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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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SUBJECT INDEX

		Page
I.	**STANDARDS FOR DETERMINING INEFFECTIVE ASSISTANCE OF COUNSEL**	1
	A. General Principles	1
	B. Guilt-Innocence Stage	2
	C. Punishment Stage	3
II.	**GUILTY PLEA**	3
	A. Standard Of Review	3
	B. Inadequate Explanations Of The Law	3
	C. Incorrect Sentencing Information	6
	D. Failure To Investigate	7
III.	**PLEA BARGAINING**	7
	A. Failure To Make A Meaningful Effort To Negotiate A Plea Bargain	7
	B. Failure To Inform The Defendant Of A Plea Bargain Offer	7
	C. Failure To Inform The Defendant Of The Deadline For Accepting A Plea Bargain Offer	7
	D. Failure To Inform The Prosecutor That The Defendant Has Accepted A Plea Bargain Offer Before Expiration Of The Deadline	7
	E. Failure To Advise The Defendant Accurately Concerning Whether Or Not To Accept A Plea Bargain Offer	7
	F. Failure to Fully Explain The Plea Bargain Offer	8
IV.	**PUNISHMENT ELECTION**	8
	A. Failure To File A Timely Election That The Jury Assess Punishment	8
	B. Failure To Advise The Defendant That The Trial Court Cannot Grant Probation Following Conviction By A Jury For An Aggravated Offense	8
	C. Failure To Advise The Defendant That The Trial Court Cannot Grant Probation Following Conviction By A Jury Where There Is An Affirmative Finding Of A Deadly Weapon In The Judgment	8

Page

D. Failure To Advise The Defendant That The Jury Cannot Grant Probation Because Of His Prior Felony Conviction 8

V. PROBATION APPLICATION 8

A. Failure To File A Sworn Application For Probation 8

B. Failure To Offer Evidence To Prove Eligibility For Probation 8

C. Failure To Request A Jury Charge On Probation 8

VI. CONFLICT OF INTEREST 8

A. Obligations Of The Trial Court 8

B. Obligations Of Counsel 9

C. Standard Of Review 10

VII. FAILURE TO FILE PRE-TRIAL MOTIONS 10

A. Suppress Illegally Obtained Evidence 10

B. Severance 10

C. Double Jeopardy 10

D. Continuance 10

VIII. INADEQUATE TRIAL PREPARATION 10

A. Failure To Confer Adequately With The Defendant, Investigate The Facts, Or Prepare for Trial 10

B. Failure To Interview Witnesses 12

C. Failure To Present Exculpatory Evidence 12

D. Failure To Investigate The Validity Of Prior Convictions Alleged For Enhancement 14

E. Failure To Investigate Jury Misconduct 14

IX. FAILURE TO OBJECT 14

A. Indictment 14

B. Voir Dire 15

C. Opening Statement 15

Page

D. Evidence 15

E. Prejudicial References To The Defendant 19

F. Jury Charge 19

G. Jury Argument 20

H. Jury Note 22

I. Victim Impact Statement 22

X. INEPT TRIAL PERFORMANCE 22

A. Decision To Waive A Jury 22

B. Voir Dire 22

C. Ineffective Cross-Examination 23

D. Introducing Evidence For No Valid Purpose 25

E. Prejudicial References To The Defendant 25

F. Conceding The Defendant's Guilt 26

G. Argument 26

XI. INEFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL 27

A. Duty To Perfect The Appeal 27

B. Duty To Raise Issues 28

XII. SUGGESTIONS FOR LITIGATING A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL 28

A. Evaluating The Appellate Record 28

B. Briefing The Issue On Appeal 28

C. Developing The Standard Of Competent Representation In A Habeas Corpus Proceeding 29

D. Preparing The Application For A Writ Of Habeas Corpus And The Brief 30

INDEX OF AUTHORITIES

Cases **Page**

Acosta v. State, 233 S.W.3d 349 (Tex. Crim. App. 2007) 10

Alaniz v. State, 937 S.W.2d 593 (Tex. App.—San Antonio 1996, no pet.) 15

Aldrich v. State, 296 S.W.3d 225 (Tex. App.—Fort Worth 2009, pet. ref'd) 7,12,25,26

Alvarado v. State, 775 S.W.2d 851 (Tex. App.—San Antonio 1989, pet. ref'd) 16,17

Alvarez v. State, 79 S.W.3d 679 (Tex. App.—Houston [1st Dist.] 2002, pet. dism'd) 2

Amaya v. State, 677 S.W.2d 159 (Tex. App.—Houston [1st Dist.] 1984, pet. ref'd) 9

Anderson v. Johnson, 338 F.3d 382 (5th Cir. 2003) 12

Andrews v. State, 159 S.W.3d 98 (Tex. Crim. App. 2005) 21

Atkins v. State, 26 S.W.3d 580 (Tex. App.—Beaumont 2000, pet. ref'd) 7

Baldwin v. State, 668 S.W.2d 762 (Tex. App.—Houston [14th Dist.] 1984, no pet.) 16,23

Banks v. State, 819 S.W.2d 676 (Tex. App.—San Antonio 1991, pet. ref'd) 19

Beets v. Johnson, 65 F.3d 1258 (5th Cir. 1995) 10

Belcher v. State, 93 S.W.3d 593 (Tex. App.—Houston [14th Dist.] 2002, pet. dism'd) 27

