

**SUMMARIES OF SUCCESSFUL
INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS
POST-*WIGGINS V. SMITH* INVOLVING
NON-CAPITAL SENTENCING PHASE ERRORS**

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A. U.S. Court of Appeals Cases

- 2009:** *United States v. Polk*, 577 F.3d 515 (3rd Cir. 2009). Counsel ineffective in sentencing for possession of a weapon by prison inmate for failing to object to the court's characterization of the offense as a "crime of violence" in calculating the Guidelines range of 37-46 months. Without the enhancement, the range would have been 27-33 months.
- 2007:** *United States v. Otero*, 502 F.3d 331 (3rd Cir. 2007). Counsel ineffective for failing to object to improper sentencing enhancement for a prior crime of violence. The defendant's prior was a simple assault in Pennsylvania, which does not require the "the use of force." Counsel's conduct was deficient just based on the statutory language but there was also available case law that should have alerted counsel to the issue. "[C]ounsel does have a duty to make reasonable investigations of the law," including citing "favorable decisions from other courts of appeals." Prejudice established because, absent the enhancement, the guideline range would have been only 18 to 24 months but the defendant was sentenced to 60 months.

Miller v. Martin, 481 F.3d 468 (7th Cir. 2007). Counsel in securities violations and frauds case deprived the defendant of representation by standing silent during sentencing and prejudice was presumed. The petitioner was convicted following trial in absentia. He retained new counsel for sentencing. Due to counsel's belief that the convictions would be reversed due to the absentia trial, counsel advised him to remain silent because he was concerned the court would learn that the defendant had been noticed with the trial date. Counsel also remained silent other than to inform the court that they would not participate. The state court applied *Strickland* and found that while counsel's choice to stand mute was "unorthodox" it was a "purely strategic decision" that was not unreasonable and not prejudicial. The court held that the state court ruling was contrary to Supreme Court precedent because the issue should have been addressed under *Cronic*. Even assuming that *Strickland* was the appropriate standard, the court held that the state court findings were unreasonable under AEDPA. Counsel's "advocacy" at sentencing was "non-existent" by his own admission. While counsel explained a "strategy" for the petitioner to remain silent during sentencing, he "never explained his own silence." Even if he had been concerned that the court would question him about his client's knowledge, he could have declined to discuss this issue. Likewise, even if he were concerned that a presentation at sentencing could have somehow prejudiced the appeal, "which is not the reason he gave the sentencing court for his decision," he was wrong and had not conducted any research or consulted the court about his concerns. The state court decision of "strategy" was unreasonable. Prejudice was presumed under *Cronic*. Prejudice was found under *Strickland* in the alternative. Counsel's silence allowed the sentencing court to rely on errors in the petitioner's criminal record, the state's aggravating factors to go unchallenged, and offered no mitigation, even though the petitioner had already paid restitution to some victims. Counsel said nothing even though the court was clearly

considering imposing maximum punishments and running some of the sentences consecutively.

2003: *Alaniz v. United States*, 351 F.3d 365 (8th Cir. 2003). Trial and appellate counsel were ineffective for failing to object to the trial court's error in adding a second uncharged drug type to the charged drug type in order to trigger a higher quantity-based statutory penalty range. The defendant was convicted of conspiring to possess marijuana with intent to distribute and distributing marijuana. In determining the penalty range for the conspiracy count, however, the trial court applied the penalty range applicable to a person with a prior felony drug conviction involving 1000 kg or more of marijuana for which the sentence was 20 years to life. The court held that the defendant had a total of almost 1150 kg of marijuana by aggravating two different drug types. The judge added the approximately 800 kg of marijuana involved in the conspiracy with 12 ounces of methamphetamine the defendant sold during the conspiracy period, which the court converted to its equivalent of approximately 340 kg. If the court had not added the methamphetamine, the defendant's statutory penalty range would have been 2 years to life as opposed to 20 years to life. Under the sentencing guidelines, there was a difference of 210 to 262 months versus 240 to 262 months. While the Eighth Circuit had not previously addressed the aggravation issue, the court noted that every circuit that has addressed the issue has concluded that a second uncharged drug type cannot be added to the charged drug type in order to trigger a higher statutory penalty range. The court, therefore, found that counsel's conduct was deficient in failing to raise this issue in sentencing or on appeal. The court found prejudice because, under *Glover*, an error increasing a defendant's sentence by as little as six months can be prejudicial within the meaning of *Strickland*. If counsel had objected and the appropriate guideline range had been used, the district court would have been authorized to impose a sentence up to 30 months shorter than the one the defendant actually received. The court remanded to the district court to determine what sentence it would have imposed if it had used the appropriate guideline range and, if the sentence would have been less than the original sentence, the district court was instructed to re-sentence the defendant.

United States v. Conley, 349 F.3d 837 (5th Cir. 2003). Trial and appellate counsel were ineffective in conspiracy and mail fraud case for failing to object to the defendant's sentence, which was greater than the maximum set for the crime for which he was convicted. The defendant was initially charged in a 15-count indictment with conspiracy, mail fraud, and money laundering. he was convicted of one count of conspiracy and four counts of mail fraud, but acquitted on the 10 counts of money laundering. The conspiracy indictment and verdict was ambiguous but "a sentence imposed for a conviction on a count charging violations of multiple statutes or provisions of statutes may not exceed the lowest of the potentially applicable maximums." Nonetheless, the judge sentenced the defendant for conspiracy with respect to the money laundering allegation to 121 months. The maximum sentence for conspiracy with respect to mail fraud though was only 60 months. Because the error "was obvious" and greatly increased the defendant's sentence,

trial and appellate counsel were ineffective in failing to assert this meritorious issue.

