

**SUMMARIES OF SUCCESSFUL  
INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS  
POST-*WIGGINS V. SMITH* INVOLVING  
ADVICE TO CLIENT AND PLEA-RELATED ISSUES**

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## I. ADVISING CLIENT

### A. GUILTY PLEA AFTER INADEQUATE INVESTIGATION OR RESEARCH

#### 1. U.S. Court of Appeals Cases

**2007:** *United States v. Mooney*, 497 F.3d 397 (4th Cir. 2007). Counsel ineffective in felon in possession of firearm case for advising the defendant to plead guilty based on the erroneous assumption that no justification defense existed. The defendant was in his home when his ex-wife, who had been drinking and had shot or shot at several former boyfriends, put a gun to his temple. He took the gun from her, called his boss at work (7 blocks away), and told him he was coming in to turn the gun over to police. His ex-wife threatened to have him arrested for possession of the gun so the defendant attempted twice to call 911 from the home to report it himself but the wife disconnected the calls. He left then and walked the seven blocks to work where the police, who had been called by his ex-wife showed up and arrested him. Counsel's conduct was deficient because the defendant insisted from the beginning that he had done the right thing and was not guilty. Counsel told him that justification was no defense though and advised him to plead guilty. When the defendant attempted to raise this question with the court at the plea hearing, defense counsel undermined him and informed the court that justification was not a defense. This advice was clearly erroneous because every circuit to consider the issue, including the Fourth Circuit, had recognized justification as an affirmative defense to this charge.

Counsel's erroneous legal advice resulted from a failure to conduct the necessary legal investigation. Counsel in criminal cases are charged with the responsibility of conducting "appropriate investigations, both factual and legal, to determine if matters of defense can be developed."

*Id.* at 404. Prejudice established because it was "incontrovertibly clear" that the defendant would not have plead guilty but for counsel's erroneous advice. He even attempted to withdraw his plea at sentencing asserting his innocence in doing the right thing. Had he proceeded to trial, the court would have been required to present the defense to the jury and the jury likely would have been persuaded of justification on these facts.

**2005:** *Maples v. Stegall*, 427 F.3d 1020 (6th Cir. 2005). Counsel ineffective in distributing cocaine case in which the defendant pled guilty following jury selection based on counsel's incorrect advice that he could retain his speedy trial claim for appeal. The defendant was prejudiced because he would not have pled guilty absent this incorrect advice. Although the case was reviewed under AEDPA, the court reviewed the merits *de novo* because the state court had not adjudicated the merits.

## 2. U.S. District Court Cases

**2010:** *Cerda v. Hedgpeth*, 744 F.Supp.2d (C.D. Cal. 2010). Counsel ineffective in drug possession plea for failing to adequately investigate and give proper advice prior to plea. The complaint alleged a prior violent felony conviction enhancement under the Three Strikes Law. The state's initial offer was for six years. Due to the 1993 conviction, counsel was uncertain whether the petitioner would be eligible for a "Prop 36 disposition," which would allow for drug treatment, a noncustodial sentence, and eventual dismissal of the charge. The state agreed that if the petitioner was eligible, which would mean that he did not either personally use a weapon or cause great bodily injury, he could have a "Prop 36 disposition." Counsel was aware there was a preliminary hearing transcript for the prior, but he was unsure whether this would be admissible to prove the strike. Counsel was also aware that the petitioner had been convicted of drug possession in 2003 and sentenced to 32 months, which suggested that the petitioner had admitted in 2003 that the 1993 conviction was a strike. With this information, counsel recommended an offer of four-years without a Prop 36 recommendation. The state agreed to either of two plea options: (1) a Prop 36 referral, but 6 years if he was found ineligible; or (2) 4 years with no Prop 36 referral. The petitioner chose the former. He clearly would not have done so if he had known he was not eligible for Prop 36. Counsel's conduct was deficient as his advice was legally and factually incorrect. While he was uncertain of Prop 36 eligibility, etc., he did nothing to research or investigate to determine the correct answer. Only after the guilty plea, did counsel obtain the documents related to the 2003 conviction, which contained an admission that the 1993 conviction was a strike. Under California law, this was equivalent to a guilty plea. Aside from that, under settled state law, the preliminary hearing transcript, which contained information that the 1993 prior did involve great bodily injury, was admissible in evidence. "Competent counsel would have been aware of this law or would have taken the time to learn the answer to his discrete, uncomplicated legal question." Likewise, the plea the petitioner entered at counsel's advice also admitted, per the complaint, that the 1993 conviction was a strike, precluding Prop 36 eligibility. Prejudice was clear as "common sense" dictates that any defendant offered a deal for four years or six years will take the four year deal. Under AEDPA, the state court's determination to the contrary was an unreasonable application of Supreme Court law.

*United States v. DeSimone*, 736 F.Supp.2d 477 (D.R.I. 2010). Counsel in mail fraud and money laundering case ineffective during plea proceedings, such that the defendant had a fair and just reason to withdraw his guilty plea. Although the defendant maintained innocence throughout, he pled guilty the morning trial was scheduled to begin based on counsel's advice that he would likely be convicted. The problem, however, was that counsel advised the defendant he could plead guilty even if he was not and that it "happens all the time." Likewise, during the state's recitation of facts during the plea hearing, the defendant complained to counsel that the statements were "bullshit" but

counsel told the defendant that he had to accept the recitation. While counsel did not explicitly tell the defendant to lie to the court in the plea colloquy, the defendant was justified in his understanding that lying was not only permissible, but even necessary, to get his plea accepted. This undermined the finding that the plea was “knowing, voluntary, and intelligent.”

*Williams v. United States*, 684 F. Supp. 2d 807 (W.D. Tex. 2010). Counsel ineffective in “conspiracy to attempt to possess with the intent to distribute” marijuana plea case for advising the defendant to plead guilty to a count in the indictment that failed to charge an offense. In short, under Fifth Circuit precedent and under the relevant statute, a defendant could be charged for “conspiracy” or “attempt,” but not “conspiracy to attempt.” Counsel’s conduct was deficient and prejudicial and relief was not barred by guilty plea.

**2009:** *United States v. Winsor*, 675 F. Supp. 2d 1069 (D. Ore. 2009). Counsel ineffective in receipt of child pornography case for allowing the defendant to plead to one count of receipt when the defendant was charged with two counts of receipt and one count of possession of child pornography. Under Ninth Circuit precedent decided more than eight months prior to the plea, convictions for receipt and possession would violate double jeopardy. Thus, counsel should have advised the defendant to plead guilty to all three charges. Counsel could then have asked the court to dismiss the receipt charges, which had a five-year mandatory minimum sentence, rather than the possession charge

Given the known general distaste for statutory mandatory minimum sentences of judges around the country, and the belief that sentences of these types of cases are too lengthy, a lawyer exercising reasonable professional skill and judgment would have counseled his client about this strategy.

Alternatively, counsel could have advised the defendant to stipulate the facts and proceed in a bench trial in order to preserve his right to appeal the denial of his motion to suppress evidence. Prejudice established as the court likely would have dismissed the receipt charge and sentenced the defendant to less than five years on the possession charge because the defendant was 62 years old and a professional engineer, the crimes were more than four years old, the defendant passed a polygraph confirming he had never had sexual contact with a child, and he had been attending therapy at the time of sentencing.

**2008:** *McBroom v. Warren*, 542 F. Supp. 2d 730 (E.D. Mich. 2008). Counsel ineffective under AEDPA in incorrectly advising the defendant of the law which resulted in a no contest plea in assault with intent to commit murder case. The state initially made a plea offer with a cap of a one year sentence, which defense counsel never advised the defendant of. The defendant indicated a willingness to accept the deal on the day of trial, but the state declared the offer was withdrawn. The defendant proceeded to trial and was convicted. Prior to sentencing, he obtained new counsel who negotiated withdrawal of the

conviction, entry of a no contest plea, a sentence of 11-17 years, and a waiver of appellate issues relating to the initial representation and the trial. Counsel's conduct was deficient because counsel incorrectly advised the defendant that the state's initial offer could not be reinstated despite the ineffectiveness of his initial counsel. Prejudice established because the defendant received a much higher sentence. In ruling on this issue, the state court incorrectly viewed it as a challenge to initial counsel's actions rather than a challenge to the plea counsel's actions.

### 3. State Cases

**2011:** *Harley v. State*, \_\_\_ N.E.2d \_\_\_, 2011 WL 3240764 (Ind. App. July 29, 2011). Counsel ineffective in non-support of child case for failing to inform the defendant and court prior to entry of guilty plea that the defendant's sole income was from SSI. SSI is a federal social welfare program and is specifically excluded from a parent's income for the purpose of computing child support under state law. Thus, the defendant had a defense that he was unable to pay child support.

*People v. Edmonson*, 946 N.E.2d 997 (Ill. App. 2011). Counsel ineffective in burglary and stolen vehicle case for misinforming the defendant prior to his negotiated plea for a 20-year-sentence cap that he would be able to challenge his sentence on appeal. The defendant faced a sentencing range of 12 to 60 years. The state recommended a 20 year sentence and the court imposed a 15 year sentence. The defendant sought to appeal this sentence. While the court and prosecutor also did not recognize it, state law was clear that the defendant could not challenge a negotiated sentence as excessive on appeal. Prejudice found, as the defendant would not have pled guilty had he been adequately advised.

**2010:** *Garcia v. State*, 237 P.3d 716 (N.M. 2010). Counsel ineffective for erroneously advising the 18-year-old defendant prior to his plea to intentional child abuse resulting in death that he could be convicted even if the child's death was "an accident." In essence, counsel advised the defendant that both negligent and intentional child abuse resulting in death were punishable by 30 years. While counsel's advice was correct based on the law prior to 2005, it was not correct at the time of trial, which was almost two years after the statutes had been amended. Under correct law, when intentional child abuse is charged, there is no lesser included offense. Thus, if the defendant acted only negligently, he must be acquitted. The defendant was charged here with only intentional child abuse. Nonetheless, counsel even informed the court at the time of the plea that the defendant had been advised that even negligent abuse and "an accident" was sufficient to establish guilt. Counsel's advice about sentencing was also incorrect as negligent abuse was punishable only up to 24 years, while intentional was punishable up to life with a mandatory minimum of 30. Counsel's conduct was deficient. Prejudice established as a conviction of *intentional* child abuse resulting in death "was by no means a foregone conclusion." Thus, there was a reasonable probability that the defendant would have

proceeded to trial if he had been adequately advised. Alternatively, with adequate advice, the defendant may have sought a more favorable plea arrangement. Regardless, the defendant's plea was not knowing or voluntary.

***Kolle v. State***, 386 S.E.2d 578 (S.C. 2010). Counsel ineffective in drug trafficking plea case for advising the defendant to plead guilty without sufficiently investigating and arguing the motion to suppress evidence seized from an apartment in which the defendant was an invited guest. Police officers testified that they received a call about loud music from the apartment. When an officer arrived, he heard music and observed fresh "forced entry marks" on the door, but no one responding to knocking. Believing there were exigent circumstances, officers entered and observed powder cocaine and materials used for processing and manufacturing cocaine in plain sight. The officers seized the powder cocaine and obtained a search warrant, which yielded a find of 63 grams of cocaine in the apartment. Counsel moved to suppress the evidence, but the motion was denied, due to the court's finding of exigent circumstances followed by plain view. The defendant pled guilty the same day. Counsel's conduct was deficient during the motion hearing, because counsel had failed to obtain discovery and, therefore, failed to question the officers about time discrepancies, such as the warrant being issued and executed even before the initial "loud music complaint." Likewise, counsel failed to point out that the arrest and search warrant affidavits and incident reports referred to crack cocaine rather than powder and made no reference to "fresh damage" or "forced entry." If counsel had adequately performed, there is a reasonable probability that the court would have granted the suppression motion. Even if the trial court had ruled erroneously, counsel could have advised the defendant to proceed to trial and then challenge the denial of the suppression motion on direct appeal.

**2009:** ***Ex parte Imoudu***, 284 S.W.3d 866 (Tex. Crim. App. 2009). Counsel ineffective in plea to murder case for failing to investigate the possibility of an insanity defense prior to advising the defendant to plead guilty. Six months prior to the crimes, the defendant had been in jail for a month for misdemeanor theft. During that time, he was prescribed an antipsychotic medication. The murder consisted of the defendant stealing a car and driving into oncoming traffic (causing a death) in the ensuing chase. In confinement, his family and a social worker at the jail immediately noted mental health problems. Both attempted to contact court-appointed counsel without success and the family retained private counsel, based on the advice of the social worker. Both retained counsel observed that the defendant seemed "incoherent" and there was "something wrong" with him and asked for a competence evaluation. A month after the defendant was found competent by court-appointed examiners, he plead guilty. Despite counsel's knowledge of the defendant's problems, counsel did not review the jail records, including those following arrest in this case that reflected numerous referrals for mental health services and evaluation, a determination of "mental illness," antipsychotic medications, and housing in an area used to house the mentally ill inmates. Counsel also never spoke to any jail personnel, did not request an insanity evaluation, did not hire a psychiatrist to evaluate

the defendant, and did not advise the defendant of the insanity defense. Counsel's conduct was deficient. Prejudice established because "there is a reasonable probability that if his attorneys had informed him of the possibility of pursuing an insanity defense, he would not have pled guilty and would have gone to trial."

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

**2008:** ***Stewart v. State***, 987 So. 2d 729 (Fla. App. 2008). Counsel ineffective in failing to advise the defendant of a statute of limitations defense prior to entry of plea. The defendant had five charges relating to non-dwelling burglaries, felony theft, and auto thefts and pled guilty as charged in exchange for a five year sentence for burglary and probation on all other charges. The statute of limitations had already passed on all of the charges except the felony theft by the time of the plea regardless of the prior placement of detainers on the defendant, who was already serving a prison sentence when the charges arose.

***Knight v. State***, 983 So. 2d 348 (Miss. App. 2008). Counsel ineffective in manslaughter and carrying concealed weapon case for allowing the defendant to plead guilty to carrying a concealed weapon, which resulted in a sentence to five years of confinement. The defendant had a pistol in a motor vehicle only, which is not illegal under Mississippi law.

