**Capital Cases*

UNITED STATES SUPREME COURT CASES

***Garza v. Idaho*, 586 U.S. ___, 139 S.Ct. 738 (2019).** Trial counsel performed deficiently in failing to file a notice of appeal as requested by his client even though defendant's plea agreement contained an appeal waiver. The presumption of prejudice recognized in *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), applied despite the waiver of appeal.

***Sexton v. Beaudreaux,* 585 U.S. ___, 138 S.Ct. 2555 (2018) (per curiam).** In murder and attempted robbery case, grant of habeas relief by Ninth Circuit Court of Appeals on claim of ineffective assistance of counsel is reversed. The petitioner had alleged that trial counsel was ineffective in failing to seek suppression of certain eyewitness identification testimony. The state habeas court had summarily denied the claim. Looking to the state court record, there was "at least one theory that could have led a fairminded jurist to conclude that the suppression motion would have failed." It would have been reasonable to conclude that the petitioner failed to prove that the identification was not reliable under the totality of the circumstances. In analyzing the claim, the Ninth Circuit erred by essentially inverting the *Richter* rule. Instead of asking whether there were arguments or theories that could have supported the state court's ruling the Ninth Circuit considered arguments against the state court's decision that had not even been raised in the state habeas petition. Further, the Ninth Circuit failed to apply appropriate deference to the state court decision. "The Ninth Circuit essentially evaluated the merits *de novo*, only tacking on a perfunctory statement at the end of its analysis asserting that the state court's decision was unreasonable." Yet this was an instance where deference to the state court should have been "near its apex" given that general rules were at issue as to both the propriety of the identification and the effectiveness of trial counsel.

***_McCoy v. Louisiana_, 584 U.S. ___, 138 S. Ct. 1500 (2018).** Although this is a case under the Sixth Amendment, it is not about counsel's effectiveness, but rather about a defendant's "[a]utonomy to decide that the objective of the defense is to assert innocence," regardless of how reasonable an alternative strategy determined by counsel may be. 138 S. Ct. at 1508. Petitioner was arrested, tried, and convicted of the murders of his estranged wife's mother, stepfather, and son. Throughout the proceedings, he "insistently maintained" that he was out of state at the time of the killings and that corrupt police killed the victims during a botched drug deal. Nevertheless, at trial, his attorney concluded that the evidence against petitioner was overwhelming and, over petitioner's strong objections (he "opposed [counsel's] assertion of his guilt at every opportunity, before and during trial, both in conference with his lawyer and in open court," 138 S. Ct. at 1509), conceded during his opening statement at the guilt phase that petitioner had committed all three killings. His attorney believed that this concession was necessary in order to secure a sentence less than death at the penalty phase of the trial. At the penalty phase, counsel urged mercy on the basis of petitioner's mental and emotional issues, but the jury returned three death verdicts. (Before and during trial, petitioner sought to have counsel removed, but his requests were denied. The trial court also determined that petitioner was competent to stand trial.) Post-trial, new counsel representing petitioner moved for a new trial, arguing that the trial court violated petitioner's constitutional rights by allowing his counsel to concede guilt over petitioner's objection. The Louisiana Supreme Court affirmed the ruling of the trial court that counsel's concession was permissible because counsel reasonably believed that admitting guilt afforded petitioner the best

opportunity to avoid a death sentence. SCOTUS held that, under the Sixth Amendment, a defendant may insist on maintaining innocence at the guilt phase of a capital trial (just as the defendant may insist on refusing to plead guilty or on representing herself, despite overwhelming evidence of guilt or lack of legal experience). "These are not strategic choices about how best to *achieve* a client's objectives; they are choices about what the client's objectives in fact *are*." 138 S. Ct. at 1508. Even if counsel reasonably concludes that concession of guilt is most likely to avoid the death penalty, the defendant may not share that objective, and that is the defendant's decision to make. SCOTUS noted that the trial court had found petitioner competent to stand trial, even though counsel believed that petitioner was not competent. SCOTUS concluded that counsel had options short of conceding guilt: "If, after consultations with [counsel] concerning the management of the defense, McCoy disagreed with [counsel's] proposal to concede McCoy committed three murders, it was not open to [counsel] to override McCoy's objection. [Counsel] could not interfere with McCoy's telling the jury 'I was not the murderer,' although counsel could, if consistent with providing effective assistance, focus his own collaboration on urging that McCoy's mental state weighed against conviction." 138 S. Ct. at 1509. SCOTUS also noted that counsel did not concede guilt because he believed petitioner to be perjuring himself by declaring innocence; counsel thought petitioner believed what he was saying but counsel disbelieved it, and counsel's approach was not designed to avoid suborning perjury but rather to avoid a death sentence. SCOTUS did not apply *Strickland* here "[b]ecause a client's autonomy, not counsel's competence, is in issue." 138 S. Ct. at 1510-11. Petitioner's Sixth Amendment right was violated when the trial "court allowed counsel to usurp control of an issue within McCoy's sole prerogative," and the error was thus structural and no prejudice analysis was required. SCOTUS remanded for a new trial.

***Ayestas v. Davis*, 584 U.S. ___, 138 S.Ct. 1080 (2018).** Although this is a funding case under 18 U.S.C. § 3599(f), the ineffective assistance of counsel (IAC) discussions are significant, especially with regard to the procedural default argument and Sotomayor's concurrence. Petitioner, a Texas death row inmate in federal habeas corpus proceedings, moved for funding under 18 U.S.C. § 3599(f), which makes funds available if they are "reasonably necessary," and the motion was denied by the district court. The United States Supreme Court held that the district and Fifth Circuit Court of Appeals applied the wrong legal standard in denying the motion for funding. Petitioner was represented by four sets of lawyers, one at trial, one on direct appeal in state court, one on state habeas, and another in federal habeas. Although some claims of IAC were raised in the state habeas petition, others, including failure to investigate petitioner's mental illness and substance abuse, were not. (As Sotomayor's concurrence notes, although petitioner was not diagnosed with schizophrenia until he was in prison and while his state post-conviction application was pending, trial counsel had information that petitioner had a history of head trauma as well as substance abuse, but failed to follow up on this information, as did state post-conviction counsel.) Federal habeas counsel (fourth set of lawyers) raised these latter claims in federal court; the district court denied them as barred by procedural default because they had not been raised in state court. After SCOTUS remanded for reconsideration under *Martinez v. Ryan*, 566 U.S. 1 (2012) and *Trevino v. Thaler*, 569 U.S. 413 (2013), petitioner's counsel filed an ex parte motion in district court pursuant to 18 U.S.C. § 3599(f) for funding to investigate and develop evidence in support of his ineffective assistance of trial and state habeas counsel claims. The district court denied the motion for funding and the habeas corpus petition. With regard to funding, the district court held that, under Fifth Circuit precedent, habeas counsel was required to demonstrate "substantial need"

for investigative services, and had not done so. (The district court also ruled that the IAC claim was procedurally barred, so funding was not available to develop it.) Both the district court and the reviewing Fifth Circuit Court of Appeals refused to issue a COA on the IAC claims. SCOTUS granted review to decide if the lower courts applied the correct legal standard in denying the funding request. It first determined that it had jurisdiction to review and rule upon this issue, because, contrary to Texas' argument, the district court's denial of petitioner's funding motion was a judicial rather than an administrative decision. SCOTUS then determined that the Fifth Circuit's standard that funds are only available under § 3599(f) if the petitioner can show a "substantial need" for services is different from, and more burdensome than, the requirement set forth in §3599(f) that funds are available if the services are "reasonably necessary." Section 3599(f) uses the term "necessary" to mean something less than essential; it calls for "a determination by the district court, in the exercise of its discretion, as to whether a reasonable attorney would regard the services as sufficiently important." 138 S. Ct. at 1093. And after *Trevino*, "[i]n those cases in which funding stands a credible chance of enabling a habeas petitioner to overcome the obstacle of procedural default, it may be error for a district court to refuse funding." 138 S. Ct. at 1094. However, "[p]roper application of the 'reasonably necessary' standard thus requires courts to consider the potential merit of the claims that the applicant wants to pursue, the likelihood that the services will generate useful and admissible evidence, and the prospect that the applicant will be able to clear any procedural hurdles standing in the way." *Id*. SCOTUS remanded the case, leaving open the question for the Fifth Circuit to consider whether funding can be reasonably necessary where a habeas petitioner seeks to present a procedurally defaulted IAC of trial counsel claim depending on facts outside the state court record.

***Davila v. Davis*, 582 U.S. ___, 137 S.Ct. 2058 (2017).** The ineffective assistance of post-conviction counsel does not provide cause to excuse the procedural default of an ineffective assistance of appellate counsel claim.

***Jae Lee v. United States*, 582 U.S. ___, 137 S.Ct. 1958 (2017).** Petitioner, a lawful permanent resident who had spent 35 years in the United States after leaving South Korea with his parents when he was 13 and never returning to South Korea, established prejudice from his attorney's deficient performance in advising him to accept a guilty plea in a drug case after erroneously informing petitioner that he did not face mandatory deportation. That there was a likelihood of an increased sentence as well as deportation had petitioner gone to trial did not negate the showing of prejudice where the record established that deportation was the determinative issue in petitioner's acceptance of the plea; it would not be irrational for someone in petitioner's position to risk additional prison time in exchange for holding on to some chance of avoiding deportation.

***Weaver v. Massachusetts*, 582 U.S. ___, 137 S.Ct. 1899 (2017).** A petitioner raising a claim of ineffective assistance of trial counsel for failing to object to closure of the courtroom to the public during jury selection is required to prove prejudice. For purposes of this case, the Court accepts the petitioner's interpretation of *Strickland* prejudice as requiring a showing of either a reasonable probability of a different outcome in the petitioner's case, or, that the particular public-trial violation was so serious as to render petitioner's trial fundamentally unfair. The Court distinguishes a public-trial violation during jury selection from other errors that have been deemed structural "because they cause fundamental unfairness, either to the defendant in the specific case

or by pervasive undermining of the systemic requirements of a fair and open judicial process." These errors include: (1) failure to give a reasonable-doubt instruction; (2) biased judge; and (3) exclusion of grand jurors based on race. Regarding claims involving allegations of race or gender discrimination in the selection of the petit jury, which have necessitated automatic reversal where preserved and raised on direct review, "this opinion does not address whether the result should be any different if the errors were raised instead in an ineffective-assistance claim on collateral review." Looking to prejudice here, the Court finds that petitioner failed to show either a reasonable probability of a more favorable result or that the trial was fundamentally unfair.

***Buck v. Davis*, 580 U.S. ___, 137 S.Ct. 759 (2017).** In death penalty case out of Texas where petitioner sought to reopen federal habeas proceedings in light of *Martinez* and *Trevino*, the Fifth Circuit's denial of a COA is reversed. First, the Fifth Circuit exceeded the limited scope of the COA analysis by essentially conducting merits review in determining that Buck was not entitled to a COA. Second, regarding petitioner's procedurally defaulted ineffective assistance of trial counsel claim, petitioner established deficient performance by his trial attorney who introduced expert testimony at the sentencing phase that petitioner's race predisposed him to violence. Petitioner was prejudiced by counsel's action as there was a reasonable probability that at least one juror would have harbored a reasonable doubt about petitioner's future dangerousness had the expert testimony not been presented. (A finding of future dangerousness by the jury was required before a sentence of death could be imposed.) Third, the district court abused its discretion in denying petitioner's Rule 60(b) motion to reopen the proceedings as the circumstances of this case were extraordinary. The State's argument that *Teague* precluded petitioner from relying on *Martinez* and *Trevino* was waived.

***Woods v. Etherton*, 578 U.S. ___, 136 S. Ct. 1149 (2016) (per curiam)**. The Court reversed the Sixth Circuit's grant of habeas relief because a "fairminded jurist" could have concluded that repetition of an anonymous tip by police officers in state court cocaine possession trial did not establish that the uncontested facts it conveyed were submitted for their truth, in violation of the Confrontation Clause, or that appellate counsel was ineffective for failing to assert plain error or ineffective assistance of trial counsel based on the Confrontation Clause issue. The police stopped the car driven by the defendant based on an anonymous tip. Drugs were found in the driver's side door compartment. The defendant and his passenger were arrested. The passenger/co-defendant, who testified as part of a plea agreement, testified the drugs belonged to the defendant. Three police officers described the content of the anonymous tip leading to the arrest. Trial counsel objected the third time and the prosecution agreed just to move on. The prosecution also discussed the content of the tip during closing arguments. The jury was instructed "that 'the tip was not evidence,' but was admitted 'only to show why the police did what they did.'" In addressing the claim of appellate counsel's ineffectiveness, the state court reasoned that appellate counsel may reasonably have decided not to raise the issue of trial counsel's ineffectiveness because trial counsel's failure to object was a strategic decision. The state court also held that, even if trial counsel's conduct had been deficient, there was no prejudice because there was ample evidence of guilt. The Sixth Circuit, reviewing the case under AEDPA, held that appellate counsel was ineffective "and that no fairminded jurist could conclude otherwise. *Etherton v. Rivard*, 800 F.3d 737 (2015). Without ruling on the merits of the court's holding that counsel had been ineffective, we disagree with the determination that no fairminded jurist could reach a contrary

conclusion, and accordingly reverse." The Sixth Circuit concluded that "the contents of the tip were admitted for their truth because the tip was referenced by three different witnesses and mentioned in closing argument." The Sixth Circuit then found prejudice by finding that the "evidence was not enough to convict" without the co-defendant's testimony. And that is where the tip came in." "In reaching these conclusions, the Sixth Circuit did not apply the appropriate standard of review under AEDPA," because a "fairminded jurist" could conclude otherwise on each of these points. A "fairminded jurist" could also conclude that trial counsel did not object "because the facts of the tip were uncontested and in any event consistent with Etherton's defense." Likewise, a "fairminded jurist" could conclude that appellate counsel was not ineffective for reaching the same conclusion. "Given AEDPA, both Etherton's appellate counsel and the state habeas court were to be afforded the benefit of the doubt. Because the Sixth Circuit failed on both counts," reversal was required.

***Maryland v. Kulbicki*, 577 U.S. ___, 136 S. Ct. 2 (2015) (per curiam).** Certiorari granted and state court finding of ineffective assistance of counsel reversed. The state court held that trial counsel were ineffective in murder case for failing to challenge the state's evidence based on comparative bullet lead analysis (CBLA). The defendant was accused of killing his mistress, while the two were "ensnarled" in a paternity and child support suit. He was convicted in 1995. An FBI Agent examined a bullet fragment found in the defendant's truck and a bullet from the victim and testified that the results were "the sort one would "expect" if "examining two pieces of the same bullet." Additionally, the FBI Agent examined a bullet recovered from a handgun in the defendant's home and testified that it "likely came from the same package." In 2006, in state post-conviction proceedings, after "CBLA had fallen out of favor" and long after the initial post-conviction application had been filed, Kulbicki first asserted that counsel was ineffective in failing to challenge the CBLA evidence. The post- conviction court rejected this claim. In the appeal to the Maryland Court of Appeals, Kulbicki abandoned his ineffective assistance of counsel claim, but the state court reversed on "that ground alone." The state court based its finding on counsels' failure to find a 1991 report coauthored by the FBI Agent that testified at trial, which "presaged the flaws in CBLA evidence" found by the Maryland court 15 years later. The state court "offered no support" for the finding that counsel was ineffective in failing "to predict the demise of CBLA," the validity of which was "widely accepted" at the time of trial. Even the 1991 report the state court relied on "did not question the validity of CBLA." Thus, the state court violated "the rule of contemporary assessment of counsel's conduct." *Id*. at ___ (quoting *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993)). This failure was especially clear in that "there is no reason to believe that a diligent search would even have discovered the supposedly crucial report." While the state appellate court, two decades after trial, found the report by "Internet research" on a Government Printing Office website, there is no support for a finding that counsel could have found this information prior to trial or used it if they had found it. "Given the uncontroversial nature of CBLA at the time of Kulbicki's trial, the effect of the judgment below is to demand that lawyers go 'looking for a needle in a haystack,' even when they have 'reason to doubt there is any needle there.'" *Id*. at (quoting *Rompilla v. Beard*, 545 U.S. 374, 389 (2005)).

***Christeson v. Roper*, 574 U.S. 373 (2015) (per curiam)**. The Supreme Court granted review, vacated, and remanded due to the District Court in Missouri abusing its discretion in denying the petitioner's request for substitution of federally-appointed habeas counsel. Petitioner's first habeas

petition was dismissed as untimely because appointed counsel filed 117 days past the one year statute of limitations, despite having been appointed nine months before the deadline. Counsel did not even meet with their client until the deadline had passed. Nearly seven years later, appointed counsel consulted with new counsel, who realized that the only option to reopen the final judgment was a Rule 60(b) motion arguing equitable tolling, which appointed counsel could not make because the argument for equitable tolling would have to be "premised on their own malfeasance in failing to file timely the habeas petition." New counsel filed a motion to substitute counsel, which was denied. New counsel appealed to the Eighth Circuit, which ultimately dismissed for lack of jurisdiction, reasoning that new counsel were not authorized to file the appeal on petitioner's behalf. While this appeal was pending, the Missouri Supreme Court set an execution date. New counsel again filed a motion in the District Court for substitution of counsel. The court denied finding that "the interests of justice" would not be served by substitution. The Eighth Circuit summarily affirmed. Under 18 U.S.C. § 3599(e), a court may replace appointed counsel with "similarly qualified counsel . . . upon motion" of the petitioner. Under *Martel v. Clair*, 132 S. Ct. 1276 (2012), a motion for substitution should be granted when it is in the "interests of justice." Factors for consideration "include: the timeliness of the motion; the adequacy of the district court's inquiry into the defendant's complaint; and the asserted cause for that complaint, including the extent of the conflict or breakdown in communication between lawyer and client (and the client's responsibility, if any, for that conflict)." The District Court's primary error was in failing to acknowledge appointed counsel's conflict of interest despite the fact that tolling was available only for "serious instances of attorney misconduct." *Holland v. Florida*, 560 U.S. 631, 651-52 (2010). Appointed counsel clearly could not make this argument, which was a clear conflict of interest. "Counsel cannot reasonably be expected to make such an argument, which threatens their professional reputation and livelihood." "Given the obvious conflict of interest here," the District Court abused its discretion in denying substitution of counsel.

***Jennings v. Stephens*, 574 U.S. 271 (2015)**. In federal habeas, petitioner asserted entitlement to sentencing relief on three grounds of ineffective assistance of counsel. Two of those grounds were under *Wiggins v. Smith*, 539 U.S. 510 (2003), and asserted ineffective assistance for failing to investigate and present evidence of a disadvantaged background, low intelligence, and organic brain damage. The third ground asserted under *Smith v. Spisak*, 558 U.S. 139 (2010) that counsel was ineffective in arguing in closing arguments that he could not "quarrel with" a death sentence. The District Court granted relief on the *Wiggins* claims but denied relief based on Spisak. The state appealed. In response, petitioner argued that the District Court was correct in granting relief based on *Wiggins* and that counsel was also ineffective under *Spisak*. The Fifth Circuit reversed under *Wiggins* and held that it lacked jurisdiction to address the *Spisak* claim because the petitioner had filed to file a timely notice of appeal and had failed to obtain a certificate of appealability. The Supreme Court held this was error. While it is unclear whether 28 U.S.C. § 2253(c) requires a certificate of appealability when a petitioner seeks to cross-appeal in a case already before a court of appeals, it is clear that § 2253(c) does not apply when the petitioner simply defends a judgment on alternative grounds. A certificate of appealability is not required in this circumstance. Thus, the Fifth Circuit erred in failing to consider the *Spisak* claim. Remanded.

***Hinton v. Alabama*, 571 U.S. 263 (2014) (per curiam)**. Under "a straightforward application" of *Strickland*, defense counsel's failure in capital murder trial to request additional funding to replace

an inadequate expert amounted to deficient performance. In February 1985, the first victim was killed during a restaurant robbery. In July 1985, the second victim was killed in a "very similar" restaurant robbery. Later the same month, a third man survived a similar robbery-shooting (which was not charged) and identified the defendant in a photo-array. The defendant was arrested and a .38 caliber pistol was seized from his home. State "firearms and toolmark" experts testified that bullets from all three crime scenes were fired by this weapon. No other evidence linked the defendant to the two murders. Recognizing the importance of his issue, counsel requested funding to hire his own expert. The trial court, believing that the statutory maximum that he could grant for each murder count was $500, authorized $1000 in funding but invited counsel to request more funding if that was insufficient. The statutory maximum relied on by the trial court had been amended more than a year prior to the defendant's arrest. The statute at the time of the ruling actually authorized the court to approve "any expenses reasonably incurred." "Operating under the mistaken belief that he could pay no more than $1,000," trial counsel searched for a qualified expert but could locate only one person, Andrew Payne, willing to perform the services for only $1000. Counsel did not believe Payne had the necessary expertise, but hired him anyway. Payne testified that the barrel of the defendant's revolver had been corroded to the point that it was impossible to say whether a particular bullet had been fired from the gun. He also testified that the bullets from the three crime scenes did not match one another. "On cross-examination, the prosecutor badly discredited Payne." He had testified in only two cases in the preceding eight years and one of those cases involved a shotgun rather than a pistol. He also conceded that he had to obtain assistance from one of the state's experts to operate the microscope at the state laboratory and that he had vision in only one eye. In closing argument, the state also highlighted the fact that Payne's expertise was in military ordinance, not firearms and toolmark identification, and that he had graduated with a degree in civil engineering "more than half a century before the trial." In post-conviction, the defense presented three qualified experts, who all testified that they could not conclude that any of the six bullets had been fired from the defendant's revolver. The state presented no evidence in rebuttal. The state trial court denied relief finding no prejudice because Payne said the same thing as the post-conviction experts. The Alabama Court of Criminal Appeals affirmed for the same reason. The Alabama Supreme Court remanded for the trial court to determine whether Payne was "a qualified firearms and toolmarks expert." After the trial court found that Payne was qualified, the Alabama Supreme Court affirmed. The Supreme Court held that, under *Strickland*, "it was unreasonable for Hinton's lawyer to seek additional funds to hire an expert where that failure was based not on any strategic choice but on a mistaken belief that available funding was capped at $1,000."

> The trial attorney's failure to request additional funding in order to replace an expert he knew to be inadequate because he mistakenly believed that he had received all he could get under Alabama law constituted deficient performance. Under *Strickland*, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." 466 U.S., at 690–691. Hinton's attorney knew that he needed more funding to present an effective defense, yet he failed to make even the cursory

> investigation of the state statute providing for defense funding for indigent defendants that would have revealed to him that he could receive reimbursement not just for $1,000 but for "any expenses reasonably incurred." An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*.

The Court further clarified its holding:

> We wish to be clear that the inadequate assistance of counsel we find in this case does not consist of the hiring of an expert who, though qualified, was not qualified enough. The selection of an expert witness is a paradigmatic example of the type of "strategic choic[e]" that, when made "after thorough investigation of [the] law and facts," is "virtually unchallengeable." *Strickland*, 466 U.S., at 690. We do not today launch federal courts into examination of the relative qualifications of experts hired and experts that might have been hired. The only inadequate assistance of counsel here was the inexcusable mistake of law – the unreasonable failure to understand the resources that state law made available to him—that caused counsel to employ an expert that he himself deemed inadequate.

The Court remanded for a proper prejudice determination. The state court had held that, because Payne's testimony was the same as the post-conviction experts' testimony, there could be no prejudice. The Supreme Court rejected this analysis.

> It is true that Payne's testimony would have done Hinton a lot of good if the jury had believed it. But the jury did not believe Payne. And if there is a reasonable probability that Hinton's attorney would have hired an expert who would have instilled in the jury a reasonable doubt as to Hinton's guilt had the attorney known that the statutory funding limit had been lifted, then Hinton was prejudiced by his lawyer's deficient performance and is entitled to a new trial.

***Burt v. Titlow*, 571 U.S. 12 (2013) (*reversing* 680 F.3d 577 (6th Cir. 2012))**. Under *Pinholster*, "[w]hen a state prisoner asks a federal court to set aside a sentence due to ineffective assistance of counsel during plea bargaining, our cases require that the federal court use a 'doubly deferential' standard of review that gives both the state court and the defense attorney the benefit of the doubt." In this case, the Supreme Court reversed the grant of relief because the Sixth Circuit "failed to apply that doubly deferential standard by refusing to credit a state court's reasonable factual finding and by assuming that counsel was ineffective where the record was silent." Petitioner, along with her aunt, was charged with first-degree murder of the aunt's husband. Even though petitioner claimed innocence, trial counsel negotiated and advised petitioner to accept a plea agreement in which the defendant would plead guilty to manslaughter and receive a sentence of 7-15 years – which was higher than provided for in state sentencing guidelines – in exchange for her testimony against her aunt. After entering the plea "and only days away from offering self incriminating testimony in open court," petitioner retained new counsel and demanded a sentence of only three years in exchange for her testimony. When the state rejected this demand, petitioner moved to withdraw her plea and refused to testify against her aunt. The aunt was acquitted and the petitioner was convicted of

second-degree murder at trial. "Although a defendant's proclamation of innocence does not relieve counsel of his normal responsibilities under *Strickland*, it may affect the advice counsel gives." The Sixth Circuit rejected the state court's conclusion that counsel's conduct was not deficient "because the 'record in this case contains no evidence that' he gave constitutionally adequate advice on whether to withdraw the guilty plea." (Quoting 680 F.3d at 590). The Supreme Court found this finding to be "troubling."

> We have said that counsel should be "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment," *Strickland*, 466 U. S., at 690, and that the burden to "show that counsel's performance was deficient" rests squarely on the defendant, *id*., at 687. The Sixth Circuit turned that presumption of effectiveness on its head. It should go without saying that the absence of evidence cannot overcome the "strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance." *Id*., at 689.

***Trevino v. Thaler*, 569 U.S. 413 (2013)**. The holding of *Martinez v. Ryan* applies where state law says that ineffective assistance of counsel (IAC) claims "must be raised in an initial- review collateral proceeding." This holding also applies where state law does not require IAC to be raised first in collateral review, but "[t]he structure and design of the [state] system in actual operation, however, make it 'virtually impossible' for an ineffective assistance claim to be presented on direct review." Here, while Texas permits IAC claims before the trial court in a motion for new trial, this "vehicle is often inadequate because of time constraints and because the trial record has generally not been transcribed at this point." *Id*. at ___ (quoting *Ex parte Torres*, 943 S.W.2d 469, 475 (Tex. Crim. App. 1997) (en banc)).

> The present capital case illustrates why it does not. The trial court appointed new counsel for Trevino eight days after sentencing. Counsel thus had 22 days to decide whether, and on what grounds, to make a motion for a new trial. She then may have had an additional 45 days to provide support for the motion but without the help of a transcript (which did not become available until much later–seven months after the trial). It would have been difficult, perhaps impossible, within that time frame to investigate Trevino's background, determine whether trial counsel had adequately done so, and then develop evidence about additional mitigating background circumstances.

Id. at ___. In addition to the inadequacy of the direct review process, the "Texas courts in effect have directed defendants to raise claims of ineffective assistance of trial counsel on collateral, rather than on direct, review." *Id*.

> [W]here, as here, state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal, our holding in Martinez applies.

Id. at ___.

***Chaidez v. United States*, 568 U.S. 342 (2013)**. The decision in *Padilla v. Kentucky* does not apply retroactively to convictions that had already become final.

***Missouri v. Frye*, 566 U.S. 133 (2012)**. In this felony driving while revoked case, the Court held that counsel's conduct was deficient in failing to communicate a formal favorable plea offer from the state to the defendant. The defendant was charged with a felony that carried up to a four year sentence. Prior to trial, the state offered two plea bargains. On the first, the state agreed to recommend a three year sentence, without a recommendation regarding probation but with a recommendation of 10 days in jail. On the second, the state offered to reduce the charge to a misdemeanor and to recommend a 90 day sentence. The state put an expiration date on both offers, which passed without defense counsel even advising the defendant of the offers. Subsequently, but before trial, the defendant was again arrested for driving with a revoked license. He ultimately plead guilty with no plea agreement. The state recommended a three-year sentence, made no recommendation on probation, and requested 10 days in jail. The Court noted the desirability of plea bargaining. "Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas." The Court also noted, "[t]hough the standard for counsel's performance is not determined solely by reference to codified standards of professional practice, these standards can be important." Here, the American Bar Association Standards for Criminal Justice require counsel to "promptly communicated and explain to the defendant all plea offers made by the prosecuting attorney," and "this standard has been adopted by numerous state and federal courts over the last 30 years." Likewise, "[t]he standard for prompt communication and consultation is also set out in state bar professional standards for attorneys."

> [A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused.

Counsel was deficient, here, because counsel "allowed the offer to expire without advising the defendant or allowing him to consider it."

> To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel. Defendants must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law. To establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time.

Here, the defendant could show that he would have accepted one of the offers had he known about the state's plea offers, as he later entered a guilty plea with no deal at all. While this might not be

enough of a showing in a case where the state's case become stronger after the initial plea offer, it was enough of a showing here. Nonetheless, "there is strong reason to doubt the prosecution and the trial court would have permitted the plea bargain to become final." Specifically, because of the defendant's additional arrest following the plea offer, the prosecution and the trial court likely would not have adhered to the deal. Case remanded to allow the state court to resolve this issue in the first instance.

***Lafler v. Cooper*, 566 U.S. 156 (2012)**. In this assault with intent to commit murder case, counsel was found to be ineffective in advising respondent to reject the state's plea offer and proceed to trial. The prosecution twice offered to dismiss two of the charges and to recommend a sentence of 51 to 85 months for the other two charges in exchange for a guilty plea. Respondent initially indicated a willingness to enter the deal, but later rejected the offer because counsel convinced him that the prosecution would be unable to establish his intent to commit murder on the basis that the victim had been shot below the waist. After a full and fair trial, respondent was convicted on all four counts and received a mandatory minimum sentence of 183 to 360 months. Respondent asserted ineffective assistance of trial counsel for advising him to reject the state's plea offer. Rather than applying *Strickland* as was inappropriate in this circumstance, the state court simply found that respondent's rejection of the plea offer was knowing and voluntary. "By failing to apply *Strickland* to assess the ineffective-assistance-of-counsel claim respondent raised, the state court's adjudication was contrary to clearly established federal law." The Supreme Court again rejected the argument that *Lockhart v. Fretwell* modified *Strickland*. The Court also reiterated the desirability of pleas as "criminal justice today is for the most part a system of pleas, not a system of trials. Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas." On deficient performance, the Supreme Court noted that "an erroneous strategic prediction about the outcome of a trial is not necessarily deficient performance," but the State conceded that counsel's conduct was deficient in this case. Thus, the only question before the Court was how to apply *Strickland*'s prejudice test where counsel's ineffectiveness resulted in rejection of a plea offer.

> In these circumstances a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed.

Respondent established a reasonable probability that he would have accepted the plea offer and the court would have accepted the guilty plea. In addition, prejudice was shown as respondent received a sentence 3 ½ times more severe than he likely would have received by pleading guilty. In fashioning a remedy, the Court noted that "a remedy must 'neutralize the taint' of a constitutional violation."

> The correct remedy in these circumstances . . . is to order the State to reoffer the plea agreement. Presuming respondent accepts the offer, the state trial court can then exercise its discretion in determining whether to vacate the convictions and

> resentence respondent pursuant to the plea agreement, to vacate only some of the convictions and resentence respondent accordingly, or to leave the convictions and sentence from trial undisturbed.

In short, "[t]oday's decision leaves open to the trial court how best to exercise that discretion in all the circumstances of the case."

***Martinez v. Ryan*, 566 U.S. 1 (2012)**. In this criminal sexual conduct with a minor case, the Court qualified the opinion in *Coleman v. Thompson*, by recognizing that a federal habeas court may excuse a procedural default of an ineffective-assistance claim when the claim was not properly presented in state court due to an attorney's errors in an initial-review collateral proceeding, i.e., the first proceeding in which a claim of ineffective assistance at trial can be raised. State law prohibited arguing ineffectiveness of trial counsel during the direct appeal. In state post-conviction, the first opportunity to assert the issue, the issue was not presented. When it was raised in a successive state post-conviction petition, the state court dismissed due to a state court procedural bar that was an independent and adequate ground. Thus, the claim could only be heard in federal court by establishing cause to excuse the procedural default. Cause can be established in two circumstances.

> The first is where the state courts did not appoint counsel in the initial-review collateral proceeding for a claim of ineffective assistance at trial. The second is where appointed counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective under the standards of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To overcome the default, a prisoner must also demonstrate that the underlying ineffective-assistance- of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit.

In other words, the State can "elect between appointing [effective] counsel in initial-review collateral proceedings or not asserting a procedural default and raising a defense on the merits in federal habeas proceedings." At bottom, ineffectiveness of post-conviction counsel is not a "freestanding" claim for relief, but merely one that allows a federal court to find cause and prejudice for failing to adequately assert the issue in state court, which "allows a federal court to consider the merits of a claim that otherwise would have been procedurally defaulted."

***Martel v. Clair*, 565 U.S. 648 (2012)**. The Court held that the standard to be applied in evaluating a capital habeas petitioner's motion to replace appointed counsel under 18 U.S.C. §3599(d) is the "interests of justice" standard applied in non-capital cases under 18 U.S.C. §3006A. The initial habeas petition was filed by appointed habeas counsel in 1994. An evidentiary hearing was held in 2004 and post-hearing briefs were filed in February 2005. The District Court informed both parties that there would be no additional materials submitted. After that, in March 2005, the petitioner moved to replace appointed counsel because "they were seeking only to overturn his death sentence, rather than to prove his innocence." The District Court denied the motion and the Supreme Court applied the "interests of justice" standard, which "contemplates a peculiarly context-specific inquiry."

> Those factors . . . generally include: the timeliness of the motion; the adequacy of the district court's inquiry into the defendant's complaint; and the asserted cause for that complaint, including the extent of the conflict or breakdown in communication between lawyer and client (and the client's own responsibility, if any, for that conflict). Because a trial court's decision on substitution is so fact-specific, it deserves deference; a reviewing court may overturn it only for an abuse of discretion.

Id. at ___(citations omitted). Courts "cannot properly resolve substitution motions without probing why a defendant wants a new lawyer" in "an on-the-record inquiry," which will make possible meaningful appellate review of the trial court's exercise of discretion. Here, after the court's initial inquiry, the petitioner dropped his complaint. When the petitioner renewed the substitution motion, it was based on counsel's failure to challenge guilt-or-innocence phase issues when, in fact, counsel had raised many challenges to the conviction, including to the sufficiency of the State's evidence. Regardless, the timing of the motion alone in this case "precludes a holding that the District Court abused its discretion." "The case was all but over but the deciding; counsel, whether old or new, could do nothing more in the trial court proceedings. At that point and in that forum, Clair's conflict with his lawyers no longer mattered."

***Maples v. Thomas*, 565 U.S. 266 (2012)**. The Court addressed the question of whether the habeas petitioner could establish "cause" to excuse the procedural default of issues due to the petitioner's failure to timely appeal the state trial court's order denying post-conviction relief. The petitioner was an Alabama death-sentenced inmate. He was initially represented in state post-conviction by two New York attorneys, who were associated with same large law firm serving pro bono. An Alabama attorney, designated as local counsel, had moved for their admission pro hac vice, but made clear to the New York counsel that he "would undertake no substantive involvement in the case." The petition was filed in August 2001. In the summer of 2002, with the petition still pending, the New York attorneys left the firm and their new employment disabled them from continuing to represent the petitioner. They did not, however, inform the petitioner of their departure and did not seek the Alabama trial court's leave to withdraw or move for substitution of counsel. In May 2003, the court denied the petition. Notice was sent to the attorneys at the law firm, but it was returned, unopened, to the trial court clerk. Local counsel also received notice but did not even contact the New York firm to ensure their receipt of notice because they were copied on the same letter from the court. The 42 days allowed for filing a notice of appeal expired on July 7, 2003. Over a month later, the Assistant Attorney General assigned to the case sent a letter directly to the petitioner informing him of the missed deadline and that he had four weeks to file a federal habeas petition. He clearly understood that local counsel and the New York counsel were providing no representation as counsel were not copied on the letter. In the federal habeas proceedings, the court did not entertain the habeas claims because of the state procedural default, which could be overcome only by demonstrating "cause" for the default and actual prejudice as a result of the alleged violation of federal law. "Cause" exists where "something external to the petitioner, something that cannot fairly be attributed to him" impeded his efforts to comply with the state procedural rule. As held in *Coleman v. Thompson*, negligence on the part of counsel does not qualify as "cause" because the attorney is the prisoner's agent. "Thus, when a petitioner's postconviction attorney misses a filing

deadline, the petitioner is bound by the oversight." Without disturbing this general rule, the Court held that "cause" existed to excuse the missed notice of appeal deadline in this case.

> Abandoned by counsel, Maples was left unrepresented at a critical time for his state postconviction petition, and he lacked a clue of any need to protect himself pro se. In these circumstances, no just system would lay the default at Maples' death-cell door.

Counsel's abandonment of the petitioner without notice severed the principal-agent relationship as counsel was no longer the petitioner's representative. The petitioner could not be faulted for failing to act on his own behalf because he lacked any reason to believe that counsel were not representing him. The Court also noted Alabama's "low eligibility requirements" for capital trial lawyers. Counsel need only be a member of the Alabama bar with five years' prior experience in the active practice of criminal law. No capital experience or even capital-case-specific professional education or training is required. Appointed counsel were also undercompensated. Until 1999, counsel were paid $40 per hour in court and $20 per hour out of court, with a cap of $1000 for out-of-court work. "[D]eath penalty litigation is plainly time intensive," as "[o]ne study of capital trials from 1990 to 1997 found that defense attorneys spent an average of 1,480 out-of-court hours preparing a defendant's case." Even now, Alabama capital counsel are paid only $70 per hour.

***Cullen v. Pinholster*, 563 U.S. 170 (2011) (sentenced in May 1984).** The Court reversed the Ninth Circuit's finding of ineffective assistance of counsel and held that federal habeas review under 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits. Prior to sentencing, trial counsel moved to exclude any aggravating evidence due to the state's failure to provide notice of the evidence to be introduced as required by state law. That motion was denied and trial counsel rejected the court's offer of a continuance. In sentencing, trial counsel presented only testimony from the petitioner's mother concerning the petitioner's troubled childhood and adolescent years. In state habeas, counsel asserted ineffectiveness in failing to adequately investigate and in failing to furnish the defense expert with adequate background materials. The petitioner presented evidence from a new expert, Dr. Woods, that the petitioner suffers from bipolar mood disorder and seizure disorders. The state court summarily rejected the claims on the merits. In federal court, the district court granted an evidentiary hearing and received additional evidence from two new medical experts. The district court and the Ninth Circuit granted habeas relief. The Supreme Court found error in the federal courts considering evidence that was not before the state court when the claim was unadjudicated on the merits. The Court also found error in the federal courts' finding of ineffective assistance of counsel. Review of the state court's decision is "doubly deferential." First, there is a "highly deferential" look at counsel's performance. Second, this must be done through the "deferential lens of § 2254(d)." Here, "[t]he state court record supports the idea that [petitioner's] counsel acted strategically to get the prosecution's aggravation witnesses excluded for lack of notice, and if that failed, to put on [petitioner's] mother." Counsel interviewed the mother and retained a psychiatrist. Counsel "confronted a challenging penalty phase with an unsympathetic client, which limited their feasible strategies." Specifically, the petitioner bragged in his trial testimony about "his criminal disposition" and "hundreds of robberies." The defense expert, who did not testify, had noted "psychopathic personality traits" and diagnosed antisocial personality disorder. "Given these

impediments, it would have been a reasonable penalty-phase strategy to focus on evoking sympathy for [petitioner's] mother." "[I]t certainly can be reasonable for attorneys to conclude that creating sympathy for the defendant's family is a better idea because the defendant himself is simply unsympathetic." In finding that the state court had unreasonably applied *Strickland*, the Ninth Circuit "erred in attributing strict rules to this Court's recent case law" in *Williams v. Taylor*, 529 U.S. 362 (2000), *Wiggins v. Smith*, 539 U.S. 510 (2003), and *Rompilla v. Beard*, 545 U.S. 374 (2005). Here, just as the relevant standard in *Wiggins* was the standard of practice for capital cases in Maryland at the time of trial, the relevant standard of professional competence here was the standard "that prevailed in Los Angeles in 1984." Even if trial counsel performed deficiently, there was no showing that the state court unreasonably concluded there was no prejudice in light of the extensive aggravating evidence and the unsympathetic defendant. The "new" evidence presented in state habeas "largely duplicated the mitigation evidence at trial." To the extent it did include "new factual allegations or evidence, much of it is of questionable mitigating value." If trial counsel had presented Dr. Woods' testimony, it would have opened the door to rebuttal by a state expert. Likewise, the "new evidence" concerning the petitioner's family–"substance abuse, mental illness, and criminal problems"–"is also by no means clearly mitigating, as the jury might have concluded that [petitioner] was simply beyond rehabilitation." The Ninth Circuit again erred in relying on *Williams* and *Rompilla* in finding prejudice. "[T]his Court did not apply AEDPA deference to the question of prejudice in those cases; each of them lack the important 'doubly deferential' standard of Strickland and AEDPA" and "therefore offer no guidance with respect to whether a state court has unreasonably determined that prejudice is lacking." Even if the federal court might have reached a different conclusion as an initial matter, the state court did not unreasonably apply Supreme Court precedent in finding no prejudice.

***Harrington v. Richter*, 562 U.S. 86 (2011)**. The Supreme Court reversed the Ninth Circuit's finding of ineffective assistance of counsel in murder and attempted murder case for failing to consult with blood evidence experts. The State's case was built on the testimony of the attempted murder victim and circumstantial evidence. While the state had not planned to present blood pattern evidence, the approach was altered following defense counsel's opening statement. The State presented expert testimony by both a blood spatter expert and a serologist to contradict the defense theory.

> The pivotal question is whether the state court's application of the Strickland standard was unreasonable. This is different from asking whether defense counsel's performance fell below *Strickland*'s standard.

Id. at ___. In this case, the state court's decision was "unaccompanied by any explanation." Under

> § 2254(d), a habeas court must determine what arguments or theories supported or, as here, could have supported, the state court's decision; and then it
> must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court.

Id. at ___. "[E]ven a strong case for relief does not mean the state court's conclusion was unreasonable." *Id*.

> As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.

Id. at ___. In assessing the effectiveness of representation, "[t]he question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." *Id*. at ___. "Counsel was entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies." *Id*. at ___. "Reliance on 'the harsh light of hindsight' to cast doubt on a trial that took place now more than 15 years ago is precisely what *Strickland* and AEDPA seek to prevent." *Id*. at ___. Counsel's failure to consult a blood expert was not unreasonable. Even if it was apparent that expert testimony would support the defense, competent counsel might elect not to use this evidence. "Counsel was entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies." Here, counsel had "reason to question the truth of his client's account, given his initial denial of involvement and then production of evidence. Thus, concentrating on the blood pool carried its own serious risks, such as exposing the petitioner's story as "an invention." "An attorney need not pursue an investigation that would be fruitless, much less one that might be harmful to the defense." "Even apart from this danger, there was the possibility that expert testimony could shift attention to esoteric matters of forensic science, distract the jury from whether [the petitioner] was telling the truth, or transform the case into a battle of the experts." *Id*. at ___.

> To support a defense argument that the prosecution has not proved its case it sometimes is better to try to cast pervasive suspicion of doubt than to strive to prove a certainty that exonerates. All that happened here is that counsel pursued a course that conformed to the first option.

Id. at ___. Counsel also was not ineffective in failing to anticipate that the state would offer expert testimony. "Just as there is no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities." *Id*. at ___. Here, the prosecution did not anticipate that it would present expert testimony until the eve of trial. Even if counsel had anticipated the state would call an expert, *Strickland* does not enact Newton's third law for the presentation of evidence, requiring for every prosecution expert an equal and opposite expert from the defense." *Id*.

> In many instances, cross-examination will be sufficient to expose defects in an expert's presentation. When defense counsel does not have a solid case, the best strategy can be to say that there is too much doubt about the State's theory for a jury to convict.

Id. at ___. Prejudice was not established.

> *Strickland* asks whether it is "reasonably likely" the result would have been different. This does not require a showing that counsel's actions "more likely than not altered the outcome," but the difference between *Strickland*'s prejudice standard and a more-probable-than-not standard is slight and matters "only in the rarest case." The likelihood of a different result must be substantial, not just conceivable.

Id. at ___ (citations omitted). "There was ample basis for the California Supreme Court to think any real possibility of [the petitioner's] being acquitted was eclipsed by the remaining evidence pointing to guilt." *Id*.

***Premo v. Moore*, 562 U.S. 115 (2011)**. The Supreme Court reversed the Ninth Circuit's finding of ineffective assistance of counsel for recommending a plea bargain in felony murder case without first seeking suppression of a confession assumed to have been properly obtained. Counsel asserted he did not move to suppress the confession in light of the petitioner's admissible confessions to two other witnesses. The state court decision was not an unreasonable application of either part of the *Strickland* rule. "With a potential capital charge lurking, [petitioner's] counsel made a reasonable choice to opt for a quick plea bargain." The Ninth Circuit erred in resting its holding on *Arizona v. Fulminante*, 499 U.S. 279 (1991) because *Fulminante* may not be incorporated into the *Strickland* performance inquiry. *Fulminante* involved the admission into evidence of an involuntary confession. It "says nothing about the *Strickland* standard of effectiveness." Thus, "a finding of constitutionally adequate performance under *Strickland* cannot be contrary to *Fulminante*."

> There are certain differences between inadequate assistance of counsel claims in cases where there was a full trial on the merits and those, like this one, where a plea was entered even before the prosecution decided upon all the charges.... Hindsight and second guesses are ... inappropriate, and often more so, where a plea has been entered without a full trial or, as in this case, eve before the prosecution decided on the charges. . . . There is a most substantial burden on the claimant to show ineffective assistance. The plea process brings to the criminal justice system a stability and a certainty that must not be undermined by the prospect of collateral challenges in cases not only where witnesses and evidence have disappeared, but also in cases where witnesses and evidence were not presented in the first place.

****Holland v. Florida*, 560 U.S. 631 (2010)**. The Court held "that the timeliness provision in the federal habeas corpus statute is subject to equitable tolling," *id*. at ___, "in appropriate cases," *id*. at ___. The Court had previously held that a petitioner would be entitled to equitable tolling only if he shows: "(1) that he had been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way" and prevented timely filing. *Id*. at _____(quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). Here, "'the extraordinary circumstances' at issue involve an attorney's failure to satisfy professional standards of care." *Id*. at ____. The Eleventh Circuit held in this case that even "grossly negligent" conduct by counsel could not warrant tolling, "absent 'bad faith, dishonesty, divided loyalty, mental impairment or so forth on the lawyer's part.'" *Id*. at ___. The Court rejected this standard as "too rigid." *Id*. at ___. The Court recognized that it

had held in "the context of procedural default" and "whether federal courts may excuse a petitioner's failure to comply with a state court's procedural rules," id. at _____, that "without qualification, . . . a petitioner 'must bear the risk of attorney error,'" *id*. at ____ (quoting *Coleman v. Thompson*, 501 U.S. 722, 752-53 (1991)). "Equitable tolling, by contrast, asks whether federal courts may excuse a petitioner's failure to comply with federal timing rules, an inquiry that does not implicate a state court's interpretation of state law." *Id*. at ____. "[A]t least sometimes, professional misconduct that fails to meet the Eleventh Circuit's standard could nonetheless amount to egregious behavior and create an extraordinary circumstance that warrants equitable tolling." *Id*. at ____. While "a garden variety claim of excusable neglect, such as a simple 'miscalculation' that leads a lawyer to miss a filing deadline, does not warrant equitable tolling," *id*. at (quotations omitted), this case does "not involve, and we are not considering, a 'garden variety claim' of attorney negligence," *id*. at _____. Here, counsel was appointed in state post-conviction when only 37 days had elapsed under the 1-year AEDPA limitation period. Counsel waited 316 days to file the post-conviction motion in state court, leaving only 12 days on the AEDPA clock. During the next three years, while the case remained in state court, the defendant sent counsel correspondence specifically asking counsel to make sure the case would be timely filed in federal court and counsel assured him it would be. After the state trial court denied relief, another two years went by with the case pending in the Florida Supreme Court. During this period relations had broken down between Holland and counsel and counsel communicated with Holland only three times by letter. Holland wrote to the state court asking it to remove counsel. He also filed a complaint with the state bar association. Neither entity took action and counsel orally argued the case in state court. Shortly afterwards, Holland again wrote to counsel specifically emphasizing the importance of timely filing in federal court after the state court ruled. Five months later the state court denied relief. Three weeks later the state court issued its mandate "making its decision final. At that point, the AEDPA federal habeas clock again began to tick–with 12 days left on the 1-year meter." Counsel took no action. A month after the AEDPA time limit expired, while Holland was still unaware of the ruling, he again wrote to counsel specifically asking him to make sure the case was timely filed in federal court. Nine days after that, and five weeks after the state court had issued its mandate, Holland learned, while working in the prison library, that the state court had denied him relief. The very next day he mailed out his own pro se federal habeas petition. That same day he received a letter from counsel saying that he intended to file a petition for certiorari in the United States Supreme Court. Holland immediately wrote back advising counsel that the AEDPA time limitations were not tolled during such discretionary reviews. He was "right about the law." Counsel wrote back five days later informing Holland that "the limitations period applicable to Holland's federal habeas application had in fact expired in 2000–before [counsel] had begun to represent Holland." Counsel was "wrong about the law," as "the AEDPA clock . . . had 328 days left to go" when counsel was appointed. Holland immediately wrote back pointing this out. Counsel did not respond to this letter or file a federal habeas petition. Holland subsequently filed another complaint with the state bar, which asked counsel to respond. The day after his response was filed through his attorney, which was over three months after Holland's AEDPA statute of limitations had expired, counsel mailed a federal habeas petition to Holland for review. The District Court granted Holland's previously filed motion and appointed different federal habeas counsel for him. In short, "this case may well be an 'extraordinary' instance in which petitioner's attorney's conduct constituted far more than 'garden variety' or 'excusable neglect.'" *Id*. at ____. Counsel was unaware of the date on which the limitations period expired and failed to "do the research

necessary," despite repeated communications from Holland. He also "failed to communicate with his client over a period of years, despite various pleas from Holland that [he] respond to his letters." As a result, Holland "lost what was likely his single opportunity for federal habeas review of the lawfulness of his imprisonment and of his death sentence." *Id*. at ___. The District Court had ruled against Holland, not on lack of extraordinary circumstances, "but rather on a lack of diligence." *Id*. at ___. "Reasonable diligence" is required for equitable tolling. Id. at ___. Holland exercised "reasonable diligence." He wrote his counsel numerous letters, contacted the state court and state bar, and prepared his own federal habeas petition, "the very day that [he] discovered that his AEDPA clock had expired due to [counsel's] failings." *Id*. at ___. Remanded to the Eleventh Circuit for further proceedings because "no lower court has yet considered in detail the facts of this case to determine whether they indeed constitute extraordinary circumstances sufficient to warrant equitable relief." *Id*. at ___.

***Sears v. Upton*, 561 U.S. 945 (2010) (per curiam)**. The Court held that the state postconviction court failed to apply the proper prejudice inquiry in determining that counsel's facially inadequate mitigation investigation did not prejudice the petitioner. Because "some mitigation evidence" had been presented, "the state court determined it could not speculate as to what the effect of additional evidence would have been." "[I]t is plain from the face of the state court's opinion that it failed to apply the correct prejudice inquiry . . .for evaluating [petitioner's] Sixth Amendment claim." At trial, "counsel presented evidence describing his childhood as stable, loving, and essentially without incident" in an effort to "portray the adverse impact of [his] execution on his family and loved ones." This strategy backfired as the prosecutor "used the evidence of [petitioner's] purportedly stable and advantaged upbringing against him during the State's closing argument." Rather than being "privileged in every way," as the state argued, petitioner's parents had a physically abusive relationship and divorced when the petitioner was young. He suffered sexual abuse from a male cousin. He was demeaned by his mother referring to him and his brothers as "little mother fuckers." His father was also "verbally abusive," even berating him in front of his school principal during a parent-teacher conference. His father disciplined him "with age-inappropriate military-style drills." He "struggled in school, demonstrating substantial behavior problems from a very young age." He repeated the second grade and was referred at age nine to a local mental health center for evaluation. By the time he reached high school, he was described as "severely learning disabled" and "severely behaviorally handicapped." His older brother was "a convicted drug dealer and user, who introduced [petitioner] to a life of crime. "Environmental factors aside, and more significantly," the postconviction evidence revealed that petitioner "performs at or below the bottom first percentile in several measures of cognitive functioning and reasoning," likely due to "significant frontal lobe damage [the petitioner] suffered as a child, as well as drug and alcohol abuse in his teens." He had a "grandiose self-conception" and beliefs of "magical thinking," due to a "profound personality disorder." "[T]he fact that some of this evidence may have been 'hearsay' does not necessarily undermine its value–or it admissibility–for penalty phase purposes" because:

> We have . . . recognized that reliable hearsay evidence that is relevant to a capital defendant's mitigation defense should not be excluded by rote application of a state hearsay rule. *See Green v. Georgia*, 442 U.S. 95, 97, 99 S. Ct. 2150, 60 L.Ed.2d 738 (1979) (per curiam) ("Regardless of whether the proffered testimony

> comes within Georgia's hearsay rule, under the facts of this case its exclusion constituted a violation of the Due Process Clause. . . . The excluded testimony was highly relevant to a critical issue in the punishment phase of the trial); see also *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S. Ct. 1038, 35 L.Ed.2d 297 (1973) ("In these circumstances, where constitutional directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice").

In considering the state court's prejudice analysis, the Court noted that the state court "appears to have stated the proper prejudice standard," but then "did not correctly conceptualize how that standard applies to the circumstances of this case." Because some mitigation evidence had been presented, the state court concluded that it could not "be fairly compared with those where little or no mitigation evidence is presented and where a reasonable prediction of outcome can be made." Likewise, the state court found it "impossible to know what effect [a different mitigation theory] would have had on [the jury]." In short, in the state court's view, "counsel put forth a reasonable theory with some supporting evidence," which precluded finding "a reasonable likelihood that the outcome at trial would have been different if a different mitigation theory had been advanced." The state court committed two errors in its analysis. First, it "placed undue reliance on the assumed reasonableness of counsel's mitigation theory," when the reasonableness of counsel's theory was, "at the very least, called into question" by the state court's "determination that counsel had conducted a constitutionally deficient mitigation investigation."

> [T]hat a theory might be reasonable in the abstract, does not obviate the need to analyze whether counsel's failure to conduct an adequate mitigation investigation before arriving at this particular theory prejudiced [petitioner]. The "reasonableness" of counsel's theory was, at this stage in the inquiry, beside the point: [petitioner] might be prejudiced by his counsel's failures, whether his haphazard choice was reasonable or not.

The Court made this "plain" in *Williams v. Taylor*, 529 U.S. 362 (2000), where the Court "rejected any suggestion that a decision to focus on one potentially reasonable trial strategy–in that case, petitioner's voluntary confession–was 'justified by a tactical decision' when 'counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background.'" *Id*. at ___ (quoting, *Williams*, 529 U.S. at 396). "A 'tactical decision' is a precursor to concluding that counsel has developed a 'reasonable' mitigation theory in a particular case." Second, "and more fundamentally, the court failed to apply the proper prejudice inquiry." The Court has "never limited the prejudice inquiry under *Strickland* to cases in which there was only 'little or no mitigation evidence' presented." To the contrary, "the *Strickland* inquiry requires . . . probing and fact-specific analysis," rather than "the type of truncated prejudice inquiry undertaken by the state court in this case." A proper prejudice analysis must consider "the newly uncovered evidence" and the mitigation evidence introduced during sentencing.

***Berghuis v. Thompkins*, 560 U.S. 370 (2010)**. Under AEDPA, counsel was not ineffective in murder trial for failing to request a limiting instruction, informing the jury that it could consider an accomplice's acquittal in a prior trial only in assessing the accomplice's credibility and not as

substantive evidence of the defendant's guilt. Here, without considering whether the state court used an incorrect legal standard or applying "AEDPA's deferential standard," prejudice could not be shown in light of significant evidence of guilt independent of the accomplice, including an eyewitness and a surveillance photo of the crime identifying the defendant, as well as, the defendant's friend's testimony that the defendant confessed to him.

***Jefferson v. Upton*, 560 U.S. 284 (2010) (per curiam)**. The state court rejected Jefferson's claim of "constitutionally inadequate" assistance due to counsel's failure "to investigate a traumatic head injury that he suffered as a child" because of "a finding that the attorneys were advised by an expert that such investigation was unnecessary." The Eleventh Circuit erred in presuming this finding was correct, under pre-AEDPA law, without having fully considered the applicable exceptions to a presumption of correctness under 28 U.S.C. § 2254(d) and *Townsend v. Sain*, 372 U.S. 293 (1963). The court considered only whether the findings were "fairly supported by the record," even though Jefferson had consistently argued that "the state court's process was deficient" because: "those findings were drafted exclusively by the attorneys for the State pursuant to an ex parte request from the state-court judge, who made no such request of Jefferson, failed to notify Jefferson of the request made to opposing counsel, and adopted the State's proposed opinion verbatim even though it recounted evidence from a nonexistent witness." Remanded for further proceedings.

***Padilla v. Kentucky*, 559 U.S. 356 (2010)**. Padilla, a native of Honduras who had lived in the U.S. for 40 years legally and fought for the U.S. in the Vietnam War, pleaded guilty based on counsel's incorrect advice that deportation was unlikely. Starting with the premise that "the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel," the Court found deficient conduct in counsel's failure to advise Padilla that his conviction for drug distribution made him subject to automatic deportation. The Court declined to consider whether there is some "distinction between direct and collateral consequences" for *Strickland* purposes because of the "unique nature of deportation," which is "an integral part–indeed, sometimes the most important part–of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes." "The first prong [of *Strickland*]–constitutional deficiency–is necessarily linked to the practices and expectations of the legal community," described in *Strickland* as "prevailing professional norms." While ABA standards and the like "are 'only guides,' and not inexorable commands,' these standards may be valuable measures of the prevailing professional norms of effective representation, especially as these standards have been adapted to deal with the intersection of modern criminal prosecutions and immigration law." Here, the Court cited the ABA Standards for Criminal Justice, NLADA standards, and others in finding, with some qualification, that "[t]he weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation."

> When the law is not succinct and straightforward . . . , a criminal defense attorney need do no more than advise a noncitizen client that pending charges may carry a risk of adverse immigration consequences. But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear.

In addressing whether there is a distinction between giving bad advice and no advice, the Court found "no relevant difference 'between an act of commission and an act of omission' in this context." Case remanded for a determination of prejudice.

***Wood v. Allen*, 558 U.S. 290 (2010) (crimes in 1993 and direct appeal in 1996)**. Under AEDPA, the Court upheld the Eleventh Circuit's finding that counsel was not ineffective in failing to pursue and present mitigating evidence of the defendant's borderline mental retardation as the failure was a strategic decision rather than a negligent omission. The state court's factual findings in denying relief were reasonable. Counsel were aware of a favorable expert report about low IQ, but that report also contained the expert's conclusion that the defendant had a high level of adaptive functioning. In addition, the report contained details of the defendant's 19 prior arrests and his attempt to murder a prior ex-girlfriend when the capital murder involved the killing of an ex-girlfriend. All of the defendant's counsel read the report. Lead counsel told the counsel handling sentencing that nothing in the report merited further investigation. Sentencing counsel told the judge that counsel did not intend to introduce the expert report before the jury. Thus, the failure to present the report "was not mere oversight or neglect but was instead the result of a deliberate decision to focus on other defenses." While Wood's counsel asserted that counsel's strategic judgment was not reasonable due to the failure to make a reasonable investigation of Wood's mental deficiencies before deciding not to pursue or present such evidence, the Court declined to reach that question because the argument was not "fairly included" in the question presented: "Whether the state court reasonably determined that there was a strategic decision under § 2254(d)(2) is a different question from whether the strategic decision itself was a reasonable exercise of professional judgment under *Strickland* or whether the application of *Strickland* was reasonable under § 2254(d)(1)."

***Smith v. Spisak*, 558 U.S. 139 (2010) (sentenced in 1983).** Without deciding whether "deference" to the state court decision was required under AEDPA, the Court reversed the Sixth Circuit's finding of ineffective assistance due to an inadequate closing argument in the capital sentencing phase. Counsel described the crimes in detail, acknowledged that the defendant's "admiration for Hitler inspired his crimes," referred to the defendant as "sick," "twisted," and "demented," and said that he would never change. Counsel did argue, however, that the defendant should not be executed due to mental illness (schizotypal and borderline personality disorders characterized by bizarre and paranoid thinking), despite the "substantial" aggravating factors. The Court assumed that counsel's conduct was deficient, but found no prejudice, as the defendant admitted three murders and two other shootings by asserting a not guilty by reason of insanity plea. In addition, the defendant himself gave very damaging testimony admitting his "Aryan" admiration of Hitler and his crimes. He also testified that he would continue to commit similar crimes if he had the chance.

***Porter v. McCollum*, 558 U.S. 30 (2009) (per curiam) (sentenced in 1988)**. Under AEDPA, counsel ineffective in capital sentencing for failing to adequately investigate and present mitigation evidence. The defendant, after proceeding pro se with stand-by counsel, plead guilty to shooting his former girlfriend. His stand-by counsel was appointed to represent him in sentencing and presented only his ex-wife's testimony and an excerpt from a deposition. "The sum total of the mitigating evidence was inconsistent testimony about [the defendant's] behavior when intoxicated and testimony that [he] had a good relationship with his son." *Id*. at 33. No mental health evidence was presented and the trial court found no mitigating circumstances. Because the state court did not

decide whether counsel's conduct was deficient, the Court reviewed this element of the claim de novo. While "counsel had an 'obligation to conduct a thorough investigation of the defendant's background,'" *id*. at 39 (quoting *Williams v. Taylor*, 529 U.S. 362, 396 (2000)), counsel "did not satisfy those norms," id. Counsel was appointed a month before sentencing and had only one short meeting with the defendant about the sentencing phase. "He did not obtain any of [the defendant's] school, medical, or military service records or interview any members of [the defendant's] family." Where counsel in *Wiggins* failed to "expand[] their investigation," counsel here "did not even take the first step of interviewing witnesses or requesting records." Id. "[H]e ignored pertinent avenues for investigation of which he should have been aware." *Id*. at 40. Even court-ordered competency evaluations revealed his limited education, his military service and combat record, and his father's "over-discipline." *Id*. While counsel asserted that the defendant was "fatalistic and uncooperative," the defendant had instructed him not to talk to his ex-wife or son, but otherwise "did not give him any other instructions limiting the witnesses he could interview." *Id*. In short, while the defendant "may have been fatalistic or uncooperative, . . . that does not obviate the need for defense counsel to conduct some sort of mitigation investigation." *Id*. There was also prejudice. In short, the judge and jury at sentencing "heard almost nothing that would humanize [the defendant] or allow them to accurately gauge his moral culpability. They learned about [his] turbulent relationship with [the victim], his crimes, and almost nothing else." *Id*. at 41. Evidence was available that the defendant had routinely witnessed his father beat his mother. He was also routinely beaten by his father, particularly when he tried to protect his mother. His father even shot at him once. He attended classes for slow learners and left school when he was 12 or 13. He joined the Army at 17 and fought in the Korean War. His company commander testified that he fought in two major battles within a 3 month period and was wounded in both. In one of the battles his unit suffered more than 50% casualties. He was individually decorated for his actions in both battles. When he returned to the U.S., he went AWOL and was sentenced to six months' confinement, but he was honorably discharged. *Id*. at 33-34. After his discharge, he suffered from posttraumatic stress disorder (PTSD), which the Court noted is "not uncommon among veterans returning from combat," as the Secretary of Veteran Affairs testified before Congress in 2009 "that approximately 23 percent of the Iraq and Afghanistan war veterans seeking treatment at a VA medical facility had been preliminarily diagnosed with PTSD." *Id*. at 35 n.4. He also developed a serious drinking problem. An expert in neuropsychology also found that he suffered from "brain damage that could manifest in impulsive, violent behavior." *Id*. at 36. The expert testified that two statutory mitigating circumstances were present: substantially impaired ability to conform conduct and extreme mental or emotional disturbance.

> Unlike the evidence presented during [the defendant's] penalty hearing, which left the jury knowing hardly anything about him other than the facts of his crimes, the new evidence described his abusive childhood, his heroic military service and the trauma he suffered because of it, his long-term substance abuse, and his impaired mental health and mental capacity.

Id. at 33. The aggravation evidence "[o]n the other side of the ledger" was not substantial. *Id*. at 41.

> Had the judge and jury been able to place [the defendant's] life history "on the mitigating side of the scale," and appropriately reduced the ballast on the aggravating

> side of the scale, there is clearly a reasonable probability that the advisory jury–and the sentencing judge–"would have struck a different balance," *Wiggins*, 539 U.S. at 537, and it is unreasonable to conclude otherwise.

Id. at 42. Thus, under AEDPA, the state court's finding of no prejudice was "an unreasonable application of our clearly established law." *Id*. at 44. The state court did not consider the expert testimony for purposes of nonstatutory mitigation and "unreasonably discounted the evidence of [the defendant's] childhood abuse and military service." *Id*. at 43. The evidence of childhood abuse "may have particular salience" in a case like this where the defendant killed his former girlfriend. *Id*. The military service was important as "[o]ur Nation has a long tradition of according leniency to veterans in recognition of their service, especially for those who fought on the front lines." *Id*. The military service was also relevant mitigation because of "the intense stress and mental and emotional toll that combat took." *Id*. at 44.

***Wong v. Belmontes*, 558 U.S. 15 (2009) (per curiam) (*reversing Belmontes v. Ayers*, 529 F.3d 834 (9th Cir. 2008))** (sentenced in 1982). The Court reversed the Ninth Circuit's finding of ineffective assistance of counsel for failing to adequately investigate and present mitigation evidence. The Court did not resolve whether counsel's conduct was deficient because it found that prejudice was not established.

> That showing requires [the defendant] to establish "a reasonable probability that a competent attorney, aware of [the available mitigating evidence], would have introduced it at sentencing," and "that had the jury been confronted with this . . . mitigating evidence, there is a reasonable probability that it would have returned with a different sentence."

Id. at ___ (quoting *Wiggins v. Smith*, 539 U.S. 510, 535, 536 (2003)). The Court accepted the lower court's conclusion that a reasonably competent lawyer would have introduced more mitigation evidence, but found no likelihood of a different result.

> In evaluating that question, it is necessary to consider all the relevant evidence that the jury would have had before it if [counsel] had pursued the different path–not just the mitigation evidence [counsel] could have presented, but also the . . . [aggravation] evidence that almost certainly would have come in with it.

Id. In this case, counsel had put on nine lay witnesses for testimony spanning two days to testify about the defendant's terrible childhood, with an alcoholic and abusive father, living in a small house, and not doing well in school. His younger sister died when she was only 10 months old and his grandmother drowned. He had plead guilty to accessory after the fact of murder and had a religious conversion in custody where he adapted well. The evidence counsel did not present was "merely cumulative" or "would have triggered admission" of powerful aggravation evidence in rebuttal. *Id*. at ___. Specifically, there was extensive evidence that the defendant had committed the prior "execution style" murder to which he plead guilty as an accessory. *Id*. at ___. He had boasted to several people and admitted to his counselor while in custody that he had committed the murder. Counsel had structured the mitigation evidence to keep this evidence out. There was no

prejudice from not using expert testimony because the mitigating evidence "was neither complex nor technical" and the jury could "use its common sense or own sense of mercy" to "understand the 'humanizing' evidence." *Id*. at ___. Moreover, presenting expert testimony would have opened the door to the evidence of the prior murder, which was the "elephant in the courtroom" kept out only by counsel's careful presentation of the mitigation. *Id*. at ___.

***Bobby v. Van Hook*, 558 U.S. 4 (2009) (per curiam) (*reversing Van Hook v. Anderson*, 560 F.3d 523 (6th Cir. 2009)) (sentenced in 1985)**. In this pre-AEDPA case, the Court reversed the Sixth Circuit's finding of ineffective assistance of counsel for failing to adequately investigate and present mitigation evidence. The Court reiterated that the *Strickland* "standard is necessarily a general one." *Id*. at 7.

> Restatements of professional standards . . . can be useful as "guides" to what reasonableness entails, but only to the extent they describe the professional norms prevailing when the representation took place.

Id. In this case, the Sixth Circuit erred by "relying on ABA guidelines announced 18 years after Van Hook went to trial" in 1985. *Id*. In short, "[t]he ABA standards in effect in 1985 described defense counsel's duty to investigate both the merits and mitigating circumstances in general terms," *id*., rather than the "detailed prescriptions for legal representation of capital defendants" in the 2003 Guidelines, *id*. at 8. It was error to judge counsel's conduct based on the 2003 Guidelines and to treat the Guidelines "not merely as evidence of what reasonably diligent attorneys would do, but as inexorable commands with which all capital defense counsel 'must fully comply.'" *Id*. The Court noted that it was expressing "no views" on how post-2003 representation should be judged, *id*. at 8 n.1, but declared here:

> What we have said of state requirements is a fortiori true of standards set by private organizations: "While States are free to impose whatever specific rules they see fit to ensure that criminal defendants are well represented, we have held that the Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices." *Roe v. Flores-Ortega*, 528 U.S. 470, 479 (2000).

Id. at 9. The Court also held that, applying the appropriate standards, counsel was not ineffective. While the lower court held that counsel "began their mitigation investigation too late," counsel had three months from the time of indictment to trial and "contacted their lay witnesses early and often," including talking nine times with the defendant's mother. *Id*. at 9. They contacted one of their experts a month before trial and met with the other expert a week before the trial court verdict. They attempted to obtain VA medical records seven weeks before trial. *Id*. They also "looked into enlisting a mitigation specialist when the trial was still five weeks away." *Id*. at 10. The scope of counsel's investigation was also not unreasonable. Counsel presented evidence that the defendant's parents were "heavy drinkers" that encouraged his drug and alcohol use as a child and that he continued abusing drugs and alcohol into adulthood. *Id*. He grew up in a "combat zone" with his father holding his mother at gun and knife-point and engaging in "sexual violence." *Id*. His drug and alcohol abuse resulted in him being forced out of the military. He had attempted suicide five times in the month before the murder. *Id*. There was also expert testimony about his diminished

capacity at the time of the offenses–a "homosexual panic"–from his borderline personality disorder and drugs and alcohol. *Id*. at 10. While counsel did not interview a stepsister, two uncles, two aunts, and a psychiatrist that had treated the defendant's mother, this conduct was not deficient. *Id*. at 10.

> [T]here comes a point at which evidence from more distant relatives can reasonably be expected to be only cumulative, and the search for it distractive from more important duties. The ABA Standards prevailing at the time called for . . . counsel to cover several broad categories of mitigating evidence, which they did. And given all the evidence they unearthed from those closest to [the defendant's] upbringing and the experts who reviewed his history, it was not unreasonable for his counsel not to identify and interview every other living family member or every therapist who once treated his parents.

Id. at 11 (citations omitted). In short, this was not a case like *Wiggins v. Smith*, 539 U.S. 510 (2003), where counsel "failed to act while potentially powerful mitigating evidence stared them in the face," or *Rompilla v. Beard*, 545 U.S. 374 (2005), where evidence "would have been apparent from documents any reasonable attorney would have obtained." *Bobby*, 558 U.S. at 11.

> It is instead a case, like *Strickland* itself, in which defense counsel's "decision not to seek more" mitigating evidence from the defendant's background "than was already in hand" fell "well within the range of professionally reasonable judgments."

Id. at 11-12 (quoting *Strickland v. Washington*, 466 U.S. 668, 699 (1984)). Finally, even if counsel's conduct was deficient, there was no prejudice as only two witnesses "even arguably would have added new, relevant information." *Id*. at 12. In addition, the lower court failed to consider the aggravation evidence "[o]n the other side of the scales," *id*. at 12, which included a history of luring homosexual men into secluded settings to rob them many times in the past, as he did in this case that resulted in murder. *Id*. at 13.

***Knowles v. Mirzayance*, 556 U.S. 111 (2009)**. Reversing the Ninth Circuit's holding, under AEDPA review, that the decision of the California Court of Appeal, that defendant was not deprived of effective assistance of counsel when his attorney recommended withdrawing his insanity defense, was not contrary to or an unreasonable application of clearly established federal law, and defense counsel was not ineffective. Defendant was charged with murder and plead not guilty and not guilty by reason of insanity. Under California law, this required a bifurcated trial, first on guilt or innocence (with the burden of proof on the state) and then on insanity (with the burden of proof on the defendant. Although the defendant confessed, the defense first sought conviction only on the lesser included offense of second-degree murder based on the defendant's inability to premeditate or deliberate. Counsel presented medical testimony in the guilt-or-innocence phase, but the jury rejected this evidence and convicted of first-degree murder. Counsel had intended to present the same medical testimony in the insanity phase, along with testimony of the defendant's parents, but the parents refused to testify. On the advice of counsel, who believed it was unlikely the defense would prevail, the defendant withdrew the insanity plea. Following confusion from the Ninth Circuit's remand, the Magistrate Judge and District Court granted relief and the Ninth Circuit affirmed even though it appeared that the District Court had "evaluated counsel's strategy under a 'nothing to lose' standard," meaning counsel had no true tactical reason for withdrawing the plea

because there was "nothing to lose" in pursuing insanity. Even following the Supreme Court's remand for consideration in light of *Carey v. Musladin*, 549 U.S. 70 (2006), the Ninth Circuit granted "because defense counsel's failure to pursue the insanity defense constituted deficient performance as it 'secured ... [n]o actual tactical advantage.'" The Supreme Court reversed.

> The question "is not whether a federal court believes the state court's determination" under the *Strickland* standard "was incorrect but whether that determination was unreasonable-a substantially higher threshold." *Schriro* [*v. Landrigan*, 550 U.S. 465 (2007)]. And, because the *Strickland* standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard. *See Yarborough v. Alvarado*, 541 U.S. 652, 664, 124 S.Ct. 2140, 158
> L.Ed.2d 938 (2004) ("[E]valuating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations").

Id. at ___.

> We conclude that the state court's decision to deny Mirzayance's ineffective-assistance-of-counsel claim did not violate clearly established federal law. The Court of Appeals reached a contrary result based, in large measure, on its application of an improper standard of review-it blamed counsel for abandoning the NGI claim because there was nothing to lose by pursuing it. But this Court has held on numerous occasions that it is not "'an unreasonable application of clearly established Federal law'" for a state court to decline to apply a specific legal rule that has not been squarely established by this Court. This Court has never established anything akin to the Court of Appeals' "nothing to lose" standard for evaluating *Strickland* claims.

Id. at ___ (citations omitted). The Court also rejected the Court's "nothing to lose" reasoning: "Finding that counsel is deficient by abandoning a defense where there is nothing to gain from that abandonment is equivalent to finding that counsel is deficient by declining to pursue a strategy where there is nothing to lose from pursuit of that strategy." *Id*. at ___.

> Under the doubly deferential judicial review that applies to a *Strickland* claim evaluated under the § 2254(d)(1) standard, *see Yarborough v. Gentry*, 540 U.S. 1, 5-6 (2003) (per curiam), Mirzayance's ineffective-assistance claim fails. It was not unreasonable for the state court to conclude that his defense counsel's performance was not deficient when he counseled Mirzayance to abandon a claim that stood almost no chance of success.

Id. at ___. "Even if Mirzayance's ineffective-assistance-of-counsel claim were eligible for de novo review, it would still fail" under *Strickland*. Counsel's conduct was not deficient because his counsel merely recommended the withdrawal of what he reasonably believed was a claim doomed to fail." *Id*. Counsel reasoned that "t]he jury had already rejected medical testimony about

Mirzayance's mental state in the guilt phase, during which the State carried its burden of proving guilt beyond a reasonable doubt" and, thus, the defense could not meet its burden in the insanity phase because "there was almost no chance that the same jury would have reached a different result when considering similar evidence." *Id*. at ___. Counsel also believed the experts could be impeached for other reasons.

> We are aware of no "prevailing professional norms" that prevent counsel from recommending that a plea be withdrawn when it is almost certain to lose. And in this case, counsel did not give up "the only defense available." Counsel put on a defense to first-degree murder during the guilt phase. Counsel also defended his client at the sentencing phase [where he received the lowest possible sentence for his first-degree murder conviction]. The law does not require counsel to raise every available nonfrivolous defense. Counsel also is not required to have a tactical reason-above and beyond a reasonable appraisal of a claim's dismal prospects for success-for recommending that a weak claim be dropped altogether.

Id. at ___ (citations omitted). While the Court of Appeals faulted counsel for not persuading the reluctant parents to testify, the Magistrate Judge and District Court had found more than reluctance. They found refusal.

> [C]ourts of appeals may not set aside a district court's factual findings unless those findings are clearly erroneous. Fed. Rule Civ. Proc. 52(a); *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573-574, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985). Here, the Court of Appeals failed even to mention the clearly-erroneous standard, let alone apply it, before effectively overturning the lower court's factual findings related to counsel's behavior.

Id. at ___. "Competence does not require an attorney to browbeat a reluctant witness into testifying, especially when the facts suggest that no amount of persuasion would have succeeded." *Id*. There was also no prejudice. "It was highly improbable that a jury, which had just rejected testimony about Mirzayance's mental condition when the State bore the burden of proof, would have reached a different result when Mirzayance presented similar evidence at the NGI phase."

***Wright v. Van Patten*, 552 U.S. 120 (2008) (per curiam)**. The Court vacated the Seventh Circuit's holding that the defendant had been denied the assistance of counsel under *Cronic* during his plea hearing for reckless homicide because his lawyer was not physically present "but was linked to the courtroom by speaker phone." Because the Court's precedents have not addressed this question, it could not be said that the state courts had unreasonably applied clearly established Federal law under AEDPA in applying *Strickland* rather than *Cronic* as the Seventh Circuit did.

****Schriro v. Landrigan*, 550 U.S. 465 (2007)**. The Court reversed the Ninth Circuit's grant of an evidentiary hearing on the question of whether counsel was ineffective for failing to adequately investigate and present mitigation despite the defendant's instruction to counsel not to offer any mitigating evidence. In sentencing, counsel attempted to present the testimony of the defendant's ex-wife and birth mother, but, at the defendant's request, both refused to testify. The defendant also

informed the court that he did not want to present any mitigating evidence. Counsel proffered that the witnesses would have testified that the defendant's birth mother used drugs and alcohol (including while she was pregnant with the defendant), that the defendant had abused drugs and alcohol, and that he had been a good father. When counsel tried to proffer additional mitigating evidence, the defendant "would have none of it" and contradicted counsel. The defendant also informed the court that "if you want to give me the death penalty, just bring it right on. I'm ready for it." In reversing the Ninth Circuit, the Court held that, if the defendant "instructed his counsel not to offer any mitigating evidence" then "counsel's failure to investigate further could not have been prejudicial under *Strickland*." *Id*. at ___. The Court also rejected the Ninth Circuit's finding that, "due to counsel's failure to investigate, [the defendant] could not have known about the mitigating evidence he now wants to explore." This finding was rejected because the proffered evidence "overlaps" with the evidence relied on in the habeas proceedings and because it was plain from the transcript "that Landrigan would have undermined the presentation of any mitigating evidence that his attorney might have uncovered." *Id*.

> In short, at the time of the Arizona postconviction court's decision, it was not objectively unreasonable for that court to conclude that a defendant who refused to allow the presentation of any mitigating evidence could not establish Strickland prejudice based on his counsel's failure to investigate further possible mitigating evidence.

Id. at ___. The Court also rejected the Ninth Circuit's finding that the decision not to present mitigation was informed and knowing. "We have never imposed an 'informed and knowing' requirement upon a defendant's decision not to introduce evidence. Even assuming, however, that an 'informed and knowing' requirement exists in this case, Landrigan cannot benefit from it. . . ." *Id*. (citation omitted). First, this issue was not raised in state court. Second, counsel informed the trial court that he had carefully explained the importance of mitigation to the defendant and it is "doubtful that Landrigan would have sat idly by" if this were not true. Finally, Landrigan's final statement to the court to "bring it right on" clearly indicates the defendant understood the consequences of not presenting mitigation. Finally, the Court rejected the Ninth Circuit's finding of a "colorable" showing of prejudice because most of the evidence available could have been presented through the defendant's birth mother and ex-wife and was proffered to the sentencing court anyway. Thus, "[t]he District Court could reasonably conclude that any additional evidence would have made no difference in the sentencing." *Id*. at ___. The "mitigation evidence was weak," the defendant had an "exceedingly violent past" ("before he was 30 years of age, Landrigan had murdered one man, repeatedly stabbed another one, escaped from prison, and within two months murdered still another man"), the defendant showed no remorse, and the defendant was "belligerent" and "flaunted his menacing behavior." In sum, "[o]n this record, assuring the court that genetics made him the way he is could not have been very helpful."

***Rompilla v. Beard*, 545 U.S. 374 (2005)**. Counsel ineffective in capital sentencing for failing "to make reasonable efforts to obtain and review material that counsel [knew] the prosecution [would] probably rely on as evidence of aggravation at the sentencing phase of the trial," *id*. at 377, which would have led to significant mitigation. Counsel interviewed the defendant, who provided minimal assistance in mitigation and "was actively obstructive by sending counsel off on false leads," *id*. at

381, and a few of the defendant's family members, and reviewed the reports of court-appointed examiners, who assessed only competence and capacity at the time of the offenses. Finding nothing "particularly helpful" in these sources, id., counsel did not conduct additional investigation for information "that might have cast light on [the defendant's] mental condition," *id*. at 382. Counsel also did not obtain the file of a prior conviction for rape and assault, even though counsel knew the state intended to rely on the aggravating circumstance of a significant history of felony convictions indicating the use or threat of violence and knew that the state specifically intended to read the testimony of the prior rape victim into evidence in sentencing. In mitigation, the defense presented brief testimony from the defendant's family members, who "argued in effect for residual doubt, and beseeched the jury for mercy." *Id*. at 378. In addressing the ineffective assistance claim, the Court noted that, in a capital sentencing, "defense counsel's job is to counter the State's evidence of aggravated culpability with evidence in mitigation." *Id*. at 380-81. While "reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste," *id*. at 383, counsel's conduct in this case was "deficient in failing to examine the court file," *id*., on the prior conviction because counsel knew the state intended to rely on it and "the prior conviction file was a public document, readily available for the asking at the very courthouse where [the defendant] was to be tried," *id*. at 384. While counsel opposed admission of the evidence, this was insufficient because "[c]ounsel's obligation to rebut aggravating evidence extended beyond arguing it ought to be kept out." *Id*. at 386 n.5. Here, despite knowing of the state's intent to rely on the evidence, counsel did not look at any part of the file, until the day before the sentencing phase began and then looked only at the transcript of the victim's testimony. The obligation to review the remainder of the file

> was particularly pressing here owing to the similarity of the violent prior offense to the crime charged and [the defendant's] sentencing strategy stressing residual doubt. Without making efforts to learn the details and rebut the relevance of the earlier crime, a convincing argument for residual doubt was certainly beyond any hope.

Id. at 386. In reaching this conclusion, the Court emphasized "[t]he ease with which counsel could examine the entire file. . . . Suffice it to say that when the State has warehouses of records available in a particular case, review of counsel's performance will call for greater subtlety." *Id*. at 386 n.5. The Court also noted that "[t]he notion that defense counsel must obtain information that the State has and will use against the defendant is not simply a matter of common sense." *Id*. at 387. It is described "in terms no one could misunderstand" in the ABA Standards for Criminal Justice "in circulation," id., at the time of trial and the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases promulgated in 1989, "shortly after" this trial, and made "even more explicit" in the 2003 revisions. *Id*. at 387 n.7. "[I]n any case, [we] cannot think of any situation in which defense counsel should not make some effort to learn the information in the possession of the prosecution and law enforcement authorities." *Id*. at 387 n.6. The state court's application of *Strickland* was objectively unreasonable because the court reasoned that "defense counsel's efforts to find mitigating evidence by other means excused them from looking at the prior conviction file." *Id*. at 388. The Court rejected this reasoning because "[n]o reasonable lawyer would forgo examination of the file thinking he could do as well by asking the defendant or family

relations whether they recalled anything helpful or damaging in the prior victim's testimony." *Id*. at 389. Counsel is not required to look

> for a needle in a haystack, when a lawyer truly has reason to doubt there is any needle there. But looking at a file the prosecution says it will use is a sure bet: whatever may be in that file is going to tell the defense counsel something about what the prosecution can produce.

Id. The Court cautioned, however, that, although counsel's conduct was unreasonable in the circumstances of this case, a different result might be obtained in other situations "where a defense lawyer is not charged with knowledge that the prosecutor intends to use a prior conviction in this way." *Id*. at 390. Because the state court never reached the question of prejudice, the Court examined this issue "de novo." *Id*. Prejudice was uncontested by the Commonwealth and the Court found prejudice. If counsel had looked in the file, counsel would have discovered "mitigation leads that no other source had opened up," *id*., including information that the defendant grew up in a "slum environment" and had numerous prior incarcerations for offenses "often of assaultive nature and commonly related to over-indulgence in alcoholic beverages," *id*. at 391. The file also contained information "pointing to schizophrenia and other disorders, and test scores showing a third grade level of cognition after nine years of schooling." *Id*. "The jury never heard even of this and neither did the mental health experts who examined [the defendant] before trial." *Id*. at 392. If the experts had reviewed these records, they (like "their post-conviction counterparts") would have "found plenty of 'red flags' pointing up to a need to test further." *Id*. This testing would have established that (1) the defendant "suffers from organic brain damage, an extreme mental disturbance significantly impairing several of his cognitive functions"; (2) the impairments probably resulted from "fetal alcohol syndrome" and, thus, existed since childhood.; and (3) the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the law was substantially impaired at the time of the offenses. *Id*. "These finds in turn would probably have prompted a look at school and juvenile records, all of them easy to get," which showed that (1) the defendant's mother was often missing from the home for a week or more at a time when the defendant was 16; (2) the defendant's mother was frequently drunk and "the children have always been poorly kept and on the filthy side which was also the condition of the home at all times"); and (3) the defendant's "IQ was in the mentally retarded range." *Id*. at 393. "This evidence adds up to a mitigation case that bears no relation to the few naked pleas for mercy actually put before the jury" and "'might well have influenced the jury's appraisal' of . . . culpability." *Id*. (quoting *Wiggins v. Smith*, 539 U.S. 510, 538 (2003) and *Williams v. Taylor*, 529 U.S. 362, 398 (2000)).

***Florida v. Nixon*, 543 U.S. 175 (2004)**. Trial counsel's "failure to obtain the defendant's express consent to a strategy of conceding guilt in a capital trial" is not automatically deficient performance and must be evaluated under the *Strickland* test rather than under the *Cronic* test. The Court recognized that some decisions concerning "basic trial rights" must be made by the defendant and require that "an attorney must both consult with the defendant and obtain consent to the recommended course of action." These basic trial rights include the determination of "whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." *Id*. (quoting *Jones v. Barnes*, 463 U.S. 745, 751 (1983)). For other matters, "[a]n attorney undoubtedly has a duty to consult with the client regarding 'important decisions,' including questions of overarching defense

strategy," *id*. (citing *Strickland*, 466 U.S. at 688), but this "obligation . . . does not require counsel to obtain the defendant's consent to 'every tactical decision,'" *id*. (citing *Taylor v. Illinois*, 484 U.S.400, 417-418 (1988) (an attorney has authority to manage most aspects of the defense without obtaining his client's approval)). With respect to capital cases, the court recognized that

> the gravity of the potential sentence in a capital trial and the proceeding's two-phase structure vitally affect counsel's strategic calculus. Attorneys representing capital defendants face daunting challenges in developing trial strategies, not least because the defendant's guilt is often clear. Prosecutors are more likely to seek the death penalty, and to refuse to accept a plea to a life sentence, when the evidence is overwhelming and the crime heinous. In such cases, "avoiding execution [may be] the best and only realistic result possible." ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases § 10.9.1, Commentary (rev. ed.2003), reprinted in 31 Hofstra L.Rev. 913, 1040 (2003).

Id. In circumstances where guilt is clear, counsel must "strive at the guilt phase to avoid a counterproductive course," *id*., such as presenting logically inconsistent strategies in the trial and sentencing. *Id*. (citing, inter alia, Lyon, Defending the Death Penalty Case: What Makes Death Different?, 42 Mercer L.Rev. 695, 708 (1991) ("It is not good to put on a 'he didn't do it' defense and a 'he is sorry he did it' mitigation. This just does not work. The jury will give the death penalty to the client and, in essence, the attorney.")). Thus, "[c]ounsel . . . may reasonably decide to focus on the trial's penalty phase," *id*., and "counsel cannot be deemed ineffective for attempting to impress the jury with his candor and his unwillingness to engage in 'a useless charade.'"

> To summarize, in a capital case, counsel must consider in conjunction both the guilt and penalty phases in determining how best to proceed. When counsel informs the defendant of the strategy counsel believes to be in the defendant's best interest and the defendant is unresponsive, counsel's strategic choice is not impeded by any blanket rule demanding the defendant's explicit consent. Instead, if counsel's strategy, given the evidence bearing on the defendant's guilt, satisfies the *Strickland* standard, that is the end of the matter; no tenable claim of ineffective assistance would remain.

Id.

***Holland v. Jackson*, 542 U.S. 649 (2004) (per curiam)**. The Sixth Circuit Court of Appeals erred in finding that the state court decision denying relief on the basis of an ineffective assistance of counsel claim was an "unreasonable application" or "contrary to" *Strickland*. The petitioner in a murder case sought state post-conviction relief on the basis of counsel's failure to adequately investigate. The court denied relief. Afterwards, the petitioner filed a motion to reopen on the basis of "newly discovered evidence" and attaching an affidavit that would have contradicted the testimony of the state's primary witness. On appeal, the state court held that the affidavit was not properly before the court. Alternatively, the court stated it would deny relief on the merits. "[W]hether a state court's decision was unreasonable must be assessed in light of the record the

court had before it." Here, the District Court and the Court of Appeals made no findings warranting the admission of new evidence buttressing a previously rejected claim. Instead, the Court of Appeals "simply ignored entirely the state court's independent ground for its decision, that [the] statement was not properly before it." Thus, the court erred in finding that the state court's decision was an unreasonable application of *Strickland*. The court also erred in finding that the state court's decision was "contrary to" *Strickland* (in three instances) due to imposition of a different burden of proof on prejudice than "reasonable probability." The important holding here is that "the unadorned word 'probably' is permissible shorthand when the complete *Strickland* standard is elsewhere recited."

***Yarborough v. Gentry*, 540 U.S. 1 (2003) (per curiam)**. The Court reversed the Ninth Circuit's grant of relief because the state court determination that counsel was not ineffective was not objectively unreasonable under the AEDPA. The defendant had been convicted of assault with a deadly weapon for stabbing his girlfriend. On appeal, he argued that his trial counsel's closing argument deprived him of his right to effective assistance of counsel. The state court denied relief, as did the federal district court, but the Ninth Circuit reversed. The court held that the right to effective assistance extends to closing arguments. Nonetheless, counsel has wide latitude in deciding how best to represent a client, and deference to counsel's tactical decisions in his closing presentation is particularly important because of the broad range of legitimate defense strategy at that stage. Closing arguments should "sharpen and clarify the issues for resolution by the trier of fact," but which issues to sharpen and how best to clarify them are questions with many reasonable answers. Indeed, it might sometimes make sense to forgo closing arguments altogether. Judicial review of a defense attorney's summation is therefore highly deferential – and doubly deferential when it is conducted through the lens of federal habeas. The Court found that the Ninth Circuit erred in finding the state court decision to be objectively unreasonable. While the Ninth Circuit found and relied on the fact that counsel did not highlight a number of potential exculpatory pieces of evidence, the Court found "these other potential arguments do not establish that the state court's decision was unreasonable." Relying on a number of law review articles and treatises, the court found that "focusing on a small number of key points may be more persuasive than a shotgun approach." "In short, judicious selection of arguments for summation is a core exercise of defense counsel's discretion." "When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he did so for tactical reasons rather than through sheer neglect." That presumption has particular force where a petitioner bases his ineffective assistance claim solely on the trial record, creating a situation in which a court "may have no way of knowing whether a seemingly unusual or misguided action had a sound strategic motive." Here, "counsel plainly put to the jury the centerpiece of his case." The court also found that counsel's argument was not deficient in reminding the jury of evidence of the defendant's bad character but also stating that evidence was legally irrelevant. "This is precisely the sort of calculated risk that lies at the heart of an advocate's discretion. By candidly acknowledging his client's shortcomings, counsel might have built credibility with the jury and persuaded it to focus on the relevant issues in the case." The Court also found that counsel's conduct in making only a passive request that the jury reach some verdict was not unreasonable. "Given a patronizing and overconfident summation by a prosecutor, a low-key strategy that stresses the jury's autonomy is not unreasonable." The Court also rejected the Ninth Circuit's finding that counsel was ineffective for failing to argue explicitly that the government had failed to prove its case. The court held "[c]ounsel's entire presentation, however

made just that point." Finally, the Court rejected the Ninth Circuit's finding of ineffectiveness because counsel admitted that he did not know the truth which implied that he did not even believe his client's testimony. The Court held, however, "there is nothing wrong with a rhetorical device that personalizes the doubt anyone but an eyewitness must necessarily have. Winning over an audience by empathy is a technique that dates back to Aristotle." In sum, the Court found that the Ninth Circuit's decision "gives too little deference to the state courts that have primary responsibility for supervising defense counsel in state criminal trials."

***Wiggins v. Smith*, 539 U.S. 510 (2003)**. Counsel ineffective in capital habeas case, decided under the AEDPA, for failing to adequately prepare and present mitigation. Counsel relied on arguments that the defendant was not directly responsible for the murder and did not present any social history or other mitigation, despite knowledge of at least some of the defendant's background information. The issue before the Court was "whether the investigation supporting counsel's decision not to introduce mitigating evidence of Wiggins' background was itself reasonable." *Id*. at 523 (emphasis in original). "In assessing counsel's investigation, we must conduct an objective review of their performance, measured for 'reasonableness under prevailing professional norms,' which includes a context-dependent consideration of the challenged conduct as seen 'from counsel's perspective at the time.'" *Id*. (quoting *Strickland*, 466 U.S. at 688). In this case, where counsel had only limited records available and did not investigate further, counsel's conduct "fell short of the professional standards that prevailed in Maryland in 1989," because no "social history report" was prepared even though counsel had funds available to retain a "forensic social worker." *Id*. at 524.

> Counsel's conduct similarly fell short of the standards for capital defense work articulated by the American Bar Association (ABA) – standards to which we have referred as "guides to determining what is reasonable." *Strickland*, *supra*, at 688; *Williams v. Taylor*, *supra*, at 396. The ABA Guidelines provide that investigations into mitigating evidence "should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.I(c), p. 93 (1989) (emphasis added).

Id. "Despite these well-defined norms, . . . , counsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources." *Id*. (citing the ABA standards again). The Court found that "[t]he scope of their investigation was also unreasonable in light of what counsel actually discovered" in the records available to them, "particularly given the apparent absence of any aggravating factors in petitioner's background." *Id*. at 525 (citation omitted).

> In assessing the reasonableness of an attorney's investigation, . . . , a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further.
>
> Even assuming [counsel] limited the scope of their investigation for strategic reasons, *Strickland* does not establish that a cursory investigation automatically

> justifies a tactical decision with respect to sentencing strategy. Rather, a reviewing court must consider the reasonableness of the investigation said to support the strategy.

Id. at 527. In this case, "counsel were not in a position to make a reasonable strategic choice . . . because the investigation supporting their choice was unreasonable." *Id*. at ___. "In assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigation evidence." *Id*. at 536. "[W]e evaluate the totality of the evidence – 'both that adduced at trial, and the evidence adduced in the habeas proceeding[s].'" *Id*. (quoting *Williams v. Taylor*, 529 U.S. at 397-98). Prejudice was found here because counsel did not discover "powerful" evidence of "physical torment, sexual molestation, and repeated rape," as well as, alcoholic parents, foster homes, homelessness, and "diminished mental capacities." *Id*. at 535. "Had the jury been able to place petitioner's excruciating life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a difference balance." *Id*. at 537. While *Williams v. Taylor* had not been decided at the time of the state court decision, the Court held that it "made no new law" in *Williams v. Taylor* and had just applied *Strickland* to conclude that "counsel's failure to uncover and present voluminous mitigating evidence at sentencing could not be justified as a tactical decision . . . , because counsel had not 'fulfill[ed] their obligation to conduct a thorough investigation of the defendant's background." *Id*. at 522 (quoting *Williams*, 529 U.S. at 396). Like in *Williams*, the state court decision here was "objectively unreasonable," *id*. at 527, and an unreasonable application of *Strickland* (under the AEDPA standards) because the state court did not

> conduct an assessment of whether the decision to cease all investigation . . . actually demonstrated reasonable professional judgment. The state court merely assumed that the investigation was adequate. In light of what the . . . [available] records actually revealed, however, counsel chose to abandon their investigation at an unreasonable juncture, making a fully informed decision with respect to sentencing strategy impossible.

Id. at 527-28. The state court decision was also an unreasonable application of the facts to the law because the state court erroneously concluded that the [available] . . . records reflected sexual abuse, when the records did not mention it at all, "much less . . . the repeated molestations and rapes of petitioner. . . ." *Id*. at 528. The state court conclusion was proven to be incorrect by clear and convincing evidence as required by 28 U.S.C. 2254(e)(1). The facts are discussed in more detail below in the capital sentencing section

**Capital Case*

I. TRIAL PHASE

A. NUMEROUS DEFICIENCIES AND INADEQUATE DEFENSE

1. U.S. Court of Appeals Cases

2019: ****Jones v. Shinn*, **943 F.3d 1211 (9th Cir. 2019), *affirming* **327 F. Supp. 3d 1157 (D. Az. 2018) (1995 trial).** In Arizona death penalty case, affirming the grant of habeas relief on claim trial counsel was ineffective for failing to sufficiently investigate the police work, medical evidence, and timeline between the four-year-old victim's fatal injury and her death. Although the claim was procedurally defaulted, the ineffectiveness by post-conviction counsel provided cause to excuse the default. At the capital trial, the prosecution presented evidence that established that most of the victim's injuries, including her fatal injury, were consistent with infliction on Sunday, May 1, 1994, between 2:00 p.m. and 5:30 p.m. The prosecution also presented evidence to support its theory that the victim was in the sole care of petitioner during that time. At the *Martinez* hearing held in federal court, petitioner presented evidence, both from his own experts and from a government expert's prior statements, that the victim may have in fact been injured earlier. He also presented evidence of other potential suspects who had access to the victim outside the critical disputed hours, including her mother, other children in the trailer park, her siblings, and her mother's former boyfriend. "Although this evidence would not necessarily exonerate Jones, there is a reasonable probability that the jury might have arrived at a different conclusion on the question of whether Jones had inflicted the injuries or knowingly failed to seek care." The court of appeals rejected the argument by respondent that the evidence presented at the *Martinez* hearing could not be considered as to the merits of the trial counsel ineffectiveness claim. The appeals court held "that 28 U.S.C. § 2254(e)(2), which precludes evidentiary hearings on claims that were not developed in state court proceedings, did not prohibit the district court from considering the evidence adduced at the *Martinez* hearing to determine the merits of Jones's underlying IAC claim. When a district court holds an evidentiary hearing to determine whether a petitioner's claim is excused from procedural default under *Martinez,* it may consider that same evidence to grant habeas relief on the underlying claim."

2017: ****Browning v. Baker*, **875 F.3d 444 (9th Cir. 2017), *cert. denied*, **138 S.Ct. 2608 (2018).** Petitioner was convicted in Nevada state court of four crimes arising from a robbery of a jewelry store and the murder of its owner, and was sentenced by a jury to death. The attorney appointed to represent petitioner at trial had been practicing as a defense lawyer for less than a year, and petitioner may have been his first capital client. After the Nevada Supreme Court affirmed petitioner's conviction on appeal, petitioner filed a habeas petition in state court alleging, among other claims, that his trial counsel was ineffective for failing to perform an adequate investigation before trial. The state court held an evidentiary hearing, during which evidence was presented that the three identifications of petitioner were questionable for several reasons, including that they were cross-racial identifications (petitioner was black) and that there was an innocent explanation for petitioner's fingerprints at the store. Petitioner also presented the testimony of trial counsel that he wanted to call petitioner's girlfriend as a witness to testify that she and petitioner had been in the store prior to the date of the homicide and that there was a person of Cuban descent who may have better matched the description of the perpetrator provided by witnesses. Trial counsel

testified that he could not find petitioner's girlfriend at the time of trial. He also testified about the investigation of the case, saying that he never went to the store while it was a crime scene, he conducted no interviews himself but instead had an investigator do so, he did not interview the informants prior to trial even though he knew they were long-time informants, and he did not inquire whether they were given benefits for their testimony against petitioner. He did not hire a fingerprint examiner or a shoe print examiner because he was a former prosecutor and trusted the state's forensic witnesses' examinations. Trial counsel did not have his investigator interview a witness he had been informed was selling jewelry from the store with one of the informants, and he did not follow up on a witness's initial statement that the man she had seen running from the store was white, not black. The trial investigator testified at the evidentiary hearing that he had no autonomy in the investigation and did only what trial counsel told him to do, he did not start work until 5 months after petitioner's arrest, even though he had been appointed much earlier, he did not get the file until 10 months after petitioner's arrest, and that only included police reports, he performed a total of 12 hours work on the case, and trial counsel denied his request for additional investigation funds. He requested funds to perform specific investigation that counsel denied, such as interviewing the informants and others who had information on the informants. The prosecutor also testified for the defense at the hearing that he had given one of the informants concrete benefits – a job, and leniency in sentencing in a criminal case. The defense also called the investigating officer, who got a description of the perpetrator from the victim before he died – describing his hair as shoulder length, loosely curled, and wet – completely different from petitioner's four-inch Afro with braids on top. Petitioner also testified that he saw a Cuban man enter one of the informants' car wearing a Hollywood hat and a tan jacket that had been identified by witnesses and found in the informants' apartment. The state court denied relief. Petitioner filed a habeas petition in federal district court, which also denied relief but granted a certificate of appealability on several claims, including limited IAC claims. The Ninth Circuit expanded the COA to include a claim that petitioner's trial counsel was ineffective generally for failing to investigate, holding that the district court's limitation of the IAC COA was error: because, under *Strickland*, the court is required to consider counsel's conduct as a whole to determine whether it was constitutionally adequate, "the IAC portion of the COA should have been crafted at a higher level of generality." The Ninth Circuit Court of Appeal held that the Nevada Supreme Court unreasonably applied clearly established Supreme Court precedent in denying some of petitioner's claims, and reversed the district court's denial of habeas corpus relief and remanded. These included *Brady* claims as well as IAC claims [but only the IAC claims are discussed here]. Counsel's performance was deficient for (1) failing to interview the state investigator before calling him to testify at trial (Nevada court agreed); (2) failing to investigate the bloody shoeprints at the scene (state court's acceptance of counsel's statements that he could just argue the source of the prints was unknown was unreasonable – not okay to simply rely on fear of learning the truth, especially when there is no reason to believe the results will be inculpatory); (3) failing to interview the informants (state court finding that it was reasonable strategy for counsel not to interview them himself was only part of the analysis – did not consider whether it was deficient for counsel not to permit his investigator to interview them). Counsel's "failure to investigate what happened [on the date of the crime] 'so undermined the proper functioning of the adversarial process that [his] trial cannot be relief on as having produced a just result'" (quoting *Strickland*). Petitioner was prejudiced because the case against him was weak, and the evidence that the shoeprints could not have been made by paramedics or a responding officer (or petitioner), that the identifications against him were grossly suspect, and that the victim's description of the perpetrator differed greatly from

petitioner's appearance would have made a significant impact. The state court's conclusions otherwise were objectively unreasonable. Court grants guilt phase habeas relief.

***United States v. Laureys*. 866 F.3d 432 (D.C. Cir. 2017).** Petitioner was convicted by a jury in federal court of attempted coercion and enticement of a minor and travel with intent to engage in illicit sexual conduct, based upon his online encounter with an undercover agent posing as a pimp for a nine-year-old girl. He was sentenced to twenty years in prison after a trial in which he testified in his own defense that he was merely engaging in fantasy when discussing a desired encounter with the girl with the undercover officer. Following an evidentiary hearing, the district court denied relief on petitioner's claim that his trial counsel was ineffective for having failed to obtain and present testimony of a mental health expert at petitioner's trial, despite having been aware that mental health testimony was needed. The district court concluded that counsel's failure to present the testimony of a mental health expert with whom he had corresponded prior to trial was not due to his lack of effort but rather due to mutual misunderstandings, and also that petitioner did not establish prejudice because he himself testified about his intent and there was no evidence he would not have testified if an expert did so instead. The D.C. Circuit Court of Appeals reversed the district court's denial of relief. The record indicated that trial counsel was seeking an "internet compulsivity diagnosis" that he had settled upon through his own online research, and led his selected expert to believe that he was only interested in establishing a diminished capacity defense that the expert did not support, rather than a fantasy defense that the expert could and would have provided, and to which petitioner ended up testifying at trial. "Trial counsel focused [the expert] on an *invalid* diminished capacity defense *to the exclusion of all other possible defenses*." Trial counsel's statements to the contrary during habeas proceedings were completely at odds with the trial record. "[T]rial counsel's grievously misguided effort to employ a mental health expert in his client's defense was so flawed as to be 'the sort of serious blunder that will singlehandedly support a *Strickland* claim.'" (internal quote omitted). "Counsel admitted that he had never handled an insanity defense, and yet he appears to have considered himself qualified, as a layperson, to effectively diagnose his client as an 'internet sexual compulsive' and pursue confirmation of a diminished capacity diagnosis with potential experts." Counsel's deficient performance was prejudicial because petitioner's defense and own testimony would have been significantly bolstered by expert testimony regarding fantasy chat, "and more specifically, the existence of a subculture of men who meet first online and then offline for sex with one another spurred on by child sex fantasies, such that a 'reasonable probability' of a different outcome at trial exists." The mental health expert testimony also would have rebutted the "dubious, quasi-expert testimony" by the undercover officer.

2016: ***Hardy v. Chappell*, 849 F.3d 803 (9th Cir. 2016)**. In capital murder case, trial counsel was ineffective for failing to investigate and present proof that the prosecution's star witness was the real killer. The California Supreme Court's denial of relief on that issue was contrary to and involved an unreasonable application of clearly established federal law. The charges against petitioner arose out of his alleged involvement as the killer in a murder-for-hire plot that resulted in the stabbing deaths of a mother and her child. At trial the prosecution maintained that petitioner killed the victims himself, and supported that theory with testimony from one Calvin Boyd, who was acquainted with the others involved in the plot and claimed to have turned down a request to carry it out, and from Colette Mitchell, petitioner's former girlfriend. Petitioner's defense counsel

made no opening statement and presented no evidence, and the jury found him guilty and sentenced him to death. Later, evidence presented in a state habeas proceeding told "a very different story than the one presented at trial," and resulted in factual findings that trial counsel had been deficient in failing to present proof that Boyd was the real killer, and that petitioner could not have been present at the time the killings took place. On review, the California Supreme Court accepted many of the lower court's factual determinations and agreed counsel's performance had been deficient, but denied guilt-or-innocence phase relief on the ground that "there was 'substantial evidence' to convict [petitioner] under an aid-and-abet or conspiracy theory." (The state court did grant relief to petitioner on his ineffective assistance claim related to the death sentence.) A federal district court later denied petitioner's *pro se* habeas petition. On appeal, because the finding of deficient performance was not contested, the focus of the analysis was on prejudice. Likening the California Supreme Court's approach in this case to the "contrary to" example contained in *Williams v. Taylor*, 529 U.S. 362 (2000), the Ninth Circuit found that the "substantial evidence" threshold used by the state court "was not the correct standard, and consequently, the relevant question regarding prejudice at the guilt phase was never properly addressed." *Id.* at 818-19. After observing that "[s]ubstantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,'" and that use of that standard "created a much higher bar for [petitioner] than the law required," the circuit court held that, "[t]o the extent that the California Supreme Court found the *Strickland* prejudice prong was not met because substantial evidence remained to convict [petitioner] under a different theory, it applied a standard contrary to clearly established federal law." *Id*. at 819 (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)). And because the state court used the wrong standard, no deference was owed to its decision on the prejudice prong of *Strickland*. Reviewing the prejudice question *de novo*, the Ninth Circuit found that petitioner "was clearly prejudiced in the guilt phase by [trial counsel's] performance." 849 F.3d at 820. The circuit court first rejected the California Supreme Court's alternative aider and abettor / conspiracy theory, explaining that, in light of the prosecution's positions at trial, "no reasonable reading of the record" could support a finding that the jury convicted petitioner as an aider or abettor, *id.* at 821; that "although [petitioner] was found guilty by the jury of conspiracy to commit murder for insurance proceeds, his conviction rested on being the actual killer," *id.*; and that, "even if the aid-or-abet and conspiracy theories of guilt could supplant what the jury found at trial—that [petitioner] was the actual killer—it is reasonably likely the jury would have had a reasonable doubt under those theories based on the evidence that should have been presented at trial," *id.* at 822. After further explaining that Mitchell's testimony was suspect from the start and would have been further undermined by the evidence indicating that Boyd was the real killer, the circuit court summed up its prejudice analysis as follows:

> This is not a case where counsel's deficient performance had no bearing on the outcome due to otherwise strong or overwhelming evidence of guilt. ... Instead, the verdict was only weakly supported by the evidence. No witness except Boyd placed [petitioner] at the scene of the crime, no witness reported seeing [petitioner] leaving the apartment complex the night of the crime, and no blood, fingerprint, footprint, hair, or other forensic evidence linked [petitioner] to the crime. No murder weapon was found and no evidence was presented that linked [petitioner] to any knife similar to the one used by the killers. Indeed, no physical evidence whatsoever

> linked [petitioner] to the crime. [Petitioner] was convicted of being the actual killer primarily on the strength of Boyd's now discredited testimony. It cannot be reasonably argued that strong or overwhelming evidence of guilt under any theory exists without Boyd's testimony. Thus, there is a substantial likelihood that the jury would not have convicted [petitioner] had [counsel] performed effectively.

849 F.3d at 824. Finally, the Ninth Circuit added that even assuming the California Supreme Court did correctly conceptualize and apply the *Strickland* prejudice standard, it applied it in an objectively unreasonable manner.

***Jones v. Calloway*, 842 F.3d 454 (7th Cir. 2016)**. The Seventh Circuit affirmed the district court's determinations that petitioner's showing of "actual innocence" was sufficient to overcome the procedural default of his ineffective assistance of trial counsel claim, and that he was entitled to relief on the merits. Petitioner was convicted of being the shooter in a homicide that took place on a Chicago street. Prior to his bench trial, however, his two co-defendants were tried for the same offense. In that earlier trial, the prosecution contended that one of those defendants – Stone – was the actual shooter; Stone himself agreed in both a post-homicide statement and in testimony at his own trial, maintaining that he alone had fired upon the decedent, and that he had done so in defense of his half-brother. Despite these admissions, petitioner's trial counsel failed to call Stone, who was by all accounts willing to testify, as a witness. Petitioner initially asserted counsel's ineffectiveness in this regard during his state post-conviction proceeding, but the trial-level state court dismissed the claim as procedurally defaulted because it was not supported with an affidavit from Stone as required by settled state law. The state appellate court agreed with that determination, but also "went on to apply *Strickland* based on the existing record," and held both that counsel's omission was a matter of "trial tactics" that were virtually "immune" to challenge, and that petitioner could not show prejudice. 842 F.3d at 459. A federal district court later granted relief after holding an evidentiary hearing at which Stone, trial counsel, and others testified. On appeal by the state, the Seventh Circuit began by agreeing with the district court "that the new evidence of actual innocence warrants a merits review of Jones's *Strickland* claim." 842 F.3d at 462. The court explained:

> In brief, the decisive evidentiary points are these: Stone turned himself in two days after the crime and immediately confessed to shooting [the decedent]. From the beginning he has consistently maintained that he alone shot ... and that he did not plan the crime with either [the co-defendant] or [petitioner]. [His] account matches the physical and forensic evidence; the accounts of the prosecution's eyewitnesses do not. His testimony is also corroborated at least in part by some of the eyewitnesses .... And Stone's testimony in the district court was entirely consistent with his testimony at his own trial. The eyewitness testimony, moreover, was all over the map. No two witnesses gave the same account of the shooting. ... In short, ... the new evidence, considered in light of the entire record, raises sufficient doubt about [petitioner's] guilt to undermine confidence in the verdict without the assurance that it was untainted by constitutional error.

842 F.3d at 462. The Seventh Circuit then concluded the state appellate court's remarks about the ineffectiveness claim were defective in multiple ways. First, with regard to deficient performance, the Seventh Circuit found that the state court's decision involved an unreasonable application of *Strickland* both because it inappropriately relied upon a "presumption" that counsel's omission was strategic in the absence of any record evidence to establish that proposition, and because it then "treated the *Strickland* presumption as essentially unrebuttable." 842 F.3d at 464; *see also id.* ("A court adjudicating a *Strickland* claim can't just label a decision 'strategic' and thereby immunize it from constitutional scrutiny. .... Because there was no post-conviction hearing in state court, [counsel's] actual reason for omitting Stone was then unknown."). With regard to prejudice, the Seventh Circuit found that the state court applied a standard that was "contrary to" *Strickland* when it required petitioner "to show that 'but for counsel's shortcomings, the outcome of the proceeding would have been different.'" *Id.* (quoting state court opinion). The Seventh Circuit then added that the "reasons" proffered by the state court in support of "its no-prejudice finding were so flawed as to fall outside the bounds of reasonable judicial disagreement." *Id.*; *see also id.* (explaining that state court's assumption that Stone would have refused to testify was "speculative" and would not have been dispositive even if correct, and that its reliance on eyewitnesses overlooked their internal inconsistencies and their conflicts with the physical evidence). Finally, proceeding under § 2254(a), the Seventh Circuit observed that its analysis "overlap[ped] so significantly [with its § 2254(d) inquiry] that [petitioner's] entitlement to relief flows easily from [the] § 2254(d) conclusion." 842 F.3d at 465.

***Liao v. Junious*, 817 F.3d 678 (9th Cir. 2016)**. Under AEDPA, counsel ineffective in attempted murder case for failing to secure medical evidence to support the defense expert's opinion that the defendant was sleepwalking at the time of the offense and did not have the requisite criminal intent when he struck the victim on the head with a hammer three times. The victim was the son of the defendant's girlfriend. He was awakened in the early morning hours after the defendant struck him with the hammer. He pushed the defendant to the ground and asked what he was doing. The defendant did not respond. The victim ran and awakened his mother, who told the defendant to call the police. After several requests, he did so. When his girlfriend asked why he did it, he said that he had been dreaming someone was hitting him and he had fought back. The victim testified that the defendant had argued with the victim's mother before they went to sleep and he believed the defendant's anger at her was the reason for the attack, as the victim had known the defendant for five years in which the defendant never struck him and never showed any animosity towards him. In preparation for trial, counsel consulted with an expert in sleep disorders who advised that the defendant should undergo a medical examination and sleep studies. Counsel filed a motion requesting authorization for the procedures, which was initially denied by a court commissioner. Counsel renewed the motion with additional information and the commissioner took the matter under advisement. When counsel's associate later called to inquire about the status of the request, a court clerk erroneously told him that the motion had been denied when in fact it had been granted. "Instead of conducting any further inquiry into the status of his motion, counsel proceeded to trial without the benefit of the medical examination and study" his expert recommended. The state conceded that counsel's conduct was deficient in failing "to verify what the court clerk told his associate over the phone." Prejudice was established. While the defense expert in sleep disorders testified to his opinion that the defendant was sleepwalking at the time of the offense, he did not have

the sleep studies or medical examination he had recommended. Thus, the prosecutor was able to discredit the expert's opinion on cross-examination and in rebuttal from a state expert. Then, "[h]aving set up her summation with the precision of a surgeon, the prosecutor belittled and mocked" the defense expert's testimony in final argument. If the additional testing had been done, two experts would have been available to testify that the defendant was a sleepwalker and that his behavior on the night of the assault was consistent with sleepwalking as it was not a "focused assault that leads to injuries that might have been expected had there been an intent to really seriously injure or kill" and "there was amnesia and confusion" afterwards. The state court's determination to the contrary was an unreasonable determination of the facts in light of the evidence presented and was a "demonstrably unreasonable" application of *Strickland*. Thus, the state court's review was entitled to no deference and the issue was considered de novo. "Counsel's error left Liao's defense weak and pregnable. It would not have been so with the evidence the jury did not hear because of counsel's mistake."

2015: ***Rivas v. Fischer*, 780 F.3d 529 (2nd Cir. 2015)**. Under AEDPA, counsel ineffective in second-degree murder case in failing to adequately investigation and present evidence challenging the testimony of the medical examiner concerning the time of death. The defendant was charged with killing his former girlfriend in her apartment. The victim had not been seen or heard from after about 8:15 p.m. on Friday until Sunday evening. Shortly after the murder, the medical examiner estimated the time of death as Saturday evening going into Sunday. While the defendant was questioned, he was not arrested as he had alibi evidence that accounted for his whereabouts on both Saturday and Sunday. The case remained a "cold case" for five years until a new District Attorney was sworn in. The defense alleged that he asked the medical examiner to review the case again with an eye toward expanding the time of death to include Friday evening, when the defendant had no alibi. The medical examiner was under criminal investigation by the D.A.'s office and other state agencies for a variety of misconduct, including improper disposal of waste and stealing and mishandling of body parts. The medical examiner resigned in 1993, in part to avoid prosecution. While some of these facts were reported in the local news, neither the defendant nor counsel was aware of this information as "both then lived downstate." Whether it was due to an eagerness to please the prosecutor or simply an independent reevaluation of the evidence, the medical examiner revised his opinion to a finding that the murder occurred on Friday evening. Thus, in late 1992, nearly six years after the murder, the defendant was indicted. The only thing that had changed in the case facts during that six years was the medical examiner's estimation of the time of death. Nonetheless, counsel failed to investigate the reason for this change or to independently consult with a medical expert about the time of death. He never even considered doing so and, instead, chose to rely on the alibi evidence that accounted for the defendant's whereabouts all weekend except for three and a half hours on Friday evening between 9:00 p.m. and 12:30 a.m. when the state alleged the murder occurred. During cross-examination of the medical examiner, counsel confronted the witness with contemporaneous newspaper accounts of his earlier estimation that the murder occurred on Saturday evening, but the witness denied that he had ever "tied" himself to a Saturday night estimation. He explained on redirect that he had not had a chance, at the time of the earlier estimations, to review some of his slides, which showed "some decomposition to the brain," which pushed the time limits back to Friday evening. In closing, the defense argued, without any evidence, that the medical examiner "had to stretch science beyond the breaking point" to place the time of

death on Friday evening, but counsel did not directly challenge the witness' credibility or suggest that he might be biased in favor of the District Attorney's office. Counsel's conduct was deficient in: (1) failing to consult an independent forensic pathologist, who would have confirmed that the revised findings were not scientifically reliable; (2) failing to investigate the medical examiner's qualifications and background, which would have revealed his prior misconduct and that he was under investigation when his opinion was revised; (3) failing to review the medical examiner's file, which would have revealed that there were no "brain slides" as alleged in the redirect testimony; and (4) failing to impeach the medical examiner with a search warrant application in which a police officer swore that the medical examiner had estimated the time of death as between Saturday afternoon and Sunday morning. Reliance simply on the alibi, which did not account for the precise time that the prosecution asserted was the time of the murder, "amounted to no defense at all." Thus, the state court's finding that counsel's conduct was based on reasonable trial strategy was an unreasonable application of Strickland. Prejudice was also established because, absent his counsel's unprofessional errors and omissions, a fact finder would have had a reasonable doubt respecting his guilt." Although the state court "did not make any express findings as to prejudice," the court held that it was "required to assume for the purpose of argument" that the court had adjudicated prejudice, as well. That "assumed" adjudication was also an unreasonable application of *Strickland*.

