

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

*Updated May 24, 2009

TERESA L. NORRIS

Blume Weyble & Norris, LLC
P.O. Box 11744
Columbia, SC 29211
(803) 765-1044

teresa@blumelaw.com

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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

2010: *State v. Dalbec*, ___ N.W.2d ___, 2010 WL 1753202 (Minn. Ct. App. May 4, 2010). Counsel ineffective in criminal sexual conduct in the third degree case for failing to "appear" at the conclusion of bench trial by submitting the written summation he had proposed, which was agreed to by the state and approved by the court. Summation was significant because a required element was that penetration occurred while the alleged victim was asleep and nearly all of the evidence in the case was circumstantial. The evidence was "not only arguably insufficient" but the trial court's finding that the alleged victim testified that the penetration occurred while she was asleep was erroneous as the victim had been drinking and testified only that she could not recall, as she could not recall other events when she was awake as described by other witnesses. While this was a bench trial, "[e]ven judges listening carefully to evidence in a bench trial can miss facts, fail to note them, misunderstand them, or fail fully to appreciate their significance." Because counsel was absent from "an entire critical stage of the trial," the court, under these circumstances, held this was structural error requiring automatic reversal.

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.

State v. Schoonmaker, 176 P.3d 1105 (N.M. 2008). The trial court deprived the defendant of effective assistance of counsel in child abuse case by denying the defendant’s request for funds and denying retained counsel’s motion to withdraw. Although the eighteen-year-old defendant was indigent, his family raised money to retain counsel. The family could not, however, afford to hire a defense expert or to pay the state’s experts, who insisted on payment by the defense for pretrial interviews. The case essentially amounted to the question of whether the one-month-old child’s death was due to violent shaking and shaken baby syndrome or was the result of a fall from a couch in combination with a premature birth and previously existing medical issues. Defense counsel requested funding for defense experts and to interview the state experts. The court denied this based on a previous state holding that indigent funding would be denied when the defendant chose to be represented by retained counsel. [The court noted that most states permit funding for indigent defendants even if counsel is retained.] Counsel then moved to withdraw so that the defendant would be represented by the public defender and entitled to indigent funding. The court also denied this motion. During trial, the state had four expert physicians on shaken baby syndrome, as well as the child’s pediatrician and a pediatric ophthalmologist. The defense had no expert due to the court’s rulings. Nonetheless, the state was permitted to comment in rebuttal closing on the lack of expert testimony supporting the defense theories. “A presumption of prejudice most certainly applies when counsel’s potential ineffectiveness is expressly brought to the attention of the district court and is occasioned by the rulings of the court itself.”

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

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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."