

**SUMMARIES OF SUCCESSFUL
INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS
POST-*WIGGINS V. SMITH* INVOLVING
ONE DEFICIENCY AT TRIAL**

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1. JURY SELECTION

a. U.S. Court of Appeals Cases

2006: *Virgil v. Dretke*, 446 F.3d 598 (5th Cir. 2006). Counsel ineffective in causing bodily injury to an elderly person case for failing to challenge for cause two jurors who expressly stated an inability to be fair and impartial. One had close relationships with law-enforcement officers and one was influenced by his mother's mugging. Counsel's failure to challenge these jurors for cause or to remove them with peremptory challenges was deficient and there was no "suggestion of a trial strategy" for counsel's inaction. Prejudice found because both jurors admitted bias. In addition to their own bias, the court could not "know the effect" of their bias on the remaining jurors. Under AEDPA, the state court's decision to the contrary was an unreasonable application of clearly established Federal law as determined by the Supreme Court.

2004: *Miller v. Webb*, 385 F.3d 666 (6th Cir. 2004). Counsel ineffective in murder case for failing to adequately question or challenge actually biased juror. During voir dire, a juror stated that she knew the state's key witness, who was the only eyewitness and had also been shot. The juror knew her through the juror's ministry and Bible Study in the local jail. She stated she would be "partial" to the witness and had sympathy for her. While she stated that she "believed" she could be fair, she qualified this by stating, "I do have some feelings about her." Counsel did not follow-up with questions or challenge this juror. Counsel's conduct was deficient and was not justified by strategy because counsel believed the juror would know the witness was unworthy of belief and would know that she was a drug addict and understand that culture. The court held, contrary to the state court, that "the decision whether to seat a biased juror cannot be a discretionary or strategic decision" because it amounts to "a waiver of a defendant's basic Sixth Amendment right to trial by an impartial jury." Under the AEDPA, the state court's finding that counsel's conduct was not deficient was an unreasonable application of Strickland. Even if strategy could justify the decision, counsel's strategy was unreasonable here where the juror clearly did not indicate a disbelief in the witness' credibility or knowledge of her being a drug addict. To the contrary, the juror indicated that she was sympathetic to the witness. Prejudice presumed because the presence of a biased juror cannot be harmless.

Quintero v. Bell, 368 F.3d 892 (6th Cir. 2004), *cert. denied*, 544 U.S. 936 (2005). Counsel was ineffective for failing to object to the presence of seven jurors who had served on the juries that convicted his co-conspirators. Prejudice was presumed under *Cronic*. *Bell v. Cone* was distinguished "[b]ecause the alleged deficient performance in Cone affected only specified parts of Cone's trial." Here, "allowing seven jurors who had convicted petitioner's co-conspirators to sit in judgment of his case surely amounted to an abandonment of 'meaningful adversarial testing' throughout the proceeding." The Court

*Capital Case

reinstated its prior opinion, *Quintero v. Bell*, 256 F.3d 409 (6th Cir. 2001), which had been vacated and remanded for reconsideration in light of *Cone*.

b. State Cases

2008: *Titel v. State*, 981 So. 2d 656 (Fla. App. 2008). Counsel ineffective in sexual battery and kidnaping case for failing to challenge a clearly biased juror, who stated that there was an incident of incest in his family and that he believed in execution of rapists. Counsel's notes mistakenly attributed these comments to a different juror that counsel did strike. The biased juror, unlike other jurors who reported rapes in their families, was not questioned further about whether he could be fair and was seated even though the defense had one remaining peremptory challenge. Prejudice found because the juror was biased.

2007: *James v. State*, 222 S.W.2d 302 (Mo. App. 2007). Counsel ineffective in second-degree murder and armed criminal action case for failing to challenge for cause a venireperson who indicated that she would draw a negative inference from a defendant's failure to testify in his own defense. If counsel had objected, the trial court would have been required to strike the juror. Counsel's conduct was not explained by any strategy. Prejudice presumed because the defendant was "tried in violation of his constitutional right to an impartial jury."

**State v. Loftin*, 922 A.2d 1210 (N.J. 2007). Trial and appellate counsel were ineffective in failing to adequately address the presence of a possibly racially biased juror, who had predetermined guilt before hearing all the evidence, in the jury panel during the trial although he ultimately served as an alternate and did not deliberate on findings and a separate jury was empaneled under state law for sentencing. The juror, who was white and worked at the post office, admitted making comments early in the trial to other postal workers that he was "going to buy a rope to hang" the defendant, a black man charged with killing a white man. He denied, however, that the comments were intended to be racist or that he had already formed an opinion of guilt. Trial counsel sought to remove the juror, which was denied, but failed to request that the remainder of the jury be questioned to determine whether this juror had made similar comments to other jurors. The trial court ultimately ordered that the juror would serve only as an alternate. Appellate counsel failed to assert error in the trial court's failure to remove the juror and to assert as plain error the court's failure to question the remaining jurors. Under state law, the court found "a decided racial undertone [in the juror's comments] that evokes an era of vigilante and mindless mob justice that reigned during a dark period in American history." *Id.* at 1219. Likewise, even without racial bias, the juror violated the court's instructions not to discuss the case with others and not to determine guilt prior to deliberations. The court held that prejudice would be presumed and that "even allowing a non-deliberating juror suspected of racial bias to sit on a panel will lead to a presumption that other members of the panel may have been tainted." *Id.* at 1222. Thus, the court

*Capital Case

presumed that the biased juror shared his views with fellow jurors and, thus, it did not matter that he did not deliberate. Although trial and appellate counsel's ineffectiveness was asserted under both the state and federal constitutions, the court addressed the merits under only the state constitution but still applying the *Strickland* standard. Deficient conduct found because the need for the removal of the predisposed juror and a voir dire of the remaining jurors should have been self-evident." Counsel's conduct was not excused by strategy. Appellate counsel was also ineffective because failure to assert these issues on appeal deprived the court of the opportunity to address the issue, which would have required reversal on direct appeal.

2006: **Anderson v. State*, 196 S.W.3d 28 (Mo. 2006), *cert. denied*, 549 U.S. 1223 (2007). Counsel ineffective in capital case for failing to move to strike, for cause, prospective juror who, during voir dire, indicated he would vote for death unless the defense could convince him otherwise. Counsel's failure was not a decision based on trial strategy and instead occurred because of a note-taking error. Moreover,

No competent defense attorney would intentionally leave someone on the jury who indicated a strong preference for the death penalty and also stated that he would require the defense to convince him that death was not appropriate even though he was aware that the burden of proof remains with the state. Any strategy that would place someone with such a predisposition on the jury is wholly unreasonable.

Prejudice established because this was a structural error.

2005: *State v. Lamere*, 112 P.3d 1005 (Mont. 2005). Counsel in aggravated assault case was ineffective in failing to question a prospective juror on whether she could remain impartial even though her daughter was a paralegal assisting the prosecutor (even in the courtroom during the trial) and someone else in her family was retired from the police force. The juror disclosed this information on her questionnaire but, due to oversight, counsel did not question her about it. When counsel learned of the problem during trial and moved to excuse the juror, the motion was denied. Counsel's conduct was deficient because the juror's relationship to her daughter obviously raised legitimate questions about her impartiality. Because errors in jury selection are "structural errors," prejudice was presumed.

2004: *State v. Garza*, 143 S.W.3d 144 (Tex. App. 2004). Counsel ineffective in aggravated sexual assault case for failing to challenge a juror for cause or to use a peremptory strike even though the juror (who became foreman) admitted that he would be biased because a family member had been the victim of sexual assault and admitted that he would believe a police officer rather than the defendant simply because it was a police officer. Counsel

admitted that he had no strategy and failed to challenge the juror only because he was distracted and simply made a mistake after learning shortly before that his wife had been diagnosed with cancer. Even though there might have been a hypothetical plausible strategy for not challenging the juror, the record here clearly established no strategy. Prejudice found because “one improper juror destroys the integrity of the verdict.” Finally, the court rejected the state’s argument that the court should consider the fact that the defendant was an experienced criminal defense counsel as a factor in the ineffective assistance claim.

2003: *Fortson v. State*, 587 S.E.2d 39 (Ga. 2003). Counsel was ineffective in a murder case for using a peremptory strike on a juror that had already been excused for cause by the trial court but inexplicably remained on the strike list. Defense used his entire allotment of peremptory strikes. Because Georgia law requires automatic reversal when a defendant is required to use a peremptory strike on a juror that should have been excused for cause, the court found prejudice under *Strickland*.

2. INDICTMENT

a. U.S. Court of Appeals Cases

2005: *United States v. Jones*, 403 F.3d 604 (8th Cir. 2005). Counsel ineffective in possession of firearm case for failing to challenge indictment as multiplicitous where the indictment included two counts of possessing the same firearm as two different dates. Counsel’s conduct was deficient because “a reasonably competent lawyer would be expected to know” that this was one offense because the evidence established that the possession was continuous. Prejudice found even though the sentences given were concurrent because: (1) the additional conviction could increase future sentences or be used to impeach the defendant’s credibility in future proceedings; and (2) the defendant had to pay an additional \$100 statutory special assessment due to the second conviction.

2004: *Young v. Dretke*, 356 F.3d 616 (5th Cir. 2004). Counsel was ineffective in murder case for failing to move to dismiss untimely indictment. Under a state statute effective at the time of the defendant’s trial, dismissal was required and re-prosecution was barred. The statute has since been amended to remove the bar to further prosecution following dismissal. The state court found that counsel’s conduct was deficient and that if counsel had moved for dismissal, petitioner could not have been tried or convicted. Nonetheless, the state court denied relief finding that under *Lockhart v. Fretwell*, there was no prejudice because the state court believed that prejudice was to be determined by reference to current law rather than the law at the time of the deficient performance. Because the state court failed to properly distinguish *Fretwell* and disregarded the interpretation of *Fretwell* in *Williams v. Taylor*, the state court’s decision was both contrary to and an unreasonable application of Supreme Court precedent, under the

AEDPA. The court distinguished *Fretwell* because, in *Fretwell*, the petitioner sought to rely on a judicial decision of a court of appeals, which was not a final statement of law established by the Supreme Court. In this case, however, the defendant sought to rely on a statute, which is a final statement of the law. Because *Strickland* was controlling rather than the limited exception of *Fretwell*, petitioner was entitled to relief.

b. State Cases

2008: *People v. Phipps*, 889 N.E.2d 1154 (Ill. App.), *appeal allowed*, 900 N.E.2d 1123 (Ill. 2008). Counsel ineffective in aggravated DUI plea for failing to object to substitution of charged offenses. The defendant was initially charged with reckless homicide, a class 3 felony punishable by up to 5 years confinement, and entered a plea in exchange for a 12 year sentence. Because of concerns about that statute being void, the parties agreed to withdraw that plea, substitute a charge of aggravated DUI, a class 2 felony punishable by up to 14 years confinement, and reenter the plea. Counsel was ineffective in objecting to the DUI charge, which was brought outside the time limits permitted under the state speedy trial rules. Plea vacated with permission for the state to reinstate the reckless homicide charge.

3. MOTIONS AND NOTICE

a. U.S. Court of Appeals Cases

2007: *United States v. Weathers*, 493 F.3d 229 (D.C. Cir. 2007). Counsel ineffective for failing to challenge multiplicitous counts in case arising out of the defendant's attempts to arrange for the murder of several witnesses and a prosecutor on pending rape charges. Two of the counts related to the prosecutor. Under the U.S. Code, the defendant was convicted of threatening a federal official. Under D.C. law, he was convicted of threatening to injure a person. Counsel's conduct was deficient and not explained by strategy. Prejudice found because there was a reasonable possibility that a challenge would have been granted. The conviction under D.C. law was vacated and the case remanded for resentencing.

2004: *United States v. Hilliard*, 392 F.3d 981 (8th Cir. 2004). Counsel ineffective in illegal firearms case for failing to timely file a post-trial motion. Following the defendant's conviction on only one of five charges even though the evidence for all five overlapped, the court informed counsel of concerns about the validity of the jury verdict and reminded counsel to file post-trial motions. Although only allowed seven days to do so under the rules, counsel did not file until 41 days after the verdict and the motion was dismissed as untimely. Counsel's conduct was deficient and was "a class dereliction" of duty. Prejudice was found because the district court found that the motion would have been granted because "a miscarriage of justice was likely done here."

Owens v. United States, 387 F.3d 607 (7th Cir. 2004). Counsel was ineffective in drug case for failing to adequately move to suppress evidence seized pursuant to a search of the defendant's house. The evidence was seized pursuant to a warrant based on a barebones affidavit, signed by a detective, that stated that an informant had bought some crack from the defendant at the house three months earlier. There was no indication of the quantity of crack or the reliability of the informant. Counsel moved to suppress the evidence because the affidavit did not establish probable cause to believe that a search of the same premises three months later would reveal evidence. The court held that the affidavit was insufficient and the search could not be saved by *United States v. Leon*, 468 U.S. 897 (1984), because the officers that conducted the search could not have reasonably believed that the warrant was supported by probable cause. Although counsel moved to suppress the evidence, counsel's conduct was deficient because counsel argued that the house did not belong to the defendant, which allowed denial of the motion on the grounds that the defendant had no standing to contest the search. The evidence that the house was the defendant's was overwhelming and the lawyer's argument otherwise, which "forfeit[ed] a compelling ground for excluding evidence essential to convict his client was therefore a blunder of the first magnitude." *Id.* at 608. Prejudice was found because if counsel had acknowledged that it was the defendant's house, the motion to suppress would have been granted and the defendant would have been acquitted. Alternatively, even if the court had denied the motion to suppress, counsel could have still argued that the house was not the defendant's under the rule of *Simmons v. United States*, 390 U.S. 377 (1968), which prohibits use of the defendant's suppression hearing testimony during the trial.

The "prejudice" essential to a violation of the Sixth Amendment right to the effective assistance of counsel is not being convicted though one is innocent, although that is the worst kind; it is being convicted when one would have been acquitted, or at least would have had a good shot at acquittal, had one been competently represented.

Id. at 610. In reaching this conclusion, the court overruled its prior holding in *Holman v. Page*, 95 F.3d 481 (7th Cir. 1996) (failure to make a Fourth Amendment objection to the admission of evidence cannot amount to ineffective assistance of counsel if the evidence was reliable, so that its admission, even if improper, created no risk that an innocent person would be convicted).

Clinkscale v. Carter, 375 F.3d 430 (6th Cir. 2004), *cert. denied*, 543 U.S. 1177 (2005). Counsel ineffective in murder and robbery case (that was a capital case but jury gave life) for failing to timely file notice of an alibi defense, which resulted in the trial court's exclusion of the evidence. The defendant had informed counsel immediately of his alibi

and the defense investigator reported that there were at least three alibi witnesses. Nonetheless, counsel gave only “verbal notice” a few days before trial of a “possible alibi.” Only after the jury was empaneled did counsel file a written notice of alibi identifying the witnesses. Counsel’s conduct was deficient because “there is nothing reasonable about failing to file an alibi notice within the time prescribed by the applicable rules when such failure risks wholesale exclusion of the evidence.” Prejudice found because the state’s evidence was weak and the trial amounted to a credibility contest between the alleged victim/witness and the defendant. The exclusion of the alibi witnesses, who would have corroborated the defendant’s testimony, was prejudicial in these circumstances. Although only one of the alibi witnesses provided an affidavit, there is no requirement that a defendant claiming ineffectiveness of counsel in these circumstances “produce an affidavit from the potential alibi witnesses documenting the substance of their anticipated testimony.” Here, the investigator’s notes and affidavit established the facts that the remaining witnesses could have testified to.