***Thomas v. Clements*, 789 F.3d 760 (7th Cir. 2015), *cert. denied*, 136 S.Ct. 1454 (2016)**. Under AEDPA, counsel ineffective in murder case for failing to consult with a pathologist or other medical expert. The case involved the death of the defendant's ex-wife, with whom he still lived and with whom he still had sexual relations with. A neighbor downstairs heard noises for an hour that included the deceased screaming "Stop, stop. I love you. I love you." Subsequently, the defendant called the police saying the deceased was unconscious. She was unresponsive when police arrived. After several inconsistent statements, the defendant admitted causing the death but stated that it was unintentionally caused during sex and horseplay when he had his forearm across the deceased's throat. The state argued intentional murder, however, and supported this theory with the testimony of the medical examiner, who concluded that the death was caused by strangulation, which was intentional and would have taken at least four minutes of continuous pressure. While the state trial court had addressed the issue of deficiency, the state appellate court did not. Because the Seventh Circuit looks only to the "last reasoned opinion" in state court, the court held that there was no "look through" to the trial court. Because the appellate court did not address this issue, no deference was required and the claim was reviewed de novo. Although the court acknowledged that the result might be different under deferential review, the court found counsel's conduct was deficient in failing to consult a medical expert, despite being aware of the opinion of the state expert and that there was no external bruising on the deceased's neck or evidence of any struggle. Counsel admitted that there was no strategy for this failure and that counsel simply did not consider consulting with an expert. In finding no prejudice, the state court addressed the issue in only two sentences in which the court held that the defendant failed to demonstrate that consultation with and presentation of a defense expert "would have led to a different result at trial." Because this is the "wrong standard" and the defendant was required only to show a "reasonable probability" of a different result, the state court's adjudication was an unreasonable application of *Strickland*. Thus, the Seventh Circuit also reviewed this prong de novo. Again, acknowledging that the result might be different under deferential review, the court found prejudice. The state's theories

of motive for murder were weak. Additionally, the state's case "suffers from a very serious flaw in terms of timing." While the state and its medical expert relied on four minutes of intentional strangulation, the neighbor heard noise for an hour, there was no evidence of a struggle, and the state provided no explanation of "how a woman being choked to death can scream 'Stop, stop, I love you, I love you' loud enough to be heard one floor below her." Under these circumstances, testimony from a defense expert that there was no evidence of intentional strangulation and that the evidence was entirely consistent with the defendant's statements of accidental death during sex and horseplay showed a reasonable probability of a different result.

***Gebaree v. Steele*, 792 F.3d 991 (8th Cir. 2015), *cert. denied*, 136 S.Ct. 1194 (2016)**. Counsel ineffective in child sodomy, molestation, and abuse case for failing to object to the inadmissible testimony of state experts vouching for the credibility of the alleged victim's and establishing the defendant's "propensity" for the crimes. There were four alleged victims, two of whom were the children of the defendant's live-in girlfriend, and two of whom were the defendant's children with the girlfriend. In 1996, three of the girls reported physical abuse. Thereafter, one of the three also alleged sexual abuse against herself and one of the others, who initially denied "bad touch[ing]" but then agreed. No physical evidence of sexual abuse was found, but there was substantial evidence of physical abuse found upon examination of the girls. Following conviction, a new trial was granted on the basis of trial counsel's failure to impeach the girls by introducing statements they had made recanting their allegations of sexual abuse. During retrial, both girls again alleged sexual abuse. The defendant testified and admitted physically disciplining the children, but denying it was abusive. He also denied the sexual abuse allegations. A state expert, Dr. Kelly, testified about the marks and evidence of physical abuse on the girls' bodies, as well as his opinion that these wounds had been intentionally inflicted. The District Court found counsel's conduct was deficient in failing to object when Dr. Kelly, who had never interviewed the two girls alleging sexual abuse or been present during their interviews, went further and testified that their disclosure of the details of sexual abuse were "consistent" and "credible." Likewise, counsel's conduct was deficient in failing to object to the testimony of Dr. Sisk, a psychologist, who testified that he interviewed the defendant and administered testing "designed to uncover abusive or neglectful attitudes." He concluded that the defendant held "parenting beliefs that contributed to abuse and neglect." Defense counsel elicited further damning conclusions on cross-examination. No strategy explained counsel's failures. Counsel could not recall in post-conviction why she had not objected but speculated that she did not want to highlight Kelly's testimony by objecting and that she chose to "argu[e] away" Sisk's conclusions. Prejudice established as the state relied heavily on this inadmissible testimony by both doctors in closing arguments. The Eighth Circuit affirmed with respect to the sexual abuse convictions, but not the physical abuse convictions. In finding reasonable strategy based on counsel's testimony of what she "might have" been thinking, the state court's adjudication was an unreasonable application of *Strickland*. The only evidence of sexual abuse was the inconsistent testimony of the girls. In this context failure to object to the improper vouching and improper "propensity" evidence so as "not to draw attention" to the testimony was objectively unreasonable. With respect to Sisk she did draw attention to the testimony by eliciting greater detail in cross- examination. Likewise, the alleged strategy of explaining away the testimony was non-existent as counsel did not even mention this testimony in her closing argument. Because the state court relied on this unreasonable determination of the facts, the Eighth Circuit

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reviewed the issue de novo and found no reasonable strategy. Likewise, because the state court had not reached the issue of prejudice, this issue was reviewed de novo. Prejudice found as "[t]he doctors' inadmissible testimony strengthened an otherwise very weak case" of sex-abuse as there was no medical evidence and no independent eyewitness accounts and the testimony of the alleged victims was "conflicting and inconsistent." These convictions were reversed. As there was substantial credible evidence of physical abuse, however, there was no prejudice here and those convictions affirmed.

2014: ***Mosley v. Butler*, 762 F.3d 579 (7th Cir. 2014)**. Under AEDPA, counsel was ineffective in murder and arson case for failing to adequately investigate and present a defense. In its prior decision, in *Mosley v. Atchison*, 689 F.3d 838 (7th Cir. 2012), the Seventh Circuit agreed with the District Court that Mosley had met the requirements of 2254(d) by showing that the state court decision denying relief "rested on an unreasonable determination of facts and an analysis that was contrary to *Strickland*." *Id*. at 580. The Seventh Circuit remanded, however, for determination of whether Mosley was entitled to relief under 2254(a), which "depends on whether he 'is in custody in violation of the Constitution or laws or treaties of the United States." The defendant was convicted in a bench trial under an accountability theory for an apartment building fire in which an elderly resident died. The state's theory was that the defendant was a gang member, who ordered two younger gang members to set the fire in retaliation for the actions of Fernando, a resident in the building, who was a rival gang member. Her car window had been smashed out earlier because "she refused to pay 'taxes' to the Gangster Disciples for selling drugs out of her apartment." Fernando testified that the defendant had threatened her at least five times and immediately before the fire, she heard the defendant outside the building saying "burn this motherfucker down." Fernando's friend corroborated this testimony. The defense presented only the testimony of Coward. She testified that the defendant was in a schoolyard across the street three hours before the fire with her and a group of people and she never heard him order anyone to set a fire or burn the building. Counsel was ineffective in failing to investigate and present testimony from two other witnesses, Jones and Taylor. Jones testified that she had been in the schoolyard with the defendant and a group of others for about two and half hours before the fire started. When the fire broke out, the defendant and the others from the schoolyard ran to the burning building in order to help the victims. She saw the defendant run into the burning building to aid rescue efforts. Taylor, who was a friend of the defendant. Taylor lived in the apartment right above Fernando. She would have testified that the defendant visited her earlier in the evening. Later, about 45 minutes before the fire she looked out her apartment window and saw the defendant and a group of other men and children (but no adult women) in the schoolyard. She never heard him say anything about burning down the building. After the fire started, she saw the defendant and others run over from the schoolyard, yelling that the building was on fire. The defendant rescued her infant son by catching him as Taylor dropped him from her window. Counsel testified that "he had not planned to call any witnesses at the trial because he was convinced hat his motion for judgment of acquittal would be granted." After the motion was denied, he spoke to Coward during a short recess and decided to call her to testify. He did not recall ever talking to Taylor but testified that he would not have called her to testify because her testimony that he had been in the building earlier contradicted his theory that the defendant was in the schoolyard all night and her testimony that no women were in the schoolyard contradicted Coward. During its initial review, the district court found counsel ineffective based on Jones and

Taylor. During the remand for consideration under 2254(a), however, the court addressed only Taylor in finding that counsel was ineffective for failing to investigate and present her testimony. Counsel's conduct was deficient, not based on strategy, and prejudicial.

***Vega v. Ryan*, 757 F.3d 960 (9th Cir. 2014)**. Under AEDPA, counsel ineffective in sexual abuse case for failing to review prior counsel's file and, as a result, failing to call as a witness a Catholic priest to whom the alleged victim, the defendant's stepdaughter, had recanted her allegations of sexual abuse. The initial allegation was made in 1996 and the defendant was charged in federal court. The charges were dismissed after Counsel 1 learned that the alleged victim had recanted her allegations to her mother and a priest. Later, the defendant was charged in state court, but again the charges were dismissed after Counsel 2 learned of the recantations. State charges were brought again (eight counts) and Counsel 3 represented the defendant. After two mistrials, the defendant was convicted on five counts. After trial, counsel filed a motion for mistrial or to vacate judgment on the grounds that he had just learned that the alleged victim had recanted her allegations to the priest. The motion was denied. Counsel 3's conduct was deficient because counsel did not review the files of Counsel 1 and Counsel 2, which contained notes by both counsel that the alleged victim had recanted to the priest. The state court held that counsel's conduct was not deficient because the defendant knew of the recantation and did not inform counsel. This was an unreasonable application of clearly established Federal law under *Rompilla* where counsel were held to be ineffective for failing to obtain and review records–"all matters that *Rompilla* himself would have had some knowledge."

> *Rompilla* is dispositive here. . . . The Court made clear in *Rompilla* that counsel had a duty–independent of whatever knowledge his client may have–to make reasonable investigation including, at a minimum, reviewing "the court file" on *Rompilla*'s prior conviction. If *Rompilla*'s counsel had a duty to review the court file in a prior case, it is minimally incumbent on Vega's counsel to review the file of the previous attorneys who handled the charges in the same case.
>
> We think it apparent from *Rompilla* that the client's own knowledge of what is in his file is irrelevant to the discharge of his counsel's duty.

Here, counsel needed to look no further than previous counsel's files, which were "at his fingertips," to find the arguably exculpatory evidence. "[W]e can conceive of no circumstances where the decision not to read a client's file–a file prepared to answer the same charges–would be reasonable." Prejudice was also established because the priest was available and willing to testify because the recantation statement from the alleged victim was not obtained during confessional and, thus, was not privileged. The state could held that there had been no prejudice because this recantation would have been cumulative to the evidence admitted at trial that the alleged victim had recanted to her mother. The state court's holding was unreasonable. First, the recantation to the priest occurred at a different time as the recantation to the mother and the priest spoke to the alleged victim alone. Second, the family members in this case were pitted against each other and some testified (and the state argued) that the mother had pressured the alleged victim to recant in order to protect the defendant. Third, although there was no "priest-penitent privilege" here, state law "recognized the

special relationship between priests and their parishioners." Thus, the priest's testimony "would have been of much greater weight" than the evidence of the recantation to the mother, such that it "could have tipped the scales" in the defendant's favor. In addition, the jury's verdict indicated prejudice, as well, in that the jury could not reach a unanimous verdict on three of the eight counts.

2013: ***McClellan v. Rapelje*, 703 F.3d 344 (6th Cir.), *cert. denied*. 571 U.S. 1036 (2013)**. Counsel's conduct in murder case was "grossly deficient" in failing to interview witnesses and appellate counsel's procedural default of the issue did not bar merits review. The case arose out of a "barroom conflict" between two groups that spilled outside when they were asked to leave. The prosecution's theory was that the shooting was premeditated as the defendant left the bar and retrieved a gun from his car prior to the shooting. Numerous witnesses were available to testify that the defendant had the gun with him to start with and never went to his car to retrieve it. Likewise, these witnesses would have testified that the alleged victim who was much larger than the defendant "rushed him with a chrome object in his hand that appeared to be a gun" before the defendant pulled out his gun and fired. Cause and prejudice was established to overcome the procedural default because both the defendant and his aunt informed appellate counsel in letters, provided to the court, of the basis for investigation.

***Cannedy v. Adams*, 706 F.3d 1148 (9th Cir. 2013), *amended*, 733 F.3d 794 (9th Cir. 2013), *cert. denied*, 571 U.S. 1170 (2014)**. Under AEDPA, counsel ineffective in lewd acts upon stepdaughter case for failing to present witnesses who could have corroborated the defendant's testimony that the stepdaughter had motives to lie. Her friend could have testified that the stepdaughter communicated with the witness by America Online Instant Message that she lied because she wanted to move to her natural father's home rather than with her mother and the defendant. Prejudice established as there was no physical evidence and there were "significant inconsistencies in the government witnesses' testimony." In denying this claim, the state court unreasonably determined the facts in finding that counsel's conduct was not deficient, as the defendant had informed counsel about the message and the witness' willingness to testify and yet counsel failed to interview the witness.

2012: ***Elmore v. Ozmint*, 661 F.3d 783 (4th Cir. 2011) (tried initially in 1982 and retried in 1984).** Under AEDPA, counsel ineffective in capital murder trial for "blind acceptance of the State's forensic evidence" and failure to investigate or adequately challenge that evidence. The defendant spent nearly 30 years on death row. His death sentence was vacated by the state court in 2010 based on a finding of mental retardation on an *Atkins* claim. The defendant, a black, mentally retarded, handyman, had done work for the elderly, wealthy white victim and others in her neighborhood. The state's evidence through the trials and for 17 years was that the victim was raped and murdered in her home on the evening of January 16, 1982, when the defendant had no alibi. Her body was discovered by a neighbor on January 18 and the neighbor immediately pointed at the defendant as a suspect. The defendant's thumbprint was found on the exterior frame of the back door of the home and he was arrested on January 20 and tried less than three months later. The neighbor, police, and state experts testified during trial. Essentially, based on circumstantial evidence, including a TV guide open to the evening of January 16, the state put the time of death on that evening, even though the state's pathologist who performed the autopsy days later, put the

time of death anywhere between 11:00 a.m. on January 16 and to 11:00 p.m. on January 18. The state argued that the defendant entered the backdoor where the fingerprint was located, assaulted the victim, forced her into her bedroom and sexually assaulted and killed her on the bed before dumping her body in the bedroom closet, cleaned the scene of fingerprint and other evidence, and stole some money before leaving in his own car. During the 1984 trial, where the state's evidence was identical to that from the 1982 initial trial, the state's pathologist based on "history" received "estimated" the time of death to be the evening of January 16. A fingerprint analyst and four police officers testified the defendant's thumbprint was "recent" and "fresh," although the analyst conceded it could have been there for a month. An agent from the South Carolina Law Enforcement Division (SLED), who assisted in processing the scene, testified that he collected a number of hairs from the victim's bed, but took no photographs of the hairs and did not collect the bedding. Another SLED agent testified that there were 49 hairs, 4 consistent with the victim, but 45 were Negroid with rare "banding" and a "reddish cast," which was consistent with the defendant. Of the 45 Negroid hairs, the agent testified that four appeared to have fallen out normally, but 41 were forcibly removed by the 75-year-old victim during the sexual assault. Although the crime scene was "a particularly bloody one," the state's evidence was that there were small amounts of blood on the defendant's shoes, coat, and denim pants. There was no blood or evidence in the defendant's car or elsewhere. While the defendant's ex-girlfriend testified that he was wearing a white shirt that she threw away that evening, no one asked for details, which would have been that she saw no blood on the shirt and she threw it away simply because she did not want his clothes at her house. All of the identifiable blood in the house was Type A, which was consistent with the victim and 40-45% of the population. Small amounts of Type A and Type B blood were on the defendant's clothing. A jailhouse snitch, who later recanted in post-conviction proceedings, also testified during trial that the defendant had spontaneously confessed to him. The only defense evidence was the defendant's own testimony denying involvement in the murder and denying confessing to the jailhouse snitch. Defense counsel essentially conceded the time of death, made only perfunctory efforts in cross-examination, and actually "vouched for the investigators" in closing arguments by citing SLED as a "fine department" with "good personnel," who are "experts at everything they do." The jury convicted after only two hours of deliberations. Counsel's conduct was deficient as counsel conducted no independent analysis of the State's evidence and never even thought to suspect irregularities in the chain of custody. Indeed, just days prior to the 1982 trial, counsel requested to see only the evidence the state intended to introduce during the trial. Even with "a rare second chance to contest the State's case – along with near-perfect knowledge of what that case would be," the same counsel did nothing more to prepare for the 1984 retrial. While counsel cited sparse state funding available, counsel made no effort to obtain funding and apparently never even considered challenging the state's case as counsel had complete faith in the police. Indeed, it appears that counsel's only preparations for trial was in the 10 day period prior to the 1982 trial and in the ten day period prior to the 1984 trial. If counsel had adequately investigated, a defense pathologist would have placed the most likely time of death, based solely on the autopsy evidence rather than a TV guide and the like, between 11:00 a.m. and 3:00 p.m. on January 17, a time frame when the defendant had an alibi. The pubic hair evidence on the bed could have been challenged by the lack of any photographs or seizure of the bedding, even though everything else in the house, including undisturbed rooms," were photographed. Likewise, there was a "conspicuous omission of any reference to the hairs" in the affidavit in support of an arrest warrant. In addition, the hairs

were contained in a clear plastic baggy on which the agent wrote directly when all the other evidence in the case had distinctive SLED labels on which the agents wrote. The defense theory was that the hairs allegedly found on the bed were removed from the defendant by police following arrest. The defendant could not challenge whether the hairs were actually his in post-conviction because neither the slides nor any record of them could be located. The print evidence could have been challenged because the defendant's thumbprint on the backdoor frame was upside, which was consistent with him leaning on the door to wash windows rather than touching it on his way into the house or leaning on it as the state theorized. Likewise, while the state examiner had testified during trial that there were no other identifiable prints in the house, there was an identifiable print on the underside of a blood-smeared toilet seat in the bathroom connected to the victim's bedroom. This print did not match the defendant. No determination could be made in post-conviction whether it belonged to the victim, as her prints also could not be located. The testimony that the defendant's print was "fresh" or "recent" also could have been challenged as there is no way to determine the age of a latent print. In addition, the evidence concerning the blood on the defendant's clothing could have been challenged because there were irregularities in the chain of custody for those items. In addition, the small amounts of blood on the clothing was inconsistent with the likely amount of the blood the actual killer, who had carried the victim's body allegedly from the bed to the closet, would have had on him. To make matters worse, the state's autopsy report reflected "apparent pubic hair" on the victim's chest and abdomen during autopsy. The evidence log by the pathologist listed this same evidence as "fibers, hairs from chest & abdomen." When this evidence reached SLED, the report of analysis of this evidence, marked as "Item T," was that it contained only "blue fibers." This evidence was not mentioned during any of the trials and "could not be located" during post-conviction until the post-conviction appeal, which was then remanded for analysis of the long hidden "blue fibers" of "Item T." Visual analysis of the slides revealed four human hairs, three animal hairs, and a single blue fiber. The human hairs were Caucasian. Experts disagreed on visual inspection about whether it was consistent or inconsistent with the victim, although everyone agreed it was inconsistent with the defendant. Mitochondrial DNA testing revealed that one of the Caucasian pubic hairs found on the victim's abdomen was not consistent with the victim. The defense also presented behavioral profiling evidence in post-conviction that tended to exculpate the defendant and implicate the neighbor who allegedly found the body, but was never seriously considered as a suspect by anyone because he was a County Councilman known personally to officers and defense counsel. The state court's determination that counsel's conduct was not deficient was both an unreasonable application of, and contrary to, the controlling *Strickland* principles." For example, the court found that no investigation was necessary because counsel "reasonably trusted in not only the integrity, but the infallibility, of the police," which the Fourth Circuit found to be a "notion abhorrent to *Strickland*, which was designed to protect the Sixth Amendment right to 'a reliable adversarial testing process.'"

> A healthy skepticism of authority, while generally advisable, is an absolute necessity for a lawyer representing a client charged with capital murder. After all, the custodians of authority in our democracy are ordinary people with imperfect skills and human motivations. The duty of the defense lawyer "is to make the adversarial testing process work in the particular case, *Strickland*, 466 U.S. at 690

> – an obligation that cannot be shirked because of the lawyer's unquestioning confidence in the prosecution.

Id. at ___. Here, counsel's conduct was deficient as "the need for scrutiny of the forensic evidence was indisputable." While counsel attempted to challenge the evidence in cross-examination, they "twice squandered opportunities to investigate the forensic evidence (prior to the 1982 and 1984 trials)." The state court also unreasonably applied *Strickland* because it "repeatedly relied on later-developed facts – unknown to Elmore's trial lawyers when they decided against investigating the State's forensic evidence prior to the 1982 and 1984 trials – to retroactively justify that decision." This was "in plain contravention of *Strickland*'s contemporary assessment rule." The state court also unreasonably "deemed facts relevant to the prejudice issue to also be pertinent to the performance question." For example, the court held that counsel's conduct was not deficient in failing to investigate because the jury would have believed the state's evidence regardless of what the defense presented. On prejudice, the state court erroneously believed that the decision in *Lockhart* changed the prejudice-prong test. This was rejected as an unreasonable application of and contrary to *Strickland* in *Williams*. The PCR court also never considered "all of the trial and PCR evidence favoring Elmore's acquittal" in the prejudice analysis. To the contrary, the state court "embraced the theory that the only evidence that mattered was the evidence incriminating Elmore." Proper analysis leads to "only one reasonable conclusion:" a reasonable probability that Elmore "would have been acquitted" if counsel had performed competently. Counsel could have shown "gross violations of standard procedures for the handling of forensic evidence," as well as "the extraordinariness of finding so many incriminating hairs." There was "additional clear evidence that the SLED team was at least mistake-prone" and at worst "that the agents were outright dishonest."

***Foster v. Wolfenbarger*, 687 F.3d 702 (6th Cir. 2012), *cert. denied*, 568 U.S. 1228 (2013)**. Under AEDPA, counsel ineffective in second-degree murder case for failing to investigate and present an alibi defense. The petitioner was at a woman's home having sexual relations. Afterwards her ex-boyfriend and father of her children showed up with friends. He assaulted the woman and then smashed the back window of the petitioner's vehicle as he was leaving. Police were called and the petitioner overheard the ex- boyfriend's address. Almost two hours later, the ex-boyfriend was shot as he arrived home by a man on foot. Petitioner was arrested and charged with first degree murder. His defense was based on mistaken identity. Prior to trial, a man sent a letter to counsel asserting that the petitioner was at his home at the time of the murder. Counsel spoke to the witness by phone for 15-20 minutes but chose not to call him as a witness because he thought he "would make a poor witness." Counsel's conduct was deficient. Even if the man was a "poor witness," counsel did nothing to investigate with respect to the other two potential alibi witnesses at the home at the same time. Either of these witnesses or all three together could have supported the defense. Moreover, the alibi defense was consistent with the mistaken identification defense presented.

> Thus, this is not a situation where defense counsel is required to choose between two different avenues and pick the theory of the case that counsel believed was stronger. Instead, trial counsel chose not to investigate an avenue that potentially could have bolstered the defense that counsel was already pursuing.

Prejudice also established. The jury initially deadlocked before convicting on the lesser included offense of second degree murder. Moreover, the sole eyewitness against the petitioner described the shooter as 5'6, 180 pounds, and wearing a green jacket. The petitioner is 6'0', 240 pounds, and was wearing a blue jacket. "By any standard this is a weak identification." There was no other evidence, forensic or otherwise, linking the petitioner to the crime.

***Toliver v. Pollard*, 688 F.3d 853 (7th Cir. 2012)**. Under AEDPA, counsel ineffective in first degree intentional homicide case for failing to present defense testimony from the petitioner's wife and cousin to support the defense argument that the petitioner tried to stop his brother from shooting the victim. The brothers lived with a man who sold drugs out of the residence. When some of the drug money was missing, they suspected that the victim had stolen it. The petitioner and his brother, who were both armed, brought her to the residence to question her. Three state witnesses testified that the petitioner ordered his brother to shoot her. The petitioner testified that he was pushing his brother back and trying to calm him when he shot her, but the brother shot and killed her anyway. Prior to trial, the petitioner's wife contacted counsel and told him that one of the state's eyewitnesses had told her that the petitioner was trying to wrestle the gun from his brother after the shooting. Counsel did not call her and never interviewed the cousin despite being told of his potential testimony by the petitioner. The cousin would have testified that the he was present for a conversation between the two brothers one the brother admitted that he was to blame. While counsel was deceased and unavailable to testify, the pretrial state court record did reflect that the petitioner had requested new counsel because counsel would not follow-up on witness leads provided. The 7th Circuit had previously found prejudice prior to remanding the case for an evidentiary hearing and did not revisit that issue. Because the state court did not address the question of deficient conduct, the issue was reviewed de novo. Counsel's decision not to call these witnesses based simply on their family relationship to the defendant was not a "sound strategic choice." This testimony was crucial as the only defense witness was the petitioner.

***Thomas v. Chappell*, 678 F.3d 1086 (9th Cir. 2012), *cert. denied*, 568 U.S. 1186 (2013)**. Under pre-AEDPA law, counsel ineffective in murder case for failing to adequately investigate and present a defense. The petitioner was convicted of murdering two "'Deadheads,' who followed the Grateful Dead band on tour," near a homeless encampment by the San Francisco Bay. There was no direct evidence of guilt, but "considerable circumstantial evidence," although "none of the evidence presented by the prosecution plainly contradicted Petitioner's generally consistent account of what had occurred on the night of the murders and during the following morning." *Id*. at 1091. The defense argued that the state had not met its burden of proof and also argued that someone other than Petitioner had committed the crime. The only evidence presented of this was from the grand jury testimony of a homeless woman, who could not be located at the time of trial. Her testimony was characterized by the prosecution as "ridiculous, at best, perjurious at worst." *Id*. at 1093. Even according to the California Supreme Court, counsel's conduct was deficient in failing to investigate and present additional witnesses to corroborate the defense that another person committed the crimes. While the petitioner presented eleven corroborating witnesses, the state court found that competent investigation would have discovered only three of these witnesses. The District Court held that this was "not fairly supported by the record." *Id*. at 1098.

Even considering just the three witnesses that the state court did, prejudice was found. The state's case was entirely circumstantial. The grand jury testimony of the one defense witness "was not particularly believable. Without any corroboration her story . . . appears to be fantasy." *Id.* at 1105. Even with that, the jury deliberated for almost five days, even though the argument and evidence only took six days to present. Moreover, "the jury struggled with precisely the theory that adequate representation would have bolstered." And, "[t]wo of the requested readbacks [of testimony during deliberations] related directly" to the theory that someone else committed the crime. *Id*. at 1103. The additional three witnesses corroborated her testimony.

2011: ***Breakiron v. Horn*, 642 F.3d 126 (3rd Cir. 2011)**. Under AEDPA, counsel was ineffective for several reasons murder committed during robbery case. The District Court vacated the murder conviction due to a *Brady* violation so only the robbery conviction was at issue. The petitioner never denied killing or theft but presented a voluntary intoxication/diminished capacity defense asserting he was guilty only of third-degree murder because he did not have the specific intent to kill. He also asserted guilt of only theft rather than robbery because he decided to steal after the murder was complete. Counsel's conduct was deficient in failing to request a jury instruction on the lesser- included offense of theft, which was supported by the evidence. This was the sole defense theory so no reasonable counsel would have failed to request the instruction. The state court's finding of no prejudice was both contrary to and an unreasonable application of *Strickland*. Counsel was also ineffective in failing to take corrective action during jury selection after a venire member testified in front of a panel of jurors that he knew the petitioner, who "used to do a lot of robbing." This juror was excused because he had a "fixed opinion" and could not be an impartial juror, but one of the venire members from the same panel served on petitioner's jury without ever being asked about other juror's statement. Counsel was ineffective in failing to move to strike the panel, seek a mistrial, or take other corrective action to ensure that no one exposed to the biased juror's testimony would serve on the jury. The state court's finding to the contrary was objectively unreasonable. While the state argued that the petitioner must show that the seated juror was actually biased, the Court held that *Strickland* requires an objective inquiry based on the prejudicial nature of the statement rather than a subjective view of the seated juror's opinions. In short, the proper inquiry was not whether the statement rendered the seated juror biased, but whether there is a reasonable probability that a juror exposed to that testimony would have voted to acquit.

***Couch v. Booker*, 632 F.3d 241 (6th Cir. 2011), *affirming* 650 F.Supp.2d 683 (E.D. Mich. 2009)** . Counsel ineffective in second-degree murder case for failing to investigate a "causation" defense. The murder "arises from an incident that occurred when a party went awry." In essence, the victim was drinking, smoking marijuana, and using cocaine at a party. A woman at the party called the defendant and two other men asking for assistance with "a situation." When the men arrived they discovered that the victim had raped a woman. They pulled him outside and "punched him repeatedly." The defendant punched him 5-7 times and kicked him once. An ambulance was called, but the victim later died. The pathologist that conducted the autopsy found a chronic heart problem, possibly related to drugs, a .17 blood-alcohol level, noticeable levels of "cannabinoids" from marijuana, and significant levels of cocaine. There was blood in the lung tissue. The doctor concluded that the cause of death was asphyxia from inhaled blood that resulted from blunt-force

injury to the face. Counsel's conduct was deficient in failing to pursue a causation defense after receiving this information. Counsel did not seek the records or interview the medics. Counsel claimed he did not get the report because he did not want to emphasize the victim's "fear and the effect of the attack." While this kind of fear might explain not offering the evidence during trial, "that is no reason not to read the report. How can one exercise reasonable professional judgment about whether to stop a causation-based investigation before reading the key report that might support it?" *Id*. at 246. Likewise, counsel's conduct was not excused by a defense medical expert agreeing with the cause of death found by the state's pathologist. The defense expert never saw the incident report or talked to the medics. "An attorney cannot hire an expert, give him whatever evidence he happens to have on hand (but not the evidence the client pointed to) and accept the report without further discussion." *Id*. at 247. "Hiring a medical expert to review an autopsy report does not amount to the outsourcing of all investigation into plausible causation theories, including a theory that may have nothing to do with the autopsy report." Prejudice found. Investigation revealed that the victim was conscious when medics arrived, he fought medics when they tried to put him in the ambulance, and his mouth and nose were not flooded with blood, even though the state repeated argued that he "drowned in his own blood." With this information, a defense expert could have testified that the cause of death was actually "cardio respiratory failure" due to cocaine toxicity from an "accidental" cocaine overdose. Prejudice especially with respect to the petitioner, as he was arguably the least culpable of assailants, such that there was no evidence of premeditation or anything else to suggest that he meant to kill the victim.

***Sussman v. Jenkins*, 636 F.3d 329 (7th Cir.), *cert. dismissed*, 564 U.S. 1063 (2011)**. Counsel ineffective in child pornography and sexual assault of minor case for failure to adequately present evidence of the minor's prior false accusation against his father during divorce proceedings. The petitioner was a former school mentor for the child, who also saw him frequently outside of school. Once the mentoring concluded, the child's mother, acting on the advice of friends, asked the child if he had been abused. The child told his mother that petitioner had sexually abused him and the authorities were called. Counsel was initially precluded from eliciting testimony about the prior false allegation because he had not timely raised the issue pretrial as required by the Wisconsin rape shield statute. After the child testified that he did not report the abuse because he thought it "was right," the trial court revisited the ruling and permitted counsel to inquire whether he had previously reported an unlawful touching. Counsel interpreted the court's ruling to allow only cross of the child on this point. Thus, counsel did not seek to present evidence from the child's father or counselor to establish the prior false accusations against the father or to establish that the child had denied to the counselor, as documented in his records, that petitioner had abused him. Because the state court addressed only prejudice, review of counsel's conduct was de novo under AEDPA. While there is a presumption of reasonable professional judgment "as a general proposition of law," that presumption "has little bearing" here. Counsel's failure to file the pretrial motion was an oversight. Counsel's failure to introduce the counselor's note was due simply to a misunderstanding of the breadth of the trial court's ruling. With respect to prejudice, the state court's determination that the evidence would have been excluded even with a timely pretrial motion under the statute could not be reviewed as it was a matter of state law. The court could, however, consider the Confrontation Clause issue as the state court ruling precluded petitioner from confronting the witnesses against him. Here, with the evidence of the prior false accusations

against his father, the jury could reasonably have concluded that the child was prone to use allegations of sexual abuse against father figures as a means either of gaining their attention or as a means of punishing them for abandoning him. This type of "evidence that exposes a motive to fabricate a specific kind of lie under a specific set of circumstances" directly implicated the petitioner's confrontation rights. In failing to even address this confrontation issue, the state court unreasonably applied the law as construed by the Supreme Court. Prejudice established even though the jury heard evidence of the prior allegations. "[T]here is an obvious difference between an accusation and a false accusation." Counsel did not establish that the prior allegation was false and did not explore the child's motives for the false allegations against his father or draw parallels to the current case. While the child's credibility was impeached generally, this evidence would have demonstrated that he "lies specifically about sexual abuse when he feels abandoned by father figures." The child's testimony was the only evidence of guilt. Even without the false-accusation testimony, the jury acquitted on some charges. Thus, "the jury harbored doubts as to some aspects of [the child's] testimony." Likewise, while a lay witness testified that the child had stated previously that his allegations against petitioner was false, failure to include the counselor's note and testimony was prejudicial. The lay witness was thoroughly discredited as biased. The counselor was an objective third party with no motive to lie. The jury would "have given far more credence" to the counselor's note. While this single note error might not require reversal due to required deference to "reasonable" state court determinations, the cumulative impact when combined with counsel's failure to present the false allegation evidence required reversal.

***United States v. Coutentos*, 651 F.3d 809 (8th Cir. 2011)**. Counsel ineffective in possession of child pornography case for failing to raise statute of limitations defense. The allegations were made by two 14-year-old girls, who alleged events eight years earlier. The government charged the defendant with possession "in or around 2001." A general statute provided a five-year statute-of-limitations period. A later statute enacted July 27, 2006, extended the statute-of-limitations period, but only if the original period had not run. Thus, July 27, 2001, was the cut-off date for determining whether the statutory time was extended in this case. Counsel's conduct was deficient in failing to challenge this issue because the government did not present any specific evidence that the alleged conduct occurred before July 27, 2001. According to the girls' testimony, the acts could have occurred any time between 2000 and 2002. Convictions vacated on these charges, although there remained valid convictions on other offenses.

2010: ***White v. Thaler*, 610 F.3d 890 (5th Cir. 2010)**. Under AEDPA, counsel was ineffective in murder case for eliciting evidence about the defendant's post-arrest silence and for failing to object to evidence the murder victim was pregnant at the time of her death. After a confrontation with a woman in a bar, the defendant ran over her and a second woman with his pickup while leaving the parking lot. The second woman, who was pregnant, died. The defendant never gave his exculpatory version of events–that he was fleeing from an angry mob–until his trial testimony. During direct, counsel elicited this fact. During cross, the state questioned the defendant "extensively about his post-arrest silence." Because the state court did not adjudicate deficiency on the merits, the court reviewed this de novo. Counsel conceded he did not elicit this evidence as part of a strategy. Because the police did not advise the defendant of his Miranda rights at the time of arrest, there was no violation under federal constitutional law. Under the Texas Constitution, however, state cases

held "that a defendant's post-arrest, pre-Miranda silence could not be used against him at trial." In short, "Texas law prohibits a prosecutor from impeaching a defendant with his post-arrest silence." By opening the door, defense counsel allowed the prosecutor to "verbally pound[]" the defendant and to "mock[]" his testimony that he feared for his life. The prosecutor used the silene as "prior inconsistent conduct" and argued the defendant was not "credible" on this basis. The state court's finding of no prejudice was "objectively unreasonable." Counsel's conduct was also deficient in failing to object or file a motion in limine to exclude evidence that the victim was pregnant. Again, because the state court did not adjudicate deficiency, this was reviewed de novo. Counsel's conduct was deficient as the evidence of pregnancy was "irrelevant" under state evidence rules as the only disputed issue at trial was whether the defendant "intended to hit the victims with his truck." Moreover, there was no evidence to show the defendant knew the victim was pregnant, as this only became apparent during the autopsy. Counsel conceded there was no strategy for failing to object to this evidence. Prejudice established, as the state referred to the death of the "unborn child" nine times in closing arguments. Prejudice was also clear as the murder conviction rested on the jury finding intent to kill the victim. By its verdict, however, the jury acquitted him of (finding no intent) attempted murder of the other woman, who was the person he had argued with. "Under these circumstances, the jury's verdict of intentional murder is not reliable." The state court's finding of no prejudice was "objectively unreasonable." While both of these issues were prejudicial, standing alone, the cumulative of "combined prejudicial effect . . . inexorably leads" to reversal.

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

2009: ***Wilson v. Mazzuca*, 570 F.3d 490 (2nd Cir. 2009)**. Under AEDPA, counsel ineffective in robbery case for numerous reasons and the state court finding to the contrary was an unreasonable application of clearly established federal law. In December 1992, the victim was robbed at gunpoint by two men. That day, he gave a general description of the man that assaulted him and demanded cash and then selected the defendant's photo from a book of "mug shots" maintained by police. The

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

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

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

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

***Richards v. Quarterman*, 566 F.3d 553 (5th Cir. 2009) (*affirming* 578 F. Supp. 2d 849 (N.D. Tex. 2008))**. Under AEDPA, counsel was ineffective in murder case (with death a day or so after assault) for a number of reasons. The case involved a number of homeless people living on the streets near a church tent known as the "slab church." Two eyewitnesses testified that they observed the victim and defendant in a minor altercation and returned later to see the victim standing over the defendant, who appeared to be asleep, with a stick and length of steel. The defendant got up, picked up a piece of asphalt, and hit the victim 9 or 10 times around the head and face. The defendant's brother later discovered the victim's body and testified that the defendant told him, consistent with the eyewitness testimony, that the victim had choked him into unconsciousness. When he awoke, he hit the victim in self-defense. First, counsel's conduct was deficient in failing to present evidence (and preventing the state from presenting evidence) of the victim's pre-death statements that significantly varied from the state's evidence and theory. In essence, the victim had gone to a nearby house at 3:00 a.m. and told a witness there he had been attacked by 3-5 men after he had fallen asleep and that another man [not the defendant] was the principal assailant that hit him in the head with a brick. Due to counsel's sustained hearsay objections, the victim's statements were excluded. The victim also told the police officer that responded to the house that he was attacked by 4 men around 3:00 a.m. and that he knew the men. Again, counsel's sustained hearsay objections excluded the victim's statements. Another homeless man testified that he was with the victim in the area around 6:00-7:00 a.m. when a man (not matching the defendant's description) walked by and the victim became agitated and said he was the attacker from the night before. Again, the victim's statements were excluded based on counsel's objections. Finally, counsel failed to present the defendant's testimony that his fight with the victim occurred around 10:00 or 10:30 p.m. Counsel's conduct was deficient and not based on any legitimate strategic reason. The state court's contrary findings were an unreasonable application of *Strickland*. Second, counsel's conduct was deficient in failing to request instruction on aggravated assault, a lesser-included offense. This was not the result of any reasoned trial strategy. Counsel initially stated she thought the request would have been frivolous. But, counsel's "testimony strongly suggests that she both failed to recognize" that it "was entirely possible for the jury to believe that [the defendant] did not act in self-defense but also believe that he did not kill [the victim]." Counsel "misunderstood the law governing lesser-included offenses." Thus, her additional explanation that she did not want to give the jury the option of convicting of a lesser offense was "a 'post-hoc rationalization' rather than a genuine account of her decision-making process." The state court's contrary finding was an unreasonable application of *Strickland*. Third, counsel's conduct was deficient in failing to put into evidence the defendant's VA medical records to establish the defendant's physical problems, which included a triple bypass surgery, left side weakness, frequent chest pains, and an inability to walk more than half a block without stopping. Counsel's "ethical" explanations for not presenting this evidence "were developed after the fact" and "make no sense." "[T]here is nothing implausible about being strong enough to hit someone two to three times with a rock in self-defense but not strong enough to kill the person." The medical evidence also might have made the self-defense claim "more plausible." Counsel's conduct was deficient and not based on reasonable strategy. The state court's contrary findings were an unreasonable application of *Strickland* and the state court's factual findings on this were rebutted by clear and convincing evidence. Finally, counsel was ineffective in failing

to interview important witnesses prior to trial. Again, the state court's contrary findings were an unreasonable application of *Strickland* and the state court's factual findings on this were rebutted by clear and convincing evidence. Prejudice established based on the "cumulative effect" of the errors. "But for the deficiencies in [counsel's] performance . . ., the jury would have heard compelling evidence that there was another, more serious assault on [the victim] after the one described by the prosecution's witnesses and [the defendant] himself, as well as of [the defendant's] documented frailties."

***Bigelow v. Haviland*, 576 F.3d 284, *rehearing denied*, 582 F.3d 670 (6th Cir. 2009) (*affirming* 476 F. Supp. 2d 760 (N.D. Ohio 2007))**. Counsel ineffective in kidnaping, assault, and arson case for failing to adequately prepare and present alibi evidence. The defendant was arrested based on his resemblance to a composite sketch of the attacker. He maintained that he was in a different city at the time of the attack. He presented one alibi witness to state that he was working with the defendant 150 miles away on the day of the crimes. Counsel's conduct was deficient in failing to identify other alibi witnesses. He called some witnesses, whose names the defendant had provided. They could verify that the defendant had been there sometime during the month, but could not pinpoint the relevant day. The defendant then attempted to locate additional witnesses, sending letters to some people. Four days before trial, one potential alibi witness contacted counsel and informed him he had met the defendant that day and identified the location where wedding preparations were being made. The witness believed only three people were there and the third person, the home owner, could not verify the defendant's presence. Nonetheless, counsel called only this witness and did not search for other corroborating witnesses. If counsel had taken additional steps, he would have discovered that "many others" were at the house the day. "An attorney's duty of investigation requires more than simply checking out the witnesses that the client himself identifies," especially where, as here, the defendant suffered from an "untreated mental illness." Prejudice established because two additional alibi witnesses would have bolstered the defense. Thus, there would have been, at minimum, "two reasonably confident alibi witnesses, with no connection to [the defendant] and no axe to grind, who had time to observe him under ordinary conditions, versus two prosecution witnesses who caught no more than a glimpse of the perpetrator's face." There was, however, a third alibi witness. "The three witnesses who corroborated his alibi were strangers to [the defendant], to the victim and to the crime and thus had no reason to perjure themselves one way or another. And all of this must be weighed against the flaws in the prosecution's case." The state court's conclusions unreasonably applied *Strickland*.

2008: ***Avery v. Prelesnik*, 548 F.3d 434 (6th Cir. 2008) (*affirming* 524 F. Supp. 2d 903 (W.D. Mich. 2007)), *cert. denied*, 558 U.S. 932 (2009)**. Under AEDPA, counsel ineffective in second degree murder case for failing to investigate and interview alibi witnesses. The defendant gave counsel three names and the business address for alibi witnesses. Counsel's investigator went there and interviewed one of the individuals, who was not personally an alibi, but told the investigator that his brother, who the defendant had named, and another person had been with the defendant. The investigator left his business card but neither the investigator nor counsel took any other action to investigate. Counsel's conduct was deficient because, at bare minimum, counsel should have sought the witness' phone number and made a reasonable attempt to contact them. Failure to do so was not excused by strategy. "[T]he limitations on [the] investigation rendered it impossible for [counsel] to have made a 'strategic choice' not to have [the alibi witnesses] testify because he

had no idea what they would have said." Prejudice was reviewed de novo because the state court did not rule on this issue. Although the state post- conviction judge found at least one of the witnesses to be "totally incredible," the Sixth Circuit noted that the hearing was more than a year after the trial. In addition, "evaluation of the credibility of alibi witnesses is 'exactly the task to be performed by a rational jury,' not by a reviewing court." The court also noted that there was "otherwise flimsy evidence" supporting the conviction, which was basically one eyewitness, "peeking" out a window in the dark. This witness also had made inconsistent statements and identifications.

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

***Fadiga v. Attorney General U.S.*, 488 F.3d 142 (3rd Cir. 2007)**. Counsel ineffective in immigration proceedings where the issue of ineffectiveness is cognizable under the Fifth Amendment as a violation of due process but the courts often and in this case essentially used the *Strickland* standard. Here, the alien was a native of Guinea, who entered the country in 1991 on a visa that expired after one month. Eleven years later, INS brought removal proceedings. The alien applied for withholding of removal and protection under the Convention Against Torture. During the hearing, the alien testified that he had left Guinea due to political issues in the country, which rose to the level of his uncle being murdered due to political motivations, and his fear that he would be "arrested, tortured, or killed." Shortly after his departure, an arrest warrant had been issued for him charging "public disorder." The Immigration Judge (IJ) found dramatic inconsistencies in his testimony and the application filed and noted the lack of supporting witnesses and documents to

corroborate the alien's testimony. Although the alien and his counsel essentially explained that the fault lay with counsel, the IJ ruled against the alien. The alien appealed to the Board of Immigration Appeals (BIA) and, represented by new counsel, asserted only the ineffectiveness of initial counsel, who provided an affidavit in support of the issue. The BIA denied relief and the case proceeded to the Third Circuit. Counsel admitted (and the court found) that counsel's conduct was deficient because a law student prepared the application and counsel assumed it was complete and accurate. Thus, counsel did not review the application with the alien or advise him to review it before signing it. He also did not discuss with the alien the need for additional witnesses and corroboration other than a simple generic letter about a month before the hearing, which is the only reason the alien was able to provide some documentation. In discussing a threshold procedural requirement applied by the BIA for ineffectiveness claims, the court held that the "Lozada requirements" do not require a bar or disciplinary complaint against counsel. Those requirements are aimed at serving, in essence, the interests of ensuring adequate counsel, deterring meritless claims of ineffectiveness, and prohibiting "collusion between counsel and the client" on these issues.

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

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

***Richey v. Bradshaw*, 498 F.3d 344 (6th Cir. 2007)**. On remand from the Supreme Court, the Sixth Circuit again held that counsel was ineffective in inadequately cross-examining the state's experts and failing to present competing scientific evidence on the cause of the fire that caused the deaths. *See Richey v. Mitchell*, 395 F.3d 660 (6th Cir. 2005). Counsel's conduct was deficient because the State presented two experts to present a detailed, specific theory of arson, which was "fundamental to the State's case." Counsel retained his own expert late in the case and just deferred to his conclusion agreeing with the State's experts without question. "[T]he mere hiring of an expert is meaningless if counsel does not consult with that expert to make an informed decision about whether a particular defense is viable." 498 F.3d at 362. Here, the defense expert did not perform his own independent testing and deferred to the state expert's who he believed to be better qualified.

> [I]t is inconceivable that a reasonably competent attorney would have failed to know what his expert was doing to test the State arson conclusion, would have failed to work with the expert to understand the basics of the science involved, at least for purposes of cross-examining the State's experts, and would have failed

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

Id. Counsel's conduct was not explained by strategy to simply challenge the identity of the arsonist since other circumstantial evidence against Richey "made such a choice unreasonable." In addition, because there were gaps in the State's proof "investigating the scientific basis for the State's arson conclusion became all the more imperative." *Id*. Counsel could have presented testimony to severely undermine the State's case by attacking the State's analysis as "unsound and out of step with prevailing scientific standards," disputing the conclusion that gasoline or paint thinner traces were found; testifying that the burn patterns and speed were consistent with a naturally occurring fire; and testifying that the most likely cause of the fire was a cigarette smoldering in the cushions of the victim's couch. Prejudice established for trial and sentencing. "Although the circumstantial evidence alone might have led to a conviction, the question before us is not one of the sufficiency of the evidence, but of undermining our confidence in the reliability of the result." *Id*. at 364.

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

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

In addition, counsel's explanation of "strategy" was contradicted by the record. Counsel was aware from the alleged victim's preliminary hearing testimony that the witnesses outside could have at least addressed whether the defendant kicked in the door and whether the alleged assault continued outside the home with one of the witnesses even assisting the defendant. "How could [counsel] rationally have concluded that . . . [none of the witnesses] could possibly have anything to add to [the defendant's] case? Of course the answer is he didn't–at least not entirely" since counsel did attempt to reach at least one of these witnesses shortly before trial and then conceded to the court during the trial that these witnesses could possibly contradict the alleged victim's testimony. With this recognition, it was "objectively unreasonable" for counsel "not to interview them (or at least make reasonable efforts to interview them) before coming to his ultimate choice of trial conduct."

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

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

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

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

> In the end, weighing the prosecution's case against the proposed witness testimony is at the heart of the ultimate question of the *Strickland* prejudice prong, and thus it is a mixed question of law and fact not within the Section 2254(e)(1) presumption. Even though the jury could have discredited the potential witnesses

> here based on factors such as bias and inconsistencies in their respective stories, there certainly remained a reasonable probability that the jury would not have.

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

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

Id. at ___.

***Raygoza v. Hulick*, 474 F.3d 958 (7th Cir.), *cert. denied*, 552 U.S. 1033 (2007)**. Under AEDPA, trial counsel was ineffective in murder trial for failing to adequately investigate and present an alibi defense. The defendant, a gang member, was charged with murder and a second shooting of rival gang members in a Chicago Pizzeria. A confession was suppressed because of a Sixth Amendment violation as a result of extended interrogations despite the petitioner's representation by counsel. The petitioner waived jury trial. During the ensuing bench trial, the state's eyewitness testimony consisted of three rival gang members and a passerby who did not see the shooter's face and was only able to give a general description of the perpetrators' clothing as they fled from the scene. Another witness testified that Petitioner had been at a party near the scene shortly before the murder and trial counsel did not impeach her even though she had previously told police he was not present and never said that he was until two years after his arrest. Trial counsel conducted almost no cross-examination of the state witnesses and presented one alibi witness, the Petitioner's girlfriend, but argued the defendant was at home with his mother, girlfriend, and others. The state hammered in closing on the lack of additional alibi witnesses and the trial court found the petitioner guilty. Counsel's conduct was deficient in failing to prepare and present the alibi evidence. Although counsel met with the Petitioner's mother numerous times, he never inquired and never learned that the date of the alleged crime, the Petitioner's mother had a birthday party in her home which the defendant and nine others, including relatives and non-relatives, attended. The court also noted that "Mapquest (a popular internet site)" put the party an hour's drive away from the murder scene. Available alibi evidence included testimony from people at the party; testimony of an attorney, who was the mother's employer, and her husband, that they had called the home during the party and spoken to the Petitioner, who answered the phone; and phone records and train tickets corroborating the available testimony in parts. Although trial counsel asserted his trial strategy was to attack the identification witnesses, he never attempted to interview any of them or the state's other witnesses. In addition, "[i]n a first-degree murder trial, it is almost impossible to see why a lawyer would not at least have investigated the alibi witnesses more thoroughly." *Id*. at 964. The court noted that counsel may have been influenced by his own opinion of the petitioner's guilt, but held that this "would hardly distinguish him from legions of defense counsel who undoubtedly do the same every day, yet who conscientiously investigate their clients' cases before coming to a final decision about trial strategy." *Id*. Counsel also asserted that each of the alibi witnesses could be impeached due to some alleged bias. Even if this were

true, counsel "does not seem to have considered what impact they would have cumulatively." *Id*. The court also found prejudice, "even taking into account both the AEDPA standard or review and the fact that the trial judge [who was also the post-conviction judge] subjectively believed that the array of additional alibi witnesses would not have swayed his judgment." *Id*. at 965. The state's case was "not particularly strong."

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

Id. at 965.

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

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

***Goodman v. Bertrand*, 467 F.3d 1022 (6th Cir. 2006)**. Counsel ineffective in armed robbery and a felon in possession of a firearm trial for numerous reasons. After police arrested two suspects

in a getaway car, one of them brokered a deal by implicating the petitioner. One of the robbery victims initially chose someone else in a lineup and then chose the petitioner. The second robbery victim selected someone else in a lineup. Following an initial mistrial due to a hung jury, the second initial suspect agreed to testify against the petitioner in exchange for leniency and identifying another participant, who also testified against the petitioner. In the second trial, the eyewitness, who did not identify the defendant, did not testify for the state and did not testify for the defense because counsel failed to subpoena her because counsel erroneously believed that the State would call her as a witness. Because counsel could not demonstrate that she was unavailable, the trial court excluded portions of her prior testimony from the second trial. "There is little tactical wisdom in counsel resting on his hands and assuming the government would help make the defense case for him." Counsel also opened the door on direct examination of the defendant to cross-examination about two of the petitioner's prior armed robbery convictions. The nature of the prior felonies would otherwise have been excluded because counsel had stipulated to the petitioner's status as a convicted felon. Counsel also failed to request a limiting charge to the jury after two of the participant witnesses testified that they had been threatened due to their participation in the trial and the court admitted the testimony for the limited basis of reflecting on the witnesses' credibility by demonstrating that they had something to lose as well as to gain by their testimony. Finally, counsel failed to object to the prosecution's misleading statements in questioning that one participant witness had not been given any reason to testify and false statements in argument to bolster the credibility of another participant witness. The state court decision was "contrary to" clearly established federal law because the court conflated the heightened prejudice standard of *Lockhart v. Fretwell*, 506 U.S. 364 (1992) with the *Strickland* standard by citing to *Strickland* at times but repeatedly reasoning that the petitioner failed to show that his trial was "fundamentally unfair" or "unreliable." Even if it wasn't contrary to federal law, it was an unreasonable application of *Strickland* because the state court weighed each error individually when the "cumulative effect" of the errors required reversal. Rather than evaluating each error in isolation, . . . the pattern of counsel's deficiencies must be considered in their totality." *Id*. at 1030.

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

petitioner's sister, who had told officers that she saw him with a gun a week before the murder when he had been drinking, which always led him to talk about beating someone or killing them. Counsel was aware of her statement but failed to cross-examine her at trial about the date of the confession or the date on which she had seen her brother with the gun. He also failed to object to the prosecutor's having led her by prefacing his question about the confession with the statement that he was directing her attention to the night of the murder. The state's primary witness also testified in post-conviction that he had been drinking the night of the murder (he had denied that at trial), that he hadn't seen the defendant shoot the victim, and that in fact he didn't know who had the gun. Prejudice found.

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

2005: ***Gersten v. Senkowski*, 426 F.3d 588 (2nd Cir. 2005) (*affirming* 299 F. Supp. 2d 84 E.D.N.Y. 2004)), *cert. denied*, 547 U.S. 1191 (2006)**. Counsel was ineffective in sodomy and sexual abuse of daughter case for failing to consult with or call expert medical witness and psychological expert to rebut the testimony of the state's experts. The defendant was charged with sexually abusing his daughter when she was between the ages of 10 and 13. During the trial, however, the daughter testified that the sexual abuse began when she was five years old with anal intercourse beginning when she was 7 years old and the sexual abuse occurring almost every night. The state called a medical expert that testified that physical examination revealed that the victim had suffered penetrating trauma to her hymen and tearing of the anus. The state presented a psychologist to testify about child sexual abuse accommodation syndrome, which corroborated the victim's statements. The defense presented no witnesses. Analyzing the case under the AEDPA, the court found that defense counsel's conduct was deficient. "In sexual abuse case, because of the centrality of medical testimony, the failure to consult with or call a medical expert is often indicative of ineffective assistance of counsel." *Id*. at 607. Here, counsel "essentially conceded" that the physical evidence was significant without investigating when a defense medical expert could have testified that the physical evidence was not indicative of sexual abuse, which would have cast doubt on the alleged victim's credibility. A defense psychological expert also would have testified that the prosecution's evidence of "Child Sexual Abuse Accommodation Syndrome" lacked any scientific validity for the purpose for which the prosecution used it. Counsel had no valid strategy for this course because "counsel settled on a defense theory and cut off further investigation of other theories without having first conducted any investigation whatsoever into the possibility of

challenging the prosecution's medical or psychological evidence." *Id*. at 610. Prejudice found because the state's entire case, aside from the expert evidence that should have been challenged, rested on the credibility of the alleged victim. The state court holding was an unreasonable application of Strickland.

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

****Jacobs v. Horn*, 395 F.3d 92 (3rd Cir.), *cert. denied*, 546 U.S. 962 (2005)**. Counsel was ineffective for failing to adequately investigate, prepare, and present mental health evidence in support of his diminished capacity defense during the trial. Counsel consulted with a psychiatrist, who reported orally that there was no evidence of a major mental illness. Even without expert testimony, counsel presented a heat of passion and diminished capacity defense asserting that the defendant was incapable of forming a specific intent to kill given his mental state at the time. The only evidence presented in support of this theory was the defendant's own testimony. Counsel's conduct was deficient because counsel failed to inform his expert that the state was seeking the death penalty and failed to provide the expert with any background information concerning the crimes or the defendant's history. "Counsel did not question any of [the defendant's] family members or friends regarding his childhood, background, or mental health history, or obtain any medical records demonstrating mental deficiencies." When counsel made the decision not to investigate further, counsel knew or should have known from his interactions with the defendant that "he should initiate some investigation 'of a psychological or psychiatric nature.'" He also knew that the defendant had no criminal history or history of violence and yet admitted to stabbing his girlfriend more than 200 times. "In light of all that was known or made available to counsel, . . . counsel did not exercise reasonable professional judgment in failing to investigate further. . . ." If counsel had adequately performed, the evidence would have established that the defendant has mild mental retardation, organic brain damage, and schizoid personality disorder. He was also a witness and victim of abuse and suffered from drug and alcohol addictions. The combination of these factors substantially diminished his capacity to formulate the specific intent to kill. The court also noted that this was not a case where counsel made a strategic decision not to investigate and present this evidence. "The question raised here is whether counsel was ineffective by failing to investigate and discover evidence to support the defense he pursued." The state court's decision was unreasonable because the court found that counsel made a reasonable decision not to

investigate further after receiving the psychiatrist's report while disregarding counsel's failure to provide the expert "with the necessary information to conduct a proper evaluation." This was an unreasonable application of *Strickland* because "*Strickland* mandates that counsel's decision 'must be directly assessed for reasonableness in all the circumstances.'" (quoting *Strickland v. Washington*, 466 U.S. 668, 691 (1984)).

***Draughon v. Dretke*, 427 F.3d 286 (5th Cir. 2005), *cert. denied*, 547 U.S. 1019 (2006)**. Counsel ineffective for failing to retain a ballistics expert. The defendant was fleeing the scene of an armed robbery and shot and killed a pursuing bystander. He testified that he did not intend to harm anyone and had attempted to fire over the heads of his pursuers. The State's evidence from another pursuing witness was that the victim had been shot from only about 10 steps away and a ballistics expert testified that the bullet recovered from the body had not ricocheted before striking the victim. Counsel's conduct was deficient because counsel was aware that the State's argument of intent to kill and for death was based on the witnesses' testimony about the distance of the shot and the ballistics evidence. Prejudice found because a defense expert could have presented a strong case that the fatal bullet struck the pavement in front of the victim and was fired at a much greater distance than the witness' testimony reflected. The prejudice increased in sentencing because the only way to counter the state's argument was for the defendant to testify and in cross examination the prosecutor marched the defendant through the horrible details of a prior rape conviction, which the prosecutor had not elicited from the prior victim out of deference to her. Under the AEDPA, the court found that the state court had unreasonably applied *Strickland*.

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

not remember the shooting or the prior threats. The "state habeas court was objectively unreasonable in holding otherwise" on deficient conduct and prejudice.

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

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

***Towns v. Smith*, 395 F.3d 251 (6th Cir. 2005)**. Counsel was ineffective in first degree murder case for failing to investigate a witness who had admitted to police, among others, that he had been involved in the crimes of which the defendant was ultimately convicted and that the defendant had played no part in these crimes. The witness was arrested with the murder weapon and he admitted that he drove the get-away car. He informed police in two statements that the defendant's brothers were the perpetrators. For unknown reasons, the police focused on the defendant rather than one of the brothers. When placed in a line-up, the single eyewitness to the murder tentatively identified him but only on the basis of size, which was similar to his brother. The prosecution initially intended to call the driver as a witness but then changed his mind at the last minute. Defense counsel insisted

that he have the opportunity to interview him so the driver was held overnight in the local jail for that purpose. Counsel never interviewed him but then informed the court that he would not be called as a defense witness. Counsel's conduct was objectively unreasonable because "counsel could not have evaluated or weighed the risks and benefits of calling [the driver] as a defense witness without so much as asking [him] what he would say if called." *Id*. at 260. Prejudice was found because, if counsel had investigated, the driver would have testified that the defendant had nothing to do with the crimes. Prejudice was also apparent because of the notable weaknesses in the prosecution's case. These findings were made even though the driver refused to testify in post-conviction. He spoke to counsel and his investigator, who both testified, but refused to testify without immunity, which the government inexplicably refused despite having never charged the driver. At the time of trial though, the driver was not worried about incriminating himself because his attorney had secured a favorable immunity deal.

***White v. Roper*, 416 F.3d 728 (8th Cir. 2005), *cert. denied*, 546 U.S. 1046 (2006)**. Counsel was ineffective in failing to investigate and present exculpatory testimony of two witnesses in the guilt- or innocence phase of trial. Because the state court did not address the merits of this claim, no deference was given under AEDPA. The defendant was charged, along with two other men, who did not receive a death sentence, in a drug- related murder. While there were witnesses that connected the defendant to the other men, no physical evidence connected the defendant to the crime scene. The defense was that the third man was not the defendant but a man named A.J. Constantine, who had a Jamaican accent. Two witnesses present at the time of the murder. One of them, who said that the defendant was not the killer, but who could not identify the third man, was called at trial. The other, who said that the defendant was not the killer and who also identified the killer as A.J., was never interviewed by counsel and did not testify. Another witness, who saw one of the co-defendants earlier in the evening looking for drugs and arranging to go to the victim's house, would have testified that it was A.J. with the co-defendant at the time. She was also never interviewed by counsel, who also did not attend the co-defendant's bench trial or obtain deposition transcripts from that trial until the eve of trial. Counsel's conduct was deficient because "counsel's investigation was too superficial." *Id*. at 732. "In other words, the presumption of sound trial strategy founders in this case on the rocks of ignorance, as in *Wiggins*." *Id*. (The district court had also found counsel ineffective in sentencing for failing to investigate and present mitigation, but the court did not address this issue because Missouri appealed only the guilt-or-innocence phase determination.)

***Daniels v. Woodford*, 428 F.3d 1181 (9th Cir. 2005), *cert. denied*, 550 U.S. 968 (2007)**. Analyzing this capital case under pre- AEDPA standards, the court held that the defendant was constructively denied counsel due to a conflict created by a series of events related to the appointment of counsel. The defendant had previously been convicted of a bank robbery in which he had been shot nine times by police officers rendering him a paraplegic. He negotiated a plea in exchange for being permitted to remain free for six months so he could seek medical treatment and rehabilitation. Despite the agreement, the court sentenced him to 13 years and immediately remanded him to custody. On appeal, Roth, a new attorney (who had previously represented the defendant on other matters) took over and the defendant was released on bond. While on bond, he was mistakenly arrested by an officer who believed there was a warrant for him. He sued the

state alleging mistreatment in jail and lack of appropriate medical care. After his appeal was denied, he failed to surrender to custody. When two officers went to his home, he shot and killed both officers. Following his arrest, the court appointed a Public Defender, who moved to substitute Roth because the PD had a conflict due to the prior representation on the robbery. The PD in that case that negotiated the plea and release left the PD's office to join the prosecutor's interest and the new PD assigned was unaware of the plea agreement so the judge was never informed of the deal for release. A federal habeas petition alleging IAC on the robbery was pending at the time of the murder case appointment. Nonetheless, the court refused to relieve the PD office and Roth remained in a pro bono capacity. Roth was ultimately appointed as co-counsel, but then the state moved to relieve him because he was be a witness for the state. Roth was relieved even though the defendant agreed to stipulate to the information the state sought to present through Roth and agreed to waive the conflict. After this, the PD assigned became ill and the case was reassigned to two new PD's. Ultimately, nine months into the case and only three months prior to trial, the court relieved the PD office on its motion due to the conflict. Appointed this time was a former prosecutor who had just started in private practice and had no capital case experience and a co-counsel with only a few years under his belt. From the beginning, the defendant's relationship with these lawyers "was strained." The defendant informed the court that he didn't trust his counsel and sent a letter to that effect before the trial started. The federal court held that, "[g]iven this history, it is understandable that the [defendant] would mistrust the judicial process and his counsel" and the trial court should have granted the defendant's motion to substitute counsel. In this instance, because of the "serious conflict" between the defendant and counsel, the court presumed prejudice and found error in the trial court's failure to inquire into the conflict even though the defendant informed the court three months prior to trial that he did not trust counsel and informed the court again prior to the beginning of the trial. The federal court also found that counsel was ineffective, particularly given counsel's "ineffective efforts to overcome the impasse" with his client. Counsel did not inform the court of the problems, attempt to adequately advise the defendant, or even call Roth for assistance even though the defendant trusted and confided in him. Counsel also failed to conduct a thorough investigation concerning mental health. "Even though [the defendant] refused to speak to his counsel, [counsel] still had an independent duty to investigate the facts of his case and possible mitigation evidence." Counsel retained a psychologist to do a preliminary screening of the defendant to determine whether additional evaluation was needed. He found suggestions of organic brain damage but counsel never sought further testing and did not even request funds until one week before sentencing (which was granted a month after sentencing). Counsel also did not follow up on a prior psychiatric evaluation of the defendant done after the defendant had been shot. Although the defendant had a good relationship with this expert, counsel retained a different psychiatrist, who the defendant refused to speak to. Thus, the defense was left only with the screening psychologist. In addition, counsel did not investigate or present evidence explaining the defendant's fear of returning to custody, must of which was available, regardless of the defendant's lack of cooperation, in police records and public records of the defendant's law suit against the county. "Instead of seeking further mental evaluations, [the defendant's] counsel relied on the expert witness testimony of [a] psychologist . . . , who was not qualified to testify in a capital case and whose testimony toyed with the idea that [the defendant] could be a sociopath. This alone constituted a significant error." *Id*. at 1204. Counsel's conduct was not the result of strategy "but of a communication breakdown with their client, the court's refusal to grant a continuance, a

shortage of time, and repeated problems with securing state funding." *Id*. at 1206. Prejudice found during trial and sentencing. During trial, despite overwhelming evidence of guilt, the defense argued that the defendant was not the perpetrator. Counsel did not pursue the more viable mental health defense even though the defendant was diagnosed as schizophrenic by prison psychiatrists many years before the murders. The psychiatrist retained by counsel was not provided with these records and was only able to do a cursory exam because of the defendant's lack of cooperation. If counsel had performed adequately, the evidence would have established that the defendant has post-traumatic stress disorder from his shooting, paranoid delusions, and organic brain damage. This evidence could have been used in a diminished capacity defense (which has been abolished now in California, but is still available for crimes committed prior to June 1982) or an imperfect self-defense argument, which would have defeated a first-degree murder finding. Prejudice also found in sentencing because the jury deliberated for two days, which suggests that additional mitigation may have influenced the jury. Instead, the only mitigation presented was from the screening psychologist "who was woefully unprepared and who suggested [the defendant] may be a sociopath. This alone is sufficient for a finding of prejudice." *Id*. at 1210. The defendant was also prejudiced in sentencing by the implausible trial phase defense that the defendant was not the shooter. "As a result, [the defendant] faced a jury that could only be profoundly annoyed by this ludicrous defense in the face of overwhelming evidence of culpability." *Id*.

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

***McFarland v. Yukins*. 356 F.3d 688 (6th Cir. 2004)**. Habeas relief granted in drug case due to the trial court's failure to adequately inquire into counsel's conflict, counsel's actual

conflict of interest that adversely effected his performance, and trial counsel's ineffectiveness in failing to present an adequate defense. The petitioner and her daughter were charged as co-defendants where drugs were found during a search of the home they shared. Both the defendant and her daughter were represented by the same retained attorney. On the day of the scheduled bench trial, counsel informed the court that the defendant and co-defendant had concerns about sharing the same attorney and that the evidence might well raise antagonistic defenses. The petitioner also informed the court that she believed she needed a separate attorney and that she had attempted to hire a different attorney but could not afford one. Rather than appoint a second attorney, the court severed the cases and ordered that they be tried in front of different judges. The trials proceeded at pretty much the same time. In the co-defendant's trial, the state presented evidence that the bedroom where most of the drugs were found belonged to the co-defendant. A caller to the crack hotline also made complaints about a woman with the co-defendant's name. A confidential informant also identified the co-defendant as the person discussing drugs. During the petitioner's trial, the state did not present any evidence that the co-defendant lived in the house or in the bedroom where most of the drugs were found and did not present any evidence that the crack hotline telephone complaints and the confidential informant had both identified the co-defendant. Defense counsel did not bring any of this information out in cross-examination or present any evidence on its own. In closing argument, the defense argued only that the drugs belonged to one of two men that were also initially suspected. One of the men was present at the time of the search, but did not have a key to the locked bedroom where most of the drugs were found. The other man was not present at the time of the search and was connected to the house only by some paperwork identifying him as the co-defendant's husband. Both the defendant and co-defendant were convicted. They were represented on appeal by a different attorney but still had the same attorney between them. Appellate counsel did not raise any issue concerning ineffective assistance of counsel or a conflict of interest. In state post-conviction, the petitioner asserted ineffectiveness of trial counsel and of appellate counsel for failing to argue that trial counsel was ineffective but the state court denied on procedural grounds that the petitioner did not show good cause for a failure to assert the issue on direct appeal as required in state court. The court first found that the petitioner was entitled to relief under Holloway v. Arkansas because the petitioner objected to the joint representation and the trial court did not resolve the issue. Independent of the trial court's failure to inquire, reversal was also required because counsel had an actual conflict of interest that adversely affected representation. Finally, the court also found that counsel was ineffective under the standard of *Strickland v. Washington* because counsel failed to present a strong argument in petitioner's case that the co-defendant actually possessed the drugs. Prejudice was found under *Strickland* because the trial judge in petitioner's case mentioned her misgivings about the sufficiency of the evidence connecting the petitioner to the drugs. If counsel had adequately presented the evidence pointing to the co-defendant, trial court may well have ruled differently in the case. The court found that, with respect to all three of these arguments, the petitioner would have won on direct appeal had appellate counsel adequately raised the issues. Appellate counsel was ineffective in failing to assert these issues, which were clearly stronger than the arguments made by counsel on direct appeal. The conflict issue was an obvious one, and the petitioner was entitled to automatic reversal under the rule in *Holloway*. Because appellate counsel also represented the co- defendant, however, appellate counsel also had a conflict of interest. The court found that appellate counsel's ineffectiveness was the cause for petitioner's failure to assert ineffectiveness of trial counsel on

appeal. Thus, the petitioner had established cause and prejudice for failing to assert these issues on appeal. Because the state court never ruled on the actual conflict of interest and the ineffective assistance claim under *Strickland*, the court reviewed these claims de novo. The only state court decision on the *Holloway* claim was the trial court's decision. Under the AEDPA, the court found that the trial court's actions contradicted the clearly established precedent of *Holloway v. Arkansas* because the state court confronted a set of facts that were materially indistinguishable from *Holloway* and yet arrived at a different result.

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

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

***Jie Lin v. Ashcroft*, 377 F.3d 1014 (9th Cir. 2004)**. Counsel was ineffective in INS hearing for failing to collect available testimony and documentary evidence or to otherwise prepare for the hearing, failing to appear at the hearing other than telephonically, and failing to present legal or factual framework for asylum claims in the hearing or on appeal. The alien was fourteen years old and did not speak English. Counsel never met with him and had little or no contact with him prior to the hearing. Counsel did not investigate or prepare the basics in terms of factual issues. Counsel failed to even appear at the hearing other than by telephone and offered only the alien's unprepared testimony and conclusory legal arguments. The alien exercised his statutory right to counsel at no expense to the government. Thus, the claim of ineffective assistance of counsel falls under the Fifth Amendment right to due process. Counsel's actions in this case were deficient under the "low bar" of the *Strickland* standard. *Id*. at 1027. Prejudice found because the alien did have several plausible claims for refugee status. While counsel presented some of the factual basis for these claims

> the presentation of a few bare facts, without documentation and without the factual context that gives them meaning or the analytical context that gives them their

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> power, does not suffice to place the critical issues squarely before the tribunal that must consider them.

Id. at 1029.

2003: ***Anderson v. Johnson*, 338 F.3d 382 (5th Cir.), *denying rehearing and rehearing en banc*, 89 Fed.Appx. 905 (2003)**. Counsel was ineffective in burglary case for failing to interview and present the testimony of an eyewitness that would have testified in the defendant's favor. During the crime, the victim, her young daughter, and the victim's boyfriend observed the suspect. The victim was unable to identify the suspect until three years later when she heard the defendant talking and then recognized him. She and her daughter then identified him in photo line-ups. The first trial ended with a hung jury. During the second trial, defense counsel cross-examined these witnesses and pointed out that the victim's boyfriend was not called to testify, but did not interview the boyfriend or present him as a defense witness. In state post-conviction, the defendant argued that counsel was ineffective and specifically stated that the boyfriend would have testified that the defendant was not the suspect. During federal habeas proceedings, the defendant presented the same claim and also offered, for the first time, an affidavit from the victim's boyfriend. The District Court granted relief. The Fifth Circuit first held that the claim was properly exhausted in state court, despite the defendant's failure to present the affidavit there, because the defendant had plead all of the facts in detail. The submission of the affidavit in federal court only supplemented the record but did not change the facts or legal arguments that were made in state court. The court then held that counsel's conduct was deficient because counsel, who was disbarred after trial, conducted no investigation and instead relied only on the state's discovery, which did not reveal that the victim's boyfriend affirmatively stated that the defendant was not the perpetrator. Since there were only two adult eyewitnesses, a reasonable attorney would have made some effort to investigate. The court also found that counsel's failure to investigate was not a reasoned decision, but was "likely the result of either indolence or incompetence." *Id*. at 393. Counsel's failure also could not be excused based on a belief that the witness would not have been credible. "In a claim grounded in failure to interview, the 'quality' and potential persuasiveness of the eyewitness is largely immaterial." *Id*. Prejudice was found because the state's case was grounded only on the identification of the victim and her daughter made three years after the crime. There was no other evidence connecting the defendant to the crimes. The court also considered the fact that the first jury to hear the same evidence hung. Finally, the court found, applying the AEDPA standards, that the state court's ultimate legal conclusion was an objectively unreasonable application of *Strickland*.

***U.S. ex rel. Hampton v. Leibach*, 347 F.3d 219 (7th Cir. 2003)**. Counsel was ineffective in sexual assault and robbery case for failing to investigate and interview exculpatory eyewitnesses and for making promises in his opening statement to the jury that he did not keep. The crimes were committed by gang members and occurred at a rhythm and blues concert near the stage. The defendant was tried with two co-defendants but a separate jury for each. In his opening statement, counsel promised that the defendant would testify that he had witnessed the attacks but was not involved and promised that the evidence would show that the defendant was not a gang member. During trial, the three victims and a security guard identified the defendant, but the evidence was shaky. The defendant's counsel presented only one witness concerning an identification of the

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

***Alcala v. Woodford*, 334 F.3d 862 (9th Cir. 2003)**. Counsel ineffective in capital case for failing to adequately present alibi evidence. The underlying crime involved the disappearance of a twelve-year old girl, whose body was found several weeks later 50 miles away. The evidence connecting the defendant was only circumstantial identifications that put him in the area where the victim disappeared taking pictures of people on the beach. The girl with the victim on the afternoon of her disappearance did not identify the defendant as the man that took their pictures and an adult that was present then could not identify the defendant in photo lineups but then positively identified him seven years later during trial. The only evidence directly connecting the defendant to the crime was a jailhouse informant and a discredited forest service worker, who was interviewed twelve times prior to trial and initially provided nothing but gradually progressed up to placing the defendant with

the body. During the second trial, following reversal, this witness denied even testifying in the first trial. During trial, the defense presented a number of alibi witnesses to establish that the defendant had been at a theme park seeking freelance photography work at the time when the one eyewitness placed him taking pictures of the victim shortly before her disappearance. While the witnesses confirmed that he had been at the park, none of them was able to give an actual date or time for the alibi. In federal court, the defendant presented testimony from another park employee, who had actual business records and her own personal calendar, who could testify that the defendant was at the park during the pertinent time and that it was, therefore, impossible for him to have committed the crime. The District Court granted relief and the state appealed. Applying the law prior to the AEDPA (because the federal habeas petition was filed in 1994), the court found counsel ineffective for failing to present the alibi witness and records that could establish the date and time of the alibi. Counsel's conduct was deficient because this was by far the strongest alibi evidence available, counsel had listed this witness and subpoenaed her as a trial witness prior to trial and could not remember why she was not called, and the witness had told a defense investigator that her personal calendar would support the alibi. The court rejected the state's argument that counsel made a strategic decision not to present the witness "because it would have us find a strategic basis . . . in the absence of any evidence" and because the court would not "assume facts not in the record in order to manufacture a reasonable strategic decision." *Id*. at ___. Moreover, even if counsel had a strategic reason not to call this witness, it would have been an unreasonable strategy. Here, "counsel made a sound strategic choice to present an alibi defense," but did not adequately present the evidence supporting the chosen defense theory. *Id*. at ___. Prejudice was found because the state's case "was far from compelling" and was entirely circumstantial. Counsel's failure at trial also harmed the credibility of the alibi evidence that was presented because trial counsel told the jurors that they would establish an alibi and then "utterly failed to do so, harming the credibility of [the] entire defense." *Id*. at ___.

2. U.S. District Court Cases

2019: ***Hughes v. Vannoy*, 2019 WL 5684501 (M.D. La. Nov. 11, 2019) (*adopting the MJ's Report and Recommendation*, 2019 WL 5686323 (M.D. La. Feb. 5, 2019)).** In case where petitioner was convicted of second degree murder for a killing petitioner maintained was accidental, trial counsel was ineffective in failing to conduct an investigation regarding the statements of an alleged eyewitness, Sandra Allen, and failing to interview Sandra prior to trial. The victim in this case was the live-in boyfriend of petitioner's daughter, Amy. Petitioner testified at trial that the shooting had been unintentional. He recounted that the gun accidently went off when the victim grabbed the barrel during a struggle. Amy, in contrast, testified that her boyfriend had his hands up and was backing away from petitioner when petitioner pulled out his gun and shot the victim from one to two feet away. Sandra's trial testimony supported Amy's version of events. Sandra testified that she heard someone call for help, exited her home and then witnessed two men arguing and pushing each other. One man backed away with his hands up and she then heard a gunshot. After the gunshot, the man who had been backing away was on the ground and the other man left in a truck. Other witnesses, however, provided testimony that was consistent with petitioner's account of what had happened. An expert stated that the victim had a contact wound indicating that the shot was fired so close to the body that the barrel made an impression on the skin and the tissue in the area. Amy's sister testified that on the night of the shooting Amy told her that she

had not witnessed the actual shooting. Following his conviction, petitioner alleged that trial counsel had been ineffective in failing to investigate Sandra's statements and to interview her prior to trial. Shortly after the incident, Sandra had provided a written statement. In that statement, she said that she had been sitting in her front room when she heard someone call for help. She then heard a gunshot at which point she exited her house and observed two people arguing. A red truck thereafter left the scene. Approximately one week before trial, defense counsel was notified that Sandra would testify that she had seen the shooting and that the victim had had his hands in the air and was surrendering when he was shot. Sandra explained at trial that her written statement differed from her trial testimony because she had "transposed" the sequence of events. In post-conviction proceedings, defense counsel conceded that he had not interviewed Sandra and he did not know that she had a roommate, Lee Allen. Defense counsel may have been aware that Sandra had given a television interview during which she stated, consistent with her written statement, that she had exited her home after hearing the gunshot, but he made no effort to secure a copy of the interview prior to trial. Lee Allen would have testified that he and Sandra were sitting in their home when they heard a gunshot. Sandra then exited the home and called police. Defense counsel explained that he had not interviewed Sandra because he did not believe that she would be able to deviate from her written statement. Defense counsel's failure to interview Sandra constituted deficient performance. Prejudice is found given that Sandra was the sole alleged disinterested witness. Use of her television interview and testimony from Lee Allen would have "greatly diminished Sandra Lee's credibility, leaving only the inconsistent testimony Amy Hughes and the physical evidence of the contact wound which corroborates the petitioner's version of events." Additionally, had defense counsel interviewed Sandra and roommate Lee Allen, Sandra may have testified consistently with her written statement and television interview. But even if she did not, defense counsel would have been in a position to mitigate the damage from her testimony had he conducted a reasonable investigation. The state court's denial of relief, which did not specifically address this claim, was objectively unreasonable.

***Rogers v. Gittere*, 2019 WL 4655894 (D. Az. Sept. 23, 2019), *appeal pending*, 19-17158 (9th Cir.) (1981 trial).** In triple homicide death penalty case from Nevada on remand from the Ninth Circuit after it affirmed the grant of sentencing relief but reversed the procedurally-based denial of some guilt-related claims, habeas relief is granted on claim that trial counsel was ineffective with respect to their investigation and presentation of petitioner's defense of not guilty by reason of insanity (NGRI). Although the claim was deemed procedurally defaulted, that default was overcome by the ineffective assistance of post-conviction counsel. Trial counsel in this case settled on an NGRI defense immediately upon their appointment. In opening statement, however, trial counsel neglected to explain to the jury what was needed to show NGRI and how the evidence would establish it. Although trial counsel referenced anticipated evidence about petitioner's mental state, e.g., that he was "paranoid" and "irrational," this was not tied to the legal standard for NGRI. At the close of the statement, trial counsel told the jury that petitioner had not acted with intent, malice, or premeditation, suggesting that negating those elements had been the purpose of her comments about petitioner's mental state. A *Strickland* expert opined that the opening statement failed to adhere to the prevailing standard of care in Nevada in 1981. The district court agreed, ruling that "trial counsel's performance in failing to explain the NGRI defense to the jury in her opening statement, fell below an objective standard of reasonableness." Turning to the actual presentation of the defense, although petitioner had been evaluated by numerous mental

health professionals at Lake's Crossing Center for the Mentally Disordered Offender ("Lake's Crossing"), the institution where petitioner was held and where his competence to stand trial was assessed, trial counsel asked only one expert to opine on petitioner's sanity at the time of the offense and this request came less than two weeks prior to trial. The expert, Dr. Pauly, opined that petitioner was schizophrenic and, at the time of the crimes, was incapable of knowing the nature and quality of his acts or that they were wrong. He was subjected to damaging cross-examination, however, because he had not been properly prepared for his testimony. Trial counsel never met with Dr. Pauly in person, never discussed with him the materials he relied on in reaching his opinions, never discussed with him reports from Lake's Crossing psychologist Gutride that contradicted his conclusions, never provided him with the Lake's Crossing daily progress notes, and never discussed with him how petitioner's violent behavior during his adolescence was related to his schizophrenia. Trial counsel also presented two other experts – Drs. Richnak and Rich – who had been appointed by the trial court to evaluate petitioner's competency to stand trial. They were not retained to opine on petitioner's sanity at the time of the offenses and were not provided with the materials they would need to do so. Instead, trial counsel used them only to testify that they had diagnosed petitioner as suffering from schizophrenia. With no objection, however, they were asked on cross-examination about petitioner's sanity at the time of the crimes, to which they expressed their beliefs that petitioner knew right from wrong at the time he was evaluated but neither was able to offer an opinion about petitioner's sanity at the time of the capital crimes. The district court found that "trial counsel performed unreasonably in not adequately preparing Dr. Pauly, Dr. Richnak and Dr. Rich to testify at trial." According to the district court, the presentation of Drs. Richnak and Rich "was mostly pointless, and worse, it was damaging to [petitioner's] NGRI defense . . .." Notably, there was an expert not utilized by the defense who had been an obvious choice to present at trial – Dr. Molde. Dr. Molde had been appointed by the court to assess petitioner's competence to stand trial as well as his mental state at the time of the crimes. Dr. Molde had evaluated petitioner five times and concluded he was schizophrenic. Yet trial counsel never spoke with him. The failure to do so "was especially egregious given that Dr. Molde had recently testified in support of an insanity defense" that was presented by the same public defenders office that trial counsel worked for. Dr. Molde's testimony at the federal evidentiary hearing made plain "that he would have been an effective expert witness in support of [petitoner's] NGRI defense." Regarding petitioner's mental state at the time of the offense, Dr. Molde opined:

> I believe that he did not know right from wrong or know the nature and quality of his act, that he was not competent at the time of the crime to know those things due to his schizophrenic disorder which I believe was quite active and intense and interfered with that ability.

In addition, Dr. Molde challenged the findings of the expert called by the state, Dr. Gutride. Dr. Molde, for example, disputed Dr. Gutride's diagnosis of ASPD, stating that it "had nothing to do with this case," and expressing the belief that schizophrenia and ASPD are mutually exclusive diagnoses. Trial counsel's failure to challenge the testimony of Dr. Gutride through cross-examination and with the experts that were utilized at trial was unreasonable. "The Court finds that there is a reasonable probability that, but for counsel's objectively unreasonable investigation and presentation of [petitioner's] NGRI defense, [petitioner] would have been found not guilty by reason of insanity."

**Capital Case*

***Dunn v. Smith*, 430 F.Supp.3d 568 (E.D. Wisc. 2019), *appeal pending*, 20-1168 (7th Cir.).** In felony-murder case, trial counsel was ineffective in failing to conduct an adequate investigation and present independent evidence on the medical and scientific issues relating to the victim's death. The victim's body was found in the early morning hours of May 10, 2011, lying face up on a concrete patio behind Peg & Lou's Bar. There was a laceration to the back of his head and a small pool of blood under it. Fresh blood was flowing from his head and there was dried blood coming from his mouth and running horizontally to the ground on both sides of his face. His blood/alcohol concentration was later reported as .298. Although the victim had multiple injuries to his face and head, the cause of death was by traumatic injuries to the brain resulting from a massive skull fracture. Petitioner and co-defendant Crochet were arrested after it was reported that they had been involved in an altercation with the victim in the parking lot of the bar during the night of May 9, 2011. After initially denying striking the victim, petitioner later admitted to a police investigator that he had slapped the victim in the face when the victim approached Crochet in a threatening manner. According to petitioner, the victim fell when he was slapped and his head bounced off the pavement. Believing that the victim had been seriously injured, petitioner notified the bartender. At trial, the bartender testified that the victim was sitting up on the ground when the bartender went to the parking lot. There were no physical marks on him. The bartender helped the victim to the back area of the bar where he left the victim seated on the grass leaning against a patio chair. Petitioner and Crochet were charged with, inter alia, felony murder with the predicate crime being misdemeanor battery. Although trial counsel initially focused on a self-defense theory, he later recognized inconsistencies in the State's theory of the case: while the medical examiner opined that the victim died immediately from the severe trauma he sustained, the bartender described speaking with the victim following the altercation with petitioner and helping him walk to the back patio. Trial counsel conveyed his impressions about the contradictions to the prosecutor and unsuccessfully suggested a settlement of the case. In fact, the medical examiner had <u>not</u> stated in her report that the victim would have died immediately from the severe head trauma he sustained. Trial counsel did not speak with the medical examiner prior to her trial testimony where she told the jury that the victim's brain injuries would not have been instantaneous and would not necessarily have prevented the victim from communicating or moving after sustaining them. Although trial counsel had consulted with a forensic pathologist pretrial who believed, based on his review of the autopsy report, that the victim's death would have been instantaneous, trial counsel did not call the expert and so the medical examiner's testimony went unrebutted. Trial counsel had also failed to follow-up when the prosecutor revealed pretrial that the co-defendant's experts – a forensic pathologist and a blood spatter expert -- were expected to opine that the victim had stood up in the area where his body was found and then fallen down and hit his head. Trial counsel apparently dismissed the potential utility of these experts to his defense given that he already had the bartender's account and the medical examiner. After petitioner was tried and convicted, the co-defendant's experts issued their final reports supporting the theory that the victim's fatal injury occurred where his body was found. The State later dismissed the felony murder charge against the co-defendant and allowed him to plead guilty to aiding and abetting a felon and misdemeanor battery. Trial counsel's representation was challenged by petitioner in state post-conviction proceedings where he presented expert testimony supporting the theory that the victim's death was not caused by the blow in the parking lot. The medical examiner defended her prior opinion but conceded that there was nothing in her autopsy report that was inconsistent with the conclusion that the victim sustained the laceration and skull fracture on the concrete patio where his body was discovered. The trial court denied relief based on lack of prejudice. The state

appellate court, however, ruled that there was no deficient performance. It accepted trial counsel's explanation that he strategically preferred getting his theory in through a State witness rather than a defense expert and that he did not believe the expert he had consulted contradicted the medical examiner in any way. In the federal habeas proceeding, the district court concluded that trial counsel's explanation for why he did not call his own expert was "plainly unreasonable," pointing out that his reasoning made no sense "if the State's expert is not going to provide the needed testimony upon which the defense is based." And his decision to forego calling his own expert "was made without the kind of investigation that *Strickland* requires." Trial counsel's objectively unreasonable performance was not limited to his failure to interview the medical examiner and to call his own witness. It also extended to his failure "to seek an adjournment based on the State's disclosure of the exculpatory findings of [the co-defendant's] experts or adequately investigate those findings." Although trial counsel attempted to defend this failure on the ground that petitioner wanted to proceed to trial, the flaw in this excuse was counsel's failure to discuss the new evidence with petitioner. Presumably, petitioner wanted to go to trial with a *complete* defense. The state appellate court's determination that trial counsel performance was adequate was an unreasonable application of *Strickland*. Addressing prejudice *de novo*, the district court acknowledged evidence in the record suggesting that there may have been an additional attack on the victim in the area where his body was discovered, including testimony potentially implicating the co-defendant. This evidence did not, however, implicate petitioner. "More importantly, the suggestion that [the victim] was later 'finished off' is inconsistent with the State's theory that [petitioner] caused his death earlier in the parking lot with his single blow." Looking to the expert evidence presented in the state post-conviction proceeding, the district court finds that confidence in the outcome of the trial is substantially undermined and prejudice is established.

***Fontenot v. Allbaugh*, 402 F.Supp.3d 1110 (E.D. Okla. 2019), *appeal pending*, 19-7045 (10th Cir.).** In procedurally complicated murder case, habeas relief is granted to former Oklahoma death row inmate on numerous claims, including ineffective assistance of counsel for failing to adequately investigate the case and present viable evidence supporting petitioner's innocence. Petitioner was convicted of the robbery, kidnapping, and murder of a convenience store clerk. Some six months after her disappearance, co-defendant Ward was interviewed by the police. He confessed and implicated petitioner as being involved in the crimes against the victim. Petitioner was then arrested and also confessed, although he later recanted the confession which failed to coincide with the prosecution's evidence of the victim's cause of death, the location of her remains, and the details of how petitioner supposedly killed her. After multiple trials, with petitioner being sentenced to death twice, he ultimately received a sentence of life without possibility of parole. Counsel is found to have performed deficiently for: (1) failing to introduce sworn statements by Ward exculpating petitioner of the crime; (2) neglecting to investigate evidence showing that the victim was being stalked by someone familiar to her; and (3) failing to investigate witnesses who were at the convenience store in the time before and after the victim's disappearance. As for Ward's statement, trial counsel conceded he was ineffective in failing to seek its introduction during petitioner's retrial. Prejudice is found for this omission when considered cumulatively with *Brady* material that included alibi testimony. Regarding the alleged stalker,

> There was no strategic or tactical reason not to present [available] evidence showing that [the victim] not only received obscene phone calls and that someone

> was watching and harassing her over a longer period of time prior to her disappearance, but also demonstrating her fear of this individual to the degree she inquired about buying a gun. Not only should [the witness with this information] have testified at trial, but defense counsel should have pursued such leads further. The failure to do so resulted in ineffective assistance of counsel for failing to call [the witness] and for not developing such evidence.

Again, it is the totality of the evidence not presented at trial, including about the existence of alternative suspects having motives to harm the victim, that establishes prejudice. Finally, had the defense utilized the information gleaned from the convenience store's register tape, witnesses would have narrowed down the window of the victim's disappearance lending credence to Ward's sworn statement of having kidnapping the victim with a man named Ashley. In the alternative, defense counsel could have used the information presented by one of the convenience store witnesses about seeing a man behind the counter with the victim, along with the account by several witnesses about a truck in the convenience store parking lot at least thirty minutes before the victim's abduction, to support a third party culpability theory. "This evidence considered cumulatively with the records impermissibly withheld by the State presents a viable defense that the man harassing [the victim] for months and weeks leading up to [her last sighting], was involved in her disappearance." The register tape could also have been used to call into question the thoroughness of the police's investigation. "But for defense counsel's failure to challenge the evidence the State presented, Mr. Fontenot would not have been convicted of these crimes. The failure to investigate this evidence deprived Mr. Fontenot of his Sixth Amendment right to effective assistance of counsel."

***Gable v. Williams*, 2019 WL 1756468 (D. Ore. April 18, 2019), *appeal and cross-appeal pending,* 19-35427 & 19-35436 (9th Cir.).** Granting habeas relief on claim that petitioner's constitutional rights were violated by the exclusion of evidence concerning a third party's confession to the murder petitioner was charged with, as well as on a claim that trial counsel was ineffective in failing to present appropriate legal support, including citation to federal law, in support of the admission of evidence of third party guilt. (The substantive exclusion of evidence claim was raised in state court solely as a state law violation.) Although the claims were procedurally defaulted, petitioner satisfied the *Schlup* actual innocence test. Multiple witnesses recanted with persuasive explanations for why they had lied, including coercive interrogation tactics, and expert witnesses testified about how the unethical and flawed polygraph testing procedures and the improper and coercive interrogations combined to obtain false testimony from the examinees. In addition, there was the third party confession that had indicia of reliability. The showing of innocence overcame the default of both the substantive exclusion of evidence claim and the ineffective assistance of counsel claim. Regarding the defaulted trial ineffective assistance of counsel claim, the district court ruled in the alternative that *Martinez* was satisfied to overcome the default. In light of the prior merits resolution of the exclusion of evidence claim, it was easily found that trial counsel's failure to assert petitioner's rights under *Chambers v. Mississippi* stated a substantial claim. Petitioner also demonstrated a reasonable probability that, absent the deficient performance of his post-conviction counsel, the result of the post-conviction proceedings would have been different. Therefore, the procedural bar to the trial ineffectiveness claim is overcome under *Martinez*.

**Capital Case*

2018: ****Jones v. Ryan,* 327 F. Supp. 3d 1157 (D. Az. 2018), *affirming in part, vacating in part and remanding,* 943 F.3d 1211 (9th Cir. 2019) (1995 trial).** Trial counsel was ineffective in failing to investigate and present evidence to counter the prosecution's theory of the case and post-conviction counsel's failure to raise the related claims provided cause under *Martinez* to excuse the procedural default of the trial IAC claims. Petitioner was convicted in Arizona state court of engaging in an act of sexual intercourse with a four-year old victim, causing physical injury to her by striking her abdominal area and causing a rupture to her small intestine under circumstances likely to produce death or serious bodily injury, causing physical injury to her by bruising her face and ear and causing a laceration to her head, causing her to be placed in a situation where her health was endangered under circumstances likely to produce death or serious physical injury, and felony murder. The penalty phase judge found the existence of two aggravating factors: the murder was especially cruel and the victim was under the age of 15, and found no mitigating factors sufficiently substantial to call for leniency. The judge sentenced petitioner to death. The trial IAC claims at issue were not raised in state post-conviction proceedings and were therefore considered procedurally defaulted. The district court had initially denied relief on the claims because of the defaults but the Ninth Circuit post-*Martinez* remanded for reconsideration of whether there was cause to excuse the procedurally default, stating that they were "substantial." Petitioner alleged that his trial counsel was ineffective for failing to adequately investigate the police work, medical evidence, and timeline between the victim's fatal injury and her death. The district court found that petitioner's inexperienced trial counsel was aware that the timing in which the victim sustained her injuries was a critical part of the state's case, because the state's theory was that the victim sustained her fatal injuries during a time when she was alone in a van with petitioner, and counsel also was aware that witnesses had described incidents in the few days before the victim's death during which she may have been injured by third parties, but counsel made no effort to investigate the timing of the victim's injuries. Evidence obtained, developed, and presented during federal habeas proceedings demonstrated that many of the victim's injuries were older than the time period within which the state argued she had been harmed, that her fatal injuries certainly predated that period, and that many of the injuries observed at autopsy may have arisen during the dying process or after her death while she was being examined. Counsel had access to autopsy slides but did not provide them to the forensic pathologist he consulted. Counsel's performance was deficient. His failure to investigate was not a strategic decision; he admitted as much in habeas proceedings and stated he "possibly just assumed Petitioner was guilty based on the State's version of the case." Counsel not only did not consult with his own experts about the timeline, but he also failed to cross-examine the state's experts and witnesses about the injury timeline. 327 F. Supp. 3d at 1205. The district court further found that trial counsel had information that the victim may not have been assaulted and raped by petitioner in his van, and knew that the state was going to present an interpretation of the blood evidence at trial. Therefore it was reasonably necessary for him to investigate the implications of the blood evidence presented at trial. Counsel's failure to do this was objectively unreasonable under prevailing professional norms. In addition, trial counsel did not ask for funding for investigators and experts, even believing that additional funding would have been granted had it been requested. Trial counsel's deficient performance was prejudicial at the guilt phase; the new evidence presented in habeas proceedings would have presented an extremely different evidentiary picture from what the jury heard at trial, both with regard to when the victim sustained her injuries and with regard to who inflicted them. Much of the evidence presented at trial linking the victim's bruises to the day before she died, when she was alone with

petitioner, was scientifically unsupported and untrue. "[T]he evidentiary hearing in this case has demonstrated that the police investigation was colored by a rush to judgment and lack of due diligence and thorough professional investigation; effective counsel would have brought this to the jury's attention, casting further doubt on the strength of the State's case." 327 F. Supp. 3d at 1208-09. The district court found that petitioner had established prejudice overall and cumulatively even though he could not prove deficient performance and/or prejudice as to some of his IAC subclaims. Post-conviction counsel's performance was also ineffective. Counsel lacked the experience to satisfy Arizona's requirements for appointment of capital post-conviction counsel. Counsel requested funding for investigators and experts through the wrong mechanisms, even though the court advised him of the proper mechanism. His "decision to forego a properly grounded request for an investigator or for experts to assist him with the investigation of the medical time of injury evidence and the bloodstain evidence was based on either ignorance of the requirements of the appropriate funding state or on counsel's mistaken assumption of the Arizona courts' unwillingness to fund experts, and was not a reasonable strategic decision." 327 F. Supp. 3d at 1216 (citing *Hinton v. Alabama*). Post-conviction counsel interviewed only one person, after he prepared the final post-conviction petition, and otherwise made no effort to identify or investigate any potential claim that relied on the establishment of facts outside the record. This was true even though counsel questioned whether trial counsel had fully investigated petitioner's case. Post-conviction deficient performance was prejudicial as the trial counsel guilt phase IAC claim was meritorious.

2017: ****Noguera v. Davis*, 290 F. Supp. 3d 974 (C.D. Cal. 2017), *appeal and cross-appeal pending*, 17-99010 & 18-9000 (9th Cir.).** Petitioner was convicted by a California state jury of the first-degree capital murder of his girlfriend's mother (the girlfriend, a minor at the time of the homicide, was convicted of conspiracy to commit murder and first degree murder and sentenced to the California Youth Authority). The financial gain special circumstance was found true. The jury sentenced petitioner to death. The state court affirmed on appeal and summarily denied habeas corpus relief. After exhausting the claim in state court, petitioner raised a claim in 2254 proceedings before the district court that his counsel was burdened by unconstitutional, undisclosed, and unwaived conflict of interest. Counsel had represented petitioner's mother in acrimonious divorce proceedings during which he became privy to turmoil in petitioner's household, including physical abuse and violence, which the mother said was negatively affecting the children. Petitioner's mother then retained counsel to represent petitioner in his capital trial proceedings. Counsel had an ongoing duty of loyalty to petitioner's mother, and did not present evidence of petitioner's home life at petitioner's trial as a result. In addition, petitioner's mother was paying counsel's legal fees to represent petitioner, she still felt as though he was first obligated to her, and was outspoken in her control over petitioner's defense. She advised counsel that he was not to use the information he learned about the family during the divorce proceedings in the defense cause, could not question her about her behavior contributing to petitioner's mental health problems, and could not present evidence of the violence and abuse in the household. Even though petitioner told his mother he thought he was crazy, she would not permit him to have mental health examinations, and she told both counsel and petitioner that they had to go with an innocence defense. Counsel also had never tried a capital case. Counsel did not explain the legal conflict to petitioner or obtain a waiver of the conflict; he spent the majority of his time on guilt phase issues, did no mental health or social history investigation; and was a potential witness at the penalty phase as to mitigating social history information. The federal district court held that the state court's denial of this claim was an

unreasonable application of clearly established federal law or an unreasonable determination of the facts under 2254(d). The evidence presented to the state court (including declarations from counsel and from petitioner's mother) indicated that trial counsel was influenced in his basic decision-making by the interests of the person paying him, petitioner's mother. This was an actual conflict of interest – it clearly made out a prima facie case – that the state court was required to investigate further. As a result, because the state court denial was not entitled to AEDPA deference, the federal court proceeded to evaluate the conflict claim de novo. Clearly established federal law holds that an actual conflict of interest arises where an attorney represents more than one client with divergent interests. Here, counsel could not simultaneously act in the best interest of both clients. The conflict adversely affected counsel's performance as petitioner's capital defense attorney. Counsel did not attend a pretrial conference at which the case could have settled on a penalty less than death, and the only explanation for this failure was that petitioner's mother did not want him to plead guilty because then everyone would say he committed the homicide and that would make her look like a bad mother. Also, although there was overwhelming evidence of petitioner's participation in the murder, and counsel had personal knowledge of petitioner's family and his mental health problems, counsel failed to investigate and present evidence to undermine the prosecution's theory of the case as death-eligible, including that petitioner was devastated when the victim forced his girlfriend to abort their baby, that petitioner suffered from brain damage and mental illness, and that he was under the influence of substances when he committed the homicide. Instead, counsel presented "a doomed innocence defense accompanied by a coerced alibi witness." Petitioner also was adversely affected by counsel's failure to investigate and present a thorough mitigation case. The district court granted petitioner guilt and penalty relief. The court granted relief on claims that trial counsel was ineffective because counsel (1) failed to investigate and present available mental state defenses; (2) failed to investigate any motive for the homicide other than the prosecution's; (3) failed to present evidence that the homicide was caused by reasons that could not have resulted in a finding of murder with a special circumstance; (4) failed to investigate and rebut false prosecution assertions regarding the victim, petitioner's girlfriend, and the homicide; (5) failed to investigate and present mitigating evidence at the penalty phase; (6) failed to participate in the prosecutor's pretrial penalty evaluation process; (7) IAC of appellate counsel for failing to challenge counsel's failure to participate in the pre-charging conference; and (8) cumulative prejudice; because they were integrally related to the conflict claim. The court denied relief on several other conflict/ineffective assistance of counsel claims. (1) Claim that there was a conflict because trial counsel's paralegal became romantically interested in him, brought petitioner mind-altering drugs in jail, became personally involved with his family, when he rejected her, she vowed to damage his defense. Court found no prejudice even if the "shocking" allegations were true. There is insufficient evidence counsel knew the paralegal was bringing the client drugs and did not stop this. (2) Claim of ineffectiveness for failure to investigate and present evidence that petitioner was incompetent during crucial proceedings. (Petitioner fails to provide evidence that he was incompetent.) (3) Claim of IAC for failure to object to prosecutor's misconduct at penalty phase closing argument (there was no reversible misconduct). (4) Claim of IAC for failure to seek recusal of the trial judge based on partiality (state court not unreasonable to determine that none of the judge's remarks biased the jury). (5) Claim of IAC for failing to investigate and present evidence of psychiatric problems to impeach prosecution's witness (no prejudice shown). (6) Claim of IAC for failure to object on multiple grounds.

**Capital Case*

2016: ***Harrison v. Tegels*, 216 F.Supp.3d 956 (W.D. Wis. 2016).** Trial counsel was ineffective for failing to identify inconsistencies in the alleged victim's statements and for failing to object to evidence of defendant's prior bad acts in this repeated sexual assault case. Defendant was accused of sexually assaulting his then stepdaughter "D.M.K." The state relied entirely on a recorded interview that D.M.K. gave to the police and the trial testimony of her mother, Kimberly, who recounted what D.M.K. allegedly told her about the assaults. At trial, counsel's theory of the case was that Kimberly persuaded her daughter to fabricate the allegations. During opening statements, counsel promised the jury that he would reveal many inconsistencies in D.M.K's and Kimberly's allegations. However, counsel never did. Counsel failed to present evidence of numerous and significant inconsistent statements that both D.M.K. and Kimberly made about the alleged assaults. Trial counsel was deficient for promising, and then failing, to identify inconsistencies in D.M.K.'s statements. Since D.M.K's statements were the only evidence of the sexual assault, the "credibility of the witnesses was the key issue for the jury to consider in evaluating the state's case." *Id*. at 966. Counsel failed to present evidence of significant inconsistencies with respect to the assaults such as the type of conduct involved, the frequency of the assaults, their location, and what defendant allegedly said to D.M.K during the assaults. Some of the differences were fundamental and dramatic such as D.M.K's initial statement that she was assaulted hundreds of times, and then her revised statement that she was assaulted between one and five times. Counsel's failure to uphold his promise to show the inconsistencies in the witness's statements, constituted deficient performance. Counsel also failed to object to D.M.K's statement at trial that defendant often hid from the police around the time that the alleged assault occurred even though defendant was hiding for reasons unrelated to the case. The statement was so clearly irrelevant to trial that "there is no excuse for counsel's failure to object." *Id.* at 967. Counsel's errors were cumulatively prejudicial under *Crisp v. Duckworth*, 743 F.2d 580 (7th Cir. 1984) because "the case the jury heard was very different from the case that it should have heard" and defendant's trial "did not reliably test whether he did as he was accused." *Id*. at 974.

***Gorby v. Wetzel*, 210 F.Supp.3d 725 (W.D. Pa. 2016), *appeal dismissed*, 2017 WL 5185335 (3rd Cir. April 25, 2017).** Trial counsel was ineffective during the guilt-innocence phase because counsel failed to conduct an investigation from which he could have presented evidence of defendant's diminished capacity to compliment his voluntary intoxication defense in this capital murder and robbery case. Defendant was convicted in 1986 of murdering Drayton Sphar in Pennsylvania. At trial, counsel argued that defendant did not commit the murder. The judge gave the jury instructions as to murder and the defense of voluntary intoxication. Counsel did not present evidence to support the latter. Trial counsel was deficient for not raising the defense of diminished capacity because defendant's cognitive and mental impairments were so severe and noticeable that even rudimentary investigation would have revealed sufficient information to spur a deeper investigation into the diminished capacity defense. Counsel conducted a limited investigation of defendant's mental health and social history, which consisted of talking to defendant, his mother, and his step-father. Counsel did not cite a tactical or strategic reason for not investigating a diminished capacity defense. Counsel testified that he knew defendant performed poorly on standardized tests, received low scores on intelligence and achievement tests, did poorly in school and that defendant was hospitalized for head trauma. With this limited information, "it is difficult to comprehend why [counsel] did not obtain educational records, medical records, or consult a

mental health professional during his investigation and preparation for trial, especially when counsel knew this was a capital case." *Id*. at 741. The extent of defendant's mental illness and drug/alcohol abuse was readily discerned by mental health professionals during PCRA proceedings. Furthermore, counsel was aware of the plethora of information that defendant was likely intoxicated during the crime, and thus could not form the specific intent to kill. Counsel did not present this evidence, despite asking the judge to instruct the jury on the voluntary intoxication defense. Counsel only argued that defendant did not commit the crime. As a result, counsel's representation was "blatantly deficient at least with respect to his failure to investigate a diminished capacity defense." *Id.* at 742. Counsel's deficient performance was prejudicial because the investigation and presentation of the diminished capacity defense would have negated the state's case for specific intent, and that there is a reasonable probability that a jury, after considering the evidence related to the diminished capacity defense, would have reached a different result.

***Fenn v. United States*, 175 F. Supp. 3d 602 (E.D. Va. 2016)**. Counsel ineffective in receipt and possession of child pornography case for failing to lay the proper foundation for admission of the out-of-court statement of the defendant's father that he downloaded the pornography. The defendant lived in the house with his parents and his brother. Several computers/hard drives in the defendant's room contained pornography, including one which remained in the basement until just several days before the search. The basement was where the father often stayed working on computers. The father's laptop also contained pornography. The day after petitioner's arrest, his father told him and his mother that the father had been downloading pornography. Counsel's entire defense was arguing a reasonable doubt by asserting that the father was the guilty party. He called defendant's mother to testify about the father's out-of-court statements against interest, but the government's hearsay objection was sustained because counsel failed to establish that the father was "unavailable" under Federal Rule of Evidence 804(a). Counsel's conduct was deficient in failing to subpoena the defendant's father and call him to testify. While the father would not have provided exculpatory testimony, he would have asserted his Fifth Amendment right against self-incrimination. By doing so, he would have been "unavailable" and his prior statements admissible under Rule 804(b)(3)'s hearsay exception. Counsel's conduct was not explained by strategy. While counsel claimed that he chose to rely only on the pornography on the father's computer rather than calling him to testify, this explanation was "not credible for several reasons." First, counsel never interviewed the father. Second, counsel stated that he expected the government to call the father to testify. Prejudice established as the father's admissions "would have gone to the central issue at trial" of whether the defendant "knowingly" received and possessed the files. The admissions also directly substantiated the theory of defense.

2015: *United States v. Arny*, 137 F. Supp. 3d 981 (E.D. Ky. 2015), *aff'd*, 831 F.3d 725 (6th Cir. 2016). Counsel ineffective in case of physician charged with unlawfully dispensing controlled substances for lying to his client and failing to adequately investigate and present a defense. The physician was a retired military pathologist, who returned to work due to financial problems. He went to work at a pain clinic, even though he was not a specialist in pain management. A month after he started, he gave notice that he was leaving because the clinic expected him to see 30-35 patients a day and he did not believe he could adequately treat so many patients in so short a time. The clinic convinced

him to stay by doubling his salary and agreeing to make changes to allow him to better serve the patients. For many of the patients, the physician simply continued to use the treatment plans of the prior clinic doctor (Saxman), who was a specialist in pain management. Ultimately, the doctor was charged, along with the clinic owners, for conspiring to distribute controlled substances. For conviction, the government had to prove that the physician was operating "outside the course of ordinary medical practice," which required a showing that the defendant "did not issue the drugs for a legitimate medical purpose and in the usual course of medical practice." The physician asked counsel to call Dr. Saxman and some of his patients in his defense. Counsel told his client that the prosecutor informed him that Dr. Saxman "either had a deal in place or soon will be indicted," which was not true. Counsel's conduct was deficient in lying to his client and in failing to interview Dr. Saxman, who was not indicted and was still practicing medicine. As the defendant was following many of her treatment plans, she could have provided a legitimate medical reason for the treatment plans she created. Counsel's conduct was also deficient in failing to interview and present the testimony of some of the defendant's patients, who would have testified that the defendant prescribed pain medication for a legitimate medical purpose after regular examinations and adjustments in medications when necessary. Cumulative prejudice established.

***LeTemps v. Secretary, Florida Department of Corrections*, 114 F. Supp.3d 1216 (M.D. Fla. 2015)**. Counsel in sexual battery and kidnaping case was ineffective in failing to investigate and challenge the semen stain analysis of a state technician and failing to properly cross-examine the arresting officer regarding the direction LeTemps was walking when he was arrested. LeTemps was convicted in 1989. In 2011, he filed a second motion for state post- conviction alleging actual innocence. The motion was summarily denied and affirmed in state court. In 2013, he filed a motion for leave to file a second or successive petition for writ of habeas corpus in the Eleventh Circuit, which was granted. The federal habeas petition filed in May 2013 was untimely under the statute of limitations but permitted under the "miscarriage of justice" exception as LeTemps made a credible showing of actual innocence. The evidence at trial revealed that the victim, who was fluent only in Spanish, was accosted around 4:30 a.m. while she was awaiting a bus. She was force to undress and sexually assaulted at knife-point before managing to escape and run to the nearby home of Williams, who gave her the robe he was wearing and called the police around 5:00 a.m. Two hours after she gave her initial statement to police, she and her cousin, Maldonado, went to the area of the crime looking for her attacker. They encountered LeTemps, who was fluent only in Creole, and contacted police, leading to the arrest and conviction. Rathman, a forensic serologist, examined the robe given to the victim by Williams and found a semen stain. The stain contained blood type O, which matched the victim who was an O "secretor." LeTemps was a type B "secretor." She testified that she could not determine the blood-type of the semen donor because the amount of semen in the stain was insufficient. LeTemps, as well as his live-in girlfriend and a roommate, testified that he had been hope asleep at the time of the crime. He woke up around 6:30 a.m. and left to walk to work at 7:00 a.m. He was arrested as he was walking to work. Prior to filing his second state post-conviction application LeTemps' counsel discovered a deposition of Rathman taken by the state prior to trial. In it Rathman revealed that she concluded that the semen stain was insufficient to type, as opposed to simply not containing type B, based on a "P30 test." "P30 is a protein only found in seminal fluid." According to Rathman, a dilution of approximately 1-in-200 would assure sufficient semen to pick-up the blood type of the donor. She took this number from the Serological Research Institute ("SERI"), which originated the technique. She found the dilution

rate in this case to be 1 in 322. Her bench notes revealed that she arrived at this conclusion based on the assumption to 5,000 units would be "a neat semen stain." In post-conviction, Harmor, the senior forensic serologist at SERI since 1979, provided an affidavit stating that Rathman's calculations were incorrect because 3,000 units was the number used by SERI for a "neat stain" during the 1980's. Using this figure, the dilution rate in this case was within the 1-in-200 minimum for accurate blood group detection. Thus, rather than being an insufficient sample of semen, the testing revealed that LeTemps was not the source of semen. Williams, a type A "secretor," was also excluded as the source and Williams testified that no one other then he and the victim had ever worn the robe. In short, the semen donor was either a type O "secretor" like the victim or was a non-secretor. Another aspect of Rathman's testing also excluded LeTemps as the semen donor. She performed a microscopic analysis of the semen stain and failed to detect spermatozoa, meaning the donor likely had a low sperm count or was sterile. Because LeTemps had three small children at the time, he had spermatozoa in his seminal fluid. Finding this evidence sufficient to establish the exception to AEDPA's one-year limitations period, the Court proceeded to the merits of the claims. Counsel's conduct was deficient in failing to investigate the testing standard used by Rathman. Counsel's conduct was also deficient in failing to cross-examine the arresting officer concerning the direction LeTemps was walking at the time of his arrest. LeTemps' home was south of the crime-scene and his place of employment was north of the location. At trial, the officer testified that LeTemps was walking south away from the crime scene and towards his home. His report, however, indicated that LeTemps was walking north bound towards his work-place. Prejudice established.

2014: ***United States v. Matthews*, 999 F. Supp. 2d 352 (N.D.N.Y. 2014), *appeal pending*, 14-731 (2nd Cir.)**. Counsel ineffective in bank robbery and conspiracy case for failing to inquire into the history between his investigator and the defendant and failing to adequately investigate and present a defense. The robbery charge was based on a bank robbery in Syracuse. The conspiracy charge related to the Syracuse robbery, as well as two prior bank robberies in Whitesboro and Auburn. The defendant had previously pled guilty to the Whitesboro and Auburn robberies in state court. Thus, he was sentenced in this case to life under the "three-strikes" sentencing law. In 1982, the defendant had been arrested for attempted murder of a police officer, but was mistakenly released prior to trial. After three months of the most extensive manhunt in Syracuse history, Richard Haumann, a deputy police chief, arrested the defendant who was disguised in women's clothes and a wig by tackling him as he attempted to flee. Following a trial in which Haumann testified, the defendant was acquitted of the attempted murder charge. Haumann was the investigator assigned by the Federal Public Defender Office to work on the defendant's case. The government's case concerning the Syracuse bank robbery revealed that Valerie Sewall and a male accomplice, who could not be identified from surveillance footage, robbed the bank. Eyewitness' described the accomplice as approximately 5'7", which matched the defendant and Sewall's boyfriend. Sewall testified that the defendant had been her accomplice in all three of the robberies and that she cooperated with police in order to secure her release from custody and avoid prosecution on the Syracuse bank robbery. The defense conceded guilt on the Whitesboro and Auburn robberies, but denied involved in the Syracuse robbery. Counsel called a single alibi witness, who could not confirm the defendant's whereabouts at the time of the crime, but contradicted Sewall's testimony about the defendant's whereabouts after the Syracuse bank robbery. Counsel was aware that Haumann and the defendant had a prior interaction and that Haumann had previously arrested the

defendant. His failure to inquire further was deficient and he failed to discover the clear conflict of interest between the investigator and the defendant. Whether due to the conflict or simple negligence, counsel's conduct was also deficient in failing to adequately investigate and present the available evidence. Counsel focused only on the time after the Syracuse robbery, even though there was no reasonable basis to limit the investigation in this fashion because counsel possessed police reports showing that two other witnesses accounted for the defendant's whereabouts before the robbery at a garage at approximately 11:30 - 11:45. It took 38 minutes to drive from the garage to the bank where the robber was on camera at 11:49. These witnesses were consistent with the defendant's statements to counsel and also contradicted Sewall's testimony of events leading up to the robbery and the defendant's whereabouts in other ways. Prejudice established on the Syracuse bank robbery charge, which was reversed. The conspiracy charge and life sentence were affirmed though because they were not depended on the Syracuse robbery evidence.

***Moore v. Beard*, 42 F. Supp. 3d 624 (M.D. Pa. 2014), *aff'd*, 640 Fed.Appx. 159 (3rd Cir. 2016), *cert. denied*, 137 S.Ct. 73 (2016)**. Following the Third Circuit's finding that the state court's decision was contrary to and an unreasonable application of federal law under AEDPA, the case was remanded to the District Court for a hearing and de novo findings. The court held that counsel was ineffective in this first-degree murder case for failing to adequately impeach co- defendant Scott, who was a state witness, and failing to call co-defendant Jones as a defense witness in the second 1983 trial. The first trial ended in a mistrial when improper evidence from a suppression hearing was sent into the jury room during deliberations. The case involved a murder during a robbery at a veterinary office that was committed by two individuals. According to Scott, Jones planned the robbery and waited in the car, while Scott and petitioner entered the office and petitioner committed the murder. According to Jones, who was willing to testify for the defense but was not called, he met up with Scott and another man, Burgis, after the crime and Scott told him of the robbery and admitted that he was the shooter. Petitioner testified that he was at home in a different city at the time of the crimes and was not involved. Scott, who is now deceased, later signed an affidavit recanting his trial testimony and stating that he had been coerced by the prosecution to testify against petitioner. Jones was also deceased. Regardless of "whether his memory was clouded by the passage of time, age, or medical condition," lead trial counsel could remember virtually nothing about the case. Thus, the court relied on co-counsel's testimony and the record. During Scott's testimony, he admitted on direct that he was testifying pursuant to a plea agreement in which he agreed to testify and plead guilty to third degree murder for which he would be sentenced to five to ten years to be served concurrently with a federal sentence and that he would be confined in a federal institution. Lead counsel's failure to conduct any cross-examination on the topic of the plea agreement was deficient given that Scott's charge was reduced from first to third degree murder and the possible sentence was reduced from a possibility of the death penalty or 60 years down to 20 years. In addition, counsel did not delve into the fact that Scott was facing a number of federal robbery charges and that even prior to the retrial a motion to reduce his 20-year sentence, based on his testimony against petitioner, had been filed. Counsel's conduct was also deficient in failing to call Jones to testify, even though counsel had identified him as a material witness and he was present in the courthouse during the initial trial. Co-counsel could recall only that he had been present when lead counsel interviewed Jones and that the interview lasted no more than 5-10 minutes. Jones was not interviewed before this and was not re-interviewed prior to the

retrial. Co-counsel did not recall hearing information that Jones exonerated petitioner or that the man with Scott was Burgis, but co-counsel conceded, however, that this was an inadequate interview. Moreover, it was clear from Jones' testimony in his own subsequent trial and in later affidavits in this case that he denied involvement, contradicted Scott, and gave statements consistent with another defense witness that Scott admitted the robbery and murder afterwards, but it was Burgis with him rather than petitioner. Thus, counsel's failure to present Jones' testimony was also deficient conduct. Prejudice was also found.

