CHAPTER 12

APPEALING YOUR CONVICTION BASED ON INEFFECTIVE ASSISTANCE OF COUNSEL*

A. Introduction

This Chapter provides information for bringing IAC claims based on both federal law and New York State protections. Ineffective assistance of counsel (often referred to as "IAC") claims are a common way for incarcerated people to challenge their convictions. Under federal law, a successful claim of ineffective assistance of counsel requires that you show two things: (1) deficient performance and (2) prejudice. In other words, you must first show that your lawyer performed so badly that they failed to follow the professional standards that govern lawyers' behavior while representing you.[1] Second, you must show there is a "reasonable probability" that your lawyer's poor representation prejudiced (or negatively affected the outcome of) your case.[2] The landmark case on ineffective assistance of counsel claims is *Strickland v. Washington*, but there are specific situations that are governed by other cases.

You have a federal right to effective counsel that comes from the Sixth and Fourteenth Amendments of the U.S. Constitution. However, most states also provide their own guarantees of the right to effective assistance of counsel in their state constitutions or in their state statutes (laws). For example, if you are in New York State, Article I, Section 6 of the New York State Constitution also protects the right to effective assistance of counsel. In your research, you should explore claims based on both state and federal protections to preserve your right to bring an IAC appeal in federal court later. There are different reasons that counsel can be found ineffective, and there are different ways to challenge your conviction based on the claim that your counsel was ineffective.

This Chapter is divided into four parts. **Part B** explains the different procedures you can use to claim ineffective assistance of counsel. **Part C** explains important rules that restrict when and how you can claim ineffective assistance of counsel. **Part D** explains the different standards for proving ineffective assistance of counsel, which tell you what you must prove in order to have a successful ineffective assistance of counsel claim. Finally, **Part E** provides examples of common situations that have been successful when proving ineffective assistance of counsel.

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[1] *See* Strickland v. Washington, 466 U.S. 668, 688, 104 S. Ct. 2052, 2065, 80 L. Ed. 2d 674, 694 (1984) ("The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.").

[2] Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984). It is important to note that the "outcome" that might be negatively affected by attorney ineffectiveness is not limited to the trial outcome. For example, you might claim that your lawyer's ineffectiveness caused you to proceed to trial when you should have accepted a plea, or to accept a plea when you should have gone to trial. *See* Lafler v. Cooper, 566 U.S. 156, 174, 132 S. Ct. 1376, 1391, 182 L. Ed. 2d 398, 414 (2012) (holding that there was a reasonable probability that the defendant would have accepted a guilty plea and received a lower minimum sentence but for his counsel's deficient performance). You might claim that your lawyer's ineffectiveness caused you to not accept a plea deal that you otherwise might have accepted. *See* Missouri v. Frye, 566 U.S. 134, 150, 132 S. Ct. 1399, 1411, 182 L. Ed. 2d 379, 393 (2012) ("There appears to be a reasonable probability Frye would have accepted the prosecutor's original offer of a plea bargain if the offer had been communicated to him, because he pleaded guilty to a more serious charge, with no promise of a sentencing recommendation from the prosecutor.").

B. Ways to Claim Ineffective Assistance of Counsel

There are three general ways to attack your conviction: (1) direct post-conviction appeal, (2) state post-conviction appeal, and (3) a federal and/or state habeas corpus claim. You might consider consulting other *JLM* chapters, which cover each of these topics in more depth.[3]

In New York State, if you are challenging your conviction based on ineffective assistance of counsel that occurred during your trial, you should do this by first raising your claim (1) in your direct appeal in state court, and then (2) in your federal habeas corpus petition.[4] If you are filing a claim in New York State court there often will not be enough facts in the record to let the court review an ineffectiveness claim on appeal.[5] If you find yourself in this situation you should start by filing an Article 440 motion in New York State court.[6] As courts have noted, "direct appeal is [generally] not an appropriate method for seeking review of trial counsel's effectiveness" because lawyers who provide ineffective assistance usually fail to develop a record that can be used to show deficient performance by not doing any work or failing to do work that should have been done, such as filing motions or appeals.[7] Article 440 motions allow the court to hold a hearing where you can ask defense counsel about their lack of preparation or poor strategy so that the court can decide whether it fell below

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[3] Review the following Chapters of the *JLM* for more information: Chapter 9, "Appealing Your Conviction or Sentence" (direct appeals); Chapter 20, "Using Article 440 of the New York Criminal Procedure Law to Attack Your Unfair Conviction or Illegal Sentence" (state post-conviction appeals); Chapter 13, "Federal Habeas Corpus Petitions" (federal habeas corpus claims); and Chapter 21, "State Habeas Corpus: Florida, New York, and Michigan" (state habeas corpus claims).

[4] Your direct appeal is your first opportunity to challenge your conviction or sentence after your guilty plea or trial. See Chapter 9 of the *JLM*, "Appealing Your Conviction or Sentence," for more information. In New York State, an ineffective assistance claim based only on the trial record must be raised on direct appeal. *See* People v. Love, 57 N.Y.2d 998, 1000, 443 N.E.2d 486, 487, 457 N.Y.S.2d 238, 239 (1982) ("Here . . . we cannot conclude that defendant's counsel was ineffective simply by reviewing the trial record without the benefit of additional background facts that 'might have been developed had an appropriate after-judgment motion been made' pursuant to [N.Y. CRIM. PROC. LAW §] 440.10." (quoting People v. Jones, 55 N.Y.2d 771, 773, 431 N.E.2d 967, 968, 447 N.Y.S.2d 242, 243 (1981))); People v. Terry, 44 A.D.3d 1157, 1159, 845 N.Y.S.2d 145, 147 (3d Dept. 2007) (holding that defendant must raise his ineffective assistance claim on direct appeal rather than in an Article 440 motion because defendant's allegations could have been raised on direct appeal, citing N.Y. CRIM. PROC. LAW § 440.10(2)(b)).

Considering your case's specific facts and the way your lawyer failed will be helpful in determining whether you should bring an IAC claim as a direct appeal or an Article 440 motion. For example, in People v. Maffei, 35 N.Y.3d 264, 272, 150 N.E.3d 1169, 1175, 127 N.Y.S.3d 403, 409 (2020), the defendant argued that his counsel failed to challenge one of the jurors during *voir dire* (jury selection) after the juror expressed uncertainty when asked whether he could be impartial. However, the court determined that it was unable to judge the claim because trial records do not include what defendant and his counsel discussed about the juror during *voir dire*.

Similarly, in People v. Delgado, 146 A.D.3d 483, 484, 44 N.Y.S.3d 434, 434 (2017), the court found the defendant's ineffective assistance claims unreviewable on direct appeal because they involve matters not reflected in the record. Compare that with People v. Dover, 294 A.D.2d 594, 596, 743 N.Y.S.2d 501, 502–503 (2d Dept. 2002), where the court found that the defendant's claim could be determined on direct appeal because the trial record included discussion of the entrapment defense that defendant argued his defense counsel was deficient for failing to pursue. *See also* People v. Laboy, 178 A.D.3d 491, 492, 111 N.Y.S.3d 538, 539 (1st Dept. 2019) (finding that defense counsel's performance cross-examining the victim to identify the defendant was assessable based on the trial record).

[5] This is especially the case with IAC claims because counsel is so deficient that they completely fail to develop the trial record. Without enough information on how your counsel lacked preparation or made poor choices, courts choose to defer to defense counsel and the assumption that their decisions are strategic. *See* People v. Ramos 194 A.D.3d 964, 965, 149 N.Y.S.3d 171, 174 (2021).

[6] Ineffective assistance of counsel claims are "generally not reviewable on direct appeal" when they involve facts outside the trial record and must first be brought through a motion under N.Y. CRIM. PROC. LAW § 440.10 so that the facts may be sufficiently developed for review. People v. Medina-Gonzalez, 116 A.D.3d 519, 520, 983 N.Y.S.2d 554, 556 (1st Dept. 2014).

[7] People v. Jiggetts, 178 A.D.2d 332, 332, 577 N.Y.S.2d 396, 397 (1st Dept. 1991).

professional standards of reasonableness.[8] Without this hearing, courts will often see your counsel's failures as strategic choices rather than finding them to be deficient performance.[9]

There is no Sixth Amendment right to counsel before you are actually charged with a crime, so you can only claim that your lawyer was ineffective after charges were brought against you (and not before that point).[10] However, you can claim that your counsel was ineffective if you took a plea or failed to take a favorable plea due to your lawyer's bad advice.[11] You also have the right to effective counsel (a lawyer who is able to meet minimum professional standards) during a direct appeal, which is your first appeal after your conviction.[12]

In New York State, if you are appealing your conviction based on ineffective counsel during your first appeal, you should file the appropriate post-conviction motion in your state court, or file a federal habeas corpus petition in federal district court.[13] To file an ineffective appellate counsel claim in New York State Court, you must file a "*coram nobis* motion"[14] in the appellate court where your first appeal was filed—i.e., in the appellate division where you were represented by ineffective counsel. A "*coram nobis* motion" can be brought at any time. This means that even if it has been years since your direct appeal concluded, you can use this opportunity to raise new issues. There is no time limit or restriction on how many *coram nobis* petitions can be filed.[15] However, each state has its own state post-conviction appeals procedure, so the procedure in your state might be different from the New York procedure described here.[16]

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[8] For further discussion of Article 440, see Chapter 20 of the *JLM*, "Using Article 440 of the New York Criminal Procedure Law to Attack Your Unfair Conviction or Illegal Sentence."

[9] *See* People v. Benevento, 91 N.Y.2d 708, 712–713, 697 N.E.2d 584, 587, 674 N.Y.S.2d 629, 632 (1998) ("As long as the defense reflects a reasonable and legitimate strategy under the circumstances and evidence presented, even if unsuccessful, it will not fall to the level of ineffective assistance.").

[10] Moran v. Burbine, 475 U.S. 412, 431, 106 S. Ct. 1135, 1146, 89 L. Ed. 2d 410, 427 (1986) (holding that "the Sixth Amendment right to counsel does not attach until after the initiation of formal charges"); People v. Claudio, 83 N.Y.2d 76, 80–81, 629 N.E.2d 384, 386, 607 N.Y.S.2d 912, 914 (1993) (holding that the right to effective counsel under both the U.S. Constitution and the New York State Constitution does not attach until the start of adversarial judicial proceedings). However, some state constitutions grant broader rights to counsel than the U.S. Constitution does. *See, e.g.*, People v. McCauley, 645 N.E.2d 923, 929, 163 Ill. 2d 414, 423–424, 206 Ill. Dec. 671, 677 (1994) (giving a broader reading to article 1, section 10 of the Illinois Constitution than the 5th Amendment right against self-incrimination as discussed in Moran v. Burbine, 475 U.S. 412, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986)). Also, you have a right to counsel under the 5th Amendment if you are interrogated while in custody. *See* Miranda v. Arizona, 384 U.S. 436, 469, 86 S. Ct. 1602, 1625, 16 L. Ed. 2d 694, 721 (1966) ("[T]he right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today."). But that right may not include the right to *effective* counsel. *See* Sweeney v. Carter, 361 F.3d 327, 333 (7th Cir. 2004) ("[T]he Supreme Court has not mentioned effective assistance of counsel (in the *Strickland* sense) and the Fifth Amendment in the same breath, let alone set forth a clearly established right to that effect.").

