CHAPTER 12

APPEALING YOUR CONVICTION BASED ON INEFFECTIVE ASSISTANCE OF COUNSEL

A. Introduction

Many prisoners appeal their conviction because of ineffective assistance of counsel. A successful claim of ineffective assistance requires two things. First, your lawyer must have not followed professional standards while representing you. Second, there must be a "reasonable probability" that your lawyer's poor representation negatively affected the outcome of your case.[1] The right to effective counsel comes from the Sixth and Fourteenth Amendments of the U.S. Constitution. If you are in New York State, Article I, Section 6 of the New York State Constitution also protects the right to effective counsel.[2] There are different reasons why counsel are found ineffective and different ways to appeal your conviction based on the claim that your counsel was ineffective. This Chapter summarizes how to bring these claims, but other *JLM* Chapters, listed in footnote 3, can give you more detailed information.

B. Ways to Claim Ineffective Counsel

There are three general ways to attack your conviction: direct post-conviction appeal, state post-conviction appeal, and a federal and/or state habeas corpus claim. Other *JLM* Chapters cover these topics in more depth.[3] In New York, if you are appealing your conviction based on ineffective assistance of counsel during your trial, you should first raise your claim (1) in your direct appeal,[4] and then (2) in your federal habeas corpus petition.[5] If you are filing a claim in New York State court and there are not enough facts in the record to let the court review an ineffectiveness claim on appeal, you should (3) also file an Article 440 motion in New York State court.[6] It is important to note that there is no Sixth Amendment right to counsel

---

1. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (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. Or you might claim that your lawyer's ineffectiveness caused you to not file an appeal when you should have filed an appeal, or caused you to lose your appeal when you might have won.

2. Even if you do not live in New York, your state's constitution may also provide the right to effective counsel. Regardless of whether your state's constitution has a provision regarding the right to counsel, the 6th and 14th Amendments of the U.S. Constitution give you a federal right to effective counsel.

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" (federal habeas corpus claims); and Chapter 21, "State Habeas Corpus" (state habeas corpus claims).

4. In New York, an ineffective assistance claim that is based only on the trial record must be made in the 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 CPL 440.10."); People v. Brown, 45 N.Y.2d 852, 853–54, 382 N.E.2d 1149, 1149–50, 410 N.Y.S.2d 287, 287 (1978) ("Generally, the ineffectiveness of counsel is not demonstrable on the main record, but in this case it is."); 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).

5. If you are not in New York, you may not be able to file both a direct appeal and a federal habeas corpus claim. *See* Peoples v. United States, 403 F.3d 844, 848 (7th Cir. 2005) (holding that "a defendant who chooses to make an ineffective assistance argument on direct appeal cannot present it again on collateral review").

6. For claims of ineffective assistance of trial counsel, an Article 440 motion, not a state habeas corpus petition, is the appropriate procedural method in New York State. See Chapter 20 of the *JLM* for further discussion of Article 440. A state habeas corpus petition may be the appropriate procedure in other states. *See*, *e.g.*, State v. Leecan, 198 Conn. 517, 541, 504 A.2d 480, 493, *cert. denied,* 476 U.S. 1184, 106 S. Ct. 2922, 91 L .Ed. 2d 550 (1986) (stating that the proper method for raising a claim of ineffective counsel in Connecticut is generally a state habeas corpus petition).

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).[7]

You have the right to have effective counsel during a first appeal of your conviction.[8] A finding that you had ineffective counsel during your first appeal can lead to a *de novo* (new) appeal and, sometimes, a reversal of your conviction.[9] 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 a federal habeas corpus petition. In New York, to file an ineffective appellate counsel claim you must file a *coram nobis* motion[10] in the court where the first appeal was filed,[11] but each state has its own state post-conviction appeals procedure.[12]

There is no federal constitutional right to counsel in state post-conviction proceedings. So, a claim of ineffective counsel during your appeal based on the U.S. Constitution will not succeed.[13] But some states do have a right to counsel in state post-conviction proceedings (based on state statutory or state constitutional law), and some states allow courts to require effective counsel in state post-conviction proceedings when it is in the interest of justice.[14] If you are in a state that gives you a right to counsel in state post-conviction proceedings, you may also have a right to effective representation in those hearings.[15]

---

7. Moran v. Burbine, 475 U.S. 412, 430–31, 106 S. Ct. 1135, 1145–46, 89 L. Ed. 2d 410, 427 (1986) (holding "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 the right under both the U.S. Constitution and the New York State Constitution to effective counsel does not attach until the start of adversarial judicial proceedings). But, note that some state constitutions grant broader rights to counsel than the U.S. Constitution does. *See* People v. McCauley, 645 N.E.2d 923, 929, 163 Ill. 2d 414, 423–24, 206 Ill. Dec. 671, 676–77 (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). 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, 1626, 16 L. Ed. 2d 694, 721 (1966). But that right may not include the right to *effective* counsel. *See* Sweeney v. Carter, 361 F.3d 327, 333 (7th Cir.), *cert. denied,* 543 U.S. 1020, 125 S. Ct. 657, 160 L. Ed. 2d 496 (2004) ("[A]s far as we can tell, the 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.").