***Raether v. Dittman*, 40 F. Supp. 3d 1097 (E.D. Wis. 2014), *aff'd*, 608 Fed.Appx. 409 (7th Cir. 2015)**. Under AEDPA, counsel ineffective in sexual assault of child and bail jumping case for failing to adequately cross-examine two state witnesses based on their prior statements to police and for inadequately preparing a defense witness and/or making an unreasonable decision to present that witness at all. The charges arose from an underage drinking party where the defendant, who was 18 years old at the time, was accused of raping D.N., who was then 14 years old. Five days after the party, D.N. told a school counselor that the defendant had raped her. A police officer then interviewed D.N., E. Bragg, E. Brown, and the defendant. In her statement to the officer, D.N. said that she was highly intoxicated and could remember only "bits and pieces" of the evening, but she recalled the defendant raping her and that Bragg had told her about some details of the evening. During trial two years later, D.N.'s testimony included numerous damaging details that were not included in her statement to the police but counsel did not impeach her based on these discrepancies. Bragg told the police that Brown found D.N. in the bedroom naked and yelled causing a number of people to go to the room where the defendant was also present. At trial, however, Bragg testified that she and others found the bedroom door locked and jimmied it open with a credit card, after which the defendant walked out. She also testified that D.N. told her about the rape the next day, which had not been mentioned to the police. Nonetheless, counsel did not impeach her based on this omission or the other discrepancies between her statement to the police and her trial testimony. Counsel's conduct was also deficient with respect to Brown, who told police that at some point in the evening she went in the bedroom and saw D.N. on the bed naked with the defendant standing next to the bed. Defense counsel called her to testify. She said that she never saw D.N. or the defendant in the bedroom or coming out of the bedroom. Counsel did not ask any questions to reconcile this testimony with her statement to police. On cross, she was impeached with her statement to police and admitted that she lied on direct because she wanted to help the defendant. After her testimony, out of the jury's presence, the trial court had her arrested for perjury. The state court held that counsel's conduct was deficient but found no prejudice. The state did not contest the state court's deficiency findings. Thus, the District Court addressed only the question of prejudice. The court found that the state court's adjudication was not a reasonable application of *Strickland* because the state court evaluated the errors only individually. Viewing the errors under the proper *Strickland* analysis, the District Court viewed the errors cumulatively – rather than "in isolation" – and found prejudice. With respect to D.N., the state court simply relied on the fact that the bottom line of her statement to the police and her trial testimony was that the defendant raped her. The District Court held, however, that the inconsistencies in her statement and testimony was significant and impeachment "could have been critical" to the jury in assessing her credibility, especially in light of the prosecutor's closing arguments asserting that her trial testimony was consistent with her statements to police. Similarly, failure to impeach Bragg was

critical because her trial testimony that D.N. told her about the rape the next day bolstered D.N.'s testimony and credibility, which again the state argued in closing arguments. Impeaching Bragg could have been critically in persuading the jury that she was not credible and that D.N.'s testimony was not corroborated. With respect to Brown, the state court found no prejudice because it was the defendant's own credibility problems, with 13 criminal convictions at age 20, that "did him in." The state court's determination was unreasonable, in part, because it focused simply on counsel's failure to adequately prepare Brown to testify when the larger issue is that counsel should never have called her to testify because her testimony was damaging to the defense rather than helpful in any way. In short, counsel "handed the prosecution the argument that the defense was willing and in fact put before the jury a witness to perjure herself to save the defendant. It is hard to imagine how such an error would not be prejudicial." *Id*. at ___ (citations omitted). The state court's focus here on weighing the defendant's credibility problems with Brown's in determining prejudice due to counsel's presentation of Brown's testimony "misses the mark" on the proper cumulative prejudice analysis of the prejudice from failing to adequately impeach the state's witnesses in conjunction with Brown not being "properly prepared by counsel (or not called at all)." Focus simply on the defendant's prior convictions, "in isolation, ignores the potential impact of the impeachment of the State's key witnesses," especially in light of there being no other evidence of the defendant's guilt. In other words, the jury could have found the defendant lacking in credibility but also found the State's witnesses lacking in credibility and "insufficiently convincing – the two are not mutually exclusive." Finally, the state court's finding of no prejudice was unreasonable because the state court relied on the defendant's impaired credibility, as addressed above, in combination "with other evidence that [the defendant] was in the bedroom with a nearly naked" D.N. This finding is not supported by the record. Brown testified only that she saw D.N. partly naked in the room, but she said nothing about seeing the defendant there and no other witness supported this finding at all other than D.N. and Bragg, both of whom should have and could have been impeached.

2013: ***Green v. Lee*, 964 F. Supp. 2d 237 (E.D.N.Y. 2013), *appeal withdrawn*, 13-3190 (2nd Cir. Oct. 1, 2013)**. Under AEDPA, counsel was ineffective in sodomy, attempted sodomy, and sexual abuse case for failing to investigate and present a defense. The defendant was charged with ten counts related to the alleged sexual molestation of his granddaughter, G.G., and four of her friends, including B.M., who was G.G.'s friend and the first of the complainants to accuse Green of sexual abuse. In the fall of 2006, allegedly after watching a particular episode of Law & Order: SVU, B.M. alleged that she and G.G. had been abused in 1998-1999, but G.G. denied that any abuse had taken place and denied knowing B.M. until 2000. Green also denied any abuse and denied knowing B.M. in 1998–1999. In support of B.M.'s testimony, the prosecution presented: (1) a photo of B.M. and G.G. together dressed in Halloween costumes allegedly taken in 1998; and (2) a device called a "Turbo Twister Speller" that Green allegedly gave to B.M. to help with her spelling in 1999. To rebut G.G.'s testimony that she did not know B.M. prior to 2000, the People presented testimony from G.G.'s mother, Cindy. Cindy was Green's daughter-in-law, and was in the process of divorcing Green's son. She offered a souvenir Polaroid photograph in a photo jacket marked "6/98" of G.G. and B.M. at Coney Island. Even though she was not present when the picture was taken, she testified based on her daughter's hair length that the picture was taken in 1998-1999. Trial counsel had contacted a private investigator, "but for unexplained reasons, trial counsel ceased contact with [him] prior to the trial." Post-trial this investigator ascertained–"[w]ith very little effort and

easy access"–"that the film used in the Coney Island photograph was not manufactured until several years after the date the People represented the photograph was taken." Likewise, the sweatshirt worn by B.M. in the Halloween photograph displayed a logo of a company that did not enter commerce until three years after the date testified to at the trial. The "Turbo–Twister" toy spelling machine given to B.M. by Green did not enter commerce until August 2001, not the years 1998 to 1999, as the testimony at the trial stated. And, the relevant episode of Law & Order: SVU did not air until several months after the time that B.M. suggested at the trial that she viewed the program. "These dates were crucial in that the Defendant and G.G. both testified that the family did not even meet B.M. and her mother until the year 2000." Here, there was prejudice, particularly based on the Coney Island photograph, which "the trial prosecutor referred to . . . as the 'one piece of evidence that the defense can't get around' and 'the one piece of evidence in the whole case that is not capable of lying.'" Nonetheless, the People argued in habeas that this photograph was only "collateral" and "cumulative" evidence.

> What the prosecution cannot be permitted to do is proffer evidence, passionately argue for its centrality to obtain a conviction, then abandon reliance on that evidence once the conviction is obtained and the evidence is shown to be false.

While New York state courts apply a prejudice standard that is "more generous toward defendants than the standard spelled out in *Strickland*, the federal court applied the *Strickland* standard. In this case, the state court "applied an overly demanding standard of prejudice," essentially rejecting Green's claim of ineffective assistance of counsel because Green could not prove to a certainty that he would have been acquitted "but for" the trial counsel's deficient performance. "This strict 'but for' standard is different from an 'unreasonable application' of *Strickland*'s more defendant-friendly 'reasonable probability' standard and is therefore constitutionally deficient." Green was prejudiced even on the counts that did not involve B.M. due to "spillover prejudice."

***Lopez v. Miller*, 915 F. Supp. 2d 373 (E.D.N.Y. 2013)**. Under AEDPA, counsel ineffective in murder case for failing to investigate and call alibi witnesses. The case was 23 years old and involved the shooting of a drug dealer in a crackhouse. The case was not barred by the statute of limitations due to the court's finding that the defendant had made a credible and compelling case of actual innocence. There was no murder weapon or forensic evidence connecting the defendant to the murder. The prosecution was based on the testimony of two witnesses, only one of whom identified the defendant. This witness was on a "two-day crack binge." She did not call the police or provide any information until a month later following her arrest for prostitution. She made a number of contradictory statements. There was conflicting evidence whether she had a plea deal with prosecution in exchange for her testimony. The other witness who had been face-to-face to the shooter and spoke to him, did not identify the defendant and described the shooter as black and 6'3". The defendant was 5'7" and the state conceded he "could not be described as black." Counsel did not call the alibi witnesses, who were the defendant's mother-in-law and sister-in-law. Counsel claimed to have interviewed both of these witnesses before deciding not to present them because they would not be believed because they were "closely related" to the defendant. On the trial record, however, counsel stated that he had interviewed a single alibi witness that he chose not to call. The state court made unreasonable determinations, without an evidentiary hearing, by finding that

counsel had interviewed both alibi witnesses and made a reasonable decision not to present the testimony because their residences were close to the location of the shooting and did not render the shooting impossible. While the court assumed that counsel had interviewed the alibi witnesses, despite their declarations to the contrary, the court found counsel's conduct deficient in failing to call the witnesses to testify. The decision not to call the witnesses solely because they were "closely related" was unreasonable. Likewise, even though the alibi witnesses "were not perfect, the court cannot imagine any significant harm that was likely to result from calling them to testify – only benefit, and potentially tremendous benefit." In short, calling them "was clearly a better option than presenting no case at all." Likewise, counsel did not discover and present testimony of a man who was in the crackhouse at the time of the shooting who affirmatively declared that the defendant was not the shooter. Prejudice established in light of the prosecution's "weak" evidence.

***Smith v. United States*, 980 F. Supp. 2d 854 (N.D. Ohio 2013)**. Counsel was ineffective in felon in possession of a firearm case for three reasons. The evidence established that the police were responding to an anonymous tip about men gambling when they observed the defendant and other men and other men sitting outside at a table with dice and cards present. As the police approached, the petitioner said he had to use the bathroom and started to enter a neighboring house. He was stopped on the front porch and officers found a gun near this spot. The defense alleged that the gun did not belong to the defendant and he was attempting to evade the police only because there was an outstanding warrant for his arrest. Counsel's conduct was deficient because counsel: (1) failed to obtain the police records and to move to suppress the gun; (2) failed "even to speak with the non-police witnesses to petitioner's arrest"; and (3) "advised petitioner that testifying would preclude him from obtaining the acceptance-of-responsibility adjustment" in sentencing. First, counsel's failure to move to suppress the gun was deficient and not based on reasonable strategy. Counsel "made unreasonable assumptions about the facts and law, thereby abandoning, without due consideration or information, the possibility of excluding the only evidence in the case that really mattered. Specifically, counsel assumed, "with no reasonable basis," that police were justified in detaining the petitioner.

> Had [counsel] sought out the police records . . . , he would have learned: 1) the complaint came in nearly one hour before police responded; 2) police responded to the wrong address; 3) the complaint mentioned thirteen males, as opposed to the four males the officers mention in their reports; and 4) the complainant failed to provide any physical description of the alleged gambling suspects.

"[T]he police records suggested, at the very least, that the officers lacked any basis to attempt to detain petitioner . . . , even if dice were in plain view." Second, counsel's conduct was deficient in failing to call the non-police witnesses who would have established that the porch was "cluttered with furniture and boxes" and "was an active neighborhood social hub accessible at all hours of the day and night," which made the defense theory that the gun was already on the porch more likely. "While counsel pressed this theory during his closing argument, he could point to no concrete evidence supporting it. Predictably, the prosecutor pounced on that omission in his rebuttal" argument. Finally, counsel's advice that petitioner should not testify "was unreasonable" because

the defense based on denial of guilt "precluded petitioner from an acceptance-of-responsibility adjustment, regardless of whether he testified. Moreover, no reasonable attorney could conclude the adjustment was available in petitioner's case." Prejudice was established. Counsel's "errors essentially cut the legs out from under the defense before the trial even began and denied petitioner the opportunity to present a plausible, coherent account of the events occurring before his arrest. The errors were all the more significant, given the lack of compelling evidence against petitioner," which was "underscored by the jury's note [during deliberations] reporting its inability to reach a unanimous verdict" prior to being given an *Allen* charge.

2012: ***Williams v. Woodford*, 859 F. Supp. 2d 1154 (E.D. Cal. 2012)**. Counsel ineffective in murder case for failing to call the defendant or his alibi witnesses to testify after promising at least 13 times in the opening statements that the testimony would be presented. The petitioner was a drug dealer. His house was burglarized and some of his drugs were stolen. The burglars left a pager behind. The next day a person the petitioner could have suspected (based on the pager) was killed. The state's case was based on this theory, the testimony of an informant that the petitioner confessed to him, and a belt and rope found on the victim. Even though counsel believed the petitioner should not testify due to evidence of other crimes and was giving this advice, counsel told the jury 10 times in the opening that the petitioner would testify. This conduct "was highly unprofessional" and prejudicial as it highlighted the petitioner's failure to testify and "undermined the presumption of innocence." Counsel's failure to present the testimony of the petitioner and two other alibi witnesses was a result of a failure to prepare for trial as counsel never talked to these witnesses. Counsel's failure to discuss the substance of the case with his own client "betrays a shocking degree of neglect on counsel's part." Counsel was also ineffective in failing to interview a primary witness, who had told the same alibi story to police multiple times in interviews, even when interviewed "in quite hostile fashion and without a lawyer." Prejudice was clear because this was a close case and even without the alibi evidence the jury deliberated for a day and a half before rendering a verdict. Under AEDPA, the state court made an unreasonable determination of the facts by making evidentiary findings without holding a hearing and allowing the petitioner an opportunity to develop his claims.

***Baldwin v. Adams*, 899 F. Supp. 2d 889 (N.D. Cal. 2012), *appeal dismissed*, 12-17183 (9th Cir. May 5, 2015)**. Under AEDPA, counsel ineffective in murder case for multiple reasons. The victim was shot multiple times with a .40 caliber pistol and left between parked cars. There were no leads in the case until more than two months later when an informant was arrested while standing near a car containing illegal drugs. He offered information and released without being charged with a crime. The petitioner's home was searched then based on a "parole search" and he was arrested due to a small amount of pot found. Police then interviewed Gaines (based on the informant's information), who said he dropped the petitioner off near the crime scene. When he returned, Hicks told him the petitioner shot the victim. Several months later, the weapon was dropped by a fleeing suspect, who generally fit the petitioner's description, in a low income housing project. Hicks was killed prior to trial. Gaines refused to testify, but his taped statement was admitted as a prior inconsistent statement. Counsel conduct was deficient for: (1) failing to object to the prosecutor's arguments that the defendant should be convicted "in order to protect community values, preserve civil order, or deter future law-breaking"; (2) failing to request a limiting instruction to limit evidence that the initial informant had been threatened to preclude consideration

of this evidence for the impermissible purpose of consciousness of guilt because there was no evidence that the petitioner was responsible for the threats; (3) failing to object to the double hearsay in Gaines prior statement that Hicks told him the defendant killed the victim and Hicks was in fear for his life if he cooperated with police; (4) failing to request a limiting instruction to preclude the inference that Hicks was killed because of his knowledge because there was no evidence that petitioner was responsible for his death; (5) failing to present evidence that Hicks told police that he knew the shooter and petitioner was not the shooter; (6) failing to object to the prosecutor's closing statements that the defendant was involved in intimidating witnesses; (7) failing to object to the prosecutor's closing statements that two defense witnesses testified falsely solely because of fear of the petitioner, which both witnesses had repeatedly denied in cross; (8) failure to redact irrelevant prejudicial pejorative statements in a taped phone call and failing to obtain a limiting instruction related to this evidence; (9) failing to object to the prosecution's misstatements of law and assertion of personal knowledge and facts not in evidence in questioning defense witnesses and in closing arguments; (10) failing to object to the prosecution's improper vouching for witnesses in closing. Reversal was required due to prosecutorial misconduct and the "cumulative impact of the multiple errors" by defense counsel.

***Hash v. Johnson*, 845 F. Supp. 2d 711 (W.D. Va. 2012)**. Under AEDPA, counsel was ineffective in capital murder trial, which resulted in a life sentence, for failing to investigate the State's jailhouse snitch witness and failing to present an alternate theory of the crime at trial. The police initially had a suspect in the murder "but the case went cold." After a new Sheriff was elected and new officers were assigned to the case, the petitioner was arrested almost four years after the crime. The prosecution had no physical evidence linking the petitioner to the crime, but had three primary witnesses: (1) an alleged accomplice; (2) the petitioner's cousin, who claimed the petitioner confessed to her; and (3) "a known prison informant, to whom [the petitioner] allegedly confessed the crime." Counsel cross-examined the snitch about inconsistencies in his statement. Counsel also asked if the informant had assisted the government on prior occasions. The snitch said he had done so only once. If counsel had investigated, counsel could have impeached the snitch with evidence that he "was a prolific informant," as he had "provided information or testimony that implicated at least twenty people in at least three different federal prosecutions." Likewise, counsel cross-examined the snitch about whether he was testifying in state court in order to obtain a reduction in his federal sentence. The snitch said "somewhat, yes," but on redirect testified that the state court proceedings would have no effect on his federal sentence. The petitioner testified in his own defense. He admitted discussions of possibly robbing "an old lady" in the area with the testifying accomplice and another man but said he withdrew from the discussions and took no part in planning or committing the murder. The defense also presented 18 witnesses emphasizing the contradictory nature of the accomplice's and cousin's testimony and putting forward an alibi defense. In discovery in state habeas proceedings it was revealed that the snitch wrote to his federal judge and others in at least 25 letters concerning a sentence reduction. Five of those letters were written prior to his testimony in the petitioner's trial. Although he had been facing a potential life sentence, the snitch was initially sentenced to 180 months. Following his testimony in this case, his sentence was reduced to 60 months, which was basically time served. There had been "a deal" and the snitch's testimony to the contrary was false. He had been moved to the jail where the petitioner was confined specifically for the purpose of obtaining information against the petitioner. The state failed to

disclose any of this information or that both the accomplice and the cousin had failed polygraph examinations regarding their statements against the petitioner. Overall, the picture in federal habeas proceedings was that: (1) the accomplice's and snitch's testimony was manufactured and contradicted the crime scene evidence; (2) the state failed to disclose communications between the police, the snitch, and the accomplice, who recanted in post-conviction proceedings and the recantation was credible; and (3) the police failed to seize and test a rifle found at the initial suspect's house that matched the caliber and type of weapon used in the murder. In addition, the initial suspect lived near the victim and a man matching his description was seen near the area where the victim's truck was found. Counsel's conduct was deficient in failing to adequately investigate and impeach the snitch. Counsel admitted that he did not obtain the snitch's "federal file," which contained five letters in the snitch's own handwriting contradicting his trial testimony. In finding no prejudice, the state court unreasonably applied Strickland. The letters would have proven that the snitch lied in his testimony in that he clearly believed that he would get a sentence reduction in federal court in exchange for his testimony in this case. Likewise the state court's decision was unreasonable in concluding that counsel's conduct was not deficient in failing to investigate and present an alternate theory simply because counsel reviewed police reports and spoke to the initial investigator who said the case against the initial suspect "had gone cold and the investigation was at a dead end."

> [I]t is not a reasonable strategic choice for defense counsel to rely on the finding of a police investigation. Counsel has an obligation to make [his] own independent investigation.

Here, the snitch's and the alleged accomplice's testimony was the primary evidence placing the petitioner at the crime scene and establishing the state's theory that the crime was committed by three people. Counsel should have contested this with evidence from the crime scene and the initial investigator, who believed the murder was committed by a single perpetrator. Because the state court did not consider prejudice on this, under *Pinholster*, the federal court was permitted to and did consider the evidence presented in federal court on this issue. The evidence revealed that the "multi-perpetrator theory was inconsistent with the evidence at the crime scene." [The court also found state misconduct for presenting false testimony and withholding evidence under *Napue* and *Brady*.]

2010: ***Larsen v. Adams*, 718 F. Supp. 2d 1201 (C.D. Cal. 2010), *aff'd*, 730 F.3d 930 (9th Cir. 2013), *amended and superceded on denial of rehearing*, 742 F.3d 1083 (9th Cir. 2013)**. Under AEDPA, counsel ineffective in possession of dagger case (which resulted in "three strikes" enhanced sentencing) for failing to adequately investigate and present exculpatory evidence. (The court excused the failure to comply with the federal statute of limitations based on "the 'actual innocence' gateway set forth in *Schlup v. Delo*, 513 U.S. 298 . . . (1995)"). The charge resulted from a 1:00 a.m. call to police of an assault with a deadly weapon in progress, with shot fired, in a bar parking lot. Two police officers approached in a single car with flashing lights and a siren, then with roof-mounted floodlights, side spotlights, and high beams. Ten to 20 people were in the parking lot. One officer testified he saw the defendant remove an object from underneath his clothing and throw it. The object turned out to be the dagger found underneath a car. There were numerous significant inconsistencies in this officer's testimony from his testimony in two preliminary hearings. The second officer testified generally about the call and arrest with the

defendant giving a false name. The only other state witness was a detective, who ran fingerprints and discovered the defendant's true identity. Counsel's conduct was deficient in failing to investigate and failing to obtain crucial information about witnesses from the prosecutor, even though the defendant informed counsel he was innocent and counsel was aware that numerous other people were in the parking lot. Counsel had even informed the prosecution that the defense theory at trial would be that it was Hewitt's dagger. "A reasonable defense attorney would have attempted to interview as many percipient witnesses as possible." Counsel of at least three eyewitnesses, who were not interviewed. If counsel had pursued the investigation, it would have led to exculpatory evidence, including the parents of one of the known eyewitnesses. While not directly relevant, the court detailed counsel's "record of indifference to his professional responsibilities" and his disbarment after this trial, as evidence "bolster[ing]" the court's findings. If counsel had adequately investigated, a military retiree, who had also been a police officer for eight years, would have testified that he was in the parking lot when police arrived and observed another man (Hewitt) throw the dagger. This witness was initially handcuffed, but was released without being questioned after officers saw his police identification in his wallet. This man's wife also would have testified generally consistently, including that she had seen Hewitt through an object under a car. Another man, who had been inside the bar would have testified that he had been threatened with "the" dagger inside the bar by another man. This witness knew the defendant, who was inside the bar at the time, but was not in possession of "the" dagger. This prompted the bartender to make the call to police. Aside from these witnesses, Hewitt himself submitted an affidavit in federal court admitting the dagger was his. Hewitt's girlfriend also gave an affidavit stating Hewitt had told her the night of the incident that the defendant had been arrested for possession of Hewitt's knife. She also said that Hewitt felt bad and sold his motorcycle to post bail for the defendant. Even if counsel's conduct pretrial was not deficient, he was informed of the existence of the former police witness and his wife after conviction, but prior to sentencing and still failed to investigate or move for a new trial.

***Barco v. Tilton*, 694 F. Supp. 2d 1122 (C.D. Cal. 2010)**. Counsel ineffective in murder and conspiracy case for failing to adequately investigate and present defense evidence. Although AEDPA applied, the court reviewed counsel's conduct de novo because the state courts had denied an evidentiary hearing and evidence was presented in federal court that further developed the claim. Prejudice was reviewed de novo because the state courts did not reach the issue. Petitioner's son had been assaulted with life-threatening injuries and was hospitalized for several months. While there were rumors that the victim's father committed the assault, the police were unable to assemble any evidence against him and the investigation was suspended. Four months after the assault on petitioner's son, there was a drive-by shooting at the victim's home, which resulted in death. The father of petitioner's grandson, who lived with petitioner, was arrested a short distance away with the murder weapon and other damning evidence on him. He had a cellphone call with someone at Petitioner's home (and a number of people lived there) shortly before the shooting. No additional arrests were made until after petitioner's daughter broke up with her boyfriend and had him arrested for breaking into her home. Only then, despite previously denying any knowledge, the boyfriend/accomplice went to police claiming a conspiracy led by petitioner. He was granted immunity in exchange for his trial testimony. Counsel was ineffective in: (1) failing to investigate and introduce the boyfriend/accomplice's numerous crimes of moral turpitude, readiness to violently

retaliate, and motive to falsely implicate petitioner; (2) failing to introduce the testimony of petitioner's family and friends to rebut the boyfriend/accomplice's testimony that numerous conversations about retaliation took place in their presence and were led by petitioner; and (3) failing to present testimony of character witnesses, particularly a veteran of the prison system to attest to petitioner's character for non-violence. Petitioner was a teacher who taught inmates in the state prison and at the California Youth Authority. The character witness would have also rebutted the allegation of a connection between Petitioner and the Mexican Mafia. Counsel's conduct was deficient in failing to retain an investigator despite the family's willingness to fund necessary investigation. Counsel also did not interview family members about the alleged discussions because, contrary to the trial record, he recalled that all of these conversations allegedly took place privately. Finally, counsel alleged a strategy not to present character evidence, but this decision was made "without even interviewing any of the character witnesses himself, to assess their demeanor and how they would have held up on cross-examination." *Id*. at 1145. It was "objectively unreasonable for [counsel] to make the decision not to call the character witnesses without interviewing them." *Id*. at 1146. His decision "cannot be deemed a fully informed one." *Id*. Prejudice established because the state's evidence was "weak" and the boyfriend/accomplice was "the critical witness" for the state. Without him, the state "would have been unable to proceed" against petitioner. Yet, the jury heard none of the evidence impeaching his credibility and rebutting his testimony and the jury did not hear credible evidence of petitioner's own character for non-violence.

***United States v. Hebshie*, 754 F. Supp. 2d 89 (D. Mass. 2010)**. Counsel ineffective in arson case for failing to move for *Daubert* hearing, challenge testimony of prosecution experts, and challenge canine evidence. The prosecution arose from a fire in a commercial building in which the defendant leased space for his convenience store. The government built its case on "less than overwhelming" evidence of defendant's motive to burn down the store and arson experts and canine evidence. Although there were numerous articles in legal journals and cases casting a "critical eye on the scientific reliability of arson evidence" by 2006, when this case was tried, counsel did not investigate. "Ordinarily competent counsel would have understood that men and women had been convicted, sentenced, perhaps even executed, on the basis of flawed arson evidence." Aside from this general "drumbeat of concern about arson prosecutions," counsel "had been specifically warned about deficiencies in this case by predecessor counsel and by the experts retained by them." During trial, the court also "pointedly inquired" three separate times whether counsel wanted to challenge the evidence or needed a continuance. Counsel's alleged "explanations" for his behavior post-trial "were, in a word, incoherent." The most significant problems with the evidence was: (1) the government experts lifted a single sample from the area they believed was the origin of the fire and took no control or comparison samples; and (2) "Billy the dog sniffed a so-called accelerant" in the same area to which she had been led. The government never even looked for accelerant elsewhere. The single sample of "accelerant" taken was a "light petroleum distillate," which covers "a category so broad that a host of entirely benign substances fit within it." In addition, it could be found in many items sold in the convenience store or generated by heat of the fire itself with other materials, such as carpet glue. While requesting a *Daubert* hearing may not have resulted in excluding evidence, "exclusion (or in the case of the dog, strict limitation) was more than a 'reasonable probability.' It was likely."

> It is not an understatement to say that Lynch, the dog handler, was permitted to testify to an almost mythical account of Billy's powers and her unique olfactory capabilities. He presented unsubstantiated claims about the dog's accuracy. He was allowed to go on at great length about his emotional relationship with the dog and his entirely subjective ability to interpret her face, what she thought, intended, and the "strength" of the alert she gave in this case. Finally, Lynch was permitted to testify that the dog did not alert to anything else on the premises, as if the dog had been allowed to range widely on the fire scene (she was not), and as if the dog's failure to alert had evidential value (it did not).

Even though "scientific literature cast doubt on the significance of the dog's failure to alert (false negatives) and even raised concerns about canine 'proficiency' testing," counsel did not challenge this evidence. "Billy, like the traditional Ouija board, was simply allowed to point to [the defendant] as an arsonist." Counsel also did not challenge the "cause-and-origin testimony," even though no photographs were taken, except in the area the government expert believed relevant, and the "building was razed to the ground" making further investigation impossible. While no prejudice was found with respect to the cause-and-origin testimony which simply purported to identify where the fire began, the canine evidence and the lab results were essential to prove that the fire was "an arson, not an accident. Without it, there is simply no crime."

***Robinson v. United States*, 744 F. Supp. 2d 684 (E.D. Mich. 2010)**. Counsel ineffective in felon in possession of ammunition case for failing to fulfill his promise to the jury in opening that the petitioner would testify and in failing to adequately investigate and present a defense. Contrary to counsel's alleged strategy and reasons, there was no evidence of unforeseeable events following the opening that would cause counsel to change his strategy mid-trial and decide against the petitioner testifying. The court did not find prejudice "without more" on this issue, but found cumulative prejudice. The state's case was based solely on police officer testimony. The petitioner had provided counsel with names and numbers for prospective defense witnesses. Counsel did not interview them, although one of them credibly corroborated the petitioner's version of events.

***Usher v. Ercole*, 710 F. Supp. 2d 287 (E.D.N.Y. 2010)**. Under AEDPA, counsel ineffective in child sex abuse case for: (1) failing to consult a medical expert to rebut the state's expert witness; (2) introducing unredacted medical records that contained otherwise inadmissible evidence and bolstered the testimony and credibility of the alleged victim; and (3) elicited damaging "outcry" testimony from a prosecution witness opening the door for the state to elicit additional damaging testimony. The state's medical expert testified that the size of the hymenal opening and other findings during physical examination established that the alleged victim had been sexually abused. Counsel's conduct was deficient in failing to consult and present rebuttal expert evidence that there were deficiencies in this expert's methodology and opinions, including that a large hymenal opening is simply not evidence of abuse and is explicable by other factors. Counsel could not make a reasoned decision as to the best defense strategy due to "counsel's failure to educate himself about the implications and validity" of the conclusions of the state expert, which was the only direct evidence of abuse aside from the testimony of the alleged victim. Counsel's conduct in introducing the

unredacted medical records was likewise deficient because the records reflect "a coherent and frankly harrowing narrative of chronic abuse, with a suggestion of continuing danger." There was no strategic reason for admitting these records, which were at odds with the defense assertion that there was no sexual abuse. Finally, counsel's conduct in eliciting the "outcry" evidence and opening the door to more was deficient, especially in light of the trial court's in limine ruling limiting "outcry" evidence to the four to six words uttered by the alleged victim in the initial outcry to her mother. Prejudice established in the failure to rebut the state's expert testimony given the "relatively weak" state's case. The only evidence was the alleged victim's testimony, the testimony of a witness about what the alleged victim told her, and the expert testimony, which could have been "undermined by contemporaneous medical literature and informed expert testimony." While the additional errors might not be sufficient on their own to establish prejudice, "together with counsel's failure to consult a medical expert" there was cumulative prejudice. The state court's determination to the contrary was an unreasonable application of *Strickland*.

***Young v. Washington*, 747 F. Supp. 2d 1213 (W.D. Wash. 2010)**. Counsel ineffective in murder case for failing to subpoena the petitioner's son, who was the undisputed triggerman and a previously acquitted co-defendant. The son went to trial first on a first-degree murder charge with a predicate felony of robbery. He testified and admitted that he was the shooter but that it was "a drug deal gone bad." As the predicate of drugs would support only second-degree murder, which was not charged, he was acquitted. The state proceeded against petitioner on the second-degree charge. While counsel hoped to call the son to testify, he did not subpoena him and the son refused to voluntarily appear. The state court unreasonably applied *Strickland* by finding that this "single lapse" rather than a "pattern of incompetence" did not constitute ineffectiveness. "In effect, the court of appeals treated counsel's general professionalism as a defense against allegations of specific deficiency, finding that the 'entire record' showed him to be a competent attorney." Because the state court did not reach prejudice, de novo review applied. Prejudice found as the son would have appeared if he had been subpoenaed. He would have been "legally obligated to appear to testify, and could have been held in contempt had he failed to appear. This is substantially different from offering testimony voluntarily." Likewise, the state's assertion that he would have refused to testify due to concerns about perjury charges was "speculative and unpersuasive."

2009: ***Madrigal v. Yates*, 662 F. Supp. 2d 1162 (C.D. Cal. 2009)**. Under AEDPA, counsel ineffective in attempted murder trial for a number of reasons. The shooting was related to retaliatory gang attacks and witnesses identified the defendant, who was married with three children, had been working steadily since 1994, had moved away from East L.A., and had only a misdemeanor prior conviction. No physical evidence linked the defendant to the crime. During counsel's opening statement, counsel told the jury that he would present an alibi defense and a third-party culpability defense and the defendant would testify. The defendant did not testify and the only alibi witness called could not absolutely verify that the defendant was at work at the time of the offenses. Counsel's conduct was deficient in failing to present an audiotape of the co-defendant's conversation with his girlfriend that appear to establish the co-defendant's involvement in the crime but exculpate the defendant. The tape was provided in discovery, but counsel could not recall whether he ever listened to it. Prejudice established because with "conflicting eyewitness statements, the prosecution's case was far from compelling." In addition, the fact that the jury deliberated for

four days after a three-day trial "underscores the weakness of the case against [the defendant]." The state court's decision to the contrary was objectively unreasonable. Counsel's conduct was also deficient in failing to call the defendant to testify after promising to do so in opening statement. While counsel testified that the defendant refused to testify at the last minute because of threats from his co-defendant, the court found the defendant's testimony to be more credible than counsel's, as counsel was "hostile and uncooperative" during the evidentiary hearing and "suddenly had a clear recollection of this single event, when he could not recall anything else." There was no tactical reason for counsel's decision "to promise the jury that [the defendant] would testify and then renege on that promise." Prejudice established as the jury was deprived of the defendant's testimony describing the details of his alibi and the basis of his belief that another man was the actual shooter. In addition, even though the jury was instructed not to consider the defendant's failure to testify against him, "it is reasonable to conclude that the jury nevertheless did so here."

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

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

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

***United States v. Montgomery*, 676 F. Supp. 2d 1218 (D. Kan. 2009)**. Counsel ineffective in possession of 100 or more marijuana plants with intent to distribute case for failing to let the defendant testify and in failing to move to dismiss based on the government's destruction of

evidence. The government searched the defendant's home and took photographs and videotape but it is impossible to determine the number of plants from the photos and video. Nonetheless, the government destroyed all the marijuana plants, except for ten samples, two days after the search. During trial, agents testified that they counted 101 plants with roots, stems, and leaves. The defendant told counsel that he wanted to testify. Counsel's conduct was deficient in this regard because he told the defendant he would withdraw from the case if he did, so the defendant dropped the subject. While counsel denied this, the court found the defendant's testimony credible as defense counsel had "a very long history of attorney discipline which involves complaints of improper withdrawal, communications terminating representation and truthfulness in communicating with others." The defendant would have testified that he routinely counted his plants and on the day of the search he had 91 plants and ten cuttings that did not have roots or growth at the time. While there was no prejudice during trial due to the defendant's failure to testify, there was prejudice when the failure to testify was considered in light of counsel's failure to move to suppress or move to dismiss based on the destruction of evidence. Counsel asserted that he did not file a motion to dismiss because he planned to argue that the government had failed to prove there were at least 100 plants. This explanation was "nonsensical" though because there was "no reason why he could not do both." Counsel also stated that he believed a motion to dismiss would be frivolous because he could not establish bad faith. "[H]is testimony and case file suggest that he did not know the legal standard for showing bad faith in the Tenth Circuit." In short, counsel "did not reasonably investigate the facts and law regarding the government's destruction of evidence." In analyzing the case law and factors to be considered, however, the court found evidence of bad faith, including the government's failure to even follow DEA policy for which the government could not offer an innocent explanation and instead attempted to argue that it had followed proper policy. Thus, the factors weighed in favor of dismissing the charge that the defendant possessed more than 100 plants.

***Couch v. Booker*, 650 F. Supp. 2d 683 (E.D. Mich. 2009), *aff'd*, 632 F.3d 241 (6th Cir. 2011)**. Counsel ineffective in murder case for failing to investigate and rebut the medical examiner's conclusions that the victim died as a result of drowning in his own blood from the beating. The victim had consumed extremely large amounts of cocaine at a party gone awry. He was subsequently found sexually assaulting a woman and then beaten by the defendant and other men. Counsel's conduct was deficient in failing to investigate, which would have revealed that the victim was still speaking and coherent when police and firefighters arrived. He was combative when emergency medical personnel tried to render care and had to be restrained by five people. He was subsequently intubated and there was not blood in the airway leading to his lungs. The death was caused by pulmonary edema, "which has been associated by researchers with fatal levels of cocaine, such as the amounts found by toxicologists in the decedent." In short, the death "fit the pattern of a typical, sudden cocaine death occurring during a struggle while the person is subjected to police restraint" and was "accidental." While counsel had retained a defense expert, counsel did not provide the expert with the reports of the first or second responders and never talked to the expert, leaving that to co-counsel. By failing to provide the expert with the information, "defense counsel precluded [the expert] from conducting a complete review of [the state pathologist's] findings as to the cause of death."

**Capital Case*

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

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

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

***Sturgeon v. Quarterman*, 615 F. Supp. 2d 546 (S.D. Tex. 2009)**. Under AEDPA, counsel ineffective in aggravated robbery case for two reasons. The case involved the robbery at gunpoint of a victim, who required a Vietnamese interpreter during testimony, by two black men. The crime occurred at night and involved the victim being repeatedly struck in the face. The victim gave descriptions of the attackers shortly after the crimes. The description did not match the defendant. The same day, a police officer stopped a car driven by the defendant. There were three passengers in the car, including co-defendant #1, who was the brother of the owner of the car. Co-defendant #1 had the victim's credit card, driver's license, and other incriminating evidence in his possession.

**Capital Case*

The registration for the victim's car was found in the trunk of the car the defendant was driving. The defendant, the co-defendant, and a witness were all arrested. The robbery victim subsequently identified the defendant as one of his attackers. During retrial (following an initial appellate reversal), defendant testified as a state's witness. He testified that Co-defendant #2 had removed all of the victim's items from the victim's car and given them to him. He could not say whether defendant was involved or not. Counsel attempted to present an expert on the questionable reliability of eyewitness identifications, but this evidence was excluded because the proffered expert was unfamiliar with the facts of the case and because the expert provided insufficient information about the scientific studies on which he purported to rely. Counsel also attempted to call Co-defendant #2 to testify. He had been initially indicted, but charges were dismissed shortly after defendant's first trial when he plead guilty to unrelated charges. Co-defendant #2 refused to testify following the prosecutor's assertion that the charges had been dismissed without prejudice to refile against Co-defendant #2 if he made any inculpatory remarks. Counsel was ineffective in failing to obtain co-defendant #2's testimony. First, counsel should have objected that the applicable five-year statute of limitations had run on the aggravated robbery charges and a witness may not invoke the Fifth Amendment privilege against self-incrimination once the statute of limitations for that offense has expired. Second, counsel should have objected that the charges were dismissed by the state "with prejudice" pursuant to a plea agreement, which could have been established by co-defendant #2's prior defense counsel. Prejudice established because co-defendant #2 would have testified that he was a participant in the robbery and that the defendant was not. The state's case was "not particularly strong" because it rested only on the victim's identification of him and his later arrest in the company of a man, who possessed the victim's property. Counsel was also ineffective in failing to adequately prepare and present the expert witness on the issue of eyewitness identification. Counsel should have prepared the expert for cross-examination about the studies he relied on by advising him "to come prepared with this information." Likewise, counsel should have prepared the expert for cross on the facts of this case "by providing him with materials pertinent to the case, such as the police reports and the transcript of [the] first trial, which information was readily available." Prejudice established because the expert's "credentials are extensive" and the "problems of cross-racial identification are well known." The expert "would have provided important support for [the] defense of mistaken identity." The state court's conclusions to the contrary were an "objectively unreasonable application of the *Strickland* standard." Reversal was also required on due process violations related to the state's misconduct in threatening the co-defendant with prosecution if he testified and related to the pretrial identification, which was suggestive.

2008: ***United States v. Thompson*, 561 F. Supp. 2d 938 (N.D. Ill. 2008)**. Counsel ineffective in felon in possession of gun case. The defendant was stopped for DUI and the gun was found on the floorboard behind or partially under the driver's seat. The defense theory was that the defendant had no knowledge of the gun. Defense counsel was ineffective for failing to interview the defendant's wife about her knowledge of the gun since she drove the vehicle on a daily basis. She would have testified that another man rode in the backseat shortly before the arrest and that she had personal knowledge that he had a gun similar in appearance to the one involved here. Counsel also objected and asked the court to advise her of her 5th Amendment rights when the prosecution asked if the gun was hers. Counsel had no strategy. "Counsel was doing anything but acting strategically; rather, he was quite plainly making it up as he went along." Even assuming this was strategy, it was not

supported by adequate investigation because, if counsel had adequately investigated he would have known that she would deny the gun was hers rather than invoking her rights following the trial court's warnings. Prejudice found because this testimony, along with her testimony at trial that the gun could not have been placed where it was from the driver's seat because of the particulars of the vehicle, likely would have resulted in acquittal. Counsel was also ineffective in failing to impeach one of the police officers, who testified that the defendant had been given traffic citations that were later dismissed by state court prosecutors. If counsel had investigated, he could have presented affirmative evidence that the defendant had not been given any traffic citations. While the court did not find prejudice with respect to the trial, the court did find prejudice with respect to the motion to suppress the gun, which the court had denied under the inevitable discovery doctrine, but now finds was error. New trial granted and the motion to suppress hearing reopened.

***Byrd v. Trombley*, 580 F. Supp. 2d 542 (E.D. Mich. 2008), *aff'd*, 352 Fed. Appx. 6 (6th Cir. 2009)**. Under AEDPA, counsel ineffective in criminal sexual conduct case for several reasons. First, counsel failed to object to the introduction of Petitioner's ten-year-old forgery conviction and the prosecution's use of the conviction as "bad man" evidence. Second, counsel failed to investigate and present an expert witness to counter the prosecution's witnesses. The failure to obtain a defense expert was not excused by cross-examination of the state expert. "Thorough cross-examination . . . does not excuse the abject failure of counsel to procure or even consult with an expert." Prejudice established because "the case turned on the credibility of Petitioner, as weighed against the credibility of the victim."

***Guilmette v. Howes*, 577 F. Supp. 2d 904 (E.D. Mich. 2008), *aff'd on other grounds*, 624 F.3d 286 (6th Cir. 2010).** Trial and appellate counsel ineffective in home invasion case. Trial counsel was ineffective for conceding the entry element of the crime and focusing only on a mistaken identity defense. The alleged victim testified that her door "came crashing open" and she ran. When she looked back, no one was there, but she looked out the window and saw a man running off her porch to a van. She identified petitioner in two photo arrays, but at a preliminary hearing she was unable to distinguish between him and his brother. At trial, she could say only that petitioner looked like the man at her home. The only other evidence was a photo of a footprint in the snow taken from her sidewalk by police. After police left, the alleged victim also took a photo of a footprint on the threshold of the front door to her home. At trial, the prosecutor relied solely on this photograph to establish that the suspect entered the home. Counsel's conduct was deficient in conceding entry without investigating as a footprint expert opined that the threshold footprint was significantly different from the footprint found outside that police believed belonged to the suspect. While counsel's decision to focus on mistaken identity was likely strategy, the strategy was deficient in light of the alleged victim's credibility problems. Indeed, counsel even cross-examined her about the questionable value of the threshold footprint photograph. Likewise, an argument that the prosecution failed to prove entry would not have been inconsistent with the alibi defense.

> The most successful criminal attorneys are often those who can create a reasonable doubt in the jurors' minds by throwing up one or two or more plausible alternatives

> to the defendant's guilt. Individual jurors need not be persuaded by the same plausible alternative to guilt to vote an acquittal.

Id. at 916 (quoting *Moore v. Johnson*, 194 F.3d 586, 611 (5th Cir. 1999). Prejudice found because evidence suggesting that the person who made the threshold footprint was someone other than the suspect could have convinced the jurors that the prosecutor did not prove the element of entry. Appellate counsel's conduct was deficient in failing to challenge trial counsel's ineffectiveness. Prejudice established because the claim and a review of the photographs could have changed the result of the appeal.

***Espinal v. Bennett*, 588 F. Supp. 2d 388 (E.D.N.Y. 2008), *aff'd*, 342 Fed. Appx. 711 (2nd Cir. Aug. 18, 2009)**. Under AEDPA, counsel ineffective in second degree murder case for a number of reasons. First, counsel failed to investigate and discover the witness whose interview was recounted in a police report with the witness' name redacted. Counsel's conduct was deficient because this witness corroborated the defendant's alibi, which counsel had investigated without success prior to receipt of this document. Counsel thus had already chosen not to present an alibi. " Nonetheless, an existing trial strategy, even if initially reasonable, cannot excuse counsel's failure to investigate new evidence that could potentially exonerate his client or create reasonable doubt in the minds of the jury." Prejudice established because counsel's deficient conduct "eliminat[ed] his best opportunity to cast significant doubt on the prosecution's case at trial."

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

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

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***McGahee v. United States*, 570 F. Supp. 2d 723 (E.D. Pa. 2008), *aff'd*, 370 Fed.Appx. 274 (3rd Cir. 2010)**. Counsel in drug and robbery case ineffective for failing to investigate and present three potential alibi witnesses made known to counsel by the defendant. "If the attorney can easily investigate, his decision not to do so raises greater concerns than if undertaking an investigation would clearly require the assembly of great resources." Counsel's conduct was not excused by strategy. "When an attorney knows the details of what a certain witness will testify to, and then chooses not to interview that proposed witness, the decision is due greater deference than when the attorney knows nothing about the potential testimony." Here, counsel "elected not to investigate the alibi even though he knew none of the details about the potential defense, and nothing suggested that his investigation 'would be in vain.'" Likewise, counsel's conduct was not excused due to insufficient contact information being provided to him. "To investigate means to seek out unknown facts. . . . [I]n this day and age, searching for a phone number is not difficult." In addition, counsel was provided with the name of the employer for two of the witnesses . "Surely, it does not take a trained investigator to find the phone number for a business or a . . . deputy sheriff. If [counsel] had made even cursory attempts to contact these witnesses, to find their phone numbers, and failed, it would be another question. But in this case, no such effort was made." Counsel also could not rely on the lack of funding for an investigator because "there is no evidence, . . . that he requested funds for an investigator to search for the alibi witnesses."

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

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

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

Prejudice established because the Government's case at trial was not overwhelming and there were no eyewitnesses other than a witness attacked by defense counsel for delaying in coming forward with allegations against the defendant and receiving benefits in his own case for disclosing the defendant's name. "[A]dditional evidence, even of relatively minor importance, would have been more likely to tip the balance in [the defendant's] favor at trial than if the Government's case had been more extensive." Although the alibi witness' had their own credibility issues and contradicted

each other to some extent, "the testimony was basically consistent." In order to convict, a jury would almost have to believe all three men, one of whom was a police officer, were lying. In addition, it would be their word against the impeached Government witness. "Judging credibility is the paradigmatic role of the jury."

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

***Schulz v. Marshall*, 528 F. Supp. 2d 77 (E.D.N.Y. 2007), *aff'd*, 345 Fed. Appx. 627 (2nd Cir. 2009)**. Under AEDPA, counsel ineffective in robbery case for failing to interview and adequately examine the only witness to identify the defendant pre-trial and in failing to present alibi evidence. If the eyewitness had been interviewed, counsel would have learned that when the police showed the witness a photo array the day after the robbery, the owner of the restaurant robbed, who was serving as an interpreter, pointed to the defendant's picture and told the witness that he was the person. He also told the witness that if she did not help put him in jail, he would be released and hurt her. The eyewitness also would have told counsel that the defendant was innocent and she was 90% certain of her identification of another man, who had some similar physical characteristics to the defendant and had been arrested for numerous robberies, including a robbery on the same night three hours earlier, at a location about 10-12 miles away. The defendant's roommate also would have

given alibi testimony. In failing to find ineffective assistance the state court unreasonably applied the *Strickland* standard. During trial, the eyewitness did not identify the defendant, but the restaurant owner did. Nonetheless, counsel did not present the alibi witness. Counsel's conduct was deficient and not based on valid strategy. "The fact that only one of the two eyewitnesses had identified petitioner at the trial and [counsel] viewed the prosecution case as weak does not justify the failure to call an alibi witness with no known credibility issues." Likewise, counsel's concern that the jury would wonder why the defendant did not also testify to the alibi was insufficient in light of counsel's other major failure in not interviewing the eyewitness prior to her testimony and to show her the picture of the man the defense asserted was the guilty party. While counsel stated that he wanted to interview the witness, he testified the prosecutor prohibited this. This testimony was contradicted by the prosecutor, though. Even if counsel's testimony was accurate, "the decision to abandon such an interview attempt certainly cannot be considered strategic." Counsel's conduct was deficient in failing to pursue this because there was "nothing to lose" and "no 'downside' at all" in interviewing the witness. If counsel had conducted the interview, counsel could have introduced the evidence against the other man and impeached the restaurant owner who identified the defendant during trial. Prejudice established because "[t]his [was] a case of underwhelming evidence. . . . All of the evidence against [the defendant] was affected by his counsel's failures." *Id*. (quoting *Lindstadt v. Keane*, 239 F.3d 191, 205 (2nd Cir. 2001)).

2006: ***Showers v. Beard*, 586 F.Supp.2d 310 (M.D. Pa. 2008), *aff'd*, 635 F.3d 625 (6th Cir. 2011)**. 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 is 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.

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

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

> would have excluded at least conducting interviews of the alibi witnesses to determine whether they could provide exculpatory evidence."

Id. at ___ (citations omitted). Likewise,

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

Id. at ___ (quoting *Thomas v. Kuhlman*, 255 F. Supp. 2d 99, 111 (E.D.N.Y.2003). If counsel believed his retainer was insufficient to make investigation "financially feasible, he could have petitioned the trial court for public assistance. And even if the court denied his request, [he] could have undertaken less costly investigative measures, such as interviewing the available witnesses and issuing subpoenas for locally available information." In short, counsel "could not have made a strategic decision not to present the alibi because he did not then know the details of such a defense or how credible it would have been." Prejudice found because "[t]here is . . . little doubt that the alibi evidence, had it been produced at trial, would have altered the landscape substantially. The decision of a jury that did not weigh this evidence is not reliable." Under AEDPA, the state court's decision was an unreasonable application of clearly established federal law because the state court rejected the claim on the basis that the defendant had not established his alibi when he was required "only to show that trial counsel's performance fell below professional standards of competence and that the outcome of the case probably would have been different but for this deficiency."

2004: ***Mitchell v. Ayers*, 309 F. Supp. 2d 1146 (N.D. Cal. 2004)**. Counsel was ineffective in burglary case for failing to interview and present testimony of witness that would have corroborated petitioner's defense that he entered the home only to escape from people who were threatening his life. During the break in, the family members understood petitioner to say at times "don't call the police" and "call the police." Other than the window through which he entered, nothing in the home was disturbed. When petitioner was arrested he was clearly impaired by drugs. Petitioner testified that he entered the home because he was being chased by a man to whom he owed money because, rather than selling drugs for the man as he was supposed to, he would sometimes use the drugs because he was addicted to crack cocaine and used heroin. A witness was available to corroborate petitioner's testimony that a man with a gun had confronted him outside the home after petitioner had been using crack, which made him "paranoid." Counsel knew about the potential witness and could have easily located him because he was in confinement and, on the day of trial, was in the court holding area along with petitioner. Counsel's conduct was deficient in failing to interview the witness, because whether Petitioner was actually threatened or only perceived that he was threatened in a drug- induced paranoid reaction, the witness would have supported

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Petitioner's otherwise uncorroborated testimony and was, therefore, "critical." Prejudice found because "[t]his was a close case in which the jury deliberated for an entire day after receiving only one and half days of evidence" and the prosecution evidence of intent "was relatively slim." Analyzing the case under the AEDPA, the court held that, due to the significant potential impact of the witness' testimony, the State court's decision was an objectively unreasonable application of federal law as set forth in Strickland.

***United States v. Ramsey*, 323 F. Supp.2d 27 (D.D.C. 2004), *appeal dismissed*, 2004 WL 2958443 (D.C. Cir. Dec. 21, 2004)**. Counselwas ineffective in drug distribution case for a number of reasons, but primarily failing to move for mistrial after the court suppressed an inculpatory statement after it was already heard by the jury. Counsel failed to realize until he heard the testimony that the defendant was questioned after he invoked his rights. This error was considered in conjunction, inter alia, with counsel's ignorance of the law and failure to understand the implications of an entrapment defense with respect to allowing evidence of predisposition until advised of the implications by the court. This resulted in counsel abandoning the sole defense in the midst of trial without having the defendant testify. Counsel's conduct was deficient and the proffered strategy reasons for failing to seek a mistrial were "so nonsensical that the Court is left to conclude that [counsel] simply abandoned what he had decided at some point during the trial was an unwinnable case, and had been unwilling to invest the time and effort that would be required by a second trial." Prejudice found, regardless of the likely outcome of a new trial, because counsel's deficient conduct deprived the defendant of a mistrial and, thus, "the opportunity for a second trial he otherwise would have had, untainted by an opening statement to the jury of an entrapment defense he could not present." A mistrial would have afforded counsel an opportunity to advise the defendant "of the substantial advantages of . . . pleading guilty in view of the strength of the government's case" after counsel had heard all of the evidence and realized that an entrapment defense could not be mounted.

***Tucker v. Renico*, 317 F. Supp. 2d 766 (E.D. Mich. 2004)**. Counsel was ineffective in criminal sexual conduct and breaking and entering case for failing to introduce evidence tending to prove that the defendant and the victim has a long-term, common-law, spousal relationship. The alleged victim downplayed her relationship with the defendant as only "spiritual," explained her two children by him as a result of prior sexual assaults, and denied that he lived with her. Analyzing the case under the AEDPA, the court held that ineffective assistance of appellate counsel established "cause" for not asserting trial counsel's ineffectiveness on direct appeal. Appellate counsel asserted only that the evidence was insufficient to support the convictions. Trial counsel was ineffective because adequate investigation and presentation would have revealed that the defendant lived with the alleged victim up through the time of his arrest, that the alleged victim held herself out as the defendant's wife, and that the defendant had an on-going relationship with their children and the alleged victim's family. Prejudice was found because these facts tended to negate the non- consensual nature of their sexual relations.

***Casey v. Frank*, 346 F. Supp. 2d 1000 (E.D. Wis. 2004)**. Trial counsel was ineffective in sexual assault case for failing to obtain the case file from the defendant's previous attorney, which contained numerous witness statements undermining the credibility of the alleged victims and an

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

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

Here, it was particularly important because prior counsel represented the defendant not long after the alleged incident when the "witnesses' memories would have been fresher." Although the state court did not specifically address the prejudice analysis under *Strickland* and it was "debatable whether AEDPA applies to the court's determination on this point," *id*., the court applied the AEDPA standard. The state court's determination was unreasonable because the court "turned a blind eye to the potential impact of the witnesses who gave statements" to prior counsel. Indeed, the state court

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

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

3. Military Cases

***United States v. Garcia*, 59 M.J. 447 (C.A.A.F. 2004)**. Counsel ineffective in robbery, conspiracy, and stolen property case for two reasons. First, civilian defense counsel waived the Article 32 pre-

trial investigation without the accused's knowledge. This was deficient because waiver of this hearing must be personal to the accused. It was prejudicial because this hearing serves as a discovery proceeding for the accused and "stands as a bulwark against baseless charges." Here, if the accused had seen the potential strength of the government's case, he might have sought a plea agreement limiting his sentence. Second, military counsel (who tried the case alone) was ineffective for failing to adequately advised the accused of his options mid-trial when the strength of the government's case was clear and the accused first confessed his full involvement in the crimes to counsel. Without explaining the options to the accused, such as exploring the possibility of a plea agreement or changing the plea to guilty, counsel advised the accused to testify admitting his full involvement in the crimes. Counsel's conduct was deficient and prejudicial. Much of what counsel elicited bolstered the government's case and opened the door to cross eliciting aggravating and damaging details not previously established by the government. Counsel also did not elicit any expressions of remorse or contrition so the testimony "had no mitigating impact." Counsel's argument in sentencing also highlighted the accused's culpability and including a statement that the accused was only "three-and-a-half pounds of trigger pull away from" murder. Under the circumstances, there was no discernable trial strategy for counsel's actions. "The extreme harshness of the sentence returned by the members is strong evidence" of prejudice. The government requested a sentence of a $23,000 fine and 86 years, but the penal returned a sentence including a $60,000 fine and 125 years of confinement.

4. State Cases

2019: ***Ex Parte Gissendanner*, 288 So.3d 1011 (Ala. 2019) (2003 trial and sentencing).** In capital case where petitioner was convicted of murder during the course of the kidnapping and robbery of the victim, as well as forging a check taken from the victim, trial counsel was ineffective in failing to conduct a sufficient investigation into the charges. The Alabama Court of Criminal Appeals applied the wrong standard of review to the disputed facts and failed to give considerable weight to the finding of prejudicial ineffective assistance of counsel by the original trial judge who also presided over the post-conviction proceedings. The prosecution's theory of the case was that petitioner assaulted the victim in her carport, transported her in the trunk of her own car, disposed of her body in a ditch, and covered the body with tree limbs. He then drove around in her car before abandoning it and cashed a forged check from her account. The defense theory was that petitioner was elsewhere at the time the prosecution asserted the murder was committed. According to the defense, petitioner had rented the victim's car from a man named Buster he saw early in the morning after the victim was killed. Buster was looking to buy drugs. Buster gave petitioner a check on the victim's account, asked petitioner to cash it (which petitioner did), and told petitioner that he would use the proceeds to buy drugs from petitioner. In post-conviction proceedings, the trial/post-conviction relief judge found trial counsel deficient for failing to adequately investigate the evidence against petitioner as well as his alibi defense. Inadequacies included: (1) failing to investigate the fingerprint evidence and educate the jury about the absence of any fingerprints from the crime scene tying petitioner to the victim; (2) failing to investigate and counter testimony placing petitioner in the victim's car in the vicinity of her house around the time of the murder; (3) failing to investigate and discredit the prosecution's theory that petitioner transported and disposed of the victim's body and covered it with tree branches; (4) failing to investigate and discredit that prosecution's allegations of forgery; (5) failing to investigate and

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discredit evidence that tied petitioner to an abandoned trailer where items taken from the victim were discovered; (6) failing to investigate and discredit evidence about the victim's blood being found on a sock linked to petitioner; and (7) failing to investigate witnesses who could have supported petitioner's alibi. In upholding the trial/post-conviction judge's grant of relief, the Alabama Supreme Court observed, inter alia, that petitioner's most plausible defense to the murder charges was an alibi. Although defense counsel argued in his opening statement that petitioner had an alibi, "defense counsel's inadequate pretrial investigation resulted in a lack of information and an inability to present an adequate alibi defense." The state supreme court agreed with the trial/post-conviction judge that "counsel's defense strategy was not based on thorough pretrial investigation or supported by a reasonable professional judgment." As for prejudice, it was clear from the findings of the trial/post-conviction judge "that defense counsel's deficiencies would have altered the entire evidentiary picture for the jury." Not only could alibi witnesses have testified to seeing petitioner at a location other than the crime scene during the period of time that the prosecution's evidence showed the murder was committed, there was also evidence that should have been discovered and presented demonstrating to the jury the lack of any physical evidence tying petitioner to the crime scene. Likewise, defense counsel's failure to investigate the forgery claim resulted in prejudice.

***Urquhart v. State*, 203 A.3d 719 (Del. Supr. 2019).** In armed robbery case where petitioner was convicted and sentenced to fifteen years in prison, the Delaware Supreme Court grants post-conviction relief and holds: "a defendant's Sixth Amendment right to the assistance of counsel in a serious felony trial requires more than the mere presence of a defense attorney the day of trial." Following petitioner's indictment, he was represented by three different public defenders at preliminary court hearings in the five months prior to trial. A fourth public defender was assigned to represent petitioner at trial. Because, however, of other commitments, trial counsel did not meet with petitioner to prepare for trial. On the morning of trial, petitioner for the first time was shown the key evidence against him – surveillance footage and photographs. (The discovery had been mailed to petitioner but it had not been received prior to the trial date.) Petitioner was offered a five-year plea deal that he turned down. Petitioner expressed to the trial court his confusion and frustration about essentially seeing his defense counsel for the first time on the day of trial along with the evidence. Petitioner denied that he was dissatisfied with counsel, but instead maintained he needed help and didn't understand what was happening. When asked if he wanted to delay the trial, petitioner said he did not. Trial counsel did not ask for a continuance and the trial went forward. In post-conviction proceedings, petitioner raised a claim of ineffective assistance of counsel under *Cronic* rather than *Strickland*. The lower court denied relief, agreeing with the State that *Cronic* required that defense counsel be "completely absent" from representation to forgo *Strickland's* prejudice requirement. Because trial counsel supposedly met with petitioner once, spoke on the telephone with him twice, and sent him five letters before trial, the lower court found that trial counsel was not completely absent during the pretrial proceedings. Before addressing the merits of the claim, the Delaware Supreme Court rejected the State's argument that petitioner had waived the claim by informing the trial court that he was not dissatisfied with counsel and did not ask for a delay. The Court explained: "Viewed in the context of [petitioner's] overall response to the court's questions —repeated requests for help and clarification—and trial counsel's failure to speak up and request a continuance for the benefit of his client, we find that [petitioner] did not knowingly and intelligently waive his right to later appeal his trial counsel's failure to provide

effective assistance of counsel." As to the merits, the Court dissected the actual communication that occurred between petitioner and trial counsel and concluded: "The grim reality is, in the critical pretrial phase when trial counsel must meet with his client to review the evidence, develop strategy, and prepare for trial, that did not occur." Regarding whether *Chronic* or *Strickland* should apply, the Court held:

> Under the stark facts in this appeal—no advance discussion with [petitioner] of trial strategy, what witnesses to call, how to respond to the State's evidence, whether [petitioner] should testify, and no sober conversation with counsel outside the distractions of the morning of trial whether to enter into plea negotiations and accept a plea— [petitioner] should not have to point to any specific event of prejudice and disprove the State's contention that trial counsel was able to "wing it" enough at trial to satisfy the Sixth Amendment."

In the alternative, *Strickland* prejudice was shown as to trial counsel's deficiency in handling the plea offer.

> [W]e think it is obvious that had the objective circumstances—the evidence the State was going to present, the length of time [petitioner] faced if he went to trial and was convicted, and the likelihood of an acquittal—been the subject of professionally adequate consultation between client and counsel, there is a "reasonable probability" that [petitioner] would have accepted the plea.

As for the remedy, although petitioner had asked for a new trial, it was left to the lower court to decide whether a new trial should be ordered, or the State and petitioner agree on another remedy, i.e., reinstating the plea offer.

***Washer v. State,* 284 So.3d 1139 (Fla. Ct. App. 2019).** In case where petitioner was convicted of, inter alia, discharging a firearm from a vehicle, shooting into a dwelling, and five counts of aggravated assault with a firearm, trial counsel was ineffective in failing to request a self-defense jury instruction and investigate and present GPS data related to the self-defense theory. The alleged victims in the case were petitioner's estranged wife, daughter, stepson, and stepson's friend. They testified that petitioner drove to his wife's home and punctured his stepson's friend's car tire with a knife. Petitioner's stepson then confronted petitioner outside the home and struck petitioner multiple times with an axe handle. At that point, petitioner drove away from the home but returned shortly thereafter and fired multiple gunshots into the home. In contrast to the account of the alleged victims, petitioner denied having punctured the tire and claimed that he fired the shots into the home after he had been assaulted from behind without provocation. At a post-conviction hearing on petitioner's ineffective assistance of counsel allegations, trial counsel testified that he believed that petitioner had a "bad" self-defense case and so opted instead for a defense of diminished capacity. Counsel further offered his belief that a pure self-defense instruction would not be available based on the evidence presented. He did acknowledge, however, that he argued self-defense during his closing argument. He contended that he nevertheless chose not to ask for a self-defense jury instruction because the "instruction for self-defense is awful." He explained that in his experience, it is sometimes the better strategy to simply argue to a jury without

the benefit of corresponding jury instructions. The post-conviction court accepted this strategy and also found that, based on the evidence presented, a self-defense instruction could not have been requested in good faith. The appellate court rejected these findings. "We can fathom no sensible, strategic reason for counsel to argue self-defense during [petitioner's] closing argument but opt not to request a self-defense jury instruction." And because no witnesses disputed that petitioner was hit multiple times with an axe handle, and petitioner testified that he fired in self-defense from that attack, petitioner would have been entitled to a self-defense instruction, contrary to the lower court's finding. Thus, defense counsel's "choice not to request the self-defense jury instruction constituted deficient performance, as it was not a reasonable, strategic decision." Regarding the failure to present GPS evidence, it was undisputed that petitioner had requested multiple times that defense counsel investigate the GPS data which petitioner claimed would establish he had not left his wife's home after he was assaulted and later returned. Defense counsel declined to conduct the requested investigation because he disbelieved his client and feared the GPS data could substantiate the wife's statement that petitioner had previously harassed her. The lower court concluded it was reasonable to forgo investigation that defense counsel viewed as unhelpful. The appellate court found defense counsel deficient because without conducting an investigation, counsel could not determine whether or not the GPS evidence was unhelpful. Considered together, the two deficiencies by defense counsel rendered petitioner's trial fundamentally unfair.

***Romero v. State*, 276 So.3d 514 (Fla. Ct. App. 2019).** In case involving multiple charges of lewd and lascivious molestation/conduct involving a child less than sixteen years old, trial counsel was ineffective in (1) failing to object to a comment by the prosecution in its closing argument that the jury should consider the negative reaction during petitioner's testimony of a witness sitting in the courtroom audience, and (2) agreeing to instruct the jury that it could consider such reactions. The victim was a friend of petitioner's stepdaughter, who asserted that petitioner repeatedly kissed her, massaged her buttocks, and touched her breasts. After she reported what happened to her sister and mother, the mother contacted the police. A call between the victim and petitioner was then recorded during which petitioner asked the victim to forgive him, and said that he did not know what came over him, that it was unintentional, and that what he did had sickened him. Petitioner told the victim that he would be in big trouble if she told anybody what he did. In a police interview, petitioner provided innocent explanations for the contact he had with the victim, stating that he touched her breast accidently while they wrestled, he had only kissed a "boo boo" of the child, and that while he did give the girl a massage, he did not touch her buttocks. As for the victim's claim that petitioner had her and the stepdaughter "pinky promise" not to tell anybody what happened, petitioner told the police that the pinky promise was because he did not want his wife to know he had been wrestling with the girls, and he admitted he told them that "whatever happens between us stays between us." At trial, the victim testified against petitioner, as did another minor who testified that while vacationing with petitioner and his family, petitioner had repeatedly touched her buttocks and grabbed her breasts. Petitioner's wife testified on her husband's behalf. She told the jury that their family members often give each other massages. She also said that she knew the victim and her daughter were wrestling with her husband on the weekend in question, but denied noticing anything amiss in any way during that weekend. She specifically said she saw nothing in the victim's demeanor that indicated anything to be concerned about. As for the other girl, petitioner's wife stated that petitioner had yelled at that girl for

something she did which made that girl angry at her husband. Petitioner's testimony largely tracked his police interview and he denied any inappropriate touching as to the other girl. Regarding the pinky promise, petitioner explained that this was simply part of a frequent family joke that was a parody of the commercial, "What happens in Vegas stays in Vegas." During closing argument, the prosecutor remarked:

> [Petitioner] had already pinky promised with her to not tell anyone, because what happens here stays here, which is not what he says on the stand: it was based on a commercial, you know, the Las Vegas commercial. All my family loves that. Anybody look out in the audience when that was going on and see his wife shaking her head no?

Defense counsel did not object to this reference to petitioner's wife's courtroom actions. During deliberations, the jury asked whether it could consider a witness's behavior in the courtroom even if the witness was not on the stand. Defense counsel and the prosecutor agreed that such off-the-stand behavior could be considered evidence, and the jury was so advised by the trial court. The jury convicted petitioner as charged. He was sentenced to twenty-five years in prison and lifetime sex-offender probation. In post-conviction proceedings, trial counsel did not offer a strategy for his failure to object to the reference to petitioner's wife's alleged courtroom behavior or his concession that the jury could consider it. Rather, trial counsel explained that he believed it was permitted. In fact, "a witness's reaction to another witness's testimony is not 'evidence introduced at trial,' nor is it 'the manner and demeanor of the witness [while] on the stand.'" (Citation omitted.) In addition, "a prosecutor is not allowed to present his or her private observations to the jury as though they were facts." Defense counsel therefore performed deficiently both in failing to object and agreeing that courtroom behavior could properly be considered. In assessing prejudice, it is acknowledged that there was ample evidence of guilt. But if petitioner and his wife were believed, that would have supported a different verdict. The prosecutor's comments impermissibly attacked their credibility. "The fact that the jury asked during deliberations whether it could consider such off-the-stand witness behavior or reaction as evidence certainly suggests that the State's closing argument and perhaps the wife's nonverbal conduct were on the jury's collective mind as it considered [petitioner's] guilt or innocence." On this record, prejudice is established.

***State v. Ellis*, 273 So.3d 1126 (Fla. Ct. App. 2019).** In case where petitioner was convicted of two counts of misdemeanor battery and one count of false imprisonment, all as lesser-included offenses of aggravated battery on a pregnant victim, domestic battery by strangulation, and kidnapping, a grant of post-conviction relief is affirmed on claims that trial counsel was ineffective for failing to file a pretrial motion to dismiss based upon pre-arrest delay, and for failing to conduct an adequate pretrial investigation. The alleged criminal incidents occurred May 13, 2011. Although the alleged victim made a police report two days after that, petitioner was not arrested until a year later. The sole witness against petitioner was the alleged victim, with no physical or testimonial corroboration of her account of what occurred. The victim's report and later testimony disclosed numerous material inconsistencies and differing accounts of the alleged criminal incidents. Bank and drug store surveillance videos may have been able to corroborate or disprove some of the victim's descriptions of what occurred but were no longer available at the time

petitioner was charged. And yet trial counsel did not file a motion to dismiss based upon the prejudice resulting from the prearrest delay (loss of prospectively-exculpatory video recordings). The State offered no explanation for the charging delay. There was a reasonable probability that the case may have been dismissed based on that delay had defense counsel made a dismissal motion. "Under the test articulated in *Rogers v. State*, 511 So.2d 526, 531 (Fla. 1987), defense counsel's failure to move for dismissal (based on the delay between the alleged commission of the crime and the defendant's arrest), amounts to a due process violation." Another lapse by defense counsel was the failure to investigate motel records. Had counsel done so, it would have been discovered that neither petitioner nor the victim was at the motel on the date of the criminal acts alleged to have happened there. It was also established that defense counsel did not investigate the victim's alleged pregnancy or petitioner's alibi that he was still at the drug treatment center on the day of the alleged incidents. "Considering the effects of these lapses on [petitioner's] ability to impeach the credibility of the alleged victim (who was the sole witness to provide evidence against [petitioner] at trial), the postconviction court properly concluded that counsel's deficient performance caused prejudice and that there exists a reasonable probability the result of the proceedings would have been different had the lapses not occurred."

***Feliciano v. State*, 263 So.3d 99 (Fla. Ct. App. 2019).** Reversing denial of post-conviction relief based on trial counsel's failure to call witnesses to support the defense in case where petitioner, the mother of the alleged victim, was convicted of lewd or lascivious molestation,. The victim was petitioner's son, who was an adult at the time of trial. He testified that petitioner fondled him while he bathed when he was around ten or eleven years old and open mouthed kissed him on another occasion. Petitioner denied the accusations and suggested her son had a motive to fabricate. Defense counsel was ineffective in failing to call two witnesses who lived with petitioner and her children who had testimony favorable to petitioner. One of the witnesses could have denied the victim's assertion that the witness had observed petitioner engaging in a salacious kiss with the victim. At trial, defense counsel stipulated that the other witness "should be precluded from testifying for violating the witness sequestration rule; the lawyer did not seek a hearing on the rule violation to determine any prejudice to the state, nor did she argue for a lesser sanction." Prejudice is found given that "this was a credibility case, without any other tangible evidence, and the witnesses would have significantly undermined the victim's testimony and provided a counterpoint to the state's case."

***Morrison v. State*, 575 S.W.3d 1 (Tex. Ct. App. 2019).** Trial counsel was ineffective in creating detailed billing records that disclosed confidential client communications and attorney work product and then failing to protect strategic defense information from public disclosure during the payment process, thereby allowing the prosecution to acquire and use information from the records against defendant. Defendant's boyfriend, Sims, killed his grandmother. Defendant was not present during the killing but the prosecution's theory at trial was that defendant was guilty of murder under the law of parties because (1) defendant knew, in advance, that Sims intended to rob and either assault or kill his grandmother and (2) she assisted Sims in carrying out that plan. Because defendant was indigent, she received appointed counsel. Her attorney was permitted to request interim billing for himself and his investigator during the course of the proceedings. At some point his unredacted, highly detailed fee requests were filed with the district court. The evidence against defendant was circumstantial. Prior to trial, the prosecution obtained copies of

defense counsel's billing records and reviewed them. Utilizing entries from those records, the prosecution pursued a line of questioning of defendant's mother, Misty, suggesting that defendant admitted her involvement in the murder in a letter she wrote to Misty from jail. The State further suggested that defense counsel had retrieved the letter from Misty prior to trial and was refusing to produce it, although there was no proof that any letter containing an admission by defendant ever existed. Defendant was convicted of murder. In finding ineffective assistance by defense counsel, it is noted that counsel breached the ethical duty to keep confidential the communications with his client. The court could "perceive no strategic reason why—under the circumstances of this case—defense counsel would ever disclose the detailed confidential communications included in his billing records." Having learned the week before trial that the prosecution had possession of the information counsel had submitted and intended to use it against defendant at trial, defense counsel failed to take any remedial measures. There was no indication that defense counsel sought to seal the records, filed a motion in limine or a motion to exclude the records and any information obtained from the records, or even objected to the prosecution's use of those billing records when the prosecutor began referring to information contained in them at trial. "Although there is no indication [defendant] waived her attorney-client privilege, defense counsel failed to assert that privilege when he learned that the [prosecution] had possession of the records or when the [prosecutor] actually used them at trial." Defense counsel also failed to ask the trial court to instruct the prosecution to return all copies of the billing records and/or to instruct the prosecutor to refrain from asking any further questions about the alleged letter or any other item derived from the records. Defense counsel further did not ask the trial court for an instruction to the jury to disregard the prosecutor's questions and comments about the letter or defense counsel's duty to produce it. Finally, he did not move for a mistrial based on the prosecutor's interjection of the information from the billing records. "We can perceive of no strategic reason why defense counsel would have offered no attempt to stop the [prosecutor] from using his billing records against [defendant] once he learned they were in the [prosecutor's] possession." Defense counsel also failed to introduce items of evidence available that tended to mitigate the damage caused by the use of his billing records: (1) a letter written by Sims to defendant's parents claiming that it was all his fault and that defendant had nothing to do with the murder; and (2) a statement by Sims at the time of his arrest that he was solely responsible for the murder. "We can perceive no strategic reason why defense counsel would not attempt to offer one or both items for the jury's consideration, especially after the [prosecutor] had speculated before the jury that [defendant] had written a letter admitting her involvement in the murder." In finding prejudice, the court pointed out that

> defense counsel not only disclosed information that was privileged, he also failed to introduce evidence that was exculpatory. When the [prosecutor's] argument that the billing records established the existence of a letter from [defendant] to her mother wherein she admitted her involvement in the murder—which did not exist—is combined with the fact that the jury did not hear about Sims' oral and written admissions that he was solely responsible for the murder—which did exist—then we find that there is a reasonable probability that, but for defense counsel's deficient performance, the result would have been different.

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***State v. Santoro*, 446 P.3d 1141 (Mt. 2019).** Appellant who was convicted, inter alia, of negligent homicide was denied the effective assistance of counsel by his defense attorney's failure to serve a subpoena upon or otherwise preserve the testimony of a crucial defense witness for trial. The charges stemmed from an altercation at a VFW bar between appellant and his neighbor, Rowell, the victim of the negligent homicide charge. Rowell had made a comment that offended appellant as appellant was exiting the bar after being asked to leave the establishment due to his crude behavior. After he left the building, appellant slammed a beer bottle on the walkway. Rowell, believing appellant had harmed Rowell's vehicle, attempted to leave the bar but was blocked by his wife and friend. When the victim's wife decided sufficient time had passed for appellant to have left, the three left the bar. Once outside, they saw appellant sitting in the driver's seat of his vehicle with the engine running. Rowell approached appellant's vehicle. Either the driver's door was open or Rowell opened it. The two men began yelling at each other. According to appellant, Rowell grabbed him by the neck and began choking him. As appellant began to lose consciousness, he gassed his truck in reverse. (He could not go forward as the bar was in front of the truck.) The reversing truck's open door caught Rowell, who was dragged and pulled under the truck. "[Appellant] felt a bump as he reversed and turned the steering wheel to the right and then put the truck in forward gear and turned to the left and sped away." Appellant maintained a justifiable use of force defense, claiming he was justified in putting the truck in reverse to free himself from Rowell's choking. The prosecution's theory was that appellant drove over Rowell twice, once in reversing and again going forward. To support this theory, the prosecution relied on pictures taken of the scene and the testimony of Rowell's family and friends who were present during the incident. Although each of the witnesses testified to appellant running Rowell over both while backing up and again while going forward, each either admitted this to be inconsistent with what they related to law enforcement immediately after the incident or admitted on cross-examination that they really had not seen Rowell hit when appellant drove forward. The prosecutor argued to the jury that even if appellant was justified in reversing the truck in order to get away from Rowell, he was not justified in running him over the second time. Not called by the prosecutor was Montana Highway Patrol Trooper Garza who had responded to the scene shortly after the incident and was the law enforcement individual responsible for investigation of the scene and reconstruction of the accident. Based on the physical evidence of the scene, his report indicated that Rowell had been dragged under appellant's truck while it was traveling in reverse and did not indicate that Rowell had been run over a second time when appellant pulled forward. During the defense case-in-chief, defense counsel attempted unsuccessfully to admit Garza's accident reconstruction report through another witness, explaining that a subpoena had been obtained for Garza two weeks earlier but Garza was no longer a Montana Highway Patrolman, he had moved out of Montana, and counsel had only located him the evening before. When counsel finally spoke with Garza, Garza related that he was not willing to appear for trial in person or by telephone. In response, the State indicated it had Garza's contact information since he left Montana and trial counsel never requested it. The State further asserted that Garza maintained the very same telephone number he had always had and that he was very easy to find. The appellate record was sufficient to determine that trial counsel performed deficiently in failing to secure Garza's presence at trial or otherwise preserve his testimony for trial. The record also supported a finding of prejudice. "It is clear from the record before us that, if presented with Garza's investigation and conclusion that Rowell was struck and killed while [appellant] was driving in reverse, such would lend support to the defense [appellant] presented at trial, while discounting the State's trial theory.

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As such, [appellant] has demonstrated 'a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different.'"

***Martin v. State*, 832 S.E.2d 277 (S.C. 2019).** In bank robbery and criminal conspiracy case, trial counsel was ineffective in failing to elicit testimony from petitioner's mother concerning the specific timeline of petitioner's purported alibi. At petitioner's, trial, his three co-defendants cooperated with authorities and testified against him. Their testimony was the only evidence implicating him. The robbery occurred at 12:20 p.m. on April 23, 2009, in North Augusta, South Carolina. At the time of the robbery, petitioner lived with his mother in Snellville, Georgia, around thirty miles outside of Atlanta. His mother testified that she dropped him off at a bus stop in Atlanta the morning of April 23rd. Although trial counsel's notes from an interview with petitioner's mother indicated she dropped petitioner off around 11:15 a.m., or 11:30 a.m., inexplicably trial counsel failed to elicit this detail. Given the distances involved, if this timing was correct, it would have been impossible for petitioner to be in North Augusta at the time of the robbery. During closing argument, defense counsel attacked the credibility of the co-defendants and noted the absence of any other evidence linking petitioner to the crimes. Although no mention was made of the alibi by defense counsel, the jury asked for a reread of the alibi testimony before convicting petitioner of the charges. The South Carolina Supreme Court first finds, "as a matter of law that Petitioner's trial attorneys were deficient for not eliciting the specific alibi timeline testimony from Petitioner's mother." It then rejects the State's characterization of the evidence against petitioner as "overwhelming."

> The only people who placed Petitioner at the robbery were the three codefendants, two of whom conceded they testified in hopes of a favorable deal with the State and two of whom admitted lying to law enforcement during the investigation in an effort to exonerate themselves and their codefendants. Further, the three codefendants all claimed to be good friends with one another, but they hardly knew Petitioner. Additionally, the forensics team was unable to find anything of evidentiary value connecting Petitioner to the crime.

Additionally, the mother's alibi testimony, such that it was, was important enough to the jury that it asked that it be reread during deliberations. "[C]ounsel's failure to present the known and available alibi evidence—the specific drop-off time in Atlanta—undermined confidence in the outcome of Petitioner's trial." (The state supreme court also rejected, without discussion, the finding by the post-conviction court that prejudice could not be established because petitioner's mother was not presented as a witness in the post-conviction proceeding. It simply noted that prejudice was proved by trial counsel's admission that they were aware of the specific timeline given pre-trial by petitioner's mother.)

2018: ***State v. Lopez,* 410 P.3d 1117 (Wash. 2018).** Reinstating the grant of a new trial based on trial counsel's failure to investigate the case as a result of his severe depression. Defendant was convicted by a jury of first degree child molestation, arising out of an allegation by a six-and-a-half year old child who was a passenger on the school bus that defendant drove, that defendant touched her butt and itched and tickled her vagina like he was trying to pinch her. After the verdict but before sentencing, defendant fired his trial lawyer and hired a new attorney, who filed a motion

for new trial based on IAC of original counsel. The motion argued that original counsel's severe mental depression, coupled with nearly contemporaneous disbarment, constituted IAC per se, removing the requirement of proving deficient performance or prejudice. Motion counsel also alleged that counsel's failure to investigate and call witnesses that defendant had identified constituted deficient performance. The record indicated that trial counsel failed to appear at court one day without explanation, called in sick at the last minute on the morning of trial another day, and usually showed up late when he did show. He failed to submit briefing requested by the court. The trial judge was alarmed and asked defendant if he wanted a new attorney. Counsel's investigator testified that she had a meeting with counsel months before trial to create a checklist for preparing for the defense, but after this meeting, counsel "checked out." He canceled numerous meetings with her, "with a different excuse every time." He stopped communicating with the investigator altogether, so that she could not communicate important case information to him. The investigator did not document the important case information she obtained in a memo because counsel stopped paying her, and she had worked for two months without payment because counsel did not submit a request for additional funding even though he told the investigator he had. The records showed he did not submit the request for additional funding until the trial ended. The trial court concluded, based on this evidence and its own observations of counsel's performance, that it was clear that if counsel had not been handicapped by his depression, he would have been more effective, and would have done things such as investigating reputation evidence and calling reputation witnesses. It granted the motion for new trial. The Court of Appeals reversed, interpreting the trial court's finding of IAC to be based solely on counsel's failure to call reputation witnesses as to defendant's sexual morality and decency, and such evidence was not admissible under the law of that division. It also interpreted the trial court's finding that counsel's depression had severely handicapped his representation as a per se prejudice finding, and held that defendants have no right to counsel free from mental illness. On petition for review, the Supreme Court of Washington reversed the Court of Appeals' reversal of the granting of the motion for new trial, and reinstated the grant of that motion. Its review of the trial court's factual findings with regard to IAC was for substantial evidence, meaning evidence that is sufficient to persuade a rational, fair-minded person of the truth of the finding. If such is found, the reviewing court would not substitute its own judgment for that of the trial court. The Supreme Court held: (1) there is no presumption of deficient performance when counsel is affected by mental illness, what matters is the effect of the disability on counsel's performance, and the trial court properly analyzed the issues under this focus; (2) the trial court properly found that counsel's performance was deficient and without strategic or tactical explanation after taking into consideration the trial investigator's declaration and testimony, counsel's audio-recorded interview and declaration, a letter by counsel's psychologist, and the court's own observations during trial, including counsel's failure to conduct preparation for trial that he had deemed necessary when he was well; (3) the evidence "supports the trial court's implicit legal conclusion that this adverse effect amounted to prejudice," 410 P.3d at 1128, because the case was not a slam-dunk for the state, and depended solely on the credibility of a six-and-a-half year old's contradictory report, the jury deliberated for over a day, and the trial court found that it was a close case that could have gone the other way.

***Edward M. v. Commissioner of Correction,* 201 A.3d. 492 (Conn. Ct. App. 2018).** In case where petitioner was convicted of sexual assault in the first degree and risk of injury to a child, based upon petitioner's alleged sexual abuse of his daughter, trial counsel was ineffective in failing to

present evidence to corroborate his assertion that he was circumcised, which conflicted with testimony presented by the prosecution. Counsel in petitioner's first habeas proceeding was also ineffective in failing to challenge the omission by trial counsel. In this case, there was no physical evidence of sexual abuse and the state admitted during closing argument that the case was a contest of credibility between petitioner and his daughter. The second habeas court hearing petitioner's case found that petitioner's daughter had described his penis as having skin on it and wrinkles, and she and her mother both testified at trial that he was uncircumcised. Both petitioner and his girlfriend at the time testified that he was circumcised. Trial counsel did not offer available medical records, testimony from a neutral third party or medical witness, or photographs of the petitioner's penis. During deliberations, the jury sent a note asking why such evidence had not been presented. The second habeas court granted relief to petitioner, which the state appealed. Under Connecticut law, "[t]he use of a habeas petition to raise an ineffective assistance of habeas counsel claim, commonly referred to as a habeas on a habeas, was approved by our Supreme Court in *Lozada v. Warden*, 223 Conn. 834, 613 A.2d 818 (1992)." In that case, the Connecticut Supreme Court had determined that the statutory right to habeas counsel includes an implied requirement that habeas counsel be effective. The state argued that the habeas court improperly determined that evidence of whether petitioner was circumcised at the time of trial, years after the alleged abuse, was relevant and admissible at trial, disregarded trial counsel's tactical decision to present evidence of petitioner's circumcised penis only through testimony, and relied on trial counsel's admission that failing to present the medical evidence was a mistake. The Appellate Court of Connecticut affirmed the habeas court's grant of relief, finding that the photographs and medical evidence of petitioner's circumcised penis at the time of trial met the extremely low standard for relevance, even if they did not affirmatively prove that petitioner was circumcised at the time of the alleged abuse. Trial counsel's failure to present this evidence was not a tactical decision; he admitted that he did not consider taking a photograph or having some appropriate person view the petitioner's circumcised penis and testify. Trial counsel admitted that he was distracted from this issue by other evidence in the case and missed the importance of the medical records. Habeas counsel failed to raise this at petitioner's first habeas trial even though petitioner had included this claim in his pro se petition, and even though trial counsel urged habeas counsel to raise this issue. The failure to present the evidence was prejudicial – given that the circumcision issue was the major point of dispute at the trial, there is a reasonable probability that further evidence of the petitioner's circumcision would have caused a different result. The fact that the jury asked this question, did not receive an answer, and then convicted petitioner is significant.

***Fahnley v. State,* 188 A.3d 871 (Me. 2018).** Affirming grant of relief in sexual abuse of a minor case where trial counsel failed to present evidence countering the prosecution's case. Petitioner was convicted by a jury of one count of sexual abuse of a minor and acquitted of another count of sexual abuse of a minor and of a charge of gross sexual assault. In a post-conviction review petition, he alleged IAC of trial counsel for counsel's (1) failure to present exculpatory evidence, including medical records and credit card records; (2) failure to present witnesses; and (3) failure to present evidence that he had told petitioner he was going to present, without discussing this with petitioner. The court granted the petition and vacated the conviction of sexual abuse of a minor. The court found that counsel had failed to interview witnesses who could have supported at least a partial alibi, and this constituted a failure to make a reasonable investigation; failed to present potentially exculpatory evidence, including evidence that the alleged victim's family was angry at petitioner because he had stopped financial support to their family, even after counsel told

petitioner he was going to present it; and failed to consult with petitioner with regard to overarching defense strategy, abandoning the defense he discussed with petitioner and which petitioner wanted presented. The court also found that petitioner was prejudiced by this deficient performance because witnesses and evidence were available to support his defense that neither he nor the victim were where the victim alleged, and witnesses and evidence that provided a motive for the victim and his family to retaliate against petitioner was not offered. The state appealed the grant of relief. The Supreme Judicial Court of Maine applied a "deferential standard of review to the findings of [the] post-conviction court," noting that in order for the state to prevail, the court "would have to conclude that the record is devoid of any competent evidence to support the court's finding." 188 A.3d at 875. Although the state noted that there was evidence to support some of the tactical decisions of counsel, that was not the guiding standard. The judgment was affirmed.

***Robinson v. State,* 428 P.3d 225 (Kan. Ct. App. 2018).** In arson-murder case, trial counsel was ineffective for failing to investigate and present sufficient expert testimony to refute the claims of the state's expert. Petitioner was convicted in state court of reckless second-degree murder and aggravated arson after he had first been indicted in federal court but the federal case was dismissed. The government's fire expert testified that the fire was intentionally set on the stairs using an open flame and a flammable liquid. Petitioner told detectives that he could have been smoking crack cocaine in the hall and could have thrown lighted matches on the floor. In state habeas proceedings, petitioner alleged numerous deficiencies by trial counsel. Following a hearing, the habeas court ruled that petitioner's counsel were ineffective for failing to investigate and present sufficient expert testimony to refute the claims of the state's expert, that this failure was prejudicial, and that cumulative trial counsel errors required relief. The Court of Appeals of Kansas affirmed the habeas court's grant of relief, using the standard of review of determining whether the habeas court's findings were supported by substantial competent evidence, whether the findings supported the court's legal conclusions, and applying a de novo standard to the habeas court's conclusions of law. It determined that the habeas court's finding of cumulative errors was insignificant given the expert evidence deficiency. It noted that the district court held that trial counsel performed an insufficient investigation into the use of an arson expert. Arson cases generally rely on expert opinions that a person intentionally started the fire, and therefore, it is incumbent upon defense counsel to counter the cause and origin evidence by exploring the possibility of using its own experts. Counsel here waited until two weeks before trial before consulting with someone who had no expertise in determining the cause and origin of fires, did not offer counsel an opinion about the cause and origins of this fire, and only provided counsel notes for use in cross-examination of the state's expert witness. At the habeas hearing, petitioner established that the state's expert's opinions were vulnerable to attack because they were not based on the actual physical evidence and only on a process of elimination of causes, which is not the product of the scientific method. The appellate court noted that there were vivid contrasts between the preparation of trial counsel and habeas counsel, and between the state trial expert and the habeas defense experts. The trial lawyer did not hire an investigator and did not hire an arson expert, but rather a person who did not point out any flaw in the state's evidence. He did not try to hire someone else because he doesn't "go around trying to find people that are just opinions for hire." The defense "expert" was asked to assist on the case as a consulting expert. He gave trial counsel a timeline and recommended cross-examination questions and had an hour-long conversation with someone on the defense team. He was not a member of arson or fire investigators organizations. The habeas lawyers presented testimony of the federal public defenders who had represented petitioner before

his federal case was dismissed. They had consulted with an expert who had written a foundational text on arson investigation and participated in the group that put together the Guide for Fire and Explosion Investigations. Counsel "studied [that guide] and used it in the preparation of his defense." 428 P.3d at 230. They moved to have the guide recognized as a learned treatise so they could use it to help with cross-examination of the state's expert. They had an investigator interview as many witnesses from the scene as possible. They moved for a *Daubert* hearing on the method the state's expert used to attempt to detect flammable accelerants. They believed the state's expert's methods did not fit with the recommendations of the guide. They also felt that the state's expert's opinion that petitioner did not flick a lit match was based on his personal belief that petitioner was not truthful, and he was not permitted to discuss that because it was outside his area of expertise. A habeas defense expert was a fire investigator who had been a fire fighter for 15 years, obtained certification through an association of fire investigators, and was a member of those organizations. He reviewed the fire investigation report, the report of the dog handler who investigated the case, read testimony from the original trial, and viewed photos and reviewed witness statements. He testified that the state expert's methodology violated the scientific method. There were numerous reasons besides the use of an accelerant why the fire spread rapidly that applied here. The appellate court noted that on appeal, many of the challenges the state raised to the habeas court's findings and conclusion were based on misinterpretations of what the habeas court actually did and found. Counsel's performance was deficient because counsel contacted the "expert" less than two weeks before trial and did not talk to another expert when the first proved unhelpful, not because (as the state contended) counsel did not call his expert to testify nor because he did not ask for a continuance to find an expert. The deficiency was prejudicial because the state expert's opinion could have been impeached, leaving the state with no case that petitioner intentionally started the fire. There was no physical evidence of any chemical accelerants at the scene. The significance of the gas can found at the scene was speculative, and the speed of the fire could have been caused by the structure of the apartment house.

2017: ***Marr v. State of Idaho*, 408 P.3d 31 (Idaho 2017).** Petitioner was charged with felony attempted strangulation and domestic battery with a traumatic injury of his wife and he was convicted by a jury on the domestic battery charge. The district court granted his petition for post-conviction relief on grounds of ineffective assistance of counsel at trial and sentencing. The Court of Appeals reversed. The Supreme Court of Idaho reversed the Court of Appeals, and affirmed the district court order granting petitioner relief on IAC grounds, ruling that trial counsel's failure to investigate petitioner's wife's character for aggression and belligerence when intoxicated and to discover and present evidence about this was prejudicial under the federal *Strickland* standard. Under Idaho law, a defendant can offer evidence of the victim's pertinent character trait, including the victim's trait for violence, in order to show the victim was the aggressor or that the defendant's force used was necessary for self-protection. Counsel should have, but failed to, investigate and present the testimony of a law enforcement officer who would have said that petitioner's wife had a reputation of being belligerent, difficult, and physically resistant when intoxicated, which corroborated petitioner's contention that he was acting in self-defense when he exercised force against her to protect himself. Counsel admitted at the post-conviction hearing that she missed this evidence (thus she did not make a strategic or tactical decision to exclude it), and she testified that despite being aware of the wife's reputation for being a nasty drunk, counsel did not interview anyone about this. The error was prejudicial because the jury's acquittal of petitioner on the attempted strangulation charge, and the wife's inconsistent testimony, demonstrated that the jury

had some doubts about the wife's credibility – it is possible the jury would have acquitted petitioner of both charges had it heard the testimony of the law enforcement officer.

***People v. Taylor*, 64 N.Y.S.3d 714 (N.Y. App. Div. 2017).** Defendant was convicted of second-degree assault and criminal possession of a weapon arising from a fight during which the victim suffered a "16-inch-wide laceration across his abdomen." The prosecution's key witness was a cab driver who testified that he saw the incident. This testimony was countered by defendant's testimony that the victim challenged him to a fight and then knocked him to the ground, and he opened his pocket knife to scare the victim but the victim lunged at him. After his convictions were affirmed on appeal, he filed a motion to vacate under state law, setting forth four allegations of IAC by his trial attorneys. Two of these allegations were based on facts demonstrable in the record, and two were based on non-record information. The trial court summarily denied the motion, determining that the claims were barred because they should have been raised on appeal. The Supreme Court, Appellate Division of New York determined that because IAC is a claim that has to be considered cumulatively (state case law provided that "the core . . . inquiry in reviewing ineffective assistance of counsel claims is whether counsel's performance viewed in totality amounts to 'meaningful representation"), presenting both record-based and non-record based IAC allegations in a motion to vacate is proper. The appellate court determined that defendant had established ineffective assistance of counsel under state law, finding that "defendant was deprived of a fair trial by less than meaningful representation," requiring the vacation of his convictions. (1) Counsel's performance was defective because he failed to challenge the cab driver, the prosecution's key witness, with statements he had made in his deposition to the police that were significantly at odds with his testimony. Counsel's failure to do this was all the more unreasonable given counsel's unsuccessful repeated attempts to introduce the cab driver's deposition into evidence, only after the cab driver's testimony was complete. (2) Counsel was ineffective for failing "to clearly articulate and support his request for a justification charge." He argued that a statute permitted an instruction on both the necessity defense and the ordinary force defense. The court denied instructions on both defenses under that statute, and thus instructed only on the necessity defense. Counsel could have requested an ordinary force instruction under a different statute, and so obtained both instructions. The appellate court determined that, cumulatively, these errors "deprived defendant of meaningful representation" under New York law. [Note that there is no reference to federal IAC law in this opinion, not even *Strickland* – it is all state IAC law.]

***Barnes v. State*, 218 So.3d 500 (Fla. Ct. App. 5th Dist. 2017).** In a case where defendant was convicted of first-degree murder, trial counsel was ineffective in failing to argue that there was insufficient evidence of premeditation to support a first-degree murder conviction. The victim had previously been in a romantic relationship with defendant and continued, unsuccessfully, to help defendant overcome his drug addiction even after they broke up. The victim was shot in her office. Two neighbors placed defendant at the office prior to and immediately after the sound of four rapid gunshots. Although some drawers in the office appeared to have been rummaged through, others did not. There was no evidence that anything was taken from the office. At the close of the prosecution's case, defense counsel moved for an acquittal, arguing there was insufficient evidence that defendant had committed the murder or that he intended the victim's death. The motion was denied. In defendant's testimony, he denied being present at the office and denied involvement in the killing. Defense counsel renewed his motion for judgment of acquittal which was again denied.

**Capital Case*

Defense counsel then stipulated to the jury receiving standard instructions on premeditated first-degree murder, second-degree murder, and manslaughter. The primary evidence supporting an inference of premeditation was the multiple gunshots. But the State presented little, if any, evidence that defendant committed the murder according to a preconceived plan or that he had exhibited, mentioned, or even possessed an intent to kill the victim at any time prior to the actual homicide. Nor was there any evidence that defendant had previously threatened the victim or that he was angry with the victim prior to arriving at her office on the date of the homicide. In fact, the prosecution's theory of the case, provided in closing argument, was that defendant had gone to the victim's office to retrieve the Electronic Balance and Transfer (EBT) card the victim kept for defendant to prevent him for using it for illicit drugs, and when the victim refused to give him the card, defendant got so angry that he shot her and then "freaked out." The State further suggested that defendant's actions were influenced by the fact that he had been using crack cocaine and was "all amped up." "In summary, the most reasonable inference arising from the State's evidence was that in a moment of rage and anger, fueled by the use of crack cocaine, [defendant] shot the victim four times in rapid succession immediately after she refused to give him his EBT card. Accordingly, we conclude that the State's evidence was insufficient to prove premeditation." There was no perceivable strategic basis for trial counsel's failure to challenge the sufficiency of the evidence as to premeditation. The remedy is vacation of the first-degree murder conviction and the entering of judgment for second-degree murder.

***Shaw v. State*, 798 S.E.2d 344 (Ga. Ct. App. 2017).** In aggravated battery and aggravated assault case involving a confrontation at a Waffle House where defendant claimed self-defense, trial counsel performed deficiently "in either seriously mishandl[ing] an attempt to assert a defense of delusional compulsion or ma[king] an unreasonable decision not to investigate the possibility of asserting that defense." (The aggravated battery conviction was reversed based on instructional error.) Defendant was a member of the United State Army. At the time of trial, defense counsel was aware that defendant likely had PTSD and other disorders that could have affected his behavior at the time of the Waffle House incident and he placed defendant's treating psychiatrist on his witness list weeks before trial. Yet defense counsel had failed to speak with the psychiatrist. The day before trial, the prosecutor spoke with the psychiatrist who recounted defendant's symptoms. The prosecutor complained to the court that the psychiatrist's testimony would lead the jury to conclude that defendant was insane but defense counsel had failed to observe the procedures for raising a defense based on insanity or other mental illness. After the trial court sustained the prosecutor's objection to the mental health evidence, defense counsel claimed that he had decided not to pursue an insanity defense. Nevertheless, defense counsel unsuccessfully attempted to have the psychiatrist's testimony about defendant's mental state admitted. When that failed, defense counsel elicited testimony from defendant, his wife, and his sister about defendant's mental condition and the effect it had on him on the night of the assault. Defense counsel also unsuccessfully attempted to have the court charge the jury on delusional compulsion and argued to the jury that it should acquit defendant because he was "sick." Notably, the record suggested that defense counsel failed to understand the defense of delusional compulsion and failed to conduct any research into asserting such a defense. Even assuming that trial counsel made a strategic decision not to assert an insanity defense, such a decision was legally flawed as it was premised on defense counsel's own conclusion, come to without expert advice, that defendant was

not insane. In sum, counsel is found to have performed deficiently because he "knew at the time of trial that [defendant] had been in combat, had psychological disorders, and was seeking treatment from a psychiatrist, yet he relied on his own opinion that [defendant] was not insane, a defense that counsel appears to have only partially understood, without performing additional investigation, in deciding not to pursue a delusional compulsion defense." Regarding prejudice, at the motion for a new trial, defendant had presented testimony from a licensed psychologist with significant experience in evaluating current and former members of the military. After examining defendant, the psychologist diagnosed defendant was having Tourette's syndrome, OCD and PTSD. (While in the military, defendant had also been diagnosed with Tourette's and OCD). The psychologist explained how the conditions could impact defendant's behavior in general, and then went on to opine on how they influenced his actions towards the victim. According to the psychologist, defendant's behavior amounted to a delusional compulsion under the circumstances." This testimony was sufficient to raise a reasonable probability that the jury would have accepted the delusional compulsion defense had it been raised at trial.

***Tran v. State*, 798 S.E.2d 71 (Ga. Ct. App. 2017).** In case where defendant was convicted of two counts of armed robbery, one count of aggravated sexual battery, and one count of possession of a firearm during the commission of a felony, convictions are reversed based on several instances of deficient performance. The crimes were committed by two men who entered a karaoke club wearing surgical masks and carrying guns. After the robberies and sexual battery, the men left the club. A witness then observed a silver Acura with tinted windows leaving the parking lot. Shortly thereafter, a silver Acura was pulled over by police. The passenger fled and was never located. Defendant was the driver of the vehicle. He told officers a gun was in the car. Also found in the car were items matching those taken from the club. At trial, defendant testified that he had been waiting outside the club for friends when a masked man pointed a gun at him and ordered him to get in the car and drive. The gunman placed objects he was carrying in the car. After the car was pulled over, the gunman took bills from the glove compartment that had defendant's name on them and threatened defendant not to say anything about the incident. The gunman then fled. According to defendant, he had been robbed and threatened previously, which he had reported to police, leading him to purchase a gun. Although defendant raised multiple allegations of deficient performance by trial counsel, only a few are found to be meritorious: (1) failing to raise a hearsay objection to testimony about the absence of a record of defendant having been a crime victim in a certain county; (2) failing to object to statements by the prosecutor that improperly impeached defendant's testimony; and (3) opening the door to damaging testimony that contradicted defendant's testimony that he was unaware who the gunman was. In finding prejudice from counsel's deficiencies, the court weighed the fact that "the jury heard the prosecutor essentially testify that [defendant] would not need an attorney if he was an innocent bystander and then question [defendant] at length about why he never gave the police information that would have cleared him of these charges." Defendant's allegation that trial counsel had been ineffective in failing to object to those improper comments and questions had been rejected because defense counsel had opened the door to them.

***Johnson v. Premo*, 399 P.3d 431 (Or. 2017).** In capital case involving the death of a fifteen-year-old girl, trial counsel was ineffective in failing to investigate and present evidence supporting

defendant's account that the victim died of a drug overdose rather than strangulation, as theorized by the prosecution, or drowning, as theorized by the defense at trial. The unrefuted evidence in the case was that defendant had sexual intercourse with the victim, the victim had been rendered unconscious by morphine ingestion, there were injuries to her body, including her neck, and defendant threw her off a bridge. The prosecution theory at trial was that defendant had drugged the victim, raped her, strangled her to death, and then threw the body off the bridge. The prosecution presented expert testimony supporting the strangulation theory. The defense theory was that the victim was alive when thrown off the bridge and that she then drowned. The defense presented an expert supporting the drowning theory. According to the defense, this meant defendant had to be acquitted because the actual killing occurred in a different county than the venue where the prosecution alleged the murder took place. Neither the prosecution nor the defense expert believed the morphine in the victim's system was sufficient to have caused her death. In post-conviction proceedings defendant adduced evidence that, early in the investigative process, he had told his defense team that, shortly before her death, the victim had willingly consumed alcohol, marijuana, morphine and other opioids with him. He also indicated that they had engaged in sexual intercourse. According to defendant's account, he fell asleep, awakened at one point to find the victim choking and vomiting, and helped her to the bathroom. He fell asleep again, and when he awoke later, he discovered that she was dead. He then wrapped her in a blanket, put her in his car, drove her to the coast, then threw her off the bridge. Although there was conflicting evidence about whether defendant had told trial counsel he was unsure that the victim was dead when he threw her off the bridge, the post-conviction court made an implicit finding that defendant had told trial counsel that the victim died in the county where he was charged. Thus trial counsel was aware that the venue defense presented was contrary to defendant's account of the crime. Defendant also presented testimony from a retired anesthesiologist and a forensic pathologist that supported the overdose defense. That counsel made a tactical decision to pursue the drowning defense in light of the defense expert's opinion, as well as that of the medical examiner, regarding the impact of the morphine did not insulate trial counsel from a finding of deficient performance. In fact, "that decision was unreasonable because counsel had not undertaken an adequate investigation of the relevant facts that, in turn, would have required hiring a toxicologist to review the forensic evidence." "Notably, the forensic data available to defense counsel tended to confirm important aspects of [defendant's] version of what had occurred — that [the victim] may have had multiple intoxicating substances in her system at the time of her death, and that she had vomited due to morphine ingestion at some time before her death. In sum, all the evidence indicated that drugs had played a significant role in the events that surrounded [the victim's] death." There was no reason for trial counsel to have believed that further inquiry into toxicology would have been fruitless or harmful.

> The defense advanced in this case, at best marginally viable in the guilt phase, lacked any tactical value in the penalty phase. In that admittedly very difficult circumstance, and in light of all the information known to defense counsel . . ., we conclude that adequate trial counsel should have sought out additional information concerning the drugs in the victim's system at the time of her death, in order to try to develop a guilt-phase theory that [defendant's] killing of the victim was unintentional, or alternatively, a penalty-phase theory that, even if the killing was

> intentional, it was not the type of crime for which the death penalty should be imposed.

Given the weakness of the defense presented at trial, both as to the guilt and penalty phases of the trial, prejudice is found.

***Butt v. State*, 398 P.3d 1024 (Utah 2017).** Trial counsel was ineffective in case involving a charge of dealing materials harmful to a minor by failing to raise a First Amendment defense. At issue in this appeal was a drawing that defendant made and sent to his five-year-old daughter while in jail on an unrelated charge. The rudimentary drawing depicted defendant naked and included his nipples, penis, and testicles. He was holding his daughter up with her bottom next to his mouth. A speech bubble from his mouth read: "Oh your butt taste [sic] so good." And a second speech bubble from his daughter's mouth read: "Oouch! Daddy don't Bite so hard Giggle giggle." At trial, defendant explained that he had made an earlier drawing of himself naked because his daughter had asked for it after they had watched a documentary about cave dwellings, with cave drawings depicting naked people. (Defendant had been convicted for this drawing but in the lower court the State had stipulated to dismissal of that conviction.) As to the drawing at issue in this appeal, defendant testified that his daughter likes being tickled. So as part of her bedtime routine he holds his daughter's hands up in the air and nibbles all over her stomach, while she laughs. To escape the tickling, his daughter rolls over from her back to her stomach. At this point, defendant teases her, saying "roll back over or I'm going to bite your butt cheek," to which his daughter responds by rolling back over. The State acknowledged that trial counsel was deficient in not raising a First Amendment defense but argued that defendant suffered no prejudice because the defense lacked merit. The state supreme court disagreed, concluding that the First Amendment defense would have prevailed as the drawing "did not appeal to the prurient interest in sex of his five-year-old daughter." "This decision rests on our independent factual conclusion that the drawing at issue is so rudimentary that taken as a whole — including the context of [defendant's] unrebutted testimony about his routine with his daughter — it does not depict a sexual act. And we likewise conclude that the drawing is not sexually suggestive."

***Khalil-Alsalaami*, 399 P.3d 264 (Kan. Ct. App. 2017).** In case involving two counts of aggravated criminal sodomy on an underage victim, trial counsel was ineffective in numerous ways. First, trial counsel was ineffective in failing to request an interpreter at trial and appellate counsel was ineffective for not raising that failure on appeal. Defendant, whose primary language was Arabic, was in the United States as a permanent resident after serving as an interpreter for the United States military forces in Iraq. He was accused of sexually assaulting the victim at a party. He initially admitted to committing some of the sexual acts at issue but claimed it was consensual and that he was unaware the victim was underage. At trial, he denied having any sexual contact with the victim and stated that he had given a contrary account to the police because the officer had repeatedly suggested that sex had occurred. Trial counsel's defense strategy was: (1) arguing that DNA matched to defendant that was found on the victim's shorts had been transferred from the bed where defendant had sex with another woman earlier; and (2) asserting that defendant was tricked by police into giving an incriminating statement. Although defendant's initial counsel had requested an interpreter for defendant and one was employed at the preliminary hearing, trial counsel decided that use of an interpreter would make it appear to the jury that defendant was

trying to hide behind a non-existent language barrier, especially given defendant's own history as an interpreter. Thus, defense counsel advised defendant not to use an interpreter. Such advice was made without counsel: (1) testing defendant's ability to understand English; (2) investigating the complexity of the interpreting defendant was asked to do for the U.S. military; or (3) considering how the use of voir dire and/or instructions could ameliorate any possible prejudice from use of an interpreter. In addition, trial counsel failed to inform defendant of his statutory right to an interpreter and the waiver was not accomplished in front of the trial court. Trial counsel had been aware that defendant would not be able to understand at least portions of the trial, such as the DNA testimony and the prosecutor's closing argument. At trial, defendant spoke in broken English that was difficult to understand and he failed to comprehend the meaning of fairly simple words. According to professionals who tested defendant post-trial, defendant's understanding of English was extremely limited and he would be very easy to trick due to the language problem. Evidence was also presented in post-conviction proceedings showing that approximately 1 year before the charged crime, defendant took an interpreter with him to get a Kansas driver's license and had to use the picture test rather than the written test. In addition, the interpreter for defendant in the preliminary hearing rated defendant's English skills on a scale of 0 to 10 as .01. He further testified that defendant's English was woefully inadequate to go through a court proceeding without an interpreter. The U.S. Army Captain that supervised defendant in Iraq indicated that their communication in English was at an elementary level and analogized defendant's ability as a little better than his 5-year-old daughter, who was entering kindergarten. Although defendant lived in the United States for 14 months prior to his arrest, he lived in a household with other Arabic speakers. When he interpreted for the U.S. Army in Iraq, again he continued to live with Arabic speakers. It was further noted by the appellate court that not only was the criminal trial complex, the stakes were extremely high – defendant was facing a possible sentence of 25 years to life, and, as an asylum seeker, a conviction would likely result in deportation to Iraq where his life could be at risk. Although the post-conviction court found, inter alia, that substantial competent evidence supported the finding that defendant adequately understood English to proceed to trial without an interpreter, the appellate court disagreed, explaining:

> Even if one assumes that [trial counsel] were in the best position to evaluate [defendant's] language abilities at the time of trial, their testimony does not support such a conclusion. They reached what they believed to be a reasonable trial strategy, without fully investigating [defendant's] ability to understand the testimony and legal arguments at his own trial. Not only did they not investigate, but they ignored clear indications that [defendant] could not effectively understand what was going on during the trial.

On this record, trial counsel performed deficiently in not requesting an interpreter at trial. And, given the egregious nature of the error here, prejudice is presumed. In addition, give the appellate court's conclusion that the evidence does not support a finding defendant was able to understand the proceedings in the absence of an interpreter, appellate counsel was deficient in not raising a claim on direct appeal that the trial court erred in failing to appoint an interpreter for defendant. Because there is a reasonable probability that the appellate court would have found that the district court abused its discretion when it failed to appoint an interpreter, prejudice is established. Trial counsel was also found to have performed deficiently in failing to seek suppression of defendant's

confession and stipulating to the voluntariness of defendant's confession after trial counsel entered the case in the midst of a *Jackson v. Denno* hearing that the State had initiated.

> The police minimization technique in conjunction with [defendant's] inability to speak and understand English weigh in favor of finding his confession was involuntary. In addition, [the interrogating officer] testified that in Iraq the police use force to coerce confessions from individuals. It is not unreasonable to conclude that [defendant] may have been pressured to confess because of his fear that force might be used. Finally, [defendant's] lack of understanding of the words used in the oral explanation of his *Miranda* rights coupled with his inability to read what was placed in front of him would also weigh in his favor in the voluntariness calculus. It is clear that [defendant] appeared to be confessing to criminal acts. That is not the issue. The issue for the district court to decide would have been whether his confession was freely and voluntarily given with an understanding of his rights under *Miranda.* We do not believe that was a foregone conclusion.

Further, by stipulating to the voluntariness of the confession and allowing admission of the stipulation into evidence, trial counsel prejudiced his own defense strategy of arguing that defendant was tricked into making the confession. Trial counsel was also deficient in failing to object when the prosecutor misstated the DNA evidence during argument in a manner that torpedoed his assertion his argument about how defendant's DNA came to be on the victim's shorts. Further, appellate counsel was ineffective in failing to raise the issue of prosecutorial misconduct on direct appeal. Finally, the appellate court concluded that defendant was entitled to relief on a claim that the cumulative impact of trial counsel's errors deprived him of a fair trial.

> [Trial counsel] committed six errors during his representation of [defendant]: (1) he failed to request an interpreter for [defendant] at trial; (2) he failed to file a motion to suppress [defendant's] confession or mount a defense at the *Jackson v. Denno* hearing; (3) he stipulated to the voluntariness of [defendant's] confession; (4) he failed to object to improper questioning of [the examining nurse]; (5) he failed to object to questions meant to highlight [defendant's] negative character traits; and (6) he failed to object when the prosecutor misstated evidence during closing arguments. We find that the number of errors is substantial, and even if the State could successfully argue that the impact that any one of them had on the trial was insignificant, we cannot ignore the fact that the accumulation of these errors impacted [defendant's] ability to receive a fair trial.

***State v. Fields*, 84 N.E.3d 193 (Ohio Ct. App. 2017).** In case involving defendant's failure to pay city taxes, trial counsel was ineffective in raising the issue of whether defendant owed taxes at all in a motion to dismiss, rather than at trial, and in failing to raise matters relating to whether defendant willfully failed to pay the taxes. Defendant had been given $55,000 during an appearance on the The Ellen DeGeneres Show in order to assist defendant and her four children who were struggling to get by. The tax form defendant received concerning the money indicated it was "nonemployee compensation." Defendant listed the $55,000 as income on her tax returns but subsequently was unable to pay the assessed taxes. Defendant was charged by the city with

knowingly failing or refusing to pay her taxes. Trial counsel moved to dismiss the charges on the ground that the money had been a gift or charity and was mistakenly listed as income. Therefore, no tax was due. The motion was denied by the trial court. Defendant pleaded no contest in order to preserve the right to appeal the denial of the motion to dismiss. She was found guilty. On appeal, the appellate court found that the motion to dismiss was properly denied as it raised a general issue for trial that was not a proper basis for a motion to dismiss. The appellate court went on:

> We are concerned by the procedural history of this case. Fields's motion to dismiss raised an issue that was more properly raised at trial, yet the parties and the trial court proceeded on the motion on its merits. This led to the entry of a no contest plea in an effort to preserve the right to appeal the denial of the motion to dismiss. Issues such as whether Fields actually owed income tax (the issue at the motion to dismiss) and whether her failure to pay was willful (which included whether she had an honest dispute about whether she owed taxes and/or had the ability to pay them) were not presented at trial, which would have been the proper forum for those issues.

Given the record, which included sympathetic statements by the trial court, the appellate court found a reasonable probability that the outcome of this case would have been different had defendant proceeded to trial.

2016: ***Ibar v. State*, 190 So. 3d 1012 (Fla. 2016)**. Counsel ineffective in capital trial for failure to obtain and present expert testimony from a facial identification expert. There was no physical evidence against the defendant, who steadfastly maintained his innocence and presented an alibi defense. The crux of the state's case was a grainy video of the murders taken by a video surveillance camera installed in the home of one of the three murder victims. The defendant was identified as one of the perpetrators from photographs distilled from the video. An initial joint trial with a co-defendant, in which the co-defendant presented testimony from a forensic anthropologist, resulted in a hung jury. Following separate trials and convictions, the co-defendant's case was reversed on appeal and he was acquitted. Each time the co-defendant had the expert testimony. The defendant in his separate trial was convicted without ever retaining a facial identification expert. Counsel conceded deficient conduct and the court agreed. Counsel's explanation was only that he had "a litany of personal and professional issues that were occurring at the time of trial," including pneumonia, depression, and other physical ailments, a domestic violence charge, concern over his drug-addicted lover who became pregnant with his child, and child custody disputes. Counsel was hospitalized following conviction, even before sentencing proceeded. Counsel had obtained a second-chair counsel and placed the burden of hiring experts on her. While she believed she had a 12 minute call with a facial identification expert, who was prepared to testify, counsel did not follow through and the expert denied in post-conviction that he had been contacted, although he would have been available for retainer if asked. Prejudice was established. The court considered the similarities with the co-defendant's case. Here, counsel had objected to testimony from police officers that a number of lay witnesses identified the defendant from the photos as substantive evidence. On appeal, the court agreed that there was error but found it to be harmless. "Our harmless error

analysis would have undoubtedly been different in this case had the surveillance videotape and images been challenged by a facial identification expert at trial."

***State v. Joshua*, 201 So.3d 284 (La. Ct. App. 2016).** In a case of aggravated battery with a firearm, trial counsel performed deficiently in failing to locate and interview eyewitnesses to the shooting. The victim, Shine, had been speaking with a woman named Rita at the time of the shooting. He identified defendant as the assailant. During his interrogation, defendant admitted being present at the crime scene but denied being the shooter. Although he initially claimed not to have seen the shooter, he later stated that he had but refused to identify him. He provided the police with the names of three eyewitnesses: Rita Reliford, "Jeff" and "Duke." Defendant claimed that these eyewitnesses could verify that he wasn't the shooter. At defendant's trial, an officer testified that no witnesses could be located during a canvas of the crime scene and that Rita Reliford could not be found. Shine testified that he had been talking with Rita when defendant got into a verbal altercation with him and then defendant shot him. Defendant agreed in his testimony that Shine had been talking to Rita. According to defendant, however, he merely told Shine to leave and Shine was shot by "Lil Duke" over a drug debt. In post-conviction proceedings, "Rita" was deposed and she corroborated defendant's account and revealed that her cousin was around that night but she didn't know if he witnessed the shooting. Rita explained that all witnesses fled the scene following the shooting because of drug usage. She also stated that she was still living in the area at the time of defendant's trial and would have been willing to testify for defendant if she had been contacted. She was unaware that defendant had been arrested for the shooting prior to moving to New Jersey. Post-conviction counsel could not locate Rita for purposes of testifying at the post-conviction hearing and the post-conviction court granted the state's objection to admission of her deposition testimony. Rita's cousin did testify about the events of the night. Although he did not see who actually shot Shine, he knew it had not been defendant because defendant was standing next to him when he heard the shot. As with Rita, the cousin stated he was unaware of defendant's arrest for a long time and would have testified that defendant was not the shooter had he been contacted. Although trial counsel had no recollection of the case or any files, evidence was presented that trial counsel never requested an investigator even though that would have been the standard protocol under the circumstances. Defendant testified that he provided trial counsel with the names of eyewitnesses, including Rita and her cousin and had assumed they would be contacted and testify on his behalf. When he learned there were no defense witnesses, he felt forced to testify. During his testimony, he was impeached with prior convictions. When the prosecutor falsely asserted during cross-examination that defendant had pled guilty to aggravated arson, defense counsel failed to move for a mistrial. Following the hearing, relief was denied by the post-conviction court. The appellate court first found error in the lower court's ruling denying admission of Rita's deposition testimony. Such testimony was relevant and post-conviction counsel demonstrated her unavailability at the time of the hearing. On appeal, the state conceded that it could not argue in good faith than defendant received the effective assistance of counsel regarding the investigation and presentation of a defense. The appellate court agreed that both deficient performance and prejudice had been established.