[11] *See* Lafler v. Cooper, 566 U.S. 156, 174, 132 S. Ct. 1376, 1391, 182 L. Ed. 2d 398, 414 (2012) (holding that there was a reasonable probability that the defendant would have accepted a guilty plea and received a lower minimum sentence but for his counsel's deficient performance). You might claim that your lawyer's ineffectiveness caused you to not accept a plea deal that you otherwise might have accepted. *See* Missouri v. Frye, 566 U.S. 134, 150, 132 S. Ct. 1399, 1411, 182 L. Ed. 2d 379, 393 (2012) ("There appears to be a reasonable probability Frye would have accepted the prosecutor's original offer of a plea bargain if the offer had been communicated to him, because he pleaded guilty to a more serious charge, with no promise of a sentencing recommendation from the prosecutor.").

[12] Evitts v. Lucey, 469 U.S. 387, 396, 105 S. Ct. 830, 836, 83 L. Ed. 2d 821, 830 (1985) (establishing that the defendant's 14th Amendment right to effective counsel during trial extends to a first appeal).

[13] *See* People v. Bachert, 69 N.Y.2d 593, 600, 509 N.E.2d 318, 323, 516 N.Y.S.2d 623, 628 (1987) (holding that a claim of ineffective assistance of counsel must be filed "in the appellate tribunal which considered the primary appeal").

[14] A "*coram nobis* motion" is a motion to restore you to a pre-conviction status, alleging a wrongful conviction. For more information on *coram nobis* motions, see Chapter 9 of the JLM, "Appealing Your Conviction or Sentence."

[15] *See* People v. D'Alessandro, 13 N.Y. 3d 216, 221, 918 N.E.2d 126, 129, 889 N.Y.S.2d 536, 539 (2009) ("Further, although we acknowledge that a significant period of time has passed since defendant's conviction was affirmed on appeal, we should not allow the lengthy passage of time, in itself, to bar review of a defendant's claims.").

[16] In addition to New York, Alabama, Arkansas, California, Connecticut, the District of Columbia, Maryland,

If your direct appeal fails, you may make additional appeals—referred to as state post-conviction appeals. However, there is no federal constitutional right to counsel for these additional appeals; the federal constitutional right to counsel only applies on direct appeal, which means you are only guaranteed a lawyer for your first appeal.[17] Therefore, the U.S. Constitution does not grant you the right to raise a claim of ineffective counsel in state post-conviction proceedings.[18] However, even though the federal constitution does not grant this right, some states do grant the right to counsel in state post-conviction proceedings, and some states allow courts to require effective counsel in state post-conviction proceedings when it is in the interest of justice.[19]

C. Timing and Order of Filings

You must raise your ineffective counsel claims within the proper time and with the proper procedures. If your claim is not raised at the proper time and with the proper procedures, it could be dismissed (these claims are sometimes called "procedurally defaulted"). In federal court, and in many states, you should not raise an ineffective assistance claim on direct appeal because the trial record usually does not contain enough information to evaluate the claim. Instead, you should make the claim in a collateral (separate) proceeding, allowing the trial court to hear testimony specifically about the adequacy of your representation. In such a collateral proceeding, you can also argue that your appellate lawyer was ineffective because they did not raise an ineffectiveness claim against your trial lawyer. If you had the same lawyer at trial and on direct appeal, failure to raise an ineffectiveness claim on direct appeal does not necessarily prevent you from raising the claim in a post-conviction proceeding.[20] However, in federal court you might not be able to introduce any new evidence that your

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Nebraska, Nevada, New Hampshire, Oregon, South Dakota, Tennessee, Vermont, Virginia, West Virginia, and Wisconsin also use *coram nobis* motions. For more information on *coram nobis* motions, see Chapter 9 of the JLM, "Appealing Your Conviction or Sentence."

[17] Pennsylvania v. Finley, 481 U.S. 551, 555, 107 S. Ct. 1990, 1993, 95 L. Ed. 2d 539, 545 (1987) ("We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions. . . ."); Ross v. Moffitt, 417 U.S. 600, 610–616, 94 S. Ct. 2437, 2443–2447, 41 L. Ed. 2d 341, 350–354,351 (1974) (holding that a criminal defendant does not have a constitutional right to counsel to pursue discretionary state appeals or applications for review); Murray v. Giarratano, 492 U.S. 1, 7–10, 109 S. Ct. 2765, 2768–2771, 106 L. Ed. 2d 1, 9–11 (1989) (holding that the right to effective counsel at trial and during the initial appeal does not apply to discretionary state post-conviction proceedings even in capital cases).

[18] *See* Wainwright v. Torna, 455 U.S. 586, 587–588, 102 S. Ct. 1300, 1301, 71 L. Ed. 2d 475, 477–478 (1982) (holding that, because the defendant had no constitutional right to counsel, he could not be deprived of the effective assistance of counsel by his retained counsel).

[19] The states that explicitly guarantee indigent incarcerated people counsel from the very beginning of their first post-conviction proceedings are: Alaska, Connecticut, Indiana, Iowa, Maine, Maryland, Missouri, New Jersey, Oregon, Pennsylvania, Rhode Island, and Vermont. ALASKA STAT. ANN. § 18.85.100(c) (West 2007); Alaska R. Crim. P. 35.1(d)(1); CONN. GEN. STAT. ANN. § 51-296 (West 2016); Ind. Post-Conviction R. 1 § 9(a); IOWA CODE ANN. § 822.5 (West 2015); ME. REV. STAT. ANN. tit. 15, § 2129(1)(B) (West 2018); MD. CODE ANN., CRIM. PROC. § 7-108 (West 2023); MO. ANN. STAT. § 547.360(5) (West 2002); N.J. Ct. R. 3:22-6; OR. REV. STAT. ANN. § 138.590 (West 2015); 234 PA. STAT. AND CONS. STAT. § 904(C) (West 2017); 10 R.I. GEN. LAWS § 10-9.1-5 (2022); Because advocacy is an art and not a science, and because the adversary system requires tit. 13, § 5562 (West 2023). In some states, an incarcerated person may become entitled to the appointment of counsel once he files a nonfrivolous post-conviction petition (Colorado, Hawaii, Illinois, Kansas, Kentucky, New Mexico, South Carolina, Tennessee, and West Virginia) or demonstrates a need for a hearing (Louisiana, Michigan, Montana), but he must prepare the initial post-conviction petition without a right to appointed counsel. Colo. R. Crim. P. 35; Haw. R. Penal P. 40(i); 725 ILL. COMP. STAT. ANN. 5/122 (West 2008); KAN. STAT. ANN. § 22-4506 (West 2023); Ky. R. Crim. P. 11.42(5); N.M. STAT. ANN. § 31-11-6 (West 2013); S.C. CODE ANN. § 17-27-80 (2023); TENN. CODE ANN. § 40-30-115 (West 2017); W. VA. CODE ANN. § 53-4A-4 (West 2019); LA. CODE CRIM. PROC. ANN. art. 930.7 (2022); Mich. Ct. R. 6.505; MONT. CODE ANN. § 46-21-201 (West 2009). California offers appointed counsel for indigent incarcerated people pursuing post-conviction proceedings if the person is subject to the death penalty. CAL. GOV'T CODE § 68662.

[20] Massaro v. United States, 538 U.S. 500, 504, 123 S. Ct. 1690, 1694, 155 L. Ed. 2d 714, 720 (2003) (holding "that "[A]n ineffective-assistance-of-counsel claim may be brought in a collateral proceeding . . . whether or not the petitioner could have raised the claim on direct appeal."); *see also* United States v. Martinez, 136 F. 3d 972, 979 (4th Cir. 1998) ("A [federal] defendant can raise the claim of ineffective assistance of counsel . . . by a collateral challenge pursuant to [federal habeas corpus]."); People v. Dor, 132 Misc. 2d 568, 569–570, 505 N.Y.S. 2d 317, 319 (Sup. Ct. Kings County 1986) (holding that, in an Article 440 motion, a defendant cannot make further attacks

appellate counsel was ineffective beyond what is included in the state court record, which effectively makes it nearly impossible to succeed on these IAC claims.[21] In some states, an ineffective assistance claim that can be decided based on the trial record alone **must** be made in the direct appeal.[22] However, as of November 2021, this rule no longer applies to IAC claims in New York State.[23] Be sure to check the laws in your state for the proper procedure.[24]

Claiming ineffective assistance of counsel means that you give up some of your attorney-client confidentiality privileges with that attorney.[25] This means that once you file an ineffective counsel claim against your lawyer, your lawyer can then sometimes reveal information about your case that

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on "any issues that were raised or could have been raised in the appeal," but could claim ineffective assistance, which is "an issue that could not possibly be raised in an appeal by the same counsel").

[21] *See* Martinez v. Ryan, 566 U.S. 1, 9, 132 S. Ct. 1309, 1315, 182 L. Ed. 2d 272, 282 (2012) (holding that a federal habeas court may excuse a failure to raise an ineffective assistance of counsel claim in state post-conviction proceedings in "narrow" circumstances). *But see* Shinn v. Ramirez, 142 S. Ct. 1718, 1734, 212 L. Ed. 2d 713, 734 (2022) (holding that a federal habeas court may not conduct an evidentiary hearing or otherwise consider evidence beyond the state-court record based on ineffective assistance of state post-conviction counsel, effectively precluding claims allowed under *Martinez*).

Note that IAC claims that are part of a federal habeas appeal are very rarely successful, especially in non-capital cases. A study of more than 2,300 federal habeas corpus petitioners showed a 0.3% success rate, and a 0% success rate on IAC claims. *See* NANCY J. KING, FRED L. CHEESMAN II & BRIAN J. OSTROM, FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS—AN EMPIRICAL STUDY OF HABEAS CORPUS CASES FILED BY STATE PRISONERS UNDER THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996, at 52, 58 (2007), *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf (last visited Mar. 30, 2024). This is largely because under the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), federal courts give huge deference to state habeas court decisions. Federal courts are only allowed to overturn state-court decisions which are "contrary to, or involved an unreasonable application of, clearly established federal law." 28 U.S.C. § 2254(d)(1). An incorrect application of federal law is not necessarily unreasonable. Williams v. Taylor, 529 U.S. 362, 410–411, 120 S. Ct. 1495, 1521–1523, 146 L. Ed. 2d. 389, 428–439 (2000).

