

**SUMMARIES OF SUCCESSFUL
INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS
POST-*WIGGINS V. SMITH* INVOLVING
NUMEROUS DEFICIENCIES AND INADEQUATE
DEFENSE AT TRIAL**

*Updated May 24, 2010

TERESA L. NORRIS

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

teresa@blumelaw.com

TABLE OF CONTENTS

NUMEROUS DEFICIENCIES AND INADEQUATE DEFENSE

1.	U.S. Court of Appeals Cases	1
2.	U.S. District Court Cases	29
3.	Military Cases	48
4.	State Cases	48

I. TRIAL PHASE

A. NUMEROUS DEFICIENCIES AND INADEQUATE DEFENSE

1. U.S. Court of Appeals Cases

2010: *English v. Romanowski*, 602 F.3d 714 (6th Cir. 2010) (affirming in part and reversing in part, 589 F. Supp. 2d 893 (E.D. Mich. 2008)). Under AEDPA, counsel ineffective in assault with intent to commit murder case for failing to adequately investigate prior to informing the jury in opening statements that the defendant's girlfriend would be called as a witness to corroborate the claim of self-defense. Because the state court had failed to address the issue, although raised in state court, review was *de novo*. Counsel's conduct was deficient, even though there were arguably valid strategic reasons for counsel's decision not to call the girlfriend as a witness. "This is not a case where counsel simply failed to pursue a potential witness. . . . Here, counsel was actually prepared to call" the witness and informed the jury of this intent before discovering the problems and concerns that caused counsel to change his mind. Simple pretrial interviews of witnesses would have revealed the problems, but counsel "failed to interview any of the witnesses outside of the courthouse or prior to trial." Reasonable trial strategy could not be developed on guesses of what witnesses would say. The unfulfilled promise to the jury to call the girlfriend as a witness was prejudicial because the unfulfilled promise (1) created a negative inference against the defendant generally; (2) caused a negative inference against the defendant's own testimony, which counsel promised would be corroborated by the girlfriend; and (3) prejudicial, inflammatory evidence of the girlfriend's witness tampering and alleged false evidence planting would not have been admitted if defense counsel had not identified her as a witness. In addition, the state's evidence was not overwhelming as there were "no unbiased witnesses" and no physical evidence.

2009: *Richter v. Hickman*, 578 F.3d 944 (9th Cir. 2009), *cert. granted*, 2010 WL 596530 (Feb. 22, 2010). Counsel ineffective in murder case for failing to consult with forensic experts and failing to conduct a "rudimentary investigation." The opinion began, as follows:

"To . . . not prepare is the greatest of crimes; to be prepared beforehand for any contingency is the greatest of virtues." – Sun Tzu, *The Art of War* 83 (Samuel B. Griffith trans., Oxford University Press 1963).

In essence, the case was a credibility contest between a state's witness and the defendant, who were associates and had been socializing, including using drugs, together hours before the crimes. According to the witness, he awoke to the defendant and a co-defendant in his bedroom stealing from him, and then shooting him and killing a man, who had been sleeping on the couch. According to the defendant, he and the co-defendant were returning some borrowed items, when the witness opened fire on them

and also shot his house-guest who was at the door of the bedroom. Police, believing the scene was consistent with the witness' statement, "did not pursue an in-depth forensic investigation." Defense counsel asserted that a pool of blood in the bedroom doorway, which was the critical evidence in the case, belonged to the dead man shot there by the state's witness rather than by the defendant and co-defendant while on the couch. Counsel's conduct was deficient, however, in failing to consult with forensic experts in forming his trial strategy, or to cross-examine state experts, who conducted testing after defense counsel's opening statement, or to testify for the defense. Despite a blood spatter and serologist presented as "surprise" witnesses during trial, counsel did not seek a continuance or obtain his own experts. Counsel's conduct was deficient and prejudicial in failing to obtain a blood-spatter expert, who would have directly contradicted the state's expert. While the court ruled just on this basis, it found that the defense case also would have been bolstered by two available serologists that would have contradicted the state's expert.

Bigelow v. Haviland, 576 F.3d 284 (6th Cir. 2009). Counsel ineffective in kidnaping, assault, and arson case for failing to adequately prepare and present alibi evidence. The defendant was arrested based on his resemblance to a composite sketch of the attacker. He maintained that he was in a different city at the time of the attack. He presented one alibi witness to state that he was working with the defendant 150 miles away on the day of the crimes. Counsel's conduct was deficient in failing to identify other alibi witnesses. He called some witnesses, whose names the defendant had provided. They could verify that the defendant had been there sometime during the month, but could not pinpoint the relevant day. The defendant then attempted to locate additional witnesses, sending letters to some people. Four days before trial, one potential alibi witness contacted counsel and informed him he had met the defendant that day and identified the location where wedding preparations were being made. The witness believed only three people were there and the third person, the home owner, could not verify the defendant's presence. Nonetheless, counsel called only this witness and did not search for other corroborating witnesses. If counsel had taken additional steps, he would have discovered that "many others" were at the house the day. "An attorney's duty of investigation requires more than simply checking out the witnesses that the client himself identifies," especially where, as here, the defendant suffered from an "untreated mental illness." Prejudice established because two additional alibi witnesses would have bolstered the defense. Thus, there would have been, at minimum, "two reasonably confident alibi witnesses, with no connection to [the defendant] and no axe to grind, who had time to observe him under ordinary conditions, versus two prosecution witnesses who caught no more than a glimpse of the perpetrator's face." There was, however, a third alibi witness. "The three witnesses who corroborated his alibi were strangers to [the defendant], to the victim and to the crime and thus had no reason to perjure themselves one way or another. And all of this must be weighed against the flaws in the prosecution's case." The state court's conclusions unreasonably applied *Strickland*.

Moore v. Czerniak, 574 F.3d 1092 (9th Cir. 2009), *cert. granted*, 130 S.Ct. 1882 (2010). Under AEDPA, counsel ineffective in felony murder case for failing to object to the admissibility of the petitioner's confession prior to recommending entry of a plea of no contest for which the petitioner was given a mandatory sentence of 25 years. Counsel did not object because (1) counsel believed the motion would not be meritorious; and (2) counsel believed it would make no difference to the outcome because the petitioner had confessed informally to his brother and his brother's girlfriend. Counsel's conduct was deficient because the issue had merit in that the confession was inadmissible because it was impermissibly extracted as the result of a promise of leniency and was, therefore, involuntary. Even assuming the lay witnesses would have testified that the petitioner confessed to them, the *formal taped confession* by the petitioner was far more damaging and reasonable counsel would have realized that excluding this evidence would have placed the petitioner in a far better position to negotiate a reasonable plea and obtain a lesser sentence. The state court findings to the contrary were contrary to *Arizona v. Fulminante*, 499 U.S. 279 (1991) and an objectively unreasonable application of *Strickland*. Prejudice found in that "[t]he probability that [the petitioner] would not have pled . . . had his counsel filed the motion" is sufficient to undermine confidence in the outcome as "the state's case would have been far weaker." In reaching its conclusions, the majority rejected consideration of possible strategic reasons not offered by trial counsel.

[W]e must decide the question based on what counsel's reasons for his decisions actually were, not on the basis of what reasons he could have had for those decisions. Thus, just as we may not second-guess a lawyer's reasonable tactical or strategic decisions, we may not deem unreasonable acts to have been "the result of reasonable professional judgment," by grounding them in considerations that were not, in fact, the lawyer's reasons for acting or failing to act.

Wilson v. Mazzuca, 570 F.3d 490 (2nd Cir. 2009). Under AEDPA, counsel ineffective in robbery case for numerous reasons and the state court finding to the contrary was an unreasonable application of clearly established federal law. In December 1992, the victim was robbed at gunpoint by two men. That day, he gave a general description of the man that assaulted him and demanded cash and then selected the defendant's photo from a book of "mug shots" maintained by police. The defendant was arrested almost two years later on unrelated extortion charges. The next day the robbery victim picked him out of a line-up and the defendant was charged with the robbery. Under New York law, the initial photo identification was inadmissible except for rebuttal purposes. During opening statements, defense counsel asserted mistaken identification and insufficient police investigation. The trial court warned defense counsel that if he proceeded along the line of the police investigation, the door would be opened for the photo identification. Following opening, the trial had to be continued because the victim did not appear. He

was brought in under a Material Witness Order. Counsel's conduct was deficient in eliciting testimony from him on cross that he did not appear because he feared the defendant would retaliate against him for testifying. This was "objectively unreasonable" because there had been no mention of fear in appearing before. "To ask these questions on the theory that [the witness] might say that he was not afraid of [the defendant] was "reckless and objectively unreasonable." Counsel also opened the door on cross to the photo identification. Counsel initially "appeared to misunderstand the legal issue" but "[t]his mistaken belief was entirely unreasonable, especially in light of the court's warning following opening that "was more than sufficient to dispel any misunderstanding" on counsel's part. During the rebuttal, the state referred to the photos as "mug shots" without objection from the defense. The trial court suggested that the "mug shots" be redacted to exclude the booking plaque hanging around the defendant's neck. Counsel's conduct was deficient in objecting to the redaction. Counsel had "no strategic explanation" for the failure to object to the "mug shot" label or for objecting to redacting the photos. Next, counsel's conduct was deficient in introducing the unredacted arrest report on the extortion charges, despite the trial court expressing concerns and *sua sponte* raising the possibility of whether the defendant had been denied the effective assistance of counsel. Counsel's reasons, in showing the prior arrest was "baloney" and to be "honest" with the jury, were "incomprehensible." It also appeared that counsel "did not even realize that the report contained prejudicial information linking the defendant to "prior threatening and violent activity." Finally, counsel presented a character witness and inquired about the defendant being a role model for youth in a community organization. Although the trial court gave counsel an opportunity to strike his own question, counsel declined. This testimony opened the door for the state to inquire on cross about the witness' knowledge of the defendant's prior convictions for drugs, weapons, theft, and assault. "It was objectively unreasonable for defense counsel, particularly in the face of the trial court's warnings, not to have understood that eliciting reputation testimony would lead to the introduction of [the defendant's] criminal history." In short:

The record indicates that defense counsel misinterpreted and misunderstood the law, failed to pay attention, acted recklessly, and did not appreciate the consequences of his decisions, even though in many cases he was explicitly warned of the risks by the trial court.

Prejudice established. The state's whole case was built on the "single eyewitness identification made *two years* after the robbery by a reluctant eyewitness who testified only after being served with a material witness warrant." "On the other side of the ledger," due only to defense counsel's errors, the evidence undermined the "mistaken identification defense, corroborated the eyewitness identification, and implied [the defendant] had a propensity for criminality and violence. Indeed, the state's closing argument relied primarily on the "evidence that would not have been admissible but for

[counsel's] decisions at trial." In addition, the trial court expressed concern about ineffective assistance during the trial or in "real-time, not merely *post hoc*."

Richards v. Quarterman, 566 F.3d 553 (5th Cir. 2009) (*affirming* 578 F. Supp. 2d 849 (N.D. Tex. 2008)). Under AEDPA, counsel was ineffective in murder case (with death a day or so after assault) for a number of reasons. The case involved a number of homeless people living on the streets near a church tent known as the "slab church." Two eyewitnesses testified that they observed the victim and defendant in a minor altercation and returned later to see the victim standing over the defendant, who appeared to be asleep, with a stick and length of steel. The defendant got up, picked up a piece of asphalt, and hit the victim 9 or 10 times around the head and face. The defendant's brother later discovered the victim's body and testified that the defendant told him, consistent with the eyewitness testimony, that the victim had choked him into unconsciousness. When he awoke, he hit the victim in self defense. First, counsel's conduct was deficient in failing to present evidence (and preventing the state from presenting evidence) of the victim's pre-death statements that significantly varied from the state's evidence and theory. In essence, the victim had gone to a nearby house at 3:00 a.m. and told a witness there he had been attacked by 3-5 men after he had fallen asleep and that another man [not the defendant] was the principal assailant that hit him in the head with a brick. Due to counsel's sustained hearsay objections, the victim's statements were excluded. The victim also told the police officer that responded to the house that he was attacked by 4 men around 3:00 a.m. and that he knew the men. Again, counsel's sustained hearsay objections excluded the victim's statements. Another homeless man testified that he was with the victim in the area around 6:00-7:00 a.m. when a man (not matching the defendant's description) walked by and the victim became agitated and said he was the attacker from the night before. Again, the victim's statements were excluded based on counsel's objections. Finally, counsel failed to present the defendant's testimony that his fight with the victim occurred around 10:00 or 10:30 p.m. Counsel's conduct was deficient and not based on any legitimate strategic reason. The state court's contrary findings were an unreasonable application of *Strickland*. Second, counsel's conduct was deficient in failing to request instruction on aggravated assault, a lesser-included offense. This was not the result of any reasoned trial strategy. Counsel initially stated she thought the request would have been frivolous. But, counsel's "testimony strongly suggests that she both failed to recognize" that it "was entirely possible for the jury to believe that [the defendant] did not act in self-defense but also believe that he did not kill [the victim]." Counsel "misunderstood the law governing lesser-included offenses." Thus, her additional explanation that she did not want to give the jury the option of convicting of a lesser offense was "a '*post-hoc* rationalization' rather than a genuine account of her decision-making process." The state court's contrary finding was an unreasonable application of *Strickland*. Third, counsel's conduct was deficient in failing to put into evidence the defendant's VA medical records to establish the defendant's physical problems, which included a triple bypass surgery, left side weakness,

frequent chest pains, and an inability to walk more than half a block without stopping. Counsel's "ethical" explanations for not presenting this evidence "were developed after the fact" and "make no sense." "[T]here is nothing implausible about being strong enough to hit someone two to three times with a rock in self-defense but not strong enough to kill the person." The medical evidence also might have made the self-defense claim "more plausible." Counsel's conduct was deficient and not based on reasonable strategy. The state court's contrary findings were an unreasonable application of *Strickland* and the state court's factual findings on this were rebutted by clear and convincing evidence. Finally, counsel was ineffective in failing to interview important witnesses prior to trial. Again, the state court's contrary findings were an unreasonable application of *Strickland* and the state court's factual findings on this were rebutted by clear and convincing evidence. Prejudice established based on the "cumulative effect" of the errors. "But for the deficiencies in [counsel's] performance . . . , the jury would have heard compelling evidence that there was another, more serious assault on [the victim] after the one described by the prosecution's witnesses and [the defendant] himself, as well as of [the defendant's] documented frailties."

2008: *Avery v. Preslesnik*, 548 F.3d 434 (6th Cir. 2008), *cert. denied*, 130 S.Ct. 80 (2009), (*affirming* 524 F. Supp. 2d 903 (W.D. Mich. 2007)). Under AEDPA, counsel ineffective in second degree murder case for failing to investigate and interview alibi witnesses. The defendant gave counsel three names and the business address for alibi witnesses. Counsel's investigator went there and interviewed one of the individuals, who was not personally an alibi, but told the investigator that his brother, who the defendant had named, and another person had been with the defendant. The investigator left his business card but neither the investigator nor counsel took any other action to investigate. Counsel's conduct was deficient because, at bare minimum, counsel should have sought the witness' phone number and made a reasonable attempt to contact them. Failure to do so was not excused by strategy. "[T]he limitations on [the] investigation rendered it impossible for [counsel] to have made a 'strategic choice' not to have [the alibi witnesses] testify because he had no idea what they would have said." Prejudice was reviewed *de novo* because the state court did not rule on this issue. Although the state post-conviction judge found at least one of the witnesses to be "totally incredible," the Sixth Circuit noted that the hearing was more than a year after the trial. In addition, "evaluation of the credibility of alibi witnesses is 'exactly the task to be performed by a rational jury,' not by a reviewing court." The court also noted that there was "otherwise flimsy evidence" supporting the conviction, which was basically one eyewitness, "peeking" out a window in the dark. This witness also had made inconsistent statements and identifications.

**Duncan v. Ornoski*, 528 F.3d 1222 (9th Cir. 2008) (sentenced in March 1986). Under pre-AEDPA standards, counsel ineffective as to alleged special circumstance (i.e., what creates eligibility for a death sentence in California) for failing to investigate and present

evidence that the blood samples from the crime scene that did not belong to the victim, who was stabbed to death in a struggle, also did not belong to the defendant. Such evidence supported an inference that the defendant had an accomplice and that the accomplice killed the victim. There was no prejudice during trial, but prejudice was established with respect to the special circumstance findings that required an intentional killing or an intent to kill. The state's serologist was given no blood to compare to samples other than the victim's and could state only what did not match the victim. The defense argued in closing that the state should have tested the defendant's blood, but the prosecutor responded that if inconsistent blood evidence had been present, the defense would have presented this evidence.

Although it may not be necessary in every instance to consult with or present the testimony of an expert, when the prosecutor's expert witness testifies about pivotal evidence or directly contradicts the defense theory, defense counsel's failure to present expert testimony on that matter may constitute deficient performance.

Here, the defense argued that the defendant was not the killer, but "did not advance any plausible alternative theory or present any specific evidence that he was not the murderer." Counsel had the serology report and understood the significance but opposed the state's motion for blood testing of the defendant and did not consult a serologist or have the defendant's blood tested.

It is especially important for counsel to seek the advice of an expert when he has no knowledge or expertise about the field. . . . Additionally, the central role that the potentially exculpatory blood evidence could have played in [the] defense increased [the] duty to seek the assistance of an expert.

Counsel did not have a valid strategy not to incriminate the defendant further because the defendant admitted presence and his fingerprints and palm prints were present at the scene. In addition, state law allowed "confidential testing by defense experts," which the prosecutor even pointed out to the jury in closing in arguing the unfavorable inferences. Even if defense counsel was concerned about maintaining confidentiality, counsel could have obtained a small sample of the defendant's saliva in a vial or cloth and used that to determine his blood type without notifying the court or the State so there was "nothing to *lose* by testing [the defendant's] blood, but he stood to *gain* crucial evidence by doing so." Prejudice found

especially considering that the blood evidence was the only physical evidence that had not been linked to [the defendant] at the time of the trial. The evidence that [counsel] failed to present

would have been highly significant because it would have suggested that [the defendant] had an accomplice and that the accomplice was likely the actual killer. Under the State's own theory, the small money room likely would have accommodated only one killer. Given the blood found at the crime scene that did not belong to the victim or to [the defendant] and that was likely shed in the course of the attack, it appears probable that [the defendant] was not in the money room during the murder.

Id. at ____.

2007: *Bell v. Miller*, 500 F.3d 149 (2nd Cir. 2007). Counsel ineffective in robbery and assault case for failing to consult with a medical expert regarding the reliability of the victim's identification of the defendant. The victim was robbed and shot in the thigh with a shotgun in the street. When police arrived he had lost half his blood. He described his assailant as a black male with a lemon-colored shirt in a fashion that implied he did not know the shooter. He then lapsed into a coma for eleven days. He identified the defendant by name when he recovered although he continued to take painkillers every four hours and suffered from memory lapses and dizziness for a month. Counsel's conduct was deficient because he asked no questions about the medications or memory loss. He also asked no questions of the ER doctor concerning the effect of blood loss on consciousness and memory or the effect of the medications. Counsel's conduct was deficient in failing to consult a "medical expert regarding the effects of trauma, blood loss and painkillers" on the victim's memory. No strategy explained this failure. Prejudice found because there was evidence of "retrograde amnesia," which was exacerbated by the medications he was likely given in the ER, and that he likely had not fully regained consciousness when he first identified the defendant. While state law prohibited testimony on the reliability of eyewitness identification from social scientists, it is likely the trial court would have permitted a "medical expert" to testify to these factors. [It should be noted that while the court repeatedly referred to a "medical expert," the defendant's post-conviction evidence of prejudice was from a "neuropsychologist."] There was no evidence linking the defendant to the crime other than the victim's identification and he had three alibi witnesses. Under AEDPA, the court's review was conducted de novo because the state court had applied a state rule that was not regularly applied to deny relief and was, therefore, not adequate to bar habeas review. The state court's alternative statement that "if the merits were reached, the result would be the same" was not an adjudication on the merits requiring application of § 2254(d).

Fadiga v. Attorney General U.S., 488 F.3d 142 (3rd Cir. 2007). Counsel ineffective in immigration proceedings where the issue of ineffectiveness is cognizable under the Fifth Amendment as a violation of due process but the courts often and in this case essentially used the *Strickland* standard. Here, the alien was a native of Guinea, who entered the

country in 1991 on a visa that expired after one month. Eleven years later, INS brought removal proceedings. The alien applied for withholding of removal and protection under the Convention Against Torture. During the hearing, the alien testified that he had left Guinea due to political issues in the country, which rose to the level of his uncle being murdered due to political motivations, and his fear that he would be “arrested, tortured, or killed.” Shortly after his departure, an arrest warrant had been issued for him charging “public disorder.” The Immigration Judge (IJ) found dramatic inconsistencies in his testimony and the application filed and noted the lack of supporting witnesses and documents to corroborate the alien’s testimony. Although the alien and his counsel essentially explained that the fault lay with counsel, the IJ ruled against the alien. The alien appealed to the Board of Immigration Appeals (BIA) and, represented by new counsel, asserted only the ineffectiveness of initial counsel, who provided an affidavit in support of the issue. The BIA denied relief and the case proceeded to the Third Circuit. Counsel admitted (and the court found) that counsel’s conduct was deficient because a law student prepared the application and counsel assumed it was complete and accurate. Thus, counsel did not review the application with the alien or advise him to review it before signing it. He also did not discuss with the alien the need for additional witnesses and corroboration other than a simple generic letter about a month before the hearing, which is the only reason the alien was able to provide some documentation. In discussing a threshold procedural requirement applied by the BIA for ineffectiveness claims, the court held that the “Lozada requirements” do not require a bar or disciplinary complaint against counsel. Those requirements are aimed at serving, in essence, the interests of ensuring adequate counsel, deterring meritless claims of ineffectiveness, and prohibiting “collusion between counsel and the client” on these issues.

All of these interests—save the last—are served without a complaint where, as here, prior counsel has fully and openly owned up to his error and provided a detailed affidavit attesting to the problems in the representation. As to the “collusion” rationale, it seems unlikely that a lawyer would go so far as to commit perjury (i.e., intentionally filing a false affidavit) in furtherance of such collusion. Therefore, we find that the requirement of a complaint was excused in this case where counsel acknowledged the ineffectiveness and made every effort to remedy the situation.

Id. at 156-57. Prejudice found because the IJ’s doubts about the alien’s credibility and the lack of corroborating evidence were caused by counsel’s deficient conduct. “Thus, counsel’s errors contributed directly to the evidentiary defects that led the IJ to deny relief.” *Id.* at 163.

**Richey v. Bradshaw*, 498 F.3d 344 (6th Cir. 2007). On remand from the Supreme Court, the Sixth Circuit again held that counsel was ineffective in inadequately cross-examining

the state's experts and failing to present competing scientific evidence on the cause of the fire that caused the deaths. *See Richey v. Mitchell*, 395 F.3d 660 (6th Cir. 2005).

Counsel's conduct was deficient because the State presented two experts to present a detailed, specific theory of arson, which was "fundamental to the State's case." Counsel retained his own expert late in the case and just deferred to his conclusion agreeing with the State's experts without question. "[T]he mere hiring of an expert is meaningless if counsel does not consult with that expert to make an informed decision about whether a particular defense is viable." 498 F.3d at 362. Here, the defense expert did not perform his own independent testing and deferred to the state expert's who he believed to be better qualified.

[I]t is inconceivable that a reasonably competent attorney would have failed to know what his expert was doing to test the State arson conclusion, would have failed to work with the expert to understand the basics of the science involved, at least for purposes of cross-examining the State's experts, and would have failed to inquire about why his expert agreed with the State. A lawyer cannot be deemed effective where he hires an expert consultant and then either willfully or negligently keeps himself in the dark about what that expert is doing, and what the basis for the expert's opinion is. . . . The point is not that [counsel] had a duty to shop around for another expert who would refute the conclusions of [the defense expert] and the State's experts. The point is that [counsel] had a duty to know enough to make a reasoned determination about whether he should abandon a possible defense based on his expert's opinion. . . . Having simply been served up with [the defense expert's] flat agreement with the State, and not having known either what [he] did to arrive at his conclusion or why he came out where he did, [counsel] was in no position to make this determination.

Id. Counsel's conduct was not explained by strategy to simply challenge the identity of the arsonist since other circumstantial evidence against Richey "made such a choice unreasonable." In addition, because there were gaps in the State's proof "investigating the scientific basis for the State's arson conclusion became all the more imperative." *Id.* Counsel could have presented testimony to severely undermine the State's case by attacking the State's analysis as "unsound and out of step with prevailing scientific standards," disputing the conclusion that gasoline or paint thinner traces were found; testifying that the burn patterns and speed were consistent with a naturally occurring fire; and testifying that the most likely cause of the fire was a cigarette smoldering in the cushions of the victim's couch. Prejudice established for trial and sentencing. "Although the circumstantial evidence alone might have led to a conviction, the question before us is

not one of the sufficiency of the evidence, but of undermining our confidence in the reliability of the result.” *Id.* at 364.

Ramonez v. Berghuis, 490 F.3d 482 (6th Cir. 2007). Under AEDPA, counsel ineffective in home invasion, assault, and aggravated stalking case for failing to interview and present the testimony of three witnesses. The defendant was charged with breaking into his ex-girlfriend’s home (and she had two of his children living with her) and assaulting her. Even according to her preliminary hearing testimony, three witnesses saw a portion of the alleged events. Those three men were the defendant’s son, stepson, and an acquaintance from work. Months prior to trial, the defendant insisted that counsel call these men as witnesses. Counsel did not interview them or even attempt to do so until just days before trial when he attempted to call one of them but was successful only in exchanging phone messages. At the close of the prosecution’s case, the defendant insisted to the court that he wanted those witnesses called. The court declined to intervene in counsel’s judgment. Thus, the defendant was left only with his own testimony, which counsel had also advised against. He denied breaking into the home, but admitted to pushing the woman when they got into an argument because she was high and his children were in the home. Counsel’s conduct was deficient because of the “decision to limit (or more accurately, not to pursue at all until it was too late) any investigation regarding the three potential witnesses.” The state court’s found that counsel had a reasonable strategy to focus just on undermining the alleged victim’s credibility as to events inside the home, but that “strategy” was based on counsel’s “belief that was grounded on a fatally flawed foundation” that the witnesses, who were outside, could not support that strategy. If counsel had interviewed the witnesses, he would have learned that they did witness events inside the home and their testimony would have corroborated the defendant’s testimony.

That being so, the state court ignored the central teaching of *Strickland*, as reaffirmed by *Wiggins*, 539 U.S. at 522-23, that the investigation leading to the choice of a so-called trial strategy must itself have been reasonably conducted lest the "strategic" choice erected upon it rest on a rotten foundation.

In addition, counsel’s explanation of “strategy” was contradicted by the record. Counsel was aware from the alleged victim’s preliminary hearing testimony that the witnesses outside could have at least addressed whether the defendant kicked in the door and whether the alleged assault continued outside the home with one of the witnesses even assisting the defendant. “How could [counsel] rationally have concluded that . . . [none of the witnesses] could possibly have anything to add to [the defendant’s] case? Of course the answer is he didn’t—at least not entirely” since counsel did attempt to reach at least one of these witnesses shortly before trial and then conceded to the court during the trial that these witnesses could possibly contradict the alleged victim’s testimony. With this

recognition, it was “objectively unreasonable” for counsel “not to interview them (or at least make reasonable efforts to interview them) before coming to his ultimate choice of trial conduct.”

In sum, the point is this: Constitutionally effective counsel must develop trial strategy in the true sense—not what bears a false label of “strategy”—based on what investigation reveals witnesses will actually testify to, not based on what counsel guesses they might say in the absence of a full investigation.

Prejudice was also established because the jury sent out a note on one point saying it was deadlocked on the home invasion count and the trial was one of a credibility contest between the alleged victim and the defendant. The court noted that there were inconsistencies in the post-conviction testimony of the three witnesses and the state court found one of them to be not credible and found a second one to be “not a particularly helpful witness,” which did not appear to be a credibility finding. The state court made no “finding” as to the third witness. Regardless, the Sixth Circuit held:

a state court’s blanket assessment of the credibility of a potential witness—at least when made in the context of evaluating whether there is a reasonable probability that the witness’s testimony, if heard by the jury, would have changed the outcome of the trial—is not a fact determination within the bounds of Section 2254(e)(1). After all, what the state court has really done is to state its view that there is not a reasonable probability that the jury would believe the testimony and thus change its verdict.