Bell v. Cone, 535 U.S. 685 (2002) 3

Beltran v. Cockrell, 294 F.3d 730 (5th Cir. 2002) 23

Blankenship v. Johnson, 118 F.3d 312 (5th Cir. 1997) 10,28

Blumenstetter v. State, 135 S.W.3d 234 (Tex. App.—Texarkana 2004, no pet.) 17

Booth v. State, 725 S.W.2d 521 (Tex. App.—Tyler 1987, pet. ref'd) 4

Bouchillon v. Collins, 907 F.2d 589 (5th Cir. 1990) 12

Boyd v. State, 811 S.W.2d 105 (Tex. Crim. App. 1991) 3

Boyington v. State, 738 S.W.2d 704 (Tex. App.—Houston [1st Dist.] 1985, no pet.) 10,18,21

Branch v. State, 335 S.W.3d 893 (Tex. App.—Austin 2011, pet. ref'd) 21

Brewer v. State, 649 S.W.2d 628 (Tex. Crim. App. 1983) 9

Brown v. Butler, 811 F.2d 938 (5th Cir. 1987) 4

Page

Brown v. State, 630 S.W.2d 876 (Tex. App.—Fort Worth 1982, no pet.) 11

Brown v. State, 974 S.W.2d 289 (Tex. App.—San Antonio 1998, pet. ref'd) 16,18,19,22,24

Bryant v. Scott, 28 F.3d 1411 (5th Cir. 1994) 12

Burdine v. Johnson, 262 F.3d 336 (5th Cir. 2001) 1

Burke v. State, 80 S.W.3d 82 (Tex. App.—Fort Worth 2002, no pet.) 4

Burley v. Cabana, 818 F.2d 414 (5th Cir. 1987) 4

Burnworth v. State, 698 S.W.2d 686 (Tex. App.—Tyler 1985, pet. ref'd) 8

Butler v. State, 716 S.W.2d 48 (Tex. Crim. App. 1986) 12

Callaway v. State, 594 S.W.2d 440 (Tex. Crim. App. 1980) 13,17,21

Cannon v. State, 252 S.W.3d 342 (Tex. Crim. App. 2008) 1

Cantu v. State, 930 S.W.2d 594 (Tex. Crim. App. 1996) 1

Cardenas v. State, 960 S.W.2d 941 (Tex. App.—Texarkana 1998, pet. ref'd) 8,19

Catalan v. Cockrell, 315 F.3d 491 (5th Cir. 2002) 11,23

Childress v. Johnson, 103 F.3d 1221 (5th Cir. 1997) 14

Compton v. State, 202 S.W.3d 416 (Tex. App.—Tyler 2006, no pet.) 14

Cook v. Lynaugh, 821 F.2d 1072 (5th Cir. 1987) 14

Cooke v. State, 735 S.W.2d 928 (Tex. App.—Houston [14th Dist.] 1987, pet. ref'd) 10

Cooper v. State, 769 S.W.2d 301 (Tex. App.—Houston [1st Dist.] 1989, pet. ref'd) 18,25

Craig v. State, 847 S.W.2d 434 (Tex. App.—El Paso 1993, no pet.) 21,23,24,26,27

Cude v. State, 588 S.W.2d 895 (Tex. Crim. App. 1979) 17

Cuyler v. Sullivan, 446 U.S. 335 (1980) 1,9,10

Damian v. State, 881 S.W.2d 102 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd) 18

Daniel v. Cockrell, 283 F.3d 697 (5th Cir. 2002) 3

Davis v. State, 413 S.W.3d 816 (Tex. App.—Austin 2013, pet. ref'd) 13,19,25

DeLeon v. State, 322 S.W.3d 375 (Tex. App.—Houston [14th Dist.] 2010, pet. ref'd) 25

Diaz v. State, 905 S.W.2d 302 (Tex. App.—Corpus Christi 1995, no pet.) 6,11,12

Page

Doherty v. State, 781 S.W.2d 439 (Tex. App.—Houston [1st Dist.] 1989, no pet.) 12,13,26

Doles v. State, 786 S.W.2d 741 (Tex. App.—Tyler 1989, no pet.)..... 17,19,24

Draughon v. Dretke, 427 F.3d 286 (5th Cir. 2005) 12

Durst v. State, 900 S.W.2d 134 (Tex. App.—Beaumont 1995, pet. ref'd) 24

Everage v. State, 893 S.W.2d 219 (Tex. App.—Houston [1st Dist.] 1995, pet. ref'd) 13,23

Evitts v. Lucey, 469 U.S. 387 (1985)..... 27

Ex parte Acosta, 672 S.W.2d 470 (Tex. Crim. App. 1984) 9

Ex parte Alaniz, 583 S.W.2d 380 (Tex. Crim. App. 1979)..... 9

Ex parte Amezquita, 223 S.W.3d 363 (Tex. Crim. App. 2006) 11

Ex parte Austin, 746 S.W.2d 226 (Tex. Crim. App. 1988)..... 4

Ex parte Axel, 757 S.W.2d 369 (Tex. Crim. App. 1988)..... 27

Ex parte Banks, 580 S.W.2d 348 (Tex. Crim. App. 1979) 27

Ex parte Battle, 817 S.W.2d 81 (Tex. Crim. App. 1991)..... 4

Ex parte Bowman, 483 S.W.3d 726 (Tex. App.—Houston [1st Dist.] 2016, pet. granted)..... 23

