Attorney-Client Issues - Ineffective Counsel – Trial and Sentencing

Favorable and Noteworthy Decisions in the Supreme Court and Federal Appellate

Sep 1, 2015

*Zapata v. Vasquez*, 788 F.3d 1106 (9th Cir. 2015)

The defendant was charged with murdering a Mexican man on a street. There was at least one witness who saw the shooting, but he could not hear what was said prior to the two shots being fired, though he could see the shooter gesticulating at the victim. In the prosecutor’s closing argument, he repeatedly asked the jury to imagine the last words heard by the victim, “You fuckin’ wetback.” There was no support for this argument, which was repeated several times during the rebuttal argument. There was no reason for the defense attorney to fail to object to this improper argument. The state habeas court’s conclusion that a defense attorney could have thought that this argument would backfire was objectively unreasonable.

*Rivas v. Fischer*, 780 F.3d 529 (2d Cir. 2015)

The defense attorney’s failure to cross-examine the medical examiner about why he changed the possible time of death was deficient performance that required setting aside the conviction. The time of death determination was critical to the defendant’s alibi defense. Initially, the medical examiner posited a time of death for which the defendant had an alibi. The medical examiner then changed the possible range of time to defeat the alibi. Cross-examining the medical examiner on this change was essential.

*Peoples v. Lafler*, 734 F.3d 503 (6th Cir. 2013)

Trial counsel failed to impeach the credibility of key witnesses with known false testimony. The impeachment would have demonstrated that two of the state’s witnesses not only lied, but that they told the *same* lie, showing that they cooked up their story while sharing a jail cell.

*Griffin v. Harrington*, 727 F.3d 940 (9th Cir. 2013)

Trial counsel’s failure to object when the key prosecution witness testified without taking an oath was ineffective assistance of counsel. The notion that this was “strategic” was rejected by the Ninth

Circuit. The witness was a reluctant witness and initially refused to take the oath. The jury was excused and the judge admonished the witness that he was required to take the oath. The jury then returned, but no oath was administered. After the witness testified in a manner that did not inculpate the defendant, his prior recorded statement was introduced and that established the defendant’s guilt. The Ninth Circuit concluded that failing to object to the witness’s unsworn testimony enabled the prosecution to bring in the prior statement; moreover, failing to object led to the state appellate court holding that the issue was waived for appellate purposes.

*Grant v. Lockett*, 709 F.3d 224 (3rd Cir. 2013)

Trial counsel’s failure to investigate the state’s key witness’s criminal background and parole status, and the failure to present that impeaching information at trial was ineffective assistance of counsel. The fact that the defendant, in the habeas petition, was not able to present evidence that the witness

was actually promised anything in return for his testimony was not fatal to a showing of prejudice. The impeaching evidence would still have been admissible under *Davis v. Alaska* and the failure to impeach the witness undermined confidence in the verdict.

*Cannedy v. Adams*, 706 F.3d 1148 (9th Cir. 2013)

State trial counsel’s failure to locate and present evidence from a witness who could have testified that the alleged child molestation victim had made recanting statements, and the failure to present the victim’s recantation statements that she posted on the internet, was ineffective assistance of counsel and a writ was properly granted by the district court.

*McPhearson v. United States*, 675 F.3d 553 (6th Cir. 2012)

Defense counsel provided ineffective assistance of counsel at sentencing because of his failure to contend that the cocaine on the defendant’s person was for personal use and should not have been considered as relevant conduct in his drug amount calculation.

*United States v. Rodriguez*, 676 F.3d 183 (D. C. Cir. 2012)

Trial counsel was ineffective in failing to seek safety-valve relief. This was a matter that could be considered on direct appeal.

*Cornell v. Kirkpatrick*, 665 F.3d 369 (2d Cir. 2011)

Trial counsel’s failure to challenge venue in this rape prosecution was ineffective assistance of counsel.

*Walker v. McQuiggan*, 656 F.3d 311 (6th Cir. 2011)

Trial counsel’s failure to recognize the viability of an insanity defense, given the records of defendant’s history of mental illness and the absurdity of the defendant’s defense to the murder charges was ineffective assistance of counsel.

*Breakiron v. Horn*, 642 F.3d 126 (3rd Cir. 2011)

Trial counsel was ineffective in failing to request an instruction on the lesser included offense of theft in this murder / robbery prosecution.

*Hodgson v. Warren*, 622 F.3d 591 (6th Cir. 2010)

A witness who had critical exculpatory testimony to offer did not appear at trial and defense counsel took no steps to assure her appearance, including a request for an adjournment or a bench warrant. This was ineffective assistance of counsel.

*United States v. Withers*, 618 F.3d 1008 (9th Cir. 2010)

Trial counsel was arguably ineffective in failing to object when the trial court ordered the spectators to leave the courtroom prior to the beginning of jury selection. This was a structural error that violated the defendant’s right to a public trial.

*United States v. Washington*, 619 F.3d 1252 (10th Cir. 2010)

The defendant’s attorney failed to advise the defendant about the consequences of admitting to “relevant conduct” during a presentence interview with a probation officer. As a result, the defendant volunteered that he had engaged in numerous prior drug deals, which resulted in an increased sentence. The Tenth Circuit held that this amounted to ineffective assistance of counsel.

*United States v. Luck*, 611 F.3d 183 (4th Cir. 2010)

Trial counsel was ineffective and the conviction was required to be set aside, because he failed to request a jury instruction that cautioned the jury that an informant’s testimony needed to be examined and weighed with greater care than the testimony of an ordinary witness. Even a general credibility instruction does not substitute for an instruction that specifically points out the potential for perjuiry born out of self-interest.

*White v. Thaler*, 610 F.3d 890 (5th Cir. 2010)

Trial counsel was ineffective during trial in numerous respects: (1) Failure to object to the defendant’s post-arrest, pre-*Miranda* silence. Though this did not violate federal constitutional law, the use of post-arrest, pre-*Miranda* silence is not allowed under Texas law and, therefore, the failure to object was ineffective assistance of counsel; (2) failure to object to evidence that the victim was pregnant. The defendant was charged with driving out of a parking lot of a bar and running over the victim,

with whom he had no prior contact. He was charged with murder. The fact that the victim was pregnant was entirely irrelevant to the issues in the trial and the failure to object was prejudicial.

