

**SUMMARIES OF SUCCESSFUL  
INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS  
POST-*WIGGINS V. SMITH* INVOLVING  
ONE DEFICIENCY AT TRIAL**

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## 1. JURY SELECTION

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

**2006:** *Virgil v. Dretke*, 446 F.3d 598 (5th Cir. 2006). Counsel ineffective in causing bodily injury to an elderly person case for failing to challenge for cause two jurors who expressly stated an inability to be fair and impartial. One had close relationships with law-enforcement officers and one was influenced by his mother's mugging. Counsel's failure to challenge these jurors for cause or to remove them with peremptory challenges was deficient and there was no "suggestion of a trial strategy" for counsel's inaction. Prejudice found because both jurors admitted bias. In addition to their own bias, the court could not "know the effect" of their bias on the remaining jurors. Under AEDPA, the state court's decision to the contrary was an unreasonable application of clearly established Federal law as determined by the Supreme Court.

**2004:** *Miller v. Webb*, 385 F.3d 666 (6th Cir. 2004). Counsel ineffective in murder case for failing to adequately question or challenge actually biased juror. During voir dire, a juror stated that she knew the state's key witness, who was the only eyewitness and had also been shot. The juror knew her through the juror's ministry and Bible Study in the local jail. She stated she would be "partial" to the witness and had sympathy for her. While she stated that she "believed" she could be fair, she qualified this by stating, "I do have some feelings about her." Counsel did not follow-up with questions or challenge this juror. Counsel's conduct was deficient and was not justified by strategy because counsel believed the juror would know the witness was unworthy of belief and would know that she was a drug addict and understand that culture. The court held, contrary to the state court, that "the decision whether to seat a biased juror cannot be a discretionary or strategic decision" because it amounts to "a waiver of a defendant's basic Sixth Amendment right to trial by an impartial jury." Under the AEDPA, the state court's finding that counsel's conduct was not deficient was an unreasonable application of Strickland. Even if strategy could justify the decision, counsel's strategy was unreasonable here where the juror clearly did not indicate a disbelief in the witness' credibility or knowledge of her being a drug addict. To the contrary, the juror indicated that she was sympathetic to the witness. Prejudice presumed because the presence of a biased juror cannot be harmless.

*Quintero v. Bell*, 368 F.3d 892 (6th Cir. 2004), *cert. denied*, 544 U.S. 936 (2005). Counsel was ineffective for failing to object to the presence of seven jurors who had served on the juries that convicted his co-conspirators. Prejudice was presumed under *Cronic*. *Bell v. Cone* was distinguished "[b]ecause the alleged deficient performance in Cone affected only specified parts of Cone's trial." Here, "allowing seven jurors who had convicted petitioner's co-conspirators to sit in judgment of his case surely amounted to an abandonment of 'meaningful adversarial testing' throughout the proceeding." The Court

\*Capital Case

reinstated its prior opinion, *Quintero v. Bell*, 256 F.3d 409 (6th Cir. 2001), which had been vacated and remanded for reconsideration in light of *Cone*.

**b. State Cases**

**2009:** *White v. State*, 290 S.W.3d 162 (Mo. App. 2009). Counsel was ineffective in drug and child endangerment case for failing to move to strike a juror who stated that he could not be fair, but ended up serving on the jury. The juror stated and then reiterated during voir dire, based simply on the nature of the charges: “I don't believe I could be fair for the defendant.” Later the juror indicated that he did not want to serve as a juror. Nonetheless, counsel did not challenge the juror and he served for the trial. Counsel cited “an oversight and not trial strategy” for the conduct. “Where trial counsel fails to strike a biased venireperson who ultimately serves as a juror, a post-conviction defendant is entitled to a presumption of prejudice.”

Here, because there were no follow-up questions to [the jurors] addressing his assertion that he could not be fair, there was not even an opportunity to give an unequivocal assurance of impartiality. Accordingly, neither the State, defense counsel, nor the trial court rehabilitated [him], and he was not qualified to serve as a juror.

Prejudice presumed.

**2008:** *Titel v. State*, 981 So. 2d 656 (Fla. App. 2008). Counsel ineffective in sexual battery and kidnaping case for failing to challenge a clearly biased juror, who stated that there was an incident of incest in his family and that he believed in execution of rapists. Counsel's notes mistakenly attributed these comments to a different juror that counsel did strike. The biased juror, unlike other jurors who reported rapes in their families, was not questioned further about whether he could be fair and was seated even though the defense had one remaining peremptory challenge. Prejudice found because the juror was biased.

**2007:** *James v. State*, 222 S.W.2d 302 (Mo. App. 2007). Counsel ineffective in second-degree murder and armed criminal action case for failing to challenge for cause a venireperson who indicated that she would draw a negative inference from a defendant's failure to testify in his own defense. If counsel had objected, the trial court would have been required to strike the juror. Counsel's conduct was not explained by any strategy. Prejudice presumed because the defendant was “tried in violation of his constitutional right to an impartial jury.”

\**State v. Loftin*, 922 A.2d 1210 (N.J. 2007). Trial and appellate counsel were ineffective in failing to adequately address the presence of a possibly racially biased juror, who had predetermined guilt before hearing all the evidence, in the jury panel during the trial

although he ultimately served as an alternate and did not deliberate on findings and a separate jury was empaneled under state law for sentencing. The juror, who was white and worked at the post office, admitted making comments early in the trial to other postal workers that he was “going to buy a rope to hang” the defendant, a black man charged with killing a white man. He denied, however, that the comments were intended to be racist or that he had already formed an opinion of guilt. Trial counsel sought to remove the juror, which was denied, but failed to request that the remainder of the jury be questioned to determine whether this juror had made similar comments to other jurors. The trial court ultimately ordered that the juror would serve only as an alternate. Appellate counsel failed to assert error in the trial court’s failure to remove the juror and to assert as plain error the court’s failure to question the remaining jurors. Under state law, the court found “a decided racial undertone [in the juror’s comments] that evokes an era of vigilante and mindless mob justice that reigned during a dark period in American history.” *Id.* at 1219. Likewise, even without racial bias, the juror violated the court’s instructions not to discuss the case with others and not to determine guilt prior to deliberations. The court held that prejudice would be presumed and that “even allowing a non-deliberating juror suspected of racial bias to sit on a panel will lead to a presumption that other members of the panel may have been tainted.” *Id.* at 1222. Thus, the court presumed that the biased juror shared his views with fellow jurors and, thus, it did not matter that he did not deliberate. Although trial and appellate counsel’s ineffectiveness was asserted under both the state and federal constitutions, the court addressed the merits under only the state constitution but still applying the *Strickland* standard. Deficient conduct found because the need for the removal of the predisposed juror and a voir dire of the remaining jurors should have been self-evident.” Counsel’s conduct was not excused by strategy. Appellate counsel was also ineffective because failure to assert these issues on appeal deprived the court of the opportunity to address the issue, which would have required reversal on direct appeal.

**2006:** \**Anderson v. State*, 196 S.W.3d 28 (Mo. 2006), *cert. denied*, 549 U.S. 1223 (2007). Counsel ineffective in capital case for failing to move to strike, for cause, prospective juror who, during voir dire, indicated he would vote for death unless the defense could convince him otherwise. Counsel’s failure was not a decision based on trial strategy and instead occurred because of a note-taking error. Moreover,

No competent defense attorney would intentionally leave someone on the jury who indicated a strong preference for the death penalty and also stated that he would require the defense to convince him that death was not appropriate even though he was aware that the burden of proof remains with the state. Any strategy that would place someone with such a predisposition on the jury is wholly unreasonable.

Prejudice established because this was a structural error.

- 2005:** *State v. Lamere*, 112 P.3d 1005 (Mont. 2005). Counsel in aggravated assault case was ineffective in failing to question a prospective juror on whether she could remain impartial even though her daughter was a paralegal assisting the prosecutor (even in the courtroom during the trial) and someone else in her family was retired from the police force. The juror disclosed this information on her questionnaire but, due to oversight, counsel did not question her about it. When counsel learned of the problem during trial and moved to excuse the juror, the motion was denied. Counsel's conduct was deficient because the juror's relationship to her daughter obviously raised legitimate questions about her impartiality. Because errors in jury selection are "structural errors," prejudice was presumed.
- 2004:** *State v. Garza*, 143 S.W.3d 144 (Tex. App. 2004). Counsel ineffective in aggravated sexual assault case for failing to challenge a juror for cause or to use a peremptory strike even though the juror (who became foreman) admitted that he would be biased because a family member had been the victim of sexual assault and admitted that he would believe a police officer rather than the defendant simply because it was a police officer. Counsel admitted that he had no strategy and failed to challenge the juror only because he was distracted and simply made a mistake after learning shortly before that his wife had been diagnosed with cancer. Even though there might have been a hypothetical plausible strategy for not challenging the juror, the record here clearly established no strategy. Prejudice found because "one improper juror destroys the integrity of the verdict." Finally, the court rejected the state's argument that the court should consider the fact that the defendant was an experienced criminal defense counsel as a factor in the ineffective assistance claim.
- 2003:** *Fortson v. State*, 587 S.E.2d 39 (Ga. 2003). Counsel was ineffective in a murder case for using a peremptory strike on a juror that had already been excused for cause by the trial court but inexplicably remained on the strike list. Defense used his entire allotment of peremptory strikes. Because Georgia law requires automatic reversal when a defendant is required to use a peremptory strike on a juror that should have been excused for cause, the court found prejudice under *Strickland*.

## 2. INDICTMENT

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

**2005:** *United States v. Jones*, 403 F.3d 604 (8th Cir. 2005). Counsel ineffective in possession of firearm case for failing to challenge indictment as multiplicitous where the indictment included two counts of possessing the same firearm as two different dates. Counsel's conduct was deficient because "a reasonably competent lawyer would be expected to know" that this was one offense because the evidence established that the possession was continuous. Prejudice found even though the sentences given were concurrent because: (1) the additional conviction could increase future sentences or be used to impeach the defendant's credibility in future proceedings; and (2) the defendant had to pay an additional \$100 statutory special assessment due to the second conviction.

**2004:** *Young v. Dretke*, 356 F.3d 616 (5th Cir. 2004). Counsel was ineffective in murder case for failing to move to dismiss untimely indictment. Under a state statute effective at the time of the defendant's trial, dismissal was required and re-prosecution was barred. The statute has since been amended to remove the bar to further prosecution following dismissal. The state court found that counsel's conduct was deficient and that if counsel had moved for dismissal, petitioner could not have been tried or convicted. Nonetheless, the state court denied relief finding that under *Lockhart v. Fretwell*, there was no prejudice because the state court believed that prejudice was to be determined by reference to current law rather than the law at the time of the deficient performance. Because the state court failed to properly distinguish *Fretwell* and disregarded the interpretation of *Fretwell* in *Williams v. Taylor*, the state court's decision was both contrary to and an unreasonable application of Supreme Court precedent, under the AEDPA. The court distinguished *Fretwell* because, in *Fretwell*, the petitioner sought to rely on a judicial decision of a court of appeals, which was not a final statement of law established by the Supreme Court. In this case, however, the defendant sought to rely on a statute, which is a final statement of the law. Because *Strickland* was controlling rather than the limited exception of *Fretwell*, petitioner was entitled to relief.

### b. State Cases

**2009:** *People v. Peyton*, 98 Cal. Rptr. 3d 243 (Cal. App. 2009). Counsel ineffective in child sexual assault case for failing to object to the filing an amended information at the close of the prosecution's case, which added a fifth count, when no preliminary hearing had been held on that count or waived by the defendant.

### 3. MOTIONS AND NOTICE

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

**2011:** *Tice v. Johnson*, \_\_\_ F.3d \_\_\_, 2011 WL 1491063 (4th Cir. Apr. 20, 2011). Counsel in murder and rape case ineffective for failing to move to suppress the petitioner's confession. The petitioner was one of the "Norfolk Four." The initial suspect in the murder, who lived nearby, was Joseph Dick. After making numerous contradictory statements, Dick testified that he and six other men, including the petitioner and Omar Ballard, participated in the rape and murder. The petitioner also confessed saying that he and five other men (Ballard not included) committed the crimes. The petitioner's statement, however, contained three incontrovertible errors or omissions of fact: (1) while he claimed forced entry, there was no evidence of such; (2) while he said he ejaculated, the only DNA evidence at the scene belonged to Ballard; and (3) while he did not name Ballard as an accomplice, Ballard undeniably was involved. His was the only DNA, he was convicted of severely beating a woman and raping a 14-year-old girl in the area within just weeks of this crime, and he plead guilty to the murder and rape and agreed to testify against his codefendants in order to avoid a capital murder charge. The investigatory process "was characterized by grim repetition." Initially, based on Dick's statements, Williams was the target. He confessed to the murder stating that he acted alone. After the DNA did not match him, the police went back to Dick who implicated himself. He then implicated Wilson. Then Tice. And then Tice implicated himself and three others, who ultimately had their charges dismissed. No one implicated Ballard and he was not even a suspect until after he wrote a letter while in confinement incriminating himself. He then confessed and admitted that he was the sole actor in the rape and murder. Tice was initially questioned for about an hour before he agreed to and did undergo a polygraph examination. After that three hour examination, Tice's interrogation continued and the officer took written notes, which included: "He told me he decide[d] not to say any more . . . . I told him he would be given time to think about it." A different officer resumed the questioning 13 minutes later without giving fresh *Miranda* warnings. Tice then confessed and signed a confession. The state court held that Tice had unambiguously invoked his constitutional right to stop questioning, that his confession would have been suppressed had a motion been made, and that counsel had performed deficiently in failing to so move. The state court found no prejudice, however, based on Dick's testimony. While the case was reviewed under AEDPA, the federal court first conducted its own independent review as "our perception of how reasonably another court applies the law in a particular case is best informed by conducting our own, independent application so that we may gauge how the two compare." Counsel's conduct was deficient as the detective's notes were in the court record for more than three years prior to the retrial and defense counsel had a copy of the notes in his file. "As with any record of an accused's statements made in police custody, and especially a statement volunteered without the benefit of a lawyer's advice, the notes should have been parsed to

ascertain not only the havoc the accused might have wreaked upon his own defense, but also any boon he may have unwittingly bestowed.” The duty to investigate does not apply “only to facts yet unknown, as opposed to those already in the litigation file.” A reasonable investigation of counsel’s own file would have revealed the officer’s notes, which should “give pause to even the greenest of criminal defense lawyers.” Counsel could not remember seeing these notes, let alone any strategy not to move to suppress the confession. “One might think that such an important and irrevocable decision concerning trial tactics would have left an indelible imprint upon the memory of the strategist.” Given this, the Court rejected the State’s “invitation to engage in after-the-fact rationalization of a litigation strategy that almost certainly was never contemplated” and concluded that counsel simply overlooked the notes. Due to counsel’s “otherwise laudably effective and competent” representation, the court was reluctant to find deficient conduct based on this “singular instance” of deficient conduct but did so because “[t]he error was of sufficient magnitude” to be “constitutionally deficient within the meaning of *Strickland*.” The court also found that the motion to suppress would have been granted if filed under *Michigan v. Mosley*, 423 U.S. 96 (1975). The invocation of the right to cease questioning was “clear and unequivocal” and a “reasonable police officer under the circumstances” would have ceased questioning. Prejudice also found. Dick’s credibility was shaky at best. His story evolved from denying all involvement, to merely being present, to being an actor, back to mere presence, and then adding additional actors including Tice. A reasonable jury would have grave doubts about his veracity. The state court in finding no prejudice “misapprehended the *Strickland* standard” by essentially finding that because Tice still could have been convicted there was no prejudice. The prosecution even recognized the relative weights of the evidence by focusing its arguments on Tice’s confession rather than on the persuasiveness of Dick’s testimony. Moreover, the jury’s questions during deliberations indicated that it was struggling to accord the proper weight to the confession. While it “is generally tricky business to try to divine a jury’s thought processes by considering only its questions and speculating as to the reasons therefor,” the Court found it “safe to say” that the jury did not consider Dick’s testimony to be conclusive evidence of guilt.

**2010:** *Hodgson v. Warren*, 622 F.3d 591 (6<sup>th</sup> Cir. 2010). Counsel ineffective in attempted murder trial for failing to seek an adjournment when an eyewitness with exculpatory testimony failed to appear after being subpoenaed. The state had 4-5 eyewitnesses implying that petitioner was the shooter but none could say affirmatively that they saw a gun in his hands or saw him fire the shots. The physical evidence, shell casings found away from where petitioner was, was inconsistent with the testimony that petitioner was the shooter. The eyewitness who failed to appear would have testified that she was only a few feet from petitioner at the time of the shooting, that she could see his hands, and she could state affirmatively that he did not have a gun. This witness also “had no obvious motive to lie.” Reasonably competent counsel would “do as much as humanly possible” to ensure the jury heard this witness’ testimony. Thus, counsel’s conduct was deficient in

failing to seek an adjournment to locate this witness. Under AEDPA, the state court's finding that counsel had a strategic reason for not calling her was unreasonable. Court had refused the prosecution's request to waive presentation of her testimony, which made clear that counsel "did not make a strategic choice to forgo her testimony." The state court's decision was also unreasonable in finding that her testimony would have been cumulative. Prejudice established as this witness if believed would have impeached the government's eyewitness and undercut the prosecution's case.

***Bellizia v. Florida Dept. of Corrections***, 614 F.3d 1326 (11<sup>th</sup> Cir. 2010). Counsel ineffective in heroin trafficking of more than 28 grams case for failing to move for a judgment of acquittal because the state tested and weighed only one of the 32 pellets removed from petitioner's stomach and simply assumed the remaining pellets were heroin of similar weights (9.1 grams each) to charge petitioner with 28 grams or more in order to apply a 25 year mandatory minimum sentence. Under clear state law, although circumstantial evidence can be used to establish "the identity of a controlled substance, it cannot be used to establish the weight of a controlled substance." Prejudice established because counsel's error meant that petitioner faced a mandatory minimum of 25 years rather than three years based on the weight of the one and only pellet that was actually weighed.

**2009:** ***Gentry v. Sevier***, 597 F.3d 838 (7th Cir. 2009). Under AEDPA, counsel ineffective in burglary and theft case for failing to move to suppress evidence seized from the defendant and his wheelbarrow. Police were investigating a "suspicious person" report when they encountered the defendant pushing a wheelbarrow with a rain coat partially covering it. Although officers did not have a reasonable suspicion to warrant a *Terry* stop, they conducted one and patted the defendant down. During the pat-down, a garage door opener was found. By locating the garage the opener worked with and by searching the wheelbarrow officers obtained additional evidence against the defendant. Counsel's conduct was deficient because the Fourth Amendment issues "should have been apparent" to counsel. Moreover, the defendant even filed his own *pro se* motion to suppress the evidence, but counsel still did not assert the issue. Prejudice established because a motion to suppress was meritorious. The state court unreasonably applied federal law by concluding the evidence was admissible despite the improper *Terry* stop based on the inevitable discovery doctrine. Because there were no intervening circumstances, all of the evidence obtained during the encounter was inadmissible as fruit of the poisonous tree.

**2007:** ***United States v. Weathers***, 493 F.3d 229 (D.C. Cir. 2007). Counsel ineffective for failing to challenge multiplicitous counts in case arising out of the defendant's attempts to arrange for the murder of several witnesses and a prosecutor on pending rape charges. Two of the counts related to the prosecutor. Under the U.S. Code, the defendant was convicted of threatening a federal official. Under D.C. law, he was convicted of

threatening to injure a person. Counsel's conduct was deficient and not explained by strategy. Prejudice found because there was a reasonable possibility that a challenge would have been granted. The conviction under D.C. law was vacated and the case remanded for resentencing.

**2004:** *United States v. Hilliard*, 392 F.3d 981 (8th Cir. 2004). Counsel ineffective in illegal firearms case for failing to timely file a post-trial motion. Following the defendant's conviction on only one of five charges even though the evidence for all five overlapped, the court informed counsel of concerns about the validity of the jury verdict and reminded counsel to file post-trial motions. Although only allowed seven days to do so under the rules, counsel did not file until 41 days after the verdict and the motion was dismissed as untimely. Counsel's conduct was deficient and was "a class dereliction" of duty. Prejudice was found because the district court found that the motion would have been granted because "a miscarriage of justice was likely done here."

*Owens v. United States*, 387 F.3d 607 (7th Cir. 2004). Counsel was ineffective in drug case for failing to adequately move to suppress evidence seized pursuant to a search of the defendant's house. The evidence was seized pursuant to a warrant based on a barebones affidavit, signed by a detective, that stated that an informant had bought some crack from the defendant at the house three months earlier. There was no indication of the quantity of crack or the reliability of the informant. Counsel moved to suppress the evidence because the affidavit did not establish probable cause to believe that a search of the same premises three months later would reveal evidence. The court held that the affidavit was insufficient and the search could not be saved by *United States v. Leon*, 468 U.S. 897 (1984), because the officers that conducted the search could not have reasonably believed that the warrant was supported by probable cause. Although counsel moved to suppress the evidence, counsel's conduct was deficient because counsel argued that the house did not belong to the defendant, which allowed denial of the motion on the grounds that the defendant had no standing to contest the search. The evidence that the house was the defendant's was overwhelming and the lawyer's argument otherwise, which "forfeit[ed] a compelling ground for excluding evidence essential to convict his client was therefore a blunder of the first magnitude." *Id.* at 608. Prejudice was found because if counsel had acknowledged that it was the defendant's house, the motion to suppress would have been granted and the defendant would have been acquitted. Alternatively, even if the court had denied the motion to suppress, counsel could have still argued that the house was not the defendant's under the rule of *Simmons v. United States*, 390 U.S. 377 (1968), which prohibits use of the defendant's suppression hearing testimony during the trial.

The "prejudice" essential to a violation of the Sixth Amendment right to the effective assistance of counsel is not being convicted though one is innocent, although that is the worst kind; it is being

convicted when one would have been acquitted, or at least would have had a good shot at acquittal, had one been competently represented.

*Id.* at 610. In reaching this conclusion, the court overruled its prior holding in *Holman v. Page*, 95 F.3d 481 (7th Cir. 1996) (failure to make a Fourth Amendment objection to the admission of evidence cannot amount to ineffective assistance of counsel if the evidence was reliable, so that its admission, even if improper, created no risk that an innocent person would be convicted).

***Clinkscale v. Carter***, 375 F.3d 430 (6th Cir. 2004), *cert. denied*, 543 U.S. 1177 (2005). Counsel ineffective in murder and robbery case (that was a capital case but jury gave life) for failing to timely file notice of an alibi defense, which resulted in the trial court's exclusion of the evidence. The defendant had informed counsel immediately of his alibi and the defense investigator reported that there were at least three alibi witnesses. Nonetheless, counsel gave only "verbal notice" a few days before trial of a "possible alibi." Only after the jury was empaneled did counsel file a written notice of alibi identifying the witnesses. Counsel's conduct was deficient because "there is nothing reasonable about failing to file an alibi notice within the time prescribed by the applicable rules when such failure risks wholesale exclusion of the evidence." Prejudice found because the state's evidence was weak and the trial amounted to a credibility contest between the alleged victim/witness and the defendant. The exclusion of the alibi witnesses, who would have corroborated the defendant's testimony, was prejudicial in these circumstances. Although only one of the alibi witnesses provided an affidavit, there is no requirement that a defendant claiming ineffectiveness of counsel in these circumstances "produce an affidavit from the potential alibi witnesses documenting the substance of their anticipated testimony." Here, the investigator's notes and affidavit established the facts that the remaining witnesses could have testified to.

