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Features

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Appellate Courts

"Defending Themselves?"

An Appellate Perspective on the Trial Attorneys' Understandable, but Misguided, Response to Claims of Ineffective Assistance of Counsel

Part One

One of Michigan's foremost experts on federal habeas corpus law and practice, and co-author of SADO's Defender Habeas Book, Marla McCowan offers observations on claims of ineffective assistance of counsel. This month in Part One: an appellate perspective on the issue. Next month: a useful list of successful claims. The Editor.

No matter what trial lawyers believe, most appellate attorneys do not enjoy raising claims of ineffective assistance of counsel on appeal. Such claims are difficult to plead, much less prove, and they are generally raised as a means to have the merits of an unpreserved issue reviewed on appeal. Inherently, the appellate attorney is saying trial counsel made a mistake. No one likes being told such a thing, even though everyone knows that everyone, from time to time, makes mistakes. But an understanding of that premise makes the task of contacting trial counsel no easier. Making matters worse is the trial attorney who immediately goes into a defensive posture in an attempt to frustrate the efforts of the attorney on appeal. Without trial counsel's assistance or insight, we appellate attorneys are often left to speculate as to what was going on at the trial level. We must either rely on our (mutual) client's memory or interpretation of the events, if any. Or, we must proceed in an absolute vacuum when the clients are just as clueless as the appellate attorney about trial counsel's failure to object to an error that occurred during the proceedings. In the event that it is not abundantly clear at this point why trial counsel should at least return our calls, please read on.

First things First, Why is the Appellate Attorney Calling?

Typically, the appellate attorney calls about an error that occurred during the pre-trial/trial/sentencing stage but there was no objection by counsel. Equally possible reasons for the call range from the not-terribly problematic (where an error occurred but the trial attorney objected on an incorrect legal ground) to the most severely problematic (where an obvious error occurred but trial counsel affirmatively agreed to the illegal procedure/improper admission of evidence/erroneous instruction, etc.). In any event, the reason for the call is that the error must be raised on appeal but it was not preserved by trial counsel, or worse, that trial counsel waived the error. When the error is significant, and especially if it is of constitutional magnitude, it is very likely that appellate counsel will be raising a separate claim of ineffective assistance of counsel to overcome the fact that the error is not preserved for appeal. Appellate attorneys must raise such a claim especially where there is the possibility that an unpreserved (or "procedurally defaulted") issue might someday be the subject of a federal habeas corpus petition. Indeed, in federal court, a petitioner must set forth "cause" and "prejudice" for procedurally defaulting a claim, and a very popular means of doing so is by way of claiming ineffective assistance of counsel. This point is further discussed in "Tips for Appellate Attorneys" infra.

Responding to the Appellate Attorney's Questions:

Inappropriate Response #1: Deflect Blame, Refuse to Cooperate.

This is an extreme example but worth exploring if for no other reason but to illustrate how much damage can be done when trial counsel refuses to cooperate with appellate counsel's investigation.

While reading the transcripts, the appellate attorney finds an obvious error that occurs in the jury's presence during trial. It is a significant error to which trial counsel asserts an intent to object if the error is not corrected and requests the ability to have a curative instruction provided to the jury if necessary. The appellate attorney anxiously reads the remaining transcripts but is perplexed to find no effort to make a formal objection and no mention whatsoever of a curative instruction by the end of the trial. The underlying/substantive error would be an issue for appeal but appears to be unpreserved. Appellate counsel therefore calls trial counsel to ascertain what happened. Trial counsel does not return that or subsequent follow-up calls. Appellate counsel is left with no choice but to raise not only the unpreserved error on appeal but also a claim of ineffective assistance of counsel for failing to preserve the issue. A remand for a Ginther[1] Hearing is ordered by the Court of Appeals and additional calls to trial counsel are made by both appellate counsel and the prosecutor in anticipation of the hearing. To the former client's appellate attorney, trial counsel is evasive and abrupt. To the prosecutor (who shares the information with defense counsel), trial counsel articulates a well thought-out and detailed "strategic" explanation for failing to object to the obvious error.