*English v. Romanowski*, 602 F.3d 714 (6th Cir. 2010)

State trial counsel was ineffective in failing to adequately investigate the availability of a witness to provide exculpatory information. Because of the failure to adequately investigate the witness’s testimony, the attorney believed that the witness had favorable testimony to offer. During trial, he realized that the witness was not that helpful, but he had already promised to call the witness during his opening statement. The decision not to call the witness was a sound decision; the failure to determine this before trial, and then promising to call the witness during opening statement, was ineffective assistance of counsel.

*Wilson v. Mazzuca*, 570 F.3d 490 (2d Cir. 2009)

In this armed robbery case, the trial defense attorney made numerous inexplicable trial decisions that prejudiced the defendant, including opening the door to the admissibility of the defendant’s prior criminal conduct (because he offered character evidence), allowing a mug shot of the defendant to be introduced, and asking questions that enabled the state to offer evidence of a witness’s prior identification of the defendant as the perpetrator, which would not otherwise have been admissible. This was ineffective assistance of counsel that necessitated granting the writ. (During the trial, the trial judge expressed concern about the attorney’s conduct and asked him whether he had some strategy to explain these tactics and the attorney responded affirmatively; the Second Circuit rejected this self-serving statement as a basis for rejecting the claim of ineffective assistance of counsel).

*Richards v. Quarterman*, 566 F.3d 553 (5th Cir. 2009)

For a host of reasons, trial counsel provided ineffective assistance of counsel to the defendant. Exculpatory evidence was not presented (in fact, trial counsel prevented the prosecutor from introducing some evidence that was exculpatory); a lesser included offense instruction was not requested; key witnesses were not interviewed prior to trial.

*Toliver v. McCaughtry*, 539 F.3d 766 (7th Cir. 2008)

Trial counsel’s failure to introduce the testimony of two witnesses whose testimony would have contradicted the theory of the state’s case was ineffective assistance of counsel. The attorney did not even interview one of the exculpatory witnesses and had no valid reason for failing to call the other. In a subsequent appeal, the Seventh Circuit granted the writ after further fact-finding by the trial court. *Toliver v. Pollard*, 688 F.3d 853 (7th Cir. 2012).

*Tilcock v. Budge*, 538 F.3d 1138 (9th Cir. 2008)

Trial counsel’s failure to challenge the use of certain prior convictions as qualifying predicate convictions for recidivist sentencing may have been ineffective assistance of counsel. Remand needed to determine if such a challenge would have been successful.

*Malone v. Walls*, 538 F.3d 744 (7th Cir. 2008)

Trial counsel’s failure to call to the stand an eyewitness who exculpated his client was ineffective assistance of counsel.

*Armstrong v. Kemna*, 534 F.3d 857 (8th Cir. 2008)

Trial counsel’s failure to research and invoke the Uniform Act to secure the attendance of out-of-state witnesses was ineffective assistance of counsel. A remand to determine whether this was prejudicial was ordered by the Eighth Circuit.

*Girts v. Yanai*, 501 F.3d 743 (6th Cir. 2007)

During closing argument, the prosecutor repeatedly made reference to the “only person” who could answer certain questions. This amounted to an improper comment on the defendant’s failure to testify. Trial counsel’s failure to object and preserve the error for appellate review was ineffective assistance of counsel.

*Bell v. Miller*, 500 F.3d 149 (2d Cir. 2007)

The victim was robbed in the street and shot. When the police asked him who shot him, he said “a black male wearing a lemon-colored shirt.” He lost copious amounts of blood and then slipped into a coma. Eleven days later he began to recover and was asked to identify the assailant again. This time he identified an acquaintance. Trial counsel did not hire an expert to explain the effects of the coma and the drugs the victim had taken and how this could have altered his identification. This was ineffective assistance of counsel.

*Miller v. Martin*, 481 F.3d 468 (7th Cir. 2007)

Standing mute at sentencing is not a valid “strategic” decision that a defense attorney can make. The defendant was absent for his trial, but appeared for sentencing. The attorney decided that saying nothing at sentencing was a good strategy. The Seventh Circuit disagreed, concluding that this amounted to ineffective assistance of counsel.

*Higgins v. Renico*, 470 F.3d 624 (6th Cir. 2006)

On the last day of trial, the prosecutor announced that he had found a key witness and called him to testify. The defense attorney had not obtained this witness’s pretrial testimony and asked for an adjournment so he could prepare to cross-examine the witness. The judge denied the request for a

several hour break and allowed the attorney a brief time to prepare. When trial re-commenced, the attorney refused to cross-examine the witness in protest. The Sixth Circuit held that this amounted to ineffective assistance of counsel.

*Lankford v. Arave*, 468 F.3d 578 (9th Cir. 2006)

Trial counsel in this death penalty case offered a jury instruction on the law of accomplice testimony that was incorrect under state law (it omitted the requirement of corroboration) that lessened the state’s burden of proof. This was ineffective assistance of counsel.

*Goodman v. Bertrand*, 467 F.3d 1022 (7th Cir. 2006)

Trial counsel was ineffective in failing to subpoena favorable witnesses, failing to file motions in limine regarding supposed threat evidence, opening the door (during direct examination of the defendant) to prior offenses of the defendant, and failing to show a prosecution witness’s motive to testify for the prosecution. The Seventh Circuit noted that while viewed in isolation, the attorney’s mistakes may not have been prejudicial, but taken in their totality, the errors constituted prejudicial ineffective assistance of counsel.

*Stanley v. Bartley*, 465 F.3d 810 (7th Cir. 2006)

Trial counsel failed to interview any witnesses or engage in any meaningful pretrial preparation. His cross-examination of witnesses reflected his lack of preparation. Judge Posner held that a new trial was necessary.

*Reynoso v. Giurbino*, 462 F.3d 1099 (9th Cir. 2006)

Trial counsel’s failure to question the two eyewitnesses about their expectation of receiving a reward for their participation in the prosecution of the defendant was ineffective assistance of counsel that necessitated setting aside the conviction.

*Medina v. Diguglielmo*, 461 F.3d 417 (3rd Cir. 2006)

Trial counsel was ineffective in failing to challenge the competency of a child witness to testify. Nevertheless, counsel’s error did not prejudice the defendant and was not a basis for granting the writ.