**2003:** ***Joshua v. Dewitt***, 341 F.3d 430 (6th Cir. 2003). Trial and appellate counsel were ineffective in drug case for failing to move to suppress evidence. The defendant was stopped by a highway patrolman for speeding. The highway patrolman did a license check on the defendant and learned that there was an entry in the station's "read and sign" book, which contained police intelligence information. The entry in the book reported that the defendant was a known drug courier who transported illegal narcotics between several cities. Based on this information, the defendant was detained for approximately forty-two minutes in order to allow time for a drug dog to come to the scene. When the dog arrived, it alerted, and a large quantity of cocaine was found. The defendant's girlfriend then told the police that the drugs belonged to the defendant. Prior to trial, counsel moved to suppress the evidence solely on the basis that the length of the traffic stop alone required suppression. The trial court denied the motion, and the defendant entered a no contest plea. The court found that counsel's conduct was deficient in failing to move for

suppression under *United States v. Hensley*, 469 U.S. 221 (1985), which held that reliance on a flyer or bulletin can justify a brief detention but can do so only if the officer who issued the flyer or bulletin had articulable facts supporting reasonable suspicion that the person wanted had committed an offense. The court found a reasonable trial attorney would have raised the *Hensley* issue at trial. Prejudice was found because the state failed to offer any evidence from the officer who provided the information from the “read and sign” book and because the state had never contended that there was a justifiable basis for the entry. The court likewise found appellate counsel ineffective for failing to raise the issue on appeal under the state plain error rule. Prejudice was found because *Hensley* bars the admissibility of the evidence seized at the scene of the defendant’s arrest, including both the drugs and his girlfriend’s statement. Without this evidence, there was a substantial probability that the defendant would not have been convicted. Analyzing the case under the AEDPA, the court found that the state court decision was contrary to clearly established Supreme Court precedent in *Hensley*.

**b. U.S. District Court Cases**

**2009:** *Nelson v. Brown*, 673 F. Supp. 2d 85 (E.D.N.Y. 2009). Under AEDPA, counsel ineffective in robbery case for failing to request a remedy for the prosecution’s discovery violation. There were several eyewitnesses to the crime that made contradictory statements about whether the assailant had facial hair or not. One of these eyewitnesses had made handwritten notes shortly after the crime but the state lost these notes and, therefore, did not provide them to the defense in discovery, even though state law required disclosure of “contemporaneous descriptions of a suspect” when identification is an issue. The state’s case depended entirely on eyewitness testimony and the defendant was entitled to a remedy, such as an adverse inference instruction that the witness’ original handwritten description was not consistent with her trial testimony, but counsel failed to seek a remedy. Prejudice established because the state’s case was “remarkably weak” and this was the only alleged eyewitness that provided a consistent account of the robber’s appearance from initial statements through to trial.

*Robinson v. United States*, 638 F. Supp. 2d 764 (E.D. Mich. 2009). Counsel ineffective in drug conspiracy case for failing to file motion for new trial, even though the defendant filed a post-trial motion for judgment of acquittal, and failing to challenge the sufficiency of the evidence of the drug quantity attributable to the defendant. The defendant, who was from Indiana, was charged with his brother and others of growing a large crop of marijuana in between rows of corn on a rural farm. The government’s only evidence connecting the defendant to the farm was in January of February, which, of course, was not in the growing season. The only other evidence connected the defendant to the operation was the testimony of the defendant’s ex-sister-in-law, whose testimony was not credible in the court’s view. Another woman had also testified that the sister-in-law bragged that she lied at trial to get even with the brothers. Despite a month long trial, the

jury deliberated less than four hours before convicting all six defendants. During the trial, the defendant had moved a judgment of acquittal under Federal Rule of Criminal Procedure 29, which the Court took under advisement. After trial, counsel filed a brief in support of this motion but did not file a motion for new trial under Rule 33. Counsel's conduct was deficient because, under Rule 29, the court must consider the evidence in the light most favorable to the government. Under Rule 33, the court can consider the credibility of witnesses. Counsel's conduct was not strategy because he was unaware of Rule 33 or its standards. "A decision based on a misunderstanding of the law is not a strategic decision." Here, "counsel's failure to file the motion was not a strategic choice; it was based on ignorance of the law." Prejudice found because "the present case represents one [of] those extraordinary matters in which a motion for a new trial would have been appropriately considered and granted." Likewise, counsel's conduct was deficient in failing to challenge the sufficiency of the evidence of the drug quantity attributable to the defendant. "Again, it does not appear that it could have been a strategic decision to challenge guilt but not the amount for which the [defendant] was to be held accountable." Prejudice established because "the statutory mandatory minimum sentence in this case was tied directly to the amount of drugs charged." A successful challenge could have reduced the sentence exposure by half.

***Oliva v. Hedgpeth***, 600 F. Supp. 2d 1067 (C.D. Cal. 2009). Under AEDPA, counsel ineffective in murder case for failing to move to suppress the pretrial identification of a six year old eyewitness. A transcript of the police interview revealed that she was shown a photo lineup without being told that the lineup might not include the shooter. She thus thought that she had to pick one of the photos. After picking one, she was asked leading questions to eliminate that person. After she picked the defendant's photo, she was praised and told that she did an "awesome" job in helping to get "that bad guy" before she had even looked at the other photos. Counsel's only reason for not challenging this evidence was that he did not believe the motion would be successful. This conduct was unreasonable because the identification procedure was clearly suggestive. The state court's decision to the contrary was objectively unreasonable in that its "conclusions unreasonably fly in the face of the undisputed evidence of record." Following a finding of suggestive procedures, the central question is "whether under the 'totality of the circumstances' the identification is reliable even though the confrontation procedure was suggestive." *Neil v. Biggers*, 409 U.S. 188, 199 (1972). Here, the witness had only a "fleeting" view of the shooter and "only a very limited opportunity" to view his face. Her prior description of him fit a number of other people at the scene. She gave inconsistent descriptions of his attire. At trial, she could not identify anyone in the courtroom and even affirmatively stated the shooter was not in the courtroom. Thus, her identification was not reliable and it is reasonably probable the trial court would have excluded the pretrial identification. Without this evidence, it was also reasonably probable that the result of the trial would have been different. The only other real evidence pointing to the defendant was another identification that was not strong and indeed the witness

“displayed a notable lack of certainty” in her identification. In addition, even with the child’s pretrial identification in evidence, the jury deliberated for two and a half days and three times requested to rehear the testimony about the witness identifications.

**2008: *Showers v. Beard***, 586 F. Supp. 2d 310 (M.D. Pa. 2008). Under AEDPA, trial counsel was ineffective in murder trial for failing to present rebuttal expert testimony and appellate counsel was ineffective for failing to assert this issue on direct appeal. Petitioner was charged with the murder of her husband, who died from ingestion of liquid morphine Roxanol. The defense asserted that his death was a suicide. The state presented an expert who testified: (1) the taste of Roxanol could be disguised in food or drink, and (2) there was no evidence of forced swallowing. While counsel attempted to refute this in cross and in closing argument, the only evidence the defense presented was a lay witness to testify that the taste of Roxanol could not be masked. Counsel’s conduct was deficient because counsel had retained a forensic psychiatrist prior to trial to review the victim’s state of mind. The psychiatrist interviewed pharmacists and nurses that administered the drug, along with the pharmacist that prescribed the medication used in this case, and learned that it is difficult to disguise the taste. He informed counsel that they needed to call an expert to testify about the drug, which he could not do because he was not a toxicologist, and gave the expert names of three possible experts. “[W]hile . . . this case does not involve the death penalty, the guidelines associated with defending a death penalty case are nevertheless instructive as to the role of defense counsel in preparing a defense in a criminal case potentially involving the use of a medical expert.” Counsel failed to adequately investigate here. *Id.* (citing ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989)). Counsel knew the administration of the Roxanol was a crucial issue, but did not present a rebuttal defense expert. The cross-examination and counsel’s arguments “did nothing to negate” the state evidence because the jury was instructed that counsel’s arguments do not constitute evidence. The state court finding to the contrary “cannot be reasonably justified under *Strickland*” and the factual determination that counsel adequately performed “is plainly controverted by the evidence.” Prejudice found because counsel could have presented the testimony of a forensic pathologist to establish: (1) the taste of the Roxanol could be disguised only in a large amount of a sweet-tasting or bitter substance; (2) the autopsy report showed no evidence of any such diluting or masking substance; and (3) the autopsy report did not indicate forced swallowing. Thus, the pathologist concluded the Roxanol was swallowed voluntarily. This testimony “would have been more convincing than testimony from a close family friend” and would have made the “innocence claim . . . considerably more compelling than a simple denial of guilt.” The state court’s finding of no prejudice “cannot be reasonably justified under *Strickland*.” Appellate counsel’s decision to pursue only eight issues on appeal, excluding this issue, was deficient and prejudicial.

***Jones v. Wilder-Tomlinson***, 577 F. Supp. 2d 1064 (N.D. Iowa 2008). Under AEDPA,

counsel in drug case ineffective in failing to timely file a motion to suppress evidence flowing from the defendant's arrest, which lacked probable cause. Counsel's conduct was deficient because the only evidence supporting the arrest was a small, gram scale, but there was no testimony regarding why the scale itself was any different from other food or mail scales and there was no other evidence, other than an officer's testimony that it was drug paraphernalia, to believe that the scale was being used to weigh drugs. Because the state court did not decide this issue on the merits, *de novo* review was conducted. Counsel's conduct was deficient because counsel "either forgot about the deadline or unreasonably assumed that the . . . Court would excuse the untimeliness of her motion." Prejudice established because "the evidence would have been suppressed had a timely motion to suppress been filed."

***Massillon v. Conway***, 574 F. Supp. 2d 381 (S.D.N.Y. 2008). Counsel ineffective in trafficking case for failing to challenge, as the fruit of an illegal arrest, the out-of-court confirmatory identifications and in-court identifications of the defendant by two law enforcement officers. Counsel's conduct was deficient because the prosecution "would not have been able to meet its burden of proving admissibility by clear and convincing evidence." Prejudice established even if the trial court had excluded only the out-of-court confirmatory identifications because a year had passed with both officers engaged in more than 100 similar "buy-and-bust" operations in that time period. "With or without the in-court identifications, the evidence of petitioner's guilt, absent the out-of-court confirmatory identifications, is extremely thin."

***Flowers v. United States***, 560 F. Supp. 2d 710 (N.D. Ind. 2008). Counsel ineffective in possession with intent to distribute drugs "within 1,000 feet" of a school, playground, or public housing. Trial and appellate counsel were ineffective for not challenging the government's failure to prove that the defendant's house was within 1,000 feet of a protected area. At trial, Officer Cameron testified that the residence was within 1,000 feet of "a public park in the South Bend Parks Department." There was no other evidence on the point even though the statute requires that the government prove beyond a reasonable doubt that the area is: 1) an outdoor facility, which is 2) intended for recreation, 3) open to the public, and 4) includes three or more separate apparatus intended for the recreation of children. Counsel's conduct was objectively unreasonable and prejudicial for failing to challenge the government's inadequate proof. The court set aside the conviction on this offense and entered a conviction on the lesser included offense (omitting the "within 1,000 feet" element) and ordered resentencing.

**2007:** ***United States v. Baker***, 492 F. Supp. 2d 1167 (D. Neb. 2007). Counsel ineffective in drug conspiracy and possession of a firearm by a felon case for failing to file a motion for new trial. Following the jury's verdict, the trial court granted a judgment of acquittal on the conspiracy charge and asking for briefing on whether the court should grant of a motion for new trial. Counsel responded only that no new trial could be granted because of

double jeopardy. The government appealed and the Eighth Circuit reversed the judgment of acquittal on the conspiracy charge and remanded for sentencing. Counsel's conduct was deficient because Fed. R. Crim. P. Rule 29 provides that "if the court enters a judgment of acquittal after a guilty verdict, the court must also conditionally determine whether any motion for a new trial should be granted if the judgment of acquittal is later vacated or reversed." Here counsel did not move for a new trial, even after the court asked both parties to brief the new trial issue and instead advised the court that a new trial would be barred by double jeopardy. Prejudice established because the court would have granted "a motion for new trial or a conditional motion for new trial under Rule 29," especially since the court found that "the evidence at trial was so deficient that it warranted the granting of the motion for judgment of acquittal."

**c. State Cases**

**2011:** *State v. Brown*, 253 P.3d 859 (Mont. 2011). Counsel ineffective in DUI and other misdemeanor case for failing to move for dismissal due to untimely scheduling of trial following initial mistrial. Under state law, the state was allowed six months after a mistrial on misdemeanor charges to bring case to retrial. While counsel did not object initially when the case was scheduled outside that window, there was no waiver as the defendant had no duty to bring himself to trial. Counsel's conduct was deficient, however, in failing to move to dismiss the charges after the six month period. There was "extreme prejudice" - "a conviction instead of a dismissal."

*State v. Barlow*, 17 A.3d 843 (N.J. Sup. Ct. App. Div. 2011). Counsel ineffective for failing to assist the defendant in his motion to withdraw a guilty plea to robbery and, thereby, depriving him of counsel at a crucial stage of the proceedings. A week after the plea hearing the defendant wrote to counsel seeking to withdraw plea. Counsel took no action, but the judge, who also received a letter from the defendant held a hearing. During the hearing, counsel did not pursue the motion for the defendant and, in fact, made statements damaging to his motion and apparently provided his letter to her to the court "which also included damaging statements." The court's decisions were undoubtedly colored by these facts. New motion hearing with new counsel and new judge ordered.

**2010:** *Suluki v. State*, 691 S.E.2d 622 (Ga. App. 2010). Counsel ineffective in felon in possession of weapon case for failing to move to suppress the gun. The police went to a hotel with arrest warrants to arrest two murder suspects and the defendant was in the company of one of them. When he arrived at his room, officers surprised him from within, took him down to the floor, cuffed him, and questioned him about a murder before the gun was located in the back of his waistband. Counsel was ineffective for failing to move to suppress the evidence.

*Lewis v. State*, 929 N.E.2d 261 (Ind. App. 2010). Counsel ineffective for failing to timely file request for jury trial in misdemeanor battery case. At the defendant's initial hearing, he informed the court that he wanted a jury trial. The trial court's "Case Summary" clearly indicated that fact. Counsel was appointed, thereafter, but counsel should have known from the court paperwork of the defendant's desires and should have timely filed the motion instead of waiting until the day of the scheduled trial. Because the motion had not been filed 10 days prior to trial, as required under the rules, the motion was denied. Because counsel's error deprived the defendant of his constitutional right to "trial by jury," prejudice was presumed.

**2009:** *Thrasher v. State*, 684 S.E.2d 318 (Ga. App. 2009). Counsel ineffective in driving under the influence of methamphetamine case for failing to move to suppress the chemical test of the defendant's blood sample because the defendant was not read his implied consent rights at the time of his arrest at the scene of the accident as required by state law.

*State v. Veney*, 977 A.2d 570 (N.J. Super. App. Div. 2009). Counsel ineffective in possession of weapon case for failing to move for dismissal of charge prior to plea because the state had previously tried the defendant on another charge arising from the same core set of facts and was, thus, barred from prosecuting this charge, pursuant to the state mandatory joinder rule.

*Frazier v. State*, 680 S.E.2d 553 (Ga. App. 2009). Counsel ineffective in aggravated assault case for waiving any objection to the admission of the defendant's videotaped statement taken in violation of *Miranda*. The defendant was charged with shooting at his business partner, with whom he had a pending lawsuit, from outside the business. After his arrest, while in custody, the defendant repeatedly stated that he did not want to talk and asked for a lawyer. The police ignored him though and got him to sign a *Miranda* waiver and interrogated him. Counsel specifically waived a pretrial hearing on admissibility and did not object when the state played the videotaped statement in its case-in-chief. On the videotape, the defendant appeared intoxicated and repeatedly used profanity. He initially denied being at the scene but then admitted that he "probably" shot at the building. He repeatedly denied shooting at the victim and said he would be dead if he had. He repeatedly asked if he was dead. The defendant testified during the trial. He admitted firing his gun but testified that he only fired into the air as a warning to possible intruders because he heard "a crash." Shell casings from his gun were found at the scene. Bullets recovered from the building were similar to his gun, but could not be specifically linked to his gun. Counsel testified that he did not object to admission of the videotaped statement because he knew the defendant planned to testify and counsel assumed the entire statement would be admissible for impeachment purposes. Counsel's conduct was deficient because the statement "was simply not admissible during the prosecution's case-in-chief." Prejudice found because "the jury's verdict likely turned on the credibility of the witnesses," including the defendant. "Given the inflammatory nature of [the

videotaped] statement, we cannot conclude that its admission did not affect his credibility; certainly, admission of the statement undermines our confidence in the verdict.”

***State v. Sutherby***, 204 P.3d 916 (Wash. 2009). Counsel ineffective in failing to move to sever charges for possession of child pornography from charges for child rape and molestation. Counsel’s conduct was deficient and not based on legitimate strategic or tactical reasons. “There is no indication of any possible advantage to the defendant in having a joint trial on all charges, given the State’s announced intent to use the pornography counts to show [the defendant’s] predisposition to molest children. Even the trial judge appeared to expect a severance motion because he asked at a pretrial hearing if severance was a possibility.” Prejudice established because “the trial judge likely would have granted a severance under the relevant considerations, with the result that the outcome at a separate trial on child rape and molestation charges would likely have been different.” While the state’s evidence was strong on the pornography charges, it was weaker on the rape and molestation charges. Thus, the state consistently argued that the presence of child pornography on the defendant’s computers proved he sexually abused his granddaughter and there was no limiting instruction directing the jury that the evidence of one crime could not be used to decide guilt for a separate crime. If the charges had been severed, it is “highly likely” that the pornography evidence would have been excluded in a separate trial for rape and molestation.

**2008: *People v. Givens***, 892 N.E.2d 1098 (Ill. App. 2008). Counsel in drug case ineffective in withdrawing motion to quash arrest and suppress evidence motion because the police officers’ warrantless entry into the bedroom occupied by the defendant as an overnight guest of the apartment holder who consented to search of the apartment was not justified by any of the factors supporting a finding of exigency and the defendant had a reasonable expectation of privacy in the bedroom. Prejudice found because “the 21 bags of drugs would not have been admitted in evidence.”

***Sparkman v. State***, 281 S.W.3d 277 (Ark. 2008). Counsel ineffective of rape of child case for failing to move to suppress the defendant’s custodial statement taken after the appointment of counsel and, thus, in violation of the Sixth Amendment right to counsel. Counsel’s conduct was deficient in that counsel moved to suppress the statement for other reasons but not on this one which was valid and would have been granted. Prejudice was clear because the only other evidence was a taped interview of the child. On direct appeal, the defendant’s confrontation issue was rejected because the tape was merely cumulative of the defendant’s confession and, therefore, harmless.

**2007: *McNabb v. State***, 967 So. 2d 1086 (Fla. App. 2007). Counsel ineffective in case involving two separate but similar drug offenses for failing to secure a severance of the charges.

*Spioch v. State*, 954 So. 2d 47 (Fla. App. 2007). Counsel ineffective in case of four counts of sexual activity with a minor in a custodial relationship, one count of attempt, and 23 counts of lewd and lascivious assault on a minor for failing to adequately move for a judgment of acquittal on 13 counts of lewd and lascivious assault. While counsel did move for acquittal, counsel's conduct was deficient because "his motion was simply a bare-bones motion" that "did not sufficiently set forth the grounds upon which relief was requested." Prejudice established because an adequate motion would have led to seven counts being dismissed for lack of evidence to support the conviction, one count being dismissed because the charging document did not allege sufficient elements to define a crime, and five counts being dismissed on double jeopardy grounds because these acts occurred when the sexual activity counts occurred. Acquittal entered on these 13 grounds and remanded for resentencing.

*Maymon v. State*, 870 N.E.2d 523, amended on rehearing, 875 N.E.2d 375 (Ind. App. 2007). Counsel ineffective in burglary case for failing to move for severance of charges. The defendant was charged with four burglaries with four separate victims over a period of three months. Two of the burglaries involved thefts while two did not. Counsel's conduct was deficient because, under state law, the burglaries were not connected together in a single scheme or plan and the defendant was entitled to severance. Prejudice found because the evidence of the two burglaries where thefts occurred would not be admissible at separate trials for the two burglaries where thefts did not occur. Those convictions remanded for new trial on rehearing.

*Alexandre v. State*, 927 A.2d 1155 (Me. 2007). Counsel ineffective in manslaughter and kidnaping case for failing to move to dismiss the kidnaping charge based on the statute of limitations. The limitations period was five years, but was extended for six years due to the defendant's absence from the state. Nonetheless, the indictment was not returned until more than 12 years after the date of the alleged offense. Counsel's conduct was deficient and was not explained by counsel's "reason" for not filing the motion, which was that he thought the defendant would be acquitted on that charge. Prejudice found even though the defendant's manslaughter conviction and length of sentence were not affected.

[T]he simple reality that one or two or more simultaneous criminal convictions may result in a longer sentence of incarceration for a defendant's future convictions, create liability under recidivist statutes, impose a stigma, be used for impeachment, or "act as an impediment to clemency, pardon, more lenient conditions of imprisonment, and professional licensing. This is certainly true for a conviction for a crime as serious and socially abhorrent as kidnapping.

*Id.* at 1168.

***Gant v. State***, 211 S.W.3d 655 (Mo. App. 2007). Counsel ineffective in second-degree trafficking case by eliciting—during cross-examination of the state’s witness during the suppression hearing—the evidence that established probable cause for arrest. Drugs and a weapon had been found in a hotel room registered to another person and officers had that man’s photo ID. Officers waited nearby and arrested the defendant, who looked nothing like the man in the ID, as he approached the room with a key in his hand. This was all that the state’s evidence in the suppression hearing established, which alone was insufficient to establish probable cause. On cross-examination, however, defense counsel elicited the testimony that established probable cause for the arrest. Specifically, a motel employee connected a man fitting the defendant’s description to the room and recognized his car and police informants described a man fitting the defendant’s description as being connected with drug activity in the area. “Trial counsel’s elicitation of evidence that supported the State’s case constitutes conduct falling below that of a reasonably competent and diligent attorney.” *Id.* at 660. Prejudice found because the defendant was not charged with the drugs or weapon in the room but was instead charged with possession of drugs found in his pocket in a search incident to arrest. This evidence likely would have been suppressed if counsel had performed adequately. New trial granted.

***Yecovenko v. State***, 173 P.3d 684 (Mont. 2007). Trial and appellate counsel ineffective in sexual abuse and sexual assault case for failing to adequately assert a motion for severance. The sexual assault charges alleged offenses involving the daughters of the defendant’s former girlfriend. The sexual abuse charges were based on ten unrelated child pornography pictures. Trial counsel moved to sever but did not provide any specific detail to allege prejudice even after the state noted the deficiency and the court denied on this basis. While appellate counsel asserted error in the denial of the motion, counsel did not assert the ineffectiveness of trial counsel as a basis. Thus, the appellate court also denied on a procedural basis. Trial and appellate counsel’s conduct was deficient. Specifically, with respect to appellate counsel: “Presenting new arguments on appeal without justification for doing so, in light of the volume of cases holding that such arguments will not be entertained, falls short of reasonable professional assistance.” Prejudice was found with respect to the sexual assault conviction because the unrelated pictures “were, quite simply, horrific,” such that the trial court had cleared the courtroom and allowed each image to be displayed to the jury for only five seconds.

***State v. Miner***, 733 N.W.2d 891 (Neb. 2007). Counsel ineffective in theft by unlawful taking case for failing to assert a double jeopardy bar to prosecution. The defendant was tried and convicted in Holt County for the theft of 62 steers from a Livestock Market in Holt County. Some of these steers (26 to be precise) were sold through a livestock market in Nance County where the defendant had been tried and convicted of theft by receiving stolen property prior to the case in Holt County coming to trial. Counsel’s conduct was

deficient because “counsel was charged with knowledge of the legal principles with respect to consolidation of theft offenses in Nebraska,” which precluding two theft charges based on “‘one scheme or course of conduct from one person’ on the same day.” Counsel’s conduct was not explained by strategy. Prejudice found because the double defense was meritorious.

\**State v. Brown*, 873 N.E.2d 858 (Ohio 2007). Counsel ineffective in capital trial for failing to request a formal ruling on whether the defendant and the state’s primary witness were actually married. Counsel’s conduct was deficient because there was a spousal privilege under state law and evidence from a marriage license and witnesses that the defendant was married to the witness. Although the witness denied it at trial, she had made contradictory pretrial statements. If counsel had requested a pretrial ruling and the court found that there was a marriage, state law required the court to instruct the witness on the spousal competency and make a finding on the record that she voluntarily chose to testify. Prejudice found because state law holds that failure to do so is reversible plain error. In addition, this was the only eyewitness testimony and the defendant was eligible for the death penalty only because he was convicted of aggravated murder based on a finding of prior calculation and design. Even if the only difference was in the “final sentence, in this case, that difference is monumental—it is the difference between life and death.” *Id.* at 870. The court also found a Brady violation and considered cumulative prejudice from both because “it might be possible to conclude that [the defendant] was not prejudiced” on the individual claims. Reversal required.

