude that advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel. *Strickland* applies to Padilla’s claim.

III

Under *Strickland*, we first determine whether counsel’s representation “fell below an objective standard of reasonableness.” 466 U. S., at 688. Then we ask whether “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.*, at 694. The first prong—constitutional deficiency—is necessarily linked to the practice and expectations of the legal community: “The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.” *Id.*, at 688. We long have recognized that “[p]revailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable” *Ibid.*; *Bobby v. Van Hook*, 558 U. S. ____, ____ (2009) (*per curiam*) (slip op., at 3); *Florida v. Nixon*, 543 U. S. 175, 191, and n. 6 (2004); *Wiggins v. Smith*, 539 U. S. 510, 524 (2003); *Williams v. Taylor*, 529 U. S. 362, 396 (2000). Although they are “only guides,” *Strickland*, 466 U. S., at 688, and not “inexorable commands,” *Bobby*, 558 U. S., at ____ (slip op., at 5), these standards may be valuable measures of the prevailing professional norms of effective representation, especially as these standards have been adapted to deal with the intersection of modern criminal prosecutions and immigration law.

The weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation. National Legal Aid and Defender Assn., Performance Guidelines for Criminal Representation §6.2 (1995); G. Herman, Plea Bargaining §3.03,

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pp. 20–21 (1997); Chin & Holmes, *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 *Cornell L. Rev.* 697, 713–718 (2002); A. Campbell, *Law of Sentencing* §13:23, pp. 555, 560 (3d ed. 2004); Dept. of Justice, Office of Justice Programs, 2 *Compendium of Standards for Indigent Defense Systems, Standards for Attorney Performance*, pp. D10, H8–H9, J8 (2000) (providing survey of guidelines across multiple jurisdictions); ABA *Standards for Criminal Justice, Prosecution Function and Defense Function* 4–5.1(a), p. 197 (3d ed. 1993); ABA *Standards for Criminal Justice, Pleas of Guilty* 14–3.2(f), p. 116 (3d ed. 1999). “[A]uthorities of every stripe—including the American Bar Association, criminal defense and public defender organizations, authoritative treatises, and state and city bar publications—universally require defense attorneys to advise as to the risk of deportation consequences for non-citizen clients” Brief for Legal Ethics, Criminal Procedure, and Criminal Law Professors as *Amici Curiae* 12–14 (footnotes omitted) (citing, *inter alia*, National Legal Aid and Defender Assn., *Guidelines, supra*, §§6.2–6.4 (1997); S. Bratton & E. Kelley, *Practice Points: Representing a Noncitizen in a Criminal Case*, 31 *The Champion* 61 (Jan./Feb. 2007); N. Tooby, *Criminal Defense of Immigrants* §1.3 (3d ed. 2003); 2 *Criminal Practice Manual* §§45:3, 45:15 (2009)).

We too have previously recognized that “[p]reserving the client’s right to remain in the United States may be more important to the client than any potential jail sentence.” *St. Cyr*, 533 U. S., at 323 (quoting 3 *Criminal Defense Techniques* §§60A.01, 60A.02[2] (1999)). Likewise, we have recognized that “preserving the possibility of” discretionary relief from deportation under §212(c) of the 1952 INA, 66 Stat. 187, repealed by Congress in 1996, “would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial.” *St. Cyr*, 533 U. S., at 323. We

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expected that counsel who were unaware of the discretionary relief measures would “follo[w] the advice of numerous practice guides” to advise themselves of the importance of this particular form of discretionary relief. *Ibid.*, n. 50.

In the instant case, the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequence for Padilla’s conviction. See 8 U. S. C. §1227(a)(2)(B)(i) (“Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States or a foreign country relating to a controlled substance . . . , other than a single offense involving possession for one’s own use of 30 grams or less of marijuana, is deportable”). Padilla’s counsel could have easily determined that his plea would make him eligible for deportation simply from reading the text of the statute, which addresses not some broad classification of crimes but specifically commands removal for all controlled substances convictions except for the most trivial of marijuana possession offenses. Instead, Padilla’s counsel provided him false assurance that his conviction would not result in his removal from this country. This is not a hard case in which to find deficiency: The consequences of Padilla’s plea could easily be determined from reading the removal statute, his deportation was presumptively mandatory, and his counsel’s advice was incorrect.

Immigration law can be complex, and it is a legal specialty of its own. Some members of the bar who represent clients facing criminal charges, in either state or federal court or both, may not be well versed in it. There will, therefore, undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain. The duty of the private practitioner in such cases is more limited. When the law is not succinct and straightforward (as it is in many of the scenarios

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posited by JUSTICE ALITO), a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences.¹⁰ But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear.

Accepting his allegations as true, Padilla has sufficiently alleged constitutional deficiency to satisfy the first prong of *Strickland*. Whether Padilla is entitled to relief on his claim will depend on whether he can satisfy *Strickland*'s second prong, prejudice, a matter we leave to the Kentucky courts to consider in the first instance.

IV

The Solicitor General has urged us to conclude that *Strickland* applies to Padilla's claim only to the extent that he has alleged affirmative misadvice. In the United States' view, "counsel is not constitutionally required to provide advice on matters that will not be decided in the criminal case . . . ," though counsel is required to provide accurate advice if she chooses to discuss these matters. Brief for United States as *Amicus Curiae* 10.

Respondent and Padilla both find the Solicitor General's proposed rule unpersuasive, although it has support among the lower courts. See, e.g., *United States v. Couto*, 311 F. 3d 179, 188 (CA2 2002); *United States v. Kwan*, 407 F. 3d 1005 (CA9 2005); *Sparks v. Sowders*, 852 F. 2d 882 (CA6 1988); *United States v. Russell*, 686 F. 2d 35 (CA10 1982); *State v. Rojas-Martinez*, 2005 UT 86, 125 P. 3d 930, 935; *In re Resendiz*, 25 Cal. 4th 230, 19 P. 3d 1171 (2001). Kentucky describes these decisions isolating an affirmative misadvice claim as "result-driven, incestuous . . .

¹⁰As JUSTICE ALITO explains at length, deportation consequences are often unclear. Lack of clarity in the law, however, does not obviate the need for counsel to say something about the possibility of deportation, even though it will affect the scope and nature of counsel's advice.

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[,and] completely lacking in legal or rational bases.” Brief for Respondent 31. We do not share that view, but we agree that there is no relevant difference “between an act of commission and an act of omission” in this context. *Id.*, at 30; *Strickland*, 466 U. S., at 690 (“The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance”); see also *State v. Paredes*, 2004–NMSC–036, 136 N. M. 533, 538–539.

A holding limited to affirmative misadvice would invite two absurd results. First, it would give counsel an incentive to remain silent on matters of great importance, even when answers are readily available. Silence under these circumstances would be fundamentally at odds with the critical obligation of counsel to advise the client of “the advantages and disadvantages of a plea agreement.” *Libretti v. United States*, 516 U. S. 29, 50–51 (1995). When attorneys know that their clients face possible exile from this country and separation from their families, they should not be encouraged to say nothing at all.¹¹ Second, it would deny a class of clients least able to represent themselves the most rudimentary advice on deportation even when it is readily available. It is quintessentially the duty of counsel to provide her client with available advice about an issue like deportation and the failure to do so “clearly satisfies the first prong of the *Strickland* analysis.” *Hill v. Lockhart*, 474 U. S. 52, 62 (1985) (White, J.,

¹¹As the Commonwealth conceded at oral argument, were a defendant’s lawyer to know that a particular offense would result in the client’s deportation and that, upon deportation, the client and his family might well be killed due to circumstances in the client’s home country, any decent attorney would inform the client of the consequences of his plea. Tr. of Oral Arg. 37–38. We think the same result should follow when the stakes are not life and death but merely “banishment or exile,” *Delgado v. Carmichael*, 332 U. S. 388, 390–391 (1947).

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concurring in judgment).

We have given serious consideration to the concerns that the Solicitor General, respondent, and *amici* have stressed regarding the importance of protecting the finality of convictions obtained through guilty pleas. We confronted a similar “floodgates” concern in *Hill*, see *id.*, at 58, but nevertheless applied *Strickland* to a claim that counsel had failed to advise the client regarding his parole eligibility before he pleaded guilty.¹²

A flood did not follow in that decision’s wake. Surmounting *Strickland*’s high bar is never an easy task. See, e.g., 466 U. S., at 689 (“Judicial scrutiny of counsel’s performance must be highly deferential”); *id.*, at 693 (observing that “[a]ttorney errors . . . are as likely to be utterly harmless in a particular case as they are to be prejudicial”). Moreover, to obtain relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances. See *Roe v. Flores-Ortega*, 528 U. S. 470, 480, 486 (2000). There is no reason to doubt that lower courts—now quite experienced with applying *Strickland*—can effectively and efficiently use its framework to

¹²However, we concluded that, even though *Strickland* applied to petitioner’s claim, he had not sufficiently alleged prejudice to satisfy *Strickland*’s second prong. *Hill*, 474 U. S., at 59–60. This disposition further underscores the fact that it is often quite difficult for petitioners who have acknowledged their guilt to satisfy *Strickland*’s prejudice prong.

JUSTICE ALITO believes that the Court misreads *Hill*, *post*, at 10–11. In *Hill*, the Court recognized—for the first time—that *Strickland* applies to advice respecting a guilty plea. 474 U. S., at 58 (“We hold, therefore, that the two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel”). It is true that *Hill* does not control the question before us. But its import is nevertheless clear. Whether *Strickland* applies to Padilla’s claim follows from *Hill*, regardless of the fact that the *Hill* Court did not resolve the particular question respecting misadvice that was before it.

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separate specious claims from those with substantial merit.

It seems unlikely that our decision today will have a significant effect on those convictions already obtained as the result of plea bargains. For at least the past 15 years, professional norms have generally imposed an obligation on counsel to provide advice on the deportation consequences of a client's plea. See, *supra*, at 11–13. We should, therefore, presume that counsel satisfied their obligation to render competent advice at the time their clients considered pleading guilty. *Strickland*, 466 U. S., at 689.

Likewise, although we must be especially careful about recognizing new grounds for attacking the validity of guilty pleas, in the 25 years since we first applied *Strickland* to claims of ineffective assistance at the plea stage, practice has shown that pleas are less frequently the subject of collateral challenges than convictions obtained after a trial. Pleas account for nearly 95% of all criminal convictions.¹³ But they account for only approximately 30% of the habeas petitions filed.¹⁴ The nature of relief secured by a successful collateral challenge to a guilty plea—an opportunity to withdraw the plea and proceed to trial—imposes its own significant limiting principle: Those who collaterally attack their guilty pleas lose the benefit of the bargain obtained as a result of the plea. Thus, a different calculus informs whether it is wise to challenge a

¹³See Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics 2003, p. 418 (31st ed. 2005) (Table 5.17) (only approximately 5%, or 8,612 out of 68,533, of federal criminal prosecutions go to trial); *id.*, at 450 (Table 5.46) (only approximately 5% of all state felony criminal prosecutions go to trial).

¹⁴See V. Flango, National Center for State Courts, Habeas Corpus in State and Federal Courts 36–38 (1994) (demonstrating that 5% of defendants whose conviction was the result of a trial account for approximately 70% of the habeas petitions filed).

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guilty plea in a habeas proceeding because, ultimately, the challenge may result in a *less favorable* outcome for the defendant, whereas a collateral challenge to a conviction obtained after a jury trial has no similar downside potential.

Finally, informed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process. By bringing deportation consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties. As in this case, a criminal episode may provide the basis for multiple charges, of which only a subset mandate deportation following conviction. Counsel who possess the most rudimentary understanding of the deportation consequences of a particular criminal offense may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence. At the same time, the threat of deportation may provide the defendant with a powerful incentive to plead guilty to an offense that does not mandate that penalty in exchange for a dismissal of a charge that does.

In sum, we have long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel. *Hill*, 474 U. S., at 57; see also *Richardson*, 397 U. S., at 770–771. The severity of deportation—“the equivalent of banishment or exile,” *Delgado v. Carmichael*, 332 U. S. 388, 390–391 (1947)—only underscores how critical it is for counsel to inform her noncitizen client that he faces a risk of deportation.¹⁵

¹⁵To this end, we find it significant that the plea form currently used in Kentucky courts provides notice of possible immigration conse-

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V

It is our responsibility under the Constitution to ensure that no criminal defendant—whether a citizen or not—is left to the “mercies of incompetent counsel.” *Richardson*, 397 U. S., at 771. To satisfy this responsibility, we now hold that counsel must inform her client whether his plea carries a risk of deportation. Our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less.

Taking as true the basis for his motion for postconviction relief, we have little difficulty concluding that Padilla has sufficiently alleged that his counsel was constitutionally deficient. Whether Padilla is entitled to relief will depend on whether he can demonstrate prejudice as a result thereof, a question we do not reach because it was not passed on below. See *Verizon Communications Inc. v. FCC*, 535 U. S. 467, 530 (2002).

quences. Ky. Admin. Office of Courts, Motion to Enter Guilty Plea, Form AOC-491 (Rev. 2/2003), <http://courts.ky.gov/NR/rdonlyres/55E1F54E-ED5C-4A30-B1D5-4C43C7ADD63C/0/491.pdf> (as visited Mar. 29, 2010, and available in Clerk of Court’s case file). Further, many States require trial courts to advise defendants of possible immigration consequences. See, e.g., Alaska Rule Crim. Proc. 11(c)(3)(C) (2009–2010); Cal. Penal Code Ann. §1016.5 (West 2008); Conn. Gen. Stat. §54-1j (2009); D. C. Code §16-713 (2001); Fla. Rule Crim. Proc. 3.172(c)(8) (Supp. 2010); Ga. Code Ann. §17-7-93(c) (1997); Haw. Rev. Stat. Ann. §802E-2 (2007); Iowa Rule Crim. Proc. 2.8(2)(b)(3) (Supp. 2009); Md. Rule 4-242 (Lexis 2009); Mass. Gen. Laws, ch. 278, §29D (2009); Minn. Rule Crim. Proc. 15.01 (2009); Mont. Code Ann. §46-12-210 (2009); N. M. Rule Crim. Form 9-406 (2009); N. Y. Crim. Proc. Law Ann. §220.50(7) (West Supp. 2009); N. C. Gen. Stat. Ann. §15A-1022 (Lexis 2007); Ohio Rev. Code Ann. §2943.031 (West 2006); Ore. Rev. Stat. §135.385 (2007); R. I. Gen. Laws §12-12-22 (Lexis Supp. 2008); Tex. Code. Ann. Crim. Proc., Art. 26.13(a)(4) (Vernon Supp. 2009); Vt. Stat. Ann., Tit. 13, §6565(c)(1) (Supp. 2009); Wash. Rev. Code §10.40.200 (2008); Wis. Stat. §971.08 (2005–2006).

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The judgment of the Supreme Court of Kentucky is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

ALITO, J., concurring in judgment

SUPREME COURT OF THE UNITED STATES

No. 08–651

JOSE PADILLA, PETITIONER *v.* KENTUCKY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF
KENTUCKY

[March 31, 2010]

JUSTICE ALITO, with whom THE CHIEF JUSTICE joins, concurring in the judgment.

I concur in the judgment because a criminal defense attorney fails to provide effective assistance within the meaning of *Strickland v. Washington*, 466 U. S. 668 (1984), if the attorney misleads a noncitizen client regarding the removal consequences of a conviction. In my view, such an attorney must (1) refrain from unreasonably providing incorrect advice and (2) advise the defendant that a criminal conviction may have adverse immigration consequences and that, if the alien wants advice on this issue, the alien should consult an immigration attorney. I do not agree with the Court that the attorney must attempt to explain what those consequences may be. As the Court concedes, “[i]mmigration law can be complex”; “it is a legal specialty of its own”; and “[s]ome members of the bar who represent clients facing criminal charges, in either state or federal court or both, may not be well versed in it.” *Ante*, at 11. The Court nevertheless holds that a criminal defense attorney must provide advice in this specialized area in those cases in which the law is “succinct and straightforward”—but not, perhaps, in other situations. *Ante*, at 11–12. This vague, halfway test will lead to much confusion and needless litigation.

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I

Under *Strickland*, an attorney provides ineffective assistance if the attorney’s representation does not meet reasonable professional standards. 466 U. S., at 688. Until today, the longstanding and unanimous position of the federal courts was that reasonable defense counsel generally need only advise a client about the *direct* consequences of a criminal conviction. See, e.g., *United States v. Gonzalez*, 202 F. 3d 20, 28 (CA1 2000) (ineffective-assistance-of-counsel claim fails if “based on an attorney’s failure to advise a client of his plea’s immigration consequences”); *United States v. Banda*, 1 F. 3d 354, 355 (CA5 1993) (holding that “an attorney’s failure to advise a client that deportation is a possible consequence of a guilty plea does not constitute ineffective assistance of counsel”); see generally Chin & Holmes, *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 *Cornell L. Rev.* 697, 699 (2002) (hereinafter Chin & Holmes) (noting that “virtually all jurisdictions”—including “eleven federal circuits, more than thirty states, and the District of Columbia”—“hold that defense counsel need not discuss with their clients the collateral consequences of a conviction,” including deportation). While the line between “direct” and “collateral” consequences is not always clear, see *ante*, at 7, n. 8, the collateral-consequences rule expresses an important truth: Criminal defense attorneys have expertise regarding the conduct of criminal proceedings. They are not expected to possess—and very often do not possess—expertise in other areas of the law, and it is unrealistic to expect them to provide expert advice on matters that lie outside their area of training and experience.

This case happens to involve removal, but criminal convictions can carry a wide variety of consequences other than conviction and sentencing, including civil commitment, civil forfeiture, the loss of the right to vote, disqualification from public benefits, ineligibility to possess fire-

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arms, dishonorable discharge from the Armed Forces, and loss of business or professional licenses. Chin & Holmes 705–706. A criminal conviction may also severely damage a defendant’s reputation and thus impair the defendant’s ability to obtain future employment or business opportunities. All of those consequences are “serious,” see *ante*, at 17, but this Court has never held that a criminal defense attorney’s Sixth Amendment duties extend to providing advice about such matters.

The Court tries to justify its dramatic departure from precedent by pointing to the views of various professional organizations. See *ante*, at 9 (“The weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation”). However, ascertaining the level of professional competence required by the Sixth Amendment is ultimately a task for the courts. *E.g.*, *Roe v. Flores-Ortega*, 528 U. S. 470, 477 (2000). Although we may appropriately consult standards promulgated by private bar groups, we cannot delegate to these groups our task of determining what the Constitution commands. See *Strickland, supra*, at 688 (explaining that “[p]revailing norms of practice as reflected in American Bar Association standards . . . are guides to determining what is reasonable, but they are only guides”). And we must recognize that such standards may represent only the aspirations of a bar group rather than an empirical assessment of actual practice.

Even if the only relevant consideration were “prevailing professional norms,” it is hard to see how those norms can support the duty the Court today imposes on defense counsel. Because many criminal defense attorneys have little understanding of immigration law, see *ante*, at 11, it should follow that a criminal defense attorney who refrains from providing immigration advice does not violate prevailing professional norms. But the Court’s opinion would not just require defense counsel to warn the client

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of a general *risk* of removal; it would also require counsel in at least some cases, to specify what the removal *consequences* of a conviction would be. See *ante*, at 11–12.

The Court’s new approach is particularly problematic because providing advice on whether a conviction for a particular offense will make an alien removable is often quite complex. “Most crimes affecting immigration status are not specifically mentioned by the [Immigration and Nationality Act (INA)], but instead fall under a broad category of crimes, such as *crimes involving moral turpitude* or *aggravated felonies*.” M. Garcia & L. Eig, CRS Report for Congress, Immigration Consequences of Criminal Activity (Sept. 20, 2006) (summary) (emphasis in original). As has been widely acknowledged, determining whether a particular crime is an “aggravated felony” or a “crime involving moral turpitude [(CIMT)]” is not an easy task. See R. McWhirter, ABA, *The Criminal Lawyer’s Guide to Immigration Law: Questions and Answers* 128 (2d ed. 2006) (hereinafter ABA Guidebook) (“Because of the increased complexity of aggravated felony law, this edition devotes a new [30-page] chapter to the subject”); *id.*, §5.2, at 146 (stating that the aggravated felony list at 8 U. S. C. §1101(a)(43) is not clear with respect to several of the listed categories, that “the term ‘aggravated felonies’ can include misdemeanors,” and that the determination of whether a crime is an “aggravated felony” is made “even more difficult” because “several agencies and courts interpret the statute,” including Immigration and Customs Enforcement, the Board of Immigration Appeals (BIA), and Federal Circuit and district courts considering immigration-law and criminal-law issues); ABA Guidebook §4.65, at 130 (“Because nothing is ever simple with immigration law, the terms ‘conviction,’ ‘moral turpitude,’ and ‘single scheme of criminal misconduct’ are terms of art”); *id.*, §4.67, at 130 (“[T]he term ‘moral turpitude’ evades precise definition”).

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Defense counsel who consults a guidebook on whether a particular crime is an “aggravated felony” will often find that the answer is not “easily ascertained.” For example, the ABA Guidebook answers the question “Does simple possession count as an aggravated felony?” as follows: “Yes, *at least in the Ninth Circuit.*” §5.35, at 160 (emphasis added). After a dizzying paragraph that attempts to explain the evolution of the Ninth Circuit’s view, the ABA Guidebook continues: “Adding to the confusion, however, is that the Ninth Circuit has conflicting opinions depending on the context on whether simple drug possession constitutes an aggravated felony under 8 U. S. C. §1101(a)(43).” *Id.*, §5.35, at 161 (citing cases distinguishing between whether a simple possession offense is an aggravated felony “for immigration purposes” or for “sentencing purposes”). The ABA Guidebook then proceeds to explain that “*attempted possession,*” *id.*, §5.36, at 161 (emphasis added), of a controlled substance *is* an aggravated felony, while “[c]onviction under the federal *accessory* after the fact statute is *probably not* an aggravated felony, but a conviction for accessory after the fact to the manufacture of methamphetamine *is* an aggravated felony,” *id.*, §5.37, at 161 (emphasis added). Conspiracy or attempt to commit drug trafficking are aggravated felonies, but “[s]olicitation is not a drug-trafficking offense because a generic solicitation offense is not an offense related to a controlled substance and therefore not an aggravated felony.” *Id.*, §5.41, at 162.

Determining whether a particular crime is one involving moral turpitude is no easier. See *id.*, at 134 (“Writing bad checks *may or may not* be a CIMT” (emphasis added)); *ibid.* (“[R]eckless assault coupled with an element of injury, but not serious injury, is *probably not* a CIMT” (emphasis added)); *id.*, at 135 (misdemeanor driving under the influence is generally not a CIMT, but may be a CIMT if the DUI results in injury or if the driver knew that his

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license had been suspended or revoked); *id.*, at 136 (“If there is no element of actual injury, the endangerment offense *may* not be a CIMT” (emphasis added)); *ibid.* (“Whether [a child abuse] conviction involves moral turpitude *may* depend on the subsection under which the individual is convicted. Child abuse done with criminal negligence *probably* is not a CIMT” (emphasis added)).

Many other terms of the INA are similarly ambiguous or may be confusing to practitioners not versed in the intricacies of immigration law. To take just a few examples, it may be hard, in some cases, for defense counsel even to determine whether a client is an alien,¹ or whether a particular state disposition will result in a “conviction” for purposes of federal immigration law.² The task of offering advice about the immigration consequences of a criminal conviction is further complicated by other problems, including significant variations among Circuit interpretations of federal immigration statutes; the frequency with

¹ Citizens are not deportable, but “[q]uestions of citizenship are not always simple.” ABA Guidebook §4.20, at 113 (explaining that U.S. citizenship conferred by blood is “derivative,” and that “[d]erivative citizenship depends on a number of confusing factors, including whether the citizen parent was the mother or father, the immigration laws in effect at the time of the parents’ and/or defendant’s birth, and the parents’ marital status”).

² “A disposition that is not a ‘conviction,’ under state law may still be a ‘conviction’ for immigration purposes.” *Id.*, §4.32, at 117 (citing *Matter of Salazar*, 23 I. & N. Dec. 223, 231 (BIA 2002) (en banc)). For example, state law may define the term “conviction” not to include a deferred adjudication, but such an adjudication would be deemed a conviction for purposes of federal immigration law. See ABA Guidebook §4.37; accord, D. Kesselbrenner & L. Rosenberg, *Immigration Law and Crimes* §2:1, p. 2–2 (2008) (hereinafter *Immigration Law and Crimes*) (“A practitioner or respondent will not even know whether the Department of Homeland Security (DHS) or the Executive Office for Immigration Review (EOIR) will treat a particular state disposition as a conviction for immigration purposes. In fact, the [BIA] treats certain state criminal dispositions as convictions even though the state treats the same disposition as a dismissal”).

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which immigration law changes; different rules governing the immigration consequences of juvenile, first-offender, and foreign convictions; and the relationship between the “length and type of sentence” and the determination “whether [an alien] is subject to removal, eligible for relief from removal, or qualified to become a naturalized citizen,” Immigration Law and Crimes §2:1, at 2–2 to 2–3.

In short, the professional organizations and guidebooks on which the Court so heavily relies are right to say that “nothing is ever simple with immigration law”—including the determination whether immigration law clearly makes a particular offense removable. ABA Guidebook §4.65, at 130; Immigration Law and Crimes §2:1. I therefore cannot agree with the Court’s apparent view that the Sixth Amendment requires criminal defense attorneys to provide immigration advice.

The Court tries to downplay the severity of the burden it imposes on defense counsel by suggesting that the scope of counsel’s duty to offer advice concerning deportation consequences may turn on how hard it is to determine those consequences. Where “the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequence[s]” of a conviction, the Court says, counsel has an affirmative duty to advise the client that he will be subject to deportation as a result of the plea. *Ante*, at 11. But “[w]hen the law is not succinct and straightforward . . . , a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences.” *Ante*, at 11–12. This approach is problematic for at least four reasons.

First, it will not always be easy to tell whether a particular statutory provision is “succinct, clear, and explicit.” How can an attorney who lacks general immigration law expertise be sure that a seemingly clear statutory provision actually means what it seems to say when read in

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isolation? What if the application of the provision to a particular case is not clear but a cursory examination of case law or administrative decisions would provide a definitive answer? See Immigration Law and Crimes §2:1, at 2–2 (“Unfortunately, a practitioner or respondent cannot tell easily whether a conviction is for a removable offense. . . . [T]he cautious practitioner or apprehensive respondent will not know conclusively the future immigration consequences of a guilty plea”).

Second, if defense counsel must provide advice regarding only one of the many collateral consequences of a criminal conviction, many defendants are likely to be misled. To take just one example, a conviction for a particular offense may render an alien excludable but not removable. If an alien charged with such an offense is advised only that pleading guilty to such an offense will not result in removal, the alien may be induced to enter a guilty plea without realizing that a consequence of the plea is that the alien will be unable to reenter the United States if the alien returns to his or her home country for any reason, such as to visit an elderly parent or to attend a funeral. See ABA Guidebook §4.14, at 111 (“Often the alien is both *excludable* and *removable*. At times, however, the lists are different. Thus, the oddity of an alien that is inadmissible but not deportable. This alien should not leave the United States because the government will not let him back in” (emphasis in original)). Incomplete legal advice may be worse than no advice at all because it may mislead and may dissuade the client from seeking advice from a more knowledgeable source.

Third, the Court’s rigid constitutional rule could inadvertently head off more promising ways of addressing the underlying problem—such as statutory or administrative reforms requiring trial judges to inform a defendant on the record that a guilty plea may carry adverse immigration consequences. As *amici* point out, “28 states and the

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District of Columbia have *already* adopted rules, plea forms, or statutes requiring courts to advise criminal defendants of the possible immigration consequences of their pleas.” Brief for State of Louisiana et al. 25; accord, Chin & Holmes 708 (“A growing number of states require advice about deportation by statute or court rule”). A nonconstitutional rule requiring trial judges to inform defendants on the record of the risk of adverse immigration consequences can ensure that a defendant receives needed information without putting a large number of criminal convictions at risk; and because such a warning would be given on the record, courts would not later have to determine whether the defendant was misrepresenting the advice of counsel. Likewise, flexible statutory procedures for withdrawing guilty pleas might give courts appropriate discretion to determine whether the interests of justice would be served by allowing a particular defendant to withdraw a plea entered into on the basis of incomplete information. Cf. *United States v. Russell*, 686 F. 2d 35, 39–40 (CA DC 1982) (explaining that a district court’s discretion to set aside a guilty plea under the Federal Rules of Criminal Procedure should be guided by, among other considerations, “the possible existence of prejudice to the government’s case as a result of the defendant’s untimely request to stand trial” and “the strength of the defendant’s reason for withdrawing the plea, including whether the defendant asserts his innocence of the charge”).

Fourth, the Court’s decision marks a major upheaval in Sixth Amendment law. This Court decided *Strickland* in 1984, but the majority does not cite a single case, from this or any other federal court, holding that criminal defense counsel’s failure to provide advice concerning the removal consequences of a criminal conviction violates a defendant’s Sixth Amendment right to counsel. As noted above, the Court’s view has been rejected by every Federal Court

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of Appeals to have considered the issue thus far. See, e.g., *Gonzalez*, 202 F. 3d, at 28; *Banda*, 1 F. 3d, at 355; Chin & Holmes 697, 699. The majority appropriately acknowledges that the lower courts are “now quite experienced with applying *Strickland*,” *ante*, at 14, but it casually dismisses the longstanding and unanimous position of the lower federal courts with respect to the scope of criminal defense counsel’s duty to advise on collateral consequences.

The majority seeks to downplay its dramatic expansion of the scope of criminal defense counsel’s duties under the Sixth Amendment by claiming that this Court in *Hill v. Lockhart*, 474 U. S. 52 (1985), similarly “applied *Strickland* to a claim that counsel had failed to advise the client regarding his parole eligibility before he pleaded guilty.” *Ante*, at 14. That characterization of *Hill* obscures much more than it reveals. The issue in *Hill* was whether a criminal defendant’s Sixth Amendment right to counsel was violated where counsel misinformed the client about his eligibility for parole. The Court found it “unnecessary to determine whether there may be circumstances under which erroneous advice by counsel as to parole eligibility may be deemed constitutionally ineffective assistance of counsel, because in the present case we conclude that petitioner’s allegations are insufficient to satisfy the *Strickland v. Washington* requirement of ‘prejudice.’” 474 U. S., at 60. Given that *Hill* expressly and unambiguously refused to decide whether criminal defense counsel must *avoid misinforming* his or her client as to *one* consequence of a criminal conviction (parole eligibility), that case plainly provides no support whatsoever for the proposition that counsel must *affirmatively advise* his or her client as to *another* collateral consequence (removal). By the Court’s strange logic, *Hill* would support its decision here even if the Court had held that misadvice concerning parole eligibility does *not* make counsel’s performance

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objectively unreasonable. After all, the Court still would have “applied *Strickland*” to the facts of the case at hand.

II

While mastery of immigration law is not required by *Strickland*, several considerations support the conclusion that affirmative misadvice regarding the removal consequences of a conviction may constitute ineffective assistance.

First, a rule prohibiting affirmative misadvice regarding a matter as crucial to the defendant’s plea decision as deportation appears faithful to the scope and nature of the Sixth Amendment duty this Court has recognized in its past cases. In particular, we have explained that “a guilty plea cannot be attacked as based on inadequate legal advice unless counsel was not ‘a reasonably competent attorney’ and the advice was not ‘within the range of competence demanded of attorneys *in criminal cases*.’” *Strickland*, 466 U. S., at 687 (quoting *McMann v. Richardson*, 397 U. S. 759, 770, 771 (1970); emphasis added). As the Court appears to acknowledge, thorough understanding of the intricacies of immigration law is not “within the range of competence demanded of attorneys *in criminal cases*.” See *ante*, at 11 (“Immigration law can be complex, and it is a legal specialty of its own. Some members of the bar who represent clients facing criminal charges, in either state or federal court or both, may not be well versed in it”). By contrast, reasonably competent attorneys should know that it is not appropriate or responsible to hold themselves out as authorities on a difficult and complicated subject matter with which they are not familiar. Candor concerning the limits of one’s professional expertise, in other words, is within the range of duties reasonably expected of defense attorneys in criminal cases. As the dissenting judge on the Kentucky Supreme Court put it, “I do not believe it is too much of a burden to place

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on our defense bar the duty to say, ‘I do not know.’” 253 S. W. 3d 482, 485 (2008).

Second, incompetent advice distorts the defendant’s decisionmaking process and seems to call the fairness and integrity of the criminal proceeding itself into question. See *Strickland*, 466 U. S., at 686 (“In giving meaning to the requirement [of effective assistance of counsel], we must take its purpose—to ensure a fair trial—as the guide”). When a defendant opts to plead guilty without definitive information concerning the likely effects of the plea, the defendant can fairly be said to assume the risk that the conviction may carry indirect consequences of which he or she is not aware. That is not the case when a defendant bases the decision to plead guilty on counsel’s express misrepresentation that the defendant will not be removable. In the latter case, it seems hard to say that the plea was entered with the advice of constitutionally competent counsel—or that it embodies a voluntary and intelligent decision to forsake constitutional rights. See *ibid.* (“The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result”).

Third, a rule prohibiting unreasonable misadvice regarding exceptionally important collateral matters would not deter or interfere with ongoing political and administrative efforts to devise fair and reasonable solutions to the difficult problem posed by defendants who plead guilty without knowing of certain important collateral consequences.

Finally, the conclusion that affirmative misadvice regarding the removal consequences of a conviction can give rise to ineffective assistance would, unlike the Court’s approach, not require any upheaval in the law. As the Solicitor General points out, “[t]he vast majority of the

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lower courts considering claims of ineffective assistance in the plea context have [distinguished] between defense counsel who remain silent and defense counsel who give affirmative misadvice.” Brief for United States as *Amicus Curiae* 8 (citing cases). At least three Courts of Appeals have held that affirmative misadvice on immigration matters can give rise to ineffective assistance of counsel, at least in some circumstances.³ And several other Circuits have held that affirmative misadvice concerning nonimmigration consequences of a conviction can violate the Sixth Amendment even if those consequences might be deemed “collateral.”⁴ By contrast, it appears that no court of appeals holds that affirmative misadvice concerning collateral consequences in general and removal in particular can *never* give rise to ineffective assistance. In short,

³See *United States v. Kwan*, 407 F. 3d 1005, 1015–1017 (CA9 2005); *United States v. Couto*, 311 F. 3d 179, 188 (CA2 2002); *Downs-Morgan v. United States*, 765 F. 2d 1534, 1540–1541 (CA11 1985) (limiting holding to the facts of the case); see also *Santos-Sanchez v. United States*, 548 F. 3d 327, 333–334 (CA5 2008) (concluding that counsel’s advice was not objectively unreasonable where counsel did not purport to answer questions about immigration law, did not claim any expertise in immigration law, and simply warned of “possible” deportation consequence; use of the word “possible” was not an affirmative misrepresentation, even though it could indicate that deportation was not a certain consequence).

⁴See *Hill v. Lockhart*, 894 F. 2d 1009, 1010 (CA8 1990) (en banc) (“[T]he erroneous parole-eligibility advice given to Mr. Hill was ineffective assistance of counsel under *Strickland v. Washington*”); *Sparks v. Sowders*, 852 F. 2d 882, 885 (CA6 1988) (“[G]ross misadvice concerning parole eligibility can amount to ineffective assistance of counsel”); *id.*, at 886 (Kennedy, J., concurring) (“When the maximum possible exposure is overstated, the defendant might well be influenced to accept a plea agreement he would otherwise reject”); *Strader v. Garrison*, 611 F. 2d 61, 65 (CA4 1979) (“[T]hough parole eligibility dates are collateral consequences of the entry of a guilty plea of which a defendant need not be informed if he does not inquire, when he is grossly misinformed about it by his lawyer, and relies upon that misinformation, he is deprived of his constitutional right to counsel”).

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the considered and thus far unanimous view of the lower federal courts charged with administering *Strickland* clearly supports the conclusion that that Kentucky Supreme Court's position goes too far.

In concluding that affirmative misadvice regarding the removal consequences of a criminal conviction may constitute ineffective assistance, I do not mean to suggest that the Sixth Amendment does no more than require defense counsel to avoid misinformation. When a criminal defense attorney is aware that a client is an alien, the attorney should advise the client that a criminal conviction may have adverse consequences under the immigration laws and that the client should consult an immigration specialist if the client wants advice on that subject. By putting the client on notice of the danger of removal, such advice would significantly reduce the chance that the client would plead guilty under a mistaken premise.