*Virgil v. Dretke*, 446 F.3d 598 (5th Cir. 2006)

Trial counsel’s failure to conduct further voir dire, or to move to remove certain prospective jurors for cause or peremptorily was ineffective assistance of counsel. The jurors expressed an inability to be fair. One juror said that because his mother had been mugged, he could not be fair. Another juror said that his relationship to law enforcement officers would preclude him from being an impartial juror. Failing to move to strike the jurors for cause – and failing to exercise a peremptory strike against

these jurors – was not a matter of strategy. In addition to the decision’s analysis of the ineffective claim, the court extensively reviews the case law relating to the requirement of ensuring that jurors are impartial.

*Davis v. Grigas*, 443 F.3d 1155 (9th Cir. 2006)

The trial attorney was ineffective in incorrectly advising the court about the sentence to which the defendant had stipulated as part of his plea. The stipulated sentence was a sentence of 6 to 15 year caps. But the attorney told the sentencing judge that the defendant stipulated to a sentence of 15 years. This was grounds for federal habeas relief.

*United States v. Alferahin*, 433 F.3d 1148 (9th Cir. 2006)

The defendant was charged with a violation of 8 U.S.C. § 1425(a), knowingly procuring naturalization contrary to law. The trial court did not instruct the jury on the concept of materiality in connection with the false statement that the defendant allegedly made on his naturalization application. The trial defense attorney acquiesced to the failure to instruct the jury on the concept of materiality. The Ninth Circuit held that materiality is an element of the offense, the failure to instruct the jury on this essential element was plain error and the attorney was ineffective in failing to object.

*Thomas v. Varner*, 428 F.3d 491 (3rd Cir. 2005)

Trial counsel was ineffective in failing to challenge the admissibility of the out-of-court and the in-court identification of his client by one of the victims. The victim was initially unable to identify the perpetrator. He was shown numerous photos and still could not identify the perpetrator. Finally, the officer took out two photos and showed them to the victim, who agreed that one of the photos showed the perpetrator. This was an impermissibly suggestive identification procedure. Counsel initially objected pretrial to any identification evidence, but the victim failed to identify the defendant in court during that hearing, so the motion was withdrawn. At trial, however, the victim spontaneously identified the defendant. Trial counsel failed to object, or seek any remedial measure. This was ineffective assistance of counsel.

*Hodge v. Hurly*, 426 F.3d 368 (6th Cir. 2005)

The Sixth wrote, “During his 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, all while defense trial counsel sat idly by. We conclude that defendant’s trial counsel was constitutionally

ineffective in failing to object to this misconduct . . .”

*Martin v. Grosshans*, 424 F.3d 588 (7th Cir. 2005)

At defendant’s state child molestation trial, the state introduced evidence that years after the alleged act of molestation, the defendant, a priest, disagreed with a proposal for how to handle allegations of abuse at the church. The state argued that this reflected his consciousness of guilt. The Seventh Circuit held that failing to object to this testimony, which was irrelevant and prejudicial, was ineffective assistance of counsel. In addition, the failure to object to the defendant’s failure to answer questions posed by an investigator, because his lawyer advised him not to answer questions was also ineffective assistance.

*Ward v. Dretke*, 420 F.3d 479 (5th Cir. 2005)

Trial counsel was ineffective in failing to object to closing argument statements by the prosecutor that the jury would be ridiculed if they sentenced the defendant too leniently; and that they should use Biblical standards in imposing punishment.

*Miller v. Dretke*, 420 F.3d 356 (5th Cir. 2005)

Trial counsel performed deficiently by failing to introduce various medical records and testimony regarding the defendant that demonstrated severe mental health issues that would have had an impact on her sentencing.

*Smith v. Dretke*, 417 F.3d 438 (5th Cir. 2005)

Trial counsel’s failure to present evidence in this murder / self-defense case about the victim’s long history of violence was ineffective assistance of counsel.

*Tenny v. Dretke*, 416 F.3d 404 (5th Cir. 2005)

Trial counsel was ineffective in failing to fully investigate and present evidence at trial relating to the defendant’s viable self-defense claim.

*United States v. Holder*, 410 F.3d 651 (10th Cir. 2005)

The trial court erred in failing to conduct an evidentiary hearing regarding trial counsel’s failure to call to the stand an eyewitness to the shooting that the defendant was charged with. The eyewitness would have supported the defendant’s self-defense claim and there was no evidence in the record to explain any strategic basis for failing to call this witness to the stand.

*United States v. McCoy*, 410 F.3d 124 (3rd Cir. 2005)

The defendant was charged with a drug offense. The government threatened to introduce a prior firearm conviction as Rule 404(b) evidence unless the defendant stipulated to the defendant’s “state of mind” with regard to the drug offense. The defendant agreed to the stipulation which informed the jury that the defendant denied possessing the duffel bag, but if the jury found that the defendant did

possess the duffel bag, it could also find, based on the stipulation, that the defendant knew its contents and intended to possess the drugs. While this might be a reasonable stipulation in some circumstances – and was, in fact a reasonable stipulation for the co-defendant to enter – for the defendant in this case, the stipulation was a poor choice for two reasons: first, he unquestionably did possess the duffel bag at some point; and second, the prior firearm conviction, though damaging, did not really prove his state of mind in possessing the duffel bag (the co-defendant had a prior drug conviction, thus explaining his rationale for entering into the stipulation). A remand was necessary to fully develop the prejudice prong of this ineffective claim.

*Henry v. Poole*, 409 F.3d 48 (2d Cir. 2005)

The defense attorney’s inadequate performance in presenting a flawed alibi defense was ineffective assistance of counsel. The alibi was for the wrong night.

*Cox v. Donnelly*, 387 F.3d 193 (2d Cir. 2004)

Trial counsel’s failure to object to an improper jury instruction in this murder case (an instruction that minimized the state’s burden of proving the defendant’s intent – a *Sandstrom* violation), was ineffective assistance of counsel, though a remand was necessary to inquire into the reason (if any) that prompted the attorney’s failure to object. Following remand, the Second Circuit agreed with the District Court that the defense attorney’s failure to object was objectively unreasonable and warranted granting habeas relief.