**2006:** ***State v. Hunter***, 143 P.3d 168 (N.M. 2006). Counsel ineffective in custodial interference case for failing to adequately advise the defendant prior to his no contest plea. Custody of the defendant's children had been granted to him in Missouri in 1992. He moved to New Mexico in 1994. His ex-wife, who had lived in Texas since prior to 1992, sought a change in custody in Missouri in 1997. Because the defendant objected to jurisdiction in Missouri and did not appear, the Missouri court granted custody to the ex-wife. She did not attempt enforcement through the New Mexico courts, but sought the help of the local police in taking physical custody. They declined. In 2001, she again sought the help of the

local police and the defendant was charged with custodial interference. He plead no contest because counsel advised him incorrectly that he had no viable argument for a motion to dismiss due to the Missouri court's lack of jurisdiction and counsel's failure to discuss a conditional plea with the defendant that would have preserved that issue for appeal. This was deficient conduct because it was clear under Missouri law that the court lacked proper jurisdiction with neither of the parties or the children living outside that state for years. This would have been a viable basis for the motion to dismiss because the criminal custodial interference statute applies only to custody orders issued by a court of competent jurisdiction. The defendant was prejudiced because he would likely have refused the no contest plea and accepted a conditional plea if counsel had performed adequately.

**2005:** *Julien v. State*, 917 So. 2d 213 (Fla. App. 2005), *review denied*, 931 So.2d 901 (Fla. 2006). Counsel ineffective in grand theft plea case for failing to inform the defendant of his option to apply for the pretrial intervention (PTI) program. The defendant was a first-time offender charged with shoplifting a pair of shoes. He pled guilty and was given probation, but then the government commenced removal proceedings to rescind his permanent residence status and remove him to Haiti. Counsel's conduct was deficient because the state rules of criminal procedure required counsel to advise the defendant of "any possible alternatives that may be open to the defendant" and the defendant was eligible for PTI, which would have resulted in dismissal of the charges if the program was successfully completed. Prejudice found because, if he had been adequately advised, the defendant would not have pled guilty but would have applied for the PTI program instead.

*Petty v. Smith*, 612 S.E.2d 276 (Ga. 2005). Counsel ineffective in felony murder and aggravated assault case for inadequate advice to the defendant that resulted in a guilty plea. The defendant was charged with (1) malice murder; (2) felony murder; and (3) aggravated assault. All three indictments were based on the defendant shooting the victim with a shotgun after a codefendant beat him. Counsel believed, however, that the assault charge was based on the codefendant beating the victim. Counsel believed that, if convicted, the defendant would be sentenced to life and 20 years consecutively. Based on counsel's advice, the defendant plead guilty to felony murder and aggravated assault and received life and a concurrent 20 year sentence. Counsel's conduct was deficient because the indictment clearly revealed that the alleged assault was shooting the victim. Thus, the aggravated assault count merged into the murder count and the accused could not be separately convicted of this offense. Counsel's conduct was deficient because "[a]ny reasonably competent attorney" would have realized this fact and that the defendant did not benefit from the plea agreement. The defendant was prejudiced because he would not have plead guilty and would not have received a harsher sentence than could legally be imposed on him if had been gone to trial and been convicted on all counts.

*Stevens v. State*, 617 S.E.2d 366 (S.C. 2005). Counsel ineffective in plea to receiving stolen goods case where the defendant was charged and pled to eighteen counts. If counsel had adequately investigated and researched the issue, counsel could have challenged the number of indictments because, under the “plain meaning of the statute,” the receipt of multiple items in a single transaction or event constitutes a single offence. Prejudice found because the defendant likely would not have pled guilty to 18 counts and may well have received a lighter sentence if the court had 4 or 5 counts before it rather than 18.

*Ex parte Briggs*, 187 S.W.3d 458 (Tex. Crim. App. 2005). Counsel ineffective in felony injury to child case for failing to adequately investigate prior to the seventeen year old defendant’s guilty plea. The defendant was charged in the death of her two month old son, who had been very sick from the time of his birth. The defendant took him to doctors and hospitals five different times in two months. Ultimately on the day of his death, the defendant called 911 and attempted mouth-to-mouth when she found him blue and limp. The admitting diagnosis at the hospital was hypoxia (lack of oxygen to the brain). Emergency room personnel tried to intubate and placed the tube in the baby’s esophagus instead of his trachea, which was not discovered for 30 minutes. By the time it was discovered, the baby was brain dead. He died seven days later. The original autopsy report concluded that the death was a homicide. After the defendant was charged, she retained counsel, but could only pay \$10,400 of the \$15,000 fee. He threatened to withdraw and stated that he could not retain experts without an additional \$2500-\$7500 for experts. He did not withdraw, did not obtain experts or adequately investigate, and advised the defendant to plead guilty. Counsel was aware of the child’s medical history. His conduct was deficient in failing to consult with experts and “[t]his was not a ‘strategic’ decision, it was an economic one.”

Counsel is most assuredly not required to pay expert witness fees or the costs of investigation out of his own pocket, but a reasonably competent attorney—regardless of whether he is retained or appointed—must seek to advance his client’s best defense in a reasonably competent manner.

Here, counsel had several options that could have been pursued: (1) subpoena the doctors that had previously treated the child and offer their records and opinions into evidence; (2) counsel could have withdrawn and requested appointment of counsel for the indigent defendant; or (3) remained as counsel, but requested investigatory and expert witness fees from the trial court due to the defendant’s indigency. “If any reasonable attorney appointed to represent an indigent defendant would be expected to investigate and request expert assistance to determine a deceased infant’s cause of death, a privately retained attorney should be held no lower standard.” If counsel had adequately investigated, substantial testimony from a number of doctors would have revealed that there was no medical evidence of child abuse and that the child died from an undiagnosed birth defect,

which led to a urinary infection, sepsis and severe pneumonia, which was made worse by the faulty intubation which led to brain death. Prejudice found because, absent counsel's deficient conduct, there is a reasonable probability that the defendant would not have pled guilty.

**2004: *Gerisch v. Meadows*, 604 S.E.2d 462 (Ga. 2004).** Counsel was ineffective in aggravated battery case for failing to recognize and adequately advise the defendant concerning a valid double jeopardy claim prior the defendant's guilty plea on the charge. The defendant was involved in a fight. He was initially charged in municipal court and plead guilty to disorderly conduct by fighting and public drunk. He was sentenced to probation. He was subsequently indicted for aggravated battery, arising from the same fight, and additional charges. The defendant accepted the prosecution's plea agreement to plead guilty in exchange for a sentence of 20 years (10 in prison and 10 on probation) for aggravated battery and concurrent sentences for the remaining offenses. On the day of the plea, the defendant, who was functionally illiterate, told counsel that he had been convicted in municipal court and asked why he was charged with the same offenses. Counsel discussed the issue with the prosecutor, who asserted that a double jeopardy claim would have no merit. Counsel also verified the city court convictions, but assumed there was no double jeopardy because the prior prosecution was under a municipal ordinance rather than state law. Counsel thus advised the defendant that a double jeopardy claim would be fruitless and would cause the state to withdraw the plea recommendation and to seek greater punishment. Counsel's conduct was deficient because counsel did not adequately research or evaluate the issue and instead relied on the advice of the prosecutor and her own misunderstanding of the law when the defendant did have a viable double jeopardy claim. Prejudice was found because, but for counsel's error, the defendant would not have pled guilty to the charge of aggravated battery.

***Heath v. State*, 601 S.E.2d 758 (Ga. App. 2004).** Counsel ineffective in injury by vehicle case for wholly failing to prepare or investigate prior to advising the defendant to plead guilty. The defendant had no memory of the collision, but he and his niece advised counsel that a co-worker may have been driving. Counsel did not investigate, conduct any research, or even consult with the defendant in person during the 13 months between arraignment and plea. Prejudice found because the defendant would not have plead guilty if counsel had performed adequately.

***Heyward v. Humphrey*, 592 S.E.2d 660 (Ga. 2004).** Counsel was ineffective in aggravated assault case for failing to adequately investigate prior to advising the defendant to plead guilty and failing to advise the defendant to withdraw from the plea agreement once it became apparent in the plea hearing that the state's case was unraveling. The defendant was charged with shooting a lounge owner. The state's case depended on the victim and four eyewitnesses. At the plea hearing, the prosecutor disclosed that one of these witnesses had given a written statement asserting that the alleged victim drew his weapon on the defendant before the defendant fired. The state

also disclosed that one of the witness' could not be located even though he had a probation violation charge pending. Another witness was reluctant to testify and failed to appear the last time the case had been scheduled. Another witness had recanted her initial version of events. Even the alleged victim was reluctant to testify. Despite this information, counsel did not advise the defendant to withdraw from the plea agreement. Counsel's conduct was deficient in failing to investigate and to pursue the defense of justification prior to the plea hearing. Even during the hearing, counsel did not attempt to subpoena the witness that had stated the victim pulled his weapon first. There could be no valid strategy for counsel's action because counsel's action "was based on a lack of vital information." Counsel's conduct was also deficient in failing to reassess the plea agreement and advise the client to withdraw from the agreement when it was apparent that the state would have grave difficulties if the defendant went to trial. Prejudice found because, if counsel had adequately investigated and adequately advised the defendant, the defendant would have insisted on going to trial.

*State v. Henderson*, 93 P.3d 1231 (Mont. 2004). Counsel ineffective in drug case for failing to adequately consult with client, investigate, or conduct any research prior to advising defendant to plead guilty. Counsel "did nothing more than request a plea agreement and facilitate the conviction of his client without a trial." Prejudice found because there was at least a colorable argument and the defendant maintained his innocence in *Alford* plea. Had counsel performed adequately, the defendant would not have entered a guilty plea.

## **B. ERRONEOUS ADVICE (OR FAILURE TO ADVISE) ON SENTENCING OR COLLATERAL CONSEQUENCES THAT LEADS TO PLEA**

### **1. U.S. Court of Appeals Cases**

**2011:** *United States v. Bonilla*, \_\_\_ F.3d \_\_\_, 2011 WL 833293 (9th Cir. Mar. 11, 2011). Counsel ineffective in felon in possession of firearm case for failing to advise the defendant of immigration consequences of a plea. The 33-year-old Mexican-born defendant had been a lawful permanent resident for over 30 years and his wife and children were U.S. citizens. The defendant's wife often spoke for him "due to his mental health condition." Prior to the plea she asked counsel about immigration consequences of a plea. Counsel told her he would look into it but never did until after the plea hearing. When the defendant's wife asked again, counsel informed her of the immigration consequences, which was that deportation was "presumptively mandatory." Counsel stated that, at the time of the plea, she believed the defendant was a U.S. citizen. This was not just a case of "inadequate legal advice." Here, the defendant "received no advice about immigration consequences of his plea." "A criminal defendant who faces almost certain deportation is entitled to know more than that it is possible that a guilty plea could lead to removal; he is entitled to know that it is a virtual certainty." It was reasonable for

the defendant here “to have inferred that he likely would not be deported if he pled” from the fact that counsel did not say differently after having been asked the question by the defendant’s wife.

**2010:** *Tovar Mendoza v. Hatch*, 620 F.3d 1261 (10<sup>th</sup> Cir. 2010). Counsel ineffective in kidnaping, criminal sexual penetration and aggravated battery case for making blatant and significant misrepresentations regarding the sentence the petitioner would receive if he entered a no contest plea. Counsel had only a brief phone call with the petitioner and then met with him briefly prior to three scheduled plea hearings. Counsel informed petitioner that he had a special relationship with the judge and that the judge had agreed to sentence the petitioner to only three years. The defendant signed a plea agreement, which was in English, at counsel’s instruction. Petitioner, a native Spanish speaker, could not read the agreement and it was not translated for him. Petitioner entered no contest pleas and faced up to 30 years confinements. He answered the court’s questions during the plea colloquy with counsel instructing him how to answer each question. He was sentenced to 25 years. The court did not apply AEDPA standards because the federal court had held an evidentiary hearing while the state court had decided the issue without a hearing despite petitioner’s diligence in attempting to develop the factual basis for his claims in state court. Thus, the court reviewed the claims *de novo* and held that the no contest pleas were involuntary and therefore constitutionally invalid.

*Bauder v. Dept. of Corrections*, 619 F.3d 1272 (11<sup>th</sup> Cir. 2010). Counsel ineffective in aggravated stalking of minor plea for affirmatively misinforming petitioner that his no contest plea would not expose him to subsequent sexually violent predator civil commitment proceedings. Counsel’s conduct was deficient because the law was clear. Even assuming it was unclear, counsel did not inform petitioner that there was a possible risk of civil commitment, or that the law was unclear, or that counsel simply did not know. Rather counsel affirmatively advised petitioner incorrectly that his plea would *not* subject him to civil commitment exposure. Prejudice established because the evidence of guilt was not overwhelming, petitioner maintained his innocence throughout, and petitioner would not have entered a no contest plea if he had been correctly advised on the potential for civil commitment.

**2005:** *United States v. Kwan*, 407 F.3d 1005 (9<sup>th</sup> Cir. 2005). Counsel in bank fraud case ineffective for affirmatively misleading the defendant as to the immigration consequences of his conviction. Counsel advised the defendant that deportation was not a “serious possibility.” After the plea but prior to sentencing, statutory amendments, however, resulted in the guilty plea “almost certainly” resulting in deportation. “[W]here, as here, counsel has not merely failed to inform, but has effectively misled, his client about the immigration consequences of a conviction, counsel's performance is objectively unreasonable under contemporary standards for attorney competence.” That counsel may have misled [the defendant] out of ignorance is no excuse. It is a basic rule of professional conduct that a lawyer must maintain competence by keeping abreast of

changes in the law and its practice. *See, e.g.*, ABA Model Rules of Professional Conduct, Rule 1.1[6]. Although counsel was a criminal defense attorney and not an immigration attorney, counsel made an affirmative representation . . . that he had knowledge and experience regarding the immigration consequences of criminal convictions; as a result, counsel had a professional responsibility to inform himself and his client of significant changes in the law that drastically affected the immigration consequences of his client's plea. *See generally* ABA Model Rules of Professional Conduct, Rule 1.1. . . . If counsel did not have the requisite competence in immigration law, or if counsel did not plan on maintaining the requisite competence, he should not have advised [the defendant] regarding the immigration consequences of his plea without referring [him] to an immigration lawyer or consulting himself with an immigration lawyer in the first place. *See id.* “Counsel's representations regarding the deportation consequences of [the] plea may not have been erroneous at the time he made them, but he failed to correct those representations when they became grossly misleading, and when counsel still had the opportunity, and responsibility, to do so.” Prejudice established because, if counsel had adequately advised the defendant and the court of the deportation consequences if sentenced to confinement for more than one year (rather than five as before), “there is a reasonable probability that the court would have imposed a sentence of less than one year.” Alternatively, there is a reasonable probability the defendant would have moved to withdraw his guilty plea and then gone to trial or renegotiated his plea agreement to avoid deportation.