III

In sum, a criminal defense attorney should not be required to provide advice on immigration law, a complex specialty that generally lies outside the scope of a criminal defense attorney's expertise. On the other hand, any competent criminal defense attorney should appreciate the extraordinary importance that the risk of removal might have in the client's determination whether to enter a guilty plea. Accordingly, unreasonable and incorrect information concerning the risk of removal can give rise to an ineffectiveness claim. In addition, silence alone is not enough to satisfy counsel's duty to assist the client. Instead, an alien defendant's Sixth Amendment right to counsel is satisfied if defense counsel advises the client that a conviction may have immigration consequences, that immigration law is a specialized field, that the attorney is not an immigration lawyer, and that the client should consult an immigration specialist if the client wants advice on that subject.

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SUPREME COURT OF THE UNITED STATES

No. 08–651

JOSE PADILLA, PETITIONER *v.* KENTUCKY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF
KENTUCKY

[March 31, 2010]

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

In the best of all possible worlds, criminal defendants contemplating a guilty plea ought to be advised of all serious collateral consequences of conviction, and surely ought not to be misadvised. The Constitution, however, is not an all-purpose tool for judicial construction of a perfect world; and when we ignore its text in order to make it that, we often find ourselves swinging a sledge where a tack hammer is needed.

The Sixth Amendment guarantees the accused a lawyer “for his defense” against a “criminal prosecutio[n]”—not for sound advice about the collateral consequences of conviction. For that reason, and for the practical reasons set forth in Part I of JUSTICE ALITO’s concurrence, I dissent from the Court’s conclusion that the Sixth Amendment requires counsel to provide accurate advice concerning the potential removal consequences of a guilty plea. For the same reasons, but unlike the concurrence, I do not believe that affirmative misadvice about those consequences renders an attorney’s assistance in defending against the prosecution constitutionally inadequate; or that the Sixth Amendment requires counsel to warn immigrant defendants that a conviction may render them removable. Statutory provisions can remedy these concerns in a more targeted fashion, and without producing

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permanent, and legislatively irreparable, overkill.

* * *

The Sixth Amendment as originally understood and ratified meant only that a defendant had a right to employ counsel, or to use volunteered services of counsel. See, *United States v. Van Duzee*, 140 U. S. 169, 173 (1891); W. Beaney, *Right to Counsel in American Courts* 21, 28–29 (1955). We have held, however, that the Sixth Amendment requires the provision of counsel to indigent defendants at government expense, *Gideon v. Wainwright*, 372 U. S. 335, 344–345 (1963), and that the right to “the assistance of counsel” includes the right to *effective* assistance, *Strickland v. Washington*, 466 U. S. 668, 686 (1984). Even assuming the validity of these holdings, I reject the significant further extension that the Court, and to a lesser extent the concurrence, would create. We have until today at least retained the Sixth Amendment’s textual limitation to criminal prosecutions. “[W]e have held that ‘defence’ means defense at trial, not defense in relation to other objectives that may be important to the accused.” *Rothgery v. Gillespie County*, 554 U. S. ___, ___ (2008) (ALITO, J., concurring) (slip op., at 4) (summarizing cases). We have limited the Sixth Amendment to legal advice directly related to defense against prosecution of the charged offense—advice at trial, of course, but also advice at postindictment interrogations and lineups, *Massiah v. United States*, 377 U. S. 201, 205–206 (1964); *United States v. Wade*, 388 U. S. 218, 236–238 (1967), and in general advice at all phases of the prosecution where the defendant would be at a disadvantage when pitted alone against the legally trained agents of the state, see *Moran v. Burbine*, 475 U. S. 412, 430 (1986). Not only have we not required advice of counsel regarding consequences collateral to prosecution, we have not even required counsel appointed to defend against one prosecution to be

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present when the defendant is interrogated in connection with another possible prosecution arising from the same event. *Texas v. Cobb*, 532 U. S. 162, 164 (2001).

There is no basis in text or in principle to extend the constitutionally required advice regarding guilty pleas beyond those matters germane to the criminal prosecution at hand—to wit, the sentence that the plea will produce, the higher sentence that conviction after trial might entail, and the chances of such a conviction. Such matters fall within “the range of competence demanded of attorneys in criminal cases,” *McMann v. Richardson*, 397 U. S. 759, 771 (1970). See *id.*, at 769–770 (describing the matters counsel and client must consider in connection with a contemplated guilty plea). We have never held, as the logic of the Court’s opinion assumes, that once counsel is appointed all professional responsibilities of counsel—even those extending beyond defense against the prosecution—become constitutional commands. Cf. *Cobb, supra*, at 171, n. 2; *Moran, supra*, at 430. Because the subject of the misadvice here was not the prosecution for which Jose Padilla was entitled to effective assistance of counsel, the Sixth Amendment has no application.

Adding to counsel’s duties an obligation to advise about a conviction’s collateral consequences has no logical stopping-point. As the concurrence observes,

“[A] criminal convictio[n] can carry a wide variety of consequences other than conviction and sentencing, including civil commitment, civil forfeiture, the loss of the right to vote, disqualification from public benefits, ineligibility to possess firearms, dishonorable discharge from the Armed Forces, and loss of business or professional licenses. . . . All of those consequences are ‘serious,’ . . .” *Ante*, at 2–3 (ALITO, J., concurring in judgment).

But it seems to me that the concurrence suffers from the

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same defect. The same indeterminacy, the same inability to know what areas of advice are relevant, attaches to misadvice. And the concurrence’s suggestion that counsel must warn defendants of potential removal consequences, see *ante*, at 14–15—what would come to be known as the “*Padilla* warning”—cannot be limited to those consequences except by judicial caprice. It is difficult to believe that the warning requirement would not be extended, for example, to the risk of heightened sentences in later federal prosecutions pursuant to the Armed Career Criminal Act, 18 U. S. C. §924(e). We could expect years of elaboration upon these new issues in the lower courts, prompted by the defense bar’s devising of ever-expanding categories of plea-invalidating misadvice and failures to warn—not to mention innumerable evidentiary hearings to determine whether misadvice really occurred or whether the warning was really given.

The concurrence’s treatment of misadvice seems driven by concern about the voluntariness of Padilla’s guilty plea. See *ante*, at 12. But that concern properly relates to the Due Process Clauses of the Fifth and Fourteenth Amendments, not to the Sixth Amendment. See *McCarthy v. United States*, 394 U. S. 459, 466 (1969); *Brady v. United States*, 397 U. S. 742, 748 (1970). Padilla has not argued before us that his guilty plea was not knowing and voluntary. If that is, however, the true substance of his claim (and if he has properly preserved it) the state court can address it on remand.¹ But we should not smuggle the

¹I do not mean to suggest that the Due Process Clause would surely provide relief. We have indicated that awareness of “direct consequences” suffices for the validity of a guilty plea. See *Brady*, 397 U. S., at 755 (internal quotation marks omitted). And the required colloquy between a federal district court and a defendant required by Federal Rule of Criminal Procedure 11(b) (formerly Rule 11(c)), which we have said approximates the due process requirements for a valid plea, see *Libretti v. United States*, 516 U. S. 29, 49–50 (1995), does not mention

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claim into the Sixth Amendment.

The Court's holding prevents legislation that could solve the problems addressed by today's opinions in a more precise and targeted fashion. If the subject had not been constitutionalized, legislation could specify which categories of misadvice about matters ancillary to the prosecution invalidate plea agreements, what collateral consequences counsel must bring to a defendant's attention, and what warnings must be given.² Moreover, legislation could provide consequences for the misadvice, nonadvice, or failure to warn, other than nullification of a criminal conviction after the witnesses and evidence needed for retrial have disappeared. Federal immigration law might provide, for example, that the near-automatic removal which follows from certain criminal convictions will not apply where the conviction rested upon a guilty plea induced by counsel's misadvice regarding removal consequences. Or legislation might put the government to a choice in such circumstances: Either retry the defendant or forgo the removal. But all that has been precluded in favor of today's sledge hammer.

In sum, the Sixth Amendment guarantees adequate assistance of counsel in defending against a pending criminal prosecution. We should limit both the constitutional obligation to provide advice and the consequences of bad advice to that well defined area.

collateral consequences. Whatever the outcome, however, the effect of misadvice regarding such consequences upon the validity of a guilty plea should be analyzed under the Due Process Clause.

²As the Court's opinion notes, *ante*, at 16–17, n. 15, many States—including Kentucky—already require that criminal defendants be warned of potential removal consequences.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

**PREMO, SUPERINTENDENT, OREGON STATE
PENITENTIARY *v.* MOORE****CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT**

No. 09–658. Argued October 12, 2010—Decided January 19, 2011

Respondent Moore and two accomplices attacked and bloodied Kenneth Rogers, tied him up, and threw him in the trunk of a car before driving into the Oregon countryside, where Moore fatally shot him. Afterwards, Moore and one accomplice told Moore’s brother and the accomplice’s girlfriend that they had intended to scare Rogers, but that Moore had accidentally shot him. Moore and the accomplice repeated this account to the police. On the advice of counsel, Moore agreed to plead no contest to felony murder in exchange for the minimum sentence for that offense. He later sought postconviction relief in state court, claiming that he had been denied effective assistance of counsel. He complained that his lawyer had not moved to suppress his confession to police in advance of the lawyer’s advice that Moore considered before accepting the plea offer. The court concluded the suppression motion would have been fruitless in light of Moore’s other admissible confession to two witnesses. Counsel gave that as his reason for not making the motion. He added that he had advised Moore that, because of the abuse Rogers suffered before the shooting, Moore could be charged with aggravated murder. That crime was punishable by death or life in prison without parole. These facts led the state court to conclude Moore had not established ineffective assistance of counsel under *Strickland v. Washington*, 466 U. S. 668. Moore sought federal habeas relief, renewing his ineffective-assistance claim. The District Court denied the petition, but the Ninth Circuit reversed, holding that the state court’s conclusion was an unreasonable application of clearly established law in light of *Strickland* and was contrary to *Arizona v. Fulminante*, 499 U. S. 279.

Held: Moore was not entitled to the habeas relief ordered by the Ninth

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Circuit. Pp. 4–17.

(a) Under 28 U. S. C. §2254(d), federal habeas relief may not be granted with respect to any claim a state court has adjudicated on the merits unless, among other exceptions, the state-court decision denying relief involves “an unreasonable application” of “clearly established Federal law, as determined by” this Court. The relevant federal law is the standard for ineffective assistance of counsel under *Strickland*, which requires a showing of “both deficient performance by counsel and prejudice.” *Knowles v. Mirzayance*, 556 U. S. ___, ___. Pp. 4–6.

(b) The state-court decision was not an unreasonable application of either part of the *Strickland* rule. Pp. 6–16.

(1) The state court would not have been unreasonable to accept as a justification for counsel’s action that suppression would have been futile in light of Moore’s other admissible confession to two witnesses. This explanation confirms that counsel’s representation was adequate under *Strickland*, so it is unnecessary to consider the reasonableness of his other justification—that a suppression motion would have failed. Plea bargains involve complex negotiations suffused with uncertainty, and defense counsel must make strategic choices in balancing opportunities—pleading to a lesser charge and obtaining a lesser sentence—and risks—that the plea bargain might come before the prosecution finds its case is getting weaker, not stronger. Failure to respect the latitude *Strickland* requires can create at least two problems. First, the potential for distortions and imbalance that can inhere in a hindsight perspective may become all too real; and habeas courts must be mindful of their limited role, to assess deficiency in light of information then available to counsel. Second, ineffective-assistance claims that lack necessary foundation may bring instability to the very process the inquiry seeks to protect because prosecutors must have assurances that a plea will not be undone in court years later. In applying and defining the *Strickland* standard—reasonable competence in representing the accused—substantial deference must be accorded to counsel’s judgment. The absence of a developed and extensive record and well-defined prosecution or defense case creates a particular risk at the early plea stage. Here, Moore’s prospects at trial were anything but certain. Counsel knew that the two witnesses presented a serious strategic concern and that delaying the plea for further proceedings might allow the State to uncover additional incriminating evidence in support of a capital prosecution. Under these circumstances, counsel made a reasonable choice. At the very least, the state court would not have been unreasonable to so conclude. The Court of Appeals relied further on *Fulminante*, but a state-court adjudication of counsel’s per-

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formance under the Sixth Amendment cannot be “contrary to” *Fulminante*, for *Fulminante*—which involved the admission of an involuntary confession in violation of the Fifth Amendment—says nothing about *Strickland*’s effectiveness standard. Pp. 6–12.

(2) The state court also reasonably could have concluded that Moore was not prejudiced by counsel’s actions. To prevail in state court, he had to demonstrate “a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” *Hill v. Lockhart*, 474 U. S. 52, 59. Deference to the state court’s prejudice determination is significant, given the uncertainty inherent in plea negotiations. That court reasonably could have determined that Moore would have accepted the plea agreement even if his second confession had been ruled inadmissible. The State’s case was already formidable with two witnesses to an admissible confession, and it could have become stronger had the investigation continued. Moore also faced the possibility of grave punishments. Counsel’s bargain for the minimum sentence for the crime of conviction was thus favorable, and forgoing a challenge to the confession may have been essential to securing that agreement. Again, the state court’s finding could not be contrary to *Fulminante*, which does not speak to *Strickland*’s prejudice standard or contemplate prejudice in the plea bargain context. To the extent *Fulminante*’s harmless-error analysis sheds any light on this case, it suggests that the state court’s prejudice determination was reasonable. Pp. 12–16.

574 F. 3d 1092, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, THOMAS, BREYER, ALITO, and SOTOMAYOR, JJ., joined. GINSBURG, J., filed an opinion concurring in the judgment. KAGAN, J., took no part in the consideration or decision of the case.

Opinion of the Court

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 09–658

JEFF PREMO, SUPERINTENDENT, OREGON STATE
PENITENTIARY, PETITIONER *v.* RANDY
JOSEPH MOORE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

[January 19, 2011]

JUSTICE KENNEDY delivered the opinion of the Court.

This case calls for determinations parallel in some respects to those discussed in today’s opinion in *Harrington v. Richter*, *ante*, p. _____. Here, as in *Richter*, the Court reviews a decision of the Court of Appeals for the Ninth Circuit granting federal habeas corpus relief in a challenge to a state criminal conviction. Here, too, the case turns on the proper implementation of one of the stated premises for issuance of federal habeas corpus contained in 28 U. S. C. §2254(d), the instruction that federal habeas corpus relief may not be granted with respect to any claim a state court has adjudicated on the merits unless, among other exceptions, the state court’s decision denying relief involves “an unreasonable application” of “clearly established Federal law, as determined by the Supreme Court of the United States.” And, as in *Richter*, the relevant clearly established law derives from *Strickland v. Washington*, 466 U. S. 668 (1984), which provides the standard for inadequate assistance of counsel under the Sixth Amendment. *Richter* involves a California conviction and

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addresses the adequacy of representation when counsel did not consult or use certain experts in pretrial preparation and at trial. The instant case involves an unrelated Oregon conviction and concerns the adequacy of representation in providing an assessment of a plea bargain without first seeking suppression of a confession assumed to have been improperly obtained.

I

On December 7, 1995, respondent Randy Moore and two confederates attacked Kenneth Rogers at his home and bloodied him before tying him with duct tape and throwing him in the trunk of a car. They drove into the Oregon countryside, where Moore shot Rogers in the temple, killing him.

Afterwards, Moore and one of his accomplices told two people—Moore’s brother and the accomplice’s girlfriend—about the crimes. According to Moore’s brother, Moore and his accomplice admitted:

“[T]o make an example and put some scare into Mr. Rogers . . . , they had blind-folded him [and] duct taped him and put him in the trunk of the car and took him out to a place that’s a little remote [T]heir intent was to leave him there and make him walk home . . . [Moore] had taken the revolver from Lonnie and at the time he had taken it, Mr. Rogers had slipped backwards on the mud and the gun discharged.” App. 157–158.

Moore and his accomplice repeated this account to the police. On the advice of counsel Moore agreed to plead no contest to felony murder in exchange for a sentence of 300 months, the minimum sentence allowed by law for the offense.

Moore later filed for postconviction relief in an Oregon state court, alleging that he had been denied his right to

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effective assistance of counsel. He complained that his lawyer had not filed a motion to suppress his confession to police in advance of the lawyer's advice that Moore considered before accepting the plea offer. After an evidentiary hearing, the Oregon court concluded a "motion to suppress would have been fruitless" in light of the other admissible confession by Moore, to which two witnesses could testify. *Id.*, at 140. As the court noted, Moore's trial counsel explained why he did not move to exclude Moore's confession to police:

"Mr. Moore and I discussed the possibility of filing a Motion to Suppress and concluded that it would be unavailing, because . . . he had previously made a full confession to his brother and to [his accomplice's girlfriend], either one of whom could have been called as a witness at any time to repeat his confession in full detail." Jordan Affidavit (Feb. 26, 1999), App. to Pet. for Cert. 70, ¶4.

Counsel added that he had made Moore aware of the possibility of being charged with aggravated murder, which carried a potential death sentence, as well as the possibility of a sentence of life imprisonment without parole. See Ore. Rev. Stat. §163.105(1)(a) (1995). The intense and serious abuse to the victim before the shooting might well have led the State to insist on a strong response. In light of these facts the Oregon court concluded Moore had not established ineffective assistance of counsel under *Strickland*.

Moore filed a petition for habeas corpus in the United States District Court for the District of Oregon, renewing his ineffective-assistance claim. The District Court denied the petition, finding sufficient evidence to support the Oregon court's conclusion that suppression would not have made a difference.

A divided panel of the United States Court of Appeals

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for the Ninth Circuit reversed. *Moore v. Czerniak*, 574 F. 3d 1092 (2009). In its view the state court’s conclusion that counsel’s action did not constitute ineffective assistance was an unreasonable application of clearly established law in light of *Strickland* and was contrary to *Arizona v. Fulminante*, 499 U. S. 279 (1991). Six judges dissented from denial of rehearing en banc. 574 F. 3d, at 1162.

We granted certiorari. 559 U. S. ____ (2010).

II

The statutory authority of federal courts to issue habeas corpus relief for persons in state custody is defined by 28 U. S. C. §2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). The text of §2254(d) states:

“An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

“(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

“(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.”

AEDPA prohibits federal habeas relief for any claim adjudicated on the merits in state court, unless one of the exceptions listed in §2254(d) obtains. Relevant here is §2254(d)(1)’s exception “permitting relitigation where the earlier state decision resulted from an ‘unreasonable application of’ clearly established federal law.” *Richter*,

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ante, at 11. The applicable federal law consists of the rules for determining when a criminal defendant has received inadequate representation as defined in *Strickland*.

To establish ineffective assistance of counsel “a defendant must show both deficient performance by counsel and prejudice.” *Knowles v. Mirzayance*, 556 U. S. ___, ___ (2009) (slip op., at 10). In addressing this standard and its relationship to AEDPA, the Court today in *Richter*, *ante*, at 14–16, gives the following explanation:

“To establish deficient performance, a person challenging a conviction must show that ‘counsel’s representation fell below an objective standard of reasonableness.’ [*Strickland*,] 466 U. S., at 688. A court considering a claim of ineffective assistance must apply a ‘strong presumption’ that counsel’s representation was within the ‘wide range’ of reasonable professional assistance. *Id.*, at 689. The challenger’s burden is to show ‘that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment.’ *Id.*, at 687.

“With respect to prejudice, a challenger must demonstrate ‘a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’ . . .

“‘Surmounting *Strickland*’s high bar is never an easy task.’ *Padilla v. Kentucky*, 559 U. S. ___, ___ (2010) (slip op., at 14). An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial [or in pretrial proceedings], and so the *Strickland* standard must be applied with scrupulous care, lest ‘intrusive post-trial inquiry’ threaten the integrity of the very adversary process the right to counsel is meant to

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serve. *Strickland*, 466 U. S., at 689–690. Even under *de novo* review, the standard for judging counsel’s representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is ‘all too tempting’ to ‘second-guess counsel’s assistance after conviction or adverse sentence.’ *Id.*, at 689; see also *Bell v. Cone*, 535 U. S. 685, 702 (2002); *Lockhart v. Fretwell*, 506 U. S. 364, 372 (1993). The question is whether an attorney’s representation amounted to incompetence under ‘prevailing professional norms,’ not whether it deviated from best practices or most common custom. *Strickland*, 466 U. S., at 690.

“Establishing that a state court’s application of *Strickland* was unreasonable under §2254(d) is all the more difficult. The standards created by *Strickland* and §2254(d) are both ‘highly deferential,’ *id.*, at 689; *Lindh v. Murphy*, 521 U. S. 320, 333, n. 7 (1997), and when the two apply in tandem, review is ‘doubly’ so, *Knowles*, 556 U. S., at ___ (slip op., at 11). The *Strickland* standard is a general one, so the range of reasonable applications is substantial. 556 U. S., at ___ (slip op., at 11). Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under §2254(d). When §2254(d) applies, the question is not whether counsel’s actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*’s deferential standard.”

III

The question becomes whether Moore’s counsel provided ineffective assistance by failing to seek suppression of Moore’s confession to police before advising Moore regard-

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ing the plea. Finding that any “motion to suppress would have been fruitless,” the state postconviction court concluded that Moore had not received ineffective assistance of counsel. App. 140. The state court did not specify whether this was because there was no deficient performance under *Strickland* or because Moore suffered no *Strickland* prejudice, or both. To overcome the limitation imposed by § 2254(d), the Court of Appeals had to conclude that both findings would have involved an unreasonable application of clearly established federal law. See *Richter, ante*, at 19–20. In finding that this standard was met, the Court of Appeals erred, for the state-court decision was not an unreasonable application of either part of the *Strickland* rule.

A

The Court of Appeals was wrong to accord scant deference to counsel’s judgment, and doubly wrong to conclude it would have been unreasonable to find that the defense attorney qualified as counsel for Sixth Amendment purposes. *Knowles, supra*, at — (slip op., at 11); *Strickland*, 466 U. S., at 687. Counsel gave this explanation for his decision to discuss the plea bargain without first challenging Moore’s confession to the police: that suppression would serve little purpose in light of Moore’s other full and admissible confession, to which both his brother and his accomplice’s girlfriend could testify. The state court would not have been unreasonable to accept this explanation.

Counsel also justified his decision by asserting that any motion to suppress was likely to fail. Reviewing the reasonableness of that justification is complicated by the possibility that petitioner forfeited one argument that would have supported its position: The Court of Appeals assumed that a motion would have succeeded because the warden did not argue otherwise. Of course that is not the same as a concession that no competent attorney would

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think a motion to suppress would have failed, which is the relevant question under *Strickland*. See *Kimmelman v. Morrison*, 477 U. S. 365, 382 (1986); *Richter*, *ante*, at 19–20. It is unnecessary to consider whether counsel’s second justification was reasonable, however, since the first and independent explanation—that suppression would have been futile—confirms that his representation was adequate under *Strickland*, or at least that it would have been reasonable for the state court to reach that conclusion.

Acknowledging guilt and accepting responsibility by an early plea respond to certain basic premises in the law and its function. Those principles are eroded if a guilty plea is too easily set aside based on facts and circumstances not apparent to a competent attorney when actions and advice leading to the plea took place. Plea bargains are the result of complex negotiations suffused with uncertainty, and defense attorneys must make careful strategic choices in balancing opportunities and risks. The opportunities, of course, include pleading to a lesser charge and obtaining a lesser sentence, as compared with what might be the outcome not only at trial but also from a later plea offer if the case grows stronger and prosecutors find stiffened resolve. A risk, in addition to the obvious one of losing the chance for a defense verdict, is that an early plea bargain might come before the prosecution finds its case is getting weaker, not stronger. The State’s case can begin to fall apart as stories change, witnesses become unavailable, and new suspects are identified.

These considerations make strict adherence to the *Strickland* standard all the more essential when reviewing the choices an attorney made at the plea bargain stage. Failure to respect the latitude *Strickland* requires can create at least two problems in the plea context. First, the potential for the distortions and imbalance that can inhere in a hindsight perspective may become all too real. The

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art of negotiation is at least as nuanced as the art of trial advocacy and it presents questions farther removed from immediate judicial supervision. There are, moreover, special difficulties in evaluating the basis for counsel's judgment: An attorney often has insights borne of past dealings with the same prosecutor or court, and the record at the pretrial stage is never as full as it is after a trial. In determining how searching and exacting their review must be, habeas courts must respect their limited role in determining whether there was manifest deficiency in light of information then available to counsel. *Lockhart v. Fretwell*, 506 U. S. 364, 372 (1993). AEDPA compounds the imperative of judicial caution.

Second, ineffective-assistance claims that lack necessary foundation may bring instability to the very process the inquiry seeks to protect. *Strickland* allows a defendant "to escape rules of waiver and forfeiture," *Richter, ante*, at 15. Prosecutors must have assurance that a plea will not be undone years later because of infidelity to the requirements of AEDPA and the teachings of *Strickland*. The prospect that a plea deal will afterwards be unraveled when a court second-guesses counsel's decisions while failing to accord the latitude *Strickland* mandates or disregarding the structure dictated by AEDPA could lead prosecutors to forgo plea bargains that would benefit defendants, a result favorable to no one.

Whether before, during, or after trial, when the Sixth Amendment applies, the formulation of the standard is the same: reasonable competence in representing the accused. *Strickland*, 466 U. S., at 688. In applying and defining this standard substantial deference must be accorded to counsel's judgment. *Id.*, at 689. But at different stages of the case that deference may be measured in different ways.

In the case of an early plea, neither the prosecution nor the defense may know with much certainty what course

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the case may take. It follows that each side, of necessity, risks consequences that may arise from contingencies or circumstances yet unperceived. The absence of a developed or an extensive record and the circumstance that neither the prosecution nor the defense case has been well defined create a particular risk that an after-the-fact assessment will run counter to the deference that must be accorded counsel's judgment and perspective when the plea was negotiated, offered, and entered.

Prosecutors in the present case faced the cost of litigation and the risk of trying their case without Moore's confession to the police. Moore's counsel could reasonably believe that a swift plea bargain would allow Moore to take advantage of the State's aversion to these hazards. And whenever cases involve multiple defendants, there is a chance that prosecutors might convince one defendant to testify against another in exchange for a better deal. Moore's plea eliminated that possibility and ended an ongoing investigation. Delaying the plea for further proceedings would have given the State time to uncover additional incriminating evidence that could have formed the basis of a capital prosecution. It must be remembered, after all, that Moore's claim that it was an accident when he shot the victim through the temple might be disbelieved.

It is not clear how the successful exclusion of the confession would have affected counsel's strategic calculus. The prosecution had at its disposal two witnesses able to relate another confession. True, Moore's brother and the girlfriend of his accomplice might have changed their accounts in a manner favorable to Moore. But the record before the state court reveals no reason to believe that either witness would violate the legal obligation to convey the content of Moore's confession. And to the extent that his accomplice's girlfriend had an ongoing interest in the matter, she might have been tempted to put more blame,

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not less, on Moore. Then, too, the accomplices themselves might have decided to implicate Moore to a greater extent than his own confession did, say by indicating that Moore shot the victim deliberately, not accidentally. All these possibilities are speculative. What counsel knew at the time was that the existence of the two witnesses to an additional confession posed a serious strategic concern.

Moore's prospects at trial were thus anything but certain. Even now, he does not deny any involvement in the kidnaping and killing. In these circumstances, and with a potential capital charge lurking, Moore's counsel made a reasonable choice to opt for a quick plea bargain. At the very least, the state court would not have been unreasonable to so conclude. Cf. *Yarborough v. Alvarado*, 541 U. S. 652, 664 (2004) (explaining that state courts enjoy "more leeway" under AEDPA in applying general standards).

The Court of Appeals' contrary holding rests on a case that did not involve ineffective assistance of counsel: *Arizona v. Fulminante*, 499 U. S. 279 (1991). To reach that result, it transposed that case into a novel context; and novelty alone—at least insofar as it renders the relevant rule less than "clearly established"—provides a reason to reject it under AEDPA. See *Yarborough*, *supra*, at 666 ("Section 2254(d)(1) would be undermined if habeas courts introduced rules not clearly established under the guise of extensions to existing law . . . [, although c]ertain principles are fundamental enough that when new factual permutations arise, the necessity to apply the earlier rule will be beyond doubt"). And the transposition is improper even on its own terms. According to the Court of Appeals, "*Fulminante* stands for the proposition that the admission of an additional confession ordinarily reinforces and corroborates the others and is therefore prejudicial." 574 F. 3d, at 1111. Based on that reading, the Court of Appeals held that the state court's decision "was contrary to *Fulminante*." *Id.*, at 1102. But *Fulminante* may not be so

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incorporated into the *Strickland* performance inquiry.

A state-court adjudication of the performance of counsel under the Sixth Amendment cannot be “contrary to” *Fulminante*, for *Fulminante*—which involved the admission of an involuntary confession in violation of the Fifth Amendment—says nothing about the *Strickland* standard of effectiveness. See *Bell v. Cone*, 535 U. S. 685, 694 (2002) (“A federal habeas court may issue the writ under the ‘contrary to’ clause if the state court applies a rule different from the governing law set forth in our cases, or if it decides a case differently than we have done on a set of materially indistinguishable facts”). The *Fulminante* prejudice inquiry presumes a constitutional violation, whereas *Strickland* seeks to define one. The state court accepted counsel’s view that seeking to suppress Moore’s second confession would have been “fruitless.” It would not have been unreasonable to conclude that counsel could incorporate that view into his assessment of a plea offer, a subject with which *Fulminante* is in no way concerned.

A finding of constitutionally adequate performance under *Strickland* cannot be contrary to *Fulminante*. The state court likely reached the correct result under *Strickland*. And under §2254(d), that it reached a reasonable one is sufficient. See *Richter, ante*, at 19.

B

The Court of Appeals further concluded that it would have been unreasonable for the state postconviction court to have found no prejudice in counsel’s failure to suppress Moore’s confession to police. To prevail on prejudice before the state court Moore had to demonstrate “a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” *Hill v. Lockhart*, 474 U. S. 52, 59 (1985).

Deference to the state court’s prejudice determination is all the more significant in light of the uncertainty inherent

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in plea negotiations described above: The stakes for defendants are high, and many elect to limit risk by forgoing the right to assert their innocence. A defendant who accepts a plea bargain on counsel's advice does not necessarily suffer prejudice when his counsel fails to seek suppression of evidence, even if it would be reversible error for the court to admit that evidence.

The state court here reasonably could have determined that Moore would have accepted the plea agreement even if his second confession had been ruled inadmissible. By the time the plea agreement cut short investigation of Moore's crimes, the State's case was already formidable and included two witnesses to an admissible confession. Had the prosecution continued to investigate, its case might well have become stronger. At the same time, Moore faced grave punishments. His decision to plead no contest allowed him to avoid a possible sentence of life without parole or death. The bargain counsel struck was thus a favorable one—the statutory minimum for the charged offense—and the decision to forgo a challenge to the confession may have been essential to securing that agreement.

Once again the Court of Appeals reached a contrary conclusion by pointing to *Fulminante*: “The state court's finding that a motion to suppress a recorded confession to the police would have been ‘fruitless’ . . . was without question contrary to clearly established federal law as set forth in *Fulminante*.” 574 F. 3d, at 1112. And again there is no sense in which the state court's finding could be contrary to *Fulminante*, for *Fulminante* says nothing about prejudice for *Strickland* purposes, nor does it contemplate prejudice in the plea bargain context.

The Court of Appeals appears to have treated *Fulminante* as a *per se* rule of prejudice, or something close to it, in all cases involving suppressible confessions. It is not. In *Fulminante* five Justices made the uncontroversial

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observation that many confessions are powerful evidence. See, e.g., 499 U. S., at 296. *Fulminante*'s prejudice analysis arose on direct review following an acknowledged constitutional error at trial. The State therefore had the burden of showing that it was "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Neder v. United States*, 527 U. S. 1, 18 (1999) (paraphrasing *Fulminante*, *supra*). That standard cannot apply to determinations of whether inadequate assistance of counsel prejudiced a defendant who entered into a plea agreement. Many defendants reasonably enter plea agreements even though there is a significant probability—much more than a reasonable doubt—that they would be acquitted if they proceeded to trial. Thus, the question in the present case is not whether Moore was sure beyond a reasonable doubt that he would still be convicted if the extra confession were suppressed. It is whether Moore established the reasonable probability that he would not have entered his plea but for his counsel's deficiency, *Hill*, *supra*, at 59, and more to the point, whether a state court's decision to the contrary would be unreasonable.

To the extent *Fulminante*'s application of the harmless-error standard sheds any light on the present case, it suggests that the state court's prejudice determination was reasonable. *Fulminante* found that an improperly admitted confession was not harmless under *Chapman v. California*, 386 U. S. 18 (1967) because the remaining evidence against the defendant was weak. The additional evidence consisted primarily of a second confession that *Fulminante* had made to the informant's fiancée. But many of its details were not corroborated, the fiancée had not reported the confession for a long period of time, the State had indicated that both confessions were essential to its case, and the fiancée potentially "had a motive to lie." 499 U. S., at 300. Moore's plea agreement, by contrast,

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ended the government's investigation well before trial, yet the evidence against Moore was strong. The accounts of Moore's second confession to his brother and his accomplice's girlfriend corroborated each other, were given to people without apparent reason to lie, and were reported without delay.

The State gave no indication that its felony-murder prosecution depended on the admission of the police confession, and Moore does not now deny that he kidnaped and killed Rogers. Given all this, an unconstitutional admission of Moore's confession to police might well have been found harmless even on direct review if Moore had gone to trial after the denial of a suppression motion.

Other than for its discussion of the basic proposition that a confession is often powerful evidence, *Fulminante* is not relevant to the present case. The state postconviction court reasonably could have concluded that Moore was not prejudiced by counsel's actions. Under AEDPA, that finding ends federal review. See *Richter, ante*, at 19.

Judge Berzon's concurring opinion in the Court of Appeals does not provide a basis for issuance of the writ. The concurring opinion would have found the state court's prejudice determination unreasonable in light of *Kimmelman*. It relied on *Kimmelman* to find that Moore suffered prejudice for *Strickland* purposes because there was a reasonable possibility that he would have obtained a better plea agreement but for his counsel's errors. But *Kimmelman* concerned a conviction following a bench trial, so it did not establish, much less clearly establish, the appropriate standard for prejudice in cases involving plea bargains. See 477 U. S., at 389. That standard was established in *Hill*, which held that a defendant who enters a plea agreement must show "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." 474 U. S., at 59. Moore's failure to make that showing

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forecloses relief under AEDPA.

IV

There are certain differences between inadequate assistance of counsel claims in cases where there was a full trial on the merits and those, like this one, where a plea was entered even before the prosecution decided upon all of the charges. A trial provides the full written record and factual background that serve to limit and clarify some of the choices counsel made. Still, hindsight cannot suffice for relief when counsel's choices were reasonable and legitimate based on predictions of how the trial would proceed. See *Richter, ante*, at 18.

Hindsight and second guesses are also inappropriate, and often more so, where a plea has been entered without a full trial or, as in this case, even before the prosecution decided on the charges. The added uncertainty that results when there is no extended, formal record and no actual history to show how the charges have played out at trial works against the party alleging inadequate assistance. Counsel, too, faced that uncertainty. There is a most substantial burden on the claimant to show ineffective assistance. The plea process brings to the criminal justice system a stability and a certainty that must not be undermined by the prospect of collateral challenges in cases not only where witnesses and evidence have disappeared, but also in cases where witnesses and evidence were not presented in the first place. The substantial burden to show ineffective assistance of counsel, the burden the claimant must meet to avoid the plea, has not been met in this case.

The state postconviction court's decision involved no unreasonable application of Supreme Court precedent. Because the Court of Appeals erred in finding otherwise, its judgment is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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JUSTICE KAGAN took no part in the consideration or decision of this case.

GINSBURG, J., concurring in judgment

SUPREME COURT OF THE UNITED STATES

No. 09–658

JEFF PREMO, SUPERINTENDENT, OREGON STATE
PENITENTIARY, PETITIONER *v.* RANDY
JOSEPH MOORE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

[January 19, 2011]

JUSTICE GINSBURG, concurring in the judgment.

To prevail under the prejudice requirement of *Strickland v. Washington*, 466 U. S. 668, 694 (1984), a petitioner for federal habeas corpus relief must demonstrate “a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial,” *Hill v. Lockhart*, 474 U. S. 52, 59 (1985). As Moore’s counsel confirmed at oral argument, see Tr. of Oral Arg. 32, Moore never declared that, better informed, he would have resisted the plea bargain and opted for trial. For that reason, I concur in the Court’s judgment.