*Miller v. Webb*, 385 F.3d 666 (6th Cir. 2004)

Trial counsel was ineffective in failing to request that a juror be excused for cause – and then failing to utilize a peremptory strike on the juror. During voir dire, the juror expressed her bias in favor of the government’s key witness in this murder case. She knew the witness from Bible study courses. The juror should have been removed for cause.

*United States v. Colon-Torres*, 382 F.3d 76 (1st Cir. 2004)

There was considerable evidence to find that the defense attorney rendered ineffective assistance of counsel during the sentencing proceedings. The court – reviewing the case on direct appeal – decided that a collateral attack was not necessary, though further evidence was required in the lower court. The attorney failed to investigate his client’s criminal history before entering into a plea agreement. (The attorney did not realize that his client was a career offender). Counsel was also arguably ineffective in failing to move to withdraw the plea once it was learned that the envisioned sentence was an impossibility due to the defendant’s criminal history.

*Earls v. McCaughtry*, 379 F.3d 489 (7th Cir. 2004)

The defendant was charged with molesting a six-year old child. There were no witnesses to the events and no physical evidence corroborating the child’s statements. A social worker who interviewed the child and testified as an expert said that she believed the child. This was inadmissible evidence and the attorney’s failure to object amounted to ineffective assistance of counsel. In addition, during the videotape of the child prepared by the social worker, the social worker told the child that she believed her and the defendant should not have done that to her. The attorney’s failure to redact the tape was ineffective assistance of counsel.

*Soffar v. Dretke*, 368 F.3d 441 (5th Cir. 2004)

Trial counsel’s failure to investigate and present the inconsistent statements that were made to by the only survivor of a robbery (three others were killed) – inconsistencies about identification that dramatically contradicted the defendant’s own alleged confession – amounted to ineffective assistance of counsel which required setting aside the conviction. For example, the witness stated that there was only one perpetrator who wore no mask and that the victims were quiet before they were killed. The defendant’s confession, on the other hand, indicated that there were two perpetrators, that they wore masks and that the victims were screaming before they were killed. Trial counsel also failed to employ a ballistic expert. Such testimony also would have contradicted the defendant’s alleged confession (and the state’s theory of the events).

*Reagan v. Norris*, 365 F.3d 616 (8th Cir. 2004)

Defendant was charged with murdering his girlfriend’s young child. The girlfriend was also charged with the homicide and ultimately entered a guilty plea to a lesser charge. The defendant claimed that if he was the cause of death, it was accidental. In the jury instruction, the trial court erroneously failed to tell the jury that in order to be found guilty, the defendant had to *knowingly* cause the death of the victim. Instead, the instruction simply stated that the defendant had to be shown to have caused the death. Trial counsel’s failure to object to this omission in the instruction was ineffective assistance of counsel necessitating a new trial.

*Alaniz v. United States*, 351 F.3d 365 (8th Cir. 2003)

Trial counsel was ineffective in failing to challenge the use of a uncharged drug offense to increase the mandatory minimum sentence.

*Caver v. Straub*, 349 F.3d 340 (6th Cir. 2003)

Appellate counsel was ineffective in failing to raise trial counsel’s ineffectiveness in failing to be present when the jury sent a note back during deliberations and when the trial court re-charged the jury.

*United States v. Conley*, 349 F.3d 837 (5th Cir. 2003)

Trial counsel was ineffective in failing to challenge the defendant’s sentence on the § 371 conspiracy count. In the trial court, the parties and the court erroneously believed the conviction was for a money laundering conspiracy (§ 1956(h)). Section 371 limits exposure to five years, while § 1956(h) permits

a twenty year sentence. It was ineffective to fail to object to a sentence that exceeded the statutory maximum. Moreover, appellate counsel was ineffective in failing to appeal this error.

*U.S. ex rel. Hampton v. Leibach*, 347 F.3d 219 (7th Cir. 2003)

Trial counsel’s failure to investigate the facts of this case necessitated the granting of habeas relief. Counsel failed to interview witnesses who were present at the scene of the alleged sexual assault (a brutal gang assault during a rock concert). The court noted that the eyewitness testimony that was presented in this case was subject to the shortcomings that infect eyewitness testimony generally, making it “frequently less reliable than other types of evidence.” *See Wright v. Gramley* 125 F.3d at 1043 n. 4. The court further held that defense counsel’s unfulfilled promises during opening statement also amounted to ineffective assistance of counsel: he promised that his client would testify and state that he did not participate in the assault and he promised that there would be no proof that the defendant was a member of a gang. Both promises were broken. “A broken promise of this magnitude taints both the lawyer who vouchsafed it and the client on whose behalf it as made.”

*United States v. Smack*, 347 F.3d 533 (3rd Cir. 2003)

Trial counsel was arguably ineffective in failing to raise at sentencing the sentencing guideline application note that reduces the drug quantity attributable to the defendant in a case involving a reverse sting, if he either did not intend to transact the quantity involved in the deal, or lacked the funds necessary to complete the deal. Remand was necessary to further develop the facts.

*Davis v. Secretary for Dept. of Corrections*, 341 F.3d 1310 (11th Cir. 2003)

When state trial counsel fails to preserve a Batson challenge for appellate review, the federal habeas court assesses the ineffectiveness in same manner that an attorney’s ineffectiveness on appeal would be assessed: that is, whether the issue would have resulted in reversal of the conviction had it been properly preserved. Thus, the question of prejudice focuses on the merits of the *Batson* challenge, not the prejudice to the determination of guilt / innocence.

*Paine v. Massie*, 339 F.3d 1194 (10th Cir. 2003)

Trial counsel’s failure to introduce expert evidence about battered spouse syndrome was ineffective assistance of counsel that required a remand for the purpose of conducting a hearing on the issue of prejudice.

*United States v. Mullins*, 315 F.3d 449 (5th Cir. 2002)

Defense counsel prevented the defendant from testifying in his firearms trial. Counsel’s decision was based on the desire to keep out impeaching information, such as the defendant’s prior drug dealing and bad check charges. The Fifth Circuit concludes that barring the defendant from testifying is deficient performance under *Strickland v. Washington*, though there was no prejudice in this case. Counsel is obligated to advise the defendant of the strategy decisions being made, but with regard to whether the defendant should testify, the defendant makes the ultimate decision and that decision may not be vetoed by counsel.