B. U.S. District Court Cases

- 2010:** *Parks v. United States*, ___ F. Supp. 2d ___, 2010 WL 272530 (W.D.N.C. Jan. 13, 2010). Counsel ineffective in sentencing following guilty plea in drug case for failing to understand the importance of the fact that the indictment did not set forth a specific drug amount. Counsel objected to a drug quantity in sentencing but withdrew the objection without explanation. This conduct was deficient as “no matter what evidence the Government might have presented at the sentencing hearing, the fact would remain that such evidence had not been found by a jury beyond a reasonable doubt.” There could be no reasonable strategy for withdrawing the objection because, in doing so, “counsel automatically increased Petitioner’s sentence 120 months beyond that to which he was otherwise exposed.” In short, the defendant was prejudiced because the court sentenced him to 360 months when the maximum statutory sentence based on the indictment was 20 years. Sentence vacated.
- 2009:** *Robinson v. United States*, 638 F. Supp. 2d 764 (E.D. Mich. 2009). Counsel ineffective in drug conspiracy case for failing to file motion for new trial, even though the defendant filed a post-trial motion for judgment of acquittal, and failing to challenge the sufficiency of the evidence of the drug quantity attributable to the defendant. The defendant, who was from Indiana, was charged with his brother and others of growing a large crop of marijuana in between rows of corn on a rural farm. The government’s only evidence connecting the defendant to the farm was in January of February, which, of course, was not in the growing season. The only other evidence connected the defendant to the operation was the testimony of the defendant’s ex-sister-in-law, whose testimony was not credible in the court’s view. Another woman had also testified that the sister-in-law bragged that she lied at trial to get even with the brothers. Despite a month long trial, the jury deliberated less than four hours before convicting all six defendants. During the trial, the defendant had moved a judgment of acquittal under Federal Rule of Criminal Procedure 29, which the Court took under advisement. After trial, counsel filed a brief in support of this motion but did not file a motion for new trial under Rule 33. Counsel’s conduct was deficient because, under Rule 29, the court must consider the evidence in the light most favorable to the government. Under Rule 33, the court can consider the credibility of witnesses. Counsel’s conduct was not strategy because he was unaware of Rule 33 or its standards. “A decision based on a misunderstanding of the law is not a strategic decision.” Here, “counsel’s failure to file the motion was not a strategic choice; it was based on ignorance of the law.” Prejudice found because “the present case represents one [of] those extraordinary matters in which a motion for a new trial would have been appropriately considered and granted.” Likewise, counsel’s conduct was deficient in failing to challenge the sufficiency of the evidence of the drug quantity attributable to the defendant. “Again, it does not appear that it could have been a strategic decision to challenge guilt but not the amount for which the [defendant] was to

be held accountable.” Prejudice established because “the statutory mandatory minimum sentence in this case was tied directly to the amount of drugs charged.” A successful challenge could have reduced the sentence exposure by half.

Baxter v. United States, 634 F. Supp. 2d 897 (N.D. Ill. 2009). Counsel ineffective in sentencing of criminal tax case for failing to retain and consult with tax expert and stipulating to the tax loss compilation included in the presentence investigation report by the U.S. Probation Office. Counsel’s conduct was deficient because counsel failed to independently examine the loss and simply accepted the government’s position. While “[d]efense counsel in criminal tax cases need not always retain a tax expert to assist, . . . [t]he tax-loss question as it relates to [the defendant] was sufficiently complicated so as to require expert assistance.” Reasonable counsel would have obtained expert assistance prior to entering a plea bargain in the case, especially in light of the fact that the defendant, a CPA, believed at the time she prepared the questioned tax documents for her clients that the tax returns were lawful. When she discovered they were not, she attempted to correct the error by cooperating with the IRS, which resulted in the clients paying all of the back taxes, etc., and not being criminally charged. The defendant was “duped . . . into believing it was legal.” Prejudice established. The government asserted that the defendant was responsible for more than 5 million tax-loss. The court rejected this, finding that the government had not proven that the defendant was accountable for that loss. The more than \$500,000 tax-loss the defense stipulated to was included in the amount already rejected by the court but the court was not aware of that fact. Both government and defense experts in 2255 agreed the actual tax-loss related to the defendant’s actions was only about \$22,000. Sentence vacated.

United States v. Frost, 612 F. Supp. 2d 903 (N.D. Ohio 2009). Counsel ineffective following plea to drug distribution for failing to object to a career offender sentence enhancement. The government sought the enhancement based on two prior convictions, one of which was for a 1996 Attempted Drug Trafficking offense under Ohio state law. Defense counsel conceded that this offense met the requirement for consideration but argued for a downward departure because the career offender designation substantially overstated the defendant’s criminal record. The Court found a guideline range of 168-210 months, but granted the downward departure to 135 months. Under the guideline, a prior controlled substance offense had to involve distribution or an intent to distribute to qualify as a predicate offense for career offender status. Under the statutory definition, the defendant’s state conviction involved only simple possession. There were conflicting unpublished decisions in the circuit at the time of defendant’s trial as to whether the determination would be made only on the statutory language or whether the court would look through to the facts of the defendant’s offense. There was a case pending in the Sixth Circuit addressing this issue. That case (*Montanez*), decided one month after sentencing, held that the determination would be made solely on the statutory definition. Counsel’s conduct “was deficient in light of the conflicting Sixth Circuit caselaw and the pending *Montanez* litigation. . . . Simply put, caselaw in the Sixth Circuit at the time of .

. . sentencing was conflicted and none was controlling” and there was one case squarely in the defendant’s favor. Counsel’s conduct was not excused by strategy because “there was nothing to lose, regardless how *Montanez* came out.” Even if the defendant would not have succeeded in sentencing the record would have been preserved for appeal. Prejudice was thus established.

2008: *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.”

Potts v. United States, 566 F. Supp. 2d 525 (N.D. Tex. 2008). Counsel ineffective in child pornography case for failing to object to the district court's impermissible double counting of sentencing enhancements. Specifically, the court enhanced his offense level by two for possession of ten or more items of pornography under one section and by four for possession of more than three hundred images under another section. Guideline amendments effective in November 2004 should have alerted counsel to this problem. Prejudice established. “When the Court imposes a sentence at the bottom of an erroneously calculated sentencing range, that sentence demonstrates prejudice even when the imposed sentence also falls within the accurately calculated guideline range.” Here, the court had imposed a sentencing “at the very bottom of the erroneously calculated range.”