Syllabus

ROE, WARDEN *v.* FLORES-ORTEGACERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

No. 98–1441. Argued November 1, 1999—Decided February 23, 2000

Respondent pleaded guilty to second-degree murder. At his sentencing, the trial judge advised him that he had 60 days to file an appeal. His counsel, Ms. Kops, wrote “bring appeal papers” in her file, but no notice of appeal was filed within that time. Respondent’s subsequent attempt to file such notice was rejected as untimely, and his efforts to secure state habeas relief were unsuccessful. He then filed a federal habeas petition, alleging constitutionally ineffective assistance of counsel based on Ms. Kops’ failure to file the notice after promising to do so. The District Court denied relief. The Ninth Circuit reversed, however, finding that respondent was entitled to relief because, under its precedent, a habeas petitioner need only show that his counsel’s failure to file a notice of appeal was without the petitioner’s consent.

Held:

1. *Strickland v. Washington*, 466 U.S. 668, provides the proper framework for evaluating a claim that counsel was constitutionally ineffective for failing to file a notice of appeal. Under *Strickland*, a defendant must show (1) that counsel’s representation “fell below an objective standard of reasonableness,” *id.*, at 688, and (2) that counsel’s deficient performance prejudiced the defendant, *id.*, at 694. Pp. 476–486.

(a) Courts must “judge the reasonableness of counsel’s conduct on the facts of the particular case, viewed as of the time of counsel’s conduct,” 466 U.S., at 690, and “[j]udicial scrutiny of counsel’s performance must be highly deferential,” *id.*, at 689. A lawyer who disregards a defendant’s specific instructions to file a notice of appeal acts in a professionally unreasonable manner, see *Rodriguez v. United States*, 395 U.S. 327, while a defendant who explicitly tells his attorney not to file an appeal plainly cannot later complain that, by following those instructions, his counsel performed deficiently, see *Jones v. Barnes*, 463 U.S. 745, 751. The Ninth Circuit adopted a bright-line rule for cases where the defendant has not clearly conveyed his wishes one way or the other; in its view, failing to file a notice of appeal without the defendant’s consent is *per se* deficient. The Court rejects that *per se* rule as inconsistent with *Strickland*’s circumstance-specific reasonableness requirement. The question whether counsel has performed deficiently in such cases is best answered by first asking whether counsel in fact consulted with

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the defendant about an appeal. By “consult,” the Court means advising the defendant about the advantages and disadvantages of taking an appeal and making a reasonable effort to discover the defendant’s wishes. Counsel who consults with the defendant performs in a professionally unreasonable manner only by failing to follow the defendant’s express instructions about an appeal. If counsel has not consulted, the court must ask whether that failure itself constitutes deficient performance. The better practice is for counsel routinely to consult with the defendant about an appeal. Counsel has a constitutionally imposed duty to consult, however, only when there is reason to think either (1) that a rational defendant would want to appeal, or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. In making this determination, courts must take into account all the information counsel knew or should have known. One highly relevant factor will be whether the conviction follows a trial or a guilty plea, because a plea both reduces the scope of potentially appealable issues and may indicate that the defendant seeks an end to judicial proceedings. Even then, a court must consider such factors as whether the defendant received the sentence bargained for and whether the plea expressly reserved or waived some or all appeal rights. Pp. 477–481.

(b) The second part of the *Strickland* test requires the defendant to show prejudice from counsel’s deficient performance. Where an ineffective assistance of counsel claim involves counsel’s performance during the course of a legal proceeding, the Court normally applies a strong presumption of reliability to the proceeding, requiring a defendant to overcome that presumption by demonstrating that attorney errors actually had an adverse effect on the defense. The complete denial of counsel during a critical stage of a judicial proceeding, however, mandates a presumption of prejudice because “the adversary process itself” has been rendered “presumptively unreliable.” *United States v. Cronin*, 466 U. S. 648, 659. The even more serious denial of the entire judicial proceeding also demands a presumption of prejudice because no presumption of reliability can be accorded to judicial proceedings that never took place. Respondent claims that his counsel’s deficient performance led to the forfeiture of his appeal. If that is so, prejudice must be presumed. Because the defendant in such cases must show that counsel’s deficient performance actually deprived him of an appeal, however, he must demonstrate that there is a reasonable probability that, but for counsel’s deficient failure to consult with him about an appeal, he would have timely appealed. This standard follows the pattern established in *Strickland* and *Cronin*, and mirrors the prejudice inquiry applied in *Hill v. Lockhart*, 474 U. S. 52, and *Rodriguez v. United States*, *supra*.

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The question whether a defendant has made the requisite showing will turn on the facts of the particular case. Nonetheless, evidence that there were nonfrivolous grounds for appeal or that the defendant promptly expressed a desire to appeal will often be highly relevant in making this determination. The performance and prejudice inquiries may overlap because both may be satisfied if the defendant shows nonfrivolous grounds for appeal. However, they are not in all cases coextensive. Evidence that a defendant sufficiently demonstrated to counsel his interest in an appeal may prove deficient performance, but it alone is insufficient to establish that he would have filed the appeal had he received counsel's advice. And, although showing nonfrivolous grounds for appeal may give weight to the defendant's contention that he would have appealed, a defendant's inability to demonstrate the merit of his hypothetical appeal will not foreclose the possibility that he can meet the prejudice requirement where there are other substantial reasons to believe that he would have appealed. Pp. 481–486.

2. The court below undertook neither part of the *Strickland* inquiry and the record does not provide the Court with sufficient information to determine whether Ms. Kops rendered constitutionally inadequate assistance. The case is accordingly remanded for a determination whether Ms. Kops had a duty to consult with respondent (either because there were potential grounds for appeal or because respondent expressed interest in appealing), whether she satisfied her obligations, and, if she did not, whether respondent was prejudiced thereby. P. 487. 160 F. 3d 534, vacated and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and SCALIA, KENNEDY, THOMAS, and BREYER, JJ., joined, and in which STEVENS, SOUTER, and GINSBURG, JJ., joined as to Part II–B. BREYER, J., filed a concurring opinion, *post*, p. 488. SOUTER, J., filed an opinion concurring in part and dissenting in part, in which STEVENS and GINSBURG, JJ., joined, *post*, p. 488. GINSBURG, J., filed an opinion concurring in part and dissenting in part, *post*, p. 493.

Paul E. O'Connor, Deputy Attorney General of California, argued the cause for petitioner. With him on the briefs were *Bill Lockyer*, Attorney General, *David P. Druliner*, Chief Assistant Attorney General, *Robert R. Anderson* and *Arnold O. Overoye*, Senior Assistant Attorneys General,

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Margaret Venturi, Supervising Deputy Attorney General, and *Ward A. Campbell*, Assistant Supervising Deputy Attorney General.

Edward C. DuMont argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Waxman*, *Assistant Attorney General Robinson*, *Deputy Solicitor General Dreeben*, and *Nina Goodman*.

Quin Denwir argued the cause for respondent. With him on the brief were *Ann H. Voris* and *Mary French*.*

JUSTICE O'CONNOR delivered the opinion of the Court.

In this case we must decide the proper framework for evaluating an ineffective assistance of counsel claim, based on counsel's failure to file a notice of appeal without respondent's consent.

I

The State of California charged respondent, Lucio Flores-Ortega, with one count of murder, two counts of assault, and a personal use of a deadly weapon enhancement allegation. In October 1993, respondent appeared in Superior Court with his court-appointed public defender, Nancy Kops, and a Spanish language interpreter, and pleaded guilty to second-degree murder. The plea was entered pursuant to a California rule permitting a defendant both to deny committing a crime and to admit that there is sufficient evidence to convict him. See *People v. West*, 3 Cal. 3d 595, 477 P. 2d 409 (1970). In exchange for the guilty plea, the state prosecutor moved to strike the allegation of personal use of a deadly weapon and to dismiss both assault charges. On November 10, 1993,

**Kent S. Scheidegger* and *Christine M. Murphy* filed a brief for the Criminal Justice Legal Foundation as *amicus curiae* urging reversal.

Lawrence S. Lustberg, *Kevin McNulty*, and *Lisa B. Kemler* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae* urging affirmance.

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respondent was sentenced to 15 years to life in state prison. After pronouncing sentence, the trial judge informed respondent, “You may file an appeal within 60 days from today’s date with this Court. If you do not have money for Counsel, Counsel will be appointed for you to represent you on your appeal.” App. 40.

Although Ms. Kops wrote “bring appeal papers” in her file, no notice of appeal was filed within the 60 days allowed by state law. See Cal. Penal Code Ann. § 1239(a) (West Supp. 2000); Cal. App. Rule 31(d). (A notice of appeal is generally a one-sentence document stating that the defendant wishes to appeal from the judgment. See Rule 31(b); Judicial Council of California, Approved Form CR–120 (Notice of Appeal–Felony) (Jan. 5, 2000), <http://www.courtinfo.ca.gov/forms/documents/cr120.pdf>.) Filing such a notice is a purely ministerial task that imposes no great burden on counsel. During the first 90 days after sentencing, respondent was apparently in lockup, undergoing evaluation, and unable to communicate with counsel. About four months after sentencing, on March 24, 1994, respondent tried to file a notice of appeal, which the Superior Court Clerk rejected as untimely. Respondent sought habeas relief from California’s appellate courts, challenging the validity of both his plea and conviction, and (before the California Supreme Court) alleging that Ms. Kops had not filed a notice of appeal as she had promised. These efforts were uniformly unsuccessful.

Respondent then filed a federal habeas petition pursuant to 28 U. S. C. § 2254, alleging constitutionally ineffective assistance of counsel based on Ms. Kops’ failure to file a notice of appeal on his behalf after promising to do so. The United States District Court for the Eastern District of California referred the matter to a Magistrate Judge, who in turn ordered an evidentiary hearing on the limited issue of whether Ms. Kops promised to file a notice of appeal on respondent’s behalf. At the conclusion of the hearing, the Magistrate Judge found:

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“The evidence in this case is, I think, quite clear that there was no consent to a failure to file [a notice of appeal].

“It’s clear to me that Mr. Ortega had little or no understanding of what the process was, what the appeal process was, or what appeal meant at that stage of the game.

“I think there was a conversation [between Ortega and Kops] in the jail. Mr. Ortega testified, and I’m sure he’s testifying as to the best of his belief, that there was a conversation after the pronouncement of judgment at the sentencing hearing where it’s his understanding that Ms. Kops was going to file a notice of appeal.

“She has no specific recollection of that. However, she is obviously an extremely experienced defense counsel. She’s obviously a very meticulous person. And I think had Mr. Ortega requested that she file a notice of appeal, she would have done so.

“But, I cannot find that he has carried his burden of showing by a preponderance of the evidence that she made that promise.” App. 132–133.

The Magistrate Judge acknowledged that under precedent from the Court of Appeals for the Ninth Circuit, *United States v. Stearns*, 68 F. 3d 328 (1995), a defendant need only show that he did not consent to counsel’s failure to file a notice of appeal to be entitled to relief. The judge concluded, however, that *Stearns* announced a new rule that could not be applied retroactively on collateral review to respondent’s case. See *Teague v. Lane*, 489 U. S. 288 (1989). Thus, the Magistrate Judge recommended that the habeas petition be denied. App. 161. The District Court adopted the Magistrate’s findings and recommendation, and denied relief. *Id.*, at 162–163.

The Court of Appeals for the Ninth Circuit reversed, reasoning that the rule it applied in *Stearns*—that a habeas petitioner need only show that his counsel’s failure to file a

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notice of appeal was without the petitioner's consent—tracked its earlier opinion in *Lozada v. Deeds*, 964 F. 2d 956 (1992), which predated respondent's conviction. 160 F. 3d 534 (1998). Because respondent did not consent to the failure to file a notice of appeal—and thus qualified for relief under *Stearns*—the court remanded the case to the District Court with instructions to issue a conditional habeas writ unless the state court allowed respondent a new appeal. We granted certiorari, 526 U. S. 1097 (1999), to resolve a conflict in the lower courts regarding counsel's obligations to file a notice of appeal. Compare *United States v. Tajeddini*, 945 F. 2d 458, 468 (CA1 1991) (*per curiam*) (counsel's failure to file a notice of appeal, allegedly without the defendant's knowledge or consent, constitutes deficient performance); *Morales v. United States*, 143 F. 3d 94, 97 (CA2 1998) (counsel has no duty to file a notice of appeal unless requested by the defendant); *Ludwig v. United States*, 162 F. 3d 456, 459 (CA6 1998) (Constitution implicated only when defendant actually requests an appeal and counsel disregards the request); *Castellanos v. United States*, 26 F. 3d 717, 719–720 (CA7 1994) (same); *Romero v. Tansy*, 46 F. 3d 1024, 1030–1031 (CA10 1995) (defendant does not need to express to counsel his intent to appeal for counsel to be constitutionally obligated to perfect defendant's appeal; unless defendant waived right, counsel was deficient for failing to advise defendant about appeal right); *United States v. Stearns*, *supra*, (counsel's failure to file a notice of appeal is deficient unless the defendant consents to the abandonment of his appeal).

II

In *Strickland v. Washington*, 466 U. S. 668 (1984), we held that criminal defendants have a Sixth Amendment right to “reasonably effective” legal assistance, *id.*, at 687, and announced a now-familiar test: A defendant claiming ineffective assistance of counsel must show (1) that counsel's representation “fell below an objective standard of reasonableness,”

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id., at 688, and (2) that counsel’s deficient performance prejudiced the defendant, *id.*, at 694. Today we hold that this test applies to claims, like respondent’s, that counsel was constitutionally ineffective for failing to file a notice of appeal.

A

As we have previously noted, “[n]o particular set of detailed rules for counsel’s conduct can satisfactorily take account of the variety of circumstances faced by defense counsel.” *Id.*, at 688–689. Rather, courts must “judge the reasonableness of counsel’s challenged conduct on the facts of the particular case, viewed as of the time of counsel’s conduct,” *id.*, at 690, and “[j]udicial scrutiny of counsel’s performance must be highly deferential,” *id.*, at 689.

We have long held that a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable. See *Rodriguez v. United States*, 395 U. S. 327 (1969); cf. *Peguero v. United States*, 526 U. S. 23, 28 (1999) (“[W]hen counsel fails to file a requested appeal, a defendant is entitled to [a new] appeal without showing that his appeal would likely have had merit”). This is so because a defendant who instructs counsel to initiate an appeal reasonably relies upon counsel to file the necessary notice. Counsel’s failure to do so cannot be considered a strategic decision; filing a notice of appeal is a purely ministerial task, and the failure to file reflects inattention to the defendant’s wishes. At the other end of the spectrum, a defendant who explicitly tells his attorney *not* to file an appeal plainly cannot later complain that, by following his instructions, his counsel performed deficiently. See *Jones v. Barnes*, 463 U. S. 745, 751 (1983) (accused has ultimate authority to make fundamental decision whether to take an appeal). The question presented in this case lies between those poles: Is counsel deficient for not filing a notice of appeal when the defendant has not clearly conveyed his wishes one way or the other?

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The Courts of Appeals for the First and Ninth Circuits have answered that question with a bright-line rule: Counsel must file a notice of appeal unless the defendant specifically instructs otherwise; failing to do so is *per se* deficient. See, e. g., *Stearns*, 68 F. 3d, at 330; *Lozada*, *supra*, at 958; *Tajedini*, *supra*, at 468. Such a rule effectively imposes an obligation on counsel in all cases either (1) to file a notice of appeal, or (2) to discuss the possibility of an appeal with the defendant, ascertain his wishes, and act accordingly. We reject this *per se* rule as inconsistent with *Strickland*'s holding that "the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." 466 U. S., at 688. The Court of Appeals failed to engage in the circumstance-specific reasonableness inquiry required by *Strickland*, and that alone mandates vacatur and remand.

In those cases where the defendant neither instructs counsel to file an appeal nor asks that an appeal not be taken, we believe the question whether counsel has performed deficiently by not filing a notice of appeal is best answered by first asking a separate, but antecedent, question: whether counsel in fact consulted with the defendant about an appeal. We employ the term "consult" to convey a specific meaning—advising the defendant about the advantages and disadvantages of taking an appeal, and making a reasonable effort to discover the defendant's wishes. If counsel has consulted with the defendant, the question of deficient performance is easily answered: Counsel performs in a professionally unreasonable manner only by failing to follow the defendant's express instructions with respect to an appeal. See *supra*, at 477. If counsel has not consulted with the defendant, the court must in turn ask a second, and subsidiary, question: whether counsel's failure to consult with the defendant itself constitutes deficient performance. That question lies at the heart of this case: Under what circumstances does counsel have an obligation to consult with the defendant about an appeal?

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Because the decision to appeal rests with the defendant, we agree with JUSTICE SOUTER that the better practice is for counsel routinely to consult with the defendant regarding the possibility of an appeal. See ABA Standards for Criminal Justice, Defense Function 4–8.2(a) (3d ed. 1993); *post*, at 490–491 (opinion concurring in part and dissenting in part). In fact, California imposes on trial counsel a *per se* duty to consult with defendants about the possibility of an appeal. See Cal. Penal Code Ann. § 1240.1(a) (West Supp. 2000). Nonetheless, “[p]revaling norms of practice as reflected in American Bar Association standards and the like . . . are only guides,” and imposing “specific guidelines” on counsel is “not appropriate.” *Strickland*, 466 U. S., at 688. And, while States are free to impose whatever specific rules they see fit to ensure that criminal defendants are well represented, we have held that the Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices. See *ibid.* We cannot say, as a *constitutional* matter, that in every case counsel’s failure to consult with the defendant about an appeal is necessarily unreasonable, and therefore deficient. Such a holding would be inconsistent with both our decision in *Strickland* and common sense. See *id.*, at 689 (rejecting mechanistic rules governing what counsel must do). For example, suppose that a defendant consults with counsel; counsel advises the defendant that a guilty plea probably will lead to a 2 year sentence; the defendant expresses satisfaction and pleads guilty; the court sentences the defendant to 2 years’ imprisonment as expected and informs the defendant of his appeal rights; the defendant does not express any interest in appealing, and counsel concludes that there are no nonfrivolous grounds for appeal. Under these circumstances, it would be difficult to say that counsel is “professionally unreasonable,” *id.*, at 691, as a constitutional matter, in not consulting with such a defendant regarding an appeal. Or, for example, suppose a sentencing court’s instructions to a defendant about

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his appeal rights in a particular case are so clear and informative as to substitute for counsel's duty to consult. In some cases, counsel might then reasonably decide that he need not repeat that information. We therefore reject a bright-line rule that counsel must always consult with the defendant regarding an appeal.

We instead hold that counsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. In making this determination, courts must take into account all the information counsel knew or should have known. See *id.*, at 690 (focusing on the totality of the circumstances). Although not determinative, a highly relevant factor in this inquiry will be whether the conviction follows a trial or a guilty plea, both because a guilty plea reduces the scope of potentially appealable issues and because such a plea may indicate that the defendant seeks an end to judicial proceedings. Even in cases when the defendant pleads guilty, the court must consider such factors as whether the defendant received the sentence bargained for as part of the plea and whether the plea expressly reserved or waived some or all appeal rights. Only by considering all relevant factors in a given case can a court properly determine whether a rational defendant would have desired an appeal or that the particular defendant sufficiently demonstrated to counsel an interest in an appeal.

Rather than the standard we announce today, JUSTICE SOUTER would have us impose an "almost" bright-line rule and hold that counsel "almost always" has a duty to consult with a defendant about an appeal. *Post*, at 488. Although he recognizes that "detailed rules for counsel's conduct" have no place in a *Strickland* inquiry, he argues that this "qualifi-

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cation” has no application here. *Post*, at 491. According to JUSTICE SOUTER, in *Strickland* we only rejected *per se* rules in order to respect the reasonable strategic choices made by lawyers, and that failing to consult about an appeal cannot be a strategic choice. *Post*, at 491–492. But we have consistently declined to impose mechanical rules on counsel—even when those rules might lead to better representation—not simply out of deference to counsel’s strategic choices, but because “the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, . . . [but rather] simply to ensure that criminal defendants receive a fair trial.” 466 U. S., at 689. The relevant question is not whether counsel’s choices were strategic, but whether they were reasonable. See *id.*, at 688 (defendant must show that counsel’s representation fell below an objective standard of reasonableness). We expect that courts evaluating the reasonableness of counsel’s performance using the inquiry we have described will find, in the vast majority of cases, that counsel had a duty to consult with the defendant about an appeal. We differ from JUSTICE SOUTER only in that we refuse to make this determination as a *per se* (or “almost” *per se*) matter.

B

The second part of the *Strickland* test requires the defendant to show prejudice from counsel’s deficient performance.

1

In most cases, a defendant’s claim of ineffective assistance of counsel involves counsel’s performance during the course of a legal proceeding, either at trial or on appeal. See, e. g., *id.*, at 699 (claim that counsel made poor strategic choices regarding what to argue at a sentencing hearing); *United States v. Cronin*, 466 U. S. 648, 649–650 (1984) (claim that young lawyer was incompetent to defend complex criminal

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case); *Penson v. Ohio*, 488 U. S. 75, 88–89 (1988) (claim that counsel in effect did not represent defendant on appeal); *Smith v. Robbins*, *ante*, p. 259 (claim that counsel neglected to file a merits brief on appeal); *Smith v. Murray*, 477 U. S. 527, 535–536 (1986) (claim that counsel failed to make a particular argument on appeal). In such circumstances, whether we require the defendant to show actual prejudice—“a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different,” *Strickland*, 466 U. S., at 694—or whether we instead presume prejudice turns on the magnitude of the deprivation of the right to effective assistance of counsel. That is because “the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial,” *Cronic*, *supra*, at 658, or a fair appeal, see *Penson*, *supra*, at 88–89. “Absent some effect of challenged conduct on the reliability of the . . . process, the [effective counsel] guarantee is generally not implicated.” *Cronic*, *supra*, at 658.

We “normally apply a ‘strong presumption of reliability’ to judicial proceedings and require a defendant to overcome that presumption,” *Robbins*, *ante*, at 286 (citing *Strickland*, *supra*, at 696), by “show[ing] how specific errors of counsel undermined the reliability of the finding of guilt,” *Cronic*, *supra*, at 659, n. 26. Thus, in cases involving mere “attorney error,” we require the defendant to demonstrate that the errors “actually had an adverse effect on the defense.” *Strickland*, *supra*, at 693. See, e. g., *Robbins*, *ante*, at 287 (applying actual prejudice requirement where counsel followed all required procedures and was alleged to have missed a particular nonfrivolous argument); *Strickland*, *supra*, at 699–700 (rejecting claim in part because the evidence counsel failed to introduce probably would not have altered defendant’s sentence).

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2

In some cases, however, the defendant alleges not that counsel made specific errors in the course of representation, but rather that during the judicial proceeding he was—either actually or constructively—denied the assistance of counsel altogether. “The presumption that counsel’s assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage.” *Cronic, supra*, at 659. The same is true on appeal. See *Penson, supra*, at 88. Under such circumstances, “[n]o specific showing of prejudice [is] required,” because “the adversary process itself [is] presumptively unreliable.” *Cronic, supra*, at 659; see also *Robbins, ante*, at 286 (“denial of counsel altogether . . . warrants a presumption of prejudice”); *Penson, supra*, at 88–89 (complete denial of counsel on appeal requires a presumption of prejudice).

Today’s case is unusual in that counsel’s alleged deficient performance arguably led not to a judicial proceeding of disputed reliability, but rather to the forfeiture of a proceeding itself. According to respondent, counsel’s deficient performance deprived him of a notice of appeal and, hence, an appeal altogether. Assuming those allegations are true, counsel’s deficient performance has deprived respondent of more than a *fair* judicial proceeding; that deficiency deprived respondent of the appellate proceeding altogether. In *Cronic*, *Penson*, and *Robbins*, we held that the complete denial of counsel during a critical stage of a judicial proceeding mandates a presumption of prejudice because “the adversary process itself” has been rendered “presumptively unreliable.” *Cronic, supra*, at 659. The even more serious denial of the entire judicial proceeding itself, which a defendant wanted at the time and to which he had a right, similarly demands a presumption of prejudice. Put simply, we cannot accord any “‘presumption of reliability,’” *Robbins, ante*, at 286, to judicial proceedings that never took place.

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3

The Court of Appeals below applied a *per se* prejudice rule, and granted habeas relief based solely upon a showing that counsel had performed deficiently under its standard. 160 F. 3d, at 536. Unfortunately, this *per se* prejudice rule ignores the critical requirement that counsel's deficient performance must actually cause the forfeiture of the defendant's appeal. If the defendant cannot demonstrate that, but for counsel's deficient performance, he would have appealed, counsel's deficient performance has not deprived him of anything, and he is not entitled to relief. Cf. *Peguero v. United States*, 526 U.S. 23 (1999) (defendant not prejudiced by court's failure to advise him of his appeal rights, where he had full knowledge of his right to appeal and chose not to do so). Accordingly, we hold that, to show prejudice in these circumstances, a defendant must demonstrate that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed.

In adopting this standard, we follow the pattern established in *Strickland* and *Cronic*, and reaffirmed in *Robbins*, requiring a showing of actual prejudice (*i. e.*, that, but for counsel's errors, the defendant might have prevailed) when the proceeding in question was presumptively reliable, but presuming prejudice with no further showing from the defendant of the merits of his underlying claims when the violation of the right to counsel rendered the proceeding presumptively unreliable or entirely nonexistent. See *Strickland*, *supra*, at 493–496; *Cronic*, 466 U.S., at 658–659; *Robbins*, *ante*, at 286–287. Today, drawing on that line of cases and following the suggestion of the Solicitor General, we hold that when counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken, the defendant has made out a successful ineffective assistance of counsel claim entitling him to an appeal.

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We believe this prejudice standard breaks no new ground, for it mirrors the prejudice inquiry applied in *Hill v. Lockhart*, 474 U.S. 52 (1985), and *Rodriguez v. United States*, 395 U.S. 327 (1969). In *Hill*, we considered an ineffective assistance of counsel claim based on counsel's allegedly deficient advice regarding the consequences of entering a guilty plea. Like the decision whether to appeal, the decision whether to plead guilty (*i. e.*, waive trial) rested with the defendant and, like this case, counsel's advice in *Hill* might have caused the defendant to forfeit a judicial proceeding to which he was otherwise entitled. We held that "to satisfy the 'prejudice' requirement [of *Strickland*], the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill, supra*, at 59. Similarly, in *Rodriguez*, counsel failed to file a notice of appeal, despite being instructed by the defendant to do so. See 395 U.S., at 328. We held that the defendant, by instructing counsel to perfect an appeal, objectively indicated his intent to appeal and was entitled to a new appeal without any further showing. Because "[t]hose whose right to an appeal has been frustrated should be treated exactly like any other appellan[t]," we rejected any requirement that the would-be appellant "specify the points he would raise were his right to appeal reinstated." *Id.*, at 330. See also *Evitts v. Lucey*, 469 U.S. 387 (1985) (defendant entitled to new appeal when counsel's deficient failure to comply with mechanistic local court rules led to dismissal of first appeal).

As with all applications of the *Strickland* test, the question whether a given defendant has made the requisite showing will turn on the facts of a particular case. See 466 U.S., at 695–696. Nonetheless, evidence that there were nonfrivolous grounds for appeal or that the defendant in question promptly expressed a desire to appeal will often be highly relevant in making this determination. We recognize that

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the prejudice inquiry we have described is not wholly dissimilar from the inquiry used to determine whether counsel performed deficiently in the first place; specifically, both may be satisfied if the defendant shows nonfrivolous grounds for appeal. See *Hill, supra*, at 59 (when, in connection with a guilty plea, counsel gives deficient advice regarding a potentially valid affirmative defense, the prejudice inquiry depends largely on whether that affirmative defense might have succeeded, leading a rational defendant to insist on going to trial). But, while the performance and prejudice prongs may overlap, they are not in all cases coextensive. To prove deficient performance, a defendant can rely on evidence that he sufficiently demonstrated to counsel his interest in an appeal. But such evidence alone is insufficient to establish that, had the defendant received reasonable advice from counsel about the appeal, he would have instructed his counsel to file an appeal.

By the same token, although showing nonfrivolous grounds for appeal may give weight to the contention that the defendant would have appealed, a defendant's inability to "specify the points he would raise were his right to appeal reinstated," *Rodriguez*, 395 U. S., at 330, will not foreclose the possibility that he can satisfy the prejudice requirement where there are other substantial reasons to believe that he would have appealed. See *ibid.*; see also *Peguero, supra*, at 30 (O'CONNOR, J., concurring) ("To require defendants to specify the grounds for their appeal and show that they have some merit would impose a heavy burden on defendants who are often proceeding *pro se* in an initial [habeas] motion"). We similarly conclude here that it is unfair to *require* an indigent, perhaps *pro se*, defendant to demonstrate that his hypothetical appeal might have had merit before any advocate has ever reviewed the record in his case in search of potentially meritorious grounds for appeal. Rather, we require the defendant to demonstrate that, but for counsel's deficient conduct, he would have appealed.

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III

The court below undertook neither part of the *Strickland* inquiry we have described, but instead presumed both that Ms. Kops was deficient for failing to file a notice of appeal without respondent's consent and that her deficient performance prejudiced respondent. See 160 F. 3d, at 536. JUSTICE SOUTER finds Ms. Kops' performance in this case to have been "derelict," presumably because he believes that she did not consult with respondent about an appeal. *Post*, at 489. But the Magistrate Judge's findings do not provide us with sufficient information to determine whether Ms. Kops rendered constitutionally inadequate assistance. Specifically, the findings below suggest that there may have been some conversation between Ms. Kops and respondent about an appeal, see App. 133; see also 160 F. 3d, at 535 (Ms. Kops wrote "bring appeal papers" in her file), but do not indicate what was actually said. Assuming, *arguendo*, that there was a duty to consult in this case, it is impossible to determine whether that duty was satisfied without knowing whether Ms. Kops advised respondent about the advantages and disadvantages of taking an appeal and made a reasonable effort to discover his wishes. Cf. *Strickland, supra*, at 691 ("inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's . . . decisions"). Based on the record before us, we are unable to determine whether Ms. Kops had a duty to consult with respondent (either because there were potential grounds for appeal or because respondent expressed interest in appealing), whether she satisfied her obligations, and, if she did not, whether respondent was prejudiced thereby. Accordingly, the judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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JUSTICE BREYER, concurring.

I write to emphasize that the question presented concerned the filing of a “notice of appeal *following a guilty plea*.” Pet. for Cert. i (emphasis added). In that context I agree with the Court. I also join its opinion, which, in my view, makes clear that counsel does “almost always” have a constitutional duty to consult with a defendant about an appeal after a trial. *Post* this page (SOUTER, J., concurring in part and dissenting in part); cf. *ante*, at 479–481.

JUSTICE SOUTER, with whom JUSTICE STEVENS and JUSTICE GINSBURG join, concurring in part and dissenting in part.

I join Part II–B of the Court’s opinion, but I respectfully dissent from Part II–A. As the opinion says, the crucial question in this case is whether, after a criminal conviction, a lawyer has a duty to consult with her client about the choice to appeal. The majority’s conclusion is sometimes; mine is, almost always in those cases in which a plea of guilty has not obviously waived any claims of error.¹ It is unreasonable for a lawyer with a client like respondent Flores-Ortega to walk away from her representation after trial or after sentencing without at the very least acting affir-

¹ I say “almost” always, recognizing that there can be cases beyond the margin: if a legally trained defendant were convicted in an error-free trial of an open-and-shut case, his counsel presumably would not be deficient in failing to explain the options. This is not what we have here. Nor is this a case in which the judge during the plea colloquy so fully explains appeal rights and possible issues as to obviate counsel’s need to do the same; such a possibility is never very likely and exists only at the furthest reach of theory, given a defendant’s right to adversarial representation, see *Smith v. Robbins*, *ante*, at 296–297 (SOUTER, J., dissenting). Finally, of course, there is no claim here that Flores-Ortega waived his right to appeal as part of his plea agreement; although he pleaded guilty, the record shows that he and the State argued before the trial court for different sentences, and he had little understanding of the legal system. The fact of the plea is thus irrelevant to the disposition of the case.

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matively to ensure that the client understands the right to appeal.

Where appeal is available as a matter of right, a decision to seek or forgo review is for the convict himself, not his lawyer, *Jones v. Barnes*, 463 U. S. 745, 751 (1983), who owes a duty of effective assistance at the appellate stage, *Evitts v. Lucey*, 469 U. S. 387, 396 (1985); *Penson v. Ohio*, 488 U. S. 75, 85 (1988). It follows, as the majority notes, that if a defendant requests counsel to file an appeal, a lawyer who fails to do so is, without more, ineffective for constitutional purposes. But, as the Court says, a lesser infidelity than that may fail the test of lawyer competence under *Strickland v. Washington*, 466 U. S. 668 (1984), which governs this case. I think that the derelict character of counsel's performance in this case is clearer than the majority realizes.

In *Strickland*, we explicitly noted that a lawyer has a duty "to consult with the defendant on important decisions . . . in the course of the prosecution." *Id.*, at 688. The decision whether to appeal is one such decision. Since it cannot be made intelligently without appreciating the merits of possible grounds for seeking review, see *Peguero v. United States*, 526 U. S. 23, 30–31 (1999) (O'CONNOR, J., concurring); *Rodriguez v. United States*, 395 U. S. 327, 330 (1969), and the potential risks to the appealing defendant, a lay defendant needs help before deciding. If the crime is minor, the issues simple, and the defendant sophisticated, a 5-minute conversation with his lawyer may well suffice; if the charge is serious, the potential claims subtle, and a defendant uneducated, hours of counseling may be in order. But only in the extraordinary case will a defendant need no advice or counsel whatever.

To the extent that our attention has been directed to statements of "prevailing professional norms," *Strickland v. Washington*, 466 U. S., at 688 (*Strickland's* touchstone of reasonable representation, see *ibid.*), they are consistent with common sense in requiring a lawyer to consult with a

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client before the client makes his decision about appeal. Thus, ABA Standards for Criminal Justice 21-2.2(b) (2d ed. 1980):

“Defense counsel should advise a defendant on the meaning of the court’s judgment, of defendant’s right to appeal, on the possible grounds for appeal, and of the probable outcome of appealing. Counsel should also advise of any posttrial proceedings that might be pursued before or concurrent with an appeal. While counsel should do what is needed to inform and advise defendant, the decision whether to appeal, like the decision whether to plead guilty, must be the defendant’s own choice.”

See also ABA Standards for Criminal Justice, Defense Function 4-8.2(a) (3d ed. 1993) (stating that trial counsel “should explain to the defendant the meaning and consequences of the court’s judgment and defendant’s right of appeal” and “should give the defendant his or her professional judgment as to whether there are meritorious grounds for appeal and as to the probable results of an appeal”); *id.*, 4-8.2, Commentary (“[C]ounsel [has the duty] to discuss frankly and objectively with the defendant the matters to be considered in deciding whether to appeal. . . . To make the defendant’s ultimate choice a meaningful one, counsel’s evaluation of the case must be communicated in a comprehensible manner. . . . [T]rial counsel should always consult promptly with the defendant after making a careful appraisal of the prospects of an appeal”); ABA Standards for Criminal Justice 21-3.2(b)(i).

So also the ABA Model Code of Professional Responsibility, EC 2-31 (1991), provides that: “Trial counsel for a convicted defendant should continue to represent his client by advising whether to take an appeal” Likewise ABA Model Rule of Professional Conduct 1.3, Comment (1996): “[I]f a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client but has not been spe-

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cifically instructed concerning pursuit of an appeal, the lawyer should advise the client of the possibility of appeal before relinquishing responsibility for the matter.” Restatement (Third) of the Law Governing Lawyers §31(3) (Proposed Final Draft No. 1, Mar. 29, 1996) embodies the same standards: “A lawyer must notify a client of decisions to be made by the client . . . and must explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” Indeed, California has apparently eliminated any option on a lawyer’s part to fail to give advice on the appeal decision (whether the failure be negligent or intentional). California Penal Code Ann. §1240.1(a) (West Supp. 2000) provides that trial counsel has a duty to “provide counsel and advice as to whether arguably meritorious grounds exist for reversal or modification of the judgment on appeal.” California thus appears to have adopted as an unconditional affirmative obligation binding all criminal trial counsel the very standard of reasonable practice expressed through the Restatement and the ABA standards.