*United States v. Leonti*, 326 F.3d 1111 (9th Cir. 2003)

The defendant was entitled to effective assistance of counsel in the post-plea, pre-sentencing phase of his case. Though a defendant does not have the right to the effective assistance of counsel during an interview with a probation officer preparing a presentence report, the attorney in this case was needed to facilitate discussions between the defendant and the prosecutor that were essential to the defendant’s cooperation agreement. The petitioner also claimed that his attorney should have helped modify a release order that required him to wear an ankle bracelet, which limited his ability to make deals for the investigators. The Ninth Circuit agreed, in principle, and remanded for a hearing on the question of whether the attorney was, in fact, ineffective in these endeavors.

*Eagle v. Linahan*, 279 F.3d 926 (11th Cir. 2001)

At trial, defense counsel raised a *Batson* claim. The prosecutor responded that the ratio of blacks on the jury mirrored the ratio in the venire, thus there could be no *Batson* claim. The judge agreed with this argument, but commented at the conclusion of the *Batson* hearing, ``I think both of you were doing what you could to get the different races off.'' Appellate counsel was ineffective in failing to raise what was a blatant error of law committed by the trial court in denying the *Batson* claim on an improper basis (comparing the venire with the jury), especially in light of the judge's comment that demonstrated that the *Batson* claim was meritorious.

*Ouber v. Guarino*, 293 F.3d 19 (1st Cir. 2002)

After promising to the jury emphatically during opening statement that the defendant would testify, the defense attorney decided not to call the defendant to the stand. This was ineffective assistance of counsel requiring that a writ of habeas corpus be granted.

*United States v. Holman*, 314 F.3d 837 (7th Cir. 2002)

Though it may be sound trial strategy, an attorney may not concede guilt on one count of an indictment without the client’s permission.

*McGurk v. Stenberg*, 163 F.3d 470 (8th Cir. 1998)

Trial counsel’s failure to determine that he had a right to a jury trial for his third-offense DWI amounted to ineffective assistance of counsel.

*Bloomer v. United States*, 162 F.3d 187 (2d Cir. 1998)

The district court’s numerous “embellishments” on the definition of proof beyond a reasonable doubt were erroneous. The trial court instructed the jury that if they did not find the elements proven beyond a reasonable doubt, the jury “could” return a not guilty verdict. Actually, absent such proof, the jury would be required to return a not guilty verdict. In addition, the trial court misleadingly explained, “To support a verdict of guilty, you need not find every fact beyond a reasonable doubt.” The court also incorrectly stated, “So a reasonable doubt means only a substantial doubt.” The Second Circuit also concluded that the failure to object to these improper instructions was probably ineffective assistance of counsel, but additional testimony was required in the lower court before this decision could be made with finality.

*Tejeda v. Dubois*, 142 F.3d 18 (1st Cir. 1998)

The state trial disintegrated into a battle between defense counsel and the judge. Counsel yelled at the judge, threw his papers around the court, and made facial expressions. Counsel was ultimately held in contempt. Counsel changed his tactic from attempting to defend the defendant to attempting to antagonize the judge. As a result, counsel neglected to exploit some of the inconsistencies in the prosecution witnesses’ testimony. Whether the unfair trial which resulted was caused by the intolerance of the judge, or the tactics of the defendant was hard to determine, but one way or the other, the defendant was denied the effective assistance of counsel.

*Groseclose v. Bell*, 130 F.3d 1161 (6th Cir. 1997)

Defendant's counsel was ineffective during the guilt phase of this death penalty trial. Counsel had no independent theory of the defense, relying instead, on the defenses of the co-defendants. He waived closing argument, urged the defendant not to testify (though the defendant had no record and always

maintained his innocence), and cross-examined fewer than half of the state's witnesses. He introduced no evidence in defense of the defendant.

*United States v. Soto*, 132 F.3d 56 (D.C. Cir. 1997)

Trial counsel's failure to request a downward adjustment for minor role under the Sentencing Guidelines amounted to ineffective assistance of counsel. The defendant was a courier who was carrying drugs for the first time from New York to North Carolina. She was not even aware of the quantity of drugs she was transporting. Though counsel requested a downward departure, he never requested a downward role adjustment.

*United States v. Russell*, 221 F.3d 615 (4th Cir. 2000)

The government moved *inlimine* to introduce three convictions of the defendant if he testified. The defendant told his attorney that two of the convictions had been overturned. The attorney did not investigate, in fact, he advised the defendant to admit the prior convictions during direct examination. In fact, two of the convictions had been vacated and were invalid. The attorney’s failure to determine the status of the two convictions was unreasonable and ineffective assistance and necessitated vacating the conviction.

*Washington v. Smith*, 219 F.3d 620 (7th Cir. 2000)

Counsel’s failure to read the police report in this case, and his failure to assure the presence of several alibi witnesses was deficient and prejudiced the defendant. Writ granted. The failure to track down the witnesses and to get them under subpoena in enough time to assure their appearance cannot be excused on the basis of crowded court dockets and the uncertainty about when a trial will actually begin. Additionally, telling his incarcerated client that he should arrange for the appearance of favorable witnesses is not satisfactory.

*Paters v. United States*, 159 F.3d 1043 (7th Cir. 1998)

Prior to trial, the government offered the defendant a five-year deal. Defense counsel incorrectly advised the defendant that he did not face more than that if he went to trial. Counsel failed to explain the concept of relevant conduct, or acceptance of responsibility. Following a conviction at trial, the defendant was sentenced to 121 months. The government and the defendant agreed that the trial attorney’s performance was deficient. The Seventh Circuit held that the deficient performance was prejudicial, if the defendant could establish, on remand, that but for the incorrect advice, he would have accepted the plea agreement.

*Genius v. Pepe*, 50 F.3d 60 (1st Cir. 1995)

The defendant’s state trial counsel was ineffective in failing to pursue an insanity defense. Experts had already determined that the defendant was mentally deficient.

*Anderson v. Butler*, 858 F.2d 16 (1st Cir. 1988)

During his opening statement, the defense attorney promised that he would call an expert witness on the issue of defendant’s psychiatric problems. At trial, however, the defense attorney changed his mind and did not introduce this testimony. The First Circuit holds that this is ineffective assistance of counsel.

*Henry v. Scully*, 78 F.3d 51 (2d Cir. 1996)

Trial counsel was ineffective in failing to make a hearsay and confrontation clause objection to the admissibility of a co-defendant’s confession which implicated the defendant.

