CHAPTER 1. THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

- § 1:1 Basic constitutional right
- § 1:2 Judicial reluctance to find ineffective assistance
- § 1:3 "Dampening the ardor" of defense counsel
- § 1:4 —Fear of defense counsel's "tactical errors"
- § 1:5 —Disinclination to depart from neutrality
- § 1:6 —Perceived costs of new trials
- § 1:7 —Pervasiveness of ineffectiveness
- § 1:8 Congruence of retained and appointed counsel standards
- § 1:9 Relationship to legal ethics
- § 1:10 Relationship to legal malpractice

CHAPTER 2. STATE STANDARDS FOR INEFFECTIVE ASSISTANCE

- § 2:1 State constitutional rights: The legitimacy of "higher" state constitutional standards
- § 2:2 —Adequate and independent state grounds
- § 2:3 —The "new federalism"
- § 2:4 State constitutional rights: Ineffective assistance of counsel
- § 2:5 —Case law examples
- § 2:6 ——Performance standards
- § 2:7 ——Prejudice requirement

CHAPTER 3. CONFLICTS OF INTEREST

- § 3:1 Basic constitutional right to conflict-free counsel
- § 3:2 Conflicts raised prior to or during trial
- § 3:3 —Remoteness-of-risk hearing
- § 3:4 —Automatic reversal
- § 3:5 Conflicts raised after trial
- § 3:6 —Actual conflicts
- § 3:7 —Adverse effect
- § 3:8 —Obligation of court to raise conflict
- § 3:9 —Waiver of right to conflict-free representation
- § 3:10 —Conflict between client's interest and counsel's self-interest
- § 3:11 Relationship to legal ethics
- § 3:12 —ABA model rules of professional conduct
- § 3:13 —ABA code of professional responsibility
- § 3:14 —ABA defense function standards
- § 3:15 Application of the standards
- § 3:16 —Conflicts raised prior to or during trial: Ineffective

- § 3:17 —Conflicts raised prior to or during trial: Not ineffective
- § 3:18 —Conflicts raised after trial: Ineffective
- § 3:19 —Conflicts raised after trial: Not ineffective

CHAPTER 4. EFFECTIVE COUNSEL AT TRIAL: CONSTITUTIONAL STANDARDS

- § 4:1 Pre-1984 standards
- § 4:2 Current standards: "Extrinsic ineffectiveness"
- § 4:3 Current standards: "Actual ineffectiveness"
- § 4:4 —Performance test
- § 4:5 ——Reasonably effective assistance
- § 4:6 ——Presumption of reasonableness
- § 4:7 ——Application of the performance test in *Strickland*
- § 4:8 ——Failure to investigate
- § 4:9 —Prejudice test
- § 4:10 ——Reasonable probability showing
- § 4:11 ——Supreme court's application of prejudice test
- § 4:12 Strickland's effect on pre-1984 decisions
- § 4:13 Ineffective assistance claims in federal habeas corpus proceedings
- § 4:14 When ineffective assistance claims can be brought

CHAPTER 5. EXTRINSIC INEFFECTIVENESS

- § 5:1 Extrinsic ineffectiveness
- § 5:2 —Insufficient time to adequately prepare
- § 5:3 —Inexperienced or unqualified counsel
- § 5:4 —Failure to appear or participate
- § 5:5 —Failure of state to make evidence available
- § 5:6 —Court denies an adjournment during voir dire
- § 5:7 —Failure to maintain client's innocence
- § 5:8 —Failure to advocate for defendant at sentencing
- § 5:9 —Bar on overnight communication
- § 5:10 Not extrinsic ineffectiveness
- § 5:11 —Insufficient time to adequately prepare
- § 5:12 —Failure to adequately prepare
- § 5:13 —Failure to hire investigator
- § 5:14 —Inexperienced or unqualified counsel
- § 5:15 —Failure to secure co-counsel
- § 5:16 —Failure to appear or participate
- § 5:17 —Failure to communicate
- § 5:18 —Counsel mentally or physically ill
- § 5:19 —Failure to pay counsel
- § 5:20 —Counsel facing criminal charges
- § 5:21 —Counsel recently assaulted
- § 5:22 —Counsel allegedly racist
- § 5:23 —Counsel not permitted to participate
- § 5:24 —Counsel previously disbarred or suspended
- § 5:25 —Counsel subsequently disbarred or suspended