2007: *Veal v. United States*, 486 F. Supp. 2d 564 (N.D. W. Va. 2007). Counsel ineffective in sentencing following guilty plea to drug offenses for failing to review the presentence report prior to sentencing. He also did not prepare objections or even review the objections submitted by the defendant pro se.

Abraham v. United States, 477 F. Supp. 2d 1232 (S.D. Fla. 2007). Counsel ineffective in sentencing on conspiracy, kidnaping a postal employee, and other charges for failure to assert that a prior escape conviction was a non-qualifying offense under the affirmative defense provision of the federal three strikes law. Counsel argued that the escape was not a serious violent felony, under 28 U.S.C. § 3559(c), because it did not involve weapons or violence. The court found it was and that the court was, therefore, required to impose the

mandatory life sentence. Counsel's conduct was deficient in failing to make the additional argument, under § 3599(c)(3)(A), of an affirmative defense, which allowed the defendant the opportunity to establish that the conviction was a non-qualifying conviction by showing by clear and convincing evidence that no weapons or guns were used or threatened to be used, and no injuries or death occurred in the commission of his escape. Counsel's conduct was deficient because counsel "failed to simply turn the page of the statute and continue the analysis under § 3599." Prejudice found because the sentencing record made clear that the court believed it had no alternative other than to impose a mandatory life sentence. Likewise, although the court found the movant's trial testimony to be less than truthful, it had accepted as true the proffer on this issue, which was proven by clear and convincing evidence with the supporting state court record in this proceeding. Sentence vacated and resentencing ordered.

2006: *United States v. Gentry*, 429 F. Supp. 2d 806 (W.D. La. 2006). Counsel ineffective following guilty plea to bank robbery for failing to file any objections to the loss calculation in the presentence report (PSR). The loss calculation included not only the robbery proceeds but worker's compensation indemnity and medical expenses associated with a police officer's wounds incurred during pursuit of the defendant and co-defendants when he was shot by a co-defendant and certain home repairs that were necessary due to a co-defendant's actions in breaking into a home during the pursuit. Counsel's conduct was deficient because his notes indicated that he was aware of a potential issue, but he failed to object and could not articulate any strategy or rationale for the failure. Although there was no existing case authority supporting the objection at the time, the plain language of the guidelines excluded consideration of the worker's compensation payments and medical payments associated with the injuries to the police officer. Moreover, the fact that the sentencing court rejected the objections raised by co-defendants did not excuse the omission. "[R]easonably effective criminal defense counsel do not shy from confrontation and must zealously present their client's arguments." *Id.* at _____. Prejudice found because the defendant received a sentence that was 16 months over the guidelines maximum. If counsel had objected and appealed, as two co-defendants did, the Fifth Circuit would have held that the worker's compensation indemnity benefits and medical expenses associated with the officer's wounds were not properly included in the computation. New sentencing ordered.

2005: *United States v. Holland*, 380 F. Supp. 2d 1264 (N.D. Ala. 2005). Counsel ineffective in sentencing and on appeal in bank robbery case where the defendant and his co-defendant separately plead guilty and received an order of restitution payment under the Victim and Witness Protection Act (VWPA) as part of their sentence. The amount of restitution was not addressed by a jury and was based solely on hearsay in the probation officer's report. Counsel's conduct was deficient in failing to object because "[e]verybody in the courtroom knew that this court considered the federal restitution scheme constitutionally flawed" and the court ended up imposing "an ambiguous and impossible restitution obligation" on the defendant that was also inconsistent with the terms placed on the

co-defendant, even though restitution was to be “paid jointly and severally.” To make matters worse, the BOP informed the defendant on numerous occasions while he was in confinement that his restitution had been paid and then 9 years later informed him that he owed the full amount without even accounting for the \$999 paid by the co-defendant. While the government challenged jurisdiction, the court held that the defendant “is not barred from access to this court to right a wrong that is partly the fault of this court.” The court found that the disparity in treatment between the defendant and his codefendant “is a travesty that calls for correction,” especially since the VWPA “limited the collectibility of restitution to ‘five years from the date of the sentence.’” The court thus allowed equitable tolling in these 2255 proceedings. Although this case preceded *Booker*, *Ring*, *Apprendi*, and *Jones* (decided a month after this sentencing), the court found that counsel was ineffective in failing to test the constitutionality of the restitution award procedure since restitution was not charged in the indictment, not found by a jury, and the amount ordered to be paid was based on a standard other than proof by the Government beyond a reasonable doubt. Counsel “was required to recognize the potential constitutional claim” that came later in court rulings because “[t]he law has long recognized that defense counsel, both trial and appellate, is required to raise potential constitutional claims in view of developing law.” Here, “this court was on record as doubting the constitutionality of the VWPA, and counsel in other cases had raised the issue in this court.”

2004: *Banyard v. Duncan*, 342 F. Supp. 2d 865 (C.D. Cal. 2004). Trial counsel was ineffective in failing to investigate and object to the use of a prior assault conviction as a “serious felony” in sentencing the defendant to 25 years to life under the “Three Strikes Law” following a conviction for possession of a controlled substance. Appellate counsel was also ineffective for failing to assert trial counsel’s ineffectiveness. Counsel’s conduct was deficient because counsel advised the defendant to admit to two prior serious felony convictions even though the defendant’s second strike was not a “serious felony,” as required by state law. The second strike was for an assault conviction, “which arose from a domestic dispute and is the only arguably violent behavior in [the defendant’s] record.” The court found that the record on this offense revealed that, although the defendant was initially charged with a serious felony, he ultimately plead no contest only to assault, which was not a serious felony, and was sentenced to time served and probation. The court found that the state court erred in its judgment in finding that the defendant entered a no contest plea to a serious felony when the plea transcript revealed otherwise. Even if the alleged victim of the assault was believed, the “minor nature” of the defendant’s “assault conviction show that it was outside the heartland of what would normally constitute assault.” In addition, the “sentence of probation is not consistent with a desire to punish [the] crime as a serious felony.” Without any real analysis, the court held, under the AEDPA, that the state court’s decision was an unreasonable application of clearly established federal law.”

