

**SUMMARIES OF SUCCESSFUL
INEFFECTIVE ASSISTANCE OF COUNSEL
CLAIMS POST-*WIGGINS V. SMITH*
INVOLVING POST-CONVICTION COUNSEL**

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- 2008:** *Taylor v. State*, 882 N.E.2d 777 (Ind. App. 2008). Post-conviction counsel’s conduct was deficient and in violation of due process under state law in felony murder case. The defendant was jointly tried with two co-defendants. One co-defendant’s conviction was reversed on direct appeal based on argument and finding of fundamental error by the trial court in failing to instruct on the elements of the underlying felony of robbery. The defendant asserted ineffective assistance of trial and appellate counsel in post-conviction proceedings for the failure to assert this same error. Post-conviction counsel presented no evidence or argument other than providing a copy of the co-defendant’s direct appeal decision and asserting that it was binding on the trial court. Under state law, this was deficient, such that the defendant “was deprived of a procedurally fair hearing.”
- 2006:** **Menzies v. Galetka*, 150 P.3d 480 (Utah 2006). Post-conviction counsel ineffective in capital case for “willfully disregard[ing] nearly every aspect of Menzies' case. As a result, the court imposed discovery sanctions, granted summary judgment in favor of the State, and ultimately dismissed Menzies' petition for post-conviction relief.” With new counsel, the death-sentenced inmate filed a Rule 60(b) motion alleging gross negligence and ineffective assistance. The Utah Supreme Court held that the district court erred in denying the Rule 60(b) motion and in compelling disclosure of work product. The defendant had initially been represented in post-conviction proceedings by pro bono counsel. After the state imposed rules for qualification and payment of counsel, the court sought qualified counsel for four months and all declined, but then Brass volunteered for appointment. He was appointed without the court ever conducting an inquiry to determine whether he was qualified under the state rule. Brass served as counsel for over five years and it would “be an understatement” to say he did little. His representation was “deplorable” in that he “willfully disregarded nearly every aspect of this case” and, in effect, “defaulted Menzies' entire post-conviction proceeding, resulting in the dismissal of Menzies' case.” Counsel only met with the inmate a few times, avoided or refused his phone calls and did not respond to letters and cards. Counsel never conducted or hired anyone to conduct an investigation, notwithstanding repeated prior requests and the fact that the record indicates that extensive investigation on actual innocence and mitigation was needed. Prior counsel had obtained \$2,000, but counsel did not even request these funds or consult with the prior pro bono team. Counsel also never challenged the inadequacy of the funding as prior counsel had and collected only his initial \$5,000 appointment fee. Counsel also failed to meet numerous court deadlines and, ultimately, filed an amended petition that did little more than re-state the arguments that had been made in the first amended petition by pro bono counsel. Counsel failed to oppose the state’s discovery requests, which resulted in orders for disclosure of trial counsel’s file and the inmate’s deposition. Counsel did not even appear for the inmate’s deposition and instead sent an unqualified counsel. Counsel was ultimately prohibited from presenting evidence in support of the claims because of his numerous violations of court orders and procedures. Likewise, counsel failed to respond to the state’s motion for summary

judgment, which was granted in its entirety with prejudice. For more than a year, counsel never even informed the defendant that the case had been dismissed. Counsel filed a notice of appeal, but never filed a docketing statement, which resulted in dismissal of the appeal. When the court allowed the appeal anyway, counsel never filed an appellate brief, despite being granted two extensions of time. Counsel did file a motion in the district court to set aside the summary judgment under Rule 60(b) stating only that the grounds would be set forth in a subsequent memo, which counsel never filed. More than a year after the event, counsel finally informed the defendant that summary judgment had been granted. Counsel still did not communicate with the defendant beyond this other than to inform the defendant that he would need new counsel without telling him why. Ultimately, another attorney from the state attended a capital litigation seminar and was asked to check on the status of Utah's death row. When she followed up on the case and learned of the events, she contacted the inmate and then filed an appearance as counsel and a memorandum in support of the Rule 60(b) motion focusing primarily on counsel's ineffectiveness. Ineffective counsel finally withdrew and admitted his inadequacies to a great extent. On appeal, the court held that the defendant has a statutory right to effective assistance of counsel, which the court analyzed under *Strickland*.

While the ABA standards are not determinative of whether counsel's performance was ineffective and courts should examine counsel's conduct in light of all the contemporary circumstances, they do represent "well-defined norms" that provide guidance to courts. Because Utah's post-conviction rules do not currently contain any provisions regarding counsel's performance in post-conviction death penalty proceedings, and because it is traditionally the duty of the courts to supervise the performance of counsel we rely on the ABA Death Penalty Guidelines to the extent they are relevant to our decision.

Id. at ___ (citations and footnotes omitted). The court analyzed the case under the Guidelines but found that counsel's "ineffective representation went far beyond a failure to comply with the ABA Death Penalty Guidelines" and that counsel's "willful disregard for Menzies' case cannot possibly be construed as sound strategy." Prejudice presumed due to counsel's complete failure to "provide meaningful adversarial testing" in the case. Relief was required on the Rule 60(b) because, while an attorney's negligent acts are ordinarily chargeable to the client, a client should not be held liable for the attorney's actions where those actions are grossly negligent and the defendant has alleged a meritorious defense. Here, the defendant had alleged multiple errors that, if proven, would require relief. Remanded to the district court to reinstate the post-conviction proceedings and to allow the defendant to investigate his claims.

*Capital Case

- 2005:** *Campbell v. State*, 114 P.3d 162 (Kan. App. 2005), *abrogated in part by* 201 P.3d 691 (Kan. 2009) [holding that the showing of prejudice for a claim of ineffective assistance by statutorily provided post-conviction counsel is the same as required in constitutional ineffective assistance cases.] Counsel in murder post-conviction case was ineffective. Although state post-conviction proceedings are “a civil action for which there is no constitutional right to effective assistance of counsel,” Kansas law provides a statutory right to counsel, which “in certain circumstances” requires that counsel be effective for indigents. Here, without the defendant present, counsel’s court-appointed counsel actively advocated against the defendant by informing the court that the defendant’s ineffectiveness claims were without merit and that she believed trial counsel had been effective. Because some of the issues warranted an evidentiary hearing, the case was remanded for appointment of new counsel and a hearing.
- 2003:** *Bahm v. State*, 789 N.E.2d 50, *clarified on rehearing*, 794 N.E.2d 444 (Ind. App. 2003). Post-conviction counsel’s conduct was deficient and in violation of due process under state law in aggravated battery case. Counsel did not produce any witnesses, any evidence, or even the transcripts of the trial and appellate proceedings. The defendant was, thus, deprived of a fair hearing.