

**SUMMARIES OF SUCCESSFUL
CLAIMS POST-*WIGGINS V. SMITH*
INVOLVING DENIAL OF RIGHT TO COUNSEL**

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*Capital Case

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A. U.S. Court of Appeals Cases

2005: *Pazden v. Maurer*, 424 F.3d 303 (3rd Cir. 2005). The trial court violated the defendant's right to counsel by denying a continuance, which forced the defendant to proceed pro se in this fraud case related to the sale of condominiums. In December 1993, the defendant was appointed counsel from the Public Defender Office on charges contained in a 131-count indictment. In October 1995, a new PD was assigned. Trial was scheduled for February 1996. Counsel requested a three-month continuance due to her late appointment and the state's delay in discovery, which ultimately involved almost 5,000 pages of discovery. The court denied a continuance. The defendant, while not hostile at all to counsel and supportive of her request for a continuance, "believing that he was more familiar with the case than his attorney, given the witnesses and materials his attorney had not had an opportunity to explore, . . . informed the court that he believed he had no alternative but to represent himself." *Id.* at 308. He was permitted to proceed pro se with the PD as stand-by counsel. Under AEDPA, the state court's ruling that the "waiver of counsel was both 'contrary to' and 'an unreasonable application of . . . clearly established' Supreme Court pronouncements" in *Johnson v. Zerbst*, 304 U.S. 458 (1938) and *Faretta v. California*, 422 U.S. 806 (1975).

**Daniels v. Woodford*, 428 F.3d 1181 (9th Cir. 2005), *cert. denied*, 127 S.Ct. 2876 (2007). Analyzing this capital case under pre-AEDPA standards, the court held that the defendant was constructively denied counsel due to a conflict created by a series of events related to the appointment of counsel. The defendant had previously been convicted of a bank robbery in which he had been shot nine times by police officers rendering him a paraplegic. He negotiated a plea in exchange for being permitted to remain free for six months so he could seek medical treatment and rehabilitation. Despite the agreement, the court sentenced him to 13 years and immediately remanded him to custody. On appeal, Roth, a new attorney (who had previously represented the defendant on other matters) took over and the defendant was released on bond. While on bond, he was mistakenly arrested by an officer who believed there was a warrant for him. He sued the state alleging mistreatment in jail and lack of appropriate medical care. After his appeal was denied, he failed to surrender to custody. When two officers went to his home, he shot and killed both officers. Following his arrest, the court appointed a Public Defender, who moved to substitute Roth because the PD had a conflict due to the prior representation on the robbery. The PD in that case that negotiated the plea and release left the PD's office to join the prosecutor's interest and the new PD assigned was unaware of the plea agreement so the judge was never informed of the deal for release. A federal habeas petition alleging IAC on the robbery was pending at the time of the murder case appointment. Nonetheless, the court refused to relieve the PD office and Roth remained in a pro bono capacity. Roth was ultimately appointed as co-counsel, but then the state moved to relieve him because he was be a witness for the state. Roth was relieved even though the defendant agreed to stipulate to the information the state sought to present through Roth and agreed to waive

the conflict. After this, the PD assigned became ill and the case was reassigned to two new PD's. Ultimately, nine months into the case and only three months prior to trial, the court relieved the PD office on its motion due to the conflict. Appointed this time was a former prosecutor who had just started in private practice and had no capital case experience and a co-counsel with only a few years under his belt. From the beginning, the defendant's relationship with these lawyers "was strained." The defendant informed the court that he didn't trust his counsel and sent a letter to that effect before the trial started. The federal court held that, "[g]iven this history, it is understandable that the [defendant] would mistrust the judicial process and his counsel" and the trial court should have granted the defendant's motion to substitute counsel. In this instance, because of the "serious conflict" between the defendant and counsel, the court presumed prejudice and found error in the trial court's failure to inquire into the conflict even though the defendant informed the court three months prior to trial that he did not trust counsel and informed the court again prior to the beginning of the trial.