I understand that under *Strickland*, “[p]revailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable, but they are only guides,” and that “[n]o particular set of detailed rules for counsel’s conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.” 466 U. S., at 688–689. But that qualification has no application here.

While *Strickland*’s disclaimer that no particular set of rules should be treated as dispositive respects the need to defer to reasonable “strategic choices” by lawyers, *id.*, at 690, no such strategic concerns arise in this case. Strategic choices are made about the extent of investigation, the risks of a defense requiring defendant’s testimony and exposure to cross-examination, the possibility that placing personal

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background information before a jury will backfire, and so on. It is not, however, an issue of “strategy” to decide whether or not to give a defendant any advice before he loses the chance to appeal a conviction or sentence. The concern about too much judicial second-guessing after the fact is simply not raised by a claim that a lawyer should have counseled her client to make an intelligent decision to invoke or forgo the right of appeal or the opportunity to seek an appeal.

The Court’s position is even less explicable when one considers the condition of the particular defendant claiming *Strickland* relief here. Flores-Ortega spoke no English and had no sophistication in the ways of the legal system. The Magistrate Judge found that “[i]t’s clear . . . that Mr. Ortega had little or no understanding of what the process was, what the appeal process was, or what appeal meant.” App. 133. To condition the duty of a lawyer to such a client on whether, *inter alia*, “a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal),” *ante*, at 480, is not only to substitute a harmless-error rule for a showing of reasonable professional conduct, but to employ a rule that simply ignores the reality that the constitutional norm must address.² Most criminal defendants, and certainly this one, will be utterly incapable of making rational judgments about appeal without guidance. They cannot possibly know what a rational decisionmaker must know unless they are given the benefit of a professional assessment of chances of success and risks of trying. And they will often (indeed, usually) be just as bad off if they seek relief on habeas after failing to take a direct appeal,

²The Court holds that a duty to consult will also be present if “this particular defendant reasonably demonstrated to counsel that he was interested in appealing.” *Ante*, at 480. Because for most defendants, and certainly for unsophisticated ones like Flores-Ortega who are unaware even of what an appeal means, such a demonstration will be a practical impossibility, I view the Court as virtually requiring the defendant to show the existence of some nonfrivolous appellate issue.

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having no right to counsel in state postconviction proceedings. See *Pennsylvania v. Finley*, 481 U. S. 551, 557 (1987); *Murray v. Giarratano*, 492 U. S. 1, 12 (1989); cf. *Peguero v. United States*, 526 U. S., at 30 (O'CONNOR, J., concurring) (“To require defendants to specify the grounds for their appeal and show that they have some merit would impose a heavy burden on defendants who are often proceeding *pro se* in an initial 28 U. S. C. § 2255 motion”).

In effect, today’s decision erodes the principle that a decision about appeal is validly made only by a defendant with a fair sense of what he is doing. Now the decision may be made inadvertently by a lawyer who never utters the word “appeal” in his client’s hearing, so long as that client cannot later demonstrate (probably without counsel) that he unwittingly had “nonfrivolous grounds” for seeking review. This state of the law amounts to just such a breakdown of the adversary system that *Strickland* warned against. “In every case the court should be concerned with whether . . . the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.” 466 U. S., at 696; see also *Rodriguez v. United States*, 395 U. S., at 330; *Penson v. Ohio*, 488 U. S., at 85.

I would hold that in the aftermath of the hearing at which Flores-Ortega was sentenced, his lawyer was obliged to consult with her client about the availability and prudence of an appeal, and that failure to do that violated *Strickland’s* standard of objective reasonableness. I therefore respectfully dissent from Part II–A of the majority’s opinion.

JUSTICE GINSBURG, concurring in part and dissenting in part.

This case presents the question whether, after a defendant pleads guilty or is convicted, the Sixth Amendment permits defense counsel simply to walk away, leaving the defendant uncounseled about his appeal rights. The Court is not

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deeply divided on this question. Both the Court and JUSTICE SOUTER effectively respond: hardly ever. Because the test articulated by JUSTICE SOUTER provides clearer guidance to lower courts and to counsel, and because I think it plain that the duty to consult was not satisfied in this case, I join JUSTICE SOUTER's opinion.

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SMITH, WARDEN *v.* ROBBINSCERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

No. 98–1037. Argued October 5, 1999—Decided January 19, 2000

An attorney appointed to represent an indigent defendant on appeal may conclude that an appeal would be frivolous and request that the appellate court allow him to withdraw or that the court dispose of the case without the filing of merits briefs. In *Anders v. California*, 386 U. S. 738, this Court found that, in order to protect a defendant's constitutional right to appellate counsel, courts must safeguard against the risk of granting such requests where an appeal is not actually frivolous; found California's procedure for evaluating such requests inadequate; and set forth an acceptable procedure. California adopted a new procedure in *People v. Wende*, 25 Cal. 3d 436, 600 P. 2d 1071. Unlike under the *Anders* procedure, counsel under *Wende* neither explicitly states that his review has led him to conclude that an appeal would be frivolous nor requests to withdraw; instead he is silent on the merits of the case and offers to brief issues at the court's direction. A California state-court jury convicted respondent Robbins of second-degree murder and grand theft. His appointed counsel on appeal concluded that appeal would be frivolous and filed with the State Court of Appeal a brief that complied with the *Wende* procedure. Agreeing with counsel's assessment, the Court of Appeal affirmed. The California Supreme Court denied review. After exhausting his state postconviction remedies, Robbins sought federal habeas relief, arguing, *inter alia*, that he had been denied effective assistance of appellate counsel because his counsel's *Wende* brief did not comply with the *Anders* requirement that the brief refer "to anything in the record that might arguably support the appeal," 386 U. S., at 744. The District Court agreed, concluding that there were at least two issues that might arguably have supported Robbins' appeal and finding that his counsel's failure to include them in his brief deviated from the *Anders* procedure and thus amounted to deficient performance by counsel. Rather than requiring Robbins to prove prejudice from this deficiency, the court applied a presumption of prejudice. The Ninth Circuit agreed, concluding that *Anders*, together with *Douglas v. California*, 372 U. S. 353—which held that States must provide appointed counsel to indigent criminal defendants on appeal—set forth the exclusive procedure by which appointed counsel's performance could be constitutional, and that counsel's brief failed to comply with

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that procedure. The court, however, remanded the case for the District Court to consider other trial errors raised by Robbins.

Held:

1. The *Anders* procedure is only one method of satisfying the Constitution's requirements for indigent criminal appeals; the States are free to adopt different procedures, so long as those procedures adequately safeguard a defendant's right to appellate counsel. Pp. 269–276.

(a) In finding that the California procedure at issue in *Anders*—which permitted appellate counsel to withdraw upon filing a conclusory letter stating that the appeal had “no merit” and permitted the appellate court to affirm the conviction upon reaching the same conclusion following a review of the record—did not comport with fair procedure and lacked the equality that the Fourteenth Amendment requires, this Court placed the case within a line of precedent beginning with *Griffin v. Illinois*, 351 U. S. 12, and continuing with *Douglas v. California*, 372 U. S. 353, that imposed constitutional constraints on those States choosing to create appellate review. Comparing the California procedure to other procedures that this Court had found invalid and to statutory requirements in the federal courts governing appeals by indigents with appointed counsel, the Court concluded that the finding that the appeal had “no merit” was inadequate because it did not mean that the appeal was so lacking in prospects as to be frivolous. The Court, in a final, separate section, set out what would be an acceptable procedure for treating frivolous appeals. Pp. 269–272.

(b) The Ninth Circuit erred in finding that *Anders*' final section, though unnecessary to the holding in that case, was obligatory upon the States. This Court has never so held; its precedents suggest otherwise; and the Ninth Circuit's view runs contrary to this Court's established practice. In *McCoy v. Court of Appeals of Wis., Dist. 1*, 486 U. S. 429, this Court rejected a challenge to Wisconsin's variation on the *Anders* procedure, even though that variation, in at least one respect, provided less effective advocacy for an indigent. In *Pennsylvania v. Finley*, 481 U. S. 551, the Court explained that the *Anders* procedure is not an independent constitutional command, but rather a prophylactic framework; it did not say that this was the only framework that could adequately vindicate the right to appellate counsel announced in *Douglas*. Similarly, in *Penson v. Ohio*, 488 U. S. 75, the Court described *Anders* as simply erecting safeguards. Finally, any view of the procedure described in *Anders*' last section that converted it from a suggestion into a straitjacket would contravene this Court's established practice of allowing the States wide discretion, subject to the minimum require-

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ments of the Fourteenth Amendment, to experiment with solutions to difficult policy problems. See, e. g., *Griffin*, *supra*. The Court, because of its status as a court—particularly a court in a federal system—avoids imposing a single solution on the States from the top down and instead evaluates state procedures one at a time, while leaving “the more challenging task of crafting appropriate procedures . . . to the laboratory of the States . . . in the first instance,” *Cruzan v. Director, Mo. Dept. of Health*, 497 U. S. 261 (O’CONNOR, J., concurring). Pp. 272–276.

2. California’s *Wende* procedure does not violate the Fourteenth Amendment. Pp. 276–284.

(a) The precise rationale for the *Griffin* and *Douglas* line of cases has never been explicitly stated, but this Court’s case law reveals that the Equal Protection and Due Process Clauses of the Fourteenth Amendment largely converge to require that a State’s procedure “afford adequate and effective appellate review to indigent defendants,” *Griffin*, *supra*, at 20 (plurality opinion). A State’s procedure provides such review so long as it reasonably ensures that an indigent’s appeal will be resolved in a way that is related to the merit of that appeal. In determining whether a particular procedure satisfies this standard, it is important to focus on the underlying goals that the procedure should serve—to ensure that those indigents whose appeals are not frivolous receive the counsel and merits brief required by *Douglas*, and also to enable the State to “protect itself so that frivolous appeals are not subsidized and public moneys not needlessly spent,” *Griffin*, *supra*, at 24 (Frankfurter, J., concurring in judgment). For an indigent’s right to counsel on direct appeal does not include the right to bring a frivolous appeal and, concomitantly, does not include the right to counsel for bringing a frivolous appeal. *Anders*’ obvious goal was to prevent this limitation on the right to appellate counsel from swallowing the right itself, and the Court does not retreat from that goal here. Pp. 276–278.

(b) The *Wende* procedure reasonably ensures that an indigent’s appeal will be resolved in a way that is related to the appeal’s merit. A comparison of that procedure to those evaluated in this Court’s chief cases demonstrates that it affords indigents the adequate and effective appellate review required by the Fourteenth Amendment. The *Wende* procedure is undoubtedly far better than those procedures the Court has found inadequate. A significant fact in finding the old California procedure inadequate in *Anders*, and also in finding inadequate the procedures that the Court reviewed in *Eskridge v. Washington Bd. of Prison Terms and Paroles*, 357 U. S. 214, and *Lane v. Brown*, 372 U. S.

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477, two of the precedents on which the *Anders* Court relied, was that those procedures required only a determination that the defendant was unlikely to prevail on appeal, not that the appeal was frivolous. *Wende*, by contrast, requires both counsel and the court to find the appeal to be lacking in arguable issues, *i. e.*, frivolous. An additional problem with the old California procedure was that it apparently permitted an appellate court to allow counsel to withdraw and then decide the appeal without appointing new counsel. Such a procedure was struck down in *Penson v. Ohio*, *supra*, because it permitted a basic violation of the *Douglas* right to have counsel until a case is determined to be frivolous and to receive a merits brief for a nonfrivolous appeal. Under *Wende*, by contrast, *Douglas* violations do not occur, both because counsel does not move to withdraw and because the court orders briefing if it finds arguable issues. The procedure disapproved in *Anders* also only required counsel to file a one-paragraph “bare conclusion” that the appeal had no merit, while *Wende* requires that counsel provide a summary of the case’s procedural and factual history, with citations of the record, in order to ensure that a trained legal eye has searched the record for arguable issues and to assist the reviewing court in its own evaluation. Finally, by providing at least two tiers of review, the *Wende* procedure avoids the additional flaw, found in the *Eskridge*, *Lane*, and *Douglas* procedures, of having only one such tier. Pp. 278–281.

(c) The *Wende* procedure is also at least comparable to those procedures the Court has approved. By neither requiring the *Wende* brief to raise legal issues nor requiring counsel to explicitly describe the case as frivolous, California has made a good-faith effort to mitigate one of the problems that critics have found with *Anders*, namely, the requirement that counsel violate his ethical duty as an officer of the court (by presenting frivolous arguments) as well as his duty to further his client’s interests (by characterizing the client’s claims as frivolous). *Wende* also attempts to resolve another *Anders* problem—that it apparently adopts gradations of frivolity and uses two different meanings for the phrase “arguable issue”—by drawing the line at frivolity and by defining arguable issues as those that are not frivolous. Finally, the *Wende* procedure appears to be, in some ways, better than the one approved in *McCoy*, and in other ways, worse. On balance, the Court cannot say that the latter, assuming, *arguendo*, that they outweigh the former, do so sufficiently to make the *Wende* procedure unconstitutional, and the Court’s purpose under the Constitution is not to resolve such arguments. The Court addresses not what is prudent or appropriate, but what is constitutionally compelled. *United States v. Cronin*, 466 U. S. 648, 665, n. 38. It is enough to say that the *Wende* procedure, like the

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Anders and *McCoy* procedures, and unlike the ones in, *e. g.*, *Douglas* and *Penson*, affords adequate and effective appellate review for criminal indigents. Pp. 281–284.

3. This case is remanded for the Ninth Circuit to evaluate Robbins' ineffective-assistance claim. It may be that his appeal was not frivolous and that he was thus entitled to a merits brief. Both the District Court and the Ninth Circuit found that there were two arguable issues on direct appeal, but it is unclear how they used the phrase "arguable issues." It is therefore necessary to clarify how strong those issues are. The proper standard for evaluating Robbins' claim on remand is that enunciated in *Strickland v. Washington*, 466 U. S. 668: He must first show that his counsel was objectively unreasonable, *id.*, at 687–691, in failing to find arguable issues to appeal, and, if Robbins succeeds in such a showing, he then has the burden of demonstrating prejudice, *id.*, at 694. He must satisfy both prongs of the *Strickland* test to prevail, for his claim does not warrant a presumption of prejudice. He has received appellate counsel who has complied with a valid state procedure for determining whether his appeal is frivolous, and the State has not left him without counsel on appeal. Thus, it is presumed that the result of the proceedings is reliable, and Robbins must prove the presumption incorrect. Further, his claim does not fall within any of the three categories of cases in which prejudice is presumed, for it does not involve the complete denial of counsel on appeal, state interference with counsel's assistance, or an actual conflict of interest on his counsel's part. *Id.*, at 692, 694. Pp. 284–289.

152 F. 3d 1062, reversed and remanded.

THOMAS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, and KENNEDY, JJ., joined. STEVENS, J., filed a dissenting opinion, in which GINSBURG, J., joined, *post*, p. 289. SOUTER, J., filed a dissenting opinion, in which STEVENS, GINSBURG, and BREYER, JJ., joined, *post*, p. 292.

Carol Frederick Jorstad, Deputy Attorney General of California, argued the cause for petitioner. With her on the briefs were *Bill Lockyer*, Attorney General, *David P. Dru-liner*, Chief Assistant Attorney General, *Carol Wendelin Pollack*, Senior Assistant Attorney General, and *Donald E. De Nicola*, Deputy Attorney General.

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Ronald J. Nessim, by appointment of the Court, 526 U. S. 1109, argued the cause for respondent. With him on the brief were *Thomas R. Freeman* and *Elizabeth A. Newman*.*

JUSTICE THOMAS delivered the opinion of the Court.

Not infrequently, an attorney appointed to represent an indigent defendant on appeal concludes that an appeal would be frivolous and requests that the appellate court allow him to withdraw or that the court dispose of the case without the filing of merits briefs. In *Anders v. California*, 386 U. S. 738 (1967), we held that, in order to protect indigent defendants' constitutional right to appellate counsel, courts must safeguard against the risk of granting such requests in cases where the appeal is not actually frivolous. We found inadequate California's procedure—which permitted appellate counsel to withdraw upon filing a conclusory letter stating that the appeal had “no merit” and permitted the appellate court to affirm the conviction upon reaching the same conclusion following a review of the record. We went on to set

*Briefs of *amici curiae* urging reversal were filed for the State of Arizona et al. by *Janet Napolitano*, Attorney General of Arizona, *Colleen L. French*, Assistant Attorney General, and *Paul J. McMurde*; and by the Attorneys General for their respective States as follows: *Bill Pryor* of Alabama, *M. Jane Brady* of Delaware, *Thurbert E. Baker* of Georgia, *Mike Moore* of Mississippi, *Frankie Sue Del Papa* of Nevada, *D. Michael Fisher* of Pennsylvania, *Paul G. Summers* of Tennessee, *Ken Salazar* of Colorado, *Robert A. Butterworth* of Florida, *Richard P. Ieyoub* of Louisiana, *Don Stenberg* of Nebraska, *Patricia A. Madrid* of New Mexico, *Charles M. Condon* of South Carolina, and *Mark L. Earley* of Virginia; for the California Academy of Appellate Lawyers by *Robert S. Gerstein*, *Jay-Allen Eisen*, *Michael M. Berger*, *Peter W. Davis*, *Rex S. Heinke*, *Wendy C. Lascher*, *Gerald Z. Marer*, and *Jonathan B. Steiner*; and for the Criminal Justice Legal Foundation by *Kent S. Scheidegger* and *Charles L. Hobson*.

Briefs of *amici curiae* urging affirmance were filed for the National Association of Criminal Defense Lawyers by *Leon Friedman*; and for Jesus Garcia Delgado by *Michael B. Dashjian*.

Gregory R. Smith filed a brief for retired Justice Armand Arabian et al. as *amici curiae*.

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forth an acceptable procedure. California has since adopted a new procedure, which departs in some respects from the one that we delineated in *Anders*. The question is whether that departure is fatal. We hold that it is not. The procedure we sketched in *Anders* is a prophylactic one; the States are free to adopt different procedures, so long as those procedures adequately safeguard a defendant's right to appellate counsel.

I

A

Under California's new procedure, established in *People v. Wende*, 25 Cal. 3d 436, 441–442, 600 P. 2d 1071, 1074–1075 (1979), and followed in numerous cases since then, see, e. g., *People v. Rowland*, 75 Cal. App. 4th 61, 63, 88 Cal. Rptr. 2d 900, 901 (1999), counsel, upon concluding that an appeal would be frivolous, files a brief with the appellate court that summarizes the procedural and factual history of the case, with citations of the record. He also attests that he has reviewed the record, explained his evaluation of the case to his client, provided the client with a copy of the brief, and informed the client of his right to file a *pro se* supplemental brief. He further requests that the court independently examine the record for arguable issues. Unlike under the *Anders* procedure, counsel following *Wende* neither explicitly states that his review has led him to conclude that an appeal would be frivolous (although that is considered implicit, see *Wende*, 25 Cal. 3d, at 441–442, 600 P. 2d, at 1075) nor requests leave to withdraw. Instead, he is silent on the merits of the case and expresses his availability to brief any issues on which the court might desire briefing. See generally *id.*, at 438, 441–442, 600 P. 2d, at 1072, 1074–1075.

The appellate court, upon receiving a “*Wende* brief,” must “conduct a review of the entire record,” regardless of whether the defendant has filed a *pro se* brief. *Id.*, at 441–442, 600 P. 2d, at 1074–1075. The California Supreme Court

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in *Wende* required such a thorough review notwithstanding a dissenting Justice's argument that it was unnecessary and exceeded the review that a court performs under *Anders*. See 25 Cal. 3d, at 444–445, 600 P. 2d, at 1077 (Clark, J., concurring in judgment and dissenting in part); see also *id.*, at 444, 600 P. 2d, at 1076 (“The precise holding in *Anders* was that a ‘no merit’ letter . . . ‘was not enough.’ . . . Just what is ‘enough’ is not clear, but the majority of the court in that case did not require an appellate court to function as co-counsel”). If the appellate court, after its review of the record pursuant to *Wende*, also finds the appeal to be frivolous, it may affirm. See *id.*, at 443, 600 P. 2d, at 1076 (majority opinion). If, however, it finds an arguable (*i. e.*, nonfrivolous) issue, it orders briefing on that issue. *Id.*, at 442, n. 3, 600 P. 2d, at 1075, n. 3.¹

B

In 1990, a California state-court jury convicted respondent Lee Robbins of second-degree murder (for fatally shooting his former roommate) and of grand theft of an automobile (for stealing a truck that he used to flee the State after committing the murder). Robbins was sentenced to 17 years to life. He elected to represent himself at trial, but on appeal

¹ In addition to this double review and double determination of frivolity, California affords a third layer of review, through the California Appellate Projects, described in a recent opinion by the California Court of Appeal for the First District:

“[The appellate projects] are under contract to the court; their contractual duties include review of the records to assist court-appointed counsel in identifying issues to brief. If the court-appointed counsel can find no meritorious issues to raise and decides to file a *Wende* brief, an appellate project staff attorney reviews the record again to determine whether a *Wende* brief is appropriate. Thus, by the time the *Wende* brief is filed in the Court of Appeal, the record in the case has been reviewed *both* by the court-appointed counsel (who is presumably well qualified to handle the case) *and* by an experienced attorney on the staff of [the appellate project].” *People v. Hackett*, 36 Cal. App. 4th 1297, 1311, 43 Cal. Rptr. 2d 219, 228 (1995).

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he received appointed counsel. His appointed counsel, concluding that an appeal would be frivolous, filed with the California Court of Appeal a brief that complied with the *Wende* procedure.² Robbins also availed himself of his right under *Wende* to file a *pro se* supplemental brief, filing a brief in which he contended that there was insufficient evidence to support his conviction and that the prosecutor violated *Brady v. Maryland*, 373 U. S. 83 (1963), by failing to disclose exculpatory evidence.

The California Court of Appeal, agreeing with counsel's assessment of the case, affirmed. The court explained that it had "examined the entire record" and had, as a result, concluded both that counsel had fully complied with his responsibilities under *Wende* and that "no arguable issues exist." App. 39. The court added that the two issues that Robbins raised in his supplemental brief had no support in the record. *Ibid.* The California Supreme Court denied Robbins' petition for review.

After exhausting state postconviction remedies, Robbins filed in the United States District Court for the Central District of California the instant petition for a writ of habeas corpus pursuant to 28 U. S. C. § 2254.³ Robbins renewed his *Brady* claim, argued that the state trial court had erred by not allowing him to withdraw his waiver of his right to trial counsel, and added nine other claims of trial error. In addition, and most importantly for present purposes, he claimed that he had been denied effective assistance of appellate counsel because his appellate counsel's *Wende* brief failed to comply with *Anders v. California*, 386 U. S., at 744. *Anders*

²Before filing his *Wende* brief, counsel consulted with the California Appellate Project for the Second District Court of Appeal and received its permission to file such a brief. App. 43.

³The Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214, which amended § 2254 and related provisions, does not apply to respondent's habeas petition, since he filed his petition before that Act's effective date of April 24, 1996. See *Lindh v. Murphy*, 521 U. S. 320 (1997).

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set forth a procedure for an appellate counsel to follow in seeking permission to withdraw from the representation when he concludes that an appeal would be frivolous; that procedure includes the requirement that counsel file a brief “referring to anything in the record that might arguably support the appeal,” *ibid.*

The District Court agreed with Robbins’ last claim, concluding that there were at least two issues that, pursuant to *Anders*, counsel should have raised in his brief (in a *Wende* brief, as noted above, counsel is not required to raise issues): first, whether the prison law library was adequate for Robbins’ needs in preparing his defense after he elected to dismiss his appointed counsel and proceed *pro se* at trial, and, second, whether the trial court erred in refusing to allow him to withdraw his waiver of counsel. The District Court did not attempt to determine the likelihood that either of these two issues would have prevailed in an appeal. Rather, it simply concluded that, in the language of the *Anders* procedure, these issues “might arguably” have “support[ed] the appeal,” App. 51, n. 6 (citing *Anders*), and thus that Robbins’ appellate counsel, by not including them in his brief, deviated from the procedure set forth in *Anders*. The court concluded that such a deviation amounted to deficient performance by counsel. In addition, rather than requiring Robbins to show that he suffered prejudice from this deficient performance, the District Court applied a presumption of prejudice. App. 49. Thus, based simply on a finding that appellate counsel’s brief was inadequate under *Anders*, the District Court ordered California to grant respondent a new appeal within 30 days or else release him from custody.

The United States Court of Appeals for the Ninth Circuit agreed with the District Court on the *Anders* issue. In the Ninth Circuit’s view, *Anders*, together with *Douglas v. California*, 372 U. S. 353 (1963), which held that States must provide appointed counsel to indigent criminal defendants on appeal, “set forth the exclusive procedure through which ap-

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pointed counsel's performance can pass constitutional muster." 152 F. 3d 1062, 1066 (1998). Rejecting petitioner's argument that counsel's brief was sufficient because it complied with *Wende*, the Ninth Circuit concluded that the brief was deficient because it did not, as the *Anders* procedure requires, identify any legal issues that arguably could have supported the appeal. 152 F. 3d, at 1066–1067.⁴ The court did not decide whether a counsel's deviation from *Anders*, standing alone, would warrant a new appeal, see 152 F. 3d, at 1066–1067, but rather concluded that the District Court's award of relief was proper because counsel had failed to brief the two arguable issues that the District Court identified. The Ninth Circuit remanded, however, for the District Court to consider respondent's 11 claims of trial error. *Id.*, at 1069. The court reasoned that if Robbins prevailed on any of these claims, it would be unnecessary to order the California Court of Appeal to grant a new direct appeal. We granted certiorari. 526 U. S. 1003 (1999).

II

A

In *Anders*, we reviewed an earlier California procedure for handling appeals by convicted indigents. Pursuant to that procedure, Anders' appointed appellate counsel had filed a letter stating that he had concluded that there was "no merit to the appeal," 386 U. S., at 739–740. Anders, in response, sought new counsel; the State Court of Appeal denied the request, and Anders filed a *pro se* appellate brief. That court then issued an opinion that reviewed the four claims in his *pro se* brief and affirmed, finding no error (or no prejudicial error). *People v. Anders*, 167 Cal. App. 2d 65, 333 P. 2d

⁴In subsequent cases, the Ninth Circuit has reiterated its view that the *Wende* procedure is unconstitutional because it differs from the *Anders* procedure. See *Delgado v. Lewis*, 181 F. 3d 1087, 1090, 1093, stay granted pending disposition of pet. for cert., 527 U. S. 1066 (1999); *Davis v. Kramer*, 167 F. 3d 494, 496, 497–498 (1999), cert. pending, No. 98–1427.

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854 (1959). Anders thereafter sought a writ of habeas corpus from the State Court of Appeal, which denied relief, explaining that it had again reviewed the record and had found the appeal to be “without merit.” *Anders*, 386 U. S., at 740 (quoting unreported memorandum opinion).

We held that “California’s action does not comport with fair procedure and lacks that equality that is required by the Fourteenth Amendment.” *Id.*, at 741. We placed the case within a line of precedent beginning with *Griffin v. Illinois*, 351 U. S. 12 (1956), and continuing with *Douglas, supra*, that imposed constitutional constraints on States when they choose to create appellate review.⁵ In finding the California procedure to have breached these constraints, we compared it to other procedures we had found invalid and to statutory requirements in the federal courts governing appeals by indigents with appointed counsel. *Anders, supra*, at 741–743. We relied in particular on *Ellis v. United States*, 356 U. S. 674 (1958) (*per curiam*), a case involving federal statutory requirements, and quoted the following passage from it:

“If counsel is convinced, after conscientious investigation, that the appeal is frivolous, of course, he may ask to withdraw on that account. If the court is satisfied that counsel has diligently investigated the possible grounds of appeal, and agrees with counsel’s evaluation of the case, then leave to withdraw may be allowed and leave to appeal may be denied.” *Anders, supra*, at 741–742 (quoting *Ellis, supra*, at 675).

In *Anders*, neither counsel, the state appellate court on direct appeal, nor the state habeas courts had made any finding of frivolity.⁶ We concluded that a finding that the appeal

⁵The Constitution does not, however, require States to create appellate review in the first place. See, e. g., *Ross v. Moffitt*, 417 U. S. 600, 606 (1974) (citing *McKane v. Durston*, 153 U. S. 684, 687 (1894)).

⁶The same was true in *Ellis* itself. See *Ellis v. United States*, 249 F. 2d 478, 480–481 (CADC 1957) (Washington, J., dissenting) (“Counsel . . . concluded that the rulings of the District Court were not ‘so clearly erro-

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had “no merit” was not adequate, because it did not mean that the appeal was so lacking in prospects as to be “frivolous”: “We cannot say that there was a finding of frivolity by either of the California courts or that counsel acted in any greater capacity than merely as *amicus curiae* which was condemned in *Ellis*.” 386 U. S., at 743.

Having rejected the California procedure, we proceeded, in a final, separate section, to set out what would be an acceptable procedure for treating frivolous appeals:

“[I]f counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel’s brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds it may grant counsel’s request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires. On the other hand, if it finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal.” *Id.*, at 744.

We then concluded by explaining how this procedure would be better than the California one that we had found deficient. Among other things, we thought that it would “induce the court to pursue all the more vigorously its own review because of the ready references not only to the record but also

neous as to constitute probable error.’ . . . Where, as here, there was a fairly arguable question, counsel should have proceeded to present argument”), vacated and remanded, 356 U. S. 674 (1958) (*per curiam*).

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to the legal authorities as furnished it by counsel.” *Id.*, at 745.

B

The Ninth Circuit ruled that this final section of *Anders*, even though unnecessary to our holding in that case, was obligatory upon the States. We disagree. We have never so held; we read our precedents to suggest otherwise; and the Ninth Circuit’s view runs contrary to our established practice of permitting the States, within the broad bounds of the Constitution, to experiment with solutions to difficult questions of policy.

In *McCoy v. Court of Appeals of Wis., Dist. 1*, 486 U. S. 429 (1988), we rejected a challenge to Wisconsin’s variation on the *Anders* procedure. Wisconsin had departed from *Anders* by requiring *Anders* briefs to discuss *why* each issue raised lacked merit. The defendant argued that this rule was contrary to *Anders* and forced counsel to violate his ethical obligations to his client. We, however, emphasized that the right to appellate representation does not include a right to present frivolous arguments to the court, 486 U. S., at 436, and, similarly, that an attorney is “under an ethical obligation to refuse to prosecute a frivolous appeal,” *ibid.* (footnote omitted). *Anders*, we explained, merely aims to “assure the court that the indigent defendant’s constitutional rights have not been violated.” 486 U. S., at 442. Because the Wisconsin procedure adequately provided such assurance, we found no constitutional violation, notwithstanding its variance from *Anders*. See 486 U. S., at 442–444. We did, in *McCoy*, describe the procedure at issue as going “one step further” than *Anders*, *McCoy, supra*, at 442, thus suggesting that *Anders* might set a mandatory minimum, but we think this description of the Wisconsin procedure questionable, since it provided less effective advocacy for an indigent—in at least one respect—than does the *Anders* procedure. The Wisconsin procedure, by providing for one-sided briefing by counsel against his own client’s best claims, probably made a court

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more likely to rule against the indigent than if the court had simply received an *Anders* brief.

In *Pennsylvania v. Finley*, 481 U. S. 551 (1987), we explained that the *Anders* procedure is not “an independent constitutional command,” but rather is just “a prophylactic framework” that we established to vindicate the constitutional right to appellate counsel announced in *Douglas*. 481 U. S., at 555. We did not say that our *Anders* procedure was the *only* prophylactic framework that could adequately vindicate this right; instead, by making clear that the Constitution itself does not compel the *Anders* procedure, we suggested otherwise. Similarly, in *Penson v. Ohio*, 488 U. S. 75 (1988), we described *Anders* as simply erecting “safeguards.” 488 U. S., at 80.

It is true that in *Penson* we used some language suggesting that *Anders* is mandatory upon the States, see 488 U. S., at 80–82, but that language was not necessary to the decision we reached. We had no reason in *Penson* to determine whether the *Anders* procedure was mandatory, because the procedure at issue clearly failed under *Douglas*, see *infra*, at 280. Further, counsel’s action in *Penson* was closely analogous to the action of counsel that we found invalid in *Anders*, see *Penson, supra*, at 77–78, so there was no need to rely on the *Anders* procedure, as opposed to just the *Anders* holding, to find counsel’s action improper. See 488 U. S., at 77 (“The question presented by this case is remarkably similar [to the one presented in *Anders*] and therefore requires a similar answer”).

Finally, any view of the procedure we described in the last section of *Anders* that converted it from a suggestion into a straitjacket would contravene our established practice, rooted in federalism, of allowing the States wide discretion, subject to the minimum requirements of the Fourteenth Amendment, to experiment with solutions to difficult problems of policy. In *Griffin v. Illinois*, 351 U. S. 12 (1956), which we invoked as the foundational case for our holding

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in *Anders*, see *Anders*, 386 U. S., at 741, we expressly disclaimed any pretensions to rulemaking authority for the States in the area of indigent criminal appeals. We imposed no broad rule or procedure but merely held unconstitutional Illinois' requirement that indigents pay a fee to receive a trial transcript that was essential for bringing an appeal. Justice Frankfurter, who provided the necessary fifth vote for the holding in *Griffin*, emphasized that it was not for this Court "to tell Illinois what means are open to the indigent and must be chosen. Illinois may prescribe any means that are within the wide area of its constitutional discretion" and "may protect itself so that frivolous appeals are not subsidized and public moneys not needlessly spent." 351 U. S., at 24 (opinion concurring in judgment). He added that while a State could not "bolt the door to equal justice," it also was not obliged to "support a wasteful abuse of the appellate process." *Ibid.* The *Griffin* plurality shared this view, explaining that the Court was not holding "that Illinois must purchase a stenographer's transcript in every case where a defendant cannot buy it. The Supreme Court [of Illinois] may find other means of affording adequate and effective appellate review to indigent defendants." *Id.*, at 20.

In a related context, we stated this basic principle of federalism in the very Term in which we decided *Anders*. We emphatically reaffirmed that the Constitution "has never been thought [to] establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure." *Spencer v. Texas*, 385 U. S. 554, 564 (1967) (citing, *inter alia*, *Griffin*, *supra*). Accord, *Medina v. California*, 505 U. S. 437, 443–444, 447–448 (1992). Justice Stewart, concurring in *Spencer*, explained further:

"If the Constitution gave me a roving commission to impose upon the criminal courts of Texas my own notions of enlightened policy, I would not join the Court's opinion. . . . [But] [t]he question is whether those procedures fall below the minimum level the Fourteenth

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Amendment will tolerate. Upon that question, I am constrained to join the opinion and judgment of the Court.” 385 U. S., at 569.

We have continued to reiterate this principle in recent years. See *Finley*, 481 U. S., at 559 (refusing to accept the premise that “when a State chooses to offer help to those seeking relief from convictions, the Federal Constitution dictates the exact form such assistance must assume”); *ibid.* (explaining that States have “substantial discretion to develop and implement programs to aid prisoners seeking to secure postconviction review”); *Murray v. Giarrratano*, 492 U. S. 1, 13 (1989) (O’CONNOR, J., concurring) (“[N]or does it seem to me that the Constitution requires the States to follow any particular federal model in [postconviction] proceedings. . . . States [have] considerable discretion”); *id.*, at 14 (KENNEDY, J., concurring in judgment) (“[J]udicial imposition of a categorical remedy . . . might pretermit other responsible solutions being considered in Congress and state legislatures”). Although *Finley* and *Murray* involved postconviction proceedings (in which there is no constitutional right to counsel) rather than direct appeal, we think, as the language of *Griffin* suggests, that the principle is the same in both contexts. For in *Griffin*, as here, there was an underlying constitutional right at issue.

In short, it is more in keeping with our status as a court, and particularly with our status as a court in a federal system, to avoid imposing a single solution on the States from the top down. We should, and do, evaluate state procedures one at a time, as they come before us, see *Murray, supra*, at 14, while leaving “the more challenging task of crafting appropriate procedures . . . to the laboratory of the States in the first instance,” *Cruzan v. Director, Mo. Dept. of Health*, 497 U. S. 261, 292 (1990) (O’CONNOR, J., concurring) (citation and internal quotation marks omitted). We will not cavalierly “imped[e] the States’ ability to serve as laboratories for testing solutions to novel legal problems.” *Arizona v.*

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Evans, 514 U. S. 1, 24 (1995) (GINSBURG, J., dissenting). Accordingly, we hold that the *Anders* procedure is merely one method of satisfying the requirements of the Constitution for indigent criminal appeals. States may—and, we are confident, will—craft procedures that, in terms of policy, are superior to, or at least as good as, that in *Anders*. The Constitution erects no barrier to their doing so.⁷

III

Having determined that California's *Wende* procedure is not unconstitutional merely because it diverges from the *Anders* procedure, we turn to consider the *Wende* procedure on its own merits. We think it clear that California's system does not violate the Fourteenth Amendment, for it provides "a criminal appellant pursuing a first appeal as of right [the] minimum safeguards necessary to make that appeal 'adequate and effective,'" *Evitts v. Lucey*, 469 U. S. 387, 392 (1985) (quoting *Griffin*, 351 U. S., at 20 (plurality opinion)).