On the day of the hearing, appellate counsel arrives in the courtroom to find trial counsel seated with the prosecutor. Trial counsel approaches appellate counsel and hands him an overflowing banker's box of material described as his file that he requested. He then returns to his seat next to the prosecutor. Trial counsel is eventually called to the witness stand in connection with the hearing. Curious about trial counsel's newfound allegiance with the prosecutor, appellate counsel makes inquiry. The prosecutor's natural objection relates to relevance, and is sustained. By the end of the hearing, the trial court finds that counsel did not perform deficiently. Later, trial counsel tells appellate counsel that he knows of no legal obligation to return his calls.

The first problem with this scenario is that if trial counsel had provided appellate counsel with his "strategic" explanation in the first place, and assuming that explanation was plausible if not downright reasonable,[2] such information changes the entire complexion of the issue. To be sure, the issue itself and the subsequent hearing might have been avoided.

The bigger problem, of course, is counsel's lack of recognition of his ethical and professional responsibilities when confronted with the claim of ineffective assistance of counsel. There is no question that a trial attorney has an obligation to cooperate with an appellate attorney's investigation of a claim of ineffective assistance of counsel. "Refusal to cooperate with the former client's new attorney is not only contrary to the standards by which lawyers must govern themselves, that refusal is also contrary to the unspoken rule among all professionals embodied by the 'golden rule'." B. Michael Mears, "The Defense Attorney's Ethical Response to Ineffective Assistance of Counsel Claims," The Georgia Public Defenders Standards Council, March 2005, at p. 37.[3] The Rules of Professional Responsibility require that even after the representation has ended, that the duty of confidentiality continues. See generally Id. at 13-16, 26. See also Michigan Rules of Professional Conduct 1.6 (Confidentiality of Information). And it goes without saying that trial counsel should not go out of his way to harm his former client: "There is no rule or standard

which would allow the defense lawyer to act to the detriment or harm of the former client simply because an ineffective assistance claim has been made." Id at 37-38.

Related points to keep in mind from this example are that the client's file should be promptly turned over to successor counsel upon request. M.R.P.C. 1.16(d); see also Mears, supra at 26 ("The ownership of the file and the privileges attached to the file are not destroyed or waived by the filing of a claim of ineffective assistance of counsel.") Also, trial counsel must resist the urge to join forces with the prosecutor: "Defense counsel must remind himself or herself that the prosecutor's role is to ensure that the conviction is not overturned because of allegations of ineffective assistance of counsel; it is not to protect defense counsel." Id. at 18-19.

The trial attorney in this scenario clearly feels as though he is under attack. But in an effort to defend himself, he actually caused more harm than help. At the end of the day, the appellate attorney was not the only one left scratching his head about how the scenario unraveled itself. Instead, the client – the person with a potentially meritorious error that occurred during the course of his trial, which was unpreserved for purposes of appeal – is left to wonder why the person who was supposed to help him is now inexplicably going out of his way to circumvent his efforts for overturning his conviction and obtaining a new trial.

Inappropriate Response #2: "I'll Fall on My Sword"

The amiable trial lawyer is a welcome respite for appellate attorneys regularly ignored (or worse) by defensive trial lawyers subjected to a claim of ineffective assistance of counsel. The trial attorney in this scenario promptly turns over the file and offers a tremendous amount of information about the case. He graciously listens to the problem noted by the appellate attorney, credibly claims no memory of the situation, but happily offers to say whatever the appellate attorney wants in an effort to assist the former client, even if he is ultimately found ineffective. At the risk of sounding completely ungrateful, this response can be equally unhelpful to the appeal. The premise is well-intentioned. It is also certainly refreshing to work with a trial attorney willing to recognize that mistakes can happen. But the "whatever you want me to say" response does little to assist the fact-finder, especially if facts contradict a claim of deficient performance.