§ 5:26	—Counsel concedes defendant's guilt
§ 5:27	—Counsel criticized by judge
§ 5:28	—Denial of counsel at preliminary hearing
§ 5:29	—Counsel violates rule of ethics or professional conduct before
	trial
§ 5:30	—Counsel does not "get along" with client
§ 5:31	—Counsel using narcotics
§ 5:32	—Representation by multiple attorneys
§ 5:33	—Counsel revealed confidential information
§ 5:34	Disarray among defense team
§ 5:35	Cumulative errors by counsel
§ 5:36	—"Cumulative-prejudice"
§ 5:37	"Cumulative-error"

CHAPTER 6. ACTUAL INEFFECTIVENESS PRETRIAL

§ 6:1	Advice regarding guilty pleas
§ 6:2	—Ineffective
§ 6:3	 — Failure to inform of deportation risk
§ 6:4	— Failure to inform defendant of applicable law
§ 6:5	——Failure to adequately research or interview witnesses
§ 6:6	 — Deficient attorney performance at hearing to withdraw
	plea
§ 6:7	——Failure to pursue opportunity to plea bargain
§ 6:8	— Failure to advise defendant to accept plea offer
§ 6:9	——Failure to move to enforce plea agreement
§ 6:10	 — Failure to inform defendant of all terms of plea agreement
§ 6:11	— — Failure to consider defendant's competency
§ 6:12	— — Failure to challenge factual basis
§ 6:13	— — Affirmative misrepresentations
§ 6:14	— — Failure to ensure plea agreement followed
§ 6:15	— —Failure to object to improper procedure
§ 6:16	—Not ineffective
§ 6:17	— —Performance
§ 6:18	— — Failure to apply or inform defendant of applicable law
§ 6:19	———Failure to estimate sentencing guidelines correctly
§ 6:20	———Failure to adequately research or interview witnesses
§ 6:21	— — Failure to discover facts which could later affect
	sentencing
§ 6:22	———Failure to inform defendant of deportation
	consequences
§ 6:23	———Failure to pursue opportunity to plea bargain
§ 6:24	— — Failure to consider defendant's competency
§ 6:25	———Performance at hearing to withdraw plea
§ 6:26	— —Prejudice
§ 6:27	— — Failure to apply or inform defendant of applicable law
§ 6:28	———Failure to adequately research or interview witnesses