Blount v. United States, 330 F. Supp. 2d 493 (E.D. Pa. 2004). Counsel was ineffective in sentencing on drug charges for failing to request a downward departure for time the

defendant had already served in state and county custody on unrelated charges.

Garcia v. United States, 301 F. Supp. 2d 1275 (D.N.M. 2004). Counsel ineffective in sentencing for drug conspiracy for failing to object to the pre-sentence report, which improperly calculated points based on the erroneous finding that the instant offense occurred while the defendant was a probation for a DWI offense. The defendant was investigated by the DEA for a conspiracy to sell marijuana. Several co-defendants were arrested long before him with the last being on February 19, 1999. Following these arrests, but prior to his own arrest, the defendant was arrested and plead guilty to DWI. He was ordered to serve one-year of probation on March 8, 1999. He was indicted for these offenses in June 1999. He plead guilty pursuant to a plea agreement in which the state would recommend the lowest penalty available under the sentencing guidelines as long as the defendant participated in a “debriefing.” Counsel at sentencing had not represented the defendant in the plea negotiations. During sentencing, although the petitioner asserted he was entitled to “the safety valve” downward departure, counsel asserted that he was ineligible without having a full understanding of the underlying facts. Because of the confusion, the court continued sentencing to allow counsel to investigate. Nonetheless, because the court had stated earlier that he would not give the “safety valve,” counsel convinced the defendant that he was ineligible and the case proceeded to sentencing the same day. Because the court’s statement of ineligibility was based on counsel’s inaccurate summation of the facts, the court rejected the government’s argument that the court had already exercised its discretion to reject the “safety valve.” The court found a guideline range of 168 to 210 months and sentenced the defendant to 168 months. Counsel’s conduct was deficient in convincing the court and the defendant that the safety valve did not apply because there was no evidence and the government never argued that the defendant was involved in any distribution after February 1999. Indeed, the pre-sentence report attributed no drug activity to the defendant after July 1998. Thus, any activity alleged preceded the defendant’s DWI arrest. Thus, the defendant was entitled to application of the “safety valve,” so long as the defendant participated in the agreed upon debriefing, which counsel never scheduled because of the erroneous belief that the defendant was not eligible for the “safety valve.” Counsel’s failure to object to the pre-sentence report was deficient because it “was based entirely on his lack of understanding of the underlying facts.” Prejudice was found because absent counsel’s error, under the appropriate sentencing guidelines and the government’s agreement to recommend the low end, the defendant would have been given a sentence 53 months shorter than the one he actually received. The court ordered the government to afford the defendant an opportunity to comply with the debriefing requirements prior to resentencing.

2003: ***Somerville v. Conway***, 281 F. Supp. 2d 515 (E.D.N.Y. 2003). Counsel was ineffective in sentencing in a burglary and assault case where he failed to challenge the legality of the defendant’s sentence as a second violent felony offender. The defendant’s status as a second violent offender was predicated on a previous conviction in Maryland for robbery

with a deadly weapon. Under New York law, however, the Maryland offense could not be used as a first offense if the Maryland offense was not equivalent to any New York felony. In state court, the prosecution conceded that if trial counsel had raised the issue that the Maryland prior offense should not have been used. Nonetheless, the state court affirmed the sentence stating that the defendant received meaningful assistance from his trial counsel. In federal court, the state no longer conceded that the crime for which the defendant was convicted in Maryland could not be used as a predicate for the second violent felony offender status. The court found that the prior conviction from Maryland could not be used under New York law because the defendant in Maryland could be convicted of armed robbery if he used force without an intent to take property and afterwards stole from the victim. While this would be felony robbery in Maryland, it would not in New York under the statute. The court found prejudice because if counsel had raised this issue, the defendant would not have been adjudicated a second violent felony offender and would have been eligible for, although not guaranteed, a sentence far below what he was given. Even if the trial court had sentenced the defendant to the exact same sentence without finding a second violent felony offender status, the defendant was nonetheless prejudiced by being adjudicated as a second violent offender because “[i]n the event he commits another felony at some point in the future, he will be exposed to a mandatory maximum prison term of life in prison.” The court also found deficient conduct because “[e]ffective counsel must be familiar with the sentencing law governing a defendant’s case.” Here, the New York law was manifested both in statute and in case law, and the Maryland law was clear from its case law.

Given that the only legal question open at petitioner’s sentencing was his status as a second violent felony offender and that resolution of the court’s adjudication of that status might have significant effects on both petitioner’s current sentence and on any sentence he might receive if he were to commit a subsequent felony, defense counsel was obliged to be familiar with this law.

The court also found that counsel’s failure could not have been motivated by any strategic rationale. Analyzing the case under the AEDPA, the court found that the state court’s decision was an unreasonable application of clearly established Supreme Court precedent as set forth in *Strickland*.

C. Military Cases

2006: *United States v. Dobrava*, 64 M.J. 503 (Army Crim. App. 2006). Counsel was ineffective in false statement and larceny case for failing to call the accused to the stand for an unsworn statement in sentencing. The accused had been stationed in Afghanistan, near the Pakistan border, in an area where the threat level was high and several soldiers had been killed in the months prior to the accused’s theft of money from a local national’s house during a search of weapons. Counsel and the accused had agreed that an unsworn

statement would be important but counsel did not call the accused. While the accused alleged that counsel simply forgot to call him, counsel asserted that he determined at the last moment that the statement would only dilute strong mitigation evidence and made a tactical decision not to call the accused. Regardless of the reason, counsel's conduct was deficient because the decision to make a statement or not was personal to the accused. Prejudice established because the accused's express statements of apology, contrition, and a desire to be rehabilitated might have persuaded the judge to give a lesser sentence.