2003: *Joshua v. Dewitt*, 341 F.3d 430 (6th Cir. 2003). Trial and appellate counsel were ineffective in drug case for failing to move to suppress evidence. The defendant was stopped by a highway patrolman for speeding. The highway patrolman did a license check on the defendant and learned that there was an entry in the station’s “read and sign” book, which contained police intelligence information. The entry in the book reported that the defendant was a known drug courier who transported illegal narcotics between several cities. Based on this information, the defendant was detained for approximately forty-two minutes in order to allow time for a drug dog to come to the scene. When the dog arrived, it alerted, and a large quantity of cocaine was found. The defendant’s girlfriend then told the police that the drugs belonged to the defendant. Prior to trial, counsel moved to suppress the evidence solely on the basis that the length of the traffic stop alone required suppression. The trial court denied the motion, and the defendant entered a no contest plea. The court found that counsel’s conduct was deficient in failing to move for suppression under *United States v. Hensley*, 469 U.S. 221 (1985), which held that reliance on a flyer or bulletin can justify a brief detention but can do so only if the officer who issued the flyer or bulletin had articulable facts supporting reasonable suspicion that the person wanted had committed an offense. The court found a reasonable trial attorney would have raised the *Hensley* issue at trial. Prejudice was found because the state failed to offer any evidence from the officer who provided the information from the “read and sign” book and because the state had never contended that there was a justifiable basis for the entry. The court likewise found appellate counsel ineffective for failing to raise the issue on appeal under the state plain error rule. Prejudice was found because *Hensley* bars the admissibility of the evidence seized at the scene of the defendant’s arrest, including both the drugs and his girlfriend’s statement. Without this evidence, there was a substantial probability that the defendant would not have been convicted. Analyzing the case under the AEDPA, the court found that the state court decision was contrary to clearly established Supreme Court precedent in *Hensley*.

b. U.S. District Court Cases

2009: *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 challenge 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: *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 is cross and in closing argument, the only evidence the defense presented was a lay witness to testify that the taste of Roxanol could not be masked. Counsel's conduct was deficient because counsel had retained a forensic psychiatrist prior to trial to review the victim's state of mind. The psychiatrist interviewed pharmacists and nurses that administered the drug, along with the pharmacist that prescribed the medication used in this case, and learned that it is difficult to disguise the taste. He informed counsel that they needed to call an expert to testify about the drug, which he could not do because he was not a toxicologist, and gave the expert names of three possible experts. "[W]hile . . . this case does not involve the death penalty, the guidelines associated with defending a death penalty case are nevertheless instructive as to the role of defense counsel in preparing a defense in a criminal case potentially involving the use of a medical expert." Counsel failed to adequately investigate here. *Id.* (citing ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989)). Counsel knew the administration of the Roxanol was a crucial issue, but did not present a rebuttal defense expert. The cross-examination and counsel's arguments "did nothing to negate" the state evidence because the jury was instructed that counsel's arguments do not constitute evidence. The state court finding to the contrary "cannot be reasonably justified under *Strickland*" and the factual determination that counsel adequately performed "is plainly controverted by the evidence." Prejudice found because counsel could have presented the testimony of a forensic pathologist to establish: (1) the taste of the Roxanol could be disguised only in a large amount of a sweet-tasting or bitter substance; (2) the autopsy report showed no evidence of any such diluting or masking substance; and (3) the autopsy report did not indicate forced swallowing. Thus, the pathologist concluded the Roxanol was swallowed voluntarily. This testimony "would have been more convincing than testimony from a close family friend" and would have made the "innocence claim . . . considerably more compelling than a simple denial of guilt." The state court's finding of no prejudice "cannot be reasonably justified under *Strickland*." Appellate counsel's decision to pursue only eight issues on appeal, excluding this issue, was deficient and prejudicial.

Jones v. Wilder-Tomlinson, 577 F. Supp. 2d 1064 (N.D. Iowa 2008). Under AEDPA, counsel in drug case ineffective in failing to timely file a motion to suppress evidence flowing from the defendant's arrest, which lacked probable cause. Counsel's conduct was deficient because the only evidence supporting the arrest was a small, gram scale, but there was no testimony regarding why the scale itself was any different from other food or mail scales and there was no other evidence, other than an officer's testimony that it was drug paraphernalia, to believe that the scale was being used to weigh drugs. Because the state court did not decide this issue on the merits, *de novo* review was conducted. Counsel's conduct was deficient because counsel "either forgot about the deadline or unreasonably assumed that the . . . Court would excuse the untimeliness of her motion." Prejudice established because "the evidence would have been suppressed had a timely motion to suppress been filed."

Massillon v. Conway, 574 F. Supp. 2d 381 (S.D.N.Y. 2008). Counsel ineffective in trafficking case for failing to challenge, as the fruit of an illegal arrest, the out-of-court confirmatory identifications and in-court identifications of the defendant by two law enforcement officers. Counsel's conduct was deficient because the prosecution "would not have been able to meet its burden of proving admissibility by clear and convincing evidence." Prejudice established even if the trial court had excluded only the out-of-court confirmatory identifications because a year had passed with both officers engaged in more than 100 similar "buy-and-bust" operations in that time period. "With or without the in-court identifications, the evidence of petitioner's guilt, absent the out-of-court confirmatory identifications, is extremely thin."

Flowers v. United States, 560 F. Supp. 2d 710 (N.D. Ind. 2008). Counsel ineffective in possession with intent to distribute drugs "within 1,000 feet" of a school, playground, or public housing. Trial and appellate counsel were ineffective for not challenging the government's failure to prove that the defendant's house was within 1,000 feet of a protected area. At trial, Officer Cameron testified that the residence was within 1,000 feet of "a public park in the South Bend Parks Department." There was no other evidence on the point even though the statute requires that the government prove beyond a reasonable doubt that the area is: 1) an outdoor facility, which is 2) intended for recreation, 3) open to the public, and 4) includes three or more separate apparatus intended for the recreation of children. Counsel's conduct was objectively unreasonable and prejudicial for failing to challenge the government's inadequate proof. The court set aside the conviction on this offense and entered a conviction on the lesser included offense (omitting the "within 1,000 feet" element) and ordered resentencing.

2007: *United States v. Baker*, 492 F. Supp. 2d 1167 (D. Neb. 2007). Counsel ineffective in drug conspiracy and possession of a firearm by a felon case for failing to file a motion for new trial. Following the jury's verdict, the trial court granted a judgment of acquittal on the conspiracy charge and asking for briefing on whether the court should grant of a motion for new trial. Counsel responded only that no new trial could be granted because of double jeopardy. The government appealed and the Eighth Circuit reversed the judgment of acquittal on the conspiracy charge and remanded for sentencing. Counsel's conduct was deficient because Fed. R. Crim. P. Rule 29 provides that "if the court enters a judgment of acquittal after a guilty verdict, the court must also conditionally determine whether any motion for a new trial should be granted if the judgment of acquittal is later vacated or reversed." Here counsel did not move for a new trial, even after the court asked both parties to brief the new trial issue and instead advised the court that a new trial would be barred by double jeopardy. Prejudice established because the court would have granted "a motion for new trial or a conditional motion for new trial under Rule 29," especially since the court found that "the evidence at trial was so deficient that it warranted the granting of the motion for judgment of acquittal."

c. State Cases

2009: *State v. Sutherby*, 204 P.3d 916 (Wash. 2009). Counsel ineffective in failing to move to sever charges for possession of child pornography from charges for child rape and molestation. Counsel's conduct was deficient and not based on legitimate strategic or tactical reasons. "There is no indication of any possible advantage to the defendant in having a joint trial on all charges, given the State's announced intent to use the pornography counts to show [the defendant's] predisposition to molest children. Even the trial judge appeared to expect a severance motion because he asked at a pretrial hearing if severance was a possibility." Prejudice established because "the trial judge likely would have granted a severance under the relevant considerations, with the result that the outcome at a separate trial on child rape and molestation charges would likely have been different." While the state's evidence was strong on the pornography charges, it was weaker on the rape and molestation charges. Thus, the state consistently argued that the presence of child pornography on the defendant's computers proved he sexually abused his granddaughter and there was no limiting instruction directing the jury that the evidence of one crime could not be used to decide guilt for a separate crime. If the charges had been severed, it is "highly likely" that the pornography evidence would have been excluded in a separate trial for rape and molestation.

2008: *People v. Givens*, 892 N.E.2d 1098 (Ill. App.), *appeal allowed*, 900 N.E.2d 1121 (2008). Counsel in drug case ineffective in withdrawing motion to quash arrest and suppress evidence motion because the police officers' warrantless entry into the bedroom occupied by the defendant as an overnight guest of the apartment holder who consented to search of the apartment was not justified by any of the factors supporting a finding of exigency and the defendant had a reasonable expectation of privacy in the bedroom. Prejudice found because "the 21 bags of drugs would not have been admitted in evidence."

Sparkman v. State, ___ S.W.3d ___, 2008 WL 733002 (Ark. Mar. 20, 2008). Counsel ineffective of rape of child case for failing to move to suppress the defendant's custodial statement taken after the appointment of counsel and, thus, in violation of the Sixth Amendment right to counsel. Counsel's conduct was deficient in that counsel moved to suppress the statement for other reasons but not on this one which was valid and would have been granted. Prejudice was clear because the only other evidence was a taped interview of the child. On direct appeal, the defendant's confrontation issue was rejected because the tape was merely cumulative of the defendant's confession and, therefore, harmless.

2007: *McNabb v. State*, 967 So. 2d 1086 (Fla. App. 2007). Counsel ineffective in case involving two separate but similar drug offenses for failing to secure a severance of the charges.

Spioch v. State, 954 So. 2d 47 (Fla. App. 2007). Counsel ineffective in case of four counts of sexual activity with a minor in a custodial relationship, one count of attempt, and 23 counts of lewd and lascivious assault on a minor for failing to adequately move for a judgment of acquittal on 13 counts of lewd and lascivious assault. While counsel did move for acquittal, counsel's conduct was deficient because "his motion was simply a bare-bones motion" that "did not sufficiently set forth the grounds upon which relief was requested." Prejudice established because an adequate motion would have led to seven counts being dismissed for lack of evidence to support the conviction, one count being dismissed because the charging document did not allege sufficient elements to define a crime, and five counts being dismissed on double jeopardy grounds because these acts occurred when the sexual activity counts occurred. Acquittal entered on these 13 grounds and remanded for resentencing.

Maymon v. State, 870 N.E.2d 523, *amended on rehearing*, 875 N.E.2d 375 (Ind. App. 2007). Counsel ineffective in burglary case for failing to move for severance of charges. The defendant was charged with four burglaries with four separate victims over a period of three months. Two of the burglaries involved thefts while two did not. Counsel's conduct was deficient because, under state law, the burglaries were not connected together in a single scheme or plan and the defendant was entitled to severance. Prejudice found because the evidence of the two burglaries where thefts occurred would not be admissible at separate trials for the two burglaries where thefts did not occur. Those convictions remanded for new trial on rehearing.

Alexandre v. State, 927 A.2d 1155 (Me. 2007). Counsel ineffective in manslaughter and kidnaping case for failing to move to dismiss the kidnaping charge based on the statute of limitations. The limitations period was five years, but was extended for six years due to the defendant's absence from the state. Nonetheless, the indictment was not returned until more than 12 years after the date of the alleged offense. Counsel's conduct was deficient and was not explained by counsel's "reason" for not filing the motion, which was that he thought the defendant would be acquitted on that charge. Prejudice found even though the defendant's manslaughter conviction and length of sentence were not affected.

[T]he simple reality that one or two or more simultaneous criminal convictions may result in a longer sentence of incarceration for a defendant's future convictions, create liability under recidivist statutes, impose a stigma, be used for impeachment, or "act as an impediment to clemency, pardon, more lenient conditions of imprisonment, and professional licensing. This is certainly true for a conviction for a crime as serious and socially abhorrent as kidnapping.

Id. at 1168.

Gant v. State, 211 S.W.3d 655 (Mo. App. 2007). Counsel ineffective in second-degree trafficking case by eliciting—during cross-examination of the state’s witness during the suppression hearing—the evidence that established probable cause for arrest. Drugs and a weapon had been found in a hotel room registered to another person and officers had that man’s photo ID. Officers waited nearby and arrested the defendant, who looked nothing like the man in the ID, as he approached the room with a key in his hand. This was all that the state’s evidence in the suppression hearing established, which alone was insufficient to establish probable cause. On cross-examination, however, defense counsel elicited the testimony that established probable cause for the arrest. Specifically, a motel employee connected a man fitting the defendant’s description to the room and recognized his car and police informants described a man fitting the defendant’s description as being connected with drug activity in the area. “Trial counsel’s elicitation of evidence that supported the State’s case constitutes conduct falling below that of a reasonably competent and diligent attorney.” *Id.* at 660. Prejudice found because the defendant was not charged with the drugs or weapon in the room but was instead charged with possession of drugs found in his pocket in a search incident to arrest. This evidence likely would have been suppressed if counsel had performed adequately. New trial granted.

Yecovenko v. State, 173 P.3d 684 (Mont. 2007). Trial and appellate counsel ineffective in sexual abuse and sexual assault case for failing to adequately assert a motion for severance. The sexual assault charges alleged offenses involving the daughters of the defendant’s former girlfriend. The sexual abuse charges were based on ten unrelated child pornography pictures. Trial counsel moved to sever but did not provide any specific detail to allege prejudice even after the state noted the deficiency and the court denied on this basis. While appellate counsel asserted error in the denial of the motion, counsel did not assert the ineffectiveness of trial counsel as a basis. Thus, the appellate court also denied on a procedural basis. Trial and appellate counsel’s conduct was deficient. Specifically, with respect to appellate counsel: “Presenting new arguments on appeal without justification for doing so, in light of the volume of cases holding that such arguments will not be entertained, falls short of reasonable professional assistance.” Prejudice was found with respect to the sexual assault conviction because the unrelated pictures “were, quite simply, horrific,” such that the trial court had cleared the courtroom and allowed each image to be displayed to the jury for only five seconds.

State v. Miner, 733 N.W.2d 891 (Neb. 2007). Counsel ineffective in theft by unlawful taking case for failing to assert a double jeopardy bar to prosecution. The defendant was tried and convicted in Holt County for the theft of 62 steers from a Livestock Market in Holt County. Some of these steers (26 to be precise) were sold through a livestock market in Nance County where the defendant had been tried and convicted of theft by receiving stolen property prior to the case in Holt County coming to trial. Counsel’s conduct was deficient because “counsel was charged with knowledge of the legal principles with respect to consolidation of theft offenses in Nebraska,” which precluding two theft

charges based on “‘one scheme or course of conduct from one person’ on the same day.” Counsel’s conduct was not explained by strategy. Prejudice found because the double defense was meritorious.

***State v. Brown**, 873 N.E.2d 858 (Ohio 2007). Counsel ineffective in capital trial for failing to request a formal ruling on whether the defendant and the state’s primary witness were actually married. Counsel’s conduct was deficient because there was a spousal privilege under state law and evidence from a marriage license and witnesses that the defendant was married to the witness. Although the witness denied it at trial, she had made contradictory pretrial statements. If counsel had requested a pretrial ruling and the court found that there was a marriage, state law required the court to instruct the witness on the spousal competency and make a finding on the record that she voluntarily chose to testify. Prejudice found because state law holds that failure to do so is reversible plain error. In addition, this was the only eyewitness testimony and the defendant was eligible for the death penalty only because he was convicted of aggravated murder based on a finding of prior calculation and design. Even if the only difference was in the “final sentence, in this case, that difference is monumental—it is the difference between life and death.” *Id.* at 870. The court also found a Brady violation and considered cumulative prejudice from both because “it might be possible to conclude that [the defendant] was not prejudiced” on the individual claims. Reversal required.

West v. Director of Dept. of Corrections, 639 S.E.2d 190 (Va. 2007). Counsel ineffective in aggravated involuntary manslaughter, involuntary manslaughter, and DUI case for failing to assert a double jeopardy objection to convictions both for statutory offense of aggravated involuntary manslaughter and common law offence of involuntary manslaughter. While counsel objected to sentencing on both offenses he did not state that his argument rested on constitutional or double jeopardy grounds. Counsel’s conduct was deficient because the common law offense does not require proof of a fact different from those required for conviction of the statutory offense. Even though the trial court gave concurrent sentences, prejudice was found because the defendant was convicted of two felonies and given two punishments. The common law conviction and sentence were set aside.

2006: People v. Boyd, 845 N.E.2d 921 (Ill. App. 2006). Counsel ineffective in multiple charge case for failing to invoke the defendant’s statutory speedy-trial rights with respect to home invasion charges. The defendant was entitled to trial within 120 days from the date he was taken into custody unless his own acts occasioned delay. Here, although all of the charges arose from a single incident, the state filed charges against the defendant on three different dates. While the defendant had agreed to a continuance on initial charges, the home invasion charges were filed after the defendant agreed to continue the initial charges. The speedy-trial clock expired on the home invasion charges prior to trial, but counsel failed to request the discharge.

Morris v. State, 639 S.E.2d 53 (S.C. 2006). Counsel ineffective in assault and battery with intent to kill trial for failing to request a continuance, which resulted in the defendant being tried in absentia. The defendant showed up on the scheduled trial date, signed a sentencing sheet in anticipation of entering a guilty plea to the lesser-included charge of assault and battery of a high and aggravated nature, and then left the courthouse. He could not be located when his case was called so he was tried in absentia. Counsel's conduct was deficient because she objected to trial in absentia, but failed to move for a continuance in order to enter the guilty plea agreed to with the State. Prejudice found because the refusal of a continuance would have amounted to an abuse of discretion where ABHAN, the crime the defendant agreed to plead guilty to, is a common law misdemeanor punishable by up to ten years in prison, while ABIK, for which he was tried and convicted, is a violent crime felony punishable by up to twenty years in prison.