8. 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).

9. *See*, *e.g.*, McHale v. United States, 175 F.3d 115, 119 (2d Cir. 1999) (reinstating appeal upon finding that appellate counsel's ineffectiveness caused dismissal of original appeal).

10. A motion to restore you to a pre-conviction state, alleging an erroneous conviction.

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

12. In most states, ineffective appellate counsel can be raised as part of your state post-conviction motion, but you should check your state's laws. *See*, *e.g.*, State v. Davis, 2008 Ohio 4608, 119 Ohio St. 3d 422, 894 N.E.2d 1221 (2008) (holding Ohio statute requires ineffective appellate counsel claims be made only to the state appellate court, rather than to the trial court in a post-conviction petition). For information on *coram nobis* motions, see Chapter 9 of the *JLM*, "Appealing Your Conviction or Sentence."

13. Coleman v. Thompson, 501 U.S. 722, 752, 111 S. Ct. 2546, 2566, 115 L. Ed. 2d 640, 670 (1991) (citing Pennsylvania v. Finley, 481 U.S. 551, 107 S. Ct. 1990, 95 L. Ed. 2d 539 (1987); Murray v. Giarratano, 492 U.S. 1, 7–8, 109 S. Ct. 2765, 2769, 106 L. Ed. 2d 1, 9–10 (1989)).

14. For example, the Alaska post-conviction statute provides for counsel in one post-conviction appeal. Alaska Stat. § 18.85.100(c) (2009). Florida does not provide a statutory right, but the court may determine in the interest of justice whether, given the facts of the case, the prisoner should have the assistance of counsel. State v. Weeks, 166 So. 2d 892, 897 (Fla. 1964) ("Each case must be decided in the light of 5th Amendment Due Process requirements."). You should research your state's post-conviction laws and relevant case law to see if such a right exists in your state.

15. *See*, *e.g.*, Lozada v. Warden, 223 Conn. 834, 613 A.2d 818 (1992) (finding that a statutory right to counsel on a habeas petition encompassed right to effective counsel, which could be vindicated by means of a second habeas petition); *compare* Moore v. Commonwealth, 199 S.W.3d 132, 139 (Ky. 2006) (reinstating appeal from denial of post-conviction relief, on grounds that statutory right to post-conviction counsel included right to competent counsel, but cautioning that "[o]ur holding ... should not be construed as sanctioning" the filing of a subsequent post-conviction motion based on previous post-conviction counsel's ineffectiveness).

You must raise your ineffective counsel claims within the proper time and with the proper procedures. If your claim is not raised during the proper time and with the proper procedures, it could be thrown out. 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 the lawyer for your appeal was ineffective for not raising an ineffectiveness claim regarding 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 bar you from raising the claim in a post-conviction proceeding.[16] But in some states like New York, an ineffective assistance claim that can be decided based on the trial record alone must be made in the direct appeal.[17] In those cases, you are barred from raising it in a post-conviction motion.[18] Be sure to check the laws in your state for the proper procedure.

C. How to Prove Ineffective Counsel

As discussed above, there is a federal right to effective counsel and, in many states, 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

---

16. Massaro v. United States, 538 U.S. 500, 504, 123 S. Ct. 1690, 1694, 155 L. Ed. 2d 714, 720 (2003) (holding an 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 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, 569–70, 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 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.").