**2003:** *Moore v. Bryant*, 348 F.3d 238 (7th Cir. 2003) (*affirming* 237 F. Supp. 2d 955 (C.D. Ill. 2002)). Counsel was ineffective in murder case for giving erroneous advice on sentencing to the defendant prior to entry of his guilty plea. The defendant was fifteen years old and charged as an adult with first degree murder. Although the defendant maintained his innocence, counsel recommended that the defendant enter a plea in order to receive a recommendation of a 20 year sentence, which was the minimum allowed. Counsel informed the defendant that if he plead guilty he would only be required to serve fifty percent of the 20 year sentence, but that if he went to trial he would be given a higher sentence and would be subject to the new state statute that would require that the defendant serve at least 85 percent of his sentence. Although the defendant was very reluctant he followed counsel's advice. Counsel's advice was wrong because the new statute did not become effective until after the defendant's trial and did not apply retroactively. Counsel's conduct was deficient because “[a] reasonably competent counsel will attempt to learn all of the facts of the case, make an estimate of a likely sentence, and communicate the results of that analysis before allowing his client to plead guilty.” Here, counsel recognized that his understanding of the statute might be incorrect, but he did not review the statute or case law to research the issue. Prejudice was found because the defendant, while maintaining innocence throughout, plead guilty solely because of counsel's advice that he would only have to serve 10 years as opposed to 22 to 27 years if he went to trial and was found guilty. The state court's decision was rejected under AEDPA for two reasons. First, the state court's reliance on the adequacy of the plea

judge's colloquy was irrelevant to the underlying question of counsel's effectiveness and, thus, was an unreasonable application of *Strickland*. Second, the state court's finding that the record did not show that the defendant relied on counsel's bad advice contradicted the testimony of the defendant and his counsel and, thus, was an unreasonable application of the facts to the law.

## 2. U.S. District Court Cases

- 2009:** *Alam v. United States*, 630 F. Supp. 2d 647 (W.D.N.C. 2009). Counsel ineffective in illegal gambling case for failing to adequately advise the defendant on deportation consequences prior to entry of the plea and failing to seek to withdraw the plea after counsel learned his previous advice to the defendant was erroneous. The defendant, a Pakistani citizen with permanent legal resident status, was one of 41 defendants indicted in a public corruption case. From the beginning he informed counsel that he was concerned about the impact of a conviction on his immigration status. Counsel allegedly contacted several immigration attorneys and personally researched the issue prior to advising the defendant that he would not be deported following a plea. Based on this advice, the defendant pled guilty. Prior to sentencing, counsel received a letter from one of those immigration lawyers alerting him to the fact that the conviction would result in deportation. Nonetheless, counsel advised the defendant not to move to withdraw the plea because it might impact his usefulness to the government at the upcoming trial of the former County Sheriff. Counsel suggested that he would take up the deportation issue with the prosecutors, who had no desire for the defendant to be deported, after sentencing and the trial of the Sheriff in which the defendant testified. The question of deportation was not even addressed in court until the court made an inquiry in a hearing related to the government's subsequent motion to reduce the defendant's sentence. Original trial counsel had been replaced by that point and this 2255 was then filed. Regardless of whether counsel consulted with other attorneys, his "advice regarding the immigration consequences of petitioner's plea was undeniably grossly inaccurate, given that the governing statute . . . explicitly enumerates" petitioner's crime as one requiring removal. "[T]he plain language of the applicable immigration statutes compels the conclusion that Counsel grossly misinformed petitioner on this subject." Counsel also "grossly misinformed" the defendant that he could prevent deportation later by obtaining the government's cooperation when "the government has no such discretion" in cases of conviction of these crimes. Prejudice established because the defendant provided a credible affidavit stating that he would not have pled guilty if he had been adequately advised. The court also found no reason to doubt this where the defendant had been a U.S. resident for 25 years, was married to a permanent legal resident, had children that were native-born U.S. citizens, had a successful business independent of the illegal gambling, and had few, if any, remaining ties to "Pakistan, a currently unstable country."
- 2008:** *United States v. Choi*, 581 F. Supp. 2d 1162 (N.D. Fla. 2008). Counsel ineffective in relying on the advice of an employee of the Bureau of Immigration and Customs

Enforcement that the defendant would probably not be deported if he pled guilty. Counsel's conduct was deficient because, "under the facts of this case, relying on a government agent's advice rather than performing one's own legal research fell short of an objective level of reasonableness. The governing statutes made clear on their face that this conviction would result in [the defendant's] mandatory deportation, subject only to narrow exceptions that [the defendant] plainly could not meet."

*Sasonov v. United States*, 575 F. Supp. 2d 626 (D.N.J. 2008). Counsel in bribery of public official case ineffective for several reasons. First, counsel affirmatively misrepresented the immigration consequences of a guilty plea. Counsel's conduct was deficient because counsel informed the defendant that, as a resident alien with a green card, he would not be subject to deportation following his plea. Prejudice established because "it is likely that Petitioner would have taken his chances at trial because he faced only six to twelve months more than the sentence he received," due to his guilty plea. Second, counsel failed to conduct discovery and, thus, failed to argue petitioner's minor role in the crimes and failed to establish that the value of the benefit received from the bribe was less than \$10,000, which would have prevented a four-point enhancement of the offense level. Prejudice established because the court might otherwise have reduced the sentence to less than one year or at least allowed the defendant "to negotiate a more favorable plea agreement with the Government."

**2007:** *U.S. v. Marcos-Quiroga*, 478 F. Supp. 2d 1114 (N.D. Iowa 2007). Counsel ineffective in guilty plea to drug trafficking offense for erroneously advising the defendant he would not qualify for sentencing as a career offender. The court's ruling was entered based on a motion to withdraw the guilty plea and a pro se motion for appointment of new counsel prior to sentencing. Counsel's conduct was deficient because the defendant had prior convictions in Iowa for felony delivering cocaine and misdemeanor assault with intent to commit sexual abuse. "[T]here should have been no doubt . . . [that the] two prior convictions . . . would qualify him for career offender status. Thus, counsel certainly could have predicted with a fair degree of certainty that [he] would be sentenced as a career offender." *Id.* at 1135 (emphasis in original). Prejudice found because the defendant likely would not have plead guilty absent counsel's erroneous advice. Motion to withdraw guilty plea and for appointment of new counsel granted.

### 3. State Cases

**2011:** *Ex parte Romero*, \_\_\_ S.W.3d \_\_\_, 2011 WL 3328821 (Tex. App. Aug. 3, 2011). Counsel ineffective in aggravated sexual assault on child case for failing to advise the defendant of the immigration consequences of his plea. Under the federal immigration statutes, it was "truly clear" that the conviction "made [the defendant] not just at risk for possible deportation but automatically deportable." The general immigration admonishment given by the trial court and counsel "did not satisfy trial counsel's duty . . . to inform [the defendant] of the specific consequences of his plea."

**Booth v. State**, \_\_\_ P.3d \_\_\_, 2011 WL 3191545 (Idaho July 28, 2011). Counsel ineffective in non-capital murder case for inadequate advice leading to plea. Although the state was not seeking the death penalty, the prosecutor gave notice pretrial that he intended to request a special verdict form in sentencing to submit statutory aggravators found in the capital statute to the jury. The statute provided that if death was sought and the jury found statutory aggravators, but did not return a death sentence, the court was to impose a fixed life sentence. If the jury did not find aggravators when death was sought or if death was not sought, the court would impose an indeterminate life sentence with a minimum period of at least ten years to be served. The prosecutor interpreted this statute to mean that in a non-capital case if aggravators were found the court had to impose a fixed life sentence. Defense counsel agreed with this interpretation. Counsel thus convinced the defendant to plead guilty in exchange for the state not pursuing statutory aggravating circumstances and an indeterminate life sentence with thirty years fixed. Counsel's conduct was deficient as his advice regarding potential penalties was "contrary to the plain and unambiguous language of the statute." Statutory aggravating circumstances were relevant only if death was sought. Counsel's "blatantly erroneous reading" of the statute was not made "reasonable" simply because the prosecutor and the judge made the same mistake. Prejudice was clear.

**Frost v. State**, \_\_\_ So.3d \_\_\_, 2011 WL 2094777 (Ala. Crim. App. May 27, 2011). Counsel ineffective in sodomy and sexual abuse of child plea case for failing to advise the defendant that he would not be eligible for parole if he pled guilty. Counsel gave his standard advice that parole was "up to the Department of Corrections." The statutes were clear, however, that a defendant convicted of these crimes "shall not be eligible for parole." "The effect of a sentence is one of the most important matters about which a criminal defense lawyer should be cognizant." Here, counsel's advice was incorrect in implying that parole was a possibility at the discretion of the Department of Corrections. Prejudice established as the defendant would not have pled guilty knowing that the required sentence was life without the possibility of parole.

**Ex parte Tanklevskaya**, \_\_\_ S.W.3d \_\_\_, 2011 WL 2132722 (Tex. App. May 26, 2011). Counsel ineffective in misdemeanor marijuana plea case for failing to specifically advise the defendant that her guilty plea would render her presumptively inadmissible upon leaving and attempting to re-enter the country. The defendant was a Ukrainian citizen granted legal permanent residence in the country. Counsel, the court, and plea paperwork advised the defendant generally that there may be immigration consequences, but that did not cure the problem in these facts. Counsel knew that the defendant had an out-of-country trip planned and the statutes were clear that if she left the country after her plea, her inadmissibility and removal were not merely a possibility but were presumptively mandatory. Counsel, therefore, had a duty to inform the defendant of the specific consequences of her guilty plea. Prejudice established because the defendant would not have pled guilty had she known of the true immigration consequences of the plea.

**Stith v. State**, \_\_\_ So.3d \_\_\_, 2011 WL 1604934 (Ala. Crim. App. Apr. 29, 2011). Counsel ineffective in sodomy plea for failing to inform the defendant that “good time” or “correctional incentive time” was not available for a Class A felony. The defendant turned down a plea agreement to a “20-year sentence, split to serve 5 years, day for day,” and insisted on a plea to a 10-year “straight” sentence, which he believed would require service of less than 5 years due to “good time” eligibility. A simple reading of the statute, however, would have informed counsel that incentive time deductions were not available. Thus, counsel’s statement that only the Department of Corrections could calculate or determine application of “good time” was “incorrect and amounted to a misrepresentation regarding the law.”

It is axiomatic that the reason way counsel is appointed is to advise a client about the law. The effect of a sentence is one of the most important matters about which a criminal-defense lawyer should be cognizant. . . . The fact that Stith, being ignorant of the law, instigated a renegotiation of his plea that effectively doubled the duration of his imprisonment is not a factor that prevents him from pleading or prevailing on a claim of ineffective assistance of counsel.

Counsel’s conduct was deficient and prejudicial.

**People v. Fonville**, \_\_\_ N.W.2d \_\_\_, 2011 WL 222127 (Mich. App. Jan. 25, 2011). Counsel ineffective in child enticement plea bargain, which included provision that the trial court would sentence the defendant at the low end of the sentencing guidelines or 51 months or allow the defendant to withdraw his plea. Defendant had been babysitting for his girlfriend and failed to timely return the children for a day as he had been out drinking and drugging. The children were not harmed in any way. Counsel’s conduct was deficient because counsel had failed to advise the defendant that his plea would require him to register as a sex offender. As the statute was “succinct, clear, and explicit,” as in *Padilla v. Kentucky*, 130 S. Ct. 4235 (2010), counsel had a duty to advise the defendant that registration would be a consequence of his guilty plea. “[G]iven the lack of any sexual component to [the defendant’s] conduct, it was all the more imperative that his counsel advise him of the unique registration consequences of his plea.”

**Calvert v. State**, 342 S.W.3d 477 (Tenn. 2011). Counsel ineffective in sex offense case for failing to advise the defendant about the mandatory lifetime community consequence of his pleas prior to entry of the pleas. The defendant pled guilty to multiple counts and was sentenced concurrently so that he effectively received a 10 year sentence suspended to probation upon service of nine months. On the judgment forms, he was also sentenced, as required by law due to the nature of his offenses, to lifetime community supervision, including the payment of supervision fees and regular reporting to a parole officer who has the discretion to impose conditions of supervision. This part of the sentence was

never discussed with him by counsel or the court, however. Counsel's conduct was deficient as the law was clear from "the plain language of the community supervision statute" that lifetime community supervision would be a consequence of the plea. Prejudice established as the defendant would not have pled guilty if he had been adequately advised.

*State v. Martinez*, 253 P.3d 445 (Wash. App. 2011). Counsel ineffective in plea case for failing to adequately warn the defendant of the deportation consequences of his plea to possession of a controlled substance with intent to deliver. Because the law "is clear" that this is a deportable offense, under *Padilla* and subsequent state rulings, counsel's conduct was deficient. Deficient conduct found even though the paperwork associated with the plea and the trial court informed the defendant that deportation may be a consequence of the plea. These warnings were not a substitute for the advice of counsel. Likewise, prejudice established even though "it may not seem rational that [the defendant] would refuse a very favorable plea offer," he claimed he would not have pled guilty if he had known deportation was a consequence and his counsel conceded that deportation was a "material factor" in the defendant's consideration. This was enough to establish prejudice.

*State v. Sandoval*, 249 P.3d 1015 (Wash. App. 2011). Counsel ineffective in third degree rape case for giving erroneous advice regarding deportation consequences of a plea. The noncitizen permanent resident defendant expressly told counsel that he did not want to plead guilty if the plea would result in deportation. Counsel told him that he would not "be immediately deported," and that he would have time to retain an "immigration counsel to ameliorate any potential immigration consequences of the plea." During the plea hearing and signed plea statement, the defendant was warned that a guilty plea is "grounds for deportation." Predictably, before he was released from jail, Customs put a "hold" on him and deportation proceedings began. Counsel's conduct was deficient as "the law was straightforward enough for a constitutionally competent lawyer to conclude" that a guilty plea would subject the defendant to deportation. Therefore, "counsel was required to correctly advise, or seek consultation to correctly advise" the defendant of the deportation consequences. The court's and plea statement warnings did not resolve the matter as counsel's advice impermissibly left the defendant with the impression that deportation was a remote possibility. With respect to prejudice, it did not matter that the plea made the sentencing range 6-12 months, while without a plea the sentencing range would have been 78-102 months with life as a maximum. The defendant "had earned permanent residency and made this country his home." Although he would have risked a longer prison term by going to trial, the court held: "Given the severity of the deportation consequence, we think [the defendant] would have been rational to take his chances at trial."

