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Appealing Ineffective Assistance of Counsel

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Introduction

The Sixth Amendment of the Constitution guarantees a criminal defendant the assistance of counsel. This guarantee has been described by the United States Supreme Court as "the most pervasive for it affects [a defendant's] ability to assert any other rights he may have." *Brescia v. New Jersey*, 417 U.S. 921 (1974) (quoting *Schaefer, Federalism and State Criminal Procedure*, 70 Harv. L. Rev. 1 (1956)). The constitutional right to counsel has been interpreted to mean a right to effective assistance of counsel. Because of the crucial nature of this right, the issue of whether a defendant received effective assistance of counsel is a topic often litigated in criminal appeals. The Supreme Court provided a two prong test that a defendant must show in order to prove ineffective assistance of counsel. The first prong requires that a defendant show that counsel's performance was deficient. In addition to this showing, a defendant must also show this deficient performance prejudiced his defense.

This web research guide is designed to serve as an outline of various research tools available, from a defense counsel perspective, to begin preparations for an appeal based on ineffective assistance of counsel. The information in this website is meant to direct users to a variety of resources available in answering the questions, when is counsel's performance deficient and when does this deficiency prejudice a defense.

About the Author

Constance Stansell is enthusiastically awaiting her graduation date from Georgia State University College of Law. At the time this website was created*, Connie was a third year law student, anticipating a graduation date in May 2006. She has a great interest in Criminal Litigation and Criminal Appeals work. Prior to entering law school, Connie resided in Orlando, Florida. She has a B.A. in Sociology from the University of Central Florida. Her work experience includes working in the hospitality field, coordinating conferences and a brief stint as a child welfare investigator. She hopes you find the information in this website both useful and informative. This website was created on November 15, 2005.

Disclaimer

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Primary Sources

Constitutional Provisions

Constitutional provisions

[Cornell University Law School](#) provides constitutional text with annotations to Supreme Court decisions online.

[U.S. Const. amend. VI](#). "In all Criminal prosecutions, the accused shall enjoy the right...to have the assistance of counsel for his defense."
[U.S. Const. amend. XIV](#). The Sixth Amendment guarantee of the assistance of counsel is one of the fundamental and essential rights made obligatory upon the states by the Fourteenth Amendment. *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L.Ed.2d 799 (1963).

Georgia Constitutional Provisions

Georgia Constitutional Provisions

The University of Georgia provides the [Georgia Constitution](#) online.

[Ga. Const. Art. I, § I, Para. XIV](#). "Every person charged with an offense against the laws of this state shall have the privilege and benefit of counsel..."

Related Statutes

Georgia code is available on the [Georgia General Assembly Website](#).

[O.C.G.A. § 15-11-6](#) Right to Counsel in Juvenile Proceedings.

Georgia has specifically codified the right to counsel in juvenile proceedings.

Supreme Court Cases

[Cornell University Law School](#) provides a searchable database of Supreme Court decisions since 1990. You may search by party, author or topic. [LexisONE](#) provides a free case search for all Supreme Court decisions since 1790.

Powell v. Alabama, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932).

This is the famous case of the "Scottsboro boys." Nine black teenage boys were alleged to have gang raped two white women. Information on the story and the inadequate defense can be found on the [University Of Missouri-Kansas City Website](#). [Although the boys were represented at trial by counsel, counsel was given no time to investigate the charges because the crime was rushed to trial. The Supreme Court for the first time recognized that counsel can be so ineffective as to be equivalent to a denial of the right to counsel, holding "defendants were not accorded the right of counsel in any substantial sense".](#)

Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L.Ed.2d 799 (1963).

This is a right to counsel case. Gideon was charged with a felony in the State of Florida. He could not afford to hire an attorney, but Florida law only provided appointed counsel in capital cases. Gideon appealed and the U.S. Supreme Court found that the right to counsel was a fundamental and essential right. Therefore, the 14th Amendment of the US Constitution incorporated this right and obligated the state to provide all criminal defendants the right to counsel. The judgment denying Gideon's habeas petition was reversed and the case was remanded.

Argersinger v. Hamlin, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972).

This case extended the right of appointed counsel to any case in which imprisonment can be imposed. Again this case involved a defendant in Florida who was not appointed representation. Florida law only provided appointed counsel in cases punishable by 6-months or more imprisonment. The defendant in this case was convicted of a petty offense and sentenced to 90 days in jail. The Supreme Court reversed the decision of the Florida Supreme Court.

Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L.E.2d 674 (1984).

This is the landmark Supreme Court Case cited in all briefs arguing ineffective assistance of counsel. The Supreme Court set forth two factors that must be proven before a case will be overturned on appeal due to ineffective assistance of counsel. A defendant must show: (1) that the counsel failed to provide reasonably effective assistance (deficient performance) and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, the results would have been different (prejudice).

Georgia Court Cases Finding Ineffective Assistance of Counsel

[The State of Georgia](#) provides a searchable database of Georgia Appellate Court opinions since 1997. For Recent opinions visit the [Supreme Court of Georgia website](#). [LexisONE](#) provides free access to Georgia Appellate Court opinions decided within the last five years. [Law Skills](#) provides free access to Georgia Cases between 1950 and 2001 with no registration requirements.

Deficient Performance

Failure to Request Jury Instructions on Lesser Included Offenses

Wadley v. State, 258 Ga. 465, 369 S.E.2d 734 (1988).

Failure to Move for Dismissal of Criminal Charges Pursuant to a Statutory Speedy Trial Demand

Sloan v. Sanders, 271 Ga. 299, 519 S.E.2d 219 (1999).

Failure to File a Timely Demurrer to a fatally defective indictment

Polk v. State, A05A1536 (Ga. Ct. App. 2005).

Failure to obtain an independent psychiatric evaluation

Curry v. Zant, 258 Ga. 527, 371 S.E.2d 647 (1988).

Misadvising the client as to the effects of a plea

Rollins v. State, 277 Ga. 488, 591 S.E.2d 796 (2004). Trial Counsel wrongly advised client that a plea of nolo contendere would not effect her ability to become a lawyer or on her immigration status. Rollins was delayed admission to the bar and faced deportation proceedings.

Smith v. Williams, 277 Ga. 778, 596 S.E.2d 112 (2004). Trial Counsel advised defendant that he would only be required to serve 5 years of a 15 year sentence upon entering a guilty plea. Trial Counsel was not aware that a recent change required that defendant's serve 90% of their sentence. Under the new rule defendant was required to serve 13 ½ years of his sentence.

Evoking Racial Prejudice

Kornegay v. State, 174 Ga. App. 279, 329 S.E.2d 601 (1985).

Failure to Object or File a Motion to Suppress Prejudicial Evidence

Collier v. State, 266 Ga. App. 762, 598 S.E.2d 373 (2004). Trial counsel's performance is deficient when she fails to move to suppress blood and urine samples that were taken without the defendant's consent.

Joncamlae v. State, 267 Ga. App. 214, 598 S.E.2d 923, (2004). Trial counsel's performance is deficient when she fails to object and move for mistrial when eyewitnesses testify at trial that the prosecutor showed them a photograph of defendant before trial.

Orr v. State, 262 Ga. App. 125, 584 S.E.2d 720 (2003). Trial counsel's performance is deficient when she fails to object and move for a mistrial when the investigating officer in a statutory rape case testifies as to the victim's truthfulness.

Mason v. State, 274 Ga. 79, 548 S.E.2d 298 (2001). Trial counsel's performance is deficient when she fails to object to improper argument about a defendant's future dangerousness.

W. v. Waters, 272 Ga. 591, 533 S.E.2d 88 (2000). Trial counsel's performance is deficient when she fails to object to a prior conviction presented in aggravation of sentence without timely notice. Defendant is prejudiced by receiving an enhanced sentence.

Bryant v. State, 204 Ga. App. 856, 420 S.E.2d 801 (1992). Trial counsel's performance is deficient when he fails to object to character evidence when the State did not provide notice of the intent to present evidence of similar transactions as required by Ga. Unif. Super. Ct. Rule 31.3.

Failure to Present a Valid Defense

Guzman v. State, 260 Ga. App. 689, 580 S.E.2d 654 (2003). Failure to present medical evidence that a person did not have the mental capacity to distinguish between right and wrong is ineffective assistance of counsel when Georgia statute provides that under these conditions a defendant shall not be found guilty of a crime.

Failure to Advise Client an Offer to Plea

Lloyd v. State, 258 Ga. 645, 373 S.E.2d 1 (1988). Trial Counsel's performance is deficient when she fails to communicate an offer to plead guilty. Prejudice is shown through proof that defendant would have accepted the plea.