17. In a New York claim, courts have said that an Article 440 motion is usually the correct way to raise an ineffective assistance of counsel claim. People v. Brown, 45 N.Y.2d 852, 853–54, 382 N.E.2d 1149, 1149–59, 410 N.Y.S.2d 287, 287 (1978) ("Generally, the ineffectiveness of counsel is not demonstrable on the main record.... Consequently, in the typical case it would be better, and in some cases essential, that an appellate attack on the effectiveness of counsel be bottomed on an evidentiary exploration by collateral or post-conviction proceeding brought under CPL 440.10."). If matters outside of the trial record must be examined, such as reasons for counsel's actions, New York 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. Love, 57 N.Y.2d 998, 1000, 443 N.E.2d 486, 487, 457 N.Y.S.2d 238, 239 (1982); People v. Monroe, 2008 N.Y. Slip Op. 05531, 1, 52 A.D.3d 623, 623, 860 N.Y.S.2d 564, 565 (2d Dept. 2008); People v. Bagarozy, 182 A.D.2d 565, 566, 582 N.Y.S.2d 424 (1st Dept. 1992) (motion to set aside); People v Garcia, 187 A.D.2d 868, 590 N.Y.S.2d 565 (3d Dept. 1992). You can use an Article 440 motion to raise claims that are based on information in the record, but in such a case you must have first made the claim in your direct appeal. N.Y. Crim. Proc. Law § 440.10(b)–(c) (McKinney 2008). See Chapter 13 of the *JLM* for an additional explanation of barred claims, and Chapter 20 of the *JLM* for more on how to file an Article 440 motion.

18. *See*, *e.g.*, Guinan v. United States, 6 F.3d 468, 471 (7th Cir. 1993), *overruled in part by* Massaro v. United States, 538 U.S. 500, 123 S. Ct. 1690, 155 L. Ed. 2d 714 (2003) (stating that ineffectiveness of counsel claims cannot be waived in cases where the lawyer bringing the appeal also represented the defendant at trial, and also holding that an ineffectiveness claim may be brought in a collateral proceeding when evidence of ineffectiveness lies outside the record and an evidentiary hearing would be necessary or useful in determining whether counsel was ineffective); Alston v. Donnelly, 461 F.Supp.2d 112, 123 (W.D.N.Y. 2006) ("where the record is sufficient to allow appellate review of [an ineffective assistance] claim, the failure to raise that claim on appeal precludes subsequent collateral review"); People v. Jossiah, 2 A.D.3d 877, 877, 769 N.Y.S.2d 743, 743 (2d Dept. 2003) ("[Since the] record ... clearly presented sufficient facts from which the defendant could have raised his [ineffective assistance claim] ... on direct appeal, it could not be raised on the CPL 440.10 motion."); Hartman v. Bagley, 492 F.3d 347, 357–58 (6th Cir. 2007) (holding that although Ohio's statute provided "adequate and independent" grounds to bar ineffective assistance claims in collateral proceedings, it did not apply to defendant's claim that relied on information outside of the trial record); Nixon v. Epps, 405 F.3d 318, 323 (5th Cir. 2005) (holding that a Mississippi statute, requiring defendant to raise ineffective assistance claim on direct review when he uses a different counsel, created an "adequate and independent" procedural default when defendant failed to comply on direct appeal).

out whether there is a different state standard for ineffective assistance of counsel that you can argue was not met at trial.[19] You should *always* raise ineffective assistance of counsel as a federal constitutional claim, even if you also claim violation of state effective counsel guarantees. If you do not present the claim as a federal constitutional violation at this point, you may not be able to do so in a later federal habeas corpus petition.[20]

1. The Federal Standard

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

(a) Actual Ineffectiveness: The *Strickland* Test

To claim that your lawyer was actually ineffective, you must pass the two-part *Strickland* test.[21] The first part of this test, the "deficient performance" prong, requires you to prove that your lawyer's performance was "deficient."[22] For this prong, the court decides whether your lawyer's representation fell below an "objective standard of reasonableness."[23] This means the court sees if your lawyer acted in a way that most other lawyers would think is acceptable. 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.[24] You cannot just 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 your lawyer did poorly or did not do at all and show that these failures made your representation fall below the professional standards for lawyers.

If the court finds your lawyer's representation fell below this objective standard of reasonable lawyering (that it was deficient), it will apply the second part of the *Strickland* test. The second part, the "prejudice prong," requires you to prove there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[25] This means that you not only have to point out what your lawyer did wrong, but you also have to show that your lawyer's actions hurt you and possibly changed the outcome of your case. You can only win on an ineffective counsel claim if you can satisfy both parts of the test.[26] You should remind the court that the Supreme Court has specifically said that the

---

19. For more information on legal research, see *JLM*, Chapter 2, "An Introduction to Legal Research."

20. For more information on filing a federal habeas corpus claim, see *JLM*, Chapter 13, "Federal Habeas Corpus."

21. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984) (establishing federal standard for ineffective assistance of counsel). *See also* Knowles v. Mirzayance, 129 S.Ct. 1411, 1420, 173 L.Ed.2d 251 (2009) (counsel's decision not to pursue insanity defense was not deficient or prejudicial because it was reasonable to believe that the defense would fail).