*Tippins v. Walker*, 77 F.3d 682 (2d Cir. 1996)

Trial counsel slept through substantial portions of the petitioner’s trial. This is not consistent with the Sixth Amendment right to effective assistance of counsel. The petitioner’s conviction was set aside, even though he could point to no particular objection that should have been raised, or other specific inadequacy of his trial counsel — other than the fact that he was virtually unconscious during the testimony of several witnesses who testified against the defendant.

*DeLuca v. Lord*, 77 F.3d 578 (2d Cir. 1996)

Trial counsel was ineffective in failing to develop and present a defense based on extreme emotional disturbance.

*Berryman v. Morton*, 100 F.3d 1089 (3rd Cir. 1996)

Three men were charged with raping a woman. One defendant was tried first and that case involved two trials because of a hung jury. At the third trial, the petitioner’s trial, his attorney failed to use transcripts from the first two trials to expose inconsistencies in the victim’s identification of the defendant. Counsel also inexplicably opened the door to evidence that the co-defendant, and at least implicitly the petitioner himself, was the subject of an armed robbery/homicide investigation. Finally, counsel was ineffective in failing to call as a witness two individuals who could provide exculpatory evidence.

*Government of Virgin Islands v. Weatherwax*, 20 F.3d 572 (3rd Cir. 1994)

On the third day of defendant’s murder trial, a local newspaper purported to recount the defendant’s testimony, but did so in a distorted and prosecution-oriented manner. Jurors were seen carrying the newspaper into the jury room. This was brought to the attention of the defense attorney, but he made no effort to seek a *voir dire* of the jury. This sets forth a non-frivolous case of ineffective assistance of counsel, requiring further factual development in the trial court.

*United States v. Headley*, 923 F.2d 1079 (3rd Cir. 1991)

The defendant was deprived of effective assistance of counsel when his attorney failed to urge that the trial court award a downward adjustment for the defendant’s role in the offense. This could be addressed on direct review and did not require a *habeas* petition.

*Government of the Virgin Islands v. Forte*, 865 F.2d 59 (3rd Cir. 1989)

The attorney’s failure to make a *Batson* challenge rendered him ineffective. Curiously, *Batson* had not been decided at the time this trial occurred. Nevertheless, the defendant, as well as a consulting attorney, had instructed the trial attorney to make the *Batson* objection. The attorney later explained

that because she had frequently excluded whites from juries when she was representing black defendants, she was “too embarrassed” to make this type of challenge.

*United States v. Breckenridge*, 93 F.3d 132 (4th Cir. 1996)

Trial counsel was ineffective in failing to argue that defendant’s prior convictions were related, and therefore did not subject him to career offender status. The case was remanded to determine whether, in fact, the prior offenses were related, and thus whether the ineffective assistance prejudiced the defendant.

*Luchenburg v. Smith*, 79 F.3d 388 (4th Cir. 1996)

The defendant was convicted of the “compound crime” of using a handgun during the commission of a crime of violence. The trial attorney failed to request an instruction cautioning the jury that they must first convict the defendant of the crime of violence, before they could convict the defendant of using a handgun during the crime of violence, and also cautioning the jury that common law assault is not a crime of violence. Instead, the court’s instruction could have conveyed to the jury that the use of a weapon might be considered in deciding whether the defendant committed a crime of violence (which is not the law in Maryland). Trial counsel’s failure to request this instruction and his failure to object to the instruction that was given was prejudicial.

*United States v. Tatum*, 943 F.2d 370 (4th Cir. 1991)

The defendant was charged with bankruptcy fraud for having failed to list certain automobiles on his assets schedule. He was represented initially by an attorney who worked for the firm which advised him not to list the cars (another of whose lawyers owned one of the cars). That attorney was eventually disqualified, but he remained in the case and sat at counsel table and advised the new defense attorney. That attorney’s participation, even as second chair, represented ineffective assistance of counsel because of the severe conflict.

*Tucker v. Day*, 969 F.2d 155 (5th Cir. 1992)

At defendant’s re-sentencing, the appointed counsel did not consult with him, had no knowledge of the facts, and acted as a mere spectator. The defendant was denied the assistance of counsel.

*Gravley v. Mills*, 87 F.3d 779 (6th Cir. 1996)

The prosecutor improperly introduced evidence, and argued to the jury the significance of this evidence, relating to the defendant’s post-*Miranda* silence. The defense counsel did not object and did not raise this issue in the new trial motion, or on direct appeal. This was ineffective assistance of counsel. The court found that this constituted the “cause” necessary to excuse the procedural default and granted the writ.

*Ward v. United States*, 995 F.2d 1317 (6th Cir. 1993)

Defendant’s trial counsel was ineffective in several ways: he opened up the character door by his inept cross-examination of one witness; was inappropriately hostile to the prosecutor and acted in such a way that the jury was snickering at him.

*Crowe v. Sowders*, 864 F.2d 430 (6th Cir. 1989)

During the course of the defendant’s trial, the judge explained to the jury the parole consequences of a verdict. The defense attorney did not object, did not move for a mistrial and failed to move for a new trial after the verdict was returned. This was ineffective assistance of counsel.

*Green v. Arn*, 809 F.2d 1257 (6th Cir. 1987)

Defense counsel absented himself from trial during portions of the proceedings. This constitutes ineffective assistance of counsel *per se*. After remand from the Supreme Court to consider whether the issue was moot, because of defendant’s release from parole, the Sixth Circuit reinstated its original opinion. 839 F.3d 300 (6th Cir. 1988).

*Patrasso v. Nelson*, 121 F.3d 297 (7th Cir. 1997)

Trial counsel was ineffective in the penalty phase of this murder (non-death penalty) trial. There was considerable mitigating evidence which was not presented by the defense counsel and, for all relevant purposes, counsel was a mere spectator at the sentencing hearing.

*Nichols v. United States*, 75 F.3d 1137 (7th Cir. 1996)

The petitioner was entitled to an evidentiary hearing to determine whether his trial counsel was ineffective in failing to challenge the relevant conduct that the probation officer recommended should be considered in imposing a sentence under the Sentencing Guidelines.