****Commonwealth v. Williams*, 141 A.3d 440 (Pa. 2016).** In triple murder case, appellate counsel was ineffective in failing to raise trial counsel's ineffectiveness in not cross-examining the

prosecution's expert or calling a defense expert concerning inconsistencies between the key prosecution witness's testimony and the forensic evidence. At trial, the prosecution relied primarily on the testimony of White, a purported eyewitness to two of the murders and an accomplice in all three. White testified that the three victims had arranged to purchase weapons from Williams, the leader of a gang that sold weapons and drugs. Williams had planned to rob the men when they met to receive the guns. When the groups met, Williams and members of the gang, including White, held the victims at gunpoint and demanded their money. After the purchase money was turned over, Williams continued to demand additional money from the three victims. When one of the men admitted he had additional money at another location, he was taken by Williams and two other gang members to retrieve the money. Williams and the gang members returned without the victim. White testified that one of the two gang members who accompanied Williams informed White that Williams had shot the victim in the head. The remaining two victims were then loaded in the back of a stolen van. Williams and another gang member were in the back with the victims and continuing to demand more money. White was in the front passenger seat. White testified that he saw Williams shoot the smallest of the three victims in the face while the victim looked at Williams and the gun. A short time later, the van slowed and this victim was thrown out of the back of the van into the street. White then saw Williams put his gun in the face of the remaining victim. White turned to face front and heard two gunshots and the back of the van open. When he next looked back, the third victim was gone, presumably also thrown out of the van. When the victims were later found by authorities, none were in a street but instead on a sidewalk or in a driveway. And each had sustained gunshots wounds but none had other injuries to their bodies, such as bruises or abrasions. Defense counsel did not ask any of the prosecution's expert witnesses a single question. Counsel for one co-defendant did cross-examine two of these witnesses about the absence of non-gun-related injuries to the victims but the witnesses opined that the lack of additional injuries did not establish that the victims had not fallen. Defense counsel argued to the jury that common sense showed that the location and conditions of the bodies were inconsistent with White's account of what occurred. In post-conviction proceedings, defense counsel conceded he had no strategic reason for failing to consult with or present testimony from a medical or forensic expert in order to highlight the problems with White's testimony. Post-conviction counsel presented testimony from an expert in the field of homicide investigation, crime scene analysis and blood spatter analysis. This expert, who was credited by the post-conviction court, opined that the medical and forensic evidence was inconsistent with White's testimony. In finding that this expert's testimony would have been helpful to defendant at trial, the state supreme court noted in particular the expert's opinion that "the blood flow evidence was [] wholly incompatible with White's testimony that the victims were shot and thrown from a moving van." Additionally, the expert testified that none of the victims sustained gunshot wounds consistent with White's testimony that the victim was looking at the shooter's gun when he was shot. As for prejudice, it was noted that although White was subject to significant impeachment, "the cross-examination of White left his story about the three murders at issue largely unscathed." If the jury believed the post-conviction expert's testimony, coupled with other evidence impeaching White's credibility, it is likely the jury would have acquitted defendant of the three murders. Finally, the record supported the post-conviction court's "factual findings and legal conclusion that appellate counsel had no reasonable basis for failing to raise the claim of trial counsel's ineffectiveness for not calling an expert to testify or cross-examining the Commonwealth's experts regarding the

blood flow evidence and gunshot wound evidence." (Appellate counsel testified that he had no independent recollection of the appeal but that confining his claims to those appearing on the record, as occurred in defendant's appeal, was consistent with his practice at the relevant time.) Prejudice is established because there was a substantial likelihood that the outcome of defendant's appeal would have been different if the trial counsel ineffectiveness claim had been raised there.

***Landry v. State*, 380 P.3d 25 (Utah Ct. App. 2016).** In aggravated arson case, trial counsel rendered ineffective assistance by failing to object to the State's use of testimony about an accelerant-detection canine's alerts at the scene of the fire and on items of defendant's clothing and by failing to consult with an arson expert or call an expert witness to refute the State's arson experts. Further, appellate counsel was objectively deficient in failing to present the meritorious claim of trial counsel ineffectiveness on appeal. The fire at issue occurred in an apartment defendant was in the process of moving out of due to eviction. It broke out five to ten minutes after defendant and his girlfriend left, apparently intending to return. Some of defendant's belongings remained in the apartment and he was supposed to meet the apartment complex manager that evening for a walk-through inspection of the apartment. At trial, the State presented expert testimony supporting the arson theory. One aspect of such testimony involved alerts by an accelerant-detection canine. Trial counsel, who had never tried an arson case before, failed to object to this testimony even though existing case law made it highly unlikely that the State would have been able to overcome a proper objection. In preparation for trial, trial counsel spoke only with a fire marshal who was a witness for the State. Obviously, this expert would not have provided trial counsel with a basis to challenge the expert's own findings. The defense theory was that either the fire started accidently by a cigarette smoked by the girlfriend contacting alcohol spilled on the floor during a party the night before or that it was started by an unknown individual who a neighbor saw outside the apartment around the time the fire began. Both theories had significant evidentiary problems. As shown by post-conviction expert testimony, had trial counsel consulted with or presented testimony from an independent arson expert, she would have had ammunition to challenge how the arson investigation had been conducted as well as the findings of the State's arson experts. The defense post-conviction expert had criticized numerous aspects of the investigation and concluded that the fire should have been classified as of "undetermined origin." Trial counsel's failure to properly educate herself constituted deficient performance. Prejudice is found because: (1) post-conviction expert testimony revealed substantial errors in the State's arson case; (2) under existing case law, trial counsel likely would have kept out the canine alert testimony; and (3) the jury struggled to reach a verdict in this case. (After the jury announced a deadlock, it was told that if it did not reach a verdict that day, it would have to return to deliberate on an extra unplanned day causing a hardship to at least one juror. The jury reached consensus after that admonition.) Because trial counsel's deficient performance prejudiced defendant, "appellate counsel's failure to raise a claim of ineffective assistance of trial counsel on appeal was likewise objectively deficient and prejudicial."

***McLaughlin v. State*, 789 S.E.2d 247 (Ga. Ct. App. 2016).** In aggravated assault and battery case, defense counsel performed deficiently in failing to withdraw a statutory speedy trial demand and seek a continuance in order to obtain expert evidence of battered person syndrome (BPS) in support of the justification defense. The victim in this case was defendant's boyfriend. Defendant

had been convicted on two prior occasions for harming the victim. Trial counsel, who had represented defendant in the two earlier cases, sought to have the charges in this case dismissed based on a justification defense. After hearing the testimony at the motion to dismiss hearing, trial counsel realized that defendant likely suffered from BPS. Nevertheless, trial counsel neither withdrew the speedy trial demand nor sought a continuance to explore BPS. As a result, trial counsel was unable to present evidence explaining taped jailhouse phone conversations between defendant and the victim in which defendant took responsibility for injuring the victim and which were used to impeach defendant. Nor was the defendant able to present evidence explaining why defendant had failed to report the victim's abusive conduct to the police, why she accepted blame for the situation, or why she continued to express love for the victim. An explanation for her behavior could have countered the testimony by a detective who stated that police look to whether a person attempted to distance his or herself from an alleged abuser in determining the veracity of a domestic violation accusation. At the motion for new trial hearing, an expert was presented who found that defendant had been suffering from BPS at the time of the offense and who explained how defendant's behaviors were consistent with BPS. In finding trial counsel's conduct deficient, it was noted that his failure to seek a continuance in order to retain a BPS expert was not based on strategy but rather on his mistaken belief that it was too late to ask for more time. As for prejudice, defendant's sole defense of justification hinged largely on her own testimony. The prosecution was able to impeach that testimony by playing the jailhouse conversations in which defendant apologized to and expressed her love for the victim and accepted blame for the incident. As the expert testimony at the hearing on defendant's new trial motion demonstrated, evidence of BPS would have explained why defendant accepted blame and why defendant's statements were not inconsistent with her claim of justification. Moreover, evidence of BPS would have entitled defendant to a jury instruction that would have allowed the jury to consider whether, given the nature of her abusive relationship with the victim, defendant reasonably believed that his use of force against her was imminent and that she therefore needed to protect herself.

***Fisher v. State*, 788 S.E.2d 757 (Ga. 2016).** In malice murder case, trial counsel was ineffective in failing to secure the attendance of a witness who could have countered the testimony of the only witness whose testimony directly identified defendant as the shooter, and in agreeing to a jury instruction that the testimony of a single witness is generally sufficient to establish a fact, without requesting an instruction on the exception that if the witness is an accomplice, his testimony must be properly corroborated. The sole witness identifying defendant as the shooter, Lewis, claimed that he was not involved in the crimes even though he admitted that he drove defendant and the victim to the crime scene, was present during the shooting, and drove defendant away afterwards. According to Lewis, who admitted using drugs with the victim, the shooting occurred over a dispute about drug sale proceeds. (Two other witnesses described men arguing about drugs and money.) Defendant denied being at the crime scene. Prior to trial, defense counsel spoke with Clark, an acquaintance of both defendant and Lewis, who informed defense counsel that Lewis was his drug dealer and that he saw Lewis flashing a revolver while looking for the victim to collect on a debt two or three days before the shooting. (The murder weapon was never recovered but it was determined to have been a revolver.) Although Clark provided defense counsel with his contact information, he never heard back from him. Defense counsel intended to have Clark testify, and he included him on the witness list, and yet he failed to secure his attendance at trial, an omission conceded by the State to be deficient performance. As for the failure to seek an

instruction on the accomplice exception to the single witness rule, defense counsel conceded it was an oversight and not a tactical decision. Given Lewis's admission to his involvement with defendant in the events before, during and after the crime, and initial lies he'd told to the police, there was sufficient evidence to support a finding that Lewis was an accomplice and not merely present for the crimes as he claimed on the witness stand. On this record, in light of the importance of Lewis's testimony, it would have been unreasonable not to have requested the accomplice instruction. Regarding prejudice, there was no forensic evidence linking defendant to the victim, the crime scene, or the murder weapon. Neither of the two women who heard men seeking drugs and/or money testified that defendant was there during the shooting. Although one offered a description of the shooter that matched defendant, it was general -- about 5′10″, medium complexion, with a low haircut and a New Orleans accent – which would match innumerable other men in Atlanta as well, except perhaps for the accent. Notably, however, Lewis admitted on cross-examination that although he is from Atlanta, he was known in the community as "N.O.," or New Orleans, because of his voice. "[H]ad Clark testified, the jury could have chosen not to believe what he said about Lewis. But that is exactly the point. Due to the deficient performance of [defendant's] trial counsel, the jurors who found him guilty did not have the opportunity to hear Clark testify or to consider the evidence they did hear with the instruction that if they found Lewis to be an accomplice to the shooting, they must treat him unlike the other witnesses and decide whether his identification of [defendant] was corroborated by other evidence. A jury that heard Clark and was properly instructed might reach the same verdict, but we cannot say that with confidence."

***People v. Goods*, 62 N.E.3d 1168 (Ill. Ct. App. 2016).** In murder case, defense counsel was ineffective in failing to assert self-defense and ask for a corresponding instruction or an instruction on second degree murder. The prosecution's theory was that defendant and the co-defendant planned in advance to kill the victim. Through defendant's statements and the argument of defense counsel, there was some evidence of the elements of self-defense, i.e., defendant believed he was in imminent danger from both the victim and the co-defendant. Whether defendant's belief was reasonable was a determination to be made by the jury. Supporting a finding of deficient performance was the fact that defense counsel initially sought to invoke compulsion as an affirmative defense, a defense unavailable for a murder charge under state law. It was only after that defense was precluded by the trial court that defense counsel switched to a theory that defendant shot the victim after he had been killed by the co-defendant. But this theory failed to relieve defendant of liability given that the jury was given an accountability instruction making defendant liable for the co-defendant's actions. In addition, an argument in defense counsel's unsuccessful motion for new trial indicated defense counsel erroneously believed he was not allowed the defense of self-defense. On this record, defense counsel performed deficiently in failing to invoke self-defense and failing to seek appropriate instructions. Prejudice is shown in part by the co-defendant's conviction in a separate trial of second degree murder.

***Fatumabahirtu v. United States*, 148 A.3d 260 (D.C. Ct. App. 2016).** In case involving a conviction for the attempted possession of drug paraphernalia with intent to sell, trial counsel was found ineffective for failing to investigate a mistaken-identification defense. Defendant worked a few days a week as a clerk at a gas station convenience store. One day, an undercover officer

came in and asked to buy an "ink pen." According to the officer, defendant was the clerk and she provided the officer with an ink pen and a copper scouring pad, items commonly used to make crack pipes. A search warrant was executed the following week while defendant was present at the store and glass pens and copper scouring pads were seized. This search formed the basis for the charges against defendant. In coram nobis proceedings, defense counsel conceded that he did not pursue a mistaken-identification defense but instead focused on attacking the government's evidence that defendant knew or had reason to know that the pen and scouring pad constituted drug paraphernalia. Even assuming defense counsel made a strategic decision to present a single defense rather than combining two possible defenses, he made that decision prior to conducting a reasonable investigation. At trial, defendant testified that she had never seen the undercover officer before, she did not recall ever selling a pen and scouring pad together, and that she never would have combined items to sell if a customer had asked for a single item. Defendant's account supported an investigation into mistaken identification which would have revealed that another clerk worked at the store every day and better fit the description given by the undercover officer of the clerk who sold him the pen and pad. This clerk also acknowledged in the coram nobis proceeding that she owned and sometimes wore to work the type of attire described by the undercover officer. Defendant, in contrast, denied having and wearing similar items. That defendant had not informed trial counsel that she was not the sales clerk on the day the undercover officer made the purchase leading to the search did not defeat her claim. Given that defendant was present when the search warrant was executed, and that she was especially new to the United States and not fluent in English, it was understandable that she failed to recognize the importance of her absence from the store on the date the undercover officer made the purchase. That defendant could not conclusively prove that the other clerk, and not herself, was working when the purchase occurred did not defeat a finding of prejudice. There was a reasonable probability that the outcome of the trial would have been different had counsel not performed deficiently.

***Commonwealth v. Millien*, 50 N.E.3d 808 (Mass. 2016)**. Retained counsel was ineffective in assault and battery on a child resulting in death case for failing to seek public funds to retain an expert witness to assist the defense with testimony and cross-examination of the state's experts. The defendant's six-month old daughter died in his care. The state's experts testified that the baby died due to "shaken baby syndrome" and the injuries could not have been caused by the baby falling off a couch onto the floor as the defendant claimed. Counsel had asked the defendant's father, who had retained him, for the necessary funds but failed to apply to the court for funds when the father refused retainer of an expert. Counsel's conduct was deficient, "not because he failed to understand that he needed an expert witness to advise him regarding the medical evidence and to offer opinion testimony, but because he failed to seek funds from the court to retain an expert witness for his indigent client." "Where, as here, the defendant was indigent and the family member who was otherwise furnishing funds for the defense refused to pay for an expert witness, it was manifestly unreasonable for defense counsel not to apply to the judge for the funds needed to retain an expert witness." *Id*. at ___ (citing *Hinton v. Alabama*, 134 S. Ct. 1081, 1088 (2014)). Prejudice also established. A defense expert would have "called into question whether shaken baby syndrome is a valid and scientifically supported medical diagnosis." Likewise, a defense expert could have provided "numerous scientific studies supporting the view that shaking alone cannot produce injuries of the type and severity suffered by" the victim in this case and would have "put forth an alternative

theory of the cause" of the child's injuries consistent with the defendant's statements that the injuries were caused by the baby accidentally falling off the couch. There were also "numerous scientific studies in support of an opinion that accidental short falls can produce injuries of the nature and severity suffered by" the victim in this case. The prejudice was especially clear because, in post-conviction, one of the state's experts even changed her opinion "that shaking alone" caused the injuries.

***State v. Weber*, 373 P.3d 26 (Mont. 2016)**. Counsel ineffective in felony theft case for failing to adequately prepare and present defense evidence concerning the value of the property stolen. The defendant was a janitor at a high school charged with stealing a tool used to cut metal and steal. The defendant was charged with theft of property in excess of $1,500. Counsel sought to show that the value was less than $1,500, which would have reduced the conviction to a misdemeanor. The prior teacher of the shop class that used the tool had created an inventory of property listed the machine as a 2009 model and valuing it at $1500. The list was provided in discovery. During trial, the state called the new shop teacher, who had been in the job for three weeks at the time of the theft, to testify that the school purchased a new replacement tool for $2,100. Counsel tried to introduce the prior inventory during cross-examination but was denied due to lack of foundation. Counsel then called the defense investigator to try to establish a lesser value. "In the end, Weber's counsel did not successfully introduce evidence that could support his theory of reduced value of the plasma cutter (other than the fact it was not new) that could reduce Weber's felony charge to a misdemeanor." Counsel's conduct was deficient in failing to offer the inventory list as a business record admissible under Montana Rule of Evidence 803(6). Likewise, if counsel had investigated, he would have realized that the inventory was created by the prior teacher, who could have been called to testify and the inventory offered through his testimony. More broadly, counsel's conduct was deficient in his general failure to establish the value of the used tool, leaved the state's replacement value more or less unchallenged. Prejudice established as, "barring an acquittal for Weber" the valuation evidence was key to the defense and could have made the difference between a maximum sentence of 10 years and a maximum sentence of six months.

****Johnson v. Premo*, 370 P.3d 553 (Or. App. Ct. 2016), *aff'd*, 399 P.3d 431 (Or. 2017)**. Counsel ineffective in aggravated murder trial for failing to investigate and present expert testimony that the victim's death was due to a morphine overdose and not strangulation. The victim's body was found along a beach in Clatsop County. State experts testified that she had high levels of morphine in her blood but she died from strangulation. Substantial evidence, including DNA from semen in the victim's vagina, connected the defendant to the case. The State's theory was that the defendant, who had a history of drugging women and then sexually assaulting them, had done so in this case and killed her at his home in Washington County before taking her body and dumping it from a bridge. The defendant told counsel that the victim had died at his home in Washington County from a drug overdose. Counsel's conduct was deficient because, without investigating this possibility, defense counsel relied on a theory of "defense" that the victim died from drowning in Clatsop County because she was alive when the defendant threw her off the bridge. Counsel presented several experts to say that drowning was a possibility. In other words, the defense was only a "venue defense," which "was not a reasonable tactical decision deserving of deference" because counsel did not investigate the possibility of a drug overdose despite the defendant

telling him that's what actually happened. Instead, counsel hoped for an acquittal despite admission that the defendant threw the live victim from a bridge killing her by drowning and despite language in the indictment that permitted venue in the defendant's home county of Washington if the jury could not determine the location of death. Prejudice was established. Two experts testified in post-conviction that the most likely cause of death was a morphine overdose. Even though the jury could still have determined that the defendant was responsible for the victim's death, the defense could have argued that the defendant was guilty of a lesser offense, such as manslaughter, criminally negligent homicide, or unintentional felony murder. Even if the jury still had convicted the defendant of aggravated murder, unless the jury found that it was "deliberate," the defendant would not have been eligible for the death penalty.

2015: ***Starling v. State*, 130 A.3d 316 (Del. 2015)**. Counsel ineffective in capital trial for: (1) failing to cross-examine an eyewitness about prior exculpatory statements to an investigator; and (2) failing to object to admission of the defendant's brother's statement to police, which was likely involuntary. The case involved the shooting of a man and 5-year-old boy in a barbershop. A month later, Gaines, the victim of an unrelated shooting, identified the defendant as his shooter and the barbershop shooter after Gaines had been arrested for violating probation and possession of drugs. Gaines also told the police that he and the defendant's brother were present after the shooting when the defendant expressed remorse for shooting the child. The defendant's 23-year-old brother was questioned extensively without any rights warnings and while being denied outside contact. He was threatened with being charged in the barbershop murders and obstruction of justice, which the police admitted, unless he told the police what they already knew, i.e., that the defendant expressed remorse for shooting the child. The defendant's brother finally acquiesced. An eyewitness from the barbershop, who chased the shooter when he ran from the barbershop, told an investigator after seeing photographs of the two suspects in the newspapers, one of which was the defendant, that neither man "had the same appearance as the shooter." Counsel's conduct was deficient. First, during trial, counsel intended to cross-examine the eyewitness with this statement but forgot to do so. Afterwards, when he remembered he was unable to locate the witness to recall him to testify. This error was prejudicial. This witness "arguably had the best view of the shooter," other witnesses had given contradictory descriptions of the shooter, and there was no physical evidence linking the defendant to the crime scene. Second, counsel's conduct was deficient in failing to object to admission of the defendant's brother's statement through a police officer. Under state law, voluntary out-of-court prior statements of a witness who is present and subject to cross-examination is admissible. A threshold determination of voluntariness must be made by the court before admission. Here, because of counsel's failure to object no such determination was made despite "substantial evidence pointing to the involuntariness" of the statement. Trial counsel did not object because he believed the statement to be admissible. This conduct was unreasonable and prejudicial. These two errors in combination with a *Brady* violation due to the state's affirmative misinformation that the charges against Gaines remained pending – when, in fact, they had been dismissed prior to trial – required reversal due to the "cumulative effect of the[] mistakes."

***Commonwealth v. Hampton*, 36 N.E.3d 586 (Mass. Ct. App. 2015)**. Counsel ineffective in assault and battery upon correctional officer case for failing to investigate and adequately present defense. The theory of defense was that the officer used excessive force and was the initial aggressor. Nonetheless, counsel failed to interview another inmate who observed a portion of the altercation

and would have testified consistent with the defense theory. Counsel simply relied on the information from the prosecution witnesses that no one other than officers witnessed the incident. Counsel's conduct was deficient and not based on sufficient strategy. Prejudice also established. Despite the trial court's finding that the other inmate was not credible, under the state law analysis required for prejudice, "the question of the witness's credibility should have been left to the jury."

***State v. Pierre*, 127 A.3d 1260 (N.J. 2015)**. Counsel ineffective in murder case for failing to adequately investigate and corroborate the alibi defense. The defendant was one of several suspects charged in a shooting in Elizabeth, New Jersey, at 3:19 a.m. on March 20, 2004. His defense was that he and one of his codefendants were on their way to visit the defendant's relatives in Florida at that time. During trial, a speeding ticket issued in his name as the driver of his car was admitted into evidence. The ticket had been issued 750 miles away in South Carolina less than four hours before the crime. The defendant's cell phone records showing a call to his girlfriend from South Carolina about three hours before the time of the crime. The state argued that the defendant's brother, who had a similar appearance and the defendant's driver's license and phone, was the driver and caller from South Carolina. While counsel's decision to present an alibi surrounding the speeding ticket was a sound strategic choice, counsel's conduct was deficient in failing to adequately investigate and present corroborating evidence "that could have reinforced that alibi." Counsel failed to interview and present the testimony of the brother and a sister who would have testified that the brother did not know how to drive, had no driver's license at the time, had never taken the defendant's car, and was in New Jersey at the time of the crime. Counsel also failed to offer into evidence the defendant's additional cell phone records showing a number of calls to his girlfriend from Florida in the week after the crime. Finally, counsel failed to interview relatives in Florida and failed to present the testimony of three of them that it was the defendant and not his brother who had visited in March 2004. Prejudice was established. The evidence implicating the defendant at trial was "sparse." The defendant was not identified by any witness in the days and weeks following the crime, although the other three men charged were identified by witnesses. The only witness to identify the defendant from a photo array did not do so until ten months after the crime. Prior to that time she had provided no description of the man whom she identified as the defendant. The only other witness placing the defendant in New Jersey on the night of the crime was an acquaintance of the defendant, who "was a frequent cocaine user at the time of the shooting as well as when she provided her statement to police."

***State v. Reeves*, 782 S.E.2d 747 (S.C. Ct. App. 2015)**. Counsel ineffective in criminal sexual conduct with a minor and lewd acts case for failing to call a medical expert to challenge the state's medical evidence. The alleged victim testified that the defendant had inappropriately touched her from age four (lewd acts) and "stuck his finger" in her vagina when she was 10-years-old (CSC). About three weeks later, she reported the abuse and was examined by an emergency room doctor, who testified that he observed a "healing scar" on the alleged victim's hymen that was consistent with penetration within 30 days earlier. A month later, the alleged victim was examined by an expert in pediatrics, who found no abnormalities. Retained counsel's conduct was deficient in failing to investigate and present the testimony of a gynecological expert, even though counsel was aware that the state would rely on evidence of physical trauma. While counsel recalled that "there was a question about money," counsel never sought funding, which may have been available, through the Office of Indigent Defense and never discussed hiring a medical expert with

the defendant. This was not "a legitimate trial strategy" excusing counsel's behavior. Prejudice established because a defense expert could have testified, contrary to the state's argument that the injury could only have been caused by abuse, that an injury to the hymen could have been caused by means other than sexual abuse. Likewise, a defense expert could have testified that an injury would have to be substantial to be apparent three weeks later and there was no evidence of substantial injury here.

***Garrido v. State*, 162 So. 3d 1069 (Fla. Dist. Ct. App. 2015)**. Counsel ineffective in kidnaping and sexual battery case for failing to pursue an alibi defense once the prosecutor disclosed a new range of offense dates after the jury had been sworn. The initial date was November 3 at noon. The defense provided notice of an alibi with four witnesses supporting his defense that he was at work. After the jury was sworn, the prosecutor, over objection, amended the dates of the charge to be between November 5 and November 9 with the alleged time still being around noon on a weekday. Counsel declined a mistrial or continuance, did not investigate or even talk to the alibi witnesses, and presented no evidence. Counsel's conduct was deficient in failing to investigate and present an alibi as supervisors and co-workers provided testimony and documentation that the defendant was working on a job in Boca Raton, a more than two hour drive from the alleged crime location, from 8:00-5:00 each day, November 5-9. Counsel's explanation for the failure to present evidence was that he wanted to preserve the error in allowing the dates to be changed. Counsel did not understand that by refusing to accept a mistrial or continuance, "he ended up waiving the very error he would to preserve." Prejudice established.

***People v. Lofton*, 42 N.E.3d 885 (Ill. Ct. App. 2015)**. Counsel ineffective in murder case for failing to object to the use of prior inconsistent statements as substantive evidence and for failing to object to inadmissible hearsay. The case involved the shooting of Dowthard on Jefferson Street. Dowthard's sister, an eyewitness, testified that he was shot after laughing at the man who said, "Stick your hands up." She could not identify the shooter that night but described his clothing including the "hoodie" on his head and bandana wrapped around his face, such that she could see only from the bottom of his eyes to the middle of his forehead. A year later, she was shown a photo line-up, and "identified" the defendant "from his body structure, his neck, and his eyes." Another woman, McLaurin, who was Jones' girlfriend and had identified the defendant from a photo array a year after the crime, denied recollection but admitted her signature was on the photo array. The state went through her grand jury testimony question by question. Jones, the defendant's cousin and McLaurin's boyfriend, testified that the defendant had told him on the night of the crime that he was planning to commit a robbery ("hitting some licks") and called a half-hour later saying he "had just shot somebody." A day or two later, Jones was at the home of his sister, Johnson, who was yelling at the defendant who was not responding. The state then went through Jones' grand jury testimony question by question about the substance of the conversation. Jones denied any recollection of his grand jury testimony and denied that the defendant ever confessed to him. Jones admitted, however, that he told the prosecutor and an investigator the day before trial that the defendant said he shot someone, but denied that he said the shooting occurred on Jefferson street. Tate, who had lived with the defendant and Johnson at the time of the crime, testified that the morning after the crime, Johnson and the defendant were talking but he did not "catch the conversation." The state then examined him based on a prior written statement, but he denied

that he had ever said that he heard the defendant say "that he had shot the dude from the night before on Jefferson." Detective Mastroianni testified that he had interviewed Jones a year after the crime and Jones told him that the defendant called after the crime saying he shot someone on Jefferson after the victim laughed at him. The detective also testified that Jones told him the next day he heard the defendant tell Johnson about the robbery and shooting on Jefferson. The detective also testified and produced a written statement of his interview with Tate a year after the crime in which Tate had said that the morning after the crime, he heard the defendant say to Johnson and Jones that he had shot the guy on Jefferson while he was trying to rob him. The written statement was admitted into evidence. Another officer testified about the prior statements of McLaurin generally implicating the defendant and her identification of him from a photo array. Her statements were never reduced to a written statement. The grand jury testimony of McLaurin and Jones was then admitted into evidence by stipulation. In his grand jury testimony, Jones had admitted that the defendant told him he shot a guy on Jefferson Street in a struggle over money, but denied that it was because the guy laughed at him. Finally, the state attorney's investigator testified that two days before trial, Jones told him that the morning after the crime he heard the defendant talking to Johnson about the shooting and robbery. The investigator did not obtain a written statement and wrote a report only on the morning of his testimony. Counsel's conduct was deficient in failing to object to the use of Tate's and Jones' prior inconsistent statements as substantive evidence. The state used Tate's prior written statement as substantive evidence, in addition to having Detective Mastroianni to give "repetitious testimony" about the statement. The same is true of the portions of Jones' oral statements recounted by Mastroianni and Lindmark. These statements met no exception under state law allowing their use as substantive evidence. Counsel's conduct was also deficient in failing to object to a portion of McLaurin's grand jury testimony. While grand jury testimony is generally admissible, the portions where McLaurin relayed to her what the defendant allegedly said to him was inadmissible hearsay. While the state kept this out during testimony, it went to the jury when defense counsel stipulated to the grand jury testimony going to the jury in "written form." There was "no strategic reason for counsel's failures." Prejudice also established. "Other than hearsay statements involving defendant's alleged confessions to others, there is very little evidence to tie defendant to Dowthard's killing." The only admissible evidence of defendant's alleged confession was from Jones' grand jury testimony, which gave the motive as a struggle rather than the victim's laughter. By admission of the inadmissible evidence, the jury heard "at least half a dozen" other references to the alleged confession, which was not just "duplicative" but prejudicial.

***Commonwealth v. Alcide*, 33 N.E.3d 424 (Mass. 2015)**. Counsel ineffective in murder case for failing to adequately investigate and present significant evidence supporting the third-party culprit defense and failing to challenge two in-court identifications of the defendant that should have been excluded. The case involved a shooting following an argument between two groups outside of a pub. The murder weapon was not recovered and no forensic evidence identified the defendant as the shooter. The defense was that someone else outside the pub shot the victim. The state's case relied heavily on the testimony of the defendant's "friends" in his group, who all had close ties to each other. All four of these witnesses testified that the defendant made statements admitting to the shooting and one of them testified that he saw the defendant lift his hand beforehand hearing the gunshot and seeing the victim fall. Two independent eyewitnesses also identified the defendant as the shooter, but they were unable to do so for photo line-ups shortly after the crime and identified

the defendant only after seeing his picture in the newspaper following his arrest in the case and/or being shown only a picture of the defendant by the prosecutor shortly before the trial. One of the victim's friends, however, did not identify the defendant as the shooter. He said the shooter ran to a light colored Honda Accord afterwards, which did not match the defendant's vehicle or the vehicle the rest of his group rode in. One of the victim's friends did identify the defendant from a photo lineup as the shooter, but she also said that the shooter dropped a cellphone while running away afterwards. It was undisputed that the cellphone was dropped by Dor, one of the defendant's "friends" and state witnesses that identified him as the shooter. While counsel argued that a third party, probably Dor, was the shooter, counsel presented no additional evidence in support of this theory. The state conceded that counsel's conduct was deficient and not based on strategy. Counsel did not review discovery, examine the state's physical evidence, conduct any independent investigation, or seek exclusion of any of the state's evidence. As a result, significant evidence supporting the third-party culprit defense was not presented at trial and two in-court identifications of the defendant that should have been excluded were admitted in evidence. Specifically, if counsel had adequately prepared, the evidence would have established that one of the victim's friends described the clothing worn by the shooter in a manner consistent with Dor's neighbor, Heidi's, description of the clothing Dor wore that day. This same witness described the shooter as having "short dread locks," which matched Dor and not the defendant, who had a short, "fuzzy head," haircut. Likewise, Dor's girlfriend said to Heidi shortly after the shooting that "her man" was the shooter. Heidi's testimony likely would have been admissible under state law even if Dor's girlfriend would not admit this statement in her own testimony. There was other evidence available that Dor "had both a motive and an intent to engage in violence toward the victim's group of friends" shortly prior to the shooting. This evidence was available through the statements of three friends and neighbors of Dor. At least some of this evidence would have been admissible at trial. Counsel's conduct was also deficient in failing to challenge the identifications of the defendant as the shooter by persons that first identified him from news articles related to the arrest. Under state law, these identifications would have been excluded from evidence if they had been challenged by the defense. Prejudice was established.

***People v. Ackley*, 870 N.W.2d 858 (Mich. 2015)**. Counsel ineffective in murder of child case for failing to investigate and present expert testimony concerning the cause of death. The case involved the death of the three-year-old daughter of the defendant's live-in girlfriend, while the child was in his care. The defendant testified that she had been napping alone in her room before he found her lying on the floor next to the bed unresponsive and called emergency services. The state alleged that the defendant killed the child either by blunt force trauma or shaking her and presented expert testimony to that affect. Specifically, the state called five medical experts opining that death was caused "by nonaccidental shaking, blunt force trauma, or a combination of both." Counsel's conduct was deficient in failing to present contrary evidence to support the defense of an accidental fall, despite the availability of funding for expert assistance. Counsel had contacted one forensic pathologist, Dr. Hunter, who explained that the medical community was sharply divided on this issue almost in a religious manner and that he was not the expert the defense wanted because he was of the wrong religious camp. He did, however, refer counsel to Dr. Shuman, a well-known forensic pathologist, who had conducted substantial research in the area and had the right religious beliefs to support the intended defense. Counsel never contacted Dr. Shuman and never even

researched the issue. Instead, he continued consulting Dr. Hunter, who continued to warn "you don't want me as your defense expert." If counsel had consulted Dr. Shuman or another expert, he would have been able to present expert testimony that the bruises on the child's body were consistent with the life-saving measures used that day and that her head injuries were likely caused by an accidental "mild impact" trauma rather than abuse. Counsel's conduct was deficient as there was no reasonably objective explanation for counsel's decision to confine his search for expert assistance to an expert who was "a self-proclaimed opponent of the very defense theory counsel was to employ at trial," who even referred counsel to a more suitable expert. Likewise, counsel did nothing to prepare himself otherwise. These "sparse efforts" did not satisfy *Strickland*'s "'duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary,' especially in light of the prominent controversy within the medical community" on this topic. *Id*. at ___ (citations omitted). Two things resulted: "a defense theory without objective, expert testimonial support, and a defense counsel insufficiently equipped to challenge the prosecution's experts because he possessed only Dr. Hunter's reluctant and admittedly ill-suited input as his guide." This was not a case of requiring counsel to "shop for experts," as counsel did no shopping at all and settled on the first one he encountered despite the importance of the issue and despite that expert's "specific recommendation to contact a different and more suitable expert." Hunter's additional statements that Shuman "would not buy into every story" and was "a man of science" were not reasons to avoid contacting Shuman, but instead were "consistent with scientific integrity." Prejudice was established. "While we cannot say that a battle of the experts would have ensured the defendant's acquittal, counsel's failure to prepare or show up for the battle sufficiently 'undermine[s our] confidence in the outcome' of this case to entitle the defendant to relief. *Id*. at ___ (quoting *Strickland*, 466 U.S. at 694).

***People v. Cassala*, 15 N.Y.S.3d 479 (N.Y. App. Div. 2015)**. Counsel was ineffective under state law "meaningful representation" standard in attempted rape case for failing to investigate and challenge the state's case, based on the alleged victim's bleeding disorder, and failing to object to the testimony of the defendant's former spouse concerning his sexual preference for anal intercourse. The charges involved three separate instances where the defendant allegedly forcibly anally assaulted a 15-year-old victim. While the sexual assault nurse examiner ("SANE") found no physical evidence of assault, she noted in her report that the alleged victim had been diagnosed with a bleeding disorder, "VWD." The SANE testified at trial that it was not unusual not to find physical evidence and that this was not inconsistent the alleged victim's testimony. Counsel's conduct was deficient in failing to investigate despite being aware of the disorder and being unaware of what "VWD" meant. Investigation and consultation with an expert would have revealed that this is Von Willebrand Disease, which would have made the presence of bruising or bleeding during forceful, non-consensual anal intercourse far more likely than in a person without VWD. This would have provided powerful cross-examination evidence for the SANE and the defense could have presented its own powerful expert testimony. These failing "were magnified by the fact that the People's only direct evidence of defendant's guilt was the victim's testimony, making counsel's efforts to undermine her credibility of paramount importance." Counsel's conduct was also deficient in failing to object to the defendant's ex-wife's testimony or to request a limiting instruction related to this evidence. There was a "legitimate question" about whether the prejudicial effect of her testimony substantially outweighed its probative value, especially considering her lack

of sexual relations with the defendant for at least several years prior to the alleged assaults. Even if this evidence was admissible, the defendant was entitled to a limiting instruction under state law. Prejudice from this unlimited propensity evidence was clear as the jury asked during deliberations to have read back the evidence of the defendant's "past sex life." Counsel also failed to object to prosecution arguments asking jurors to put themselves in the "victim's shoes" and to advocate or "fight" for her in the deliberations. The "cumulative effect" of counsel's conduct deprived the defendant of "meaningful representation" and required reversal.

***People v. Graham*, 11 N.Y.S.3d 242 (N.Y. App. Div. 2015)**. Counsel ineffective under state law in second degree murder case for failing to investigate a mental defense to charge that the defendant stabbed his former girlfriend to death while she was driving a car, despite awareness of the defendant's psychiatric history, which included several hospitalizations, and despite being authorized by the trial court to obtain an independent psychiatric evaluation. Under state law, a defendant need only show that he was denied "meaningful representation." "[S]ome showing of prejudice" is required, "albeit not necessarily the 'but for' prejudice required under federal law." Here, that standard was met.

***Freiburger v. State*, 775 S.E.2d 391 (S.C. Ct. App. 2015)**. Counsel ineffective in murder case for failing to introduce a letter rebutting the state's ballistics evidence. The case involved a 1961 murder of a taxi driver. Three bullet fragments were recovered from the victim's head, which identified the murder weapon as a .32 caliber revolver. The defendant was arrested carrying a .32. Another potential suspect, Dreher, was also found to possess a .32. Ballistics testing at the time could not conclusively identify either weapon as the murder weapon and no charges were brought. In 2000, the Richland County Sheriff's Department reopened the case. Five ballistics examiners from the South Carolina Law Enforcement Division (SLED), headed by Parnell, reported inconclusive results in which neither weapon could be included or excluded as the murder weapon. The Sheriff's Department hired a private ballistics expert, Cayton, who concluded that Freiburger's gun was the murder weapon. During trial, Parnell testified concerning the inconclusive findings of SLED, but qualified this by saying there was "a remarkable similarity" with Freiburger's revolver but not enough for him to say it was a match. The state also called Stokes, who had been a SLED ballistics examiner from 1954-1981. Stokes testified that Lt. Cate set up the SLED ballistics division and that Stokes had been his "first understudy." According to Stokes, he worked with Lt. Cate on the case and the two of them had excluded the Dreher gun. Finally, Cayton testified that Frieburger's weapon was the murder weapon. Counsel's conduct was deficient in failing to introduce into evidence a letter from 1961 in which the Chief of SLED stated that Lt. Cate's opinion was that the Dreher gun was the murder weapon. Counsel stated no strategic reason for the failure. Prejudice was established as the state's case "was purely circumstantial, and – other than ballistics – weak." The letter would have contradicted Cayton, upset the "apparent unanimity" of the State's experts, and contradicted Stokes about the results of the 1961 testing. In short, admission of this letter "would have deeply undermined the State's case."

***State v. Jones*, 352 P.3d 776 (Wash. 2015)**. Counsel was ineffective in second degree assault case for failing to interview several eyewitnesses clearly identified in the discovery provided by the state and failing to present this testimony. The case involved a street fight involving the defendant,

the alleged victim, and three of the alleged victim's friends. The state's witnesses, including the alleged victim's friends involved in the fight, generally identified the defendant as the aggressor and testified that he held a knife. A sole defense witness, Forbes, who was a neutral bystander, testified that it was essentially mutual combat and the defendant drew the knife only to protect himself after the three other men joined the fight. Based on a detective's testimonial mention of a witness listed in discovery that counsel had failed to interview, counsel sought a mistrial believing inaccurately that this witness' identity had not been disclosed. The court granted a continuance instead and the witness was then called by the prosecution. This witness, Brown, testified that the alleged victim had been chasing the defendant prior to the altercation. She also never saw a knife and only heard reference to it after the alleged victim's three friends joined the fray. Counsel's conduct was deficient in failing to interview Brown and failing to interview Hamilton, another eyewitness disclosed by the state in the discovery papers. Hamilton would have testified that the alleged victim had tackled the defendant and started beating him before the alleged victim's friends joined in. He saw the defendant with a knife only after he had been tackled and all four men were assaulting him. Counsel's conduct was also deficient in failing to interview witness Ooveda, who had been listed in an incident report in discovery. The prosecutor interviewed her at the beginning of the trial and informed counsel she might have evidence favorable to the defense, but counsel still did not interview her. In finding no prejudice for failing to call Hamilton, the trial court relied on counsel's post-trial testimony that when he read the transcript of Hamilton's 911 call after trial, he did not believe that Hamilton's testimony would have been helpful. This was error. "Strategic decisions are made before, not after, taking the challenged action" and counsel's testimony, after the fact, about the helpfulness of the potential testimony was nothing more than "hindsight." Prejudice was established due to the failure to present Hamilton's testimony, which would have corroborated Brown's testimony and bolstered Forbes' credibility, while also diminishing the credibility of the state's witnesses. "The failure to interview Brown and Ooveda compounds the prejudice."

***State v. Coleman*, 865 N.W.2d 190 (Wis. Ct. App. 2015)**. Counsel ineffective in sexual assault of 13-year-old child on two occasions case for multiple reasons. First, counsel informed the jury during voir dire and the opening statement that the defendant had been previously convicted of a crime and is "not an angel." This evidence was not admissible because the defendant did not testify. Second, counsel also informed the jury that it was counsel's decision to make and he had decided the defendant would testify. The defendant did not testify and counsel did not take responsibility for that in the closing. Because counsel conceded that the defendant never indicated an intent to testify, there could be no reasonable strategy to explain this conduct. Third, counsel failed to impeach the alleged victim with statements to three different people that the defendant had ejaculated during the second alleged assault when there was no male DNA on her clothing or bedding. Counsel's only explanation for failing to present this evidence was that counsel "didn't want to talk about any sticky, wet substance on a 13-year old girl." This explanation was not reasonable as these prior statements were relevant and material in light of the lack of DNA evidence. Finally, counsel failed to impeach the alleged victim with her father's prior statements contradicting her trial testimony about events on the day of the first alleged assault. While this last aspect "might be minor," standing alone, "is was not the only misstep." Prejudice established based on the "cumulative effect" of the errors. There was no physical evidence and no witnesses, such that the entire case depended on the credibility of the alleged victim. Counsel's errors

bolstered her credibility by failing to impeach her and impugned the defendant's character by providing inadmissible information.

2014: ***Robinson v. State*, 141 So. 3d 656 (Fla. Dist. Ct. App. 2014)**. Counsel was ineffective in aggravated battery case for failing to timely subpoena the defendant's girlfriend to testify. This was a "he said, he said" case where the defendant and the alleged victim each claimed that the other was the aggressor. The only other witness to the confrontation was the defendant's girlfriend, who did testify in sentencing. Thus, the record was sufficient to find deficient conduct and prejudice on direct appeal.

***Humphrey v. Williams*, 761 S.E.2d 297 (Ga. 2014)**. Trial counsel was ineffective in child molestation and statutory rape case involving the defendant's stepdaughter and her friend for failing to adequately investigate and present evidence concerning an alleged similar transaction of sexual abuse against his daughter in Florida seven years before. While trial counsel argued that the similar transaction evidence should be excluded, he presented no witnesses and offered no evidence. During trial, the state presented the defendant's daughter, Jessica, as its final witness. She testified that the defendant had gotten into bed with her, put his hand under her shirt, and rubbed her behind over her underwear on one occasion when she was 11 years old. She reported the incident to social services and was placed in a foster home before eventually being sent to the defendant's mother and then returned to the defendant. The defense presented four witnesses to counter her testimony. The defendant's sisters testified that "the State" returned Jessica to the defendant's custody, but the State challenged this in cross-examination alleging that there was no legal process and the defendant's mother simply returned Jessica to him. The defendant's mother testified that Jessica made shifting allegations against the defendant "in the context of a custody battle with Jessica's mother." She testified that the "allegations were investigated and shown to be false." Counsel did not, however, introduce documents from the Florida proceedings which supported the testimony that Jessica's allegations had been found to be false by a Florida court and that the court had, in fact, ordered that she be returned to the defendant's custody. At the close of the evidence, when the trial court asked the defendant if he was satisfied with counsel's performance, the defendant specifically stated that he wanted counsel to call additional witnesses and introduce the Florida records. The court offered to continue the case for a day, but counsel intervened and asked to speak to the defendant. After that, counsel reported (and the defendant agreed) that they did not want a continuance because counsel believed the information was "already in the case sufficiently." The prosecutor's closing argument started with the assertion that "[t]here is not the first bit of evidence that Jessica was not believed by a Florida court." Trial counsel also represented the defendant on direct appeal and again challenged the trial court's admission of the similar transaction evidence unsuccessfully. In state habeas proceedings on the ineffectiveness claims, the Florida court records were presented. These records had been obtained by the defendant's mother from the courthouse in the adjacent county one week after trial. She notified defense counsel but he "said they wouldn't have any bearing on the case." The records contradicted Jessica's testimony at trial. She had previously alleged only that the defendant had kissed her and told her "she would get anything she wanted if she would have sex with him for ten minutes." After ten months of bi-weekly counseling sessions, a social worker reported to the court reported "conflicting and confusing" allegations by Jessica and concluded with the social worker's "clinical opinion that . . . no actual abuse occurred." A school psychologist had

also reported in a letter that Jessica "lies easily." A joint report from a social services attorney and a counselor also reported that Jessica lies. The Florida court returned custody to the defendant and terminated the involvement of social services. Counsel's conduct was deficient in failing to obtain these records and present them to the trial court to get the similar transaction evidence excluded. Counsel was aware of the Florida court proceedings but made no effort to obtain the records "although any competent lawyer knows that courts produce documents reflecting (and usually explaining) such decisions." The Florida court records "presented an obvious source of information and evidence for presentation at the similar transaction hearing to try to exclude [Jessica's] testimony altogether and for impeachment if Jessica was allowed to testify at trial." Moreover, the records were easily accessible from the neighboring county "as revealed by the fact that Williams–operating pro se and from a Georgia prison–was able to obtain them without difficulty." Prejudice was established. The failure to present the Florida records "enabled the prosecutor to insinuate falsely on cross-examination" that Jessica had been returned to the defendant's custody "without any kind of court order to that effect. The prosecutor also "claim[ed] falsely in closing argument that Jessica did not make shifting allegations" and that there was no evidence that she had not been believed by the Florida court. Aside from Jessica's testimony, the other evidence of guilt was "conflicting." The significance of Jessica's testimony in the trial was clear as she testified last for the state and the defense presented four witnesses just to contradict her testimony. "The importance of the similar transaction evidence was also demonstrated by the prosecutor's repeated references to it in his closing argument–references that the Florida court records show to be untrue in significant part."

***Douglas v. State*, 761 S.E.2d 180 (Ga. Ct. App. 2014)**. Trial counsel was ineffective in armed robbery, aggravated assault, possession of weapon, carjacking, and misdemeanor obstruction of an officer case for failing to obtain the criminal records of the three alleged victims and impeach them on that basis. The three alleged victims testified that they were in the park together when they were robbed by two armed men of over $1100 in cash, cell phones, and a car. The robbers attempted to leave in the car and were immediately in a car accident. They then split up and ran and the alleged victims chased them joined a witness to the robbery. Ultimately the police were involved and when a police officer spotted the defendant the witness, who had lost sight of the robbers during the chase, identified him as one of the suspects. The defendant attempted to run from the officer but was ultimately subdued and arrested. He had approximately $300 on him, but no weapon or cell phone and none was found along the route of the chase. After the defendant was cuffed and sitting in the police car, the three victims identified him as one of the robbers. The defense theory was misidentification. Counsel's conduct was deficient in failing to obtain the criminal records of the alleged victims and use the information to impeach them. Counsel admitted the deficiency and the lack of a strategic reason for the failure. Prejudice was established as the identification of the defendant as the robber rested almost entirely on these witnesses. The alleged victims had all been convicted of drug-related offenses and two of them actually had major drug charges pending when they testified. This information would have allowed impeachment of three kinds: (1) impeachment with a prior felony conviction; (2) impeachment regarding the nature of the victims' relationships; and (3) impeachment or possible bias due to pending charges. All convictions vacated, except the misdemeanor obstruction conviction.

**Capital Case*

***People v. Dupree*, 16 N.E.3d 788 (Ill. Ct. App. 2014)**. Counsel ineffective in murder and attempted murder case for multiple errors related to a prior consistent statement of a state's witness. The shooting involved a drive-by shooting into a group of people standing outside a house. While not labeled as gangs, the two groups had had conflicts before. Police interrogated Latimer and Haywood, who both initially denied involvement, but then Latimer admitted that he was in the car and identified Dupree as the shooter. The next day, Haywood returned to the police station and told the police that he was driving the car and that Dupree was the shooter. During trial, Latimer admitted being in the car and hearing shots but he testified that he believed the shots were fired towards the car and not out of it. He denied any recollection of telling the police that Dupree was the shooter. Haywood, however, testified consistent with his second statement. Counsel cross-examined Haywood about his initial statement and asked whether his "enhanced memory" had "just come to his mind last week." In rebuttal, the state read questions and answers from his statement the following day, which was consistent with his trial testimony, and repeatedly asked Haywood if that statement was true. Counsel's conduct was deficient in opening the door to this prior consistent statement, which was inadmissible.

> A prior consistent statement may not be used on direct examination to enhance the credibility of a witness's testimony. "Moreover, when a witness is impeached by means of a prior inconsistent statement, if a consistent statement does not disprove or explain the making of the inconsistent statement, it is inadmissible." Specifically, a prior consistent statement is not admissible simply because a witness has been impeached with a prior inconsistent statement. However, where there is a charge or inference of recent fabrication, a prior consistent statement is admissible to show that the witness told the same story before the time of the alleged fabrication.

Id. at ___ (citations omitted). Here, counsel opened the door to the prior consistent statement by suggesting that the change in the witness' statements was of "recent vintage," which counsel undoubtedly knew was not true. Then, counsel called a detective to testify about Haywood's prior inconsistent statement. On cross, the state elicited additional testimony about Haywood's prior consistent statement. When the detective was asked if Haywood had identified Dupree as the shooter, counsel objected that the testimony was beyond the scope of direct. After the jury was sent out, the court sustained the objection. When the jury returned, it was not informed of that or given an instruction to disregard the question. Counsel's conduct was deficient in failing to object to the cross on the basis that the substance of the prior consistent statement was already before the jury. In addition, counsel's conduct was deficient in failing to obtain an instruction to at least disregard the question on which the court sustained counsel's objection. During closing arguments, counsel's conduct was also deficient in failing to object to the state's repeated assertion of the prior consistent statement as substantive evidence. Finally, counsel's conduct was deficient in failing to request a limiting instruction to inform the jury that the prior consistent statement could not be considered as substantive evidence of guilt. Counsel's failures were not based on strategy. Prejudice established.

> The reason prior consistent statements are prohibited is because they are likely to unfairly enhance the witness's credibility with the trier of fact simply because

> the statement has been repeated. "The danger in prior consistent statements is that a jury is likely to attach disproportionate significance to them. People tend to believe that which is repeated most often, regardless of its intrinsic merit, and repetition lends credibility to testimony that it might not otherwise deserve."

Id. at ___ (citations omitted). Here, Haywood was a crucial witness, the prior consistent statement directly related to the question of guilt, and the state's evidence was far from compelling.

***Wilson v. State*, 340 P.3d 1213 (Kan. Ct. App. 2014)**. Counsel was ineffective in murder case for multiple reasons. The defendant was convicted based primarily on the testimony of Goodpasture, an alleged eyewitness. Counsel's conduct was deficient in: 1) failing to challenge the state's evidence on the date of the offense when five witnesses had seen the victim alive several days later; 2) failing to challenge Goodpasture's credibility based on inconsistent statements to police; 3) failing to present letters Goodpasture wrote that contradicted his statements to police; and 4) failure to present police recordings of the defendant and another person – made without the defendant's knowledge – which suggested that the defendant did not even know a person Goodpasture said was also present at the murder. Prejudice established based on counsel's "failure to damage the credibility of the State's only eyewitness." The other two errors relating to the date of the offense and the letters, "when taken together," were also prejudicial. In reaching this conclusion, it was not error for the court to consider attorney expert testimony.

> While it's true, as the State argues, that many judges have had experience trying criminal cases, many have not. Certainly, most judges have not had the level of experience of Kerns, who had defended 10 murder trials and handled more than 60 jury trials. His testimony helped to place the legal issues of this case into context and thus was admissible.

***People v. Douglas*, 852 N.W.2d 587 (Mich. 2014) (*affirming* 817 N.W.2d 640 (Mich. Ct. App. 2012))**. Counsel ineffective in criminal sexual conduct case involving his three-year-old daughter for failing to object to testimony from a forensic interviewer, a police detective, and a social services caseworker that vouched for the alleged victim's credibility and indicated there was no indication that she had been coached, as the defense alleged. Counsel's conduct was deficient and not based on strategy. Prejudice established as the prosecution's case "hinged wholly" on the alleged victim's credibility as there was no physical evidence and no independent witness. Reversal was also required due to the trial court's error in admitting inadmissible hearsay from the forensic interview through the testimony of the interviewer and the videotape of the interview.

***People v. Ugweches*, 983 N.Y.S.2d 244 (N.Y. App. Div. 2014)**. Counsel was ineffective in assault on police officer with vehicle case for three reasons, which caused cumulative prejudice in this second trial following a hung jury in the first trial. The primary problem was that counsel, who had not represented the defendant in the first trial, failed to object to hearsay testimony about alleged bystander statements supporting the complainant's version when the prosecution was primarily based on her testimony. Counsel's conduct was deficient and not based on any strategy, as counsel was not even aware that this hearsay had been excluded in the initial trial. Likewise, counsel failed to subpoena the police officer's medical records or to call the medical expert that had testified in the

first trial to establish that the officer's records did not corroborate her testimony that she had sustained physical injury in the assault. Finally, counsel failed to impeach the officer with her prior inconsistent statement to an administrative board concerning whether she had been knocked down. Here, the officer denied making the prior inconsistent statement and that was the end of the matter, but in the first trial counsel had taken proper steps to prove the issue.

***Bagwell v. State*, 763 S.E.2d 630 (S.C. Ct. App. 2014)**. Counsel ineffective in burglary case for failing to seek DNA testing of blood found on glass from the crime scene. The case involved an alleged burglary of the alleged victim's apartment. The alleged victim testified that he returned home to find the defendant exiting through the back glass patio door, which was shattered. Afterwards he confronted the defendant outside and punched him, but the defendant's face was already bleeding before the punch. The alleged victim's roommate also testified that the defendant's face was bleeding prior to the fight. The defendant testified that he was asleep in his own apartment in the same complex when he awoke to find the alleged victim beating him and accusing the defendant's roommate of breaking into his apartment. The defendant called the police and then looked outside where he saw the alleged victim beating the defendant's roommate and holding a gun to his head and he went outside. He testified that his face was bleeding after the incident because of the alleged victim's attack. During closing arguments, the state asserted as the "linchpin" of its case that the defendant's face was cut because he ran through the glass door in the alleged victim's apartment and was cut. Counsel's conduct was deficient in failing to seek DNA testing of blood found on three pieces of glass from the patio door. The testing, conducted in post-conviction, revealed that the blood was not the defendant's blood. "'At a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case.' *Ard v. Catoe*, 642 S.E.2d 590, 597 (S.C. 2007) (internal quotation marks omitted) (emphasis omitted)." Here, trial counsel's only explanation for the failure was that she believed the State had planned to do DNA testing. This was unreasonable "because criminal defense attorneys have a duty 'to make an independent investigation of the facts and circumstances of the case.' *Ard*, 642 S.E.2d at 597 (internal quotation marks omitted) (emphasis omitted). Her duty to test the blood from the glass was especially important here because the test results could have supported Bagwell's claim that he was asleep in his apartment at the time of burglary." Prejudice established. This evidence would have rebutted the state's theory that the defendant' eye was cut when he exited the defendant's apartment through the glass patio door and would have cast doubt on the alleged victim's and his roommate's testimony that the defendant was bleeding before the alleged victim punched him. Likewise, this evidence would have supported the defendant's testimony that he was bleeding when police arrived because the alleged victim assaulted him.

***Walker v. State*, 756 S.E.2d 144 (S.C. 2014)**. Counsel was ineffective in kidnaping and criminal sexual conduct case for failing to interview the defendant's former girlfriend and present her testimony as an alibi witness. The victim testified that her car would not start after she stopped for gas at a convenience store in the early evening of a Saturday. She accepted help from her assailant, who fixed the car and then followed her home to obtain payment because she did not have the money with her. The assailant kidnapped her and took her – blindfolded – to his home where he sexually assaulted her. The following morning he returned her – again blindfolded – to her home around 5:00 a.m. The victim identified the defendant as her assailant from store video surveillance

footage. In a videotaped statement, the defendant admitted being at the store but denied the remainder claiming instead that he had gone to a friend's home after leaving the store and then returned to his girlfriend's home around 9:30-10:00 p.m. and that he spent the remainder of the night there. Counsel's conduct was deficient in failing to interview the girlfriend despite being aware of the statement and having notes that the girlfriend should be interviewed. Five years later when the girlfriend was interviewed, she testified that she had spent every weekend with the defendant before he inexplicably disappeared, which she had not known was due to his arrest in this case. Prejudice established as the post-conviction judge found her to be credible and that there was a reasonable probability that the jury would have believed her alibi testimony.

***Ex parte Overton*, 444 S.W.3d 632 (Tex. Crim. App. 2014)**. Counsel ineffective in capital murder case for failing to present medical expert testimony. The defendant was charged in the death of a four-year-old child that she and her husband were in the process of adopting. The child died in the hospital due to brain swelling caused by incredibly high sodium intoxication. The defendant testified that the child was "obsessed with eating" and would become upset whenever he was not permitted to eat whatever he wanted. She had reported his excessive and inappropriate eating behaviors to the adoption supervisor. On the day of his death, the defendant gave the child chili was Zatarain's seasoning added to it. When he wanted more and became upset, she gave him water with Zatarain's mixed in to drink in his sippy cup. Twenty minutes or so later he "stumbled to the floor, said he was cold, and threw up." He then started to shake. The defendant put him in beds with blankets and a heating pad, but was not overly concerned. Later she put him in a warm bath. He then started having breathing problems and sounded congested. His breathing got better when she used a nebulizer on him. When the abnormal breathing returned and the child was moaning and lethargic, the defendant and her husband took him to an urgent care center. On the way, the child stopped breathing and the defendant performed CPR. The urgent care center transferred the child to a hospital and that hospital transferred him on to a Children's Hospital where he died the next day. The state argued two theories of murder: (1) that the defendant forced the child to consume sodium; and (2) that she failed to obtain medical care for him. A jury poll following conviction revealed that the jury found the defendant guilty based only on the defendant's failure to obtain medical care. Defense counsel hired a leading expert on hypernatremia, or sodium intoxication, and he gave a deposition during the middle of the criminal trial. He was questioned by the defendant's counsel in a separate child-custody case. Two of the trial counsel in this case either attended or watched a portion, but advised the lead counsel not to use the deposition because it obtained objectionable material and could not be adequately edited. Counsel also failed to present the expert's testimony because his testimony had been postponed twice and counsel did not want to ask "for a continuance to accommodate the doctor, who could not travel on the Sabbath." Counsel's conduct was deficient because the two hour deposition "contained much testimony that was favorable to the defense." The expert described "emotional deprivation syndrome, which is often associated with extreme eating habits." The victim exhibited many features of this syndrome. This expert also disputed the testimony of the state's expert about the amount of Zatarain's the victim would have had to consume in order for his sodium level to be that high. While the state sought to prove that the defendant had forced the child to consume high levels of sodium, this expert concluded that the Defendant did not poison the child and that the child likely consumed something himself which was the cause of his sodium intoxication. More importantly, this expert concluded that salt

poisoning and acute hypernatremia is rapidly lethal, but it would take at least an hour for the child to exhibit symptoms that would cause a reasonable person to believe that he was deathly ill and should be taken to the hospital. Even then by the time it would take to get to the hospital and for testing to be done to determine that the problem was salt poisoning, and the lack of any "specific therapy" or treatment, whether "someone lives or dies, to a large degree, it's luck." In short, the mortality rate is very high. Thus, even if the defendant had called 911 immediately and an ambulance had taken the child directly to the hospital, "it would be exceedingly unlikely for him to live; and, if he did, in all probability or almost certainly there would be irreversible neurological injury." The two primary trial counsel conceded that they did not review the deposition and that they were ineffective for not using the deposition or calling this expert to testify. While the one counsel believed that it would have been difficult to edit around objectionable parts of the deposition containing the prosecution's improper comments, this does not describe "a strategic decision." Moreover, there was no strategic decision not to request a continuance to accommodate the experts travel restrictions. Prejudice was established especially in light of the jury's conviction based on the defendant's alleged failure to obtain adequate medical care.

***Ex parte Skelton*, 434 S.W.3d 709 (Tex. Ct. App. 2014)**. Counsel ineffective in forgery case for three reasons. The defendant was an attorney charged with forging the will of a deceased client. During trial, the defense conceded that the defendant had cut and pasted the signatures of the decedent and two witnesses onto a writing purporting to be a will and then photocopying the altered document and filing it with the court. The contested point at trial was whether the defendant acted "with the intent to harm or defraud" because the defense contended that the forged will filed accurately represented a will actually executed by the decedent. The signed copy the defendant had kept had been severely damaged in a flood of the office, such that parts of it were illegible. She had simply cut and pasted the signatures from the copy onto a new copy of the will kept on and printed out from the defendant's computer. Both witnesses listed on the forged will testified that they had, in fact, witnessed the decedent sign the will. Counsel's conduct was deficient. First, counsel failed to object when the prosecution elicited testimony from a police investigator that the defendant invoked her right to silence to terminate the interview of her. Second, counsel actually emphasized this testimony during cross-examination. Third, counsel failed to object to the investigator's "expert" testimony about the legal definition of forgery and his opinion that the defendant was guilty. The investigator had no specific training, expertise, or knowledge and his testimony was not helpful to the jury as it amounted only to his opinion of the defendant's guilt. Prejudice established because the testimony about the defendant invoking her rights was inadmissible and damaging to the defendant's credibility before she even testified and her credibility was essential to her defense and counsel's overall strategy. Likewise, the prejudice was enhanced by the prosecution's closing argument, which invited the jury to draw an inference of guilt from the defendant "attempting to cover up her actions by hiring an attorney." Considering the "overall record, . . . counsel's deficient performance permeated Skelton's trial."

***State v. Thompson*, 318 P.3d 1221 (Utah Ct. App. 2014)**. Counsel ineffective in forcible sodomy case for failing to object to state's "expert" rebuttal witness and state's improper closing arguments. The defendant, a "long-haul truck driver" from Wisconsin was charged with forcible sodomy of a 16-year old girl. The alleged victim testified that the defendant and his friend spent the night at her

house and that the defendant sexually assaulted her between 9:00-9:30 a.m. the following morning. The incident allegedly occurred six years before trial and was not reported until 18 months later. The alleged victim was the only witness called in the state's case-in-chief. The defendant and his friend testified that no assault had occurred and that they were on the road to Las Vegas well before 9:00 a.m. Defense counsel sought admission of the defendant's "commercial truck driver's logs" to corroborate this testimony. The state opposed admission on the ground of late disclosure. The court admitted the log's but allowed the state a lunch break to locate a rebuttal witness. The rebuttal witness was a "transportation specialist" with the Utah Highway Patrol. In his testimony, he relied on "a computer software program called PC*Miler, which uses trucking routes and speed limits to estimate travel times." He presented a report generated by this program and testified, on the basis of this report, that the defendant's testimony about the time necessary for a specific trip "could not be accurate" and that the defendant "cooked the books." Trial counsel's conduct was deficient in failing to inquire about the "expert's) qualifications or his involvement in the preparation of the report. Only a single question was asked by the state on this topic: "What does the program do?" The defense presented the post-conviction testimony of a senior vice president of the company that developed the software. His testimony revealed that the state expert relied on an out-dated version of the software and "default settings" rather than "using the actual speed limits." Even using the out-dated version used by the state expert, the only was he could approximate the numbers relied on by the state's expert was to use a 55-miles per hour speed limit rather than the actual speed limit of 75-miles per hour. Using the correct speed limit on the correct software or the out-dated version, the time required for the trip was consistent the time range logged by the defendant. Likewise, the state's expert conceded in his post-conviction testimony that he did not generate the report he relied on and was not present when it was generated. Thus, the report itself was entirely inadmissible hearsay of the "declarant" who actually wrote the report. The trial court also found that the state's "expert" did not have the qualifications necessary to testify as an expert using the software. Trial counsel was also deficient in failing to object the following improper arguments by the state: (1) the prosecutor personally vouched for the "expert's" credibility; (2) the prosecutor expressed his personal opinion that the defendant's friend was not credible; (3) the prosecutor expressed his opinion that the defendant's body language during his testimony indicated that he was dishonest when there had been no evidence presented to support these arguments; and (4) the prosecutor impermissibly appealed to the jurors' passions and prejudices in arguing that "this is the kind of crime that occurs very often" and asking the jury to "send a message" with its verdict. The court could "conceive of no reasonable trial strategy" for not objecting to the argument about the defendant's body language or the other arguments when credibility of the defendant versus the alleged victim was the primary issue in the case. Prejudice was established based on the "cumulative harm." "[W]hile trial counsel's impromptu cross-examination of [the state's expert] was skillful, it was not a substitute for preventing [the expert] from testifying in the first instance." Likewise, the improper arguments mostly related to the credibility of witnesses, which was the primary issue in the case. The trial court's instructions that counsel's statements were not evidence did not cure the problem, especially because the instructions came before the improper arguments.

***State v. Fedoruk*, 339 P.3d 233 (Wash. Ct. App. 2014)**. Counsel in second-degree murder case was ineffective in failing to investigate a mental-health defense. Counsel's conduct was deficient in failing to investigate the possibility of a mental health defense. The defendant had a long history

of serious mental illness, including a diagnosis of schizophrenia and two prior admissions to a psychiatric hospital. In a competence evaluation following a prior arrest, the defendant had been diagnosed with bipolar disorder with psychotic features. At trial on this prior offense, a court found the defendant not guilty by reason of insanity. In events surrounding the current charge, the defendant engaged in bizarre behaviors and statements. A pretrial competence examiner found major mental illness. Nonetheless, counsel waived an affirmative defense of diminished capacity until the day before jury selection, when counsel sought a continuance in order to pursue an insanity defense. Counsel stated that he had no basis for such a defense prior to speaking with the defendant through an interpreter. Given the defendant's extensive mental health history, counsel's failure to seek to retain a mental health expert until the day before jury selection was deficient conduct. Prejudice was also established.

***State v. Jenkins*, 848 N.W.2d 786 (Wis. 2014)**. Counsel ineffective in intentional homicide case for failing to present testimony of an eyewitness, who did not identify the defendant in a photo array, and would have testified that the defendant was definitely not the shooter and that she had seen him across the street minutes after the shooting. Trial counsel's strategy was to attack the credibility of the victim, who identified the defendant as the shooter, and to provide an alibi for the defendant. Trial counsel had the police report that identified the eyewitness and included information that she had failed to identify the defendant in a photo array. He could not recall interviewing her, but the eyewitness testified that she spoke with defense counsel on multiple occasions but was not asked to testify or subpoenaed for the trial. Counsel's conduct was deficient in failing to present this witness, who supported the defense strategy and would have impeached the state's witness. Her testimony also would have supported the defendant's version of events and his professed alibi of visiting someone in the area as she saw him across the street outside that friend's home shortly after the shooting. Prejudice was also established. Although her testimony was not necessarily consistent over time and her credibility could be challenged, "the prosecution's key eyewitness, had similar if not more substantial credibility problems."

***Cooper v. State*, 319 P.3d 914 (Wyo. 2014)**. Counsel ineffective in aggravated assault with a deadly weapon case for failing to develop and present an expert witness to testify as to how close the victim's vehicle was to the defendant before the defendant started shooting his gun at the vehicle. The defendant and his friends got into an argument with the victim and his friend over a carnival game at a fair. Law enforcement directed all to leave the fair but the two groups encountered each other again later the same day. Although there were some conflicts in the evidence, it was undisputed that the victim drove his car towards the defendant, the defendant then shot into the windshield twice, the car hit the defendant before the defendant shot a third time while he was on the hood of the car, after the victim stopped the car and the defendant fell to the ground the victim of the car and the defendant told him to get the car off him, which the victim refused, and then the defendant fired three more shots with one hitting the victim in the leg. Trial counsel, who was arguing self-defense, was aware that there were discrepancies in witness statements about how far the car was from the defendant when he fired initially, but counsel did not retain an expert. Rather, counsel consulted "trajectory charts" on the internet and made her own calculations that the car was no more than 8 feet away when the first shots were fired. She hoped to present the evidence concerning distance through cross of the state witnesses but this "did not pan out." The state did not,

as counsel assumed, call the evidence technician that conducted the trajectory analysis for the state and the detective on the case simply responded that he did not have any training in trajectory analysis and could not answer any questions about distance. During closing, defense counsel pointed out that the state presented no evidence on the issue and drew an objection when she argued her own calculations, which were not supported by the evidence. Counsel's conduct was deficient. Prejudice established because an accident and crime scene reconstructionist could have testified, based on the defendant's height and trajectory, that the first bullet was fired only 42 inches from the windshield, meaning that the defendant's hand and the gun itself were already past the front bumper.

2013: ***State v. Denz*, 306 P.3d 98 (Ariz. Ct. App. 2013)**. Counsel ineffective in child abuse and aggravated assault case for failing to consult with an independent medical expert. The defendant was charged with causing injuries to his infant son. He claimed he had accidentally dropped the infant while changing his diaper and the infant landed face-first onto a carpeted floor. The state had three medical experts to testify that the infant's injuries were inconsistent with the defendant's explanations and that the infant's abdominal injuries could only have resulted from intentional blows to his stomach. Counsel interviewed the state's experts prior to trial, but decided as "strategy" not to retain an expert and to rely instead on cross-examine of the state's experts to support the defense theory. This conduct was deficient, especially in light of the fact that funding was available to retain an independent medical expert.

> Counsel had no medical training or expertise, had limited experience with medical professionals, and could not independently assess whether the state's witnesses were competent. He also stated "this was the sole child-abuse case that [he had] ever tried and he had not consulted with any other attorneys about the case.

Counsel simply could not make a informed decision to rely solely on cross-examination without consulting an expert. Counsel even acknowledged that there was "no downside" to consulting with an expert prior to trial. In short, "despite its strategic gloss, counsel's decision not to consult with an expert before settling on a defense strategy cannot qualify as a reasoned decision." Prejudice established as a forensic pathologist would have testified to the contrary.

***State v. Estrada*, 426 S.W.3d 405 (Ark. 2013)**. Counsel ineffective in rape and sexual abuse case for failing to impeach the alleged victim, failing to investigate and present alibi witnesses, and failing to object to the victim's testimony about an incident outside the range of the charges. With respect to the rape charge, the 15-year-old alleged victim testified that the defendant, her uncle by marriage, sexually abused her at age 4 and again in 2001 at age 7. In her recorded statements to police about the 2001 incident, she said more than once than her grandparents were asleep downstairs during the incident, despite the fact that her grandmother had died in 2000. With respect to the sex abuse charge, the 18-year-old alleged victim testified that the defendant had abused her in December 1999. Even though the defendant had been charged for abuse between June 1998 and June 1999, counsel failed to object. Counsel also failed to present testimony from the defendant's sisters that he was in Texas with them in December 1999.

**Capital Case*

***Dieudonne v. Commissioner of Correction*, 60 A.3d 385 (Conn. Ct. App. 2013)**. Counsel ineffective in interfering with an officer case for failing to investigate and present a defense. The police received an anonymous tip that the defendant was selling drugs on a street corner. According to the officers, the defendant placed a white item in his mouth and attempted to run when they approached. He was wrestled to the ground but no drugs were found. Counsel failed to discover an eyewitness who would have testified that the defendant did not assault the officers or resist arrest. Prejudice established as this would have supported a credible defense that the defendant lacked the specific intent to interfere with an officer and any injuries suffered by the officers were a result of the defendant attempting to regain his ability to breathe as he was being choked by officers. The case was a "close one," even without the defense witness because the jury did acquit the defendant of assaulting one of the officers.

****State v. Fitzpatrick*, 118 So. 3d 737 (Fla. 2013)**. Counsel ineffective in capital trial for failing to investigate and challenge the state's forensic evidence of sexual assault and the timing of sexual activity prior to the victim's discovery. On August 18, 1996, at approximately 3:00 a.m., the inebriated victim was found walking on the side of the road, nude and bloody, with her throat slit. At the scene, while in and out of consciousness, she told one of her rescuers and a paramedic, separately, that "Steve" was her attacker. At the hospital, while heavily medicated, when police officers asked directly if "Steve" was her attacker, she shook her head "no." She died thereafter. "Steve" was cleared by DNA, alibi, and other evidence. The DNA from semen in the victim's vagina was matched to the defendant. The state's evidence at trial showed that the defendant, a Pro Pizza delivery man on duty, picked the victim up at a convenience store and gave her a ride to a motel around 7:30-8:00 p.m. Witnesses at the hotel confirmed this and testified that the victim then left the motel with "Howard" around 9:00 p.m. The defendant left work at 11:45 p.m. Thereafter, a witness saw his pizza delivery truck at the motel again and then at Howard's house. Howard and a woman at his home said that the victim left Howard's home with the defendant around midnight. Contrary to these witnesses, the defendant's girlfriend testified that he was home by 12:30 to 1:00 a.m. While the defendant admitted picking the victim up and dropping her off at the motel earlier in the evening, he adamantly denied seeing her again prior to her death. After he was confronted with the DNA evidence during the investigation and during trial, he said that he had had consensual sexual intercourse with the victim on the morning of her death, i.e. between 9:30 and noon on August 17 more than 15 hours before the victim was found with her throat slit. During trial, the state presented two "experts." The first was a registered nurse, who had conducted the "sexual assault victim examination" at the hospital. She testified that: (1) the victim had a penetrating wound on her breast, which was either a stab wound or a bitemark, and a cigarette burn on her leg; (2) based primarily on the amount of fluid present which would have been removed by continued activities, sexual activity occurred a maximum of an hour or two before the victim was found with her throat cut; (3) the victim's "undergarment which was around her waist" when she was found, had not been on after the sexual activity because there was no semen on the garment; and (4) based on coloring of the flesh, sperm in the anal swabs, etc., the sexual activity also included anal intercourse and was most likely forcible rather than consensual. The state also presented "expert" testimony from a lab analyst in the serology/DNA division of the Florida Department of Law Enforcement (FDLE). She testified that: (1) the DNA from the semen in the victim's vagina matched the defendant; (2) the sexual activity occurred no more than 15 hours prior to the victim being found based on her

microscopic evaluation of sperm, which revealed "'many to some' heads with tails still intact"; and (3) she conducted both an acid phosphate test and microscopic sperm search of the undergarment and found no semen. Counsel's conduct was deficient in failing to conduct a reasonable investigation and present expert testimony on "sperm motility," whether there was sperm on the underwear, and whether the amount of fluid could be used to determine timing. As expert testimony in post-conviction, including forensic pathologist Daniel Spitz, revealed, the state's testing and testimony on "sperm motility" was flawed. The state's expert never actually mounted the sperm on "wet mount slides," which would be required to determine whether sperm was "motile" or not. The state's expert also was incorrect in assuming that all sperm with a tail was "motile." Likewise, the evidence showed "intact sperm, meaning a head with a tail, and sperm heads without tails, "which indicate[s] that there was a period of many hours between the deposition of that material and the collection of the evidence." Generally, the tails began to separate from the heads, 15-18 hours after intercourse. Thus, 15 hours was the minimum amount of time from the intercourse, not the maximum as the state's expert testified and the time from the intercourse to collection was most likely approximately 24 hours. Additionally, the state's reliance on the amount of fluid, i.e. "a lot," to estimate timing within an hour or two was flawed and not even "a scientific statement." The amount of fluid is not even indicative of sexual contact. Likewise, the amount of fluid would not necessarily be lessened by continued activities. Moreover, additional testing and expert testimony in the post-conviction proceeding established that there were over 100 sperm heads found in 9 of 11 areas of the underwear tested and the sperm matched the defendant. This expert testified that there likely was no testing of the underwear prior to trial or if there was it was done incorrectly because there had been no prior cuttings made from the underwear. Counsel's conduct was deficient because counsel never sought expert assistance prior to trial, even though counsel was aware of the state's evidence and theory that the sexual contact occurred only a short time prior to the murder. Counsel's preparation for this expert and forensic evidence was, at most, a brief, undocumented conversation with a medical examiner and research at a law library. While counsel did find one article from an organization in London allegedly supporting "an extended timeline for the sexual encounter," he was precluded from offering this into evidence during cross examination of the state's expert.

> While it is counsel's responsibility to educate themselves about the aspects of a case they do not understand, gaining personal knowledge of a subject does not end counsel's obligation to his or her client. Counsel must apply the knowledge gained in a way that provides his or her client with evidence and constitutionally adequate legal representation. Here, even if we were to assume that counsel spent hours independently researching the scientific aspects of [the] case, he did not utilize this scientific knowledge in a way that meaningfully benefitted [the defendant] during his trial.

"Counsel's unpreparedness" was especially clear from his post-conviction testimony in that he still "did not understand the difference between motile and intact sperm. This fact alone exemplifies the objective unreasonableness of his performance." With respect to the testing of the underwear, counsel did not retest it because he was "under the impression" that retesting would have produced the same result. This was not a valid "strategy" because retesting would have reveled: (1) no semen, as the state said; (2) the defendant's semen; or (3) another man's semen. Thus, retesting could not

have harmed the defendant in light of the DNA evidence already matching the defendant to semen from the victim's vagina and his admission of consensual sex. Prejudice was clear as the state's case relied primarily on the two trial "experts" and the forensic evidence, which was clear from the prosecutor's closing arguments which also informed the jury that the credibility of the state's experts had not been challenged. Clearly, if trial counsel had performed adequately, the state's case, as well as the credibility of the state's experts, would have been severely undermined. Counsel was also ineffective in failing to challenge the qualifications and testimony of the nurse expert. As Dr. Spitz testified in post-conviction, forensic nurse examiners are generally not qualified or involved in "interpretation" of the evidence. They simply collect it. Here, the nurse expert's testimony that there was anal intercourse and that sexual activity was most likely forcible was incorrect and misleading in substantial respects. First, there was no evidence of a stab wound or bite mark on the victim's breast. It was a nonspecific bruise that could have been caused in many ways. Second, the mark in the victim's pubic area interpreted by the nurse as a "cigarette burn" was just as consistent with a number of other things, such as syphilis. Third, the nurse found anal intercourse based on coloring and a swab from "deep within" the anus finding the presence of sperm. This did not establish anal intercourse as the fluid could easily have drained from the vagina into the anal cavity. Likewise, the testimony that the swab came from "deep within" the anus was "completely without scientific basis" because once the swab touched the outside of the anus and moved inward, there is no way to tell whether sperm collected came from the outside or "deep within." Finally, the evidence did not suggest that sexual activity was forced and the nurse lacked the credentials and expertise to even formulate such an opinion. Counsel's conduct was deficient in completely failing to investigate the qualifications of the state's "expert" nurse. Counsel never even considered doing so and just assumed that she had been recognized as an expert in the past. The prejudice was clear.

> By incorrectly assuming that [the nurse] was qualified to interpret [the] injuries, he failed to prevent [her] from painting a picture in the minds of the jurors of a victim who was vaginally and anally raped, stabbed, burned, and bitten. After [her] bleak characterization of [the] injuries on direct examination, nothing counsel did during his cross-examination . . . erased this horrific picture from the minds of the jurors.

As additional evidence of prejudice, the court pointed out the nurse expert's testimony was not only summarized in the direct appeal opinion denying relief, but also "directly relied upon as a basis for denying" three claims, which "exemplifies the materiality of that testimony and how ineffective assistance compromises not only the trial, but the entire judicial process."

***Darst v. State*, 746 S.E.2d 865 (Ga. Ct. App. 2013)**. Counsel ineffective in aggravated child molestation case for a number of reasons. The defendant was charged with molesting two young girls who he was caring for, along with his girlfriend, as foster parents during on-going custody proceedings. After approximately two and a half years of being in the defendant's care, in September 2004 when the girls were four and seven, the girls' grandparents in Pennsylvania were granted permanent custody but the children were not moved to Pennsylvania until several months later. In October 2004, the four-year-old reported to the defendant's girlfriend that she had been abused by the defendant and "Uncle Billy." The girlfriend did not report this to police but did report

it to a therapist seeing the older girl. The therapist reported this to the Department of Family and Children Services, who ordered a psycho-sexual evaluation of the child but did not remove the children or inform police. A month later, the seven-year-old reported to the defendant's girlfriend that she also had been abused. After repeatedly trying to dissuade the girl, who did not recant "[d]espite the intense questioning," the girlfriend also reported this allegation to the therapist. The therapist notified the Department and the police were notified. Both girls essentially refused to talk to the initial police investigator and the female detective brought in after initial efforts failed. A month later, forensic interviews of both children were conducted and both girls again alleged that the defendant had molested them. These interviews were videotaped and admitted in evidence without objection. The defendant denied the allegations in trial testimony. The defense challenged the girls' statements as inconsistent and unbelievable and also suggested that, if the children had been molested, it was by their biological father or their "Uncle Billy." Counsel's conduct was deficient. First, counsel failed to obtain school, therapy, and Department records that "demonstrated that the children's documented behavior during the time" they were in the defendant's foster case "was inconsistent with their allegations" of sexual abuse. Two months after being placed in the defendant's care, the older child reported that she had been sexually abused by her biological father. The records and reports otherwise indicated that, while in the defendant's care, the children made "positive social, developmental, and educational progress" up until the time they were informed they would be moving to Pennsylvania with their grandparents. This information was "clearly favorable to [the] defense theory that, if the children had been molested, it was someone other than [the defendant]." Counsel had no valid strategy for failing to obtain these records because his only "reason" was the desire to argue to the jury that the state had failed to obtain these records. Second, counsel's conduct was deficient in failing to consult with an expert and present expert testimony that the children's behavior was inconsistent with having been molested by the defendant. Specially, lay witnesses, including a teacher, saw no problems with the girls' behavior until they were informed of the impending move to Pennsylvania. An expert could have testified, based on this information, that neither girl presented the typical behavioral patterns observed in children who have been sexually abused. Counsel admitted that it "had not occurred to him" to retain an expert. Thus, there was no strategy decision. Third, counsel's conduct was deficient in failing to consult an expert and present expert testimony on the subject of the reliability of forensic interviews. Here, in addition to other criticisms, expert testimony was available to challenge the reliability of the forensic interviews in this case, which were not conducted until after the defendant's girlfriend, the therapist, the Department case manager, at least two police investigators, and a "psycho-sexual evaluator" had interviewed the girls. Thus, the girls had been "subjected to repeated, suggestive questioning about the allegations" before the forensic interviews. Again, counsel conceded that there had been no strategy in failing to obtain expert assistance. Finally, counsel was ineffective in failing to object to hearsay testimony from the Department case worker that the biological father and "Uncle Billy" had undergone "psycho-sexual evaluations" and "no red flags" were raised, while the defendant had been offered a "psycho-sexual evaluation" but never completed it. The caseworker had no personal knowledge of this information "and, if she was relying on a document in the Department records, that document was never admitted at trial." Counsel's conduct was deficient in failing to object to this inadmissible hearsay evidence, which "lacked any probative value and should not have been presented for the jury's consideration." This failure was especially prejudicial, however, because it "essentially eliminated [the biological father and Uncle Billy] as possible molestation suspects and,

as a result, severely undermined one of [the] primary defense theories, a fact the State specifically emphasized in its closing argument."

***Shumway v. State*, 293 P.3d 772 (Kan. 2013)**. Counsel ineffective in murder case for failing to present testimony of alibi witnesses and other available witnesses that supported the defense theories and contradicted the state's case. The state's primary witness was the defendant's friend who said they had been planning to steal bicycles from the victim's yard, but instead the defendant killed the victim. He admitted that the police had provided him with details of the crime and showed him crime scene photographs and diagrams. In exchange for his testimony, the witness, who had prior convictions involving false statements and dishonesty, was not charged. The other witnesses for the State were the primary witness' wife and three jailhouse informants. The defense theory was that the victim had been killed by a drug dealer (Love) in a dispute over drugs and drug money. One of the victim's neighbors testified that the victim was nervous and that Love had been looking for him on the day of the murder. Counsel filed a notice of alibi but did not present the available alibi witnesses because he believed their credibility was questionable. Counsel's conduct was deficient because even if they "were bad witnesses, they were the only witnesses" that could establish innocence. Likewise, counsel failed to present testimony from the primary witness' niece, who would have contradicted the other state witnesses about events on the evening of the murder. In addition, counsel failed to present testimony from a disinterested witness, who would have testified that she was at the victim's home from about 10:00 p.m. to 2:00 a.m., when the state's primary witnesses placed the murder between 10:30 p.m. and midnight. The witness was an addict at the victim's home waiting for delivery of methamphetamine. Counsel also failed to present testimony from a woman who had sold drugs to the victim and Love. The victim still owed her $100. Love was upset on the day of the murder because he said he had given the victim the money, but he paid the $100. Thus, Love was very angry because he believed he had to pay twice for drugs he had never received from the victim. He even made a statement that the victim would be dead by the next die. Finally, counsel failed to call the victim's friend as a witness. He would have testified that the victim was afraid of Love and had armed himself on the day of his murder because of his fear. Prejudice was established as there was no physical evidence against the defendant, who also had no apparent motive.

****State v. Cheatham*, 292 P.3d 318 (Kan. 2013)**. Counsel ineffective in capital trial for introducing the defendant's prior conviction for voluntary manslaughter and repeatedly referring to the defendant as a "professional drug dealer" and "shooter of people." The State agreed prior to trial to stipulate that the defendant was a convicted felon for purposes of the criminal possession of a firearm charge in order to avoid having the jury become aware that the prior was voluntary manslaughter. Nonetheless, counsel informed the jury during jury selection that the defendant was a cocaine dealer, who had previously killed another cocaine dealer with a gun when the State's theory in this case was that the defendant had killed two women in retaliation for stealing drug money from him. During trial, despite his claim of innocence in this case, counsel had the defendant testify in detail about his prior conviction, which opened the door for the state to introduce exhibits, including photographs of the victim who had been shot four times. Counsel gave two contradictory explanations for his actions. First, he said he believed the State would be able to introduce the evidence because it was an aggravating factor in sentencing, which revealed that counsel "was confused or uninformed about

the difference between the guilt and penalty phases of a capital murder trial." Likewise, the State had already agreed not to present this evidence during the trial. Second, he said his strategy was to "tell the truth," which the court found to be "nonsensical." Prejudice was clear, as even counsel said in his closing that asking the jury to ignore the defendant's background in trial deliberations required "superhuman fiction." Counsel also had a conflict of interest that adversely affected his representation due to a flat fee arrangement.

***State v. Rocha*, 836 N.W.2d 774 (Neb. 2013)**. Counsel was ineffective in first degree sexual assault of a child and four counts of child abuse case for failing to move to sever the sexual assault of a child charge from the child abuse charges or to even request an instruction limiting the jury's consideration of the evidence of one crime to that particular crime. The alleged victim of sexual assault was also the alleged victim of one count of child abuse. The other three counts of child abuse related to her three brothers. The charges were improperly joined together because (1) the charges were not of the same or similar character; (2) the sexual assault charge was not based on the same act or transaction as the child abuse charges; and (3) the sexual assault charge and the child abuse charges were not connected together or parts of a common scheme or plan. Counsel's conduct was deficient in failing to request severance, especially because the "evidence of sexual assault, by its nature, was highly volatile and had the potential to fan the jury's emotions. That risk was exacerbated by the fact that the court did not specifically instruct the jury on the importance of keeping the charges, and evidence related to those charges, separate during its deliberations." The court could "conceive of no reasonable explanation" or strategy in allowing the joint trial without even requesting a limiting instruction. Prejudice was established.

***State v. L.A.*, 76 A.3d 1276 (N.J. Super. App. Div. 2013)**. Counsel ineffective in aggravated sexual assault case involving the defendant's 15-year-old daughter, who lived with her mother while the defendant lived with his wife and son, for failing to call the defendant's wife and son as exculpatory witnesses. There were three alleged incidents, the first of which was in November 2000 at the defendant's home when no one else was present in the home. The final alleged incident was in February 2001. The daughter reported the alleged abuse in April 2001. The State's evidence included evidence that the daughter's grades suffered and her behavior deteriorated after November 2000. The defendant denied the allegations and testified that his wife and son were home during the alleged incident in November 2000. During trial, defense counsel first interviewed the defendant's wife and attempted to call her to testify but was precluded from doing so because she was not disclosed as a potential witness until after jury selection. Counsel's conduct was deficient in failing to interview the wife and son in advance of trial and failing to call them as witnesses. Prejudice was established because the wife would have testified that the alleged victim had behavioral issues, problems in school, and questionable veracity long before November 2000. Both the wife and son also would have testified that they were home at the time of the alleged incident in November 2000 and that no abuse occurred. The prejudice was heightened because the prosecutor highlighted the defendant's testimony and argued that "[s]urely his son and wife would have corroborated [the] defendant's testimony, if [he] had been telling the truth." There was prejudice due to the absence of the exculpatory testimony, the failure to corroborate the defendant's testimony, and the failure to challenge the alleged victim's credibility in general.

**Capital Case*

***People v. Mehmood*, 977 N.Y.S.2d 78 (N.Y. App. Div. 2013)**. Counsel was ineffective in child sexual abuse case under state law standard for eliciting testimony from state's expert of child sexual abuse accommodation syndrome that "the truthfulness of a child's disclosure of sexual abuse could be analyzed by looking at whether the content is specific and not age-appropriate knowledge." Even though this testimony was inadmissible under state law, "defense counsel inexplicably asked the expert to elaborate, eliciting highly damaging testimony that a child's allegations of oral sexual conduct, sexual contact between males, or reciprocal contact would be "rather unique and idiosyncratic," and more believable than "just a global statement that I was touched." Thus, defense counsel intentionally elicited inadmissible and unduly prejudicial testimony. Defense counsel was also ineffective in failing to object to the prosecutor's improper closing arguments. The prosecutor's improper arguments were, as follows. (1) The prosecutor argued that the defense evidence that the alleged victims had a motive to fabricate the allegations was only "an elaborate attempt to distract [the jury] from the real issues in this case." (2) The prosecutor inaccurately characterized the defendant's request for a clarification of the state's question during cross-examination to assert that "the defendant's denials of the sexual abuse allegations in the indictment were implicit admissions that he had abused the complainants outside the periods of time designated for the charged crimes. (3) "[T]he prosecutor impugned the defendant's right to testify and improperly suggested that he lied on the stand, when she referred to him as "an opportunist" who "took the stand, and ... said what he thought he had to to save himself." (4) "[T]he prosecutor impermissibly vouched for the credibility of a witness based on his position as a law enforcement officer." Reversal was also required on the separate plain error issue of the cumulative effect of the prosecutor's improper arguments.

***People v. Canales*, 972 N.Y.S.2d 316 (N.Y. App. Div. 2013)**. Counsel ineffective in murder and possession of a weapon case for failing to object to a videotape presented by the prosecution, failing to give the defendant the opportunity to view the videotape prior to trial or to discuss it with him, and failing to attempt to reconcile the defendant's claim that the shooting was accidental with the videotape evidence showing the defendant chasing someone. The videotape was one of the state's primary pieces of evidence as it shows the defendant, wielding a handgun, chasing another person who enters the screen but falls and tumbles out of view. The prosecutor contended throughout the trial that the person being chased by the defendant was the victim and argued to the jury that the videotape provided evidence of the defendant's intent to kill him. The People also introduced the defendant's confession to the police, in which he claimed that he borrowed the gun from a friend, but asked the friend to remove the clip so that it would not be loaded. He claimed that he only intended to use the gun to scare away a group of people who were threatening his friends, but that someone grabbed his arm and, as he spun around, the gun unexpectedly fired. During deliberations, in response to a jury note asking to see "the video footage of the victim and [the defendant]," the defendant personally addressed the court, stating, "That is not the victim" in the videotape. A colloquy ensued wherein the defendant appears to have declined an offer by the court to reopen his case and give testimony about the videotape. The jury subsequently returned a verdict of guilt on both counts. In post-trial proceedings, the parties stipulated that the person being chased by the defendant in the videotape was not, in fact, the victim. The trial court vacated the murder conviction but nevertheless upheld the defendant's conviction of criminal possession of a weapon. In declining to vacate the defendant's conviction of criminal possession of a weapon in the second

degree, the trial court applied the *Strickland* prejudice standard rather than the more lenient state law standard that required reversal on both counts.

***Commonwealth v. Stewart*, 84 A.3d 701 (Pa. Super. Ct. 2013)**. Counsel ineffective in murder case for failing to meaningfully interview an alibi witness and present her testimony at trial, even though the state's case was built on only one eyewitness and the defendant informed counsel of the witness prior to trial and the defendant testified to the alibi. While trial counsel denied that the defendant told him of the witness and stated that the defendant admitted being present at the crime scene, the trial court found this testimony to be incredible, especially in light of counsel's presentation of the defendant's testimony about the alibi at trial and argument that his testimony was credible. Counsel also stated that he did not believe the alibi witness was credible. "[W]hile trial counsel offered an explanation for why he did not call the witness, he gave no credible answer as to why he conducted no investigation into this case and did not interview the alibi witness."

***Commonwealth v. Champney*, 65 A.3d 386 (Pa. 2013) (per curiam)**. Convictions and death sentence vacated after affirmance (due to the court being evenly divided) of the post-conviction court's finding of ineffective assistance of counsel and state misconduct under *Brady*.

***Commonwealth v. Matias*, 63 A.3d 807 (Pa. Super. Ct. 2013)**. Counsel ineffective in sex abuse of minors case for failing to call an available eyewitness and failing to present photographic evidence. The defendant was charged with molesting his daughter's friend when the alleged victim was 8 and the daughter was 7. The alleged victim, who was 13 at the time of trial, alleged that one incident occurred in the defendant's basement when his daughter was present. She also alleged that a second incident occurred in the basement bathroom. Counsel's conduct was deficient in failing to interview the defendant's daughter after the alleged victim said for the first time during trial that she was present during an assault. Counsel's decision not to interview her because of her young age and status as the defendant's daughter was simply unreasonable and prejudicial. She would have testified that the defendant was present with the two girls in the basement only once and that he committed no assault on that date. Counsel's conduct was also deficient with respect to the second alleged incident because he failed to investigate properly by "view[ing] the crime scene." He was, therefore, unaware that there was no bathroom in the defendant's basement. The defendant and his wife later gave counsel photographs establishing this fact, but counsel "either misplaced" them of simply "failed to recognize the relevance" of the photographs. The prejudice was clear especially in light of the fact, which was clear from a jury note sent during deliberations, that "the jury obviously had trouble with the inconsistencies and credibility in [the alleged victim's] testimony."

***Ex parte Villegas*, 415 S.W. 3d 885 (Tex. Crim. App. 2013)**. Counsel ineffective in capital murder trial for failing to discover and present evidence of possible alternative perpetrators and for failing to discover and present evidence that would have allowed the jury to give effect to the voluntary confession jury instruction submitted in the case.

***Frangias v. State*, 413 S.W.3d 212 (Tex. Ct. App. 2013)**. Counsel ineffective in sexual assault case for failing to take the steps necessary to procure and introduce the deposition testimony of a

crucial defense witness. The alleged victim testified that the defendant sexually assaulted her when she stayed at his hotel. The defendant testified that he found the alleged victim drunk and on the ground outside of the hotel late in the evening. He and a part-time maintenance worker helped her upstairs to her room but left her there alone. The alleged victim, however, testified than the defendant entered the room and sexually assaulted her. More than three months prior to trial, the maintenance worker provided an affidavit supporting the defendant's statements. Counsel did not call him to testify in Houston, however, because the witness was undergoing chemotherapy in El Paso and his doctor would not permit him to travel. The witness was, however, available to testify via deposition. Counsel's conduct was deficient and prejudicial, especially in light of the weakness of the state's evidence.

***State v. Campos*, 309 P.3d 1160 (Utah Ct. App. 2013)**. Counsel ineffective in attempted murder with injury case for (1) failing to request a special mitigation jury instruction for extreme emotional distress; (2) failing to object to a verdict form that misplaced the burden of proof for imperfect self-defense; and (3) failing to object to the prosecutor's improper closing arguments appealing to the jury's sympathies and attacking defense counsel's character. The defendant was charged with shooting an unofficial neighborhood watch volunteer, who was on the lookout for "suspicious" vehicles in the neighborhood. The defendant's 16-year-old daughter and her friend were out walking when the neighborhood watch guy passed in his SUV and told them to be careful going home. Neither girl knew who he was or responded. After they returned to the defendant's house, they got in a car and drove to pick up another friend. As they were driving back towards the defendant's house late at night, the neighborhood watch guy saw the vehicle and mistook them for one of the "suspicious" vehicles he was watching for.

> The girls were "freaked out" and "a bit traumatized" when they realized that the same individual who had spoken to them earlier was now following them. One of the girls called [the defendant] to tell him they were being followed and to ask for help.

The defendant took a gun from his home and drove to meet the girls, who had managed to elude the neighborhood watch guy by turning out of the neighborhood onto a major road. After the defendant got the girls to his house, he and his daughter drove around to find the vehicle that had been following the girls. Meanwhile, neighborhood watch guy, who had also armed himself was out still looking for the "suspicious" vehicle. When the two vehicles passed, the defendant blocked the road and got out with his weapon. According to the watch guy, the defendant was pointing his weapon, and demanding to know why the girls were followed. While the neighborhood watch guy attempted to defuse the situation and put down his weapon, the defendant's daughter was screaming hysterically from the defendant's vehicle and the defendant shot him. According to the defendant, on the other hand, he had the weapon in his back pocket and only pulled it out and fired when the watch guy got out pointing his weapon at the defendant and cocked it in response to the defendant asking why the girls were being followed. Under these circumstances, counsel was ineffective in failing to request a jury instruction on the affirmative defense of extreme emotional distress, which was supported by the evidence. In short, "a rational jury might conclude that Campos was under 'extremely unusual and overwhelming stress that would cause the average reasonable person under

the same circumstances to experience a loss of self-control, and be overborne by intense feelings, such as passion [and] anger.'" This failure was not explained by counsel's "strategy" of arguing self-defense as the two defenses were not inconsistent. "Campos's trial counsel could have argued to the jury that if it believed Campos's version of events, it must acquit him, but if it believed the State's version of events, it must convict him only of attempted manslaughter, not attempted murder." Counsel was also ineffective in failing to object to the verdict form's description of imperfect self-defense, which is available under state law if the defendant "attempted to cause the death of another under a reasonable belief that the circumstances provided a legal justification or excuse for the conduct although the conduct was not legally justifiable or excusable under the existing circumstances." Once a defendant has produced some evidence of imperfect self-defense, the prosecution is required to disprove imperfect self-defense beyond a reasonable doubt. While the court properly instructed the jury, the verdict form directly contradicted that instruction and placed the burden on the defendant to prove imperfect self-defense beyond a reasonable doubt. Finally, counsel was ineffective in failing to object to the prosecutor's improper arguments.

> Here, the prosecutor's comments called attention to matters the jury should not have considered in reaching its verdict. We are most troubled by the prosecutor's reference to Campos's "stealing from [the neighborhood watch guy] his ability to run, his ability to bike, his ability to walk his daughter down the aisle." The statement was a direct appeal to the passions of the jury. It suggested to the jury that it should find Campos guilty out of vengeance or sympathy for the victim rather than based on what the facts and the law required.

The prosecutor also improperly compared the defense's theory of the case to a "red herring" and suggested that defense counsel was being deceitful. "A prosecutor diverts the jury from its duty to decide the case on the evidence when he is 'permitted to make unfounded and inflammatory attacks on the opposing advocate.'" *Id*. at ___ (citing *United States v. Young*, 470 U.S. 1, 9 (1985) ("'A personal attack by the prosecutor on defense counsel is improper.'" (quoting ABA Standards for Criminal Justice 4–7.8 (2d ed.1980))).

> The prosecutor's comments here crossed the line from permissible argument of the evidence to an impermissible attack on defense counsel's character. The prosecutor argued not only that the claim of self-defense was a distraction, but also that it was a technique or ploy to confuse and distract the jury. That is, the prosecutor argued that defense counsel intended to mislead the jury. Arguing that the evidence does not support the defense theory and that the theory is thus a distraction from the ultimate issue is fundamentally different from arguing that defense counsel is intentionally trying to distract and mislead the jury.

Prejudice found due to "the cumulative effect of trial counsel's errors."

2012: ***State v. Harrison*, 404 S.W.3d 830 (Ark. 2012)**. Counsel ineffective in capital murder trial for failing to adequately impeach the state witnesses and to present a defense. The defendant was charged with killing a co-worker at an automobile repair shop. Two eyewitnesses and a jailhouse

snitch, who had a prior juvenile adjudication for capital murder, testified for the state. The post-conviction court found counsel ineffective for failing to adequately impeach the snitch and present a defense alleging that he was the actual perpetrator. The state appealed but conceded deficient conduct. Thus, the only question was one of prejudice. Deficiency was clear in failing to learn of the prior adjudication. While the case file in juvenile proceedings was sealed, "there is a published opinion of [the] direct appeal issued by the Arkansas Court of Appeals." Likewise, the defendant told counsel about the adjudication. Counsel's conduct was also deficient in failing to pursue a defense strategy that the snitch committed the crime. Counsel knew the snitch had been stealing cars and was fired by the defendant for stealing money from the auto repair shop. Thus, he had a "motive" for pointing at the defendant. Prejudice was also established. No physical or scientific evidence implicated the defendant. Both eyewitnesses had biases and gave inconsistent statements. One was the defendant's step-cousin, who was having an adulterous affair with the victim and was angry at the defendant "for his expressed disapproval" of her affair.

***Gaines v. Commissioner of Correction*, 51 A.3d 948 (Conn. 2012) (*affirming* 7 A.3d 395 (Conn. Ct. App. 2010))**. Counsel ineffective in murder and conspiracy case for failing to adequately investigate and present alibi testimony. Two people were killed in a parked car. They were shot with .22 and .45 bullets. Five months after the murders, the 16-year-old defendant was arrested. He informed counsel he was not involved in the murders but he could not remember his whereabouts on the night of the murders. He gave counsel names of two potential witnesses for him, but counsel never interviewed these witnesses. During trial, the defense theory was that the two primary state witnesses were the killers. One of them testified that the defendant had lived with him and admitted that he and another man had committed the murders with weapons the other man had borrowed from the witness. This witness' girlfriend testified that, after the defendant's arrest, he had confessed to her that he had committed the murders for payment. The defendant testified that he sold drugs to pay his rent, the state witness was his "lieutenant," and there had been problems between them. He testified that the "lieutenant's" girlfriend had attempted to get him to admit involvement in the shooting but he did not. Counsel's conduct was deficient in failing to investigate. If counsel had called the two people, whose names the defendant had provided, he would have discovered an alibi witness. This witness would have testified that the defendant was with her on the evening of the murders assisting her in moving. This witness also could have put counsel in touch with her mother, who also supported the defendant's alibi. The first alibi witness attended the defendant's trial and testified that she told counsel of the defendant's alibi, but she was not called to testify. She said she had not provided the information prior to trial because no one asked her and she did not think anyone would listen to "a parolee." Counsel should have interviewed the people identified by the defendant as possible witnesses to determine if they "had any useful information," especially since one of the persons, who turned out to be an alibi witness, was the sister of the lieutenant/state witness, who defense counsel asserted was one of the killers. Prejudice established. The post-conviction court found both alibi witnesses to "be credible and compelling" and also found the defendant's testimony that he did not recall his whereabouts at the time of the murders to be credible, as he was not arrested until five months after the crimes. Even trial counsel conceded that he believed the alibi witness testimony "might have made a difference in the jury's verdict." The state's case "was not particularly strong, as there were no indifferent eyewitnesses and no forensic evidence tying the petitioner to the crimes."

***Young v. United States*, 56 A.3d 1184 (D.C. 2012)**. Counsel ineffective in drug distribution case for failing to investigate and present testimony of narcotics expert witness to challenge police accounts of alleged drug transactions. Police officers testified that they observed the defendant enter a restaurant with another man, overheard the man say he had "50 on me," and observed the defendant pass a small brown object to the man in exchange for currency. The defendant was arrested by other officers one minute after he left the restaurant. The other man tossed away a "piece of brown-paper" containing 10 ziplock bags containing .87 grams of 28% pure heroin. The defendant denied that he had been in the restaurant and had two alibi witnesses who claimed to have been talking with him outside the restaurant the whole time. There was no forensic evidence linking the defendant to the drugs. He was carrying $72 on him when searched but had no drugs or drug paraphernalia. If counsel had investigated, available expert testimony would have established that the street value of the drugs found was $200 and that a typical street-level transaction would involve 1-3 ziplock bags rather than 10. Counsel's conduct was deficient. He conceded that he was unfamiliar with the street value of the drugs and that it had not occurred to him to consult with an expert. While he testified that he rarely found narcotics experts to be helpful, he did not say that was the reason for not consulting an expert in this case. "In other words, this was an omission, not a strategic decision." Prejudice established as the narcotics expert, a former police officer himself, would have cast doubt on the police testimony. "[T]he likely impact on the jury cannot be underestimated."

***Hills v. State*, 78 So. 3d 648 (Fla. Dist. Ct. App. 2012)**. Counsel ineffective in child sex abuse case involving two victims for multiple reasons. First, counsel failed to move to sever the cases until after the jury was informed of both crimes. Severance was granted. "Although the trial court tried to salvage a bad situation, the damage was irreparable, as counsel continued to perform ineffectively." During the testimony, the remaining alleged victim of incidents occurring between November 1997 and November 1998 (when she was 11), but not reported until June 2007 when her sister reported abuse, testified that the sexual encounters occurred about 50 times. Counsel suggested it could have been as many as 200 times. She also testified that the abuse continued until she was 16-17 and defense counsel did not object to the allegation of incidents five years outside the time period actually charged. Counsel then waived objection to the state's failure to give notice and failed to object to the trial court's finding that the second alleged victim could testify, even though the charges related to her had been severed. Likewise, counsel did not object to the trial court's refusal to permit the defense to introduce evidence during the hearing on admissibility of this testimony that the alleged victim had recanted and changed her story. "Because the trial court must determine that clear and convincing evidence supports the claim that the defendant did commit a collateral crime whose admission is sought, a defendant has the right to present evidence on the issue." Finally, counsel failed to object "when the judge left a position of neutrality in an attempt to salvage the trial mess created by [the] belated motion to sever." The could made suggestions to the state on how to introduce the second alleged victim's testimony anyway and obtained a waiver from defense counsel to the lack of the statutorily required notice.

***State v. Crapp*, 732 S.E.2d 806 (Ga. Ct. App. 2012)**. Counsel ineffective in armed robbery and kidnaping case for failing to introduce available evidence to corroborate the defendant's testimony. The victim was forced to drive her kidnapper to a house where he purchased drugs. While she could

not identify her attacker, she was able to locate the house again. The occupant identified the defendant and testified against him. The defendant testified that the witness was motivated to lie because the defendant owed him drug money and the witness had him robbed and pistol-whipped by another man who sold drugs for the witness. The defendant had reported the incident and the man was arrested. Charges were dismissed after the defendant ended up in the same jail, was threatened, and then retracted his statement. During cross-examination and argument, the state mocked the testimony and said that there was no report or it would have been admitted. Counsel did not introduce the police report, indictment, or arrest warrant despite these circumstances. Prejudice established as this case was "a pure credibility contest" between the defendant and the witness.

***State v. Kamau*, 131 So.3d 871 (La. Ct. App. 2012)**. Counsel ineffective in drug case for failing to raise numerous valid objections to state's case. The defendant was charged in an amended indictment with possession with intent to distribute over 200 grams of cocaine. "[T]here is no such crime," under state law but counsel failed to move to quash the indictment. Subsequently, none of the responsive verdicts presented to the jury included a requirement of finding that the defendant possessed over 200 grams of cocaine. Nevertheless, the verdict forms allowed the jury to convict of possession of over 200 grams of cocaine, which the jury found. Afterwards, the court and counsel agreed that the "200 grams" element should not have been included and that the jury's verdict was for simple possession only. Nonetheless, the defendant was sentenced to 20 years, with 10 to be served without parole. This was not a proper sentence for simple possession, but counsel failed to object. The result of all of this "was an insolubly ambiguous verdict." Reversal required.

***People v. Trakhtenberg*, 826 N.W.2d 136 (Mich. 2012)**. Counsel ineffective in criminal sexual conduct case for failing to investigate and present an adequate defense. The defendant was charged with sexually abusing his eight-year-old daughter. Counsel's alleged strategy was to impeach the child with inconsistent statements about the number of times she was abused and to show that the defendant lacked the requisite intent of sexual gratification. Counsel waived preliminary examination, did not obtain discovery, did not interview any witnesses, failed to consult an expert to testify about the problems with how the child's statements and testimony were developed, and failed to adequately impeach the state's witnesses, particularly the defendant's ex-wife and the child. During trial, counsel presented no defense other than the defendant's testimony in which he denied abuse but admitted that he had touched the child's genitals six times to apply medication for yeast infections at his ex-wife's insistence. If counsel had investigated, counsel would have discovered that the defendant's ex-wife (the alleged victim's mother) had made numerous negative comments about the defendant to her daughter and had repeatedly asked her leading and suggestive questions. In addition, before reporting the allegations to the police, she took her daughter to a treatment center for child abuse victims where she underwent a forensic interview by a caseworker who was unaware that the child had spoken to others about the abuse. Counsel was also unaware that the child had testified in a civil trial, consistent with the defendant's statements that he had touched her while applying medication. Finally, counsel failed to present the testimony of another child, who was the alleged victim's friend, but testified in the civil trial that the defendant had never behaved inappropriately towards his daughter.

**Capital Case*

***Hibbler v. State*, 115 So. 3d 832 (Miss. Ct. App. 2012)**. Counsel ineffective in statutory rape case for multiple reasons. The case involved a 13-year-old victim who had been diagnosed with reactive attachment disorder and borderline intellectual functioning. The defendant was 69 years old. A pediatrician and an OB-GYN determined that the victim's hymen was still intact but that she tested positive for chlamydia, a sexually transmitted disease. Two months later the defendant was voluntarily tested and did not have chlamydia. During trial, the court allowed the state to ask leading questions of the victim due to her "obvious . . . diminished intellectual functioning." Counsel relied entirely on the defendant's lack of chlamydia as a defense. Counsel's conduct was deficient in failing to interview the victim; the defendant's daughters who were present on the day of the alleged offenses in the defendant's home; the victim's father, teachers, and the unidentified person to whom the victim first reported the offense; or the state's experts, whose testimony caught counsel by surprise. Specifically, the state's experts reported that the victim reported that she had no sexual contact with anyone other than the defendant. The experts also testified that chlamydia could only be contracted with "actual penile penetration of the vagina." Finally, the experts testified that the defendant could have been cured of chlamydia in the two months before he was tested, even if he had not received treatment. Counsel's conduct was deficient in cross-examination of the victim. Counsel asked only three questions and did not elicit information about the 3-day-delay in reporting the incident. Counsel also did not elicit information that the victim had previously accused someone else of raping her because counsel believed, contrary to the state rules of evidence, that he was prohibited from introducing this information. Likewise, counsel did not cross examine the victim about her prior inconsistent statements that the defendant did not rape her. In short, counsel "completely failed the challenge the believability of [the victim's] testimony and, "[i]n effect, . . . conceded it." Counsel's conduct was also deficient in failing to effectively cross-examine the state's expert who testified the defendant could have been cured of chlamydia without treatment, which was contradicted by all the medical journals defense counsel reviewed. Likewise, counsel could have established that symptoms of chlamydia generally do not appear in women until one to three weeks after exposure. Thus, it is unlikely the victim's chlamydia found in a test only three days after the alleged incident could have been caused by the defendant. Prejudice established.

***Smith v. State*, 370 S.W.3d 883 (Mo. 2012)**. Counsel ineffective in robbery case for failing to call the co-defendant to testify as a defense witness. Two men committed the crime. Initially, only the co-defendant was arrested. He pled guilty in September 2007. Subsequently, a pretrial inmate, seeking and obtaining a plea agreement in his own case, told police that the defendant had admitted his involvement. Counsel's conduct was deficient and prejudicial because the co-defendant would have testified, if called, that the defendant was not with him during the crime.

***Gregg v. State*, 279 P.3d 396 (Utah 2012)**. Trial and appellate counsel ineffective in rape case for failing to adequately present a defense. The defendant and the victim both testified that they met on an "online dating service." They first met in person around 2:20 a.m. when the alleged victim invited the defendant to her apartment. According to her, they engaged in consensual kissing until 3:20 a.m. when a friend of the victim called. Thereafter, they resumed consensual kissing and "progressed to foreplay." According to the victim, she said no but was raped. According to the defendant, it progressed to consensual sex, which was interrupted by the friend, who was waiting outside with his girlfriend, calling again at 4:07 a.m. Counsel's conduct was deficient in failing to

investigate and present evidence of the alleged victim's continued activity on the dating site after the alleged rape and in failing to elicit information about the 47 minutes between the calls. In her testimony, she said that she only logged back into the site to pull information about the defendant for the police. In reality, only two days after the alleged rape she had contacted four other men in "cheerful, light-hearted emails" saying she was leaving site to avoid charges but inviting them to contact her privately. These emails would also have undermined her credibility regarding the severe anxiety and panic attacks she claimed to suffer following the alleged rape. Counsel failed to subpoena these records. Likewise, counsel's conduct was deficient in failing to present evidence of the actual time line of events. While the alleged victim claimed the calls were only minutes apart, the phone records and the police report revealed that, even according to her testimony, there was "nearly an hour of [consensual] sexual foreplay" before intercourse. While counsel did make a vague reference in closing to a 45-minute time period, counsel presented no evidence supporting this argument. Prejudice was also established as consent was the only issue. Appellate counsel was ineffective for failing to assert trial counsel's ineffectiveness on appeal.

2011: ***In re Hill*, 129 Cal. Rptr. 3d 856 (Cal. Ct. App. 2011)**. Counsel ineffective in lewd acts against minor case for failing to obtain forensic examination photos and failing to secure medical expert testimony to contradict state's expert. The defendant's stepdaughter alleged 100-200 sexual penetrations over a two year period when she was 12-14 years old. A forensic examination conducted one month after the last alleged event was "normal," according to the state's expert. She also had no herpes virus even though the defendant was positive for herpes during the entire time period. After these initial allegations, a friend of the stepdaughter also alleged molestation on one incident. Subsequently, the stepdaughter reported to police and a defense investigator that she lied because she was angry at the defendant for imposing strict rules at home. She told her friend (the other alleged victim) and a Child Protective Service worker that she lied in these recantations, however, because her mother was pressuring her and she was afraid of going into foster care. During trial, the stepdaughter denied that the defendant had raped her or touched her inappropriately. The defense presented the defendant's denial testimony and character witnesses to his truthfulness and the stepdaughters untruthful character and argued that the stepdaughter was lying. Counsel's conduct was deficient in failing to obtain colposcopic photos referred to in the examining physician's report and in failing to adequately consult with an expert. Counsel had attempted to consult with one expert, who had a conflict. Counsel recalled consulting with a second expert but this discussion was "superficial, at best," as counsel could not recall the basis of the expert's conclusion that the "no findings" examination was not inconsistent with molestation, but could recall that the expert did not want to assist the defense. Likewise, the expert had not been provided with the colposcopic photos. Adequate consultation would have rendered expert testimony to contradict the state's expert's conclusion that a "normal exam" was not inconsistent with the allegations. The defense expert opined that if there had been 100-200 penetrations there would have been changes in the hymen, which would be apparent in the colposcopic photos. Likewise, while the state expert testified that there was only a 4-10 percent chance of a person with herpes infecting an uninfected partner, there was no evidence where these statistics came from. The defense expert concluded that there was a 50% chance of infection with each act of intercourse. As the court put it, statistically there was almost a 100% chance that if the stepdaughter's allegations were true, she would have become infected with the herpes virus. Prejudice was apparent as the jury even asked for a "readback" of the

testimony of the state's physician during deliberations. While the expert testimony related only to the stepdaughter, the court also found "a 'spillover' effect" related to the allegations of the friend. In essence, if the jury rejected the more serious allegations of the stepdaughter, the jury's determination of the friend's credibility would also be substantially impacted.

***Larry v. State*, 61 So.3d 1205 (Fla. Dist. Ct. App. 2011)**. Counsel ineffective in delivery of cocaine within 1,000 feet of a "convenience business" for failing to assert the defense that the business involved was not a "convenience business." Testimony by the lead investigator for the state established that the gas station had "at least 10,000 feet of retail space." Under the relevant statutes, a business of "at least 10,000 square feet of retail floor space" is not a "convenience business." Counsel's conduct was deficient in failing to assert this obvious defense. Prejudice established as the trial court would have been obliged to reduce the charge to the lesser-included offense of delivery of cocaine.

***Word v. State*, 708 S.E.2d 623 (Ga. Ct. App. 2011)**. Counsel in armed robbery case ineffective in failing to object to a police officer's testimony that he believed the alleged victim. Alleged victim initially said he did not know robber, but then identified the defendant in statements and testimony as the robber. Defense counsel attacked the victim's credibility during trial, but failed to object to the officer's testimony bolstering the victim's credibility and did not probe this in cross. Prejudice established as the alleged victim's testimony was the only direct evidence against the defendant.

***People v. Vega*, 945 N.E.2d 1189 (Ill. Ct. App. 2011)**. Counsel ineffective in criminal damage to government property in excess of $500 for failing to timely discover that the actual damage was less than $500 making the defendant guilty only of a lesser-included offense. The defendant damaged a police vehicle. The total repair charges submitted was $502, but this included $33 of sales tax. Under state law, the police department was exempt from paying sales tax. Counsel did not discover this and raise the issue until after trial.

***Timms v. State*, 54 So.3d 310 (Miss. Ct. App. 2011)**. Counsel ineffective in possession of firearm by a felon case for failing to ensure accurate portrayal of the defendant's status as a convicted felon. The defendant had been convicted of felony possession of cocaine, but counsel mistakenly believed he had been convicted of possession of a stolen firearm. While he had been arrested on this charge, he was never convicted but counsel failed to object when the State introduced documents showing that the defendant had been charged for this offense. This was compounded by counsel asking the defendant and other witnesses about this non-existence prior conviction. This was especially prejudicial due to the similarity of that charge with the current charge. Likewise, the State introduced documents about the cocaine conviction that showed that he was charged with possession enhanced by possession of a stolen firearm when his plea and conviction was without the firearm enhancement. Counsel should have sought a stipulation as to the defendant's status prior to trial.