Ex parte Bratchett, 513 S.W.2d 851 (Tex. Crim. App. 1974) 6,10

Ex parte Briggs, 187 S.W.3d 458 (Tex. Crim. App. 2005)..... 13

Ex parte Bryant, 448 S.W.3d 29 (Tex. Crim. App. 2014) 19

Ex parte Burns, 601 S.W.2d 370 (Tex. Crim. App. 1980)..... 4

Ex parte Burton, 623 S.W.2d 418 (Tex. Crim. App. 1981) 6

Ex parte Canedo, 818 S.W.2d 814 (Tex. Crim. App. 1991)..... 8

Ex parte Cavett, 521 S.W.2d 619 (Tex. Crim. App. 1975)..... 11,12

Ex parte Chandler, 684 S.W.2d 700 (Tex. Crim. App. 1985) 6

Ex parte Cockrell, 424 S.W.3d 543 (Tex. Crim. App. 2014) 11

Ex parte Coy, 909 S.W.2d 927 (Tex. Crim. App. 1995)..... 28

Ex parte Crow, 180 S.W.3d 135 (Tex. Crim. App. 2005) 28

Ex parte Daigle, 848 S.W.2d 691 (Tex. Crim. App. 1993)..... 28

Page

Ex parte Dietzman, 790 S.W.2d 305 (Tex. Crim. App. 1990) 27

Ex parte Drinkert, 821 S.W.2d 953 (Tex. Crim. App. 1991)..... 14,19,21

Ex parte Duffy, 607 S.W.2d 507 (Tex. Crim. App. 1980).....12,13

Ex parte Dunham, 650 S.W.2d 825 (Tex. Crim. App. 1983) 22

Ex parte Evans, 690 S.W.2d 274 (Tex. Crim. App. 1985) 5

Ex parte Felton, 815 S.W.2d 733 (Tex. Crim. App. 1991) 1,14

Ex parte Florentino, 206 S.W.3d 124 (Tex. Crim. App. 2006) 28

Ex parte Gallegos, 511 S.W.2d 510 (Tex. Crim. App. 1974)..... 3,4

Ex parte Gonzales, 204 S.W.3d 391 (Tex. Crim. App. 2006) 13

Ex parte Griffin, 679 S.W.2d 15 (Tex. Crim. App. 1984) 6

Ex parte Guzmon, 730 S.W.2d 724 (Tex. Crim. App. 1987) 12,13,25

Ex parte Hairston, 766 S.W.2d 790 (Tex. Crim. App. 1989) 5

Ex parte Harrington, 310 S.W.3d 452 (Tex. Crim. App. 2010) 7

Ex parte Harris, 596 S.W.2d 893 (Tex. Crim. App. 1980) 6,10-11

Ex parte Hill, 863 S.W.2d 488 (Tex. Crim. App. 1993) 25

Ex parte Howard, 591 S.W.2d 906 (Tex. Crim. App. 1980) 10

Ex parte Howard, 425 S.W.3d 323 (Tex. Crim. App. 2014) 13

Ex parte Huerta, 692 S.W.2d 681 (Tex. Crim. App. 1985) 6

Ex parte Imoudu, 284 S.W.3d 866 (Tex. Crim. App. 2009)..... 7,12-13

Ex parte Jarrett, 891 S.W.2d 935 (Tex. Crim. App. 1994) 27

Ex parte Jordan, 879 S.W.2d 61 (Tex. Crim. App. 1994)..... 14

Ex parte Kelly, 676 S.W.2d 132 (Tex. Crim. App. 1984) 4

Ex parte LaHood, 401 S.W.3d 45 (Tex. Crim. App. 2013) 11

Ex parte Lane, 303 S.W.3d 702 (Tex. Crim. App. 2009) 19,21

Ex parte Langley, 833 S.W.2d 141 (Tex. Crim. App. 1992) 14

Ex parte Leal, 427 S.W.3d 455 (Tex. App.—San Antonio 2014, no pet.)..... 5

Page

Ex parte Lemke, 13 S.W.3d 791 (Tex. Crim. App. 2000) 7

Ex parte Lilly, 656 S.W.2d 490 (Tex. Crim. App. 1983) 11

Ex parte McCormick, 645 S.W.2d 801 (Tex. Crim. App. 1983) 9,10

Ex parte Marez, 505 S.W.2d 930 (Tex. Crim. App. 1974) 10

Ex parte Menchaca, 854 S.W.2d 128 (Tex. Crim App. 1993) 17

Ex parte Miller, 330 S.W.3d 610 (Tex. Crim. App. 2009) 28

Ex parte Moody, 991 S.W.2d 856 (Tex. Crim. App. 1999) 6

Ex parte Morse, 591 S.W.2d 904 (Tex. Crim. App. 1980) 3

Ex parte Moussazadeh, 361 S.W.3d 684 (Tex. Crim. App. 2012) 5

Ex parte Nailor, 105 S.W.3d 272 (Tex. App.—Houston [14th Dist.] 2003), aff'd, 149 S.W.3d 125 (Tex. Crim. App. 2004) 19,21