The Sixth Circuit rejected this approach because “the question whether those witnesses were believable for purposes of evaluating [the alleged victim’s] guilt is properly a jury question.”

In the end, weighing the prosecution’s case against the proposed witness testimony is at the heart of the ultimate question of the *Strickland* prejudice prong, and thus it is a mixed question of law and fact not within the Section 2254(e)(1) presumption. Even though the jury could have discredited the potential witnesses here based on factors such as bias and inconsistencies in their respective stories, there certainly remained a reasonable probability that the jury would not have.

The court also declared that “[a]ll it would have taken is for ‘one juror [to] have struck a different balance’ between the competing stories (*Wiggins*, 529 U.S. at 537).” The court

footnoted that

Wiggins was a death penalty case in which a single juror's vote would have spared defendant's life. In [this] case, of course, even a single juror's holdout would have resulted in a hung jury rather than a conviction, while a jury's unanimous striking of "a different balance" would have produced an acquittal.

Id. at ____.

Raygoza v. Hulick, 474 F.3d 958 (7th Cir.), *cert. denied*, 128 S.Ct. 613 (2007). Under AEDPA, trial counsel was ineffective in murder trial for failing to adequately investigate and present an alibi defense. The defendant, a gang member, was charged with the murder and a second shooting of rival gang members in a Chicago Pizzeria. A confession was suppressed because of a Sixth Amendment violation as a result of extended interrogations despite the petitioner's representation by counsel. The petitioner waived jury trial. During the ensuing bench trial, the state's eyewitness testimony consisted of three rival gang members and a passerby who did not see the shooter's face and was only able to give a general description of the perpetrator's clothing as they fled from the scene. Another witness testified that Petitioner had been at a party near the scene shortly before the murder and trial counsel did not impeach her even though she had previously told police he was not present and never said that he was until two years after his arrest. Trial counsel conducted almost no cross-examination of the state witnesses and presented one alibi witness, the Petitioner's girlfriend, but argued the defendant was at home with his mother, girlfriend, and others. The state hammered in closing on the lack of additional alibi witnesses and the trial court found the petitioner guilty. Counsel's conduct was deficient in failing to prepare and present the alibi evidence. Although counsel met with the Petitioner's mother numerous times, he never inquired and never learned that the date of the alleged crime, the Petitioner's mother had a birthday party in her home which the defendant and nine others, including relatives and non-relatives, attended. The court also noted that "Mapquest (a popular internet site)" put the party an hours drive away from the murder scene. Available alibi evidence included testimony from people at the party; testimony of an attorney, who was the mother's employer, and her husband, that they had called the home during the party and spoken to the Petitioner, who answered the phone; and phone records and train tickets corroborating the available testimony in parts. Although trial counsel asserted his trial strategy was to attack the identification witnesses, he never attempted to interview any of them or the state's other witnesses. In addition, "[i]n a first-degree murder trial, it is almost impossible to see why a lawyer would not at least have investigated the alibi witnesses more thoroughly." *Id.* at 964. The court noted that counsel may have been influenced by his own opinion of the petitioner's guilt, but held that this "would hardly distinguish him from legions of defense counsel who undoubtedly do the same every day, yet who conscientiously investigate their clients'

cases before coming to a final decision about trial strategy.” *Id.* Counsel also asserted that each of the alibi witnesses could be impeached due to some alleged bias. Even if this were true, counsel “does not seem to have considered what impact they would have cumulatively.” *Id.* The court also found prejudice, “even taking into account both the AEDPA standard of review and the fact that the trial judge [who was also the post-conviction judge] subjectively believed that the array of additional alibi witnesses would not have swayed his judgment.” *Id.* at 965. The state’s case was “not particularly strong.”

Obviously, a trier of fact approaching the case with fresh eyes might choose to believe the eyewitnesses and to reject the alibi evidence, but this trier of fact never had the chance to do so.

Id. at 965.

2006: *Stewart v. Wolfenbarger*, 468 F.3d 338 (6th Cir. 2006). Under AEDPA, counsel ineffective in murder case for several reasons. Counsel failed to provide alibi notice to the prosecution of the place of the alibi, as required by Michigan law, which resulted in the exclusion of alibi testimony. Counsel also failed to investigate a potential witness, who resided in a home where a prosecution witness alleged that the defendant made death threats against the victim. This witness would likely have testified that the defendant was not at his house on the date of the alleged threats. Prejudice found because the failure to give proper alibi notice resulted in the trial court's exclusion of two of the three alibi witnesses when the jury knew that others should be available and the one that testified was impeached with prior convictions, the prosecution emphasized the lack of other alibi witnesses during cross-examination of the one alibi witness who did testify, and the witness not called would have cast substantial doubt on the key prosecution witness's testimony that the defendant made death threats against the victim shortly before the murder.

Goodman v. Bertrand, 467 F.3d 1022 (6th Cir. 2006). Counsel ineffective in armed robbery and a felon in possession of a firearm trial for numerous reasons. After police arrested two suspects in a getaway car, one of them brokered a deal by implicating the petitioner. One of the robbery victims initially chose someone else in a lineup and then chose the petitioner. The second robbery victim selected someone else in a lineup. Following an initial mistrial due to a hung jury, the second initial suspect agreed to testify against the petitioner in exchange for leniency and identifying another participant, who also testified against the petitioner. In the second trial, the eyewitness, who did not identify the defendant, did not testify for the state and did not testify for the defense because counsel failed to subpoena her because counsel erroneously believed that the State would call her as a witness. Because counsel could not demonstrate that she was unavailable, the trial court excluded portions of her prior testimony from the second trial.

“There is little tactical wisdom in counsel resting on his hands and assuming the government would help make the defense case for him.” Counsel also opened the door on direct examination of the defendant to cross-examination about two of the petitioner’s prior armed robbery convictions. The nature of the prior felonies would otherwise have been excluded because counsel had stipulated to the petitioner’s status as a convicted felon. Counsel also failed to request a limiting charge to the jury after two of the participant witnesses testified that they had been threatened due to their participation in the trial and the court admitted the testimony for the limited basis of reflecting on the witnesses’ credibility by demonstrating that they had something to lose as well as to gain by their testimony. Finally, counsel failed to object to the prosecution’s misleading statements in questioning that one participant witness had not been given any reason to testify and false statements in argument to bolster the credibility of another participant witness. The state court decision was “contrary to” clearly established federal law because the court conflated the heightened prejudice standard of *Lockhart v. Fretwell*, 506 U.S. 364 (1992) with the *Strickland* standard by citing to *Strickland* at times but repeatedly reasoning that the petitioner failed to show that his trial was “fundamentally unfair” or “unreliable.” Even if it wasn’t contrary to federal law, it was an unreasonable application of *Strickland* because the state court weighed each error individually when the “cumulative effect” of the errors required reversal. Rather than evaluating each error in isolation, . . . the pattern of counsel’s deficiencies must be considered in their totality.” *Id.* at 1030.

Stanley v. Bartley, 465 F.3d 810 (7th Cir. 2006). Counsel ineffective in murder case for failing to interview any witnesses or prospective witnesses. According to the state’s case, three gang members were present at the time of the murder, including the state’s primary witness, who was a cocaine addict and convicted felon. The petitioner’s sister also testified, following a question directing her attention to a day and time shortly after the murder, that the petitioner told her he had killed someone. Other testimony was only secondary. Counsel read the statements prospective witnesses gave the police, but he did not interview anyone. He sought instead to only cross-examine the witnesses concerning any discrepancies. Counsel was aware of the statement of a prospective witness, who did not testify at trial, that a few hours before the murder, the state’s primary witness and the murder victim had had a quarrel over cocaine that had involved pushing and shoving. Counsel cross-examined the state’s principal witness about this argument, but he denied that the argument had been serious or had involved pushing or shoving. If counsel had interviewed the prospective witness, he would have been aware and could have cross-examined the witness and presented evidence that the murder victim had struck the witness with a wine bottle, punched him, and had knocked him down. Afterwards, the witness told the murder victim that he would catch “his ass later on.” Counsel also had failed to interview the petitioner’s sister, who had told officers that she saw him with a gun a week before the murder when he had been drinking, which always led him to talk about beating someone or killing them. Counsel was aware of her statement but failed to

cross-examine her at trial about the date of the confession or the date on which she had seen her brother with the gun. He also failed to object to the prosecutor's having led her by prefacing his question about the confession with the statement that he was directing her attention to the night of the murder. The state's primary witness also testified in post-conviction that he had been drinking the night of the murder (he had denied that at trial), that he hadn't seen the defendant shoot the victim, and that in fact he didn't know who had the gun. Prejudice found.

Adams v. Bertrand, 453 F.3d 428 (7th Cir. 2006). Counsel ineffective in sexual assault case in which counsel cross-examined the alleged victim about prior inconsistent statements but did not call an available defense witness, who would have testified that he heard the alleged victim invite the alleged assailants to her room before events unfolded and saw the alleged victim smoking a cigarette with the alleged assailants after the alleged assault. Counsel made an unreasonable decision not to investigate the potential defense witness because counsel was aware even before the trial that the witness "could have swung the case in his client's favor." While counsel made minimal efforts to locate the witness, he did not pursue the matter because he had decided to call no witnesses. In other words, counsel "committed to a predetermined strategy without a reasonable investigation that could have produced a pivotal witness." The state court's determination of a reasonable trial strategy in this regard was not a reasonable application of *Strickland*. Prejudice found because this was a close case contingent on the alleged victim's credibility and the available defense witness would have contradicted her in several significant respects.

**Rolan v. Vaughn*, 445 F.3d 671 (3rd Cir. 2006). Counsel ineffective in capital trial for failing to adequately investigate and present two witnesses who would have supported the claim of self-defense. The defendant told counsel about the witnesses and counsel notified the state that they were alibi witnesses (rather than self-defense), but never attempted to contact the two witnesses. The state did contact the witnesses. One (who died prior to post-conviction proceedings) refused to cooperate with the state and denied being an alibi witness and the other declined to be a witness against the defendant. During trial, the defendant informed the court that he had two witnesses but counsel refused to call the witnesses. Counsel's conduct was deficient because "[f]ailure to conduct any pretrial investigation is objectively unreasonable." Counsel's decision was not given "the normal deference to strategic choices because it was uninformed." Under AEDPA, the state court's ruling that the second witness would have refused to testify on behalf of the defense was an objectively unreasonable finding of fact that was not supported by the record. The witness had stated only that he would not testify for the prosecution. Prejudice found because the state's case was weak and this witness would have bolstered the affirmative defense and undermined the prosecution's claims of a premeditated murder during a robbery. This witness "also shows the relevance" of the other witness, who died after trial without ever having been interviewed.

2005: **Daniels v. Woodford*, 428 F.3d 1181 (9th Cir. 2005). 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. The federal court also found that counsel was ineffective, particularly given counsel's "ineffective efforts to overcome the impasse" with his client. Counsel did not inform the court of the problems, attempt to adequately advise the defendant, or even call Roth for assistance even though the defendant trusted and confided in him. Counsel also failed to conduct a thorough investigation concerning mental health. "Even though [the defendant] refused to speak to his counsel, [counsel]

still had an independent duty to investigate the facts of his case and possible mitigation evidence.” Counsel retained a psychologist to do a preliminary screening of the defendant to determine whether additional evaluation was needed. He found suggestions of organic brain damage but counsel never sought further testing and did not even request funds until one week before sentencing (which was granted a month after sentencing). Counsel also did not follow up on a prior psychiatric evaluation of the defendant done after the defendant had been shot. Although the defendant had a good relationship with this expert, counsel retained a different psychiatrist, who the defendant refused to speak to. Thus, the defense was left only with the screening psychologist. In addition, counsel did not investigate or present evidence explaining the defendant’s fear of returning to custody, much of which was available, regardless of the defendant’s lack of cooperation, in police records and public records of the defendant’s law suit against the county. “Instead of seeking further mental evaluations, [the defendant’s] counsel relied on the expert witness testimony of [a] psychologist . . . , who was not qualified to testify in a capital case and whose testimony toyed with the idea that [the defendant] could be a sociopath. This alone constituted a significant error.” *Id.* at 1204. Counsel’s conduct was not the result of strategy “but of a communication breakdown with their client, the court’s refusal to grant a continuance, a shortage of time, and repeated problems with securing state funding.” *Id.* at 1206. Prejudice found during trial and sentencing. During trial, despite overwhelming evidence of guilt, the defense argued that the defendant was not the perpetrator. Counsel did not pursue the more viable mental health defense even though the defendant was diagnosed as schizophrenic by prison psychiatrists many years before the murders. The psychiatrist retained by counsel was not provided with these records and was only able to do a cursory exam because of the defendant’s lack of cooperation. If counsel had performed adequately, the evidence would have established that the defendant has posttraumatic stress disorder from his shooting, paranoid delusions, and organic brain damage. This evidence could have been used in a diminished capacity defense (which has been abolished now in California, but is still available for crimes committed prior to June 1982) or an imperfect self-defense argument, which would have defeated a first-degree murder finding. Prejudice also found in sentencing because the jury deliberated for two days, which suggests that additional mitigation may have influenced the jury. Instead, the only mitigation presented was from the screening psychologist “who was woefully unprepared and who suggested [the defendant] may be a sociopath. This alone is sufficient for a finding of prejudice.” *Id.* at 1210. The defendant was also prejudiced in sentencing by the implausible trial phase defense that the defendant was not the shooter. “As a result, [the defendant] faced a jury that could only be profoundly annoyed by this ludicrous defense in the face of overwhelming evidence of culpability.” *Id.*

**Draughon v. Dretke*, 427 F.3d 286 (5th Cir. 2005), *cert. denied*, 547 U.S. 1019 (2006). Counsel ineffective for failing to retain a ballistics expert. The defendant was fleeing the scene of an armed robbery and shot and killed a pursuing bystander. He testified that he did not intend to harm anyone and had attempted to fire over the heads of his pursuers.

The State's evidence from another pursuing witness was that the victim had been shot from only about 10 steps away and a ballistics expert testified that the bullet recovered from the body had not ricocheted before striking the victim. Counsel's conduct was deficient because counsel was aware that the State's argument of intent to kill and for death was based on the witnesses' testimony about the distance of the shot and the ballistics evidence. Prejudice found because a defense expert could have presented a strong case that the fatal bullet struck the pavement in front of the victim and was fired at a much greater distance than the witness' testimony reflected. The prejudice increased in sentencing because the only way to counter the state's argument was for the defendant to testify and in cross examination the prosecutor marched the defendant through the horrible details of a prior rape conviction, which the prosecutor had not elicited from the prior victim out of deference to her. Under the AEDPA, the court found that the state court had unreasonably applied *Strickland*.

Gersten v. Senkowski, 426 F.3d 588 (2nd Cir. 2005) (*affirming* 299 F. Supp. 2d 84 (E.D.N.Y. 2004)). Counsel was ineffective in sodomy and sexual abuse of daughter case for failing to consult with or call expert medical witness and psychological expert to rebut the testimony of the state's experts. The defendant was charged with sexually abusing his daughter when she was between the ages of 10 and 13. During the trial, however, the daughter testified that the sexual abuse began when she was five years old with anal intercourse beginning when she was 7 years old and the sexual abuse occurring almost every night. The state called a medical expert that testified that physical examination revealed that the victim had suffered penetrating trauma to her hymen and tearing of the anus. The state presented a psychologist to testify about child sexual abuse accommodation syndrome, which corroborated the victim's statements. The defense presented no witnesses. Analyzing the case under the AEDPA, the court found that defense counsel's conduct was deficient. "In sexual abuse case, because of the centrality of medical testimony, the failure to consult with or call a medical expert is often indicative of ineffective assistance of counsel." *Id.* at 607. Here, counsel "essentially conceded" that the physical evidence was significant without investigating when a defense medical expert could have testified that the physical evidence was not indicative of sexual abuse, which would have cast doubt on the alleged victim's credibility. A defense psychological expert also would have testified that the prosecution's evidence of "Child Sexual Abuse Accommodation Syndrome" lacked any scientific validity for the purpose for which the prosecution used it. Counsel had no valid strategy for this course because "counsel settled on a defense theory and cut off further investigation of other theories without having first conducted any investigation whatsoever into the possibility of challenging the prosecution's medical or psychological evidence." *Id.* at 610. Prejudice found because the state's entire case, aside from the expert evidence that should have been challenged, rested on the credibility of the alleged victim. The state court holding was an unreasonable application of *Strickland*.

Miller v. Dretke, 420 F.3d 356 (5th Cir. 2005). Counsel was ineffective in deadly conduct case for failing to prepare and present evidence of treating physicians' testimony regarding the defendant's medical and psychological problems during sentencing. The defendant had been convicted of shooting into the unoccupied home of her in-laws a year after her husband died of a drug overdose, which his family blamed the defendant for. During sentencing, she and her ex-husband testified about her previous hospital for several weeks due to head injuries suffered in a car accident, her amnesia, post-traumatic stress disorder, and severe depression, which required medication and continuous care. Her testimony that she could not recall shooting into the home or previously threatening her in-laws was ridiculed as self-serving by the prosecutor and she was sentenced to 8 years and a fine of \$5,000 with no recommendation of a suspended sentence. Counsel's conduct was deficient because he was aware of the defendant's mental and emotional problems but did not investigate further and made no effort to call the defendant's doctors as witnesses. This conduct was not excused by strategy because counsel admitted that he did not prepare for sentencing because he believed the defendant would accept a plea bargain offer, be acquitted, or given probation. "While [counsel] may have made reasonable tactical decisions based on the information that he had at the time, our review must focus on whether the information he possessed would have led a reasonable attorney to investigate further." Prejudice was found because expert testimony was available that the defendant had post-traumatic stress disorder, organic brain syndrome with frontal lobe dysfunction, memory loss, including amnesia, severe anxiety, depression, and some paranoia all of which was relevant and admissible in sentencing and would have explained the defendant's erratic, paranoid, and hostile behavior and would have supported the defendant's testimony that she could not remember the shooting or the prior threats. The "state habeas court was objectively unreasonable in holding otherwise" on deficient conduct and prejudice.

Smith v. Dretke, 417 F.3d 438 (5th Cir. 2005). Counsel ineffective in murder case for failing to adequately prepare and present evidence of self-defense. Although petitioner identified four witnesses for counsel, counsel did not interview them or call them to testify to corroborate the petitioner's testimony concerning the victim's history of violence. Counsel did not do so because of his erroneous belief that the testimony of these witnesses was inadmissible and that only evidence known to the defendant was permitted. Counsel's conduct was deficient because he "failed to achieve a rudimentary understanding of the well-settled law of self-defense in Texas" and because "[f]ailing to introduce evidence because of a misapprehension of the law is a classic example of deficiency of counsel." *Id.* at 442. The "state court was objectively unreasonable" in finding otherwise. Prejudice was found because petitioner's only plausible defense was that he acted in self-defense and he testified to that affect but his testimony was easily discounted and disparaged by the prosecutor in argument without corroboration. "[A]n objectively reasonable court could not conclude otherwise." *Id.* at 444.

***White v. Roper**, 416 F.3d 728 (8th Cir. 2005), *cert. denied*, 546 U.S. 1157 (2006).

Counsel was ineffective in failing to investigate and present exculpatory testimony of two witnesses in the guilt-or innocence phase of trial. Because the state court did not address the merits of this claim, no deference was given under AEDPA. The defendant was charged, along with two other men, who did not receive a death sentence, in a drug-related murder. While there were witnesses that connected the defendant to the other men, no physical evidence connected the defendant to the crime scene. The defense was that the third man was not the defendant but a man named A.J. Constantine, who had a Jamaican accent. Two witnesses present at the time of the murder. One of them, who said that the defendant was not the killer, but who could not identify the third man, was called at trial. The other, who said that the defendant was not the killer and who also identified the killer as A.J., was never interviewed by counsel and did not testify. Another witness, who saw one of the co-defendants earlier in the evening looking for drugs and arranging to go to the victim's house, would have testified that it was A.J. with the co-defendant at the time. She was also never interviewed by counsel, who also did not attend the co-defendant's bench trial or obtain deposition transcripts from that trial until the eve of trial. Counsel's conduct was deficient because "counsel's investigation was too superficial." *Id.* at 732. "In other words, the presumption of sound trial strategy founders in this case on the rocks of ignorance, as in *Wiggins*." *Id.* (The district court had also found counsel ineffective in sentencing for failing to investigate and present mitigation, but the court did not address this issue because Missouri appealed only the guilt-or-innocence phase determination.)

Tenny v. Dretke, 416 F.3d 404 (5th Cir. 2005). Counsel was ineffective in murder case for failing to adequately prepare and present evidence of self-defense. Because the state did not address the District Court's finding of deficient conduct in its opening brief, the court held that the State had waived argument on this issue and assumed deficient conduct. Prejudice was found because the evidence counsel failed to prepare and present included evidence that the victim, the defendant's live-in girlfriend, had threatened to kill him in the days prior to her death and even on that day, she had stabbed him within the week before, she had threatened to burn the house down, she had violent tendencies and would have "insane rages," and she was strong enough to throw almost any grown man to the ground. In addition, a doctor, who examined the defendant in the hospital after the fight with the victim would have testified that the defendant had a black eye, his ear was cut, and he had a punctured lung from being stabbed and had "nearly lost his life." The defendant also could have provided additional testimony that he knew of the threats made against him and that the victim had stabbed her previous husband. Counsel did not call some of these witnesses because they worked at a monastery and had been involved in a sex-abuse scandal. This did not justify not presenting the evidence, however, because their testimony was corroborated by another witness not involved in any scandal and this testimony was significant. Under the AEDPA standards, the state court's decision was unreasonable.

Henry v. Poole, 409 F.3d 48 (2nd Cir. 2005), *cert. denied*, 547 U.S. 1040 (2006). Counsel ineffective in robbery case for presenting and emphasizing an alibi that was clearly given for the wrong day. The state's evidence was dependent on the eyewitness testimony of the victim, who was robbed at 12:10 a.m. on August 10. The alibi presented covered "the night" of August 10 and counsel continued to argue this as an alibi even after its flaw was clearly exposed by the state in cross-examination. Counsel's conduct was deficient because the date and time of the crime were undisputed and counsel had been provided with the witness' grand jury testimony, which revealed that her alibi was given for the wrong night. "The failure to recognize the difference between the beginning and the end of the day plainly falls below any acceptable level of professional competence." Prejudice was found because the jury would likely have viewed the alibi as contrived, which is commonly accepted as evidence of a defendant's consciousness of guilt. Thus, the state's case was bolstered. Under the AEDPA, the state court's denial of relief was an objectively unreasonable application of *Strickland*.

Towns v. Smith, 395 F.3d 251 (6th Cir. 2005). Counsel was ineffective in first degree murder case for failing to investigate a witness who had admitted to police, among others, that he had been involved in the crimes of which the defendant was ultimately convicted and that the defendant had played no part in these crimes. The witness was arrested with the murder weapon and he admitted that he drove the get-away car. He informed police in two statements that the defendant's brothers were the perpetrators. For unknown reasons, the police focused on the defendant rather than one of the brothers. When placed in a line-up, the single eyewitness to the murder tentatively identified him but only on the basis of size, which was similar to his brother. The prosecution initially intended to call the driver as a witness but then changed his mind at the last minute. Defense counsel insisted that he have the opportunity to interview him so the driver was held overnight in the local jail for that purpose. Counsel never interviewed him but then informed the court that he would not be called as a defense witness. Counsel's conduct was objectively unreasonable because "counsel could not have evaluated or weighed the risks and benefits of calling [the driver] as a defense witness without so much as asking [him] what he would say if called." *Id.* at 260. Prejudice was found because, if counsel had investigated, the driver would have testified that the defendant had nothing to do with the crimes. Prejudice was also apparent because of the notable weaknesses in the prosecution's case. These findings were made even though the driver refused to testify in post-conviction. He spoke to counsel and his investigator, who both testified, but refused to testify without immunity, which the government inexplicably refused despite having never charged the driver. At the time of trial though, the driver was not worried about incriminating himself because his attorney had secured a favorable immunity deal.

***Jacobs v. Horn**, 395 F.3d 92 (3rd Cir. 2005). Counsel was ineffective for failing to adequately investigate, prepare, and present mental health evidence in support of his diminished capacity defense during the trial. Counsel consulted with a psychiatrist, who

reported orally that there was no evidence of a major mental illness. Even without expert testimony, counsel presented a heat of passion and diminished capacity defense asserting that the defendant was incapable of forming a specific intent to kill given his mental state at the time. The only evidence presented in support of this theory was the defendant's own testimony. Counsel's conduct was deficient because counsel failed to inform his expert that the state was seeking the death penalty and failed to provide the expert with any background information concerning the crimes or the defendant's history. "Counsel did not question any of [the defendant's] family members or friends regarding his childhood, background, or mental health history, or obtain any medical records demonstrating mental deficiencies." When counsel made the decision not to investigate further, counsel knew or should have known from his interactions with the defendant that "he should initiate some investigation 'of a psychological or psychiatric nature.'" He also knew that the defendant had no criminal history or history of violence and yet admitted to stabbing his girlfriend more than 200 times. "In light of all that was known or made available to counsel, . . . counsel did not exercise reasonable professional judgment in failing to investigate further. . . ." If counsel had adequately performed, the evidence would have established that the defendant has mild mental retardation, organic brain damage, and schizoid personality disorder. He was also a witness and victim of abuse and suffered from drug and alcohol addictions. The combination of these factors substantially diminished his capacity to formulate the specific intent to kill. The court also noted that this was not a case where counsel made a strategic decision not to investigate and present this evidence. "The question raised here is whether counsel was ineffective by failing to investigate and discover evidence to support the defense he pursued." The state court's decision was unreasonable because the court found that counsel made a reasonable decision not to investigate further after receiving the psychiatrist's report while disregarding counsel's failure to provide the expert "with the necessary information to conduct a proper evaluation." This was an unreasonable application of *Strickland* because "*Strickland* mandates that counsel's decision 'must be directly assessed for reasonableness in all the circumstances.'" (quoting *Strickland v. Washington*, 466 U.S. 668, 691 (1984)).

2004: *Earls v. McCaughtry*, 379 F.3d 489 (7th Cir. 2004). Counsel ineffective in sexual assault on child case for failing to object to testimony from an expert that she believed the alleged victim and for failing to redact a videotape of the expert interviewing the child when the videotape also included statements that the expert believed the child. Prejudice found because the child's credibility was the key issue in the trial and there were no corroborating witnesses even though numerous other people were present at the time of the alleged acts and no physical evidence.

Jie Lin v. Ashcroft, 377 F.3d 1014 (9th Cir. 2004). Counsel was ineffective in INS hearing for failing to collect available testimony and documentary evidence or to otherwise prepare for the hearing, failing to appear at the hearing other than

telephonically, and failing to present legal or factual framework for asylum claims in the hearing or on appeal. The alien was fourteen years old and did not speak English. Counsel never met with him and had little or no contact with him prior to the hearing. Counsel did not investigate or prepare the basics in terms of factual issues. Counsel failed to even appear at the hearing other than by telephone and offered only the alien's unprepared testimony and conclusory legal arguments. The alien exercised his statutory right to counsel at no expense to the government. Thus, the claim of ineffective assistance of counsel falls under the Fifth Amendment right to due process. Counsel's actions in this case were deficient under the "low bar" of the *Strickland* standard. *Id.* at 1027. Prejudice found because the alien did have several plausible claims for refugee status. While counsel presented some of the factual basis for these claims

the presentation of a few bare facts, without documentation and without the factual context that gives them meaning or the analytical context that gives them their power, does not suffice to place the critical issues squarely before the tribunal that must consider them.

Id. at 1029.