§ 6:29	———Failure to inform defendant of deportation or other
§ 6:30	consequences — — —Failure to inform defendant of all terms of plea
8 0.50	agreement
§ 6:31	———Bad advice to accept or reject plea bargain
§ 6:32	———Insufficient time to consider
§ 6:33	—Failure to vacate pleas
§ 6:34	—Failure to inform defendant that motion to suppress still
3 0.0 1	pending
§ 6:35	Pretrial investigation or research
§ 6:36	—Ineffective
§ 6:37	——Failure to adequately prepare in general
§ 6:38	— Failure to locate or interview witnesses
§ 6:39	——Failure to adequately investigate defendant's mental
ς 0.0 <i>0</i>	health
§ 6:40	— —Failure to adequately investigate particular evidence
§ 6:41	—Not ineffective
§ 6:42	——Performance
§ 6:43	———Failure to adequately prepare in general
§ 6:44	———Failure to locate or interview witnesses
§ 6:45	———Failure to locate or interview expert witnesses
§ 6:46	— — Failure to adequately investigate defendant's mental
3	health
§ 6:47	— — Failure to adequately investigate particular evidence
§ 6:48	——Prejudice test
§ 6:49	———Failure to adequately prepare in general
§ 6:50	— — Failure to locate or interview witnesses
§ 6:51	— — Failure to adequately investigate defendant's mental
	health
§ 6:52	———Failure to adequately investigate particular evidence
§ 6:53	Pretrial evidentiary motions
§ 6:54	—Ineffective
§ 6:55	—Not ineffective
§ 6:56	— —Performance
§ 6:57	— — Failure to make a motion to exclude evidence
§ 6:58	———Failure to adequately argue a motion to exclude
Ü	evidence
§ 6:59	—Failure to call defendant or other witnesses at suppression
	hearing
§ 6:60	—Not ineffective—Performance—Failure to file a discovery
	motion
§ 6:61	— —Prejudice
§ 6:62	— — Failure to file a motion to exclude evidence
§ 6:63	———Failure to call witnesses at suppression hearing
§ 6:64	— — Failure to cross-examine witnesses at suppression
· ·	hearing
§ 6:65	———Failure to file a discovery motion
§ 6:66	Other pretrial errors
§ 6:67	—Failure to initiate plea negotiations
, 0.01	2 dilato to iniviato pica nogotianono

§ 6:68	—Pretrial admissions or stipulations
§ 6:69	Pretrial stipulation to polygraph
§ 6:70	Other pretrial errors—Advice to forgo a jury trial
§ 6:71	—Motions to change venue
§ 6:72	—Failure to object to information or indictment
§ 6:73	—Advice prior to speaking with police
§ 6:74	—Motions to dismiss
§ 6:75	—Motions for severance
§ 6:76	-Motions to consolidate cases
§ 6:77	—Notice of alibi
§ 6:78	—Motions in limine
§ 6:79	—Motions to recuse
§ 6:80	—Waiver of speedy trial
§ 6:81	—Waiver of jury trial
§ 6:82	—Appearance before grand jury
§ 6:83	—Failure to timely file notice
§ 6:84	—Failure to seek continuance or seeking continuance
§ 6:85	—Giving evidence to prosecution
§ 6:86	—Failure to move to sever charges
§ 6:87	—Joinder of charges
§ 6:88	—Failure to object to capital charge
§ 6:89	—Failure to object to appointment of trial judge
§ 6:90	—Failure to object to prosecution's untimely motion for reconsideration
§ 6:91	—Failure to negotiate a lower sentence as part of a plea agreement
§ 6:92	—Errors regarding defendant's confession or cooperation with
	prosecution
§ 6:93	—Failure to warn about Fifth Amendment rights
§ 6:94	—Failure to request bill of particulars
§ 6:95	—Failure to raise double jeopardy
§ 6:96	—Failure to seek a competency hearing
§ 6:97	—Permitting defendant to make statement to police
§ 6:98	—Preliminary hearing
§ 6:99	—Competency hearing
§ 6:100	—Failure to challenge defendant's competency to waive counsel
§ 6:101	—Failure to seek prosecutor's recusal
§ 6:102	—Violation of Vienna Convention
§ 6:103	—Decision to reject plea offer
§ 6:104	—Advice to plead not guilty
§ 6:105	—Deposition conduct
§ 6:106	—Counsel failed to realize defendant was becoming adult
§ 6:107	—Failure to notify defendant of right to withdraw plea
§ 6:108	—Failure to request <i>Franks</i> hearing
§ 6:109	—Failure to challenge asset freeze
§ 6:110	—Failure to use interpreter in client meetings
§ 6:111	—Failure to seek pretrial release on bond
§ 6:112	—Failure to secure transfer to juvenile court
	· ·

- § 6:113 —Failure to challenge discovery statute
 § 6:114 —Failure to object to breach of plea agreement

