

**SUMMARIES OF SUCCESSFUL
INEFFECTIVE ASSISTANCE OF COUNSEL
CLAIMS POST-*WIGGINS V. SMITH*
INVOLVING APPEAL-RELATED ISSUES**

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*Capital Case

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I. PERFECTING APPEAL

A. U.S. Court of Appeals Cases

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. Shedrick, 493 F.3d 292 (3rd Cir. 2007). Trial counsel ineffective following plea to felon in possession of firearm in failing to timely file notice of appeal. Petitioner entered a plea pursuant to a pretrial agreement that waived most appeal issues and collateral proceedings. One exception allowed for appeal was for upward departures from the sentencing guidelines. In this case, the court applied an eight-level upward departure. Counsel’s conduct was deficient because the plea agreement expressly allowed an appeal on this issue, petitioner’s interest in appeal was clear because he was “vehemently contesting the factual issues that led to his enhancement and upward departure throughout the District Court proceedings,” and he notified the court in a letter of his desire to appeal before the appeal deadline had passed. In this context, counsel had

a duty to consult with petitioner concerning a possible appeal. Because petitioner was denied his right to appeal solely due to ineffective assistance, the court declined to apply the plea agreement prohibition of collateral proceedings because it would result in a miscarriage of justice. Sentence is vacated and case is remanded for reimposition of sentence so that petitioner can appeal.

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: *Frazer 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

- 2009:** *Lee v. Lampert*, ___ F. Supp. 2d ___, 2009 WL 764434 (D. Ore. Mar. 24, 2009). Trial and appellate counsel ineffective in child sexual abuse case for failing to adequately challenged the trial court's evidentiary ruling under the Oregon Rape Shield Law, which prohibited admission of evidence regarding the alleged victim's abuse by a man other than the defendant. Despite trial counsel’s challenge of this ruling, appellate counsel filed a “no merits” brief, even though the trial court’s “ruling, and the way that ruling severely constrained examination of witnesses and the evidence heard by the jury, was an obvious issue for appeal” that “was not frivolous.” The ruling “irrevocably altered” the defense strategy and prohibited counsel from mentioning “the strongest evidence for the defense or even the defendant's intended theory of the case” in opening. Counsel was also prevented from effectively cross-examining the alleged victim. Even though the court allowed counsel to cross-examine a detective, this was insufficient because “cross-examining [the] Detective . . . regarding the hearsay account in his official report

is no substitute for cross-examining [the alleged victim] himself regarding these events,” in part, because the detective had “no personal knowledge.” Appellate counsel was ineffective in failing to challenge the trial court’s ruling under the Rape Shield Law. In addition, trial counsel was ineffective in that “counsel did a poor job of articulating the significance of this evidence” to the trial court. Trial counsel was also deficient in not consulting an expert to prepare for the hearing and for trial, and not presenting expert testimony at that hearing and at trial. “The severity of the penalties for conviction also weighed in favor of devoting adequate resources to [the] defense, including consultation with an expert and quite possibly expert testimony at the pretrial hearing and at trial.” Instead, counsel called the alleged victim’s father as his only witness, which was “not trial strategy. It was a blunder” that resulted in damaging testimony. Counsel also failed to object or move for a mistrial when it was twice mentioned during trial that the defendant was on parole at the time of the offenses. In addition, the most prejudicial evidence on the most serious charges were hearsay statements about what the alleged victim said to his father and another person and his demonstrations with (which amounts to an out of court statement offered for the truth of what had been depicted). Trial counsel did not challenge this evidence and, thus, the trial court made no finding that these statements bore indicia of reliability, as required by Supreme Court precedent at the time of trial.

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 consult 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

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.

Gonzalez v. State, 979 So. 2d 1257 (Fla. App. 2008). Counsel ineffective in probation revocation case for filing the motion to reduce or modify the sentence in an untimely fashion. State law allowed a period of 60 days after imposition of the sentence and counsel’s filing was timely from the written sentence but not the oral imposition, which was the appropriate trigger under state law. 60-day period re-opened.

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 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

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."

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: *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*.

**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.

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.

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*.

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.

B. U.S. District Court Cases

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: *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.

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.

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

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.

Henley v. State, 881 N.E.2d 639 (Ind. 2008). Appellate counsel ineffective in attempted murder, kidnapping, robbery, and criminal mischief case for failing to adequately assert the insufficiency of the evidence to establish attempted murder. The evidence showed only that the defendant was hiding in the back of a van when a police dog that was tracking him (on a fifteen-foot leash) jumped into the van. The defendant fired four shots killing the dog. There was no evidence, however, that the defendant was aware of the police officer’s presence when he fired the shots. Thus, the evidence was insufficient to establish the specific intent to kill, which is required for attempted murder. Appellate counsel’s conduct was deficient because counsel asserted the issue in a summary fashion but “provided no further analysis on this issue, failed to cite any legal authority, and failed to cite the relevant portion of the record.” Prejudice found because the appellate court declined to address the issue on the grounds of waiver. Attempted murder conviction and

sentence vacated.

State v. Echols, 941 A.2d 599 (N.J. Super.), *certification granted*, 950 A.2d 908 (N.J. 2008). Trial and appellate counsel ineffective in felony murder and related offenses case for several errors. Trial counsel was ineffective for failing to adequately present alibi evidence. While the witness had testified fully outside the presence of the jury, the witness only testified partially in front of the jury and never firmly established, as he could have, that the defendant was in the parking lot and, therefore, not in the victim's apartment, at the time of the shooting and that the defendant had no weapon with him. Appellate counsel was ineffective for failing to assert the trial court's erroneous denial of an alibi charge. While the court assumed the testimony was sufficient, the court erred by concluding that presence in the parking lot 50 feet from the murder was insufficient for an alibi and constituted an identification issue only. Trial and appellate counsel were also ineffective in failing to challenge the prosecutor's opening statement. The prosecutor properly discussed the defendant's membership in a street gang and intimidation of witnesses in the case, which were relevant issues for the trial. The prosecutor went further, however, and asserted that the defendant and the other gang members were also a threat to the jurors but they would be safe because of the presence of courtroom security. The prejudice from this error was compounded because the trial court required several witnesses, who were also gang members, to either remain shackled or appear in prison clothes during their testimony. "[V]iewed separately or collectively these failures and omissions" were prejudicial.

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 intimated 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.