**Soffar v. Dretke*, 368 F.3d 441, *amended*, 391 F.3d 703 (5th Cir. 2004). Counsel ineffective in capital trial for failing to interview living victim, who was the only eyewitness to the crimes, and failing to consult with a ballistics expert. The basic facts are that four people were shot in a bowling alley armed robbery and shooting and only one of these people lived. The surviving victim made a number of statements, including under hypnosis, describing the events and the lone assailant. After weeks with no suspect, the defendant, who had a history of confessing to crimes that he did not commit, was arrested on other charges and confessed in a number of statements. He initially said that he was the getaway driver for the assailant and ultimately said that his "accomplice" shot two of the victims and then the defendant shot the last two. Analyzing the case under pre-AEDPA amendments, the court found that counsel's conduct was deficient in failing to interview the surviving victim even though counsel was aware that there were significant discrepancies between his statements and the defendant's "confession" and the victim had been unable to identify the defendant or his "accomplice" in a pretrial lineup. Counsel was also ineffective for failing to retain a ballistics expert, who could have established that the crime scene was consistent with the surviving victim's statements and inconsistent with the defendant's "confession." Counsel's conduct was inexplicable because the sole defense theory at trial was that the defendant's "confession" was false and should not be believed. Although the state argued that there were potential pitfalls if counsel had called the surviving victim to testify, the court held that "an actual failure to investigate cannot be excused by a hypothetical decision not to use its unknown results." Prejudice was found because the state's case was "predominantly" based on the

defendant's "confession," which would have been contradicted by the surviving victim and the ballistics evidence if counsel had adequately investigated.

Harris v. Cotton, 365 F.3d 552 (7th Cir. 2004). Counsel ineffective in murder case for failing to obtain a toxicology report that showed that the victim was under the influence of cocaine and alcohol at the time of his death. Counsel's conduct was deficient because the sole defense at trial was self-defense and counsel was aware that the toxicology report existed but did not obtain it solely due to "oversight," even though he knew that the victim's behavior prior to the shooting was "absolutely critical" to the defense. Prejudice was found because counsel attempted to question the state's pathologist about the victim's alcohol abuse but was prohibited from doing so because there was no evidence supporting this line of questioning. Prejudice also found because "[f]rom the perspective of a defense attorney, an affirmative defense of self-defense against a drunk and cocaine-high victim stands a better chance than the same defense against a stone-cold-sober victim." *Id.* at 556. Analyzing the case under the AEDPA, the court held that the state court's decision was an unreasonable application of *Strickland* because the state court unreasonably applied the "reasonable probability" standard in finding no prejudice.

McFarland v. Yukins. 356 F.3d 688 (6th Cir. 2004). Drug conviction reversed due to the trial court's failure to adequately inquire into counsel's conflict, counsel's actual conflict of interest that adversely effected his performance, and trial counsel's ineffectiveness in failing to present an adequate defense. The petitioner and her daughter were charged as co-defendants where drugs were found during a search of the home they shared. Both the defendant and her daughter were represented by the same retained attorney. On the day of the scheduled bench trial, counsel informed the court that the defendant and co-defendant had concerns about sharing the same attorney and that the evidence might well raise antagonistic defenses. The petitioner also informed the court that she believed she needed a separate attorney and that she had attempted to hire a different attorney but could not afford one. Rather than appoint a second attorney, the court severed the cases and ordered that they be tried in front of different judges. The trials proceeded at pretty much the same time. In the co-defendant's trial, the state presented evidence that the bedroom where most of the drugs were found belonged to the co-defendant. A caller to the crack hotline also made complaints about a woman with the co-defendant's name. A confidential informant also identified the co-defendant as the person discussing drugs. During the petitioner's trial, the state did not present any evidence that the co-defendant lived in the house or in the bedroom where most of the drugs were found and did not present any evidence that the crack hotline telephone complaints and the confidential informant had both identified the co-defendant. Defense counsel did not bring any of this information out in cross-examination or present any evidence on its own. In closing argument, the defense argued only that the drugs belonged to one of two men that were also initially suspected. One of the men was present at the time of the search, but did not have a key to

the locked bedroom where most of the drugs were found. The other man was not present at the time of the search and was connected to the house only by some paperwork identifying him as the codefendant's husband. Both the defendant and co-defendant were convicted. They were represented on appeal by a different attorney but still had the same attorney between them. Appellate counsel did not raise any issue concerning ineffective assistance of counsel or a conflict of interest. In state post-conviction, the petitioner asserted ineffectiveness of trial counsel and of appellate counsel for failing to argue that trial counsel was ineffective but the state court denied on procedural grounds that the petitioner did not show good cause for a failure to assert the issue on direct appeal as required in state court. The court first found that the petitioner was entitled to relief under *Holloway v. Arkansas* because the petitioner objected to the joint representation and the trial court did not resolve the issue. Independent of the trial court's failure to inquire, reversal was also required because counsel had an actual conflict of interest that adversely affected representation. Finally, the court also found that counsel was ineffective under the standard of *Strickland v. Washington* because counsel failed to present a strong argument in petitioner's case that the co-defendant actually possessed the drugs. Prejudice was found under *Strickland* because the trial judge in petitioner's case mentioned her misgivings about the sufficiency of the evidence connecting the petitioner to the drugs. If counsel had adequately presented the evidence pointing to the co-defendant, trial court may well have ruled differently in the case. The court found that, with respect to all three of these arguments, the petitioner would have won on direct appeal had appellate counsel adequately raised the issues. Appellate counsel was ineffective in failing to assert these issues, which were clearly stronger than the arguments made by counsel on direct appeal. The conflict issue was an obvious one, and the petitioner was entitled to automatic reversal under the rule in *Holloway*. Because appellate counsel also represented the co-defendant, however, appellate counsel also had a conflict of interest. The court found that appellate counsel's ineffectiveness was the cause for petitioner's failure to assert ineffectiveness of trial counsel on appeal. Thus, the petitioner had established cause and prejudice for failing to assert these issues on appeal. Because the state court never ruled on the actual conflict of interest and the ineffective assistance claim under *Strickland*, the court reviewed these claims de novo. The only state court decision on the *Holloway* claim was the trial court's decision. Under the AEDPA, the court found that the trial court's actions contradicted the clearly established precedent of *Holloway v. Arkansas* because the state court confronted a set of facts that were materially indistinguishable from *Holloway* and yet arrived at a different result.

2003: *U.S. ex rel. Hampton v. Leibach*, 347 F.3d 219 (7th Cir. 2003). Counsel was ineffective in sexual assault and robbery case for failing to investigate and interview exculpatory eyewitnesses and for making promises in his opening statement to the jury that he did not keep. The crimes were committed by gang members and occurred at a rhythm and blues concert near the stage. The defendant was tried with two co-defendants but a separate jury for each. In his opening statement, counsel promised that the defendant would testify that

he had witnessed the attacks but was not involved and promised that the evidence would show that the defendant was not a gang member. During trial, the three victims and a security guard identified the defendant, but the evidence was shaky. The defendant's counsel presented only one witness concerning an identification of the defendant near the scene. In closing, counsel attacked the weakness of the state's case and the eyewitness identifications. Counsel's conduct in failing to interview exculpatory eyewitnesses identified by the defendant and to independently investigate was deficient. Although the state court found that counsel had a reasonable strategy for this failure, this finding was not supported by any evidence. Moreover, even if counsel had such a strategy it was based on an inadequate investigation and was unreasonable. While counsel vigorously attacked the eyewitnesses, he presented no exculpatory eyewitness evidence. The state court's "assertion that such testimony would have been 'redundant' is' plainly wrong; testimony by one eyewitness to a crime that the perpetrator was not the person named by another eyewitness is the antithesis of redundancy." The state court's finding that counsel also had a reasonable strategy to avoid "guilt by association" by establishing the defendant's presence at the scene with some suspected individuals was also unreasonable. Presence at the concert, knowing the perpetrators, and riding the same bus home was not incriminating since they and many of the witnesses lived in the same neighborhood as the defendant. Prejudice was found because of "the central role that eyewitness testimony played in this case, the vulnerabilities in the testimony of the State's eyewitnesses, and the shortcomings in human perception that so frequently render eyewitness testimony less reliable than other types of evidence." The codefendant's acquittal highlighted the prejudice because he presented the type of evidence in question. The state court's finding of no prejudice was also an unreasonable application of *Strickland*. "[U]nder *Strickland*, [the defendant] need not convince the court that such testimony more likely than not would have resulted in his acquittal; he need only establish that this is a reasonable probability, a better than negligible likelihood." Counsel's conduct was also deficient in failing to fulfill his promises to the jury. While it may have been reasonable not to call the defendant to testify or to decide not to call witnesses to establish that the defendant was not a gang member, "the foundation for this claim is the broken promise as opposed to the decision not to pursue a particular line of testimony." "[L]ittle is more damaging than to fail to produce important evidence that had been promised in an opening." (quoting *Anderson v. Butler*, 858 F.2d 16, 17 (1st Cir.1988)). While the state court found that counsel changed his mind due to a reasonable strategy this finding was unreasonable because "[t]he potential disadvantages of [the defendant's] testimony were ones that would have been obvious from the outset of the case." While the broken promises to the jury "was not so prejudicial that it would support relief in and of itself, the breach serves to underscore the more important failure to investigate exculpatory occurrence witnesses." The defendant's "unexplained failure to take the witness stand" may have given the jury the impression that the state's witnesses were correct in their testimony.

Anderson v. Johnson, 338 F.3d 382 (5th Cir. 2003). Counsel was ineffective in burglary

case for failing to interview and present the testimony of an eyewitness that would have testified in the defendant's favor. During the crime, the victim, her young daughter, and the victim's boyfriend observed the suspect. The victim was unable to identify the suspect until three years later when she heard the defendant talking and then recognized him. She and her daughter then identified him in photo line-ups. The first trial ended with a hung jury. During the second trial, defense counsel cross-examined these witnesses and pointed out that the victim's boyfriend was not called to testify, but did not interview the boyfriend or present him as a defense witness. In state post-conviction, the defendant argued that counsel was ineffective and specifically stated that the boyfriend would have testified that the defendant was not the suspect. During federal habeas proceedings, the defendant presented the same claim and also offered, for the first time, an affidavit from the victim's boyfriend. The District Court granted relief. The Fifth Circuit first held that the claim was properly exhausted in state court, despite the defendant's failure to present the affidavit there, because the defendant had plead all of the facts in detail. The submission of the affidavit in federal court only supplemented the record but did not change the facts or legal arguments that were made in state court. The court then held that counsel's conduct was deficient because counsel, who was disbarred after trial, conducted no investigation and instead relied only on the state's discovery, which did not reveal that the victim's boyfriend affirmatively stated that the defendant was not the perpetrator. Since there were only two adult eyewitnesses, a reasonable attorney would have made some effort to investigate. The court also found that counsel's failure to investigate was not a reasoned decision, but was "likely the result of either indolence or incompetence." *Id.* at 393. Counsel's failure also could not be excused based on a belief that the witness would not have been credible. "In a claim grounded in failure to interview, the 'quality' and potential persuasiveness of the eyewitness is largely immaterial." *Id.* Prejudice was found because the state's case was grounded only on the identification of the victim and her daughter made three years after the crime. There was no other evidence connecting the defendant to the crimes. The court also considered the fact that the first jury to hear the same evidence hung. Finally, the court found, applying the AEDPA standards, that the state court's ultimate legal conclusion was an objectively unreasonable application of *Strickland*.

**Alcala v. Woodford*, 334 F.3d 862 (9th Cir. 2003). Counsel ineffective in capital case for failing to adequately present alibi evidence. The underlying crime involved the disappearance of a twelve-year old girl, whose body was found several weeks later 50 miles away. The evidence connecting the defendant was only circumstantial identifications that put him in the area where the victim disappeared taking pictures of people on the beach. The girl with the victim on the afternoon of her disappearance did not identify the defendant as the man that took their pictures and an adult that was present then could not identify the defendant in photo lineups but then positively identified him seven years later during trial. The only evidence directly connecting the defendant to the crime was a jailhouse informant and a discredited forest service worker, who was

interviewed twelve times prior to trial and initially provided nothing but gradually progressed up to placing the defendant with the body. During the second trial, following reversal, this witness denied even testifying in the first trial. During trial, the defense presented a number of alibi witnesses to establish that the defendant had been at a theme park seeking freelance photography work at the time when the one eyewitness placed him taking pictures of the victim shortly before her disappearance. While the witnesses confirmed that he had been at the park, none of them was able to give an actual date or time for the alibi. In federal court, the defendant presented testimony from another park employee, who had actual business records and her own personal calendar, who could testify that the defendant was at the park during the pertinent time and that it was, therefore, impossible for him to have committed the crime. The District Court granted relief and the state appealed. Applying the law prior to the AEDPA (because the federal habeas petition was filed in 1994), the court found counsel ineffective for failing to present the alibi witness and records that could establish the date and time of the alibi. Counsel's conduct was deficient because this was by far the strongest alibi evidence available, counsel had listed this witness and subpoenaed her as a trial witness prior to trial and could not remember why she was not called, and the witness had told a defense investigator that her personal calendar would support the alibi. The court rejected the state's argument that counsel made a strategic decision not to present the witness "because it would have us find a strategic basis . . . in the absence of any evidence" and because the court would not "assume facts not in the record in order to manufacture a reasonable strategic decision." *Id.* at _____. Moreover, even if counsel had a strategic reason not to call this witness, it would have been an unreasonable strategy. Here, "counsel made a sound strategic choice to present an alibi defense," but did not adequately present the evidence supporting the chosen defense theory. *Id.* at _____. Prejudice was found because the state's case "was far from compelling" and was entirely circumstantial. Counsel's failure at trial also harmed the credibility of the alibi evidence that was presented because trial counsel told the jurors that they would establish an alibi and then "utterly failed to do so, harming the credibility of [the] entire defense." *Id.* at _____.

2. U.S. District Court Cases

2010: *Usher v. Ercole*, ___ F. Supp. 2d ___, 2010 WL 1813779 (E.D.N.Y. May 4, 2010). Under AEDPA, counsel ineffective in child sex abuse case for: (1) failing to consult a medical expert to rebut the state's expert witness; (2) introducing unredacted medical records that contained otherwise inadmissible evidence and bolstered the testimony and credibility of the alleged victim; and (3) elicited damaging "outcry" testimony from a prosecution witness opening the door for the state to elicit additional damaging testimony. The state's medical expert testified that the size of the hymenal opening and other findings during physical examination established that the alleged victim had been sexually abused. Counsel's conduct was deficient in failing to consult and present

rebuttal expert evidence that there were deficiencies in this expert's methodology and opinions, including that a large hymenal opening is simply not evidence of abuse and is explicable by other factors. Counsel could not make a reasoned decision as to the best defense strategy due to "counsel's failure to educate himself about the implications and validity" of the conclusions of the state expert, which was the only direct evidence of abuse aside from the testimony of the alleged victim. Counsel's conduct in introducing the unredacted medical records was likewise deficient because the records reflect "a coherent and frankly harrowing narrative of chronic abuse, with a suggestion of continuing danger." There was no strategic reason for admitting these records, which were at odds with the defense assertion that there was no sexual abuse. Finally, counsel's conduct in eliciting the "outcry" evidence and opening the door to more was deficient, especially in light of the trial court's *in limine* ruling limiting "outcry" evidence to the four to six words uttered by the alleged victim in the initial outcry to her mother. Prejudice established in the failure to rebut the state's expert testimony given the "relatively weak" state's case. The only evidence was the alleged victim's testimony, the testimony of a witness about what the alleged victim told her, and the expert testimony, which could have been "undermined by contemporaneous medical literature and informed expert testimony." While the additional errors might not be sufficient on their own to establish prejudice, "together with counsel's failure to consult a medical expert" there was cumulative prejudice. The state court's determination to the contrary was an unreasonable application of *Strickland*.

United States v. Bass, ___ F. Supp. 2d ___, 2010 WL 1254942 (D. Neb. Mar. 24, 2010). Counsel ineffective in drug conspiracy case for three reasons. First, counsel failed to move in limine to exclude the testimony of one of the government witnesses who had an admitted history of telling numerous contradictory lies in the case. Second, counsel failed to object to the prosecutor vouching for its witnesses in closing when the only government witness without "something substantial to gain—downward departures" was the defendant's brother, who had made proffers against the other witnesses, which also gave them motive against the defendant as revenge against his brother. Finally, counsel failed to object to testimony and the prosecutor's argument about a man who was expelled from college for dealing drugs and continued to do so because there was no evidence this man had any connection with the alleged conspiracy in this case.

2009: ***United States v. Montgomery***, 676 F. Supp. 2d 1218 (D. Kan. 2009). Counsel ineffective in possession of 100 or more marijuana plants with intent to distribute case for failing to let the defendant testify and in failing to move to dismiss based on the government's destruction of evidence. The government searched the defendant's home and took photographs and videotape but it is impossible to determine the number of plants from the photos and video. Nonetheless, the government destroyed all the marijuana plants, except for ten samples, two days after the search. During trial, agents testified that they counted 101 plants with roots, stems, and leaves. The defendant told counsel that he

wanted to testify. Counsel's conduct was deficient in this regard because he told the defendant he would withdraw from the case if he did, so the defendant dropped the subject. While counsel denied this, the court found the defendant's testimony credible as defense counsel had "a very long history of attorney discipline which involves complaints of improper withdrawal, communications terminating representation and truthfulness in communicating with others." The defendant would have testified that he routinely counted his plants and on the day of the search he had 91 plants and ten cuttings that did not have roots or growth at the time. While there was no prejudice during trial due to the defendant's failure to testify, there was prejudice when the failure to testify was considered in light of counsel's failure to move to suppress or move to dismiss based on the destruction of evidence. Counsel asserted that he did not file a motion to dismiss because he planned to argue that the government had failed to prove there were at least 100 plants. This explanation was "nonsensical" though because there was "no reason why he could not do both." Counsel also stated that he believed a motion to dismiss would be frivolous because he could not establish bad faith. "[H]is testimony and case file suggest that he did not know the legal standard for showing bad faith in the Tenth Circuit." In short, counsel "did not reasonably investigate the facts and law regarding the government's destruction of evidence." In analyzing the case law and factors to be considered, however, the court found evidence of bad faith, including the government's failure to even follow DEA policy for which the government could not offer an innocent explanation and instead attempted to argue that it had followed proper policy. Thus, the factors weighed in favor of dismissing the charge that the defendant possessed more than 100 plants.

Hicks v. Howton, 675 F. Supp. 2d 1050 (D. Ore. 2009). Under AEDPA, trial and appellate counsel ineffective in sexual abuse case. Trial counsel was ineffective in failing to adequately investigate and to cross examine witnesses. The defendant had an IQ of 60 and was charged with touching his step-daughter "with his hand, over her pajamas." The state offered a plea deal of 20-22 months, which was rejected. Counsel's conduct was deficient. The court noted first that the defendant's cognitive impairments raised serious questions about his ability to understand the severity of the charges, the risks inherent in going to trial, and the consequences of not accepting the plea offer. Nonetheless, trial counsel simply told the defendant "to 'think about' the plea offer, without further discussion or assistance."

Advising a client to "think about" a plea presumes the client is able to assess the situation he is in, weigh the pros and cons of going to trial—whether it be a bench trial or a jury trial—and, in this case, take into consideration . . . sentencing and the possibility of consecutive terms of imprisonment. Asking a client to think about a plea is only reasonable advice when the client has the cognitive ability to do the necessary thinking, or is provided support.

Likewise, trial counsel failed to adequately investigate and present a defense. Trial counsel met with the defendant only briefly prior to trial and his “file contained no evidence witnesses were investigated or interviewed.” “A file devoid of notes pertaining to investigation in preparation for trial is clear evidence that no investigation occurred.” During trial, “counsel did not subject the State’s case to meaningful adversarial testing.” Counsel did not raise or challenge ambiguities and discrepancies in the witnesses accounts of the touching. Counsel’s failure could not be justified or explained because the defense theory was that the state could not prove its case and witness credibility was central to the state’s case. In addition, proof that the defendant’s acts were done for the “purpose of sexual arousal or gratification” was a required element of the offense but the state made no attempt to prove this. Nonetheless, counsel failed to seize on this opportunity and to offer the plausible explanation that the defendant did not have the required criminal intent. Instead, counsel “performed little cross-examination” and “did nothing to test the State’s case” or consider the motives of the defendant’s wife. Likewise, counsel waited until after conviction to “investigate his client’s cognitive impairments,” even though he had been receiving social security disability benefits for seven years by the time of trial. Counsel was also obviously aware of the impairments since he mentioned this in opening statements and sought to have the defendant’s mother testify about this. The state court’s finding that trial counsel was not ineffective was an unreasonable application of *Strickland*.

Madrigal v. Yates, 662 F. Supp. 2d 1162 (C.D. Cal. 2009). Under AEDPA, counsel ineffective in attempted murder trial for a number of reasons. The shooting was related to retaliatory gang attacks and witnesses identified the defendant, who was married with three children, had been working steadily since 1994, had moved away from East L.A., and had only a misdemeanor prior conviction. No physical evidence linked the defendant to the crime. During counsel’s opening statement, counsel told the jury that he would present an alibi defense and a third-party culpability defense and the defendant would testify. The defendant did not testify and the only alibi witness called though could not absolutely verify that the defendant was at work at the time of the offenses. Counsel’s conduct was deficient in failing to present an audiotape of the co-defendant’s conversation with his girlfriend that appear to establish the co-defendant’s involvement in the crime but exculpate the defendant. The tape was provided in discovery, but counsel could not recall whether he ever listened to it. Prejudice established because with “conflicting eyewitness statements, the prosecution’s case was far from compelling.” In addition, the fact that the jury deliberated for four days after a three-day trial “underscores the weakness of the case against [the defendant].” The state court’s decision to the contrary was objectively unreasonable. Counsel’s conduct was also deficient in failing to call the defendant to testify after promising to do so in opening statement. While counsel testified that the defendant refused to testify at the last minute because of threats from his co-defendant, the court found the defendant’s testimony to be more credible than counsel’s, as counsel was “hostile and uncooperative” during the evidentiary hearing and

“suddenly had a clear recollection of this single event, when he could not recall anything else.” There was no tactical reason for counsel’s decision “to promise the jury that [the defendant] would testify and then renege on that promise.” Prejudice established as the jury was deprived of the defendant’s testimony describing the details of his alibi and the basis of his belief that another man was the actual shooter. In addition, even though the jury was instructed not to consider the defendant’s failure to testify against him, “it is reasonable to conclude that the jury nevertheless did so here.”

The jury could have surmised that the reason for [the defendant’s] failure to testify, after his trial attorney promised he would, was that [counsel] had realized, at some point during trial, that [the defendant] was not a credible witness or, even worse, that he would commit perjury if allowed to take the stand.

The state court’s decision was an objectively unreasonable application of *Strickland*. Counsel’s conduct was also deficient in failing to present alibi testimony from the defendant’s work supervisor. The supervisor had given a notarized statement to prior counsel and in two interviews had “unequivocally” asserted that the defendant was at work a 50-minute drive away at the time of the crimes. Counsel had never interviewed him and did not subpoena him for trial, but informed the jury he would testify. Counsel did not, however, and offered no strategy reason. Prejudice established because the supervisor “was a disinterested third party and had no apparent motive to fabricate an alibi” and his testimony would have been “certain and unequivocal.” In addition, “the jury was expecting to hear [him] testify.” Counsel’s conduct was also deficient in failing to call the defendant’s brother as an alibi witness. The brother car pooled with the defendant to work everyday and had been asked by counsel to testify. Counsel did not call him to testify, however, even though he was present in court. Counsel’s alleged reasons for the failure were that the witness was related to the defendant, a gang member, and recently released on parole. “However, that a witness ‘*might* not . . . make the best appearance’ at trial is not a reasonable basis for failing to call a witness.” Prejudice established because he strongly corroborated the alibi and would have clearly undermined the prosecution’s “relatively weak case.”

[N]ot only were the multiple deficiencies individually prejudicial, but they also were cumulatively prejudicial. [Counsel] did not just botch one witness or one argument or one issue—he repeatedly demonstrated the lack of diligence required for a vigorous defense.

Couch v. Booker, 650 F. Supp. 2d 683 (E.D. Mich. 2009). Counsel ineffective in murder case for failing to investigate and rebut the medical examiner’s conclusions that the victim died as a result of drowning in his own blood from the beating. The victim had consumed extremely large amounts of cocaine at a party gone awry. He was subsequently

found sexually assaulting a woman and then beaten by the defendant and other men. Counsel's conduct was deficient in failing to investigate, which would have revealed that the victim was still speaking and coherent when police and firefighters arrived. He was combative when emergency medical personnel tried to render care and had to be restrained by five people. He was subsequently intubated and there was not blood in the airway leading to his lungs. The death was caused by pulmonary edema, "which has been associated by researchers with fatal levels of cocaine, such as the amounts found by toxicologists in the decedent." In short, the death "fit the pattern of a typical, sudden cocaine death occurring during a struggle while the person is subjected to police restraint" and was "accidental." While counsel had retained a defense expert, counsel did not provide the expert with the reports of the first or second responders and never talked to the expert, leaving that to co-counsel. By failing to provide the expert with the information, "defense counsel precluded [the expert] from conducting a complete review of [the state pathologist's] findings as to the cause of death."

Pillette v. Berghuis, 630 F. Supp. 2d 791 (E.D. Mich. 2009). Counsel ineffective in assault with intent to commit murder and felonious assault case for failing to adequately prepare and present a defense. The defendant was in an altercation in the trailer park where he lived and was beaten badly. Thereafter, state witnesses asserted that he pointed a shotgun at one person and pulled the trigger, making an audible "click." He then allegedly pointed a rifle at a second person and threatened to kill her. The defendant was the only defense witness. He testified that, after being beaten, he went inside his trailer. After someone broke his windows out, he went outside and fired a warning shot with the shotgun. He put that away and came back out with a rifle but did not point it at anyone or fire it. Counsel's conduct was deficient in failing to interview and present at least four witnesses that would have corroborated the defendant's testimony and contradicted the testimony of state witnesses. These witnesses were interviewed by police and made written statements, including their addresses and phone numbers, that were provided to counsel in discovery. Although counsel testified that he interviewed "some" witnesses, he could not remember who and "there is no indication contained in trial counsel's file that any pre-trial investigation was done other than to visit petitioner in jail. Petitioner's counsel has failed to present adequate evidence that he ever interviewed any of these potential witnesses."

Where a defense counsel fails to investigate and interview promising witnesses, and therefore has no reason to believe they would not be valuable in securing a defendant's release, counsel's inaction constitutes negligence, not trial strategy, for purpose of analyzing an ineffective assistance of counsel claim.

Id. (citing *Workman v. Tate*, 957 F.2d 1339, 1345 (6th Cir. 1992). Prejudice also established.

[E]ven though a finder of fact could have discredited the potential defense witnesses based on factors such as bias and inconsistencies in their respective stories, there certainly remains a reasonable probability that a finder of fact would not have.

Counsel was also ineffective in failing to present evidence that a gun was stolen from the defendant's house on the night in question and that some of the witnesses to the altercation had been involved in past thefts or illegal discharges of firearms in the same trailer park. This information also would have corroborated the defendant's testimony that someone else fired additional shots heard by witnesses and his claim of self-defense. Because the state court failed to adjudicate the claim on the merits, the court's review, under AEDPA, was *de novo*.

Guiets v. Kirkpatrick, 618 F. Supp. 2d 193 (E.D.N.Y. 2009). Counsel ineffective in first-degree assault case for three reasons. The victim was found in a park and initially told police and emergency room workers that she was raped and assaulted by a single man. A witness looking out her apartment window witnessed a portion of the attack and called 911. The defendant was arrested in the park with her blood on his shoes. He said that he saw a portion of the assault by a black man and had the blood on his shoes because the victim sought his assistance but he pushed her away. He was initially charged with rape, but that charge was dropped and he was charged only with assault after DNA evidence from the victim's vagina and anus matched another rape case in Maryland where the victim described her attacker as a black man. Neither the victim nor the witness could identify the defendant as the attacker during trial, although the witness had in her grand jury testimony. First, counsel's conduct was deficient in failing to secure and present the DNA evidence that would have corroborated the defendant's statements and undermined evidence pointing to him as the attacker. Counsel sought a stipulation from the prosecutor, but when that failed he "simply gave up—he had no back up plan." Second, counsel failed to raise the appropriate statutory objection (although he did object on other grounds) to the prosecution's impeachment of the witness with her grand jury testimony, which was the only eyewitness identification of the defendant in evidence. This impeachment was improper and the prior testimony was inadmissible under state statute. "He either knowingly failed to make a correct objection to the admission of the impeachment, or failed to make that objection as the result of an unfamiliarity with the applicable law." Finally, counsel failed to request a limiting instruction that the prior statement, even if appropriately used, could only be considered as impeachment evidence. All three of these errors "were not strategic decisions on the part of his trial counsel but rather the result of inattention and error." "[T]he cumulative effect of [the defendant's] cognizable errors was prejudicial," especially given the prosecutor's capitalization on the errors in his closing argument. Each error was also prejudicial "considered alone." The state court's "conclusory rejection" of relief was an unreasonable application of established Supreme Court case law.