2005: *United States v. Davis*, 60 M.J. 469 (2005). Counsel ineffective in rape and sexual abuse of stepdaughter (over a period of seven years) case for basing the entire sentencing strategy on an erroneous conclusion that the accused officer would be allowed to retire from the military with benefits if not sentenced to a dismissal. Prior to these charges, the accused had been passed over twice for promotion and, in order to avoid involuntary separation, had applied for voluntary retirement under the discretionary Temporary Early Retirement Authority (TERA). He was approved for TERA, but these charges arose before his separation and the TERA retirement was terminated. The accused plead guilty to some charges and was found guilty on other contested charges. In sentencing, counsel argued for a longer period of confinement in order to avoid a punitive discharge so the accused could obtain retirement benefits for his family. The panel sentenced the accused to life but did not order dismissal. After sentencing, counsel finally learned that eligibility for TERA required that an adverse action be "resolved in favor of the member." The accused, thus, was not eligible for TERA and was separated with an "other than honorable" discharge. Counsel's conduct was deficient in failing to research the TERA eligibility or to even make a phone call, which would have revealed a policy that a felony conviction disqualified the accused from TERA retirement. There was no reasonable strategy because the sentencing strategy was "fundamentally flawed from its inception because of a failure to research the critical law." *Id.* at 474-75. Prejudice was found because the accused would not have asked for increased confinement if he had been adequately advised. If defense counsel had not asked for the increased punishment, the panel likely would have accepted the government's recommendation of 40 years and a dismissal rather than sentencing the accused to life with no dismissal.

D. State Cases

2010: *State v. Ott*, ___ P.3d ___, 2010 WL 11138 (Utah App. Jan. 5, 2010). Counsel ineffective in non-capital murder case for failing to object to inadmissible victim-impact evidence in jury sentencing where the defendant could be sentenced to life with or without the possibility of parole. Specifically, counsel failed to object to a six-minute videotape of pictures of the victim set to "moving music," and testimony of family members about the impact on them and their opinions of the defendant's character and the appropriate sentence. The opinions of the defendant's character (i.e. that he could not be rehabilitated) and opinions on the appropriate sentence were "at odds with United States Supreme Court precedent" in *Payne* and *Booth*. Thus, counsel's conduct was

deficient. Prejudice also established.

2009: *Ex parte Lane*, ___ S.W.3d ___, 2009 WL 4825122 (Tex. Crim. App. Dec. 16, 2009). Counsel ineffective in methamphetamine sentencing for failing to object to improper testimony during the trial and sentencing about “the methamphetamine problem.” During trial, counsel’s conduct was deficient in failing to object to an officer’s testimony “that there is a methamphetamine epidemic in Texas.” Counsel’s conduct was also deficient in failing to object to the prosecutor’s closing argument, which was not supported by evidence, asserting that the defendant was bringing methamphetamine into the county to poison the children and turn them into addicts and that children were in fact shooting up and smoking methamphetamine. The defendant suffered no prejudice during trial, but counsel’s deficient conduct continued in sentencing. Counsel failed to object to testimony by a DEA agent about the societal problems caused by methamphetamine. Counsel also failed to request pre-trial notice of the State’s experts, including the DEA agent, to properly object to his testimony about addiction and that 45,000 people could get high from the amount of methamphetamine possessed by the defendant, and to call an expert in rebuttal. The DEA agent was not qualified to testify about the addictive nature of the drug or about the number of people who could get high on the amount possessed by the defendant. Prejudice was established as the state asked for and obtained a life sentence, relying heavily on the objectionable testimony and argument in both phases of the trial.

Ramirez v. State, ___ S.W.3d ___, 2009 WL 3925819 (Tex. App. Nov. 20, 2009). Counsel ineffective in intoxication manslaughter sentencing for failing to elect jury sentencing based on counsel’s misunderstanding of the law. The state alleged use of a vehicle as a “deadly weapon,” which, if found by the jury, meant that only the jury (and not the judge) could assess a punishment of probation in sentencing. In order for the jury to be eligible to assess probation, defense counsel was required to file a sworn motion prior to voir dire that the defendant had not previously been convicted of a felony. Here, counsel filed the sworn statement, but failed to elect jury sentencing prior to voir dire, which meant under state law that the jury could assess punishment only if the prosecutor consented. Counsel did this because she believed the defendant could get probation if he had judge sentencing and she advised the defendant that he would have a better chance of getting probation before the judge. When counsel learned of her error, she met with the prosecutor in an attempt to resolve the problem. The state did consent to jury sentencing, but only on the condition the defendant waive his right to appeal on the basis that the jury had not been asked any questions relating to punishment in voir dire. Defense counsel believed she could not do this, but failed to even consult with the defendant about it. The prosecutor, who had offered a probationary sentence in pre-trial and post-guilty verdict negotiations, then agreed to a 10 year probationary sentence, but the trial court refused to accept this agreement and sentenced the defendant to 18 years’ confinement. Counsel’s conduct was admittedly deficient as it was “based on her misunderstanding of the law” and precluded a probationary sentence even though counsel argued that the defendant was

“a good candidate for probation.” Prejudice was also clear in that the jury may well have assessed probation as evidenced by the prosecutor’s actions in the case in attempting to negotiate for a probationary sentence even after the guilty verdict. The prosecutor also testified in post-conviction that the victim’s family agreed that probation was an appropriate punishment.