A

As we have admitted on numerous occasions, "[t]he precise rationale for the *Griffin* and *Douglas* lines of cases has never been explicitly stated, some support being derived from the Equal Protection Clause of the Fourteenth Amendment and some from the Due Process Clause of that Amendment.'" *Evitts*, *supra*, at 403 (quoting *Ross v. Moffitt*, 417 U. S. 600, 608–609 (1974) (footnote omitted)). But our case law reveals that, as a practical matter, the two Clauses largely converge to require that a State's procedure "affor[d] adequate and effective appellate review to indigent defendants," *Griffin*, 351 U. S., at 20 (plurality opinion). A State's procedure provides such review so long as it reasonably en-

⁷States have, in fact, already been doing this to some degree. See Warner, *Anders* in the Fifty States: Some Appellants' Equal Protection is More Equal Than Others', 23 Fla. St. U. L. Rev. 625, 642–662 (1996); *Arizona v. Clark*, 196 Ariz. 530, 536–539, 2 P. 3d 89, 95–98 (App. 1999).

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sure that an indigent's appeal will be resolved in a way that is related to the merit of that appeal.⁸ See *id.*, at 17–18 (plurality opinion) (state law regulating indigents' appeals bore “no rational relationship to a defendant's guilt or innocence”); *id.*, at 22 (Frankfurter, J., concurring in judgment) (law imposed “differentiations . . . that have no relation to a rational policy of criminal appeal”); *Douglas*, 372 U. S., at 357 (decision of first appeal “without benefit of counsel, . . . no matter how meritorious [an indigent's] case may turn out to be,” discriminates between rich and poor rather than between “possibly good and obviously bad cases” (internal quotation marks omitted)); *Rinaldi v. Yeager*, 384 U. S. 305, 310 (1966) (state appellate system must be “free of unreasoned distinctions”); *Evitts*, *supra*, at 404 (law in *Griffin* “decided the appeal in a way that was arbitrary with respect to the issues involved”). Compare *Finley*, *supra*, at 556 (“The equal protection guarantee . . . only . . . assure[s] the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process” (quoting *Ross*, *supra*, at 616)), with *Evitts*, *supra*, at 405 (“[D]ue process . . . [requires] States . . . to offer each defendant a fair opportunity to obtain an adjudication on the merits of his appeal” (discussing *Griffin* and *Douglas*)).⁹

In determining whether a particular state procedure satisfies this standard, it is important to focus on the underlying goals that the procedure should serve—to ensure that those indigents whose appeals are not frivolous receive the counsel and merits brief required by *Douglas*, and also to enable the

⁸ Of course, no procedure can eliminate all risk of error. *E. g.*, *Walters v. National Assn. of Radiation Survivors*, 473 U. S. 305, 320–321 (1985).

⁹ Although we have said that an indigent must receive “substantial equality” compared to the legal assistance that a defendant with paid counsel would receive, *McCoy v. Court of Appeals of Wis., Dist. 1*, 486 U. S. 429, 438 (1988), we have also emphasized that “[a]bsolute equality is not required; lines can be and are drawn and we often sustain them,” *Douglas v. California*, 372 U. S. 353, 357 (1963).

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State to “protect itself so that frivolous appeals are not subsidized and public moneys not needlessly spent,” *Griffin, supra*, at 24 (Frankfurter, J., concurring in judgment). For although, under *Douglas*, indigents generally have a right to counsel on a first appeal as of right, it is equally true that this right does not include the right to bring a frivolous appeal and, concomitantly, does not include the right to counsel for bringing a frivolous appeal.¹⁰ See *McCoy*, 486 U. S., at 436–438; *Douglas, supra*, at 357; see also *United States v. Cronin*, 466 U. S. 648, 656, n. 19 (1984) (“Of course, the Sixth Amendment does not require that [trial] counsel do what is impossible or unethical”); cf. *Nix v. Whiteside*, 475 U. S. 157, 175 (1986) (no violation of Sixth Amendment right to the effective assistance of counsel when trial counsel refuses to violate ethical duty not to assist his client in presenting perjured testimony). To put the point differently, an indigent defendant who has his appeal dismissed because it is frivolous has not been deprived of “a fair opportunity” to bring his appeal, *Evitts, supra*, at 405; see *Finley*, 481 U. S., at 556, for fairness does not require either counsel or a full appeal once it is properly determined that an appeal is frivolous. The obvious goal of *Anders* was to prevent this limitation on the right to appellate counsel from swallowing the right itself, see *Penson*, 488 U. S., at 83–84; *McCoy, supra*, at 444, and we do not retreat from that goal today.

B

We think the *Wende* procedure reasonably ensures that an indigent’s appeal will be resolved in a way that is related to

¹⁰This distinction gives meaning to our previous emphasis on an indigent appellant’s right to “advocacy.” Although an indigent whose appeal is frivolous has no right to have an advocate make his case to the appellate court, such an indigent does, in all cases, have the right to have an attorney, zealous for the indigent’s interests, evaluate his case and attempt to discern nonfrivolous arguments. See *Ellis*, 356 U. S., at 675; *Anders v. California*, 386 U. S. 738, 741–743 (1967).

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the merit of that appeal. Whatever its strengths or weaknesses as a matter of policy, we cannot say that it fails to afford indigents the adequate and effective appellate review that the Fourteenth Amendment requires. A comparison of the *Wende* procedure to the procedures evaluated in our chief cases in this area makes this evident.

The *Wende* procedure is undoubtedly far better than those procedures we have found inadequate. *Anders* itself, in disapproving the former California procedure, chiefly relied on three precedents: *Ellis v. United States*, 356 U. S. 674 (1958) (*per curiam*), *Eskridge v. Washington Bd. of Prison Terms and Paroles*, 357 U. S. 214 (1958) (*per curiam*), and *Lane v. Brown*, 372 U. S. 477 (1963). See *Anders*, 386 U. S., at 741–743. Although we did not, in *Anders*, explain in detail why the California procedure was inadequate under each of these precedents, our particularly heavy reliance on *Ellis* makes clear that a significant factor was that the old California procedure did not require either counsel or the court to determine that the appeal was frivolous; instead, the procedure required only that they determine that the defendant was unlikely to prevail on appeal. Compare *Anders*, *supra*, at 741–742 (“If counsel is convinced, after conscientious investigation, that the appeal is frivolous, of course, he may ask to withdraw If the court . . . agrees with counsel’s evaluation of the case, then leave to withdraw may be allowed and leave to appeal may be denied”) (quoting *Ellis*, *supra*, at 675)), with *Anders*, *supra*, at 743 (“We cannot say that there was a finding of frivolity”). See also *McCoy*, *supra*, at 437 (quoting same passage from *Ellis* that we quoted in *Anders*). This problem also appears to have been one of the flaws in the procedures at issue in *Eskridge* and *Lane*. The former involved a finding only that there had been “no grave or prejudicial errors” at trial, *Anders*, *supra*, at 742 (quoting *Eskridge*, *supra*, at 215), and the latter, a finding only that the appeal “would be unsuccessful,” *Anders*, *supra*, at 743 (quoting *Lane*, *supra*, at 482). *Wende*,

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by contrast, requires both counsel and the court to find the appeal to be lacking in arguable issues, which is to say, frivolous. See 25 Cal. 3d, at 439, 441–442, 600 P. 2d, at 1073, 1075; see *id.*, at 441, 600 P. 2d, at 1074 (reading *Anders* as finding old California procedure deficient largely “because the court itself did not make an express finding that the appeal was frivolous”).

An additional problem with the old California procedure was that it apparently permitted an appellate court to allow counsel to withdraw and thereafter to decide the appeal without appointing new counsel. See *Anders, supra*, at 740, n. 2. We resolved any doubt on this point in *Penson*, where we struck down a procedure that allowed counsel to withdraw before the court had determined whether counsel’s evaluation of the case was accurate, 488 U. S., at 82–83, and, in addition, allowed a court to decide the appeal without counsel even if the court found arguable issues, *id.*, at 83 (stating that this latter flaw was the “[m]ost significan[t]” one). Thus, the *Penson* procedure permitted a basic violation of the *Douglas* right to have counsel until a case is determined to be frivolous and to receive a merits brief for a nonfrivolous appeal. See 488 U. S., at 88 (“[I]t is important to emphasize that the denial of counsel in this case left petitioner completely without representation during the appellate court’s actual decisional process”); *ibid.* (defendant was “entirely without the assistance of counsel on appeal”). Cf. *McCoy, supra*, at 430–431, n. 1 (approving procedure under which appellate court first finds appeal to be frivolous and affirms, then relieves counsel). Under *Wende*, by contrast, *Douglas* violations do not occur, both because counsel does not move to withdraw and because the court orders briefing if it finds arguable issues. See *Wende, supra*, at 442, n. 3, 600 P. 2d, at 1075, n. 3; see also, *e. g.*, *Rowland*, 75 Cal. App. 3d, at 61–62, 88 Cal. Rptr. 2d, at 900–901.

In *Anders*, we also disapproved the old California procedure because we thought that a one-paragraph letter from

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counsel stating only his “bare conclusion” that the appeal had no merit was insufficient. 386 U. S., at 742. It is unclear from our opinion in *Anders* how much our objection on this point was severable from our objection to the lack of a finding of frivolity, because we immediately followed our description of counsel’s “no merit” letter with a discussion of *Ellis*, *Eskridge*, and *Lane*, and the lack of such a finding. See 386 U. S., at 742–743. In any event, the *Wende* brief provides more than a one-paragraph “bare conclusion.” Counsel’s summary of the case’s procedural and factual history, with citations of the record, both ensures that a trained legal eye has searched the record for arguable issues and assists the reviewing court in its own evaluation of the case.

Finally, an additional flaw with the procedures in *Eskridge* and *Lane* was that there was only one tier of review—by the trial judge in *Eskridge* (who understandably had little incentive to find any error warranting an appeal) and by the public defender in *Lane*. See *Anders, supra*, at 742–743. The procedure in *Douglas* itself was, in part, flawed for the same reason. See 372 U. S., at 354–355. The *Wende* procedure, of course, does not suffer from this flaw, for it provides at least two tiers of review.

Not only does the *Wende* procedure far exceed those procedures that we have found invalid, but it is also at least comparable to those procedures that we have approved. Turning first to the procedure we set out in the final section of *Anders*, we note that it has, from the beginning, faced “‘consistent and severe criticism.’” *In re Sade C.*, 13 Cal. 4th 952, 979, n. 7, 920 P. 2d 716, 731, n. 7 (1996) (quoting Note, 67 Texas L. Rev. 181, 212 (1988)). One of the most consistent criticisms, one with which we wrestled in *McCoy*, is that *Anders* is in some tension both with counsel’s ethical duty as an officer of the court (which requires him not to present frivolous arguments) and also with his duty to further his client’s interests (which might not permit counsel to characterize his

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client's claims as frivolous).¹¹ California, through the *Wende* procedure, has made a good-faith effort to mitigate this problem by not requiring the *Wende* brief to raise legal issues and by not requiring counsel to explicitly describe the case as frivolous. See *Wende*, 25 Cal. 3d, at 441–442, 600 P. 2d, at 1074–1075.

Another criticism of the *Anders* procedure has been that it is incoherent and thus impossible to follow. Those making this criticism point to our language in *Anders* suggesting that an appeal could be both “wholly frivolous” and at the same time contain arguable issues, even though we also said that an issue that was arguable was “therefore not frivolous.” *Anders, supra*, at 744.¹² In other words, the *Anders* procedure appears to adopt gradations of frivolity and to use two different meanings for the phrase “arguable issue.” The *Wende* procedure attempts to resolve this problem as well, by drawing the line at frivolity and by defining arguable issues as those that are not frivolous.¹³

¹¹ As one former public defender has explained, “an attorney confronted with the *Anders* situation has to do something that the Code of Professional Responsibility describes as unethical; the only choice is as to which canon he or she prefers to violate.” Pengilly, *Never Cry Anders: The Ethical Dilemma of Counsel Appointed to Pursue a Frivolous Criminal Appeal*, 9 *Crim. Justice J.* 45, 64 (1986). See also, *e.g.*, *Commonwealth v. Moffett*, 383 Mass. 201, 206, 418 N. E. 2d 585, 590 (1981) (*Anders* requires a “Janus-faced approach” by counsel); Hermann, *Frivolous Criminal Appeals*, 47 *N. Y. U. L. Rev.* 701, 711 (1972).

¹² Justice Stewart, in his dissent in *Anders*, was the first to make this criticism of the procedure set out by the *Anders* majority: “[I]f the record did present any such ‘arguable’ issues, the appeal would not be frivolous.” 386 U.S., at 746; see *id.*, at 746, n. See also, *e.g.*, C. Wolfram, *Modern Legal Ethics* 817 (1986) (“The *Anders* directives are confusing, if not contradictory”).

¹³ See *supra*, at 279–280. A further criticism of *Anders* has been that it is unjust. More particularly, critics have claimed that, in setting out the *Anders* procedure, we were oblivious to the problem of scarce resources (with regard to both counsel and courts) and, as a result, crafted a rule that diverts attention from meritorious appeals of indigents and ensures poor representation for all indigents. See, *e.g.*, Pritchard, *Auc-*

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Finally, the *Wende* procedure appears to be, in some ways, better than the one we approved in *McCoy* and, in other ways, worse. On balance, we cannot say that the latter, assuming, *arguendo*, that they outweigh the former, do so sufficiently to make the *Wende* procedure unconstitutional. The Wisconsin procedure we evaluated in *McCoy*, which required counsel filing an *Anders* brief to explain why the issues he raised in his brief lacked merit, arguably exacerbated the ethical problem already present in the *Anders* procedure. The *Wende* procedure, as we have explained, attempts to mitigate that problem. Further, it appears that in the *McCoy* scheme counsel discussed—and the appellate court reviewed—only the parts of the record cited by counsel in support of the “arguable” issues he raised. See 486 U. S., at 440, 442. The *Wende* procedure, by contrast, requires a more thorough treatment of the record by both counsel and court. See 25 Cal. 3d, at 440–441, 600 P. 2d, at 1074–1075; *id.*, at 445, 600 P. 2d, at 1077 (Clark, J., concurring in judg-

tioning Justice: Legal and Market Mechanisms for Allocating Criminal Appellate Counsel, 34 Am. Crim. L. Rev. 1161, 1167–1168 (1997) (*Anders* has created a “tragedy of the commons” that, “far from guaranteeing adequate appellate representation for all criminal defendants, instead ensures that indigent criminal defendants will receive mediocre appellate representation, whether their claims are good or bad” (footnote omitted)); Pritchard, *supra*, at 1169 (noting *Anders*’ similar effect on appellate courts); Pritchard, *supra*, at 1162 (“[J]udicial fiat cannot cure scarcity; it merely disguises the symptoms of the disease”); Doherty, Wolf! Wolf!—The Ramifications of Frivolous Appeals, 59 J. Crim. L., C. & P. S. 1, 2 (1968) (“[T]he people who will suffer the most are the indigent prisoners who have been *unjustly* convicted; they will languish in prison while lawyers devote time and energy to hopeless causes on a first come-first served basis” (footnote omitted)). We cannot say whether the *Wende* procedure is better or worse than the *Anders* procedure in this regard (although we are aware of policy-based arguments that it is worse as to appellate courts, see *People v. Williams*, 59 Cal. App. 4th 1202, 1205–1206, 69 Cal. Rptr. 2d 690, 692 (1997); Brief for Retired Justice Armand Arabian et al. as *Amici Curiae*), but it is clear that, to the extent this criticism has merit, our holding today that the *Anders* procedure is not exclusive will enable States to continue to experiment with solutions to this problem.

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ment and dissenting in part). On the other hand, the *McCoy* procedure, unlike the *Wende* procedure, does assist the reviewing court by directing it to particular legal issues; as to those issues, this is presumably a good thing. But it is also possible that bad judgment by the attorney in selecting the issues to raise might divert the court's attention from more meritorious, unmentioned, issues. This criticism is, of course, equally applicable to the *Anders* procedure. Moreover, as to the issues that counsel does raise in a *McCoy* brief, the one-sided briefing on why those issues are frivolous may predispose the court to reach the same conclusion. The *Wende* procedure reduces these risks, by omitting from the brief signals that may subtly undermine the independence and thoroughness of the second review of an indigent's case.

Our purpose is not to resolve any of these arguments. The Constitution does not resolve them, nor does it require us to do so. "We address not what is prudent or appropriate, but only what is constitutionally compelled." *Cronic*, 466 U. S., at 665, n. 38. It is enough to say that the *Wende* procedure, like the *Anders* and *McCoy* procedures, and unlike the ones in *Ellis*, *Eskridge*, *Lane*, *Douglas*, and *Penson*, affords adequate and effective appellate review for criminal indigents. Thus, there was no constitutional violation in this case simply because the *Wende* procedure was used.

IV

Since Robbins' counsel complied with a valid procedure for determining when an indigent's direct appeal is frivolous, we reverse the Ninth Circuit's judgment that the *Wende* procedure fails adequately to serve the constitutional principles we identified in *Anders*. But our reversal does not necessarily mean that Robbins' claim that his appellate counsel rendered constitutionally ineffective assistance fails. For it may be, as Robbins argues, that his appeal was not frivolous and that he was thus entitled to a merits brief rather than to a *Wende* brief. Indeed, both the District Court and the

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Ninth Circuit found that there were two arguable issues on direct appeal. The meaning of “arguable issue” as used in the opinions below, however, is far from clear. The courts below most likely used the phrase in the unusual way that we used it in *Anders*—an issue arguably supporting the appeal even though the appeal was wholly frivolous. See 152 F. 3d, at 1067 (discussing arguable issues in context of requirements of *Anders*); App. 48 (District Court opinion) (same). Such an issue does not warrant a merits brief. But the courts below may have used the term to signify issues that were “arguable” in the more normal sense of being non-frivolous and thus warranting a merits brief. See *id.*, at 49, and n. 3 (District Court, considering arguable issues to determine “whether *Anders* was violated,” but also defining arguable issue as one that counsel could argue “in good faith with some potential for prevailing”). Further, the courts below, in determining whether there were arguable issues, did not address petitioner’s argument that, at least with regard to the adequacy of the prison law library, Robbins waived the issue for appeal by failing to object at trial. Thus, it will be necessary on remand to clarify just how strong these two issues are.

On remand, the proper standard for evaluating Robbins’ claim that appellate counsel was ineffective in neglecting to file a merits brief is that enunciated in *Strickland v. Washington*, 466 U. S. 668 (1984). See *Smith v. Murray*, 477 U. S. 527, 535–536 (1986) (applying *Strickland* to claim of attorney error on appeal). Respondent must first show that his counsel was objectively unreasonable, see *Strickland*, 466 U. S., at 687–691, in failing to find arguable issues to appeal—that is, that counsel unreasonably failed to discover nonfrivolous issues and to file a merits brief raising them. If Robbins succeeds in such a showing, he then has the burden of demonstrating prejudice. That is, he must show a reasonable probability that, but for his counsel’s unreasonable failure to file a merits brief, he would have prevailed on his appeal.

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See *id.*, at 694 (defendant must show “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different”).¹⁴

The applicability of *Strickland*’s actual-prejudice prong to Robbins’ claim of ineffective assistance follows from *Penson*, where we distinguished denial of counsel altogether on appeal, which warrants a presumption of prejudice, from mere ineffective assistance of counsel on appeal, which does not. See 488 U. S., at 88–89. The defendant in *Penson* faced a denial of counsel because, as we have discussed, *supra*, at 280, not only was an invalid state procedure followed, but that procedure was clearly invalid insofar as it denied the defendant his right to appellate counsel under *Douglas*, see 488 U. S., at 83, 88. Our holding in *Penson* was consistent with *Strickland* itself, where we said that we would presume prejudice when a defendant had suffered an “[a]ctual or constructive denial of the assistance of counsel altogether.” 466 U. S., at 692; see also *Cronic*, *supra*, at 659, and n. 25. In other words, while we normally apply a “strong presumption of reliability” to judicial proceedings and require a defendant to overcome that presumption, *Strickland*, *supra*, at 696, when, as in *Penson*, there has been a complete denial of counsel, we understandably presume the opposite, see *Strickland*, *supra*, at 692.

But where, as here, the defendant has received appellate counsel who has complied with a valid state procedure for determining whether the defendant’s appeal is frivolous, and the State has not at any time left the defendant without counsel on appeal, there is no reason to presume that the defendant has been prejudiced. In *Penson*, we worried that requiring the defendant to establish prejudice would leave him “without any of the protections afforded by *Anders*.”

¹⁴The performance component need not be addressed first. “If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.” *Strickland v. Washington*, 466 U. S., at 697.

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488 U. S., at 86. Here, by contrast, counsel followed a procedure that is constitutional under *Anders* and our other precedents in this area, and Robbins therefore received all the procedural protection that the Constitution requires. We thus presume that the result of the proceedings on appeal is reliable, and we require Robbins to prove the presumption incorrect in his particular case. See *Strickland*, 466 U. S., at 694.

Further, the ineffective-assistance claim that Robbins presses does not fall within any of the three categories of cases, described in *Strickland*, in which we presume prejudice rather than require a defendant to demonstrate it. First, as noted, we presume prejudice in a case of denial of counsel. Second, “various kinds of state interference with counsel’s assistance” can warrant a presumption of prejudice. *Id.*, at 692; see *Cronic*, 466 U. S., at 659, and n. 25. Third, “prejudice is presumed when counsel is burdened by an actual conflict of interest,” *Strickland*, 466 U. S., at 692, although in such a case we do require the defendant to show that the conflict adversely affected his counsel’s performance, *ibid.* None of these three categories applies to a case such as Robbins’. Nor does the policy reason that we offered in *Strickland* for the first two categories apply here, for it is not the case that, if an attorney unreasonably chooses to follow a procedure such as *Anders* or *Wende* instead of filing a merits brief, prejudice “is so likely that case-by-case inquiry into prejudice is not worth the cost.” 466 U. S., at 692; see *Cronic*, *supra*, at 658.¹⁵ On the contrary, in most cases in which a defendant’s appeal has been found, pursuant to a valid state procedure, to be frivolous, it will in fact be frivolous.

It is no harder for a court to apply *Strickland* in this area than it is when a defendant claims that he received ineffec-

¹⁵ Moreover, such an error by counsel is neither “easy to identify” (since it is necessary to evaluate a defendant’s case in order to find the error) nor attributable to the prosecution. See *Strickland*, *supra*, at 692.

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tive assistance of appellate counsel because his counsel, although filing a merits brief, failed to raise a particular claim. It will likely be easier to do so. In *Jones v. Barnes*, 463 U. S. 745 (1983), we held that appellate counsel who files a merits brief need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal. Notwithstanding *Barnes*, it is still possible to bring a *Strickland* claim based on counsel's failure to raise a particular claim, but it is difficult to demonstrate that counsel was incompetent. See, e. g., *Gray v. Greer*, 800 F. 2d 644, 646 (CA7 1986) ("Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome"). With a claim that counsel erroneously failed to file a merits brief, it will be easier for a defendant-appellant to satisfy the first part of the *Strickland* test, for it is only necessary for him to show that a reasonably competent attorney would have found one nonfrivolous issue warranting a merits brief, rather than showing that a particular nonfrivolous issue was clearly stronger than issues that counsel did present. In both cases, however, the prejudice analysis will be the same.¹⁶

¹⁶ Federal judges are, of course, fully capable of assessing prejudice in this area, including for the very sorts of claims that Robbins has raised. See, e. g., *Duhamel v. Collins*, 955 F. 2d 962, 967 (CA5 1992) (defendant not prejudiced by appellate counsel's failure to challenge sufficiency of the evidence); *Banks v. Reynolds*, 54 F. 3d 1508, 1515–1516 (CA10 1995) (finding both parts of *Strickland* test satisfied where appellate counsel failed to raise claim of violation of *Brady v. Maryland*, 373 U. S. 83 (1963)); *Cross v. United States*, 893 F. 2d 1287, 1290–1291, 1292 (CA11) (rejecting challenge to appellate counsel's failure to raise claim of violation of *Faretta v. California*, 422 U. S. 806 (1975), by determining that there was no prejudice), cert. denied, 498 U. S. 849 (1990). Since Robbins was convicted in state court, we have no occasion to consider whether a *per se* prejudice approach, in lieu of *Strickland*'s actual-prejudice requirement, might be appropriate in the context of challenges to federal convictions where counsel was deficient in failing to file a merits brief on direct appeal. See *Goeke v. Branch*, 514 U. S. 115, 119 (1995) (*per curiam*) (distinguishing

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In sum, Robbins must satisfy both prongs of the *Strickland* test in order to prevail on his claim of ineffective assistance of appellate counsel. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE GINSBURG joins, dissenting.

While I join JUSTICE SOUTER's cogent dissent without qualification, I write separately to emphasize two points that are obscured by the Court's somewhat meandering explanation of its sharp departure from settled law.

First, despite its failure to say so directly, the Court has effectively overruled both *Anders v. California*, 386 U. S. 738 (1967), and *Penson v. Ohio*, 488 U. S. 75 (1988). Second, its unexplained rejection of the reasoning underlying our decision in *McCoy v. Court of Appeals of Wis., Dist. 1*, 486 U. S. 429 (1988), see *ante*, at 272–273, illustrates the extent of today's majority's disregard for accepted precedent.

To make my first point it is only necessary to quote the Court's new standard for determining whether a State's appellate procedure affords adequate review for indigent defendants:

“A State's procedure provides such review so long as it reasonably ensures that an indigent's appeal will be resolved in a way that is related to the merit of that appeal.” *Ante*, at 276–277.

The California procedure reviewed in *Anders* and the Ohio procedure reviewed in *Penson*—both found inadequate by this Court—would easily have satisfied that standard. Yet the Court today accepts California's current procedure be-

rules established pursuant to this Court's supervisory power to administer federal court system from constitutional rules applicable to States); *United States v. Cronin*, 466 U. S. 648, 665, n. 38 (1984) (same).

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cause it “requires both counsel and the court to find the appeal to be lacking in arguable issues.” *Ante*, at 280. But in defense of its position in *Anders*, California relied heavily on those very same requirements, *i. e.*, “the additional feature of the [State’s] system where the court also reads the full record.” Brief for Respondent in *Anders v. California*, O. T. 1966, No. 98, pp. 30–31; see also *id.*, at 12–13, 19, 23, 28–29. Our *Anders* decision held, however, that this “additional feature” was insufficient to safeguard the indigent appellant’s rights.

To make my second point I shall draw on my own experience as a practicing lawyer and as a judge. On a good many occasions I have found that the task of writing out the reasons that support an initial opinion on a question of law—whether for the purpose of giving advice to my client or for the purpose of explaining my vote as an appellate judge—leads to a conclusion that was not previously apparent. Colleagues who shared that view of the importance of giving reasons, as opposed to merely announcing conclusions, joined the opinions that I authored in *McCoy*, *Penson*, and *Nickols v. Gagnon*, 454 F. 2d 467 (CA7 1971).¹ In its casual rejection of the reasoning in *McCoy*, the Court simply ignores this portion of the opinion:

“Wisconsin’s Rule merely requires that the attorney go one step further. Instead of relying on an unexplained assumption that the attorney has discovered law or facts that completely refute the arguments identified in the

¹“The danger that a busy or inexperienced lawyer might opt in favor of a one sentence letter instead of an effective brief in an individual marginal case is real, notwithstanding the dedication that typifies the profession. If, however, counsel’s ultimate evaluation of the case must be supported by a written opinion ‘referring to anything in the record that might arguably support the appeal,’ the temptation to discharge an obligation in summary fashion is avoided, and the reviewing court is provided with meaningful assistance.” *Nickols*, 454 F. 2d, at 470 (citation and footnotes omitted) (quoting *Anders v. California*, 386 U. S. 738, 744 (1967)).

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brief, the Wisconsin court requires additional evidence of counsel's diligence. This requirement furthers the same interests that are served by the minimum requirements of *Anders*. Because counsel may discover previously unrecognized aspects of the law in the process of preparing a written explanation for his or her conclusion, the discussion requirement provides an additional safeguard against mistaken conclusions by counsel that the strongest arguments he or she can find are frivolous. Just like the references to favorable aspects of the record required by *Anders*, the discussion requirement may forestall some motions to withdraw and will assist the court in passing on the soundness of the lawyer's conclusion that the appeal is frivolous." *McCoy*, 486 U. S., at 442; see also *Penson*, 488 U. S., at 81–82.

In short, "simply putting pen to paper can often shed new light on what may at first appear to be an open-and-shut issue." *Id.*, at 82, n. 4. For this reason, the Court is quite wrong to say that requiring counsel to articulate reasons for its conclusion results in "less effective advocacy." *Ante*, at 272.²

An appellate court that employed a law clerk to review the trial transcripts in all indigent appeals in search of arguable error could be reasonably sure that it had resolved all of those appeals "in a way that is related" to their merits. It would not, however, provide the indigent appellant with anything approaching representation by a paid attorney. Like

²The *Wende* procedure at issue in this case requires a "summary of the proceedings and facts," but does not require counsel to raise any legal issues. *People v. Wende*, 25 Cal. 3d 436, 438, 600 P. 2d 1071, 1072 (1979); see also *ante*, at 265. This procedure plainly does not serve the above purpose, since it does not force counsel to "put pen to paper" regarding those things most relevant to an appeal—legal issues. Accordingly, and contrary to the Court's assertion, *ante*, at 280–281, this summary does not improve upon the procedure rejected in *Anders*—a "bare conclusion" by the attorney that an appeal is without merit. 386 U. S., at 742.

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California's so-called *Wende* procedure, it would violate the "principle of substantial equality" that was described in *Anders* and *McCoy* and has been a part of our law for decades. *McCoy*, 486 U. S., at 438; *Anders*, 386 U. S., at 744.

JUSTICE SOUTER, with whom JUSTICE STEVENS, JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting.

A defendant's right to representation on appeal is limited by the prohibition against frivolous litigation, and I realize that when a lawyer's corresponding obligations are at odds with each other, there is no perfect place to draw the line between them. But because I believe the procedure adopted in *People v. Wende*, 25 Cal. 3d 436, 600 P. 2d 1071 (1979), fails to assure representation by counsel with the adversarial character demanded by the Constitution, I respectfully dissent.

I

Although the Sixth Amendment guarantees trial counsel to a felony defendant, see *Gideon v. Wainwright*, 372 U. S. 335 (1963), the Constitution contains no similarly freestanding, unconditional right to counsel on appeal, there being no obligation to provide appellate review at all, see *Ross v. Moffitt*, 417 U. S. 600, 606 (1974). When a State elects to provide appellate review, however, the terms on which it does so are subject to constitutional notice. See, e. g., *Griffin v. Illinois*, 351 U. S. 12, 18 (1956); *Rinaldi v. Yeager*, 384 U. S. 305, 310 (1966); *Evitts v. Lucey*, 469 U. S. 387, 393 (1985).

In a line of cases beginning with *Griffin*, this Court examined appellate procedural schemes under the principle that justice may not be conditioned on ability to pay, see generally *Ross*, *supra*, at 605–609. Even though "[a]bsolute equality is not required," *Douglas v. California*, 372 U. S. 353, 357 (1963), we held in *Douglas* that when state criminal defendants are free to retain counsel for a first appeal as of right,

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the Fourteenth Amendment¹ requires that indigent appellants be placed on a substantially equal footing through the appointment of counsel at the State's expense. See *McCoy v. Court of Appeals of Wis., Dist. 1*, 486 U. S. 429, 438 (1988) (referring to "principle of substantial equality").

Two services of appellate counsel are on point here. Appellate counsel examines the trial record with an advocate's eye, identifying and weighing potential issues for appeal. This is review not by a dispassionate legal mind but by a committed representative, pledged to his client's interests, primed to attack the conviction on any ground the record may reveal. If counsel's review reveals arguable trial error, he prepares and submits a brief on the merits and argues the appeal.

The right to the first of these services, a partisan scrutiny of the record and assessment of potential issues, goes to the irreducible core of the lawyer's obligation to a litigant in an adversary system, and we have consistently held it essential to substantial equality of representation by assigned counsel. "The paramount importance of vigorous representation follows from the nature of our adversarial system of justice." *Penson v. Ohio*, 488 U. S. 75, 84 (1988). See, e. g., *Ellis v. United States*, 356 U. S. 674, 675 (1958) (*per curiam*); *Douglas, supra*, at 357–358; *McCoy, supra*, at 438. The right is unqualified when a defendant has retained counsel, and I can imagine no reason that it should not be so when counsel has been appointed.

Because the right to the second service, merits briefing, is not similarly unqualified, however, the issue we address

¹The *Griffin* line of cases has roots in both due process and equal protection, see *M. L. B. v. S. L. J.*, 519 U. S. 102, 120 (1996), but we have noted that "[m]ost decisions in this area have rested on an equal protection framework . . .," *Bearden v. Georgia*, 461 U. S. 660, 665 (1983). See also *Ross v. Moffitt*, 417 U. S. 600, 611 (1974) (noting that right to appellate counsel "is more profitably considered under an equal protection analysis").

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today arises. The limitation on the right to a merits brief is that no one has a right to a wholly frivolous appeal, see *Anders v. California*, 386 U. S. 738, 742 (1967), against which the judicial system's first line of defense is its lawyers. Being officers of the court, members of the bar are bound "not to clog the courts with frivolous motions or appeals," *Polk County v. Dodson*, 454 U. S. 312, 323 (1981); see also *McCoy, supra*, at 436, and this is of course true regardless of a lawyer's retained or appointed status in a given case. The problem to which *Anders* responds arises when counsel views his client's appeal as frivolous, leaving him duty barred from pressing it upon a court.²

The rub is that although counsel may properly refuse to brief a frivolous issue and a court may just as properly deny leave to take a frivolous appeal, there needs to be some reasonable assurance that the lawyer has not relaxed his partisan instinct prior to refusing,³ in which case the court's review could never compensate for the lawyer's failure of advocacy. A simple statement by counsel that an appeal has no merit, coupled with an appellate court's endorsement of counsel's conclusion, gives no affirmative indication that anyone has sought out the appellant's best arguments or championed his cause to the degree contemplated by the adversary system. Nor do such conclusions acquire any implicit per-

² *Anders* addressed the problem as confronted by assigned counsel, though in theory it can be equally acute when counsel is retained. It is unlikely to show up in practice, however. Paying clients generally can fire a lawyer expressing unsatisfying conclusions and will often find a replacement with a keener eye for arguable issues or a duller nose for frivolous ones. As a practical matter, the States may find it too difficult or costly to prevent moneyed appellants from wasting their own resources, and those of the judicial system, by bringing frivolous appeals. This does not mean, however, that the States are obligated to subsidize such efforts by indigents.

³ An assurance, that is, that he has not become what is known around the Los Angeles County Jail as a "dumptruck." Reply Brief for Petitioner 1.

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suasiveness through exposure to an interested opponent's readiness to mount a challenge. The government is unlikely to dispute or even test counsel's evaluation; one does not berate an opponent for giving up. To guard against the possibility, then, that counsel has not done the advocate's work of looking hard for potential issues, there must be some prod to find any reclusive merit in an ostensibly unpromising case and some process to assess the lawyer's efforts after the fact. A judicial process that renders constitutional error invisible is, after all, itself an affront to the Constitution. See *Penson*, *supra*, at 81–82.