***People v. Reid*, 918 N.Y.S.2d 863 (N.Y. 2011)**. Counsel ineffective in failing to adequately investigate in larceny and stolen property case. Defendant was charged as an accomplice is a subway pickpocketing heist of an undercover officer. Charges were dismissed against the alleged principal

and trial counsel hoped he would testify for the defense. The Defendant informed counsel that he was elsewhere in the city (NYC) at the time of the crimes for meetings related to his job as an independent daycare provider. Even after counsel learned shortly before trial that the principal would not testify, counsel failed to investigate and present paperwork or testimony establishing the defendant's presence at a city office, and failed to review surveillance tapes and Metro card transactions to establish that the defendant had not been on the subway platform where the crime was committed. Because the state's case relied on a single eyewitness, counsel "had everything to gain and nothing to lose from undertaking an investigation that would likely have revealed a creditable source of reasonable doubt." Counsel's failure was the result of neglect, not strategy.

***People v. Bodden*, 918 N.Y.S.2d 141 (N.Y. App. Div. 2011)**. Counsel ineffective in criminal possession of weapon and reckless endangerment case due to the cumulative effect of counsel's conduct. Examples included distancing himself from the defendant in jury selection, failing to adequately cross-examine state witnesses, allowing the state to introduce evidence counsel had not even reviewed, stipulating that a lay fact witness was an expert, stipulating to testimony he had not reviewed, failing to adequately examine defense witnesses, interrupting court numerous times and being admonished before jury, making untimely requests for important jury instructions, and arguing only rhetoric in closing arguments when there were serious weaknesses in the state's case. The representation was so bad that the court noted on the record before sentencing that he was troubled by counsel's behavior and believed the defendant had a viable appellate claim of ineffective assistance of counsel.

***Galloway v. Nooth*, 268 P.3d 736 (Ore. Ct. App. 2011)**. Counsel ineffective in arson and attempted murder case for failing to adequately investigate the cause of the fire and present evidence that the fire was not as serious as portrayed by the prosecution. The defendant was pending pretrial on charges of assault and theft. After his second arrest, he was intoxicated and "made boisterous statements and threats" against the prosecutor. The attempted murder victim was the prosecutor on those cases. He awoke to a smoke detector alarm in his home in the early morning hours and discovered a fire in his basement garage. The fire was basically a burning pile of clothing on an area rug on the concrete floor in front of a washer and dryer. Responding police officers put the fire out before firefighters arrived. First, they tried a fire extinguisher and then used a garden hose. Firefighters initially believed that the fire was a result of spontaneous combustion caused by compression of bleach and laundry detergent and they began cleaning up the scene. Another fire, which was ruled as an arson, was set in a nearby park the following night. The defendant was seen by police in the area of both fires. After this, an arson detective inspected the scene at the prosecutor's house. The remains of the clothing had been rolled up in the area rug and was outside the house. The detective found a burned book of matches in the roll, even though the prosecutor kept no matches in his home. Thus, arson was suspected. At trial, the detective testified that he believed an accelerant was used to start the fire, even though he did not smell one and the crime lab found nothing, "because clothing generally does not readily burn." He suspected that alcohol was accelerant. The lab would not test for alcohol unless specifically requested because the crime lab used alcohol to clean its equipment. He did not explain why alcohol testing was not requested in this case. Three jailhouse snitches testified that the defendant had made incriminating statements. Counsel argued reasonable doubt in closing, but did not actually present any evidence to support the

argument. Counsel asserted that she did not investigate because the defendant confessed to her that he intended to kill the prosecutor. The post-conviction court noted that there was evidence challenging counsel's credibility, but made no finding on this point because "even assuming that petitioner did make that confession, it does not follow that an investigation would have been fruitless." If counsel had investigated, she could have presented the evidence that a co-defendant presented if his own trial. Specifically, a firefighter who responded to the house would have testified that the first thing he did when he arrived was to smell the burned pile of laundry. He did not smell anything, accelerant or otherwise. On a scale of one to ten with one being something simple like a toaster fire, he rated the seriousness of the fire as a two. An "accident reconstructionist," who had worked more than 100 fires, testified that no accelerant had been used. There was no petroleum-based accelerant, which was tested for by the crime lab. He also found no alcohol-based accelerant, which would be apparent after water was used to put out the fire and the arson detective did not report anything consistent with this. In addition, the firefighter would have been able to smell an accelerant if it had been used. This expert videotaped two fires that he set. He used piles of clothing roughly the size of that described in the fire report. He used an alcohol accelerant on one and no accelerant on the other. While the video was played from the jury, the expert commented that neither of the flames rose above 2-3 feet. Neither the fire nor the smoke, in his opinion, posed a threat of serious injury to the occupants of the house. Indeed, the fire would have gone out in its own without ever posing a threat. Prejudice was established because the state's case on intent to kill rested primarily on the threat posed by the fire.

***State v. Charles*, 263 P.3d 469 (Utah Ct. App. 2011)**. Counsel ineffective in murder case for multiple reasons. The defendant's girlfriend was killed by blunt force trauma and asphyxiation, but was found submerged in the bathtub in the home. The state's expert believed she died prior to 6:00 a.m. but conceded that it could have been as late as 8:00 a.m. The defendant said that he had left for work around 6:00 a.m. and the victim had to help him get his truck in reverse to get it out of the driveway, due to mechanical difficulties with the truck. While the police concluded there was no evidence of robbery, because a purse, cash, and a Rolex watch had not been taken, a safe was open and empty. The defendant was not charged with the murder until eleven years later. The state presented a mechanical expert to testify the defendant's truck had no mechanical difficulties at the time of the death, but his report was lost and he was relying on his memory of eleven years earlier. There were holes in his memory and the circumstances and reliability of his testing was also questionable. A jailhouse snitch and distant relative testified that the defendant confessed to him while in pretrial confinement. The defendant testified to his version, including that drugs and money had been stored in the safe found by police to be open and empty. Counsel's conduct was deficient in failing to subpoena the defendant's cousin to testify that on the day of her death the victim had called him between 1:00 and 3:00 a.m. and there was a brown car parked in the driveway after the defendant left for work. In addition, on the day of the funeral, he had received an anonymous threatening phone call telling him not to mention the car. Counsel did not subpoena the cousin because he expected the state to call him as a witness. Counsel's conduct was also deficient in failing to present evidence to corroborate the defendant's story that his girlfriend was alive when he went to work from the defendant's next-door neighbor and the victim's grandmother. The grandmother had died prior to trial and counsel sought to introduce her statement through the police officer who had taken her statement, but had failed to give proper notice of intent to present the

hearsay evidence under state rules. Likewise, while the neighbor testified during trial, counsel failed to present the neighbor's testimony, which had been given during a preliminary hearing, to establish that the defendant had been having mechanical problems with his truck in the weeks before the death and that the neighbor had helped him. Both the grandmother and the neighbor would have corroborated the story that he would not have been able to drive his truck to work without his girlfriend's assistance that morning. Prejudice was cumulative. The state's case "was not particularly strong" and the trial court had even expressed "misgivings about the verdict" in denying a motion for directed verdict.

2010: ***State v. Smith*, 85 So. 3d 1063 (Ala. Crim. App. 2010) (sentenced in August 1995).** Retained counsel was ineffective in failing to adequately investigate and present a defense during capital trial and sentencing. The victim, a friend of the defendant's, had been missing for approximately 10 days when his body was found. He had been shot in the back of the head with a .25 pistol. Based on information from a single state witness, police focused the investigation on the defendant. The witness testified that he and the defendant had discussed robbing the victim initially as a joke but later the defendant was serious about it and the witness said he wanted nothing to do with it. This same witness testified that he had seen the defendant with a .25 pistol. A different witness testified that he had purchased a .25 caliber pistol that the defendant had offered to buy. This gun was later missing and the witness confronted the defendant who denied taking the gun. A third man testified that he saw the defendant and the victim together on a Friday in September. The prosecutor argued, without objection, that this witness had seen the defendant with the victim on September 23, the date on which the victim disappeared. Finally, police testified that the defendant had been interrogated and then confessed after a second interrogation in a tape-recorded statement. The defendant testified that had an alibi and that he had not seen the victim on Friday, September 23, the last day he was seen alive. Because the circuit court had found ineffective assistance, the court applied the abuse-of-discretion standard. Counsel's conduct was deficient in failing to adequately investigate. While counsel testified that he had interviewed a "whole list of people" and "everybody we could talk to," the circuit court found this testimony to be incredible. First, none of the witnesses called to testify in post-conviction proceedings had been interviewed and only the defendant's mother, who had testified during trial, recalled meeting counsel. The mother never spoke to counsel prior to the morning the trial started and counsel spent no time with her preparing her for her testimony. Second, counsel described his efforts in "broadest generalities" but could provide neither names nor details of his alleged investigation. He produced no witness list nor any interview notes although he claimed he would have made notes and those notes would be in his file. Finally, when counsel did remember speaking to a particular person, what he remembered was trial testimony–"not anything that occurred in his purported pretrial investigation." While counsel also claimed to have employed others to assist with the investigation, no evidence supported this other than a mere three hours of investigation within the week before trial by a man who had never before and never since performed any investigation in a criminal case. The failure to investigate adequately could not be blamed on the family's failure to pay all of counsel's retainer either. The defendant was indigent, but counsel never sought money from the court to pay for a professional investigator. While counsel believed "the Court would not have granted such assistance," this assertion was not supported by the evidence. If counsel had interviewed the witness, who allegedly saw the defendant with the victim on September 23 and inquired further, he would have testified that it was actually September 16

when he saw the two together. Thus, there would have been no evidence suggesting the defendant had been with the victim on the date of his disappearance. Likewise, counsel failed to adequately investigate whether the primary state witness, who police relied on in focusing on the defendant, was the actual killer, although counsel believed he was. Counsel did not interview the witness' ex-wife, who had made a statement to police consistent with her husband's statement. By the time of trial, she was divorced from the witness and would have testified if asked that she and the witness were having financial problems at the time of the murder. Her husband had proposed the idea of robbing the victim to the defendant, who dismissed the idea because the victim was a good friend, who would loan him money any time he needed it. She would have testified further than her husband had purchased a handgun several months before the murder, that he was gone the afternoon the witness disappeared and came home muddy and wet with torn clothing that he disposed of, that he was unusually interested in news accounts of the discovery of the body, and that he had threatened her, prior to police interviewing them, that he would kill her and her parents if she "ever went against him." She and her husband had been interviewed together and she merely substituted the defendant's name for her husband's in the statement and parroted her husband's statement. The court found this witness to be credible. The court also found deficient conduct for failing to present expert testimony relating to the police procedures used in interviewing this witness with her husband and in interrogating the defendant. The police did not preserve a recording or transcript of the initial interview, which "was highly unusual" and undermined the credibility of the subsequent taped confession. The circuit court also made extensive findings on counsel's failure to present testimony in the "area of false confessions." Counsel was also ineffective in failing to adequately present evidence in sentencing. Counsel presented only two witnesses. The circuit court's findings with respect to both the trial and sentencing phase ineffective assistance of counsel was supported by the record and upheld.

***Head v. State*, 35 So. 3d 1008 (Fla. Dist. Ct. App. 2010)**. Court found trial counsel ineffective in per curiam opinion without "detail[ing] counsel's deficiencies."

***Henderson v. Hames*, 397 S.E.2d 798 (Ga. 2010)**. Counsel ineffective in misuse of a firearm while hunting and felony murder case for two reasons. The defendant was charged with malice murder, two counts of felony murder, and the predicate felonies of misuse of a firearm while hunting and aggravated assault following the shooting death of his brother. The jury rejected the state's argument that the defendant intentionally shot his brother and acquitted on malice murder and aggravated assault. First, counsel was ineffective for failing to challenge the defective indictments. Misuse of a firearm while hunting required both "consciously disregarding a substantial and unjustifiable risk" and "the disregard constitute[d] a gross deviation from the standard of care which a reasonable person would exercise." The indictment for misuse included only the latter. The indictment for felony murder simply incorporated the indictment for misuse. Thus, the indictments were defective under the plain language of the statute. Second, counsel was ineffective for failing to move for a directed verdict of acquittal at the conclusion of the state's case because the circumstances known to the defendant would not have led a reasonable person to believe that there was a risk from which bodily injury would probably result. The brothers were hunting on their own land and had agreed to hunt separate areas. The deceased, however, did not stay in his area and was not wearing his

"hunter's orange." The defendant shot him believing he was a bobcat or wildcat, which had been reported by the neighbors to be in the area.

***People v. Baines*, 927 N.E.2d 158 (Ill. Ct. App. 2010)**. Counsel ineffective in attempted murder and armed robbery case for a number of reasons. The victim had been assaulted by three men one of whom he was able to identify and provide a phone number for. Weeks later, he notified police he had seen one of his attackers at a Home Depot and was "100 percent" sure of identity. This man had a videotaped alibi and was quickly cleared by police. Months later, after failing to identify the defendant in a photographic lineup, the victim identified the defendant in a lineup, even though his height did not match initial descriptions to police. Counsel was ineffective in: (1) failing to adequately learn the facts behind the victim's misidentification of the man at the Home Depot; (2) failing to establish with clarity during cross-examination of the victim that this man had been exonerated by police; (3) failing to adequately impeach the alleged victim for continuing to maintain in his testimony that the exonerated man was one of the attackers; and (4) failing to adequately prepare the defendant's testimony, which resulted in counsel eliciting damaging admissions and bolstering the state's case. In short, "[d]efense counsel manifested a lack of knowledge about fundamental facts of the case, and a lack of knowledge of basic principles of trial procedure." Counsel's closing argument pointing out the weakness of the victim's identification was insufficient to cure the prejudice. "That was too late. Closing arguments are not evidence, and the jury was free to disregard those comments."

***Sea v. State*, 49 So. 3d 614 (Miss. 2010)**. Counsel ineffective in child sex abuse case for introducing evidence of the defendant's two prior criminal convictions–both of which had occurred more than 20 years prior to trial–and for failing to object to the state's introduction into evidence videotapes of damaging forensic interviews of the four alleged victims, who were all less than 10 years old. Counsel's conduct was deficient in introducing the two prior convictions for sexual battery, one of which involved a child under the age of 13 rather than filing a motion to exclude the convictions or at least have the trial court rule on admissibility. The convictions were 25 and 22 years old, well in excess of the ten-year threshold, under state Rule 609 and thus could not be admitted unless the trial court found that the prejudice created by the convictions was substantially outweighed by their probative value. Prejudice found because there was no physical evidence of abuse and "while there were four accusers, their trial testimony came almost entirely from the mouth of the prosecutor, with the children responding 'yes, sir' or 'no, sir.'" In these circumstances, the prior convictions evidence "was incendiary." Counsel's conduct was also deficient in failing to object to the videotaped forensic interviews, which were "comprised almost entirely of leading and suggestive questions" and "were rife with hearsay statements from both the victims and the interviewers."

***People v. Okongwu*, 897 N.Y.S.2d 330 (N.Y. App. Div. 2010)**. Counsel ineffective in child sex abuse case for three reasons, which were the basis of a federal court's grant of relief to a co-defendant tried in a joint trial. First, counsel failed to introduce evidence of a 1988 medical examination of one of the alleged victims, which was consistent with the 1992 examination on which the allegation of abuse was based. Second, counsel failed to obtain experts to refute and discredit the state's experts. Finally, counsel failed to cross-examine the state's expert concerning literature raising doubts about child sexual abuse syndrome.

**Capital Case*

***State v. A.N.J.*, 225 P.3d 956 (Wash. 2010)**. Counsel ineffective in juvenile case where defendant pleaded guilty to first degree child molestation. Counsel was contracted by the county to provide public defender services for a flat yearly fee, which provided that counsel had to pay experts and investigators from this fee. Under state rules, "it is now unethical for an attorney to sign a public defender contract" of this nature. This contract "created an incentive" for counsel not to investigate. Counsel met with his 12-year old client and his parents for no more than an hour before the plea hearing, did no independent investigation, consulted with no experts, and did not carefully review the plea agreement before advising the defendant and his parents to accept it believing incorrectly that the conviction could be removed from the defendant's record when he turned 18 or 21. Counsel's failure to investigate was not excused by counsel's belief that the defendant was going to confess or even that he was guilty. "[A]t the very least, counsel must reasonably evaluate the evidence against the accused and the likelihood of a conviction if the case proceeds to trial so that the defendant can make a meaningful decision as to whether or not to plead guilty." Counsel also erroneously advised the defendant and his parents about the consequences of the plea by advising them that the conviction could be removed from the defendant's record when he turned 18 or 21. While the court has discretion to relieve the requirement to register as a sex offender, the conviction never goes away. Based on counsel's ineffectiveness, the defendant was entitled to withdraw his guilty plea.

2009: ***Bryant v. Commissioner of Correction*, 964 A.2d 1186 (Conn. 2009)**. Counsel ineffective in manslaughter case for failing to present four independent witnesses whose testimony would have supported a third party culpability defense and substantially impeached the evidence presented against the petitioner. The testimony of these witnesses "would have worked in concert to create a credible scenario in which the cause of . . . death was a gunshot wound to the head perpetrated by a small group of unidentified Hispanic males driving a white Cadillac or Lincoln, not the actions of the petitioner." Counsel's conduct was deficient and not explained by strategy because the witness' statements were given contemporaneous to the events and "there was no evidence in the record to suggest that any of these witnesses' statements . . . were influenced by the statements made by the other witnesses." Prejudice established. "When reviewed in its totality, the testimony of these neutral witnesses, each of whom the habeas court found to be credible and highly persuasive, creates a plausible, well supported third party culpability defense." The state's evidence, on the other hand, was limited to the eyewitness testimony of two witnesses who were both "subject to substantial impeachment evidence." "[N]ot only was the testimony that linked the petitioner to the attack of dubious credibility, it also was internally inconsistent with respect to significant facts."

***Gravitt v. State*, 687 S.E.2d 150 (Ga. Ct. App. 2009)**. Counsel ineffective in DUI case for failing to adequately investigate and present testimony of two readily available eyewitnesses, who were riding in the defendant's vehicle at the time of the alleged incident. There was a two car crash allegedly caused by unsafe driving by the defendant, whose vehicle was not involved in the crash. Counsel called no witnesses and argued only that the defendant's actions were not the proximate cause of the accident. Counsel's conduct was deficient in making only minimal attempts to locate the eyewitnesses and waiting until close to trial to subpoena them, even though counsel knew they would be hard to locate. Prejudice established because these witnesses denied that the defendant

appeared to be under the influence or was driving recklessly and explained how the accident happened through no fault of the defendant. In rejecting this finding, the trial court erred in measuring the credibility of these witnesses' testimony, "not against the witnesses who testified at the hearing, but against the witnesses who testified at . . . trial." In short, "the trial court judged the credibility of the witnesses had they testified at trial, and that is 'solely a matter to be resolved by the jury.'" The trial court also failed to consider that the state capitalized on counsel's error by arguing that these witnesses were not called by the defense because they might testify against the defendant.

***People v. Wilson*, 911 N.E.2d 413 (Ill.Ct.App. 2009)**. Counsel ineffective in murder case for failing to make a closing argument and failing to object to the admission of evidence of an unrelated revolver found in close proximity to the defendant at the time of his arrest. The case involved a shooting in the projects that may have been due to ill-will between the occupants of several buildings or areas. The state's evidence was based entirely on inconsistent witness identification testimony from arguably biased witnesses. There was no confession and no physical evidence connecting the defendant to the shooting. At the close of the evidence, the court informed the jury that the state and defense would have the opportunity to make final arguments, but then was surprised when defense counsel chose not to argue, especially in light of the state's extensive argument. Counsel's conduct was deficient and not sound trial strategy in assuming the jury would find "the prosecutor's argument specious."

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

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

***People v. Bryant*, 907 N.E.2d 862 (Ill. Ct. App. 2009)**. Counsel ineffective in murder case for failing to call any witnesses in support of the defense theory that the murder was committed by others. Counsel represented two defendants, husband and wife, who allegedly killed a cocaine dealer in their home. They were accused along with two other men, one of whom was not prosecuted in exchange for his testimony. The victim's blood and driver's license was discovered in the defendants' home and the victim's blood was on the shoe of the other man charged. The only direct evidence that the defendants committed the murder came from the immunized witness, who had made numerous inconsistent statements. In opening statements, defense counsel said the defendants were in their bedroom asleep when the victim was killed by the other men. Counsel repeatedly said the defendants would testify to this. Counsel also told the jury it would hear evidence that the other two men met together prior to arrest to plan their story and that one of them had bragged to others that he had committed the murder. When counsel attempted to elicit this information about the other men in cross-examination of witnesses, however, the state's objections that it was beyond the scope of direct were sustained and the court instructed the jury to disregard. Each time, the court invited defense counsel to recall the witness in the defense case in chief and defense counsel repeatedly said before the jury that he intended to do so. After the state rested, however, the defense also rested without presenting any evidence. In closing argument, defense counsel repeated his arguments from

the opening. There were numerous objections from the state that he was arguing facts not in evidence and repeated admonishments from the judge that arguments were not evidence and that statements not based on evidence should be disregarded. Counsel asserted in a post-trial motions hearing that he did not present any witnesses because he was able to elicit the information on cross-examination. He did not call the defendants to testify because he did not want to subject them to cross or open the way for rebuttal and he believed that he had been able to make all the points he wanted in cross-examination and argument. While counsel's conduct "was a matter of trial strategy as opposed to witness reluctance or unavailability," the strategy was not "sound." Counsel promised the jury it would hear evidence and then "failed to present any evidence whatsoever, and his stated reasons for failing to do so are not reasonable explanations." Counsel did not present any evidence to support the defense theory and the court repeatedly instructed the jury to disregard the improper cross and closing arguments. The court also rejected counsel's reasons for not calling the defendants, despite promising the jury he would, and giving their version in the opening and closing. In essence, "counsel concluded that rather than support the defense theory with evidence that the jury might reject, it was better to not support the theory at all." Counsel also clearly "erroneously believed that he did not need to support his arguments with evidence." Thus, "counsel's chosen strategy was unsound." He was essentially relying on the jury to forgive his promises to present evidence he did not present and to ignore the court's instructions, which is contrary to the "assumption of the law that jurors follow their instructions." Even if the jurors were inclined to believe the defense theory, "they had no choice but to ignore it because they were presented with no evidence to support it." Prejudice found because, "[i]n the absence of overwhelming evidence establishing a defendant's guilt, the failure to present promised evidence that someone other than the defendant is guilty of the offense in question is highly prejudicial." Here, the state's case "hinged on the testimony of an admitted addict and uncharged accomplice whose testimony defense counsel effectively impeached." "[T]he defendants were undoubtedly prejudiced by counsel's conduct."

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

****Fisher v. State*, 206 P.3d 607 (Okla. Crim. App. 2009) (direct appeal in 1987).** Counsel ineffective in capital retrial and sentencing for numerous reasons including: (1) failing to establish a trust relationship with the defendant, even going so far as to physically threaten the

defendant at a pre-trial hearing, which resulted in the defendant's refusal to attend his trial, which counsel did not explain to the jury; (2) counsel's alcohol and cocaine abuse during the representation; (3) failing to examine the eighteen boxes of records delivered to counsel by prior counsel; (4) failing to conduct an independent investigation or to utilize an experienced investigator assigned to him; (5) failing to review the physical evidence prior to trial, which would have revealed that the fingerprint card containing the only physical evidence linking the defendant to the crimes had been lost and had not even been used during the first trial, and failing to challenge the fingerprint evidence; (6) failing to present available evidence that the primary state's witness was the actual killer and failing to impeach the witness with his prior inconsistent statements, criminal record, and flight after his arrest and release; and (7) failing to request instructions on a lesser included offense or the defense of voluntary intoxication. Prejudice established despite the defendant's flight from the state and two incriminating statements because "counsel failed to discover and utilize evidence that would have called into question the validity and import of [the] statements" and the flight. The court also affirmed the PCR court's finding (and the State's concession) of ineffective assistance in sentencing for failing to adequately investigate and present mitigation.

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

***Aldrich v. State*, 296 S.W.3d 225 (Tex.Ct.App. 2009)**. Counsel ineffective in intoxication manslaughter case where the defendant drove his truck into the wheel-chair bound victim in a crosswalk. Counsel's conduct was deficient for a number of different reasons. (1) Counsel failed to understand basic discovery procedures and believed he did not have to investigate because *Kyles v. Whitley*, 514 U.S. 419 (1995), "required the State to do all of the investigation in the case and to turn over . . . all reports, statements, and evidence discovered in its investigation." The trial court repeatedly informed counsel of his misinterpretation but he persisted in his beliefs. (2) He failed to adequately convey a 20-year plea offer to the defendant because of his "belief that it would be unethical and would constitute malpractice for him to even discuss the proposed plea bargain" with

the defendant. (3) He failed to investigate until just weeks before trial, including refusing to independently test the defendant's blood sample or interview an officer, whom the defendant asserted he had told at the scene that he had been blinded by headlights from an oncoming car. (4) He failed to timely obtain and designate experts, despite his awareness of the need, which resulted in the trial court's exclusion of the expert evidence. The only reason asserted was the defendant's financial problems. "[A] reasonably competent attorney would have several options, including to withdraw from the case" and to have the defendant declared indigent and counsel appointed. Alternatively, counsel could remain "but request investigatory and expert witness fees from the trial court for a now-indigent client." In short, counsel's failure "was not a strategic decision, it was an economic decision." (5) Counsel presented "bizarre" defense theories not supported by the evidence, despite the state's repeated objections. Counsel alternated between "theories that the accident was a suicide, assisted suicide, or [the victim's] fault for failing to yield the right-of-way" in her wheelchair. (6) Counsel did not understand the rules of evidence and "had great difficulty questioning witnesses," "repeatedly made sidebar comments during his questioning," "repeatedly interjected his own testimony,"–despite repeated warnings from the trial court–and asked over 18 times to have the jury removed so he could question witnesses outside the jury's presence. (7) Counsel repeatedly made inaccurate statements and arguments. "The totality of defense counsel's errors pervaded and prejudiced the entire defense." This was clear because the prosecutor and the trial court repeatedly "felt compelled to assist defense counsel." Prejudice also established.

***Holmes v. State*, 277 S.W.3d 424 (Tex.Ct.App. 2009)**. Counsel ineffective in misdemeanor assault on wife case where the wife refused to testify for failing to investigate and discover evidence (including the 911 and patrol car tapes), failed to develop a trial strategy, failed to be prepared for trial, and failed to object to admission of the 911 and patrol car tapes, or seek a continuance. Prejudice established during pretrial negotiations, including an offer of 120-days in exchange for a plea after jury selection began, because the defendant was "unable to make an informed decision regarding plea offers." Prejudice also established during the trial itself.

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

***Rayshad v. State*, 670 S.E.2d 849 (Ga. Ct. App. 2008)**. Counsel ineffective in armed robbery, assault, and kidnaping case for failing to object to inadmissible, prejudicial evidence. First, counsel failed to object when the state elicited on cross-examination of the defendant that he had entered a guilty plea to a charge of theft by receiving a stolen car. This was error because under state law the charge was dismissed without an adjudication under the First Offender Act and, where there is no adjudication of guilt, could not be used as impeachment evidence on general credibility grounds. Second, counsel erred in not objecting to, and even introducing, out-of-court statements of a co-defendant who did not testify in violation of the right to confrontation. The statements were made

to police several days after the crimes were committed and "[p]lainly, . . . were not made during the course of any conspiracy with [the defendant] and therefore were not admissible as declarations of a conspirator." Finally, counsel erred by not objecting to, and even introducing in evidence out-of-court statements of a second co-defendant, who did not testify. Again, these statements "were not made during the pendency of any criminal project . . . thus were not admissible as declarations of a conspirator." Prejudice found in light of the case being a credibility contest and notes during deliberations revealing the "jurors' focus on impermissible hearsay."

***Coney v. State*, 659 S.E.2d 768 (Ga. Ct. App. 2008)**. Counsel ineffective in aggravated assault and cocaine possession case for several reasons. First, counsel failed to object to the trial court's failure to charge on "assault," which was a necessary element of the aggravated assault. Prejudice established because the charge allowed the jury to convict of aggravated assault even for criminal negligence when the defense was contending that he accidentally shot the police officer in the hand during a struggle. Second, counsel was ineffective for failing to move to suppress evidence that the defendant was under the influence of cocaine, which was obtained in an illegal seizure of blood and urine samples taken while the defendant was hospitalized after being shot by another police officer. Prejudice was established because without this evidence the evidence showed only that crack cocaine was found in the vehicle driven by the defendant, with two passengers in it at the time of the traffic stop, and the vehicle was owned by the defendant's father and driven by others, as well. Thus, without this evidence, there was no presumption that the cocaine was his and the burden remained with the state.

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

and presenting the mental health evidence, counsel simply used the "defense of 'accidents happen'" without supporting evidence. Counsel "closed not only his ears, but also his eyes as he neglected to obtain medical records evidencing [the defendant's] mental state." Even if the court accepted "trial counsel's assessment that insanity and diminished responsibility defenses are rarely successful, the decision to ignore evidence of . . . compromised mental state was not a reasonable professional judgment excusing an investigation of the extent to which that mental state supported the defense theory of accidental death." The court found "a reasonable probability that if a reasonable investigation had been undertaken, evidence would have been developed and presented at trial tending to establish [the defendant's] conduct from the time of [the infant's] birth until his death was profoundly affected by postpartum depression" and that an expert could have connected the evidence of severe postpartum depression "with her bizarre behavior in furtherance of the accidental death defense." While the court was "mindful of the deference owed by postconviction courts to counsel's strategic choices," the could held that "[d]eference for such choices is not unlimited, however, and it will not be stretched to deny [the defendant] a new trial under the circumstances presented here."

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

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

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

Id. at ___.

***Lounds v. State*, 670 S.E.2d 646 (S.C. 2008)**. Counsel, who was since suspended from the practice of law indefinitely for other reasons, was ineffective in armed robbery and kidnaping trial for

failing to adequately investigate and present the defense and for making harmful arguments contradictory to the petitioner's testimony in closing. Counsel's conduct was deficient because counsel did not speak to petitioner until the morning the trial began and admitted on the record that he had just learned the name of possible defense witnesses, who were not called because they could not be located during the trial and because counsel "believed the witnesses would not add much to petitioner's defense." Even if this could be considered as a strategic reason, it was "not objectively reasonable given the defense theory of the case." In essence, the petitioner testified that he asked the alleged victim for money owed to him due to previous drug dealings and the victim went with him voluntarily to the victim's parent's house to get money. The victim denied knowing the petitioner, owing him money, or every buying or using drugs. The defense witnesses the petitioner sought during trial and who testified in PCR would have testified that the victim did know the petitioner through drug dealing, which "would have added significantly to the credibility of petitioner's case." Counsel's conduct was also deficient in closing argument for asserting that the petitioner had a friend with him for "extra muscle" when the defendant had denied robbery or kidnaping or any attempt to threaten the victim. Prejudice was found on each individual count because the jury necessarily rejected the victim's testimony in acquitting on the armed robbery.

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

***Proffit v. State*, 193 P.3d 228 (Wyo. 2008)**. Counsel ineffective in sexual assault case for numerous errors. Counsel failed to object to testimony that the appellant had refused to take a polygraph test, testimony presenting the two officers' opinions that the appellant was guilty, the testimony that the

appellant was a victim of molestation as a child (possibly leading to the assumption that, as a result, he had become an offender), the cross-examination of the appellant concerning whether other witnesses were "lying," the court's response to a jury question allowing use of the prior murder conviction evidence as substantive evidence, "and perhaps the most egregious failure, the failure to object to the prosecutor "hearsaying in" the extremely damaging testimony from two prior murder cases. Concerning the latter:

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

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

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

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

**Capital Case*

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

***Cosio v. United States*, 927 A.2d 1106 (D.C. 2007)**. Counsel was ineffective in child sexual abuse and carnal knowledge case for failing to ask the defendant's coworkers about his interactions with the alleged victim, who was the defendant's younger half-sister. The alleged victim testified that she had been repeatedly sexually assaulted by the defendant over a seven year period starting when she was seven or eight, but she did not report the abuse until she was fifteen due to her fear of the defendant. The government's case rested primarily on the alleged victim's testimony, but also included evidence from a pediatrician that the condition of the child's hymen was "strongly indicative of sexual abuse." A defense expert testified in a similar fashion. Three of the defendant's coworkers also testified that he was a good worker and a law-abiding citizen. Counsel's conduct was deficient because counsel failed to interview the coworkers concerning their knowledge of the defendant's relationship with the alleged victim even though counsel received a memo from his investigator that should have led counsel to investigate further rather than choosing to focus only a theory that the child resented the defendant due to discipline within the home, jealousy, and other matters, enough to fabricate charges against him. Reasonable counsel would also have seen the need to investigate the allegations that the alleged victim was afraid of the defendant. Further investigation would have revealed five coworkers with substantial knowledge of the relationship, who would have testified that the alleged victim voluntarily sought out the defendant at work and in other places, was very affectionate with him, and showed no sign of fear of him. Likewise, even in interviewing the coworkers to determine who would testify concerning the defendant's character, counsel should have asked about any knowledge of the defendant's relationship with the alleged victim because of the need to anticipate wide-ranging cross-examination. Counsel's failure is also not explained by counsel's "resentment" theory because counsel settled on this "theory prematurely, without having thoroughly investigated the relationship." This "was not the kind of 'reasonable professional judgment[]' that could support the curtailment of further defense investigation." Prejudice found because the coworkers would have undermined the alleged victim's testimony of fearing the defendant and the believability of the remainder of her testimony. Likewise, counsel would also have been able to confront the alleged victim in cross-examination with the contradiction between her words and her deeds.

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

under the rape shield statute. Prejudice found because all three men and at least one other corroborating witness would have been available to testify.

***Starling v. State*, 646 S.E.2d 695 (Ga. Ct. App. 2007)**. Counsel ineffective in aggravated assault and possession of a firearm by a convicted felon for failing to stipulate to the defendant's felon status, eliciting the defendant's testimony on the details of his criminal history, and failing to obtain a jury instruction on the use of the evidence of the defendant's criminal history. Counsel's conduct was deficient because a stipulation would have avoided exposing the jury to information that the defendant had previously been convicted of receiving stolen property, of aggravated assault that involved a gun, and possession of a gun by a first offender. Although counsel requested a limiting instruction at the conclusion of the evidence and the trial court agreed, counsel failed to renew the request the next day when the charges were given but the trial court failed to include the limiting charge. Prejudice found because the defense case rested largely on the defendant's credibility, only a single eyewitness testified that he saw the shooting, and the state emphasized the defendant's criminal history in closing arguments.

***People v. Sims*, 869 N.E.2d 1115 (Ill. Ct. App. 2007)**. Counsel ineffective in felony murder case for failing to timely give notice of the affirmative defense of compulsion and to seek instruction on the defense. According to the state's evidence, the defendant had been part of an armed robbery of a restaurant. The state's primary witness was a co-defendant who had plead guilty in a cooperation agreement with the state. He testified that the defendant was 15 while the other four participants were adults. After the robbery was discussed but before they entered the car to go to the crime scene, the defendant indicated that he was scared and did not want to participate. A codefendant, who was holding a gun at the time, told him that "he was there when it started, he got to be there when it finished." The state's witness testified that everyone knew "what that meant." During the robbery, the defendant was outside at a pay phone as a lookout and never entered the building. During the robbery, an employee of the store was hit and several shots were fired. The employee who was hit and close by the shooting died 5 ½ hours after the robbery. The state's expert testified that the victim died from cardiac arrest caused by the stress of the robbery. A defense expert disputed this finding. Counsel's conduct was deficient in failing to give timely notice of a compulsion defense or to, at least, give notice when he learned of this aspect of the codefendant's testimony 1 ½ hours before he testified. Although the court expressed concern about trial by ambush, the court allowed the codefendant's testimony in this regard, but informed counsel that the issue concerning arguments and instructions would be addressed later. During the instruction conference, counsel did not request a compulsion instruction even though there was sufficient evidence to require the instruction on the affirmative defense, which required only a showing that the defendant acted under the threat or menace of imminent infliction of death or great bodily harm. Prejudice found because "this case was close" in light of the issues concerning the cause of death, a co-defendant's prior acquittal on the murder because of that issue, the defendant's age in comparison to his adult codefendants, and his role in the crimes as only a "look out."

****Commonwealth v. Bussell*, 226 S.W.3d 96 (Ky. 2007)**. Counsel ineffective in capital trial for failing to adequately investigate and to obtain expert assistance to rebut the state's experts concerning tree bark from a tree near the victim's body and the damaged fender of the defendant's

car, automobile paint on the tree, and hair and fiber samples from the car and the victim's home. Prejudice found.

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

***People v. Tykhonov*, 838 N.Y.S.2d 436 (N.Y. Co. Ct. 2007)**. Counsel ineffective for numerous reasons in driving while intoxicated case. The defendant was convicted based on a car accident. No one saw the accident but an ice fisherman allegedly saw the defendant walking around the vehicle from 200 yards away shortly after hearing the crash and was brought to the scene where he identified the defendant, who was then given field sobriety tests which he failed. Counsel failed to file a motion to suppress the arrest and identification. Counsel also "was not prepared in both the law and the facts and he was unable to employ basic principles of criminal law and procedure." Counsel's conduct was ineffective under the New York State law standard, which is "more favorable to the defendant" than the *Strickland* standard.

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

****Ard v. Catoe*, 642 S.E.2d 590 (S.C. 2007)**. Counsel ineffective in capital case for failing to adequately develop and present gunshot residue evidence. The defendant was charged with killing his

pregnant girlfriend, which resulted in the viable fetus dying from a lack of oxygen. The defense theory and the defendant's testimony was that his girlfriend was holding a gun during an argument and that it fired when he grabbed it to take it away from her. The state examiner issued a report that there was no gunshot residue on the victim's hands but testified that several particles were "very interesting, but there was not any or enough material for us to be able to call gunshot residue." Citing to the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty cases, the court held that counsel's conduct was deficient in failing to interview the state examiner or to cross-examine him on this point. Counsel's conduct was also deficient because the expert they retained had been the state expert's supervisor at the time the test was done and he reviewed and approved the report. This expert was not an "independent expert" because casting down on the state examiner's findings would have implicitly cast doubt on his own oversight of the analysis. Counsel's actions "were unreasonable and clearly deficient, especially given the fact that this was a capital case with an arguable defense to the guilt phase." Prejudice found because interviewing or cross-examining the state expert and hiring an independent expert would have revealed that, although the tests were not conclusive for gun powder, the "interesting" particles contained the three required elements of gunshot residue and the particles were "consistent with gunshot residue and could have come from her handling a weapon." Prejudice was also established because the defense's critical theory relied on this evidence and the state capitalized in argument on the lack of gunshot residue evidence and even called the "defense expert" to testify that he agreed with that finding and that he had been hired by the defense. Finally, the court noted that "the jury apparently did not believe this to be an open-and-shut case of murder" because the jury sought additional instructions on involuntary manslaughter during deliberations.

***Dillon v. Weber*, 737 N.W.2d 420 (S.D. 2007)**. Counsel ineffective in rape and criminal pedophilia case for numerous errors. The defendant was charged with abusing his eight-year-old daughter and four of her friends on two occasions. Counsel failed to object on double jeopardy grounds to charges of rape and pedophilia based on the same acts. Counsel did not investigate a prior allegation of sexual abuse by two of the alleged victim's that the state declined to prosecute against another man. Counsel failed to prepare his expert witnesses (social worker and psychologist) even though the entire case hinged on the credibility of the alleged victim's. Counsel also failed to provide the trial court with a sufficient offer of proof concerning his expert witnesses and did not establish an adequate foundation for some of the testimony counsel sought to present. Counsel also made numerous errors during the trial including failing to impeach the testimony of the mother of two of the alleged victims. She testified they were healthy and normal prior to the alleged sexual assault but their medical records revealed an extensive history including more that 50 emergency room visits. "Possibly the most disturbing trial error" was in the cross-examination of one of the alleged victims. The trial court explained on the record that counsel was taking 40 seconds to a minute between each question leaving complete silence in the courtroom. The court found this "unsettling" and could find "no reasonable explanation for this type of uncomfortable delay during the cross examination of one of the victims." Counsel also elicited from one alleged victim that denied penetration on direct that she had been penetrated. "Based on this cross-examination, it is difficult to determine who [counsel] was representing in this case." Counsel also elicited testimony from a state's witness vouching for the credibility and truthfulness of one of the alleged victims when the trial court had ruled this testimony inadmissible. Counsel, thus, "violated a pretrial order that

expressly favored his own client." Counsel also declined to offer video tapes, audio tapes, and transcripts of interviews of the child witnesses/victims even though he repeatedly told the jury that he would. His purported reason was that he felt pressured to get the trial over quickly. "Why [counsel] would feel pressured to make trial decisions based on judicial economy is a mystery, as is his decision to actually give in to this impulse." Finally, counsel said in closing that in rape cases the burden is on the defendant to disprove it. Although he later correctly stated the burden, he was "sending mixed and confusing signals to the jury about how they were to weigh the evidence." "When viewed in the totality of the circumstances," the Court found counsel's performance deficient and prejudicial. Although the court disavowed reliance on speculation about trial counsel's mental health, the court noted in a footnote that counsel was diagnosed with bipolar disorder two years after trial and received several months of in-patient treatment. The court observed "that bi-polar disorder is not a sudden onset condition. Instead, it develops over time." The court, thus, found "reason to be concerned" about counsel's mental health at the time of trial. "Here, we cannot even be certain that [counsel] was competent in a general sense, let alone competent to provide legal representation in a serious criminal matter."

***State v. Hales*, 152 P.3d 321 (Utah 2007).** Counsel ineffective in murder of a child victim case for failing to obtain a qualified expert to give an independent interpretation of CT scans of the child victim. The defendant was charged with the murder 14 years after the child was allegedly injured by being violently shaken as a five-month-old infant. The child lived until the age of 12 but was mostly in a persistent vegetative state. The defendant was not charged until two years later. The child had been in the defendant's care for only 20 to 30 minutes on the alleged date of the crime when he called 911. The state's case that the injury occurred while the child was in the defendant's care and that the cause of death was a violent shaking that caused immediate unconsciousness was almost entirely based on a state expert's interpretation of CT scans of the child's brain taken after admission to the hospital. Counsel did not seek to have a defense expert to review the CT scans until the morning of trial and then asked a defense-retained pathologist to conduct this review. The pathologist testified that shaking could injure a child's neck but not the brain and that the most likely cause of death was an alleged near miss car accident in which the child had hit its head several days before followed by a "lengthy 'lucid interval.'" The pathologist was not permitted to testify concerning the CT scan though because he admitted in voir dire that he was not qualified to interpret the scan and did not do so in his practice. Counsel's conduct was deficient in failing to adequately investigate. It was clear from the preliminary hearing that the interpretation of the CT scans was critical to the State's case because there was no witness to the child's injuries. Counsel's conduct was not explained by strategy because counsel made the choice to rely only on the pathologist without having conducted the investigation with an expert review of the CT scans. It is also clear from the opinion (although not clearly relied on by the court on this point) that counsel did ask the pathologist to review the scans and sought to introduce his testimony on this point, but counsel had failed to ascertain beforehand his qualification to do so and had not sought review by a defense expert until the morning of trial. The court also noted that, while counsel may sometimes have a valid strategy to rely on cross-examination or other strategy such that a defense expert need not be retained in every instance, "the centrality of this medical evidence to the jury's determination of . . . guilt or innocence made an expert necessary in this case." *Id*. at 341. Prejudice was also established because review of the CT scans by a qualified pediatric neuroradiologist "would likely

alter the defense's theory at trial as well as the entire evidentiary picture presented to the jury." *Id*. at 342. Here, a qualified expert could have countered the state expert's testimony with testimony that the initial CT scans showed changes in cell structures that would not be present until 6 to 12 hours after injury. This testimony alone would have been significant because the child was not in the defendant's care during that time frame. A defense expert also could have countered the state's expert conclusion that the injuries were a result of shaking because nothing in the scans suggested shaking as a cause as opposed to an impact injury or other possible causes. Likewise, a defense expert could have testified that the scans did not support any conclusion of immediate unconsciousness and were not inconsistent with a period of lucidity following the injury. In short, a defense expert could have countered most of the state's expert testimony because the "[t]he scan shows the point to which the injury had progressed–not how it got there."

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

***State ex rel. Humphries v. McBride*, 647 S.E.2d 798 (W. Va. 2007)**. Counsel ineffective in murder case for numerous reasons. The defendant was convicted of accessory before the fact of murder and conspiracy to commit murder in the bombing death of his wife's ex-husband, which was originally determined to be an accidental death by a bomb the victim built, 22 years before trial. Counsel's conduct was so bad that the state even conceded ineffective assistance of counsel and other reversible errors. (1) Counsel had an actual conflict and should have withdrawn from the case or should have been removed by the court when the state moved to disqualify counsel prior to trial. At that time, counsel admitted that his father and law partner had represented the victim in divorce proceedings from the defendant's wife, which went "to the very heart of the alleged motive" for murder. He stated that he was not involved in that representation and that the defendant waived any potential conflict. The post-conviction evidence, however, established that counsel was likely the last attorney to see the victim before his death, he did work on the divorce case, and he could have

been a necessary witness for the defense to refute some of the state's assertions. Because counsel had misrepresented his involvement in the divorce case prior to trial, the court also questioned whether the defendant's waiver was "truly an informed decision" following adequate disclosure. (2) Counsel failed to object to testimony that the defendant had consulted with counsel and declined to speak with investigators during the initial investigation of the death, which violated the defendant's Fifth Amendment rights. (3) Counsel failed to offer an FBI report into evidence or to cross-examine an FBI agent with his original report that revealed that all of the components of the bomb were also found in the alleged victim's home, which supported the defense theory that he constructed the bomb himself and accidentally detonated it. (4) Counsel failed to retain a bomb expert or an independent investigator even though the case was very complex. (5) Counsel failed to object to testimony that the defendant's co-defendants had already been convicted even though counsel had sought a change of venue because of the publicity generated by those trials. (6) Counsel failed to object to numerous instances of hearsay testimony even though the state and the trial court were even posing their own objections to counsel's questions eliciting hearsay because "even they feared that [the defendant] was being 'done in' by his defense counsel." Counsel's deficient conduct was not excused by his "strategy" to "put it all out on the table" because "no reasonable attorney would have pursued a like 'strategy.'" Prejudice found due to the "cumulative effect of these errors."

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

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

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

eyewitnesses, and the first witness to report the "crime" had a history of making false accusations of molestation.

***Gibson v. State*, 634 S.E.2d 204 (Ga. Ct. App. 2006)**. Counsel was ineffective in homicide by vehicle case where the defense theory was that the defendant had a green light before entering the intersection where the accident occurred. Counsel was ineffective in failing to introduce into evidence county records indicating previous problems with the traffic signals at the intersection. The records included a document provided in discovery that showed that just four days prior to this collision there had been a report that the traffic signals were showing green in all four directions at the same time. Counsel was also ineffective in failing to discover additional documents showing similar malfunctions in the year before this accident, which were obtained by appellate counsel. Counsel did not present evidence of the malfunction 4 days before because their request to subpoena the appropriate witness was not made until just before the state rested and the court denied the request. Prejudice established.

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

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

***Commonwealth v. Garcia*, 845 N.E.2d 1196 (Mass. Ct. App. 2006)**. Counsel ineffective in indecent assault case for failing to adequately investigate and present a defense. The defendant, a former part-time teacher, was charged with sexual acts with three young children at a Learning Center. Counsel's conduct was deficient because counsel failed to interview any of the government witnesses and inexplicably failed to present evidence from one essential witness, who was a teacher and a babysitter for one of the children. Her statement provided by the state in discovery included information that the child initially denied allegations even though she encouraged him to speak up

until his mother became involved, which supported a defense theory of parental influence and pressure. Prejudice found on all three charges because the case against the defendant with respect to the other two children had similar problems in that there was physical evidence or injury and credibility was the sole issue.

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

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

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

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

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

evidence in the file to impeach some of the testimony concerning development of a false alibi by showing that this attempt was after the defendants became suspects rather than just hours after the murder as the state suggested. The state's file also contained a transcript of a prior inconsistent statement by the prosecution's key witness, which also reflected his statement that he would set the other co-defendants up if necessary to help himself. There was also evidence that the witness' mother had attempted to smuggle a knife into the jail for him and the charges were dropped against her as part of his plea agreement. Finally, there was evidence reflecting that others, who had never been charged or convicted, may have been involved in the murder. Both trial counsel denied seeing this information in the state's files, but would have used the information if they had known about it. In addition to the state's open file policy, the post-conviction evidence reflected that both trial counsel had been provided with copies of the relevant information. Trial counsel's conduct in both cases was found to be ineffective for failing to discover and use this evidence during the trials. Prejudice was found due to the "cumulative effect of trial counsels' errors."

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

***Nance v. Ozmint*, 626 S.E.2d 878 (S.C. 2006)**. On remand from the U.S. Supreme Court for consideration under *Florida v. Nixon*, 543 U.S. 175 (2004), the court reinstated its opinion finding that trial counsel's failure to investigate, plan, and present a defense in this capital trial constituted "a classic example of a complete breakdown in the adversarial process" and prejudice was presumed for eight reasons. (1) Lead counsel was suffering from numerous health problems, including alcoholism, and was taking numerous medications that impaired his memory and caused other problems. Co-counsel had been practicing law for only 18 months. (2) Counsel sought to show that the defendant was mentally ill and wanted the jury to view him in his unmedicated state and successfully got the judge to order such, but then failed to inform the jail personnel of the court's order so the jury saw "a drug-influenced demeanor" during trial. (3) Counsel pronounced in opening statements that they were appointed and neither of them "wanted to be there." (4) Counsel presented a defense of guilty but mentally ill but failed to qualify their only expert and presented supporting testimony of the defendant's sister only after the expert testified denying him the

opportunity to inform the jury of how the sister's testimony supported a finding of mental illness. (5) Counsel presented no evidence of adaptability to confinement in sentencing when they had presented the only bad incident of urine-throwing in confinement during the trial. Evidence was available to establish that the defendant had been selected as an institution's inmate of the year and nominated for the entire state's inmate of the year and testimony was available from a jail administrator and prison minister that the defendant was a "model inmate." (6) Counsel presented "no mitigating social history evidence," even though the evidence would have established physical abuse throughout the defendant's childhood, an alcoholic, abusive father; being "treated with alcohol as a child in lieu of over-the-counter medication"; and growing up "in a family of extreme poverty and physical deprivation." (7) "[D]efense counsel's seven-minute mitigation presentation failed to provide the jury with any insight concerning Petitioner's mental illness," even though he has a family history of schizophrenia, history of hearing voices, and suffered from neurological damage. (8) In closing arguments in sentencing, counsel "failed to plead for Petitioner's life and referred to him as a 'sick' man."

> [C]ounsel abandoned his role as defense counsel and in fact helped bolster the case against his client. . . . We again recognize that this type of "consistently inept form of lawyer conduct [is not] acceptable in this state, nor will we employ a prejudice analysis, for '[defense] counsel's ineffectiveness [is] so pervasive as to render a particularized prejudice inquiry unnecessary.'"

Id. (quoting *Nance v. Frederick*, 596 S.E.2d 62, 67 (S.C. 2004)).

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

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

**Capital Case*

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

***Walker v. State*, 195 S.W.3d 250 (Tex. Crim. App. 2006)**. Counsel ineffective in resisting arrest case for several reasons. First, counsel's conduct was deficient in failing to ask any questions in voir dire even after six members of the jury venire identified themselves as working or having close relatives who worked in law enforcement and made statements indicating potential prejudice or bias. Counsel used peremptories to remove two of these jurors but otherwise failed to conduct voir dire or challenge these biased jurors for cause. Counsel was also ineffective in failing to conduct an appropriate investigation and to object to inadmissible evidence of extraneous offenses and bad acts that were irrelevant to the trial for resisting arrest. This evidence included evidence of another person at the scene being arrested for possession of drugs, the defendant having previously disturbed the peace by firing an automatic weapon, and a 20-year-old misdemeanor conviction for assault on an officer. Counsel failed to object to this evidence because he was not familiar with the appropriate admissibility standards and also failed to request a limiting instruction. Here, where the defendant's credibility was critical to the defense, counsel should have investigated, filed appropriate discovery, prepared the defendant for his testimony, filed motions in limine to prevent the inadmissible evidence from coming before the jury, and objected and requested a limiting instruction when the evidence did come before the jury. Counsel was also ineffective in sentencing for failing to adequately investigate and opening the door to cross-examination of the defendant about numerous arrests for concealed weapons, criminal mischief, assault, and reckless conduct. Counsel also failed to object to the court's failure to instruct the jury in sentencing that evidence of unadjudicated offenses could not be considered unless the offenses were proven beyond a reasonable doubt. The defendant was prejudiced even though unadjudicated offenses were admissible under state law because the state did not offer any of this evidence or raise the issue until counsel asked the defendant broadly in redirect if he had "any problems with law violations." Prejudice found because

evidence of extraneous offenses is inherently prejudicial. The prejudice in sentencing was particularly clear because the state recommended probation only, but the jury sentenced the defendant to 180 days in jail and a $2000 fine in addition to probation.

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

***Lee v. State*, 899 So. 2d 348 (Fla. Dist. Ct. App. 2005)**. Counsel ineffective in capital sexual battery of child under 12 case for failing to adequately investigate and present a defense. This was a "classic familial sexual abuse situation, with no eyewitnesses, no direct physical evidence of abuse, nor even similar fact evidence." The defendant's 10-year-old stepdaughter alleged abuse on three occasions. The allegations were not made until the defendant left her mother for another woman, her mother was incarcerated, and her step-sister (who had found a letter to the alleged victim's mother stating that the defendant "was doing it with her") urged her to tell her grandmother, with whom she was living although she did not know her well. The only alleged physical evidence was from the testimony of a pediatrician, who testified that the victim's hymen had been torn and formed a scar as it healed. The pediatrician concluded that the hymenal ring was abnormal and indicated repeated penetration. She acknowledged that it was possible that the abnormality was caused by excessive masturbation "but virtually excluded that possibility." The only defense presented (other than the defendant maintaining his innocence) was that the alleged victim's mother had previously caught her masturbating and had been told then that a man (other than the defendant) had showed her how. Counsel's conduct was deficient. Counsel had never tried a capital sexual battery case and did not consider retaining an expert even though counsel could not read the state expert's notes and did not know the meaning of some of the terms used in the notes. Counsel also did not retain an expert because counsel dismissed the pediatrician's opinion because she "was not an expert." Counsel even advised the defendant that "he had a good trial case because there was no physical evidence of abuse." The defendant "had the right to an attorney who understood the ramifications of the pediatrician's testimony." Moreover, counsel's conduct was not excused by the defendant's request that the case not be continued for counsel to investigate because counsel had not done any investigation until two weeks before trial even though the defendant had informed counsel from the beginning that the alleged victim had previously alleged sexual abuse by someone else. Moreover, counsel's erroneous belief that there was no physical evidence of abuse, even though the pediatrician corroborated the alleged victim's testimony, "significantly contributed" to the defendant's decision. By finding that counsel's conduct was excused by the defendant's conduct, "[i]ronically, the circuit court thus held the defendant to a higher standard than his attorney for understanding the significance of the evidence against him."

> The trial court made no factual findings or legal conclusions about the fact that the attorney had information about previous allegations available to him almost

> six months before trial and did nothing about it until the eve of trial, despite knowing that his client had been unable to make bond, had been held in jail since his arrest, and was anxious for his case to be concluded. Thus, when [the defendant] insisted on going to trial, he did so without the benefit of all of the relevant information that a reasonably prompt and thorough investigation by an effective attorney would have revealed. The circuit court erred when it found that [the defendant's] decision to go forward with the trial negated the deficiencies in his counsel's preparation.

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

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

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

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

never cross-examined." *Id*. at 1170. Counsel's conduct was deficient because this evidence was inadmissible, the trial court informed counsel in the midst of the cross that it was inadmissible (but the court did not exclude it since the state did not object), and any alleged strategy was unreasonable because the hearsay elicited "served to further incriminate" the defendant. *Id*. at 1171. Prejudice found on each of these issues.

***Parish v. State*, 838 N.E.2d 495 (Ind. Ct. App. 2005)**. Counsel ineffective in attempted murder and robbery case for failing to adequately investigate and present a defense and failing to object to an improper Allen charge. The state's witnesses testified that they were in the victim's apartment watching a movie. After a knock on the door, intruders entered demanding drugs, money, and guns. After a struggle with the co-defendant the victim was shot in the stomach. The defendant allegedly threatened the witnesses with a gun if they moved. The co-defendant was tried separately. Counsel presented an alibi defense supported by seven witnesses, all family members, during trial. Counsel's conduct was deficient in failing to adequately investigate because he just "assumed" that the crime did occur in the fashion the state alleged. *Id*. at 501. In short, counsel "did not make a reasonable decision not to investigate the shooting, which would have uncovered evidence that perhaps the crime did not occur as the State's eyewitnesses testified at trial." *Id*. at 502. If counsel had investigated, he would have discovered two independent witnesses who would have testified that the victim was selling drugs in the parking lot of the building when he was shot. This was also supported by a witness that did not testify for the state during trial but his statement to officers and identification of the defendant was admitted into evidence. This witness testified in post-conviction that he had been coerced by police into identifying the defendant. The state's crime technician would have testified that no blood was found in the apartment, although there was blood in the car used to transport the victim to a nearby fire station. Likewise, DNA evidence from a hat allegedly belonging to the co-defendant revealed that it was not the co-defendant's hat. Prejudice found because, at the least, this evidence would have seriously undermined the credibility of the state's witnesses. "That is, if the eyewitnesses were not telling the truth about where the crime occurred, then that could cast doubt on their account of how the crime occurred and who was involved," strengthening the alibi defense. In addition, five additional alibi witnesses, one of whom was not a family member, were available but not presented by counsel. This was complicated by the trial court's *Allen* charge, which had been modified from the state's standard charge, in an impermissible fashion and was included in pre-deliberation charges. During deliberations, the jury submitted several questions concerning the state's primary witnesses, which went unanswered. After 9 hours of deliberations, the jury returned with a verdict of guilt. If counsel had "independently investigated the shooting, presented that evidence, and then objected to the Allen charge, the result of the proceeding would be different." *Id*. at 503.

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

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

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

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

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In sum:

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

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

***Johnson v. State*, 172 S.W.3d 6 (Tex. App. 2005)**. Counsel ineffective in assault on public servant case where the defendant and her husband had fought, he called 911 asking for an ambulance but then called back saying the defendant did not want an ambulance, and police went to the home anyway. When no one answered the door they kicked the door in and refused to leave when asked to do so insisting on questioning the two individually. The defendant became agitated and fought with officers. Afterwards another officer arrived and was audiotaping events as he talked with the defendant, her minister talked to her, and she talked to an officer that was allegedly assaulted. Counsel's conduct was deficient because, although counsel filed a discovery motion seeking all statements of the defendant, counsel never obtained a ruling on the motion and, thus, was not provided with this tape. When he learned of the tape during the trial, he ignored the defendant's request to personally review the tape, did not seek a continuance or recess, and reviewed the tape just over a lunch recess without the benefit of a transcript. He did not object to admission of a redacted tape that excluded the only arguably exculpatory portion of the tape. Counsel's conduct was deficient because the defense was clearly entitled to receive this tape in discovery but "a discovery request alone, without an order or follow-up in some manner, is a hollow gesture." Moreover, counsel's attempt to redact the tape, without the benefit of a transcript, just over a lunch recess was "difficult and virtually meaningless." Counsel also did not correct and, in fact, agreed with the state's evidence that the redacted tape contained the entire dialogue between the defendant and officers when it did not and the portion excluded was the only arguably exculpatory portion. Prejudice was found because if the defendant had been provided with the tape prior to trial her trial strategy might have changed. She might have considered a plea or been better prepared to testify.

Counsel might have considered filing a motion to suppress when counsel otherwise was not even aware that the defendant had not been read her rights prior to the taping. Here, the recording was the "lynchpin of a case that turned on" the defendant's credibility and she was prejudiced by counsel's actions.

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

***Keats v. State*, 115 P.3d 1110 (Wyo. 2005)**. Counsel ineffective in first degree arson case for failing to investigate the possibility of a plea of not guilty by reason of mental illness (NGMI). After the defendant set a fire in his mobile home, his roommate put it out and called police because he was threatening to burn the home down with him in it. After police arrived he vacillated between suicidal, threatening, anger, laughter, and depression. He set several fires that officers and firemen were able to put out, but ultimately set a fire that spread and filled the home with smoke. He was finally subdued but the mobile home was damaged beyond repair. After his arrest, the defendant was involuntarily committed to a mental health unit and found to have a major depressive disorder and reality distortion. He also had symptoms consistent with bipolar disorder. He was later transferred to another mental health facility where he was diagnosed with substance abuse and a bipolar disorder. Counsel was aware of these facts and had also been informed by the defendant's mother that he had a history of mental health problems and an inability to stabilize his moods. While counsel discussed the possibility of an NGMI plea with the defendant and his mother, his strategy was to argue that the defendant's specific intent was suicide and not to burn down the house. He believed that NGMI was incompatible with this argument. Prior to trial, the court granted the state's motion to exclude mental because counsel had not entered an NGMI plea. Counsel's conduct was deficient because his trial strategy was to make some sort of diminished capacity argument that the defendant was depressed and suicidal when state law did not recognize a diminished capacity defense. Counsel's belief that the NGMI argument was inconsistent with his theory of the case was also "puzzling" and "not a reasonable decision that made further investigation unnecessary." "[F]urther investigation was essential" under these facts. Nonetheless, counsel did not obtain the defendant's medical records, did not consult with a mental health expert, or obtain an opinion about the

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defendant's mental state at the time of the crimes. Prejudice was found because the only question during trial was the defendant's intent. Counsel's deficient conduct deprived him "of the only true defense available to him," which had a reasonable likelihood of success.

2004: ***People v. Callahan*, 21 Cal. Rptr. 3d 226 (Cal. Ct. App. 2004)**. Counsel was ineffective in first degree murder case for three reasons. Following the arrest of four people, who believed that the victim had "ratted" on them, the defendant sought the assistance of two men who were members of "The Skin Head Dogs (SHD), a male white supremacist group," to obtain money to bail one of the arrested persons out. The victim subsequently asked the defendant to assist her in obtaining money to bail out a different arrested person. The defendant met with the victim at the defendant's home. The victim ingested two pills from a prescription drug on the defendant's dresser. In a pretrial statement, the defendant said that the victim took the pills to alleviate withdrawal symptoms of other drugs, even though the defendant warned her that the pills were strong and she would probably pass out. Two witnesses at trial testified, however, that the defendant stated that she deliberately gave the victim the pills to cause her to pass out within a few hours. According to the defendant's pretrial statement, which was admitted in evidence, after the victim took the pills, she and the defendant picked up some stolen electronic equipment that they intended to sell for bail money. They then met up with the SHD men and went to a hotel. By the time they reached the hotel, the victim had passed out. While at the hotel room, the stolen equipment was sold and the SHD exited the room. When the victim woke up, the defendant allowed her to call her mother. While she was on the phone, the SHD men returned to the room. One of them became upset because he feared the victim would report them for stealing the electronic equipment. Although the defendant argued that the victim should be allowed to leave, the SHD men killed the victim by slashing her throat while the defendant was in another room. The defendant assisted in disposing of the body. The state's theory was based on felony murder. While a duress defense would not apply to murder, it would apply to the underlying felonies of robbery and kidnaping, which were necessary to support first degree murder and the punishment of life without parole. Because counsel was aware of this, competent counsel would have sought to refute the testimony of the witnesses who asserted that the defendant deliberately gave the victim pills to cause her to pass out. This would have allowed counsel to portray any robbery and kidnaping as beginning inside the motel room, so that a duress jury instruction would be given, and counsel would have had a factual and legal basis to argue against application of the felony murder rule. Counsel's conduct was deficient in failing to adequately cross examine the witnesses concerning the defendant's alleged statements concerning the suspicious circumstances under which they came forward, which caused even the prosecutor's investigator to doubt their truthfulness. Counsel's conduct was also deficient in failing to call the defendant to testify since she would have testified that she never met these witnesses until after the victim's death. She would have also testified that she was afraid of being killed if she did not comply with the SHD man's orders. Counsel's conduct was also deficient in failing to present expert testimony in support of a duress defense in that the defendant's fear was reasonable under the circumstances because of the history of the SHD members in being controlling and threatening the defendant previously. The duress defense was also supported by evidence that the defendant suffered from drug addiction and dissociation at the time of the murder, which would have impaired her thinking. Prejudice was found because counsel's actions "effectively" left the

defendant with "no defense to the charged crimes," which allowed her conviction on felony murder despite her "concededly peripheral involvement" in the victim's death.

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

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

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

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

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

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

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

familiar with the state law requirements. Moreover, the expert testified, consistent with his pretrial report, that the defendant's ability to control his behavior was compromised, but he was capable of forming the intent required for the crimes. Thus, because counsel was unfamiliar with the standards and did not adequately prepare his own expert, counsel presented the expert's testimony that "destroy[ed] the very defense he was attempting to establish."

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

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

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

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

***State v. Thiel*, 665 N.W.2d 305 (Wis. 2003)**. Counsel was ineffective in sexual exploitation by a therapist case for numerous deficiencies. The alleged victim asserted that she had repeated sexual relations with her psychiatrist and had been to his house more than one hundred times. When she first went to police, she also took a vial of semen that she claimed was the defendant's, but DNA testing revealed that it was not his. She explained that she had hoped to force him to confess with this false evidence. An assistant prosecutor, who had also had a sexual relationship with the alleged victim, testified that she had informed him of the relationship long before she reported it to police. The defendant's ex-wife, who had also been a former patient, and another former patient provided "other acts" evidence in corroboration. The defendant testified and denied the allegations and asserted the defense theory that the alleged victim made the complaint against him because he refused to assist her in filing for government disability benefits. He claimed that she had been to his house only three times when she showed up unannounced, but he had not documented these visits in her chart. The state called the victim's new psychiatrist in rebuttal to say that any contact with

patients should be documented, but this was his personal opinion and not a standard of care requirement. Counsel's conduct was deficient in failing to read police reports and medical notes that had been provided in discovery. Counsel's conduct was also deficient in failing to conduct an independent investigation when they already knew of the lie concerning the semen. Finally, counsel's conduct was deficient in failing to file a motion that would have allowed the defense to present relevant evidence of the alleged victim's prior personal and medical history. If counsel had read the discovery documents, counsel would have discovered and been able to use numerous items that would further impeach the alleged victim, including giving the wrong address for the defendant, and even items consistent with the defense theory that her motive was anger at the defendant for not helping the victim to seek disability benefits. They would also have discovered that the statement to the assistant prosecutor used as a prior consistent statement was made only shortly before her report to police, which would have rendered this statement likely inadmissible. If counsel had investigated they would have discovered that the alleged victim had no driver's license during the time she claimed to have driven to the defendant's house 100 times, she had difficulty finding the defendant's house when police asked her to show them, none of the defendant's neighbors recalled seeing her, and she had numerous phone calls with the assistant prosecutor at his home and his work, which was inconsistent with the way that relationship had been portrayed in court. If counsel had filed the motion, the state may not have called the rebuttal witness due to concern that the defense could use his notes to impeach the credibility of the alleged victim further. No strategy could explain the failure to read discovery or to independently investigate when counsel knew the alleged victim had already lied about the semen. Likewise, counsel's purported strategy for not filing the motion prior to trial was based on "an erroneous view of the law" and, therefore, could not be a reasonable strategy. While finding that the deficiencies found did not "individually prejudice[]" the defendant to such a degree as to warrant a new trial, the court concluded "that the cumulative effective" of the deficiencies warranted a new trial, *id*. at ___, in this case, which "was a classic instance of the 'he-said-she-said' dilemma," *id*. at ____. While counsel had performed well in most areas of representation, "the proper inquiry for assessing prejudice is not the totality of counsel's performance, but rather the effect of counsel's acts or omissions on the reliability of the trial's outcome." *Id*. at ___.

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B. ONE DEFICIENCY

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 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*.

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b. U.S. District Court Cases

2015: ****Mitcham v. Davis*, 103 F. Supp. 3d 1091 (N.D. Cal. 2015)**. Under AEDPA, counsel ineffective in capital murder case for failing to object in 1984 trial to the state's peremptory strikes of all black jurors on the basis of *People v. Wheeler*, 583 P.2d 748 (Cal. 1978), which held the use of peremptory challenges to strike venirepersons on the basis of race to be a violation of the California Constitution and the Sixth Amendment right to an impartial jury. While this issue had been litigated in state court, the state court denied relief on procedural grounds, which were not sufficient to operate as a bar to federal review. Thus, the federal court's review was de novo. After exclusions for cause and by stipulation, there were 117 qualified prospective jurors, seventeen of whom were black. During selection of the jury, the prosecutor peremptorily struck all five black jurors called and all three black jurors called in alternate selection. As a result, the black defendant with white victims was tried by "eleven Caucasian jurors and one Hispanic-surnamed juror." Under *Wheeler*, like *Batson v. Kentucky*, 479 U.S. 314 (1986), which was decided later, if the defendant objects and establishes a prima facie case of unlawful discrimination, the burden then shifts to the state to show that the peremptory challenged were "not predicated on group bias alone." If the state fails, the remedy is a different venire and jury selection starts anew. If the error is found on appeal, it is deemed prejudicial per se and reversal is required. Counsel, who was later disbarred for misconduct dating back to 1968, was deficient in failing to object on the basis of Wheeler, which had been the law in California for six years at the time of trial. A number of appellate court decisions in those six years had reversed judgments on the basis of *Wheeler*. An "expert regarding the standard of practice applicable to criminal defense attorneys" testified that by 1984, it was "the regular practice of defense counsel in California . . . to object to improper prosecutorial jury challenges under *Wheeler*." Not only had the prosecutor struck all eight potential black jurors, he had previously disclosed to defense counsel an intent to strike an additional four black jurors if they were called. Additionally, the prosecutor struck two white jurors "who evidenced potential sympathy for" black people – one was a college professor who had written a book on African American folklore and one was married to a black man. The prosecution had also questioned black jurors about whether they thought the death penalty was enforced disproportionately against minorities without also asking white jurors this question. Likewise, the prosecutor asked black jurors if the criminal justice system treated them differently without also asking white jurors this question. Additionally, the prosecutor asked black jurors if the race of the defendants would affect their ability to be fair or vote for the death penalty without asking white jurors this question, with the lone exception being the college professor who had expressed concern about the "disproportionate" sentencing of poor people and black people. Counsel not only failed to object to the strikes, but he also failed to develop a record of the race of prospective jurors. There could be no tactical reason justifying these failures. Prejudice was also established. The voir dire of three black jurors revealed no evidence of bias and suggested that these jurors would have been favorable to the state. The state could not have claimed a race-neutral reason that they preferred life without parole or equivocated on the death penalty because the prosecutor did not strike four white jurors that fell in this category and were seated on the jury. A number of white alternate jurors also fell in this category. Moreover, the prosecutor's notes indicated that he was keeping track of the black jurors by writing "B" next to their names on the qualified jury list, while not tracking any other race. He also had a rating system on which he rated all but one of 17 qualified black jurors as unacceptable.

The other was not rated because he was never called to the jury box. The prosecutor also had notes for potential black juror Combs that listed her race and that: "She has some feelings about death penalty – but could impose it in a given case. I think she would be alright but she does have some reservations about death – Keep if necessary to avoid Wheeler – She would try to be fair." In the absence of any objections by defense counsel, the prosecutor also struck this juror, who was an 18-year veteran of the U.S. postal service. The strike of this juror alone requires reversal. The court also reviewed the strikes of two other potential black jurors, who should have been desirable for the state absent race considerations. Both had family members in law enforcement.

2012: ***Drain v. Woods*, 902 F. Supp. 2d 1006 (E.D. Mich. 2012), *aff'd*, 595 Fed.Appx. 558 (6th Cir. 2014)**. Under AEDPA, trial counsel was ineffective in murder case for failing to object to the prosecutor's discriminatory use of peremptory challenges and to the trial court's corrective procedures. Even though trial counsel failed to object, the trial court raised the *Batson* issue sua sponte after the prosecutor used seven of nine peremptory challenges to eliminate black jurors. After the prosecutor voluntarily offered her reasons for the strikes, the court found a *Batson* violation. Rather than recalling the discriminatorily removed jurors or dismissing the entire panel and starting over, the court simply continued with jury selection and required the prosecutor to seek permission before dismissing any additional black jurors. Trial counsel did not object to this procedure. On direct appeal, the state court found the issue had been waived due to failure to object. In post-conviction, the state court found that no *Batson* error occurred and thus the trial court's improper procedure for correction of the error was irrelevant. The state court's determination was unreasonable because it found that a prima facie showing of discriminatory intent had not been shown, even though this issue was moot since the prosecutor voluntarily offered explanations for the strikes. Even if the issue was not moot, a prima facie case had been established since the prosecutor used 78 percent of her strikes to exclude black jurors, who comprised only 28 percent of the venire. In short, the state court decision "was contrary to clearly established Supreme Court precedent and was unreasonable." With regard to the state court's conclusions based on the prosecutor's answers, the state court unreasonably concluded that the trial court's findings were not supported by the record. The state court also unreasonably concluded that exclusion of a minority juror based on the same response given by a white juror who was not excused did not violate *Batson*. In short, the state court's decision was based on an unreasonable determination of the facts and resulted in an unreasonable application of *Batson* and progeny. Because *Batson* errors are structural and not subject to harmless error, automatic reversal was required. Counsel's conduct in failing to object to the violations and the trial court's procedure was deficient and prejudicial. The proper procedure was to either discharge the entire panel or to disallow the discriminatory challenges.

c. State Cases

2019: ***Sexton v. State*, 2019 WL 6320518 (Tenn. Crim. App. Nov. 25, 2019).** In double-murder case where petitioner had at one time been sentenced to death for the crimes, trial counsel was ineffective in failing to properly question a juror regarding her revelations on the juror questionnaire. The prosecution's theory of the case was that petitioner killed the victims because of sexual abuse allegations made against him by the daughter of the male victim who was also

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petitioner's stepdaughter. In Juror N.S.'s questionnaire, she wrote that she and her sister had been raped by their stepfather and that N.S. was also the victim of domestic abuse. During voir dire, defense counsel did not ask N.S. about what she had revealed in the questionnaire. When asked about this omission during the post-conviction proceeding, co-counsel testified he did not recall that questionnaire response. He stated that he and lead counsel may not have asked her about being the victim of child rape if "there were other things in her questionnaire that made us think that we didn't need to ask her that question." He was unable to specify, however, what those "other things" may have been. On cross-examination, co-counsel agreed that N. S. may have been chosen to sit because she knew co-counsel's mother. Lead counsel testified there was no explanation why Juror N. S. was not excused after disclosing she was raped by her stepfather. However, on cross-examination, lead counsel acknowledged N. S.'s disclosure would be a "factor" to consider instead of the "whole picture." On this record, the Tennessee Court of Criminal Appeals finds "nothing in the record demonstrating trial counsel had a strategic reason not to question Juror N. S. about her disclosure." Therefore, it concludes "trial counsel's failure to question Juror N. S. about her experiences as a victim of a crime was objectively unreasonable and resulted in deficient performance." Because juror bias had already been found as to a different juror, the appeals court concluded that petitioner had demonstrated the requisite prejudice.

2017: ***Wadlow v. State*, 518 S.W.3d 872 (Mo. Ct. App. 2017).** In statutory sodomy case where the victim was a five year old girl, trial counsel was ineffective in failing to move to strike a venireperson who indicated that she could not be impartial in this case. When the prosecutor asked the venire panel whether anyone felt they would not be able to be fair and impartial simply due to the nature of the charges of this case, the venireperson in question, Juror3, raised her hand. She explained, "I have a granddaughter that's four years old and I just truly don't think that I could do it, to be honest, to be fair about it" She was then asked, "[w]ould you be able to listen to the evidence and make a decision just based on that evidence?" She responded "no." During his portion of voir dire, defense counsel did not ask any questions directed to Juror 3. Defense counsel did ask the panel if anyone "would find it difficult to find in favor of an older person as opposed to a young child if the evidence so dictated" or "find it impossible to adhere to the law as the Judge reads it to you and meet the standard of beyond a reasonable doubt before you would return a verdict of guilty?" The record did not indicate that Juror 3 responded to either of these questions. Defense counsel did not challenge Juror 3 for cause or use a peremptory challenge to strike her from the jury. At the post-conviction hearing, defense counsel couldn't recall a strategic basis for failing to strike Juror 3 but he offered that there "certainly could be" reasons to consider Juror 3 "a good potential juror for the defense[,]" but no such reasons were identified. Trial counsel recalled that defendant was with him "during the entire voir dire process[,]" and trial counsel did not recall defendant "expressing an objection to [him] regarding [Juror 3.]" Defendant testified that he did ask defense counsel why he had not objected to Juror 3 but that defense counsel ignored him. The post-conviction court denied the claim of ineffective assistance of counsel on the ground that defendant admitted that he was aware that Juror 3 was on the jury despite her statements and that he was aware that no objection had been made. Defending that ruling, the State first argued that defendant had failed to prove that defense counsel lacked a strategic reason for keeping Juror 3 on the jury. Looking to case law, the appellate counsel observed that an attorney's inability to recall the reasons for deciding not to strike a juror does not support a finding that the attorney's decision

was a matter of trial strategy where the attorney has reviewed his notes from jury selection and no strategic reason for keeping the juror is apparent from the record. Secondly, the State asserted that Juror 3 was rehabilitated when she remained silent to the questions asked of the panel by defense counsel. Regarding the first question, about any difficulty finding in favor of an older person over a child, the appellate court stated: "Even if we assumed, *arguendo,* that Juror 3's silence was an unequivocal assurance that she would not find it hard to find in favor of [defendant] because he was older than his child victim, such an assurance would fail to cure the form of Juror 3's expressed bias. Her bias did not rest on the age difference between [defendant] and the victim — it was based instead on her granddaughter's age-based similarity to the victim." Regarding defense counsel's second question, the appellate court stated:

> Juror 3's silence in response to trial counsel's question to the panel as to whether anyone would "find it impossible to adhere to the law as the Judge reads it to you and meet the standard of beyond a reasonable doubt before you would return a verdict of guilty" can rightly be interpreted as an unequivocal assurance that Juror 3 could follow the law, including its requirement that she find [defendant] guilty beyond a reasonable doubt. But that assurance was also insufficient to cure Juror 3's bias that she would have a significant difficulty in fairly deciding the *factual* disputes in the case, a different concern than a difficulty in applying the law to the evidence. Juror 3 informed the parties that she believed she would be unable to listen to the evidence and fairly and impartially evaluate it. As a result, Juror 3's silence in response to the questions identified by the State did nothing to either remove or attenuate the nature of the bias she had freely admitted.

***State v. Courtney*, 415 P.3d 604 (Utah Ct. App. 2017).** In case where defendant was on trial for a drug-related charge, trial counsel was ineffective in failing to move for a mistrial during voir dire when a prospective juror made statements that could taint the jury pool against defendant. During jury selection, trial counsel asked the prospective jurors whether any of them knew himself or defendant. One prospective juror responded affirmatively and offered additional unsolicited information: "Due to my years in law enforcement, yes. I have had affiliations with him, especially during the time that I was serving as an agent for the Weber-Morgan Narcotics Strike Force." Questioning of the prospective jurors continued after that answer. A few minutes later, the trial court asked: "Would any of you have difficulty in affording the defendant his guarantee of being considered innocent until proven guilty beyond a reasonable doubt or, stated differently, would any of you believe that because the defendant has been charged in this case by the State that there must be some basis for his guilt?" The prospective juror at issue raised her hand, the only one on the panel to do so, but before she could speak, the trial court cut her off and asked both counsel to approach the bench for a discussion out of the potential jurors' hearing. At the bench conference, the prospective juror's first answer was brought up as having possibly tainted the jury pool. It was agreed that the prospective juror would be immediately excused on a pretext to avoid the potential of further tainting. It was not until the jury was selected and sworn that a mistrial motion was made by trial counsel. It was denied as untimely. Given this record, there was no conceivable tactical basis for trial counsel to have not asked for a mistrial during jury selection. Defendant was prejudiced by trial counsel's inaction because the prospective juror's comments suggested that

defendant had repeatedly had some involvement in the types of crimes he was on trial for. This prejudice was not cured by the fact that a detective at trial mentioned that unnamed other agents were familiar with defendant. The prospective juror's statement, which was not subject to cross-examination, improperly corroborated the detective's testimony. Absent the prospective juror's remark, there was a reasonable likelihood that the result of defendant's trial would have been different.

2010: ***Middleton v. State*, 41 So. 3d 357 (Fla. Dist. Ct. 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: ***White v. State*, 290 S.W.3d 162 (Mo. Ct. 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. Ct. 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.3d 302 (Mo. Ct. 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)**. 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,

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> 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. Ct. 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*.

**Capital Case*

2. INDICTMENT

a. U.S. Court of Appeals Cases

2019: ***Jones v. Zatecky*, 917 F.3d 578 (7th Cir. 2019).** Trial counsel was ineffective in failing to object when the prosecution moved to amend the information in a battery case to add a charge of criminal confinement which ultimately accounted for the lion's share of petitioner's sentence. At the time of petitioner's arrest and prosecution, a statute and an Indiana Supreme Court decision provided a strong basis for arguing that the prosecution had missed the deadline for such an amendment Respondent defended trial counsel's inaction by arguing that defense attorneys around Indiana routinely ignored both the clear text of the relevant statute and the state supreme court precedent and allowed prosecutors to make untimely amendments. The Seventh Circuit responded: "If that is an accurate account, it is hardly reassuring. For a lawyer to fail to take advantage of a clear avenue of relief for her client is no less concerning because many others made the same error—if anything, it is more so." "[F]ollowing the crowd is no excuse for depriving a criminal defendant of his constitutional right to the effective assistance of counsel." Further, respondent presented no data backing up the contention that defense attorneys routinely ignored the state supreme court case that supported an argument that the amendment at issue was impermissible. "This was one of those rare cases in which 'counsel's performance fell below the constitutional minimum, and that the Indiana appellate court's conclusion otherwise was an unreasonable application of Supreme Court precedent.'" As to prejudice, "[h]indsight in [petitioner's] case tells us that his attorney's silence doomed his appeal." On direct appeal, the intermediate appellate court agreed that the amendment had violated the relevant statute. But petitioner was denied relief because of his attorney's failure to object. "In other words, what killed the argument in that court was waiver, not lack of merit."

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 multiplicious 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

2015: ***Romine v. State*, 162 So. 3d 1102 (Fla. 2015)**. Counsel in burglary case was ineffective in failing to object to trial on uncharged offense. The defendant was charged with first-degree burglary while armed, but was convicted after a jury trial of burglary with assault. At the conclusion of the state's case, counsel moved for a judgment of acquittal on burglary while armed because the state failed to present evidence of the existence of a dangerous weapon. The court granted the motion and the trial proceeded. At the conclusion of the defense case, the state requested an instruction on burglary with assault. Counsel argued that the state had failed to present evidence of fear of imminent danger but the victim had testified, without objection from the defense, that he was scared. The court allowed the instruction, which changed the offense level, and the jury convicted of burglary with assault. Counsel's conduct was deficient. While counsel objected to the instruction due to insufficient evidence, counsel failed to object that the jury was being instructed on an offense not charged in the information. Counsel also failed to object to the verdict form. Counsel had also failed to object to the victim's testimony that he was in fear, which was irrelevant to the charge of burglary while armed. Prejudice was established as the defendant was convicted of a first-degree felony when his exposure should have been limited to a second-degree felony due to the judgment of acquittal.

***State v. Smith*, 115 A.3d 210 (Md. Ct. Spec. App. 2015)**. Counsel in felony murder case was ineffective in failing to object to the prosecution's entry of nolle prosequi prior to the jury's deliberations. The victim and the defendant had a disagreement over a dog, which the defendant's girlfriend had taken from the victim, who was engaged to the girlfriend's mother. The victim called the defendant's girlfriend and said that if the dog was not returned, she was not going to "live to see tomorrow." The defendant, his girlfriend, and the girlfriend's son went to the victim's home to try "to make peace," but it escalated and the victim was shot and killed. The defendant was charged with first-degree felony murder predicated on first-degree burglary with intent to commit assault and second-degree felony murder predicated on assault. During trial, the state proceeded on the theory of first-degree felony murder. The defense proceeded on the theory that there was no burglary and the defendant had gone to the home only to "mend fences." At the conclusion of the state's case, the state dismissed the second-degree felony murder charge without objection from the defense. Counsel's conduct in failing to object was deficient and prejudicial. "It would be fundamentally unfair to say that the assault was sufficiently connected to the burglary so as to make the crime first-degree felony murder, while at the same time, keeping the jury from having the option of convicting Smith of second-degree felony murder predicated on the very same assault." No rational strategy could explain counsel's actions and counsel could not recall his thought process or whether he had discussed the issue with the defendant.

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2013: ***Lacey v. State*, 114 So. 3d 452 (Fla. Dist. Ct. App. 2013)**. Counsel ineffective in escape from detention case for failing to recognize that the defendant's escape was governed by statute governing escapes from children's detention facilities and not from the Department of Corrections. The defendant was housed in the Department of Juvenile Justice (DJJ) and escaped from a hospital, while still under DJJ supervision. Counsel's conduct was deficient and prejudicial as the maximum possible sentence was lower under the correct statute

2012: ***McDuffie v. State*, 135 So. 3d 317 (Fla. Dist. Ct. App. 2012)**. Counsel ineffective in drug case for failing to object to an amended information filed after expiration of the speedy trial rule time. The defendant was initially charged with sale of cocaine, a second-degree felony. After expiration of the 175 days under the state speedy trial rule, the defendant demanded trial. Just days before the trial, the state amended the charge to sale of cocaine within 1000 feet of a school, a first-degree felony. Counsel's conduct was deficient in failing to object. Prejudice established as the defendant was convicted on the greater offense.

2009: ***People v. Peyton*, 98 Cal. Rptr. 3d 243 (Cal. Ct. App. 2009)**. Counsel ineffective in child sexual assault case for failing to object to the filing of 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.

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3. MOTIONS AND NOTICE

a. U.S. Court of Appeals Cases

2018: ***Hendrix v. Palmer*, 893 F.3d 906 (6th Cir. 2018).** Trial counsel was ineffective in failing to move to suppress a statement made by petitioner which was obtained in violation of *Miranda*. Petitioner was convicted in Michigan state court of felony murder, carjacking, and unlawfully driving away a motor vehicle, and was sentence to life in prison. Upon arrest, petitioner had spoken briefly with officers, and then refused to speak further until he had the opportunity to consult with an attorney, and signed an advice-of-rights form to this effect. Two days later, when he still had not met with an attorney, an officer gave him another advice-of-rights form and tried to interrogate him again. Petitioner did not sign the form but agreed to speak with the police. The officer testified at trial about statements made by petitioner during that interview. Petitioner raised claims in both state and federal courts under the Fifth and Sixth Amendments that the admission of these statements violated his *Miranda* rights and that his counsel's failure to challenge their admission violated his rights to effective assistance of counsel. In federal court, the state agreed that the admission of the statements was erroneous but argued that the error was harmless. The district court granted relief on these claims. With regard to the Fifth Amendment claim, the Sixth Circuit affirmed the district court's grant of relief, noting both that the State had conceded the statements were improperly admitted and that the "governing law is beyond dispute" under *Miranda* and *Edwards v. Arizona*, 451 U.S. 477 (1981), which holds that police are not permitted to re-interrogate an accused regarding any offense after the accused has invoked his rights until counsel is present. The admission of the statements had a substantial and injurious effect on petitioner's defense because the prosecutor referred to them at length during closing argument, emphasizing that petitioner offered no alibi even though he was told that the victim was seriously injured and that his silence was "defining" and indicated, "I did it." Petitioner's anxious question about whether he would be charged with murder and his statement that he did not want to say anymore because he didn't want to get into any more trouble were also damning. Other parts of his statements were "inculpatory because of their incoherence. They smack of nonsense." 893 F.3d at 921. Regarding the Sixth Amendment claim, the Sixth Circuit ruled that trial counsel's failure to challenge the admission of the statements was ineffective. Regarding deficient performance, "[t]he meritorious nature of a motion to suppress, under these circumstances, is clear from blackletter law." 893 F.3d at 922. Counsel had access to all the facts that should have led him to conclude the statements were inadmissible, and there was nothing favorable to petitioner in the statements; on the contrary, they were only harmful. Petitioner was prejudiced by the deficient performance for the same reason he was prejudiced by the admission of the statements. The Michigan Court of Appeals' decision to the contrary was unreasonable given the nature and effect of the constitutional violation. The Sixth Circuit also held that the prosecutor's comments on petitioner's post-*Miranda* silence violated petitioner's right to due process under *Doyle v. Ohio*, and reversed the district court's denial of relief on that ground.

2016: ***United States v. Bankston*, 820 F.3d 215 (6th Cir. 2016)**. Counsel ineffective for failing to move to dismiss the charge of making false statements to a judge. The defendant already had charges of mail and wire fraud pending when she wrote a letter to the judge complaining about defense counsel and accusing the government of planting evidence in her home. In a superseding indictment, the

government added the false statement charge based solely on the letter. Counsel's conduct was deficient in failing to move to dismiss this charge because 18 U.S.C. § 1001(b), which criminalizes false statements, explicitly provides that it "does not apply to a party to a judicial proceeding ... for statements, representations, writings or documents submitted by such party ... to a judge or magistrate in that proceeding." Prejudice established because if counsel had moved to dismiss this count, there is a reasonable probability the charge would have been dismissed.

***Grueninger v. Director, Virginia Department of Corrections*, 813 F.3d 517 (4th Cir. 2016)**. Under AEDPA, counsel ineffective in child sexual abuse case for failing to timely move to suppress the defendant's confession to a police investigator during a re-interview three days after the defendant invoked his right to counsel. The defendant was arrested for sexually abusing his fourteen-year-old daughter. During the initial interrogation, after being read his Miranda rights, he said, "I need an attorney." The interrogation stopped. Three days later, the investigator re-interviewed him without an attorney present, and this time, the defendant confessed. The state court denied relief holding that the defendant had not been "interrogated" under *Edwards v. Arizona*, 451 U.S. 477 (1981), as he only made voluntary statements after being served with additional warrants. This finding was objectively unreasonable under AEDPA as the officer did more than serve warrants. He questioned the defendant about the charges and those questions clearly constitute "interrogation" for *Edwards* purposes. As the state court did not address the question of prejudice, the court reviewed this issue de novo. Prejudice was established as the defendant's confession was "detailed and deeply disturbing." The independent evidence of guilt, on the other hand, "while substantial, was not so overwhelming" that the court could find no prejudice. While the defendant's daughter testified as to his guilt, "the defense was able to raise questions about the reliability of that testimony."

***United States v. Freeman*, 818 F.3d 175 (5th Cir. 2016)**. Counsel ineffective in conspiracy to possess cocaine and possession with intent to distribute cocaine case for failing to move to dismiss the possession count, added in the superseding indictment, as barred by the statute of limitations. Counsel's conduct was deficient. "Although counsel's affidavit stated that he considered the issue, the record is silent as to the extent of counsel's research. Even minimal research would have revealed . . . a compelling argument" that the possession charge in the superseding indictment was barred by the statute of limitations. Prejudice established as the defendant had to pay a $100 special assessment for the possession conviction and the defendant would not have that conviction otherwise.

2015: ***United States v. Mercedes-De La Crus*, 787 F.3d 61 (1st Cir. 2015)**. Counsel ineffective in drug case for failing to timely file a motion to suppress post-arrest statements when the arrest was made without probable cause. Federal agents were conducting surveillance of a remote stretch of coastline in Puerto Rico that was suspected to be an area of drug trafficking activity. It was a large wooded area with trails near a beach and there were five or six "well kept" houses nearby. In this area, there was an abandoned vehicle. When the defendant came out of the woods towards the vehicle, he was immediately arrested. Drugs were found 100 feet from the vehicle and a boat that apparently delivered the drugs was found abandoned in the sand, but the arresting agents did not know of these discoveries at the time of the arrest. The defendant's incriminating statements at the scene and upon his

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arrival at the Homeland Security Office should have been suppressed. Counsel's conduct in failing to make this motion was deficient and prejudicial as the government's case "was based almost exclusively on these statements."

2013: ***United States v. Liu*, 731 F.3d 982 (9th Cir. 2013)**. Counsel was ineffective in criminal copyright infringement and trafficking in counterfeit labels case for failing to raise an obvious statute-of-limitations defense on one count, which was not brought in indictment until February 2010. The count alleged criminal conduct between 2001 and 2003. The applicable statute of limitations period was five years. Counsel's conduct was deficient and prejudicial.

2012: ***Harris v. Thompson*, 698 F.3d 609 (7th Cir. 2012)**. Counsel in murder case ineffective due to failure to adequately perform in hearing on the competency of the defendant's six-year-old son as a witness in a case that involved the killing of the defendant's four-year-old son. It was undisputed that the child died from asphyxiation by an elastic band that had come loose from a fitted bed sheet and that the six-year-old son was present. The son had maintained since his first interview that his brother wrapped the band around his own neck and that the defendant was not present. The jury never heard this testimony though due to the trial court's finding that the son was not competent to testify. Because the state court did not review the constitutional issue under the Sixth Amendment Compulsory Process Clause, this issue was reviewed de novo. Counsel's conduct was deficient in: (1) failing to interview the child witness and prepare him for his testimony; (2) failing to secure the presence of a witness who would have established that the child's testimony was consistent and credible; and (3) failing to correct the trial court's misapplication of the burden of proof when the trial court placed the burden on the defendant to establish competence when the burden, under state law, was on the state to establish that the child witness was not competent. Prejudice established as the state court's holding to the contrary was an unreasonable application of *Strickland*. In short, the state court relied on the "trial judge's own post hoc rationalization," during motion for new trial proceedings, that a more diligent performance would not have changed his mind. Under *Strickland*, the assessment of prejudice is an "objective inquiry" in which "courts must consider the effect the evidence would have on an unspecified objectively reasonable decision-maker – not its effect on one particular judge."

2011: ***Tice v. Johnson*, 647 F.3d 87 (4th Cir. 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 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 court found no prejudice, however, based on Dick's testimony. While the case was reviewed under AEDPA, the 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 (6th 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 (11th 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 multiplicious 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: ***Clinkscale v. Carter*, 375 F.3d 430 (6th Cir. 2004)**. 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.

***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).

***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 fil until 41 days after the verdict and the motion was dismissed as untimely. Counsel's conduct was deficient and was "a classic 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."

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

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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

2019: ***United States v. Gladden*, 394 F.Supp.3d 465 (S.D. N.Y. 2019).** In case involving multiple drug-related charges, trial counsel was ineffective in failing to move to suppress evidence that had been recovered from the Range Rover petitioner had been driving during a drug deal. The Range Rover, which petitioner had borrowed from a friend, was seized days after the drug transaction on the ground that it had been illegally parked. Found in the vehicle was, inter alia, a Boost Mobile printout of a cell phone number, XXX-XXX-XXXX, and an associated walkie-talkie number, 176*734*9, that tied petitioner to the charged drug conspiracy. Evidence presented at the hearing on petitioner's motion to vacate, as well as the trial record, established that if trial counsel had conducted an adequate investigation, he would have concluded that there was a good basis to move to suppress the items seized from the car on the ground that the vehicle was not illegally parked at the time of the seizure. The district court rejected the Government's argument that counsel could not have been expected to file a motion for suppression because petitioner did not affirmatively tell him "how the Government's version of the facts was incorrect" and therefore did not give him a "reason to believe that the Range Rover was improperly seized." There was no indication that trial counsel ever discussed the documents seized from the Range Rover with petitioner, or that he ever asked his client about the circumstances of the seizure. "It was counsel's job to ask those questions, and, more generally, to investigate the circumstances of the seizure." The Government also raised a standing issue that was determined to be forfeited due to not having been raised before the Magistrate Judge. The standing issue was also without merit. That petitioner shared the vehicle with his live-in girlfriend did not extinguish his expectation of privacy. That petitioner had a suspended license also did not interfere with his standing both because he was authorized to use the car and he was not driving it at the time of the seizure. The Government further argued that the seizure was valid because the Range Rover had been used in narcotics trafficking and was therefore forfeitable. But this argument was itself forfeited because it was not raised before the Magistrate Judge. Even addressing the argument on the merits, it failed. "At a minimum, there is a reasonable probability that the Government would not have been able to establish the applicability of the forfeiture exception at a pretrial suppression hearing." As for prejudice, apart from the Boost Mobile printout, the only evidence linking petitioner to the phone numbers found in the car was the testimony of a cooperating co-conspirator who testified against petitioner at trial. While the jury might have credited the witness' testimony even without any corroboration, there were substantial reasons to doubt his credibility, including that the witness himself participated extensively in the narcotics conspiracy and was testifying in exchange for favorable treatment from the Government. Also unavailing was an inevitable discovery argument the Government made concerning another item seized from the Range Rover which linked petitioner

to another drug sale. The argument was both forfeited and without merit. The seized evidence made it substantially more likely that the jury would accept the Government's contention that petitioner was involved in the broad conspiracy. Therefore, that there is a reasonable possibility that, but for the admission of the evidence seized from the Range Rover, the outcome of the trial would have been different.

***United States v. Frederiksen*, 2019 WL 5395751 (D. Kansas Oct. 22, 2019).** In case where petitioner was convicted of lying to federal agents during an investigation into illegal poker parties, trial counsel was ineffective in: (1) failing to timely file a post-trial motion seeking acquittal or a new trial where the prosecution's evidence was insufficient to support a conviction as to two elements of the charged crime; (2) failing to object to the prosecution's misstatement of the law during closing argument; and (4) failing to object to irrelevant and prejudicial evidence concerning other poker games throughout the trial.

***Hesser v. United States*, 2019 WL 2717271 (M.D. Fla. June 28, 2019), *appeal pending*, 19-13297 (11th Cir.).** In case involving, inter alia, three counts of filing false tax returns with the IRS, trial counsel was ineffective in failing to renew or make a motion for judgment of acquittal at the conclusion of all of the evidence. Petitioner was charged with filing false tax returns in 2005, 2006, and 2007 – Counts One through Three. At the close of the government's case in chief, defense counsel moved for a judgment of acquittal only on Count Three based on the absence of a signature on Form 1040. The motion was denied. After the defense presented its case, defense counsel failed to renew the motion as to Count Three or make a motion for judgment of acquittal on any other count. Petitioner was convicted of the charges. On direct appeal, the Eleventh Circuit Court of Appeals affirmed the convictions. Although it found that the evidence presented by the prosecution in its case-in-chief was not sufficient to establish the falsity element of the three false tax return counts, it applied the difficult manifest miscarriage of justice standard due to defense counsel's failure to properly raise or renew a motion for judgment of acquittal. Defense counsel's "failure to renew or make a motion for judgment of acquittal at the conclusion of all the evidence constituted deficient performance as to Counts One through Three." Had counsel properly preserved a challenge to the sufficiency of the evidence, review would have been *de novo* and petitioner would have prevailed on appeal. Thus, prejudice was established. Because the grant of relief is based on insufficiency of evidence, double jeopardy prevents petitioner from being re-tried on the three counts.

2018: ***Pierotti v. Harris*, 350 F.Supp.3d 187 (E.D. N.Y. 2018).** In case involving multiple charges including two counts of murder where petitioner contended the victims were shot in self-defense, trial counsel was ineffective in failing to request and obtain reasonable accommodation for petitioner's hearing disability. Counsel was aware that petitioner had a hearing impairment and that petitioner normally wore two hearing aids but was wearing no hearing aids during the trial. On numerous occasions petitioner told counsel that he could not hear what was going on in the courtroom. Counsel's explaining and summarizing what had happened during the proceedings did not cure the problem. Prejudice is presumed here, because of the undisputed facts of the severity of petitioner's hearing disability; his inability to hear high frequencies (1/3 of the trial witnesses were women, whose voices have higher frequencies); the conditions in the courtroom, including the

location of the witnesses in relation to the defense table, the position of the speakers (not facing directly at petitioner), the hard surfaces in the courtroom; and the presence of ambient noise. Petitioner was essentially rendered absent for much of his trial and without the present ability to consult with his lawyer with a reasonable degree of rational understanding (it is appropriate to presume prejudice when a defendant is denied the right to consult with counsel). These problems rendered his trial fundamentally unfair. That petitioner addressed his inability to hear to his counsel rather than to the trial court was "not surprising," and "when his trial counsel did not raise the issue, Petitioner's reluctance to address the court directly was understandable in view of the judge's somewhat brusque reaction to Petitioner's pro se audibility complaint during the pre-trial proceedings." Relief granted. (Note: This claim was reviewed *de novo* because it had not been adjudicated on the merits by the state court. Instead, it had been found procedurally defaulted by the state court but the Second Circuit in a prior decision had found that this case fell within the limited category of exceptional cases where the "exorbitant application of a generally sound rule renders the state ground inadequate to stop consideration of a federal question." *Pierotti v, Walsh,* 834 F.3d 171, 180 (2nd Cir. 2016).)

***Mendoza v. Holland*, 2018 WL 540095 (N.D. Cal. Jan. 22, 2018).** In case where petitioner was convicted in California state court of a total of 11 charges of committing a lewd or lascivious act against three minors under the age of 14, trial and appellate counsel were ineffective in failing to raise a claim that petitioner's *Miranda* rights had been violated. This ineffectiveness provided cause to overcome the procedural default of the *Miranda* claim in state court. Looking to *Visciotti v. Martel*, 862 F.3d 749, 768 (9th Cir. 2016), the district court independently determined whether there was IAC and did not defer to the state court's determination of this issue. Petitioner unambiguously invoked his *Miranda* rights as soon as the detective started talking to him, saying "No way" did he want to discuss anything with the detective. Nevertheless, the interview continued for an hour thereafter. This was not an implied waiver of his *Miranda* rights; petitioner only answered later questions because the detectives had ignored his response and continued questioning him. The admission of his statements at trial was thus a constitutional violation. In its harmless error analysis, the court did not review petitioner's testimony at trial given that petitioner only testified because of the confession. The direct and graphic statements he gave to the police about two of the three victims had a substantial and injurious effect, because the independent evidence as to petitioner's guilt of those was less strong; with regard to the third victim, there was evidence obtained from a taped pretext call between petitioner and the victim that was damaging, and so his admissions to the police about that victim did not have a prejudicial effect under *Brecht*. Notably, the prosecution emphasized the confession in closing argument. Both trial and appellate counsel were deficient for failing to present this meritorious *Miranda* claim. There is a reasonable probability that had trial counsel raised it, the trial court would have suppressed the interview and an acquittal was possible, at least on the charges against two of the victims. There is also a reasonable probability that if appellate counsel raised it on appeal, petitioner would have prevailed then. Thus, cause and prejudice for the procedural default was established. Furthermore, the state superior court's denial of the IAC for failure to raise the *Miranda* claims involved an unreasonable application of *Strickland's* prejudice prong, because although the superior court articulated the correct standard (reasonable probability that the outcome of the proceedings would have been different), it then conflated that with a sufficiency of the evidence test. So AEDPA deference to the state court's decision did not apply.

**Capital Case*

2014: ***United States v. Wendfeldt*, 58 F. Supp. 3d 1124 (D. Nev. 2014), *appeal dismissed*, 15-15010 (9th Cir. May 5, 2015)**. Counsel ineffective in plea to drug possession with intent to distribute case for failing to move to suppress the drug evidence due to an unlawful search. A highway patrol trooper stopped the defendant on the interstate because his tires touched the outside line of his lane several times. At the conclusion of the traffic stop, the trooper told the defendant that he was free to leave. As the defendant walked towards his car, however, the trooper asked for consent to search. When the defendant refused, the trooper took his canine from his patrol car and walked around the defendant's car. The dog alerted in the area of the passenger door. Thereafter, the trooper detained the defendant until a search warrant was obtained. Drugs and guns were found in the trunk of the car. The trooper lacked reasonable suspicion to justify the stop because the defendant's tires touched the line, but never crossed it. Even if the trooper acted in good faith, "this did not transform the unlawful traffic stop into a lawful one." The second seizure to use the canine was also unlawful. Counsel's failure to move to suppress was deficient and prejudicial.

2011: ***United States v. Serrano*, 798 F. Supp. 2d 634 (E.D. Pa. 2011)**. Counsel ineffective in possession with intent to distribute cocaine case for failing to move to suppress the defendant's confession on Miranda grounds. The defendant initially waved down an officer asserting that he had been kidnaped, robbed, and had his car stolen. After a car chase and shootout with the kidnapper, the car was recovered. In the car was a plastic bag containing a white powdery substance. The defendant was taken to the police department. After being left alone for hours in a locked room, he was questioned about the kidnaping and then his involvement in drug activity by different officers. He refused to answer any questions. After several more hours alone, a detective told the defendant that they were not interested in his involvement in drug activity and he could leave if he would just say that he had done a couple of deals with his robbers before and this time they robbed him. The defendant took the detective at his word and signed a statement in line with the detective's outline. He was detained a few more hours and released without being arrested. In all, he had been held in the interrogation room for over 24 hours and he was never informed of his Miranda rights. Counsel negotiated a plea agreement and the defendant was sentenced to 151 months. Counsel stated that he believed a motion to suppress would be unsuccessful because the defendant was not "in custody" in that he was not charged at the time of the confession. Nonetheless, counsel admitted that he did not know the circumstances surrounding the confession and did not inquire about it. Counsel's conduct was deficient as counsel did not inquire about the circumstances. If he had "no reasonably competent attorney could conclude that [the defendant] was not entitled to a Miranda warning." Miranda applies when (1) a defendant is "in custody" and (2) he was subjected to "interrogation." Even though the defendant was not charged with a crime when his confession was made, that does not mean that his interrogation was non-custodial. Factors to be considered in determining whether the defendant was "in custody" include: (1) whether he told he was under arrest or free to leave; (2) the location and physical surroundings of the interrogation; (3) the length of the interrogation; (4) whether officers used coercive tactics, displayed weapons, physically restrained the defendant, etc.; and (5) whether the defendant voluntarily submitted to questioning. Here, the defendant was clearly in custody when he confessed. While it may be true that a motion to suppress may have scuttled ongoing plea negotiations, counsel decided between an agreement to 151 months in prison and moving to suppress the only evidence of guilt, which would have led to an acquittal. "[C]ounsel's decision was not only

wrong, but it was uninformed." Prejudice established as there was no other evidence of guilt in the record. A motion to suppress "would have sounded a death knell for the prosecution's case."

2009: ***Oliva v. Hedgpeth*, 600 F. Supp. 2d 1067 (C.D. Cal. 2009), *aff'd*, 375 Fed.Appx. 697 (9th Cir. 2010)**. 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.

***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 challenged could have reduced the sentence exposure by half.

***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.

2008: ***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.

***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."

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

2019: ***Madison v. State*, 278 So.3d 921 (Fla. Ct. App. 2019).** In case where petitioner was sentenced to twelve years in prison after accepting trial counsel's advice to plead no contest to violating probation, trial counsel was found ineffective in failing to file a motion to suppress. In 2008, petitioner had pled no contest to one count of robbery with a firearm, three counts of aggravated assault with a firearm and one count of possession of a firearm by a minor in exchange for adjudication of guilt being withheld and a youthful offender sentence of six years of probation. Approximately two years later, petitioner was arrested for carrying a concealed weapon (a knife), resisting an officer without violence, and carrying a simulated firearm (pellet gun). The new charges and several technical violations resulted in the violation of his probation. The circumstances of the arrest were as follows. The arresting officer was dispatched to investigate a complaint of a black male, wearing a black shirt and black pants, with a gun in a high crime neighborhood. The officer observed petitioner, who fit

the description, about two blocks from the described location. After exiting his patrol car, the officer drew his firearm and told petitioner to stop. In response to the officer asking if he had any weapons, petitioner admitted that he had a kitchen knife in his pocket. The officer retrieved a three-to-four-inch paring knife and arrested petitioner for carrying a concealed weapon. During the search of handcuffed petitioner, the officer discovered that petitioner had a pellet gun, gloves and a nylon skull cap in his possession. At that point, petitioner pulled away from the officer and ran, resulting in petitioner being tasered and taken into custody. During post-conviction proceedings, the officer confirmed that during his encounter with petitioner, petitioner was not free to leave. The officer also admitted that he never met with the complainant and did not know if the 911 caller provided the dispatcher with any identifying information. Defense counsel testified, inter alia, that she didn't believe a suppression motion was viable on the facts of this case and that even if she had filed a motion to suppress, it would have been dispositive only as to the new law violations and not the technical violations, and that petitioner would still have lost the six-year youthful offender cap. The appellate court concludes, however, that there is a reasonable probability a suppression motion would have been granted had defense counsel filed one. "The anonymous 911 call, combined with [petitioner's] mere presence in the general location, did not constitute reasonable suspicion to justify a stop at gunpoint." Further, the totality of circumstances supports a finding of prejudice.

> First, [petitioner] had a viable motion to suppress the evidence relating to all of the substantive new law violations against him. … Second, at the time that [petitioner] entered the plea, he knew that he faced a maximum life sentence in prison, but the evidence presented at the evidentiary hearing shows there was a reasonable probability that the motion to suppress would have been granted and the evidence the State needed to prove the substantive violations would have been suppressed. If the three new law violations were dismissed, only the technical violations would have remained. The maximum sentence [petitioner] could have received as a youthful offender for the technical violations under section 958.14, Florida Statutes (2010), was six years in prison. [Footnote omitted.] … Instead, [defense counsel] counseled [petitioner] to plea to all the probation violations in exchange for a twelve-year prison sentence, double what he would have faced had the motion to suppress been granted. Based on the totality of the circumstances surrounding [petitioner's] plea, there is an objectively reasonable probability that if he had known that he had a dispositive motion to suppress his substantive violations, he would not have entered a plea.

***Squire v. State*, 278 So.3d 153 (Fla. Ct. App. 2019).** Trial counsel was ineffective on the face of the appellate record for failing to move for a judgment of acquittal on the issue of whether appellant's discharge of a firearm caused great bodily injury to the victim. The evidence showed that appellant and his brother had fired multiple shots at the victim, who took off and ran away. The victim suffered two gunshots in each leg. A bullet recovered from one of the victim's legs was determined to have come from a revolver. A revolver found at the home shared by appellant and his brother had DNA linking the brother to the gun. Two other firearms were found at the home, a 40-caliber semiautomatic pistol and a 22-caliber semiautomatic pistol, although neither had DNA linking them to appellant. A shell casing found at the scene of the shooting had been fired by the 40-caliber semiautomatic pistol found in appellant's home. Appellant was convicted of attempted first-degree murder and the jury made specific findings that appellant actually possessed a firearm, actually

discharged a firearm, and actually inflicted great bodily harm as a result of discharging the firearm. Following the second phase of trial, the jury also found appellant guilty of possession of a firearm by a convicted felon. His ultimate sentence was negatively impacted by the great bodily harm finding because that implicated the provisions of Florida's 10/20/Life statute and mandated a 25-year mandatory minimum sentence On appeal, appellant conceded that there was sufficient evidence to support a finding that he actually possessed a firearm and discharged it. He contended, however, that there was insufficient evidence to prove that his personal discharge of the firearm actually caused great bodily harm to the victim. The appellate court agreed and found trial counsel deficient for failing to preserve the sufficiency of evidence issue. "There was no strategic reason for defense counsel to fail to move for a judgment of acquittal on this issue. Contrary to the State's argument that a motion for judgment of acquittal on this issue would have been inconsistent with appellant's misidentification defense, a motion for judgment of acquittal on this issue would not have precluded defense counsel from arguing to the jury that appellant was misidentified as one of the shooters." Prejudice was indisputable on this record. The case was remanded for the trial court to strike the 25-year mandatory minimum sentence and replace it with the 20-year mandatory minimum sentence for discharging a firearm.

***State v. Ellis*, 273 So.3d 1126 (Fla. Ct. App. 2019).** In case where petitioner was convicted of two counts of misdemeanor battery and one count of false imprisonment, all as lesser-included offenses of aggravated battery on a pregnant victim, domestic battery by strangulation, and kidnapping, a grant of post-conviction relief is affirmed on claims that trial counsel was ineffective for failing to file a pretrial motion to dismiss based upon pre-arrest delay, and for failing to conduct an adequate pretrial investigation. The alleged criminal incidents occurred May 13, 2011. Although the alleged victim made a police report two days after that, petitioner was not arrested until a year later. The sole witness against petitioner was the alleged victim, with no physical or testimonial corroboration of her account of what occurred. The victim's report and later testimony disclosed numerous material inconsistencies and differing accounts of the alleged criminal incidents. Bank and drug store surveillance videos may have been able to corroborate or disprove some of the victim's descriptions of what occurred but were no longer available at the time petitioner was charged. And yet trial counsel did not file a motion to dismiss based upon the prejudice resulting from the prearrest delay (loss of prospectively-exculpatory video recordings). The State offered no explanation for the charging delay. There was a reasonable probability that the case may have been dismissed based on that delay had defense counsel made a dismissal motion. "Under the test articulated in *Rogers v. State*, 511 So.2d 526, 531 (Fla. 1987), defense counsel's failure to move for dismissal (based on the delay between the alleged commission of the crime and the defendant's arrest), amounts to a due process violation." Another lapse by defense counsel was the failure to investigate motel records. Had counsel done so, it would have been discovered that neither petitioner nor the victim was at the motel on the date of the criminal acts alleged to have happened there. It was also established that defense counsel did not investigate the victim's alleged pregnancy or petitioner's alibi that he was still at the drug treatment center on the day of the alleged incidents. "Considering the effects of these lapses on [petitioner's] ability to impeach the credibility of the alleged victim (who was the sole witness to provide evidence against [petitioner] at trial), the postconviction court properly concluded that counsel's deficient performance caused prejudice and that there exists a reasonable probability the result of the proceedings would have been different had the lapses not occurred."

**Capital Case*

***Mims v. State*, 823 S.E.2d 325 (Ga. 2019).** In case where defendant was convicted of malice murder and other crimes related to a killing during an armed robbery and also of theft by bringing a stolen vehicle into the state, trial counsel was ineffective in failing to move to sever the theft charge from the murder-related counts. "There is no argument, much less a showing, that the theft offense and the murder-related offenses were parts of a single scheme or plan or that the offenses were of a similar character. The crimes were committed about a month apart and involved different victims in different states." Although defendant's possession of the stolen vehicle was relevant to establish the identity of the murderer. "the fact that the car was stolen or that [defendant] brought the stolen vehicle to Georgia from another state had no bearing on any of the murder-related offenses." Because the joinder of the offenses was not authorized, trial counsel was therefore deficient for failing to move to sever the theft count. Regarding prejudice, there was overwhelming evidence of defendant's guilt on the murder-related charges precluding relief on those convictions. Prejudice was found on the theft conviction as the evidence was weak: the victim described a white male as the thief and defendant is a black woman; and the evidence that defendant knew or should have known the vehicle was stolen was not overwhelming. Further, the evidence of defendant's participation in a gruesome murder was very prejudicial to the jury's consideration of the theft offense.

***People v. Coulibaly*, 101 N.Y.S.3d 318 (N.Y. App. Div. 2019).** Defendant was denied the effective assistance of counsel with regard to his speedy trial motion due to counsel's miscalculation of the relevant time. Had counsel correctly calculated the time, defendant's speedy trial claim would have been meritorious. Because counsel's error denied defendant the relief of dismissal to which he was entitled, and constituted ineffective assistance, the court exercises its discretion to dismiss the indictment, rather than ordering further speedy trial proceedings with new counsel.

***Mathews v. State*, 2019 WL 7212603 (Tenn. Crim. App. Dec. 27, 2019).** In multiple homicide case where death penalty was sought but petitioner received LWOPP, post-conviction relief granted under *Cronic* standard due to trial counsel's acts and omissions related to petitioner's motion for new trial. The issues in the initial new trial motion "were skeletal in nature, without argument or citation to authority." The motion for new trial proceedings were not pursued for over seven years, during which time trial counsel engaged in unethical behaviors related specially to the petitioner's representation. First, trial counsel met with the trial judge, who was presiding over the new trial motion as well as the pending trial of the co-defendant, and informed him of their belief that the co-defendant was innocent based on their investigation into the case. Second, they allowed counsel for the co-defendant access to an unredacted timeline that included petitioner's account of the crime which demonstrated both his guilt and his cruelty towards the victims. Although trial counsel sought return of the timeline, this was unsuccessful and trial counsel obtained their own legal representation as a result. The trial judge was aware of this document at the time he ultimately ruled on petitioner's new trial motion. The document had been the subject of considerable litigation at the co-defendant's post-trial proceedings which preceded a ruling on petitioner's new trial motion and during which one of petitioner's trial attorneys was called to testify. Petitioner was not informed of any of this during the pendency of the new trial motion. Once the proceedings on the new trial motion were reinitiated, the amended motion again presented skeletal issues lacking argument and citation to legal authority. And a hearing on the motion was waived by trial counsel.

> Here, trial counsel entirely failed to subject the prosecution's case to meaningful adversarial testing in the post-trial phase, and there has been a denial of the Petitioner's Sixth Amendment rights that makes the adversary process itself presumptively unreliable. . . . . We cannot speculate about what issues might have been raised in the Petitioner's motion for new trial had he had the effective assistance of conflict-free counsel.
>
> Because the presumed prejudice standard of *Cronic* applies, we hold that the Petitioner is entitled to relief. However, the Petitioner's convictions remain intact. Trial counsels' deficiencies occurred post-trial. Upon remand, the Petitioner is permitted a delayed motion for a new trial and conflict-free counsel during the motion for new trial phase.

***State v. Hawkins*, 150 N.E.3d 519 (Ohio Ct. App. 2019).** Where appellant was convicted of several felony offenses stemming from a physical altercation with his girlfriend, trial counsel was ineffective in failing to move to dismiss the indictment on statute of limitations grounds. The incident occurred on March 20, 2011, with both parties offering very different descriptions of what happened. Although there was an immediate investigation by the police, no charges were filed against appellant for five years, several months short of the six-year statute of limitation for felony offenses. On the same day as appellant was indicted by a grand jury on eight felony counts, a summons was issued and sent to his residence with an arraignment date set for two weeks later, on December 16, 2016. According to a docket entry on December 18, 2016, appellant appeared not to have received the summons. There was no entry in the case docket for the next 15 months. On April 23, 2018, the entry stated that the December 16, 2016 arraignment was cancelled. An entry the following day stated appellant was arraigned. Apparently, he was arrested on an outstanding warrant sometime before April 24, 2018. Subsequently, appellant waived a jury trial and the trial court found him guilty of all eight counts. Although appellant asked defense counsel to file a motion to dismiss based on the delay in prosecution, defense counsel responded that the case law did not support such a motion. Thus, there appeared to be no tactical basis for not filing a dismissal motion. And such a motion may have been successful as the state bore the burden to show the prosecution was timely commenced. The appellate court's review of the record "shows there is a reasonable probability that the state may not be able to sustain its burden of showing that it exercised reasonable diligence in executing process of the indictment upon [appellant] and that he 'purposely avoided' prosecution." (The record indicated that the sole attempt to serve appellant with the summons was by sending it to his last known address, which was that of his ex-girlfriend. He had moved from that address after the incident to another location in the city and then moved to Georgia two years after that. Appellant asserted that he had been unaware of the criminal charges pending against him.) The remedy is a remand to the trial court to allow appellant the opportunity to file a motion to dismiss and present evidence for his claim of untimely prosecution.