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

23. These basic 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. Strickland v. Washington, 466 U.S. 668, 688–89, 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.").

24. Strickland v. Washington, 466 U.S. 668, 690, 104 S. Ct. 2052, 2066, 80 L. Ed. 2d 674, 695 (1984) (in deciding an ineffectiveness claim, a judge will look at the reasonableness of counsel's conduct based on facts of the particular case, viewed at the time of the counsel's conduct).

25. Strickland v. Washington, 466 U.S. 668, 691–92, 694, 104 S. Ct. 2052, 2067, 2068, 80 L. Ed. 2d 674, 696, 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."); Williams v. Taylor, 529 U.S. 362, 390–91, 120 S. Ct. 1495, 1511–12, 146 L. Ed. 2d 389, 416 (2000) (holding 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); Wiggins v. Smith, 539 U.S. 510, 534, 123 S. Ct. 2527, 2542, 156 L. Ed. 2d 471, 493 (2003) ("In assessing prejudice [in a capital case], we reweigh the evidence in aggravation against the totality of available mitigating evidence.").

26. Strickland v. Washington, 466 U.S. 668, 700, 104 S. Ct. 2052, 2071, 80 L. Ed. 2d 674, 702 (1984) ("Failure to make the required showing of either deficient performance or sufficient prejudice defeats the

"prejudice prong" requires you to show only a "reasonable probability" of a different result, and you do not have to prove that your lawyer's errors "more likely than not altered the outcome" of your trial.[27]

Ineffective counsel claims are some of the most difficult claims to plead successfully because of the second part of the *Strickland* test. Courts usually do not find that an attorney's behavior affected a trial so strongly that the outcome is unreliable. 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.[28] Try to find cases where defendants successfully made similar claims 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 those cases are different from your 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 described in *United States v. Cronic*.[29] You can claim constructive ineffective assistance if the circumstances of your trial were so unfair that ineffective assistance and prejudice can be presumed.[30] This means that under the *Cronic* standard, unlike the *Strickland* test, you do not have to prove that there was actual prejudice.

The *Cronic* standard applies in three situations.[31] First, prejudice may be presumed if you were completely denied counsel during a "critical stage" of your trial.[32] Second, you can claim ineffective assistance under *Cronic* if your lawyer "entirely fails to subject the prosecution's case to meaningful adversarial testing."[33] Your lawyer's failure to test the state's case must have been "complete," meaning she put up no opposition whatsoever.[34] 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.[35] If your case falls within this third situation, you do not have to prove that your lawyer's trial performance was deficient.

---

ineffectiveness claim.").

27. Strickland v. Washington, 466 U.S. 668, 693, 104 S. Ct. 2052, 2067, 80 L. Ed. 2d 674, 697 (1984).

28. *See, e.g.*, Mackey v. Russell, No. 02-4237, 148 Fed. App'x. 355, 369 (6th Cir. August 9, 2005) (*unpublished*) (holding state court unreasonably applied *Strickland* when it failed to consider the cumulative effect of counsel's errors); *but see* Stainaker v. Bobby, 589 F.Supp.2d 905, 931 (N.D. Ohio 2008) (holding that "there is some question whether cumulative error claims are cognizable on habeas review").

29. United States v. Cronic, 466 U.S. 648, 658, 104 S. Ct. 2039, 2046, 80 L. Ed. 2d. 657, 667 (1984) (recognizing a right where performance of counsel deprived defendant of a fair trial).

30. United States v. Cronic, 466 U.S. 648, 658, 104 S. Ct. 2039, 2046, 80 L. Ed. 2d. 657, 667 (1984).

31. United States v. Cronic, 466 U.S. 648, 659–62, 104 S. Ct. 2039, 2047–48, 80 L. Ed. 2d. 657, 668–70 (1984); Bell v. Cone, 535 U.S. 685, 695–98, 122 S. Ct. 1843, 1850–52, 152 L. Ed. 2d 914, 927–29 (2002) (limiting *Cronic*'s holding that prejudice may be presumed to the three situations identified).

32. *See, e.g.*, Wright v. Van Patten, 128 S. Ct. 743, 746, 169 L. Ed. 2d 583, 588 (2008) (holding counsel's participation in plea hearing by speakerphone should not be treated as complete denial of counsel); Rickman v. Bell, 131 F.3d 1150, 1156–60 (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 second prosecutor); Javor v. United States, 724 F.2d 831, 833–34 (9th Cir. 1984) (finding prejudice inherent when counsel slept through much of the trial). *But see* Tippins v. Walker, 77 F.3d 682, 683–85 (2d Cir. 1996) (holding ineffective assistance claim should be judged under *Strickland* when counsel slept through the trial).