*Williams v. Washington*, 59 F.3d 673 (7th Cir. 1995)

Defense counsel failed to review discovery materials provided by the state; failed to object to the admissibility of certain evidence which was introduced in violation of the rules against hearsay; and apparently conducted no investigation of the case prior to trial.

*Stoia v. United States*, 22 F.3d 766 (7th Cir. 1994)

The defendant was represented at trial by certain attorneys, but claimed in this §2255 petition that another attorney, who did not file an appearance, was actually directing trial strategy. An ineffective assistance of counsel claim may be valid, even with respect to an attorney who has not filed an appearance. In this case, the non-appearing attorney was burdened with a conflict of interest. The non-appearing attorney made numerous tactical decisions which the defendant followed, including

requesting a continuance, not interviewing certain witnesses and recommending that the defendant not testify in his own behalf. He also failed to file any pretrial motions, which was his delegated responsibility in the case. The non-appearing attorney’s conflict resulted from an agreement he had with the government, as part of his own plea agreement, that provided that he would not represent any person charged with crimes. The attorney was also involved in undercover work with law enforcement.

*Moffett v. Kolb*, 930 F.2d 1156 (7th Cir. 1991)

At defendant’s state attempted murder trial, trial counsel failed to impeach a witness (who testified that the defendant shot the gun) with prior statements that another person shot the gun. This was ineffective assistance of counsel. Though counsel asked the witness whether he had made inconsistent statements, he failed to produce the statements when the witness denied the prior inconsistent statement.

*Harris v. Reed*, 894 F.2d 871 (7th Cir. 1990)

During opening statements, the defense attorney promised the jury that an alternative theory of the killing would be presented; the defense presented no evidence, however, relying instead on the perceived weakness of the State’s case. Furthermore, there were two witnesses available to the defense to suggest that a person other than the defendant had committed the crime. This constitutes ineffective assistance of counsel.

*United States v. Myers*, 892 F.2d 642 (7th Cir. 1990)

Trial counsel failed to review *Brady* material turned over by the government and failed to submit an instruction designed to limit the impact of certain evidence. A full evidentiary hearing was necessary to determine whether the defendant was, in fact, denied effective assistance of counsel.

*Freeman v. Class*, 95 F.3d 639 (8th Cir. 1996)

Trial counsel’s failure to request a cautionary instruction amounted to ineffective assistance of counsel. Specifically, the state relied on the testimony of an accomplice and under state law the defendant was entitled to an instruction that cautioned the jury about the reliability of accomplice testimony. Trial counsel was also ineffective in offering hearsay evidence that implicated the defendant. Finally, counsel was ineffective in failing to object when the state offered evidence of the defendant’s silence after being advised of his *Miranda* rights.

*Starr v. Lockhart*, 23 F.3d 1280 (8th Cir. 1994)

Trial counsel was ineffective in failing to object to jury instructions during the penalty phase of this death penalty trial relating to “pecuniary gain” and “heinous, atrocious, or cruel” aggravating circumstances. Both of these aggravating circumstances had been found unconstitutional at the time

of the defendant’s trial. Though the “pecuniary gain” circumstance was later found to be constitutional (and thus there was no prejudice from failing to object to this instruction), the “heinous, atrocious, or cruel” circumstance was unconstitutionally vague and did not adequately limit the death-eligible defendants. See *Godfrey v. Georgia*, 446 U.S. 420 (1980); and *Maynard v. Cartwright*, 486 U.S. 356 (1988). Though one aggravating circumstance was still valid, in a “weighing” state, such as Arkansas (the jury weighs the aggravating circumstances against the mitigating circumstances), if there is one invalid aggravating circumstance, the death sentence must be set aside.

*Prichard v. Lockhart*, 990 F.2d 352 (8th Cir. 1993)

The defendant was sentenced as a recidivist because of a prior out-of-state drug conviction. The plain language of the statute under which he was sentenced, however, precluded the use of out-of-state convictions. His trial attorney’s failure to object to the use of this prior conviction was plainly ineffective and prejudicial. The fact that the state statute had not been construed by the state court to preclude the use of out-of-state convictions until after the sentence was imposed in this case is not relevant, because the statute plainly barred consideration of such convictions.

*Houston v. Lockhart*, 982 F.2d 1246 (8th Cir. 1993)

Though an evidentiary hearing was necessary to develop the record, the petitioner set forth a valid ineffective assistance of counsel claim. There was an oral agreement between the defense attorney and the prosecutor to stipulate to the admissibility of polygraph results. The defendant passed the polygraph. An oral stipulation, however, was not sufficient under state law. The attorney was ineffective in not requesting that the agreement be in writing prior to the polygraph; or in at least asking that it be reduced to writing after the polygraph results were obtained.

*United States v. Span*, 75 F.3d 1383 (9th Cir. 1996)

Trial counsel was ineffective in failing to request a jury instruction on an applicable affirmative defense in this assault case; failing to object to the trial court’s substitute instruction; and failing to present available evidence as a foundation for the affirmative defense. In summary, trial counsel failed to present the excessive force defense to a charge of assaulting a federal officer, relying instead on a simple self-defense defense.

*Crotts v. Smith*, 73 F.3d 861 (9th Cir. 1996)

The defendant was tried in state court on a charge of assaulting a police officer. He had previously been convicted of a sexual offense. A witness to the assault on the police officer was asked by the prosecutor whether the defendant had told her that he had “just done ten years for killing a cop?” The prosecutor also asked the defendant, on cross-examination, whether he had told the witness that he was “wanted” for killing a cop. The prosecutor knew, in fact, that the defendant had never been convicted for such an offense. The defense attorney did not object. This was ineffective assistance of

counsel. Even if the defendant had made these boastful (but untruthful) statements to the witness, they were not admissible, because not probative of whether he assaulted the police officer in this case.

*Tomlin v. Myers*, 30 F.3d 1235 (9th Cir. 1994)

The petitioner’s trial counsel failed to challenge an out-of-court identification (because it was conducted without the benefit of counsel), as well as the in-court identification which may have been the product of the unlawful out-of-court identification. This was ineffective assistance of counsel, necessitating the granting of *habeas* relief.

*Sanders v. Ratelle*, 21 F.3d 1446 (9th Cir. 1994)

The defendant’s attorney was aware that the defendant’s brother had confessed to his mother that he was the person who killed the victim. Nevertheless, the attorney did not pursue this defense and did not call the brother to the stand, or seek to admit his out-of-court confession under the applicable state rule of evidence which would permit the introduction of a statement against interest.