***People v. Utley*, 142 N.E.3d 352 (Ill. Ct. App. 2019).** In case where appellant was charged with being an armed habitual criminal, with unlawful use of a weapon by a felon for his alleged possession of guns and ammunition, and with possession of a controlled substance with intent to deliver for his alleged possession of cocaine and heroin, defense counsel was ineffective in failing to file a motion

to sever the gun charges from the drug charges. In addition, trial counsel was also ineffective in withdrawing a motion to suppress appellant's statement to police. In order to prove the gun charges, the prosecution was required to introduce evidence of appellant's prior convictions for aggravated battery with a firearm and delivery of a controlled substance, neither of which would have been admissible to prove the possession of a controlled substance offense. Defense counsel's failure to move for severance constituted deficient performance as the appellate court could not discern any possible strategy for counsel's inaction. Given that appellant was facing a sentence of life imprisonment without the possibility of parole if he were to be convicted of the drug charge, "counsel was required to take some action to minimize the prejudice to [appellant] that would arise from the introduction of his prior convictions. Counsel here did not do so." Prejudice is also established. Appellant's defense was that the contraband found in the apartment his wife lived in, where he was arrested, did not belong to him and he only confessed because of threats made by the officers to charge his wife and send his children to child protective services. (He also claimed to have invoked his right to counsel which was disregarded.) "Because the jury heard that [appellant] had been previously convicted of aggravated battery with a firearm and unlawful delivery of a controlled substance, crimes that involved the same type items of contraband in this case, the jury may have inferred that the contraband at issue here also belonged to [appellant], rejecting the defense's version of events." And, notably, there were discrepancies in the prosecution's case against appellant "which may have been overlooked by the jury based on their knowledge of his prior criminal record." It was appellant's wife who directed the searching officers to the contraband found in two closets in her home. And only women's items were in the closet where the guns were located. Additionally, there were significant questions surrounding the circumstances of appellant's statement to police, discussed below. "Under the facts here, we find that [appellant] sufficiently showed prejudice arising from counsel's failure to move to sever the charges and that counsel's failure to do so was ineffective." Turning to motion to suppress, appellant offered agreement when defense counsel withdrew the motion and stated that he understood that he would not be able to refile it. The appellate court rejected respondent's argument that this exchange defeated an ineffective assistance of counsel claim. "Defendants are generally entitled to rely on the advice of counsel . . . and cannot be expected to object to all actions of counsel with which they disagree so as to preserve later potential claims of ineffective assistance." Based on the record in this case, the appellate court concluded that appellant rebutted the presumption that counsel's decision to withdraw the suppression motion was proper. No strategic basis could be found for the decision. And "[h]ad counsel not withdrawn the motion to suppress, there is a reasonable probability that it would have been granted." The appellate court found appellant's statement to be questionable because it contradicted the evidence and testimony provided by the officers at trial. In his statement, appellant claimed full responsibility for the contraband found in the closets and maintained that his wife knew nothing about the items. But testimony from the officers established that it was the wife who first directed them to the closet containing drugs and later to the closet containing the guns and ammunition. And while the officers denied threatening to charge appellant's wife, the testimony established that she was also brought to the police station, "which could cause a reasonable finder of fact to believe that the officers were either considering charging her or attempting to use her presence to induce [appellant] to confess."

> There was also a question regarding the timing of [appellant's] signing of the typewritten statement. Specifically, both pages of the statement were signed at 1:49 p.m. by [appellant] and both officers. During [one officer's] testimony, he testified

> that [appellant] would not have signed both pages at the same time but, rather, they would have gone through each page separately. It is unlikely that the officers could have gone through both pages of the statement and had all three individuals sign each page in less than one minute. To the contrary, the time notation on each page of the statement would support [appellant's] claim that he was forced to sign the statement without reviewing, or being able to make changes to, it.

There is a reasonable probability that the suppression motion would have been granted if not withdrawn and a reasonable probability of a different outcome at trial without admission of appellant's statement.

***Commonwealth v. Shaw*, 214 A.3d 283 (Pa. Super. Ct. 2019), *appeal granted*, 2020 WL 1433552 (Pa. March 24, 2020).** In case involving, inter alia, attempted murder, post-conviction counsel was ineffective in failing to preserve a claim that trial counsel was ineffective for failing to seek to amend the alibi notice prior to trial. Trial counsel had filed an initial alibi notice indicating that petitioner was with both April Wynn and Devon Crowley in Philadelphia at the time the offenses were committed in Darby. Trial counsel had previously been told by petitioner, however, that petitioner had been with Crowley during the first part of the day, and then went to visit with Wynn where he remained overnight. The prosecution used the notice of alibi to discredit Wynn's trial testimony. At the post-conviction hearing, trial counsel admitted that he had never contacted Crowley, believing that petitioner's mother would make her available to him. As for the impeachment of Wynn, trial counsel explained that he was unaware that the notice of alibi could be used for that purpose. Post-conviction counsel initially raised a claim that trial counsel was ineffective for failing to call Crowley as a witness and was granted a hearing on that claim. After speaking with Crowley, post-conviction counsel determined he was unable to proceed with that claim and was permitted to orally amend the petition to allege that trial counsel was ineffective in failing to file an amended notice of alibi. After the claim was denied and a notice of appeal was filed, post-conviction counsel omitted the issue from the statement of issues being appealed. New appellate counsel then raised post-conviction counsel's ineffectiveness for abandoning the trial ineffectiveness claim. The superior court finds that the post-conviction ineffectiveness issue was not waived or is otherwise unreviewable, reasoning that the ineffectiveness of post-conviction counsel did not occur prior to the post-conviction court losing jurisdiction and so the claim was raised as soon as it became available. Looking to the record, no reasonable basis can be discerned for abandoning the trial counsel ineffectiveness claim on appeal. And prejudice is shown by the loss of a potentially meritorious claim. As for the merits of the trial ineffectiveness claim, the superior court finds that it was not, as suggested by trial counsel, an open question whether a notice of alibi could be used to impeach a witness. And trial counsel's suggestion that the alibi notice was not amended because counsel hoped Crowley would show up did not establish a reasonable tactical decision. In any event, the failure to file an amendment to the notice which trial counsel knew was inaccurate was not reasonable. Regarding prejudice, although the victim identified petitioner as his assailant, there was some evidence challenging the credibility of the identification and no physical evidence at trial corroborated it. The record did not show that other witnesses were able to identify petitioner. The testimony of Wynn, if believed, could have established a reasonable doubt, thereby establishing prejudice.

**Capital Case*

2018: ***Twigg v. State*, 254 So.3d 464 (Fla. Ct. App. 2018).** In case involving, inter alia, a charge of battery on an emergency medical care provider, trial counsel was ineffective in failing to move for a judgment of acquittal on that count. The alleged battery involved appellant spitting on a nurse when he was involuntarily hospitalized in an inpatient psychiatric unit. Because the nurse was not a registered nurse, and was not working through the hospital's emergency department, the nurse did not qualify as an emergency care provider. If counsel had moved for a judgment of acquittal, appellant would have been entitled to a reduction of the charge from a felony to a misdemeanor battery.

***Woods v. State,* 242 So.3d 47 (Miss. 2018).** Trial counsel was ineffective in murder case for failing to file a post-trial motion on behalf of appellant. Appellant was convicted by a jury of second degree murder after being indicted on charges of first degree murder stemming from the shooting of his girlfriend's estranged husband, when the estranged husband showed up drunk at her house after having fired a shotgun into her house several weeks earlier and having been ordered to stay away from her and the home. The court sentenced appellant as a habitual offender to LWOP. On appeal, he argued, inter alia, that trial counsel was ineffective for failing to file any post-trial motion, thereby waiving his right to argue on appeal that the verdict was against the overwhelming weight of the evidence. When considering such a motion, the trial court acts as a thirteenth juror. Under its own precedent, the state supreme court determined that no strategic reason existed for trial counsel not to file a motion for new trial and argue that the verdict was contrary to the overwhelming weight of the evidence. In determining prejudice, the court described the standard for reviewing a lower court's denial of a new trial based on the weight of the evidence: the verdict will only be disturbed when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice. The state supreme court found that standard met here. Appellant's jury was instructed on justifiable homicide and the Castle Doctrine (a state doctrine curtailing the duty to retreat and creating a presumption that the defendant reasonably feared imminent death, great bodily harm, or the commission of a felony upon him from a person who has unlawfully and forcibly entered the immediate premises of a dwelling). There was a great deal of evidence that the estranged husband was warned a number of times not to come to his wife's house, that he came anyway, heavily intoxicated, took his leg brace off to fight appellant, threw his wife down at the edge of her yard, and pulled a gun before appellant shot him in the leg (leading to his death). If the trial court had been presented with a motion for new trial, it would have evaluated the evidence and the applicability of the Castle Doctrine, and based on the evidence at trial, there is a reasonable probability that the trial court "would have found that the overwhelming weight of the evidence showed that [appellant] was in a place where he had a right to be; [the estranged husband] was the immediate provoker and aggressor; and [appellant] was not engaged in unlawful activity. As a result [he] had no duty to retreat." 242 So.3d at 61. Reversed and remanded for a new trial.

***State v. Gonzales-Bejarano,* 427 P.3d 251 (Utah Ct. App. 2018).** In case involving multiple charges, defense counsel was ineffective in failing to move for a directed verdict as to two of the charges. Appellant was convicted by a jury of possession of a stolen motor vehicle, possession of a controlled substance with intent to distribute, a count of forgery, two counts of unlawful possession of a financial transaction card, and unlawful possession of another's identification documents. The conviction stemmed from an incident during which appellant and his fiancée were stopped in a stolen car, appellant showed false identification documents to the officer, additional identification

documents not belonging to appellant or his fiancée were found in the car, and later a package of nearly one pound of methamphetamine was also found in the car. The Court of Appeals of Utah found that defense counsel was ineffective under *Strickland* for failing to move for a directed verdict as to the two charges of unlawful possession of a financial transaction card. Under the portion of the unlawful possession statute that the state requested the trial court instruct the jury on, the state was required to prove that appellant intended to use fraudulently the financial transaction cards belonging to another in his possession. Appellant argued that the state failed to present any evidence that he intended to use the card fraudulently, and that therefore his counsel should have moved for a directed verdict as to these two charges. Although the state argued on appeal that it only had to prove that appellant acquired the card without the consent of the card holder or that he received it with the intent to use it in violation of another statute – the Fraudulent Use Statute – the state did not seek to have the jury instructed on those portions of the statute. The appellate court could find no direct or circumstantial evidence that appellant intended to use the cards fraudulently. The appellate court vacated the two unlawful possession of a financial transaction card convictions and affirmed the rest.

***State v. Asadi-Ousley,* 120 N.E.3d 520 (Ohio Ct. App. 2018).** In case involving convictions of two counts of rape, felonious assault, and two counts of kidnapping, based on the sexual assault of a victim more than seven years prior to the trial, appellate counsel was ineffective in failing to argue that trial counsel was deficient in not moving to dismiss the charge of felonious assault based on the expiration of the six-year statute of limitations. After the convictions were affirmed on appeal, appellant had applied to the Court of Appeals to reopen the direct appeal in order to raise the argument that his appellate counsel had been ineffective. Although the state conceded the error, it argued that appellant's IAC claim should be rejected on the basis of waiver. The Court of Appeals granted the application and remanded for the trial court to reverse the felonious assault conviction. The court held that this is not a case where appellant pleaded guilty to the offense where the SOL had run (such a plea constitutes a waiver), or where appellant absconded and purposely avoided prosecution. The fact that appellant sought to avoid identification by coming upon the victim from behind did not constitute behavior tolling the SOL. Appellant was prejudiced as a result of his conviction of this crime even though his sentence was ordered to run concurrently with his sentences on the other charges; "a defendant is prejudiced by having more convictions than are authorized by law." (internal quotation omitted). Appellant was denied the effective assistance of appellant counsel by counsel's failure to argue ineffective assistance of trial counsel on this issue. Had trial counsel moved to dismiss the felonious assault charge, the charge would have been dismissed; had appellate counsel raised this issue on appeal, there is a reasonable probability the outcome of the appeal would have been different as to the felonious assault conviction.

2017: ***Bryant v. State*, 800 S.E.2d 537 (Ga. 2017).** In a murder case, although defense counsel did make a motion to suppress evidence seized from defendant's home, counsel performed deficiently in failing to expressly challenge the search warrant for lack of particularity. The box on the warrant for listing the items to be seized contained only a detailed description of defendant's house and the vehicles on the property. Although the affiant detective's testimony by cell phone video to the magistrate at the time the affidavit was presented did provide additional particularity as to what items were expected to be seized, this was not incorporated by reference into the warrant itself. Nor was there any evidence that the video or a transcript of the testimony had been provided to defendant at

his home. Regarding prejudice, testimony that defendant was the shooter of the victim came from three friends, D.T., D.B., and D.J., who were present with defendant at the time of the shooting. D.T. had an unrelated pending armed robbery charge at the time of trial. A detective testified that during his interview with D.T., D.T. provided conflicting stories stating that he was not present at the time of the shooting, that he did not know who committed the shooting, and at another point claiming that friend D.B. was the shooter before naming defendant as the shooter. At trial, D.T. denied implicating D.B. The detective also testified that he recalled hearing that the group of friends were shooting the gun the day before the murder, and specifically that defendant's brother, who was present at the time of the shooting, had shot the gun. D.B. denied making any such statement to police and D.J. claimed not to have seen the gun prior to the shooting. Although the murder weapon itself was never found, officers recovered .40 caliber shell chasings and a .40 caliber bullet at the scene. The only physical evidence implicating defendant was an empty box of .40 caliber bullets seized during the search of his home. This empty box was highlighted during the prosecutor's argument to the jury. The court concludes: "Here, the credibility of the three eyewitnesses was substantially challenged and there was evidence presented that D.B. was the shooter. The only physical evidence connecting [defendant] to the crime was the empty ammunition box, and the State relied heavily on this piece of unconstitutionally obtained evidence in its argument and presentation of its case to the jury. Under these circumstances, we hold that [defendant] has shown a reasonable probability that the outcome of the trial would have been different had the empty ammunition box been excluded."

***People v. Peck*, 79 N.E.3d 232 (Ill. Ct. App. 2017).** In case involving multiple drug-related convictions, trial counsel was ineffective in failing to file a motion to suppress defendant's incriminating statements following his request for legal representation. It was undisputed that defendant was in custody and that he invoked his right to counsel after being read his *Miranda* rights. He later waived his rights and made admissions. Trial counsel explained in post-conviction proceedings that she did not file the suppression motion requested by defendant because in her viewing of the interrogation she concluded that defendant's rights were not violated because defendant reinitiated the conversation with the interrogating officer after having requested an attorney. This conclusion was erroneous given that defendant only reinitiated the interrogation after the police officer informed defendant that defendant's girlfriend was going to be arrested. Such a statement was reasonably likely to elicit an incriminating response, constituting an improper continuation of the interrogation. Thus counsel's failure to file the motion "was not the result of a tactical decision, but of a fundamental misjudgment." As for prejudice, "[t]he record demonstrate[d] that defendant's confession had an immense impact on the outcome of his case, and its admission negatively impacted defendant's ability to provide alternative theories and request jury instructions on lesser-included offenses. Additionally, defendant's confession was the State's strongest piece of evidence to establish his intent to deliver. As mentioned by the State in its closing argument, the jury did not have to speculate as to defendant's intent, as he said exactly what he intended to do with the drugs."

***Khalil-Alsalaami v. State*, 399 P.3d 264 (Kan. Ct. App. 2017), *aff'd*, ___ P.3d ___ (Kan. Sept. 11, 2020).** In case involving two counts of aggravated criminal sodomy on an underage victim, trial counsel was ineffective in failing to request an interpreter at trial and appellate counsel was

ineffective for not raising that failure on appeal. Trial counsel was also ineffective in failing to seek suppression of defendant's confession and for failing to lodge several meritorious objections. Defendant, whose primary language was Arabic, was in the United States as a permanent resident after serving as an interpreter for the United States military forces in Iraq. He was accused of sexually assaulting the victim at a party. He initially admitted to committing some of the sexual acts at issue but claimed it was consensual and that he was unaware the victim was underage. At trial, he denied having any sexual contact with the victim and stated that he had given a contrary account to the police because the officer had repeatedly suggested that sex had occurred. Trial counsel's defense strategy was: (1) arguing that DNA matched to defendant that was found on the victim's shorts had been transferred from the bed where defendant had sex with another woman earlier; and (2) asserting that defendant was tricked by police into giving an incriminating statement. Although defendant's initial counsel had requested an interpreter for defendant and one was employed at the preliminary hearing, trial counsel decided that use of an interpreter would make it appear to the jury that defendant was trying to hide behind a non-existent language barrier, especially given defendant's own history as an interpreter. Thus, defense counsel advised defendant not to use an interpreter. Such advice was made without counsel: (1) testing defendant's ability to understand English; (2) investigating the complexity of the interpreting defendant was asked to do for the U.S. military; or (3) considering how the use of voir dire and/or instructions could ameliorate any possible prejudice from use of an interpreter. In addition, trial counsel failed to inform defendant of his statutory right to an interpreter and the waiver was not accomplished in front of the trial court. Trial counsel had been aware that defendant would not be able to understand at least portions of the trial, such as the DNA testimony and the prosecutor's closing argument. At trial, defendant spoke in broken English that was difficult to understand and he failed to comprehend the meaning of fairly simple words. According to professionals who tested defendant post-trial, defendant's understanding of English was extremely limited and he would be very easy to trick due to the language problem. Evidence was also presented in post-conviction proceedings showing that approximately 1 year before the charged crime, defendant took an interpreter with him to get a Kansas driver's license and had to use the picture test rather than the written test. In addition, the interpreter for defendant in the preliminary hearing rated defendant's English skills on a scale of 0 to 10 as .01. He further testified that defendant's English was woefully inadequate to go through a court proceeding without an interpreter. The U.S. Army Captain that supervised defendant in Iraq indicated that their communication in English was at an elementary level and analogized defendant's ability as a little better than his 5-year-old daughter, who was entering kindergarten. Although defendant lived in the United States for 14 months prior to his arrest, he lived in a household with other Arabic speakers. When he interpreted for the U.S. Army in Iraq, again he continued to live with Arabic speakers. It was further noted by the appellate court that not only was the criminal trial complex, the stakes were extremely high – defendant was facing a possible sentence of 25 years to life, and, as an asylum seeker, a conviction would likely result in deportation to Iraq where his life could be at risk. Although the post-conviction court found, inter alia, that substantial competent evidence supported the finding that defendant adequately understood English to proceed to trial without an interpreter, the appellate court disagreed, explaining:

> Even if one assumes that [trial counsel] were in the best position to evaluate [defendant's] language abilities at the time of trial, their testimony does not support such a conclusion. They reached what they believed to be a reasonable trial strategy,

> without fully investigating [defendant's] ability to understand the testimony and legal arguments at his own trial. Not only did they not investigate, but they ignored clear indications that [defendant] could not effectively understand what was going on during the trial.

On this record, trial counsel performed deficiently in not requesting an interpreter at trial. And, given the egregious nature of the error here, prejudice is presumed. In addition, give the appellate court's conclusion that the evidence does not support a finding defendant was able to understand the proceedings in the absence of an interpreter, appellate counsel was deficient in not raising a claim on direct appeal that the trial court erred in failing to appoint an interpreter for defendant. Because there is a reasonable probability that the appellate court would have found that the district court abused its discretion when it failed to appoint an interpreter, prejudice is established. Trial counsel was also found to have performed deficiently in failing to seek suppression of defendant's confession and stipulating to the voluntariness of defendant's confession after trial counsel entered the case in the midst of a *Jackson v. Denno* hearing that the State had initiated.

> The police minimization technique in conjunction with [defendant's] inability to speak and understand English weigh in favor of finding his confession was involuntary. In addition, [the interrogating officer] testified that in Iraq the police use force to coerce confessions from individuals. It is not unreasonable to conclude that [defendant] may have been pressured to confess because of his fear that force might be used. Finally, [defendant's] lack of understanding of the words used in the oral explanation of his *Miranda* rights coupled with his inability to read what was placed in front of him would also weigh in his favor in the voluntariness calculus. It is clear that [defendant] appeared to be confessing to criminal acts. That is not the issue. The issue for the district court to decide would have been whether his confession was freely and voluntarily given with an understanding of his rights under *Miranda.* We do not believe that was a foregone conclusion.

Further, by stipulating to the voluntariness of the confession and allowing admission of the stipulation into evidence, trial counsel prejudiced his own defense strategy of arguing that defendant was tricked into making the confession. Trial counsel was also deficient in failing to object when the prosecutor misstated the DNA evidence during argument in a manner that torpedoed his assertion his argument about how defendant's DNA came to be on the victim's shorts. Further, appellate counsel was ineffective in failing to raise the issue of prosecutorial misconduct on direct appeal. Finally, the appellate court concluded that defendant was entitled to relief on a claim that the cumulative impact of trial counsel's errors deprived him of a fair trial.

> [Trial counsel] committed six errors during his representation of [defendant]: (1) he failed to request an interpreter for [defendant] at trial; (2) he failed to file a motion to suppress [defendant's] confession or mount a defense at the *Jackson v. Denno* hearing; (3) he stipulated to the voluntariness of [defendant's] confession; (4) he failed to object to improper questioning of [the examining nurse]; (5) he failed to object to questions meant to highlight [defendant's] negative character traits; and (6) he failed to object when the prosecutor misstated evidence during closing arguments.

> We find that the number of errors is substantial, and even if the State could successfully argue that the impact that any one of them had on the trial was insignificant, we cannot ignore the fact that the accumulation of these errors impacted [defendant's] ability to receive a fair trial.

***People v. Hardimon*, 77 N.E.3d 1184 (Ill. Ct. App. 2017).** In murder case, trial counsel was ineffective in failing to move to further redact a videotape recording of the police interview of defendant that was played for the jury. The original recording was more than four hours in length. The prosecution had redacted approximately three hours of the videotape, eliminating parts where defendant was not actively interviewed, where defendant was asked about prior *Miranda* warnings, and where the police referenced information they had received from defendant's companion on the night of the offense. Trial counsel failed to move for the redaction of irrelevant and prejudicial portions remaining in the redacted tape. Defendant during the interview acknowledged being present at the club where the shooting occurred but denied involvement in the shooting. Approximately 20 minutes of the redacted video contained defendant's relevant admissions about his location at the time of the shooting. The remainder of the video, however, consisted of prejudicial statements by the interrogating officers that "(1) described, in detail, a scenario where the defendant shot the victim because he was afraid; (2) attacked the defendant's character and credibility, which included the State's potential use of the words 'liar,' 'cold-blooded killer,' and 'execute,' at trial; (3) served to bolster the testimonies of the officers and other prosecution witnesses; (4) described the contents of the surveillance video, while inaccurately vouching for the clarity of the video; (5) claimed the case would be easily prosecuted; and (6) indicated the defendant hid in his girlfriend's basement when the police came to arrest him, which indicated knowledge of guilt." These comments "served only to impermissibly bolster the State's case and inflame the passions of the jury" while having no probative value. Prejudice from trial counsel's deficient performance is "supported by the totality of the evidence, which failed to directly connect the defendant to the crime. No witness identified the defendant as the shooter, the defendant never admitted to committing the charged offenses, and the physical evidence did not directly connect the defendant to the offense."

***State v. Taylor*, ___ So.3d ___, 2017 WL 1282124 (La. Ct. App. April 6, 2017).** In rape case, trial counsel was ineffective in failing to argue that the retroactive application of a statute to revive defendant's already prescribed forcible rape charge violated the Ex Post Facto Clauses of the state and federal constitutions. The crime occurred in 1994. At that time, there was a six-year statute of limitations for rape. In 2003, Louisiana enacted a statute extending the time limitation for cases where the identity of the offender was established after the expiration of the six-year time limitation through the use of a DNA profile. The statute was expressly retroactive. It wasn't until 2008 that defendant's DNA was matched with DNA taken from the victim. The trial occurred in 2011. In 2015, the Louisiana Supreme Court ruled that application of the 2003 statute to cases which had prescribed before its enactment violated ex post facto principles. Even though defendant's trial preceded that state supreme court ruling, trial counsel was nevertheless ineffective in failing to raise the meritorious ex post facto challenge in light of *Stogner v. California*, 539 U.S. 607 (2003), and then-existing state law that subscribed to the rule that the state may extend the time limits for

instituting prosecution and apply them against a particular defendant, but only if the prior limitation period has not expired and abated the criminal consequences of that individual's conduct.

***Wurdemann v. State*, 390 P.3d 439 (Idaho 2017)**. In case involving numerous felony convictions related to an attack on the victim, trial counsel was ineffective in failing to properly challenge eyewitness identifications. The video lineup shown to the victim was unduly suggestive in that defendant was the only one of the six participants who met the victim's description of her attacker. An expert in eyewitness identification testified at the post-conviction hearing that this was among the worst lineups he had ever seen. Under the *Manson-Biggers* balancing test, it was found "due to the fact that it was dark and [the victim] was under the influence of marijuana when the attack occurred, combined with the fact that it had been close to two years between the attack and her identification of [defendant] and the fact that [the victim] had identified various other individuals as her attacker during that two-year interval, we cannot say that the reliability of the identification of [defendant] is sufficient to overcome the blatant suggestiveness of the lineup." Had trial counsel challenged the identification, the motion to suppress should have been granted. Trial counsel's failure to move to suppress the suggestive identification constituted deficient performance because it was based on inadequate preparation and ignorance of the law rather than strategy. The lower court's finding of prejudice is summarily affirmed as the State did not argue it was erroneous.

2016: ***Monroe v. State*, 191 So. 3d 395 (Fla. 2016)**. Counsel ineffective in sexual battery on a child under 12 years of age by a defendant 18 years of age or older and lewd and lascivious molestation, with the same age requirements, in failing to move for judgment of acquittal due to the state's failure to prove that the defendant was 18 years old or older at the time of the offenses that, according to the alleged victim, happened on only one occasion. Counsel's conduct was "patently unreasonable," especially in light of counsel's vigorous arguments concerning the defendant's age in closing arguments. Prejudice also established as the penalty for sexual battery for a defendant 18 years or older was a mandatory life sentence. If the defendant was under 18, the judge had far greater discretion in sentencing. Here, the trial court had already indicated "obvious hesitation" in imposing a life sentence.

***People v. Booth*, 209 Cal.Rptr.3d 1 (Cal. Ct. App. 2016).** In a case involving an apparently gang related deadly shooting in 1992 that was not prosecuted until 2011, defense counsel was ineffective in failing to move to dismiss the case based on precharging delay where an eyewitness who had exonerated defendant in 1992 could not be located in 2011. Although defendant wanted the trial to start sooner rather than later because of a fear that the co-defendants might turn state's evidence in hopes of receiving a deal, this did not justify forgoing a motion to dismiss as the concern was merely theoretical and it was clear that a motion to dismiss would not have delayed the trial in any material sense. Further, the record did not support respondent's argument that trial counsel did not believe delay was worthwhile because the missing witness had credibility issues. Rather, the record established that reasonably competent counsel would have filed a motion to dismiss based on the precharging delay. As to prejudice, the appellate court declined to defer to the lower court's finding that the missing eyewitness lacked credibility. Because the lower court's determination was based on information in the record that the appellate court had equal access to, the appellate court was in an identical position to evaluate credibility. In addition, the lower court's credibility determination

was premised in part on an important factual error concerning the missing eyewitness's identification of one of the participants in the shooting incident. The appellate court's own review of the record led it to conclude that the credibility issues were not that significant and that there were other circumstances supporting the truthfulness of the eyewitness's account of the shooting. Thus, "despite all of the possible impeachment [the eyewitness] might have been subjected to had he been available to testify, he still had the potential to be a blockbuster witness for the defense. While it is impossible to know for sure how the jury would have perceived [the eyewitness's] testimony, it is reasonable to conclude [defendant] was substantially and materially prejudiced by [the eyewitness's] absence at his trial." Turning to the timing of the charges against defendant, the alleged lack of investigative resources in 1992 provided a strong justification for the delay. In 2009 there was an influx of grant money to fund cold case homicide investigations that led to the charges in this case. And there was no evidence of police negligence or wrongdoing in the original investigation. Although the delay was justified, the weakness of the case against defendant was considered in determining whether there was a probability of an unfair trial because of the delay. Looking to the record, the court found: "Balancing the prejudice from [the eyewitness's] absence against the state's justification for the precharging delay, and considering the weakness of the prosecution's case against [defendant], we conclude it is at least reasonably probable the trial court would have found the delay violated [defendant's] right to a fair trial" had defense counsel filed the motion to dismiss. As to the proper remedy, it is determined that the case can be retried but with the jury hearing the otherwise hearsay statements from the missing eyewitness.

***People v. Rogers*, 200 Cal. Rptr. 3d 355 (Cal. Ct. App. 2016)**. Counsel ineffective in case with multiple charges arising out of two hours of false imprisonment and assaults by the defendant on his girlfriend for failing to object to the addition of charges and enhancements after the defendant waived preliminary hearing. The defendant was initially charged with two counts and two enhancements. The defendant waived a preliminary hearing. Four days before trial, a different prosecutor that the one that agreed to the waiver of the preliminary hearing, without objection, added two additional counts and an enhancement. The state conceded, based on established California law that counsel's conduct was deficient in failing to object to the addition of the three additional counts because an information cannot be amended after the defendant has waived his right to a preliminary hearing. The court also found that counsel's conduct was deficient in failing to object to the addition of an enhancement after the defendant waived his right to a preliminary hearing. "While there is apparently no published case prohibiting an amendment to add a conduct enhancement to an information after a preliminary hearing has been waived," based on previously decided cases, "the writing was clearly on the wall. At the very least, under prevailing professional norms, counsel should have objected to preserve the issue." Prejudice established. The remedy was to strike the counts and the enhancement added after the waiver of the preliminary hearing. Remanded for new sentencing.

***People v. Davydov*, 144 A.D.3d 1170 (N.Y. App. Div. 2016).** In case where defendant was convicted of aggravated assault in the second degree, the conviction is vacated based on trial counsel's ineffectiveness in failing to seek severance from a co-defendant, defendant's uncle, once it became clear they were pursuing antagonistic defenses and also for failing to request a missing witness charge for an eyewitness who was not called to testify. The theory set forth by the uncle's attorney was that

defendant had called his uncle to the crime scene to mediate a dispute between defendant and the victim. The uncle's attorney theorized that the dispute involved defendant's desire to have the victim participate in a fraudulent scheme. According to the uncle's attorney, when the uncle arrived at the scene he observed defendant in an altercation and intervened. The defendant's theory, in contrast, was essentially that the victim was incredible in his account of events, that defendant was actually a friend of the victim and was merely at the scene, and that defendant did not act in concert with the co-defendants in assaulting the victim. Given that the two defenses were irreconcilably in conflict, defense counsel performed deficiently in failing to request a severance. Defense counsel also performed deficiently in failing to request a missing witness charge instructing the jury that an unfavorable inference could be drawn from the failure of the prosecution to call a friend and business associate of the victim as a witness. This friend was nearby when the assault occurred and had previously stated that the victim threw the first punch during the initial confrontation. No legitimate strategic reason could be found to support defense counsel's failure to request the charge.

***State v. Batchford*, 79 N.E.3d 97 (Ohio Ct. App. 2016).** In drug possession/possession of criminal tools case, trial counsel was ineffective in failing to move to suppress statements made by defendant. In light of testimony by the first officer encountering defendant that defendant had invoked his right to counsel during law enforcement's investigation, there were grounds to seek to suppress statements made by defendant later to another officer. Defendant was prejudiced as a result of trial counsel's error, as there was a reasonable probability that had counsel sought suppression of defendant's statements the result of the trial would have been different. The state heavily relied on defendant's statements in proving that he "knowingly possessed" the marijuana. And notably the jury appeared to rely on defendant's statements in finding defendant guilty, as the jury specifically requested it be permitted to rehear the audio recording of defendant's interview during its deliberations.

***Kennebrew v. State*, 792 S.E.2d 695 (Ga. 2016).** In robbery-murder case, trial counsel performed deficiently in failing to seek suppression of evidence found in backpacks seized by officers following defendant's arrest. Defendant had been arrested pursuant to a warrant in his girlfriend's college dorm room. The police seized the backpacks after defendant had been handcuffed and removed from the room. It was not until six days later that the backpacks were opened and shot gun shells and bullets of the type taken from the victim's home were discovered, along with a knife that might have been involved in the killing. These items were severely damaging to defendant's trial defense that he went with the co-defendants to the victim's home for the purpose of selling the victim a PlayStation and then fled the scene after co-defendant Hall unexpectantly went crazy and viciously beat and stabbed the victim to death. The prosecutor emphasized the items in arguing that defendant was not merely present in the victim's home but was an active participant in the robbery-murder. At the hearing on defendant's motion for new trial, defense counsel explained that he had not moved to suppress the backpack evidence because he believed it had been lawfully taken during a search incident to arrest. This exception to the search warrant requirement, however, was clearly inapplicable to the facts of this case. Defense counsel's misunderstanding of the law constituted deficient performance. Also deficient was defendant counsel's failure to object when the prosecutor commented on defendant's pre-arrest silence/failure to come forward after the killing, a clear violation of the state law *Mallory* rule. Although defense counsel guessed at the post-trial hearing that he had decided to forgo an objection in order to avoid bringing more attention to the issue, this did not justify the omission:

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"The State's discussion of [defendant's] failure to come forward to the police was not . . . just a passing or equivocal remark that the jury might have overlooked. It was a specific, extended argument aimed directly at demonstrating [defendant's] guilt. Given [defendant's] defense theory, the importance of the State's silence-equals-guilt argument to its case against him, and the obviousness of the *Mallory* violation, [defense counsel's] failure to object was patently unreasonable and thus deficient performance under *Strickland*." Because the case against defendant was not overwhelming and he had a plausible explanation for his presence at the crime scene, prejudice is found given the prosecution's reliance on the backpack-related evidence, his improper argument, and notes from the jury seeking to compare the bullets found in the backpack with those found in the possession of co-defendant Hall.

***People v. Tayborn*, 49 N.E.3d 983 (Ill.Ct. App. 2016)**. Counsel ineffective in drug case for failing to file a motion to suppress the defendant's custodial statements made in response to police questioning without having received *Miranda* warnings. The defendant was a passenger in a car stopped because it did not have a registration plate. After the driver was removed from the car and arrested, the defendant was removed from the car while the car was searched incident to the arrest. Police officer testimony was contradictory about whether the defendant was handcuffed then. A search of the car revealed cocaine in the driver's purse. An officer asked the defendant about the cocaine and the defendant admitted that he obtained it in Chicago and was taking it to Iowa. Counsel's conduct was deficient as the trial court found that the defendant was in custody at the time the cocaine was discovered. Even if he had not been then, he certainly would have been when the cocaine was discovered. Prejudice also established because a motion to suppress would have been successful. Without the defendant's statement, there is a reasonable probability that the outcome of the trial would have been different.

***State v. Craft*, 397 P.3d 889 (Utah Ct. App. 2017).** In aggravated robbery and aggravated burglary case, trial counsel was ineffective in failing to move for a mistrial following a statement by a detective that co-defendants had placed defendant at the scene of the crime. Defendant and two other men were charged with a robbery-burglary. Defendant's trial was severed from his co-defendants so that incriminating admissions by them could not be used against defendant. The key evidence against defendant was an identification of him made by one of the two victims. The reliability of the identification was challenged by the defense. The detective who had prepared a photo lineup for the victim to view was asked by the State how he had selected the photos to include with defendant's photo. The following exchange occurred:

> Q. Okay. And the defense counsel mentioned hair, goatee and white skin as the characteristics discussed with [the witness] during his description before the lineup, correct?
>
> A. Yes.
>
> Q. Aside from those, are there any other factors other than just the similarity to the defendant that guided you in selecting the lineup photographs?

A. *As far as the other two defendants saying he was there.*

Q. No. Let me — the — when you were picking the photographs out —

A. Oh.

Defense counsel did not object. Given the significance of the statement to the defense, the appellate court concludes it was likely that a mistrial would have been granted had defense counsel asked for one. There was no conceivable strategic basis for counsel's failure to make the request. Defendant established prejudice given that the witness's description of his assailant was not very detailed, the witness did not have a direct view of his assailant's face, the room was dim, he had recently been assaulted, and he had blood in his eyes. In addition, the defense eyewitness identification expert highlighted the various limitations of eyewitness testimony under the circumstances and also described deficiencies in the photo lineup that could have influenced the jury's view of the reliability of the eyewitness identification. The other evidence in the case was a jail phone call made by defendant to a friend. Although it undercut defendant's defense, it did not unequivocally place defendant at the scene of the crime or include any explicit admissions. His statement that he expected to "do a nickel" could simply have indicated that he feared a conviction for the crime with which he was being charged. His statement that he told his "homeboys" to "leave all the electronics" suggests that he was aware of their intention to commit a crime but does not establish that he was at the house when the crime was committed. Notably, defendant was not found in possession of any stolen property, and neither his DNA nor his fingerprints were found on any of the stolen items. The vehicle where evidence was found belonged to one of the other co-defendants, and there was no evidence connecting defendant to that vehicle.

***State v. Ortiz*, 383 P.3d 586 (Wash. Ct. App. 2016).** In case involving, inter alia, charges of manufacturing controlled substances, trial counsel was ineffective in failing to challenge a "knock and announce" search that resulted in the discovery of 41 marijuana plants and other evidence of a growing operation. Officers obtained a warrant to search the home of defendant's mother where defendant resided. The officers executed the search warrant at approximately 6:47 a.m. in the morning. An officer knocked on the door three times, announced "police search warrant," waited one to two seconds, and repeated that process twice more. Hearing nothing, the officers breached the door and entered. Once inside, they encountered persons appearing to have just woken up and a juvenile who was still asleep. On the facts of this case, the officers did not wait a reasonable time before forcing entry into the house. It was foreseeable that the occupants of the house would be sleeping and giving them only six to nine seconds to respond violated the knock and announce rule. Trial counsel could not have a tactical reason for not challenging the search on that basis. Prejudice is established because the prosecution would have had insufficient evidence to bring the charges without the fruits of the illegal search.

***State v. Bell*, 380 P.3d 11 (Utah Ct. App. 2016).** In case where defendant was charged with two counts of aggravated robbery, trial counsel was ineffective in failing to move for a merger of the two counts. Defendant had entered the unlocked car of one of the victims. He was unable to start the car when the owner of the car and her two friends confronted defendant. Defendant then pulled out a

knife. Observing the car owner's purse on the floorboard, defendant grabbed it and attempted to flee the scene. Defendant was charged with aggravated robbery as to the car and separately as to the purse. But because the robbery was completed when defendant attempted to take the car and its contents from the victim's immediate presence, the two counts should have merged. On this record, there was no conceivable tactical basis for trial counsel not to have moved for merger.

***People v. Kindell*, 23 N.Y.S.3d 65 (N.Y. App. Div. 2016)**. Counsel ineffective in burglary case for failing to move to reopen the suppression hearing after a trial witness contradicted the suppression hearing testimony of the officer's relied on by the court in denying the suppression motion. Specifically, the court refused to suppress a tool bag and the burglar's tools it contained based on the testimony of two officers that the bag was open at the defendant's feet and the tools were in plain view when they arrived. During trial, however, the building superintendent who chased the defendant, detained him, and flagged down the police, testified that the bag was in the defendant's hand and closed when the police arrived. Counsel's conduct was deficient and prejudicial.

2015: ***Ayotte v. State*, 129 A.3d 285 (Me. 2015)**. Counsel ineffective in possession of stolen goods case for failing to move to dismiss the indictment on double jeopardy grounds. The defendant plead guilty in Cumberland County to theft by unauthorized taking or transfer as a result of the theft of items from an apartment in Cumberland County on November 29, 2012. A month later, he was indicted in York County for theft by receiving stolen property "for allegedly receiving, retaining, or disposing of some of the same stolen property – silverware – to pawnshops" in York County. Counsel in York County considered the possibility of double jeopardy but concluded that there was no double jeopardy violation. Counsel thus negotiated a plea agreement for a suspended jail sentence and consecutive probation to the Cumberland County sentence. Counsel's conduct was deficient as double jeopardy, under the test of *Blockburger v. United States*, 284 U.S. 299 (1932), clearly barred the York County prosecution. The Cumberland County theft was a continuing theft, given that the defendant continually exercised authorized control over the stolen silverware until he pawned it in York County. While counsel researched the issue, his conducted was not insulated as "strategy" where he reached "an erroneous conclusion about the state of the law and Ayotte's rights." Prejudice established.

***People v. Harris*, 43 N.E.3d 750 (N.Y. Ct. App. 2015)**. Counsel ineffective in burglary in the second degree and petit larceny case for failing to move for dismissal of the larceny charge, which was brought after the passage of the applicable statute of limitations had expired. The defendant entered a home while the alleged victim was asleep. She awoke after the defendant ejaculated on her and he ran taking with him a pair of her earrings. Seven years later, based on the defendant's DNA in the semen, he was charged with burglary and petit larceny. The state argued burglary because of the intent to steal in the home. Defense counsel argued that there was no burglary because the intent was only to masturbate over the victim, which was not at the time a crime under state law. Counsel's conduct in failing to object to the larceny charge, which had a two-year statute of limitations, was deficient and "there could have been no strategic purpose" for failing to object, particularly in light of counsel's arguments in defense of the burglary charge. Prejudice established, such that the larceny charge was dismissed.

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***Haney v. United States*, 120 A.3d 608 (D.C. Ct. App. 2015)**. Counsel ineffective in assault with intent to kill case for failing to move to suppress a videotaped recording of the defendant's statement to police. The trial court found deficient conduct but no prejudice. The recording included a detective making accusations, which the defendant denied "often with profanity." After about one and a half hours, the defendant indicated that he did not want to answer any more questions, but the interrogation continued. During this portion, the defendant made statements that were admitted at trial. In these statements, the defendant referred to the shooting victim as "a bi**h," said that she was afraid of him, and said that he believed that she had "snitched" on his friend. The appellate court agreed that counsel's conduct was deficient but reviewed only the question of prejudice. The trial court's finding of no prejudice relied on the court's own view of the credibility of witnesses and the weight of the evidence based on an initial mistrial, where the jury could not reach a unanimous verdict, and the retrial. In determining whether there is prejudice under Strickland, however, the focus is on whether there is a reasonable probability of a different result with "reasonable jurors, acting as factfinders." Under this analysis, prejudice was clear. The prosecutor opened her closing argument and closed her rebuttal argument emphasizing the defendant's statement and his alleged motive for the shooting. Although the defendant was acquitted on the obstruction charge that related to the victim's implication of the defendant's friend in a homicide, the appellate court refused to speculate, as the trial court did, that the defendant's statements played no role in the conviction for assault with intent to kill when the victim had significant credibility issues and she was the only witness that identified the defendant as the shooter.

***State v. Halverson*, 857 N.W.2d 632 (Iowa 2015)**. Counsel ineffective in possession of marijuana at a residential facility case for failing to move to dismiss due to the absence of evidence that the residential facility was under management of the Department of Corrections, as was required for the conviction.

***State v. Millett*, 356 P.3d 700 (Utah Ct. App. 2015)**. Counsel ineffective in forcible sodomy and attempted rape case for failing to move to suppress the defendant's statements to police on the grounds that the *Miranda* warnings were inadequate. The defendant who was 18 was charged with crimes against a 14 year old girl. The two had engaged in consensual sexual encounters involving touching each other's genitalia. On one occasion she performed oral sex on him and they attempted vaginal sex before she said it hurt and he stopped. After her mother called the police and he was arrested, he was interviewed. Prior to the interview, he was advised of his right to silence and that anything he said could and would be used against him in a court of law, but he was not advised that he had the right to an attorney and, if he could not afford one, an attorney would be appointed for him. Counsel moved to suppress the resulting statement on the basis of the rules of evidence but did not challenge the constitutionality of admission of the statement. Counsel's conduct was deficient as this was clearly a custodial interrogation conducted after inadequate *Miranda* warnings. While the state argued that counsel had a strategy to use the statement to argue consent rather than having the defendant testify, the record did not support this because counsel did move to exclude the statement, just on the wrong basis. Counsel's subsequent arguments of consent based on the statement were simply a "reaction" to the admission rather than "a deliberate trial strategy." Prejudice established. In order to convict, the state was required to prove that the defendant had enticed or coerced the

victim to submit or participate. The state's theory was that the defendant coerced her by threatening to end the relationship if she did not perform oral sex and have sex with him. While the alleged victim had made statements of this nature prior to trial, she did not testify on direct that she was coerced. Instead, she said they were never really "together" and that it was her decision. During cross and redirect examination, she made conflicting statements. "In light of the equivocal state of the girl's testimony," admission of the defendant's statements and the detective's testimony about the statements was prejudicial as the detective's testimony was the "only unequivocal" evidence that the defendant threatened to end the relationship with the girl in order to entice or coerce her to engage in oral and vaginal sex. If the statements had not been admitted, the detective's testimony also would have been inadmissible.

***State v. Maynard*, 351 P.3d 159 (Wash. 2015)**. Counsel ineffective in criminal mischief case for failing to notice juvenile defendant's impending 18th birthday and request that the juvenile court extend its jurisdiction, which was permitted under state law. As a result, the juvenile court lost jurisdiction after the state had extended a plea offer that the defendant intended to accept and the defendant was required to be tried as an adult. Counsel's conduct was deficient and prejudicial. The defendant was returned to juvenile court and the state ordered to reinstate the plea offer.

2014: ***Conley v. State*, 433 S.W.3d 234 (Ark. 2014)**. Counsel was ineffective in delivery of crack cocaine, possession of marijuana, and possession of paraphernalia case for failing to move for directed verdict on the marijuana and paraphernalia charges. The defendant sold crack to an undercover police officer, but was not arrested until several months later. On the day of the arrest, the police also executed a search warrant at the defendant's home, which he shared with someone else, and found a bag of marijuana and a digital scale in the laundry room on top of a cabinet out of view behind a decorative item. The defendant was not at home during the search. Counsel's conduct was deficient in failing to move for a directed verdict and prejudice was established as there was insufficient evidence to support the convictions for possessing the marijuana and the paraphernalia.

***Spargo v. State*, 132 So.3d 354 (Fla. Dist. Ct. App. 2014)**. Counsel ineffective for failing, prior to sentencing, to adopt and present the defendant's pro se motions to withdraw his guilty plea to second-degree murder, which had never been formally accepted by the trial court. "Because there was no formal acceptance, and sentence had not yet been pronounced, appellant had a right [under a state criminal rule] to withdraw his plea without any justification for doing so." Prejudice established.

***State v. Ross*, 845 N.W.2d 692 (Iowa 2014)**. Counsel ineffective in voluntary manslaughter and intimidation with a dangerous weapon with intent case for failing to move for a judgment of acquittal after the verdict on the intimidation charges where the defendant was convicted of five counts when he was guilty of only two under state law. The defendant had an ongoing argument with Milton, who passed the defendant's home with six other people. After additional argument, the defendant, while standing in the street, fired down the street into the crowd. By most accounts, there were two separate groups of shots separated by as much as 30 seconds. When the initial shots were fired, the group dispersed with Milton going to one side of the street and his uncle going to the other. After the initial rode of shooting had stopped, Milton's uncle attempted to cross the street prompting the

defendant to fire again. The uncle was killed. The defendant was charged with seven counts and counsel moved to dismiss six counts prior to trial on the basis that there were not seven "separate independent acts" involved in the shooting. The motion was denied. Counsel also moved for a directed verdict on the basis of insufficient evidence at the end of the state's case, but did not make a specific objection on seven counts versus one. This motion was renewed at the end of the case. The jury convicted on five counts. Counsel's conduct was deficient in failing to move for a judgment of acquittal and prejudice established because the defendant was guilty of only two counts of intimidation rather than five as the record supported only two "separate and distinct acts" based on the two separate groupings of shots.

***People v. Hall*, 991 N.Y.S.2d 114 (N.Y. App. Div. 2014)**. Counsel in robbery, drug, and resisting arrest case ineffective for failing to move to sever the robbery charge from the unrelated charges. The alleged robbery occurred over two months prior to the defendant's arrest at his mother's home where drugs were found and the resisting arrest charge arose. Counsel's conduct was deficient and prejudicial as "the jury could have inferred that the robbery at issue as committed for a drug-related purpose," which was improper.

***People v. Jian Long Shi*, 987 N.Y.S.2d 791 (N.Y. App. Div. 2014)**. Counsel was ineffective in endangering welfare of child case for failing to move *in limine* and failing to object to the prosecutor's improper cross-examination of the defendant about his illegal entry into the country. counsel's conduct was deficient and prejudicial where the case turned on the credibility of the defendant and the 11-year-old alleged victim.

***Burcham v. Franke*, 335 P.3d 298 (Or. Ct. App. 2014)**. Counsel ineffective in rape, sodomy, sexual abuse, and furnishing alcohol to a minor case for failing to challenge the state's interpretation of the mental incapacitation statute. The 16-year-old victim attended the birthday party of her friend's father, where she met the defendant, who was the friend's 48-year-old uncle. After the party, the defendant invited his niece and the victim to his house where he served them alcohol. The victim became intoxicated and was slurring her words and having trouble walking before she decided to go to bed. The defendant took her into a bedroom, laid her on the bed, and removed her pants and underwear. She attempted to stand but was too "severely intoxicated" to do so. The defendant performed oral sex on her and then attempted penile penetration of her vagina but she felt a sharp pain that "jolted her out of her 'extremely drunken state'" and she jumped up and ran out of the room screaming for her friend. The friend drove her back to the friend's house and the next day the friend's father took the girls to the police station to report the offenses. For three counts of the charges, the state was required to prove that the victim was "incapable of consent by reason of mental incapacitation." At the relevant time, "mentally incapacitated" required that the person was under the influence of an intoxicating substance "administered to the person without the consent of the person." Three other counts required a showing that the victim was "physically helpless" and the jury acquitted on those counts. The state's theory at trial on the "mental incapacitation" counts was that the victim was "legally unable to consent to drink alcohol" due to her age. Counsel was deficient in failing to challenge this theory or the jury instructions. As the post-conviction court held, the state's interpretation of the statute was "pure 'silliness.'" The statute clearly meant "factual

consent" and said nothing about "legal consent." Moreover, challenging the state's interpretation could have been done simply in a motion for directed verdict or for a judgment of acquittal, which would have presented no risk before the jury. Prejudice also established as these three counts would have been dismissed or, at least, preserved for appeal where this Court would have reversed. The remaining convictions of two counts of sexual abuse in the second degree and furnishing alcohol to a minor were affirmed.

***Ex parte Cockrell*, 424 S.W.3d 543 (Tex. Crim. App. 2014)**. Counsel ineffective in aggravated sexual assault case for failing to seek an interpreter and other accommodations due to the defendant's deafness. The defendant used hearing aids, but basically could interpret what was said only by reading lips. Nonetheless, counsel did not seek an interpreter, even though he had to "yell" even when the defendant was testifying. Even that, the defendant had to ask clarification questions a number of times. Counsel's conduct was deficient in that the defendant was "deaf" and automatically entitled to an interpreter under the relevant state statutes. Prejudice established because the defendant could not understand a substantial portion of the trial proceedings and, therefore, could not adequately participate in his defense. The case against the defendant primarily consisted of the testimony of the alleged victim, who was the defendant's 12-year-old daughter, who had made admittedly false allegations of abuse before.

***State v. Hamilton*, 320 P.3d 142 (Wash. Ct. App. 2014)**. Counsel was ineffective in possession of methamphetamine case for failing to move to suppress the methamphetamine on the grounds that it was obtained through an unlawful search of the defendant's purse. The defendant had left her husband and their home for approximately 10 days. During her absence, the husband obtained a protective order against her. When she returned to the home, she left her purse on the kitchen counter and the husband observed drug paraphernalia in plain view in the purse and called the police. Officers arrived and told the husband they could not search the house but that he could bring items outside to show them. The husband brought out the purse and opened it so that the officers could see the drug paraphernalia. The officers then searched the purse and discovered a glass pipe that tested positive for methamphetamine. Counsel filed a motion to suppress but argued only that the search of the house was unlawful because the husband was acting as a police agent. Counsel's failure to move to suppress on the basis of the warrantless search of the purse was deficient and not based on any strategy. Prejudice established as the trial court likely would have suppressed the methamphetamine if the proper basis had been argued.

2013: ***Lamb v. State*, 124 So. 3d 953 (Fla. Ct. App. 2013)**. Counsel ineffective in armed robbery and false imprisonment case for failing to file a motion for new trial, based on the weight of the evidence. The charges arose from the armed robbery of the defendant's nephew and his girlfriend, who was also kidnaped in a car-jacking after the robbery. During trial, the nephew denied that the defendant was one of the masked perpetrators. The girlfriend, on the other hand, testified that one of the perpetrators was called "Chicken," which was the defendant's nickname. She also testified that the men never removed their masks, "but in a seeming contradiction," she also testified that she got a glimpse of their faces.According to police witnesses, the day following the crimes, she identified the defendant, who she knew, in a photo lineup. During trial, the girlfriend admitted picking the defendant in the photo lineup, but "she testified that she was not sure" who the perpetrators were and

she could not identify the defendant as one of them. The defense moved for judgment of acquittal. During arguments, the parties agreed "that the entire case turned on" the girlfriend's identification of Lamb." The trial judge characterized it as "one of the weakest in my experience of trying these kinds of cases," but denied the motion, concluding "that there was identification sufficient to go to the jury." Following conviction, trial counsel filed a renewed motion for judgment of acquittal based on the sufficiency of the evidence. Counsel's conduct was deficient in failing to file a motion for new trial based on the weight of the evidence instead. Counsel testified that he did not file the motion as a matter of strategy because (1) he did not think the judge would reconsider his trial rulings; and (2) success on the motion for acquittal "would end the case, whereas a motion for new trial would merely garner a new trial." This was "not reasonable trial strategy" because "trial counsel's testimony at the evidentiary hearing reflected his misunderstanding of the two motions."

> On the one hand, a motion for judgment of acquittal tests the sufficiency of the evidence; a trial court must determine "whether the evidence presented is legally adequate to permit a verdict." On the other hand, a motion for new trial tests the weight of the evidence; a trial court must weigh the evidence and determine credibility just as a juror is required to do. Trial counsel asserted that he forewent moving for a new trial because he did not think the judge would change his mind about rulings made during the trial. But his renewed motion for judgment of acquittal asked the judge to do precisely that in regard to the judge's previous ruling that the State's evidence was sufficient. A motion for new trial would have presented an entirely different question for the judge – based on the weight of the evidence, not its sufficiency.

Prejudice established. "Although the trial judge ultimately concluded that the [highly equivocal identification] testimony was legally sufficient, he struggled with that question, and he characterized the testimony as the weakest identification evidence he had ever seen."

***Laurito v. State*, 120 So. 3d 203 (Fla. Ct. App. 2013)**. Counsel was ineffective in aggravated battery and aggravated assault case for failing to file a motion to suppress the defendant's statements to police, which were made after the defendant unequivocally invoked his right to counsel after being given the Miranda warnings. While the State had no difficulty establishing that the crimes were committed when shots were fired from a vehicle in which Laurito was one of three passengers, prejudice was established because the State relied mainly on Laurito's admissions to prove that he was the shooter. Counsel's conduct was deficient because the defendant's immediate response after being read his rights was to ask: "Can I make a phone call so I can get a lawyer?" Counsel moved to suppress the statements as involuntary due to the coercive nature of the interrogation under the totality of the circumstances, but failed to assert invocation of the right to counsel. Counsel's conduct was deficient because "counsel missed or misunderstood the legal significance of [the] request to call a lawyer." Prejudice was established as the "confession would have been suppressed by the trial court if the issue had been raised or, absent a correct ruling at that point, could have been raised as an issue on appeal."

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***People v. Miller*, 993 N.E.2d 988 (Ill. Ct. App. 2013)**. Counsel ineffective in possession of a stolen motor vehicle case for failing to move to suppress the defendant's admission made during custodial interrogation when no Miranda warnings had been given. An officer was attempting to stop the defendant for a traffic violation. After a high speed chase, the defendant crashed and then attempted to flee on foot. After he was detained at gun-point, the officer asked if he was fleeing because the car was stolen and the defendant said yes. Counsel's conduct was deficient as this was clearly custodial interrogation without the benefit of Miranda warnings. Prejudice also clear as the remainder of the trial evidence were "not inconsistent with the defendant's explanation that defendant's employee purchased the vehicle for defendant from [the alleged victim's] husband."

***Pace v. State*, 981 N.E.2d 1253 (Ind. Ct. App. 2013)**. Counsel ineffective in drug and firearm case for failing to move to bifurcate the trial. The firearm charge was possession by a serious violent felon based on the defendant's prior conviction for felony dealing in cocaine. State law established more than a year before trial allowed for bifurcation so that the jury could first determine whether the defendant was guilty on the drug charge, so that the jury would not be aware at the time of the prior drug conviction. Counsel's conduct was deficient and prejudicial.

***State v. Brooks*, 305 P.3d 634 (Kan. 2013)**. Counsel ineffective in rape and aggravated criminal sodomy case for failing to seek a continuance to obtain evidence to rebut the alleged victim's testimony that the defendant had a unique identifying scar on his penis. Brooks immediately advised his counsel that he had no such scar and that he wanted to testify in rebuttal. Defense counsel advised Brooks against taking the stand and recommended finding another way to establish that Brooks did not have a scar on his penis, but defense counsel failed to follow through on obtaining any such impeachment testimony. Nonetheless, the jury found Brooks guilty of two counts but acquitted him of five counts. On appeal, Brooks submitted medical records from a prison physician who had examined Brooks' penis and detected no visible scars. The Court of Appeals found that counsel's conduct was deficient but found no prejudice. The only issue before the Supreme Court was whether prejudice was established. In finding no prejudice, the lower court questioned the weight that should have been given to the victim's testimony that she observed a scar on Brooks' penis when she allegedly saw it at least 4 years and perhaps 10 years prior to trial. The court found that her "credibility would likely have survived" any impeachment. The Supreme Court found error in the finding that the jury still would have found the alleged victim to be credible.

> In doing so, the panel glossed over the credibility issues arising from S.C.'s prior untruthful statements about her sexual activities with others and declared that "her overall credibility was anchored in her expressed anxiety in 'outing' her stepdad." Interestingly, the panel's credibility calculus did not include any reference to the jury's acquittal of Brooks on five of the seven counts upon which S.C. testified nor any rumination upon what inference might be drawn therefrom about the jury's view of S.C.'s credibility.
>
> Given the panel's stated reasons for finding no prejudice, we discern that it ran afoul of the oft-stated rule that an appellate court will not determine the credibility of witnesses or weigh conflicting evidence.

Id. at 640 (citation omitted). Prejudice was especially clear in light of the State's reliance on the alleged victim's testimony and the lack of rebuttal in closing argument: "You heard [S.C.] which is unrefuted describe Mr. Brooks' genitalia. How it was uncircumcised and how it had a small scar. Unrefuted. How would she know that?"

> Thus, not only was Brooks denied the opportunity to attack S.C.'s credibility with her allegedly false testimony, but the failure to cross-examine S.C. permitted the State to bolster the credibility of its complaining witness as being unrefuted. Then, having established the scar testimony as being true because it was unrefuted, the State used the substance of the statement to suggest that the abuse must have occurred because that was the only way that S.C. would have seen the scar on Brooks' penis. That use of the scar testimony would suggest that the prosecutor considered it to be a weightier part of the State's case than did the panel.

Id. at 640-41.

***State v. Tellegen*, 314 P.3d 902 (Mont. 2013)**. Trial counsel was ineffective in theft and accountability to burglary case for failing to object to the theft conviction, which was a lesser included offense of the burglary.

***People v. Oliveras*, 993 N.E.2d 1241 (N.Y. 2013) (*affirming* 936 N.Y.S.2d 12 (N.Y. App. Div. 2011))**. Counsel ineffective in murder case for failing to adequately and timely move to suppress the defendant's statements and to present psychiatric evidence challenging admission of the statements. While counsel did file a timely pretrial motion, it was denied with the trial court noting that counsel failed to produce the defendant's psychiatric records. Months later, trial counsel filed an untimely motion to present psychiatric evidence, which was denied. Counsel's conduct was deficient. The defendant confessed after being interrogated for over six and a half hours. The detectives were aware beforehand from the defendant's mother that he had been hospitalized for mental illness as a child. A pretrial psychiatric examination, conducted on motion of defense counsel, revealed that the defendant has a learning disability and "certain mental health issues," including auditory hallucinations. When counsel moved to suppress the confessions, he did not supply these records to the court. Counsel did not have a valid strategy: "It simply cannot be said that a total failure to investigate the facts of a case, or review pertinent records, constitutes a trial strategy resulting in meaningful representation." Prejudice was also clear as "no other evidence directly connected defendant with the murder. The 911 caller's description of the perpetrator did not match defendant's ethnicity or attire."

2012: ***Pryor v. State*, 973 N.E.2d 629 (Ind. Ct. App. 2012)**. Counsel ineffective in resisting law enforcement case for failing to timely file demand for jury trial. Under state law, the demand was required to be filed at least ten days prior to the trial date, but the motion was filed only six days prior to the scheduled trial date and was denied due to untimeliness. Prejudice established.

**Capital Case*

***People v. Wright*, 971 N.E.2d 549 (Ill. Ct. App. 2012)**. Counsel in aggravated criminal sexual assault case ineffective for failing, in the course of a motion to exclude DNA evidence, to inform the trial court of the results of a search of the Illinois database based on 9-loci. The prosecution was based almost entirely on "a cold-case DNA match" eight years after the crime. DNA was recovered from the victim's underwear and rectal swabs. The underwear was tested using the "standard" 13 loci evaluation. There was not match, but the defendant could not be excluded. The rectal swabs were examined using only 9 loci and the examiner reported "a match" to defendant. Defense counsel moved to exclude the DNA evidence done with only 9 loci. As an alternative, citing an Arizona study, the defense asked that the court order the State to determine how many 9 loci "matches there are in [the State's] convicted database." After the motions were denied, the defense proceeded with a consent defense. The court held that the trial court erred in failing to order a DNA database search and in barring the defense from cross-examining the State's expert about the Arizona study. Likewise, the court found that counsel was ineffective in litigating the DNA suppression motion. "[C]ounsel was asking the trial court to order a database search, that had already been done, and that had been done at the request of the same counsel." Not only had the search been done, but "the state's own director of that database had stated [in a deposition in the earlier case] that it was 'misleading' to call a nine-loci comparison 'a match.'" The database search "had revealed that close to 2000 individuals had matched at 9 loci." If the court had known this, there is a reasonable probability the court would have granted the defense's motion to exclude the 9-loci analysis."

***State v. Madsen*, 813 N.W.2d 714 (Iowa 2012)**. Counsel ineffective in sexual abuse case for failing to move to suppress the defendant's statements, which were made only after impermissible leniency promises to him. The defendant was charged with molesting neighborhood boys. During his interrogation, police implied that he would be released and no information would be provided to the news or his employer if came "clean on everything." Counsel's conduct was deficient and prejudicial because under the state's "common law evidentiary test," the confession was inadmissible because it was obtained while the defendant was "influenced by any threat or promise." Here, the defendant was threatened with an adverse newspaper story and promised a quick wrap up and release if he confessed.

***Ennenga v. State*, 812 N.W.2d 696 (Iowa 2012)**. Counsel ineffective in eluding officer and drug possession case for failing to move to dismiss the state's untimely trial information. A state rule required dismissal "if an indictment or trial information is not 'found' within forty-five days of the defendant's arrest, unless the State can show good cause for its failure." Here, the trial court timely signed a trial information, but the information was not filed with the clerk of court until 56 days after arrest. Counsel's conduct was deficient in failing to object. No showing of prejudice was required under the state rule. Thus, the charges would have been dismissed if counsel had moved to dismiss.

***People v. Delgado*, 956 N.Y.S.2d 579 (N.Y. App. Div. 2012)**. Counsel ineffective in burglary trial for failing to request a pretrial hearing to limit the scope of the prosecution's cross of the defendant concerning his prior conduct. While evidence was properly admitted concerning the defendant's prior burglary convictions, which were relevant to motive, counsel failed to object to cross of the

defendant concerning the underlying facts of the prior burglaries, which were similar to the charged crime.

***State v. Canty*, 736 S.E.2d 532 (N.C. Ct. App. 2012)**. Counsel ineffective in firearms case for failing to move to suppress the evidence obtained during a traffic stop. The defendant was a passenger in the vehicle but had standing to challenge the stop, which was initiated on the basis of the driver allegedly crossing the fog line, nervousness and failure to make eye contact when the officers drove up, and slowed speed. Counsel's conduct was deficient as these factors fall short of reasonable suspicion. The police video showed that the fog line was not crossed and, thus, there was no traffic violation before the officer initiated the stop. Counsel knew this. The officer's testimony was questionable in that it was "hard to believe" that the officer can determine nervousness while driving beside the car. Likewise, the "slowed speed" did not amount to anything as the vehicle only slowed from 65 mph to 59 mph, which is hardly significant. Even if the officer's testimony was accepted as true, "[n]ervousness, slowing down, and not making eye contact is nothing unusual when passing law enforcement stationed on the side of the highway." Prejudice established as the weapons recovered in the search following the illegal stop was the only evidence against the defendant.

2011: ***Gordon v. State*, 126 So.3d 292 (Fla. Ct. App. 2011)**. Counsel ineffective in aggravated battery case for failing to move for a judgment of acquittal as the evidence was insufficient as a matter of law to establish the element of great bodily harm. The defendant struck the victim "one time with a belt, which caused bruises that healed without any medical treatment, and left neither scarring nor any other lasting effects."

***State v. Brubaker*, 805 N.W.2d 164 (Iowa 2011)**. Counsel ineffective in unlawful possession of a prescription drug case for failing to specify, as a ground for directed verdict, the insufficiency of evidence to support the charge. Syringes, a pipe, and an unlabeled prescription pill bottle with 51 yellow pills were found in the defendant's car. A criminalist testified, after simply by comparing the pills with a picture, that the pills were "consistent in appearance" with Clonazepam, a controlled substance for which a prescription is required. "Just because a pill looks like Clonazepam does not mean it is Clonazepam." Indeed, the court found that the pills were similar in size, shape, and consistency to aspirin and a number of other over-the-counter drugs. Likewise, the fact that the pills were in an unlabeled prescription bottle and found with syringes and a pipe was insufficient to establish illegal drug use as the State presented no evidence that Clonazepam could be smoked or injected into the body. While counsel made a broad motion for directed verdict, counsel's conduct was deficient in failing to move for a directed verdict on these specific grounds. Prejudice was clear as the trial court would have sustained a specific motion.

***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.

***Smith v. State*, 357 S.W.3d 322 (Tenn. 2011) (sentenced in 1995).** Counsel ineffective in capital murder case for failing to adequately investigate and present evidence supporting his motion to recuse the sentencing judge due to bias. The defendant was initially arrested in 1984 and convicted and sentenced to death in 1985. He was convicted again and sentenced to death in a 1989 retrial. Following vacation of his death sentence, he was again sentenced to death in a 1995 retrial on sentence. The judge on the initial two trials had retired so a new judge was assigned for the third go-round. He sua sponte changed venue and denied a defense motion to recuse himself on the grounds that he had been the prosecuting attorney on a prior conviction of robbery and DUI. Counsel appealed both issues and obtained reversal of the change of venue order but lost on the denial of recusal issue. Counsel's conduct was deficient in ailing to adequately investigate and present the facts in support of the recusal motion. If counsel had performed adequately the record would have shown that, in 1985 and 1985 while the capital charges were initially pending, the judge was a prosecutor in a different county on the robbery and DUI charges that were pending at the same time. The judge/prosecutor was communicating and cooperating with the capital prosecutor through correspondence and phone calls. Following the robbery and DUI convictions, the judge/prosecutor provided the capital prosecutor with certified copies of the convictions, which were introduced in the capital sentencing proceedings to support the sole aggravating factor. In sentencing on the robbery and DUI case, the judge/prosecutor sought unsuccessfully to elicit testimony of the capital murder conviction. He also sought a sentence consecutive to the murder sentences (one life and one death) because Tennessee had not actually carried out a death sentence. In 1989, which the defendant was pending new trial on the capital murder case, he was charged with introducing contraband into the county jail. The judge/prosecutor presided over this contraband case "less than one year after he had been actively defending" the robbery/DUI convictions. He sentenced the defendant as a "persistent offender based in part on the convictions [he] had obtained as a prosecutor." Then came the capital resentencing in 1995 with the judge/prosecutor assigned. The sole aggravating factor was that the defendant had been convicted of one or more felonies involving the use or threat of violence. One of the convictions used to establish this aggravator was prosecuted by the judge. After the state's case, the judge held that the defendant could waive presentation of mitigation and final argument, and "approved the death penalty as thirteenth juror." "The State does not take issue with th[e] holding" that counsel's conduct was deficient. The issue is one of prejudice. The court found that "the roles of prosecutor Brown and Judge Brown were too closely connected,"

such that "a person of ordinary prudence would have a reasonable basis for questioning Judge Brown's impartiality." Under these circumstances, no evidence of actual bias was required.

> The justice meted out in this case did not "satisfy the appearance of justice." The potential injury to the judicial process due to the appearance of impropriety and unfair lack of impartiality by a judge imposing a death sentence is too great to allow the sentence of death to stand.

Id. at 345 (quoting *Offutt v. United States*, 348 U.S. 11, 13 (1954)).

***Ken v. State*, 267 P.3d 567 (Wyo. 2011)**. Counsel ineffective in attempted murder case for failing to timely file a motion for new trial. Prejudice established as the trial court would have granted the motion.

2010: ***Suluki v. State*, 691 S.E.2d 622 (Ga. Ct. 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. Ct. 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. Ct. 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.

***Frazier v. State*, 680 S.E.2d 553 (Ga. Ct. 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. Veney*, 977 A.2d 570 (N.J. Super. Ct. 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.

***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: ***Sparkman v. State*, 281 S.W.3d 277 (Ark. 2008)**. Counsel ineffective in 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.

**Capital Case*

***People v. Givens*, 892 N.E.2d 1098 (Ill.Ct.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."

2007: ***McNabb v. State*, 967 So. 2d 1086 (Fla. Dist. Ct. 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. Dist. Ct. 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. Ct. 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. Ct. 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. Ct. 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.

**Capital Case*

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 too, 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. Ct. 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. Perez-Avila*, 131 P.3d 864 (Utah Ct. 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.

***State v. Horton*, 146 P.3d 1227 (Wash. Ct. App. 2006)**. 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. Ct. App. 2006)**. 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.

**Capital Case*

2005: ***Thompson v. Commissioner of Correction*, 880 A.2d 965 (Conn.Ct.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. Ct.App. 2005)**. Counsel ineffective in murder case for failing to move to suppress the defendants 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. Ct. 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. Ct. 2005)**. 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 is 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. Dist. Ct. 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. Ct. 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. Ct. 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 that 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. Ct. 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.

***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.

***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.

2003: ***State v. Johnson*, 837 A. 2d 1131 (N.J. Super. Ct. App. Div. 2003), *aff'd on other grounds*, 940 A.2d 1185 (N.J. 2008)**. Counsel ineffective in weapons case for failing to move to suppress a handgun seized from the defendant. The police obtained a 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 officers 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 officers 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.

**Capital Case*

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.

**Capital Case*

4. PROSECUTION EVIDENCE OR ARGUMENT

a. U.S. Court of Appeals Cases

2018: ****Baer v. Neal*, 879 F.3d 769 (7th Cir.), *cert. denied*, 139 S.Ct. 595 (2018).** In capital case from Indiana, trial counsel was ineffective for failing to object to improper and confusing penalty phase jury instructions as well as improper prosecutorial statements and the deficient performance was prejudicial as to the death sentence. Petitioner was convicted of two murders, robbery, theft, and attempted rape arising from a murder of a woman and her four-year-old daughter in their home. Petitioner had admitted that he had committed the crimes and sought to plead guilty but mentally ill, but the trial court rejected the plea, finding insufficient evidence of mental illness. At the penalty phase, the defense presented the testimony of Dr. Mark Cunningham, who described petitioner's social history, including prenatal and perinatal difficulties such as his mother's alcohol use and cancer while pregnant, petitioner's childhood in and out of foster care, the murder of his sister, his ADHD, head injuries, and substance abuse. Regarding the penalty phase instructions, trial counsel failed to object to modification of a jury instruction that eliminated intoxication as a basis for finding that the defendant lacked the capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law. Counsel also failed to object to the improper definition of intoxication as requiring involuntariness of the intoxication. Because counsel essentially failed to object to the removal of a mitigating factor from the jurors' consideration, the Seventh Circuit found his performance deficient under *Lockett v. Ohio*, 438 U.S. 586 (1978). The state court's analysis of the jury instructions in isolation rather than in the context of the overall charge was unreasonable because a juror could have understood the complete penalty phase instructions as foreclosing evidence of voluntary intoxication from consideration for all purposes in sentencing. The timing under which the instructions were given was also important; although the instructions were a correct statement of the law with regard to the mens rea of the crime, and the aggravating factors, they were not correct statements of the law with regard to the mitigating factors. But the instructions were given at the penalty phase, and not in conjunction with the aggravating factor instructions, but rather at the end of the charges as a whole. The jurors also were given the general mitigation instruction that there were no limits on what they could consider mitigating much earlier and at a different time from the voluntary intoxication instruction, and language that merely contradicts and does not explain a constitutionally infirm instruction does not suffice to absolve the infirmity under *Francis v. Franklin*, 471 U.S. 307, 322 (1985). "It is unreasonable to assume jurors could catch the nuance that voluntary intoxication can be considered for mitigation, but not as evidence of criminal intent, without any clear instruction." 879 F.3d at 779. Trial counsel's failure to object was deficient, and the state court unreasonably found otherwise. The error was prejudicial because evidence of petitioner's mental health and drug use was the cornerstone both of the defense at guilt phase and also the defense's sole strategy for avoiding a death sentence, and the instruction blocked consideration of this crucial mitigating evidence. It was unreasonable of the state court to conclude otherwise. Regarding statements by the prosecutor, the prosecutor repeatedly made improper and prejudicial comments, and trial counsel and the trial court failed to address them, introducing doubt into the reliability of the results of the penalty phase trial. First, the prosecutor improperly conflated the standards of guilty but mentally ill and the legal defense of insanity. The insanity defense, which requires a finding that defendant has a severely abnormal mental condition that renders him unable to appreciate the

wrongfulness of his conduct at the time of the offense" is a defense to intent and to guilt, while the guilty but mentally ill issue requires a finding that defendant suffers from an illness that "disturbs thinking, feeling, or behavior, and impairs ability to function" and has effect at the penalty phase but not at the guilt phase because it does not have an effect on his conviction. The prosecutor conflated these terms throughout the trial, starting during voir dire. The state court found that counsel's failure to object was "likely" strategic because counsel testified that he knew the prosecutor was capable of overstating his case and he was planning to correctly state the law to the jury. The Seventh Circuit found this analysis unreasonable, because "hoping the jury would decide that the prosecutor was not credible" is not strategic, especially where the difference between insanity and GBMI was never clarified. Second, the prosecutor repeatedly told the jurors (again beginning during voir dire) that the victims' family members wanted the jury to impose the death penalty. Trial counsel objected only one time to the violations of *Payne v. Tennessee*, 501 U.S. 808 (1991). The state court acknowledged that the prosecutor's statements were problematic, but erroneously found that the prosecutor told the jury he misspoke – this did not occur. Furthermore, the trial court repeatedly stated that the court was not listening, and "missed numerous opportunities to stop or clarify the prosecutor's statements and his absence was noticeable throughout trial." 879 F.3d at 786. Third, the prosecutor stated personal opinions and introduced facts not in evidence directing the jurors toward a death penalty verdict. For example, he said that it was possible that Indiana was going to change the law so LWOP would no longer be an option – there was no basis for this speculation. He also compared petitioner's crime to that of others he had personally seen and experienced. Petitioner's counsel did not object. And just because defense counsel argued that petitioner's crime wasn't the worst of the worst did not permit the prosecutor to argue what he did. "[J]ust because defense counsel cracked open the door to these subjects, it did not permit the prosecutor to drive a truck through it. The seditious and specific comments about the prosecutor's own mother, the community's layoffs, and 9/11 were all not hard blows, but beyond the pale foul ones." 879 F.3d at 787. It was unreasonable for trial counsel not to object. The state court's finding that the prosecutor's improper comments did not cumulatively affect the outcome of the trial was unreasonable – the state court failed to aggregate prejudice even though it claimed to do so. "[I]t is nearly impossible that the comments did not impact the juror's [sic] decision to recommend the death penalty." 879 F.3d at 788. "[The prosecutor's] misstatements were prolific and harmful to [petitioner's] case, yet [petitioner's] trial counsel failed to object at every opportunity. [The prosecutor's] comments began in voir dire, where his comments conditioned jurors to believe that [petitioner] was a liar, that mental illness was a 'copout' and 'defense,' that [petitioner] should not receive a GBMI conviction because he appreciated the wrongfulness of his actions (improperly using the insanity defense standard), life without parole was at a high risk of providing release, and the [victims'] family wanted a death sentence. All these comments were made before the jury heard any evidence in [petitioner's] case. Then at the close of penalty phase, [the prosecutor] again injected inflammatory comments and facts not in evidence, including remarks about [the prosecutor's] mother's prostitution, people being laid off to afford the state's pursuit of the death penalty, and [petitioner's] crime being worse than any of the prior 125 murders [the prosecutor] had heard of in his career in law enforcement. . . . Can we be certain that [petitioner] would not have been sentenced to death if given a fair trial and effective counsel? No. But it is 'reasonably likely' that without the prosecutor's injection of impermissible statements and incorrect law the jurors would not have recommended death." 879 F.3d at 788-89.

**Capital Case*

2015: ***Zapata v. Vasquez*, 788 F.3d 1106 (9th Cir. 2015)**. Under AEDPA, counsel ineffective in murder case for failing to object to improper prosecutorial arguments in rebuttal. The victim, a first-generation Mexican immigrant, was killed in a gang-infested area of Los Angeles, apparently because he was wearing a basketball jersey with the number 8, for Lakers star Kobe Bryant. The area was controlled by the Outside Posse (OSP), which was part of the Nortenos street gang, whose rival was the Surenos gang known as "Eighth Street." Thus, according to the state's gang expert, the victim was a "marked man" by wearing the number 8. The Nortenos tend to be established U.S. residents who speak English rather than Spanish. The Surenos, on the other hand, tend to be first-generation Mexican immigrants who speak limited English. As a member of the OSP, the defendant had participated previously in attacks on Eighth Street gang members and Mexican Nationals. The state's case was built mostly on circumstantial evidence and clearly biased witnesses. The only eyewitness to the shooting testified that the shooter was angry and yelling, but could not provide any substance of what was said. Nonetheless, in rebuttal closing arguments – after describing "scrap" and "wetback" in opening statements as derogatory terms like the "N word" for Mexican nationals – the prosecutor asserted several times, including at the end of the rebuttal, that the defendant was yelling, "Fuckin' scrap. You fuckin' wetback" at the time of the shooting. Counsel's conduct in failing to object to these arguments and ask for a curative instruction was deficient and prejudicial. While the state court agreed that the arguments constituted serious prosecutorial misconduct, the state court determination that counsel's conduct might have been based on a reasonable strategy and that there was no prejudice were unreasonable determinations.

2013: ***Griffin v. Harrington*, 727 F.3d 940 (9th Cir. 2013)**. Under AEDPA, counsel was ineffective in murder case for failing to object in a timely fashion to the unsworn testimony of a recanting jailhouse snitch. The victim was killed during a confrontation in Los Angeles involving rival street gangs during which at least forty bullets were fired from four different firearms. Nine months later, a jailhouse snitch informed police in a recorded statement that Griffin was the shooter. Griffin was arrested and charged based on this information. No other witness claimed to be able to identify Griffin as the shooter. By the time of Griffin's trial, however, the snitch had decided to change his story. Defense counsel was aware of that fact and that, under state law, the likely consequence of the snitch's repudiation of his prior statement would be that the prior recorded statement would be admitted "for the truth of the matter," i.e. as substantive evidence of guilt. When the snitch was called, he simply answered "no" after the clerk read him the oath and asked him to "swear to tell the truth." Without objection, the trial court then instructed the snitch to testify and allowed the prosecutor to treat him as a hostile witness. "On direct examination by the prosecutor, [the snitch] answered every question, but denied all knowledge of petitioner and the shooting, and also denied having ever identified petitioner to the police." The next day, the prosecutor sought to admit the prior recorded statement through a detective. Defense counsel objected for the first time that the snitch had not given "sworn testimony" and his in-court statements "could not technically be considered evidence." Counsel clearly knew at the time of the in-court statements that the snitch was not giving "sworn testimony" and counsel chose not to object at that time.

> What [counsel] did not know and what he did not comprehend under settled state law, however, was that by failing timely to object to that testimony in combination

> with conducting cross-examination, he was waiving any objection he might have had to [the] testimony. The dire consequences of his ignorance on this point was first, that [the] prior inconsistent inculpatory statement then became admissible . . . ; and second, that [the defendant] would be barred on appeal from raising any issue related to [the] [un]sworn testimony. . . .
>
> Thus, by waiting to object until after [the snitch] had been excused as a witness, and until the next day, [counsel] unwittingly sealed his client's fate, both at the trial and on appeal.

The Ninth Circuit rejected– as "objectively unreasonable"–the state court's conclusion that counsel's "decision not to object in a timely fashion was acceptably tactical" and not deficient conduct.

> It is one thing to devise a litigation tactic that fails. That is a common occurrence in the courtroom. It is wholly another matter to devise a tactic without realizing not only that it cannot work, but that it will result in permanently depriving your client of the one opportunity he has to render inadmissable the prosecution's only direct evidence linking him to the murder with which he is charged. With all respect, the state court's strained reasoning runs afoul of the Supreme Court's warning that courts should "not indulge [in] post hoc rationalization for counsel's decisionmaking that contradicts the available evidence of counsel's actions."

Id. at ___ (quoting *Harrington v. Richter*, 131 S. Ct. 770, 790 (2011) (internal quotation marks omitted)). In short, the state court's ruling was "beyond any possibility for fairminded disagreement." *Id*. (quoting *Richter*, 131 S. Ct. at 787). Likewise, the state court's "factual determinations" umderlying its conclusions that counsel engaged in reasonable tactics and conduct "were plainly unsupported by the record and thus demonstrably and clearly erroneous." Counsel's conduct was also clearly prejudicial: "To add injury to injury, the damaging effect of trial counsel's waiver at trial has now carried over into his client's federal habeas proceedings, blocking him from raising substantial federal constitutional issues" related to the violation of his right to confront the witness at trial.

2007: ***Girts v. Yanai*, 501 F.3d 743 (6th Cir. 2007), *cert. denied*, 555 U.S. 819 (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. Case reversed 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

**Capital Case*

2019: ***Jones v. Gavin*, 395 F.Supp.3d 440 (E.D. Pa. 2019).** In murder case, petitioner's trial attorney was ineffective in failing to impeach two Commonwealth eyewitnesses who identified petitioner as the shooter of the victim. Although the ineffective assistance of counsel claim was procedurally defaulted, the default was excused under both the inadequate state rule doctrine and *Martinez v. Ryan*. (Petitioner had affirmatively sought to raise the ineffectiveness claim in state court through pro se filings because his post-conviction counsel failed to include it in the post-conviction proceeding. A recent rule precluding merits review of the pro se claim under such circumstances was applied retroactively to petitioner. See section VIII.B. for discussion of the *Martinez* analysis.) At trial, the Commonwealth presented testimony from two men who had been in the car with the victim when the victim was shot. Witness Rucker testified that there were three males on the corner before the shooting, and Khalil Rippy, whom he knew from school, was one of them. Rucker testified that petitioner, the only defendant on trial, and another male came out of the alley immediately before the shooting. Rucker stated that petitioner was the shooter and that he had picked petitioner's photograph from an array at the police station. On cross-examination, Rucker testified that he did not recall what petitioner or anyone else was wearing. He claimed not to remember talking to the police at the scene. In fact, he had been interviewed at the crime scene at which time he reported that one of the men involved in the shooting had worn a yellow jumpsuit. This was not brought out at trial. Witness Lyles testified that Edward Thomas was one of the three males on the corner before the shooting and petitioner was not there when the eyewitnesses and the victim first arrived at the scene. He identified petitioner and Thomas as the two males who later came out of the alley moments before the shooting. He testified that petitioner pulled a gun and started firing. He did not recall what the shooter was wearing. Nor did he remember having told the police at the scene that the shooter was wearing a yellow jumpsuit. Lyles further testified that at the police station he gave a statement identifying petitioner as the shooter. Portions of that statement were read into the record, including the portion where he stated that petitioner had been wearing a dark blue hoody. On cross-examination, Lyles eventually recalled speaking with police at the crime scene but claimed not to remember telling the officer that one of the men was in a yellow jumpsuit. Although defense counsel had a police report indicating Lyles had in fact mentioned the yellow jumpsuit, counsel did not confront Lyles with his prior statement. Instead, trial counsel simply asked if the officer would be lying if the officer testified that Lyles had stated the shooter wore a yellow jumpsuit. The significance of the yellow jumpsuit was demonstrated through the testimony of witness Riggins who looked out of a window after hearing screaming and observed four men running from the crime scene: petitioner, who Riggins knew, Rippy, Thomas, and an unknown man who was wearing a yellow jumpsuit. Despite the importance of the yellow jumpsuit, trial counsel did not call the two officers who took statements from Lyles and Rucker at the scene in which both indicated that the shooter wore a yellow jumpsuit. There was no reasonable strategic basis for this omission. Trial counsel explained that he did not call the officers because: (1) counsel thought that he had already impeached the witnesses' testimony and had introduced the statements they made at the crime scene; and (2) calling police officers is dangerous. At to the first reason, it was simply not true. And trial counsel's attempted defense of his inaction revealed his misapprehension of the actual evidence at trial. As for counsel's apparent fear of dishonesty from police officers, this concern was not real given that the officers had memorialized the witnesses' statements in their reports. Thus, "[t]hey could not have credibly retracted them." In addition, trial counsel had called two other police officers at trial thereby establishing that the post-trial reason he gave for not calling the officers at issue was not in fact his motivation at the

time of trial. Given that the prior statements of Lyles and Rucker cast doubt on their identification of petitioner as the shooter, petitioner was prejudiced by trial counsel's deficient performance.

***United States v. Frederiksen*, 2019 WL 5395751 (D. Kansas Oct. 22, 2019).** In case where petitioner was convicted of lying to federal agents during an investigation into illegal poker parties, trial counsel was ineffective in: (1) failing to timely file a post-trial motion seeking acquittal or a new trial where the prosecution's evidence was insufficient to support a conviction as to two elements of the charged crime; (2) failing to object to the prosecution's misstatement of the law during closing argument; and (4) failing to object to irrelevant and prejudicial evidence concerning other poker games throughout the trial.

2017: *Bryant v. Thomas*, 274 F.Supp.3d 166 (S.D.N.Y. 2017), *aff'd*, 725 Fed.Appx. 72 (2nd Cir. 2018). Trial counsel was ineffective for failing to request serological testing of defendant's blood at trial for murder and sexual assault in 1976. Three witnesses said they saw defendant in the area on the day of the crime, but there was conflicting evidence about whether anyone saw him carrying a knife. All witnesses agreed defendant was wearing white pants and a light colored sweatshirt. The victim was found early the next morning in a stairwell where she had been raped and stabbed repeatedly. The crime scene contained a large amount of blood. Police went to defendant's apartment where he was found sleeping in his underwear and asked him to get dressed in the same clothes he had worn the evening before. Defendant put on white pants, a light colored sweatshirt and sneakers. He was interrogated over the course of a day and repeatedly denied any involvement in or knowledge of the crime. Later that evening, Detective William Brent arrived at defendant's interrogation room. Brent later testified that defendant voluntarily confessed to the crime, but defendant alleged he was physically coerced after Brent grabbed him, threw him to the floor and kicked him. Defendant's confession contained several inaccurate facts and details and no blood was found on his clothing. At trial, an expert for the State testified that the victim had type O blood and he did not conduct any tests to determine whether she was a secretor or a non-secretor. A sample taken from the victim's underwear reacted for type O blood from a non-secretor, but the expert was unable to determine whether the typing was from the blood or semen collected on the underwear. In 2010, defendant's new counsel requested blood testing, which determined that defendant has type B blood and is a secretor. At an evidentiary hearing, defendant's expert testified that the presence of a sperm head suggested there was enough semen present in the crime scene sample to type the blood type of the semen donor and that there was a high probability that the victim was a secretor, so the serological evidence excluded defendant. The State's expert disagreed and concluded the new serological evidence was inconclusive and had no weight. Trial counsel was ineffective for failing to consult a serology expert and to test defendant's blood type and secretor status. Trial counsel initially testified that he could not recall anything about defendant's trial. However, after reviewing portions of the record, trial counsel clearly stated that there was no strategic reason for him not to order serology tests and he never considered retaining a serologist. It was not surprising that counsel had no independent recollection of defendant's trial dating back several decades. That does not detract from the clarity of his post-reflection answers given under oath that he had no strategic reason for his failures and his admission that the use of serological evidence was simply not on his "radar" at the time of trial. Trial counsel's failures were objectively unreasonable. He knew that the sample from the victim's underwear had tested

positive for type O blood and that the prosecution was going to call a serological expert to testify. A reasonable attorney in these circumstances would have, at a minimum, investigated further. The fact that defendant's blood type is type B would have severely undermined the prosecution's case. For similar reasons, counsel's failure was prejudicial. Even if this evidence did not conclusively exculpate defendant, it would still have been significant. It would have forced the prosecution to make a much less straightforward argument, such as the possibility that there was not enough semen present to accurately test for type B blood. The blood type evidence would have cast doubt on defendant's confession, which he testified was coerced. As such, it would have strongly supported the conclusion that the prosecution had not met its burden in proving guilt. Defendant has established a reasonable probability that absent the errors of his counsel, the outcome of his trial would have been different.

***Jordon v. Hepp*, 260 F.Supp.3d 1046 (E.D. Wisc. 2017), *appeal dismissed*, 2017 WL 6513944 (7th Cir. Aug. 14, 2017).** Trial counsel was ineffective for failing to object to the prosecution's improper vouching of a witness's credibility. Defendant was convicted of reckless homicide, first-degree endangerment and being a felon in possession of a firearm. A key issue at trial was defendant's confession and his claim that law enforcement officers had misled him into signing the confession. During closing argument, the prosecutor argued that the detective who took defendant's confession was more credible because she had more to lose, asserting: "Somebody's lying. Who is it? She [the detective] is going to put her whole career and her future on the line for this case? She does this every day. She's investigating homicide cases every day for years. Who has the most to lose based on your verdict in this case? Her or him?" *Id.* at *2. The Seventh Circuit concluded that defendant's trial counsel performed deficiently in failing to object to a textbook case of improper vouching and defendant suffered prejudice, but remanded for an evidentiary hearing to determine whether trial counsel had a strategic reason for his failure to object. Trial counsel testified that he had no independent recollection of the prosecutor's statements or any decision he may have made about whether to object to those comments. Trial counsel then added that he did recall thinking he did not want to draw the jury's attention to this issue because it was late in the day. Trial counsel also testified that he did not believe the prosecutor's comments rose to the level of vouching at all. Based on this testimony, the district court concluded that trial counsel did not remember the substance of the prosecutor's comments, did not believe the prosecutor's comments constituted vouching, and did not have a strategic reason for failing to object.

2011: ***Rogers v. McDaniel*, 801 F. Supp. 2d 1049 (D. Nev. 2011), *aff'd on other grounds*, 793 F.3d. 1036 (9th Cir. 2015)**. 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.

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2008: ***Neri v. Hornbeak*, 550 F. Supp. 2d 1143 (C.D. Cal. 2008)**. Under AEDPA, counsel ineffective in murder of her 16-month-old daughter 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

2019: ***State v. Bonds*, 450 P.3d 120 (Utah Ct. App. 2019), *cert. granted*, 466 P.3d 1072 (Utah 2020).** In murder case where appellant claimed he shot his friend after his friend threatened to harm appellant's children, trial counsel was ineffective for failing to object to erroneous and confusing jury instructions regarding the burden of proof germane to the affirmative defense of imperfect self-defense and for failing to object to references to appellant's post-arrest silence. Regarding the instructions on self-defense, the State failed to offer, and the appellate court could not discern, a strategic basis for counsel's failure to object to the instructions. Similarly, the appellate court could not find any reason why trial counsel would forgo an objection to testimony about appellant's failure to invoke self-defense upon his arrest. That appellant also did not mention self-defense to two others prior to his arrest did not explain the failure to object to testimony from the arresting officer. As for prejudice, the arguments for imperfect self-defense were "decent" if not "totally convincing." Notably, the jury deliberated for over ten hours and acquitted appellant of one count of felonious discharge of a firearm. The acquittal indicated that the jury might have accepted appellant's testimony about how the first shot occurred. "In the end, we conclude that a reasonable probability exists that, had the jury received proper instructions and had the State's inference of guilt from [appellant's] silence been kept from the jury, the jury's decision regarding self-defense and manslaughter may have been different and, accordingly, our confidence in the outcome has been undermined."

***State v. Crow*, 438 P.3d 541 (Wash. Ct. App. 2019).** Where the defense to a charge of possession of a stolen gun was that defendant was unaware that the gun was stolen, trial counsel was

ineffective in failing to object to testimony by law enforcement officers concerning the probability that a firearm possessed by a convicted felon, which defendant was, is a stolen gun. The impermissible "profile" testimony included assertions that: (1) someone disqualified from obtaining a gun legally will obtain a firearm by stealing it or buying it unlawfully on the street; (2) illegally obtained firearms are typically stolen during burglaries and vehicle prowls (the gun at issue here came from a burglarized vehicle); (3) a person who knows he possesses a stolen firearm commonly discards the gun and flees when approached by a law enforcement officer (as did defendant); (4) the majority of disqualified people apprehended with a firearm have a stolen firearm; and (5) most or a high percentage of firearms in the hands of a disqualified person are stolen firearms. "The Yakima Police Department officers answered questions in the context of their knowledge based on 'training and experience.' Thus, the State used the imprimatur of expertise and law enforcement to group [defendant] with other guilty persons." Because of a question by defense counsel about how one should know a gun is stolen, defendant waived his right to challenge the testimony from law enforcement officers that a disqualified person will obtain a firearm by stealing it or buying it unlawfully on the street. Defendant did not, however, "open the door to the further testimony of the law enforcement officers. The additional testimony about conduct of persons possessing a gun and percentages of stolen guns on disqualified persons clarified nothing with regard to a person's knowledge of the status of a firearm and thus remained inadmissible profile evidence." On this record, "no reasonable trial strategy explains defense counsel's failure to object to profile evidence." In addition, the question to an officer about how one would know a gun was stolen "served no legitimate purpose in the defense of [defendant]. Instead, the answer to the question allowed the jury to convict [defendant] solely on the basis of his fitting a profile. [Defendant's] counsel could have more effectively argued the lack of knowledge without an officer's expert inadmissible opinion as to reasons why one should conclude a gun to be stolen." Finally, "[t]he nature of the evidence alone without further analysis compels a conclusion that the law enforcement officers' testimony prejudiced [defendant]."

***People v. Julian*, 246 Cal.Rptr.3d 517 (Cal. Ct. App. 2019).** Trial counsel was ineffective in case involving multiple charges of sexual offenses against a child in failing to object to inadmissible statistical evidence from the prosecution's expert that went beyond the permissible scope of child sexual abuse accommodation syndrome (CSAAS) evidence. CSAAS dispels myths people have about the reactions children have to sexual abuse. After the prosecution expert explained the myths to the jury, the People introduced a new issue—the statistical percentage of false allegations by child sexual abuse victims. According to the expert's testimony, false allegations occur in only 1-8% of the cases and are extremely rare. Trial counsel not only failed to object to the statistical evidence testimony, his cross-examination of the expert reinforced the expert's direct testimony. There is no justification for trial counsel's failure to object to the statistical evidence on false allegations. "It was inadmissible and it improperly suggested [defendant] was guilty based on statistical probabilities that were irrelevant to this case." The inadmissible evidence was highly prejudicial because this case was heavily contested with strong defense evidence: defendant denied the child's claims and cooperated with police; the children's nanny never saw defendant touch the alleged victim or her three young sisters "inappropriately" and she said none of the girls ever complained that defendant engaged in such conduct; although there was testimony child molesters frequently possess child pornography, the police found no evidence that defendant possessed such material; the prosecution investigator monitored more than

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100 of defendant's jail phone calls and could not recall one where defendant ever requested anyone to destroy evidence; sister 1 testified defendant did not touch her inappropriately, she did not see him touch the alleged victim in that manner, and she did not recall the alleged victim ever saying defendant did something to make her "feel uncomfortable"; the other two sisters did not see defendant inappropriately touch any of the girls and one of them believed the alleged victim was lying when told of the allegations; there was no sexual assault response team (SART) examination of the alleged victim to corroborate her claims and no eyewitnesses; the alleged victim had difficulty remembering certain facts, gave some tentative responses, and some of her testimony was introduced with leading questions; and there were serious conflicts between the alleged victim's trial testimony and a prior interview. Although the impermissible statistic evidence may not be prejudicial where it occurs in a slight passing reference by the expert, "here the jury was bombarded with it" and the prosecutor asked the jury during argument to rely on the evidence. Trial counsel also performed deficiently and prejudiced defendant by asking a detective whether he believed the alleged child victim had been truthful with him, to which the detective responded, "Yes, Sir."

***Brewer v. State*, 924 N.W.2d 87 (N.D. 2019).** In case where petitioner was charged with and convicted of two counts of Gross Sexual Imposition involving two minors, trial counsel was ineffective in failing to renew an objection to admission of an interview of one of the minors in which an incident involving petitioner that was unrelated to the charged crimes was discussed. In response to a pretrial motion to exclude evidence of the interview, the trial court ruled that the evidence was admissible to prove motive, intent, plan, absence of mistake or lack of accident. When the State offered a recording of the interview into evidence at trial, defense counsel failed to renew the objection. Petitioner raised a claim of ineffective assistance of counsel based on trial counsel's inaction. The trial judge presided in the post-conviction proceeding and stated it was likely that he would have granted the motion to exclude if it had been renewed in light of the evidence that had been presented at trial. Trial counsel explained that he did not renew the motion because he "felt that [he] had adequately formed a record in the hearing on the motion itself [and] did not need to raise it." According to the state supreme court, "[t]his statement admits a legal error that is below an objective standard of reasonableness." And even beyond the intentional failure to object, trial counsel stated affirmatively "no objection" when the State offered the interview. "We conclude failing to object at trial because of reliance on the record made in a pretrial motion is a basic legal error that satisfies *Strickland's* prong one" As to prejudice, admission of the interview "impl[ied] a propensity for sexual contact with minors," and perhaps particularly with the minor involved in the interview. The absence of an objection precluded the trial court from conducting the requisite three-step analysis for determining admissibility. Prejudice is established regardless of whether the objection would have been sustained or overruled. If sustained, the evidence would not have been admitted. If overruled, the issue would have been preserved for appeal. "Because we have repeatedly expressed grave concern where prior bad acts evidence has been admitted without the required analysis by the district court, if it had been preserved, this issue would have had sufficient merit on direct appeal to undermine our confidence in the outcome.. . . Although the admissibility of the interview and the appropriateness of a limiting jury instruction are left for the district court's determination in the context of any subsequent retrial, we conclude Brewer satisfied the prejudice requirement of *Strickland's* second prong." The argument that prejudice should only be found as to the one victim is rejected.

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***State v. Marden*, 212 A.3d 407 (N.H. 2019).** In aggravated felonious sexual assault case, trial counsel was ineffective under the State Constitution in failing to object when the testimony by the State's expert witness, a physician specializing in the care of abused or neglected children, ran afoul of the general prohibition against offering expert testimony to prove that a particular child has been sexually abused. The complainant and appellant were in his vehicle in a parking garage outside the victim's workplace apparently having sex when her supervisor knocked on the car window. Appellant was ordered to leave the property. The complainant was upset when she returned to the store where she worked. She told her supervisor that she had been raped and she feared losing her job. Appellant maintained that the encounter was consensual. At the time of the incident, the complainant was 17 years old and appellant was 20 years old. They had been in a personal relationship for several months earlier in the year. During trial, the State's expert witness informed the jury that she had testified "[s]everal dozen times" as an expert "[p]rincipally in the area of child abuse." When the State moved to qualify her as an expert, defense counsel did not object and the trial court granted the motion. The witness recounted her evaluation of the complainant three weeks after the incident while the expert was clinically affiliated with the Child Advocacy and Protection Program at Dartmouth-Hitchcock. The expert described the complainant telling her about vaginal irritation she was suffering from. The State then asked the expert: "What other symptoms of significance did she mention to you during your conversation with her?" Defense counsel did not object to the question. The expert then went on to recount in detail the behavioral and emotional symptoms the complainant said she was experiencing following the alleged assault. Trial counsel was deficient in failing to object to the question about the complainant's symptoms because the expert was then permitted to improperly link such symptoms the complainant was experiencing to the sexual assault at issue. Although the expert did not explicitly draw such a link, because the jury knew that the witness was an expert on child abuse and she had recounted the complainant's reported symptoms of significance, the jury could have inferred that she made that link. Indeed, there was "no discernible purpose for [the witness] to have been recognized as an expert other than to invite the jury to infer that she had formed the expert opinion that [appellant] had assaulted the complainant." The state supreme court rejects the State's argument that appellant suffered no prejudice because, according to the State, the expert's testimony was merely cumulative of testimony by the complainant's co-workers about the complainant's emotional state following the alleged assault. The witness' testimony "and the inferences that could be drawn from it — that she believed that the complainant had been sexually assaulted — were not cumulative of the other demeanor evidence because [the witness], unlike the other trial witnesses, was recognized as an expert." Because appellant established ineffective assistance of counsel under the State Constitution, the New Hampshire Supreme Court does not address whether the Federal Constitution was also violated.

***Chappell v. State*, 837 S.E.2d 496 (S.C. Ct. App. 2019).** In case involving conviction for criminal sexual conduct with a minor and lewd act on a child, trial counsel was ineffective in failing to object when the State's expert gave improper bolstering testimony. Petitioner was the boyfriend of the nine-year-old victim's grandmother. The victim testified that petitioner touched her privates and made her touch his. The jury also saw a video of a forensic interview in which the victim described the abuse and identified petitioner as the perpetrator. Over defense counsel's objection, the State was permitted to present testimony from an expert who had not interviewed the victim or seen the video. She was qualified to testify as an expert in child sexual abuse and treatment.

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On direct examination, she explained why children in general might not report sexual abuse immediately. She continued, without objection, to testify that children do not often lie about sexual abuse. The appellate court agrees with petitioner that this testimony constituted improper bolstering of the child victim. That the expert had not herself interviewed the victim did not defeat the claim of bolstering. "[A] comment on the credibility of a class of persons to which the victim belongs is a comment on the credibility of the victim." Unavailing is the State's argument that trial counsel could not be faulted for failing to object because at the time of the 2012 trial the appellate court had not yet considered an improper bolstering case involving an independent expert. But as the State conceded at oral argument, when such a case was decided in 2015 "the court did not establish a new legal principle or change the existing law." Rather, the court "applied the existing law to a new set of facts. Accordingly, we find the law at the time of [petitioner's] trial indicated an independent expert, like any other witness, may not testify whether another witness is telling the truth." As for prejudice, "[b]ecause the outcome hinged on the victim's credibility, we find there is a reasonable probability that the outcome of [petitioner's] trial would have been different had trial counsel objected when [the State's expert] improperly bolstered the victim's credibility." Indeed, South Carolina courts "have found improper bolstering testimony was prejudicial in every South Carolina case in which the State presented no physical evidence of the defendant's guilt or relied solely on the victim's testimony to establish the details of the crime."

***Felder v. State*, 832 S.E.2d 591 (S.C. 2019).** In case where petitioner was convicted of murder and possession of firearm during the commission of a violent crime, trial counsel was ineffective in failing to seek redaction of the portion of the summary of petitioner's statement to police that mentioned a pending lynching charge. The murder occurred when a vehicle stopped, a man stepped out of the car and shot the victim, and the man returned to the car and drove away. Eyewitnesses could not identify petitioner as the shooter in a lineup. The strongest evidence against him was a hat found at the shooting scene with petitioner's fingerprint and DNA evidence on it. During trial, defense counsel had several opportunities to lodge an objection to admission of the lynching charge reference but failed to do so constituting deficient performance. In assessing prejudice, the state supreme court began by observing:

> The reference to the lynching charge was indisputably propensity evidence that served no purpose other than to prejudice Felder. In this case, the risks associated with propensity evidence were heightened due to the specific crime—lynching. The word "lynching" is extremely problematic in itself. It immediately evokes a visceral reaction and a grim mental image. The lynching reference could reasonably cause a juror to presume Felder was a violent person and deserving of a guilty verdict.

Because petitioner did not take the stand, "it is reasonable to believe the jury focused—at least to some extent—on the summary because it provided Felder's version of events." Additionally, the statement itself was admitted into evidence as an exhibit and a copy was provided to the jury for its consideration during deliberations. Regarding the strength of the State's case, the case against petitioner was largely circumstantial. The strongest evidence against him was the hat found at the crime scene. Two eyewitnesses had stated that the shooter wore a hat and the victim did not. But in addition to petitioner's fingerprint and DNA on the hat, there was an unidentified fingerprint on the hat as well as DNA belonging to someone else. Ultimately, the evidence only showed that

petitioner possessed the hat at some point in time. The evidence linking petitioner's car to the shooting was also weak. Two eyewitnesses were not certain that it was the same car they had seen at the shooting and the door handles of petitioner's car did not match the description of another witness. The two eyewitnesses stated that the assailant's car had tinted windows while petitioner's car did not have tinted windows, although two officers testified it appeared that tint had been removed from the windows of petitioner's car. Finally, there was no blood or DNA from the victim found in petitioner's car. "After weighing trial counsel's error against the strength of the State's case, we conclude the error creates a reasonable probability that the outcome of Felder's trial would have been different had trial counsel acted to exclude the reference to the lynching charge."

***State v. Fuchs*, 2019 WL 5295573 (Ohio Ct. App. Oct. 18, 2019).** In case where appellant was charged with violating a civil stalking protective order and his defense was alibi, defense counsel was ineffective for stipulating to the admission of evidence associated with appellant's prior conviction for violating the same protective order. The protective order was obtained by the husband of a woman appellant had previously been romantically involved with and it covered the husband, Gary Belcher, and his family. At the trial for the second violation, the defense stipulated that a valid protective order existed on the date of the alleged second violation and that appellant had previously violated that order. The defense did not object to the admission of documents proving the already stipulated to fact of the prior violation, and even stipulated to their authenticity. These documents included the magistrate's decision granting the request for the protective order. In it, the magistrate found

> that Fuchs had threatened to "cut" Gary Belcher during a threatening telephone call; that "[t]elecommunications harassment charges [were] pending" against Fuchs as a result of an earlier incident of telephone harassment; that Fuchs had threatened to kill Belcher and was arrested while driving in Belcher's neighborhood with a gun in his vehicle, "a case [that] likewise [was] pending"; and that Fuchs and Belcher had "got[ten] into a fistfight" in January 2016. The order itself stated Fuchs had "knowingly engaged in a pattern of conduct that caused [Belcher] to believe that [Fuchs] [would] cause physical harm * * *."

During the trial, the prosecution called only three witnesses: Gary Belcher's wife, a neighbor, and a police office. Only Belcher's wife testified to seeing appellant on the day of the alleged violation, driving his pickup truck in her neighborhood. The neighbor testified to seeing a pickup truck matching some of the characteristics of appellant's pickup truck but the neighbor denied that he had seen the driver, and when he was shown photographs of appellant's truck, he could not confirm that the truck he saw was the same vehicle. The police officer did not witness any of the events in question. Appellant called two witnesses. His first witness testified that he only was acquainted with appellant through a mutual friend and at the time in question the witness, the mutual friend, and appellant had been kayaking. Appellant's other witness was his mother who testified that appellant's truck was inoperable on the date of the alleged violation. On this record there is a reasonable probability of a different outcome had the exhibit with the magistrate's opinion not been admitted. The court is unpersuaded by the State's argument that counsel may have made a strategic decision to allow admission of the magistrate's opinion given that there was a footnote in

that opinion casting doubt on Mrs. Belcher's truthfulness as a witness. The court points out that defense counsel "made no reference to that portion of the magistrate's decision in his opening or closing statement, and he made no attempt to impeach Belcher's testimony on the basis of the footnote during cross-examination."

***State v. Brewer*, 2019 WL 3287823 (Ohio Ct. App. July 22, 2019).** In cruelty against animal case based on alleged abuse by appellant of his dog, appellant was denied of a fundamentally fair trial by the cumulative impact of trial counsel's multiple failures to lodge appropriate objections. Prior to trial, defense counsel moved to preclude admission of evidence of appellant's criminal history and any prior bad acts, particularly veterinary visits. The trial court declined to rule in advance, waiting instead to hear what evidence was offered before making any ruling. During trial, defense counsel did not object to anything, including statements by a county humane agent about her investigation into the mistreatment allegation which were "scarcely relevant" to the actual alleged abuse. The absence of an objection on hearsay and/or relevance/prejudice grounds allowed the prosecution to introduce out-of-court statements that the agent and her supervisor "were afraid of Brewer, the dog had suffered prior injury under suspicious circumstances (which Brewer was neglectful about treating), Brewer's son loved the dog, and Brewer's mother, family friends, and Willowick police officers all knew and had concerns about Brewer's anger issues." Similarly, defense counsel failed to object when the agent was asked whether she was aware that appellant was involved in other criminal incidents. The agent's acknowledgment that she knew of other criminal matters was "of doubtful relevance and create[d] the impression that animal cruelty may be the least of Brewer's criminal activity." And although the agent had not been qualified as an expert, without objection she was asked about any correlation between domestic violence and animal cruelty. Hearsay records of other bad acts found by the agent were then used to show that appellant was known to be suspected of domestic violence. The State's contention that defense counsel may have declined to object in order to avoid drawing unnecessary attention to damaging testimony is unpersuasive on the facts of the case. "Here, trial counsel's failure to raise a single objection during the course of the trial cannot be reconciled with reasonable trial strategy or tactical choice."

***Cartwright v. Caldwell*, 825 S.E.2d 168 (Ga. 2019).** Reversing denial of habeas relief in case involving murder and other crimes committed in connection with the killing where appellate counsel was ineffective in failing to present the evidence required to substantiate a claim of ineffective assistance of trial counsel. On direct appeal, petitioner claimed that his trial counsel provided ineffective assistance by failing to challenge Detective Tyner's testimony that petitioner had not mentioned his alibi during his post-arrest police interview. Petitioner contended that during a preliminary hearing, Detective Spicer, the lead investigator in the case, testified that Detective Tyner told him that petitioner *had* mentioned his alibi during the interview. The claim was rejected for lack of prejudice given petitioner's failure at the motion for new trial hearing to call Detective Spicer as a witness or introduce a transcript of the detective's preliminary hearing testimony. In habeas proceedings, petitioner alleged that appellate counsel was ineffective in failing to present the Spicer evidence at the new trial hearing. In support, he introduced the relevant preliminary hearing transcript, as well as an affidavit from Detective Spicer reiterating that Detective Tyner had told him of petitioner providing an alibi and stating that neither trial nor appellate counsel ever contacted him. The habeas court denied the claim on the ground that petitioner did not establish

prejudice given that he presented, albeit unsuccessfully, his alibi defense at trial through other witnesses. The Georgia Supreme Court first addressed the trial counsel ineffectiveness claim. Trial counsel never claimed to have had a strategic basis for not presenting Detective Spicer's account and the Georgia Supreme Court found that it appeared from the record that "trial counsel simply whiffed on this issue." It further noted that "[a]lthough the scope of cross-examination will rarely support a claim of deficient performance, no reasonably competent defense attorney would have decided to forgo presenting this evidence to cast doubt on the credibility of the State and one of its key witnesses and to bolster [petitioner's] alibi defense." As to prejudice, the Georgia Supreme Court finds that the habeas court's reliance on the alibi witnesses petitioner presented at trial to have "misse[d] the point for which the defense would have offered Detective Spicer's testimony. The detective's testimony would have been relatively insignificant to bolster the credibility of the five witnesses who testified that [petitioner] was at his family's apartment on the night of the shooting—but it was critical to rebut the State's vociferous assertion that [petitioner] invented that alibi *after* his post-arrest interview." Notably, "[t]he prosecutor had Detective Tyner testify repeatedly and definitively that [petitioner] had not mentioned his alibi in any way during the interview" and "the prosecutor then relied on that 'undisputed evidence' during closing argument to assert repeatedly that petitioner invented his alibi defense after the interview and then convinced his alibi witnesses to testify on his behalf . . .." The invented alibi narrative was "particularly significant in light of the nature of the evidence against [petitioner]. There was no physical evidence linking him to the shooting, and although the State presented four witnesses who said that they saw [petitioner] shoot [the victim], the defense substantially impeached each of them." The Georgia Supreme Court concluded: "Given the less than overwhelming evidence of [defendant's] guilt, his affirmative defense of alibi supported by multiple witnesses, and the importance of Detective Tyner's testimony to the State's efforts to disprove that defense, we conclude that trial counsel's failure to introduce Detective Spicer's contrary testimony had a reasonable probability of affecting the outcome of the trial." Having found the trial counsel ineffectiveness claim meritorious, the only issue left was whether appellate counsel performed deficiently at the habeas hearing. The state supreme court found: "No reasonable attorney would have failed to present the readily available evidence from Detective Spicer, which was essential to proving trial counsel's ineffectiveness."

2018: ***Parmer v. State,* 545 S.W.3d 724 (Tex. Ct. App. 2018).** In attempted capital murder case, trial counsel was ineffective in failing to object to the inclusion during the guilt/innocence phase, of appellant's medical records, which contained evidence of several extraneous offenses and prior bad acts. The incident from which the charge stemmed was one in which appellant shot a police officer in the face when that officer and a number of others reported to appellant's girlfriend's distress call at night that appellant was acting strangely and shooting a gun. When the officers cut the power to appellant's property, appellant ran inside and grabbed a shotgun. The officer who was shot had shined a flashlight into a window of the house. To prove its case, the state had to establish that appellant knew the person he shot was a police officer, and the state presented evidence that the officers announced themselves and appellant would have been able to hear them. Appellant presented only argument that he did not intentionally or knowingly attempt to cause the officer's death and only intended to get people off his property when he shot the weapon. With regard to deficient performance, the medical records, while containing helpful information about appellant's serious mental illness that supported his girlfriend's report that he was acting strangely, they also

contained numerous, detailed references to appellant's extraneous offenses, prior bad acts, and unpopular attitudes, and these were admitted without objection. These included such acts as taking a rifle to work and frightening people, being uncooperative with police, having a substance abuse problem and being narcissistic, destroying several bedrooms and a bathroom, and having a gambling debt. They also included statements he made about being prejudiced and a member of the KKK. The danger of including all this information was that appellant might have been convicted on an implied charge of having a propensity to commit crimes generally. These prior bad acts and attitudes were inadmissible because they were irrelevant to the issue of whether appellant intentionally or knowingly attempted to cause the death of a person he knew to be a peace officer. Because this evidence was inadmissible, no reasonable trial strategy could have supported counsel's choice not to object to its admission. With regard to prejudice, the court found "probability sufficient to undermine confidence in the outcome where the effect of the error permeated the entire case and went to the heart of counsel's only defense issue." The only defense strategy was to challenge the intent requirement. Counsel presented no evidence and made no opening statement, and only argued in closing that there was no intent to kill the officer and just an attempt to get the officers off his property. The state called attention to the extraneous offenses in the medical records during closing argument, without any objection by defense counsel. During deliberations, the jury asked to see appellant's medical records. "[T]he totality of counsel's representation raises concern," and the court noted this was relevant for the purposes of determining prejudice. If the jury had only the admissible portions of appellant's mental health history, those portions, along with the evidence that appellant was acting strangely on the day of the incident, wasn't making any sense whatsoever, and that appellant said he wanted people to get off his property, could have negated the mens rea element of the crime. Reversed and remanded for a new trial.

***Robinson v. State,* 428 P.3d 225 (Kan. Ct. App. 2018).** In arson-murder case, trial counsel was ineffective for failing to investigate and present sufficient expert testimony to refute the claims of the state's expert. Petitioner was convicted in state court of reckless second-degree murder and aggravated arson after he had first been indicted in federal court but the federal case was dismissed. The government's fire expert testified that the fire was intentionally set on the stairs using an open flame and a flammable liquid. Petitioner told detectives that he could have been smoking crack cocaine in the hall and could have thrown lighted matches on the floor. In state habeas proceedings, petitioner alleged numerous deficiencies by trial counsel. Following a hearing, the habeas court ruled that petitioner's counsel were ineffective for failing to investigate and present sufficient expert testimony to refute the claims of the state's expert, that this failure was prejudicial, and that cumulative trial counsel errors required relief. The Court of Appeals of Kansas affirmed the habeas court's grant of relief, using the standard of review of determining whether the habeas court's findings were supported by substantial competent evidence, whether the findings supported the court's legal conclusions, and applying a de novo standard to the habeas court's conclusions of law. It determined that the habeas court's finding of cumulative errors was insignificant given the expert evidence deficiency. It noted that the district court held that trial counsel performed an insufficient investigation into the use of an arson expert. Arson cases generally rely on expert opinions that a person intentionally started the fire, and therefore, it is incumbent upon defense counsel to counter the cause and origin evidence by exploring the possibility of using its own experts. Counsel here waited until two weeks before trial before consulting with someone who had no expertise in determining the cause and origin of fires, did not offer counsel an opinion about

the cause and origins of this fire, and only provided counsel notes for use in cross-examination of the state's expert witness. At the habeas hearing, petitioner established that the state's expert's opinions were vulnerable to attack because they were not based on the actual physical evidence and only on a process of elimination of causes, which is not the product of the scientific method. The appellate court noted that there were vivid contrasts between the preparation of trial counsel and habeas counsel, and between the state trial expert and the habeas defense experts. The trial lawyer did not hire an investigator and did not hire an arson expert, but rather a person who did not point out any flaw in the state's evidence. He did not try to hire someone else because he doesn't "go around trying to find people that are just opinions for hire." The defense "expert" was asked to assist on the case as a consulting expert. He gave trial counsel a timeline and recommended cross-examination questions and had an hour-long conversation with someone on the defense team. He was not a member of arson or fire investigators organizations. The habeas lawyers presented testimony of the federal public defenders who had represented petitioner before his federal case was dismissed. They had consulted with an expert who had written a foundational text on arson investigation and participated in the group that put together the Guide for Fire and Explosion Investigations. Counsel "studied [that guide] and used it in the preparation of his defense." 428 P.3d at 230. They moved to have the guide recognized as a learned treatise so they could use it to help with cross-examination of the state's expert. They had an investigator interview as many witnesses from the scene as possible. They moved for a *Daubert* hearing on the method the state's expert used to attempt to detect flammable accelerants. They believed the state's expert's methods did not fit with the recommendations of the guide. They also felt that the state's expert's opinion that petitioner did not flick a lit match was based on his personal belief that petitioner was not truthful, and he was not permitted to discuss that because it was outside his area of expertise. A habeas defense expert was a fire investigator who had been a fire fighter for 15 years, obtained certification through an association of fire investigators, and was a member of those organizations. He reviewed the fire investigation report, the report of the dog handler who investigated the case, read testimony from the original trial, and viewed photos and reviewed witness statements. He testified that the state expert's methodology violated the scientific method. There were numerous reasons besides the use of an accelerant why the fire spread rapidly that applied here. The appellate court noted that on appeal, many of the challenges the state raised to the habeas court's findings and conclusion were based on misinterpretations of what the habeas court actually did and found. Counsel's performance was deficient because counsel contacted the "expert" less than two weeks before trial and did not talk to another expert when the first proved unhelpful, not because (as the state contended) counsel did not call his expert to testify nor because he did not ask for a continuance to find an expert. The deficiency was prejudicial because the state expert's opinion could have been impeached, leaving the state with no case that petitioner intentionally started the fire. There was no physical evidence of any chemical accelerants at the scene. The significance of the gas can found at the scene was speculative, and the speed of the fire could have been caused by the structure of the apartment house.