To take another extreme example,[4] a client is charged with multiple counts of murder based on various theories of a single person's death – in this case, premeditated murder and felony murder. Trial counsel presents a strong and well-supported defense of provocation and/or self-defense to the charges. At the conclusion of trial, counsel specifically requests that the jury be allowed to consider the lesser included offense of manslaughter to the premeditated murder charge. Counsel makes no similar request for the felony murder charge. The jury returns a verdict of manslaughter as to the (original) premeditated murder count, but felony murder (as charged) on the second count, having no lesser offenses from which to choose.

It would not be particularly helpful for this attorney to claim at a Ginther hearing that he did not know that there were lesser included offenses to a charge of felony murder. Such an admission obviates a presumption of sound trial "strategy" and on these facts would most likely constitute deficient performance. But it is not likely that an attorney who mounts a successful defense to the premeditated murder charge could be so inept when it came to the charge of felony murder. The better answer by the trial attorney – rather than trying to make up a dead-bang winner for the client on appeal – would be to just say he was not sure what happened, or that he simply made a mistake or failed to closely scrutinize the verdict form. Such a response is clearly possible, as mistakes regularly happen at trial. It also constitutes deficient performance, especially where there are facts in evidence to support the lesser offense instruction being given to the jury. And finally, the error prejudiced the client in light of the fact that for the identical death the jury opted to convict on the lesser charge when given the option to do so.

The Better, if Not "Only" Approach: Honesty, Candor, and Remembering the Ethical and Professional Requirements in these Cases

Mears explains that "[T]he only ethical and professional response allowed to a claim of ineffective assistance of counsel is complete honesty." Id. at 38. Indeed, the most credible trial lawyer's answer to the ultimate question posed by the appellate attorneys indicates that they don't know what happened, but nevertheless agree to work with the appellate attorney in an effort to piece together the problem in the event that a claim of ineffective assistance of counsel is necessary for the appeal.

To that end, it is critical for the trial attorney to:

(1) Continue to honor the duty of confidentiality owed to his former client and only reveal confidences to the extent that is

(2) necessary to defend against a claim of ineffective assistance of counsel. See generally, Mears, supra at 16-26; see also M.R.P.C. 1.6.

(3) Cooperate with successor counsel including but not limited to turning over the file to appellate attorney, which remains the property of the client. See generally, Mears, supra at 22-26; M.R.P.C. 1.16(d).

(4) Refrain from considering the former client as an adversary, in the absence of a civil claim of legal malpractice; see Mears, supra at 9-10.

(5) Remember that the duty not to harm the client continues even after the representation has concluded: "The defense lawyer, when facing a claim of ineffective assistance of counsel, has a duty not only to be honest and candid with the court, but the defense lawyer also has a continuing duty not to injure the client." Mears, supra at 26.

And finally,

(5) Realize that appellate counsel is interested in achieving a just result for his or her client on appeal by investigating every possible meritorious avenue for relief, and is by no means "targeting" the trial attorney for any reason other than trying to protect the mutual client's best interests.

Tips for Appellate Attorneys:

Having said all that, the fact remains that no one likes to make the call to the trial lawyer, for any reason, including completely innocuous reasons such as an attempt to locate something that is missing from the physical file. This is because even such simple requests are met with resistance when the assumption is that the appellate attorney is really calling about something else: that a claim of ineffective assistance of counsel is in the works. And this assumption is probably well founded, given that on a twice-weekly basis when opinions are released by the Court of Appeals there is at least one criminal appeal involving a claim of ineffective assistance of counsel. (At least, it seems that way.)