Conflict of Interest

Ellis v. State, 272 Ga. 763 (2000). A deficient performance is shown through proof of an actual conflict of interest. Counsel continued to represent two defendants after learning that they relied upon inconsistent versions of their defense of innocent presence. Prejudice is shown when the conflict adversely affects performance. Here, defense counsel failed to pursue the possibility of a more favorable plea bargain on behalf of one co-defendant in exchange for his testimony against the other.

Prejudice to the Defendant

Conflict of Interest

Tarwater v. State, 259 Ga. 516 (1989). Deficient performance is shown through a conflict of interest, Counsel represented three co-defendants. A plea was negotiated that required that all three defendants had to plead guilty or none could. Prejudice existed because counsel could not negotiate a bargain for one client without jeopardizing another.

Evidence of Little Investigation

Wharton v. Jones, 248 Ga. 265 (1981). An attorney with little experience was notified of a case for the first time on the day of the plea. Counsel then met with the client briefly before the plea. The Court held that the performance was deficient because there could not be an adequate investigation. This deficiency is ineffective assistance of counsel and renders a plea involuntary.

Heyward v. Humphrey, 277 Ga. 565, 592 S.E.2d 660 (2004). The record demonstrated counsel's deficiency when he became angry with the defendant after denying his guilt when the judge questioned defendant before entering a plea. The attorney and client then conferred privately and defendant entered a guilty plea. This exchange draws the validity of the plea into question. Shortly before the plea arrangement, trial counsel learned that a State witness had revealed a valid justification defense. Defendant was not made aware of this statement. Trial counsel's deficiency prejudiced the defendant because there was a reasonable probability that, had Heyward been advised of the serious problems with the State's case against him, he would have insisted on going to trial.

McArver v. State, 114 Ga. 514, 40 SE 779 (1902); *Hughes v. State*, 168 Ga. App. 413, 309 S.E.2d 409 (1983). Trial Counsel entered the case on the day of trial.

Weak Evidence

Richardson v. State, 189 Ga. App. 113, 375 S.E.2d 59 (1988). Since the evidence against the defendant was weak, defendant was

prejudiced.

Wilson v. State, 199 Ga. App. 900, 406 S.E.2d 293 (1991). Trial counsel's performance was deficient because she had no strategy in picking a jury, she did not cross-examine the victims, the record shows she was confused about evidentiary rules, and she failed to impeach certain witnesses. Prejudice was shown because the evidence was not overwhelming.

Unnecessary Waste of Peremptory Strikes

Fortson v. State, 277 Ga. 164, 587 S.E.2d 39 (2003). Attorney used a peremptory strike against a jury member already stricken for cause. Court held that the unnecessary waste of the peremptory strike prejudiced defendant.

Procedural Bars

Georgia requires that an ineffectiveness claim must be raised "at the earliest practicable moment." Therefore, a claim must be raised at the motion for new trial. Failure to seize that opportunity is a procedural bar to raising the issue at a later time. *Glover v. State*, 266 Ga. 183, 465 S.E.2d 659 (1996). If the motion for new trial has already been decided when appellate counsel is appointed, the motion for new trial is properly raised for the first time on appeal. *Holland v. State*, 240 Ga. App. 169, 523 S.E.2d 33 (1999).

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Secondary Sources

Books & Treatises

These books are quick and easy resources to keep on hand for review. These books serve to keep counsel up to date on Georgia's criminal case law. Both books provide chapters specifically addressing the Right to Counsel and Effective Assistance of Counsel. You can find these books at the Georgia State Law Library. You may also expect to find current editions behind the bench of most Georgia Criminal Court Judges.

Jack Goger, *Daniel's Georgia Criminal Trial Practice* (Thomson/West 2003).
(Call No: KFG575.D36)

Donald F. Samuel, *Georgia Criminal Law Case Finder* (Danvers, MA: LexisNexis Matthew Bender 2004).
(Call No: KFG561.A57 S26 2004)

American Law Reports

Gregory G. Sarno, *Modern Status of Rules and Standards in State Courts as to Adequacy of Defense Counsel's Representation of Criminal Client*, 2 A.L.R.4th 27 (2005).
(Call No: KF132 .A522)

Legal Encyclopedia

21A Am. Jur. 2d *Criminal Law* §§ 1223 - 1228 (2005).
The article provides a large source of information on the definition of "assistance of counsel as ineffective."