[22] *See, e.g.*, Leake v. State, 737 N.W.2d 531, 535 (Minn. 2007) ("When a claim of ineffective assistance of trial counsel can be adjudicated on the basis of the trial record, it must be brought on direct appeal . . . ."); People v. Mendez, 582 N.E.2d 1265, 1268, 221 Ill. App. 3d 868, 871, 164 Ill. Dec. 321, 324 (1991) ("Petitioner's arguments regarding trial counsel's representation were matters of record which could have been raised on direct appeal. These issues, therefore, have been waived."). See Chapter 13 of the *JLM*, "Federal Habeas Corpus Petitions," for an additional explanation of barred claims.

[23] N.Y. CRIM. PROC. LAW § 440.10(2)(c) (McKinney 2023). Under this revised rule, you can still raise your IAC claim in an Article 440 motion even if sufficient facts appeared on the trial record and you did not raise your IAC claim on direct appeal.

[24] In New York State courts, an Article 440 motion is usually the correct way to raise an ineffective assistance of counsel claim. *See* People v. Brown, 45 N.Y.2d 852, 853–854, 382 N.E.2d 1149, 1149–1150, 410 N.Y.S.2d 287, 287 (1978) ("Generally, the ineffectiveness of counsel is not demonstrable on the main record . . ."); *see also* People v. Medina-Gonzalez, 116 A.D. 3d 519, 520, 983 N.Y.S. 2d 554, 556 (1st Dept. 2014) (finding the record insufficient to resolve the issue of counsel's ineffectiveness and explaining that a defendant seeking to bring ineffective assistance of counsel claims where the record is insufficient must bring a motion under N.Y. CRIM. PROC. LAW § 440.10 to expand the record before the court can consider the issue). If matters outside of the trial record must be examined, such as reasons for counsel's actions, New York State courts require you to raise an ineffective counsel claim in an Article 440 motion, rather than in a motion to set aside the verdict or in a direct appeal. *See* People v. Monroe, 52 A.D.3d 623, 623, 860 N.Y.S.2d 564, 565 (2d Dept. 2008) ("To the extent that the defendant's claim of ineffective assistance of counsel . . . [goes beyond] the record, . . . it may not be reviewed on direct appeal."); People v. Bagarozy, 182 A.D.2d 565, 566, 582 N.Y.S.2d 424, 425 (1st Dept. 1992) ("The appropriate vehicle by which to allege ineffective assistance of counsel grounded in allegations referring to facts outside of the trial record is pursuant to CPL.440.10, where matters . . . [beyond] the record may be considered."). See Chapter 20 of the JLM, "Using Article 440 of the New York Criminal Procedure Law to Attack Your Unfair Conviction or Illegal Sentence," for more on how to file an Article 440 motion.

If you are researching procedure in other states, see *JLM*, Chapter 2, "Introduction to Legal Research" for more information on legal research.

[25] MODEL RULES OF PRO. CONDUCT r. 1.6(b)(5) (AM. BAR ASS'N 2004) (allowing a lawyer to "reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to respond to allegations in any proceeding concerning the lawyer's representation of the client"); STANDARDS FOR CRIM. JUST. § 4-9.6(d) (AM. BAR ASS'N 2015) ("Defense counsel whose conduct in a criminal case is drawn into question is permitted to testify concerning the matters at issue, and is not precluded from disclosing the truth concerning the matters raised by his former client, even though this involves revealing matters which were given in confidence."). Note that this is not a complete waiver of confidentiality and does not allow for complete disclosure.

otherwise would be kept secret. For example, your lawyer could cooperate with the prosecution by turning over your case files or even by testifying against you.

D. How to Prove Ineffective Assistance of Counsel

As discussed above, there is a federal right to effective counsel and, in many states, there is a separate state right as well. The federal and New York State standards for ineffective counsel are discussed below. If you were convicted in a state other than New York, you should research your state's constitution and laws to find out whether there is a different state standard for ineffective assistance of counsel that you can argue was not met at trial.[26] You should always raise ineffective assistance of counsel as a federal constitutional claim, even if you are also claiming a violation of state guarantees to effective assistance of counsel. If you do not present the claim as a federal constitutional violation when you first raise the claim, you may not be able to do so in a later federal habeas corpus petition.[27]

1. The Federal Standard

The standard for ineffective assistance of counsel under the U.S. Constitution is the same no matter where you are in the United States. There are three ways that you can make an ineffective counsel claim under federal law: you can claim that your lawyer (1) was actually ineffective, (2) was constructively ineffective, or (3) had a conflict of interest that caused them to be actually ineffective. Each claim requires you to prove different things, which are detailed below.

(a) Actual Ineffectiveness: The *Strickland* Test

To claim that your lawyer was actually ineffective, you must pass the two-part (often called "two-pronged") *Strickland* test.[28] The first part (or prong) of this test requires you to prove that your lawyer's performance was "deficient." For this part, the court decides whether your lawyer's representation fell below an "objective standard of reasonableness" under prevailing professional norms.[29] This means that the court looks to see if your lawyer acted in a way that most other lawyers would think is acceptable.[30] Since this standard can apply differently in different situations, you must identify the specific things your lawyer did that were so bad that you were effectively deprived of your right to counsel. Some examples of ineffective assistance of counsel are included in Part E of this Chapter, "Examples of Ineffective Assistance of Counsel Claims." Note that you cannot simply say that you had a bad lawyer or that your lawyer did not do enough to help you. You must point to the specific things that your lawyer did poorly or did not do at all (like failing to cross-examine a witness). In addition to pointing to these specific failures, you must show that these failures made their representation of your case fall below the professional standards for lawyers.

(i) *The Deficient Performance Prong*

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[26] For more information on legal research, see *JLM*, Chapter 2, "Introduction to Legal Research."

[27] For more information on federal habeas corpus petitions, see *JLM*, Chapter 13, "Federal Habeas Corpus Petitions."

[28] Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984).

[29] Prevailing professional norms are partly based on the legal professional standards. These professional standards could include, but are not limited to: a duty of loyalty, a duty to avoid conflicts of interest, a duty to advocate the defendant's cause, a duty to consult with defendant on important decisions and to keep defendant informed of important developments during the prosecution, and a duty to use the level of skill and knowledge that make the trial truly adversarial. *See* Strickland v. Washington, 466 U.S. 668, 688–689, 104 S. Ct. 2052, 2065, 80 L. Ed. 2d 674, 694 (1984) (outlining these duties but noting that they "neither exhaustively define the obligations of counsel nor form a checklist for judicial evaluation of attorney performance").

[30] *See* Strickland v. Washington, 466 U.S. 668, 688, 104 S. Ct. 2052, 2065, 80 L. Ed. 2d 674, 694 (1984) ("Prevailing norms of practice as reflected in American Bar Association standards and the like, *e.g.*, ABA Standards for Criminal Justice 4-1.1 to 4-8.6 (2d ed. 1980) ('The Defense Function'), are guides to determining what is reasonable, but they are only guides.").

There are a couple of important things to note about the "deficient" prong of the *Strickland* test. First, courts tend to view counsel's choices as strategic and will assume that your lawyer made a legitimate choice unless you prove otherwise.[31] Second, the Supreme Court has specifically ruled that hindsight cannot help you prove deficiency: the counsel's performance is judged based on the facts and information they have at the time.[32] Both of these factors make it more difficult to satisfy this first prong of the *Strickland* test.

(ii) *The Prejudice Prong*

If the court finds your lawyer's representation fell below this objective standard of reasonable performance, you will have satisfied the first part of the Strickland test. The court will then apply the second part of the test, also called the "prejudice prong." To prove prejudice, you must show that there is a "reasonable probability that but for [without the existence of] counsel's unprofessional errors, the result of the proceeding would have been different."[33] This means that you not only have to point out what your lawyer did wrong, but you also must show that your lawyer's actions hurt you and likely changed the outcome of your case.[34] You can only win on an ineffective counsel claim if you can satisfy both parts of the *Strickland* test. You should remind the court that the Supreme Court has specifically said that the "prejudice prong" requires you to show only a "reasonable probability" of a different result. This means you do not have to prove that your lawyer's errors "more likely than not altered the outcome" of your trial.[35]

Ineffective counsel claims are some of the most difficult claims to plead successfully because of the second part of the *Strickland* test. The standard is so strict because the court is more concerned with the reliability of trial outcomes than with the fairness of the trial process. This means that if the court finds there is a lot of evidence indicating your guilt, they will likely not find prejudice, because a jury probably would have convicted you even if you had proper counsel.

Courts usually will not find that one instance of bad behavior from your attorney affected a trial so strongly that it makes the outcome unreliable. So, when you are making an ineffective counsel claim, you should ask the court to consider the **total** effect of all of your lawyer's errors.[36] Ineffective assistance claims are fact-intensive, meaning many cases are decided because of the specific facts before the court. Try to find cases where defendants successfully made claims based on facts similar to yours and argue your claim in a similar way. Unfortunately, for every successful ineffective counsel claim, there are many others that do not win. So, be aware of recent cases that work against you and try to point out how the facts of those cases are different from yours.

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[31] *See* Strickland v. Washington, 466 U.S. 668, 681, 104 S. Ct. 2052, 2061, 80 L. Ed. 2d 674, 689 (1984) ("Because advocacy is an art and not a science, and because the adversary system requires deference to counsel's informed decisions, strategic choices must be respected in these circumstances if they are based on professional judgment.").

[32] *See* Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 2065 80 L. Ed. 2d 674, 694 (1984) ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight.").

[33] Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984). ("An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment."); *see also* Williams v. Taylor, 529 U.S. 362, 390–393, 120 S. Ct. 1495, 1511–1513, 146 L. Ed. 2d 389, 416–418 (2000) (affirming that analysis of the prejudice prong should focus solely on whether there was reasonable probability that but for counsel's errors, the result of the proceeding would have been different).

[34] *See* Strickland v. Washington, 466 U.S. 668, 700, 104 S. Ct. 2052, 2071, 80 L. Ed. 2d 674, 702 (1984) (holding that, in addition to failing the first prong, the second prong was also failed because "respondent has made no showing that the justice of his sentence was rendered unreliable . . . by deficiencies in counsel's assistance").

[35] Strickland v. Washington, 466 U.S. 668, 693, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 697 (1984).

