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Presenting an Ineffective Assistance of Counsel Claim

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**PRESENTING AN
INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM**

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I. STANDARDS FOR DETERMINING INEFFECTIVE ASSISTANCE OF COUNSEL

A. General Principles

1. The defendant has the right to the effective assistance of counsel at trial. U.S. CONST. amends. VI and XIV; TEX. CONST. art. I, §10; Powell v. Alabama, 287 U.S. 45 (1932).
 - a. A juvenile has the same right to effective representation as an adult. In re K.J.O., 27 S.W.3d 340 (Tex. App.—Dallas 2000, pet. denied).
2. The defendant was constructively denied the assistance of counsel within the meaning of United States v. Cronin, 466 U.S. 648 (1984), where counsel periodically slept during the trial. Burdine v. Johnson, 262 F.3d 336 (5th Cir. 2001), and failed to participate in the trial after a motion for continuance was denied. Cannon v. State, 252 S.W.3d 342 (Tex. Crim. App. 2008).
 - a. Counsel's absence from the courtroom during the testimony of a prosecution witness requires a showing of harm. Hodges v. State, 116 S.W.3d 289 (Tex. App.—Corpus Christi 2003, pet. ref'd).
 - b. Failure to assert as ground for new trial that plea agreement was illegal. State v. Webb, 244 S.W.3d 543 (Tex. App.—Houston [1st Dist.] 2007, no pet. reported).
3. Counsel must act within the range of competence demanded of counsel in criminal cases. McMann v. Richardson, 397 U.S. 759 (1970).
4. The same standards apply in evaluating the representation of retained and appointed counsel. Cuyler v. Sullivan, 446 U.S. 335 (1980).
5. Counsel must be authorized to practice law; where counsel's license was suspended for professional misconduct at the time of trial, the defendant is denied effective assistance if the reasons for the suspension reflected so poorly on counsel's competence that it may reasonably be inferred that counsel was incompetent to represent the defendant. Cantu v. State, 930 S.W.2d 594 (Tex. Crim. App. 1996).
6. The effectiveness of counsel is ordinarily gauged by the totality of the representation, but a single error, if sufficiently egregious, can constitute ineffective assistance. Ex parte Felton, 815 S.W.2d 733 (Tex. Crim. App. 1991).
7. The defendant is entitled to a hearing on a motion for new trial alleging ineffective assistance of counsel where the allegations, if true, would entitle him to a new trial. Reyes v. State, 849 S.W.2d 812 (Tex. Crim. App. 1993).
 - a. The defendant has the right to question counsel; the admission of counsel's affidavit, over objection, denies confrontation. Lopez v. State, 895 S.W.2d 392 (Tex. App.—Corpus Christi 1994, no pet.).
 - b. Counsel cannot invoke his fifth amendment privilege and refuse to testify about his representation. Porchia v. State, 904 S.W.2d 147 (Tex. App.—Dallas 1995, pet. ref'd).
 - c. The granting of a motion for new trial based on ineffective assistance of counsel is reviewed for an abuse of discretion. State v. Kelley, 20 S.W.3d 147 (Tex. App.—Texarkana 2000, no pet.) (failure to obtain ruling on speedy trial motion).
8. The defendant need not object in the trial court to counsel's ineffective representation to preserve the issue for appellate review. Robinson v. State, 16 S.W.3d 808 (Tex. Crim. App. 2000).

9. The appellate court can abate the appeal to order the trial court to conduct an evidentiary hearing to determine:
 - a. whether counsel advised the defendant regarding the risks of joint representation of co-defendants. Gonzales v. State, 605 S.W.2d 278 (Tex. Crim. App. 1980); Guillory v. State, 638 S.W.2d 73 (Tex. App.—Houston [1st Dist.] 1982, no pet.); Guillory v. State, 646 S.W.2d 467 (Tex. App.—Houston [1st Dist.] 1982, no pet.).
 - b. whether counsel had a reasonable basis to advise the defendant to elect the jury to assess punishment at the retrial where the trial court had imposed the minimum sentence at the first trial. Jackson v. State, 640 S.W.2d 323 (Tex. App.—San Antonio 1982, pet. ref'd).
 - c. whether trial counsel, who said he would not challenge his own effectiveness at trial, should have been appointed on appeal. Alvarez v. State, 79 S.W.3d 679 (Tex. App.—Houston [1st Dist.] 2002, pet. dism'd).
10. Where the issue of ineffective assistance of counsel has been rejected on appeal, it can be relitigated on habeas corpus if the defendant introduces evidence not contained in the appellate record. Ex parte Torres, 943 S.W.2d 469 (Tex. Crim. App. 1997).
 - a. A claim rejected on appeal cannot be relitigated as part of a larger habeas claim absent new evidence to support the prior claim. Ex parte Nailor, 149 S.W.3d 125 (Tex. Crim. App. 2004).
11. Ineffective assistance of state habeas counsel may constitute cause and prejudice sufficient to permit federal habeas court to consider merits of procedurally defaulted claims. Martinez v. Ryan, 132 S.Ct. 1309 (2012); Trevino v. Thaler, 133 S.Ct. 1911 (2013).
 - a. Abandonment by state habeas counsel constitutes cause to excuse untimely filing of federal petition. Maples v. Thomas, 132 S.Ct. 912 (2012).
12. Trial counsel's file belongs to the defendant. Trial counsel cannot be compelled to turn over the file to appointed habeas counsel without the defendant's consent. In re McCann, 422 S.W.3d 701 (Tex. Crim. App. 2013).

B. Guilt-Innocence Stage

1. The standard of Strickland v. Washington, 466 U.S. 668 (1984) applies.
 - a. The defendant must show that counsel's performance was deficient.
 - (1) The defendant must show that counsel made errors so serious that he was not functioning as the "counsel" guaranteed by the Sixth Amendment.
 - (2) Counsel's performance must be evaluated on the basis of the caselaw extant at the time of trial. Vaughn v. State, 931 S.W.2d 564 (Tex. Crim. App. 1996).
 - b. The defendant must show that the deficient performance prejudiced the defense.
 - (1) The defendant must show that counsel's errors were so serious as to deprive him of a fair trial with a reliable result.
 - c. Standard of appellate review
 - (1) The defendant must identify specific acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment.

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