

**Court Findings of Ineffective Assistance of Counsel Claims in
Post-Conviction Appeals
Among the First 255 DNA Exoneration Cases**

Prepared by:

**Dr. Emily M. West
Director of Research
Innocence Project
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Introduction

The Sixth Amendment of the U.S. Constitution establishes the right to assistance of counsel for individuals accused of crimes, and the U.S. Supreme Court has established that states must provide representation for indigent defendants. Unfortunately, the lack of national standards for creating and funding such a system has left most states with inadequate, underfunded systems¹. This problem has led to overburdened and sometimes incompetent defense lawyers and a lack of funding for the investigative process, all of which can contribute to inadequate defense, and in some cases, wrongful convictions.

Yet, the standard set in the landmark decision in *Strickland v. Washington* creates an extremely high burden on the defendant to establish ineffectiveness. In *Strickland v. Washington*, the Supreme Court set a two-prong test to determine ineffectiveness - the counsel's representation must fall below an objective standard of reasonableness, and there must be reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different². Further, in evaluating the performance of counsel, the Supreme Court stated that courts "must be highly deferential...A court must indulge a strong presumption that counsel's performance was within the wide range of reasonable professional assistance."³

Allowing such deference to the defense sets a low bar for defining effectiveness, making it difficult for defendants to gain post conviction relief via claims of ineffective assistance of counsel. Review studies of post conviction appeals have demonstrated that ineffective assistance of counsel is the most commonly raised issue. One study by NCSC, reviewing Habeas Corpus claims, found that while nearly half of state claims involved allegations of ineffective assistance of counsel, only eight percent found relief⁴.

DNA exoneration cases offer a unique perspective on this issue, given that we know the clients in these cases were convicted of crimes they did not commit. However, as this review will demonstrate DNA exonerees do not seem more likely to find relief on this claim than those in the larger prison population. A review of published appeals among the DNA exoneration reveals that 54 exonerees (about 1 in 5) raised claims of ineffective assistance of counsel and courts rejected these claims in the overwhelming majority of cases⁵.

Methodology

In order to locate appeals involving ineffective assistance of counsel, WestLaw was accessed to conduct searches using specific search terms, as well as more general searches by exoneree name and state of conviction. This summary relies on published appellate decisions and therefore does not

¹ The Constitution Project (2009). *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel*.

² *Strickland v. Washington*, 466 U.S. 668 (1984).

³ *Id.*

⁴ Brandon Garrett, *Judging Innocence*, 108 *Columbia Law Review*, 107 (2008); Victor E. Flango, *Habeas Corpus in State and Federal Courts* (1994) at http://www.ncsconline.org/WC/Publications/KIS_StaFedHabCorpStFedCts.pdf#search=%22habeas%20study%22 ("NCSC study").

⁵ Six others raised IAC claims, but court findings were not available (they did not respond or address the claim) and were therefore excluded from this analysis.

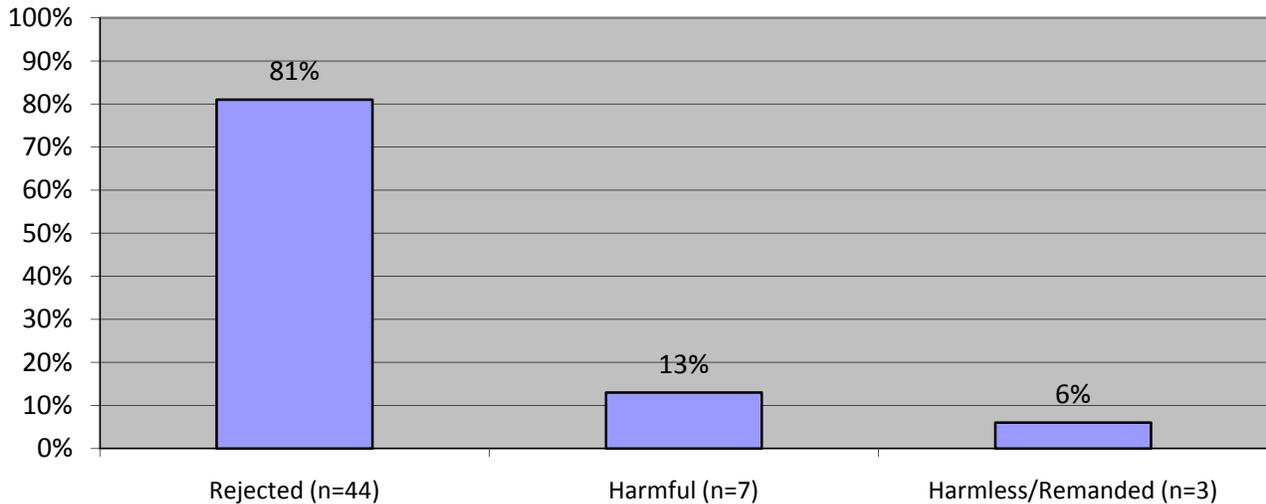
capture the full scope of all appeals that exonerees may have filed involving ineffective assistance of counsel.