B. State Cases

2011: *State v. Chavez*, ___ P.3d ___, 2011 WL 2568889 (Wash. App. June 30, 2011). Counsel provided no representation during motion to withdraw guilty plea to violations of no-contact order. The defendant was initially charged with domestic violence and ordered to have no contact with his wife, but he contacted her four times from the jail. The state amended the charges to add violations of the "no-contact" order and witness tampering. Due to statements made by the defendant and his wife in recorded jail calls, defense counsel expressed concern that he had a potential conflict of interest on the witness tampering count as, according to statements in the calls, he was a "purported accomplice to the witness tampering claim." The court allowed counsel to withdraw and appointed new counsel on that charge only. With potentially-conflicted counsel, the defendant entered guilty pleas on the four no-contact order charges but, subsequently, moved to withdraw the pleas. The initial counsel was allowed to withdraw and the new counsel took over, but filed only an *Anders* brief in which counsel "clearly distanced" himself from his client and suggested "his client's position was frivolous." The court noted that an "*Anders* brief is an appellate procedure that is not appropriate for a trial court." Here, counsel's action amounted to a complete denial of counsel during a critical stage of the proceedings. Prejudice presumed.

2010: *Commonwealth v. Grant*, 992 A.2d 152 (Pa. 2010). Rape defendant denied effective assistance due to representation by attorney whose license to practice law had been put on inactive status due to attorney's failure to comply with the continuing legal education (CLE) requirements for lawyers. This failure was not a "technical licensing defect" because it reflected "directly on his lack of competence to practice law" as counsel had not attended CLE programs for almost five years and could not regain his license simply by completing the CLE classes.

2008 *State v. Hemphill*, 186 P.3d 777 (Kan. 2008). Counsel ineffective in drug case following no contest pleas when the defendant filed a pre-sentence motion to withdraw his pleas. Counsel abandoned his advocacy role during the hearing. “Appointed counsel for the defendant *argued against* his client's interest by explaining to the court why he did not believe the defendant's motions had merit,” and the defendant had to argue his own motion. Prejudice established because the motion to withdraw raised questions about the voluntariness of the pleas and their factual basis sufficiently that the trial court did not summarily deny the motion and instead appointed counsel for the defendant. Counsel also failed to advise the defendant of his right to appeal the denial of his motion.

Cannon v. State, 252 S.W.3d 342 (Tex. Crim. App. 2008). The defendant was constructively denied counsel in misdemeanor DWI case by counsel’s refusal to participate in the trial following denial of a motion for continuance to obtain expert assistance and statements that he was not prepared for trial. Prejudice presumed under *Cronic*.

2007: *Brown v. Commonwealth*, 226 S.W.3d 74 (Ky. 2007). The defendant was denied his right to counsel in drug case when the court allowed counsel to leave the courtroom during the defendant’s testimony, cross-examination, and closing argument. Counsel informed the court that he had an ethical conflict with the defendant and implied that the defendant intended to offer perjured testimony. Counsel acted properly and the court appropriately addressed the defendant and allowed the defendant to testify in narrative form, but the error occurred in allowing counsel to leave the courtroom rather than remaining present to make appropriate objections to the state’s cross-examination during portions of the testimony counsel did not believe were perjured.

State v. Blair, 872 N.E.2d 986 (Ohio App. 2007). Counsel ineffective in violation of a protective order case where counsel’s motion for continuance due to lack of notice and lack of preparation was denied and then counsel refused to participate in the trial. A trial date was set at a hearing where the defendant was represented by a member of the public defender office. A different member of the same public defender office appeared for the defendant during trial. Prejudice was presumed. In addition, the court found that prejudice was apparent because the defendant was forced to have a bench trial due to counsel’s untimely request for a jury trial and the defendant was denied his best defense because counsel had failed to file a timely notice of alibi. While the state argued that counsel and the defendant “acted in concert as a trial strategy to create error and thereby gain additional time,” the trial court did not question the defendant and the court declined “to presume such outrageous and clearly unethical behavior by counsel.”