**2010:** *Greene v. Commissioner of Correction*, 2 A.3d 29 (Conn. App. 2010). Counsel ineffective in theft of weapons case for advising the defendant to plead guilty but failing

to ensure that the State would not be allowed to introduce the guilty pleas in evidence in the defendant's murder and conspiracy trial. While counsel's strategy was to preclude the jury in the murder case from learning of the earlier theft of weapons, counsel failed to take any action to prohibit the state's use of the guilty pleas. Prejudice established as the defendant would not have plead guilty to the weapons charges if he had been adequately advised.

***Johnson v. State***, 318 S.W.3d 313 (Mo. App. 2010). Counsel ineffective in drug case for incorrectly advising the defendant that, as part of his negotiated plea agreement, that he could get sentence credit for time he spent on bond pretrial. Counsel's conduct was deficient because counsel made positive misrepresentations suggesting that bond time credit was available when it clearly was not under state law. The defendant was entitled to rely on counsel's advice, especially because the prosecutor and the trial court agreed with counsel and the trial court pronounced he would receive credit toward his sentence for the time he spent on bond. Prejudice was clear, as the decision to plead guilty rested on the mistaken belief that both the written agreement and the bond credit agreement would be honored.

***People v. Garcia***, 907 N.Y.S.2d 398 (N.Y. Sup. Ct. 2010). Counsel was ineffective in misdemeanor drug plea case for failing to advise the defendant, a native of the Dominican Republic, of immigration consequences of his guilty plea. The defendant was charged with multiple drug counts, but pled guilty to a single misdemeanor charge in exchange for dismissal of the remaining charges. Prior to his plea, he asked counsel about immigration consequences, but counsel admitted his ignorance concerning immigration law, declined to research the issue, and informed the defendant that he should seek advice from an immigration specialist. The defendant paid "an immigration paralegal to assess his situation and was erroneously informed that a single misdemeanor conviction would have no adverse immigration consequences." Counsel's conduct was deficient. *Padilla v. Kentucky*, 130 S. Ct. 4235 (2010), did not create a new rule of law as *Padilla* merely applied *Strickland* precedents to a new set of facts. Here, the immigration consequences were readily ascertainable and "merely advising a client to seek outside immigration advice, without more, now fails to meet the affirmative duty set forth in *Padilla*, at least where the immigration implications of the plea were fairly straightforward, . . . ad where the 'specialist's' advice was wrong." *Garcia*, 907 N.Y.S.2d at 405. Prejudice was established because the defendant likely would not have pled guilty if he had been accurately advised. He clearly was concerned enough to ask counsel and to follow counsel's advice to get further guidance from an immigration specialist. "That defendant went to a paralegal does not alter this Court's finding that defendant would not have pleaded guilty but for the deficiencies in the representation by his counsel." The more difficult issue was that during the plea hearing, the trial court had advised the defendant that, while he did not know for certain, conviction could lead to deportation and that he should "assume that he's deportable" if convicted. "[W]here, as here, defendant is found in fact to have been misled by bad advice from a so-called retained specialist and by a

lack of advice from his defense attorney, the Court's general warning will not automatically cure counsel's failure nor erase the consequent prejudice." *Id.* at 407.

***State v. Powell***, 935 N.E.2d 85 (Ohio App. 2010). Counsel was ineffective in providing inadequate and inaccurate advice concerning sex offender registration requirements that resulted in the defendant pleading guilty to voyeurism. The defendant was charged with obstructing official business, criminal trespass, and voyeurism, all of which were misdemeanors. The state initially offered to allow a plea to the obstruction and trespass charges in exchange for dismissing the voyeurism charges. This was rejected on the advice of counsel to litigate mental health issues and attempt to gain dismissal. After the court found the defendant competent, counsel advised him to accept the state's offer to plead guilty to voyeurism in exchange for dismissing the remaining charges. The possibility of required registration was never mentioned to the defendant until the middle of the plea hearing. The court allowed a brief recess for counsel to discuss the issue with the defendant. Counsel informed the defendant that he would have to register but that he would only have to be on the list for a year or so. Almost a year after sentencing and having completed his probation, the defendant sought relief. Counsel's conduct was deficient because, under applicable state law at the time, the defendant was exempt from registration (because he had no prior offenses and the victim was over age 18) unless the trial court may findings and entered an order removing the exemption. Further, counsel misadvised the defendant that the registration could be expunged within a brief time. Prejudice established and the plea vacated.

***Hart v. State***, 314 S.W.3d 37 (Tex. App. 2010). Counsel ineffective in sexual assault of child plea for advising the defendant that he was eligible to receive community supervision if he pled guilty. The defendant was 19 and mentally retarded, as he had an IQ between 47-52 and a mental age of a six year old. "Even a person of genius status requires somewhat correct data in order to make an informed decision." Here, under state law the defendant was not eligible for community supervision due to the nature of the convictions. Prejudice established as the defendant would not have pled guilty absent the erroneous advice.

***State v. A.N.J.***, 225 P.3d 956 (Wash. 2010). Counsel ineffective in juvenile case where defendant pleaded guilty to first degree child molestation. Counsel erroneously advised the defendant and his parents about the consequences of the plea by advising them that the conviction could be removed from the defendant's record when he turned 18 or 21. While the court has discretion to relieve the requirement to register as a sex offender, the conviction never goes away. Based on counsel's ineffectiveness, the defendant was entitled to withdraw his guilty plea.

**2009: *Grindstaff v. State***, 297 S.W.3d 208 (Tenn. 2009). Counsel ineffective in aggravated sexual battery plea case for advising the defendant incorrectly that he would be eligible for probation if he pled guilty. Under state law, the defendant could not be given

probation and was subject to a sentence of not less than eight nor more than twelve years on each of the five counts. The court gave the defendant an effective sentence of thirty years confinement without parole eligibility. Counsel's conduct was deficient because the defendant was not eligible for probation under state law, even though counsel submitted evidence and argued for imposition of probation at sentencing. Counsel "obviously did not know" the law on this point and the prosecutor and court never corrected him. The court cited the ABA Standards for Criminal Justice as "guidelines" for gauging counsel's conduct. "Criminal defense attorneys must conduct adequate legal research in order to meet the required range of competence." Absent counsel's deficient advice, the defendant would not have plead guilty, which was evidenced by his rejection of prior plea offers by the state, which demanded a period of confinement.

***State v. Nunez-Valdez***, 975 A.2d 418 (N.J. 2009). Counsel ineffective in criminal sexual contact plea for providing false or misleading information as to the deportation consequences of the plea. Retained counsel advised the defendant to plead guilty in exchange for five years of probation or he would get a 10 year sentence. When the defendant asked about immigration consequences, counsel informed him "nothing like that" would ever happen. A different attorney appeared for the actual plea and conferred with the defendant through an interpreter. At best, he informed the defendant that deportation was a "possibility." The trial court found that deportation consequences were a central concern for the defendant, who had been in the U.S. for 18 years with his wife and children. The appellate court decided the case under the state constitution "because we recognize that a federal remedy may depend on whether deportation is a penal or collateral consequence." The trial court's finding that the defendant would not have pled guilty if properly advised was supported by sufficient credible evidence.

**2008:** ***Polite v. State***, 990 So. 2d 1242 (Fla. App. 2008). Counsel ineffective in robbery, carjacking, and violation of probation plea for incorrectly advising the defendant of the maximum sentence he could receive upon revocation of the community control/probation when the plea entailed a sentence of two years in prison followed by two years of community control with the possibility of conversion to probation. Counsel advised the defendant that the maximum would be six years upon revocation, which was incorrect.

**2007:** ***Sial v. State***, 862 N.E.2d 702 (Ind. App. 2007). Counsel ineffective in theft case for failing to advise the defendant that his guilty plea carried possible deportation consequences. Counsel's conduct was deficient and he admitted—"with admirable candor"—"that he dropped the proverbial ball." *Id.* at 707. The fact that the probation officer preparing the presentence investigation report may have advised the defendant of the deportation causes a month after the plea was irrelevant to what the defendant knew at the time of the plea. Prejudice found because the defendant, a native of Pakistan, had been in the U.S. for 20 years and had a wife and 13-year-old daughter, who was presumably born here and a U.S. citizen. Thus, sufficient circumstances existed to establish a reasonable probability that the defendant would not have plead guilty if he had

been adequately advised.

- 2006:** *State v. Patel*, 626 S.E.2d 121 (Ga. 2006). Counsel was ineffective in sexual battery plea of nolo contendere for making affirmative misrepresentations to the defendant with respect to the effect of the plea on the defendant's future participation as a physician in federal health care programs, such as Medicare and Medicaid. The defendant entered a plea only after specifically asking counsel about this issue. Without conducting "the basic research" necessary, counsel incorrectly advised the defendant that there would not be any long-term consequence when, in fact, the defendant was prohibited from participation in these programs for 10 years. Although there is no constitutional requirement to advise defendant's of collateral consequences of a plea, counsel here made an affirmative misrepresentation in response to the defendant's specific inquiries. Prejudice found because the defendant would not have entered a plea of nolo contendere if he had been properly advised.
- 2005:** *Davis v. Murrell*, 619 S.E.2d 662 (Ga. 2005). Counsel was ineffective in armed robbery plea case. The defendant was charged with six armed robberies and other offenses and plead guilty to one armed robbery in exchange for dismissing the other charges and a sentence of 20 years that was made concurrent to a sentence he was serving in Florida. Counsel's conduct was deficient because counsel affirmatively misinformed the defendant that he would be eligible for parole and sentence review when neither was true. Prejudice found.
- 2004:** *Cobb v. State*, 895 So. 2d 1044 (Ala. Crim. App. 2004). Counsel ineffective in driving under the influence case for failing to adequately investigate and advise the defendant prior to his entry of a guilty plea. The defendant plead guilty under the assumption that he would be accepted into drug court and would receive no prison time. Because of a prior conviction of which counsel was unaware, the defendant was ineligible for drug court. Counsel admitted in his post-trial motions and conceded that his conduct was deficient. Prejudice found because the defendant consistently maintained innocence and would not have plead guilty if he had been adequately advised.
- Hernandez v. Commissioner of Correction*, 846 A.2d 889 (Conn. App. 2004). Counsel ineffective in murder nolo contendere plea case for erroneously advising the defendant concerning parole eligibility. During the first day of trial, the defendant withdraw his not guilty plea and entered a nolo plea in exchange for a 25 year sentence. He had been informed by counsel that he would be eligible for parole after serving half of the sentence, when the defendant was ineligible for parole under state law. Counsel's conduct was deficient and the defendant was prejudiced because he likely would not have entered the plea absent counsel's misadvice because the defendant had a plausible self-defense argument and the court had already excluded the testimony of the only state's witness that could testify about the defendant's motive to commit murder.

***Rollins v. State***, 591 S.E.2d 796 (Ga. 2004). Counsel was ineffective in drug plea for giving the defendant erroneous advise concerning the collateral consequences of pleading guilty, which resulted in the defendant pleading guilty. The defendant was a native of Barbados and a resident alien when she entered a first offender guilty plea to a drug charge based on trace amounts of cocaine discovered on a dollar bill in her purse. Although the defendant maintained innocence and the state's evidence was very weak, she entered a plea on the advice of counsel. Prior to entry of the plea, the defendant asked counsel if there would be any negative repercussions from the plea that would effect the defendant's desire to go to law school and become a lawyer and her INS status. Without conducting any research, counsel advised the defendant that there would be no repercussions. Counsel's conduct was deficient because basic research would have revealed that the defendant was subject to deportation upon a drug conviction. Basic research also would have revealed that it is standard practice for any state bar to require the applicant to provide information concerning prior convictions. Prejudice was found because both the defendant and counsel testified unequivocally that the defendant would not have entered a plea had she known of the adverse impact on either her intension to become a lawyer or her immigration status.

***State v. Lamb***, 804 N.E.2d 1027 (Ohio App. 2004). Counsel ineffective in sexual imposition plea for failing to object to the trial court's failure to inform the defendant, at the time of his guilty pleas, that he was subject to a mandatory five-year post-release control period, due to a prior felony sex offense and the determination that he was a sexually oriented offender. Prior to accepting a guilty plea, state law requires the trial court to inform the defendant of the maximum penalty involved. Post-release control is part of an offender's sentence. Thus, the trial court's failure to provide any explanation of the mandatory period of post-release control at the time of the plea was error. Without the proper instruction, the defendant here could not have fully understood the implications of the plea. Counsel's conduct was deficient and prejudicial in failing to object to the trial court's error.

## **C. FAILURE TO INFORM DEFENDANT OR STATE OF PLEA OFFER**

### **1. U.S. Court of Appeals Cases**

**2006:** ***Satterlee v. Wolfenbarger***, 453 F.3d 362 (6th Cir. 2006) (*affirming* 374 F. Supp. 2d 562 (E.D. Mich. 2005)). Counsel ineffective in drug conspiracy case for failing to inform the defendant of the prosecution's plea offer on the day of trial to allow the defendant to plead guilty in exchange for a sentence of six to 20 years so the defendant proceeded to trial and received a sentence of 20 to 30 years. The defendant was facing up to life imprisonment on the indicted charges and from the beginning cooperated with police in order to obtain release on bond. Prior to counsel's retainer, the government had offered a deal to 12 to 20 years. The defendant rejected this offer but continued cooperating with the police. Ultimately, prior to trial, the prosecutor offered a deal of 7 to 20 years, but this

was never conveyed to the defendant. On the day of trial, the prosecutor offered 6 to 20, but again this was not conveyed to the defendant. In finding counsel's conduct deficient the court found the defendant's testimony to be more credible than counsel's because it was supported by the defendant's mother and the prosecutor. The district court granted a conditional writ ordering reinstatement of the plea offer. When the state failed to reinstate the plea offer, the district court ordered immediate release and expungement of the record of conviction. The Sixth Circuit affirmed.