Compton v. State, 202 S.W.3d 416 (Tex. App. 2006). Counsel ineffective in aggravated perjury case for failing to move to dismiss the indictment even though the indictment was filed 75 days after the expiration of the two year statute of limitations period. Counsel's conduct was deficient because he assumed the three year period for all other felonies applied and "[a] modest amount of research . . . would have disclosed an uncontradicted line of recent cases holding that aggravated perjury has a two year limitation period." "Without a firm command of the law governing the case, a lawyer cannot render effective assistance to the defendant." Prejudice found because "undeniable" since the motion to dismiss had merit.

State v. Horton, 146 P.3d 1227 (Wash. App. 2006), *review denied*, 178 P.3d 1032 (Wash. 2008). Counsel ineffective in possession with intent to manufacture and possession of drugs case for failing to move to suppress evidence from a pat-down search. The officer stopped a vehicle for traffic violations and observed materials in the back seat, which led to a valid search warrant for the car. Prior to obtaining the warrant, the officer performed a pat-down search of the defendant, who was a passenger in the car, and found a cigarette pack with a small baggie of methamphetamine inside. Counsel's conduct was deficient because counsel moved to suppress the evidence due to a pretextual stop but failed to move to suppress on the basis that the pat-down was an illegal search. A valid pat-down search is limited to objects that might be used as weapons, which would not include the cigarette pack or its contents or items subsequently found in the defendants pockets, which included a pill bottle containing ephedrine and a digital scale. Prejudice found.

State v. Meckelson, 135 P.3d 991 (Wash. App. 2006), *review denied*, 154 P.3d 919 (Wash. 2007). Counsel ineffective in drug case for failing to move to suppress evidence on the basis that the officer's traffic stop was pretextual. While the officer stopped the defendant after the defendant made a right turn without signaling, the officer had begun following the defendant's car for the legally insufficient reason that the defendant had given the officer a "deer-in-the-headlight" look. Counsel's conduct was deficient because

it is not enough for the state to show that there was a traffic violation, but rather the question is whether the traffic violation was the real reason for the stop. Prejudice found because there was a reasonable probability the motion to suppress would have been granted.

State v. Perez-Avila, 131 P.3d 864 (Utah App. 2006). Counsel ineffective in DUI and felony automobile homicide case for failing to move to consolidate the charges because under state law the DUI was a lesser included offense of the felony automobile homicide.

2005: ***Thompson v. Commissioner of Correction***, 880 A.2d 965 (Conn. App. 2005). Counsel ineffective for failing to file a motion to dismiss a count of failure to appear because of the delay between the issuance and the execution of the warrant such that the statute of limitations had expired. The defendant was charged with various sexual assault charges in addition to two charges of failure to appear for earlier scheduled court dates. Prejudice found because there is a reasonable probability that the charge would have been dismissed by the trial court because the defendant lived in state the whole time and had been arrested 15 times since the warrant for failure to appear had issued and each time provided his correct address and driver's license number.

People v. Hernandez, 840 N.E.2d 1254 (Ill. App. 2005), *appeal denied*, 852 N.E.2d 243 (Ill. 2006). Counsel ineffective in murder case for failing to move to suppress the defendant's videotaped statement to an assistant prosecutor, which clearly revealed that the defendant had invoked his right to silence in a clear and unequivocal fashion. Nonetheless, the prosecutor continued the interrogation. Counsel moved to suppress the statement on other grounds, but not this ground and this failure was not explained by strategy. Prejudice found because the statement would have been excluded and the state's case was largely based just on this statement because there was no eyewitness testimony or physical evidence.

State v. Becker, 110 P.3d 1 (Mont. 2005). Counsel ineffective in drug possession and drug manufacture case for failing to move to dismiss the possession charge as a violation of double jeopardy under the state constitution and statutes. Because the state could not prove manufacture of drugs without first proving possession, state law prohibited conviction on both because the possession was a lesser included offense of the manufacturing charge. Possession charge dismissed and case remanded for resentencing.

People v. Turner, 840 N.E.2d 123 (N.Y. App. 2005). Trial and appellate counsel ineffective in manslaughter case for failing to assert a statute of limitations defense. The defendant was arrested 16 years after the crime and charged with second degree murder, which has no statute of limitations. During trial, the prosecutor requested an instruction on the lesser included offense of manslaughter. Counsel objected only on the basis of not offering the jury a compromise. The jury convicted only on manslaughter, which had a

five year limitations period. Although the statute allows some tolling, the maximum period for tolling is an additional five years. Trial and appellate counsel's conduct was deficient because there was case law from 1914 supporting the argument, which was old but still valid. In addition, while there was some contrary precedent and the law may not have been definitively settled at the time of trial, "[a] reasonable defense lawyer at the time of defendant's trial might have doubted that the statute of limitations argument was a clear winner—but no reasonable defense lawyer could have found it so weak as to be not worth raising." Trial counsel should have asserted the issue. Appellate counsel should have asserted the ineffectiveness of trial counsel on this point.

Commonwealth v. McClellan, 887 A.2d 291 (Pa. Super. 2005), *appeal denied*, 897 A.2d 453 (Pa. 2006). Counsel ineffective in third degree murder and conspiracy case for failing to provide, in a timely manner, the identity and opinion of the defense expert, which resulted in the exclusion of the expert's testimony. The defendant's child died only about 15 minutes after the defendant returned from a convenience store where she was caught on the surveillance tape. When she returned home, she and her boyfriend were alone with baby for a few minutes before a friend entered and found the defendant with the child saying something was wrong with him. Paramedics were called, but the child died from extensive, recently inflicted injuries. Appellant and her boyfriend were charged. From the beginning, counsel discussed the need to secure an expert witness in forensic pathology to understand the scientific principles involved and present testimony concerning the timing of the injuries. Counsel initially retained a different expert and fought the court's orders for disclosure before ultimately disclosing this expert's report and allowing a deposition. Even prior to his deposition, counsel had retained a second expert, however, but counsel never disclosed this information until shortly before the conclusion of the trial. The trial court excluded this expert's testimony because of the untimely disclosure. Counsel expressed no strategy for the untimely disclosure. Counsel simply did not expect that the court would exclude the testimony. Counsel's conduct was deficient because "counsel were or should have been aware the trial court required disclosure of their experts' opinions and reports, based in particular on their previous experience" with their first expert. "[C]ounsel's actions exhibited either a lack of knowledge of the Rules of Criminal Procedure, constituting incomplete investigation into the law, or a deliberate attempt to frustrate the Commonwealth's right to learn of the witness, constituting a violation of both the Rules of Professional Conduct and the ABA Standards." Prejudice found because this expert would have testified that, in his opinion, the child's injuries were inflicted during the time period when the defendant was clearly away from home.

2004: ***United States v. Little***, 851 A.2d 1280 (D.C. 2004). Counsel ineffective in murder case for failing to timely move to suppress the defendant's unwarned custodial statement. Counsel's conduct was deficient and prejudicial because the defendant was in custody at the time of his written confession, but he had not been given the *Miranda* warnings. Thus, the statement should have been suppressed. Although counsel asserted a weak strategic

reason and that there was no merit to the motion, counsel had made a motion, during the trial, to suppress the statement, which was denied as untimely. If counsel had adequately investigated, counsel would have also been aware that the issue had merit. There was also a reasonable probability of a different outcome at trial if the statement had been suppressed.

Bruton v. State, 875 So. 2d 1255 (Fla. App. 2004). Counsel ineffective in exploitation of an elderly person and third degree grand theft case for failing to move to dismiss the grand theft charge as a lesser included offense. The basic facts were that the defendant wore a nurse's uniform in a hospital, pretending to be a care giver, and stole the victim's diamond ring. Because the two crimes involved one act of taking the same property, convictions on both counts violated double jeopardy. Even though the precedent for this ruling had not been decided at the time of trial, "this is an issue that trial counsel should have recognized."

Collier v. State, 598 S.E.2d 373 (Ga. App. 2004), *aff'd on other grounds*, 612 S.E.2d 281 (Ga. 2005). Counsel ineffective in homicide by vehicle case for failing to move to suppress blood and urine samples taken from the defendant. The defendant ran a red light and collided with another car, killing two people. The defendant refused to consent to blood and urine tests, but police threatened to obtain a search warrant and to forcibly use a catheter to obtain the samples if he did not consent. In the face of the threat, the defendant consented. Counsel's conduct was deficient because the consequences of refusing under state law did not include the possibility of a search warrant and forcible testing. The police, thus, misled the defendant and his consent was coerced and invalid. Prejudice found because the admission of the blood and urine results showing methamphetamine and amphetamine unquestionably harmed the defense.

Vann v. State, 596 S.E.2d 722 (Ga. App. 2004). Counsel ineffective in robbery and assault case for failing to move to sever the charge of possession of a firearm by a convicted felon. The evidence against the defendant for robbery and assault was based on shaky eyewitness testimony and a codefendant's statement. Because of the weapons charge, the defendant's prior conviction for receiving stolen property was admitted in evidence. Counsel did not move for severance because counsel wanted the jury to know about the prior conviction rather than wondering whether the defendant had prior convictions. Counsel's conduct was deficient because "counsel misunderstood the law concerning admission of bad character evidence." When the State introduced the prior conviction, the defendant's character was undoubtedly placed in evidence, even though the prior conviction was unrelated to the charges for which he was being tried. Prejudice found because even though the prior conviction was admitted only through certified documents referred to only once in the state's closing argument, trial counsel did not request a charge that the jury limit its consideration of the prior conviction to the charges of possession of a firearm by a convicted felon. Thus, the jurors were free to consider this

evidence with respect to character and credibility when the evidence against the defendant was otherwise “far from overwhelming.”

People v. Miller, 806 N.E.2d 759 (Ill. App. 2004). Counsel ineffective in drug possession with intent to deliver plea case for failing to challenge third-party consent to search the defendant’s zipped duffle bag where the drugs were found. Counsel moved to suppress the evidence, which was located in a home shared with the third-party in a locked storage cabinet containing some of the third-party’s property but for which only the defendant had keys. The third-party consented to police opening the cabinet with a crowbar and drugs were found inside. The motion was denied, without any evidence that the drugs were actually in a zipped duffle bag, which the third-party informed police belonged to the defendant, but the police searched it anyway and found the drugs. Following the denial of the suppression motion, the defendant plead guilty. Counsel’s conduct was deficient in failing to present evidence of the zipped duffle bag. Counsel did not do so only because counsel’s “mistake of law” in believing it was immaterial since the police had consent to open the storage cabinet. Prejudice found because, but for counsel’s errors, the defendant would not have pleaded guilty and would have insisted on going to trial.

State v. Reichenbach, 101 P.3d 80 (Wash. 2004). Trial counsel was ineffective in possession of methamphetamine case for failing to move to suppress the methamphetamine that was involuntarily abandoned in the course of an illegal seizure of the defendant. An informant notified the police on several occasions that the defendant was forcing him to drive to Canada so that the defendant could purchase drugs. On the last of these occasions, the police obtained a search warrant for the informant’s car and the defendant’s person. After the warrant was obtained, however, the informant notified the police that the defendant had been unable to purchase drugs and that he was not sure whether he would be able to do so. The police then staged an accident to stop the informant’s car. With weapons drawn and pointed at the defendant, officers ordered the defendant to raise his hands. Before doing so, the defendant dropped a bag of methamphetamine on the floor next to the passenger seat. The defendant was removed from the car and the drugs were discovered during the search of the car. Counsel’s conduct was deficient in failing to move to suppress the drugs because the search warrant was invalid because the information supplied by the informant after the warrant was obtained negated probable cause. Failure to object could not be explained by any legitimate tactic. Moreover, although the informant consented to search of the car, the informant could not consent to seizure of the defendant’s person. The defendant was “seized” at gunpoint, however, and his abandonment of the bag of drugs was in response to the unlawful seizure and, thus, involuntary. The seizure of the bag of drugs thus violated the state constitution. Prejudice was found because the conviction was dependent on admission of the bag of drugs.

Firestone v. State, 83 P.3d 279 (Nev. 2004). Trial and appellate counsel ineffective in

leaving the scene of an accident case for failing to challenge multiple convictions arising from one accident involving three victims. State statutes were clear that, “Since there was only one accident, and one ‘leaving,’ the statute allows only one charge of leaving the scene of an accident, regardless of the number of people involved.” Counsel’s conduct was deficient and prejudicial in failing to raise this meritorious issue. Two of the three convictions were vacated and the case was remanded for further proceedings.

2003: *State v. Johnson*, 837 A. 2d 1131 (N.J. Super. App. Div. 2003). Counsel ineffective in weapons case for failing to move to suppress a handgun seized from the defendant. The police obtained warrant to arrest the defendant’s half-brother on domestic violence charges. When the police arrived at the defendant’s stepfather’s home, they asked for permission to enter after advising him they had multiple arrest warrants and they were concerned about the presence of a handgun. The stepfather allowed the police to enter the home to arrest his son. Following the arrest, the police frisked the son and then took him outside to the squad car. The officer’s went back into the home to begin searching for the gun. The defendant was on the phone in the kitchen and stated that he was just visiting. The police officer frisked him and then asked him to leave until the police finished with their search. The defendant agreed to leave but said he needed to gather his things. He took a DVD box and another small box from a closet and proceeded to leave. The police officer stopped him and questioned him about the contents of the box. After receiving conflicting answers, the officer searched the box and found a loaded handgun inside. Counsel did not move to suppress the handgun because he believed the motion would have lacked merit because the owner of the home had consented to police entry. Counsel’s conduct was deficient because it was based on a fundamental misunderstanding of the law. The homeowner’s consent may well not have been knowingly and voluntarily given in that the homeowner was confronted with multiple warrants for his son’s arrest and may not have been advised of his right to refuse consent. Moreover, the homeowner’s permission appeared to be limited to entry for purposes of affecting his son’s arrest on the second floor. The police officer’s far exceeded the scope of this invitation because, by their own admission, they re-entered the premises once the son had been safely secured in the squad car in order to search the home. The search was also outside the scope of the limited area included in a search incident to arrest. A search warrant was, therefore, required. Prejudice found due to the critical significance of the handgun to the prosecution’s case. The court ordered that a suppression hearing be conducted. If the court granted suppression, the convictions would be set aside. If the court denied suppression, the judgment of conviction will stand.

4. PROSECUTION EVIDENCE OR ARGUMENT

a. U.S. Court of Appeals Cases

2007: *Girts v. Yanal*, 501 F.3d 743 (6th Cir. 2007), *cert. denied*, 129 S.Ct. 92 (2008). Counsel

ineffective in aggravated murder case for failing to object to the prosecutor commenting on the petitioner's silence three separate times during closing arguments. Prejudice found because trial counsel's "failure to object exacerbated the prejudicial effect of the prosecutor's statements." The court found "a strong likelihood that at least one juror would have changed his mind if the improper and prejudicial statements would not have been made, especially because the prosecutor presented weak and limited evidence at trial." The IAC also served as cause and prejudice to excuse the procedural default of the prosecutorial misconduct issue, which had been reviewed by the state court only under a plain error analysis. Relief granted on the misconduct issue also.

2005: *Hodge v. Hurley*, 426 F.3d 368 (6th Cir. 2005). Counsel ineffective in child rape case for failing to object to the prosecutor's "egregiously improper closing argument, the prosecutor commented on the credibility of witnesses, misrepresented the facts of the case, made derogatory remarks about the defendant, and generally tried to convince the jury to convict on the basis of bad character." The prosecutor's arguments, among other things, incorrectly informed the jury that they would have to disbelieve all of the victim's family members to acquit, which was not true since two family members testified to seeing blood in the child's underwear and abnormal behavior. The jury could have believed this without convicting the defendant. The prosecutor also implied that disagreement between state and defense experts "(who could very well have legitimate professional disagreements) meant that one of those witnesses must be perjuring him or herself." *Id.* at 383. With respect to character, the prosecutor argued that the defendant, who was underage, regularly drank alcohol illegally and wanted to live off his family and not work, which was irrelevant and not based on any evidence before the court. The prosecutor also urged the jury to "put [itself] in the place of someone that might run into [the defendant] at night," which is "a version of the impermissible 'golden rule argument.'" *Id.* at 384. Under AEDPA, the state court's decision was an unreasonable application of Supreme Court precedent. Prejudice found because the result of the trial depended primarily on the jury's credibility determination between the defendant and the 3 year old child's mother, who claimed to have seen the rape. In addition, the trial court's "generic jury instructions . . . were insufficient to dispel any prejudice from these statements." *Id.* at 388 n.27.