In *Anders*, we devised such a mechanism to ensure respect for an appellant's rights. See *Penson*, *supra*, at 80. A lawyer's request to withdraw on the ground that an appeal is frivolous "must . . . be accompanied by a brief referring to anything in the record that might arguably support the appeal." *Anders*, 386 U. S., at 744. This simply means that counsel must do his partisan best, short of calling black white, to flag the points that come closest to being appealable; the lawyer's job is to state the issues that give the defendant his best chances to prevail, even if the best comes up short under the rule against trifling with the court. "[T]he court—not counsel—," we continued, "then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous." *Ibid.*

Anders thus contemplates two reviews of the record, each of a markedly different character. First comes review by the advocate, the defendant's interested representative. His job is to identify the best issues the partisan eye can spot. Then comes judicial review from a disinterested judge, who asks two questions: whether the lawyer really did function as a committed advocate, and whether he misjudged the legitimate appealability of any issue. In reviewing the advocate's work, the court is responsible for assuring that counsel has gone as far as advocacy will take him with the best issues undiscounted. We have repeatedly de-

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scribed the task of an appellate court in terms of this dual responsibility. “First, [the court] must satisfy itself that the attorney has provided the client with a diligent and thorough search of the record for any arguable claim that might support the client’s appeal. Second, it must determine whether counsel has correctly concluded that the appeal is frivolous.’” *Penson*, 488 U. S., at 83 (quoting *McCoy*, 486 U. S., at 442).

Griffin and *Anders* thus require significantly more than the abstract evaluation of the merits of conceivably appealable points. Without the assurance that assigned counsel has done his best as a partisan, his substantial equality to a lawyer retained at a defendant’s expense cannot be assumed. And without the benefit of the lawyer’s statement of strongest claims, the appellate panel cannot act as a reviewing court, but is relegated to an inquisitorial role.

It is owing to the importance of assuring that an adversarial, not an inquisitorial, system is at work that I disagree with the Court’s statement today that our cases approve of any state procedure that “reasonably ensures that an indigent’s appeal will be resolved in a way that is related to the merit of that appeal.” *Ante*, at 276–277. A purely inquisitorial system could satisfy that criterion, and so could one that appoints counsel only if the appellate court deems it useful. But we have rejected the former and have explicitly held the latter unconstitutional, see *Douglas*, 372 U. S., at 355, the reason in each case being that the Constitution looks to the means as well as to the ends.⁴ See *Singer v. United States*, 380 U. S. 24, 36 (1965) (“The Constitution recognizes an adversary system as the proper method of determining guilt . . .”). See also, *e. g.*, *Penson*, *supra*, at 87 (“A criminal appellant is entitled to a single-minded advocacy . . .”);

⁴Of course, if appellate review is not constitutionally required, States may well be able to impose nonadversarial review on all appellants. They may not, however, reserve the adversary system for those able to afford counsel.

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Strickland v. Washington, 466 U. S. 668, 685 (1984) (“The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel’s playing a role that is critical to the ability of the adversarial system to reach just results”); *United States v. Cronin*, 466 U. S. 648, 656 (1984) (“Thus, the adversarial process protected by the Sixth Amendment requires that the accused have ‘counsel acting in the role of an advocate’”) (quoting *Anders*, *supra*, at 743).

II

We have not held the details of *Anders* to be exclusive, but it does make sense to read the case as exemplifying what substantial equality requires on behalf of indigent appellants entitled to an advocate’s review and to reasonable certainty that arguable issues will be briefed on their merits. With *Anders* thus as a benchmark, California’s *Wende* procedure fails to measure up. Its primary failing is in permitting counsel to refrain as a matter of course from mentioning possibly arguable issues in a no-merit brief; its second deficiency is a correlative of the first, in obliging an appellate court to search the record for arguable issues without benefit of an issue-spotting, no-merit brief to review. See 25 Cal. 3d, at 440–442, 600 P. 2d, at 1074–1075.

Although *Wende* assumes that counsel will act as an advocate, see *id.*, at 441–442, 600 P. 2d, at 1075, it fails to assure, or even promote, the partisan attention that the Constitution requires. While the lawyer must summarize the procedural and factual history of the case with citations to the record, nothing in the *Wende* scheme requires counsel to show affirmatively, subject to evaluation, that he has made the committed search for issues and the advocate’s assessment of their merits that go to the heart of appellate representation in our adversary system. It begs the question to say that “[c]ounsel’s inability to find any arguable issues may readily be inferred from his failure to raise any,” *id.*, at 442, 600 P. 2d, at 1075, and it misses the point to argue that the

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indigent appellant is adequately protected because the lawyer assigned to a case under California's assigned counsel scheme may not file a *Wende* brief without the approval of a supervisor. The point is the need for some affirmative and express indicator that an advocate has been at work, in the form of a product that an appellate court can specifically review.⁵ Thus *Anders* requires counsel to flag the best issues for the sake of keeping counsel on his toes and giving focus to judicial review of his judgment. *Wende* on the other hand requires no indication of conceivable issues and hence nothing specifically reviewable by a court bound to preserve the system's adversary character. *Wende* does no more to protect the indigent's right to advocacy than the no-merit letter condemned in *Anders*, or the conclusory statement disapproved in *Penson*.

On like reasoning, *Wende* is deficient in relying on a judge's nonpartisan review to assure that a defendant suffers no prejudice at the hands of a lawyer who has failed to document his best effort at partisan review. Exactly because our system assumes that a lawyer committed to a client is the most dependable guardian of the client's interest, see *supra*, at 296–297, we have consistently rejected procedures leaving the determination of frivolousness to the court in the first instance, see *Douglas, supra*, at 355–356, or to the court following a conclusory declaration by counsel, see *Penson, supra*, at 81–82, or to the court assisted by counsel in the role of *amicus curiae*, see *Ellis*, 356 U. S., at 675. The defect in these procedures is their entire reliance on review by a detached magistrate who does not apply the partisan scrutiny in the first instance that defendants with paid lawyers get as a matter of course.

⁵Since the state petitioner's claims that the lawyer's unrevealing and conclusory certification has been approved by a superior are neither here nor there on my analysis, I need not evaluate assertions by *amicus* Delgado that there is no scheme of assigned representation uniform throughout the State, see Brief for Jesus Garcia Delgado as *Amicus Curiae* 8.

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It goes without saying, too, that *Wende's* reliance on judges to start from scratch in seeking arguable issues adds substantially to the burden on the judicial shoulders. While I have no need to decide whether this drawback of the *Wende* scheme is of constitutional significance, it raises questions that certainly underscore the constitutional failing of relying on judicial scrutiny uninformed by counsel's partisan analysis. In an *amicus* brief filed in this case, 13 retired justices of the Supreme Court or Courts of Appeal of California have pointed out the "risk that the review of the cold record [under the *Wende* scheme] will be more perfunctory without the issue-spotting guidance, and associated record citations, of counsel." Brief for Retired Justice Armand Arabian et al. as *Amici Curiae* 5. The *amici* have candidly represented that "[w]hen a California appellate court receives a *Wende* brief, it assigns the case to a staff attorney who prepares a memorandum analyzing all possible legal issues in the case. Typically, the staff attorney then makes an oral presentation to the appellate panel . . ." *Id.*, at 6. When the responsibility of counsel is thrown onto the court, the court gives way to a staff attorney; it could not be clearer that *Wende* is seriously at odds with the respective obligations of counsel and the courts as contemplated by the Constitution.

III

Unlike the Court, I reach the question of appropriate relief. With respect to respondent's *Anders* claim, the Court of Appeals premised its disposition on finding that two potentially meritorious issues showed that Robbins had been prejudiced by the failure of the *Wende* scheme to result in their litigation. I think it unnecessary to invoke such findings, however, and would hold for Robbins simply because of the failure to provide an advocate's analysis of issues as a predicate of court review. Without more, I would, in effect, require the state courts to reinstate the appeal for treatment consistent with the *Anders* application of *Griffin*.

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It is true, of course, that before relief is normally granted for want of adequate assistance of trial counsel, a defendant must show not only his lawyer's failure to represent him with reasonable competence (demonstrated here by the failure to file an advocate's issue-spotting brief), but also a "reasonable probability" that competent representation would have produced a different result in his case, see *Strickland*, 466 U. S., at 694. But the assumption behind *Strickland's* prejudice requirement is that the defendant had a lawyer who was representing him as his advocate at least at some level, whereas that premise cannot be assumed when a defendant receives the benefit of nothing more than a *Wende* brief. In a *Wende* situation, nominal counsel is functioning merely as a friend of the court, helping the judge to grasp the structure of the record but not even purporting to highlight the record's nearest approach to supporting his client's hope to appeal. Counsel under *Wende* is doing less than the judge's law clerk (or a staff attorney) might do, and he is doing nothing at all in the way of advocacy. When a lawyer abandons the role of advocate and adopts that of *amicus curiae*, he is no longer functioning as counsel or rendering assistance within the meaning of the Sixth Amendment. See *Cronic*, 466 U. S., at 654–655. Since the apparently missing ingredient of the advocate's analysis goes to the very essence of the right to counsel, a lawyer who does nothing more than file a *Wende* brief is closer to being no counsel at all than to being subpar counsel under *Strickland*.

This, I think, is the answer to any suggestion that a specific assessment of prejudice need be shown in order to get relief from *Wende*. A complete absence of counsel is a reversible violation of the constitutional right to representation, even when there is no question that at the end of the day the smartest lawyer in the world would have watched his client being led off to prison. See *Cronic, supra*, at 658–659; cf. *Rodriguez v. United States*, 395 U. S. 327 (1969). We do not ask how the defendant would have fared if he had

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been given counsel, and we should not look to what sort of appeal might have ensued if an appellant's lawyer had flagged the points that came closest to appealable issues. Such a result is equally consistent with our cases holding a violation of due process to be complete when a defendant is denied a right to the appeal he is otherwise entitled to pursue. See *Peguero v. United States*, 526 U. S. 23, 30–31 (1999) (O'CONNOR, J., concurring); *Rodriguez, supra*, at 330.⁶

This conclusion was anticipated in *Penson*, in which we dealt with the violation of *Anders* standards when counsel was allowed to withdraw without supplying the court with his best effort to identify appealable weaknesses, and prior to any judicial determination that counsel had missed nothing in finding no arguable appellate issues in the record. The appellate court in *Penson* subsequently identified arguable issues but thought the appointment of new counsel unnecessary after finding that any legitimately appealable issues would be losers. This Court recognized a presumption of prejudice without more, for purposes of both *Strickland* and *Chapman v. California*, 386 U. S. 18 (1967). See *Penson*, 488 U. S., at 85–86. Although the state court's failure to appoint counsel after identifying issues made *Penson* an egregious case, *id.*, at 83, the failure of advocacy and consequent constructive absence of counsel was clear even at the point at which the lawyer withdrew, *id.*, at 82, and the presumption of prejudice applicable then is applicable in this case now.

There is practical sense as well as good theory behind this presumption of prejudice, for any requirement to demonstrate prejudice specifically would often place federal judges on habeas in highly precarious positions calling for judgments that state judges are generally better qualified to

⁶ Although this habeas proceeding began on February 24, 1994, and is therefore not governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), see *Lindh v. Murphy*, 521 U. S. 320 (1997), the result should be no different in a post-AEDPA case. See *infra*, at 303.

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make. Since there will have been no advocate's help in analyzing the record on the direct state appeal, and since counsel may well have been absent formally as well as constructively in any state postconviction proceedings, the federal judge would be looking for (among other things) previously unidentified state-law issues not previously waived. One could not ask for a more certain guarantee of inefficient and time consuming judicial effort.⁷

What remains is only to say a word about the State's argument that relief in this case is barred under *Teague v. Lane*, 489 U. S. 288 (1989), as requiring application of a new rule of law not clearly entailed by our prior holdings. The argument seems to be that California has relied on *Wende* for so long that any disapproval from a federal court at this juncture is some sort of novelty (resulting from the failure of other state defendants to reach the federal courts earlier with *Wende* objections). The obvious answer is that the application of *Douglas* and *Griffin* standards to meritless appeals has been subject to repeated explanation starting with *Anders* and echoed in *McCoy* and *Penson*. Once general rules are announced they do not become "new" again with every particular violation that may subsequently occur. See *Saffle v. Parks*, 494 U. S. 484, 491–492 (1990) (discussing application of the rule of *Jurek v. Texas*, 428 U. S. 262 (1976),

⁷Since a *Wende* case is like a denial of counsel, it would make no more sense to give the State an option to demonstrate no prejudice under *Chapman v. California*, 386 U. S. 18 (1967), or *Brecht v. Abrahamson*, 507 U. S. 619 (1993), than it would to require a defendant to show it under *Strickland v. Washington*, 466 U. S. 668 (1984). The presumption of prejudice does not, however, promise relief to every California defendant whose appeal was dismissed as frivolous and against whom the statute of limitations has not run, see 28 U. S. C. § 2244(d)(1) (1994 ed., Supp. III). One submission before us claims that the *Wende* scheme has not supplanted *Anders v. California*, 386 U. S. 738 (1967), throughout California. See Brief for Jesus Garcia Delgado as *Amicus Curiae* 9–10. Briefs that measure up according to the standards adumbrated in *Anders* would of course receive standard *Strickland* analysis.

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in *Penry v. Lynaugh*, 492 U. S. 302 (1989)). The same point, of course, would answer any objection under the AEDPA that an *Anders* petitioner was seeking to go beyond “clearly established Federal law, as determined by the Supreme Court of the United States,” 28 U. S. C. § 2254(d)(1) (1994 ed., Supp. III).

* * *

The *Wende* procedure does not assure even the most minimal assistance of counsel in an adversarial role. The Constitution demands such assurances, and I would hold Robbins entitled to an appeal that provides them.

Syllabus

SWIDLER & BERLIN ET AL. *v.* UNITED STATESCERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-1192. Argued June 8, 1998—Decided June 25, 1998

When various investigations of the 1993 dismissal of White House Travel Office employees were beginning, Deputy White House Counsel Vincent W. Foster, Jr., met with petitioner Hamilton, an attorney at petitioner law firm, to seek legal representation. Hamilton took handwritten notes at their meeting. Nine days later, Foster committed suicide. Subsequently, a federal grand jury, at the Independent Counsel's request, issued subpoenas for, *inter alia*, the handwritten notes as part of an investigation into whether crimes were committed during the prior investigations into the firings. Petitioners moved to quash, arguing, among other things, that the notes were protected by the attorney-client privilege. The District Court agreed and denied enforcement of the subpoenas. In reversing, the Court of Appeals recognized that most courts assume the privilege survives death, but noted that such references usually occur in the context of the well-recognized testamentary exception to the privilege allowing disclosure for disputes among the client's heirs. The court declared that the risk of posthumous revelation, when confined to the criminal context, would have little to no chilling effect on client communication, but that the costs of protecting communications after death were high. Concluding that the privilege is not absolute in such circumstances, and that instead, a balancing test should apply, the court held that there is a posthumous exception to the privilege for communications whose relative importance to particular criminal litigation is substantial.

Held: Hamilton's notes are protected by the attorney-client privilege. This Court's inquiry must be guided by "the principles of the common law . . . as interpreted by the courts . . . in light of reason and experience." Fed. Rule Evid. 501. The relevant case law demonstrates that it has been overwhelmingly, if not universally, accepted, for well over a century, that the privilege survives the client's death in a case such as this. While the Independent Counsel's arguments against the privilege's posthumous survival are not frivolous, he has simply not satisfied his burden of showing that "reason and experience" require a departure from the common-law rule. His interpretation—that the testamentary exception supports the privilege's posthumous termination because in practice most cases have refused to apply the privilege posthumously;

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that the exception reflects a policy judgment that the interest in settling estates outweighs any posthumous interest in confidentiality; and that, by analogy, the interest in determining whether a crime has been committed should trump client confidentiality, particularly since the estate's financial interests are not at stake—does not square with the case law's implicit acceptance of the privilege's survival and with its treatment of testamentary disclosure as an "exception" or an implied "waiver." And his analogy's premise is incorrect, since cases have consistently recognized that the testamentary exception furthers the client's intent, whereas there is no reason to suppose the same is true with respect to grand jury testimony about confidential communications. Knowing that communications will remain confidential even after death serves a weighty interest in encouraging a client to communicate fully and frankly with counsel; posthumous disclosure of such communications may be as feared as disclosure during the client's lifetime. The Independent Counsel's suggestion that a posthumous disclosure rule will chill only clients intent on perjury, not truthful clients or those asserting the Fifth Amendment, incorrectly equates the privilege against self-incrimination with the privilege here at issue, which serves much broader purposes. Clients consult attorneys for a wide variety of reasons, many of which involve confidences that are not admissions of crime, but nonetheless are matters the clients would not wish divulged. The suggestion that the proposed exception would have minimal impact if confined to criminal cases, or to information of substantial importance in particular criminal cases, is unavailing because there is no case law holding that the privilege applies differently in criminal and civil cases, and because a client may not know when he discloses information to his attorney whether it will later be relevant to a civil or criminal matter, let alone whether it will be of substantial importance. Balancing *ex post* the importance of the information against client interests, even limited to criminal cases, introduces substantial uncertainty into the privilege's application and therefore must be rejected. The argument that the existence of, *e. g.*, the crime-fraud and testamentary exceptions to the privilege makes the impact of one more exception marginal fails because there is little empirical evidence to support it, and because the established exceptions, unlike the proposed exception, are consistent with the privilege's purposes. Indications in *United States v. Nixon*, 418 U. S. 683, 710, and *Branzburg v. Hayes*, 408 U. S. 665, that privileges must be strictly construed as inconsistent with truth seeking are inapposite here, since those cases dealt with the creation of privileges not recognized by the common law, whereas here, the Independent Counsel seeks to narrow a well-established privilege. Pp. 403–411.

124 F. 3d 230, reversed.

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REHNQUIST, C. J., delivered the opinion of the Court, in which STEVENS, KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. O'CONNOR, J., filed a dissenting opinion, in which SCALIA and THOMAS, JJ., joined, *post*, p. 411.

James Hamilton, pro se, argued the cause for petitioners. With him on the briefs was *Robert V. Zener*.

Brett M. Kavanaugh argued the cause for the United States. With him on the brief were *Kenneth W. Starr* and *Craig S. Lerner*.*

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner James Hamilton, an attorney, made notes of an initial interview with a client shortly before the client's death. The Government, represented by the Office of Independent Counsel, now seeks his notes for use in a criminal investigation. We hold that the notes are protected by the attorney-client privilege.

This dispute arises out of an investigation conducted by the Office of the Independent Counsel into whether various individuals made false statements, obstructed justice, or committed other crimes during investigations of the 1993 dismissal of employees from the White House Travel Office. Vincent W. Foster, Jr., was Deputy White House Counsel when the firings occurred. In July 1993, Foster met with petitioner Hamilton, an attorney at petitioner Swidler & Berlin, to seek legal representation concerning possible congressional or other investigations of the firings. During a 2-hour meeting, Hamilton took three pages of

*Briefs of *amici curiae* urging reversal were filed for the American Bar Association by *Jerome J. Shestack, William H. Jeffress, Jr., and Scott L. Nelson, Jr.*; for the American College of Trial Lawyers by *Edward Brodsky and Alan J. Davis*; and for the National Association of Criminal Defense Lawyers et al. by *Mark I. Levy, Timothy K. Armstrong, Lisa B. Kemler, Steven Alan Bennett, Arthur H. Bryant, and Richard G. Taranto*.

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handwritten notes. One of the first entries in the notes is the word “Privileged.” Nine days later, Foster committed suicide.

In December 1995, a federal grand jury, at the request of the Independent Counsel, issued subpoenas to petitioners Hamilton and Swidler & Berlin for, *inter alia*, Hamilton’s handwritten notes of his meeting with Foster. Petitioners filed a motion to quash, arguing that the notes were protected by the attorney-client privilege and by the work-product privilege. The District Court, after examining the notes *in camera*, concluded they were protected from disclosure by both doctrines and denied enforcement of the subpoenas.

The Court of Appeals for the District of Columbia Circuit reversed. *In re Sealed Case*, 124 F. 3d 230 (1997). While recognizing that most courts assume the privilege survives death, the Court of Appeals noted that holdings actually manifesting the posthumous force of the privilege are rare. Instead, most judicial references to the privilege’s posthumous application occur in the context of a well-recognized exception allowing disclosure for disputes among the client’s heirs. *Id.*, at 231–232. It further noted that most commentators support some measure of posthumous curtailment of the privilege. *Id.*, at 232. The Court of Appeals thought that the risk of posthumous revelation, when confined to the criminal context, would have little to no chilling effect on client communication, but that the costs of protecting communications after death were high. It therefore concluded that the privilege was not absolute in such circumstances, and that instead, a balancing test should apply. *Id.*, at 233–234. It thus held that there is a posthumous exception to the privilege for communications whose relative importance to particular criminal litigation is substantial. *Id.*, at 235. While acknowledging that uncertain privileges are disfavored, *Jaffee v. Redmond*, 518 U. S. 1, 17–18 (1996), the Court of Appeals determined that the uncertainty introduced by its balancing test was insignificant in light of existing excep-

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tions to the privilege. 124 F. 3d, at 235. The Court of Appeals also held that the notes were not protected by the work-product privilege.

The dissenting judge would have affirmed the District Court's judgment that the attorney-client privilege protected the notes. *Id.*, at 237. He concluded that the common-law rule was that the privilege survived death. He found no persuasive reason to depart from this accepted rule, particularly given the importance of the privilege to full and frank client communication. *Id.*, at 237.

Petitioners sought review in this Court on both the attorney-client privilege and the work-product privilege.¹ We granted certiorari, 523 U. S. 1045 (1998), and we now reverse.

The attorney-client privilege is one of the oldest recognized privileges for confidential communications. *Upjohn Co. v. United States*, 449 U. S. 383, 389 (1981); *Hunt v. Blackburn*, 128 U. S. 464, 470 (1888). The privilege is intended to encourage "full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice." *Upjohn, supra*, at 389. The issue presented here is the scope of that privilege; more particularly, the extent to which the privilege survives the death of the client. Our interpretation of the privilege's scope is guided by "the principles of the common law . . . as interpreted by the courts . . . in the light of reason and experience." Fed. Rule Evid. 501; *Funk v. United States*, 290 U. S. 371 (1933).

The Independent Counsel argues that the attorney-client privilege should not prevent disclosure of confidential communications where the client has died and the information is relevant to a criminal proceeding. There is some authority for this position. One state appellate court, *Cohen v. Jenkintown Cab Co.*, 238 Pa. Super. 456, 357 A. 2d 689 (1976),

¹Because we sustain the claim of attorney-client privilege, we do not reach the claim of work-product privilege.

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and the Court of Appeals below have held the privilege may be subject to posthumous exceptions in certain circumstances. In *Cohen*, a civil case, the court recognized that the privilege generally survives death, but concluded that it could make an exception where the interest of justice was compelling and the interest of the client in preserving the confidence was insignificant. *Id.*, at 462–464, 357 A. 2d, at 692–693.

But other than these two decisions, cases addressing the existence of the privilege after death—most involving the testamentary exception—uniformly presume the privilege survives, even if they do not so hold. See, *e. g.*, *Mayberry v. Indiana*, 670 N. E. 2d 1262 (Ind. 1996); *Morris v. Cain*, 39 La. Ann. 712, 1 So. 797 (1887); *People v. Modzelewski*, 611 N. Y. S. 2d 22, 203 A. 2d 594 (App. Div. 1994). Several State Supreme Court decisions expressly hold that the attorney-client privilege extends beyond the death of the client, even in the criminal context. See *In re John Doe Grand Jury Investigation*, 408 Mass. 480, 481–483, 562 N. E. 2d 69, 70 (1990); *State v. Doster*, 276 S. C. 647, 650–651, 284 S. E. 2d 218, 219 (1981); *State v. Macumber*, 112 Ariz. 569, 571, 544 P. 2d 1084, 1086 (1976). In *John Doe Grand Jury Investigation*, for example, the Massachusetts Supreme Judicial Court concluded that survival of the privilege was “the clear implication” of its early pronouncements that communications subject to the privilege could not be disclosed at any time. 408 Mass., at 483, 562 N. E. 2d, at 70. The court further noted that survival of the privilege was “necessarily implied” by cases allowing waiver of the privilege in testamentary disputes. *Ibid.*

Such testamentary exception cases consistently presume the privilege survives. See, *e. g.*, *United States v. Osborn*, 561 F. 2d 1334, 1340 (CA9 1977); *DeLoach v. Myers*, 215 Ga. 255, 259–260, 109 S. E. 2d 777, 780–781 (1959); *Doyle v. Reeves*, 112 Conn. 521, 152 A. 882 (1931); *Russell v. Jackson*, 9 Hare 387, 68 Eng. Rep. 558 (V. C. 1851). They view testa-

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mentary disclosure of communications as an exception to the privilege: “[T]he general rule with respect to confidential communications . . . is that such communications are privileged during the testator’s lifetime and, also, after the testator’s death unless sought to be disclosed in litigation between the testator’s heirs.” *Osborn*, 561 F. 2d, at 1340. The rationale for such disclosure is that it furthers the client’s intent. *Id.*, at 1340, n. 11.²

Indeed, in *Glover v. Patten*, 165 U. S. 394, 406–408 (1897), this Court, in recognizing the testamentary exception, expressly assumed that the privilege continues after the individual’s death. The Court explained that testamentary disclosure was permissible because the privilege, which normally protects the client’s interests, could be impliedly waived in order to fulfill the client’s testamentary intent. *Id.*, at 407–408 (quoting *Blackburn v. Crawfords*, 3 Wall. 175 (1866), and *Russell v. Jackson*, *supra*).

The great body of this case law supports, either by holding or considered dicta, the position that the privilege does survive in a case such as the present one. Given the language of Rule 501, at the very least the burden is on the Independ-

² About half the States have codified the testamentary exception by providing that a personal representative of the deceased can waive the privilege when heirs or devisees claim through the deceased client (as opposed to parties claiming against the estate, for whom the privilege is not waived). See, *e. g.*, Ala. Rule Evid. 502 (1996); Ark. Code Ann. § 16–41–101, Rule 502 (Supp. 1997); Neb. Rev. Stat. § 27–503, Rule 503 (1995). These statutes do not address expressly the continuation of the privilege outside the context of testamentary disputes, although many allow the attorney to assert the privilege on behalf of the client apparently without temporal limit. See, *e. g.*, Ark. Code Ann. § 16–41–101, Rule 502(c) (Supp. 1997). They thus do not refute or affirm the general presumption in the case law that the privilege survives. California’s statute is exceptional in that it apparently allows the attorney to assert the privilege only so long as a holder of the privilege (the estate’s personal representative) exists, suggesting the privilege terminates when the estate is wound up. See Cal. Code Evid. Ann. §§ 954, 957 (West 1995). But no other State has followed California’s lead in this regard.

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ent Counsel to show that “reason and experience” require a departure from this rule.

The Independent Counsel contends that the testamentary exception supports the posthumous termination of the privilege because in practice most cases have refused to apply the privilege posthumously. He further argues that the exception reflects a policy judgment that the interest in settling estates outweighs any posthumous interest in confidentiality. He then reasons by analogy that in criminal proceedings, the interest in determining whether a crime has been committed should trump client confidentiality, particularly since the financial interests of the estate are not at stake.

But the Independent Counsel’s interpretation simply does not square with the case law’s implicit acceptance of the privilege’s survival and with the treatment of testamentary disclosure as an “exception” or an implied “waiver.” And the premise of his analogy is incorrect, since cases consistently recognize that the rationale for the testamentary exception is that it furthers the client’s intent, see, *e. g.*, *Glover, supra*. There is no reason to suppose as a general matter that grand jury testimony about confidential communications furthers the client’s intent.

Commentators on the law also recognize that the general rule is that the attorney-client privilege continues after death. See, *e. g.*, 8 Wigmore, *Evidence* § 2323 (McNaughton rev. 1961); Frankel, *The Attorney-Client Privilege After the Death of the Client*, 6 *Geo. J. Legal Ethics* 45, 78–79 (1992); 1 J. Strong, *McCormick on Evidence* § 94, p. 348 (4th ed. 1992). Undoubtedly, as the Independent Counsel emphasizes, various commentators have criticized this rule, urging that the privilege should be abrogated after the client’s death where extreme injustice would result, as long as disclosure would not seriously undermine the privilege by deterring client communication. See, *e. g.*, C. Mueller & L. Kirkpatrick, 2 *Federal Evidence* § 199, pp. 380–381 (2d ed. 1994); *Restatement (Third) of the Law Governing Lawyers* § 127, Comment

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d (Proposed Final Draft No. 1, Mar. 29, 1996). But even these critics clearly recognize that established law supports the continuation of the privilege and that a contrary rule would be a modification of the common law. See, *e. g.*, Mueller & Kirkpatrick, *supra*, at 379; Restatement of the Law Governing Lawyers, *supra*, § 127, Comment *c*; 24 C. Wright & K. Graham, Federal Practice and Procedure § 5498, p. 483 (1986).

Despite the scholarly criticism, we think there are weighty reasons that counsel in favor of posthumous application. Knowing that communications will remain confidential even after death encourages the client to communicate fully and frankly with counsel. While the fear of disclosure, and the consequent withholding of information from counsel, may be reduced if disclosure is limited to posthumous disclosure in a criminal context, it seems unreasonable to assume that it vanishes altogether. Clients may be concerned about reputation, civil liability, or possible harm to friends or family. Posthumous disclosure of such communications may be as feared as disclosure during the client's lifetime.

The Independent Counsel suggests, however, that his proposed exception would have little to no effect on the client's willingness to confide in his attorney. He reasons that only clients intending to perjure themselves will be chilled by a rule of disclosure after death, as opposed to truthful clients or those asserting their Fifth Amendment privilege. This is because for the latter group, communications disclosed by the attorney after the client's death purportedly will reveal only information that the client himself would have revealed if alive.

The Independent Counsel assumes, incorrectly we believe, that the privilege is analogous to the Fifth Amendment's protection against self-incrimination. But as suggested above, the privilege serves much broader purposes. Clients consult attorneys for a wide variety of reasons, only one of which involves possible criminal liability. Many attorneys

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act as counselors on personal and family matters, where, in the course of obtaining the desired advice, confidences about family members or financial problems must be revealed in order to assure sound legal advice. The same is true of owners of small businesses who may regularly consult their attorneys about a variety of problems arising in the course of the business. These confidences may not come close to any sort of admission of criminal wrongdoing, but nonetheless be matters which the client would not wish divulged.

The contention that the attorney is being required to disclose only what the client could have been required to disclose is at odds with the basis for the privilege even during the client's lifetime. In related cases, we have said that the loss of evidence admittedly caused by the privilege is justified in part by the fact that without the privilege, the client may not have made such communications in the first place. See *Jaffee*, 518 U. S., at 12; *Fisher v. United States*, 425 U. S. 391, 403 (1976). This is true of disclosure before and after the client's death. Without assurance of the privilege's posthumous application, the client may very well not have made disclosures to his attorney at all, so the loss of evidence is more apparent than real. In the case at hand, it seems quite plausible that Foster, perhaps already contemplating suicide, may not have sought legal advice from Hamilton if he had not been assured the conversation was privileged.

The Independent Counsel additionally suggests that his proposed exception would have minimal impact if confined to criminal cases, or, as the Court of Appeals suggests, if it is limited to information of substantial importance to a particular criminal case.³ However, there is no case authority for the proposition that the privilege applies differently in crimi-

³ Petitioners, while opposing wholesale abrogation of the privilege in criminal cases, concede that exceptional circumstances implicating a criminal defendant's constitutional rights might warrant breaching the privilege. We do not, however, need to reach this issue, since such exceptional circumstances clearly are not presented here.

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nal and civil cases, and only one commentator ventures such a suggestion, see Mueller & Kirkpatrick, *supra*, at 380–381. In any event, a client may not know at the time he discloses information to his attorney whether it will later be relevant to a civil or a criminal matter, let alone whether it will be of substantial importance. Balancing *ex post* the importance of the information against client interests, even limited to criminal cases, introduces substantial uncertainty into the privilege’s application. For just that reason, we have rejected use of a balancing test in defining the contours of the privilege. See *Upjohn*, 449 U. S., at 393; *Jaffee*, *supra*, at 17–18.

In a similar vein, the Independent Counsel argues that existing exceptions to the privilege, such as the crime-fraud exception and the testamentary exception, make the impact of one more exception marginal. However, these exceptions do not demonstrate that the impact of a posthumous exception would be insignificant, and there is little empirical evidence on this point.⁴ The established exceptions are con-

⁴ Empirical evidence on the privilege is limited. Three studies do not reach firm conclusions on whether limiting the privilege would discourage full and frank communication. Alexander, *The Corporate Attorney Client Privilege: A Study of the Participants*, 63 *St. John’s L. Rev.* 191 (1989); Zacharias, *Rethinking Confidentiality*, 74 *Iowa L. Rev.* 352 (1989); Comment, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 *Yale L. J.* 1226 (1962). These articles note that clients are often uninformed or mistaken about the privilege, but suggest that a substantial number of clients and attorneys think the privilege encourages candor. Two of the articles conclude that a substantial number of clients and attorneys think the privilege enhances open communication, Alexander, *supra*, at 244–246, 261, and that the absence of a privilege would be detrimental to such communication, Comment, 71 *Yale L. J.*, *supra*, at 1236. The third article suggests instead that while the privilege is perceived as important to open communication, limited exceptions to the privilege might not discourage such communication, Zacharias, *supra*, at 382, 386. Similarly, relatively few court decisions discuss the impact of the privilege’s application after death. This may reflect the general assumption that the privilege sur-

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sistent with the purposes of the privilege, see *Glover*, 165 U. S., at 407–408; *United States v. Zolin*, 491 U. S. 554, 562–563 (1989), while a posthumous exception in criminal cases appears at odds with the goals of encouraging full and frank communication and of protecting the client’s interests. A “no harm in one more exception” rationale could contribute to the general erosion of the privilege, without reference to common-law principles or “reason and experience.”

Finally, the Independent Counsel, relying on cases such as *United States v. Nixon*, 418 U. S. 683, 710 (1974), and *Branzburg v. Hayes*, 408 U. S. 665 (1972), urges that privileges be strictly construed because they are inconsistent with the paramount judicial goal of truth seeking. But both *Nixon* and *Branzburg* dealt with the creation of privileges not recognized by the common law, whereas here we deal with one of the oldest recognized privileges in the law. And we are asked, not simply to “construe” the privilege, but to narrow it, contrary to the weight of the existing body of case law.

It has been generally, if not universally, accepted, for well over a century, that the attorney-client privilege survives the death of the client in a case such as this. While the arguments against the survival of the privilege are by no means frivolous, they are based in large part on speculation—thoughtful speculation, but speculation nonetheless—as to whether posthumous termination of the privilege would diminish a client’s willingness to confide in an attorney. In an area where empirical information would be useful, it is scant and inconclusive.

Rule 501’s direction to look to “the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience” does not mandate that a rule, once established, should endure for all time. *Funk v. United States*, 290 U. S. 371, 381 (1933). But

vives—if attorneys were required as a matter of practice to testify or provide notes in criminal proceedings, cases discussing that practice would surely exist.

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here the Independent Counsel has simply not made a sufficient showing to overturn the common-law rule embodied in the prevailing case law. Interpreted in the light of reason and experience, that body of law requires that the attorney-client privilege prevent disclosure of the notes at issue in this case. The judgment of the Court of Appeals is

Reversed.

JUSTICE O'CONNOR, with whom JUSTICE SCALIA and JUSTICE THOMAS join, dissenting.

Although the attorney-client privilege ordinarily will survive the death of the client, I do not agree with the Court that it inevitably precludes disclosure of a deceased client's communications in criminal proceedings. In my view, a criminal defendant's right to exculpatory evidence or a compelling law enforcement need for information may, where the testimony is not available from other sources, override a client's posthumous interest in confidentiality.

We have long recognized that “[t]he fundamental basis upon which all rules of evidence must rest—if they are to rest upon reason—is their adaptation to the successful development of the truth.” *Funk v. United States*, 290 U. S. 371, 381 (1933). In light of the heavy burden that they place on the search for truth, see *United States v. Nixon*, 418 U. S. 683, 708–710 (1974), “[e]videntiary privileges in litigation are not favored, and even those rooted in the Constitution must give way in proper circumstances,” *Herbert v. Lando*, 441 U. S. 153, 175 (1979). Consequently, we construe the scope of privileges narrowly. See *Jaffee v. Redmond*, 518 U. S. 1, 19 (1996) (SCALIA, J., dissenting); see also *University of Pennsylvania v. EEOC*, 493 U. S. 182, 189 (1990). We are reluctant to recognize a privilege or read an existing one expansively unless to do so will serve a “public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.” *Trammel v. United*

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States, 445 U.S. 40, 50 (1980) (internal quotation marks omitted).