## 2. U.S. District Court Cases

**2010:** *Merzbacher v. Shearin*, 732 F. Supp. 2d 527 (D. Md. 2010). Counsel ineffective in multiple count child rape case for failing to inform the petitioner of a pre-trial offer of a plea agreement in which the state agreed to recommend and the trial court agreed to impose a sentence of ten years. Unaware of this offer, the petitioner proceeded to trial and was sentenced to life. Due to the multiple charges, petitioner was represented by both private counsel and a public defender. Private counsel did not inform the petitioner of the offer because she was busy with other matters. The public defender, believing that it was more appropriate for retained counsel to discuss the offer and assuming that she had, also did not inform the petitioner of the offer. The state court rejected their explicit admissions of deficient conduct, however, and found that neither testified truthfully. The court explicitly found that private counsel had perjured herself. In doing so, the state court relied on three outside sources of evidence: (1) counsel had been admitted to the bar despite a negative character committee report because she concealed two shoplifting convictions; (2) counsel had been accused of lying to another judge; and (3) counsel consented to disbarment due to acceptance of fees from clients and failure to provide the contracted legal services. Under AEDPA, the state court record itself provides clear and convincing evidence rebutting the presumptive correctness of the dispositive facts and establishing that the state court's holding was reached in an objectively unreasonable manner. In sum, there was no probative evidence that private counsel perjured herself or that the public defender was "out of the loop" on the issue. "Their testimony cut significantly against their own interests since it suggests professional malfeasance." *Id.* at 551.

Further, there is little evidence to answer the question of what could possibly motivate a lawyer to sacrifice her legacy and good name and commit perjury for a defendant like Merzbacher, a convicted child rapist. . . . Although one could at least conceive that a lawyer might sacrifice herself to save a wrongly convicted defendant from lethal injection, that is hardly the situation here.

*Id.* at 552-53. Counsel's testimony was entirely credible and uncontradicted by record evidence. The state court "relied heavily" and impermissibly "on information imported from outside the record" to find to the contrary. In addition to being outside the record,

the state court's reliance on the bar admission, which was more than 25 years old, was incredible as this type of information would not be admissible in any case. Likewise, counsel's acceptance of disbarment was not probative of credibility. Counsel's conduct was deficient. Likewise, the petitioner was prejudiced. Although he repeatedly asserted his innocence, this "does not preclude accepting a future plea offer, as defendants often accept plea agreements despite previously, often vigorously, proclaiming innocence." *Id.* at 564. Here, the petitioner had 16 independent charges, insufficient funds to retain counsel on all of them, and "incessant and constant media attention." The plea bargain offered was exceptionally generous, such that even the trial judge that prompted the plea discussions was "taken aback" by the generosity of the offer. Likewise, both defense counsel believed the plea offer was a beneficial arrangement for the petitioner. For all of these reasons, there is more than a reasonable probability that the petitioner would have taken the plea agreement if he was provided that opportunity. Convictions and sentence set aside with order for the state to reinstate the plea offer.

***Williams v. Booker***, 715 F. Supp. 2d 756 (E.D. Mich. 2010). Trial counsel was ineffective in failing to inform the defendant of a favorable plea offer. The defendant was charged with conspiracy to commit first degree murder, assault with intent to commit murder, felon in possession of weapon, and two counts of felony firearm. Counsel unilaterally rejected the prosecution's offer to have the defendant plead guilty to the weapons charges in return for dismissal of the other charges. While counsel's recollections diverged from the defendant's, the court explicitly found the defendant "to be more credible than his trial attorney." Appellate counsel's ineffectiveness served as cause and prejudice to excuse the state court procedural default. "A reasonable appellate attorney would have asked Petitioner whether there was a plea offer. . . . [and] would have consulted with Petitioner and his trial attorney about issues to be raised on appeal before filing the appellate brief." Had appellate counsel performed adequately and presented this issue during appeal, the defendant "in all likelihood would have prevailed."

**2008:** ***Leatherman v. Palmer***, 583 F. Supp. 2d 849 (W.D. Mich. 2008). Counsel ineffective in criminal sexual conduct case for failing to properly advise the defendant of the government's plea offer for probation and up to one year of confinement when the defendant faced a possible life sentence. Prejudice established.

**2004:** ***Shiwlochan v. Portuondo***, 345 F. Supp. 2d 242 (E.D.N.Y. 2004), *aff'd*, 150 Fed. Appx. 58 (2d Cir. 2005). Counsel was ineffective in failing to advise the defendant of the court's plea offer in second degree murder case. Although the prosecution never made a plea offer, the trial court offered to impose a sentence of 15 years to life—the minimum sentence for second degree murder—if the defendant plead guilty to the charge of second degree murder and the other offenses included in the indictment. [It is common practice in New York for trial courts to engage in plea offers independent of the prosecution.] Following conviction, the defendant was sentenced to 41 2/3 years to life, which was the maximum possible sentence. Counsel did not inform the defendant of the offer because

counsel: (1) did not think the defendant would accept the offer since he maintained innocence; (2) believed that there was a viable defense of misidentification; and (3) did not believe that the defendant would receive a “severe sentence” if convicted. Counsel’s conduct was deficient and the state court’s finding to the contrary was, under the AEDPA standard, an unreasonable determination of the facts in light of the evidence presented. The state court’s finding that counsel did convey the offer was contradicted by counsel’s affidavit. Moreover, even though counsel knew the maximum sentence, he never informed the defendant of the actual maximum sentence or that he could be sentenced consecutively because counsel did not believe the defendant would receive a “severe sentence” if convicted. Instead, he left the defendant with the impression that the maximum sentence he faced was 25 years to life. The state court’s finding that counsel’s conduct was reasonable was an unreasonable application of *Strickland* under the AEDPA because

By underestimating petitioner’s exposure, [counsel] breached his duty ‘to advise his client fully on whether a particular plea to a charge appears desirable. . . . Merely advising petitioner as to possible sentences rather than advising him on his full sentencing exposure is insufficient.

Despite the defendant’s assertion of innocence, the court found a reasonable probability that the defendant would have accepted the plea offer for 15 years had he known of the court’s offer. The court thus ordered resentencing according to the plea offer.

### 3. State Cases

**2011:** *Johnson v. State*, \_\_\_ S.E.2d \_\_\_, 2011 WL 2302855 (Ga. June 13, 2011). Counsel ineffective in armed robbery and aggravated assault case for failing to adequately advise the defendant of the state’s plea offer of 25 years. A series of public defenders did not advise the defendant for various reasons. Thus, the defendant was not advised of the offer or that he was facing a mandatory sentence of life without parole if convicted until two days before trial. The defendant proposed a counteroffer of 20 years to serve 10, which was conveyed to the state. When that offer was rejected, within minutes, the defendant agreed to accept the 25 year offer. This was rejected due to the standing policy of the prosecutor that plea offers were closed after the docket call when the defendant pled not guilty. While there was conflicting evidence of whether the defendant was ever advised of the 25 year offer prior to two days before trial, it was undisputed that no one attempted to negotiate a plea prior to the docket call. Likewise, counsel made no investigation and did not advise the defendant of the mandatory life sentence, prior to the docket call. Final counsel did not even meet with the defendant until after the docket call, even though he was aware of the prosecutor’s docket call deadline for plea offers. Prejudice established as there is a reasonable probability the defendant would have accepted the state’s offer if he had been adequately advised.

**2009:** *Carmichael v. People*, 206 P.3d 800 (Colo. 2009). Counsel ineffective in case involving numerous charges related to child sexual assault for inadequately advising the defendant about the state's plea offer. The defendant faced a sentence of 20 years to life. The state offered a plea bargain that included an indeterminate sentence of probation with a minimum of ten years. On counsel's advice, the defendant rejected this offer. He was ultimately sentenced to twenty years of probation. Counsel's conduct was deficient because counsel never informed the defendant he faced two indeterminate life sentences if convicted. He also did not inform the defendant that the minimum length of probationary supervision he would receive if convicted at trial would be twenty years, twice the minimum he would be facing if he accepted the plea offer. Instead, counsel incorrectly advised the defendant he would "end up with the same probationary sentence offered in the plea bargain" if convicted at trial. Counsel "fundamentally misunderstood the potential consequences of the charges" and was "unaware of the specialized sentencing requirements for sex offenders" under state law. Counsel mistakenly believed the defendant "would be subject to general felony sentencing guidelines. This mistake, combined with a failure to conduct adequate research," led counsel to incorrectly advise the defendant, who as a result "was unable to properly evaluate the attractiveness of" the state's offer and did not have "an opportunity to make a reasonably informed decision regarding the relative benefits of the offered plea bargain." Prejudice established because there is a reasonable probability that the defendant would have accepted the plea offer if he had been adequately advised. Indeed, the defendant, "though his counsel, was affirmatively pursuing a plea bargain despite his proclamations of innocence." "[A] defendant's protestations of innocence, standing alone, are insufficient to support a finding of no prejudice when weighed against objective evidence of prejudice."

A large number of defendants will enter into the criminal justice system maintaining their innocence, only to later admit to the criminal acts they have committed. In addition, a defense attorney's accurate presentation of available outcomes may encourage a defendant to admit his actions and face the applicable consequences.

New trial granted without any order to reinstate the plea offer.

*Davie v. State*, 675 S.E.2d 416 (S.C. 2009). Counsel ineffective in drug trafficking case for failing to inform the defendant of the state's initial written plea offer in which the State offered a fifteen-year sentence in exchange for a guilty plea. Counsel was unaware of the state's offer until after its expiration because counsel was relocating his office and changing his mailing address. Ultimately, the defendant entered a "straight up" plea to eight charges in return for the state dismissing three charges and the state recommended life without parole. The defendant was sentenced to 27 years. Even though counsel may not have been aware of the plea offer until after the expiration date, counsel's conduct was deficient in failing to object at the plea hearing to lack of notice of the first offer

when it was mentioned by the state. “Had counsel done so, he might have been able to convince the solicitor to reinstate this plea offer or persuade the circuit court judge to impose a fifteen-year sentence.” Prejudice established based on the difference in the sentence the defendant received and that offered by the state initially and the fact that counsel and the defendant testified that he would have accepted the initial plea offer if it had been communicated to him. Remanded for resentencing not to exceed the original twenty-seven year sentence.

**2006:** *Jiminez v. State*, 144 P.3d 903 (Okla. App. 2006). Counsel ineffective in second-degree burglary and other offenses case for failing to inform the defendant of a plea offer until the day set for trial. Prejudice found because the plea offer was not open when defense counsel did inform the defendant about it and the defendant probably would have accepted the offer and received a sentence of five years in prison rather than the 12-year sentence assessed by jury. Sentence modified to five years.

**2004:** *Sanders v. Commissioner of Correction*, 851 A.2d 313 (Conn. App. 2004). Counsel ineffective in robbery and conspiracy case for failing to meaningfully advise the defendant of a plea offer from the state. The defendant rejected an initial plea offer by the state and the state made a second offer. Although counsel informed the defendant of the offer, counsel did not inform the defendant of the statements of the witnesses against him or advise him of the likely outcome if the case proceeded to trial. Although *Strickland* presumes counsel’s conduct to be reasonable,

Nowhere is it said, though, that such a presumption is irrebutable. As with any refutable presumption, the petitioner may rebut the presumption on adequate proof of sufficient facts indicating a less than competent performance by counsel. In determining whether the presumption should apply, . . . other acts of ineffective assistance in the same matter may be considered in making that determination.

Prejudice found because the defendant would have accepted the second plea offer limiting his sentence if it had been meaningfully explained. Although the only evidence of this was the defendant’s testimony, this was sufficient because the court assessed the defendant’s demeanor and credibility.

## **D. BAD ADVICE LEADING TO REJECTION OF PLEA OFFER**

### **1. U.S. Court of Appeals Cases**

**2009:** *Dasher v. Attorney General, Florida*, 574 F.3d 1310 (11th Cir. 2009). Counsel ineffective in drug case for advising client to reject plea offer from judge and to plead guilty without any agreement on sentence. The prosecutor offered the defendant a two

year sentence, which was rejected. Due to a huge backlog of cases and overflowing jails, the trial court, who rarely involved himself in plea negotiations, made his own offer of 13 months in a Florida State prison. The defendant, however, preferred a 12 month sentence that could be served in a county jail. Counsel advised the defendant that if he rejected the plea offer, pled straight up, and offered mitigation evidence, the trial court likely would not sentence the defendant to more than 13 months. The defendant pled guilty the same day and, considering a presentence report prepared by defense counsel that revealed numerous juvenile and adult priors, the court sentenced the defendant to 10 years. Counsel's conduct was deficient in that "the advice he gave . . . was a piece of foolishness," because, with the 13 month offer, the judge was already "giving away the store." Once the defendant rejected the judge's offer and pled straight up, the judge "had no reason to give him the thirteen month sentence he offered to induce a plea." In addition, although counsel suggested presenting mitigation to convince the judge, "it was obvious that he was not then aware of any."

We do not suggest that there are no circumstances where it would be reasonable for a lawyer to advise his client to plead guilty without an agreement and throw himself at the mercy of the judge. But this was not such a case. Whether or not he had a lengthy prior criminal record, [the defendant] was clearly risking a sentence of substantially more than thirteen months, and there was certainly no reason to believe he would do better.

Because the defendant had served all but 5 months of his sentence, the sentence was modified to time served.

*Williams v. Jones*, 571 F.3d 1086 (10th Cir. 2009). The state court failed to fashion a constitutionally permissible remedy following a finding of ineffective assistance in rejecting a plea offer in first-degree murder case. The Oklahoma prosecutor offered the defendant a 10-year sentence in exchange for a plea to second-degree murder. Believing the defendant was innocent, counsel threatened to withdraw if the defendant accepted the offer. Against his own desires and following counsel's advice, the defendant proceeded to trial, was convicted, and sentenced to life without parole. The Oklahoma Court of Criminal Appeals found ineffective assistance and, as a remedy, modified the defendant's sentence to life *with* parole eligibility, which was the minimum punishment allowed under state law for first-degree murder. The federal court declined to determine whether deference was due under AEDPA or whether review was *de novo* "because even under a deferential standard of review the remedy was objectively unreasonable." "[A]ny correction for a federal constitutional violation must be consistent with federal law," which requires "a remedy that comes as close as possible to remedying the constitutional violation, and is not limited by state law." Remanded to District Court to determine remedy.