In re A.E., ___ N.E.2d ___, 2009 WL 3862454 (Ohio App. Nov. 17, 2009). Counsel ineffective in juvenile sex offender case for failing to advise the juvenile and the court of the proper classification procedures related to the statutory duty to register as a sex offender for the rest of the juvenile’s life and failing to advocate on the defendant’s behalf. The defendant was 15 and had no prior sex offense adjudications. Under state law, registrations requirements for a 14-15 year old with no prior sex offense adjudications was discretionary. Nonetheless, defense counsel sat silently in court when the court stated incorrectly that registration for the juvenile would be mandatory. Even assuming that counsel and the court understood the discretionary nature of the determination, counsel made no argument that the court should decline registration requirements or that the court should consider the mandatory factors listed in the state statute.

Gordon v. Hall, 221 P.3d 763 (Ore. App. 2009). Counsel ineffective in sentencing of first degree sexual abuse case where the defendant was given an enhanced sentence of life imprisonment without the possibility of parole (LWOP). Under state law, the presumptive sentence for a felony sex crime was LWOP if the defendant had been “sentenced” for two prior felony sex crimes. The state presented evidence of two prior sex “convictions” and counsel did not challenge this evidence, despite informing the court that the defendant did not believe he had a second conviction. Counsel’s conduct was deficient in failing to investigate the defendant’s prior criminal record and in failing to challenge the imposition of the enhanced sentence. First, the plain text of the statute required two prior “sentences” for the enhancement. Second, while counsel discussed prior “convictions” with the defendant, he did not discuss prior “sentences” with him and “failed to look beyond the face of the documents offered by the prosecutor to determine whether they had actually involved the imposition of sentences.” Third, counsel failed to object to the enhanced sentence on the basis that the state had failed to prove two prior “sentences.” The defendant was prejudiced because one of his prior convictions did not result in the imposition of a sentence because his sentence was suspended and he was placed on probation in California. At the completion of the probation, the court sentence aside the guilty plea, entered a not guilty plea, and dismissed the complaint. Thus, no prison sentence was ever imposed. Under the applicable law at the time in both California and Oregon, “probation was not a sentence.” Thus, the defendant did not have two prior sentences for felony sex offenses and the presumptive LWOP sentence did not apply to him.

State v. Bounhiza, 294 S.W.3d 78 (Tex. App. 2009). Trial court did not err in granting a motion for mistrial in sexual assault case based on ineffective assistance of counsel. Prior to trial, the defendant filed an application for probation. After conviction, however, the parties realized that the trial court was statutorily prohibited from considering probation as a sentence. The punishment range was 2-20 years. Counsel conceded his error and that he had incorrectly advised the defendant to choose the court rather than the jury for sentencing based on this error.

State v. Adamy, ___ P.3d ___, 2009 WL 2461721 (Wash. App. Aug. 13, 2009). Counsel ineffective in child rape and assault case for failing to advise the court that it could consider a special sex offender sentencing alternative (SSOSA) under state law, despite a federal immigration hold. The defendant's parents were U.S. citizens and he always believed he was also, but learned shortly before the charges were filed that he had been born during a visit to Mexico and his mother had never filled out the required paperwork for citizenship. The defendant pled guilty and the state agreed he could seek a SSOSA if he was, in fact, a citizen and eligible. The court denied the SSOSA believing it could not grant a SSOSA because the defendant was subject to a deportation order. Under state law, however, the court could have sentenced under SSOSA regardless of the defendant's citizenship or immigration status. Counsel's conduct "was deficient for failing to recognize and cite the appropriate case law . . . to the sentencing court." Prejudice shown.

People v. Heinz, ___ N.E.2d ___, 2009 WL 1537865 (Ill. App. June 1, 2009). Counsel ineffective in burglary and theft case for failing to object to restitution order in sentencing. The defendant was ordered to pay \$7,000 in restitution following convictions from breaking into and stealing from a bowling alley. Counsel's conduct was deficient and not based on strategy because the State's restitution request "was cursory at best" and the supporting evidence was inconsistent, ambiguous, vague, or completely absent. Counsel's conduct was deficient in "remaining silent under these circumstances." Prejudice found because if counsel had objected, the trial court would have held a hearing to determine the actual amount of damages.

Farris v. State, 907 N.E.2d 985 (Ind. 2009). Counsel ineffective for failing to challenge consecutive habitual offender sentence. Defendant was initially charged with robbery and while pending trial was charged with murder committed by someone he hired and who was attempting to kill his robbery co-defendant who was cooperating with the state. The defendant was convicted first of the robbery and his sentence was enhanced by 30 years as a habitual offender. Following his murder conviction, his sentence in that case was also enhanced by 30 years and ordered to run consecutive to sentence in robbery case. Counsel's conduct was deficient and prejudicial because state case law from at least seven years before the defendant's offenses or trial prohibited the state from seeking multiple enhancements by bringing successive prosecutions for charges that could have been consolidated for trial. These charges could have been consolidated because they

were based on a “series of acts connected together” as required by statute.

In re Personal Restraint Petition of Crawford, 209 P.3d 507 (Wash. App. 2009).

Counsel ineffective in sentencing following robbery and assault convictions for failing to challenge the use of an out-of-state conviction in designating the defendant as a persistent offender, which resulted in a sentence of life without parole. The prior conviction was for sex abuse in Kentucky. State law required the court to classify this according to the comparable offense in Washington law, based on the elements of the offense (legal comparability) or based on the defendant’s conduct as evidenced by the indictment or information (factual comparability). Here, the Washington statute included several elements that the Kentucky statute did not and, although the defendant’s conduct almost certainly violated the Washington statute, the necessary information to establish the elements was not contained in the Kentucky documents. Thus, counsel’s conduct was deficient and the defendant was prejudiced because the Kentucky offense was improperly counted as a strike under the persistent offender statute.