Ex parte Nailor, 149 S.W.3d 125 (Tex. Crim. App. 2004) 2

Ex parte Napper, 322 S.W.3d 202 (Tex. Crim. App. 2010) 12

Ex parte Overton, 444 S.W.3d 632 (Tex. Crim. App. 2014) 13

Ex parte Owens, 206 S.W.3d 670 (Tex. Crim. App. 2006) 28

Ex parte Parham, 611 S.W.2d 103 (Tex. Crim. App. 1981) 9

Ex parte Parker, 704 S.W.2d 40 (Tex. Crim. App. 1986) 9

Ex parte Pool, 738 S.W.2d 285 (Tex. Crim. App. 1987) 14

Ex parte Prejean, 625 S.W.2d 731 (Tex. Crim. App. 1981) 9

Ex parte Pruitt, 689 S.W.2d 905 (Tex. Crim. App. 1985) 5

Ex parte Raborn, 658 S.W.2d 602 (Tex. Crim. App. 1983) 7,11

Ex parte Raley, 528 S.W.2d 257 (Tex. Crim. App. 1975) 27

Ex parte Reedy, 282 S.W.3d 492 (Tex. Crim. App. 2009) 3

Ex parte Reyna, 707 S.W.2d 110 (Tex. Crim. App. 1986) 6

Ex parte Rich, 194 S.W.3d 508 (Tex. Crim. App. 2006) 14

Ex parte Riley, 193 S.W.3d 900 (Tex. Crim. App. 2006) 28

Page

Ex parte Rogers, 519 S.W.2d 861 (Tex. Crim. App. 1975) 4

Ex parte Rogers, 369 S.W.3d 858 (Tex. Crim. App. 2012) 7,18

Ex parte Saenz, 491 S.W.3d 819 (Tex. Crim. App. 2016) 23

Ex parte Sanchez, 475 S.W.3d 287 (Tex. Crim. App. 2015) 5

Ex parte Scott, 581 S.W.2d 181 (Tex. Crim. App. 1979) 14

Ex parte Shields, 550 S.W.2d 670 (Tex. Crim. App. 1977) 27

Ex parte Skelton, 434 S.W.3d 709 (Tex. App.—San Antonio 2014, pet. ref'd) 16,17

Ex parte Slaughter, 689 S.W.2d 464 (Tex. Crim. App. 1985) 6

Ex parte Stamnitz, 768 S.W.2d 461 (Tex. App.—Houston [1st Dist.] 1989, no pet.) 5

Ex parte Stephenson, 722 S.W.2d 426 (Tex. Crim. App. 1987) 5

Ex parte Steptoe, 132 S.W.3d 434 (Tex. Crim. App. 2004) 27-28

Ex parte Thacker, 731 S.W.2d 99 (Tex. App.—Houston [1st Dist.] 1987, no pet.) 27

Ex parte Torres, 943 S.W.2d 469 (Tex. Crim. App. 1997) 2

Ex parte Trahan, 781 S.W.2d 291 (Tex. Crim. App. 1989) 5

Ex parte Varelas, 45 S.W.3d 627 (Tex. Crim. App. 2001) 20

Ex parte Villegas, 415 S.W.3d 885 (Tex. Crim. App. 2013) 13

Ex parte Walker, 777 S.W.2d 427 (Tex. Crim. App. 1989) 14,23-25

Ex parte Walker, 794 S.W.2d 36 (Tex. Crim. App. 1990) 8

Ex parte Welborn, 785 S.W.2d 391 (Tex. Crim. App. 1990) 12,14,16,17,22

Ex parte Welch, 981 S.W.2d 183 (Tex. Crim. App. 1998) 8

Ex parte Wilson, 724 S.W.2d 72 (Tex. Crim. App. 1987) 7

Ex parte Wilson, 956 S.W.2d 25 (Tex. Crim. App. 1997) 27

Ex parte Wolf, 296 S.W.3d 160 (Tex. App.—Houston [14th Dist.] 2009, pet. ref'd) 7

Ex parte Ybarra, 629 S.W.2d 943 (Tex. Crim. App. 1982) 11,23

Ex parte Young, 644 S.W.2d 3 (Tex. Crim. App. 1983) 5

Ex parte Young, 684 S.W.2d 704 (Tex. Crim. App. 1985) 6

Page

Ex parte Zepeda, 819 S.W.2d 874 (Tex. Crim. App. 1991) 20

Fernandez v. State, 830 S.W.2d 693 (Tex. App.—Houston [1st Dist.] 1992, no pet.)..... 16,25

Fielder v. State, 834 S.W.2d 509 (Tex. App.—Fort Worth 1992, pet. ref'd) 6

Flores v. State, 576 S.W.2d 632 (Tex. Crim. App. 1978)..... 12

Flores v. State, 784 S.W.2d 579 (Tex. App.—Fort Worth 1990, pet. ref'd)..... 7

Flowers v. State, 951 S.W.2d 883 (Tex. App.—San Antonio 1997, no pet.) 6

Frangias v. State, 392 S.W.3d 642 (Tex. Crim. App. 2013)..... 10

Frangias v. State, 413 S.W.3d 212 (Tex. App.—Houston [14th Dist.] 2013, no pet.)..... 10