**2007:** *Julian v. Bartley*, 495 F.3d 487 (7th Cir. 2007). Counsel ineffective in plea negotiations for incorrectly advising the defendant on the maximum punishment he could receive if he did not accept the state's proposed plea offer, which led the defendant to reject the plea offer. The defendant was charged with two robberies and faced a maximum sentence of 60 years. The state offered a concurrent 23 year sentence for both. Just before entry of a plea, the court informed the defendant that his sentence would have to be served consecutive to his separate sentence imposed for parole violation. The defendant conferred with counsel, who informed him that under the recent decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), he could only be sentenced to 30 years because the indictments did not mention the prior conviction. The defendant then rejected the plea and proceeded to trial and got 40 years concurrent. Counsel's conduct was deficient and the state court's determination to the contrary was based on an unreasonable determination of the facts in light of the evidence presented in state court. The state court decision was also an unreasonable application of *Strickland*. Counsel's conduct was deficient because, in the context of advice concerning a plea agreement, "[a] reasonably competent attorney will attempt to learn all the facts of the case, make an estimate of the likely sentence, and communicate the result of that analysis before allowing the client to plead guilty." *Id.* at 495. Here, counsel's advice was plainly wrong because "the holding of *Apprendi* is clear on first, second, or third glance that the fact of a prior conviction need not be submitted to a jury and proved beyond a reasonable doubt." *Id.* at 497. Thus, counsel's interpretation of *Apprendi* "simply cannot constitute an objectively reasonable analysis of the law." Prejudice established because the information counsel provided was "precisely the type of information that is likely to impact a plea decision." The defendant might risk seven extra years in prison for a chance at acquittal, but a reasonable defendant would not risk an extra 37 years for this gamble. In addition, the defendant rejected the plea immediately after counsel's erroneous advice. While the defendant argued that the remedy was to reinstate the state's initial plea offer, the court rejected this as inappropriate because "the State had no hand in denying [the defendant] his Sixth Amendment right to effective assistance of counsel, and [the defendant] never actually accepted the terms of the original plea offer." *Id.* at 500. New trial granted.

**2006:** *United States v. Morris*, 470 F.3d 596 (6th Cir. 2006) (*affirming in part United States v. Morris*, 377 F. Supp. 2d 630 (E.D. Mich. 2005)). Counsel was ineffective in felon in possession of a firearm case brought under Project Safe Neighborhoods, a joint program of the federal and state prosecutors in Michigan, for failing to adequately advise the defendant with respect to the state's plea offer. The defendant was initially charged in state court and offered a deal for one to four years on a marijuana charge and two additional years on the weapons charge. The state prosecutor required an immediate decision, however, and the defendant was informed that if he declined the deal, he would be transferred to federal court which could result in a more severe sentence. Counsel, who did not have complete discovery at that time, was able to speak only briefly with the defendant in the "bull pen" with others present and no ability for privileged communications prior to a hearing. State counsel was not familiar with the federal

sentencing guidelines and relied on what the state prosecutor told her based on his information from the federal prosecutor. She, thus, informed the defendant that if transferred to federal court, he could receive a sentence of 62 to 68 months when he actually faced 101 to 111 months under the federal guidelines. The defendant rejected the deal and was transferred to federal court where he filed a motion to dismiss the federal indictment and to “remand” him to state court and to reinstate the plea. The District Court granted the motion on the basis of ineffective assistance of counsel. The Sixth Circuit found that it was proper to dismiss the indictment because the federal prosecutor was involved in the state court plea offer, which included dismissal of the federal charges as part of the agreement, but the federal court could not remand to state court and order reinstatement of the plea offer. The court held that the defendant was constructively denied counsel under *United States v. Cronin*, 466 U.S. 648 (1984), and prejudice was presumed.

The fact that . . . counsel gave him some advice does not preclude a finding of constructive denial of counsel under this standard. Rather, the circumstances, such as the lack of time for adequate preparation and the lack of privacy for attorney-client consultation, would have precluded any lawyer from providing effective advice. This is demonstrated here in part by the fact that . . . counsel was precluded from taking basic preparatory steps such as looking at his prior record in conjunction with the federal sentencing guidelines so as to make an accurate prediction of his guideline range, and instead had to rely on the erroneous estimate provided by an Assistant United States Attorney. . . .

Alternatively, the court held that counsel provided ineffective assistance of counsel under *Strickland*. Counsel’s conduct was deficient in failing to adequately inform the defendant of the likely consequences of rejecting the plea offer and being transferred to federal court. Prejudice found because the defendant would likely have accepted the plea offer and entered a plea of guilty if he had been adequately advised.

**2004:** *United States v. Grammas*, 376 F.3d 433 (5th Cir. 2004). Counsel ineffective in altering vehicle identification number case for failing to realize (and, therefore, failing to advise the defendant) that his prior convictions were crimes of violence that raised the base offense level for sentencing. Counsel’s conduct was deficient because failure to properly advise the defendant of the maximum sentence that he could receive falls below an objective standard of reasonableness. The defendant was prejudiced because there is a reasonable probability that if he had known of the greater sentencing exposure, he would have plead guilty and availed himself of a guidelines reduction for acceptance of responsibility.

**2003:** *Nunes v. Mueller*, 350 F. 3d 1045 (9th Cir. 2003). Counsel was ineffective in second

degree murder case for giving the defendant incorrect information and advice concerning the state's plea offer, which resulted in the defendant rejecting the offer. The defendant was initially charged with murder during the first two trials, the jury hung. After the third trial, the defendant was convicted of second degree murder but that conviction was reversed on appeal. Prior to the fourth trial, the state offered the defendant a sentence of eleven years in exchange for a guilty plea to voluntary manslaughter. Counsel met only briefly with the defendant and did not adequately explain the offer. The defendant believed the offer was for a 22 year sentence. The first time the defendant was able to talk to counsel again and clarify the offer was on the day of trial when the offer had expired. The defendant was convicted of second degree murder and received a 15 year to life sentence. Without holding an evidentiary hearing, the state court held that the defendant had not made out a prima facie case for prejudice and denied relief. Analyzing the case under the AEDPA, the Ninth Circuit found that the state court decision was an unreasonable application of the law to the facts and an unreasonable application of clearly established Supreme Court law. The court held that there was ample evidence in the record to establish a prima facie. The state court also unreasonably required the defendant to prove prejudice with absolute certainty when he needed only to demonstrate that there was a reasonable probability that he would have accepted the plea offer. Here, the defendant met that burden. To the extent the state court demanded more, it applied the *Strickland* test unreasonably. To the extent that the state court had made findings of fact, the court held that deference was not required because the state court did so without holding a hearing. Prejudice was clear here in that the defendant's strategy through all four trials was to argue that he was guilty only of voluntary manslaughter. Thus, the court found that it was reasonable to infer that he would have accepted an offer to plead guilty to voluntary manslaughter. To the extent that the state court made contrary inferences without a hearing, the court found that the state court decision was objectively unreasonable because there were equally valid inferences that could have been drawn in the defendant's favor. The court ordered the defendant released unless the state made an identical plea offer to the defendant.

## 2. U.S. District Court Cases

**2011:** *Young v. Zon*, \_\_\_ F.Supp.2d \_\_\_, 2011 WL 691631 (W.D.N.Y. Feb. 18, 2011).

Counsel ineffective in attempted murder case in failing to render any advice concerning state's plea offer. The state made an offer of a maximum of seven years in exchange for a guilty plea when the petitioner was facing a possible sentence of 25 years. While retained counsel sent his associate to inform the petitioner of the offer, counsel did not advise the petitioner "about the pros and cons" or whether he should accept or reject the plea and gave his standard answer that "it was not his policy to recommend to his client whether a sentence [sic] offer should be accepted or rejected." The court found this "extremely troubling," as counsel's policy applied "*especially* when the potential sentence was 'significant' - a situation where the defendant is arguably in the most need of an attorney's professional recommendation." Counsel's conduct was deficient.

[T]his is not a case where trial counsel's advice about the wisdom of accepting a plea could be placed on a continuum of reasonableness because, as trial counsel admitted, he gave no advice whatsoever. The failure to give any advice was entirely contrary to the minimum professional norms of practice.

There was also prejudice. There were eyewitnesses that positively identified the petitioner as the shooter, he had a motive, he was arrested shortly after the crime in a police chase, GSR results were "inconclusive" but did not exclude him as the shooter, and he had made statements to a jailhouse snitch. Under AEDPA, the state court unreasonably applied clearly established Supreme Court law.

**2010:** *Wolford v. United States*, 722 F. Supp. 2d 644 (E.D. Va. 2010). Counsel ineffective in drug case for failing to adequately advise the defendant during plea negotiations, which resulted in the defendant rejecting a very favorable plea agreement. The defendant was initially charged with several co-conspirators on one count of conspiracy to distribute drugs over a five year period out of the defendant's house, which was located within 1,000 feet of an elementary school. The majority of the controlled substances involved were pain medications the defendant and her boyfriend obtained through the use of physician-issued medical prescriptions. A search of the house revealed nearly 100 empty prescription bottles, totaling more than 8,000 pills, and other evidence. While there was substantial evidence of distribution, significant quantities of the substances were also used by the defendant and her boyfriend, as both were addicted to prescription pain killers. Counsel was appointed in February 2006. Several weeks later, while the defendant was in an inpatient drug treatment program, the government extended its first written plea offer, which would have allowed the defendant to plead to conspiracy at a base level of 28 to 30 and health care fraud. In exchange the government would agree not to charge her with distribution within a school zone and would not seek any additional adjustments or enhancements to the offense level. There is no evidence that counsel informed the defendant of this initial offer. Several months later, in May 2006, the defendant and counsel met with government agents for a "de-brief and proffer session" where the defendant signed an immunity agreement and agreed to show an undercover agent how she obtained the prescriptions from various doctor's offices. Several weeks later, counsel finally spoke with the defendant about the government's plea offer. Only a few days after this, the defendant and counsel met with the government and covered the plea offer with the defendant in detail. The offer was the same, except the health care fraud charge was eliminated at counsel's request. The defendant was "not comfortable" with the offer. While she did not dispute that she had distributed *some* drugs, she contested the amount of drugs she would be held responsible for under the plea. She also did not accept the plea because she sought probation and no jail time if she entered a plea. A few days after this, the prosecution renewed the offer, which would expire in two weeks. While could discussed the offer with the defendant, he did not inform her of the expiration date. The offer expired and the government indicted on the initial charge, on two counts of

distribution, and distribution within a school zone. The next day, the defendant and counsel again met with the prosecution to discuss a plea. She remained reluctant about the quantity of drugs, although she understood the government agent's explanation that if you distributed one pill out of a bottle the whole bottle was counted in the charge. The government suggested they meet again in two weeks, presumably to continue plea discussions, and the defendant agreed. Afterwards, counsel advised her, however, that the government would never agree to anything she wanted. Nonetheless, at the end of August 2006, the government extended the same offer without a deadline attached to it. Counsel informed the defendant of the offer and continued to discuss the offer, trial strategy, etc., with her but had no additional plea discussions with the government before a superceding indictment in October 2006 that added additional drugs to the conspiracy charge, which now was charged as within the school zone, and added six additional counts for distribution. Following this indictment, the government extended no additional offer and the case was set for trial. She was ultimately convicted of the conspiracy and two substantive counts of distribution. In sentencing, the court found her accountable for more than 21,000 kilograms of marijuana placing her base offense level at 36. With enhancements, she was sentenced at a base level of 42, with a guidelines range of 360 months to life. The court sentenced her, however, to concurrent 108 month sentences. Counsel's conduct was deficient because counsel advised the defendant throughout that there was a "household or family member" defense. In essence, she believed, based on counsel's bad advice and his "faith" in the defense that it was legal to distributed prescription drugs to family and household members if no money was exchanged. She also believed, based on counsel's bad advice, that she could not be held responsible for any drug quantity that she personally ingested. There was clear Fourth Circuit precedent contrary to counsel's advice. Counsel also never advised the defendant of his belief that she would be convicted of conspiracy. He also never advised her that conviction on the conspiracy charge would render her accountable for all "reasonably foreseeable" controlled substances that she and her co-conspirators distributed and possessed with intent to distribute during the course of the conspiracy. Counsel also never informed her that the trial judge would make this finding based on a preponderance of the evidence and could consider amounts even from substantive charges of which she was acquitted. In short, there were "no viable defenses" available to the defendant, but, based on counsel's bad advice, the defendant believed she did have viable defenses.

This incorrect and incomplete advice, in turn, prevented [the defendant] from making a knowing and voluntary decision whether to accept the government's plea offer rather than proceed to trial. Of course, it is important to note that the Sixth Amendment does not require defense counsel to be 100% correct or perfect in advising his or her client in the course of a criminal prosecution, as such a standard would sometimes be impossible to meet. Indeed, defense counsel, on occasion, must make predictions in areas of unsettled law or perhaps make new arguments in areas of unsettled

law, and in both of these instances, defense counsel will likely be unable to be 100% accurate. Yet where, as here, the legal advice at issue involves areas of settled law and no reasonable arguments could be made to alter these settled rules, defense counsel clearly has an affirmative duty to advise his or her client correctly in all material respects. And significantly, the incorrect and incomplete legal advice trial counsel provided [the defendant] in this instance was not only material, it was indeed central to [her] decision whether to accept the government's plea offer or instead proceed to trial.

Prejudice established because "there is ample objective evidence establishing a reasonable probability" the defendant would have accepted the plea offer if she had "received complete and accurate advice from trial counsel." The defendant never disputed that she distributed *some* quantity of drugs. "[T]he most compelling objective evidence in the prejudice analysis is the significant—indeed striking—disparity between the government's plea offer and [her] sentencing exposure were she to be convicted at trial." In essence, there was about 17 levels difference, which would have given her a guidelines range of 63-78 months rather than 360 months-life.