The attorney-client privilege promotes trust in the representational relationship, thereby facilitating the provision of legal services and ultimately the administration of justice. See *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). The systemic benefits of the privilege are commonly understood to outweigh the harm caused by excluding critical evidence. A privilege should operate, however, only where "necessary to achieve its purpose," see *Fisher v. United States*, 425 U.S. 391, 403 (1976), and an invocation of the attorney-client privilege should not go unexamined "when it is shown that the interests of the administration of justice can only be frustrated by [its] exercise," *Cohen v. Jenkintown Cab Co.*, 238 Pa. Super. 456, 464, 357 A. 2d 689, 693-694 (1976).

I agree that a deceased client may retain a personal, reputational, and economic interest in confidentiality. See *ante*, at 407. But, after death, the potential that disclosure will harm the client's interests has been greatly diminished, and the risk that the client will be held criminally liable has abated altogether. Thus, some commentators suggest that terminating the privilege upon the client's death "could not to any substantial degree lessen the encouragement for free disclosure which is [its] purpose." 1 J. Strong, McCormick on Evidence §94, p. 350 (4th ed. 1992); see also Restatement (Third) of the Law Governing Lawyers §127, Comment *d* (Proposed Final Draft No. 1, Mar. 29, 1996). This diminished risk is coupled with a heightened urgency for discovery of a deceased client's communications in the criminal context. The privilege does not "protect disclosure of the underlying facts by those who communicated with the attorney," *Upjohn, supra*, at 395, and were the client living, prosecutors could grant immunity and compel the relevant testimony. After a client's death, however, if the privilege precludes an attorney from testifying in the client's stead, a complete

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“loss of crucial information” will often result, see 24 C. Wright & K. Graham, *Federal Practice and Procedure* § 5498, p. 484 (1986).

As the Court of Appeals observed, the costs of recognizing an absolute posthumous privilege can be inordinately high. See *In re Sealed Case*, 124 F. 3d 230, 233–234 (CADDC 1997). Extreme injustice may occur, for example, where a criminal defendant seeks disclosure of a deceased client’s confession to the offense. See *State v. Macumber*, 112 Ariz. 569, 571, 544 P. 2d 1084, 1086 (1976); cf. *In the Matter of a John Doe Grand Jury Investigation*, 408 Mass. 480, 486, 562 N. E. 2d 69, 72 (1990) (Nolan, J., dissenting). In my view, the paramount value that our criminal justice system places on protecting an innocent defendant should outweigh a deceased client’s interest in preserving confidences. See, e. g., *Schlup v. Delo*, 513 U. S. 298, 324–325 (1995); *In re Winship*, 397 U. S. 358, 371 (1970) (Harlan, J., concurring). Indeed, even petitioners acknowledge that an exception may be appropriate where the constitutional rights of a criminal defendant are at stake. An exception may likewise be warranted in the face of a compelling law enforcement need for the information. “[O]ur historic commitment to the rule of law . . . is nowhere more profoundly manifest than in our view that the twofold aim of criminal justice is that guilt shall not escape or innocence suffer.” *Nixon, supra*, at 709 (internal quotation marks omitted); see also *Herrera v. Collins*, 506 U. S. 390, 398 (1993). Given that the complete exclusion of relevant evidence from a criminal trial or investigation may distort the record, mislead the factfinder, and undermine the central truth-seeking function of the courts, I do not believe that the attorney-client privilege should act as an absolute bar to the disclosure of a deceased client’s communications. When the privilege is asserted in the criminal context, and a showing is made that the communications at issue contain necessary factual information not otherwise available, courts

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should be permitted to assess whether interests in fairness and accuracy outweigh the justifications for the privilege.

A number of exceptions to the privilege already qualify its protections, and an attorney “who tells his client that the expected communications are absolutely and forever privileged is oversimplifying a bit.” 124 F. 3d, at 235. In the situation where the posthumous privilege most frequently arises—a dispute between heirs over the decedent’s will—the privilege is widely recognized to give way to the interest in settling the estate. See *Glover v. Patten*, 165 U. S. 394, 406–408 (1897). This testamentary exception, moreover, may be invoked in some cases where the decedent would not have chosen to waive the privilege. For example, “a decedent might want to provide for an illegitimate child but at the same time much prefer that the relationship go undisclosed.” 124 F. 3d, at 234. Among the Court’s rationales for a broad construction of the posthumous privilege is its assertion that “[m]any attorneys act as counselors on personal and family matters, where, in the course of obtaining the desired advice, confidences about family members or financial problems must be revealed . . . which the client would not wish divulged.” *Ante*, at 407–408. That reasoning, however, would apply in the testamentary context with equal force. Nor are other existing exceptions to the privilege—for example, the crime-fraud exception or the exceptions for claims relating to attorney competence or compensation—necessarily consistent with “encouraging full and frank communication” or “protecting the client’s interests.” *Ante*, at 410. Rather, those exceptions reflect the understanding that, in certain circumstances, the privilege “ceases to operate” as a safeguard on “the proper functioning of our adversary system.” See *United States v. Zolin*, 491 U. S. 554, 562–563 (1989).

Finally, the common law authority for the proposition that the privilege remains absolute after the client’s death is not a monolithic body of precedent. Indeed, the Court acknowl-

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edges that most cases merely “presume the privilege survives,” see *ante*, at 404, and it relies on the case law’s “implicit acceptance” of a continuous privilege, see *ante*, at 406. Opinions squarely addressing the posthumous force of the privilege “are relatively rare.” See 124 F. 3d, at 232. And even in those decisions expressly holding that the privilege continues after the death of the client, courts do not typically engage in detailed reasoning, but rather conclude that the cases construing the testamentary exception imply survival of the privilege. See, e. g., *Glover*, *supra*, at 406–408; see also *Wright & Graham*, *supra*, § 5498, at 484 (“Those who favor an eternal duration for the privilege seldom do much by way of justifying this in terms of policy”).

Moreover, as the Court concedes, see *ante*, at 403–404, 406–407, there is some authority for the proposition that a deceased client’s communications may be revealed, even in circumstances outside of the testamentary context. California’s Evidence Code, for example, provides that the attorney-client privilege continues only until the deceased client’s estate is finally distributed, noting that “there is little reason to preserve secrecy at the expense of excluding relevant evidence after the estate is wound up and the representative is discharged.” Cal. Evid. Code Ann. § 954, and comment, p. 232, § 952 (West 1995). And a state appellate court has admitted an attorney’s testimony concerning a deceased client’s communications after “balanc[ing] the necessity for revealing the substance of the [attorney-client conversation] against the unlikelihood of any cognizable injury to the rights, interests, estate or memory of [the client].” See *Cohen*, *supra*, at 464, 357 A. 2d, at 693. The American Law Institute, moreover, has recently recommended withholding the privilege when the communication “bears on a litigated issue of pivotal significance” and has suggested that courts “balance the interest in confidentiality against any exceptional need for the communication.” Restatement (Third) of the Law Governing Lawyers § 127, at 431, Com-

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ment *d*; see also 2 C. Mueller & L. Kirkpatrick, *Federal Evidence*, § 199, p. 380 (2d ed. 1994) (“[I]f a deceased client has confessed to criminal acts that are later charged to another, surely the latter’s need for evidence sometimes outweighs the interest in preserving the confidences”).

Where the exoneration of an innocent criminal defendant or a compelling law enforcement interest is at stake, the harm of precluding critical evidence that is unavailable by any other means outweighs the potential disincentive to forthright communication. In my view, the cost of silence warrants a narrow exception to the rule that the attorney-client privilege survives the death of the client. Moreover, although I disagree with the Court of Appeals’ notion that the context of an initial client interview affects the applicability of the work product doctrine, I do not believe that the doctrine applies where the material concerns a client who is no longer a potential party to adversarial litigation.

Accordingly, I would affirm the judgment of the Court of Appeals. Although the District Court examined the documents *in camera*, it has not had an opportunity to balance these competing considerations and decide whether the privilege should be trumped in the particular circumstances of this case. Thus, I agree with the Court of Appeals’ decision to remand for a determination whether any portion of the notes must be disclosed.

With respect, I dissent.

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NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

TAPIA *v.* UNITED STATESCERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

No. 10–5400. Argued April 18, 2011—Decided June 16, 2011

Petitioner Tapia was convicted of, *inter alia*, smuggling unauthorized aliens into the United States. The District Court imposed a 51-month prison term, reasoning that Tapia should serve that long in order to qualify for and complete the Bureau of Prisons’ Residential Drug Abuse Program (RDAP). On appeal, Tapia argued that lengthening her prison term to make her eligible for RDAP violated 18 U. S. C. §3582(a), which instructs sentencing courts to “recogniz[e] that imprisonment is not an appropriate means of promoting correction and rehabilitation.” The Ninth Circuit disagreed. Relying on Circuit precedent, it held that a sentencing court cannot impose a prison term to assist a defendant’s rehabilitation, but once imprisonment is chosen, the court may consider the defendant’s rehabilitation needs in setting the sentence’s length.

Held: Section 3582(a) does not permit a sentencing court to impose or lengthen a prison term in order to foster a defendant’s rehabilitation. Pp. 3–15.

(a) For nearly a century, the Federal Government used an indeterminate sentencing system premised on faith in rehabilitation. *Mistretta v. United States*, 488 U. S. 361, 363. Because that system produced “serious disparities in [the] sentences” imposed on similarly situated defendants, *id.*, at 365, and failed to “achieve rehabilitation,” *id.*, at 366, Congress enacted the Sentencing Reform Act of 1984 (SRA), replacing the system with one in which Sentencing Guidelines would provide courts with “a range of determinate sentences,” *id.*, at 368. Under the SRA, a sentencing judge must impose at least imprisonment, probation, or a fine. See §3551(b). In determining the appropriate sentence, judges must consider retribution, deterrence, incapacitation, and rehabilitation, §3553(a)(2), but a particular pur-

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pose may apply differently, or not at all, depending on the kind of sentence under consideration. As relevant here, a court ordering imprisonment must “recogniz[e] that imprisonment is not an appropriate means of promoting correction and rehabilitation.” §3582(a). A similar provision instructs the Sentencing Commission, as the Sentencing Guidelines’ author, to “insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant.” 28 U. S. C. §994(k). Pp. 3–6.

(b) Consideration of Tapia’s claim starts with §3582(a)’s clear text. Putting together the most natural definitions of “recognize”—“to acknowledge or treat as valid”—and not “appropriate”—not “suitable or fitting for a particular purpose”—§3582(a) tells courts to acknowledge that imprisonment is not suitable for the purpose of promoting rehabilitation. It also instructs courts to make that acknowledgment when “determining whether to impose a term of imprisonment, and . . . [when] determining the length of the term.” *Amicus*, appointed to defend the judgment below, argues that the “recognizing” clause is merely a caution for judges not to put too much faith in the capacity of prisons to rehabilitate. But his alternative interpretation is unpersuasive, as Congress expressed itself clearly in §3582(a). *Amicus* also errs in echoing the Ninth Circuit’s reasoning that §3582’s term “imprisonment” relates to the decision whether to incarcerate, not the determination of the sentence’s length. Because “imprisonment” most naturally means “the state of being confined” or “a period of confinement,” it does not distinguish between the defendant’s initial placement behind bars and his continued stay there.

Section 3582(a)’s context supports this textual conclusion. By restating §3582(a)’s message to the Sentencing Commission, Congress ensured that all sentencing officials would work in tandem to implement the statutory determination to “reject imprisonment as a means of promoting rehabilitation.” *Mistretta*, 488 U. S., at 367. Equally illuminating is the absence of any provision authorizing courts to ensure that offenders participate in prison rehabilitation programs. When Congress wanted sentencing courts to take account of rehabilitative needs, it gave them authority to do so. See, e.g., §3563(b)(9). In fact, although a sentencing court can recommend that an offender be placed in a particular facility or program, see §3582(a), the authority to make the placement rests with the Bureau of Prisons, see, e.g., §3621(e). The point is well illustrated here, where the District Court’s strong recommendations that Tapia participate in RDAP and be placed in a particular facility went unfulfilled. Finally, for those who consider legislative history useful, the key Senate Report on the SRA provides corroborating evidence. Pp. 6–12.

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(c) *Amicus*' attempts to recast what the SRA says about rehabilitation are unavailing. Pp. 12–14.

(d) Here, the sentencing transcript suggests that Tapia's sentence may have been lengthened in light of her rehabilitative needs. A court does not err by discussing the opportunities for rehabilitation within prison or the benefits of specific treatment or training programs. But the record indicates that the District Court may have increased the length of Tapia's sentence to ensure her completion of RDAP, something a court may not do. The Ninth Circuit is left to consider on remand the effect of Tapia's failure to object to the sentence when imposed. Pp. 14–15.

376 Fed. Appx. 707, reversed and remanded.

KAGAN, J., delivered the opinion for a unanimous Court. SOTOMAYOR, J., filed a concurring opinion, in which ALITO, J., joined.

Opinion of the Court

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 10–5400

ALEJANDRA TAPIA, PETITIONER *v.* UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

[June 16, 2011]

JUSTICE KAGAN delivered the opinion of the Court.

We consider here whether the Sentencing Reform Act precludes federal courts from imposing or lengthening a prison term in order to promote a criminal defendant’s rehabilitation. We hold that it does.

I

Petitioner Alejandra Tapia was convicted of, *inter alia*, smuggling unauthorized aliens into the United States, in violation of 8 U. S. C. §§1324(a)(2)(B)(ii) and (iii). At sentencing, the District Court determined that the United States Sentencing Guidelines recommended a prison term of between 41 and 51 months for Tapia’s offenses. The court decided to impose a 51-month term, followed by three years of supervised release. In explaining its reasons, the court referred several times to Tapia’s need for drug treatment, citing in particular the Bureau of Prison’s Residential Drug Abuse Program (known as RDAP or the 500 Hour Drug Program). The court indicated that Tapia should serve a prison term long enough to qualify for and complete that program:

“The sentence has to be sufficient to provide needed correctional treatment, and here I think the needed

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correctional treatment is the 500 Hour Drug Program.

“Here I have to say that one of the factors that—I am going to impose a 51-month sentence, . . . and one of the factors that affects this is the need to provide treatment. In other words, so she is in long enough to get the 500 Hour Drug Program, number one.” App. 27.

(“Number two” was “to deter her from committing other criminal offenses.” *Ibid.*) The court “strongly recommend[ed]” to the Bureau of Prisons (BOP) that Tapia “participate in [RDAP] and that she serve her sentence at” the Federal Correctional Institution in Dublin, California (FCI Dublin), where “they have the appropriate tools . . . to help her, to start to make a recovery.” *Id.*, at 29. Tapia did not object to the sentence at that time. *Id.*, at 31.

On appeal, however, Tapia argued that the District Court had erred in lengthening her prison term to make her eligible for RDAP. App. to Pet. for Cert. 2. In Tapia’s view, this action violated 18 U. S. C. §3582(a), which instructs sentencing courts to “recogniz[e] that imprisonment is not an appropriate means of promoting correction and rehabilitation.” The United States Court of Appeals for the Ninth Circuit disagreed, 376 Fed. Appx. 707 (2010), relying on its prior decision in *United States v. Duran*, 37 F. 3d 557 (1994). The Ninth Circuit had held there that §3582(a) distinguishes between deciding to impose a term of imprisonment and determining its length. See *id.*, at 561. According to *Duran*, a sentencing court cannot impose a prison term to assist a defendant’s rehabilitation. But “[o]nce imprisonment is chosen as a punishment,” the court may consider the defendant’s need for rehabilitation in setting the length of the sentence. *Ibid.*

We granted certiorari to consider whether §3582(a)

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permits a sentencing court to impose or lengthen a prison term in order to foster a defendant’s rehabilitation. 562 U. S. ____ (2010). That question has divided the Courts of Appeals.¹ Because the United States agrees with Tapia’s interpretation of the statute, we appointed an *amicus curiae* to defend the judgment below.² We now reverse.

II

We begin with statutory background—how the relevant sentencing provisions came about and what they say. Aficionados of our sentencing decisions will recognize much of the story line.

“For almost a century, the Federal Government employed in criminal cases a system of indeterminate sentencing.” *Mistretta v. United States*, 488 U. S. 361, 363 (1989). Within “customarily wide” outer boundaries set by Congress, trial judges exercised “almost unfettered discretion” to select prison sentences for federal offenders. *Id.*, at 364. In the usual case, a judge also could reject prison time altogether, by imposing a “suspended” sentence. If the judge decided to impose a prison term, discretionary authority shifted to parole officials: Once the defendant had spent a third of his term behind bars, they could order his release. See K. Stith & J. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 18–20 (1998).

This system was premised on a faith in rehabilitation.

¹Three Circuits have held that §3582(a) allows a court to lengthen, although not to impose, a prison term based on the need for rehabilitation. See *United States v. Duran*, 37 F. 3d 557 (CA9 1994); *United States v. Hawk Wing*, 433 F. 3d 622 (CA8 2006); *United States v. Jimenez*, 605 F. 3d 415 (CA6 2010). Two Courts of Appeals have ruled that §3582(a) bars a court from either imposing or increasing a period of confinement for rehabilitative reasons. See *United States v. Manzella*, 475 F. 3d 152 (CA3 2007); *In re Sealed Case*, 573 F. 3d 844 (CA10 2009).

²We appointed Stephanos Bibas to brief and argue the case, 562 U. S. ____ (2011), and he has ably discharged his responsibilities.

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Discretion allowed “the judge and the parole officer to [base] their respective sentencing and release decisions upon their own assessments of the offender’s amenability to rehabilitation.” *Mistretta*, 488 U. S., at 363. A convict, the theory went, should generally remain in prison only until he was able to reenter society safely. His release therefore often coincided with “the successful completion of certain vocational, educational, and counseling programs within the prisons.” S. Rep. No. 98–225, p. 40 (1983) (hereinafter S. Rep.). At that point, parole officials could “determin[e] that [the] prisoner had become rehabilitated and should be released from confinement.” Stith & Cabranes, *supra*, at 18.³

But this model of indeterminate sentencing eventually fell into disfavor. One concern was that it produced “[s]erious disparities in [the] sentences” imposed on similarly situated defendants. *Mistretta*, 488 U. S., at 365. Another was that the system’s attempt to “achieve rehabilitation of offenders had failed.” *Id.*, at 366. Lawmakers and others increasingly doubted that prison programs could “rehabilitate individuals on a routine basis”—or that parole officers could “determine accurately whether or when a particular prisoner ha[d] been rehabilitated.” S. Rep., at 40.

³The statutes governing punishment of drug-addicted offenders (like Tapia) provide an example of this system at work. If a court concluded that such an offender was “likely to be rehabilitated through treatment,” it could order confinement “for treatment . . . for an indeterminate period of time” not to exceed the lesser of 10 years or the statutory maximum for the offender’s crime. 18 U. S. C. §4253(a) (1982 ed.); see also §4251(c) (“‘Treatment’ includes confinement and treatment in an institution . . . and includes, but is not limited to, medical, educational, social, psychological, and vocational services, corrective and preventive guidance and training, and other rehabilitative services”). Once the offender had undergone treatment for six months, the Attorney General could recommend that the Board of Parole release him from custody, and the Board could then order release “in its discretion.” §4254.

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Congress accordingly enacted the Sentencing Reform Act of 1984, 98 Stat. 1987 (SRA or Act), to overhaul federal sentencing practices. The Act abandoned indeterminate sentencing and parole in favor of a system in which Sentencing Guidelines, promulgated by a new Sentencing Commission, would provide courts with “a range of determinate sentences for categories of offenses and defendants.” *Mistretta*, 488 U. S., at 368. And the Act further channeled judges’ discretion by establishing a framework to govern their consideration and imposition of sentences.

Under the SRA, a judge sentencing a federal offender must impose at least one of the following sanctions: imprisonment (often followed by supervised release), probation, or a fine. See §3551(b). In determining the appropriate sentence from among these options, §3553(a)(2) requires the judge to consider specified factors, including:

- “the need for the sentence imposed—
 - “(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - “(B) to afford adequate deterrence to criminal conduct;
 - “(C) to protect the public from further crimes of the defendant; and
 - “(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.”

These four considerations—retribution, deterrence, incapacitation, and rehabilitation—are the four purposes of sentencing generally, and a court must fashion a sentence “to achieve the[se] purposes . . . to the extent that they are applicable” in a given case. §3551(a).

The SRA then provides additional guidance about how the considerations listed in §3553(a)(2) pertain to each of

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the Act’s main sentencing options—imprisonment, supervised release, probation, and fines. See §3582(a); §3583; §3562(a); §3572(a). These provisions make clear that a particular purpose may apply differently, or even not at all, depending on the kind of sentence under consideration. For example, a court may *not* take account of retribution (the first purpose listed in §3553(a)(2)) when imposing a term of supervised release. See §3583(c).

Section 3582(a), the provision at issue here, specifies the “factors to be considered” when a court orders imprisonment. That section provides:

“The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation.”

A similar provision addresses the Sentencing Commission in its capacity as author of the Sentencing Guidelines. The SRA instructs the Commission to:

“insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment.” 28 U. S. C. §994(k).

With this statutory background established, we turn to the matter of interpretation.

III

A

Our consideration of Tapia’s claim starts with the text of 18 U. S. C. §3582(a)—and given the clarity of that provi-

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sion's language, could end there as well. As just noted, that section instructs courts to "recogniz[e] that imprisonment is not an appropriate means of promoting correction and rehabilitation." A common—and in context the most natural—definition of the word "recognize" is "to acknowledge or treat as valid." Random House Dictionary of the English Language 1611 (2d ed. 1987). And a thing that is not "appropriate" is not "suitable or fitting for a particular purpose." *Id.*, at 103. Putting these two definitions together, §3582(a) tells courts that they should acknowledge that imprisonment is not suitable for the purpose of promoting rehabilitation. And when should courts acknowledge this? Section §3582(a) answers: when "determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, [when] determining the length of the term." So a court making these decisions should consider the specified rationales of punishment *except for* rehabilitation, which it should acknowledge as an unsuitable justification for a prison term.

As against this understanding, *amicus* argues that §3582(a)'s "recognizing" clause is not a flat prohibition but only a "reminder" or a "guide [for] sentencing judges' cognitive processes." Brief for Court-Appointed *Amicus Curiae* in Support of Judgment Below 23–24 (hereinafter *Amicus* Brief) (emphasis deleted). *Amicus* supports this view by offering a string of other definitions of the word "recognize": "'recall to mind,' 'realize,' or 'perceive clearly.'" *Id.*, at 24 (quoting dictionary definitions). Once these are plugged in, *amicus* suggests, §3582(a) reveals itself as a kind of loosey-goosey caution not to put *too* much faith in the capacity of prisons to rehabilitate.

But we do not see how these alternative meanings of "recognize" help *amicus*'s cause. A judge who "perceives clearly" that imprisonment is not an appropriate means of promoting rehabilitation would hardly incarcerate someone for that purpose. Ditto for a judge who "realizes" or

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“recalls” that imprisonment is not a way to rehabilitate an offender. To be sure, the drafters of the “recognizing” clause could have used still more commanding language: Congress could have inserted a “thou shalt not” or equivalent phrase to convey that a sentencing judge may never, ever, under any circumstances consider rehabilitation in imposing a prison term. But when we interpret a statute, we cannot allow the perfect to be the enemy of the merely excellent. Congress expressed itself clearly in §3582(a), even if armchair legislators might come up with something even better. And what Congress said was that when sentencing an offender to prison, the court shall consider all the purposes of punishment except rehabilitation—because imprisonment is not an appropriate means of pursuing that goal.

Amicus also claims, echoing the Ninth Circuit’s reasoning in *Duran*, that §3582(a)’s “recognizing” clause bars courts from considering rehabilitation only when imposing a prison term, and not when deciding on its length. The argument goes as follows. Section 3582(a) refers to two decisions: “[1] in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, [2] in determining the length of the term” must consider the purposes of punishment listed in §3553(a)(2), subject to the caveat of the “recognizing” clause. But that clause says only that “imprisonment” is not an appropriate means of rehabilitation. Because the “primary meaning of ‘imprisonment’ is ‘the act of confining a person,’” *amicus* argues, the clause relates only to [1] the decision to incarcerate, and not to [2] the separate determination of the sentence’s length. *Amicus* Brief 52.

We again disagree. Under standard rules of grammar, §3582(a) says: A sentencing judge shall recognize that imprisonment is not appropriate to promote rehabilitation when the court considers the applicable factors of §3553(a)(2); and a court considers these factors when

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determining *both* whether to imprison an offender *and* what length of term to give him. The use of the word “imprisonment” in the “recognizing” clause does not destroy—but instead fits neatly into—this construction. “Imprisonment” as used in the clause most naturally means “[t]he state of being confined” or “a period of confinement.” Black’s Law Dictionary 825 (9th ed. 2009); see also Webster’s Third New International Dictionary 1137 (1993) (the “state of being imprisoned”). So the word does not distinguish between the defendant’s initial placement behind bars and his continued stay there. As the D. C. Circuit noted in rejecting an identical argument, “[a] sentencing court deciding to keep a defendant locked up for an additional month is, as to that month, in fact choosing imprisonment over release.” *In re Sealed Case*, 573 F. 3d 844, 850 (2009).⁴ Accordingly, the word “imprisonment” does not change the function of the “recognizing” clause—to constrain a sentencing court’s decision both to impose and to lengthen a prison term.⁵

The context of §3582(a) puts an exclamation point on this textual conclusion. As noted earlier, *supra*, at 6, another provision of the SRA restates §3582(a)’s message,

⁴Indeed, we can scarcely imagine a reason why Congress would have wanted to draw the distinction that *amicus* urges on us. That distinction would prevent a court from considering rehabilitative needs in imposing a 1-month sentence rather than probation, but not in choosing a 60-month sentence over a 1-month term. The only policy argument *amicus* can offer in favor of this result is that “[t]he effects of imprisonment plateau a short while after the incarceration” and “[t]he difference in harm between longer and shorter prison terms is smaller than typically assumed.” *Amicus* Brief 56. But nothing in the SRA indicates that Congress is so indifferent to the length of prison terms.

⁵The Government argues that “Congress did not intend to prohibit courts from imposing *less* imprisonment in order to promote a defendant’s rehabilitation.” Brief for United States 40 (emphasis added). This case does not require us to address that question, and nothing in our decision expresses any views on it.

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but to a different audience. That provision, 28 U. S. C. §994(k), directs the Sentencing Commission to ensure that the Guidelines “reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment.” In this way, Congress ensured that all sentencing officials would work in tandem to implement the statutory determination to “rejec[t] imprisonment as a means of promoting rehabilitation.” *Mistretta*, 488 U. S., at 367 (citing 28 U. S. C. §994(k)). Section 994(k) bars the Commission from recommending a “term of imprisonment”—a phrase that again refers both to the fact and to the length of incarceration—based on a defendant’s rehabilitative needs. And §3582(a) prohibits a court from considering those needs to impose or lengthen a period of confinement when selecting a sentence from within, or choosing to depart from, the Guidelines range. Each actor at each stage in the sentencing process receives the same message: Do not think about prison as a way to rehabilitate an offender.

Equally illuminating here is a statutory silence—the absence of any provision granting courts the power to ensure that offenders participate in prison rehabilitation programs. For when Congress wanted sentencing courts to take account of rehabilitative needs, it gave courts the authority to direct appropriate treatment for offenders. Thus, the SRA instructs courts, in deciding whether to impose probation or supervised release, to consider whether an offender could benefit from training and treatment programs. See 18 U. S. C. §3562(a); §3583(c). And so the SRA *also* authorizes courts, when imposing those sentences, to order an offender’s participation in certain programs and facilities. §3563(b)(9); §3563(b)(11); §3563(a)(4); §3583(d). As a condition of probation, for example, the court may require the offender to “undergo

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available medical, psychiatric, or psychological treatment, including treatment for drug or alcohol dependency, as specified by the court, and [to] remain in a specified institution if required for that purpose.” §3563(b)(9).

If Congress had similarly meant to allow courts to base prison terms on offenders’ rehabilitative needs, it would have given courts the capacity to ensure that offenders participate in prison correctional programs. But in fact, courts do not have this authority. When a court sentences a federal offender, the BOP has plenary control, subject to statutory constraints, over “the place of the prisoner’s imprisonment,” §3621(b), and the treatment programs (if any) in which he may participate, §§3621(e), (f); §3624(f). See also 28 CFR pt. 544 (2010) (BOP regulations for administering inmate educational, recreational, and vocational programs); 28 CFR pt. 550, subpart F (drug abuse treatment programs). A sentencing court can *recommend* that the BOP place an offender in a particular facility or program. See §3582(a). But decisionmaking authority rests with the BOP.

This case well illustrates the point. As noted earlier, the District Court “strongly recommend[ed]” that Tapia participate in RDAP, App. 29, and serve her sentence at FCI Dublin, “where they have the facilities to really help her,” *id.*, at 28. But the court’s recommendations were only recommendations—and in the end they had no effect. See *Amicus* Brief 42 (“[Tapia] was not admitted to RDAP, nor even placed in the prison recommended by the district court”); Reply Brief for United States 8, n. 1 (“According to BOP records, [Tapia] was encouraged to enroll [in RDAP] during her psychology intake screening at [the federal prison], but she stated that she was not interested, and she has not volunteered for the program”). The sentencing court may have had plans for Tapia’s rehabilitation, but it lacked the power to implement them. That incapacity speaks volumes. It indicates that Congress did not intend

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that courts consider offenders' rehabilitative needs when imposing prison sentences.

Finally, for those who consider legislative history useful, the key Senate Report concerning the SRA provides one last piece of corroborating evidence. According to that Report, decades of experience with indeterminate sentencing, resulting in the release of many inmates after they completed correctional programs, had left Congress skeptical that "rehabilitation can be induced reliably in a prison setting." S. Rep., at 38. Although some critics argued that "rehabilitation should be eliminated completely as a purpose of sentencing," Congress declined to adopt that categorical position. *Id.*, at 76. Instead, the Report explains, Congress barred courts from considering rehabilitation in imposing prison terms, *ibid.*, and n. 165, but not in ordering other kinds of sentences, *ibid.*, and n. 164. "[T]he purpose of rehabilitation," the Report stated, "is still important in determining whether a sanction *other than a term of imprisonment* is appropriate in a particular case." See *id.*, at 76–77 (emphasis added).

And so this is a case in which text, context, and history point to the same bottom line: Section 3582(a) precludes sentencing courts from imposing or lengthening a prison term to promote an offender's rehabilitation.

B

With all these sources of statutory meaning stacked against him, *amicus* understandably tries to put the SRA's view of rehabilitation in a wholly different frame. *Amicus* begins by conceding that Congress, in enacting the SRA, rejected the old "[r]ehabilitation [m]odel." *Amicus* Brief 1. But according to *amicus*, that model had a very limited focus: It was the belief that "isolation and prison routine" could alone produce "penitence and spiritual renewal." *Id.*, at 1, 11. What the rehabilitation model did *not* include—and the SRA therefore did not reject—was prison

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treatment programs (including for drug addiction) targeted to offenders' particular needs. See *id.*, at 21, 25, 27–28. So even after the passage of §3582(a), *amicus* argues, a court may impose or lengthen a prison sentence to promote an offender's participation in a targeted treatment program. The only thing the court may not do is to impose a prison term on the ground that confinement itself—its inherent solitude and routine—will lead to rehabilitation.

We think this reading of the SRA is too narrow. For one thing, the relevant history shows that at the time of the SRA's enactment, prison rehabilitation efforts focused on treatment, counseling, and training programs, not on seclusion and regimentation. See Rotman, *The Failure of Reform: United States, 1865–1965*, in *Oxford History of the Prison: The Practice of Punishment in Western Society* 169, 189–190 (N. Morris & D. Rothman eds. 1995) (describing the pre-SRA “therapeutic model of rehabilitation” as characterized by “individualized treatment” and “vocational training and group counseling programs”); see also n. 3, *supra* (noting pre-SRA statutes linking the confinement of drug addicts to the completion of treatment programs). Indeed, Congress had in mind precisely these programs when it prohibited consideration of rehabilitation in imposing a prison term. See 28 U. S. C. §994(k) (instructing the Sentencing Commission to prevent the use of imprisonment to “provid[e] the defendant with needed educational or vocational training . . . or other correctional treatment”); S. Rep., at 40 (rejecting the “model of ‘coercive’ rehabilitation—the theory of correction that ties prison release dates to the successful completion of certain vocational, educational, and counseling programs within the prisons”). Far from falling outside the “rehabilitation model,” these programs practically defined it.

It is hardly surprising, then, that *amicus's* argument finds little support in the statutory text. Read most natu-

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rally, 18 U. S. C. §3582(a)'s prohibition on "promoting correction and rehabilitation" covers efforts to place offenders in rehabilitation programs. Indeed, §3582(a)'s language recalls the SRA's description of the rehabilitative purpose of sentencing—"provid[ing] the defendant with needed educational or vocational training, medical care, or other correctional treatment." §3553(a)(2)(D). That description makes clear that, under the SRA, treatment, training, and like programs are rehabilitation's sum and substance. So *amicus's* efforts to exclude rehabilitation programs from the "recognizing" clause's reach do not succeed. That section prevents a sentencing court from imposing or lengthening a prison term because the court thinks an offender will benefit from a prison treatment program.

IV

In this case, the sentencing transcript suggests the possibility that Tapia's sentence was based on her rehabilitative needs.

We note first what we do *not* disapprove about Tapia's sentencing. A court commits no error by discussing the opportunities for rehabilitation within prison or the benefits of specific treatment or training programs. To the contrary, a court properly may address a person who is about to begin a prison term about these important matters. And as noted earlier, a court may urge the BOP to place an offender in a prison treatment program. See *supra*, at 11. Section 3582(a) itself provides, just after the clause at issue here, that a court may "make a recommendation concerning the type of prison facility appropriate for the defendant"; and in this calculus, the presence of a rehabilitation program may make one facility more appropriate than another. So the sentencing court here did nothing wrong—and probably something very right—in trying to get Tapia into an effective drug treatment

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program.

But the record indicates that the court may have done more—that it may have selected the length of the sentence to ensure that Tapia could complete the 500 Hour Drug Program. “The sentence has to be sufficient,” the court explained, “to provide needed correctional treatment, and here I think the needed correctional treatment is the 500 Hour Drug Program.” App. 27; see *supra*, at 1–2. Or again: The “number one” thing “is the need to provide treatment. In other words, so she is in long enough to get the 500 Hour Drug Program.” App. 27; see *supra*, at 2. These statements suggest that the court may have calculated the length of Tapia’s sentence to ensure that she receive certain rehabilitative services. And that a sentencing court may not do. As we have held, a court may not impose or lengthen a prison sentence to enable an offender to complete a treatment program or otherwise to promote rehabilitation.

For the reasons stated, we reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion. Consistent with our practice, see, e.g., *United States v. Marcus*, 560 U. S. ____, ____ (2010) (slip op., at 8), we leave it to the Court of Appeals to consider the effect of Tapia’s failure to object to the sentence when imposed. See Fed. Rule Crim. Proc. 52(b); *United States v. Olano*, 507 U. S. 725, 731 (1993).

It is so ordered.

SOTOMAYOR, J., concurring

SUPREME COURT OF THE UNITED STATES

No. 10–5400

ALEJANDRA TAPIA, PETITIONER *v.* UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

[June 16, 2011]

JUSTICE SOTOMAYOR, with whom JUSTICE ALITO joins,
concurring.

I agree with the Court’s conclusion that 18 U. S. C. §3582(a) “precludes federal courts from imposing or lengthening a prison term in order to promote a criminal defendant’s rehabilitation.” *Ante*, at 1. I write separately to note my skepticism that the District Judge violated this proscription in this case.

At the sentencing hearing, the District Judge carefully reviewed the sentencing factors set forth in §3553(a). First, he considered “[t]he nature and circumstances of the offense” committed by petitioner Alejandra Tapia—in this case, alien smuggling. App. 25–26; see §3553(a)(1). He emphasized that Tapia’s criminal conduct “created a substantial risk of death or serious bodily injury” to the smuggled aliens. App. 26; see also *id.*, at 20 (noting that the aliens were secreted in the vehicle’s gas tank compartment). Second, he reviewed Tapia’s “history and characteristics,” §3553(a)(1), including her history of being abused and her associations “with the wrong people,” *id.*, at 26. He noted his particular concern about Tapia’s criminal conduct while released on bail, when she failed to appear and was found in an apartment with methamphetamine, a sawed-off shotgun, and stolen mail. *Id.*, at 25–26. Third, he noted that the offense was “serious,” warranting a “sufficient” sentence. *Id.*, at 26; see

SOTOMAYOR, J., concurring

§3553(a)(2)(A). Fourth, he considered the need “to deter criminal conduct” and “to protect the public from further crimes of the defendant,” which he characterized as a “big factor here, given [Tapia’s] failure to appear and what she did out on bail.” App. 26; see §§3553(a)(2)(B), (C). Fifth, he took account of the need “to provide needed correctional treatment,” in this case, the Bureau of Prisons’ (BOP) “500 Hour Drug Program,” more officially called the Residential Drug Abuse Treatment Program (RDAP). App. 27; see §3553(a)(2)(D). And, finally, he noted the need “to avoid unwarranted sentencing disparities” and the need for the sentence “to be sufficient to effect the purposes of 3553(a) but not greater.” App. 27; see §§3553(a), (a)(6).