Sturgeon v. Quarterman, 615 F. Supp. 2d 546 (S.D. Tex. 2009). Under AEDPA, counsel ineffective in aggravated robbery case for two reasons. The case involved the robbery at gunpoint of a victim, who required a Vietnamese interpreter during testimony, by two black men. The crime occurred at night and involved the victim being repeatedly struck in the face. The victim gave descriptions of the attackers shortly after the crimes. The description did not match the defendant. The same day, a police officer stopped a car driven by the defendant. There were three passengers in the car, including co-defendant #1, who was the brother of the owner of the car. Co-defendant #1 had the victim's credit card, driver's license, and other incriminating evidence in his possession. The registration for the victim's car was found in the trunk of the car the defendant was driving. The defendant, the co-defendant, and a witness were all arrested. The robbery victim subsequently identified the defendant as one of his attackers. During retrial (following an initial appellate reversal), defendant testified as a state's witness. He testified that Co-defendant #2 had removed all of the victim's items from the victim's car and given them to him. He could not say whether defendant was involved or not. Counsel attempted to present an expert on the questionable reliability of eyewitness identifications, but this evidence was excluded because the proffered expert was unfamiliar with the facts of the case and because the expert provided insufficient information about the scientific studies on which he purported to rely. Counsel also attempted to call Co-defendant #2 to testify. He had been initially indicted, but charges were dismissed shortly after defendant's first trial when he plead guilty to unrelated charges. Co-defendant #2 refused to testify following the prosecutor's assertion that the charges had been dismissed without prejudice to refile against Co-defendant #2 if he made any inculpatory remarks. Counsel was ineffective in failing to obtain co-defendant #2's testimony. First, counsel should have objected that the applicable five-year statute of limitations had run on the aggravated robbery charges and a witness may not invoke the Fifth Amendment privilege against self-incrimination once the statute of limitations for that offense has expired. Second, counsel should have objected that the charges were dismissed by the state "with prejudice" pursuant to a plea agreement, which could have been established by co-defendant #2's prior defense counsel. Prejudice established because co-defendant #2 would have testified that he was a participant in the robbery and that the defendant was not. The state's case was "not particularly strong" because it rested only on the victim's identification of him and his later arrest in the company of a man, who possessed the victim's property. Counsel was also ineffective in failing to adequately prepare and present the expert witness on the issue of eyewitness identification. Counsel should have prepared the expert for cross-examination about the studies he relied on by advising him "to come prepared with this information." Likewise, counsel should have prepared the expert for cross on the facts of this case "by providing him with materials pertinent to the case, such as the police reports and the transcript of [the] first trial, which information was readily available." Prejudice established because the expert's "credentials are extensive" and the "problems of cross-racial identification are well known." The expert "would have provided important support for [the] defense

of mistaken identity.” The state court’s conclusions to the contrary were an “objectively unreasonable application of the *Strickland* standard.” Reversal was also required on due process violations related to the state’s misconduct in threatening the co-defendant with prosecution if he testified and related to the pretrial identification, which was suggestive.

2008: *English v. Romanowski*, 589 F. Supp. 2d 893 (E.D. Mich. 2008). Counsel ineffective in assault with intent to commit murder case for failing to adequately investigate and to call the defendant’s girlfriend as a witness to corroborate the claim of self-defense. Counsel’s conduct was deficient. Counsel informed the jury in opening that she would be called to testify and detailed what her testimony would be, but then neither the defense nor the state called her as a witness. Counsel’s conduct was deficient and the state court’s finding to the contrary was an unreasonable application of *Strickland*. While the state court held that the girlfriend’s testimony was merely cumulative to the petitioner’s, she “was the only witness who would have corroborated Petitioner’s version of events. In an assault case where the disputed issue concerns who was the aggressor, corroborating testimony is critical to a self-defense claim.” In addition to corroborating the self-defense, she would have contradicted several state witnesses and testified about the victim’s abusive conduct towards her and her own attempts to contact the police concerning his conduct on the day in question. By failing to present her testimony, counsel allowed the state’s case “to go unchallenged save for Petitioner’s own testimony.” Counsel’s conduct was not explained by strategy. First, counsel claimed he chose not to call her because a state witness alleged that she had threatened him and pressured him to change his testimony. Counsel knew of this allegation, however, before he promised in opening to present her testimony. Thus, by not presenting her testimony, “counsel did not suppress the damaging testimony but instead allowed it to be considered by the jury without being refuted by the person best-suited for that task,” the actual witness. Second, counsel claimed he chose not to call the girlfriend because another state witness claimed she offered him sexual favors and then threatened him in an effort to influence his testimony. Counsel did not learn of this claim until after the opening. This was no excuse because counsel had failed to adequately investigate beforehand and “counsel provided no reasons why he failed to investigate [the state’s witness] or learn of his challenges to [the girlfriend’s] credibility before trial.” In addition, by not calling the girlfriend to testify, “counsel did not suppress the damaging testimony but instead allowed it to be considered by the jury without being refuted by the person in the best position to do so.” Third, counsel claimed he did not call the girlfriend because “he was concerned that she would commit perjury and her testimony would be detrimental to the defense case,” but counsel “did not provide specific reasons” for these beliefs. In addition:

The fact that the prosecution did not believe [her] story or that her testimony would have conflicted with some of the other witnesses does not mean that [she] would have committed perjury. It is the

jury's job to evaluate the credibility of witnesses. Moreover, even accepting that counsel did not [sic] to call [her] as a witness because he was concerned about presenting perjured testimony, counsel provided no reasons why he failed to investigate such matters and make such a determination prior to trial—and before promising that [she] would testify on Petitioner's behalf.

Finally, counsel also testified that he did not call the girlfriend to testify because he learned that she had planted a knife at the scene to bolster the defendant's self-defense claim.

Again, counsel appears to have accepted the prosecution's version of events, . . . despite the fact that Petitioner and [the girlfriend] would have provided conflicting testimony. Again, the damaging information was already before the jury at trial and [the girlfriend] was best-suited to refute such testimony. Furthermore, and perhaps more importantly, counsel was or should have been aware of the damaging information given that the knife-planting allegation surfaced during the preliminary examination. Counsel should have known or recalled this information before trial and before promising that [the girlfriend] would testify for the defense. Counsel's conduct cannot be deemed sound and strategic when it derives from a failure to properly investigate and prepare his case.

“The unreasonableness of counsel's failure to call [the girlfriend], as well as its detrimental impact on the defense, is exacerbated by the fact that he told the jury during opening statements that [she] would testify on Petitioner's behalf at trial.” Because the state court did not reach the question of prejudice, the federal court's review was *de novo*. Prejudice established here because the girlfriend “was the only person who would have corroborated Petitioner's self-defense claim and her testimony would have also challenged the credibility of” three state witnesses. “Because trial counsel failed to call [the girlfriend] to the stand, the jury never had the chance to evaluate all of the relevant testimony and make a fully-informed decision as to Petitioner's guilt or innocence.”

Furthermore, the prejudicial effect of counsel's failure to call [her] as a witness was exacerbated by the fact that counsel promised the jury that she would testify on Petitioner's behalf at trial. When [she] was not produced, the jury was left to conclude that either she would not or she could not testify in his favor, thereby giving further credence to the prosecution's theory of the case. Simply put, [her] testimony would have balanced the scale of witness testimony at trial. . . . By failing to call [her] to testify at trial,

counsel deprived Petitioner of any reasonable chance of acquittal, or conviction of a lesser offense.

Espinal v. Bennett, 588 F. Supp. 2d 388 (E.D.N.Y. 2008). Under AEDPA, counsel ineffective in second degree murder case for a number of reasons. First, counsel failed to investigate and discover the witness whose interview was recounted in a police report with the witness' name redacted. Counsel's conduct was deficient because this witness corroborated the defendant's alibi, which counsel had investigated without success prior to receipt of this document. Counsel thus had already chosen not to present an alibi. "Nonetheless, an existing trial strategy, even if initially reasonable, cannot excuse counsel's failure to investigate new evidence that could potentially exonerate his client or create reasonable doubt in the minds of the jury." Prejudice established because counsel's deficient conduct "eliminat[ed] his best opportunity to cast significant doubt on the prosecution's case at trial."

Although petitioner's alibi was before the jury, through his videotaped testimony, it was entirely uncorroborated. It is reasonable to expect a jury to discount an uncorroborated and self-serving statement offered by a defendant, and to give greater weight to an alibi corroborated by a witness whose credibility is not initially suspect. Moreover, this corroborating evidence would not have been merely cumulative, . . . because it would have significantly strengthened the alibi claims already before the jury through petitioner's videotaped statements.

The state court's holding to the contrary was an unreasonable application of *Strickland* and was based on an unreasonable determination of the facts in light of the evidence presented. Second, counsel's conduct was deficient in failing to introduce the victim's statement, given to police before he died, that identified someone other than the defendant as the shooter. This statement was admissible under New York's "constitutional" exception to the hearsay rule and could have been used to rebut the prosecution's argument that the defendant was a shooter. While the court did not find prejudice based solely on this issue, the court considered "the cumulative effect of counsel's errors at trial." Third, counsel's conduct was deficient in failing to impeach a government witness with his prior inconsistent statements that did not mention that there were two shooters rather than one. Again, while not finding individual prejudice, the court held that "counsel's failure to investigate evidence that might have corroborated petitioner's alibi defense was error of constitutional importance."

Byrd v. Trombley, 580 F. Supp. 2d 542 (E.D. Mich. 2008). Under AEDPA, counsel ineffective in criminal sexual conduct case for several reasons. First, counsel failed to object to the introduction of Petitioner's ten-year-old forgery conviction and the

prosecution's use of the conviction as “bad man” evidence. Second, counsel failed to investigate and present an expert witness to counter the prosecution's witnesses. The failure to obtain a defense expert was not excused by cross-examination of the state expert. “Thorough cross-examination . . . does not excuse the abject failure of counsel to procure or even consult with an expert.” Prejudice established because “the case turned on the credibility of Petitioner, as weighed against the credibility of the victim.”

Richards v. Quarterman, 578 F. Supp. 2d 849 (N.D. Tex. 2008), *aff'd*, 566 F.3d 553 (5th Cir. 2009). Under AEDPA, counsel was ineffective in murder case for a number of reasons. First, counsel’s conduct was deficient in failing to present evidence (and preventing the state from presenting evidence) of the victim’s pre-death statements that significantly varied from the state’s evidence and theory, including the victim’s statements that another man [not the defendant] was the principal assailant. Counsel’s alleged strategies were “an afterthought” or “based on a false premise and . . . disputed by other parts of the record.” “The record establishes that, in fact, [counsel] had no trial strategy that played a role in her decision to prevent the jury from learning what [the victim] said after he was injured concerning the circumstances of his injury.” Second, counsel’s conduct was deficient in failing to request instruction on aggravated assault, a lesser-included offense instruction. Counsel “lack[ed] an appreciation for the use of a lesser-included offense instruction as insurance for a defendant when the evidence raises the issue of commission of the charged more serious offense as well as the lesser offense.” Counsel’s conduct was not the result of strategy as it “never occurred” to her to request the instruction. Third, counsel’s conduct was deficient in failing to put into evidence the defendant’s VA medical records to establish the defendant’s physical inability to commit the charged acts. Counsel’s alleged strategy for this failure was “gibberish” and “an after-the-fact justification for her failure to perform properly as an attorney.” Prejudice established on this issue for the trial and the sentencing because these records established that the defendant was a Vietnam War vet and was “totally disabled for all practical purposes.” Finally, counsel was ineffective in failing to interview important witnesses prior to trial, failing to have an organized plan of defense, and failing to present an adequate defense. “There is no excuse for [counsel’s] failure to interview in advance of trial the important witnesses.” Counsel also conducted inadequate cross-examination “[b]ecause of her apparent lack of a sense of direction in her trial defense.” “The lack of a defined strategy . . . is further illustrated by her summation to the jury, during which she flitted from one subject to another with very little cohesiveness between any of them.” “The cumulative effect of [counsel’s] deficiencies in the representation . . . amounted to ineffective assistance of counsel that permeated [the] entire trial.”

McGahee v. United States, 570 F. Supp. 2d 723 (E.D. Pa. 2008). Counsel in drug and robbery case ineffective for failing to investigate and present three potential alibi witnesses made known to counsel by the defendant. “If the attorney can easily

investigate, his decision not to do so raises greater concerns than if undertaking an investigation would clearly require the assembly of great resources.” Counsel’s conduct was not excused by strategy. “When an attorney knows the details of what a certain witness will testify to, and then chooses not to interview that proposed witness, the decision is due greater deference than when the attorney knows nothing about the potential testimony.” Here, counsel “elected not to investigate the alibi even though he knew none of the details about the potential defense, and nothing suggested that his investigation ‘would be in vain.’” Likewise, counsel’s conduct was not excused due to insufficient contact information being provided to him. “To investigate means to seek out unknown facts. . . . [I]n this day and age, searching for a phone number is not difficult.” In addition, counsel was provided with the name of the employer for two of the witnesses . “Surely, it does not take a trained investigator to find the phone number for a business or a . . . deputy sheriff. If [counsel] had made even cursory attempts to contact these witnesses, to find their phone numbers, and failed, it would be another question. But in this case, no such effort was made.” Counsel also could not rely on the lack of funding for an investigator because “there is no evidence, . . . that he requested funds for an investigator to search for the alibi witnesses.”

A final factor, and perhaps the most important, is the nature and quality of the strategy employed at trial. For example, where the defense counsel's strategy is to attack a weak prosecution case, and where the presentation of the un-investigated evidence could distract from that strategy, the attorney's decision not to investigate is owed deference. In contrast, where an attorney fails to investigate a lead that might provide help for the defense actually employed at trial, the decision deserves greater scrutiny.

Id. at ___ (citations omitted). Counsel here “sought to create reasonable doubt by attacking the prosecution's witnesses and calling into question the work done by the investigating officers” and two of four counts were dismissed. Nonetheless, counsel’s “decision cannot be labeled a strategic choice between putting on an alibi defense, on one hand, versus merely seeking to create reasonable doubt, on the other” because counsel failed to investigate.

Even if a particular trial strategy may be strong, a lawyer should still investigate other leads, especially those that do not conflict with that strategy. Various defenses need not be mutually exclusive; to determine that one strategy might work is not to exclude all other options.

Prejudice established because the Government's case at trial was not overwhelming and there were no eyewitnesses other than a witness attacked by defense counsel for delaying

in coming forward with allegations against the defendant and receiving benefits in his own case for disclosing the defendant's name. "[A]dditional evidence, even of relatively minor importance, would have been more likely to tip the balance in [the defendant's] favor at trial than if the Government's case had been more extensive." Although the alibi witness' had their own credibility issues and contradicted each other to some extent, "the testimony was basically consistent." In order to convict, a jury would almost have to believe all three men, one of whom was a police officer, were lying. In addition, it would be their word against the impeached Government witness. "Judging credibility is the paradigmatic role of the jury."

United States v. Thompson, 561 F. Supp. 2d 938 (N.D. Ill. 2008). Counsel ineffective in felon in possession of gun case. The defendant was stopped for DUI and the gun was found on the floorboard behind or partially under the driver's seat. The defense theory was that the defendant had no knowledge of the gun. Defense counsel was ineffective for failing to interview the defendant's wife about her knowledge of the gun since she drove the vehicle on a daily basis. She would have testified that another man rode in the backseat shortly before the arrest and that she had personal knowledge that he had a gun similar in appearance to the one involved here. Counsel also objected and asked the court to advise her of her 5th Amendment rights when the prosecution asked if the gun was hers. Counsel had no strategy. "Counsel was doing anything but acting strategically; rather, he was quite plainly making it up as he went along." Even assuming this was strategy, it was not supported by adequate investigation because, if counsel had adequately investigated he would have known that she would deny the gun was hers rather than invoking her rights following the trial court's warnings. Prejudice found because this testimony, along with her testimony at trial that the gun could not have been placed where it was from the driver's seat because of the particulars of the vehicle, likely would have resulted in acquittal. Counsel was also ineffective in failing to impeach one of the police officers, who testified that the defendant had been given traffic citations that were later dismissed by state court prosecutors. If counsel had investigated, he could have presented affirmative evidence that the defendant had not been given any traffic citations. While the court did not find prejudice with respect to the trial, the court did find prejudice with respect to the motion to suppress the gun, which the court had denied under the inevitable discovery doctrine, but now finds was error. New trial granted and the motion to suppress hearing reopened.

**Saranchak v. Beard*, 538 F. Supp. 2d 847 (M.D. Pa. 2008) (sentencing in September 1994). Under AEDPA, counsel ineffective in capital trial and sentencing for a number of reasons. The defendant pled guilty to criminal homicide and his degree of guilt was tried by the judge alone prior to jury sentencing. Counsel's conduct was deficient in failing to prepare and present mental health evidence in support of a diminished capacity defense to the charges of first degree murder. Counsel filed a motion for appointment of a psychiatrist, which was granted only for a limited evaluation of competence and

voluntariness of his confession. Counsel did not seek further evaluation on issues of diminished capacity or mitigation and did not even speak to the expert until after the degree of guilt hearing was completed. During that hearing counsel presented evidence of the defendant's alcohol use on the day of the crimes and argued diminished capacity, but presented no evidence of the defendant's history of drug and alcohol abuse or expert mental health evidence of the history of alcoholism, as required by Pennsylvania law when presenting a diminished capacity defense. Counsel failed to obtain the defendant's school and mental health records, although he was aware that the defendant had been in special education and had prior hospitalizations. Counsel also failed to interview special education teachers and the defendant's probation officer. Prejudice established because if this information had been obtained, presented to a mental health expert, and presented in evidence, the evidence would have established an adult attention deficit disorder, chronic substance abuse, personality disorder NOS with paranoid and anti-social features, and depressive disorder NOS. At the time of the offenses, the defendant had a psychoactive substance-induced depressive disorder and was suffering psychotic effects. The evidence supported a finding of third degree murder rather than first degree and prejudice found even though the post-conviction court that rejected this claim was the trial court. Counsel's conduct was also deficient in withdrawing the motion to suppress the defendant's statements to police due to a *Miranda* violation. Counsel's conduct was based on a misunderstanding of state law, which does not require waiver of this issue for a general plea where a contested degree of guilt hearing follows. Counsel's conduct was similarly deficient in failing to seek suppression of the defendant's statements to a youth services caseworker, which were taken in violation of *Miranda* and the defendant's Sixth Amendment right to counsel. Cumulative prejudice found.

2007: *Avery v. Prelesnik*, 524 F. Supp. 2d 903 (W.D. Mich. 2007), *aff'd*, 548 F.3d 434 (6th Cir. 2008). Counsel ineffective under AEDPA in second degree murder case for failing to investigate and interview alibi witnesses. The defendant gave counsel three names and the business address for alibi witnesses. Counsel's investigator went there and interviewed one of the individuals, who was not personally an alibi, but told the investigator that his brother, who the defendant had named, and another person had been with the defendant. The investigator left his business card but neither the investigator nor counsel took any other action to investigate. Counsel's conduct was deficient because, at bare minimum, counsel should have sought the witness' phone number and made a reasonable attempt to contact them. Failure to do so was not excused by strategy. "Where counsel fails to investigate and interview promising witnesses, and therefore ha[s] no reason to believe they would not be valuable in securing [defendant's] release, counsel's inaction constitutes negligence, not trial strategy." *Id.* at ___ (quoting *Workman v. Tate*, 957 F.2d 1339, 1345 (6th Cir. 1992)). Prejudice found in light of the state's "very weak case" based on inconsistent statements, unexplainable actions, and the conditions of the identification by the sole eyewitness.

Hays v. Farwell, 482 F. Supp. 2d 1180 (D. Nev. 2007). Under AEDPA review, trial/appellate counsel was ineffective for numerous reasons in case where the petitioner was convicted of four counts of sexual assault on a minor and four counts of lewdness with a minor for alleging sexually abusing his oldest daughter, who was then eight years old. While many of the petitioner's claims had not been presented in state court and there was no showing of cause and prejudice, "the default was forgiven based on his preliminary evidence demonstrating to this court that he is actually innocent of the charges against him." Most of the claims were reviewed de novo because they had not been raised in state court or had been procedurally barred in state court. The charges arose because the petitioner's wife, who "was an abusive and neglectful mother" of their five children, "wanted desperately to be released from the responsibility of her five young children and from her marriage." In order to achieve her goals, she "schooled and coached eight-year old Jennifer about adult sexual behavior and then threatened and coerced her into making accusations of sexual abuse against her father," who was not himself abusive to the children but "was unable, or unwilling to stop his wife's actions" in general. Before reaching the issues related to counsel, the court granted relief on the bases of: (1) insufficient evidence to support the convictions; (2) improper denial of a new trial when the daughter, who was no longer in her mother's custody, immediately confessed after the trial that her testimony was false and had been coerced; (3) double jeopardy; and (4) prosecutorial misconduct. Counsel was also held to be ineffective during trial for: (1) failing to request an evidentiary hearing on the motion for new trial in order to present the daughter's testimony concerning the recantation; (2) failing to seek an independent medical expert to challenge the testimony of the examining nurse, which would have resulted in testimony (supported even by the state's expert in habeas) that the photographs taken of the girls genitalia revealed no evidence of abuse or anything abnormal; (3) conceding guilt in closing argument; (4) failing to challenge the veracity or expertise of the social worker and the examining nurse called as state's witnesses and "merely enhancing the State's evidence by reinforcement"; (5) failing to object to the prosecutor's improper argument denigrating the presumption of innocence; and (6) failing to argue on the defendant's behalf at sentencing.

Bigelow v. Haviland, 476 F. Supp. 2d 760 (N.D. Ohio 2007) (following remand in *Bigelow v. Williams*, 367 F.3d 562 (6th Cir. 2004)). Counsel ineffective in kidnaping, assault, and arson case for failing to further investigate and present alibi evidence. Counsel's conduct was deficient because counsel failed to investigate further once an alibi witness came forward four days prior to trial. Counsel had previously investigated various unproductive leads because the defendant lived an "itinerant life" and could not remember exactly where he was on the day of the crime. Based on the defendant's "own letter-writing investigation," however, an employee of Orkin in Columbus, which was 150 miles from the scene of the crime, came forward and testified that the defendant had been at a home he serviced and assisted him in moving furniture on the day of the crime. While counsel discussed this issue with the defendant,

[m]erely discussing an issue of alibi—when it is the defendant’s main defense—cannot alone rise to the level of reasonable representation. A lawyer who does only this cannot be deemed to have effectively represented his client.

Moreover, counsel did not, however, investigate the lead further or seek a continuance to do so. Prejudice established because this witness was impeached by his failure to earlier identify the defendant as the man there on the day of the crime, his work at the home covering two days instead of just the day of the crime, and his numerous calls since that time. If counsel had adequately investigated, three additional witnesses, who were employed by a landscaping company in Columbus, would have testified that the defendant was present in Columbus on the day of the crime and their testimony was supported with documentation of their presence in the home on the day of the crime. The court also found it significant that these were “completely disinterested” witnesses and the state’s case was based only on the weak identification of the victim and another witness, “both of whom had limited opportunity to view the attacker and had at least initial difficulty identifying Bigelow.” Even if only one additional alibi had testified, it would have bolstered the defense. Thus, there was no question of prejudice here.

2006: *Garcia v. Portuondo*, 459 F. Supp. 2d 267 (S.D.N.Y. 2006). Under AEDPA, counsel ineffective in second-degree murder case for failing to adequately investigate and present alibi evidence, including foreign public documents. The defendant consistently maintained his innocence and asserted that he was in jail in the Dominican Republic on the day of the murder, but the jury heard almost nothing of this alibi. Counsel gave notice of the alibi with supporting documents prior to trial, but realized admissibility might be an issue. The trial court expressed doubt as to admissibility but suggested that counsel brief the issue. Counsel failed to do so and never offered the documents into evidence. The state’s case consisted of a single eyewitness. This witness, who was on Valium at the time of the crime and Thorazine during trial, identified the defendant as one of three assailants in a lineup five months after the murder after initially identifying someone else in the same lineup. This witness had made a number of inconsistent statements. The defense presented the victim’s sister as its sole witness. She testified that the defendant and her brother were friends, she did not see the defendant getting into the car when she saw her brother on the ground, and that she had talked to the defendant on the phone shortly after the murder and he was in the Dominican Republic. The prosecution discredited this testimony because she had no personal knowledge of his whereabouts and had not dialed the phone. In habeas, the District Court denied the state’s “motion to dismiss the petition as untimely, finding that the statute of limitations was tolled because Garcia’s was one of the “exceedingly rare case[s] in which the petitioner makes out a credible claim of actual innocence.” Counsel’s performance was deficient because the defendant’s family had provided him with numerous official documents from the Dominican Republic to establish the defendant’s alibi, but he made no efforts to verify

the authenticity of any of the documents in his possession and made no effort to obtain additional documentary evidence to support the alibi. Counsel was also aware of several alibi witnesses who were prepared to testify, but they were not called. While counsel believed that the witnesses were truthful, he did not interview them because they were relatives and friends of the defendant's wife and counsel believed they would not likely be credited by the jury. If counsel had investigated, he could have found additional documentary and testimonial evidence to support the alibi and could have established the admissibility of the foreign documents.

[A] decision not to prepare an adequate defense because a defense lawyer thinks the prosecution's case is weak is not "strategic." It is motivated by the desire to avoid work, not to serve the best interests of the defendant. "No lawyer could make a 'strategic' decision not to interview witnesses thoroughly, because such preparation is necessary in order to know whether the testimony they could provide would help or hinder his client's case, and thus is prerequisite to making any strategic decisions at all." Thus, . . . "[t]here is no reasonable trial strategy that would have excluded at least conducting interviews of the alibi witnesses to determine whether they could provide exculpatory evidence."

Id. at ___ (citations omitted). Likewise,

Deciding that investigation is costly is not, as *Strickland* requires, equivalent to a reasonable and informed decision that investigation is unnecessary. Indeed, as one court has held, "There are costs involved whenever defense counsel is obliged to undertake an investigation. These costs are often substantial.... [However, h]aving accepted the responsibility of representing a criminal defendant, counsel owes a duty to his client that will on occasion require him to make financial outlays that might be considered unfair for an ordinary businessman who, unlike a licensed attorney, has not voluntarily adopted an enhanced ethical obligation to society."

Id. at ___ (quoting *Thomas v. Kuhlman*, 255 F. Supp. 2d 99, 111 (E.D.N.Y.2003)). If counsel believed his retainer was insufficient to make investigation "financially feasible, he could have petitioned the trial court for public assistance. And even if the court denied his request, [he] could have undertaken less costly investigative measures, such as interviewing the available witnesses and issuing subpoenas for locally available information." In short, counsel "could not have made a strategic decision not to present the alibi because he did not then know the details of such a defense or how credible it

would have been.” Prejudice found because “[t]here is . . . little doubt that the alibi evidence, had it been produced at trial, would have altered the landscape substantially. The decision of a jury that did not weigh this evidence is not reliable.” Under AEDPA, the state court’s decision was an unreasonable application of clearly established federal law because the state court rejected the claim on the basis that the defendant had not established his alibi when he was required “only to show that trial counsel’s performance fell below professional standards of competence and that the outcome of the case probably would have been different but for this deficiency.”

2004: *Casey v. Frank*, 346 F. Supp. 2d 1000 (E.D. Wis. 2004). Trial counsel was ineffective in sexual assault case for failing to obtain the case file from the defendant’s previous attorney, which contained numerous witness statements undermining the credibility of the alleged victims and an alleged corroborating eyewitness. The defendant was initially charged in 1993 for sexually assaulting a girl in the neighborhood. He was represented by a public defender, who assigned an investigator to interview potential witnesses. The investigator took a number of statements that raised questions about the credibility of the alleged victim and the prosecutor ultimately dismissed the charge without prejudice. A year later, the defendant’s step-daughter alleged that the defendant sexually assaulted her, but the prosecutor brought no charges. In 1997, the stepdaughter alleged that the defendant had assaulted her in 1992 and that she witnessed the defendant assaulting the neighbor girl in the same time period. The defendant was charged with both assaults and retained counsel. Counsel requested two specific documents from the defendant’s prior counsel, but did not request the entire file, which contained numerous witness statements challenging the credibility of both alleged victims and an alleged corroborating eyewitness. He also failed to independently discover the witnesses that previously gave exculpatory statements. While the state court held that trial counsel requested the previous attorney’s entire file, this finding was an unreasonable determination of the facts under the AEDPA because the evidence showed only that counsel asked for two specific documents. Counsel’s conduct was deficient because counsel failed “to obtain predecessor counsel’s investigative reports” or to otherwise adequately investigate. While the state court found that counsel’s failure was excused because counsel did not know the additional documents existed, this finding was unpersuasive.