Law Review Articles

56 Mercer L. Rev. 153 (2004). *

Mercer Law Review publishes an annual survey of Georgia Law each fall. Each fall Mercer reviews important cases in Georgia criminal law. These articles have generally included the latest developments in effective assistance of counsel. Call no: .M554 .L415

44 Mercer L. Rev. 1143 (1993).*

Mercer Law Review publishes an annual eleventh circuit survey each summer. Included in this edition are opinions on a variety of criminal constitutional law cases. Call no: .M554 .L415

*[Mercer University School of Law](#) has a limited number of journals available online.

American Bar Association Publications

The US Supreme Court often quotes ABA standards in analyzing ineffective assistance of counsel cases. See *Wiggins v. Smith*, 539 U.S. 510, 123 S. Ct. 2527, 156 L.E.2d 471 (2003); *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.E.2d 674 (1984).

ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. ed. 2003). For an online copy:
http://www.capdefnet.org/pdf_library/standards1.pdf

ABA Standards for Criminal Justice: Prosecution Function and Defense Function (3d ed. 1993). For an online copy:
http://www.abanet.org/crimjust/standards/dfunc_toc.html

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Computerized Research

Capital Defense Network

This website lists cases on point to various constitutional issues. Although this site primarily focuses upon death penalty defense, many of the cases are applicable to all criminal defense proceedings. Specifically, you will find a summary of all published successful ineffective assistance of counsel claims.

Law Skills

Law Skills allows free access to Georgia Case Law and Georgia code. Currently, the database includes cases between 1950 and 2001. The search features are limited. You can browse the database by selecting the year of the case you need and then you will be directed to an alphabetical list of all cases from that year. Additionally, Google provides a search engine that allows you to search the entire website. If you know exactly what you are looking for, this is a great resource. Once you select a case, you can view the full text. An added bonus is that at the end of each case is a list of cases that have cited the selected case.

FindLaw

[A collection of available free resources for legal research. FindLaw provides links to a variety of free legal resources. FindLaw claims to have the most comprehensive set of legal resources on the Internet. Of course, FindLaw is only as good as the websites to which it directs you.](#)

LexisNexis and Westlaw

LexisNexis and Westlaw are two fee based services with extensive, up to date information. Both provide numerous unique features. Unless you are footing the bill, you cannot help but fall in love. These services provide great searching features and most importantly allow you to quickly determine whether a case is still good law or whether a more recent decision has overturned the holding in the case.

[Westlaw](#)

A special feature to Westlaw allows you to search by key number. By using Westlaw key number [110k641.13](#), you can be connected to all cases regarding the topic of Adequacy of Representation for the accused in a Criminal Trial. You can then further narrow your topic. West has this same feature available in print, so check your local law library.

[LexisNexis](#)

LexisNexis allows you to find cases quickly through a feature titled search advisor. Once you enter search advisor you can narrow your topic: Click on (1) Criminal Law & Procedure, (2) Counsel, and (3) Effective Assistance. From here LexisNexis allows you to further narrow your topic depending on the specific facts of your case, choose from one of 6 topics: pretrial, plea, trial, sentencing, appeals or tests. From this point you can receive all cases within the jurisdiction of your choice. A suggested way to further narrow the topic is by entering the following search terms" reverse! w/s convict! This search attempts to find cases where the court reversed the conviction based upon ineffective assistance of counsel.

CASEMAKER

State Bar of Georgia members may conduct free web-based research. CASEMAKER allows users to search codes, rules and case law. Although the ease of searching does not compare to a high quality fee based service, the capabilities are as equal to many of the more affordable fee based databases. Additionally, at this time the service is continually upgrading to allow for greater ease of service.

Appellate.net

Appellate.net provides a large variety of resources on the Supreme Court and Appellate Practice. Here you can find a variety of briefs according to subject topic. You can also listen to the oral arguments. Interesting way to blow an afternoon.

Hieros Gamos

This is another website full of links to various Internet resources. Particularly of interest may be the variety of international resources.

LexisONE

Provides free access to federal and state cases within the last five years and Supreme Court cases since 1790. This cite does require registration in order to access content. For a wider access of resources, LexisONE offers daily, weekly and monthly rates.

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Criminal Defense Associations

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[Georgia Association of Criminal Defense Lawyers](#)

[National Legal Aid & Defender Association](#)

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