33. United States v. Cronic, 466 U.S. 648, 658, 104 S. Ct. 2039, 2047, 80 L. Ed. 2d. 657, 668 (1984).

34. Bell v. Cone, 535 U.S. 685, 697, 122 S. Ct. 1843, 1851, 152 L. Ed. 2d 914, 928 (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, 188–89, 125 S. Ct. 551, 561–62, 160 L. Ed. 2d 565, 579–80 (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, 440–41, 14 P.3d 1138, 1148 (2000) (finding that a breakdown in the adversarial system of justice when counsel premised defense on defendant's guilt against his client's wishes).

35. *Compare* Powell v. Alabama, 287 U.S. 45, 56–58, 53 S. Ct. 55, 59–60, 77 L. Ed. 158, 164–65 (1932) (holding denial of effective counsel when defendants, who were "young, ignorant, illiterate, [and] surrounded

(c) Conflict of Interest

The third type of federal claim you can make is that your lawyer provided ineffective assistance due to a conflict of interest. To show that your lawyer had a conflict of interest, you must demonstrate that she had an actual conflict of interest that "adversely affected" her performance.[36] For example, a conflict of interest can arise when one lawyer represents more than one co-defendant for the same crime.[37] The conflict must be actual, not just potential. This means that your lawyer must have taken some action, or refrained from acting in some way, which harmed you and benefited the other person.[38] You are not required to show prejudice if your lawyer had an actual conflict of interest that adversely affected you, because prejudice is presumed.

2. New York State 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.[39] This means in New York, you must show that your lawyer's failures harmed you so much that you did not have meaningful representation at trial.[40] Meaningful representation does not mean your attorney made no mistakes, but that your lawyer provided good enough representation to satisfy the court that you were properly represented.[41]

---

by hostile sentiment," were tried for a capital offense, and when defense counsel was designated only minutes earlier and thus had no opportunity to investigate the facts or to prepare), *with* U.S. v. Cronic, 466 U.S. 648, 658–67, 104 S. Ct. 2039, 2046–51, 80 L. Ed. 2d. 657, 667–73 (1984) (rejecting defendant's constructive ineffective assistance argument based on counsel's lack of experience in criminal law or jury trials, and 25-day preparation time).

36. 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).

37. 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.*, Mickens v. Taylor, 535 U.S. 162, 174–76, 122 S. Ct. 1237, 1245–46, 152 L. Ed. 2d 291, 306–07 (2002) (holding that *Cuyler* applied to petitioner's claim that counsel was conflicted because he represented the victim in an unrelated case); Perillo v. Johnson, 205 F.3d 775, 808 (5th Cir. 2000) (finding actual conflict existed when counsel represented a co-defendant cooperating with the state as witness against accused); United States *ex rel.* Duncan v. O'Leary, 806 F.2d 1307, 1315 (7th Cir. 1986) (holding 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 retain him because it would be good for the campaign).

38. *See*, *e.g.*, Burger v. Kemp, 483 U.S. 776, 783–85, 107 S. Ct. 3114, 3120–21, 97 L. Ed. 2d 638, 650–51 (1987) (holding petitioner failed to show actual conflict when lawyer's partner was appointed to represent co-defendant, because "defendants may actually benefit from the joint efforts of two partners who supplement one another in their preparation"); 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, 1305–07 (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, 721–22 (8th Cir. 1994) (finding ineffective counsel where public defender also represented co-defendant who had pleaded guilty and made statements implicating the client in the crime).

39. 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.").

40. If you are in a state other than New York, your state may have an independent source for the right to effective counsel and/or a different standard for proving ineffective counsel. You should research successful ineffective counsel claims in your state and look at what standard the courts use.

41. *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, 882–83,

Note that claiming ineffective assistance of counsel means that you give up some of your attorney-client confidentiality privileges with that attorney.[42] This means that once you file an ineffective counsel claim against your lawyer, your lawyer can then sometimes reveal information about your case that otherwise would be kept secret. For example, your lawyer could cooperate with the prosecution by turning over case files, or even testifying for the prosecution against you.

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 prohibited. As the various Chapters on attacking your conviction explain, many issues must be "preserved" in order to be appealed.[43] 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 never raised and preserved during your trial, often it can still be raised as part of an ineffective counsel claim.[44] In other words, the fact that your lawyer did not raise certain issues during trial can be used as evidence that he did not effectively represent you.