CHAPTER 7. ACTUAL INEFFECTIVENESS AT TRIAL

IRIAL	
§ 7:1	Errors regarding an argument or defense
§ 7:2	—Ineffective
§ 7:3	—Not ineffective: Performance
§ 7:4	—Not ineffective: Prejudice
§ 7:5	Errors concerning the admission of evidence or testimony
§ 7:6	—Ineffective
§ 7:7	—Not ineffective
§ 7:8	——Performance
§ 7:9	— — Failure to introduce evidence or testimony
§ 7:10	— — Failure to present evidence of mental health
§ 7:11	———Failure to object to the introduction of evidence or
0.510	testimony
§ 7:12	— — —Introduction of evidence or testimony or failure to
¢ 7.19	introduce evidence or testimony
§ 7:13	——Prejudice
§ 7:14	— — Failure to introduce evidence or testimony
§ 7:15	— — —Failure to object to the introduction of evidence or testimony
§ 7:16	— — —Introduction of evidence or testimony
§ 7:17	Errors regarding witnesses
§ 7:17	—Ineffective
§ 7:10 § 7:19	——Failure to call, question or cross-examine witnesses
§ 7:13 § 7:20	——Ineffective cross-examination
§ 7.20 § 7:21	— Failure to impeach witnesses
§ 7.21 § 7:22	— Failure to impeach witnesses — Failure to adequately prepare witnesses
§ 7.22 § 7:23	—Not ineffective
§ 7.23 § 7:24	— Performance
-	
§ 7:25	— — Failure to call or question witnesses
§ 7:26	————Counsel's investigation sufficient
§ 7:27	————Defendant responsible for failure
§ 7:28	— — — Failure to impeach witnesses
§ 7:29	———Failure to put defendant on stand
§ 7:30	— — —Counsel advised or permitted defendant to take the stand
8 7.91	
§ 7:31	——Prejudice
§ 7:32	———Failure to call or question witnesses
§ 7:33	———Failure to impeach or ineffective cross-examination of witnesses
§ 7:34	————Counsel elicited damaging testimony
§ 7.34 § 7:35	
§ 7:35 § 7:36	— — Failure to adequately prepare witnesses
	— ——Failure to put the defendant on the stand
§ 7:37	— — —Counsel advised or permitted defendant to take the stand
	Stanu

§ 7:38	———Failure to request continuance to obtain witness
§ 7:39	testimony Failure to object to prosecutorial actions
§ 7.33 § 7:40	—Ineffective
§ 7:41	——Failure to object to improper use of peremptory
3 1.11	challenges
§ 7:42	— —Failure to object to improper examination
§ 7:43	 — Failure to object to improper argument
§7:44	—Not ineffective
§ 7:45	——Performance
§ 7:46	— —Prejudice
§ 7:47	Other trial errors
§ 7:48	—Ineffectiveness for failing to request or object to a jury instruction
§ 7:49	—Errors in drafting jury instructions
§ 7:50	—Failing to request or object to a jury instruction—Not
	ineffective
§ 7:51	—Requesting or objecting to jury instruction—Not Ineffective
§ 7:52	—Ineffectiveness for failing to challenge or rehabilitate a
	juror or the composition of the jury
§ 7:53	—Failing to challenge or rehabilitate a juror or the
	composition of the jury—Not Ineffective
§ 7:54	—Failure to make or reserve an opening or a closing
e = = =	argument
§ 7:55	—Counsel exhibited inappropriate behavior in the court
§ 7:56	—Counsel conceded the defendant's guilt
§ 7:57	—Counsel demeaned the defendant
§ 7:58	—Failure to follow defendant's instructions
§ 7:59	—Failure to move for or moving for a mistrial
§ 7:60	—Failure to object to judicial actions
§ 7:61	—Counsel encouraged or permitted defendant to lie
§ 7:62	—Failure to object to juror misconduct
§ 7:63	—Counsel advised defendant to waive attorney-client
\$ 7.G1	privilege
§ 7:64	—Failure to object to absence during jury view of crime scene
§ 7:65	—Waiver of right to counsel
§ 7:66	—Failure to object to sleeping judge
§ 7:67	—Failure to object to sleeping juror
§ 7:68	—Failure to ask or inappropriate voir dire questions
§ 7:69	—Failure to ensure defendant properly medicated
§ 7:70	—Counsel ignorant of applicable law
§ 7:71	—Failure to object to prison garb or leg irons
§ 7:72	—Failure to move for acquittal or directed verdict
§ 7:73	—Failure to object to judge's answers to jury questions
§ 7:74	—Failure to object to judge's comments
§ 7:75	—Failure to object to <i>Allen</i> charge
§ 7:76	—Failure to poll the jury
§ 7:77	—Failure to object to defendant's shackling
§ 7:78	—Failure to object to co-defendant's counsel's actions