[36] *See* Lundgren v. Mitchell, 440 F. 3d 754, 770 (6th Cir. 2006) (stating that, in determining prejudice under the *Strickland* test, the "[c]ourt examines the combined effect of all acts of counsel found to be constitutionally deficient, in light of the totality of the evidence in the case").

(b) Constructive Ineffectiveness: The *Cronic* Standard

If you cannot establish that your lawyer was actually ineffective under the *Strickland* test (above), the second type of ineffective assistance of counsel claim available under the U.S. Constitution is a "constructive denial" of assistance claim as laid out in United States v. Cronic.[37] You can claim constructive ineffective assistance if the circumstances of your trial were so unfair that the court can presume that there was ineffective assistance and prejudice.[38] This means that under the *Cronic* standard, unlike the *Strickland* test, you do not have to prove that your lawyer's ineffective assistance caused there was actual prejudice to your case. This is important because, as mentioned above, having to show actual prejudice under the second part of *Strickland* is often difficult to prove to a court. But keep in mind that it can sometimes be even more difficult to prove your counsel was so incompetent as to render assistance of counsel constructively denied.

The *Cronic* standard applies in three situations. First, prejudice may be presumed if you were completely denied counsel during a "critical stage" of your trial—meaning that you did not have a lawyer at all.[39] Second, you can claim ineffective assistance under *Cronic* if your lawyer, though present in the courtroom, "entirely fails to subject the prosecution's case to meaningful adversarial testing."[40] "Adversarial testing" requires your lawyer to have fought the state's case in some way, whether it was through cross-examining its witnesses, presenting evidence, or making meaningful arguments to the jury. Your lawyer's failure to test the state's case must have been "complete," meaning they presented no opposition whatsoever. Third, you can also make a *Cronic* claim if the circumstances of your trial made it highly unlikely that any lawyer could have provided effective assistance to you.[41] If your case falls within this third situation, you do not have to prove that your lawyer's trial performance was deficient.

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[37] United States v. Cronic, 466 U.S. 648, 659, 104 S. Ct. 2039, 2047, 80 L. Ed. 2d. 657, 668 (1984); *see* Rickman v. Bell, 131 F. 3d 1150, 1156–1160 (6th Cir. 1997) (affirming judgment of ineffective assistance where counsel had abandoned defendant's interests by repeatedly expressing contempt for client at trial and portraying client as crazy and dangerous, effectively acting as a prosecutor); *see also* Javor v. United States, 724 F. 2d 831, 833–834 (9th Cir. 1984) (finding prejudice inherent when counsel slept through much of the trial). *But see* Tippins v. Walker, 77 F. 3d 682, 684–687 (2nd Cir. 1996) (holding ineffective assistance claim should be judged under Strickland when counsel slept through the trial).

[38] *See* United States v. Cronic, 466 U.S. 648, 659–662, 104 S. Ct. 2039, 2047–2048, 80 L. Ed. 2d. 657, 668–670 (1984) (describing cases where ineffective assistance and prejudice may be presumed); *see also* Bell v. Cone, 535 U.S. 685, 695–698, 122 S. Ct. 1843, 1850–1852, 152 L. Ed. 2d 914, 927–929 (2002) (recognizing *Cronic*'s holding that prejudice may be presumed in the three situations identified).

[39] United States v. Cronic, 466 U.S. 648, 659, 104 S. Ct. 2039, 2047, 80 L. Ed. 2d. 657, 668 (1984).

[40] United States v. Cronic, 466 U.S. 648, 659, 104 S. Ct. 2039, 2047, 80 L. Ed. 2d. 657, 668 (1984); *see* Bell v. Cone, 535 U.S. 685, 697–698, 122 S. Ct. 1843, 1851–1852, 152 L. Ed. 2d 914, 928–929 (2002) (holding counsel's failure to produce mitigating evidence and waiver of closing argument did not constitute a complete failure to test the prosecutor's case and that *Strickland* applied rather than *Cronic*). This is a difficult standard to meet. For example, counsel's decision to concede guilt in a capital trial and focus instead on the sentencing phase, even though his client entered a "not guilty" plea, is not automatically a complete failure to subject the prosecution's case to adversarial testing. *Compare* Florida v. Nixon, 543 U.S. 175, 189, 125 S. Ct. 551, 561, 160 L. Ed. 2d 565, 579 (2004) ("The Florida Supreme Court's erroneous equation of [counsel's] concession strategy to a guilty plea led it to . . . [wrongly apply the *Cronic* standard] in determining whether counsel's performance ranked as ineffective assistance."), *with* State v. Carter, 270 Kan. 426, 441, 14 P.3d 1138, 1148 (2000) (finding a "breakdown in the our adversarial system of justice" when counsel premised defense on defendant's guilt against his client's wishes).

[41] *See* Powell v. Alabama, 287 U.S. 45, 56–58, 53 S. Ct. 55, 59–60, 77 L. Ed. 158, 164–165 (1932) (finding a denial of effective counsel when defendants, who were "young, ignorant, illiterate, [and] surrounded by hostile sentiment," were tried for a capital offense, and when defense counsel was designated only minutes before their trials began and thus had no opportunity to investigate the facts or to prepare). Note that in United States v. Cronic, 466 U.S. 648, 658–667, 104 S. Ct. 2039, 2046–2051, 80 L. Ed. 2d. 657, 667–673 (1984), the court rejected defendant's constructive ineffective assistance argument based on counsel's lack of experience in criminal law or jury trials, and 25-day preparation time. This is an extremely narrow exception. It is unlikely that a court will find your lawyer could not have provided effective assistance to you simply because they had a high caseload.

(c) Conflict of Interest: The *Cuyler* Standard

In addition to actual and constructive ineffectiveness claims, you can also argue that your lawyer provided ineffective assistance due to a conflict of interest. To establish that your lawyer provided ineffective assistance due to a conflict of interest, you must show that they had an actual conflict that "adversely affected," or had a negative impact on, their work in your case.[42] A conflict of interest arises when an attorney represents multiple people who have competing interests, such that the attorney cannot effectively represent one client without violating the duties they owe to another. For example, a conflict of interest can exist when one lawyer represents more than one co-defendant for the same crime.[43] Note, however, that the mere possibility of a conflict is not enough—you must show that the conflict actually exists.[44] This means that your lawyer must have taken some action, or refrained from acting in some way, that harmed you and benefited the state or another person.[45] You do not have to show prejudice if your lawyer had an actual conflict of interest that adversely affected you; in those cases, the court will presume that there is prejudice.

2. New York State Standard: The *Baldi* Standard

In addition to your federal right to effective counsel, New York State courts have said that you are entitled to "meaningful representation" under Article I, Section 6 of the New York State Constitution.[46]

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[42] Cuyler v. Sullivan, 446 U.S. 335, 350, 100 S. Ct. 1708, 1719, 64 L. Ed. 2d 333, 348 (1980); *see also* United States v. Iorizzo, 786 F.2d 52, 57–58 (2d Cir. 1986) (applying *Cuyler* and finding that defendant's trial counsel had a conflict of interest because he had previously represented the state's key witness on a related matter and failed to effectively cross-examine this witness after the trial judge had told counsel that he might encounter ethical problems if he pursued certain lines of questioning).

[43] A conflict of interest may also arise in other situations, including if your lawyer represented a government or defense witness in a related trial, if the victim was a client of your lawyer, or if your lawyer collaborated or had a connection with the prosecution. *See, e.g.*, Perillo v. Johnson, 205 F.3d 775, 808 (5th Cir. 2000) (finding that an actual conflict existed when counsel represented a co-defendant who was cooperating with the state as a witness against the accused); United States v. O'Leary, 806 F.2d 1307, 1315 (7th Cir. 1986) (holding that an actual conflict existed when counsel was prosecutor's campaign manager for State's Attorney election, and counsel colluded with prosecutor and a police officer to get defendant to hire him because it would be good for the campaign).

[44] *See* Cuyler v. Sullivan, 446 U.S. 335, 348, 100 S. Ct. 1708, 1718, 64 L. Ed. 2d 333, 346 (1980) ("Since a possible conflict inheres in almost every instance of multiple representation, . . . a reviewing court cannot presume that the possibility for conflict has resulted in ineffective assistance of counsel."); United States v. Fulton, 5 F.3d 605, 609 (2d Cir. 1993) ("If the defendant establishes the mere possibility of a conflict of interest, he or she must prove prejudice, that is, that counsel's performance fell below an objective standard of reasonableness, and the reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different.").

[45] *See, e.g.*, Edens v.Hannigan, 87 F.3d 1109, 1116 (10th Cir. 1996) (holding actual conflict of interest existed when counsel made no effort to present a defense for client because it would have harmed co-defendant); Burden v. Zant, 24 F.3d 1298, 1305–1307 (11th Cir. 1994) (finding ineffective assistance where counsel, representing two co-defendants, made an agreement with the prosecutor that one co-defendant would testify against the other in exchange for not prosecuting that co-defendant); Dawan v. Lockhart, 31 F.3d 718, 721–722 (8th Cir. 1994) (finding ineffective counsel where a public defender also represented codefendant who had pleaded guilty and made statements tying the client to the crime).

But see Burger v. Kemp, 483 U.S. 776, 783–785, 107 S. Ct. 3114, 3120–3121, 97 L. Ed. 2d 638, 650–651 (1987) (holding that it is not a conflict if two law partners represented co-defendants and one wrote the appellate brief for both and failed to argue "lesser culpability" on behalf of his client because it was a strategic choice); Mickens v. Taylor, 535 U.S. 162, 170–173, 122 S. Ct. 1237, 1242–1245, 152 L. Ed. 2d 291, 303–306 (2002) (rejecting defendant's argument for automatic reversal because counsel had met with victim for 20 minutes as counsel on separate charges before being appointed as defendant's counsel).

Comparing the facts of United States v. Fulton, 5 F.3d 605, 609 (2d Cir. 1993), with Mickens v. Taylor, 535 U.S. 162, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002), is helpful. In *Fulton*, a witness told the prosecutor that his defense attorney had engaged in the same crimes (drug trafficking) that the defendant was accused of, which seriously called into question his ability to represent his client. In *Mickens*, simply meeting with the victim for fewer than 30 minutes before representing the defendant did not render the attorney unable to provide effective counsel.

[46] People v. Baldi, 54 N.Y.2d 137, 147, 429 N.E.2d 400, 405, 444 N.Y.S.2d 893, 898 (1981) ("So long as the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation, the constitutional requirement will have been met.").