*West v. Director of Dept. of Corrections*, 639 S.E.2d 190 (Va. 2007). Counsel ineffective in aggravated involuntary manslaughter, involuntary manslaughter, and DUI case for failing to assert a double jeopardy objection to convictions both for statutory offense of aggravated involuntary manslaughter and common law offence of involuntary manslaughter. While counsel objected to sentencing on both offenses he did not state that his argument rested on constitutional or double jeopardy grounds. Counsel’s conduct was deficient because the common law offense does not require proof of a fact different from those required for conviction of the statutory offense. Even though the trial court gave concurrent sentences, prejudice was found because the defendant was convicted of two felonies and given two punishments. The common law conviction and sentence were set aside.

**2006:** *People v. Boyd*, 845 N.E.2d 921 (Ill. App. 2006). Counsel ineffective in multiple charge case for failing to invoke the defendant’s statutory speedy-trial rights with respect to home invasion charges. The defendant was entitled to trial within 120 days from the date he was taken into custody unless his own acts occasioned delay. Here, although all of the charges arose from a single incident, the state filed charges against the defendant on three different dates. While the defendant had agreed to a continuance on initial charges, the home invasion charges were filed after the defendant agreed to continue the initial

charges. The speedy-trial clock expired on the home invasion charges prior to trial, but counsel failed to request the discharge.

***Morris v. State***, 639 S.E.2d 53 (S.C. 2006). Counsel ineffective in assault and battery with intent to kill trial for failing to request a continuance, which resulted in the defendant being tried in absentia. The defendant showed up on the scheduled trial date, signed a sentencing sheet in anticipation of entering a guilty plea to the lesser-included charge of assault and battery of a high and aggravated nature, and then left the courthouse. He could not be located when his case was called so he was tried in absentia. Counsel's conduct was deficient because she objected to trial in absentia, but failed to move for a continuance in order to enter the guilty plea agreed to with the State. Prejudice found because the refusal of a continuance would have amounted to an abuse of discretion where ABHAN, the crime the defendant agreed to plead guilty to, is a common law misdemeanor punishable by up to ten years in prison, while ABIK, for which he was tried and convicted, is a violent crime felony punishable by up to twenty years in prison.

***Compton v. State***, 202 S.W.3d 416 (Tex. App. 2006). Counsel ineffective in aggravated perjury case for failing to move to dismiss the indictment even though the indictment was filed 75 days after the expiration of the two year statute of limitations period. Counsel's conduct was deficient because he assumed the three year period for all other felonies applied and "[a] modest amount of research . . . would have disclosed an uncontradicted line of recent cases holding that aggravated perjury has a two year limitation period." "Without a firm command of the law governing the case, a lawyer cannot render effective assistance to the defendant." Prejudice found because "undeniable" since the motion to dismiss had merit.

***State v. Horton***, 146 P.3d 1227 (Wash. App. 2006), *review denied*, 178 P.3d 1032 (Wash. 2008). Counsel ineffective in possession with intent to manufacture and possession of drugs case for failing to move to suppress evidence from a pat-down search. The officer stopped a vehicle for traffic violations and observed materials in the back seat, which led to a valid search warrant for the car. Prior to obtaining the warrant, the officer performed a pat-down search of the defendant, who was a passenger in the car, and found a cigarette pack with a small baggie of methamphetamine inside. Counsel's conduct was deficient because counsel moved to suppress the evidence due to a pretextual stop but failed to move to suppress on the basis that the pat-down was an illegal search. A valid pat-down search is limited to objects that might be used as weapons, which would not include the cigarette pack or its contents or items subsequently found in the defendants pockets, which included a pill bottle containing ephedrine and a digital scale. Prejudice found.

***State v. Meckelson***, 135 P.3d 991 (Wash. App. 2006), *review denied*, 154 P.3d 919 (Wash. 2007). Counsel ineffective in drug case for failing to move to suppress evidence on the basis that the officer's traffic stop was pretextual. While the officer stopped the

defendant after the defendant made a right turn without signaling, the officer had begun following the defendant's car for the legally insufficient reason that the defendant had given the officer a "deer-in-the-headlight" look. Counsel's conduct was deficient because it is not enough for the state to show that there was a traffic violation, but rather the question is whether the traffic violation was the real reason for the stop. Prejudice found because there was a reasonable probability the motion to suppress would have been granted.

***State v. Perez-Avila***, 131 P.3d 864 (Utah App. 2006). Counsel ineffective in DUI and felony automobile homicide case for failing to move to consolidate the charges because under state law the DUI was a lesser included offense of the felony automobile homicide.

**2005:** ***Thompson v. Commissioner of Correction***, 880 A.2d 965 (Conn. App. 2005). Counsel ineffective for failing to file a motion to dismiss a count of failure to appear because of the delay between the issuance and the execution of the warrant such that the statute of limitations had expired. The defendant was charged with various sexual assault charges in addition to two charges of failure to appear for earlier scheduled court dates. Prejudice found because there is a reasonable probability that the charge would have been dismissed by the trial court because the defendant lived in state the whole time and had been arrested 15 times since the warrant for failure to appear had issued and each time provided his correct address and driver's license number.

***People v. Hernandez***, 840 N.E.2d 1254 (Ill. App. 2005), *appeal denied*, 852 N.E.2d 243 (Ill. 2006). Counsel ineffective in murder case for failing to move to suppress the defendant's videotaped statement to an assistant prosecutor, which clearly revealed that the defendant had invoked his right to silence in a clear and unequivocal fashion. Nonetheless, the prosecutor continued the interrogation. Counsel moved to suppress the statement on other grounds, but not this ground and this failure was not explained by strategy. Prejudice found because the statement would have been excluded and the state's case was largely based just on this statement because there was no eyewitness testimony or physical evidence.

***State v. Becker***, 110 P.3d 1 (Mont. 2005). Counsel ineffective in drug possession and drug manufacture case for failing to move to dismiss the possession charge as a violation of double jeopardy under the state constitution and statutes. Because the state could not prove manufacture of drugs without first proving possession, state law prohibited conviction on both because the possession was a lesser included offense of the manufacturing charge. Possession charge dismissed and case remanded for resentencing.

***People v. Turner***, 840 N.E.2d 123 (N.Y. App. 2005). Trial and appellate counsel ineffective in manslaughter case for failing to assert a statute of limitations defense. The defendant was arrested 16 years after the crime and charged with second degree murder,

which has no statute of limitations. During trial, the prosecutor requested an instruction on the lesser included offense of manslaughter. Counsel objected only on the basis of not offering the jury a compromise. The jury convicted only on manslaughter, which had a five year limitations period. Although the statute allows some tolling, the maximum period for tolling is an additional five years. Trial and appellate counsel's conduct was deficient because there was case law from 1914 supporting the argument, which was old but still valid. In addition, while there was some contrary precedent and the law may not have been definitively settled at the time of trial, "[a] reasonable defense lawyer at the time of defendant's trial might have doubted that the statute of limitations argument was a clear winner—but no reasonable defense lawyer could have found it so weak as to be not worth raising." Trial counsel should have asserted the issue. Appellate counsel should have asserted the ineffectiveness of trial counsel on this point.

***Commonwealth v. McClellan***, 887 A.2d 291 (Pa. Super. 2005), *appeal denied*, 897 A.2d 453 (Pa. 2006). Counsel ineffective in third degree murder and conspiracy case for failing to provide, in a timely manner, the identity and opinion of the defense expert, which resulted in the exclusion of the expert's testimony. The defendant's child died only about 15 minutes after the defendant returned from a convenience store where she was caught on the surveillance tape. When she returned home, she and her boyfriend were alone with baby for a few minutes before a friend entered and found the defendant with the child saying something was wrong with him. Paramedics were called, but the child died from extensive, recently inflicted injuries. Appellant and her boyfriend were charged. From the beginning, counsel discussed the need to secure an expert witness in forensic pathology to understand the scientific principles involved and present testimony concerning the timing of the injuries. Counsel initially retained a different expert and fought the court's orders for disclosure before ultimately disclosing this expert's report and allowing a deposition. Even prior to his deposition, counsel had retained a second expert, however, but counsel never disclosed this information until shortly before the conclusion of the trial. The trial court excluded this expert's testimony because of the untimely disclosure. Counsel expressed no strategy for the untimely disclosure. Counsel simply did not expect that the court would exclude the testimony. Counsel's conduct was deficient because "counsel were or should have been aware the trial court required disclosure of their experts' opinions and reports, based in particular on their previous experience" with their first expert. "[C]ounsel's actions exhibited either a lack of knowledge of the Rules of Criminal Procedure, constituting incomplete investigation into the law, or a deliberate attempt to frustrate the Commonwealth's right to learn of the witness, constituting a violation of both the Rules of Professional Conduct and the ABA Standards." Prejudice found because this expert would have testified that, in his opinion, the child's injuries were inflicted during the time period when the defendant was clearly away from home.

**2004:** ***United States v. Little***, 851 A.2d 1280 (D.C. 2004). Counsel ineffective in murder case for failing to timely move to suppress the defendant's unwarned custodial statement.

Counsel's conduct was deficient and prejudicial because the defendant was in custody at the time of his written confession, but he had not been given the *Miranda* warnings. Thus, the statement should have been suppressed. Although counsel asserted a weak strategic reason and that there was no merit to the motion, counsel had made a motion, during the trial, to suppress the statement, which was denied as untimely. If counsel had adequately investigated, counsel would have also been aware that the issue had merit. There was also a reasonable probability of a different outcome at trial if the statement had been suppressed.

***Bruton v. State***, 875 So. 2d 1255 (Fla. App. 2004). Counsel ineffective in exploitation of an elderly person and third degree grand theft case for failing to move to dismiss the grand theft charge as a lesser included offense. The basic facts were that the defendant wore a nurse's uniform in a hospital, pretending to be a care giver, and stole the victim's diamond ring. Because the two crimes involved one act of taking the same property, convictions on both counts violated double jeopardy. Even though the precedent for this ruling had not been decided at the time of trial, "this is an issue that trial counsel should have recognized."

***Collier v. State***, 598 S.E.2d 373 (Ga. App. 2004), *aff'd on other grounds*, 612 S.E.2d 281 (Ga. 2005). Counsel ineffective in homicide by vehicle case for failing to move to suppress blood and urine samples taken from the defendant. The defendant ran a red light and collided with another car, killing two people. The defendant refused to consent to blood and urine tests, but police threatened to obtain a search warrant and to forcibly use a catheter to obtain the samples if he did not consent. In the face of the threat, the defendant consented. Counsel's conduct was deficient because the consequences of refusing under state law did not include the possibility of a search warrant and forcible testing. The police, thus, misled the defendant and his consent was coerced and invalid. Prejudice found because the admission of the blood and urine results showing methamphetamine and amphetamine unquestionably harmed the defense.

***Vann v. State***, 596 S.E.2d 722 (Ga. App. 2004). Counsel ineffective in robbery and assault case for failing to move to sever the charge of possession of a firearm by a convicted felon. The evidence against the defendant for robbery and assault was based on shaky eyewitness testimony and a codefendant's statement. Because of the weapons charge, the defendant's prior conviction for receiving stolen property was admitted in evidence. Counsel did not move for severance because counsel wanted the jury to know about the prior conviction rather than wondering whether the defendant had prior convictions. Counsel's conduct was deficient because "counsel misunderstood the law concerning admission of bad character evidence." When the State introduced the prior conviction, the defendant's character was undoubtedly placed in evidence, even though the prior conviction was unrelated to the charges for which he was being tried. Prejudice found because even though the prior conviction was admitted only through certified

documents referred to only once in the state's closing argument, trial counsel did not request a charge that the jury limit its consideration of the prior conviction to the charges of possession of a firearm by a convicted felon. Thus, the jurors were free to consider this evidence with respect to character and credibility when the evidence against the defendant was otherwise "far from overwhelming."

***People v. Miller***, 806 N.E.2d 759 (Ill. App. 2004). Counsel ineffective in drug possession with intent to deliver plea case for failing to challenge third-party consent to search the defendant's zipped duffle bag where the drugs were found. Counsel moved to suppress the evidence, which was located in a home shared with the third-party in a locked storage cabinet containing some of the third-party's property but for which only the defendant had keys. The third-party consented to police opening the cabinet with a crowbar and drugs were found inside. The motion was denied, without any evidence that the drugs were actually in a zipped duffle bag, which the third-party informed police belonged to the defendant, but the police searched it anyway and found the drugs. Following the denial of the suppression motion, the defendant plead guilty. Counsel's conduct was deficient in failing to present evidence of the zipped duffle bag. Counsel did not do so only because counsel's "mistake of law" in believing it was immaterial since the police had consent to open the storage cabinet. Prejudice found because, but for counsel's errors, the defendant would not have pleaded guilty and would have insisted on going to trial.

***State v. Reichenbach***, 101 P.3d 80 (Wash. 2004). Trial counsel was ineffective in possession of methamphetamine case for failing to move to suppress the methamphetamine that was involuntarily abandoned in the course of an illegal seizure of the defendant. An informant notified the police on several occasions that the defendant was forcing him to drive to Canada so that the defendant could purchase drugs. On the last of these occasions, the police obtained a search warrant for the informant's car and the defendant's person. After the warrant was obtained, however, the informant notified the police that the defendant had been unable to purchase drugs and that he was not sure whether he would be able to do so. The police then staged an accident to stop the informant's car. With weapons drawn and pointed at the defendant, officers ordered the defendant to raise his hands. Before doing so, the defendant dropped a bag of methamphetamine on the floor next to the passenger seat. The defendant was removed from the car and the drugs were discovered during the search of the car. Counsel's conduct was deficient in failing to move to suppress the drugs because the search warrant was invalid because the information supplied by the informant after the warrant was obtained negated probable cause. Failure to object could not be explained by any legitimate tactic. Moreover, although the informant consented to search of the car, the informant could not consent to seizure of the defendant's person. The defendant was "seized" at gunpoint, however, and his abandonment of the bag of drugs was in response to the unlawful seizure and, thus, involuntary. The seizure of the bag of drugs thus violated the state constitution. Prejudice was found because the conviction was dependent

on admission of the bag of drugs.

*Firestone v. State*, 83 P.3d 279 (Nev. 2004). Trial and appellate counsel ineffective in leaving the scene of an accident case for failing to challenge multiple convictions arising from one accident involving three victims. State statutes were clear that, “Since there was only accident, and one ‘leaving,’ the statute allows only one charge of leaving the scene of an accident, regardless of the number of people involved.” Counsel’s conduct was deficient and prejudicial in failing to raise this meritorious issue. Two of the three convictions were vacated and the case was remanded for further proceedings.

**2003:** *State v. Johnson*, 837 A. 2d 1131 (N.J. Super. App. Div. 2003). Counsel ineffective in weapons case for failing to move to suppress a handgun seized from the defendant. The police obtained warrant to arrest the defendant’s half-brother on domestic violence charges. When the police arrived at the defendant’s stepfather’s home, they asked for permission to enter after advising him they had multiple arrest warrants and they were concerned about the presence of a handgun. The stepfather allowed the police to enter the home to arrest his son. Following the arrest, the police frisked the son and then took him outside to the squad car. The officer’s went back into the home to begin searching for the gun. The defendant was on the phone in the kitchen and stated that he was just visiting. The police officer frisked him and then asked him to leave until the police finished with their search. The defendant agreed to leave but said he needed to gather his things. He took a DVD box and another small box from a closet and proceeded to leave. The police officer stopped him and questioned him about the contents of the box. After receiving conflicting answers, the officer searched the box and found a loaded handgun inside. Counsel did not move to suppress the handgun because he believed the motion would have lacked merit because the owner of the home had consented to police entry. Counsel’s conduct was deficient because it was based on a fundamental misunderstanding of the law. The homeowner’s consent may well not have been knowingly and voluntarily given in that the homeowner was confronted with multiple warrants for his son’s arrest and may not have been advised of his right to refuse consent. Moreover, the homeowner’s permission appeared to be limited to entry for purposes of affecting his son’s arrest on the second floor. The police officer’s far exceeded the scope of this invitation because, by their own admission, they re-entered the premises once the son had been safely secured in the squad car in order to search the home. The search was also outside the scope of the limited area included in a search incident to arrest. A search warrant was, therefore, required. Prejudice found due to the critical significance of the handgun to the prosecution’s case. The court ordered that a suppression hearing be conducted. If the court granted suppression, the convictions would be set aside. If the court denied suppression, the judgment of conviction will stand.

#### 4. PROSECUTION EVIDENCE OR ARGUMENT

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

**2007:** *Girts v. Yanal*, 501 F.3d 743 (6th Cir. 2007), *cert. denied*, 129 S.Ct. 92 (2008). Counsel ineffective in aggravated murder case for failing to object to the prosecutor commenting on the petitioner's silence three separate times during closing arguments. Prejudice found because trial counsel's "failure to object exacerbated the prejudicial effect of the prosecutor's statements." The court found "a strong likelihood that at least one juror would have changed his mind if the improper and prejudicial statements would not have been made, especially because the prosecutor presented weak and limited evidence at trial." The IAC also served as cause and prejudice to excuse the procedural default of the prosecutorial misconduct issue, which had been reviewed by the state court only under a plain error analysis. Relief granted on the misconduct issue also.

**2005:** *Hodge v. Hurley*, 426 F.3d 368 (6th Cir. 2005). Counsel ineffective in child rape case for failing to object to the prosecutor's "egregiously improper closing argument, the prosecutor commented on the credibility of witnesses, misrepresented the facts of the case, made derogatory remarks about the defendant, and generally tried to convince the jury to convict on the basis of bad character." The prosecutor's arguments, among other things, incorrectly informed the jury that they would have to disbelieve all of the victim's family members to acquit, which was not true since two family members testified to seeing blood in the child's underwear and abnormal behavior. The jury could have believed this without convicting the defendant. The prosecutor also implied that disagreement between state and defense experts "(who could very well have legitimate professional disagreements) meant that one of those witnesses must be perjuring him or herself." *Id.* at 383. With respect to character, the prosecutor argued that the defendant, who was underage, regularly drank alcohol illegally and wanted to live off his family and not work, which was irrelevant and not based on any evidence before the court. The prosecutor also urged the jury to "put [itself] in the place of someone that might run into [the defendant] at night," which is "a version of the impermissible 'golden rule argument.'" *Id.* at 384. Under AEDPA, the state court's decision was an unreasonable application of Supreme Court precedent. Prejudice found because the result of the trial depended primarily on the jury's credibility determination between the defendant and the 3 year old child's mother, who claimed to have seen the rape. In addition, the trial court's "generic jury instructions . . . were insufficient to dispel any prejudice from these statements." *Id.* at 388 n.27.

*Martin v. Grosshans*, 424 F.3d. 588 (7th Cir. 2005). Counsel ineffective in sexual assault case for failing to object to improper testimony and argument. The defendant was an ordained Episcopal priest charged with molesting a boy prior to 1988. The boy first raised the allegation in 1993 and the defendant learned about the allegation in 1994. During the

state's evidence, without objection from counsel, the state presented the testimony of a former prosecutor who had worked with the defendant in 1993 to develop a policy for dealing with allegation of sexual misconduct in the parish. She testified that his focus was greatly on protecting the accused clergymen and not the accusers. Counsel also did not object to testimony from a police officer, who met with the defendant in the presence of his counsel, that the defendant refused to answer questions about the allegations. Finally, counsel did not object or move for a mistrial based on the prosecutor's argument that the jury should not be swayed by the defense's strong character witnesses because even Jeffrey Dahmer had character witnesses. Counsel's conduct was deficient because: (1) the former prosecutor's testimony was irrelevant and prejudicial because the defendant was not even aware of allegations against him when these conversations occurred in a completely different jurisdiction years after the crimes alleged here and the defendant's beliefs did not necessarily imply a guilty conscience; (2) the officer's testimony was an improper comment on the defendant's right to counsel; and (3) the prosecutor's argument was inflammatory and improper, especially since this trial occurred in 1995 in Wisconsin when Dahmer's case was fresh in people's minds. Under AEDPA, the state court's decision was contrary to *Strickland* because it placed the burden on the defendant to prove that, but for counsel's errors, "the result of the proceeding would have different. Prejudice was, therefore, considered de novo. "[E]ven if these errors, in isolation, were not sufficiently prejudicial, their cumulative effect prejudiced . . . [the] defense" where "the prosecution's evidence was not overwhelming."

**b. U.S. District Court Cases**

**2011:** \**Rogers v. McDaniel*, \_\_\_ F.Supp.2d \_\_\_, 2011 WL 2680763 (D. Nev. July 8, 2011). Counsel ineffective in failing to challenge prior conviction supporting aggravating circumstance in capital sentencing. The jury found two aggravating circumstances: (1) prior violent felony conviction; and (2) torture, depravity of mind or mutilation of the victim. The state offered evidence through a probation officer of two prior felony convictions in Ohio. On one of those, the defendant pled guilty but failed to appear for sentencing. Under Nevada law at the time, this meant there was no conviction, but counsel failed to recognize that and instead conceded that there was a conviction. Counsel's conduct was deficient in "failing to conduct even the most basic research" regarding the purported prior convictions. Prejudice also established as there were no other constitutionally valid aggravating circumstances and there was significant mitigation of mental illness and extreme mental and emotional disturbance at the time of the offenses. The state court ruling to the contrary was an unreasonable application of *Strickland*. With respect to the other aggravating circumstance found by the jury, the court found that the instruction was unconstitutionally vague under *Godfrey v. Georgia*, 446 U.S. 420 (1980). With respect to cumulative error, the state court found with respect to both aggravators that the underlying evidence was admissible in sentencing regardless of whether it supported a valid statutory aggravating circumstance. As a nonstatutory

circumstance, “[h]owever, such evidence does not factor into the weighing of aggravating and mitigating circumstances [under state law]; only the valid aggravating circumstances are part of that weighing.”

**2009:** *Daly v. Burt*, 613 F. Supp. 2d 916 (E.D. Mich. 2009). Under AEDPA, the District Court found a Confrontation Clause violation due to admission of nontestifying codefendants’ statement and that the state court ruling was an unreasonable application of *Crawford v. Washington*, 541 U.S. 36 (2004). The District Court also specifically adopted the Magistrate Judge’s Report and Recommendation as “the opinion of this Court.” The R&R included an alternative finding of ineffective assistance of counsel, in the event the Confrontation Clause issue was found to be procedurally defaulted, for failing to object to the admission of these statements or to move for severance. The defendant was charged with attempted armed robbery and conspiracy to commit armed robbery. Following a tip to the police of a pending robbery at a McDonalds, the defendant was arrested outside the McDonalds with a ski mask and a hammer. One codefendant was with him and another was nearby waiting in a getaway car. Both codefendants confessed in writing that they intended to rob that manager as he was taking a bank deposit to the bank and that the hammer was to be used as a weapon. The defendant made only an oral statement. While a police officer testified that his statement was consistent with the codefendants, the defendant testified that he had intended to break and enter the McDonalds and steal from the safe rather than committing an armed robbery and that this is what he told police. Prior to their joint trial, counsel for one co-defendant moved for a severance or, alternatively, to exclude the statements of the others. The District Court denied the motion. The District Court’s finding of admissibility was erroneous under *Crawford*, which was decided while the case was pending on appeal. Under *Crawford*, testimonial statements of nontestifying witnesses, including those made while in police custody, are inadmissible. Under pre-*Crawford* law in *Ohio v. Roberts*, 448 U.S. 56 (1980), the statements were also inadmissible because they did not bear “adequate indicia of reliability.” Specifically, the codefendants were shifting or stretching the blame while in police custody, which “weighed heavily against finding that there was an adequate indicia of reliability” even though the codefendants also admitted their own guilt. Counsel’s conduct was deficient and not based on sound strategy.

[A] knowledge of the applicable law is essential to providing effective assistance, and considering the extensive Supreme Court case law discussed above, no competent attorney could have failed to recognize the confrontation clause violations that occurred because of the introduction of the out-of court statements of the non-testifying codefendants at the joint trial.

Prejudice established because “the out-of-court statements . . . were extremely persuasive proof” of the attempted armed robbery and the conspiracy, which carries a potential life

sentence.