Martin v. Grosshans, 424 F.3d. 588 (7th Cir. 2005). Counsel ineffective in sexual assault case for failing to object to improper testimony and argument. The defendant was an ordained Episcopal priest charged with molesting a boy prior to 1988. The boy first raised the allegation in 1993 and the defendant learned about the allegation in 1994. During the state's evidence, without objection from counsel, the state presented the testimony of a former prosecutor who had worked with the defendant in 1993 to develop a policy for dealing with allegation of sexual misconduct in the parish. She testified that his focus was greatly on protecting the accused clergymen and not the accusers. Counsel also did not object to testimony from a police officer, who met with the defendant in the presence of

his counsel, that the defendant refused to answer questions about the allegations. Finally, counsel did not object or move for a mistrial based on the prosecutor's argument that the jury should not be swayed by the defense's strong character witnesses because even Jeffrey Dahmer had character witnesses. Counsel's conduct was deficient because: (1) the former prosecutor's testimony was irrelevant and prejudicial because the defendant was not even aware of allegations against him when these conversations occurred in a completely different jurisdiction years after the crimes alleged here and the defendant's beliefs did not necessarily imply a guilty conscience; (2) the officer's testimony was an improper comment on the defendant's right to counsel; and (3) the prosecutor's argument was inflammatory and improper, especially since this trial occurred in 1995 in Wisconsin when Dahmer's case was fresh in people's minds. Under AEDPA, the state court's decision was contrary to *Strickland* because it placed the burden on the defendant to prove that, but for counsel's errors, "the result of the proceeding would have been different. Prejudice was, therefore, considered de novo. "[E]ven if these errors, in isolation, were not sufficiently prejudicial, their cumulative effect prejudiced . . . [the] defense" where "the prosecution's evidence was not overwhelming."

b. U.S. District Court Cases

2009: *Dittrich v. Woods*, 602 F. Supp. 2d 802 (E.D. Mich. 2009). Under AEDPA, counsel ineffective in criminal sexual conduct case involving the thirteen-year-old friend of the defendant's daughter for failing to object to "other act evidence" that the defendant allegedly physically and verbally abused his wife and daughters. Counsel admitted there was no strategy reason for not objecting to this damaging character evidence, which counsel acknowledged was irrelevant and prejudicial. The state court's finding of no prejudice was incorrect because there were no eyewitnesses. The alleged victim testified and the defendant's wife testified that he admitted having a sexual relationship with the alleged victim, but her "testimony must be regarded with great skepticism, in light of her contentious relationship" with the defendant. "Because this case essentially boiled down to a credibility contest between the complainant and [the defendant], counsel's failure to object to the domestic violence evidence prejudiced [the defendant]." In granting relief, the court expressed "great appreciation to trial counsel for his candor and honesty at the evidentiary hearing concerning his failure to object to this evidence. It was courageous for him to admit his error before this Court. This Court stresses that human error does not equate with an ethical violation."

2008: *Hall v. Vasbinder*, 551 F. Supp. 2d 652 (E.D. Mich. 2008). Counsel ineffective in criminal sexual conduct of daughter case for failing to object to the prosecutor's cross-examination of the defendant and argument about the defendant's failure to testify at a previous probate hearing after social services moved to have the defendant's daughters removed from his custody. Counsel's conduct was deficient because a clear violation of the defendant's right to silence while represented by counsel but used as substantive

evidence of guilt in his criminal trial. Prejudice was established because the evidence amounted to a credibility contest and was not overwhelming.

Neri v. Hornbeak, 550 F. Supp. 2d 1143 (C.D. Cal. 2008). Counsel ineffective in murder of her 16-month-old daughter under AEDPA for failing to object to the prosecutor's cross-examination of the defendant in violation of the trial court's previous ruling. In support of a pretrial motion, counsel had presented an unsigned "declaration" of the defendant. Prior to trial, the state requested a signed version. The hearings revealed that counsel had drafted the declaration on the basis of his notes of a discussion with the defendant, who was just learning English, and had shown it to her, but had not had it translated for her. She testified that there were inaccuracies in the declaration and it was corrected through her testimony and changes made to the declaration, which she then signed. The court ruled that she could be impeached if she testified by using her signed declaration or testimony, but not the unsigned declaration. Nonetheless, the prosecutor cross-examined her extensively about inconsistencies from the unsigned declaration without objection from defense counsel. Counsel's conduct was deficient. Prejudice was established because the defendant's credibility was a central issue. The major inconsistencies came from the unsigned declaration. Although there were some inconsistencies from her prior testimony and signed declaration, these inconsistencies were relatively minor in comparison and would not have been as harmful to her credibility. Prejudice was also clear because the jury deliberated for four days and nearly deadlocked even without this improper cross-examination.

2006: *Wynters v. Poole*, 464 F. Supp. 2d 167 (W.D.N.Y. 2006). Under AEDPA review for pro se petitioner, counsel ineffective in first degree rape case for failing to object to the prosecutor's cross-examination of the investigator who interrogated the petitioner. The investigator testified that he requested that the petitioner take a polygraph after he denied guilt and the petitioner terminated the interview and requested counsel. The alleged victim had made numerous inconsistent statements and did not report the rape for more than a year. Appellate counsel asserted that the prosecutor committed misconduct and that trial counsel had been ineffective in failing to object. The District Court construed the pro se pleadings to assert trial counsel's ineffectiveness as "cause" and "prejudice" to overcome the procedural default of the state misconduct issue and found that counsel was ineffective. Counsel's conduct was deficient in failing to object to the prosecutor's misconduct, which "effectively decimated" the petitioner's credibility in a case where his credibility and the alleged victim's credibility was the only real issue. The prosecutor's conduct rendered the trial "fundamentally unfair." The state court's holding to the contrary (on the merits, despite finding a procedural default) was an unreasonable application of clearly established Supreme Court precedent. *Id.* at ___ (citing *Darden v. Wainwright*, 477 U.S. 168, 181-82 (1986)). In addressing this issue, the state court "approved of the way defense counsel handled the situation" and, therefore, summarily dismissed the ineffective assistance claim as "without merit." Because this was an

adjudication on the merits, the District Court applied the AEDPA standards to this claim also. Counsel's conduct was deficient and prejudicial because the prosecutor deliberately implicated the petitioner's Fifth Amendment right to remain silent, his Sixth Amendment right to counsel, and conveyed to the jury that it could infer guilt due to the petitioner's failure to submit to the polygraph. Although counsel attempted to mitigate the damage, "there is no evidence that he made an intelligent, tactical decision not to object." Instead, trial counsel "only reinforced the negative evidence elicited on direct examination" by having it repeated rather than objecting and moving for a mistrial or a curative instruction. "While the instance in which a single error will rise to the level of Sixth Amendment ineffectiveness is clearly the exception and not the rule, this case is one of those exceptions." *Id.* at ___ (quoting *Chatom v. White*, 858 F.2d 1479, 1486 (11th Cir. 1988)). The state court's summary denial was an unreasonable application of *Strickland*.

2005: *Wade v. White*, 368 F. Supp. 2d 695 (E.D. Mich. 2005). Counsel ineffective in manslaughter case for failing to object to evidence regarding the shooting of a key prosecution witness and the state's closing argument concerning this evidence. The victim was killed when he was hit by a stolen car being pursued by police. The witness was a passenger in the car, who, at the scene of the accident, initially identified his friend as the driver, but changed his statement the next day to identify the defendant as the driver. He was later shot numerous times and testified about this, but he did not know of any connection between the shooter and the defendant and no evidence connecting the defendant to the shooting was presented. Nonetheless, the prosecutor focused on this incident in sentencing and strongly implied that there was some connection between the defendant and the shooting. Although this issue had been raised in state court, the state court failed to address this issue so the court's review, under the AEDPA, was de novo. Counsel's conduct was deficient because the evidence of the shooting of the witness was clearly inadmissible and the prosecutor's argument was improper. There could be no reasonable strategy not to object to this testimony and argument. The court found that the state court's finding that the testimony was properly admitted was irrelevant because it was wrong in that no evidence established any connection between the defendant and the shooting of the witness. Prejudice was found because the witness was the key witness identifying the defendant as the driver.

c. State Cases

2009: *Holman v. State*, 674 S.E.2d 171 (S.C. 2009). Trial counsel ineffective in case involving multiple charges arising from a shooting incident due to counsel's failure to object to admission of handgun found in defendant's apartment that had no relevance to the offenses for which the defendant was charged. "[T]he failure to object to this clearly inadmissible evidence was ineffective assistance of counsel" not explained by a valid trial strategy. Prejudice established.

2008: *Antunes-Salgado*, 987 So. 2d 222 (Fla. App. 2008). Counsel ineffective in cocaine trafficking and conspiracy case for stipulating to the admissibility of the postarrest and post-*Miranda* statements of co-defendants through the police officer who took their statements. Each of the statements “minimized the respective declarant's involvement in the offenses and shifted the bulk of the involvement to [the defendant].” The statements were not admissible as being in furtherance of the conspiracy, statements against interest to the extent the statements inculcated the defendant, nonhearsay “verbal acts” (showing the effect of a statement on the defendant), or under any hearsay exception. The statements were inadmissible under *Crawford v. Washington*, 541 U.S. 36 (2004), which specifically holds that statements made during police interrogations are testimonial and therefore inadmissible. Prejudice found because, without these statements, the state could not establish the “agreement” element of the conspiracy charge, which was established solely through the inadmissible hearsay statements. Prejudice also found on trafficking charge when the evidence was disputed at trial. No strategy could excuse the ineffectiveness because “counsel conceded the admissibility of inadmissible statements that ultimately convicted his client without having researched the admissibility issue. Generally, important legal concessions are made after, not before, the applicable law is researched.”

Cobb v. State, 658 S.E.2d 750 (Ga. 2008). Counsel ineffective in murder case for failing to object to improper hearsay testimony from a state firearms examiner. The examiner testified that bullets and casings found at the crime scene were from a .45 caliber pistol. A holster had been found in a search of the defendant’s apartment. The expert testified that she called the manufacturer, gave the model number, and was told the holster was a Colt .45 pistol. Counsel’s conduct was deficient because counsel failed to object to this testimony until the state attempted to elicit the testimony a second time. Prejudice was established because the testimony bolstered the only eyewitness, who was a crack addict with inconsistencies in her testimony, and the state’s evidence was not overwhelming as evidenced by two prior hung juries.

State v. Reynolds, 746 N.W.2d 837 (Iowa 2008). Counsel was ineffective in counterfeit money orders case for failing to object to hearsay testimony. An employee of the bank that cashed the money orders testified, without objection, that she received emails from the Federal Reserve indicating the money orders were counterfeit. While counsel objected successfully to admission of those emails, counsel failed to object to this testimony, which was inadmissible as offered under the Business Records exception.

Wood v. State, 260 S.W.3d 146 (Tex. App. 2008). Counsel ineffective in DWI trial for failing to object to admission of evidence of a prior DWI conviction. Prejudice found because the evidence of guilt was not overwhelming.

Crawford v. State, 256 S.W.3d 150 (Mo. App. 2008). Counsel ineffective in murder case

for failing to consistently object to the state's repeated cross-examination of the defendant about the veracity of other witnesses.

2007: *People v. Davis*, 879 N.E.2d 996 (Ill. App. 2007), *appeal denied*, 888 N.E.2d 1186 (Ill. 2008). Counsel ineffective in murder case for failing to adequately challenge and rebut "lip print" identification testimony alleging that the defendant's lip prints were on duct tape found at the crime scene. Counsel's conduct was deficient because this was the only physical evidence against the defendant and counsel knew it should be challenged. Counsel informed the defendant's family, who did not have additional funds to retain an expert, but did not attempt to retain an expert from his retainer fees or attempt to establish the defendant's indigence and get a court-appointed expert. The court found other bases, including court's extremely ill health prior to and during trial and failing to challenge the inconsistent eyewitness testimony, and found that "the cumulative effect of his errors was prejudicial."

****Sims v. State***, 967 So. 2d 148 (Fla. 2007). Counsel ineffective in capital trial for failing to object to evidence of a "canine-alert" to drugs in a car that had been driven by the defendant at the time of the murder. The defendant had been stopped by an officer on suspicion of driving a stolen vehicle, which the defendant had borrowed but had failed to return. During the stop, the defendant shot and killed the officer. The defendant abandoned the car, which was subsequently searched. Although there was a "canine-alert" for drugs, no drugs were found in the car and there was no evidence the defendant had ever used drugs or been involved in the sale of them. Counsel's conduct was deficient in failing to object to this "canine-alert" evidence or an officer's testimony that "the dog would alert to the scent of narcotics after the drugs had been removed." Counsel objected only when the defendant's parole officer was called to testify that parole would have been revoked if the defendant had been found in possession of drugs. The court overruled this objection. Counsel's conduct was also deficient in moving to strike the "canine-alert" evidence that laid the foundation for this testimony. All of this evidence supported the state's theory that the officer was killed because the defendant possessed drugs and was attempting to avoid a return to prison for violation of parole. Counsel admitted that there was no strategic reason for the failure to object and that he knew before trial that the state intended to offer this evidence, which was irrelevant since the defendant did not own the vehicle and no drugs were actually found in the car. Prejudice found because this evidence was essential to the state's motive theory and the state repeatedly relied on it in closing arguments.

People v. Hoerer, 872 N.E.2d 572 (Ill. App. 2007). Counsel ineffective in drug and involuntary manslaughter case for stipulating to the admission of the defendant's testimony from a codefendant's trial admitting that he entered into plea negotiations with the state. Counsel's conduct was deficient because a state rule of evidence prohibited this testimony. Prejudice established because, under state law, admission of this evidence is

“considered so devastating and prejudicial to a defendant that it constitutes reversible error absent a contemporaneous objection from trial counsel and even in the fact of overwhelming evidence of guilt.” *Id.* at 578.

State v. Butcher, 866 N.E.2d 13 (Ohio App. 2007). Counsel ineffective in rape and kidnaping case for failing to adequately object to hearsay testimony. The defendant was charged with raping two sisters in the same room at the same time. One sister was five and the other was six. Almost two months after the alleged incident the sister’s reported the alleged abuse and the identity of the abuser, the boyfriend of the aunt of one of the girls, to their grandmother, who relayed the information to the mother. During trial, counsel objected to the grandmother’s testimony concerning statements the girls had made to her but the trial court improperly admitted this testimony. During the mother’s testimony, which included double hearsay of what the girls said to the grandmother, who told her, counsel failed to object, however. Counsel also failed to timely object to improper hearsay testimony of the state’s medical expert. The mother had taken the girls to a private doctor initially for treatment. On the advice of Child Services, the mother then took the children for examination at the “Child Advocacy Center” where they were physically examined and interviewed in depth by the doctor. The Detective on the case did not interview the children and deferred to the doctor’s interview. Prior to trial, counsel had filed a motion in limine to exclude the doctor’s testimony about statements of the children because these were not made for the purpose of medical treatment. The court conditionally granted this motion unless a hearsay exception was established. When the doctor’s testimony and report, which also included the hearsay statements, was offered, however, counsel failed to object. Counsel’s conduct was deficient in failing to object to the mother’s double-hearsay testimony, which was based on the grandmother’s statements that counsel had objected to, and in failing to object to the Doctor’s testimony and report because “[t]he granting of a motion in limine alone will not preserve error for review.” It was also clear here that the doctor was “a ‘manufactured witness’” that “assume[d] the role of a police investigator” and testified to hearsay statements “under the guise that they were given for the purpose of medical diagnosis or treatment.” For example, the doctor testified that the identity of the perpetrator was important medically due to concerns about sexually transmitted diseases, but clearly was not concerned about that since the girls were not tested for STD. Considering both the court’s error and the IAC, the court found the denial of a fair trial because four different adults (grandmother, mother, doctor, and detective) testified and the doctor’s report also concluded that the defendant was the perpetrator based on inadmissible hearsay. Although the girls also testified,

The prejudice arises when numerous adults repeat the girls’ stories in court. If a statement is repeated often enough, it is more believable. Additionally, the repetition has the effect of the adults’ vouching for the veracity of the statements.

Prejudice was also clear because portions of the girls' testimony were suspect because inconsistent with each other and one girl could not even identify the defendant in the courtroom and the medical evidence was equivocal because it was "consistent with" but not "diagnostic of" abuse.