§ 7:79	—Failure to make offer of proof for record
§ 7:80	—Filing or failing to file motion for a new trial
§ 7:81	—Counsel introduced damaging testimony
§ 7:82	—Counsel stipulated to record
§ 7:83	—Counsel stipulated to evidence
§ 7:84	—Counsel waives defendant's marital privilege
§ 7:85	—Failure to request a competency hearing during trial
§ 7:86	—Law-student intern argues case
§ 7:87	—Counsel held in contempt
§ 7:88	—Failure to object to amount of peremptory challenges
§ 7:89	—Failure to request a continuance during trial
§ 7:90	—Counsel failed to object to bailiff as witness
§ 7:91	—Failure to order complete transcript
§ 7:92	—Defense counsel made improper comments during closing
	argument
§ 7:93	—Opening statements
§ 7:94	—Closing arguments
§ 7:95	—Failure to object to closing of courtroom
§ 7:96	—Failure to object to minor's testimony outside courtroom
§ 7:97	—Failure to request or object to translators
§ 7:98	—Failure to assure defendant's presence for jury challenge or
	question
§ 7:99	—Failure to object to variance from indictment or
	amendment of information
§ 7:100	—Failure to object to use of defendant's alias
§ 7:101	—Counsel waived public trial
§ 7:102	—Counsel failed to "conceal his cards"
§ 7:103	—Counsel failed to disclose pending charges
§ 7:104	—Counsel failed to hire trial consultant
§ 7:105	—Counsel had defendant reenact his version of events
§ 7:106	—Counsel sleeps during trial
§ 7:107	—Failure to redact information on exhibits going to jury
§ 7:108	—Counsel failed to ensure recording of sidebar
§ 7:109	—Counsel made ex parte comments to trial judge
§ 7:110	—Failure to object to deadlocked jury's request to resume
Ü	deliberations
§ 7:111	—Failure to object to verdict form
§ 7:112	—Failure to address juror communication with defendant's
Ü	family member
§ 7:113	—Failure to move to reopen evidence
§ 7:114	—Failure to object to presence of victim advocate
§ 7:115	—Failure to argue statute of limitations applied
§ 7:116	—Failure to object to jury's use of laptop
§ 7:117	—Failure to object to written instructions to jury
§ 7:118	—Failure to request additional peremptory jury challenges
§ 7:119	—Failure to object to reading of unredacted information to
2 1.110	jury
	J J