Ineffective assistance claims are also useful in "procedural default" situations. "Procedural default" happens when your claim is kept out of federal court because you have not followed all the procedures in your state. In procedural default situations, federal courts will not hear your claim because you did not follow state procedures. If your claim has been procedurally defaulted, you can often raise it as an ineffective counsel claim instead.[45] You can argue that the jury was selected in a racially discriminatory manner because your lawyer failed to object. 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.[46] As a general rule of thumb, if you are raising a claim for the first time that should have been raised earlier, you should allege that you did not raise the claim earlier because your attorney was ineffective.

To include a prohibited claim (a claim that is not preserved or is procedurally defaulted) in an ineffective assistance of counsel claim, you must restate the issue by saying 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 "preserved," you can claim that your attorney was ineffective for not objecting to the jury instructions. Remember, you still must prove that your attorney'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 attorney performed below the standard attorneys are judged by; and (2) by not objecting, your attorney lost a chance to argue a claim that would have succeeded.

---

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 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 *People v. Baldi* and *People v. Droz* only apply to ineffective assistance during trial; evaluation of attorney performance rests on different grounds when the defendant has entered a guilty plea).

42. Model Rules of Prof'l Conduct R. 1.6(b)(5) (2004) (allowing that "[a] lawyer may 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. § 4-8.6(d) (1993) ("Defense counsel whose conduct of a criminal case is drawn into question is entitled to testify concerning the matters charged and is not precluded from disclosing the truth concerning the accusation to the extent defense counsel reasonably believes necessary, 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.

43. See *JLM*, Chapter 9, "Appealing Your Conviction or Sentence," regarding preservation of claims; *JLM*, 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 *JLM*, Chapter 13, "Federal Habeas Corpus," regarding procedural default.

44. In Kimmelman v. Morrison, 477 U.S. 365, 384–85, 106 S. Ct. 2574, 2587–88, 91 L. Ed. 2d 305, 325–26 (1986), for example, the trial court refused to rule on the defendant's motion to suppress evidence because counsel's motion was untimely. The defendant nonetheless ultimately obtained a hearing on the merits of the suppression motion by raising a claim that his trial counsel was ineffective for failing to make a timely suppression motion.

45. *See* Kimmelman v. Morrison, 477 U.S. 365, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986).

46. See *JLM*, Chapter 13 for an additional explanation of prohibited claims.

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 now is 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 attorneys;
(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 overall claim is that by not objecting to the racially discriminatory way in which the jury was selected, your lawyer was ineffective because his performance fell below the standard of objective reasonableness for attorneys, and this resulted in a biased jury, which affected the outcome of your case.

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

(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?;[47] and
(3) Argue that the claim is 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 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.

Note that in addition to re-framing the barred claim as an ineffective counsel claim, you should still raise the claim separately, alleging that counsel's ineffectiveness constitutes "cause and prejudice" for any procedural default.[48]

D. Common Ineffective Counsel Claims

Below are some of the most common ineffective counsel claims that have succeeded. This does not mean that these claims are always successful or that this list includes every possible ineffective counsel claim. When you plead these claims, be sure to check the case law in your state.

(1) Counsel is not qualified to practice law;[49]
(2) Counsel had a conflict of interest;[50]
(3) Counsel failed to investigate[51] or perform certain pretrial functions;[52]

---

47. 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, but granted relief on the defendant's claim that his appellate counsel was ineffective for failing to raise the double jeopardy claim.

48. *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 the procedural default that it caused).

49. *See* United States v. Novak, 903 F.2d 883, 890 (2d Cir. 1990) (holding that "counsel" does not include an individual who holds himself out as a lawyer but obtains admission to the bar under false pretenses). *See also* Solina v. United States, 709 F.2d 160, 167–69 (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, 382–83 (2d Cir. 1988) (framing rule to exclude situation where licensed attorney is unknowingly disbarred during trial).

50. See the discussion in Part C(1)(c) of this Chapter.

51. *See* Wiggins v. Smith, 539 U.S. 510, 535–38, 123 S. Ct. 2527, 2542–44, 156 L. Ed. 2d 471, 493–95 (2003) (finding decision of counsel not to expand investigation of petitioner's life history for mitigating evidence beyond pre-sentence investigation report and department of social services records fell short of prevailing professional standards and amounted to ineffective assistance); Appel v. Horn, 250 F.3d 203, 215–18 (3d Cir. 2001) (finding counsel's failure to investigate or prepare for the petitioner's competency determination violated his right to effective assistance and merited granting habeas corpus relief); People v.