Fuller v. State, 224 S.W.3d 823 (Tex. App. 2007). Counsel ineffective in sexual assault of a child and indecency with a child case for failing to object to improper testimony from four witnesses "bolstering" the 15-year-old alleged victim's truthfulness and credibility. The child's teacher testified in the state's case-in-chief that she was a credible and truthful person. This testimony was improper because the relevant rule of evidence allowed testimony concerning the victim's character for truthfulness only after her character had been attacked. The defense cross-examination of her does not "open the door" to character for truthfulness evidence. Likewise, "a defense theory of fabrication (as opposed to recent fabrication) which generally denies the charges against a defendant is not the equivalent of an attack on the victim's general character for truthfulness so as to warrant the admission of character testimony." The alleged victim's mother, an expert in child sexual assault investigations, and a forensic interviewer also testified that they believed the alleged victim's allegations against the defendant. This testimony was improper and inadmissible. Counsel's conduct was deficient in failing to object to this evidence because "counsel's conduct in allowing the State unfettered and unchecked bolstering of the victim was so outrageous that no competent attorney would have engaged in it." The failure to object was not explained by strategy or tactics. "Where counsel's strategy is premised on an incorrect understanding of the law, we need not defer to that as a reasonable strategy." Prejudice found because the alleged victim's credibility was the only real issue at trial and the repeated objectionable testimony was also "emphasized . . . to the jury during [the state's] closing argument."

State v. Hendrickson, 158 P.3d 1257 (Wash. App. 2007). Counsel ineffective in second-degree identity theft case for failing to object to hearsay testimony from a Social Security Administration special agent that the owner of the social security card stated that his card had been lost and that no one had permission to use it. These statements were not admissible as business or government records and were "testimonial" and barred under *Crawford v. Washington*, 541 U.S. 36 (2004). Counsel's conduct was deficient and not explained by strategy. Prejudice found because this was the only evidence that the defendant did not have a valid reason to possess this card. Thus, absent counsel's error, there is a reasonable probability that the defendant would have been acquitted on this charge.

2006: McIntosh v. State, 941 So. 2d 1 (Fla. App. 2006). Counsel ineffective in attempted murder case for failing to object to the improper use of demonstrative evidence and improper prosecutorial questioning and argument. The defense theory was that the defendant stabbed the victim in the neck with a pocketknife in self-defense. The stab

wound was less than 3/4 inch across but left the victim partially paralyzed. Counsel was ineffective in failing to object when, during cross examination of the defendant, the prosecutor pulled out his own knife to demonstrate his theory that the defendant could not have pulled out his knife during the struggle and had come prepared to fight. Although the defendant had used an ordinary pocketknife, the prosecutor pulled out a knife that was 8 to 10 inches long, which was 3 times larger than what the defendant had used. Counsel did not object even though this knife was not in evidence and the prosecutor had given no notice of his intent to use it. Counsel also failed to address this issue when the jury returned from deliberations and asked, "What happened to the knife? And what are its dimensions?" Counsel did not request an instruction to clarify that the knife used by the prosecutor was not in evidence and was not intended to replicate the knife the defendant used, which was also not in evidence. Instead, counsel said nothing when the court instructed that "you've heard all of the evidence you're going to hear and seen all of the evidence you're going to see." Prejudice established because the evidence of self-defense was fairly strong and the jury's question revealed that the jury was influenced by the prosecutor's improper actions. Counsel also failed to object to the prosecutor's "completely improper" question to the defendant about whether he believed one of the defense witnesses, whose testimony was mostly helpful to the defendant, but included some bad information, which the defendant denied. This error was compounded when the prosecutor repeatedly restated in his closing arguments that the defendant called his own witness a liar, again without objection. While this error alone may not have been sufficiently prejudicial to require reversal, when "added to" the other error there was cumulative prejudice.

State v. Milne, 921 So. 2d 792 (Fla. App. 2006). Counsel ineffective in sexual battery and false imprisonment case for failing to request a mistrial due to the prosecutor's unsupported allegations during closing arguments. The defendant had told police at the time of arrest, consistent with his trial testimony, that he had consensual sex with the victim. The state had successfully excluded evidence of the prior consistent statements from evidence with a motion in limine. During arguments, however, the prosecutor implied that the defendant had tailored his trial testimony after hearing all the other witnesses testify.

Rose v. State, 846 N.E.2d 363 (Ind. App. 2006). Counsel ineffective in child molestation case for failing to object to the treating physician's opinion that the victim's allegations were truthful. Prejudice found in light of the inconclusive physical evidence in the case.

Bowman v. State, 710 N.W.2d 200 (Iowa 2006). Counsel ineffective in kidnaping and assault case for failing to object to the prosecutor's repeated cross-examination questions asking the defendant if the state's witnesses fabricated their testimony. These questions were prohibited under clear state law. The defendant was prejudiced because the case depended on witness credibility to such a great extent that counsel presented two expert

witnesses to testify concerning the impaired credibility of the state's intoxicated witnesses.

State v. Roberson, 924 So. 2d 1201 (La. App. 2006). Counsel ineffective in robbery case for failing to object to admission in evidence of the defendant's letter to the prosecution and cross-examination concerning the defendant's pretrial offer to plead guilty to a lesser included offense. Counsel's conduct was deficient because counsel was unaware of the state law making this information clearly inadmissible. Prejudice found.

2004: ***Joncamlae v. State***, 598 S.E.2d 923 (Ga. App. 2004). Counsel ineffective in aggravated assault case for failing to object to tainted in-court identifications of the defendant by the two victims. Defense counsel learned only during the testimony of the victims that they had been shown a photo line-up, including the defendant's picture, the day before trial. Counsel conceded that her conduct was deficient because she was "in shock" at that point and failed to object or move for mistrial. Prejudice found because the witnesses "were not absolutely certain of their in-court identifications, and did not have excellent views of the defendants at the time of the attacks." One witness even admitted outright his reliance on the photograph of the defendant he had seen in the prosecutor's office.

Collier v. State, 596 S.E.2d 795 (Ga. App. 2004). Counsel ineffective in aggravated assault case for failing to object to the prosecutor's improper comments during closing argument. The defendant was charged in connection with several unrelated bar fights that he initiated. During the trial, evidence was admitted concerning two similar incidents, one of which resulted in a guilty plea to terroristic threats. The defendant claimed self defense or defense of others with respect to all four incidents. During the closing argument, the prosecutor, without objection, commented that he had taken part in a negotiated plea with respect to defendant's prior conviction for terroristic threats and was now asking for the jury's "forgiveness" for making the deal, which involved no confinement time, and that the jury should ensure confinement to protect the community from future danger. The prosecutor's arguments were impermissible use of similar transaction evidence and argument on future dangerousness, which was irrelevant to guilt or innocence. Counsel did not object solely because of his policy not to object in closing argument absent "blatant" error because objection just draws attention to the argument. The court rejected this as a "reasonable trial tactic" because of numerous state cases rejecting these same arguments as improper. Prejudice found, "not because the jury would have reached a different verdict, but because the case would never have been submitted to it for deliberation if defense counsel had moved for a mistrial."

People v. Jura, 817 N.E.2d 968 (Ill. App. 2004). Counsel ineffective in use of weapon by felon case for failing to object to the admission of hearsay portions of a radio call and to the prosecution's use of that evidence. Three police officers testified and included hearsay statements identifying the suspect in initial radio calls about the incident. They further

testified that the defendant matched these initial descriptions and the state relied on this testimony in closing argument, without objection, even though the court had sustained an objection to the testimony about the match. Prejudice found because the trial amounted to a credibility contest between the three officers and the defendant but the improper hearsay was repeatedly used by the state in argument and evidence as substantive evidence from a “concerned citizen” that made the radio call but never testified at trial.

People v. Young, 807 N.E.2d 1125 (Ill. App. 2004). Counsel ineffective in first degree murder case involving a shooting at a backyard barbecue where the defense was self-defense because counsel failed to object to the prosecutor’s improper questions to the defendant and argument. The prosecutor improperly questioned the defendant concerning the veracity of other witnesses, confused the jury about the state’s burden of proof, cross-examined the defendant about his post-arrest silence and prior bad acts, improperly vouched for witnesses and injected his own opinions in the proceedings. Counsel was also ineffective for admitting during cross-examine that he lacked the expertise to adequately cross-examine the state’s pathologist, but failing to ask for a continuance that would likely have been granted. The cross of the expert actually bolstered the testimony of the expert. Counsel was also ineffective in failing to order gunshot residue tests of the victim’s clothing, which the state had declined to order. The court declined to address whether each instance of deficient conduct would require reversal on its own because “[t]he process was tainted by the prosecution such that the arguable failures of the defense acting in concert therewith denied this defendant a fair trial.

Peterson v. State, 149 S.W.3d 583 (Mo. App. 2004). Counsel was ineffective in second degree murder case for failing to object to the prosecutor’s improper rebuttal closing argument that suggested that the state had more than one eyewitness implicating the defendant, although only one eyewitness testified. Counsel’s conduct was deficient because the prosecutor’s argument was not supported by the evidence. Prejudice was found because “a prosecutor’s assertions of personal knowledge . . . are apt to carry much weight against the accused when they should carry none. . . .” The improper arguments were “especially troublesome” in this case because there was no physical evidence implicating the defendant and the only eyewitness was a convicted felon with credibility problems.

Vaughn v. State, 607 S.E.2d 72 (S.C. 2004). Counsel was ineffective in drug case for failing to object to the prosecutor’s closing argument stating what uncalled witnesses would have testified to. The state presented only the testimony of the arresting officer to support a finding that the defendant possessed drugs. In response to defense counsel’s argument that there had been another officer in the car at the scene who did not testify, the prosecutor argued that the other officer would have testified consistently if called to testify. Although the prosecutor was entitled to “some response” to the defense argument, the prosecutor’s argument was unfair. Prejudice was found because the state’s evidence

was limited to the arresting officer. Moreover, during deliberations, the jury asked to see the “testimony” of the officer who was not called to testify.

Roberts v. State, 602 S.E.2d 768 (S.C. 2004). Counsel was ineffective in murder case for failing to adequately impeach a jailhouse snitch, who testified that he was 10 feet away in the cell next to the defendant in pretrial confinement and the defendant confessed to him. While counsel discussed with the defendant that the conversation was impossible due to the layout of the cells, counsel did not question the snitch about this or present any evidence on the issue. Counsel’s conduct was deficient because, if counsel had adequately prepared and presented the evidence, the evidence would have established that the snitches’ cell was 35-100 feet from the defendant and the cell block was extremely noisy. Any conversation between the snitch and the defendant would have been heard by numerous guards and inmates because the defendant would have had to yell to be heard over the noise. Although a “close case,” prejudice found because the snitch was a key witness and the state’s remaining evidence consisted almost entirely of testimony of a codefendant who had made four contradictory statements, including implicating a clearly innocent man in three of those statements. The jury had also asked “who was on trial” during deliberations.

Sessums v. State, 129 S.W.3d 242 (Tex. App. 2004). Counsel ineffective in indecency with a child case for failing to object to inadmissible expert testimony that improperly commented on the alleged victim’s truthfulness. The evidence at trial showed that the alleged victim’s mother found the five-year-old boy performing oral sex on her husband’s stepfather. Child Protective Services (CPS) investigated. During interviews of the victim, he stated that he was also sexually abused by the Defendant, who was his paternal grandfather. At trial, the State’s evidence consisted of testimony of four expert witnesses and the testimony of the victim’s step-grandfather, who said the victim had told him his bottom was sore because the Defendant had been “playing with it.” Each of the experts testified about the alleged victim’s statements to them and were then asked to explain and then to comment directly on the factors they used in determining if this child was telling the truth. This testimony was inadmissible. Counsel’s conduct was deficient “in failing to object to [this] clearly and unquestionably objectionable testimony of the most outrageous and destructive type. There is no conceivable strategy or tactic that would justify allowing this testimony in front of a jury.” Prejudice found because the entire trial hinged on statements of the alleged victim, who did not even testify, and the state specifically argued in closing that the child must be truthful because he had convinced these four experts.

2003: *Orr v. State*, 584 S.E.2d 720 (Ga. App. 2003). Counsel ineffective in statutory rape case for failing to object to police officer’s testimony that impermissibly bolstered the credibility of the alleged victim where credibility was a major issue on the element of penetration.

State v. Graves, 668 N.W.2d 860 (Iowa 2003). Counsel was ineffective in manufacturing and possession of marijuana case for failing to object to the prosecutor asking the defendant whether a police officer was lying, failing to object to the prosecutor's argument in which he accused the defendant of calling the officer a liar, and failing to object in the prosecutor's rebuttal argument when he repeatedly characterized the defendant as lying. In addition, the prosecutor improperly called the defense argument a "smokescreen," improperly asserted that the police officer had no motivation to lie because he would keep his job regardless of the outcome of the case, argued that he personally did not leave cash at other people's homes, and inaccurately declared that if the jury believed the police officer it would have to find the defendant guilty. The court found that all of these arguments were improper and that counsel could not reasonably have concluded that failing to object was sound trial strategy. Prejudice was found because the police officer's and the defendant's credibility were the primary issue in the case, and the state's case was relatively weak and circumstantial outside of the credibility issue.

5. IMPEACHING WITNESS

a. U.S. Court of Appeals Cases

2008: *Brown w. Smith*, 551 F.3d 424 (6th Cir. 2008). Counsel ineffective in sexual molestation of teenage daughter case for failing to investigate and obtain daughter's counseling records. Counsel's conduct was deficient because the state's case depended almost entirely on the daughter's credibility and counsel knew that the counselor, who saw the daughter both before and after the alleged assault, did not believe her. Counsel's alleged belief that the counselor would not have been a credible witness did not excuse the conduct.

[O]ur quarrel is not with trial counsels' decision to forego calling [the counselor] as a witness *per se*, but rather with the lack of any reasonable, timely investigation into what she might have offered the defense. Without ever seeking *in camera* review of the counseling records, . . . counsel could not reasonably have determined what value, if any, those records might have been to his defense, and could not properly have weighed the potential benefit of calling [the counselor] to the stand (whatever her perceived credibility) against the potential risk. Moreover, even if [the counselor] were never called as a witness, defense counsel could still have used the counseling records to impeach the daughter on cross-examination. But by the time defense counsel met directly with [the counselor] (for two to three minutes on the third day of trial), the daughter had already testified, and the opportunity to

impeach her testimony directly had passed.

Prejudice established because the records also revealed inconsistencies in the daughter's statements to the counselor and her trial testimony. The court reviewed the issue *de novo* rather than under AEDPA's standards because the state court did not adjudicate this claim on the merits because the state court did not have the daughter's records before it through no fault of the defendant who had requested hearings and discovery and been denied until federal court.

2006: *Higgins v. Renico*, 470 F.3d 624 (6th Cir. 2006) (*affirming Higgins v. Renico*, 362 F. Supp. 2d 904 (E.D. Mich. 2005)). Under AEDPA, counsel was ineffective in murder case for failing to cross-examine the key prosecution witness because of lack of preparation. The defendant and the state's witness were the only people present when the victim was shot. The defendant made a statement, which was admitted in evidence, that the state's witness shot the victim. The witness, who said that the defendant was the shooter, did not show up for his scheduled testimony during trial and his preliminary hearing testimony was read into the record. Two days later, the witness showed up and testified. Counsel informed the court that he had been provided with the witness' two prior statements several days before but had not reviewed the statements or prepared for cross-examination. The court recessed for 30 minutes, but counsel informed the court that he still was not prepared. The court would not delay longer and counsel asked no questions on cross-examination. The state court made a conclusory finding that there was no prejudice but did not address the issue of deficient conduct so this issue was reviewed *de novo*. Counsel's conduct in failing to adequately prepare for cross-examination was deficient and not justified by strategy. Prejudice was found because the witness at issue was the only witness that directly implicated the defendant as the shooter. There was no cross even though the witness (1) had a strong interest in the jury's finding since he was the only other person present at the time of the shooting; (2) had made two prior statements with inconsistencies; and (3) had gunshot residue on his hands after the shooting. In addition, the failure to challenge the testimony left the impression that the defense accepted the testimony. Likewise, the witness testified that he had not shown up earlier in the trial because he had been threatened by "people" and the failure to cross-examine left the impression that the threats came from the defendant when there was no evidence to support that inference. Finally, the preliminary cross-examination testimony was inadequate because counsel had been conducting only non-confrontational discovery at that time. In its AEDPA analysis, citing *Strickland*, the court held that the state court's finding of no prejudice was an unreasonable application of Supreme Court precedent.