A failure to investigate is not excused because it is not known in advance what will be found. That is precisely the reason to investigate. A lawyer must request a file to discover what documents it contains.

Here, it was particularly important because prior counsel represented the defendant not long after the alleged incident when the “witnesses’ memories would have been fresher.” Although the state court did not specifically address the prejudice analysis under *Strickland* and it was “debatable whether AEDPA applies to the court’s determination on

this point,” *id.*, the court applied the AEDPA standard. The state court’s determination was unreasonable because the court “turned a blind eye to the potential impact of the witnesses who gave statements” to prior counsel. Indeed, the state court

failed even to mention most of the statements, much less analyze their potential significance. The critical issue in the case was credibility, and a number of the statements severely undercut the credibility of the state’s principal witnesses. . . .

Moreover, many of the statements would have been admissible and none were cumulative. Thus, there was “more than a negligible chance that the statements counsel failed to obtain would have affected the outcome of the trial.” *Id.*

United States v. Ramsey, 323 F. Supp.2d 27 (D.D.C. 2004). Under the AEDPA, counsel was ineffective in drug distribution case for a number of reasons, but primarily failing to move for mistrial after the court suppressed an inculpatory statement after it was already heard by the jury. Counsel failed to realize until he heard the testimony that the defendant was questioned after he invoked his rights. This error was considered in conjunction, *inter alia*, with counsel’s ignorance of the law and failure to understand the implications of an entrapment defense with respect to allowing evidence of predisposition until advised of the implications by the court. This resulted in counsel abandoning the sole defense in the midst of trial without having the defendant testify. Counsel’s conduct was deficient and the proffered strategy reasons for failing to seek a mistrial were “so nonsensical that the Court is left to conclude that [counsel] simply abandoned what he had decided at some point during the trial was an unwinnable case, and had been unwilling to invest the time and effort that would be required by a second trial.” Prejudice found, regardless of the likely outcome of a new trial, because counsel’s deficient conduct deprived the defendant of a mistrial and, thus, “the opportunity for a second trial he otherwise would have had, untainted by an opening statement to the jury of an entrapment defense he could not present.” A mistrial would have afforded counsel an opportunity to advise the defendant “of the substantial advantages of . . . pleading guilty in view of the strength of the government’s case” after counsel had heard all of the evidence and realized that an entrapment defense could not be mounted.

Tucker v. Renico, 317 F. Supp. 2d 766 (E.D. Mich. 2004). Counsel was ineffective in criminal sexual conduct and breaking and entering case for failing to introduce evidence tending to prove that the defendant and the victim had a long-term, common-law, spousal relationship. The alleged victim downplayed her relationship with the defendant as only “spiritual,” explained her two children by him as a result of prior sexual assaults, and denied that he lived with her. Analyzing the case under the AEDPA, the court held that ineffective assistance of appellate counsel established “cause” for not asserting trial counsel’s ineffectiveness on direct appeal. Appellate counsel asserted only that the

evidence was insufficient to support the convictions. Trial counsel was ineffective because adequate investigation and presentation would have revealed that the defendant lived with the alleged victim up through the time of his arrest, that the alleged victim held herself out as the defendant's wife, and that the defendant had an on-going relationship with their children and the alleged victim's family. Prejudice was found because these facts tended to negate the non-consensual nature of their sexual relations.

Mitchell v. Ayers, 309 F. Supp. 2d 1146 (N.D. Cal. 2004). Counsel was ineffective in burglary case for failing to interview and present testimony of witness that would have corroborated petitioner's defense that he entered the home only to escape from people who were threatening his life. During the break in, the family members understood petitioner to say at times "don't call the police" and "call the police." Other than the window through which he entered, nothing in the home was disturbed. When petitioner was arrested he was clearly impaired by drugs. Petitioner testified that he entered the home because he was being chased by a man to whom he owed money because, rather than selling drugs for the man as he was supposed to, he would sometimes use the drugs because he was addicted to crack cocaine and used heroin. A witness was available to corroborate petitioner's testimony that a man with a gun had confronted him outside the home after petitioner had been using crack, which made him "paranoid." Counsel knew about the potential witness and could have easily located him because he was in confinement and, on the day of trial, was in the court holding area along with petitioner. Counsel's conduct was deficient in failing to interview the witness, because whether Petitioner was actually threatened or only perceived that he was threatened in a drug-induced paranoid reaction, the witness would have supported Petitioner's otherwise uncorroborated testimony and was, therefore, "critical." Prejudice found because "[t]his was a close case in which the jury deliberated for an entire day after receiving only one and half days of evidence" and the prosecution evidence of intent "was relatively slim." Analyzing the case under the AEDPA, the court held that, due to the significant potential impact of the witness' testimony, the State court's decision was an objectively unreasonable application of federal law as set forth in *Strickland*.

3. Military Cases

2004: ***United States v. Garcia***, 59 M.J. 447 (C.A.A.F. 2004). Counsel ineffective in robbery, conspiracy, and stolen property case for two reasons. First, civilian defense counsel waived the Article 32 pre-trial investigation without the accused's knowledge. This was deficient because waiver of this hearing must be personal to the accused. It was prejudicial because this hearing serves as a discovery proceeding for the accused and "stands as a bulwark against baseless charges." Here, if the accused had seen the potential strength of the government's case, he might have sought a plea agreement limiting his sentence. Second, military counsel (who tried the case alone) was ineffective for failing to adequately advised the accused of his options mid-trial when the strength of

the government's case was clear and the accused first confessed his full involvement in the crimes to counsel. Without explaining the options to the accused, such as exploring the possibility of a plea agreement or changing the plea to guilty, counsel advised the accused to testify admitting his full involvement in the crimes. Counsel's conduct was deficient and prejudicial. Much of what counsel elicited bolstered the government's case and opened the door to cross eliciting aggravating and damaging details not previously established by the government. Counsel also did not elicit any expressions of remorse or contrition so the testimony "had no mitigating impact." Counsel's argument in sentencing also highlighted the accused's culpability and including a statement that the accused was only "three-and-a-half pounds of trigger pull away from" murder. Under the circumstances, there was no discernable trial strategy for counsel's actions. "The extreme harshness of the sentence returned by the members is strong evidence" of prejudice. The government requested a sentence of a \$23,000 fine and 86 years, but the penal returned a sentence including a \$60,000 fine and 125 years of confinement.

4. State Cases

2010: *People v. Baines*, ___ N.E.2d ___, 2010 WL 1235408 (Ill. App. Mar. 30, 2010). Counsel ineffective in attempted murder and armed robbery case for a number of reasons. The victim had been assaulted by three men one of whom he was able to identify and provide a phone number for. Weeks later, he notified police he had seen one of his attackers at a Home Depot and was "100 percent" sure of identity. This man had a videotaped alibi and was quickly cleared by police. Months later, after failing to identify the defendant in a photographic lineup, the victim identified the defendant in a lineup, even though his height did not match initial descriptions to police. Counsel was ineffective in: (1) failing to adequately learn the facts behind the victim's misidentification of the man at the Home Depot; (2) failing to establish with clarity during cross-examination of the victim that this man had been exonerated by police; (3) failing to adequately impeach the alleged victim for continuing to maintain in his testimony that the exonerated man was one of the attackers; and (4) failing to adequately prepare the defendant's testimony, which resulted in counsel eliciting damaging admissions and bolstering the state's case. In short, "[d]efense counsel manifested a lack of knowledge about fundamental facts of the case, and a lack of knowledge of basic principles of trial procedure." Counsel's closing argument pointing out the weakness of the victim's identification was insufficient to cure the prejudice. "That was too late. Closing arguments are not evidence, and the jury was free to disregard those comments."

People v. Okongwu, 897 N.Y.S.2d 330 (N.Y. App. Div. 2010). Counsel ineffective in child sex abuse case for three reasons, which were the basis of a federal court's grant of relief to a co-defendant tried in a joint trial. First, counsel failed to introduce evidence of a 1988 medical examination of one of the alleged victims, which was consistent with the 1992 examination on which the allegation of abuse was based. Second, counsel failed to

obtain experts to refute and discredit the state's experts. Finally, counsel failed to cross-examine the state's expert concerning literature raising doubts about child sexual abuse syndrome.

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 was contracted by the county to provide public defender services for a flat yearly fee, which provided that counsel had to pay experts and investigators from this fee. Under state rules, "it is now unethical for an attorney to sign a public defender contract" of this nature. This contract "created an incentive" for counsel not to investigate. Counsel met with his 12-year old client and his parents for no more than an hour before the plea hearing, did no independent investigation, consulted with no experts, and did not carefully review the plea agreement before advising the defendant and his parents to accept it believing incorrectly that the conviction could be removed from the defendant's record when he turned 18 or 21. Counsel's failure to investigate was not excused by counsel's belief that the defendant was going to confess or even that he was guilty. "[A]t the very least, counsel must reasonably evaluate the evidence against the accused and the likelihood of a conviction if the case proceeds to trial so that the defendant can make a meaningful decision as to whether or not to plead guilty." Counsel also 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: ***State v. Moore***, 223 P.3d 1137 (Utah App. 2009). Counsel ineffective in aggravated sexual abuse of child and dealing in harmful material case for failing to present evidence and argument as to the timing of the alleged offense. The defendant was charged with offenses committed in the summer of 2002. The testimony at trial from the defendant's sisters contradicted the evidence that the crimes could have been committed in 2002. Nonetheless, counsel did not pursue this evidence or challenge a police officer's testimony that the alleged victim was not clear of the date of the crimes in the initial interview, when a recording clearly revealed the alleged victim initially stated he was 14 at the time of the crimes, which would have been the summer of 2003, and only later said he was 13. Counsel's conduct was deficient as the one-year discrepancy in the alleged victim's age could have made the difference between first-degree sexual abuse, if the alleged victim was 13, and a second degree felony or class A misdemeanor, if he was 14. Likewise, the Information charged that the crimes were committed in the summer of 2002. Thus, under the instructions presented to the jury, if there was a reasonable doubt as to whether the charged conduct occurred in 2002, the jury would have been obligated to acquit the defendant.

Garcia v. State, 308 S.W.3d 62 (Tex. App. 2009). Counsel ineffective in aggravated sexual assault case of mentally and physically disabled 53-year-old niece for a number of reasons. First, counsel elicited testimony from the defendant and his wife that opened the door to otherwise inadmissible extraneous offense or “bad acts” evidence of a prior alleged sexual assault, a shooting in the defendant’s home, and two prior DUI arrests and then failed to request a limiting instruction on this evidence. Second, counsel failed to object to hearsay testimony from the alleged victim’s aunt concerning the victim’s statements about the sexual assault to her. The state asserted admissibility under the “outray” statute. Counsel’s conduct was deficient for failing to object because the “outray” statute applied only to hearsay statements of a child 12 or younger and, thus, “plainly did not apply” in this case. Third, counsel failed to interview the alleged victim or other state witnesses’ prior to trial and, thus, was not aware that the initial defense theory (that the alleged victim was a trouble-maker and had been banned from the homes of relatives) would not be supported by the evidence. Finally, counsel incorrectly advised the defendant that the trial judge could award him community supervision, which resulted in the defendant waiving jury sentencing. While the jury could have ordered community supervision, the trial judge was prohibited by state law from ordering this sentencing alternative. Counsel’s conduct “[i]n its totality” (or cumulatively) required reversal.

State v. Aldrich, 296 S.W.3d 225 (Tex. App. 2009). Counsel ineffective in intoxication manslaughter case where the defendant drove his truck into the wheel-chair bound victim in a crosswalk. Counsel’s conduct was deficient for a number of different reasons. (1) Counsel failed to understand basic discovery procedures and believed he did not have to investigate because *Kyles v. Whitley*, 514 U.S. 419 (1995), “required the State to do all of the investigation in the case and to turn over . . . all reports, statements, and evidence discovered in its investigation.” The trial court repeatedly informed counsel of his misinterpretation but he persisted in his beliefs. (2) He failed to adequately convey a 20-year plea offer to the defendant because of his “belief that it would be unethical and would constitute malpractice for him to even discuss the proposed plea bargain” with the defendant. (3) He failed to investigate until just weeks before trial, including refusing to independently test the defendant’s blood sample or interview an officer, whom the defendant asserted he had told at the scene that he had been blinded by headlights from an oncoming car. (4) He failed to timely obtain and designate experts, despite his awareness of the need, which resulted in the trial court’s exclusion of the expert evidence. The only reason asserted was the defendant’s financial problems. “[A] reasonably competent attorney would have several options, including to withdraw from the case” and to have the defendant declared indigent and counsel appointed. Alternatively, counsel could remain “but request investigatory and expert witness fees from the trial court for a now-indigent client.” In short, counsel’s failure “was not a strategic decision, it was an economic decision.” (5) Counsel presented “bizarre” defense theories not supported by the evidence, despite the state’s repeated objections. Counsel alternated between “theories that the accident was a suicide, assisted suicide, or [the victim’s] fault for failing

to yield the right-of-way” in her wheelchair. (6) Counsel did not understand the rules of evidence and “had great difficulty questioning witnesses,” “repeatedly made sidebar comments during his questioning,” “repeatedly interjected his own testimony,”—despite repeated warnings from the trial court—and asked over 18 times to have the jury removed so he could question witnesses outside the jury’s presence. (7) Counsel repeatedly made inaccurate statements and arguments. “The totality of defense counsel’s errors pervaded and prejudiced the entire defense.” This was clear because the prosecutor and the trial court repeatedly “felt compelled to assist defense counsel.” Prejudice also established.

Gravitt v. State, 687 S.E.2d 150 (Ga. App. 2009). Counsel ineffective in DUI case for failing to adequately investigate and present testimony of two readily available eyewitnesses, who were riding in the defendant’s vehicle at the time of the alleged incident. There was a two car crash allegedly caused by unsafe driving by the defendant, whose vehicle was not involved in the crash. Counsel called no witnesses and argued only that the defendant’s actions were not the proximate cause of the accident. Counsel’s conduct was deficient in making only minimal attempts to locate the eyewitnesses and waiting until close to trial to subpoena them, even though counsel knew they would be hard to locate. Prejudice established because these witnesses denied that the defendant appeared to be under the influence or was driving recklessly and explained how the accident happened through no fault of the defendant. In rejecting this finding, the trial court erred in measuring the credibility of these witnesses’ testimony, “not against the witnesses who testified at the hearing, but against the witnesses who testified at . . . trial.” In short, “the trial court judged the credibility of the witnesses had they testified at trial, and that is ‘solely a matter to be resolved by the jury.’” The trial court also failed to consider that the state capitalized on counsel’s error by arguing that these witnesses were not called by the defense because they might testify against the defendant.

People v. Wilson, ___ N.E.2d ___, 2009 WL 1606548 (Ill. App. June 8, 2009). Counsel ineffective in murder case for failing to make a closing argument and failing to object to the admission of evidence of an unrelated revolver found in close proximity to the defendant at the time of his arrest. The case involved a shooting in the projects that may have been due to ill-will between the occupants of several buildings or areas. The state’s evidence was based entirely on inconsistent witness identification testimony from arguably biased witnesses. There was no confession and no physical evidence connecting the defendant to the shooting. At the close of the evidence, the court informed the jury that the state and defense would have the opportunity to make final arguments, but then was surprised when defense counsel chose not to argue, especially in light of the state’s extensive argument. Counsel’s conduct was deficient and not sound trial strategy in assuming the jury would find “the prosecutor’s argument specious.”

It would be a rare case in which choosing not to make a closing argument in a jury trial would be sound trial strategy. Given the evidence here, this

was not such a case.

Counsel's conduct was also deficient in failing to object to the evidence of the unrelated revolver and failing to point out its irrelevance in closing. Prejudice found.

People v. Bryant, 907 N.E.2d 862 (Ill. App. 2009). Counsel ineffective in murder case for failing to call any witnesses in support of the defense theory that the murder was committed by others. Counsel represented two defendants, husband and wife, who allegedly killed a cocaine dealer in their home. They were accused along with two other men, one of whom was not prosecuted in exchange for his testimony. The victim's blood and driver's license was discovered in the defendants' home and the victim's blood was on the shoe of the other man charged. The only direct evidence that the defendant committed the murder came from the immunized witness, who had made numerous inconsistent statements. In opening statements, defense counsel said the defendants were in their bedroom asleep when the victim was killed by the other men. Counsel repeatedly said the defendants would testify to this. Counsel also told the jury it would hear evidence that the other two men met together prior to arrest to plan their story and that one of them had bragged to others that he had committed the murder. When counsel attempted to elicit this information about the other men in cross-examination of witnesses, however, the state's objections that it was beyond the scope of direct were sustained and the court instructed the jury to disregard. Each time, the court invited defense counsel to recall the witness in the defense case in chief and defense counsel repeatedly said before the jury that he intended to do so. After the state rested, however, the defense also rested without presenting any evidence. In closing argument, defense counsel repeated his arguments from the opening. There were numerous objections from the state that he was arguing facts not in evidence and repeated admonishments from the judge that arguments were not evidence and that statements not based on evidence should be disregarded. Counsel asserted in a post-trial motions hearing that he did not present any witnesses because he was able to elicit the information on cross-examination. He did not call the defendants to testify because he did not want to subject them to cross or open the way for rebuttal and he believed that he had been able to make all the points he wanted in cross-examination and argument. While counsel's conduct "was a matter of trial strategy as opposed to witness reluctance or unavailability," the strategy was not "sound." Counsel promised the jury it would hear evidence and then "failed to present any evidence whatsoever, and his stated reasons for failing to do so are not reasonable explanations." Counsel did not present any evidence to support the defense theory and the court repeatedly instructed the jury to disregard the improper cross and closing arguments. The court also rejected counsel's reasons for not calling the defendants, despite promising the jury he would, and giving their version in the opening and closing. In essence, "counsel concluded that rather than support the defense theory with evidence that the jury might reject, it was better to not support the theory at all." Counsel also clearly "erroneously believed that he did not need to support his arguments with

evidence.” Thus, “counsel's chosen strategy was unsound.” He was essentially relying on the jury to forgive his promises to present evidence he did not present and to ignore the court’s instructions, which is contrary to the “assumption of the law that jurors follow their instructions.” Even if the jurors were inclined to believe the defense theory, “they had no choice but to ignore it because they were presented with no evidence to support it.” Prejudice found because, “[i]n the absence of overwhelming evidence establishing a defendant’s guilt, the failure to present promised evidence that someone other than the defendant is guilty of the offense in question is highly prejudicial.” Here, the state’s case “hinged on the testimony of an admitted addict and uncharged accomplice whose testimony defense counsel effectively impeached.” “[T]he defendants were undoubtedly prejudiced by counsel’s conduct.”

In re Edwards, 92 Cal. Rptr. 3d 725 (Cal. App. 2009). Counsel was ineffective in juvenile jurisdictional hearing in sex offense case for: (1) failing to investigate potentially exculpatory evidence; (2) failing to seek an adequate continuance based on a mistake of law; and, (3) failing to move for a substitution of counsel knowing he was unable to devote the time and resources necessary to properly defend the case. Counsel was aware that the state’s case was based almost entirely on the credibility of the ten-year-old alleged victim. The juvenile defendant provided counsel with information that the victim and her siblings had been molested by an uncle and perhaps her father and that the alleged victim and her mother had motives to fabricate the charges. Counsel was also given information about corroborating witnesses, but made no attempt to investigate. Counsel gave no strategic reason for the failure and explained only that he had an overwhelming caseload and a lack of resources and needed investigators and experts due to his supervisor’s denial of funds and his fear of being fired if he pushed too hard on those requests. “[N]o reasonable defense attorney would have declined to investigate the information [the juvenile] provided simply because it contained hearsay and he was an ex-felon (especially one who had been released from custody six years earlier and was presently gainfully employed).” Counsel also sought a continuance of only seven days, although he knew this was inadequate, because he mistakenly believed the state statutes did not allow for a longer continuance. Moreover, even if the statute had imposed a seven-day limit, counsel still could have requested a longer continuance, which would have waived speedy trial rights. Alternatively, counsel should have moved to withdraw because “a conflict of interest is inevitably created when a public defender is compelled by his or her excessive caseload to choose between the rights of the various indigent defendants he or she is representing.” Prejudice established.

Acknowledging that the prosecution's case boiled down to the question “why would a ten-year-old child make this up?”, [counsel’s] only response was “well, its not the defense's burden to-to provide an answer to that question. And I don't think that anyone would have an answer to that question.” But [the juvenile]

had provided [counsel] several potential answers.

The potential answers, however, were not investigated and corroborated with available evidence. The finding of prejudice was based primarily on: (1) the closeness of the case “because there was no eyewitness or physical evidence and the matter turned almost entirely on credibility”; (2) the evidence made available to counsel by the juvenile “ was germane to the central issue of the victim's credibility”; and (3) counsel “failed to produce available evidence indicating that [the juvenile] d[id] not fit the typical personality or historical profile for juvenile sex offenders and lack[ed] the psychological sophistication necessary to steadfastly maintain his innocence over a long period of time and in the face of a polygraph test.”

Smith v. State, 203 P.3d 1221 (Idaho 2009). Counsel ineffective in civil designation as violent sexual predator case for several reasons. First, counsel failed to timely challenge the denial of due process in the designation process due to “inadvertence or neglect.” Prejudice found because the statutory scheme violated procedural due process principles by denying meaningful notice and an opportunity to be heard. Second, counsel failed to timely assert a challenge to the review board’s failure to adopt and apply objective criteria for predator designation. Prejudice established where the trial court rejected this argument solely due to the untimeliness but otherwise stated “serious reservations concerning the constitutional validity” of the designation process. In addition, without objective standards, “due process rights could not be protected by the process of judicial review.” Finally, counsel failed to timely assert due process claims regarding the district court's review, including the right to review the information considered by the district court from the board, which was not provided to the defense. Prejudice established because “the statutory denial of access to the information which the district court utilizes in making its decision deprives the offender of meaningful notice of that which he is attempting to challenge and consequently, it deprives the offender of any meaningful opportunity to be heard.”

Bryant v. Commissioner of Correction, 964 A.2d 1186 (Conn. 2009). Counsel ineffective in manslaughter case for failing to present four independent witnesses whose testimony would have supported a third party culpability defense and substantially impeached the evidence presented against the petitioner. The testimony of these witnesses “would have worked in concert to create a credible scenario in which the cause of . . . death was a gunshot wound to the head perpetrated by a small group of unidentified Hispanic males driving a white Cadillac or Lincoln, not the actions of the petitioner.” Counsel’s conduct was deficient and not explained by strategy because the witness’ statements were given contemporaneous to the events and “there was no evidence in the record to suggest that any of these witnesses' statements . . . were influenced by the statements made by the other witnesses.” Prejudice established. “When reviewed in its totality, the testimony of these neutral witnesses, each of whom

the habeas court found to be credible and highly persuasive, creates a plausible, well supported third party culpability defense.” The state’s evidence, on the other hand, was limited to the eyewitness testimony of two witnesses who were both “subject to substantial impeachment evidence.” “[N]ot only was the testimony that linked the petitioner to the attack of dubious credibility, it also was internally inconsistent with respect to significant facts.”

***Fisher v. State**, 206 P.3d 607 (Okla. Crim. App. 2009) (direct appeal in 1987). Counsel ineffective in capital retrial and sentencing for numerous reasons including: (1) failing to establish a trust relationship with the defendant, even going so far as to physically threaten the defendant at a pre-trial hearing, which resulted in the defendant’s refusal to attend his trial, which counsel did not explain to the jury; (2) counsel’s alcohol and cocaine abuse during the representation; (3) failing to examine the eighteen boxes of records delivered to counsel by prior counsel; (4) failing to conduct an independent investigation or to utilize an experienced investigator assigned to him; (5) failing to review the physical evidence prior to trial, which would have revealed that the fingerprint card containing the only physical evidence linking the defendant to the crimes had been lost and had not even been used in first trial, and failing to challenge the fingerprint evidence; (6) failing to present available evidence that the primary state’s witness was the actual killer and failing to impeach the witness with his prior inconsistent statements, criminal record, and flight after his arrest and release; and (7) failing to request instructions on lesser included offense or the defense of voluntary intoxication. Prejudice established despite the defendant’s flight from the state and two incriminating statements because “counsel failed to discover and utilize evidence that would have called into question the validity and import of [the] statements” and the flight. The court also affirmed the PCR court’s finding (and the State’s concession) of ineffective assistance in sentencing for failing to adequately investigate and present mitigation.

State v. Overstreet, 200 P.3d 427 (Kan. 2009). Counsel ineffective in attempted murder case for failing to present the testimony of two eyewitnesses that corroborated the defendant’s assertion that he was not driving the car during the shooting. Counsel was aware from police reports that two witnesses identified someone other than the defendant as the driver. Counsel relied on his belief that the state, who had listed them as potential witnesses, would call them and did not subpoena these witnesses or interview them. When counsel realized his error, counsel was able to subpoena one of them and spoke for him the first time on the day of his testimony, which was more than 8 months after the crime and, by that time, the witness incorrectly believed he had identified the defendant. Counsel’s conduct was deficient in failing to interview these eyewitnesses and subpoena them. Counsel’s conduct was also unreasonable in “fail[ing] to adequately prepare the one man who eventually did testify.” Prejudice established because the jury asked to rehear testimony and asked questions relating to identification during deliberations. “In light of the record, there is a real possibility that but for counsel’s deficient performance

in this case, the jury would have returned a different verdict.”

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: *Rayshad v. State*, 670 S.E.2d 849 (Ga. App. 2008). Counsel ineffective in armed robbery, assault, and kidnaping case for failing to object to inadmissible, prejudicial evidence. First, counsel failed to object when the state elicited on cross-examination of the defendant that he had entered a guilty plea to a charge of theft by receiving a stolen car. This was error because under state law the charge was dismissed without an adjudication under the First Offender Act and, where there is no adjudication of guilt, could not be used as impeachment evidence on general credibility grounds. Second, counsel erred in not objecting to, and even introducing, out-of-court statements of a co-defendant who did not testify in violation of the right to confrontation. The statements were made to police several days after the crimes were committed and “[p]lainly, . . . were not made during the course of any conspiracy with [the defendant] and therefore were not admissible as declarations of a conspirator.” Finally, counsel erred by not objecting to, and even introducing in evidence out-of-court statements of a second co-defendant, who did not testify. Again, these statements “were not made during the pendency of any criminal project . . . thus were not admissible as declarations of a conspirator.” Prejudice found in light of the case being a credibility contest and notes during deliberations revealing the “jurors’ focus on impermissible hearsay.”

Lounds v. State, 670 S.E.2d 646 (S.C. 2008). Counsel, who was since suspended from the practice of law indefinitely for other reasons, was ineffective in armed robbery and kidnaping trial for failing to adequately investigate and present the defense and for making harmful arguments contradictory to the petitioner’s testimony in closing. Counsel’s conduct was deficient because counsel did not speak to petitioner until the morning the trial began and admitted on the record that he had just learned the name of possible defense witnesses, who were not called because they could not be located during the trial and because counsel “believed the witnesses would not add much to petitioner’s defense.” Even if this could be considered as a strategic reason, it was “not objectively reasonable given the defense theory of the case.” In essence, the petitioner testified that he asked the alleged victim for money owed to him due to previous drug dealings and the victim went with him voluntarily to the victim’s parents house to get money. The victim denied knowing the petitioner, owing him money, or every buying or using drugs. The

defense witnesses the petitioner sought during trial and who testified in PCR would have testified that the victim did know the petitioner through drug dealing, which “would have added significantly to the credibility of petitioner's case.” Counsel’s conduct was also deficient in closing argument for asserting that the petitioner had a friend with him for “extra muscle” when the defendant had denied robbery or kidnaping or any attempt to threaten the victim. Prejudice was found on each individual count because the jury necessarily rejected the victim’s testimony in acquitting on the armed robbery.