**2008:** *Neri v. Hornbeak*, 550 F. Supp. 2d 1143 (C.D. Cal. 2008). Counsel ineffective in murder of her 16-month-old daughter under AEDPA for failing to object to the prosecutor's cross-examination of the defendant in violation of the trial court's previous ruling. In support of a pretrial motion, counsel had presented an unsigned "declaration" of the defendant. Prior to trial, the state requested a signed version. The hearings revealed that counsel had drafted the declaration on the basis of his notes of a discussion with the defendant, who was just learning English, and had shown it to her, but had not had it translated for her. She testified that there were inaccuracies in the declaration and it was corrected through her testimony and changes made to the declaration, which she then signed. The court ruled that she could be impeached if she testified by using her signed declaration or testimony, but not the unsigned declaration. Nonetheless, the prosecutor cross-examined her extensively about inconsistencies from the unsigned declaration without objection from defense counsel. Counsel's conduct was deficient. Prejudice was established because the defendant's credibility was a central issue. The major inconsistencies came from the unsigned declaration. Although there were some inconsistencies from her prior testimony and signed declaration, these inconsistencies were relatively minor in comparison and would not have been as harmful to her credibility. Prejudice was also clear because the jury deliberated for four days and nearly deadlocked even without this improper cross-examination.

**2006:** *Wynters v. Poole*, 464 F. Supp. 2d 167 (W.D.N.Y. 2006). Under AEDPA review for pro se petitioner, counsel ineffective in first degree rape case for failing to object to the prosecutor's cross-examination of the investigator who interrogated the petitioner. The investigator testified that he requested that the petitioner take a polygraph after he denied guilt and the petitioner terminated the interview and requested counsel. The alleged victim had made numerous inconsistent statements and did not report the rape for more than a year. Appellate counsel asserted that the prosecutor committed misconduct and that trial counsel had been ineffective in failing to object. The District Court construed the pro se pleadings to assert trial counsel's ineffectiveness as "cause" and "prejudice" to overcome the procedural default of the state misconduct issue and found that counsel was ineffective. Counsel's conduct was deficient in failing to object to the prosecutor's misconduct, which "effectively decimated" the petitioner's credibility in a case where his credibility and the alleged victim's credibility was the only real issue. The prosecutor's conduct rendered the trial "fundamentally unfair." The state court's holding to the contrary (on the merits, despite finding a procedural default) was an unreasonable application of clearly established Supreme Court precedent. *Id.* at \_\_\_ (citing *Darden v. Wainwright*, 477 U.S. 168, 181-82 (1986)). In addressing this issue, the state court "approved of the way defense counsel handled the situation" and, therefore, summarily dismissed the ineffective assistance claim as "without merit." Because this was an adjudication on the merits, the District Court applied the AEDPA standards to this claim

also. Counsel's conduct was deficient and prejudicial because the prosecutor deliberately implicated the petitioner's Fifth Amendment right to remain silent, his Sixth Amendment right to counsel, and conveyed to the jury that it could infer guilt due to the petitioner's failure to submit to the polygraph. Although counsel attempted to mitigate the damage, "there is no evidence that he made an intelligent, tactical decision not to object." Instead, trial counsel "only reinforced the negative evidence elicited on direct examination" by having it repeated rather than objecting and moving for a mistrial or a curative instruction. "While the instance in which a single error will rise to the level of Sixth Amendment ineffectiveness is clearly the exception and not the rule, this case is one of those exceptions." *Id.* at \_\_\_ (quoting *Chatom v. White*, 858 F.2d 1479, 1486 (11th Cir. 1988)). The state court's summary denial was an unreasonable application of *Strickland*.

**2005:** *Wade v. White*, 368 F. Supp. 2d 695 (E.D. Mich. 2005). Counsel ineffective in manslaughter case for failing to object to evidence regarding the shooting of a key prosecution witness and the state's closing argument concerning this evidence. The victim was killed when he was hit by a stolen car being pursued by police. The witness was a passenger in the car, who, at the scene of the accident, initially identified his friend as the driver, but changed his statement the next day to identify the defendant as the driver. He was later shot numerous times and testified about this, but he did not know of any connection between the shooter and the defendant and no evidence connecting the defendant to the shooting was presented. Nonetheless, the prosecutor focused on this incident in sentencing and strongly implied that there was some connection between the defendant and the shooting. Although this issue had been raised in state court, the state court failed to address this issue so the court's review, under the AEDPA, was de novo. Counsel's conduct was deficient because the evidence of the shooting of the witness was clearly inadmissible and the prosecutor's argument was improper. There could be no reasonable strategy not to object to this testimony and argument. The court found that the state court's finding that the testimony was properly admitted was irrelevant because it was wrong in that no evidence established any connection between the defendant and the shooting of the witness. Prejudice was found because the witness was the key witness identifying the defendant as the driver.

### c. State Cases

**2011:** *State v. Washington*, \_\_\_ So.3d \_\_\_, 2011 WL 3586149 (La. App. Aug. 17, 2011). Counsel ineffective in possession of cocaine with intent to distribute case for failing to move for mistrial or to request a jury admonishment after the trial court sustained counsel's objection to the prosecution's improper closing argument on the defendant's post-*Miranda* silence. Counsel had elicited testimony of the defendant's silence in cross-examination of a police officer and the state had properly explored this in redirect. The prosecution's argument crossed the line, however, "by asking the jurors to speculate what they would have done if wrongly accused of possessing drugs. With these remarks,

the prosecutor was openly using the defendant's silence as substantive evidence of the defendant's guilt." While counsel objected and the court sustained the objection, counsel did not request mistrial or admonishment. Prejudice established as the state's case against the defendant was circumstantial. While the cocaine was in his home, it was in plain view on top of a television where four young men were playing video games when officers searched the home and found the drugs. In addition, while drugs were found in a bedroom, there was no proof that the bedroom belonged to the defendant, who was not the sole resident of the house. At minimum, an admonishment from the court would have lessened the impact of the improper argument on the jury.

***People v. Fillyaw***, 948 N.E.2d 1116 (Ill. App. 2011). Counsel ineffective in murder case for failing to object to admission, as substantive evidence, of a written statement by a state witness that was given to a detective pretrial and included alleged inculpatory statements by the defendant to the witness. The witness testified during trial but maintained that the entire prior statement was false. Counsel's conduct was deficient.

The constitutional guarantee of effective assistance of counsel requires a criminal defense attorney to use the applicable rules of evidence to shield his client from a trial based upon unreliable evidence.

Counsel's conduct was also prejudicial.

***State v. Gieser***, 248 P.3d 300 (Mont. 2011). Counsel ineffective in driving under the influence case for failing to object to admission of horizontal gaze nystagmus (HGN) evidence that was not supported by expert testimony and breath tests done on "un-certified apparatus." State law allowed HGN evidence only with a showing that the test was properly administered by the officer and supported by expert testimony. State law also required that breath test instruments be regularly inspected and calibrated. Prejudice established as the HGN and breath test evidence had "an appearance of precision and scientific reliability" and the breath test numbers from the machine could be used to infer intoxication under state law.

***State v. Thompson***, 20 A.3d 242 (N.H. 2011). Counsel ineffective in aggravated sexual assault on child case for failing repeatedly to object to hearsay testimony of the child's babysitter, the child's mother, and a police officer about the child's out-of-court statements, even though counsel was aware the child had recanted her statements prior to trial and told the jury this in opening. This hearsay was the only substantive evidence of guilt as the child denied in her trial testimony, even with leading questions and coaxing by the prosecutor, that the defendant had touched her. Counsel did object at times, but counsel's "erratic and inconsistent decisions . . . clearly fall below the constitutional bar." Counsel's behavior was "completely irrational" and could "only be attributed to a lack of

understanding of the rules of evidence or extreme carelessness.” Prejudice established as counsel allowed a legally insufficient case to go to the jury. The court relied exclusively on the hearsay in denying the motion for directed verdict. “The inaction was so fundamental and flawed that the State was able to prove the case only because of defense counsel’s failure.”

***Menefield v. State***, \_\_\_ S.W.3d \_\_\_, 2011 WL 2297684 (Tex. App. June 10, 2011). Counsel ineffective in drug possession case for failing to object to admission of the laboratory’s drug report stating that there was a trace amount of cocaine in a pipe. The report, prepared by the previous supervisor of the lab, was offered through the manager of the lab as a business record. Counsel’s conduct was deficient as the Confrontation Clause barred admission of this report. Prejudice established as this was the state’s only evidence showing the presence of a controlled substance.

**2010: *People v. Sanchez***, 935 N.E.2d 1099 (Ill. App. 2010). Counsel ineffective in bench trial of drug case for failing to object to admission of the defendant’s prior drug conviction that was more than 10 years old to impeach him. Although the defendant’s release from parole was only 9 years prior to trial, state law calculates the period from the date of the prior conviction “or of the release of the witness from confinement, whichever is the later date.” The defendant’s release from confinement was more than 10 years prior to trial. There was no valid strategic reason for the failure to object. Either counsel failed to investigate the details of the prior conviction or was aware of those details and misapprehended the law. Under either scenario, counsel was ineffective. Prejudice established as this was a credibility contest between the defendant and police officers and the trial court twice expressly relied on the prior conviction in weighing the defendant’s credibility.

***State v. Banks***, 790 N.W.2d 526 (Wis. App. 2010). Counsel ineffective in felon in possession of firearm and resisting or obstructing an officer case for failing to object to testimony and argument implying guilt based on the defendant’s refusal to consent to DNA testing prior to the state obtaining a search warrant. The defendant and two other men were in a van that the police attempted to stop due to an expired license plate. All three men jumped and ran. A gun was found in the area. The driver of the van testified that the defendant had been in the backseat and the driver was not aware of there being a gun in the van. The frontseat passenger of the van testified that the defendant had the gun in the van but threw it in the lap of the passenger during the attempted stop. The passenger then dropped the gun as he attempted to run. Both the driver and frontseat passenger had at least five prior criminal convictions. Counsel’s conduct was deficient in failing to object to testify by two officers and subsequent argument in closing that the defendant had twice refused to consent to DNA testing and that he did so “because his DNA might have been on that gun, and because he was the one that tossed the gun from the back of the van to the front into [the State witness’s] lap.”

[I]t is a violation of the defendant's right to due process for a prosecutor to comment on a defendant's failure to consent to a warrantless search. It has long been a tenet of federal jurisprudence that a defendant's invocation of a constitutional right cannot be used to imply guilt.

*Id.* at 533-34 (citations omitted). Prejudice established because the court could not "say with any confidence that the jury's verdict was untainted by the inadmissible evidence. . . . Consequently, there is a reasonable probability that, but for counsel's deficient performance, the result at trial would have been different." *Id.* at 535.

**Higgins v. State**, 698 S.E.2d 335 (Ga. App. 2010). Counsel was ineffective in rape and sodomy case for failing to object to the state's admission of an "unredacted juvenile disposition order . . . that the state used to prove a similar transaction." Counsel had raised the need for redaction of the sentence and obtained the state's agreement to redact prior to trial. Nonetheless, the order was not redacted and included information about the "need for protection" of the community, "sex offender treatment," and the like, for the defendant. Counsel's conduct was deficient and there was no strategic reason not to object. Prejudice established as "this case was not overwhelming because evidence was introduced that the encounter may have been consensual."

**Purvis v. State**, 43 So. 3d 734 (Fla. App. 2010). Counsel was ineffective for failing to object to the commingling of the contents of packages of suspected cocaine in trafficking of more than 400 grams case. Officers seized 27 small packets of white powder, a bag of white powder, and a bag of rock-like substance. The two bags were separately tested for cocaine and weighed 10.78 grams. The small packets were commingled 4-7 bags at a time in five different measures *without testing the contents of each bag before commingling*. The total weight of the substance from these bags was over 600 grams. The failure to test each bag was notable because officers had also found a large bag of benzocaine, which is not a controlled substance. In any event, the evidence was insufficient to establish that there were 400 grams of cocaine, as each individual packet contained approximately 14-28 grams and the court could be sure only that 5 of the packets contained cocaine.

**Smith v. State**, 689 S.E.2d 629 (S.C. 2010). Counsel ineffective in criminal sexual conduct with minor case for failing to object to improper hearsay from a "forensic interviewer" corroborating the alleged victim and asserting her statements were "believable" and that she had no reason "not to be truthful." Counsel's conduct was deficient, as corroborative witness testimony, under SCRE Rule 801(d)(1) is limited to time and place of the alleged assault. The testimony here far exceeded that and there was no valid strategy by counsel to allow this. Prejudice established as the case "hinged" on the alleged victim's credibility, there was otherwise an absence of overwhelming evidence of guilt, and the state relied heavily on this improper testimony in closing

arguments.

***State v. King***, 248 P.3d 984 (Utah App. 2010). Counsel ineffective in attempted forcible sexual abuse case for failing to object to the prosecutor's improper statements in closing argument urging the jury to consider matters not in evidence. The defendant was accused of inappropriately touching his daughter's friend during a "tickle fight" with both girls during a sleep over at his home. The alleged victim testified the touching lasted for "two to three minutes." The daughter testified she saw no inappropriate touching during the "tickle fight" After making the allegations, an acquaintance of the alleged victim who testified for the defense, overheard her say, "I am so glad that nobody found out that I lied." During closing arguments, the prosecutor suggested, without evidentiary basis, that the reason for this statement was that she was only expressing concern that people would think she was a liar. Likewise, without evidentiary basis, the prosecutor argued the incident lasted just "a few seconds" during which the defendant's daughter had been looking away or distracted. While counsel can argue inferences, the prosecutor "went much further in 'spinning' the evidence to suit his purposes" and encouraged the jury to consider matters not in evidence. Likewise, the defense counsel, rather than objecting, basically agreed that "the encounter 'was probably fairly quick,' arguably conceding that the sexual touching actually occurred." Cumulative prejudice established, in combination with the "plain error" in the prosecution's misconduct, as the evidence of guilt was "scant" and relied almost exclusively on the alleged victim.

**2009:** ***State v. Shanklin***, 925 N.E.2d 161 (Ohio App. 2009). Counsel ineffective in grand theft case for failing to object to numerous instances of inadmissible hearsay by detectives. In essence, the defendant borrowed money from the alleged victim using a purchase order as collateral. Charges were brought when the defendant's "payment" checks were bounced for insufficient funds. During trial, without objection, detectives testified, based on information received only through third parties who did not testify at trial, that the purchase order was invalid and fictitious. This testimony was not only inadmissible hearsay, but, in one instance, left the jury with the impression that one third party admitted the purchase order was phony, when the transcript of the officer's phone interview with that third party revealed that the third party said the purchase order was okay. Counsel's conduct was deficient and prejudicial as the state's whole case was based on the argument that the purchase order was "a sham."

***Holman v. State***, 674 S.E.2d 171 (S.C. 2009). Trial counsel ineffective in case involving multiple charges arising from a shooting incident due to counsel's failure to object to admission of handgun found in defendant's apartment that had no relevance to the offenses for which the defendant was charged. "[T]he failure to object to this clearly inadmissible evidence was ineffective assistance of counsel" not explained by a valid trial strategy. Prejudice established.

**2008: *Antunes-Salgado***, 987 So. 2d 222 (Fla. App. 2008). Counsel ineffective in cocaine trafficking and conspiracy case for stipulating to the admissibility of the postarrest and post-*Miranda* statements of co-defendants through the police officer who took their statements. Each of the statements “minimized the respective declarant's involvement in the offenses and shifted the bulk of the involvement to [the defendant].” The statements were not admissible as being in furtherance of the conspiracy, statements against interest to the extent the statements inculcated the defendant, nonhearsay “verbal acts” (showing the effect of a statement on the defendant), or under any hearsay exception. The statements were inadmissible under *Crawford v. Washington*, 541 U.S. 36 (2004), which specifically holds that statements made during police interrogations are testimonial and therefore inadmissible. Prejudice found because, without these statements, the state could not establish the “agreement” element of the conspiracy charge, which was established solely through the inadmissible hearsay statements. Prejudice also found on trafficking charge when the evidence was disputed at trial. No strategy could excuse the ineffectiveness because “counsel conceded the admissibility of inadmissible statements that ultimately convicted his client without having researched the admissibility issue. Generally, important legal concessions are made after, not before, the applicable law is researched.”

***Cobb v. State***, 658 S.E.2d 750 (Ga. 2008). Counsel ineffective in murder case for failing to object to improper hearsay testimony from a state firearms examiner. The examiner testified that bullets and casings found at the crime scene were from a .45 caliber pistol. A holster had been found in a search of the defendant’s apartment. The expert testified that she called the manufacturer, gave the model number, and was told the holster was a Colt .45 pistol. Counsel’s conduct was deficient because counsel failed to object to this testimony until the state attempted to elicit the testimony a second time. Prejudice was established because the testimony bolstered the only eyewitness, who was a crack addict with inconsistencies in her testimony, and the state’s evidence was not overwhelming as evidenced by two prior hung juries.

***State v. Reynolds***, 746 N.W.2d 837 (Iowa 2008). Counsel was ineffective in counterfeit money orders case for failing to object to hearsay testimony. An employee of the bank that cashed the money orders testified, without objection, that she received emails from the Federal Reserve indicating the money orders were counterfeit. While counsel objected successfully to admission of those emails, counsel failed to object to this testimony, which was inadmissible as offered under the Business Records exception.

***Wood v. State***, 260 S.W.3d 146 (Tex. App. 2008). Counsel ineffective in DWI trial for failing to object to admission of evidence of a prior DWI conviction. Prejudice found because the evidence of guilt was not overwhelming.

*Crawford v. State*, 256 S.W.3d 150 (Mo. App. 2008). Counsel ineffective in murder case for failing to consistently object to the state's repeated cross-examination of the defendant about the veracity of other witnesses.

**2007:** *People v. Davis*, 879 N.E.2d 996 (Ill. App. 2007), *appeal denied*, 888 N.E.2d 1186 (Ill. 2008). Counsel ineffective in murder case for failing to adequately challenge and rebut "lip print" identification testimony alleging that the defendant's lip prints were on duct tape found at the crime scene. Counsel's conduct was deficient because this was the only physical evidence against the defendant and counsel knew it should be challenged. Counsel informed the defendant's family, who did not have additional funds to retain an expert, but did not attempt to retain an expert from his retainer fees or attempt to establish the defendant's indigence and get a court-appointed expert. The court found other bases, including court's extremely ill health prior to and during trial and failing to challenge the inconsistent eyewitness testimony, and found that "the cumulative effect of his errors was prejudicial."

\**Sims v. State*, 967 So. 2d 148 (Fla. 2007). Counsel ineffective in capital trial for failing to object to evidence of a "canine-alert" to drugs in a car that had been driven by the defendant at the time of the murder. The defendant had been stopped by an officer on suspicion of driving a stolen vehicle, which the defendant had borrowed but had failed to return. During the stop, the defendant shot and killed the officer. The defendant abandoned the car, which was subsequently searched. Although there was a "canine-alert" for drugs, no drugs were found in the car and there was no evidence the defendant had ever used drugs or been involved in the sale of them. Counsel's conduct was deficient in failing to object to this "canine-alert" evidence or an officer's testimony that "the dog would alert to the scent of narcotics after the drugs had been removed." Counsel objected only when the defendant's parole officer was called to testify that parole would have been revoked if the defendant had been found in possession of drugs. The court overruled this objection. Counsel's conduct was also deficient in moving to strike the "canine-alert" evidence that laid the foundation for this testimony. All of this evidence supported the state's theory that the officer was killed because the defendant possessed drugs and was attempting to avoid a return to prison for violation of parole. Counsel admitted that there was no strategic reason for the failure to object and that he knew before trial that the state intended to offer this evidence, which was irrelevant since the defendant did not own the vehicle and no drugs were actually found in the car. Prejudice found because this evidence was essential to the state's motive theory and the state repeatedly relied on it in closing arguments.

*People v. Hoerer*, 872 N.E.2d 572 (Ill. App. 2007). Counsel ineffective in drug and involuntary manslaughter case for stipulating to the admission of the defendant's testimony from a codefendant's trial admitting that he entered into plea negotiations with the state. Counsel's conduct was deficient because a state rule of evidence prohibited this

testimony. Prejudice established because, under state law, admission of this evidence is “considered so devastating and prejudicial to a defendant that it constitutes reversible error absent a contemporaneous objection from trial counsel and even in the fact of overwhelming evidence of guilt.” *Id.* at 578.

***State v. Butcher***, 866 N.E.2d 13 (Ohio App. 2007). Counsel ineffective in rape and kidnaping case for failing to adequately object to hearsay testimony. The defendant was charged with raping two sisters in the same room at the same time. One sister was five and the other was six. Almost two months after the alleged incident the sister’s reported the alleged abuse and the identity of the abuser, the boyfriend of the aunt of one of the girls, to their grandmother, who relayed the information to the mother. During trial, counsel objected to the grandmother’s testimony concerning statements the girls had made to her but the trial court improperly admitted this testimony. During the mother’s testimony, which included double hearsay of what the girls said to the grandmother, who told her, counsel failed to object, however. Counsel also failed to timely object to improper hearsay testimony of the state’s medical expert. The mother had taken the girls to a private doctor initially for treatment. On the advice of Child Services, the mother then took the children for examination at the “Child Advocacy Center” where they were physically examined and interviewed in depth by the doctor. The Detective on the case did not interview the children and deferred to the doctor’s interview. Prior to trial, counsel had filed a motion in limine to exclude the doctor’s testimony about statements of the children because these were not made for the purpose of medical treatment. The court conditionally granted this motion unless a hearsay exception was established. When the doctor’s testimony and report, which also included the hearsay statements, was offered, however, counsel failed to object. Counsel’s conduct was deficient in failing to object to the mother’s double-hearsay testimony, which was based on the grandmother’s statements that counsel had objected to, and in failing to object to the Doctor’s testimony and report because “[t]he granting of a motion in limine alone will not preserve error for review.” It was also clear here that the doctor was “a ‘manufactured witness’” that “assume[d] the role of a police investigator” and testified to hearsay statements “under the guise that they were given for the purpose of medical diagnosis or treatment.” For example, the doctor testified that the identity of the perpetrator was important medically due to concerns about sexually transmitted diseases, but clearly was not concerned about that since the girls were not tested for STD. Considering both the court’s error and the IAC, the court found the denial of a fair trial because four different adults (grandmother, mother, doctor, and detective) testified and the doctor’s report also concluded that the defendant was the perpetrator based on inadmissible hearsay. Although the girls also testified,

The prejudice arises when numerous adults repeat the girls’ stories in court. If a statement is repeated often enough, it is more believable. Additionally, the repetition has the effect of the adults’

vouching for the veracity of the statements.

Prejudice was also clear because portions of the girls' testimony were suspect because inconsistent with each other and one girl could not even identify the defendant in the courtroom and the medical evidence was equivocal because it was "consistent with" but not "diagnostic of" abuse.

**Fuller v. State**, 224 S.W.3d 823 (Tex. App. 2007). Counsel ineffective in sexual assault of a child and indecency with a child case for failing to object to improper testimony from four witnesses "bolstering" the 15-year-old alleged victim's truthfulness and credibility. The child's teacher testified in the state's case-in-chief that she was a credible and truthful person. This testimony was improper because the relevant rule of evidence allowed testimony concerning the victim's character for truthfulness only after her character had been attacked. The defense cross-examination of her does not "open the door" to character for truthfulness evidence. Likewise, "a defense theory of fabrication (as opposed to recent fabrication) which generally denies the charges against a defendant is not the equivalent of an attack on the victim's general character for truthfulness so as to warrant the admission of character testimony." The alleged victim's mother, an expert in child sexual assault investigations, and a forensic interviewer also testified that they believed the alleged victim's allegations against the defendant. This testimony was improper and inadmissible. Counsel's conduct was deficient in failing to object to this evidence because "counsel's conduct in allowing the State unfettered and unchecked bolstering of the victim was so outrageous that no competent attorney would have engaged in it." The failure to object was not explained by strategy or tactics. "Where counsel's strategy is premised on an incorrect understanding of the law, we need not defer to that as a reasonable strategy." Prejudice found because the alleged victim's credibility was the only real issue at trial and the repeated objectionable testimony was also "emphasized . . . to the jury during [the state's] closing argument."

**State v. Hendrickson**, 158 P.3d 1257 (Wash. App. 2007), *aff'd on other grounds*, 198 P.3d 1029 (Wash. 2009). Counsel ineffective in second-degree identity theft case for failing to object to hearsay testimony from a Social Security Administration special agent that the owner of the social security card stated that his card had been lost and that no one had permission to use it. These statements were not admissible as business or government records and were "testimonial" and barred under *Crawford v. Washington*, 541 U.S. 36 (2004). Counsel's conduct was deficient and not explained by strategy. Prejudice found because this was the only evidence that the defendant did not have a valid reason to possess this card. Thus, absent counsel's error, there is a reasonable probability that the defendant would have been acquitted on this charge.