Court Findings in Appeals Involving Ineffective Assistance of Counsel Claims

A review of published appeals revealed that 54 of the first 255 DNA exonerees (21%) raised claims of ineffective assistance of counsel. In the overwhelming majority of these appeals, the courts rejected the claims (81%), however in seven cases, courts agreed with appellants and found ineffective assistance of counsel, leading to reversals of convictions for six exonerees and new representation in one case (additional details of these seven cases are presented in the last section of this summary).

In three other cases courts either determined that the actions, or lack thereof, of the counsel were harmless (counsel deficient, but no prejudice) or courts remanded the case to lower courts for further review.

**Court Findings of Ineffective Assistance of Counsel Claims
in DNA Exoneration Cases
N=54**



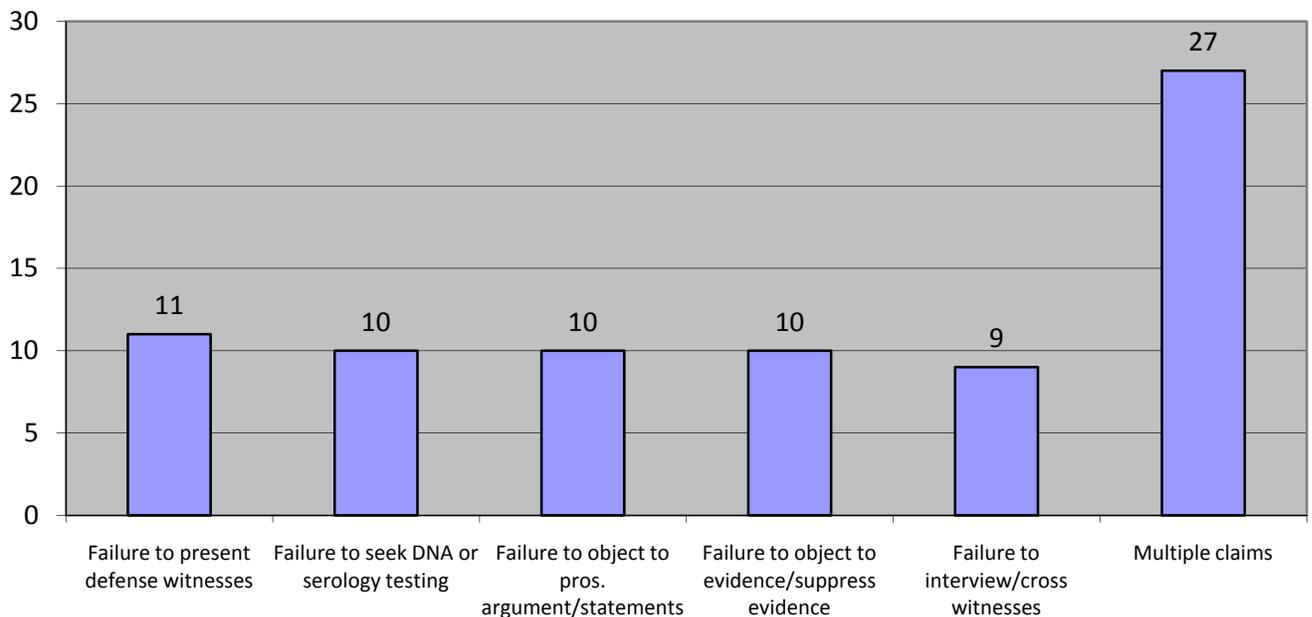
Types of Claims Pursued

While there was great variation in the specific types of claims pursued in these appeals, a few trends emerge. As presented in the figure below, the most common types of claims included defense lawyers who: failed to present defense witnesses (often to establish/confirm an alibi); failed to seek DNA testing or have serology testing done to try to exclude the client; failed to object to prosecutor arguments or to evidence introduced by the state; and failed to interview witnesses in preparation for trial or to cross examine state witnesses. Other examples of less frequently reported claims included failure to investigate, failure to object to an ID, and failure to present expert testimony. Half of exonerees who presented ineffective assistance of counsel claims in appeals raised multiple claims.