Anfinson v. State, 758 N.W.2d 496 (Iowa 2008). Counsel ineffective in murder case arising from the drowning death of the defendant’s infant son for failing to investigate and present evidence of the defendant's postpartum depression in furtherance of claim that the infant's death was an accident. Counsel was aware from interviews of the defendant’s sisters about the defendant’s behavior (including self-mutilation by plucking leg and pubic hairs) of the probability of postpartum depression, but “categorically rejected any suggestion that this condition be explored in her defense,” including in statements in the media made “without the benefit of a reasonable investigation of [the defendant’s] mental health.” Counsel believed that asserting postpartum depression was tantamount to admitting an intentional killing. Thus, counsel did not request or obtain copies of medical records from the defendant’s post-arrest hospitalization and treatment for depression, suicidal ideation, and panic attacks. He also failed to conduct an investigation which would have divulged the defendant’s prior episodes of depression after she gave birth and consented to the adoption of her first child in 1980, and again following an abortion in 1985. Trial counsel was also dismissive of the opinion of the defendant’s post-arrest/post-hospitalization counselor that the defendant had symptoms consistent with postpartum depression. Retained counsel also rejected the defendant’s father’s request for a mental evaluation at the Menninger Clinic, even though the father offered to pay for the evaluation and the father was paying counsel. Counsel told the family that it would be “fuel for the prosecution.” Counsel’s conduct was deficient because the evidence of postpartum depression would have supported the accidental death defense to explain three things: (1) why the defendant was distracted enough to leave the infant in the bath to use the telephone; (2) why the defendant acted irrationally in hiding the body in a lake after she discovered his death; and (3) why her affect was flat and emotionless later that day when being questioned by investigators. Instead of investigating and presenting the mental health evidence, counsel simply used the “defense of ‘accidents happen’” without supporting evidence. Counsel “closed not only his ears, but also his eyes as he neglected to obtain medical records evidencing [the defendant’s] mental state.” Even if the court accepted “trial counsel's assessment that insanity and diminished responsibility defenses are rarely successful, the decision to ignore evidence of . . . compromised mental state was not a reasonable professional judgment excusing an investigation of the extent to which that mental state supported the defense theory of accidental death.” The court found “a reasonable probability that if a reasonable investigation had been undertaken, evidence would have been developed and presented at

trial tending to establish [the defendant's] conduct from the time of [the infant's] birth until his death was profoundly affected by postpartum depression” and that an expert could have connected the evidence of severe postpartum depression “with her bizarre behavior in furtherance of the accidental death defense.” While the court was “mindful of the deference owed by postconviction courts to counsel’s strategic choices,” the court held that “[d]eference for such choices is not unlimited, however, and it will not be stretched to deny [the defendant] a new trial under the circumstances presented here.”

Wiley v. State, 199 P.3d 877 (Okla. Crim. App. 2008). Counsel ineffective in robbery, burglary, and rape case for numerous reasons. “[R]etained counsel provided little representation, much less the minimal effective assistance required by the Sixth Amendment.”

Due to defense counsel's obvious unpreparedness, his failure to comply with discovery requirements, to have the DNA independently tested, to know the names of his witnesses, to interview all alibi witnesses, to know the proper sentencing range for one of the charged crimes, and his abrupt conclusion of *voir dire*, despite advice from the trial judge not to pursue that course of conduct, the prosecution's case was not subject to meaningful adversarial testing.

Id. at ____.

Aldrich v. State, ____ S.W.3d ____, 2008 WL 5057647 (Tex. App. Nov. 26, 2008). Counsel ineffective in intoxication manslaughter case for numerous reasons. First, counsel misinterpreted *Kyles v. Whitley*, 514 U.S. 419 (1995) to relieve him of any duty to investigate, misunderstood basic discovery procedures, and misunderstood what legally constitutes exculpatory evidence. Second, counsel failed to convey the state’s 20-year plea bargain offer to the defendant because he believed “it would be unethical and would constitute malpractice for him to even discuss the proposed plea bargain” with the defendant. Third, counsel “neither performed a reasonable investigation nor made a reasonable decision that a particular investigation was unnecessary . . . based on the unreasonable decision that *Kyles* required the State to perform an investigation for him.” Fourth, counsel failed to timely obtain and designate defense experts due to the defendant’s financial situation and his misinterpretation of *Kyles*, which resulted in the exclusion of the defense experts. Counsel’s conduct was deficient in failing to move to withdraw so counsel could be appointed or, alternatively, to “request investigatory and expert witness fees from the trial court for a now-indigent client. Here, defense counsel's failure to timely designate experts was not a strategic decision, it was an economic decision and a decision based on a legally incorrect interpretation of a United States Supreme Court decision.” *Id.* at ____ (citation omitted). Fifth, counsel argued “bizarre

defensive theories” that “permeated the entire trial of the case,” but were not supported by the evidence and the court repeatedly sustained outside-the-evidence objections fell. Sixth, counsel continued with his misunderstanding of *Kyles* and misinterpreted the rules of evidence during trial. Seventh, counsel had great difficulty questioning witnesses, repeatedly “made sidebar comments” or interjected his own testimony, asked over 18 times to remove the jury so witnesses could be questioned outside the presence of the jury, and improperly attempted to impeach a witness on the basis of a prior inconsistent statement. Finally, counsel made inaccurate factual statements and arguments, including mistakenly reciting the defendant’s blood test result as “.17” instead of “.07” and referring to the defendant by the wrong name. Prejudice found as “[d]efense counsel’s errors pervaded and prejudiced the entire defense,” including during pretrial and plea negotiations.

Proffit v. State, 193 P.3d 228 (Wyo. 2008). Counsel ineffective in sexual assault case for numerous errors. Counsel failed to object to testimony that the appellant had refused to take a polygraph test, testimony presenting the two officers’ opinions that the appellant was guilty, the testimony that the appellant was a victim of molestation as a child (possibly leading to the assumption that, as a result, he had become an offender), the cross-examination of the appellant concerning whether other witnesses were “lying,” the court’s response to a jury question allowing use of the prior murder conviction evidence as substantive evidence, “and perhaps the most egregious failure, the failure to object to the prosecutor “hearsaying in” the extremely damaging testimony from two prior murder cases. Concerning the latter:

The astounding fact that a prosecutor would engage in a cross-examination and would make a closing argument of this nature is exceeded only by the more astounding fact that defense counsel did not object. In effect, the prosecutor “hearsayed in” the testimony from two murder trials, told the jury that the other juries had convicted the appellant of those crimes, and then told the jury that [the victim] was murdered because he was going to be the witness in the present trial. It is hard to conceive of a more unfairly prejudicial presentation.

Counsel’s “apparent theory of the case makes no sense.” He believed that the earlier convictions were unreliable because the appellant did not testify and that when he did testify, the jury would acquit. “What is wrong with that construct is that the appellant could have testified in this case without opening the door to all the damaging testimony from the earlier cases.” In short:

Garnering trust for one’s client rarely begins by allowing the jury to hear the detailed testimony from two murder trials in which that

client was convicted. Neither is the client's veracity enhanced by allowing law enforcement officers to testify that they believe he is guilty. This is not trial strategy that any reasonable attorney would follow. As Mark Twain observed in evaluating the writings of James Fenimore Cooper, "crass stupidities [should] not be played upon the reader as 'the craft of the woodsman, the delicate art of the forest[.]'" Mark Twain, *Fenimore Cooper's Literary Offenses*, The Portable Mark Twain 543 (Viking Press, 1968).

Id. at 242. Likewise, "[t]here are few rules of cross-examination that could be said to be set in stone, but it is hard to conceive of a situation where sound trial strategy would include asking a law enforcement officer why he believed your client was guilty." Counsel also failed to demand notice of the State's intent to present evidence of uncharged misconduct and failed to challenge admissibility prior to trial, which resulted in evidence of: (1) a prior sexual assault on the victim in this case; (2) involvement in a homosexual child pornography ring; and (3) involvement in two murders. "[N]o reasonable attorney in this situation would forfeit the opportunity to prevent the jury from learning about the different instances of uncharged misconduct noted above. While the appellant may have been subject to an attack upon his credibility through introduction of evidence . . . of the *fact* of the two murder convictions, there was a solid legal basis for defense counsel to attempt to prevent the jury from hearing the *details* of those crimes, or from hearing about the other alleged misconduct." Reversal was also required due to the plain error in the state's improper elicitation of polygraph information and improper cross and argument concerning the "lying" witnesses and the prior conviction evidence.

Vazquez v. Commissioner of Correction, 944 A.2d 429 (Conn. App. 2008). Counsel ineffective in robbery case for failing to present alibi testimony establishing that the defendant was at home asleep with his girlfriend at the time of the robbery. Counsel's conduct was deficient because he failed to prepare and present this evidence only because he believed incorrectly that the alleged victim/eyewitness would not show up for trial because she was an illegal alien. Prejudice established because the PCR court found the defendant and his girlfriend to be credible and there was no evidence of any credible impeachment evidence.

Coney v. State, 659 S.E.2d 768 (Ga. App. 2008). Counsel ineffective in aggravated assault and cocaine possession case for several reasons. First, counsel failed to object to the trial court's failure to charge on "assault," which was a necessary element of the aggravated assault. Prejudice established because the charge allowed the jury to convict of aggravated assault even for criminal negligence when the defense was contending that he accidentally shot the police officer in the hand during a struggle. Second, counsel was ineffective for failing to move to suppress evidence that the defendant was under the influence of cocaine, which was obtained in an illegal seizure of blood and urine samples

taken while the defendant was hospitalized after being shot by another police officer. Prejudice was established because without this evidence the evidence showed only that crack cocaine was found in the vehicle driven by the defendant, with two passengers in it at the time of the traffic stop, and the vehicle was owned by the defendant's father and driven by others, as well. Thus, without this evidence, there was no presumption that the cocaine was his and the burden remained with the state.

Coleman v. State, 256 S.W.3d 151 (Mo. App. 2008). Counsel ineffective in burglary case for failing to present evidence of the defendant's pre-existing injury in defense. An eyewitness saw a white man kick the front door of her neighbor's house in and then saw a second man ("well-tanned" or possibly Mexican) "run" from a vehicle into the house. While these men were inside the house and the police were on their way, the vehicle left the scene. The defendant, a light-skinned black man, was arrested outside the victim's house claiming that he was simply visiting someone in the neighborhood and innocent. Counsel's conduct was deficient in failing to present testimony and medical records of the defendant's pre-existing injury that resulted in him having an air brace on his ankle. While counsel asserted that this evidence was not presented because she did not want the jury to infer that he did not run from police officers only because he could not run, this was unreasonable because a police officer had already testified that he could not run, which raised this inference. Prejudice was established because this medical evidence cast doubt on whether the defendant could have been the white kicker or the darker skinned runner.

State v. Echols, 941 A.2d 599 (N.J. Super.), *certification granted*, 950 A.2d 908 (N.J. 2008). Trial and appellate counsel ineffective in felony murder and related offenses case for several errors. Trial counsel was ineffective for failing to adequately present alibi evidence. While the witness had testified fully outside the presence of the jury, the witness only testified partially in front of the jury and never firmly established, as he could have, that the defendant was in the parking lot and, therefore, not in the victim's apartment, at the time of the shooting and that the defendant had no weapon with him. Appellate counsel was ineffective for failing to assert the trial court's erroneous denial of an alibi charge. While the court assumed the testimony was sufficient, the court erred by concluding that presence in the parking lot 50 feet from the murder was insufficient for an alibi and constituted an identification issue only. Trial and appellate counsel were also ineffective in failing to challenge the prosecutor's opening statement. The prosecutor properly discussed the defendant's membership in a street gang and intimidation of witnesses in the case, which were relevant issues for the trial. The prosecutor went further, however, and asserted that the defendant and the other gang members were also a threat to the jurors but they would be safe because of the presence of courtroom security. The prejudice from this error was compounded because the trial court required several witnesses, who were also gang members, to either remain shackled or appear in prison clothes during their testimony. "[V]iewed separately or collectively these failures and

omissions” were prejudicial.

McKnight v. State, 661 S.E.2d 354 (S.C. 2008). Counsel ineffective for numerous reasons in retrial of homicide by child abuse case involving a full-term stillborn baby with cocaine in its system. The initial autopsy listed three causes of death, one of which was cocaine consumption. The state’s theory was that other causes were ruled out and the cocaine use alone caused the death. In an initial trial, the defense presented two experts. The first completely contradicted the state’s theory, testified that the cocaine studies the state’s experts relied on were outdated, and ruled on cocaine as a cause of death. The second ruled out other causes, but could not rule out cocaine, which the state argued effectively supported the state’s theory. The first trial resulted in a mistrial due to jury misconduct after seven hours of deliberations. In the second trial, the same defense counsel did not call the first defense expert because he was unavailable and recalled only the second that supported the state’s theory, which resulted in conviction after only 30 minutes of deliberations. Counsel was ineffective both in calling the defense expert that undermined the defense and in failing to call the same (by obtaining a continuance or videotaped testimony) or a different available (and local) expert that supported the defense theory. Counsel was also ineffective in failing to investigate and present the medical evidence that contradicted the state’s experts’ testimony on the link between cocaine and stillbirth and failing to challenge the state’s evidence. Counsel was also ineffective in failing to object to improper instructions that confused the measure of intent required for homicide by child abuse. The court initially charged the required “extreme indifference to human life” and then gave a general charge of criminal intent. While this was proper, in response to a jury question on intent, the court repeated only the general charge which confused the issue further and resulted in conviction only five minutes later. Finally, counsel was ineffective in failing to introduce the autopsy report into evidence simply because counsel “just forgot” when the report contradicted the state’s theory of the case. Prejudice found individually on each of these issues.

2007: ***State v. Barrett***, 263 S.W.3d 542 (Ark. 2007). Counsel ineffective in capital murder case (resulting in a life sentence) for failing to adequately present a defense. Counsel’s conduct was deficient for failing to develop any strategy at all; failing to voir dire on “the elements of the State’s case, the burden of proof, the presumption of innocence, or the mental states required for various degrees of murder”; and failing to present any discernible defense. Prejudice found because there was no defense and no distinction in “the various mental states of murder to the jury,” even though the defendant had no prior felonies, was sympathetic, and was believable in his accident theory.

Cosio v. United States, 927 A.2d 1106 (D.C. 2007). Counsel was ineffective in child sexual abuse and carnal knowledge case for failing to ask the defendant’s coworkers about his interactions with the alleged victim, who was the defendant’s younger half-sister. The alleged victim testified that she had been repeatedly sexually assaulted by

the defendant over a seven year period starting when she was seven or eight, but she did not report the abuse until she was fifteen due to her fear of the defendant. The government's case rested primarily on the alleged victim's testimony, but also included evidence from a pediatrician that the condition of the child's hymen was "strongly indicative of sexual abuse." A defense expert testified in a similar fashion. Three of the defendant's coworkers also testified that he was a good worker and a law-abiding citizen. Counsel's conduct was deficient because counsel failed to interview the coworkers concerning their knowledge of the defendant's relationship with the alleged victim even though counsel received a memo from his investigator that should have led counsel to investigate further rather than choosing to focus only a theory that the child resented the defendant due to discipline within the home, jealousy, and other matters, enough to fabricate charges against him. Reasonable counsel would also have seen the need to investigate the allegations that the alleged victim was afraid of the defendant. Further investigation would have revealed five coworkers with substantial knowledge of the relationship, who would have testified that the alleged victim voluntarily sought out the defendant at work and in other places, was very affectionate with him, and showed no sign of fear of him. Likewise, even in interviewing the coworkers to determine who would testify concerning the defendant's character, counsel should have asked about any knowledge of the defendant's relationship with the alleged victim because of the need to anticipate wide-ranging cross-examination. Counsel's failure is also not explained by counsel's "resentment" theory because counsel settled on this "theory prematurely, without having thoroughly investigated the relationship." This "was not the kind of 'reasonable professional judgment[]' that could support the curtailment of further defense investigation." Prejudice found because the coworkers would have undermined the alleged victim's testimony of fearing the defendant and the believability of the remainder of her testimony. Likewise, counsel would also have been able to confront the alleged victim in cross-examination with the contradiction between her words and her deeds.

Gibbs v. State, 652 S.E.2d 591 (Ga. App. 2007). Counsel ineffective in child sexual abuse case for failing to investigate and present evidence that the alleged victim had a history of making false allegations of sexual molestation. The defendant, who was the alleged victim's neighbor, identified three men that the alleged victim had made allegations against and then recanted them. Counsel did not investigate or present this evidence because of his stated belief that it was inadmissible under the rape shield statute. Counsel's conduct was deficient in that any research was only "cursory" because the Georgia Supreme Court had explicitly held in 1989 that this type of evidence was not precluded under the rape shield statute. Prejudice found because all three men and at least one other corroborating witness would have been available to testify.

Starling v. State, 646 S.E.2d 695 (Ga. App. 2007). Counsel ineffective in aggravated assault and possession of a firearm by a convicted felon for failing to stipulate to the defendant's felon status, eliciting the defendant's testimony on the details of his criminal

history, and failing to obtain a jury instruction on the use of the evidence of the defendant's criminal history. Counsel's conduct was deficient because a stipulation would have avoided exposing the jury to information that the defendant had previously been convicted of receiving stolen property, of aggravated assault that involved a gun, and possession of a gun by a first offender. Although counsel requested a limiting instruction at the conclusion of the evidence and the trial court agreed, counsel failed to renew the request the next day when the charges were given but the trial court failed to include the limiting charge. Prejudice found because the defense case rested largely on the defendant's credibility, only a single eyewitness testified that he saw the shooting, and the state emphasized the defendant's criminal history in closing arguments.

State v. McMillon, 642 S.E.2d 343 (Ga. App. 2007). On review of trial court's granting of a motion for new trial in involuntary manslaughter case based on ineffective assistance of counsel, the court affirmed because the trial court had not abused its discretion because "the verdict set aside by the trial court was [not] absolutely demanded" by the evidence. The defendant was charged with pushing his wife into the path of an oncoming vehicle during an argument outside a nightclub. The trial court found counsel was ineffective for failing to interview the state witnesses, including the driver of the vehicle, or to obtain their prior tape recorded statements; failed to investigate how the drugs and alcohol revealed in toxicology reports of the defendant and the victim may have "affected their ability to function"; and failed to investigate or pursue evidence that the death may have been an accident when the evidence raised the possibility that the defendant had thrown his shirt into the highway and the victim died accidentally when she bent to pick it up.

People v. Sims, 869 N.E.2d 1115 (Ill. App. 2007). Counsel ineffective in felony murder case for failing to timely give notice of the affirmative defense of compulsion and to seek instruction on the defense. According to the state's evidence, the defendant had been part of an armed robbery of a restaurant. The state's primary witness was a co-defendant who had plead guilty in a cooperation agreement with the state. He testified that the defendant was 15 while the other four participants were adults. After the robbery was discussed but before they entered the car to go to the crime scene, the defendant indicated that he was scared and did not want to participate. A codefendant, who was holding a gun at the time, told him that "he was there when it started, he got to be there when it finished." The state's witness testified that everyone knew "what that meant." During the robbery, the defendant was outside at a pay phone as a lookout and never entered the building. During the robbery, an employee of the store was hit and several shots were fired. The employee who was hit and close by the shooting died 5 ½ hours after the robbery. The state's expert testified that the victim died from cardiac arrest caused by the stress of the robbery. A defense expert disputed this finding. Counsel's conduct was deficient in failing to give timely notice of a compulsion defense or to, at least, give notice when he learned of this aspect of the codefendant's testimony 1 ½ hours before he testified. Although the court expressed concern about trial by ambush, the court allowed the codefendant's testimony

in this regard, but informed counsel that the issue concerning arguments and instructions would be addressed later. During the instruction conference, counsel did not request a compulsion instruction even though there was sufficient evidence to require the instruction on the affirmative defense, which required only a showing that the defendant acted under the threat or menace of imminent infliction of death or great bodily harm. Prejudice found because “this case was close” in light of the issues concerning the cause of death, a co-defendant’s prior acquittal on the murder because of that issue, the defendant’s age in comparison to his adult codefendants, and his role in the crimes as only a “look out.”

**Commonwealth v. Bussell*, 226 S.W.3d 96 (Ky. 2007). Counsel ineffective in capital trial for failing to adequately investigate and to obtain expert assistance to rebut the state’s experts concerning tree bark from a tree near the victim’s body and the damaged fender of the defendant’s car, automobile paint on the tree, and hair and fiber samples from the car and the victim’s home. Prejudice found.

People v. Cyrus, 848 N.Y.S.2d 67 (N.Y. App. Div. 2007). Counsel ineffective in first-degree robbery case for several reasons. The primary issue was whether the defendant was armed with a box cutter during the offense or was unarmed, which would have been only a misdemeanor petit larceny. Eyewitnesses testified about the box cutter and a box cutter was found on the defendant at the time of arrest just outside the crime scene. Counsel’s conduct was deficient in failing to adequately investigate and in opening the door to testimony about a crime scene videotape, when the existence of “taped recordings” had been disclosed by the prosecution. After cross about the tape, officers testified that the original tape was subsequently destroyed but officers had reviewed it and it showed a metal object in the defendant’s hand. Counsel’s conduct was also deficient in failing to adequately litigate a motion to suppress the defendant’s statement when the defendant had been in custody for 17 hours and had been questioned several times before being given his *Miranda* warnings; he had not slept; he was suffering from heroin withdrawal and told officers that; he was not arraigned for more than 30 hours after his arrest; and the defendant alleged that he had been induced to falsely confess to using a box cutter in order to obtain leniency. While counsel’s actions related to suppression may not have been prejudicial alone, it required reversal “when considered along with his error regarding the videotape.”

People v. Tykhonov, 838 N.Y.S.2d 436 (N.Y. Co. 2007). Counsel ineffective for numerous reasons in driving while intoxicated case. The defendant was convicted based on a car accident. No one saw the accident but an ice fisherman allegedly saw the defendant walking around the vehicle from 200 yards away shortly after hearing the crash and was brought to the scene where he identified the defendant, who was then given field sobriety tests which he failed. Counsel failed to file a motion to suppress the arrest and identification. Counsel also “”was not prepared in both the law and the facts and he was

unable to employ basic principles of criminal law and procedure.” Counsel’s conduct was ineffective under the New York State law standard, which is “more favorable to the defendant” than the *Strickland* standard.

Kincek v. Hall, 175 P.3d 496 (Ore. App. 2007). Counsel ineffective in attempted murder case for failing to present expert testimony about the defendant’s mental state at the time of the shooting. The defendant and his wife of 25 years separated and he suspected her of having an affair. When he entered her bedroom to find her having phone sex with the other man, an argument ensued and he ultimately shot her in the ankle. Although he had told officers that he had intended to kill her and himself, he testified that he did not intend to kill her and had only accidentally shot her. Defense counsel sought prior to trial to introduce the testimony of a clinical psychologist, who concluded that the defendant was acutely depressed at the time of the shooting and had not intended to shoot his wife. The trial court held that the expert could not testify as to the ultimate issue of petitioner’s intent, but would otherwise be permitted to testify. Counsel did not call the expert to testify. Counsel’s conduct was deficient and prejudicial.

****Ard v. Catoe***, 642 S.E.2d 590 (S.C.), *cert. denied*, 128 S.Ct. 370 (2007). Counsel ineffective in capital case for failing to adequately develop and present gunshot residue evidence. The defendant was charged with killing his pregnant girlfriend, which resulted in the viable fetus dying from a lack of oxygen. The defense theory and the defendant’s testimony was that his girlfriend was holding a gun during an argument and that it fired when he grabbed it to take it away from her. The state examiner issued a report that there was no gunshot residue on the victim’s hands but testified that several particles were “very interesting, but there was not any or enough material for us to be able to call gunshot residue.” Citing to the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty cases, the court held that counsel’s conduct was deficient in failing to interview the state examiner or to cross-examine him on this point. Counsel’s conduct was also deficient because the expert they retained had been the state expert’s supervisor at the time the test was done and he reviewed and approved the report. This expert was not an “independent expert” because casting doubt on the state examiner’s findings would have implicitly cast doubt on his own oversight of the analysis. Counsel’s actions “were unreasonable and clearly deficient, especially given the fact that this was a capital case with an arguable defense to the guilt phase.” Prejudice found because interviewing or cross-examining the state expert and hiring an independent expert would have revealed that, although the tests were not conclusive for gun powder, the “interesting” particles contained the three required elements of gunshot residue and the particles were “consistent with gunshot residue and could have come from her handling a weapon.” Prejudice was also established because the defense’s critical theory relied on this evidence and the state capitalized in argument on the lack of gunshot residue evidence and even called the “defense expert” to testify that he agreed with that finding and that he had been hired by the defense. Finally, the court noted that “the jury

apparently did not believe this to be an open-and-shut case of murder” because the jury sought additional instructions on involuntary manslaughter during deliberations.

Dillon v. Weber, 737 N.W.2d 420 (S.D. 2007). Counsel ineffective in rape and criminal peophilia case for numerous errors. The defendant was charged with abusing his eight-year-old daughter and four of her friends on two occasions. Counsel failed to object on double jeopardy grounds to charges of rape and peophilia based on the same acts. Counsel did not investigate a prior allegation of sexual abuse by two of the alleged victim’s that the state declined to prosecute against another man. Counsel failed to prepare his expert witnesses (social worker and psychologist) even though the entire case hinged on the credibility of the alleged victim’s. Counsel also failed to provide the trial court with a sufficient offer of proof concerning his expert witnesses and did not establish an adequate foundation for some of the testimony counsel sought to present. Counsel also made numerous errors during the trial including failing to impeach the testimony of the mother of two of the alleged victims. She testified they were healthy and normal prior to the alleged sexual assault but their medical records revealed an extensive history including more than 50 emergency room visits. “Possibly the most disturbing trial error” was in the cross-examination of one of the alleged victims. The trial court explained on the record that counsel was taking 40 seconds to a minute between each question leaving complete silence in the courtroom. The court found this “unsettling” and could find “no reasonable explanation for this type of uncomfortable delay during the cross examination of one of the victims.” Counsel also elicited from one alleged victim that denied penetration on direct that she had been penetrated. “Based on this cross-examination, it is difficult to determine who [counsel] was representing in this case.” Counsel also elicited testimony from a state’s witness vouching for the credibility and truthfulness of one of the alleged victims when the trial court had ruled this testimony inadmissible. Counsel, thus, “violated a pretrial order that expressly favored his own client.” Counsel also declined to offer video tapes, audio tapes, and transcripts of interviews of the child witnesses/victims even though he repeatedly told the jury that he would. His purported reason was that he felt pressured to get the trial over quickly. “Why [counsel] would feel pressured to make trial decisions based on judicial economy is a mystery, as is his decision to actually give in to this impulse.” Finally, counsel said in closing that in rape cases the burden is on the defendant to disprove it. Although he later correctly stated the burden, he was “sending mixed and confusing signals to the jury about how they were to weigh the evidence.” “When viewed in the totality of the circumstances,” the Court found counsel’s performance deficient and prejudicial. Although the court disavowed reliance on speculation about trial counsel’s mental health, the court noted in a footnote that counsel was diagnosed with bipolar disorder two years after trial and received several months of in-patient treatment. The court observed “that bi-polar disorder is not a sudden onset condition. Instead, it develops over time.” The court, thus, found “reason to be concerned” about counsel’s mental health at the time of trial. “Here, we cannot even be certain that [counsel] was competent in a general sense, let alone competent to provide

legal representation in a serious criminal matter.”

In re Hubert, 158 P.3d 1282 (Wash. App. 2007). Counsel ineffective in attempted rape case for failing to discover and present the defense that the defendant reasonably believed that the victim was not mentally incapacitated. The defendant had met up with three women out drinking and dancing and had been invited back to the home of two of the women for drinks. He was also invited to spend the night on the couch. He later entered the room of one of the women, who testified that she awoke undressed with the defendant having sex with her. She ended the encounter and left the home for over an hour while he remained in her room. He left after her roommate insisted he leave. The defendant testified that he believed the alleged victim’s was awake and consenting the entire time. Counsel’s conduct was deficient because it is a defense to second degree rape that the defendant reasonably believed the person was not mentally incapacitated. Counsel was also aware that both the defendant and the alleged victim confirmed that he stopped physical advances to the woman when she did insist and that he remained in her room for a substantial time even after she left. Counsel did not pursue this defense simply because he was not aware of the statutory defense. Counsel needed only to review the relevant statutes and pattern jury instructions to learn of the defense. “An attorney’s failure to investigate the relevant statutes under which his client is charged cannot be characterized as a legitimate tactic.” *Id.* at 1285. Prejudice found because the defendant was convicted of attempted rape, which required a finding of specific intent to have sexual intercourse with a victim incapable of consent. Here, the jury was unaware that a reasonable belief that the alleged victim had capacity to consent was a defense to this charge.