CHAPTER 8. ACTUAL INEFFECTIVENESS AT SENTENCING

§ 8:1	Failure to adequately investigate or present mitigating evidence
§ 8:2	—Ineffective
§ 8:3	——Failure to investigate mitigating evidence in general
§ 8:4	— Failure to investigate or call mitigating character witnesses
§ 8:5	——Failure to present evidence of mental health
§ 8:6	—Not ineffective
§ 8:7	——Performance
§ 8:8	———Failure to investigate or present mitigating evidence in general
§ 8:9	———Failure to investigate or present evidence of mental health
§ 8:10	— — Failure to investigate or call mitigating character witnesses
§ 8:11	— — Failure to call the defendant
§ 8:12	— — Other mitigating evidence
§ 8:13	— — —Impeachment evidence
§ 8:14	——Prejudice
§ 8:15	— — — Failure to investigate or present mitigating evidence in general
§ 8:16	— — Failure to investigate or present evidence of mental
	health
§ 8:17	— — Failure to investigate or call mitigating character
	witnesses
§ 8:18	— — — Other mitigating evidence
88:19	Presenting or failing to present a particular argument
§ 8:20	—Ineffective
88:21	—Not ineffective—Performance
§ 8:22	——Prejudice
§ 8:23	Failure to object to the introduction of evidence
§ 8:24	—Ineffective
§ 8:25	—Not ineffective
§ 8:26	——Performance
§ 8:27	——Prejudice
§ 8:28	Other sentencing errors
§ 8:29	—Counsel demeaned defendant
§ 8:30	—Failure to request a particular jury instruction
§ 8:31	—Failure to object to a particular jury instruction
§ 8:32	—Failure to object to errors in presentence report
§ 8:33	—Failure to object to improper argument
§ 8:34	—Failure to move to reconsider sentence
§ 8:35	—Failure to move for severance
§ 8:36	—Failure to accompany defendant to presentence interview
§ 8:37	—Failure to move to continue sentencing
§ 8:38	—Failure to object to judge's response to jury question

§ 8:39 -Failure to advise defendant of the right to testify § 8:40 —Failure to object to sentencing errors —Failure to advise defendant of the right of allocution § 8:41 § 8:42 —Failure relating to closing argument § 8:43 —Failure to object to defendant's shackling § 8:44 —Failure to object to verdict form § 8:45 —Failure to request appointment of co-counsel § 8:46 —Errors regarding witnesses § 8:47 —Failure to file sentencing memorandum —Counsel conceded defendant's guilt § 8:48 § 8:49 —Counsel introduced damaging evidence or testimony § 8:50 —Sentencing following probation § 8:51 —Failure to request competency hearing § 8:52 —Errors regarding the sentencing jury § 8:53 —Failure to discuss strategy with defendant prior to allocution —Failure to correctly advise the court on law § 8:54

—Waiver of defendant's presence

CHAPTER 9. INEFFECTIVE ASSISTANCE ON APPEAL

§ 9:1 Right to effective assistance on appeal § 9:2 Constitutional standards for defendant without counsel on appeal § 9:3 —Ineffective under the standards § 9:4 —Not ineffective under the standards § 9:5 Constitutional standard for failing to perfect appeal or file brief § 9:6 —Performance § 9:7 -Prejudice § 9:8 -Ineffective under the standard § 9:9 ——Prejudice per se § 9:10 ——Reasonable probability of prejudice -Not ineffective under the standard § 9:11 § 9:12 ——Performance § 9:13 --- Prejudice § 9:14 Constitutional standard for failing to raise an issue § 9:15 —Ineffective § 9:16 —Not ineffective — —Performance § 9:17 § 9:18 — Prejudice § 9:19 Constitutional standards for failing to include or examine particular parts of the record § 9:20 —Application of standards Constitutional standards for failing to make an oral argument § 9:21 § 9:22 —Application of standards § 9:23 Constitutional standards for failing to advise defendant of

applicable law

§ 8:55

§ 9:24	—Application of standards
§ 9:25	Failure to represent client's interests
§ 9:26	Misstatement of argument
§ 9:27	Failure to supplement appellate record
§ 9:28	Defendant drafts appellate brief
§ 9:29	Failure to inform defendant of right to cross-appeal
§ 9:30	Counsel disclosed damaging evidence to prosecution
§ 9:31	Failure to inform defendant of right to file petition for
	certiorari
§ 9:32	Failure to consult with defendant about appeal
§ 9:33	Failure to seek continuance
§ 9:34	Failure to file statement of errors

APPENDICES

APPENDIX A

APPENDIX B

Table of Cases

Index