Freeman v. State, 94 S.W.3d 827 (Tex. App.—Texarkana 2002, no pet.) 5

Freeman v. State, 167 S.W.3d 114 (Tex. App.—Waco 2005, no pet.)..... 11

Fuller v. State, 224 S.W.3d 823 (Tex. App.—Texarkana 2007, no pet.)..... 17

Gallegos v. State, 756 S.W.2d 45 (Tex. App.—San Antonio 1988, pet. ref'd)..... 8

Garcia v. State, 712 S.W.2d 249 (Tex. App.—El Paso 1986, pet. ref'd)..... 17

Garcia v. State, 979 S.W.2d 809 (Tex. App.—Houston [14th Dist.] 1998, pet. ref'd) 9

Garcia v. State, 308 S.W.3d 62 (Tex. App.—San Antonio 2009, no pet.)..... 4,11,16,24

Gifford v. State, 980 S.W.2d 791 (Tex. App.—Houston [14th Dist.] 1998, pet. ref'd)..... 22

Glivens v. State, 918 S.W.2d 30 (Tex. App.—Houston [1st Dist.] 1996, pet. ref'd) 17-18

Glover v. United States, 531 U.S. 198 (2001) 3,14

Gonzales v. State, 605 S.W.2d 278 (Tex. Crim. App. 1980)..... 2,9

Gray v. Lynn, 6 F.3d 265 (5th Cir. 1993)..... 19

Green v. State, 899 S.W.2d 245 (Tex. App.—San Antonio 1995, no pet.) 11,18,20,24

Greene v. State, 928 S.W.2d 119 (Tex. App.—San Antonio 1996, no pet.)..... 17-20,23,24

Guillory v. State, 638 S.W.2d 73 (Tex. App.—Houston [1st Dist.] 1982, no pet.)..... 2

Guillory v. State, 646 S.W.2d 467 (Tex. App.—Houston [1st Dist.] 1982, no pet.)..... 2

Hall v. State, 161 S.W.3d 142 (Tex. App.—Texarkana 2005, pet. ref'd)..... 16,18,20

Hanzelka v. State, 682 S.W.2d 385 (Tex. App.—Austin 1984, no pet.)..... 7

Page

Hart v. State, 314 S.W.3d 37 (Tex. App.—Texarkana 2010, no pet.) 5

Haynes v. State, 790 S.W.2d 824 (Tex. App.—Austin 1990, no pet.) 11,12

Helton v. State, 909 S.W.2d 298 (Tex. App.—Beaumont 1995, pet. ref'd) 4

Hernandez v. State, 726 S.W.2d 53 (Tex. Crim. App. 1986) 3

Hernandez v. State, 862 S.W.2d 193 (Tex. App.—Beaumont 1993, pet. ref'd) 8

Hernandez v. State, 988 S.W.2d 770 (Tex. Crim. App. 1999) 3

Hill v. Lockhart, 474 U.S. 52 (1985) 3

Hodges v. State, 116 S.W.3d 289 (Tex. App.—Corpus Christi 2003, pet. ref'd) 1

Holloway v. Arkansas, 435 U.S. 475 (1978) 8

Holmes v. State, 277 S.W.3d 424 (Tex. App.—Beaumont 2009, no pet.) 7

Howard v. State, 972 S.W.2d 121 (Tex. App.—Austin 1998, no pet.) 20

Huffman v. State, 676 S.W.2d 677 (Tex. App.—Houston [1st Dist.] 1984, pet. ref'd) 6

Hutchinson v. State, 663 S.W.2d 610 (Tex. App.—Houston [1st Dist.] 1983, pet. ref'd) 11,22-24

In re I.R., 124 S.W.3d 294 (Tex. App.—El Paso 2003, no pet.) 12

In re K.J.O., 27 S.W.3d 340 (Tex. App.—Dallas 2000, pet. denied) 1,12,26

In re McCann, 422 S.W.3d 701 (Tex. Crim. App. 2013) 2

In re R.D.B., 20 S.W.3d 255 (Tex. App.—Texarkana 2000, no pet.) 12

Jackson v. State, 640 S.W.2d 323 (Tex. App.—San Antonio 1982, pet. ref'd) 2

Jackson v. State, 857 S.W.2d 678 (Tex. App.—Houston [14th Dist.] 1993, pet. ref'd) 11,13,17,25

Jackson v. State, 139 S.W.3d 7 (Tex. App.—Fort Worth 2004, pet. ref'd) 5

Johnson v. State, 172 S.W.3d 6 (Tex. App.—Austin 2005, pet. ref'd) 11

Jones v. Barnes, 463 U.S. 745 (1983) 28

Kelly v. State, 640 S.W.2d 605 (Tex. Crim. App. 1982) 9

Knight v. State, 839 S.W.2d 505 (Tex. App.—Beaumont 1992, no pet.) 15

Kucel v. State, 907 S.W.2d 890 (Tex. App.—Houston [1st Dist.] 1995, pet. ref'd) 20

Lafler v. Cooper, 132 S.Ct. 1376 (2012) 7

Page

Lair v. State, 265 S.W.3d 580 (Tex. App.—Houston [1st Dist.] 2008, pet. ref'd) 13,14