This means that in New York, you must show that your lawyer's failures harmed you so much that you did not have meaningful representation at trial. The Court has made clear that you are entitled to a fair trial, but not a perfect one.[47] Meaningful representation does not mean that your attorney made no mistakes. It means that your lawyer provided good enough representation to satisfy the court that you were properly represented.[48]

The court will consider all of the information available *at the time of* representation (i.e., information known now cannot help you prove your counsel was deficient if it was not known then).[49] One single error could constitute ineffective assistance if it is substantial.[50] Like with the federal standard, there is a strong presumption that your counsel made strategic decisions, not mistakes.[51] You have the high burden of proving that what your lawyer did or did not do was a mistake rather than a tactical choice.[52] Still, the *Baldi* standard is supposedly easier to prove than the *Strickland* standard,[53] because the *Baldi* standard has a less strict prejudice requirement than that required under *Strickland*. This looser prejudice standard functions to protect your right to a fair trial, regardless of whether the court believes you are innocent or guilty.[54] Under New York State law, a

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[47] People v. Henry, 95 N.Y.2d 563, 565–566, 744 N.E.2d 112, 113, 721 N.Y.S.2d 577, 578 (2000) ("The Constitution guarantees a defendant a fair trial, not a perfect one. Isolated errors in counsel's representation generally will not rise to the level of ineffectiveness, unless the error is so serious that defendant did not receive a 'fair trial.'" (first citing Delaware v. Van Arsdall, 475 U.S. 673, 681, 106 S. Ct. 1431, 1436, 89 L. Ed. 2d. 674, 684 (1986)); and then quoting People v. Flores, 84 N.Y.2d 184, 189, 639 N.E.2d 19, 19, 615 N.Y.S.2d 662, 664 (1994))).

[48] *See* People v. Benevento, 91 N.Y.2d 708, 712, 697 N.E.2d 584, 587, 674 N.Y.S.2d 629, 632 (1998) (holding that the New York State Constitution guarantees meaningful but not perfect representation, and that representation does not have to be "errorless" (quoting People v. Aiken, 45 N.Y.2d 394, 398, 380 N.E.2d 272, 274, 408 N.Y.S.2d 444, 447 (1978))); *see also* People v. Droz, 39 N.Y.2d 457, 462, 348 N.E.2d 880, 882–883, 384 N.Y.S.2d 404, 407 (1976) (finding improper representation where a lawyer failed to adequately prepare for trial, did not communicate with his client in a timely manner, made almost no attempt to contact potential witnesses, and neglected to study the record). *But see* People v. Young, 116 A.D.2d 922, 923, 498 N.Y.S.2d 667, 669 (3d Dept. 1986) (noting that the standards from *Baldi* and *Droz* only apply to ineffective assistance during trial; evaluation of attorney performance is measured differently when the defendant has entered a guilty plea).

[49] *See* People v. Baldi, 54 N.Y.2d 137, 147, 429 N.E.2d 400, 405, 444 N.Y.S.2d 893, 898 (1981) (holding the right to effective counsel is satisfied so long as the evidence, law, and circumstances of the particular case, viewed in totality and at the time of the representation, reveal that the attorney provided meaningful representation).

[50] *See* People v. Hobot, 84 N.Y.2d 1021, 1022, 646 N.E.2d 1102, 1103, 622 N.Y.S.2d 675, 676 (1995) ("Where a single, substantial error by counsel so seriously compromises a defendant's right to a fair trial, it will qualify as ineffective representation.").

[51] *See* People v. Rivera, 71 N.Y.2d 705, 709, 525 N.E.2d 698, 700, 530 N.Y.S.2d 52, 54 (1988) ("It is incumbent on defendant to demonstrate the absence of strategic or other legitimate explanations for counsel's failure to request a particular hearing. Absent such a showing, it will be presumed that counsel acted in a competent manner and exercised professional judgment in not pursuing a hearing."); *see also* People v. Benevento, 91 N.Y.2d 708, 713, 697 N.E.2d 584, 587, 674 N.Y.S.2d 629, 632 (1998) ("Counsel's performance should be 'objectively evaluated' 'to determine whether it was consistent with strategic decisions of a 'reasonably competent attorney.' As long as the defense reflects a reasonable and legitimate strategy under the circumstances and evidence presented, even if unsuccessful, it will not fall to the level of ineffective assistance." (first quoting People v. Angelakos, 70 N.Y.2d 670, 673, 512 N.E.2d 305, 307, 518 N.Y.S.2d 784, 786 (1987); and then quoting People v. Satterfield, 66 N.Y.2d 796, 799, 488 N.E.2d 834, 836, 497 N.Y.S.2d 903, 906 (1985))).

[52] *See* People v. Hobot, 84 N.Y.2d 1021, 1022, 646 N.E.2d 1102, 1103, 622 N.Y.S.2d 675, 676 (1995). ("To prevail on a claim that he was denied effective assistance of trial counsel, defendant bears the well-settled, high burden of demonstrating that he was deprived of a fair trial by less than meaningful representation.").

[53] People v. Turner, 5 N.Y.3d 476, 480, 840 N.E.2d 123, 125–126, 806 N.Y.S.2d 154, 156–157 (2005) ("[New York's] ineffective assistance cases have departed from the second ('but for') prong of *Strickland*, adopting a rule somewhat more favorable to defendants." (citations omitted)); People v. Caban, 5 N.Y.3d 143, 156, 833 N.E.2d 213, 22, 800 N.Y.S.2d 70, 79 (2005) (describing the state standard as being "somewhat more favorable to defendants" and "offer[ing] more protection than the federal test").

[54] *See* People v. Hobot, 84 N.Y.2d 1021, 1022, 646 N.E.2d 1102, 1103, 622 N.Y.S.2d 675, 676 (1995) (holding that the test is whether counsel's errors "seriously compromise a defendant's right to a fair trial"); People v. Jones, 30 A.D.2d 1038, 1039, 294 N.Y.S.2d 827, 828 (1968) (counsel's errors were "so prejudicial to the defendant" that they deprived him of a "fair trial"), *aff'd*, 25 N.Y.2d 637, 254 N.E.2d 232, 306 N.Y.S.2d 17 (1969); *see also* People v. Stultz, 2 N.Y.3d 277, 283–284, 810 N.E.2d 883, 887, 778 N.Y.S.2d 431, 435 (2004) ("*Strickland*'s prejudice prong is what chiefly separates it from New York's *Baldi* test. From time to time, [the Court of Appeals of New York] refer[s] to the Strickland standard and measures counsel's performance under it, but [it] has never applied it with

court will consider "prejudice" more generally when they consider whether a defendant received meaningful representation, rather than consider it as a separate question.[55] This same *Baldi* standard is applicable to claims that your appellate counsel was ineffective.[56]

3. Using a Claim of Ineffectiveness to Save a Procedurally Defaulted Claim

Ineffective assistance of counsel claims can be very useful because they can allow you to present claims that would otherwise be barred (not allowed). As the various Chapters on attacking your conviction explain, many issues must be "preserved" in order to be appealed.[57] Usually, if you or your lawyer did not raise certain issues during your trial, you cannot raise them on appeal because they were not "preserved." But, even if an issue was not raised or preserved during your trial, it can often still be raised as part of an ineffective counsel claim.[58] In other words, the fact that your lawyer did not raise certain issues during trial can be used as evidence that they did not effectively represent you.

Ineffective assistance claims are also useful in "procedural default" situations. "Procedural default" happens when you are precluded from presenting your claim in federal court because you failed to follow all of the necessary procedures for raising the claim in your state. In procedural default situations, federal courts will refuse to hear your claim because you did not follow state procedures first. If your claim has been procedurally defaulted, you can often raise that claim as an ineffective counsel claim instead.[59] For example, you might be able to argue that your attorney was ineffective because they failed to object to a racially discriminatory jury selection process. In addition, if any court has held that you have a procedurally defaulted claim, you can argue that your lawyer's ineffectiveness was the "cause" of the default.[60] As a general rule, if you are raising a claim for the first time that should have been raised earlier, you should argue that the reason you did not raise the claim earlier was because your attorney was ineffective.[61] However, in instances where ineffective assistance of counsel claims were not made in state post-conviction proceedings, you will typically be unable to overcome a procedural default meaning you cannot raise the ineffective assistance of counsel claim

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such stringency as to require a defendant to show that, but for counsel's ineffectiveness, the outcome would probably have been different. Under *Baldi* jurisprudence, a defendant need not fully satisfy the prejudice test of *Strickland*.").

[55] *See* People v. Stultz, 2 N.Y.3d 277, 284, 810 N.E.2d 883, 887, 778 N.Y.S.2d 431, 435 (2004) ("But under our *Baldi* jurisprudence, a defendant need not fully satisfy the prejudice test of *Strickland*. We continue to regard a defendant's showing of prejudice as a significant but not indispensable element in assessing meaningful representation. Our focus is on the fairness of the proceedings as a whole.").

[56] People v. Stultz, 2 N.Y.3d 277, 279, 810 N.E.2d 883, 884, 778 N.Y.S.2d 431, 432 (2004) (holding that *Baldi* standard of "meaningful representation" should also be applied in cases involving claims of appellate counsel ineffectiveness).

[57] In addition to the brief discussion in Part B of this Chapter (above), see *JLM*, Chapter 9, "Appealing Your Conviction or Sentence," regarding preservation of claims; Chapter 20, "Using Article 440 of the New York Criminal Procedure Law to Attack Your Unfair Conviction or Illegal Sentence," regarding errors of record in the trial; and Chapter 13, "Federal Habeas Corpus Petitions," regarding procedural default.

[58] *See* Kimmelman v. Morrison, 477 U.S. 365, 384–385, 106 S. Ct. 2574, 2587–2588, 91 L. Ed. 2d 305, 325–326 (1986) (granting defendant a hearing on the merits of an untimely suppression motion because he raised a claim that his trial counsel was ineffective for failing to make the suppression motion in a timely manner).

[59] *See* Kimmelman v. Morrison, 477 U.S. 365, 382–383, 106 S. Ct. 2574, 2587, 91 L. Ed. 2d 305, 324 (1986) (finding that the usual rules regarding procedural default do not apply to 6th Amendment ineffective assistance claims, since, without effective assistance, the incarcerated person has been unconstitutionally deprived of their liberty).

[60] See *JLM*, Chapter 13, "Federal Habeas Corpus Petitions," for an additional explanation of prohibited claims.