Some advice for approaching trial attorneys is as follows:

(1) **Make contact early** – many appellate attorneys have form letters that are automatically sent to trial counsel informing them that they have taken the case for appeal. These letters request the file and ask for the trial attorney's insight as to possible appellate issues. Even if not in letter form, a phone call shortly after taking the case goes a long way to make the introduction and establish a connection if something does need to be acquired later on without putting the trial attorney in a defensive posture from the outset. After all, if you explain that you just got the case and are in need of additional materials, how could you possibly be formulating the appellate issues yet?

(2) **Make contact regularly, if necessary** – obviously the key is being professional (and not something closer to stalking behavior) but if you really are trying to investigate a claim of ineffective assistance of counsel it is critical to check back in with an attorney – especially one who initially can not remember the problem you have posed. It goes without saying that when an attorney has a significant amount of time to consider his error, a follow up call before a hearing needs to be made in preparation for the actual testimony.

(3) **Be completely honest about the issue that you are investigating for appeal** – it really is best to be straightforward and ask about the error if you want a direct response and if you want to be able to competently decide whether to raise the issue on appeal. In a significant amount of cases, the reality is that there was a strategic reason for counsel's actions at trial.

Having said all of this, claims of ineffective assistance of counsel are absolutely necessary if it means that you can overcome an unpreserved trial error for appeal. As mentioned in the beginning of this article, unpreserved appellate issues are generally considered "procedurally defaulted" for purposes of federal habeas corpus review. In order to be considered as "cause" for overcoming a procedural default, a claim of ineffective assistance of counsel must itself be presented as an independent claim for the state courts to adjudicate prior to federal habeas corpus proceedings. See Murray v Carrier, 477 U.S. 478 (1986). While these procedural prerequisites are not truly the subject of the instant article, they are worth noting in passing if for nothing else than to consider the sheer complexity that the problem of a defaulted claim presents for the appeal and beyond when counsel is "cause" for the default. See e.g., Edwards v Carpenter, 529 US 446, 454 (2000) ("… few lawyers, let alone unrepresented state prisoners, will readily understand it." Breyer, J. concurring). For a full discussion of these concepts, see Chapter 2 of the Defender Habeas Book.

Less difficult to comprehend are the now-familiar requirements that constitute a claim of ineffective assistance of counsel. To raise a successful claim, it must be established that counsel's performance was deficient, and that the deficient performance prejudiced the defendant (i.e., but for counsel's deficient performance, the result of the proceedings would have been different.) Strickland v Washington, 466 US 668, 694 (1984). In a companion case to Strickland, the United States Supreme Court identified three types of cases where the prejudice prong of the inquiry is presumed: where counsel is absent during a critical stage of the proceedings, where counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, or where counsel is operating under a conflict of interest. United States v Cronic, 466 US 648 (1984).

The ability to raise a successful claim is difficult, to be sure. But enough habeas corpus petitions have been granted in the past few years to warrant close attention to the procedural requirements mentioned above so as to preserve claims of ineffective assistance of counsel during the earliest stages of appeal.

Next month: a list of Michigan-based cases where habeas corpus relief was granted for deficient performance on the part of trial counsel.

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End Notes

1. People v Ginther, 390 Mich 436 (1973).

2. "However, `the mere incantation of' strategy" does not insulate attorney behavior from review.'" Fisher v Gibson, 282 F3d 1283, 1296 (10th Cir. 2002) quoting Breechen v Reynolds, 41 F3d 1343, 1369 (10th Cir. 1994).

3. This comprehensive and extremely useful article on the subject can be found at: http://www.gpdsc.org/docs/resources-publications-ineffective_assistance.pdf.

4. While the examples in this article are partially based on actual events, considerable dramatic license has been taken for purposes of illustrating problems posed by counsel's conduct.

From Our Readers: New Reasonable Doubt Instruction in Circulation

Judges, criminal defense attorneys and prosecutors are reacting to an alternative reasonable doubt jury instruction being circulated for use in Washtenaw County. In late April, Judge Donald Shelton sent the alternative around, indicating that "Criminal Division judges have been interested in having a better instruction concerning reasonable doubt, fueled in part by continued jury questions and requests for a better definition of the phrase." The charge was discussed at a recent Bench Bar Conference for Washtenaw County practitioners. Those wishing to weigh in may contact the Bar's Criminal Law Section Chairs, Orlando Simon and Robert Keyes.