*United States v. Swanson*, 943 F.2d 1070 (9th Cir. 1991)

Conceding during the closing argument that there was no reasonable doubt that the defendant robbed the bank was grossly ineffective – a total breakdown in the adversary system which required granting a new trial even without any inquiry into actual prejudice.

*Williamson v. Ward*, 110 F.3d 1508 (10th Cir. 1997)

Trial counsel was ineffective in failing to investigate and present to the jury the fact that prior to defendant’s trial, another individual had confessed to the murder and also in failing to investigate the defendant’s mental illness which might have explained his “confession” – his confession was that he “dreamed” that he had committed the murder. There was considerable evidence in support of the defendant’s mental illness. There was a reasonable probability that the defendant was tried while incompetent, and that his “dream confession” was a product of his mental illness. Counsel (who was blind) had his son sit near him during the trial and had instructed him to wrestle the defendant to the ground if he made any sudden movements toward him during the trial.

*United States v. Glover*, 97 F.3d 1345 (10th Cir. 1996)

Trial counsel was ineffective in failing to challenge whether the methamphetamine that was the subject of the defendant’s sentencing was “d” or “l” meth.

*Capps v. Sullivan*, 921 F.2d 260 (10th Cir. 1990)

The defendant testified, admitting every element of the offense of trafficking in heroin. There was evidence to support a defense of entrapment, but the attorney opted instead to go for jury nullification. The failure to request an entrapment instruction was ineffective assistance.

*United States v. Cronic*, 839 F.2d 1401 (10th Cir. 1988)

On remand from the United States Supreme Court which revamped the rules for gauging ineffective assistance of counsel, this case was again reversed by the Tenth Circuit on grounds that the attorney was ineffective. The attorney failed to assert a good faith defense in this mail fraud prosecution and

also failed to investigate the bank’s acceptance of security for the overdraft upon which this prosecution was based.

*Nichols v. Butler*, 953 F.2d 1550 (11th Cir. 1992)

Counsel threatened to withdraw from representing the defendant mid-trial if the defendant insisted on testifying. This amounted to ineffective assistance of counsel under the *United States v. Teague* standard.

*United States v. Teague*, 953 F.2d 1525 (11th Cir. 1992)

A defendant has the fundamental right to testify in his own defense. This may only be waived personally, not solely through counsel. Thus, if the attorney vetoes the defendant’s decision to testify, the defendant may challenge his conviction. After rehearing the case *en banc*, the Eleventh Circuit re-affirmed the principle that the defendant has a fundamental right to testify and that the right may not be unilaterally waived by his attorney. However, the facts in this case did not show that the defendant’s will was overborne. Rather, the attorney urged the defendant not to testify and the defendant agreed. Consequently, there was no ineffective assistance of counsel.

*Smelcher v. Alabama*, 947 F.2d 1472 (11th Cir. 1991)

Defendant’s trial attorney failed to object to the trial judge’s prohibition of any evidence that the rape victim had had prior sexual liaisons with the defendant. A hearing on the attorney’s ineffectiveness was required.

*Oyola v. Bowers*, 947 F.2d 928 (11th Cir. 1991)

Defendant’s trial counsel was ineffective in failing to object to a jury instruction which incorrectly set forth the elements of the offense of conviction.

*Thomas v. Harrelson*, 942 F.2d 1530 (11th Cir. 1991)

The proof at trial amounted to a constructive amendment of the indictment. The trial attorney failed to object to this variance and did not preserve the issue for appellate review. This was ineffective assistance of counsel.

*Hollis v. Davis*, 941 F.2d 1471 (11th Cir. 1991)

In 1959, the defendant was convicted of burglary. His sentence, which he was still serving in 1990, was 99 years. He was denied effective assistance of counsel based on his attorney’s failure to challenge the pervasive discrimination in both the grand and petit juries in the Alabama jurisdiction in 1959.

*Atkins v. Attorney General of Alabama*, 932 F.2d 1430 (11th Cir. 1991)

Trial counsel was ineffective in failing to object to the introduction of defendant’s fingerprint card which contained a notation of the defendant’s prior arrest.

*Nixon v. Newsome*, 888 F.2d 112 (11th Cir. 1989)

The defendant was denied effective assistance of counsel in light of his lawyer’s failure to cross-examine the only eyewitness to the murder with regard to her prior sworn testimony that it was not the defendant, but another person who shot the victim. The lawyer had the transcript of this prior testimony at counsel table but failed to introduce the prior inconsistent statements which would have been admissible as substantive evidence under Georgia law.

*Harrison v. Jones*, 880 F.2d 1279 (11th Cir. 1989)

Under Alabama law, a former plea of *nolo contendere* is not admissible to enhance the defendant’s sentence. The lawyer’s failure to object to such evidence at the sentencing of his client operated to deprive the defendant of effective assistance of counsel.

*Harding v. Davis*, 878 F.2d 1341 (11th Cir. 1989)

The trial judge directed a verdict of guilty against the defendant. The failure to object represents ineffective assistance even without a showing of prejudice.

*Chatom v. White*, 858 F.2d 1479 (11th Cir. 1988)

The Eleventh Circuit holds that the failure to object to the introduction of an “atomic absorption test” which reportedly demonstrated that an accomplice had not fired the murder weapon constituted ineffective assistance of counsel. Because the case against the defendant was entirely circumstantial, the test had the potential of conclusively establishing for the jury that the defendant, and not the accomplice, had fired the gun.

*Julius v. Johnson*, 840 F.2d 1533 (11th Cir. 1988)

Defense counsel was ineffective for failing to request a cautionary instruction regarding the admissibility of the defendant’s prior murder conviction during the guilt phase of his murder prosecution. This was harmless error in this case.

*Quartararo v. Fogg*, 679 F.Supp. 212 (E.D.N.Y. 1988)

Defense counsel was ineffective in failing to object to a whole range of hearsay evidence which the prosecutor introduced. Police officers were permitted to testify about what the defendant’s parents had opined about the truthfulness of their son and their belief that the defendant’s denials were false. The attorney also failed to object to the prosecutor’s closing argument which relied on this testimony. The Second Circuit affirmed: 849 F.2d 1467.