**2006: McIntosh v. State**, 941 So. 2d 1 (Fla. App. 2006). Counsel ineffective in attempted murder case for failing to object to the improper use of demonstrative evidence and

improper prosecutorial questioning and argument. The defense theory was that the defendant stabbed the victim in the neck with a pocketknife in self-defense. The stab wound was less than 3/4 inch across but left the victim partially paralyzed. Counsel was ineffective in failing to object when, during cross examination of the defendant, the prosecutor pulled out his own knife to demonstrate his theory that the defendant could not have pulled out his knife during the struggle and had come prepared to fight. Although the defendant had used an ordinary pocketknife, the prosecutor pulled out a knife that was 8 to 10 inches long, which was 3 times larger than what the defendant had used. Counsel did not object even though this knife was not in evidence and the prosecutor had given no notice of his intent to use it. Counsel also failed to address this issue when the jury returned from deliberations and asked, "What happened to the knife? And what are its dimensions?" Counsel did not request an instruction to clarify that the knife used by the prosecutor was not in evidence and was not intended to replicate the knife the defendant used, which was also not in evidence. Instead, counsel said nothing when the court instructed that "you've heard all of the evidence you're going to hear and seen all of the evidence you're going to see." Prejudice established because the evidence of self-defense was fairly strong and the jury's question revealed that the jury was influenced by the prosecutor's improper actions. Counsel also failed to object to the prosecutor's "completely improper" question to the defendant about whether he believed one of the defense witnesses, whose testimony was mostly helpful to the defendant, but included some bad information, which the defendant denied. This error was compounded when the prosecutor repeatedly restated in his closing arguments that the defendant called his own witness a liar, again without objection. While this error alone may not have been sufficiently prejudicial to require reversal, when "added to" the other error there was cumulative prejudice.

***State v. Milne***, 921 So. 2d 792 (Fla. App. 2006). Counsel ineffective in sexual battery and false imprisonment case for failing to request a mistrial due to the prosecutor's unsupported allegations during closing arguments. The defendant had told police at the time of arrest, consistent with his trial testimony, that he had consensual sex with the victim. The state had successfully excluded evidence of the prior consistent statements from evidence with a motion in limine. During arguments, however, the prosecutor implied that the defendant had tailored his trial testimony after hearing all the other witnesses testify.

***Rose v. State***, 846 N.E.2d 363 (Ind. App. 2006). Counsel ineffective in child molestation case for failing to object to the treating physician's opinion that the victim's allegations were truthful. Prejudice found in light of the inconclusive physical evidence in the case.

***Bowman v. State***, 710 N.W.2d 200 (Iowa 2006). Counsel ineffective in kidnaping and assault case for failing to object to the prosecutor's repeated cross-examination questions asking the defendant if the state's witnesses fabricated their testimony. These questions

were prohibited under clear state law. The defendant was prejudiced because the case depended on witness credibility to such a great extent that counsel presented two expert witnesses to testify concerning the impaired credibility of the state's intoxicated witnesses.

***State v. Roberson***, 924 So. 2d 1201 (La. App. 2006). Counsel ineffective in robbery case for failing to object to admission in evidence of the defendant's letter to the prosecution and cross-examination concerning the defendant's pretrial offer to plead guilty to a lesser included offense. Counsel's conduct was deficient because counsel was unaware of the state law making this information clearly inadmissible. Prejudice found.

**2004:** ***Joncamlae v. State***, 598 S.E.2d 923 (Ga. App. 2004). Counsel ineffective in aggravated assault case for failing to object to tainted in-court identifications of the defendant by the two victims. Defense counsel learned only during the testimony of the victims that they had been shown a photo line-up, including the defendant's picture, the day before trial. Counsel conceded that her conduct was deficient because she was "in shock" at that point and failed to object or move for mistrial. Prejudice found because the witnesses "were not absolutely certain of their in-court identifications, and did not have excellent views of the defendants at the time of the attacks." One witness even admitted outright his reliance on the photograph of the defendant he had seen in the prosecutor's office.

***Collier v. State***, 596 S.E.2d 795 (Ga. App. 2004). Counsel ineffective in aggravated assault case for failing to object to the prosecutor's improper comments during closing argument. The defendant was charged in connection with several unrelated bar fights that he initiated. During the trial, evidence was admitted concerning two similar incidents, one of which resulted in a guilty plea to terroristic threats. The defendant claimed self defense or defense of others with respect to all four incidents. During the closing argument, the prosecutor, without objection, commented that he had taken part in a negotiated plea with respect to defendant's prior conviction for terroristic threats and was now asking for the jury's "forgiveness" for making the deal, which involved no confinement time, and that the jury should ensure confinement to protect the community from future danger. The prosecutor's arguments were impermissible use of similar transaction evidence and argument on future dangerousness, which was irrelevant to guilt or innocence. Counsel did not object solely because of his policy not to object in closing argument absent "blatant" error because objection just draws attention to the argument. The court rejected this as a "reasonable trial tactic" because of numerous state cases rejecting these same arguments as improper. Prejudice found, "not because the jury would have reached a different verdict, but because the case would never have been submitted to it for deliberation if defense counsel had moved for a mistrial."

***People v. Jura***, 817 N.E.2d 968 (Ill. App. 2004). Counsel ineffective in use of weapon by felon case for failing to object to the admission of hearsay portions of a radio call and to

the prosecution's use of that evidence. Three police officers testified and included hearsay statements identifying the suspect in initial radio calls about the incident. They further testified that the defendant matched these initial descriptions and the state relied on this testimony in closing argument, without objection, even though the court had sustained an objection to the testimony about the match. Prejudice found because the trial amounted to a credibility contest between the three officers and the defendant but the improper hearsay was repeatedly used by the state in argument and evidence as substantive evidence from a "concerned citizen" that made the radio call but never testified at trial.

***People v. Young***, 807 N.E.2d 1125 (Ill. App. 2004). Counsel ineffective in first degree murder case involving a shooting at a backyard barbecue where the defense was self-defense because counsel failed to object to the prosecutor's improper questions to the defendant and argument. The prosecutor improperly questioned the defendant concerning the veracity of other witnesses, confused the jury about the state's burden of proof, cross-examined the defendant about his post-arrest silence and prior bad acts, improperly vouched for witnesses and injected his own opinions in the proceedings. Counsel was also ineffective for admitting during cross-examine that he lacked the expertise to adequately cross-examine the state's pathologist, but failing to ask for a continuance that would likely have been granted. The cross of the expert actually bolstered the testimony of the expert. Counsel was also ineffective in failing to order gunshot residue tests of the victim's clothing, which the state had declined to order. The court declined to address whether each instance of deficient conduct would require reversal on its own because "[t]he process was tainted by the prosecution such that the arguable failures of the defense acting in concert therewith denied this defendant a fair trial.

***Peterson v. State***, 149 S.W.3d 583 (Mo. App. 2004). Counsel was ineffective in second degree murder case for failing to object to the prosecutor's improper rebuttal closing argument that suggested that the state had more than one eyewitness implicating the defendant, although only one eyewitness testified. Counsel's conduct was deficient because the prosecutor's argument was not supported by the evidence. Prejudice was found because "a prosecutor's assertions of personal knowledge . . . are apt to carry much weight against the accused when they should carry none. . . ." The improper arguments were "especially troublesome" in this case because there was no physical evidence implicating the defendant and the only eyewitness was a convicted felon with credibility problems.

***Vaughn v. State***, 607 S.E.2d 72 (S.C. 2004). Counsel was ineffective in drug case for failing to object to the prosecutor's closing argument stating what uncalled witnesses would have testified to. The state presented only the testimony of the arresting officer to support a finding that the defendant possessed drugs. In response to defense counsel's argument that there had been another officer in the car at the scene who did not testify, the prosecutor argued that the other officer would have testified consistently if called to

testify. Although the prosecutor was entitled to “some response” to the defense argument, the prosecutor’s argument was unfair. Prejudice was found because the state’s evidence was limited to the arresting officer. Moreover, during deliberations, the jury asked to see the “testimony” of the officer who was not called to testify.

***Roberts v. State***, 602 S.E.2d 768 (S.C. 2004). Counsel was ineffective in murder case for failing to adequately impeach a jailhouse snitch, who testified that he was 10 feet away in the cell next to the defendant in pretrial confinement and the defendant confessed to him. While counsel discussed with the defendant that the conversation was impossible due to the layout of the cells, counsel did not question the snitch about this or present any evidence on the issue. Counsel’s conduct was deficient because, if counsel had adequately prepared and presented the evidence, the evidence would have established that the snitches’ cell was 35-100 feet from the defendant and the cell block was extremely noisy. Any conversation between the snitch and the defendant would have been heard by numerous guards and inmates because the defendant would have had to yell to be heard over the noise. Although a “close case,” prejudice found because the snitch was a key witness and the state’s remaining evidence consisted almost entirely of testimony of a codefendant who had made four contradictory statements, including implicating a clearly innocent man in three of those statements. The jury had also asked “who was on trial” during deliberations.

***Sessums v. State***, 129 S.W.3d 242 (Tex. App. 2004). Counsel ineffective in indecency with a child case for failing to object to inadmissible expert testimony that improperly commented on the alleged victim’s truthfulness. The evidence at trial showed that the alleged victim’s mother found the five-year-old boy performing oral sex on her husband’s stepfather. Child Protective Services (CPS) investigated. During interviews of the victim, he stated that he was also sexually abused by the Defendant, who was his paternal grandfather. At trial, the State’s evidence consisted of testimony of four expert witnesses and the testimony of the victim’s step-grandfather, who said the victim had told him his bottom was sore because the Defendant had been “playing with it.” Each of the experts testified about the alleged victim’s statements to them and were then asked to explain and then to comment directly on the factors they used in determining if this child was telling the truth. This testimony was inadmissible. Counsel’s conduct was deficient “in failing to object to [this] clearly and unquestionably objectionable testimony of the most outrageous and destructive type. There is no conceivable strategy or tactic that would justify allowing this testimony in front of a jury.” Prejudice found because the entire trial hinged on statements of the alleged victim, who did not even testify, and the state specifically argued in closing that the child must be truthful because he had convinced these four experts.

\*Capital Case

**2003:** *Orr v. State*, 584 S.E.2d 720 (Ga. App. 2003). Counsel ineffective in statutory rape case for failing to object to police officer's testimony that impermissibly bolstered the credibility of the alleged victim where credibility was a major issue on the element of penetration.

*State v. Graves*, 668 N.W.2d 860 (Iowa 2003). Counsel was ineffective in manufacturing and possession of marijuana case for failing to object to the prosecutor asking the defendant whether a police officer was lying, failing to object to the prosecutor's argument in which he accused the defendant of calling the officer a liar, and failing to object in the prosecutor's rebuttal argument when he repeatedly characterized the defendant as lying. In addition, the prosecutor improperly called the defense argument a "smokescreen," improperly asserted that the police officer had no motivation to lie because he would keep his job regardless of the outcome of the case, argued that he personally did not leave cash at other people's homes, and inaccurately declared that if the jury believed the police officer it would have to find the defendant guilty. The court found that all of these arguments were improper and that counsel could not reasonably have concluded that failing to object was sound trial strategy. Prejudice was found because the police officer's and the defendant's credibility were the primary issue in the case, and the state's case was relatively weak and circumstantial outside of the credibility issue.

## 5. IMPEACHING WITNESS

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

**2008:** *Brown w. Smith*, 551 F.3d 424 (6th Cir. 2008). Counsel ineffective in sexual molestation of teenage daughter case for failing to investigate and obtain daughter's counseling records. Counsel's conduct was deficient because the state's case depended almost entirely on the daughter's credibility and counsel knew that the counselor, who saw the daughter both before and after the alleged assault, did not believe her. Counsel's alleged belief that the counselor would not have been a credible witness did not excuse the conduct.

[O]ur quarrel is not with trial counsels' decision to forego calling [the counselor] as a witness *per se*, but rather with the lack of any reasonable, timely investigation into what she might have offered the defense. Without ever seeking *in camera* review of the counseling records, . . . counsel could not reasonably have determined what value, if any, those records might have been to his defense, and could not properly have weighed the potential benefit of calling [the counselor] to the stand (whatever her perceived credibility) against the potential risk. Moreover, even if [the counselor] were never called as a witness, defense counsel could still have used the counseling records to impeach the daughter on cross-examination. But by the time defense counsel met directly with [the counselor] (for two to three minutes on the third day of trial), the daughter had already testified, and the opportunity to impeach her testimony directly had passed.

Prejudice established because the records also revealed inconsistencies in the daughter's statements to the counselor and her trial testimony. The court reviewed the issue *de novo* rather than under AEDPA's standards because the state court did not adjudicate this claim on the merits because the state court did not have the daughter's records before it through no fault of the defendant who had requested hearings and discovery and been denied until federal court.

**2006:** *Higgins v. Renico*, 470 F.3d 624 (6th Cir. 2006) (*affirming Higgins v. Renico*, 362 F. Supp. 2d 904 (E.D. Mich. 2005)). Under AEDPA, counsel was ineffective in murder case for failing to cross-examine the key prosecution witness because of lack of preparation. The defendant and the state's witness were the only people present when the victim was shot. The defendant made a statement, which was admitted in evidence, that the state's witness shot the victim. The witness, who said that the defendant was the shooter, did not show up for his scheduled testimony during trial and his preliminary hearing testimony

was read into the record. Two days later, the witness showed up and testified. Counsel informed the court that he had been provided with the witness' two prior statements several days before but had not reviewed the statements or prepared for cross-examination. The court recessed for 30 minutes, but counsel informed the court that he still was not prepared. The court would not delay longer and counsel asked no questions on cross-examination. The state court made a conclusory finding that there was no prejudice but did not address the issue of deficient conduct so this issue was reviewed de novo. Counsel's conduct in failing to adequately prepare for cross-examination was deficient and not justified by strategy. Prejudice was found because the witness at issue was the only witness that directly implicated the defendant as the shooter. There was no cross even though the witness (1) had a strong interest in the jury's finding since he was the only other person present at the time of the shooting; (2) had made two prior statements with inconsistencies; and (3) had gunshot residue on his hands after the shooting. In addition, the failure to challenge the testimony left the impression that the defense accepted the testimony. Likewise, the witness testified that he had not shown up earlier in the trial because he had been threatened by "people" and the failure to cross-examine left the impression that the threats came from the defendant when there was no evidence to support that inference. Finally, the preliminary cross-examination testimony was inadequate because counsel had been conducting only non-confrontational discovery at that time. In its AEDPA analysis, citing *Strickland*, the court held that the state court's finding of no prejudice was an unreasonable application of Supreme Court precedent.

***Reynoso v. Giurbino***, 462 F.3d 1099 (9th Cir. 2006). Counsel ineffective in murder case for failing to cross-examine state witnesses about their motivation for testifying. The crime went unsolved for two years and then a jail house snitch, after seeing advertisements about a \$25,000 reward on television, contacted police saying the defendant had confessed to him shortly after the crime. After another year, with the reward still being advertised on television and in newspapers, the police reinterviewed a witness interviewed the night of the murder and another witness, who allegedly saw the defendant near the scene the night of the murder, contacted the police. Although there was no physical evidence, both of these witnesses also identified the defendant. During trial, counsel cross-examined the snitch about his motivation in seeking the reward (\$10,000 of which he ultimately collected). Although counsel cross-examined the other two witnesses on other matters concerning credibility, counsel did not cross-examine them about the reward motivation. Counsel's conduct was deficient in failing to investigate or to question the witnesses on this matter because counsel knew about the reward. Prejudice was found because, if counsel had asked, she would have learned that both witnesses were aware of the reward and had asked police about it. Thus, they "may have had a motive to lie." (Both witnesses did ultimately collect \$7,500 each). Prejudice was also clear because the prosecutor emphasized in closing that these witnesses had no bias and "that neither had any reason or motive to lie." Under AEDPA, the state court's

decision was an unreasonable application of federal law. *Id.* at \_\_\_ (citing *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000)).

**b. U.S. District Court Cases**

**2010:** *Schoenauer v. United States*, 759 F.Supp.2d 1090 (S.D. Iowa 2010). Counsel ineffective in drug conspiracy case for failing to investigate and present impeachment evidence. The government presented expert testimony from an ATF auditor to establish the petitioner's wealth exceeded his income during the relevant time period. While he earned \$262,000, according to the government, he had available 2.9 million. While the defendant had requested that counsel obtain discovery and investigate to rebut this testimony, counsel believed this was a "'side issue' and that this was a drug case, not a tax case." Thus, counsel did not move to exclude this testimony or investigate even though the defendant had been investigated by the IRS, who had seized all of his financial records. The defendant, who was an accountant, informed counsel the IRS found no unexplained income. At trial, there was no "direct evidence" of the defendant participating in the conspiracy. Thus, his conviction was primarily because of this "unexplained income" testimony. If counsel had investigated, a special agent with the IRS, would have testified that he had investigated a five year period at the prosecution's request looking for criminal violations and found none. He also would have testified explicitly that he found no evidence of unreported or unexplainable funds. The court noted in a footnote that the defense had not asserted a *Brady* claim due to the government's failure to disclose this information. Nonetheless, the court was "troubled" by the government's actions and, on rehearing, dismissed the indictment citing the impracticalities of retrial due to the passage of time and the "significant expense" to the defendant in defending himself the first time.

**2004:** *Harris v. Senkowski*, 298 F. Supp. 2d 320 (E.D.N.Y. 2004). Counsel was ineffective in second degree robbery case for failing to challenge the testimony of the robbery victim with her prior inconsistent description of the robber. Only thirty minutes after the robbery, the victim described her assailant as a black male standing 5'4" tall and weighing 130 pounds. The next evening, the victim, who was Asian, rode around the neighborhood with police officers and identified the defendant, who was then arrested. The defendant was 6' tall and 220 pounds. Prior to trial, counsel moved to suppress the identification as being unduly suggestive, but counsel never addressed the victim's prior description and the motion was denied. During the trial, the victim and the police officer that drove her around were the only state's witness. Counsel did not cross-examine the victim concerning her prior description of the defendant even though his sole argument in defense was mistaken identification. The defendant never squarely claimed that trial counsel was ineffective on this basis in state court and, therefore, the state courts never ruled on the issue. The government explicitly waived any procedural or exhaustion issues though. Analyzing the case under pre-AEDPA standards, the court found that counsel's conduct was deficient and that "[a] more compelling example of ineffective

representation is difficult to fathom.” While counsel alleged strategic reasons for his failure, the court found that each reason was “ludicrous.” Even if counsel chose not to cross-examine the victim for an alleged strategy, counsel still could have offered the complaint report into evidence as a business record or called the police officer that took the complaint as a witness. Prejudice found because the government’s case rose or fell on the strength of the victim’s testimony, but the jury never heard about her prior, strikingly inconsistent identification in the case.

**c. State Cases**

**2008:** *Miller v. State*, 665 S.E.2d 596 (S.C. 2008). Counsel ineffective in armed robbery case for failing to cross-examine the defendant’s girlfriend, a state witness, regarding the similarities of three armed robberies she and the defendant’s nephew were charged with. Specifically, the girlfriend’s car was used in each robbery, a similar handgun was used, and the victim’s description of the assailant more closely matched the nephew than the defendant. Prejudice established because the defense argued mistaken identity and third-party guilt, which was the primary defense. In addition, the girlfriend’s credibility was “questionable at best” because she had initially implicated the defendant in an armed robbery, in which she and the nephew were charged, before she learned he could not have committed the crime because he was in jail at the time.

*Millam v. State*, 745 N.W.2d 719 (Iowa 2008). Counsel ineffective in sexual abuse case for failing to present evidence of the alleged victim’s prior, false accusation of sexual abuse. The alleged victim was the daughter of the defendant’s girlfriend and she had previously alleged sexual abuse by her mother’s previous boyfriend but then recanted the accusation. Counsel made no attempt to present this evidence even though there was no physical evidence and no witnesses other than the alleged victim. Counsel believed the evidence was inadmissible under the rape-shield law which excluded evidence of “past sexual behavior” of the victim. The Iowa court had held, prior to the enactment of the rape-shield law, that prior false allegations were not inadmissible under general relevance considerations, but had not addressed the issue under the statute at the time of the defendant’s trial. The court subsequently held that prior false allegations are not “sexual behavior” prohibited by the statute and this evidence is admissible if the defendant making a showing that the alleged victim made the statements and the statements were false, based on a preponderance of the evidence. Counsel’s conduct was deficient because “the test to determine whether counsel is required to raise an issue” is based on “a normally competent attorney.” “This test does not require an attorney to be clairvoyant, but rather to research the relevant legal issues and determine whether, given the circumstances of the particular case, the issue is ‘worth raising.’” Here counsel conducted no research. If he had researched, he would have found “that many jurisdictions had concluded that prior false claims of sexual abuse were not protected by their rape-shield laws.” In addition the plain wording of the statute was clear because “it

refers to sexual behavior, and quite simply, claims of sexual abuse are not sexual behavior.” Prejudice was clear in that this evidence “could have greatly impugned” the alleged victim’s credibility. This was especially so since “her own mother doubted her claims . . . due to her prior false claims.”

- 2006:** *J.J. v. State*, 858 N.E.2d 244 (Ind. App. 2006). Counsel ineffective in burglary and theft case for failing to inform the jury that the defendant’s alleged accomplice had been granted use immunity. Prejudice found because the witness’ testimony was of great consequence to the jury’s consideration of the case and the prosecutor commented that the witness had “cooked himself” by his testimony that he had participated in the crime with the defendant, implying that the witness was credible because he would suffer for his own admission when the prosecutor knew he would not.
- 2005:** *Thompson v. Commonwealth*, 177 S.W.3d 782 (Ky. 2005). Counsel ineffective in reckless homicide and persistent felony offender case for failing to challenge the accident reconstruction testimony of the investigating officer. The case involved the death of an eight year old child that ran into the street chasing a puppy and was hit by the defendant’s motorcycle. Testing revealed alcohol in the defendant’s blood, along with traces of marijuana, pain reliever, and anti-depressant medication. The investigating officer used an English study based on the running speed of eight year olds, distance, and the defendant’s estimated speed and concluded that the defendant should have been able to stop with 26 feet to spare. Even without a defense expert, counsel should have realized that the officer made a mathematical error and his own formula would have revealed that the defendant could not have stopped his motorcycle until 40 feet after the point of impact. Counsel did not retain his own expert because the defendant consistently told him that he never saw the child before the impact. Thus, counsel believed the possible braking distance was irrelevant. Counsel’s conduct was deficient because his only defense was that the accident was unavoidable and counsel knew that the prosecution would rely on the officer’s testimony that it was avoidable with normal reaction times. It was unreasonable to fail to attempt to challenge this testimony because “jurors are undoubtedly greatly influenced by the testimony of someone deemed an ‘expert.’ This is especially true if the only countervailing testimony comes from the defendant, the sole person with a strong motive to lie (if the truth would deem him guilty of the crime charged).” In addition, the expert’s testimony was so clearly erroneous in this case that “a non-mathematical expert discovered it on simple review of the calculations.” Prejudice found because if counsel had performed adequately, the expert would have had to admit that the defendant “could not have stopped” in time.
- 2004:** *\*Black v. State*, 151 S.W.3d 49 (Mo. 2004). Counsel ineffective in capital trial for failing to impeach three state witnesses with prior inconsistent statements that supported the defense theory that the killing was committed in self-defense rather than as the result of deliberation. The case involved a black victim and a white defendant in a road fight that

\*Capital Case

“grew out of [the defendant’s] race-based reaction to the victim's behavior toward [the defendant’s girlfriend].” Counsel failed to cross-examination one eyewitness with his prior statement, omitted at trial, that he saw the victim get out of his vehicle and hit the defendant with a beer bottle. Another eyewitness was not crossed on his prior statement that the two men both got out and exchanged blows, which was at odds with his trial testimony. Finally, another eyewitness was not crossed with evidence the victim was yelling and exited his vehicle without injury, even though she testified at trial that the victim remained in his vehicle. Counsel also failed to cross-examine a state witness concerning inconsistent statements about how alcohol the victim had prior to the altercation. Prejudice established because “counsel's failures went to the key issue of deliberation” as evidenced by the jury’s request for additional instructions defining “cool reflection” in the first-degree murder verdict form. Reversal required even though each of the state witnesses did not testify in post-conviction. “[A] movant is not required to reenact how a hypothetical trial would have proceeded had particular evidence been utilized, but to show that counsel knew of the evidence and was ineffective in failing to use it, to movant's prejudice.”