2017: ***Tran v. State*, 798 S.E.2d 71 (Ga. Ct. App. 2017).** In case where defendant was convicted of two counts of armed robbery, one count of aggravated sexual battery, and one count of possession of a firearm during the commission of a felony, convictions are reversed based on several instances of deficient performance. The crimes were committed by two men who entered a karaoke club wearing surgical masks and carrying guns. After the robberies and sexual battery, the men left the

club. A witness then observed a silver Acura with tinted windows leaving the parking lot. Shortly thereafter, a silver Acura was pulled over by police. The passenger fled and was never located. Defendant was the driver of the vehicle. He told officers a gun was in the car. Also found in the car were items matching those taken from the club. At trial, defendant testified that he had been waiting outside the club for friends when a masked man pointed a gun at him and ordered him to get in the car and drive. The gunman placed objects he was carrying in the car. After the car was pulled over, the gunman took bills from the glove compartment that had defendant's name on them and threatened defendant not to say anything about the incident. The gunman then fled. According to defendant, he had been robbed and threatened previously, which he had reported to police, leading him to purchase a gun. Although defendant raised multiple allegations of deficient performance by trial counsel, only a few are found to be meritorious: (1) failing to raise a hearsay objection to testimony about the absence of a record of defendant having been a crime victim in a certain county; (2) failing to object to statements by the prosecutor that improperly impeached defendant's testimony; and (3) opening the door to damaging testimony that contradicted defendant's testimony that he was unaware who the gunman was. In finding prejudice from counsel's deficiencies, the court weighed the fact that "the jury heard the prosecutor essentially testify that [defendant] would not need an attorney if he was an innocent bystander and then question [defendant] at length about why he never gave the police information that would have cleared him of these charges." Defendant's allegation that trial counsel had been ineffective in failing to object to those improper comments and questions had been rejected because defense counsel had opened the door to them.

***Entwisle v. State*, 796 S.E.2d 743 (Ga. Ct. App. 2017).** In case where defendant was convicted of numerous charges, including computer invasion of privacy, counsel was found ineffective as to the computer charge for failing to object to hearsay testimony by the victim about someone using her stolen computer to access her financial information. Because the hearsay testimony was the only evidence to offered to prove the elements of the offense, prejudice is found.

***Khalil-Alsalaami*, 399 P.3d 264 (Kan. Ct. App. 2017), *aff'd*, ___ P.3d ___ (Kan. Sept. 11, 2020).** In case involving two counts of aggravated criminal sodomy on an underage victim, trial counsel was ineffective in numerous ways. First, trial counsel was ineffective in failing to request an interpreter at trial and appellate counsel was ineffective for not raising that failure on appeal. Defendant, whose primary language was Arabic, was in the United States as a permanent resident after serving as an interpreter for the United States military forces in Iraq. He was accused of sexually assaulting the victim at a party. He initially admitted to committing some of the sexual acts at issue but claimed it was consensual and that he was unaware the victim was underage. At trial, he denied having any sexual contact with the victim and stated that he had given a contrary account to the police because the officer had repeatedly suggested that sex had occurred. Trial counsel's defense strategy was: (1) arguing that DNA matched to defendant that was found on the victim's shorts had been transferred from the bed where defendant had sex with another woman earlier; and (2) asserting that defendant was tricked by police into giving an incriminating statement. Although defendant's initial counsel had requested an interpreter for defendant and one was employed at the preliminary hearing, trial counsel decided that use of an interpreter would make it appear to the jury that defendant was trying to hide behind a non-existent language barrier, especially given defendant's own history as an interpreter. Thus, defense counsel advised

defendant not to use an interpreter. Such advice was made without counsel: (1) testing defendant's ability to understand English; (2) investigating the complexity of the interpreting defendant was asked to do for the U.S. military; or (3) considering how the use of voir dire and/or instructions could ameliorate any possible prejudice from use of an interpreter. In addition, trial counsel failed to inform defendant of his statutory right to an interpreter and the waiver was not accomplished in front of the trial court. Trial counsel had been aware that defendant would not be able to understand at least portions of the trial, such as the DNA testimony and the prosecutor's closing argument. At trial, defendant spoke in broken English that was difficult to understand and he failed to comprehend the meaning of fairly simple words. According to professionals who tested defendant post-trial, defendant's understanding of English was extremely limited and he would be very easy to trick due to the language problem. Evidence was also presented in post-conviction proceedings showing that approximately 1 year before the charged crime, defendant took an interpreter with him to get a Kansas driver's license and had to use the picture test rather than the written test. In addition, the interpreter for defendant in the preliminary hearing rated defendant's English skills on a scale of 0 to 10 as .01. He further testified that defendant's English was woefully inadequate to go through a court proceeding without an interpreter. The U.S. Army Captain that supervised defendant in Iraq indicated that their communication in English was at an elementary level and analogized defendant's ability as a little better than his 5-year-old daughter, who was entering kindergarten. Although defendant lived in the United States for 14 months prior to his arrest, he lived in a household with other Arabic speakers. When he interpreted for the U.S. Army in Iraq, again he continued to live with Arabic speakers. It was further noted by the appellate court that not only was the criminal trial complex, the stakes were extremely high – defendant was facing a possible sentence of 25 years to life, and, as an asylum seeker, a conviction would likely result in deportation to Iraq where his life could be at risk. Although the post-conviction court found, inter alia, that substantial competent evidence supported the finding that defendant adequately understood English to proceed to trial without an interpreter, the appellate court disagreed, explaining:

> Even if one assumes that [trial counsel] were in the best position to evaluate [defendant's] language abilities at the time of trial, their testimony does not support such a conclusion. They reached what they believed to be a reasonable trial strategy, without fully investigating [defendant's] ability to understand the testimony and legal arguments at his own trial. Not only did they not investigate, but they ignored clear indications that [defendant] could not effectively understand what was going on during the trial.

On this record, trial counsel performed deficiently in not requesting an interpreter at trial. And, given the egregious nature of the error here, prejudice is presumed. In addition, give the appellate court's conclusion that the evidence does not support a finding defendant was able to understand the proceedings in the absence of an interpreter, appellate counsel was deficient in not raising a claim on direct appeal that the trial court erred in failing to appoint an interpreter for defendant. Because there is a reasonable probability that the appellate court would have found that the district court abused its discretion when it failed to appoint an interpreter, prejudice is established. Trial counsel was also found to have performed deficiently in failing to seek suppression of defendant's

confession and stipulating to the voluntariness of defendant's confession after trial counsel entered the case in the midst of a *Jackson v. Denno* hearing that the State had initiated.

> The police minimization technique in conjunction with [defendant's] inability to speak and understand English weigh in favor of finding his confession was involuntary. In addition, [the interrogating officer] testified that in Iraq the police use force to coerce confessions from individuals. It is not unreasonable to conclude that [defendant] may have been pressured to confess because of his fear that force might be used. Finally, [defendant's] lack of understanding of the words used in the oral explanation of his *Miranda* rights coupled with his inability to read what was placed in front of him would also weigh in his favor in the voluntariness calculus. It is clear that [defendant] appeared to be confessing to criminal acts. That is not the issue. The issue for the district court to decide would have been whether his confession was freely and voluntarily given with an understanding of his rights under *Miranda.* We do not believe that was a foregone conclusion.

Further, by stipulating to the voluntariness of the confession and allowing admission of the stipulation into evidence, trial counsel prejudiced his own defense strategy of arguing that defendant was tricked into making the confession. Trial counsel was also deficient in failing to object when the prosecutor misstated the DNA evidence during argument in a manner that torpedoed his assertion his argument about how defendant's DNA came to be on the victim's shorts. Further, appellate counsel was ineffective in failing to raise the issue of prosecutorial misconduct on direct appeal. Finally, the appellate court concluded that defendant was entitled to relief on a claim that the cumulative impact of trial counsel's errors deprived him of a fair trial.

> [Trial counsel] committed six errors during his representation of [defendant]: (1) he failed to request an interpreter for [defendant] at trial; (2) he failed to file a motion to suppress [defendant's] confession or mount a defense at the *Jackson v. Denno* hearing; (3) he stipulated to the voluntariness of [defendant's] confession; (4) he failed to object to improper questioning of [the examining nurse]; (5) he failed to object to questions meant to highlight [defendant's] negative character traits; and (6) he failed to object when the prosecutor misstated evidence during closing arguments. We find that the number of errors is substantial, and even if the State could successfully argue that the impact that any one of them had on the trial was insignificant, we cannot ignore the fact that the accumulation of these errors impacted [defendant's] ability to receive a fair trial.

***Humphrey v. State*, 73 N.E.3d 677 (Ind. 2017).** In murder case, trial counsel was ineffective in failing to object to use of a witness's prior unsworn statement as substantive evidence and failing to request appropriate instructions on how the statement could be considered by the jury. The murder occurred during an attempted drug deal. According to a friend of the murder victim, he and the victim had been driving around in the friend's truck searching for drugs. When they spotted three men who appeared to be dealers, they pulled up near them. One of the men approached the truck and the victim asked him to get in to discuss a drug purchase. As the friend drove, words were spoken between the victim and the dealer who then drew a gun. The victim

grabbed the gun and it went off. The dealer jumped out of the moving car and ran away. The victim had been struck in the abdomen and ultimately died from the wound. The victim's friend could only give a vague description of the dealer. A man named Smith testified that he had been with defendant and a man named Brooks on the night of the murder. He observed a truck stop and defendant going to greet it, indicating to Smith that defendant thought the occupants wanted to buy drugs. Although Smith heard the door of the truck open and close, he didn't see defendant get in the truck and he heard no gunshot. He did hear the truck peel out and then defendant returned, telling Smith that the "dude" tried to "gank him" or "git him." Smith had seen defendant with a gun before but not on that night. Brooks, the third man allegedly present that night, gave police an unsworn statement about the events when Brooks was in jail on an unrelated charge. Brooks identified defendant in a photo lineup and stated that defendant went out to a truck, Brooks heard a "noise," and defendant returned stating that he had shot one of the men. At trial, however, Brooks denied being with defendant and Smith on the night of the shooting and claimed that his statement had been fabricated due to police pressure. The statement was admitted to impeach his in-court repudiation. As for trial counsel's failure to object to admission of the unsworn statement on hearsay grounds and to request a limiting instruction, the State argued that defense counsel could reasonably have decided not to further highlight the statement. But this supposed strategic justification for the omission was belied by the record which showed trial counsel's repeated references to the unsworn statement throughout the remainder of the trial, including defense counsel reading out loud the portion of the statement where Brooks identified defendant as the shooter. Trial counsel even expressly asked the jurors during closing argument to consider the out-of-court statement in determining defendant's guilt or innocence. The State's other argument – that trial counsel had a secondary strategy of wanting the Brooks statement admitted in order to sow reasonable doubt – was similarly unpersuasive. First, trial counsel had unsuccessfully objected to admission of the statement on other grounds (lack of foundation). Second, this argument contradicted the primary argument that trial counsel allowed the statement's admission in order to avoid further focus on it. "It defies credulity to say on the one hand that defense counsel strategically elected not to mount a hearsay objection or request a limiting instruction to refrain from drawing attention to Brooks' unsworn statement, but insist on the other hand that counsel wanted to 'use it to show the inconsistencies in the State's key witnesses.'" On this record, the deference normally accorded to trial counsel's acts or omissions was inappropriate and counsel's failure to lodge a hearsay objection to admission of the statement constituted deficient performance. Counsel also performed deficiently in failing to request an admonition or limiting instruction precluding the unsworn statement from being used as substantive evidence rather than only as impeachment evidence. Also deficient was defense counsel's failure to object to a jury instruction that expressly told the jury that it could consider the out-of-court statement in determining defendant's guilt. (The pattern instruction given to the jury had been rendered an incorrect statement of the law by a recent state supreme court ruling.) As to prejudice, the court observed: "[E]vidence improperly considered by the jury for want of a limiting instruction is no less prejudicial than evidence presented which should have never been introduced in the first instance. Both permit the jury to improperly determine guilt based information that should not be considered. Even if Brooks' unsworn statement was properly admitted for impeachment purposes, counsel failed to limit the use of that statement to his client's detriment." On the record before it,

the court concluded there was a reasonable probability of a more favorable verdict had counsel not acted deficiently.

***Alne v. Nooth*, 406 P.3d 109 (Or. Ct. App. 2017).** In case involving charges of multiple sexual offenses, trial counsel was ineffective in failing to object to testimony by a prosecution witness commenting on the credibility of the complainant. The complainant, a five-year-old girl at the time of the alleged offense, told her father that defendant had committed several sexual acts on her. The girl was interviewed by a licensed social worker with extensive experience with child abuse evaluations. At trial, the social worker was asked about the girl's statements about sexual abuse and whether a non-abused child at her age would have been able to manufacture the descriptions she provided. The social worker responded, in part: "From my training and experience, I thought again that she provided information that was from a child's point of view, and it just seemed like a genuine statement." Defendant's counsel did not object to this testimony. Other evidence at trial included that the complainant had been brought in to be examined for sexual abuse on three prior occasions unrelated to defendant. There was also testimony that the complainant may have, at some time prior to her allegations of abuse by defendant, witnessed her parents engaging in sexual activity and may have seen pornographic videos playing on two occasions. Additionally, the defense brought an expert to testify about the memories of young children and how they may be affected and influenced by what they have seen. In affirming the grant of relief, the appellate court agreed with the lower court that the social worker's testimony about the complainant's statement seeming "genuine" was clearly impermissible vouching for the complainant. Trial counsel failed to exercise reasonable professional skill and judgment by not lodging an objection. Regarding prejudice, there was no physical evidence of sexual abuse and the credibility of the complainant was critical. The social worker's testimony that the complainant's statements were genuine could have tended to affect the outcome of the trial. Defendant was therefore prejudiced by trial counsel's failure to object to the vouching testimony.

***Briggs v. State*, 806 S.E.2d 713 (S.C. 2017).** In case involving charges of sexual crimes against a child, trial counsel was ineffective in failing to object when the forensic interviewer gave opinion testimony that she believed the alleged victim's accusations to be true and then eliciting further bolstering testimony on cross-examination. On direct examination the forensic interviewer's testimony that her "role" was to determine whether the child knows the difference between the truth and a lie and that her "purpose" was "finding out if something happened" or "to figure out what has occurred" clearly conveyed to the jury that she believed the victim. Trial counsel conceded he had no strategic reason for not objecting to this vouching testimony and his failure to object constituted deficient performance. During cross-examination, trial counsel asked the forensic interviewer an open-ended question that included "how can you as an expert determine if she's telling the truth . . .." Such a question "was sure to solicit an answer that directly bolstered the victim's credibility" and the answer provided met expectations "and placed squarely before the jury her opinion that the victim was telling the truth." This questioning constituted deficient performance. Given the importance of the victim's credibility and the absence of physical evidence, prejudice is found irrespective of some incriminating remarks by defendant. The most damaging testimony against defendant, which came from two jailhouse informants, was dismissed as unreliable.

**Capital Case*

2016: ***Kennebrew v. State*, 792 S.E.2d 695 (Ga. 2016).** In robbery-murder case, trial counsel performed deficiently in failing to seek suppression of evidence found in backpacks seized by officers following defendant's arrest, as well as failing to object to improper comments by the prosecutor. Defendant had been arrested pursuant to a warrant in his girlfriend's college dorm room. The police seized the backpacks after defendant had been handcuffed and removed from the room. It was not until six days later that the backpacks were opened and shot gun shells and bullets of the type taken from the victim's home were discovered, along with a knife that might have been involved in the killing. These items were severely damaging to defendant's trial defense that he went with the co-defendants to the victim's home for the purpose of selling the victim a PlayStation and then fled the scene after co-defendant Hall unexpectantly went crazy and viciously beat and stabbed the victim to death. The prosecutor emphasized the items in arguing that defendant was not merely present in the victim's home but was an active participant in the robbery-murder. At the hearing on defendant's motion for new trial, defense counsel explained that he had not moved to suppress the backpack evidence because he believed it had been lawfully taken during a search incident to arrest. This exception to the search warrant requirement, however, was clearly inapplicable to the facts of this case. Defense counsel's misunderstanding of the law constituted deficient performance. Also deficient was defendant counsel's failure to object when the prosecutor commented on defendant's pre-arrest silence/failure to come forward after the killing, a clear violation of the state law *Mallory* rule. Although defense counsel guessed at the post-trial hearing that he had decided to forgo an objection in order to avoid bringing more attention to the issue, this did not justify the omission: "The State's discussion of [defendant's] failure to come forward to the police was not . . . just a passing or equivocal remark that the jury might have overlooked. It was a specific, extended argument aimed directly at demonstrating [defendant's] guilt. Given [defendant's] defense theory, the importance of the State's silence-equals-guilt argument to its case against him, and the obviousness of the *Mallory* violation, [defense counsel's] failure to object was patently unreasonable and thus deficient performance under *Strickland*." Because the case against defendant was not overwhelming and he had a plausible explanation for his presence at the crime scene, prejudice is found given the prosecution's reliance on the backpack-related evidence, his improper argument, and notes from the jury seeking to compare the bullets found in the backpack with those found in the possession of co-defendant Hall.

***Christian v. State*, 502 S.W.3d 702 (Mo. Ct. App. 2016).** In forgery case, trial counsel was ineffective in failing to object when the prosecutor introduced evidence that defendant had invoked his Fifth Amendment right to remain silent in a deposition he gave in a related civil suit. The prosecution's theory of the case was that defendant had forged the victim's signature on a deed transferring the victim's property to defendant and another party. During the prosecution's case-in-chief, the victim was asked whether he had gotten the property back. The victim responded that he had, through a civil bench trial. Also during the case-in-chief, the prosecutor read portions of defendant's deposition in the civil suit which referenced the pending criminal case. These excerpts included defendant's assertion of his Fifth Amendment rights on numerous occasions. Trial counsel did not object during the reading of the deposition but moved for a mistrial the following day. He commented that he had been surprised when the prosecution read the invocations but thought it better to approach the issue outside the presence of the jury. The prosecutor pointed out, however, that trial counsel had a copy of the deposition, which he had attended, and the

prosecutor had omitted reading one part of the deposition at trial counsel's request. The prosecutor stated he would not further reference the invocations. The mistrial motion was denied but no admonitions were given to the jury about what it had heard about defendant invoking his Fifth Amendment rights. At the post-conviction hearing, trial counsel testified that his lack of contemporaneous objection was due to his shock and surprise by the prosecutor's use of the deposition. The post-conviction court denied relief. In reversing the post-conviction court's ruling the appellate court rejected the State's argument that no deficient performance was possible because there was no case establishing that use of an invocation of the Fifth Amendment in a related civil case was impermissible. The appellate court, applying the basic principles of Fifth Amendment jurisprudence, concluded that reasonably competent counsel would have objected to the prosecutor's use of the invocations. The fact that defendant ultimately chose to testify did not render the constitutional violation harmless.

***Taylor v. State*, 788 S.E.2d 97 (Ga. Ct. App. 2016)**. Counsel ineffective in vehicular homicide and traffic offenses case for failing to object to hearsay testimony of a police officer that the defendant was driving without a license and operating a vehicle without a current registration. The officer testified that this information came from a computer check or from another police officer's report. Either would be hearsay. Under Georgia law, "[w]hen an officer testifies about the results of a computer check of a registration tag or driver's license, the testimony is hearsay," unless the information was "obtained from a terminal lawfully connected to the Georgia Crime Information Center." Here, the state offered no such proof. Counsel's conduct was deficient and prejudicial as this hearsay testimony was the only evidence supporting the misdemeanor convictions of driving without a license and operating a vehicle without a current registration.

***People v. Shaw*, 892 N.W.2d 15 (Mich. Ct. App. 2016)**. Counsel ineffective in criminal sexual conduct case for failing to object to hearsay testimony of five witnesses concerning the alleged victim's statements to them about the crimes and failing to present evidence of an alternative source of the victim's injuries. In essence, when the alleged victim was 23 years old, she reported that the defendant, her stepfather, sexually molested her between the ages of 8 and 16. Three family members, a pediatrician, and a police detective testified concerning her statements to them about the crimes. Counsel's conduct was deficient in failing to object to this testimony. The state conceded the family member testimony was improper, but argued the statements to the pediatrician were admissible because they were statements made for the purposes of medical treatment. As the examination was conducted seven years after the last incident of alleged abuse and was for purposes of investigation, rather than gynecological treatment, Michigan Rule of Evidence 803(4) did not apply. Failure to object to the detective's testimony was even worse, as she recounted the alleged victim's statements to her but also the alleged victim's statements to the pediatrician and testified extensively about how she "confirmed" and "corroborated" the alleged victim's statements with investigation. Thus, the detective also vouched for the alleged victim's credibility. Prejudice established as the state's entire case "turned largely on the complainant's credibility." By failing to object, the jury heard her version of events six times rather than once. And, with regards to the pediatrician and detective, "the hearsay was offered with what amounted to an official stamp of approval" as both of these witnesses testified that they believed the alleged victim. Counsel's conduct was also deficient and prejudicial in failing to investigate and present evidence that the complainant was sexually active with her live-in boyfriend beginning at age 19. Counsel did not do

so because he believed the evidence was barred by the rape shield law. That law does not, however, prevent admission of other instances of sexual activity "to show the origin of a physical condition" offered by the prosecution to prove an element of the crime. Here, the pediatrician had testified to "hymenal changes" and a "chronic anal fissure" that were consistent with the complainant's description of the alleged abuse, but also could be consistent with consensual vaginal and anal intercourse the complainant had with her boyfriend.

***Baranovich v. Brockamp*, 379 P.3d 702 (Or. Ct. App. 2016)**. Counsel ineffective in burglary and theft case under both the Sixth Amendment and the Oregon Constitution for failing to object to hearsay evidence identifying the defendant as the perpetrator of the burglary and commenting on petitioner's character. On the day of the burglary and theft at the home of Rosabal and Alvarez, a neighbor saw a car drive by the house and thought the woman in the passenger seat looked "slightly familiar." Later when Rosabal and Alvarez returned home, the neighbor discussed the possible identity of the woman with Alvarez. Alvarez showed the neighbor pictures of the defendant from his cell phone. The neighbor testified that he told Alvarez that the defendant "may have been" the woman in the car. Alvarez testified, however, that the neighbor "had identified" the defendant as the perpetrator. Rosabal testified that he had gone to the defendant's house to confront her. She was not home, but her brother told Rosabal that she "was a really bad person, and he hopes she gets in trouble, and she does a lot of things like this." Counsel's conduct was deficient in failing to object to the hearsay evidence in the testimony of both Alvarez and Rosabal. Prejudice also established, particularly with respect to the hearsay testimony that the defendant's "own brother [thought] that she is a chronic thief who needs punishment." "[E]ither alone or 'certainly in combination,'" the errors were prejudicial.

***Tappeiner v. State*, 785 S.E.2d 471 (S.C. 2016)**. Counsel ineffective in criminal sexual conduct with a minor case for failing to object to the prosecutor's improper arguments vouching for the child victim's credibility, mischaracterizing a rape counselor's testimony, and appealing to the jurors' emotions. The defendant was accused of sexually abusing her 13-year-old neighbor on a night when he and his sister stayed with the defendant and her husband. The alleged victim testified that the defendant sexually assaulted him after the others went to bed and that he had screamed for help but no one heard him. A school resource officer who had interviewed the alleged victim also testified, including statements that he believed the alleged victim. An expert in forensic interviewing from a local rape crisis center interviewed the alleged victim but testified only in response to hypothetical questions "as to why child victims of sex crimes may delay reporting the abuse." Defense counsel called only the defendant's husband as a witness. He testified that his wife had gone to bed at the same time as he did and remained there all night. He also testified that he was a light sleeper and he and the family dog would have reacted if there had been screaming. He also testified that the alleged victim was asleep in the living room when he awoke and behaving normally while having breakfast with him. In closing arguments, the prosecutor reminded the jury that the resource officer believed the boy, asserted that the expert testified that she believed the boy, and also asked the jurors if they would be comfortable with the defendant babysitting their children or grandchildren. Counsel's conduct was deficient in failing to object to the prosecution's improper arguments. Not only was it impermissible for witnesses to testify that they believed the victim, but the prosecutor misrepresented the evidence by asserting that the expert had done so when she had

not even testified that she had interviewed the boy. The prosecutor's appeal to the jurors' emotions was also improper. Prejudice also established as the state's evidence depended almost entirely on the boy's credibility.

***People v. Lucious*, 63 N.E.3d 211 (Ill. Ct. App. 2016).** In case where defendant was convicted at a bench trial of aggravated robbery, trial counsel was ineffective in failing to object to evidence of a statement by the co-defendant which was used by the trial court to find an element of the crime in defendant's case. Defendant and the co-defendant accosted a woman in an alley and took two backpacks from her. They both confessed to the robbery. The victim testified that defendant put a gun to her head, leading to a charge of armed robbery, as well as aggravated robbery. In his confession, defendant denied having a gun but stated he had a cell phone. In the co-defendant's confession, he stated that he told the victim, "Don't make him [i.e., defendant] shoot you." The co-defendant also stated he didn't know why he said that given that defendant only had a cell phone. When defendant and the co-defendant were arrested shortly after the robbery, neither had a gun or a cell phone with them. After the prosecution presented its case, the court granted defendant's motion for a directed verdict on the armed robbery charge. Neither defendant testified. Trial counsel argued that the evidence did not establish an aggravated robbery as that required that the defendant indicate to the victim, either verbally or through his actions, that he was armed with a firearm or other deadly weapon. Based on the statement of the co-defendant, which the court found accountable to defendant, the court concluded the defendants were attempting to make the victim believe they had a gun and convicted both defendants of aggravated robbery. Trial counsel's failure to object to the use of the co-defendant's statement against defendant was deficient performance as it violated defendant's confrontation rights. As to prejudice, it was reasonable to infer, as the State did in summation, that defendant had pressed a cell phone to the victim's head making her believe it was a gun. Nevertheless, the direct evidence of a threat to shoot having been made was far stronger proof of the element of the crime, establishing prejudice from trial counsel's failure to object.

***Landry v. State*, 380 P.3d 25 (Utah Ct. App. 2016).** In aggravated arson case, trial counsel rendered ineffective assistance by failing to object to the State's use of testimony about an accelerant-detection canine's alerts at the scene of the fire and on items of defendant's clothing and by failing to consult with an arson expert or call an expert witness to refute the State's arson experts. Further, appellate counsel was objectively deficient in failing to present the meritorious claim of trial counsel ineffectiveness on appeal. The fire at issue occurred in an apartment defendant was in the process of moving out of due to eviction. It broke out five to ten minutes after defendant and his girlfriend left, apparently intending to return. Some of defendant's belongings remained in the apartment and he was supposed to meet the apartment complex manager that evening for a walk-through inspection of the apartment. At trial, the State presented expert testimony supporting the arson theory. One aspect of such testimony involved alerts by an accelerant-detection canine. Trial counsel, who had never tried an arson case before, failed to object to this testimony even though existing case law made it highly unlikely that the State would have been able to overcome a proper objection. In preparation for trial, trial counsel spoke only with a fire marshal who was a witness for the State. Obviously, this expert would not have provided trial counsel with a basis to challenge the expert's own findings. The defense theory was

that either the fire started accidently by a cigarette smoked by the girlfriend contacting alcohol spilled on the floor during a party the night before or that it was started by an unknown individual who a neighbor saw outside the apartment around the time the fire began. Both theories had significant evidentiary problems. As shown by post-conviction expert testimony, had trial counsel consulted with or presented testimony from an independent arson expert, she would have had ammunition to challenge how the arson investigation had been conducted as well as the findings of the State's arson experts. The defense post-conviction expert had criticized numerous aspects of the investigation and concluded that the fire should have been classified as of "undetermined origin." Trial counsel's failure to properly educate herself constituted deficient performance. Prejudice is found because: (1) post-conviction expert testimony revealed substantial errors in the State's arson case; (2) under existing case law, trial counsel likely would have kept out the canine alert testimony; and (3) the jury struggled to reach a verdict in this case. (After the jury announced a deadlock, it was told that if it did not reach a verdict that day, it would have to return to deliberate on an extra unplanned day causing a hardship to at least one juror. The jury reached consensus after that admonition.) Because trial counsel's deficient performance prejudiced defendant, "appellate counsel's failure to raise a claim of ineffective assistance of trial counsel on appeal was likewise objectively deficient and prejudicial."

***Commonwealth v. Williams*, 141 A.3d 440 (Pa. 2016).** In triple murder case, appellate counsel was ineffective in failing to raise trial counsel's ineffectiveness in not cross-examining the prosecution's expert or calling a defense expert concerning inconsistencies between the key prosecution witness's testimony and the forensic evidence. At trial, the prosecution relied primarily on the testimony of White, a purported eyewitness to two of the murders and an accomplice in all three. White testified that the three victims had arranged to purchase weapons from Williams, the leader of a gang that sold weapons and drugs. Williams had planned to rob the men when they met to receive the guns. When the groups met, Williams and members of the gang, including White, held the victims at gunpoint and demanded their money. After the purchase money was turned over, Williams continued to demand additional money from the three victims. When one of the men admitted he had additional money at another location, he was taken by Williams and two other gang members to retrieve the money. Williams and the gang members returned without the victim. White testified that one of the two gang members who accompanied Williams informed White that Williams had shot the victim in the head. The remaining two victims were then loaded in the back of a stolen van. Williams and another gang member were in the back with the victims and continuing to demand more money. White was in the front passenger seat. White testified that he saw Williams shoot the smallest of the three victims in the face while the victim looked at Williams and the gun. A short time later, the van slowed and this victim was thrown out of the back of the van into the street. White then saw Williams put his gun in the face of the remaining victim. White turned to face front and heard two gunshots and the back of the van open. When he next looked back, the third victim was gone, presumably also thrown out of the van. When the victims were later found by authorities, none were in a street but instead on a sidewalk or in a driveway. And each had sustained gunshots wounds but none had other injuries to their bodies, such as bruises or abrasions. Defense counsel did not ask any of the prosecution's expert witnesses a single question. Counsel for one co-defendant did cross-examine two of these witnesses about the absence of non-gun-related injuries to the victims but the witnesses opined that the lack of additional injuries did not establish that the victims had not fallen. Defense counsel

argued to the jury that common sense showed that the location and conditions of the bodies were inconsistent with White's account of what occurred. In post-conviction proceedings, defense counsel conceded he had no strategic reason for failing to consult with or present testimony from a medical or forensic expert in order to highlight the problems with White's testimony. Post-conviction counsel presented testimony from an expert in the field of homicide investigation, crime scene analysis and blood spatter analysis. This expert, who was credited by the post-conviction court, opined that the medical and forensic evidence was inconsistent with White's testimony. In finding that this expert's testimony would have been helpful to defendant at trial, the state supreme court noted in particular the expert's opinion that "the blood flow evidence was [] wholly incompatible with White's testimony that the victims were shot and thrown from a moving van." Additionally, the expert testified that none of the victims sustained gunshot wounds consistent with White's testimony that the victim was looking at the shooter's gun when he was shot. As for prejudice, it was noted that although White was subject to significant impeachment, "the cross-examination of White left his story about the three murders at issue largely unscathed." If the jury believed the post-conviction expert's testimony, coupled with other evidence impeaching White's credibility, it is likely the jury would have acquitted defendant of the three murders. Finally, the record supported the post-conviction court's "factual findings and legal conclusion that appellate counsel had no reasonable basis for failing to raise the claim of trial counsel's ineffectiveness for not calling an expert to testify or cross-examining the Commonwealth's experts regarding the blood flow evidence and gunshot wound evidence." (Appellate counsel testified that he had no independent recollection of the appeal but that confining his claims to those appearing on the record, as occurred in defendant's appeal, was consistent with his practice at the relevant time.) Prejudice is established because there was a substantial likelihood that the outcome of defendant's appeal would have been different if the trial counsel ineffectiveness claim had been raised there.

2015: ***State v. Johnson*, 57 N.E.3d 76 (Ohio Ct. App. 2015)**. Counsel ineffective in failing to object to the prosecutor's closing argument asking the jury to consider hearsay statements admitted for a limited purpose as substantive evidence of guilt. The defendant was convicted of assault for firing shots into a car occupied by his girlfriend and two other women. One of those women (Starks) did not testify but the state was permitted to introduce her statements during the investigation through a police officer over the defendant's objection. Prior to the testimony, the court instructed the jury that the testimony could be considered only for the limited purpose of describing the ongoing investigation. The officer testified that Starks said the defendant and his girlfriend were arguing and after the girlfriend got in the car and they were living, the defendant fired shots into the car. The cautionary instruction was not repeated in the final instructions. Following the defense closing asserting that no one testified that the defendant had a gun, the state argued in closing that Starks identified the defendant as the shooter. Counsel's conduct was deficient in failing to object to this argument because use of Starks' hearsay statements as probative evidence of guilt violated the defendant's right to confrontation. Prejudice established because without evidence identifying the defendant as the shooter, the state's case was weak and based entirely on inference as no gun was recovered and the shell casings in the parking lot near where the defendant was standing did not match the bullets removed from the car. The prejudice was enhanced because the improper arguments came in the state's rebuttal when the defense had no opportunity to respond. "As the last argument heard by the jury prior to deliberations, there is a substantial likelihood that its impact was prejudicial."

**Capital Case*

****Oatney v. Premo*, 369 P.3d 387 (Or. Ct. App. 2015).** Counsel ineffective in capital murder trial for failing to move to suppress the testimony and out-of-court statements of the codefendant which were used in violation of a use and derivative use immunity agreement between the state and petitioner. The victim disappeared after leaving home purportedly to meet with petitioner. Petitioner was questioned but denied seeing the victim for three weeks. A week or so later the victim's badly decomposed body was found. Petitioner retained counsel and informed counsel he was innocent but knew who had committed the crime. Counsel arranged a recorded interview of petitioner by the prosecutor and detectives. At the beginning of the interview, throughout the interview, and at the end of the interview, the prosecutor "promised petitioner that 'anything you say during the course of this interview' and 'any information that we derive from what you tell us' 'cannot ever be used against you.'" Petitioner then made a statement that, while he was away from his apartment, his associate, Johnston, kidnaped the victim, sexually assaulted, and murdered her in petitioner's apartment. When petitioner returned, he helped clean up and dispose of the body because he feared being charged. Johnston was in custody on unrelated charges and had been interviewed several times about the murder, but he denied any knowledge. After petitioner's taped statement was played for Johnston, he became angry and then implicated petitioner. Over the next two days, he made additional statements ultimately admitting that both he and petitioner had sexually assaulted the victim and murdered her. Johnston and petitioner were jointly charged. In pretrial proceedings, counsel argued that petitioner's statements and Johnston's statements were inadmissible against petitioner due to the immunity agreement. Johnston subsequently entered into a plea agreement in which he agreed to plead guilty and testify against petitioner in exchange for a life sentence. Trial counsel continued to argue that petitioner's statements were inadmissible under the agreement but inexplicably did not move to suppress Johnston's statements and testimony. The prosecutor conceded that petitioner's statements were inadmissible. During trial, Johnston testified consistent with his statements. Petitioner also testified consistent with his statement. The only physical evidence of significance was the victim's blood in petitioner's apartment. Counsel's conduct was deficient in failing to move to suppress Johnston's testimony and prior statements. While counsel testified that he believed these statements were admissible, this "subjective belief, apparently belatedly arrived at," was unreasonable in light of the plain language of the agreement and counsel's earlier challenges to the statements. Likewise, while the state argued that the agreement was premised on petitioner's statements being true, this was inconsistent with the plain language of the agreement and was never argued before by the prosecutor who made the agreement and conceded that the agreement precluded use of petitioner's prior statements. While the state also argued that Johnston's statements were not derivative because they were from an independent source and would have inevitably been discovered, those arguments were also rejected. The record was clear that Johnston had consistently denied knowledge of the crimes and confessed only after petitioner's recorded statement was played for him. Prejudice was "readily" found, as the state made no argument otherwise and Johnston's statements and testimony were the only direct evidence against petitioner.

***Floyd v. State*, 159 So. 3d 987 (Fla. Dist. Ct. App. 2015)**. Counsel ineffective in shooting case for failing to object to the prosecutor's comments on the defendant's exercise of his post-arrest right to remain silent. These comments were made while cross-examining the defendant, who was arguing

self-defense. Counsel's explanation of "not wanting to annoy the jury or give the appearance of attempting to hide something from the jury" was unreasonable because could did make other objections during the state's cross of the defendant.

***State v. Sims*, 769 S.E.2d 62 (Ga. 2015)**. Counsel ineffective in felony murder case for failing to object to the prosecutor's opening statement comments concerning the defendant's silence prior to arrest. Counsel's failure to object "was an oversight unrelated to any strategy." Prejudice established. The sole defense was justification, but these comments tainted the trial from the beginning leaving the impression of guilt from the defendant's failure to contact the police of his own accord following the shooting.

***People v. Coleman*, 25 N.E.3d 82 (Ill. Ct. App. 2015)**. Counsel ineffective in unlawful delivery of a controlled substance case for stipulating to the existence of over 900 grams of cocaine, even though the police field tested only 1 bag, containing only 63 or 64 grams, prior to commingling this evidence with powder contained in 14 other bags before sending it to the lab. Counsel's conduct was deficient and prejudicial with respect to quantity. Remanded for resentencing on the lesser included offense of possession of "15 grams or more but less than 100 grams."

***Taylor v. State*, 167 So. 3d 1143 (Miss. 2015)**. Counsel ineffective in receiving stolen property case for failing to object to the introduction of the defendant's past felony convictions. The police were investigating a stolen "skid steer" used by the owner of a tree service when they discovered photos of an identical "skid steer" on the defendant's phone while he was under arrest for an unrelated crime. The tree service owner, who had previously identified someone else as the person he bought the equipment from, then identified the defendant as the culprit. Prior to trial, counsel moved to exclude evidence of the defendant's past criminal record, but the ruling was delayed until trial. Just prior to the defendant's testimony, counsel withdrew the motion as the defendant had decided to testify and would admit that he was a convicted felon. During his direct testimony, he admitted that he had previously been convicted on a drug charge. On cross, the state elicited testimony of seven or eight prior felony convictions of house burglary, vehicle theft, grand larceny, and other offenses. Defense counsel made no objection. Counsel's conduct was deficient, lacking in strategy, and prejudicial, as the evidence admitted was, under the state evidentiary rules, "clearly more prejudicial than probative in a case that largely turned on the respective credibility of Taylor and the State's main witness." The defendant's admission of his felon status should have been the only evidence admitted concerning the defendant's prior criminal history.

***State v. Pruett*, 31 N.E.3d 197 (Ohio Ct. App. 2015)**. Counsel ineffective in theft case for failing to object to police officers' statements, which bolstered victims' testimony. The case arose from alleged fraudulent fuel purchases made on the account of a painting company, who had an account at a gas station. The defendant was an employee of the gas station allegedly creating false fuel purchases and pocketing the cash. The owners of the businesses compared paperwork and concluded that the defendant was the guilty party. This information was taken to the police who brought charges. During trial, a detective was asked, without objection, whether he had any reason to doubt that the defendant signed the tickets. Another officer testified, without objection, that he verified the information provided. The defendant was never asked to provide a handwriting

exemplar to determine whether he wrote the disputed tickets and neither officer conducted any investigation beyond speaking with the alleged victims and the defendant. Counsel's conduct was deficient in failing to object to the officers' testimony "attesting to the veracity of witnesses." Prejudice established, as there was no actual accounting of the business records, which were not admitted in evidence, and no independent investigation by the police.

***State v. Vandyke*, 863 N.W.2d 626 (Wis. Ct. App. 2015)**. Counsel ineffective in reckless homicide by delivery of controlled substance case for failing to objection to the introduction of a lab report containing the victim's blood and urine tests results, which was testimonial for confrontation clause purposes. The only evidence that the victim died of a heroin overdose came from this report, when neither the author of the report nor anyone else from the lab was produced as a witness. While counsel allegedly wanted this report in evidence in order to argue that a different drug killed the victim, this was unreasonable. If the objection were successful, such argument would be unnecessary because the state could not prove its case. If the argument were unsuccessful, counsel's argument could still have been made. Prejudice established. **NOTE:** Review in the Wisconsin Supreme Court was not sought in this case. In a later case, the Wisconsin Supreme Court expressly overruled the holding here that the lab report at issue was testimonial for purposes of the Confrontation Clause. *State v. Mattox*, 890 N.W.2d 256 (Wisc. 2017).

2014: ***People v. Centeno*, 338 P.3d 938 (Cal. 2014)**. Counsel was ineffective in lewd acts case for failing to object to the prosecutor's arguments using a hypothetical to explain the burden of proof and other statements that diluted the state's burden of proof. Specifically, the prosecutor used a diagram showing the boundaries of California and urged the jury to convict based on a "reasonable" view of the evidence, which risked misleading the jury.

> The use of an iconic image like the shape of California or the Statue of Liberty, unrelated to the facts of the case, is a flawed way to demonstrate the process of proving guilt beyond a reasonable doubt. These types of images necessarily draw on the jurors' own knowledge rather than evidence presented at trial. They are immediately recognizable and irrefutable. Additionally, such demonstrations trivialize the deliberative process, essentially turning it into a game that encourages the jurors to guess or jump to a conclusion.

Id. at 947. Counsel's conduct was deficient in failing to object. Prejudice established as "this was a very close case" dependent almost entirely on the 10-year-old alleged victim's testimony, the credibility of which was repeatedly called into question.

***Hutchins v. State*, 756 S.E.2d 347 (Ga. Ct. App. 2014)**. Counsel ineffective in manufacture of methamphetamine and allowing child to remain present where methamphetamine was being manufactured case for failing to object to uncharged misconduct and bad character evidence. The defendant and her 3-year-old daughter lived with the defendant's mother and stepfather for 6 months. During this time, police received a tip from a confidential informant that methamphetamine was being manufactured and sold from the property. Police made two "controlled buys" from the defendant's stepfather at the home. A search of the home revealed methamphetamine ingredients, supplies, and a "recipe" but all in common areas of the home or in the parents' bedroom. Thus, the

court of appeals held that there was insufficient evidence to support the manufacturing charge because the only evidence linking the defendant to any of the relevant evidence "was her awareness of and proximity to" it. The evidence was sufficient to support the charge of allowing her child to be present around the manufacture, though it was all circumstantial. Defense counsel's conduct was deficient, however, in failing to object to testimony from the lead police detective that the defendant had been involved in a suspected illegal "pill ring," in which participants obtained doctor's prescriptions for oxycodone and Oxycontin and then sold the pills on the street. The defendant allegedly transported participants to the doctor appointments. The investigator also testified without objection that he believed the defendant was lying when she denied knowledge of drug manufacture and sale from her home and claimed awareness only that her mother had manufactured methamphetamine in the past. During cross-examination of the defendant, the prosecutor questioned her extensively about the details and her involvement in the pill ring based on information from a confidential informant and from the police. While counsel did object to the cross-examination, the court overruled the objection because the evidence about the alleged "pill ring" had already been admitted. "[T]rial counsel offered no strategic basis for admitting the evidence; rather she testified that she did not think the evidence was harmful." Prejudice was established as the prosecutor relied on this evidence to establish the defendant's propensity for drug crimes and her intimate knowledge of the drug trade, which severely undermined her credibility on key issues in the trial.

***State v. Collins*, 91 A.3d 1208 (N.H. 2014)**. Counsel ineffective under the state constitution in aggravated sexual assault case involving the defendant's 14-year-old daughter for failing to object to improper expert testimony from the daughter's therapist that her behaviors "fit perfectly" with those of sexual abuse victims and that her disclosure, which "came out of the blue . . . added to its credibility." Counsel's conduct was deficient as this testimony was clearly improper. Prejudice established as the case turned primarily on the daughter's credibility, which was improperly bolstered by the expert based on his "forty-two years of experience."

***People v. Jian Long Shi*, 987 N.Y.S.2d 791 (N.Y. App. Div. 2014)**. Counsel was ineffective in endangering welfare of child case for failing to move in limine and failing to object to the prosecutor's improper cross-examination of the defendant about his illegal entry into the country. Counsel's conduct was deficient and prejudicial where the case turned on the credibility of the defendant and the 11-year-old alleged victim.

***Ex parte Bryant*, 448 S.W.3d 29 (Tex. Crim. App. 2014)**. Counsel ineffective in murder case for failing to object to evidence that several state witnesses had been given polygraph tests prior to changing their statements from favorable to the defendant to harmful to him. On the night of the murder, the victim's children told police they saw three men at the time of the shooting: Kenneth, Mitchell, and Tom, but were initially unable to identify Tom. A year later, Kenneth and Mitchell were indicted. Kenneth was killed in a car accident and the charges were dismissed against Mitchell. Nineteen years after the crime, when a new Sheriff took office, the case was reopened. A jailhouse snitch implicated Mitchell, who initially denied involvement. After being told that he failed a polygraph, however, he admitted involvement as a get-away driver and implicated Bryant as the shooter. One of the victim's children also changed his statement to implicate Bryant. Finally, Bryant's live-in girlfriend, Janie, was questioned. After she was told that she failed

a polygraph, she also signed a written statement implicating Bryant. Counsel's conduct was deficient in failing to object to repeated references to Janie's and Mitchell's polygraph tests and the results, which the state used to argue that they were untruthful until confronted with these results. Thereafter, according to the state, they were truthful in implicating Bryant. Prejudice established.

***State v. Doutre*, 335 P.3d 366 (Utah 2014)**. Counsel ineffective in attempted kidnaping case for failing to object to the testimony of a detective, who was testifying as an expert witness. The state's case was based on the testimony of three young girls, who testified that they were out sledding. One girl separated from the group to walk towards a nearby house where her mother was visiting a friend. She testified that she was approached by a man who grabbed her hand and told her that her mother was by his truck. The other girls began yelling and the man fled. Based on their descriptions of the truck and the man's clothing, police arrested the defendant who lived in a nearby apartment. The state's case "hinged on whether the jury believed the girls' account – that Defendant ran down the hill, attempted to kidnap the girl, and then ran away in a different direction – or Defendant's explanation – that he saw a girl fall in the mud, walked a few feet over to help her, and then left." During trial, the detective in question was appointed by the court to guide the jury during a jury view of the scene. Afterwards he testified about his investigation in general but also gave expert testimony about footprints in the snow. He claimed to have found footprints in the melting snow five days after the attempted kidnaping that he testified were from an adult who was running down the hill, which was consistent with the girls' story. The state emphasized this testimony in closing arguments. Counsel's conduct was deficient in failing to object to this testimony for four different reasons: (1) the detective had served as the escort and narrator during the jury view; (2) the state failed to give prior notice of this expert testimony; and (3) the detective was not qualified to give expert testimony and his methods were unreliable. With respect to the jury view, the detective "explained the location of events that supported the State's theory of the case, even though he had served as the court-appointed guide who was supposed to impartially point out landmarks for the benefit of the jurors during the jury view. All of this had the probable effect of bolstering his credibility." With respect to notice, the defendant was entitled to 30 days' notice, but the state gave only three business days' notice before trial. With respect to the "expert" testimony, the detective testified that he was a 4-year veteran of the search and rescue team with training in tracking people, which was "questionable qualification" from the start, but it was immediately apparent that his testimony was not "(1) reliable, (2) based on sufficient facts or data, or (3) reliably applied to the facts of the case." He did not even examine the unsecured scene until several days later when others could have walked through the area and, at minimum, the snow had melted a great deal. Prejudice established.

2013: ***Williams v. State*, 983 N.E.2d 661 (Ind. Ct. App. 2013)**. Counsel ineffective in burglary and firearms case for failing to object to a "breathtaking" "deluge" of prior criminal acts used by the State to argue the defendant's propensity to commit the crimes. The state's case was based on the burglary victim's testimony that he saw the defendant in his house with a gun. He could not identify the defendant's face, but identified him by his jacket and boots. An accomplice, testifying with immunity, identified the defendant as the burglar, but did not mention a gun. No gun was found at the time of arrest either. The defendant testified that he went to the home as a confidential informant to purchase drugs and guns for the police. On cross, the state elicited testimony and admitted evidence that the defendant had been charged and convicted of possession of cocaine and a firearm

and placed on home detention. While on home detention, his was found to be in possession of drugs and guns and had tested positive for marijuana use. A detective confirmed his role as a confidential informant but denied that he was acting as such in this case. The detective also testified that the defendant admitted to him that he had committed previous unspecified burglaries, robberies, and gun-trafficking offenses. Counsel's conduct was deficient and prejudicial as the state's witnesses had credibility problems.

***Commonwealth v. Robertson*, 431 S.W.3d 430 (Ky. Ct. App. 2013)**. Counsel ineffective in sodomy and sexual assault case for complete failure to provide representation during juvenile transfer hearing and for failing to object to the prosecution's improper argument on the defendant's failure to testify during trial. The defendant was charged with sexually molesting two young boys that he babysat when he was 16-17 years old. He was charged in August 1995 when he was six weeks shy of his eighteenth birthday. At the juvenile transfer hearing, counsel provided essentially no representation resulting in a presumption of prejudice under *Cronic*. Nonetheless, given the defendant's age at the time of this opinion state law provided no remedy. Juvenile court jurisdiction ends at age 21. The defendant is now in his thirties. "To send [him] back before a juvenile court would be to ask the juvenile court to operate under the fiction that he could still benefit from a trial as a juvenile." The defendant was entitled to a new trial, however, due to counsel's ineffectiveness during trial. The defendant did not testify. During the prosecution's closing argument, the prosecutor informed the jury that sex abuse cases generally come down to a child's word against an adult's, but that this case was "as good as it gets. Additionally, he argued "this defendant cannot give you any reason why these children would make this up" and that the testimony of the two children was "un-refuted" when the defendant was the only person that could refute the testimony. Counsel's failure to object to these three comments was deficient conduct.

> [E]ach constituted at least an indirect reference to [the defendant's] failure to testify. Even if each, if taken in isolation, might be permitted (which we do not concede), the cumulative effect of all three was prejudicial to [the defendant] and violated his Fifth Amendment right. The Commonwealth's comments were not general, they were specific; and they were not benign, they were prejudicial. They thrice reminded the jury that [the defendant] himself had offered no testimony in response to the allegations against him. This constitutes prosecutorial misconduct and impermissible evidence, both of which, if objected to, would likely have been cause for a mistrial or, at the very least, excluded from the jury's consideration.

Prejudice was especially clear in light of the "weak nature of the prosecution's case."

***Coleman v. State*, 75 A.3d 916 (Md. 2013)**. Counsel ineffective in murder case for failing to object to a detective's testimony about approximately 30 instances where the petitioner remained silent in the face of police questioning/accusation while the petitioner was in custody and after he had been issued Miranda warnings. Counsel's conduct was deficient because counsel "was not properly informed of the law, whether by neglect or ignorance." Prejudice was established by the numerous instances. *Id*. at ___ (citing *Williams v. Zahradnick*, 632 F.2d 353, 363 n. 13 (4th Cir.1980) ("One reference is less damaging than four; a lengthy colloquy is more prejudicial than a brief one")).

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Prejudice was enhanced by the detective's "editorializing" commentary which made "it appear as though Coleman might have been searching for an answer that would not hurt him." *Id*. at ___ (citing *Alston v. Garrison*, 720 F.2d 812, 816 (4th Cir.1983) (noting that evidence of a defendant's post-Miranda silence "plants in the mind of the jury the dark suspicion that the defendant had something to hide, and that any alibi which is subsequently proffered is pure fabrication"). Prejudice was not diminished by the fact that the defendant ultimately answered all of the detective's questions at some point over the course of the very lengthy interrogation because "it is the silence itself, and any inferences drawn from it, that is harmful to Coleman, and these harmful inferences are what the principles underlying Miranda strive to protect." Also factoring into prejudice was that the State's primary evidence of guilt came from "co-defendants that testified as a result of plea agreements with the State" and Coleman's theory of the case was accessory-after-the-fact, which made Coleman's version of the events and his credibility an essential factor for his defense. "[W]e would be naive if we failed to recognize that most laymen view an assertion of the Fifth Amendment privilege as a badge of guilt." *Id*. at ___ (quoting *Walker v. United States*, 404 F.2d 900, 903 (5th Cir.1968)).

***Vail v. State*, 738 S.E.2d 503 (S.C. Ct. App. 2013)**. Counsel ineffective in criminal sexual conduct with a minor case for failing to object to hearsay testimony about the alleged sexual relationship between the 13-year-old girl and her teacher and coach at her church school. Counsel's conduct was deficient in failing to object to testimony from the alleged victim's sister, father, and friend about her statements to them about the relationship and testimony from the school principal that there had been rumors of the defendant engaging in inappropriate behavior without another student. While counsel's strategy was to show that the alleged victim was "obsessed" with the defendant, the detailed accounts of the alleged relationship went well beyond this and the rumor about the other student certainly had no "place amidst his articulated strategies." "The only purpose these testimonies served was to corroborate and bolster Victim's story and to evoke an emotional response from the jury, which was improper." Prejudice established as there were no eyewitnesses and no physical evidence as the alleged victim's hymen was fully intact despite six to nine alleged instances of sexual intercourse.

***State v. Larrabee*, 321 P.3d 1136 (Utah 2013)**. Trial counsel ineffective in aggravated sexual abuse of a child and dealing in material harmful to a minor case for failing to object to the state's improper closing argument. The defendant was charged with abusing his step-granddaughter. He and his wife were court-ordered guardians. Following his divorce, he was given court-ordered visitation, during which the abuse was alleged to have occurred. During trial, the state sought to introduce evidence that the defendant had sexually molested the alleged victim's mother, who was his stepdaughter, but the trial court ruled her testimony inadmissible due to unreliability and instructed the witness and counsel not to refer to these allegations in front of the jury or a mistrial would be granted. Nonetheless, during closing arguments, the prosecutor did refer to the allegations that the defendant had sexually abused the alleged victim's mother. Counsel's conduct was deficient in failing to object and move for a mistrial or, at the very least, to request a curative instruction. This was not based on any alleged strategy to avoid highlighting the issue by objection. "Allegations of past sexual abuse of a child do not pass by unnoticed, particularly within the context of a criminal trial for that very crime. They shout their presence." Moreover, "the prosecutor's violation of the judge's order was so brazen and the accusation so obviously inflammatory that it had already been brightly highlighted

by its very nature." Prejudice also established as the prosecutor's comments "went to the heart of what the jury was being asked to decide: whether Defendant's testimony was credible."

2012: ***State v. Moore*, 733 S.E.2d 418 (Ga. Ct. App. 2012)**. Counsel ineffective in rape case for failing to object to improper state evidence and argument concerning the defendant's pre-arrest silence. The state elicited evidence and argument that police called the defendant when he became a suspect asking to interview him. He declined at that time saying he was going out of state to see his son. Counsel's conduct was deficient as state law precluded reliance on pre-arrest silence even where the defendant had not received *Miranda* warnings and testified in his own defense. Prejudice established as the only real issue at trial was whether the sex was consensual, and the evidence of guilt was not overwhelming.

***People v. Moore*, 964 N.E.2d 1276 (Ill. Ct. App. 2012)**. Counsel ineffective in murder case for failing to object to the admission of other crimes evidence on interrogation videos. The defendant was interrogated on video over a period of two days with the actual questioning lasting 8-9 hours. Most of the defendant's statements were denials of the various allegations against him. During direct examination of a detective, several excerpts from the videos were shown to the jury. Afterwards, the court ruled that the jury would be allowed to watch the entire video and that it would be made available to them. The video contained detailed discussions of the defendant's prior crimes and past wrongs. Specifically, the defendant was questioned about a prior incident of domestic violence to which he plead guilty. In the video, the police indicated that they interviewed the woman involved, and she claimed that the defendant punched her and broke her jaw after finding her with another man. The defendant responded that he learned that she had been hurt when she was granted an order of protection against him. Likewise, on the video, a detective refers to the defendant's "history of robberies," as well as his "prior history as a drug dealer and membership in the Vice Lords street gang." Counsel's conduct in failing to object to this information being provided to the jury was deficient. Prejudice established, because the trial court "would have excluded the irrelevant, unfairly prejudicial other crimes evidence." While the state argued that it was unlikely the jury watched the video, as deliberations lasted less than 6 hours, the Court rejected this. Most of the video showed the defendant in the room alone and the jury likely would have watched only the interrogation portions. Even if the jury did not watch all of the interrogation portions, "most of the unfairly prejudicial material appear[ed] in the first hours of the video."

***People v. Watson*, 965 N.E.2d 474 (Ill. Ct. App. 2012)**. Counsel ineffective in residential burglary case for failing to challenge partial-profile DNA comparisons. Hairs were recovered from the window that was the point of entry. The state's expert testified that his "laboratory types 13 loci on the DNA to create a profile." The hair sample allowed him to obtain information only on 7 of the 13 loci. Based on this, he was unable to exclude the defendant. He also testified that only 1 in 103 million (about 1/3 of the population of the U.S.) white men would meet this 7 loci profile. Defense counsel asked only three questions of the expert in cross, but argued in closing that the DNA was not a "perfect match" since there were only 7 of 13 loci. The state, on the other hand, argued in closing that the DNA was "a match" and that only 3 people in the U.S. would have that profile. Counsel's conduct was deficient in failing to challenge the DNA evidence. She failed to challenge the meaning or significance of the partial-profile comparison, even though "one legal scholar" has

explained that matching on less than 13 loci will exclude a suspect. Likewise, counsel did not highlight that the state's expert said only that the defendant could not be excluded, not that he was a match. This error was compounded by counsel's failure to challenge the statistical significance of the partial match. Counsel's conduct was deficient as studies have been conducted in at least three states that suggest the statistical testimony here was overblown. Likewise, many "[l]egal scholars and scientists" dispute the legal significance testimony. In short, "it is clear that counsel's challenge to this evidence was virtually nonexistent, and quite possibly counsel simply did not understand the evidence." Prejudice established as this was "the only evidence linking defendant to the crime."

***Herrington v. State*, 102 So. 3d 1241 (Miss. Ct. App. 2012)**. Counsel ineffective in aggravated assault and possession of weapon by a felon case for allowing the defendant's prior convictions to be admitted as evidence. Even though the defendant stipulated that he was a convicted felon, two prior sentencing orders were admitted into evidence, which revealed three prior drug convictions. Counsel's conduct was deficient in failing to object to this evidence, which supported the state's motive theory, contradicted the defendant's testimony, and allowed the jury to infer the defendant "was lying" in his testimony. Prejudice established.

***People v. McArthur*, 956 N.Y.S.2d 71 (N.Y. App. Div. 2012)**. Counsel ineffective in murder case for failing to object to the prosecutor's comments about the defendant's post-arrest silence and demeanor as evidence of consciousness of guilt. Likewise, counsel elicited testimony concerning an unrelated shooting shortly before this crime and just two blocks away, even after the trial court warned that this would open the door to the prosecutor presenting evidence that the defendant had pled guilty in connection with that shooting. Counsel failed to even request a limiting instruction related to this evidence. Prejudice established due to "[t]he cumulative effect" of the errors.

***People v. Fisher*, 944 N.Y.S.2d 453 (N.Y. Ct. App. 2012)**. Counsel ineffective in sex offense case for failing to object to improper argument encouraging "inferences of guilt based on facts not in evidence." The prosecutor argued, without a basis in evidence, that the alleged victims had said the same thing over and over to police, social workers, doctors, and the grand jury. Likewise, the prosecutor essentially testified in arguing that the alleged victims' contemporaneous misbehavior at school was proof of the crimes. Finally, the prosecutor made a "less than frank minimization" argument concerning a benefit to a jailhouse snitch, who was confined on a parole violation and testified that the defendant confessed to him. The defense cross-examined the snitch about the prosecutor's agreement to write a letter to the parole board on his behalf. The prosecutor argued in closing that she was not the parole board and did not "control" the snitch's fate. While this was technically true, this argument was also "materially misleading; the prosecutor was plainly in a position, if not to control, at least to influence the outcome of [the snitch's] parole violation hearing." Finally, the prosecutor admonished the jury that their acceptance of the truth of the testimony of the child witnesses was essential to the administration of justice. "[D]efense counsel's failure to object to any, let alone all, of the prosecutor's egregiously improper departures during summation, particularly in the highly charged, potentially outcome determinative context in which they occurred, deprived defendant of the right to effective assistance of counsel." No possible strategy could explain this.

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2011: ***People v. Fillyaw*, 948 N.E.2d 1116 (Ill. Ct. 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. Washington*, 72 So. 3d 422 (La. Ct. App. 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.

***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."

2010: ***Purvis v. State*, 43 So. 3d 734 (Fla. Dist. Ct. 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.

***Higgins v. State*, 698 S.E.2d 335 (Ga. Ct. 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."

***People v. Sanchez*, 935 N.E.2d 1099 (Ill. Ct. 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.

***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 Ct. 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.

***State v. Banks*, 790 N.W.2d 526 (Wis. Ct. 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 front seat 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 front seat 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'] 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). Prejudiced 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.

2009: ***State v. Shanklin*, 925 N.E.2d 161 (Ohio Ct. 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 v. State*, 987 So. 2d 222 (Fla. Dist. Ct. 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 inculpated 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.

***Crawford v. State*, 256 S.W.3d 150 (Mo. Ct. 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.

***Wood v. State*, 260 S.W.3d 146 (Tex. Crim. 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.

2007: ***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 failing to move 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. Davis*, 879 N.E.2d 996 (Ill. Ct. App. 2007)**. 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."

***People v. Hoerer*, 872 N.E.2d 572 (Ill. Ct. App. 2007)**. Counsel ineffective in drug and involuntary manslaughter case for stipulating to the admission of the defendant's testimony from a co-defendant'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 Ct. 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. Ct. 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. Ct. 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. Ct. 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. Ct. 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. Ct. 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. Ct. 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. Ct. 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. Ct. 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. Ct. 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. Ct. 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. Ct. 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.

***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.

***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.

***Sessums v. State*, 129 S.W.3d 242 (Tex. Crim. 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

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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.

2003: ***Orr v. State*, 584 S.E.2d 720 (Ga. Ct. 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

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5. IMPEACHING WITNESS

a. U.S. Court of Appeals Cases

2013: ***Grant v. Lockett*, 709 F.3d 224 (3rd Cir. 2013)**. Under AEDPA, counsel ineffective in murder case for failing to investigate and impeach the state's key witness–the only one who identified the defendant as the shooter–with prior drug convictions and the fact that he was on parole at the time of his testimony. The state court did not address the issue of whether counsel's conduct was deficient, but even if it had "such a determination would be an unreasonable application of *Strickland*." With respect to prejudice, the state court rejected the claims because the defendant had not presented evidence that the key witness had a special deal or was treated favorably by the prosecution in exchange for his testimony. There is simply "no requirement" that the defendant make this showing "before the witness's subjective motivation for bias becomes relevant. Thus, the state court made unreasonably applied *Strickland* and *Davis v. Alaska*, 415 U.S. 308 (1974). Under *Davis*, evidence that the defendant was on parole was relevant to show that the witness "might have been subject to undue pressure from the police and made his identifications under fear of possible probation revocation." *Id*. at ___(quoting *Davis*, 415 U.S. at 311). Prejudice was clear as the state's entire case rested on this witness, who was contradicted by the physical evidence and at least two other eyewitnesses who said the defendant was not the shooter. The state's closing argument even made clear that the state would not have even been able to charge the defendant without this witness.

***Peoples v. Lafler*, 734 F.3d 503 (6th Cir. 2013)**. Under AEDPA, counsel was ineffective in murder case for failing to impeach the only two witnesses tying the defendant to the murder with their known false testimony. The victim, "a drug dealer," was shot and killed outside of his Detroit home. Three months later, the defendant was arrested with Cornelius Harris and another man in a stolen Jaguar, after a high-speed car chase ended in a crash. After the crash, police found a nine millimeter Sig Sauer pistol – the murder weapon – on the driver's side floorboard of the Jaguar. During the murder trial, Harris and the other man "testified to two key facts: 1) that Peoples was the driver of the stolen Jaguar and had thus been sitting closest to the murder weapon, which Peoples owned; and 2) that Peoples told them about how he killed" the victim. The prosecution knew that, at least a portion of this testimony was false. Specifically, according to a police report written by an officer who witnessed the crash, the driver of the Jaguar was Harris. Moreover, Harris was the only one of the three who was charged and convicted for the crimes of fleeing in the third degree, which requires "being the driver," and unlawfully driving away in a motor vehicle. Counsel's conduct was deficient in failing to use these facts during trial. "Failure to impeach the credibility of key witnesses with known false testimony is an egregious error in a criminal case."

> Although the entire defense theory was that the two witnesses conspired to point the finger at Peoples, trial counsel did not use the only hard evidence at his disposal to prove that the two witnesses not only lied, but told the same lie. And he failed to do so despite the fact that Peoples himself found the evidence and told him how to use it.

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The state court's decision rejecting this claim was an objectively unreasonable application of *Strickland*. Before trial, Peoples mailed defense counsel a copy of the police report, indictment, and criminal docket sheet showing that Harris was the driver of the Jaguar. Nonetheless, counsel made no attempt to impeach Harris or the other witness with this information. Counsel also failed to present testimony from (1) the officer who wrote the police report naming Harris as the driver of the Jaguar; and (2) another officer who observed the car crash and could testify that Harris was the driver of the Jaguar. While counsel claimed a strategy to "try to limit testimony regarding the car chase," this was not "a protected strategic decision when there is no conceivable way that this decision could help the defense." Moreover, detailed evidence concerning the chase, the arrests, and the "various convictions arising out of the incident" had already been presented. Prejudice established because the state's case "hinged on the credibility of Harris" and the other man. Impeachment with evidence that Harris was driving the car

> would have done more than undermine the theory that Peoples sat closest to the gun. It would have shown that Harris and Powell told at least one lie – the same lie. All counsel had to do was ask one more question on cross-examination to completely undermine the credibility of these witnesses. . . . Moreover, impeachment would not have been a new and novel theory at trial. Trial counsel's entire defense strategy was to cast doubt on the credibility of Harris and Powell by suggesting that they cooked up their stories while sharing a jail cell. Impeachment on the issue of who drove the Jaguar would have been entirely consistent with and a significant boost to this theory.

Moreover, the defense could have "provided solid evidence that Harris and Powell had coordinated their stories, because both of them gave the same false testimony. We can think of no better way to attack the credibility of these witnesses than by proving that they testified to the same lie." Prejudice was clear in light of the events at trial, the weaknesses of the government's case, and the fact that the jury announced that it was deadlocked and only returned a guilty verdict after being given an Allen charge. "[B]y announcing that they were deadlocked two hours before reaching a verdict, the jury signaled that it was not persuaded that Harris and Powell were credible." "If counsel had done as Peoples asked and impeached the testimony that Peoples was the driver of the Jaguar, "there is a reasonable probability that at least one juror would have struck a different balance.'" (quoting *Wiggins*, 539 U.S. at 523–28).

2008: ***Brown v. 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.

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***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

2017: ***United States v. Cross*, 249 F.Supp.3d 339 (D.D.C. 2017).** Trial counsel was ineffective for failing to use a chart suggesting the quantity of heroin attributable to defendant was under one kilogram in this prosecution for conspiracy to distribute over one kilogram of heroin. The government offered testimony from defendant's supplier, Mouloukou Toure, who told the jury that he sold defendant 1.2 to 1.3 kilograms for further distribution. Trial counsel performed deficiently by failing to use a chart created by law enforcement detailing the quantities of heroin that the FBI recovered from the alleged co-conspirators. It was undisputed that Toure imported 4,800 grams of heroin from a Toronto-based supplier and that this was Toure's first and only heroin supplier. The FBI recovered 623.4 grams of heroin in controlled buys from Toure, seized 944.3 grams from Toure's stash house and located 1,984.4 grams in a third co-conspirator' stash house that Toure testified he provided for distribution. When those amounts are added to the amounts Toure testified he distributed to a fourth co-conspirator, that leaves only approximately 400 grams for defendant – significantly less than the 1.2 or 1.3 kilograms to which Toure testified. Trial counsel's strategy was to show that defendant had a simple buyer/supplier relationship with Toure, but was not involved in a wider, international conspiracy to distribute large amounts of heroin. Counsel had no recollection of why she failed to use the drug quantity chart, but acknowledged that it would have supported her theory of the case and undermined an element of the charged offense. Counsel's performance was deficient, and there is no sound trial strategy that would have justified not using the chart, which trial counsel acknowledged she received prior to trial. Defendant suffered prejudice because the chart would have discredited Toure, the prosecution's key witness who provided the only evidence as to the one-kilogram drug amount, which was an essential element of defendant's conviction. Thus, there is a reasonable probability that the jury's

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verdict as to the essential drug amount element would have been different if the chart had been put into play.

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.

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c. State Cases

2016: ***Ex Parte Saenz*, 491 S.W.3d 819 (Tex. Crim. App. 2016)**. Counsel ineffective in murder case for failing to impeach Gonzalez, the State's primary witness, with a prior inconsistent statement. The defendant was charged with shooting four people, including Gonzalez, in a drive-by shooting. One of those shot died. The state's theory was that the defendant, who was a member of Suicidal Barrio, a Corpus Christi gang, did the shooting in retaliation against the La Quarenta gang for a prior assault against Pimentel, who was allegedly associated with Suicidal Barrio. One day after the shooting, Gonzalez was interviewed at the hospital by the police. When asked if he would recognize the shooter if he saw him again, Gonzalez said no. Nonetheless, during trial, Gonzalez identified the defendant as the shooter and a police officer testified that Gonzalez identified the defendant out of a photo array of six people. Counsel's conduct was deficient in failing to impeach Gonzalez with his prior inconsistent statement. Counsel conceded that this failure was not a strategy as he was challenging Gonzalez's identification and had intended to use the prior inconsistent statement. Prejudice was also established, as Gonzalez was the only person to identify the defendant as the shooter and the State stressed this fact in closing arguments. Gonzalez's credibility "would have been severely crippled by his prior inconsistent statement denying his ability to identify the shooter." While the state also relied on statements the defendant had made to a friend on the night of the shooting, her belief that the defendant was involved in the shooting based on what he said was "largely speculative." Cell phone records that placed the defendant in the general vicinity of the crime allowed a range of approximately a quarter mile only. Likewise, while the State relied on a jailhouse snitch, who testified that the defendant confessed to being the shooter, this testimony was "questionable," as the snitch "had a criminal history, a motive to falsify his statements, and his description of the offense was inconsistent with the other evidence." His testimony was also contradicted by another witness, who testified that he heard the snitch say that the defendant denied being the shooter but the snitch intended to lie in court and say that he confessed. Finally, the evidence that the defendant had a motive based on the prior attack on Pimentel was "insubstantial," as Pimentel was not associated with Suicidal Barrio and denied knowing the defendant.

***Hannon v. State*, 491 S.W.3d 234 (Mo. Ct. App. 2016)**. Counsel ineffective in sodomy of a child case for failing to obtain the child's school records which would have contradicted the child's testimony. The child testified that he was molested by the defendant the day before his mother overdosed on drugs and his grandmother took custody of him. The day was named in the indictment and the state's arguments as October 3, 2005. The child testified that he was out of school sick that day and it was during that time that he was molested. Counsel's conduct was deficient in failing to obtain the child's school records, which reflected that he was in school on the day in question. While counsel testified that he had been informed by the school that the child was out sick all that week, the trial court rejected this testimony finding that counsel lacked credibility. Prejudice was established.

***Rutland v. State*, 785 S.E.2d 350 (S.C. 2016)**. Counsel ineffective in murder case for failing to cross-examine the state's "key" witness with prior inconsistent statements to the police and to newspaper reporters. The defendant was involved with the deceased's estranged wife. On the day

of the shooting, the defendant and his girlfriend were at a pet grooming business to inquire about purchasing the business. The deceased came in and was shot and killed by the defendant. The only other person present besides the defendant's girlfriend was an employee of the business, Kestner. Kestner initially told law enforcement that the deceased was armed when he entered the business and pulled a gun before he was shot and killed. She made a similar statement to a newspaper reporter. At trial, however, she testified that the deceased had nothing in his hands when he entered the business, except a pack of cigarettes. She said she never saw him with a gun, but after the shooting there was a second gun lying on the floor. Counsel's conduct was deficient in failing to question her about the prior inconsistent statements to law enforcement and the newspaper reporter. Counsel conceded knowledge of these prior statements and an "oversight" in failing to cross-examine on this basis. While the post-conviction court found that counsel's conduct was deficient, the court found no prejudice because the defendant failed to produce extrinsic evidence of the prior inconsistent statements in the post-conviction hearing. This finding was not supported by the evidence in the record as the defendant produced the prior statement to law enforcement, as well as affidavits from individuals attesting to having heard the witness say that the deceased was armed at the time of the shooting. Prejudice established because, if trial counsel had adequately cross-examined the witness, the evidence would have demonstrated that "all three witnesses to the incident attested at some juncture the victim was armed at the time of the shooting." Additionally, the prosecutor relied on the witness' testimony in closing arguments, which "highlights trial counsel's deficient performance." Likewise, the jury sent out several relevant questions during deliberations indicating that "the jury was focusing on whether the victim was armed" and that the jury was having difficulty reaching a unanimous verdict.

2012: ***State v. Hollin*, 970 N.E.2d 147 (Ind. 2012)**. Counsel ineffective in conspiracy to commit burglary case for failing to present evidence to impeach the alleged accomplice's testimony. The defendant and the accomplice were arrested after a report of suspicious activity. Both made tape recorded statements. The accomplice claimed that they had entered the home to use the telephone but then stole money from the bedroom while inside. He did not implicate the defendant in a plan to burglarize the home and said the defendant learned of the theft only after they left the home. The accomplice entered a plea agreement to felony theft with the burglary charge being dismissed and the felony charge being reduced to misdemeanor if he completed probation. The accomplice also pled guilty to a theft charge that was already pending at the time of this arrest and was given a suspended sentence. While in pretrial confinement, after being arrested for an additional felony and having petitions filed to revoke his suspended sentences, the accomplice claimed for the first time that he and the defendant had agreed in advance to break into homes and commit burglaries. Counsel's conduct was deficient in failing to adequately impeach the accomplice. The jury was aware that the accomplice had pled guilty and was in jail for the same incident as charged in this case, but the jury was not aware that the accomplice had faced a possible 23 year sentence, but ultimately pled in a manner that involved only a misdemeanor theft conviction and no jail time if he succeeded on probation. Thus, the jury had no idea that the only person to actually take money in these crimes got this result while the defendant still faced felony charges and up to 23 years confinement. A *Brady* violation was also found as the state failed to disclose much of this information prior to trial.

**Capital Case*

2011: ***People v. Armstrong*, 806 N.W.2d 676 (Mich. 2011)**. Counsel ineffective in criminal sexual conduct case for failing to introduce phone records to undermine the complainant's credibility. The complainant testified that she met with the defendant three times and was raped on the last two occasions. She testified unequivocally that she did not communicate with the defendant following the third meeting. Defense counsel confronted her with the defendant's cell phone records that revealed incoming calls from her adoptive mother's phone and she admitted making one or two calls to the defendant just days after the second alleged rape. When counsel confronted her with additional records allegedly revealing hundreds of incoming calls from her cell phone, the complainant unequivocally denied that she had called the defendant. Counsel's conduct was deficient in failing to introduce the phone records. Counsel attempted to do so, but the state's objection to lack of foundation was sustained. Counsel made no further effort to introduce the records. The court instructed the jury to disregard evidence not introduced. Counsel's conduct was not excused by any strategy, as counsel had simply failed to subpoena the custodian of the records due to a mistaken belief that the business records exception to the hearsay did not require a custodian to testify. Prejudice established, despite significant evidence from the complainant's grandmother, mother, and stepfather that she had falsely accused her stepfather of rape in the past and was a compulsive liar. The omitted records would have provided strong proof that "the complainant lied to this jury" about "the alleged rapes in this case." Aside from showing that she lied about contacting the defendant after the alleged rapes, these records case serious doubt on the substance of her allegations because if she was brutally raped as she testified "then one must question why she reached out to defendant through text messages and phone calls" afterwards. Likewise, even though the jury heard the testimony about the cell phone records, the court instructed the jury to disregard the evidence. In addition, the complainant only acknowledged making a fraction of the numerous calls and the state argued that the defendant or defense counsel might have fabricated the records.

2008: ***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."

***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.

2006: ***J.J. v. State*, 858 N.E.2d 244 (Ind. Ct. 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

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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 "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."

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6. ELICITING DAMAGING EVIDENCE AND MAKING DAMAGING ARGUMENT

a. U.S. District Court Cases

2017: ***Emerson-Bey v. Attorney General of Maryland*, 2017 WL 3279461 (D. Md., July 31, 2017).** Trial counsel was ineffective for eliciting damaging and inadmissible information at trial which also resulted in a violation of defendant's Sixth Amendment right to cross-examine witnesses against him. Defendant was charged with murder in connection with the shooting death of his estranged wife. The state's case was entirely circumstantial; defendant had motive and opportunity, there was no sign of forced entry at the victim's home, and defendant's palm print was found in the home. However, defendant had been inside the home for non-incriminating reasons and he and the victim sometimes exchanged friendly calls and texts. Following the murder, Phyllis Mason (also known as Leteara Thompson) was arrested on unrelated charges. During an interview with police, Mason said she was getting high in an alley with her friend, Tiffany Jenkins, on the night of the murder. Mason identified defendant in a photo array as the man she saw fleeing the home after the shooting. Tiffany Jenkins was also interviewed by police and stated that she was in the alley during the day (not at midnight when the shooting occurred) but claimed she also heard shots and saw a man fleeing a home. However, Jenkins was unable to identify defendant. Prior to trial, Mason died and Jenkins could not be located. There was no dispute that Mason's identification was inadmissible and the prosecutor agreed not to introduce it. And yet, during cross-examination of a police detective, trial counsel asked whether police had canvassed the neighborhood and whether any witnesses had indicated defendant was near the victim's home at the time of the crime. The detective responded "yes" and then counsel asked the detective to name the witness. The detective answered, "Veronica Jenkins, James, Tiffany Jenkins. She had several different names." In a misguided attempt to correct this blunder, trial counsel then asked a series of confusing follow up questions that incorrectly suggested that two different witnesses had identified defendant as the man they saw fleeing the house immediately after the shooting. After a lunch break, trial counsel continued questioning the detective to establish that Phyllis Mason was one of the names involved and that she gave a statement after she was arrested and under the influence of drugs and alcohol. Trial counsel did not move for a mistrial or move to strike any of the detective's testimony. Trial counsel performed deficiently in eliciting the damaging information and then compounded the error due to his failure to appreciate other avenues for attempting to cure his mistake, *i.e.*, by objecting, moving to strike, or moving for a mistrial or new trial. The evidence of defendant's guilt was neither abundant nor overwhelming, but was instead entirely circumstantial. If the identification evidence had not been erroneously introduced by trial counsel, there is a reasonable probability that the jury would have had a reasonable doubt as to defendant's guilt and the outcome of his trial would have been different. Moreover, trial counsel's inept handling of the detective's cross-examination also violated defendant's right to confrontation because Mason's identification was testimonial and defendant had no opportunity to cross-examine her. This error was not harmless because the identification was the only direct evidence of defendant's involvement in the crime and the only evidence that placed him at the crime scene at the time of the crime. The identification testimony was not cumulative, nor was it

corroborated by any other evidence. No cross-examination was permitted as the witness did not testify, and the overall strength of the prosecution's case was weak.

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

2019: ***State v. Crow*, 438 P.3d 541 (Wash. Ct. App. 2019).** Where the defense to a charge of possession of a stolen gun was that defendant was unaware that the gun was stolen, trial counsel was ineffective in failing to object to testimony by law enforcement officers concerning the probability that a firearm possessed by a convicted felon, which defendant was, is a stolen gun. The impermissible "profile" testimony included assertions that: (1) someone disqualified from obtaining a gun legally will obtain a firearm by stealing it or buying it unlawfully on the street; (2) illegally obtained firearms are typically stolen during burglaries and vehicle prowls (the gun at issue here came from a burglarized vehicle); (3) a person who knows he possesses a stolen firearm commonly discards the gun and flees when approached by a law enforcement officer (as did defendant); (4) the majority of disqualified people apprehended with a firearm have a stolen firearm; and (5) most or a high percentage of firearms in the hands of a disqualified person are stolen firearms. "The Yakima Police Department officers answered questions in the context of their knowledge based on 'training and experience.' Thus, the State used the imprimatur of expertise and law enforcement to group [defendant] with other guilty persons." Because of a question by defense counsel about how one should know a gun is stolen, defendant waived his right to challenge the testimony from law enforcement officers that a disqualified person will obtain a firearm by stealing it or buying it unlawfully on the street. Defendant did not, however, "open the door to the further testimony of the law enforcement officers. The additional testimony about conduct of persons possessing a gun and percentages of stolen guns on disqualified persons clarified nothing with regard to a person's knowledge of the status of a firearm and thus remained inadmissible profile evidence." On this record, "no reasonable trial strategy explains defense counsel's failure to object to profile evidence." In addition, the question to an officer about how

one would know a gun was stolen "served no legitimate purpose in the defense of [defendant]. Instead, the answer to the question allowed the jury to convict [defendant] solely on the basis of his fitting a profile. [Defendant's] counsel could have more effectively argued the lack of knowledge without an officer's expert inadmissible opinion as to reasons why one should conclude a gun to be stolen." Finally, "[t]he nature of the evidence alone without further analysis compels a conclusion that the law enforcement officers' testimony prejudiced [defendant]."

2013: ***People v. Barnes*, 965 N.Y.S.2d 488 (N.Y. App. Div. 2013)**. Counsel ineffective in drug case for failing to investigate prior to trial, which resulted in counsel advancing an unsupported theory of defense during trial. The defendant was arrested in a "buy and bust" operation where he was arrested just moments after a sell drugs in a Ziploc bag to an undercover officer by other officers. At the time of his arrest, he had five Ziploc bags containing drugs, but did not possess the pre-recorded buy money used by the undercover officer to pay for the drugs. Counsel's prior argument during trial was that the purple Ziploc bag of drugs sold to the officer did not match the Ziploc bags found on the defendant. During closing arguments, counsel sought permission to open the heat-sealed evidence bags to display the evidence to the jury, but the court denied the motion. "Counsel then urged the jurors to examine the evidence themselves." During deliberations, the jury asked to do exactly that and the court unsealed the evidence, which revealed that "all the bags did match." Counsel's conduct was deficient for failing to examine this evidence pretrial. Prejudice was also clear as the defense counsel committed "self-sabotage" and "undermined his own credibility" and his error went to "the heart" of the defense. The error also undermined the defendant's credibility as he testified based on the understanding from counsel that the bags did not match. Even with this blunder, the jury requested to rehear some of the evidence, requested additional instructions, and announced deadlock resulting in an Allen charge before finally reaching a verdict.

2011: ***State v. Fowers*, 265 P.3d 832 (Utah Ct. App. 2011)**. Counsel ineffective in criminal solicitation case involving two teenage boys for eliciting testimony about the defendant's 25-year-old conviction for sodomy on a child after the trial court had ruled the evidence would be excluded. Counsel apparently believed that the defendant could be cross-examined about the prior if he testified and had advised the defendant not to testify. The defendant did testify and counsel elicited information about the prior in direct. The defendant admitted contact with the boys but denied solicitation. Prejudice was established. Without the evidence of the prior, the jury might have been more inclined to believe the defendant rather than the boys, who were both residents of a juvenile detention facility and attended the same alternative high school. Thus, "unlike multiple victims who are strangers to one another, the boys here had an opportunity to collaborate on their version of events." Moreover, the jury acquitted with respect to one of the alleged victims in this "classic credibility contest." The prior "may have influenced [the jury] to convict [the defendant] on at least one of the charges.

2007: ***People v. Bailey*, 872 N.E.2d 420 (Ill.Ct.App. 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. Ct. 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. Ct. 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.

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***Bowers v. State*, 929 So. 2d 1199 (Fla. Ct. 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. Ct. 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.Ct. App. 2005)**. 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.

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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

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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 Ct. 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.

2003: ***Emilio v. State*, 588 S.E.2d 797 (Ga. Ct. 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.

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7. CONCEDING GUILT/CONTRADICTING CLIENT

2018: ***People v. Miramontes*, 116 N.E.3d 199 (Ill. Ct. App. 2018).** In drug possession case, trial counsel was ineffective in stipulating to the weight of the drugs found in appellant's possession. Appellant was convicted at a bench trial of possession of between 400 and 900 grams of methamphetamine and sentenced to nine years in prison. On appeal, he argued that his conviction should be reduced to the lowest class of possessory offenses for methamphetamine because the state failed to prove that he possessed that specified amount of meth, and that his defense counsel was ineffective for stipulating to the weight of methamphetamine. Officers had commingled the substances they recovered – the substances had been in three bags and officers put them all in a single bag. The examining chemist weighed and tested the substance in the bag and measured it at 415 grams of a substance containing methamphetamine. Appellant argued that "the nonhomogenous substance recovered by police, which was originally in three separate bags, was commingled into one bag prior to testing, making it 'impossible to know whether each of the bags contained methamphetamine, or whether the officers mixed what was mostly a legal substance with a small amount of methamphetamine to create 415 grams of a "substance containing methamphetamine."'" The Appellate Court found that while it was clear that defense counsel's strategy was to challenge whether appellant knowingly possessed the methamphetamine, that strategy did not require counsel to stipulate to the weight of the substance – the knowledge element is entirely separate from the weight element. Counsel could have challenged both elements. Counsel rendered deficient performance by failing to require the state to prove an important element of its case; there was no reasonable trial strategy that supported the stipulation. The deficient performance was prejudicial; exactly how much of the 415 grams of nonhomogenous substance contained methamphetamine is unknown; if counsel had not stipulated, and the chemist had testified that he or she did not know how much was methamphetamine, it is reasonably likely that there would have been a different outcome. No evidentiary hearing is necessary to determine this. The proper remedy is not to reduce the sentence, but to grant appellant a new trial.

2011: ***Benitez-Saldana v. State*, 67 So.3d 320 (Fla. Ct. App. 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. Ct. 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."

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2009: ****Cooke v. State*, 977 A.2d 803 (Del. Supr. Ct. 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 effect 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. Cronic*, 466 U.S. 648 (1984). There was a breakdown in the adversarial system in this case in two ways.

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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. Ct. 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. County 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

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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.

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8. INSTRUCTIONS

a. U.S. Court of Appeals Cases

2018: *_Baer v. Neal_, 879 F.3d 769 (7th Cir.), _cert. denied_, 139 S.Ct. 595 (2018). In capital case from Indiana, trial counsel was ineffective for failing to object to improper and confusing penalty phase jury instructions as well as improper prosecutorial statements and the deficient performance was prejudicial as to the death sentence. Petitioner was convicted of two murders, robbery, theft, and attempted rape arising from a murder of a woman and her four-year-old daughter in their home. Petitioner had admitted that he had committed the crimes and sought to plead guilty but mentally ill, but the trial court rejected the plea, finding insufficient evidence of mental illness. At the penalty phase, the defense presented the testimony of Dr. Mark Cunningham, who described petitioner's social history, including prenatal and perinatal difficulties such as his mother's alcohol use and cancer while pregnant, petitioner's childhood in and out of foster care, the murder of his sister, his ADHD, head injuries, and substance abuse. Regarding the penalty phase instructions, trial counsel failed to object to modification of a jury instruction that eliminated intoxication as a basis for finding that the defendant lacked the capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law. Counsel also failed to object to the improper definition of intoxication as requiring involuntariness of the intoxication. Because counsel essentially failed to object to the removal of a mitigating factor from the jurors' consideration, the Seventh Circuit found his performance deficient under *Lockett v. Ohio*, 438 U.S. 586 (1978). The state court's analysis of the jury instructions in isolation rather than in the context of the overall charge was unreasonable because a juror could have understood the complete penalty phase instructions as foreclosing evidence of voluntary intoxication from consideration for all purposes in sentencing. The timing under which the instructions were given was also important; although the instructions were a correct statement of the law with regard to the mens rea of the crime, and the aggravating factors, they were not correct statements of the law with regard to the mitigating factors. But the instructions were given at the penalty phase, and not in conjunction with the aggravating factor instructions, but rather at the end of the charges as a whole. The jurors also were given the general mitigation instruction that there were no limits on what they could consider mitigating much earlier and at a different time from the voluntary intoxication instruction, and language that merely contradicts and does not explain a constitutionally infirm instruction does not suffice to absolve the infirmity under *Francis v. Franklin*, 471 U.S. 307, 322 (1985). "It is unreasonable to assume jurors could catch the nuance that voluntary intoxication can be considered for mitigation, but not as evidence of criminal intent, without any clear instruction." 879 F.3d at 779. Trial counsel's failure to object was deficient, and the state court unreasonably found otherwise. The error was prejudicial because evidence of petitioner's mental health and drug use was the cornerstone both of the defense at guilt phase and also the defense's sole strategy for avoiding a death sentence, and the instruction blocked consideration of this crucial mitigating evidence. It was unreasonable of the state court to conclude otherwise. Regarding statements by the prosecutor, the prosecutor repeatedly made improper and prejudicial comments, and trial counsel and the trial court failed to address them, introducing doubt into the reliability of the results of the penalty phase trial. First, the prosecutor improperly conflated the standards of guilty but mentally ill and the legal defense of insanity. The insanity defense, which requires a finding that defendant has a severely abnormal mental condition that renders him unable

to appreciate the wrongfulness of his conduct at the time of the offense" is a defense to intent and to guilt, while the guilty but mentally ill issue requires a finding that defendant suffers from an illness that "disturbs thinking, feeling, or behavior, and impairs ability to function" and has effect at the penalty phase but not at the guilt phase because it does not have an effect on his conviction. The prosecutor conflated these terms throughout the trial, starting during voir dire. The state court found that counsel's failure to object was "likely" strategic because counsel testified that he knew the prosecutor was capable of overstating his case and he was planning to correctly state the law to the jury. The Seventh Circuit found this analysis unreasonable, because "hoping the jury would decide that the prosecutor was not credible" is not strategic, especially where the difference between insanity and GBMI was never clarified. Second, the prosecutor repeatedly told the jurors (again beginning during voir dire) that the victims' family members wanted the jury to impose the death penalty. Trial counsel objected only one time to the violations of *Payne v. Tennessee*, 501 U.S. 808 (1991). The state court acknowledged that the prosecutor's statements were problematic, but erroneously found that the prosecutor told the jury he misspoke – this did not occur. Furthermore, the trial court repeatedly stated that the court was not listening, and "missed numerous opportunities to stop or clarify the prosecutor's statements and his absence was noticeable throughout trial." 879 F.3d at 786. Third, the prosecutor stated personal opinions and introduced facts not in evidence directing the jurors toward a death penalty verdict. For example, he said that it was possible that Indiana was going to change the law so LWOP would no longer be an option – there was no basis for this speculation. He also compared petitioner's crime to that of others he had personally seen and experienced. Petitioner's counsel did not object. And just because defense counsel argued that petitioner's crime wasn't the worst of the worst did not permit the prosecutor to argue what he did. "[J]ust because defense counsel cracked open the door to these subjects, it did not permit the prosecutor to drive a truck through it. The seditious and specific comments about the prosecutor's own mother, the community's layoffs, and 9/11 were all not hard blows, but beyond the pale foul ones." 879 F.3d at 787. It was unreasonable for trial counsel not to object. The state court's finding that the prosecutor's improper comments did not cumulatively affect the outcome of the trial was unreasonable – the state court failed to aggregate prejudice even though it claimed to do so. "[I]t is nearly impossible that the comments did not impact the juror's [sic] decision to recommend the death penalty." 879 F.3d at 788. "[The prosecutor's] misstatements were prolific and harmful to [petitioner's] case, yet [petitioner's] trial counsel failed to object at every opportunity. [The prosecutor's] comments began in voir dire, where his comments conditioned jurors to believe that [petitioner] was a liar, that mental illness was a 'copout' and 'defense,' that [petitioner] should not receive a GBMI conviction because he appreciated the wrongfulness of his actions (improperly using the insanity defense standard), life without parole was at a high risk of providing release, and the [victims'] family wanted a death sentence. All these comments were made before the jury heard any evidence in [petitioner's] case. Then at the close of penalty phase, [the prosecutor] again injected inflammatory comments and facts not in evidence, including remarks about [the prosecutor's] mother's prostitution, people being laid off to afford the state's pursuit of the death penalty, and [petitioner's] crime being worse than any of the prior 125 murders [the prosecutor] had heard of in his career in law enforcement. . . . Can we be certain that [petitioner] would not have been sentenced to death if given a fair trial and effective counsel? No. But it is 'reasonably likely' that without the prosecutor's injection of impermissible statements and incorrect law the jurors would not have recommended death." 879 F.3d at 788-89.

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2017: ***Bey v. Superintendent, Greene SCI*, 856 F.3d 230 (3rd Cir. 2017), *cert. denied*, 138 S.Ct. 740 (2018).** The Third Circuit granted relief in this Pennsylvania non-capital murder case, finding that trial counsel was ineffective for failing to object to an erroneous jury instruction on eyewitness testimony, and that state post-conviction counsel's inadequate failure to assert that claim in state court constituted "cause" to overcome the resulting procedural default. Petitioner was charged with the shootings of two people, one fatal and one non-fatal. The "key witness" at his trial was a police officer, whose "certain and unequivocal" eyewitness identification of petitioner was the prosecution's strongest evidence. 856 F.3d at 233. The claim addressed by the Third Circuit arose when the trial court agreed to give a "*Kloiber* charge" concerning eyewitness testimony, then – without objection from trial counsel – gave a version of the charge that was "critically inconsistent with" state law. *Id.* at 234. "A proper charge under *Kloiber*," the Third Circuit explained, "informs the jury that it has the ultimate discretion of deciding whether to credit positive eyewitness testimony. Instead, the trial court's instruction essentially required the jury to accept positive eyewitness testimony as true by directing that 'testimony as to the identification may not be received with caution.'" 856 F.3d at 238 (emphasis by the court); *see also id.* at 239-40 ("The charge removed the discretion that the jury could otherwise have exercised that may have raised a reasonable doubt in the mind of one or more jurors about the identity of the shooter."). When petitioner later sought state post-conviction relief, his post-conviction counsel alleged that trial counsel had been ineffective for failing to object to three other aspects of the charge, but not the "may not" language targeted in the federal habeas petition that followed. On appeal from the denial of federal habeas relief, the Third Circuit accepted and agreed with petitioner's concession that the "specific ineffective assistance claim" he advanced was procedurally defaulted notwithstanding the state court's adjudication of three other claims based on the same defective jury charge. The court then examined the merits of the ineffective assistance of trial counsel claim to determine whether it was "substantial," such that post-conviction counsel's failure to raise it constituted "cause" under *Martinez v. Ryan*, and if so, whether it required a grant of habeas relief. Both inquiries were resolved in petitioner's favor. After explaining that "the faulty *Kloiber* instruction deprived [petitioner] of his due process right to have the prosecution prove every element beyond a reasonable doubt," 856 F.3d at 241, the Third Circuit held that trial counsel performed deficiently in failing to object: "Clearly, this instruction could be reasonably understood as requiring the jury to accept an eyewitness's identification of [petitioner] as the shooter. Indeed, that was what the jurors were told. We can think of no strategic reason for defense counsel not to object to a charge that raises such due process concerns." *Id.* With regard to prejudice, the court rejected the state's contention that the prosecution had presented an "overwhelming case," explaining that, "[a]t [petitioner's] first trial, nearly identical evidence resulted in a hung jury," and that two jury questions at petitioner's second trial (which yielded the judgment at issue here) indicated that the officer's eyewitness "testimony may well have been a source of concern." *Id.* at 243. Because the erroneous charge left the jury with "no room ... to conclude that [the officer], though certain, was wrong," the court added, "the prosecution was unconstitutionally relieved of its burden of proving [petitioner] was the shooter beyond a reasonable doubt," and petitioner was prejudiced by trial counsel's failure to object. *Id.* Finally, returning to the question of "cause" under *Martinez*, the Third Circuit concluded that petitioner had made the requisite showing. *See* 856 F.3d at 244.

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2015: ***Crace v. Herzog*, 798 F.3d 840 (9th Cir. 2015)**. Under AEDPA, counsel ineffective in felony attempted second-degree assault case for failing to request an instruction on the misdemeanor lesser-included offense of unlawful display of a weapon. The defendant, who had consumed a great deal of drugs and alcohol, was hallucinating and believed that someone was out to kill him. He was running down the street with a sword at night and screaming for help. When he spotted an officer, he ran towards him seeking protection. When the officer pulled his weapon and ordered him to stop, the defendant dropped the sword but continued running towards the officer because he was afraid. He stopped seven feet from the officer and got down on the ground. The Washington Court of Appeals found deficient conduct and prejudice, but the Washington Supreme Court reversed, without deciding whether counsel's conduct was deficient, because the court found no prejudice. In doing so, the state court assumed the jury would have reached the same verdict even if it had been instructed on the lesser-included-offense because the evidence was sufficient to support the verdict reached. By doing so, the state court "in essence converted *Strickland*'s prejudice inquiry into a sufficiency-of-the-evidence question." "This approach to *Strickland* is not merely wrong, but 'objectively unreasonable' under AEDPA." This issue was thus entitled to de novo review. The defendant was entitled to the lesser-included offense instruction because there was evidence to support an inference that the defendant displayed the sword without any intent to create reasonable fear or apprehension of bodily injury, which is the specific intent required for assault and attempted assault. The defense presented lay and expert testimony in support of a diminished capacity defense. Prejudice was clear, because with proper instruction, "a jury could rationally choose to convict Crace only of unlawful display of a weapon." Because the Washington Supreme Court did not address whether counsel's conduct was deficient, that question was also reviewed de novo. Where counsel admitted that he did not consider the issue, the "failure to request the instruction was neither strategic nor deliberate." Failure to consider the issue was deficient performance. Even if counsel had considered the issue and then failed to request the instruction, counsel's actions would still be "manifestly unreasonable."

***Lee v. Clarke*, 781 F.3d 114 (4th Cir. 2015)**. Under AEDPA, counsel ineffective in second degree murder case for failing to request a manslaughter and heat of passion instruction. The state court decision to the contrary was an unreasonable application of clearly established federal law set forth in *Strickland*. The victim died of multiple stab wounds to the chest. The state's evidence included a history of disputes between the defendant and the alleged victim. A state witness testified that the decedent approached the defendant "ready to fight" and struck the defendant multiple times. As they were fighting the witness heard the decedent yell that the defendant had stabbed him. The decedent then ran up the road holding his chest with the defendant following attacking from behind until two of the decedent's friends intervened. The defendant said "I'm gonna kill him" before running away. Following the state case, counsel moved to strike the first degree murder charge due to lack of premeditation and to proceed only on second degree murder or manslaughter. The court denied both motions. The defendant testified, along with his friend who was present. The defendant testified that the decedent attacked him and had him on the ground before he pulled out his pocket knife and stabbed the decedent. The friend did not see the stabbing but first saw the two men getting up off the ground and the decedent running away saying he had been stabbed. The defendant then got up and left. Counsel's conduct was deficient in failing to object to the court's charge, which included second degree murder and manslaughter but did not include the "full model instruction" from the "Virginia Model Jury Instructions" on heat of passion. Counsel did, however, in closing arguments

attempt to distinguish between malice and heat of passion. The jury sent out three notes during deliberations asking for clarification on premeditation and indicating a hung jury. The court repeated the initial instructions and gave an Allen charge without objection by defense counsel. Counsel's conduct was deficient in failing to request the appropriate instructions. The state did not contest this and the state court did not address this aspect in its analysis. The court analyzed it, nonetheless, and found counsel's conduct deficient. With respect to prejudice, "the undisputed testimony that [the decedent struck the defendant] first demonstrates that the state habeas court's *Strickland* analysis fails to perceive the prejudice created by the lack of a definitional heat of passion instruction." The defendant was given an instruction on manslaughter, but not an instruction defining heat of passion. While the state argued no prejudice based on defense counsel's argument, "it is well established that 'arguments of counsel generally carry less weight with a jury than . . . instructions from the court.'" *Id*. at 125 (quoting *Boyde v. California*, 494 U.S. 370, 384 (1990)).

> A court issued jury instruction carries the command and force of law in a way that a statement by counsel cannot, and thus prejudice that arises from a flawed or omitted jury instruction is not cured by mere argument.

Additionally, counsel's argument did not actually include the language of the model instruction or attempt to define heat of passion. Prejudice established.

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 inculpate 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

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failure was due te 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 Case

2019: ***Alvarado v. Wetzel*, 2019 WL 3037148 (E.D. Pa. July 10, 2019).** In robbery-murder case where petitioner was the get-away driver and tried as an accomplice, trial counsel was ineffective in failing to object on due process grounds to the trial judge's written response to a question from the jury during deliberations concerning accomplice liability that suggested that the jury could convict petitioner on an accomplice liability theory based on the *actus reus* element alone without any finding that she had the *mens rea*, or intent element, necessary for accomplice liability. Post-conviction counsel was also ineffective in failing to raise the trial ineffectiveness claim premised on a due process violation. Petitioner and her boyfriend purchased Xanax from a person in a park that was well-known for illegal prescription drug sales. They shared the drugs with a childhood friend of petitioner who accepted a ride in the vehicle driven by petitioner. At some point, petitioner's boyfriend pulled out a gun from under the front passenger seat where he was sitting and showed it to petitioner and her friend. The three later decided to return to the park to obtain more Xanax. After petitioner parked the vehicle, the childhood friend suggested that petitioner's boyfriend try to "get a play," meaning to get more pills than were paid for. As her boyfriend walked away from the car, petitioner called him back and told him, "Cuz, you know, you know what to do. You know, if they don't give you a play, just pull that shit out." The childhood friend took that to be a suggestion to use the gun which upset her and caused her to yell at petitioner. The boyfriend then left the vehicle and went to the park where he pulled the gun on the drug dealer and took a bottle of Xanax the man was holding. As the boyfriend returned to the car, the drug dealer shouted, "He robbed me," which was repeated by others in the crowd, including the victim, who along with others followed the boyfriend to the car. After the boyfriend entered the front passenger side of the vehicle, the victim attempted to look in the driver's side window. The boyfriend reached over and shot the victim, after which he fired two or three more shots into the park. As they drove away, petitioner exclaimed, "That's why he loves me. That's why we ride or die." Petitioner was tried jointly with her boyfriend. The judge instructed the jury four times concerning accomplice liability, three of the times after questions from the jury. The final instruction was in response to a written question from the jury: "Does aiding after a crime in itself constitute accomplice liability?" After discussing the question with counsel, the trial court sent the jury a written answer to the effect that "it could." Following petitioner's conviction for robbery and second degree murder, trial counsel represented her on direct appeal and raised a single issue: "Did the trial court commit legal error by instructing the jury that she could be convicted under the accomplice theory solely by aiding after the crime had been committed?" Petitioner's judgment and sentence were affirmed with the appellate court finding that

the instruction complied with state law. In state post-conviction proceedings, petitioner unsuccessfully argued that trial counsel had been ineffective in failing to object to the trial court's written response to the final jury question. In the federal habeas proceedings, petitioner alleged that her due process rights were violated by the supplemental instruction and that trial counsel was ineffective in failing to object on this basis. Because petitioner's state counsel had relied only on state law on appeal and in state post-conviction proceedings, the claims were unexhausted. And because no available state remedy remained open, they were deemed procedurally defaulted. The default was overcome for the trial ineffectiveness claim based on post-conviction counsel's ineffectiveness. Although post-conviction counsel did challenge trial counsel's performance under state law, post-conviction counsel overlooked the "significant and obvious" due process implications of the written supplemental jury instruction and trial counsel's failure to object on that ground. No strategic reason for the omission of the due process argument could be discerned. "Having shown that she presents a substantial claim of ineffectiveness of trial counsel and that her postconviction counsel's performance was deficient for allowing the default of that claim, [petitioner] has shown that the procedural default of her ineffective assistance of counsel claim may be excused under *Martinez*." Turning to the merits, which is reviewed *de novo*, the district court first found that under Pennsylvania law petitioner could be convicted of second degree murder if the jury found that a homicide occurred while she was acting as an accomplice to a robbery. Accomplice liability required a specific *mens rea* element: the intent to promote or facilitate commission of the offense. The trial court's initial instruction on accomplice liability conformed closely to the standard instruction on the issue. The following two supplemental instructions given by the trial court also comported with state law. But the provision of the correct instructions did not negate the harm from the final written answer to the jury inquiry. "The challenged supplemental instruction was a two-word response to the jury's specific question and was delivered in writing. This concise but ambiguous written instruction likely stood out more to the jury than the previous verbal instructions that correctly explained the *mens rea* for accomplice liability." As the Supreme Court recognized in *Bollenbach v. United States*, 326 U.S. 607, 612 (1946), a specific instruction on a key issue likely carries greater weight with a jury than a previous generalized instruction. "Reviewing the written answer to the jury's question in the context of the trial record, there is '"a reasonable likelihood" that the jury applied the instruction in a way that relieved the State of its burden of proving' that [petitioner] acted with the intent to promote or facilitate the robbery." While the prosecution in argument relied heavily on the childhood friend's account of petitioner's statements before and after the robbery to establish the requisite *mens rea*, her credibility was significantly challenged by petitioner and the record suggested that the jury may indeed have discounted the friend's testimony. Notably, the jury acquitted petitioner of the charge of conspiracy to commit robbery even though conspiracy and accomplice liability have the same intent requirement under Pennsylvania law. The supplemental written instruction violated due process and the record provided no basis to discern a tactical reason for trial counsel not objecting on this ground. Longstanding Supreme Court precedent made clear that the Due Process Clause of the United States Constitution requires proof beyond a reasonable doubt of every element necessary to constitute a crime and that a jury instruction that relieves the government of its burden of proving every element beyond a reasonable doubt violates due process. Thus, deficient performance was established. As for prejudice:

> The Court concludes that the error of [petitioner's] trial counsel in this case in failing to object to the due process violation undermines confidence in the outcome. Given

> the government's primary reliance on [petitioner's] statements in the car, both before and after the shooting, and the jury's apparent lack of confidence in [the friend's] testimony and obvious confusion concerning accomplice liability, there is a reasonable probability that the outcome would have been different had [petitioner's] trial counsel objected to the trial court's written response and had the jury been properly instructed on accomplice liability. [Petitioner] has demonstrated prejudice from her counsel's deficient performance and therefore has established ineffective assistance of her trial counsel under *Strickland*.

***Vonville v. Kerestes*, 2019 WL 1040747 (M.D. Pa. March 5, 2019), *appeal dismissed*, 2019 WL 4668042 (3rd Cir. Aug. 13, 2019).** In case where petitioner was convicted of third degree murder, trial counsel was ineffective in failing to object to a jury instruction allowing the jurors to infer guilt from petitioner's failure to testify. Although the claim was procedurally defaulted, the default was excused under *Martinez* due to the ineffectiveness of post-conviction counsel in failing to raise the claim. (See subsection VIII.B. for a full summary of the *Martinez* analysis.) The failure to object to a jury instruction that is expressly forbidden by *Griffin v. California*, 380 U.S. 609 (1965), was clearly substandard under the first prong of *Strickland*. The district court was unpersuaded by the Commonwealth's argument that it was inconceivable that the trial court in fact incorrectly instructed the jury, reading the instruction in the context of other contemporaneous instructions and given the trial court's extensive experience. Under these circumstances, the Commonwealth argued, the transcript must have been the result of a typographical or scrivener's error. The district court responded that experience does not render one immune from error and that having given the correct instruction in other cases did not establish that the judge provided a correct one in the case at hand. Also unpersuasive was the argument that because trial, appellate and post-conviction counsel were experienced, the failure by any of them to raise the issue pointed again to a scrivener's error. But experience alone does not render a claim of ineffective assistance incredible. The district court further rejected the Commonwealth's request to hold a hearing at which trial counsel and the prosecutors could provide their recollections of the actual jury charge. (The trial judge was deceased.) Notably, the Commonwealth made no proffer that any of the parties would testify that the correct instruction had been given. In addition, although the Commonwealth took the position early on in the habeas proceedings that a typographical error explained the erroneous instruction, it never asked for a hearing on that assertion until after the Magistrate Judge recommended a grant of relief on the claim. The request for a hearing was therefore waived. Finally, no hearing was warranted because the transcript was certified as accurate by the stenographer and signed and approved by the trial judge. "This is essentially the testimony of the court reporter and the trial judge that the jury was, in fact, instructed that they 'may infer any inference of guilt from the fact that he did not testify in his own defense.'" Having overcome the default, the merits of the claim was addressed. The deficiency by trial counsel was easily shown. As for prejudice, the key issue in this case was petitioner's mental state at the time he killed the victim, as shown by the closing arguments. But because trial counsel failed to provide proper notice, the defense was barred from presenting any evidence at trial as to petitioner's state of mind at the time of the crime.

> This failure was then compounded and magnified when, after [petitioner] exercised his Fifth Amendment right, trial counsel allowed to go unchecked the trial judge's comment to the jury that they could infer guilt because [petitioner] did not testify.

**Capital Case*

> Thus, not only did trial counsel's own professional errors preclude her from offering any testimony of [petitioner's] mental state during the commission of the offense, she then failed to act when the trial judge instructed the jury that they could infer criminal intent from her client's silence at trial. On these facts, [petitioner] has "show[n] that but for counsel's unprofessional errors there is a reasonable probability that the outcome of the proceeding would have been different."

***Gray v. Tice*, 2019 WL 824045 (W.D. Pa. Feb. 21, 2019).** Trial counsel was ineffective in failing to object to the jury instructions on counts of retaliation against witnesses that failed to define a key competent of the charged crime. Petitioner, a prison inmate, was charged, inter alia, with retaliation against witnesses. Petitioner had written threatening letters to witnesses involved in another inmate's trial. The statute related to witness retaliation provided:

> A person commits an offense if he harms another by any unlawful act or engages in a course of conduct or repeatedly commits acts which threaten another in retaliation for anything lawfully done in the capacity of witness, victim or a party in a civil matter.

Pennsylvania courts have interpreted this statute to allow for a conviction of retaliation if the Commonwealth proves the defendant engaged in any one of the following three scenarios for a retaliatory purpose: (1) "the defendant harmed another by any unlawful act"; (2) the defendant "engag[ed] in a course of conduct which threatened another"; or (3) "the defendant repeatedly committed acts which threaten another." For the first scenario, the Pennsylvania Supreme Court has found it requires a showing that (1) the defendant caused harm; and (2) such harm resulted from an unlawful act. Importantly, the element of harm cannot be established merely by showing that an unlawful act was committed. Rather, the Commonwealth must prove that the victim suffered a specific and identifiable harm as a result of the threat, not just that the victim suffered "feelings of concern and intimidation[,]" which "are feelings that one would expect to accompany any threat that was made." (Citation omitted.) The trial court did not instruct on the second two scenarios after defense counsel successfully argued that the evidence did not support them. In giving the instruction on the first scenario, however, the trial court failed to define "harm" in accordance with state supreme court precedent. This failure was compounded when the trial court grouped the "harm" and "unlawful act" elements together and instructed the jury that the Commonwealth had to prove *only two elements* in order for it to convict petitioner on the witness retaliation count: (1) that he harmed the victim by an unlawful act; and (2) that he did so in retaliation. But under state law, the jury had to find *three elements* to convict petitioner of the offense: (1) that he harmed the victim, as defined by the state supreme court*;* (2) by an unlawful act; and (3) that he did so in retaliation. After giving the flawed instruction, the trial court asked defense counsel whether he had any objections or additions. Trial counsel replied that he had none. Petitioner was convicted of three counts of witness retaliation based on the three letters he had written. In post-conviction proceedings, the post-conviction court concluded that trial counsel was deficient in failing to object to the lack of a definition of harm in the instructions but held that petitioner did not establish prejudice. In so ruling, the post-conviction court found that "trial counsel's repeated emphasis of the harm requirement during cross-examination and in closing arguments" "sufficiently alerted the jury to the harm element of the offense[.]" The district court held that this finding was objectively unreasonable. First, it is the trial court that tells the jury the correct law to apply, a point the trial court reiterated to the jury.

**Capital Case*

Second, defense counsel also argued to the jury why the evidence did not support a finding of the second and third scenarios which the jury was never instructed on. This could only have further confused the jury as to what elements the jury needed to find in order to convict on witness retaliation. Third, there could be no dispute that the evidence was insufficient to convict petitioner under the first scenario. Relief is granted as to the witness retaliation convictions.

2017: ***Brooks v. Gilmore*, 2017 WL 3475475 (E.D. Pa. Aug. 11, 2017), *appeal dismissed*, 2018 WL 1304895 (3rd Cir. 2018).** Petitioner was convicted by a jury in Pennsylvania state court of first degree murder and was sentenced to life without parole. The prosecution's key witness, and the "lynchpin of the case," was a sole eyewitness who identified two other individuals from a lineup before selecting petitioner, and named petitioner only because the cops kept bothering him. The witness was high on Xanax and alcohol at the time of the crime. At the time of trial, the witness was under court supervision and had two open cases. Charges of carjacking, robbery, and weapons offenses that were pending against him were dismissed for lack of prosecution just after he gave the police a statement implicating petitioner. Petitioner's conviction and sentence were affirmed on direct appeal and his state post-conviction petition was denied without a hearing. In federal habeas pursuant to 28 U.S.C. § 2254, petitioner alleged that he was deprived the right to effective assistance of counsel because his trial lawyer failed to object to a jury instruction improperly defining reasonable doubt. After providing the standard jury instruction on reasonable doubt, the court instructed the jury:

> It's helpful to think about reasonable doubt in this manner. Let's say, and I know that each one of you does have someone that you love very much, a spouse, a significant other, a child, a grandchild. Each one of you has someone in your life who's absolutely precious to you. If you were told by your precious one's physician that they had a life-threatening condition and that the only known protocol or the best protocol for that condition was an experimental surgery, you're very likely going to ask for a second opinion. You may even ask for a third opinion. You're probably going to research the condition, research the protocol. What's the surgery about? How does it work? You're going to do everything you can to get as much information as you can. You're going to call everybody you know in medicine: What do you know? What have you heard? Tell me where to go. But at some point the question will be called. If you go forward, it's not because you have moved beyond all doubt. There are no guarantees. If you go forward, it is because you have moved beyond all reasonable doubt.

The court held that this "emotionally charged metaphor" violated petitioner's due process rights because the jurors could interpret it to allow conviction based on any degree of proof below the reasonable doubt standard, under *Cage v. Louisiana*, 498 U.S. 39, 41 (1991). Because "any person of decency and morals would strive to put aside doubt when faced with a single life-saving option for a loved one," this instruction diminished the prosecution's burden of proof, creating strong motivation to put aside doubt. The initially accurate instruction on the standard of proof did not render the charge as a whole acceptable because the jury was instructed to consider the court's example as a proper exposition of the standard, and it was not. Counsel's failure to object was

deficient because reasonable doubt is such a fundamental principle and the nature of the court's hypothetical was so instinctively problematic. Any reasonable attorney "would have focused sharp attention as soon as the judge deviated from the standard instruction." The deficiency was prejudicial because the error in defining reasonable doubt was structural under *Sullivan v. Louisiana*, 508 U.S. 275 (1993) (holding that without the reasonable doubt standard, a criminal trial cannot reliably serve its function). Prejudice was therefore presumed. But even if prejudice was not presumed, prejudice was established because there was not overwhelming evidence of guilt in this case. The state court's denial of the claim was both an unreasonable determination of fact (that the instruction was a mere example rather than a "lengthy and emotionally charged illustration antithetical to the concept purportedly being explained") and an unreasonable failure to recognize the due process principles in *Cage* and *Sullivan*.

2015: ***Ruiz v. United States*, 146 F. Supp. 3d 726 (D. Md. 2015)**. Counsel ineffective in drugs and possession of a machine gun case for failing to request an instruction that conviction of the machine gun count required proof that the defendant knew the weapon was a machine gun. The defendant was "a first-time non-violent offender," who participated in a drug trafficking ring led by another. Because of the machine gun charge, the defendant, "a minor participant in the drug conspiracy, was sentenced to 480 months, which was greater than the combined total sentence for all of his co-conspirators and the "undisputed ringleader." Counsel's conduct was deficient in failing to request a mens rea instruction because "bedrock principles of Anglo-American jurisprudence" and the Supreme Court's interpretation of a similar automatic weapon offense required proof that the defendant knew the features of the weapon. Prejudice established. There was no direct evidence that the defendant knew the weapon was a machine gun, and the circumstantial evidence was minimal, at best, as forensic evidence showed the weapon had never been fired and the co-conspirators referred to the weapon as a "rifle" of "semi-automatic," while a machine gun is "automatic." There simply was no evidence that the defendant knew the weapon was a machine gun. If this issue had been raised, a reasonable jury would have found the defendant not guilty or the court would have granted a motion to dismiss. Conviction vacated and sentence reduced to 120 months.

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 as 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

2019: ***State v. Alires*, 455 P.3d 636 (Utah Ct. App. 2019).** In case where appellant was charged with six counts of aggravated sexual abuse of a child -- two counts for conduct toward his youngest daughter

and four counts for conduct toward one of his daughter's friends – and appellant was convicted of one count for each victim and acquitted of the remaining four counts, trial counsel was ineffective in failing to request an instruction requiring the jury to reach a unanimous verdict with respect to each act for which he was convicted. The charges stemmed from an incident when the friend and another girl were staying over at appellant's home for his daughter's eleventh birthday. Appellant was interacting with the girls in an attempt to lighten the mood after appellant and his wife had gotten into a loud argument that was overheard by the girls. The friend gave vague testimony about appellant touching her butt while they were dancing but "trying to make it look like it wasn't happening." After appellant sat between the friend and his daughter on the couch, the friend testified that when appellant tickled his daughter, "it looked like he was touching like in her inner thigh, and like moved up to her crotch area." According to the friend, "it was really not tickling, it was more like grabbing and grosping [sic]." When appellant announced he was then going to tickle the friend, she replied, "[P]lease don't." Appellant nevertheless started tickling near her "ribcage and then touched [her] breast area" and then he "started tickling [her] inner thighs and did the same thing that he did to [the daughter]." The friend testified, "[H]e slid his hand up to my vagina and started like grabbing, and like grosping [sic], I guess" for "[p]robably about seven to 10 seconds." Although the daughter and the friend reported that some touching had occurred to a school counselor, the daughter and the other friend testified at trial that nothing inappropriate happened. The daughter explained that she only confirmed to the school counselor what her friend had told her. The jury was instructed that four of the six charged counts were for conduct perpetrated against the friend and two of the counts were for conduct perpetrated against the daughter, although the conduct at issue was not specified. During closing argument, the prosecutor explained that, based on the friend's testimony, the jury could "ascertain six counts of touching of [the friend]" and that the State was "charging four" of those touches. Regarding appellant's daughter, the prosecutor cited the friend's testimony that she saw appellant touch his daughter on her "inner thigh" and "on her vagina." The prosecutor explained that "any one of those touchings qualifies for each of the counts. One for one. One touch for one count. And . . . it has to be just on the vagina, just on the butt, or just on the breast. It can be any combination." During deliberations, the jury sent a note asking: "Can we please have a clarification on how the counts work? We don't understand how to weigh each count when they are all the same. Not sure what they mean." Even after this question, trial counsel did not request a specific unanimity instruction. Instead, with consent from both parties, the court referred the jury to instructions it had already received. Following appellant's conviction of one count each as to the friend and daughter, trial counsel filed a motion to arrest judgment and for a new trial arguing, inter alia, that the jury instructions were "fatally erroneous in failing to require the jury to find a unanimous verdict." The motions were denied. In finding trial counsel ineffective, the appellate court observed that "[w]here neither the charges nor the elements instructions link each count to a particular act, instructing the jury that it must agree as to which criminal acts occurred is critical to ensuring unanimity on each element of each crime." Trial counsel's failure to request a unanimity instruction was objectively unreasonable. This was true even though no prior Utah appellate decisions had applied the Unanimous Verdict Clause to a case where a defendant was charged with multiple counts of the same crime. Trial counsel is not "categorically excused from failure to raise an argument not supported by existing legal precedent." In any event, a state supreme court decision involving a single count of sexual abuse established that jurors must be unanimous as to the particular act or acts that form the basis for a sexual abuse conviction. "[I]t should have been readily apparent" that although that case "involved a prosecution in which the defendant was charged with and convicted of a single

count of sexual abuse that could have been based on any one of a number of separate acts, its holding applies with equal force to a case such as this where a defendant is charged with multiple counts of sexual abuse, each of which could have been based on any one of a number of separate acts." In finding prejudice, the appellate court noted that the evidence was conflicting both as to which acts occurred and as to appellant's intent. Given the conflicting evidence, there is a reasonable probability that the jury did not unanimously agree that the same two acts occurred. In addition, the jury's question showed that the absence of a proper unanimity instruction had a palpable impact on the jury deliberations and undermined confidence in the jury's verdict.