Since most of these cases were rejected on appeal, it is difficult to determine whether some claims are more likely than others to find relief in the courts. Among the seven appeals where courts confirmed ineffective assistance of counsel, the types of claims varied widely (conflict of interest issue; failure to seek expert; failure to seek DNA testing; failure to investigate). When examining the appeals where courts rejected the claims, here again no distinct patterns emerged, however, it did appear that simple negligence without awareness in pursuit of a 'reasonable strategy' did not meet the court's definition of ineffective assistance of counsel. If the record was silent on strategy, the courts tended to give defense counsel the benefit of doubt.

Examples of Types of Ineffective Assistance of Counsel Claims

N=54



Details of the 7 Appeals Where Courts Confirmed Allegations of Ineffective Assistance of Counsel:

Jimmy Bromgard, MT

Bromgard's court-appointed lawyer failed to file an appeal after his conviction.

- *Court's reasoning:* Appellate court agreed that defense counsel was inadequate by not filing appeals.
 - In 1991 Bromgard was granted a new lawyer (cited in State v. Bromgard, 261 Mont. 291). His new lawyer filed subsequent appeals but Bromgard did not find relief until DNA testing later exonerated him.

Anthony Hicks, WI

Anthony Hicks' private lawyer decided not to do a DNA test, which he never discussed with the client. Counsel claims he did not because 1. Strategy – none of the serology evidence could be conclusively linked to the defendant. 2. He thought that the hair evidence would be inadmissible. 3. He said the cost of DNA testing was an issue.

[NOTE: DNA testing had already been performed when this appeal was heard. However, the prosecutor refused to drop charges, suggesting that since only one of the pubic hairs excluded him, the others could have been his (these other hairs were not suitable for DNA testing).]

- *Court's reasoning:*
 - The court did not agree with the defense counsel's reasoning – strategy argument was not convincing (testing DNA would have complimented the strategy he did follow) (State v. Hicks, 536 N.W.2d 487). **NOTE:** see Josiah Sutton's case below – this similar claim was rejected by another court, revealing the broad variation in the way different courts interpret and apply the test for ineffective assistance of counsel.
 - "Hicks' trial counsel understood that the hair samples were going to be a major issue in the case. But he has provided no reasoned basis for failing to pursue a testing process that he knew had the potential to provide exculpatory evidence on this major issue. We do not intend to suggest that failure to obtain DNA test results is always deficient circumstances of each case. We hold here only that, under the circumstances of this case, Hicks' trial counsel's decision not to pursue DNA analysis of the hair specimens was not "a strategic or tactical decision...based upon rationality founded on the facts and the law," (State v. Hicks, 536 N.W.2d 487, 492).
 - He should have known that the court may have let the hair evidence in (which it did).
 - While defense counsel said that the cost of testing was an issue, he admitted that he never looked into how much it would cost.
 - In 1995, this court reversed the conviction. The State appealed this decision and lost and eventually dropped the charges based on this appellate decision and the DNA results.

Willie Jackson, LA

Willie Jackson's private lawyer did not request funds from the state for an odontology expert to rebut state's expert, despite acknowledging the need for a rebuttal expert by requesting funds from Jackson's parent and Jackson's own request to seek the funds from the state.

- *Court's reasoning:* The court found that the fact that defense counsel did not call an expert witness to challenge another expert witness is not enough on its own to overturn the decision. However, the lawyer's decision here not to obtain an expert was based on non-strategic reasons, having more to do with convenience for him - he had asked the defendant's parents for money for an expert and they refused. He did not then ask for the court to appoint one (Jackson v. Day, 1996 WL 225021).
 - In 1996 this court reversed the conviction. The State appealed and this lower court's decision was reversed – conviction was reinstated. He remained incarcerated until DNA testing later exonerated him.

Ron Williamson, OK

Williamson's court-appointed lawyer in this case failed to investigate mental competency; investigate last person to see victim alive (whose hairs could not be excluded from the crime scene evidence); cross examine snitch; and introduce videotape of another person's confession.

- *Court's reasoning:* The court found that the cumulative nature of these failures was enough to overturn the conviction and retry with new counsel (Williamson v. Reynolds, 904 F.Supp. 1529).
 - In preparation for the new trial, DNA testing was performed and exonerated Williamson. Charges were dropped.