## 6. ELICITING DAMAGING EVIDENCE AND MAKING DAMAGING ARGUMENT

### a. U.S. District Court Cases

**2009:** *Ramos v. Lawler*, 615 F. Supp. 2d 347 (M.D. Pa. 2009). Under AEDPA, counsel ineffective in conspiracy to commit murder case for eliciting testimony from the victim that the co-defendant had pled guilty to conspiracy to commit murder. Counsel's conduct was deficient because this evidence in no way negated the defendant's culpability and was damaging. "[T]he prosecutor relied extensively, almost exclusively, on the [evidence of the co-defendant's guilty plea] during his closing argument." Prejudice established even though the trial court instructed that the substance of the guilty plea could not be used as evidence of guilt.

[T]here is a presumption that a jury will obey a jury instruction. However, this is only a *presumption* and can be rebutted by record evidence and the circumstances of the case.

Here, there was prejudice because there was very little, if any, evidence of a conspiracy to commit murder, although there was of conspiracy to assault and assault. The jury's guilty verdict on the conspiracy to commit murder charge "indicates that it necessarily and improperly considered [the] guilty plea as substantive evidence" of the defendant's guilt. The state court's decision was an unreasonable application of clearly established law.

### b. State Cases

**2007:** *People v. Bailey*, 872 N.E.2d 420 (Ill. App.), *appeal denied*, 879 N.E.2d 933 (Ill. 2007). Counsel ineffective in bench trial for possession of crack with intent to distribute for eliciting damaging evidence in cross-examination. A police officer testified that he observed an "unknown person" yelling "Rocks" to passing cars. When cars stopped, he would direct them to an alley where the defendant would exchange money for drugs. The officer witnessed four such transactions in about 35 minutes before arresting the defendant who had cash and drugs on him. Counsel's conduct was deficient because during cross counsel elicited further information that the officer witnessed the defendant provide money to the "unknown person" several times and included that information in his case report, which counsel either had not read or did not think about. Counsel's lack of knowledge of the report, failure to move to strike the officer's initial non-responsive answer, and "digging the hole deeper" with further questioning was not explicable by any valid trial strategy. Prejudice found because this was "key" evidence in the case and the trial court clearly relied on it and said so.

*Robertson v. State*, 214 S.W.3d 665 (Tex. App. 2007). Counsel ineffective in aggravated

assault case for eliciting testimony from the defendant that he was incarcerated on two convictions and that he was in possession of a knife at the time of the previous arrests. Prejudice found because this testimony opened the door for the state to elicit testimony on cross-examination that the defendant had two prior drug convictions with “deadly weapon findings on both charges.” The state used this evidence in argument to undermine the defendant’s credibility in arguing self-defense.

**2006:** *Glancy v. State*, 941 So. 2d 1201 (Fla. App. 2006). Counsel ineffective in burglary with a sexual battery case for eliciting damaging character evidence against the defendant. Specifically, counsel’s conduct was deficient for eliciting testimony from the alleged victim that she did not like the defendant because he gave her minor children pot, booze, and cigarettes and because she believed that he had been breaking into her house for two years, stealing her underwear, and leaving “dirty magazines” behind. Counsel also elicited testimony from her son that the alleged victim did not like the defendant because he had been “in and out of prison.” Prejudice found.

*Bowers v. State*, 929 So. 2d 1199 (Fla. App. 2006). Counsel ineffective in burglary and grand theft case for questioning the defendant concerning his prior criminal convictions and eliciting numerous details that the State would not have been entitled to elicit since the state’s examination would have been limited to the number of felony convictions or convictions for misdemeanors involving dishonesty or false statement. Prejudice found because there was no physical evidence and the trial hinged on credibility issues. By eliciting information concerning prior convictions for burglary and grand theft, trial counsel impugned his client’s credibility in front of the jury. While counsel’s strategy to be completely candid with the jury so that the defendant’s testimony would be more believable, “counsel’s execution of the strategy defeated the intent” because the information was presented in such a manner, due to counsel’s failure to properly prepare with the defendant, that it appeared the defendant was trying to withhold some information. Thus, the court held “that counsel’s strategy to bolster his client’s credibility with candor was ‘patently unreasonable.’”

**2005:** *Whitaker v. State*, 622 S.E.2d 916 (Ga. App. 2005). Counsel ineffective in burglary case for introducing an unredacted copy of previous convictions for two of the state’s key witnesses that also showed that the defendant had been charged with the same crimes (possession of tools for the commission of a crime, criminal trespass, and burglary). Counsel’s conduct was deficient and not explained simply by counsel’s strategy to impeach the witnesses. Counsel “did not offer any explanation for failing to redact the exhibits, which she knew implicated her client in other crimes.” Prejudice found because the state’s case rested primarily on the testimony of these two alleged accomplices. The evidence showing that the defendant had been previously charged along with these witnesses was especially damaging because it “may have caused the jury to give additional credence to the testimony of the state’s star witnesses.”

***People v. Orta***, 836 N.E.2d 811 (Ill. App. 2005), *appeal denied*, 844 N.E.2d 970 (Ill. 2006). Counsel ineffective in bench trial for possession of drugs with intent to deliver drugs case for eliciting testimony from police officers that enabled the State to prove an essential element of the charge. Counsel's conduct was deficient because counsel elicited information that a prior "control transaction" in which the defendant sold drugs to an informant, over the state's objection. Counsel also elicited testimony that there were a lot of male clothes in the apartment (when the defendant's argument was that he had no control or possession) and the drugs were found in a shaving bag, along with money, a scale, and the defendant's mail, which the state later attempted to move into evidence. Counsel's conduct was deficient. "A person charged with a crime has the right to expect his lawyer's questions to prosecution witnesses will not help the State prove its accusations." Prejudice found primarily because counsel elicited testimony about the prior "control transaction" with the state objecting and the trial court trying to discourage counsel from presenting this evidence. Counsel's reason for offering this evidence was because he was attacking the officer's credibility. The court rejected this as a valid strategy. This evidence was prejudicial because the court relied on it in finding an intent to deliver. The evidence about the clothes was also prejudicial because the court relied on it in finding constructive possession. Without all of the evidence elicited by the defense counsel the state's case for possession was solely that the defendant had keys to the apartment where the drugs were found.

**2004:** \****State v. Davis***, 872 So. 2d 250 (Fla. 2004). Counsel ineffective in capital case for his statements during voir dire expressing racial animus and admitting his own racial prejudice where the Defendant, an African-American male who was 22 at the time, was accused of stabbing to death a 73-year-old white woman, but there was no apparent racial motivation for the crime. During voir dire counsel stated, "Sometimes I just don't like black people. Sometimes black people make me mad just because they're black." In closing in sentencing, counsel reminded the jurors that none had expressed the same feelings and that they promised not to consider race. Counsel's strategy in making the comments was to get the jurors to "drop the mask" and acknowledge hidden feelings about race. The court found that "an explicit expression of racial prejudice can[not] be considered a legitimate tactical approach. Whether or not counsel is in fact a racist, his expressions of prejudice against African-Americans cannot be tolerated." Prejudice was found because "the expressions of racial animus voiced by trial counsel" would have "unnecessarily tended either to alienate jurors who did not share his animus against African Americans . . . or to legitimize racial prejudice without accomplishing counsel's stated objective of bringing latent bias out into the open." Counsel's expressions of racial bias also may have affected his performance in both the guilt and penalty phases of trial. In the guilt phase, trial counsel rested without presenting a case, rather than present two African-American witnesses whose testimony would have implicated others in the murder because another white witness would contradict their testimony and counsel found the white witness to be more credible. The trial court also found counsel to be

ineffective in sentencing for failing to obtain records and witnesses and never visiting the Defendant's family or neighborhood.

*\*People v. Morris*, 807 N.E.2d 377, *overruled on other grounds*, 813 N.E.2d 93 (Ill. 2004). Counsel ineffective in capital case for discussing in great detail an unrelated murder committed by the defendant in opening, even though the trial court had previously agreed to exclude all evidence of the unrelated murder from trial. Defendant was charged, along with several codefendants, with the robbery and murder in Chicago of someone believed to be a drug dealer. Several days before, the defendant had killed a man in a drug-deal gone bad scenario. In opening counsel conceded the defendant's participation in the charged crimes and discussed the unrelated murder in great detail. The defendant subsequently testified with respect to his involvement in both murders and the state offered evidence on both. In closing argument, the State repeatedly reminded the jury of the unrelated murder. Counsel conceded guilt in opening because her strategy was to minimize the defendant's culpability and essentially plead for jury nullification. While this was a proper strategy, in light of the significant evidence against the defendant, the problem in this case is that counsel also conceded guilt to an unrelated murder that had been excluded from the state's case prior to trial. Counsel did so because she misunderstood the court's pretrial ruling to allow the state to use this evidence in rebuttal. Likewise, the defendant's acquiescence was immaterial because it was undoubtedly based on the same misunderstanding. Thus, counsel's actions "were not the product of an informed, strategic choice. Rather, these actions were the product of a mistaken belief that the trial court had ruled evidence of the [unrelated] murder admissible at trial when, in fact, the trial court had ruled just the opposite." Prejudice was found because of the "severe repercussions at trial." First, counsel's jury nullification strategy was dependent on the jury sympathizing with the defendant to some extent. This strategy was completely destroyed by evidence of the defendant's guilt of the unrelated murder committed just 36 hours before the charged offense. Thus, counsel's actions "eviscerated the minimal trial strategy that was available to her." "Counsel's deficiencies in this case are distinguishable from typical trial error 'not [in] degree but [in] kind.' *Bell v. Cone*, 535 U.S. 685, ----, 122 S.Ct. 1843, 1851, 152 L.Ed.2d 914, 928 (2002). For in all practical effect, as a result of defense counsel's actions, defendant stood before the jury throughout the trial with no defensive strategy whatsoever."

*State v. Barr*, 814 N.E.2d 79 (Ohio App. 2004). Counsel was ineffective in fleeing and eluding case for opening the door in cross-examination of a police officer to admission of the defendant's statements that had previously been suppressed as involuntary. Prejudice found because without the statements there was no evidence the defendant knew he was being followed by police.

\*Capital Case

**2003:** *Emilio v. State*, 588 S.E.2d 797 (Ga. App. 2003). Counsel was ineffective in drug trafficking case for admitting evidence of bad character. The defendant and his girlfriend had been arrested following a traffic stop for drugs found in the car. The girlfriend, who had been driving, pled guilty to a lesser offense and testified at the defendant's trial. During cross-examination of her, counsel offered into evidence a letter the girlfriend had written the defendant, which revealed that the girlfriend had asked the defendant to commit a crime, but also included a statement that the defendant was wanted in five different states. Counsel was ineffective for failing to redact the damaging portions of the letter or to even inform the jury that the defendant was not actually wanted in five states. Counsel's conduct was prejudicial because the bad character evidence created a reasonable probability that the outcome would have been different since the evidence of the defendant's guilt was not overwhelming.

## 7. CONCEDED GUILT/CONTRADICTING CLIENT (State Cases Only)

- 2011:** *Benitez-Saldana v. State*, \_\_\_ So.3d \_\_\_, 2011 WL 2462964 (Fla. App. June 22, 2011). Counsel ineffective in robbery and burglary with assault or battery for conceding that the defendant was guilty on both charges. Counsel informed the court prior to trial that he would concede theft, consistent with the defendant's statement to police. During cross-examination and argument, however, counsel conceded facts sufficient to establish both charges. Thus, while counsel argued the defendant was not guilty of the charged crimes, he made factual assertions that amounted to admissions to the charges. These admissions "were unintentional and not a matter of trial strategy." Even assuming counsel was attempting to convince the jury to misapply the law, this was not a reasonable strategy when the jury could have acquitted if it believed the defendant's statement. Prejudice found as "this case boiled down to a credibility contest" and the state's case was not overwhelming.
- 2010:** *State v. Maready*, 695 S.E.2d 771 (N.C. App. 2010). Counsel was *per se* ineffective in murder case for conceding guilt of involuntary manslaughter in closing arguments. Because North Carolina courts require the defendant's explicit consent prior to any concession of guilt, even after *Florida v. Nixon*, 543 U.S. 175 (2004), reversal was required. The record did not reflect that "Defendant was asked if he consented to these admissions, or that Defendant had given informed and voluntary consent to these admissions of his guilt."
- 2009:** *\*Cooke v. State*, 977 A.2d 803 (Del. Supr. 2009). Prejudice was presumed, on direct appeal, due to ineffective assistance of counsel and the trial court's failure to intervene when defense counsel pursued a guilty but mentally ill verdict over the objection of the defendant and while the defendant was arguing and testifying that he was innocent and not mentally ill. The trial court was informed of the conflict more than a year prior to trial. The defendant repeatedly objected to counsel's theory. The state moved *in limine* to preclude defense counsel from presenting the defense over the defendant's objections. Nonetheless, the trial court did not inquire and made no real effort to resolve the conflict. From defense counsel's opening statement focusing entirely on pursuit of a GBMI verdict, the stage was set for chaos. Throughout the state's case, there were repeated outbursts by the defendant in the jury's presence and in the jury's absence, all related to his objections to the GBMI defense. The defendant was removed from the courtroom at times. During some of those times, he was not even allowed to watch the proceedings. During other times, he was in a holding cell watching the proceedings by television. Some of the removals from the courtroom were requested by defense counsel. During the defense case, counsel presented evidence that the defendant confessed to a mental health expert, although the defendant in his own testimony denied making the statement. Defense counsel did not question the defendant during his testimony. He was instead allowed to testify on direct without anyone questioning him. In his testimony, he

informed the jury that he disagreed with defense counsel, that he was innocent, and that he was not mentally ill. The defendant was excluded from the courtroom during the state's rebuttal, summations, and the charge, but watched by television. Defense counsel argued that the defendant's denials of mental illness was proof of it and argued that the defendant was guilty despite his testimony that he was innocent. After conviction, defense counsel continued to assert the defendant's guilt in sentencing, but argued that his mental illness was mitigating. The court held that the trial court violated the defendant's Sixth Amendment rights by permitting defense counsel's arguments and by failing to inquire into the issue and to resolve it. "[C]ounsel cannot undermine the defendant's right to make . . . personal and fundamental decisions by ignoring the defendant's choice and arguing affirmatively against the defendant's chosen objective." Here, counsel's actions infringed the defendant's right to plead not guilty and negated the defendant's right to testify in his own defense. Counsel refused to call him, although they believed his claims of innocence were due to mental illness rather than perjury. They also presented evidence of his confession to a mental health expert without obtaining the defendant's waiver of the psychotherapist-patient privilege. Counsel also deprived the defendant of his right to an impartial jury because counsel stated from the opening that he was guilty but mentally ill. The jury's impartiality was also likely affected by the defendant's frequent outbursts and his absences from the courtroom when these were caused by defense counsel's actions. The affect on the jury is also "apparent" from counsel's argument directly contradicting the defendant's testimony and asserting his guilt despite his not guilty plea and claims of innocence. The impartiality of the jury was also compromised in sentencing because counsel conceded the presence of the aggravating factors that made the defendant death eligible. This situation was not comparable to that in *Florida v. Nixon*, 543 U.S. 175 (2004) because the defendant here did not acquiesce silently to counsel's actions. Here, the defendant adamantly objected repeatedly to counsel's actions prior to and during trial. Thus, this was not a situation where the standard from *Strickland v. Washington*, 466 U.S. 668 (1984) was applicable. This was a case to be reviewed under *United States v. Cronin*, 466 U.S. 648 (1984). There was a breakdown in the adversarial system in this case in two ways. First, counsel did not "assist" the defendant in obtaining his objective of a not guilty verdict. Second:

[C]ounsel not only failed to subject the prosecution's case to meaningful adversarial testing, but also undermined the due process requirement that the State prove [the defendant's] guilt—and his eligibility for the death penalty—beyond a reasonable doubt. . . . [O]n the issue of his guilt and his eligibility for a death sentence—the elements of capital murder—[the] defense attorneys' alignment with the prosecutors was complete.

Counsel's conduct "was inherently prejudicial and does not require a separate showing of prejudice." Reversal was also required due to the trial court's failure to inquire into the propriety of the representation. In essence, the trial court failed to protect the defendant's

right to a fair trial “by failing to intervene and provide a remedy for this error, notwithstanding [the defendant’s] explicit requests.” “In this instance, the trial judge’s obligation to ensure that the defendant receives a fair trial required the trial judge to instruct counsel not to pursue a verdict of guilty but mentally ill against [the defendant’s] wishes.”

**2004:** *In re Welfare of B.R.C.*, 675 N.W.2d 348 (Minn. App. 2004). Counsel ineffective in juvenile damaging property case where counsel conceded the juvenile’s guilt of shooting at a pickup truck and the record failed to show that the juvenile consented in this strategy. The court declined to assume acquiescence. “Given a juvenile’s lack of maturity, we believe that a juvenile defendant’s consent should be express and placed on the record before a concession of guilt can be made.” Counsel’s concession was inconsistent with the juvenile’s prior statements to police and the statements of his accomplices. Counsel’s references to admissions in the juvenile’s withdrawn guilty plea were improper, because evidence regarding a withdrawn guilty plea may not be admitted in a criminal trial under state law. Counsel apparently made the concession in an attempt to convince the court to find the juvenile guilty of a misdemeanor and avoid a felony conviction. “While it may be a reasonable trial strategy to concede an adult defendant’s guilt to a lesser-included offense in the hope of persuading the fact finder to acquit him or her of the greater charge, juvenile dispositions are not necessarily tied to a misdemeanor/felony distinction. Thus, the strategy of appellant’s attorney was not reasonable in this juvenile proceeding.” Counsel also incorrectly assumed that by conceding guilt to a misdemeanor, the juvenile could not be held accountable for the entire amount of restitution.

\**State v. Matthews*, 591 S.E.2d 535 (N.C. 2004). Prejudice presumed in capital trial where defense counsel conceded the defendant’s guilt to second degree murder without the defendant’s consent, which must be established by “more than implicit consent based on an overall trial strategy and the defendant’s intelligence.”

*People v. Washington*, 785 N.Y.S.2d 885 (N.Y. Co. Ct. 2004). Counsel ineffective in robbery case for conceding guilt to a lesser included offense where the defendant did not consent and objected during the trial to counsel’s strategy. While counsel’s strategy was sound, “an attorney cannot concede guilt at trial . . . without consent of the accused” because this is the equivalent of a guilty plea which “must be entered voluntarily by the defendant.” While the court acknowledged that most courts reviewing this issue require a showing of prejudice under *Strickland* and that such an analysis might result in affirmance, the court held that New York courts have declined to follow *Strickland* because “the state constitution has been interpreted to set a higher standard of effectiveness for criminal attorneys than the federal constitution.” Here, counsel’s concession not only denied the effective assistance of counsel but also denied the defendant a fair trial because the state was not required to prove identification.

## 9. INSTRUCTIONS

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

- 2010:** *United States v. Luck*, 611 F.3d 183 (4th Cir. 2010). Counsel ineffective in drug case for failing to request an “informant instruction,” when the government’s evidence consisted only of the investigating officer and two paid informants. One of the informants approached police offering assistance because “she wanted to reduce her exposure for a robbery charge she was facing.” The other approached police to benefit the first informant, who was the mother of his child, and to “earn money.” While a buy in which the first informant was wired was conducted, the image and sound quality was too poor to record events. The officer also did not do a thorough search of the informant prior to the “buy.” A search warrant of the defendant’s house revealed scales and baggies commonly used to package narcotics, but no drugs. Without deciding “whether and when an informant instruction is required,” the court held that “on these facts . . . counsel erred in failing to request an informant instruction.” “This case presents the classic case of a professional informant paid for his services,” with “little corroborating evidence.” “[A] reasonable lawyer would have been concerned that the uncorroborated testimony of paid informants could have been ‘manufactured . . . out of whole cloth’ for the benefit of the informant alone. Because ‘counsel’s defense strategy seem[ed] to be focused on discrediting the government’s witnesses,’ there was no indication counsel’s failure to request the instruction was strategy. Prejudice established, even though the court gave ‘general instructions’ on witness credibility. “[T]he informant instruction is *sui generis*; it alerts jurors to the potentially unique problems that inhere where an individual is paid to inculcate a defendant.”
- 2005:** *Cox v. Donnelly*, 432 F.3d 388 (2nd Cir. 2005). Counsel ineffective in second degree murder case for failing to object to an erroneous jury instruction that impermissibly shifted to the defendant the burden of proving that he did not intend “the ordinary consequences of his voluntary acts.” The failure was due to counsel’s “ignorance of the law on point.” Under AEDPA, the state court holding was an unreasonable application of *Strickland*.
- 2004:** *Reagan v. Norris*, 365 F.3d 616 (8th Cir. 2004). Counsel ineffective in first-degree murder case for failing to object to the trial court’s instructions that failed to include an essential element of the crime – that the defendant “knowingly” caused the death. Counsel conceded that the failure to object was not strategic. Analyzing the case under the AEDPA, the court found that counsel’s conduct was deficient and prejudicial because the jury could have believed every aspect of the defense case (that the death was accidental) and still convicted of first-degree murder under the erroneous instructions.

**b. U.S. District Court Cases**

**2005:** \**Baker v. Horn*, 383 F. Supp. 2d 720 (E.D. Pa. 2005). Counsel was ineffective in capital trial for failing to object to the trial court's instructions that permitted the jury to convict the petitioner of first degree murder under an accomplice liability theory without finding that the petitioner himself possessed the specific intent to kill, which was a required element under Pennsylvania law. Counsel's conduct was deficient because the state law was clearly established at the time of trial. Prejudice was found even though the jury could have convicted the petitioner either as a principal or an accomplice because the verdict sheet did not reveal which theory the jury used and the evidence was contradictory concerning the identity of the shooter. Although AEDPA applied the state court had not addressed the merits of this claim and the court reviewed the issues de novo.

**c. State Cases**

**2011:** *State v. Soboroff*, 798 N.W.2d 1 (Iowa 2011). Counsel ineffective in threat to contaminate a water supply case for failing to request instructions that defined "true threat." The defendant was convicted based on internet postings of a slide show referring to putting 500 pounds of Thorazine in the city water tower with pictures of the tower. Conviction required a showing of "true threat," i.e., a threat that a reasonable person of ordinary intelligence would have understood as such. While there was some evidence that the threats were real, there was also evidence from which the jury could have concluded the statements were not real threats. For example, the state's own expert testified it would be nearly impossible to obtain 500 pounds of Thorazine, the defendant did not disseminate the threats other than on his own website, and, although double-edged, the defendant was known generally as an unstable person. If the jury had been adequately advised on the "reasonable person" standard, there is a reasonable probability the outcome of the trial would have been different.

*Blunt v. State*, 55 So.3d 207 (Miss. App. 2011). Counsel ineffective in murder case for requesting an erroneous self defense instruction that had been condemned by the Mississippi Supreme Court ten years prior to trial. Prejudice established as the misstatement of law on the instruction essentially left the defendant with no instruction on his theory of defense.

*Bailey v. State*, 709 S.E.2d 671 (S.C. 2011). Counsel ineffective in homicide by child abuse case for failing to object to supplemental jury instructions that allowed the jury to convict the defendant based on an act that was not alleged in the indictment. The indictment alleged "infliction of physical injuries" by the defendant. During deliberations, the jury sent out notes asking whether the defendant had to have "caused" the death as a result of "neglect and abuse." During the discussion with court, the foreperson informed the court that the jury could see "neglect" but no evidence that the

defendant had struck the child. The judge gave supplemental instructions allowing the jury to convict for “abuse or neglect” that was a proximate cause of the harm. Nine minutes later the jury returned a guilty verdict. “[T]he trial judge’s instructions improperly enlarged” the indictment. The indictment alleged a specific “act” by the defendant, while the charge allowed conviction for an “omission” or neglect. This was a material variance or a constructive amendment to the indictment.

***State v. Thomas***, 796 N.W.2d 706 (S.D. 2011). Counsel ineffective in reckless burning case for failing to request appropriate instructions on accomplice testimony. At trial, the only direct evidence of guilt was from two accomplices who had made prior inconsistent statements and had entered into plea agreements requiring their testimony. At the very least, counsel was ineffective in failing to request an instruction allowed under state law that accomplice testimony should be examined “with great care and caution.” Likewise, counsel was ineffective in failing to request instructions that state law required corroboration of accomplice testimony and one accomplice could corroborate the other and that the remaining circumstantial evidence merely showing the circumstances and commission of the offense was not sufficient corroboration. Prejudice established.