2008: *Thompson v. State*, 990 So. 2d 482 (Fla. 2008). Counsel ineffective in burglary, false imprisonment, and sexual battery case for failing to timely move to disqualify the presiding judge from sentencing. Prior to trial, counsel moved to withdraw stating the defendant had threatened to kill him, his family, and anyone associated with the case following conviction. The defendant denied the allegations and the motion was denied based on the court’s finding that he would likely be sentenced to life and unable to carry out his threat if he was convicted. Counsel filed a motion to disqualify the court 14 days later, which was denied as untimely under state rules requiring that a motion for disqualification be made within 10 days after the discovery of the facts constituting the grounds for disqualification. Following conviction, the court sentenced the defendant to concurrent life sentences. Counsel’s conduct was deficient and not based on strategy. Prejudice found because “the statements made by the judge . . . sufficiently evince judicial bias and predisposition so as to undermine confidence in the eventual sentence imposed.”

Robinson v. State, 669 S.E.2d 588 (S.C. 2008). Counsel ineffective following plea to drug trafficking offense for failing to challenge the use of a prior uncounseled magistrate court conviction to enhance the sentence, which resulted in a 20 year sentence. Prejudice found even though the sentence imposed was less than the maximum allowable punishment for a first trafficking offense. No sentencing ordered.

Lair v. State, 265 S.W.3d 580 (Tex. App. 2008). Counsel ineffective in sentencing in possession of ecstasy case. Counsel presented only the defendant’s sister-in-law to testify, despite the availability and willingness of over twenty witnesses, including the defendant’s mother, relatives, and neighbors, who would have given good character type evidence. Counsel’s conduct was deficient because he “did not even interview these witnesses, let alone present their testimony at the punishment hearing. This fact . . .

necessarily defeats counsel's subsequent representation that the testimony of these additional witnesses would have been merely cumulative since, without conducting any sort of investigation into their testimony, he could not know whether the testimony was cumulative or not." Counsel's alleged concern about the state cross-examining these witnesses with the defendant's prior 50-year sentence also did not explain the failure because the jurors were already aware of the prior sentence. Prejudice found because the evidence the jury heard "was brief and lacking in the detail and information that the additional witnesses would have offered." In addition, the jury sentenced the defendant to 70 years when the State had requested only a 50 year sentence.

2007: *Pettis v. State*, 212 S.W.3d 189 (Mo. App. 2007). Counsel ineffective in sentencing following guilty plea to possession of a controlled substance within a correctional institution for affirmatively misstating the parole consequences of a consecutive sentence to the court. The defendant was serving a life sentence and had been approved for parole prior to these charges. Following these charges, his parole was cancelled and a new parole hearing was scheduled. The defendant entered a plea in this case pursuant to an agreement wherein the state agreed to maximum of five years but left to the court the determination of whether the sentence should be concurrent or consecutive to the life sentence. During the sentencing, the court inquired about the impact on parole and clearly wanted to impose a sentence with some deterrent effect but also to show some leniency to the defendant. In response to the court's inquiries, counsel stated that his "release date is to going to be pushed backward" and urged the court not to impose a consecutive sentence. The court gave the defendant a sentence of four years consecutive. Counsel's conduct was deficient because counsel affirmatively misstated the real consequence, which was that a consecutive sentence of any length effectively converted the life sentence to one of life without parole. Prejudice was clear because the court had no inkling the defendant's parole eligibility would be extinguished by a consecutive sentence when the court clearly wanted to show some leniency in sentencing the defendant to four years rather than the five recommended by the state.

State v. Thiefault, 158 P.3d 580 (Wash. 2007). Counsel ineffective in sentencing following indecent liberties and attempted rape convictions for failing to object to the sentencing court's comparability analysis regarding the defendant's prior Montana conviction for attempted robbery, which led to the sentencing court counting that offense as a strike under the Persistent Offender Accountability Act (allowing a life without parole sentence based on three prior convictions or "strikes) and sentencing the defendant to life without parole. Counsel's conduct was deficient because the Montana offense was broader than its Washington counterpart because the Montana statute required a lesser mens rea. There was also insufficient evidence in the record for the court to factually compare the offense to make a proper comparability determination. Prejudice found because counting the Montana offense as a strike allowed the court to sentence the defendant to life without parole.

2006: *People v. Thimmes*, 41 Cal. Rptr. 3d 925 (Cal. App. 2006). Counsel ineffective in sentencing for felony drug case for failing to advise the court that the defendant had been warned of the consequences of his prior conviction and the Three Strikes Law prior to the defendant's no contest plea in exchange for a sentence of 32 months. The strike offense admitted was a 1999 criminal threat for which the defendant was sentenced to probation. Counsel's conduct was deficient because the trial court assumed that the defendant had been advised that the 1999 conviction would count under the Three Strikes Law even though criminal threat was not included for purposes of that provision until 2000. Prejudice found because the trial court was permitted to decline to apply the Three Strikes Law and had stated that the case was "a pitiful one," but applied the law based on the assumption that the defendant had previously been advised of the consequences.

People v. Le, 39 Cal. Rptr. 3d 146 (Cal. App. 2006). Counsel ineffective in robbery and burglary case for failing to object based on double jeopardy to consideration of both offenses in calculating the restitution fine. Counsel's conduct was deficient and prejudicial because state law precluded multiple punishment for a single act or omission and the defendant's sole intent was to steal from a drugstore. Thus, the defendant should have been sentenced solely on the robbery conviction but the burglary conviction was included, which essentially doubled the restitution fine.

Estrada v. State, 149 P.3d 833 (Idaho 2006). Counsel ineffective in plea to rape case for failing to advise the defendant of his right to refuse to cooperate with a court-ordered psychosexual evaluation for purposes of sentencing. After accepting the plea, the trial court ordered a psychosexual evaluation of the defendant, which counsel informed the defendant must be completed, even though the defendant initially refused to participate. Counsel's conduct was deficient in failing to advise the defendant that he still retained his right against self-incrimination following his plea and he was not required to participate in the psychosexual evaluation. Prejudice found because the sentencing judge's specific, repeated references to the psychosexual evaluation suggest that it played an important role in the sentencing and the evaluation report included a number of unfavorable and derogatory comments, including references to the defendant's potential for future violent actions.