[61] For an example of how to successfully turn a procedurally barred claim into a successful claim of ineffectiveness, see Jackson v. Leonardo, 162 F.3d 81, 84–87 (2d Cir. 1998). In *Jackson*, the Court of Appeals held that the defendant's double jeopardy claim was procedurally barred, but granted relief on the defendant's claim that his appellate counsel was ineffective for failing to raise the double jeopardy claim. *See also* Williams v. Anderson, 460 F.3d 789, 799–801 (6th Cir. 2006) (finding that appellate counsel's ineffectiveness in raising trial counsel ineffectiveness claim on direct appeal constituted "cause and prejudice" for the procedural default that it caused).

later by suggesting your state post-conviction lawyer was ineffective.[62] As highlighted earlier, there is no federal right to a lawyer in state post-conviction proceedings, thus the court does not overturn procedural defaults where ineffective assistance of counsel claims were not brought by state post-conviction representation.

To include a prohibited claim (a claim that is not preserved or is procedurally defaulted) in an ineffective assistance of counsel claim, you must state the issue by explaining that your lawyer was ineffective for not properly arguing your claim. For example, if the wrong jury instructions were given at trial, but that claim is prohibited because it was not raised at trial (or not"preserved") you can claim that your lawyer was ineffective for not objecting to the jury instructions. Remember, you still must prove that your lawyer's mistake deprived you of your right to counsel because it negatively affected your trial. This means you must show both that (1) by not objecting to the instructions, your lawyer performed below the standard of effectiveness by which lawyers are judged; and (2) by not objecting, your lawyer lost a chance to argue a claim that would have succeeded.

Here is an example of how to include a prohibited claim in an ineffective counsel claim. Suppose you believe that your jury was selected in a racially discriminatory manner, but this issue was not raised at trial or on direct appeal and is now prohibited. You can follow these possible steps:

(1) Argue that your lawyer failed to object to the way in which the jury was selected and also failed to select a racially unbiased jury. Argue that your lawyer's failure to correct or object to the discriminatory jury selection fell below the reasonable standard of performance for lawyers;
(2) Argue that this failure of your attorney meant that you had a racially biased jury and, because of the circumstances of your case, you were denied a fair trial as a result of this jury selection error. Since there is a chance the outcome of your case would have been different, your lawyer's failure to object to or raise this claim resulted in prejudice.

To summarize, your lawyer was ineffective because his performance fell below the standard of objective reasonableness for lawyers. By not objecting to the racially discriminatory way in which the jury was selected, the lawyer negatively affected the outcome of your case.

Below is a checklist for incorporating a barred claim into an ineffective counsel claim:

(1) Identify the prohibited claim. Make sure the claim cannot be raised directly for procedural reasons;
(2) Determine whether the claim is prohibited because of your lawyer's ineffectiveness. Did your lawyer not raise the issue at trial? Did your lawyer say or do something at trial that decreased your chance of winning on the issue? Did your lawyer fail to raise the issue on direct appeal?;[63] and
(3) Argue that the claim is *only* prohibited because of your lawyer's ineffectiveness. Then, show that if your lawyer had not been ineffective in this way, this claim would have succeeded. Remember that you must plead both the "deficient performance" prong and the "prejudice" prong of the *Strickland* test. This means you must both (a) point out the specific failures of your lawyer and (b) show that your lawyer's failures to correct or address the issues hurt your case.

In addition to re-framing the barred claim as an ineffective counsel claim, you should still raise the claim separately and argue that your lawyer's ineffectiveness constitutes "cause and prejudice" for any procedural default.[64]

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[62] *See* Shinn v. Ramirez, 142 S. Ct. 1718, 1728, 212 L. Ed. 2d 713, 727 (2022).

[63] Jackson v. Leonardo, 162 F.3d 81, 84–87 (2d Cir. 1998) is an excellent example of how to turn a procedurally barred claim into a successful claim of ineffectiveness. In *Jackson*, the Court of Appeals held that the defendant's double jeopardy claim was procedurally barred as it was not raised in the original appeal. However, the court granted relief on the defendant's claim that his appellate counsel was ineffective for failing to raise the double jeopardy claim. The court found that the counsel's failure to raise the claim could not have been the result of any strategy as it was so obviously the best path forward in representing Jackson.

[64] *See, e.g.*, Williams v. Anderson, 460 F.3d 789, 799–801 (6th Cir. 2006) (finding that appellate counsel's ineffectiveness in raising trial counsel ineffectiveness claim on direct appeal constituted "cause and prejudice" for

E. Examples of Ineffective Assistance of Counsel Claims

This Part includes some examples of common successful IAC claims under both federal and New York state law. This list is not exhaustive and does not mean these claims are guaranteed to be successful in your case. It is only intended to demonstrate the wide variety of cases with facts that courts have found to amount to ineffective assistance of counsel. IAC claims are very fact-intensive, so you should compare and contrast the facts of your own case and your lawyer's performance with those of the cases listed below to determine if any of these cases (or others that you find through your own research) can help you make a successful IAC claim. Also remember that you must prove that your lawyer did not make a strategic (intentional) choice to do or not do these things.

- Your counsel was not actually qualified to practice law[65]
- Your counsel failed to investigate or perform certain pretrial functions[66]
    - Failed to demand a hearing on probable cause for your arrest[67]
    - Failed to demand a suppression hearing on evidence seized from you during arrest[68]
    - Failed to demand a suppression hearing on the voluntariness of a statement you made to the police[69]
- You counsel failed to properly select a jury at your trial[70]

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the procedural default that it caused).

[65] *See* Solina v. United States, 709 F.2d 160, 167–169 (2d Cir. 1983) (requiring reversal where defendant was unaware that counsel was unlicensed to practice law in any state, and "the lack of such authorization stemmed from failure to seek it or from its denial for a reason going to legal ability, such as failure to pass a bar examination, or want of moral character"). *But see* Waterhouse v. Rodriguez, 848 F.2d 375, 382–383 (2d Cir. 1988) (framing rule to exclude situation where licensed attorney is unknowingly disbarred during trial).

[66] *See* Kimmelman v. Morrison, 477 U.S. 365, 385–391, 106 S. Ct. 2574, 2588–2591, 91 L. Ed. 2d 305, 326–329 (1986) (finding ineffective assistance of counsel where counsel failed to conduct any pretrial discovery and failed to file timely motion to suppress illegally seized evidence); Gersten v. Senkowski, 426 F.3d 588, 609–615 (2d Cir. 2005) (finding that attorney's failure to seek medical expert consultation for the defense or to investigate critical government evidence constituted ineffective assistance of counsel); People v. Donovan, 184 A.D.2d 654, 654–656, 585 N.Y.S.2d 70, 71–72 (2d Dept. 1992) (ordering a new trial for ineffective assistance of counsel after attorney did not move to suppress certain evidence and failed to conduct an adequate investigation before the trial).

[67] *See* People v. Detling, 73 A.D.2d 937, 937, 423 N.Y.S.2d 509, 510 (2d Dept. 1980) (granting defendant a new trial because his counsel's failure to move for a hearing to determine whether there was probable cause for the arrest of the defendant, who was seized on the basis of a tip from an unidentified informant, constituted ineffective assistance of counsel).

[68] *See* People v. Donovan, 184 A.D.2d 654, 655, 585 N.Y.S.2d 70, 72 (2d Dept. 1992) (holding that counsel was deficient for failure to move to suppress physical evidence when it was a viable defense for his client); *see also* People v. Gugino, 132 A.D.2d 989, 990, 518 N.Y.S.2d 517, 518 (4th Dept. 1987) ("The critical nature of this evidence required that its admission be challenged."). *But see* People v. Lockhart, 167 A.D.2d 427, 427, 562 N.Y.S.2d 453, 454 (2d Dept. 1990) (holding that the failure to move to suppress physical evidence does not per se compel a finding that the defendant received less than effective assistance of counsel).

[69] *See* People v. Sanin, 84 A.D.2d 681, 683, 446 N.Y.S.2d 636, 639 (4th Dept.1981) (finding ineffective assistance of counsel when defendant's lawyer made no attempt to suppress statements he made during his arrest outside his home). *But see* People v. Sposito, 37 N.Y.3d 1149, 1151, 180 N.E.3d 1053, 1054 (2022) (holding that defense counsel's decision to waive suppression hearing and allow defendant's statements into evidence was reasonable trial strategy); People v. Rivera, 71 N.Y.2d 705, 709, 525 N.E.2d 698, 700 (1988) (denying defendant's ineffective assistance of counsel claim because he made no showing that the failure to seek a suppression hearing was not premised on strategy); Premo v. Moore, 562 U.S. 115, 129, 131 S. Ct. 733, 744, 178 L. Ed. 2d 649, 663 (2011) ("A defendant who accepts a plea bargain on counsel's advice does not necessarily suffer prejudice when his counsel fails to seek suppression of evidence, even if it would be reversible error for the court to admit that evidence.").

[70] *See* Johnson v. Armontrout, 961 F.2d 748, 755–756 (8th Cir. 1992) (finding ineffective assistance where evidence showed that at least two jurors were biased, and counsel failed to request removal of those jurors for cause); Hollis v. Davis, 912 F.2d 1343, 1351–1353 (11th Cir. 1990) (finding ineffective assistance where trial counsel failed to challenge the racial composition of a jury chosen in 1959 when African-Americans were systematically excluded from the list of potential jurors). *But see* United States v. Chandler, 950 F. Supp. 1545, 1557 (N.D. Ala. 1996) ("[T]he government's use of strikes did not show racial discrimination. [Petitioner]'s potential *Batson* claims were without merit, and so his trial counsel's failure to make them cannot serve as the basis for a claim of ineffective assistance."), *aff'd*, 218 F.3d 1305 (11th Cir. 2000).

- Your counsel failed to pursue defenses available to you[71]
  - Failed to prepare an insanity defense[72]
  - Failed to prepare a defense based on your alibi[73]
- Your counsel did not properly advise you about a plea[74]
  - Failed to tell you information about a viable defense before advising you to plead guilty[75]
  - Failed to properly counsel you about the success of your case so you took a plea when you otherwise would have gone to trial[76]
  - Failed to counsel you so you rejected a favorable plea bargain and were later convicted either by trial or subsequent (less favorable) plea bargain[77]

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[71] *See* Wilcox v. McGee, 241 F.3d 1242, 1246 (9th Cir. 2001) (finding ineffective assistance where counsel failed to move at a second trial to dismiss an indictment barred by double jeopardy); Jackson v. Leonardo, 162 F.3d 81, 86–87 (2d Cir. 1998) (holding that appellate counsel's failure to raise the obvious double jeopardy claim constituted ineffective assistance); DeLuca v. Lord, 77 F.3d 578, 590 (2d Cir. 1996) (determining that counsel's failure to pursue an extreme emotional disturbance defense constituted ineffective assistance when it is likely that a jury would have found this defense persuasive and would have reduced defendant's liability from second degree murder to first degree manslaughter). However, defense counsel does not have to pursue defenses that she believes are futile, even if it is the only defense available and there is nothing to lose by pursuing it. *See* Knowles v. Mirzayance, 556 U.S. 111, 123–128, 129 S. Ct. 1411, 1420–1422, 173 L. Ed. 2d 251, 262–265 (2009).