The alternative instruction reads:

CJI 3.2 revised
(burden of proof – reasonable doubt):

A person accused of a crime is presumed to be innocent. This means that you must start with the presumption that the defendant is innocent. This presumption continues throughout the trial and entitles the defendant to a verdict of not guilty unless you are satisfied beyond a reasonable doubt that he is guilty.

Every crime is made up of parts called elements. The prosecutor must prove each element of the crime beyond a reasonable doubt. The defendant is not required to prove his innocence or to do anything. If you find that the prosecutor has not proven every element beyond a reasonable doubt, then you must find the defendant not guilty.

How do you decide whether or not the defendant is guilty? The prosecution must prove that the defendant is guilty. The defendant does not have to prove that he/she is innocent. In a criminal trial the task of proving that defendants are guilty is always on the prosecution. How does the prosecution prove that the defendant is guilty? The answer is - by making you sure of it. Nothing less than that will do. If after considering all the evidence, you are sure that the defendant is guilty, you must return a verdict of guilty. If you are not sure that the defendant is guilty, your verdict must be not guilty.

The law uses the term "proof beyond a reasonable doubt" to tell you how convincing the evidence of guilt must be to permit a verdict of guilty. The law recognizes that, in dealing with human affairs, there are very few things in this world that we know with absolute certainty. Therefore the law does not require the prosecution to prove a defendant guilty beyond all possible doubt. On the other hand, it is not sufficient to prove that the defendant is probably guilty. In a criminal case, the proof of guilt must be stronger than that. It must be beyond reasonable doubt. A reasonable doubt is an honest doubt of the defendant's

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Part Two

One of Michigan's foremost experts on federal habeas corpus law and practice, and co-author of SADO's Defender Habeas Book, Marla McCowan offers observations on claims of ineffective assistance of counsel. This month: habeas relief based on IAC claims.

The ability to raise a successful claim is difficult, to be sure. But enough habeas corpus petitions have been granted in the past few years to warrant close attention to the procedural requirements mentioned in Part One of the series, so as to preserve claims of ineffective assistance of counsel during the earliest stages of appeal.

The following is a categorized list of Michigan-based cases where habeas corpus relief was granted for **deficient performance** on the part of trial counsel:

Plea bargains, including failure to adequately relay plea bargain:

McBroom v. Warren, 542 F. Supp. 2d 730 (E. D. Mich. 2008) (original counsel rendered deficient perfor-mance by failing to communicate the plea offer prior to trial; successor counsel rendered deficient performance by misinforming petitioner of ability to have plea bargain reinstated as a result of original counsel's deficient performance).

Satterlee v. Wolfenbarger, 453 F.3d 362 (6th Cir. 2006) *cert. denied* 127 S. Ct. 1832 (2007) (failure to advise petitioner of plea offer made on the morning of trial).

Dando v. Yukins, 461 F.3d 791 (6th Cir. 2006) (deficient performance for advising petitioner to plead guilty without investigating potential defense of battered spouse syndrome/duress).

Maples v. Stegall, 340 F.3d 433 (6th Cir. 2003) (failure to advise petitioner that guilty plea waived speedy trial claim on appeal).

Lyons v. Jackson, 299 F.3d 588 (6th Cir. 2002) (failure to advise juvenile defendant that the state could appeal juvenile sentence constituted deficient performance where petitioner established that he would not have pled guilty to first degree murder had he known of possibility of appeal). *See also* *Miller v. Straub*, 299 F.3d 570 (6th Cir. 2002) (same, affirming *Haynes v. Burke*, 115 F. Supp. 2d 813 (E. D. Mich. 2000).