Lampkin v. State, 470 S.W.3d 876 (Tex. App.—Texarkana 2015, pet. ref'd) 14

Lawson v. State, 896 S.W.2d 828 (Tex. App.—Corpus Christi 1995, pet. ref'd) 11

Lemons v. State, 135 S.W.3d 878 (Tex. App.—Houston [1st Dist.] 2004, no pet.) 15

Lockett v. Anderson, 230 F.3d 695 (5th Cir. 2000) 13

Lombard v. Lynaugh, 868 F.2d 1475 (5th Cir. 1989) 28

Long v. State, 764 S.W.2d 30 (Tex. App.—San Antonio 1989, pet. ref'd) 26

Lopez v. State, 895 S.W.2d 392 (Tex. App.—Corpus Christi 1994, no pet.) 1

Lopez v. State, 462 S.W.3d 180 (Tex. App.—Houston [1st Dist.] 2015, no pet.) 14

Loyd v. Whitley, 977 F.2d 149 (5th Cir. 1992) 13

Lyons v. McCotter, 770 F.2d 529 (5th Cir. 1985) 15,17

Maples v. Thomas, 132 S.Ct. 912 (2012) 2

Mares v. State, 52 S.W.3d 886 (Tex. App.—San Antonio 2001, pet. ref'd) 17

Martinez v. Ryan, 132 S.Ct. 1309 (2012) 2

Matter of E.Q., 839 S.W.2d 144 (Tex. App.—Austin 1992, no writ) 6

May v. State, 722 S.W.2d 699 (Tex. Crim. App. 1984) 8

Maya v. State, 932 S.W.2d 633 (Tex. App.—Houston [14th Dist.] 1996, no pet.) 9

McCain v. State, 995 S.W.2d 229 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd) 19

McMann v. Richardson, 397 U.S. 759 (1970) 1

Medeiros v. State, 733 S.W.2d 605 (Tex. App.—San Antonio 1987, no pet.) 8

Melton v. State, 987 S.W.2d 72 (Tex. App.—Dallas 1998, no pet.) 7

Mendoza v. State, 959 S.W.2d 321 (Tex. App.—Waco 1997, pet. ref'd) 11

Menefee v. State, 175 S.W.3d 500 (Tex. App.—Beaumont 2005, no pet.) 18

Milburn v. State, 15 S.W.3d 267 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd) 12,13

Miles v. State, 644 S.W.2d 23 (Tex. App.—El Paso 1982, no pet.) 10,22,24,26

Miller v. Dretke, 420 F.3d 356 (5th Cir. 2005) 13

Page

Miller v. State, 728 S.W.2d 133 (Tex. App.—Houston [14th Dist.] 1987, pet. ref'd) 22,26

Miller v. State, 757 S.W.2d 880 (Tex. App.—Dallas 1988, pet. ref'd)..... 17

Missouri v. Frye, 132 S.Ct. 1399 (2012) 7

Mitchell v. State, 762 S.W.2d 916 (Tex. App.—San Antonio 1988, pet. ref'd)..... 4,7,10,11

Montez v. State, 824 S.W.2d 308 (Tex. App.—San Antonio 1992, no pet.)..... 15,22-24

Moore v. Johnson, 194 F.3d 586 (5th Cir. 1999) 12-14,23

Moore v. State, 983 S.W.2d 15 (Tex. App.—Houston [14th Dist.] 1998, no pet.) 13,26

Morales v. State, 910 S.W.2d 642 (Tex. App.—Beaumont 1995, pet. ref'd)..... 5,6

Murphy v. Puckett, 893 F.2d 94 (5th Cir. 1990) 10

Murphy v. State, 663 S.W.2d 604 (Tex. App.—Houston [1st Dist.] 1983, no pet.) 6,11

Nealy v. Cabana, 764 F.2d 1173 (5th Cir. 1985)..... 12

Nelson v. State, 725 S.W.2d 784 (Tex. App.—San Antonio 1987, no pet.)..... 27

Nelson v. State, 832 S.W.2d 762 (Tex. App.—Houston [1st Dist.] 1992, no pet.)..... 15

Nethery v. State, 29 S.W.3d 178 (Tex. App.—Dallas 2000, pet. ref'd)..... 9

Oliva v. State, 942 S.W.2d 727 (Tex. App.—Houston [14th Dist.] 1997, pet. dism'd)..... 21

Ortiz v. State, 849 S.W.2d 921 (Tex. App.—Corpus Christi 1993, no pet.)..... 28

Owens v. State, 916 S.W.2d 713 (Tex. App.—Waco 1996, no pet.)..... 16,20

Padilla v. Kentucky, 559 U.S. 356 (2010) 5

Paz v. State, 28 S.W.3d 674 (Tex. App.—Corpus Christi 2000, no pet.) 7

Pennington v. State, 768 S.W.2d 740 (Tex. App.—Tyler 1988, no pet.) 7

Perillo v. Johnson, 205 F.3d 775 (5th Cir. 2000) 9

Perkins v. State, 812 S.W.2d 326 (Tex. Crim. App. 1991)..... 10

Perrero v. State, 990 S.W.2d 896 (Tex. App.—El Paso 1999, pet. ref'd)..... 11

Pina v. State, 29 S.W.3d 315 (Tex. App.—El Paso 2000, pet. ref'd)..... 9

Porchia v. State, 904 S.W.2d 147 (Tex. App.—Dallas 1995, pet. ref'd) 1

Porter v. McCollum, 558 U.S. 30 (2009)..... 14

Page

Powell v. Alabama, 287 U.S. 45 (1932) 1

Prine v. State, 494 S.W.3d 909 (Tex. App.—Houston [14th Dist.] 2016, pet. granted) 25