Ford Heights Four Case (Gray, Williams, Rainge, and Adams)

Paula Gray, IL: Paula Gray's case relied on the conflict of interest which arose from her sharing a private lawyer with her codefendants (Williams and Rainge-Adams had his own lawyer). The court said that the test is not whether the defenses given for each client actually conflict, but whether the decision-making process of the lawyer was impacted by conflicting loyalties.

- *Court's reasoning:* "The Appellate Court of Illinois, in affirming Paula's conviction, rejected any argument that there was a conflict of interest between Paula and Williams, primarily for the reason, mistaken we believe, that their defenses at trial did not conflict because both denied having had anything to do with the crimes. The test for conflict between defendants is not whether the defenses actually chosen by them are consistent but whether in *making the choice* of defenses the interests of the defendants were in conflict," (U.S. ex rel. Gray v. Director, Department of Corrections, State of IL, 721 F.2d 586, 597).
 - The court reversed and Gray was granted a new trial, but she struck a deal with the prosecutor to testify against the others in exchange for time served, before DNA testing eventually exonerated her and her co-defendants

Willie Rainge, IL: Private defense lawyer's misconduct in another case (for which he was disbarred), during the same time period he tried this case, led to new trials for Rainge (and Williams-see below). The defense counsel had testified in the other case that he was so stressed during the Williams, Adams, and Rainge case that he couldn't think straight. Rainge (and Williams) were each granted relief (in separate appeals).

- *Court's reasoning:* The court gave them new trials, saying that the totality of events warranted throwing out the standard tests for IAC, and by merely judging the case as a capital offense, they decided that the totality of events and the inattentiveness of the counsel warranted a new trial (People v. Williams, 93 Ill.2d 309, People v. Rainge, 445 N.E.2d 535).
 - The court reversed and Rainge (and Williams) received new trials and were reconvicted before DNA later exonerated them.

Dennis Williams, IL: See Willie Range above: same issue and reasoning applies, although relief was granted in a separate appeal (People v. Williams, 93 Ill.2d 309).

Details of Appeals Where Courts Rejected Allegations of Ineffective Assistance of Counsel (3 case examples):

Jeffrey Pierce, OK

(1) Counsel (type of lawyer unknown) failed to raise issue of Gilchrist's disobedience of a court order, which had directed her to submit a hair sample for testing. Counsel failed to follow up on this despite knowing two months in advance of the trial that the sample had not been sent. (2) Defense counsel's cross-examination of a witness elicited other crimes evidence of the defendant.

- *Court's reasoning:*
 - "Counsel's strategy at trial is readily apparent. He sought to establish that the police had not done a good job in the investigation of the case. By his introduction of the other crimes evidence, he sought to prove that other suspects were known, but had been excluded through improper scientific means. He tried to use the fact that the State failed to send the hair evidence to his advantage as well, by claiming it was another instance of sloppy police work. Considering each of the errors set out by Appellant, we cannot say that "counsel's errors were so serious as to deprive the defendant of a fair trial," (Pierce v. State, 786 P.2d 1255, 1267).

Josiah Sutton, TX

Sutton's court-appointed lawyer told Josiah's mother and her family that he would need money to conduct independent DNA testing, and the family was able to raise \$600-650, which they gave to Herbert. Herbert, however, simply failed to obtain the testing—and kept the money.

- *Court's reasoning:*
 - The Texas appellate court refused to grant Sutton relief on ineffective assistance grounds, commenting that Sutton had failed to show how testing might have established innocence. Notably, this finding was made even while the court acknowledged that the case "raises questions about [XXX's] handling of client funds" (Sutton v. State, 2001 WL 40349)—but it deferred that issue and suggested the Sutton family take it up with the state's Bar Grievance Committee.

Earl Washington, VA

Washington's private lawyer did not present exculpatory results of tests on the semen stains found on the blanket recovered from the bed where the rape of the victim allegedly occurred.

- *Court's reasoning:*

- Court felt that there was enough other inculpatory evidence so that counsel's failure here would not have changed the outcome of the verdict. "...nothing extrinsic in laboratory reports made them so manifestly unreliable to identification issue that failure to use them could be deemed justified without further explanation, and evidence consisted essentially of confession obtained by interrogation almost a year after crime," (Washington v. Murray, 952 F.2d 1472, 1473).