Dedvukovic v. Martin, 36 Fed. Appx. 795 (6th Cir. Docket No. 00-2306, March 22, 2002) (failure to advise of consequences of not accepting guilty plea to reduced charges and correlating risks of proceeding to trial as charged).

Magana v. Hofbauer, 263 F.3d 542 (6th Cir. 2001) (counsel's advice to reject plea offer based on counsel's misunderstanding of the terms of the sentence constituted deficient performance where there was a reasonable probability that petitioner would have accepted the plea had it been accurately explained).

Failure to investigate witnesses/prepare for trial:

Ramonez v. Berghuis, 490 F.3d 482 (6th Cir. 2007) (failure to investigate witnesses identified by the petitioner to corroborate, amongst other points, the fact that petitioner charged with crimes including home invasion did not force his way into the complaining witnesses home).

Avery v. Prelesnik, -- F. Supp. 2d ---; 2007 WL 3346520; 2007 US Dist LEXIS 82966 (W. D. Mich. 2007) (failure to investigate, contact or interview potential alibi witnesses in a murder trial).

Poindexter v. Booker, 2007 WL 1556671; 2007 US Dist LEXIS 38928 (E. D. Mich. Docket No. 05-71607, May 30, 2007) (failure to interview or produce alibi witnesses at trial).

Tucker v. Cason, 2007 WL 3121589; 2007 US Dist LEXIS 78329 (E. D. Mich. Docket No. 03-10254, October 23, 2007) (failure to investigate automobile accident as alternate source of pelvic injury to complaining witness in a criminal sexual conduct case).

Stewart v. Wolfenbarger, 468 F.3d 338 (6th Cir. 2006) (failure to provide proper alibi notice and failure to investigate potential witnesses for trial).

Smith v. Lafler, 175 Fed. Appx. 1 (6th Cir. Docket No. 04-1353, March 15, 2006) (failure to investigate complaining witness' stay at a psychiatric facility).

Towns v. Smith, 395 F.3d 251 (6th Cir. 2005) (failure to make contact with or investigate potentially important witnesses made known to counsel prior to trial).

Higgins v. Renico, 362 F. Supp. 2d 904 (E. D. Mich. 2005) aff'd 470 F.3d 624 (6th Cir. 2006) (failure to cross examine state's key witness at trial due to lack of preparation).

Failure to object to prosecutorial misconduct:

Hall v. Vasbinder, 2008 US Dist. LEXIS 17560 (E. D. Mich. Docket No. 04-73548, adopting magistrate's report and recommendation) (failure to object to testimony and prosecutor's repeated references to petitioner's silence).

Smith v. Jones, 2007 WL 2873931; 2007 US Dist LEXIS 70721 (E. D. Mich. Docket No. 05-72971, September 25, 2007) (failure to object to ongoing misconduct throughout trial and failure to request curative instruction).

Hanna v. Price, 245 Fed. Appx. 538 (6th Cir. Docket No. 06-1019, August 27, 2007) (failure to object to prosecutorial misconduct in the form of disparagement of insanity defense during closing argument).

Washington v. Hofbauer, 228 F.3d 689 (6th Cir. 2000) (failure to object to prosecutorial misconduct where the prosecutor improperly emphasized the bad character of the petitioner and argued facts not in evidence during closing argument).

Trial errors:

Goldy v. Tierney, 2008 US Dist LEXIS 32000 (E. D. Mich. Docket No. 06-10546, April 18, 2008) (failure to adequately object to damaging impeachment evidence and failure to object to an insufficient jury instruction regarding the element of intent).

Ege v. Yukins, 485 F.3d 364 (6th Cir. 2007) (failure to object to the state expert's statistical opinion on bite mark evidence in the absence of a proper foundation for the admissibility of the evidence).