Reynoso v. Giurbino, 462 F.3d 1099 (9th Cir. 2006). Counsel ineffective in murder case for failing to cross-examine state witnesses about their motivation for testifying. The crime went unsolved for two years and then a jail house snitch, after seeing

advertisements about a \$25,000 reward on television, contacted police saying the defendant had confessed to him shortly after the crime. After another year, with the reward still being advertised on television and in newspapers, the police reinterviewed a witness interviewed the night of the murder and another witness, who allegedly saw the defendant near the scene the night of the murder, contacted the police. Although there was no physical evidence, both of these witnesses also identified the defendant. During trial, counsel cross-examined the snitch about his motivation in seeking the reward (\$10,000 of which he ultimately collected). Although counsel cross-examined the other two witnesses on other matters concerning credibility, counsel did not cross-examine them about the reward motivation. Counsel's conduct was deficient in failing to investigate or to question the witnesses on this matter because counsel knew about the reward. Prejudice was found because, if counsel had asked, she would have learned that both witnesses were aware of the reward and had asked police about it. Thus, they "may have had a motive to lie." (Both witnesses did ultimately collect \$7,500 each). Prejudice was also clear because the prosecutor emphasized in closing that these witnesses had no bias and "that neither had any reason or motive to lie." Under AEDPA, the state court's decision was an unreasonable application of federal law. *Id.* at ___ (citing *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000)).

b. U.S. District Court Cases

2004: *Harris v. Senkowski*, 298 F. Supp. 2d 320 (E.D.N.Y. 2004). Counsel was ineffective in second degree robbery case for failing to challenge the testimony of the robbery victim with her prior inconsistent description of the robber. Only thirty minutes after the robbery, the victim described her assailant as a black male standing 5'4" tall and weighing 130 pounds. The next evening, the victim, who was Asian, rode around the neighborhood with police officers and identified the defendant, who was then arrested. The defendant was 6' tall and 220 pounds. Prior to trial, counsel moved to suppress the identification as being unduly suggestive, but counsel never addressed the victim's prior description and the motion was denied. During the trial, the victim and the police officer that drove her around were the only state's witness. Counsel did not cross-examine the victim concerning her prior description of the defendant even though his sole argument in defense was mistaken identification. The defendant never squarely claimed that trial counsel was ineffective on this basis in state court and, therefore, the state courts never ruled on the issue. The government explicitly waived any procedural or exhaustion issues though. Analyzing the case under pre-AEDPA standards, the court found that counsel's conduct was deficient and that "[a] more compelling example of ineffective representation is difficult to fathom." While counsel alleged strategic reasons for his failure, the court found that each reason was "ludicrous." Even if counsel chose not to cross-examine the victim for an alleged strategy, counsel still could have offered the complaint report into evidence as a business record or called the police officer that took the complaint as a witness. Prejudice found because the government's case rose or fell on

the strength of the victim's testimony, but the jury never heard about her prior, strikingly inconsistent identification in the case.

c. State Cases

2008: *Miller v. State*, 665 S.E.2d 596 (S.C. 2008). Counsel ineffective in armed robbery case for failing to cross-examine the defendant's girlfriend, a state witness, regarding the similarities of three armed robberies she and the defendant's nephew were charged with. Specifically, the girlfriend's car was used in each robbery, a similar handgun was used, and the victim's description of the assailant more closely matched the nephew than the defendant. Prejudice established because the defense argued mistaken identity and third-party guilt, which was the primary defense. In addition, the girlfriend's credibility was "questionable at best" because she had initially implicated the defendant in an armed robbery, in which she and the nephew were charged, before she learned he could not have committed the crime because he was in jail at the time.

Millam v. State, 745 N.W.2d 719 (Iowa 2008). Counsel ineffective in sexual abuse case for failing to present evidence of the alleged victim's prior, false accusation of sexual abuse. The alleged victim was the daughter of the defendant's girlfriend and she had previously alleged sexual abuse by her mother's previous boyfriend but then recanted the accusation. Counsel made no attempt to present this evidence even though there was no physical evidence and no witnesses other than the alleged victim. Counsel believed the evidence was inadmissible under the rape-shield law which excluded evidence of "past sexual behavior" of the victim. The Iowa court had held, prior to the enactment of the rape-shield law, that prior false allegations were not inadmissible under general relevance considerations, but had not addressed the issue under the statute at the time of the defendant's trial. The court subsequently held that prior false allegations are not "sexual behavior" prohibited by the statute and this evidence is admissible if the defendant making a showing that the alleged victim made the statements and the statements were false, based on a preponderance of the evidence. Counsel's conduct was deficient because "the test to determine whether counsel is required to raise an issue" is based on "a normally competent attorney." "This test does not require an attorney to be clairvoyant, but rather to research the relevant legal issues and determine whether, given the circumstances of the particular case, the issue is 'worth raising.'" Here counsel conducted no research. If he had researched, he would have found "that many jurisdictions had concluded that prior false claims of sexual abuse were not protected by their rape-shield laws." In addition the plain wording of the statute was clear because "it refers to sexual behavior, and quite simply, claims of sexual abuse are not sexual behavior." Prejudice was clear in that this evidence "could have greatly impugned" the alleged victim's credibility. This was especially so since "her own mother doubted her claims . . . due to her prior false claims."

- 2007:** *State v. Lamb*, 651 S.E.2d 504 (Ga. App. 2007). Counsel ineffective in sexual battery of sister-in-law case for failing to obtain the criminal records and cross-examine a state's witness with her prior convictions for theft and forgery. Counsel's conduct was deficient because his only reason for not obtaining the records was that he asked the defendant to obtain them and "the ultimate responsibility for ensuring a thorough investigation lies with trial counsel" rather than the defendant or an investigator. Prejudice found because the witness was the alleged victim's sister testifying as a similar transaction witness that the defendant had previously molested her. The jury convicted only of a lesser included offense, there was evidence the alleged victim had a motive to lie, and the alleged victim's sister filed for divorce before the allegations were made.
- 2006:** *J.J. v. State*, 858 N.E.2d 244 (Ind. App. 2006). Counsel ineffective in burglary and theft case for failing to inform the jury that the defendant's alleged accomplice had been granted use immunity. Prejudice found because the witness' testimony was of great consequence to the jury's consideration of the case and the prosecutor commented that the witness had "cooked himself" by his testimony that he had participated in the crime with the defendant, implying that the witness was credible because he would suffer for his own admission when the prosecutor knew he would not.
- 2005:** *Thompson v. Commonwealth*, 177 S.W.3d 782 (Ky. 2005). Counsel ineffective in reckless homicide and persistent felony offender case for failing to challenge the accident reconstruction testimony of the investigating officer. The case involved the death of an eight year old child that ran into the street chasing a puppy and was hit by the defendant's motorcycle. Testing revealed alcohol in the defendant's blood, along with traces of marijuana, pain reliever, and anti-depressant medication. The investigating officer used an English study based on the running speed of eight year olds, distance, and the defendant's estimated speed and concluded that the defendant should have been able to stop with 26 feet to spare. Even without a defense expert, counsel should have realized that the officer made a mathematical error and his own formula would have revealed that the defendant could not have stopped his motorcycle until 40 feet after the point of impact. Counsel did not retain his own expert because the defendant consistently told him that he never saw the child before the impact. Thus, counsel believed the possible braking distance was irrelevant. Counsel's conduct was deficient because his only defense was that the accident was unavoidable and counsel knew that the prosecution would rely on the officer's testimony that it was avoidable with normal reaction times. It was unreasonable to fail to attempt to challenge this testimony because "jurors are undoubtedly greatly influenced by the testimony of someone deemed an 'expert.' This is especially true if the only countervailing testimony comes from the defendant, the sole person with a strong motive to lie (if the truth would deem him guilty of the crime charged)." In addition, the expert's testimony was so clearly erroneous in this case that "a non-mathematical expert discovered it on simple review of the calculations." Prejudice found because if counsel had performed adequately, the expert would have had to admit

that the defendant “could not have stopped” in time.

6. ELICITING DAMAGING EVIDENCE AND MAKING DAMAGING ARGUMENT (State Cases Only)

2007: *People v. Bailey*, 872 N.E.2d 420 (Ill. App.), *appeal denied*, 879 N.E.2d 933 (Ill. 2007). Counsel ineffective in bench trial for possession of crack with intent to distribute for eliciting damaging evidence in cross-examination. A police officer testified that he observed an “unknown person” yelling “Rocks” to passing cars. When cars stopped, he would direct them to an alley where the defendant would exchange money for drugs. The officer witnessed four such transactions in about 35 minutes before arresting the defendant who had cash and drugs on him. Counsel’s conduct was deficient because during cross counsel elicited further information that the officer witnessed the defendant provide money to the “unknown person” several times and included that information in his case report, which counsel either had not read or did not think about. Counsel’s lack of knowledge of the report, failure to move to strike the officer’s initial non-responsive answer, and “digging the hole deeper” with further questioning was not explicable by any valid trial strategy. Prejudice found because this was “key” evidence in the case and the trial court clearly relied on it and said so.

Robertson v. State, 214 S.W.3d 665 (Tex. App. 2007). Counsel ineffective in aggravated assault case for eliciting testimony from the defendant that he was incarcerated on two convictions and that he was in possession of a knife at the time of the previous arrests. Prejudice found because this testimony opened the door for the state to elicit testimony on cross-examination that the defendant had two prior drug convictions with “deadly weapon findings on both charges.” The state used this evidence in argument to undermine the defendant’s credibility in arguing self-defense.

2006: *Glancy v. State*, 941 So. 2d 1201 (Fla. App. 2006). Counsel ineffective in burglary with a sexual battery case for eliciting damaging character evidence against the defendant. Specifically, counsel’s conduct was deficient for eliciting testimony from the alleged victim that she did not like the defendant because he gave her minor children pot, booze, and cigarettes and because she believed that he had been breaking into her house for two years, stealing her underwear, and leaving “dirty magazines” behind. Counsel also elicited testimony from her son that the alleged victim did not like the defendant because he had been “in and out of prison.” Prejudice found.

Bowers v. State, 929 So. 2d 1199 (Fla. App. 2006). Counsel ineffective in burglary and grand theft case for questioning the defendant concerning his prior criminal convictions and eliciting numerous details that the State would not have been entitled to elicit since the state’s examination would have been limited to the number of felony convictions or convictions for misdemeanors involving dishonesty or false statement. Prejudice found

because there was no physical evidence and the trial hinged on credibility issues. By eliciting information concerning prior convictions for burglary and grand theft, trial counsel impugned his client's credibility in front of the jury. While counsel's strategy to be completely candid with the jury so that the defendant's testimony would be more believable, "counsel's execution of the strategy defeated the intent" because the information was presented in such a manner, due to counsel's failure to properly prepare with the defendant, that it appeared the defendant was trying to withhold some information. Thus, the court held "that counsel's strategy to bolster his client's credibility with candor was 'patently unreasonable.'"

2005: *Whitaker v. State*, 622 S.E.2d 916 (Ga. App. 2005). Counsel ineffective in burglary case for introducing an unredacted copy of previous convictions for two of the state's key witnesses that also showed that the defendant had been charged with the same crimes (possession of tools for the commission of a crime, criminal trespass, and burglary). Counsel's conduct was deficient and not explained simply by counsel's strategy to impeach the witnesses. Counsel "did not offer any explanation for failing to redact the exhibits, which she knew implicated her client in other crimes." Prejudice found because the state's case rested primarily on the testimony of these two alleged accomplices. The evidence showing that the defendant had been previously charged along with these witnesses was especially damaging because it "may have caused the jury to give additional credence to the testimony of the state's star witnesses."

People v. Orta, 836 N.E.2d 811 (Ill. App. 2005), *appeal denied*, 844 N.E.2d 970 (Ill. 2006). Counsel ineffective in bench trial for possession of drugs with intent to deliver drugs case for eliciting testimony from police officers that enabled the State to prove an essential element of the charge. Counsel's conduct was deficient because counsel elicited information that a prior "control transaction" in which the defendant sold drugs to an informant, over the state's objection. Counsel also elicited testimony that there were a lot of male clothes in the apartment (when the defendant's argument was that he had no control or possession) and the drugs were found in a shaving bag, along with money, a scale, and the defendant's mail, which the state later attempted to move into evidence. Counsel's conduct was deficient. "A person charged with a crime has the right to expect his lawyer's questions to prosecution witnesses will not help the State prove its accusations." Prejudice found primarily because counsel elicited testimony about the prior "control transaction" with the state objecting and the trial court trying to discourage counsel from presenting this evidence. Counsel's reason for offering this evidence was because he was attacking the officer's credibility. The court rejected this as a valid strategy. This evidence was prejudicial because the court relied on it in finding an intent to deliver. The evidence about the clothes was also prejudicial because the court relied on it in finding constructive possession. Without all of the evidence elicited by the defense counsel the state's case for possession was solely that the defendant had keys to the apartment where the drugs were found.

2004: **State v. Davis*, 872 So. 2d 250 (Fla. 2004). Counsel ineffective in capital case for his statements during voir dire expressing racial animus and admitting his own racial prejudice where the Defendant, an African-American male who was 22 at the time, was accused of stabbing to death a 73-year-old white woman, but there was no apparent racial motivation for the crime. During voir dire counsel stated, “Sometimes I just don’t like black people. Sometimes black people make me mad just because they’re black.” In closing in sentencing, counsel reminded the jurors that none had expressed the same feelings and that they promised not to consider race. Counsel’s strategy in making the comments was to get the jurors to “drop the mask” and acknowledge hidden feelings about race. The court found that “an explicit expression of racial prejudice can[not] be considered a legitimate tactical approach. Whether or not counsel is in fact a racist, his expressions of prejudice against African-Americans cannot be tolerated.” Prejudice was found because “the expressions of racial animus voiced by trial counsel” would have “unnecessarily tended either to alienate jurors who did not share his animus against African Americans . . . or to legitimize racial prejudice without accomplishing counsel’s stated objective of bringing latent bias out into the open.” Counsel’s expressions of racial bias also may have affected his performance in both the guilt and penalty phases of trial. In the guilt phase, trial counsel rested without presenting a case, rather than present two African-American witnesses whose testimony would have implicated others in the murder because another white witness would contradict their testimony and counsel found the white witness to be more credible. The trial court also found counsel to be ineffective in sentencing for failing to obtain records and witnesses and never visiting the Defendant’s family or neighborhood.

**People v. Morris*, 807 N.E.2d 377, *overruled on other grounds*, 813 N.E.2d 93 (Ill. 2004). Counsel ineffective in capital case for discussing in great detail an unrelated murder committed by the defendant in opening, even though the trial court had previously agreed to exclude all evidence of the unrelated murder from trial. Defendant was charged, along with several codefendants, with the robbery and murder in Chicago of someone believed to be a drug dealer. Several days before, the defendant had killed a man in a drug-deal gone bad scenario. In opening counsel conceded the defendant’s participation in the charged crimes and discussed the unrelated murder in great detail. The defendant subsequently testified with respect to his involvement in both murders and the state offered evidence on both. In closing argument, the State repeatedly reminded the jury of the unrelated murder. Counsel conceded guilt in opening because her strategy was to minimize the defendant’s culpability and essentially plead for jury nullification. While this was a proper strategy, in light of the significant evidence against the defendant, the problem in this case is that counsel also conceded guilt to an unrelated murder that had been excluded from the state’s case prior to trial. Counsel did so because she misunderstood the court’s pretrial ruling to allow the state to use this evidence in rebuttal. Likewise, the defendant’s acquiescence was immaterial because it was undoubtedly based on the same misunderstanding. Thus, counsel’s actions “were not the product of an

informed, strategic choice. Rather, these actions were the product of a mistaken belief that the trial court had ruled evidence of the [unrelated] murder admissible at trial when, in fact, the trial court had ruled just the opposite.” Prejudice was found because of the “severe repercussions at trial.” First, counsel’s jury nullification strategy was dependent on the jury sympathizing with the defendant to some extent. This strategy was completely destroyed by evidence of the defendant’s guilt of the unrelated murder committed just 36 hours before the charged offense. Thus, counsel’s actions “eviscerated the minimal trial strategy that was available to her.” “Counsel’s deficiencies in this case are distinguishable from typical trial error ‘not [in] degree but [in] kind.’ *Bell v. Cone*, 535 U.S. 685, ----, 122 S.Ct. 1843, 1851, 152 L.Ed.2d 914, 928 (2002). For in all practical effect, as a result of defense counsel’s actions, defendant stood before the jury throughout the trial with no defensive strategy whatsoever.”

State v. Barr, 814 N.E.2d 79 (Ohio App. 2004). Counsel was ineffective in fleeing and eluding case for opening the door in cross-examination of a police officer to admission of the defendant’s statements that had previously been suppressed as involuntary. Prejudice found because without the statements there was no evidence the defendant knew he was being followed by police.

2003: *Emilio v. State*, 588 S.E.2d 797 (Ga. App. 2003). Counsel was ineffective in drug trafficking case for admitting evidence of bad character. The defendant and his girlfriend had been arrested following a traffic stop for drugs found in the car. The girlfriend, who had been driving, pled guilty to a lesser offense and testified at the defendant’s trial. During cross-examination of her, counsel offered into evidence a letter the girlfriend had written the defendant, which revealed that the girlfriend had asked the defendant to commit a crime, but also included a statement that the defendant was wanted in five different states. Counsel was ineffective for failing to redact the damaging portions of the letter or to even inform the jury that the defendant was not actually wanted in five states. Counsel’s conduct was prejudicial because the bad character evidence created a reasonable probability that the outcome would have been different since the evidence of the defendant’s guilt was not overwhelming.