Profitt v. Waldron, 831 F.2d 1245 (5th Cir. 1987) 12

Ramirez v. State, 873 S.W.2d 757 (Tex. App.—El Paso 1994, pet. ref'd) 17,20,21

Ramirez v. State, 987 S.W.2d 938 (Tex. App.—Austin 1999, no pet.) 16

Ramirez v. State, 13 S.W.3d 482 (Tex. App.—Corpus Christi 2000, pet. dism'd) 9

Ramirez v. State, 65 S.W.3d 156 (Tex. App.—Amarillo 2001, pet. ref'd) 19,21,25

Ramirez v. State, 301 S.W.3d 410 (Tex. App.—Austin 2009, no pet.) 8

Randle v. State, 760 S.W.2d 30 (Tex. App.—Houston [1st Dist.] 1988, no pet.) 28

Randle v. State, 847 S.W.2d 576 (Tex. Crim. App. 1993) 7

Raney v. State, 958 S.W.2d 867 (Tex. App.—Waco 1997, pet. dism'd) 21

Reyes v. State, 849 S.W.2d 812 (Tex. Crim. App. 1993) 1

Riascos v. State, 792 S.W.2d 754 (Tex. App.—Houston [14th Dist.] 1990, pet. ref'd) 18,19,24

Richards v. Quarterman, 566 F.3d 553 (5th Cir. 2009) 12,13,20

Rivera v. State, 716 S.W.2d 68 (Tex. App.—Dallas 1986, pet. ref'd) 6

Rivera v. State, 952 S.W.2d 34 (Tex. App.—San Antonio 1997, no pet.) 5

Robertson v. State, 187 S.W.3d 475 (Tex. Crim. App. 2006) 25

Robinson v. State, 16 S.W.3d 808 (Tex. Crim. App. 2000) 1

Rompilla v. Beard, 545 U.S. 374 (2005) 14

Ruedas v. State, 586 S.W.2d 520 (Tex. Crim. App. 1979) 20

Ruth v. State, 522 S.W.2d 517 (Tex. Crim. App. 1975) 17

Salts v. Epps, 676 F.3d 468 (5th Cir. 2012) 9

Sam v. State, 467 S.W.3d 685 (Tex. App.—Houston [14th Dist.] 2015, no pet.) 28

Sanchez v. State, 931 S.W.2d 331 (Tex. App.—San Antonio 1996, pet. ref'd) 20

San Roman v. State, 681 S.W.2d 872 (Tex. App.—El Paso 1984, pet. ref'd) 8,21-23

Sanders v. State, 715 S.W.2d 771 (Tex. App.—Tyler 1986, no pet.) 7,10,11,18

Page

Sessums v. State, 129 S.W.3d 242 (Tex. App.—Texarkana 2004, pet. ref'd) 17

Shanklin v. State, 190 S.W.3d 154 (Tex. App.—Houston [1st Dist.] 2005, pet. dism'd) 13

Shead v. State, 711 S.W.2d 345 (Tex. App.—Dallas 1986, pet. ref'd) 27

Shelton v. State, 841 S.W.2d 526 (Tex. App.—Fort Worth 1992, no pet.) 12

Smith v. Dretke, 417 F.3d 438 (5th Cir. 2005) 13

Smith v. Robbins, 528 U.S. 259 (2000) 28

Smith v. State, 894 S.W.2d 876 (Tex. App.—Amarillo 1995, pet. ref'd) 12

Snow v. State, 697 S.W.2d 663 (Tex. App.—Houston [1st Dist.]1985, pet. dism'd) 8

Soffar v. Dretke, 368 F.3d 441 (5th Cir. 2004) 12

Spriggs v. Collins, 993 F.2d 85 (5th Cir. 1993) 3

Stafford v. State, 813 S.W.2d 503 (Tex. Crim. App. 1991) 28

State v. Bounhiza, 294 S.W. 780 (Tex. App.—Austin 2009, no pet.) 8

State v. Diaz-Bonilla, 495 S.W.3d 45 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd) 4

State v. Garza, 143 S.W.3d 144 (Tex. App.—San Antonio 2004, pet. ref'd) 15

State v. Kelley, 20 S.W.3d 147 (Tex. App.—Texarkana 2000, no pet.) 1

State v. Pilkinton, 7 S.W.3d 291 (Tex. App.—Beaumont 1999, pet. ref'd) 7

State v. Thomas, 768 S.W.2d 335 (Tex. App.—Houston [14th Dist.] 1989, no pet.) 13

State v. Webb, 244 S.W.3d 543 (Tex. App.—Houston [1st Dist.] 2007, no pet.) 1,6

State v. Williams, 83 S.W.3d 371 (Tex. App.—Corpus Christi 2002, no pet.) 8

Stone v. State, 751 S.W.2d 579 (Tex. App.—Houston [1st Dist.] 1988, pet. ref'd) 8

Stone v. State, 17 S.W.3d 348 (Tex. App.—Corpus Christi 2000, pet. ref'd) 25

Storr v. State, 126 S.W.3d 647 (Tex. App.—Houston [14th Dist.] 2004, pet. ref'd) 20