State v. Hales, 152 P.3d 321 (Utah 2007). Counsel ineffective in murder of a child victim case for failing to obtain a qualified expert to give an independent interpretation of CT scans of the child victim. The defendant was charged with the murder 14 years after the child was allegedly injured by being violently shaken as a five-month-old infant. The child lived until the age of 12 but was mostly in a persistent vegetative state. The defendant was not charged until two years later. The child had been in the defendant’s care for only 20 to 30 minutes on the alleged date of the crime when he called 911. The state’s case that the injury occurred while the child was in the defendant’s care and that the cause of death was a violent shaking that caused immediate unconsciousness was almost entirely based on a state expert’s interpretation of CT scans of the child’s brain taken after admission to the hospital. Counsel did not seek to have a defense expert to review the CT scans until the morning of trial and then asked a defense-retained pathologist to conduct this review. The pathologist testified that shaking could injure a child’s neck but not the brain and that the most likely cause of death was an alleged near miss car accident in which the child had hit its head several days before followed by a “lengthy ‘lucid interval.’” The pathologist was not permitted to testify concerning the CT scan though because he admitted in voir dire that he was not qualified to interpret the scan and did not do so in his practice. Counsel’s conduct was deficient in failing to

adequately investigate. It was clear from the preliminary hearing that the interpretation of the CT scans was critical to the State's case because there was no witness to the child's injuries. Counsel's conduct was not explained by strategy because counsel made the choice to rely only on the pathologist without having conducted the investigation with an expert review of the CT scans. It is also clear from the opinion (although not clearly relied on by the court on this point) that counsel did ask the pathologist to review the scans and sought to introduce his testimony on this point, but counsel had failed to ascertain beforehand his qualification to do so and had not sought review by a defense expert until the morning of trial. The court also noted that, while counsel may sometimes have a valid strategy to rely on cross-examination or other strategy such that a defense expert need not be retained in every instance, "the centrality of this medical evidence to the jury's determination of . . . guilt or innocence made an expert necessary in this case." *Id.* at 341. Prejudice was also established because review of the CT scans by a qualified pediatric neuroradiologist "would likely alter the defense's theory at trial as well as the entire evidentiary picture presented to the jury." *Id.* at 342. Here, a qualified expert could have countered the state expert's testimony with testimony that the initial CT scans showed changes in cell structures that would not be present until 6 to 12 hours after injury. This testimony alone would have been significant because the child was not in the defendant's care during that time frame. A defense expert also could have countered the state's expert conclusion that the injuries were a result of shaking because nothing in the scans suggested shaking as a cause as opposed to an impact injury or other possible causes. Likewise, a defense expert could have testified that the scans did not support any conclusion of immediate unconsciousness and were not inconsistent with a period of lucidity following the injury. In short, a defense expert could have countered most of the state's expert testimony because the "[t]he scan shows the point to which the injury had progressed—not how it got there."

State ex rel. Shelton v. Painter, 655 S.E.2d 794 (W. Va. 2007). Counsel ineffective in sentencing of murder case for several reasons. The jury returned a verdict of murder without a recommendation of mercy, which resulted in a life sentence without parole eligibility. While the defendant testified and conceded his guilt, counsel's conduct violated the duty of loyalty by, among other things, expressing that he "did not know" whether the defendant "even deserved mercy"; distanced himself from the defendant "with suggestions that it was his duty, or his job to ask for mercy; and reminding the jury that it had no obligation to recommend mercy. The court also noted that counsel overly emphasized the defendant's guilt in argument, failed to request bifurcation for sentencing, and failed to make even a minimal effort to obtain a life with mercy verdict. Prejudice found and remanded for a jury trial limited only to the question of whether mercy should or should not be granted.

State ex rel. Humphries v. McBride, 647 S.E.2d 798 (W. Va. 2007). Counsel ineffective in murder case for numerous reasons. The defendant was convicted of accessory before

the fact of murder and conspiracy to commit murder in the bombing death of his wife's ex-husband, which was originally determined to be an accidental death by a bomb the victim built, 22 years before trial. Counsel's conduct was so bad that the state even conceded ineffective assistance of counsel and other reversible errors. (1) Counsel had an actual conflict and should have withdrawn from the case or should have been removed by the court when the state moved to disqualify counsel prior to trial. At that time, counsel admitted that his father and law partner had represented the victim in divorce proceedings from the defendant's wife, which went "to the very heart of the alleged motive" for murder. He stated that he was not involved in that representation and that the defendant waived any potential conflict. The post-conviction evidence, however, established that counsel was likely the last attorney to see the victim before his death, he did work on the divorce case, and he could have been a necessary witness for the defense to refute some of the state's assertions. Because counsel had misrepresented his involvement in the divorce case prior to trial, the court also questioned whether the defendant's waiver was "truly an informed decision" following adequate disclosure. (2) Counsel failed to object to testimony that the defendant had consulted with counsel and declined to speak with investigators during the initial investigation of the death, which violated the defendant's Fifth Amendment rights. (3) Counsel failed to offer an FBI report into evidence or to cross-examine an FBI agent with his original report that revealed that all of the components of the bomb were also found in the alleged victim's home, which supported the defense theory that he constructed the bomb himself and accidentally detonated it. (4) Counsel failed to retain a bomb expert or an independent investigator even though the case was very complex. (5) Counsel failed to object to testimony that the defendant's co-defendants had already been convicted even though counsel had sought a change of venue because of the publicity generated by those trials. (6) Counsel failed to object to numerous instances of hearsay testimony even though the state and the trial court were even posing their own objections to counsel's questions eliciting hearsay because "even they feared that [the defendant] was being 'done in' by his defense counsel." Counsel's deficient conduct was not excused by his "strategy" to "put it all out on the table" because "no reasonable attorney would have pursued a like 'strategy.'" Prejudice found due to the "cumulative effect of these errors."

Strandlien v. State, 156 P.3d 986 (Wyo. 2007). Counsel ineffective in aggravated vehicular homicide case for failing to secure the services of an expert in accident reconstruction. Although the defendant's blood alcohol concentration shortly after arrest was .20, the defense theory was that the impairment was not the proximate cause of the accident. The defendant testified that he was passing the victim's car when, without a turn signal, the victim began turning left. Two state troopers disputed the defendant's theory and testifying that the defendant had adequate notice to avoid the collision had he not been impaired. Counsel's conduct in failing to retain an expert was deficient because the exact nature of how the collision occurred was vital to the defense strategy and counsel had notice of the troopers' opinions months before trial. Prejudice established because an

independent expert would have supported the defense theory and challenged the validity of the troopers' investigations and conclusions.

2006: *People v. Gayton*, 40 Cal. Rptr. 3d 40 (Cal. App. 2006). Counsel ineffective in probation revocation proceeding for failing to review the defendant's probation file and to present it to impeach the probation officer's testimony that the defendant never reported and had otherwise failed to comply with the terms of probation. The probation file and the officer's own notes completely contradicted the probation officer's notes but counsel never bothered to review the file despite the defendant's statements to him, which were "from a different universe" than the probation officer's statements. The probation file would have corroborated the defendant's statements and revealed that the probation officer's testimony was, at best, "brutally incorrect." Counsel's conduct was deficient because, he interviewed the probation officer, but otherwise "assumed his client was lying and did not bother to take even the most basic steps to test that assumption." There was "no justification for counsel's failure to review the file." Prejudice was "inescapable" where probation was revoked and the defendant confined for seven years.

Douglas v. State, 937 So. 2d 825 (Fla. App. 2006). Without any detail or explanation of the case, the court held that counsel was ineffective for failing to investigate appellant's treating physician due to counsel's speculation that the physician's opinions, which counsel was unaware of, would be successfully challenged on cross-examination.

Goldstein v. State, 640 S.E.2d 599 (Ga. App. 2006). Counsel ineffective in child molestation and aggravated sexual battery case for several reasons: (1) failing to cross-examine the alleged victim's mother about her many prior allegations of child molestation extending from childhood into adulthood; and (2) failing to present expert medical testimony to refute the state's experts' opinions. The mother's own family members had provided information concerning her numerous false allegations to defense counsel, but this evidence was not pursued. Likewise, experts were available to contradict the state's expert's medical testimony concerning the elasticity of a prepubescent hymen, which counsel had notice of but did not attempt to rebut. Prejudice found because the state's evidence was far from overwhelming. There was no physical trauma to the alleged victim, no eyewitnesses, and the first witness to report the "crime" had a history of making false accusations of molestation.

Gibson v. State, 634 S.E.2d 204 (Ga. App. 2006). Counsel was ineffective in homicide by vehicle case where the defense theory was that the defendant had a green light before entering the intersection where the accident occurred. Counsel was ineffective in failing to introduce into evidence county records indicating previous problems with the traffic signals at the intersection. The records included a document provided in discovery that showed that just four days prior to this collision there had been a report that the traffic signals were showing green in all four directions at the same time. Counsel was also

*Capital Case

ineffective in failing to discover additional documents showing similar malfunctions in the year before this accident, which were obtained by appellate counsel. Counsel did not present evidence of the malfunction 4 days before because their request to subpoena the appropriate witness was not made until just before the state rested and the court denied the request. Prejudice established.

**Terry v. Jenkins*, 627 S.E.2d 7 (Ga. 2006). Counsel ineffective in capital trial for failing to adequately investigate and present defense in case where the victims were abducted from a coin-operated laundry and later murdered. The state's evidence was largely based on immunized testimony and trial counsel attempted to show that other persons were the murderers. Local counsel had no experience in capital cases so lead counsel was appointed. The two appointed counsel miscommunicated on the role of each counsel. Lead counsel assumed local counsel was investigating. Local counsel believed his job was to provide "local flavor" and knowledge, but otherwise just to do as he was told. Lead counsel did not discover until trial that very little investigation had been done. Counsel's files revealed some information pointing to other suspects and the falsity of their alibis but counsel could not recall investigating further and this evidence was not presented. Counsel also failed to seek a continuance in order to investigate when the defendant told counsel only six days before trial that his family had been threatened if the defendant "spoke up." "Had defense counsel investigated its own primary defense," the evidence would have implicated persons other than the defendant. Counsel's conduct was deficient and prejudicial.

Testerman v. State, 907 A.2d 294 (Md. App. 2006). Counsel ineffective in eluding a uniformed officer and DWI case for failing to challenge the sufficiency of the evidence of eluding. The charge was based on the defendant's changing seats with the passenger as the arresting officer was getting out of his patrol car. Counsel's conduct was deficient because these actions may have been an attempt to evade arrest, but was not an evasion of the police officer, which was required under the statute for this offense. Prejudice established.

Commonwealth v. Garcia, 845 N.E.2d 1196 (Mass. App. 2006). Counsel ineffective in indecent assault case for failing to adequately investigate and present a defense. The defendant, a former part-time teacher, was charged with sexual acts with three young children at a Learning Center. Counsel's conduct was deficient because counsel failed to interview any of the government witnesses and inexplicably failed to present evidence from one essential witness, who was a teacher and a babysitter for one of the children. Her statement provided by the state in discovery included information that the child initially denied allegations even though she encouraged him to speak up until his mother became involved, which supported a defense theory of parental influence and pressure. Prejudice found on all three charges because the case against the defendant with respect to the other two children had similar problems in that there was physical evidence or

injury and credibility was the sole issue.

Johns v. State, 926 So. 2d 188 (Miss. 2006). Counsel ineffective in aggravated assault case for failing to adequately investigate and present alibi witnesses. The victim testified that he was shot during a 20-minute period by the defendant firing into his car from the defendant's car behind him. The defendant was quickly arrested at his home and no evidence was found connecting him to the crime. The defendant claimed to have been at home with his young daughter at the time of the shooting. The defendant retained counsel he met in a retail store, who had no office, met with his client only at McDonald's or the courthouse, and was indicted four months after this trial for the sale of marijuana in a correctional facility. The defendant and his parents, who retained counsel, all informed counsel of the names and addresses of three alibi witnesses. Counsel never interviewed them and never contacted his client again until the night before trial. The defendant did not realize until the morning of trial that he had no witnesses, but he turned down a plea offer for five to six years because counsel told him the State had no evidence and that he would be able to win. Counsel's conduct was deficient.

The decision not to interview witnesses, particularly your own, cannot be considered an effective strategic choice. When counsel makes choices of which witnesses to use or not to use, those choices must be based on counsel's proper investigation. Counsel's minimum duty is to interview potential witnesses and make an independent investigation of the facts and circumstances of the case.

Prejudice found because the post-conviction testimony of the alibi witnesses was not rebutted by the prosecution and "could very well have changed the outcome of the trial."

People v. Anderson, 813 N.Y.S.2d 725 (N.Y. App. Div. 2006). Counsel ineffective in drug case for announcing that the defense would be that of agency and conceding the defendant's identity as person involved in drug transaction when the officer's out of court identification of the defendant had been suppressed and counsel abandoned the issue of allowing the officer's in-court identification of the defendant.

State v. Gondor, 860 N.E.2d 77 (Ohio 2006). Counsel ineffective in separate murder trials for two defendants. One co-defendant plead guilty and the other two were tried separately and convicted with their former co-defendant as the prosecution's key witness in both cases. During both trials, the state also relied on blood evidence in the back of one co-defendant's truck and evidence that the two co-defendants attempted to create a false alibi. One counsel testified that the prosecutor's file was made available to him but he did not review each page because of his busy trial schedule. He relied just on things pointed out to him that were consistent with the state's theory. The other counsel also testified

that the state's file was made available to him. If either counsel had adequately reviewed the state's files, they would have discovered a report from a serologist that the substance found in the back of the truck was not blood and was most likely perspiration. There was also evidence in the file to impeach some of the testimony concerning development of a false alibi by showing that this attempt was after the defendants became suspects rather than just hours after the murder as the state suggested. The state's file also contained a transcript of a prior inconsistent statement by the prosecution's key witness, which also reflected his statement that he would set the other co-defendants up if necessary to help himself. There was also evidence that the witness' mother had attempted to smuggle a knife into the jail for him and the charges were dropped against her as part of his plea agreement. Finally, there was evidence reflecting that others, who had never been charged or convicted, may have been involved in the murder. Both trial counsel denied seeing this information in the state's files, but would have used the information if they had known about it. In addition to the state's open file policy, the post-conviction evidence reflected that both trial counsel had been provided with copies of the relevant information. Trial counsel's conduct in both cases was found to be ineffective for failing to discover and use this evidence during the trials. Prejudice was found due to the "cumulative effect of trial counsels' errors."

Smith v. State, 144 P.3d 159 (Okla. Crim. App. 2006). Counsel ineffective in murder case for failing to prepare and present a Battered Woman's Syndrome defense. The defendant called a neighbor and asked him to come to her house where she admitted to shooting her husband and killing him because she said she couldn't take another beating from him. The weapon was located at the scene with a live round jammed in the chamber. She told police that her husband was physically abusive throughout their marriage and his abuse had gotten worse through the years. In the month before the shooting, he had kicked the dog and shot the defendant's cat. His abuse of her escalated. During an episode of physical and mental abuse, she picked up a gun that was lying on a table. With her husband still yelling at her, the defendant, who feared another beating, shot him and then attempted to kill herself but the gun jammed. While counsel presented nine witnesses at trial concerning the victim's abusiveness to the defendant, counsel did not present an expert on Battered Woman's Syndrome and instead relied on a generalized self-defense argument. Counsel's conduct was deficient in failing to file an application with the court for appointment of an expert when the defendant said that she could not afford to pay for the expert. Prejudice established even though the defendant had been convicted of the lesser offense of second degree murder because, if counsel had obtained an expert, the defendant may have been acquitted.

****Nance v. Ozmint***, 626 S.E.2d 878 (S.C.), *cert. denied*, 549 U.S. 943 (2006). On remand from the U.S. Supreme Court for consideration under *Florida v. Nixon*, 543 U.S. 175 (2004), the court reinstated its opinion finding that trial counsel's failure to investigate, plan, and present a defense in this capital trial constituted "a classic example of a

complete breakdown in the adversarial process” and prejudice was presumed for eight reasons. (1) Lead counsel was suffering from numerous health problems, including alcoholism, and was taking numerous medications that impaired his memory and caused other problems. Co-counsel had been practicing law for only 18 months. (2) Counsel sought to show that the defendant was mentally ill and wanted the jury to view him in his unmedicated state and successfully got the judge to order such, but then failed to inform the jail personnel of the court’s order so the jury saw “a drug-influenced demeanor” during trial. (3) Counsel pronounced in opening statements that they were appointed and neither of them “wanted to be there.” (4) Counsel presented a defense of guilty but mentally ill but failed to qualify their only expert and presented supporting testimony of the defendant’s sister only after the expert testified denying him the opportunity to inform the jury of how the sister’s testimony supported a finding of mental illness. (5) Counsel presented no evidence of adaptability to confinement in sentencing when they had presented the only bad incident of urine-throwing in confinement during the trial. Evidence was available to establish that the defendant had been selected as an institution’s inmate of the year and nominated for the entire state’s inmate of the year and testimony was available from a jail administrator and prison minister that the defendant was a “model inmate.” (6) Counsel presented “no mitigating social history evidence,” even though the evidence would have established physical abuse throughout the defendant’s childhood, an alcoholic, abusive father; being “treated with alcohol as a child in lieu of over-the-counter medication”; and growing up “in a family of extreme poverty and physical deprivation.” (7) “[D]efense counsel’s seven-minute mitigation presentation failed to provide the jury with any insight concerning Petitioner’s mental illness,” even though he has a family history of schizophrenia, history of hearing voices, and suffered from neurological damage. (8) In closing arguments in sentencing, counsel “failed to plead for Petitioner’s life and referred to him as a ‘sick’ man.” [C]ounsel abandoned his role as defense counsel and in fact helped bolster the case against his client. . . . We again recognize that this type of “consistently inept form of lawyer conduct [is not] acceptable in this state, nor will we employ a prejudice analysis, for ‘[defense] counsel’s ineffectiveness [is] so pervasive as to render a particularized prejudice inquiry unnecessary.’” *Id.* (quoting *Nance v. Frederick*, 596 S.E.2d 62, 67 (S.C. 2004)).

**Wiley v. State*, 183 S.W.3d 317 (Tenn. 2006). Counsel ineffective in felony murder trial for failing to request an instruction on second degree murder and failing to preserve the issue for appeal and in failing to adequately investigate and assert self-defense. Prejudice was found because the defendant informed counsel that the victim “rushed” him. Although the defendant did not tell counsel that his nose had been bloodied, diligent counsel would have conducted additional investigation. Prejudice found because two bloody towels were evident in crime scene photos and at least one of them had the defendant’s blood on it. The victim also had a prior conviction for battery, which would have been admissible under state law even though the defendant was not aware of it to establish that the victim was the initial aggressor.

Ex parte Amezquita, 223 S.W.3d 363 (Tex. Crim. App. 2006). Counsel ineffective in aggravated assault case for failing to investigate evidence involving the alleged victim's cellular telephone, which was taken and used while she remained in a coma for 10 days after the offense. If counsel had adequately investigated, the evidence would have revealed that the defendant was never in possession of the victim's telephone or that, other than the victim's testimony, he was at her place of business on the day of the assault. There was, however, evidence that another business employee, who was a parolee with a history of violent crime and who had recently been confronted about his harassment of the victim, was at the business on the day of the assault and possessed the victim's telephone shortly after the attack. Prejudice found.

Wright v. State, 223 S.W.3d 36 (Tex. App. 2006). Counsel ineffective in indecency with daughter case for failing to investigate following receipt of notes of the victim's therapy sessions and failing to obtain the assistance of an expert. The defense theory was that the victim had been coached into making false allegations because of a child custody dispute. The victim initially said that the defendant masturbated in front of her. She then began therapy and the therapist's notes indicated that the victim's mother, who had child custody disputes with the defendant, was present for most of the sessions. The therapist initially noted that the child said she accidentally woke up and saw her father and it was her fault. Her statements kept evolving though. The therapist was noting a belief that the defendant had the child to participate in the masturbation months before the child said that he had done so. The prosecutor was also present at one of the "therapy" sessions. Although counsel had never been denied access to the state's file and knew of the therapist at least a month prior to trial, counsel did not obtain the file until just before trial. Counsel did not seek a continuance or obtain expert assistance. Counsel's conduct was not excused by strategy because counsel did not seek an expert only because he had been told that his expert would not be allowed to interview the child, he did not have time after receiving the notes, he had difficulty reading the notes, and he thought the therapist would be providing him with a report. Prejudice found because an expert could have testified that custody disputes generate a high proportion of false allegations of sexual abuse. In addition, this "therapy" was outside the standard protocol for working with child victims and conducive to false allegations. The expert also could have assisted counsel in preparing cross-examination of the state's witnesses.

Walker v. State, 195 S.W.3d 250 (Tex. App. 2006). Counsel ineffective in resisting arrest case for several reasons. First, counsel's conduct was deficient in failing to ask any questions in voir dire even after six members of the jury venire identified themselves as working or having close relatives who worked in law enforcement and made statements indicating potential prejudice or bias. Counsel used peremptories to remove two of these jurors but otherwise failed to conduct voir dire or challenge these biased jurors for cause. Counsel was also ineffective in failing to conduct an appropriate investigation and to object to inadmissible evidence of extraneous offenses and bad acts that were irrelevant

to the trial for resisting arrest. This evidence included evidence of another person at the scene being arrested for possession of drugs, the defendant having previously disturbed the peace by firing an automatic weapon, and a 20-year-old misdemeanor conviction for assault on an officer. Counsel failed to object to this evidence because he was not familiar with the appropriate admissibility standards and also failed to request a limiting instruction. Here, where the defendant's credibility was critical to the defense, counsel should have investigated, filed appropriate discovery, prepared the defendant for his testimony, filed motions in limine to prevent the inadmissible evidence from coming before the jury, and objected and requested a limiting instruction when the evidence did come before the jury. Counsel was also ineffective in sentencing for failing to adequately investigate and opening the door to cross-examination of the defendant about numerous arrests for concealed weapons, criminal mischief, assault, and reckless conduct. Counsel also failed to object to the court's failure to instruct the jury in sentencing that evidence of unadjudicated offenses could not be considered unless the offenses were proven beyond a reasonable doubt. The defendant was prejudiced even though unadjudicated offenses were admissible under state law because the state did not offer any of this evidence or raise the issue until counsel asked the defendant broadly in redirect if he had "any problems with law violations." Prejudice found because evidence of extraneous offenses is inherently prejudicial. The prejudice in sentencing was particularly clear because the state recommended probation only, but the jury sentenced the defendant to 180 days in jail and a \$2000 fine in addition to probation.

2005: *State v. Hamlet*, 913 So. 2d 493 (Ala. Crim. App. 2005). Counsel was ineffective in robbery case for numerous reasons. One counsel was appointed and did not do much in preparation. The other was retained only days before trial but acted as lead counsel without preparation (although he had moved for a continuance). The original counsel did not inform the new counsel of prior inconsistent statements by key state witnesses and sat silently while the new counsel pursued a defense theory that fell apart quickly and required a change in the middle of trial. And, neither counsel advised the defendant of the state's plea offer.

Lee v. State, 899 So. 2d 348 (Fla. App.), *review denied*, 914 So.2d 955 (Fla. 2005). Counsel ineffective in capital sexual battery of child under 12 case for failing to adequately investigate and present a defense. This was a "classic familial sexual abuse situation, with no eyewitnesses, no direct physical evidence of abuse, nor even similar fact evidence." The defendant's 10-year-old stepdaughter alleged abuse on three occasions. The allegations were not made until the defendant left her mother for another woman, her mother was incarcerated, and her step-sister (who had found a letter to the alleged victim's mother stating that the defendant "was doing it with her") urged her to tell her grandmother, with whom she was living although she did not know her well. The only alleged physical evidence was from the testimony of a pediatrician, who testified that the victim's hymen had been torn and formed a scar as it healed. The pediatrician

concluded that the hymenal ring was abnormal and indicated repeated penetration. She acknowledged that it was possible that the abnormality was caused by excessive masturbation “but virtually excluded that possibility.” The only defense presented (other than the defendant maintaining his innocence) was that the alleged victim’s mother had previously caught her masturbating and had been told then that a man (other than the defendant) had showed her how. Counsel’s conduct was deficient. Counsel had never tried a capital sexual battery case and did not consider retaining an expert even though counsel could not read the state expert’s notes and did not know the meaning of some of the terms used in the notes. Counsel also did not retain an expert because counsel dismissed the pediatrician’s opinion because she “was not an expert.” Counsel even advised the defendant that “he had a good trial case because there was no physical evidence of abuse.” The defendant “had the right to an attorney who understood the ramifications of the pediatrician’s testimony.” Moreover, counsel’s conduct was not excused by the defendant’s request that the case not be continued for counsel to investigate because counsel had not done any investigation until two weeks before trial even though the defendant had informed counsel from the beginning that the alleged victim had previously alleged sexual abuse by someone else. Moreover, counsel’s erroneous belief that there was no physical evidence of abuse, even though the pediatrician corroborated the alleged victim’s testimony, “significantly contributed” to the defendant’s decision. By finding that counsel’s conduct was excused by the defendant’s conduct, “[i]ronically, the circuit court thus held the defendant to a higher standard than his attorney for understanding the significance of the evidence against him.”

The trial court made no factual findings or legal conclusions about the fact that the attorney had information about previous allegations available to him almost six months before trial and did nothing about it until the eve of trial, despite knowing that his client had been unable to make bond, had been held in jail since his arrest, and was anxious for his case to be concluded. Thus, when [the defendant] insisted on going to trial, he did so without the benefit of all of the relevant information that a reasonably prompt and thorough investigation by an effective attorney would have revealed. The circuit court erred when it found that [the defendant’s] decision to go forward with the trial negated the deficiencies in his counsel’s preparation.

If counsel had adequately investigated, counsel could have presented expert testimony that (1) the change in the hymenal ring was not indicative of repeated penetration; (2) the alleged victim’s hymen was considered “a normal variance”; and (3) it was inappropriate procedure for the pediatrician to take the child’s history while the grandmother was present.

At a minimum, he could have impeached the pediatrician, and the jury would not have been left with the unchallenged impression that the medical evidence corroborated the State's theory that something of a criminal nature happened to the victim. Had the defense attorney gone further and discovered whether the victim had made prior allegations of abuse, either founded or unfounded, that information could have provided valuable impeachment of the victim's testimony. . . . As it stood, defense counsel was left with the very difficult job of attempting to demonstrate that a sympathetic young child, crying on the stand, was lying.

Martin v. Barrett, 619 S.E.2d 656 (Ga. 2005). Counsel ineffective in aggravated child molestation and cruelty to children case where counsel failed to seek to obtain the records or to request the assistance of an expert despite counsel's knowledge that the defendant had been hospitalized for treatment of mental illness. Prejudice found because the defendant had Bipolar Disorder with psychotic episodes of auditory and visual hallucinations. The defendant "might have been found to be incompetent to stand trial, legally insane at the time of the crimes, or guilty but mentally ill."

People v. Moore, 824 N.E.2d 1162 (Ill. App. 2005). Counsel ineffective in burglary of car case for two reasons. First, counsel failed to object to the prosecutor's improper closing argument urging the jury to convict the defendant in order to prevent their insurance rates from increasing. This was an inflammatory argument that "served no purpose other than to appeal to the jurors' fears, prejudice defendant, and inflame the passions of the jury." *Id.* at 1165. The argument was also based on "irrelevant speculation" and not on the evidence because there was no mention of auto insurance during the trial. *Id.* at 1166. Second, counsel elicited incriminating hearsay during cross-examination of two of the state's key witnesses. The witnesses testified that they had seen the defendant burglarize the car and take a camera bag. When the defendant was arrested, however, he did not have the camera bag and it was nowhere near him so the defense was arguing mistaken identity and a reasonable doubt. During cross-examination of these witnesses, however, counsel elicited hearsay information from "members of the crowd" that the defendant dropped the bag during a struggle and a man with the defendant grabbed the bag and took it with him. "The members of the crowd who allegedly provided this information were not named, never testified during trial, and were never cross-examined." *Id.* at 1170. Counsel's conduct was deficient because this evidence was inadmissible, the trial court informed counsel in the midst of the cross that it was inadmissible (but the court did not exclude it since the state did not object), and any alleged strategy was unreasonable because the hearsay elicited "served to further incriminate" the defendant. *Id.* at 1171. Prejudice found on each of these issues.