Tapia faced a mandatory minimum sentence of 36 months’ incarceration, App. 18, but her Guidelines range was 41 to 51 months, *id.*, at 13. After reviewing the §3553(a) factors, the judge imposed a sentence of 51 months, the top of the Guidelines range. He offered two reasons for choosing this sentence: “number one,” the need for drug treatment; and “[n]umber two,” deterrence. *Id.*, at 27. With respect to the latter reason, the judge highlighted Tapia’s criminal history and her criminal conduct while released on bail—which, he said, was “something that motivates imposing a sentence that in total is at the high end of the guideline range.” *Id.*, at 27–28. He concluded, “I think that a sentence less than what I am imposing would not deter her and provide for sufficient time so she could begin to address these problems.” *Id.*, at 28.

The District Judge’s comments at sentencing suggest that he believed the need to deter Tapia from engaging in further criminal conduct warranted a sentence of 51 months’ incarceration. Granted, the judge also mentioned the need to provide drug treatment through the RDAP. The 51-month sentence he selected, however, appears to have had no connection to eligibility for the RDAP. See BOP Program Statement No. P5330.11, §2.5.1(b) (Mar. 16,

SOTOMAYOR, J., concurring

2009) (providing that, to participate in the RDAP, an inmate must ordinarily have at least 24 months remaining on her sentence). Even the 36-month mandatory minimum would have qualified Tapia for participation in the RDAP. I thus find it questionable that the judge lengthened her term of imprisonment beyond that necessary for deterrence in the belief that a 51-month sentence was necessary for rehabilitation. Cf. S. Rep. No. 98–225, p. 176 (1983) (“A term imposed for another purpose of sentencing may . . . have a rehabilitative focus if rehabilitation in such a case is an appropriate secondary purpose of the sentence”).

Although I am skeptical that the thoughtful District Judge imposed or lengthened Tapia’s sentence to promote rehabilitation, I acknowledge that his comments at sentencing were not perfectly clear. Given that Ninth Circuit precedent incorrectly permitted sentencing courts to consider rehabilitation in setting the length of a sentence, see *ante*, at 2, and that the judge stated that the sentence needed to be “long enough to get the 500 Hour Drug Program,” App. 27, I cannot be certain that he did not lengthen Tapia’s sentence to promote rehabilitation in violation of §3582(a). I therefore agree with the Court’s disposition of this case and join the Court’s opinion in full.

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215 F.3d 315 (2nd Cir. 2000)

UNITED STATES OF AMERICA, Appellee,

v.

JOSE GOMEZ PEREZ, also known as Hector Parra Cruz, also known as Gaston Guitierrez, also known as Riccardo Rios, also known as Sergio Guerra, also known as Ricardo M. Caballos, also known as Jose E. Vergara, also known as Jose Polomino, also known as Vincente Perez, also known as Jose Gomez, also known as Jose Colon, Defendant Appellant.

Docket No. 00-1036
August Term, 1999

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

Submitted: March 7, 2000
Decided: June 15, 2000

Appeal from a judgment of conviction and sentence of the United States District Court for the Eastern District of New York (John Gleeson, Judge), entered on January 18, 2000, upon Defendant-Appellant's plea of guilty. Appeal Dismissed.

Henriette D. Hoffman, The Legal Aid Society, New York, NY, for Defendant-Appellant.

Loretta E. Lynch, United States Attorney for the Eastern District of New York, New York, NY (Peter A. Norling and Cecil C. Scott, Assistant United States Attorneys, of Counsel, on the brief), for Appellee.

Before: OAKES, CALABRESI, and PARKER, Circuit Judges.

PARKER, Circuit Judge:

1 On February 4, 2000, the government filed a motion to dismiss Defendant-Appellant Jose Gomez-Perez's appeal in this case, arguing that Gomez-Perez had waived all rights to appeal so long as his sentence was within the range stipulated to in the plea agreement. On February 18, 2000, Gomez-Perez's counsel notified this Court that she took "no position with respect to the government's motion." On March 8, 2000, this Court denied the government's motion without prejudice, and it ordered briefing on the question of whether Gomez-Perez's counsel should be required to submit a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), in the event that counsel concludes that there is no non-frivolous opposition to the motion to dismiss.

2 We now conclude that, in such a circumstance, counsel is required to submit a brief in accordance with *Anders*, but confined to certain discrete issues as outlined below. After reviewing the brief submitted by counsel in this case, we conclude that Defendant-Appellant's waiver of his right to appeal was knowing, competent, and voluntary, and that neither he nor his counsel has identified any other non-frivolous issues for appeal. We therefore dismiss the appeal.

I. BACKGROUND

3 After serving an 18-month sentence for robbery, Defendant-Appellant Jose
« up Gomez-Perez was deported to Colombia in February 1998. Gomez-Perez was
subsequently apprehended in the United States and charged with illegal reentry
into the United States, in violation of 8 U.S.C. § 1326. On September 23, 1999,
Gomez-Perez signed a plea agreement in which he agreed to plead guilty to one
count of illegal reentry. As part of this plea agreement, Gomez-Perez also agreed:

4 not [to] file an appeal or otherwise challenge the conviction or sentence in the
event that the Court imposes a sentence within or below the range of imprisonment
set forth in paragraph 2, even if the Court employs a Guidelines analysis different
from that set forth in paragraph 2.

5 According to paragraph 2 of the plea agreement, the government estimated the
likely range of Gomez-Perez's imprisonment as 46 to 57 months.

6 On September 23, 1999, the United States District Court for the Eastern District
of New York (John Gleeson, Judge) conducted a plea hearing pursuant to Rule 11 of
the Federal Rules of Criminal Procedure. During this plea hearing, the court
specifically stated:

7 If you plead guilty and I accept your plea, you would be giving up your right to a
trial, you would be giving up the rights you have during trial that I've been going
over with you.

8 I'll enter a finding that you are guilty of this lone count against you, this only
count, based on your own admission of guilt here today and you won't have a right
to appeal to a higher court from my finding that you are guilty.

9 Do you understand?

10 Gomez-Perez indicated that he understood. The court later asked if Gomez-Perez
understood that he was "giv[ing] up [his] right to appeal to a higher court from any
sentence that [the court] imposed as long as the jail term portion of the sentence
[was] 57 months or less." Gomez-Perez responded that he understood. Following a
further colloquy with Gomez-Perez, the court found that there was a factual basis
for the plea, and that it was knowing and voluntary. The court therefore accepted
the plea.

11 On January 6, 2000, the district court conducted Gomez-Perez's sentencing
hearing. The court first ascertained that Gomez-Perez had received a copy of the
Presentence Report (the "PSR"), and that someone had translated its contents for
him. The district court then addressed Gomez-Perez's prior written request for a
downward departure. After considering Gomez-Perez's various arguments for a
downward departure, the district court accepted one of his arguments, and it
therefore departed from a Criminal History Category 4, as suggested by the PSR, to
a Criminal History Category 2, on the ground that the criminal history level
"overstate[d] the seriousness of [his] prior criminal conduct." The district court
then accepted the PSR's recommended offense level calculation of 21 and imposed a
sentence of 41 months, which represented the bottom end of the applicable
guideline range.

12 On January 6, 2000, Judge Gleeson signed a written judgment memorializing the
oral pronouncement of sentence, which was entered on January 18, 2000. On the
same day, Gomez-Perez filed a pro se notice of appeal.

On February 9, 2000, the government filed a motion to dismiss Gomez-Perez's
appeal. The government's Affidavit in Support of Motion to Dismiss Appeal
reiterates that Gomez-Perez agreed to waive all rights to an appeal as part of his
plea agreement, so long as his sentence was "within or below the Sentencing
Guideline range of 46 to 57 months incarceration." See Scott Aff. of 2/8/2000, ¶ 3.

13 The affidavit also states that Gomez-Perez was sentenced to 41 months, see *id.* at ¶
« up 5, and that Gomez-Perez's appeal should therefore be dismissed pursuant to the
plea agreement. On February 18, 2000, Gomez-Perez's trial counsel, The Legal Aid
Society, submitted a Response to Motion for Dismissal of Appeal, which stated that
"we take no position with respect to the government's motion." See *Hoffman Aff.* of
2/18/2000.

14 On March 8, 2000, this Court denied the government's motion to dismiss, and
ordered that "Government and appellant's counsel are directed to brief, by March
27, 2000, the issue of whether a brief pursuant to *Anders v. California*, 386 U.S. 738
(1967), must be filed in order to comport with the Sixth Amendment guarantee of
effective assistance of appellate counsel, and if so, what issues should be addressed
by the *Anders* brief." On March 22, 2000, and in keeping with this Court's prior
scheduling order of February 2, 2000, counsel for Gomez-Perez filed an *Anders*
brief, as well as a motion to be relieved as counsel.

15 On March 28, 2000, the government and counsel for Gomez-Perez both filed
briefs in response to our March 8, 2000, Order. On April 11, 2000, the government
filed a motion for summary affirmance. On April 20, 2000, this Court issued an
order notifying Gomez-Perez that his counsel had filed an *Anders* brief and
notifying him that he had until May 10, 2000, to submit any additional arguments
to the court on his own behalf. To date, Gomez-Perez has not responded to the April
20, 2000, order.

II. DISCUSSION

16 Plea agreements that include a waiver of a defendant's right to appeal his
conviction and sentence are a relatively recent phenomenon. See David E. Carney,
Note, *Waiver of the Right to Appeal Sentencing in Plea Agreements with the
Federal Government*, 40 *Wm. & Mary L. Rev.* 1019, 1020-23 (1999) (noting that
appeal waivers came into existence following the Sentencing Reform Act in 1984,
but there was no uniform federal policy until 1997). This Court has repeatedly
upheld the validity of such waivers, with the obvious caveat that such waivers must
always be knowingly, voluntarily, and competently provided by the defendant. See
United States v. Rosa, 123 F.3d 94, 97 (2d Cir. 1997) (citing *United States v. Maher*,
108 F.3d 1513, 1531 (2d Cir. 1997); *United States v. Jacobson*, 15 F.3d 19, 22-23 (2d
Cir. 1994); *United States v. Salcido-Contreras*, 990 F.2d 51, 53 (2d Cir. 1993) (*per
curiam*); *United States v. Rivera*, 971 F.2d 876, 896 (2d Cir. 1992)); *Felder v. Unites
States*, 429 F.2d 534 (2d Cir. 1970). We have also held that, in some circumstances
that implicate a defendant's constitutional rights, a waiver of the right to appeal
may be invalid and should not be enforced. See *Jacobson*, 15 F.3d at 23.

17 When upholding the validity of these waivers, we have recognized that the
benefits of such waivers inure to both government and the defendant alike, with the
government receiving the benefit of reduced litigation, and the defendant receiving
some certainty with respect to his liability and punishment. *Rosa*, 123 F.3d at 97. In
seeking to reap its bargained-for benefit, the government in this case filed a motion
to dismiss the appeal, and Gomez-Perez's response to this motion would normally
be required far in advance of the due date for his brief and before counsel has had
full opportunity to review the record.¹

We have not previously addressed the nature of defense counsel's obligations to
her client under *Anders* when a defendant has executed such a waiver of the right to
appeal, but has nonetheless filed a notice of appeal, and where the government files
a motion to dismiss based on the defendant's waiver. We now hold that in such a
situation, if defense counsel concludes there is no basis to contest the validity of the
waiver then she is responsible for submitting a brief similar to that required by
Anders that addresses only the limited issues of: (1) whether defendant's plea and
waiver of appellate rights were knowing, voluntary, and competent, see *United*

18 States v. Ibrahim, 62 F.3d 72, 74 (2d Cir. 1995) (per curiam) (holding that "Anders
« up briefs . . . should always contain a discussion regarding a guilty plea"); or (2)
whether it would be against the defendant's interest to contest his plea, see *id.*; and
(3) any issues implicating a defendant's constitutional or statutory rights that either
cannot be waived, or cannot be considered waived by the defendant in light of the
particular circumstances, see, e.g., *Rosa*, 123 F.3d at 98; *United States v. Yemitan*,
70 F.3d 746, 748 (2d Cir. 1995); *Jacobson*, 15 F.3d at 22-23.

19 In such cases, if, after reviewing the record, defense counsel is satisfied that there
are no non-frivolous issues for appeal, defense counsel should file an Anders brief,
confined to these issues alone, and an accompanying motion seeking to be relieved
as counsel. Counsel must also advise the defendant-appellant in accordance with
our normal Anders procedures, and the defendant-appellant must be given an
opportunity to respond.

20 This motion, as well as the government's motion to dismiss, can then be decided
by a Motions Panel of this Court, unless it concludes that there are non-frivolous
issues for appeal. If the Motions Panel reaches such a conclusion, the motion to be
relieved as counsel should be denied, as should the government's motion to dismiss,
and the case should then be heard by a Merits Panel in accordance with our
standard procedures. See *Instructions for Appealing a Criminal Case to the U.S.*
Court of Appeals for the Second Circuit (January 1997).

A. Issues in the Brief

21 In preparing an Anders brief in these circumstances, counsel should examine
both the adequacy of the defendant's waiver and whether the defendant's plea and
sentence were in accord with the applicable law. In some cases, a defendant may
have a valid claim that the waiver of appellate rights is unenforceable, such as when
the waiver was not made knowingly, voluntarily, and competently, see *United*
States v. Ready, 82 F.3d 551, 556-57 (2d Cir. 1996), when the sentence was imposed
based on constitutionally impermissible factors, such as ethnic, racial or other
prohibited biases, see *Jacobson*, 15 F.3d at 22-23, when the government breached
the plea agreement, see *Rosa*, 123 F.3d at 98 (citing *United States v. Gonzalez*, 16
F.3d 985, 990 (9th Cir. 1993)), or when the sentencing court failed to enunciate any
rationale for the defendant's sentence, thus "amount[ing] to an abdication of
judicial responsibility subject to mandamus." *Yemitan*, 70 F.3d at 748.

22 These exceptions to the presumption of the enforceability of a waiver, however,
occupy a very circumscribed area of our jurisprudence. Accordingly, we have upheld
waiver provisions even in circumstances where the sentence was conceivably
imposed in an illegal fashion or in violation of the Guidelines, but yet was still
within the range contemplated in the plea agreement. See *id.* (holding that 18
U.S.C. § 3742(c)(1), in tandem with plea agreement, prevented defendant from
challenging his sentence based on alleged illegality unless the sentence violated
public policy constraints); accord *United States v. Feichtinger*, 105 F.3d 1188, 1190
(7th Cir. 1997) ("[A]n improper application of the guidelines is not a reason to
invalidate a knowing and voluntary waiver of appeal rights."). We have also upheld
waiver provisions when the plea agreement did not contain a specific, estimated
sentencing range, so long as the defendant's actual sentence was reasonably
foreseeable at the time of defendant's plea and was not "fundamentally unfair."
Rosa, 123 F.3d at 102.

But while these exceptions may be few in kind and sporadic in frequency in
comparison with the bulk of cases where waivers are presumptively enforceable,
they are the exceptions that must drive our rule requiring an Anders brief. To
ensure that the constitutional rights that form the bases for the exceptions are not
trampled by the increasing practice of including appeal waivers in plea agreements,

23 we hold that defendant's counsel must file an Andersbrief addressing only the
24 narrow issues addressed in the above paragraphs.

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24 We see nothing that would justify any departure from the dictates of Anders simply because a defendant has entered into a plea agreement including a waiver of his right to appeal. Our ruling is therefore consistent with Anders's command of maintaining certain "safeguards" and with its "prophylactic framework." *Smith v. Robbins*, 120 S. Ct. 746, 757 (2000) (citations omitted). Mindful of the benefit of reduced litigation sought by the government, however, we hold that counsel submitting an Anders brief in these situations is restricted to the narrow subset of issues previously outlined.

25 This being so, our above recitation of cases representing prior circumstances in which we have held waivers unenforceable should in no way be considered exhaustive. Instead, these cases should comprise the backdrop by which counsel begins her review of a defendant's case prior to determining whether an Anders brief is warranted. If counsel subsequently determines that an Anders brief is appropriate and thereafter files such a brief, this Court must, as we have done in prior cases involving Anders briefs, afford the defendant an opportunity to raise pro se any issues he feels merit discussion. See *Anders*, 386 U.S. at 744.

26 We note that both the government and counsel for defendant-appellant are in agreement on this issue. Both parties readily agree that Anders briefs serve an important function, even in cases where, as here, a superficial review of the defendant's case would seem to indicate that he has previously relinquished any right to appeal. Both parties similarly agree that defendant must be provided notice and an opportunity to respond once an Anders brief has been filed.

27 B. Future Procedures in Cases Involving Motions to Dismiss Based on Waivers of a Right to Appeal

28 We must still address the procedures to be used in cases such as this one. Because the government filed a motion to dismiss in this case, the issue of Gomez-Perez's waiver was raised before his counsel had the opportunity to prepare an Anders brief. Since we cannot determine whether it is appropriate to grant such a motion until we are convinced that defendant's waiver and sentence satisfied the above requirements, we will, in the future, reserve judgment on such motions until such time as defendant and defendant's counsel have had an opportunity to address these issues. Specifically, counsel shall respond in accordance with the normal briefing schedule.

29 In the event that defendant's counsel files an adequate Anders brief, and the defendant likewise fails to point to any non-frivolous issues pertaining to the plea agreement and appeal waiver, a Motions Panel will then review the record and determine whether it is appropriate to dismiss the appeal. In cases where dismissal is not appropriate, the government's motion will be denied, and the matter will be sent to a Merits Panel, in accordance with normal Anders procedures.

C. The Merits of Gomez-Perez's Appeal

30 In this case, Gomez-Perez's counsel has submitted an adequate Anders brief that addresses the issues we have identified above, and this Court notified Gomez-Perez that his counsel now seeks to be relieved.² Gomez-Perez has not responded with any non-frivolous issues for appeal, and we conclude that there are no other non-frivolous issues for appeal. After reviewing the Anders brief, as well as the record, we determine that Gomez-Perez knowingly, voluntarily, and competently waived his right to appeal. As a result, the appeal is dismissed.

III. CONCLUSION

31 For the foregoing reasons, the appeal is dismissed.

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Notes:

¹ Rule 27(a)(3)(A) of the Federal Rules of Appellate Procedure requires that any response to a motion be filed within ten days of service of that motion "unless the court shortens or extends the time."

² We note that this Court notified Gomez-Perez because of the unusual circumstances of this case, which were precipitated by our prior briefing order. In the future, an attorney filing an Anders brief must adhere to standard procedure by including with his Anders brief an affidavit certifying that she has notified his client that an Anders brief has been filed, which will likely result in affirmance, and that the client thereafter has 14 days to respond with any issues he believes are meritorious.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Judge John L. Kane

Criminal Action No. **12-cr-00069**

UNITED STATES OF AMERICA,

Plaintiff,

v.

1. TIMOTHY JOHN VANDERWERFF,

Defendant.

ORDER

Kane, J.

The prosecution of Defendant Timothy John Vanderwerff has been characteristic of modern criminal justice. Shortly after the government filed a three-count indictment charging Mr. Vanderwerff with receiving and possessing child pornography shipped or transmitted in a means affecting interstate and foreign commerce, the parties reached a tentative disposition and requested a change of plea hearing. In anticipation of that hearing, they submitted a proposed plea agreement whereby Mr. Vanderwerff agreed to plead guilty to Count 2 of the indictment in exchange for the dismissal of Counts 1 and 3. The proposed plea agreement contained a waiver of Mr. Vanderwerff's statutory right to appeal any matter in connection with his prosecution.

The commonplace nature of these proceedings does not obviate the need to carefully consider the appropriateness of the parties' negotiated disposition. Quite the contrary, I owe a

duty to the public and to Mr. Vanderwerff to conduct an individualized inquiry into the terms of the proposed plea agreement in light of the facts and circumstances particular to the charged offenses.

FACTS

The parties have agreed to the following statement of facts:

In October 2009, law enforcement officials were contacted by the defendant's sister-in-law. She told law enforcement [officers] that the defendant's wife, Deni Vanderwerff, found thousands of images of child pornography on the defendant's computer. Deni also believed the defendant had an improper infatuation with an 11 year-old neighbor. Deni overheard the young girl tell the defendant, "All you want to do is take down my pants."

On October 6, 2009, law enforcement authorities interviewed Deni Vanderwerff. She confirmed the events described by her sister. Deni believed the defendant was continuing to view child pornography on the computer by using the internet. Deni also said that she found a large stack of child pornography pictures that appeared to have been printed off the internet. Deni put these pictures into a suitcase in the attic.

On October 6, 2009, law enforcement officers obtained a state search warrant to search the defendant's home and seize the computer and images of child pornography. The warrant was executed at the defendant's home that day. Agents from the FBI and local law enforcement interviewed the defendant during the search. The defendant admitted that he possessed the child pornography found on the computer. The defendant told the agents he began looking at pornography on the internet approximately five years prior. The defendant said he was initially interested in adult pornography, but later began looking at child pornography when adult pornography ceased to sexually excite him. The defendant said he liked to look at child pornography with images of children between the ages of eight and 11 years old. the defendant admitted that the images sexually aroused him and that he masturbated to those child pornography images.

The defendant said he obtained all of his child pornography from the internet. He would search the internet for child pornography using search engines, such as Google. The defendant would save his favorite websites on his computer. The defendant also said that he would download child pornography images from the internet and save them on his computer in an electronic folder entitled "New Folder." The defendant would occasionally "clean out" the child pornography from that folder by deleting images and emptying those files from the computer's electronic recycle bin. The defendant believed there were approximately 25 images saved in the "New Folder" on his computer.

The defendant admitted that he also printed copies of child pornography

images he found on the internet. During the search of the home, law enforcement officers found 53 pages of printed child pornography images in a suitcase in the attic, as described by the defendant's wife. The printed pages were shown to the defendant, who admitted he had printed the images from the internet.

A Dell desktop computer and hard drive were seized from the home along with the printed child pornography images. The computer and hard drive were submitted to the Rocky Mountain Regional Computer Forensic Laboratory (RMRCFL) for examination. The forensic examination located more than 900 files containing images of child pornography on the computer. There were 27 files of child pornography images located in the "New Folder" section on the computer described by the defendant. The computer had approximately 292 files containing images of child pornography with prepubescent minors. There were approximately 27 files containing images of child pornography involving sadistic or masochistic conduct. There were 2 video files showing child pornography involving prepubescent minors. Additionally, there were eight "erotic" stories describing adults having sex with children. The forensic laboratory also discovered websites saved on the defendant's computer as "favorites." These websites include those named "Retro Child Porn," "Topless Lolita," and "Kids Fucker TGP" as well as others.

The child pornography images from the computer and the printed pages were sent to the National Center for Missing and Exploited Children (NCMEC) for review. The Child Victim Identification Program (CVIP) at NCMEC catalogues known child pornography images and known victims of child pornography. CVIP discovered 87 "known" image files of child pornography on the defendant's computer from 25 different series of known child pornography. All of the "known" images on the computer and the printed pages were created outside the State of Colorado. The images originated in the states of Connecticut, Florida, Georgia, Indiana, Kentucky, Michigan, Missouri, Montana, North Carolina, Pennsylvania, and Washington, and the countries of Austria, Belgium, Brazil, England, France, Germany, Norway, and Paraguay.

Two of the known images were saved in the "New Folder" section of the computer described by the defendant. These known images were from the "Tara" series of known child pornography. The images showed a naked prepubescent female child having sexual intercourse with an adult male.

The printed pages contained 12 images of known child pornography. These known images included an image from the "Blue Shirt Girl" series in which a young girl is shown giving oral sex to a preteen male while having sexual intercourse with an adult male. Another image, from the "IM" series of known child pornography, shows a prepubescent female giving oral sex to an adult male while a sexual device, often referred to as a vibrator or "dildo," is inserted into her vagina. Yet another image, from the "Helen" series, shows a prepubescent female, naked from the waist down, having sexual intercourse with an adult male. Another page showed a collage of images from the "Helen" series. These images included a prepubescent female having oral sex with an adult male, a prepubescent female having sexual intercourse with an adult male, and a prepubescent female lasciviously displaying her vagina to

the camera. Other images from the printed pages showed minors engaged in oral and vaginal sex, as well as the lascivious display of the genitalia of minors.

Simultaneous with the federal child pornography investigation, state law enforcement officers investigated allegations of improper sexual contact between the defendant and the 11-year-old female neighbor. During an interview with law enforcement [officers], the 11-year-old minor said the defendant had touched her “privates” on approximately 50-100 occasions when she visited his home. The child said the defendant always touched her genital area through her clothing; there was never any penetration of any kind. In July 2010, the defendant pled guilty to, and was convicted of, the felony offense of Sexual Assault on a Child - Victim less Than 15 in Rio Grande County, Colorado, Case Number 2009CR193. In that case, the defendant received 90 days of jail followed by 10 years of sex offender specific probation.

Parties’ Proposed Plea Agreement and Statement of Facts Relevant to Sentencing, 12-16.

DISCUSSION

At a minimum, I must ensure that Mr. Vanderwerff’s plea is voluntary and intelligent. *See Mendoza v. Hatch*, 620 F.3d 1261, 1269 (10th Cir. 2010). To ensure the integrity of the judicial process, however, I must also exercise my discretion to determine whether or not the parties’ proposed plea agreement is appropriate. Once the parties have reached a negotiated disposition, the adversarial nature of their relationship evaporates. In such a situation, neither the prosecutor nor the defendant are likely to cite relevant facts or raise otherwise meritorious arguments that threaten to upset their plea bargain. In such situations, only a judge is sufficiently disinterested in the bargain to examine its validity.

My exercise of discretion is not informed by fungible considerations readily applicable to any criminal defendant; instead, I must conduct a case-specific inquiry which results in a decision based upon what is fair under the circumstances and guided by the rules and principles of law. *See Valley Forge Ins. Co. v. Health Mgmt. Partners, Ltd.*, 616 F.3d 1086, 1096 (10th Cir. 2010). That inquiry applies to each bargained-for provision, including a defendant’s waiver of

his statutory right to appeal any matter in connection with his prosecution.

Plea Bargaining

“[C]riminal justice today is for the most part a system of pleas, not a system of trials.” *Lafler v. Cooper*, 132 S. Ct. 1376, 1388 (2012). With those words, Justice Kennedy acknowledged what has long been reality: the criminal trial has become an anachronism.¹ As noted by Justice Scalia, the Supreme Court has “elevate[d] plea bargaining from a necessary evil to a constitutional entitlement.” *Lafler*, 132 S. Ct. at 1397 (Scalia, J. dissenting). A product of our legal system, plea bargaining’s prevalence is largely attributable to mounting caseloads and the rising costs, both financial and temporal, of the modern criminal trial.² Armed with the power to dismiss charges and suggest more lenient sentences, prosecutors have conserved scarce resources by inducing criminal defendants to plead guilty and waive their constitutional right to trial by jury.

These gains in efficiency are not, however, without consequence. As a result of a guilty plea, bargained for or otherwise, and the concomitant waiver of the right to trial by jury, a criminal defendant also waives his rights to confront and cross-examine adverse witnesses, to

¹ Justice Kennedy’s observation was hardly groundbreaking. Commentators first noted the prevalence of plea bargaining nearly ninety years ago. See Justin Miller, *The Compromise of Criminal Cases*, 1 S. Cal. L. Rev. 1 (1927); Raymond Moley, *The Vanishing Jury*, 2 S. Cal. L. Rev. 97 (1928). The Court’s application of the Sixth Amendment in the plea bargaining context, however, marks a significant development.

² Some commentators have posited a third reason: plea bargaining allows prosecutors to secure convictions even in weak cases. See Albert W. Alschuler, *The Prosecutor’s Role in Plea Bargaining*, 36 U.Chi.L.Rev. 50,59 (1968); Note, *The Unconstitutionality of Plea Bargaining*, 83 Harv.L.Rev. 1387, 1389 (1969). For an excellent discussion of plea bargaining’s rise to prominence in the American legal system, see George Fisher, *Plea Bargaining’s Triumph* (Stanford Univ. Press 2003).

present evidence, to compel the attendance of witnesses, and to require prosecutors to prove guilt beyond reasonable doubt.³ The glut of plea bargaining and the pandemic waiver of these rights have rendered trial by jury an inconvenient artifact.⁴

The pervasive waiver of individual rights has fundamentally altered the function of the courts. The act of judging, once central to the determination of guilt or innocence, has been shunted to the margins. A defendant's "guilt" is, more often than not, preordained by the grand jury's indictment. To the extent judges actually participate in the criminal process, the push is to relegate us to approving or disapproving proposed plea bargains and, unless the plea contains a negotiated sentence, determining an appropriate sentence. As characterized by Justice Scalia, the modern plea bargaining regime reflects "the sporting-chance theory of criminal law, in which the State functions like a conscientious casino-operator, giving each player a fair chance to beat

³ These rights form the core of the Sixth Amendment, which provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI. Widespread plea bargaining also implicates the Fifth Amendment's protection from compulsory self-incrimination. A more thorough treatment of this issue can be found in the Cardozo Law Review's symposium entitled, *The Future of Self-Incrimination: Fifth Amendment, Confessions, & Guilty Pleas*. 30 Cardozo L. Rev. 717-1140 (2008).

⁴ In 2010, only 2.8% of federal criminal defendants exercised their right to a trial; only 2.4% exercised their Sixth Amendment right to trial by jury. During that same time period, 88.9% of federal criminal defendants entered into plea agreements. See The Sourcebook of Criminal Justice Statistics, Criminal Defendants Disposed of in U.S. District Courts, Table 5.22.2010, available at <http://albany.edu/sourcebook/pdf/t5222010.pdf>.

the house, that is, to serve less time than the law says he deserves.” *Lafler*, 132 S. Ct. at 1398 (Scalia, J., dissenting).

Prioritizing efficiency at the expense of the individual exercise of constitutional rights applies to the guilty and the innocent alike, and sacrificing constitutional rights on the altar of efficiency is of dubious legality. As noted by Justice Scalia, plea bargaining “presents grave risks of prosecutorial overcharging that effectively compels an innocent defendant to avoid massive risk by pleading guilty to a lesser offense” *Id.* at 1397 (Scalia, J. dissenting). A rational defendant, even if innocent, may plead guilty to a lesser offense in order to minimize the risk of prosecution. Each plea bargain, therefore, and its concomitant prioritization of efficiency at the expense of the individual exercise of constitutional rights or the exercise of judicial responsibility, requires close scrutiny.

Appellate Waivers

In the wake of the Supreme Court’s holding that the U.S. Sentencing Guidelines are merely advisory, not mandatory, *see United States v. Booker*, 543 U.S. 220, 247 (2005), no circuit court has revisited the enforceability of appellate waivers. Sentencing, post-*Booker*, requires a trial court to consider context and to apply criteria rather than perform a mechanical or clerical entry of a matrixed judgment. *See United States v. Calderon-Villaneuva*, 1:12-cr-235, Order Denying Unopposed Motion to Enter into Plea Agreement Containing an Appeal Waiver (doc. 14) (D. Colo. June 28, 2012). Ethical and moral values inevitably infuse the decision-making process, but they must be justified by being drawn from governing texts in statutes and judicial opinions and established principles of fairness generally accepted by the community affected by the criminal conduct, *i.e.*, the fundamental values widely accepted by society and

identifiable as such.

The responsibility of appellate review is to decide how well the sentencing judge has established the sentence within this described discipline. That is fundamentally dissimilar to the pre-*Booker* function of determining whether an arithmetic calculation has been executed correctly. Rather, reviewing sentences under an abuse of discretion standard is a complex inquiry meant to assure that the judicial administration of justice is relevant to the values and expectations of society.

Indiscriminate acceptance of appellate waivers undermines the ability of appellate courts to ensure the constitutional validity of convictions and to maintain consistency and reasonableness in sentencing decisions. Indeed, appellate waivers would have insulated from review the underlying convictions in some of the most notable criminal decisions in the Supreme Court's recent history. See Nancy J. King and Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 Duke L. J. 209, 249 (2005) (noting that waivers would have precluded appellate review in *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Blakely v. Washington*, 542 U.S. 296 (2004); and *United States v. Booker*, 543 U.S. 220 (2005)). Thus, such waivers should only be included where they are justified by the facts and circumstances of a particular case.

Mr. Vanderwerff's Proposed Plea Bargain

Pursuant to the authority cited in the foregoing discussion, I must weigh the facts and circumstances of Mr. Vanderwerff's case to determine whether to accept his proposed plea bargain and the appellate waiver contained therein. In his proposed plea bargain, Mr.

Vanderwerff has agreed to plead guilty to Count 2 of the indictment in exchange for the dismissal of Counts 1 and 3 of the indictment.⁵ Having reviewed the facts of this case, and the applicable law, I find this aspect of his plea bargain is not unconscionable and therefore it is appropriate to defer to prosecutorial discretion. The inclusion of an appellate waiver is, however, unjustified.

The parties' arguments in support of the proposed appellate waiver echo the general justifications for their enforceability. As summarized by the government, "A waiver of appellate rights can be of great value to an accused as a means of gaining concessions from the government. Appellate waivers also benefit the government by saving them time and money involved in arguing appeals. And society benefits from the finality that waivers bring."⁶ United States' Brief in Support of Plea Agreement (doc. 18), at 4 (quoting *United States v. Elliott*, 264 F.3d 1171, 1174 (10th Cir. 2001)). Although such considerations may support the general enforceability of appellate waivers, they are irrelevant to my determination of whether an appellate waiver is justified in the context of this case.

The parties' case-specific arguments are similarly unavailing. First, they argue that Mr. Vanderwerff's willingness to waive his appellate rights "demonstrates [his] remorse and high

⁵ The dismissal of Counts 1 and 3 eliminates the statutory mandatory minimum sentence of five years and lowers the potential maximum period of imprisonment from twenty to ten years.

⁶ Although tangential to the instant controversy, I take this opportunity to note my disagreement with the Tenth Circuit's contention that appellate waivers are strongly supported by public policy. The above list of public policy considerations is not exhaustive; it omits the significant public interest served by appellate review. Appellate review allows for the development and refinement of important constitutional issues, and it ensures reasonableness of judicially imposed sentences.

level of responsibility for his criminal actions.” United States’ Brief in Support of Plea Agreement (doc. 18), at 6; *see also* Defendant’s Statement in Support of Accepting Plea Agreement with Appellate Waiver (doc. 17), at 3. This argument ignores the nature of Mr. Vanderwerff’s bargain. In exchange for his guilty plea and his waiver of the right to appeal, the government is dismissing two charges – charges for criminal activity which the government had probable cause to believe Mr. Vanderwerff committed. This is the antithesis of acceptance of responsibility. *See* U.S.S.G. § 3E1.1 and Commentary.

The parties also argue that the dismissal of charges 1 and 3 will result in a statutory sentencing range that better accommodates the interests of justice and the strictures of 18 U.S.C. § 3553. If found guilty of all charges, Mr. Vanderwerff would face a statutory sentencing range of five to twenty years of incarceration. This is clearly what Congress intended, yet his proposed plea bargain would result in a statutory sentencing range of probation to ten years.

Although I could sentence Mr. Vanderwerff to any sentence within that range, as part of his proposed plea bargain Mr. Vanderwerff agrees not to actively seek a sentence of less than five years – the statutory minimum he would face if convicted of all charges. In effect, the parties seek to limit Mr. Vanderwerff’s sentence to a range of five to ten years of incarceration. Although these sentencing consequences may have induced Mr. Vanderwerff to accept the government’s plea bargain, they do not justify including an appellate waiver. The interests of justice as I perceive them are best served by permitting the calm and deliberate review by the Court of Appeals of my decision and how it conforms to the requirements of 18 U.S.C. § 3553.

CONCLUSION

The proposed plea bargain is rejected because of the above-stated reasons. This case will

be set for trial by jury.

Dated: June 28, 2012

BY THE COURT:

/s/ John L. Kane

Senior U.S. District Court Judge