(4) Counsel failed to properly select a jury;[53]
(5) Counsel failed to pursue defenses available to defendant;[54]
(6) Counsel did not properly advise defendant as to a plea;[55]
(7) Counsel did not advise non-citizen defendant of possible deportation risks of a guilty plea;[56]

LaBree, 34 N.Y.2d 257, 259–61, 313 N.E.2d 730, 731–32, 357 N.Y.S.2d 412, 413–15 (1974) (finding ineffective assistance based on counsel's inadequate investigation and preparation); *see also* Henry v. Poole, 409 F.3d 48, 67–72 (2d Cir. 2005) (finding counsel's failure to investigate led counsel to present alibi defense for the wrong date and helped an otherwise weak prosecution case).

52. *See* Kimmelman v. Morrison, 477 U.S. 365, 385–91, 106 S. Ct. 2574, 2588–91, 91 L. Ed. 2d 305, 326–29 (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, 609–15 (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, 654–56, 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 by failed to conduct an adequate investigation before the trial).

53. *See* Johnson v. Armontrout, 961 F.2d 748, 755–56 (8th Cir. 1992) (finding ineffective assistance where evidence showed that at least two jurors were biased, and counsel failed to request removal for cause of those biased jurors); Hollis v. Davis, 912 F.2d 1343, 1350–52 (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).

54. *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 (2d Cir. 1998) (holding that appellate counsel's failure to raise the obvious double jeopardy claim constituted ineffective performance); 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 a reasonable probability existed 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 you have nothing to lose by pursuing it. *See* Knowles v. Mirzayance, 129 S. Ct. 1411, 173 L. Ed. 2d 251 (2009).

55. The Supreme Court in *Hill v. Lockhart*, 474 U.S. 52, 57, 106 S. Ct. 366, 370, 88 L. Ed. 2d 203, 209 (1985), held that the two-prong *Strickland* standard is "applicable to ineffective-assistance claims arising out of the plea process." Hill claimed his guilty plea was induced by false information about his parole eligibility. The Court held that if a defendant claims that he pleaded guilty because of ineffective assistance of counsel, the second prong of the *Strickland* test would be satisfied by showing "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 59, 106 S. Ct. 366, 370, 88 L. Ed. 2d 203, 210 (1985); *see also* Meyers v. Gillis, 142 F.3d 664, 666–70 (3d Cir. 1998) (finding the second prong of the *Strickland* test satisfied, the Court held the defendant would be eligible for parole after seven years when law required mandatory life sentence without possibility of parole); 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 pleaded guilty but for counsel's error). Courts have extended this reasoning to the "reverse-*Hill*" claim where a defendant claims that counsel's ineffectiveness caused the defendant to proceed to trial when there is a reasonable probability that, if correctly advised, the defendant would have accepted a plea offer. *See* Mask v. McGinnis, 233 F.3d 132, 139–42 (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, 380–82 (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 had the defendant's counsel properly advised him, the proceedings would have gone differently); *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 client whether to plead guilty or not). Normally, your lawyer is not required to advise you about the collateral consequences of a guilty plea. "Collateral consequences" refers to the effects of a guilty plea that do not arise directly from the plea. For example, if you lose your job because of a guilty plea, that is considered a collateral consequence. In some jurisdictions, however, if your lawyer provides incorrect information about collateral consequences, it may be considered ineffective assistance of counsel. *See, e.g.*, United States v. Couto, 311 F.3d 179–89 (2d Cir. 2002). However, you should check the law in your state because some states do not allow ineffective assistance claims for collateral consequences even if your attorney has given you grossly erroneous advice.

(8) Counsel failed to use important evidence or testimony at trial;[57]
(9) Counsel failed to object to improper use of evidence at trial;[58]
(10) Counsel failed to request proper jury instructions;[59]
(11) Counsel failed to object to improper jury instructions;[60]
(12) Counsel failed to present or argue an appeal,[61] or to present a meritorious issue on appeal;[62] and

---

56. The Supreme Court, in *Padilla v. Kentucky*, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010), held that a defense attorney's failure to inform the defendant that his guilty plea would lead to automatic removal from the country and that he need not worry about the immigration consequences of his plea constituted ineffective assistance of counsel. Thus, counsel must advise non-citizen clients about the deportation risks of a guilty plea.