Parish v. State, 838 N.E.2d 495 (Ind. App. 2005). Counsel ineffective in attempted

murder and robbery case for failing to adequately investigate and present a defense and failing to object to an improper Allen charge. The state's witnesses testified that they were in the victim's apartment watching a movie. After a knock on the door, intruders entered demanding drugs, money, and guns. After a struggle with the co-defendant the victim was shot in the stomach. The defendant allegedly threatened the witnesses with a gun if they moved. The co-defendant was tried separately. Counsel presented an alibi defense supported by seven witnesses, all family members, during trial. Counsel's conduct was deficient in failing to adequately investigate because he just "assumed" that the crime did occur in the fashion the state alleged. *Id.* at 501. In short, counsel "did not make a reasonable decision not to investigate the shooting, which would have uncovered evidence that perhaps the crime did not occur as the State's eyewitnesses testified at trial." *Id.* at 502. If counsel had investigated, he would have discovered two independent witnesses who would have testified that the victim was selling drugs in the parking lot of the building when he was shot. This was also supported by a witness that did not testify for the state during trial but his statement to officers and identification of the defendant was admitted into evidence. This witness testified in post-conviction that he had been coerced by police into identifying the defendant. The state's crime technician would have testified that no blood was found in the apartment, although there was blood in the car used to transport the victim to a nearby fire station. Likewise, DNA evidence from a hat allegedly belonging to the co-defendant revealed that it was not the co-defendant's hat. Prejudice found because, at the least, this evidence would have seriously undermined the credibility of the state's witnesses. "That is, if the eyewitnesses were not telling the truth about where the crime occurred, then that could cast doubt on their account of how the crime occurred and who was involved," strengthening the alibi defense. In addition, five additional alibi witnesses, one of whom was not a family member, were available but not presented by counsel. This was complicated by the trial court's Allen charge, which had been modified from the state's standard charge, in an impermissible fashion and was included in pre-deliberation charges. During deliberations, the jury submitted several questions concerning the state's primary witnesses, which went unanswered. After 9 hours of deliberations, the jury returned with a verdict of guilt. If counsel had "independently investigated the shooting, presented that evidence, and then objected to the Allen charge, the result of the proceeding would be different." *Id.* at 503.

Bolden v. State, 171 S.W.3d 785 (Mo. App. 2005). Counsel was ineffective in assault and armed criminal action trial for failing to seek a mental health examination, waiving the issue of competence, and proceeding to trial despite the defendant's incompetence. Counsel and the court had received letters prior to trial that contained "random numbers and letters that made no sense" and one had feces smeared on it. During pretrial hearings, the defendant "acted erratically and strangely," including urinating in the courtroom and swinging at counsel. He also testified in a hearing about "a conspiracy regarding activist Louis Farrakhan." Counsel was also aware that the defendant was unable to understand the plea offer by the State but refused to allow counsel to talk with his family and would

not respond to her questions. Instead, the defendant would tell counsel how to kill herself. Counsel requested a mental health examination and the defendant was found to be competent but the doctor warned that there could be deterioration over time. Counsel requested a second examination and the defendant refused to speak with the doctor, but based on a review of the records, the doctor concluded that the defendant should receive an inpatient evaluation. The initial examining doctor agreed that inpatient examination was appropriate. The defendant, however, “announced that he was competent and ready for trial.” Counsel then let the case go forward without requesting further evaluation. During the trial, the defendant’s bizarre behavior continued, including making sexual and threatening statements to witnesses in the presence of the jury. He made a number of bizarre statements in sentencing including that the country would end and that he had done away with emotions and feelings through “astro-rejection, metaphysics, telepathic powers, telekinetics, and psychokinesis.” Counsel had no strategy. She simply waived the competency issue because the defendant wanted her to do so. Prejudice found because “there is a reasonable probability that the result would have been different if an inpatient evaluation had been requested” because the defendant would likely have been able to establish a defense of not guilty by reason of insanity.

Dorsey v. State, 156 S.W.3d 825 (Mo. App. 2005). Counsel ineffective in kidnaping, sodomy, and other offenses case for failing to present evidence of juror misconduct in the motion for new trial and for urging the jury to convict the defendant of forcible sodomy. The victim testified that she was lost and asked the defendant for directions and then was kidnaped and raped. The defendant testified that the alleged victim was looking for drugs and he had consensual sex with her in exchange for cocaine. During deliberations, one of the jurors went to the scene “to investigate the victim’s story about getting lost.” The juror got lost in the same area and told the other jurors about it. The defendant was convicted of forcible sodomy and other offenses that day, but acquitted of a number of other charges. Shortly after the verdict, the judge’s law clerk and an assistant prosecutor learned of the juror’s trip and the information to the other jurors and disclosed it. The officer conducting the pre-sentence investigation (PSI) also disclosed that the juror that had made the trip called the victim’s family after the trial to say that he “totally believed” the victim’s story. Counsel’s conduct was deficient because counsel filed a motion for new trial seven days late and included no evidence or argument other than the letter from the PSI officer. Counsel’s conduct was not excused because counsel did not offer a strategic reason. Counsel’s conduct was deficient because the jury misconduct was clear. Once that was established, prejudice was presumed and the state offered insufficient evidence to rebut the presumption. While three jurors testified that they were not influenced, nine jurors did not testify and the juror that engaged in misconduct “attempt[ed] to minimize the effect of his own misconduct.” Prejudice was found because “the victim’s credibility was clearly at issue.” If she had not been lost, her credibility was undermined and the defendant’s version was supported. Relief granted despite the trial court’s purported ruling on the merits even though it had no jurisdiction due to the late

filing of the motion.

The test is not whether that particular trial judge would have granted relief. The test of merit is not whether the trial judge would have reversed his earlier ruling but rather whether, in the light of applicable law, the contention was a valid one.

In sum:

Even though there was a verdict of acquittal on many of the charges, we cannot say that there was not a reasonable likelihood of even more acquittals, at least as to charges requiring belief in the use of a weapon. Because we know so little about the dynamics of the jury deliberations and the true effect of the juror misconduct in this case, we have very little basis to say that, had counsel secured a new trial, [the defendant] would have done no better in a second trial. Thus, we feel constrained to say that defense counsel's errors and overall performance were such that we cannot be confident in the trial having achieved a just result. Because we have a definite and firm impression that a mistake was made in ruling on the post-conviction motion, we reverse the motion court's decision.

The court considered counsel's concession of guilt "only in regard to our consideration of counsel's overall performance." While the jury could have found the defendant guilty of forcible sodomy based on his testimony, counsel is expected "to argue the evidence in a way favorable to the client." In addition, the court's instructions required a finding that the defendant "displayed a dangerous instrument" in order to convict and the defendant had not admitted this element here. Finally, where there was obvious concern about the victim's credibility, "it seems less than astute for counsel to concede" guilt on any offense when the defendant had denied guilt. While the court declined finding ineffectiveness based only on this issue, it concluded that the overall performance of counsel undermined confidence in the outcome of the case.

Johnson v. State, 172 S.W.3d 6 (Tex. App. 2005). Counsel ineffective in assault on public servant case where the defendant and her husband had fought, he called 911 asking for an ambulance but then called back saying the defendant did not want an ambulance, and police went to the home anyway. When no one answered the door they kicked the door in and refused to leave when asked to do so insisting on questioning the two individually. The defendant became agitated and fought with officers. Afterwards another officer arrived and was audiotaping events as he talked with the defendant, her minister talked to her, and she talked to an officer that was allegedly assaulted. Counsel's conduct was deficient because, although counsel filed a discovery motion seeking all statements

of the defendant, counsel never obtained a ruling on the motion and, thus, was not provided with this tape. When he learned of the tape during the trial, he ignored the defendant's request to personally review the tape, did not seek a continuance or recess, and reviewed the tape just over a lunch recess without the benefit of a transcript. He did not object to admission of a redacted tape that excluded the only arguably exculpatory portion of the tape. Counsel's conduct was deficient because the defense was clearly entitled to receive this tape in discovery but "a discovery request alone, without an order or follow-up in some manner, is a hollow gesture." Moreover, counsel's attempt to redact the tape, without the benefit of a transcript, just over a lunch recess was "difficult and virtually meaningless." Counsel also did not correct and, in fact, agreed with the state's evidence that the redacted tape contained the entire dialogue between the defendant and officers when it did not and the portion excluded was the only arguably exculpatory portion. Prejudice was found because if the defendant had been provided with the tape prior to trial her trial strategy might have changed. She might have considered a plea or been better prepared to testify. Counsel might have considered filing a motion to suppress when counsel otherwise was not even aware that the defendant had not been read her rights prior to the taping. Here, the recording was the "lynchpin of a case that turned on" the defendant's credibility and she was prejudiced by counsel's actions.

Hall v. State, 161 S.W.3d 142 (Tex. App. 2005). Counsel was ineffective in drug trafficking case for numerous reasons. The defendant was a passenger in a car stopped for speeding. The officer asked for consent to search the vehicle and found cocaine in a cooler in the back of the car. The driver pled guilty and testified. State law required an accomplice testimony instruction under these circumstances and precluded conviction on the testimony of an accomplice unless there was other evidence tending to connect the defendant to the crime. Here, because the jury was not properly instructed, the jury was authorized to convict the defendant with no corroborating evidence and the nonaccomplice testimony provided only a weak inference of guilt. Counsel's conduct was deficient because the failure to request a proper instruction "relieved the State from proving the portion of its case that would have been the most difficult to prove." Counsel's conduct was also deficient in failing to object the state's cross-examination of the defendant based on inadmissible, unadjudicated offenses that the state referred to as "gang-banging" offenses. Counsel's conduct was also deficient in failing to object to the state's comment on the defendant's post-arrest silence in the opening statement and closing argument. Counsel's conduct was not excused by strategy because the court could not "envision a reason" for counsel's failures in each respect. The court found prejudice with respect to each deficiency and found that "the combined effects" required reversal.

Keats v. State, 115 P.3d 1110 (Wyo. 2005). Counsel ineffective in first degree arson case for failing to investigate the possibility of a plea of not guilty by reason of mental illness (NGMI). After the defendant set a fire in his mobile home, his roommate put it out and called police because he was threatening to burn the home down with him in it. After

police arrived he vacillated between suicidal, threatening, anger, laughter, and depression. He set several fires that officers and firemen were able to put out, but ultimately set a fire that spread and filled the home with smoke. He was finally subdued but the mobile home was damaged beyond repair. After his arrest, the defendant was involuntarily committed to a mental health unit and found to have a major depressive disorder and reality distortion. He also had symptoms consistent with bipolar disorder. He was later transferred to another mental health facility where he was diagnosed with substance abuse and a bipolar disorder. Counsel was aware of these facts and had also been informed by the defendant's mother that he had a history of mental health problems and an inability to stabilize his moods. While counsel discussed the possibility of an NGMI plea with the defendant and his mother, his strategy was to argue that the defendant's specific intent was suicide and not to burn down the house. He believed that NGMI was incompatible with this argument. Prior to trial, the court granted the state's motion to exclude mental state evidence because counsel had not entered an NGMI plea. Counsel's conduct was deficient because his trial strategy was to make some sort of diminished capacity argument that the defendant was depressed and suicidal when state law did not recognize a diminished capacity defense. Counsel's belief that the NGMI argument was inconsistent with his theory of the case was also "puzzling" and "not a reasonable decision that made further investigation unnecessary." "[F]urther investigation was essential" under these facts. Nonetheless, counsel did not obtain the defendant's medical records, did not consult with a mental health expert, or obtain an opinion about the defendant's mental state at the time of the crimes. Prejudice was found because the only question during trial was the defendant's intent. Counsel's deficient conduct deprived him "of the only true defense available to him," which had a reasonable likelihood of success.

2004: *People v. Callahan*, 21 Cal. Rptr. 3d 226 (Cal. App. 2004). Counsel was ineffective in first degree murder case for three reasons. Following the arrest of four people, who believed that the victim had "ratted" on them, the defendant sought the assistance of two men who were members of "The Skin Head Dogs (SHD), a male white supremacist group," to obtain money to bail one of the arrested persons out. The victim subsequently asked the defendant to assist her in obtaining money to bail out a different arrested person. The defendant met with the victim at the defendant's home. The victim ingested two pills from a prescription drug on the defendant's dresser. In a pretrial statement, the defendant said that the victim took the pills to alleviate withdrawal symptoms of other drugs, even though the defendant warned her that the pills were strong and she would probably pass out. Two witnesses at trial testified, however, that the defendant stated that she deliberately gave the victim the pills to cause her to pass out within a few hours. According to the defendant's pretrial statement, which was admitted in evidence, after the victim took the pills, she and the defendant picked up some stolen electronic equipment that they intended to sell for bail money. They then met up with the SHD men and went to a hotel. By the time they reached the hotel, the victim had passed out. While at the hotel room, the stolen equipment was sold and the SHD exited the room. When the

victim woke up, the defendant allowed her to call her mother. While she was on the phone, the SHD men returned to the room. One of them became upset because he feared the victim would report them for stealing the electronic equipment. Although the defendant argued that the victim should be allowed to leave, the SHD men killed the victim by slashing her throat while the defendant was in another room. The defendant assisted in disposing of the body. The state's theory was based on felony murder. While a duress defense would not apply to murder, it would apply to the underlying felonies of robbery and kidnaping, which were necessary to support first degree murder and the punishment of life without parole. Because counsel was aware of this, competent counsel would have sought to refute the testimony of the witnesses who asserted that the defendant deliberately gave the victim pills to cause her to pass out. This would have allowed counsel to portray any robbery and kidnaping as beginning inside the motel room, so that a duress jury instruction would be given, and counsel would have had a factual and legal basis to argue against application of the felony murder rule. Counsel's conduct was deficient in failing to adequately cross examine the witnesses concerning the defendant's alleged statements concerning the suspicious circumstances under which they came forward, which caused even the prosecutor's investigator to doubt their truthfulness. Counsel's conduct was also deficient in failing to call the defendant to testify since she would have testified that she never met these witnesses until after the victim's death. She would have also testified that she was afraid of being killed if she did not comply with the SHD man's orders. Counsel's conduct was also deficient in failing to present expert testimony in support of a duress defense in that the defendant's fear was reasonable under the circumstances because of the history of the SHD members in being controlling and threatening the defendant previously. The duress defense was also supported by evidence that the defendant suffered from drug addiction and dissociation at the time of the murder, which would have impaired her thinking. Prejudice was found because counsel's actions "effectively" left the defendant with "no defense to the charged crimes," which allowed her conviction on felony murder despite her "concedely peripheral involvement" in the victim's death.

Woods v. Commissioner of Correction, 857 A.2d 986 (Conn. App. 2004). Counsel ineffective in murder case for failing to obtain an expert evaluation and to request an extension of time for notifying the state of the intent to present expert testimony in support of a diminished capacity defense. Counsel knew that the defendant was "slow" and was informed by another attorney, after jury selection began, that the defendant may have organic brain damage. Counsel did not seek expert assistance or a continuance because she believed it was "too late" and "felt that the court would have denied such a request." Counsel's conduct was deficient because the court had the discretion to fashion a remedy and a denial of the request would have preserved the record for appeal. Prejudice found because, if counsel had performed adequately, the jury would have heard expert testimony supporting diminished capacity and a lack of intent to commit murder.

Yarbrough v. State, 871 So. 2d 1026 (Fla. App. 2004). Counsel ineffective in sexual battery case, where the defense asserted consensual intercourse, for failing to properly investigate and secure the testimony of a witness who would have testified that the alleged victim had told her on several occasions that she had a sexual desire for the defendant and hoped that he would leave his wife. Counsel knew about the witness 10 months prior to trial and that she was in jail at that time, but counsel did not attempt to interview her until one month prior to trial when she had moved out of state. Although the witness spoke to counsel by telephone, counsel did not attempt to depose her or subpoena her for trial. Counsel's conduct was deficient and the defendant was prejudiced.

People v. Briones, 816 N.E.2d 1120 (Ill. App. 2004). Counsel ineffective in damage to property case for failing to call the defendant to testify after promising the jury that the defendant would testify and failing to object to an erroneous witness identification instruction. Although counsel's conduct is presumed to be sound trial strategy, when counsel promised that the defendant would testify and then changed his mind, "it was counsel's responsibility to evidence in the record that she was not deficient, i.e., that the determination was a result of the defendant's fickleness or of counsel's sound trial strategy due to unexpected events." Counsel was also ineffective in accepting an erroneous instruction even though she initially submitted a proper instruction. The court also cited five other areas of deficient conduct and, "in conjunction with" with the other errors, found cumulative prejudice.

People v. McMillin, 816 N.E.2d 10 (Ill. App. 2004). Counsel ineffective in driving under the influence case for: failing to object to inadmissible hearsay that contradicted the defendant's statement that another man was driving; failing to object to the prosecutor's improper argument about missing defense witnesses; failing to object to the prosecutor's argument expanding the evidence; failing to object to the prosecutor's argument of prior consistent statements (which were not in evidence) by an officer; introducing the defendant's prior convictions, including two prior DUI convictions; and failing to object to the prosecutor's cross-examination concerning a charge for which the defendant was never tried or convicted. Prejudice found based on the "cumulative effect" of counsel's errors.

People v. Lemke, 811 N.E.2d 708 (Ill. App. 2004). Counsel ineffective in first-degree murder bench trial for failing to present the possibility of a conviction for involuntary manslaughter. The defendant was charged with the shooting death of his step-son who was both intoxicated and arguing. The defendant asserted that the shooting was accidental and there was sufficient evidence to establish involuntary manslaughter rather than murder. The court found that counsel's deficient conduct could not adequately be explained by an "all-or-nothing" strategy here because the evidence presented by the defendant could not have supported a finding of not guilty. Prejudice found.

Montgomery v. State, 804 N.E.2d 1217 (Ind. App. 2004). Counsel ineffective in arson and fraud case for failing to subpoena two of the State's expert witnesses when the State did not call the experts to testify. Alternatively, counsel was ineffective in failing to request a continuance in order to obtain the testimony of these witnesses. The defendant was convicted of burning down his own home. His girlfriend said he told her he was going to kill her dog and burn down the house. A police investigator, with no formal fire pattern recognition training, concluded that two fires had been set in the house. No accelerants were found. Two insurance company investigators concluded that the fire had been set, one could not find evidence of a second fire, and the other could not rule out the extension cord as a source of the fire. The state subpoenaed these investigators, but did not call them to testify. Defense counsel had not subpoenaed the witnesses and was unable to serve them in time to testify at trial. Counsel did not move to continue the trial though. Counsel read a portion of the second investigator's deposition. Although counsel had also deposed the other investigator, he did not read any portion of that deposition to the jury. Counsel's conduct was deficient in failing to subpoena these witnesses or, alternatively, in failing to move for a continuance in order to obtain their testimony. Prejudice was found because both of these experts contradicted the opinions of the State's fire expert and were consistent to some extent with the defense expert that the fire was caused by an electric cord and the "second" fire was a natural "drop down fire." Where there was only circumstantial evidence of guilt and a "battle of experts," corroborating expert testimony would have been particularly powerful. The introduction of one of the depositions was an inadequate substitute for live testimony when the only reason for the witness' unavailability was counsel's failure to serve a subpoena.

State v. Davis, 85 P.3d 1164 (Kan. 2004). Counsel ineffective in kidnaping and attempted rape case for failing to seek a competence evaluation and failing to understand and adequately present a mental state defense. The defendant suffers from schizophrenia and had been committed to psychiatric hospitals 31 times since age 13. His last release was two months prior to the offenses. Following his arrest, he was found to be incompetent and treated in a hospital for six months before competence was restored. He was found competent in May and new counsel was appointed in August. Counsel did not seek a competence evaluation prior to the November bench trial. Counsel was ineffective in failing to seek a competence evaluation because the defendant's letters to him were at times incoherent and clearly revealed confusion about the defense. If counsel had investigated, he would also have discovered that the defendant was not taking his medications after his return to the county jail. He had also reported an increase in hallucinations in the months prior to trial. Counsel was also ineffective in presenting a defense. Kansas has abolished the insanity or diminished capacity defense, but allows a defense that the defendant "lacked the mental state required as an element of the offense charged." During trial, counsel argued insanity and presented an expert that was also not familiar with the state law requirements. Moreover, the expert testified, consistent with his pretrial report, that the defendant's ability to control his behavior was compromised,

but he was capable of forming the intent required for the crimes. Thus, because counsel was unfamiliar with the standards and did not adequately prepare his own expert, counsel presented the expert's testimony that "destroy[ed] the very defense he was attempting to establish."

State v. Peterson, 857 A.2d 1132 (Md. App. 2004). Counsel was ineffective in murder case for failing to prepare and present evidence of battered spouse syndrome. The defendant was charged with killing her husband. A defense expert testified that the defendant was suffering from bipolar disorder with psychotic features, had been physically abused throughout the marriage, and thought she was in imminent danger of being killed. Although counsel had discussed presenting a defense based on battered spouse syndrome and the expert would have testified in support of this defense, counsel did not ask any questions on this topic. Counsel's conduct was deficient because evidence of battered spouse syndrome would have supported a defense of imperfect self-defense, which would have negated the element of malice and reduced the offense to manslaughter. If counsel had adequately developed and presented the evidence, the jury would have learned of more than 20 years of physical and emotional abuse of the defendant by the victim. In the months leading up to the shooting, there was an instance of physical abuse and escalating daily threats to rape and kill the defendant. Counsel was aware of much of this information and presented some of this evidence, but argued insanity and imperfect self-defense without presenting the evidence of the syndrome because counsel "did not appreciate" that this evidence was a necessary predicate to the defense of imperfect self-defense. Thus, "[t]he decision not to introduce battered spouse syndrome evidence was not a product of trial strategy; it was a consequence of trial counsel's not being adequately familiar with the law." Prejudice found because, without the evidence of battered spouse syndrome, the trial court refused an instruction on the defense of imperfect self-defense. If the evidence had been presented and the instruction given, there is a reasonable probability that the outcome would have been different.

People v. Grant, 684 N.W.2d 686 (Mich. 2004). Counsel ineffective in criminal sexual conduct case for failing to adequately investigate and substantiate the defendant's primary defense. The defendant was charged with three counts of sexual abuse on his girlfriend's two nieces. The first alleged incident to the older girl resulted in physical injury, but was reported at the time as a bicycle accident. A year later, another allegation involving both girls arose and the older girl asserted that her previous injury was due to assault rather than a bicycle accident. Counsel's conduct was deficient in failing to investigate to seek evidence concerning the accident because counsel was aware of the girl's initial report, the initial doctor's finding that the injury was more consistent with a bicycle accident than abuse, and the defendant's insistence of innocence. Although the defendant provided counsel with a number of potential witnesses, counsel did not adequately pursue the matter. Prejudice established because adequate investigation would have revealed that two cousins of the girls witnessed the bicycle accident and would have testified

accordingly. If counsel had been able to establish that the physical injury had been due to the accident, it would have called the credibility of the alleged victim's into question and the other allegations involved only a credibility contest between them and the defendant. Thus, the court found a reasonable probability of a different outcome.

2003: *State v. Wakisaka*, 78 P.3d 317 (Haw. 2003). Counsel was ineffective in a second degree murder case for failing to object to the prosecution's improper argument commenting on the defendant's failure to testify and in counsel's cross-examination of a police officer during which counsel intentionally solicited the officer's opinion of the defendant's guilt in evidence. Counsel knew that the officer's opinion was that the defendant murdered his wife and, despite the court's warning and the prosecution's objection to the line of questioning, counsel insisted on eliciting the officer's testimony and did not move to strike the officer's testimony even though the court informed counsel that it would in fact strike the testimony if counsel desired. Counsel's stated reason for the questioning was that he wanted to show that the officer was working in conjunction with the victim's daughters to collect evidence and, therefore, the officer was biased. The court found that while this line of questioning may well have been part of counsel's misguided strategy, his conduct was an error reflecting defense counsel's lack of skill or judgment. The court found prejudice because counsel's errors and omissions resulted in "the possible impairment of a potentially meritorious defense" that the victim had in fact committed suicide.

***Law v. State*, 797 N.E.2d 1157 (Ind. App. 2003).** Counsel was ineffective in child molesting and sexual misconduct with a minor case for failing to present evidence of the victim's age at the time of the offenses. The victim testified that the defendant began sexually abusing her when she was ten years old and the defendant was charged with multiple counts. One of the elements of a number of the offenses that the defendant was charged with was that the victim was under twelve years old when the crimes occurred. There was a significant difference in sentencing range for a child under twelve and a child over twelve. While the defendant presented a theory that he was not guilty, the court found that defense counsel's failure to present evidence that the victim was over twelve years old at the time of the alleged offenses was deficient in light of the sentencing consequences. The court also found that counsel made no strategic decision to avoid the apparent contradiction in defense theories because counsel had intended to introduce evidence of the victim's age through the defendant's wife and had not obtained other evidence to establish the victim's age because he did not anticipate that the defendant's wife would refuse to give this testimony. While the court found no prejudice with respect to some of the counts, the court did find prejudice with respect to several counts of the conviction and reversed in part.

***State v. Thiel*, 665 N.W.2d 305 (Wis. 2003).** Counsel was ineffective in sexual exploitation by a therapist case for numerous deficiencies. The alleged victim asserted

that she had repeated sexual relations with her psychiatrist and had been to his house more than one hundred times. When she first went to police, she also took a vial of semen that she claimed was the defendant's, but DNA testing revealed that it was not his. She explained that she had hoped to force him to confess with this false evidence. An assistant prosecutor, who had also had a sexual relationship with the alleged victim, testified that she had informed him of the relationship long before she reported it to police. The defendant's ex-wife, who had also been a former patient, and another former patient provided "other acts" evidence in corroboration. The defendant testified and denied the allegations and asserted the defense theory that the alleged victim made the complaint against him because he refused to assist her in filing for government disability benefits. He claimed that she had been to his house only three times when she showed up unannounced, but he had not documented these visits in her chart. The state called the victim's new psychiatrist in rebuttal to say that any contact with patients should be documented, but this was his personal opinion and not a standard of care requirement. Counsel's conduct was deficient in failing to read police reports and medical notes that had been provided in discovery. Counsel's conduct was also deficient in failing to conduct an independent investigation when they already knew of the lie concerning the semen. Finally, counsel's conduct was deficient in failing to file a motion that would have allowed the defense to present relevant evidence of the alleged victim's prior personal and medical history. If counsel had read the discovery documents, counsel would have discovered and been able to use numerous items that would further impeach the alleged victim, including giving the wrong address for the defendant, and even items consistent with the defense theory that her motive was anger at the defendant for not helping the victim to seek disability benefits. They would also have discovered that the statement to the assistant prosecutor used as a prior consistent statement was made only shortly before her report to police, which would have rendered this statement likely inadmissible. If counsel had investigated they would have discovered that the alleged victim had no driver's license during the time she claimed to have driven to the defendant's house 100 times, she had difficulty finding the defendant's house when police asked her to show them, none of the defendant's neighbors recalled seeing her, and she had numerous phone calls with the assistant prosecutor at his home and his work, which was inconsistent with the way that relationship had been portrayed in court. If counsel had filed the motion, the state may not have called the rebuttal witness due to concern that the defense could use his notes to impeach the credibility of the alleged victim further. No strategy could explain the failure to read discovery or to independently investigate when counsel knew the alleged victim had already lied about the semen. Likewise, counsel's purported strategy for not filing the motion prior to trial was based on "an erroneous view of the law" and, therefore, could not be a reasonable strategy. While finding that the deficiencies found did not "individually prejudice[]" the defendant to such a degree as to warrant a new trial, the court concluded "that the cumulative effective" of the deficiencies warranted a new trial, *id.* at ____, in this case, which "was a classic instance of the 'he-said-she-said' dilemma," *id.* at _____. While counsel had performed well in most areas

*Capital Case

of representation, “the proper inquiry for assessing prejudice is not the totality of counsel’s performance, but rather the effect of counsel’s acts or omissions on the reliability of the trial’s outcome.” *Id.* at ____.