[72] *See* People v. Angellilo, 91 A.D.2d 666, 667, 457 N.Y.S.2d 118, 119 (2d Dept. 1982) ("We note that this is not a case where defense counsel, after careful analysis of the facts, concluded that the best tactical approach would be to ignore the insanity defense. In fact, at defendant's sentencing, his attorney stated that he would have presented the defense of insanity had he been given the adjournment that he had requested"). *But see* Knowles v. Mirzayance, 556 U.S. 111, 123, 129 S. Ct. 1411, 1420, 173 L. Ed. 2d 251, 262 (2009) (holding that it was not deficient performance to counsel the defendant to abandon an insanity defense that had little chance to succeed).

[73] *See* People v. Sullivan, 209 A.D.2d 558, 558–559, 618 N.Y.S.2d 916, 917 (2d Dept. 1994). ("In addition, counsel failed to properly prepare the defendant's alibi defense by not serving a timely notice of an alibi witness and by not subpoenaing witnesses and the hospital records to verify the defendant's [alibi]."); Brown v. Myers, 137 F.3d 1154, 1156–1158 (9th Cir. 1998) (finding ineffective assistance when counsel failed to investigate and present testimony supporting petitioner's alibi); Tosh v. Lockhart, 879 F.2d 412, 414–415 (8th Cir. 1989) (finding ineffective assistance of counsel when defense counsel failed to try to find alibi witnesses). *But see* People v. Henry, 95 N.Y.2d 563, 566, 744 N.E.2d 112, 114 (2000) ("Although the prosecution discredited the alibi testimony, this alone did not 'seriously compromise' defendant's right to a fair trial. Counsel competently represented defendant's interests at other stages of the proceedings, and counsel's presentation of the alibi testimony did not diminish the legitimacy of defendant's misidentification defense.")

[74] *See* McMann v. Richardson, 397 U.S. 759, 771, 90 S. Ct. 1441, 1449, 25 L. Ed. 2d 763, 773 (1970) (stating that the right to effective assistance of counsel belongs to defendants deciding whether to plead guilty).

[75] *See* People v. Thomson, 279 A.D.2d 644, 644, 719 N.Y.S.2d 171, 172 (3d Dept. 2001) (holding that it was ineffective assistance of counsel when the attorney failed to advise the client that criminal intent was a necessary element of attempted murder in the second degree and that element could have been negated by the fact that the client was intoxicated).

[76] *See* Hill v. Lockhart, 474 U.S. 52, 59, 106 S. Ct. 366, 370, 88 L. Ed. 2d 203, 210 (1985) ("In order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."); United States v. Hansel, 70 F.3d 6, 8 (2d Cir. 1995) (finding counsel provided ineffective assistance in plea bargaining when counsel failed to inform defendant that charges against him were time-barred and defendant would not have otherwise pleaded guilty); Lee v. United States, 582 U.S. 357, 369–371, 137 S. Ct. 1958, 1967–1969, 198 L. Ed. 2d 476, 487–489 (2017) (holding that there was a reasonable probability that, but for counsel's erroneous advice, defendant would have rejected a guilty plea where the circumstances showed deportation was the determinative issue in his decision to accept the plea, and it was not irrational to reject the plea deal when there was some chance of avoiding deportation, however remote). *But see* Premo v. Moore, 562 U.S. 115, 129, 131 S. Ct. 733, 744, 178 L. Ed. 2d 649, 663 (2011) ("A defendant who accepts a plea bargain on counsel's advice does not necessarily suffer prejudice when his counsel fails to seek suppression of evidence, even if it would be reversible error for the court to admit that evidence.").

[77] *See* Missouri v. Frye, 566 U.S. 134, 148, 132 S. Ct. 1399, 1410, 182 L. Ed. 2d 379, 392 (2012) (holding that while counsel is ineffective if he fails to disclose plea offer to defendant and there is a strong likelihood that Frye would have accepted the plea offer provided by the prosecution, it is less certain that the trial court would have permitted the plea offer to become final); Lafler v. Cooper, 566 U.S. 156, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012) (holding that even if defendant still got a fair trial, if the plea he rejected on poor advice from counsel have been acceptable and carried a lesser sentence, the acceptable remedy is for the plea bargain to be re-offered and the

- If you are not a citizen of the United States, and your attorney failed to advise you of the possible deportation risks of a guilty plea made before 2010[78]
- Your counsel refused to let you testify if you wished to do so[79]
- Your counsel failed to call expert witnesses[80]
- Your counsel failed to object to the improper use of evidence at trial[81]
  - Specifically, your counsel failed to object to improper hearsay evidence[82]
  - Your counsel did not object to the use of improper forensic science (also known as "junk science")[83]

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trial court may then exercise discretion to either vacate conviction and accept the plea or leave the conviction undisturbed); Mask v. McGinnis, 233 F.3d 132, 139–142 (2d Cir. 2000) (finding that a reasonable probability that the defendant would have accepted a plea if counsel effectively advised him constitutes ineffective assistance of counsel); United States v. Gordon, 156 F.3d 376, 380–382 (2d Cir. 1998) (finding that the large disparity between the defendant's actual maximum sentence under the Sentencing Guidelines and the maximum sentence represented by defendant's attorney indicated that a reasonable probability existed that the proceedings would have gone differently if defendant's counsel had properly advised him). *But see* Purdy v. United States, 208 F.3d 41, 46–48 (2d Cir. 2000) (finding that although attorney should inform each client of the probable costs and benefits of accepting a plea bargain, he need not actually advise his client whether to plead guilty or not).

Note that your lawyer is not normally required to advise you about the collateral consequences of a guilty plea. "Collateral consequences" refers to the effects of a guilty plea that are not a direct result of the plea. For example, if you lose your job because of a guilty plea, that is considered a collateral consequence. There is an exception for immigration-related consequences, as discussed below in footnote 79.

[78] *See* Padilla v. Kentucky, 559 U.S. 356, 371, 130 S. Ct. 1473, 1484, 176 L. Ed. 2d 284, 297 (2010) ("It is quintessentially the duty of counsel to provide her client with available advice about an issue like deportation, and the failure to do so 'clearly satisfies the first prong of the *Strickland* analysis.'"); *see also* Janvier v. United States, 659 F. Supp. 827, 828–829 (N.D.N.Y. 1987) (holding that a non-citizen's defense lawyer's failure to petition the sentencing court to issue a recommendation against deportation constituted ineffective assistance of counsel). *But see* Chaidez v. United States, 568 U.S. 342, 344, 133 S. Ct. 1103, 1105, 185 L. Ed. 2d 149, 154 (2013) (holding that *Padilla* does not have a retroactive effect, which means you cannot claim your lawyer was ineffective under *Padilla* if the representation occurred before 2010).

[79] *See* People v. Britton, No. 2825/2003, 2006 N.Y. Misc. LEXIS 4006, at *40 (N.Y Sup. Ct. Mar. 6, 2006) (*unpublished*) (holding that in order to claim ineffective assistance of counsel, the defendant has the burden of demonstrating by a preponderance of credible evidence that he wanted to testify, and his trial counsel denied him that right).

[80] *See* People v. Saunders, 54 A.D.2d 938, 939, 388 N.Y.S.2d 142, 142 (2d Dept. 1976) ("In support of the said defense, counsel merely introduced into evidence hospital records, some of which were illegible. She failed to present a psychiatrist or other expert to evaluate their contents. The defense presented was, therefore, largely meaningless."); *see also* Hinton v. Alabama, 571 U.S. 263, 274, 134 S. Ct. 1081, 1088, 188 L. Ed. 2d 1, 9 (2014) (holding that trial counsel was ineffective because he failed "to request additional funding in order to replace an expert he knew to be inadequate because he mistakenly believed that he had received all he could get"). *But see* United States v. Luciano, 158 F.3d 655, 660 (2d Cir. 1998) ("The decision not to call a particular witness is typically a question of trial strategy that appellate courts are ill-suited to second-guess."); Baxter v. Noeth, No. 17 Civ. 8918, 2020 U.S. Dist. LEXIS 22781, at *50 (S.D.N.Y. Feb. 7, 2020) (*unpublished*) ("A decision to call or not call a certain witness is generally a tactical decision.").

[81] *See* Quartararo v. Fogg, 679 F. Supp. 212, 240 (E.D.N.Y. 1988) (counsel failed to object to evidence that defendant's parents believed him to be guilty), *aff'd*, 849 F.2d 1467 (2d Cir. 1988); *see also* Kimmelman v. Morrison, 477 U.S. 365, 385–387, 106 S. Ct. 2574, 2588–2590, 91 L. Ed. 2d 305, 326–327 (1986) (finding ineffective assistance when counsel failed to move to suppress evidence because of counsel's failure to investigate); Tomlin v. Myers, 30 F.3d 1235, 1237–1239 (9th Cir. 1994) (finding counsel ineffective for failure to move to suppress lineup identification evidence); People v. Wallace, 187 A.D.2d 998, 998–999, 591 N.Y.S.2d 129, 130 (4th Dept. 1992) (finding attorney's failure to object to admission of evidence was ineffective assistance); People v. Riley, 101 A.D.2d 710, 711, 475 N.Y.S.2d 691, 692–693 (4th Dept. 1984) (finding counsel's failure to object to inadmissible hearsay evidence, lack of preparation, and pursuit of a highly prejudicial cross-examination constituted ineffective assistance).

[82] See Mason v. Scully, 16 F.3d 38, 44 (2d Cir. 1994) (finding that counsel was ineffective in failing to object, on hearsay and Confrontation Clause grounds, to critical testimony by a police detective about an inculpatory statement made by a non-testifying co-defendant).

[83] Examples of unreliable forensic or "junk" sciences include bite mark analysis, hair microscopy, and handwriting comparison. For more information, see Harry T. Edwards & Jennifer L. Mnookin, Opinion, *A Wake-Up Call on the Junk Science Infesting Our Courtrooms*, WASH. POST (Sept. 20, 2016), *available at* https://www.washingtonpost.com/opinions/a-wake-up-call-on-the-junk-science-infesting-our-courtrooms/2016/09/19/85b6eb22-7e90-11e6-8d13-d7c704ef9fd9_story.html (last visited Mar. 30, 2024). However, courts are reluctant

- Your counsel did not present a closing argument[84]
- Your counsel did not thoroughly investigate or present sufficient mitigating evidence (evidence that would lessen the seriousness of the offense)[85]
- Your counsel did not object to improper jury instructions[86]
- Your counsel did not file an appeal when you asked them to[87]

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to deem defense counsel deficient for failing to object to the use of junk science in trials. *See* Maryland v. Kulbicki, 577 U.S. 1, 136 S. Ct. 2, 193 L. Ed. 2d 1 (2015) (holding that counsel did not perform deficiently in failing to anticipate that Comparative Bullet Lead Analysis (CBLA) would become discredited).