***State v. Sellers***, 248 P.3d 70 (Utah App. 2011). Counsel ineffective in child sexual abuse case for failing to object to erroneous voluntary intoxication instructions. The crime charged required two intent elements for conviction: a general intent to touch and a specific intent to cause pain or to arouse or gratify sexual desires. Voluntary intoxication was raised as an affirmative defense to the specific intent element. While the court gave a voluntary intoxication instruction, the instructions failed to inform the jury that the State had the burden of disproving the defense beyond a reasonable doubt. Counsel’s conduct was deficient and there could not be any reasonable trial strategy for the deficiency. Prejudice found.

**2010: *Sloss v. State***, 45 So. 3d 66 (Fla. App. 2010). Trial counsel ineffective in aggravated battery case for failing to object to the inclusion of a forcible felony jury instruction, which informed the jury that the use of force likely to cause death or great bodily harm is not justifiable if the defendant was committing an aggravated battery. This instruction is appropriate only if the defendant “is charged with an independent forcible felony in addition to the offense for which he claims self-defense. When an instruction is read in the absence of a charge of an independent forcible felony, it essentially negates the defendant’s theory of self-defense.” Prejudice found as the evidence of guilt was “hardly overwhelming” and essentially amounted to a “swearing contest” between the defendant on one side and the alleged victim and his nephew on the other side.

***Smith v. State***, 991 A.2d 1169 (Del. 2010). Counsel ineffective in murder case for failing to request a specific instruction of the credibility of accomplice testimony. The state’s case rested almost entirely on the testimony of an accomplice, who had actually fired the

bullet that killed the victim, and another eyewitness and the their testimony was conflicting, internally inconsistent, and arguably inconsistent with prior statements. Under state law, the defendant was entitled, upon request, to a specific accomplice testimony instruction. Counsel's conduct was deficient in failing to request the instruction. Prejudice establish even though a general credibility of witnesses instruction was given.

*In re Crace*, 236 P.3d 914 (Wash. App. 2010). Counsel was ineffective in second-degree assault case for failing to request an instruction on unlawful display of weapon, as a lesser included offense. The defendant consumed substantial amounts of alcohol and drugs, including cocaine, and fell asleep watching Planet of the Apes. When he awoke in the middle of the night, he believed there were humans or demons trying to murder him and went screaming through the trailer park, including entering other people's homes. Ultimately, when a police officer arrived, the defendant was armed with a sword and screaming "they are after me, someone help me." The defendant ran toward the officer, who drew his gun and demanded the defendant drop the sword and get on the ground. When the defendant realized it was a police officer, he did drop the sword about 50 feet away from the officer but kept running towards the officer and did not get on the ground until he was five to seven feet anyway. The defendant testified he did so because he wanted to be near the officer for protection. After being put in the police car and left there alone, the defendant kicked out a window because, as he testified, he was afraid of being alone. The officer "based on his experience as a law enforcement officer, . . . suspected substance abuse." The defendant was charged with second-degree assault, which requires a "specific intent to create reasonable fear and apprehension of bodily injury." The court charged on second-degree and attempted second-degree. The jury deadlocked on second-degree, but convicted of the attempt. Because he had two prior violent convictions, the defendant was sentenced to life without parole. Under state law, unlawful display of a weapon, which requires either "an intent to intimidate another person" or circumstances "warrant[ing] alarm for the safety of other persons," is a lesser included offense of second-degree assault. Counsel's conduct was deficient in failing to request a charge on this offense as the evidence, including the defendant's testimony and expert testimony of diminished capacity due to a drug-induced psychotic break, supported an inference that the defendant had "no intent to create reasonable fear or apprehension of bodily harm." While "pursuing an all-or-nothing strategy" is not *per se* deficient conduct, in this case it was because conviction of unlawful display of a weapon would have resulted in a sentence of less than a year as opposed to life without parole. "Pursuing an all-or-nothing strategy in these circumstances was not a reasonable trial tactic." Prejudice established.

*State v. Johnston*, 237 P.3d 70 (Mont. 2010). Counsel was ineffective in obstructing a peace officer case for failing to object to charge that eliminated the crucial "knowing" element. Officers were responding to reports of gunshots during winter weather conditions. After stopping their vehicle, due to bad road conditions, they observed the

defendant walking towards them. He informed them his car was stuck in the snow and other individuals and cars were further up the “snowy mountain road” having problems. The officers spent 30-40 minutes “attempting to assess the matter,” before taking the defendant and the two others in his car to the police station. Based on the defendant’s a search and rescue team was sent out looking for another man, who was not located. Due to the defendant’s “various statements to police,” he was charged with misdemeanor obstructing a peace officer. The offense requires that the person “knowingly obstructs, impairs, or hinders . . . the performance of a governmental function.” Under state law, the court must also instruct on the meaning of “knowingly,” which, depending on context, is awareness “of the person’s own conduct” or awareness “that it is highly probable that the result will be caused by the person’s conduct.” Here, the court instructed only on awareness of his “own conduct” and the state argued repeatedly that the defendant was guilty because he was aware of his own conduct, as he admitted in his testimony that he made false statements to the officers. Counsel’s conduct was deficient as “knowing” in this context required awareness that “it is highly probable that his conduct will obstruct, impair or hinder the officers’ performance of their governmental function.” To hold otherwise would only an obstruction conviction by “merely proving that a person gave a dishonest answer in response to an officer’s question,” and “the statute clearly requires more.” There was no plausible justification for failing to object to the court’s inadequate instructions. Counsel “had nothing to lose” and “failed to use the law to strike at the heart of the State’s case.” *Id.* at \_\_\_ (quoting *State v. Koughl*, 97 P.3d 1095, \_\_\_ (Mont. 2004)).

***People v. Wheeler***, 929 N.E.2d 99 (Ill. App. 2010). Counsel ineffective in murder trial for failing to request an accomplice-witness instruction. The state’s key witness was a friend of the victim, a convicted felon, and an admitted accomplice testifying in exchange for a deal. No physical evidence linked the defendant to the crimes. Prejudice established, because the only other witness connecting the defendant to the crimes with a jailhouse snitch, who had been promised help with parole in exchange for his testimony.

***Taylor v. State***, 922 N.E.2d 710 (Ind. App. 2010). Counsel ineffective in felony-murder case for failing to object to the trial court’s instructions that did not include the elements of the underlying felony (robbery). While the lower court had found the error harmless based on the trial evidence, “[h]armless-error analysis has no place where, as here, an essential instruction on the underlying offense is missing entirely.”

***Hatcher v. Commonwealth***, 310 S.W.3d 691 (Ky. App. 2010). Counsel ineffective in murder case for failing to object to the trial court’s failure to provide a separate self-protection instruction, failure to define self-protection, failure to provide an imperfect self-defense instruction, failure to define extreme emotional disturbance, and failure to instruct on the lesser-included offense of second degree manslaughter. The court noted, “[i]n all fairness to defense counsel,” that counsel “had already been in court for nearly 13 hours by the time the court asked him to state his objections to the instructions.”

***State v. Breitung***, 230 P.3d 614 (Wash. App. 2010), *review granted*, 253 P.3d 392 (Wash. 2011). Counsel ineffective in second degree assault case for failing to propose a lesser included offense instruction on fourth degree assault where the only real issue in the case, even based on the defendant's testimony, was whether the defendant pointed a gun or a microscope lens at the alleged victims.

**2009: *Spicer v. State***, 22 So. 3d 706 (Fla. App. 2009). Counsel ineffective in aggravated battery case for imposing the burden of proving self-defense on the defendant through argument and requested instructions. Under state law, once a defendant has made a prima facie showing of self-defense, the burden is on the state to prove that the defendant did not act in self-defense. Counsel "was obviously unaware of the law on this point" and repeatedly argued in closing that the defendant had the burden of proof. Counsel also requested an outdated jury instruction, which had been replaced by an amended instruction nine months prior to trial, on this same point. "[C]ounsel's burden-shifting error caused a breakdown in the adversary process."

***State v. Smith***, 223 P.3d 1262 (Wash. App. 2009). Counsel ineffective in first-degree animal cruelty case for failing to request a jury instruction on lesser-included offense. Where there was evidence that the llama may have died from a parasite rather than starvation, the evidence supported a rational inference that the defendant committed only a second degree offense by failing to seek appropriate medical attention for the animal. Counsel's "all or nothing strategy was not a legitimate trial tactic."

***State v. Kylo***, 215 P.3d 177 (Wash. 2009). Counsel ineffective in assault case for proposing an erroneous "act on appearances" self-defense instruction that lowered the state's burden of proof. While the law required only that the defendant reasonably apprehend that he is about to be injured, the jury was instructed that he must reasonably apprehend that he was in actual danger of great bodily harm. "Failing to research or apply relevant law was deficient performance." Prejudice also established as the instruction and counsel's argument in closing misstated the law.

***State v. Powell***, 206 P.3d 703 (Wash. App. 2009). Counsel ineffective in second degree rape case, based on sexual intercourse with another person who was incapable of consent by reason of being physically helpless or mentally incapacitated, for failing to request instruction on the statutory affirmative defense of "reasonable belief" that the person had capacity to consent. Counsel's conduct was deficient and not based on a reasonable trial tactic because even the alleged victim's version of events was that she had blacked out from drug and alcohol use, woke up with the defendant (who she did not know previously), having sex with her, and then willingly participated in it because she was afraid. There was no indication that she told the defendant she was afraid or not a willing participant. In addition, independent state witnesses, who mostly agreed she appeared intoxicated, did not believe she appeared too drunk or otherwise incapacitated to make

decisions. Prejudice established because, without the instruction, the jury had no way of acquitting the defendant even if it accepted his testimony and the defense argument that he reasonably believed the alleged victim was not mentally incapacitated or physically helpless. In short, “[t]he absence of this instruction essentially nullified [the] defense.” *Id.* at 711.

**2008:** *Michel v. State*, 989 So. 2d 679 (Fla. App. 2008). Counsel ineffective in simple battery case for failing to request an instruction on justifiable use of non-deadly force, which negated the defendant’s self-defense argument.

*Stoute v. State*, 987 So. 2d 748 (Fla. App. 2008). Counsel ineffective in attempted murder case for failing to object to forcible felony instruction, which was not applicable and deprived him of his theory of self defense. This instruction is only appropriate when the accused is charged with at least two criminal acts, the act for which the accused is claiming self defense and a separate forcible felony. Here, the defendant was charged with one crime, the shooting, and no other forcible felony. The state supreme court reached this conclusion in an opinion issued after this trial, but “[i]t does not follow . . . [that] it constituted a change in the law.” The decision was based on a statute and the court had not previously construed the statute in a contrary manner. Thus, counsel’s conduct was deficient and prejudicial.

*People v. Gonzalez*, 895 N.E.2d 982 (Ill. App. 2008). Counsel ineffective in sexual abuse case for failing to object when the jury was not adequately instructed on the state's burden to disprove the affirmative defense, a reasonable belief that the victim was 17 years of age or older. The relationship began when the victim was 14 and the defendant 23, but there was conflicting evidence on whether she ever told the defendant her age. The charges arose when the 16 year old victim became pregnant with the defendant’s child. The trial court held that the evidence was sufficient to support the affirmative defense and agreed to give the necessary instruction. In the instructions, however, the court did not define “reasonable belief” and did not instruct on the State’s burden to disprove the affirmative defense. Counsel’s conduct was deficient. “Where defense counsel argues a theory of the case, such as an affirmative defense, but then fails ensure that the jury is properly instructed on that theory, that failure cannot be called trial strategy.” Prejudice found.

*Tisdale v. State*, 662 S.E.2d 410 (S.C. 2008). Counsel ineffective in murder case for failing to request charges on involuntary manslaughter and accident. Counsel’s conduct was deficient because the defendant’s testimony supported the involuntary manslaughter charge by providing evidence of a struggle over a weapon and supported an accident charge because of an accidental discharge of a gun with the defendant lawfully armed for self-defense.

***Lowry v. State***, 657 S.E.2d 760 (S.C. 2008). Counsel ineffective in murder case for failing to object to a burden-shifting instruction on malice. The court initially gave proper instructions but because of the state's concern that the court had failed to instruct on felony murder, the court gave a supplemental instruction. While the initial charge contained permissive language allowing the inference of malice from participation in a felony, the supplemental charge created a presumption of malice from participation in a felony and shifted the burden of proof to the defendant. This charge was improper, was not alleviated by the early proper charge, and was especially problematic as "the last thing the jurors heard before beginning deliberations." Counsel's conduct was deficient in failing to object. Prejudice also established because the error was not "harmless" beyond a reasonable doubt. There was "little direct probative evidence of malice" in the defendant's statements and other evidence was questionable or minimal, such that "the only undisputed relevant facts . . . are that Petitioner was near the scene of the crime at the time it occurred, but was neither the gunman, nor in the getaway car."

**2007:** ***Nickens v. State***, 981 So. 2d 1165 (Ala. Crim. App. 2007). Counsel ineffective in theft of property case for failing to request an instruction defining the term "deprive" and failing to object when the trial court failed to give this instruction when the defense theory was that the defendant used the vehicle to escape from police but did not intend to permanently deprive the owner of the property, did not damage it, and merely abandoned it not far from the scene of the theft.

***Berdecia v. State***, 971 So. 2d 846 (Fla. App. 2007). Counsel ineffective in manslaughter and battery case for requesting an erroneous charge on manslaughter. The defendant was on trial with a codefendant. They had fought with two other men and the co-defendant shot and killed one of them. Both were charged with second degree murder. The co-defendant was convicted, but the defendant was convicted of the lesser included offense of manslaughter. Counsel's conduct was deficient because counsel requested a charge that repeatedly informed the jury that the defendant could be convicted based on his acts and intentions "and/or" his co-defendant's acts and intentions. State law held that "and/or" instructions can result in fundamental error. Prejudice was established because the jury could have convicted the defendant based solely on the acts and intentions of the co-defendant even if the jurors thought the defendant was innocent with regard to the death.

***Aversano v. State***, 966 So. 2d 493 (Fla. App. 2007). Counsel ineffective in grant theft case for failing to seek instruction on good faith defense or advice of counsel defense. Following several major impacts in the area, the defendant allowed a third-party to temporarily store restaurant equipment in her garage. There was no agreement on length of time. Subsequently, she notified the third-party to remove the equipment. She contacted an attorney and followed his advice to send a registered letter and then hire a process server notifying the third-party that she would dispose of the equipment if not

picked up by a stated deadline. The deadline passed and she sold the equipment to an auctioneer. Counsel's conduct was deficient because counsel called the prior attorney to testify, but failed to request an instruction of either the good faith or the advice of counsel defense, both of which were available under state law. "[I]s patently unreasonable to fail to request an instruction that provides a legal defense to undisputed facts." Prejudice established because omission of these instructions "essentially deprived her of a defense."

***Stiers v. State***, 229 S.W.3d 257 (Mo. App. 2007). Counsel ineffective in forcible restraint case for failing to request a self-defense instruction. The defendant was charged with two counts of forcible sodomy, two counts of armed criminal action, and felonious restraint following an altercation with his girlfriend. He was acquitted on all charges other than felonious restraint. Their testimony and evidence of her injuries was basically the entire case. The defendant's testimony alleged that the altercation began when she attempted to steal property from him and he defended with non-deadly force, which was permitted under state law. The altercation that elevated when she grabbed a knife and he then defended himself with deadly force. Under state law, he was entitled to a self-defense finding if he reasonably believed that deadly force was necessary to protect himself from serious physical injury. Counsel was ineffective in failing to request the self-defense instruction. Prejudice found because, without the self-defense instruction, the jury was obligated to convict if the defendant forcibly restrained the alleged victim and, in so doing, exposed her to risk of serious physical injury, regardless of the reason.

***State v. Eyre***, 179 P.3d 792 (Utah 2007). Counsel ineffective in tax evasion case for failing to object to instructions that did not require the jury to find the existence of a tax deficiency, which was a necessary element of the crime. Counsel's conduct was deficient and prejudicial because the defense argued that the defendant did not file his taxes because he did not believe he owed any taxes, but counsel failed to object to the court's failure to give the necessary charge.

**2006:** ***Mathis v. State***, 941 So. 2d 1 (Fla. App. 2006). Counsel ineffective in aggravated battery on a fellow inmate case for failing to request a jury instruction on the justifiable use of non-deadly force where the defense argued that the victim was the aggressor and the defendant was acting only in self-defense.

***Tillman v. Massey***, 637 S.E.2d 720 (Ga. 2006). Counsel ineffective in malice murder case for failing to object to an erroneous instruction on the presumption of innocence in the court's final charge. The court instructed the jury that the presumption protects only the innocent, which implies that the jury's assessment of guilt is separate and distinct from the prosecution's burden to prove guilt beyond a reasonable doubt, thereby eviscerating the presumption of innocence. Prejudice found even though a correct charge on the presumption of innocence was given in preliminary instructions.

***People v. Pollards***, 854 N.E.2d 705 (Ill. App.), *appeal denied*, 861 N.E.2d 661 (Ill. 2006). Counsel ineffective in stolen motor vehicle case for failing to request jury instructions on definitions of stolen property and theft. Prejudice found because the defendant's intent was an issue in the case.

***Vaughn v. State***, 202 S.W.3d 106 (Tenn. 2006). Counsel ineffective in murder and other offenses case for failing to object to the court's erroneous jury instruction regarding the defendant's release eligibility dates. The trial court informed the jury that, if convicted of murder, the defendant would not be eligible for parole for 25 years, but a new statute had been passed so that the defendant actually would not have been eligible for parole for 51 years. Counsel's conduct was deficient at trial because he was unaware of the new provision. After trial counsel learned of the new provision but still did not assert the issue. While there were two conflicting provisions in the statutes, such that it may not have been clear at the time whether it was 25 or 51 years, "this conflict in the provisions, far from excusing counsel from raising the issue, should have brought to their attention the very need to raise the issue." Even after the Attorney General issued an opinion clarifying that it was 51 years, counsel still did not raise the issue as plain error in the direct appeal which was still pending. Trial and appellate counsel's conduct was deficient. Prejudice established because "prejudice occurs when a defendant receives a sentence greater than the range of punishment contemplated by the jury." If the jury had been properly instructed, it was reasonably likely the jury would have convicted the defendants of a lesser offense.

***State v. Pittman***, 166 P.3d 730 (Wash. App. 2006). Counsel ineffective in attempted residential burglary case for failing to request a lesser included offense instruction on first degree attempted criminal trespass, which was supported by the evidence.

**2005:** ***State v. Dabney***, 908 So.2d 60 (La. App. 2005). Counsel was ineffective in armed robbery case for failing to object to a modified *Allen* charge to a deadlocked jury. The jury announced a guilty verdict but polling revealed an 8 to 4 vote when at least 10 votes were needed for a conviction. When the jury asked what happened if they could not agree, the court gave a modified *Allen* charge, without objection. Counsel's conduct was deficient because Louisiana law prohibited an *Allen* charge and approved only of following ABA Standards in this situation. Prejudice was found because the charge given was confusing, coerced jurors to reach a verdict, and coerced jurors in the minority to conform their views to the majority. Two jurors changed their votes within 35 minutes, which suggested that they "surrendered their beliefs in order to achieve a verdict."

**2004:** ***Benham v. State***, 591 S.E.2d 824 (Ga. 2004). Counsel was ineffective in aggravated assault case for failing to request an instruction on the use of force in defense of a habitation. The defendant and the alleged victim had a history of animosity because the victim's husband had fathered children with both women. The victim confronted the

defendant while the defendant was sitting in her car with her three young children talking to friends. Following a heated conversation, the victim admittedly threw the first blow. The women fought with the victim standing outside the car reaching in and the defendant inside her car. The defendant had attempted to drive away but her path was blocked by onlookers in the street. Ultimately, the defendant grabbed a box cutter from the car console and slashed the victim. Counsel argued self defense but did not request an instruction on defense of habitation. Under state law, deadly force is permitted to prevent or terminate the unlawful entry into or attack upon a habitation, including a motor vehicle, if the entry is made or attempted in a violent and tumultuous manner and there is a reasonable belief that the entry is made for the purpose of assault or personal violence therein. The uncontradicted evidence at trial clearly would have authorized such a charge because the victim threw the first punch and eyewitnesses testified that it took two attempts for on lookers to restrain the victim from continuing the attack. Counsel stated that her strategy was to present self-defense as the best defense because she wanted the jury to believe that the defendant was in fear for her safety and the safety of her children and not just that she was protecting her vehicle. The court held this was not a reasonable strategy because counsel failed to appreciate that the defense of habitation may have justified the use of deadly force. “In failing to adequately research and understand the defenses available to [the] client, defense counsel rendered assistance that fell below the minimum standard set forth in *Strickland*.” Prejudice found because it was reasonably probable that the jury would have accepted the substantial evidence that the victim unlawfully entered the defendant’s car in a violent and tumultuous manner for the purpose of offering personal violence to the occupants.

*State v. Kougl*, 97 P.3d 1095 (Mont. 2004). Counsel ineffective in operation of unlawful methamphetamine lab case for failing to request jury instructions on accomplice testimony. Although the prosecutor and counsel both informed the jury that accomplice testimony should be viewed with suspicion, counsel did not request instructions that accomplice testimony should be viewed with distrust and that it must be corroborated. In direct appeal, counsel’s conduct was found to be deficient because there was no plausible reason not to request the instructions. Prejudice found because the state’s case was built almost entirely on accomplice testimony with little corroboration. In addition, although counsel informed the jury to view accomplice testimony with suspicion, “hearing this from counsel, . . . is not the same as hearing it from the court.”

**2003:** *Patterson v. State*, 110 S.W.3d 896 (Mo. App. 2003). Counsel was ineffective in second-degree robbery case for failing to present the trial court with a properly worded instruction for the lesser included offense of felony stealing. Under state law, second degree robbery required the forcible stealing of property, whereas the lesser included offense of stealing did not include the element of force. Counsel argued the lack of force and requested an instruction on the lesser included offense of stealing but proposed a stealing instruction that improperly included the “forcibly stole” language, which

\*Capital Case

materially misstated the elements of stealing. Counsel did not have a reasonable trial strategy for proposing the incorrect instruction and counsel even argued that the jury could find that there was no use or threat of use of physical force. “Counsel clearly made a strategic decision to have the jury instructed on the lesser-included offense of stealing but then failed to execute that strategy when he submitted instructions to the court that did not properly track the language” of the lesser-included offense. *Id.* at 903. The court found prejudice because the lesser included offense instruction was warranted by the evidence, where the witnesses never saw a weapon and a juror could reasonably find that the defendant did not actually use physical force or threaten immediate physical harm to anyone during the theft. Where doubt exists over whether a lesser included offense should be instructed, the court should give the instruction. Even assuming that the state’s argument was correct that the defendant must also prove a reasonable possibility that he would not have been convicted of the greater offense had the lesser-included instruction been given, the court found prejudice where “the evidence of either an explicit or an implicit threat of physical force in the stealing was not overwhelming.”

## 10. FAILURE TO CHALLENGE COMPETENCE

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

**2009:** *Hummel v. Rosemeyer*, 564 F.3d 290 (3rd Cir. 2009). Under AEDPA, counsel ineffective in murder case for stipulating the defendant was competent to stand trial and failing to challenge competence. The defendant was charged with shooting and killing his wife because of her affair with another man. Shortly after shooting her, the defendant shot himself in the head and, thereafter, was “missing a portion of his brain.” *Id.* at 291. Counsel was appointed and was informed by the defendant’s parents, who were his legal guardians, that he was not competent. The parents requested evaluation by a psychiatrist and even gave counsel a list of possible experts. Rather than a psychiatrist, the defendant was examined by a psychologist retained by the prosecutor and a psychologist retained by the defense. The state’s expert reported the defendant had an I.Q. of 65, which placed him in the mentally retarded range of intelligence. Due to the head trauma, he had only limited cognitive skills and deficits in short-term memory. This expert was unable to state to a reasonable degree of certainty that the defendant was competent, but noted that at best understood things only in a concrete, simplified fashion and it would be necessary during trial to continually make sure he was understanding the proceedings. The defense psychologist reached similar conclusions in finding the defendant “marginally competent” but recommending frequent breaks in the trial for counsel to explain things to the defendant. Without seeking any additional evaluation or even meeting with the defendant himself, counsel stipulated that the defendant was competent. Counsel met with the defendant only briefly prior to the preliminary hearing and never saw him again until the day jury selection began. Counsel never talked to the defendant about his version of events but asserted a provocation defense. He convinced the defendant and his father that the defendant should not testify. Counsel had concerns about the defendant’s ability to focus during the trial and even had to request a recess when the defendant was sleeping at the defense table. During the state’s closing argument, the defendant woke up and shouted “[t]ell them about the blowjobs.” The defendant’s father took him out of the courtroom so he was not present for the rest of closing arguments. He was also absent during the jury instructions because counsel could not wake him. Following trial, counsel moved for a new trial based on concerns about competence but did not present any medical evidence. Counsel’s conduct was deficient in stipulating to competence based on the psychologists reports.