Davis v. Jones, 2007 WL 2710404; 2007 US Dist LEXIS 67630 (E. D. Mich. Docket No. 03-73306, September 13, 2007) (failure to move to suppress statement on pre-arraignment delay theory).

Carter v. Wolfenbarger, 2006 WL 3446205 (no LEXIS cite available) (E. D. Mich. Docket No. 04-74564, November 27, 2006) (failure to object to court's instruction to jury that they could not obtain transcripts of critical witnesses testimony during deliberation).

Ferensic v. Birkett, 451 F. Supp. 2d 874 (E. D. Mich. 2006) (failure to secure the presence of expert witnesses at trial) *affirmed on other grounds*, 501 F.3d 469 (6th Cir. 2007).

Wade v. White, 368 F. Supp. 2d 695 (E. D. Mich. 2005) (failure to object to irrelevant and highly prejudicial testimony of unrelated shooting of key witness for the state, and failure to object during state's closing argument regarding that evidence).

Tucker v. Renico, 317 F. Supp. 2d 766 (E. D. Mich. 2004) (failure to introduce evidence including long term relationship with complaining witness in criminal sexual conduct and breaking and entering case which would have supported defense of consent and/or negated elements of crimes).

Northrop v. Trippett, 265 F.3d 372 (6th Cir. 2001) (failure to move to suppress evidence obtained during an illegal search).

Gonzalez v. Phillips, 195 F. Supp. 2d 893 (E. D. Mich. 2001) (failure to obtain Spanish-speaking interpreter to communicate and translate for petitioner at trial constituted deficient performance where petitioner advised counsel that he did not understand the proceedings, was unable to confront the witnesses against him, and where he would have testified at trial with the assistance of an interpreter).

Appellate errors:

Tucker v. Renico, 317 F. Supp. 2d 766 (E. D. Mich. 2004) (appellate counsel's failure to raise in direct appeal a claim of ineffective assistance of trial counsel for failing to introduce evidence at trial in support of defense constituted cause for procedural default of underlying claim of ineffective assistance of trial counsel).

McFarland v. Yukins, 356 F. 3d 688 (6th Cir. 2004) (appellate counsel erred in failing to raise conflict of interest issue on direct appeal for trial counsel's dual representation with co-defendant/petitioner's daughter).

Caver v. Straub, 349 F.3d 340 (6th Cir. 2003) (appellate counsel's failure to raise in direct appeal that petitioner was deprived of counsel during critical stage of proceedings/jury reinstruction constituted deficient performance on appeal, given strength of underlying issue).

The following Michigan cases involve habeas relief granted for ineffective assistance of counsel where **prejudice was presumed**:

Absence of counsel:

Hann v. Harry, 2008 US Dist LEXIS 41483 (E. D. Mich. Docket No. 06-13478, May 27, 2008) (petitioner was deprived of counsel in his first-tier appeal from his plea-based conviction where the originally-appointed appellate attorney improperly withdrew from the representation by not filing an *Anders* brief and where the state appellate courts failed to appoint substitute counsel contrary to *Halbert v. Michigan*, 545 U.S. 605 (2005).

Hereford v. Warren, 486 F. Supp. 2d 659 (E. D. Mich. 2007) (petitioner was deprived of right to counsel where counsel was absent during mid-trial side bar conference between prosecutor, co-defendant's counsel, and judge relating to state witness' testimony).

Cottenham v. Jamrog, 2007 WL 2382359; 2007 FED App 0605N (6th Cir. Docket No. 04-1614, August 21, 2007) (petitioner was denied right to counsel of his choice on appeal from his convictions where petitioner desired his appointed counsel to stay on his case despite the fact that his family retained counsel for purposes of appeal. Appointed counsel improperly withdrew from case without consultation with or approval of petitioner prior to filing the motion to withdraw as counsel so that retained counsel could proceed with appeal).

Cooper v. Luoma, 2006 WL 3454793; 2006 US Dist LEXIS 89357 (E. D. Mich. Docket No. 04-

74790, November 29, 2006) (retained appellate counsel's failure to file a timely appeal deprived petitioner of counsel in his appeal of right).