7. CONCEDING GUILT/CONTRADICTING CLIENT (State Cases Only)

2004: *In re Welfare of B.R.C.*, 675 N.W.2d 348 (Minn. App. 2004). Counsel ineffective in juvenile damaging property case where counsel conceded the juvenile’s guilt of shooting at a pickup truck and the record failed to show that the juvenile consented in this strategy. The court declined to assume acquiescence. “Given a juvenile’s lack of maturity, we believe that a juvenile defendant’s consent should be express and placed on the record before a concession of guilt can be made.” Counsel’s concession was inconsistent with the juvenile’s prior statements to police and the statements of his accomplices. Counsel’s references to admissions in the juvenile’s withdrawn guilty plea were improper, because

evidence regarding a withdrawn guilty plea may not be admitted in a criminal trial under state law. Counsel apparently made the concession in an attempt to convince the court to find the juvenile guilty of a misdemeanor and avoid a felony conviction. “While it may be a reasonable trial strategy to concede an adult defendant’s guilt to a lesser-included offense in the hope of persuading the fact finder to acquit him or her of the greater charge, juvenile dispositions are not necessarily tied to a misdemeanor/felony distinction. Thus, the strategy of appellant’s attorney was not reasonable in this juvenile proceeding.” Counsel also incorrectly assumed that by conceding guilt to a misdemeanor, the juvenile could not be held accountable for the entire amount of restitution.

***State v. Matthews**, 591 S.E.2d 535 (N.C. 2004). Prejudice presumed in capital trial where defense counsel conceded the defendant’s guilt to second degree murder without the defendant’s consent, which must be established by “more than implicit consent based on an overall trial strategy and the defendant’s intelligence.”

People v. Washington, 785 N.Y.S.2d 885 (N.Y. Co. Ct. 2004). Counsel ineffective in robbery case for conceding guilt to a lesser included offense where the defendant did not consent and objected during the trial to counsel’s strategy. While counsel’s strategy was sound, “an attorney cannot concede guilt at trial . . . without consent of the accused” because this is the equivalent of a guilty plea which “must be entered voluntarily by the defendant.” While the court acknowledged that most courts reviewing this issue require a showing of prejudice under *Strickland* and that such an analysis might result in affirmance, the court held that New York courts have declined to follow *Strickland* because “the state constitution has been interpreted to set a higher standard of effectiveness for criminal attorneys than the federal constitution.” Here, counsel’s concession not only denied the effective assistance of counsel but also denied the defendant a fair trial because the state was not required to prove identification.

9. INSTRUCTIONS

a. U.S. Court of Appeals Cases

2008: Thompkins v. Berghuis, 547 F.3d 572 (6th Cir. 2008). Under AEDPA, counsel ineffective in murder case for failing to request a limiting instruction to inform the jury that evidence of the accomplice/witness’ conviction on weapons charge (although acquitted on murder) and subsequent pleas on additional weapon charges could be considered only in evaluating the witness’ credibility and not as substantive evidence of guilt. Counsel’s conduct was deficient and not reasonable strategy, especially in light of the defense theory that the accomplice was the actual shooter and the defendant had merely been present. Prejudice established because the jury heard of the accomplice’s acquittal from multiple witnesses, which likely exerted a powerful influence on the jury to convict [the defendant] of murder” because otherwise the jury “knew that no one

would be convicted. “Most importantly, in the absence of a limiting instruction, the jury could well have believed that it was entirely proper to weigh [the accomplice’s] acquittal as significant evidence that [the defendant] must have been the shooter.” The state court “applied *Strickland* in an objectively unreasonable manner . . . because its analysis of prejudice was fundamentally flawed” because it focused on the prosecution’s intent in offering the evidence. “Questions of the prosecution’s purpose or intent are completely irrelevant in an [sic] analyzing whether an error resulted in prejudice, which by definition concerns the error’s effect upon the *outcome*.”

2005: *Cox v. Donnelly*, 432 F.3d 388 (2nd Cir. 2005). Counsel ineffective in second degree murder case for failing to object to an erroneous jury instruction that impermissibly shifted to the defendant the burden of proving that he did not intend “the ordinary consequences of his voluntary acts.” The failure was due to counsel’s “ignorance of the law on point.” Under AEDPA, the state court holding was an unreasonable application of *Strickland*.

2004: *Reagan v. Norris*, 365 F.3d 616 (8th Cir. 2004). Counsel ineffective in first-degree murder case for failing to object to the trial court’s instructions that failed to include an essential element of the crime – that the defendant “knowingly” caused the death. Counsel conceded that the failure to object was not strategic. Analyzing the case under the AEDPA, the court found that counsel’s conduct was deficient and prejudicial because the jury could have believed every aspect of the defense case (that the death was accidental) and still convicted of first-degree murder under the erroneous instructions.

b. U.S. District Court Cases

2005: **Baker v. Horn*, 383 F. Supp. 2d 720 (E.D. Pa. 2005). Counsel was ineffective in capital trial for failing to object to the trial court’s instructions that permitted the jury to convict the petitioner of first degree murder under an accomplice liability theory without finding that the petitioner himself possessed the specific intent to kill, which was a required element under Pennsylvania law. Counsel’s conduct was deficient because the state law was clearly established at the time of trial. Prejudice was found even though the jury could have convicted the petitioner either as a principal or an accomplice because the verdict sheet did not reveal which theory the jury used and the evidence was contradictory concerning the identity of the shooter. Although AEDPA applied the state court had not addressed the merits of this claim and the court reviewed the issues de novo.

c. State Cases

2008: *Michel v. State*, 989 So. 2d 679 (Fla. App. 2008). Counsel ineffective in simple battery case for failing to request an instruction on justifiable use of non-deadly force, which negated the defendant’s self-defense argument.

Stoute v. State, 987 So. 2d 748 (Fla. App. 2008). Counsel ineffective in attempted murder case for failing to object to forcible felony instruction, which was not applicable and deprived him of his theory of self defense. This instruction is only appropriate when the accused is charged with at least two criminal acts, the act for which the accused is claiming self defense and a separate forcible felony. Here, the defendant was charged with one crime, the shooting, and no other forcible felony. The state supreme court reached this conclusion in an opinion issued after this trial, but “[i]t does not follow . . . [that] it constituted a change in the law.” The decision was based on a statute and the court had not previously construed the statute in a contrary manner. Thus, counsel’s conduct was deficient and prejudicial.

People v. Gonzalez, 895 N.E.2d 982 (Ill. App. 2008). Counsel ineffective in sexual abuse case for failing to object when the jury was not adequately instructed on the state's burden to disprove the affirmative defense, a reasonable belief that the victim was 17 years of age or older. The relationship began when the victim was 14 and the defendant 23, but there was conflicting evidence on whether she ever told the defendant her age. The charges arose when the 16 year old victim became pregnant with the defendant’s child. The trial court held that the evidence was sufficient to support the affirmative defense and agreed to give the necessary instruction. In the instructions, however, the court did not define “reasonable belief” and did not instruct on the State’s burden to disprove the affirmative defense. Counsel’s conduct was deficient. “Where defense counsel argues a theory of the case, such as an affirmative defense, but then fails ensure that the jury is properly instructed on that theory, that failure cannot be called trial strategy.” Prejudice found.

Tisdale v. State, 662 S.E.2d 410 (S.C. 2008). Counsel ineffective in murder case for failing to request charges on involuntary manslaughter and accident. Counsel’s conduct was deficient because the defendant’s testimony supported the involuntary manslaughter charge by providing evidence of a struggle over a weapon and supported an accident charge because of an accidental discharge of a gun with the defendant lawfully armed for self-defense.

Lowry v. State, 657 S.E.2d 760 (S.C. 2008). Counsel ineffective in murder case for failing to object to a burden-shifting instruction on malice. The court initially gave proper instructions but because of the state’s concern that the court had failed to instruct on felony murder, the court gave a supplemental instruction. While the initial charge contained permissive language allowing the inference of malice from participation in a felony, the supplemental charge created a presumption of malice from participation in a felony and shifted the burden of proof to the defendant. This charge was improper, was not alleviated by the early proper charge, and was especially problematic as “the last thing the jurors heard before beginning deliberations.” Counsel’s conduct was deficient in failing to object. Prejudice also established because the error was not “harmless” beyond a reasonable doubt. There was “little direct probative evidence of malice” in the

defendant's statements and other evidence was questionable or minimal, such that "the only undisputed relevant facts . . . are that Petitioner was near the scene of the crime at the time it occurred, but was neither the gunman, nor in the getaway car."

2007: *Nickens v. State*, 981 So. 2d 1165 (Ala. Crim. App. 2007). Counsel ineffective in theft of property case for failing to request an instruction defining the term "deprive" and failing to object when the trial court failed to give this instruction when the defense theory was that the defendant used the vehicle to escape from police but did not intend to permanently deprive the owner of the property, did not damage it, and merely abandoned it not far from the scene of the theft.

Sipple v. State, 972 So. 2d 912 (Fla. App. 2007). Trial counsel ineffective in manslaughter case for failing to challenge the trial court's instruction that the use of deadly force was not justified if the defendant was committing a forcible felony. This instruction is permissible only when the defendant is charged with at least two criminal acts, the act for which the accused is claiming self-defense and a separate forcible felony. Prejudice found because this instruction essentially negated the self-defense claim.

Berdecia v. State, 971 So. 2d 846 (Fla. App. 2007). Counsel ineffective in manslaughter and battery case for requesting an erroneous charge on manslaughter. The defendant was on trial with a codefendant. They had fought with two other men and the co-defendant shot and killed one of them. Both were charged with second degree murder. The co-defendant was convicted, but the defendant was convicted of the lesser included offense of manslaughter. Counsel's conduct was deficient because counsel requested a charge that repeatedly informed the jury that the defendant could be convicted based on his acts and intentions "and/or" his co-defendant's acts and intentions. State law held that "and/or" instructions can result in fundamental error. Prejudice was established because the jury could have convicted the defendant based solely on the acts and intentions of the co-defendant even if the jurors thought the defendant was innocent with regard to the death.

Aversano v. State, 966 So. 2d 493 (Fla. App. 2007). Counsel ineffective in grant theft case for failing to seek instruction on good faith defense or advice of counsel defense. Following several major impacts in the area, the defendant allowed a third-party to temporarily store restaurant equipment in her garage. There was no agreement on length of time. Subsequently, she notified the third-party to remove the equipment. She contacted an attorney and followed his advice to send a registered letter and then hire a process server notifying the third-party that she would dispose of the equipment if not picked up by a stated deadline. The deadline passed and she sold the equipment to an auctioneer. Counsel's conduct was deficient because counsel called the prior attorney to testify, but failed to request an instruction of either the good faith or the advice of counsel defense, both of which were available under state law. "[I]s patently unreasonable to fail

to request an instruction that provides a legal defense to undisputed facts.” Prejudice established because omission of these instructions “essentially deprived her of a defense.”

Stiers v. State, 229 S.W.3d 257 (Mo. App. 2007). Counsel ineffective in forcible restraint case for failing to request a self-defense instruction. The defendant was charged with two counts of forcible sodomy, two counts of armed criminal action, and felonious restraint following an altercation with his girlfriend. He was acquitted on all charges other than felonious restraint. Their testimony and evidence of her injuries was basically the entire case. The defendant’s testimony alleged that the altercation began when she attempted to steal property from him and he defended with non-deadly force, which was permitted under state law. The altercation that elevated when she grabbed a knife and he then defended himself with deadly force. Under state law, he was entitled to a self-defense finding if he reasonably believed that deadly force was necessary to protect himself from serious physical injury. Counsel was ineffective in failing to request the self-defense instruction. Prejudice found because, without the self-defense instruction, the jury was obligated to convict if the defendant forcibly restrained the alleged victim and, in so doing, exposed her to risk of serious physical injury, regardless of the reason.

State v. Eyre, 179 P.3d 792 (Utah 2007). Counsel ineffective in tax evasion case for failing to object to instructions that did not require the jury to find the existence of a tax deficiency, which was a necessary element of the crime. Counsel’s conduct was deficient and prejudicial because the defense argued that the defendant did not file his taxes because he did not believe he owed any taxes, but counsel failed to object to the court’s failure to give the necessary charge.

2006: ***Mathis v. State***, 941 So. 2d 1 (Fla. App. 2006). Counsel ineffective in aggravated battery on a fellow inmate case for failing to request a jury instruction on the justifiable use of non-deadly force where the defense argued that the victim was the aggressor and the defendant was acting only in self-defense.

Tillman v. Massey, 637 S.E.2d 720 (Ga. 2006). Counsel ineffective in malice murder case for failing to object to an erroneous instruction on the presumption of innocence in the court’s final charge. The court instructed the jury that the presumption protects only the innocent, which implies that the jury’s assessment of guilt is separate and distinct from the prosecution’s burden to prove guilt beyond a reasonable doubt, thereby eviscerating the presumption of innocence. Prejudice found even though a correct charge on the presumption of innocence was given in preliminary instructions.

People v. Pollards, 854 N.E.2d 705 (Ill. App.), *appeal denied*, 861 N.E.2d 661 (Ill. 2006). Counsel ineffective in stolen motor vehicle case for failing to request jury instructions on definitions of stolen property and theft. Prejudice found because the defendant’s intent was an issue in the case.

Vaughn v. State, 202 S.W.3d 106 (Tenn. 2006). Counsel ineffective in murder and other offenses case for failing to object to the court's erroneous jury instruction regarding the defendant's release eligibility dates. The trial court informed the jury that, if convicted of murder, the defendant would not be eligible for parole for 25 years, but a new statute had been passed so that the defendant actually would not have been eligible for parole for 51 years. Counsel's conduct was deficient at trial because he was unaware of the new provision. After trial counsel learned of the new provision but still did not assert the issue. While there were two conflicting provisions in the statutes, such that it may not have been clear at the time whether it was 25 or 51 years, "this conflict in the provisions, far from excusing counsel from raising the issue, should have brought to their attention the very need to raise the issue." Even after the Attorney General issued an opinion clarifying that it was 51 years, counsel still did not raise the issue as plain error in the direct appeal which was still pending. Trial and appellate counsel's conduct was deficient. Prejudice established because "prejudice occurs when a defendant receives a sentence greater than the range of punishment contemplated by the jury." If the jury had been properly instructed, it was reasonably likely the jury would have convicted the defendants of a lesser offense.

2005: *State v. Dabney*, 908 So.2d 60 (La. App. 2005). Counsel was ineffective in armed robbery case for failing to object to a modified *Allen* charge to a deadlocked jury. The jury announced a guilty verdict but polling revealed an 8 to 4 vote when at least 10 votes were needed for a conviction. When the jury asked what happened if they could not agree, the court gave a modified *Allen* charge, without objection. Counsel's conduct was deficient because Louisiana law prohibited an *Allen* charge and approved only of following ABA Standards in this situation. Prejudice was found because the charge given was confusing, coerced jurors to reach a verdict, and coerced jurors in the minority to conform their views to the majority. Two jurors changed their votes within 35 minutes, which suggested that they "surrendered their beliefs in order to achieve a verdict."

2004: *Benham v. State*, 591 S.E.2d 824 (Ga. 2004). Counsel was ineffective in aggravated assault case for failing to request an instruction on the use of force in defense of a habitation. The defendant and the alleged victim had a history of animosity because the victim's husband had fathered children with both women. The victim confronted the defendant while the defendant was sitting in her car with her three young children talking to friends. Following a heated conversation, the victim admittedly threw the first blow. The women fought with the victim standing outside the car reaching in and the defendant inside her car. The defendant had attempted to drive away but her path was blocked by onlookers in the street. Ultimately, the defendant grabbed a box cutter from the car console and slashed the victim. Counsel argued self defense but did not request an instruction on defense of habitation. Under state law, deadly force is permitted to prevent or terminate the unlawful entry into or attack upon a habitation, including a motor vehicle, if the entry is made or attempted in a violent and tumultuous manner and there is

a reasonable belief that the entry is made for the purpose of assault or personal violence therein. The uncontradicted evidence at trial clearly would have authorized such a charge because the victim threw the first punch and eyewitnesses testified that it took two attempts for on lookers to restrain the victim from continuing the attack. Counsel stated that her strategy was to present self-defense as the best defense because she wanted the jury to believe that the defendant was in fear for her safety and the safety of her children and not just that she was protecting her vehicle. The court held this was not a reasonable strategy because counsel failed to appreciate that the defense of habitation may have justified the use of deadly force. “In failing to adequately research and understand the defenses available to [the] client, defense counsel rendered assistance that fell below the minimum standard set forth in *Strickland*.” Prejudice found because it was reasonably probable that the jury would have accepted the substantial evidence that the victim unlawfully entered the defendant’s car in a violent and tumultuous manner for the purpose of offering personal violence to the occupants.