Strickland v. State, 747 S.W.2d 59 (Tex. App.—Texarkana 1988, no pet.) 11,17

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

Summitt v. Blackburn, 795 F.2d 1237 (5th Cir. 1986) 19

Tenny v. Dretke, 416 F.3d 404 (5th Cir. 2005) 13

Page

Thomas v. State, 812 S.W.2d 346 (Tex. App.—Dallas 1991, pet. ref'd) 16

Thomas v. State, 923 S.W.2d 611 (Tex. App.—Houston [1st Dist.] 1995, no pet.) 18

Thompson v. State, 9 S.W.3d 808 (Tex. Crim. App. 1999)..... 29

Torres v. State, 39 S.W.3d 631 (Tex. App.—Corpus Christi 2000, pet. ref'd)..... 13

Trevino v. State, 752 S.W.2d 735 (Tex. App.—Eastland 1988, pet. dism'd)..... 8

Trevino v. Thaler, 133 S.Ct. 1911 (2013)..... 2

Trinh v. State, 974 S.W.2d 872 (Tex. App.—Houston [14th Dist.] 1998, no pet.) 8

Tucker v. Day, 969 F.2d 155 (5th Cir. 1992) 26

Turner v. State, 755 S.W.2d 207 (Tex. App.—Houston [14th Dist.] 1988, no pet.) 8

Turner v. State, 49 S.W.3d 461 (Tex. App.—Fort Worth 2001, pet. dism'd) 7

United States v. Bass, 310 F.3d 321 (5th Cir. 2002) 28

United States v. Castro, 26 F.3d 557 (5th Cir. 1994) 5

United States v. Cronic, 466 U.S. 648 (1984) 1

United States v. Franks, 230 F.3d 811 (5th Cir. 2000)..... 14

United States v. Grammas, 376 F.3d 433 (5th Cir. 2004)..... 6

United States v. Higdon, 832 F.2d 312 (5th Cir. 1987) 29

United States v. Juarez, 672 F.3d 381 (5th Cir. 2012) 4

United States v. Pham, 722 F.3d 320 (5th Cir. 2013) 27

United States v. Phillips, 210 F.3d 345 (5th Cir. 2000) 14

United States v. Reinhart, 357 F.3d 521 (5th Cir. 2004)..... 3

United States v. Williamson, 183 F.3d 458 (5th Cir. 1999)..... 28

Valencia v. State, 966 S.W.2d 188 (Tex. App.—Houston [1st Dist.]1998, pet. ref'd) 21

Vasquez v. State, 830 S.W.2d 948 (Tex. Crim. App. 1992)..... 20

Vaughn v. State, 931 S.W.2d 564 (Tex. Crim. App. 1996)..... 2

Vela v. Estelle, 708 F.2d 954 (5th Cir. 1983)..... 18

Vicknair v. State, 702 S.W.2d 304 (Tex. App.—Houston [1st Dist.]1985, no pet.) 27

Page

Villa v. State, 417 S.W.3d 455 (Tex. Crim. App. 2013) 20

Virgil v. Dretke, 446 F.3d 598 (5th Cir. 2006) 15

Waddell v. State, 918 S.W.2d 91 (Tex. App.—Austin 1996, no pet.) 20

Walker v. State, 195 S.W.3d 250 (Tex. App.—San Antonio 2006, no pet.) 17,18,20,22,24

Ware v. State, 875 S.W.2d 432 (Tex. App.—Waco 1994, pet. ref'd) 8

Watrous v. State, 842 S.W.2d 792 (Tex. App.—El Paso 1992, no pet.) 20

Weathersby v. State, 627 S.W.2d 729 (Tex. Crim. App. 1982) 16,18

Wenzy v. State, 855 S.W.2d 47 (Tex. App.—Houston [14th Dist.] 1993, pet. ref'd) 11,12

Wenzy v. State, 855 S.W.2d 52 (Tex. App.—Houston [14th Dist.] 1993, pet. ref'd) 16,17

Wheat v. United States, 486 U.S. 153 (1988) 9

White v. Johnson, 180 F.3d 648 (5th Cir. 1999) 27

White v. Reiter, 640 S.W.2d 586 (Tex. Crim. App. 1982) 9

White v. Thaler, 610 F.3d 890 (5th. Cir. 2010) 19,25

Wiggins v. Smith, 539 U.S. 510 (2003) 12,14

Williamson v. State, 771 S.W.2d 601 (Tex. App.—Dallas 1989, pet. ref'd) 16,21,22

Winn v. State, 871 S.W.2d 756 (Tex. App.—Corpus Christi 1993, no pet.) 13,15,16,22,23,25

Wood v. Georgia, 450 U.S. 261 (1981) 9

Wood v. State, 260 S.W.3d 146 (Tex. App.—Houston [1st Dist.] 2008, no pet.) 17

Wright v. State, 223 S.W.3d 36 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd) 11,13

Young v. State, 10 S.W. 3d 705 (Tex. App.—Texarkana 1999, pet. ref'd) 20

Constitutional Provisions

U.S. CONST. amend. VI 1

U.S. CONST. amend. XIV 1

TEX. CONST. art. I, § 10 1,3

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. Cronic, 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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