

**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

**2008:** *Moore v. Czerniak*, 534 F.3d 1128 (9th Cir. 2008). Under AEDPA, counsel ineffective in felony murder case for failing to object to the admissibility of the petitioner's confession prior to recommending entry of a plea of no contest for which the petitioner was given a mandatory sentence of 25 years. Counsel did not object because (1) counsel believed the motion would not be meritorious; and (2) counsel believed it would make no difference to the outcome because the petitioner had confessed informally to his brother and his brother's girlfriend. Counsel's conduct was deficient because the issue had merit in that the confession was inadmissible because it was impermissibly extracted as the result of a promise of leniency and was, therefore, involuntary. Even assuming the lay witnesses would have testified that the petitioner confessed to them, the *formal taped confession* by the petitioner was far more damaging and reasonable counsel would have realized that excluding this evidence would have placed the petitioner in a far better position to negotiate a reasonable plea and obtain a lesser sentence. The state court findings to the contrary were contrary to *Arizona v. Fulminante*, 499 U.S. 279 (1991) and an objectively unreasonable application of *Strickland*. Prejudice found in that "[t]he probability that [the petitioner] would not have pled . . . had his counsel filed the motion" is sufficient to undermine confidence in the outcome as "the state's case would have been far weaker." In reaching its conclusions, the majority rejected consideration of possible strategic reasons not offered by trial counsel.

[W]e must decide the question based on what counsel's reasons for his decisions actually were, not on the basis of what reasons he could have had for those decisions. Thus, just as we may not second-guess a lawyer's reasonable tactical or strategic decisions, we may not deem unreasonable acts to have been "the result of reasonable professional judgment," by grounding them in considerations that were not, in fact, the lawyer's reasons for acting or failing to act.

The court also reject arguments concerning prejudice raised by the dissenting judge but not the state. "It is not the function of appellate judges . . . to decide cases that the parties have not presented to them."

**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

**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

**2009:** *Berry v. State*, 675 S.E.2d 425 (S.C. 2009). Counsel ineffective in drug case in failing to inform the defendant who pled guilty to a drug charge of a potential challenge to the use of his prior conviction for possession of drug paraphernalia for sentencing enhancement purposes. Counsel's conduct was deficient because a conviction for possession of drug paraphernalia may not be used for enhancement purposes as it does not "relate to" drugs as statutorily mandated. Nonetheless, counsel did not challenge the State's reliance on the paraphernalia conviction for enhancement purposes or inform the defendant of the potential challenge. Indeed "counsel never gave any thought to the issue." While the validity of the legal challenge may have been "unclear" at the time of the plea, "uncertainty concerning a potential legal challenge may well provide a defendant a catalyst in plea negotiations with the State." Counsel's conduct was deficient because "[s]imply saying 'I never gave it a thought' falls short of the Sixth Amendment guarantee of effective assistance of counsel." Prejudice established because the defendant testified in PCR that he would have gone to trial if he had known that his paraphernalia conviction did not qualify as a prior offense for enhancement purposes.

**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 babies 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**

**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

**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

- 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.

*Matton v. State*, 872 So. 2d 308 (Fla. App. 2004). Counsel in sexual battery case was ineffective in probation revocation plea case for failing to advise the defendant that he was entitled to credit for his previously accrued "gain time" in prison and that, by entering plea agreement for 9 years credit, he was waiving his right to this gain time credit to which he was otherwise entitled. Counsel was also ineffective for failing to challenge the victim injury points included in the sentencing guidelines score sheet simply because they had been included in the initial sentencing and counsel believed she could not challenge them. Counsel's conduct was deficient because she could have made the challenge. Prejudice was found because the defendant was entitled to the gain time absent a knowing and intelligent waiver and the state could not include the victim injury points without proof of actual physical injury to the victim. Admission to probation violation withdrawn.

***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

**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 (2nd Cir. 2005). Counsel was ineffective in failing to advise the defendant of the court's plea offer in second degree murder case. Although the prosecution never made a plea offer, the trial court offered to impose a sentence of 15 years to life—the minimum sentence for second degree murder—if the defendant plead guilty to the charge of second degree murder and the other offenses included in the indictment. [It is common practice in New York for trial courts to engage in plea offers independent of the prosecution.] Following conviction, the defendant was sentenced to 41 2/3 years to life, which was the maximum possible sentence. Counsel did not inform the defendant of the offer because counsel: (1) did not think the defendant would accept the offer since he maintained innocence; (2) believed that there was a viable defense of misidentification; and (3) did not believe that the defendant would receive a “severe sentence” if convicted. Counsel's conduct was deficient and the state court's finding to the contrary was, under the AEDPA standard, an unreasonable determination of the facts in light of the evidence presented. The state court's finding that counsel did convey the offer was contradicted by counsel's affidavit. Moreover, even though counsel knew the maximum sentence, he never informed the defendant of the actual maximum sentence or that he could be sentenced consecutively because counsel did not believe the defendant would receive a “severe sentence” if convicted. Instead, he left the defendant with the impression that the maximum sentence he faced was 25 years to life. The state court's finding that counsel's conduct was reasonable was an unreasonable application of *Strickland* under the AEDPA because

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

**2009:** *Carmichael v. People*, \_\_\_ P.3d \_\_\_, 2009 WL 975856 (Colo. Apr. 13, 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

**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

**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 (2<sup>nd</sup> 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

**2009:** *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.

#### **G. 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 and 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.

#### **H. INADEQUATE ADVICE ON RIGHT TO APPEAL (U.S. Court of Appeals Cases Only)**

**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.

## II. FAILURE TO COMPEL COMPLIANCE WITH PLEA AGREEMENT (STATE CASES ONLY)

- 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.

*Estridge 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.