David v. Birkett, 2006 WL 2660763; 2006 US Dist LEXIS 66058 (E. D. Mich. Docket No. 05-71519, September 15, 2006) (appellate counsel's failure to properly move to withdraw from case without filing an *Anders* brief and without response by petitioner prior to filing motion to withdraw deprived him of right to counsel on appeal from plea based conviction)

Hatchett v. Kapture, 109 Fed. Appx. 34 (6th Cir. Docket Nos. 03-1421 and 03-1501, August 19, 2004) (counsel's failure to file a notice of appeal was deficient performance without a need for demonstrating prejudice in the form of meritorious issues on appeal).

Ward v. Wolfenbarger, 323 F. Supp. 2d 818 (E. D. Mich. 2004) (trial court's failure to advise petitioner of his appellate rights including right to counsel on appeal deprived petitioner of his right to appellate counsel).

Caver v. Straub, 349 F.3d 340 (6th Cir. 2003) (absence of counsel during jury reinstruction with new/supplemental information to jury deprived petitioner of counsel during a critical stage of the proceedings).

French v. Jones, 332 F.3d 430 (6th Cir. 2003) (absence of counsel during jury reinstruction containing supplemental instruction for a deadlocked jury).

Mitchell v. Mason, 325 F.3d 732 (6th Cir. 2003) (absence of counsel during critical pre-trial period of proceedings due to counsel's suspension from the practice of law until the day that trial began deprived petitioner of consultation with counsel and deprived counsel of ability to investigate case).

Frazier v. Berghuis, 2003 WL 25195212 (no LEXIS cite available) (E. D. Mich. Docket No. 02-71741, August 6, 2003) (counsel's abandonment of petitioner during police interrogation, which produced incriminating statements, tainted entire trial).

Not functioning as counsel:

Benoit v. Bock, 237 F. Supp. 2d 804 (E. D. Mich. 2003) (failure to diligently pursue appeal of right due to payment dispute causing dismissal of appeal).

Gonzalez v. Phillips, 195 F. Supp. 2d 893 (E. D. Mich. 2001) (failure to obtain Spanish-speaking interpreter to communicate with client at trial deprived petitioner of his right to communication and/or a meaningful attorney-client relationship during the proceedings).

Conflict of Interest:

Stradwick v. Howe, 2007 WL 1267529; 2007 US Dist LEXIS 31414 (E. D. Mich. Docket No. 06-10020, April 30, 2007) (conflict of interest where counsel represented both petitioner and co-defendant at preliminary examination, which adversely affected the defense even though separate counsel was appointed at trial where key state's witness was unavailable to testify at trial and preliminary examination testimony was used instead, depriving successor counsel the opportunity to effectively cross-examine the witness).

McFarland v. Yukins, 356 F. 3d 688 (6th Cir. 2004) (trial court did not adequately address concerns expressed by petitioner as to joint representation with co-defendant/petitioner's daughter).

Robinson v. Stegall, 343 F. Supp. 2d 626 (E. D. Mich. 2004) (representation of petitioner and his co-defendant by same attorney and attorneys from the same firm created a conflict of interest that adversely affected counsel's performance on the facts of the case and which effectively deprived petitioner of his right to counsel and caused petitioner to decline to testify in his own defense in the absence of conflict-free counsel).

These cases make it clear that appellate attorneys do a tremendous disservice to their clients by shying away from raising a claim of ineffective assistance of counsel at trial. In many cases such claims have provided relief for otherwise unpreserved appellate issues. That said, a claim of ineffective assistance of counsel must never be taken lightly and should be investigated to the fullest extent possible before being raised on appeal. However, when trial counsel is uncooperative and the errors appear strong, a prudent appellate practitioner really has no choice but to go forward with a claim, with or without the trial attorney's insight.

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