[84] *See* Bell v. Cone, 535 U.S. 685, 701–702, 122 S. Ct. 1843, 1853–1854, 152 L. Ed. 2d 914, 931 (2002) (holding that it is not unreasonable to conclude that defense counsel's waiver of closing argument was a strategic choice and therefore, not ineffective assistance of counsel); *see also* Smith v. Spisak, 558 U.S. 139, 154, 130 S. Ct. 676, 687, 175 L. Ed. 2d 595, 607 (2010) (holding that counsel's inadequate closing argument did not violate the 6th Amendment because there was no reasonable probability that a better closing argument would have changed the outcome of the trial).

[85] *See* Andrus v. Texas, 140 S. Ct. 1875, 1881–1882, 207 L. Ed. 2d 335, 342 (2020) (*per curiam*) (finding trial counsel's performance to be deficient where "counsel performed almost no mitigation investigation" and that, because of that failure, the little evidence that counsel did present strengthed the State's aggravation case); Wiggins v. Smith, 539 U.S. 510, 534, 123 S. Ct. 2527, 2542, 156 L. Ed. 2d 471, 493 (2003) ("*Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. . . . [However,] 'strategic choices made after less than complete investigation are reasonable' only to the extent that 'reasonable professional judgments support the limitations on investigation.'" (quoting Strickland v. Washington, 466 U.S. 668, 690–691, 104 S. Ct. 2052, 2066, 80 L. Ed. 2d 674, 695 (1984))); Rompilla v. Beard, 545 U.S. 374, 390, 125 S. Ct. 2456, 2467, 162 L. Ed. 2d 360 (2005) (finding counsel deficient because he failed to uncover mitigating circumstances, school records, or records from defendant's juvenile and adult incarcerations, and he failed to research possible mental health issues, including schizophrenia and alcohol addiction); Porter v. McCollum, 558 U.S. 30, 33, 130 S. Ct. 447, 449, 175 L. Ed. 2d 398 (2009) (*per curiam*) (holding that the defendant received ineffective assistance of counsel at sentencing because counsel failed to present mitigating evidence of the defendant's heroic military service, mental difficulties, and abusive childhood, which would allow an accurate assessment of his moral culpability).

But see Wong v. Belmontes, 558 U.S. 15, 25, 130 S. Ct. 383, 389, 175 L. Ed. 2d 328, 336 (2009) (*per curiam*) (defendant failed to establish prejudice from his counsel's performance in violation of his 6th Amendment rights during the sentencing phase of his capital trial because if his counsel had presented more mitigating evidence, it probably would have opened the door to evidence that the petitioner had previously committed another murder); Cullen v. Pinholster, 563 U.S. 170, 202–203, 131 S. Ct. 1388, 1410–1411, 179 L. Ed. 2d 557, 583 (2011) (denying ineffective assistance of counsel claim based on counsel's failure to investigate mitigating evidence because of the "'doubly deferential' standard of *Strickland* and AEDPA").

If you were convicted and received a life-without-parole (LWOP) sentence as a juvenile, you might have an ineffective assistance of counsel claim if your lawyer failed to raise your age and juvenile status as mitigating factors to the sentencing judge. *See* Jones v. Mississippi, 141 S. Ct. 1307, 1319 n.6, 209 L. Ed. 2d 390, 405 n.6 (2021). *But see* People v. Matias, 68 Misc. 3d 352, 364 n.16, 123 N.Y.S.3d 792, 802 n.16 (Sup. Ct. Bronx County 2020) ("The mere fact that the Court in its statement at sentencing did not explicitly identify defendant's age as a mitigating factor is of no moment and does not mean the Court failed to consider it."), *aff'd*, 205 A.D.3d 557, 168 N.Y.S.3d 67 (1st Dept. 2022).

[86] *See* Cox v. Donnelly, 432 F.3d 388, 390 (2d Cir. 2005) (finding that counsel's repeated failure to object to erroneous jury instruction constituted ineffective counsel); Everett v. Beard, 290 F.3d 500, 513, 515–516 (3d Cir. 2002) (holding that counsel performed deficiently by failing to object on due process grounds to jury instruction which incorrectly permitted jury to convict defendant of first degree murder even if his accomplice intended to cause the death of the victim); Gray v. Lynn, 6 F.3d 265, 269, 271–272 (5th Cir. 1993) (finding counsel fell below objective standard of reasonable assistance, thereby providing ineffective assistance, where counsel failed to object to erroneous jury instructions regarding elements of first degree murder).

[87] *See* Roe v. Flores-Ortega, 528 U.S. 470, 480–484, 120 S. Ct. 1029, 1036–1039, 145 L. Ed. 2d 985, 997–1000 (2000) (holding that trial counsel performs deficiently by failing "to consult with the defendant about an appeal when there is reason to think" the defendant either wants to appeal or could succeed on appeal, but the defendant still must "demonstrate that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed"); Garza v. Idaho, 139 S. Ct. 738, 742, 203 L. Ed. 2d 77, 84 (2019) (holding that when an attorney performs deficiently by failing to follow the defendant's express instructions to file a notice of appeal, prejudice should be presumed "with no further showing from the defendant of the merits of his underlying claims," even when the defendant has signed a plea deal waiving his right to appeal); Garcia v. United States, 278 F.3d 134, 137–138 (2d Cir. 2002) (finding ineffective assistance of counsel where counsel incorrectly advised defendant on the record that he could not appeal and district court confirmed that advice); United States v. Phillips, 210 F.3d 345, 348, 50–53 (5th Cir. 2000) (finding that counsel's failure to appeal an obstruction of justice sentencing enhancement constituted ineffective assistance); Castellanos v. United States, 26 F.3d 717, 718 (7th Cir. 1994) (holding that when a defendant tells his lawyer to appeal, and the lawyer

- Your appellate counsel raised weak issues or undermined your appeal[88]
- Counsel's conduct at trial was simply so bad that it was ineffective[89]

F. Conclusion

Ineffective assistance of counsel is a useful claim for incarcerated people who had inadequate legal representation at trial or on direct appeal or for those who face procedural problems with some of their appellate claims. But remember a successful ineffective assistance of counsel claim requires that you show the specific ways in which your lawyer performed poorly *and* that with proper counsel the outcome of your case would probably have been different. The law places the burden on you to make this showing, and the court will often assume your lawyer made a strategic choice if you do not prove that your lawyer actually made a mistake. Consult other relevant chapters of the *JLM*, including Chapter 9, "Appealing Your Conviction or Sentence" (direct appeals); Chapter 20, "Using Article 440 of the New York Criminal Procedure Law to Attack Your Unfair Conviction or Illegal Sentence" (state post-conviction appeals); Chapter 13, "Federal Habeas Corpus Petitions" (federal habeas corpus claims); and Chapter 21, "State Habeas Corpus: Florida, New York, and Michigan" (state habeas corpus claims). Additionally, you might want to read Chapter 2 of the *JLM*, "Introduction to Legal Research" for some tips about how to distinguish other cases from your own, since the success or failure of IAC claims turns so often on the case's facts.

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does not file an appeal by the court's deadline, the lawyer commits ineffective assistance of counsel); United States v. Peak, 992 F.2d 39, 41–42 (4th Cir. 1993) (finding that counsel's failure to file for appellate review when requested by defendant deprives defendant of 6th Amendment right to assistance of counsel even if he would have not been likely to win on appeal); United States v. Horodner, 993 F.2d 191, 195–196 (9th Cir. 1993) (finding that, unless the defendant agreed to waive an appeal, counsel's failure to file a timely notice of appeal constitutes ineffective assistance of counsel that prejudiced the defendant); Bonneau v. United States, 961 F.2d 17, 18–19, 22–23 (1st Cir. 1992) (finding that where attorney never filed an appeal despite multiple time extensions, ineffective assistance of counsel denied the defendant his constitutionally guaranteed opportunity to appeal); People v. Stokes, 95 N.Y.2d 633, 638–639, 744 N.E.2d 1153, 1156, 722 N.Y.S.2d 217, 220 (2001) (finding defendant's right to appellate counsel was not adequately fulfilled because appellate counsel's brief contained no reference to the evidence or to defense counsel's objections at trial and made clear that counsel did not act like an advocate on behalf of the client); People v. Vasquez, 70 N.Y.2d 1, 3–4, 509 N.E.2d 934, 935, 516 N.Y.S.2d 921, 922 (1987) (finding that defense counsel denied the defendant effective assistance of counsel by characterizing the points defendant wished to raise on appeal in an appellate brief as being "without merit").

But see Roe v. Flores-Ortega, 528 U.S. 470, 478, 120 S. Ct. 1029, 1035, 145 L. Ed. 2d 985, 995 (2000) (rejecting that there is a *per se* finding of ineffective assistance of counsel when an attorney fails to file a notice of appeal without his client's consent).

[88] *See* Mayo v. Henderson, 13 F.3d 528, 536 (2d Cir. 1994) (finding ineffective assistance of counsel when defendant's appellate counsel chose to argue issues that were particularly weak and had little or no chance of success); Matire v. Wainwright, 811 F.2d 1430, 1438 (11th Cir.1987) (finding ineffective assistance of counsel when appellate counsel ignored "a substantial, meritorious Fifth Amendment issue" and instead raised a "weak issue"). *But see* Jones v. Barnes, 463 U.S. 745, 754, 103 S. Ct. 3308, 3314, 77 L. Ed. 2d 987, 995 (1983) (noting that appellate counsel does not have to raise "every 'colorable' claim suggested by a client").

[89] This kind of general argument is very hard to raise successfully. Your claim must include specific information about why your counsel's conduct was not acceptable. *See* Tippins v. Walker, 77 F.3d 682, 686–690 (2d Cir. 1996) (finding ineffective assistance where attorney slept through substantial portions of the trial, noting that the judge interrupted proceedings two times to reprimand attorney); Burdine v. Johnson, 262 F.3d 336, 339–341 (5th Cir. 2001) (finding ineffective assistance because counsel was unconscious during substantial portions of trial, leaving the petitioner without representation during critical stages of the trial); People v. Huggins, 164 A.D.2d 784, 786–887, 559 N.Y.S.2d 720, 721–722 (1st Dept. 1990) (finding ineffective assistance where attorney was an alcoholic, who had once been disbarred for 20 years, and was confused and inattentive at trial).