***United States v. Wilson***, 719 F. Supp. 2d 1260 (D. Ore. 2010). Counsel ineffective in drug case in failing to adequately advise the defendant in pretrial negotiations. At the time of arrest, the defendant had 116 ecstasy pills, scales, and drug packaging materials in his home. He confessed involvement in smuggling more than 100,000 ecstasy pills on the day of arrest. He cooperated with law enforcement for three weeks, including recording phone calls, and assisting agents in seizing additional drugs and locating his co-defendant in Amsterdam. The defendant believed the agents had offered him an immunity agreement. When he insisted on speaking to the prosecutor about a "deal" in exchange for his cooperation, the AUSA facilitated the appointment of counsel for him. The AUSA offered a pre-indictment plea bargain of six years with a one day time limit and no discovery. Despite counsel's awareness of the evidence seized in the defendant's possession, his confession, and his cooperation for weeks, counsel refused to advise the defendant on whether to accept the offer because counsel could not do so without obtaining discovery. Counsel made a counter "offer" of continued cooperation in exchange for full immunity, which the AUSA rejected immediately. Without evening informing the defendant that immunity had been rejected, counsel informed the AUSA that the six year offer was rejected. Post-indictment, counsel did not pursue any plea negotiations other than continuing to push for full immunity. Due to counsel's grossly inadequate advice, the defendant went to trial believing that he faced between 30-80 months in prison when he actually faced a possible 20 year sentence. The Court rejected the government's argument that there was no right to the effective assistance of counsel pre-indictment. This was a "critical stage of the criminal process" that was "the functional equivalent of the initiation of formal adversarial proceedings." Moreover,

when counsel was appointed at the request of the government, a finding that there was no right to effective assistance of that counsel “would make a mockery of the judicial appointment of counsel.” Counsel’s conduct was deficient. He failed to inform the defendant that he could be held liable for all the ecstasy imported or delivered during the conspiracy. He failed to inform the defendant he was facing a much longer possible sentence than 6 years and that acquittal was unlikely given the evidence against him. Counsel also provided inaccurate advice by informing the defendant the guideline range at that time was 41-51 months, which was based on an outdated version of the Sentencing Guidelines. These errors were compounded by counsel’s failure to advise the defendant that full immunity in these circumstances was extremely unlikely. Even assuming the defendant was not entitled to effective assistance pre-indictment, counsel was ineffective post-indictment in failing to aggressively pursue a plea agreement comparable to the initial six year offer. He never accurately advised the defendant of his sentencing exposure. At the time of trial, the defendant believed he faced 30-80 months when he faced 20 years. Prejudice established. The Court found the defendant’s testimony that he would have taken the six year deal if adequately advised to be credible and validated by the objective circumstances. Counsel’s affidavit was rejected as incredible, where the affidavit contradicted counsel’s notes and correspondence at the time. The remedy ordered was reinstatement of the government’s initial six-year plea offer.

*Harris v. United States*, 701 F. Supp. 2d 1084 (S.D. Iowa 2010). Counsel ineffective in cocaine distribution case for incorrectly advising the defendant, which resulted in the defendant rejecting the government’s offer to plead guilty and accept responsibility for 100 grams of cocaine in exchange for a 10 year sentence. The defendant was charged with distributing on four occasions a total amount of 7.5 grams, but a superseding indictment included special findings that she was responsible for 500 grams to 1.5 kilograms. Due to counsel’s misunderstanding of the role of “relevant conduct” under the sentence guidelines and his belief that the defendant could not be held responsible for more than 7.5 grams if she plead guilty, the defendant rejected the plea offer and entered an open guilty plea. Over her objection, the court accepted the PSI finding that she was responsible for 315 grams and sentenced her under the guidelines to 151 months, which was later reduced to 121 months. Counsel’s conduct was deficient as counsel did not understand the application of *Booker* or the sentencing guidelines to the case.

The court recognizes that counsel cannot be expected to predict the eventual sentence that a defendant will receive. Counsel should be expected, however, to advise a defendant on at least the fundamental provisions of the guidelines so that she can make an intelligent decision whether to accept or reject a plea.

*Id.* at 1094. Prejudice found as the defendant would have accepted the government’s plea offer if she had been adequately advised. The remedy granted was reinstatement of the offer to plead to 100 grams of cocaine base for a 10 year sentence.

**2009:** *Carrion v. Smith*, 644 F. Supp. 2d 452 (S.D.N.Y. 2009). Under AEDPA, counsel ineffective in drug and attempted murder case for inadequately advising the defendant, which resulted in rejection of the state's pre-trial plea offer. The defendant had numerous charges arising from a shootout with the police, in which he was shot twice, and possession of five kilograms of cocaine. Conviction of just the least serious offence required a mandatory sentence of 15 years to life. Conviction on all carried the potential of 125 years to life. While the defendant was still hospitalized following his arrest, counsel informed him that the prosecution would agree to 10 years to life in exchange for pleas on all, which counsel thought was a "good offer." Counsel did not, however, inform the defendant of these sentencing ranges or discuss the strength of the state's case.

When a plea offer is made and there is a reasonable probability that the defendant is uncertain about the sentencing exposure he faces, whether or not he accepts the plea, a lawyer unquestionably has a duty to inform his client of the sentencing exposure he faces if he accepts the plea offer and if he does not.

Counsel "knew that an acquittal on the drug charge was virtually impossible." As a matter of practice, counsel never made recommendations to his clients on whether to accept or reject plea offers. "Under these unique circumstances, where nothing could be gained by proceeding to trial, counsel should have made an explicit recommendation to take the plea offer, at the very least." Prejudice was clear in that the defendant had proceeded to trial and received a sentence of 125 years to life. There was sufficient objective evidence to support the conclusion that there is a reasonable probability that the defendant would have accepted the offer if properly advised. The state court decision to the contrary unreasonably applied *Strickland*. Court ordered reinstatement of plea offer.

*United States v. Kimes*, 624 F. Supp. 2d 565 (W.D. La. 2009). Counsel ineffective in methamphetamine and conspiracy case for failing to advise the defendant of the potential sentencing benefits of pleading guilty. Counsel failed to advise the defendant of how the Sentencing Guidelines might affect his sentence or that he could potentially receive a three-point reduction in sentence for acceptance of responsibility if he pled guilty. Although the government never made a specific plea offer, the prosecutor did state that a general offer of sentence reduction was made if the defendant pleaded guilty prior to one of his co-defendants. Regardless of whether the government officially made a plea offer to the defendant, counsel's conduct was objectively unreasonable. Because he was not adequately advised, the defendant was "under the impression" that he was going to be sentenced in the same fashion whether he pled guilty or proceeded to trial. Prejudice established because the court found the defendant's testimony that he would have pled guilty if he had been adequately advised to be "credible and substantially uncontradicted." Although the defendant had denied guilt in one letter to counsel prior to trial, this did not refute his credible testimony that he would have plead guilty. "An individual whose

lawyer, through action or inaction alike, has left him with the impression that there is no benefit to a guilty plea would certainly be more inclined to rely on claims of actual innocence once resigned to the fact that trial was imminent.” Prejudice found because the court routinely granted sentence reductions for acceptance of responsibility, even though not required to do so under the Guidelines. Thus, it was “reasonably likely” that the defendant would have received a lower sentence if he had been adequately advised and pled guilty. Sentence vacated and resentencing ordered as if the defendant had plead guilty.

- 2006:** *United States v. Hernandez*, 450 F. Supp. 2d 950 (N.D. Iowa 2006). Counsel ineffective in conspiracy to distribute methamphetamine case for failing to adequately advise the defendant concerning the possible sentence, which resulted in the defendant declining to plead guilty and testifying during the trial rather than just relying on his pretrial statement, which had negative consequences under the Guidelines due to an obstruction of justice enhancement. While counsel believed that the defendant should plead guilty, even without a plea agreement, he never told the defendant that he believed he would be convicted and did not lean on him to plead guilty. He simply advised the defendant incorrectly that he would likely get a sentence of about 14 years rather than the 360 months to life range of the guidelines and the 360 months the defendant got. Prejudice established because the defendant would have entered a guilty plea, if counsel had performed adequately, and would have received a lesser sentence. At minimum, he would not have had the obstruction of justice enhancement because he would not have testified at trial, falsely or otherwise, and would have received a reduction for acceptance of responsibility. The court ordered resentencing based on a guilty plea with no plea agreement, with a range of 210 to 262 months of imprisonment.
- 2005:** *United States v. White*, 371 F. Supp. 2d 378 (W.D.N.Y. 2005), *aff'd*, 257 Fed.Appx. 382 (2<sup>nd</sup> Cir. 2007). Counsel was ineffective in drugs and weapons case for failing to know of and to adequately advise the defendant of the consequences of a second conviction of possessing a firearm in furtherance of a drug crime, which resulted in the defendant rejecting a plea agreement. Counsel’s conduct was deficient, because even conviction of more than one count of the statute, even if contained in a single indictment, required a 30-year mandatory consecutive sentence. If the defendant had been adequately advised, he most likely would have accepted the plea offer that would have required a plea to only one count of this offense and would have required a sentence of 147 to 168 months under the Sentencing Guidelines. Although the defendant had been convicted at trial, but not yet sentenced, the court found that habeas review under 28 U.S.C. 2241(c) was appropriate. The court ordered that the rejected plea agreement would be enforced and set aside the convictions not in line with that agreement and scheduled sentencing for a later date.

### 3. State Cases

**2011:** *Riley v. State*, \_\_\_ S.W.3d \_\_\_, 2011 WL 3209175 (Tex. App. July 29, 2011). Counsel ineffective in advising the defendant to proceed to trial in murder case. Counsel's primary argument and evidence sought community supervision for the defendant. Counsel's conduct was deficient because, under state law, a defendant who proceeded to trial and was convicted was not eligible for community supervision, but counsel did not realize this until the charge conference. State law did allow a judge to enter deferred adjudication community supervision following a guilty plea or plea of nolo contendere. If the defendant had known the jury could not grant community supervision, he would have pled nolo contendere. Thus, prejudice established.

*H.P.T. v. Commissioner of Correction*, 14 A.3d 1047 (Conn. App. 2011). Counsel ineffective in pretrial negotiations which resulted in the defendant rejecting a plea offer in sexual assault on child case. In a pretrial conference, the prosecutor made an offer, including a recommendation of a 25 year sentence, suspended after 12 years. The trial court made its own offer, which the prosecutor acquiesced to by silence, of a 20 year sentence, suspended after 9 years. Counsel did not retain the services of an interpreter, even though the defendant's native language was Vietnamese, and did not advise the defendant to accept the court's offer. After the defendant rejected the offer, initial counsel withdrew and the case proceeded to trial. Following conviction, the defendant was sentenced to 23 years, suspended after 13 years. The court affirmed the lower court's finding of ineffective assistance and in remanding for sentencing only not to exceed the court's pretrial plea offer of 20 years, suspended after 9.

**2010:** *Kolle v. State*, 690 S.E.2d 73 (S.C. 2010). Counsel ineffective in drug trafficking plea case for failing to adequately advise the defendant with respect to the state's initial plea offer of ten years suspended on service of five. The defendant was facing a sentence of 7-25 years, but counsel advised the defendant the offer was not a "good deal." Counsel also misinformed the defendant that the offer would still be open after the suppression hearing, when it was not. If the defendant had been aware that the state would withdraw the offer after the suppression hearing, he may have decided to accept it and receive a lower sentence.

*People v. McCauley*, 782 N.W.2d 520 (Mich. App. 2010). Counsel ineffective in first-degree murder case for failing to adequately advise the defendant prior to his rejection of a plea offer to plead to second-degree murder with an 18-year minimum sentence. Counsel failed to advise the defendant about aiding and abetting, even though counsel was aware that the defendant denied being the shooter and that the state would proceed under an aiding and abetting theory. Thus, the defendant was not aware that he could be convicted of first-degree murder even if he did not fire the fatal shot. Counsel's conduct "fell below an objective standard of reasonableness" and was prejudicial because the 18 year old defendant would have accepted the plea offer rather than proceeding to trial and

being sentenced to life. Remanded although the state was free to present a new offer in excess of the original offer if it could rebut the presumption of vindictiveness.

**2009:** *Lester v. State*, 15 So. 3d 728 (Fla. App. 2009). Counsel was ineffective in robbery case for failing to adequately advise the defendant of the potential sentence, which led the defendant to reject a favorable pretrial plea offer. The defendant was initially charged with robbery by sudden snatching. The state offered a deal for 41.7 months, but this offer was rejected after counsel advised the defendant of the five year maximum punishment. Just before trial, the state amended the charge to indictment by force. The deal was still rejected after counsel advised the defendant of the possible fifteen year sentence and recommended the defendant take the deal. Counsel did not, however, advise the defendant of the possibility that the state would seek habitual felony offender status, which happened prior to sentencing. The defendant was thus subject to a 30 year mandatory sentence. The remedy ordered was that the state could elect whether to retry the defendant or simply to withdraw the habitual offender notice, subjecting the defendant only to the fifteen year maximum.

*Holmes v. State*, 277 S.W.3d 424 (Tex. App. 2009). Counsel ineffective in misdemeanor assault on wife case where the wife refused to testify for failing to investigate and discover evidence (including the 911 and patrol car tapes), failed to develop a trial strategy, failed to be prepared for trial, and failed to object to admission of the 911 and patrol car tapes, or seek a continuance. Prejudice established during pretrial negotiations, including an offer of 120-days in exchange for a plea after jury selection began, because the defendant was “unable to make an informed decision regarding plea offers.” Prejudice also established during the trial itself.

**2008:** *Revell v. State*, 989 So. 2d 751 (Fla. App. 2008). Counsel ineffective in driving while license suspended or revoked case for failing to advise the defendant, who had two prior felony convictions, that he was eligible for habitual felony offender (HFO) enhanced sentencing prior to the State withdrawing its plea offer. The state offered nine months in the county jail in exchange for a plea; counsel advised the defendant he faced a maximum sentence of five years; and the defendant rejected the plea offer. The state then withdrew the offer and two weeks later filed a notice of intent to seek enhanced sentencing. The defendant was sentenced to ten years. Counsel’s conduct was deficient because counsel conceded he was not aware of the possibility of an enhanced sentence until after the state’s notice was filed. “Counsel’s failure to accurately advise his client of the maximum sentence he faced when considering the offer of a plea negotiation amounts to ineffective assistance.”

**2006:** *Hall v. State*, 929 So. 2d 1148 (Fla. App. 2006). Counsel ineffective in advising client prior to guilty pleas to various property crimes because counsel erroneously believed and advised the defendant that he would be sentenced to no more than seven years of confinement and that he was eligible for probation. Prejudice found because the

defendant had been offered a plea agreement for 10 years in prison and five years of probation, but turned it down and then inexplicably pled guilty and got the mandatory 15 year prison sentence due to his prison releasee reoffender status.

**2004:** *McKeeth v. State*, 103 P.3d 460 (Idaho 2004). Trial counsel was ineffective in sexual exploitation by a medical care provider for failing to draft the conditional plea agreement in accordance with the terms that he and the defendant intended. The defendant, a licensed professional counselor, was charged with sexual contact with six patients. He offered a conditional plea agreement that was intended to reserve his right to appeal the denial of pre-trial motions and to withdraw all of his guilty pleas if he prevailed on appeal with respect to even one count. The defendant entered *Alford* pleas to all six counts. On appeal, three counts were dismissed but the court did not allow the defendant to withdraw his guilty pleas on the remaining three counts because the language of the plea agreement only allowed the defendant to withdraw his plea to those counts on which he prevailed on appeal. Counsel's conduct was deficient in failing to draft the conditional plea agreement according to the terms that he and the defendant intended to proffer. The defendant was prejudiced because but for counsel's error the defendant would have pleaded not guilty to all the offenses. The defendant's guilty pleas to the remaining three counts were vacated.