57. *See* Lindstadt v. Keane, 239 F.3d 191, 201–02 (2d Cir. 2001) (finding ineffective assistance in part because trial counsel made no effective challenge to the only physical evidence of sexual abuse, which consisted of expert testimony based on unnamed studies, which were essentially unchallenged at trial and disputed by other easily available published studies); Pavel v. Hollins, 261 F.3d 210, 216–26, 223, 228 (2d Cir. 2001) (finding ineffective assistance where trial counsel did not prepare a defense, failed to call two important fact witnesses, and did not call a medical expert); Brown v. Myers, 137 F.3d 1154, 1156–58 (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, 414-15 (8th Cir. 1989) (finding defense counsel's failure to find alibi witnesses was ineffective assistance of counsel); People v. Jenkins, 68 N.Y.2d 896, 897, 501 N.E.2d 586, 586–87, 508 N.Y.S.2d 937, 937–38 (1986) (finding that failure to use crucial evidence, if due solely to attorney's erroneous assumption of its inadmissibility, may be so prejudicial as to be ineffective assistance of counsel); People v. Riley 101 A.D.2d 710, 711, 475 N.Y.S.2d 691, 692–93 (4th Dept. 1984) (finding failure to impeach prosecution witnesses with available records of prior testimony contributed to ineffective assistance of counsel).

58. *See* Kimmelman v. Morrison, 477 U.S. 365, 385–87, 106 S. Ct. 2574, 2588–90, 91 L. Ed. 2d 305, 326–27 (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, 1237–39 (9th Cir. 1994) (finding counsel ineffective for failure to move to suppress lineup identification evidence); People v. Wallace, 187 A.D.2d 998, 998–99, 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, 692–93 (4th Dept. 1984) (finding failure to object to inadmissible hearsay evidence, and lack of preparation and the pursuit of a highly prejudicial cross-examination constituted ineffective assistance).

59. *See* People v. Norfleet, 267 A.D.2d 881, 883–84, 704 N.Y.S.2d 146, 148 (3d Dept. 1999) (finding ineffective assistance where counsel failed to seek jury instructions for lesser offense); People v. Wiley, 120 A.D.2d 66, 67–68, 507 N.Y.S.2d 928, 929 (4th Dept. 1986) (finding an attorney who fails to request an alibi charge may be found ineffective).

60. *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, 515–16 (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, 271–72 (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).

61. *See* Roe v. Flores-Ortega, 528 U.S. 470, 484, 120 S. Ct. 1029, 1038, 145 L. Ed. 2d 985, 999–1000 (2000) (finding that defendant was entitled to effective assistance of counsel when deciding whether to file a notice of appeal, but that he must show a reasonable probability that, but for counsel's errors, he would have filed the appeal); Garcia v. United States, 278 F.3d 134, 137–38 (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, 350–53 (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, 719–20 (7th Cir. 1994) (finding attorney provides ineffective assistance of counsel in failing to appeal conviction following a guilty plea if the prisoner told the lawyer to appeal in a timely manner); 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, 195–96 (9th Cir. 1993) (finding ineffective assistance of counsel which prejudiced the defendant if the defendant did not agree to waive the appeal); 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, 638–39, 744 N.E.2d 1153, 1156, 722 N.Y.S.2d 217, 220 (2001) (finding defendant's right to appellate counsel was not adequately safeguarded because the brief

(13)Counsel's conduct at trial was simply so bad that it was ineffective.[63]

E. Conclusion

Ineffective assistance of counsel can be a very useful claim for prisoners who had inadequate legal representation at trial or on direct appeal. It can also be useful for prisoners who face procedural problems with some of their appellate claims. When you bring your ineffective counsel claim, it is important to check the relevant Chapters of the *JLM* and other sources to make sure you are using the right procedure. Your ineffective counsel claim will have a better chance of success if you make sure to show the court all the specific reasons why your lawyer performed poorly, and all of the ways in which this inadequate representation prejudiced the outcome of your case.

submitted by appellate counsel 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's identification of points as being "without merit" in appellate brief, though defendant wished to raise them on appeal, denied defendant effective assistance of counsel).

62. *See, e.g.*, Ballard v. United States, 400 F.3d 404, 407–10 (6th Cir. 2005) (holding appellate counsel ineffective for failing to raise meritorious argument that sentence enhancement by judge violated right to jury trial).

63. This kind of general argument is very hard to make successfully. Your claim must include specific information about why your counsel's conduct was not acceptable. *See* Tippins v. Walker, 77 F.3d 682, 686–90 (2d Cir. 1996) (finding ineffective assistance where attorney slept through substantial portions of the trial such that judge interrupted proceedings to reprimand attorney); Burdine v. Johnson, 262 F.3d 336, 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, 786–87, 559 N.Y.S.2d 720, 721–22 (1st Dept. 1990) (finding ineffective assistance where attorney was an alcoholic who had once been disbarred for twenty years and was confused and inattentive at trial).