***State v. Bonds*, 450 P.3d 120 (Utah Ct. App. 2019)*, cert. granted*, 466 P.3d 1072 (Utah 2020).** In murder case where appellant claimed he shot his friend after his friend threatened to harm appellant's children, trial counsel was ineffective for failing to object to erroneous and confusing jury instructions regarding the burden of proof germane to the affirmative defense of imperfect self-defense and for failing to object to references to appellant's post-arrest silence. Regarding the instructions on self-defense, the State failed to offer, and the appellate court could not discern, a strategic basis for counsel's failure to object to the instructions. Similarly, the appellate court could not find any reason why trial counsel would forgo an objection to testimony about appellant's failure to invoke self-defense upon his arrest. That appellant also did not mention self-defense to two others prior to his arrest did not explain the failure to object to testimony from the arresting officer. As for prejudice, the arguments for imperfect self-defense were "decent" if not "totally convincing." Notably, the jury deliberated for over ten hours and acquitted appellant of one count of felonious discharge of a firearm. The acquittal indicated that the jury might have accepted appellant's testimony about how the first shot occurred. "In the end, we conclude that a reasonable probability exists that, had the jury received proper instructions and had the State's inference of guilt from [appellant's] silence been kept from the jury, the jury's decision regarding self-defense and manslaughter may have been different and, accordingly, our confidence in the outcome has been undermined."

***State v. Resh*, 448 P.3d 1100 (Mt. 2019).** In case involving one charge of sexual intercourse without consent and one charge of sexual assault, both stemming from the same incident involving appellant and his fourteen-year-old stepdaughter, trial counsel was ineffective in failing to object to an instruction that a person under the age of sixteen is incapable of consent as a matter of law which did not differentiate between the two charged offenses. Although the instruction was correct for the sexual intercourse charge, there can be no consent as a matter of law for sexual assault only if the victim is less than fourteen years old. Deficient performance is found because the record provided no plausible justification for defense counsel's failure to object to an incorrect jury instruction that misstated an element of one of the charged offenses Under the correct law, the State had the burden of proving the sexual contact was without consent. Regarding prejudice, the Montana Supreme Court found that trial counsel's deficiency undermined confidence in the verdict.

> The State argues that the evidence against Resh was overwhelming. But the instruction allowed the jury to convict Resh solely on evidence of [the victim's] age. Had trial counsel offered and argued a separate sexual assault "without consent" instruction, the jury would have been required to consider all the testimony, and the result may have been different. Because the jury could have convicted Resh without even considering the witnesses' credibility, there is a probability sufficient to

> undermine confidence in the outcome of the trial. The second prong of *Strickland* is satisfied, and prejudice is apparent.

***Baynum v. State*, 211 A.3d 1075 (Del. Supr. 2019).** In case involving multiple convictions arising from petitioner breaking into his estranged wife's residence and physically accosting her and her new romantic partner, trial counsel was ineffective in failing to ask the trial court to instruct the jury to consider the charge of offensive touching as a lesser-included offense of third-degree assault in connection with petitioner's attack on his estranged wife's partner.

> Not only would a conviction of the lesser charge have provided [petitioner] with the possibility of a lighter sentence, but to the extent it would have been based on the absence of physical injury, the corresponding acquittal of the more serious third-degree assault charge would have undermined the State's prosecution of the first-degree burglary charges, which also had a physical-injury component.

The lower court correctly found that trial counsel's failure to request the lesser-included offense instruction was deficient. It erred, however, in finding petitioner had failed to establish prejudice. The lower court had reasoned: (1) the jury found petitioner guilty of first-degree burglary when second-degree burglary was offered as a lesser-included offense, rendering a guilty finding on the third-degree assault charge the only possible consistent outcome; and (2) petitioner had not shown that the trial judge would have given him a lesser sentence. The reasoning on the first point was at odds with itself. Looking at it the other way,

> because the jury did not have the option to consider offensive touching—an offense that does not require injury—the jury likewise might have felt compelled to ignore the option of second-degree burglary, an offense that likewise does not require injury. In other words, if there was a "substantial risk" (as the [lower court] found) that the jury was willing to find [petitioner] guilty of third-degree assault despite no proven injury [rather than acquit him entirely], then it seems that there also was a "substantial risk" that the jury was willing to find [petitioner] guilty of first-degree burglary despite no proven injury in order to maintain a consistent overall verdict.

As to what sentence petitioner might have received: (1) if petitioner would have been found guilty of a lesser offense, that is enough to change the outcome of the case, which is what *Strickland* requires; and (2) the lower court's finding that petitioner failed to demonstrate a reasonable probability of a lesser sentence was in conflict with its reasoning that, if the jury had found petitioner guilty of offensive touching instead of third-degree assault, "the logical corollary is that [petitioner] would have been convicted of Burglary Second, not Burglary First." Second-degree burglary has a less severe sentencing range than first-degree burglary.

***State v. Shortall*, 205 A.3d 985 (Md. 2019), *affirming* 183 A.3d 820 (Md. Ct. Spec. App. 2018).** Trial counsel was ineffective in failing to object to instructions that incorrectly increased the number of counts that petitioner could be convicted of. Petitioner was convicted of five misdemeanor counts of failing to comply with a state regulation for disposing of sewage in a manner which may cause

pollution of the ground surface and five misdemeanor counts of failure to comply with a state regulation for disposing of sewage without an approved permit. The charges and convictions arose when environmental health department personnel noted that human waste and toilet paper had been discharged outside from a pipe leading from petitioner's building. The number of counts reflected the number of times inspectors visited the site and observed the sewage before the pipe was finally capped. Under the relevant statute, "[e]ach day on which a violation occurs is a separate violation under this subsection." The day before trial, the prosecution distributed its requested instructions which including one involving a continuing violation theory which stated that "every day on which a violation is still present constitutes a separate offense until the date the violation is corrected." After the prosecution rested its case, defense counsel moved for judgment of acquittal on all counts. During argument on the motion, the trial court asked the prosecutor what proof there was that any waste was deposited at the site after the initial inspection. The prosecutor responded that it was a continuing violation offense. The acquittal motion was denied. When instructing the jury, the trial court included the continuing violation instruction proffered by the prosecution with no objection by the defense. In argument, the prosecution asserted that the jury could charge petitioner for every day that the water had not been turned off. Defense counsel countered that this argument was "somewhat offensive" because the inspectors spoke of observing the same waste in four visits to the site following the initial inspection. Petitioner was convicted on all counts. In post-conviction proceedings, petitioner alleged that the failure to object to the continuing violation instruction constituted deficient performance. Trial counsel testified that no exception was made to the instruction because counsel agreed with the prosecution's interpretation of the statute after reviewing the authorities it cited. The post-conviction court denied relief, observing that there was no controlling Maryland authority as to whether the continuing violation doctrine applies in cases involving environmental crimes. The Court of Special Appeals reversed, finding that the challenged instruction was an incorrect statement of law and that trial counsel was ineffective in failing to lodge an objection. These findings are upheld. First, the plain language of the statute established that the prosecution's instruction was legally incorrect. And as for trial counsel, the "failure to except to that instruction and thereby preserve appellate review based on the plain language of the statute and regulations fell below an objective standard of reasonableness." Regarding the case law the prosecution claimed supported its interpretation of the statute, "[r]easonably competent counsel . . . would have had no difficulty in showing the lack of relevance of those authorities." Also upheld is the Court of Special Appeals' finding that petitioner was prejudiced as to his convictions for eight of the ten counts. And the fact that the counts were merged for sentencing does not change that – petitioner still has ten convictions on his criminal record, and that was prejudicial to him. The Court rejects the State's argument that it should be permitted to retry petitioner on the eight counts under a proper interpretation of the statute, explaining: "Rather than try the case on eight of the offenses on the theory alleged in the charging document, the State convinced the trial court that the disposal of waste which was observed [during the initial inspection], legally could continue as eight additional violations until the pipe was capped. The prosecution does not get a second chance to prove its case by a different theory."

***Copeland v. State*, 277 So.3d 1137 (Fla. Ct. App. 2019).** In case where appellant was convicted of aggravated assault with a deadly weapon resulting from a "road rage" incident, trial counsel was ineffective for failing to request a jury instruction for the justifiable use of nondeadly force. Appellant and another driver, Twigg, had an encounter on the highway during which appellant pulled

out a handgun while the parties were driving. Twigg testified that appellant pointed the gun at him and threatened to kill him. Appellant denied making any threats, testifying that he only pulled his gun out to deter Twigg from pursuing him. Both parties stopped in the road at which point, according to Twigg, appellant approached Twigg's car, still holding the gun. Twigg ducked down in his car and when he looked up, appellant had retreated to his motorcycle and no longer had the gun in his hand. Twigg testified that he then attempted to exit his vehicle but that appellant ran back towards him, pinning Twigg between the driver's door and car frame, causing damage to his car window. Appellant denied Twigg's accusation and stated that he merely approached the car. Appellant's defense at trial was that he only displayed the loaded handgun because he was in fear of his life due to Twigg's aggressive actions towards him. At defense counsel's request, the jury was instructed on the justifiable use of deadly force in self-defense, which provides that a person is justified in using deadly force if he or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or to prevent the commission of a forcible felony. No request was made for an instruction on the justifiable use of nondeadly force, which states that nondeadly force may be used when and to the extent a person reasonably believes that such conduct or force is necessary to defend himself or another against the imminent use of unlawful force. But under the facts of the case, appellant was entitled to a nondeadly force self-defense jury instruction. "Counsel's failure to request this instruction is significant because a defendant's use of deadly force is justifiable in much narrower circumstances (to prevent imminent death or great bodily harm or the commission of a forcible felony) than the use of nondeadly force (the preventing of imminent use of unlawful force)." Trial counsel can be found to have performed deficiently solely on the appellate record because no strategic reason could be gleaned for counsel's failure to request the nondeadly force instruction that was, "from an evidentiary standpoint, both easier to establish and factually justified in this case where [appellant's] own trial testimony was that he simply displayed his firearm." In finding prejudice, it was noted that the prosecutor was able to argue that Twigg's alleged conduct did not meet the criteria necessary to invoke deadly force. Additionally, defense counsel essentially argued to the jury that appellant had used what amounted to nondeadly force (drawing a gun), and that this force was entirely justified. But without the nondeadly force instruction, the jury had no ability to give effect to this argument. Because of trial counsel's deficient performance, "the jury was left with no choice but to decide [appellant's] fate without the benefit of a proper instruction to evaluate his best, and arguably only, defense."

***State v. Thomas*, 139 N.E.3d 1253 (Ohio Ct. App. 2019).** In murder case where appellant unsuccessfully raised self-defense, trial counsel was ineffective in failing to request an instruction on the "castle doctrine,' which explained that appellant had no duty to retreat. Appellant along with others was visiting the apartment of a woman appellant had an "on again, off again" relationship with. During the evening, appellant and another guest, Dixon, got into an argument. Dixon left and returned sometime later with her boyfriend, Brack. Both Brack and appellant were armed. At trial, it was disputed who initiated the shooting that left Brack and another person in the apartment dead. The jury was instructed on the three elements of self-defense: (1) that the defendant was not at fault in creating the situation giving rise to the affray; (2) that the defendant had a bona fide belief that he was in imminent danger of death or great bodily harm and that his only means of escape from such danger was in the use of such force; and (3) that the defendant did not violate any duty to retreat or avoid the danger. The jury was also instructed that the defendant "is presumed to have acted in self-defense when using defensive force that was intended to cause death or great bodily harm to another

if the person against whom the defensive force was used had entered, *unlawfully and without privilege to do so,* the residence occupied by the Defendant." Such instruction was inapplicable under the circumstances as there was no claim that Brack, who came with an invited guest, had entered the apartment unlawfully. The jury was not instructed pursuant to the castle doctrine which was more properly applicable to the facts of this case. Under this doctrine, a person who lawfully is in someone's residence has no duty to retreat before using force in self-defense. Because appellant was an invited guest at the time of the party and often lived in the apartment for days at a time, "a castle doctrine instruction should have been given under these circumstances." Given the conflicting evidence, it was highly possible that the jury rejected appellant's claim of self-defense because it incorrectly believed he was under a duty to retreat. On this record, there was no strategic basis for not requesting the instruction and a reasonable probability of a more favorable result had it been given.

***State v. Reid*, 135 N.E.3d 517 (Ohio Ct. App. 2019).** Reversing murder conviction due to trial counsel's ineffectiveness in failing to request a jury instruction on the "castle doctrine." Defendant stabbed her boyfriend who died from his injuries. The stabbing occurred at defendant's apartment. Defendant was charged with murder. At trial, defendant argued she had acted in self-defense. Supporting the prosecution's murder theory were the victim's brother, the victim's nephew, and the wife of the victim's nephew. They, however, had earlier provided inconsistent statements about what they witnessed when interviewed by the police. Questions were also raised about the brother's memory, how much he had had to drink on the day of the offense, and whether or not he suffered from slight dementia. Evidence was presented establishing that prior to the stabbing, defendant made a 911 call requesting assistance because the victim was assaulting her and would not leave her apartment. The officers arrived after the victim had been stabbed. In her statement to police, which was video recorded and played to the jury, defendant described the events leading up to the stabbing. She corroborated the victim's brother's claim that he disarmed her at one point after the victim kicked her and she had retrieved a large knife. When the victim kicked her again, she ran back to the kitchen and grabbed a smaller knife. Defendant told police that she had only intended to scare the victim but she must have hit him with the knife. In closing argument, the prosecutor told the jury that defendant could have left the apartment after calling 911 and waited for the police to arrive. Defense counsel countered that defendant had no duty to retreat from her own apartment when faced with deadly force or fear of harm and that the jury would be instructed on that point. Defense counsel stated that this was known as the "castle doctrine." No instruction on the castle doctrine was given to the jury, however. Defense counsel was ineffective in failing to request such an instruction. "In the absence of the castle-doctrine instruction, which counsel had stated would be given, the jury reasonably would have believed that [defendant] in fact did have a duty to retreat." On this record, prejudice is found.

***Swanson v. State*, 829 S.E.2d 312 (Ga. 2019).** In felony murder case with sale of marijuana as the predicate felony, trial counsel was ineffective in failing to request a jury charge on use of force in defense of habitation. The relevant facts are as follows. Appellant agreed through an intermediary to meet the victim at an apartment complex to sell him marijuana. Appellant drove to the complex with other occupants in his vehicle, parked his car and waited for the victim. The victim arrived shortly thereafter and approached appellant's car on foot. At some point during the encounter, the victim pulled out a firearm. Appellant then pulled out his own gun and shot the victim two times,

killing him. Appellant retrieved the bag of marijuana which was laying on the ground before driving off. In his trial testimony, appellant stated that the victim had reached into his vehicle and snatched the bag of marijuana while pointing the gun at appellant. The victim did not leave at that point, however. He continued to point the gun at appellant and stated he wanted more stuff. Appellant retrieved his gun and shot when the victim looked away for a second. One of the occupants of the car testified that she thought the victim grabbed the marijuana that was in the car but was not sure of that detail. Defense counsel's request for an instruction on use of force in defense of self or others was granted. Under that theory, however, use of force could not be justified if the force at issue was used in the course of committing a felony. Here, appellant had admitted in his testimony to committing a felony, rendering the defense unavailable to appellant. What defense counsel did not do was to request an instruction on use of force in defense of habitation. Under Georgia law, a motor vehicle can constitute a habitation. Importantly, that defense does not include a provision disallowing it if the force was used during commission of a felony. On this record, the Georgia Supreme Court concludes there was sufficient evidence to justify a defense of habitation instruction and a reasonable attorney would have requested it. Defense counsel's explanation for failing to do so was his ignorance of the law including a motor vehicle in the definition of habitation. Defense counsel's performance was deficient. As for prejudice, it is noted that the prosecutor's closing argument both emphasized the inapplicability of the chosen defense because of appellant's commission of a felony and essentially conceded that if a justification defense that was *not* precluded by law were available, then appellant would have had a strong defense at trial. "This supports the notion that there is a reasonable probability the jury would have returned a different verdict had it been instructed on defense of habitation." In addition, "the record shows that the jury was paying close attention to the defense on which it was instructed, and that it carefully considered whether it could apply that defense in [appellant's] case." This was shown by the jury's question of whether it was bound by the provision of Georgia law stating that a person cannot claim self-defense while committing a felony. Prejudice is established.

2018: ***Calhoun v. State of Kansas,* 426 P.3d 519 (Kan. Ct. App. 2018).** In case involving charges of multiple offenses allegedly committed by movant and three others, trial counsel was ineffective in failing to object to the instruction that the jury could convict movant of the aiding and abetting specific intent crimes if it found that the specific intent crimes were a reasonably foreseeable consequence of the intended crime of aggravated robbery. Appellate counsel was also ineffective in failing to raise the trial IAC claim on direct appeal. Movant was convicted by a jury of aggravated kidnapping, aggravated criminal sodomy, attempted voluntary manslaughter, aggravated burglary, criminal threat, two counts of aggravated robbery, and two counts of aggravated battery. The charges arose from an incident in which movant and three others broke into a family's home, demanded money, pointed a gun at and threatened to kill a baby who was present, kicked, stomped on, and shot the father, and raped, sodomized, beat the mother and forced her to perform oral sex. Movant testified that he was at the house, that he and the others planned to rob the father who had sold him marijuana in the past, and that he participated in the robbery. He denied that he had committed any of the violent crimes against the mother, father, and baby. A minor who participated in the crimes testified that movant actively participated in the sexual assaults of the mother and punched the father in the head. After movant's convictions were affirmed on direct appeal, he filed a motion raising numerous claims, including ineffective assistance by trial and appellate counsel. The motion was denied and he appealed. The appellate court pointed out that Kansas state law (*State v. Overstreet*,

200 P.3d 427 (2009)) requires that in order to be convicted of a specific intent crime under an aiding and abetting theory, the defendant must have the same specific intent as the principal. Thus, when a defendant is charged with specific intent crimes under an aiding and abetting theory, the jury must be given the "same mental culpability" instruction, rather than the "foreseeability" instruction, which is only applicable to aiding and abetting general intent crimes. Here, trial counsel failed to object to the instruction that the jury could convict movant of the aiding and abetting specific intent crimes (aggravated kidnapping, attempted voluntary manslaughter, and criminal threat) if it found that the specific intent crimes were a reasonably foreseeable consequence of the intended crime (aggravated robbery). Appellate counsel also failed to raise the trial IAC claim on direct appeal. Both trial and appellate counsel's performance was deficient in this way, and both were prejudicial, given that "the prosecutor's entire rebuttal during closing arguments hinged on telling the jury that they could convict [movant] of all of the crimes charged because they were reasonably foreseeable consequences of the intended robbery," 426 P.3d at 531, that the jury asked questions about the reasonable foreseeability portion of the aiding and abetting instructions, and that the jury acquitted movant of rape and three counts of aggravated criminal sodomy (indicating that it did not believe he aided and abetted all of the crimes). [NOTE: Jurors had provided statements indicating that half the jurors believed he was guilty of all, and half the jurors believed he was guilty of none, one of the jurors had a planned vacation, and they decided to convict of some and acquit of some. The appellate court ruled that it was precluded from considering these statements, but it appears nevertheless that they may have had some effect on the court.] There was a real possibility that the jury would not have found movant guilty of aggravated kidnapping, attempted voluntary manslaughter, and criminal threat if it had been properly instructed. Under Kansas law, if a movant makes more than conclusory contentions and an evidentiary basis supports movant's claims, the movant is entitled to an evidentiary hearing. In addition, when ineffective assistance of counsel and prejudice is readily apparent from the motion, files, and records of the movant's case, the appellate court has exercised its de novo review and reversed the defendant's conviction and remanded for a new trial without first remanding for an evidentiary hearing. Here, the court decided that this was such a case. The court thus reversed his aggravated kidnapping, attempted voluntary manslaughter, and criminal threat charges and remanded for a new trial.

***State v. Classen,* 422 P.3d 489 (Wash. Ct. App. 2018).** Trial counsel was ineffective in failing to request an inferior degree offense instruction as to one of the many crimes appellant was charged with. The offenses were based on an event during which a woman, who was driving with her infant son, offered to give appellant a ride, and once he was in the car he refused to get out, beat the woman, sexually assaulted her, and directed her where to drive. He was arrested after the woman and her son escaped from the car, he struck one bystander who was attempting to assist the woman, and other bystanders caught and subdued him. In the information, appellant was charged with second degree assault as to the bystander. He argued on appeal that trial counsel was ineffective as to that charge for failing to request an inferior degree offense instruction for the lesser crime of fourth degree assault. Here, appellant was entitled to such an instruction as it was an inferior degree of the charged offense, and there was evidence that appellant committed only the inferior degree offense. The evidence was that appellant slapped the bystander and then immediately ran away. Viewing this evidence in the light most favorable to appellant, the jury could have found that appellant was not intending to kidnap the bystander or the first victim at the time he slapped her, and intended instead only to harm her. It was clear from the closing argument that trial counsel's failure to request an

inferior degree instruction was not a reasonable strategy, because the only statement counsel made about the assault on the bystander was that appellant was "guilty of assault. . . What kind of assault is it? That's the question." Counsel obviously was not pursuing an all or nothing approach to this charge (i.e., that appellant was innocent of the charge), so there was no legitimate reason to fail to request the instruction. Appellant was prejudiced by this failure, because in order to convict him of second degree assault, the jury had to find that appellant committed the assault with the intent to commit a felony – here, the evidence that appellant intended to kidnap either the first or second victim at the time he slapped the second victim was very weak. The Court of Appeals of Washington remanded for a new trial on the assault charge.

2017: ***White v. Delaware*, 173 A.3d 78 (Del. 2017).** Petitioner was convicted of first degree reckless endangering and his conviction was affirmed on appeal. He then filed a petition for post-conviction relief, alleging that his counsel was ineffective for failing to request an instruction on the lesser included offense of second degree reckless endangering. The post-conviction court denied relief. The Supreme Court of Delaware reversed the denial of relief, finding that counsel's performance was deficient because counsel did not understand the elements of either first or second degree reckless endangering. First degree required proof of a substantial risk of death, while second degree required proof of a substantial risk of injury, but counsel thought that first degree required proof either of risk of death or risk of serious physical injury (and did not read the statute). Asking for the instruction would have been consistent with trial counsel's strategy – to show that petitioner fired a gun but did not create a substantial risk of death. The evidence in this case, that petitioner was not pointing his gun at anyone in particular but instead behind himself, that there were few people on the street, that the shots went far away from the two people who were there and did not penetrate any residence, could have supported second degree reckless endangering.

***Kruse v. State*, 222 So.3d 13 (Fla. Ct. App. 4th Dist. 2017).** In a case involving a charge of felony battery on an elderly person with prior conviction, resulting in a conviction of the lesser included offense of felony battery with prior conviction, trial counsel was ineffective for failing to request a self-defense jury instruction. Regarding deficient performance, it was noted that defense counsel elicited testimony from defendant asserting that the victim was the aggressor who first made physical contact and "tried to push" defendant out of the yard. Defense counsel also elicited from a third-party witness that the victim was the first to make physical contact. In addition, defense counsel made arguments during closing that could have reasonably comported with a theory of self-defense. Yet defense counsel inexplicably failed to request an instruction on self-defense. That defense counsel may have reasonably assumed the jury would be skeptical of the defense given that defendant was some twenty years younger than the feeble victim who was punched in the face and had his jaw broken, that didn't explain the failure to request an instruction that coincided with the testimony and argument. As to prejudice, it was observed, inter alia, that the jury expressly asked the court during deliberations whether there was an affirmative defense available in this case, indicating the jury would have seriously considered the possibility that defendant acted in self-defense if that option were available under the instructions.

***Hardman v. State*, 217 So.3d 107 (Fla. Ct. App. 4th Dist. 2017).** In a case where defendant was convicted of two counts of grand theft, trial counsel was ineffective in failing to request a jury instruction on good faith. The two transactions at issue involved the exchange of money for

promissory notes. Defendant considered the monies loans; the victims (Krenzel and the Diehls) considered the monies an investment. Defendant initially made interest payments to both parties and ultimately attempted to deed property to the Diehls but they deeded it back. When defendant used the monies for personal expenses and failed to repay them, charges were filed. Defendant's recorded statement, which was admitted at trial, indicated that he borrowed $20,000 from Krenzel, promised a percentage back but failed to follow through, an outcome he had not intended. Defendant admitted owing about 1.3 million dollars in bad investments. He was trying to come up with the money. At trial, defense counsel emphasized the theory that the monies were loans and that defendant had attempted to repay them but had invested poorly. In moving for a judgment of acquittal, defense counsel argued that the prosecution had failed to prove defendant's intent to permanently deprive the victims of the money. The motion was granted on security fraud charges but not on those of grand theft. Because the evidence in the record supported a good faith defense, defense counsel performed deficiently in failing to request specific instructions on that defense. And given the absence of an instruction on the law applicable to defendant's only defense, there was prejudice.

***Burns v. State*, 803 S.E.2d 79 (Ga. Ct. App. 2017).** In a case where defendant was convicted, inter alia, of aggravated assault, trial counsel was ineffective in failing to request an instruction regarding the requirement that accomplice testimony be corroborated. Defendant and the co-defendant had been attempting to sell the victim a stolen car. Following a dispute between the parties, one of the defendants shot the victim. There was conflicting testimony by the victim and eyewitnesses regarding who the shooter was. The co-defendant testified that defendant had been the shooter. The jury was charged: "[t]he testimony of a single witness, if believed, is sufficient to establish a fact. Generally there is no legal requirement of corroboration of a witness provided that you find ... the evidence to be sufficient." Defense counsel raised no objection to the instruction nor requested that an accomplice-corroboration instruction be given. Defendant and the co-defendant were acquitted of numerous charges but both were conviction of theft by receiving stolen property. Defendant alone was convicted of aggravated assault. It was conceded on appeal that defense counsel performed deficiently in failing to request the accomplice instruction. In assessing prejudice, it was first noted that the co-defendant's acquittal of the aggravated assault charge established that defendant had not been convicted on the basis of having been a party to the assault. Second, it was observed that the fact that some evidence corroborated the co-defendant's account did not foreclose a finding of prejudice. "[T]he question is not whether there was sufficient corroboration of the accomplice testimony to allow the jury to rely on that testimony when determining the defendant's guilt. Rather . . . the question is whether, under the circumstances of this case, the absence of an instruction on the necessity for corroboration of accomplice testimony undermines confidence in the outcome of trial." Prejudice is found because: (1) the co-defendant's identification of defendant as the sole shooter was contradicted by testimony of an eyewitness who affirmatively identified the co-defendant as the shooter; (2) eyewitness description of the clothing worn by the shooter matched clothing the co-defendant was wearing at the time of the crime; (3) an eyewitness testified that the shooter had been seated in the front passenger seat of the car and the co-defendant had admitted that he had been in the front passenger seat, and (4) although the victim stated that both defendants shot him, his testimony indicated that defendant never left the car, implying it was the co-defendant who pursued the victim and delivered the shot that injured him. On this record, the outcome of the trial was likely affected by the absence of an accomplice-corroboration instruction.

**Capital Case*

***Humphrey v. State*, 73 N.E.3d 677 (Ind. 2017).** In murder case, trial counsel was ineffective in failing to object to use of a witness's prior unsworn statement as substantive evidence and failing to request appropriate instructions on how the statement could be considered by the jury. The murder occurred during an attempted drug deal. According to a friend of the murder victim, he and the victim had been driving around in the friend's truck searching for drugs. When they spotted three men who appeared to be dealers, they pulled up near them. One of the men approached the truck and the victim asked him to get in to discuss a drug purchase. As the friend drove, words were spoken between the victim and the dealer who then drew a gun. The victim grabbed the gun and it went off. The dealer jumped out of the moving car and ran away. The victim had been struck in the abdomen and ultimately died from the wound. The victim's friend could only give a vague description of the dealer. A man named Smith testified that he had been with defendant and a man named Brooks on the night of the murder. He observed a truck stop and defendant going to greet it, indicating to Smith that defendant thought the occupants wanted to buy drugs. Although Smith heard the door of the truck open and close, he didn't see defendant get in the truck and he heard no gunshot. He did hear the truck peel out and then defendant returned, telling Smith that the "dude" tried to "gank him" or "git him." Smith had seen defendant with a gun before but not on that night. Brooks, the third man allegedly present that night, gave police an unsworn statement about the events when Brooks was in jail on an unrelated charge. Brooks identified defendant in a photo lineup and stated that defendant went out to a truck, Brooks heard a "noise," and defendant returned stating that he had shot one of the men. At trial, however, Brooks denied being with defendant and Smith on the night of the shooting and claimed that his statement had been fabricated due to police pressure. The statement was admitted to impeach his in-court repudiation. As for trial counsel's failure to object to admission of the unsworn statement on hearsay grounds and to request a limiting instruction, the State argued that defense counsel could reasonably have decided not to further highlight the statement. But this supposed strategic justification for the omission was belied by the record which showed trial counsel's repeated references to the unsworn statement throughout the remainder of the trial, including defense counsel reading out loud the portion of the statement where Brooks identified defendant as the shooter. Trial counsel even expressly asked the jurors during closing argument to consider the out-of-court statement in determining defendant's guilt or innocence. The State's other argument – that trial counsel had a secondary strategy of wanting the Brooks statement admitted in order to sow reasonable doubt – was similarly unpersuasive. First, trial counsel had unsuccessfully objected to admission of the statement on other grounds (lack of foundation). Second, this argument contradicted the primary argument that trial counsel allowed the statement's admission in order to avoid further focus on it. "It defies credulity to say on the one hand that defense counsel strategically elected not to mount a hearsay objection or request a limiting instruction to refrain from drawing attention to Brooks' unsworn statement, but insist on the other hand that counsel wanted to 'use it to show the inconsistencies in the State's key witnesses.'" On this record, the deference normally accorded to trial counsel's acts or omissions was inappropriate and counsel's failure to lodge a hearsay objection to admission of the statement constituted deficient performance. Counsel also performed deficiently in failing to request an admonition or limiting instruction precluding the unsworn statement from being used as substantive evidence rather than only as impeachment evidence. Also deficient was defense counsel's failure to object to a jury instruction that expressly told the jury that it could consider the out-of-court statement in determining defendant's guilt. (The pattern instruction given to the jury had been rendered an incorrect statement of the law by a recent state supreme court ruling.) As to prejudice, the court observed: "[E]vidence improperly considered

by the jury for want of a limiting instruction is no less prejudicial than evidence presented which should have never been introduced in the first instance. Both permit the jury to improperly determine guilt based information that should not be considered. Even if Brooks' unsworn statement was properly admitted for impeachment purposes, counsel failed to limit the use of that statement to his client's detriment." On the record before it, the court concluded there was a reasonable probability of a more favorable verdict had counsel not acted deficiently.

***State v. Virgil*, 895 N.W.2d 873 (Iowa 2017).** In domestic assault abuse case, third offense, trial counsel was ineffective in failing to request a jury instruction defining "household member." The marshaling instruction required the State to prove the assault occurred "between family or household members who resided together at the time of the incident or persons who have been family or household members residing together within the past year but not residing together at the time of the incident." If that element was not proven, the instructions permitted the jury to convict defendant of simple assault. The central issue at trial was whether defendant and the victim had been cohabitating. The first trial resulted in a hung jury. At the retrial, the jury asked during deliberations to define "Reside + Domestic." Without objection by defense counsel, the jury was told to refer to the ordinary meaning of the words. Defendant was convicted of the charge. There was no argument made that defense counsel had a strategic basis for failing to request the uniform instruction either before or after the jury submitted its questions. At issue was whether defendant was prejudiced by counsel's omission. Evidence at trial showed that during defendant's eight-month relationship with the victim, he spent three or four nights a week at her rented home. He was not on the lease or the utilities and did not pay any rent or household expenses. When he stayed over, he and the victim shared meals. Defendant kept a cell phone and a garbage bag with some clothes at the victim's home but no other possessions. The rest of his belongings were at his uncle or cousin's home, where he stayed three or four nights a week. He did not have a key to the victim's home but could come and go as he pleased. He was not allowed to have guests. He did not receive mail or phone calls at the victim's home, but she believed he gave his family her address as his own.. On most days, he provided child care to the victim's children. Although the victim claimed she and defendant were not living together, she acknowledged saying that to avoid jeopardizing her section 8 housing subsidy, which prohibits nonfamily cohabitants. Defendant and the victim had begun their relationship in late 2013. The first assault occurred in May 2014, after which the victim told defendant he was no longer welcome in her home and the relationship ended in June. Defendant assaulted the victim again in August 2014. The assault at issue here occurred in October 2014, with defendant first accosting the victim on the street and telling her he had nowhere to go. When the victim reached her doorway, defendant pushed her inside and assaulted her. On this record, the jury could have found either way on the cohabitation issue, thereby establishing prejudice from defense counsel's failure to request a uniform instruction that defined "household members" and "cohabitating." (The instruction defined "family or household members" as persons cohabiting with each other, and then explained: "'Cohabiting' does not require a sexual relationship, but does require more than dwelling or living together in the same place. To determine if the defendant and (victim) were cohabiting at the time of the alleged offense, you may consider whether they had sexual relations while sharing the same living quarters; they shared income or expenses; they jointly used or owned property together; they held themselves out as husband and wife; the continuity and length of their relationship, and any other facts shown by the evidence bearing on their relationship with each other.")

**Capital Case*

***State v. Brown*, 96 N.E.3d 1128 (Ohio Ct. App. 2017).** In felonious assault case, trial counsel was ineffective in failing to request an instruction on self-defense. At trial, the victim and defendant's girlfriend testified that defendant attacked the victim after finding the victim in defendant's girlfriend's home. Defendant, in contrast, testified that he had no intention of getting into a physical altercation with the victim. It was only after the victim tackled him, nearly causing defendant to fall down a steep flight of stairs, that defendant fought back. Trial counsel requested an instruction on the lesser offense of aggravated assault but it was denied. Trial counsel then unsuccessfully argued to the jury that the prosecution had failed to establish each element of felonious assault. Because defendant was at the least a visiting guest at the time of the incident, he had no duty to retreat prior to using force in self-defense. In order to warrant a jury instruction on self-defense, D only needed to submit evidence demonstrating that he was not at fault in creating the situation giving rise to the altercation with the victim, and that he had an honest belief that he was in imminent danger of bodily harm, i.e., that he acted out of fear of bodily harm. Defendant's testimony made the requisite showing for the self-defense instruction. Because of that, trial counsel's failure to request the instruction fell below an objective standard of reasonable representation. Prejudice is established despite the State's claim that defendant's self-serving testimony would not have been credited in light of the testimony of his girlfriend and the victim. Notably, there was significant credibility issues with both the testimony of the victim and the girlfriend. "Given the testimony and the various credibility issues, we find that that there is a reasonable probability that the jury might have accepted Brown's version of events and concluded that Brown acted in self-defense when he fought with [the victim]. In other words, there is a reasonable probability that, but for counsel's failure to request the self-defense instruction, the out-come of trial would have been different, thus prejudicing Brown."

***Commonwaelth v. Domek*, 167 A.3d 761 (Pa. Super. Ct. 2017).** In case involving a conviction for aggravated assault against a corrections officer ("CO"), trial counsel was ineffective in failing to object to an erroneous jury charge which permitted the jury to return a guilty verdict upon a finding that defendant acted recklessly. Under state law, aggravated assault required that the defendant acted intentionally or knowingly in causing the bodily injury. Regarding prejudice, it was noted that defendant had also been charged with assault by a prison on the same CO. That crime required the jury to find that "it was the intended conscious goal or purpose to cause serious bodily injury." Defendant was acquitted of that count. This demonstrated that the aggravated assault conviction might well have been premised on a finding of recklessness. Upon review of the record, the court could not conclude that the evidence tending to show that defendant intentionally or knowingly injured the CO was so overwhelming as to overcome the prejudice caused by the erroneous jury instruction. The testimony offered by the Commonwealth tended to show that defendant merely fell backwards onto the CO while he was being restrained by two other officers.

***In re Sharrow*, 175 A.3d 1236 (Vt. 2017).** In case where defendant was convicted of attempted second-degree murder, defendant was prejudiced by trial counsel's deficient performance in failing to object to jury instructions that did not require that the State prove the absence of passion or provocation in order to convict for attempted second-degree murder and did not include attempted voluntary manslaughter as a lesser offense. Defendant and the complainant in this case had been involved in a volatile relationship with allegations of abusive behavior by defendant leading to police involvement on a number of occasions. On the night at issue, complainant stated that defendant came to her apartment to visit. At some point he became angry and assaulted her. When neighbors

heard her screams and came to her aid, complainant left with them to call the police and defendant left the premises. Later that night, defendant reentered the apartment through a window and threatened to kill complainant for calling the police earlier. He punched her and began to strangle her. He retrieved one or more knives from the kitchen and continued the assault. The neighbors again heard screams and called the police. Defendant was arrested at the apartment. Complainant had multiple knife wounds to her head, neck, arm, and back, most of which were superficial but at least one of which was potentially life threatening. Defendant told a starkly different version of events. He testified that complainant drank often and was frequently abusive while drunk. On prior occasions she had sprayed him with mace, and a couple of weeks before the incident at issue complainant hit defendant over the head with a cutting board. Defendant admitted entering through the window on the night in question but claimed he did not intend to kill complainant. According to defendant, he found complainant shaking, upset, and holding a knife with the blade up. Because of the earlier cutting board incident, and because he "didn't want to get stuck with the knife," he grabbed hold of complainant's wrist. The two struggled violently as he tried to get her to drop the knife. Defendant claimed that the knife remained in complainant's hand throughout the struggle, and that he did not realize she had been cut by the knife during the struggle. He eventually succeeded in getting complainant to drop the knife. As he was leaving, defendant grabbed a butterfly knife that was on the kitchen counter so complainant couldn't use it on him. He testified that he never touched her with that knife. Police arrested defendant on the porch as he left complainant's apartment. He had the butterfly knife hidden in his sleeve and a small cut between the fingers of his right hand. The State argued that defendant had stabbed complainant in a premeditated and deliberate attempt to kill complainant. Trial counsel argued self-defense. The trial court instructed the jury on attempted first-degree murder, attempted second-degree murder, and aggravated assault, as well as self-defense. The trial court concluded that the evidence did not support instructions on attempted voluntary manslaughter and on the burden on the State to prove beyond a reasonable doubt that defendant had not acted out of passion or provocation in order to convict on attempted second-degree murder. Trial counsel did not object to the instructions. The post-conviction court found that there had been sufficient evidence to justify the omitted instructions and trial counsel's failure to object was deficient performance. That finding was not challenged on appeal. At issue was the lower court's finding of prejudice. The jury clearly disbelieved defendant's story of self-defense and concluded that he intentionally attempted to kill complainant by stabbing her. The omitted jury instructions would not have affected the jury's conclusion on these points. Nevertheless, three reasons supported the lower court's finding. "First, the error in this case removed from the jury's consideration an essential element of the second-degree murder charge. Second, the existence of that element was supported by substantial evidence. Third, the State's burden of proof on this element was high. The fact that, to acquit of attempted second-degree murder and convict [defendant] of voluntary manslaughter, the jury would have had to credit portions of [defendant's] testimony while rejecting most of it does not undermine our conclusion." "[J]uries routinely accept and reject portions of testimony in determining what actually happened. This is sufficient to undermine confidence in the outcome of the trial."

2016: ***Dumas v. State*, 786 S.E.2d 508 (Ga. Ct. App. 2016)**. Counsel ineffective in rape and child molestation case for failing to ask for a curative jury instruction following improper comments by the state concerning the defendant's post-arrest silence. During the defendant's testimony, the state

questioned him six times about his post-arrest silence. Each time counsel objected and the court sustained the objections. Counsel failed, however, to object or request a curative instruction or mistrial when the prosecutor also commented on the defendant's post-arrest silence in closing arguments. This conduct was deficient and prejudicial as the evidence of guilt was "not overwhelming." The alleged victim waited 10 years to report the alleged abuse and the state's case was built entirely on her testimony and her family's testimony about changes in her behavior.

***Mellerio v. Nooth*, 379 P.3d 560 (Or. Ct. App. 2016).** Trial counsel was ineffective as to two counts of coercion for failing to request a jury concurrence instruction. Defendant was charged with kidnapping, assaulting, menacing and coercing two woman. The coercion at issue here involved threats to each of the women to abstain from certain conduct - reporting defendant's conduct to a couple they met in the course of the offenses, and calling the authorities following the offenses. One count went to one victim, the second to the other victim. Because the counts implicated "multiple factual scenarios," jurors could return a verdict of guilt on either count without actually having agreed on the same predicate occurrence of coercion. Trial counsel's failure to request a jury concurrence instruction with respect to the two counts constituted a failure to exercise reasonable professional skill and judgment. (Trial counsel explained that such an instruction had not been requested because counsel did not believe, mistakenly as it turns out, that there had been multiple factual scenarios present for the counts at issue.) Prejudice is found because, on the record presented, some jurors could have found persuasive the victim's testimony about coercion as to revealing defendant's conduct to the couple while disbelieving alleged coercion as to police nondisclosure. Other jurors could have found the obverse.

***Cusumano v. State*, 494 S.W.3d 652 (Mo. Ct. App. 2016).** In rape and sodomy case, defense counsel was ineffective in submitting lesser included offense instructions that waived the statute of limitations bar to defendant's ultimate convictions in this case, solely to support an untenable and largely unintelligible defense theory unsupported by Missouri law. Defendant was charged with three class A felonies. Defense counsel sought to have the charges dismissed on statute of limitations grounds despite the fact that Missouri law unambiguously provided that class A felonies were not subject to a statute of limitations. When that failed, defense counsel offered jury instructions on lesser included, unclassified felonies of forcible rape and sodomy. The instructions were given and the jury convicted defendant of the lesser included offenses. Defense counsel then renewed his prior motion to dismiss the class A felonies, arguing that the court had been retroactively deprived of its jurisdiction over prosecution of defendant on the class A felony charges because his convictions of the lesser included offenses were time-barred and, most critically, demonstrated that there was no evidence of the aggravating facts required to prove the class A felony versions of the crimes. Not only was this convoluted argument unsupported by the law, by submitting the instructions on the lesser included offenses, counsel waived defendant's statute of limitations objections to the time-barred offenses of which defendant was ultimately convicted. That defendant had not been convicted of the class A felonies did not establish that there was insufficient evidence to have charged him with those crimes. Thus the trial court had not lacked jurisdiction. Defense counsel's explanation for his strategy was premised on his mistaken belief that the class A felonies were subject to a statute of limitations and that his actions would somehow have preserved that non-existent affirmative defense. The motions court clearly erred in finding that defense counsel submitted the lesser included offenses

instructions in order to give the jury an opportunity to render compromise verdicts which carried lesser sentences. Defense counsel had expressly stated that the lower sentence would not really matter and it was clear that his decision was based on his erroneous understanding of the law. As to prejudice, it was "a certainty that but for counsel's unreasonable submission of those instructions, the result in this case would have been different (i.e., [defendant] would not have been convicted of standard forcible rape and forcible sodomy)."

***Hoeber v. State*, 488 S.W.3d 648 (Mo. 2016)**. Counsel ineffective in statutory sodomy case for failing to object to "verdict directors" (instructions on specific elements the state must prove in order to convict) that were so broad that the defendant could have been convicted in violation of his right to a unanimous verdict. Missouri law requires that the verdict must be definite and certain as to the crime committed. Here, the two "verdict directors" failed to identify a specific act or incident of abuse despite testimony at trial regarding multiple incidents of sexual molestation. Thus, the jurors could have convicted the defendant without unanimous agreement as to the specific acts on which the guilty verdict was based. Counsel's conduct was deficient and prejudicial as "one juror could have found Mr. Hoeber guilty of an act that occurred in the kitchen, while another juror could have found him guilty of an act that occurred in the bathroom."

***Marty v. State*, 210 So.3d 121 (Fla. Ct. App. 2nd Dist. 2016).** In a case where defendant was convicted of aggravated assault with a deadly weapon, trial counsel "was ineffective for neglecting to request a jury instruction on the justifiable use of nondeadly force, the only self-defense instruction supportable by the undisputed facts presented at trial. Instead, [trial] counsel requested a self-defense instruction on the justifiable use of deadly force, which is applicable in a narrower set of circumstances as compared to nondeadly force." There was no apparent strategic reason to make the burden of proving self-defense more difficult, "especially because self-defense was essential to [defendant's] theory of defense at trial." The incident leading to the charge and conviction concerned an altercation between defendant and one of his neighbors. Although the accounts of what exactly occurred differed, there was no question that defendant did not fire his gun at the victim. And even if defendant had, as the victim contended, pointed his gun at her, this was, as a matter of law, the use of nondeadly force. Defense counsel's deficient performance was prejudicial because it was reasonably probable that the jury believed that defendant was entitled to use some form of self-defense against the neighbor, but not to the extent of deadly force.

***Gibson v. State*, 786 S.E.2d 121 (S.C. 2016)**. Counsel ineffective in murder case for failing to object to the court's omission of permissive inference language in the jury instruction on malice and the use of a deadly weapon. The evidence showed that there was a fight between two groups at a bar. Afterwards, the defendant's brother called him for a ride. After the defendant arrived at the bar, there was a physical altercation between the two groups in the parking lot. Several gunshots were heard and the victim died from a single shot to the back of his shoulder. The defendant told police that he pointed his weapon at someone he thought was going to hit his brother but he only fired the weapon into the air three to four times as he drove away. The malice instruction included that "[i]nferred malice may also arise when the dead is done with deadly weapon." Nowhere in the charge did the court include the permissive inference language approved in *State v. Elmore*, 308 S.E.2d 781 (S.C. 1983):

> The law says if one intentionally kills another with a deadly weapon, the implication of malice may arise. If facts, [sic] are proved beyond a reasonable doubt, sufficient to raise an inference of malice to your satisfaction, this inference would be simply an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case, and you may give it such weight as you determine it should receive.

Because the court's charge in this case did not include the *Elmore* language, the charge was erroneous and counsel was deficient in failing to object. Prejudice was also established as there was little evidence of malice in this case other than the use of a deadly weapon.

***People v. Goods*, 62 N.E.3d 1168 (Ill. Ct. App. 2016).** In murder case, defense counsel was ineffective in failing to assert self-defense and ask for a corresponding instruction or an instruction on second degree murder. The prosecution's theory was that defendant and the co-defendant planned in advance to kill the victim. Through defendant's statements and the argument of defense counsel, there was some evidence of the elements of self-defense, i.e., defendant believed he was in imminent danger from both the victim and the co-defendant. Whether defendant's belief was reasonable was a determination to be made by the jury. Supporting a finding of deficient performance was the fact that defense counsel initially sought to invoke compulsion as an affirmative defense, a defense unavailable for a murder charge under state law. It was only after that defense was precluded by the trial court that defense counsel switched to a theory that defendant shot the victim after he had been killed by the co-defendant. But this theory failed to relieve defendant of liability given that the jury was given an accountability instruction making defendant liable for the co-defendant's actions. In addition, an argument in defense counsel's unsuccessful motion for new trial indicated defense counsel erroneously believed he was not allowed the defense of self-defense. On this record, defense counsel performed deficiently in failing to invoke self-defense and failing to seek appropriate instructions. Prejudice is shown in part by the co-defendant's conviction in a separate trial of second degree murder.

***People v. Zambrano*, 64 N.E.3d 639 (Ill. Ct. App. 2016).** In murder case, defense counsel was ineffective in failing to submit an accomplice witness instruction. The victim was the boyfriend of co-defendant Sanchez's ex-girlfriend. The ex-girlfriend testified that someone buzzed her apartment late one night and the victim got up to answer the door. She heard the victim and Sanchez speaking before a gunshot. When she entered the living room, the victim was lifeless on the floor. Outdoor surveillance footage showed defendant, Sanchez, witness Lopez and a fourth person arriving in a car at the building next door to where the murder occurred. Sanchez was seen exiting the car and walking towards the building. Defendant also exited the car and removed something from under the hood. Then he, followed shortly by Lopez, walked toward the building. Not long after, Lopez ran back and reentered the car, followed by defendant who placed something under the hood before getting back in the car. Sanchez was seen running to the car seconds later. He entered it and the car departed from the scene. When Lopez was called by the prosecution at defendant's trial, his attorney informed the court that Lopez would invoke his Fifth Amendment rights. Lopez's attorney and defendant's

attorney argued that Lopez had incriminated himself at Sanchez's earlier trial. The trial court rejected the prosecutor's argument that Lopez's mere presence at the crime scene was not enough to support criminal charges, leading the prosecutor to confer use immunity on Lopez. In his testimony, Lopez stated that defendant had a gun and that defendant and co-defendant Sanchez walked up to the third floor where the victim was shot while Lopez waited on a landing in the stairwell. Five minutes later he heard a bang. Defense counsel impeached Lopez with inconsistencies in the police statement and his attempt to portray defendant and Sanchez as the bad guys and himself as completely innocent. He was also examined on bias based on pending criminal charges and favorable dispositions he had received on other charges following his testimony in Sanchez's trial. Lopez maintained that he had no deal with the State. Defense counsel argued to the jury that the only evidence indicating defendant participated in the murder was Lopez's testimony which was not credible. But defense counsel failed to seek an instruction on accomplice witnesses. This was deficient performance as the "evidence at trial and the reasonable inferences that can be drawn from the evidence establish probable cause that Lopez acted as an accomplice." The videos showed Lopez exiting the car with defendant and Sanchez, with defendant retrieving something from under the hood of the car. Lopez admitted entering the apartment building with them. The video shows that he returned to the car at the same time as defendant and with the same sense of urgency. "At no time did Lopez separate himself from the criminal activity, and by his own admission, he participated in it. The grant of use immunity to Lopez is further support of his role as an accomplice. There would be no need to immunize Lopez if he was not implicated in the shooting and involved in some fashion as an accomplice." There was no viable strategy for counsel's failure to submit the accomplice-witness instruction. "Counsel's failure to submit an instruction on accomplice testimony prejudiced [defendant] by depriving the jury of critical information it needed to evaluate Lopez's testimony."

***Fisher v. State*, 788 S.E.2d 757 (Ga. 2016).** In malice murder case, trial counsel was ineffective in failing to secure the attendance of a witness who could have countered the testimony of the only witness whose testimony directly identified defendant as the shooter, and in agreeing to a jury instruction that the testimony of a single witness is generally sufficient to establish a fact, without requesting an instruction on the exception that if the witness is an accomplice, his testimony must be properly corroborated. The sole witness identifying defendant as the shooter, Lewis, claimed that he was not involved in the crimes even though he admitted that he drove defendant and the victim to the crime scene, was present during the shooting, and drove defendant away afterwards. According to Lewis, who admitted using drugs with the victim, the shooting occurred over a dispute about drug sale proceeds. (Two other witnesses described men arguing about drugs and money.) Defendant denied being at the crime scene. Prior to trial, defense counsel spoke with Clark, an acquaintance of both defendant and Lewis, who informed defense counsel that Lewis was his drug dealer and that he saw Lewis flashing a revolver while looking for the victim to collect on a debt two or three days before the shooting. (The murder weapon was never recovered but it was determined to have been a revolver.) Although Clark provided defense counsel with his contact information, he never heard back from him. Defense counsel intended to have Clark testify, and he included him on the witness list, and yet he failed to secure his attendance at trial, an omission conceded by the State to be deficient performance. As for the failure to seek an instruction on the accomplice exception to the single witness rule, defense counsel conceded it was an oversight and not a tactical decision. Given

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Lewis's admission to his involvement with defendant in the events before, during and after the crime, and initial lies he'd told to the police, there was sufficient evidence to support a finding that Lewis was an accomplice and not merely present for the crimes as he claimed on the witness stand. On this record, in light of the importance of Lewis's testimony, it would have been unreasonable not to have requested the accomplice instruction. Regarding prejudice, there was no forensic evidence linking defendant to the victim, the crime scene, or the murder weapon. Neither of the two women who heard men seeking drugs and/or money testified that defendant was there during the shooting. Although one offered a description of the shooter that matched defendant, it was general -- about 5′10″, medium complexion, with a low haircut and a New Orleans accent – which would match innumerable other men in Atlanta as well, except perhaps for the accent. Notably, however, Lewis admitted on cross-examination that although he is from Atlanta, he was known in the community as "N.O.," or New Orleans, because of his voice. "[H]ad Clark testified, the jury could have chosen not to believe what he said about Lewis. But that is exactly the point. Due to the deficient performance of [defendant's] trial counsel, the jurors who found him guilty did not have the opportunity to hear Clark testify or to consider the evidence they did hear with the instruction that if they found Lewis to be an accomplice to the shooting, they must treat him unlike the other witnesses and decide whether his identification of [defendant] was corroborated by other evidence. A jury that heard Clark and was properly instructed might reach the same verdict, but we cannot say that with confidence."

***People v. Davydov*, 43 N.Y.S.3d 74 (N.Y. App. Div. 2016).** In case where defendant was convicted of aggravated assault in the second degree, the conviction is vacated based on trial counsel's ineffectiveness in failing to seek severance from a co-defendant, defendant's uncle, once it became clear they were pursuing antagonistic defenses and also for failing to request a missing witness charge for an eyewitness who was not called to testify. The theory set forth by the uncle's attorney was that defendant had called his uncle to the crime scene to mediate a dispute between defendant and the victim. The uncle's attorney theorized that the dispute involved defendant's desire to have the victim participate in a fraudulent scheme. According to the uncle's attorney, when the uncle arrived at the scene he observed defendant in an altercation and intervened. The defendant's theory, in contrast, was essentially that the victim was incredible in his account of events, that defendant was actually a friend of the victim and was merely at the scene, and that defendant did not act in concert with the co-defendants in assaulting the victim. Given that the two defenses were irreconcilably in conflict, defense counsel performed deficiently in failing to request a severance. Defense counsel also performed deficiently in failing to request a missing witness charge instructing the jury that an unfavorable inference could be drawn from the failure of the prosecution to call a friend and business associate of the victim as a witness. This friend was nearby when the assault occurred and had previously stated that the victim threw the first punch during the initial confrontation. No legitimate strategic reason could be found to support defense counsel's failure to request the charge.

2015: ***State v. Revish*, 185 So.3d 8 (La.Ct.App. 2015)**. Counsel ineffective in second degree murder case for failing to object to the trial court's instruction that self- defense was not available as a defense if the jury determined that the homicide occurred as a result of drug activity. The defendant, who had drugs for sale, was riding around with two other men doing some drug dealing. He shot both when the car was stopped because he believed that he was about to killed. State law at the time provided that a homicide is justifiable when committed in self- defense by one who reasonably believes that he

is in imminent danger of losing his life or receiving great bodily harm and that the killing is necessary to save himself from that danger. La. R.S. 14:20(A)(1). In an unrelated portion of the self-defense statute, a homicide is justifiable in a motor vehicle when the person reasonably believes that the use of deadly force is necessary to prevent entry of an intruder or to compel the intruder to leave, except when the person committing the homicide is engaged, at the time of the homicide, in drug activity. La. R.S. 14:20(A)(4). The trial court erred in its instruction because the plain language of the statute made the drug activity exception applicable only to paragraph 4 of the statute and not paragraph 1, which was the provision applicable to the defendant. Counsel's conduct was deficient in failing to object to the instruction. Prejudice established because, "[e]ven if the jury had fully believed defendant's version of the facts, . . . the erroneous jury instruction would have categorically denied defendant from availing himself of a claim of self-defense."

***State v. Liti*, 355 P.3d 1078 (Utah Ct. App. 2015)**. Counsel ineffective in manslaughter case for failing to object to the trial court's inadequate instruction on the elements of manslaughter. Under state law, "[a] defendant, who 'recklessly causes the death of another' is guilty of manslaughter." Recklessness requires both that the defendant is "aware of but consciously disregards a substantial and unjustifiable risk" and that "[t]he risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances." The trial court failed to include the "gross deviation" instruction. Counsel's conduct in failing to object was deficient and prejudicial.

***Workman v. State*, 771 S.E.2d 636 (S.C. 2015)**. Counsel in assault and battery case was ineffective in failing to object to unconstitutionally coercive *Allen* charge, which instructed the minority to reconsider their opinions without instructing the majority jurors to consider the positions of the minority jurors. Counsel's conduct was deficient and prejudicial.

***State v. Barela*, 349 P.3d 676 (Utah 2015)**. Counsel ineffective in rape case for failing to object to an erroneous mens rea requirement in the court's instructions on the elements of the offense. In essence, the court's instruction implied that the defendant was guilty if the state established that he "intentionally or knowingly" had intercourse with the alleged victim, when, in fact, the state also had to prove that the defendant "intentionally or knowingly" had such intercourse "without . . . consent." Prejudice was established in this case because even in the alleged victim's account, "she never explicitly (in words) or openly (in physical resistance) rebuffed [the defendant's] advances. Instead [she] testified that she 'froze' – neither actively participating in sex nor speaking any words."

2014: ***People v. Hussain*, 179 Cal. Rptr. 3d 679 (Cal. Ct. App. 2014)**. Counsel ineffective in grand theft of automobile arising from an improper lien sale for failing to request a jury instruction on a claim of right defense. The Defendant, who was born in the Fiji Islands, moved to the United States in 2000. He owned a car report shop in 2006. Under state law, a lien sale is permitted based on a possessory lien for services and permits a licensed repair facility to sell a car to recoup repair costs and other expenses. The defendant, who only went to school through the sixth grade and learned to speak English but could not read or write English, consulted with the former office manager for a towing company, who advised him about how to do a possessory lien. She completed the paperwork for him,

including the required notices, one of which was returned by the post office because she accidentally transposed numbers in an address and zip code. Without consulting with her further, the defendant submitted the paperwork to the DMV where the clerk did not notice the error and instead transferred title to the defendant, who sold the vehicle in question. "A claim-of-right defense provides that a defendant's good faith belief, even if mistakenly held, that he has a right or claim to property he takes from another negates the felonious intent necessary for conviction of theft or robbery." Counsel relied on claim of right in his closing arguments but failed to request an instruction on that defense. Counsel's conduct was deficient and could not be based on strategy. Prejudice was also established because the jury clearly did not reject the defendant's testimony in its entirety. Specifically, in addition to the grand theft charge, the defendant was charged with running a chop shop, theft by false pretenses, and perjury. The jury acquitted him of these other charges based on his testimony.

***Morgan v. State*, 146 So. 3d 508 (Fla. Dist. Ct. App. 2014)**. Counsel was ineffective in sexual battery of child case for failing to object to erroneous verdict form and instructions. The defendant had been convicted of battering his daughter, who was under the age of 12. There were three counts covering different time periods, which all alleged battery by penetration. Although contact of the defendant's mouth with the victim's vagina also violates the statute, this was not included in the Information. The trial court's instructions, however, specifically allowed conviction for contact of the defendant's mouth with the victim's vagina and the verdict form specifically asked for findings on whether there was penetration or whether there was contact of the defendant's mouth with the victim's vagina. The jury did not find penetration and convicted on each count solely on the basis of contact of the defendant's mouth with the victim's vagina. Counsel's conduct was deficient because counsel did not object to the verdict form or the instructions and affirmatively agreed with both. Prejudice established because the defendant was "convicted of uncharged offenses."

***People v. Falco*, 17 N.E.3d 671 (Ill. Ct. App. 2014)**. Counsel in possession of firearm with defaced identification marks case ineffective for failing to request a jury instruction on mental state. Specifically, counsel failed to request an instruction that possession of the weapon had to be knowing and intentional where the defendant denied knowledge that the weapon was in the trunk of his car, which was stopped with another person driving. The defendant, whose driver's license was suspended, was a passenger. The defendant testified that the driver had asked to borrow his car. The defendant agreed but informed the driver the car was having steering issues. The driver told the defendant his cousin could fix the car. They were returning from a visit to the cousin's house when they were stopped and the weapon was found. Counsel's conduct was deficient and prejudicial because knowledge "was clearly an issue critical" to the defense.

***State v. Chafee*, 332 P.3d 240 (Mont. 2014)**. Counsel ineffective in accountability for arson and theft case for failing to request a "mere presence" instruction. The victims found their car burning and observed a vehicle drive away. An hour later, the vehicle, driven by the defendant, was stopped. She testified that the passenger in her vehicle told her to pull over near the victims' vehicle. He then busted a window in the vehicle and stole items from it before setting the vehicle on fire and telling her to drive away. Defense counsel also argued in closing that she was "merely present" and did not participate in the crimes. Counsel was deficient, however, in failing to request an instruction on "mere presence," which would have informed the jury that "mere presence" and knowledge of the

crime, without participation, were insufficient for conviction. "The prosecutor was able to capitalize on this omission" in closing arguments by arguing that mere presence was sufficient for conviction. "Under these circumstances, there was no plausible justification for the failure of defense counsel to offer the 'mere presence' jury instruction." Prejudice established.

***People v. Collins*, 990 N.Y.S.2d 565 (N.Y. App. Div. 2014)**. Under New York standard for ineffective assistance, counsel was ineffective in robbery in the first degree, grand larceny, and possession of stolen property case where the defendant only pretended to have a gun during the robbery for failing to request an instruction on the affirmative defense that the object that appeared to be a firearm was not a loaded weapon from which a shot, capable of producing death or other serious physical injury, could be discharged. While normally the remedy would be a new trial, Collins sought only that his robbery conviction be reduced to second degree. The People conceded that counsel's conduct was deficient and that this remedy was appropriate.

***State v. Lewis*, 337 P.3d 1053 (Utah 2014)**. Counsel ineffective in sexual abuse of child case for failing to object to flawed jury instructions. The defendant was charged with two counts based on alleged abuse of two sisters, ages 13 and 11, during the same night. The 13-year-old testified that the defendant touched her breast and vagina over her clothing. The 11-year-old testified that she awoke to find the defendant trying to remove her pants. The defendant completely denied the allegations of the 11-year-old and denied the allegations of the 13-year-old, but admitted that he told her she was pretty, prompted her to lift her shirt, and poked her stomach teasingly with his finger. The defendant was acquitted of the charge related to the 11-year-old but convicted on the charge related to the 13-year-old. The applicable statute allowed for conviction if the defendant "touches the anus, buttocks, or genitalia of any child, the breast of a female child, or otherwise takes indecent liberties with a child." While counsel objected to other inapplicable or vague parts of the proposed instructions, counsel failed to object to "indecent liberties" language or failing to object that "indecent liberties" be defined. Counsel's conduct was deficient as the "indecent liberties" provision was not alleged in this case. Moreover, "indecent liberties" had been interpreted by the Utah Supreme Court to mean activities of the "same magnitude or gravity as that specifically described in the statute." Here, without this definition, the jurors could reasonably assume that the "catch-all [indecent liberties] phrase covered actions that are less serious than the specifically prohibited conduct – including actions that are merely socially or morally reprehensible or that strike us, subjectively, as being indecent in the sense of being totally inappropriate." Here, while the defendant's actions, admitted in his own testimony, might be "indecent" in this lay person's view, they were not "indecent" under the appropriate interpretation of the statute. Counsel's conduct was deficient and prejudicial because the jurors could have completely disregarded the testimony of the 13-year-old while finding the defendant's testimony to be credible and yet convicted him erroneously of taking an "indecent liberty."

2013: ***Holloway v. Commissioner of Correction*, 77 A.3d 777 (Conn. Ct. App. 2013)**. Counsel was ineffective in possession of narcotics with intent to sell within 1500 feet of a public housing project case for failing to object to the trial court's failure to adequately instruct the jury that it could not find the defendant guilty under state law unless the state proved beyond a reasonable doubt, as an

essential element of that offense, that he possessed narcotics with the intent to sell them at a specific location, which location happened to be within 1500 feet of a public housing project. In this case, however, the sole focus of the trial judge's charge to the jury with respect to the location where the prohibited activity must have occurred was on the element of possession. The court omitted all reference to or explanation of the intended-location-of-sale element of the offense. Counsel's conduct was deficient and prejudicial because the evidence was by no means clear and uncontested, much less overwhelming, that the defendant was engaged or about to engage in a drug sale at the time of his arrest within 1500 feet of a public housing project. He was not caught in the act of selling drugs and was not found in possession of other implements of the drug sales trade. Indeed, it was suggested by police officers who testified that, if a drug transaction was in progress at the time of arrest, it was more likely one where the defendant was the buyer rather than the seller.

***Washington v. State*, 113 So. 3d 1028 (Fla. Dist. Ct. App. 2013)**. Counsel ineffective in murder case (reduced to manslaughter by jury's verdict) for failing to request an addition to the justifiable homicide instruction of include aggravated assault and aggravated battery as felonies that the defendant would have been justified to resist. The defendant shot the victim five times in front of a crowd of patrons at a restaurant. His sole defense was that he was acting in self- defense. The jury was instructed only that the defendant could act in self-defense in response to death or grievous bodily harm. The failure to request the additional instruction, consistent with state law, was deficient and prejudicial "because it is far more likely that the victim was attempting to scare or shoot at [the defendant] rather than to rob or kill him in front of a crowd."

***Byrd v. State*, 752 S.E.2d 84 (Ga. Ct. App. 2013)**. Trial counsel ineffective in armed robbery case for failing to object to instruction that a firearm is a deadly weapon as a matter of law, which removed from the jury's province an element of the offense, i.e., that the defendant used a deadly weapon.

***People v. Kidd*, 997 N.E.2d 634 (Ill. Ct. App. 2013)**. Counsel was ineffective for failing to proffer the entire pattern jury instruction regarding delivery in drug-induced homicide case where the defendant's girlfriend died after inhaling cocaine with the defendant. The Defendant told police that he and the victim had used cocaine the day before her death. When he awoke the next morning, he found her dead. While she had frequently used cocaine in the past, over the last year, she normally did not use cocaine but she asked him to get her some because she was upset that her cat died. The autopsy revealed that she had also consumed Xanax and morphine and she died from hypoxia (deficiency of oxygen reaching body tissues) caused by "cocaine and opiate intoxication." A defense expert on pharmacy and pharmacology testified that the cocaine did not contribute to the cause of death, but that the level of morphine in her blood was a "highly toxic level" that was "lethal." "The effect of the [therapeutic level of the] Xanax enhance[d] the toxicity of the morphine." She had consumed the morphine sometime after the defendant had gone to bed. The State never alleged that the defendant delivered either Xanax or morphine to the victim. During trial, there was a jury question, however, of who actually "possessed" the cocaine and whether the defendant had made a "delivery" of cocaine to the victim or whether the defendant and the victim bought the cocaine together. If so, there was

no delivery. Counsel's conduct was deficient and prejudicial in failing to request complete and proper instructions on delivery.

***Roberson v. State*, 982 N.E.2d 452 (Ind. Ct. App. 2013)**. Counsel ineffective in murder case for failing to object to erroneous jury instructions on sudden heat and voluntary manslaughter. Under state law, in order to establish voluntary manslaughter, the state was required to prove all the elements of murder and disprove sudden heat when there is any appreciable evidence of such. Thus, the trial court's instruction on manslaughter placing the burden on the state to prove sudden heat was "erroneous as a matter of law." Likewise, the murder instruction failing to require the state to disprove sudden heat suffered a fatal flaw. Finally, the trial court erroneously instructed the jury that it could only consider manslaughter instead of murder if it first found the defendant not guilty of murder because the jury was required to simultaneously determine whether the defendant was guilty of murder or voluntary manslaughter. Prejudice established as the evidence of sudden heat in the case "was not inconsiderable."

***McTiller v. State*, 113 So. 3d 1284 (Miss. Ct. App. 2013)**. Counsel was ineffective in aggravated assault case for failing to object to jury instruction or offer additional instruction on accident. The trial court's instruction on accident lacked all the elements required by state law in that the instruction did not mention "accident, misfortune, the heat of passion, or any sudden and sufficient provocation."

***State v. Barnes*, 994 N.E.2d 925 (Ohio Ct. App. 2013)**. Counsel ineffective in resisting arrest and vandalism case for failing to request an instruction on necessity, which was presented as a defense to vandalism. On a warm, sunny evening in September 2011 at approximately 6:30 p.m., a police officer in Portage County responded to a domestic disturbance call was attempting to question the alleged victim. The defendant, "appearing both agitated and inebriated," kept interrupting and would not calm down. The officer attempted to handcuff him but he resisted. When he was forced to the ground, his "face was planted in dog excrement" and he continued resisting until the offer pepper sprayed the side of his face. The defendant "was placed into the cruiser with the excrement and pepper spray still on his face." After driving to the police station and parking in the garage, with the garage door closed, the car windows up except for a slight crack, and the car engine off, the officer left the defendant in the car while he went inside to write his report. The initial officers apparently went off duty at 7:00 p.m. and a new officer took over. The new officer observed the defendant in the car in the garage yelling, but left to take a nearby call. After about 45 minutes of sitting in the hot car, handcuffed and with pepper stray and dog excrement still on his face, the defendant broke out the cruiser window with his foot because he was hyperventilating and afraid he would asphyxiate. While trial counsel presented this evidence "arguing that [the defendant] had no choice but to kick out the window in order to breathe," counsel did not actually assert the defense of necessity or request the appropriate jury instruction. Clearly, there was no strategy for this failure as counsel "attempted to raise the defense." Counsel's conduct was deficient and prejudicial. "Without the instruction on the defense of necessity, there is nothing in the jury instructions as given that could have permitted the jury to find [the defendant] not guilty" on the vandalism charge/ Vandalism charge reversed and remanded for new trial.

***Villa v. State*, 417 S.W.3d 455 (Tex. Crim. App. 2013)**. Trial counsel was ineffective in indecency with a child and aggravated sexual assault case for failing to request a jury instruction on the medical-care defense to the aggravated sexual assault, even though the issue was raised and discussed throughout the trial. The defendant was alleged to have penetrated the vagina with his finger. Penetration was defined as contact that "could reasonably be regarded by ordinary English speakers as more intrusive than contact with [the victim's] outer vaginal lips." Additionally, penetration could include the "pushing aside and reaching beneath a natural fold of skin into an area of the body not usually exposed to view, even in nakedness." Here, the real dispute at trial was the "degree of penetration committed" by the defendant, who admitted to touching the child–with others present in the room–"for the sole purpose of applying diaper-rash medication" but confessed that his finger may have penetrated the vagina. Counsel's conduct was deficient and there was "no imaginable strategic motivation for trial counsel's failure to request a medical-care defensive instruction." Prejudice was clear as the jury acquitted on the indecency charge indicating that the jury found no intent by defendant to arouse or gratify his sexual desires.

***State v, Ekstrom*, 316 P.3d 435 (Utah Ct. App. 2013)**. Trial counsel was ineffective in aggravated assault case for failing to object to the trial court's failure to instruct on the statutory definition of "serious bodily injury," which is "the type of injury a dangerous weapon must be capable of inflicting," when the state's case was based on the theory that the defendant had used a dangerous weapon or force likely to produce serious bodily injury. While a witness testified that the defendant struck the victim, the witness was uncertain about the object used but believed it was a pipe and no pipe or other weapon was ever found and there was no evidence that even if it was a pipe that it was made of metal.

2012: ***Brooks v. State*, 40 A.3d 346 (Del. Supr. Ct. 2012)**. Counsel in conspiracy on drug and weapon case and other charges was ineffective in failing to request an instruction on accomplice testimony. While there was independent corroborating evidence on the other charges, the conspiracy conviction "included an element entirely reliant upon accomplice testimony." There could be no reasonable strategy for this, as "the defense gains nothing by failing to request a cautionary instruction, aside perhaps from a later chance at a claim for ineffective assistance of counsel."

***Capiro v. State*, 97 So. 3d 298 (Fla. Dist. Ct. App. 2012)**. Counsel ineffective in grand theft case for failing to request an instruction of the good faith defense. The case involved a loan from the victims to the defendant who was starting a commercial mortgage lending company. The defendant used the loan to pay personal expenses. The defendant testified at trial that he believed the loan was a personal loan to him without any restriction on use. Under state law, "a good faith belief in one's right to possession of property is a defense to the charge of theft." Counsel referred to this defense in his opening and closing arguments but was ineffective in failing to request a jury instruction on the defense.

***In re Wilson*, 279 P.3d 990 (Wash. Ct. App. 2012)**. Counsel ineffective in felony murder case for requesting a defective pattern instruction on accomplice liability. The instruction requested was that

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"[a] person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of a crime," he does certain acts. The reference to "a crime" rather than "the crime" is erroneous because in order to be an accomplice, "a person must have knowledge that he or she was promoting or facilitating the crime charged." Counsel's conduct was deficient despite this being a pattern instruction. Prejudice established, especially in light of the prosecutor's misstatement of law in closing that the defendant was guilty of the crimes committed by the principal because he had in mind "a crime," even if it was not the same crime the principal had in mind.

***People v. Gallagher*, 980 N.E.2d 140 (Ill. Ct. App. 2012)**. Counsel ineffective in residential burglary case for failing to request a jury instruction on the lesser included offense of criminal trespass to a residence. The defendant walked into the victim's hotel room in the middle of the night. While the defendant claimed he thought the room was empty and he was looking for a bathroom, the alleged victim claimed that the defendant stole $40. The victim did not claim that money was stolen at the time of the arrest and this information was not included in the police reports. Counsel's conduct was deficient and prejudicial as the defendant admitted entry into the room, but the jury initially deadlocked on the burglary charge.

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. Ct. 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 Ct. 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: ***Smith v. State*, 991 A.2d 1169 (Del. 2010)**. Counsel ineffective in murder case for failing to request a specific instruction on 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 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 established even though a general credibility of witnesses instruction was given.

***Sloss v. State*, 45 So. 3d 66 (Fla. Dist. Ct. 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.

***People v. Wheeler*, 929 N.E.2d 99 (Ill. Ct. 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. Ct. 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. Ct. 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. 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. Kougl*, 97 P.3d 1095, ___ (Mont. 2004)).

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2009: ***Spicer v. State*, 22 So. 3d 706 (Fla. Dist. Ct. 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. Ct. 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. Kyllo*, 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. Ct. 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. Dist. Ct. 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.

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***Stoute v. State*, 987 So. 2d 748 (Fla. Dist. Ct. 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. Ct. 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 to 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. Dist. Ct. 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 though the defendant was innocent with regard to the death.

***Aversano v. State*, 966 So. 2d 493 (Fla. Dist. Ct. 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]is 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. Ct. 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.

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***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. Dist. Ct. 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. Ct. App. 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. Ct. 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.

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2005: ***State v. Dabney*, 908 So. 2d 60 (La. Ct. 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*, 591S.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

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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. Ct. 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 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."

**Capital Case*

9. FAILURE TO CHALLENGE COMPETENCE

a. U.S. Court of Appeals Cases

2013: ***Newman v. Harrington*, 726 F.3d 921 (7th Cir. 2013) (*affirming United States ex rel. Newman v. Rednour*, 917 F. Supp. 2d 765 (N.D. Ill. 2012))**. Under AEDPA, counsel was ineffective in murder case for failing to investigate the mentally retarded defendant's competence and failing to seek a competence hearing. The defendant's mother provided counsel with a "two-inch-thick stack" of records reflecting that the 16-year-old defendant went to a "special school," was found disabled by the Social Security Administration due to mental retardation, and had an IQ of 62. The state court did not determine whether counsel's conduct was deficient but rejected this claim due to a finding of no prejudice. The state conceded that the district court properly evaluated whether counsel's conduct was deficient de novo and that counsel's conduct was deficient. With respect to prejudice, the state court unreasonably applied Strickland by deeming an expert report of incompetence as "irrelevant" because it came after trial and because a state expert believed Newman was malingering.

> It would be unreasonable to think that Newman began faking symptoms of mental retardation before he was 11-years-old, leading to the creation of documentation 2- inches thick reflecting his mental deficits just to "use his manufactured retardation to confuse the justice system."

In short, the expert opinion ignored by the state court "was well-supported and relevant. It was consistent with the numerous reports from psychological and educational experts over many years (about a decade) leading up to trial and after." The state court's decision was also based on an unreasonable determination of the facts in light of the state-court record. Specifically, the state court unreasonably determined that Newman was nothing "other than academically challenged and a slow learner." "This factual determination is quite troubling," as it ignored the expert report and "most of the other evidence in the record." "Indeed, the state court ignored the clear and convincing weight of the evidence, resulting in a decision based on an unreasonable determination of the facts." The state court also unreasonably determined that Newman "at all times ... responded appropriately to questioning by the trial court."

> First, the evidence establishes that "yes, sir" and "no, sir" were the extent of Newman's responses to the trial court's questioning. He never gave more than a two-word answer and his simplistic answers do not suffice to show that he understood the questions regarding his defense rights. And Newman's responses to the trial court's questioning were not at all times appropriate. During one colloquy the trial judge asked Newman if he understood his constitutional rights to testify and not to testify, and asked "knowing all of this . . . what is your wish?" Newman responded, "No, sir." This nonresponsive answer lends support to the conclusion that Newman was unable to understand the proceedings against him and assist in his defense.

**Capital Case*

In sum, the state court's denial of Newman's petition was based on an unreasonable determination of the facts in light of the evidence presented. "[T]here is a reasonable probability that Newman would have been found unfit had a hearing been held."

2009: ***Hummel v. Rosemeyer*, 564 F.3d 290 (3rd Cir. 2009), *cert. denied*, 558 U.S. 1063 (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 psychologist's 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

2019: ***Schmid v. McCauley*, 385 F.Supp.3d 710 (S.D. Ind. 2019), *appeal dismissed*, 19-2128 (7th Cir. Aug. 30, 2019).** In case where petitioner was found guilty but mentally ill of murder and related charges in an Indiana state court, habeas relief is granted on claim of ineffective assistance of counsel based on trial counsel's failure to request a competency hearing before trial despite counsel's inability to communicate effectively with petitioner about her case due to her mental state. Petitioner had initially been found incompetent to stand trial. A second round of competency evaluations resulted in findings of competence by the examiners. Eight months elapsed between this second round of competency evaluations and trial. During this time, petitioner was transferred several times to a hospital for evaluations and to have her medications adjusted due to fluctuations in her mood and behavior. Prior to and during trial, petitioner was administered numerous psychiatric medications on a daily basis. Before trial began, a new judge was assigned to the case. He made a nunc pro tunc finding of competence based on the reports from eight months earlier. The defense at trial focused on petitioner's severe mental illness. The trial judge was told during a side bar that petitioner continued to suffer from hallucinations but second counsel informed the court that she would alert it if petitioner's competence was in question. When the prosecutor

requested a ruling on petitioner's competence the following day, the trial court found no reason to rule petitioner was incompetent after counsel stipulated that petitioner was communicating with counsel, although second counsel noted that she had been concerned about petitioner's blank stares and auditory hallucinations. In state post-conviction proceedings, petitioner's claim that trial counsel was ineffective in failing to raise her incompetence was denied. The rejection of the claim by the state courts was unreasonable as to both prongs of the *Strickland* test. Regarding deficient performance, the state courts relied only on the post-conviction testimony of two public defenders who opined that petitioner had been able to assist counsel. But one of these public defenders had withdrawn from the case prior to trial and the other had taken a supporting role to the new lead counsel. The public defender who had remained on the case as second counsel, while opining that petitioner was able to assist counsel, also testified that petitioner "was fairly psychotic at times" and that she "would talk about voices and things like that and the biggest issue comes in to making sure that she is dealing in reality and not responding to voices." Completely ignored by the state courts was the post-conviction testimony of lead trial counsel, who stated that he did not bother discussing a preliminary plea offer with petitioner before trial because she would have given him a "blank stare." He further testified, "I think she could understand what you're saying but she was heavily medicated and it-I don't know almost like being immobilized." The testimony by trial counsel, particularly taking into account the prior incompetence finding, established the existence of a bona fide doubt as to petitioner's competence to stand trial that required counsel to raise the issue. The state court's finding to the contrary was an unreasonable application of Supreme Court precedent as well as a decision based on an unreasonable determination of the facts. As for prejudice, it was unreasonable for the state courts to have relied on the evaluations that were conducted eight months before trial given that petitioner's medications were adjusted multiple times in the interim and petitioner's mental illness left her prone to psychotic episodes triggered by stressful situations. In light of the evidence raising a bona fide doubt as to petitioner's competence, there was a reasonable probability that petitioner would have been found incompetent had counsel requested a competency hearing.

c. State Cases

2017: ***Ramirez v. State*, 795 S.E.2d 841 (S.C. 2017).** In case involving numerous felony charges against a sixteen-year-old severely mentally retarded defendant, plea counsel was ineffective for failing to request an independent competency evaluation prior to the guilty plea. Defendant was initially found competent after a short forensic interview with an employee of the Department of Mental Health who also considered a limited number of documents primarily related to the charged crimes and defendant's juvenile criminal history. Plea counsel then requested that a psychological examination of defendant be conducted because plea counsel was concerned that defendant did not fully understand the gravity of the offenses or the charges he faced. (Defendant had informed the first examiner that he believed he was only facing a few years in the Department of Juvenile Justice. In fact, he was being tried as an adult and faced a sentence of fifteen years to life without parole in the Department of Corrections.) The second examiner met with defendant numerous times for extended periods. He also based his conclusions on a number of psychological tests, defendant's medical records, and collateral interviews conducted with defendant's family to obtain historical information defendant may not have been able to accurately convey due to his

intellectual limitations. The expert diagnosed defendant with an adjustment disorder with mixed disturbance of emotions and conduct, severe mental retardation, and a Global Assessment of Functioning (GAF) score of thirty-five out of one hundred. The expert did not, however, opine as to defendant's competency to stand trial. Defendant ultimately pleaded guilty but mentally ill and the reports of the two experts were submitted on the issue of whether defendant was mentally ill at the time of the offenses. The plea was accepted and defendant was sentenced to concurrent twenty-year terms for all charges, except the lewd act on a minor for which the circuit judge imposed a consecutive fifteen year sentence suspended upon five years' probation for mental health counseling. In post-conviction proceedings, plea counsel conceded he should have moved to have defendant's competency reevaluated after comparing the two reports. Given the second report, and plea counsel's own interactions with defendant, the failure to seek a reevaluation constituted deficient performance. Prejudice is found based on plea counsel's testimony and the second report. These "clearly established a reasonable, if not strong, likelihood that [defendant] was incompetent to plead guilty."

2009: ***Mast v. State*, 914 N.E.2d 851 (Ind. Ct. 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. Dist. Ct. 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 follow-up. 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. Ct. App. 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 ___.

> 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, carjacking, 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.

**Capital Case*

10. FAILURE TO PRESERVE THE RECORD FOR APPEAL

a. U.S. Court of Appeals Cases

2003: ***Davis v. Secretary, 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. U.S. District Court Cases

2019: ***Alvarado v. Wetzel*, 2019 WL 3037148 (E.D. Pa. July 10, 2019).** In robbery-murder case where petitioner was the get-away driver and tried as an accomplice, trial counsel was ineffective in failing to object on due process grounds to the trial judge's written response to a question from the jury during deliberations concerning accomplice liability that suggested that the jury could convict petitioner on an accomplice liability theory based on the *actus reus* element alone without any finding that she had the *mens rea*, or intent element, necessary for accomplice liability. Post-conviction counsel was also ineffective in failing to raise the trial ineffectiveness claim premised on a due process violation. Petitioner and her boyfriend purchased Xanax from a person in a park that was well-known for illegal prescription drug sales. They shared the drugs with a childhood friend of petitioner who accepted a ride in the vehicle driven by petitioner. At some point, petitioner's boyfriend pulled out a gun from under the front passenger seat where he was sitting and showed it to petitioner and her friend. The three later decided to return to the park to obtain more Xanax. After petitioner parked the vehicle, the childhood friend suggested that petitioner's boyfriend try to "get a play," meaning to get more pills than were paid for. As her boyfriend walked away from the car, petitioner called him back and told him, "Cuz, you know, you know what to do. You know, if they don't give you a play, just pull that shit out." The childhood friend took that to be a suggestion to use the gun which upset her and caused her to yell at petitioner. The boyfriend then left the vehicle and went to the park where he pulled the gun on the drug dealer and took a bottle of Xanax the man was holding. As the boyfriend returned to the car, the drug dealer shouted, "He robbed me," which was repeated by others in the crowd, including the victim, who along with others followed the boyfriend to the car. After the boyfriend entered the front passenger side of the vehicle, the victim attempted to look in the driver's side window. The boyfriend reached over and shot the victim, after which he fired two or three more shots into the park. As they drove away, petitioner exclaimed, "That's why he loves me. That's why we ride or die." Petitioner was tried jointly with her boyfriend. The judge instructed the jury four times concerning accomplice liability, three of the times after questions from the jury. The final instruction was in response to a written question from the jury: "Does aiding after a crime in itself constitute accomplice liability?" After discussing the question with counsel, the trial court sent the jury a written answer to the effect that "it could." Following petitioner's conviction for robbery and second degree

murder, trial counsel represented her on direct appeal and raised a single issue: "Did the trial court commit legal error by instructing the jury that she could be convicted under the accomplice theory solely by aiding after the crime had been committed?" Petitioner's judgment and sentence were affirmed with the appellate court finding that the instruction complied with state law. In state post-conviction proceedings, petitioner unsuccessfully argued that trial counsel had been ineffective in failing to object to the trial court's written response to the final jury question. In the federal habeas proceedings, petitioner alleged that her due process rights were violated by the supplemental instruction and that trial counsel was ineffective in failing to object on this basis. Because petitioner's state counsel had relied only on state law on appeal and in state post-conviction proceedings, the claims were unexhausted. And because no available state remedy remained open, they were deemed procedurally defaulted. The default was overcome for the trial ineffectiveness claim based on post-conviction counsel's ineffectiveness. Although post-conviction counsel did challenge trial counsel's performance under state law, post-conviction counsel overlooked the "significant and obvious" due process implications of the written supplemental jury instruction and trial counsel's failure to object on that ground. No strategic reason for the omission of the due process argument could be discerned. "Having shown that she presents a substantial claim of ineffectiveness of trial counsel and that her postconviction counsel's performance was deficient for allowing the default of that claim, [petitioner] has shown that the procedural default of her ineffective assistance of counsel claim may be excused under *Martinez*." Turning to the merits, which is reviewed *de novo*, the district court first found that under Pennsylvania law petitioner could be convicted of second degree murder if the jury found that a homicide occurred while she was acting as an accomplice to a robbery. Accomplice liability required a specific *mens rea* element: the intent to promote or facilitate commission of the offense. The trial court's initial instruction on accomplice liability conformed closely to the standard instruction on the issue. The following two supplemental instructions given by the trial court also comported with state law. But the provision of the correct instructions did not negate the harm from the final written answer to the jury inquiry. "The challenged supplemental instruction was a two-word response to the jury's specific question and was delivered in writing. This concise but ambiguous written instruction likely stood out more to the jury than the previous verbal instructions that correctly explained the *mens rea* for accomplice liability." As the Supreme Court recognized in *Bollenbach v. United States*, 326 U.S. 607, 612 (1946), a specific instruction on a key issue likely carries greater weight with a jury than a previous generalized instruction. "Reviewing the written answer to the jury's question in the context of the trial record, there is '"a reasonable likelihood" that the jury applied the instruction in a way that relieved the State of its burden of proving' that [petitioner] acted with the intent to promote or facilitate the robbery." While the prosecution in argument relied heavily on the childhood friend's account of petitioner's statements before and after the robbery to establish the requisite *mens rea*, her credibility was significantly challenged by petitioner and the record suggested that the jury may indeed have discounted the friend's testimony. Notably, the jury acquitted petitioner of the charge of conspiracy to commit robbery even though conspiracy and accomplice liability have the same intent requirement under Pennsylvania law. The supplemental written instruction violated due process and the record provided no basis to discern a tactical reason for trial counsel not objecting on this ground. Longstanding Supreme Court precedent made clear that the Due Process Clause of the United States Constitution requires proof beyond a reasonable doubt of every element necessary to constitute a crime and that a jury instruction that relieves the government of its burden of proving every element beyond a

reasonable doubt violates due process. Thus, deficient performance was established. As for prejudice:

> The Court concludes that the error of [petitioner's] trial counsel in this case in failing to object to the due process violation undermines confidence in the outcome. Given the government's primary reliance on [petitioner's] statements in the car, both before and after the shooting, and the jury's apparent lack of confidence in [the friend's] testimony and obvious confusion concerning accomplice liability, there is a reasonable probability that the outcome would have been different had [petitioner's] trial counsel objected to the trial court's written response and had the jury been properly instructed on accomplice liability. [Petitioner] has demonstrated prejudice from her counsel's deficient performance and therefore has established ineffective assistance of her trial counsel under *Strickland*.

***Hesser v. United States*, 2019 WL 2717271 (M.D. Fla. June 28, 2019), *appeal pending*, 19-13297 (11th Cir.).** In case involving, inter alia, three counts of filing false tax returns with the IRS, trial counsel was ineffective in failing to renew or make a motion for judgment of acquittal at the conclusion of all of the evidence. Petitioner was charged with filing false tax returns in 2005, 2006, and 2007 – Counts One through Three. At the close of the government's case in chief, defense counsel moved for a judgment of acquittal only on Count Three based on the absence of a signature on Form 1040. The motion was denied. After the defense presented its case, defense counsel failed to renew the motion as to Count Three or make a motion for judgment of acquittal on any other count. Petitioner was convicted of the charges. On direct appeal, the Eleventh Circuit Court of Appeals affirmed the convictions. Although it found that the evidence presented by the prosecution in its case-in-chief was not sufficient to establish the falsity element of the three false tax return counts, it applied the difficult manifest miscarriage of justice standard due to defense counsel's failure to properly raise or renew a motion for judgment of acquittal. Defense counsel's "failure to renew or make a motion for judgment of acquittal at the conclusion of all the evidence constituted deficient performance as to Counts One through Three." Had counsel properly preserved a challenge to the sufficiency of the evidence, review would have been *de novo* and petitioner would have prevailed on appeal. Thus, prejudice was established. Because the grant of relief is based on insufficiency of evidence, double jeopardy prevents petitioner from being re-tried on the three counts.

***Gable v. Williams*, 2019 WL 1756468 (D. Ore. April 18, 2019), *appeal and cross-appeal pending,* 19-35427 & 19-35436 (9th Cir.).** Granting habeas relief on claim that petitioner's constitutional rights were violated by the exclusion of evidence concerning a third party's confession to the murder petitioner was charged with, as well as on a claim that trial counsel was ineffective in failing to present appropriate legal support, including citation to federal law, in support of the admission of evidence of third party guilt. (The substantive exclusion of evidence claim was raised in state court solely as a state law violation.) Although the claims were procedurally defaulted, petitioner satisfied the *Schlup* actual innocence test. Multiple witnesses recanted with persuasive explanations for why they had lied, including coercive interrogation tactics, and expert witnesses testified about how the unethical and flawed polygraph testing procedures and the improper and coercive interrogations combined to obtain false testimony from

the examinees. In addition, there was the third party confession that had indicia of reliability. The showing of innocence overcame the default of both the substantive exclusion of evidence claim and the ineffective assistance of counsel claim. Regarding the defaulted trial ineffective assistance of counsel claim, the district court ruled in the alternative that *Martinez* was satisfied to overcome the default. In light of the prior merits resolution of the exclusion of evidence claim, it was easily found that trial counsel's failure to assert petitioner's rights under *Chambers v. Mississippi* stated a substantial claim. Petitioner also demonstrated a reasonable probability that, absent the deficient performance of his post-conviction counsel, the result of the post-conviction proceedings would have been different. Therefore, the procedural bar to the trial ineffectiveness claim is overcome under *Martinez*.

c. State Cases

2019: ***Squire v. State*, 278 So.3d 153 (Fla. Ct. App. 2019).** Trial counsel was ineffective on the face of the appellate record for failing to move for a judgment of acquittal on the issue of whether appellant's discharge of a firearm caused great bodily injury to the victim. The evidence showed that appellant and his brother had fired multiple shots at the victim, who took off and ran away. The victim suffered two gunshots in each leg. A bullet recovered from one of the victim's legs was determined to have come from a revolver. A revolver found at the home shared by appellant and his brother had DNA linking the brother to the gun. Two other firearms were found at the home, a 40-caliber semiautomatic pistol and a 22-caliber semiautomatic pistol, although neither had DNA linking them to appellant. A shell casing found at the scene of the shooting had been fired by the 40-caliber semiautomatic pistol found in appellant's home. Appellant was convicted of attempted first-degree murder and the jury made specific findings that appellant actually possessed a firearm, actually discharged a firearm, and actually inflicted great bodily harm as a result of discharging the firearm. Following the second phase of trial, the jury also found appellant guilty of possession of a firearm by a convicted felon. His ultimate sentence was negatively impacted by the great bodily harm finding because that implicated the provisions of Florida's 10/20/Life statute and mandated a 25-year mandatory minimum sentence On appeal, appellant conceded that there was sufficient evidence to support a finding that he actually possessed a firearm and discharged it. He contended, however, that there was insufficient evidence to prove that his personal discharge of the firearm actually caused great bodily harm to the victim. The appellate court agreed and found trial counsel deficient for failing to preserve the sufficiency of evidence issue. "There was no strategic reason for defense counsel to fail to move for a judgment of acquittal on this issue. Contrary to the State's argument that a motion for judgment of acquittal on this issue would have been inconsistent with appellant's misidentification defense, a motion for judgment of acquittal on this issue would not have precluded defense counsel from arguing to the jury that appellant was misidentified as one of the shooters." Prejudice was indisputable on this record. The case was remanded for the trial court to strike the 25-year mandatory minimum sentence and replace it with the 20-year mandatory minimum sentence for discharging a firearm.

***Brewer v. State*, 924 N.W.2d 87 (N.D. 2019).** In case where petitioner was charged with and convicted of two counts of Gross Sexual Imposition involving two minors, trial counsel was ineffective in failing to renew an objection to admission of an interview of one of the minors in which an incident involving petitioner that was unrelated to the charged crimes was discussed. In

response to a pretrial motion to exclude evidence of the interview, the trial court ruled that the evidence was admissible to prove motive, intent, plan, absence of mistake or lack of accident. When the State offered a recording of the interview into evidence at trial, defense counsel failed to renew the objection. Petitioner raised a claim of ineffective assistance of counsel based on trial counsel's inaction. The trial judge presided in the post-conviction proceeding and stated it was likely that he would have granted the motion to exclude if it had been renewed in light of the evidence that had been presented at trial. Trial counsel explained that he did not renew the motion because he "felt that [he] had adequately formed a record in the hearing on the motion itself [and] did not need to raise it." According to the state supreme court, "[t]his statement admits a legal error that is below an objective standard of reasonableness." And even beyond the intentional failure to object, trial counsel stated affirmatively "no objection" when the State offered the interview. "We conclude failing to object at trial because of reliance on the record made in a pretrial motion is a basic legal error that satisfies *Strickland's* prong one" As to prejudice, admission of the interview "impl[ied] a propensity for sexual contact with minors," and perhaps particularly with the minor involved in the interview. The absence of an objection precluded the trial court from conducting the requisite three-step analysis for determining admissibility. Prejudice is established regardless of whether the objection would have been sustained or overruled. If sustained, the evidence would not have been admitted. If overruled, the issue would have been preserved for appeal. "Because we have repeatedly expressed grave concern where prior bad acts evidence has been admitted without the required analysis by the district court, if it had been preserved, this issue would have had sufficient merit on direct appeal to undermine our confidence in the outcome.. . . Although the admissibility of the interview and the appropriateness of a limiting jury instruction are left for the district court's determination in the context of any subsequent retrial, we conclude Brewer satisfied the prejudice requirement of *Strickland's* second prong." The argument that prejudice should only be found as to the one victim is rejected.

2008: ***People v. Owens*, 894 N.E.2d 187 (Ill. Ct. 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

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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."

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11. MISCELLANEOUS

a. U.S. Court of Appeals Cases

2019: ***Brewster v. Hetsel*, 913 F.3d 1042 (11th Cir. 2019).** In armed robbery case, jury's guilty verdict was impermissibly coerced and, therefore, trial counsel's failure to object and move for a mistrial constituted ineffective assistance of counsel. There were two days of deliberations with two different judges presiding. During the two days, the jury sent 6 notes to the two judges saying it could not reach a verdict. Three times the jury revealed how it was divided – 9-3 guilt, 11-1 guilt, and finally, one holdout that continued to hold out. Throughout the deadlocking the judges gave one formal *Allen* charge, later two additional admonitions that the jurors had to continue deliberating, and, finally, another long charge that including instructions to keep deliberating. After reading materials were confiscated from the jury room the holdout surrendered. In denying petitioner relief, the state courts recast his claim as an attack on the language of one of the supplemental instructions. Thus, his actual claim was not adjudicated on the merits by the state courts and was entitled to *de novo* review. Regarding deficient performance, on the facts known to defense counsel "there was no conceivable reason, no reasonable strategy, for sitting silent and seeing how things would turn out. The cards had already been dealt, face up, and it was obvious who had the losing hand." As for prejudice, the appeals court observed that "[i]t doesn't matter for prejudice purposes whether the judge at this defendant's trial would have sustained an objection; what counts is whether the judge would have been required to do so under the applicable law and, if so, whether doing so would have resulted in a reasonable probability of a different result." Because the answer to both inquiries is yes, petitioner was entitled to habeas relief.

2017: ***McKernan v. Superintendent Smithfield SCI*, 849 F.3d 557 (3rd Cir. 2017)**. The Third Circuit granted relief in this Pennsylvania first degree murder case on petitioner's claim that because of the egregious advice given him by his counsel, he was deprived of the right to a fair trial before an impartial tribunal. On the second day of the bench trial, after the prosecution had rested but prior to the defense beginning its case-in-chief, the trial judge, Judge Lisa Richette, summoned counsel for the parties and members of the victim's family to her robing room to complain about and discuss disparaging comments about herself that she had found on a website created by the victim's family members. Judge Richette read some of the comments from the website which she characterized as "vicious and unfair."

> The website described an ongoing controversy between the judge and the actor Charlton Heston, who had criticized the judge as being soft on crime and referred to her as "Let `em Loose Lisa." The judge read a passage from the website stating "Lisa Richette is a bleeding heart judge that often sympathizes with murderers and other violent criminals and gives them light sentences," which the judge characterized as "a total lie." The judge then accused the [victim's family] of writing "dreadful, slanderous things about [her]" throughout the website.

(Footnotes omitted.) Despite her anger, Judge Richette sought approval from the victim's family of her actions in the trial. She described the case as "a horrible, horrible murder," and told the victim's family that she "just want[ed] to make sure that you folks are happy with me." Noting

that the victim's family had "already been hurt enough," she told the assistant district attorney that she didn't "want them to have this case heard by a Judge in whom they have no faith." She also told the victim's family that they were very fortunate because there was a witness who came forward in this case unlike in many other murder cases. After being assured by the victim's family that they were "satisfied" with Judge Richette presiding over petitioner's trial, she concluded, "I don't want to open the Daily News tomorrow and read the usual B.S." Defense counsel remained mute during this meeting until the assistant district attorney asked him if he was concerned about the conference. Defense counsel responded that he needed to apprise his client of what had transpired and he left the robing room with the other parties still there with Judge Richette remarking that she'd just talk to the family generally in defense counsel's absence. In the continued discussion in the robing room, the victim's brother and Judge Richette entered into an agreement permitting the judge to "red line" anything she did not approve of from the site and to write her own thoughts about victimology, which would be posted in the judge's "defense." The judge told the victim's mother that she (the judge) would have acted similarly if the same events had happened to her son. She also told the victim's mother that the family was "very lucky" because the assistant district attorney assigned to the case was "one of the best D.A.s in the world." After the victim's family left the robing room, defense counsel returned and expressed his client's concern over the judge's mention of the prosecution's witness and worry that the judge would be harsh on petitioner to prove the victim's family wrong. The assistant district attorney shared those concerns. Defense counsel said that he had advised petitioner to continue before Judge Richette and suggested the problem might be solved if petitioner was brought into the robing room as had the victim's family to talk with the judge. In the robing room, the judge assured petitioner that she would not be influenced by the conversation with the victim's family and that she would "try and pray to God that I be fair to you." Following further conversation with defense counsel, petitioner reluctantly accepted counsel's advice to proceed with trial, which later ended with the judge's rejection of his claim of self-defense and arguments for conviction on a theory less severe than first degree murder. On appeal from denial of relief by the district court, the Third Circuit had "no trouble holding that, in the unique circumstances of this case, counsel's performance in failing to move for recusal of Judge Richette fell far below the minimal standards of competence in the profession and the state court's failure to recognize this incompetence was an unreasonable application of the *Strickland* factors." Petitioner had reasonably recognized, as defense counsel had not, that a finding by the judge that petitioner was guilty of some offense involving a lower standard of culpability would play directly into the narrative the victim's family had published on their website, "the caricature of 'Let 'em Loose Lisa Strikes Again!'"

> While [defense] counsel's belief that Judge Richette was the best option for his client at the beginning of trial may have been a reasonable strategic decision, by the time Judge Richette held the robing room conference and revealed herself to be actively concerned with her image on the internet and the victim's family's perception of her, any competent attorney would have realized that the strategy had to be revised. ¶ Indeed, it appears that if [petitioner] had had no counsel at all, he would have made the decision to seek recusal. He expressed his concerns to his attorney, only to have his attorney inexplicably talk him out of those concerns .... If counsel is ineffective only where his conduct was so deficient as

> to render his client *de facto* without counsel, [petitioner's] counsel may have been worse: he convinced his client to proceed before a tribunal that objectively had the appearance of bias against him. He advised his client to proceed before a court that was structurally deficient, something no competent attorney would ever do. Under § 2254, where "[t]he question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard," the answer here is "No." Consequently, [petitioner] claim fulfills the first prong of *Strickland*.

(Footnotes omitted). The Third Circuit went on to find that "*Strickland*'s second prong ... is easily met." The court explained:

> In view of Judge Richette's sensitivity to criticism for being lenient, it would not appear likely that she would now accept [petitioner's] defense of a lesser degree of homicide. There is evidence in the record from which an impartial judge could have found a lesser degree of homicide. ... Thus, there is a reasonable probability that if [petitioner's] counsel had been effective and moved for recusal, the outcome of the trial would have been different.

2012: ***Cornell v. Kirkpatrick*, 665 F.3d 369 (2nd Cir. 2011)**. Counsel was ineffective due to the failure to object to improper venue on one of two counts of rape. There were two separate instances involving two different women. The first woman was raped in a car in a motel parking lot in Monroe County but she did not report it until the second woman, who was her friend, was raped in Ontario County and reported it. The State conceded the first rape was in Monroe County but indicted the petitioner on both charges in Ontario County. The State asserted it had jurisdiction under a state criminal rule that states: "[a]n offense committed in a private vehicle during a trip thereof extending through more than one county may be prosecuted in any county through which such vehicle passed in the course of such trip." Counsel moved to sever the charges but did not object to venue on the first rape. The District Court found counsel's conduct was deficient because there was clear state case law limiting the application of this criminal rule to instances where it is "impossible to determine in what county the offense occurred," but counsel did not research the law. The State did not appeal this issue. Prejudice found. If counsel had objected, the trial court would have been required to submit the issue of venue to the jury. The State twice conceded that the rape was in Monroe County and the victim's testimony was unequivocal on this point. Thus, there is a reasonable probability that this charge would have been dismissed. Under AEDPA, the state court's ruling was an unreasonable application of Federal law, as determined by the Supreme Court.

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.

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b. Military Cases

***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

2019: ***People v. Mooney*, 124 N.E.3d 1068 (Ill. Ct. App. 2019).** Conviction for driving while license suspended was reversed due to trial counsel's deficient performance for twice agreeing to continuances on the day of trial, thus tolling the speedy trial clock. Because of the absence of jail time in this case, defendant did not enjoy a Sixth Amendment right to counsel. He was entitled, however, to effective assistance of counsel under state law and the test for effectiveness is *Strickland*. Counsel could have no strategic basis for agreeing to delays that should have been attributable to the prosecution. "Defendant having asserted his statutory right to a speedy trial, defense counsel was duty-bound to zealously protect that right. Instead, counsel twice agreed, despite her expressed readiness for trial on both of the scheduled dates, to allow both continuances and concessions of tolling to be attributed to defendant. This, failure was objectively unreasonable under prevailing professional norms, and it rendered counsel's performance deficient." Rather than speculate what might have happened absent the deficient performance, the court holds that "the deficiency was prejudicial in that it resulted in defendant being brought to trial outside of the statutorily prescribed 160-day period."

***Ford v. State*, 205 A.3d 896 (Me. 2019).** Reversing the partial denial of post-conviction relief where trial counsel precluded petitioner from testifying on his own behalf. Petitioner had been approached by police who suspected that the concrete well tiles in the bed of petitioner's truck had been stolen. Petitioner sped off and a chase ensued, during which petitioner repeatedly used his truck to ram police vehicles. Petitioner eventually surrendered after being shot and crashing his vehicle. Petitioner was charged with aggravated attempted murder, two counts of aggravated criminal mischief, two counts of reckless conduct with a dangerous weapon, one count of eluding an officer, and one count of theft by unauthorized taking or transfer. He presented a mental state defense through expert testimony. The defense was unsuccessful and petitioner was convicted of all counts. In post-conviction proceedings, he alleged that trial counsel was ineffective, inter alia,

for refusing to allow him to testify. "The post-conviction court found that [petitioner's] trial counsel failed to prepare [petitioner] to testify, failed to inform [petitioner] of his right to testify, and in fact prevented [petitioner] from testifying by stating, in no uncertain terms, '[t]here is no f***ing way you're going to testify.'" The post-conviction court ruled, however, that this deficiency by trial counsel only prejudiced petitioner on the theft count. The finding was based on a receipt for the well tiles and the testimony petitioner would have offered. The post-conviction court's ruling was erroneous because the theft conviction was "inextricably intertwined with the other charges, and the prejudice that [petitioner] suffered also affected his other convictions." The prosecution's theory was that petitioner was a thief who was attempting to avoid being caught. Petitioner's version of events, in contrast, began with his claim that

> he was not a thief, and that, in response to an unwarranted confrontation with the police, he was reliving traumatic experiences from his military service. According to [petitioner], when he was confronted by the police with sirens and flashing lights, his PTSD caused a "flashback" that made him believe that he was back in a combat zone.

If petitioner had not believed he had stolen the tiles, there would have been no reason for his flight, making the prosecution's explanation for his actions less plausible. "Because [petitioner] was prevented from testifying, the jury did not hear crucial testimony that would have borne directly on the pivotal issue in this case—whether [petitioner] was suffering from an abnormal state of mind."

2017: *Khalil-Alsalaami*, 399 P.3d 264 (Kan. Ct. App. 2017), *aff'd*, ___ P.3d ___ (Kan. Sept. 11, 2020). In case involving two counts of aggravated criminal sodomy on an underage victim, trial counsel was ineffective in numerous ways. First, trial counsel was ineffective in failing to request an interpreter at trial and appellate counsel was ineffective for not raising that failure on appeal. Defendant, whose primary language was Arabic, was in the United States as a permanent resident after serving as an interpreter for the United States military forces in Iraq. He was accused of sexually assaulting the victim at a party. He initially admitted to committing some of the sexual acts at issue but claimed it was consensual and that he was unaware the victim was underage. At trial, he denied having any sexual contact with the victim and stated that he had given a contrary account to the police because the officer had repeatedly suggested that sex had occurred. Trial counsel's defense strategy was: (1) arguing that DNA matched to defendant that was found on the victim's shorts had been transferred from the bed where defendant had sex with another woman earlier; and (2) asserting that defendant was tricked by police into giving an incriminating statement. Although defendant's initial counsel had requested an interpreter for defendant and one was employed at the preliminary hearing, trial counsel decided that use of an interpreter would make it appear to the jury that defendant was trying to hide behind a non-existent language barrier, especially given defendant's own history as an interpreter. Thus, defense counsel advised defendant not to use an interpreter. Such advice was made without counsel: (1) testing defendant's ability to understand English; (2) investigating the complexity of the interpreting defendant was asked to do for the U.S. military; or (3) considering how the use of voir dire and/or instructions could ameliorate any possible prejudice from use of an interpreter. In addition, trial counsel failed to inform defendant of his statutory right to an interpreter and the waiver was not accomplished in

front of the trial court. Trial counsel had been aware that defendant would not be able to understand at least portions of the trial, such as the DNA testimony and the prosecutor's closing argument. At trial, defendant spoke in broken English that was difficult to understand and he failed to comprehend the meaning of fairly simple words. According to professionals who tested defendant post-trial, defendant's understanding of English was extremely limited and he would be very easy to trick due to the language problem. Evidence was also presented in post-conviction proceedings showing that approximately 1 year before the charged crime, defendant took an interpreter with him to get a Kansas driver's license and had to use the picture test rather than the written test. In addition, the interpreter for defendant in the preliminary hearing rated defendant's English skills on a scale of 0 to 10 as .01. He further testified that defendant's English was woefully inadequate to go through a court proceeding without an interpreter. The U.S. Army Captain that supervised defendant in Iraq indicated that their communication in English was at an elementary level and analogized defendant's ability as a little better than his 5-year-old daughter, who was entering kindergarten. Although defendant lived in the United States for 14 months prior to his arrest, he lived in a household with other Arabic speakers. When he interpreted for the U.S. Army in Iraq, again he continued to live with Arabic speakers. It was further noted by the appellate court that not only was the criminal trial complex, the stakes were extremely high – defendant was facing a possible sentence of 25 years to life, and, as an asylum seeker, a conviction would likely result in deportation to Iraq where his life could be at risk. Although the post-conviction court found, inter alia, that substantial competent evidence supported the finding that defendant adequately understood English to proceed to trial without an interpreter, the appellate court disagreed, explaining:

> Even if one assumes that [trial counsel] were in the best position to evaluate [defendant's] language abilities at the time of trial, their testimony does not support such a conclusion. They reached what they believed to be a reasonable trial strategy, without fully investigating [defendant's] ability to understand the testimony and legal arguments at his own trial. Not only did they not investigate, but they ignored clear indications that [defendant] could not effectively understand what was going on during the trial.

On this record, trial counsel performed deficiently in not requesting an interpreter at trial. And, given the egregious nature of the error here, prejudice is presumed. In addition, give the appellate court's conclusion that the evidence does not support a finding defendant was able to understand the proceedings in the absence of an interpreter, appellate counsel was deficient in not raising a claim on direct appeal that the trial court erred in failing to appoint an interpreter for defendant. Because there is a reasonable probability that the appellate court would have found that the district court abused its discretion when it failed to appoint an interpreter, prejudice is established. Trial counsel was also found to have performed deficiently in failing to seek suppression of defendant's confession and stipulating to the voluntariness of defendant's confession after trial counsel entered the case in the midst of a *Jackson v. Denno* hearing that the State had initiated.

> The police minimization technique in conjunction with [defendant's] inability to speak and understand English weigh in favor of finding his confession was involuntary. In addition, [the interrogating officer] testified that in Iraq the police

> use force to coerce confessions from individuals. It is not unreasonable to conclude that [defendant] may have been pressured to confess because of his fear that force might be used. Finally, [defendant's] lack of understanding of the words used in the oral explanation of his *Miranda* rights coupled with his inability to read what was placed in front of him would also weigh in his favor in the voluntariness calculus. It is clear that [defendant] appeared to be confessing to criminal acts. That is not the issue. The issue for the district court to decide would have been whether his confession was freely and voluntarily given with an understanding of his rights under *Miranda.* We do not believe that was a foregone conclusion.

Further, by stipulating to the voluntariness of the confession and allowing admission of the stipulation into evidence, trial counsel prejudiced his own defense strategy of arguing that defendant was tricked into making the confession. Trial counsel was also deficient in failing to object when the prosecutor misstated the DNA evidence during argument in a manner that torpedoed his assertion his argument about how defendant's DNA came to be on the victim's shorts. Further, appellate counsel was ineffective in failing to raise the issue of prosecutorial misconduct on direct appeal. Finally, the appellate court concluded that defendant was entitled to relief on a claim that the cumulative impact of trial counsel's errors deprived him of a fair trial.

> [Trial counsel] committed six errors during his representation of [defendant]: (1) he failed to request an interpreter for [defendant] at trial; (2) he failed to file a motion to suppress [defendant's] confession or mount a defense at the *Jackson v. Denno* hearing; (3) he stipulated to the voluntariness of [defendant's] confession; (4) he failed to object to improper questioning of [the examining nurse]; (5) he failed to object to questions meant to highlight [defendant's] negative character traits; and (6) he failed to object when the prosecutor misstated evidence during closing arguments. We find that the number of errors is substantial, and even if the State could successfully argue that the impact that any one of them had on the trial was insignificant, we cannot ignore the fact that the accumulation of these errors impacted [defendant's] ability to receive a fair trial.

***Commonwealth v. Brown*, 145 A.3d 196 (Pa. Super. Ct. 2016), *appeal granted* (Pa. Feb. 1, 2017).** Trial counsel was *per se* ineffective where he failed to have even one face-to-face meeting with defendant prior to his capital trial.

2016: ***State v. Garland*, 781 S.E.2d 787 (Ga. 2016)**. Counsel ineffective in motion for new trial of sexual battery involving a child case for withdrawing the motion without the defendant's consent and failing to challenge trial counsel's ineffectiveness for failing to adequately investigate and present mental health evidence challenging competence to stand trial and capacity at the time of the offenses. The defendant was convicted of initially touching a child's buttocks as he picked her up during a church conference. He was sentenced to one year imprisonment followed by four years of probation. Following sentencing, new counsel filed a motion for new trial asserting ineffective assistance of counsel. Prior to the motion hearing, the defendant had served his confinement and had been re-incarcerated on a probation violation. Without the defendant's knowledge, counsel entered an agreement with the state to re-instate probation in exchange for withdrawing the motion

for new trial. Counsel's conduct was deficient in entering this agreement without the defendant's knowledge and for failing to pursue the issue of trial counsel's ineffectiveness, which was a meritorious claim. Uncontradicted expert testimony was available that the defendant had a cognitive disorder caused by multiple mini-strokes that impaired the defendant's ability to assist counsel and rendered the defendant unable to discern right from wrong or to conform his behavior to socially acceptable norms at the time of the crime.

2015: *State v. Banks*, 56 N.E.3d 289 (Ohio Ct. App. 2015). Counsel ineffective in multi-count conviction case for failing to seek a bench trial on the repeat violent offender specifications. Counsel's conduct was deficient and not based on strategy. Prejudice established because the error allowed the jury to hear evidence of the defendant's prior conviction, even though the defendant had stipulated to the conviction and did not testify. The prejudice was compounded because the trial court erroneously informed the jury that it could consider the repeat violent offender specification as "other acts evidence."

***Ex parte Whited*, 180 So. 3d 69 (Ala. 2015)**. Counsel ineffective in sodomy case for waiving closing argument. While counsel stated generally that this was a strategic decision, counsel did not recall any specifics of this waiver. There was no reasonable strategy and counsel's conduct was deficient. Prejudice was also established, as the state's case lacked any physical evidence connecting the defendant to the crime, there were inconsistencies in the alleged victim's testimony, the alleged victim and a codefendant had a sexually transmitted disease not carried by the defendant, and the defendant had "a relatively strong alibi." By failing to make a closing argument, "counsel lost the final opportunity to present these arguments to the jury."

***State v. Armstrong*, 863 N.W.2d 449 (Neb. 2015)**. Counsel in sexual assault on children case had an actual conflict of interest and was ineffective in stipulating that defense witnesses would be excluded. The case arose from allegations that the defendant, who was retired, sexually abused two twin girls that he babysat routinely after school and before school for his neighbors. The girls had been interviewed on video by a forensic interviewer prior to trial and the videos were released to the defense for trial preparation and for use by the defense expert. Defense counsel provided the videos to the defendant without any instruction not to share the videos with anyone and the defendant's wife and son-in-law intended defense witnesses also viewed the videos. During the trial's opening, the state asserted that the alleged victims' behavior had changed over time due to the alleged abuse and that they had become reluctant to spend time with the defendant. The defense countered in the defense opening that the defendant's wife, son-in-law, and granddaughter would testify that the girls were always happy to stay with the defendant. Following the state's case, the defendant's granddaughter testified followed by the defendant's son-in-law. During cross-examination of the son-in-law, it was discovered that he had watched the videos of the alleged victims' pretrial interviews. Based on a state law making it a misdemeanor to disclose videos of interviews of child sex abuse victims without court permission, the state challenged the son-in-law's testimony. The trial court stating that defense counsel may be guilty of a crime and that he had a right to remain silent heard argument only by the co-counsel. The state focusing on impact on the trial rather than on whether counsel was guilty of a crime stated that there were only two options: (1) a mistrial; or (2) to strike the son-in-law's testimony and precluded testimony by the defendant's wife, who was

similarly "tainted." Without asking for a continuance or conducting any research to determine whether the statute had been violated or whether exclusion of the evidence was appropriate, even assuming a violation, counsel agreed to exclude the defense evidence believing this was a better alternative to a mistrial because the defense evidence would still be excluded and the state would have more time to prepare for the defense evidence. Counsel had an actual conflict of interest due to "the prospect of criminal or ethical violations [that] had a chilling effect on defense counsel's representation." "[C]ounsel's interest in avoiding criminal or ethical sanctions was in conflict with Armstrong's interest in presenting the strongest defense possible." Counsel acquiesced to appease the state and the trial court for counsel's benefit rather than as a matter of "trial strategy to benefit Armstrong's defense." Because the conflict adversely affected counsel's performance, prejudice was presumed. Even if no presumption was applied, the court found actual prejudice under *Strickland*. The excluded defense witnesses would have lent credibility to the defendant's testimony. This prejudice was compounded by "the negative inferences the jury could have drawn from the unexplained striking of the son-in-law's testimony and the unexplained absence of Armstrong's wife." "[T]here is a natural negative inference any time a defendant's spouse fails to testify." This negative inference was "made even worse" here because the jury reasonably expected from the defense opening that the wife would testify.

2014: ***People v. Spencer*, 20 N.E.3d 785 (Ill. Ct. App. 2013)**. Counsel ineffective in bench trial of armed robbery with a firearm for failing to object to the trial court's conviction on the separate and distinct offense of armed robbery with a dangerous weapon other than a firearm. The trial court stated there was a reasonable doubt about whether a firearm was used as none was found and noted a sentencing enhancement if a firearm were used. It was error, however, to convict of armed robbery with a dangerous weapon other than a firearm because this offense was not a lesser-included-offense and the defendant had not been charged with this offense. Counsel's conduct in failing to object was deficient and prejudicial. Conviction reduced to the lesser-included-offense of robbery and remanded for sentencing.

2013: ***Huertas v. Commissioner of Correction*, 64 A.3d 766 (Conn. 2013)**. Counsel was ineffective in failing to request an increase on bond on two prior charges so that the petitioner could be credited with 17 days of presentence confinement credit on those charges. Counsel had "no strategic reason."

***People v. Johnson*, 991 N.E.2d 396 (Ill. Ct. App. 2013)**. Counsel ineffective in unlawful possession of weapon by a felon and misdemeanor domestic battery case for acquiescing to the joinder of the charges. Counsel's conduct was deficient and prejudicial. In the felon weapon case, the effect of joinder was that the jury was improperly allowed to consider other crimes evidence of domestic violence or threats. While these uncharged acts were admissible on the domestic battery case, they were not admissible on the felon weapon case. This error was exacerbated by improper jury instructions. Likewise, the jury was improperly permitted in the domestic battery case, to consider the defendant's felon status. "[C]ounsel's decision to go along with the joinder was based more on convenience than strategy." Reversal was also required due to "cumulative error" in light of the plain error in the trial court's instructions, which did not limit consideration of the defendant's felon status to the weapons charge.

**Capital Case*

2012: ***State v. Moore*, 289 P.3d 487 (Utah 2012) (*affirming* 223 P.3d 1137 (Utah Ct. App. 2009))**. Counsel ineffective in aggravated sexual abuse and dealing in material harmful to a minor case for failing to press issue of the discrepancy in the alleged victim's testimony about whether incident occurred when he was 13 or 14 years old. Aggravated sexual abuse, a first-degree felony, was applicable only if the victim was under 14 years old. Thus, if the victim was 14, the defendant could be convicted only of a lesser offense. The state conceded that counsel's conduct was deficient and prejudicial on that offense but argued that the pornography charge was unaffected, even though both offenses allegedly occurred on the same day, which was "illogical."

2010: ***Middleton v. State*, 41 So. 3d 357 (Fla. Dist. Ct. 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: ***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.

***People v. Centeno*, 916 N.E.2d 70 (Ill. Ct. 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.

**Capital Case*

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. Ct. 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 or 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 new 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.