We must ask whether either of these reports presented such an unqualified affirmation of [the defendant's] competency to stand trial so as to lead a reasonable attorney under these circumstances to stipulate that [the defendant] was competent. The answer is self-evident. Neither does. The reports from the psychologists were hardly ringing endorsements of [the defendant's] competency. There is little reason to believe that testimony

from a psychiatrist would not have been enough to tip the scales, and it was unreasonable for [the defendant's] counsel not to pursue this further.

*Id.* at 301. “[A] reasonable attorney would not have stipulated to his client’s competency without insisting on more information and further proceedings.” Under the state statutes, counsel could have sought a court-order evaluation of competence, which would have been “conducted by at least one psychiatrist.” Prejudice found. The state court’s decision was rejected as an unreasonable application of *Strickland* and as contrary to clearly established United States Supreme Court law in that rather than the appropriate standard of “reasonable probability” the state court used “the more stringent requirement of “show” in finding no prejudice.

**2005:** \**Burt v. Uchtman*, 422 F.3d 557 (7th Cir. 2005). Counsel ineffective in capital murder case (where the death sentence was later commuted by Governor Ryan) for failing to request a competence evaluation when the defendant plead guilty without any concessions and against the advice of counsel near the end of the state’s case-in-chief. Counsel’s conduct was deficient because counsel was aware that the defendant had been consistently medicated with anti-depressants and psychotropic drugs while in pretrial confinement. The only competence examination was conducted eight months prior to trial by an expert who did not even review the defendant’s prison mental health records. A defense psychologist examined the defendant in connection to a motion to suppress statements and found a borderline IQ, neurological impairments, and severe depression. During jury selection, the defense requested a continuance, which was denied, because the defendant was having difficulty sleeping and expressing his inability to assist counsel. Counsel’s conduct was deficient because counsel were aware of the defendant’s medications, his frequent mood swings and that the defendant did not appear to comprehend legal advice. The state court had not addressed this prong of the *Strickland* test. The court found prejudice because there was “a reasonable probability that [the defendant] would have been found incompetent at the time he pleaded guilty if his attorneys had requested a competency hearing” because the only competence evaluation was 8 months prior to trial, failed to consider the effects of heavy medications, and could not have accounted for the repeated changes in prescriptions in the time after that evaluation until trial. Under AEDPA, the state court “unreasonably applied *Strickland* to the facts” because it “ignored a wealth of evidence.” [The court also held that the trial court should have sua sponte ordered a competence evaluation.]

#### **b. U.S. District Court Cases**

**2010:** \**Deere v. Cullen*, 713 F. Supp. 2d 1011 (C.D. Cal. 2010). Counsel ineffective in failing to challenge competence to stand trial. The defendant was charged with killing three members of his girlfriend’s family shortly after she left him. When he was arrested the defendant informed officers he had been living on ditch water and raw birds for five days.

He was dressed in a bizarre fashion and had picture of his girlfriend with him. At the request of police, he was examined by a “doctor” shortly after his arrest, but the doctor found no mental illness or cause for concern. At counsel’s first meeting with the defendant he noticed a significant gash on the defendant’s arm and numerous scars on his abdomen and chest that appeared to be self-inflicted wounds. By the time of trial, counsel was aware of the defendant’s “self-inflicted mutilation, alcoholism, and drug abuse” and that these were red flags for “mental issues.” Counsel had no doubts about the defendant’s competence, but sought funding for a mental evaluation and was granted \$5000, although he only used \$1700. Counsel gave his psychologist only police reports and the “doctor” report from shortly after arrest and asked for testing and a “general psychological evaluation, because he wanted background information before focusing upon any particular mental defense.” Counsel obtained the defendant’s medical, school, juvenile court, and sheriff’s records, but did not provide these to his expert. When the defendant sought to plead guilty, the prosecution asked for a competence evaluation by the “doctor,” who had examined the defendant shortly after his arrest. Counsel consented “despite knowing that [this “doctor”] had no formal psychiatric training whatsoever,” knowing that the doctor had previously reported no mental illness, and knowing that his report was “a joke.” The doctor basically was a routine prison doctor without credentials or training in mental health. Counsel consented because he believed the defendant was competent without question. The defense expert reported that the defendant had a full scale IQ of 77. The doctor reported that the defendant was guarded and emotionally over-controlled, he was depressed and lonely, had feelings of helplessness and abandonment, and was fatalistic and exhibiting “some suicidal ‘acting out.’” The doctor noted the defendant’s dependence on his girlfriend and great stress during his breakup with her. He diagnosed adjustment disorder with depressed mood, mixed substance abuse disorder, and borderline personality disorder with antisocial aspects. Although counsel did not ask his expert to examine competence, the expert believed that competence “was very questionable,” as the expert believed the defendant’s “mental disorders rendered him unable to assist counsel in the conduct of a defense in a rational manner.” In short, the defendant’s demand to plead guilty and to ask for the death penalty were “an outgrowth of his mental disturbances.” The expert recalled informing counsel of his concerns. Nonetheless, defense counsel stipulated to competence and the defendant pled guilty and admitted the special circumstances. Counsel stood quietly while the defendant informed the court he had told counsel all the facts and circumstances of the case, even though he had refused to discuss the case with counsel and had cooperated only minimally with the defense expert and despite being aware that there was a “substantial mental defense.” The defendant also waived his right to a jury. Counsel presented no evidence in sentencing. Counsel’s conduct was deficient.

While a client’s choices about the direction the litigation should take may influence the reasonableness of counsel’s actions, *see Strickland*, 466 U.S. at 691, that influence is circumscribed where

the client's competency is at issue. Where there are "sufficient indicia of incompetence to give objectively reasonable counsel reason to doubt the defendant's competency," counsel must "request the trial court to order a hearing or evaluation on the issue of the defendant's competency." *Jermyn v. Horn*, 266 F.3d 257, 283, 301 (3d Cir. 2001).

Counsel's "belief" the defendant was competent was "based in part upon an erroneous estimation of [the defendant's] intelligence and overall mental health. For example, counsel believed he was "very intelligent" when he had an IQ of 77. Regardless, counsel's assessment was "unreliable" and "not determinative," given that his own expert at the time had concerns about competence. Prejudice was established. The defendant grew up in chronic poverty with his parents working as farm laborers, around pesticides and fertilizers. He had convulsions as a baby. He grew up eating fish from polluted water. This water was also used to irrigate the family's vegetable garden. Areas when the children played were sprayed with pesticides. The well water the family drank often had "an odd taste." The defendant's father was a violent alcoholic, who beat his wife and children. The defendant was placed in special education classes in the third grade due to emotional problems and learning difficulties. Testing at age 10 revealed a full scale IQ of 76. The defendant was electrocuted at age 10 or 11. He began cutting himself. By age 12, he was running away from home. He quit school in the 8th grade to work in the fields full time. By 14, he was committed to the California Youth Authority and spent several years in and out of institutions. After age 16, he was addicted to drugs and alcohol and often asked his girlfriend and others to kill him. He was well known to police and had refused medical treatment they offered several times. In the six months prior to the murders, he had numerous arrests for public drunkenness and disturbing the peace and his self-mutilation increased. He was drinking a fifth of vodka daily. Several months before the murders, his girlfriend left him and took their baby. Several weeks later, he and his girlfriend met with a social worker in an effort to prevent losing custody of their baby. The social worker recognized immediately that the defendant had psychiatric problems and discussed his self mutilation with him. She recommended mental health treatment and he agreed. The intake worker at the mental health center diagnosed on alcohol abuse and antisocial personality disorder, but did recommend a treatment plan for "his periods of depression." As the defendant's relationship and mental health continued to spiral down and he became more threatening to himself and others, the social work advised the defendant's girlfriend to get him into mental health treatment. The social worker viewed the situation as an emergency and called the Mental Health Department and probation herself in an unsuccessful attempt to have him picked up for a 72-hour psychiatric hold. In the two weeks before the murders, the defendant's girlfriend called the social worker multiple times daily and the social worker personally visited law enforcement offices daily informing them of the defendant's threats to kill his girlfriend or his family members. In short, there is a "reasonable probability" that the defendant would have been

\*Capital Case

found to be incompetent if counsel had performed adequately.

**c. State Cases**

**2009:** *Mast v. State*, 914 N.E.2d 851 (Ind. App. 2009). Counsel ineffective in failing to ensure that psychiatrists' reports were given to the court and a competence hearing conducted prior to the defendant's guilty plea to rape and sentence to 30 years. Initial counsel gave notice of a defense or mental disease or defect and the court appointed two doctors to examine competency and sanity issues. With substitute counsel, the defendant entered a guilty plea without obtaining the reports. The first doctor's report was received by the clerk's office on the day of the plea. It stated that he was unable to form an opinion about competency and that he requested repeated interviews and an in-patient evaluation. It was not clear whether the trial court had this report at the time of the plea. The second doctor's report, submitted four days after the plea, explicitly stated the doctor's "doubt[s]" that the defendant was competent. Counsel's conduct was deficient in advising the defendant to plead guilty without awaiting the results of the competency evaluations. Prejudice established as "there is a reasonable probability that the outcome of the case would have been different had the trial court been aware of the psychiatrists' reports."

**2008:** *Coker v. State*, 978 So. 2d 809 (Fla. App. 2008). Counsel ineffective prior to plea for failing to obtain a competence hearing. Counsel's conduct was deficient because the trial court gave oral authorization for an evaluation, but counsel never presented a written order and failed to otherwise followup. Prejudice established because the defendant may well have been incompetent at the time of his plea. Remanded for a competence determination.

**2004:** *People v. Shanklin*, 814 N.E.2d 139 (Ill. App.), *appeal denied*, 824 N.E.2d 289 (Ill. 2004). Counsel ineffective in attempted murder plea for failing to request a hearing on the defendant's competence or fitness or, alternatively, asking the trial court to question the defendant carefully as to the plea he entered and the consequences. Following the defendant's guilty plea, a presentence report disclosed that the defendant had been hospitalized three times for mental-health problems as a teenager. In addition, he was mildly mentally retarded and had significant problems retaining and receiving verbal information.

When confronted by a defendant, who may be mentally retarded, the trial court and both prosecution and defense may not simply rely on affirmative answers to rote questions to conclude the defendant understands the proceedings and the consequences of his plea.

*Id.* at \_\_\_\_.

\*Capital Case

It is incumbent on the attorney representing a mentally retarded defendant to make that fact known to the trial court and for the trial court to proceed with care in accepting a plea.

*Id.* at \_\_\_\_\_. Counsel's conduct was deficient and prejudicial.

***Matthews v. State***, 596 S.E.2d 49 (S.C. 2004). Counsel ineffective in armed robbery, car jacking, and accessory after the fact to murder plea for failing to request a competence hearing prior to the defendant's plea. The defendant had learning disabilities and took special education classes in school. Just one year before the crimes, the defendant had been in a near fatal car accident that caused significant frontal lobe, neurological damage.

## 12. FAILURE TO PRESERVE THE RECORD FOR APPEAL

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

**2003:** *Davis v. Secretary for Dept. of Corrections*, 341 F.3d 1310 (11th Cir. 2003). Counsel was ineffective in murder case in failing to adequately preserve a *Batson* claim for appellate review. While counsel did object, counsel failed to renew the motion before accepting the jury, which was required in order to preserve the issue for appeal. Because counsel's negligence affected only the appeal, the relevant focus in assessing prejudice was the appeal. Because the state court had already recognized that the *Batson* claim was meritorious, the court found that there was a reasonable probability that the state court would have granted reversal on appeal. This claim had been raised in state post-conviction, but the state court failed to resolve the merits of the claim. Thus, the court found that this case fell outside of § 2254(d)(1) requirement of deference to the state court decision.

### b. State Cases

**2008:** *People v. Owens*, 894 N.E.2d 187 (Ill. App. 2008). Counsel ineffective in residential burglary case for failing to consult with the defendant concerning a motion to reconsider sentence. The defendant informed the court he wished to appeal his 18 year sentence and the court informed him he must file a motion to reconsider the sentence in order to preserve the appellate issue. Retained counsel withdrew without taking any action and the court entered a notice of appeal for the defendant. "[T]he attorney's failure to consult with the defendant during a critical stage of the proceedings" was deficient and the defendant's ability to preserve his sentencing arguments for appeal was prejudiced.

**2004:** *Heckelsmiller v. State*, 687 N.W.2d 454 (N.D. 2004). Counsel ineffective in criminal trespass case for failing to preserve the record for appeal after two potential defense corroborating witnesses were excluded during the trial because counsel failed to ensure that they were sequestered as all other witnesses were. The defense was that the defendant had permission to be on the premises, but counsel considered this unsubstantiated and decided not to present the corroborating witnesses due to credibility concerns because they were family members. (Alleged victim was also a family member.) During the trial, counsel changed his mind and decided to present the testimony. Counsel's conduct was deficient because, when the court excluded the evidence, counsel did not make a proffer or preserve the record for appeal. Prejudice found because the excluded witnesses would have corroborated the only defense presented. Although the court was unaware of the substance of the witnesses' statements, the court held that "the significant point is that counsel's failure to make an offer of proof prevented a meaningful appeal on the issue."

### 13. MISCELLANEOUS

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

**2005:** *United States v. Scott*, 394 F.3d 111 (2nd Cir. 2005). The indictment in illegal reentry case was dismissed because counsel was ineffective in the underlying deportation case for failing to apply for a waiver of deportation even though the immigration judge stated that he believed the defendant was eligible for a waiver and instructed counsel to file an application. Prejudice was found because the defendant could have made a strong showing that he was eligible for a waiver and his subsequent criminal charges were irrelevant because they would not have been considered at the time.

#### b. Military Cases

**2006:** *United States v. Edmond*, 63 M.J. 343 (C.A.A.F. 2006). Counsel ineffective in conspiracy, larceny, and other offenses case for failing to secure the testimony of a subpoenaed defense witness. The alleged conspiracy and larceny concerned two cellular telephones. The subpoenaed witness had also been charged but had been discharged from the military in lieu of a court-martial. He would have testified that there was no conspiracy and that he and the accused, who had both worked in the supply room, believed that they were authorized to obtain the cell phones and that they had intended to return them to the unit but kept the phones after the unit said they no longer wanted the cell phones. When the witness arrived for court, the prosecutor warned him of the possibility of a perjury charge if he testified falsely. When the prosecutor told defense counsel that the witness did not want to testify, counsel did not speak to the witness before he was allowed to leave but instead entered into a stipulation that the witness was invoking his Fifth Amendment rights. Counsel's conduct was deficient and prejudicial because the witness not only did not testify but the implication of the stipulation to the panel members was that the accused's coconspirator could not testify without incriminating himself. The case was remanded either for dismissal of the larceny and conspiracy charges and reassessment of the sentence or for a rehearing.

#### c. State Cases

**2010:** *State v. Middleton*, 41 So. 3d 357 (Fla. App. 2010). Counsel was ineffective in failing to adequately advise the defendant in capital murder prosecution. During trial, the state moved to strike a juror, who had failed to disclose (when asked) that he had a prior felony conviction. The court struck the juror and informed the defendant he could consent to proceeding with 11 jurors or replacing the struck juror with a previously-dismissed alternate juror. Counsel's conduct was deficient in failing to advise the defendant of the third option—a motion for mistrial—in light of the defendant's absolute right under state law to have a jury of 12. Without this advice, the defendant consented to proceeding with

11 jurors and was convicted of second degree murder. On initial review, the court found counsel's conduct was deficient and remanded for a determination of whether the defendant would have moved for a mistrial if he had been adequately advised. On remand, the court found that he would have moved for a mistrial, but found no prejudice because the defendant could not demonstrate that the "outcome of a new trial would have been any different." This was erroneous because the defendant needed only to demonstrate a reasonable probability that he would have requested a mistrial and that a mistrial would have been granted.

**2009:** *People v. Centeno*, 916 N.E.2d 70 (Ill. App. 2009). Counsel was ineffective in stolen vehicle plea case for failing to surrender the defendant on his recognizance bond in Will County while he was in custody in Cook County on an unrelated offense. Prejudice established because, if counsel had performed adequately, the defendant would have been in simultaneous custody on both offenses and would have received credit for both offenses. Presentence credit given.

*Bass v. State*, 674 S.E.2d 255 (Ga. 2009). Counsel ineffective in arson and robbery case for failing to object when the county sheriff assumed the duties of the bailiff after providing key testimony for the state. Counsel's conduct was deficient because "no competent attorney could reasonably have believed that [the Sheriff's] service as bailiff would not compromise appellant's constitutional right to a fair jury." Prejudice established where the Sheriff acted as bailiff for half of the trial or a two day period from the beginning of the defense case to the verdict. "[E]ven if it could be assumed that [the Sheriff] never did discuss the case directly with any members of the jury, it would be blinking reality not to recognize the extreme prejudice inherent in this continual association throughout [half of] the trial between the jurors and th[is] key witness[ ] for the prosecution." *Id.* at \_\_\_ (quoting *Turner v. Louisiana*, 379 U.S. 466, 473 (1965)). In addition, the state's case was circumstantial and hinged on credibility and a prior jury hung on 23 of 24 counts.

**2008:** *McCombs v. State*, 3 So. 3d 950 (Ala. Crim. App. 2008). Counsel ineffective in murder case for advising the 18-year-old defendant to lie in his testimony and deny that he stabbed the victim, which resulted in the defendant giving up the right to assert self-defense. In light of *Nix v. Whiteside*, 475 U.S. 157, 171 (1986) ("under no circumstance may a lawyer either advocate or passively tolerate a client's giving false testimony"), "[t]here can be no question that the performance of . . . trial counsel falls outside prevailing professional norms and was unreasonable under any circumstance." Prejudice found because the evidence was undisputed that the defendant was told he was outnumbered and was going to get his "butt whooped," that he had been hit by three people, and that he was attempted to run when the victim was killed. Thus, "a defense that [he] acted out of a reasonable belief that an assault was imminent was a viable defense."

**Williams v. State**, 254 S.W.3d 70 (Mo. App. 2008). Counsel ineffective in murder case for failing to adequately establish the defendant's indigence in support of a motion for a psychiatric expert to evaluate the defendant's capacity at the time of the offense and to assist counsel. The defendant was indigent, but counsel was retained for him by his father. Counsel requested funds for a defense expert and presented evidence that the defendant had twice been involuntarily committed and diagnosed with a schizophreniform type psychosis within several years of the crime. Counsel also presented testimony from the defendant to establish indigence that was inadequate under the state statute requiring an affidavit of indigence and specific information. Counsel's conduct was deficient for failing to present adequate testimony of evidence, which would have entitled the defendant to appointment of an independent expert. Prejudice was found because the court appointed competence evaluation was insufficient. In addition, prejudice was found despite the defendant's failure to establish the expected testimony of an independent expert. "It would be useless to require such a movant, now proven to have been indigent, to produce at a post-conviction hearing the same expert testimony he could not afford at trial."

**2007: State v. Grogan**, 163 P.3d 494 (N.M. 2007). Court affirmed trial court's grant of new trial on its own motion following conviction for great bodily harm by vehicle. The court found that counsel was ineffective. On appeal, the court held that it was appropriate to presume prejudice "when a trial court witnesses gross or obvious incompetence." Here, the defense counsel's failure to secure and review his own expert's opinion before permitting the expert to write the report. While the state examiners had found cocaine and methamphetamines in the defendant's blood it was not quantified. The defense expert did so and his written report was provided to the state, which called him to testify and admitted the report. This was the most harmful evidence against the defendant.

**2006: In re R.K.S.**, 905 A.2d 201 (D.C. 2006). Juvenile adjudicated for unauthorized use of motor vehicle and receiving stolen property was completely denied counsel and prejudice was presumed under *Cronic* due to counsel's refusal to participate in the first day of trial after being denied a continuance. While counsel refused to participate, the juvenile's statement to police and an officer's testimony that the juvenile was a passenger in the car were admitted without objection or even cross examination.

**Smith v. State**, 905 A.2d 315 (Md. 2006). Counsel ineffective in criminal contempt case. The witness, an inmate, was called to testify as a prosecution witness in another case. When the witness sought to invoke his Fifth Amendment right against self-incrimination, the court appointed counsel for him. Counsel informed the court, after discussions with the witness and the prosecutor, that he had advised the witness that he could find no legitimate basis for assertion of the Fifth Amendment privileges. The witness continued refusing to answer questions, although not on the asserted basis of the Fifth Amendment. The court found him in contempt and subsequently imposed a sentence of five months.

Counsel's conduct was deficient because counsel, in violation of the attorney-client privilege, disclosed the nature of his advice to the witness and advised the trial judge as to his opinion regarding the application of the Fifth Amendment. In essence, counsel had a conflict due to his attempt to advise the witness and be a friend of the court. He could not do both here. Prejudice found because the trial court relied on counsel's statement in finding that the witness did not have a Fifth Amendment privilege.

- 2005:** *Jackson v. Washington*, 619 S.E.2d 92 (Va. 2005). Counsel was ineffective in burglary and grand larceny case for failing to object to the defendant being tried before a jury while wearing a jail issued "jumpsuit" after the jail misplaced the defendant's civilian clothes and failed to replace them or allow him an adequate opportunity to obtain new clothing. There was no valid strategy where counsel did not object simply because he believed the defendant wanted to go to trial quickly because counsel knew that the defendant also objected to being tried in jail clothing and that his credibility would be a critical issue during the trial. Prejudice found because "[r]eason and common human experience dictate, at a minimum, that the accused's appearance in jail clothes is such a badge of guilt that it would render an accused's assertion of innocence less than fully credible to the jury."
- 2004:** *State v. Guerard*, 682 N.W.2d 12 (Wis. 2004). Counsel ineffective in armed robbery and burglary case for failing to adequately seek admission of the defendant's brother's statements against penal interest. The state relied on the victim and an eyewitness, who identified the defendant as the perpetrator. The defendant's brother confessed to his sister and a defense investigator though that he was the perpetrator. During trial, the brother invoked his right to silence. Counsel initially sought to admit the brother's confession to his sister, but did not pursue this or inform the court about the brother's additional confession to the defense investigator. Counsel's conduct was deficient because the brother's statements against penal interest were sufficiently corroborated (by their repetition to several people) to be admissible. Prejudice found because the defense sought to establish that the brother and not the defendant committed the crimes. If the jury had heard the brother's confessions, there was a reasonable probability of a different result.
- 2003:** *\*Commonwealth v. Brooks*, 839 A.2d 245 (Pa. 2003). Counsel was ineffective in capital trial for failing to meet with his client face-to-face prior to trial. Counsel's conduct was deficient in that counsel never once met with the defendant prior to the beginning of jury selection. Counsel spoke only briefly with the defendant by telephone.

It should go without saying that no lawyer, no matter how talented and efficient, can possibly forge a meaningful relationship with his client and obtain adequate information to defend that client against first-degree murder charges in a single thirty minute telephone conversation.

\*Capital Case

The court found that face-to-face meetings were important, because

Without such a meeting, there is little to no hope that the client will develop a fundamental base of communication with his attorney, such that the client will freely share important information and work comfortably with the lawyer in developing a defense plan. Moreover, only a face-to-face meeting allows an attorney to assess the client's demeanor, credibility, and the overall impression he might have on a jury. This is of particular importance in cases in which the client may take the stand in his defense or at the penalty phase in an attempt to establish the existence of particular mitigating circumstances.

The court held that there was no reasonable basis for the attorney's failure to meet with the defendant and that "failure to do so is 'simply an abdication' of the most basic expectations of defense counsel in a capital case." Prejudice found because, in this instance, the attorney's failure to meet with the client and develop a relationship resulted in the defendant proceeding *pro se* with counsel serving only as standby counsel.