#### **E. ERRONEOUS ADVICE ON RIGHT TO TESTIFY (State Cases Only)**

**2007:** *Reeves v. State*, 974 So. 2d 314 (Ala. Crim. App. 2007). Counsel ineffective in burglary case for preventing the defendant from testifying on his own behalf after the defendant insisted that he wanted to do so. The defendant was charged with entering the home of his wife's ex-husband and had made a statement to police that he had gone to the home but he did not enter the home. Counsel's conduct was deficient because "[a] defendant has a fundamental right to testify on his own behalf, that right is personal to the defendant, and defense counsel may not waive that right." Counsel's conduct was not explained by strategy to avoid cross about the defendant's prior actions and stalking his wife because she had already testified to these events and the existence of a restraining order against the defendant. The denial of the right to testify was not "harmless," even though the defendant's testimony to police was admitted into evidence because he implied in the statement that he did not enter the home but did not specifically state that and because his testimony would have allowed the jury to "judge[] his credibility against the victim's," who was the only person to testify that he entered the home. Even without the defendant's testimony the jury had sought additional instruction on the elements of the charge and reached a verdict only after receiving an *Allen* charge.

*Visger v. State*, 953 So. 2d 741 (Fla. App. 2007). Counsel ineffective in burglary and battery case for advising the defendant not to testify. Counsel's conduct was deficient because the defense theory was that the defendant was invited into the home, but without the defendant's testimony there was no evidence to support that theory. Counsel's strategy to keep out information concerning the defendant's prior conviction of

aggravated battery was not reasonable under these circumstances, particularly where there was already evidence that the state's two primary witnesses had drugs in their home and one of them was a convicted felon "thus reducing any effect of appellant's convictions on his credibility, as compared to that of the state's witnesses." *Id.* at 744. Strategic decisions must be informed decisions, where the alternatives have been considered and rejected. Where those decisions are uninformed, counsel's judgment may be deficient. That is the case here." *Id.* It was also not "strategy" that counsel believed that some of the defendant's version of events was "preposterous," but counsel failed to investigate.

Furthermore, we find it unreasonable and deficient performance to believe that counsel could argue to the jury a theory that appellant was invited in without any evidence whatsoever to support it and all the evidence clearly contrary to that theory. Such an argument amounts to sheer speculation.

*Id.* at 745. Prejudice found in light of the inconsistencies in the state witnesses' testimony, the fact that some of their testimony "strains credulity," and the fact that much of the actions of the state witnesses, even according to their own testimony, "may appear more consistent with having been involved in an attack on the appellant [who was shot in the encounter] rather than the other way around." *Id.* at 746.

**2006:** *People v. Whiting*, 849 N.E.2d 125 (Ill. App. 2006). Counsel ineffective in aggravated battery case for advising the defendant, who desired to testify, that she could not do so. The defendant was charged with assaulting an investigator of the Department of Children and Family Services who was in the defendant's home to investigate an incident between the defendant's son and local police days before. While the defendant's husband and son testified, the defendant was prejudiced because she did not herself testify.

## F. ERRONEOUS ADVICE ON RIGHT TO JURY OR BENCH TRIAL

**2011:** *State v. Sampson*, \_\_\_ A.3d \_\_\_, 2011 WL 2670182 (R.I. July 8, 2011). Counsel ineffective in child abuse case for refusing to comply with the defendant's request to waive a jury and proceed to a bench trial. Under state law, the defendant had the right to waive the jury and proceed with a bench trial. Moreover, the Rhode Island Supreme Court had "explicitly stated that the decision whether or not to waive the jury is ultimately the decision of the defendant and not of counsel." Here, however, counsel mistakenly informed the court that it was his decision and the court accepted this. Faced with this, the defendant waived counsel and proceeded pro se to his bench trial. The court offered the defendant two choices: (1) trial by jury, against his wishes, represented by counsel; or (2) a pro se bench trial. The correct, third option of a bench trial, in accordance with his wishes, represented by counsel was never offered or considered by the court. Thus, the defendant's waiver of his right to counsel was not knowing, voluntary, or intelligent.

## G. INADEQUATE ADVICE ON RIGHT TO APPEAL

### 1. U.S. Court of Appeals Cases

**2009:** *Bostick v. Stevenson*, 589 F.3d 160 (4th Cir. 2009). Under AEDPA, counsel ineffective following murder trial in failing to consult with the defendant about filing an appeal. While the defendant had told counsel prior to trial that he would be satisfied with the jury's verdict, he told his daughter in open court prior to sentencing not to worry because he would "get an appeal." Counsel did not speak with the defendant about an appeal after that, but he told the defendant's then-wife, who inquired about an appeal, that there were no possible grounds for an appeal. Counsel's failure to consult with the defendant was deficient and "flew in the face of a duty to do so." *Id.* at 166.

An attorney must consult with a client about filing an appeal either where a reasonable defendant would have wanted to appeal, typically because there were non-frivolous grounds to pursue, or because the particular defendant adequately demonstrated to counsel an interest in appealing. Though there is no per-se rule, a lawyer who fails to consult with a defendant about an appeal following a jury trial almost always acts unreasonably.

*Id.* at 166-67. "Here, trial counsel had a duty to consult with [the defendant] because he went to trial, there were non-frivolous grounds to pursue, and, most importantly, [the defendant] unequivocally demonstrated his interest in an appeal post-verdict." *Id.* at 167. He did so "in open court, which was sufficient, in and of itself, to implicate his attorney's duty to consult." *Id.*

**2007:** *Thompson v. United States*, 504 F.3d 1203 (11th Cir. 2007). Trial counsel ineffective following plea to conspiracy to possess cocaine with intent to distribute for failing to adequately advise the defendant of the right to appeal. The defendant and his two codefendants were sentenced the same day and the codefendants, who had filed motions for reduction based on "minor rule," were given lesser sentences than the defendant, whose counsel made only an oral motion, which was denied. Counsel's conduct was deficient because counsel did not adequately advise the defendant concerning the right to appeal following the trial court's advice to the defendant and the defendant's question to counsel about a possible appeal. Counsel told the defendant, in a five minute conversation, only that he could appeal but counsel did not think an appeal would be successful or worthwhile. Counsel had a duty to consult with the defendant because the defendant "demonstrated an interest in an appeal by asking his attorney about that right." Counsel's advice was deficient because the defendant was given no information from which he could have intelligently and knowingly either asserted or waived his right to appeal. Prejudice established because there is a reasonable probability the defendant would have appealed if he had been adequately advised.

## 2. U.S. District Court Cases

**2010:** *United States v. Ibersen*, 705 F. Supp. 2d 504 (W.D. Va. 2010). Counsel ineffective in drug case for failing to adequately consult with the defendant during plea negotiations regarding the true advantages of appealing his sentence enhancement, which rendered the plea agreement waivers of appeal rights and collateral rights invalid. Prior to trial, the defendant unsuccessfully challenged a sentence enhancement based on prior felony drug convictions that increased the statutory mandatory minimum sentence from 10 to 20 years. The defendant wanted to appeal, but counsel believed the chances of the Fourth Circuit reversing the trial court were not great. “Advise regarding an appeal’s chances for success is not the equivalent of discussing the advantages and disadvantages of appeal.” Counsel advised the defendant his only other chance to reduce the length of the sentence was to offer substantial assistance to the government in hopes of achieving a motion for reduction below the statutory minimum. Based on counsel’s advice, the defendant entered a plea agreement in which one charge was dismissed, the government recommended credit for acceptance of responsibility, and the defendant waived appeal and collateral attack rights. Counsel’s conduct was deficient in failing to advise the defendant of the possibility of pleading guilty “straight up” without a plea agreement. This would not have exposed the defendant to a greater sentence, would have allowed the defendant to appeal the sentence enhancement, and left open the possibility of seeking a sentence reduction based on substantial assistance. Likewise, counsel did not “fully explore” the “minimal benefit” the defendant got from the plea agreement, which dismissed one count “but did not reduce his sentence exposure in the least.” Likewise, “the reduction for acceptance of responsibility was swallowed up” by the sentence enhancement. Prejudice established as the defendant had expressed his dissatisfaction and desire to appeal the sentencing enhancement. There was a reasonable probability that if adequately advised the defendant would have entered a “straight up” plea to both counts and pursued an appeal. Judgment reentered and appeal allowed.

**2009:** *United States v. Purcell*, 667 F. Supp. 2d 498 (E.D. Pa. 2009). Counsel ineffective in drug case for failing to adequately consult with the defendant about filing an appeal. Prior to sentencing, counsel spoke to the defendant and told the defendant he did not see any meritorious issues for appeal. Nonetheless, the defendant said he wanted to file an appeal. Counsel’s failure to follow through on this was deficient and prejudicial, despite the defendant’s failure to identify any specific appealable issues. Direct appeal allowed.

*Walton v. Hill*, 652 F. Supp. 2d 1148 (D. Ore. 2009). Under AEDPA, counsel ineffective in murder case for failing to notify the defendant about the amended judgment following resentencing imposed without a hearing following remand. Counsel attempted to notify the defendant by letter, but the initial letter was “refused” by the prison mail room because counsel’s secretary failed to put a return address on the envelope. After that counsel forgot to resend it. Thus, the defendant did not learn of the amended judgment until after the time to appeal had expired. The state court decision was contrary to

established federal law under *Roe v. Flores-Ortega*, 528 U.S. 470, 486 (2000) because “[t]he question is not, as the PCR judge framed it, whether the appeal might have had merit, but instead, ‘but for counsel’s deficient conduct [the petitioner] would have appealed.’” Here, the defendant had taken a “pro-active role in his defense at all stages of this case, over the course of many years.” Counsel had a constitutional duty to confer with him about an appeal, because he had “reasonably demonstrated to counsel that he was interested in appealing” and would have if counsel had performed adequately. “[R]egardless of the apparent lack of non-frivolous grounds for appeal,” habeas relief was required to allow the defendant to prosecute an appeal.

## **II. FAILURE TO COMPEL COMPLIANCE WITH PLEA AGREEMENT (State Cases Only)**

**2011:** *State v. Fannon*, 799 N.W.2d 515 (Iowa 2011). Counsel ineffective in negotiated plea to sexual abuse for failing to adequately address the prosecutor’s breach of the agreement during the plea hearing. The initial prosecutor agreed to make no sentencing recommendation during the sentencing hearing. A different prosecutor argued for up to ten year terms on both counts and asked for consecutive sentences before defense counsel interrupted for a bench trial. Following this, the prosecutor attempted to withdraw his statements in compliance with the plea agreement and the case proceeded to sentencing. Counsel’s conduct was deficient in failing to move to withdraw the plea, failing to move for specific performance before a different judge, and failing to even consult with the defendant on these matters. While the court recognized the sentencing court’s ability to disregard the improper argument, the court found it appropriate in light of the interests of justice to remand for sentencing before a different court with strict compliance by the state with the agreement.

**2008:** *Baldrige v. Weber*, 746 N.W.2d 12 (S.D. 2008). Counsel ineffective in sentencing following drug charge plea for failing to object to the state’s failure to comply with the plea agreement. The agreement required, among other things, that the defendant cooperate in the investigation and reveal sources, contacts, and associates and that the state would inform the sentencing judge of the level of his cooperation. The defendant complied with other terms and provided information about people in the Aberdeen area. The prosecution indicated that they wanted information only on people in the Watertown area. The defendant was not from the area, but obtained information from his girlfriend about people in the Watertown area and supplied this as well. Without any allegation that his information was untruthful or his cooperation insufficient, the state failed to inform the sentencing court of the cooperation as required. This information was also not included in the presentencing report. Defense counsel did not object and the court sentenced the defendant to the maximum sentence. Counsel’s conduct was deficient and not based on strategy. With respect to prejudice, the court held that “[i]t is immaterial that the sentencing judge may not have been influenced by the State fulfilling its end of the bargain.” Prejudice was presumed because the defendant “had a substantial right to

the fulfillment of the terms of his plea agreement” and the court viewed this as an instance whether there was an “[a]ctual or constructive denial of the assistance of counsel.”

**2007:** *Custodio v. State*, 644 S.E.2d 36 (S.C. 2007). Counsel ineffective in burglary and grand larceny case for failing to have the defendant’s plea agreement enforced based on detrimental reliance. Shortly after his arrest, the defendant met with police and two assistant prosecutors and was promised a 15 year cap if he would cooperate with officers. He did so in admitting to “a string of at least seventy-five burglaries” and assisting in the recovery of a half million dollars worth of property. Following his cooperation, the elected prosecutor chose not to honor the initial agreement and the defendant pled guilty and was sentenced to 45 years. Counsel’s conduct was deficient in failing to pursue enforcement of the initial agreement, which the defendant told her about and the police and the assistant prosecutors confirmed it. The lower court’s finding that there was no agreement was “without any evidence of probative value” because the defendant and his counsel testified and the state presented no contrary evidence. Thus, “[t]he only evidence presented was that an agreement in fact existed.” Prejudice established because the defendant was entitled to enforcement of the deal. “[T]he State may withdraw a plea bargain offer before a defendant pleads guilty, provided the defendant has not detrimentally relied on the offer.” Here, the defendant had detrimentally relied on the offer. Initial plea bargain enforced.

**2006:** *Taylor v. State*, 919 So. 2d 669 (Fla. App. 2006). Counsel ineffective in negotiated plea drug case for failing to ensure enforcement of the plea agreement. The agreement had a maximum of nine months confinement, but defense counsel and the prosecutor that negotiated the agreement were not present for sentencing. New defense counsel informed the court that it was a “straight up plea” and the prosecution sought confinement resulting in two concurrent five year prison sentences.

*Eskridge v. State*, 193 S.W.3d 849 (Mo. App. 2006). Counsel ineffective in drug case for failing to inform the sentencing court that the negotiated plea agreement had been for concurrent time and failing to object to imposition of consecutive sentences.

**2005:** *Barber v. State*, 901 So. 2d 364 (Fla. App. 2005). Counsel in unlawful sex with child case was ineffective in failing to move to withdraw the defendant’s guilty plea. The defendant had a deal to plead guilty in exchange for the state’s recommendation of a sentence of 15 years, but the defendant failed to appear at sentencing. The state recommended a sentence of 30 years and the court sentenced the defendant to 22 years. Counsel did not move to withdraw the guilty plea even though the state violated the plea agreement, which did not include any agreement concerning the defendant’s appearance for sentencing. Under state law, if the trial court declined to honor the terms of the agreement, the defendant was entitled to withdraw the plea. Counsel’s conduct was deficient and prejudicial.