2005: *Mikell v. State*, 903 So. 2d 1054 (Fla. App. 2005). Counsel was ineffective in probation revocation proceedings for failing to inform the court that it had authority to continue probation. The defendant had entered a no contest plea to lewd acts and been sentenced to 10 years suspended and five years probation. After he committed several probation violations and was brought before the court counsel presented mitigation evidence and the defendant asked for mercy. The trial court indicated her belief that legally she could not extend mercy and sentenced the defendant to concurrent 10 year terms. Trial counsel's conduct was deficient because state law clearly allowed the court to continue probation. Prejudice was found because the record reflects that the trial court would have considered continuing the probation if she had known that she could do so. Remanded for

resentencing by the same trial court without opposition from the state.

Matthews v. State, 868 A.2d 895 (Md. App. 2005). Counsel ineffective and prejudice presumed in probation violation case for failing to file a motion for modification of sentence when requested to do so by the defendant. Defendant entitled to file a belated motion for modification of sentence.

Shanklin v. State, 190 S.W.3d 154 (Tex. App. 2005). Counsel ineffective in punishment phase of non-capital murder case for failing to investigate or present evidence from at least 20 available witnesses and instead called only the defendant to testify that he was sorry. The prosecutor requested a sentence of 25 to 35 years but the jury imposed a sentence twice that length. The available witnesses would have testified that the defendant was an excellent father, helped his friends and relatives, and worked hard.

Freeman v. State, 167 S.W.3d 114 (Tex. App. 2005). Counsel ineffective in sentencing on aggravated sexual assault charge for failing to adequately investigate and present evidence of the defendant's history of mental illness. While counsel was aware that the defendant had previously been hospitalized on a couple of occasions (and the defendant testified about this during trial), counsel presented only testimony from the defendant's mother in sentencing asking the jury to take his illness into account. If counsel had adequately investigated, the evidence would have shown that the defendant had another prior hospitalization following an attempted suicide and had been receiving regular outpatient treatment for more than a year prior to the crime. He had last been seen three weeks before the crime. Counsel's conduct was deficient under *Wiggins* because counsel failed to investigate and there was no strategy for this failure. Prejudice was found because counsel only presented lay testimony from the defendant and his mother on this issue. Although "it is sheer speculation" that the jury would have given a lighter sentence if additional evidence had been presented, the court found a reasonable probability of a different outcome.

Andrews v. State, 159 S.W.3d 98 (Tex. Crim. App. 2005). Counsel ineffective in sentencing for indecency and sexual assault of child case for failing to object to the prosecutor's argument that the defendant's sentences could not be made consecutive, which was a misstatement of law and contrary to the state's pretrial motion asking to make the sentences consecutive or cumulative. Counsel's conduct was deficient (and could not be explained by trial strategy) because "counsel has a duty to correct misstatements of law that are detrimental to his client." Prejudice was found because the argument left the jury with the false impression that the maximum the defendant would serve was 20 years when the maximum sentence was actually 80 years.

2004: ***Barger v. State***, 895 So. 2d 385 (Ala. Crim. App. 2004). Counsel ineffective in theft case for failing to appear at the restitution hearing, which was "a component of the criminal-sentencing proceeding." Remanded for new restitution hearing.

McCarty v. State, 802 N.E.2d 959 (Ind. App. 2004). Counsel was ineffective in failing to prepare and present mitigating evidence in sentencing following the defendant's plea to child molestation. Counsel's conduct was deficient because he met with the defendant only once, conducted no investigation, and did not retain an investigator or mental health expert. Prejudice was found because adequate investigation and presentation would have revealed that the defendant was mentally retarded, he had been molested himself as a child, there was a likelihood that he could be successfully rehabilitated, and his confession admitted acts beyond what the victims had reported. Because of the trial court's reluctance to find prejudice and grant relief, the court exercised its state constitutional authority to revise the defendant's sentence and reduced his sentence by 10 years to the presumptive term of 30 years.

Storr v. State, 126 S.W.3d 647 (Tex. App. 2004). Counsel was ineffective in sentencing in aggravated kidnaping case for failing to obtain an instruction on voluntary release of kidnaping victim in a safe place. The defendant was charged with aggravated kidnaping, which is a felony in the first degree. Under state law, however, if the defendant raises the issue of voluntary release of the victim at the punishment stage and proves that by a preponderance of the evidence, the offense is a felony in the second degree. The first degree felony is punishable by imprisonment of 5 to 99 year. The second degree felony is punishable by a term of 2 to 20 years. Counsel's conduct was deficient in failing to request the instruction because the evidence conclusively established that the appellant voluntarily released the victim in a safe place. The victim was left in his car at a post office which is exactly the point where he had been abducted to start with. The court found that it was inconceivable that counsel had some trial strategy for not requesting an instruction on safe release given the significant difference in punishment. Prejudice found because the defendant was sentenced to 35 years which is 15 years more than the maximum imprisonment allowed for the second degree felony.

State v. Saunders, 86 P.3d 232 (Wash. App. 2004). Trial counsel was ineffective in sentencing in murder, rape, and kidnaping case for failing to argue that rape and kidnaping constituted the "same criminal conduct" for purposes of calculating offender score. "Same criminal conduct" refers to the situation where there are two or more crimes that (1) require the same criminal intent, (2) are committed at the same time and place, and (3) involve the same victim. Here, the primary motivation for sexually assaulting the victim by inserting a television antenna in her anus was to dominate her and to cause her pain and humiliation. Because this intent arguably was similar to the motivation for the kidnap, defense counsel was deficient for failing to make this argument. Prejudice was found because the case law provides strong support for this argument. New sentencing granted.

2003: *Carswell v. State*, 589 S.E.2d 605 (Ga. App. 2003). Counsel's performance was deficient in an aggravated assault case for failing to object to two prior convictions used by the state in aggravation of sentence because those guilty pleas may not have been entered into

voluntarily. Because the court found that reversal was required on the substantive issue, the court found that the question of prejudice with respect to the ineffectiveness of counsel was moot.