State v. Koughl, 97 P.3d 1095 (Mont. 2004). Counsel ineffective in operation of unlawful methamphetamine lab case for failing to request jury instructions on accomplice testimony. Although the prosecutor and counsel both informed the jury that accomplice testimony should be viewed with suspicion, counsel did not request instructions that accomplice testimony should be viewed with distrust and that it must be corroborated. In direct appeal, counsel’s conduct was found to be deficient because there was no plausible reason not to request the instructions. Prejudice found because the state’s case was built almost entirely on accomplice testimony with little corroboration. In addition, although counsel informed the jury to view accomplice testimony with suspicion, “hearing this from counsel, . . . is not the same as hearing it from the court.”

2003: *Patterson v. State*, 110 S.W.3d 896 (Mo. App. 2003). Counsel was ineffective in second-degree robbery case for failing to present the trial court with a properly worded instruction for the lesser included offense of felony stealing. Under state law, second degree robbery required the forcible stealing of property, whereas the lesser included offense of stealing did not include the element of force. Counsel argued the lack of force and requested an instruction on the lesser included offense of stealing but proposed a stealing instruction that improperly included the “forcibly stole” language, which materially misstated the elements of stealing. Counsel did not have a reasonable trial strategy for proposing the incorrect instruction and counsel even argued that the jury could find that there was no use or threat of use of physical force. “Counsel clearly made a strategic decision to have the jury instructed on the lesser-included offense of stealing but then failed to execute that strategy when he submitted instructions to the court that did not properly track the language” of the lesser-included offense. *Id.* at 903. The court found prejudice because the lesser included offense instruction was warranted by the evidence, where the witnesses never saw a weapon and a juror could reasonably find that the defendant did not actually use physical force or threaten immediate physical harm to

anyone during the theft. Where doubt exists over whether a lesser included offense should be instructed, the court should give the instruction. Even assuming that the state's argument was correct that the defendant must also prove a reasonable possibility that he would not have been convicted of the greater offense had the lesser-included instruction been given, the court found prejudice where "the evidence of either an explicit or an implicit threat of physical force in the stealing was not overwhelming."

10. FAILURE TO CHALLENGE COMPETENCE

a. U.S. Court of Appeals Cases

2005: **Burt v. Uchtman*, 422 F.3d 557 (7th Cir. 2005). Counsel ineffective in capital murder case (where the death sentence was later commuted by Governor Ryan) for failing to request a competence evaluation when the defendant plead guilty without any concessions and against the advice of counsel near the end of the state's case-in-chief. Counsel's conduct was deficient because counsel was aware that the defendant had been consistently medicated with anti-depressants and psychotropic drugs while in pretrial confinement. The only competence examination was conducted eight months prior to trial by an expert who did not even review the defendant's prison mental health records. A defense psychologist examined the defendant in connection to a motion to suppress statements and found a borderline IQ, neurological impairments, and severe depression. During jury selection, the defense requested a continuance, which was denied, because the defendant was having difficulty sleeping and expressing his inability to assist counsel. Counsel's conduct was deficient because counsel were aware of the defendant's medications, his frequent mood swings and that the defendant did not appear to comprehend legal advice. The state court had not addressed this prong of the *Strickland* test. The court found prejudice because there was "a reasonable probability that [the defendant] would have been found incompetent at the time he pleaded guilty if his attorneys had requested a competency hearing" because the only competence evaluation was 8 months prior to trial, failed to consider the effects of heavy medications, and could not have accounted for the repeated changes in prescriptions in the time after that evaluation until trial. Under AEDPA, the state court "unreasonably applied *Strickland* to the facts" because it "ignored a wealth of evidence." [The court also held that the trial court should have sua sponte ordered a competence evaluation.]

b. State Cases

2008: *Coker v. State*, 978 So. 2d 809 (Fla. App. 2008). Counsel ineffective prior to plea for failing to obtain a competence hearing. Counsel's conduct was deficient because the trial court gave oral authorization for an evaluation, but counsel never presented a written order and failed to otherwise followup. Prejudice established because the defendant may well have been incompetent at the time of his plea. Remanded for a competence

determination.

2004: *People v. Shanklin*, 814 N.E.2d 139 (Ill. App.), *appeal denied*, 824 N.E.2d 289 (Ill. 2004). Counsel ineffective in attempted murder plea for failing to request a hearing on the defendant's competence or fitness or, alternatively, asking the trial court to question the defendant carefully as to the plea he entered and the consequences. Following the defendant's guilty plea, a presentence report disclosed that the defendant had been hospitalized three times for mental-health problems as a teenager. In addition, he was mildly mentally retarded and had significant problems retaining and receiving verbal information.

When confronted by a defendant, who may be mentally retarded, the trial court and both prosecution and defense may not simply rely on affirmative answers to rote questions to conclude the defendant understands the proceedings and the consequences of his plea.

Id. at ____.

It is incumbent on the attorney representing a mentally retarded defendant to make that fact known to the trial court and for the trial court to proceed with care in accepting a plea.

Id. at ____ . Counsel's conduct was deficient and prejudicial.

Matthews v. State, 596 S.E.2d 49 (S.C. 2004). Counsel ineffective in armed robbery, car jacking, and accessory after the fact to murder plea for failing to request a competence hearing prior to the defendant's plea. The defendant had learning disabilities and took special education classes in school. Just one year before the crimes, the defendant had been in a near fatal car accident that caused significant frontal lobe, neurological damage.

12. FAILURE TO PRESERVE THE RECORD FOR APPEAL

a. U.S. Court of Appeals Cases

2003: *Davis v. Secretary for Dept. of Corrections*, 341 F.3d 1310 (11th Cir. 2003). Counsel was ineffective in murder case in failing to adequately preserve a *Batson* claim for appellate review. While counsel did object, counsel failed to renew the motion before accepting the jury, which was required in order to preserve the issue for appeal. Because counsel's negligence affected only the appeal, the relevant focus in assessing prejudice was the appeal. Because the state court had already recognized that the *Batson* claim was meritorious, the court found that there was a reasonable probability that the state court would have granted reversal on appeal. This claim had been raised in state

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post-conviction, but the state court failed to resolve the merits of the claim. Thus, the court found that this case fell outside of § 2254(d)(1) requirement of deference to the state court decision.

b. State Cases

- 2008:** *People v. Owens*, 894 N.E.2d 187 (Ill. App. 2008). Counsel ineffective in residential burglary case for failing to consult with the defendant concerning a motion to reconsider sentence. The defendant informed the court he wished to appeal his 18 year sentence and the court informed him he must file a motion to reconsider the sentence in order to preserve the appellate issue. Retained counsel withdrew without taking any action and the court entered a notice of appeal for the defendant. “[T]he attorney's failure to consult with the defendant during a critical stage of the proceedings” was deficient and the defendant's ability to preserve his sentencing arguments for appeal was prejudiced.
- 2004:** *Heckelsmiller v. State*, 687 N.W.2d 454 (N.D. 2004). Counsel ineffective in criminal trespass case for failing to preserve the record for appeal after two potential defense corroborating witnesses were excluded during the trial because counsel failed to ensure that they were sequestered as all other witnesses were. The defense was that the defendant had permission to be on the premises, but counsel considered this unsubstantiated and decided not to present the corroborating witnesses due to credibility concerns because they were family members. (Alleged victim was also a family member.) During the trial, counsel changed his mind and decided to present the testimony. Counsel's conduct was deficient because, when the court excluded the evidence, counsel did not make a proffer or preserve the record for appeal. Prejudice found because the excluded witnesses would have corroborated the only defense presented. Although the court was unaware of the substance of the witnesses' statements, the court held that “the significant point is that counsel's failure to make an offer of proof prevented a meaningful appeal on the issue.”

13. MISCELLANEOUS

a. U.S. Court of Appeals Cases

- 2005:** *United States v. Scott*, 394 F.3d 111 (2nd Cir. 2005). The indictment in illegal reentry case was dismissed because counsel was ineffective in the underlying deportation case for failing to apply for a waiver of deportation even though the immigration judge stated that he believed the defendant was eligible for a waiver and instructed counsel to file an application. Prejudice was found because the defendant could have made a strong showing that he was eligible for a waiver and his subsequent criminal charges were irrelevant because they would not have been considered at the time.

b. Military Cases

2006: *United States v. Edmond*, 63 M.J. 343 (C.A.A.F. 2006). Counsel ineffective in conspiracy, larceny, and other offenses case for failing to secure the testimony of a subpoenaed defense witness. The alleged conspiracy and larceny concerned two cellular telephones. The subpoenaed witness had also been charged but had been discharged from the military in lieu of a court-martial. He would have testified that there was no conspiracy and that he and the accused, who had both worked in the supply room, believed that they were authorized to obtain the cell phones and that they had intended to return them to the unit but kept the phones after the unit said they no longer wanted the cell phones. When the witness arrived for court, the prosecutor warned him of the possibility of a perjury charge if he testified falsely. When the prosecutor told defense counsel that the witness did not want to testify, counsel did not speak to the witness before he was allowed to leave but instead entered into a stipulation that the witness was invoking his Fifth Amendment rights. Counsel's conduct was deficient and prejudicial because the witness not only did not testify but the implication of the stipulation to the panel members was that the accused's coconspirator could not testify without incriminating himself. The case was remanded either for dismissal of the larceny and conspiracy charges and reassessment of the sentence or for a rehearing.

c. U.S. District Court Cases

2009: *Sharpe v. Bell*, 595 F. Supp. 2d 636 (E.D.N.C. 2009). Under AEDPA, counsel ineffective in murder trial for failing to properly argue for the admission of a state witness's boyfriend's hearsay statements that he had committed the murder and that he would rather commit suicide than go to prison. Counsel's conduct was deficient because counsel sought admission only on the incorrect bases of dying declaration and state of mind exceptions rather than the correct basis of a statement against penal interest. Counsel also failed to argue that it would be a violation of petitioner's due process rights to exclude the exculpatory testimony at trial. Prejudice established because the state's case was "weak. Petitioner is not linked by any physical evidence to the murder, the murder weapon, the victim, or the crime scene."

d. State Cases

2009: *Bass v. State*, ___ S.E.2d ___, 2009 WL 159428 (Ga. Jan. 26, 2009). Counsel ineffective in arson and robbery case for failing to object when the county sheriff assumed the duties of the bailiff after providing key testimony for the state. Counsel's conduct was deficient because "no competent attorney could reasonably have believed that [the Sheriff's] service as bailiff would not compromise appellant's constitutional right to a fair jury." Prejudice established where the Sheriff acted as bailiff for half of the trial or a two day period from the beginning of the defense case to the verdict. "[E]ven if it could be

assumed that [the Sheriff] never did discuss the case directly with any members of the jury, it would be blinking reality not to recognize the extreme prejudice inherent in this continual association throughout [half of] the trial between the jurors and th[is] key witness[] for the prosecution.” *Id.* at ___ (quoting *Turner v. Louisiana*, 379 U.S. 466, 473 (1965)). In addition, the state’s case was circumstantial and hinged on credibility and a prior jury hung on 23 of 24 counts.

2008: *McCombs v. State*, ___ So. 2d ___, 2008 WL 3989303 (Ala. Crim. App. Aug. 29, 2008). Counsel ineffective in murder case for advising the 18-year-old defendant to lie in his testimony and deny that he stabbed the victim, which resulted in the defendant giving up the right to assert self-defense. In light of *Nix v. Whiteside*, 475 U.S. 157, 171 (1986) (“under no circumstance may a lawyer either advocate or passively tolerate a client’s giving false testimony”), “[t]here can be no question that the performance of . . . trial counsel falls outside prevailing professional norms and was unreasonable under any circumstance.” Prejudice found because the evidence was undisputed that the defendant was told he was outnumbered and was going to get his “butt whooped,” that he had been hit by three people, and that he was attempted to run when the victim was killed. Thus, “a defense that [he] acted out of a reasonable belief that an assault was imminent was a viable defense.”

2007: *State v. Grogan*, 163 P.3d 494 (N.M. 2007). Court affirmed trial court’s grant of new trial on its own motion following conviction for great bodily harm by vehicle. The court found that counsel was ineffective. On appeal, the court held that it was appropriate to presume prejudice “when a trial court witnesses gross or obvious incompetence.” Here, the defense counsel’s failure to secure and review his own expert’s opinion before permitting the expert to write the report. While the state examiners had found cocaine and methamphetamines in the defendant’s blood it was not quantified. The defense expert did so and his written report was provided to the state, which called him to testify and admitted the report. This was the most harmful evidence against the defendant.

2006: *In re R.K.S.*, 905 A.2d 201 (D.C. 2006). Juvenile adjudicated for unauthorized use of motor vehicle and receiving stolen property was completely denied counsel and prejudice was presumed under *Cronic* due to counsel’s refusal to participate in the first day of trial after being denied a continuance. While counsel refused to participate, the juvenile’s statement to police and an officer’s testimony that the juvenile was a passenger in the car were admitted without objection or even cross examination.

Smith v. State, 905 A.2d 315 (Md. 2006). Counsel ineffective in criminal contempt case. The witness, an inmate, was called to testify as a prosecution witness in another case. When the witness sought to invoke his Fifth Amendment right against self-incrimination, the court appointed counsel for him. Counsel informed the court, after discussions with the witness and the prosecutor, that he had advised the witness that he could find no

legitimate basis for assertion of the Fifth Amendment privileges. The witness continued refusing to answer questions, although not on the asserted basis of the Fifth Amendment. The court found him in contempt and subsequently imposed a sentence of five months. Counsel's conduct was deficient because counsel, in violation of the attorney-client privilege, disclosed the nature of his advice to the witness and advised the trial judge as to his opinion regarding the application of the Fifth Amendment. In essence, counsel had a conflict due to his attempt to advise the witness and be a friend of the court. He could not do both here. Prejudice found because the trial court relied on counsel's statement in finding that the witness did not have a Fifth Amendment privilege.

- 2005:** *Jackson v. Washington*, 619 S.E.2d 92 (Va. 2005). Counsel was ineffective in burglary and grand larceny case for failing to object to the defendant being tried before a jury while wearing a jail issued "jumpsuit" after the jail misplaced the defendant's civilian clothes and failed to replace them or allow him an adequate opportunity to obtain new clothing. There was no valid strategy where counsel did not object simply because he believed the defendant wanted to go to trial quickly because counsel knew that the defendant also objected to being tried in jail clothing and that his credibility would be a critical issue during the trial. Prejudice found because "[r]eason and common human experience dictate, at a minimum, that the accused's appearance in jail clothes is such a badge of guilt that it would render an accused's assertion of innocence less than fully credible to the jury."
- 2004:** *State v. Guerard*, 682 N.W.2d 12 (Wis. 2004). Counsel ineffective in armed robbery and burglary case for failing to adequately seek admission of the defendant's brother's statements against penal interest. The state relied on the victim and an eyewitness, who identified the defendant as the perpetrator. The defendant's brother confessed to his sister and a defense investigator though that he was the perpetrator. During trial, the brother invoked his right to silence. Counsel initially sought to admit the brother's confession to his sister, but did not pursue this or inform the court about the brother's additional confession to the defense investigator. Counsel's conduct was deficient because the brother's statements against penal interest were sufficiently corroborated (by their repetition to several people) to be admissible. Prejudice found because the defense sought to establish that the brother and not the defendant committed the crimes. If the jury had heard the brother's confessions, there was a reasonable probability of a different result.
- 2003:** **Commonwealth v. Brooks*, 839 A.2d 245 (Pa. 2003). Counsel was ineffective in capital trial for failing to meet with his client face-to-face prior to trial. Counsel's conduct was deficient in that counsel never once met with the defendant prior to the beginning of jury selection. Counsel spoke only briefly with the defendant by telephone.

It should go without saying that no lawyer, no matter how talented and efficient, can possibly forge a meaningful relationship with his

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client and obtain adequate information to defend that client against first-degree murder charges in a single thirty minute telephone conversation.

The court found that face-to-face meetings were important, because

Without such a meeting, there is little to no hope that the client will develop a fundamental base of communication with his attorney, such that the client will freely share important information and work comfortably with the lawyer in developing a defense plan. Moreover, only a face-to-face meeting allows an attorney to assess the client's demeanor, credibility, and the overall impression he might have on a jury. This is of particular importance in cases in which the client may take the stand in his defense or at the penalty phase in an attempt to establish the existence of particular mitigating circumstances.

The court held that there was no reasonable basis for the attorney's failure to meet with the defendant and that "failure to do so is 'simply an abdication' of the most basic expectations of defense counsel in a capital case." Prejudice found because, in this instance, the attorney's failure to meet with the client and develop a relationship resulted in the defendant proceeding *pro se* with counsel serving only as standby counsel.